Arizona Dream Act Coal. v. Brewer, No. 15-15307

Circuit Judge **KOZINSKI**, with whom Circuit Judges **O'SCANNLAIN**, **BYBEE**, **CALLAHAN**, **BEA** and **N.R. SMITH** join, dissenting from the denial of rehearing en banc:

At the crossroads between two presidents, we face a fundamental question of presidential power. President Obama created, by executive memorandum, a sweeping new immigration program that gives the benefit of "deferred action" to millions of illegal immigrants who came to the United States before the age of sixteen. Deferred action confers no formal immigration status; it is simply a commitment not to deport. Arizona, like many states, does not issue drivers' licenses to unauthorized aliens, and therefore refuses to issue drivers' licenses to the program's beneficiaries.

Does the Supremacy Clause nevertheless force Arizona to issue drivers' licenses to the recipients of the President's largesse? There's no doubt that Congress can preempt state law; its power to do so in the field of immigration is particularly broad. But Congress never approved the deferred-action program: The President adopted it on his own initiative after Congress repeatedly declined to pass the DREAM Act—legislation that would have authorized a similar program. Undeterred, the panel claims that the President acted pursuant to authority "delegated to the executive branch" through the Immigration and Naturalization

Act (INA). Amended op. at 27. According to the panel, Congress gave the President the general authority to create a sprawling new program that preempts state law, even though Congress declined to create the same program.

This puzzling new preemption theory is at odds with the Supreme Court's preemption jurisprudence; it is, instead, cobbled together out of 35-year-old Equal Protection dicta. It is a theory that was rejected with bemusement by the district court, see Ariz. Dream Act Coal. v. Brewer, 945 F. Supp. 2d 1049, 1057 (D. Ariz. 2013), only to be resurrected by the panel at the eleventh hour and buried behind a 3,000-word Equal Protection detour. It's a theory that puts us squarely at odds with the Fifth Circuit, which held recently that "the INA flatly does not permit the [executive] reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits." Texas v. United States, 809 F.3d 134, 184 (5th Cir. 2015), aff'd by an equally divided court, 136 S. Ct. 2271, 2272 (2016) (per curiam). And it's a theory that makes no mention of the foundational principle of preemption law: Historic state powers are not preempted "unless that was the clear and manifest purpose of Congress." Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (internal quotation omitted).

The opinion also buckles under the weight of its own ambiguities. The

panel says repeatedly that Arizona has created "immigration classifications not found in federal law." Amended op. at 30 n.8; see also id. at 35, 42. But Arizona follows federal law to the letter—that is, all laws passed by Congress and signed by the President. Thus, when the panel uses the term "law," it means something quite different from what that term normally means: The panel in effect holds that the enforcement decisions of the President are federal law. Yet the lawfulness of the President's policies is an issue that the panel bends over backward not to reach. See id. at 35–39. I am at a loss to explain how this cake can be eaten and yet remain on the plate: The 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. While the panel suggests other reasons to doubt Arizona's response,[1] the opinion's slippery preemption theory simply isn't one of them. See, e.g., Noah Feldman, Obama's Wobbly Legal

[1] I have little to say about the panel's lengthy Equal Protection discussion. While this Equal Protection excursus eclipses the panel's terse and enigmatic discussion of preemption, the panel is nonetheless clear that "we do not ultimately decide the Equal Protection issue." Amended op. at 18. I note, however, that there are serious doubts about the coherence of the Supreme Court's Equal Protection jurisprudence as applied to aliens. See, e.g., Korab v. Fink, 797 F.3d 572, 585 (9th Cir. 2014) (Bybee, J., concurring) (describing this jurisprudence as "riddled with exceptions and caveats that make consistent judicial review of alienage classifications difficult," and suggesting an approach based solely on preemption).

Victory on Immigration, Bloomberg (Apr. 6, 2016) (describing the panel's "precarious," "tricky" and "funky" reasoning that is "vulnerable to reversal by the Supreme Court").

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In the summer of 2012, the President directed his officers not to remove certain illegal immigrants who came to the United States before age sixteen. The program, Deferred Action for Childhood Arrivals (DACA), did not clear any of the normal administrative-law hurdles; the memorandum announcing the program states that it "confers no substantive right, immigration status or pathway to citizenship" because "[o]nly the Congress, acting through its legislative authority, can confer these rights." DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, June 15, 2012.

Arizona responded with an executive order of its own, stating, in apparent agreement with the DACA memorandum, that the new federal program "does not and cannot confer lawful or authorized status or presence upon the unlawful alien applicants." Ariz. Exec. Order 2012-06. Because Arizona law requires that applicants for a driver's license submit proof that their presence is "authorized

under federal law," Ariz. Rev. Stat. § 28-3153(D)—and DACA "confers no substantive right [or] immigration status"—Arizona felt justified withholding licenses from illegal immigrants who happen to be DACA beneficiaries. Several DACA beneficiaries then sued Arizona, claiming, among other things, that the state's policy was preempted.

The panel agrees, holding that Arizona's policy "strayed into an exclusive domain that Congress, through the INA, delegated to the executive branch." Amended op. at 27 (emphasis added); see also id. at 17. One might think that the panel would present especially strong evidence of congressional delegation, such as an express statement to that effect. After all, it's rare enough to find that Congress has kept an entire field to itself, much less ceded one to the executive. And the bar that preemption must clear is both well-established and high: The historic police powers of states are not preempted "unless that was the clear and manifest purpose of Congress." E.g., Arizona, 132 S. Ct. at 2501; Wyeth v. Levine, 555 U.S. 555, 565 (2009); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

The panel doesn't bother showing that Congress evinced a "clear and manifest purpose" before forcing the states to accept immigration classifications

invented entirely by the President. Indeed, the panel's preemption analysis mentions only two small provisions of the INA, and this thin statutory evidence cannot possibly carry the heavy burden of field preemption.[2] The panel first notes that the INA refers to an alien's "period of stay authorized by the Attorney General," beyond which the alien is "deemed to be unlawfully present in the United States." Amended op. at 33 (quoting 8 U.S.C. § 1182(a)(9)(B)(ii)). But the panel has now corrected its opinion to explain that this provision actually contemplates the executive's ability to "authorize" a period of stay only for a tiny subset of aliens—those "previously removed"—and not, as its original opinion suggested, every class of immigrant covered by the statute.[3]

The panel's second claim is that the REAL ID Act identifies deferred-action

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[2] The panel's only other analysis of the INA, in its non-precedential Equal Protection discussion, makes the rather unremarkable point that the executive branch has responsibility for executing the INA. See amended op. at 13–16. This does not in any way help establish whether Congress intended the INA to let the executive branch preempt the states.

[3] Compare Ariz. Dream Act Coal. v. Brewer, 818 F.3d 901, 916 (9th Cir. 2016) with amended op. at 33 (adding "at least for purposes of § 1182(a)(9)(B)"). As the string of letters and numbers might suggest, § 1182(a)(9)(B) is not a large portion of the INA. This subsection also offers no support for a second reason: Even if it were true that an immigrant was "unlawfully present" if he stayed beyond a period approved by the Attorney General, this doesn't mean he would be "lawfully present" if he didn't stay beyond such a period. In formal logic, the inverse of a conditional cannot be inferred from the conditional.

immigrants "as being present in the United States during a 'period of authorized stay,' for the purpose of issuing state identification cards." Amended op. at 34 (citation omitted). This narrow provision also can't be authority for the proposition that the INA "delegated to the executive branch" the wholesale authority to preempt state law by declaring immigrants legal when they are not. Nor does this narrow provision conflict with Arizona's policy: 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. REAL ID Act of 2005, Pub. L. No. 109–13, § 202(c)(2)(C)(i) (emphasis added).

Nevertheless, the panel insists that this evidence "directly undermines" Arizona's response to DACA. Amended op. at 33. That the panel can trawl the great depths of the INA—one of our largest and most complex statutes—and return with this meager catch suggests exactly the opposite conclusion: The INA evinces a "clear and manifest" intention not to cede this field to the executive. This is precisely the conclusion that the Fifth Circuit reached in Texas v. United States. Our sister circuit held that even if the President's policies were of the type to which Chevron deference was owed—which the circuit assumed only for the sake of argument—such deference would be unavailable because "the INA expressly and carefully provides legal designations allowing defined classes of aliens to be

lawfully present." See Texas, 809 F.3d at 179. In other words, the INA has spoken directly to the issue and "flatly does not permit" executive supplementation like the DACA program. Id. at 184. If what the panel relies on evinces a "clear and manifest purpose" to cede a field to the executive, it's hard to imagine what statute doesn't.[4]

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Perhaps daunted by the lack of support in the statute it purports to interpret, the panel turns to Supreme Court precedent, but it doesn't fare much better here. The primary case on which the panel relies, Plyler v. Doe, might contain some impressive-sounding dicta—"The States enjoy no power with respect to the classification of aliens," 457 U.S. 202, 225 (1982)—but the reasons to reject this dicta are more impressive still. As the district court put it when it rebuffed the Plyler theory of preemption: "Plyler is not a preemption case." 945 F. Supp. 2d at 1057. Justice Brennan's 1982 majority opinion—a 5-4 opinion that garnered three individual concurrences and has been questioned continuously since

[4] And even if it were undeniably the case that Congress delegated the power of preemption to the President, I am skeptical that such a statute would be constitutional. The nondelegation doctrine is still waiting in the wings. See generally Whitman v. Am. Trucking Assocs., 531 U.S. 457 (2001).

publication—never once mentions preemption. See 457 U.S. at 205–30.[5]

The panel's search for support in the Supreme Court's actual preemption jurisprudence is equally misguided. The panel quotes De Canas v. Bica for the proposition that the "[p]ower to regulate immigration is unquestionably exclusively a federal power." Amended op. at 24 (quoting 424 U.S. 351, 354 (1976)). But the panel overlooks the very next sentence of De Canas, which notes that "the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted." 424 U.S. at 355. So what's "a regulation of immigration" that would be preempted? The De Canas opinion tells us a couple of sentences later: It's "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." Id. Denying a driver's license is not tantamount to denying admission to the country.[6] Like the state law upheld in De

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

[6] The more recent cases cited by the panel—Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013), Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524 (5th Cir. 2013), and United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012)—are easily distinguishable for this reason. They involved what the courts held to be an actual regulation of immigration—that is, "a determination of

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Canas—which prevented California businesses from hiring illegal immigrants—Arizona's control over its drivers' licenses is well "within the mainstream of [the state's] police power." Id. at 356.

Indeed, it's difficult to imagine a preemption case less helpful to the panel than De Canas. The De Canas majority states explicitly that it will "not presume that Congress, in enacting the INA, intended to oust state authority to regulate . . . in a manner consistent with pertinent federal laws." Id. at 357. That uncontroversial proposition simply raises once more the question the panel works hard to avoid: If Arizona relies on the categories drawn by the INA, but not those of the executive branch, why isn't it operating consistently with "pertinent federal laws"? The panel never says.

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Instead, we're left with the enigmatic holding we started with: Arizona "impermissibly strayed into an exclusive domain that Congress, through the INA, delegated to the executive branch." Amended op. at 27. This conclusion finds no support in the actual text of the INA. It receives no help from the Court's

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who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." 424 U.S. at 355.

preemption jurisprudence. And it is a brazen renegotiation of our federal bargain. If states must accept the complete policy classifications of the INA and also every immigration decision made by the President, then we've just found ourselves in a world where the President really can preempt state laws with the stroke of a pen.

The Constitution gives us a balance where federal laws "shall be the supreme law of the land," but powers not delegated to the federal government "are reserved to the states." U.S. Const., art. VI cl. 2; id. amend. X. The political branches of the federal government must act together to overcome state laws. Unison gives us clarity about what federal law consists of and when state law is subordinated. The vast power to set aside the laws of the sovereign states cannot be exercised by the President acting alone, with his power at its "lowest ebb." Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).[7]

Presidential power can turn on and off like a spigot; what our outgoing President has done may be undone by our incoming President acting on his own. The judiciary might find itself, after years of litigation over a President's policy,

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[7] We are not in the "zone of twilight," Youngstown, 343 U.S. at 637, where the distribution of presidential and congressional power is uncertain. Congress has repeatedly declined to act—refusing time and time again to pass the DREAM Act—so the President is flying solo.

faced with a change in administration and a case on the verge of mootness.[8] And our precedent may long outlive the DACA program: We may soon find ourselves with new conflicts between the President and the states. See, e.g., California and Trump Are on a Collision Course Over Immigrants Here Illegally, L.A. Times, Nov. 11, 2016; Cities Vow to Fight Trump on Immigration, Even if They Lose Millions, N.Y. Times, Nov. 27, 2016.

These looming conflicts should serve as a stark reminder: Executive power favors the party, or perhaps simply the person, who wields it. That power is the forbidden fruit of our politics, irresistible to those who possess it and reviled by those who don't. Clear and stable structural rules are the bulwark against that power, which shifts with the sudden vagaries of our politics. In its haste to find a doctrine that can protect the policies of the present, our circuit should remember the old warning: May all your dreams come true.

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[8] Mootness concerns aren't theoretical. In Texas v. United States—the direct challenge to the Obama Administration's immigration policies over which the Supreme Court split 4-4—the parties filed a joint motion to stay the merits proceedings until one month after the presidential inauguration. See Joint Motion to Stay, No. 1:14-cv-00254, Doc. 430 (Nov. 18, 2016).