No. 18-587

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *ET AL.*,

Petitioners,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, *ET AL.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This dispute concerns the policy of immigration enforcement discretion known as Deferred Action for Childhood Arrivals ("DACA"). In 2016, this Court affirmed, by an equally divided Court, a decision of the Fifth Circuit holding that two related Department of Homeland Security ("DHS") discretionary enforcement policies, including an expansion of the DACA policy, were likely unlawful and should be enjoined. *See United States v. Texas*, 136 S. Ct. 2271 (2016) (*per curiam*). In September 2017, DHS determined that the original DACA policy was unlawful and would likely be struck down by the courts on the same grounds as the related policies. DHS thus instituted an orderly wind-down of the DACA policy.

The questions presented are as follows:

1. Whether DHS's decision to wind down the DACA policy is judicially reviewable.

2. Whether DHS's decision to wind down the DACA policy is lawful.

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae Eagle Forum Education & Legal Defense Fund ("EFELDF") is a nonprofit corporation founded in 1981. For more than thirty-five years, EFELDF has defended American sovereignty and promoted adherence to federalism and the separation of powers under the U.S. Constitution. EFELDF has consistently opposed unlawful behavior, including illegal entry into and residence in the United States.

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. *Amicus* files this brief after providing the requisite ten-day prior written notice to all parties, and obtaining written consent from all the parties to file this brief. *See* S. Ct. R. 37.2(a).

Phyllis Schlafly, the founder of EFELDF, was an outspoken defender of national sovereignty against open borders.

For all these reasons, EFELDF has direct and vital interests in the issues before this Court.

SUMMARY OF ARGUMENT

This case presents yet another nationwide injunction issued by a federal court in California, as affirmed by the Ninth Circuit, which interferes with the clear authority by the Congress and the President to govern immigration. It is difficult to imagine a constitutional power for which judicial restraint is more important, and where nationwide injunctions by district courts are so unjustified. In light of the immense significance of this issue, and amid an epidemic of litigation over it, the Petition should be granted.

As Justice Thomas wisely wrote in concurrence to a reversal last Term of another Ninth Circuit-related immigration decision:

> Injunctions that prohibit the Executive Branch from applying a law or policy against anyone — often called "universal" or "nationwide" injunctions — have become increasingly common. District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the federal court system — preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.

Trump v. Hawaii, 138 S. Ct. 2392, 2424-25 (2018) (Thomas, J., concurring).

These words of Justice Thomas have not yet been heeded, because here we are again having to deal with yet another overreaching nationwide injunction that undermines Congress and disrupts presidential authority. But it is even worse than that. Not only is the breadth of the injunction below unjustified, but the district court even lacked jurisdiction under Immigration and Naturalization Act and there was not any standing because mere agency action cannot create a federal right. The Ninth Circuit decision based its decision on anecdotal virtues of the "Dreamers" – the recipients of DACA benefits – but it is for Congress alone to decide whether to grant them American citizenship. Congress has chosen not to do so, and instead the judicial branch has conferred rights where none exists. This presents an urgent issue of national importance, which the Supreme Court should not defer or avoid.

The decision below committed errors on matters of enormous significance to our entire Nation, and thus the Petition for Writ of *Certiorari* should be granted.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED TO ADDRESS AN ISSUE OF IMMENSE NATIONAL IMPORTANCE: NATIONWIDE INJUNCTIONS BY DISTRICT COURTS AGAINST THE PRESIDENT ON IMMIGRATION POLICY.

Justice Thomas's alarm bells against nationwide injunctions have not yet been heeded. They need to be. Nationwide injunctions, like the one below, create havoc in all three branches of government, including the judiciary itself. The President has publicly expressed his frustration at these injunctions, which all-too-often emanate from within the same few circuits. Congress is paralyzed by these injunctions from taking up legislation to address perceived problem. Courts in other jurisdictions are being improperly bound by injunctions from other courts that lack legitimate authority over them. *See, e.g.*, *United States v. Glaser*, 14 F.3d 1213, 1216 (7th Cir. 1994) (courts should be bound only by their appellate courts).

Nationwide injunctions "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," as this Court has observed. *United States v. Mendoza*, 464 U.S. 154, 160 (1984). Moreover, injunctions which extend beyond the parties before the court are inconsistent with due process and not within any exceptions to it, such as class action litigation. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) ("The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.") (inner quotations omitted). *See also Comcast Corp. v. Behrend*, 569 U.S.

27, 33 (2013) ("To come within the exception, a party seeking to maintain a class action must affirmatively demonstrate his compliance with Rule 23.") (inner quotations omitted). No such exception exists for sweeping injunctions by district courts that alter immigration rights across the entire country.

The nationwide injunction below is in particular need for review by this Court because the district court also lacks jurisdiction under the preclusion-of-review provision of the Immigration and Naturalization Act. "[N]o court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act." 8 U.S.C. § 1252(g).

Moreover, there was no standing to support the injunction below either, because mere agency action cannot create a federal right. In vintage writing by Justice Scalia for the Court:

> Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

Alexander v. Sandoval, 532 U.S. 275, 291 (2001) (citation omitted).

Even when this Court has upheld in part an injunction sought by abortion clinics, it has emphasized that such remedy "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (Rehnquist, C.J.). Yet nearly 25 years later, sweeping nationwide injunctions issued by district courts, like the one at issue here, go far beyond the parties in the case and what is necessary to grant them relief. Rather, immigration policy is plainly and impermissibly being made by the federal judiciary rather than by Congress. Nothing in the Constitution remotely supports such overreach.

As decried by Judge Fernandez in dissenting from yet another immigration-related injunction upheld by the Ninth Circuit, in words that ring equally true on this Petition:

> While it goes without saying that I would vacate the injunction in its entirety, even if it were otherwise proper, the district court erred when it granted a nationwide injunction. It could have granted relief to the Counties without so doing. In fact, the whole concept of issuing nationwide injunctions is somewhat dubious. *See Trump*, U.S. at , 138 S. Ct. at 2425-29 (Thomas, J., concurring); *cf. id.* at , 138 S. Ct. at 2423 (majority opinion) (declining to decide "propriety of the nationwide scope of the injunction"). They should at the very least be used with a great deal of caution. In general, a court should not stretch to impose its will further than is necessary to grant

> relief to those before it. *See L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011); *see also Califano v. Yamasaki*, 442 U.S. 682, 701-03, 99 S. Ct. 2545, 2558, 61 L. Ed. 2d 176 (1979).

City & Cty. of S.F. v. Trump, 897 F.3d 1225, 1250 n.16 (9th Cir. 2018) (Fernandez, J., dissenting).

Strong supervision by this Court of the lower courts is needed, and soon. The Petition should be granted for this Court to rein in the epidemic of national injunctions against the President, particularly in this field of immigration. When it comes to national sovereignty, courts should not play the "sorcerer himself," and the Petition should be granted to correct that error below.

II. WHILE SOME "DREAMERS" DESERVE PRAISE, IT IS FOR CONGRESS ALONE TO GRANT THEM CITIZENSHIP, AND PETITION SHOULD BE GRANTED TO CLARIFY THIS.

It is hardly controversial to observe that Congress alone has the power to establish immigration law, U.S. CONST. art. I, §8, cl. 4. Accordingly, Congress enacted the Immigration and Naturalization Act, 8 U.S.C. §§1101-1537 ("INA"), and it is not for the courts to change it. The essential role of the President is to ensure that immigration laws are faithfully executed. U.S. CONST. art. II, §3. In addition, the Executive Branch possesses rulemaking authority over immigration, as in other fields of law.

All this leaves the judiciary with precious little legitimate authority over immigration policy. But that is how it should be, and the Petition should be granted to rein in the lower courts as they run far afield on this issue. Immigration is fundamentally an issue of

national sovereignty and foreign policy, to which courts should defer to the President rather than interfere with him. "[T]he executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs." *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980) (deferring to the president on the issue of wiretapping, without a warrant, foreigners while in the United States).

Sympathetic anecdotes can be powerful, and decision below makes the most of them. "She … was awarded a scholarship that, together with her mother's life savings, enabled her to fulfill her longstanding dream of attending and graduating from law school. Today, Garcia maintains a thriving legal practice in San Diego, where she represents members of underserved communities …." *Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec.*, 2018 U.S. App. LEXIS 31688, at *18 (9th Cir. Nov. 8, 2018). No one doubts that the hard work deserves praise.

But few DACA recipients graduate from law school, and some DACA recipients base their claim to beneficiary status in having criminal records that do not quite rise to the level of felonies. Suppl. Pet. App. 15a. Moreover, the high achievers would do much to improve their own families' country of origin, and perhaps serve even greater needs there, if they were not given citizenship here. *See* Angela Nagle, "The Left Case Against Open Borders," *American Affairs* Vol. II, No. 4, 17-30 (Winter 2018).[2] Regardless, this

[2] https://americanaffairsjournal.org/2018/11/the-left-case-against-open-borders/ (viewed Dec. 4, 2018).

is a decision for Congress to make, and citation to a few success stories cannot justify a far broader grant of entitlement than Congress has given. The President is correct in faithfully executing the immigration laws that Congress has enacted, and it was reversible error for the courts below to rule otherwise.

CONCLUSION

For the foregoing reasons, the Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

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