No. 15-15307

In the United States Court of Appeals for the Ninth Circuit

ARIZONA DREAM ACT COALITION, *ET AL.*,

Plaintiffs-Appellees,

v.

JANICE K. BREWER, *ET AL.*,

Defendants-Appellants.

Appeal from the United States District Court for the District of Arizona, (Campbell, J.)
Case No. CV12-02546

PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF COUNSEL 1

INTRODUCTION 3

ARGUMENT 7

I. The Supreme Court and Other Circuits Have Held that Informal Executive Branch Communications Lack Preemptive Force. 8

II. If DACA Carried the Force of Law, It Would Be Unconstitutional and Therefore Incapable of Preempting State Law. 11

III. The Panel Ignored Supreme Court Precedent to Find Implied Preemption. 16

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Alden v. Maine,
527 U.S. 706 (1999) 12

Aleman v. Glickman,
217 F.3d 1191 (9th Cir. 2000) 18

Alvarez v. IBP, Inc.,
339 F.3d 894 (9th Cir. 2003) 11

Ariz. Dream Act Coalition v. Brewer,
945 F. Supp. 2d 1049 (D. Ariz. 2013) 4

Ariz. Dream Act Coalition v. Brewer,
757 F.3d 1053 (9th Cir. 2014) 5

Ariz. Dream Act Coalition v. Brewer,
No. CV12-02546, 2015 WL 300376 (D. Ariz. Feb. 20, 2015) 5

Ariz. Water Co. v. Ariz. Dept. of Water Res.,
91 P.3d 990 (Ariz. 2004) 11

Arizona v. United States,
132 S. Ct. 2492 (2012) 1

Barclays Bank PLC v. Franchise Tax Bd. of Cal.,
512 U.S. 298 (1994) 1, 6, 8, 9, 13, 14

Chamber of Commerce v. Whiting,
563 U.S. 582 (2011) 1, 21

De Canas v. Bica,
424 U.S. 351 (1976) 17

Hillsborough Cnty., Fl. v. Automated Med. Labs., Inc.,
471 U.S. 707 (1985) 12

Holk v. Snapple Beverage Corp.,
575 F.3d 329 (3d Cir. 2009) 1, 6, 8

Iowa League of Cities v. EPA,
711 F.3d 844 (8th Cir. 2013) 16

Keller v. City of Fremont,
719 F.3d 931 (8th Cir. 2013) 1, 18

LeClerc v. Webb,
419 F.3d 405 (5th Cir. 2005) 1, 18, 22

McClouth Steel Prods. Corp. v. Thomas,
838 F.2d 1317 (D.C. Cir. 1988) 16

Medellin v. Texas,
552 U.S. 491 (2008) 14

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 21

Perez v. Mortg. Bankers Ass'n,
135 S. Ct. 1199 (2015) 9

Plyler v. Doe,
457 U.S. 202 (1982) 5, 7, 17, 18

Reno v. American-Arab Anti-Discrimination Comm.,
525 U.S. 471 (1999) 15

S.J. Groves & Sons Co. v. Fulton County,
920 F.2d 752 (11th Cir. 1991) 1, 6, 12

Southern Forest Watch, Inc. v. Jewell,
--- F.3d ----, No. 15-5413, 2016 WL 1127828
(6th Cir. Mar. 23, 2016) 9

Texas v. United States,
787 F.3d 733 (5th Cir. 2015) 1, 12, 16

United States v. Mead Corp.,
533 U.S. 218 (2001) 8

United States v. Ochoa-Colchado,
521 F.3d 1292 (10th Cir. 2008) 20

Wabash Valley Power Ass'n v. Rural Electrification Admin.,
903 F.2d 445 (7th Cir. 1990) 8

Wyeth v. Levine,
555 U.S. 555 (2009) 1, 6, 20

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 1, 11, 12, 13

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 4 ..... 11, 13

U.S. Const. art. II, § 3 12

U.S. Const. art. VI, cl. 2 7

STATUTES

5 U.S.C. § 553(b)(A) 9

8 U.S.C. § 1154(a)(1)(D) 14

A.R.S. § 28-3153(D) 3, 7, 10, 16

RULES

Fed. R. App. P. 35(b)(1) 2

Ninth Cir. R. 35-1 2

LEGISLATIVE MATERIALS

DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011) 14

DREAM Act of 2010, H.R. 6497, S. 3962, S. 3963, 111th Cong. (2010) . 14

DREAM Act of 2007, S. 774, 110th Cong. (2007) 15

REGULATIONS

8 C.F.R. § 254.1(d) 22

OTHER

1 Laurence H. Tribe, Am. Const. L., § 5-18 (3d ed. 2000) 17,18

Noah Feldman, *Obama's Wobbly Legal Victory on Immigration*, Bloomberg View (Apr. 6, 2016) 10

Petitioners' Brief, *United States v. Texas*, No. 15-674 (U.S. Mar. 1, 2016) 9

Reply Brief, *United States v. Texas*, No. 15-674 (U.S. Apr. 11, 2016) 7

STATEMENT OF COUNSEL

The panel's decision is contrary to holdings of the Supreme Court of the United States and other Courts of Appeals.

In particular, the opinion departed from Supreme Court and other precedent by treating an enforcement memorandum as carrying the force of law. *E.g.*, *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994); *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015); *Holk v. Snapple Beverage Corp.*, 575 F.3d 329 (3d Cir. 2009). Alternatively, if the memorandum had the force of law, Supreme Court precedent confirms that it was unconstitutionally enacted, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and therefore lacks preemptive force, *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752 (11th Cir. 1991). Either way, neither the executive memorandum nor the statutes it purports to enforce demonstrate the required congressional intent to oust state law in a traditional area of state regulation. *Arizona v. United States*, 132 S. Ct. 2492 (2012); *Chamber of Commerce v. Whiting*, 563 U.S. 582 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Keller v. City of Fremont*, 719 F.3d 931 (8th Cir. 2013); *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005).

Rehearing en banc is therefore necessary (i) to assure uniformity across the Supreme Court's and this Court's precedents and (ii) to resolve the important issue of whether States may set standards, which take federal immigration classifications as given, for issuing state driver's licenses and identification cards. Fed. R. App. P. 35(b)(1); 9th Cir. R. 35-1.

INTRODUCTION

The panel decision rests on a theory—federal preemption—that the district court dismissed, Appellees abandoned, and the panel resurrected in order to avoid affirming its earlier preliminary-injunction decision on grounds that are now untenable.

In every State, including Arizona, state law determines eligibility for driver's licenses. Among the conditions for a driver's license in Arizona is that an applicant "submit proof satisfactory to the [Arizona Department of Transportation (ADOT)] that the applicant's presence in the United States is authorized under federal law." A.R.S. § 28-3153(D). To implement this law, ADOT adopted a policy of issuing driver's licenses to persons who have either (1) formal immigration status, (2) a path to obtaining such status, or (3) relief provided pursuant to the Immigration and Nationality Act (INA). ER145; ER147–51. Any document that establishes one of these situations is "proof satisfactory" to ADOT of presence "authorized under federal law." Among the many documents that can fulfill this requirement are employment authorization documents (EADs) issued by the federal government. With three exceptions, every class of EAD entitles its

holder to an Arizona driver's license. Identified by their federal category codes, the three exceptions are: (a)(11) (deferred enforced departure), (c)(14) (deferred action), and (c)(33) (Deferred Action for Childhood Arrivals (DACA)). The last of these is the product of a memorandum issued in June 2012 by the U.S. Department of Homeland Security that suspends removals of unauthorized aliens who "came to the United States under the age of sixteen" and meet several other conditions. ER478-80. Persons holding every other class of EAD either have or are seeking authorized presence pursuant to the INA, and, as a result, holders of those EADs are eligible for an Arizona driver's license.

Plaintiffs filed suit, alleging that ADOT's refusal to accept (c)(33) EADs as proof of presence "authorized under federal law" violated the Equal Protection Clause (because other EADs, from allegedly similarly-situated applicants, sufficed) and that the INA preempted ADOT's policy. The district court initially denied Plaintiffs' motion for a preliminary injunction while granting Defendants' motion to dismiss the preemption claims. *Ariz. Dream Act Coalition v. Brewer*, 945 F. Supp. 2d 1049 (D. Ariz. 2013). Plaintiffs appealed only the denial of

their own motion, leaving the preemption claims behind. This Court—the same panel that has retained jurisdiction for nearly three years—reversed, finding that a preliminary injunction should issue on equal protection grounds. *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) (Pregerson, Berzon and Christen, JJ.). On remand for consideration of a permanent injunction, the lower court felt "bound to apply" a "more rigorous" level of scrutiny than traditional rational basis and entered a permanent injunction. *Ariz. Dream Act Coalition v. Brewer*, No. CV12-02546, 2015 WL 300376 at *7 (D. Ariz. Feb. 20, 2015).

In the current appeal, Defendants explained that "more rigorous" scrutiny does not apply, *see Plyler v. Doe*, 457 U.S. 202 (1982), and that the full complement of evidence does not support a permanent injunction under the correct standard. At oral argument, the panel unexpectedly pivoted to the long-forsaken topic of preemption. Its resulting opinion, which includes a lengthy recapitulation of the earlier equal-protection reasoning, announced that the panel "need not and should not come to rest on the Equal Protection issue." Op. 3. Instead,

preemption alone formed the panel's basis for permanently enjoining Arizona's driver's license regulations. Op. 23-33.

SUMMARY OF THE ARGUMENT

The heart of the panel's error was finding preemption based on an executive-branch enforcement memorandum when this Court and the Supreme Court have always required that ***Congress*** express a "clear and manifest" intention to oust state law. *Wyeth*, 555 U.S. at 565. Lesser pronouncements from the federal government, including "Executive Branch communications that express federal policy but lack the force of law," are insufficient for preemption. *Barclays*, 512 U.S. at 300; *Holk*, 575 F.3d at 339–42. So, too, are federal measures that would have the force of law (e.g., legislation, formal agency action) but are unconstitutional. *S.J. Groves*, 920 F.2d at 763 ("[O]nly measures that are *constitutional* may preempt state law.").

The DACA memorandum must belong to one of these two categories: either it is an enforcement guide without the force of law, or, if announcing something beyond guidelines for case-by-case prosecutorial discretion, then an unlawful exercise of executive power. Either option lacks preemptive force.

Substantively, without the DACA memorandum to give Plaintiffs a claim to "presence . . . authorized under federal law," A.R.S. § 28-3153(D), there is no basis for preemption. ADOT simply accepted the federal EAD taxonomy and concluded that three types of EADs demonstrate only "tolerated presence"—to borrow a term from the Department of Justice, *see* Reply Br. at 17, *United States v. Texas*, No. 15-674 (U.S. Apr. 11, 2016)—and therefore do not meet the statute's requirement of "authorized" presence. The Supreme Court and other Courts of Appeals have approved States' incorporation of federal immigration classifications. *E.g., Plyler*, 457 U.S. at 226. ADOT's use of such classifications to regulate driver's licenses is the type of police-power interest for which this rule exists.

ARGUMENT

The Supremacy Clause limits its application to duly-enacted federal law: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." U.S. Const. art. VI, cl. 2. As the text provides, documents that are not "Laws of the United States" and laws that are not "made in Pursuance" of the Constitution do not preempt state law,

even if they otherwise clear the already high threshold for preemption. The DACA memorandum fails multiple of these conditions, and without it, Plaintiffs have no claim to an Arizona driver's license.

I. The Supreme Court and Other Circuits Have Held that Informal Executive Branch Communications Lack Preemptive Force.

The Supreme Court has explained that administrative actions can preempt state law only when they result from "formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001); *see also Holk*, 575 F.3d at 340 (concluding that an FDA "policy statement . . . is not entitled to preemptive effect"); *Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) (listing procedures needed for force of law). It is undisputed that the DACA memorandum arose without formal procedures, including notice-and-comment rulemaking, and that the memorandum "confers no substantive right." ER480. According to the Supreme Court and numerous Courts of Appeals, this type of informal Executive Branch communication "lacks the force of law." *Barclays*, 512 U.S. at 330.

This conclusion comports with the Administrative Procedure Act (APA), which exempts from notice-and-comment rulemaking "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). Seizing on this exception, the Department of Justice recently argued in the Supreme Court that DACA's sister program is just such a "statement of policy" that confers no substantive rights and was therefore exempt from notice-and-comment rulemaking. Petitioners' Br. at 66–67, *United States v. Texas*, No. 15-674 (U.S. Mar. 1, 2016). If DOJ is correct, then the corollary also must be true: "convenience comes at a price: Interpretive rules do not have the force and effect of law . . . ." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (quotation omitted); *Southern Forest Watch, Inc. v. Jewell*, --- F.3d ----, No. 15-5413, 2016 WL 1127828, at *3 (6th Cir. Mar. 23, 2016).

Under the federal government's theory, the DACA memorandum lacks the force of law. As an alleged exercise of prosecutorial discretion, it is similar to the "precatory" statements that the Supreme Court said "express federal policy but lack the force of law [and] cannot render unconstitutional California's otherwise valid [statute]." *Barclays*, 512

U.S. at 330. This insight did not escape legal commentators, including Noah Feldman of Harvard Law School, who wrote within 24 hours of the panel's decision that "[t]he Ninth Circuit pushed the envelope" because "[t]he legal authority for deferred-action status isn't federal law," but rather prosecutorial discretion. Noah Feldman, *Obama's Wobbly Legal Victory on Immigration*, Bloomberg View (Apr. 6, 2016), *available at* http://tinyurl.com/h82d3f3; *see also id.* ("[T]he dreamer rule wasn't passed by Congress. It's an executive order, something that isn't mentioned in the supremacy clause.").

The Constitution does not countenance preemption by memo, and for good reason. If it did, each successive presidential administration could alter and re-alter States' laws with minimal process and ever-worsening erosion of state sovereignty. If the federal government is correct that the DACA memorandum is mere enforcement guidance, then it lacks the force of law. It cannot, therefore, confer "presence . . . authorized under federal law," A.R.S. § 28-3153(D), and it certainly cannot preempt state statutes and regulations governing driver's licenses.

This Court should grant rehearing en banc to confirm that only statutes and formal administrative actions carry the force of law and that ADOT reasonably applied Supreme Court precedent to conclude that unlawful presence—even if "tolerated" by the executive—remains unauthorized for purposes of A.R.S. § 28-3153(D).[1]

II. If DACA Carried the Force of Law, It Would Be Unconstitutional and Therefore Incapable of Preempting State Law.

If the DACA memorandum ***does*** have the force of law, then its enactment was inconsistent with the Constitution's separation of powers. The Constitution specifies that "Congress shall have the power . . . [t]o establish a uniform rule of naturalization." U.S. Const. art. I, § 8, cl. 4. Because Congress has exercised that authority on numerous occasions—and abstained from exercising it on others—the President's unilateral power in this area is "at its lowest ebb." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Under these circumstances, the President must "take Care that the Laws be faithfully executed." U.S.

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[1] This Court defers to a state agency's reasonable interpretation of a statute if the courts of that State would do likewise. *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 911 (9th Cir. 2003). Under the present circumstances, Arizona courts afford "considerable deference." *See Ariz. Water Co. v. Ariz. Dept. of Water Res.*, 91 P.3d 990, 998 (Ariz. 2004).

Const. art. II, § 3. If the DACA program amounts to a "substantive" rule suspending the INA for a class of noncitizens, *Texas*, 787 F.3d at 762–66, then it lies beyond the President's unilateral power, violates the Take Care clause, and, consequently, lacks preemptive force.

Consistent with the Supremacy Clause's limitation to laws "made in Pursuance" of the Constitution, courts require that federal action be constitutional in order to preempt state law. *Alden v. Maine*, 527 U.S. 706, 731 (1999) ("As is evident from its text, however, the Supremacy Clause enshrines as 'the supreme Law of the Land' only those Federal Acts that accord with the constitutional design."); *Hillsborough Cnty., Fl. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985); *S.J. Groves*, 920 F.2d at 763.

One feature of our "constitutional design," *Alden*, 527 U.S. at 731, is the separation of powers. In the case of executive action encroaching on the power of Congress, the Court uses a three-part framework for analyzing separation-of-powers challenges. Under that framework, the President wields the greatest power—that assigned to both the executive and legislative branches—when acting "pursuant to an express or implied authorization of Congress." *Youngstown*, 343 U.S. at

635 (Jackson, J., concurring). When Congress has taken no action, the President "can only rely upon his own independent powers" in Article II. *Id.* at 637. Finally, when the President "takes measures incompatible with the expressed or implied will of Congress," the executive "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* Because the Constitution expressly entrusts immigration to Congress, U.S. Const. art. I, § 8, cl. 4, the President is powerless when acting contrary to the express or implied will of Congress in this area.

Under conditions similar to the present case, the Supreme Court has found that the President's actions were contrary to congressional intent. In *Youngstown* itself, existing legislation on the topic of property seizure was sufficient to preclude President Truman from seizing steel mills under Article II's commander-in-chief authority. 343 U.S. at 639 & nn.6–8 (Jackson, J., concurring). In *Barclays*, the Court pointed to a history of failed legislation seeking to ban California's method of tax collection: "Congress has focused its attention on this issue, but has refrained from exercising its authority," thus "yield[ing] the floor" to the States, not the executive. 512 U.S. at 329; *see also id.*

at 324–26 & nn.24–25 (tracing legislative proposals). Even more recently, the Court held that a "Memorandum of the Attorney General" could not make a non-self-executing treaty binding upon the States, notwithstanding the President's "plainly compelling" interests in the conduct of foreign affairs. *Medellin v. Texas*, 552 U.S. 491, 524–26 (2008).

Like *Youngstown*, *Barclays*, and *Medellin*, the present case belongs in the third and most constrained *Youngstown* category. Congress has spoken specifically on the subject of class-wide deferred action, *see, e.g.*, 8 U.S.C. § 1154(a)(1)(D) (providing such class-based relief for the children of self-petitioners under the Violence Against Women Act), but has not extended such treatment to the group of noncitizens covered by DACA. As in *Youngstown*, existing legislation on the same topic strips the executive of the ability to enact a parallel program unilaterally. Moreover, as in *Barclays*, Congress has considered and rejected legislation that would have accomplished what the Executive ultimately attempted in response to legislative inaction. *See, e.g.*, DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011); DREAM Act of 2010, H.R. 6497, S. 3962, S. 3963, 111th Cong. (2010);

DREAM Act of 2007, S. 774, 110th Cong. (2007). Under these precedents from the Supreme Court, the President was powerless to create a class-based program of deferred action.

Finally, all of the evidence suggests that the DACA program operates as just such a substantive change in the law. For example, over a span of 80 days, USCIS approved almost 103,000 DACA applications. ER470. As a point of comparison, Secretary Napolitano testified that DHS approved a total of 900 applications for deferred action over the entire year of 2010. *Id.* The change in approval rate from 2010 to the DACA program amounts to a 52,200% increase in approvals. The notion that an increase of that magnitude could occur without shifting to class-based eligibility is not plausible. *See* Appellants' Supp. Br. at 15–17.

This class-wide suspension of the INA cannot squeeze within the meaning of prosecutorial discretion, which the Supreme Court has noted occurs "on a case-by-case basis." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 n.8 (1999); *see also* Appellants' Supp. Br. at 11–19. The only evidence in the record indicates that case-by-case determinations are not occurring. While the

panel decision appears to accept DOJ's assertion that DACA actually operates as traditional prosecutorial discretion, Op. 33, other Courts of Appeals have refused to take similar bait. *Texas*, 787 F.3d at 763 (noting that 5% denial rate, likely due to errors or ineligibility for the program, supported a finding of no case-by-case review); *McClouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320–21 (D.C. Cir. 1988) (holding that where a model was used to resolve 96 out of 100 applications, it was a substantive rule); *Iowa League of Cities v. EPA*, 711 F.3d 844, 865 (8th Cir. 2013) (rejecting agency's "pro forma reference to . . . discretion" as "Orwellian Newspeak").

This Court should grant en banc review to confirm that a half-hearted claim of case-by-case discretion cannot mask a substantive legal change and that such a policy must be constitutional in order to have preemptive force. In the case of DACA, the change in immigration law violated the separation of powers and the Take Care Clause.

III. The Panel Ignored Supreme Court Precedent to Find Implied Preemption.

Without the DACA memorandum, Plaintiffs have no claim to "presence . . . authorized under federal law." A.R.S. § 28-3153(D). Anticipating this deficiency, the panel doubles down, asserting that

even if DACA does not preempt ADOT's treatment of (c)(33) EADs, federal immigration law nevertheless preempts ADOT's incorporation of federal EAD classifications. Op. 28 n.8. The Supreme Court and other Circuits disagree. As long as a State takes federal classifications as given, the "State may borrow the federal classification." *Plyler*, 457 U.S. at 226.

As a preliminary matter, the federal government's authority over the "admission, removal, and presence of aliens," Op. 24 (citing *Plyler*), is not in question. The Supreme Court has described the field of federal authority as "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *De Canas v. Bica*, 424 U.S. 351, 355 (1976) *superseded by statute in irrelevant part as recognized in Arizona*, 132 S. Ct. at 2503. Notably, however, this field of federal authority does not preclude all state "act[ion] with respect to illegal aliens." *Plyler*, 457 U.S. at 225. Indeed, "[o]utside the context of entry, stay, and naturalization, congressional authority to regulate the activities of aliens . . . loses its clear connection to considerations of national sovereignty and foreign policy." 1 Laurence H. Tribe, Am. Const. L.,

§ 5-18, at 975 (3d ed. 2000) (cited in *Aleman v. Glickman*, 217 F.3d 1191, 1199 (9th Cir. 2000)).

The regulation of driver's licenses is a quintessential exercise of state police power, unconnected to "considerations of national sovereignty and foreign policy." *Id.; see also Plyler*, 457 U.S. at 228 n.23 (distinguishing between "entry into this country" and "traditional state concerns"). On the same reasoning, the Fifth Circuit reasoned that the Constitution "did not deprive the states of all power to legislate regarding aliens." *LeClerc*, 419 F.3d at 423. And the Eighth Circuit upheld an ordinance limiting unauthorized aliens' ability to rent property because the law did not encroach on "the federal government's exclusive power in controlling the nation's borders." *Keller*, 719 F.3d at 941.

As an exercise of the police power, ADOT's policy "borrow[s]" federal immigration classifications for the purpose of accomplishing the State's rational interest in regulating driver's licenses.[2] *Plyler*, 457 U.S.

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[2] Of course, the Parties dispute whether ADOT's use was, indeed, rational under the Equal Protection Clause, but that question is immaterial for preemption purposes.

at 226. Its policy adheres to EAD classifications created by the federal government. It is ironic that the panel's equal-protection analysis has no trouble describing ADOT's policy in terms of federal EAD classifications: (c)(9) and (c)(10) EADs satisfy ADOT's conditions, while (a)(11), (c)(14), and (c)(33) EADs do not. *See* Op. 7, 12. These classifications are not ADOT's. Moreover, ADOT does not tamper with the federal classifications by, for example, dividing (c)(33) EAD-holders (DACA beneficiaries) brought to the United States before the age of five from those who entered the country after their fifth birthdays. Such conflicting re-classification would trigger preemption, but ADOT does no such thing. It is baffling, therefore, that the panel opinion simultaneously recognizes the permissibility of "incorporat[ing] federal immigration classifications," Op. 25, while faulting ADOT for "arranging federal classifications in the way it prefers," *id.* at 28. The Supreme Court's approval of "borrowing" has no meaning if States cannot "arrange" the borrowed federal classifications in a way that responds to the State's regulatory project.

In fact, ADOT's policy includes a second layer of deference to the federal system by asking which EADs establish "presence . . .

authorized under federal law." As discussed, ADOT's conclusion about which EADs establish authorized presence "under federal law" tracks the Supreme Court's explication of which federal pronouncements have the force of law. *See supra* Part I & n.1. On the specific subject of EADs, other courts have recognized that permitting a noncitizen "to remain in the country temporarily [does] not render his presence in this country lawful, even when coupled with the receipt of an EAD." *United States v. Ochoa-Colchado*, 521 F.3d 1292, 1294 (10th Cir. 2008).

Not only is ADOT's policy consistent with the Supreme Court's approval of States borrowing federal classifications, but Plaintiffs' challenge cannot overcome the strong presumption against preemption. The panel acknowledges that "issuance of driver's licenses" is "admittedly an area of traditional state concern." Op. 27 (citing *Whiting*, 131 S. Ct. at 1983). As a result, the presumption against preemption applies, and Plaintiffs must show that preempting ADOT's treatment of (c)(33) EADs was the "***clear and manifest*** purpose" of Congress. *Wyeth*, 555 U.S. at 565 (emphasis added); *see also* Appellants' Supp. Br. 31-52 (discussing lack of congressional intent to preempt).

Far from condoning such a conclusion, the Supreme Court has held that Congress did not intend to forbid States from regulating licenses based on federal immigration law. Like the current case, *Whiting* concerned state licensing requirements, specifically Arizona's incorporation of the federal E-Verify system as a condition for maintaining a business license. The Court upheld this use of the federal immigration system, rejecting an argument for implied preemption. 563 U.S. at 600-07.

Finally, at a logical level, the panel's reasoning, which condemns ADOT's policy for the sin of borrowing and then "arranging" federal classifications, fails in light of the multiplicity of federal "arrangements" and the absence of congressional intent indicating that any of them controls the States' authority to issue driver's licenses. The panel's distinction between "borrowing" and "arranging" is without support from Congress—"the ultimate touchstone in every pre-emption case," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)—and undermines what the Supreme Court has expressly allowed.

The panel's reasoning would amend *Plyler* to require States to borrow ***both*** the federal classifications ***and*** one of their "arrangements"

under federal law. But those arrangements, which are not tailored to the task at hand, might exclude some persons to whom the State would prefer to issue licenses. *E.g.*, 8 C.F.R. § 254.1(d) (defining "lawful immigration status"); *see also* Op. 31-32 (noting other ways in which the federal government arranges classifications to suit specific purposes). The panel provides no evidence that Congress clearly and manifestly intended to preempt better-tailored incorporations of federal classifications (like ADOT's) while allowing more blunt incorporations that also borrow a federal "arrangement" of classifications. This absurdity illustrates the panel's error in attempting to honor *Plyler*'s permissible "borrowing" while faulting ADOT for how it "arranges" the borrowed classifications. Perhaps for this reason, the key sentence of the panel's preemption holding is without any citation to another court that has found preemption based on a State borrowing and then "arranging federal classifications." Op. 28; *cf. LeClerc*, 419 F.3d at 423 (upholding state "arrangement" that permitted most aliens to take the bar exam but excluded non-immigrant aliens because their status could impede the State's "regulatory and disciplinary efforts").

Congress has done nothing to evince a desire to bar States from incorporating federal EAD classifications for the purpose of serving the State's legitimate police-power interests. ADOT's rule adheres to federal classifications, if not federal enforcement policy. But, as explained in Parts I & II *supra*, the latter is insufficient to preempt state laws.

CONCLUSION

The panel decision disrupts other courts' unequivocal requirement that only a clear and manifest statement from Congress can trigger preemption under the Supremacy Clause. Because that Clause does not extend to executive memoranda lacking the force of law or to unconstitutional Article II-made legislation, this Court should rehear the case en banc and correct the panel's mistake.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 9th Cir. R. 40-1(a) because this brief contains 4,165 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 May 19, 2016. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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