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.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Arizona law prohibits the issuance of a driver's license to anyone who "does not submit proof satisfactory to the [Arizona Department of Transportation] that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. Ann. § 28-3153(D) (Supp. 2017). Prior to 2012, Arizona accepted any federal employment authorization document issued by the U.S. Department of Homeland Security (DHS) to an alien with or without lawful status as "proof satisfactory" of the document holder's authorized presence for purposes of that Arizona law. Following DHS's adoption of the Deferred Action for Childhood Arrivals (DACA) policy, however, Arizona changed its policy and no longer accepts federal employment authorization documents issued to DACA recipients as proof of "presence * * * authorized under federal law." The court of appeals found that Arizona's policy is preempted by federal law. The question presented is as follows:

Whether Arizona's policy of not issuing driver's licenses to aliens with federal employment authorization documents issued in conjunction with deferred action under the DACA policy is preempted by federal law.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulations, and rule:

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari in this case should be held pending the Court's disposition of the petition for a writ of certiorari before judgment in *United States Department of Homeland Security* v. *Regents of the University of California*, No. 17-1003 (filed Jan. 18, 2018). If the Court grants the *Regents* petition, this petition should be held pending the decision in that case and then disposed of as appropriate in light of that decision. If the Court denies the *Regents* petition, this petition should also be denied.

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, contains a detailed scheme for

classifying aliens and determining whether they are subject to removal. See, *e.g.*, 8 U.S.C. 1101, 1151 *et seq.*, 1181 *et seq.* Individual aliens are subject to removal if, *inter alia*, "they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Arizona* v. *United States*, 567 U.S. 387, 396 (2012); see 8 U.S.C. 1182(a) (2012 & Supp. IV 2016); see also 8 U.S.C. 1227(a). As a practical matter, however, the federal government cannot remove every removable alien, and a "principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396.

One manner in which the Secretary of Homeland Security exercises that discretion is through a practice known as deferred action—in which the Secretary exercises her discretion "for humanitarian reasons or simply for [her] own convenience" to notify an alien of her decision to forbear from seeking his removal for a designated period. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999). A grant of deferred action does not confer lawful immigration status or provide any defense to removal. The Department of Homeland Security (DHS) retains discretion to revoke deferred action unilaterally, and the alien remains removable at any time.

Congress has provided that an alien is authorized to work if he is a lawful permanent resident or is "authorized to be so employed by th[e INA] or by the Attorney General" (now the Secretary). 8 U.S.C. 1324a(h)(3); see 8 U.S.C. 1103(a)(1). Under DHS regulations, aliens in various categories are either automatically authorized to work, may work for a particular employer incident to status, or may apply to DHS for employment authoriza-

tion. See 8 C.F.R. 274a.12(a)-(c). Aliens granted deferred action may apply for and receive work authorization for the duration of the deferred-action grant if they establish economic necessity. 8 C.F.R. 274a.12(c)(14).

2. a. This case arose in the wake of the June 2012 announcement by Secretary of Homeland Security Janet Napolitano of the policy known as Deferred Action for Childhood Arrivals (DACA). See Pet. App. 195-199. DACA made deferred action available to "certain young people who were brought to this country as children." *Id.* at 196. Under the DACA policy, following successful completion of a background check and other review, an alien would receive deferred action for a period of two years, subject to renewal or revocation. *Id.* at 197-198. The DACA policy made clear that it "confer[red] no substantive right, immigration status or pathway to citizenship," because "[o]nly the Congress, acting through its legislative authority, can confer these rights." *Id.* at 199.

Following the adoption of DACA, the Governor of Arizona issued an executive order stating that DACA could result in unlawfully present aliens "inappropriately gaining access to public benefits contrary to the intent of Arizona voters and lawmakers," and expressing concern about the "significant and lasting impacts on the Arizona budget, its health care system, and additional public benefits that Arizona taxpayers fund." Pet. App. 201. The Governor therefore directed state agencies, including the Arizona Department of Transportation (ADOT), to "initiate operational, policy, rule and statutory changes necessary 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 202.

b. Arizona law requires anyone applying for an Arizona driver's license to "submit proof satisfactory to the [Arizona Department of Transportation] that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. Ann. § 28-3153(D) (Supp. 2017). State law further requires the Director of Arizona's Department of Transportation to "adopt rules necessary to carry out the purposes of" that provision. *Ibid.* Consistent with that directive, the Department publishes a list of documents that the State will accept as sufficient to demonstrate that an individual's presence in the United States is "authorized under federal law." ADOT Policy 16.1.2. Prior to DHS's adoption of the DACA policy, the list of accepted documents included any federal employment authorization document (EAD), which reflects federal work authorization under 8 C.F.R. 274a.12. Pet. App. 19.

Following the Governor's executive order, ADOT changed its policy. Initially, in 2012, ADOT announced that it would not accept EADs issued to DACA recipients. Pet. App. 18-19. In 2013, after this suit was filed, ADOT changed its policy again, announcing that it would also no longer accept EADs issued to any recipient of deferred action, pursuant to DACA or otherwise, or to any recipient of deferred enforced departure.[1] *Id.* at 19-20. Arizona continues to accept EADs from a wide

[1] "Deferred enforced departure" is "a temporary, discretionary, administrative stay of removal granted to aliens from designated countries." *USCIS Adjudicator's Field Manual*, at Ch. 38.2. For example, following the protests in Tiananmen Square, the United States granted temporary deferred enforced departure to Chinese nationals present in the United States. Exec. Order No. 12,711, § 1, 55 Fed. Reg. 13,897 (Apr. 11, 1990). Aliens granted deferred enforced departure are authorized to be employed under 8 C.F.R. 274a.12(a)(11).

range of aliens with or without any formal immigration status, including aliens who are seeking an adjustment of status or are in removal proceedings but requesting cancellation of removal. *Id.* at 20 (citing 8 C.F.R. 274a.12(c)(9) and (10)).

3. a. Respondents filed suit in the United States District Court for the District of Arizona challenging Arizona's revised driver's-license policy. The complaint alleged that Arizona's policy of refusing to accept federal EADs as proof of authorized presence in the United States when such documents are presented by individuals who have been granted deferred action, while accepting the same documents when presented by other aliens, violates the Equal Protection Clause and is preempted by federal law.

The district court concluded that Arizona's driver's-license policy likely violated the Equal Protection Clause but denied respondents' motion for a preliminary injunction because, in its view, respondents had not shown irreparable harm. 945 F. Supp. 2d 1049. The Ninth Circuit reversed. The court concluded that respondents had established a likelihood of success on their equal-protection argument and suggested that they might also succeed on preemption grounds, and it found that respondents had demonstrated irreparable injury. 757 F.3d 1053.

Petitioners sought rehearing en banc. In response to the court of appeals' invitation, the United States filed an amicus brief arguing that the panel had reached the correct result because Arizona's policy is preempted, and that rehearing en banc should be denied. 13-16248 Gov't C.A. Amicus Br. 8. The United States argued that Arizona's policy is preempted because Ari-

zona has created a new alien classification not supported by federal law and its action is not supported by a substantial state interest. *Id.* at 8-17. The United States took no position on the equal-protection argument.

The court of appeals denied rehearing en banc, and this Court denied petitioners' stay application, with three Justices noting their dissent. 135 S. Ct. 889. Petitioners did not file a petition for a writ of certiorari.

b. On remand, the district court held that Arizona's policy deprived respondents of equal protection. The court entered a permanent injunction preventing petitioners from refusing to accept federal EADs issued to DACA recipients as proof that the document holder's "presence in the United States is authorized under federal law," Ariz. Rev. Stat. Ann. § 28-3153(D) (Supp. 2017), for purposes of obtaining a driver's license or state identification card. Pet. App. 130-131.

c. Petitioners appealed. Following oral argument, the court of appeals directed the parties to file supplemental briefs addressing whether the Arizona policy is preempted by federal law and whether the DACA policy violates the separation of powers or the Take Care Clause, U.S. Const. Art. II, § 3. See Pet. App. 34 n.6. The court invited the United States to express its views on those questions.

The United States filed an amicus brief arguing that Arizona's policy is preempted by federal law because it carves out a subset of federal work authorizations and treats them differently on grounds not recognized by federal law, and Arizona has not advanced a substantial state interest in support of its policy. 15-15307 Gov't C.A. Amicus Br. 7-16. The United States also argued that the court of appeals should not consider the constitutionality of DACA because that issue was not raised

in a timely manner by the State, because there were serious questions regarding the State's ability to challenge the Secretary's exercise of enforcement discretion, and because the validity of the Secretary's exercise of enforcement discretion would not alter the outcome of the preemption issue. *Id.* at 18-22. Finally, the United States contended that, in any event, DACA was a valid exercise of the Secretary's discretion under the INA to grant deferred action. *Id.* at 22-28. The United States did not address the district court's equal-protection holding.

d. The court of appeals affirmed. Pet. App. 1-63. The court "agree[d] with the district court that DACA recipients are similarly situated to other groups of noncitizens Arizona deems eligible for drivers' licenses," and that this "disparate treatment * * * may well violate the Equal Protection Clause." *Id.* at 16. The court determined, however, that constitutional-avoidance principles counseled in favor of resolving the case, if possible, on preemption grounds. *Id.* at 33-34.

Turning to preemption, the court of appeals observed that "'[t]he States enjoy no power with respect to the classification of aliens.'" Pet. App. 35 (quoting *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982)). It reasoned that, although States can "regulate areas of traditional state concern that might impact noncitizens" when those regulations "mirror federal objectives" or "incorporate federal immigration classifications," *id.* at 36, States may not create their own conflicting classifications. Applying that principle, the court determined that, by distinguishing among federal EAD recipients, "even though the federal government treats their EADs the same in all relevant respects," Arizona had created its own novel classification of aliens "that neither mir-

rors nor borrows from the federal immigration classification scheme." *Id.* at 39. Accordingly, the court held, Arizona's policy was "preempted by the exclusive authority of the federal government under the INA to classify noncitizens." *Id.* at 43-44.

The court of appeals "decline[d] to rule on the constitutionality of * * * DACA." Pet. App. 44. Although the court expressed skepticism about Arizona's argument that "the Executive has no power, independent of Congress, to enact the DACA program," *id.* at 44-46, it explained that "Arizona's policy is preempted not because the DACA program is or is not valid, but because the policy usurps the authority of the federal government to create immigrant classifications," *id.* at 47.

e. The court of appeals denied rehearing en banc over the dissent of six judges. Pet. App. 1-2; see *id.* at 2-13 (Kozinski, J., joined by O'Scannlain, Bybee, Callahan, Bea, & N.R. Smith, JJ., dissenting). The dissenting judges faulted the panel for, among other things, simultaneously declining to decide the validity of DACA and yet implicitly relying on DACA to hold that Arizona is using alien classifications not found in federal law. See, *e.g.*, *id.* at 4-5.

In response, the panel issued an amended opinion with a new concurrence. Pet. App. 52-63 (Berzon, J.). In the concurrence, Judge Berzon "emphasized that the 'law' that has preemptive power over Arizona's policy is Congress' conferral of exclusive authority on the executive branch to defer removal of individuals who lack legal status and to authorize them to work while temporarily permitted to remain." *Id.* at 52. She stated that "it is the authority specifically conferred on the Attorney General by the [INA] * * * and the associated regulations, that is the body of federal law that preempts

Arizona's policy, not any particular exercise of executive authority." *Ibid.* (emphasis omitted).

4. Several months after the petition for a writ of certiorari was filed in this case and the Court invited the Solicitor General to express the views of the United States, the DACA policy was rescinded.

On September 4, 2017, the Attorney General wrote to the Acting Secretary of Homeland Security advising her that she should rescind the DACA policy. The Attorney General observed that "DACA was effectuated by the previous administration through executive action, without proper statutory authority and with no established end-date, after Congress' repeated rejection of proposed legislation that would have accomplished a similar result." Letter from Jefferson B. Sessions III, Att'y Gen., to Elaine C. Duke, Acting Sec'y, DHS 1 (Sept. 4, 2017) (DACA Letter). And he concluded that DACA suffered from "the same legal and constitutional defects" as the similar Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) policy and the expansion of DACA declared unlawful by the Fifth Circuit in *Texas* v. *United States*, 809 F.3d 134 (2015), aff'd by an equally divided Court, 136 S. Ct. 2271 (2016). DACA Letter 1.

The following day, the Acting Secretary decided to wind down the DACA policy. See Memorandum from Elaine C. Duke, Acting Sec'y, DHS, *Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children"* (Sept. 5, 2017) (Rescission Memo). In the Rescission Memo, the Acting Secretary explained that, "[t]aking into consideration the Supreme Court's and the Fifth Circuit's rulings in the [*Texas*] litigation," as well as the Attorney

General's advice, "it is clear that the June 15, 2012 DACA program should be terminated." *Ibid.* Accordingly, the Acting Secretary announced that, "[i]n the exercise of [her] authority in establishing national immigration policies and priorities," the June 15, 2012 memorandum is "rescind[ed]." *Ibid.*

In light of the "complexities associated with winding down the program," the Rescission Memo announced that DHS would "provide a limited window in which it w[ould] adjudicate certain requests for DACA." Rescission Memo 4. DHS would adjudicate initial and renewal requests for deferred action that had been accepted by DHS as of the date of the rescission, and until October 5, 2017, would accept renewal requests from current beneficiaries whose deferred action would expire before March 5, 2018. The Rescission Memo further explained that DHS would not revoke prior grants of deferred action "solely based on the directives in this memorandum" for the remaining duration of their two-year validity periods. *Ibid.*

5. On January 9, 2018, the District Court for the Northern District of California entered a nationwide preliminary injunction enjoining the Acting Secretary's rescission of the DACA policy. *Regents of the Univ. of Cal.* v. *United States Dep't of Homeland Sec.*, No. 17-5211, 2018 WL 339144. The court ruled that the plaintiffs in that case were likely to prevail on their claim under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, that the rescission was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A). *Regents*, 2018 WL 339144, at *17. The district court entered a preliminary injunction that requires DHS to "maintain the DACA program on a nationwide basis on the same terms and conditions as were

in effect before the rescission," subject to certain exceptions, including that new applications from individuals who had not previously received deferred action need not be processed. *Id.* at *27. The government appealed, and on January 18, 2018, it filed a petition for a writ of certiorari before judgment. *United States Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.*, No. 17-1003.

DISCUSSION

This litigation was precipitated by Secretary Napolitano's 2012 announcement of the DACA policy and the Arizona Governor's serious concerns about the potential impact that policy might have on state programs. Pet. App. 201. The focus of the litigation has been Arizona's authority, consistent with federal law, to respond to DACA by excluding DACA recipients from its state policy of deeming aliens who have been issued EADs to be eligible for a state driver's license. The court of appeals determined that Arizona's selective granting of driver's licenses is preempted by federal law, and did not reach the question of whether the DACA policy is valid. Before this Court, in addition to challenging the court of appeals' preemption holding, petitioners contend that DACA is not valid and therefore can have no effect on Arizona's authority for that reason as well.

Those questions, and this litigation, have been overtaken by events. Since the petition for a writ of certiorari was filed, the Attorney General of the United States has announced his conclusion that the Secretary exceeded her lawful authority in adopting the DACA policy and that in any event DACA presents significant litigation risks. Informed by that conclusion, the former Acting Secretary of DHS rescinded DACA and instituted an orderly wind-down of the policy. As a result,

Arizona's opposition to DACA has largely been vindicated, and its concerns about the policy and its effects have been addressed. Moreover, Arizona apparently is the only State that has sought to deny driver's licenses to DACA recipients, see Br. in Opp. 14-15 & nn.7-9; Pet. Reply Br. 11, so its authority to do so is not a matter of broad significance. This case is therefore not appropriate for this Court's plenary review.

As petitioners' January 22, 2018 letter to this Court notes, also pending before the Court is the government's petition for a writ of certiorari before judgment in one of several cases challenging the Acting Secretary's decision to rescind DACA. *United States Dep't of Homeland Sec.* v. *Regents of the Univ. of Cal.*, No. 17-1003 (filed January 18, 2018) (*Regents*). In that petition, the government defends the lawfulness of DACA's rescission based, in part, on the Acting Secretary's determination that the adoption of DACA was unlawful. Because of the overlap in issues between that petition and this one, if the Court grants the government's petition for a writ of certiorari before judgment in *Regents*, the Court may wish to hold the petition in this case pending any decision in *Regents* and to dispose of this petition as appropriate in light of that decision. Otherwise, it should deny the petition.

A. Whether The Now-Rescinded DACA Policy Is Capable Of Preempting State Law Does Not Warrant Plenary Review

1. Petitioners devote much of their petition (Pet. 21-32) to the question whether the DACA policy is "valid 'federal law' capable of preempting" Arizona's policy of rejecting federal EADs issued to DACA recipients as a basis for obtaining state driver's licenses. Pet. i. That question does not warrant this Court's plenary review

for the simple reason that the DACA policy has been rescinded. In its Rescission Memo, DHS adopted an orderly wind-down under which DHS would not accept any new initial requests for deferred action under DACA and would stop accepting renewal requests on October 5, 2017. The Rescission Memo contemplates that the number of individuals with DACA-related deferred action, and corresponding work authorization, will progressively diminish as the two-year grants expire in the ordinary course and are not renewed. Any prospective effect of the injunction below requiring Arizona to accept EADs issued to DACA recipients for purposes of establishing eligibility for an Arizona driver's license will diminish and expire in tandem with the wind-down instituted by the Rescission Memo.

The preliminary injunction issued on January 9, 2018, in the *Regents* case does not alter that conclusion. That injunction, although extraordinary, does not require DHS to process applications from individuals who have not previously received deferred action. *Regents of the Univ. of Cal.* v. *United States Dep't of Homeland Sec.*, No. 17-5211, 2018 WL 339144, at *27 (N.D. Cal.), petition for cert. pending, No. 17-1003 (filed Jan. 18, 2018).[2] And, by virtue of the injunctive relief in this case, which has been in place for three years, the number of existing DACA recipients who desire but have not yet obtained an Arizona's driver's license is likely to be extremely small. It is the understanding of this Office that those

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[2] On February 13, 2018, the District Court for the Eastern District of New York also entered a preliminary injunction enjoining the Acting Secretary's rescission of the DACA policy. See *Batalla Vidal* v. *Nielsen*, No. 16-4756, slip op. The "scope of th[at] preliminary injunction conforms to that previously issued by the [*Regents* court]." *Id.* at 6.

licenses will expire when the recipients' work authorization expires, see ADOT Policy 16.1.4, and Arizona has not stated that it intends to revoke those licenses before that time. Moreover, although the *Regents* court (erroneously) concluded that the plaintiffs challenging DACA's rescission are likely to succeed in establishing that the manner in which DHS rescinded the policy is invalid, even that court recognized that DACA recipients have no right to the retention of the policy, as long as it is rescinded in a manner that complies with the APA. See *Regents of the Univ. of Cal.* v. *United States Dep't of Homeland Sec.*, No. 17-5211, 2018 WL 401177, at *3 (N.D. Cal. Jan. 12, 2018); see also *Batalla Vidal* v. *Nielsen*, No. 16-4756 (E.D.N.Y. Feb. 13, 2018), slip op. 4 ("Defendants indisputably can end the DACA program.").

2. In addressing DACA's preemptive force, petitioners contend (Pet. 22) that the "'lawfulness of Arizona's policy' depends upon the lawfulness of DACA," and on that basis invite the Court to use this petition to determine whether DACA is lawful. In a letter to the Court dated January 22, 2018, petitioners note the relevance of that question to the government's pending petition for a writ of certiorari before judgment in the *Regents* case, No. 17-1003, and suggest that, if the Court grants the government's petition in *Regents*, the Court may wish to consider this case at the same time. But the government's petition in *Regents* adequately presents the questions of DACA's continued effect and validity in a case in which DHS itself is a party. Accordingly, there is no evident reason, if this Court grants the *Regents* petition, to grant this petition as well.

In fact, this case would be a poor vehicle for addressing the validity of DACA even in the absence of the *Regents* petition. In addition to the diminishing practical

significance of the issue in the context of this case, the validity of DACA was not decided in either of the courts below. Petitioners did not raise the issue in the district court, and the court of appeals reasoned that the issue "[wa]s not properly before [that] court" and declined to resolve it. Pet. App. 44. Petitioners contend (Pet. 22-23) that the court of appeals' failure to determine the validity of DACA was error. But whether that is so, it remains true that this Court would be the first in this litigation to address the issue. See *Ford Motor Co.* v. *United States*, 134 S. Ct. 510, 510-511 (2013) (per curiam) ("This Court 'is one of final review, not of first view.'") (citation omitted).

B. The Preemption Question Resolved By The Court Of Appeals Does Not Warrant Plenary Review

Petitioners also contend (Pet. i) that the court of appeals erred by "creating an immigration-specific rule under which state police power regulations that 'arrang[e]' federal immigration classifications are preempted." See Pet. 15-21. But the court neither adopted nor applied such a rule. The court held instead that, although a State may "borrow[] from the federal immigration classification scheme" for its own regulations, it may not "create[] new immigration classifications based on its independent view of who is authorized under federal law to be present in the United States." Pet. App. 39, 43. Regardless of whether that holding reflects a correct application of law to the facts of this case, the legal principles articulated by the court of appeals do not conflict with any decision of this Court or of another court of appeals. Instead, petitioners principally disagree with how the court of appeals applied the legal

principles to the State's regulatory scheme. The application of law to the facts of this case does not warrant plenary review by this Court.

1. Petitioners' claim of error is premised on the court of appeals' statement that "by arranging federal classifications in the way it prefers, Arizona impermissibly assumes the federal prerogative of creating immigration classifications according to its own design, * * * despite the fact that 'States enjoy no power with respect to the classification of aliens.'" Pet. App. 39-40 (quoting *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982)). Petitioners acknowledge that a State may not, consistent with the federal government's authority over immigration, "tamper with the federal classifications" of aliens. Pet. 18; see *ibid.* ("[C]onflicting re-classification would trigger preemption."). They argue (Pet. 18-19), however, that Congress has not "clear[ly] and manifest[ly]" prohibited States from "borrowing" pre-existing federal classifications, and that the court erred in adopting such a rule in the absence of clear congressional intent.

Petitioners misread the court of appeals' opinion. Taken as a whole and in context, the court did not find Arizona's policy to be preempted because it borrowed pre-existing federal classifications; rather, the court found preemption because the State created its own classification. The court explained that "[p]ermissible state regulations include those that mirror federal objectives and incorporate federal immigration classifications." Pet. App. 36. But here, the court reasoned, by distinguishing between recipients of federal EADs that the federal government treats "the same in all relevant respects," Arizona's policy "distinguishes between noncitizens based on its *own* definition of 'authorized presence,' one that neither mirrors nor borrows from

the federal immigration classification scheme." *Id.* at 39. On the basis of this "clear departure from federal immigration classifications," the court found that Arizona's policy is preempted. *Id.* at 42; see *id.* at 40 n.8 ("Arizona's scheme impermissibly creates immigration classifications not found in federal law."); *id.* at 47 ("We reiterate that, in the end, Arizona's policy is preempted * * * because [it] usurps the authority of the federal government to create immigrant classifications.").

2. Whether the court of appeals' holding is correct, it does not conflict with any decision of this Court or another court of appeals.

Petitioners contend (Pet. 19) that the court of appeals' decision conflicts with this Court's decision in *Toll* v. *Moreno*, 458 U.S. 1 (1982), which held that a Maryland policy prohibiting certain visa holders from acquiring in-state status for tuition at public universities *was preempted* by federal law. According to petitioners, *Toll* confirms that States may "'borrow[]' * * * immigrant classifications" as long as the state regulation is not otherwise inconsistent with congressional intent for those aliens. Pet. 19. But that is what the court of appeals held. See Pet. App. 36 ("Permissible state regulations include those that mirror federal objectives and incorporate federal immigration classifications."). Thus, even if the court of appeals was wrong in its characterization of Arizona's regulatory scheme, the court of appeals' reasoning is not inconsistent with *Toll*.

Petitioners further assert (Pet. 19-20) that the court of appeals' decision conflicts with the Fifth Circuit's decision in *LeClerc* v. *Webb*, 419 F.3d 405 (2005), cert. denied, 551 U.S. 1158 (2007), which upheld a Louisiana policy restricting eligibility for membership in the state bar to U.S. citizens and lawful permanent residents. The

Ninth Circuit distinguished that case, however, on precisely the rationale that petitioners endorse here. In the court's view, the Louisiana policy "permissibly borrowed from existing federal classifications," rather than "creat[ing] a novel immigration classification as Arizona does here." Pet. App. 43. So again, there is no conflict between the reasoning of the court of appeals and *LeClerc*.

Finally, petitioners wrongly contend (Pet. 20-21) that the court of appeals' decision conflicts with the Second Circuit's decision in *Dandamudi* v. *Tisch*, 686 F.3d 66 (2012). In *Dandamudi*, the Second Circuit suggested in dicta that a New York law prohibiting certain visa holders from being licensed as pharmacists was preempted because, even though the state law borrowed from federal classifications, its regulation stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in granting those visas. *Id.* at 80 (citation omitted); see *id.* at 79-81. In petitioners' view, *Dandamundi* indicates that the "precise borrowing of federal classifications is within a State's prerogative." Pet. 20-21. Even assuming that is correct, the reasoning of the Ninth Circuit's decision is not to the contrary for the reasons already stated.

3. In the end, petitioners' disagreement is not with the rule that the court of appeals applied, but with its application to the facts of this case. Although the court reasoned that, by distinguishing among the recipients of federal EADs that the federal government treats the same, Arizona has impermissibly created its own immigration classification, Pet. App. 39, petitioners maintain that, by distinguishing among EAD recipients based on the means by which the alien became eligible for work authorization, Arizona is permissibly borrowing federal classifications as they exist in the federal law, Pet. 18.

But that question concerning the application of preemption principles to Arizona's licensing regime, adopted in response to a now-rescinded federal policy, does not warrant this Court's further review. See Sup. Ct. R. 10. That is especially so because Arizona apparently is the only State to have adopted such a regime, and therefore the question is not a matter of broad significance.

C. This Petition Should Be Held Pending The Court's Disposition Of The Petition In *United States Department Of Homeland Security* v. *Regents Of The University Of California*

Although the petition does not warrant plenary review by this Court, it is related to the government's pending petition for a writ of certiorari before judgment in *Regents*, No. 17-1003, concerning the legality of DACA's rescission and involving similar questions concerning the validity of the adoption of DACA itself. Indeed, this litigation and the district court's order enjoining Arizona's policy adopted in response to DACA underscore the need for this Court to settle the questions presented by the *Regents* petition and provide needed clarity on the lawfulness of DACA's rescission. Because of this overlap in issues between the *Regents* petition and this one, the Court may wish to hold this petition until the Court disposes of the government's petition in *Regents*. If the Court grants the government's petition in *Regents*, the Court could then hold this petition pending a decision in *Regents*, and dispose of it as appropriate in light of that decision. If the Court denies the government's petition in *Regents*, the Court should deny this petition as well for the reasons stated above.

CONCLUSION

If the Court grants the petition for a writ of certiorari before judgment in *United States Department of Homeland Security* v. *Regents of the University of California*, No. 17-1003, the petition for a writ of certiorari in this case should be held pending the decision in that case, and then disposed of as appropriate in light of that decision. Otherwise, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted.

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