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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Defendants' driver's license policy likely violates not only the Equal Protection Clause, as the district court held, but the Supremacy Clause, and Plaintiffs are irreparably harmed by these constitutional violations. Defendants' response repeatedly mischaracterizes the facts and law, and fails to respond to the bulk of Plaintiffs' authorities. Defendants instead focus on claiming, erroneously, that the upshot of Plaintiffs' arguments is that states may no longer regulate drivers' licenses. To the contrary, Plaintiffs argue only that state driver's license regulation must be consistent with constitutional mandates. When a state chooses, as Arizona has, to condition licenses on whether an individual's "presence in the United States is authorized under federal law," A.R.S. § 28-3153(D), it may not make that determination independently of and in conflict with federal law.

Defendants disregard the legal consequences of Deferred Action for Childhood Arrivals ("DACA") relief and misapply Supremacy Clause precedent to deem Plaintiffs "illegal people" unauthorized to be present under federal law. Furthermore, Defendants attempt to hide the irreparable harms that arise from their illegal determination behind factual mischaracterizations and misread rulings in this case. Despite these

attempts, Defendants' policy remains unconstitutional; Plaintiffs' injuries are real and non-compensable; and an injunction is necessary.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR PREEMPTION CLAIM

The district court correctly concluded that individuals granted deferred action pursuant to DACA indisputably are authorized to be present under federal law. Arizona's policy is preempted both because it conflicts with federal law and because it usurps the federal government's exclusive power to regulate immigration. Defendants' arguments to the contrary lack merit.

A. Likelihood of Success on Preemption is Relevant to the Preliminary Injunction Analysis

As an initial matter, likelihood of success on preemption affects Plaintiffs' entitlement to a preliminary injunction in multiple respects, contrary to Defendants' assertion. *See* Defs.' Opp. Br. ("Opp.") 42. A Supremacy Clause violation "alone, coupled with the damages incurred, can suffice to show irreparable harm." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009). Further, "it is *clear that it would not be equitable or in the public's interest to allow the state…*to violate the requirements of federal law." *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011); *accord Ga. Latino Alliance for Human Rights v.*

Governor of Ga., 691 F.3d 1250, 1269 (11th Cir. 2012) ("[E]nforcement of a state law at odds with the federal immigration scheme is neither benign nor equitable."). *See* Opening Br. ("Br.") 45, 63.[1]

B. DACA Recipients Are Authorized to Be Present Under Federal Law

Federal statutes and regulations, agency guidance, case law, and Board of Immigration Appeals' decisions uniformly demonstrate that under federal law, individuals granted deferred action, including DACA recipients, are authorized to be present in the United States for a specified period. *See* Br. 14-19. Unable to respond to Plaintiffs' authorities, Defendants emphasize that there is no single catch-all definition of "authorized presence" in the Immigration and Nationality Act ("INA"). Opp. 43. Defendants, however, fail to refute the plethora of authority establishing, at a minimum, that deferred action confers federal authorization to be present in the United States.

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[1] Proposed *amicus* (Dkt. #26-2, at 4-7) raises an argument that Defendants have not, suggesting that this Court may not review the district court's preemption holding because its dismissal of that claim is not ordinarily interlocutorily appealable. This Court clearly has jurisdiction to review the likelihood of success on the merits of claims that have been dismissed below, even where the Court is not reviewing the grant of the motion to dismiss. *See Cotter v. Desert Palace, Inc.*, 880 F.2d 1142, 1144, 1146 (9th Cir. 1989) (reviewing likelihood of success of plaintiffs' "right to work" claim for preliminary injunction purposes, after holding that dismissal of that claim was not appealable).

Perhaps Defendants' most glaring omission is to ignore what Congress has said directly on the question of whether persons granted deferred action are authorized to be present for driver's license purposes. The REAL ID Act provides that "approved deferred action status" constitutes a "period of...authorized stay in the United States" for issuance of federally secure state drivers' licenses. 49 U.S.C. § 30301 note, Sec. 202(c)(2)(B)(viii), (C)(ii); *see also* Br. 14-15. Defendants protest that "[m]ost of the authorities…do not specifically address DACA recipients," but that is irrelevant. Opp. 44. Nothing indicates that DACA recipients are somehow less authorized to be present than all other deferred action recipients. In fact, U.S. Citizenship and Immigration Services ("USCIS") expressly confirmed, and the district court recognized, "[t]he relief an individual receives pursuant to the [DACA] process is identical for immigration purposes to the relief obtained by any person who receives deferred action as an act of prosecutorial discretion." ER 365 (FAQ #7); *see also* ER 14-15 (district court order).[2]

[2] Defendants also cite the Department of Health and Human Services' ("HHS") decision to exclude DACA recipients from the list of "lawfully present" noncitizens eligible for coverage under the Affordable Health Care Act, Medicaid, and the Children's Health Insurance Program. Opp. 11, 46 n.11. Yet HHS's decision to deny access to specific federal health programs does not render DACA recipients unauthorized. *See* ER 14 (district court concluding same). Arizona law requires an individual's "presence in the

Defendants go on to mischaracterize the USCIS DACA Frequently Asked Questions ("FAQs") to assert that DACA recipients' presence is federally authorized only for the purpose of determining inadmissibility. *See* Opp. 44-46. In so doing, Defendants ignore express language in the FAQs to the contrary. FAQ #1 states unequivocally:

> An individual who has received deferred action *is authorized by the Department of Homeland Security (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 (emphasis added). Defendants rely on FAQ #6, but that FAQ hardly supports the notion that DACA grantees are authorized to be present *only* for purposes of determining admissibility. It is their authorized presence that allows DACA grantees to accrue lawful presence. *Id.* ("is authorized…and *is therefore* considered by DHS to be lawfully present" (emphasis added)). Indeed, like FAQ #1, FAQ #6 states that a DACA recipient's "period of stay is *authorized* by the Department of Homeland Security." *Id.* (emphasis added). Thus, FAQ #6's confirmation that deferred action recipients are lawfully present for the specific purpose of determining admissibility is consistent with the statements in FAQs #1 and #6 that DHS has authorized their presence as a general matter.

United States [be] authorized under federal law." A.R.S. § 28-3153(D). USCIS, among other authorities, confirmed in its FAQs that DACA recipients are so "authorized." ER 365-66 (FAQ #1, FAQ #6).

Plaintiffs' experts likewise testified that DACA recipients are authorized to be present in the United States and never suggested, as Defendants contend, that their authorization is relevant only in determining admissibility.[3]

Finally, Defendants cite a Congressional Research Service memorandum, suggesting that noncitizens granted DACA and issued employment authorization documents ("EADs") and Social Security Numbers "are not otherwise authorized to reside in the United States." Opp. 47-48 (citing ER 442). There is no dispute, however, that *but for* the grant of deferred action, most DACA recipients would not "otherwise" be authorized to reside in the United States.[4]

Ultimately, Defendants' contention that DACA recipients are not authorized to be present cannot be squared with federal law or immigration agency guidance.

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[3] *See, e.g.*, SER 950 (Cooper Dep. 60:3-8) ("It's my opinion that DACA recipients are authorized under Federal Law to be present in the United States."); *see also id*. at 947-48, 949; SER 956 (Yale-Loehr Dep. 49:2-19) ("a DACA recipient has presence authorized under federal law").

[4] The Field Manual Defendants cite (Opp. 46 n.10) simply explains that there is a difference between "unlawful presence" and "unlawful status." SER 785. The same passage expressly recognizes that individuals permitted by DHS to remain in the United States are "authorized." *Id.* Whether DACA recipients have a formal, lawful immigration status does not determine whether their presence is "authorized." *See* Br. 17-18.

C. Defendants' Policy is Conflict Preempted

Plaintiffs have established that Arizona's policy is conflict preempted for three reasons: (i) it treats DACA recipients as if they lack authorized presence, in direct conflict with federal law; (ii) it impermissibly undermines the federal government's power to authorize otherwise removable noncitizens to remain; and (iii) it frustrates federal intent that noncitizens granted work authorization be able to work. Defendants' attempts to save their policy from these fundamental conflicts lack merit.

First: As Plaintiffs have shown, Defendants' policy is preempted not only because it contradicts federal law by defining DACA recipients as unauthorized to be present, but also because it imposes a state restriction based on that erroneous state determination. Br. 21-24, 28. *Toll v. Moreno*, 458 U.S. 1 (1982), and other cases demonstrate that a state violates the Supremacy Clause when it restricts access to a state benefit based on a classification of noncitizens inconsistent with federal law. *See* Br. 22-24. Apart from denying they are mischaracterizing DACA recipients (Opp. 48), Defendants have no response to these precedents.

***Second*:** Defendants' policy is also conflict preempted because it treats as "unauthorized" for state purposes the very same DACA recipients that federal authorities have deemed authorized, frustrating the federal

Executive's discretion and control over immigration decisions. Br. 24-29. Because the federal government alone has discretion to decide "whether it is appropriate to allow a foreign national to continue living in the United States," *Arizona v. United States*, 132 S. Ct. 2492, 2506-07 (2012), a state unconstitutionally frustrates that discretion by treating that noncitizen as if she is not allowed to remain in the country when the federal government has decided otherwise. *See id.* at 2506 (preemption where law could result in "unnecessary harassment of some aliens…whom federal officials determine should not be removed"); *Lozano v. City of Hazleton*, __ F.3d __, 2013 WL 3855549, at *16 (3rd Cir. Jul. 26, 2013) (preemption where law "attempt[s] to unilaterally attach additional consequences to a person's immigration status with no regard for…the discretion [granted by] Congress"); *United States v. Alabama*, 691 F.3d 1269, 1295 (11th Cir. 2012) (preemption where law has no regard for "whether the Executive Branch would exercise its discretion to permit the alien's presence").

Defendants contend that their policy does not so conflict and is distinguishable from the laws invalidated in *Arizona* and *Alabama* because it does not determine whether DACA recipients can remain in Arizona. Opp. 48-49. But whether Arizona's policy is conflict preempted does not turn on whether the state is literally deciding whether noncitizens will be allowed to

remain. Indeed, *Arizona* and *Alabama* held that the state laws conflicted with the federal government's immigration discretion even though neither law purported to remove anyone from the state. *See Arizona*, 132 S. Ct. at 2506-07; *Alabama*, 691 F.3d at 1292-93, 1295; *Hazleton*, 2013 WL 3855549, at *15 (noting that *Arizona* concluded that the state law conflicted with federal discretion even though the law does not "purport[] to physically remove any aliens from Arizona").

Nor does it matter for preemption purposes that Defendants' policy involves a state benefit such as drivers' licenses. *See* Opp. 48. Indeed, in *Toll*, the Supreme Court found a conflict based on the state's mischaracterization of certain noncitizens' immigration status for in-state tuition purposes. 458 U.S. at 14. *See also, e.g.*, *Villas at Parkside Partners v. City of Farmers Branch ("Farmers Branch II")*, __ F.3d __, 2013 WL 3791664, at *9 (5th Cir. July 22, 2013) (en banc) (city ordinance regarding housing eligibility held conflict preempted because it "allows state courts to assess the legality of a non-citizen's presence,…opening the door to conflicting state and federal rulings"); *Hispanic Interest Coal. of Ala. v. Bentley* ("*HICA*"), No. 5:11–CV–2484–SLB, 2011 WL 5516953, at *20 n.11, *23-*24 & n.13 (N.D. Ala. Sept. 28, 2011) (holding college enrollment law erroneously defining lawful presence to exclude deferred

action recipients conflicts with federal law), *vacated as moot*, 691 F.3d 1236 (11th Cir. 2012).

Defendants' policy undermines federal discretion by disregarding the federal government's decision to authorize DACA recipients to be present and by imposing a state restriction based on their own contrary judgment.

Third: Defendants' policy also creates an obstacle to the federal intent that deferred action grantees with work authorization, including DACA recipients, have access to employment. Br. 29-31. Defendants fail to respond to Plaintiffs' specific statutory and regulatory citations demonstrating that Congress granted the federal Executive power to authorize a noncitizen to be employed. *Compare* Br. 29-30 *with* Opp. 51. Contrary to Defendants' assertions (Opp. 52 n.13), the record reinforces the obstacles posed by Arizona's policy, demonstrating that Plaintiffs have lost employment opportunities as a result of their lack of reliable transportation. *See* Br. 30, 47-49; *infra* Part III.

D. Defendants' Policy is an Unconstitutional Regulation of Immigration

This Court has held that the classification of noncitizens constitutes impermissible state regulation of immigration because "[u]ndeniably, '[t]he States enjoy no power with respect to the classification of aliens.'" *Lopez-Valenzuela v. Cty. of Maricopa*, 719 F.3d 1054, 1070-71 (9th Cir. 2013)

(quoting *Plyler v. Doe*, 457 U.S. 202, 225 (1982)). This Court's recognition of the constitutional prohibition against state-made alien classifications is consistent with the decisions of numerous courts, including two recent decisions from sister circuits. *See Farmers Branch II*, 2013 WL 3791664, at *9-*10 ("[T]he power to classify non-citizens is reserved exclusively to the federal government[.]"); *Lozano*, 2013 WL 3855549, at *15 (restrictions constituted "an impermissible regulation of immigration…because they intrude on the regulation of residency and presence of aliens in the United States"); *see also HICA*, 2011 WL 5516953, at *23-*24 (state law defining "lawfully present" to exclude some noncitizens who are lawfully present under federal law held preempted as a "'classification' of aliens"),[5] *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 771-72 (C.D. Cal. 1995) (holding state benefits provisions preempted as "impermissible immigration regulation" because the state therein "created its *own* scheme setting forth who is, and who is not, entitled to be in the United States."); *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 602 (E.D. Va. 2004) ("[T]he creation of standards for determining who is and is not in this

[5] Defendants suggest that only conflicts with immigration classifications "that the INA expressly created" are relevant for preemption purposes (Opp. 55) but cite no case law to support this illogical distinction. Moreover, *HICA* directly debunks this contention, finding preempted a law that classified deferred action recipients as "not lawfully present." 2011 WL 5516953, at *20 n.11, *23-*24.

country legally…constitutes a regulation of immigration…not whether a state's determination…results in the actual removal or inadmissibility of any particular alien....").

For example, in *Villas at Parkside Partners v. City of Farmers Branch* ("*Farmers Branch I*"), 577 F. Supp. 2d 858 (N.D. Tex. 2008), the district court held a city ordinance preempted as a regulation of immigration because—like Defendants' policy—it relied on an immigration classification that did "not include all noncitizens lawfully in the country under federal immigration standards" and was "not consistent and coextensive with federal immigration standards." *Id.* at 871; *see also Farmers Branch II*, 2013 WL 3791664, at *9-*10 (holding subsequent version of city ordinance preempted, where "the Ordinance allows state courts to assess the legality of a non-citizen's presence" without "confin[ing] the state court to the federal determination").[6] Defendants' denial of the existence of the doctrine of constitutional preemption and assertion of the power to classify noncitizens

[6] Defendants' use of *John Doe No. 1 v. Ga. Dep't of Pub. Safety*, 147 F. Supp. 2d 1369 (N.D. Ga. 2001), is inapposite. There was no dispute in that case that the plaintiff was an undocumented noncitizen (*id.* at 1371), whereas here, Plaintiffs are deferred action recipients with authorized presence. Indeed, Georgia allows all deferred action recipients including DACA recipients to obtain licenses. Letter from Ga. Attorney Gen. on Issuance of License to Persons Granted Deferred Action Status (Aug. 22, 2012), *available at* http://www.scribd.com/doc/162819761/Ga-Atty-Gen-Ltr.

independently is baseless. Opp. 52-57.

Defendants also mischaracterize Plaintiffs as arguing that "any state law touching on immigration is constitutionally preempted." Opp. 53. What Plaintiffs actually argue is that Arizona's policy is an unconstitutional regulation of immigration because it classifies DACA recipients as lacking authorized presence despite the federal government's contrary determination. Br. 32-39. As discussed above, Arizona cannot create its own immigration classifications without running afoul of the Constitution.

Finally, Defendants claim that they have, in fact, adopted federal determinations. Opp. 56. But Defendants' insistence that DACA recipients are unauthorized to be present is at odds with not only the district court's finding (ER 14-15, 29), but with USCIS' guidance and numerous other federal legal authorities. *See* Br. 14-19; *supra* Part I.B.

Defendants have made a determination of whether a DACA recipient's presence "in the United States is authorized under federal law" independent of the federal classifications. ER 200-01 (Exec. Order 2012-06); *see* A.R.S. § 28-3153(D). Arizona did not adopt or confine itself to federal determinations regarding the authorized presence of DACA recipients. Instead it claimed the power to "*separately* and validly determine [that] DACA recipients do not have authorized or lawful presence." ER 481

(emphasis added). Accordingly, Arizona's independent determination that DACA recipients lack authorized presence is an impermissible regulation of immigration.

II. PLAINTIFFS' REQUESTED PRELIMINARY INJUNCTION IS PROHIBITORY

Preservation of the *status quo ante litem* "refers not simply to any situation before the filing of a lawsuit, but instead 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). As Plaintiffs have shown, the status quo prior to the policy contested in this litigation was that the Arizona Department of Transportation ("ADOT") accepted all EADs, including those presented by all deferred action recipients, as proof of authorized presence. *See* Br. 41. Plaintiffs requested a prohibitory injunction to halt the new policy, and return to the previous state of affairs. *See Regents of the Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 512-13, 514 (9th Cir. 1984) (where "matter in controversy is the terms of the [] contract," injunction enjoining enforcement of that contract was a prohibitory injunction preserving status quo).

Defendants and the district court move the target, arguing that because Plaintiffs had never received drivers' licenses, their lack of drivers' licenses

is the status quo.[7] Opp. 22-23. But Defendants changed their policy preemptively with the intent of making Plaintiffs ineligible for an anticipated benefit. "'Requir[ing] a party who has recently disturbed the status quo to reverse its actions…restores, rather than disturbs, the status quo ante.'" *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012) (quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004)).

Defendants' reasoning is inconsistent with this Court's precedent. For example, in *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999), plaintiffs tried to relocate their methadone clinic to Antioch. Then-existing laws would have permitted the clinic, but before plaintiffs were able to open, Antioch passed a zoning ordinance to prevent it, and plaintiffs sought an injunction. *Id.* at 729. Like Defendants, Antioch argued that an injunction to force the city to allow a clinic there for the first time would be mandatory. This Court held otherwise, determining it was "a prohibitory injunction that merely preserves the status quo." *Id*. at 732 n.13.

[7] Defendants offer an unduly narrow interpretation of the status quo "between the parties." Opp. 21-22. Defendants' reliance on *McCormack v. Hiedeman*, 694 F.3d 1004 (9th Cir. 2012), is inapposite. *McCormack* concerned an overbroad injunction, not the mandatory/prohibitory distinction.

Similarly, in *N.D. v. Hawaii Department of Education*, parents of disabled students in Hawaii's public schools sought an injunction to prevent the state from closing schools on seventeen Fridays and furloughing the teachers. 600 F.3d 1104, 1107-08 (9th Cir. 2010). When plaintiffs filed the case, the challenged furlough contracts already had been signed. This Court held that such an injunction "would maintain the status quo of no furlough days and is a prohibitory injunction—not a mandatory injunction." *Id*. at 1112 n.6. *See also United Steelworkers of Am., AFL–CIO v. Textron, Inc*., 836 F.2d 6, 10 (1st Cir. 1987) (finding injunction requiring Defendant to pay retirement benefits was prohibitory because the last uncontested status was that Defendant was responsible for payments before contracting these to another provider).

In short, Plaintiffs' pre-policy immigration status or access to licenses is immaterial where, here, the litigation concerns a change in Defendants' policy. Plaintiffs' requested injunction is thus prohibitory because it would require ADOT only to revert to its previous policy of accepting EADs from all deferred action recipients.[8]

[8] ADOT continues to accept EADs from all other noncitizens, including EADs presented by deferred action recipients outside of the DACA program, as sufficient to establish authorized presence. ER 687.

III. PLAINTIFFS HAVE ESTABLISHED IRREPARABLE HARM

Both the Individual and Organizational Plaintiffs have established that they face a host of irreparable harms resulting from Defendants' unconstitutional policy. Each type of injury recurs continually: activities and opportunities are restricted, relationships strained, and the stigma persists due to Arizona's policy. The cumulative impact of these harms underscores their irreparability. *See San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1238 n.5 (9th Cir. 1997) (injuries "[t]aken together" can provide "sufficient evidence of substantial and irreparable injury"); *see also, e.g.*, *Cohen v. Brown Univ.*, 991 F.2d 888, 905 (1st Cir. 1993) (affirming finding that "aggregate injury" or "cumulative severity" of harms was irreparable); Br. 39-40.

Faced with a record replete with numerous irreparable harms, Defendants utilize selective snippets from Plaintiffs' testimony, and at times outright mischaracterizations, to ignore the injuries Defendants' policy has wreaked. Despite Defendants' efforts, Plaintiffs have established irreparable harm under any injunction standard.

A. Harm Due to Constitutional Violations

This Court's precedent states unequivocally that "constitutional violations cannot be adequately remedied through damages and therefore

generally constitute irreparable harm." *Am. Trucking Ass'ns*, 559 F.3d at 1059; Br. 42. This Court has *not* held, and Defendants have provided no basis for suggesting, that an exception to this approach exists in the Equal Protection context. Indeed this Court's decisions are to the contrary. *See Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (noting that "it is not apparent how" monetary damages would remedy the harm from "unconstitutional discrimination"); *see also Collins v. Brewer*, 727 F. Supp. 2d 797, 813 (D. Ariz. 2010) (finding irreparable harm from the "serious constitutional and dignitary harms" from likely violation of Equal Protection), *aff'd sub nom. Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011); Br. 42-44.

In any event, even without the benefit of any presumption of irreparable harm for constitutional violations, the particular unconstitutional discrimination suffered in this case is clearly irreparable because it is not compensable by money damages. Critically, the district court never found nor did Defendants contend that the actual discrimination caused by Arizona's policy is compensable—nor could they. As the district court found in its Equal Protection analysis, Defendants' policy was likely motivated by a desire to undermine the Obama Administration and to target so-called "illegal people" from fully realizing their newfound immigration

relief. ER 27-30. Such state-sanctioned discrimination, at the expense of federal immigration policy and a politically unpopular group, is plainly not compensable and warrants an injunction. *See* Br. 44.

Nonetheless, Defendants assert a cramped and inaccurate view of this Court's precedent, arguing that likely constitutional violations establish irreparable harm only "in limited circumstances not present here" and generally confined to the First Amendment context. Opp. 24. But this Court has never articulated such a limitation. Instead, it has held that constitutional violations alone "generally" give rise to irreparable harm unless the violation can be compensated. *See, e.g.*, *Am. Trucking Ass'ns*, 559 F.3d at 1059.

Defendants attempt to distinguish this Court's holding in *Ortega Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012), as limited to Fourth Amendment violations, where the Court also "specifically analyzed the harm alleged." Opp. 25. Defendants misunderstand *Ortega Melendres*, which found "irreparable harm in the form of a deprivation of constitutional rights." *Ortega Melendres*, 695 F.3d at 1002. Moreover, an analysis of the nature of the constitutional violation (here, the discrimination itself) is precisely what the district court failed to do.

Finally, Defendants ignore that a likely violation of the Supremacy Clause also establishes irreparable harm. *See* Br. 45 (citing cases); *see also Am. Trucking Ass'ns*, 559 F.3d at 1058 (holding that a Supremacy Clause "violation alone, coupled with the damages incurred, can suffice to show irreparable harm"); *United States v. S. Carolina*, 720 F.3d 518, 533 (4th Cir. 2013) (finding irreparable harm from state's attempt to enforce its own immigration scheme); *HICA*, 2011 WL 5516953, at *24 (finding irreparable harm based on likely success on the merits of Plaintiffs' preemption challenge).

B. Harms Related to Employment, Family Relationships, and Daily Activities

Defendants cite selected portions of Plaintiffs' testimony regarding driving without a license or obtaining rides from others to support the district court's erroneous finding that they did not establish irreparable harm. Opp. 27-30; ER 35-36. Yet the district court failed to consider, and Defendants fail to refute, the substantial evidence demonstrating that the limitations on driving and need to obtain rides from others cause Plaintiffs irreparable harm on a daily basis. *See* Br. 46-51.

For example, one Plaintiff is self-employed, and the fact that he must turn down customers located outside the Phoenix area due to his lack of a driver's license restricts his ability to expand his business and diminishes his

business' good will. *See* ER 633-42 (testimony that he could double or even triple his business if he was not so restricted). Defendants' citations to his testimony about driving in the Phoenix area, Opp. 29, do not refute this showing of harm. Another Plaintiff testified that he stopped driving when he was granted DACA to avoid liability, is now dependent on public transportation that requires him to spend two hours each way commuting to work, and has not been able to apply for certain jobs because they required a driver's license. ER 669-77. Again, Defendants' citations to his testimony about his pre-DACA driving do not refute this showing of harm. Opp. 29-30.

A third Plaintiff testified that not having a driver's license prevented her from applying for some jobs, and that unavailability of rides forced her to put off important tasks such as buying groceries. ER 597-602. Defendants mischaracterize her testimony, asserting that she has "always a way to get somewhere by car to attend to daily needs such as grocery shopping or taking her children to doctors." Opp. 28. Defendants also create a false impression that she is not currently working because she is "principally a caregiver to her child," Opp. 30, but her testimony clearly shows that she has attempted to obtain employment. Br. 47-48 & n.7. Her lack of state identification also has prevented her from viewing an apartment

for rent, and from returning purchased merchandise to a store. ER 603-08. Defendants' summaries of the other Plaintiffs' testimony is similarly misleading; both testified that their driving and ability to get rides is limited due to their lack of licenses.[9]

C. Stigma and Emotional Harm

Plaintiffs also established irreparable emotional and stigmatic harm. As an initial matter, Defendants dismiss these harms as merely feelings of inferiority and stress around potential prosecution for unlicensed driving. Opp. 31. But Plaintiffs testified to far more, including ongoing stress based on discriminatory mistreatment and lost professional and social opportunities. Br. 52-53.

Defendants also assert incorrectly that only one Plaintiff raised these emotional and stigmatic harms. Opp. 33. In fact, multiple Plaintiffs described the continuous and daily disruption of their lives caused by Defendants' discriminatory denial of licenses, and the effect on their mental and emotional well-being. One Plaintiff testified that "mentally, its

[9] One Plaintiff testified that she drives only to school and work, and does not go anywhere else unless she can get a ride, greatly restricting her ability to take part in social and family functions. ER 620-23. Again, Defendants mischaracterize her testimony by claiming that lack of a license "does not impact her ability to work, go to school, or function in daily life" (Opp. 28) when she testified to the strict limitations on her daily life. Another Plaintiff testified that his lack of a license prevents him from visiting family in Phoenix more often, and from visiting relatives out-of-state. ER 655-56.

stressful." ER 657. Yet another stated that Defendants' facially discriminatory policy has had "a huge impact on [him] mentally" and that "[i]t's terrible to be the target of discrimination." ER 151; *see also* Br. 53.

Defendants' attempt to distinguish *Chalk v. U.S. District Court, Central District of California,* 840 F.2d 701 (9th Cir. 1988), is unavailing. Opp. 32. *Chalk* held that the district court's failure to account for the emotional and stigmatic harms experienced by the plaintiff "was clearly erroneous" because it did not account for the harm stemming from the plaintiff being assigned a "distasteful" job that "involve[d] no student contact, and d[id] not utilize his skills, training or experience" and separated him from students to whom he had grown attached. *Id.* Here, the district court committed similar clear error. Multiple Plaintiffs testified regarding the emotional and stigmatic harm of discrimination due to their inability to present the necessary identification to return clothes or apply for an apartment (ER 607-608), their curtailment of visits with friends and family (ER 655-56), the frustration of ability to grow a nascent business (ER 638-39), or their inability to conduct routine trips (ER 620-22).[10] Thus Plaintiffs, like the plaintiff in *Chalk*, experience deprivation of professional

[10] Just as the district court erred in precluding Plaintiffs' testimony concerning irreparable harm from exposure to prosecution, it also erred in failing to consider the emotional harms from having to drive without a license and fear prosecution, fines, and impoundment.

satisfaction, separation from family and friends, and barriers to performing daily tasks.[11]

Finally, the Supreme Court has "repeatedly emphasized" that intentionally discriminatory policies like Defendants' "perpetuat[e] archaic and stereotypic notions" or "stigmatiz[e] members of the disfavored group as…less worthy participants in the political community [and] can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984). For this reason, courts understand that "general allegation[s] of [intentional] discrimination embraces its inherent harms, such as stigma, insult, and the inability to receive the same opportunities as those who do not face discrimination." *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 238 (S.D.N.Y. 1996), *aff'd in part*, 117 F.3d 37 (2d Cir. 1997). Here, Defendant Brewer's Executive Order sought to ensure there would be "no drivers [sic] licenses for illegal people." ER 28; *see also* SER 969-70 (Defendant Halikowski stating he understands DACA recipients to be "illegal

[11] Defendants also cite *Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506 (2d Cir. 2005), to argue that Plaintiffs' stigmatic and emotional harms are speculative. Opp. 31. But there the court found "no evidence that defendants [had] intimidated plaintiff…from participating in litigation"—the alleged basis of plaintiff's emotional injuries. *Moore*, 409 F.3d at 508.

immigrants"). Defendants' policy seeks to treat DACA recipients as less worthy of participating in social and public life and thus stigmatizes them in an irreparable manner.

D. Harms Stemming from Potential Prosecution

The district court committed clear error in denying Plaintiffs the opportunity to establish irreparable harm based on fear of prosecution for driving without a license. Contrary to the district court's ruling and Defendants' assertions, Plaintiffs requested that only specific categories of information be deemed non-discoverable, but these categories did not include Plaintiffs' driving or licensing. ER 516-18 (requesting limiting inquiries into third parties' immigration status, and Plaintiffs' immigration history and compliance with federal immigration law, including employment history, prior to DACA); *see also* ER 518 (lines 11-12). Plaintiffs only requested that other categories, including "information that may lead to related criminal liability" be subject to a protective order. ER 518. Plaintiffs' counsel specifically stated that they would not object to Defendants' inquiries into driving, but that some Plaintiffs may invoke their Fifth Amendment rights against questions that would directly elicit a confession of driving without a license. *See* ER 540-41 ("Have you driven a car, I believe, would be a question that we would allow...but where we are

concerned for our plaintiffs and where our plaintiffs may opt to take the Fifth Amendment is if it implicates potential criminal liability for them with respect to proper licensing to drive a vehicle."). Plaintiffs did *not* request a blanket prohibition on the use of information regarding unlicensed driving, and the district court should not have precluded Plaintiffs from establishing harm on this basis.

Defendants' assertion that they "never asked whether any of the Individual Plaintiffs, at any time, drove with a driver's license or had a driver's license under another person's name" and "merely asked…that Plaintiffs drove" (Opp. 35-36) evades the key point.[12] It is undisputed that none of the Plaintiffs are licensed to drive in Arizona, and Defendants' counsel inquired into, and received testimony concerning Plaintiffs' unlicensed driving and the harms from that driving. *Cf.* ER 51 (Court order stating "If information on how Plaintiffs *were able to undertake...driving* is unavailable to Defendants, it will also be unavailable to Plaintiffs" (emphasis added)). Indeed, Defendants' counsel specifically asked one Plaintiff whether he or she would fear driving to a job if he or she had a driver's license. ER 641 (lines 10-19) ("If you had a driver's license, would

[12] Since Plaintiffs have been denied, and thus lack, Arizona drivers' licenses, any testimony concerning driving necessarily implicates facts related to unlicensed driving.

you be afraid to take those jobs?"). Another Plaintiff was asked about the psychological harm of driving without a license and testified that "[m]entally it's stressful." *See* ER 657 (lines 5-13), 655; *see also* ER 670 (Defense asking a third Plaintiff "Couldn't you have gotten in trouble before you received your DACA permit for driving?"); *cf.* ER 623 (a fourth Plaintiff testifying "[I am a]lways afraid that I might get stopped and get a ticket for not having a driver's license"). No Plaintiff declined to respond to any such inquiry based upon the Fifth Amendment or any other ground.

Thus, even assuming the district court initially barred Plaintiffs' evidence concerning fear of prosecution validly, it committed clear error by disregarding this evidence after Defendants "opened the door" to it by introducing deposition excerpts related to unlicensed driving to assert that Plaintiffs were not harmed by Defendants' policy. ER 495-98.[13] Under the doctrine of curative admissibility, courts may allow testimony that would be

[13] Defendants mistakenly characterize Plaintiffs' argument regarding opening the door as turning on whether Plaintiffs asserted their Fifth Amendment rights. Defendants also mistakenly assert that Plaintiffs are subject to only civil liability for driving without a license. Opp. 36-37. Arizona imposes criminal penalties for driving without a valid license. *See* A.R.S. § 28-3473(A) ("[A] person who drives a motor vehicle on a public highway when the person's privilege to drive a motor vehicle is...refused or when the person is disqualified from driving is guilty of a class 1 misdemeanor"). Because the Plaintiffs who have admitted to driving without a license have either been refused a license from ADOT (ER 72-75) or ineligible to drive under Defendants' interpretation of state law, they may face criminal liability under Arizona law.

otherwise barred "to remove any unfair prejudice which might have resulted from the evidence" introduced by the opposing side. *United States v. Segall*, 833 F.2d 144, 148 (9th Cir. 1987); *United States v. Makhlouta*, 790 F.2d 1400, 1402-03 (9th Cir. 1986) (holding a party may introduce evidence not previously admitted to rebut a misleading impression created by testimony introduced by the opposing party); *see also London v. Standard Oil Co. of Cal., Inc.*, 417 F.2d 820, 825 (9th Cir. 1969) (applying doctrine in a non-criminal context).

Here, Plaintiffs were asked questions and made admissions that subject them to potential civil and criminal liability. Defendants then used this deposition testimony to create the misimpression that Plaintiffs were not harmed by their lack of licenses, including by threat of prosecution. *See supra* Part III.B. The district court's decision even relied on the fact that certain Plaintiffs have driven and are driving despite not having drivers' licenses, in considering whether Plaintiffs are harmed by having to limit their daily activities. ER 35-36. Yet the district court refused to consider the risk of prosecution that naturally results from those facts. This refusal was an abuse of discretion.

E. ADAC has Established Irreparable Harm

Arizona DREAM Act Coalition ("ADAC"), the Organizational Plaintiff, has likewise established irreparable harm, and Defendants' arguments to the contrary fail.

First, Defendants claim, without authority, that ADAC cannot suffer "irreparable harm by addressing issues that its organization [was] formed to address." Opp. 37. However, ADAC's core mission is "to promote the educational success of immigrant youth, increase civic engagement and community service, and advocate for the passage of the DREAM Act at the national level." ER 306. Having to divert time, effort, and funds to Defendants' new and unconstitutional policy has directly and irreparably harmed the organization. Defendants do not contend—nor could they—that ADAC's lost opportunities to do other work central to its mission can be adequately compensated after the fact.

Second, Defendants allege that the lost opportunities that ADAC suffered related to the 2012 elections as a result of the policy change do not constitute irreparable harm because they are past injuries. Opp. 37-38 (citing *Kaiser v. Blue Cross of Cal.*, 347 F.3d 1107, 1115 (9th Cir. 2003)). However, *Kaiser*—which is not even a preliminary injunction case—simply holds that the ordinary requirement to exhaust administrative remedies in a

Medicare case cannot be waived when plaintiffs can only show that the irreparable injury they would suffer without a waiver was a past injury. The case says nothing about whether past injury can support a finding of irreparable harm for a preliminary injunction. *See Kaiser*, 347 F.3d at 1115-16. Moreover, Defendants do not address the cases cited by Plaintiffs that found irreparable harm for a preliminary injunction based on a showing of lost opportunities—which are necessarily past harms. *See* Br. 59-60. In any event, the record demonstrates that ADAC continues to suffer a myriad of harms, including the opportunity costs of responding to Defendant's illegal policy. *See* Br. 61.

Finally, Defendants fault ADAC for not providing precise quantifications of its revenue, volunteer hours, members' out of state licenses, or of "how many more members it would have, if any, if DACA recipients could get drivers' licenses." Opp. 38. Several of these assertions are refuted by record evidence.[14] Moreover, Defendants fail to cite any case

[14] Although Defendants claim that "ADAC does not keep time records for the work of its members and is unable to calculate the total number of hours spent by ADAC volunteers on any given ADAC project or initiative" (Opp. 38), ADAC's representative testified that in the lead-up to the 2012 election, ADAC members were devoting substantial time and energy to civic engagement activities (ER 578-79) and that after the policy change ADAC leadership spent 4 to 15 hours *every* week on the policy change that would otherwise have been spent on other activities. ER 581-82. In addition, while Defendants contend that "ADAC cannot determine with accuracy how

indicating that such precise quantification is required to establish irreparable harm. Indeed, Defendants' suggestion that ADAC must provide specific dollar figures to quantify its irreparable harm makes little sense, since precisely what makes a harm irreparable is that it is not fully compensable.

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For the reasons discussed above, Plaintiffs have established irreparable harm as a result of Defendants' policy—even if considered under the heightened standard for mandatory injunctions.

IV. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR AN INJUNCTION

Plaintiffs' irreparable harms heavily tip the balance of equities in their favor. As the district court correctly found, Defendants would suffer nothing more than possible inconvenience if their policy is enjoined. ER 39. Defendants now raise as "hardships" the same arguments the district court rejected as rational bases for their policy (ER 30-33) without citing record evidence or legal support. Opp. 40-42. In fact, as the district court found, Defendants lack any real concern about canceling licenses for the many current noncitizen-drivers who could lose their authorized presence. ER 31-

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many of its total members have a driver's license issued by any state" (Opp. 38), the record clearly indicates that over two-thirds of ADAC's core leadership are DACA applicants and grantees whose ability to advance of the work of ADAC has been encumbered because of Defendants' policy. ER 572-74.

33; *see also* ER 31 (finding approximately 47,500 driver's licensed in Arizona on the basis of EADs between 2005-2012). Also, Defendants admitted having "no basis for believing that a driver's license alone could be used to establish eligibility for such [public] benefits" (ER 31-32), nor could they "identify instances where ADOT faced liability for issuing licenses to individuals who lacked authorized presence." ER 31.

Public policy also favors Plaintiffs. "[I]t is always in the public interest to prevent the violation of a party's Constitutional rights." *Ortega Melendrez*, 695 F.3d at 1002. Moreover, there is a public interest represented by "the Constitution's declaration that federal law is to be supreme." *Am. Trucking Ass'ns*, 559 F.3d at 1059-60; *supra* Part I.A.

CONCLUSION

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

Dated: August 26, 2013

Respectfully submitted,

/s/Karen C. Tumlin
NATIONAL IMMIGRATION LAW CENTER

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/s/Jennifer Chang Newell
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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' Reply Brief is proportionally spaced, has a 14-point Times New Roman typeface and contains 6,937 words or fewer including headings, footnotes, and quotations.

Dated: August 26, 2013

/s/ Karen C. Tumlin
Karen C. Tumlin

CERTIFICATE OF SERVICE –
APPELLANTS' REPLY BRIEF

I hereby certify that I electronically filed the foregoing **APPELLANTS' REPLY 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 August 26, 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: August 26, 2013

/s/ Karen C. Tumlin
Karen C. Tumlin

CERTIFICATE OF SERVICE –
APPELLANTS' SUPPLEMENTAL EXCERPTS
OF RECORD VOLUME I (SER 939 - 971)

I hereby certify that I electronically filed the foregoing **APPELLANTS' SUPPLEMENTAL EXCERPTS OF RECORD VOLUME I (SER 939 - 971)** 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 August 26, 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: August 26, 2013

/s/ Karen C. Tumlin
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