No. 16-1180

In the Supreme Court of the United States

JANICE K. BREWER, ET AL., PETITIONERS
v.
ARIZONA DREAM ACT COALITION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, GEORGIA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF PETITIONERS

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

J. CAMPBELL BARKER
Deputy Solicitor General

ARI CUENIN
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous:

In the Supreme Court of the United States

No. 16-1180

JANICE K. BREWER, ET AL., PETITIONERS

v.

ARIZONA DREAM ACT COALITION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, GEORGIA, KANSAS, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Amici are the States of Texas, Alabama, Arkansas, Georgia, Kansas, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Tennessee, and West Virginia, and Mississippi Governor Phil Bryant.[1] States may restrict benefits available to aliens who are unlawfully present in the country, provided States do

[1] No counsel for any party authored this brief in whole or in part. No person or entity other than amici made a monetary contribution to the preparation or submission of the brief. Counsel of record for the parties received timely notice and consented to the filing of this brief. *See* Sup. Ct. R. 37.2(a), 37.6.

not override Congress's statutory framework defining when aliens are lawfully present. *See* Pet. App. 36 (C.A. amended op.) (citing *Plyler v. Doe*, 457 U.S. 202, 225-26 (1982)). The Executive Branch, however, purports to possess the unilateral power to authorize the presence in this country of any alien it chooses not to deport. A coalition of 26 States and elected state officials previously challenged a separate use of this purported executive power to grant lawful presence and work authorization to millions of unlawfully present aliens. The Fifth Circuit affirmed a preliminary injunction of that program as unlawful, both procedurally (as promulgated without notice and comment) and substantively (as foreclosed by immigration statutes). *Texas v. United States*, 809 F.3d 134, 146-88 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). This lawsuit presents essentially the same issue and same state interest: If the Executive can unilaterally make aliens lawfully present, and thus eligible for driver's licenses, that "would have a major effect on the states' fiscs, causing millions of dollars of losses." *Id.* at 152-53.

SUMMARY OF ARGUMENT

The federal Executive Branch unilaterally created a sweeping program, known as DACA, that has granted "deferred action" status to hundreds of thousands of foreign nationals present in this country unlawfully. Deferred action under DACA is much more than just a decision not to pursue removal of the alien. The Executive deems deferred action under DACA to confer lawful presence and a host of attendant benefits.

Arizona law requires that applicants for driver's licenses show that their presence in this country is "authorized under federal law." Ariz. Rev. Stat. § 28-3153(D). Arizona correctly recognizes that aliens covered by DACA are not authorized under federal *statutes* to be present in the country. But the Ninth Circuit treated DACA as part of the supreme federal law capable of preempting Arizona's law. To the contrary, DACA's unlawful attempt to confer lawful presence violates immigration statutes.

Because DACA is unlawful, it cannot preempt Arizona law. Yet even if DACA were simply a lawful memorialization of enforcement discretion—and it is not—it could not preempt state law under *Arizona v. United States*, 132 S. Ct. 2492 (2012). Either way, therefore, DACA cannot preempt Arizona's law.

I. DACA, or "Deferred Action for Childhood Arrivals," is unlawful. It thus cannot be part of the "supreme Law of the Land" preempting state laws. U.S. Const. art. VI, cl. 2. DACA is unlawful executive action for essentially the same reasons that a materially identical executive action expanding DACA has been held unlawful—it affirmatively grants lawful presence and

work authorization in violation of Congress's intricate statutory framework for determining when an alien may lawfully be present and work in the country. *Texas*, 809 F.3d at 146. The Ninth Circuit erred by effectively giving preemptive force to this unlawful executive action.

The chief defense of DACA has been that it is allegedly mere enforcement discretion—forbearing from deporting certain aliens. *See* Pet. App. 44, 46 (C.A. amended op.); Pet. App. 190-91 (Office of Legal Counsel (OLC) memo); Pet. App. 197 (DACA memo); *see also Texas*, 809 F.3d at 174-78. That is wrong. "Lawful presence" is an immigration classification created by Congress with significant consequences. Likewise, Congress authorized only certain classes of aliens for work authorization. Yet DACA deems hundreds of thousands of unlawfully present aliens as lawfully present and eligible for work authorization. *See* Pet. App. 199 (DACA memo); *infra* Part I.A-I.B. This affirmative change in classification far exceeds enforcement discretion.

II. Even assuming for the sake of argument that DACA was merely a lawful program reflecting whom the Executive would forbear from removing, that would mean that DACA could not possibly preempt state law. This Court held in *Arizona v. United States* that mere "enforcement priorities" of the Executive Branch could not preempt state law. 132 S. Ct. at 2508. As *Arizona* explained, what matters for a preemption analysis is what "Congress has done" or delegated through statutes. *Id.*; *see also* Pet. App. 8-9 & n.4 (Kozinski, J., dissenting from the denial of reh'g en banc).

* * *

Just like the States' challenge to the executive action granting lawful presence in *Texas v. United States*, this case is about an unprecedented assertion of executive power. Legislators have disagreed on whether immigration statutes should be amended. And the class of individuals covered by DACA may compel particularly sensitive enforcement decisions because it comprises individuals who entered the country as minors. Holding DACA unlawful would not require the Executive to remove any alien or disrupt the Executive's power to prioritize categories of aliens for removal. But when Congress has defined certain conduct as unlawful, the separation of powers does not permit the Executive to unilaterally declare that conduct lawful.

ARGUMENT

I. Because DACA's Executive Authorization of Aliens' Presence and Work in this Country Violates Federal Statutes, DACA Cannot Have Preemptive Force.

A. DACA contravenes Congress's extensive statutory framework for lawful presence.

DACA's conferral of lawful presence violates Congress's extensive statutory framework defining when aliens are authorized to be present in the country.

The Executive deems the "deferred action" granted by DACA, Pet. App. 196-99 (DACA memo), to confer lawful presence on otherwise unlawfully present aliens, Pet. App. 18 (C.A. amended op.).[2] The Executive has made this clear: "Deferred action . . . means that, for a specified period of time, an individual is permitted to be lawfully present in the United States." *Texas*, 809 F.3d at 148 (quoting executive memo extending DACA deferred-action period from two to three years).[3] The Ex-

---

[2] The Executive currently explains to prospective DACA recipients that "while your deferred action is in effect . . . you are considered to be lawfully present in the United States." USCIS, Frequently Asked Questions, https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (last visited May 1, 2017).

[3] *Accord* Pet. App. 18 (C.A. amended op.) (Executive does not consider DACA recipients unlawfully present); *see* Resp. to Mot. for Preliminary Injunction Ex. 6 (DACA Toolkit) at 11, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14-cv-254), ECF No. 38-6 (Executive considers DACA recipients lawfully present); Surreply to Mot. for Preliminary

ecutive even told the Ninth Circuit in this lawsuit that DACA "deferred action status" is "lawful status." U.S. Br. as Amicus Curiae in Opp. to Reh'g En Banc 16, *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) (No. 13-16248).

DACA's purported grant of lawful presence violates the Immigration and Nationality Act (INA). "The INA flatly does not permit the [Executive to deem] aliens as 'lawfully present' and thereby make them newly eligible for a host of federal and state benefits." *Texas*, 809 F.3d at 184. The Executive has no power to unilaterally "create immigration classifications" that authorize aliens' presence in this country, Pet. App. 34 (C.A. amended op.), because "the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present," *Texas*, 809 F.3d at 179. DACA violates the INA just like the materially identical DAPA program. *See id.*[4]

1. "Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress"—not the Executive. *Arizona*, 132 S. Ct. at 2507 (citing *Galvan v. Press*, 347 U.S. 522, 531 (1954)); *see* U.S. Const. art. I, § 8, cl. 4. Congress has accordingly enacted "extensive and complex" statutory provisions

---

Injunction Ex. 44 (Neufeld Decl.) at Ex. B, *Texas*, *supra*, ECF No. 130-11 (same in 2013 version of DACA FAQs).

[4] DACA also violates federal law because, like DAPA, it was issued without notice-and-comment rulemaking procedure. *See Texas*, 809 F.3d at 188. This brief focuses on the unlawfulness of DACA's substance under federal law.

governing when aliens may be lawfully present in the country. *Arizona*, 132 S. Ct. at 2499.

Congress has not given the Executive *carte blanche* to permit aliens to be lawfully present in the country. When Congress allows aliens to be lawfully present, it identifies these "specified categories of aliens" in statutes. *Id.*; *accord Texas*, 809 F.3d at 179.

Congress has delineated over 40 classes of lawfully present aliens: lawful permanent residents, nonimmigrants, asylees, refugees, and many others. *See* Br. of State Respondents 2-4, 45, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) (*Texas* Resp. Br.); *accord Texas*, 809 F.3d at 179. The INA creates two primary categories of aliens permitted to be present in the country:

- Aliens admitted as "nonimmigrant" aliens, who receive temporary permission to be lawfully present in the country according to one of several visa categories. 8 U.S.C. § 1101(a)(15)(A)-(V).
- Aliens admitted for lawful permanent residence, that is, LPRs, who lawfully entered the country with an "immigrant" visa. *Id.* §§ 1101(a)(20), 1151, 1153, 1181.

Congress also created other avenues to lawful presence, such as admission as a refugee, *id.* §§ 1157, 1159, asylum, *id.* § 1158, and humanitarian "parole" into the country, available only "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." *Id.* § 1182(d)(5)(A).

When Congress has seen fit to grant lawful presence to a significant portion of the aliens present unlawfully

in the country, it has enacted legislation to do so. *E.g.*, *id.* §§ 1160, 1254a (1986 legislation). But no such legislation covers aliens unlawfully present who entered the country as minors. *See* Pet. App. 192 (OLC memo). The Executive's belief that immigration statutes have "turn[ed] out not to work in practice" to achieve a certain policy outcome does not grant the Executive "a power to revise clear statutory terms."[5] *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) (*UARG*).

2. DACA directly flouts several statutory mechanisms that Congress enacted to discourage aliens from being unlawfully present in the country.

a. First, the lawful presence purportedly granted by DACA appears to negate the charge that an alien is removable as "present in the United States in violation of [federal law]," 8 U.S.C. § 1227(a)(1)(B). *Texas* Resp. Br. 5. And lawful presence under DACA may also negate the charge that an alien is removable as present "without being admitted or paroled," 8 U.S.C. § 1182(a)(6)(A)(i), because the Executive maintains that an alien granted lawful presence is *not* considered "present in the United States without being admitted or paroled," *Texas* Resp. Br. 5 (quoting Pet. Br. 9 n.3, *Texas*, 136 S. Ct. 2271). *Contra* Pet. App. 42 (amended opinion stating that because aliens with deferred action are "provisionally present without being admitted or paroled, their stay must be considered "'authorized by the [Executive]'" (quoting 8 U.S.C. § 1182(a)(9)(B)(ii))).

---

[5] DACA also violates the Take Care Clause, U.S. Const. art. II, § 3, as it purports to render conduct that Congress established as unlawful to be lawful. *See Texas* Resp. Br. 71-77.

Of course, an alien's unlawful presence does not automatically mean that he must be removed. For example, in four narrow contexts, Congress provided statutory authority to grant class-based deferred action and attendant legal consequences. *See Texas v. United States*, 787 F.3d 733, 759 & n.78 (5th Cir. 2015) (collecting statutes); *infra* p. 14-16. Congress has also imposed several statutory limitations on removal. *E.g.*, 8 U.S.C. §§ 1229b (cancellation of removal), 1231(b)(3) (withholding of removal). And due to limited enforcement resources, the Executive generally has "discretion to abandon" removal proceedings on a "case-by-case basis"—forbearance rooted in prosecutorial discretion and traditionally called "deferred action." *Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 483-84 & n.8 (1999) (*AADC*). But *AADC*'s conception of deferred action is far removed from deferred-action status as the Executive now confers it—as granting lawful presence and a host of attendant benefits.

b. DACA also vitiates another statutory mechanism for discouraging unlawful presence: the INA's reentry bar. Congress directed that the total time in which an alien is "unlawfully present" in the country triggers a 3- or 10-year bar on that alien's reentry into the country after departure. 8 U.S.C. § 1182(a)(9)(B)(i). But the lawful presence that DACA purports to assign would stop the reentry-bar clock. *Texas*, 809 F.3d at 166 n.99.

That is contrary to law. "Unlawful presence" is defined as an alien's presence in the United States "after the expiration of the period of stay authorized by the [Executive] *or* presen[ce] in the United States *without being admitted or paroled*." 8 U.S.C. § 1182(a)(9)(B)(ii)

(emphases added). The disjunctive second clause triggers the reentry-bar clock for aliens who have not been admitted or paroled. *Texas* Resp. Br. 50. The INA does not authorize the Executive to stop this clock for any alien of its choosing or to admit or parole aliens into the country merely because they are not priorities for removal proceedings. *See* 8 U.S.C. § 1182(d)(5)(A) (humanitarian "parole" "shall not be regarded as an admission of the alien" into the country and is available only "on a case-by-case basis for urgent humanitarian reasons or significant public benefit").

c. For certain DACA recipients, the Executive has ignored the INA reentry bar in another way. Unlawfully present aliens who depart the country are generally inadmissible upon return. *See* 8 U.S.C. § 1182(a)(9)(B). But the Executive has given unlawfully present aliens with DACA status access to "advance parole," which allows them to leave and reenter the country.[6] *Cf. id.* § 1182(d)(5)(A). Furthermore, a number of DACA recipients who received "advance parole" subsequently obtained adjustment to LPR status[7]—and thus a path-

---

[6] *See* Letter from León Rodríguez, Dir., USCIS, to Sen. Grassley 1 (June 29, 2016), available at https://www.judiciary.senate.gov/imo/media/doc/2016-06-29 USCIS to CEG - DACA Advance Parole Program.pdf. Even the Executive admits that it "has been permissive in authorizing travel by DACA recipients via advance parole." Pet. Reply Br. 18 n.2, *Texas*, 136 S. Ct. 2271.

[7] Letter from Rodríguez to Grassley, *supra*, at 1-2. The Executive's electronic records did not track which of the 2,994 DACA recipients who were approved for advance parole and who were subsequently granted adjustment of status "may have been otherwise eligible for adjustment of status regardless of the grant of advance parole." *Id.* at 1.

way to citizenship, *id.* § 1427(a). *See Texas* Resp. Br. 12-13.

d. Finally, DACA violates Congress's 1996 decision to eliminate most federal benefits for unlawfully present aliens whom the Executive has not yet removed. Contrary to that condition for benefits, DACA status makes otherwise unlawfully present aliens eligible for Social Security, Medicare, and the Earned Income Tax Credit. *See Texas* Resp. Br. 7, 11-12, 16.[8]

Congress introduced "lawful presence" as a requirement for benefits eligibility in 1996. *See Texas* Resp. Br. 47. Before then, certain statutes permitted benefits for aliens "permanently residing in the United States under color of law" (PRUCOL)[9]—interpreted to include unlawfully present aliens whom the Executive was forbearing from removing. *See, e.g.*, *Lewis v. Thompson*, 252 F.3d 567, 571-72 (2d Cir. 2001) (citing *Berger v. Heckler*, 771 F.2d 1556, 1575-76 (2d Cir. 1985)).

In 1996, Congress eliminated most benefits for these aliens. It did so in part by enacting welfare-reform legislation replacing PRUCOL status with "lawful presence" as the immigration classification triggering eligi-

---

[8] In addition to these federal benefits, DACA also makes aliens eligible under some state laws for benefits, such as driver's licenses, *e.g.*, Tex. Transp. Code § 521.142(a), and unemployment insurance, *e.g.*, Tex. Lab. Code § 207.043(a)(3).

[9] *E.g.*, Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9406(a), 100 Stat. 1874, 2057 (amending 42 U.S.C. § 1396b(v)(1)) (prohibiting nonemergency Medicaid payments for aliens "not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law").

bility for specified benefits. The legislative history confirmed that "[p]ersons residing under color of law shall be considered to be aliens *unlawfully present* in the United States." H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2771 (emphasis added).

As relevant here, Congress required aliens to be "lawfully present in the United States as determined by the [Executive]" to obtain Social Security, Medicare, and another retirement benefit. 8 U.S.C. § 1611(b)(2)-(4). DACA purports to enable access to those benefits. *See* 8 C.F.R. § 1.3(a)(4)(vi); 45 C.F.R. § 152.2(4)(vi). Yet extensive statutory criteria define when an alien's presence is lawful, and these provisions do not mention discretion to deem any alien in the country lawfully present. *See supra* pp. 7-9. Nor does anything in the legislative history suggest such discretion. *See Texas* Resp. Br. 49 & n.36. DACA thus does what Congress prohibited in 1996: it authorizes benefits for aliens, not because their presence is authorized by law, but simply because the Executive is forbearing from removing them.

B. DACA contravenes statutes defining which aliens are authorized to work in this country.

The ability of DACA recipients to present employment-authorization documents (EADs) as proof of lawful presence is central to the Ninth Circuit's holding. *See* Pet. App. 18-20, 23, 28-32, 38-40, 50 (C.A. amended op.). But DACA's unilateral grant of work authorization, Pet. App. 199 (DACA memo), violates immigration statutes and is unlawful.

1. Congress has not given the Executive free rein to grant work authorization. Instead, Congress intri-

cately defined which aliens are authorized for employment in the country.

About 20 nonimmigrant-visa categories directly authorize employment. *E.g.*, 8 U.S.C. § 1101(a)(15)(H) (temporary employment of certain nonimmigrants), (P) (entertainment work).[10] Congress also requires the Executive to authorize employment of other categories of aliens, such as:

- Asylum holders, *id.* § 1158(c)(1)(B);
- Temporary protected status, *id.* § 1254a(a)(1)(B);
- Aliens granted and applying for relief under the Immigration Reform and Control Act of 1986 (IRCA), *id.* § 1255a(b)(3), (e)(1)-(2);
- Aliens granted "Family Unity" under the Immigration Act of 1990, Pub. L. No. 101-649, tit. III, § 301, 104 Stat. 4978, 5029 (codified as amended at 8 U.S.C. § 1255a note).

Congress then provided that aliens in certain categories are "eligible" for or "may" receive work authorization from the Executive; those categories include:

- Asylum applicants, 8 U.S.C. § 1158(d)(2);
- Certain battered spouses of nonimmigrants, *id.* § 1105a(a);
- Certain agricultural worker preliminary applicants, *id.* § 1160(d)(3)(A);

---

[10] *See also* USCIS, *How Do I Change to Another Nonimmigrant Status?* 2 (Jan. 2016), https://www.uscis.gov/sites/default/files/USCIS/Resources/C2en.pdf.

- Certain nationals applying for status adjustment;[11]
- Deferred-action U-visa applicants;[12]
- Deferred-action family members of LPRs killed on September 11, 2001;[13]
- Deferred-action family members of U.S. citizens killed in combat;[14] and
- Deferred-action Violence Against Women Act self-petitioners and family members.[15]

Against the backdrop of that "comprehensive framework," *Arizona*, 132 S. Ct. at 2504, there is no power to unilaterally grant work authorization to any unlawfully present alien whom the Executive chooses not to remove. A view of work authorization that would make Congress's detailed work-authorization provisions surplusage must be rejected. *Bd. of Trustees of Leland Stanford Jr. Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 788 (2011). Importantly, when Congress wanted to provide work-authorization eligibility to four nar-

---

[11] Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, div. A, § 101(h), tit. IX, § 902(c)(3), 112 Stat. 2681-538, 2681-539; Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, tit. II, § 202(c)(3), 111 Stat. 2160, 2193 (1997).

[12] 8 U.S.C. § 1184(p)(6); *see id.* § 1227(d)(1)-(2).

[13] USA PATRIOT Act of 2001, Pub. L. No. 107-56, tit. IV, § 423(b)(1)-(2), 115 Stat. 272, 361.

[14] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, tit. XVII, § 1703(c)(2), 117 Stat. 1392, 1694-95.

[15] 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV), (a)(1)(K).

row classes of deferred-action recipients, it did so by statute.[16] Otherwise, the 1986 IRCA "prohibit[s] the employment of aliens who are unauthorized to work in the United States because they either *entered the country illegally*, or are in an immigration status which does not permit employment." H.R. Rep. No. 99-682(I), at 46, 51-52 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650, 5655-56 (emphasis added).

Contrary to Judge Berzon's suggestion, Pet. App. 52-53 (Berzon, J., concurring in the denial of reh'g en banc), 8 U.S.C. § 1324a(h)(3) does not convey the broad power to authorize employment. *Texas* Resp. Br. 52-53. Section 1324a(h)(3) is simply a definitional section in an IRCA provision regulating employer liability for hiring an "unauthorized alien." 8 U.S.C. § 1324a(a). Section 1324a(h)(3) defines "unauthorized alien" to mean aliens who are not either LPRs or "authorized to be so employed by [the INA] or by the [Executive]."[17] This section merely tells employers that they can rely on work authorization conferred by statute or by the Executive

---

[16] 8 C.F.R. § 274a.12(c)(14) makes work authorization available to certain aliens granted "deferred action." This provision would cover the four categories of deferred-action recipients that Congress made eligible for work authorization. *See Texas*, 787 F.3d at 762 n.95.

[17] The phrase "authorized to be so employed by [the INA]" refers to all the alien categories directly authorized to work by the INA itself, like many recipients of nonimmigrant visas. *See supra* p. 14. The phrase "authorized to be so employed . . . by the [Executive]" refers to the alien categories for which the Executive either must or may separately grant work authorization. *See supra* pp. 14-15.

without fear of liability. As the Fifth Circuit rightly concluded, *Texas*, 809 F.3d at 183, this section does not address the scope of the Executive's delegated work-authorization power, let alone covertly grant the Executive power to undo Congress's comprehensive 1986 IRCA reforms with the stroke of a pen. *See Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes").

2. DACA's work-authorization component thus flouts numerous restrictions that Congress imposed on the employment of unauthorized aliens. In 1986, IRCA created "a comprehensive framework for 'combating the employment of illegal aliens.'" *Arizona*, 132 S. Ct. at 2504 (quoting *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002)). Breaking with previous law, Congress created penalties for employers who hire "unauthorized aliens"—another mechanism for discouraging unlawful immigration. 8 U.S.C. § 1324a(a), (f); *see Texas*, 809 F.3d at 181 & n.174 (citing *Hoffman Plastic Compounds*, 535 U.S. at 147). Unauthorized employment also has legal consequences for the alien. It generally makes aliens ineligible to adjust to LPR status, 8 U.S.C. § 1255(c)(2), and forecloses any available tolling of the unlawful-presence clock under the INA's reentry bar, *id.* § 1182(a)(9)(B)(iv).

Furthermore, work authorization allows aliens to obtain a Social Security number, and therefore eligibility for the valuable Earned Income Tax Credit, *Texas*, 809 F.3d at 149 & n.18 (referencing district court citation of IRS Commissioner testimony); *see* 26 U.S.C. § 32(c)(1)(E), (m). The Executive's position on this matter reflects the view that aliens' receipt of work authori-

zation connotes that their "*status* is so changed as to make it lawful for them to engage in such employment," thus allowing a Social Security number to issue. 42 U.S.C. § 405(c)(2)(B)(i)(I) (emphasis added); *accord* 20 C.F.R. § 422.104(a)(2).

C. DACA is unsupported by historical practice.

"[P]ast practice does not, by itself, create power." *Medellín v. Texas*, 552 U.S. 491, 532 (2008) (citation and quotation marks omitted). Regardless, the historical practice here confirms that DACA is unlawful. *See Texas* Resp. Br. 53-59.

Many of the historical programs preceding DACA—where the Executive was forbearing from removing classes of aliens—were supported by statutory authorization that Congress has since curtailed. Several programs were forms of "parole," which previously had been left to the "discretion" of the Executive "under such conditions as he may prescribe." 8 U.S.C. § 1182(d)(5)(A) (1952). But Congress clamped down on the Executive's statutory parole authority in 1996. *See* 8 U.S.C. § 1182(d)(5)(A).

Other programs, including the 1990 Family Fairness program,[18] Pet. App. 27 n.2 (C.A. amended op.), offered "extended voluntary departure" that Congress permitted at the time. *See* 8 U.S.C. §§ 1252(b), 1254(e) (1988). But Congress took that power away in 1996, capping voluntary departure at 120 days. 8 U.S.C. § 1229c(a)(2)(A).

---

[18] Family Fairness granted relief to only about 1% of the country's unlawfully present aliens (about 47,000 people), David Hancock, *Few Immigrants Use Family Aid Program*, Miami Herald, Oct. 1, 1990, at 1B.

Historical practice does not support DACA's work-authorization component either. No Executive practice preceding IRCA's comprehensive regulation of alien employment offers relevant support because, before IRCA in 1986, there was no general federal ban on hiring unauthorized aliens.

Post-1986 historical practice is equally unsupportive of unilateral work-authorization power. Congress has never amended IRCA's definition of "unauthorized alien" in 8 U.S.C. § 1324a(h)(3). Congress has thus consistently maintained its intent to generally "prohibit the employment of aliens" who "entered the country illegally." H.R. Rep. No. 99-682(I), at 46, 1986 U.S.C.C.A.N. at 5650. Congress reinforced that position in 1996, capping the period of voluntary departure and thus eliminating the basis for work authorization provided under programs like the 1990 Family Fairness program.

The Executive did promulgate a post-IRCA work-authorization regulation that covered a few categories of aliens either with a pending application for status or whom the Executive was forbearing from removing. *E.g.*, 8 C.F.R. § 274a.12(c)(9)-(10), (c)(14), (c)(16).[19] The regulation's grant of work-authorization eligibility to deferred-action recipients is valid in the four narrow contexts in which Congress, by statute, deemed deferred-action recipients eligible for work authorization. *See supra* p. 14-16.

---

[19] For many alien classes covered by this regulation, work authorization is ancillary to an existing legal status. *E.g.*, 8 C.F.R. § 274a.12(a). Numerous classes consist of aliens lawfully admitted with a nonimmigrant visa. *Id.* § 274a.12(a)(6), (a)(9), (c)(3), (c)(5)-(7), (c)(17), (c)(21), (c)(25).

But this regulation cannot show congressional acquiescence to a massive new program like DACA, when the Executive itself justified its deferred-action regulation based on the minuscule number of work authorizations it would allow. 52 Fed. Reg. 46,092, 46,092-93 (Dec. 4, 1987) (number of aliens covered was so small as "to be not worth recording statistically" and "the impact on the labor market is minimal"); *see also Texas*, 86 F. Supp. 3d at 639 n.46 (only 500-1,000 aliens received deferred action annually from 2005-2010, before DACA). And only a handful of class-based deferred-action programs operated in the past 50 years, essentially as "bridges from one legal status to another." *Texas*, 809 F.3d at 184; *see* Josh Blackman, *The Constitutionality of DAPA Part I*, 103 Geo. L.J. Online 96, 119-25 (2015) (historical overview); *Texas* Resp. Br. 59 n.47 (noting the four examples). Historical practice provides no basis to argue congressional acquiescence to a program like DACA, much less a basis that could overcome the numerous statutes this program contravenes.

D. The Ninth Circuit's preemption ruling was incorrect.

Because DACA lacks congressional authorization, the Ninth Circuit erred in holding that DACA preempts state law.

1. The Ninth Circuit erred because the INA does not "delegate[] to the [E]xecutive" power to unilaterally authorize aliens' presence. Pet. App. 36 (C.A. amended op.).

"The INA evinces a 'clear and manifest' intention *not* to cede this field to the executive." Pet. App. 8 (Kozinski, J., dissenting from the denial of reh'g en

banc). Insofar as this purported delegation relates to preemption analysis, "the INA has spoken directly to the issue and 'flatly does not permit' executive supplementation like the DACA program." *Id.* (quoting *Texas*, 809 F.3d at 184). And implied authority to deem hundreds of thousands of aliens lawfully present cannot exist. That is "a question of deep 'economic and political significance' that is central to [the INA's] statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *UARG*, 134 S. Ct. at 2444); *see* Pet. App. 8 (Kozinski, J., dissenting from the denial of reh'g en banc).

The definition of "unlawful presence" in the INA's reentry bar does not give the Executive unilateral power to confer lawful presence on any alien it chooses. *Cf.* Pet. App. 42 (C.A. amended op.). This statute's definition of unlawful presence refers to a "period of stay authorized by the [Executive]." 8 U.S.C. § 1182(a)(9)(B)(ii). But that is just one of two alternative clauses. An alien is also unlawfully present if in the country "without being admitted or paroled." *Id.*; *see supra* pp. 10-11. As Judge Kozinski noted: "Even if it were true that an immigrant was 'unlawfully present' if he stayed beyond a period approved by the [Executive], this doesn't mean he would be 'lawfully present' if he didn't stay beyond such a period." Pet. App. 7 n.3 (Kozinski, J., dissenting from the denial of reh'g en banc). Contrary to the Ninth Circuit's opinion, Pet. App. 42 (C.A. amended op.), no regulation provides reentry-bar tolling for DACA recipients or requires "deference"; the cited regulations are

limited to certain crime and human trafficking victims, *see* 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2).

Nor does the REAL ID Act suggest congressional approval of DACA. Simply because the REAL ID Act contemplates that States may issue driver's licenses to deferred-action recipients does not mean that States must do so. "The provision actually says that a state 'may only issue a temporary driver's license or temporary identification card' to deferred-action immigrants—a limit, not a requirement." Pet. App. 8 (Kozinski, J., dissenting from the denial of reh'g en banc) (quoting REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 202(c)(2)(C)(i), 119 Stat. 302, 313).

2. The Ninth Circuit purported to decline to rule on DACA's lawfulness, while holding that Arizona's decision to deny driver's licenses to DACA recipients was preempted by federal law. Pet. App. 44, 47 (C.A. amended op.). That purported restraint is illusory. As Judge Kozinski noted, one is "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 burdens and obligations on the sovereign states." Pet. App. 4 (Kozinski, J., dissenting from the denial of reh'g en banc).

The Ninth Circuit asserted that what preempted Arizona's driver's-license policy was not DACA but the INA's definition of "authorized presence." Pet. App. 16; *see* Pet. App. 34, 38, 39-40 & n.8 (C.A. amended op.). But asking whether Arizona's decision to recognize DACA recipients as unlawfully present is preempted by the INA's lawful-presence definition is just another way of asking whether the INA authorizes DACA's granting

of lawful presence. The Ninth Circuit's decision necessarily requires concluding that DACA is lawful—even if the Ninth Circuit "ben[t] over backward" to purportedly avoid reaching that issue. Pet. App. 4 (Kozinski, J., dissenting from the denial of reh'g en banc). No ambiguity in the Ninth Circuit's reasoning precludes this Court from reaching the questions presented.

3. To recap, Congress did not, "through the INA, delegate[] to the executive branch" the power to make "immigration classification[s]," Pet. App. 36 (C.A. amended op.), which render unlawful presence lawful, *see supra* Part I.A. And, as the Fifth Circuit held with respect to DACA's expansion, programs like DACA are more than mere prosecutorial discretion. *Cf.* Pet. App. 46 (C.A. amended op.). DACA, like DAPA, relies on a massive bureaucracy to grant applicants lawful presence, related benefits eligibility, and work authorization. *See* C.A. E.R. 31, 33-34 (DAPA memo).

DACA is thus affirmative governmental action, *see Texas*, 809 F.3d at 165-68, not just a decision to forbear from enforcement, *cf. Heckler v. Chaney*, 470 U.S. 821, 831 (1985). DACA goes far beyond this Court's understanding of deferred action as only the "discretion to abandon" removal proceedings. *AADC*, 525 U.S. at 483-84 & n.8. Instead, DACA reflects a "general policy" that contravenes the Executive's "statutory responsibilities." *Heckler*, 470 U.S. at 833 n.4. Comparing DACA to past Executive practice, *see supra* Part I.C, shows that DACA is far from the "'general policy' nonenforcement" described by the Ninth Circuit, Pet. App. 46 (C.A. amended op.).

The history of DACA and DAPA further confirm that they are unlawful executive actions. President Obama repeatedly urged Congress to pass the DREAM Act, *see* Pet. 6-7, which would generally allow unlawfully present aliens to apply for conditional-permanent-resident status if, among other things, they had been in the country continuously for five years and entered before age 16. *See Texas* Resp. Br. 9. After Congress repeatedly refused, the Executive created DACA. *See Texas* Resp. Br. 9. The Executive described DACA as an "exercise of prosecutorial discretion" "on an individual basis." Pet. App. 197 (DACA memo). But Executive officials mechanically approve applications that meet DACA's eligibility criteria. *See Texas* Resp. Br. 9. Unlike prosecutorial discretion, DACA confers a meaningful immigration classification established by Congress. *See supra* pp. 7-9, 12-13. And when the 113th Congress did not pass the DREAM Act and President Obama responded with DAPA, *Texas* Resp. Br. 10-11, the President then admitted, "I just took an action to change the law." *Texas*, 86 F. Supp. 3d at 668 & n.94 (citation and quotation marks omitted).

The Executive has admitted that DACA and DAPA recipients receive a "lawful" status. *See supra* pp. 6-7; U.S. Br. as Amicus Curiae in Opp. to Reh'g En Banc 16; *Ariz. Dream Act Coal.*, 757 F.3d 1053. Even the Executive's own benefits regulations have established a "deferred action status." 8 C.F.R. § 1.3(a)(4)(vi); 45 C.F.R. § 152.2(4)(vi). The Executive similarly conceded in *Texas v. United States* that DAPA "works in a way that's different than … prosecutorial discretion" because it grants inducements "for people to come out and identify

themselves." J.A. 716, *Texas*, 136 S. Ct. 2271. In short, DACA "purports to *alter* [statutory] requirements" and thus is not "an exercise of [the Executive's] enforcement discretion." *UARG*, 134 S. Ct. at 2445.

II. Even If DACA Were Merely Enforcement Discretion, It Could Not Preempt State Law Under *Arizona v. United States*.

As explained above in Part I, DACA is much more than mere enforcement discretion because it affirmatively grants lawful presence and work authorization. But, even if DACA were just enforcement discretion, it could not preempt state law under *Arizona v. United States*. As *Arizona* held, mere Executive Branch "federal enforcement priorities" cannot preempt state law. 132 S. Ct. at 2508. Instead, preemption analysis must examine what "Congress has done" or delegated through statutes. *Id.*; *see also id.* at 2524 (Alito, J., concurring in part and dissenting in part) ("The United States' argument that [Arizona law] is pre-empted, not by any federal statute or regulation, but simply by the Executive's current enforcement policy is an astounding assertion of federal executive power that the Court rightly rejects.").

The Ninth Circuit's understanding of DACA contradicts settled law that Executive enforcement policy lacks preemptive effect. "It is Congress—not the [Executive]—that has the power to pre-empt otherwise valid state laws." *North Dakota v. United States*, 495 U.S. 423, 442 (1990). "Executive Branch actions [like] press releases, letters, and *amicus* briefs" are not law. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298,

329-30 (1994). "Executive Branch communications" may thus "express federal policy" but they "lack the force of law." *Id.*; *see Arizona*, 132 S. Ct. at 2508.

The Ninth Circuit, however, now "holds that the enforcement decisions of the President are federal law." Pet. App. 4 (Kozinski, J., dissenting from the denial of reh'g en banc). This directly conflicts with *Arizona*'s admonishment that federal enforcement priorities cannot preempt state law. Furthermore, Arizona's law follows Congress's immigration classifications "to the letter." Pet. App. 4. The Ninth Circuit's preemption ruling is thus particularly damaging because it strips the States of their role in the legislative process and allows the Executive an unchecked ability to supplant state law. *See, e.g.*, Ernest A. Young, *Executive Preemption*, 102 Nw. U. L. Rev. 869, 878 (2008) ("The political and procedural safeguards of federalism are thus readily circumvented through executive action.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEVEN T. MARSHALL
Attorney General of
Alabama

LESLIE RUTLEDGE
Attorney General of
Arkansas

CHRISTOPHER M. CARR
Attorney General of
Georgia

DEREK SCHMIDT
Attorney General of
Kansas

JEFF LANDRY
Attorney General of
Louisiana

JOSHUA D. HAWLEY
Attorney General of
Missouri

TIM FOX
Attorney General of
Montana

DOUGLAS J. PETERSON
Attorney General of
Nebraska

KEN PAXTON
Attorney General of
Texas

JEFFREY C. MATEER
First Assistant Attorney
General

SCOTT A. KELLER
Solicitor General
Counsel of Record

J. CAMPBELL BARKER
Deputy Solicitor General

ARI CUENIN
Assistant Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@oag.texas.gov
(512) 936-1700

MIKE HUNTER
Attorney General of
Oklahoma

ALAN WILSON
Attorney General of
South Carolina

HERBERT H. SLATERY III
Attorney General and
Reporter of Tennessee

PATRICK MORRISEY
Attorney General of
West Virginia

PHIL BRYANT
Governor of Mississippi

MAY 2017