No. 13-16248

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARIZONA DREAM ACT COALITION; et al.,
Plaintiffs-Appellants,
v.
JANICE K. BREWER, *et al.*
Defendants-Appellees

On Appeal from the United States District Court for the District of Arizona No. 2:12-CV-02546-DGC

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for Plaintiffs-Appellants Arizona DREAM Act Coalition, *et al*. state that none of the Plaintiffs-Appellants have a parent corporation or any subsidiaries. None of the Plaintiffs-Appellants issue stock, and therefore no publicly held corporation owns 10% or more of their stock.

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INTRODUCTION

This preliminary injunction appeal involves young immigrants who were brought to the United States as children, have worked hard to pursue their education and contribute to their communities, and call this country home. In light of these equitable considerations, the U.S. Department of Homeland Security ("DHS") initiated the "Deferred Action for Childhood Arrivals" ("DACA") program, allowing these youth to live and work in the United States for a renewable two-year period. Deferred action is a discretionary mechanism used by federal officials to authorize otherwise removable noncitizens to remain in the United States.

Based on a political disagreement with DACA, Defendants-Appellees ("Defendants") incorrectly categorize DACA recipients as "not authorized under federal law" to be present in the United States, in order to deny them Arizona driver's licenses. Yet Defendants still classify all other noncitizens granted deferred action as "authorized" and eligible for licenses.

The district court properly recognized that DACA recipients are authorized to be present under federal law, and that Defendants' policy likely discriminates against DACA recipients without any rational basis.

The district court committed legal error, however, by finding no likelihood of success on Plaintiffs-Appellants' ("Plaintiffs") Supremacy

Clause claim. Arizona's treatment of DACA recipients as unauthorized is preempted because it directly contradicts federal immigration law and obstructs Congress's delegation of discretionary authority to the federal Executive. Further, Arizona's creation of an immigration classification contrary to federal standards is a preempted regulation of immigration.

The district court also committed legal error and abused its discretion in evaluating the remaining injunction factors, applying the wrong injunction standard and improperly disregarding evidence of Plaintiffs' irreparable harms.

Defendants' policy must be enjoined.

STATEMENT OF JURISDICTION

Plaintiffs appeal from the district court's May 16, 2013 order denying their preliminary injunction motion. That order was the subject of a motion for reconsideration filed by Plaintiffs, which the district court denied on June 6, 2013. The district court had subject matter jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§ 1331 and 1343. Plaintiffs timely filed a notice of appeal on June 17, 2013. Fed. R. App. P. 4(a)(1)(A), 4(a)(4)(A)(ii). This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED

1. Whether Plaintiffs have shown a likelihood of success on their claim that Arizona's treatment of DACA recipients as unauthorized to be present in the United States is preempted.

2. Whether Plaintiffs' request for a prohibitory injunction restoring the status quo is subject to the heightened standard for mandatory injunctions.

3. Whether Plaintiffs have established that they are irreparably harmed by Arizona's unconstitutional driver's license policy and whether the remaining injunction factors weigh in favor of an injunction.

STATEMENT OF THE CASE

On November 29, 2012, Plaintiffs Arizona DREAM Act Coalition ("ADAC") and five individual DACA recipients filed suit raising Equal Protection and Supremacy Clause claims against Defendants' policy. On December 14, 2012, Plaintiffs filed a preliminary injunction motion. ER 117. On January 14, 2013, Defendants filed a motion to dismiss the case. ER 310-53. On May 16, 2013, the district court denied Plaintiffs' preliminary injunction motion and granted in part, and denied in part, Defendants' motion to dismiss. ER 1-40. The district court subsequently denied Plaintiffs' motion for reconsideration on June 6, 2013. ER 41-43.

The district court's denial of the preliminary injunction is the subject of this appeal.[1]

In its preliminary injunction ruling, the district court held Plaintiffs had not shown a likelihood of success on their Supremacy Clause claim. The district court held Arizona's policy deeming DACA recipients unauthorized to be present in the United States does not conflict with federal law, notwithstanding the court's conclusion that all deferred action recipients, including DACA grantees, have authorized presence under federal law. ER 11-13, 14-15. The court also rejected Plaintiffs' argument that Arizona could not create its own immigration classifications, failing to recognize the doctrine that the Constitution of its own force preempts states from regulating immigration. ER 10-11.

With respect to Equal Protection, the district court found a likelihood of success on the merits. The court concluded DACA recipients are similarly situated to all other noncitizens issued employment authorization documents ("EADs"), including all other deferred action recipients, who remain eligible for Arizona licenses. ER 14-16. The court further held Defendants' policy irrationally discriminates against DACA recipients and

[1] Plaintiffs do not appeal the district court's order on the motion to dismiss in this proceeding.

does not actually advance any of Defendants' asserted governmental interests. ER 31-33.

Despite holding that Defendants' policy was likely unconstitutional, the district court denied the preliminary injunction motion, concluding Plaintiffs had not established irreparable harm. The court held that Plaintiffs requested a mandatory injunction and therefore required a heightened showing of irreparable harm. The district court also held: (1) the violation of Plaintiffs' Equal Protection rights did not constitute irreparable harm; (2) the denial of driver's licenses and the resulting injuries were not irreparable harm; (3) the evidence of stigmatic harm resulting from unconstitutional discrimination was insufficient to constitute irreparable harm; and (4) ADAC's diversion of resources did not amount to irreparable harm. ER 33-38. The court also did not consider evidence showing irreparable harm arising from the threat of prosecution for driving without a license, finding that Plaintiffs had asked to keep this evidence from being discoverable. ER 36 n.11.

In the same Order, the court granted Defendants' motion to dismiss with respect to Plaintiffs' preemption claim, but denied the motion and refused to convert the motion to a summary judgment motion with respect to Plaintiffs' Equal Protection claim. ER 40.

On May 30, 2013, Plaintiffs moved for reconsideration of the district court's decision to exclude evidence of irreparable harm by threat of prosecution for unlicensed driving. On June 6, 2013, the court denied Plaintiffs' motion. ER 41-43.

STATEMENT OF FACTS

Arizona law provides that the Arizona Department of Transportation ("ADOT") "shall not issue to or renew a driver license ... for a person who does not submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law." A.R.S § 28-3153(D). Prior to August 2012, ADOT accepted all federally issued EADs as proof of authorized presence in the United States for purposes of obtaining Arizona driver's licenses. *See* ER 684-85; E.R. 681-82 (Jeffries Decl. ¶11). On June 15, 2012, DHS announced the DACA program, which made certain young immigrants eligible for deferred action and EADs. *See* ER 203-05. On August 15, 2012, Defendant Brewer issued Executive Order 2012-06, instructing state agencies to "prevent Deferred Action recipients from obtaining eligibility ... for any ... state identification, including a driver's license." *See* ER 200. In September 2012, ADOT updated its policy on proving authorized presence to exclude only EADs issued to

DACA recipients. *See* ER 189-92, 687. These events, explained further below, led to the instant action.

I. Deferred Action

For nearly four decades, federal immigration authorities have used deferred action to refrain from seeking removal of otherwise removable noncitizens, and to authorize their presence in the United States for a period of time. *See, e.g.*, ER 157 (Yale-Loehr Decl. ¶5). The federal government affirmatively grants deferred action after an individualized assessment, providing permission to remain in the United States for a specified period and seek employment authorization. ER 160-61 (Yale-Loehr Decl. ¶14); 8 C.F.R. § 274a.12(c)(14).

The DACA program is the most recent instance of this longstanding discretionary practice. To qualify for deferred action under DACA, young immigrants who entered the United States as children must meet several educational and residency requirements, undergo extensive criminal background checks, and establish that their individual circumstances justify a grant. *See* ER 203, 208-11. Individuals granted deferred action under DACA are permitted to remain in the United States for a renewable period of two years, are shielded from removal proceedings during that time, are

eligible for federal employment authorization, and may apply for a Social Security Number. ER 204-05, 689; *see generally* Part I.A, *infra*.

II. Arizona Policy on Driver's License Eligibility

Before the announcement of DACA, the Motor Vehicle Division ("MVD") of ADOT accepted all federally issued EADs as sufficient evidence that a noncitizen's presence in the United States was authorized under federal law, and therefore issued driver's licenses to such individuals. ER 684-85; ER 681-82 (Jeffries Decl. ¶11).

On August 15, 2012, Defendant Brewer issued Executive Order 2012-06, instructing state agencies to restrict deferred action recipients from eligibility for driver's licenses. *See* ER 200-01. The Executive Order purports to "Re-affirm[] [the] Intent of Arizona Law in Response to the Federal Government's Deferred Action Program[.]" *Id.* The Executive Order states that "the Deferred Action program does not and cannot confer lawful or authorized status or presence upon the unlawful alien applicants" and that "[t]he issuance of Deferred Action or Deferred Action USCIS [EADs] to unlawfully present aliens does not confer upon them any lawful or authorized status[.]" *Id.*

In a public statement, Defendant Brewer explained that the Executive Order was intended to clarify that there would be "no drivers [sic] licenses

for illegal people." ER 219. Defendant Brewer stated: "They are here illegally and unlawfully in the state of Arizona, and it's already been determined that you're not allowed to have a driver's license if you are here illegally." *See* ER 223. She further claimed, "The Obama amnesty plan doesn't make them legally here." *Id.*

MVD subsequently revised its policies to comply with the Executive Order, providing that EADs issued to DACA recipients do not establish authorized presence. ER 189. MVD continues to accept EADs from all other noncitizens as sufficient to establish authorized presence, including EADs presented by deferred action recipients outside of the DACA program. ER 687.

SUMMARY OF ARGUMENT

Arizona law requires that a noncitizen applying for a driver's license demonstrate that his or her "presence in the United States is authorized under federal law." A.R.S § 28-3153(D). Based on the state's own erroneous conclusion that DACA recipients are not authorized to be present in the United States, however, Defendants have categorically barred DACA recipients from obtaining driver's licenses. Arizona's determination contradicts federal law, which defines deferred action as a grant of federal authorization to be present and remain in the country, and creates an illegal

state-law immigration classification. The district court erred as a matter of law in concluding that Defendants' policy does not violate the Supremacy Clause. Furthermore, while the court correctly concluded that Arizona's policy likely violates the Equal Protection Clause because it lacks any rational basis, the court nevertheless erroneously held that Plaintiffs had not proven irreparable harm, and incorrectly applied the mandatory injunction standard.

First, the state's policy treating DACA recipients as not authorized to be present is conflict preempted because it is flatly inconsistent with federal law and undermines Congress'ss intent to empower the Executive Branch to implement immigration law. Federal law unmistakably establishes Congress'ss intent that the federal Executive exercise discretion over decisions concerning whether an otherwise removable noncitizen should be permitted to remain in the country. In taking into its own hands the power to determine whether DACA recipients are federally authorized—and in categorizing them erroneously as not so authorized—Arizona has erected a clear obstacle to Congress'ss immigration scheme, including the federal government's discretion and control over the decision whether to authorize a noncitizen's presence in the United States. Arizona's denial of driver's licenses to DACA recipients further conflicts with federal law providing that

these noncitizens be able to live and work productively in the United States during the period of their deferred action grant. *See* Part I.A-B.

Second, Arizona's independent classification of DACA recipients as "unauthorized" is preempted because it constitutes an impermissible regulation of immigration. The Supreme Court has long recognized that the Constitution itself preempts states from engaging in immigration regulation. And the Court has instructed that the power to classify aliens is an integral part of the exclusive federal power to regulate immigration. In rejecting the federal government's classification of DACA recipients as authorized to be present, Arizona has usurped this exclusive federal power. *See* Part I.C. Under both Supremacy Clause doctrines, the district court's conclusion that Plaintiffs have no likelihood of success on the merits of their preemption claim must be reversed as legally erroneous.

The district court also erred in applying the remaining, non-merits preliminary injunction factors, including in holding that Plaintiffs were required to meet the stringent mandatory injunctive relief standard. Plaintiffs' requested injunction seeks to have Defendants cease implementing their new unconstitutional policy. This injunction is prohibitory, not mandatory, because it would restore the status quo that existed prior to this controversy, in which all noncitizens with EADs—

including all deferred action recipients—were able to establish authorized presence and receive driver's licenses. *See* Part II.A.

Further, the district court erred in concluding that Plaintiffs are not irreparably harmed by Arizona's policy. The court committed legal error in concluding that the constitutional injury flowing from Defendants' Equal Protection violation did not amount to irreparable harm. Moreover, the evidence shows that as a result of the state's unconstitutional policy, Plaintiffs suffer irreparable harm from limitations on their everyday activities and employment opportunities, resulting stigmatic harms, and the risk of criminal prosecution for driving without a license. The organizational Plaintiff ADAC has also demonstrated irreparable harm because Arizona's policy has frustrated core mission activities, leading to a diversion of resources and lost strategic opportunities. The district court erred in dismissing certain of these harms as compensable, and abused its discretion in declining to consider a plentitude of evidence which, taken separately and as a whole, inescapably lead to a finding of irreparable harm. *See* Part II.C-D.

For these reasons, and because the remaining injunction factors strongly favor Plaintiffs, *see* Part III, the district court decision must be reversed and a preliminary injunction should issue.

STANDARD OF REVIEW

In preliminary injunction appeals, this Court applies a "*de novo*" standard of review to legal issues "underlying" district court determinations that are "alleged to have relied on an erroneous legal premise." *Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 760 (9th Cir. 2004) (citation omitted). *See also, e.g.*, *Miller v. Ca. Pac. Med. Ctr.*, 991 F.2d 536, 539 (9th Cir. 1993) (in such cases, "review is plenary") (citation omitted). The district court's factual findings regarding preliminary injunctive relief are reviewed for abuse of discretion, and clearly erroneous factual findings must be reversed. *Demery v. Arpaio*, 378 F.3d 1020, 1027 (9th Cir. 2004) (citation omitted).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR PREEMPTION CLAIM.

The district court properly recognized that Arizona's driver's license policy deems DACA recipients unauthorized to be present in the United States even though, under federal law, the presence of such individuals indisputably is authorized. ER 14-15. Nonetheless, the court concluded that Plaintiffs had not shown a likelihood of success on their Supremacy Clause claim, holding that Arizona's driver's license policy neither conflicts with

federal law nor amounts to an impermissible state regulation of immigration. The district court's preemption holding was legally erroneous in multiple respects, and must be reversed.

A. Individuals Granted Deferred Action, Including DACA Recipients, Are Authorized to Be Present in the United States.

Federal statutes and regulations, agency guidance, and case law all uniformly demonstrate that deferred action is a federal grant of authorization to be present in the United States for a period of time. A grant of deferred action indicates that the federal government knows of the noncitizen's presence in the country, has made a formal determination to allow her to remain, and has taken steps to facilitate her participation in the community. *See*, *e.g.*, ER 227 (USCIS Ombudsman Deferred Action Recommendations (July 11, 2011)) ("[a] grant of deferred action indicates that ... the named individual may remain, provisionally, in the United States."); *accord Reno v. Am.-Arab Anti-Discrimination Comm.("AADC")*, 525 U.S. 471, 484 (1999) ("Approval of deferred action status means that ... no action will thereafter be taken to proceed against an apparently deportable alien") (citation omitted).

Congress also considered deferred action and the question of authorized presence in the driver's license context when it passed the REAL

ID Act of 2005, Pub.L.No. 109-13, 119 Stat. 302 (2005) (codified at 49 U.S.C. § 30301 note), which sets forth requirements necessary for state driver's licenses to be valid for federal purposes. In that legislation, Congress provided that "approved deferred action status" constitutes "[a] period of ... authorized stay in the United States" for the purpose of issuing driver's licenses valid for federal identification. 49 U.S.C. § 30301 note, Sec. 202(c)(2)(B)(viii), (C)(ii) (persons with "approved deferred action status" are eligible to obtain REAL ID compliant driver's licenses during "the applicant's authorized stay in the United States"). Thus, federal law defines "lawful status" for driver's license purposes to include "approved deferred action status." *Id.*; *see also* 6 C.F.R. § 37.3 (same).

Similarly, DHS interprets the statutory term "period of stay authorized by the Attorney General" in 8 U.S.C. § 1182(a)(9)(B) to include presence under a deferred action grant. Under § 1182(a)(9)(B)(ii), a noncitizen who is present pursuant to "period of stay authorized by the Attorney General" is not considered to be "unlawfully present" and is therefore not subject to the bars on inadmissibility set forth in § 1182(a)(9)(B)(i). Because deferred action grantees are present in a period of authorized stay, they are not subject to these statutory bars on re-admission. *See* ER 240-42 (USCIS Memorandum: Consolidation of Guidance Concerning Unlawful Presence

for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) (May 2009)); *accord* 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2).

Federal regulations likewise confirm that deferred action is a form of authorized presence. For example, DHS regulations provide that persons "currently in deferred action status" are "permitted to remain in" and "lawfully present in the United States" for purposes of determining eligibility for Title II Social Security benefits. 8 C.F.R. § 1.3(a)(4)(vi).

In addition, under DHS regulations, noncitizens granted deferred action are eligible to receive employment authorization, 8 C.F.R. § 274a.12(c)(14), and in some cases are required to apply for it. *See* ER 377 (USCIS DACA FAQs (Jan. 18, 2013)). The granting of work authorization in the United States further reinforces that DHS has authorized these individuals to be present in the United States.

Regulations promulgated by the Departments of Justice and of State likewise define deferred action to be an "authorized form of continued presence." *See* 28 C.F.R. § 1100.35(b) (discussing relief for human trafficking victims).

Consistent with these authorities, the Board of Immigration Appeals ("BIA"), a branch of the Department of Justice and the highest administrative body for interpreting and applying immigration laws, has

long held that "deferred action status is ... permission to remain in this country." *In re Quintero*, 18 I&N Dec. 348, 349 (BIA 1982); *see also, e.g.*, *In re Pena-Diaz*, 20 I&N Dec. 841, 846 (BIA 1994) (deferred action status "*affirmatively permit[s] the alien to remain*" (emphasis added)); *In re Monreal-Aguinaga*, 23 I&N Dec. 56, 62 n.3 (BIA 2001).

Federal courts also have recognized that deferred action reflects federal authorization or permission to remain in the United States. *See, e.g.*, *Ga. Latino Alliance for Human Rights v. Governor of Ga.* ("*GLAHR*"), 691 F.3d 1250, 1258-9 (11th Cir. 2012) (a noncitizen "currently classified under 'deferred action' status ... remains permissibly in the United States"); *Hispanic Interest Coal. of Ala. v. Bentley* ("*HICA*"), No. 5:11–CV–2484–SLB, 2011 WL 5516953, at *20 n.11 (N.D. Ala. Sept. 28, 2011) (deferred action recipients are persons "whom the federal government has authorized to remain in the United States"), *vacated as moot*, 691 F.3d 1236 (11th Cir. 2012); *In re Guerrero-Morales*, 512 F. Supp. 1328, 1329 (D. Minn. 1981) (noting that deferred action is a decision "whether to permit an alien to remain in the United States").

Although deferred action does not confer a formal "immigration status" under the federal immigration system, an individual's lack of a formal immigration status does not mean that his presence in the United

States is unauthorized. ER 365 (USCIS DACA FAQs at Q1 (Jan. 18, 2013)); *see* ER 177-79 (Cooper Decl. ¶24-27); ER 164 (Yale-Loehr Decl. ¶22). Indeed, numerous categories of persons lacking formal immigration status nonetheless are authorized by the federal government to be present in the United States. *See* ER 178-79 (Cooper Decl. ¶26); ER 164-68 (Yale-Loehr Decl. ¶¶24-31). Such persons include not only DACA recipients and other individuals granted deferred action, but also persons who have pending applications to adjust their status pursuant to the Violence Against Women Act ("VAWA"), *see* 8 U.S.C. § 1255(i), (m); certain applicants for asylum, *see* 8 U.S.C. § 1158(d)(2); 8 C.F.R. § 208.7(a)(1); persons who are applying for "temporary protected status" under 8 U.S.C. § 1254a; and persons with final orders of removal who cannot be removed from the United States. *See Zadvydas v. Davis*, 533 U.S. 678 (2001).

Consistent with these authorities, U.S. Citizenship and Immigration Services ("USCIS") has confirmed that a DACA recipient, like any other deferred action grantee, is "*authorized by [DHS] to be present in the United States*, and is therefore considered by DHS to be lawfully present during the period deferred action is in effect." ER 365 (USCIS DACA FAQs (Jan. 13, 2013)) (emphasis added); *see also id.* at 366 ("[A DACA recipient's] stay is *authorized* by [DHS] while [their] deferred action is in effect") (emphasis

added). USCIS also has confirmed that deferred action under DACA is no different from any other grant of deferred action: "The relief an individual receives pursuant to the deferred action for childhood arrivals process is *identical* for immigration purposes to the relief obtained by any person who receives deferred action as an act of prosecutorial discretion." *Id.* at 367 (emphasis added).

In sum, DACA recipients, like all other deferred action recipients, are federally authorized to be present in the United States.

B. Arizona's Policy Impermissibly Conflicts with Federal Immigration Law.

The district court erred in failing to recognize that Arizona's driver's license policy is conflict preempted. It is well-established that "state laws are preempted when they conflict with federal law." *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012). Conflict is present when the state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress's—whether that 'obstacle' goes by the name of 'conflicting; contrary to; ... repugnance; difference; irreconcilability; inconsistency; violation; curtailment; ... interference,' or the like." *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also, e.g.*, *Arizona*, 132 S. Ct. at 2501; *DeCanas v. Bica*, 424 U.S. 351, 363 (1976).

Arizona law conditions driver's license eligibility on whether applicants can prove that their "presence in the United States is authorized under federal law." A.R.S. § 28-3153(D). However, contrary to the federal law summarized above, Executive Order 2012-06 provides that "the Deferred Action program does not and cannot confer lawful or authorized status or presence upon the unlawful alien applicants," and instructs state agencies to take steps to "prevent Deferred Action recipients from obtaining eligibility, ... for any ... state identification, including a driver's license." ER 200.

Defendants' policy is conflict preempted in at least three critical ways. First, Arizona's classification of DACA recipients as unauthorized to be present is wholly incompatible with federal immigration law, under which all deferred action recipients are authorized to be present in the United States. Second, Arizona's policy is repugnant to and undermines Congress's delegation of discretion to the Executive Branch to determine whether a noncitizen is authorized to be present in the United States and his status while he remains. Third, Arizona's policy undermines the federal goal, as reflected in the federal statutory and regulatory provisions authorizing DHS to grant work authorization, that DACA recipients who are granted employment authorization be able to work here. These fundamental

conflicts combine to create an obstacle to the uniform immigration system that our Constitution requires.

1. Defendants' Conclusion that DACA Recipients Lack Authorized Presence Conflicts with Federal Law.

First, Defendants' policy is conflict preempted because it defines "authorized" presence in a manner inconsistent with federal immigration law. As the Supreme Court has instructed, states may at most "borrow the federal classification" or "follow the federal direction," *Plyler v. Doe*, 457 U.S. 202, 219 n.19, 226 (1982), but they have no independent power to create state-specific immigration status definitions that conflict with federal law. *See, e.g.*, *DeCanas*, 424 U.S. at 364 (indicating a conflict would arise if the state's definition of noncitizens eligible for work conflicted with the class of persons who "may under federal law be permitted to work here").

In holding Arizona's policy not conflict preempted, the district court failed to address the direct conflict between the numerous federal immigration law authorities defining all deferred action recipients as "authorized" to be present, and Defendants' determination that individuals receiving deferred action under DACA are not "authorized." Defendants' policy is inconsistent with federal statutory and regulatory provisions, federal court and BIA decisions, as well as DHS guidance, all demonstrating that under federal law, a grant of deferred action is a federal grant of

authorization to be present in the United States. *See supra* Part I.A. Notably, Congress has provided in the Real ID Act that noncitizens granted deferred action are present in a period of authorized stay for purposes of eligibility for driver's licenses that are valid as federal identification. 49 U.S.C. § 30301 note, Sec. 202(c)(2)(C)(i)-(ii); Sec. 202(c)(2)(B)(viii); *accord*, *GLAHR*, 691 F.3d at 1258 (concluding that a noncitizen "currently classified under 'deferred action' status … remains permissibly in the United States" "[a]s a result of this status"); *see also supra* Part I.A.

Given that Arizona has conditioned eligibility for driver's licenses on presence "authorized under federal law," Supreme Court precedent instructs that it may not redefine such presence in a manner conflicting with federal law. In *Toll v. Moreno*, 458 U.S. 1 (1982), the Supreme Court made clear that states are preempted from imposing a state restriction based on a state-law determination of immigration status that is at odds with federal law. The Court considered a preemption challenge to a state policy denying "in-state" status to a certain category of noncitizens, G-4 visaholders, for resident tuition at public colleges. The Court explained that although "[f]or many ... nonimmigrant categories, Congress has precluded the covered alien from establishing domicile in the United States[,]" Congress placed no such restrictions on G-4 visaholders. *Id*. at 14 (citing *Elkins v. Moreno*, 435 U.S.

647, 664 (1978)); *see also Elkins* at 666 (explaining that Congress "was willing to allow" G-4 aliens to establish domicile in the United States). The Supreme Court explained, "[i]n light of Congress's explicit decision not to bar G-4 aliens from acquiring domicile, the state's decision to deny 'in-state' [tuition] status to G-4 aliens, *solely* on account of the ... alien's federal immigration status" was preempted. *Toll*, 456 U.S. at 14. *Toll* makes clear that a state's miscategorization of noncitizens in a manner inconsistent with federal law violates the Supremacy Clause. Just as a state may not treat G-4 visaholders as if they were nonresident aliens, Defendants may not treat DACA recipients as if they were unauthorized in contradiction with federal law. *See also, e.g.*, *Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 608 (E.D. Va. 2004) ("a policy that classifies [a noncitizen] as an illegal alien, although he ... is lawfully present in the United States under federal law, directly conflicts with federal laws defining categories of persons lawfully or unlawfully present in the United States"); *HICA*, 2011 WL 5516953 at n.13 (a state "cannot, without conflicting with federal law, exclude unlawfully-present aliens from its postsecondary institutions if its definition of unlawfully present aliens conflicts with Congress's definition").

The district court incorrectly concluded that Arizona's policy does not conflict with federal law, even while recognizing that DACA recipients are,

like all deferred action recipients, federally authorized to be present. *See* ER 14-15 ("All deferred action recipients are permitted to remain in the country without removal for a temporary period of time[.]"). Further, the district court reasoned that Arizona's categorization of DACA recipients was not conflict preempted because it involved the issuance of driver's licenses, rather than the direct removal or admission of any noncitizen. *See id.* at 12-13. Yet the court's conflict preemption analysis failed to address the reasoning of the several cases cited by Plaintiffs that demonstrate states may not make their own, conflicting determinations concerning immigration status even in traditional state contexts such as in-state tuition or college admission. *See, e.g.*, *Toll*, 456 U.S. at 14; *Equal Access Educ.*, 305 F. Supp. 2d at 608; *HICA*, 2011 WL 5516953, at *24 n.13.[2] Neither did the court address Congress's guidance in the REAL ID Act.

2. Defendants' Policy Conflicts with Congress'ss Decision to Delegate Immigration Discretion to the Federal Executive.

Second, Defendants' treatment of DACA recipients as not "authorized under federal law," A.R.S. § 28-3153(D), conflicts with and undermines

[2] The district court briefly addressed *Toll* in the portion of its decision analyzing Plaintiffs' "per se" preemption argument, dismissing it as a "conflict preemption case." ER 10. Yet when the district court analyzed Plaintiffs' conflict preemption argument, it wholly ignored *Toll*. *Id.* at 11-13.

Congress's intent that the Executive Branch exercise discretion in the enforcement and administration of the immigration laws, including deciding whether a noncitizen should be authorized to be present in the United States and what his status should be while he remains. *See, e.g.*, 8 U.S.C. §§ 1103(a)(1) (granting to the Secretary of DHS authority over "administration and enforcement" of the Immigration and Nationality Act, including the power to "perform such ... acts as [s]he deems necessary for carrying out [her] authority"); *see also, e.g.*, *id.* at § 1103(a)(2)-(3), 1103(g). The Supreme Court's *Arizona* decision emphasized that "[a] principal feature of [Congress's] removal system is the broad discretion exercised by immigration officials." 132 S. Ct. at 2499. Significantly, the Supreme Court has instructed that the discretion granted by Congress includes the discretion to decide *not* to pursue the removal of a noncitizen and to authorize such persons to remain in the United States. *See id.* ("[f]ederal officials" have discretion to "decide whether it makes sense to pursue removal at all"); *AADC*, 525 U.S. at 483-84 ("At each stage, the Executive has discretion to abandon" the deportation process, including through the "regular practice … known as 'deferred action'"). Notably, Congress has specifically passed legislation to protect the Executive's deferred action decisions and similar

discretionary determinations from judicial review. *See AADC*, 525 U.S. at 483-85 (discussing 8 U.S.C. § 1252(g)).

Here, DHS has exercised its lawful authority to authorize a category of otherwise removable noncitizens to remain in the United States by granting them deferred action. Arizona's treatment of those noncitizens as unauthorized under federal law impermissibly frustrates Congress's intent to vest discretion over such decisions in the federal Executive. Indeed, Defendant Brewer's purpose in deeming DACA recipients unauthorized and ineligible for driver's licenses was to oppose the federal government's discretionary decision to grant them deferred action in the first place. *See supra*, Statement of Facts at II. The Executive's discretion in the administration of the INA is undermined if every state can decide for itself, contrary to the federal government's determination, to treat a particular noncitizen or group of noncitizens as unauthorized.

The conclusion that Defendants' policy conflicts with Congress's vesting of discretionary authority in the Executive Branch is reinforced by the Supreme Court's decision in *Arizona*. There, the Supreme Court struck down as conflict preempted a state law that would have allowed Arizona officers to "decide whether an alien should be detained for being removable." 132 S. Ct. at 2506. The Court explained that "[a] decision on

removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice." *Id.* at 2506-07. The Court held that allowing state officers to decide for themselves whether a particular noncitizen should be arrested for being removable—regardless of whether "federal officials determine [the noncitizen] should not be removed"—was conflict preempted because it "violates the principle that the removal process is entrusted to the discretion of the Federal Government." *Id.* The Court reached this conclusion even though the state law authorized only arrest, and did not authorize the actual removal of any noncitizen from the state.

Although *Arizona* found a conflict with federal discretion in the context of state determinations of removability for purposes of state arrest, this analysis applies to other areas of state action as well. For example, in *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012), the Eleventh Circuit struck down a state provision invalidating contracts entered into by unlawfully present immigrants, holding that the state law conflicted with "Congress['s] inten[t] that the Executive Branch determine who must be removed and who may permissibly remain." *Id.* at 1295. There, the Eleventh Circuit recognized that it is "obvious from the statutory scheme

that Congress intends the Executive Branch to retain discretion over expulsion decisions and applications for relief." *Id.* The Eleventh Circuit held the state law preempted even though it involved contracts—"a matter of traditional state concern." *Id.* at 1295-96.

As in the foregoing cases, Arizona claims for itself the right to determine—wholly independently from any federal determination—whether a noncitizen's presence in the United States is "authorized under federal law," and to impose a significant disability—the inability to drive—based on that state determination. Thus, Arizona's policy conflicts with the federal government's exclusive discretion to determine "whether it is appropriate to allow a foreign national to continue living in the United States." *Arizona*, 132 S. Ct. at 2506.

The district court erroneously held that Defendants' policy does not undermine Congress'ss decision to delegate discretion to the Executive Branch over which noncitizens are authorized to remain because the policy "does not concern the arrest, prosecution, or removal of aliens from the State or the Nation." ER 12-13. Under that reasoning, a state may make its own determinations regarding whether a noncitizen is removable or authorized to be present, so long as those determinations are not made for purposes of arrest, prosecution, or removal. Such a result is untenable in light of the

considerable precedents holding that states may not make independent determinations concerning immigration status if they conflict with federal classifications, even in traditional state contexts such as in-state tuition or the enforceability of contracts. *See Arizona*, 132 S. Ct. at 2506-07; *Toll*, 458 U.S. at 14; *Alabama*, 691 F.3d at 1295.

3. Defendants' Policy Undermines the Federal Government's Determination that DACA Recipients Be Permitted To Work.

Third, Defendants' policy is conflict preempted because it presents a significant obstacle to the federal intent that noncitizens granted work authorization, including DACA recipients, be able to work. The district court incorrectly rejected this argument, questioning whether Congress intended that the Executive Branch have the authority to decide who should be authorized to work. ER 13. But federal law expressly recognizes that the Executive has power to authorize a noncitizen to be employed in the United States. *See, e.g.*, 8 U.S.C. § 1324a(b)(1)(C) (providing that a document is valid as evidence of employment authorization if "the Attorney General finds it, by regulation, to be acceptable" for such purpose), 1324a(h)(3) (defining an "unauthorized alien" as an alien who is not "authorized to be [] employed ... by the Attorney General"), 1324a(h)(1) (specifying certain requirements applicable when the Attorney General "provid[es]

documentation or endorsement of authorization of aliens … authorized to be employed in the United States"); *see also* 8 C.F.R. § 274a.12. Notably, federal law, 8 C.F.R. § 274a.12(c)(14), makes deferred action grantees eligible for employment authorization, and DACA applicants must apply for employment authorization in order to qualify for DACA. *See* ER 377 (USCIS DACA FAQs (Jan. 18, 2013)). These federal statutes and regulations demonstrate that Congress intended for the federal Executive to determine which noncitizens should be permitted to work.

Courts have long recognized that the ability to work often depends on the ability to drive. *See, e.g.*, *Bell v. Burson*, 402 U.S. 535, 539 (1971) (noting that "possession [of a driver's license] may become essential in the pursuit of a livelihood"); *Miller v. Anckaitis*, 436 F.2d 115, 120 (3d Cir. 1970) ("use of an automobile [is] an actual necessity for virtually everyone who must work for a living"). A license to drive is particularly critical to the ability to work in Arizona, where over 87 percent of Arizonans commute to work by car. *See* ER 288 (U.S. Census Bureau, *Selected Economic Characteristics*, *2011 American Community Survey 1 Year Estimates*). Accordingly, Defendants' decision to deny driver's licenses to DACA recipients who are authorized to work impermissibly frustrates the federal

determination that these individuals should be able to secure and gain access to employment.[3]

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That Arizona's policy is conflict preempted in each of the three significant respects discussed above is made even clearer in light of the Constitution's requirement of a uniform immigration system. *See, e.g.*, *Arizona*, 132 S. Ct. at 2506-07 ("Decisions of this nature ... must be made with one voice."); *see also id.* at 2498. Under the district court's view, when USCIS issues a visa to a noncitizen, states and cities are nonetheless free to disregard the federal decision and treat the individual as if he is unauthorized to be present in the United States. The consequence of the district court's holding is that, rather than a uniform system of immigration classification across the 50 states determined by the federal government, for any state or local purpose other than arrest, prosecution, and removal, a noncitizen's immigration status will change every time he crosses a state (or city) border.

[3] Notably, the district court mischaracterized Plaintiffs' conflict preemption argument, suggesting that Plaintiffs had argued that Defendants' policy was directly preempted by the DACA program itself. *See* ER 11-12 (stating that the DHS Secretary's DACA "memorandum does not have the force of law" and therefore has no preemptive force). As Plaintiffs have shown above, however, contrary to the district court's characterization, each of Plaintiffs' conflict preemption arguments identifies conflict with the intent embodied directly in federal statutes or regulations, or both.

But the Supreme Court long ago rejected the view that states are free to regulate contrary to federal law so long as a local purpose is asserted. In *Hines,* the Court emphasized that even though state laws imposing distinct burdens on aliens "may be immediately associated with the accomplishment of a local purpose, they provoke questions in the field of international affairs." *Hines*, 312 U.S. at 66; *see also id.* at 73 ("[T]he treatment of aliens, in whatever state they may be located, [is] a matter of national moment."). Similarly here, the fact that Defendants' policy involves state driver's licenses does not allow the state to negate the federal government's discretion and control over which noncitizens are authorized to be present.

In sum, the district court erred in concluding that Defendants' policy is not conflict preempted.

C. Arizona Has Impermissibly Regulated Immigration By Creating Its Own Classification of Noncitizens Authorized to Be Present.

As Plaintiffs have shown, Arizona's driver's license policy is wholly incompatible with federal law. Rather than accept the federal determination, Arizona has created its own classification of DACA recipients and, in so doing, has intruded on the federal government's exclusive, constitutional power to regulate immigration. The district court erred in rejecting the well-established principle that the power to create immigration classifications is

exclusively federal, and any state attempt to create independent classifications is preempted.

1. State Policies Regulating Immigration Are Constitutionally Preempted.

The district court erred as a matter of law in rejecting the doctrine of "constitutional preemption"—the rule that the Constitution of its own force forecloses states from enforcing policies regulating immigration. The district court based its conclusion on its view that the Court in "*DeCanas* did not adopt a per se preemption rule." ER 9.

Such a conclusion is directly contradicted by a long line of Supreme Court cases including *DeCanas*, where the Supreme Court reiterated the well-established principle that the Constitution gives the federal government exclusive power to regulate immigration. *DeCanas*, 424 U.S. at 354; *Truax v. Raich*, 239 U.S. 33, 42 (1915). This exclusive and "broad undoubted power over the subject of immigration and the status of aliens" derives from the Constitution's grant to the federal government of the power to "establish a uniform Rule of Naturalization" and to "regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3, 4, as well as from the national government's "inherent power as sovereign." *Arizona*, 132 S. Ct. at 2498; *see also Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (recognizing inherent power of sovereign nation to control its borders).

In *DeCanas*, the Court expressly recognized that a state or local law that constitutes a "regulation of immigration [is] *per se* pre-empted by this constitutional power, whether latent or exercised." 424 U.S. at 355 (emphasis added). As the Court explained, "the existence *vel non* of federal regulation is wholly irrelevant if the *Constitution of its own force* requires pre-emption of such state regulation." *Id.* at 355 (emphasis added).

DeCanas relied on a number of early Supreme Court cases that invalidated state laws seeking to regulate immigration even before Congress enacted a comprehensive national immigration scheme. *See Henderson v. Mayor of New York*, 92 U.S. 259, 273-75 (1875) (voiding New York law which required vessel owners to post bond for each landing foreign passenger); *Chy Lung v. Freeman*, 92 U.S. 275, 280-81 (1875) (striking down California statute requiring vessel owners to pay a bond for certain arriving passengers); *see also Passenger Cases,* 48 U.S. 283, 409-10 (1849) (holding unconstitutional New York and Massachusetts laws that imposed head taxes on landing foreign persons likely to become public charges); *DeCanas*, 424 U.S. at 354-55 (citing cases). These cases, decided in the Nation's first century, established that even absent any federal immigration regulation, state attempts to regulate immigration are impermissible. *See generally Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010) ("The Nation's

first 100 years was 'a period of unimpeded immigration' .... It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country") (internal citations omitted).

Indeed, this Circuit has recently reaffirmed that under the doctrine of constitutional preemption, "laws [that are] actual regulations of immigration—that is, were they to actually function as a determination of who should or should not be admitted or allowed to remain in the United States—[] would be preempted." *Lopez-Valenzuela v. Cnty. of Maricopa*, No. 11-16487, 2013 WL 2995220, at *12 (9th Cir. June 18, 2013) (citing *DeCanas,* 424 U.S. at 355). Thus, the district court's holding rejecting the doctrine of constitutional preemption cannot be squared with the precedent of the Supreme Court or this Circuit.

2. The Power to Classify Immigrants is a Core Part of the Power to Regulate Immigration.

The Supreme Court has explained that "Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States." *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977). The power to classify noncitizens is central to the exclusive federal power to regulate immigration because "alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and

to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation." *Plyler*, 457 U.S. at 219 n. 19.[4] Because the power to classify constitutes a regulation of immigration, "[u]ndeniably, '[t]he States enjoy no power with respect to the classification of aliens.'" *Lopez-Valenzuela*, 2013 WL 2995220, at *12 (quoting *Plyler*, 457 U.S. at 225).

3. Defendants' Policy Unconstitutionally Creates an Arizona Immigration Classification which Defines DACA Recipients as "Unauthorized."

Because the district court erroneously rejected the doctrine of constitutional preemption, it failed to consider whether Arizona's state classification of immigrants was preempted as a regulation of immigration. As Plaintiffs have shown, Defendants have classified DACA recipients as not authorized to be present in contravention to the federal government's classification of these same individuals. This is a determination that Defendants cannot make. *See DeCanas,* 424 U.S. at 354-55; *Lopez-Valenzuela*, 2013 WL 2995220, at *12.

[4] The district court attempted to distinguish *Plyler* as an Equal Protection case. However, as the quoted text indicates, *Plyler* addressed questions of preemption to set the groundwork for its Equal Protection holding. Indeed, this Circuit has cited *Plyler* for its precedential value in the preemption context. *See Lopez-Valenzuela*, 2013 WL 2995220, at *12 (quoting *Plyler*, 457 U.S. at 225).

Indeed, Defendants have effectively admitted that their policy is a state-created classification scheme. In the district court, Defendants asserted that they "may separately and validly determine [that] DACA recipients do not have authorized or lawful presence for purposes of Arizona's driver's license statute," which they did when issuing Defendants' policy. ER 481. The district court recognized that "[t]his record suggests that the State's policy was adopted at the direction of Governor Brewer *because* she disagreed with the Obama Administration's DACA program." ER 28 (emphasis added). Defendants' policy towards DACA recipients is, at its core, a protest of the federal regulation of immigration. While Defendants may disagree with federal immigration policy, they cannot do so by creating their own immigration classifications that negate those of the federal government.

Courts have held preempted state attempts to create their own immigration classifications because they were impermissible regulations of immigration. *See Lopez-Valenzuela*, 2013 WL 2995220, at *12 (discussing cases). One district court recently preliminarily enjoined an Alabama law because it created an idiosyncratic state classification of immigrants who are "not lawfully present," emphasizing that "only Congress may classify aliens." *Hispanic Interest Coalition of Alabama* ("*HICA*") *v. Bentley,* No.

5:11–cv–02484–SLB, 2011 WL 5516953, at *23 (N.D. Ala. Sept. 28, 2011), *vacated as moot in part by* 691 F.3d 1236, 1242 (11th Cir. 2012). Similarly, in *LULAC*, the district court held that portions of a California voter-approved initiative were an impermissible regulation of immigration because the state had established its own immigration status classification" that "*is not in any way tied to federal standards.*" *League of United Latin American Citizens v. Wilson* ("*LULAC*"), 908 F. Supp. 755, 772 (C.D. Cal. 1995). *See also, e.g.*, *Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 602-03 (E.D. Va. 2004) (upholding a Virginia higher education admissions policy that deferred to federal immigration classifications, but explaining that the policy would be preempted as a regulation of immigration if the state had crafted its own immigration standard).

By contrast, this Court upheld Arizona's Proposition 100 because it found that "the state-law determination here *is tied* to federal standards." *Lopez-Valenzuela*, 2013 WL 2995220, at *12-*13 (emphasis added).[5] Here, Defendants concede that they created a state-law immigration classification

[5] Plaintiffs' counsel in *Lopez-Valenzuela* plan to file a petition for rehearing en banc. *See Lopez-Valenzuela,* Ninth Cir. No. 11-16487, Order of June 21, 2013 (granting Plaintiffs' request for an extension of time until August 2, 2013, to file a petition for rehearing en banc).

that purposefully rejects the federal standard. Arizona's attempt to regulate immigration is per se preempted under the Supremacy Clause. *Id.* at *12.

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In sum, the district court erred as a matter of law in holding that Plaintiffs were not likely to succeed on their Supremacy Clause claim.

II. PLAINTIFFS HAVE ESTABLISHED IRREPARABLE HARM.

Although the district court rightly determined that Defendants had discriminated against DACA recipients, likely violating the Equal Protection Clause, it erroneously concluded that Plaintiffs suffered no irreparable harm. Moreover, to reach this conclusion, the district court mistakenly applied the standard for mandatory injunctions when Plaintiffs only seek prohibitory injunctive relief.

Regardless, even under the more stringent standard, the court erred in analyzing Plaintiffs' harms. The district court failed to recognize that Defendants' violation of Plaintiffs' constitutional rights, alone, constitutes irreparable injury. Furthermore, the court abused its discretion by ignoring record evidence and reaching unsupportable legal conclusions based on undisputed facts of multiple irreparable harms suffered by the Plaintiffs. While each of the harms is independently irreparable, the district court also erred in failing to consider whether all of the injuries "[t]aken together [are]

sufficient evidence of substantial and irreparable injury." *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1238 n.5 (9th Cir. 1997); *see also, e.g.*, *Cohen v. Brown Univ.*, 991 F.2d 888, 905 (1st Cir. 1993) (district court properly considered "aggregate injury" for irreparable harm).

A. Plaintiffs' Requested Preliminary Injunction is Prohibitory, Not Mandatory.

First, the district court committed legal error in applying the standard for mandatory, and not prohibitory, injunctions to Plaintiffs' claims. Prohibitory injunctions "preserve[] the status quo pending a determination of the action on the merits." *Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 704 (9th Cir. 1988); *see also Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994); *Heckler v. Lopez*, 463 U.S. 1328, 1333 (1983). For purposes of a prohibitory injunction, "[t]he status quo ante litem refers ... to 'the last uncontested status which preceded the pending controversy.'" *GoTo.com, Inc. v. Walt Disney Co*., 202 F.3d 1199, 1210 (9th Cir. 2000) (citations omitted); *see e.g.*, *Regents of the Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 514 (9th Cir. 1984) (last uncontested status in a contract dispute was state of affairs prior to the existence of the contract). Where a litigant seeks to enjoin the enforcement of a law or policy, the status quo was the state of affairs prior to the challenged law or policy. *See Bay Area Addiction*

Research & Treatment, Inc. v. City of Antioch ("BAART"), 179 F.3d 725, 728, 732 n.13 (9th Cir. 1999) (injunction to stop enforcement of a challenged law "is a prohibitory injunction that merely preserves the status quo").

The district court erroneously concluded that the status quo in this case refers to the period *after* Arizona implemented its unconstitutional policy because Plaintiffs could not get driver's licenses prior to DACA. ER 7. But that policy is precisely what is contested in this litigation, and therefore cannot be "the last uncontested status." Further, it is undisputed that prior to the challenged policy, ADOT accepted all EADs as proof of authorized presence, including those presented by all deferred action grantees. *See* ER 4; ER 684-85; ER 681-82 (Jeffries Decl. ¶11). Additionally, as the district court recognized, Plaintiffs are identical in all relevant respects to other deferred action grantees that were and remain eligible for Arizona driver's licenses. *See* ER 14-16. Therefore, *but for* the change in policy at issue in this litigation, a DACA recipient with an EAD would have been eligible for a driver's license.

Because Plaintiffs' requested injunction would merely return the parties to this "last uncontested status" before the subject of the litigation, their requested injunction of Defendants' policy is prohibitory. As such,

Plaintiffs are only required to demonstrate they are "likely to succeed on the merits ... [and that they are] likely to suffer irreparable harm" to be entitled to preliminary relief. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *cf. Dahl v. HEM Pharm. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) (mandatory injunctions require "heightened scrutiny," meaning "the facts and the law clearly favor the moving party"). Here, the district court has already found a likelihood of success on the merits of Plaintiffs' Equal Protection claim. Under the appropriate standard for prohibitory injunctions, Plaintiffs have demonstrated that they are likely to suffer—and, indeed, do suffer—irreparable harm if Arizona's unconstitutional policy barring them from obtaining driver's licenses is not enjoined.

B. Plaintiffs Are Irreparably Harmed By Arizona's Violation of Their Constitutional Rights.

The district court erred by failing to find irreparable injury based on the likely violation of Plaintiffs' Equal Protection and Supremacy Clause rights. ER 33-35. As this Court recently held, "[it] is well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted).

This Court's authority regarding the Equal Protection Clause strongly suggests that discrimination violating the Equal Protection Clause, like all

other constitutional deprivations, will often alone cause irreparable harm. In *Monterey Mech. Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), the Court emphasized that "it is not apparent to us how [money damages] would remedy" harm from "unconstitutional discrimination," and reiterated that "'an alleged constitutional infringement will often alone constitute irreparable harm.'" *Id.* at 715 (citation omitted).[6] This reasoning is consistent with the holdings of other circuit and district courts that a finding of unconstitutional discrimination alone will establish irreparable injury. *See Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 744 (2d Cir. 2000) (finding in an Equal Protection case that "when an alleged deprivation of a constitutional right is involved, most courts hold no further showing of irreparable injury is necessary," and refusing to limit this principle to First Amendment cases); *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960) (a court "has no discretion to deny relief by preliminary injunction" on the basis of irreparable harm once an Equal Protection

[6] Although this Court ordered a remand in *Monterey Mech. Co.* for the trial court to consider granting an injunction in light of the determination that the statute at issue violated the Equal Protection Clause, it strongly suggested that such discrimination constituted irreparable harm. 125 F.3d at 715. Similarly, *Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, on which the district court relied, also recognized that Equal Protection violations involving "intangible" harms cannot be adequately "compensated for by monetary damages." 896 F.2d 1283, 1286 (11th Cir. 1990).

violation has been established); *Maldonado v. Houstoun*, 177 F.R.D. 311, 333 (E.D. Penn. 1997) ("Plaintiffs can demonstrate irreparable harm based on the sole fact that they will be deprived of their constitutional right to the equal protection of law in the absence of an injunction."); *Back v. Carter*, 933 F. Supp. 738, 754 (N.D. Ind. 1996) (collecting cases and finding that "equal protection rights are so fundamental to our society that any violation of those rights causes irreparable harm").

Here, the harm from unconstitutional discrimination to Plaintiffs is precisely the kind of harm that cannot be compensated with monetary damages. As discussed below, *see* Part II.C., Plaintiffs are stigmatized by Defendants' singling them out and treating them differently from all other Arizona residents with EADs. *See, e.g.*, *Chalk*, 840 F. 2d at 709 (collecting cases recognizing that psychological harms caused by discrimination are non-compensable and therefore constitute irreparable injury). Plaintiffs suffer more than simply economic disadvantage or impediments to contract. *Cf. Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1286 (11th Cir. 1990) (finding no irreparable harm where a city ordinance allocates municipal contracting dollars to minority-owned or -controlled businesses because damages were "chiefly, if not completely, economic").

Failing to recognize that the Equal Protection violation suffered by Plaintiffs is non-compensable, the district court attempted to analogize recent copyright cases that decline to presume a likelihood of irreparable harm. ER 34 (citing *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.,* 654 F.3d 989, 997-98 (9th Cir. 2011)). But critically, the cases relied upon by the district court involve neither discrimination nor constitutional injury. And, as this Court has repeatedly and even just recently found, constitutional violations cause irreparable harm. *See, e.g.*, *Ortega Melendres*, 695 F.3d at 1002.

Finally, because Arizona's policy also violates the Supremacy Clause, Plaintiffs are able to establish irreparable harm based on that constitutional violation. *See, e.g.*, *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011) (concluding that irreparable harm was demonstrated in immigration preemption challenge because "an alleged constitutional infringement will often alone constitute irreparable harm"), *aff'd in part, rev'd on other grounds sub nom Arizona v. United States*, 132 S. Ct. 2492; *see also, e.g.*, *GLAHR*, 691 F. 3d at 1269 ("[E]nforcement of a state law at odds with the federal immigration scheme is neither benign nor equitable.").

C. The District Court Abused Its Discretion by Ignoring Evidence of Plaintiffs' Irreparable Injuries.

Further, Plaintiffs have presented uncontroverted evidence that is legally sufficient to demonstrate irreparable harm. However, the district court abused its discretion by misconstruing some evidence of irreparable injury and outright ignoring other evidence of such injury, including the stigmatic harms inflicted by Arizona's discriminatory policy and the threat of prosecution for driving without a license.

1. Harms Related to Employment, Family Relations, and Everyday Activities.

The district court erroneously concluded that because some Plaintiffs have either driven without a license or otherwise managed to arrange for transportation, they have not suffered irreparable injury. ER 35-36. In so doing, the court wholly failed to address evidence of Plaintiffs' non-compensable harms caused by Defendants' policy—including limitations on Plaintiffs' professional opportunities, restrictions on their ability to accomplish simple errands, and an inability to visit family and friends. The district court's failure to address this critical evidence was an abuse of discretion. *See Regents of Univ. of Cal.*, 747 F.2d at 525 (remanding for "[a] full and fair consideration of the parties' claims," and requiring "the district court to address the [] hardships [advanced by the parties] specifically in its findings"); *Polymer Tech. Corp. v. Mimran*, 975 F.2d 58, 61 (2d Cir. 1992)

(finding abuse of discretion because "certain factual evidence relevant to [plaintiff's] claims was not considered").

Record evidence demonstrates that the inability to drive lawfully is a severe disability on individual Plaintiffs and ADAC's members, restricting job opportunities, limiting the freedom to engage in everyday life activities, and requiring dependency on others to accomplish basic tasks. For example, one Plaintiff testified that, despite being groomed to become a manager with his company, he could not be promoted because "it would require me to drive from this location to other locations or meetings to headquarters and [my partner] was not going to always be available to drive me around." ER 672 (Dep. 36:5-10, 44:24-25). Eventually he had to quit "[b]ecause it was a long commute" and he "didn't have reliable transportation[.]" ER 671-72 (Dep. 35:12-16, 36:5-10). He further testified that he was unable to apply to some job opportunities because they required a driver's license. ER 677 (Dep. 46:3-6).

Similarly, another Plaintiff testified that she has lost out on employment prospects that require a driver's license, are too far or out of sync with her primary ride's schedule, or because they ask for a second form

of government-issued identification.[7] As a result, she has been held back from beginning a career in either cosmetology or insurance, setting back her long-term career goals. ER 609 (Dep. 48:1-8). A third Plaintiff has his own business but has been burdened by his inability to drive lawfully, as he is unable to accept work that is not in his immediate vicinity.[8] Likewise, several members of ADAC have lost job opportunities because they were unable to produce a driver's license. *See* ER 585-86 (Dep. 66:3-67:25).

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[7] *See* ER 606 (Dep. 45:14-24 (testifying that "a lot" of the job postings she sees "will say ... on the description ... [you] must have driver's license or must have their own transportation, and things like that. So a lot of those things may be a good fit for me ... but ... I just don't even apply for them because I know that's a problem")); ER 602 (Dep. 28:16-23, 28:21-24 (testifying that she applied to a company with multiple locations, in the hope that she would be assigned somewhere near to her home, allowing for her husband to drive her, but when the company offered her an interview in Tempe, she was forced to decline due to distance from her home)); ER 606 (Dep.45:5-10 (testifying that she turned down an offer of employment at a call center because the hours did not align with her husband's schedule, and he would be unavailable to drive her)); ER 607 (Dep. 46:17-25 (explaining that she has difficulty at job interviews when they ask for two forms of ID, and she only has her EAD)); *see also* ER 299.

[8] *See* ER 635-41 (Dep. 22:4, 52:1-13, 56:4-16 (testifying that he limited his business to areas "not far away from the house" and turns down jobs that are not in his immediate vicinity because "I don't want to risk driving that far ... I might get pulled over ... I wouldn't be able to get back home.")); *see also* ER 638-42 (Dep. 49:8-22, 56:20, 56:22-24, 57:4-5) (testifying that he wants to grow his business, has both the time and capacity to take the jobs he currently has to decline, and that if he could accept all of the jobs that he declines due to distance, his income would be "double or triple" its current size)).

Given the youth of Plaintiffs and other DACA recipients, Defendants' denial of driver's licenses is effectively stunting their careers just as they are supposed to begin. Indeed, courts have long recognized that the ability to drive is critical to the ability to work. *See, e.g.*, *Bell*, 402 U.S. at 539 (noting that "possession [of a driver's license] may become essential in the pursuit of a livelihood"); *Miller*, 436 F.2d at 120 ("use of an automobile [is] an actual necessity for virtually everyone who must work for a living"). In a state like Arizona, the ability to drive is especially crucial. *See* ER 197 (indicating that over 87 percent of Arizona residents commute to work by car).

Plaintiffs' evidence of lost job opportunities and restrictions on career advancement clearly demonstrates irreparable harm. *See, e.g.*, *Lopez v. Town of Cave Creek, Arizona*, 559 F. Supp. 2d 1030, 1036 (D. Ariz. 2008) (finding irreparable harm due to loss of employment opportunities necessary to support plaintiffs and their families). The long-term damage to Plaintiffs' professional development is unquantifiable.

Furthermore, the district court ignored evidence that Plaintiffs' inability to drive lawfully forces them to become dependent on others on a daily basis. Several Plaintiffs testified that Arizona's policy hampers their ability to conduct everyday activities, including social visits with family and

friends or errands such as grocery shopping. They either drive less frequently as a result of their inability to obtain a license,[9] or rely on friends or family that are not always available to drive them.[10] *See*, *e.g.*, ER 622 (Dep. 32:1-2 ("I don't go anywhere without getting a ride, or if I can't, I won't go")); ER 620 (Dep. 29:21-25 (stating that she does not drive for groceries or social outings)); ER 655 (Dep. 36:22-23 (testifying that if he had a driver's license, he would "visit family more often")). One Plaintiff even testified that the lack of state-issued identification prevented her from completing basic errands such as returning merchandise, and disqualified her from viewing an apartment for rent.[11] These types of harms—foregone family visits, missed social opportunities, daily dependency on others, and

[9] *See, e.g.*, ER 597 (Dep. 14:3 (testifying that she drives her husband's car "[o]nly when absolutely necessary")); ER 620-21 (Dep. 29:21-25, 31:14-16 (testifying that although she borrows her sister's car to drive to school or work, she does not drive for grocery shopping or to go out socially)).

[10] *See, e.g.*, ER 598 (Dep. 16:8-18 (testifying that her husband works at night, and "sleeps mostly all day" so is not always available to drive her where she needs to go)); ER 672 (Dep. 36:5-10 (testifying that his husband could not always be there to drive him)).

[11] *See* ER 608 (Dep. 47:7-15 (testifying that she was turned away from viewing an apartment for rent due to lack of state-issued ID)); ER 607-08 (Dep. 46:25-47:6 (testifying that she was told by a store clerk she cannot return merchandise without a state-issued ID)); ER 603-04 (Dep. 36:25-37:4 ("I just feel like I have a lot of things that I would want to do that are kind of on hold because of my situation ... just a lot of places where I show them my work permit, and they just don't accept it.")).

the refusal of services—are injuries that simply cannot be quantified or restored through money damages.

The district court did address the testimony of one Plaintiff who has a four-hour round trip commute to work as a result of his inability to drive lawfully. Although the court acknowledged that that Plaintiff "commutes a significant distance to work by light rail and bus," the court concluded that "that inconvenience does not constitute irreparable injury." ER 36. In the court's view, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of [an injunction], are not enough." ER 36 (quoting *Sampson v. Murray,* 415 U.S. 61, 90 (1974)). But, the court ignored the extent of the injury and mischaracterized the harm as compensable in nature, providing no explanation for how the Plaintiff can be compensated for the many hours unnecessarily lost from his life every week while commuting.

In sum, the district court abused its discretion in failing to address large portions of the record regarding the irreparable harm suffered by Plaintiffs in their everyday lives, and in failing to find with respect to the limited evidence he did address that it establishes irreparable harm.

2. Stigmatic, Psychological Harm.

The district court further erred in failing to consider Plaintiffs'

evidence of stigmatic and psychological harm. The district court abused its discretion in refusing to consider the bulk of Plaintiffs' evidence of such harms, reasoning in part that this issue "was raised for the first time in a reply brief." ER 37. It also abused its discretion in its review of the limited record it did consider.

First, Plaintiffs in no way waived this issue, and in fact alleged stigmatic and psychological harm in their opening preliminary injunction brief. Specifically, Plaintiffs alleged that they were experiencing "emotional and psychological harm because [the lack of a driver's license] creates the perception that they are inferior," citing as an example a Plaintiff's statement that Defendants' discrimination against DACA recipients has "had a huge impact on [him] mentally" because "[i]t's terrible to be the target of discrimination." ER 151; *id.* ("I was crushed when I found out I couldn't get a license[.]"). Thus, Plaintiffs did raise these issues as proof of irreparable harm, and Defendants were on notice.

In any case, Plaintiffs should not have been prohibited from presenting additional argument in their reply. This is so because, as a result of Defendants' request for discovery, new deposition testimony as to these harms arose after Plaintiffs' opening brief but before Defendants' responding brief was due. *See, e.g.*, ER 667-68 (Dep. 15:22-16:1 (stating

she is "[a]lways afraid that [she] might get stopped and get a ticket for not having a driver's license")). Thus, Defendants addressed this evidence in their opposition papers, ER 498-99, and it was entirely proper for Plaintiffs to use this new evidence in their reply.

Finally, the district court abused its discretion in concluding that the evidence of stigmatic harm addressed in Plaintiffs' opening brief was insufficient to constitute irreparable harm. According to the court, "the emotional effect of being denied a driver's license" does not rise to the level of irreparable injury. ER 37. Yet the uncontroverted evidence made clear that the Plaintiff was "crushed," suffered a "huge impact ... mentally," and felt "terrible to be the target of discrimination." ER 151. These harms cannot be compensated with monetary damages, and are by definition irreparable. The court's decision to the contrary must be reversed. *See Chalk*, 840 F. 2d at 709 (collecting cases establishing that irreparable harm based on psychological harm, including "emotional stress, depression, and a reduced sense of well-being" cannot be adequately compensated by monetary damages).

3. Harm From Potential Prosecution for Driving Without a License.

The district court further erred in precluding Plaintiffs from relying on harms stemming from the threat of prosecution for driving without a license.

It is well settled that risk of prosecution is sufficient to establish irreparable injury. *See Wooley v. Maynard*, 430 U.S. 705, 712 (1977) (holding that plaintiffs had demonstrated harms sufficient to justify injunctive relief to redress threat of prosecution for use of automobile); *see also Mesa Petroleum Co. v. Cities Serv. Co.*, 715 F.2d 1425, 1432 (10th Cir. 1983) (concluding that possible prosecution under state securities law constituted irreparable harm). Yet, the district court failed to even consider the evidence in the record of Plaintiffs' well-founded fears of prosecution and, in one instance, evidence of actual prosecution.

As an initial matter, the district court mistakenly found that "Plaintiffs asked the Court to preclude Defendants from inquiring into how Plaintiffs were able to drive ... without valid Arizona driver's licenses," ER 36 n.11, and on this basis precluded Plaintiffs from asserting harms from potential prosecution for driving without licenses. It failed to correct this mistake when it denied Plaintiffs' motion for reconsideration. ER 41-3. However, as the record shows, Plaintiffs did not seek to preclude discovery into Plaintiffs' history of driving without a license, and requested only that the court treat this probative evidence as confidential and subject to a protective order. ER 518, 540-41. Specifically with regard to questions that would directly elicit a confession of driving without a license, Plaintiffs indicated

that they might elect to invoke their Fifth Amendment rights. ER 540-41; *see also Brown v. United States*, 356 U.S. 148, 155 (1958) (right to invoke Fifth Amendment privilege belongs to the testifying party).

Even assuming Plaintiffs originally sought to bar Defendants' inquiries into unlicensed driving, the beneficiary of an order precluding inquiry into a topic may independently "open the door" to questioning on that subject. *See United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988) ("[T]he introduction of inadmissible evidence by one party allows an opponent, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission."); *see also Actuate Corp. v. Aon Corp*., No. C 10-05750 WHA, 2012 WL 2285187 (N.D. Cal. June 18, 2012) ("a grant of a motion in limine does not exclude the evidence under any and all circumstances; the beneficiary of a grant may open the door to the disputed evidence"). Thus, the discovery order does not block the door or bar a beneficiary from introducing relevant evidence that is essential to the case.

Here, during discovery Plaintiffs in fact allowed questions as to—and Defendants inquired into—whether Plaintiffs were driving without a license, and Plaintiffs provided unrestricted testimony on that subject. Plaintiffs

asserted no Fifth Amendment protections and opened the door to the use of this relevant evidence.

In each individual Plaintiff's deposition the parties probed the issue of illegal driving, and the related fear of prosecution. Four of the five individual Plaintiffs stated that they are currently driving without licenses,[12] and it is undisputed that each of the individual Plaintiffs lacks an Arizona driver's license. Three Plaintiffs specifically discussed fears stemming from potential prosecution in their depositions. For example, one Plaintiff testified to "[a]lways being afraid that [she] might get stopped and get a ticket for not having a driver's license." ER 623 (Dep. 37:13-15). Another Plaintiff testified that the fear of being pulled over causes him to avoid going far from home. ER 641 (Dep. 56:4-16). Similarly, a third Plaintiff testified that the individual "want[s] to be able to roam around freely ...without fear ... [of] being pulled over for, you know, like a ticket or something and then possibly [the police] could take my car if I'm pulled over if they see that I don't have a driver's license." ER 655 (Dep. 36:8-16).

The reasonableness of Plaintiffs' fear is irrefutable. Any time Plaintiffs choose to drive, often out of absolute necessity, they run the risk of

[12] *See, e.g.*, ER 622 (Dep. 32:11-19); ER 599 (Dep. 17:3-12; 19:5-10; 20:9-21); ER 650-54 (Dep. 8:3-9; 10:16-20; 11:23-12:7; 12:17-13:10); ER 631-634, 636-37 (Dep. 10:22-11:13; 20:5-21:1; 21:7-21; 27:8-28:3).

being charged and prosecuted. *See, e.g.*, A.R.S. § 28-3473(A); A.R.S. § 28-3151(A). Indeed, one Plaintiff received a traffic citation and fine for driving without a license subsequent to the district court's decision, but the district court refused to consider this evidence in the course of denying Plaintiffs' motion for reconsideration. *See* ER 42; ER 690-96. *See also* ER 657 (Dep. 38:6-7 ("Mentally it's stressful")).

The evidence of risking prosecution or refraining from driving due to fear of criminal charges that was before the district court is plainly relevant to Plaintiffs' showing of irreparable harm, and the court abused its discretion in disregarding this direct and uncontested evidence. *See e.g.*, *Regents of Univ. of Cal.*, 747 F.2d at 525; *Polymer Tech. Corp.* at 61. This was particularly erroneous given that the district court relied on evidence of some Plaintiffs' unlicensed driving to find a *lack* of irreparable injury, yet refused to acknowledge that those same activities invariably include a risk of prosecution. *Compare* ER 35-36 *with* ER 36 n.11. If such facts are relevant to the restrictions Plaintiffs face in their everyday lives, they are surely relevant to showing a threat of prosecution.

In sum, the district court abused its discretion in refusing to consider evidence of harm from the threat of prosecution for driving without a

license. Such harm is undeniably irreparable and warrants a grant of injunctive relief.

D. The Organizational Plaintiff Has Independently Established Irreparable Harm.

Finally, the district court committed legal error and abused its discretion in concluding that ADAC, the organizational Plaintiff, was not irreparably harmed. The court ignored concrete evidence of ADAC's inability to carry out activities that are core to its mission due to Defendants' policy, including time-sensitive activities relating to the 2012 elections. The district court disregarded these harms by reasoning that ADAC's additional effort to combat the Arizona policy was simply part of "fulfilling its mandate," and thus caused no harm. ER 38. The district court also conclusorily dismissed the harms ADAC suffered as "mere injuries of 'money, time and energy,'" and not irreparable harm. ER 38.

As an initial matter, the district court's reasoning would preclude any organizational plaintiff from *ever* being able to demonstrate irreparable harm based on diversion of resources to challenge a new policy impacting its members, since any response to that policy would always fall within the organization's mission. In the context of organizational standing, this Court has routinely found that organizations suffer cognizable harms as a result of unconstitutional state policies, even where that harm is shifting resources

from a core mission to address tangentially related concerns of membership. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (finding standing where an organization's goals were frustrated by the need to expend resources to represent clients that they otherwise would spend on other matters). The question in the preliminary injunction context is whether the harm caused to ADAC and the resulting detraction from the organization's primary advocacy mission is irreparable.

The court committed legal error when it failed to recognize that an organization's diversion of resources could constitute irreparable injury. The type of injury inflicted by Defendants' policy was *irreparable* because it prevented ADAC from carrying out core activities that are central to its mission—namely, promoting the educational success of immigrant youth, increasing civic and community engagement, and advocating for national immigration reform including a federal DREAM Act. *See* ER 38-39. The opportunity to carry out these activities is forever lost and cannot be appropriately compensated by monetary damages—making it exactly the kind of irreparable harm routinely recognized by courts. *See, e.g.*, *MacGinnitie v. Hobbs Group, LLC*, 420 F.3d 1234, 1242 (11th Cir. 2005) (finding irreparable harm based on injuries in the form of lost opportunities

to an organization which "are difficult, if not impossible, to quantity"); *Woodfords Family Servs., Inc. v. Casey*, 832 F. Supp. 2d 88, 101 (D. Me. 2011) ("The loss of an opportunity is probative of irreparable harm, particularly when such lost opportunities cannot be quantified or adequately compensated monetarily.").

Indeed, ADAC began to suffer lost opportunities in the very days following Defendant Brewer's announcement of the policy. In order to mobilize a response to that policy, ADAC curtailed its voter registration and participation campaign—a core project for an organization seeking to promote the election of legislators most sympathetic to ADAC's mission of passing a DREAM Act. ER 577-79 (Dep. 49:25-51:7). For example, from the moment the state announced its policy, ADAC leadership has spent no fewer than four hours a week, and up to fifteen hours a week, every week, answering members' questions and organizing workshops to help them understand Arizona's policy and its implications. ER 580-82 (Dep. 52:6-54:10.). There is no monetary compensation for ADAC's reduced ability to conduct civic engagement activities before the 2012 election as a result of Arizona's policy. This critical time before an election cannot be recaptured and, therefore, cannot be recovered appropriately with monetary damages after the fact.

ADAC also presented evidence of additional irreparable harms. Well over two-thirds of ADAC's core leadership are DACA applicants and grantees whose ability to attend ADAC meetings, rouse volunteers, and work with partners across the state and the nation has been hampered because they cannot obtain an Arizona driver's license. *See* ER 572-74; 575-76 (Dep. 34:21-36:23; 47:19-48:9). Defendants' policy has also limited ADAC's growth and ability to expand its activities to outlying areas, *see* ER 583-84 (Dep. 60:23-61:5), costing the organization numerous advocacy opportunities. The district court failed to consider these significant limitations on ADAC's organizational growth and on the size of its impact—limitations that cannot be quantified in dollar amounts.

The district court's reliance on *Sampson* to conclude that ADAC has not suffered an irreparable injury is misplaced. In *Sampson*, the Supreme Court concluded that the record was virtually devoid of any evidence—or even allegations—that could reasonably constitute irreparable harm. *Id.* at 88 (noting that "no witnesses were heard on the issue of irreparable injury, that respondent's complaint was not verified, and that the affidavit she submitted to the District Court did not touch in any way upon considerations relevant to irreparable injury"). The Supreme Court also determined that the nature of the harm and the legislative history of the statute at issue suggested

that compensation for lost earnings would suffice. *Id.* at 90-91. As discussed above, that is simply not the case here—the record is replete with evidence of ADAC's irreparable injuries.

In closing, the harms suffered by ADAC are *irreparable* precisely because monetary compensation would not serve to regain the ground ADAC has lost in furthering its core mission, the restrictions on its growth and impact, and the diversion of its limited resources to address Arizona's policy. The district court's conclusion that ADAC has not been irreparably harmed must be reversed.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST STRONGLY FAVOR AN INJUNCTION.

The district court also abused its discretion in failing to conclude that the balance of equities and public interest considerations tip sharply in favor of Plaintiffs. The harm to Plaintiffs from denying a preliminary injunction far outweighs the harm to Defendants from granting the motion. As shown above, Defendants' discriminatory and unconstitutional policy denying access to driver's licenses severely hinders Plaintiffs' ability to work and to function as fully participating members of society, inflicts stigmatic and psychological harms, subjects them to a threat of prosecution, and causes a diversion of ADAC's resources. *See supra* Part II.B.-D. In comparison, any hardship to Defendants from a preliminary injunction would be minimal.

Under its previous policy, Arizona issued driver's licenses to all deferred action recipients without distinction. Moreover, it continues issuing driver's licenses to all other deferred action recipients and noncitizens with EADs. *See supra*, Statement of Facts at II. It is clearly not a substantial hardship for Arizona to continue its prior approach in the face of a constitutionally suspect policy.

In addition, a preliminary injunction would serve the public interest by permitting DACA recipients to meaningfully participate in society and contribute to Arizona as a whole, and by enjoining the continuing violation of Plaintiffs' Equal Protection and Supremacy Clause rights. Indeed, "it is always in the public interest to prevent the violation of a party's Constitutional rights." *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002) (internal quotation marks and citation omitted).

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CONCLUSION

For the reasons set forth above, the district court's judgments should be reversed and a preliminary injunction should issue.

Dated: July 15, 2013

Respectfully submitted,

/s/Jennifer Chang Newell
AMERICAN CIVIL LIBERTIES UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECT

/s/Karen C. Tumlin
NATIONAL IMMIGRATION LAW CENTER

/s/Victor Viramontes
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

/s/Daniel J. Pochoda
ACLU FOUNDATION OF ARIZONA

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, that the attached Appellants' Opening Brief is proportionally spaced, has a 14-point Times New Roman typeface and contains 13,409 words or fewer including headings, footnotes, and quotations.

Dated: July 15, 2013

/s/ Jennifer Chang Newell
Jennifer Chang Newell

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for Appellants states that counsel knows of no cases raising the same or closely related issues pending before the Ninth Circuit Court of Appeals.

CERTIFICATE OF SERVICE –
APPELLANTS' OPENING BRIEF

I hereby certify that I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 15, 2013. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 15, 2013

/s/ Jennifer Chang Newell
Jennifer Chang Newell

CERTIFICATE OF SERVICE –
APPELLANTS' EXCERPTS OF RECORD

I hereby certify that on July 15, 2013, pursuant to agreement of the parties, I served the **APPELLANTS' EXCERPTS OF RECORD** by electronic mail on the parties identified below:

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