No. 14A625

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,

Applicants,

v.

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

Respondents.

Response In Opposition to Application to Stay Ninth Circuit Mandate Pending Disposition of a Petition for Writ of Certiorari

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

Linton Joaquin
Karen C. Tumlin
Shiu-Ming Cheer
Nora A. Preciado
Nicholás Espíritu
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010

Daniel Pochoda
James Duff Lyall
ACLU FOUNDATION OF ARIZONA
3707 N. 7th Street, Suite 235
Phoenix, AZ 85014

Victor Viramontes
Jorge M. Castillo
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 S. Spring Street, 11th Floor
Los Angeles, CA 90014

Steven R. Shapiro
Lee Gelernt
Michael Tan
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Jennifer Chang Newell
Counsel of Record
Cecillia D. Wang
Araceli Martínez-Olguín
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0774
jnewell@aclu.org

Tanya Broder
NATIONAL IMMIGRATION LAW CENTER
405 14th Street, Suite 401
Oakland, CA 94612

Counsel for Respondents

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INTRODUCTION

Applicants fail to carry their heavy burden for a stay. The Court of Appeals correctly ruled that Respondents were likely to succeed on the merits of their equal protection claim because Applicants denied driver's licenses to young immigrants with federal authorization to live and work in this country under the Deferred Action for Childhood Arrivals ("DACA") program, while granting licenses to similarly situated immigrants. This interlocutory ruling is hardly groundbreaking, as 48 states have already concluded that deferred action recipients, including DACA recipients, can receive state driver's licenses.

Neither of the issues for which review is sought merit a grant of certiorari, much less reversal. First, certiorari on the preemption issue principally relied upon by Applicants is unlikely because the Court of Appeals did not rest its holding on preemption, and preemption was irrelevant to the Court of Appeals' determination that Respondents are entitled to a preliminary injunction. Further, this dicta merely reflects a straightforward recitation of ordinary conflict preemption principles. Second, Applicants take issue with the Court of Appeals' application of the rational basis test. Applicants concede that the Court of Appeals stated the standard correctly, and merely assert that the Court of Appeals engaged in an "improper application" of the test to the facts of this case. Applicants' contention is incorrect, as the Court of Appeals' analysis is wholly consistent with this Court's equal protection precedents. In any event, this Court's rules establish that misapplication of a correctly stated legal standard rarely merits review.

Finally, Applicants have entirely failed to establish irreparable harm. Until Applicants adopted the challenged policy in September 2012 to specifically exclude DACA recipients, noncitizens who, like the Individual Respondents, had been granted federal work permits ("Employment Authorization Documents" or "EADs"), were eligible to receive an Arizona driver's license. Thus, an injunction merely restores the status quo that preceded this controversy for years. Further, the equities similarly favor Respondents because the state's denial of driver's licenses—in a state where eighty-seven percent of Arizona workers commute to work by car—severely restricts Individual Respondents in their efforts to attend to basic life activities. *See* Appl'ts' Ex. A, Slip Op. at 26, *ADAC v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). Respondents have suffered under Arizona's discriminatory policy for over two years now, and the Court of Appeals' order finally allowing them to obtain driver's licenses should not be delayed.

The Stay Application should be denied.

STATEMENT OF THE CASE

A. Background

Arizona law provides that applicants that can establish that their "presence in the United States is authorized under federal law" are eligible for a driver's license. A.R.S. § 28-3153(D). *See also* A.R.S. §§ 28-3158(C), 28-3165(F). Prior to 2012, Applicants accepted all federally issued EADs as sufficient evidence that a noncitizen's presence in the United States was authorized under federal law, and issued driver's licenses to such individuals. *See* Stay Application at 3; Appl'ts' Ex.

B, District Court Order at 4, *ADAC v. Brewer,* 945 F. Supp. 2d 1049, 1054 (D. Ariz. 2013), *reconsideration denied,* (Jun. 6, 2013).

On September 17, 2012, pursuant to Governor Brewer's Executive Order, Applicants changed this longstanding practice when they announced a policy ("2012 Policy") to deny driver's licenses only to young immigrants like Respondents who had been granted deferred action and work authorization under the DACA program. Applicant Brewer explained that the Executive Order was intended to clarify that there would be "no drivers [sic] licenses for illegal people." *See* Mem. in Supp. of Prelim. Inj. at 5, *ADAC. v. Brewer*, No. 12-02546 (D. Ariz. Nov. 29, 2012) (Dkt. No. 30).

Respondents are young immigrants who have lived in Arizona for many years after arriving in the United States as children, and a nonprofit organization that represents other immigrants like them. *See* Am. Compl. at ¶¶ 20-25, *ADAC. v. Brewer*, No. 12-02546 (D. Ariz. Nov. 29, 2012) (Dkt. No. 173); *see also* Slip Op. at 8-9. The Individual Respondents are students and young adults who are trying to pursue an education, advance their careers, support their families, and fully contribute to their communities. Am. Compl. at ¶¶ 20-25, *ADAC. v. Brewer*, No. 12-02546 (D. Ariz. Nov. 29, 2012) (Dkt. No. 173). Because of the challenged policy, Respondents must forego educational and professional opportunities; neglect friends and family members; miss church and important family events, and rearrange much of their lives around the hardships caused by Applicants' policy. Mem. in

Supp. of Prelim. Inj., *ADAC. v. Brewer*, No. 12-02546 (D. Ariz. Nov. 29, 2012) (Dkt. No. 30).

B. Procedural History

On November 29, 2012, Respondents sued Applicants raising equal protection and preemption claims against their 2012 policy. Am. Compl. at ¶¶ 80-93, *ADAC. v. Brewer*, No. 12-02546 (D. Ariz. Nov. 29, 2012) (Dkt. No. 173). On Respondents' motion for a preliminary injunction, the District Court found that Respondents had established a likelihood of success on their equal protection claim, but nonetheless denied their motion, finding that Respondents had not established irreparable harm. *See* District Court Order at 33-39. The District Court also held Respondents had not shown a likelihood of success on their preemption claim. District Court Order at 7-13. In addition, on Applicants' motion to dismiss all claims, the district court dismissed Respondents' preemption claim, granting the motion in part. *Id.*

On July 15, 2013, Respondents filed an appeal of the court's denial of the preliminary injunction, but did not appeal the dismissal of the preemption claim. Opening Br., *ADAC v. Brewer*, No. 13-16248 (9th Cir.) (Dkt. No. 15). In September 2013, Applicants expanded the 2012 policy to make additional groups of noncitizens ineligible for licenses (the "2013 Policy"). This subsequent expansion denied driver's licenses to other noncitizens with deferred action (beyond the DACA program) and those with deferred enforced departure who present EADs to establish lawful presence to obtain a license. The Court of Appeals requested supplemental briefing on how the superseding 2013 Policy affected the case.

The Court of Appeals found that despite the modification, Arizona continued to treat those in the DACA program differently than other noncitizens from whom EADs are accepted as proof of authorized presence. *See* Slip Op. at 18-19. Ultimately, the Court of Appeals held that Respondents are likely to succeed on the merits of their equal protection claim, and that they face numerous irreparable harms. Slip Op. at 28. Because the Court of Appeals determined that Respondents are likely to succeed on the merits of their equal protection claim, it declined to rule on whether Respondents were likely to succeed on the merits of their preemption claim. Slip Op. at 16-17. The Court of Appeals remanded the case to the District Court with instruction to enter a preliminary injunction in favor of Respondents. Slip Op. at 28-29.

The Court of Appeals subsequently denied Applicants' petition for rehearing en banc. Appl'ts' Ex. E, *ADAC v. Brewer*, No. 13-16248 (9th Cir.), Order Denying Pet. For Reh'g & Reh'g *En Banc*, Nov. 24, 2014 (Dkt. No. 82). The Court of Appeals also denied Applicants' motion for a stay. Appl'ts' Ex. F, *ADAC v. Brewer*, No. 13-16248 (9th Cir.), Order Denying Pet. for Stay Pending Appeal, Dec. 9, 2014 (Dkt. No. 86).

REASONS THE STAY APPLICATION SHOULD BE DENIED

The Court of Appeals' order should not be stayed pending the filing and disposition of a petition for a writ of certiorari. As demonstrated below, Applicants have failed to meet their heavy burden of showing: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a

fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay."). *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). In a close case, the Court assesses the balance of equities and weighs the relative harms to the applicant and the respondent. *Id.* Applicants have not made the requisite showing.

I. APPLICANTS HAVE NOT SHOWN A REASONABLE PROBABILITY THAT CERTIORARI WILL BE GRANTED.

A. The Court is Unlikely to Grant Review of the Court of Appeals' Dicta on Preemption.

Applicants seek review of dicta contained in the Court of Appeals' opinion concerning preemption. This Court is unlikely to grant that request for at least two reasons. First, the preliminary injunction directed by the Court of Appeals does not rest on preemption grounds. To the contrary, the Court of Appeals expressly declined to decide any preemption question. The preemption discussion highlighted in the stay application is dicta, and was not the basis for the preliminary injunction that Applicants ask this Court to stay. Second, Applicants' protests notwithstanding, there is nothing remarkable in the Court of Appeal's discussion of preemption principles, which merely reflects well-settled law.

1. A grant of certiorari is unlikely because review of the preemption issue relied upon by Applicants would not change the outcome of the appeal. This Court does not stay opinions, but orders. While Applicants may disagree with the discussion of preemption in the Court of Appeals opinion, that discussion is irrelevant to the preliminary injunction ruling Applicants now seek to stay.

Respondents did not appeal the dismissal of their preemption claim by the District Court, *ADAC v. Brewer*, No. 13-16248 (9th Cir.), Opening Br. (Dkt. No. 15) at 4 n.1, and the Court of Appeals was clear that it did not "rely on [Respondents]' preemption claim . . . in determining whether [Respondents] have established a likelihood of success on the merits." Slip Op. at 16; *see also* Slip Op. at 16-17 (explaining that because Respondents "have established a likelihood of success on the merits of their Equal Protection Clause claim" and met the other requirements for an injunction, "we [] reverse the district court's denial of a preliminary injunction *whether or not* the record on Plaintiffs' . . . conflict preemption theory is now adequate to establish a likelihood of success on that theory") (emphasis added). The Court of Appeals merely indicated that, if Respondents are able to develop the record on remand to the District Court and establish that the challenged policy is precluding them from working, they may be able to establish conflict preemption. Accordingly, the preemption issue that Applicants present as the principal argument in favor of a stay is not even properly before this Court. *See California v. Rooney*, 483 U.S. 307, 311 (1987) ("This Court 'reviews judgments, not statements in opinions.'") (citations omitted).

2. In addition, nothing in the Court of Appeals' analysis merits certiorari. Applicants misconstrue the Court of Appeals' preemption analysis, arguing that it rests on the principle that the Department of Homeland Security ("DHS") memorandum establishing DACA has "preemptive effect." Stay Application at 12, 21. On the contrary, the Court of Appeals' discussion of the potential conflict with

federal law created by Arizona's denial of driver's licenses to DACA recipients is focused on the Executive's congressionally-delegated role in the complex regulation of immigration, and is fully consistent with federal statutes and preemption case law.

As the Court of Appeals properly recognized, the Immigration and Nationality Act ("INA") empowers the Attorney General to grant authorization to noncitizens to work in the United States. *See* Slip Op. at 12-17 (discussing statutory provisions concerning work authorization); *see also* 8 U.S.C. § 1324a(h)(3) (providing that persons may be authorized for employment by statute "*or by the Attorney General*" (emphasis added)); 8 U.S.C. § 1324a(h)(1) (providing that Attorney General is responsible for certifying aliens' right to work in the United States); 8 U.S.C. § 1324a(b)(1)(C)(ii) (providing that a document is valid as evidence of employment authorization if "the Attorney General finds [it], by regulation, to be acceptable" for that purpose).[1]

Applicants quarrel with the preemption discussion in the decision below without ever addressing the relevant provisions of federal law or the Court of Appeals' reliance on the statutory grant of authority to the Attorney General to determine work authorization. Yet, those statutes lie at the heart of the Court of Appeals' preemption discussion and form the predicate for its unremarkable

[1] Likewise, because the Court of Appeals focused on conflict with Congress' grant of power to the Executive to determine work authorization, and not with any conflict with the DACA memorandum, the cases Applicants cite in support of the proposition that the DACA memorandum cannot have preemptive effect, *United States v. Mead Corp.*, 533 U.S. 218 (2001) and *River Runners for Wilderness v. Martin*, 593 F.3d 1064 (9th Cir. 2010), are wholly inapposite.

observation, based on ordinary conflict preemption principles, that Arizona's policy would be preempted were Respondents ultimately to prove that it interfered with DACA recipients' congressionally-authorized and DHS-directed permission to work. *See* Slip Op. at 12-17.

It is well-established that a state law is conflict preempted "whenever it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Slip Op. at 13 (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012)). What is more, "'preemption analysis must contemplate the practical result of the state law, not just the means that a state utilizes to accomplish the goal.'" Slip Op. at 15 (quoting *United States v. Alabama*, 691 F.3d 1269, 1296 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013)) (alteration omitted); *see also Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (explaining that in determining whether a state law is conflict preempted, the courts must "consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written"); Slip Op. at 15 (citing *Jones*, 430 U.S. at 526).

In sum, the Court of Appeals' discussion does not merit a grant of certiorari because it is irrelevant to its preliminary injunction holding, and in any event is fully consistent this Court's preemption precedents.

B. The Court of Appeals' Equal Protection Analysis Did Not Involve an "Improper Application" of the Rational Basis Test, and Even if it Did, Any Such "Improper Application" Would Not Warrant a Grant of Certiorari.

With respect to the Court of Appeals' conclusion that Respondents are likely to succeed on the merits of their equal protection claim, Applicants take issue with the Court of Appeals' "improper application of rational basis review." Stay Application at 2. As Applicants acknowledge, Stay Application at 15-16, the Court of Appeals properly stated the standard, quoting this Court's controlling precedent and explaining that "[t]o survive rational basis review, Defendants' disparate treatment of DACA recipients must be 'rationally related to a legitimate state interest.'" Slip Op. at 20 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)); *see also* Slip Op. at 19-20 (holding that "as the district court concluded, Defendants' policy is likely to fail even rational basis review"). Applicants disagree with the Court of Appeals' application of the standard to the facts of this case. *See, e.g.*, Stay Application at 16 (contending that the Court of Appeals' "Opinion ignored the fact[s]" regarding DACA recipients). Applicants' assertion that the Court of Appeals misapplied the rational basis test is incorrect, however, and in any event, does not constitute a valid basis for a grant of certiorari.

Regardless of the merits of Applicants' argument, it is well established that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Because Applicants seek review of the Court of Appeals' "improper application" of a properly stated rule, certiorari is unwarranted.

Moreover, Applicants are wrong to suggest that the Court of Appeals erred by considering whether the proffered rationales had at least some basis in reality. While this Court has described the deferential nature of rational basis review on various occasions, it has nonetheless made clear that rational basis review is not "toothless." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976); s*ee also, e.g.*, *Dep't of Agric. v. Moreno,* 413 U.S. 528, 533-38 (1973) (overturning statute denying eligibility for public benefits to households comprising non-relatives under rational basis review); *Eisenstadt v. Baird*, 405 U.S. 438, 446-55 (1972) (overturning statute criminalizing distribution of contraceptives that discriminated against unmarried persons under rational basis review). Thus, in *Heller v. Doe*, 509 U.S. 312 (1993), a case relied upon by Applicants (Stay Application at 16-17, 18), this Court explained that "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." *Id.* at 321; *accord Romer v. Evans*, 517 U.S. 620, 632 (1996) (in striking down state ballot initiative, noting that "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained"); *id.* at 632-33 (classification must be "grounded in a sufficient factual context for [the Court] to ascertain some relation between the classification and the purpose it serve[s]"). In *Heller*, for example, the Court did not simply allow Kentucky to speculate that mental retardation is more likely to manifest itself earlier, and be easier to diagnose, than mental illness. 509 U.S. at 321-22. Instead, the Court relied upon a long list of

diagnostic manuals and journals to satisfy itself that Kentucky's rationale "has a sufficient basis in fact," *id.* at 322, and to determine that the state had legislated on the basis of reasonably conceivable facts and not stereotypes or misunderstandings. *See id.* at 321-25; *see also id.* at 329 (concluding that "[b]ased on these facts" the state could reasonably have reached its conclusion).

Here, the Court of Appeals correctly concluded, based on the specific circumstances of this case, that Applicants' proffered rationales could not survive rational basis review.[2] In urging that certiorari is likely to be granted, Applicants point to the Court of Appeals' analysis of three purported rationales (Stay Application at 16). First, Applicants argue that DACA recipients are not authorized to be in the United States under federal law. But the Court of Appeals correctly rejected this rationale given that, *inter alia*, other noncitizens eligible for Arizona licenses based on their EADs "are authorized to be present in the United States in the same sense that DACA recipients are authorized to be here: in both cases, the federal government has allowed noncitizens to remain in the United States, has pledged not to remove them during the designated period, and has authorized them to work in this country." Slip Op. at 21-22; *cf., e.g.*, *Cleburne*, 473 U.S. at 449-50

[2] For this reason, the Court of Appeals' fact-specific application of the standard does not remotely conflict with the cases cited by Applicants (Stay Application at 17-18). Ultimately, Applicants' complaint with the Court of Appeals' decision appears to be that its application of the rational basis test resulted in a conclusion that Applicants' policy is likely unconstitutional. *See, e.g.*, Stay Application at 18 (arguing that the Court of Appeals' opinion conflicts with cases in which this Court "upheld the challenged laws as constitutional"). The fact that the outcome of the rational basis test is different in cases involving different circumstances is unsurprising, however, and does not establish any conflict that merits certiorari review.

(rejecting as irrational purported rationales that were equally applicable to classes not excluded by the challenged policy).

Second, Applicants argue that providing licenses to Respondents could somehow subject the state to liability for granting licenses to unauthorized immigrants. Applicants have not clearly articulated the nature of the liability they fear. Moreover, Applicants offered no rational basis for any such concern given that DACA recipients have been granted authorization to remain and work in the United States, and are materially indistinguishable on that basis from other immigrants who remain eligible for Arizona licenses. Applicants have never identified a single instance in which they faced such liability—despite the tens of thousands of driver's licenses Applicants have issued to noncitizens establishing eligibility based on federal Employment Authorization Documents. Slip Op. at 23.

Third, although Applicants have suggested that issuing licenses to Respondents could lead to unauthorized access to public benefits, Applicants Halikowski and Stanton themselves admitted that they have *no basis* to believe that a driver's license alone could be used to establish eligibility for public benefits. Slip Op. at 23.

Applicants contend in the alternative that the Court of Appeals applied, without saying so, a "heightened" level of rational basis review, improperly following this Court's precedent in *Cleburne*. Stay Application at 18-19. Applicants contend that the opinion in *Cleburne* "is a departure from traditional rational basis review." Stay Application at 19. Yet Applicants' characterization of *Cleburne* is

flatly contradicted by *Cleburne* itself, which expressly stated that it was applying the traditional rational basis standard. *See Cleburne*, 473 U.S. at 476 ("Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose."). Subsequent Supreme Court cases have also rejected Applicants' argument. For example, in *Heller*, the Court cited *Cleburne* and explained that it had "applied rational-basis review in previous cases involving the mentally retarded and the mentally ill" and in those cases it had not "purport[ed] to apply a different standard of rational-basis review from that just described." 509 U.S. at 321. In sum, the Court of Appeals' application of the rational basis standard was entirely proper, and consistent with this Court's precedents.

C. The Court of Appeals' Judgment Does Not Impact Any Other State Laws.

Additionally, the Court is not likely to grant certiorari in this case because the Court of Appeal's ruling will have little impact on other states, within the Ninth Circuit and nationwide. Only *one* other state denies driver's licenses to DACA recipients (Nebraska); the other 48 states already provide DACA recipients with driver's licenses.[3] Moreover, the lawfulness of Nebraska's policy is the subject of ongoing litigation. *See Marquez Hernandez v. Heineman*, Case No. 4:14-CV-3178

[3] *See* Nat'l Immigration Law Ctr., *Are Individuals Granted Deferred Action under the Deferred Action for Childhood Arrivals (DACA) Policy Eligible for State Driver's Licenses?* (June 19, 2013), http://www.nilc.org/dacadriverslicenses.html.

(D. Neb.). Accordingly, at this time, there exists no conflict between the Court of Appeals' decision and any other circuit or state supreme court on this issue. Simply put: Arizona is an outlier in its discrimination against DACA recipients, and the Court of Appeals' decision merely puts Arizona in line with the practice in 48 other states. This case does not present an issue of nationwide importance meriting certiorari.

D. The Interlocutory Nature of This Appeal Also Weighs Against Review.

The interlocutory nature of this appeal also renders certiorari inappropriate. The Court of Appeals' decision concerns a preliminary injunction rather than a final judgment, and accordingly is based on an extremely limited record. *See, e.g.*, *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395-96 (1981) (noting that the district court's findings from "a preliminary injunction are not binding at trial on the merits" and that during a preliminary injunction hearing "the parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the actual merits of the controversy"); *see also* Stay Application at 33 n.9 (stating that the record for the preliminary injunction was "only limited," and that "substantial discovery and numerous depositions" have occurred since the appeal was filed). The parties have fully briefed and submitted cross-motions for summary judgment to the District Court, and are now awaiting the court's decision. *See ADAC v. Brewer*, No. 2:12-cv-02546-DGC (D. Ariz.), Defs.' Mot. for Summ. J. (Dkt. No. 247) and Pls.' Mot. for Summ. J. & Perm. Inj. (Dkt. No. 251) (both filed Mar. 30, 2014). A final judgment on the merits of this case, based on a complete

record, may raise different, additional, or fewer issues than those raised at this preliminary stage. Thus, the Court's efficiency would be served by awaiting a final resolution, rather than by granting review at this early stage.

E. This Case Does Not Concern the Validity of the Federal Governments' Deferred Action Expansion, a Program Yet to Be Implemented.

Finally, Applicants appear to suggest that review is necessary in this case "in light of the Executive Branch's continued expansion of deferred action." Stay Application at 1; *see also id.* at 5-7. But this case does not raise issues concerning the validity or extent of the Executive's discretionary authority, either with respect to DACA or the deferred action programs newly announced in late November. Neither the Court of Appeals nor the District Court has considered whether the DACA Program is lawful, much less ruled on this basis. Notably, Applicants admit to the federal government's general authority to grant deferred action. Stay Application at 7.

Further, as Applicants acknowledge, Arizona, along with other states, is suing the United States and directly challenging the extent of the federal executive's power to grant broader deferred action relief in the recently announced deferred action programs. *See* Stay Application at 7; *see also* Compl. at 2, *Texas v. United States*, No. 1:14-cv-00254, ECF No. 1 (S.D. Tex. Dec. 3, 2014). A second suit, filed by an Arizona sheriff against President Obama, raises the same issues. *See* Compl. at 1, *Arpaio v. Obama*, No. 1:14-cv-1966, ECF No. 1 (D.D.C. Nov. 20, 2014). To the extent review of such issues is appropriate, the Court should await decisions from the cases that squarely challenge the Executive's power.

II. APPLICANTS HAVE NOT SHOWN A FAIR PROSPECT OF REVERSAL OF THE JUDGMENT BELOW.

A. Reversal of the Court of Appeals' Preemption Analysis is Not a Significant Possibility.

In urging that reversal on preemption is likely, Applicants raise the same arguments they rely on with respect to the likelihood of certiorari. For the same reasons that the Court is unlikely to grant review of the preemption issues involved in this case, reversal is also not significantly likely. *See supra* at Part I.A. As discussed, the analysis by the Court of Appeals is correct on the law and would not lead to reversal on the merits. If the record were to establish that Arizona's policy interferes with the federal government's decision to authorize DACA recipients to work, then the policy would be conflict preempted. *See id.* Applicants' singular focus on the memorandum establishing DACA (*see* Stay Application at 20-25) completely disregards the Court of Appeals' actual analysis, which relies not on the DACA memorandum, but on Congress' decision to grant the Executive the power to authorize noncitizens to work in the United States.

B. Reversal on Equal Protection is Not a Significant Possibility.

In urging that reversal of the Court of Appeals' equal protection holding is a "significant possibility," Stay Application at 20, Applicants largely repeat the arguments put forward in support of their assertion that a grant of certiorari is likely. *See* Stay Application at 26-28. Respondents have explained above the reasons why the Court of Appeals decision did not err in applying the rational basis standard, *see supra I.B*. Respondents have also addressed Applicants' purported

rationales concerning DACA recipients' authorization to be present, alleged legal liability faced by Applicants, and access to public benefits, *see supra* I.B.

Applicants point to two additional rationales that they claim are rationally related to the denial of driver's licenses to young immigrants granted DACA. Stay Application at 26. Neither has merit. With respect to Applicants' concern that it would be burdensome to issue licenses to DACA recipients and then revoke them if the DACA program is terminated, the Court of Appeals properly recognized that this concern cannot justify singling out DACA recipients because it is equally applicable to other noncitizens who are eligible for Arizona licenses and are similarly situated to DACA recipients in that they could be subject to removal. *See* Slip Op. at 24 (noting that noncitizens eligible for licenses because of EADs based on pending applications for adjustment of status or cancellation of removal routinely have those applications denied); *cf. Cleburne*, 473 U.S. at 449-51. Indeed, many noncitizens eligible for Arizona driver's licenses could be subject to removal, yet Applicants have not denied them licenses on that ground. Further, even assuming Applicants were correct that a large number of DACA recipients might apply for Arizona driver's licenses and that a burden might result, this Court has emphasized that "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources. . . . The State must do more than justify its classification with a concise expression of an intention to discriminate." *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (citing *Graham v.*

Richardson, 403 U.S. 365, 374-75 (1971), and *Examining Bd. v. Flores de Otero*, 426 U.S. 572, 605 (1976)).

With respect to Applicants' concern that DACA recipients might not be financially responsible if they are removed from the United States, the Court of Appeals properly concluded that because this concern was equally applicable to other noncitizens who remain eligible for licenses under Applicants' policy, it was not a rational basis for the classification. Slip Op. at 24. Indeed, this concern is wholly unrelated to status as a DACA recipient, given that "[*a*]*ny* driver—regardless of his or her citizenship or immigration status—could flee Arizona after an automobile accident, in an effort to avoid financial responsibility." Slip Op. at 24 n.6. *Cf. Examining Bd. v. Flores de Otero*, 426 U.S. 572, 606 (1976) (noting that "United States citizenship is not a guarantee that" a person will "continue to reside in [a particular state] or even in the United States, and bears no . . . rational relationship to . . . financial responsibility").

In sum, there is no significant possibility of reversal because the Court of Appeals properly applied the rational basis test, and correctly concluded that Applicants' rationales are not rationally related to a legitimate state interest.

III. APPLICANTS HAVE NOT SHOWN IRREPARABLE HARM.

Applicants assert speculative harms that two courts have already rejected as failed rational bases for their illegal policies. Because they ignore the record in this case and rely on inapplicable case law, their application for a stay should be denied on this basis, as well.

Before Applicants decided in 2012 to specifically exclude Employment Authorization Documents presented by DACA recipients from the list of documents acceptable as proof of authorized presence, all deferred action recipients were eligible for Arizona licenses based on their EADs. As Applicants plainly admit, Arizona "had previously accepted EADs as satisfactory proof of authorized presence under federal law, providing driver's licenses to such individuals." Stay Application at 3. The preliminary injunction would do nothing more than restore the status quo that preceded this controversy.

Applicants are in no position to argue that any change—especially one that merely restores the status quo—poses a severe administrative burden since Applicants have themselves changed their driver's license policy twice in the last two years without apparent difficulty, both times illegally excluding DACA recipients by refusing to recognize their EADs as proof of authorized presence. *See* Stay Application at 3-4; Slip Op. at 7-9. Similarly, any complaint that the need to process additional license applications would unduly burden the state's resources rings hollow given the fact that Applicants have also successfully administered licenses for tens of thousands of noncitizens that used EADs to obtain licenses since 2005. *See* District Court Order at 4-5 & n.3; Slip Op. at 23.

Not surprisingly, therefore, every court to consider Applicants' supposed administrative burdens has rejected them. First, the District Court held: "Defendants might be inconvenienced by an order requiring them to issue driver's licenses to Plaintiffs and their class, but Defendants appear to issue licenses to

similarly situated individuals without serious difficulties." District Court Order at 39. The Court of Appeals agreed, rejecting Applicants' contention that issuing licenses to Respondents is administratively complex. Slip Op. at 23-24. Applicants have provided no reason to reach a contrary conclusion here.

Indeed, this Court's cases make clear that it does not grant a stay in every case where an agency alleges "irreparable financial and administrative difficulties." *See, e.g., Buchanan v. Evans*, 439 U.S. 1360, 1365 (1978) (Brennan, J., in chambers) (denying application for stay of Third Circuit's judgment and mandate affirming a district court ordered desegregation plan). Here, the stay request should be denied given the utter lack of record evidence of actual harms or costs for Applicants. Applicants' citations (Stay Application at 30-31) are therefore wholly distinguishable. *Compare Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 1, 5 (2010) (Scalia, J., in chambers) (amount of money expected to be irretrievably lost demonstrated based on elements of $241,540,488 judgment requiring Applicants to fund smoking cessation program); *Mori v. Int'l Bhd. of Boilermakers*, 454 U.S. 1301 (1981) (Rehnquist, J., in chambers) (record demonstrated amount of money expected to be lost).[4] Not only have defendants failed to substantiate their alleged harm, it is

[4] Also, *I.N.S. v. Legalization Assistance Project of Los Angeles Cnty. Fed'n of Labor*, 510 U.S. 1301 (1993) (O'Connor, J., in chambers), cited by Applicants (Stay Application at 30), was an "exceptional case" where standing was at issue, and thus the federal courts may not have had jurisdiction at all. *See Legalization Assistance Project*, 510 U.S. at 1302, 1306 (noting that the challenged court order may be "an improper intrusion by a federal court into the workings of a coordinate branch of the Government"). While this fact weighed heavily against respondents in that case, Respondents' standing is undisputed in this appeal.

flatly contradicted by record in this case, as noted above. They have not carried their burden.

Last, Applicants allege for the first time that an injunction in this case would prohibit them from enforcing an Arizona statute. Stay Application at 31. A fairer reading of the situation is that the preliminary injunction directs Arizona to comply with its own statute, which renders persons whose "presence in the United States is authorized under federal law" eligible for state driver's licenses. *See* A.R.S. § 28-3153(D). Arizona's policies have in the past recognized that noncitizens with EADs based on deferred action are indeed authorized to be present. Stay Application at 3. Arizona's policies currently recognize that other immigrants who are identically situated to Respondents are authorized to be present. *See supra* I.B. Applicants' argument fails on its face.

IV. THE BALANCE OF EQUITIES TIP AGAINST A STAY.

This is not a close case, and the Court need not balance the equities. But if it did, the equities would tip entirely against issuance of a stay. In contrast to Applicants' unsubstantiated harms, there is "ample evidence that Defendants' policy causes [Respondents] to suffer irreparable harm." Slip Op. at 26-27. Even taking into account Applicants' unproven allegations of harm, the balance of equities tips sharply in Plaintiffs' favor. The Court of Appeals recognized that Respondents are hindered in their "ability to work and engage in other everyday activities" because Applicants deny Respondents drivers' licenses, Slip Op. at 27, and found irreparable harms in the form of irretrievably lost career opportunities,

which are heightened by Plaintiffs' young age.[5] *Id.* A stay would also subject Plaintiffs to continued discrimination under a policy that the Court of Appeals held likely violates their equal protection rights—certainly a "substantial injury" to the non-moving party. In addition, allowing the mandate to issue would serve the public interest by enjoining the continuing violation of Plaintiffs' constitutional rights.

In sum, Applicants have failed to show they would suffer irreparable harm, while Respondents will continue to experience irreparable harm absent preliminary injunctive relief.

[5] Applicants wrongly suggest that the District Court found no harms for Respondents. The District Court held that "Plaintiffs undoubtedly are harmed to some degree by Defendants' apparent violation of their equal protection rights . . . ." District Court Order at 39. Applying the correct injunction standard, the Court of Appeals found, based on the facts in the record, that Respondents have established irreparable harm warranting a preliminary injunction. Slip Op. at 26-28.

CONCLUSION

The application for a stay of the Court of Appeals' mandate should be denied.

Respectfully submitted,

Jennifer Chang Newell
Counsel of Record
Cecillia D. Wang
Araceli Martínez-Olguín
Michael Tan
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0775
jnewell@aclu.org

Linton Joaquin
Karen C. Tumlin
Shiu-Ming Cheer
Nora A. Preciado
Nicholás Espíritu
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 2850
Los Angeles, CA 90010
(213) 639-3900

Tanya Broder
NATIONAL IMMIGRATION LAW CENTER
405 14th Street, Suite 401
Oakland, CA 94612
(510) 663-8282

Victor Viramontes
Jorge M. Castillo
MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATIONAL FUND
634 S. Spring Street, 11th Floor
Los Angeles, CA 90014
(213) 629-2512

Steven R. Shapiro
Lee Gelernt
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2676

Daniel Pochoda
James Duff Lyall
ACLU FOUNDATION OF ARIZONA
3707 N. 7th Street, Suite 235
Phoenix, AZ 85014
(602) 650-1967