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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

LUCRECIA RIVAS VALENZUELA, MARCOS GONZALEZ, MARIA DEL CARMEN CRUZ HERNANDEZ, GUADALUPE KARINA NAVA RIVERA, and MARIA ISABEL ACEITUNO LOPEZ,

Plaintiffs,

v.

DOUG DUCEY, Governor of the State of Arizona**,** in his official capacity; JOHN S. HALIKOWSKI, Director of the Arizona Department of Transportation, in his official capacity; and ERIC JORGENSON, Assistant Director of the Motor Vehicle Division of the Arizona Department of Transportation, in his official capacity,

Defendants.

CASE NO. 2:16-CV-03072-SPL

MOTION FOR PRELIMINARY INJUNCTION

(oral argument requested)

Additional Co-Counsel

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INTRODUCTION

The Ninth Circuit and the Arizona District Court already have ordered Defendants to drop thier unlawful and discriminatory policy prohibiting a subset of deferred action holders—those granted deferred action under the Deferred Action for Childhood Arrivals (DACA) guidance—from receiving driver's licenses. *See Arizona Dream Act Coal. v. Brewer* (*ADAC IV*), 818 F.3d 901 (9th Cir. 2016); *see also Arizona Dream Act Coal. v. Brewer* (*ADAC III*), 81 F. Supp. 3d 795 (D. Ariz. 2015). Those holdings compel Defendants to do the same for all deferred action recipients and other putative class members because all of these individuals have the federally authorized presence required under Arizona law to be eligible for a driver's license. Yet, Defendants continue to deny driver's licenses to the putative class members pursuant to their impermissible state classification system even after the Ninth Circuit's binding precedent found the policy to be preempted.

Arizona requires that an applicant for an instruction permit, driver's license, or identification card submit proof that his or her "presence in the United States is authorized under federal law." Ariz. Rev. Stat. §§ 28-3153(D), 28-3158(C), 28-3165(F). All individuals who possess a valid federal Employment Authorization Document (EAD) are authorized to be in the United States by the federal government. Defendants simply cannot reject the federal government's determination that individuals granted work authorization via deferred action or other forms of immigration relief are authorized to be present in the United States. Because Defendants stubbornly reject the EADs of individuals granted deferred action outside of the DACA program, while accepting them for virtually everyone else, Defendants unconstitutionally discriminate against Plaintiffs and the class and violate the Equal Protection Clause. Similarly, Defendants' state-based immigration classification is preempted on several grounds.

STATEMENT OF FACTS AND BACKGROUND

I. Before DACA, Arizona Recognized that *All* Individuals with Federal Employment Authorization Documents were Eligible for Licenses then Defendants Reversed Course

Prior to DACA, Arizona policy recognized that *any* valid federal employment authorization document was sufficient to prove that an applicant's presence was "authorized under federal law." *See* Espíritu Decl. A (MVD, Primary and Secondary Forms of Acceptable Documentation). However, on August 15, 2012, then-Arizona-Governor Jan Brewer issued Executive Order 2012-06 (EO 2012-06), instructing state agencies to take necessary steps to "prevent Deferred Action recipients from obtaining eligibility . . . for any . . . state identification, including a driver's license." *See* Espíritu Decl., Ex. B.[1] On the same day she issued EO 2012-06, then-Governor Brewer stated that EO 2012-06 was intended to clarify that there would be "no drivers [sic] licenses for illegal people."[2] She also stated: "They are here illegally and unlawfully in the state of Arizona . . . ."[3]

On September 17, 2012, Defendant Arizona Department of Transportation (ADOT) revised its policy by issuing Motor Vechicle Division (MVD) Policy 16.1.4. MVD Policy 16.1.4 barred the acceptance of DACA recipients' EADs, while still accepting EADs for all other individuals including all non-DACA deferred action recipients and putative class members. *See* Espíritu Decl., Ex. C.

In November of 2012, litigation was brought in federal district court challenging Arizona's policy on the grounds that it violated the Equal Protection and Supremacy Clauses of the United States Constitution. *See Ariz. Dream Act Coal. v. Brewer*, No.

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[1] Governor Ducey has allowed the EO and MVD Policy 16.1.4 to remain in place.

[2] *Why Did Brewer Issue 'Dreamer' Order?*, ARIZ. REPUBLIC (Aug. 15, 2012)). http://www.azcentral.com/video/#/Why+did+Brewer+issue+%27dreamer%27+order%3F/1787777903001, (video documenting remarks by Defendant Brewer) (last visited October 11, 2016).

[3] *Jan Brewer Bars IDs, Benefits for Undocumented Immigrants in Arizona*, FOX NEWS LATINO (Aug. 16, 2012)), http://latino.foxnews.com/latino/politics/2012/08/16/brewer-blocks-id-benefits-for-undocumented-immigrants/, (last visited October 11, 2016).

CV12–02546 PHX DGC. After the Arizona District Court found that Defendants' policy was likely unconstitutional, *Ariz. Dream Act Coal. v. Brewer*, 945 F. Supp. 2d 1049, 1061 (D. Ariz. 2013) ("*ADAC I*"), Defendants changed course again, and on September 16, 2013 revised MVD Policy 16.1.4 again to now purport that additional deferred action recipients (including DACA recipients) and all deferred enforced departure recipients (DED) were not authorized to be present in the United States, and therefore would be precluded from receiving Arizona driver's licenses. *See* Espíritu Decl., Ex. D (MVD Policy 16.1.4(s)); *see also Arizona Dream Act Coal. v. Brewer* (*ADAC II*), 757 F.3d 1053, 1060 (9th Cir. 2014) (noting that defendants attempted to argue that as a result of their September 2013 policy revision they were no longer distinguishing between similarly situated groups of noncitizens). This revised policy denied driver's licenses to other noncitizens granted deferred action outside of the DACA program and those granted DED who present EADs. Defendants attempted to justify this change by stating that "Arizona views an EAD as proof of presence authorized under federal law only if the EAD demonstrates: (1) the applicant has formal immigration status; (2) the applicant is on a path to obtaining formal immigration status; or (3) the relief sought or obtained is expressly provided pursuant to the INA." *ADAC IV*, 818 F.3d at 907 (noting testimony of ADOT Director John S. Halikowski).

On January 22, 2015, the district court permanently enjoined Defendants' policy of denying driver's licenses to a subset of deferred action recipients pursuant to the DACA program, *ADAC III*, 81 F. Supp. 3d at 810-11, and the Ninth Circuit subsequently affirmed the district court's order. *ADAC IV*, 818 F.3d at 920. Thus, by court order, Defendants now provide driver's licenses to DACA recipients. Today, after four federal court decisions declaring that deferred action recipients are authorized to be present for purposes of the Arizona driver's license statute, Arizona has still refused to make non-DACA deferred action recipients and individuals granted DED eligible for licenses.

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ARGUMENT

I. Legal Standard

To obtain a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat'l Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008). Here Plaintiffs seek a prohibitory injunction. "[A] prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits." *See ADAC II*, 757 F.3d at 1060-61 (*quoting Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.,* 571 F.3d 873, 878–79 (9th Cir.2009)). The relevant status quo is the "relationship *between the parties* before the controversy arose." *Id*. at 1061 (emphasis in original). As the Ninth Circuit recognized in *ADAC II*, "[t]he status quo . . . was that Plaintiffs were subject to a legal regime under which all holders of federal [EADs] were eligible for Arizona driver's licenses." *Id.* Accordingly, because Plaintiffs seek a return to this previous policy, Plaintiffs' requested injunction is prohibitory.

II. Plaintiffs Are Likely to Succeeed on the Merits

A. The Ninth Circuit Has Already Ruled that All Deferred Action Recipients Have Authorized Presence under Federal Law

The Ninth Circuit already has held that a subset of deferred action holders "are permitted to remain in the United States, " *ADAC IV*, 818 F.3d at 905, and any other result would be contrary to federal law. The Ninth Circuit further explained with respect to deferred action under the DACA program that "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." *ADAC II*, 757 F.3d at 1066. Importantly, the Ninth Circuit clarified that its holdings were applicable to all individuals with deferred action, noting that "because Arizona's novel classification scheme includes not just DACA recipients but also recipients of regular deferred action

and deferred enforced departure, our conclusion . . . is not dependent upon the continued vitality of the DACA program." *ADAC IV*, 818 F.3d at 915, n.8.

The Ninth Circuit also noted that under the INA, federal regulations provide that "deferred action recipients do not accrue 'unlawful presence' for purposes of calculating when they may seek admission to the United States." *ADAC IV*, 818 F.3d at 916 (citing to 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2)). Similarly, the Ninth Circuit pointed to yet another federal law, the REAL ID Act, under which "[p]ersons with 'approved deferred action status' are expressly identified as being present in the United States during a 'period of authorized stay,' for the purpose of issuing state identification cards." *ADAC IV*, 818 F.3d 901 at 917 (citing to REAL ID Act of 2005, Pub. L. No. 109–13, div. B, § 202(c)(2)(B)(viii), (C)(ii), 119 Stat. 231).

B. Defendants' Policy Violates the Equal Protection Clause of the Constitution

1. Deferred Action recipients are similarly situated to DACA recipients and all other lawfully present Arizona noncitizens

Plaintiffs, who have been denied driver's licenses, are similarly situated to DACA recipients and other noncitizens residing in Arizona who posess a valid EAD because all have had their presence authorized by the federal government.[4] *See ADAC II*, 757 F.3d at 1064. Plaintiffs "need not be similar in all respects" to other groups receiving driver's

[4] Although Plaintiffs have established that they are similarly situated to other noncitizens who are currently eligible for Arizona driver's licenses, in the context of a facially discriminatory policy, the similarly situated analysis, if required at all, is properly considerd in conjunction with the court's review of the state's purported interests, rather than as an independent, threshold inquiry. *See generally* Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 598 (2011) ("[T]he U.S. Supreme Court has not historically viewed [the similarly situated requirement] as a separate, threshold requirement, but rather as one and the same as the equal protection merits inquiry."); *see also, e.g., Williams v. Vermont*, 472 U.S. 14, 23 (1985) (considering similarly situated and legitimate purpose questions together); *Romer v. Evans,* 517 U.S. 620, 632-36 (1996) (same). *Cf. Pac. Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013) (holding similarly situated is not an element needed "to create a triable issue of fact regarding discriminatory intent in a disparate treatment case").

licenses "but they must be similar in those respects relevant to the Defendants' policy." *Id.*; *see also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1203 (11th Cir. 2007) (holding similarly situated inquiry involves only one factor when policy makes only that factor relevant). Here, Arizona requires that an individual have authorized presence in the United States to be eligible for a driver's license, and thus authorized presence is the only factor relevant to whether individuals are similarly situated. *ADAC II*, 757 F.3d at 1064. Like DACA recipients, individuals applying for adjustment of status, and individuals applying for cancellation of removal,[5] non-DACA deferred action recipients have been granted federal authorization to live and work in the United States as evidenced by their EADs. *See infra* II.A; 8 C.F.R. § 274a.12(c)(14).

Prior to the implementation of the DACA program, Defendants treated *all* individuals with a valid EAD uniformly as eligible for driver's licenses. *ADAC I*, 945 F. Supp. 2d at 1061. The Arizona district court previously has recognized that noncitizens permitted to remain in the country temporarily for "an individual humanitarian reason" and DACA recipients were similarly situated because both groups "have been granted deferred action status through federal prosecutorial discretion, both have been granted that status temporarily, both are eligible to work while here, and both may be issued EADs." *Id.* at 1070; *accord ADAC II*, 757 F.3d at 1064. As such, the district court concluded that it was "inclined to agree" that DACA recipients and other deferred action recipients "are the same in respects relevant to the driver's license policy." *ADAC I*, 945 F. Supp. 2d at 1061. Similarly, the Ninth Circuit has ruled that a subset of deferred action recipients are similarly situtated to individuals applying for adjustment of status and applying for withholding of removal. *ADAC II*, 757 F.3d at 1064. Finally, the Ninth Circuit, recognized that all individuals with valid EADs are similarly situated to DACA recipients,

[5] EADs issued to individuals applying for adjustment of status are coded as (c)(9) and those applying for cancellation of removal are issued EADs coded (c)(10). The Ninth Circuit sometimes used these administrative codes in its opinions.

noting that "DACA recipients are similarly situated to other categories of noncitizens who may use Employment Authorization Documents to obtain driver's licenses in Arizona." *Id*. Since non-DACA deferred action recipients are similarly situated to DACA recipients, adjustment of status applicants, and cancellation of removal applicants, and all others who have EADs, the district and appellate courts' previous reasoning applies here.

Although all of these similarly situated groups have authorized presence in the United States, Defendants treat them disparately by allowing DACA recipients, applicants for adjustment of status, applicants for cancellation of removal, and others with EADs to receive driver's licenses while denying driver's licenses to non-DACA deferred action recipients and individuals granted DED. As described in more detail below, Defendants' disparate treatment of deferred action and DED recipients is irrational and unconstitutional. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446, (1985).

2. Defendants' policy is subject to strict scrutiny or, alternatively, heightened scrutiny

As the Ninth Circuit acknowledged in *ADAC II,* the Supreme Court has "consistently required the application of strict scrutiny to state action that discriminates against noncitizens authorized to be present in the United States." *ADAC II*, 757 F.3d. at 1056 n.4 (citing *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948)). Conversely, the Ninth Circuit continued, "alienage-based discrimination is subject to rational basis review *only when* the aliens targeted by that discrimination are 'presen[t] in this county in violation of federal law.'" *Id*. (quoting *Plyler v. Doe*, 457 U.S. 202, 223 (1982)) (emphasis added). Both principles support the application of strict scrutiny here. Moreover, Arizona's driver's license policy barring non-DACA deferred action recipients is state action "directed at aliens and . . . only aliens are harmed by it." *Nyquist*, 432 U.S. at 9; *see also id*. at 7 (applying strict scrutiny to a New York law prohibiting certain lawful permanent residents from receiving financial aid for higher education). Thus, the Court

should apply strict scrutiny to the extent it reaches this question. Alternatively, the Court should apply a form of intermediate scruity for "quasi-suspect" classifications. *Seeboth v. Allenby*, 789 F.3d 1099, 1104 (9th Cir. 2015), *cert. denied sub nom. Seeboth v. Ahlin*, 136 S. Ct. 1168 (2016). In order to constitute a suspect or quasi-suspect class, a group "must 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless, or alternatively show that the statutory classification at issue burdens a fundamental right." *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990).

Here, Arizona targeted a related group of deferred action recipients when it originally restricted DACA recipients' access to driver's licenses via EO 2012-06. *ADAC I*, 945 F. Supp. 2d at 1070; *see also, Juarez v. Nw. Mut. Life Ins. Co.*, 69 F. Supp. 3d 364, 368 (S.D.N.Y. 2014), *appeal withdrawn* (June 4, 2015) (national employer foreclosed deferred action recipients from working at any of their locations throughout the county). Further, as noncitizens, they cannot vote and thus cannot rely on the protection of the ordinary checks of the political process. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102-03 (1976); *Toll v. Moreno*, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring); *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938); *Dandamudi v. Tisch*, 686 F.3d 66, 77 (2d Cir. 2012). For these reasons, Defendants' policy calls for, at a minimum, heightened scrutiny.

3. Defendants' policies fail even rational basis review

Defendants' policy does not even pass rational basis review, and thus, as the Ninth Circuit opted, this Court need not reach the standard of scrutiny question. *See ADAC II*, 757 F.3d at 1065 (declining to determine whether a higher level of scrutiny applied and reaffirming that Arizona's policy "is likely to fail even rational basis review"). The rational basis standard requires that a classification "be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of

the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (citations omitted). Arizona's policy must therefore be "rationally related to a legitimate state interest" to withstand rational basis review. *City of Cleburne*, 473 U.S. at 440.

Defendant Director of ADOT previously submitted sworn deposition testimony detailing all of Defendants' purported ratonales for the current policy. Four of the bases for their 2013 policy were identical to those proffered as justification for their intial discrimination against DACA recipients in the 2012 policy: (1) that, like DACA recipients, individuals in the additional categories did not have authorized presence under federal law, and ADOT therefore could face liability for issuing driver's licenses to unauthorized non-citizens; (2) issuing driver's licenses could allow individuals to gain access to federal and state benefits to which they are not entitled; (3) ADOT could be burdened by having to process a large number of driver's licenses and then cancel those licenses if the government's grant of prosecutorial discretion were revoked; and (4) if DHS commenced removal proceedings against any individual in these categories as it could at any time, the recipient would be subject to immediate deportation or removal and could escape financial responsibility for property damage or personal injury caused in automobile accidents. *ADAC III*, 81 F. Supp. 3d at 806-07; Espíritu Decl. E (Halikowski Depo 13:7-15:10).

In the *ADAC* litigation, both the Arizona district court, *ADAC III*, 81 F. Supp. 3d at 806-07, and the Ninth Circuit, *ADAC II* 757 F.3d at 1066–67, considered each of these justifications and found that none of them satisfies rational basis review. Further, as the Ninth Circuit's most recent decision makes clear, none of these purported rationales for withholding driver's licenses also can sustain Defendant's current policy with respect to (c)(14) and (a)(11) EAD holders. *ADAC IV*, 818 F.3d at 911-14. There, the Ninth Circuit noted that in "the depositions of ADOT Director John S. Halikowski and Assistant Director of the Motor Vehicle Division Stacey K. Stanton . . . [n]either witness was able to

identify any instances in which the state faced liability for issuing licenses to noncitizens not authorized to be present in the country." *Id.* at 912. It also noted that Defedants' depositions revealed that "they had no basis for believing that drivers' licenses could be used to access state and federal benefits." *Id.* The Ninth Circuit also noted that Defendants faced similar burdens with respect to revoking driver's licenses for (c)(9) and (c)(10) EAD holders and that these individuals also could potentially be removed on short notice, leaving individuals injured in traffic accidents potentially exposed to financial harms. *Id.* However, because it did not deny licenses to these individuals, it could not use this as a basis to deny licenses to other groups.

Defedants' only additional stated rationales were that the denial of driver's licenses to non-DACA deferred action holders and DED holders was to create "consistency" with their policy with respect to DACA recipients, and claim that such a decision was necessary to administer the Arizona's driver's license statute. *Id.* at 912-13; Espíritu Decl. E (Halikowski Depo 13:7-15:10). As the Ninth Circuit noted, Defendants were at that time failing to apply their policy in a consistent manner because they continued to allow individuals with (c)(9) and (c)(10) EADs to receive driver's licenses. *ADAC IV*, 818 F.3d at 912-13. However, Defendants' policy is even more inconsistent now, as they allow (c)(9), (c)(10), and (c)(33) EAD holders to receive driver's licenses while denying them to (c)(14) and (a)(11) EAD holders.

As the Ninth Circuit has made clear, the State's rationale that distinguishing between classes of individuals with federal work authorization by withholding driver's licenses from non-DACA deferred action recipients is necessary under the its statute is not a legimate basis because "Arizona has no cognizable interest in making the distinction [between DACA recipients and other noncitizens] for driver's licenses purposes." *Id.* at 909. This is because "[t]he federal government, not the states, holds exclusive authority concerning direct matters of immigration law." *Id.* Likewise, Arizona can articulate no rational basis for making a distinction between non-DACA deferred action recipients and

other non-citizens, including DACA recipients, for driver's licenses purposes.

Thus, Arizona's policy fails any level of constitutional scrutiny and therefore violates the Equal Protection Clause.

C. Defendants' Policy Violates the Supremacy Clause

MVD Policy 16.1.4 creates a state classification of immigrants by deeming that individuals with EADs based on a grant of deferred action or deferred enforced departure lack federally authorized presence. This state-created immigration classification is preempted as a regulation of immigration, intrudes on the field of non-citizen classification which Congress has occupied through the INA, and also conflicts with federal law and policy.

1. MVD Policy 16.1.4 is preempted as a regulation of immigration

EO 2012-06 and MVD Policy 16.1.4 are preempted because they are an impermissible state regulation of immigration. Defendants have created their own classification of noncitizens whose presence in the United States is "authorized under federal law," Ariz. Rev. Stat. § 28-3153(D), that is unconnected to the federal classification. In doing so, they have erroneously classified individuals granted deferred action outside of the DACA program and those with deferred enforced departure as lacking federal authorization to remain in the United States.

In the immigration context, state action is "per se pre-empted" if it amounts to a regulation of immigration because the Constitution grants this power exclusively to the federal government. *DeCanas v. Bica*, 424 U.S. 351, 354-55 (1976); *ADAC IV*, 818 F.3d at 914 ("states may not directly regulate immigration"); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1023 (9th Cir. 2013) (same). Part of this exclusive power to regulate immigration is the "power to classify aliens for immigration purposes" which "is 'committed to the political branches of the Federal Government.'" *ADAC IV*, 818 F.3d at 914 (internal quotation omitted); *Plyler*, 457 U.S. at 225 ("The States enjoy no power with respect to the classification of aliens"). At most, states may, in some circumstances,

"borrow the federal classification," *Plyler*, 457 U.S. at 226, or "follow the federal direction," but "[n]o State may independently exercise" the power to classify noncitizens. *Id.* at 219 n.19; *accord Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 602-03 (E.D. Va. 2004).

As the Ninth Circuit has already held, MVD Policy 16.1.4 "necessarily 'embodies the State's independent judgment that recipients of [DACA] are not 'authorized' to be present in the United States '*under federal law*.'" *ADAC IV*, 818 F.3d at 915 (citation omitted). It rejected Arizona's assertion that these EAD holders do not have "presence . . . authorized under federal law" because they cannot meet Arizona's state-created criteria. *Id.* The Ninth Circuit held that these criteria "cannot be equated with 'authorized presence' under federal law" because federal law does not limit federally authorized presence in the manner claimed by Arizona. *Id.* Specifically, it found that a subset of deferred action holders are authorized to be present under federal law. *Id.* at 917. It thus held that Arizona "distinguishes between noncitizens based on its *own* definition of 'authorized presence,' one that neither mirrors nor borrows from the federal immigration classification scheme" and "impermissibly assumes the federal prerogative of creating immigration classifications according to its own design." *Id.* at 915.

The Ninth Circuit's reasoning applies equally to individuals granted deferred action based on *any* ground as well as those granted deferred enforced departure. *See supra* at II.A.; *ADAC IV*, 818 F.3d at 915 n.8 (because Arizona's scheme "includes . . . recipients of regular deferred action and deferred enforced departure" the Ninth Circuit's ruling is "not dependent" on DACA). All deferred action recipients, whether granted through DACA, to survivors of domestic violence or other serious crimes, or for other reasons, are authorized by federal law to be present in the United States. *Id*. Here, as before, Defendants' continued designation of non-DACA deferred action recipients and individuals with deferred enforced departure as lacking federally authorized presence "created a new

immigration classification when it adopted its policy regarding driver's license eligibility [on this basis,] impermissibly stray[ing] into the exclusive domain of the INA." *Id.* at 914.

2. Defendants intrude on the federally occupied field of noncitizen classification

Just as Defendants' policy is preempted as a regulation of immigration, it also intrudes on the field of noncitizen classification that is reserved exclusively for the federal government. In the *ADAC IV* case, the Ninth Circuit also held that Arizona's policy of denying licenses to DACA recipients was preempted because "[t]he Supreme Court's immigration jurisprudence recognizes that the occupation of a regulatory field may be 'inferred from a framework of regulation so pervasive . . . that Congress left no room for the States to supplement it.'"[6] *ADAC IV*, 818 F.3d at 914 (citing *Arizona v. U.S.*, 132 S. Ct 2492, 2501 (2012) (emphasis added; internal quotations omitted). This holding applies with equal force here and Defendants' state-constructed classification of non-DACA deferred action recipients and those wth DED is also preempted as a regulation of immigration because it intrudes on the INA's comprehensive framework for classifying noncitizens. *See id*.

As the Ninth Circuit recognized, deferred action recipients are in a "period of authorized stay" for the purpose of determining their admissibility. *Id.* at 916, 917; *see also supra* at II.A. Here, Defendants cannot classify deferred action recipients as lacking authorized presence because Congress has occupied the field for classifying non-citizens.

3. Defendants' policy is conflict preempted

By classifying deferred action recipients and those with DED as unauthorized under federal law, Defendants have created a straightforward conflict with federal immigration law. *Id.* at 915 (Arizona "neither mirrors nor borrows" from federal immigration law). The Ninth Circuit has concluded that deferred action recipients have federal permission to

[6] The Ninth Circuit's recent opinion supports a holding of both field preemption and conflict preemption. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990) (noting significant overlap between field preemption and conflict preemption).

live and work in the United States. *See supra* at II.A. Arizona's determination to the contrary conflicts with the INA, and Arizona has no authority to make its own immigration classification. *Id.* at 915-916. Simlarly, Defendants have interfered with the Executive's congressionally delegated authority to enforce immigration laws and categorize immigrants. *Id*. at 916 ("Executive has, as a matter of discretion, placed [deferred action holders] in a low priority category for removal"). This contravention of the federal determination that deferred action recipients and those with DED are authorized to be in the Untied States creates an obstacle to the federal government's ability to excercise its exclusive power to classify non-citizens.

III. Plaintiffs Meet the Other Requirements Necessary to Obtain Preliminary Injunctive Relief

Plaintiffs easily meet the other requirements necessary to obtain preliminary injunctive relief. **First**, Plaintiffs here have suffered many of the same irreparable injuries that the Ninth Circuit found to be irreparable in the context of the *ADAC* litigation. Not only is each of the harms suffered by Plaintiffs independently irreparable, but all of the injuries, "[t]aken together, [are] sufficient evidence of substantial and irreparable injury." *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1238 n.5 (9th Cir. 1997). Here, Plaintiffs' injuries are irreparable because there are no "remedies available at law []adequate to compensate them." *ADAC IV*, 818 F.3d at 919.

In *ADAC II*, the Ninth Circuit found that because plaintiffs' inability to obtain driver's licenses had limited their professional opportunities, they had suffered irreparable injuries. 757 F.3d. at 1068 ("The 'loss of opportunity to pursue [plaintiffs'] chosen profession[s]' constitutes irreparable harm.") (quoting *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011)). Here, Plaintiffs have suffered irreparable harm as a result of decreased employment opportunities.[7] Specifically,

[7] The Ninth Circuit has recognized the significant burden that the inability to drive places on Arizona residents. *ADAC IV*, 818 F.3d. at 919 ("[i]n Arizona, it takes an average of over four times as long to commute to work by public transit than it does by driving, and

Plaintiffs have had to decline job offers, had job offers rescinded, or have been forced to forgo employment opportunities because the jobs either required that they have a driver's license, or were not accessible via public transportation. *See, e.g.,* Nava Decl. ¶¶ 12-14 (stopped working independently because clients were inaccessible by bus, had job offer rescinded because she does not have a driver's license, and could not apply to another job for the same reason); del Carmen Cruz Decl. ¶¶ 9-11 (was not hired by two different employers because she does not have a driver's license and could not apply to two job openings because they were too far away by bus); Gonzalez Decl. ¶ 17 (declined job offer because the job was too far away via public transportation); Valenzuela Decl. ¶¶ 11-12 (declined job offer because job required driver's license and can only apply to jobs near her home or near public transportation lines because she does not have a driver's license); Aceituno Decl. ¶¶ 10-11 (noting reduced compensation and the impact on her ability to apply for additional employment opportunities absent the ability to get a driver's license). Additionally, some of the Plaintiffs, one of whom has cancer, have had to miss days of work to commute to pharmacies or to doctor's appointments for themselves and/or their children. *See, e.g.*, Nava Rivera Decl. ¶ 18; del Carmen Cruz Decl. ¶ 14; Valenzuela Decl. ¶ 15.

Plaintiffs' harms resulting from the lack of a valid driver's license are not limited to their employment. For example, Ms. Valenzuela had to walk her son to a doctor's office in the cold while he was ill with pneumonia. Valenzuela Decl. ¶ 14. Similarly, Ms. Nava Rivera's car was towed because she had to drive without her license and she cannot attend church services because her church is inaccessible by bus. Nava Rivera Decl. ¶¶ 15-17. Ms. Del Carmen Cruz has to leave work at 4 p.m. to get her cancer medication by taking public transportation and walking, and she does not get home until the unsafe hour of 10 p.m. because the commute to the pharmacy takes so long. del Carmen Cruz Decl. ¶ 15.

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public transportation is not available in most localities"); *see also* Carmen Cruz Decl. ¶¶ 13-14 (detailing the additional time required to commute by public transportation); Gonzalez Decl. ¶ 13 (same); Valenzuela Decl. ¶¶ 8-9 (same).

Additionally, lack of valid state identification has harmed Mr. Gonzalez, who was told by his bank that he cannot withdraw money using his work permit as proof of his identity, Gonzalez Decl. ¶ 24, and he has not been able to submit loan and rental applications that require a valid state issued ID, *id*. at ¶ 26.

It is also "well established that the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Ortega Melendres v. Arpaio*, 695 F.3d 900, 1002 (9th Cir. 2012) (citation omitted). As shown above, Defendants' policy likely violates Plaintiffs' Equal Protection and Supremacy Clause Rights. Accordingly, Plaintiffs have been and will continue to be harmed if this court does not enjoin Defendants' illegal practice.

Second, balancing "the competing claims of injury" and considering "the effect on each party of the granting or withholding of the requested relief" in the current controversy makes clear that the equities favor granting Plaintiffs' requested injunctive relief. *Winter,* 555 U.S. at 24. Defendants may not rely on illegal practices to support their argument for hardship. *See Melendres,* 695 F.3d at 1002 (balance of the equities tips in favor of "prevent[ing] the violation of a party's constitutional rights").

Finally, it is well established that preliminarily enjoining enforcement of an unconstitutional policy serves the public interest. *Valle del Sol,* 732 F.3d at 1029 ("[I]t is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available.") (alteration and ellipsis in original). Here, as demonstrated above, Plaintiffs are likely to succeed on the merits of their claim that Defendants' policy of denying deferred action recipients driver's licenses is unconstitutional on a number of grounds. It is therefore in the public interest to enjoin enforcement of Defendants' unconstitutional policy. *See ADAC IV*, 818 F.3d. at 920 (holding that "a remedy in equity is warranted and [ ] the public interest would not be disserved by a permanent injunction" where plaintiffs

suffered almost identical harms as Plaintiffs here as a result of Defendants' policy in this case).

CONCLUSION

For all of the foregoing reasons, Defendants' policy should be preliminarily enjoined.

Dated: October 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2016, I caused a PDF version of the foregoing document to be electronically transmitted to the Clerk of the Court, using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

By: /s/ Nicholas Espíritu