No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in creating an immigration-specific rule under which state police power regulations that "arrang[e]" federal immigration classifications are preempted, even if preemption was not "the clear and manifest purpose of Congress"?

2. Did the Ninth Circuit err in assuming that the Deferred Action for Childhood Arrivals (DACA) program, an executive-branch policy of non-enforcement, was valid "federal law" capable of preempting a state police power regulation?

PARTIES TO THE PROCEEDING

Petitioners are Janice K. Brewer, the 22nd Governor of the State of Arizona; John S. Halikowski, Director of the Arizona Department of Transportation; and Stacey K. Stanton, Director of the Motor Vehicle Division of the Arizona Department of Transportation.

Respondents are the Arizona Dream Act Coalition, a non-profit organization, and the following individuals: Christian Jacobo, Alejandra Lopez, Ariel Martinez, Natalia Perez-Gallegos, Carla Chavarria, and Jose Ricardo Hinojos.

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PETITION FOR WRIT OF CERTIORARI

The Ninth Circuit has now held that an executive branch memorandum can preempt state law. While the panel takes great pains to cloak its holding in the theory that Arizona impermissibly borrows federal law, App. 36, that theory is so plainly at odds with this Court's precedent and the decisions of other circuits that it merits little debate. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 226 (1982) ("The State may borrow the federal [immigration] classification."). In fact, the panel itself moves past its superficial holding to defend the presidential legislation at issue in this case. App. 44–47. And the dissenting opinion of six judges who favored rehearing en banc explains how the panel "holds that the enforcement decisions of the President are federal law." App. 4 (Kozinski, J., dissenting). This type of unilateral lawmaking usurps the role of Congress and permits too-easy preemption of state law. The Ninth Circuit's decision is therefore a threat to both the separation of powers and our federal system.

Like every State, Arizona regulates the "privilege of driving on state roads." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2169 (2016). To that end, the Arizona Department of Transportation ("ADOT") issues driver's licenses to anyone who can meet certain criteria, including "submit[ting] proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. § 28-3153(D). The present controversy asks whether ADOT *must* accept three types of Employment Authorization Documents ("EADs") issued by the Department of Homeland Security as proof that the EAD-holder's presence in the United States is

"authorized under federal law." *Id.* One of those EAD categories, labeled "(c)(33)," corresponds to the Deferred Action for Childhood Arrivals ("DACA") program.

The Secretary of Homeland Security created DACA in a June 2012 memorandum (the "DACA Memo"). The DACA Memo was not enacted by Congress or promulgated through any formal rulemaking procedures. Moreover, its benefits are justified as "prosecutorial discretion," App. 197, and revocable at any time in the sole discretion of the Department of Homeland Security.

A discretionary, revocable program of non-enforcement, which was created by executive action alone, cannot preempt state law regulating driver's licenses. Even the Ninth Circuit acknowledges that granting licenses is a traditional police power. App. 36. Where police powers are involved, this Court requires that Congress supply "clear and manifest" evidence of its intent to preempt state law. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 330 (1947)). The two statutory provisions identified by the Ninth Circuit as evidence of congressional intent are inadequate, which explains why that court rejected the "clear and manifest" standard entirely. App. 35; *see also* App. 6 (Kozinski, J., dissenting). The Ninth Circuit's rejection of the "clear and manifest" standard is a departure from 70 years of this Court's preemption jurisprudence. To protect the sovereignty of the States, this Court should grant review.

Additionally, the Ninth Circuit never explains how the DACA program can be federal law. The Constitution assigns authority over immigration to Congress. U.S. Const. art. I, § 8, cl. 4. Unlike the demanding test for preemption, the separation of powers requires only that Congress has exercised its Article I authority to regulate immigration—including sanctioning certain types of deferred action and assigning them unique EADs—to strip the President of power to create new law in this area. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The separation of powers thus forecloses any argument that the DACA Memo or EADs issued under DACA carry the force of law for purposes of the Supremacy Clause. *Alden v. Maine*, 527 U.S. 706, 731 (1999) ("[T]he Supremacy Clause enshrines as 'the supreme Law of the Land' only those Federal Acts that accord with the constitutional design.").

Even if the Ninth Circuit were correct that non-enforcement under DACA is "a matter of discretion," App. 40, a memo designed to guide prosecutorial discretion cannot preempt Arizona's permissible incorporation of federal immigration classifications. *Plyler*, 457 U.S. at 226. The decision not to prosecute someone does not change that person's classification under federal law or establish presence authorized "under federal law." Ariz. Rev. Stat. § 28-3153(D). That insight is consistent with the holdings of this Court, which confirm that not every dispatch from the executive branch carries the force of law. Thus this Court recognizes a category of "Executive Branch communications that express federal policy but lack the force of law" and therefore "cannot render unconstitutional [a State's] otherwise valid [statute]."

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). The Fifth Circuit, considering the same assertion of executive power at issue in this case, held that federal immigration law "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 v. United States*, 809 F.3d 134, 184 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). By assuming that DACA is sufficient to establish presence in the United States "authorized under federal law," the Ninth Circuit departs from precedent in this Court and numerous circuits.

While the executive branch is free to exercise prosecutorial discretion "on a case-by-case basis," *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 n.8 (1999), it cannot preempt state laws related to traditional state-provided benefits with blanket policies of non-enforcement. This formerly settled feature of the separation of powers demands this Court's vindication.

OPINIONS BELOW

The order from the U.S. Court of Appeals for the Ninth Circuit denying rehearing en banc appears at 2017 WL 461503. App. 1–2. Accompanying it are the panel's amended opinion, App. 14–51, Judge Berzon's concurring opinion, App. 52–63, and Judge Kozinski's dissenting opinion for himself and five other judges, App. 2–13. The order and permanent injunction issued by the U.S. District Court for the District of Arizona appear at 81 F. Supp. 3d 795. App. 104–41.

JURISDICTION

The Ninth Circuit denied rehearing en banc and issued its amended opinion on February 2, 2017. App. 1. That court's jurisdiction rested on 28 U.S.C. § 1291. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The Take Care Clause requires that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

The relevant portion of Arizona's statute governing driver's licenses appears at App. 207–08. Ariz. Rev. Stat. § 28-3153(D).

STATEMENT OF THE CASE

A. Statutory Background

1. **Deferred action.** Congress has plenary authority to regulate immigration, U.S. Const. art. I, § 8, cl. 4, and has done so through numerous statutes, including the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101–07. For persons who have not

complied with the INA and would otherwise face deportation, "the Executive has discretion to abandon" removal proceedings in what has "come to be known as 'deferred action.'" *Reno*, 525 U.S. at 483–84. When initiated by the executive branch as a component of prosecutorial discretion, deferred action is a "case-by-case" decision. *Id.* at 484 n.8.

Congress can also authorize deferred action on a class-wide basis. In a memorandum outlining the legal argument for DACA and its later expansions, the Office of Legal Counsel cited four such occasions. *See* 8 U.S.C. § 1154(a)(1)(D) (self-petitioners under the Violence Against Women Act); Pub. L. No. 107–56, § 423(b), 115 Stat. 272, 361 (family members of permanent residents killed on September 11, 2001); Pub. L. No. 108-136, § 1703(c)–(d), 117 Stat. 1392, 1694–95 (family members of U.S. citizens killed in combat); 8 U.S.C. § 1227(d)(1)–(2) (certain T- and U-visa applicants); *see also* Memorandum from Karl R. Thompson, Principal Deputy Assistant Attorney General at the Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (hereinafter "OLC Opinion") (Nov. 19, 2014). App. 133–94.

What Congress has not done is adopt one of the many versions of the Development, Relief, and Education for Alien Minors Act ("DREAM Act"). *See, e.g.*, DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011); DREAM Act of 2010, H.R. 6497, S. 3992, S. 3963, 111th Cong. (2010); DREAM Act of 2007, S. 774, 110th Cong. (2007). Across its various incarnations, the DREAM Act has aimed to provide

lawful presence to substantially the same class of beneficiaries covered by the DACA Memo. Indeed, Respondent's name—the Arizona *Dream Act* Coalition—recognizes the congruity of the unsuccessful legislation and the DACA program.

2. **Work authorizations**. In exercising its constitutional authority over immigration, Congress has also enacted detailed statutes addressing when aliens are authorized to work in the United States. The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, is "a comprehensive scheme" that "forcefully made combating the employment of [unauthorized] aliens central to the policy of immigration law." *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (internal quotation and alterations omitted).

Among other things, Congress established penalties for employers who hire unauthorized aliens. 8 U.S.C. § 1324a(a),(f). The law defines "unauthorized alien" as an "alien [who] is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." *Id.* § 1324a(h)(3). This definitional subsection, however, does not give the executive branch a blank check to grant work authorizations.

To the contrary, Congress has separately demarcated the Executive's delegated authority to issue work permits. *E.g.*, 8 U.S.C. § 1101(i)(2) (human-trafficking victims); 8 U.S.C. §§ 1158(c)(1)(B),(d)(2) (asylum applicants); 8 U.S.C. §§ 1184(c)(2)(E),(e)(6), (p)(3),(p)(6),(q)(1)(A) (spouses of L- and E-visa holders; certain victims of crime; spouses and certain children of lawful permanent residents); 8 U.S.C.§ 1254a(a)(1)

(temporary-protected-status holders). Congress has also statutorily granted work permit eligibility to a few narrow classes of deferred-action recipients. *E.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II),(IV) (children of Violence Against Women Act self-petitioners). Additionally, certain nonimmigrant visas automatically provide work authorizations. *E.g.*, 8 U.S.C. § 1101(a)(15)(E), (H),(I),(L) (commercial workers); *id.* § 1101(a)(15)(A),(G) (foreign-government or international-organization workers); *id.* § 1101(a)(15)(P) (athletes or entertainers). Congress has taken no such action with respect to the group of aliens at issue in this case.

B. Deferred Action for Childhood Arrivals (DACA)

On June 15, 2012, the Department of Homeland Security issued the DACA Memo. Couched in language of prosecutorial discretion, the DACA Memo promised deferred action on two-year intervals and work authorizations for individuals who meet several criteria. App. 195.

The DACA Memo itself stressed that it "confers no substantive right, immigration status or pathway to citizenship." App. 199. The Office of Legal Counsel picked up the same theme two years later, explaining that DACA "does not establish any enforceable legal right to remain in the United States—and it may be revoked by immigration authorities at their discretion." App. 156. The reason DACA could reflect only the ephemeral "decision to openly tolerate an undocumented alien's continued presence . . . (subject to revocation at the agency's discretion)," App. 169, is that "[o]nly the Congress, acting through its legislative authority, can confer" substantive rights or a lawful

immigration status," App. 199. The executive branch acting alone was constrained by "the framework of existing law," which the DACA Memo purported not to change. *Id.*

Two years later, the Department of Homeland Security expanded the DACA program to encompass a broader range of persons who had illegally entered the United States as children and launched a parallel program for unauthorized aliens with children who had been born in the United States and were therefore citizens (DAPA). Around that time, the Office of Legal Counsel offered a memorandum attempting to fit these actions as well as the original DACA Memo within the scope of executive prerogative. App. 133–94. As the OLC memorandum illustrates, the legal justification for each of these initiatives was identical. It is therefore important for the present case that the Fifth Circuit struck down the 2014 expansions for exceeding the authority of the executive branch to change the law unilaterally, a decision affirmed by an equal division of this Court. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016)

Shortly after DACA was created, ADOT began reviewing its policies to determine whether DACA beneficiaries would qualify for Arizona driver's licenses. ER 181–84. The department came to the conclusion that "presence . . . authorized under federal law," Ariz. Rev. Stat. § 28-3153(D), covered almost every category of alien created by the federal government: those with a formal immigration status, those on a path to obtaining formal immigration status,

and those with relief provided pursuant to the INA. ER 145; ER 147–51.

DACA, however, is not part of the INA or any other statute. Nor is it the product of agency rulemaking pursuant to a congressional delegation. Rather, DACA purports to be mere prosecutorial discretion. As such, it is not "federal law," and applicants for a driver's license could not rely on category (c)(33) EADs—the category created by the federal government specifically for DACA—to prove eligibility.[1]

C. Procedural History

Respondents filed suit, asserting that ADOT's interpretation of "presence in the United States . . . authorized under federal law" to exclude persons holding (c)(33) EADs violated both the Supremacy and Equal Protection Clauses of the United States Constitution.

Until its final chapter, this litigation focused on the Fourteenth Amendment. In fact, the district court used only one paragraph of a 40-page opinion to grant ADOT's motion to dismiss the Supremacy Clause claim. *Arizona Dream Act Coal. v. Brewer*, 945 F. Supp. 2d 1049, 1077–78 (D. Ariz. 2013), *rev'd and remanded*, 757 F.3d 1053 (9th Cir. 2014). The court explained that "even under the lenient Rule 12(b)(6) standard, the claim is not based on a cognizable legal theory." *Id.* Years later, the six judges dissenting from denial of rehearing en banc would note that the trial court

[1] Two other categories of EADs likewise fail to establish presence authorized under federal law. Identified by their federal category codes, they are (a)(11) (deferred enforced departure) and (c)(14) (generic deferred action). ER 145.

dismissed the preemption claim "with bemusement." App. 3 (Kozinski, J., dissenting).

In the meantime, Respondents appealed only the district court's denial of their motion for summary judgment on equal protection. The Ninth Circuit reversed the lower court's finding of no irreparable harm and proceeded to consider all four preliminary injunction factors in the first instance and to order the district court to "enter a preliminary injunction prohibiting [ADOT] from enforcing any policy by which the Arizona Department of Transportation refuses to accept Plaintiffs' Employment Authorization Documents, issued to Plaintiffs under DACA, as proof that Plaintiffs are authorized under federal law to be present in the United States." *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1058 (9th Cir. 2014).

Petitioners moved this Court for a stay pending the resolution of a petition for certiorari. Justice Kennedy referred that motion to the whole Court, which denied the stay with three Justices dissenting from the denial. *See* App. 132. Confident that they would prevail on remand and because discovery had continued in the district court for over a year, Petitioners did not seek certiorari.

The district court, believing itself bound by the earlier Ninth Circuit decision, entered a permanent injunction borrowed verbatim from the Ninth Circuit's opinion. *Ariz. Dream Act Coalition v. Brewer*, 81 F. Supp. 3d 795, 811 (D. Ariz. 2015) (also found at ER 7–26). Petitioners again appealed, and the case was assigned to the same Ninth Circuit panel. *See* Order,

Ariz. Dream Act Coalition v. Brewer, No. 15-15307 (9th Cir. June 2, 2015) (Pregerson, Berzon & Christen, JJ.).

At oral argument, the panel unexpectedly pivoted to the long-forsaken topic of preemption. Although Respondents abandoned their Supremacy Clause claims, App. 210–11, the panel called for supplemental briefing on that subject and on the constitutionality of DACA, App. 34.

On April 5, 2016, the Ninth Circuit panel affirmed the entry of a permanent injunction, this time based on preemption. App. 71, *as amended by* App. 21. While the panel recognized that driver's licenses are a traditional area of state regulation, App. 36, and that States may incorporate federal immigration classifications, *id.* (citing *Plyler*, 457 U.S. at 225–26), it nevertheless found preemption because "by arranging federal classifications in the way it prefers, Arizona impermissibly assumes the federal prerogative of creating immigration classifications according to its own design," App. 39.

Petitioners sought rehearing en banc, which the Ninth Circuit denied over a six-judge dissent. App. 2–13 (Kozinski, J., dissenting). The dissent faults the panel opinion for declaring ADOT's policy preempted without identifying the federal laws that preempt it, App. 6–9, and for refusing to address the antecedent question of whether the DACA Memo could be described as either "law" or "lawful" before concluding that it is "part of the body of 'federal law' that imposes burdens and obligations on the sovereign states," App. 4. Because DACA is neither law nor lawful, Petitioners seek this Court's review.

REASONS FOR GRANTING THE PETITION

Since the Founding, the separation of powers has been "a bulwark against tyranny." *United States v. Brown*, 381 U.S. 437, 443 (1965). Preserving liberty "requires[] that the three great departments of power should be separate and distinct." The Federalist No. 47, at 324 (James Madison) (J. Cooke ed. 1961). And just as the division of power among the branches of the federal government protects liberty, so too does the vertical separation of power between the federal government and the States. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."')). Thus, "the police power is controlled by 50 different States instead of one national sovereign," *id.*, and when States exercise that power, only the "'clear and manifest purpose of Congress'" will suffice to preempt those laws, *Arizona*, 132 S. Ct. at 2501 (quoting *Rice*, 331 U.S. at 230); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

The Ninth Circuit's decision in this case is remarkable for eroding both dimensions of the constitutional division of power. It diminishes the States by rejecting the "clear and manifest" standard that has existed since *Rice* in favor of an immigration-specific test. That holding contradicts decades of precedent from this Court and every circuit court of appeals. And after lowering the bar for preemption, the panel undermines this Court's allowance that a "State may borrow the federal classification" of aliens, *Plyler*, 457 U.S. at 226, by holding that Arizona was not

free to "arrange[]" those classifications—the EADs—in a manner that suits its regulatory task. In the absence of any evidence that Congress intended such a radical departure, this Court should restore the traditional sovereignty of the 50 States.

The Constitution's division of power among the federal branches fares no better. Specifically, the effect of the panel's decision is to hold "that the enforcement decisions of the President are federal law." App. 4 (Kozinski, J., dissenting). It does so by finding a conflict with Arizona's requirement of "presence . . . authorized under federal law." Ariz. Rev. Stat. § 28-3153(D). But the only authorization for (c)(33) EADs is the DACA Memo, which must belong to one of two categories: either it announces a substantive change in the law by executive action alone, or it is a precatory enforcement guide without the force of law. Either option lacks preemptive force.

This Court should grant certiorari to bring the Ninth Circuit's outlier decision into harmony with precedent from this Court and courts around the nation. Along the way, it will restore the two-part separation of powers that guards against the consolidation of power in any individual.

I. The Ninth Circuit's Rejection of the "Clear and Manifest" Standard for Preempting State Law Is Contrary to Precedent from this Court and the Second and Fifth Circuits.

While purporting to avoid a host of issues, the Ninth Circuit decision comes to rest on the idea that Arizona's incorporation of federal classifications is preempted by federal law. App. 33. To do so, the lower court adopts an incorrect legal standard for finding preemption and, as a result, reaches a decision that is irreconcilable with precedent from this Court and others. This gossamer-thin appeal to constitutional avoidance is easy to expose, but would be devastating if left in place.

Preemption is a drastic outcome. While the federal government is one of limited and enumerated powers, the "States have vast residual powers" under the Tenth Amendment. *United States v. Locke*, 529 U.S. 89, 109 (2000). Mindful of this "fundamental" feature of "our federal structure," *id.*, this Court imposes a high threshold for preempting state laws. To wit, when "Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. at 565 (alterations in original, quotation omitted). This "clear and manifest" standard gives life to the bedrock principle that "it is Congress rather than the courts that preempts state law." *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (quotation omitted).

Congress unquestionably has authority to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. This power "is essentially a determination of who should or should not be admitted to the country, and the conditions under which a legal entrant may remain." *De Canas v. Bica*, 424 U.S. 351, 355 (1976), *superseded by statute in irrelevant part as recognized in Arizona*, 132 S. Ct. at 2503 (cited at App. 24). This federal field does not, however, preclude all state "act[ion] with respect to illegal aliens." *Plyler*, 457 U.S. at 225. In fact, the States' interest in illegal immigration includes "deter[ring]" the practice in service of traditional police-power interests. *Id.* at 228 n.23 ("Although the State has no direct interest in controlling entry into this country . . . we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law."). Thus, Arizona was within its rights to make mandatory the federal E-Verify system in "hopes that its law will result in more effective enforcement of the prohibition on employing unauthorized aliens." *Whiting*, 563 U.S. at 607. Short of determining who may enter and remain in the United States, each State has significant latitude to regulate in traditional areas of state concern.

The Ninth Circuit panel admits that regulating driver's licenses is within the States' police power. App. 38. That fact triggers the requirement that preemption be the "clear and manifest purpose of Congress." *Arizona*, 132 S. Ct. at 2501 (quotation omitted).

But the Ninth Circuit refused to apply this requirement. By misusing a quotation from a footnote

characterizing the dissent in *Toll v. Moreno*, 458 U.S. 1 (1982), the Ninth Circuit adopted a different test: "'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 (quoting *Toll*, 458 U.S. at 11 n.16). That is not correct. The *Toll* footnote did not address the presumption against preemption and, by its own admission, referred to a case decided under the Equal Protection Clause. Moreover, had the Ninth Circuit taken seriously this Court's more recent decisions involving the presumption against preemption in the immigration context, it would have seen that the "clear and manifest" threshold applies with full force. *E.g., Arizona*, 132 S. Ct. at 2501 (citing *Wyeth*).

In defense of the vertical separation of powers, this Court should grant certiorari for the purpose of extinguishing this error alone. Creating an immigration-specific rule is unnecessary and negates the logic of the presumption against preemption.

The Ninth Circuit's need for a special rule becomes apparent when considering the decision's two feeble tethers to congressional intent. The first is a provision defining "unlawful presence" for purposes of a single paragraph in the INA. App. 42; 8 U.S.C. § 1182(a)(9)(B)(ii). It explains that an alien is unlawfully present if he remains in the United States "after the expiration of the period of stay authorized by the Attorney General." *Id.* That fact does not, of course, imply that anyone who has not overstayed a period authorized by the Attorney General is, for all purposes including getting a driver's license in Arizona,

lawfully present. Second, the Ninth Circuit panel points to a provision of the REAL ID Act that permits but does not require States to give licenses to persons with deferred action. App. 42; Pub. L. No. 109-13, § 202(c)(2)(C)(i). That is all the panel has. As the dissenting judges point out, "[t]hat the panel can trawl the great depths of the INA . . . and return with this meager catch suggests exactly the opposite" of a clear and manifest congressional intent to preempt Arizona's law. App. 8 (Kozinski, J., dissenting).

Congressional disapproval is impossible to find because ADOT "borrows" federal classifications exactly as they are created by the federal government. *Plyler*, 457 U.S. at 226. Its policy awards driver's licenses to all classes of aliens holding an EAD except those with (a)(11), (c)(14), and (c)(33) EADs. These classifications are not ADOT's. Moreover, ADOT does not tamper with the federal classifications by, for example, dividing (c)(33) EAD-holders (DACA beneficiaries) brought to the United States before the age of five from those who entered the country after their fifth birthdays. Such conflicting re-classification would trigger preemption, but ADOT does no such thing.

While the panel acknowledges that States may "incorporate federal immigration classifications," App. 36, it strikes down Arizona's law for the sin of "arranging federal classifications in the way it prefers," App. 39. Its reasoning is self-contradictory: "by *arranging federal classifications* . . ., Arizona impermissibly assumes the federal prerogative of *creating* immigration classifications." App. 39 (emphasis added). The panel never explains how arranging classifications that are admittedly federal is

akin to creating classifications rather than borrowing them, as sanctioned in *Plyler*. Moreover, the panel identifies nothing to indicate that Congress clearly and manifestly intended to preempt States from arranging immigration classifications to further an exercise of state police powers.

This Court and others have recognized that States' ability to "borrow" classifications entails the flexibility to arrange them in response to the State's regulatory project. *Toll* is a prime example. Although the Court struck down the University of Maryland's policy excluding aliens with G-4 visas from paying in-state tuition, its reasoning had nothing to do with a State's ability to borrow visa classifications. 458 U.S. at 16–17 (discussing congressional intent specific to G-4 visas). To the contrary, the Court noted that other visa categories could be treated differently because Congress had not evinced the same intent that those immigrants make the United States their domicile. *Id.* at 7 n.8. If the Ninth Circuit were correct, *Toll* would have been a much shorter opinion: Maryland could not use visa-specific classifications, regardless of how congressional intent varied from visa to visa. This Court's contrary approach confirms that permissible "borrowing" of immigrant classifications does not depend on how fine the classifications are but rather on what the plaintiff can prove regarding congressional intent.

In *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005), the Fifth Circuit upheld a Louisiana law that denied bar admission to aliens holding "nonimmigrant" visas. In concluding that the INA did not preempt Louisiana's regulation, the court explained that, "as with the alien

class in general, the sub-class of nonimmigrant aliens is itself heterogeneous, and the distinctions among them are relevant for preemption purposes." *Id.* at 424 (citing *Toll*'s distinctions based on type of visa). Because there was no conflict between the state law and what Congress clearly intended under federal law, Congress had not "unmistakably" preempted Louisiana's police power regulation of the legal profession. *Id.* at 423–25. The Ninth Circuit attempts to distinguish *LeClerc* because it is the federal government that classifies lawful aliens as either immigrant or non-immigrant. App. 43. But the federal government is also the source of the EAD classifications in the present case.

Further illustrating the point, the Second Circuit, in a decision that examined *LeClerc*, found fault with a professional licensing scheme that was insufficiently refined in its approach to visa classifications. *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012). The Second Circuit found a conflict between Congress's creation of H-1B and TN visas for pharmacists (including the plaintiffs) and New York's rule limiting pharmacy licenses to citizens and legal permanent residents, a blunt rule that excluded the plaintiffs. The Second Circuit found preemption based on a conflict specific to plaintiffs' type of visa: "Congress intended to allow [H-1B and TN visa-holders] to practice specialty occupations." *Id.* at 80. *Dandamudi*'s emphasis on congressional intent specific to pharmacists with two types of professional visas suggests that had New York adopted a *more* precise rule—one that carved out H-1B and TN pharmacists—it would have survived. Unlike the Ninth Circuit, the Second Circuit recognized that a more precise borrowing of federal classifications is

within a State's prerogative and can actually avoid conflict with congressional intent.

This Court has sanctioned States' borrowing federal immigration classifications. When they do so in exercising a traditional police power, the only question is whether Congress has clearly and manifestly expressed an intent to preempt the State's action. The Ninth Circuit panel has rejected this standard and created a division with other circuits in the process. Certiorari is necessary to extinguish this error and confirm that borrowed federal classifications do not offend the Supremacy Clause.

II. The Ninth Circuit Departed from Precedent in this Court and Six Circuits by Treating DACA as Federal Law.

It takes little squinting to see that the Ninth Circuit's core objection is with Arizona's conclusion that DACA fails to confer "presence . . . authorized under federal law," Ariz. Rev. Stat. § 28-3153(D). Thus it bemoans that the State "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. As the dissent points out, this is not a matter of borrowing EAD classifications, which Arizona does faithfully, but rather a question of what counts as "federal law." App. 4. The panel attempts to hide its equation of DACA with federal law by rewriting the state statute to require generic "authorized presence," *e.g.*, App. 39. This subtle change, which appears eleven times throughout the analysis but nowhere in the Arizona statute, omits the condition of "presence . . . authorized *under federal law*." That condition is at the

heart of the state statute and should be at the core of any preemption analysis.

As explained above, DACA can be one of two things: an amendment to immigration law or precatory guidance for prosecutors. If DACA is a substantive change in the law, as many circuits would hold (and one effectively has), then it must fail under *Youngstown*. If it is merely guidance for prosecutorial discretion, then the Ninth Circuit panel diverges from this Court and numerous others in finding preemption based on a document that lacks the force of law. Arizona has faithfully interpreted the boundaries of "federal law," and DACA does nothing to alter that conclusion.

A. DACA Is an Attempt to Change Substantive Law, which Is Unlawful Under *Youngstown* and Therefore Incapable of Preempting State Law.

DACA is an attempt by the executive branch to change federal immigration law without involving Congress. For preemption, however, a law must be "made in Pursuance" of the Constitution. U.S. Const. art. VI, cl. 2. The Ninth Circuit works hard to avoid answering how DACA can comply with the constitutional process for lawmaking: "We decline to rule on the constitutionality of the DACA program, as the issue is not properly before our court; only the lawfulness of Arizona's policy is in question." App. 44. This position makes no sense because "the lawfulness of Arizona's policy" depends upon the lawfulness of DACA. After all, "only measures that are constitutional may preempt state law." *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 763 (11th Cir.

1991). Or, as the dissenting judges explained: "I am at a loss to explain how . . . [t]he President's policies may or may not be 'lawful' and may or may not be 'law,' but are nonetheless part of the body of 'federal law' that imposes obligations on the sovereign states." App. 4 (Kozinski, J., dissenting).

The Fifth Circuit has held that the legally-indistinguishable 2014 DACA expansion and the creation of DAPA are substantive changes in the law rather than an exercise of prosecutorial discretion. *Texas*, 809 F.3d at 174–78. Precedent from the Eighth and D.C. Circuits supports the same conclusion. If these courts are correct, then the Constitution's separation of powers demands more than an executive memorandum to enact the substantive policy change embodied in DACA.

1. **Not prosecutorial discretion.** The separation of powers allows Congress the luxury of inaction. The President, on the other hand, "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. Prosecutorial discretion is an exception to that obligation, but this Court has limited that exception to avoid swallowing the rule. Prosecutors may therefore decide not to take action against a particular offender only "on a case-by-case basis." *Reno*, 525 U.S. at 484 n.8 (1999).

DACA, however, is more than a decision not to seek removal. It also awards affirmative benefits in contravention of the INA. Specifically, Congress has prohibited the employment of unauthorized aliens, 8 U.S.C. § 1324a(1), yet DACA provides EADs. This unlawful bonus takes DACA well beyond the boundaries of prosecutorial discretion. While Judge

Berzon views affirmative benefits as sanctioned by the INA's definition of "unauthorized alien," App. 52–53, a closer reading of the statute belies this theory. For purposes of employment, the INA defines unauthorized aliens as noncitizens not admitted as permanent residents or "authorized to be so employed by this chapter *or by the Attorney General*." 8 U.S.C. § 1324a(h)(3) (emphasis added). But the italicized language does not create any power. It merely reflects the fact that work authorization can come directly from a statute, *see, e.g.,* 8 U.S.C. § 1154(a)(1)(D)(i)(II), and other times must come from the Attorney General *pursuant to* a statute, *see, e.g.,* 8 U.S.C. §§ 1160(d)(1)(B), (d)(2)(B). Thus, nothing in the INA's definitional provisions allows the executive branch to confer affirmative benefits through an exercise of prosecutorial discretion.

In addition to extending benefits beyond non-enforcement, DACA is not discretionary. It is instead "a general policy" that contravenes the executive's "statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). Over a span of 80 days, USCIS approved almost 103,000 DACA applications. ER 470. As a point of comparison, Secretary Napolitano testified that DHS approved a total of 900 applications for deferred action over the entire year of 2010. *Id.* The change from 2010 to the DACA Program reflects a 52,200% increase in approvals per day. Considering similar "evidence from DACA's implementation," the Fifth Circuit characterized the government's appeals to discretion as mere "pretext." *Texas*, 809 F.3d at 172. When asked, DHS had precisely zero examples of an individualized determination under DACA. *Id.* This result is

unsurprising given that the president of the USCIS workers' union reported that "DHS management has taken multiple steps to ensure that DACA applications are simply rubberstamped if the applicants meet the necessary criteria." *Id.* at 172–73.

Faced with similar evidence that individualized determinations are not occurring, other courts of appeals refuse to take the bait. The D.C. Circuit, for example, rejected EPA's claims of discretion when an agency model resolved 96 out of 100 applications. *McLouth Steel Prods. v. Thomas*, 838 F.2d 1317, 1320–21 (D.C. Cir. 1988). With slightly more flourish, the Eighth Circuit rejected a federal agency's "pro forma reference to . . . discretion" as "Orwellian Newspeak." *Iowa League of Cities v. EPA*, 711 F.3d 844, 865 (8th Cir. 2013).

The Ninth Circuit, on the other hand, ignores the limits of prosecutorial discretion. After citing several cases involving case-by-case discretion, the panel asserts that past practice also "includes 'general policy' non-enforcement." App. 46. Astonishingly, the panel quotes precisely the language this Court used in *Heckler* to identify *impermissible* forms of prosecutorial discretion that would violate the Take Care Clause. 470 U.S. at 832. By relying on a "history that includes" class-based deferred action, the panel also deepens its conflict with the Fifth Circuit, which considered the same examples and concluded that "historical practice . . . 'does not, by itself, create power.'" 809 F.3d at 184 (quoting *Medellin v. Texas*, 552 U.S. 491, 532 (2008)).

DACA is not prosecutorial discretion because it goes beyond non-enforcement and does not rely on prosecutors' case-by-case evaluation.

2. **Separation of Powers.** Because DACA attempts a substantive change in the law, the Ninth Circuit's assumption that DACA is constitutional is contrary to longstanding precedent from this Court and at least two courts of appeals.

In the arena of executive lawmaking, Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952), is the rulebook. *Youngstown* announced a tripartite framework for evaluating how much freedom the executive enjoys to create law. The widest berth exists where "the President acts pursuant to an express or implied authorization of Congress." *Id.* at 635 (Jackson, J., concurring). Conversely, when acting contrary to a congressional pronouncement, the President's "power is at its lowest ebb . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 638 (Jackson, J., concurring). In between lies a "zone of twilight" characterized by "congressional inertia, indifference or quiescence." *Id.* at 637 (Jackson, J., concurring).

Congress has authority over immigration, U.S. Const. art. I, § 8, cl.4, and has exercised that authority on numerous occasions, including to provide class-based deferred action. *See, e.g.,* 8 U.S.C. § 1154(a)(1)(D) (self-petitioners under the Violence Against Women Act); Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361 (family members of permanent residents killed on September 11, 2001); Pub. L. No. 108-136, § 1703(c)–(d), 117 Stat. 1392, 1694–95 (family members of U.S. citizens killed in combat); 8 U.S.C. § 1227(d)(1)–(2) (certain T- and U-visa applicants). As

a result of this tide of legislation, the President's power to create or amend immigration law is limited to "his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring). Because the Constitution assigns Congress authority over immigration, the President has no authority to enact new policies like DACA. *See* App. 11–12 & n.7 (Kozinski, J., dissenting) (explaining that this case belongs to *Youngstown*'s third category).

In *Youngstown* itself, existing legislation on the topic of property seizure was sufficient to preclude President Truman from seizing steel mills under Article II's commander-in-chief authority. *Id.*, 343 U.S. at 639 & nn.6–8 (Jackson, J., concurring). In *Barclays*, the Court pointed to a history of failed legislation seeking to ban California's method of tax collection: "Congress has focused its attention on this issue, but has refrained from exercising its authority," thus "yield[ing] the floor" to the States, not the executive. 512 U.S. at 329; *see also id.* at 324–26 & nn.24–25 (tracing legislative proposals). Even more recently, the Court held that a "Memorandum of the Attorney General" could not make a non-self-executing treaty binding upon the States, notwithstanding the President's "plainly compelling" interests in the conduct of foreign affairs. *Medellin*, 552 U.S. at 524–26.

Like *Youngstown*, *Barclays*, and *Medellin*, the present case belongs in the third and most constrained *Youngstown* category. Congress has spoken specifically on the subject of class-wide deferred action, but has not extended such treatment to the group of noncitizens

covered by DACA. As in *Youngstown*, existing legislation on the same topic strips the executive of the ability to enact a parallel program unilaterally. Moreover, as in *Barclays*, Congress has considered and rejected legislation that would have accomplished what the executive attempted in response to legislative inaction. *See, e.g.,* DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011); DREAM Act of 2010, H.R. 6497, S. 3992, S. 3963, 111th Cong. (2010); DREAM Act of 2007, S. 774, 110th Cong. (2007). The Ninth Circuit's decision is inconsistent with this body of precedent.

It is also inconsistent with the holdings of other circuits. Most notably, 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 eligible for a host of federal and state benefits." *Texas*, 809 F.3d at 184. The Eleventh Circuit likewise struck down a presidential effort to regulate immigration in an area where Congress has imposed a "statutory scheme." *United States v. Frade*, 709 F.2d 1387, 1402 (11th Cir. 1983). In *Frade*, the question was whether the President could punish cooperation with the Mariel boatlift, which he justified as encompassed within the Trading with the Enemy Act. The Eleventh Circuit rejected this argument because Congress had already provided a different mechanism for emergency actions, which meant that the President's power was at its "lowest ebb" under *Youngstown*. *Id.* Alternatively, if the regulation was indeed based on trade, then the Constitution had already assigned that power to Congress in Article I, § 8, cl. 3—the clause at issue in *Barclays* and immediately preceding the one at issue in this

case—with the same result in terms of unilateral presidential power. *Id*. at 329, 334.

In the present case, Congress has passed numerous laws governing immigration. It is therefore "the expressed and codified intent of Congress," *id.*, that immigration occur in accordance with the INA and other laws.

If the Ninth Circuit shared the Eleventh Circuit's recognition that "presidential power to exclude aliens . . . does not include the power to enact general immigration laws by executive order," *id.*, or the Fifth Circuit's specific conclusions regarding DACA, then a different result would have obtained in the present case. This Court should grant certiorari to reaffirm its existing precedent limiting the scope of presidential lawmaking and to confirm that the Fifth and Eleventh Circuits were correct to follow those precedents in the context of immigration.

B. Alternatively, if DACA Were Prosecutorial Discretion, This Court and Three Circuits Have Held that Executive Branch Policy Statements Lack the Force of Law.

The Supremacy Clause enthrones the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties" as the supreme law of the land. U.S. Const. art. VI, cl. 2. It does not extend the same significance to every missive that issues from a single branch of government.

This Court has refused to treat as law "Executive Branch actions [like] press releases, letters, and amicus briefs." *Barclays*, 512 U.S. at 329–30. The *Barclays*

Court reasoned that "[w]e need not here consider the scope of the President's power to preempt state law pursuant to authority delegated by a statute" because the "Executive Branch communications" before it merely "express federal policy but lack the force of law." *Id.* Communications of this sort "cannot render unconstitutional California's otherwise valid [statute]." *Id.* at 330.

The Third and Seventh Circuits have reached similar conclusions by following this Court's reasoning in *United States v. Mead Corp.*, 533 U.S. 218 (2001). While *Mead* itself is not a preemption case, it traces the clearest boundary between agency-made law and precatory guidance. *Mead* announces a straightforward standard: "Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 230. Part of the "force" attending agency action that satisfies the standard in *Mead* is the ability to preempt state laws.

In *Holk*, the Third Circuit began its preemption analysis by asking "whether the FDA has . . . taken actions that are capable of having preemptive effect." 575 F.3d at 340. The candidate actions in *Holk* included a request for public comments, an informal policy, and several letters from the FDA to food and beverage manufacturers telling them to remove the term "natural" from their labels. *Id.* at 340–41. Applying *Mead*, the Third Circuit concluded that the lack of a "formal, deliberative process" prevented the FDA's actions from creating federal law. *Id.* at 342.

Likewise, the Seventh Circuit explained that "[i]n order to preempt state authority," a federal agency "must establish rules with the force of law." *Wabash Valley Power Assn. v. Rural Elec. Admin.*, 903 F.2d 445, 453–54 (7th Cir. 1990). A mere letter from the agency was not nearly enough. *Id.* at 454. In fact, the *Wabash* court noted that "[w]e have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication." *Id.*

Regarding the specific executive branch communication at issue in this case, the Fifth Circuit has already held that DAPA and the 2014 DACA expansion were substantive rules requiring notice-and-comment rulemaking, which DHS did not do. *Texas*, 809 F.3d at 177–78. In the Seventh Circuit, this failure to comply with the requirements of the Administrative Procedure Act would mean that DACA cannot be the basis for federal preemption. *Wabash*, 903 F.2d at 453.

In the Ninth Circuit, however, a different result followed. Examining Arizona's statute that requires "presence in the United States . . . authorized under federal *law*," Ariz. Rev. Stat. § 28-3153(D) (emphasis added), the Ninth Circuit found preemption because DACA beneficiaries—a group defined by no statute and no formal rulemaking—were excluded. App. 36. In any other Circuit, the requirement of presence "authorized under federal law" would have excluded persons whose sole claim to "authorization" was an executive branch memorandum. As the dissenting opinion points out, "[t]he panel decision in effect holds that the enforcement decisions of the President are federal law." App. 4. In the Third, Fifth, and Seventh Circuits, that holding would be impossible.

Rather than expressly disagree, the panel opinion simply ignores unhelpful precedent regarding the boundaries of "law," especially when contrasted with precatory communications from the executive branch. Despite dozens of references in the briefs, *Barclays* appears nowhere in the Ninth Circuit's opinion. In fact, the panel goes so far as to assert in a footnote that the DACA Memo is immaterial to its holding, which purportedly relies instead on "federal authority under the INA to create immigration categories." App. 39–40 n.8. The panel does not, however, explain how the plaintiffs in this case would have a cause of action in the absence of that allegedly irrelevant memorandum.[2]

This Court and the circuits that follow it have spoken with one voice on the procedures that create federal law. That the DACA Memo could trigger a different result in the Ninth Circuit calls out for review. *See* Noah Feldman, *Obama's Wobbly Legal Victory on Immigration*, Bloomberg View (Apr. 6, 2016) (describing the Ninth Circuit's preemption holding as "vulnerable to reversal by the Supreme Court" because "[t]he legal authority for [DACA] deferred-action status isn't federal law").

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[2] The opening sentence of Respondents' Complaint belies the Ninth Circuit's assertion that DACA is immaterial: "This lawsuit challenges . . . Arizona's practice of denying driver's licenses to immigrant youth whom the federal government has authorized to remain in the United States under the Deferred Action for Childhood Arrivals (DACA) program." ER 330, ¶ 1. Without DACA, there is no lawsuit.

III. The Importance of Defining Executive Power in the Context of Immigration Will Not Soon Diminish.

DACA threatens the separation of executive and legislative powers. This Court recognized as much by granting certiorari in *Texas*. *United States v. Texas*, 136 S. Ct. 906 (2016). In the same way, every finding of preemption affects the division of power between the federal government and the States. What makes this case remarkable is the coincidence of both attacks on divided government in a single event.

The Constitution is not agnostic about the division of power over immigration. The federal government has authority over "who should or should not be admitted to the country, and the conditions under which a legal entrant may remain;" other police powers that impact aliens belong to the States. *De Canas*, 424 U.S. at 355. Within the federal system, authority rests with Congress. U.S. Const. art. I, § 8, cl. 4. The Ninth Circuit's preemption holding upsets both of these divisions of power, consolidating from both horizontal and vertical directions in favor of the President.

This Court has long resisted such consolidation. Even when Congress willingly ceded its lawmaking authority to the executive, the Court would not participate. *Clinton v. City of New York*, 524 U.S. 417 (1998). DACA, taken to its logical limit, would create a type of de facto line-item veto, with the executive branch empowered to suspend enforcement of disagreeable provisions in the name of prosecutorial discretion. Indeed, DACA goes further than *Clinton*. It assumes that the executive branch may functionally veto portions of existing law without congressional

authorization and beyond the narrow universe of spending provisions at issue in *Clinton*. *See* Pub. L. 104-130, § 1021 (1996) (limiting the line-item veto to expenditures).

The division of power between the States and the federal government is no less important. *Arizona*, 132 S. Ct. at 2498 ("This Court granted certiorari to resolve important questions concerning the interaction of state and federal power[.]").

Because the Ninth Circuit panel switched its rationale from equal protection to preemption, this case now implicates both the horizontal and vertical separation of powers. As a result, the importance of certiorari is stronger now than when three Justices of this Court publicly noted their desire to stay the original panel decision pending certiorari. App. 132.

Either DACA is an exercise of prosecutorial discretion without the force of law, or it is a substantive legal change done outside and against the constitutional scheme. Under either option, the Ninth Circuit's decision finding preemption of an admitted police power is both wrong and at odds with numerous other circuits, including the Fifth Circuit's determination that DAPA and the 2014 DACA expansion are substantive changes in the law.

Judge Kozinski's dissent ends with a reminder: "Executive power favors the party, or perhaps simply the person, who wields it." App. 12. His concern mirrors James Madison's: the consolidation of power in any one person is the "very definition of tyranny." The Federalist No. 47 (Madison). Thus, the reason for concern over each successive President's ability to

suspend statutes, confer benefits, and preempt state laws is not a fear over policy tumult or distrust of a given President; the reason for concern is that this new power marks the arrival of an Imperial Presidency far more sweeping than any our nation has known.

This Court should grant certiorari to restore and clarify the relationship between the state and federal governments and among the three branches of the federal system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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