No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JANICE K. BREWER, Governor of the State of Arizona, in her official capacity; JOHN S. HALIKOWSKI, Director of the Arizona Department of Transportation, in his official capacity; and STACEY K. STANTON, Assistant Director of the Motor Vehicle Division of the Arizona Department of Transportation, in her official capacity,

Petitioners,

v.

ARIZONA DREAM ACT COALITION; JESUS CASTRO-MARTINEZ; CHRISTIAN JACOBO; ALEJANDRA LOPEZ; ARIEL MARTINEZ; and NATALIA PEREZ-GALLEGOS,

Respondents.

Application To Stay The Mandate Of The United States Court Of Appeals For The Ninth Circuit Pending Disposition Of A Petition For Writ of Certiorari

---

DIRECTED TO THE HONORABLE ANTHONY KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

Timothy Berg
FENNEMORE CRAIG, P.C.
2394 E. Camelback Road, Suite 600
Phoenix, Arizona 85016-3429
Telephone: (602) 916-5000
Email: tberg@fclaw.com
Counsel of Record for Petitioners
Governor Janice K. Brewer,
John S. Halikowski and Stacey K. Stanton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

CASES

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

STATE STATUTES

REGULATIONS

RULES

OTHER

To the Honorable Anthony Kennedy, Associate Justice of the Supreme Court and Circuit Justice for the Ninth Circuit Court of Appeals:

Pursuant to Rules 22 and 23 of this Court's rules, as well as 28 U.S.C. § 1651(a),[1] Governor Brewer, Director Halikowski, and Assistant Director Stanton (collectively, "ADOT") respectfully present this application to stay the enforcement of the Ninth Circuit Court of Appeals' opinion in *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) (Appendix **Exhibit A** and referred to herein as the "Opinion").

INTRODUCTION

This case presents fundamental issues of Constitutional law and state sovereignty, the significance of which cannot be downplayed in light of the Executive Branch's continued expansion of deferred action and refusal to enforce federal immigration law. Specifically, it involves determining whether a federal agency's informal policy memorandum to ignore federal law preempts a long standing state driver's license law and assessing whether any state action can pass muster under the court of appeals' exacting application of rational basis review, a form of review that typically involves great deference to the State.

This Court should stay the Ninth Circuit's mandate for several important and urgent reasons. First, although the procedural posture of this case presents these issues in the context of a preliminary injunction, failing to intervene now will result in the status quo being changed in a way that is not easily remediable if

[1] Section1651(a) preserves the Supreme Court's inherent "power to hold an order in abeyance" by granting a stay. *See Nken v. Holder*, 556 U.S. 418, 427 (2009) (citations omitted).

ADOT ultimately prevails after a full trial of the merits. Despite the Ninth Circuit's conclusion to the contrary, the district court properly concluded that Plaintiffs seek a mandatory injunction. Now, Arizona is not only being ordered to disregard long standing state law, it is being ordered to take action that is contrary to preserving the status quo. The Ninth Circuit is re-writing Arizona law in a preliminary ruling, not just stopping a law from taking effect.

Second, there is a reasonable probability that four members of this Court will grant ADOT's petition for certiorari and there is a significant possibility of reversal because: (1) the Opinion's preemption analysis will serve as precedent going forward to allow informal agency policy to preempt State action in contexts that have long been reserved to the States; and (2) the Opinion's improper application of rational basis review ensures that any State action will fail even under minimal scrutiny.

BACKGROUND

A. Factual Background.

This case arises from a challenge to an Arizona Department of Transportation ("ADOT") policy that does not allow employment authorization documents ("EADs") with category code C33 as proof of authorized presence in the United States for purposes of obtaining an Arizona driver's license. Individuals who obtain deferred action pursuant to the Deferred Action for Childhood Arrivals ("DACA") program are assigned category C33 if issued an EAD.

In June 2012, the Department of Homeland Security ("DHS") issued a memorandum (the "DACA Memo") announcing its administrative policy choice to

defer the removal of certain illegal immigrants who were brought to the United States as children (the "DACA Program"). *See* May 16, 2013 District Court Order at 1, 3-4 (Appendix **Exhibit B** and referred to herein as "Order"); *see also* DACA Memo at 1 (Appendix **Exhibit C**). As part of the DACA Program, DACA recipients may apply for work authorization. DACA Memo at 3. Notably, DHS issued its policy memorandum after Congress repeatedly refused to pass federal immigration legislation to grant legal status to such individuals. DHS has been clear to point out (in the DACA Memo itself) that the DACA Program does not confer any substantive right or immigration status and that "[o]nly the Congress, acting through its legislative authority, can confer these rights." *Id.* at 3.

Under long standing Arizona law, 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). In response to DHS's announcement of the DACA Program, Arizona Governor Jan Brewer issued Executive Order 2012-06 (the "Executive Order"). Order at 5. The Executive Order directed state agencies to conduct a full statutory, rulemaking, and policy analysis to prevent DACA recipients—who remain in the United States without legal immigration status—from obtaining eligibility for any state or public benefit, including an Arizona driver's license, to which they are not entitled under Arizona law. *Id.*

ADOT had previously accepted EADs as satisfactory proof of authorized presence under federal law, providing driver's licenses to such individuals. *Id.* at 2.

In response to the DACA Memo, ADOT conducted an internal review to assess whether the new category code for DACA recipients, C33, satisfied A.R.S. § 28-3153(D). Order at 5. On September 17, 2012, ADOT revised its policy to provide that EADs issued to DACA recipients (identified by category code (c)(33)) do not constitute sufficient evidence of authorized presence. Order at 2, 5; Opinion at 8.

B. Procedural History.

The Arizona Dream Act Coalition and five individual DACA recipients (collectively, "Plaintiffs") sued ADOT, arguing that ADOT's policy violates the Supremacy Clause of the United Stated Constitution and the Equal Protection Clause of the Fourteenth Amendment. Order at 2. Plaintiffs subsequently filed a preliminary injunction motion, and ADOT filed a motion to dismiss the case. *Id.* The district court denied Plaintiffs' preliminary injunction motion and granted in part, and denied in part, ADOT's motion to dismiss. *Id.* at 2-3.

Plaintiffs appealed the denial of a preliminary injunction. *See generally* Opinion at 5. On September 17, 2013, after a thorough review of policy and while Plaintiffs' appeal was pending, ADOT revised its policy to ensure full compliance with the authorized presence requirements of A.R.S. § 28-3153. *See* Defendants' Notice of Revision to Policy 16.1.4 Concerning Acceptance of Employment Authorization Cards, Doc. 172, at 2-3 (Appendix **Exhibit D**). Specifically, ADOT determined that in addition to not accepting code C33 EADs, it would no longer accept EADs with category codes A11 (Deferred Enforced Departure) and C14 (Deferred Action) as satisfactory proof of authorized presence under federal law. *Id.*

Without remanding to the district court for consideration of ADOT's policy change, the Ninth Circuit Court of Appeals reversed the district court's denial of a preliminary injunction and remanded with instructions to "enter a preliminary injunction prohibiting [ADOT] from enforcing any policy by which the Arizona Department of Transportation refuses to accept Plaintiffs' Employment Authorization Documents, issued to Plaintiffs under DACA, as proof that Plaintiffs are authorized under federal law to be present in the United States." *See* Opinion at 28-29.

On November 24, 2014, the Ninth Circuit denied ADOT's Petition for Rehearing and Rehearing *en banc*. *See* November 24, 2014 Order, Dkt. 82, at 1 (Appendix **Exhibit E**). Subsequently, on December 9, 2014, the Ninth Circuit denied ADOT's Motion to Stay the Mandate Pending Filing of a Petition for a Writ of Certiorari. *See* December 9, 2014 Order, Dkt. 86, at 1 (Appendix **Exhibit F**). Accordingly, ADOT first requested the court of appeals for the relief sought in this application and such relief is not available from any other court.

C. The Executive Branch expands the DACA Program in 2014.

The DACA Memo provides that illegal immigrants who: (1) were under the age of 31 as of June 15, 2012; (2) came to the United States before June 15, 2007 as children under the age of 16; and (3) meet certain other criteria are eligible for deferred action. DACA Memo at 1. Deferred action for DACA recipients is for a period of two years, subject to renewal. *See id*. at 2.

Significantly, on November 20, 2014, the United States Secretary of Homeland Security issued another memorandum that drastically expanded the

DACA Program and the use of deferred action in general. This new memorandum, entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents*, instructs U.S. Citizenship and Immigration Services ("USCIS") and its related agencies to exercise prosecutorial discretion and grant deferred action to a materially larger group of illegal immigrants. *See generally* November 20, 2014 memorandum from Jeh Johnson, Secretary of Homeland Security (Appendix **Exhibit G** and referred to herein as the "2014 Deferred Action Memo").

The 2014 Deferred Action Memo expands the current DACA Program in two primary ways. First, it removes the age restriction that required DACA recipients to be under the age of 31 as of the date the DACA Program was announced. *Id*. at 3. Second, it extends the period for which DACA and the accompanying employment authorization is granted by an additional year. *Id*.

Further, the 2014 Deferred Action Memo expands the use of deferred action and instructs USCIS to "establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action" to parents who have children that are U.S. Citizens or lawful permanent residents and meet certain other criteria. *Id*. at 4. This unilateral expansion could defer the removal of millions of illegal immigrants in the United States.

In response to this unprecedented expansion of deferred action, twenty-four (24)[2] states filed suit against the United States, Secretary Johnson and several federal officials for declaratory and injunctive relief, arguing the Secretary's directive violates the Take Care Clause, U.S. Const. art. II, § 3, cl. 5, and the Administrative Procedure Act. *See Texas v. United States*, No. 14-cv-00254 (S.D. Tex. amended complaint filed Dec. 9, 2014), ECF No. 14. Arizona has joined this lawsuit.

D. Deferred action does not confer lawful status.

Congress is solely responsible for making federal immigration law. The Secretary of the DHS is charged with administering and enforcing the Immigration and Nationality Act (the "INA") and all other laws relating to the immigration and naturalization of aliens. 8 U.S.C. § 1103(a); U.S. Const. art. II, § 3, cl. 5. As a result, DHS, along with its related agencies, USCIS and U.S. Immigration and Customs Enforcement ("ICE"), have the ability in certain circumstances to exercise prosecutorial discretion in determining whether to enforce the INA to seek removal of an individual who is not lawfully in the United States. One form of prosecutorial discretion available to DHS is "deferred action." Deferred action is a discretionary decision to defer legal action that would remove an individual from the country. *See Lennon v. INS*, 527 F.2d 187, 191 n.7 (2d Cir. 1975). Deferred action is not expressly authorized by the INA or any other federal statute. *Reno v. American-*

[2] Texas, Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wisconsin; along with Attorney General Bill Schuette of Michigan and Governors Phil Bryant of Mississippi, Paul R. LePage of Maine, Patrick L. McCrory of North Carolina, Patrick L. McCrory of South Carolina, and C.L. "Butch" Otter of Idaho.

Arab Anti-Discrimination Comm., 525 U.S. 471, 484 (1999). Further, as recognized by the Ninth Circuit, deferred action recipients "enjoy no formal immigration status." Opinion at 7.

With respect to the deferred action granted to DACA recipients, the Attorney General Office of Legal Counsel recently recognized, in connection with questions concerning the 2014 Deferred Action Memo, that DACA recipients "unquestionably lack lawful status in the United States[,]" providing the following explanation as to why the parents of DACA recipients cannot receive deferred action:

> Although [DACA recipients] may presumptively remain in the United States, at least for the duration of the grant of deferred action, that grant is both time-limited and contingent, revocable at any time in the agency's discretion. Extending deferred action to the parents of DACA recipients would therefore expand family-based immigration relief in a manner that deviates in important respects from the immigration system Congress has enacted and the policies that system embodies.

November 19, 2014 memorandum from Karl R. Thompson, Principal Deputy Assistant Attorney General, on DHS' authority to prioritize the removal of certain aliens unlawfully presents in the US and defer removal of others, at 32 (Appendix **Exhibit H**). In short, deferred action is not meant to be used in the way DHS has applied it in both the DACA Memo and the 2014 Deferred Action Memo. Like Secretary Napolitano's DACA Program, Secretary Johnson's expanded deferred

action program is contrary to law. Simply put, the Secretary of DHS does not have the authority to unilaterally create, change or violate federal immigration law.[3]

LEGAL STANDARD

Generally, a party seeking a stay of the mandate pending disposition of a petition for certiorari must show that there is: (1) "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction"; (2) "a significant possibility of reversal of the lower court's decision"; and (3) "a likelihood that irreparable harm will result if that decision is not stayed." *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974) (citation omitted) (Powell, J., as Circuit Justice, in chambers).

Applying those factors here, it is plain that the Ninth Circuit's mandate should be stayed pending the disposition of a petition for certiorari. The certiorari petition will raise both basic and important issues concerning the Supremacy Clause, the Equal Protection Clause, state sovereignty, and federal law. Specifically, the petition will raise questions regarding the preemptive force of informal federal agency actions, the proper application of rational basis review under the Equal Protection Clause and the applicability of "heightened" rational basis review. The Opinion's treatment of these issues creates a reasonable probability that the Supreme Court will grant certiorari review. The Opinion's exacting application of rational basis review and its boundless preemption analysis

[3] Indeed, the President himself has stated that he "just took an action to change the law." Eric Bradner, *Obama to immigration hecklers: 'I just took an action to change the law*,' CNN (Nov. 26, 2014), http://www.cnn.com/2014/11/25/politics/obama-hecklers-immigration-chicago/.

are likely to be rejected by the Court. Finally, issuing driver's licenses to recipients of deferred action will cause irreparable injury because ADOT would need to establish a temporary procedure for issuing driver's licenses to category code C33 EAD holders in a hurried manner that is likely to cause serious administrative difficulties and unanticipated costs that cannot be recouped.

LEGAL ANALYSIS

I. It is probable that at least four members of the Supreme Court would grant certiorari.

In determining whether to accept review on a writ of certiorari, the Court may consider whether the circumstances of the case are such that a

> United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court.

SUP. CT. R. 10(C). Both of these considerations are satisfied here.

A. ADOT's certiorari petition will raise important questions of federal law that should be settled by this Court.

ADOT's certiorari petition will present issues relating to the scope of implied conflict preemption, addressing whether informal agency action has the preemptive force of federal law. ADOT's certiorari petition also will present issues relating to the proper application of rational basis review under the Equal Protection Clause, including the issue of whether courts can apply a more exacting application of the rational basis standard inconsistent with the highly deferential review historically and properly applied by federal courts.

The Ninth Circuit's preemption analysis creates precedent implying that agency policy decisions that are not subject to any formal rulemaking procedure have the preemptive force of federal law and can preempt State action in contexts that have long been reserved to the States. Further, the Ninth Circuit's application of rational basis review arguably ensures that many types of State action will fail even under minimal scrutiny, a result that is contrary to well-settled principles of Equal Protection Clause jurisprudence.

These constitutional issues undoubtedly present substantial questions that are of exceptional importance for the constitutional balance of powers and responsibilities between the federal government and the States; issues the Supreme Court is likely to review on certiorari. For the very reasons the Supreme Court gave for granting certiorari in *Arizona v. United States*, 132 S. Ct. 2492 (2012), the Supreme Court is likely to grant review here. 132 S. Ct. at 2498 ("This Court granted certiorari to resolve important questions concerning the interaction of state and federal power[.]").

1. The court of appeals' near-boundless preemption analysis requires correction by the Supreme Court.

Implied conflict preemption arises when state law or policy obstructs "the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 2501 (citations omitted).[4] Plaintiffs argued below "that [ADOT's] policy is

[4] Although the court of appeals stated that it did not need to rely on Plaintiffs' preemption claim in assessing their likelihood of success on the merits, *see* Opinion at 16, it proceeded to analyze the preemption issue—arguably creating binding Ninth Circuit precedent that will widely expand the scope of conflict preemption. *See Spears v. Stewart*, 283 F.3d 992, 1006 (9th Cir. 2002) (statement of Kozinski, J., concerning denial of petitions for rehearing) ("Whether a court ought to speak to an issue that is not strictly necessary to the outcome of the case is a legitimate topic of debate during

conflict-preempted because it interferes with Congress's intent that the Executive Branch possess discretion to determine when noncitizens may work in the United States." Opinion at 13.

The Opinion accepted this argument, relying on the DACA Memo itself as the "execution of the full purposes and objectives of Congress":

> If . . . Plaintiffs submit adequate proof that [ADOT's] policy interferes with the DHS Secretary's directive that DACA recipients be permitted . . . to work, they will, in turn, show that [ADOT's] policy interferes with Congress' intention that the Executive determine when noncitizens may work in the United States.

Id. at 16. The court of appeals was therefore required to analyze whether the DACA Memo actually had preemptive force of law. *See Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985 (2011) (controlling opinion of Roberts, C.J.) ("Implied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law.") (citations and internal quotations omitted).

The Supreme Court is likely to grant certiorari because the Opinion's conclusion that the DACA Memo carries preemptive force is grossly inconsistent with Supreme Court precedent. Agency action can only have preemptive effect when it arises from a formal rulemaking procedure. *See United States v. Mead*

---

the process of collegial deliberation. Judges may choose not to join opinions that contain what they see as dicta, or the court may choose to take a case *en banc* when a panel strays into areas that are best left unexplored. But it is quite a different matter to suggest . . . that the work product of a panel of this court can simply be disregarded because a later panel finds a way to call it 'dicta' or 'advisory' or some similar invective . . . [S]o long as the issue is presented in the case and expressly addressed in the opinion, that holding is binding and cannot be overlooked or ignored by later panels of this court or by other courts of the circuit.").

Corp., 533 U.S. 218, 230 (2001) ("Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."); *Wyeth v. Levine*, 555 U.S. 555, 577 (2009) (FDA finalized a rule without notice and comment that "articulated a sweeping position on" the preemptive effect of a federal law, which the court found "inherently suspect in light of this procedural failure"); *see also Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 329-30 (1994) ("Executive Branch communications [like press releases, letters and amicus briefs] that express federal policy but lack the force of law cannot render unconstitutional [a state's] otherwise valid, congressionally condoned" action); *Arizona*, 132 S. Ct. at 2527 (Alito, J., concurring in part and dissenting in part) (citing *Barclays Bank* to support the proposition that mere agency policy does not have preemptive effect).

The Ninth Circuit below took the unusual step of inviting the United States, which obviously has a vested interest in the DACA Memo, to submit an amicus brief. The United States' amicus brief (addressing ADOT's Petition for Rehearing and Rehearing *En Banc*) highlights that, although the district court dismissed Plaintiffs' preemption claim, preemption is a central issue in this case and one warranting the Supreme Court's review. The United States argued that rehearing was unwarranted because ADOT's policy is preempted by "[f]ederal [l]aw." *See* United States' Amicus Brief, Dkt. 75, at 8 (Appendix **Exhibit I**). The fact that the United States also contends that the DACA Memo constitutes preemptive federal

law substantiates that preemption is a sufficiently important issue warranting clarification on certiorari review.[5]

Furthermore, in rejecting its own precedent without explanation, the court of appeals laid bare the need for the Supreme Court to clarify the extent to which the DACA Memo and similar agency memoranda lack preemptive force. The Ninth Circuit has previously established a two-part test to determine when agency pronouncements have the force and effect of law:

> To have the force and effect of law, enforceable against an agency in federal court, the agency pronouncement must (1) prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice—and (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.

River Runners for Wilderness v. Martin, 593 F.3d 1064, 1071 (9th Cir. 2010) (citation omitted); *see also* Order at 12 (the district court here citing *River Runners* for the proposition that "federal regulations have the force of law only when they prescribe substantive rules and are promulgated through congressionally-mandated

[5] Notably, the United States' amicus brief did not address the equal protection issue at all. This fact reveals a truism: the United States cannot take the position that DACA recipients are similarly situated to others who receive deferred action because the federal government itself treats DACA recipients dissimilarly from other EAD holders. For example, as explained below, notwithstanding the fact that deferred action recipients generally are eligible for the Affordable Care Act, U.S. Department of Health and Human Services ("HHS") determined that DACA recipients were not, exempting such individuals from eligibility. Federal law supports ADOT's view that DACA recipients are not similarly situated to other EAD holders. The United States' silence on this component of the equal protection analysis is revealing.

procedures such as notice-and-comment rulemaking"). The court of appeals did not even address this case in its Opinion.

In accepting the argument that the ADOT policy is likely preempted, the court of appeals failed to consider that the DACA Memo was not subject to notice and comment rule making, is merely an internal directive providing a general policy statement regarding DHS's current enforcement priorities, and states that it "confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights." *See* DACA Memo at 3. Unable to rely on the Ninth Circuit's own rule governing when agency pronouncements carry the force and effect of law, ADOT emphasizes the appropriateness of Supreme Court clarification on the issue of when agency statements like the DACA Memo carry preemptive force.

The Supreme Court will likely accept review of the Opinion, for either of two reasons: the court of appeals improperly ascribed preemptive force to the DACA Memo in contravention of established Supreme Court precedent, or the Supreme Court's review is necessary to explain the extent to which agency memoranda like the DACA Memo carry preemptive force. *See* SUP. CT. R. 10(C).

2. The court of appeals' exacting application of rational basis review conflicts with Supreme Court precedent.

The court of appeals declined to "decide what standard of scrutiny applies to [ADOT's] policy" because it determined that the policy "is likely to fail even rational basis review." Opinion at 19-20. Although it acknowledged that "[t]o survive rational basis review, [ADOT's] disparate treatment of DACA recipients must be

'rationally related to a legitimate state interest,'" *see id.* at 20 (*citing City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985)), the Opinion wholly dismissed the legitimate rationales for ADOT's policy and applied an exacting standard of review that departs from rational basis case law.

The Opinion ignored the fact that DACA recipients are not authorized to be in the United States under federal law. Further, the Opinion completely disregarded ADOT's concern that issuing driver's licenses to DACA recipients might expose ADOT to legal liability for issuing licenses to 80,000 unauthorized immigrants because: (1) "this concern has not been borne out by the numbers," Opinion at 23 (quoting the district court's order); and (2) ADOT is "unable to identify instances in which" it faced liability for issuing licenses to unauthorized noncitizens. *Id.* The Opinion also rejected ADOT's concern that improper access to federal and state benefits may result because ADOT officials allegedly testified that they did not have a basis for "believing that a driver's license alone could be used to establish eligibility for such benefits." *Id.* The Opinion reasoned that "[i]t follows that [ADOT has] no *rational* basis for any such belief." *Id.* (emphasis in original).

The Supreme Court has clearly stated, however, that "[a] State . . . has *no obligation* to produce evidence to sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (emphasis added). "[A] [state's] choice is not subject to courtroom factfinding and may be based on rational speculation *unsupported by evidence or empirical data*." *Id.* (emphasis added) (citations omitted); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456,

464 (1981). The Opinion's consideration of whether the liability concern was "borne out by the numbers" is flatly inconsistent with this Court's precedent (*Heller*) because such concern may indeed be based on rational speculation and need not be supported by empirical data. Similarly, because ADOT had "no obligation to produce evidence to sustain the rationality" of the policy, it had no obligation to produce testimony sustaining the rationality of their facially reasonable concern that improper access to federal and state benefits may result in the policy's absence. *See Heller*, 509 U.S. at 320.

A classification "fails rational-basis review only when it rests on grounds wholly irrelevant to the achievement of the State's objective." *Id.* at 324 (citation and internal quotation marks omitted). "States are not required to convince the courts of the correctness of their . . . judgments." *Id.* at 326 (citation omitted). The Supreme Court has explained that the rational basis

> inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary.

Schweiker v. Wilson, 450 U.S. 221, 234-35 (1981) (internal quotation marks and citations omitted). "It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength." *Vance v. Bradley*, 440 U.S. 93, 112 (1979) (citation and quotations omitted).

The Opinion's application of rational basis review plainly conflicts with this lenient rational basis standard set forth in the Supreme Court's decisions in *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993); *Heller*, 509 U.S. 312; *Clover Leaf*

Creamery Co., 449 U.S. 456; and *Vance*, 440 U.S. 93. In these decisions, the Supreme Court applied the more deferential form of rational basis review and upheld the challenged laws as constitutional. *See, e.g., Beach Commc'ns*, 508 U.S. at 313, 317 (finding there were at least two "conceivable" bases for the challenged distinction and explaining that "[i]n areas of social and economic policy, a . . . classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."); *Heller*, 509 U.S. at 320 (finding the State proffered "adequate justifications" and reiterating that a classification "must be upheld against equal protection challenge if there *is any reasonably conceivable state of facts* that could provide a rational basis for the classification") (emphasis added).

Under the deferential review undertaken in those Supreme Court precedents, ADOT's policy should have been upheld if *any* conceivable reason supports the decision, *regardless* of the availability of "evidence or empirical data" supporting its rationality. *See, e.g., Heller*, 509 U.S. at 320. The Opinion's failure to uphold the policy did not provide such deference to ADOT's decision-making. The Supreme Court is likely to grant review because the court of appeals "decided an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court." *See* SUP. CT. R. 10(C).

Finally, to the extent that the Opinion applied (without specifically indicating that it was applying) a more heightened level of rational basis review than the

traditional level described above, certiorari review is appropriate because in determining that such review was proper here the court of appeals "decided an important question of federal law that has not been, but should be, settled by this Court . . . ." *See id.* The Opinion utilized the heightened form of rational basis utilized in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). *See* Opinion at 22-25. The majority's opinion in *Cleburne*, however, is a departure from traditional rational basis review. *City of Cleburne,* 472 U.S. at 458 ("[T]he rational basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), *Allied Stores of Ohio, Inc. v. Bower*s, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959), and their progeny.") (Marshall, J., concurring in part and dissenting in part). The applicability of the more rigorous form of rational basis review outside of those limited circumstances in which it has previously been applied by this Court is highly questionable. "[W]hether the higher-order rational basis review" utilized by the Court in *Cleburne* and *Romer v. Evans*, 517 U.S. 620 (1995) "is broadly applicable in other contexts is far from clear." *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 1023, 1038 (E.D. Cal. 2007) (citations and internal quotations omitted); *see also Powers v. Harris*, 379 F.3d 1208, 1224 (10th Cir. 2004) (discussing three competing interpretations of the *Cleburne/Romer* approach). To the extent that the court of appeals concluded that heightened rational basis review is applicable to ADOT's policy, it "decided an important question of federal law that

has not been, but should be, settled by this Court" and certiorari review would be eminently proper. *See* SUP. CT. R. 10(C).

II. A significant possibility of reversal of the Opinion exists.

A significant possibility of reversal exists because the Opinion not only misconstrues an agency policy memorandum as federal law but erroneously applies the rational basis review standard.

A. <u>The DACA Memo lacks preemptive force</u>.

The Opinion is likely to be reversed because its preemption analysis rests on the assumption that the DACA Memo creates federal law. Indeed, the Ninth Circuit completely ignores the fact that no federal *law* is at issue in the present case; rather, an agency's internal policy memo, issued without notice and comment or subjected to any formal rulemaking processes, is the document alleged to have preemptive effect. The Opinion asserts:

> In considering whether a state law is conflict-preempted, "we 'consider the relationship between state and ***federal laws*** as they are interpreted and applied, not merely as they are written.'" If the practical result of the application of [ADOT's] policy is that DACA recipients in Arizona are generally obstructed from working—***despite the Executive's determination, backed by a delegation of Congressional authority***, that DACA recipients throughout the United States may work—then [ADOT's] policy is preempted.

Opinion at 15 (internal citation omitted) (emphasis added).

Agency action can only have preemptive effect when it arises from "formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *See Mead*, 533 U.S. at 230. As the Ninth

Circuit has previously recognized (but failed to appreciate in its Opinion in this case), an agency pronouncement only has the force of law if it: (1) "prescribe[s] substantive rules—not interpretative rules, general statements of policy or rules of agency organization procedure or practice—and (2) conform[s] to certain procedural requirements." *See River Runners*, 593 F.3d at 1071 (citation omitted); Order at 12 (the district court here citing *River Runners* for the proposition that "federal regulations have the force of law only when they prescribe substantive rules and are promulgated through congressionally-mandated procedures such as notice-and-comment rulemaking"); *see also Wyeth*, 555 U.S. at 577 (FDA finalized a rule without notice and comment that "articulated a sweeping position on" the pre-emptive effect of a federal law, which the Court found "inherently suspect in light of this procedural failure."); *United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982) (to have the "force and effect of law," agency policy "must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress").

The DACA Memo is an internal directive providing a general policy statement regarding DHS's current enforcement priorities that lacks preemptive force. In fact, by its own terms, the DACA Memo "does not purport to establish substantive rules . . . and it was not promulgated through any formal procedure." Order at 12. It was merely an "exercise of [the agency's] prosecutorial discretion[.]" DACA Memo at 1. Rather than purporting to carry force of law akin to a formally-crafted rule, Secretary Napolitano explained that the DACA Memo simply supposes

that immigration law should not be "blindly enforced without consideration given to the individual circumstances of each case." *Id.* at 2. Clarifying its nature as a mere statement of agency policy, the DACA Memo expressly states that it "confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights." *Id.* at 3. The DACA Memo acknowledges that it merely "set[s] forth policy" to focus resources on higher priority cases through the exercise of prosecutorial discretion. *Id.* Because the DACA Memo was not subject to notice-and-comment rule making, it is a general statement of policy. It is error to ascribe the force of law to the DACA Memo.

As Justice Alito recognized in *Arizona v. United States*, a general agency policy that addresses federal enforcement priorities (*e.g.*, the DACA Memo) does not preempt state law:

> The United States suggests that a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency's current enforcement priorities. Those priorities, however, are not law. They are nothing more than agency policy. ***I am aware of no decision of this Court recognizing that mere policy can have pre-emptive force . . . If [a state statute] were pre-empted at the present time because it is out of sync with the Federal Government's current priorities, would it be unpre-empted at some time in the future if the agency's priorities changed?***

132 S. Ct. at 2526-527 (Alito, J., concurring in part and dissenting in part) (emphasis added). Allowing such policy to preempt state law would "give the Executive unprecedented power to invalidate state laws that do not meet with its

approval, even if the state laws are otherwise consistent with federal statutes and duly promulgated regulations." *Id.* at 2527. Just as in *Arizona v. United States*, the breadth of the United States' pre-emption argument here is squarely inconsistent with the law and concepts of federalism:

> If accepted, the United States' pre-emption argument would give the Executive unprecedented power to invalidate state laws that do not meet with its approval, even if the state laws are otherwise consistent with federal statutes and duly promulgated regulations. This argument, to say the least, is fundamentally at odds with our federal system.

Id. Simply stated, under the Supremacy Clause, "pre-emptive effect [should] be given only those to federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures." *Wyeth*, 555 U.S. at 586 (Thomas, J., concurring) (citation omitted). It defies reason (as well as the law) to ascribe preemptive force to an agency policy memo premised on the agency leadership's subjective, and easily reversed, determinations as to how to best ration limited agency resources given shifting priorities. *See id.* at 600-01 ("[N]o agency or individual Member of Congress can pre-empt a State's judgment by merely musing about goals or intentions not found within or authorized by the statutory text.") (Thomas, J., concurring) (citation omitted).

Finally, any goals underlying the DACA Program are the goals of DHS—not the goals of Congress. *Arizona,* 132 S. Ct. at 2501 (noting that conflict preemption exists when a state law or policy "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (emphasis added). The

DACA Program's goals cannot be imputed to Congress because Congress has refused to enact legislation that would accomplish the DACA Program's goals. *See, e.g.*, DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011). Indeed, another federal agency passed a regulation that states that DACA recipients are not lawfully present in the United States. On August 28, 2012, HHS explicitly carved out DACA recipients from recipients of other forms of deferred action in HHS's definition of who is "lawfully present" for purposes of participating in the Pre-Existing Condition Insurance Plan Program contained in the Patient Protection and Affordable Care Act, Public Law 111-148, and the Health Care and Education Reconciliation Act, Public Law 111-152 (collectively, "ACA").[6] The fact that there may be disagreement among federal government agencies about the import of the DACA Memo underscores why one policy memorandum of one agency cannot preempt state action here.

In short, the DACA Memo does not have the force of law and cannot preempt ADOT's policy change concerning the issuance of driver's licenses. The Opinion conflates federal law and Congressional action with an administrative agency's internal policy. If the court of appeals had followed Supreme Court precedent, it would have properly found the DACA Memo does not create federal law, and necessarily determined that the DACA Memo cannot preempt State law. Because

[6] Specifically, HHS implemented an exception to exclude DACA recipients from individuals considered "lawfully present" for purposes of the Pre-Existing Condition Insurance Plan Program. The exception provided, "(8) Exception: An individual with deferred action under the Department of Homeland Security's deferred action for childhood arrivals process, as described in the Secretary of Homeland Security's June 15, 2012 memorandum, shall not be considered to be lawfully present with respect to any of the above categories in paragraphs (1) through (7) of this definition" 45 C.F.R. § 152.2(8).

the Opinion rests its preemption analysis on an incorrect assumption, the Ninth Circuit is likely to be reversed.

B. ADOT's policy survives Plaintiffs' constitutional challenge under traditional rational basis review.

Departing from Supreme Court precedent that historically applies a highly deferential form of rational basis review, the Opinion erroneously held that ADOT's policy is unlikely to survive even the most minimal form of scrutiny. *See* Opinion at 22. Reversal is likely because ADOT's policy passes constitutional muster under rational basis review as applied in *Beach Commc'ns*, *Heller* and *Vance*.

On rational basis review, "[w]here there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'" *Beach Commc'ns*, 508 U.S. at 313-14 (citation omitted). "[E]qual protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," and, as such, there is a "strong presumption of validity" when a state law is analyzed under rational basis review. *Id*. at 314 (citations omitted). The Equal Protection Clause only requires that ADOT reasonably believed that the means chosen would promote the purpose. *See W. & S. Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 668 (1981). "As long as the classificatory scheme chosen . . . rationally advances a reasonable and identifiable governmental objective, [the Court] must disregard the existence of other methods of allocation that [it] perhaps would have preferred." *Schweiker*, 450 U.S. at 235.

ADOT set forth multiple rational bases that substantiate its policy. Given the scope of the DACA Program and the size of the class of potential DACA

recipients in Arizona, ADOT's distinction between EADs issued under the DACA Program and other EADs is rationally related to, without limitation, Arizona's strong state interest in: (1) avoiding the risk of potential liability for the State and ADOT; (2) reducing the risk that driver's licenses provide improper access to public benefits; (3) unduly burdening ADOT with being required to process an extremely large number of applications for licenses from a group that is not lawfully authorized to be in the United States, or having to revoke those licenses if the DACA Program itself is revoked; and (4) avoiding the risk that DACA recipients might not be financially responsible for property damage or personal injury caused by automobile accidents should the DACA Program become revoked and those individuals become subject to immediate deportation and/or are removed from the United States.[7]

ADOT's decision not to issue driver's licenses to DACA recipients complies with the Equal Protection Clause because "there is a rational relationship between" the difference in "treatment and some legitimate governmental purpose." *See Heller*, 509 U.S. at 313 (citations omitted). ADOT has no obligation to "articulate at any time the purpose or rationale supporting its classification" or to produce "any

[7] Further, the Opinion states that "[u]nless there is some basis in *federal* law for reviewing (c)(9) and (c)(10) Employment Authorization recipients as having federally authorized presence that DACA recipients lack, Arizona's attempt at rationalizing this discrimination fails." Opinion at 21. But federal law supports Arizona's basis for treating DACA recipients differently than (c)(9) and (c)(10) EAD holders. EADs with code (c)(9) are provided to individuals seeking an adjustment of status to persons admitted for permanent residence pursuant to INA Section 245, which results in a green card. 8 C.F.R. § 274a.12(c)(9). EADs with code (c)(10) are related to suspension of deportation and cancellation of removal pursuant to INA Section 240A and results in a green card. 8 C.F.R. § 274a.12(c)(10). In contrast, DACA recipients are not on any path that will result in a green card. Although the Opinion may disagree with Arizona's choices, the distinction between (c)(9) and (c)(10) EAD holders and DACA recipients is rational.

evidence to sustain the rationality" of its actions. *Id.* at 320 (citation omitted). Completely disregarding this Court's pronouncement that "[w]here there are 'plausible reasons' for Congress' action, 'our inquiry is at an end[,]'" *Beach Commc'ns*, 508 U.S. at 313-14, the Ninth Circuit outright dismissed the State's stated rationales. *See supra* Section I.A.2.

Finally, to the extent that the Opinion applied (without specifically indicating that it was applying) a more heightened level of rational basis review than the traditional level described above, it erred. The Opinion relies on *Cleburne* and *Romer* in its analysis. *See* Opinion at 20, 24, 25. The review applied in these cases, however, is a departure from traditional rational basis review (*see, e.g., Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in part and dissenting in part)), and they differ from other rational basis precedent because in each this Court noted apparent animus toward the class affected by the discriminatory treatment. *See Romer*, 517 U.S. at 624-32 (referendum to Colorado's State Constitution that prohibited "all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons" imposed such a broad disability on a single named group it seemed "inexplicable by anything but animus towards the class it affects. . ."); *Cleburne,* 473 U.S. at 450 (zoning ordinance requiring a home for the mentally retarded obtain a special use permit would rest only on an irrational prejudice against the mentally retarded because there was no rational basis for the restriction). Although the Opinion stated that ADOT's policy "appears intended to express animus toward DACA recipients," the district court expressly

declined to find such animosity. *See* Order at 30 n. 9 ("Plaintiffs argue that the Governor's statements . . . evince hostility to DACA recipients and other illegal aliens. The Court need not, and does not, ascribe such an intent to the Governor."). Even if the heightened standard of *Cleburne* and *Romer* were otherwise applicable, that standard cannot apply here because the court of appeals' off-the-cuff finding of "animus toward DACA recipients" stands in stark contrast to the district court's finding (after measured review and explanation of the record) that Governor Brewer's statements expressing her displeasure with the DACA Program (which ADOT is left to presume constitute the basis for the court of appeals' baseless animosity determination) did *not* evince such animosity.[8]

For the reasons stated above, ADOT's classification of DACA recipients as different from other EAD holders (even those under regular deferred action) is rationally related to several substantial state interests. The Opinion is likely to be reversed.

III. Irreparable harm will result if the Opinion is not stayed.

Forcing ADOT to issue driver's licenses pending a final resolution of this litigation by the district court will irreparably harm ADOT.

This Court should consider whether ADOT will be irreparably harmed in the context of Plaintiffs' requested relief--entry of a preliminary injunction requiring issuance of driver's licenses to all DACA recipients in Arizona. *See* Plaintiffs' Notice Regarding Proposed Order Granting Motion for Preliminary Injunction, Doc. 290, at

[8] Although the district court did ultimately apply heightened rational basis review, it did so without a finding of animosity toward the class affected by ADOT's policy. *See* Order at 30 n. 9. Its application of heightened rational basis review was therefore improper for the same reasons as here.

1-2 (arguing that "even if it is not a class action" the preliminary injunction should apply to "all holders" and "not just the original Plaintiffs in the case") (Appendix **Exhibit J** and referred to herein as "Notice"). The Ninth Circuit remanded this case to the district court "with instruction to enter a preliminary injunction prohibiting [ADOT] from enforcing any policy by which the Arizona Department of Transportation refuses to accept Plaintiffs' Employment Authorization Documents, issued to Plaintiffs under DACA." Opinion at 28-29. ADOT interprets the Ninth Circuit's instruction to mean that a preliminary injunction must be limited to the issuance of licenses to the named Plaintiffs. *See, e.g., Zepeda v. I.N.S.*, 753 F.2d 719, 727-28 & n.1 (9th Cir. 1985) ("On remand, the injunction must be limited to apply to the individual plaintiffs unless the district judge certifies a class of plaintiffs . . . our legal system does not automatically grant individual plaintiffs standing to act on behalf of all citizens similarly situated.") (citations omitted). Despite the fact that there is no class claim remaining in the litigation, Plaintiffs contend that anyone who provides a category code C33 EAD must receive driver's licenses as a result of the Opinion. *See* Notice at 1-2.

Of further significance to this issue is the fact that the Secretary of DHS essentially expanded the DACA Program on November 20, 2014. If the EAD code given to those individuals entitled to deferred action as a result of this expansion is the same as current DACA recipients (C33), there is no doubt Plaintiffs will take the position that the new classes of deferred action recipients should be issued driver's licenses as well. Although the district court would have to resolve these

issues before entering the preliminary injunction if this Court denied ADOT's application, the irreparable harm analysis should assume that ADOT could be forced to issue driver's licenses *en masse* to thousands of people.

ADOT has steadfastly maintained that preliminarily issuing thousands of time-limited driver's licenses to DACA recipients would be administratively complex, imposing considerable expense and logistical burdens on ADOT and requiring ADOT to develop a special process to issue thousands of licenses in a short period of time. *See supra* Section I.A.2. None of the expense related to the creation of a particularized one-time issuance of thousands of time-limited driver's licenses could be recouped by ADOT. In such circumstances, irreparable harm results. *See I.N.S. v. Legalization Assistance Project of Los Angeles Cnty. Fed'n of Labor*, 510 U.S. 1301, 1305-06 (1993) (O'Connor, J., as Circuit Justice, in chambers) (granting the stay application of a district court order pending appeal to the Ninth Circuit, noting that the balance of equities tips in favor of the INS due to "a considerable administrative burden on the INS" and the fact that it would require "the granting of interim work authorizations"); *Philip Morris USA, Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., as Circuit Justice, in chambers) (granting stay application: "If expenditures cannot be recouped, the resulting loss may be irreparable. . . . Funds spent to provide antismoking counseling and devices will not likely be recoverable; nor, it seems, will the $11,501,928 fee immediately payable toward administrative expenses in setting up the funded program.") (citing *Mori v. International Broth. of Boilermakers*, 454 U.S. 1301, 1303 (1981) (Rehnquist, J., as

Circuit Justice, in chambers) (granting stay application and noting that "[t]he funds held in escrow, now totalling somewhere in the neighborhood of $150,000, would be very difficult to recover should applicants' stay not by granted.")). If ADOT ultimately prevails after a trial on the merits, the driver's licenses would have to be recalled, requiring ADOT to establish a process to recall and cancel the wrongfully issued driver's licenses.

Further, ADOT's policy simply implements a state statute requiring that an individual demonstrate lawful presence in order to obtain a driver's license. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., as Circuit Justice, in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., as Circuit Justice, in chambers)). Requiring the Director of ADOT to determine that an individual is lawfully present before providing a driver's license is sound public policy. For example, in Arizona, a driver's license is a form of primary documentation that can be used either alone or in conjunction with other documents to qualify for and access taxpayer-funded public benefits for which DACA recipients are ineligible. *See* A.R.S. §§ 1-501(A), 1-502(A). Enjoining a state's implementation of a state statute even temporarily constitutes irreparable harm, particularly here where a Director of a state agency has a statutory duty to enforce the State's driver's license statute.

Due to the irreparable harm to ADOT, this Court should stay entry of the preliminary injunction pending a timely petition for writ of certiorari.

IV. The balance of equities favor a stay.

The district court properly rejected Plaintiffs' irreparable harm arguments. First, irreparable harm is not presumed from an equal protection violation. *See Vaquiera Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 484-85 (1st Cir. 2009). Second, factually, there is no basis for a finding that named Plaintiffs will suffer irreparable harm if the preliminary injunction is stayed. Indeed, the district court, which heard the evidence and assessed the facts first-hand, determined in spring 2013 that Plaintiffs did not demonstrate irreparable harm to warrant preliminary injunctive relief: "Plaintiffs have acknowledged . . . that they either drive or have readily available alternative means of transportation . . . Given this testimony, the Court cannot conclude that Plaintiffs are suffering irreparable harm from being unable to drive as a result of [ADOT's] policy." Order at 35-36. The district court, having considered the parties' evidence at the preliminary injunction hearing, concluded "that Plaintiffs have not established that they are likely to suffer irreparable injury in the absence of a preliminary injunction." *Id*. at 38. Although sitting only as a reviewing court and not having heard any evidence, the Ninth Circuit substituted its judgment for that of the trial court, holding that Plaintiffs had suffered irreparable injury. The fact that the court that considered the evidence did not find irreparable injury provides a reasonable basis here to stay issuance of the mandate pending disposition of a timely petition for writ of certiorari.

Finally, although the procedural posture of this case presents these issues in the context of a preliminary injunction, failing to intervene now will result in the status quo being changed in a way that is not easily remediable if Defendants ultimately prevail after a full trial of the merits. Despite the Ninth Circuit's conclusion to the contrary, the district court properly concluded that Plaintiffs seek a mandatory injunction. Whereas prohibitory injunctions preserve the status quo, a mandatory injunction "goes well beyond simply maintaining the status quo *pendent lite* . . . ." *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1320 (9th Cir. 1994) (citations omitted). The district court found that, before implementation of the DACA Program and issuance of the Executive Order, Defendants did not issue driver's licenses to the individual Plaintiffs, or other persons who later became eligible for relief under the DACA Program, because they were not eligible for driver's licenses. Order at 7. Because the Ninth Circuit's Opinion will change the status quo by requiring Defendants to issue driver's licenses to them and other DACA recipients and the district court has not had the opportunity to consider all of the evidence developed through discovery subsequent to the preliminary injunction hearing, the balance of hardships tips in favor of Defendants.[9]

This lawsuit has been pending for two years. Considering the irreparable harm to ADOT and the recent expansion of deferred action, the balance of equities

[9] The district court allowed only limited discovery before the preliminary injunction hearing. Since that time, the parties have engaged in substantial discovery and numerous depositions. A major component of this discovery, which the district court has yet to consider, demonstrates that Defendants had substantial reasons for taking the steps that they did and clearly met the rational basis test.

favor staying the mandate to allow this Court to consider the important Constitutional issues that will be raised in ADOT's petition for writ of certiorari.

RELIEF REQUESTED

The separation of powers doctrine and federalism are at the heart of this case. They serve as a critical backdrop for analyzing the issues presented here. If Executive Branch policy statements have preemptive force over issues assigned by the Constitution to Congress, the separation between the legislative and executive branches is significantly undermined and core principles of state sovereignty will easily be eroded. Indeed, the Tenth Amendment to the Constitution mandates another layer of separation of powers between the federal government and the states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

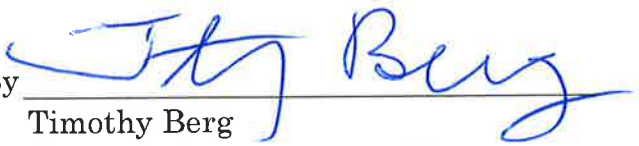
The Ninth Circuit's imposition of a mandatory preliminary injunction on Arizona's Department of Transportation—based on the DHS Secretary's policy decision NOT to enforce well-established federal law—turns well-established principles of separation of powers and federalism upside down. The Opinion implicates issues of the most fundamental importance, including whether a federal agency can impliedly preempt State law in an area of traditional State authority by issuing an informal policy memorandum and whether the federal courts may undertake a form of rational basis analysis that undercuts Fourteenth Amendment jurisprudence reaching back to the days of the New Deal.

The separation of powers doctrine and federalism goes to "the heart of our system of government." It is crucial to the concept of "ordered democracy"—the concept of dividing governmental power. As President Reagan profoundly opined: "Concentrated power has always been the enemy of liberty."

ADOT respectfully requests that this Court stay the issuance of its mandate pending the filing of a timely petition for writ of certiorari.

RESPECTFULLY SUBMITTED: December 11, 2014.

FENNEMORE CRAIG, P.C.

By 

Timothy Berg
Counsel of Record for Petitioners
Governor Janice K. Brewer, John S. Halikowski and Stacey K. Stanton

9783708.2