

1 Jennifer Chang Newell*
2 Cecilia D. Wang*
3 Michael Tan*
4 R. Orion Danjuma*†
5 AMERICAN CIVIL LIBERTIES UNION
6 FOUNDATION
7 IMMIGRANTS' RIGHTS PROJECT
8 39 Drumm Street
9 San Francisco, CA 94111
10 T: (415) 343-0770
11 *jnewell@aclu.org*
12 *cwang@aclu.org*
13 *mtan@aclu.org*
14 *odanjuma.org*

15 Linton Joaquin*
16 Karen C. Tumlin*
17 Shiu-Ming Cheer*
18 NATIONAL IMMIGRATION LAW
19 CENTER
20 3435 Wilshire Boulevard, Suite 2850
21 Los Angeles, CA 90010
22 T: (213) 639-3900
23 *joaquin@nilc.org*
24 *tumlin@nilc.org*
25 *cheer@nilc.org*

26 *Attorneys for Plaintiffs*

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

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

Additional Co-Counsel on Subsequent Pages

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

ARIZONA DREAM ACT COALITION;
et al.,

Plaintiffs,

vs.

JANICE K. BREWER; *et al.* ,

Defendants.

CASE NO. 02:12-cv-02546-DGC-PHX

**MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

1 *Additional Co-Counsel*

2
3 Tanya Broder*
4 NATIONAL IMMIGRATION LAW
5 CENTER
6 405 14th Street, Suite 1400
7 Oakland, CA 94612
8 T: (510) 663-8282
9 *broder@nilc.org*

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

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

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

15
16 **Pro hac vice*

***Admitted pursuant to Ariz. Sup. Ct. R. 38(f)*

17 † *Admitted in New York*

Attorneys for Plaintiffs

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

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

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

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

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

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

5 **II. BACKGROUND**

6 **A. Deferred Action.**

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

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

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

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

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

15 **B. Arizona Provisions on Driver’s License Eligibility.**

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

20
21
22 ¹ Noncitizens are eligible for DACA if they: a) were under the age of 31 as of June
23 15, 2012; b) came to the United States before reaching their 16th birthday; c) have
24 continuously resided in the country from June 15, 2007 to the present; d) were physically
25 present in the country on June 15, 2012, and at the time of making the request for
26 deferred action; e) entered without inspection before June 15, 2012, or their lawful
27 immigration status expired as of June 15, 2012; f) are currently in school, have graduated
28 or obtained a certificate of completion from high school, have obtained a general
education development (“GED”) certificate, or are an honorably discharged veteran of
the Coast Guard or Armed Forces of the United States; and g) have not been convicted of
a felony, significant misdemeanor, or three or more other misdemeanors, and do not
otherwise pose a threat to national security or public safety. Ranahan Decl., Ex. C
(*Napolitano Memo.* at 2).

1 provides that “the [Arizona Department of Transportation (“ADOT”)] shall not issue to
2 or renew a driver license or nonoperating identification license for a person *who does not*
3 *submit proof satisfactory to the department that the applicant’s presence in the United*
4 *States is authorized under federal law.”* A.R.S. § 28-3153(D) (emphasis added). The
5 statute further provides that ADOT shall make rules for “[v]erification that the
6 applicant’s presence in the United States is authorized under federal law.” *Id.* at § 28-
7 3153(D)(1).

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

18 However, on August 15, 2012 – the first day the federal government began
19 accepting DACA applications – Defendant Brewer issued Executive Order 2012-06,
20 instructing state agencies to take necessary steps to “prevent Deferred Action recipients
21 from obtaining eligibility . . . for any . . . state identification, including a driver’s license.”
22 *See* Ranahan Decl., Ex. A (Executive Order 2012-06). The Executive Order purports to
23 “Re-affirm[] [the] Intent of Arizona Law in Response to the Federal Government’s
24 Deferred Action Program[.]” *Id.*

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

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

7 In a public statement made the same day she issued the Executive Order, Defendant
8 Brewer explained that the Order was intended to clarify that there would be “no drivers
9 [sic] licenses for illegal people.” Ranahan Decl., Ex. E (Terry Greene Sterling, *The Daily*
10 *Beast, Gov. Jan Brewer Battles Obama’s DREAM Directive in Arizona* (Aug. 17,
11 2012)).² Defendant Brewer stated: “They are here illegally and unlawfully in the state of
12 Arizona, and it’s already been determined that you’re not allowed to have a driver’s
13 license if you are here illegally.” *See* Ranahan Decl., Ex. F (Fox News Latino, *Jan*
14 *Brewer Bars IDs, Benefits for Undocumented Immigrants in Arizona* (Aug. 16, 2012)).
15 She further stated, “The Obama amnesty plan doesn’t make them legally here.” *Id.*

16 To implement the Executive Order, the Arizona MVD revised its policy regarding
17 acceptance of EADs as proof of authorized presence. The new policy expressly excludes
18 EADs resulting from the DACA program from a long list of acceptable evidence of
19 authorized presence for applying for a driver’s license or identification card. *See* Pochoda
20 Decl., Ex. D (Arizona MVD Policy 16.1.4(S) (rev. Sept. 18, 2012)). However, for all
21 other recipients of deferred action (*i.e.* other than DACA beneficiaries), and, indeed, *all*
22 other classes of noncitizens, EADs will continue to be accepted as proof of authorized
23 status. *See* Pochoda Decl., Ex. E (Arizona MVD, *Primary and Secondary Forms of*
24 *Acceptable Documentation* (rev. Sept. 18, 2012)). These other classes of noncitizens
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28 ² *See also, e.g.,* Ranahan Decl. ¶ 5 (Arizona Channel 12 News Video, *Why did Brewer issue “dreamer” order?* (Aug. 15, 2012)).

1 remain eligible for driver's licenses and continue to receive them. *See* Jeffries Decl. ¶¶ 7-
2 11.

3 **III. ARGUMENT**

4 Plaintiffs are entitled to a preliminary injunction to suspend enforcement of
5 Executive Order 2012-06 and its implementing policies. A preliminary injunction should
6 ordinarily be granted when the moving party establishes: (1) a likelihood of success on
7 the merits; (2) that he or she is likely to suffer irreparable harm in the absence of
8 preliminary relief; (3) that the balance of equities tips in his or her favor; and (4) that an
9 injunction is in the public interest. *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th
10 Cir. 2009) (citing *Winters v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20
11 (2008)). “The same standard applies regardless of whether the movant seeks to maintain
12 the status quo or to halt an ongoing deprivation of rights.” *Klein v. City of Laguna Beach*,
13 381 F. App'x 723, 725 (9th Cir. 2010) (citing *Textile Unlimited, Inc. v. A. BMH & Co.*,
14 240 F.3d 781, 786 (9th Cir. 2001)). However, where “the balance of hardships tips
15 sharply in the plaintiff's favor,” the plaintiff need only “demonstrate[] . . . that serious
16 questions going to the merits were raised” to justify an injunction. *Alliance of the Wild*
17 *Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (citation omitted). Plaintiffs
18 meet these elements here under either standard.

19 **A. Defendants' policy violates the Supremacy Clause.**

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

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

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

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

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

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

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

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

1 1258-59 (11th Cir. 2012) (a noncitizen “currently classified under ‘deferred action’ status
2 . . . remains permissibly in the United States” “[a]s a result of this status”); *Hispanic*
3 *Interest Coal. of Ala. v. Bentley*, No. 5:11–CV–2484–SLB, 2011 WL 5516953, at *20
4 n.11 (N.D. Ala. Sept. 28, 2011), *vacated as moot*, 691 F.3d 1236 (11th Cir. 2012)
5 (noncitizens granted deferred action are persons “whom the federal government has
6 authorized to remain in the United States”).

7 This conclusion is confirmed by Congress’s treatment of deferred action. Congress
8 has specifically indicated that “approved deferred action status” constitutes “a period of
9 . . . authorized stay in the United States” for the purpose of issuing driver’s licenses that
10 are valid as federal identification. REAL ID Act, 49 U.S.C. § 30301 note, Sec.
11 202(c)(2)(B)(viii),(C)(ii) (providing that complying states may issue a temporary driver’s
12 license to persons with “approved deferred action status” for “the period of time of the
13 applicant’s authorized stay in the United States”). Thus, federal law expressly defines
14 “lawful status” for driver’s license purposes to include “approved deferred action status.”
15 49 U.S.C. § 30301 note, Sec. 202(c)(2)(B)(viii); *see also* 6 C.F.R. § 37.3 (same).³
16 Notably, Congress made no distinction between individuals or groups granted deferred
17 action in deeming them to be “authorized” for the purpose of issuing driver’s licenses.⁴

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

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

1 Likewise, numerous immigration regulations confirm that DHS treats deferred
2 action as authorization to remain in the United States. Under DHS regulations,
3 noncitizens with deferred action are eligible for employment authorization, and the
4 agency regularly grants such authorization. The granting of work authorization to
5 deferred action recipients reinforces that DHS permits them to be present in the United
6 States, for they can only work in the United States if they are present here. *See* 8 C.F.R. §
7 274a.12(c)(14).

8 In addition, DHS specifically considers deferred action recipients to be present
9 pursuant to a “period of stay authorized by the Attorney General,” and thus not
10 “unlawfully present,” for the purposes of the bars on re-admission of certain noncitizens
11 under 8 U.S.C. § 1182 (a)(9)(B). *See, e.g.,* Ranahan Decl., Ex. H (Memorandum of
12 Donald Neufeld, Acting Assoc. Dir., USCIS, *Consolidation of Guidance Concerning*
13 *Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the*
14 *Act, May 2009*, at 6-7, 42 (hereinafter “*Neufeld Memo.*”). Although the INA does not
15 contain a general definition of “unlawful presence,” the INA does use the term “unlawful
16 presence” for the purpose of setting out the circumstances in which certain previously
17 unlawfully present noncitizens who depart the United States and then seek re-admission
18 are barred from re-entry.⁵ Deferred action recipients are not “unlawfully present” under
19 this definition. *See, e.g., id. (Neufeld Memo. at 6-7, 42); accord* 8 C.F.R. § 214.14(d)(3);
20 28 C.F.R. § 1100.35(b)(2). Thus, USCIS has explained that under the DACA program,
21 “an individual whose case is deferred will not be considered to be accruing unlawful
22 presence in the United States during the period deferred action is in effect.” Ranahan
23 Decl., Ex. I (USCIS, *Frequently Asked Questions, Consideration of Deferred Action for*
24 *Childhood Arrivals Process*, Q1 (Sept. 14, 2012)); *see also id.* at Q5, Q6.

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

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

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

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

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

1
2 **2. Arizona’s misclassification of DACA recipients as “unauthorized” is**
3 **preempted because it impermissibly attempts to regulate**
4 **immigration and conflicts with federal law.**

5 Arizona has conditioned its driver’s licenses on whether applicants can prove that
6 their “presence in the United States is authorized under federal law.” A.R.S. § 28-
7 3153(D). However, rather than deferring to federal categories and classifications with
8 respect to the DACA program, Executive Order 2012-06 decrees that DACA “does not
9 and cannot confer lawful or authorized status or presence upon the unlawful alien
10 applicants,” and that DACA recipients are therefore ineligible “for any . . . state
11 identification, including a driver’s license.” Ranahan Decl., Ex. A (Executive Order
12 2012-06). In deeming DACA recipients “unauthorized” to be present in the United States
13 and thus ineligible for driver’s licenses, Executive Order 2012-06 and its implementing
14 policies are wholly inconsistent with federal law and are preempted for at least two
15 independent reasons.

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

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

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

1 457 U.S. 202, 225 (1982) (internal citations omitted) (quoting *Mathews v. Diaz*, 426 U.S.
2 67, 80-81, 84-85 (1976)). Accordingly, “[t]he States enjoy no power with respect to the
3 classification of aliens.” *Id.* See also *id.* at 219 n.19; *Toll v. Moreno*, 458 U.S. 1, 10
4 (1982) (noting “the substantial limitations upon the authority of the States in making
5 classifications based upon alienage.”); *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977)
6 (“Congress, as an aspect of its broad power over immigration and naturalization, enjoys
7 rights to distinguish among aliens that are not shared by the States.”). At most, states
8 may, in some circumstances, “borrow the federal classification,” *Plyler*, 457 U.S. at 226,
9 or “follow the federal direction,” but “[n]o State may independently exercise” the power
10 to classify aliens. *Id.* at 219 n.19; see also *id.* at 225 (“The States enjoy no power with
11 respect to the classification of aliens.”); accord *Equal Access Educ. v. Merten*, 305 F.
12 Supp. 2d 585, 602-03 (E.D. Va. 2004).

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

24 Federal courts have found state classifications constitutionally preempted under
25 analogous circumstances. For example, in *League of United Latin Am. Citizens v. Wilson*,
26 908 F. Supp. 755 (C.D. Cal. 1995), the Court held that California’s Proposition 187 was
27 an impermissible regulation of immigration because it created a classification system for
28 public benefits purposes that was not “tied to federal standards,” *id.* at 772, but rather “an

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

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

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

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

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

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

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

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

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

21 In sum, by defining “authorized” presence to exclude DACA recipients, Executive
22 Order 2012-06 impermissibly regulates immigration by creating the state’s own
23 immigration classification, and fundamentally conflicts with federal law and federal
24 goals. The federal government has made a clear policy choice by exercising its discretion
25 over immigration enforcement. The state’s apparent disagreement with the federal
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28 ⁷ *See, e.g.*, Ranahan Decl., Ex. K (U.S. Census Bureau, *Selected Economic Characteristics, 2011 American Community Survey 1 Year Estimates*).

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

4 **B. Defendants' policy violates Equal Protection.**

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

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

17 In denying driver's licenses to DACA grantees, Defendants are now singling out
18 and discriminating against DACA grantees despite Arizona's longstanding policy of
19 allowing other noncitizens granted deferred action to submit their EADs as proof of
20 authorized presence and obtain licenses. These similarly situated recipients of deferred
21 action have included survivors of domestic violence who have filed a VAWA self-
22 petition, and victims of serious crimes who have applied for U nonimmigrant status. *See*
23 *Cooper Decl.* ¶¶ 34-34; *Yale-Loehr Decl.* ¶¶ 13-19. Indeed, Arizona makes temporary
24 driver's licenses available to many similar groups of noncitizens who demonstrate
25 authorized presence in the country by presenting an EAD, including those who lack a
26 formal immigration status. *See Pochoda Decl., Ex. F (Type F License Chart); Jeffries*
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1 Decl. ¶¶ 7-12.⁸ The number of such individuals is not insubstantial. Between 2005 and
2 2012, applicants presented EADs as proof of authorized presence to obtain an Arizona
3 driver's license an estimated 47,500 times. *See* Pochoda Decl., Ex. G. Under Arizona's
4 current policy, every noncitizen who has received an EAD can present his EAD as proof
5 of authorized status and is therefore eligible for a driver's license – with the single
6 exception of DACA recipients. As explained below, there is no valid justification – under
7 any standard of review – for treating DACA recipients differently from such similarly
8 situated noncitizens.

9
10 **2. Discrimination against DACA recipients is subject to strict or
heightened scrutiny.**

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

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

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

1 By denying Arizona driver's licenses only to individuals granted deferred action
2 and work authorization under DACA, Defendants are discriminating based on alienage.
3 The sole basis for the exclusion is DACA recipients' immigration category rather than
4 any substantive qualification for an Arizona driver's license. This is a quintessential
5 classification based on alienage. The fact that Arizona is discriminating *among* classes of
6 noncitizens does not make its policies any less of an alienage classification. Rather, what
7 matters is that Arizona's driver license policy is "directed at aliens and . . . only aliens are
8 harmed by it." *Nyquist*, 432 U.S. at 9; *see also id.* at 7 (applying strict scrutiny to a New
9 York law prohibiting certain lawful permanent residents from receiving state financial aid
10 for higher education); *Graham*, 403 U.S. at 368-70 (same, for an Arizona law denying
11 disability benefits to lawful permanent residents who had not resided in the state for 15
12 years).

13 Although the Supreme Court has held that undocumented immigrants are not a
14 "suspect class," *see Plyler*, 457 U.S. at 219-20, n.19, that rule does not apply to
15 noncitizens like DACA grantees, who are authorized to live in the United States. *See*
16 § III.A.1, *supra*. As the Second Circuit recently explained in *Dandamudi v. Tisch*,
17 although laws discriminating against "people who reside in the United States without
18 authorization" are subject to a lesser level of scrutiny, that limited exception does not
19 apply to noncitizens "who have been granted the legal right to live and work in the
20 United States." 686 F.3d 66, 72, 74 (2d Cir. 2012).⁹ Thus, *Dandamudi* applied strict
21 scrutiny to a New York rule prohibiting nonimmigrant visa holders who had obtained
22 state pharmacist licenses from renewing those licenses. *Id.* at 69.¹⁰ Although the Ninth
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24 ⁹ Notably, undocumented immigrants are the *only* group of noncitizens whom the
25 Supreme Court has excluded from strict scrutiny. *See Dandamudi*, 686 F.3d at 70
26 (reviewing Supreme Court case law). The only other exception the Supreme Court has
27 created to the "general principle that alienage is a suspect classification" is for laws that
28 "exclude aliens from political and government functions." *Id.* at 73. That exception is not
applicable here.

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

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

5 At minimum, Plaintiffs are entitled to the heightened scrutiny that courts have
6 found warranted for certain state classifications that are not inherently suspect. *See*
7 *Plyler*, 457 U.S. at 223-24 (applying heightened scrutiny to Texas’s denial of access to
8 public education to undocumented children); *Mathews v. Lucas*, 427 U.S. 495, 505
9 (1976) (same, to state discrimination against children with unmarried parents); *Windsor*
10 *v. United States*, 699 F.3d 169, 185 (2d Cir. 2012), *cert. granted*, 12-307, 2012 WL
11 4009654 (U.S. Dec. 7, 2012) (same, to discrimination against same-sex couples);
12 *Golinski v. U.S. Office of Personnel Management*, 824 F. Supp. 2d 968, 985-990 (N.D.
13 Cal. 2012) (same).

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

23 Courts in the Ninth Circuit apply heightened review to classifications that are not
24 inherently suspect when the targeted group has: (1) “suffered a history of discrimination”;
25 (2) “exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a
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28 *Dandamudi*, 686 F.3d at 75-76 (rejecting *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005)
and *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523 (6th Cir. 2007)).

1 discrete group”; and (3) “shows that they are a minority or politically powerless.” *High*
2 *Tech Gays v. Defense Ind. Sec. Clearance Off.*, 895 F.2d 563, 573 (9th Cir. 1990). DACA
3 grantees easily satisfy this standard. First, these immigrant youth have faced, and
4 continue to face discrimination. *See, e.g., Lozano v. Hazelton*, 496 F. Supp. 2d 477, 509-
5 10 (M.D. Pa. 2007) (granting plaintiffs’ request to proceed anonymously after noting
6 “climate of fear and hostility” around those supporting perceived as undocumented
7 immigrants or supporting immigrants’ rights); *see also* John Hart Ely, *Democracy and*
8 *Distrust: A Theory of Judicial Review* 161-62 (1980) (contending that, because
9 noncitizens cannot vote and have suffered a history of discrimination, immigrants
10 constitute a discrete and insular minority deserving of special protection by the courts).
11 Second, these individuals share distinguishing characteristics that define them as a
12 discrete group, easily subject to discrimination. In this case, the EADs provided to
13 individuals granted DACA have an identifiable code – “(c)(33)” – that allows Defendants
14 to single them out from other individuals granted deferred action, and to deny them
15 driver’s licenses on this basis alone. *See, e.g., Martinez Decl., Ex. 1*. Finally, as
16 individuals only recently granted federal authorization to live and work in the United
17 States, and who cannot vote, DACA grantees are politically powerless. *See Toll*, 458 U.S.
18 at 23 (Blackmun, J., concurring) (“[T]he fact that aliens constitutionally may be – and
19 generally are – formally and completely barred from participating in the process of self-
20 government makes particularly profound the need for searching judicial review of
21 classifications grounded on alienage.”); *see also Golinski*, 824 F. Supp. 2d at 989
22 (concluding that lesbians and gays should be considered politically powerless despite
23 some legislative gains because of their “basic inability to bring about an end to
24 discrimination and pervasive prejudice, to secure desired policy outcomes and to prevent
25 undesirable outcomes on fundamental matters that directly impact their lives”). For these
26 reasons, heightened review is appropriate.

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

1 *Village Gen. Improvement Dist.*, 665 F.3d 1128, 1141 (9th Cir. 2011) (“When applying
2 strict scrutiny, we ask whether the [challenged policy] is narrowly tailored to serve a
3 compelling governmental interest) (internal quotations omitted); *see also Dandamudi*,
4 686 F.3d 66 (to withstand strict scrutiny, state policy must be “narrowly tailored to
5 further a compelling government interest”). Under heightened scrutiny, Defendants must
6 show that their challenged policy is “substantially related to an important government
7 objective.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988). In making this showing Defendants
8 may only refer to the “actual [governmental] purpose, not rationalizations for actions in
9 fact differently grounded.” *United States v. Virginia*, 518 U.S. 515, 535-36 (1996).
10 Defendants cannot meet either of these tests. However, this Court need not decide
11 precisely which standard of review is applicable because, as shown below, Defendants’
12 policy is wholly irrational and cannot even withstand rational basis review.

13 **3. Defendants’ driver’s license policy does not even pass rational basis**
14 **review.**

15 The rational basis standard requires that a classification “be reasonable, not
16 arbitrary, and must rest upon some ground of difference having a fair and substantial
17 relation to the object of the legislation, so that all persons similarly circumstanced shall
18 be treated alike.” *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (citations omitted); *accord*
19 *Armendariz v. Penman*, 75 F.3d 1311, 1326-27 (9th Cir. 1996) (en banc) (citations
20 omitted) (“The State may not rely on a classification whose relationship to an asserted
21 goal is so attenuated as to render the distinction arbitrary or irrational.”). As the Supreme
22 Court held in *Heller v. Doe*, “the standard of rationality . . . must find some footing in the
23 realities of the subject addressed by the legislation.” 509 U.S. 312, 319-320 (1993).
24 Importantly, “[a] bare . . . desire to harm a politically unpopular group cannot constitute a
25 legitimate governmental interest.” *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (quoting
26 *Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)); *accord Cleburne v. Cleburne*
27 *Living Ctr., Inc.*, 473 U.S. 432, 446-47 (1985). Put another way, under the rational basis
28 standard, a law is invalid if it lacks any factual or legal basis. *FCC v. Beach*

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

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

22 Indeed, Governor Brewer's statements regarding Executive Order 2012-06 makes
23 clear that Arizona's policy was motivated by an illegitimate intent to defy federal
24 immigration policy and to discriminate against a disfavored group. Immediately after
25 President Obama announced the DACA program, Governor Brewer denounced the
26 program as "backdoor amnesty" and "desperate political pandering by a president
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28

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

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

23 Finally, Defendants’ vague assertion that providing state benefits to DACA
24 recipients “will have significant and lasting impacts on the Arizona budget” lacks any
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26 ¹¹ Ranahan Decl. ¶ 12 (*Brewer: Obama immigration ‘outrageous,’ CNN*, (June 15,
27 2012) (video)).

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

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

5 **C. The Court should grant preliminary injunctive relief.**

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

8 As a result of Defendants’ denial of driver’s licenses to DACA recipients, Plaintiffs,
9 Plaintiffs’ members, and proposed class members suffer numerous irreparable harms, and
10 will continue to suffer them if the Executive Order is not enjoined. *Winters*, 129 S. Ct. at
11 375 (injunction appropriate where irreparable harm “likely”). *See, e.g.*, Lopez Decl. ¶¶ 5-
12 7; Jacobo Decl. ¶¶ 7-10; Martinez Decl. ¶¶ 5-7; Perez-Gallegos Decl. ¶¶ 6-8; Castro-
13 Martinez Decl. ¶¶ 6-8; Matuz Decl. ¶¶ 7-11.

14 First, being subjected to an unconstitutional state action such as Arizona’s driver’s
15 license policy constitutes irreparable injury. *See Monterey Mech. Co. v. Wilson*, 125 F.3d
16 702, 715 (9th Cir. 1997) (“an alleged constitutional infringement will often alone
17 constitute irreparable harm”). This principle applies to Supremacy Clause violations as
18 well as other constitutional violations. *See e.g., Morales v. Trans World Airlines, Inc.*,
19 504 U.S. 374, 381 (1992); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F.
20 Supp. 2d 858, 878 (N.D. Tex. 2008).

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

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

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

17 Third, the inability to drive legally imposes onerous restrictions on the daily lives of
18 the Individual Plaintiffs and of ADAC’s members by restricting their ability to assist their
19 families with child care, health needs, and other necessities of daily life. *See Wooley v.*
20 *Maynard*, 430 U.S. 705, 712 (1977) (holding that plaintiffs had demonstrated harms
21 sufficient to justify injunctive relief where threat of prosecution impeded ability to
22 perform the ordinary tasks of daily life requiring an automobile); *Mills v. Dist. of*
23 *Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (finding irreparable injury where
24 citizens’ right to drive was unconstitutionally limited); *Ligon v. City of New York*, No: 12
25 CIV 2274 SAS, 2012 WL 3597066 (S.D.N.Y. Aug. 21, 2012) (holding preliminary
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27
28 ¹³ Ranahan Decl., Ex. K (U.S. Census Bureau, *Selected Economic Characteristics, 2011 American Community Survey 1 Year Estimates*).

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

6 Fourth, the continued discrimination will cause Plaintiffs and their members
7 emotional and psychological harm because it creates the perception that they are inferior.
8 *See, e.g.,* Ranahan Decl., Ex. E (*Gov. Jan Brewer Battles Obama's DREAM Directive in*
9 *Arizona* (reporting Defendant Brewer's statement that there will be "no drivers licenses
10 [sic] for illegal people")); *Chalk v. United States Dist. Court*, 840 F.2d 701, 709 (9th Cir.
11 1988) (collecting cases holding that discrimination that creates emotional and
12 psychological harms can constitute irreparable injury). For example, Mr. Castro-Martinez
13 has testified that Defendants' discrimination against DACA recipients has "had a huge
14 impact on [him] mentally" because "[i]t's terrible to be the target of discrimination."
15 Castro-Martinez Decl. ¶ 8.

16 Finally, ADAC is suffering irreparable harm due to the reallocation of its
17 organizational resources to address the impact of Arizona's policy on its membership.
18 The vast majority of ADAC's members are recipients of DACA or are DACA-eligible.
19 Matuz Decl. ¶ 6. Arizona's policy is impeding ADAC's ability to carry out its mission
20 because it has forced ADAC to expend resources dealing with the logistics of
21 transporting its members, rather than focusing on the organization's core goals of
22 improving community education and civic participation. This has caused ADAC to lose
23 opportunities to strengthen outreach and expand its membership. Matuz Decl. ¶ 9. The
24 diversion of resources and frustration of its core mission represent irreparable and
25 continuing injuries to ADAC. *See Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th
26 Cir. 2002); *Nat'l Fair Hous. Alliance v. A.G. Spanos Const., Inc.*, 542 F. Supp. 2d 1054,
27 1066 (N.D. Cal. 2008).

28

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

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

18 **3. The preliminary injunction will serve the public interest.**

19 The public's interest is firmly aligned with that of the Plaintiffs. *See Miller v. Ca.*
20 *Pac. Med. Ctr.*, 991 F.2d 536, 540 (9th Cir. 1993); *vacated on other grounds*, 19 F.3d
21 449 (9th Cir. 1994) (public interest encompasses general welfare). A preliminary
22 injunction supports the public interest by permitting DACA recipients to participate
23 meaningfully in the state's communities and to contribute to Arizona as a whole. Driver's
24 licenses allow DACA grantees access to work and educational opportunities, and help
25 them contribute to the economy and provide for their families – as the federal
26 government has intended the DACA program to do. *See Ranahan Decl., Ex. J (Remarks*
27 *by the President on Immigration* (noting that permitting economic participation by
28 DACA eligible youth is the “right thing to do for our economy”)).

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

9 **IV. CONCLUSION**

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

13 Dated this 14th day of December, 2012.

14 Respectfully submitted,

15
16 /s/Jennifer Chang Newell
17 AMERICAN CIVIL LIBERTIES UNION
18 FOUNDATION IMMIGRANTS’ RIGHTS
PROJECT

19 /s/Linton Joaquin
20 NATIONAL IMMIGRATION LAW
CENTER

21 /s/ Nicolás Espíritu
22 MEXICAN AMERICAN LEGAL
23 DEFENSE AND EDUCATIONAL FUND

24 /s/Daniel Pochoda
ACLU FOUNDATION OF ARIZONA

25 /s/Marty Harper
26 POLSINELLI SHUGHART PC

27 *Attorneys for Plaintiffs*
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CERTIFICATE OF SERVICE

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

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