No. 16-1180

In The

Supreme Court of the United States

JANICE K. BREWER, ET AL.,

Petitioners,

v.

ARIZONA DREAM ACT COALITION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts (including this Court) and administrative bodies, including *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 99 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

IRLI submits this brief to urge this Court to grant review in order to decide this case on a narrow ground – *viz.*, that the executive, on its own, lacks authority to

[1] Both Petitioners and Respondents were given timely notice and have consented in writing to the filing of this *amicus curiae* brief. No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

alter immigration classifications made by Congress – that obviates difficult constitutional adjudication.

SUMMARY OF THE ARGUMENT

The executive, acting alone, lacks authority to alter (or abolish) immigration classifications made by Congress in a valid federal statute. This Court should grant review to affirm this bedrock principle. In so doing, this Court would resolve a circuit split on an important national issue on a narrow ground, and avoid unnecessary constitutional adjudication.

The above principle, though obvious, is central to this case. In the Immigration and Nationality Act ("INA"), beneficiaries of the Deferred Action for Childhood Arrivals ("DACA") program of the Department of Homeland Security ("DHS") are classified as inadmissible applicants for admission, and as such they are statutorily presumed to be unlawfully present in the country. The United States Court of Appeals for the Ninth Circuit, in holding that Arizona's denial of drivers' licenses to DACA beneficiaries was preempted by federal law, relied on the proposition that the deferred action in DACA altered this statutory status. The Ninth Circuit first noted that neither DACA beneficiaries nor another group of aliens, one to whose members Arizona did give drivers' licenses – namely, aliens with proper pending applications for cancellation of removal ("COR") or adjustment of status ("AOS") – had lawful presence in the country conferred by statute.

The Court then held that Arizona, by treating the presence of this other, supposedly-similar group of aliens as authorized and that of DACA beneficiaries as unauthorized, was making up its own immigration categories, which it was preempted by federal law from doing. In fact, however, aliens in this other group have a statutory immigration status – that of being on a statutory pathway to citizenship – that is strikingly different from that of DACA beneficiaries, and adequately grounds Arizona's differing treatment of them. Only on the supposition (if only *sub silentio*) that the deferred action in DACA can alter the statutory immigration status of its beneficiaries could this distinction be lessened sufficiently for the Ninth Circuit's purposes.

The principle that the executive lacks authority to alter statutory immigration classifications also is central to a circuit split. While the Ninth Circuit failed to apply this principle, the Fifth Circuit made it an alternative basis for its holding that a similar deferred-action program, Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"), was unlawful.

Resolving this circuit split on this basis would not only uphold an important aspect of the constitutional separation of powers, but would also allow this Court to avoid a difficult constitutional question: determining the point at which the executive, faced with limited resources and accordingly exercising its discretion to defer some enforcement of our nation's immigration laws, either 1) defers so much enforcement that it fails to take care that the laws are faithfully executed or

2) exercises its discretion in a way that constitutes forbidden executive lawmaking.

ARGUMENT

I. DACA And DAPA Beneficiaries Have A Statutory Immigration Status That Is Very Different From That Of COR And AOS Applicants For Lawful Permanent Residence.

The DACA memo issued by the Secretary of DHS made eligible for "deferred action" a class of aliens who reside in the United States but have not been admitted into the country. App. 195-99. Later, the DHS Secretary issued the DAPA memo, which extended the temporal term of DACA and also applied it to a further class of unadmitted aliens. Dep't of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents 1-2 (2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

The INA clearly states that every noncitizen who is "present in the United States" but "has not been admitted shall be deemed for purposes of this Act an *applicant for admission*." 8 U.S.C. § 1225(a)(1) (emphasis added). "Any person who . . . makes application for admission" bears the statutory burden of proof that "he . . . is not inadmissible under any provision of this Act. . . . If such burden of proof is not sustained, such

person shall be presumed to be in the United States in violation of law." 8 U.S.C. § 1361. Section 1361 "imposes a statutory presumption that the alien is in the country illegally." *Bustos-Torres v. INS*, 898 F.2d 1053, 1057 (5th Cir. 1990).

By contrast, COR or AOS applicants – that is, aliens with proper pending applications for cancellation of removal under 8 U.S.C. § 1229b(b) or adjustment of status under 8 U.S.C. §§ 1255(a) or 1255(i) – are applicants for lawful permanent resident status. *See* 8 U.S.C. § 1229b(b)(1) ("The Attorney General [now Secretary of Homeland Security] may cancel the removal of, and adjust to the status of alien lawfully admitted for permanent residence, an alien who. . . ."); 8 U.S.C. § 1255(a) ("The status of an alien who was inspected or admitted or paroled into the United States . . . may be adjusted by the Attorney General . . . to that of an alien lawfully admitted for permanent residence if. . . ."); 8 U.S.C. § 1255(i)(1) ("Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States . . . may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence."). As applicants for lawful permanent residence, COR and AOS applicants are on a statutory pathway – albeit not a certain one – to citizenship, because lawful permanent resident status is a statutory prerequisite to naturalization. 8 U.S.C. § 1437(a)(1) ("No person . . . shall be naturalized, unless such applicant . . . has resided continuously, after being lawfully

admitted for permanent residence, within the United States for at least five years. . . .").

II. There Is A Clear Circuit Split On Whether The Executive Has Authority To Alter Congressional Immigration Classifications.

Remarkably, the circuits do not agree about whether the executive, acting alone, has authority to alter federal statutory immigration classifications. The United States Court of Appeals for the Fifth Circuit held that it does not. The Ninth Circuit, in reaching its preemption holding, relied on the proposition that the executive does have such authority.

A. The Fifth Circuit Held That DAPA Was Unlawful Because It Purported To Grant Lawful Status To Those Whose Presence Under Federal Immigration Statutes Was Unlawful.

In *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), the Fifth Circuit held that DAPA was an unlawful basis for the grant of benefits, such as work authorization, to illegal aliens. That DAPA could not alter the legal status of such aliens was a crucial part of the Court's reasoning. Surveying the INA, the Fifth Circuit held that "the INA flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits." *Id*. at 184. *See also id*. at 170 ("At its core, this case is about the [DHS] Secretary's

decision *to change the immigration classification of millions of illegal aliens* on a class-wide basis.") (emphasis added).

The Court explained:

> The adequacy or insufficiency of legislative appropriations is not relevant to whether DHS has statutory authority to implement DAPA. Neither our nor the dissent's reasoning hinges on the budgetary feasibility of a more thorough enforcement of the immigration laws; instead, our conclusion turns on whether the INA gives DHS the power to create and implement a sweeping class-wide rule changing the immigration status of the affected aliens without full notice-and-comment rulemaking, especially where – as here – the directive is flatly contradictory to the statutory text.

Id. at 113.

B. The Ninth Circuit's Erroneous Preemption Holding Depends On The Proposition That DACA Altered Its Beneficiaries' Statutory Immigration Status.

In finding preemption, the Ninth Circuit found that both DACA beneficiaries and COR or AOS applicants have, under federal law, the same degree of authorized presence (or lack thereof) in the country, because both lack "formal immigration status" and may never receive it. App. 28. Therefore, the Court reasoned, Arizona, by giving drivers' licenses to COR

and AOS applicants but not DACA beneficiaries on the ground that the presence of the latter but not the former was "authorized," was making up its own immigration categories at variance with federal ones. App. 39.

In fact, however, neither group lacks a formal immigration status.[2] By statute, DACA beneficiaries are presumptively unlawfully present. 8 U.S.C. §§ 1225(a)(1), 1361. In sharp contrast, COR and AOS applicants enjoy a statutory pathway to citizenship, if an uncertain one. 8 U.S.C. §§ 1229b(b), 1255(a), 1255(i), 1437(a)(1). This distinction, referencing a fundamental divide in federal immigration law – that between unadmitted aliens and lawful permanent residents – is reflected in Arizona's respective treatment of these groups. Given this statutory posture, both groups could have the same degree of authorization to be in the country only if DACA, as a mere exercise in executive discretion to defer action, could alter or abrogate the statutory immigration status of its beneficiaries.

To be fair, by "formal immigration status" the Ninth Circuit seems to have meant "*lawful* presence conferred by statute." *See, e.g.*, App. 28. On this reading, the Court would be (trivially) correct that both

[2] "Status is a term of art, which . . . denotes someone who possesses a certain legal standing, *e.g.*, classification as an immigrant or nonimmigrant." *Vasquez de Alcantar v. Holder*, 645 F.3d 1097, 1102 (9th Cir. 2011).

DACA beneficiaries and COR or AOS applicants lack such a status. But the latter have a potentially-momentous statutory status – that of being on a statutory pathway to citizenship – that DACA beneficiaries lack. Whatever the Ninth Circuit meant by "formal immigration status," in light of this sharp statutory distinction between DACA beneficiaries and COR or AOS applicants, Arizona's different treatment of them, far from being preempted by federal law, adequately traces it. *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582, 602 (2011) (finding no preemption because "the Arizona law [in its terms] continues to trace the federal [immigration] law").

III. This Court Should Grant Certiorari To Make Clear That The Deferred Action In DACA Can Neither Preempt State Law Nor Change Statutory Immigration Classifications.

Needless to say, the Ninth Circuit cited no authority for the proposition that the deferred action of the DACA program had the power to alter statutory immigration classifications. No such authority exists. It is obvious that the executive, acting alone, has no power to annul or redraft the statutes it is charged with enforcing. On the contrary, it has a constitutional duty to "take care that the laws be faithfully executed." U.S. Const. art. II, § 1. True, when faced with insufficient resources to enforce a given law thoroughly, the executive has discretion to decide how to enforce it partially. *See City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C.

Cir. 1977) (holding that when a statutory mandate is not fully funded, "the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint."). Whether the DACA program transgresses the limits of this discretion, by either being a failure to take care that the laws are faithfully executed or amounting, due to the sweeping nature of its categories, to executive law-making forbidden by the separation of powers, is a difficult constitutional question that this Court does not have to reach here. Even lawful executive discretion, considered in itself, cannot preempt state law.

Indeed, such discretion has nothing to do with the Supremacy Clause, which states that "laws of the United States . . . in pursuance" of the Constitution – not exercises of discretion in the enforcement of such laws – are supreme. U.S. Const. art. IV, cl. 2.

In short, executive discretion, considered in itself, is not enough in this (or any) case for preemption. Nor, contrary to the Ninth Circuit's holding, can the executive, by action or inaction, alter the immigration status of aliens clearly given in the relevant immigration statutes. This Court should grant review to make these fundamental points abundantly clear.

CONCLUSION

For the foregoing reasons, the Court should grant Arizona's petition for writ of certiorari.

Respectfully submitted,

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