No. 15-15307

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA DREAM ACT COALITION et al.,

Plaintiffs-Appellees,

v.

JANICE K. BREWER et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES' BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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INTRODUCTION AND SUMMARY

The United States submits this brief at the invitation of the Court. Arizona's driver's license policy is preempted because it distinguishes among aliens in ways not supported by federal law, and the Court should affirm the permanent injunction on that basis. The Court need not address Arizona's belated argument that the Department of Homeland Security's (DHS) Deferred Action for Childhood Arrivals (DACA) policy violates separation-of-powers principles and the Take Care Clause of the U.S. Constitution, because that argument is not preserved and is irrelevant to the preemptive force of federal law on the Arizona policy. In any event, DACA is a valid exercise of the Secretary's broad authority and discretion 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.

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). Arizona maintains that "presence … authorized under federal law" is not a concept defined in federal law, and that the State is accordingly entitled to give content to the concept, which it has done by publishing a list of documents it deems acceptable for establishing presence authorized under federal law. Ariz. Dep't of Transp. Policy 16.1.2. That list previously included all federal

employment authorization documents. Following the announcement of the DACA policy, however, Arizona no longer accepts federal employment authorization documents held by most (but not all) aliens who have been accorded deferred action by DHS.

The federal government's exclusive authority to establish alien classifications and to distinguish among aliens on immigration-related grounds is well established. Although the States may employ federal alien classifications in furtherance of legitimate state interests, they may not intrude on the federal immigration power by establishing novel alien classifications not found in federal law. Arizona's driver's licensing scheme runs afoul of that principle by adopting a concept of "presence in the United States … authorized under federal law" under which it makes federal employment authorization documents sufficient proof of such presence for most individuals but then distinguishes among aliens holding federal employment authorization documents, where federal law draws no such distinctions, and without a substantial, independent state justification. The Arizona policy thus is based on an impermissible second-guessing of federal enforcement of the immigration laws.

The United States submitted a brief in the prior appeal, contending that the preliminary injunction was supported by preemption principles and that the case did not warrant further review. The Court has now directed the parties to file supplemental briefs addressing the preemption issue and whether the DACA policy violates separation-of-powers principles and/or the Take Care Clause. The Court has

invited the United States to express its views on these issues. For the reasons that follow, the permanent injunction should be upheld on preemption grounds; the Court need not consider the validity of the DACA policy; and the policy is, in any event, fully within the Secretary's authority.

STATEMENT

A. Federal Law

The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, and other federal immigration laws "establish[] a comprehensive federal statutory scheme for regulation of immigration and naturalization," *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1973 (2011), including a detailed scheme for determining whether an alien is subject to removal, *see, e.g.*, 8 U.S.C. §§ 1101, 1151 *et seq.*, 1181 *et seq.* As part of that scheme, Congress has authorized the Secretary of Homeland Security to "establish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and to "establish such regulations; … issue such instructions; and perform such other acts as he deems necessary for carrying out his authority," 8 U.S.C. § 1103(a)(3). Regulations and enforcement policies and decisions refining and implementing alien classifications established by Congress are an integral part of the federal scheme. *See*, *e.g.*, 8 C.F.R. § 274a.12; *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

Under federal law, aliens may be subject to removal proceedings if they are inadmissible or deportable on various statutory grounds. *See* 8 U.S.C. §§ 1182,

1227(a). But removal proceedings are not automatic. "Federal officials … must decide whether it makes sense to pursue removal at all," and, "[i]f removal proceedings commence," whether to grant "discretionary relief allowing [the alien] to remain in the country or at least to leave without formal removal." *Arizona*, 132 S. Ct. at 2499. Recognizing that the Executive Branch must decide where to focus limited resources, Congress has directed DHS to prioritize "the identification and removal of aliens convicted of a crime by the severity of that crime." DHS Appropriations Act, Pub. L. No. 114-4, 129 Stat. 39, 43 (2015).

One well-established way in which the Executive Branch exercises its discretion over removal is through deferred action. Recognized by regulation for thirty-four years, deferred action is an "act of administrative convenience to the government which gives some cases lower priority" by deferring removal of an alien for a temporary period. 8 C.F.R. § 274a.12(c)(14); *see Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999). Over the past several decades, the Executive Branch has accorded deferred action to various members of certain groups. *See Arpaio v. Obama*, No. 14-5325, slip op. at 6 (D.C. Cir. Aug. 14, 2015), and 27 F. Supp. 3d 185, 193-94 & nn.2-5 (D.D.C. 2014).

On June 15, 2012, the Secretary announced the DACA policy, which directs DHS officials to consider, on a case-by-case basis, exercising discretion in favor of individual aliens who were brought to the United States as children, have resided here for at least five years, and meet certain other threshold eligibility criteria. *See*

Memorandum from Sec'y Napolitano, DHS, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, at 1 (June 15, 2012) (DACA Memo). Pursuant to federal regulations in effect since 1981, aliens accorded deferred action may be accorded employment authorization by DHS if employment is an economic necessity. *See* 46 Fed. Reg. 25,079-03, 25,081 (May 5, 1981); 8 C.F.R. § 274a.12(c)(14). Many other categories of aliens can obtain employment authorization. 8 C.F.R. § 274a.12(a)-(c). Significantly, in defining the term "unauthorized alien" for purposes of employment authorization, Congress excluded individuals whom the Secretary has authorized to be employed, and it did so subsequent to the promulgation of the 1981 regulation making individuals accorded deferred action eligible for employment authorization. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

B. Arizona Law

Arizona law prohibits the issuance of a driver's license to anyone "who does not submit proof satisfactory to the department [of transportation] that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. Ann. § 28-3153(D). The State has emphasized that "presence in the United States … authorized under federal law" is not a concept found in federal law but is instead "a term of art in state law" that is defined by state officials. Oral Arg. at 0:53-59; *see* Defs.' Opening Br. 22.

In defining that concept, the Arizona Department of Transportation publishes a list of documents that it recognizes as establishing that an individual's presence in the United States is authorized under federal law. Ariz. Dep't of Transp. Policy 16.1.2. Previously, the list included all federal employment authorization documents, which contemplate the alien's presence in the United States for the duration of the work authorization. Immediately upon DHS's announcement of the DACA policy, however, Arizona revised its policy so that federal employment authorization documents issued to individuals accorded deferred action pursuant to the DACA policy will not suffice. The State subsequently revised its policy to additionally exclude federal employment authorization documents issued to most other aliens accorded deferred action or deferred enforced departure. *See* 1/22/15 Order (Op.) 7. Arizona continues to accept federal employment authorization documents, however, if the alien who submits the document is, among other things, currently in or awaiting proceedings for adjustment of status or cancellation of removal, or has filed an approved self-petition pursuant to the Violence Against Women Act and been accorded deferred action on that basis. *See* Dkt. No. 247, at 14-15 & n.6.

ARGUMENT

I. This Court Should Uphold the Permanent Injunction on the Ground that Arizona's Policy Is Preempted by Federal Law.

A. Federal law preempts Arizona's policy because that policy distinguishes between groups of aliens in ways that federal law does not recognize, and the State has advanced no substantial interest in support of those distinctions.

1. The authority to establish alien classifications is exclusively and comprehensively exercised by the federal government.

The power to classify aliens is "committed to the political branches of the Federal Government." *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)). It is "'a routine and normally legitimate part' of the business of the Federal Government to classify on the basis of alien status, and to 'take into account the character of the relationship between the alien and this country.'" *Id.* (quoting *Mathews*, 426 U.S. at 81, 85). Drawing upon its constitutional power to "establish a[] uniform Rule of Naturalization," U.S. Const. art. I., § 8, cl. 4, as well as "its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to control its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders." *Plyler*, 457 U.S. at 225; *see, e.g.*, 8 U.S.C. §§ 1101, 1151 *et seq.*, 1181 *et seq.* Congress has tasked the Secretary with enforcing this scheme and granted him broad discretion to do so, including by determining whether to accord deferred action and work authorization to certain aliens based on enforcement

priorities, resource limitations, humanitarian considerations, and other factors. *See Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999); 8 U.S.C. § 1324a(h)(3); 8 C.F.R. § 274a.12(c)(14)..

In contrast to the federal government, "[t]he States enjoy no power with respect to the classification of aliens." *Plyler*, 457 U.S. at 225. The Supreme Court's decisions in a variety of contexts have "been at pains to note the substantial limitations upon the authority of the States in making classifications based upon alienage." *Toll v. Moreno*, 458 U.S. 1, 10 (1982); *see Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Accordingly, a State generally may not establish classifications that distinguish among aliens whom the federal government has treated similarly. *See Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 536 (5th Cir. 2013).

The States retain power to regulate in areas of traditional state concern that may affect aliens, however, because "standing alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration." *DeCanas v. Bica*, 424 U.S. 351, 355 (1976), *superseded by statute on other grounds as recognized in Arizona v. United States*, 132 S. Ct. 2492, 2503 (2012). Permissible state regulations may include those that borrow standards from the federal scheme. *See Plyler*, 457 U.S. at 226. But States may not usurp federal immigration power in the guise of furthering state interests. The risk of such intrusion on federal prerogatives is reduced where a state law incorporates existing federal alien classifications and does not create new ones, and

the State can identify a substantial state interest to which its reliance on the classification relates. *See Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1981 (2011) (approving state licensing law that "beg[an] by adopting the federal definition of who qualifies as an 'unauthorized alien'" for employment purposes under 8 U.S.C. § 1324a(h)(3)).

2. States enjoy substantial leeway in setting policies for licensing drivers, but Arizona's policy intrudes on federal immigration authority by establishing alien classifications not found in federal law.

The issuance of driver's licenses is an area of traditional state concern, *see Whiting*, 131 S. Ct. at 1983, and would not ordinarily impinge on federal immigration authority. This is true even if a state licensing scheme distinguishes among groups of aliens, as long as the alien classifications are borrowed from federal law and further a substantial state interest. *See id.* at 1981; *cf. Plyler*, 457 U.S. at 226. Indeed, federal law contemplates that States may take federal alien classifications into account in regulating the licensure of drivers within their jurisdiction. *See* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B., § 202, 119 Stat. 231, 302, 312 (49 U.S.C. § 30301 note). Accordingly, as a matter of preemption, a State might distinguish between aliens who have been accorded deferred action and those who have not, so long as the distinction follows the contours of federal alien classifications and furthers substantial state interests. What a State may not do is create new alien classifications where federal law draws no such distinctions, particularly where the new classifications are grounded in

disagreement with the manner in which the federal government exercises its exclusive authority over immigration.

In urging that its policy is not preempted, Arizona does not contest this settled framework. Instead, it advances a variety of arguments to suggest that it has exercised only the power reserved to the States by "analyz[ing] which individuals are authorized to be present in the country 'under federal law.'" Defs.' Supp. Br. 47.

But far from borrowing federal alien classifications, Arizona's policy selectively incorporates and manipulates federal law to create new classifications and distinguish among aliens on grounds not recognized by federal law. The concept of whether an alien's "presence in the United States is authorized under federal law" is "a term of art in state law that doesn't appear in federal law." Oral Arg. at 0:53-59. Arizona has defined this phrase through measures that recognize some (but not all) federal employment authorization documents as sufficient to demonstrate eligibility for a license, *see* Ariz. Dep't of Transp. Policy 16.1.2, even though all employment authorization documents for aliens accorded deferred action similarly authorize an employer to hire that alien, 8 C.F.R. § 274a.12(c)(14), and all such documents contemplate the alien's presence in the United States for the duration of the authorization.

At bottom, Arizona is second-guessing DHS's decision to accord certain individuals deferred action and work authorization, and thereby intruding on the federal government's exclusive authority under the Constitution and the INA. If this

conduct were permissible, Arizona could also distinguish among aliens in a variety of contexts, including those with direct foreign-policy implications—for example, by concluding that only a subset of aliens to whom DHS has granted asylum or temporary protected status (*e.g.*, only those from certain countries) may receive driver's licenses.[1]

Arizona urges that the classifications it seeks to draw rely in part on "the federal administrative classification of DACA recipients as unauthorized aliens." Defs.' Supp. Br. 47-48. But there is no such federal administrative classification, and the State does not point to any provision of federal law to support its contention. The only federal pronouncement cited by the State is the statement of a local DHS employee confirming that federal employment authorization documents issued to aliens who are accorded deferred action under the DACA policy bear a different code than documents issued to other individuals who have been accorded deferred action. *See id.* at 48; ER 184. But these codes are solely for DHS's convenience and say

[1] This argument is distinct from the theory that Arizona's policy is conflict-preempted because it interferes with the federal government's decisions regarding the ability of aliens to work in the United States. *See ADAC*, 757 F.3d at 1061-62. Because driving may be necessary to employment in Arizona, it has been suggested that Arizona's policy may stand in the way of the alleged federal judgment reflected in federal employment authorization that such aliens should work in the United States. *Id.* at 1062-63. In the view of the United States, that theory too broadly construes the federal judgment implicit in work authorizations, which serve only to establish which aliens an employer may lawfully employ under 8 U.S.C. § 1324a, and does not express an inviolable federal policy favoring the employment of such aliens. The Court therefore should not hold that Arizona's policy is preempted on that basis.

nothing about whether the presence of aliens holding such documents "is authorized under federal law" for purposes of Arizona's scheme. All aliens with deferred action and work authorization are equally authorized to work in the United States.

Arizona is on no firmer ground in claiming that the criteria it uses are derived from federal law. To determine which federal employment authorization documents suffice to establish that the holder's presence in the United States is authorized under federal law, the State asserts that it looked to whether a document shows "'(1) that the applicant has formal immigration status, (2) that the applicant is on a path to obtaining a formal immigration status, or (3) that the relief sought or obtained is expressly provided for in the INA.'" Op. 5. Contrary to the State's contention, that inquiry is not based on federal immigration classifications. Federal immigration law is rooted in concepts of whether an alien is inadmissible, deportable, subject to removal, or eligible for various grounds of relief from removal such as cancellation or adjustment of status, *see, e.g.*, 8 U.S.C. §§ 1158 (asylum), 1182 (inadmissibility), 1187 (visa waiver program), 1227 (deportability), 1229a (removal proceedings), 1229b (cancellation of removal), 1231(b)(3) (withholding of removal), as well as categories stemming from DHS's discretion in enforcing the INA, such as temporary protected status designations or deferred action.

"[N]o federal law expressly articulates or even implies the distinct concept of a '*path to* legal status.'" *Arizona DREAM Act Coalition (ADAC) v. Brewer*, 757 F.3d 1053, 1070 (9th Cir. 2014) (Christen, J., concurring) (emphasis added). Arizona is "unable

to point to any federal statute or regulation that justifies classifying applicants for adjustment of status and cancellation of removal as authorized to be present" on that basis while at the same time excluding those accorded deferred action or deferred enforced departure. *Id.* at 1073. "All of these groups similarly lack formal immigration status but are allowed to live and work in the country for a period of time by the federal government." *Id.* Indeed, applicants for cancellation of removal, to whom Arizona issues driver's licenses, have a more attenuated connection with the country, for they are already in removal proceedings.

Arizona cites 8 U.S.C. §§ 1621 and 1622 as support for its contention that the challenged state policy is not preempted because "Congress has not intended to occupy a field so vast that it precludes all state regulations that touch upon immigration." Defs.' Supp. Br. 51. There is no dispute that some state laws affecting aliens are not preempted. It is equally well established, however, that the federal government enjoys exclusive power to establish alien classifications and has exercised that power through the INA and actions taken by DHS pursuant to that statute. *See supra* pp. 7-8. Nothing in 8 U.S.C. §§ 1621 and 1622 or *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005), supports the contention that States may adopt alien classifications not found in federal law.[2]

[2] Contrary to the State's suggestion, a driver's license is not a "state or local public benefit" for purposes of 8 U.S.C. §§ 1621 or 1622. *See id.* § 1621(c)(1) (referring only to "professional" and "commercial" licenses).

Arizona also suggests that its policy is not preempted because DHS's DACA memorandum lacks "the force of law." Defs.' Supp. Br. 2-4. While it is true that DACA is a general statement of policy and thus lacks the "force of law," Arizona's suggestion reflects a misunderstanding of the preemption question here, which is not determined by whether there are enforceable rights under the DACA policy. The State's policy is preempted not because it conflicts with the enforcement policy outlined in the DACA memorandum, but rather because the federal government has the exclusive power to establish alien classifications, and the State's policy intrudes on that federal prerogative by distinguishing among groups of aliens in novel ways and without substantial justification.

For the same reason, the State does not advance its position by urging that DHS's DACA policy is not a valid exercise of authority under the INA. As we show below, the INA provides ample authority for the DACA policy. But in any event, Arizona's assertion does not entitle the State to substitute its own alien classifications. *See infra* pp. 21-22. Through its "novel gloss on the federal immigration scheme" and creation of a "sub-classification of aliens lacking lawful status," Arizona has impermissibly intruded on exclusively federal power. *ADAC*, 757 F.3d at 1070 (Christen, J., concurring).

Arizona's failure to identify a substantial state interest served by its challenged policy further demonstrates that the policy is an impermissible regulation of immigration. *See, e.g.*, *DeCanas*, 424 U.S. at 356-57. A State wishing to regulate in an

area that touches on immigration must identify a substantial state interest and show that its regulation is "reasonably adapted to the purposes for which the state desires to use it." *Plyler*, 457 U.S. at 226 (emphasis and internal quotation marks omitted). The target of the state law—*i.e.*, whether it is "aimed at subjects left to the States to regulate" or instead "aimed directly at" the interest that is the subject of federal law—is highly relevant to the inquiry. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599-1600 (2015) (emphasis and internal quotation marks omitted). Here, Arizona has granted tens of thousands of driver's licenses to aliens based on their federal employment authorization, and it has failed to identify any reason why the same authorization with the same legal effect should not similarly suffice for plaintiffs. *See ADAC*, 757 F.3d at 1065. The various grounds advanced by the State are either at odds with the record or apply with equal force to other individuals who the State has determined may establish that their presence in the United States is authorized under federal law by presenting federal employment authorization documents. *See* Op. 13-14.

The United States' position in this case fully comports with its position in *Texas v. United States*, No. 15-40238 (5th Cir.). Texas asserted an injury based on costs allegedly associated with providing subsidized driver's licenses to aliens accorded deferred action under DACA and another DHS policy. The United States has argued that Texas lacks standing, in part because the State is free to unilaterally avoid these asserted costs. For example, Texas could decline to subsidize the costs of the "temporary visitor" licenses created by Texas law—a change the State might justify on

the grounds that it would not recoup the full benefits of subsidization from temporary residents. Texas might also distinguish between individuals who have been accorded deferred action and other aliens, as long as it borrows federal alien classifications and has an adequate state interest in the distinction. In contrast to those hypothetical approaches, Arizona has adopted novel alienage classifications not supported by federal law, and it has not advanced any significant state interest furthered by the challenged policy.

B. The Court should decide the case on preemption grounds.

The preemption question is before the Court and is an appropriate basis for resolving the case. At the outset of this litigation, plaintiffs "focus[ed] specifically on the State's act of 'classifying' aliens … and argue[d] that such classification by a state is preempted by the federal government's sole right to classify aliens." *ADAC v. Brewer*, 945 F. Supp. 2d 1049, 1057 (D. Ariz. 2013); *see ADAC*, 757 F.3d at 1071 n.6 (Christen, J., concurring). Although plaintiffs did not directly renew that argument in moving for summary judgment, they continued to make essentially the same argument in the context of their equal protection claim, urging that "[d]efendants impermissibly 'attempt to distinguish between … noncitizens on the basis of an immigration classification that has no basis in federal law.'" Pls.' Resp. Br. 19 (quoting *ADAC*, 757 F.3d at 1066); *see Toll v. Moreno*, 458 U.S. 1, 11 n.16 (1982) (noting extent to which preemption and equal protection arguments overlap in this context).

Although the district court granted summary judgment on equal protection grounds, this Court "may affirm a grant of summary judgment on any ground supported by the record." *Curley v. City of North Las Vegas*, 772 F.3d 629, 631 (9th Cir. 2014). The record amply supports a ruling that Arizona's policy is preempted because it intrudes on the exclusive federal prerogative of alien classification and the comprehensive scheme for regulation of immigration established by the federal government. No further factual development is necessary.

The Court should rule on preemption grounds to avoid the need to resolve plaintiffs' substantive constitutional challenge to Arizona's policy. This Court generally will "not decide federal constitutional questions where a dispositive nonconstitutional ground is available," and "[t]his rule against unnecessary constitutional adjudication applies even when neither the trial court nor the parties have considered the nonconstitutional basis for decision." *City of Los Angeles v. County of Kern*, 581 F.3d 841, 846 (9th Cir. 2009).

Although the preemptive force of federal law ultimately depends on the Supremacy Clause of the Constitution, a preemption claim typically calls on the court to address the relationship between the challenged state law and federal statutes. *Swift & Co. v. Wickham*, 382 U.S. 111, 120 (1965); *C.E.R. 1988, Inc. v. Aetna Cas. & Sur. Co.*, 386 F.3d 263, 272 n.13 (3d Cir. 2004). Accordingly, preemption claims are generally "treated as 'statutory' for purposes of [the Court's] practice of deciding statutory claims first to avoid unnecessary constitutional adjudications.'" *Douglas v. Seacoast*

Prods., Inc., 431 U.S. 265, 272 (1977); *cf. Hotel Emps. & Rest. Emps. Int'l Union v. Nevada Gaming Comm'n*, 984 F.2d 1507, 1512 (9th Cir. 1993) (observing in another context that "preemption is not a constitutional issue").

Although the Court's earlier opinion in this case addressed the scope of plaintiffs' constitutional rights, it did not make a final determination regarding the constitutionality of the State's policy. Instead, the Court framed its discussion in terms of whether the plaintiffs were likely to prevail on the merits of their claim. *See University of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981) (emphasizing distinction between "likelihood of success" and "success"). Accordingly, principles of constitutional avoidance continue to have force in this appeal.

II. DACA Is a Valid Policy for Exercising Enforcement Discretion Under Federal Immigration Law, but the Court Need Not Reach That Issue.

A. The validity of the DACA policy is not properly before the Court, and this appeal would be a poor vehicle for resolving that issue.

Although the DACA policy is plainly constitutional, its constitutionality is not properly before the Court. Arizona has attempted to raise that issue for the first time on appeal, and even the statutory argument on which the State's belated constitutional argument ultimately rests is not one that the State raised in district court.

In moving for summary judgment, Arizona argued that 8 U.S.C. § 1225(b)(2)(A) compels immigration officers to initiate removal proceedings against any aliens who are not clearly entitled to be admitted to the United States, Dkt. No. 247, at 13-14 (citing *Crane v. Napolitano*, No. 12-3247, 2013 WL 1744422 (N.D. Tex.

Apr. 23, 2013)), and that "deferring a removal action perpetuates an ongoing violation of federal immigration law," *id.* at 11. In contrast to that narrow statutory argument, Arizona's supplemental brief now launches a broadside attack on the validity of the DACA policy.

To the extent that Arizona is attempting to advance constitutional challenges, the Court should not adjudicate them because they are belatedly raised and not properly before the Court. *See Biller v. Toyota Motor Corp.*, 668 F.3d 655, 663 (9th Cir. 2012). Indeed, the State's argument that the DACA policy violates the Take Care Clause was not adequately raised even on appeal, because the State mentioned the issue only in a footnote. Defs.' Opening Br. 38 n.7; *see Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("[A] bare assertion does not preserve a claim.").

In any event, the State's argument is, at bottom, statutory rather than constitutional. Although the contours of Arizona's arguments have shifted in its briefing, Arizona's bottom-line contention is that the INA does not authorize the DACA policy as Arizona has incorrectly characterized it—*i.e.,* as a grant of class-wide relief to a category of individuals not lawfully admitted into the United States. Whether framed in statutory or constitutional terms, that argument fails for the reasons discussed below. But the constitutional aspect of the State's argument is especially insubstantial. A party cannot transform a statutory argument—here, that the Secretary has adopted a policy in conflict with the INA—into a meaningful constitutional challenge merely by citing the Take Care Clause and separation-of-

powers principles. Were it otherwise, nearly every statute-based suit against the government would become constitutional in dimension.

It would be particularly inappropriate to excuse the untimely nature of Arizona's argument that the Secretary's policy conflicts with the INA because there are serious questions regarding the State's ability to challenge the Secretary's exercise of enforcement discretion via deferred action. "[T]he removal process is entrusted to the discretion of the Federal Government." *Arizona*, 132 S. Ct. at 2506. Moreover, third parties generally may not contest the exercise of prosecutorial discretion as to another, *Linda RS v. Richard D*, 410 U.S. 614, 619 (1973), including in the context of immigration, *see Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984); *see also Heckler v. Chaney*, 470 U.S. 821, 828 (1985).

The INA itself further builds upon those principles by depriving courts of jurisdiction to entertain challenges to DHS's deferred-action decisions, which are committed to the Secretary's discretion by law, even when the challenge is raised by the alien directly affected. 8 U.S.C. §§ 1252(a)(2)(B), (g). The INA instead provides for review of the Secretary's removal decisions through a carefully tailored scheme of administrative and judicial review of final orders of removal. Although § 1252(g) on its face bars challenges brought by or on behalf of an alien, the Supreme Court has emphasized that the statute adding this provision to the INA was broadly "aimed at protecting the Executive's discretion from the courts," and that § 1252(g) was directed against "attempts to impose judicial constraints upon prosecutorial discretion."

American-Arab Anti-Discrimination Comm., 525 U.S. at 485-86 & n.9. Given that the State may not itself bring a suit to challenge the Executive's exercise of enforcement discretion through deferred-action policies, there is a serious question as to whether the State may circumvent this limitation by couching its challenge to DACA as a defense of its driver's license policy in this action. The presence of that reviewability issue is yet another reason why the Court should not entertain Arizona's belated challenge to DACA.

Even if untimeliness were not an issue, the Court need not, and should not, address the State's constitutional arguments regarding the validity of the DACA policy. As discussed above, it is no answer to plaintiffs' challenge to Arizona's driver's license policy to assert that the DACA policy is invalid. *See supra* p. 14. Arizona urges that, because the DACA policy is invalid, individuals who have been accorded deferred action pursuant to that policy are not among those whose "presence in the United States is authorized under federal law." *See* Defs.' Opening Br. 25, 31. The central flaw in the State's analysis is the erroneous assumption that the State may create and rely on the concept of an alien's presence in the United States being authorized under federal law—which Arizona maintains is "a term of art in state law," Oral Arg. at 0:53-59—and give content to that concept through a selective and novel reading of federal law. As discussed above, the notion of presence authorized under federal law, and the further criteria devised by the State in defining that concept, do not borrow federal alien classifications but rather create new ones. A

finding that the DACA policy is invalid would not cure that fatal flaw in the State's policy. The Court should conclude that the State's driver's license policy is preempted on that basis without allowing the constitutionality of the DACA policy to be injected belatedly into this appeal.

B. The DACA policy is a valid exercise of the Secretary's well-established discretion under the INA to accord deferred action.

The State's challenge to the validity of the DACA policy is, in any event, without merit, whether viewed through a constitutional prism or a statutory one. The Secretary of Homeland Security is "charged with the administration and enforcement" of the immigration laws. 8 U.S.C. § 1103(a)(1). The Supreme Court's decisions squarely establish that the Secretary has authority and discretion to accord deferred action. The Court has recognized that "the broad discretion exercised by immigration officials" is "[a] principal feature of the removal system." *Arizona*, 132 S. Ct. at 2499. Federal officials "must decide whether it makes sense to pursue removal at all," *id.*, and "[a]t each stage [of the removal process] the Executive has discretion to abandon the endeavor," *American-Arab Anti-Discrimination Comm.*, 525 U.S. at 483-84. The Court has also recognized DHS's longstanding use of deferred action as a "commendable" means of exercising discretion to defer removal action against aliens "for humanitarian reasons or simply for its own convenience." *Id.* Congress has likewise approved of the Secretary's exercise of enforcement discretion through policies of deferred action, as where it has directed the Secretary to consider according

deferred action to aliens within particular groups. *See* 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV); USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b)(1), 115 Stat. 272, 361. And when Congress enacted these laws and the Supreme Court decided *Reno*, it was already long-settled that when an alien is accorded deferred action, the alien may also be accorded work authorization. 8 U.S.C. § 1324a(h)(3); 8 C.F.R. § 274a.12(c)(14).

For the first time on appeal, Arizona urges that the DACA policy exceeds the Secretary's authority because Congress has specifically authorized deferred action in particular circumstances, which the State urges implies a congressional intent to foreclose the exercise of deferred action absent a specific grant of statutory power. *See* Defs.' Opening Br. 33-34; Defs.' Supp. Br. 13. But Congress's references to the use of deferred action in no way purport to grant the Secretary authority that would otherwise be lacking (or to restrict preexisting discretionary authority). Instead, such enactments are premised on Congress's understanding that the Secretary has preexisting authority to defer enforcement action—as formally recognized in regulations governing employment authorization since 1981—and those enactments direct the Secretary to consider exercising that existing authority on behalf of aliens in specific groups. For example, in the case of aliens petitioning under the Violence Against Women Act, Congress stated that a qualifying alien "*is eligible* for deferred action and work authorization." 8 U.S.C. § 1154(a)(1)(D)(i)(II) (emphasis added). Similarly, in the USA PATRIOT Act of 2001, § 423(b)(1), 115 Stat. at 361, Congress

provided that certain aliens "*may be eligible* for deferred action and work authorization." (emphasis added).

Arizona is likewise wrong that Congress's failure to enact the DREAM Act precludes the Secretary from exercising his preexisting discretion by issuing the DACA policy. *See* Defs.' Supp. Br. 42-43. The Supreme Court has admonished that an unenacted bill is an unreliable indicator of legislative intent. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969). And in any event, the bills considered by Congress provided rights and relief that the DACA policy does not. Most significantly, the DREAM Act proposals would have granted covered aliens conditional residency, and later permanent residency, whereas DACA provides only the ability to request discretionary deferral of removal that is temporary and revocable at any time, and the opportunity to request work authorization. Thus, the legislative history cited by the State does not undermine the Secretary's broad and longstanding authority to accord deferred action and work authorization to non-priority aliens.

Framing the State's arguments in constitutional terms does not change the foregoing analysis. Arizona's argument that the DACA policy is inconsistent with separation-of-powers principles is predicated on the assumption that the Secretary lacks authority under the INA to exercise his enforcement discretion on the terms reflected in the DACA policy. That assumption fails for the reasons already stated.

In arguing otherwise, Arizona asserts that the DACA policy is unconstitutional because it purports to "enact wholesale, class-wide" relief, thereby "transform[ing] the

responsibility for enforcement into the power of enactment." Defs.' Opening Br. 32; Reply Br. 14. That argument ignores the Secretary's broad authority to "establish[] national immigration enforcement policies and priorities" and not merely policies subject to case-by-case exceptions determined by individual agents. 6 U.S.C. § 202(5); *see infra* pp. 26-27. In any event, Arizona fundamentally mischaracterizes the DACA policy, which establishes guidelines for the discretionary exercise of the Secretary's power to determine *on an individual basis* whether to defer enforcement efforts to remove an alien from the United States. By its terms, the policy "makes it clear that [federal immigration officials] shall exercise their discretion in deciding to grant deferred action, and this judgment should be exercised on a case-by-case basis." *Crane v. Johnson*, 783 F.3d 244, 254-55 (5th Cir. 2015); DACA Memo, at 2. The implementation of the DACA policy is consistent with that clear direction. *See Arpaio v. Obama*, 27 F. Supp. 3d 185, 209 & n.13 (D.D.C. 2014).

Arizona's arguments with respect to the Take Care Clause similarly lack merit. The premise that DHS has refused to enforce the immigration laws is baseless. From 2009 through 2014, DHS removed approximately 2.4 million aliens from the United States—an unprecedented number. *See* Migration Policy Institute, *Deportation and Discretion: Reviewing the Record and Options for Change* 13, 15 (Oct. 2014) (DHS removal data for 2009-2013); *DHS Releases End of Year Statistics*, http://www.ice.gov/news/releases/dhs-releases-end-year-statistics (Dec. 18, 2014) (DHS removal data for 2014). Notwithstanding DHS's substantial efforts, appropriations permit it to remove only a

few hundred thousand aliens per year—and approximately 11.3 million undocumented aliens still live in the United States, and many others are newly apprehended at the border each year. The Secretary thus must make difficult choices about how to prioritize limited resources as "necessary." *See* 8 U.S.C. § 1103(a)(3). His choices to prioritize removal of serious criminals, security threats, and recent border-crossers—and to consider deferring action for aliens who pose no such danger and have lived here since they were children—are interrelated and represent responsible immigration enforcement in the face of real-world resource constraints and humanitarian concerns. Making these difficult decisions is a key element of the implementation of the Executive's obligation to "take Care that the Laws be faithfully executed," not a violation of it. U.S. Const. art. II, § 3. "The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws … ." *Community for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) ; *see Arpaio v. Obama*, No. 14-5325, slip op. at 5 (D.C. Cir. Aug. 14, 2015)..

Moreover, there is nothing novel, much less unconstitutional, about what the State refers to as "policy-level non-enforcement." Defs.' Supp. Br. 21. For years and on multiple occasions, DHS has employed broad, group-based policies for according deferred action and various forms of relief to individuals within defined categories of aliens. *See* OLC, *DHS's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. & to Defer Removal of Others* 14-20 (Nov. 19, 2014). More generally, agencies

often issue policies and instructions that direct subordinates in allocating limited enforcement resources among the universe of potential violators. For example, the Selective Service Agency adopted a "passive enforcement" policy under which it initiated enforcement action only against non-registrants "who report themselves as having violated the law, or who are reported by others," a policy that effectively exempted an estimated ninety-nine percent of violators from prosecution. *Wayte v. United States*, 470 U.S. 598, 600, 604 & n.3 (1985). And the Department of Justice has long had guidelines that employ a variety of categorical standards for enforcement discretion. *See*, *e.g.*, Memorandum from Deputy Attorney General James M. Cole to U.S. Attorneys, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2103); DOJ: A Report to the U.S. Congress, *U.S. Attorneys' Written Guidelines for the Declination of Alleged Violations of Federal Criminal Laws* 6-9, 22-24 (1979); *see also* 18 U.S.C. § 659. The fact that a high-level official frames a policy in categorical terms does not mean that enforcement discretion is not being exercised by the agency, nor does it mean that the law is not being "faithfully executed."

The only authority Arizona cites to support its contention that "policy-level non-enforcement" is problematic is *Train v. City of New York*, 420 U.S. 35 (1975), in which the Supreme Court held that an agency did not have discretion to withhold certain funds allocated by Congress. But *Train* involved the proper construction of a statute, not the Take Care Clause. *See id.* at 42-44. Although Arizona makes a passing effort to recast *Train* as a constitutional decision, Defs.' Supp. Br. 22 n.3, the State's

reliance on that decision simply underscores that the State's "constitutional" arguments in this case are really statutory. Indeed, Arizona concedes that its arguments "could be cast as a matter of applying the INA." *Id.* Arizona's arguments are without merit as a statutory matter, and they gain nothing by being recast in constitutional terms.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court on preemption grounds.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for the United States as Amicus Curiae contains 6,967 words according to the count of this office's word processing system.

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2015, I filed the foregoing brief by causing a digital version to be filed electronically via the CM/ECF system. Counsel will be served by the CM/ECF system.

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