No. _____

In the Supreme Court of the United States

JANICE K. BREWER, ET AL.,
Petitioners,
v.
ARIZONA DREAM ACT COALITION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in creating an immigration-specific rule under which state police power regulations that "arrang[e]" federal immigration classifications are preempted, even if preemption was not "the clear and manifest purpose of Congress"?

2. Did the Ninth Circuit err in assuming that the Deferred Action for Childhood Arrivals (DACA) program, an executive-branch policy of non-enforcement, was valid "federal law" capable of preempting a state police power regulation?

PARTIES TO THE PROCEEDING

Petitioners are Janice K. Brewer, the 22nd Governor of the State of Arizona; John S. Halikowski, Director of the Arizona Department of Transportation; and Stacey K. Stanton, Director of the Motor Vehicle Division of the Arizona Department of Transportation.

Respondents are the Arizona Dream Act Coalition, a non-profit organization, and the following individuals: Christian Jacobo, Alejandra Lopez, Ariel Martinez, Natalia Perez-Gallegos, Carla Chavarria, and Jose Ricardo Hinojos.

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PETITION FOR WRIT OF CERTIORARI

The Ninth Circuit has now held that an executive branch memorandum can preempt state law. While the panel takes great pains to cloak its holding in the theory that Arizona impermissibly borrows federal law, App. 36, that theory is so plainly at odds with this Court's precedent and the decisions of other circuits that it merits little debate. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 226 (1982) ("The State may borrow the federal [immigration] classification."). In fact, the panel itself moves past its superficial holding to defend the presidential legislation at issue in this case. App. 44–47. And the dissenting opinion of six judges who favored rehearing en banc explains how the panel "holds that the enforcement decisions of the President are federal law." App. 4 (Kozinski, J., dissenting). This type of unilateral lawmaking usurps the role of Congress and permits too-easy preemption of state law. The Ninth Circuit's decision is therefore a threat to both the separation of powers and our federal system.

Like every State, Arizona regulates the "privilege of driving on state roads." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2169 (2016). To that end, the Arizona Department of Transportation ("ADOT") issues driver's licenses to anyone who can meet certain criteria, including "submit[ting] proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. § 28-3153(D). The present controversy asks whether ADOT *must* accept three types of Employment Authorization Documents ("EADs") issued by the Department of Homeland Security as proof that the EAD-holder's presence in the United States is

"authorized under federal law." *Id.* One of those EAD categories, labeled "(c)(33)," corresponds to the Deferred Action for Childhood Arrivals ("DACA") program.

The Secretary of Homeland Security created DACA in a June 2012 memorandum (the "DACA Memo"). The DACA Memo was not enacted by Congress or promulgated through any formal rulemaking procedures. Moreover, its benefits are justified as "prosecutorial discretion," App. 197, and revocable at any time in the sole discretion of the Department of Homeland Security.

A discretionary, revocable program of non-enforcement, which was created by executive action alone, cannot preempt state law regulating driver's licenses. Even the Ninth Circuit acknowledges that granting licenses is a traditional police power. App. 36. Where police powers are involved, this Court requires that Congress supply "clear and manifest" evidence of its intent to preempt state law. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 330 (1947)). The two statutory provisions identified by the Ninth Circuit as evidence of congressional intent are inadequate, which explains why that court rejected the "clear and manifest" standard entirely. App. 35; *see also* App. 6 (Kozinski, J., dissenting). The Ninth Circuit's rejection of the "clear and manifest" standard is a departure from 70 years of this Court's preemption jurisprudence. To protect the sovereignty of the States, this Court should grant review.

Additionally, the Ninth Circuit never explains how the DACA program can be federal law. The Constitution assigns authority over immigration to Congress. U.S. Const. art. I, § 8, cl. 4. Unlike the demanding test for preemption, the separation of powers requires only that Congress has exercised its Article I authority to regulate immigration—including sanctioning certain types of deferred action and assigning them unique EADs—to strip the President of power to create new law in this area. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The separation of powers thus forecloses any argument that the DACA Memo or EADs issued under DACA carry the force of law for purposes of the Supremacy Clause. *Alden v. Maine*, 527 U.S. 706, 731 (1999) ("[T]he Supremacy Clause enshrines as 'the supreme Law of the Land' only those Federal Acts that accord with the constitutional design.").

Even if the Ninth Circuit were correct that non-enforcement under DACA is "a matter of discretion," App. 40, a memo designed to guide prosecutorial discretion cannot preempt Arizona's permissible incorporation of federal immigration classifications. *Plyler*, 457 U.S. at 226. The decision not to prosecute someone does not change that person's classification under federal law or establish presence authorized "under federal law." Ariz. Rev. Stat. § 28-3153(D). That insight is consistent with the holdings of this Court, which confirm that not every dispatch from the executive branch carries the force of law. Thus this Court recognizes a category of "Executive Branch communications that express federal policy but lack the force of law" and therefore "cannot render unconstitutional [a State's] otherwise valid [statute]."

Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 330 (1994); *see also, e.g., Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 339 (3d Cir. 2009). The Fifth Circuit, considering the same assertion of executive power at issue in this case, held that federal immigration law "flatly does not permit the [executive] reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits." *Texas v. United States*, 809 F.3d 134, 184 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). By assuming that DACA is sufficient to establish presence in the United States "authorized under federal law," the Ninth Circuit departs from precedent in this Court and numerous circuits.

While the executive branch is free to exercise prosecutorial discretion "on a case-by-case basis," *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 n.8 (1999), it cannot preempt state laws related to traditional state-provided benefits with blanket policies of non-enforcement. This formerly settled feature of the separation of powers demands this Court's vindication.

OPINIONS BELOW

The order from the U.S. Court of Appeals for the Ninth Circuit denying rehearing en banc appears at 2017 WL 461503. App. 1–2. Accompanying it are the panel's amended opinion, App. 14–51, Judge Berzon's concurring opinion, App. 52–63, and Judge Kozinski's dissenting opinion for himself and five other judges, App. 2–13. The order and permanent injunction issued by the U.S. District Court for the District of Arizona appear at 81 F. Supp. 3d 795. App. 104–41.

JURISDICTION

The Ninth Circuit denied rehearing en banc and issued its amended opinion on February 2, 2017. App. 1. That court's jurisdiction rested on 28 U.S.C. § 1291. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The Take Care Clause requires that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

The relevant portion of Arizona's statute governing driver's licenses appears at App. 207–08. Ariz. Rev. Stat. § 28-3153(D).

STATEMENT OF THE CASE

A. Statutory Background

1. **Deferred action.** Congress has plenary authority to regulate immigration, U.S. Const. art. I, § 8, cl. 4, and has done so through numerous statutes, including the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101–07. For persons who have not

complied with the INA and would otherwise face deportation, "the Executive has discretion to abandon" removal proceedings in what has "come to be known as 'deferred action.'" *Reno*, 525 U.S. at 483–84. When initiated by the executive branch as a component of prosecutorial discretion, deferred action is a "case-by-case" decision. *Id.* at 484 n.8.

Congress can also authorize deferred action on a class-wide basis. In a memorandum outlining the legal argument for DACA and its later expansions, the Office of Legal Counsel cited four such occasions. *See* 8 U.S.C. § 1154(a)(1)(D) (self-petitioners under the Violence Against Women Act); Pub. L. No. 107–56, § 423(b), 115 Stat. 272, 361 (family members of permanent residents killed on September 11, 2001); Pub. L. No. 108-136, § 1703(c)–(d), 117 Stat. 1392, 1694–95 (family members of U.S. citizens killed in combat); 8 U.S.C. § 1227(d)(1)–(2) (certain T- and U-visa applicants); *see also* Memorandum from Karl R. Thompson, Principal Deputy Assistant Attorney General at the Office of Legal Counsel, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (hereinafter "OLC Opinion") (Nov. 19, 2014). App. 133–94.

What Congress has not done is adopt one of the many versions of the Development, Relief, and Education for Alien Minors Act ("DREAM Act"). *See, e.g.*, DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011); DREAM Act of 2010, H.R. 6497, S. 3992, S. 3963, 111th Cong. (2010); DREAM Act of 2007, S. 774, 110th Cong. (2007). Across its various incarnations, the DREAM Act has aimed to provide

lawful presence to substantially the same class of beneficiaries covered by the DACA Memo. Indeed, Respondent's name—the Arizona *Dream Act* Coalition—recognizes the congruity of the unsuccessful legislation and the DACA program.

2. **Work authorizations**. In exercising its constitutional authority over immigration, Congress has also enacted detailed statutes addressing when aliens are authorized to work in the United States. The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, is "a comprehensive scheme" that "forcefully made combating the employment of [unauthorized] aliens central to the policy of immigration law." *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002) (internal quotation and alterations omitted).

Among other things, Congress established penalties for employers who hire unauthorized aliens. 8 U.S.C. § 1324a(a),(f). The law defines "unauthorized alien" as an "alien [who] is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." *Id.* § 1324a(h)(3). This definitional subsection, however, does not give the executive branch a blank check to grant work authorizations.

To the contrary, Congress has separately demarcated the Executive's delegated authority to issue work permits. *E.g.*, 8 U.S.C. § 1101(i)(2) (human-trafficking victims); 8 U.S.C. §§ 1158(c)(1)(B),(d)(2) (asylum applicants); 8 U.S.C. §§ 1184(c)(2)(E),(e)(6), (p)(3),(p)(6),(q)(1)(A) (spouses of L- and E-visa holders; certain victims of crime; spouses and certain children of lawful permanent residents); 8 U.S.C.§ 1254a(a)(1)

(temporary-protected-status holders). Congress has also statutorily granted work permit eligibility to a few narrow classes of deferred-action recipients. *E.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II),(IV) (children of Violence Against Women Act self-petitioners). Additionally, certain nonimmigrant visas automatically provide work authorizations. *E.g.*, 8 U.S.C. § 1101(a)(15)(E), (H),(I),(L) (commercial workers); *id.* § 1101(a)(15)(A),(G) (foreign-government or international-organization workers); *id.* § 1101(a)(15)(P) (athletes or entertainers). Congress has taken no such action with respect to the group of aliens at issue in this case.

B. Deferred Action for Childhood Arrivals (DACA)

On June 15, 2012, the Department of Homeland Security issued the DACA Memo. Couched in language of prosecutorial discretion, the DACA Memo promised deferred action on two-year intervals and work authorizations for individuals who meet several criteria. App. 195.

The DACA Memo itself stressed that it "confers no substantive right, immigration status or pathway to citizenship." App. 199. The Office of Legal Counsel picked up the same theme two years later, explaining that DACA "does not establish any enforceable legal right to remain in the United States—and it may be revoked by immigration authorities at their discretion." App. 156. The reason DACA could reflect only the ephemeral "decision to openly tolerate an undocumented alien's continued presence . . . (subject to revocation at the agency's discretion)," App. 169, is that "[o]nly the Congress, acting through its legislative authority, can confer" substantive rights or a lawful

immigration status," App. 199. The executive branch acting alone was constrained by "the framework of existing law," which the DACA Memo purported not to change. *Id.*

Two years later, the Department of Homeland Security expanded the DACA program to encompass a broader range of persons who had illegally entered the United States as children and launched a parallel program for unauthorized aliens with children who had been born in the United States and were therefore citizens (DAPA). Around that time, the Office of Legal Counsel offered a memorandum attempting to fit these actions as well as the original DACA Memo within the scope of executive prerogative. App. 133–94. As the OLC memorandum illustrates, the legal justification for each of these initiatives was identical. It is therefore important for the present case that the Fifth Circuit struck down the 2014 expansions for exceeding the authority of the executive branch to change the law unilaterally, a decision affirmed by an equal division of this Court. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016)

Shortly after DACA was created, ADOT began reviewing its policies to determine whether DACA beneficiaries would qualify for Arizona driver's licenses. ER 181–84. The department came to the conclusion that "presence . . . authorized under federal law," Ariz. Rev. Stat. § 28-3153(D), covered almost every category of alien created by the federal government: those with a formal immigration status, those on a path to obtaining formal immigration status,

and those with relief provided pursuant to the INA. ER 145; ER 147–51.

DACA, however, is not part of the INA or any other statute. Nor is it the product of agency rulemaking pursuant to a congressional delegation. Rather, DACA purports to be mere prosecutorial discretion. As such, it is not "federal law," and applicants for a driver's license could not rely on category (c)(33) EADs—the category created by the federal government specifically for DACA—to prove eligibility.[1]

C. Procedural History

Respondents filed suit, asserting that ADOT's interpretation of "presence in the United States . . . authorized under federal law" to exclude persons holding (c)(33) EADs violated both the Supremacy and Equal Protection Clauses of the United States Constitution.

Until its final chapter, this litigation focused on the Fourteenth Amendment. In fact, the district court used only one paragraph of a 40-page opinion to grant ADOT's motion to dismiss the Supremacy Clause claim. *Arizona Dream Act Coal. v. Brewer*, 945 F. Supp. 2d 1049, 1077–78 (D. Ariz. 2013), *rev'd and remanded*, 757 F.3d 1053 (9th Cir. 2014). The court explained that "even under the lenient Rule 12(b)(6) standard, the claim is not based on a cognizable legal theory." *Id.* Years later, the six judges dissenting from denial of rehearing en banc would note that the trial court

[1] Two other categories of EADs likewise fail to establish presence authorized under federal law. Identified by their federal category codes, they are (a)(11) (deferred enforced departure) and (c)(14) (generic deferred action). ER 145.

dismissed the preemption claim "with bemusement." App. 3 (Kozinski, J., dissenting).

In the meantime, Respondents appealed only the district court's denial of their motion for summary judgment on equal protection. The Ninth Circuit reversed the lower court's finding of no irreparable harm and proceeded to consider all four preliminary injunction factors in the first instance and to order the district court to "enter a preliminary injunction prohibiting [ADOT] from enforcing any policy by which the Arizona Department of Transportation refuses to accept Plaintiffs' Employment Authorization Documents, issued to Plaintiffs under DACA, as proof that Plaintiffs are authorized under federal law to be present in the United States." *Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1058 (9th Cir. 2014).

Petitioners moved this Court for a stay pending the resolution of a petition for certiorari. Justice Kennedy referred that motion to the whole Court, which denied the stay with three Justices dissenting from the denial. *See* App. 132. Confident that they would prevail on remand and because discovery had continued in the district court for over a year, Petitioners did not seek certiorari.

The district court, believing itself bound by the earlier Ninth Circuit decision, entered a permanent injunction borrowed verbatim from the Ninth Circuit's opinion. *Ariz. Dream Act Coalition v. Brewer*, 81 F. Supp. 3d 795, 811 (D. Ariz. 2015) (also found at ER 7–26). Petitioners again appealed, and the case was assigned to the same Ninth Circuit panel. *See* Order,

Ariz. Dream Act Coalition v. Brewer, No. 15-15307 (9th Cir. June 2, 2015) (Pregerson, Berzon & Christen, JJ.).

At oral argument, the panel unexpectedly pivoted to the long-forsaken topic of preemption. Although Respondents abandoned their Supremacy Clause claims, App. 210–11, the panel called for supplemental briefing on that subject and on the constitutionality of DACA, App. 34.

On April 5, 2016, the Ninth Circuit panel affirmed the entry of a permanent injunction, this time based on preemption. App. 71, *as amended by* App. 21. While the panel recognized that driver's licenses are a traditional area of state regulation, App. 36, and that States may incorporate federal immigration classifications, *id.* (citing *Plyler*, 457 U.S. at 225–26), it nevertheless found preemption because "by arranging federal classifications in the way it prefers, Arizona impermissibly assumes the federal prerogative of creating immigration classifications according to its own design," App. 39.

Petitioners sought rehearing en banc, which the Ninth Circuit denied over a six-judge dissent. App. 2–13 (Kozinski, J., dissenting). The dissent faults the panel opinion for declaring ADOT's policy preempted without identifying the federal laws that preempt it, App. 6–9, and for refusing to address the antecedent question of whether the DACA Memo could be described as either "law" or "lawful" before concluding that it is "part of the body of 'federal law' that imposes burdens and obligations on the sovereign states," App. 4. Because DACA is neither law nor lawful, Petitioners seek this Court's review.

REASONS FOR GRANTING THE PETITION

Since the Founding, the separation of powers has been "a bulwark against tyranny." *United States v. Brown*, 381 U.S. 437, 443 (1965). Preserving liberty "requires[] that the three great departments of power should be separate and distinct." The Federalist No. 47, at 324 (James Madison) (J. Cooke ed. 1961). And just as the division of power among the branches of the federal government protects liberty, so too does the vertical separation of power between the federal government and the States. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."')). Thus, "the police power is controlled by 50 different States instead of one national sovereign," *id.*, and when States exercise that power, only the "'clear and manifest purpose of Congress'" will suffice to preempt those laws, *Arizona*, 132 S. Ct. at 2501 (quoting *Rice*, 331 U.S. at 230); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

The Ninth Circuit's decision in this case is remarkable for eroding both dimensions of the constitutional division of power. It diminishes the States by rejecting the "clear and manifest" standard that has existed since *Rice* in favor of an immigration-specific test. That holding contradicts decades of precedent from this Court and every circuit court of appeals. And after lowering the bar for preemption, the panel undermines this Court's allowance that a "State may borrow the federal classification" of aliens, *Plyler*, 457 U.S. at 226, by holding that Arizona was not

free to "arrange[]" those classifications—the EADs—in a manner that suits its regulatory task. In the absence of any evidence that Congress intended such a radical departure, this Court should restore the traditional sovereignty of the 50 States.

The Constitution's division of power among the federal branches fares no better. Specifically, the effect of the panel's decision is to hold "that the enforcement decisions of the President are federal law." App. 4 (Kozinski, J., dissenting). It does so by finding a conflict with Arizona's requirement of "presence . . . authorized under federal law." Ariz. Rev. Stat. § 28-3153(D). But the only authorization for (c)(33) EADs is the DACA Memo, which must belong to one of two categories: either it announces a substantive change in the law by executive action alone, or it is a precatory enforcement guide without the force of law. Either option lacks preemptive force.

This Court should grant certiorari to bring the Ninth Circuit's outlier decision into harmony with precedent from this Court and courts around the nation. Along the way, it will restore the two-part separation of powers that guards against the consolidation of power in any individual.

I. The Ninth Circuit's Rejection of the "Clear and Manifest" Standard for Preempting State Law Is Contrary to Precedent from this Court and the Second and Fifth Circuits.

While purporting to avoid a host of issues, the Ninth Circuit decision comes to rest on the idea that Arizona's incorporation of federal classifications is preempted by federal law. App. 33. To do so, the lower court adopts an incorrect legal standard for finding preemption and, as a result, reaches a decision that is irreconcilable with precedent from this Court and others. This gossamer-thin appeal to constitutional avoidance is easy to expose, but would be devastating if left in place.

Preemption is a drastic outcome. While the federal government is one of limited and enumerated powers, the "States have vast residual powers" under the Tenth Amendment. *United States v. Locke*, 529 U.S. 89, 109 (2000). Mindful of this "fundamental" feature of "our federal structure," *id.*, this Court imposes a high threshold for preempting state laws. To wit, when "Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. at 565 (alterations in original, quotation omitted). This "clear and manifest" standard gives life to the bedrock principle that "it is Congress rather than the courts that preempts state law." *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (quotation omitted).

Congress unquestionably has authority to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. This power "is essentially a determination of who should or should not be admitted to the country, and the conditions under which a legal entrant may remain." *De Canas v. Bica*, 424 U.S. 351, 355 (1976), *superseded by statute in irrelevant part as recognized in Arizona*, 132 S. Ct. at 2503 (cited at App. 24). This federal field does not, however, preclude all state "act[ion] with respect to illegal aliens." *Plyler*, 457 U.S. at 225. In fact, the States' interest in illegal immigration includes "deter[ring]" the practice in service of traditional police-power interests. *Id.* at 228 n.23 ("Although the State has no direct interest in controlling entry into this country . . . we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law."). Thus, Arizona was within its rights to make mandatory the federal E-Verify system in "hopes that its law will result in more effective enforcement of the prohibition on employing unauthorized aliens." *Whiting*, 563 U.S. at 607. Short of determining who may enter and remain in the United States, each State has significant latitude to regulate in traditional areas of state concern.

The Ninth Circuit panel admits that regulating driver's licenses is within the States' police power. App. 38. That fact triggers the requirement that preemption be the "clear and manifest purpose of Congress." *Arizona*, 132 S. Ct. at 2501 (quotation omitted).

But the Ninth Circuit refused to apply this requirement. By misusing a quotation from a footnote

characterizing the dissent in *Toll v. Moreno*, 458 U.S. 1 (1982), the Ninth Circuit adopted a different test: "'neither a clear encroachment on exclusive federal power to admit aliens nor a clear conflict with a specific congressional purpose' is required in order for federal law to preempt state regulations of immigrants." App. 35 (quoting *Toll*, 458 U.S. at 11 n.16). That is not correct. The *Toll* footnote did not address the presumption against preemption and, by its own admission, referred to a case decided under the Equal Protection Clause. Moreover, had the Ninth Circuit taken seriously this Court's more recent decisions involving the presumption against preemption in the immigration context, it would have seen that the "clear and manifest" threshold applies with full force. *E.g., Arizona*, 132 S. Ct. at 2501 (citing *Wyeth*).

In defense of the vertical separation of powers, this Court should grant certiorari for the purpose of extinguishing this error alone. Creating an immigration-specific rule is unnecessary and negates the logic of the presumption against preemption.

The Ninth Circuit's need for a special rule becomes apparent when considering the decision's two feeble tethers to congressional intent. The first is a provision defining "unlawful presence" for purposes of a single paragraph in the INA. App. 42; 8 U.S.C. § 1182(a)(9)(B)(ii). It explains that an alien is unlawfully present if he remains in the United States "after the expiration of the period of stay authorized by the Attorney General." *Id.* That fact does not, of course, imply that anyone who has not overstayed a period authorized by the Attorney General is, for all purposes including getting a driver's license in Arizona,

lawfully present. Second, the Ninth Circuit panel points to a provision of the REAL ID Act that permits but does not require States to give licenses to persons with deferred action. App. 42; Pub. L. No. 109-13, § 202(c)(2)(C)(i). That is all the panel has. As the dissenting judges point out, "[t]hat the panel can trawl the great depths of the INA . . . and return with this meager catch suggests exactly the opposite" of a clear and manifest congressional intent to preempt Arizona's law. App. 8 (Kozinski, J., dissenting).

Congressional disapproval is impossible to find because ADOT "borrows" federal classifications exactly as they are created by the federal government. *Plyler*, 457 U.S. at 226. Its policy awards driver's licenses to all classes of aliens holding an EAD except those with (a)(11), (c)(14), and (c)(33) EADs. These classifications are not ADOT's. Moreover, ADOT does not tamper with the federal classifications by, for example, dividing (c)(33) EAD-holders (DACA beneficiaries) brought to the United States before the age of five from those who entered the country after their fifth birthdays. Such conflicting re-classification would trigger preemption, but ADOT does no such thing.

While the panel acknowledges that States may "incorporate federal immigration classifications," App. 36, it strikes down Arizona's law for the sin of "arranging federal classifications in the way it prefers," App. 39. Its reasoning is self-contradictory: "by *arranging federal classifications* . . ., Arizona impermissibly assumes the federal prerogative of *creating* immigration classifications." App. 39 (emphasis added). The panel never explains how arranging classifications that are admittedly federal is

akin to creating classifications rather than borrowing them, as sanctioned in *Plyler*. Moreover, the panel identifies nothing to indicate that Congress clearly and manifestly intended to preempt States from arranging immigration classifications to further an exercise of state police powers.

This Court and others have recognized that States' ability to "borrow" classifications entails the flexibility to arrange them in response to the State's regulatory project. *Toll* is a prime example. Although the Court struck down the University of Maryland's policy excluding aliens with G-4 visas from paying in-state tuition, its reasoning had nothing to do with a State's ability to borrow visa classifications. 458 U.S. at 16–17 (discussing congressional intent specific to G-4 visas). To the contrary, the Court noted that other visa categories could be treated differently because Congress had not evinced the same intent that those immigrants make the United States their domicile. *Id.* at 7 n.8. If the Ninth Circuit were correct, *Toll* would have been a much shorter opinion: Maryland could not use visa-specific classifications, regardless of how congressional intent varied from visa to visa. This Court's contrary approach confirms that permissible "borrowing" of immigrant classifications does not depend on how fine the classifications are but rather on what the plaintiff can prove regarding congressional intent.

In *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005), the Fifth Circuit upheld a Louisiana law that denied bar admission to aliens holding "nonimmigrant" visas. In concluding that the INA did not preempt Louisiana's regulation, the court explained that, "as with the alien

class in general, the sub-class of nonimmigrant aliens is itself heterogeneous, and the distinctions among them are relevant for preemption purposes." *Id.* at 424 (citing *Toll*'s distinctions based on type of visa). Because there was no conflict between the state law and what Congress clearly intended under federal law, Congress had not "unmistakably" preempted Louisiana's police power regulation of the legal profession. *Id.* at 423–25. The Ninth Circuit attempts to distinguish *LeClerc* because it is the federal government that classifies lawful aliens as either immigrant or non-immigrant. App. 43. But the federal government is also the source of the EAD classifications in the present case.

Further illustrating the point, the Second Circuit, in a decision that examined *LeClerc*, found fault with a professional licensing scheme that was insufficiently refined in its approach to visa classifications. *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012). The Second Circuit found a conflict between Congress's creation of H-1B and TN visas for pharmacists (including the plaintiffs) and New York's rule limiting pharmacy licenses to citizens and legal permanent residents, a blunt rule that excluded the plaintiffs. The Second Circuit found preemption based on a conflict specific to plaintiffs' type of visa: "Congress intended to allow [H-1B and TN visa-holders] to practice specialty occupations." *Id.* at 80. *Dandamudi*'s emphasis on congressional intent specific to pharmacists with two types of professional visas suggests that had New York adopted a *more* precise rule—one that carved out H-1B and TN pharmacists—it would have survived. Unlike the Ninth Circuit, the Second Circuit recognized that a more precise borrowing of federal classifications is

within a State's prerogative and can actually avoid conflict with congressional intent.

This Court has sanctioned States' borrowing federal immigration classifications. When they do so in exercising a traditional police power, the only question is whether Congress has clearly and manifestly expressed an intent to preempt the State's action. The Ninth Circuit panel has rejected this standard and created a division with other circuits in the process. Certiorari is necessary to extinguish this error and confirm that borrowed federal classifications do not offend the Supremacy Clause.

II. The Ninth Circuit Departed from Precedent in this Court and Six Circuits by Treating DACA as Federal Law.

It takes little squinting to see that the Ninth Circuit's core objection is with Arizona's conclusion that DACA fails to confer "presence . . . authorized under federal law," Ariz. Rev. Stat. § 28-3153(D). Thus it bemoans that the State "distinguishes between noncitizens based on its own definition of 'authorized presence,' one that neither mirrors nor borrows from the federal immigration classification scheme." App. 39. As the dissent points out, this is not a matter of borrowing EAD classifications, which Arizona does faithfully, but rather a question of what counts as "federal law." App. 4. The panel attempts to hide its equation of DACA with federal law by rewriting the state statute to require generic "authorized presence," *e.g.*, App. 39. This subtle change, which appears eleven times throughout the analysis but nowhere in the Arizona statute, omits the condition of "presence . . . authorized *under federal law*." That condition is at the

heart of the state statute and should be at the core of any preemption analysis.

As explained above, DACA can be one of two things: an amendment to immigration law or precatory guidance for prosecutors. If DACA is a substantive change in the law, as many circuits would hold (and one effectively has), then it must fail under *Youngstown*. If it is merely guidance for prosecutorial discretion, then the Ninth Circuit panel diverges from this Court and numerous others in finding preemption based on a document that lacks the force of law. Arizona has faithfully interpreted the boundaries of "federal law," and DACA does nothing to alter that conclusion.

A. DACA Is an Attempt to Change Substantive Law, which Is Unlawful Under *Youngstown* and Therefore Incapable of Preempting State Law.

DACA is an attempt by the executive branch to change federal immigration law without involving Congress. For preemption, however, a law must be "made in Pursuance" of the Constitution. U.S. Const. art. VI, cl. 2. The Ninth Circuit works hard to avoid answering how DACA can comply with the constitutional process for lawmaking: "We decline to rule on the constitutionality of the DACA program, as the issue is not properly before our court; only the lawfulness of Arizona's policy is in question." App. 44. This position makes no sense because "the lawfulness of Arizona's policy" depends upon the lawfulness of DACA. After all, "only measures that are constitutional may preempt state law." *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 763 (11th Cir.

1991). Or, as the dissenting judges explained: "I am at a loss to explain how . . . [t]he President's policies may or may not be 'lawful' and may or may not be 'law,' but are nonetheless part of the body of 'federal law' that imposes obligations on the sovereign states." App. 4 (Kozinski, J., dissenting).

The Fifth Circuit has held that the legally-indistinguishable 2014 DACA expansion and the creation of DAPA are substantive changes in the law rather than an exercise of prosecutorial discretion. *Texas*, 809 F.3d at 174–78. Precedent from the Eighth and D.C. Circuits supports the same conclusion. If these courts are correct, then the Constitution's separation of powers demands more than an executive memorandum to enact the substantive policy change embodied in DACA.

1. **Not prosecutorial discretion.** The separation of powers allows Congress the luxury of inaction. The President, on the other hand, "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. Prosecutorial discretion is an exception to that obligation, but this Court has limited that exception to avoid swallowing the rule. Prosecutors may therefore decide not to take action against a particular offender only "on a case-by-case basis." *Reno*, 525 U.S. at 484 n.8 (1999).

DACA, however, is more than a decision not to seek removal. It also awards affirmative benefits in contravention of the INA. Specifically, Congress has prohibited the employment of unauthorized aliens, 8 U.S.C. § 1324a(1), yet DACA provides EADs. This unlawful bonus takes DACA well beyond the boundaries of prosecutorial discretion. While Judge

Berzon views affirmative benefits as sanctioned by the INA's definition of "unauthorized alien," App. 52–53, a closer reading of the statute belies this theory. For purposes of employment, the INA defines unauthorized aliens as noncitizens not admitted as permanent residents or "authorized to be so employed by this chapter *or by the Attorney General*." 8 U.S.C. § 1324a(h)(3) (emphasis added). But the italicized language does not create any power. It merely reflects the fact that work authorization can come directly from a statute, *see, e.g.,* 8 U.S.C. § 1154(a)(1)(D)(i)(II), and other times must come from the Attorney General *pursuant to* a statute, *see, e.g.,* 8 U.S.C. §§ 1160(d)(1)(B), (d)(2)(B). Thus, nothing in the INA's definitional provisions allows the executive branch to confer affirmative benefits through an exercise of prosecutorial discretion.

In addition to extending benefits beyond non-enforcement, DACA is not discretionary. It is instead "a general policy" that contravenes the executive's "statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). Over a span of 80 days, USCIS approved almost 103,000 DACA applications. ER 470. As a point of comparison, Secretary Napolitano testified that DHS approved a total of 900 applications for deferred action over the entire year of 2010. *Id.* The change from 2010 to the DACA Program reflects a 52,200% increase in approvals per day. Considering similar "evidence from DACA's implementation," the Fifth Circuit characterized the government's appeals to discretion as mere "pretext." *Texas*, 809 F.3d at 172. When asked, DHS had precisely zero examples of an individualized determination under DACA. *Id.* This result is

unsurprising given that the president of the USCIS workers' union reported that "DHS management has taken multiple steps to ensure that DACA applications are simply rubberstamped if the applicants meet the necessary criteria." *Id.* at 172–73.

Faced with similar evidence that individualized determinations are not occurring, other courts of appeals refuse to take the bait. The D.C. Circuit, for example, rejected EPA's claims of discretion when an agency model resolved 96 out of 100 applications. *McLouth Steel Prods. v. Thomas*, 838 F.2d 1317, 1320–21 (D.C. Cir. 1988). With slightly more flourish, the Eighth Circuit rejected a federal agency's "pro forma reference to . . . discretion" as "Orwellian Newspeak." *Iowa League of Cities v. EPA*, 711 F.3d 844, 865 (8th Cir. 2013).

The Ninth Circuit, on the other hand, ignores the limits of prosecutorial discretion. After citing several cases involving case-by-case discretion, the panel asserts that past practice also "includes 'general policy' non-enforcement." App. 46. Astonishingly, the panel quotes precisely the language this Court used in *Heckler* to identify *impermissible* forms of prosecutorial discretion that would violate the Take Care Clause. 470 U.S. at 832. By relying on a "history that includes" class-based deferred action, the panel also deepens its conflict with the Fifth Circuit, which considered the same examples and concluded that "historical practice . . . 'does not, by itself, create power.'" 809 F.3d at 184 (quoting *Medellin v. Texas*, 552 U.S. 491, 532 (2008)).

DACA is not prosecutorial discretion because it goes beyond non-enforcement and does not rely on prosecutors' case-by-case evaluation.

2. **Separation of Powers.** Because DACA attempts a substantive change in the law, the Ninth Circuit's assumption that DACA is constitutional is contrary to longstanding precedent from this Court and at least two courts of appeals.

In the arena of executive lawmaking, Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952), is the rulebook. *Youngstown* announced a tripartite framework for evaluating how much freedom the executive enjoys to create law. The widest berth exists where "the President acts pursuant to an express or implied authorization of Congress." *Id.* at 635 (Jackson, J., concurring). Conversely, when acting contrary to a congressional pronouncement, the President's "power is at its lowest ebb . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 638 (Jackson, J., concurring). In between lies a "zone of twilight" characterized by "congressional inertia, indifference or quiescence." *Id.* at 637 (Jackson, J., concurring).

Congress has authority over immigration, U.S. Const. art. I, § 8, cl.4, and has exercised that authority on numerous occasions, including to provide class-based deferred action. *See, e.g.,* 8 U.S.C. § 1154(a)(1)(D) (self-petitioners under the Violence Against Women Act); Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361 (family members of permanent residents killed on September 11, 2001); Pub. L. No. 108-136, § 1703(c)–(d), 117 Stat. 1392, 1694–95 (family members of U.S. citizens killed in combat); 8 U.S.C. § 1227(d)(1)–(2) (certain T- and U-visa applicants). As

a result of this tide of legislation, the President's power to create or amend immigration law is limited to "his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring). Because the Constitution assigns Congress authority over immigration, the President has no authority to enact new policies like DACA. *See* App. 11–12 & n.7 (Kozinski, J., dissenting) (explaining that this case belongs to *Youngstown*'s third category).

In *Youngstown* itself, existing legislation on the topic of property seizure was sufficient to preclude President Truman from seizing steel mills under Article II's commander-in-chief authority. *Id.*, 343 U.S. at 639 & nn.6–8 (Jackson, J., concurring). In *Barclays*, the Court pointed to a history of failed legislation seeking to ban California's method of tax collection: "Congress has focused its attention on this issue, but has refrained from exercising its authority," thus "yield[ing] the floor" to the States, not the executive. 512 U.S. at 329; *see also id.* at 324–26 & nn.24–25 (tracing legislative proposals). Even more recently, the Court held that a "Memorandum of the Attorney General" could not make a non-self-executing treaty binding upon the States, notwithstanding the President's "plainly compelling" interests in the conduct of foreign affairs. *Medellin*, 552 U.S. at 524–26.

Like *Youngstown*, *Barclays*, and *Medellin*, the present case belongs in the third and most constrained *Youngstown* category. Congress has spoken specifically on the subject of class-wide deferred action, but has not extended such treatment to the group of noncitizens

covered by DACA. As in *Youngstown*, existing legislation on the same topic strips the executive of the ability to enact a parallel program unilaterally. Moreover, as in *Barclays*, Congress has considered and rejected legislation that would have accomplished what the executive attempted in response to legislative inaction. *See, e.g.,* DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011); DREAM Act of 2010, H.R. 6497, S. 3992, S. 3963, 111th Cong. (2010); DREAM Act of 2007, S. 774, 110th Cong. (2007). The Ninth Circuit's decision is inconsistent with this body of precedent.

It is also inconsistent with the holdings of other circuits. Most notably, the Fifth Circuit held that "the INA flatly does not permit the reclassification of millions of illegal aliens as lawfully present and thereby make them eligible for a host of federal and state benefits." *Texas*, 809 F.3d at 184. The Eleventh Circuit likewise struck down a presidential effort to regulate immigration in an area where Congress has imposed a "statutory scheme." *United States v. Frade*, 709 F.2d 1387, 1402 (11th Cir. 1983). In *Frade*, the question was whether the President could punish cooperation with the Mariel boatlift, which he justified as encompassed within the Trading with the Enemy Act. The Eleventh Circuit rejected this argument because Congress had already provided a different mechanism for emergency actions, which meant that the President's power was at its "lowest ebb" under *Youngstown*. *Id.* Alternatively, if the regulation was indeed based on trade, then the Constitution had already assigned that power to Congress in Article I, § 8, cl. 3—the clause at issue in *Barclays* and immediately preceding the one at issue in this

case—with the same result in terms of unilateral presidential power. *Id*. at 329, 334.

In the present case, Congress has passed numerous laws governing immigration. It is therefore "the expressed and codified intent of Congress," *id.*, that immigration occur in accordance with the INA and other laws.

If the Ninth Circuit shared the Eleventh Circuit's recognition that "presidential power to exclude aliens . . . does not include the power to enact general immigration laws by executive order," *id.*, or the Fifth Circuit's specific conclusions regarding DACA, then a different result would have obtained in the present case. This Court should grant certiorari to reaffirm its existing precedent limiting the scope of presidential lawmaking and to confirm that the Fifth and Eleventh Circuits were correct to follow those precedents in the context of immigration.

B. Alternatively, if DACA Were Prosecutorial Discretion, This Court and Three Circuits Have Held that Executive Branch Policy Statements Lack the Force of Law.

The Supremacy Clause enthrones the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties" as the supreme law of the land. U.S. Const. art. VI, cl. 2. It does not extend the same significance to every missive that issues from a single branch of government.

This Court has refused to treat as law "Executive Branch actions [like] press releases, letters, and amicus briefs." *Barclays*, 512 U.S. at 329–30. The *Barclays*

Court reasoned that "[w]e need not here consider the scope of the President's power to preempt state law pursuant to authority delegated by a statute" because the "Executive Branch communications" before it merely "express federal policy but lack the force of law." *Id.* Communications of this sort "cannot render unconstitutional California's otherwise valid [statute]." *Id.* at 330.

The Third and Seventh Circuits have reached similar conclusions by following this Court's reasoning in *United States v. Mead Corp.*, 533 U.S. 218 (2001). While *Mead* itself is not a preemption case, it traces the clearest boundary between agency-made law and precatory guidance. *Mead* announces a straightforward standard: "Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *Id.* at 230. Part of the "force" attending agency action that satisfies the standard in *Mead* is the ability to preempt state laws.

In *Holk*, the Third Circuit began its preemption analysis by asking "whether the FDA has . . . taken actions that are capable of having preemptive effect." 575 F.3d at 340. The candidate actions in *Holk* included a request for public comments, an informal policy, and several letters from the FDA to food and beverage manufacturers telling them to remove the term "natural" from their labels. *Id.* at 340–41. Applying *Mead*, the Third Circuit concluded that the lack of a "formal, deliberative process" prevented the FDA's actions from creating federal law. *Id.* at 342.

Likewise, the Seventh Circuit explained that "[i]n order to preempt state authority," a federal agency "must establish rules with the force of law." *Wabash Valley Power Assn. v. Rural Elec. Admin.*, 903 F.2d 445, 453–54 (7th Cir. 1990). A mere letter from the agency was not nearly enough. *Id.* at 454. In fact, the *Wabash* court noted that "[w]e have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication." *Id.*

Regarding the specific executive branch communication at issue in this case, the Fifth Circuit has already held that DAPA and the 2014 DACA expansion were substantive rules requiring notice-and-comment rulemaking, which DHS did not do. *Texas*, 809 F.3d at 177–78. In the Seventh Circuit, this failure to comply with the requirements of the Administrative Procedure Act would mean that DACA cannot be the basis for federal preemption. *Wabash*, 903 F.2d at 453.

In the Ninth Circuit, however, a different result followed. Examining Arizona's statute that requires "presence in the United States . . . authorized under federal *law*," Ariz. Rev. Stat. § 28-3153(D) (emphasis added), the Ninth Circuit found preemption because DACA beneficiaries—a group defined by no statute and no formal rulemaking—were excluded. App. 36. In any other Circuit, the requirement of presence "authorized under federal law" would have excluded persons whose sole claim to "authorization" was an executive branch memorandum. As the dissenting opinion points out, "[t]he panel decision in effect holds that the enforcement decisions of the President are federal law." App. 4. In the Third, Fifth, and Seventh Circuits, that holding would be impossible.

Rather than expressly disagree, the panel opinion simply ignores unhelpful precedent regarding the boundaries of "law," especially when contrasted with precatory communications from the executive branch. Despite dozens of references in the briefs, *Barclays* appears nowhere in the Ninth Circuit's opinion. In fact, the panel goes so far as to assert in a footnote that the DACA Memo is immaterial to its holding, which purportedly relies instead on "federal authority under the INA to create immigration categories." App. 39–40 n.8. The panel does not, however, explain how the plaintiffs in this case would have a cause of action in the absence of that allegedly irrelevant memorandum.[2]

This Court and the circuits that follow it have spoken with one voice on the procedures that create federal law. That the DACA Memo could trigger a different result in the Ninth Circuit calls out for review. *See* Noah Feldman, *Obama's Wobbly Legal Victory on Immigration*, Bloomberg View (Apr. 6, 2016) (describing the Ninth Circuit's preemption holding as "vulnerable to reversal by the Supreme Court" because "[t]he legal authority for [DACA] deferred-action status isn't federal law").

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[2] The opening sentence of Respondents' Complaint belies the Ninth Circuit's assertion that DACA is immaterial: "This lawsuit challenges . . . Arizona's practice of denying driver's licenses to immigrant youth whom the federal government has authorized to remain in the United States under the Deferred Action for Childhood Arrivals (DACA) program." ER 330, ¶ 1. Without DACA, there is no lawsuit.

III. The Importance of Defining Executive Power in the Context of Immigration Will Not Soon Diminish.

DACA threatens the separation of executive and legislative powers. This Court recognized as much by granting certiorari in *Texas*. *United States v. Texas*, 136 S. Ct. 906 (2016). In the same way, every finding of preemption affects the division of power between the federal government and the States. What makes this case remarkable is the coincidence of both attacks on divided government in a single event.

The Constitution is not agnostic about the division of power over immigration. The federal government has authority over "who should or should not be admitted to the country, and the conditions under which a legal entrant may remain;" other police powers that impact aliens belong to the States. *De Canas*, 424 U.S. at 355. Within the federal system, authority rests with Congress. U.S. Const. art. I, § 8, cl. 4. The Ninth Circuit's preemption holding upsets both of these divisions of power, consolidating from both horizontal and vertical directions in favor of the President.

This Court has long resisted such consolidation. Even when Congress willingly ceded its lawmaking authority to the executive, the Court would not participate. *Clinton v. City of New York*, 524 U.S. 417 (1998). DACA, taken to its logical limit, would create a type of de facto line-item veto, with the executive branch empowered to suspend enforcement of disagreeable provisions in the name of prosecutorial discretion. Indeed, DACA goes further than *Clinton*. It assumes that the executive branch may functionally veto portions of existing law without congressional

authorization and beyond the narrow universe of spending provisions at issue in *Clinton*. *See* Pub. L. 104-130, § 1021 (1996) (limiting the line-item veto to expenditures).

The division of power between the States and the federal government is no less important. *Arizona*, 132 S. Ct. at 2498 ("This Court granted certiorari to resolve important questions concerning the interaction of state and federal power[.]").

Because the Ninth Circuit panel switched its rationale from equal protection to preemption, this case now implicates both the horizontal and vertical separation of powers. As a result, the importance of certiorari is stronger now than when three Justices of this Court publicly noted their desire to stay the original panel decision pending certiorari. App. 132.

Either DACA is an exercise of prosecutorial discretion without the force of law, or it is a substantive legal change done outside and against the constitutional scheme. Under either option, the Ninth Circuit's decision finding preemption of an admitted police power is both wrong and at odds with numerous other circuits, including the Fifth Circuit's determination that DAPA and the 2014 DACA expansion are substantive changes in the law.

Judge Kozinski's dissent ends with a reminder: "Executive power favors the party, or perhaps simply the person, who wields it." App. 12. His concern mirrors James Madison's: the consolidation of power in any one person is the "very definition of tyranny." The Federalist No. 47 (Madison). Thus, the reason for concern over each successive President's ability to

suspend statutes, confer benefits, and preempt state laws is not a fear over policy tumult or distrust of a given President; the reason for concern is that this new power marks the arrival of an Imperial Presidency far more sweeping than any our nation has known.

This Court should grant certiorari to restore and clarify the relationship between the state and federal governments and among the three branches of the federal system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 29, 2017

APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-15307
D.C. No. 2:12-cv-02546-DGC
District of Arizona, Phoenix

[Filed February 2, 2017]

ARIZONA DREAM ACT COALITION; CHRISTIAN JACOBO; ALEJANDRA LOPEZ; ARIEL MARTINEZ; NATALIA PEREZ-GALLEGOS; CARLA CHAVARRIA; JOSE RICARDO HINOJOS,
Plaintiffs-Appellees,

v.

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

ORDER

Before: PREGERSON, BERZON, and CHRISTEN, Circuit Judges.

The court's opinion filed on April 5, 2016, appearing at 818 F.3d 901 (9th Cir. 2016), is hereby amended. An amended opinion, including a concurrence by Judge Berzon, is filed herewith.

Judges Berzon and Christen voted to deny the petition for rehearing en banc, and Judge Pregerson so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**, and no further petitions for rehearing will be accepted.

Arizona Dream Act Coal. v. Brewer, No. 15-15307

Circuit Judge **KOZINSKI**, with whom Circuit Judges **O'SCANNLAIN**, **BYBEE**, **CALLAHAN**, **BEA** and **N.R. SMITH** join, dissenting from the denial of rehearing en banc:

At the crossroads between two presidents, we face a fundamental question of presidential power. President Obama created, by executive memorandum, a sweeping new immigration program that gives the benefit of "deferred action" to millions of illegal immigrants who came to the United States before the age of sixteen. Deferred action confers no formal

immigration status; it is simply a commitment not to deport. Arizona, like many states, does not issue drivers' licenses to unauthorized aliens, and therefore refuses to issue drivers' licenses to the program's beneficiaries.

Does the Supremacy Clause nevertheless force Arizona to issue drivers' licenses to the recipients of the President's largesse? There's no doubt that Congress can preempt state law; its power to do so in the field of immigration is particularly broad. But Congress never approved the deferred-action program: The President adopted it on his own initiative after Congress repeatedly declined to pass the DREAM Act—legislation that would have authorized a similar program. Undeterred, the panel claims that the President acted pursuant to authority "delegated to the executive branch" through the Immigration and Naturalization Act (INA). Amended op. at 27. According to the panel, Congress gave the President the general authority to create a sprawling new program that preempts state law, even though Congress declined to create the same program.

This puzzling new preemption theory is at odds with the Supreme Court's preemption jurisprudence; it is, instead, cobbled together out of 35-year-old Equal Protection dicta. It is a theory that was rejected with bemusement by the district court, see Ariz. Dream Act Coal. v. Brewer, 945 F. Supp. 2d 1049, 1057 (D. Ariz. 2013), only to be resurrected by the panel at the eleventh hour and buried behind a 3,000-word Equal Protection detour. It's a theory that puts us squarely at odds with the Fifth Circuit, which held recently that "the INA flatly does not permit the [executive]

reclassification of millions of illegal aliens as lawfully present and thereby make them newly eligible for a host of federal and state benefits." Texas v. United States, 809 F.3d 134, 184 (5th Cir. 2015), aff'd by an equally divided court, 136 S. Ct. 2271, 2272 (2016) (per curiam). And it's a theory that makes no mention of the foundational principle of preemption law: Historic state powers are not preempted "unless that was the clear and manifest purpose of Congress." Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (internal quotation omitted).

The opinion also buckles under the weight of its own ambiguities. The panel says repeatedly that Arizona has created "immigration classifications not found in federal law." Amended op. at 30 n.8; see also id. at 35, 42. But Arizona follows federal law to the letter—that is, all laws passed by Congress and signed by the President. Thus, when the panel uses the term "law," it means something quite different from what that term normally means: The panel in effect holds that the enforcement decisions of the President are federal law. Yet the lawfulness of the President's policies is an issue that the panel bends over backward not to reach. See id. at 35–39. I am at a loss to explain how this cake can be eaten and yet remain on the plate: The President's policies may or may not be "lawful" and may or may not be "law," but are nonetheless part of the body of "federal law" that imposes burdens and obligations on the sovereign states. While the panel suggests other reasons to doubt Arizona's response,[1]

[1] I have little to say about the panel's lengthy Equal Protection discussion. While this Equal Protection excursus eclipses the panel's terse and enigmatic discussion of preemption, the panel is

the opinion's slippery preemption theory simply isn't one of them. See, e.g., Noah Feldman, Obama's Wobbly Legal Victory on Immigration, Bloomberg (Apr. 6, 2016) (describing the panel's "precarious," "tricky" and "funky" reasoning that is "vulnerable to reversal by the Supreme Court").

* * *

In the summer of 2012, the President directed his officers not to remove certain illegal immigrants who came to the United States before age sixteen. The program, Deferred Action for Childhood Arrivals (DACA), did not clear any of the normal administrative-law hurdles; the memorandum announcing the program states that it "confers no substantive right, immigration status or pathway to citizenship" because "[o]nly the Congress, acting through its legislative authority, can confer these rights." DHS Memorandum, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, June 15, 2012.

Arizona responded with an executive order of its own, stating, in apparent agreement with the DACA memorandum, that the new federal program "does not and cannot confer lawful or authorized status or

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nonetheless clear that "we do not ultimately decide the Equal Protection issue." Amended op. at 18. I note, however, that there are serious doubts about the coherence of the Supreme Court's Equal Protection jurisprudence as applied to aliens. See, e.g., Korab v. Fink, 797 F.3d 572, 585 (9th Cir. 2014) (Bybee, J., concurring) (describing this jurisprudence as "riddled with exceptions and caveats that make consistent judicial review of alienage classifications difficult," and suggesting an approach based solely on preemption).

presence upon the unlawful alien applicants." Ariz. Exec. Order 2012-06. Because Arizona law requires that applicants for a driver's license submit proof that their presence is "authorized under federal law," Ariz. Rev. Stat. § 28-3153(D)—and DACA "confers no substantive right [or] immigration status"—Arizona felt justified withholding licenses from illegal immigrants who happen to be DACA beneficiaries. Several DACA beneficiaries then sued Arizona, claiming, among other things, that the state's policy was preempted.

The panel agrees, holding that Arizona's policy "strayed into an exclusive domain that Congress, through the INA, delegated to the executive branch." Amended op. at 27 (emphasis added); see also id. at 17. One might think that the panel would present especially strong evidence of congressional delegation, such as an express statement to that effect. After all, it's rare enough to find that Congress has kept an entire field to itself, much less ceded one to the executive. And the bar that preemption must clear is both well-established and high: The historic police powers of states are not preempted "unless that was the clear and manifest purpose of Congress." E.g., Arizona, 132 S. Ct. at 2501; Wyeth v. Levine, 555 U.S. 555, 565 (2009); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

The panel doesn't bother showing that Congress evinced a "clear and manifest purpose" before forcing the states to accept immigration classifications invented entirely by the President. Indeed, the panel's

preemption analysis mentions only two small provisions of the INA, and this thin statutory evidence cannot possibly carry the heavy burden of field preemption.[2] The panel first notes that the INA refers to an alien's "period of stay authorized by the Attorney General," beyond which the alien is "deemed to be unlawfully present in the United States." Amended op. at 33 (quoting 8 U.S.C. § 1182(a)(9)(B)(ii)). But the panel has now corrected its opinion to explain that this provision actually contemplates the executive's ability to "authorize" a period of stay only for a tiny subset of aliens—those "previously removed"—and not, as its original opinion suggested, every class of immigrant covered by the statute.[3]

The panel's second claim is that the REAL ID Act identifies deferred-action immigrants "as being present in the United States during a 'period of authorized stay,' for the purpose of issuing state identification cards." Amended op. at 34 (citation omitted). This

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[2] The panel's only other analysis of the INA, in its non-precedential Equal Protection discussion, makes the rather unremarkable point that the executive branch has responsibility for executing the INA. See amended op. at 13–16. This does not in any way help establish whether Congress intended the INA to let the executive branch preempt the states.

[3] Compare Ariz. Dream Act Coal. v. Brewer, 818 F.3d 901, 916 (9th Cir. 2016) with amended op. at 33 (adding "at least for purposes of § 1182(a)(9)(B)"). As the string of letters and numbers might suggest, § 1182(a)(9)(B) is not a large portion of the INA. This subsection also offers no support for a second reason: Even if it were true that an immigrant was "unlawfully present" if he stayed beyond a period approved by the Attorney General, this doesn't mean he would be "lawfully present" if he didn't stay beyond such a period. In formal logic, the inverse of a conditional cannot be inferred from the conditional.

narrow provision also can't be authority for the proposition that the INA "delegated to the executive branch" the wholesale authority to preempt state law by declaring immigrants legal when they are not. Nor does this narrow provision conflict with Arizona's policy: The provision actually says that a state "may only issue a temporary driver's license or temporary identification card" to deferred-action immigrants—a limit, not a requirement. REAL ID Act of 2005, Pub. L. No. 109–13, § 202(c)(2)(C)(i) (emphasis added).

Nevertheless, the panel insists that this evidence "directly undermines" Arizona's response to DACA. Amended op. at 33. That the panel can trawl the great depths of the INA—one of our largest and most complex statutes—and return with this meager catch suggests exactly the opposite conclusion: The INA evinces a "clear and manifest" intention not to cede this field to the executive. This is precisely the conclusion that the Fifth Circuit reached in Texas v. United States. Our sister circuit held that even if the President's policies were of the type to which Chevron deference was owed—which the circuit assumed only for the sake of argument—such deference would be unavailable because "the INA expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present." See Texas, 809 F.3d at 179. In other words, the INA has spoken directly to the issue and "flatly does not permit" executive supplementation like the DACA program. Id. at 184. If what the panel relies on evinces a "clear and manifest

purpose" to cede a field to the executive, it's hard to imagine what statute doesn't.[4]

* * *

Perhaps daunted by the lack of support in the statute it purports to interpret, the panel turns to Supreme Court precedent, but it doesn't fare much better here. The primary case on which the panel relies, Plyler v. Doe, might contain some impressive-sounding dicta—"The States enjoy no power with respect to the classification of aliens," 457 U.S. 202, 225 (1982)—but the reasons to reject this dicta are more impressive still. As the district court put it when it rebuffed the Plyler theory of preemption: "Plyler is not a preemption case." 945 F. Supp. 2d at 1057. Justice Brennan's 1982 majority opinion—a 5-4 opinion that garnered three individual concurrences and has been questioned continuously since publication—never once mentions preemption. See 457 U.S. at 205–30.[5]

The panel's search for support in the Supreme Court's actual preemption jurisprudence is equally misguided. The panel quotes De Canas v. Bica for the proposition that the "[p]ower to regulate immigration is unquestionably exclusively a federal power."

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[4] And even if it were undeniably the case that Congress delegated the power of preemption to the President, I am skeptical that such a statute would be constitutional. The nondelegation doctrine is still waiting in the wings. See generally Whitman v. Am. Trucking Assocs., 531 U.S. 457 (2001).

[5] The case was also wrong ab initio and is due to be reconsidered. See, e.g., Eugene Volokh, Why Justices May Overrule 'Plyler' on Illegal Aliens, L.A. Daily J., Nov. 28, 1994, at 6 (describing objections to Plyler and reasons why it may be overruled).

Amended op. at 24 (quoting 424 U.S. 351, 354 (1976)). But the panel overlooks the very next sentence of De Canas, which notes that "the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted." 424 U.S. at 355. So what's "a regulation of immigration" that would be preempted? The De Canas opinion tells us a couple of sentences later: It's "essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." Id. Denying a driver's license is not tantamount to denying admission to the country.[6] Like the state law upheld in De Canas—which prevented California businesses from hiring illegal immigrants—Arizona's control over its drivers' licenses is well "within the mainstream of [the state's] police power." Id. at 356.

Indeed, it's difficult to imagine a preemption case less helpful to the panel than De Canas. The De Canas majority states explicitly that it will "not presume that Congress, in enacting the INA, intended to oust state authority to regulate . . . in a manner consistent with pertinent federal laws." Id. at 357. That uncontroversial proposition simply raises once more the question the panel works hard to avoid: If Arizona

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[6] The more recent cases cited by the panel—Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013), Villas at Parkside Partners v. City of Farmers Branch, 726 F.3d 524 (5th Cir. 2013), and United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012)—are easily distinguishable for this reason. They involved what the courts held to be an actual regulation of immigration—that is, "a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." 424 U.S. at 355.

relies on the categories drawn by the INA, but not those of the executive branch, why isn't it operating consistently with "pertinent federal laws"? The panel never says.

* * *

Instead, we're left with the enigmatic holding we started with: Arizona "impermissibly strayed into an exclusive domain that Congress, through the INA, delegated to the executive branch." Amended op. at 27. This conclusion finds no support in the actual text of the INA. It receives no help from the Court's preemption jurisprudence. And it is a brazen renegotiation of our federal bargain. If states must accept the complete policy classifications of the INA and also every immigration decision made by the President, then we've just found ourselves in a world where the President really can preempt state laws with the stroke of a pen.

The Constitution gives us a balance where federal laws "shall be the supreme law of the land," but powers not delegated to the federal government "are reserved to the states." U.S. Const., art. VI cl. 2; id. amend. X. The political branches of the federal government must act together to overcome state laws. Unison gives us clarity about what federal law consists of and when state law is subordinated. The vast power to set aside the laws of the sovereign states cannot be exercised by the President acting alone, with his power at its "lowest ebb." Cf. Youngstown Sheet & Tube Co. v.

Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).[7]

Presidential power can turn on and off like a spigot; what our outgoing President has done may be undone by our incoming President acting on his own. The judiciary might find itself, after years of litigation over a President's policy, page 12 faced with a change in administration and a case on the verge of mootness.[8] And our precedent may long outlive the DACA program: We may soon find ourselves with new conflicts between the President and the states. See, e.g., California and Trump Are on a Collision Course Over Immigrants Here Illegally, L.A. Times, Nov. 11, 2016; Cities Vow to Fight Trump on Immigration, Even if They Lose Millions, N.Y. Times, Nov. 27, 2016.

These looming conflicts should serve as a stark reminder: Executive power favors the party, or perhaps simply the person, who wields it. That power is the forbidden fruit of our politics, irresistible to those who possess it and reviled by those who don't. Clear and stable structural rules are the bulwark against that power, which shifts with the sudden vagaries of our

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[7] We are not in the "zone of twilight," Youngstown, 343 U.S. at 637, where the distribution of presidential and congressional power is uncertain. Congress has repeatedly declined to act—refusing time and time again to pass the DREAM Act—so the President is flying solo.

[8] Mootness concerns aren't theoretical. In Texas v. United States—the direct challenge to the Obama Administration's immigration policies over which the Supreme Court split 4-4—the parties filed a joint motion to stay the merits proceedings until one month after the presidential inauguration. See Joint Motion to Stay, No. 1:14-cv-00254, Doc. 430 (Nov. 18, 2016).

politics. In its haste to find a doctrine that can protect the policies of the present, our circuit should remember the old warning: May all your dreams come true.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-15307
D.C. No. 2:12-cv-02546-DGC

[Filed February 2, 2017]

ARIZONA DREAM ACT COALITION; CHRISTIAN JACOBO; ALEJANDRA LOPEZ; ARIEL MARTINEZ; NATALIA PEREZ-GALLEGOS; CARLA CHAVARRIA; JOSE RICARDO HINOJOS, Plaintiffs-Appellees,	)
v.	)
JANICE K. BREWER, Governor of the State of Arizona, in her official capacity; JOHN S. HALIKOWSKI, Director of the Arizona Department of Transportation, in his official capacity; STACEY K. STANTON, Assistant Director of the Motor Vehicle Division of the Arizona Department of Transportation, in her official capacity, Defendants-Appellants.	)

AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted July 16, 2015
Pasadena, California

Before: Harry Pregerson, Marsha S. Berzon, and Morgan B. Christen, Circuit Judges.

Opinion by Judge Harry Pregerson, Senior Circuit Judge:

Plaintiffs are five individual recipients of deferred action under the Deferred Action for Childhood Arrivals ("DACA") program, and the Arizona DREAM Act Coalition ("ADAC"), an organization that advances the interests of young immigrants. DACA recipients are noncitizens who were brought to this country as children. Under the DACA program, they are permitted to remain in the United States for some period of time as long as they meet certain conditions. Authorized by federal executive order, the DACA program is administered by the Department of Homeland Security and is consistent with the Supreme Court's ruling that the federal government "has broad, undoubted power over the subject of immigration and the status of aliens" under the Constitution. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

In response to the creation of the DACA program, Defendants—the Governor of the State of Arizona; the Arizona Department of Transportation ("ADOT") Director; and the Assistant Director of the Motor Vehicle Division—instituted a policy that rejected the Employment Authorization Documents ("EADs") issued to DACA recipients under the DACA program as proof of authorized presence for the purpose of obtaining a driver's license. Plaintiffs seek permanently to enjoin Defendants from categorically denying drivers' licenses

to DACA recipients. The district court ruled that Arizona's policy was not rationally related to a legitimate government purpose and thus violated the Equal Protection Clause of the Fourteenth Amendment. The district court granted Plaintiffs' motion for summary judgment and entered a permanent injunction. Defendants appealed.

We agree with the district court that DACA recipients are similarly situated to other groups of noncitizens Arizona deems eligible for drivers' licenses. As a result, Arizona's disparate treatment of DACA recipients may well violate the Equal Protection Clause, as our previous opinion indicated is likely the case. *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014). The district court relied on this ground when it issued the permanent injunction. Applying the principle of constitutional avoidance, however, we need not and should not come to rest on the Equal Protection issue, even if it "is a plausible, and quite possibly meritorious" claim for Plaintiffs, so long as there is a viable alternate, nonconstitutional ground to reach the same result. *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1211 (9th Cir. 2005) (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576–78 (1988)).

We conclude that there is. Arizona's policy classifies noncitizens based on Arizona's independent definition of "authorized presence," classification authority denied the states under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq*. We therefore affirm the district court's order granting summary judgment and entry of a permanent injunction, on the basis that

Arizona's policy is preempted by the exclusive authority of the federal government to classify noncitizens. *See Weiser v. United States*, 959 F.2d 146, 147 (9th Cir. 1992) ("[This court] can affirm the district court on any grounds supported by the record.").

FACTUAL BACKGROUND

I. The DACA Program

On June 15, 2012, the Department of Homeland Security announced the DACA program pursuant to the DACA Memorandum. Under the DACA program, the Department of Homeland Security exercises its prosecutorial discretion not to seek removal of certain young immigrants. The DACA program allows these young immigrants, including members of ADAC, to remain in the United States for some period of time as long as they meet specified conditions.

To qualify for the DACA program, immigrants must have come to the United States before the age of sixteen and must have been under the age of thirty-one by June 15, 2012. *See* Memorandum from Secretary Janet Napolitano, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012). They must have been living in the United States at the time the DACA program was announced and must have continuously resided here for at least the previous five years. *Id.* Additionally, DACA-eligible immigrants must be enrolled in school, have graduated from high school, have obtained a General Educational Development certification, or have been honorably discharged from the U.S. Armed Forces or Coast Guard. *Id*. They must

not pose a threat to public safety and must undergo extensive criminal background checks. *Id.*

If granted deferred action under DACA, immigrants may remain in the United States for renewable two-year periods. DACA recipients enjoy no formal immigration status, but the Department of Homeland Security does not consider them to be unlawfully present in the United States and allows them to receive federal EADs.

II. Arizona's Executive Order

On August 15, 2012, the Governor of Arizona issued Arizona Executive Order 2012–06 ("Arizona Executive Order"). Executive Order 2012–06, "Re-Affirming Intent of Arizona Law In Response to the Federal Government's Deferred Action Program" (Aug. 15, 2012). A clear response to DACA, the Arizona Executive Order states that "the Deferred Action program does not and cannot confer lawful or authorized status or presence upon the unlawful alien applicants." *Id.* at 1. The Arizona Executive Order announced 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 and does not entitle them to any additional public benefit." *Id.* The Order directed Arizona state agencies, including ADOT, to "initiate operational, policy, rule and statutory changes necessary to prevent Deferred Action recipients from obtaining eligibility, beyond those available to any person regardless of lawful status, for any taxpayer-funded public benefits and state identification, including a driver's license." *Id.*

III. Arizona's Driver's License Policy

To implement the Arizona Executive Order, officials at ADOT and its Motor Vehicle Division initiated changes to Arizona's policy for issuing drivers' licenses. Under Arizona state law, applicants can receive a driver's license only if they can "submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. Ann. § 28–3153(D). Prior to the Arizona Executive Order, ADOT Policy 16.1.2 included all federally issued EADs as "proof satisfactory" that an applicant's presence was "authorized under federal law." The Motor Vehicle Division therefore issued drivers' licenses to all individuals with such documentation.

After the Arizona Executive Order, the Motor Vehicle Division announced that it would not accept EADs issued to DACA recipients—coded by the Department of Homeland Security as (c)(33)—as proof that their presence in the United States is "authorized under federal law." The Motor Vehicle Division continued to accept federally issued EADs from all other noncitizens as proof of their lawful presence, including individuals who received deferred action outside of the DACA program and applicants coded (c)(9) (individuals who have applied for adjustment of status), and (c)(10) (individuals who have applied for cancellation of removal).

In 2013, ADOT revised its policy again. Explaining this change, ADOT Director John S. Halikowski testified 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. Using these criteria, ADOT began to refuse driver's license applications that relied on EADs, not only from DACA recipients, but also from beneficiaries of general deferred action and deferred enforced departure. It continued to accept as proof of authorized presence for purposes of obtaining drivers' licenses EADs from applicants with (c)(9) and (c)(10) status. We refer to the policy that refuses EADs from DACA recipients as "Arizona's policy."

IV. Preliminary Injunction

On November 29, 2012, Plaintiffs sued Defendants in federal district court, alleging that Arizona's policy of denying drivers' licenses to DACA recipients violates the Equal Protection Clause and the Supremacy Clause of the U.S. Constitution. Plaintiffs sought declaratory relief and a preliminary injunction prohibiting Defendants from enforcing their policy against DACA recipients. On May 16, 2013, the district court ruled that Arizona's policy likely violated the Equal Protection Clause but it declined to grant the preliminary injunction because Plaintiffs had not shown irreparable harm. *ADAC v. Brewer*, 945 F. Supp. 2d 1049 (D. Ariz. 2013) ("*ADAC I*"), *reversed by ADAC v. Brewer*, 757 F.3d 1053 (9th Cir. ("*ADAC II*"). It also granted Defendants' motion to dismiss the Supremacy Clause claim. *Id.* at 1077–78. Plaintiffs appealed the district court's denial of a preliminary injunction.

V. Permanent Injunction

While Plaintiffs' appeal of the preliminary injunction ruling was pending, Plaintiffs sought a permanent injunction in district court on Equal Protection grounds and moved for summary judgment. Defendants also moved for summary judgment, arguing that DACA recipients are not similarly situated to other noncitizens who are eligible for drivers' licenses under Arizona's policy.

We reversed the district court's decision on the motion for preliminary injunction, agreeing with the district court that Arizona's policy likely violated the Equal Protection Clause and holding that Plaintiffs had established that they would suffer irreparable harm as a result of its enforcement. *See ADAC II*, 757 F.3d at 1064. In a concurring opinion, one member of our panel concluded that Plaintiffs also demonstrated a likelihood of success on their claim that Arizona's policy was preempted. *Id.* at 1069 (Christen, J., concurring). On January 22, 2015, the district court granted Plaintiffs' motion for summary judgment and entered a permanent injunction. *ADAC v. Brewer*, 81 F. Supp. 3d 795 (D. Ariz. 2015) ("*ADAC III*"). We affirm the district court's order.

STANDARD OF REVIEW

We review the district court's grant or denial of motions for summary judgment *de novo*. *Besinga v. United States*, 14 F.3d 1356, 1359 (9th Cir. 1994). We determine whether there are any genuine issues of material fact and review the district court's application of substantive law. *Gerhart v. Lake Cty., Mont.*, 637 F.3d 1013, 1019 (9th Cir. 2011). We "may affirm a

grant of summary judgment on any ground supported by the record." *Curley v. City of N. Las Vegas*, 772 F.3d 629, 631 (9th Cir. 2014).

We review the district court's decision to grant a permanent injunction for abuse of discretion. *La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 879 (9th Cir. 2014) (citing *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 941 (9th Cir. 2002)). We review questions of law underlying the district court's decision *de novo*. *See Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir. 2003). "If the district court 'identified and applied the correct legal rule to the relief requested,' we will reverse only if the court's decision 'resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record.'" *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1247 (9th Cir. 2013) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)).

DISCUSSION

I. Equal Protection

A. Similarly Situated

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). To prevail on an Equal Protection claim, plaintiffs must show "that a class that is similarly situated has been

treated disparately." *Christian Gospel Church, Inc. v. City & Cty. of S.F.*, 896 F.2d 1221, 1225 (9th Cir. 1990), *superseded on other grounds by* 42 U.S.C. § 2000e.

"The first step in equal protection analysis is to identify the state's classification of groups." *Country Classic Dairies, Inc. v. Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). "The groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005). In this instance, DACA recipients do not need to be similar in all respects to other noncitizens who are eligible for drivers' licenses, but they must be similar in those respects that are relevant to Arizona's own interests and its policy. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all *relevant* respects alike." (emphasis added)).

We previously held that DACA recipients and other categories of noncitizens who may rely on EADs are similarly situated with regard to their right to obtain drivers' licenses in Arizona. *See ADAC II*, 757 F.3d at 1064. The material facts and controlling authority remain the same from the preliminary injunction stage. Thus, we again hold that in all relevant respects DACA recipients are similarly situated to noncitizens eligible for drivers' licenses under Arizona's policy. Nonetheless, for clarity and completeness, we address once more Defendants' arguments.

Defendants assert that DACA recipients are not similarly situated to other noncitizens eligible for

drivers' licenses under Arizona's policy because DACA recipients neither received nor applied for relief provided by the INA, or any other relief authorized by federal statute. Particularly relevant here, Defendants note that eligible noncitizens under the categories of (c)(9) and (c)(10) are tied to relief expressly found in the INA: adjustment of status (INA § 245; 8 U.S.C. § 1255; 8 C.F.R. § 274a.12(c)(9)) and cancellation of removal (INA § 240A; 8 U.S.C. § 1229b; 8 C.F.R. § 274a.12(c)(10)), respectively. In contrast, Defendants contend that DACA recipients' presence in the United States does not have a connection to federal law but rather reflects the Executive's discretionary decision not to enforce the INA.

We continue to disagree. *See ADAC II*, 757 F.3d at 1061. As explained below, Arizona has no cognizable interest in making the distinction it has for drivers' licenses purposes. The federal government, not the states, holds exclusive authority concerning direct matters of immigration law. *DeCanas v. Bica*, 424 U.S. 351, 354 (1976), *superseded by statute on other grounds as recognized in Arizona*, 132 S. Ct. at 2503–04. The states therefore may not make immigration decisions that the federal government, itself, has not made, *Plyler*, 457 U.S. at 225 (citing *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)). Arizona's encroachment into immigration affairs—making distinctions between groups of immigrants it deems not to be similarly situated, despite the federal government's decision to treat them similarly—therefore seems to exceed its authority to decide which aliens are similarly situated to others for Equal Protection purposes. In other words, the "similarly situated" analysis must focus on factors of similarity and distinction pertinent to the state's

policy, not factors outside the realm of its authority and concern.

Putting aside that limitation, the INA explicitly authorizes the Secretary of Homeland Security to administer and enforce all laws relating to immigration and naturalization. INA § 103(a)(1); 8 U.S.C. § 1103(a)(1). As part of this authority, it is well settled that the Secretary can exercise deferred action, a form of prosecutorial discretion whereby the Department of Homeland Security declines to pursue the removal of a person unlawfully present in the United States.

The INA expressly provides for deferred action as a form of relief that can be granted at the Executive's discretion. For example, INA § 237(d)(2); 8 U.S.C. § 1227(d)(2), allows a noncitizen who has been denied an administrative stay of removal to apply for deferred action. Certain individuals are also "eligible for deferred action" under the INA if they qualify under a set of factors. *See* INA § 204(a)(1)(D)(i)(II); 8 U.S.C. § 1154(a)(1)(D)(i)(II). Deferred action is available to individuals who can make a showing of "exceptional circumstances." INA § 240(e); 8 U.S.C. § 1229a(e). By necessity, the federal statutory and regulatory scheme, as well as federal case law, vest the Executive with very broad discretion to determine enforcement priorities.[1]

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[1] Pursuant to this discretion, the Department of Homeland Security and its predecessor, the Immigration and Naturalization Service ("INS"), established a series of general categorical criteria to guide enforcement. For example, the 1978 INS Operating Instructions outlined five criteria for officers to consider in exercising prosecutorial discretion, including "advanced or tender age." O.I. 103.1(a)(1)(ii); *see also Pasquini v. Morris*, 700 F.2d 658,

Congress expressly charged the Department of Homeland Security with the responsibility of "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). The Department of Homeland Security regulations describe deferred action as "an act of administrative convenience to the government which gives some cases lower priority." 8 C.F.R. § 274a.12(c)(14). Additionally, the Supreme Court has made it clear that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The Supreme Court has explained that the Secretary has discretion to exercise deferred action at each stage of the deportation process, and has acknowledged the long history of the Executive "engaging in a regular practice . . . of exercising that discretion for humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999); *see also id.* n.8; *Arizona*, 132 S. Ct. at 2499 (noting that "[a] principal

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661 (11th Cir. 1983). Discretion can also cut the other way. For example, the 2011 Morton Memo highlighted "whether the person poses national security or public safety concern," Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, on "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" (June 17, 2011), and the 2014 Johnson Memo identifies the "highest [enforcement] priority" as noncitizens who might represent a threat to "national security, border security, and public safety," Memorandum from Jeh Charles Johnson, Secretary, Department of Homeland Security, on "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (November 20, 2014).

feature of the removal system is the broad discretion exercised by" the Executive); *Texas v. United States,* 106 F.3d 661, 667 (5th Cir. 1997) (noting the State of Texas's concession that the INA "places no substantive limits on the Attorney General and commits enforcement of the INA to her discretion").[2]

Defendants' argument fails because they attempt to distinguish categories of EAD-holders in a way that does not amount to any relevant difference. Like adjustment of status, (c)(9), and cancellation of removal, (c)(10), deferred action is a form of relief grounded in the INA. Moreover, the exercise of

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[2] In the past, the Department of Homeland Security and the INS have granted deferred action to different groups of noncitizens present in the United States. In 1977, the Attorney General granted stays of removal to 250,000 nationals of certain countries (known as "Silva Letterholders"). *Silva v. Levi*, No. 76-C4268 (N.D. Ill. 1977), *modified on other grounds sub nom. Silva v. Bell*, 605 F.2d 978 (7th Cir.1979). In 1990, the INS instituted the "Family Fairness" program that deferred the deportation of 1.5 million family members of noncitizens who were legalized through the Immigration Reform and Control Act. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; Memorandum for Regional Commissioners, INS, from Gene McNary, Commissioner, INS, "Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens" (Feb. 2, 1990). In 1992, President Bush directed the Attorney General to grant deferred enforced departure to 190,000 Salvadorans. *See* Immigration Act of 1990 § 303, Public Law 101-649 (Nov. 29, 1990); https://www.gpo.gov/fdsys/pkg/FR1994-12-06/html/94-30088.htm. And nationals of Liberia were granted deferred enforced departure until September 30, 2016, http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/deferred-enforced-departure.

prosecutorial discretion in deferred action flows from the authority conferred on the Secretary by the INA.

Defendants provide two criteria to explain when they deem an EAD satisfactory proof of authorized presence: the applicant has formal immigration status, or the applicant is on the path to formal immigration status. Neither criteria suffices to render DACA recipients not similarly situated to other EAD-holders on any basis pertinent to Arizona's decision whether to grant them drivers' licenses. Like DACA recipients, many noncitizens who apply for adjustment of status and cancellation of removal—including individuals with (c)(9) and (c)(10) EADs—do not, and may never, possess formal immigration status. *See Guevara v. Holder*, 649 F.3d 1086, 1095 (9th Cir. 2011).

Additionally, "submission of an application does not connote that the alien's immigration status has changed." Thus, merely applying for immigration relief does not signal a clear path to formal immigration status. *Vasquez de Alcantar v. Holder*, 645 F.3d 1097, 1103 (9th Cir. 2011) (quoting *United States v. Elrawy*, 448 F.3d 309, 313 (5th Cir. 2006)). Indeed, given how frequently these applications are denied, "the supposed 'path' may lead to a dead end." *ADAC II*, 757 F.3d at 1065. In this regard, noncitizens holding (c)(9) and (c)(10) EADs are no different from DACA recipients. And as discussed above, DACA recipients have a temporary reprieve—deferred action—that is provided for by the INA, pursuant to the prosecutorial discretion statutorily delegated to the Executive.

Therefore, in all relevant respects, DACA recipients are similarly situated to other categories of noncitizens

who may rely on EADs to obtain drivers' licenses under Arizona's policy.

B. State Interest

The next step in an Equal Protection analysis is to determine the applicable level of scrutiny. *Country Classic Dairies*, 847 F.2d at 596. Although we do not ultimately decide the Equal Protection issue, we remain of the view, articulated in our preliminary injunction opinion, that Arizona's policy may well fail even rational basis review. So, as before, we need not reach what standard of scrutiny applies.[3] *See ADAC II*, 757 F.3d at 1065.

Arizona's policy must be "rationally related to a legitimate state interest" to withstand rational basis review. *City of Cleburne*, 473 U.S. at 440. On appeal, Defendants advance six rationales for Arizona's policy, none of which persuade us that Plaintiffs' argument under the Equal Protection Clause is not at least sufficiently strong to trigger the constitutional avoidance doctrine we ultimately invoke.

First, Defendants argue that Arizona's policy is rationally related to the State's concern that it could face liability for improperly issuing drivers' licenses to DACA recipients. But as the district court observed,

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[3] In cases involving alleged discrimination against noncitizens authorized to be present in the United States, the Supreme Court has consistently applied strict scrutiny to the state action at issue. *See, e.g.*, *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977); *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Where the alleged discrimination targets noncitizens who are not authorized to be present, the Supreme Court applies rational basis review. *See Plyler*, 457 U.S. at 223–24.

the depositions of ADOT Director John S. Halikowski and Assistant Director of the Motor Vehicle Division Stacey K. Stanton did not yield support for this rationale. Neither 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. *ADAC III*, 81 F. Supp. 3d at 807. So the record probably does not establish that there is a rational basis for this concern.

Second, Defendants contend that Arizona's policy serves the State's interest in preventing DACA recipients from making false claims for public assistance. As the district court noted, however, Director Halikowski and Assistant Director Stanton testified that they had no basis for believing that drivers' licenses could be used to access state and federal benefits. It follows that this concern is probably not a rational basis justifying Arizona's policy either. *Id.* (citing *ADAC II*, 757 F.3d at 1066).

Third, Defendants claim that Arizona's policy is meant to reduce the administrative burden of issuing drivers' licenses to DACA recipients, only to have to revoke them once the DACA program is terminated. The district court found this argument lacked merit, noting this court's observation that it is less likely that Arizona will need to revoke the licenses of DACA recipients than of noncitizens holding (c)(9) and (c)(10) EADs, because applications for adjustment of status or cancellation of removal are routinely denied.[4]

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[4] Defendants suggest "later-developed facts" indicate that noncitizens holding (c)(9) and (c)(10) EADs are on the path to permanent residency. We are not convinced that *achieving* certain forms of relief (adjustment of status or cancellation of removal)

ADAC III, 81 F. Supp. 3d at 807 (citing *ADAC II*, 757 F.3d at 1066–67). Indeed, noncitizens with (c)(10) EADs are already in removal proceedings, which means they are further along in the deportation process than are many DACA recipients. The administrative burden of issuing and revoking drivers' licenses for DACA recipients is not greater than the burden of issuing and revoking drivers' licenses for noncitizens holding (c)(9) and (c)(10) EADs. Certainly, the likelihood of having to do so does not distinguish these two classes of noncitizens, as (c)(9) and (c)(10) applications for relief are frequently denied.

Fourth, Defendants argue that Arizona has an interest in avoiding financial harm to individuals who may be injured in traffic accidents by DACA recipients. Defendants contend that individuals harmed by DACA recipients may be left without recourse when the DACA program is terminated and DACA recipients are removed from the country. But this rationale applies equally to individuals with (c)(9) and (c)(10) EADs. These noncitizens may find their applications for immigration relief denied and may be quickly removed from the country, leaving those injured in traffic accidents exposed to financial harm. Nevertheless, Arizona issues drivers' licenses to noncitizens holding (c)(9) and (c)(10) EADs.

Fifth, Defendants contend that denying licenses to DACA recipients serves the goal of consistently applying ADOT policy. But ADOT *in*consistently applies its own policy by denying licenses to DACA recipients while providing licenses to holders of (c)(9)

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alters the fact that applications for such relief are regularly denied in very great numbers.

and (c)(10) EADs. Arizona simply has no way to know what "path" noncitizens in any of these categories will eventually take. DACA recipients appear similar to individuals who are eligible under Arizona's policy with respect to all the criteria ADOT relies on. ADOT thus applies its own immigration classification with an uneven hand by denying licenses only to DACA recipients. *See, e.g.*, *Yick Wo. v. Hopkins*, 118 U.S. 356, 373–74 (1886) ("[I]f [the law] is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

Sixth, Defendants claim that Arizona's policy is rationally related to ADOT's statutory obligation to administer the state's driver's license statute. ADOT's disparate treatment of DACA recipients pursuant to the driver's license statute relies on the premise that federal law does not authorize DACA recipients' presence in the United States. This rationale is essentially an assertion of the state's authority to decide whether immigrants' presence is authorized under federal law. Rather than evaluating that assertion as part of the Equal Protection analysis, we defer doing so until our discussion of our ultimate, preemption ground for decision, which we adopt as part of our constitutional avoidance approach.

Before proceeding to that discussion, it bears noting, once again, *see ADAC II*, 757 F.3d at 1067, that the record *does* suggest an additional reason for Arizona's policy: a dogged animus against DACA recipients. The

Supreme Court has made very clear that such animus cannot constitute a legitimate state interest, and has cautioned against sowing the seeds of prejudice. *See Romer v. Evans*, 517 U.S. 620, 634 (1996); *see also City of Cleburne*, 473 U.S. at 464 (Marshall, J., concurring in the judgment in part, and dissenting in part) ("Prejudice, once let loose, is not easily cabined."). "The Constitution's guarantee of equality must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot justify disparate treatment of that group." *United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013) (citation omitted).

II. Preemption

We do not "decide federal constitutional questions where a dispositive nonconstitutional ground is available." *City of L.A. v. Cty. of Kern*, 581 F.3d 841, 846 (9th Cir. 2009) (quoting *Correa v. Clayton*, 563 F. 2d 396, 400 (9th Cir. 1977)). While preemption derives its force from the Supremacy Clause of the Constitution, "it is treated as 'statutory' for purposes of our practice of deciding statutory claims first to avoid unnecessary constitutional adjudications." *Douglas v. Seacoast Prods.*, 431 U.S. 265, 271–72 (1977).[5] Given the formidable Equal Protection concerns Arizona's policy raises, we turn to a preemption analysis as an

[5] Though preemption principles are rooted in the Supremacy Clause, this court has previously applied the principle that preemption does not implicate a constitutional question for purposes of constitutional avoidance. *See Hotel Emps. & Rest. Emps. Int'l Union v. Nev. Gaming Comm'n*, 984 F.2d 1507, 1512 (9th Cir. 1993) (holding that *Pullman* abstention was not warranted for preemption claims because "preemption is not a constitutional issue."); *Knudsen Corp. v. Nev. State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982) (same).

alternative to resting our decision on the Equal Protection Clause.[6] Doing so, we conclude that Arizona's policy encroaches on the exclusive federal authority to create immigration classifications and so is displaced by the INA.

The "[p]ower to regulate immigration is unquestionably exclusively a federal power." *DeCanas*, 424 U.S. at 354. The 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.'" *Arizona*, 132 S. Ct. at 2501 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Supreme Court has also indicated that the INA provides a pervasive framework with regard to the admission, removal, and presence of aliens. *See Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *DeCanas*, 424 U.S. at 353, 359); *cf. Arizona*, 132 S. Ct. at 2499 ("Federal governance of immigration and alien status is extensive and complex.").

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[6] In their opening brief, Defendants argue preemption is not properly before this court because Plaintiffs did not appeal the district court's dismissal of their preemption claim. But at oral argument, defense counsel offered to provide supplemental briefing on the issue. Separately, Plaintiffs noted that Defendants raised the Take Care argument for the first time on appeal and argued it ought not be considered because it was not presented to the district court. Following oral argument, we requested and the parties submitted supplemental briefing on both issues. Defendants' supplemental brief conceded that, in light of the considerations articulated in *Olympia Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006), we may properly consider preemption in this case.

Traditionally, federal law preempts state law when: (1) Congress expressly includes a preemption provision in federal law; (2) states attempt to "regulat[e] conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance"; or (3) state law conflicts with federal law, either because "compliance with both federal and state regulations is a physical impossibility" or "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963), and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

"The States enjoy no power with respect to the classification of aliens." *Plyler v. Doe*, 457 U.S. 202, 225 (1982). The Supreme Court has also expressly recognized that the source of preemption in the immigration context is unique. The "[f]ederal authority to regulate the status of aliens derives" not from one specific federal law or network of laws, but "from various sources, including the Federal Government's power '[t]o establish [a] uniform Rule of Naturalization,'. . . its power '[t]o regulate Commerce with foreign Nations,' and its broad authority over foreign affairs . . . ." *Toll v. Moreno*, 458 U.S. 1, 10 (1982). Supreme Court precedent explains that "neither a clear encroachment on exclusive federal power to admit aliens nor a clear conflict with a specific congressional purpose" is required in order for federal law to preempt state regulations of immigrants. *See id.* at 11 n.16 (internal quotation marks omitted). "Not surprisingly, . . . [Supreme Court] cases have also been

at pains to note the substantial limitations upon the authority of the States in making classifications based upon alienage." *Id.* at 10.

To be sure, not all state regulations touching on immigration are preempted. *See Chamber of Commerce*, 131 S. Ct. at 1974. But states may not directly regulate immigration, *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1023 (9th Cir. 2013), and the power to classify aliens for immigration purposes is "committed to the political branches of the Federal Government." *Plyler*, 457 U.S. at 225 (quoting *Mathews*, 426 U.S. at 81). Arizona prohibits the issuance of drivers' licenses to anyone who does not submit proof that his or her presence in the United States is "authorized under federal law," Ariz. Rev. Stat. § 28-3153(D), and then purports to create its own independent definition of "authorized under federal law," one that excludes DACA beneficiaries. Because Arizona created a new immigration classification when it adopted its policy regarding driver's license eligibility, it impermissibly strayed into an exclusive domain that Congress, through the INA, delegated to the executive branch.

States can regulate areas of traditional state concern that might impact noncitizens. *See DeCanas*, 424 U.S. at 355. Permissible state regulations include those that mirror federal objectives and incorporate federal immigration classifications. *Plyler*, 457 U.S. at 225-26. But a law that regulates an area of traditional state concern can still effect an impermissible regulation of immigration.

For example, in *Takahashi v. Fish & Game Commission*, the Supreme Court observed that a state

regulation of entitlement to commercial fishing licenses based on immigration classifications conflicted with the "constitutionally derived federal power to regulate immigration." 334 U.S. 410, 419 (1948). In *Toll v. Moreno*, the Supreme Court held that preemption principles foreclosed a state policy concerning the imposition of tuition charges and fees at a state university on the basis of immigration status. 458 U.S. 1, 16-17 (1982). Similarly, the Third Circuit has held that municipal ordinances preventing unauthorized aliens from renting housing constituted an impermissible regulation of immigration and were preempted by the INA. *Lozano v. City of Hazleton*, 724 F.3d 297, 317 (3d Cir. 2013). Although the housing ordinances did not directly regulate immigration in the sense of dictating who could or could not be admitted into the United States, the Third Circuit concluded that they impermissibly "intrude[d] on the regulation of residency *and presence* of aliens in the United States." *Id.* (emphasis added).

Similarly, the Fifth Circuit held that an ordinance "allow[ing] state courts to assess the legality of a non-citizen's presence" in the United States was preempted because it "open[ed] the door to conflicting state and federal rulings on the question." *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 536 (5th Cir. 2013). The Fifth Circuit's decision was based on its recognition that "[t]he federal government alone . . . has the power to classify non-citizens." *Id.* In accord with these decisions, the Eleventh Circuit held that a state law prohibiting courts from recognizing contracts involving unlawfully present aliens was preempted as "a thinly veiled attempt to regulate immigration under the guise of

contract law." *See United States v. Alabama*, 691 F.3d 1269, 1292–96 (11th Cir. 2012).

Cases involving the allocation of state resources on the basis of immigration classifications frequently raise both equal protection and preemption concerns. Some decisions applying preemption principles have ultimately rested on equal protection grounds, *see, e.g.*, *Takahashi*, 334 U.S. 410. In *Toll*, however, the Supreme Court noted commentators' observations "that many of the Court's decisions concerning alienage classifications, such as *Takahashi*, are better explained in pre-emption than in equal protection terms." 458 U.S. at 11 n.16.

Here, Arizona's policy ostensibly regulates the issuance of drivers' licenses, admittedly an area of traditional state concern. *See Chamber of Commerce*, 131 S. Ct. at 1983. But its policy 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 II*, 757 F.3d at 1069 (Christen, J., concurring). Indeed, the Arizona Executive Order declared that "the Deferred Action program does not and cannot confer lawful or authorized . . . presence upon the unlawful alien applicants." Executive Order 2012–06 at 1. The Order also announced Arizona's view that "[t]he issuance of Deferred Action or Deferred Action . . . [EADs] to unlawfully present aliens does not confer upon them any lawful *or* authorized status." *Id.* (emphasis added). To implement the Order, ADOT initiated a policy of denying licenses to DACA recipients pursuant to Arizona's driver's license statute, which requires that applicants "submit proof satisfactory to the department

that the applicant's presence in the United States is *authorized under federal law*." Ariz. Rev. Stat. Ann. § 28–3153(D) (emphasis added).

Arizona points to three criteria to justify treating EAD recipients differently than individuals with (c)(9) and (c)(10) EADs,[7] even though the federal government treats their EADs the same in all relevant respects. But Arizona's three criteria—that an applicant: has formal status; is on a path to formal status; or has applied for relief expressly provided for in the INA—cannot be equated with "authorized presence" under federal law. DACA recipients and noncitizens with (c)(9) and (c)(10) EADs all lack formal immigration status, yet the federal government permits them to live and work in the country for an undefined period of time, provided they comply with certain conditions.

Arizona thus distinguishes between noncitizens based on its *own* definition of "authorized presence," one that neither mirrors nor borrows from the federal immigration classification scheme. And by arranging federal classifications in the way it prefers, Arizona impermissibly assumes the federal prerogative of creating immigration classifications according to its own design,[8] thereby engaging in an "exercise of

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[7] As we have noted, recipients of (c)(9) and (c)(10) documents are noncitizens who have applied for adjustment of status and cancellation of removal, respectively. *See* 8 C.F.R. § 274a.12(c)(9)–(10).

[8] Defendants' continual insistence that Arizona's policy is not preempted because the DACA program lacks "the force of law" reflects a misunderstanding of the preemption question. Preemption is not a gladiatorial contest that pits the DACA

regulatory bricolage," *ADAC II*, 757 F.3d at 1072 (Christen, J., concurring), despite the fact that "States enjoy no power with respect to the classification of aliens," *Plyler*, 457 U.S. at 225.

That this case involves classes of aliens the Executive has, as a matter of discretion, placed in a low priority category for removal is a further consideration weighing against the validity of Arizona's policy. The Supreme Court has emphasized that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 132 S. Ct. at 2499. And the Court has specifically recognized that federal statutes contemplate and protect the discretion of the Executive Branch when making determinations concerning deferred action. *See Reno*, 525 U.S. at 484–86. The discretion built into statutory removal procedures suggests that auxiliary state regulations regarding the presence of aliens in the United States are particularly intrusive on the overall federal statutory immigration scheme.

Unable to point to any federal statute or regulation that justifies classifying individuals with (c)(9) and (c)(10) EADs as authorized to be present while excluding recipients of deferred action or deferred

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Memorandum against Arizona's policy. Nor does this opinion rely on the DACA Memorandum for its conclusion that Arizona's policy is preempted by federal law. Rather, Arizona's policy is preempted by the supremacy of federal authority under the INA to create immigration categories. Indeed, because Arizona's novel classification scheme includes not just DACA recipients but also recipients of regular deferred action and deferred enforced departure, our conclusion that Arizona's scheme impermissibly creates immigration classifications not found in federal law is not dependent upon the continued vitality of the DACA program.

enforced departure, Defendants argue that Arizona properly relied on statements by the U.S. Citizenship and Immigration Service that "make clear that deferred action does not confer a lawful immigration status." These statements take the form of an email from a local U.S. Citizenship and Immigration Service Community Relations Officer in response to an inquiry from ADOT. In the email, the officer notes that DACA recipients applying for work authorization should fill in category "C33" and not category "C14," which is the category for regular deferred action.

This email does nothing to further Defendants' argument. The officer's statement in no way suggests that federal law supports Arizona's novel classifications. And even if it did, an email from a local U.S. Citizenship and Immigration Services Officer is not a source of "federal law," nor an official statement of the government's position.[9]

The INA, indeed, directly undermines Arizona's novel classifications. For purposes of determining the admissibility of aliens other than those lawfully admitted for permanent residence, the INA states that if an alien is present in the United States beyond a "period of stay *authorized* by the Attorney General" or without being admitted or paroled, the alien is "deemed to be *unlawfully present* in the United States," at least

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[9] In *ADAC II*, Defendants also argued that a "Frequently Asked Questions" section of the U.S. Citizenship and Immigration Services Website and a Congressional Research Service Memorandum demonstrated that Arizona's classification found support in federal law. *See* 757 F.3d at 1073. We understand Defendants to have abandoned these arguments. But even if they had not, neither source is a definitive statement of federal law.

for purposes of § 1182(a)(9)(B). INA § 212(a)(9)(B)(ii); 8 U.S.C. § 1182(a)(9)(B)(ii) (emphases added). The administrative regulations implementing this section of the INA, to which we owe deference, establish that deferred action recipients do not accrue "unlawful presence" for purposes of calculating when they may seek admission to the United States. 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2). Because such recipients are provisionally present without being admitted or paroled, their stay must be considered "authorized by the Attorney General," for purposes of this statute. INA § 212(a)(9)(B)(ii); 8 U.S.C. § 1182(a)(9)(B).

The REAL ID Act, which amended the INA, further undermines Arizona's interpretation of "authorized presence." REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231. The Real ID Act amendments provide that states may issue a driver's license or identification card to persons who can demonstrate they are "authorized [to] stay in the United States." *Id.* § 202(c)(2)(C)(i)–(ii). Persons 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. *Id.* § 202(c)(2)(B)(viii), (C)(ii). We point to these statutory definitions not as examples of all-encompassing congressionally authorized decisions about who may remain in the United States, but as examples of the federal government exercising its exclusive authority to classify immigrants.

Despite Arizona's clear departure from federal immigration classifications, Defendants argue Arizona's policy is not a "back-door regulation of

immigration." They compare it to the Louisiana Supreme Court policy the Fifth Circuit upheld in *LeClerc v. Webb*, which prohibited any alien lacking permanent resident status from joining the state bar. 419 F.3d 405, 410 (5th Cir. 2005). But the Louisiana Supreme Court did not create a novel immigration classification as Arizona does here. Rather, it permissibly borrowed from existing federal classifications, distinguishing "those aliens who have attained permanent resident status in the United States" from those who have not. *Id.* (quoting *In re Bourke*, 819 So. 2d 1020, 1022 (La. 2002)).

Defendants also argue that sections of the INA granting states discretion to provide public benefits to certain aliens, including deferred action recipients, suggest that Congress "has not intended to occupy a field so vast that it precludes all state regulations that touch upon immigration." *See* 8 U.S.C. §§ 1621, 1622. But we do not conclude that Congress has preempted all state regulations that touch upon immigration. Arizona's policy is preempted because, in determining which aliens shall be eligible to receive a state benefit, Arizona created new immigration classifications based on its independent view of who is authorized under federal law to be present in the United States.

Defendants offer no foundation for an interpretation of federal law that classifies individuals with (c)(9) and (c)(10) EADs as having "authorized presence," but DACA recipients as having no authorized presence. Arizona's policy of denying drivers' licenses to DACA recipients based on its own notion of "authorized presence" is preempted by the exclusive authority of

the federal government under the INA to classify noncitizens.

III. Constitutionality of the DACA Program

We decline to rule on the constitutionality of the DACA program, as the issue is not properly before our court; only the lawfulness of Arizona's policy is in question.

We note, however, that the discussion above is quite pertinent to both of Defendants' primary arguments undergirding their challenge to the constitutionality of the DACA program. First, Defendants argue that the Executive has no power, independent of Congress, to enact the DACA program. But as we have discussed, the INA is replete with provisions that confer prosecutorial discretion on the Executive to establish its own enforcement priorities. *See supra*, section II. Third parties generally may not contest the exercise of this discretion, *see Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), including in the immigration context, *see Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984).[10]

Second, Defendants contend that the DACA program amounts to a wholesale suspension of the

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[10] Congress's failure to pass the Development, Relief, and Education for Alien Minors ("DREAM") Act does not signal the illegitimacy of the DACA program. The Supreme Court has admonished that an unenacted bill is not a reliable indicator of Congressional intent. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969). Moreover, the DREAM Act and the DACA program are not interchangeable policies because they provide different forms of relief (*i.e.*, the DREAM Act would have granted conditional residency that could lead to permanent residency, whereas the DACA program offers a more limited, temporary deferral of removal).

INA's provisions, which in turn violates the President's obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3 ("the Take Care Clause"). But, according to an amicus brief filed by the Department of Justice, the Department of Homeland Security only has funding annually to remove a few hundred thousand of the 11.3 million undocumented aliens living in the United States. Constrained by these limited resources, the Department of Homeland Security must make difficult decisions about whom to prioritize for removal. Despite Defendants' protestations, they have not shown that the Department of Homeland Security failed to comply with its responsibilities to the extent its resources permit it to do so.[11]

For that reason, this case is nothing like *Train v. City of New York*, a case relied upon by Defendants, in which the Supreme Court affirmed an order directing a presidential administration to spend money allocated by Congress for certain projects. 420 U.S. 35, 40 (1975). Here, by contrast, the Department of Justice asserts that Congress has not appropriated sufficient funds to remove all 11.3 million undocumented aliens, and several prior administrations have adopted programs,

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[11] Indeed, the Department of Justice's brief reports that the administration has removed approximately 2.4 million noncitizens from the country from 2009 to 2014, a number the government states is "unprecedented." Prioritizing those removal proceedings for noncitizens who represent a threat to "national security, border security, and public safety," Memorandum from Jeh Charles Johnson, Secretary, Department of Homeland Security, on "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (November 20, 2014), cannot fairly be described as abdicating the agency's responsibilities.

like DACA, to prioritize which noncitizens to remove. *See supra* n.2. "The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws . . . ." *Cmty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986); *see Arpaio v. Obama*, 797 F.3d 11, 18 (D.C. Cir. 2015).

Further, as we have noted, the Supreme Court has acknowledged the history of the Executive engaging in a regular practice of prosecutorial discretion in enforcing the INA. *See Reno*, 525 U.S. at 483–84 & n.8 ("To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This commendable exercise in administrative discretion, . . . is now designated as deferred action." (quoting 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure § 72.03 [2][h] (1998))). This history includes "general policy" non-enforcement, such as deferred action granted to foreign students affected by Hurricane Katrina, U.S. Citizenship and Immigration Services, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* at 1 (Nov. 25, 2005), and deferred action for certain widows and widowers of U.S. citizens, Memorandum for Field Leadership, U.S. Citizenship and Immigration Services, from Donald Neufeld, Acting Associate Director, U.S. Citizenship and Immigration Services, "Guidance Regarding Surviving

Spouses of Deceased U.S. Citizens and Their Children" at 1 (Sept. 4, 2009).[12]

We reiterate that, in the end, Arizona's policy is preempted not because the DACA program is or is not valid, but because the policy usurps the authority of the federal government to create immigrant classifications.

IV. Permanent Injunction

Before a court may grant a permanent injunction, the plaintiff must satisfy a four-factor test, demonstrating:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

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[12] The recent ruling in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) *petition for cert. granted sub nom. United States v. Texas*, — S. Ct. — , 2016 WL 207257 (U.S. Nov. 20, 2015) (mem.), is also inapposite to Defendants' constitutional claims. There, several states challenged the Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA"), including DAPA recipients' eligibility for certain public benefits such as drivers' licenses and work authorization. *Id.* at 149. The court concluded that the states were likely to succeed on their procedural and substantive claims under the Administrative Procedure Act, and expressly declined to reach the Take Care Clause issue. *Id.* at 146 & n.3, 149.

Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 141 (2010) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

Plaintiffs have proven that they suffer irreparable injury as a result of Arizona's policy, and that remedies available at law are inadequate to compensate them for that injury. In particular, Plaintiffs have demonstrated that their inability to obtain drivers' licenses limits their professional opportunities. In Arizona, it takes an average of over four times as long to commute to work by public transit than it does by driving, and public transportation is not available in most localities. One ADAC member had to miss full days of work so that she could take her son to his doctors' appointments by bus. Another ADAC member finishes work after midnight but the buses by her workplace stop running at 9 p.m. And as the district court noted, another Plaintiff is a graphic designer whose inability to obtain a driver's license caused her to decline work from clients, while yet another Plaintiff wants to pursue a career as an Emergency Medical Technician but is unable to do so because the local fire department requires a driver's license for employment. *ADAC III*, 81 F. Supp. 3d at 809.

Plaintiffs' inability to obtain drivers' licenses hinders them in pursuing new jobs, attending work, advancing their careers, and developing business opportunities. They thus suffer financial harm and significant opportunity costs. And as we have previously found, the irreparable nature of this injury is exacerbated by Plaintiffs' young age and fragile socioeconomic status. *ADAC II*, 757 F.3d at 1068. Setbacks early in their careers can have significant

impacts on Plaintiffs' future professions. *Id.* This loss of opportunity to pursue one's chosen profession constitutes irreparable harm. *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.,* 630 F.3d 1153, 1165 (9th Cir. 2011); *see also Chalk v. U.S. Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701, 709–10 (9th Cir. 1988) (holding that plaintiff's transfer to a less satisfying job created emotional injury that constituted irreparable harm). Since irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages, *see Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991), Plaintiffs have also shown that remedies available at law are inadequate to compensate them.

Plaintiffs have also demonstrated that, after considering the balance of hardships, a remedy in equity is warranted and that the public interest would not be disserved by a permanent injunction. We conclude that Arizona's policy is preempted by federal law. "[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." *Valle del Sol*, 732 F.3d at 1029 (quoting *Arizona*, 641 F.3d at 366) (alterations omitted). The public interest and the balance of the equities favor "prevent[ing] the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted).

CONCLUSION

In sum, we find that DACA recipients are similarly situated in all relevant respects to other noncitizens eligible for drivers' licenses under Arizona's policy. And

Arizona's refusal to rely on EADs from DACA recipients for purposes of establishing eligibility for drivers' licenses may well violate the Equal Protection Clause for lack of a rational governmental interest justifying the distinction relied upon. Invoking the constitutional avoidance doctrine, we construe the INA as occupying the field of Arizona's classification of noncitizens with regard to whether their presence is authorized by federal law, and as therefore preempting states from engaging in their very own categorization of immigrants for the purpose of denying some of them drivers' licenses. Plaintiffs have shown that they suffer irreparable harm from Arizona's policy and that remedies at law are inadequate to compensate for that harm. Plaintiffs have also shown that a remedy in equity is warranted and that the public interest would not be disserved by a permanent injunction.

Accordingly, we AFFIRM the district court's grant of summary judgment in favor of Plaintiffs. We also AFFIRM the district court's order entering a permanent injunction that enjoins Arizona's policy of denying the EADs issued under the DACA program as satisfactory proof of authorized presence under federal law in the United States.

AFFIRMED.

COUNSEL

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Arizona Dream Act Coalition v. Brewer, 15-15307

BERZON, Circuit Judge, Concurring in light of the Dissent from the denial of rehearing en Banc:

I join the panel opinion in full. I write in concurrence to further explain our holding in light of the dissent from denial of rehearing en banc.

I write first to emphasize that the "law" that has preemptive power over Arizona's policy is Congress' conferral of exclusive authority on the executive branch to defer removal of individuals who lack legal status and to authorize them to work while temporarily permitted to remain. Furthermore, I write to highlight that the preemption issues ultimately decided in this case can be viewed as embedded in the equal protection analysis, given the historical and conceptual overlap between equal protection and preemption concerns in cases involving state laws that affect immigrants. The serious equal protection concerns raised by Arizona's policy bolster our preemption holding, which was reached in a careful exercise of the principle of constitutional avoidance.

I.

As the panel opinion makes clear, it is the *authority* specifically conferred on the Attorney General by the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, and the associated regulations, that is the body of federal law that preempts Arizona's policy, not any particular exercise of executive authority. The INA, as implemented by authorized regulations, affirmatively permits the Attorney General to decide whether undocumented immigrants should be removed from the country and when, and also whether they

should be authorized to stay and to work if they are not to be immediately removed. Contrary to the Dissent from the denial of rehearing en banc ("Dissent"), this conferral of authority is not limited to "only two small provisions of the INA." Dissent at 6. *See e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (indicating that certain visa applicants are "eligible for deferred action and work authorization"); *id.* § 1182(a)(9)(B)(ii) (providing that for purposes of determining inadmissibility, unlawful presence includes any time an alien "is present in the United States after the expiration of the period of stay authorized by the Attorney General"); *id.* § 1227(d)(2) (indicating that certain visa applicants who are denied an administrative stay of removal can apply for "a stay of removal, deferred action, or a continuance or abeyance of removal proceedings"); *id.* § 1229b (giving the Attorney General the discretion to cancel removal for certain inadmissable or removable aliens, including those who were never lawfully admitted); *id.* § 1324a(h)(3) (defining an "unauthorized alien" for purposes of employment as an alien who is neither "lawfully admitted for permanent residence" *nor* "authorized to be so employed by [statute] or by the Attorney General"); REAL ID Act of 2005, Pub. L. No. 109-13, div. B, § 202(c)(2)(B)(viii), (C)(ii), 119 Stat. 231, 313 (indicating that persons with "approved deferred action status" are present in the United States during a "period of authorized stay" for purposes of issuing state drivers' licenses and identification cards); 8 C.F.R. § 274a.12(c)(14) (indicating that an "alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority" may be granted work authorization upon application and a showing of economic necessity).

These various provisions, among others, make clear that Congress has expressly authorized the Attorney General, at his discretion, officially to defer removal of individuals who lack legal status, thereby temporarily authorizing their stay, and to authorize such individuals to work while temporarily permitted to remain.[1] *See Arizona v. United States*, 132 S. Ct. 2492, 2506 (2012) ("[T]he removal process is entrusted to the discretion of the Federal Government.").

The Attorney General granted the plaintiffs in this case deferred action and furnished them with federal employment authorization documents.[2] Arizona's

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[1] Authorizing someone to work in the country is necessarily to authorize their presence. The Supreme Court, in *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 416 (1948), stated that "[t]he assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." (quoting *Truax v. Raich*, 239 U.S. 33, 42 (1915)). The obverse is also true: Authorizing an alien to work in the country is necessarily authorizing him to remain.

[2] I note that the Dissent at points treats this case as parallel to *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court,* 136 S. Ct. 2271 (2016) (per curiam). It decidedly is not. Arizona raised in the district court no affirmative challenge to the Deferred Action for Childhood Arrivals ("DACA") program, whether based on administrative law concepts or the scope of the executive's responsibility to enforce federal laws. *Compare id.* at 149. (Arizona is a plaintiff in the *Texas v. United States* litigation, which does raise such issues and is ongoing.). Instead, Arizona has asserted the authority to treat some undocumented individuals with deferred status and federal work authorization differently from others with the same federal dispensations. It is the validity of that *differential* treatment that is at the heart of this case.

denial of drivers' licenses to DACA recipients rests on the premise that their presence is *not* "authorized under federal law," even though the federal government has decided otherwise, exercising the powers delegated to it by Congress. Arizona has, therefore, intruded into an area of decisionmaking entrusted to the federal government.[3]

II.

Critically, our preemption holding reflects a careful exercise of constitutional avoidance, based on the serious equal protection concerns raised by Arizona's policy. Although we rest our decision on preemption grounds, the preemption and equal protection concerns raised in this case are overlapping rather than distinct. And because that is so, I am convinced that although we wisely did not decide the equal protection issue, were it necessary to decide the question I would have held that there was an equal protection violation.

Equal protection and preemption concerns have long been intertwined in cases dealing with state laws that classify immigrants. *See Plyler v. Doe*, 457 U.S. 202 (1982); *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi*, 334 U.S. 410; *Truax*, 239 U.S. 33; *see also* Jenny-Brooke Condon, *The Preempting of Equal*

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[3] Arizona's driver's license statute turns upon whether an immigrant's presence is "authorized under federal law" not whether the presence is "lawful" in the sense of specifically condoned by statute. *See* Ariz. Rev. Stat. Ann. § 28–3153(D). If the statute turned on the latter, Arizona could not, as it does, issue licenses to many undocumented individuals who do not have lawful status but have been granted work authorization while in removal proceedings. *See* Amended op. 17.

Protection for Immigrants?, 73 Wash. & Lee L. Rev. 77 (2016); David F. Levi, Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 Stan. L. Rev. 1069 (1979).

For example, in *Nyquist v. Mauclet*, the state asserted that one of its goals in excluding certain classes of aliens from eligibility for in-state tuition was to provide incentives for aliens to naturalize. 432 U.S. at 9-10. In holding the state law violated the Equal Protection Clause, the Court found that state purpose "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." *Id.* at 10. Similarly in *Graham v. Richardson*, another decision that rested on equal protection grounds, the Court provided that "[s]tate alien residency requirements that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a [state] right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible." 403 U.S. at 380. *Takahashi v. Fish and Game Commission* likewise held that "[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with [the] constitutionally derived federal power to regulate immigration." 334 U.S. at 419.

The overlap evident in these cases between the equal protection and preemption analyses where state laws that affect immigrants are at issue is no accident. As the equal protection analysis in the panel opinion illustrates, both the "similarly situated" and

"legitimate state interest" inquiries required for equal protection analysis necessarily incorporate recognition of the preeminent, although not exclusive, federal role in immigration matters, the same role distribution emphasized in immigration preemption cases.[4]

A.

The primacy of federal immigration law first informs the equal protection analysis when we are determining whether the groups being classified are "similarly situated." As the panel opinion states, the Equal Protection Clause prevents the government from "treating differently persons who are *in all relevant respects* alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added). "*Relevant* respects" are only those respects that relate to the goals of the challenged state law.

Classifications adopted by states "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, 76 (1971) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Accordingly, to adopt a federal immigration classification "as a criterion for its own discriminatory policy, the State must demonstrate that the

[4] Because preemption concerns are embedded in and addressed by equal protection decisions regarding state laws that affect immigrants, equal protection decisions like *Plyler v. Doe*, 457 U.S. 202, *are* relevant to our preemption holding. *See* Condon, *supra* pp. 5, at 83 ("[T]he Supreme Court has reinforced the principle that the federal government has exclusive responsibility for the regulation of immigration, as much through its equal protection jurisprudence as it has through preemption decisions.").

classification is reasonably adapted to *the purposes for which the state desires to use it*." *Plyler*, 457 U.S. at 226 (internal quotation marks and citations omitted) (emphasis in original). Those purposes do not properly include making decisions about who should remain in this country, who should be removed, or what are the conditions of stay for those temporarily authorized to be here.

For example, in *Graham v. Richardson*, the Court struck down on equal protection grounds a state law that denied welfare benefits to non-citizens whom the Court found similarly situated in all respects *relevant* to the state welfare law: non-citizens paid taxes, could be called into the armed forces, and worked in the state, thereby contributing to the state's economic welfare. 403 U.S. at 376. The groups of residents were "indistinguishable except with respect to whether they are or are not citizens of this country." *Id.* at 371. The two groups were not, of course, similarly situated in the latter respect — that is, as to whether they were citizens. And that difference entailed many embedded distinctions between the non-citizens and citizens, including the right to vote, to serve on juries, and to remain in the country even if engaged in criminal activities. But the citizen/non-citizen distinction was the one that the state had to *justify*, not a basis for declaring the two groups not similarly situated with regard to receiving welfare benefits.

Similarly, the immigration-related distinction between the plaintiffs and other undocumented immigrants has no role in this case at the "similarly

situated" juncture.[5] Rather, the pertinent comparisons at this stage concern the *other* requirements for obtaining drivers' licenses — Are the applicants old enough? Can they pass the written test? Can they pass the driving test? Have they violated driving laws in the past, as by driving without a license or while drunk? The immigration-related classification is the one the state must *justify* at the next stage of equal protection analysis, not the measure of whether the plaintiffs are *otherwise* similarly situated with regard to obtaining drivers' licenses.

B.

Preemption themes next surface in the equal protection analysis in the examination of *legitimate* state interests. A state interest is only legitimate for equal protection purposes when it lies within an area of concern within the state's authority. When the state law touches on immigration, the ambit of legitimate state concern is constrained by the federal government's preeminent power directly to regulate immigration — that is, to decide who will be admitted, who may remain, and who will be removed.

As stated in *Plyler v. Doe*, "[a]lthough 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

[5] The panel opinion makes this basic point, briefly. Amended op. at 11-13. It then goes on for completeness to answer the state's similarly situated argument on its own terms, which stressed immigration status differences between the plaintiffs and other aliens. Amended op. at 13-17.

rarely are such matters relevant to legislation by a State." 457 U.S. at 225 (internal quotation marks and citations omitted). Consistently with this view, *Mathews v. Diaz* explained that "a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business." 426 U.S. 67, 85 (1976).

For this reason, the Supreme Court has long recognized that federal power over immigration constrains a state's *legitimate* interests in classifying groups of immigrants differently from one another and then disadvantaging one of the groups so classified. In *Truax v. Raich*, 239 U.S. at 42, for example, the Court admonished that "reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power." *Truax* involved an equal protection challenge, by an alien lawfully admitted into the United States, to an Arizona law that required certain employers to hire a majority of workers who were qualified electors or native-born United States citizens. *Id.* at 40. *Truax* rejected the argument that the state's prioritization of citizens for employment was justified by the state's power "to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction," because the state lacked "the authority to deal with that at which the legislation is aimed." *Id.* at 41, 43; *see also Takahashi*, 334 U.S. at 420 (noting the "tenuousness of the state's claim that it has power to

single out and ban its lawful alien inhabitants . . . from following a vocation simply because Congress has put some groups in special classifications in exercise of its broad and wholly distinguishable powers over immigration and naturalization.").

States assuredly *do* have authority to regulate employment, just as they have authority to regulate the distribution of drivers' licenses. The state authority lacking in *Truax*, and here, is the authority to justify discrimination as to areas *within* state power on grounds that are *beyond* state authority because exclusively within the authority of the federal government.

For these reasons, equal protection analysis with regard to state laws, like Arizona's, that disadvantage some aliens compared with others necessarily incorporates distribution-of-authority concerns that directly parallel those encountered in preemption analyses. It is in light of this overlap between preemption and equal protection analyses in the immigration context that the panel's equal protection analysis evaluated the proffered state interests said rationally to justify the denial of drivers' licenses to the plaintiffs. And it is in this light that we rejected any state justification for the classification in state law that suggested an intent to preclude or discourage the plaintiffs from remaining and working even though the federal government allowed them to do so. For the same reason, we rejected any justification that turned on immigration status distinctions with no connection to state-drivers'-license-related concerns (such as the distinction between aliens holding work authorization *while* in removal proceedings and DACA recipients

holding work authorization but *not* in the process of being removed). Amended op. at 17-18, 22, 26-27. We then concluded that the remaining rationales Arizona provided simply are not reasonable. Amended op. at 18-22.

In short, the preeminent federal role in immigration matters thus not only underlies our ultimate preemption holding, but also directly informs the equal protection analysis. Given the constraints on a state's *legitimate* interests in classifying groups of immigrants, we could, in my view, have rested our rejection of the challenged Arizona statute simply on a rational basis equal protection analysis (without reaching the question whether a more stringent standard of review applies). Were it necessary to reach the question, I would have held Arizona's application of its drivers' license statute invalid as a denial of equal protection to DACA recipients, as compared to other *undocumented* individuals to whom Arizona does provide drivers' licenses. *See* Amended op. at 18-23.

The Dissent brushes past these equal protection concerns, regarding them as an "excursus," and even suggesting that over a century of equal protection jurisprudence regarding state immigration regulations, beginning with *Truax* in 1915, be overturned. Dissent at 3 n.1, 9 n.5

But the panel's methodology — a careful analysis of the strength of a constitutional challenge, before turning to an alternative that avoids definitely deciding that constitutional question — is one with a long pedigree, grounded in judicial restraint. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 690-96, 699 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. &*

Const. Trades Council, 485 U.S. 568, 575-78 (1988).[6] To criticize the panel's preemption analysis in a vacuum, with little recognition of the constitutional avoidance rationale underlying it, is tantamount to lopping off the first five floors of a ten story building and then declaring that the building, thus truncated, is unstable.

Again, I concur fully in the panel opinion. In addition, in my view, as we held in the preliminary injunction appeal, *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1067 (9th Cir. 2014), and as the district court held as the basis for the final injunction, *Arizona Dream Act Coalition v. Brewer*, 81 F. Supp. 3d 795, 808 (D. Ariz. 2015), the equal protection challenge is independently valid and, if we needed to reach it, would justify our conclusion that Arizona's denial of drivers' licenses to DACA recipients cannot stand.

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[6] This court has observed that *DeBartolo* reached a statutory holding only "[a]fter considering at some length, but not deciding, the [constitutional] arguments." *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1209 (9th Cir. 2005).

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-15307
D.C. No. 2:12-cv-02546-DGC

[Filed April 5, 2016]

ARIZONA DREAM ACT COALITION; CHRISTIAN JACOBO; ALEJANDRA LOPEZ; ARIEL MARTINEZ; NATALIA PEREZ-GALLEGOS; CARLA CHAVARRIA; JOSE RICARDO HINOJOS,
Plaintiffs-Appellees,

v.

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

OPINION

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted July 16, 2015
Pasadena, California

Before: Harry Pregerson, Marsha S. Berzon, and Morgan B. Christen, Circuit Judges.

Opinion by Judge Harry Pregerson,
Senior Circuit Judge:

Plaintiffs are five individual recipients of deferred action under the Deferred Action for Childhood Arrivals ("DACA") program, and the Arizona DREAM Act Coalition ("ADAC"), an organization that advances the interests of young immigrants. DACA recipients are noncitizens who were brought to this country as children. Under the DACA program, they are permitted to remain in the United States for some period of time as long as they meet certain conditions. Authorized by federal executive order, the DACA program is administered by the Department of Homeland Security and is consistent with the Supreme Court's ruling that the federal government "has broad, undoubted power over the subject of immigration and the status of aliens" under the Constitution. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012).

In response to the creation of the DACA program, Defendants—the Governor of the State of Arizona; the Arizona Department of Transportation ("ADOT") Director; and the Assistant Director of the Motor Vehicle Division—instituted a policy that rejected the

Employment Authorization Documents ("EADs") issued to DACA recipients under the DACA program as proof of authorized presence for the purpose of obtaining a driver's license. Plaintiffs seek permanently to enjoin Defendants from categorically denying drivers' licenses to DACA recipients. The district court ruled that Arizona's policy was not rationally related to a legitimate government purpose and thus violated the Equal Protection Clause of the Fourteenth Amendment. The district court granted Plaintiffs' motion for summary judgment and entered a permanent injunction. Defendants appealed.

We agree with the district court that DACA recipients are similarly situated to other groups of noncitizens Arizona deems eligible for drivers' licenses. As a result, Arizona's disparate treatment of DACA recipients may well violate the Equal Protection Clause, as our previous opinion indicated is likely the case. *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014). The district court relied on this ground when it issued the permanent injunction. Applying the principle of constitutional avoidance, however, we need not and should not come to rest on the Equal Protection issue, even if it "is a plausible, and quite possibly meritorious" claim for Plaintiffs, so long as there is a viable alternate, nonconstitutional ground to reach the same result. *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1211 (9th Cir. 2005) (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576–78 (1988)).

We conclude that there is. Arizona's policy classifies noncitizens based on Arizona's independent

definition of "authorized presence," classification authority denied the states under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq*. We therefore affirm the district court's order that Arizona's policy is preempted by the exclusive authority of the federal government to classify noncitizens.

FACTUAL BACKGROUND

I. The DACA Program

On June 15, 2012, the Department of Homeland Security announced the DACA program pursuant to the DACA Memorandum. Under the DACA program, the Department of Homeland Security exercises its prosecutorial discretion not to seek removal of certain young immigrants. The DACA program allows these young immigrants, including members of ADAC, to remain in the United States for some period of time as long as they meet specified conditions.

To qualify for the DACA program, immigrants must have come to the United States before the age of sixteen and must have been under the age of thirty-one by June 15, 2012. *See* Memorandum from Secretary Janet Napolitano, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012). They must have been living in the United States at the time the DACA program was announced and must have continuously resided here for at least the previous five years. *Id.* Additionally, DACA-eligible immigrants must be enrolled in school, have graduated from high school, have obtained a General Educational Development certification, or have been honorably discharged from the U.S. Armed Forces or Coast Guard. *Id*. They must

not pose a threat to public safety and must undergo extensive criminal background checks. *Id.*

If granted deferred action under DACA, immigrants may remain in the United States for renewable two-year periods. DACA recipients enjoy no formal immigration status, but the Department of Homeland Security does not consider them to be unlawfully present in the United States and allows them to receive federal EADs.

II. Arizona's Executive Order

On August 15, 2012, the Governor of Arizona issued Arizona Executive Order 2012–06 ("Arizona Executive Order"). Executive Order 2012–06, "Re-Affirming Intent of Arizona Law In Response to the Federal Government's Deferred Action Program" (Aug. 15, 2012). A clear response to DACA, the Arizona Executive Order states that "the Deferred Action program does not and cannot confer lawful or authorized status or presence upon the unlawful alien applicants." *Id.* at 1. The Arizona Executive Order announced 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 and does not entitle them to any additional public benefit." *Id.* The Order directed Arizona state agencies, including ADOT, to "initiate operational, policy, rule and statutory changes necessary to prevent Deferred Action recipients from obtaining eligibility, beyond those available to any person regardless of lawful status, for any taxpayer-funded public benefits and state identification, including a driver's license." *Id.*

III. Arizona's Driver's License Policy

To implement the Arizona Executive Order, officials at ADOT and its Motor Vehicle Division initiated changes to Arizona's policy for issuing drivers' licenses. Under Arizona state law, applicants can receive a driver's license only if they can "submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law." Ariz. Rev. Stat. Ann. § 28–3153(D). Prior to the Arizona Executive Order, ADOT Policy 16.1.2 included all federally issued EADs as "proof satisfactory" that an applicant's presence was "authorized under federal law." The Motor Vehicle Division therefore issued drivers' licenses to all individuals with such documentation.

After the Arizona Executive Order, the Motor Vehicle Division announced that it would not accept EADs issued to DACA recipients—coded by the Department of Homeland Security as (c)(33)—as proof that their presence in the United States is "authorized under federal law." The Motor Vehicle Division continued to accept federally issued EADs from all other noncitizens as proof of their lawful presence, including individuals who received deferred action outside of the DACA program and applicants coded (c)(9) (individuals who have applied for adjustment of status), and (c)(10) (individuals who have applied for cancellation of removal).

In 2013, ADOT revised its policy again. Explaining this change, ADOT Director John S. Halikowski testified 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. Using these criteria, ADOT began to refuse driver's license applications that relied on EADs, not only from DACA recipients, but also from beneficiaries of general deferred action and deferred enforced departure. It continued to accept as proof of authorized presence for purposes of obtaining drivers' licenses EADs from applicants with (c)(9) and (c)(10) status. We refer to the policy that refuses EADs from DACA recipients as "Arizona's policy."

IV. Preliminary Injunction

On November 29, 2012, Plaintiffs sued Defendants in federal district court, alleging that Arizona's policy of denying drivers' licenses to DACA recipients violates the Equal Protection Clause and the Supremacy Clause of the U.S. Constitution. Plaintiffs sought declaratory relief and a preliminary injunction prohibiting Defendants from enforcing their policy against DACA recipients. On May 16, 2013, the district court ruled that Arizona's policy likely violated the Equal Protection Clause but it declined to grant the preliminary injunction because Plaintiffs had not shown irreparable harm. *ADAC v. Brewer*, 945 F. Supp. 2d 1049 (D. Ariz. 2013) ("*ADAC I*"), *reversed by ADAC v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) ("*ADAC II*"). It also granted Defendants' motion to dismiss the Supremacy Clause claim. *Id.* at 1077–78. Plaintiffs appealed the district court's denial of a preliminary injunction.

V. Permanent Injunction

While Plaintiffs' appeal of the preliminary injunction ruling was pending, Plaintiffs sought a permanent injunction in district court on Equal Protection grounds and moved for summary judgment. Defendants also moved for summary judgment, arguing that DACA recipients are not similarly situated to other noncitizens who are eligible for drivers' licenses under Arizona's policy.

We reversed the district court's decision on the motion for preliminary injunction, agreeing with the district court that Arizona's policy likely violated the Equal Protection Clause and holding that Plaintiffs had established that they would suffer irreparable harm as a result of its enforcement. *See ADAC II*, 757 F.3d at 1064. In a concurring opinion, one member of our panel concluded that Plaintiffs also demonstrated a likelihood of success on their claim that Arizona's policy was preempted. *Id.* at 1069 (Christen, J., concurring). On January 22, 2015, the district court granted Plaintiffs' motion for summary judgment and entered a permanent injunction. *ADAC v. Brewer*, 81 F. Supp. 3d 795 (D. Ariz. 2015) ("*ADAC III*"). We affirm the district court's order.

STANDARD OF REVIEW

We review the district court's grant or denial of motions for summary judgment *de novo*. *Besinga v. United States*, 14 F.3d 1356, 1359 (9th Cir. 1994). We determine whether there are any genuine issues of material fact and review the district court's application of substantive law. *Gerhart v. Lake Cty., Mont.*, 637 F.3d 1013, 1019 (9th Cir. 2011). We "may affirm a

grant of summary judgment on any ground supported by the record." *Curley v. City of N. Las Vegas*, 772 F.3d 629, 631 (9th Cir. 2014).

We review the district court's decision to grant a permanent injunction for abuse of discretion. *La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 879 (9th Cir. 2014) (citing *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 941 (9th Cir. 2002)). We review questions of law underlying the district court's decision *de novo*. *See Ting v. AT&T*, 319 F.3d 1126, 1135 (9th Cir. 2003). "If the district court 'identified and applied the correct legal rule to the relief requested,' we will reverse only if the court's decision 'resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record.'" *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1247 (9th Cir. 2013) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)).

DISCUSSION

I. Equal Protection

A. Similarly Situated

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). To prevail on an Equal Protection claim, plaintiffs must show "that a class that is similarly situated has been

treated disparately." *Christian Gospel Church, Inc. v. City & Cty. of S.F.*, 896 F.2d 1221, 1225 (9th Cir. 1990), *superseded on other grounds by* 42 U.S.C. § 2000e.

"The first step in equal protection analysis is to identify the state's classification of groups." *Country Classic Dairies, Inc. v. Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). "The groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005). In this instance, DACA recipients do not need to be similar in all respects to other noncitizens who are eligible for drivers' licenses, but they must be similar in those respects that are relevant to Arizona's own interests and its policy. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all *relevant* respects alike." (emphasis added)).

We previously held that DACA recipients and other categories of noncitizens who may rely on EADs are similarly situated with regard to their right to obtain drivers' licenses in Arizona. *See ADAC II*, 757 F.3d at 1064. The material facts and controlling authority remain the same from the preliminary injunction stage. Thus, we again hold that in all relevant respects DACA recipients are similarly situated to noncitizens eligible for drivers' licenses under Arizona's policy. Nonetheless, for clarity and completeness, we address once more Defendants' arguments.

Defendants assert that DACA recipients are not similarly situated to other noncitizens eligible for

drivers' licenses under Arizona's policy because DACA recipients neither received nor applied for relief provided by the INA, or any other relief authorized by federal statute. Particularly relevant here, Defendants note that eligible noncitizens under the categories of (c)(9) and (c)(10) are tied to relief expressly found in the INA: adjustment of status (INA § 245; 8 U.S.C. § 1255; 8 C.F.R. § 274a.12(c)(9)) and cancellation of removal (INA § 240A; 8 U.S.C. § 1229b; 8 C.F.R. § 274a.12(c)(10)), respectively. In contrast, Defendants contend that DACA recipients' presence in the United States does not have a connection to federal law but rather reflects the Executive's discretionary decision not to enforce the INA.

We continue to disagree. *See ADAC II*, 757 F.3d at 1061. As explained below, Arizona has no cognizable interest in making the distinction it has for drivers' licenses purposes. The federal government, not the states, holds exclusive authority concerning direct matters of immigration law. *DeCanas v. Bica*, 424 U.S. 351, 354 (1976), *superseded by statute on other grounds as recognized in Arizona*, 132 S. Ct. at 2503–04. The states therefore may not make immigration decisions that the federal government, itself, has not made, *Plyler*, 457 U.S. at 225 (citing *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)). Arizona's encroachment into immigration affairs—making distinctions between groups of immigrants it deems not to be similarly situated, despite the federal government's decision to treat them similarly—therefore seems to exceed its authority to decide which aliens are similarly situated to others for Equal Protection purposes. In other words, the "similarly situated" analysis must focus on factors of similarity and distinction pertinent to the

state's policy, not factors outside the realm of its authority and concern.

Putting aside that limitation, the INA explicitly authorizes the Secretary of Homeland Security to administer and enforce all laws relating to immigration and naturalization. INA § 103(a)(1); 8 U.S.C. § 1103(a)(1). As part of this authority, it is well settled that the Secretary can exercise deferred action, a form of prosecutorial discretion whereby the Department of Homeland Security declines to pursue the removal of a person unlawfully present in the United States. The INA expressly provides for deferred action as a form of relief that can be granted at the Executive's discretion. For example, INA § 237(d)(2); 8 U.S.C. § 1227(d)(2), allows a noncitizen who has been denied an administrative stay of removal to apply for deferred action. Certain individuals are also "eligible for deferred action" under the INA if they qualify under a set of factors. *See* INA § 204(a)(1)(D)(i)(II); 8 U.S.C. § 1154(a)(1)(D)(i)(II). Deferred action is available to individuals who can make a showing of "exceptional circumstances." INA § 240(e); 8 U.S.C. § 1229a(e). By necessity, the federal statutory and regulatory scheme, as well as federal case law, vest the Executive with very broad discretion to determine enforcement priorities.[1]

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[1] Pursuant to this discretion, the Department of Homeland Security and its predecessor, the Immigration and Naturalization Service ("INS"), established a series of general categorical criteria to guide enforcement. For example, the 1978 INS Operating Instructions outlined five criteria for officers to consider in exercising prosecutorial discretion, including "advanced or tender age." O.I. 103.1(a)(1)(ii); *see also Pasquini v. Morris*, 700 F.2d 658, 661 (11th Cir. 1983). Discretion can also cut the other way. For

Congress expressly charged the Department of Homeland Security with the responsibility of "[e]stablishing national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). The Department of Homeland Security regulations describe deferred action as "an act of administrative convenience to the government which gives some cases lower priority." 8 C.F.R. § 274a.12(c)(14). Additionally, the Supreme Court has made it clear that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The Supreme Court has explained that the Secretary has discretion to exercise deferred action at each stage of the deportation process, and has acknowledged the long history of the Executive "engaging in a regular practice . . . of exercising that discretion for humanitarian reasons or simply for its own convenience." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483–84 (1999); *see also id.* n.8; *Arizona*, 132 S. Ct. at 2499 (noting that "[a] principal feature of the removal system is the broad discretion exercised by" the

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example, the 2011 Morton Memo highlighted "whether the person poses national security or public safety concern," Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, on "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" (June 17, 2011), and the 2014 Johnson Memo identifies the "highest [enforcement] priority" as noncitizens who might represent a threat to "national security, border security, and public safety," Memorandum from Jeh Charles Johnson, Secretary, Department of Homeland Security, on "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (November 20, 2014).

Executive); *Texas v. United States,* 106 F.3d 661, 667 (5th Cir. 1997) (noting the State of Texas's concession that the INA "places no substantive limits on the Attorney General and commits enforcement of the INA to her discretion").[2]

Defendants' argument fails because they attempt to distinguish categories of EAD-holders in a way that does not amount to any relevant difference. Like adjustment of status, (c)(9), and cancellation of removal, (c)(10), deferred action is a form of relief grounded in the INA. Moreover, the exercise of prosecutorial discretion in deferred action flows from the authority conferred on the Secretary by the INA.

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[2] In the past, the Department of Homeland Security and the INS have granted deferred action to different groups of noncitizens present in the United States. In 1977, the Attorney General granted stays of removal to 250,000 nationals of certain countries (known as "Silva Letterholders"). *Silva v. Levi*, No. 76-C4268 (N.D. Ill. 1977), *modified on other grounds sub nom. Silva v. Bell*, 605 F.2d 978 (7th Cir.1979). In 1990, the INS instituted the "Family Fairness" program that deferred the deportation of 1.5 million family members of noncitizens who were legalized through the Immigration Reform and Control Act. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359; Memorandum for Regional Commissioners, INS, from Gene McNary, Commissioner, INS, "Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens" (Feb. 2, 1990). In 1992, President Bush directed the Attorney General to grant deferred enforced departure to 190,000 Salvadorans. *See* Immigration Act of 1990 § 303, Public Law 101-649 (Nov. 29, 1990); https://www.gpo.gov/fdsys/pkg/FR-1994-12-06/html/94-30088.htm. And nationals of Liberia were granted deferred enforced departure until September 30, 2016, http://www.uscis.gov/humanitarian/temporary-protected-status-deferred-enforced-departure/deferred-enforced-departure.

Defendants provide two criteria to explain when they deem an EAD satisfactory proof of authorized presence: the applicant has formal immigration status, or the applicant is on the path to formal immigration status. Neither criteria suffices to render DACA recipients not similarly situated to other EAD-holders on any basis pertinent to Arizona's decision whether to grant them drivers' licenses. Like DACA recipients, many noncitizens who apply for adjustment of status and cancellation of removal—including individuals with (c)(9) and (c)(10) EADs—do not, and may never, possess formal immigration status. *See Guevara v. Holder*, 649 F.3d 1086, 1095 (9th Cir. 2011).

Additionally, "submission of an application does not connote that the alien's immigration status has changed." Thus, merely applying for immigration relief does not signal a clear path to formal immigration status. *Vasquez de Alcantar v. Holder*, 645 F.3d 1097, 1103 (9th Cir. 2011) (quoting *United States v. Elrawy*, 448 F.3d 309, 313 (5th Cir. 2006)). Indeed, given how frequently these applications are denied, "the supposed 'path' may lead to a dead end." *ADAC II*, 757 F.3d at 1065. In this regard, noncitizens holding (c)(9) and (c)(10) EADs are no different from DACA recipients. And as discussed above, DACA recipients have a temporary reprieve—deferred action—that is provided for by the INA, pursuant to the prosecutorial discretion statutorily delegated to the Executive.

Therefore, in all relevant respects, DACA recipients are similarly situated to other categories of noncitizens who may rely on EADs to obtain drivers' licenses under Arizona's policy.

B. State Interest

The next step in an Equal Protection analysis is to determine the applicable level of scrutiny. *Country Classic Dairies*, 847 F.2d at 596. Although we do not ultimately decide the Equal Protection issue, we remain of the view, articulated in our preliminary injunction opinion, that Arizona's policy may well fail even rational basis review. So, as before, we need not reach what standard of scrutiny applies.[3] *See ADAC II*, 757 F.3d at 1065.

Arizona's policy must be "rationally related to a legitimate state interest" to withstand rational basis review. *City of Cleburne*, 473 U.S. at 440. On appeal, Defendants advance six rationales for Arizona's policy, none of which persuade us that Plaintiffs' argument under the Equal Protection Clause is not at least sufficiently strong to trigger the constitutional avoidance doctrine we ultimately invoke.

First, Defendants argue that Arizona's policy is rationally related to the State's concern that it could face liability for improperly issuing drivers' licenses to DACA recipients. But as the district court observed, the depositions of ADOT Director John S. Halikowski and Assistant Director of the Motor Vehicle Division Stacey K. Stanton did not yield support for this

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[3] In cases involving alleged discrimination against noncitizens authorized to be present in the United States, the Supreme Court has consistently applied strict scrutiny to the state action at issue. *See, e.g.*, *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977); *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Where the alleged discrimination targets noncitizens who are not authorized to be present, the Supreme Court applies rational basis review. *See Plyler*, 457 U.S. at 223–24.

rationale. Neither 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. *ADAC III*, 81 F. Supp. 3d at 807. So the record probably does not establish that there is a rational basis for this concern.

Second, Defendants contend that Arizona's policy serves the State's interest in preventing DACA recipients from making false claims for public assistance. As the district court noted, however, Director Halikowski and Assistant Director Stanton testified that they had no basis for believing that drivers' licenses could be used to access state and federal benefits. It follows that this concern is probably not a rational basis justifying Arizona's policy either. *Id.* (citing *ADAC II*, 757 F.3d at 1066).

Third, Defendants claim that Arizona's policy is meant to reduce the administrative burden of issuing drivers' licenses to DACA recipients, only to have to revoke them once the DACA program is terminated. The district court found this argument lacked merit, noting this court's observation that it is less likely that Arizona will need to revoke the licenses of DACA recipients than of noncitizens holding (c)(9) and (c)(10) EADs, because applications for adjustment of status or cancellation of removal are routinely denied.[4] *ADAC III*, 81 F. Supp. 3d at 807 (citing *ADAC II*, 757

[4] Defendants suggest "later-developed facts" indicate that noncitizens holding (c)(9) and (c)(10) EADs are on the path to permanent residency. We are not convinced that *achieving* certain forms of relief (adjustment of status or cancellation of removal) alters the fact that applications for such relief are regularly denied in very great numbers.

F.3d at 1066–67). Indeed, noncitizens with (c)(10) EADs are already in removal proceedings, which means they are further along in the deportation process than are many DACA recipients. The administrative burden of issuing and revoking drivers' licenses for DACA recipients is not greater than the burden of issuing and revoking drivers' licenses for noncitizens holding (c)(9) and (c)(10) EADs. Certainly, the likelihood of having to do so does not distinguish these two classes of noncitizens, as (c)(9) and (c)(10) applications for relief are frequently denied.

Fourth, Defendants argue that Arizona has an interest in avoiding financial harm to individuals who may be injured in traffic accidents by DACA recipients. Defendants contend that individuals harmed by DACA recipients may be left without recourse when the DACA program is terminated and DACA recipients are removed from the country. But this rationale applies equally to individuals with (c)(9) and (c)(10) EADs. These noncitizens may find their applications for immigration relief denied and may be quickly removed from the country, leaving those injured in traffic accidents exposed to financial harm. Nevertheless, Arizona issues drivers' licenses to noncitizens holding (c)(9) and (c)(10) EADs.

Fifth, Defendants contend that denying licenses to DACA recipients serves the goal of consistently applying ADOT policy. But ADOT *in*consistently applies its own policy by denying licenses to DACA recipients while providing licenses to holders of (c)(9) and (c)(10) EADs. Arizona simply has no way to know what "path" noncitizens in any of these categories will eventually take. DACA recipients appear similar to

individuals who are eligible under Arizona's policy with respect to all the criteria ADOT relies on. ADOT thus applies its own immigration classification with an uneven hand by denying licenses only to DACA recipients. *See, e.g.*, *Yick Wo. v. Hopkins*, 118 U.S. 356, 373–74 (1886) ("[I]f [the law] is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

Sixth, Defendants claim that Arizona's policy is rationally related to ADOT's statutory obligation to administer the state's driver's license statute. ADOT's disparate treatment of DACA recipients pursuant to the driver's license statute relies on the premise that federal law does not authorize DACA recipients' presence in the United States. This rationale is essentially an assertion of the state's authority to decide whether immigrants' presence is authorized under federal law. Rather than evaluating that assertion as part of the Equal Protection analysis, we defer doing so until our discussion of our ultimate, preemption ground for decision, which we adopt as part of our constitutional avoidance approach.

Before proceeding to that discussion, it bears noting, once again, *see ADAC II*, 757 F.3d at 1067, that the record *does* suggest an additional reason for Arizona's policy: a dogged animus against DACA recipients. The Supreme Court has made very clear that such animus cannot constitute a legitimate state interest, and has cautioned against sowing the seeds of prejudice. *See*

Romer v. Evans, 517 U.S. 620, 634 (1996); *see also City of Cleburne*, 473 U.S. at 464 (Marshall, J., concurring in the judgment in part, and dissenting in part) ("Prejudice, once let loose, is not easily cabined."). "The Constitution's guarantee of equality must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot justify disparate treatment of that group." *United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013) (citation omitted).

II. Preemption

We do not "decide federal constitutional questions where a dispositive nonconstitutional ground is available." *City of L.A. v. Cty. of Kern*, 581 F.3d 841, 846 (9th Cir. 2009) (quoting *Correa v. Clayton*, 563 F. 2d 396, 400 (9th Cir. 1977)). While preemption derives its force from the Supremacy Clause of the Constitution, "it is treated as 'statutory' for purposes of our practice of deciding statutory claims first to avoid unnecessary constitutional adjudications." *Douglas v. Seacoast Prods.*, 431 U.S. 265, 271–72 (1977).[5] Given the formidable Equal Protection concerns Arizona's policy raises, we turn to a preemption analysis as an alternative to resting our decision on the Equal

[5] Though preemption principles are rooted in the Supremacy Clause, this court has previously applied the principle that preemption does not implicate a constitutional question for purposes of constitutional avoidance. *See Hotel Emps. & Rest. Emps. Int'l Union v. Nev. Gaming Comm'n*, 984 F.2d 1507, 1512 (9th Cir. 1993) (holding that *Pullman* abstention was not warranted for preemption claims because "preemption is not a constitutional issue."); *Knudsen Corp. v. Nev. State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982) (same).

Protection Clause.[6] Doing so, we conclude that Arizona's policy encroaches on the exclusive federal authority to create immigration classifications and so is displaced by the INA.

The "[p]ower to regulate immigration is unquestionably exclusively a federal power." *DeCanas*, 424 U.S. at 354. The 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.'" *Arizona*, 132 S. Ct. at 2501 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The Supreme Court has also indicated that the INA provides a pervasive framework with regard to the admission, removal, and presence of aliens. *See Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1973 (2011) (quoting *DeCanas*, 424 U.S. at 353, 359); *cf. Arizona*, 132 S. Ct. at 2499 ("Federal governance of immigration and alien status is extensive and complex.").

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[6] In their opening brief, Defendants argue preemption is not properly before this court because Plaintiffs did not appeal the district court's dismissal of their preemption claim. But at oral argument, defense counsel offered to provide supplemental briefing on the issue. Separately, Plaintiffs noted that Defendants raised the Take Care argument for the first time on appeal and argued it ought not be considered because it was not presented to the district court. Following oral argument, we requested and the parties submitted supplemental briefing on both issues. Defendants' supplemental brief conceded that, in light of the considerations articulated in *Olympia Pipe Line Co. v. City of Seattle*, 437 F.3d 872 (9th Cir. 2006), we may properly consider preemption in this case.

To be sure, not all state regulations touching on immigration are preempted. *See Chamber of Commerce*, 131 S. Ct. at 1974. But states may not directly regulate immigration. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1023 (9th Cir. 2013). In particular, the power to classify aliens for immigration purposes is "committed to the political branches of the Federal Government." *Plyler*, 457 U.S. at 225 (quoting *Mathews*, 426 U.S. at 81). "The States enjoy no power with respect to the classification of aliens." *Plyler*, 457 U.S. at 225. Because Arizona created a new immigration classification when it adopted its policy regarding driver's license eligibility, it impermissibly strayed into the exclusive domain of the INA.

States can regulate areas of traditional state concern that might impact noncitizens. *See DeCanas*, 424 U.S. at 355. Permissible state regulations include those that mirror federal objectives and incorporate federal immigration classifications. *Plyler*, 457 U.S. at 225–26. But a law that regulates an area of traditional state concern can still effect an impermissible regulation of immigration.

For example, in *Toll v. Moreno*, the Supreme Court held that preemption principles foreclosed a state policy concerning the imposition of tuition charges and fees at a state university on the basis of immigration status. 458 U.S. 1, 16–17 (1982). Similarly, the Third Circuit has held that municipal ordinances preventing unauthorized aliens from renting housing constituted an impermissible regulation of immigration and were preempted by the INA. *Lozano v. City of Hazleton*, 724 F.3d 297, 317 (3d Cir. 2013) (emphasis added). Although the housing ordinances did not directly

regulate immigration in the sense of dictating who could or could not be admitted into the United States, the Third Circuit concluded that they impermissibly "intrude[d] on the regulation of residency *and presence* of aliens in the United States." *Id.* (emphasis added).

Similarly, the Fifth Circuit has held that an ordinance "allow[ing] state courts to assess the legality of a non-citizen's presence" in the United States was preempted because it "open[ed] the door to conflicting state and federal rulings on the question." *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 536 (5th Cir. 2013). The Fifth Circuit's decision was based on its recognition that "[t]he federal government alone . . . has the power to classify non-citizens." *Id.* In accord with these decisions, the Eleventh Circuit held that a state law prohibiting courts from recognizing contracts involving unlawfully present aliens was preempted as "a thinly veiled attempt to regulate immigration under the guise of contract law." *See United States v. Alabama*, 691 F.3d 1269, 1292–96 (11th Cir. 2012).

Here, Arizona's policy ostensibly regulates the issuance of drivers' licenses, admittedly an area of traditional state concern. *See Chamber of Commerce*, 131 S. Ct. at 1983. But its policy 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 II*, 757 F.3d at 1069 (Christen, J., concurring). Indeed, the Arizona Executive Order declared that "the Deferred Action program does not and cannot confer lawful or authorized . . . presence upon the unlawful alien applicants." Executive Order 2012–06 at 1. The Order

also announced Arizona's view that "[t]he issuance of Deferred Action or Deferred Action . . . [EADs] to unlawfully present aliens does not confer upon them any lawful *or* authorized status." *Id.* (emphasis added). To implement the Order, ADOT initiated a policy of denying licenses to DACA recipients pursuant to Arizona's driver's license statute, which requires that applicants "submit proof satisfactory to the department that the applicant's presence in the United States is *authorized under federal law*." Ariz. Rev. Stat. Ann. § 28–3153(D) (emphasis added).

Arizona points to three criteria to justify treating EAD recipients differently than individuals with (c)(9) and (c)(10) EADs,[7] even though the federal government treats their EADs the same in all relevant respects. But Arizona's three criteria—that an applicant: has formal status; is on a path to formal status; or has applied for relief expressly provided for in the INA—cannot be equated with "authorized presence" under federal law. DACA recipients and noncitizens with (c)(9) and (c)(10) EADs all lack formal immigration status, yet the federal government permits them to live and work in the country for some period of time, provided they comply with certain conditions.

Arizona thus distinguishes between noncitizens based on its *own* definition of "authorized presence," one that neither mirrors nor borrows from the federal immigration classification scheme. And by arranging

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[7] As we have noted, recipients of (c)(9) and (c)(10) documents are noncitizens who have applied for adjustment of status and cancellation of removal, respectively. *See* 8 C.F.R. § 274a.12(c)(9)–(10).

federal classifications in the way it prefers, Arizona impermissibly assumes the federal prerogative of creating immigration classifications according to its own design.[8] Arizona engages in this "exercise of regulatory bricolage," *ADAC II*, 757 F.3d at 1072 (Christen, J., concurring), despite the fact that "States enjoy no power with respect to the classification of aliens," *Plyler*, 457 U.S. at 225.

That this case involves classes of aliens the Executive has, as a matter of discretion, placed in a low priority category for removal is a further consideration weighing against the validity of Arizona's policy. The Supreme Court has emphasized that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 132 S. Ct. at 2499. And the Court has specifically recognized that federal statutes contemplate and protect the discretion of the Executive Branch when making determinations concerning deferred action. *See Reno*, 525 U.S. at 484–86. The discretion built into statutory removal procedures suggests that auxiliary state regulations regarding the presence of aliens in the United States

[8] Defendants' continual insistence that Arizona's policy is not preempted because the DACA program lacks "the force of law" reflects a misunderstanding of the preemption question. Preemption is not a gladiatorial contest that pits the DACA Memorandum against Arizona's policy. Rather, Arizona's policy is preempted by the supremacy of federal authority under the INA to create immigration categories. Additionally, because Arizona's novel classification scheme includes not just DACA recipients but also recipients of regular deferred action and deferred enforced departure, our conclusion that Arizona's scheme impermissibly creates immigration classifications not found in federal law is not dependent upon the continued vitality of the DACA program.

are particularly intrusive on the overall federal statutory immigration scheme.

Unable to point to any federal statute or regulation that justifies classifying individuals with (c)(9) and (c)(10) EADs as authorized to be present while excluding recipients of deferred action or deferred enforced departure, Defendants argue that Arizona properly relied on statements by the U.S. Citizenship and Immigration Service that "make clear that deferred action does not confer a lawful immigration status." These statements take the form of an email from a local U.S. Citizenship and Immigration Service Community Relations Officer in response to an inquiry from ADOT. In the email, the officer notes that DACA recipients applying for work authorization should fill in category "C33" and not category "C14," which is the category for regular deferred action.

This email does nothing to further Defendants' argument. The officer's statement in no way suggests that federal law supports Arizona's novel classifications. And even if it did, an email from a local U.S. Citizenship and Immigration Services Officer is not a source of "federal law," nor an official statement of the government's position.[9]

The INA, indeed, directly undermines Arizona's novel classifications. For purposes of determining the

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[9] In *ADAC II*, Defendants also argued that a "Frequently Asked Questions" section of the U.S. Citizenship and Immigration Services Website and a Congressional Research Service Memorandum demonstrated that Arizona's classification found support in federal law. *See* 757 F.3d at 1073. We understand Defendants to have abandoned these arguments. But even if they had not, neither source is a definitive statement of federal law.

admissibility of aliens other than those lawfully admitted for permanent residence, the INA states that if an alien is present in the United States beyond a "period of stay *authorized* by the Attorney General" or without being admitted or paroled, the alien is "deemed to be *unlawfully present* in the United States." INA § 212(a)(9)(B)(ii); 8 U.S.C. § 1182(a)(9)(B)(ii) (emphases added). The administrative regulations implementing this section of the INA, to which we owe deference, establish that deferred action recipients do not accrue "unlawful presence" for purposes of calculating when they may seek admission to the United States. 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2). Because such recipients are present without being admitted or paroled, their stay must be considered "authorized by the Attorney General," for purposes of this statute. INA § 212(a)(9)(B)(ii); 8 U.S.C. § 1182(a)(9)(B).

The REAL ID Act, which amended the INA, further undermines Arizona's interpretation of "authorized presence." REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231. The Real ID Act amendments provide that states may issue a driver's license or identification card to persons who can demonstrate they are "authorized [to] stay in the United States." *Id.* § 202(c)(2)(C)(i)–(ii). Persons 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. *Id.* § 202(c)(2)(B)(viii), (C)(ii).

Despite Arizona's clear departure from federal immigration classifications, Defendants argue Arizona's policy is not a "back-door regulation of

immigration." They compare it to the Louisiana Supreme Court policy the Fifth Circuit upheld in *LeClerc v. Webb*, which prohibited any alien lacking permanent resident status from joining the state bar. 419 F.3d 405, 410 (5th Cir. 2005). But the Louisiana Supreme Court did not create a novel immigration classification as Arizona does here. Rather, it permissibly borrowed from existing federal classifications, distinguishing "those aliens who have attained permanent resident status in the United States" from those who have not. *Id.* (quoting *In re Bourke*, 819 So. 2d 1020, 1022 (La. 2002)).

Defendants also argue that sections of the INA granting states discretion to provide public benefits to certain aliens, including deferred action recipients, suggest that Congress "has not intended to occupy a field so vast that it precludes all state regulations that touch upon immigration." *See* 8 U.S.C. §§ 1621, 1622. But we do not conclude that Congress has preempted all state regulations that touch upon immigration. Arizona's policy is preempted not because it denies state benefits to aliens, but because the classification it uses to determine which aliens receive benefits does not mirror federal law.

In sum, Defendants offer no foundation for an interpretation of federal law that classifies individuals with (c)(9) and (c)(10) EADs as having "authorized presence," but not DACA recipients. Arizona's policy of denying drivers' licenses to DACA recipients based on its own notion of "authorized presence" is preempted by the exclusive authority of the federal government under the INA to classify noncitizens.

III. Constitutionality of the DACA Program

We decline to rule on the constitutionality of the DACA program, as the issue is not properly before our court; only the lawfulness of Arizona's policy is in question.

We note, however, that the discussion above is quite pertinent to both of Defendants' primary arguments undergirding their challenge to the constitutionality of the DACA program. First, Defendants argue that the Executive has no power, independent of Congress, to enact the DACA program. But as we have discussed, the INA is replete with provisions that confer prosecutorial discretion on the Executive to establish its own enforcement priorities. *See supra*, section II. Third parties generally may not contest the exercise of this discretion, *see Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), including in the immigration context, *see Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984).[10]

Second, Defendants contend that the DACA program amounts to a wholesale suspension of the INA's provisions, which in turn violates the President's obligation to "take Care that the Laws be faithfully

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[10] Congress's failure to pass the Development, Relief, and Education for Alien Minors ("DREAM") Act does not signal the illegitimacy of the DACA program. The Supreme Court has admonished that an unenacted bill is not a reliable indicator of Congressional intent. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969). Moreover, the DREAM Act and the DACA program are not interchangeable policies because they provide different forms of relief (*i.e.*, the DREAM Act would have granted conditional residency that could lead to permanent residency, whereas the DACA program offers a more limited, temporary deferral of removal).

executed." U.S. Const. art. II, § 3 ("the Take Care Clause"). But, according to an amicus brief filed by the Department of Justice, the Department of Homeland Security only has funding annually to remove a few hundred thousand of the 11.3 million undocumented aliens living in the United States. Constrained by these limited resources, the Department of Homeland Security must make difficult decisions about whom to prioritize for removal. Despite Defendants' protestations, they have not shown that the Department of Homeland Security failed to comply with its responsibilities to the extent its resources permit it to do so.[11]

For that reason, this case is nothing like *Train v. City of New York*, a case relied upon by Defendants, in which the Supreme Court affirmed an order directing a presidential administration to spend money allocated by Congress for certain projects. 420 U.S. 35, 40 (1975). Here, by contrast, the Department of Justice asserts that Congress has not appropriated sufficient funds to remove all 11.3 million undocumented aliens, and several prior administrations have adopted programs, like DACA, to prioritize which noncitizens to remove. *See supra* n.2. "The power to decide when to

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[11] Indeed, the Department of Justice's brief reports that the administration has removed approximately 2.4 million noncitizens from the country from 2009 to 2014, a number the government states is "unprecedented." Prioritizing those removal proceedings for noncitizens who represent a threat to "national security, border security, and public safety," Memorandum from Jeh Charles Johnson, Secretary, Department of Homeland Security, on "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (November 20, 2014), cannot fairly be described as abdicating the agency's responsibilities.

investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws . . . ." *Cmty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986); *see Arpaio v. Obama*, 797 F.3d 11, 18 (D.C. Cir. 2015).

Further, as we have noted, the Supreme Court has acknowledged the history of the Executive engaging in a regular practice of prosecutorial discretion in enforcing the INA. *See Reno*, 525 U.S. at 483–84 & n.8 ("To ameliorate a harsh and unjust outcome, the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This commendable exercise in administrative discretion, . . . is now designated as deferred action." (quoting 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure § 72.03 [2][h] (1998))). This history includes "general policy" non-enforcement, such as deferred action granted to foreign students affected by Hurricane Katrina, U.S. Citizenship and Immigration Services, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* at 1 (Nov. 25, 2005), and deferred action for certain widows and widowers of U.S. citizens, Memorandum for Field Leadership, U.S. Citizenship and Immigration Services, from Donald Neufeld, Acting Associate Director, U.S. Citizenship and Immigration Services, "Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children" at 1 (Sept. 4, 2009).[12]

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[12] The recent ruling in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) *petition for cert. granted sub nom. United States v. Texas*, — S. Ct. — , 2016 WL 207257 (U.S. Nov. 20, 2015) (mem.),

We reiterate that, in the end, Arizona's policy is preempted not because the DACA program is or is not valid, but because the policy usurps the authority of the federal government to create immigrant classifications.

IV. Permanent Injunction

Before a court may grant a permanent injunction, the plaintiff must satisfy a four-factor test, demonstrating:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 141 (2010) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

Plaintiffs have proven that they suffer irreparable injury as a result of Arizona's policy, and that remedies

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is also inapposite to Defendants' constitutional claims. There, several states challenged the Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA"), including DAPA recipients' eligibility for certain public benefits such as drivers' licenses and work authorization. *Id.* at 149. The court concluded that the states were likely to succeed on their procedural and substantive claims under the Administrative Procedure Act, and expressly declined to reach the Take Care Clause issue. *Id.* at 146 & n.3, 149.

available at law are inadequate to compensate them for that injury. In particular, Plaintiffs have demonstrated that their inability to obtain drivers' licenses limits their professional opportunities. In Arizona, it takes an average of over four times as long to commute to work by public transit than it does by driving, and public transportation is not available in most localities. One ADAC member had to miss full days of work so that she could take her son to his doctors' appointments by bus. Another ADAC member finishes work after midnight but the buses by her workplace stop running at 9 p.m. And as the district court noted, another Plaintiff is a graphic designer whose inability to obtain a driver's license caused her to decline work from clients, while yet another Plaintiff wants to pursue a career as an Emergency Medical Technician but is unable to do so because the local fire department requires a driver's license for employment. *ADAC III*, 81 F. Supp. 3d at 809.

Plaintiffs' inability to obtain drivers' licenses hinders them in pursuing new jobs, attending work, advancing their careers, and developing business opportunities. They thus suffer financial harm and significant opportunity costs. And as we have previously found, the irreparable nature of this injury is exacerbated by Plaintiffs' young age and fragile socioeconomic status. *ADAC II*, 757 F.3d at 1068. Setbacks early in their careers can have significant impacts on Plaintiffs' future professions. *Id.* This loss of opportunity to pursue one's chosen profession constitutes irreparable harm. *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.,* 630 F.3d 1153, 1165 (9th Cir. 2011); *see also Chalk v. U.S. Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701, 709–10 (9th Cir. 1988)

(holding that plaintiff's transfer to a less satisfying job created emotional injury that constituted irreparable harm). Since irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages, *see Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991), Plaintiffs have also shown that remedies available at law are inadequate to compensate them.

Plaintiffs have also demonstrated that, after considering the balance of hardships, a remedy in equity is warranted and that the public interest would not be disserved by a permanent injunction. We conclude that Arizona's policy is preempted by federal law. "[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." *Valle del Sol*, 732 F.3d at 1029 (quoting *Arizona*, 641 F.3d at 366) (alterations omitted). The public interest and the balance of the equities favor "prevent[ing] the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted).

CONCLUSION

In sum, we find that DACA recipients are similarly situated in all relevant respects to other noncitizens eligible for drivers' licenses under Arizona's policy. And Arizona's refusal to rely on EADs from DACA recipients for purposes of establishing eligibility for drivers' licenses may well violate the Equal Protection Clause for lack of a rational governmental interest justifying the distinction relied upon. Invoking the constitutional avoidance doctrine, we construe the INA

as occupying the field of Arizona's classification of noncitizens with regard to whether their presence is authorized by federal law, and as therefore preempting states from engaging in their very own categorization of immigrants for the purpose of denying some of them drivers' licenses. Plaintiffs have shown that they suffer irreparable harm from Arizona's policy and that remedies at law are inadequate to compensate for that harm. Plaintiffs have also shown that a remedy in equity is warranted and that the public interest would not be disserved by a permanent injunction.

Accordingly, we AFFIRM the district court's grant of summary judgment in favor of Plaintiffs. We also AFFIRM the district court's order entering a permanent injunction that enjoins Arizona's policy of denying the EADs issued under the DACA program as satisfactory proof of authorized presence under federal law in the United States.

AFFIRMED.

COUNSEL

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American Civil Liberties Union Foundation Immigrants' Rights Project, San Francisco, CA; Kelly Flood, ASU Alumni Law Group, Phoenix, AZ, for Plaintiffs-Appellees.

Dominic Draye (argued) and John Robert Lopez, IV, Arizona Attorney General's Office, Phoenix, AZ; Timothy Berg, Sean Hood, and Douglas C. Northup, Fennemore Craig P.C., Phoenix, AZ, for Defendants-Appellants.

Dale Wilcox, Washington, D.C. for Amicus Curiae Immigration Reform Law Institute.

Lindsey Powell, Washington D.C. for Amicus Curiae United States of America.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-15307

D.C. No. 2:12-cv-02546-DGC
District of Arizona, Phoenix

[Filed July 17, 2015]

ARIZONA DREAM ACT COALITION; et al., Plaintiffs - Appellees,	)
v.	)
JANICE K. BREWER, Governor of the State of Arizona, in her official capacity; et al., Defendants - Appellants.	)

ORDER

Before: PREGERSON, BERZON, and CHRISTEN, Circuit Judges.

Plaintiffs-Appellees' complaint in this litigation contained two claims for relief: (1) a preemption claim, and (2) an equal protection claim. At oral argument on July 16, 2015, the parties appeared to agree that there is significant overlap between these two claims, but the district court order presently on appeal only addresses

the equal protection claim. Plaintiffs did not appeal an earlier order dismissing their preemption claim, but argued that our court may affirm the district court on any ground. The State requested an opportunity to brief the preemption claim if it is to be addressed by our court.

The State argued on appeal that the DACA program violates the separation of powers doctrine and the Take Care Clause of the U.S. Constitution. Plaintiffs' position is that these arguments were waived because they were not raised in the district court.

In light of the foregoing, the parties are ordered to file simultaneous supplemental briefs within fourteen (14) days of the date of this order, addressing:

(1) Whether any issue of preemption is properly before this court, if so, what it is, and how it should be resolved, and whether it is appropriately addressed as a threshold matter before reaching Plaintiffs' equal protection claim, to avoid ruling on constitutional grounds; and

(2) Whether the DACA program violates the separation of powers doctrine and/or the Take Care Clause.

The panel invites the United States to file an amicus curiae brief expressing its views on these issues. The amicus brief should be filed no later than seven (7) days after the parties have filed their supplemental briefs. *See* Fed. R. App. P. 29. In the event the United States chooses not to file an amicus brief, the court requests that the United States notify the Clerk, in writing, as soon as that decision is made.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NO. CV 12-02546-PHX DGC

[Filed February 18, 2015]

ARIZONA DREAM ACT COALITION; CHRISTIAN JACOBO; ALEJANDRA LOPEZ; ARIEL MARTINEZ; NATALIA PEREZ-GALLAGOS; CARLA CHAVARRIA; JOSE RICARDO HINOJOS, *Plaintiffs*,	)
v.	)
JANICE K. BREWER, Governor of the State of Arizona, in her official capacity; JOHN S. HALIKOWSKI, Director of the Arizona Department of Transportation, in his official capacity; and STACEY K. STANTON, Assistant Director of the Motor Vehicle Division of the Arizona Department of Transportation, in her official capacity, *Defendants*.	)

FINAL JUDGMENT

For the reasons set out in the Order and Permanent Injunction (Doc. 306) entered January 22, 2015:

1. Plaintiffs' motion for summary judgment and a permanent injunction (Doc. 251) is **granted**.

2. Defendants' motion for summary judgment (Doc. 247) is **denied**.

3. Defendants and their officials, agents, and employees, and all persons acting in concert or participating with them, are permanently enjoined from enforcing any policy or practice by which the Arizona Department of Transportation refuses to accept Employment Authorization Documents, issued under the DACA program announced by Secretary Napolitano's June 15, 2012 memorandum, as proof that the document holders are authorized under federal law to be present in the United States for purposes of obtaining a driver's license or state identification card.

4. The Clerk is directed to terminate this action.

IT IS ORDERED AND ADJUDGED THAT JUDGMENT, pursuant to Federal Rule of Civil Procedure 58(a), is entered in favor of the Plaintiffs and against the Defendants.

Dated this 18th day of February, 2015.

/s/_____
David G. Campbell
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV 12-02546 PHX DGC

[Filed January 22, 2015]

Arizona Dream Act Coalition; Jesus Castro-Martinez; Christian Jacobo; Alejandra Lopez; Ariel Martinez; Natalia Perez-Gallagos; Carla Chavarria; and Jose Ricardo Hinojos,
Plaintiffs,

v.

Janice K. Brewer, Governor of the State of Arizona, in her official capacity; John S. Halikowski, Director of the Arizona Department of Transportation, in his official capacity; and Stacey K. Stanton, Assistant Director of the Motor Vehicle Division of the Arizona Department of Transportation, in her official capacity,
Defendants.

ORDER AND PERMANENT INJUUNCTION

This case concerns the constitutionality of the State of Arizona's denial of driver's licenses to persons

commonly known as "DREAMers."[1] On June 15, 2012, the Secretary of the Department of Homeland Security ("DHS") announced the Deferred Action for Childhood Arrivals ("DACA") program, which provides deferred action for a period of two years to certain eligible DREAMers (referred to here as "DACA recipients"). Deferred action constitutes a discretionary decision by law enforcement authorities to defer legal action that would remove an individual from the country. The DACA program provides that DACA recipients may work during the period of deferred action and may obtain employment authorization documents, generally known as "EADs," from the United States Citizenship and Immigration Services ("USCIS").

Under Arizona law, the Arizona Department of Transportation ("ADOT") "shall not issue to or renew a driver license . . . for a person who does not submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law." A.R.S. § 28-3153(D). Before the announcement of the DACA program, the Motor Vehicle Division ("MVD") of ADOT accepted all federally-issued EADs as sufficient evidence that a person's presence in the United States was authorized under federal law, and therefore granted driver's

[1] Plaintiffs generally refer to themselves as "DREAMers" based on proposed federal legislation known as the Development, Relief, and Education for Alien Minors Act (the "DREAM Act"). Doc. 1, ¶ 2. The DREAM Act would grant legal status to certain undocumented young adults. Congress has considered the DREAM Act several times, but no version has been enacted. *See, e.g.*, DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011); DREAM Act of 2010, H.R. 6497, S. 3962, S. 3963, 111th Cong. (2010); DREAM Act of 2007, S. 774, 110th Cong. (2007).

licenses to these individuals. After announcement of the DACA program, MVD revised its policy to provide that EADs issued to DACA recipients did not constitute sufficient evidence of authorized presence, even though the MVD continued to accept all other EADs, including those issued to persons who had received other forms of deferred action. MVD later revised its policy so that two other categories of deferred action recipients – those with (a)(11) and (c)(14) deferrals – could not use EADs to obtain driver's licenses.

Plaintiffs are the Arizona Dream Act Coalition (the "Coalition"), which is an immigrant youth-led community organization, and six individual DACA recipients. They allege that Defendants' driver's license policy violates the Equal Protection Clause of the United States Constitution.[2] Plaintiffs sought a preliminary injunction barring Defendants from enforcing their policy. Doc. 29. The Court found that Defendants were likely to succeed on the merits of their equal protection claim, but that they had not shown a likelihood of irreparable harm sufficient to justify preliminary injunctive relief. Doc. 114. The Ninth Circuit reversed, *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) ("*ADAC*"), and the Court entered a preliminary injunction on remand. Doc. 295.

The parties have filed and briefed motions for summary judgment. Docs. 247, 251, 259-2, 261, 267-1, 273, 278-1. At the Court's request, the parties also filed memoranda addressing the effect of *ADAC* on the

[2] Plaintiffs also claim that Defendant's policy is preempted by federal law. *See* Doc. 1. The Court granted Defendants' motion to dismiss this claim. Doc. 114.

merits of this case. Docs. 287, 289. The Court heard oral argument on January 7, 2015. For the reasons that follow, the Court will grant summary judgment to Plaintiffs and enter a permanent injunction.

BACKGROUND

I. Deferred Action and DACA.

The federal government has broad and plenary powers over the subject of immigration and the status of aliens. *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012); *see also* U.S. Const. art. I, § 8, cl. 4. Through the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101, *et seq*., Congress has created a complex and detailed federal immigration scheme governing the conditions under which foreign nationals may be admitted to and remain in the United States, *see, e.g.*, *id.* §§ 1181, 1182, 1184, and providing for the removal and deportation of aliens not lawfully admitted to this country, *see, e.g.*, *id.* §§ 1225, 1227-29, 1231. *See generally United States v. Arizona*, 703 F. Supp. 2d 980, 987-88 (D. Ariz. 2010) (describing the federal immigration scheme). The INA charges the Secretary of Homeland Security with the administration and enforcement of all laws relating to immigration and naturalization. 8 U.S.C. § 1103(a)(1). Under this delegation of authority, the Secretary may exercise a form of prosecutorial discretion and decide not to pursue the removal of a person unlawfully in the United States. This exercise of prosecutorial discretion is commonly referred to as deferred action. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 & n.8 (1999) (recognizing the practice of "deferred action" where the Executive exercises

discretion and declines to institute proceedings for deportation).

On June 15, 2012, the DHS Secretary issued a memorandum announcing that certain young persons not lawfully present in the United States will be eligible to obtain deferred action if they meet specified criteria under the newly instituted DACA program. Doc. 259-5 at 131-33. Eligible persons must show that they (1) came to the United States under the age of 16; (2) continuously resided in the United States for at least five years preceding the date of the memorandum and were present in the United States on the date of the memorandum; (3) currently attend school, have graduated from high school or obtained a general education development certificate, or have been honorably discharged from the Coast Guard or Armed Forces of the United States; (4) have not been convicted of a felony offense, a significant misdemeanor, multiple misdemeanor offenses, or otherwise pose a threat to national security or public safety; and (5) are not older than 30. *See id.* at 131-33, 208-13. Eligible persons could receive deferred action for two years, subject to renewal, and could obtain an EAD for the period of the deferred action. *Id.* at 132-33. The DHS memorandum makes clear that it "confers no substantive right, immigration status or pathway to citizenship[,]" and that "[o]nly the Congress, acting through its legislative authority, can confer these rights." *Id.* at 133.

II. Defendants' Driver's License Policy.

As noted above, A.R.S. § 28-3153(D) states that non-citizens may obtain Arizona driver's licenses by presenting proof that their presence in the United States is authorized under federal law. MVD policies

identify the documentation deemed sufficient to show federal authorization. *See* Doc. 259-6 at 13. Before DACA, MVD accepted EADs as satisfactory evidence. Doc. 259-3, ¶ 31; Doc. 267-2, ¶ 31. Between 2005 and 2012, MVD issued tens of thousands of driver's licenses to persons who submitted EADs to prove their lawful presence in the United States. Doc. 259-6 at 8-11.

The announcement of the DACA program prompted ADOT Director John S. Halikowski to review the program's potential impact on ADOT's administration of the State's driver's license laws. Doc. 248-1 at 48. After Director Halikowski initiated the ADOT policy review, but before the review had been concluded, Governor Brewer issued Executive Order 2012-06 on August 15, 2012 (the "Executive Order"). Doc. 259-5 at 231-32. The Executive Order concluded that "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 and does not entitle them to any additional public benefit." *Id*. The Executive Order directed state agencies to "conduct a full statutory, rule-making and policy analysis and . . . initiate operational, policy, rule and statutory changes necessary to prevent Deferred Action recipients from obtaining eligibility, beyond those available to any person regardless of lawful status, for any taxpayer-funded public benefits and state identification, including a driver's license[.]" *Id.* On September 17, 2012, ADOT formally revised its policy to conform to the Governor's order. *Id.* at 254-57.

III. 2013 Revision.

After the 2012 revision and during the pendency of this lawsuit, Director Halikowski continued to review ADOT's driver's license policy. *See* Doc. 248, ¶¶ 28-33. He was concerned about possible inconsistencies in ADOT's treatment of EAD holders. *See* Doc. 248-1 at 65-67. To resolve these inconsistencies, ADOT developed three criteria for determining which EADs would be deemed sufficient proof that the EAD holder had authorized presence under federal law. *Id.* Under these criteria, an EAD is sufficient proof of authorized presence if the EAD demonstrates: "(1) that the applicant has formal immigration status, (2) that the applicant is on a path to obtaining a formal immigration status, or (3) that the relief sought or obtained is expressly provided for in the INA." Doc. 248, ¶ 31 (citing Doc. 248-1 at 67). Applying these criteria, ADOT revised its policy on September 16, 2013. Doc. 172-1 at 3-6. The newly revised policy continued to deny driver's licenses to DACA recipients, who have EADs with a category code of (c)(33). *Id.* at 6. The revised policy also refused to accept EADs with a category code of (c)(14), which are issued to recipients of other forms of deferred action, and (a)(11), which are issued to recipients of deferred enforced departure. *Id.*; *see also* 8 CFR § 274a.12 (listing category codes of EAD holders). The revised policy continued to accept EADs with other category codes as sufficient proof of authorized presence under federal law. *See* Doc. 172-1 at 6. Defendants argue that, as revised, the 2013 policy does not violate the Equal Protection Clause. Doc. 247. The Ninth Circuit considered the revised policy and found, at the preliminary injunction stage, a likelihood

that the policy violates the Equal Protection Clause. *ADAC*, 757 F.3d at 1063-67.

IV. Present Position of Case.

Plaintiffs and Defendants have filed motions for summary judgment. Docs. 247, 251. Defendants' motion rests entirely on their argument that DACA recipients are not similarly situated to other EAD holders who may obtain driver's licenses under Arizona's revised policy. Plaintiffs' motion argues that DACA recipients are similarly situated to other EAD holders who may obtain driver's licenses. Plaintiffs also argue that although a heightened scrutiny should apply to Arizona's denial of driver's licenses to DACA recipients, Defendants' driver's license policy fails under any standard of review. Plaintiffs seek summary judgment in their favor and a permanent injunction.

The parties filed and briefed these motions before the Ninth Circuit had ruled on Plaintiffs' motion for a preliminary injunction. Although the Ninth Circuit's *DACA* decision does not control the outcome of the motions for summary judgment where new facts or evidence are presented, it does control questions of law:

> [T]he district court should abide by 'the general rule' that our decisions at the preliminary injunction phase do not constitute the law of the case. Any of our conclusions on pure issues of law, however, are binding. The district court must apply this law to the facts anew with consideration of the evidence presented in the merits phase.

Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agr., 499 F.3d

1108, 1114 (9th Cir. 2007) (citations omitted); *see also S. Oregon Barter Fair v. Jackson Cnty., Oregon*, 372 F.3d 1128, 1136 (9th Cir. 2004).

MOTIONS FOR SUMMARY JUDGMENT

I. Plaintiffs Are Similarly Situated.

To prevail on their equal protection claim, Plaintiffs "must make a showing that a class that is similarly situated has been treated disparately." *Christian Gospel Church, Inc. v. City and Cnty. of S.F.*, 896 F.2d 1221, 1225-26 (9th Cir. 1990). "The first step in equal protection analysis is to identify the state's classification of groups." *Country Classic Dairies, Inc. v. State of Mont., Dep't of Commerce Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). "The groups must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2012). The question is not whether DACA recipients are identical in every respect to other noncitizens who are eligible for a driver's license, but whether they are the same in respects relevant to the driver's license policy. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.").[3]

[3] Plaintiffs argue that the Equal Protection Clause does not require the Court to find that DACA recipients are similarly situated to other EAD holders who are eligible to receive driver's licenses. Doc. 261 at 20. It is true that identification of a "similarly situated class" is not always a requirement in Equal Protection cases. For example, in cases challenging statutes on the basis of their discriminatory purpose the Supreme Court has not discussed the

Defendants' policy initially prevented only DACA recipients from receiving driver's licenses. All other holders of EADs, including other deferred action recipients, could use their EADs to obtain licenses. Defendants subsequently amended their policy to bar two additional classes of EAD holders from receiving driver's licenses – persons in the (c)(14) category who had also received deferred action, albeit for reasons other than the DACA program, and persons in the (a)(11) category who had received deferred enforced departures. *See* Doc. 172-1 at 6; *see also* 8 CFR § 274a.12.

Defendants argue that DACA recipients are not similarly situated to the remaining EAD holders who are entitled to obtain driver's licenses because those persons either have lawful status in the United States, are on a path to lawful status, or have EADs that are tied to relief provided under the INA. Doc. 247 at 10-14. Defendants also argue that DACA recipients are not similarly situated because their authorization to stay – unlike the authorization of other EAD holders who may obtain a driver's license – is the result of prosecutorial discretion. *Id.*

"similarly situated" requirement. *See, e.g.*, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *see also* Giovanna Shay, *Similarly Situated*, 18 Geo. Mason L. Rev. 581, 598 (2011) (noting that the 'similarly situated' requirement "has never been viewed by the U.S. Supreme Court as a threshold hurdle to obtaining equal protection review on the merits"). The Court need not decide whether these cases control Plaintiffs' challenge, however, because the Court finds that DACA recipients are similarly situated to other EAD holders who are eligible to receive driver's licenses.

The Court does not agree. DACA recipients have been authorized by the federal government to remain in the United States for two years and have been granted the right to work through the issuance of EADs. Other noncitizens are in similar positions. For example, applicants for adjustment of status receive a (c)(9) code and applicants for suspension of deportation and cancellation of removal receive a (c)(10) code. 8 C.F.R. §§ 274a.12(c)(9)-(10). These persons have not been granted citizenship or lawful residence, but they have been permitted to remain and work in the United States while their applications are considered. These individuals may present their EADs to ADOT and obtain driver's licenses, while DACA recipients cannot. It is not a material difference that DACA recipients receive their authorization from an act of prosecutorial discretion and other EAD holders receive their authorization through a statutory provision. The fact remains that they all receive a form of authorization, and documents entitling them to work, from the federal government.

The Ninth Circuit provided this explanation about (c)(9) and (c)(10) recipients, with which the Court agrees:

> DACA recipients are similarly situated to other categories of noncitizens who may use [EADs] to obtain driver's licenses in Arizona. Even under Defendants' revised policy, Arizona issues driver's licenses to noncitizens holding [EADs] with category codes (c)(9) and (c)(10). These (c)(9) and (c)(10) [EADs] are issued to noncitizens who have applied for adjustment of

status and cancellation of removal, respectively. See 8 C.F.R. § 274a.12(c)(9)-(10). . . .

Defendants look to the statutory and regulatory availability of immigration relief for the (c)(9) and (c)(10) groups as a point of distinction. But individuals with (c)(10) employment authorization, for example, are not in the United States pursuant to any statutory provision while their applications are pending. With regard to adjustment of status, we have noted that "the submission of an application does not connote that the alien's immigration status has changed, as the very real possibility exists that the INS will deny the alien's application altogether." *Vasquez de Alcantar v. Holder*, 645 F.3d 1097, 1103 (9th Cir. 2011) (quoting *United States v. Elrawy*, 448 F.3d 309, 313 (5th Cir. 2006)).

In sum, like DACA recipients, many noncitizens who have applied for adjustment of status and cancellation of removal possess no formal lawful immigration status, and may never obtain any. *See Guevara v. Holder*, 649 F.3d 1086, 1095 (9th Cir. 2011). Like DACA recipients, noncitizens who have applied for adjustment of status and cancellation of removal often have little hope of obtaining formal immigration status in the foreseeable future. Indeed, those with (c)(10) documents are already in removal proceedings, while many DACA recipients are not – suggesting that individuals in the (c)(10) category are more, not less, likely to be removed in the near future than are DACA recipients. In the relevant respects, then, noncitizens with

> (c)(9) and (c)(10) employment authorization documents are similarly situated to DACA recipients.
>
> Unlike DACA recipients, however, noncitizens holding (c)(9) and (c)(10) [EADs] may use those documents when applying for Arizona driver's licenses to prove — to the satisfaction of the Arizona Department of Transportation — that their presence in the United States is authorized under federal law. As the district court found, these two groups of noncitizens account for more than sixty-six percent of applicants who obtained Arizona driver's licenses using [EADs] during the past seven years. Although DACA recipients are similarly situated to noncitizens holding (c)(9) and (c)(10) [EADs], they have been treated disparately.

ADAC, 757 F.3d at 1064.[4]

Other categories of noncitizens who receive driver's licenses under Defendants' current policy are also similarly situated to DACA recipients. For example, individuals who receive a discretionary grant of parole are authorized to be present in the United States and are eligible for EADs (coded (c)(11)) although they lack formal immigration status, are not necessarily eligible for obtaining such a status, and are not even

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[4] Defendants argue that the Ninth Circuit's decision is not binding at this summary judgment stage. Defendants also argue, however, that Plaintiffs' "similarly situated" claim "fails as a matter of law." Doc. 273 at 11; *see also* Doc. 269 at 2. Defendants thus concede that the "similarly situated" issue in this case is a question of law, on which the Ninth Circuit's decision does control. *Ranchers Cattlemen*, 499 F.3d at 1114.

considered admitted. *See* 8 U.S.C. § 1182(d)(5)(A). Parolees lack any avenue for obtaining lawful immigration status, and yet they may obtain an Arizona driver's license on the basis of their EADs.[5]

Defendants argue that DACA recipients are still in the country illegally because the Secretary of DHS lacked the authority to grant them deferred status. Doc. 247 at 12-14. Defendants rely on a district court decision in *Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 1744422 (N.D. Tex. Apr. 23, 2013). In *Crane*, immigration enforcement agents argued that the DACA program forced them to violate 8 U.S.C. § 1225, which requires immigration officers to initiate removal proceedings when they determine that "an alien seeking admission is not clearly and beyond a doubt entitled to be admitted." *Id.* at *5. In response to the plaintiffs' motion for a preliminary injunction, the district court addressed whether the plaintiffs were likely to succeed on the merits of their claim that the DACA program conflicts with § 1225 by forbidding immigration officers from initiating removal proceedings against certain unauthorized aliens. *Id.* at *13. Although the district court found that the

[5] The relevant statute on the status of parolees provides: "The Attorney General may, . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall . . . have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U.S.C. § 1182(d)(5)(A).

plaintiffs were likely to succeed on this claim, it did not grant a preliminary injunction because of concerns over whether it had subject matter jurisdiction. *Id.* at *19. After additional briefing, the court dismissed the case for lack of subject-matter jurisdiction. *See Crane v. Napolitano*, No. 3:12-CV-03247-O, 2013 WL 8211660 (N.D. Tex. July 31, 2013).

Crane did not hold the DACA program invalid. It concluded that the plaintiffs were likely to succeed on the merits of their DACA-related arguments, but then found that it lacked subject matter jurisdiction to address the issue at all. *Crane* is less than dictum from a fellow district court – it is a preliminary conclusion from a court that lacked subject matter jurisdiction to reach even a preliminary conclusion. Furthermore, *Crane*'s holding was limited to a finding that the DHS lacked the "discretion to refuse to initiate removal proceedings when the requirements of Section 1225(b)(2)(A) are satisfied." *Crane*, 2013 WL 1744422, at *13. Defendants do not address whether the requirements of that section are satisfied by any Plaintiffs in this case. Finally, although *Crane* preliminarily concluded that DHS was required to initiate removal proceedings against DACA recipients, it also expressly noted that DHS could then exercise its discretion to terminate the proceedings and permit the unauthorized aliens to remain in the United States. *See id.* at *24.

Other authorities have recognized that noncitizens on deferred action status are lawfully permitted 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"); *In re Pena-Diaz*, 20 I.&N. Dec. 841, 846 (B.I.A. 1994) (deferred action status "affirmatively permit[s] the alien to remain"); 8 C.F.R. § 1.3(a)(4)(vi) (persons "currently in deferred action status" are "permitted to remain in" and are "lawfully present in the United States").

The Court concludes that DACA recipients are similarly situated in all relevant respects to noncitizens who are permitted by the State to obtain driver's licenses on the basis of EADs. DACA recipients are treated differently for purposes of equal protection.

II. Level of Scrutiny.

Although it implied that strict scrutiny should apply (757 F.3d at 1065 n.4), the Ninth Circuit in *ADAC* elected not to address the level of scrutiny applicable to Defendants' driver's license policy: "we need not decide what standard of scrutiny applies to Defendants' policy: as the district court concluded, Defendants' policy is likely to fail even rational basis review." *ADAC*, 757 F.3d at 1065 (citation omitted). The Ninth Circuit went on to assess whether "Defendants' disparate treatment of DACA recipients [was] 'rationally related to a legitimate state interest.'" *Id.* (citation omitted). The Ninth Circuit did not state that it was applying a more rigorous form of rational basis of review, as had this Court in its preliminary injunction decision. *See* Doc. 114 at 24-27.

The Ninth Circuit examined each of the justifications proffered by Defendants in support of their policy, considered whether the justifications were supported by evidence or consistent with Defendants'

other actions, and found "no legitimate state interest that is rationally related to Defendants' decision to treat DACA recipients disparately from noncitizens holding (c)(9) and (c)(10) [EADs]." 757 F.3d at 1065-67. This form of rational basis review appears to be more rigorous than the traditional approach, under which "a classification . . . is accorded a strong presumption of validity. . . . [A] classification 'must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a rational basis for the classification*.'" *Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (emphasis added; citations omitted). Because the rigorousness of equal protection review is a question of law, the Court feels bound to apply the form of rational basis scrutiny applied in *ADAC*. *See Ranchers Cattlemen*, 499 F.3d at 1114.[6]

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[6] In ruling on the preliminary injunction, this Court applied a more rigorous form of rational basis review after concluding that the reason for Defendants' policy was Governor Brewer's political disagreement with the Obama Administration's DACA program. *See* Doc. 114 at 24-28. Defendants have now presented evidence that the State may have adopted the new policy for a different reason – ADOT's conclusion that DACA recipients do not have authorized presence under federal law. *See* Docs. 270-3 at 50; 270-4 at 59, 93. Although this evidence might create a question of fact as to why Defendants adopted their policy, that reason appears to be irrelevant under the Ninth Circuit's rational basis scrutiny. *ADAC* did not base the rigorousness of its review on Defendants' reason for adopting the policy. 757 F.3d at 1065. Defendants' evidence on this issue, therefore, does not preclude summary judgment. *See* Fed. R. Civ. P. 56(a) (summary judgment is warranted if "there is no genuine dispute as to any *material* fact and the movant is entitled to judgment as a matter of law") (emphasis added).

III. Application.

Defendants rely on four rational bases for their policy: (1) DACA recipients may not have authorized presence under federal law, and ADOT therefore could face liability for issuing up to 80,000 driver's licenses to unauthorized aliens or for not cancelling those licenses quickly enough if the DACA program is subsequently determined to be unlawful; (2) issuing driver's licenses to DACA recipients could allow those individuals to access 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 for DACA recipients and then cancel those licenses if DACA were revoked; and (4) if DACA were revoked or if DHS commenced removal proceedings against any DACA recipient, as it could at any time, then the DACA recipient would be subject to immediate deportation or removal and that individual could escape financial responsibility for property damage or personal injury caused in automobile accidents. Doc. 269 at 17-20. The Ninth Circuit considered each of these justifications and found that none of them satisfies rational basis review. 757 F.3d at 1066-67.[7]

As their first justification, Defendants argue that they had uncertainty about whether DACA recipients

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[7] Defendants present no new evidence in support of these justifications, arguing instead that a "government actor need not have specific evidence to validate a reasonable concern for the purposes of rational basis analysis." Doc. 270, ¶ 176; *see also id.*, ¶¶ 152, 160-161, 171, 177-78. As noted above, however, the *ADAC* did not apply this deferential level of review. Because Defendants have presented no new evidence on these justifications, the decision in *ADAC* controls. *See Ranchers Cattlemen*, 499 F.3d at 1114.

have an authorized presence in the United States under federal law and were concerned that they might face liability if they issued licenses to unauthorized persons. Doc. 269 at 18. In their depositions, however, ADOT Director Halikowski and Assistant Director Stanton could identify no instances where ADOT faced liability for issuing licenses to individuals who lacked authorized presence. Docs. 259-3, ¶¶ 152-53; 270, ¶¶ 152-53. Halikowski provided only one example of potential state liability – when ADOT had improperly issued a driver's license to a person convicted of driving under the influence of alcohol (Doc. 270, ¶ 152; Doc. 270-4 at 62) – an instance quite unrelated to the prospect of issuing a license to a person presenting a federally-issued EAD as proof of lawful presence under federal law. Stanton could provide no examples. Doc. 259-6 at 298. Thus, the evidence does not support Defendants' first justification. *See ADAC*, 757 F.3d at 1066.

Second, Defendants express concern that issuing driver's licenses to DACA recipients could lead to improper access to federal and state benefits. But as the Ninth Circuit recognized, "Defendant Halikowski . . . and Defendant Stanton . . . testified that they had *no* basis whatsoever for believing that a driver's license alone could be used to establish eligibility for such benefits. It follows that Defendants have no *rational* basis for any such belief." *Id.* at 1066 (emphasis in original); *see also* Doc. 259-6 at 262, 302. Furthermore, although Defendants no longer issue driver's licenses to (a)(11) and (c)(14) EAD holders, they have made no attempt to revoke licenses previously issued to these types of EAD holders. Doc. 259-6 at 283, 316.

Third, Defendants assert that because the DACA program might be canceled, ADOT might be burdened by having to process a large number of driver's licenses for DACA recipients and then cancel those licenses. But the depositions of Halikowski and Stanton show a general lack of knowledge regarding any revocation process. *See* Doc. 254-2 at 266, 300-01. Also, as the Ninth Circuit recognized, "it is *less* likely that Arizona will need to revoke DACA recipients' driver's licenses, compared to driver's licenses issued to noncitizens holding (c)(9) and (c)(10) [EADs]. While Defendants' concern for DACA's longevity is purely speculative, applications for adjustment of status or cancellation of removal are routinely denied." *ADAC*, 757 F.3d at 1066-67 (emphasis in original).

Fourth, Defendants argue that DACA recipients may have their status revoked at any time and may be removed quickly from the country, leaving those they have injured in accidents with no financial recourse. The Ninth Circuit responded:

> Here too, however, Defendants' professed concern applies with equal force to noncitizens holding (c)(9) and (c)(10) [EADs]. Noncitizens who have applied for adjustment of status or cancellation of removal may find their applications denied at any time, and thereafter may be quickly removed from the United States, leaving those they may have injured in automobile accidents with no financial recourse. Nevertheless, Defendants' policy allows noncitizens holding (c)(9) and (c)(10) [EADs] to obtain driver's licenses, while prohibiting DACA recipients from doing the same.

ADAC, 757 F.3d at 1067. If Defendants were genuinely concerned about persons being removed from the country and leaving those injured in accidents without financial recourse, they would not allow (c)(9) and (c)(10) EAD holders to obtain driver's licenses.

Although not directly argued, Defendants have suggested two additional rational bases for their policy. Defendants argue that their concern about "consistent application of ADOT policy" provides a rational basis. *See* Docs. 269 at 19-20; 270, ¶ 151. They point to ADOT's three criteria for determining whether an EAD is sufficient proof of authorized presence – criteria that supposedly treat equally those who have formal immigration status, are on a path to obtaining formal immigration status, or who receive relief expressly provided for in the INA. Doc. 248, ¶ 31. But the same policy grants driver's licenses to (c)(9) and (c)(10) applicants even though they do not appear to satisfy these requirements. As the Ninth Circuit noted in *ADAC*, "we are unconvinced that Defendants have defined a 'path to lawful status' in any meaningful way. After all, noncitizens' applications for adjustment of status or cancellation of removal [(c)(9) and (c)(10) holders] are often denied, so the supposed 'path' may lead to a dead end." 757 F.3d at 1065.

Defendants also argue that their driver's license policy is "rationally related to ADOT's statutory obligation in administering A.R.S. § 28-3153(D)." Doc. 269 at 17. But as noted above, Defendants' granting of driver's licenses to (c)(9) and (c)(10) applicants who present EADs does not appear to be more consistent with § 28-3153(D) – which requires that the applicant's presence be authorized by federal law – than granting

of licenses to similarly situated DACA recipients who presents EADs.

In summary, the Court concludes that Defendants' distinction between DACA recipients and other EAD holders does not satisfy rational basis review. While Defendants have articulated concerns that may be legitimate state interests, they have not shown that the exclusion of DACA recipients is rationally related to those interests. The Court is not saying that the Constitution requires the State of Arizona to grant driver's licenses to all noncitizens. But if the State chooses to confer licenses on some individuals who have been temporarily authorized to stay by the federal government, it may not deny them to similarly situated individuals without a rational basis for the distinction.

REQUEST FOR A PERMANENT INJUNCTION

I. Legal Standard.

An injunction is "an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008). A plaintiff seeking a permanent injunction must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, LLC.*, 547 U.S. 388, 391 (2006). "While '[t]he decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court,' the 'traditional principles of equity' demand a

fair weighing of the factors listed above, taking into account the unique circumstances of each case." *La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 880 (9th Cir. 2014) (quoting *eBay*, 547 U.S. at 391, 394).

II. Irreparable Harm and Adequacy of Legal Remedies.

A. Harm to Individual Plaintiffs.

The Ninth Circuit found that the individual Plaintiffs are suffering irreparable harm as a result of Defendants' policy:

> Plaintiffs in this case have produced ample evidence that Defendants' policy causes them to suffer irreparable harm. In particular, Plaintiffs' inability to obtain driver's licenses likely causes them irreparable harm by limiting their professional opportunities. Plaintiffs' ability to drive is integral to their ability to work – after all, eighty-seven percent of Arizona workers commute to work by car. It is unsurprising, then, that Plaintiffs' inability to obtain driver's licenses has hurt their ability to advance their careers. Plaintiffs' lack of driver's licenses has prevented them from applying for desirable entry-level jobs, and from remaining in good jobs where they faced possible promotion. Likewise, one Plaintiff – who owns his own business – has been unable to expand his business to new customers who do not live near his home. Plaintiffs' lack of driver's licenses has, in short, diminished their opportunity to pursue their chosen professions. This "loss of opportunity to

> pursue [Plaintiffs'] chosen profession[s]" constitutes irreparable harm.

ADAC, 757 F.3d at 1068.

In their summary judgment briefing, Plaintiffs have presented uncontradicted evidence that their inability to obtain a driver's license has caused a "loss of opportunity to pursue [their] chosen profession." *Id*. One Plaintiff is a self-employed graphic designer. Doc. 259-6 at 333. Because she is unable to obtain a driver's license, she relies on public transportation. Doc. 259-7 at 421. Using public transportation instead of a car causes her to spend roughly the same amount of time working on her clients' projects as she does travelling to meet those clients. Doc. 259-6 at 334. Plaintiff's inability to drive has forced her to decline work from clients. *Id.* at 342-45; Doc. 259-7 at 423. Another Plaintiff is interested in becoming an Emergency Medical Technician. Doc. 259-7 at 34. He has been unable to pursue this career because the local fire department requires a driver's license for employment. *Id.* at 35. A third Plaintiff turned down a job opportunity partly because she was unable to drive with a driver's license. *Id.* at 155-56. Other Plaintiffs have been unable to pursue new jobs or develop business opportunities because of their inability to drive. *See, e.g.*, Doc. 259-3, ¶¶ 264-77.

The Court finds that the denial of driver's licenses has caused Plaintiffs irreparable harm. Although Defendants dispute the extent and details of Plaintiffs' harm (Doc. 269 at 25-31), they have not shown that there is a genuine issue as to whether the individual Plaintiffs have lost employment opportunities. The Court finds that monetary damages cannot fully

compensate Plaintiffs for their harm and that legal remedies are inadequate. *See Chalk v. U.S. Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701, 709 (9th Cir. 1988) (finding that an alternate job that did not use plaintiff's "skills, training or experience [was a] non-monetary deprivation" and a "substantial injury").

B. Harm to Coalition Members.

The Arizona Dream Act Coalition has brought suit both on its own behalf and on behalf of its members. Doc. 173, ¶ 18. The Coalition claims that Defendants' policy has irreparably harmed its members by depriving them of employment opportunities. Doc. 259-2 at 37-38. The Court agrees. One Coalition member currently works in a temporary position. Doc. 259-7 at 3. She has been unable to acquire a permanent position at her place of work because such a position requires a driver's license. *Id.* Another member works as a nutritionist, although she has been trained as a diet technician. *Id.* at 199-202, 225-26. She was not able to pursue a job opportunity as a diet technician because her employer required that she have a driver's license. *Id.* at 236-37. As with the individual plaintiffs, the Coalition has shown that Defendants' policy has caused its members to lose opportunities to pursue their chosen professions. The Court finds this to be an irreparable harm that is not compensable by legal remedies. *ADAC*, 757 F.3d at 1068.[8]

[8] Because of this conclusion, the Court finds it unnecessary to address whether the Coalition as an organization has suffered irreparable harm to its organizational mission. *See* Doc. 259-2 at 38 (citing *Valle del Sol v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013)).

III. Balance of Hardships and the Public Interest.

In deciding whether to grant a permanent injunction, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. . . [and] should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quotation marks and citations omitted); *see Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987) (finding that the standards for a permanent injunction are "essentially the same" as for a preliminary injunction). Addressing these factors, the Ninth Circuit held:

> [B]y establishing a likelihood that Defendants' policy violates the U.S. Constitution, Plaintiffs have also established that both the public interest and the balance of the equities favor a preliminary injunction. It 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. On the contrary, the public interest and the balance of the equities favor prevent[ing] the violation of a party's constitutional rights.

ADAC, 757 F.3d at 1069 (quotation marks and citations omitted).

The Court agrees. The government "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). And the public has little interest in

Defendants' continuing a policy that violates the Equal Protection Clause.

IV. Scope of Injunction.

The parties disagree on whether the Court should enter an injunction that applies to all DACA recipients, as opposed to applying merely to the named plaintiffs in this action. Docs. 288, 290. The Ninth Circuit has held that an injunction should be limited to the named plaintiffs unless the court has certified a class. *Zepeda v. I.N.S.*, 753 F.2d 719, 727-28 & n.1 (9th Cir. 1983). The Ninth Circuit has also held, however, that an injunction is not overbroad because it extends benefits to persons other than those before the Court "if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996) (quoting *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987)). Because the Coalition seeks relief on behalf of its members, the Court concludes that the permanent injunction should apply to all DACA recipients. Requiring state officials at driver's license windows to distinguish between DACA recipients who are members of the Coalition and those who are not is impractical, and granting an injunction only with respect to the named plaintiffs would not grant the Coalition the relief it seeks on behalf of its members.

IT IS ORDERED:

1. Plaintiffs' motion for summary judgment and a permanent injunction (Doc. 251) is **granted.**

2. Defendants' motion for summary judgment (Doc. 247) is **denied.**

3. Defendants and their officials, agents, and employees, and all persons acting in concert or participating with them, are permanently enjoined from enforcing any policy or practice by which the Arizona Department of Transportation refuses to accept Employment Authorization Documents, issued under DACA, as proof that the document holders are authorized under federal law to be present in the United States for purposes of obtaining a driver's license or state identification card.

4. The Clerk is directed to terminate this action.

Dated this 22nd day of January, 2015.

/s/_____
David G. Campbell
United States District Judge

APPENDIX F

(ORDER LIST: 574 U.S.)

WEDNESDAY, DECEMBER 17, 2014

ORDER IN PENDING CASE

14A625 BREWER, GOV. OF AZ, ET AL. V. ARIZONA DREAM ACT COALITION, ET AL.

The application for stay presented to Justice Kennedy and by him referred to the Court is denied.

Justice Scalia, Justice Thomas, and Justice Alito would grant the application for stay.

APPENDIX G

The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others

The Department of Homeland Security's proposed policy to prioritize the removal of certain aliens unlawfully present in the United States would be a permissible exercise of DHS's discretion to enforce the immigration laws.

The Department of Homeland Security's proposed deferred action program for parents of U.S. citizens and legal permanent residents would also be a permissible exercise of DHS's discretion to enforce the immigration laws.

The Department of Homeland Security's proposed deferred action program for parents of recipients of deferred action under the Deferred Action for Childhood Arrivals program would not be a permissible exercise of DHS's enforcement discretion.

November 19, 2014

MEMORANDUM OPINION FOR THE SECRETARY OF HOMELAND SECURITY AND THE COUNSEL TO THE PRESIDENT

You have asked two questions concerning the scope of the Department of Homeland Security's discretion to enforce the immigration laws. First, you have asked

whether, in light of the limited resources available to the Department ("DHS") to remove aliens unlawfully present in the United States, it would be legally permissible for the Department to implement a policy prioritizing the removal of certain categories of aliens over others. DHS has explained that although there are approximately 11.3 million undocumented aliens in the country, it has the resources to remove fewer than 400,000 such aliens each year. DHS's proposed policy would prioritize the removal of aliens who present threats to national security, public safety, or border security. Under the proposed policy, DHS officials could remove an alien who did not fall into one of these categories provided that an Immigration and Customs Enforcement ("ICE") Field Office Director determined that "removing such an alien would serve an important federal interest." Draft Memorandum for Thomas S. Winkowski, Acting Director, ICE, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants* at 5 (Nov. 17, 2014) ("Johnson Prioritization Memorandum").

Second, you have asked whether it would be permissible for DHS to extend deferred action, a form of temporary administrative relief from removal, to certain aliens who are the parents of children who are present in the United States. Specifically, DHS has proposed to implement a program under which an alien could apply for, and would be eligible to receive, deferred action if he or she is not a DHS removal priority under the policy described above; has continuously resided in the United States since before January 1, 2010; has a child who is either a U.S. citizen or a lawful permanent resident; is physically present in

the United States both when DHS announces its program and at the time of application for deferred action; and presents "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Draft Memorandum for Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and Others* at 4 (Nov. 17, 2014) ("Johnson Deferred Action Memorandum"). You have also asked whether DHS could implement a similar program for parents of individuals who have received deferred action under the Deferred Action for Childhood Arrivals ("DACA") program.

As has historically been true of deferred action, these proposed deferred action programs would not "legalize" any aliens who are unlawfully present in the United States: Deferred action does not confer any lawful immigration status, nor does it provide a path to obtaining permanent residence or citizenship. Grants of deferred action under the proposed programs would, rather, represent DHS's decision not to seek an alien's removal for a prescribed period of time. *See generally Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 483-84 (1999) (describing deferred action). Under decades-old regulations promulgated pursuant to authority delegated by Congress, *see* 8 U.S.C. §§ 1103(a)(3), 1324a(h)(3), aliens who are granted deferred action—like certain other categories of aliens who do not have lawful immigration status, such as asylum applicants—may apply for authorization to work in the United States in certain circumstances, 8 C.F.R. § 274a.12(c)(l4) (providing that deferred action

recipients may apply for work authorization if they can show an "economic necessity for employment"); *see also* 8 C.F.R. § 109.1(b)(7) (1982). Under DHS policy guidance, a grant of deferred action also suspends an alien's accrual of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I), provisions that restrict the admission of aliens who have departed the United States after having been unlawfully present for specified periods of time. A grant of deferred action under the proposed programs would remain in effect for three years, subject to renewal, and could be terminated at any time at DHS's discretion. *See* Johnson Deferred Action Memorandum at 2, 5.

For the reasons discussed below, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be permissible exercises of DHS's discretion to enforce the immigration laws. We further conclude that, as it has been described to us, the proposed deferred action program for parents of DACA recipients would not be a permissible exercise of enforcement discretion.

I.

We first address DHS's authority to prioritize the removal of certain categories of aliens over others. We begin by discussing some of the sources and limits of DHS's enforcement discretion under the immigration laws, and then analyze DHS's proposed prioritization policy in light of these considerations.

A.

DHS's authority to remove aliens from the United States rests on the Immigration and Nationality Act of

1952 ("INA"), as amended, 8 U.S.C. §§ 1101 *et seq*. In the INA, Congress established a comprehensive scheme governing immigration and naturalization. The INA specifies certain categories of aliens who are inadmissible to the United States. *See* 8 U.S.C. § 1182. It also specifies "which aliens may be removed from the United States and the procedures for doing so." *Arizona v. United States,* 132 S. Ct. 2492, 2499 (2012). "Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Id.* (citing 8 U.S.C. § 1227); *see* 8 U.S.C. § 1227(a) (providing that "[a]ny alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien" falls within one or more classes of deportable aliens); *see also* 8 U.S.C. § 1182(a) (listing classes of aliens ineligible to receive visas or be admitted to the United States). Removal proceedings ordinarily take place in federal immigration courts administered by the Executive Office for Immigration Review, a component of the Department of Justice. *See id.* § 1229a (governing removal proceedings); *see also id.* §§ 1225(b)(1)(A), 1228(b) (setting out expedited removal procedures for certain arriving aliens and certain aliens convicted of aggravated felonies).

Before 2003, the Department of Justice, through the Immigration and Naturalization Service ("INS"), was also responsible for providing immigration-related administrative services and generally enforcing the immigration laws. In the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, Congress transferred most of these functions to DHS, giving it primary responsibility both for initiating removal proceedings and for carrying out final orders of

removal. *See* 6 U.S.C. §§ 101 *et seq.*; *see also Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005) (noting that the immigration authorities previously exercised by the Attorney General and INS "now reside" in the Secretary of Homeland Security and DHS). The Act divided INS's functions among three different agencies within DHS: U.S. Citizenship and Immigration Services ("USCIS"), which oversees legal immigration into the United States and provides immigration and naturalization services to aliens; ICE, which enforces federal laws governing customs, trade, and immigration; and U.S. Customs and Border Protection ("CBP"), which monitors and secures the nation's borders and ports of entry. *See* Pub. L. No. 107-296, §§ 403, 442, 451, 471, 116 Stat. 2135, 2178, 2193, 2195, 2205; *see also Name Change From the Bureau of Citizenship and Immigration Services to U.S. Citizenship and Immigration Services*, 69 Fed. Reg. 60938, 60938 (Oct. 13, 2004); *Name Change of Two DHS Components*, 75 Fed. Reg. 12445, 12445 (Mar. 16, 2010). The Secretary of Homeland Security is thus now "charged with the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1).

As a general rule, when Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action. This discretion is rooted in the President's constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and it reflects a recognition that the "faithful[]" execution of the law does not necessarily entail "act[ing] against

each technical violation of the statute" that an agency is charged with enforcing. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Rather, as the Supreme Court explained in *Chaney*, the decision whether to initiate enforcement proceedings is a complex judgment that calls on the agency to "balanc[e] . . . a number of factors which are peculiarly within its expertise." *Id.* These factors include "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and . . . whether the agency has enough resources to undertake the action at all." *Id.* at 831; *cf. United States v. Armstrong*, 517 U.S. 456, 465 (1996) (recognizing that exercises of prosecutorial discretion in criminal cases involve consideration of "'[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan'" (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985))). In *Chaney*, the Court considered and rejected a challenge to the Food and Drug Administration's refusal to initiate enforcement proceedings with respect to alleged violations of the Federal Food, Drug, and Cosmetic Act, concluding that an agency's decision not to initiate enforcement proceedings is presumptively immune from judicial review. *See* 470 U.S. at 832. The Court explained that, while Congress may "provide[] guidelines for the agency to follow in exercising its enforcement powers," in the absence of such "legislative direction," an agency's non-enforcement determination is, much like a prosecutor's decision not to indict, a "special province of the Executive." *Id.* at 832-33.

The principles of enforcement discretion discussed in *Chaney* apply with particular force in the context of immigration. Congress enacted the INA against a background understanding that immigration is "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (internal quotation marks omitted). Consistent with this understanding, the INA vested the Attorney General (now the Secretary of Homeland Security) with broad authority to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the statute. 8 U.S.C. § 1103(a)(3). Years later, when Congress created the Department of Homeland Security, it expressly charged DHS with responsibility for "[e]stablishing national immigration enforcement policies and priorities." Homeland Security Act of 2002, Pub. L. No. 107-296, § 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. § 202(5)).

With respect to removal decisions in particular, the Supreme Court has recognized that "the broad discretion exercised by immigration officials" is a "principal feature of the removal system" under the INA. *Arizona*, 132 S. Ct. at 2499. The INA expressly authorizes immigration officials to grant certain forms of discretionary relief from removal for aliens, including parole, 8 U.S.C. § 1182(d)(5)(A); asylum, *id.* § 1158(b)(1)(A); and cancellation of removal, *id.* § 1229b. But in addition to administering these statutory forms of relief, "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Arizona*, 132 S. Ct. at 2499.

And, as the Court has explained, "[a]t each stage" of the removal process—"commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders"—immigration officials have "discretion to abandon the endeavor." *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 483 (quoting 8 U.S.C. § 1252(g) (alterations in original)). Deciding whether to pursue removal at each of these stages implicates a wide range of considerations. As the Court observed in *Arizona*:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations . . . . The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

132 S. Ct. at 2499.

Immigration officials' discretion in enforcing the laws is not, however, unlimited. Limits on enforcement

discretion are both implicit in, and fundamental to, the Constitution's allocation of governmental powers between the two political branches. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952). These limits, however, are not clearly defined. The open-ended nature of the inquiry under the Take Care Clause—whether a particular exercise of discretion is "faithful[]" to the law enacted by Congress—does not lend itself easily to the application of set formulas or bright-line rules. And because the exercise of enforcement discretion generally is not subject to judicial review, *see Chaney*, 470 U.S. at 831–33, neither the Supreme Court nor the lower federal courts have squarely addressed its constitutional bounds. Rather, the political branches have addressed the proper allocation of enforcement authority through the political process. As the Court noted in *Chaney,* Congress "may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Id.* at 833. The history of immigration policy illustrates this principle: Since the INA was enacted, the Executive Branch has on numerous occasions exercised discretion to extend various forms of immigration relief to categories of aliens for humanitarian, foreign policy, and other reasons. When Congress has been dissatisfied with Executive action, it has responded, as *Chaney* suggests, by enacting legislation to limit the Executive's discretion in enforcing the immigration laws.[1]

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[1] *See, e.g.*, Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 503–05 (2009) (describing Congress's response to its dissatisfaction with the

Nonetheless, the nature of the Take Care duty does point to at least four general (and closely related) principles governing the permissible scope of enforcement discretion that we believe are particularly relevant here. First, enforcement decisions should reflect "factors which are peculiarly within [the enforcing agency's] expertise." *Chaney*, 470 U.S. at 831. Those factors may include considerations related to agency resources, such as "whether the agency has enough resources to undertake the action," or "whether agency resources are best spent on this violation or another." *Id.* Other relevant considerations may include "the proper ordering of [the agency's] priorities," *id.* at 832, and the agency's assessment of "whether the particular enforcement action [at issue] best fits the agency's overall policies," *id.* at 831.

Second, the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences. *See id.* at 833 (an agency may not "disregard legislative direction in the statutory scheme that [it] administers"). In other words, an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering. *Cf. Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."); *Nat'l Ass'n*

Executive's use of parole power for refugee populations in the 1960s and 1970s); *see also, e.g.*, *infra* note 5 (discussing legislative limitations on voluntary departure and extended voluntary departure).

of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (explaining that where Congress has given an agency the power to administer a statutory scheme, a court will not vacate the agency's decision about the proper administration of the statute unless, among other things, the agency "'has relied on factors which Congress had not intended it to consider'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))).

Third, the Executive Branch ordinarily cannot, as the Court put it in *Chaney*, "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)); *see id.* (noting that in situations where an agency had adopted such an extreme policy, "the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion'"). Abdication of the duties assigned to the agency by statute is ordinarily incompatible with the constitutional obligation to faithfully execute the laws. *But see, e.g.*, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (noting that under the Take Care Clause, "the President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law").

Finally, lower courts, following *Chaney*, have indicated that non-enforcement decisions are most comfortably characterized as judicially unreviewable exercises of enforcement discretion when they are made on a case-by-case basis. *See, e.g.*, *Kenney v. Glickman*,

96 F.3d 1118, 1123 (8th Cir. 1996); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676–77 (D.C. Cir. 1994). That reading of *Chaney* reflects a conclusion that case-by-case enforcement decisions generally avoid the concerns mentioned above. Courts have noted that "single-shot non-enforcement decisions" almost inevitably rest on "the sort of mingled assessments of fact, policy, and law . . . that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion." *Crowley Caribbean Transp.,* 37 F.3d at 676–77 (emphasis omitted). Individual enforcement decisions made on the basis of case-specific factors are also unlikely to constitute "general polic[ies] that [are] so extreme as to amount to an abdication of [the agency's] statutory responsibilities." *Id.* at 677 (quoting *Chaney*, 477 U.S. at 833 n.4). That does not mean that all "general policies" respecting non-enforcement are categorically forbidden: Some "general policies" may, for example, merely provide a framework for making individualized, discretionary assessments about whether to initiate enforcement actions in particular cases. *Cf. Reno v. Flores*, 507 U.S. 292, 313 (1993) (explaining that an agency's use of "reasonable presumptions and generic rules" is not incompatible with a requirement to make individualized determinations). But a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses "special risks" that the agency has exceeded the bounds of its enforcement discretion. *Crowley Caribbean Transp.,* 37 F.3d at 677.

B.

We now turn, against this backdrop, to DHS's proposed prioritization policy. In their exercise of

enforcement discretion, DHS and its predecessor, INS, have long employed guidance instructing immigration officers to prioritize the enforcement of the immigration laws against certain categories of aliens and to deprioritize their enforcement against others. *See, e.g.*, INS Operating Instructions § 103(a)(1)(i) (1962); Memorandum for All Field Office Directors, ICE, et al., from John Morton, Director, ICE, *Re: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011); Memorandum for All ICE Employees, from John Morton, Director, ICE, *Re: Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011); Memorandum for Regional Directors, INS, et al., from Doris Meissner, Commissioner, INS, *Re: Exercising Prosecutorial Discretion* (Nov. 17, 2000). The policy DHS proposes, which is similar to but would supersede earlier policy guidance, is designed to "provide clearer and more effective guidance in the pursuit" of DHS's enforcement priorities; namely, "threats to national security, public safety and border security." Johnson Prioritization Memorandum at 1.

Under the proposed policy, DHS would identify three categories of undocumented aliens who would be priorities for removal from the United States. *See generally id.* at 3–5. The highest priority category would include aliens who pose particularly serious threats to national security, border security, or public safety, including aliens engaged in or suspected of espionage or terrorism, aliens convicted of offenses related to participation in criminal street gangs, aliens convicted of certain felony offenses, and aliens

apprehended at the border while attempting to enter the United States unlawfully. *See id.* at 3. The second-highest priority would include aliens convicted of multiple or significant misdemeanor offenses; aliens who are apprehended after unlawfully entering the United States who cannot establish that they have been continuously present in the United States since January 1, 2014; and aliens determined to have significantly abused the visa or visa waiver programs. *See id.* at 3–4. The third priority category would include other aliens who have been issued a final order of removal on or after January 1, 2014. *See id.* at 4. The policy would also provide that none of these aliens should be prioritized for removal if they "qualify for asylum or another form of relief under our laws." *Id.* at 3–5.

The policy would instruct that resources should be directed to these priority categories in a manner "commensurate with the level of prioritization identified." *Id.* at 5. It would, however, also leave significant room for immigration officials to evaluate the circumstances of individual cases. *See id.* (stating that the policy "requires DHS personnel to exercise discretion based on individual circumstances"). For example, the policy would permit an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations to deprioritize the removal of an alien falling in the highest priority category if, in her judgment, "there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority." *Id.* at 3. Similar discretionary provisions would apply to

aliens in the second and third priority categories.[2] The policy would also provide a non-exhaustive list of factors DHS personnel should consider in making such deprioritization judgments.[3] In addition, the policy would expressly state that its terms should not be construed "to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities," and would further provide that "[i]mmigration officers and attorneys may pursue removal of an alien not identified as a priority" if, "in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest." *Id.* at 5.

DHS has explained that the proposed policy is designed to respond to the practical reality that the number of aliens who are removable under the INA

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[2] Under the proposed policy, aliens in the second tier could be deprioritized if, "in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority." Johnson Prioritization Memorandum at 4. Aliens in the third tier could be deprioritized if, "in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority." *Id*. at 5.

[3] These factors include "extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child or a seriously ill relative." Johnson Prioritization Memorandum at 6.

vastly exceeds the resources Congress has made available to DHS for processing and carrying out removals. The resource constraints are striking. As noted, DHS has informed us that there are approximately 11.3 million undocumented aliens in the country, but that Congress has appropriated sufficient resources for ICE to remove fewer than 400,000 aliens each year, a significant percentage of whom are typically encountered at or near the border rather than in the interior of the country. *See* E-mail for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from David Shahoulian, Deputy General Counsel, DHS, *Re: Immigration Opinion* (Nov. 19, 2014) ("Shahoulian E-mail"). The proposed policy explains that, because DHS "cannot respond to all immigration violations or remove all persons illegally in the United States," it seeks to "prioritize the use of enforcement personnel, detention space, and removal assets" to "ensure that use of its limited resources is devoted to the pursuit of" DHS's highest priorities. Johnson Prioritization Memorandum at 2.

In our view, DHS's proposed prioritization policy falls within the scope of its lawful discretion to enforce the immigration laws. To begin with, the policy is based on a factor clearly "within [DHS's] expertise." *Chaney,* 470 U.S. at 831. Faced with sharply limited resources, DHS necessarily must make choices about which removals to pursue and which removals to defer. DHS's organic statute itself recognizes this inevitable fact, instructing the Secretary to establish "national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). And an agency's need to ensure that scarce enforcement resources are used in an effective

manner is a quintessential basis for the use of prosecutorial discretion. *See Chaney*, 470 U.S. at 831 (among the factors "peculiarly within [an agency's] expertise" are "whether agency resources are best spent on this violation or another" and "whether the agency has enough resources to undertake the action at all").

The policy DHS has proposed, moreover, is consistent with the removal priorities established by Congress. In appropriating funds for DHS's enforcement activities—which, as noted, are sufficient to permit the removal of only a fraction of the undocumented aliens currently in the country—Congress has directed DHS to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Department of Homeland Security Appropriations Act, 2014, Pub. L. No. 113-76, div. F, tit. II, 128 Stat. 5, 251 ("DHS Appropriations Act"). Consistent with this directive, the proposed policy prioritizes individuals convicted of criminal offenses involving active participation in a criminal street gang, most offenses classified as felonies in the convicting jurisdiction, offenses classified as "aggravated felonies" under the INA, and certain misdemeanor offenses. Johnson Prioritization Memorandum at 3–4. The policy ranks these priority categories according to the severity of the crime of conviction. The policy also prioritizes the removal of other categories of aliens who pose threats to national security or border security, matters about which Congress has demonstrated particular concern. *See, e.g.,* 8 U.S.C. § 1226(c)(1)(D) (providing for detention of aliens charged with removability on national security grounds); *id.* § 1225(b) & (c) (providing for an expedited removal process for certain aliens apprehended at the

border). The policy thus raises no concern that DHS has relied "on factors which Congress had not intended it to consider." *Nat'l Ass'n of Home Builders*, 551 U.S. at 658.

Further, although the proposed policy is not a "single-shot non-enforcement decision," neither does it amount to an abdication of DHS's statutory responsibilities, or constitute a legislative rule overriding the commands of the substantive statute. *Crowley Caribbean Transp.*, 37 F.3d at 676–77. The proposed policy provides a general framework for exercising enforcement discretion in individual cases, rather than establishing an absolute, inflexible policy of not enforcing the immigration laws in certain categories of cases. Given that the resources Congress has allocated to DHS are sufficient to remove only a small fraction of the total population of undocumented aliens in the United States, setting forth written guidance about how resources should presumptively be allocated in particular cases is a reasonable means of ensuring that DHS's severely limited resources are systematically directed to its highest priorities across a large and diverse agency, as well as ensuring consistency in the administration of the removal system. The proposed policy's identification of categories of aliens who constitute removal priorities is also consistent with the categorical nature of Congress's instruction to prioritize the removal of criminal aliens in the DHS Appropriations Act.

And, significantly, the proposed policy does not identify any category of removable aliens whose removal may not be pursued under any circumstances. Although the proposed policy limits the discretion of

immigration officials to expend resources to remove non-priority aliens, it does not eliminate that discretion entirely. It directs immigration officials to use their resources to remove aliens in a manner "commensurate with the level of prioritization identified," but (as noted above) it does not "prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities." Johnson Prioritization Memorandum at 5. Instead, it authorizes the removal of even non-priority aliens if, in the judgment of an ICE Field Office Director, "removing such an alien would serve an important federal interest," a standard the policy leaves open-ended. *Id.* Accordingly, the policy provides for case-by-case determinations about whether an individual alien's circumstances warrant the expenditure of removal resources, employing a broad standard that leaves ample room for the exercise of individualized discretion by responsible officials. For these reasons, the proposed policy avoids the difficulties that might be raised by a more inflexible prioritization policy and dispels any concern that DHS has either undertaken to rewrite the immigration laws or abdicated its statutory responsibilities with respect to non-priority aliens.[4]

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[4] In *Crane v. Napolitano*, a district court recently concluded in a non-precedential opinion that the INA "mandates the initiation of removal proceedings whenever an immigration officer encounters an illegal alien who is not 'clearly and beyond a doubt entitled to be admitted.'" Opinion and Order Respecting Pl. App. for Prelim. Inj. Relief, No. 3:12-cv-03247-O, 2013 WL 1744422, at *5 (N.D. Tex. Apr. 23) (quoting 8 U.S.C. § 1225(b)(2)(A)). The court later dismissed the case for lack of jurisdiction. *See Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 8211660, at *4 (N.D. Tex. July 31). Although the opinion lacks precedential value, we have

II.

We turn next to the permissibility of DHS's proposed deferred action programs for certain aliens who are parents of U.S. citizens, lawful permanent residents ("LPRs"), or DACA recipients, and who are not removal priorities under the proposed policy discussed above. We begin by discussing the history and current practice of deferred action. We then discuss the legal authorities on which deferred action relies and identify legal principles against which the proposed use of deferred action can be evaluated. Finally, we turn to an analysis of the proposed deferred action programs themselves, beginning with the program for parents of U.S. citizens and LPRs, and concluding with the program for parents of DACA recipients.

A.

In immigration law, the term "deferred action" refers to an exercise of administrative discretion in which immigration officials temporarily defer the

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nevertheless considered whether, as it suggests, the text of the INA categorically forecloses the exercise of enforcement discretion with respect to aliens who have not been formally admitted. The district court's conclusion is, in our view, inconsistent with the Supreme Court's reading of the INA as permitting immigration officials to exercise enforcement discretion at any stage of the removal process, including when deciding whether to initiate removal proceedings against a particular alien. *See Arizona*, 132 S. Ct. at 2499; *Am.-Arab Anti-Discrim. Comm.,* 525 U.S. at 483–84. It is also difficult to square with authority holding that the presence of mandatory language in a statute, standing alone, does not necessarily limit the Executive Branch's enforcement discretion, *see, e.g.*, *Chaney*, 470 U.S. at 835; *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973).

removal of an alien unlawfully present in the United States. *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484 (citing 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03[2][h] (1998)); *see* USCIS, *Standard Operating Procedures for Handling Deferred Action Requests at USCIS Field Offices* at 3 (2012) ("USCIS SOP"); INS Operating Instructions § 103.1(a)(1)(ii) (1977). It is one of a number of forms of discretionary relief—in addition to such statutory and non-statutory measures as parole, temporary protected status, deferred enforced departure, and extended voluntary departure—that immigration officials have used over the years to temporarily prevent the removal of undocumented aliens.[5]

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[5] Parole is available to aliens by statute "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Among other things, parole gives aliens the ability to adjust their status without leaving the United States if they are otherwise eligible for adjustment of status, *see id.* § 1255(a), and may eventually qualify them for Federal means-tested benefits, *see id.* §§ 1613, 1641(b)(4). Temporary protected status is available to nationals of designated foreign stales affected by armed conflicts, environmental disasters, and other extraordinary conditions. *Id.* § 1254a. Deferred enforced departure, which "has no statutory basis" but rather is an exercise of "the President's constitutional powers to conduct foreign relations," may be granted to nationals of appropriate foreign states. USCIS, Adjudicator's Field Manual § 38.2(a) (2014). Extended voluntary departure was a remedy derived from the voluntary departure statute, which, before its amendment in 1996, permitted the Attorney General to make a finding of removability if an alien agreed to voluntarily depart the United States, without imposing a time limit for the alien's departure. *See* 8 U.S.C. §§ 1252(b), 1254(e) (1988 & Supp. II 1990); *cf.* 8 U.S.C. § 1229c (current provision of the INA providing authority to grant voluntary departure, but limiting such grants to 120 days). Some commentators, however, suggested that extended voluntary departure was in fact a form of "discretionary

The practice of granting deferred action dates back several decades. For many years after the INA was enacted, INS exercised prosecutorial discretion to grant "non-priority" status to removable aliens who presented "appealing humanitarian factors." Letter for Leon Wildes, from E. A. Loughran, Associate Commissioner, INS at 2 (July 16, 1973) (defining a "non-priority case" as "one in which the Service in the exercise of discretion determines that adverse action would be unconscionable because of appealing humanitarian factors"); *see* INS Operating Instructions § 103.1(a)(1)(ii) (1962). This form of administrative discretion was later termed "deferred action." *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484; *see* INS Operating Instructions § 103.1(a)(1)(ii) (1977)

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relief formulated administratively under the Attorney General's general authority for enforcing immigration law." Sharon Stephan, Cong. Research Serv., 85-599 EPW, *Extended Voluntary Departure and Other Grants of Blanket Relief from Deportation* at 1 (Feb. 23, 1985). It appears that extended voluntary departure is no longer used following enactment of the Immigration Act of 1990, which established the temporary protected status program. *See U.S. Citizenship and Immigration Services Fee Schedule*, 75 Fed. Reg. 33446, 33457 (June 11, 2010) (proposed rule) (noting that "since 1990 neither the Attorney General nor the Secretary have designated a class of aliens for nationality-based 'extended voluntary departure,' and there no longer are aliens in the United States benefitting from such a designation," but noting that deferred enforced departure is still used); H. R. Rep. No. 102-123, at 2 (1991) (indicating that in establishing temporary protected status, Congress was "codif[ying] and supersed[ing]" extended voluntary departure). *See generally* Andorra Bruno et al., Cong. Research Serv., *Analysis of June 15, 2012 DHS Memorandum*, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children at 5–10 (July 13, 2012) ("CRS Immigration Report").

(instructing immigration officers to recommend deferred action whenever "adverse action would be unconscionable because of the existence of appealing humanitarian factors").

Although the practice of granting deferred action "developed without express statutory authorization," it has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court. *Am.-Arab Anti-Discrim. Comm.,* 525 U.S. at 484 (internal quotation marks omitted); *see id.* at 485 (noting that a congressional enactment limiting judicial review of decisions "to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA]" in 8 U.S.C. § 1252(g) "seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations"); *see also, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (providing that certain individuals are "eligible for deferred action"). Deferred action "does not confer any immigration status"—i.e., it does not establish any enforceable legal right to remain in the United States—and it may be revoked by immigration authorities at their discretion. USCIS SOP at 3, 7. Assuming it is not revoked, however, it represents DHS's decision not to seek the alien's removal for a specified period of time.

Under longstanding regulations and policy guidance promulgated pursuant to statutory authority in the INA, deferred action recipients may receive two additional benefits. First, relying on DHS's statutory authority to authorize certain aliens to work in the United States, DHS regulations permit recipients of deferred action to apply for work authorization if they

can demonstrate an "economic necessity for employment." 8 C.F.R. § 274a.12(c)(14); *see* 8 U.S.C. § 1324a(h)(3) (defining an "unauthorized alien" not entitled to work in the United States as an alien who is neither an LPR nor "authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]"). Second, DHS has promulgated regulations and issued policy guidance providing that aliens who receive deferred action will temporarily cease accruing "unlawful presence" for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); Memorandum for Field Leadership, from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, USCIS, *Re: 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* at 42 (May 6, 2009) ("USCIS Consolidation of Guidance") (noting that "[a]ccrual of unlawful presence stops on the date an alien is granted deferred action"); *see* 8 U.S.C. § 1182(a)(9)(B)(ii) (providing that an alien is "unlawfully present" if, among other things, he "is present in the United States after the expiration of the period of stay authorized by the Attorney General").[6]

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[6] Section 1182(a)(9)(B)(i) imposes three- and ten-year bars on the admission of aliens (other than aliens admitted to permanent residence) who departed or were removed from the United States after periods of unlawful presence of between 180 days and one year, or one year or more. Section 1182(a)(9)(C)(i)(1) imposes an indefinite bar on the admission of any alien who, without being admitted, enters or attempts to reenter the United States after previously having been unlawfully present in the United States for an aggregate period of more than one year.

Immigration officials today continue to grant deferred action in individual cases for humanitarian and other purposes, a practice we will refer to as "ad hoc deferred action." Recent USCIS guidance provides that personnel may recommend ad hoc deferred action if they "encounter cases during [their] normal course of business that they feel warrant deferred action." USCIS SOP at 4. An alien may also apply for ad hoc deferred action by submitting a signed, written request to USCIS containing "[a]n explanation as to why he or she is seeking deferred action" along with supporting documentation, proof of identity, and other records. *Id.* at 3.

For decades, INS and later DHS have also implemented broader programs that make discretionary relief from removal available for particular classes of aliens. In many instances, these agencies have made such broad-based relief available through the use of parole, temporary protected status, deferred enforced departure, or extended voluntary departure. For example, from 1956 to 1972, INS implemented an extended voluntary departure program for physically present aliens who were beneficiaries of approved visa petitions—known as "Third Preference" visa petitions—relating to a specific class of visas for Eastern Hemisphere natives. *See United States ex rel. Parco v. Morris,* 426 F. Supp. 976, 979–80 (E.D. Pa. 1977). Similarly, for several years beginning in 1978, INS granted extended voluntary departure to nurses who were eligible for H-1 visas. *Voluntary Departure for Out-of-Status Nonimmigrant H-1 Nurses*, 43 Fed. Reg. 2776, 2776 (Jan. 19, 1978). In addition, in more than two dozen instances dating to 1956, INS and later DHS granted parole, temporary

protected status, deferred enforced departure, or extended voluntary departure to large numbers of nationals of designated foreign states. *See, e.g.*, CRS Immigration Report at 20–23; Cong. Research Serv., ED206779, *Review of U.S. Refugee Resettlement Programs and Policies* at 9, 12–14 (1980). And in 1990, INS implemented a "Family Fairness" program that authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens who had been granted legal status under the Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359 ("IRCA"). *See* Memorandum for Regional Commissioners, INS, from Gene McNary, Commissioner, INS, *Re: Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990) ("Family Fairness Memorandum"); *see also* CRS Immigration Report at 10.

On at least five occasions since the late 1990s, INS and later DHS have also made discretionary relief available to certain classes of aliens through the use of deferred action:

1. Deferred Action for Battered Aliens Under the Violence Against Women Act. INS established a class-based deferred action program in 1997 for the benefit of self-petitioners under the Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902. VAWA authorized certain aliens who have been abused by U.S. citizen or LPR spouses or parents to self-petition for lawful immigration status, without having to rely on their abusive family members to petition on their behalf. *Id.* § 40701(a) (codified as

amended at 8 U.S.C. § 1154(a)(1)(A)(iii)–(iv), (vii)). The INS program required immigration officers who approved a VAWA self-petition to assess, "on a case-by-case basis, whether to place the alien in deferred action status" while the alien waited for a visa to become available. Memorandum for Regional Directors et al., INS, from Paul W. Virtue, Acting Executive Associate Commissioner, INS, *Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997). INS noted that "[b]y their nature, VAWA cases generally possess factors that warrant consideration for deferred action." *Id.* But because "[i]n an unusual case, there may be factors present that would militate against deferred action," the agency instructed officers that requests for deferred action should still "receive individual scrutiny." *Id.* In 2000, INS reported to Congress that, because of this program, no approved VAWA self-petitioner had been removed from the country. *See Battered Women Immigrant Protection Act: Hearings on H.R. 3083 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. at 43 (July 20, 2000) ("H.R. 3083 Hearings").

2. Deferred Action for T and U Visa Applicants. Several years later, INS instituted a similar deferred action program for applicants for nonimmigrant status or visas made available under the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA"), Pub. L. No. 106-386, 114 Stat. 1464. That Act created two new nonimmigrant classifications: a "T visa" available to victims of human trafficking and their family members, and a "U visa" for victims of certain other crimes and their family members. *Id.* §§ 107(e), 1513(b)(3) (codified at 8 U.S.C.

§ 1101(a)(15)(T)(i), (U)(i)). In 2001, INS issued a memorandum directing immigration officers to locate "possible victims in the above categories," and to use "[e]xisting authority and mechanisms such as parole, deferred action, and stays of removal" to prevent those victims' removal "until they have had the opportunity to avail themselves of the provisions of the VTVPA." Memorandum for Michael A. Pearson, Executive Associate Commissioner, INS, from Michael D. Cronin, Acting Executive Associate Commissioner, INS, *Re: Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2—"T" and "U" Nonimmigrant Visas* at 2 (Aug. 30, 2001). In subsequent memoranda, INS instructed officers to make "deferred action assessment[s]" for "all [T visa] applicants whose applications have been determined to be bona fide," Memorandum for Johnny N. Williams, Executive Associate Commissioner, INS, from Stuart Anderson, Executive Associate Commissioner, INS, *Re: Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* at 1 (May 8, 2002), as well as for all U visa applicants "determined to have submitted *prima facie* evidence of [their] eligibility," Memorandum for the Director, Vermont Service Center, INS, from William R. Yates, USCIS, *Re: Centralization of Interim Relief for U Nonimmigrant Status Applicants* at 5 (Oct. 8, 2003). In 2002 and 2007, INS and DHS promulgated regulations embodying these policies. *See* 8 C.F.R. § 214.11(k)(1), (k)(4), (m)(2) (promulgated by *New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status*, 67 Fed. Reg. 4784, 4800–01 (Jan. 31, 2002)) (providing that any T visa applicant who presents "*prima facie* evidence" of his eligibility should have his removal "automatically stay[ed]" and

that applicants placed on a waiting list for visas "shall maintain [their] current means to prevent removal (deferred action, parole, or stay of removal)"); *id.* § 214.14(d)(2) (promulgated by *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53014, 53039 (Sept. 17, 2007)) ("USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list" for visas.).

3. Deferred Action for Foreign Students Affected by Hurricane Katrina. As a consequence of the devastation caused by Hurricane Katrina in 2005, several thousand foreign students became temporarily unable to satisfy the requirements for maintaining their lawful status as F-1 nonimmigrant students, which include "pursuit of a 'full course of study.'" USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* at 1 (Nov. 25, 2005) (quoting 8 C.F.R. § 214.2(f)(6)), *available at* http//www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situati ons/Previous%20Special%20Situations%20By%20Topic/faq-interim-student-relief-hurricane-katrina.pdf (last visited Nov. 19, 2014). DHS announced that it would grant deferred action to these students "based on the fact that [their] failure to maintain status is directly due to Hurricane Katrina." *Id.* at 7. To apply for deferred action under this program, students were required to send a letter substantiating their need for deferred action, along with an application for work authorization. Press Release, USCIS, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane*

Katrina at 1–2 (Nov. 25, 2005), *available at* http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_ 11_25_05_PR.pdf (last visited Nov. 19, 2014). USCIS explained that such requests for deferred action would be "decided on a case-by-case basis" and that it could not "provide any assurance that all such requests will be granted." *Id.* at 1.

4. Deferred Action for Widows and Widowers of U.S. Citizens. In 2009, DHS implemented a deferred action program for certain widows and widowers of U.S. citizens. USCIS explained that "no avenue of immigration relief exists for the surviving spouse of a deceased U.S. citizen if the surviving spouse and the U.S. citizen were married less than 2 years at the time of the citizen's death" and USCIS had not yet adjudicated a visa petition on the spouse's behalf. Memorandum for Field Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, *Re: Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* at 1 (Sept. 4, 2009). "In order to address humanitarian concerns arising from cases involving surviving spouses of U.S. citizens," USCIS issued guidance permitting covered surviving spouses and "their qualifying children who are residing in the United States" to apply for deferred action. *Id.* at 2, 6. USCIS clarified that such relief would not be automatic, but rather would be unavailable in the presence of, for example, "serious adverse factors, such as national security concerns, significant immigration fraud, commission of other crimes, or public safety reasons." *Id.* at 6.[7]

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[7] Several months after the deferred action program was announced, Congress eliminated the requirement that an alien be

5. Deferred Action for Childhood Arrivals. Announced by DHS in 2012, DACA makes deferred action available to "certain young people who were brought to this country as children" and therefore "[a]s a general matter . . . lacked the intent to violate the law." Memorandum for David Aguilar, Acting Commissioner, CBP, et al., from Janet Napolitano, Secretary, DHS, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* at 1 (June 15, 2012) ("Napolitano Memorandum"). An alien is eligible for DACA if she was under the age of 31 when the program began; arrived in the United States before the age of 16; continuously resided in the United States for at least 5 years immediately preceding June 15, 2012; was physically present on June 15, 2012; satisfies certain educational or military service requirements; and neither has a serious criminal history nor "poses a threat to national security or public safety." *See id.* DHS evaluates applicants' eligibility for DACA on a case-by-case basis. *See id.* at 2; USCIS, *Deferred Action for Childhood Arrivals (DACA) Toolkit: Resources for Community Partners* at 11 ("DACA Toolkit").

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married to a U.S. citizen "for at least 2 years at the time of the citizen's death" to retain his or her eligibility for lawful immigration status. Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 568(c), 123 Stat. 2142, 2186 (2009). Concluding that this legislation rendered its surviving spouse guidance "obsolete," users withdrew its earlier guidance and treated all pending applications for deferred action as visa petitions. *See* Memorandum for Executive Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, et al., *Re: Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (REVISED)* at 3, 10 (Dec. 2, 2009).

Successful DACA applicants receive deferred action for a period of two years, subject to renewal. *See* DACA Toolkit at 11. DHS has stated that grants of deferred action under DACA may be terminated at any time, *id.* at 16, and "confer[] no substantive right, immigration status or pathway to citizenship," Napolitano Memorandum at 3.[8]

Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice.[9] On the

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[8] Before DACA was announced, our Office was consulted about whether such a program would be legally permissible. As we orally advised, our preliminary view was that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis. We noted that immigration officials typically consider factors such as having been brought to the United States as a child in exercising their discretion to grant deferred action in individual cases. We explained, however, that extending deferred action to individuals who satisfied these and other specified criteria on a class-wide basis would raise distinct questions not implicated by ad hoc grants of deferred action. We advised that it was critical that, like past policies that made deferred action available to certain classes of aliens, the DACA program require immigration officials to evaluate each application for deferred action on a case-by-case basis, rather than granting deferred action automatically to all applicants who satisfied the threshold eligibility criteria. We also noted that, although the proposed program was predicated on humanitarian concerns that appeared less particularized and acute than those underlying certain prior class-wide deferred action programs, the concerns animating DACA were nonetheless consistent with the types of concerns that have customarily guided the exercise of immigration enforcement discretion.

[9] Congress has considered legislation that would limit the practice of granting deferred action, but it has never enacted such a

contrary, it has enacted several pieces of legislation that have either assumed that deferred action would be available in certain circumstances, or expressly directed that deferred action be extended to certain categories of aliens. For example, as Congress was considering VAWA reauthorization legislation in 2000, INS officials testified before Congress about their deferred action program for VAWA self-petitioners, explaining that "[a]pproved [VAWA] self-petitioners are placed in deferred action status," such that "[n]o battered alien who has filed a[n approved] self petition . . . has been deported." H.R. 3083 Hearings at 43. Congress responded by not only acknowledging but also expanding the deferred action program in the 2000 VAWA reauthorization legislation, providing that children who could no longer self-petition under VAWA because they were over the age of 21 would nonetheless be "eligible for deferred action and work authorization." Victims of Trafficking and Violence Protection Act of

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measure. In 2011, a bill was introduced in both the House and the Senate that would have temporarily suspended DHS's authority to grant deferred action except in narrow circumstances. *See* H.R. 2497, 112th Cong. (2011); S. 1380, 112th Cong. (2011). Neither chamber, however, voted on the bill. This year, the House passed a bill that purported to bar any funding for DACA or other class-wide deferred action programs, H.R. 5272, 113th Cong. (2014), but the Senate has not considered the legislation. Because the Supreme Court has instructed that unenacted legislation is an unreliable indicator of legislative intent, *see Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969), we do not draw any inference regarding congressional policy from these unenacted bills.

2000, Pub. L. No. 106-386, § 1503(d)(2), 114 Stat. 1464, 1522 (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV)).[10]

Congress demonstrated a similar awareness of INS's (and later DHS's) deferred action program for bona fide T and U visa applicants. As discussed above, that program made deferred action available to nearly all individuals who could make a prima facie showing of eligibility for a T or U visa. In 2008 legislation, Congress authorized DHS to "grant . . . an administrative stay of a final order of removal" to any such individual. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5044, 5060 (codified at 8 U.S.C. § 1227(d)(1)). Congress further clarified that "[t]he denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for . . . deferred action." *Id.* It also directed DHS to compile a report detailing, among other things, how long DHS's "specially trained [VAWA] Unit at the [USCIS] Vermont Service Center" took to adjudicate victim-based immigration applications for "deferred action," along with "steps taken to improve in this area." *Id.* § 238.

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[10] Five years later, in the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, Congress specified that, "[u]pon the approval of a petition as a VAWA self-petitioner, the alien . . . is eligible for work authorization." *Id.* § 814(b) (codified at 8 U.S.C. § 1154(a)(1)(K)). One of the Act's sponsors explained that while this provision was intended to "give[] DHS statutory authority to grant work authorization . . . without having to rely upon deferred action . . . [t]he current practice of granting deferred action to approved VAWA self-petitioners should continue." 151 Cong. Rec. 29334 (2005) (statement of Rep. Conyers).

Representative Berman, the bill's sponsor, explained that the Vermont Service Center should "strive to issue work authorization and deferred action" to "[i]mmigrant victims of domestic violence, sexual assault and other violence crimes . . . in most instances within 60 days of filing." 154 Cong. Rec. 24603 (2008).

In addition, in other enactments, Congress has specified that certain classes of individuals should be made "eligible for deferred action." These classes include certain immediate family members of LPRs who were killed on September 11, 2001, USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361, and certain immediate family members of certain U.S. citizens killed in combat, National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)–(d), 117 Stat. 1392, 1694. In the same legislation, Congress made these individuals eligible to obtain lawful status as "family-sponsored immigrant[s]" or "immediate relative[s]" of U.S. citizens. Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361; Pub. L. No. 108-136, § 1703(c)(1)(A), 117 Stat. 1392, 1694; *see generally Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2197 (2014) (plurality opinion) (explaining which aliens typically qualify as family-sponsored immigrants or immediate relatives).

Finally, Congress acknowledged the practice of granting deferred action in the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (codified at 49 U.S.C. § 30301 note), which makes a state-issued driver's license or identification card acceptable for federal purposes only if the state verifies, among other things, that the card's recipient has "[e]vidence of [l]awful [s]tatus." Congress specified that, for this

purpose, acceptable evidence of lawful status includes proof of, among other things, citizenship, lawful permanent or temporary residence, or "approved deferred action status." *Id*. § 202(c)(2)(B)(viii).

B.

The practice of granting deferred action, like the practice of setting enforcement priorities, is an exercise of enforcement discretion rooted in DHS's authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed. It is one of several mechanisms by which immigration officials, against a backdrop of limited enforcement resources, exercise their "broad discretion" to administer the removal system—and, more specifically, their discretion to determine whether "it makes sense to pursue removal" in particular circumstances. *Arizona*, 132 S. Ct. at 2499.

Deferred action, however, differs in at least three respects from more familiar and widespread exercises of enforcement discretion. First, unlike (for example) the paradigmatic exercise of prosecutorial discretion in a criminal case, the conferral of deferred action does not represent a decision not to prosecute an individual for past unlawful conduct; it instead represents a decision to openly tolerate an undocumented alien's continued presence in the United States for a fixed period (subject to revocation at the agency's discretion). Second, unlike most exercises of enforcement discretion, deferred action carries with it benefits in addition to non-enforcement itself; specifically, the ability to seek employment authorization and suspension of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). Third, class-

based deferred action programs, like those for VAWA recipients and victims of Hurricane Katrina, do not merely enable individual immigration officials to select deserving beneficiaries from among those aliens who have been identified or apprehended for possible removal—as is the case with ad hoc deferred action—but rather set forth certain threshold eligibility criteria and then invite individuals who satisfy these criteria to apply for deferred action status.

While these features of deferred action are somewhat unusual among exercises of enforcement discretion, the differences between deferred action and other exercises of enforcement discretion are less significant than they might initially appear. The first feature—the toleration of an alien's continued unlawful presence—is an inevitable element of almost any exercise of discretion in immigration enforcement. Any decision not to remove an unlawfully present alien—even through an exercise of routine enforcement discretion—necessarily carries with it a tacit acknowledgment that the alien will continue to be present in the United States without legal status. Deferred action arguably goes beyond such tacit acknowledgment by expressly communicating to the alien that his or her unlawful presence will be tolerated for a prescribed period of time. This difference is not, in our view, insignificant. But neither does it fundamentally transform deferred action into something other than an exercise of enforcement discretion: As we have previously noted, deferred action confers no lawful immigration status, provides no path to lawful permanent residence or citizenship, and is revocable at any time in the agency's discretion.

With respect to the second feature, the additional benefits deferred action confers—the ability to apply for work authorization and the tolling of unlawful presence—do not depend on background principles of agency discretion under DHS's general immigration authorities or the Take Care Clause at all, but rather depend on independent and more specific statutory authority rooted in the text of the INA. The first of those authorities, DHS's power to prescribe which aliens are authorized to work in the United States, is grounded in 8 U.S.C. § 1324a(h)(3), which defines an "unauthorized alien" not entitled to work in the United States as an alien who is neither an LPR nor "authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]." This statutory provision has long been understood to recognize the authority of the Secretary (and the Attorney General before him) to grant work authorization to particular classes of aliens. *See* 8 C.F.R. § 274a.12; *see also Perales v. Casillas*, 903 F.2d 1043, 1048–50 (5th Cir. 1990) (describing the authority recognized by section 1324a(h)(3) as "permissive" and largely "unfettered").[11] Although the INA requires the

[11] Section 1324a(h)(3) was enacted in 1986 as part of IRCA. Before then, the INA contained no provisions comprehensively addressing the employment of aliens or expressly delegating the authority to regulate the employment of aliens to a responsible federal agency. INS assumed the authority to prescribe the classes of aliens authorized to work in the United States under its general responsibility to administer the immigration laws. In 1981, INS promulgated regulations codifying its existing procedures and criteria for granting employment authorization. *See Employment Authorization to Aliens in the United States*, 46 Fed. Reg. 25079, 25080–81 (May 5, 1981) (citing 8 U.S.C. § 1103(a)). Those regulations permitted certain categories of aliens who lacked

Secretary to grant work authorization to particular classes of aliens, *see, e.g.*, 8 U.S.C. § 1158(c)(1)(B) (aliens granted asylum), it places few limitations on the Secretary's authority to grant work authorization to

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lawful immigration status, including deferred action recipients, to apply for work authorization under certain circumstances. 8 C.F.R. § 109.1(b)(7) (1982). In IRCA, Congress introduced a "comprehensive scheme prohibiting the employment of illegal aliens in the United States," *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002), to be enforced primarily through criminal and civil penalties on employers who knowingly employ an "unauthorized alien." As relevant here, Congress defined an "unauthorized alien" barred from employment in the United States as an alien who "is not . . . either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter *or by the Attorney General.*" 8 U.S.C. § 1324a(h)(3) (emphasis added). Shortly after IRCA was enacted, INS denied a petition to rescind its employment authorization regulation, rejecting an argument that "the phrase 'authorized to be so employed by this Act or the Attorney General' does not recognize the Attorney General's authority to grant work authorization except to those aliens who have already been granted specific authorization by the Act." *Employment Authorization; Classes of Aliens Eligible*, 52 Fed. Reg. 46092, 46093 (Dec. 4, 1987). Because the same statutory phrase refers both to aliens authorized to be employed by the INA and aliens authorized to be employed by the Attorney General, INS concluded that the only way to give effect to both references is to conclude "that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined 'unauthorized alien' in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the regulatory process, in addition to those who are authorized employment by statute." *Id.*; *see Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844 (1986) (stating that "considerable weight must be accorded" an agency's "contemporaneous interpretation of the statute it is entrusted to administer").

other classes of aliens. Further, and notably, additional provisions of the INA expressly contemplate that the Secretary may grant work authorization to aliens lacking lawful immigration status—even those who are in active removal proceedings or, in certain circumstances, those who have already received final orders of removal. *See id.* § 1226(a)(3) (permitting the Secretary to grant work authorization to an otherwise work-eligible alien who has been arrested and detained pending a decision whether to remove the alien from the United States); *id.* § 1231(a)(7) (permitting the Secretary under certain narrow circumstances to grant work authorization to aliens who have received final orders of removal). Consistent with these provisions, the Secretary has long permitted certain additional classes of aliens who lack lawful immigration status to apply for work authorization, including deferred action recipients who can demonstrate an economic necessity for employment. *See* 8 C.F.R. § 274a.12(c)(14); *see also id.* § 274a.12(c)(8) (applicants for asylum), (c)(10) (applicants for cancellation of removal); *supra* note 11 (discussing 1981 regulations).

The Secretary's authority to suspend the accrual of unlawful presence of deferred action recipients is similarly grounded in the INA. The relevant statutory provision treats an alien as "unlawfully present" for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I) if he "is present in the United States after the expiration of the period of stay authorized by the Attorney General." 8 U.S.C. § 1182(a)(9)(B)(ii). That language contemplates that the Attorney General (and now the Secretary) may authorize an alien to stay in the United States without accruing unlawful presence under section 1182(a)(9)(B)(i) or section

1182(a)(9)(C)(i). And DHS regulations and policy guidance interpret a "period of stay authorized by the Attorney General" to include periods during which an alien has been granted deferred action. *See* 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); USCIS Consolidation of Guidance at 42.

The final unusual feature of deferred action programs is particular to class-based programs. The breadth of such programs, in combination with the first two features of deferred action, may raise particular concerns about whether immigration officials have undertaken to substantively change the statutory removal system rather than simply adapting its application to individual circumstances. But the salient feature of class-based programs—the establishment of an affirmative application process with threshold eligibility criteria—does not in and of itself cross the line between executing the law and rewriting it. Although every class-wide deferred action program that has been implemented to date has established certain threshold eligibility criteria, each program has also left room for case-by-case determinations, giving immigration officials discretion to deny applications even if the applicant fulfills all of the program criteria. *See supra* pp. 15–18. Like the establishment of enforcement priorities discussed in Part I, the establishment of threshold eligibility criteria can serve to avoid arbitrary enforcement decisions by individual officers, thereby furthering the goal of ensuring consistency across a large agency. The guarantee of individualized, case-by-case review helps avoid potential concerns that, in establishing such eligibility criteria, the Executive is attempting to rewrite the law by defining new categories of aliens who are

automatically entitled to particular immigration relief. *See Crowley Caribbean Transp.*, 37 F.3d at 676–77; *see also Chaney*, 470 U.S. at 833 n.4. Furthermore, while permitting potentially eligible individuals to apply for an exercise of enforcement discretion is not especially common, many law enforcement agencies have developed programs that invite violators of the law to identify themselves to the authorities in exchange for leniency.[12] Much as is the case with those programs, inviting eligible aliens to identify themselves through an application process may serve the agency's law enforcement interests by encouraging lower-priority individuals to identify themselves to the agency. In so doing, the process may enable the agency to better focus its scarce resources on higher enforcement priorities.

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[12] For example, since 1978, the Department of Justice's Antitrust Division has implemented a "leniency program" under which a corporation that reveals an antitrust conspiracy in which it participated may receive a conditional promise that it will not be prosecuted. *See* Dep't of Justice, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (November 19, 2008)*, *available at* http://www.justice.gov/atr/public/criminal/239583.pdf (last visited Nov. 19, 2014); *see also* Internal Revenue Manual § 9.5.11.9(2) (Revised IRS Voluntary Disclosure Practice), *available at* http://www.irs.gov/uac/Revised-IRS-Voluntary-Disclosure-Practice (last visited Nov. 19, 2014) (explaining that a taxpayer's voluntary disclosure of misreported tax information "may result in prosecution not being recommended"); U.S. Marshals Service, *Fugitive Safe Surrender FAQs*, *available at* http://www.usmarshals.gov/safesurrender/faqs.html (last visited Nov. 19, 2014) (stating that fugitives who surrender at designated sites and times under the "Fugitive Safe Surrender" program are likely to receive "favorable consideration").

Apart from the considerations just discussed, perhaps the clearest indication that these features of deferred action programs are not per se impermissible is the fact that Congress, aware of these features, has repeatedly enacted legislation appearing to endorse such programs. As discussed above, Congress has not only directed that certain classes of aliens be made eligible for deferred action programs—and in at least one instance, in the case of VAWA beneficiaries, directed the expansion of an existing program—but also ranked evidence of approved deferred action status as evidence of "lawful status" for purposes of the REAL ID Act. These enactments strongly suggest that when DHS in the past has decided to grant deferred action to an individual or class of individuals, it has been acting in a manner consistent with congressional policy "'rather than embarking on a frolic of its own.'" *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139 (1985) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969)); *cf. id.* at 137–39 (concluding that Congress acquiesced in an agency's assertion of regulatory authority by "refus[ing] . . . to overrule" the agency's view after it was specifically "brought to Congress'[s] attention," and further finding implicit congressional approval in legislation that appeared to acknowledge the regulatory authority in question); *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (finding that Congress "implicitly approved the practice of claim settlement by executive agreement" by enacting the International Claims Settlement Act of 1949, which "create[d] a procedure to implement" those very agreements).

Congress's apparent endorsement of certain deferred action programs does not mean, of course, that

a deferred action program can be lawfully extended to any group of aliens, no matter its characteristics or its scope, and no matter the circumstances in which the program is implemented. Because deferred action, like the prioritization policy discussed above, is an exercise of enforcement discretion rooted in the Secretary's broad authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed, it is subject to the same four general principles previously discussed. *See supra* pp. 6–7. Thus, any expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects considerations within the agency's expertise, and that it does not seek to effectively rewrite the laws to match the Executive's policy preferences, but rather operates in a manner consonant with congressional policy expressed in the statute. *See supra* pp. 6–7 (citing *Youngstown*, 343 U.S. at 637, and *Nat'l Ass'n of Home Builders*, 551 U.S. at 658). Immigration officials cannot abdicate their statutory responsibilities under the guise of exercising enforcement discretion. *See supra* p. 7 (citing *Chaney*, 470 U.S. at 833 n.4). And any new deferred action program should leave room for individualized evaluation of whether a particular case warrants the expenditure of resources for enforcement. *See supra* p. 7 (citing *Glickman*, 96 F.3d at 1123, and *Crowley Caribbean Transp.*, 37 F.3d at 676–77).

Furthermore, because deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion, particularly careful examination is needed to ensure that any proposed expansion of deferred action complies with these general principles, so that the

proposed program does not, in effect, cross the line between executing the law and rewriting it. In analyzing whether the proposed programs cross this line, we will draw substantial guidance from Congress's history of legislation concerning deferred action. In the absence of express statutory guidance, the nature of deferred action programs Congress has implicitly approved by statute helps to shed light on Congress's own understandings about the permissible uses of deferred action. Those understandings, in turn, help to inform our consideration of whether the proposed deferred action programs are "faithful[]" to the statutory scheme Congress has enacted. U.S. Const. art. II, § 3.

C.

We now turn to the specifics of DHS's proposed deferred action programs. DHS has proposed implementing a policy under which an alien could apply for, and would be eligible to receive, deferred action if he or she: (1) is not an enforcement priority under DHS policy; (2) has continuously resided in the United States since before January 1, 2010; (3) is physically present in the United States both when DHS announces its program and at the time of application for deferred action; (4) has a child who is a U.S. citizen or LPR; and (5) presents "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Johnson Deferred Action Memorandum at 4. You have also asked about the permissibility of a similar program that would be open to parents of children who have received deferred action under the DACA program. We first address DHS's proposal to implement a deferred action

program for the parents of U.S. citizens and LPRs, and then turn to the permissibility of the program for parents of DACA recipients in the next section.

1.

We begin by considering whether the proposed program for the parents of U.S. citizens and LPRs reflects considerations within the agency's expertise. DHS has offered two justifications for the proposed program for the parents of U.S. citizens and LPRs. First, as noted above, severe resource constraints make it inevitable that DHS will not remove the vast majority of aliens who are unlawfully present in the United States. Consistent with Congress's instruction, DHS prioritizes the removal of individuals who have significant criminal records, as well as others who present dangers to national security, public safety, or border security. *See supra* p. 10. Parents with longstanding ties to the country and who have no significant criminal records or other risk factors rank among the agency's lowest enforcement priorities; absent significant increases in funding, the likelihood that any individual in that category will be determined to warrant the expenditure of severely limited enforcement resources is very low. Second, DHS has explained that the program would serve an important humanitarian interest in keeping parents together with children who are lawfully present in the United States, in situations where such parents have demonstrated significant ties to community and family in this country. *See* Shahoulian E-mail.

With respect to DHS's first justification, the need to efficiently allocate scarce enforcement resources is a quintessential basis for an agency's exercise of

enforcement discretion. *See Chaney*, 470 U.S. at 831. Because, as discussed earlier, Congress has appropriated only a small fraction of the funds needed for full enforcement, DHS can remove no more than a small fraction of the individuals who are removable under the immigration laws. *See supra* p. 9. The agency must therefore make choices about which violations of the immigration laws it will prioritize and pursue. And as *Chaney* makes clear, such choices are entrusted largely to the Executive's discretion. 470 U.S. at 831.

The deferred action program DHS proposes would not, of course, be costless. Processing applications for deferred action and its renewal requires manpower and resources. *See Arizona*, 132 S. Ct. at 2521 (Scalia, J., concurring in part and dissenting in part). But DHS has informed us that the costs of administering the proposed program would be borne almost entirely by USCIS through the collection of application fees. *See* Shahoulian E-mail; *see also* 8 U.S.C. § 1356(m); 8 C.F.R. § 103.7(b)(1)(i)(C), (b)(1)(i)(HH). DHS has indicated that the costs of administering the deferred action program would therefore not detract in any significant way from the resources available to ICE and CBP—the enforcement arms of DHS—which rely on money appropriated by Congress to fund their operations. *See* Shahoulian E-mail. DHS has explained that, if anything, the proposed deferred action program might increase ICE's and CBP's efficiency by in effect using USCIS's fee-funded resources to enable those enforcement divisions to more easily identify non-priority aliens and focus their resources on pursuing aliens who are strong candidates for removal. *See id.* The proposed program, in short, might help DHS

address its severe resource limitations, and at the very least likely would not exacerbate them. *See id.*

DHS does not, however, attempt to justify the proposed program solely as a cost-saving measure, or suggest that its lack of resources alone is sufficient to justify creating a deferred action program for the proposed class. Rather, as noted above, DHS has explained that the program would also serve a particularized humanitarian interest in promoting family unity by enabling those parents of U.S. citizens and LPRs who are not otherwise enforcement priorities and who have demonstrated community and family ties in the United States (as evidenced by the length of time they have remained in the country) to remain united with their children in the United States. Like determining how best to respond to resource constraints, determining how to address such "human concerns" in the immigration context is a consideration that is generally understood to fall within DHS's expertise. *Arizona*, 132 S. Ct. at 2499.

This second justification for the program also appears consonant with congressional policy embodied in the INA. Numerous provisions of the statute reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States. *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787,795 n.6 (1977); *INS v. Errico*, 385 U.S. 214, 220 n.9 (1966) ("'The legislative history of the Immigration and Nationality Act clearly indicates that the Congress . . . was concerned with the problem of keeping families of United States citizens and immigrants united.'" (quoting H.R. Rep. No. 85-1199, at 7 (1957)). The INA provides a path to lawful status for the parents, as well

as other immediate relatives, of U.S. citizens: U.S. citizens aged twenty-one or over may petition for parents to obtain visas that would permit them to enter and permanently reside in the United States, and there is no limit on the overall number of such petitions that may be granted. *See* 8 U.S.C. § 1151(b)(2)(A)(i); *see also Cuellar de Osorio*, 134 S. Ct. at 2197–99 (describing the process for obtaining a family-based immigrant visa). And although the INA contains no parallel provision permitting LPRs to petition on behalf of their parents, it does provide a path for LPRs to become citizens, at which point they too can petition to obtain visas for their parents. *See, e.g.*, 8 U.S.C. § 1427(a) (providing that aliens are generally eligible to become naturalized citizens after five years of lawful permanent residence); *id.* § 1430(a) (alien spouses of U.S. citizens become eligible after three years of lawful permanent residence); *Demore v. Kim*, 538 U.S. 510, 544 (2003).[13]

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[13] The INA does permit LPRs to petition on behalf of their spouses and children even before they have attained citizenship. *See* 8 U.S.C. § 1153(a)(2). However, the exclusion of LPRs' parents from this provision does not appear to reflect a congressional judgment that, until they attain citizenship, LPRs lack an interest in being united with their parents comparable to their interest in being united with their other immediate relatives. The distinction between parents and other relatives originated with a 1924 statute that exempted the wives and minor children of U.S. citizens from immigration quotas, gave "preference status"—eligibility for a specially designated pool of immigrant visas—to other relatives of U.S. citizens, and gave no favorable treatment to the relatives of LPRs. Immigration Act of 1924, Pub. L. No. 68-139, §§ 4(a), 6, 43 Stat. 153, 155–56. In 1928, Congress extended preference status to LPRs' wives and minor children, reasoning that because such relatives would be eligible for visas without regard to any quota when their LPR relatives became citizens, granting preference status to LPRs' wives and minor children would "hasten[]" the

Additionally, the INA empowers the Attorney General to cancel the removal of, and adjust to lawful permanent resident status, aliens who have been physically present in the United States for a continuous period of not less than ten years, exhibit good moral character, have not been convicted of specified offenses, and have immediate relatives who are U.S. citizens or LPRs and who would suffer exceptional hardship from the alien's removal. 8 U.S.C. § 1229b(b)(1). DHS's proposal to focus on the parents of U.S. citizens and LPRs thus tracks a congressional concern, expressed in the INA, with uniting the immediate families of individuals who have permanent legal ties to the United States.

At the same time, because the temporary relief DHS's proposed program would confer to such parents is sharply limited in comparison to the benefits Congress has made available through statute, DHS's proposed program would not operate to circumvent the limits Congress has placed on the availability of those benefits. The statutory provisions discussed above offer the parents of U.S. citizens and LPRs the prospect of permanent lawful status in the United States. The

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"family reunion." S. Rep. No. 70-245, at 2 (1928); *see* Act of May 29, 1928, ch. 914, 45 Stat. 1009, 1009–10. The special visa status for wives and children of LPRs thus mirrored, and was designed to complement, the special visa status given to wives and minor children of U.S. citizens. In 1965, Congress eliminated the basis on which the distinction had rested by exempting all "immediate relatives" of U.S. citizens, including parents, from numerical restrictions on immigration. Pub. L. No. 89-236, § 1, 79 Stat. 911, 911. But it did not amend eligibility for preference status for relatives of LPRs to reflect that change. We have not been able to discern any rationale for this omission in the legislative history or statutory text of the 1965 law.

cancellation of removal provision, moreover, offers the prospect of receiving such status immediately, without the delays generally associated with the family-based immigrant visa process. DHS's proposed program, in contrast, would not grant the parents of U.S. citizens and LPRs any lawful immigration status, provide a path to permanent residence or citizenship, or otherwise confer any legally enforceable entitlement to remain in the United States. *See* USCIS SOP at 3. It is true that, as we have discussed, a grant of deferred action would confer eligibility to apply for and obtain work authorization, pursuant to the Secretary's statutory authority to grant such authorization and the longstanding regulations promulgated thereunder. *See supra* pp. 13, 21–22. But unlike the automatic employment eligibility that accompanies LPR status, *see* 8 U.S.C. § 1324a(h)(3), this authorization could be granted only on a showing of economic necessity, and would last only for the limited duration of the deferred action grant, *see* 8 C.F.R. § 274a.12(c)(14).

The other salient features of the proposal are similarly consonant with congressional policy. The proposed program would focus on parents who are not enforcement priorities under the prioritization policy discussed above—a policy that, as explained earlier, comports with the removal priorities set by Congress. *See supra* p. 10. The continuous residence requirement is likewise consistent with legislative judgments that extended periods of continuous residence are indicative of strong family and community ties. *See* IRCA, Pub. L. No. 99-603, § 201(a), 100 Stat. 3359, 3394 (1986) (codified as amended at 8 U.S.C. § 1255a(a)(2)) (granting lawful status to certain aliens unlawfully present in the United States since January 1, 1982); *id.*

§ 302(a) (codified as amended at 8 U.S.C. § 1160) (granting similar relief to certain agricultural workers); H.R. Rep. No. 99-682, pt. 1, at 49 (1986) (stating that aliens present in the United States for five years "have become a part of their communities[,] . .. have strong family ties here which include U.S. citizens and lawful residents[,] . . . have built social networks in this country[, and] . . . have contributed to the United States in myriad ways"); S. Rep. No. 99-132, at 16 (1985) (deporting aliens who "have become well settled in this country" would be a "wasteful use of the Immigration and Naturalization Service's limited enforcement resources"); *see also Arizona*, 132 S. Ct. at 2499 (noting that "[t]he equities of an individual case" turn on factors "including whether the alien has . . . long ties to the community").

We also do not believe DHS's proposed program amounts to an abdication of its statutory responsibilities, or a legislative rule overriding the commands of the statute. As discussed earlier, DHS's severe resource constraints mean that, unless circumstances change, it could not as a practical matter remove the vast majority of removable aliens present in the United States. The fact that the proposed program would defer the removal of a subset of these removable aliens—a subset that ranks near the bottom of the list of the agency's removal priorities—thus does not, by itself, demonstrate that the program amounts to an abdication of DHS's responsibilities. And the case-by-case discretion given to immigration officials under DHS's proposed program alleviates potential concerns that DHS has abdicated its statutory enforcement responsibilities with respect to, or created a categorical, rule-like entitlement to immigration

relief for, the particular class of aliens eligible for the program. An alien who meets all the criteria for deferred action under the program would receive deferred action only if he or she "present[ed] no other factors that, in the exercise of discretion," would "make[] the grant of deferred action inappropriate." Johnson Deferred Action Memorandum at 4. The proposed policy does not specify what would count as such a factor; it thus leaves the relevant USCIS official with substantial discretion to determine whether a grant of deferred action is warranted. In other words, even if an alien is not a removal priority under the proposed policy discussed in Part I, has continuously resided in the United States since before January 1, 2010, is physically present in the country, and is a parent of an LPR or a U.S. citizen, the USCIS official evaluating the alien's deferred action application must still make a judgment, in the exercise of her discretion, about whether that alien presents any other factor that would make a grant of deferred action inappropriate. This feature of the proposed program ensures that it does not create a categorical entitlement to deferred action that could raise concerns that DHS is either impermissibly attempting to rewrite or categorically declining to enforce the law with respect to a particular group of undocumented aliens.

Finally, the proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has implicitly approved in the past, which provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action. As noted above, the

program uses deferred action as an interim measure for a group of aliens to whom Congress has given a prospective entitlement to lawful immigration status. While Congress has provided a path to lawful status for the parents of U.S. citizens and LPRs, the process of obtaining that status "takes time." *Cuellar de Osorio*, 134 S. Ct. at 2199. The proposed program would provide a mechanism for families to remain together, depending on their circumstances, for some or all of the intervening period.[14] Immigration officials have on several occasions deployed deferred action programs as interim measures for other classes of aliens with prospective entitlements to lawful immigration status, including VAWA self-petitioners, bona fide T and U

[14] DHS's proposed program would likely not permit all potentially eligible parents to remain together with their children for the entire duration of the time until a visa is awarded. In particular, undocumented parents of adult citizens who are physically present in the country would be ineligible to adjust their status without first leaving the country if they had never been "inspected and admitted or paroled into the United States." 8 U.S.C. § 1255(a) (permitting the Attorney General to adjust to permanent resident status certain aliens present in the United States if they become eligible for immigrant visas). They would thus need to leave the country to obtain a visa at a U.S. consulate abroad. *See id*. § 1201(a); *Cuellar de Osorio*, 134 S. Ct. at 2197–99. But once such parents left the country, they would in most instances become subject to the 3- or 10-year bar under 8 U.S.C. § 1182(a)(9)(B)(i) and therefore unable to obtain a visa unless they remained outside the country for the duration of the bar. DHS's proposed program would nevertheless enable other families to stay together without regard to the 3- or 10-year bar. And even as to those families with parents who would become subject to that bar, the proposed deferred action program would have the effect of reducing the amount of time the family had to spend apart, and could enable them to adjust the timing of their separation according to, for example, their children's needs for care and support.

visa applicants, certain immediate family members of certain U.S. citizens killed in combat, and certain immediate family members of aliens killed on September 11, 2001. As noted above, each of these programs has received Congress's implicit approval—and, indeed, in the case of VAWA self-petitioners, a direction to expand the program beyond its original bounds. *See supra* pp. 18–20.[15] In addition, much like these and other programs Congress has implicitly endorsed, the program serves substantial and particularized humanitarian interests. Removing the parents of U.S. citizens and LPRs—that is, of children who have established permanent legal ties to the United States—would separate them from their nuclear families, potentially for many years, until they

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[15] Several extended voluntary departure programs have been animated by a similar rationale, and the most prominent of these programs also received Congress's implicit approval. In particular, as noted above, the Family Fairness policy, implemented in 1990, authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens granted legal status under IRCA—aliens who would eventually "acquire lawful permanent resident status" and be able to petition on behalf of their family members. Family Fairness Memorandum at 1; *see supra* pp. 14–15. Later that year, Congress granted the beneficiaries of the Family Fairness program an indefinite stay of deportation. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 4978, 5030. Although it did not make that grant of relief effective for nearly a year, Congress clarified that "the delay in effectiveness of this section shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date." *Id*. § 301(g). INS's policies for qualifying Third Preference visa applicants and nurses eligible for H-1 nonimmigrant status likewise extended to aliens with prospective entitlements to lawful status. *See supra* p. 14.

were able to secure visas through the path Congress has provided. During that time, both the parents and their U.S. citizen or LPR children would be deprived of both the economic support and the intangible benefits that families provide.

We recognize that the proposed program would likely differ in size from these prior deferred action programs. Although DHS has indicated that there is no reliable way to know how many eligible aliens would actually apply for or would be likely to receive deferred action following individualized consideration under the proposed program, it has informed us that approximately 4 million individuals could be eligible to apply. *See* Shahoulian E-mail. We have thus considered whether the size of the program alone sets it at odds with congressional policy or the Executive's duties under the Take Care Clause. In the absence of express statutory guidance, it is difficult to say exactly how the program's potential size bears on its permissibility as an exercise of executive enforcement discretion. But because the size of DHS's proposed program corresponds to the size of a population to which Congress has granted a prospective entitlement to lawful status without numerical restriction, it seems to us difficult to sustain an argument, based on numbers alone, that DHS's proposal to grant a limited form of administrative relief as a temporary interim measure exceeds its enforcement discretion under the INA. Furthermore, while the potential size of the program is large, it is nevertheless only a fraction of the approximately 11 million undocumented aliens who remain in the United States each year because DHS lacks the resources to remove them; and, as we have indicated, the program is limited to individuals who

would be unlikely to be removed under DHS's proposed prioritization policy. There is thus little practical danger that the program, simply by virtue of its size, will impede removals that would otherwise occur in its absence. And although we are aware of no prior exercises of deferred action of the size contemplated here, INS's 1990 Family Fairness policy, which Congress later implicitly approved, made a comparable fraction of undocumented aliens—approximately four in ten—potentially eligible for discretionary extended voluntary departure relief. *Compare* CRS Immigration Report at 22 (estimating the Family Fairness policy extended to 1.5 million undocumented aliens), *with* Office of Policy and Planning, INS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000* at 10 (2003) (estimating an undocumented alien population of 3.5 million in 1990); *see supra* notes 5 & 15 (discussing extended voluntary departure and Congress's implicit approval of the Family Fairness policy). This suggests that DHS's proposed deferred action program is not, simply by virtue of its relative size, inconsistent with what Congress has previously considered a permissible exercise of enforcement discretion in the immigration context.

In light of these considerations, we believe the proposed expansion of deferred action to the parents of U.S. citizens and LPRs is lawful. It reflects considerations—responding to resource constraints and to particularized humanitarian concerns arising in the immigration context—that fall within DHS's expertise. It is consistent with congressional policy, since it focuses on a group—law-abiding parents of lawfully present children who have substantial ties to the

community—that Congress itself has granted favorable treatment in the immigration process. The program provides for the exercise of case-by-case discretion, thereby avoiding creating a rule-like entitlement to immigration relief or abdicating DHS's enforcement responsibilities for a particular class of aliens. And, like several deferred action programs Congress has approved in the past, the proposed program provides interim relief that would prevent particularized harm that could otherwise befall both the beneficiaries of the program and their families. We accordingly conclude that the proposed program would constitute a permissible exercise of DHS's enforcement discretion under the INA.

2.

We now turn to the proposed deferred action program for the parents of DACA recipients. The relevant considerations are, to a certain extent, similar to those discussed above: Like the program for the parents of U.S. citizens and LPRs, the proposed program for parents of DACA recipients would respond to severe resource constraints that dramatically limit DHS's ability to remove aliens who are unlawfully present, and would be limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. And like the proposed program for LPRs and U.S. citizens, the proposed program for DACA parents would preserve a significant measure of case-by-case discretion not to award deferred action even if the general eligibility criteria are satisfied.

But the proposed program for parents of DACA recipients is unlike the proposed program for parents of U.S. citizens and LPRs in two critical respects. First,

although DHS justifies the proposed program in large part based on considerations of family unity, the parents of DACA recipients are differently situated from the parents of U.S. citizens and LPRs under the family-related provisions of the immigration law. Many provisions of the INA reflect Congress's general concern with not separating individuals who are legally entitled to live in the United States from their immediate family members. *See, e.g.*, 8 U.S.C. § 1151(b)(2)(A)(i) (permitting citizens to petition for parents, spouses and children); *id.* § 1229b(b)(1) (allowing cancellation of removal for relatives of citizens and LPRs). But the immigration laws do not express comparable concern for uniting persons who lack lawful status (or prospective lawful status) in the United States with their families. DACA recipients unquestionably lack lawful status in the United States. *See* DACA Toolkit at 8 ("Deferred action . . . does not provide you with a lawful status."). Although they may presumptively remain in the United States, at least for the duration of the grant of deferred action, that grant is both time-limited and contingent, revocable at any time in the agency's discretion. Extending deferred action to the parents of DACA recipients would therefore expand family-based immigration relief in a manner that deviates in important respects from the immigration system Congress has enacted and the policies that system embodies.

Second, as it has been described to us, the proposed deferred action program for the parents of DACA recipients would represent a significant departure from deferred action programs that Congress has implicitly approved in the past. Granting deferred action to the parents of DACA recipients would not operate as an

interim measure for individuals to whom Congress has given a prospective entitlement to lawful status. Such parents have no special prospect of obtaining visas, since Congress has not enabled them to self-petition—as it has for VAWA self-petitioners and individuals eligible for T or U visas—or enabled their undocumented children to petition for visas on their behalf. Nor would granting deferred action to parents of DACA recipients, at least in the absence of other factors, serve interests that are comparable to those that have prompted implementation of deferred action programs in the past. Family unity is, as we have discussed, a significant humanitarian concern that underlies many provisions of the INA. But a concern with furthering family unity alone would not justify the proposed program, because in the absence of any family member with lawful status in the United States, it would not explain why that concern should be satisfied by permitting family members to remain in the United States. The decision to grant deferred action to DACA parents thus seems to depend critically on the earlier decision to make deferred action available to their children. But we are aware of no precedent for using deferred action in this way, to respond to humanitarian needs rooted in earlier exercises of deferred action. The logic underlying such an expansion does not have a clear stopping point: It would appear to argue in favor of extending relief not only to parents of DACA recipients, but also to the close relatives of any alien granted deferred action through DACA or any other program, those relatives' close relatives, and perhaps the relatives (and relatives' relatives) of any alien granted any form of discretionary relief from removal by the Executive.

For these reasons, the proposed deferred action program for the parents of DACA recipients is meaningfully different from the proposed program for the parents of U.S. citizens and LPRs. It does not sound in Congress's concern for maintaining the integrity of families of individuals legally entitled to live in the United States. And unlike prior deferred action programs in which Congress has acquiesced, it would treat the Executive's prior decision to extend deferred action to one population as justifying the extension of deferred action to additional populations. DHS, of course, remains free to consider whether to grant deferred action to individual parents of DACA recipients on an ad hoc basis. But in the absence of clearer indications that the proposed class-based deferred action program for DACA parents would be consistent with the congressional policies and priorities embodied in the immigration laws, we conclude that it would not be permissible.

III.

In sum, for the reasons set forth above, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be legally permissible, but that the proposed deferred action program for parents of DACA recipients would not be permissible.

KARL R. THOMPSON
Principal Deputy Assistant Attorney General
Office of Legal Counsel

APPENDIX H

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

June 15, 2012

MEMORANDUM FOR: David V. Aguilar
Acting Commissioner, U.S. Customs and Border Protection

Alejandro Mayorkas
Director, U.S. Citizenship and Immigration Services

John Morton
Director U.S. Immigration and Customs Enforcement

FROM: Janet Napolitano
Secretary of Homeland Security
/s/_____

SUBJECT: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children

By this memorandum, I am setting forth how, in the exercise of our prosecutorial discretion, the Department

of Homeland Security (DHS) should enforce the Nation's immigration laws against certain young people who were brought to this country as children and know only this country as home. As a general matter, these individuals lacked the intent to violate the law and our ongoing review of pending removal cases is already offering administrative closure to many of them. However, additional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities.

The following criteria should be satisfied before an individual is considered for an exercise of prosecutorial discretion pursuant to this memorandum:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.

Our Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case. Nor are they designed to remove productive young people to countries where they may not have lived or even speak the language. Indeed, many of these young people have already contributed to our country in significant ways. Prosecutorial discretion, which is used in so many other areas, is especially justified here.

As part of this exercise of prosecutorial discretion, the above criteria are to be considered whether or not an individual is already in removal proceedings or subject to a final order of removal. No individual should receive deferred action under this memorandum unless they first pass a background check and requests for relief pursuant to this memorandum are to be decided on a case by case basis. DHS cannot provide any assurance that relief will be granted in all cases.

1. With respect to individuals who are encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or U.S. Citizenship and Immigration Services (USCIS):

- With respect to individuals who meet the above criteria, ICE and CBP should immediately exercise their discretion, on an individual basis, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.
- USCIS is instructed to implement this memorandum consistent with its existing

guidance regarding the issuance of notices to appear.

2. With respect to individuals who are **in** removal proceedings but not yet subject to a final order of removal, and who meet the above criteria:

- ICE should exercise prosecutorial discretion, on an individual basis, for individuals who meet the above criteria by deferring action for a period of two years, subject to renewal, in order to prevent low priority individuals from being removed from the United States.
- ICE is instructed to use its Office of the Public Advocate to permit individuals who believe they meet the above criteria to identify themselves through a clear and efficient process.
- ICE is directed to begin implementing this process within 60 days of the date of this memorandum.
- ICE is also instructed to immediately begin the process of deferring action against individuals who meet the above criteria whose cases have already been identified through the ongoing review of pending cases before the Executive Office for Immigration Review.

3. With respect to the individuals who are **not** currently in removal proceedings and meet the above criteria, and pass a background check:

- USCIS should establish a clear and efficient process for exercising prosecutorial discretion, on an individual basis, by defining action

against individuals who meet the above criteria and are at least 15 years old, for a period of two years, subject to renewal, in order to prevent low priority individuals from being placed into removal proceedings or removed from the United States.

- The USCIS process shall also be available to individuals subject to a final order of removal regardless of their age.
- USCIS is directed to begin implementing this process within 60 days of the date of this memorandum.

For individuals who are granted deferred action by either ICE or USCIS, USCIS shall accept applications to determine whether these individuals qualify for work authorization during this period of deferred action.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights. It remains for the executive branch, however, to set forth policy for the exercise of discretion within the framework of the existing law. I have done so here.

/s/_____
Janet Napolitano

APPENDIX I

Executive Order 2012-46

Re-Affirming Intent of Arizona Law In Response to the Federal Government's Deferred Action Program

WHEREAS, United States Citizenship and Immigration Services (USCIS) plans to issue employment authorization documents to certain unlawfully present aliens who are granted Deferred Action under federal immigration laws; and

WHEREAS, the USCIS has confirmed that the Deferred Action program does not and cannot confer lawful or authorized status or presence upon the unlawful alien applicants; and

WHEREAS, unless otherwise made available under applicable law, 8 United States Code § 1621 provides that aliens unlawfully present in the United States are not eligible for any state or local public benefit – as defined in both federal and Arizona law; and

WHEREAS, 8 United States Code § 1622 authorizes states to determine eligibility for any state public benefits for most classes of aliens, including unlawfully present aliens with Deferred Action; and

WHEREAS, the Deferred Action program is purportedly an act of prosecutorial discretion and the program does not provide for any additional public benefit to unlawfully present aliens beyond the delayed

enforcement of United States immigration laws and the possible provision of employment authorization; and

WHEREAS, Arizona Revised Statutes § 1-501 and § 1-502 limit access to public benefits to persons demonstrating lawful presence in the United States; and

WHEREAS, Arizona Revised Statutes § 28-3153 prohibits the Arizona Department of Transportation (ADOT) from issuing a drivers 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; and

WHEREAS, the federal executive's policy of Deferred Action and the resulting federal paperwork issued could result in some unlawfully present aliens inappropriately gaining access to public benefits contrary to the intent of Arizona voters and lawmakers who enacted laws expressly restricting access to taxpayer funded benefits and state identification; and

WHEREAS, allowing more than an estimated 80,000 Deferred Action recipients improper access to state or local public benefits, including state issued identification, by presenting a USCIS employment authorization document that does not evidence lawful, authorized status or presence will have significant and lasting impacts on the Arizona budget, its health care system and additional public benefits that Arizona taxpayers fund.

NOW THEREFORE, I, Janice K. Brewer, Governor of the State of Arizona, by virtue of the authority vested in me by the Constitution and laws of the State of Arizona, do hereby order and direct as follows:

1. The 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 and does not entitle them to any additional public benefit.

2. State agencies that provide public benefits, as defined in 8 United States Code § 1621 shall conduct a full statutory, rule-making and policy analysis and, to the extent not prohibited by state or federal law, initiate operational, policy, rule and statutory changes necessary to prevent Deferred Action recipients from obtaining eligibility, beyond those available to any person regardless of lawful status, for any taxpayer-funded public benefits and state identification, including a driver's license, so that the intent of Arizona voters and lawmakers who enacted laws expressly restricting access to taxpayer funded benefits and state identification are enforced.

3. All state agencies that confer taxpayer-funded public benefits and state issued identification shall undergo emergency rule making to address this issue if necessary.

[Seal] **IN WITNESS WHEREOF**, I have hereunto set my hand and caused to be affixed the Great Seal of the State of Arizona.

/s/_____
GOVERNOR

DONE at the Capitol in Phoenix on this 15th day of August in the Year Two Thousand Twelve and of the Independence of the United States of America the Two Hundred and Thirty-Seventh.

ATTEST:

/s/_____
SECRETARY OF STATE

APPENDIX J

A.R.S. § 28-3153

§ 28-3153. Driver license issuance; prohibitions

Effective: September 26, 2008

A. The department shall not issue the following:

1. A driver license to a person who is under eighteen years of age, except that the department may issue:

(a) A restricted instruction permit for a class D or G license to a person who is at least fifteen years of age.

(b) An instruction permit for a class D, G or M license as provided by this chapter to a person who is at least fifteen years and six months of age.

(c) A class G or M license as provided by this chapter to a person who is at least sixteen years of age.

2. A class D, G or M license or instruction permit to a person who is under eighteen years of age and who has been tried in adult court and convicted of a second or subsequent violation of criminal damage to property pursuant to § 13-1602, subsection A, paragraph 1 or convicted of a felony offense in the commission of which a motor vehicle is used, including theft of a motor vehicle pursuant to § 13-1802, unlawful use of means of transportation pursuant to § 13-1803 or theft of means of transportation pursuant to § 13-1814, or who has been adjudicated delinquent for a second or subsequent act that would constitute criminal damage to property pursuant to § 13-1602, subsection A,

paragraph 1 or adjudicated delinquent for an act that would constitute a felony offense in the commission of which a motor vehicle is used, including theft of a motor vehicle pursuant to § 13-1802, unlawful use of means of transportation pursuant to § 13-1803 or theft of means of transportation pursuant to § 13-1814, if committed by an adult.

3. A class A, B or C license to a person who is under twenty-one years of age, except that the department may issue a class A, B or C license that is restricted to only intrastate driving to a person who is at least eighteen years of age.

4. A license to a person whose license or driving privilege has been suspended, during the suspension period.

5. Except as provided in § 28-3315, a license to a person whose license or driving privilege has been revoked.

6. A class A, B or C license to a person who has been disqualified from obtaining a commercial driver license.

7. A license to a person who on application notifies the department that the person is an alcoholic as defined in § 36-2021 or a drug dependent person as defined in § 36-2501, unless the person successfully completes the medical screening process pursuant to § 28-3052 or submits a medical examination report that includes a current evaluation from a substance abuse counselor indicating that, in the opinion of the counselor, the condition does not affect or impair the person's ability to safely operate a motor vehicle.

8. A license to a person who has been adjudged to be incapacitated pursuant to § 14-5304 and who at the

time of application has not obtained either a court order that allows the person to drive or a termination of incapacity as provided by law.

9. A license to a person who is required by this chapter to take an examination unless the person successfully passes the examination.

10. A license to a person who is required under the motor vehicle financial responsibility laws of this state to deposit proof of financial responsibility and who has not deposited the proof.

11. A license to a person if the department has good cause to believe that the operation of a motor vehicle on the highways by the person would threaten the public safety or welfare.

12. A license to a person whose driver license has been ordered to be suspended pursuant to § 25-518.

13. A class A, B or C license to a person whose license or driving privilege has been canceled until the cause for the cancellation has been removed.

14. A class A, B or C license or instruction permit to a person whose state of domicile is not this state.

15. A class A, B or C license to a person who fails to demonstrate proficiency in the English language as determined by the department.

B. The department shall not issue a driver license to or renew the driver license of the following persons:

1. A person about whom the court notifies the department that the person violated the person's written promise to appear in court when charged with

a violation of the motor vehicle laws of this state until the department receives notification in a manner approved by the department that the person appeared either voluntarily or involuntarily or that the case has been adjudicated, that the case is being appealed or that the case has otherwise been disposed of as provided by law.

2. If notified pursuant to § 28-1601, a person who fails to pay a civil penalty as provided in § 28-1601, except for a parking violation, until the department receives notification in a manner approved by the department that the person paid the civil penalty, that the case is being appealed or that the case has otherwise been disposed of as provided by law.

C. The magistrate or the clerk of the court shall provide the notification to the department prescribed by subsection B of this section.

D. Notwithstanding any other law, the department 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. For an application for a driver license or a nonoperating identification license, the department shall not accept as a primary source of identification a driver license issued by a state if the state does not require that a driver licensed in that state be lawfully present in the United States under federal law. The director shall adopt rules necessary to carry out the purposes of this subsection. The rules shall include procedures for:

1. Verification that the applicant's presence in the United States is authorized under federal law.

2. Issuance of a temporary driver permit pursuant to § 28-3157 pending verification of the applicant's status in the United States.

APPENDIX K

IN THE NINTH CIRCUIT COURT OF APPEALS

No. 15-15307
D.C. No. 2:12-cv-02546-DGC

[July 16, 2015]

ARIZONA DREAM ACT COALITION; CHRISTIAN JACOBO; ALEJANDRA LOPEZ; ARIEL MARTINEZ; NATALIA PEREZ-GALLEGOS; CARLA CHAVARRIA; JOSE RICARDO HINOJOS, Plaintiffs-Appellees,	)
v.	)
JANICE K. BREWER, Governor of the State of Arizona, in her official capacity; JOHN S. HALIKOWSKI, Director of the Arizona Department of Transportation, in his official capacity; STACEY K. STANTON, Assistant Director of the Motor Vehicle Division of the Arizona Department of Transportation, in her official capacity, Defendants-Appellants.	)

Pasadena, California
July 16, 2015

BEFORE THE HONORABLE HARRY PREGERSON
BEFORE THE HONORABLE MARSHA S. BERZON
BEFORE THE HONORABLE MORGAN B. CHRISTEN

TRANSCRIPT OF PROCEEDINGS

Oral Argument

Proceedings recorded by electronic sound recording; transcript produced by AVTranz, an eScribers, LLC company.

REGINA WITTKOWSKE
Transcriptionist

* * *

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* * *

JUDGE CHRISTEN: But, counsel -- counsel, if I might? Counsel, if I might? This is why this begs of preemption analysis, it seems to me. And the record is now pretty schizophrenic about what your position is on preemption, if I might. And I don't mean to be disrespectful, but I am struggling to figure out what you're doing here because we have the DOJ analysis, right, and that's certainly not a secret. It's right out there filed in the public record. There was a brief filed by your team in the District Court that dropped a footnote asking the District Court to rule on preemption if it didn't rule in your favor on Equal Protection. And then I think that's the last we've heard of it. Is that right?

MS. TUMLIN: Well, that's right, Your Honor. We did not formally cross-appeal the preemption here.

* * *

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CERTIFICATE

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I, Cindy Ferguson, a court approved proofreader, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

TRANSCRIPTIONIST(S): REGINA WITTKOWSKE

/s/ March 9, 2017
CINDY FERGUSON
Proofreader