Jennifer Chang Newell*
Cecilia D. Wang*
Michael Tan*
R. Orion Danjuma*†
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
T: (415) 343-0770
jnewell@aclu.org
cwang@aclu.org
mtan@aclu.org
odanjuma.org

Linton Joaquin*
Karen C. Tumlin*
Shiu-Ming Cheer*
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 2850
Los Angeles, CA 90010
T: (213) 639-3900
joaquin@nilc.org
tumlin@nilc.org
cheer@nilc.org

Attorneys for Plaintiffs

Victor Viramontes*
Nicholás Espíritu*
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 S. Spring Street, 11th Floor
Los Angeles, CA 90014
T: (213) 629-2512
vviramontes@maldef.org
nespiritu@maldef.org

Daniel J. Pochoda (Bar No. 021979)
ACLU FOUNDATION OF ARIZONA
3707 North 7th Street, Suite 235
Phoenix, AZ 85014
T: (602) 650-1854
dpochoda@acluaz.org

Additional Co-Counsel on Subsequent Pages

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ARIZONA DREAM ACT COALITION; *et al.*, *Plaintiffs,* vs. JANICE K. BREWER; *et al.* , *Defendants*.	CASE NO. 02:12-cv-02546-DGC-PHX **MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Additional Co-Counsel

Tanya Broder*
NATIONAL IMMIGRATION LAW CENTER
405 14th Street, Suite 1400
Oakland, CA 94612
T: (510) 663-8282
broder@nilc.org

Kelly J. Flood (Bar No. 019772)
James Duff Lyall (Bar No. 330045)**
ACLU FOUNDATION OF ARIZONA
3707 North 7th Street, Suite 235
Phoenix, AZ 85014
T: (602) 650-1854
kflood@acluaz.org
jlyall@acluaz.org

Marty Harper (Bar No. 003416)
Thomas K. Irvine (Bar No. 006365)
Andrew S. Jacob (Bar No. 022516)
POLSINELLI SHUGHART PC
One East Washington, Suite 1200
Phoenix, AZ 85004
T: (602) 650-2096
mharper@polsinelli.com
tirvine@polsinelli.com
ajacob@polsinelli.com

Lee Gelernt*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad St., 18th Floor
New York, NY 10004
T: (212) 549-2660
lgelernt@aclu.org

**Pro hac vice*
***Admitted pursuant to Ariz. Sup. Ct. R. 38(f)*
† Admitted in New York

Attorneys for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs respectfully move this Court to enjoin Defendants from unlawfully denying them and their members Arizona driver's licenses. Plaintiffs and their members are young immigrants residing in Arizona who arrived in the United States as children, have lived here for years, and have overcome innumerable obstacles to pursue an education, support their families, and succeed in their lives. In light of the humanitarian factors and strong equities in their favor, Plaintiffs and their members have been granted deferred action under the federal government's Deferred Action for Childhood Arrivals ("DACA") program, and have thus received federal authorization to live and work in the United States for a renewable two-year period. Yet despite federal action authorizing their presence, Defendants have deemed Plaintiffs and their members categorically ineligible for driver's licenses, *see* Ranahan Decl., Ex. A (Executive Order 2012-06), thus making it essentially impossible for individuals who live in Arizona to avail themselves of the benefits of the DACA program in their state.

Defendants assert that Plaintiffs are ineligible for driver's licenses because youth granted deferred action under DACA are not "authorized" to be present in the United States. This assertion is wholly erroneous and Defendants' driver's license policy is preempted by federal immigration law, and violates the Supremacy Clause. Defendants' policy impermissibly applies a state-law classification to DACA recipients and places the State of Arizona in conflict with federal immigration law and policy.

Arizona's policy also violates the Fourteenth Amendment Equal Protection Clause because it makes DACA recipients who obtain work authorization documents ineligible for driver's licenses when similarly situated individuals – including all other individuals granted deferred action – remain eligible for licenses and continue to receive them.

Defendants' illegal policy causes Plaintiffs and their members irreparable harm and interferes with their ability to meet their daily needs, such as attending school or work, driving their children or loved ones to school or medical appointments, or going to the

grocery store. Because Plaintiffs are likely to succeed on the merits of their claims, and because they satisfy the remaining injunction factors, Plaintiffs seek a preliminary injunction barring Defendants' unlawful driver's license policy while the merits of their claims are finally determined.

II. BACKGROUND

A. Deferred Action.

Deferred action is a longstanding form of prosecutorial discretion in which the federal government decides, often based on humanitarian reasons, to refrain from seeking a noncitizen's removal and to authorize her continued presence in the United States. *See, e.g.*, Yale-Loehr Decl. ¶ 5. Individuals granted deferred action are eligible to obtain employment authorization, 8 C.F.R. § 274a.12(c)(14), and a Social Security Number. *See, e.g.*, Ranahan Decl., Ex. B (Social Security Administration, Social Security Number – Deferred Action for Childhood Arrivals).

For over four decades, the federal government has used deferred action to authorize numerous groups of immigrants to live and work in the United States for a temporary and renewable period. *See* Yale-Loehr Decl. ¶¶ 8-9. Deferred action has been made available to victims of human trafficking and sexual exploitation; to relatives of victims of terrorism; to surviving family members of a lawful permanent resident member of the armed forces; to spouses and children of U.S. citizens or lawful permanent residents who are survivors of domestic violence; to surviving spouses of U.S. citizens; to foreign students affected by Hurricane Katrina; and to applicants for certain types of visas. *See* Yale-Loehr Decl. ¶¶ 13-19. In addition, the federal government may grant deferred action on an individual basis: for example, where the person's continued presence is desired by law enforcement for an ongoing investigation. *See* Cooper Decl. ¶¶ 17-19.

Most recently, on June 15, 2012, the Secretary of the U.S. Department of Homeland Security ("DHS") announced that certain youth present in the United States without immigration status would be eligible to obtain deferred action if they meet specified criteria. *See* Ranahan Decl., Ex. C (Janet Napolitano, *Memo. on Exercising Prosecutorial*

Discretion with Respect to Individuals Who Came to the United States as Children, June 15, 2012, at 2-3 (hereinafter "*Napolitano Memo.*")). Individuals granted deferred action under DACA are permitted to remain in the United States for a renewable period of two years; are shielded from removal proceedings during that time; are required to apply for federal employment authorization; and may apply for a Social Security Number. *Id.* DACA recipients, like all other recipients of deferred action, are authorized to be present in the United States during the deferred action period. *See* Cooper Decl. ¶¶ 24-27; Yale-Loehr Decl. ¶¶ 24, 32.

To apply for deferred action under DACA, young immigrants who entered the United States as children must meet several educational and residency requirements, submit an application to the federal government, undergo extensive criminal background checks, and establish that their individual circumstances justify a grant. *See* Ranahan Decl., Ex. C (*Napolitano Memo*. at 1); Ranahan Decl., Ex. D (USCIS, *Consideration of Deferred Action for Childhood Arrivals Process* (Sept. 12, 2012)).[1]

B. Arizona Provisions on Driver's License Eligibility.

Both before and after the announcement of the DACA program, Arizona law required an applicant for an instruction permit, driver's license, or identification card to submit proof that her "presence in the United States is authorized under federal law." A.R.S. §§ 28-3153(D), 28-3158 (C), 28-3165 (F). Specifically, A.R.S. § 28-3153(D)

[1] Noncitizens are eligible for DACA if they: a) were under the age of 31 as of June 15, 2012; b) came to the United States before reaching their 16th birthday; c) have continuously resided in the country from June 15, 2007 to the present; d) were physically present in the country on June 15, 2012, and at the time of making the request for deferred action; e) entered without inspection before June 15, 2012, or their lawful immigration status expired as of June 15, 2012; f) are currently in school, have graduated or obtained a certificate of completion from high school, have obtained a general education development ("GED") certificate, or are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States; and g) have not been convicted of a felony, significant misdemeanor, or three or more other misdemeanors, and do not otherwise pose a threat to national security or public safety. Ranahan Decl., Ex. C (*Napolitano Memo*. at 2).

provides that "the [Arizona Department of Transportation ("ADOT")] shall not issue to or renew a driver license or nonoperating identification 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) (emphasis added). The statute further provides that ADOT shall make rules for "[v]erification that the applicant's presence in the United States is authorized under federal law." *Id.* at § 28-3153(D)(1).

The policy of the Arizona Motor Vehicles Division ("MVD") *prior* to the announcement of the DACA program was that an employment authorization document ("EAD") or card was sufficient to prove that an applicant's presence was "authorized under federal law." *See* Pochoda Decl., Ex. C (Arizona MVD, Primary and Secondary Forms of Acceptable Documentation (rev. Nov. 30, 2010)). Deferred action recipients who obtained federal employment authorization were able to meet the "authorized" presence requirement by submitting their EADs. *See* Jeffries Decl. ¶ 11. Thus, Plaintiffs and other DACA beneficiaries would have been able to meet the "authorized presence" requirement under the previous state policy and obtain Arizona driver's licenses by submitting their EADs.

However, on August 15, 2012 – the first day the federal government began accepting DACA applications – Defendant Brewer issued Executive Order 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* Ranahan Decl., Ex. A (Executive Order 2012-06). The Executive Order purports to "Re-affirm[] [the] Intent of Arizona Law in Response to the Federal Government's Deferred Action Program[.]" *Id.*

The Executive Order explains that "Arizona Revised Statutes 28-3153 prohibits [ADOT] from issuing a drivers [sic] license or nonoperating identification license unless an applicant submits proof satisfactory to ADOT that the applicant's presence in the United States is authorized under federal law[.]" *Id.* The Executive Order further opines

that "the Deferred Action program does not and cannot confer lawful or authorized status or presence upon the unlawful alien applicants" and that "[t]he issuance of Deferred Action or Deferred Action USCIS employment authorization documents to unlawfully present aliens does not confer upon them any lawful or authorized status[.]" *Id.* The Executive Order thus concludes that deferred action recipients are unable to meet the "authorized" presence requirement for driver's licenses and identification.

In a public statement made the same day she issued the Executive Order, Defendant Brewer explained that the Order was intended to clarify that there would be "no drivers [sic] licenses for illegal people." Ranahan Decl., Ex. E (Terry Greene Sterling, The Daily Beast, *Gov. Jan Brewer Battles Obama's DREAM Directive in Arizona* (Aug. 17, 2012)).[2] Defendant Brewer stated: "They are here illegally and unlawfully in the state of Arizona, and it's already been determined that you're not allowed to have a driver's license if you are here illegally." *See* Ranahan Decl., Ex. F (Fox News Latino, *Jan Brewer Bars IDs, Benefits for Undocumented Immigrants in Arizona* (Aug. 16, 2012)). She further stated, "The Obama amnesty plan doesn't make them legally here." *Id.*

To implement the Executive Order, the Arizona MVD revised its policy regarding acceptance of EADs as proof of authorized presence. The new policy expressly excludes EADs resulting from the DACA program from a long list of acceptable evidence of authorized presence for applying for a driver's license or identification card. *See* Pochoda Decl., Ex. D (Arizona MVD Policy 16.1.4(S) (rev. Sept. 18, 2012)). However, for all other recipients of deferred action (*i.e.* other than DACA beneficiaries), and, indeed, *all* other classes of noncitizens, EADs will continue to be accepted as proof of authorized status. *See* Pochoda Decl., Ex. E (Arizona MVD, *Primary and Secondary Forms of Acceptable Documentation* (rev. Sept. 18, 2012)). These other classes of noncitizens

[2] *See also, e.g.*, Ranahan Decl. ¶ 5 (Arizona Channel 12 News Video, *Why did Brewer issue "dreamer" order?* (Aug. 15, 2012)).

remain eligible for driver's licenses and continue to receive them. *See* Jeffries Decl. ¶¶ 7-11.

III. ARGUMENT

Plaintiffs are entitled to a preliminary injunction to suspend enforcement of Executive Order 2012-06 and its implementing policies. A preliminary injunction should ordinarily be granted when the moving party establishes: (1) a likelihood of success on the merits; (2) that he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009) (citing *Winters v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). "The same standard applies regardless of whether the movant seeks to maintain the status quo or to halt an ongoing deprivation of rights." *Klein v. City of Laguna Beach*, 381 F. App'x 723, 725 (9th Cir. 2010) (citing *Textile Unlimited, Inc. v. A. BMH & Co.*, 240 F.3d 781, 786 (9th Cir. 2001)). However, where "the balance of hardships tips sharply in the plaintiff's favor," the plaintiff need only "demonstrate[] . . . that serious questions going to the merits were raised" to justify an injunction. *Alliance of the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (citation omitted). Plaintiffs meet these elements here under either standard.

A. Defendants' policy violates the Supremacy Clause.

Plaintiffs are likely to succeed on the merits of their preemption claim. In the immigration context, state action is "per se pre-empted" if it amounts to a regulation of immigration because the Constitution grants that power exclusively to the federal government. *DeCanas v. Bica*, 424 U.S. 351, 355 (1976). In addition, state action may be expressly or impliedly preempted by federal law. *See, e.g., Arizona v. United States*, __ U.S. __, 132 S. Ct. 2492, 2500-01 (2012). Here, Arizona's driver's license policy is per se preempted as a regulation of immigration and impliedly preempted because it conflicts with federal law. While Arizona law expressly conditions the issuance of drivers' licenses on proof that "the applicant's presence in the United States is authorized under

federal law," A.R.S. § 28-3153(D), Executive Order 2012-06 states that "the Deferred Action program does not and cannot confer lawful or authorized status or presence upon the unlawful alien applicants," and thereby renders DACA recipients ineligible for driver's licenses. Yet numerous authorities confirm that under federal immigration law, deferred action provides federal authorization to remain in the United States. Thus, Executive Order 2012-06 violates the Supremacy Clause because its classification of DACA recipients as "unauthorized" to be present in the United States amounts to a state-created immigration classification that impermissibly intrudes upon the federal government's exclusive power to regulate immigration and conflicts with federal law.

1. Under the federal immigration system, persons granted deferred action are present with federal authorization.

As set forth below, deferred action is by federal definition a grant of authorization to be present in the United States. Both the Board of Immigration Appeals ("BIA") and the federal courts have long recognized that deferred action grants authorization to remain in the country. Likewise, Congress has specifically provided, in the context of legislation concerning federally recognized driver's licenses, that deferred action is a period of authorized stay. In addition, DHS regulations make clear that noncitizens granted deferred action are authorized to be present in the United States.

As an initial matter, the Secretary of Homeland Security's authority to grant deferred action to otherwise removable noncitizens derives from her statutory authority over "administration and enforcement" of the Immigration and Nationality Act ("INA"), including the power to "perform such . . . acts as [s]he deems necessary for carrying out [her] authority." 8 U.S.C. §§ 1103(a)(1), 1103(a)(2); *see also* 8 C.F.R. § 2.1. As the Supreme Court explained in *Arizona*, "[a] principal feature of [Congress's] removal system is the broad discretion exercised by immigration officials." 132 S. Ct. at 2499. Significantly, the discretion granted by Congress includes the discretion to decide *not* to pursue the removal of a noncitizen, and to authorize such persons to remain in the United States. *See id.* ("[f]ederal officials" have discretion to "decide whether it makes sense to

pursue removal at all"); *United States v. Alabama*, 691 F.3d 1269, 1295 (11th Cir. 2012) ("It is [] obvious from the statutory scheme that Congress intends the Executive Branch to retain discretion over expulsion decisions and applications for relief."). Deferred action is simply one manifestation of the general discretionary authority that Congress has granted to the Executive in immigration matters. *See* Yale-Loehr Decl. ¶¶ 6-7.

The federal government's granting of deferred action unambiguously provides the noncitizen with authorization to remain in the United States. Indeed, that is the very point of deferred action: it is a decision by the federal government to allow an otherwise removable noncitizen to remain for a specified period. *See, e.g.*, Cooper Decl. ¶¶ 27, 37; Ranahan Decl., Ex. G (USCIS Ombudsman, *Deferred Action: Recommendations to Improve Transparency and Consistency in the USCIS Process*, 2 (July 11, 2011)) ("A grant of deferred action indicates that . . . the named individual may remain, provisionally, in the United States."). Deferred action status indicates that the noncitizen's presence in the country is known to the federal government, and that the government has made a formal determination not to remove him, and to allow him to remain, during the period of the deferred action grant. *See, e.g.*, Cooper Decl. ¶ 18; *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) ("Approval of deferred action status means that . . . no action will thereafter be taken to proceed against an apparently deportable alien"); *see also, e.g.*, 28 C.F.R. § 1100.35(b) (explaining, in the context of trafficking victims, that deferred action is a "mechanism to ensure the aliens's continued presence in the United States").

Thus, the BIA has long held that "deferred action status is . . . permission to remain in this country." *Matter of Quintero*, 18 I&N Dec. 348, 349 (BIA 1982); *see also, e.g.*, *Matter of Pena-Diaz*, 20 I&N Dec. 841, 846 (BIA 1994) (deferred action status "*affirmatively permit[s] the alien to remain*") (emphasis added); *accord In re Monreal-Aguinana*, 23 I&N Dec. 56, 62 n.3 (BIA 2001). Federal courts have similarly recognized that deferred action reflects authorization or permission to remain in the United States. *See, e.g., Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250,

1258-59 (11th Cir. 2012) (a noncitizen "currently classified under 'deferred action' status . . . remains permissibly in the United States" "[a]s a result of this status"); *Hispanic Interest Coal. of Ala. v. Bentley*, No. 5:11–CV–2484–SLB, 2011 WL 5516953, at *20 n.11 (N.D. Ala. Sept. 28, 2011), *vacated as moot*, 691 F.3d 1236 (11th Cir. 2012) (noncitizens granted deferred action are persons "whom the federal government has authorized to remain in the United States").

This conclusion is confirmed by Congress's treatment of deferred action. Congress has specifically indicated that "approved deferred action status" constitutes "a period of . . . authorized stay in the United States" for the purpose of issuing driver's licenses that are valid as federal identification. REAL ID Act, 49 U.S.C. § 30301 note, Sec. 202(c)(2)(B)(viii),(C)(ii) (providing that complying states may issue a temporary driver's license to persons with "approved deferred action status" for "the period of time of the applicant's authorized stay in the United States"). Thus, federal law expressly defines "lawful status" for driver's license purposes to include "approved deferred action status." 49 U.S.C. § 30301 note, Sec. 202(c)(2)(B)(viii); *see also* 6 C.F.R. § 37.3 (same).[3] Notably, Congress made no distinction between individuals or groups granted deferred action in deeming them to be "authorized" for the purpose of issuing driver's licenses.[4]

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[3] To be sure, states are free to choose, as Arizona has, *not* to comply with the REAL ID Act's heightened security standards. *See, e.g.*, 6 C.F.R. § 37.1 (explaining that the REAL ID requirements "apply to States . . . that *choose* to issue [federally valid] driver's licenses and identification cards") (emphasis added); A.R.S. § 28-336 (prohibiting REAL ID implementation in Arizona). States also may opt *not* to verify immigration status as a condition of issuing driver's licenses and provide licenses to undocumented immigrants. *See* 49 U.S.C. § 30301 note, Sec. 202(d)(11); 6 C.F.R. § 37.71. However, where (as here) the state chooses to condition licenses on "authorized" presence, it is preempted from defining "authorized" presence in a manner that conflicts with its treatment under federal law. *See* § III.A.2, *infra*.

[4] In the narrow instances when a federal agency intends for DACA recipients to be treated differently from other deferred action recipients, it has explicitly so specified. *See, e.g.*, 45 C.F.R. § 152.2(4)(vi) (Department of Health and Human Services regulation implementing the Affordable Care Act providing that "[a]n individual with deferred action under [DACA] . . . shall not be considered to be lawfully present with respect to" eligibility for certain health care coverage).

Likewise, numerous immigration regulations confirm that DHS treats deferred action as authorization to remain in the United States. Under DHS regulations, noncitizens with deferred action are eligible for employment authorization, and the agency regularly grants such authorization. The granting of work authorization to deferred action recipients reinforces that DHS permits them to be present in the United States, for they can only work in the United States if they are present here. *See* 8 C.F.R. § 274a.12(c)(14).

In addition, DHS specifically considers deferred action recipients to be present pursuant to a "period of stay authorized by the Attorney General," and thus not "unlawfully present," for the purposes of the bars on re-admission of certain noncitizens under 8 U.S.C. § 1182 (a)(9)(B). *See, e.g.*, Ranahan Decl., Ex. H (Memorandum of Donald Neufeld, Acting Assoc. Dir., USCIS, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act, May 2009*, at 6-7, 42 (hereinafter "*Neufeld Memo.*")). Although the INA does not contain a general definition of "unlawful presence," the INA does use the term "unlawful presence" for the purpose of setting out the circumstances in which certain previously unlawfully present noncitizens who depart the United States and then seek re-admission are barred from re-entry.[5] Deferred action recipients are not "unlawfully present" under this definition. *See, e.g.*, *id*. (*Neufeld Memo.* at 6-7, 42); *accord* 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2). Thus, USCIS has explained that under the DACA program, "an individual whose case is deferred will not be considered to be accruing unlawful presence in the United States during the period deferred action is in effect." Ranahan Decl., Ex. I (USCIS, *Frequently Asked Questions, Consideration of Deferred Action for Childhood Arrivals Process*, Q1 (Sept. 14, 2012)); *see also id.* at Q5, Q6.

[5] Section 1182(a)(9)(B) provides that noncitizens who have been unlawfully present for at least 180 days, departed the United States, and then sought re-admission are inadmissible to the United States for a period of either three years or ten years depending on the length of the unlawful presence. 8 U.S.C. § 1182(a)(9)(B).

Similarly, DHS regulations explain for the purposes of determining eligibility for Title II Social Security benefits an "alien[] currently in deferred action status" is an alien "lawfully present" and "permitted to remain in" the United States. 8 C.F.R. § 1.3(a)(4)(iv).

Although deferred action does not confer a formal "immigration status,"[6] under the federal immigration system, an individual's lack of a formal immigration status does not mean that his presence in the United States is not authorized. *See* Cooper Decl. ¶ 23; Yale-Loehr Decl. ¶ 22. Indeed, numerous categories of persons lacking immigration status are nonetheless authorized by the federal government to be present in the United States. *See* Cooper Decl. ¶ 26; Yale-Loehr Decl. ¶ 24-31. Such persons include not only DACA recipients and other individuals granted deferred action, but also persons who have pending applications to adjust to a lawful status pursuant to the Violence Against Women Act ("VAWA"), *see* 8 U.S.C. § 1255(i), (m); certain applicants for asylum, *see* 8 U.S.C. § 1158(d)(2); 8 C.F.R. § 208.7(a)(1); persons who are applying for "temporary protected status" under 8 U.S.C. § 1254a; and persons with final orders of removal who cannot be removed from the United States. *See Clark v. Martinez*, 543 U.S. 371 (2005); *Zadvydas v. Davis*, 533 U.S. 678 (2001).

In sum, recipients of deferred action – including those under the DACA program – are clearly authorized by the federal government to remain in the United States during the period of the deferred action grant.

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[6] "Immigration status" is a specialized term referring to federal immigration classifications involving noncitizens temporarily admitted as "nonimmigrants," permanently admitted as "immigrants," and certain other limited classifications established under federal law, such as temporary protected status. Cooper Decl. ¶ 25.

2. Arizona's misclassification of DACA recipients as "unauthorized" is preempted because it impermissibly attempts to regulate immigration and conflicts with federal law.

Arizona has conditioned its driver's licenses on whether applicants can prove that their "presence in the United States is authorized under federal law." A.R.S. § 28-3153(D). However, rather than deferring to federal categories and classifications with respect to the DACA program, Executive Order 2012-06 decrees that DACA "does not and cannot confer lawful or authorized status or presence upon the unlawful alien applicants," and that DACA recipients are therefore ineligible "for any . . . state identification, including a driver's license." Ranahan Decl., Ex. A (Executive Order 2012-06). In deeming DACA recipients "unauthorized" to be present in the United States and thus ineligible for driver's licenses, Executive Order 2012-06 and its implementing policies are wholly inconsistent with federal law and are preempted for at least two independent reasons.

First, Arizona impermissibly intrudes on the federal government's exclusive power to regulate immigration by taking the power to create alien classifications into its own hands. It is well-established that the Constitution gives the federal government sole and exclusive power to regulate immigration. *DeCanas*, 424 U.S. at 354; *Truax v. Raich*, 239 U.S. 33, 42 (1915). *See also, e.g.*, *Arizona*, 132 S.Ct. at 2498. State or local law that regulates immigration is "per se pre-empted by this constitutional power, whether latent or exercised." *DeCanas*, 424 U.S. at 355.

In particular, the power to classify aliens is a core component of the federal government's exclusive power. As the Supreme Court explained in *Plyler v. Doe*,

> This [classification] power "is committed to the political branches of the Federal Government." Although it is "a routine and normally legitimate part" of the business of the Federal Government to classify on the basis of alien status, and to "take into account the character of the relationship between the alien and this country," only rarely are such matters relevant to legislation by a State.

457 U.S. 202, 225 (1982) (internal citations omitted) (quoting *Mathews v. Diaz*, 426 U.S. 67, 80-81, 84-85 (1976)). Accordingly, "[t]he States enjoy no power with respect to the classification of aliens." *Id. See also id.* at 219 n.19; *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (noting "the substantial limitations upon the authority of the States in making classifications based upon alienage."); *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977) ("Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States."). 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 aliens. *Id.* at 219 n.19; *see also id.* at 225 ("The States enjoy no power with respect to the classification of aliens."); *accord Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 602-03 (E.D. Va. 2004).

Here, Arizona has created its *own* classification of noncitizens that are "authorized" under federal law and deemed DACA grantees unauthorized. Although Arizona law uses federal terminology ("presence . . . authorized under federal law," A.R.S. § 28-3153(D)), the Executive Order establishes a state classification of authorized presence that contradicts the federal treatment of DACA grantees. Thus, Arizona's classification scheme is preempted because it usurps the exclusive federal power to classify noncitizens and therefore amounts to a regulation of immigration. *See, e.g.*, *Equal Access Educ.*, 305 F. Supp. 2d at 603 (explaining that restrictions on postsecondary admission "would amount to a regulation of immigration" if state officials "failed to adopt federal immigration standards . . . and instead . . . either implicitly or explicitly developed their own, different standards").

Federal courts have found state classifications constitutionally preempted under analogous circumstances. For example, in *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995), the Court held that California's Proposition 187 was an impermissible regulation of immigration because it created a classification system for public benefits purposes that was not "tied to federal standards," *id.* at 772, but rather "an

entirely *independent* set of criteria by which to classify individuals based on immigration status." *Id*. at 769-70. Similarly, in *Bentley*, the court concluded that section 8 of Alabama's H.B. 56 was preempted because it impermissibly created a state definition of "lawful presence" for purposes of admission to public higher education that excluded numerous categories of noncitizens who were in fact lawfully present under federal law — including deferred action recipients. 2011 WL 5516953, at *23. Here Arizona also has sought to regulate immigration impermissibly by creating its own idiosyncratic classification of immigrants whose presence is "authorized under federal law," and by improperly excluding DACA recipients from its definition.

Second, Arizona's policy is conflict preempted because it defines "authorized" presence in a manner that is inconsistent with federal immigration law and that undermines federal discretion and control over immigration matters. The Supreme Court has held that a state law conflicts with federal law where, inter alia, it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *DeCanas*, 424 U.S at 363 (internal punctuation and citations omitted). *See also, e.g.*, *Arizona*, 132 S.Ct. at 2501. That is precisely the situation here.

Having chosen to condition eligibility for driver's licenses on federally "authorized" presence, Arizona may not define such presence in a manner inconsistent with federal law. *See, e.g.*, *DeCanas*, 424 U.S. at 364-65 (remanding on conflict preemption grounds, but suggesting that a state classification of noncitizens eligible for work that conflicts with federal law would be preempted); *Equal Access Educ.*, 305 F. Supp. 2d at 608 (holding that state-created standards "to determine an applicant's immigration status" constitute "a classification system in conflict with federal immigration laws").

Thus, the Supreme Court has held that a state is preempted from imposing a penalty on certain noncitizens granted federal authorization to be in the United States based upon a state-law determination of the noncitizen's immigration status that is at odds with the federal authorization. In *Toll v. Moreno*, for example, the Supreme Court held preempted a state policy denying "in-state" status to a certain category of noncitizens, "G-4 aliens,"

for the purposes of resident tuition at public colleges. 458 U.S. 1, 17 (1982). The Court explained that although "[f]or many . . . nonimmigrant categories, Congress has precluded the covered alien from establishing domicile in the United States[,]" Congress had placed no such restrictions on G-4 aliens. *Id.* at 13-14 (citing *Elkins v. Moreno*, 435 U.S. 647 (1978)). Thus, "[i]n light of Congress' explicit decision not to bar G-4 aliens from acquiring domicile, the state's decision to deny 'in-state' [tuition] status to G-4 aliens, solely on account of the . . . alien's federal immigration status" was preempted. *Id.* at 14. *Toll* illustrates that state attempts, like Executive Order 2012-06, to categorize classes of noncitizens in a manner inconsistent with federal law violate the Supremacy Clause.

In addition, Arizona's approach frustrates Congress' intent that DHS exercise discretion in the enforcement of the INA and have the ability to take into account competing national concerns and changing circumstances at home and abroad in making decisions about which noncitizens should be permitted to remain in the United States. *See* Cooper Decl. ¶ 35-36; *see also Arizona*, 132 S.Ct. at 2499 (emphasizing that "[d]iscretion in the enforcement of immigration law embraces immediate human concerns," and "[s]ome discretionary decisions involve policy choices that bear on this Nation's international relations"). When, in the exercise of its lawful authority granted by Congress, DHS authorizes a category of otherwise removable noncitizens to remain in the country, a state may not demonstrate its disagreement with the federal government's approach by deeming those same noncitizens unauthorized. *See* Cooper Decl. ¶ 37; *cf. Arizona*, 132 S. Ct. at 2506 (holding that when "state officers . . . decide whether an alien should be detained for being removable, . . . [it] violates the principle that the removal process is entrusted to the discretion of the federal government").

Arizona's denial of driver's licenses to DACA recipients also impermissibly undermines the federal goal of permitting these individuals to remain and work in the United States, and to be full, contributing members of society. *See* Cooper Decl. ¶ 37. An important federal rationale for the DACA program is to recognize the many contributions

made by these young immigrants, and to facilitate their ability to contribute to our economy through their ingenuity and labor. *See, e.g.*, Ranahan Decl., Ex. J (*Remarks by the President on Immigration* (June 15, 2012) ("[I]t makes no sense … to expel these young people who want to staff our labs, or start new businesses, or defend our country.")); *id.* ("[T]hese young people are going to make extraordinary contributions, and are already making contributions to our society."); Ranahan Decl., Ex. C (*Napolitano Memo.* at 2 ("many of these young people have already contributed to our country in significant ways.")). But the denial of driver's licenses to individuals such as Plaintiffs makes their daily lives extremely difficult, undermining their ability to do everything from finding employment to furthering their education, providing for their children, and meeting needs as basic as going to the grocery store. *See* § III.C.1, *infra*.

The conflict between Arizona's policy and federal objectives is particularly sharp since federal law makes deferred action grantees eligible for employment authorization – and, as courts have long recognized, the ability to work is often dependent on the ability to drive. *See, e.g.*, *Bell v. Burson*, 402 U.S. 535, 539 (1971) (noting that "possession [of a driver's license] may become essential in the pursuit of a livelihood"); *Miller v. Anckaitis*, 436 F.2d 115, 120 (3d Cir. 1970) ("use of an automobile [is] an actual necessity for virtually everyone who must work for a living"). The fact that over 87 percent of Arizonans commute to work by car further demonstrates that a driver's license is critical to an individual's ability to work in the state.[7]

In sum, by defining "authorized" presence to exclude DACA recipients, Executive Order 2012-06 impermissibly regulates immigration by creating the state's own immigration classification, and fundamentally conflicts with federal law and federal goals. The federal government has made a clear policy choice by exercising its discretion over immigration enforcement. The state's apparent disagreement with the federal

[7] *See, e.g.*, Ranahan Decl., Ex. K (U.S. Census Bureau, *Selected Economic Characteristics, 2011 American Community Survey 1 Year Estimates*).

government's decision to grant deferred action to immigrant youth is no justification for undermining the federal decision. *See Arizona*, 132 S. Ct. at 2510 (emphasizing that "the State may not pursue policies that undermine federal law").

B. Defendants' policy violates Equal Protection.

Plaintiffs also are likely to prevail on the merits of their Equal Protection claim. Defendants provide driver's licenses to all noncitizens granted EADs, including deferred action recipients, *except* for those whose deferred action and EADs are granted under the DACA program. As discussed below, because Defendants' policy is an alienage classification that discriminates against a group of noncitizens authorized to remain in the United States, Plaintiffs are entitled to strict scrutiny or, at the very least, heightened scrutiny. However, this Court need not determine precisely what level of scrutiny applies because Defendants' policy fails even a rational basis review. As shown below, Arizona's policy treats DACA recipients differently from similarly situated noncitizens without any permissible justification.

1. Arizona is denying driver's licenses to DACA recipients while granting driver's licenses to similarly situated noncitizens.

In denying driver's licenses to DACA grantees, Defendants are now singling out and discriminating against DACA grantees despite Arizona's longstanding policy of allowing other noncitizens granted deferred action to submit their EADs as proof of authorized presence and obtain licenses. These similarly situated recipients of deferred action have included survivors of domestic violence who have filed a VAWA self-petition, and victims of serious crimes who have applied for U nonimmigrant status. *See* Cooper Decl. ¶¶ 34-34; Yale-Loehr Decl. ¶¶ 13-19. Indeed, Arizona makes temporary driver's licenses available to many similar groups of noncitizens who demonstrate authorized presence in the country by presenting an EAD, including those who lack a formal immigration status. *See* Pochoda Decl., Ex. F (Type F License Chart); Jeffries

Decl. ¶¶ 7-12.[8] The number of such individuals is not insubstantial. Between 2005 and 2012, applicants presented EADs as proof of authorized presence to obtain an Arizona driver's license an estimated 47,500 times. *See* Pochoda Decl., Ex. G. Under Arizona's current policy, every noncitizen who has received an EAD can present his EAD as proof of authorized status and is therefore eligible for a driver's license – with the single exception of DACA recipients. As explained below, there is no valid justification – under any standard of review – for treating DACA recipients differently from such similarly situated noncitizens.

2. Discrimination against DACA recipients is subject to strict or heightened scrutiny.

Although the Court need not reach this question because Defendants' policy lacks even a rational basis, Plaintiffs note that classifications singling out DACA recipients are properly reviewed under strict, or – at the very least – heightened, scrutiny.

It is well established that state classifications based on alienage are subject to strict scrutiny. *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny"); *Nyquist*, 432 U.S. at 7 (same). The Supreme Court has repeatedly found that "[a]liens as a class are a prime example of a discrete and insular minority, [and] the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." *Graham*, 403 U.S. at 372.

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[8] These include noncitizens paroled into the country without a formal immigration status, 8 C.F.R. § 274a.12(c)(11); noncitizens who lack a formal immigration status, but are applying for temporary protected status, *id*. § 274a.12(c)(19); noncitizens who lack a formal immigration status but have a pending application for asylum, withholding of removal, *id*. § 274a.12(c)(8), or adjustment of status, *id*. § 274a.12(c)(9); noncitizens granted deferred enforced departure, *id*. § 274a.12(a)(11); noncitizens granted temporary protected status, *id*. § 274a.12(a)(12); noncitizens with a pending application for suspension of deportation or cancellation of removal, *id*. § 274a.12(c)(10); noncitizens ordered removed, but granted withholding of removal or relief under the Convention Against Torture, *id*. § 274a.12(a)(10); and noncitizens who have been ordered removed, but permitted to remain in the country under an order of supervision, *id*. § 274a.12(c)(18).

By denying Arizona driver's licenses only to individuals granted deferred action and work authorization under DACA, Defendants are discriminating based on alienage. The sole basis for the exclusion is DACA recipients' immigration category rather than any substantive qualification for an Arizona driver's license. This is a quintessential classification based on alienage. The fact that Arizona is discriminating *among* classes of noncitizens does not make its policies any less of an alienage classification. Rather, what matters is that Arizona's driver license policy is "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 state financial aid for higher education); *Graham*, 403 U.S. at 368-70 (same, for an Arizona law denying disability benefits to lawful permanent residents who had not resided in the state for 15 years).

Although the Supreme Court has held that undocumented immigrants are not a "suspect class," *see Plyler*, 457 U.S. at 219-20, n.19, that rule does not apply to noncitizens like DACA grantees, who are authorized to live in the United States. *See* § III.A.1, *supra*. As the Second Circuit recently explained in *Dandamudi v. Tisch*, although laws discriminating against "people who reside in the United States without authorization" are subject to a lesser level of scrutiny, that limited exception does not apply to noncitizens "who have been granted the legal right to live and work in the United States." 686 F.3d 66, 72, 74 (2d Cir. 2012).[9] Thus, *Dandamudi* applied strict scrutiny to a New York rule prohibiting nonimmigrant visa holders who had obtained state pharmacist licenses from renewing those licenses. *Id.* at 69.[10] Although the Ninth

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[9] Notably, undocumented immigrants are the *only* group of noncitizens whom the Supreme Court has excluded from strict scrutiny. *See Dandamudi*, 686 F.3d at 70 (reviewing Supreme Court case law). The only other exception the Supreme Court has created to the "general principle that alienage is a suspect classification" is for laws that "exclude aliens from political and government functions." *Id*. at 73. That exception is not applicable here.

[10] The Second Circuit rejected the suggestion of the Fifth and Sixth Circuits that strict scrutiny applies only to discrimination against lawful permanent residents.

Circuit has yet to address this precise question, Supreme Court precedent makes clear that state classifications, like the one at issue here, that discriminate against individuals granted federal authorization to remain in the country warrant the strict scrutiny generally applied to alienage discrimination. *See Graham*, 403 U.S. at 372; *Nyquist*, 432 U.S. at 7.

At minimum, Plaintiffs are entitled to the heightened scrutiny that courts have found warranted for certain state classifications that are not inherently suspect. *See Plyler*, 457 U.S. at 223-24 (applying heightened scrutiny to Texas's denial of access to public education to undocumented children); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (same, to state discrimination against children with unmarried parents); *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *cert. granted*, 12-307, 2012 WL 4009654 (U.S. Dec. 7, 2012) (same, to discrimination against same-sex couples); *Golinski v. U.S. Office of Personnel Management*, 824 F. Supp. 2d 968, 985-990 (N.D. Cal. 2012) (same).

Notably, in *Plyler*, the Supreme Court applied heightened scrutiny to Texas' efforts to restrict public education to undocumented children who were brought to the country by their parents. 457 U.S. at 223-24. The Court in *Plyler* found that undocumented children "can affect neither their parents' conduct [in bringing them to this country], nor their own [immigration] status." *Plyler*, 457 U.S. at 220. Targeting a child for a parent's perceived misdeeds "does not comport with fundamental conceptions of justice." *Id*. Here, the Arizona policy at issue should be subject to stricter review, as Arizona is discriminating against a class of noncitizen youth whom the federal government has specifically authorized to live and work in the United States.

Courts in the Ninth Circuit apply heightened review to classifications that are not inherently suspect when the targeted group has: (1) "suffered a history of discrimination"; (2) "exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a

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Dandamudi, 686 F.3d at 75-76 (rejecting *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005) and *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523 (6th Cir. 2007)).

discrete group"; and (3) "shows that they are a minority or politically powerless." *High Tech Gays v. Defense Ind. Sec. Clearance Off.*, 895 F.2d 563, 573 (9th Cir. 1990). DACA grantees easily satisfy this standard. First, these immigrant youth have faced, and continue to face discrimination. *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477, 509-10 (M.D. Pa. 2007) (granting plaintiffs' request to proceed anonymously after noting "climate of fear and hostility" around those supporting perceived as undocumented immigrants or supporting immigrants' rights); *see also* John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 161-62 (1980) (contending that, because noncitizens cannot vote and have suffered a history of discrimination, immigrants constitute a discrete and insular minority deserving of special protection by the courts). Second, these individuals share distinguishing characteristics that define them as a discrete group, easily subject to discrimination. In this case, the EADs provided to individuals granted DACA have an identifiable code – "(c)(33)" – that allows Defendants to single them out from other individuals granted deferred action, and to deny them driver's licenses on this basis alone. *See*, *e.g.*, Martinez Decl., Ex. 1. Finally, as individuals only recently granted federal authorization to live and work in the United States, and who cannot vote, DACA grantees are politically powerless. *See Toll*, 458 U.S. at 23 (Blackmun, J., concurring) ("[T]he fact that aliens constitutionally may be – and generally are – formally and completely barred from participating in the process of self-government makes particularly profound the need for searching judicial review of classifications grounded on alienage."); *see also Golinski*, 824 F. Supp. 2d at 989 (concluding that lesbians and gays should be considered politically powerless despite some legislative gains because of their "basic inability to bring about an end to discrimination and pervasive prejudice, to secure desired policy outcomes and to prevent undesirable outcomes on fundamental matters that directly impact their lives"). For these reasons, heightened review is appropriate.

In order to withstand strict scrutiny, Defendants must establish that their policy is narrowly tailored to meet a compelling governmental interest. *See Wright v. Incline*

Village Gen. Improvement Dist., 665 F.3d 1128, 1141 (9th Cir. 2011) ("When applying strict scrutiny, we ask whether the [challenged policy] is narrowly tailored to serve a compelling governmental interest) (internal quotations omitted); *see also Dandamudi*, 686 F.3d 66 (to withstand strict scrutiny, state policy must be "narrowly tailored to further a compelling government interest"). Under heightened scrutiny, Defendants must show that their challenged policy is "substantially related to an important government objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). In making this showing Defendants may only refer to the "actual [governmental] purpose, not rationalizations for actions in fact differently grounded." *United States v. Virginia*, 518 U.S. 515, 535-36 (1996). Defendants cannot meet either of these tests. However, this Court need not decide precisely which standard of review is applicable because, as shown below, Defendants' policy is wholly irrational and cannot even withstand rational basis review.

3. Defendants' driver's license policy does not even pass 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); *accord Armendariz v. Penman*, 75 F.3d 1311, 1326-27 (9th Cir. 1996) (en banc) (citations omitted) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). As the Supreme Court held in *Heller v. Doe*, "the standard of rationality . . . must find some footing in the realities of the subject addressed by the legislation." 509 U.S. 312, 319-320 (1993). Importantly, "[a] bare … desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (quoting *Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)); *accord Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-47 (1985). Put another way, under the rational basis standard, a law is invalid if it lacks any factual or legal basis. *FCC v. Beach*

Communications, Inc., 508 U.S. 307, 313 (1993); *cf. Diaz v. Brewer*, 656 F.3d 1008, 1012, 1014-15 (9th Cir. 2012), *reh'g en banc denied*, 676 F.3d 823 (9th Cir. 2012), *petition for cert. filed* (U.S. Jul. 2, 2012) (No. 12-23) (affirming a preliminary injunction against an Arizona law terminating health care benefits of state employees' same-sex partners where the record could not sustain Arizona's proffered interests). Moreover, once plaintiffs present some evidence showing that discrimination against a particular group motivated the passage of defendant's challenged policy, the Ninth Circuit has required defendants to "establish on the record that its policy had a rational basis" *See Pruitt v. Cheney*, 963 F.2d 1160, 1166 (9th Cir. 1992).

Arizona's categorical denial of driver's licenses to persons granted deferred action and EADs under DACA treats similarly situated individuals differently without any legitimate basis. As discussed, under Defendants' policy, all noncitizens granted deferred action and EADs are eligible for driver's licenses, *except* for DACA recipients. Defendants also issue licenses to numerous other categories of similarly situated noncitizens who submit an EAD as proof of authorized presence. *See* § II.B., *supra*; Yale-Loehr Decl. ¶¶ 25-32; Jeffries Decl. ¶¶ 7-12. When a state chooses to provide a state benefit, the state "may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular." *Diaz*, 656 F.3d at 1013-14. Arizona's selective restriction creates the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Perry v. Brown*, 671 F.3d 1052, 1088 (9th Cir. 2012) (quoting *Romer*, 517 U.S. at 634).

Indeed, Governor Brewer's statements regarding Executive Order 2012-06 makes clear that Arizona's policy was motivated by an illegitimate intent to defy federal immigration policy and to discriminate against a disfavored group. Immediately after President Obama announced the DACA program, Governor Brewer denounced the program as "backdoor amnesty" and "desperate political pandering by a president

desperate to shore up his political base" and "pandering to a certain population."[11] Subsequently, on the day she issued Executive Order 2012-06, Governor Brewer explained in statements to the media that the Executive Order was necessary to make clear there would be "no drivers [sic] licenses for illegal people."[12] Such political disagreement with federal immigration law and policy is not a legitimate basis for the state to target and exclude a disfavored group from its programs. *See, e.g.*, *Nyquist*, 432 U.S. at 10 (state's immigration-based justification is "not a permissible one for a State [because] [c]ontrol over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere").

Further, although the Executive Order cites federal immigration classifications as a justification for denying state identification documents, as set forth above, federal law does not support this restriction. *See* § III.A.1, *supra*. Like all other noncitizens granted deferred action, DACA grantees are authorized to remain in the country and can obtain EADs and a Social Security Number. Under the federal immigration system, deferred action has the same purpose and the same effect for all recipients – to prevent removal and allow the noncitizen to remain. *See* Cooper Decl. ¶¶ 33-34; Yale-Loehr Decl. ¶ 19. Moreover, Congress specifically considered whether noncitizens granted deferred action should be excluded from federally recognized driver's licenses and determined, under even the heightened security standards of the REAL ID Act, that individuals granted deferred action grantees would be eligible for these licenses. *See* § III.A.1, *supra.* Yet individuals granted deferred action under DACA are uniquely barred from eligibility by Arizona's policy.

Finally, Defendants' vague assertion that providing state benefits to DACA recipients "will have significant and lasting impacts on the Arizona budget" lacks any

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[11] Ranahan Decl. ¶ 12 (*Brewer: Obama immigration 'outrageous,'* CNN, (June 15, 2012) (video)).

[12] Ranahan Decl. ¶ 13 (*Brewer Bans Benefits for Undocumented Immigrants*, Fox News (August 15, 2012) (video)).

factual basis. Ranahan Decl., Ex A (Executive Order 2012-06). Indeed, there is *no* evidence in the public record that its policy would rationally save the state funds, or that the cost of licensing DACA grantees would be more than minimal or cost-neutral. As a result, Arizona's policy fails under even rational basis review.

C. The Court should grant preliminary injunctive relief.

1. Plaintiffs and their members will suffer irreparable harm if the Court does not grant an injunction.

As a result of Defendants' denial of driver's licenses to DACA recipients, Plaintiffs, Plaintiffs' members, and proposed class members suffer numerous irreparable harms, and will continue to suffer them if the Executive Order is not enjoined. *Winters*, 129 S. Ct. at 375 (injunction appropriate where irreparable harm "likely"). *See, e.g.*, Lopez Decl. ¶¶ 5-7; Jacobo Decl. ¶¶ 7-10; Martinez Decl. ¶¶ 5-7; Perez-Gallegos Decl. ¶¶ 6-8; Castro-Martinez Decl. ¶¶ 6-8; Matuz Decl. ¶¶ 7-11.

First, being subjected to an unconstitutional state action such as Arizona's driver's license policy constitutes irreparable injury. *See Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) ("an alleged constitutional infringement will often alone constitute irreparable harm"). This principle applies to Supremacy Clause violations as well as other constitutional violations. *See e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858, 878 (N.D. Tex. 2008).

Second, the denial of driver's licenses causes irreparable injury by hindering Plaintiffs' and class members' efforts to find and maintain stable employment, develop their resumes, and begin their careers. *See Enyart v. Nat'l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1166 (9th Cir. 2011) (denial of bar admission caused irreparable harm to individual prevented from beginning her legal career); *see also Kinney v. Int'l Union of Operating Eng'rs, Loc. 150*, 994 F.2d 1271, 1279 (7th Cir. 1993) (personal costs of being unnecessarily unemployed is irreparable harm). The courts have long recognized that "possession [of a driver's license] may become essential in the pursuit of

a livelihood." *Bell*, 402 U.S. at 539; *see also Miller*, 436 F.2d at 120 ("use of an automobile [is] an actual necessity for virtually everyone who must work for a living"). The ability to drive is a necessity not only for Plaintiffs, but for the overwhelming majority of Arizona workers. U.S. Census Bureau statistics indicate that over 87 percent of Arizonans commute to work by car and only two percent of all Arizonan workers commute to work by public transportation.[13]

Here, denying driver's licenses to Plaintiffs and Plaintiffs' members severely frustrates their ability to work, advance their careers, and achieve economic self-sufficiency. For example, Plaintiff Lopez had to turn down a job interview because she would have been unable to commute to the job without a driver's license. Lopez Decl. ¶7. Ms. Perez-Gallegos is afraid she will not be able to maintain her job in the medical field and pursue her nursing degree without the ability to drive between school and work. Perez-Gallegos Decl. ¶¶ 7-8. Mr. Castro-Martinez fears he will not be able to get a promotion at his job unless he is able to drive. Castro-Martinez Decl. ¶ 6. For Mr. Jacobo, the inability to obtain a license imposes financial and practical strains on his business and livelihood. Jacobo Decl. ¶ 7.

Third, the inability to drive legally imposes onerous restrictions on the daily lives of the Individual Plaintiffs and of ADAC's members by restricting their ability to assist their families with child care, health needs, and other necessities of daily life. *See Wooley v. Maynard*, 430 U.S. 705, 712 (1977) (holding that plaintiffs had demonstrated harms sufficient to justify injunctive relief where threat of prosecution impeded ability to perform the ordinary tasks of daily life requiring an automobile); *Mills v. Dist. of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (finding irreparable injury where citizens' right to drive was unconstitutionally limited); *Ligon v. City of New York*, No: 12 CIV 2274 SAS, 2012 WL 3597066 (S.D.N.Y. Aug. 21, 2012) (holding preliminary

[13] Ranahan Decl., Ex. K (U.S. Census Bureau, *Selected Economic Characteristics, 2011 American Community Survey 1 Year Estimates*).

injunction was warranted where plaintiffs' daily lives are being disrupted by police harassment). For example, Ms. Lopez is the primary caretaker of her child and two minor siblings; she needs to drive to take her child to doctor's appointments and her siblings to school. Lopez Decl. ¶ 5. *See also* Jacobo Decl. ¶ 9 (stating that he wants to be able to help family members by providing transportation).

Fourth, the continued discrimination will cause Plaintiffs and their members emotional and psychological harm because it creates the perception that they are inferior. *See, e.g.*, Ranahan Decl., Ex. E (*Gov. Jan Brewer Battles Obama's DREAM Directive in Arizona* (reporting Defendant Brewer's statement that there will be "no drivers licenses [sic] for illegal people")); *Chalk v. United States Dist. Court*, 840 F.2d 701, 709 (9th Cir. 1988) (collecting cases holding that discrimination that creates emotional and psychological harms can constitute irreparable injury). For example, Mr. Castro-Martinez has testified that Defendants' discrimination against DACA recipients has "had a huge impact on [him] mentally" because "[i]t's terrible to be the target of discrimination." Castro-Martinez Decl. ¶ 8.

Finally, ADAC is suffering irreparable harm due to the reallocation of its organizational resources to address the impact of Arizona's policy on its membership. The vast majority of ADAC's members are recipients of DACA or are DACA-eligible. Matuz Decl. ¶ 6. Arizona's policy is impeding ADAC's ability to carry out its mission because it has forced ADAC to expend resources dealing with the logistics of transporting its members, rather than focusing on the organization's core goals of improving community education and civic participation. This has caused ADAC to lose opportunities to strengthen outreach and expand its membership. Matuz Decl. ¶ 9. The diversion of resources and frustration of its core mission represent irreparable and continuing injuries to ADAC. *See Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002); *Nat'l Fair Hous. Alliance v. A.G. Spanos Const., Inc.*, 542 F. Supp. 2d 1054, 1066 (N.D. Cal. 2008).

2. The balance of equities tips sharply in Plaintiffs' favor.

The harm to Plaintiffs from denying a preliminary injunction strongly outweighs the harm to Defendants from granting the motion. As described above, barring access to driver's licenses severely hinders Plaintiffs' ability to work and to function as fully participating members of society, and causes a diversion of ADAC's resources. *See* § III.C.1, *supra*. In comparison, any hardship to Defendants from a preliminary injunction would be minimal. Under its previous policy, Arizona issued driver's licenses to all deferred action recipients without distinction. Moreover, it continues issuing driver's licenses to numerous deferred action recipients and other noncitizens with EADs. *See* § II.B, *supra*. It is not a substantial hardship for Arizona to continue its prior approach in the face of a constitutionally suspect policy. Indeed, courts frequently find that the equities favor an injunction to preserve the status quo – here, the Arizona MVD policy in place before Executive Order 2012-06. *See, e.g.*, *Chalk*, 840 F.2d at 704 ("The basic function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits."); *Nat'l Ctr. For Immigrants' Rights, Inc. v. INS*, 743 F.2d 1365, 1368 (9th Cir. 1984). Thus, the equities tip sharply in favor of the grant of a preliminary injunction.

3. The preliminary injunction will serve the public interest.

The public's interest is firmly aligned with that of the Plaintiffs. *See Miller v. Ca. Pac. Med. Ctr.*, 991 F.2d 536, 540 (9th Cir. 1993); *vacated on other grounds*, 19 F.3d 449 (9th Cir. 1994) (public interest encompasses general welfare). A preliminary injunction supports the public interest by permitting DACA recipients to participate meaningfully in the state's communities and to contribute to Arizona as a whole. Driver's licenses allow DACA grantees access to work and educational opportunities, and help them contribute to the economy and provide for their families – as the federal government has intended the DACA program to do. *See* Ranahan Decl., Ex. J (*Remarks by the President on Immigration* (noting that permitting economic participation by DACA eligible youth is the "right thing to do for our economy")).

Furthermore, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002) (internal quotation marks and citation omitted); *see also Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 925 (S.D. Ind. 2011) ("'the public has a strong interest in the vindication of an individual's constitutional rights . . . .'" (quoting *O'Brien v. Town of Caledonia*, 748 F.2d 403, 408 (7th Cir. 1984)). As described above, Arizona's driver's license policy is preempted by federal law and violates equal protection. For these reasons, the public interest weighs in favor of a preliminary injunction.

IV. CONCLUSION

For all of the foregoing reasons, Defendants' policy of denying driver's licenses to individuals granted employment authorization documents under the DACA program should be preliminarily enjoined.

Dated this 14th day of December, 2012.

Respectfully submitted,

/s/Jennifer Chang Newell
AMERICAN CIVIL LIBERTIES UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECT

/s/Linton Joaquin
NATIONAL IMMIGRATION LAW CENTER

/s/ Nicholás Espíritu
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

/s/Daniel Pochoda
ACLU FOUNDATION OF ARIZONA

/s/Marty Harper
POLSINELLI SHUGHART PC

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December 2012, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

By: /s/ Andrew S. Jacob
Andrew S. Jacob