No. 13-16248

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

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-Appellees.

On Appeal from the United States District Court for the District of Arizona,
No. 2:12-cv-02546-DGC

GOVERNOR JANICE K. BREWER'S, JOHN S. HALIKOWSKI'S AND STACEY K. STANTON'S PETITION FOR REHEARING AND REHEARING *EN BANC*

Douglas C. Northup
Timothy Berg
Sean T. Hood
FENNEMORE CRAIG, P.C.
2394 E. Camelback Road, Suite 600
Phoenix, Arizona 85016-3429
Telephone: (602) 916-5000
Email: dnorthup@fclaw.com
Email: tberg@fclaw.com
Email: shood@fclaw.com
Attorneys for Defendants-Appellees
Governor Janice K. Brewer,
John S. Halikowski and Stacey K. Stanton

Joseph Sciarrotta, Jr.
Office of Governor Janice K. Brewer
1700 West Washington St., 9th Floor
Phoenix, Arizona 85012-2913
Telephone: (602) 542-1586
Email: jsciarrotta@az.gov

Co-Counsel for Defendant-Appellee
Governor Janice K. Brewer

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

FED. R. APP. P. 35(b) STATEMENT 1

LEGAL ANALYSIS 2

I. The preemption analysis warrants panel and *en banc* rehearing. 2

A. Panel rehearing is warranted because the preemption analysis overlooks that the DACA Memo does not have the preemptive force of law. 4

B. Rehearing *en banc* is warranted because the Opinion is inconsistent with Supreme Court precedent and provides for near boundless implied conflict preemption. 6

II. Panel and *en banc* rehearing are warranted because the Opinion erred in holding that Plaintiffs demonstrated a likelihood of proving that the revised Policy violated the Equal Protection Clause. 11

A. The application of rigorous rational basis review conflicts with United States Supreme Court precedent, requiring *en banc* review. 11

B. The Opinion overlooked that the appellate court should have remanded to the district court for assessment of the revised policy. 15

III. The irreparable harm analysis warrants panel and *en banc* rehearing. 16

A. Impairment of professional opportunities is not irreparable harm, warranting rehearing *en banc* 16

B. The Opinion overlooked that Plaintiffs have been able to pursue professional opportunities. 17

RELIEF REQUESTED 19

CERTIFICATE OF COMPLIANCE.....20

CERTIFICATE OF SERVICE.....21

TABLE OF AUTHORITIES

PAGES

CASES

Arizona v. United States, 132 S. Ct. 2492 (2012) 5, 6, 7

Arizona Dream Act Coalition v. Brewer, 945 F. Supp. 2d 1049 (D. Ariz. 2013) 4, 5

Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968 (2011) 1, 7

City of Cleburne v. Cleburne Living Center., 473 U.S. 432 (1985) 14, 15

English v. Gen. Elec. Co., 496 U.S. 72 (1990) 1, 7

F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307 (1993) 1, 11

Fusari v. Steinberg, 419 U.S. 379 (1975) 15

Hawkins v. Comparet-Cassani, 251 F.3d 1230 (9th Cir. 2001) 17

Heller v. Doe, 509 U.S. 312 (1993) 1, 11, 12, 13

Hillman v. Maretta, 133 S. Ct. 1943 (2013) 10

Lupert v. Cal. State Bar, 761 F.2d 1325 (9th Cir. 1985) 9

Mason & Dixon Intermodal, Inc. v. Lapmaster Int'l LLC, 632 F.3d 1056 (9th Cir. 2011) 7

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 1, 11, 13

Morton v. Beyer, 822 F.2d 364 (3d Cir. 1987) 2, 17

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 16

Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973) 9

Reed v. Town of Gilbert, 707 F.3d 1057 (9th Cir. 2013) 15

Rhodes v. Stewart, 705 F.2d 159 (6th Cir. 1983) 10

River Runners for Wilderness v. Martin, 593 F.3d 1064 (9th Cir. 2010).....4

Schweiker v. Wilson, 450 U.S. 221 (1981).....12

Spears v. Stewart, 283 F.3d 992 (9th Cir. 2002).....2

United States v. Mead Corp., 533 U.S. 218 (2001).....4

Vance v. Bradley, 440 U.S. 93 (1979).....1, 11, 12

Wal-Mart Stores, Inc. v. City of Turlock, 483 F. Supp. 2d 1023 (E.D. Cal. 2007).....14

Wyeth v. Levine, 555 U.S. 555 (2009).....1, 10

FEDERAL STATUTES

REAL ID Act, Pub. L. No. 109-13, § 201, 119 Stat. 231, 312 (2005).....9

8 U.S.C. § 1103(g)(2).....8

8 U.S.C. § 1324a.....8

STATE STATUTES

A.R.S. § 28-336 (2008).....10

FEDERAL RULES

Rule 35(b)(1)(B), Fed. R. App. P.....17

FEDERAL REGULATIONS

6 C.F.R. § 37.1.....10

8 C.F.R. § 274a.12(c)(9).....13

8 C.F.R. § 274a.12(c)(10).....13

LEGISLATIVE MATERIALS

DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011) 6

151 Cong. Rec. H453, H454 (daily ed. Feb. 9, 2005) (statement of Rep. Sensenbrenner) 9

FED. R. APP. P. 35(b) STATEMENT

Appellees Governor Brewer, Director Halikowski, and Assistant Director Stanton (collectively, "ADOT") petition for panel rehearing and rehearing *en banc* of the Opinion issued in this case on July 7, 2014.

The Opinion's preemption analysis warrants panel and *en banc* rehearing because: (1) the preemption analysis overlooks the fact that Secretary Napolitano's deferred action for childhood arrivals memorandum ("DACA Memo") does not have the preemptive force of law; and (2) the preemption analysis is inconsistent with Supreme Court precedent, including *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011), *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990), and *Wyeth v. Levine*, 555 U.S. 555 (2009).

The Opinion's equal protection analysis warrants panel and *en banc* rehearing because: (1) the Opinion overlooks the fact that the appellate court should have remanded to the district court for assessment of the revised policy; and (2) the Opinion's exacting application of the highly deferential rational basis review conflicts with Supreme Court precedent, including *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993); *Heller v. Doe*, 509 U.S. 312 (1993); *Vance v. Bradley*, 440 U.S. 93 (1979); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

The Opinion's irreparable harm analysis warrants panel and *en banc* rehearing because: (1) the Opinion, which gives no deference to the district court's findings of fact, overlooks the fact that Plaintiffs have been able to pursue professional opportunities; and (2) the speculative conclusion that impairment of professional opportunities is irreparable harm conflicts with precedent from another circuit, *Morton v. Beyer*, 822 F.2d 364 (3d Cir. 1987).

These are issues of exceptional importance for federalism. The Opinion's preemption analysis will serve as precedent going forward to preempt State action in contexts that have long been reserved to the States. Further, the Opinion's improper application of rational basis review ensures that any State action will fail even under minimal scrutiny.

LEGAL ANALYSIS

I. The preemption analysis warrants panel and *en banc* rehearing.

Although the Opinion does not ultimately determine whether ADOT's Policy is preempted, its preemption analysis arguably remains binding in the Ninth Circuit. *See Spears v. Stewart*, 283 F.3d 992, 1006 (9th Cir. 2002) ("Whether a court ought to speak to an issue that is not strictly necessary to the outcome of the case is a legitimate topic of debate during the process of collegial deliberation. Judges may choose not to join opinions that contain what they see as dicta, or the court may choose to take a case *en banc* when a panel strays into areas that are best

left unexplored. . . . [S]o long as the issue is presented in the case and expressly addressed in the opinion, that holding is binding and cannot be overlooked or ignored by later panels of this court or by other courts of the circuit.") (Statement of Judge Kozinski with whom Circuit Judges O'Scannlain, T.G. Nelson, Graber and Tallman join, concerning the denial of petitions for rehearing *en banc*).

The Opinion holds that implied conflict preemption will be found if "Plaintiffs submit adequate proof that Defendants' policy interferes with the DHS Secretary's directive that DACA recipients be permitted (and, indeed, encouraged) to work . . . ." Op. at 16. According to the Opinion, such evidence will "show that Defendants' policy interferes with Congress's intention that the Executive determine when noncitizens may work in the United States." *Id*. In effect, the Opinion holds that a federal agency's policy decision preempts traditional state functions, notwithstanding that Congress expressly declined to pass laws that would achieve goals similar to the DACA program. Panel rehearing is warranted because the Opinion's preemption analysis rests on the flawed assumption that the DACA Memo has preemptive force. Rehearing *en banc* is necessary because the Opinion's implied conflict preemption analysis is unhinged from Supreme Court precedent, *creating* (rather than determining) Congressional intent to preempt ADOT's Policy.

A. Panel rehearing is warranted because the preemption analysis overlooks that the DACA Memo does not have the preemptive force of law.

The Opinion's preemption analysis rests on the assumption that the DACA Memo creates federal law. The Panel wrote "**[t]he federal government** has enacted a program called" DACA. Op. at 4 (emphasis added). The DACA Memo, however, is a general administrative policy statement that lacks such preemptive force, and administrative agencies are not *per se* "the federal government." Agency action can only have preemptive effect when it arises from a formal rulemaking procedure. This fosters the deliberation that must underlie a pronouncement of such force. *See United States v. Mead Corp*., 533 U.S. 218, 230 (2001). An agency pronouncement only has force of law if it: (1) "prescribe[s] substantive rules—not interpretative rules, general statements of policy or rules of agency organization procedure or practice—and (2) conform[s] to certain procedural requirements." *See River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071 (9th Cir. 2010); *Arizona Dream Act Coalition v. Brewer*, 945 F. Supp. 2d 1049, 1059 (D. Ariz. 2013) (the district court here citing *River Runners* for the proposition that "federal regulations have the force of law only when they prescribe substantive rules and are promulgated through congressionally-mandated procedures such as notice-and-comment rulemaking").

Here, the DACA Memo is an internal directive providing a general policy statement regarding DHS's current enforcement priorities. It does not have the force of law. *Brewer*, 945 F. Supp. 2d at 1049 ("Secretary Napolitano's memorandum does not purport to establish substantive rules . . . and it was not promulgated through any formal procedure."). Indeed, the DACA Memo expressly states that it "confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights." (ER205) The DACA Memo acknowledges that it merely "set[s] forth policy" to focus resources on higher priority cases through the exercise of prosecutorial discretion. (*Id.*) Because the DACA Memo was not subject to notice-and-comment rule making, it is a general statement of policy. It is error to ascribe the force of law to the DACA Memo.

As Justice Alito recognized in *Arizona v. United States,* a general agency policy that addresses federal enforcement priorities (*e.g.*, the DACA Memo) does not preempt state law:

> The United States suggests that a state law may be pre-empted, not because it conflicts with a federal statute or regulation, but because it is inconsistent with a federal agency's current enforcement priorities. Those priorities, however, are not law. They are nothing more than agency policy. I am aware of no decision of this Court recognizing that mere policy can have pre-emptive force . . . If [a state statute] were pre-empted at the present time because it is out of sync with the Federal Government's

> current priorities, would it be unpre-empted at some time in the future if the agency's priorities changed?

132 S. Ct. 2492, 2526-527 (2012) (Alito, J., concurring in part and dissenting in part). Allowing federal policy to preempt state law would "give the Executive unprecedented power to invalidate state laws that do not meet with its approval, even if the state laws are otherwise consistent with federal statutes and duly promulgated regulations." *Id.* at 2527.

Even if the DACA Memo had the force and effect of law (it does not), it is only the policy of the Department of Homeland Security ("DHS"). Thus, any goals underlying the DACA Program are the goals of DHS—not the goals of Congress. *Id.* at 2501 (noting that conflict preemption exists when a state law or policy "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of *Congress*") (emphasis added). The DACA program's goals cannot be imputed to Congress because Congress has refused to enact legislation that would accomplish the DACA program's goals. *See, e.g.,* DREAM Act of 2011, S. 952, H.R. 1842, 112th Cong. (2011). Because the Opinion rests its preemption analysis on an incorrect assumption, panel rehearing is appropriate.

B. Rehearing *en banc* is warranted because the Opinion is inconsistent with Supreme Court precedent and provides for near boundless implied conflict preemption.

The Supreme Court has made clear that "[i]mplied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension

with federal objections'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Whiting*, 131 S. Ct. at 1985 (citation omitted). Indeed, "a *high threshold* must be met if a state law is to be preempted for conflicting with the purposes of a federal act." *Id.* at 1985 (emphasis added); *Arizona*, 132 S. Ct. at 2501 ("[C]ourts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'") (citations omitted). Courts should not "seek[] out conflicts between state and federal regulation where none clearly exists." *English*, 496 U.S. at 90 (citation omitted).

The first step of any preemption analysis is to determine Congress' purpose in enacting the federal legislation alleged to have preemptive force. *Mason & Dixon Intermodal, Inc. v. Lapmaster Int'l LLC*, 632 F.3d 1056, 1061 (9th Cir. 2011). Once the purpose of the federal and state laws at issue is determined, a court must assess "whether 'there is a *significant* conflict between some federal policy or interest and the use of state law.'" *Id*. (citation omitted and emphasis added).

The Opinion's preemption analysis rests on the conclusion that "Congress has given the Executive Branch broad discretion to determine when noncitizens may work in the United States." Op. at 13. Based on that delegation, the Opinion

concludes that the Executive Branch's determination that DACA recipients may obtain EADs preempts ADOT's driver's license policy. This analysis is flawed.

First, disregarding the first step of a preemption analysis, the Opinion undertakes no analysis of the purposes of the cited United States Code provisions. The Opinion cites various provisions of 8 U.S.C. § 1324a as revealing Congress' intent to override ADOT's licensing decision. But 8 U.S.C. § 1324a imposes criminal and civil penalties against *employers* for hiring unauthorized aliens. 8 U.S.C. § 1324a provides enforcement guidance to the Attorney General, listing the documents sufficient to establish employment authorization and permitting him to determine, by regulation, other forms of "documentation evidencing authorization of employment[.]" *See* 8 U.S.C. § 1324a(b)(1)(B) & (C). When Congress authorized the Attorney General to determine acceptable evidence of work authorization, it was solely for the purpose of determining which employers to prosecute for employing unauthorized aliens. ADOT's Policy does not conflict with the purpose of 8 U.S.C. § 1324a.

The Opinion also cites 8 U.S.C. § 1103(g)(2) without considering its purpose. Based on the plain language, this section defines the respective roles of the DHS Secretary and the Attorney General, granting the Attorney General the power to "perform . . . acts as the Attorney General determines to be necessary" in carrying out enforcement of Federal immigration law. This general grant of

discretion in no way supports the notion that employment authorization by USCIS, an agency over which the Attorney General has no control, preempts ADOT's Policy.[1]

Other acts of Congress belie the intent the Opinion imputes. The clear Congressional expression on state driver's licenses demonstrates that Congress did not intend to preempt a State's determination of eligibility for a state-issued license. The REAL ID Act was aimed at creating minimum standards for identification used for federal purposes (*e.g.*, access to federal facilities) as a result of security concerns. *See* Pub. L. No. 109-13, § 201, 119 Stat. 231, 312 (2005) (within Title II: "Improved Security for Drivers' Licenses"). "*[T]he legislation does not . . . try to set States' policy for those who may or may not drive a car*, but it does address the use of a driver's license as a form of identification to a Federal official such as an airport screener at a domestic airport." 151 Cong. Rec. H453, H454 (daily ed. Feb. 9, 2005) (statement of Rep. Sensenbrenner) (emphasis added). That states may elect not to participate in the REAL ID Act shows that

[1] The Opinion also elevates a privilege (*i.e.*, a driver's license) to a fundamental right. But there is no fundamental right to a driver's license or even a right to a person's ideal job. Thus, ADOT's Policy does not conflict with any alleged Congressional goal to permit certain EAD holders to work. *See, e.g., Lupert v. Cal. State Bar*, 761 F.2d 1325, 1327 n. 2 (9th Cir. 1985); *Raper v. Lucey*, 488 F.2d 748, 751 (1st Cir. 1973).

Congress did not intend to regulate that area traditionally reserved to states.[2] *See* 6 C.F.R. § 37.1; *Wyeth*, 555 U.S. at 576 ("The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.") (alteration original); *Rhodes v. Stewart*, 705 F.2d 159, 163 (6th Cir. 1983) ("Congress has not preempted an area wherein it has legislated when it expressly and concurrently authorizes the state . . . [to] opt-out of such federal legislative area.").

The Opinion "engage[s] in a freewheeling inquiry into whether state law undermines supposed federal purposes and objectives[,]" looking "beyond the text of enacted federal law[.]" *Hillman v. Maretta*, 133 S. Ct. 1943, 1955 (2013) (Thomas, J. concurring) (citation omitted). This analysis "permits the Federal Government to displace state law without satisfying an essential precondition to pre-emption, namely, the Bi-cameral and Presentment Clause." *Id*. (citation omitted). As a result, rehearing *en banc* is warranted.

[2] Arizona, under Governor Napolitano, opted out of the REAL ID Act. *See* A.R.S. § 28-336 (2008).

II. Panel and *en banc* rehearing are warranted because the Opinion erred in holding that Plaintiffs demonstrated a likelihood of proving that the revised Policy violated the Equal Protection Clause.

A. The application of rigorous rational basis review conflicts with United States Supreme Court precedent, requiring *en banc* review.

The Opinion erroneously held that the revised Policy is unlikely to survive rational basis review. *See* Op. at 22. The Panel's analysis constitutes a dramatic departure from the Supreme Court's highly deferential standard. *See, e.g., F.C.C. v. Beach Commc'ns, Inc*., 508 U.S. 307, 320 (1993); *Heller v. Doe*, 509 U.S. 312, 333 (1993); *Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456, 470 (1981); *Vance v. Bradley*, 440 U.S. 93, 112 (1979).

On rational basis review, "[w]here there are '*plausible reasons*' for Congress' action, 'our inquiry is at an end.'" *F.C.C.*, 508 U.S. at 313-14 (emphasis added). "In areas of social and economic policy, a . . . classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights 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." *Id*. at 313 (emphasis added).

A classification "fails rational-basis review only when it rests on grounds wholly irrelevant to the achievement of the State's objective." *Heller*, 509 U.S. at 324 (citation and internal quotation marks omitted). "States are not required to

convince the courts of the correctness of their . . . judgments." *Id*. at 326. The Supreme Court explained:

> This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary.

Schweiker v. Wilson, 450 U.S. 221, 234-35 (1981) (internal quotation marks and citations omitted). "It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength." *Vance*, 440 U.S. at 112. Thus, the Opinion's exacting analysis is inconsistent with rational basis review. Under such review, ADOT's Policy should have been upheld if any conceivable reason supports the decision.

The Opinion's outright dismissal of the State's stated rationales is also improper. The Opinion disregards the State's concern regarding liability exposure because "this concern has not been borne out by the numbers" and because Defendants "are unable to identify instances in which" ADOT faced liability for issuing licenses to unauthorized noncitizens. Op. at 23 (quoting the district court's order). The Opinion also rejected the State's concern that improper access to federal and state benefits may result because Defendants, allegedly, testified they did not have a basis for "believing that a driver's license alone could be used to establish eligibility for such benefits." *Id*. Yet, the Supreme Court has explicitly

explained, "[a] State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller*, 509 U.S. at 320. "[A] [State's] choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Id*. (quoting *F.C.C.*, 508 U.S. at 315); *see also Minnesota*, 449 U.S. at 464.

Further, the Opinion states "[u]nless there is some basis in *federal* law for reviewing (c)(9) and (c)(10) Employment Authorization recipients as having federally authorized presence that DACA recipients lack, Arizona's attempt at rationalizing this discrimination fails." Op. at 21. Federal law supports Arizona's basis for treating DACA recipients differently than (c)(9) and (c)(10) EAD holders.

EADs with code (c)(9) are provided to individuals seeking an adjustment of status to persons admitted for permanent residence pursuant to INA Section 245, which results in a green card. 8 C.F.R. § 274a.12(c)(9). EADs with code (c)(10) are related to suspension of deportation and cancellation of removal pursuant to INA Section 240A and results in a green card. 8 C.F.R. § 274a.12(c)(10). In contrast, DACA recipients are not on any path that will result in a green card. Although the Opinion may disagree with Arizona's choices, the distinction between (c)(9) and (c)(10) EAD holders and DACA recipients is rational.

Finally, the Opinion did not address whether a "heightened" rational basis review standard is applicable – or even permissible.[3] The Opinion applies a far more exacting form of rational basis review while purportedly employing a traditional rational basis review, relying largely on *City of Cleburne v. Cleburne Living Center*., 473 U.S. 432 (1985). *See* Op. at 22-25. Significantly, the majority's opinion in *Cleburne* is a departure from traditional rational basis review. *Cleburne Living Ctr*., 473 U.S. at 458 ("[T]he rational basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical of Oklahoma, Inc*., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), *Allied Stores of Ohio, Inc. v. Bower*s, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959), and their progeny.") (Marshall, J., concurring in part and dissenting in part). As Justice Marshall explained, cases where courts apply a traditional rational basis review but nonetheless strike down state action are not true applications of rational basis review:

> The two cases the Court cites in its rational-basis discussion . . . expose the special nature of the rational-basis test employed today. As two of only a handful of modern equal protection cases striking down legislation under what purports to be a rational-basis standard, these cases must be and generally have been viewed as

[3] Heightened rational basis review is not an appropriate level of scrutiny here. *See Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 1023, 1038 (E.D. Cal. 2007) ("[W]hether the 'higher-order rational basis review,' [used] . . . in *City of Cleburne* . . . is broadly applicable in other contexts is far from clear.").

> *intermediate review decisions masquerading in rational-basis language.*

City of Cleburne, 473 U.S. at 460, n. 4 (Marshall, J., concurring in part and dissenting in part) (emphasis added). The Opinion's exacting application of rational basis review is inconsistent with the majority of Supreme Court case law regarding that level of scrutiny and warrants *en banc* review.

B. The Opinion overlooked that the appellate court should have remanded to the district court for assessment of the revised policy.

Defendants revised the challenged policy during the pendency of this appeal. Under the policy originally challenged (the "2012 Policy"), ADOT did not accept EADs with code (c)(33) as primary identification for obtaining a driver's license (*see* SER773; ER191). Under the revised policy (the "2013 Policy"), ADOT does not accept EADs with codes (a)(11), (c)(14) and (c)(33) because recipients of regular deferred action (c)(14) and deferred enforced departure (a)(11) do not have authorized presence under federal law. The facts related to the 2013 Policy were not in the record before the Panel.

The policy revision divested this Court of its ability to address meaningfully Plaintiffs' equal protection claim. It was inappropriate to analyze the 2013 Policy given that the district court's conclusion was premised on the 2012 Policy. *See Fusari v. Steinberg*, 419 U.S. 379, 385-89 (1975); *Reed v. Town of Gilbert*, 707 F.3d 1057, 1077 (9th Cir. 2013). Where, as here, the Court is faced with a policy

not considered by the district court, the Court is without an adequate record and should refrain from making findings in the first instance. *See, e.g., Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982) ("[F]actfinding is the basic responsibility of the district courts, rather than the appellate courts . . . .") (alteration in the original and citation omitted).

Rather than assessing the 2013 Policy, the Panel should have remanded to allow the district court an opportunity to consider evidence relating to the 2013 Policy. None of the following evidence was in the record before this court: (1) two supplemental expert reports and declarations from Plaintiffs' experts addressing the 2013 Policy; (2) supplemental expert and rebuttal reports from Defendants' expert Robert Brown who was subsequently deposed in February 2014; and (3) additional facts from ADOT Director Halikowski (who was deposed twice after the record was submitted for this appeal) and Kevin Biesty, an ADOT employee, supporting ADOT's rational bases for the 2013 Policy. Because the 2013 Policy rationale was not in the record on appeal, the Court should not have considered Plaintiffs' equal protection claim as it relates to the 2013 Policy.

III. The irreparable harm analysis warrants panel and *en banc* rehearing.

A. Impairment of professional opportunities is not irreparable harm, warranting rehearing *en banc*.

The Opinion reasoned that Plaintiffs have shown irreparable harm because ADOT's Policy impairs their ability to pursue their chosen professions. *See* Op. at

26. That reasoning conflicts with the Third Circuit's decision in *Morton v. Beyer*. In *Morton*, the court rejected the plaintiff's argument that he was "precluded from obtaining employment in his chosen profession" by distinguishing those circumstances where a plaintiff would be potentially *barred*, rather than merely *impaired*, from obtaining employment. *See* 822 F.2d 364, 372, n. 13 (3d Cir. 1987). Because the defendants' actions merely impaired rather than barred the plaintiff's pursuit of his desired employment, the Third Circuit found no irreparable harm. *See id*. Here, the record demonstrates Plaintiffs are at most inconvenienced, and the Opinion's determination that such inconvenience constitutes irreparable harm conflicts with the holding of at least one other Circuit. *See* FRAP 35(b)(1)(B).

B. The Opinion overlooked that Plaintiffs have been able to pursue professional opportunities.

The Panel gave absolutely no deference to the district court's findings of fact addressing irreparable harm, as it is required to do, and instead improperly substituted its judgment for the district court's. *See Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1239 (9th Cir. 2001). In ignoring the district court's findings of fact and concluding that ADOT's Policy limited Plaintiffs' professional opportunities, the Panel relied on general propositions regarding Arizona's workforce and overlooked evidence that ADOT's Policy has not prevented Plaintiffs from pursuing professional opportunities:

- **Plaintiff 1:**[4]
    - Works as a medical assistant and plans to stay at her current job for several years until she finishes school. (ER621-22)
    - Affirmed that not having a driver's license does not impact her ability to get to her present job. (ER622)
- **Plaintiff 2:**
    - Started working at Sports Lines in May of 2012 and plans to continue working there for the foreseeable future. (SER932-933)
    - He has not been denied a job due to his lack of a driver's license nor has he been deterred from applying to any job. (SER934-937)
- **Plaintiff 3:**
    - Employed from 2010 until he started his own business in November 2012. (SER919; ER633)
- **Plaintiff 4:**
    - Currently employed at Valley Metro. (ER673)
    - Previously worked in a managerial position for AUM enterprises. (SER900)
- **Plaintiff 5:**
    - Worked part-time before becoming a full-time caregiver. (SER904, 907)
    - Only specified one job interview she turned down because the location was too far from her home. She applied for that job with the intent of obtaining a job with the same company at a different location. (ER602)
    - Lack of a driver's license was not the reason she did not get other jobs to which she applied. (SER905-906)

[4] The parties agreed to withhold Plaintiffs' names.

Lack of a driver's license has not limited Plaintiffs' professional opportunities. Instead, all Plaintiffs have secured employment and intend to stay at their current jobs.

RELIEF REQUESTED

The Court should grant panel rehearing and rehearing *en banc*, vacate the Opinion and affirm the denial of the preliminary injunction.

RESPECTFULLY SUBMITTED: July 18, 2014.

FENNEMORE CRAIG, P.C.

By *s/ Douglas C. Northup*
Douglas C. Northup
Timothy Berg
Sean T. Hood
Attorneys for Defendants-Appellees Governor Janice K. Brewer, John S. Halikowski and Stacey K. Stanton

- and -

Joseph Sciarrotta, Jr.
Office of Governor Janice K. Brewer
Co-Counsel for Defendant-Appellee Governor Janice K. Brewer

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Circuit Rules 35-4 and 40-1, the foregoing Petition for Rehearing and Rehearing *En Banc* is proportionately spaced, has a typeface of 14 points or more and contains 4,191 words (according to the Microsoft Word word count function).

RESPECTFULLY SUBMITTED: July 18, 2014.

s/ Douglas C. Northup
Attorney for Defendants-Appellees
Governor Janice K. Brewer, John S. Halikowski and Stacey K. Stanton

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Petition for Rehearing and Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 18, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Douglas C. Northup
Attorney for Appellees
Governor Janice K. Brewer, John S. Halikowski and Stacey K. Stanton

9307893