No. 16-1180

IN THE
Supreme Court of the United States

JANICE K. BREWER,
FORMER GOVERNOR OF ARIZONA, *ET AL.*, *Petitioners*,

v.

ARIZONA DREAM ACT COALITION, *ET AL.*, *Respondents*.

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

Brief *Amicus Curiae* of United States Justice Foundation, English First, English First Foundation, Gun Owners Foundation, Gun Owners of America, Inc., U.S. Border Control Foundation, Policy Analysis Center, and Conservative Legal Defense and Education Fund in Support of Petitioners

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

English First Foundation, United States Justice Foundation, Gun Owners Foundation, U.S. Border Control Foundation, Policy Analysis Center, and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(3). English First and Gun Owners of America, Inc. are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Several of these amici filed an *amicus* brief in this case in the Ninth Circuit.[2]

SUMMARY OF ARGUMENT

From the beginning of our constitutional republic, the people of the United States were not only citizens

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] *See* Brief *Amicus Curiae* of English First Foundation, *et al.*, http://lawandfreedom.com/wordpress/wp-content/uploads/2016/06/Arizona-Dream-Amicus-Brief.pdf (May 31, 2016).

of the United States, but citizens of the State in which they resided. This dual citizenship was confirmed by the Fourteenth Amendment which states that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The Ninth Circuit opinion rests upon a mistaken view that there is only one combined citizenry, governed solely by federal immigration law and practice.

The preemption doctrine devised and applied to DACA by the Ninth Circuit disregards the Article VI text which states that "the laws of the United States which shall be made in pursuance" of the Constitution, *inter alia*, are "the Supreme Law of the Land." DACA is not an obligatory general rule and, therefore, is not a "law," but only a transient exercise in prosecutorial discretion subject to change by the executive branch. Nor is DACA a law, because it was not promulgated "pursuant" to Article I, Section 7, the Constitution's required legislative procedure.

Although the Ninth Circuit opinion purports to be based on preemption, in reality its original and continuing focus on equal protection doctrine belies that claim. By focusing on the equal protection claim, the Ninth Circuit's decision on preemption was unconstitutionally tainted by baseless and improper charges of animus and prejudice against the Arizona Governor.

Moreover, the Ninth Circuit relied heavily on this Court's deeply flawed, 5 to 4, Plyler v. Doe equal protection decision, which even liberal academics have

criticized as being grounded neither in Constitutional text nor precedent, but rather a policy decision cobbled together as an exercise in judicial log rolling. The nation has suffered under Plyler for 35 years, and should be overruled as a derelict on the body of equal protection law.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION RESTS UPON THE FUNDAMENTALLY FLAWED PREMISE THAT THERE IS ONLY ONE CLASS OF CITIZENS IN AMERICA — CITIZENS OF THE UNITED STATES.

In a summary statement lodged at the outset of its opinion, the Ninth Circuit panel announced that it "affirm[ed] the district court's order granting summary judgment and entry of a permanent injunction, on the basis that Arizona's policy is preempted by the exclusive authority of the federal government to classify noncitizens." Ariz. Dream Act Coalition v. Brewer, 2017 U.S. App. LEXIS 1919, *5 (9th Cir. 2017). Thus, it explained that because "Arizona's policy classifies noncitizens based on Arizona's independent definition of 'authorized presence,' classification authority denied the states under" federal immigration law, the Arizona law governing the issuance of Arizona driver's licenses cannot stand, federal law being the supreme law of the land. *Id.*

This decision is neither historically nor logically sound. Historically, it fails because, from the founding of the American republic, the People of the United

States have always held dual citizenships. As the Supreme Court observed in the Slaughter-House Cases, "there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual." *Id.*, 83 U.S. 36, 74 (1873). Or, more recently, as Justice Anthony Kennedy has written in U.S. Term Limits, Inc. v. Thornton, "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *Id.*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

It is true that the United States Congress and the President together have the exclusive authority to "classify noncitizens," subject to the Fourteenth Amendment's admonition that United States citizenship is comprised of "[a]ll persons born ... in the United States, and subject to the jurisdiction thereof." However, that power is limited to United States citizenship, and does not include State citizenship. States, on the other hand, have exclusive authority to define matters relating to State citizenship, subject to the Fourteenth Amendment command that a person who is a citizen of the United States is also a citizen of the State in which he resides. Thus, with respect to State citizenship, the State has authority to inquire into a person's United States citizenship to ascertain whether that person is a citizen of the United States, and if so, then that person is entitled to become a citizen of the State in which he chooses to reside. But, if a person is not a U.S. citizen, then the State has the power to decide how that person should be treated by the State, and what rights he should have, including

some or all of those enjoyed by citizens of the State. And that is precisely what the State of Arizona driver's license law was designed to do – allow some non-U.S. citizens some of the benefits of state citizenship, including a driver's license, while disallowing others.

The Ninth Circuit panel found Arizona's driver's license policy to be preempted because Arizona chose to confer one of the benefits of state citizenship on some non-U.S. citizens but not on others, mistakenly assuming that, by not treating all non-U.S. citizens the same, Arizona was intruding upon the federal government's general authority. Indeed, the Ninth Circuit also charged Arizona for violation of the equal protection clause for not treating similarly situated persons the same. Neither charge is true.

Although wholly ignored by the Ninth Circuit, Arizona's "noncitizen" categories reflect a reasonable and sensible state policy designed to identify those illegal aliens whose immigration status with the federal government most likely would lead to United States citizenship and, consequently, to Arizona State citizenship. Thus, at the top of Arizona's priorities for the issuance of a State driver's license are those applicants who could produce an Employment Authorization Document ("EAD"), demonstrating that the applicant has "formal immigration status." Arizona Dream at *8. Next are those applicants whose EAD evidenced that they were "on a path to obtaining formal immigration status." *Id.* Then also included are applicants who could show that they were seeking a change of status or cancellation of a removal order. *Id.* at *8. Excluded from this list were those

applicants whose EAD reflected that they were beneficiaries of "deferred action" under DACA, subject to change at the unfettered discretion of the federal government. *Id.* at *9.

In support of its policy, the Governor of Arizona issued an Executive Order "to prevent Deferred Action recipients from obtaining eligibility, beyond those available to any person regardless of lawful status, for any taxpayer-funded public benefits and state identification, including a driver's license." *Id.* at *7. Cognizant of the varied uses of a state driver's license — especially as an official identity document — Arizona seeks to protect its own citizens from the failure of federal immigration law enforcement that opens the door wide for any and all illegal aliens on Arizona soil to have ready access to State health, welfare, educational, and commercial benefits at the expense of the State's citizens. By limiting such access to those illegal aliens whose immigration status is most likely to blossom into United States citizenship, and consequently Arizona citizenship, the State is exercising its power as an independent sovereign, guarding and protecting its geographic boundaries, and the solvency of its fisc. *See* DeCanas v. Bica, 424 U.S. 351, 356-57 (1976).

The federal Government, however, insists that the DHS Secretary's discretionary judgment "to set policies for enforcing the immigration laws, which includes according deferred action and work authorization to certain aliens who, in light of real-world resource constraints and weighty humanitarian concerns, warrant deferral rather than removal,"

preempts these concerns. *See* U.S. *Amicus Curiae* Brief filed in support of plaintiffs in Ninth Circuit, at 1.

But, as the Supreme Court ruled in DeCanas, "[s]tates possess broad authority under their police powers ... to protect [Arizona's] fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens...." *Id.* at 356-57.

However, there is more at stake here than Arizona's economy. Preemption applied to the power of Arizona to define who is eligible for a driver's license would adversely impair the power of the State to determine whether the applicant would have access to the single most important document that identifies his State of residence and, impliedly, State citizenship. Indeed, in many States, when one goes to the polls to vote in a State or local election, it is the driver's license — with the holder's picture, name, and address — that is reviewed to attest a person's eligibility to vote. To be sure, States may — and do — provide official identification cards that are not licenses to drive, but that is the exception, not the rule, in today's world. Although a driver's license issued by one State may be all one needs to travel through or do business in another State, it will not do if the out-of-state driver seeks State welfare, health, unemployment, education, or other government "entitlements." And although Article IV, Section 2 entitles a person who is a citizen of one State the privileges and immunities of another State, such privileges and immunities do not include the right to vote or the right to all State benefits. *See*

Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. 1823). *See also* United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208 (1984). To gain those rights, a person would be required to become a resident of the State in which he desires to vote and obtain such benefits. But that choice is constitutionally secured because the Fourteenth Amendment allows a U.S. citizen to choose any State in which to reside.

But what of the DACA illegal immigrant? Does he possess a unilateral right to choose Arizona as his State of residence? As Justice Scalia has observed, apart from expressed constitutional limits, and valid acts of Congress, States retain "the inherent power to exclude persons from its territory." *See* Arizona v. United States, 132 S.Ct. 2492, 2511 (2012) (Scalia, J., concurring and dissenting). The State's power over the issuance of a driver's license has become the most important screening process available to the States to exercise their inherent "power to exclude from the sovereign's territory people who have no right to be there." *See id.* The DHS Secretary may be empowered to choose not to remove illegal aliens on American soil, but he is not empowered to deny to the States their inherent power to determine whether a person who is not a U.S. citizen may take up residence in the State of his choice. That power was never delegated by the States or the people, and therefore is reserved to the States by the Tenth Amendment.

II. PREEMPTION IS MISPLACED BECAUSE THE SUPREMACY CLAUSE DOES NOT APPLY.

The Ninth Circuit invalidated Arizona's executive order by finding that it was preempted by federal "law." The preemption doctrine is based on the Supremacy Clause, which applies, *inter alia*, to "laws of the United States which shall be made in pursuance" to the Constitution. Article VI. Thus, the threshold question is whether DACA is law, within the meaning of the phrase: "law made in pursuant to the Constitution."

A. DACA Is Not a Law within the Meaning of Article VI.

According to the general rule of construction, the word "laws" is "to be understood in [its] ordinary ... meaning" at the time that Article VI was written, unless the context indicates otherwise. *See* A. Scalia & B. Garner, *Reading Law* at 69 (West: 2012). That rule is entirely consistent with Chief Justice John Marshall's opinion that:

> the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. [Gibbons v. Ogden, 22 U.S. 1, 188 (1824).]

At the time that the Constitution was ratified, Blackstone's *Commentaries on the Laws of England*

was the most widely used legal text in America.[3] Blackstone defined "law" as "that rule of action, which is prescribed by some superior, and which the inferior is bound to obey." I *Commentaries* at 38. From this general premise, Blackstone defined "municipal law," that is the law of civil society, to be "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." *Id.* at 44. Such a rule, he elaborated, is not a "transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal," not something "which we are at liberty to follow or not, as we see proper." *Id.*

Applying these foundational principles to President Obama's DACA program confirms that the DHS executive directives are not law because they lack permanency, uniformity, and universality. As an exercise in prosecutorial discretion, DACA may be followed or not followed, as the DHS Secretary deems proper — not as he would be obliged. Thus, the Ninth Circuit recognized that "[u]nder the DACA program, the Department of Homeland Security exercises its prosecutorial discretion not to seek removal of certain young immigrants," Arizona Dream at *4, but is not obliged to do so.

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[3] *See* H. Titus, God, Evolution, Legal Education, and Law, J. OF CHRIST. JURIS. at 11, 15 (1979).

B. DACA Was Not Promulgated through the Constitutionally Required Legislative Procedure.

In applying preemption, the Ninth Circuit employed a "puzzling new preemption theory ... at odds with the Supreme Court's preemption jurisprudence." Arizona Dream at *42 (Kozinski, J., dissenting from denial of rehearing *en banc*). Where, as here, Congress has not clearly and manifestly expressed its purpose to preempt all state laws that touch even tangentially on immigration, the courts should exercise judicial restraint in invoking preemption. In dissenting from the Ninth Circuit's denial of rehearing *en banc*, Judge Kozinski explained that "[c]lear and stable structural rules are the bulwark against [Executive] power, which shifts with the sudden vagaries of our [Nation's] politics." *Id*. at *51.

To be considered a law made pursuant to the Constitution, it must be enacted pursuant to the procedures clearly established in Article I, Section 7: generally, a bill must (i) be passed by both Houses of Congress and signed by the President "before it becomes **a Law**," or (ii) be passed by both Houses with two-thirds vote over the President's veto, at which point "it shall become **a Law**." Art. I, Sect. 7 (emphasis added). The Congress is vested with "[a]ll legislative Powers ... granted" by the Constitution. Art. I, Sect. 1. The President is vested with the "executive Power" (Art. II, Sect. 1), but not legislative authority, to make laws, and he is charged with the responsibility to "take Care that the Laws be faithfully

executed." Art. II, Sect. 3. Accordingly, the Supremacy Clause applies only to those laws enacted in accordance with the Article I, Section 7 process.

As Judge Kozinski's dissent warned, "[t]he political branches of the federal government must act together to overcome state laws. Unison gives us clarity about what federal law consists of and when state law is subordinated." Arizona Dream at *50. If unilateral presidential actions are given the force of law, "then we've just found ourselves in a world where the President really can preempt state laws with the stroke of a pen." *Id.* Judge Kozinski correctly concluded that Article VI does not confer "power to set aside the laws of the sovereign states ... by the President acting alone...." *Id.*

III. EVEN AFTER DECLINING TO AFFIRM ON EQUAL PROTECTION GROUNDS, THE PANEL IMPROPERLY ACCUSED ARIZONA'S GOVERNOR OF ANIMUS AND THEN RELIED ON FLAWED PRECEDENT.

On January 22, 2015, the U.S. District Court for the District of Arizona granted the Arizona Dream Act Coalition's motion for summary judgment and permanent injunction. Arizona Dream Act Coalition v. Brewer, 81 F. Supp. 3d 795 (D. Az. 2015). The district court ruled based on plaintiffs' equal protection claim, finding that Arizona did not satisfy even rational basis review when it enacted a policy to deny driver's licenses to those illegal aliens who have been allowed temporarily to remain in Arizona under the DACA program. On April 5, 2016, a Ninth Circuit panel

affirmed the district court, but based on findings of federal preemption. Arizona Dream Act Coalition v. Brewer, 818 F.3d 901 (9th Cir. 2016). Earlier this year, the Ninth Circuit denied Arizona's petition for rehearing *en banc*, amending its opinion, but continuing to rely on preemption. Arizona Dream Act Coalition v. Brewer, 2017 U.S. App. LEXIS 1919 at *4 (9th Cir., Feb. 2, 2017).

The Ninth Circuit opined that the Arizona executive order "may well violate the Equal Protection Clause," but declined to rule on that constitutional issue, choosing rather to decide that "Arizona's policy classifies noncitizens" in a way that the States have been prohibited from doing by the exclusive authority of the federal government. *Id*. at *4-5. Despite its conclusion that "we need not and **should not** come to rest on the Equal Protection issue" (*id.* at *7 (emphasis added)), the Ninth Circuit presumed itself at liberty to engage in extensive (and gratuitous) discussion of equal protection — before even reaching the preemption ground on which it purported to rule. Citing City of Cleburn v. Cleburn Living Ctr., 473 U.S. 432 (1985), and Plyler v. Doe, 457 U.S. 202 (1982), the Ninth Circuit adopted the broad principle that:

> The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike. [2017 U.S. App. LEXIS 1919 at *11.]

Indeed, the panel's opinion reveals that the decision was based more on the Equal Protection Clause than the doctrine of preemption.

A. The Panel Imputed Animus to the Governor of Arizona.

Motivation is irrelevant to preemption analysis. Nevertheless, the panel could not resist imputing malice to Arizona state officials, based on the vague introductory phrase "it bears noting...." *Id.* at *22. The panel describes, without any support whatsoever for its invective, that Arizona's policy reflects:

- "a dogged animus against DACA recipients";
- "animus";
- "sowing the seeds of prejudice";
- "'Prejudice'"; and
- "'a bare ... desire to harm a politically unpopular group.'" *Id.*

In its gratuitous discussion of which types of illegal aliens were similarly situated for equal protection purposes, the panel cited itself — that is, its decision in Arizona Dream Act Coalition v. Brewer, 757 F.3d 1053 (9th Cir. 2014), where the Ninth Circuit earlier had explained its rationale for finding animus as follows:

> Defendants' policy appears intended to express **animus** toward DACA recipients themselves, in part because of the federal government's policy toward them. Such **animus**, however,

> is not a legitimate state interest. [*Id*. at 1067 (emphasis added).]

Although not entirely clear, the Ninth Circuit appears to conclude the State showed animus against DACA beneficiaries when it disagreed with the DACA policy. To borrow a phrase from the panel, "it is worth noting" that President Obama's DACA policy was implemented by the Department of Homeland Security only after he was unable to convince a majority in Congress to enact his DREAM Act. *See* S. 729 (111th Cong.). By the Ninth Circuit's reasoning, those in Congress who opposed the DREAM Act also must have been guilty of animus.[4]

Epithets such as "animus" have long been a part of the lexicon of the political branches, but not the judiciary. However, since Romer v. Evans, 517 U.S. 620 (1996), their use by the theoretically non-political third branch of government has been on the ascendancy. In the last two decades, the judiciary has sought to seize the high moral ground by leveling such charges at the states, the Congress, and even the

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[4] Since political analysis has been employed, it also is "worth noting" that all three judges on the panel finding Republican Governor Brewer guilty of animus were appointed by Democrat Presidents: President Carter (Judge Pregerson, senior judge), President Clinton (Judge Berzon), and President Obama (Judge Christen). Moreover, the constitutionality of the non-random manner in which senior judges are assigned to panels under 28 U.S.C. section 294 has been called into question. *See* D.R. Stras & R.W. Scott, "Are Senior Judges Unconstitutional?" CORNELL L. REV. vol. 92, issue 3 (Mar. 2007). https://papers.ssrn.com/sol3/papers.cfm? abstract_id=886711&high=%20david%20stras.

People. *See, e.g.,* Perry v. Brown, 671 F.3d 1052, 1093 (9th Cir. 2012) ("Absent any legitimate purpose ... we are left with "the inevitable inference that disadvantage imposed is born of animosity....").

However, if judges are free to impute animus to to others, what should the states and the political branches and the People be denied that same right? If animus automatically invalidates a governmental decision, may others disregard court decisions based on judicial animus? There is no provision in the U.S. Constitution which imbues a federal judge with greater power once that judge declares the government to have been improperly motivated in enacting a law or issuing a regulation, or the People in passing an initiative or referendum.

It is time for this Court to restore order within the federal judiciary, by disabusing lower federal judges of the notion that their power can be enhanced by belittling states and the political branches in a manner that is indistinguishable from political commentary. If political actions violate the sensitivities of the federal judges, it is the duty of those judges to keep those personal opinions to themselves, and to ensure that they do not affect their decisions. If they cannot operate within those constraints, they should at the very least recuse themselves from cases that involve political issues, or resign their seats on the bench. Failure to do so brings disrepute on the judiciary, whose authority is based on its impartiality in discovering or finding the law and applying it, not in making policy. *See* H. Titus, "Moses, Blackstone, and

the Law of the Land," Christian Legal Society Quarterly, vol. 1, no. 4 (Fall 1980).

B. The Court's Reliance on Plyler v. Doe Resulted in a Grave Injustice.

Throughout its main opinion, the panel relied on this Court's flawed decision of Plyler v. Doe, 457 U.S. 202 (1982) no fewer than six times — three times regarding the Equal Protection Clause, and three times regarding the doctrine of preemption. Moreover, Plyler was invoked three additional times in Judge Berzon's concurring opinion supporting the denial of rehearing. Although the panel supposedly decided the case on preemption grounds, the judges appeared to have been moved to reach their decision based on equal protection arguments. Indeed, Plyler was heavily leaned on to establish the following propositions:

- "'The States enjoy no power with respect to the classification of aliens.'" Arizona Dream at *24
- "[T]he power to classify aliens for immigration purposes is 'committed to the political branches of the Federal Government.'" *Id*. at *25.
- "Permissible state regulations include those that mirror federal objectives and incorporate federal immigration classifications." *Id*.

The deficiencies in the Plyler decision also figured prominently in the powerful dissent by Judge Kozinski, joined in by Judges O'Scannlain, Bybee, Callahan, Bea, and N.R. Smith. Judge Kozinski describes the panel's statements, such as that

contained in the first bullet point above, as no more than "impressive-sounding dicta" and:

> the reasons to reject this dicta are more impressive still. As the district court put it when it rebuffed the Plyler theory of preemption: "Plyler is not a preemption case...." Justice Brennan's 1982 majority opinion — a 5-4 opinion that garnered three individual concurrences and has been questioned continuously since publication — never once mentions preemption. [2017 U.S. App. LEXIS 1919 at *48.]

Judge Kozinski also pointed to some of the criticism that Plyler has received:

> The case was also wrong ab initio and is due to be reconsidered. *See, e.g.,* Eugene Volokh, Why Justices May Overrule 'Plyler' on Illegal Aliens, L.A. Daily J. Nov. 28, 1994,[5] at 6 (describing objections to Plyler and reasons why it may be overruled). [2017 U.S. App. LEXIS 1919 at *48, n.5.]

Indeed, Professor Volokh's 23-year-old commentary on California Prop 187 to which Judge Kozinski referred demonstrates that, in Plyler v. Doe, this Court did not strike down an unconstitutional law, but struck down a law that five justices believed to be based on a bad policy. As Professor Volokh put it:

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[5] http://www2.law.ucla.edu/volokh/plyler.jpg.

> After all, the government discriminates all the time, between the young and the old, the sane and the insane, the criminal and the law-abiding. Discrimination is the essence of lawmaking.... [I]n *Plyler* the Court conceded that discriminating against illegal aliens is permissible [as] [t]he whole point of borders is to discriminate against illegal aliens. [Volokh, Why Justices May Overrule 'Plyler' on Illegal Aliens.]

Professor Volokh correctly concluded that other justices may consider Plyler as "depriving Americans of a basic right of self-government: the right to refuse to pay, from their taxes, for people who — innocent and needy though they may be — are not Americans ... [I]t's a fundamental right ... on which the concept of nationhood is founded." *Id*.

The Plyler majority did not even pause to discuss the consequences that would necessarily follow its assertion of this supposed constitutional right. However, in the ensuing 35 years, those consequences have been severe. The Plyler decision has wreaked havoc on the budgets of every state in the union as they have been compelled to pay to educate millions of illegal aliens in scores of languages, at the cost of untold billions of dollars — either causing increased taxes or taking funds away from other state priorities such as law enforcement. And, no doubt having publicly promised free education, Plyler has encouraged untold additional millions of illegal aliens to breach the nation's borders in order to cash in on the Court's promise.

C. This Court Should Reject the Ninth Circuit's Attempt to Use Plyler to Create New Legal "Rights" For Illegal Aliens.

Justice Brennan's 5-to-4 Plyler opinion was heavily criticized when it was written, and is still heavily criticized today. Plyler bears less resemblance to a legal decision by a court, than a statement of policy preferences. Indeed, Plyler itself has been given limited application since it was decided, and for the most part has not been expanded to public benefits aside from K-12 education.[6]

Even Harvard Law Professor Mark Tushnet, an admirer of Justice Brennan, explains that, in Plyler, "Justice Brennan ... was ... not writing a carefully crafted opinion, not being profound, but building a coalition."[7]

First, Justice Brennan admitted that the Equal Protection Clause protects only what he termed "'**similarly circumstanced**'" persons. Plyler at 216 (emphasis added). Yet, Justice Brennan did not even attempt to argue that illegal aliens were **similarly situated** to lawful aliens and United States citizens. Rather, he dismissed the key legal issue, claiming that "[o]f course, undocumented status is not irrelevant...."

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[6] *See* Z. J. Pérez, "Removing Barriers to Higher Education for Undocumented Students," Center for American Progress (Dec. 5, 2014), http://goo.gl/fBAMQE.

[7] M. Tushnet, "The Optimist's Tale," 132 U. PA. L. REV. 1257, 1263 (1984).

Id. at 220. Nevertheless, Justice Brennan instead argued that there were "[p]ersuasive arguments" (presumably emotionally appealing ones) to educate minor illegal aliens, who "'can affect neither their parents' conduct nor their own status.'" *Id.* Thus, he argued, the court must compel the states to educate the children of illegal aliens, for to do otherwise would be "illogical" and "not comport with fundamental conceptions of justice" *Id.* Justice Brennan all but admitted that, although there was no legal or constitutional basis for his decision, this must be done for the sake of "the children."

Second, Justice Brennan could not find that minor illegal aliens are a **suspect class** warranting heightened scrutiny. In fact, Justice Brennan admitted that "undocumented status is [not] an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action." *Id.* at 220. Regardless, Justice Brennan argued that children of illegal aliens were an awful lot like a suspect class (claiming that they were "'relegated to such a position of political powerlessness'"), and criticized "[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control [because it suggests] the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." *Id.* at 216 n.14.

Finally, Justice Brennan admitted that free state public education is not a **fundamental right** — in fact, it is not a right of any sort "granted to individuals by the Constitution." *Id.* at 221. Nevertheless, he emoted that education is a "'matter[] of supreme

importance'" and a "'most vital civic institution,'" with a "fundamental role in maintaining the fabric of our society." *Id.* at 221. In other words, even though not a right, fundamental or otherwise, education is really important, so the Court will treat it like a fundamental right.

In sum, Justice Brennan's opinion in Plyler compounds error upon error. Unable to find that illegal aliens are similarly situated to legal aliens and to U.S. citizens, the analysis should have proceeded no further. And yet it did. Then, although noting that a law generally must be based only upon a "**legitimate** public purpose," Justice Brennan noted that laws which target "suspect class[es]" and "fundamental rights" may need a "**compelling** governmental interest." *Id.* at 216-17 (emphasis added). However, unable to show that minor illegal aliens are a suspect class or that education is a fundamental right, Justice Brennan opted for something in the middle — requiring the state to demonstrate a "**substantial** goal," and a "**substantial** state interest." *Id.* at 224, 230 (emphasis added). This requirement of a heightened showing was based not on any legal principle, but on a desire to reach a result unattainable by legal reasoning. Thus, Justice Brennan focused on the "'innocence'" of the children and the "fabric of our society" and "social costs" imposed. *Id.* at 221, 246.

As Professor Tushnet notes, Justice Brennan's majority opinion hit on several major (and unrelated) themes, each one designed to garner favor with a different Justice to form his bare five-justice coalition.

Tushnet at 1264. To appeal to Justice Blackmun's illegitimacy opinions, Justice Brennan focused on the "'not nice[ness]'" of "kids who are being deprived of something largely because of what their parents have done." *Id.* To appeal to Justice Powell's and "Virginia's experience during the period of massive resistance to desegregation," Justice Brennan focused on the "deprivations of education" to children. *Id.* at 1264. Finally, in order to appeal to Justice Stevens' "bizarre attraction to the idea that equal protection cases involving state regulations affecting aliens are rather like preemption cases," Justice Brennan focused heavily on the "primary responsibility of the national government for regulating aliens...." *Id.* at 1265. With his "log-rolling" complete, Justice Brennan had garnered the five votes necessary for his desired result.

In the name of protecting a supposedly vulnerable, powerless class of persons, the panel's opinion lengthens a line of decisions protecting illegal aliens without constitutional warrant. However, it is no more honorable for courts to manipulate the Constitution to give preference to illegal aliens, than for courts to manipulate the Constitution to rule against them. As Holy Writ teaches: "Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the **poor**, nor honor the person of the **mighty**: but in righteousness shalt thou judge thy neighbour." Lev. 19:15 (emphasis added).

Plyler was an unprincipled and politicized abuse of judicial power, elevating the Court above the Constitution. It is time to place it in the judicial wastebin, not to rely on it as a source of authority for

Ninth Circuit judges to force their public policy preferences about drivers licenses upon the state of Arizona.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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