No. 13-16248

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ARIZONA DREAM ACT COALITION; *et al.*,
Plaintiffs-Appellants,
v.
JANICE K. BREWER, *et al.*,
Defendants-Appellees.

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

APPELLANTS' RULE 8 MOTION FOR AN INJUNCTION PENDING APPEAL

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Under Rule 8 of the Federal Rules of Appellate Procedure, Appellants-Plaintiffs (collectively, "Plaintiffs") respectfully move the Court for an injunction pending appeal. Plaintiffs move to prevent Appellees-Defendants (collectively, "Defendants") from continuing to enforce their policy of refusing to accept Plaintiffs' Employment Authorization Documents as proof of federal authorization to be in the United States and, consequently, denying them Arizona driver's licenses. This Court has already held that Plaintiffs are likely to succeed on the merits of their Equal Protection claim against Defendants' unconstitutional licensing policies, and also found that Plaintiffs would suffer irreparable harm unless those policies are enjoined. Before the mandate issued, however, Defendants petitioned for rehearing, thereby staying the mandate and depriving Plaintiffs of any relief for the time being. For the very same reasons it found in its July 7, 2014, decision, this Court should grant Plaintiffs' motion for an injunction pending appeal. Plaintiffs have already suffered almost two years of unconstitutional discrimination, and Defendants' attempt to seek rehearing should not delay this long-awaited relief.

PROCEDURAL HISTORY

On July 7, 2014, this Court held that Plaintiffs established that they are likely to succeed on the merits of their claim that Defendants' policy violates the Constitution's guarantee of Equal Protection under the law and that Plaintiffs are

being irreparably harmed by the policy. *See* Slip Opinion, *Arizona DREAM Act Coalition ("ADAC") v. Brewer*, No. 13-16248 (Dkt. Entry 62-1) (9th Cir. July 7, 2014) (hereinafter "*ADAC*, Slip Op."). This Court remanded the case to the District Court with instruction to enter a preliminary injunction in favor of Plaintiffs. *Id.* However, before the mandate issued, on July 18, Defendants filed a petition for panel rehearing and rehearing *en banc* before the Ninth Circuit. Appellants' Pet. for Reh'g & Reh'g *En Banc*, *ADAC v. Brewer*, No. 13-16248 (Dkt. Entry 63-1) (9th Cir. July 18, 2014).

Less than a week later, Plaintiffs moved the District Court for an injunction to prevent Defendants from enforcing their unconstitutional policy and from continuing to harm Plaintiffs while the appellate court considers the petition. Pls.' Mot. for Inj. Pending Appeal, *Arizona DREAM Act Coalition ("ADAC") v. Brewer*, No. 2:12-cv-02546-DGC (ECF No. 282) (D. Ariz. July 21, 2014). On August 1, 2014, the District Court denied Plaintiffs' motion. Order, *ADAC*, No. 2:12-cv-02546-DGC (ECF No. 291) (D. Ariz. Aug. 1, 2014).[1] In the text entry, the District Court noted that the appellate panel decision is not yet final, and denied Plaintiffs' motion for the "reasons stated in its original preliminary injunction ruling." *Id.* The "original preliminary injunction ruling" is precisely what this

[1] A true and correct copy of this Order is appended here as Exhibit A.

Court reversed one month ago, and cannot justify continuing to allow an unconstitutional policy to be implemented.

ARGUMENT

The standard for an injunction pending appeal is identical to the standard for preliminary injunctive relief. A party must "establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest." *Cal. Pharm. Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 849-50 (9th Cir. 2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)), *vacated other grds. sub nom. Douglas v. Indep. Living Ctr. of S. Cal.*, 132 S. Ct. 1204 (U.S. 2012). Under the "sliding scale" approach to preliminary injunctions observed in this circuit, "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

This Court has already considered each of these factors and concluded that Plaintiffs are entitled to a preliminary injunction. *See ADAC*, Slip Op. at 4-5, 10-29. Specifically, this Court found that Defendants' policy likely could not survive any level of constitutional scrutiny. *Id.*, Slip. Op. at 19-20. In this regard, it affirmed the District Court's ruling, and also found that Defendants' 2013 policy

change did nothing to cure Arizona's discrimination. Rather, the Court held Defendants' driver's license policy, which continues to treat DACA recipients differently than (c)(9) and (c)(10) EAD holders, has "no basis in federal law" and "is not likely to withstand equal protection scrutiny." *Id.*, Slip. Op. at 22; *see also id.*, Slip. Op. at 25. This Court also held that Plaintiffs "produced ample evidence" that they have and continue to suffer irreparable harm as a result of Defendants' unconstitutional policies. *Id.*, Slip. Op. at 26-28. Finally, the Court held that "both the public interest and the balance of equities favor a preliminary injunction" because "'it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available.'" *Id.*, Slip. Op. at 28 (quoting *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013)).[2] For the same reasons, the Court should issue an injunction pending Defendants' attempts to seek further appellate review. *Cf., e.g., U.S. v. El-O-Pathic Pharmacy*, 192 F.2d 62, 79 (9th Cir. 1951) (stating that, where court of appeals had issued decision holding that the appellant was entitled to an injunction, even before the mandate issues the appellant "is entitled to immediate relief by way of a temporary injunction which, as this court's opinion discloses, is required in the interest of the protection of the public").

[2] Any harm to Defendants in issuing licenses to the Plaintiffs is *de minimis* compared to the undeniable and serious irreparable harms that Plaintiffs are suffering.

Plaintiffs are justified in relying on this panel's decision on the merits of the appeal to support their instant motion for an injunction. Indeed, the Ninth Circuit did substantially the same thing in *Tribal Village of Akutan v. Hodel*. 859 F.2d 662, 664 (9th Cir. 1988). There, the Court granted a motion to stay an injunction[3] "[b]ecause appellees have prevailed on the merits and the balance of hardships clearly tips in their favor." *Id.* Regarding the merits, the Court relied entirely on the fact that it had already "ruled in favor of the appellees on the merits" in the concurrently filed panel decision. *Id.* (citing to 859 F.2d 651 (9th Cir.1988)). The fact that the mandate had not yet issued, or that the *Tribal Village* plaintiffs eventually petitioned for *en banc* review, was irrelevant to whether the moving parties were entitled to stay the injunction pending appeal. *See Tribal Village of Akutan v. Hodel*, 859 F.2d 651 *opinion amended and superseded on denial of reh'g*, 869 F.2d 1185 (9th Cir. 1988). Indeed, the Court went on to find that the moving parties had "also shown that the balance of hardships now tips in their favor" and that further delay would only extend what had already been two years' worth of non-recoverable harm. *Tribal Village of Akutan*, 859 F.2d at 664. Thus, the Court reinforced *El-O-Pathic*'s conclusion that a prevailing party receiving an order supporting an injunction on appeal can be "entitled to *immediate relief* by

[3] In determining whether to stay the injunction, a court applies the same standard used when considering a motion for a preliminary injunction. *Tribal Village of Akutan*, 859 F.2d at 663 (citing *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983)).

way of a temporary injunction" while and until the mandate reaches the district court. *El-O-Pathic Pharmacy*, 192 F.2d at 79 (emphasis added).

An injunction is particularly important here because the resolution of Defendants' petition could take months. This Court already found that the irreparable nature of the harms to the Plaintiffs "is heightened by Plaintiffs' young age and socioeconomic position." *ADAC*, Slip Op. at 27. Accordingly, any delay in enjoining Defendants' illegal policies, "'even if only a few months, . . . represents . . . productive time irretrievably lost' to these young Plaintiffs." *Id.*, Slip Op. at 27 (citation omitted). Under Ninth Circuit General Order 5.4(b)(1), a petition for rehearing *en banc* must remain pending for a minimum of 21 days. If any judge calls for a vote by the panel pursuant to 5.4(b)(1), the panel must respond "ordinarily within ninety (90) days." Ninth Cir. G.O. 5.4(b)(2). This petition process is in addition to the nearly two years it has taken to get to this point in the litigation. Plaintiffs require immediate relief from the violation of their constitutional rights that both the District Court and this Court have identified.

Moreover, an injunction pending appeal here would act to preserve the status quo. The Ninth Circuit held: "The status quo before Defendants[] revised their policy in response to DACA was that Plaintiffs were subject to a legal regime under which all holders of federal Employment Authorization Documents were eligible for Arizona driver's licenses." *ADAC*, Slip Op. at 11. An injunction, then,

would return the parties to the status quo in which Plaintiffs' Equal Protection rights are not violated. On the other hand, without an injunction Plaintiffs will remain victims of unconstitutional discrimination while Defendants' petition is considered.

The Court should note that Plaintiffs first mentioned an injunction pending appeal in one paragraph at the end of its supplemental briefing filed shortly after oral argument. *See* Appellants' Suppl. Br. at 20, *ADAC*, No. 13-16248 (Dkt. Entry 52-1) (9th Cir. Dec. 24, 2013). This Court never discussed this request in its Slip Opinion. Nevertheless, nothing prevents this Court from granting Plaintiffs' instant motion and issuing an injunction pending a decision on Defendants' petition.

In short, all factors warrant granting Plaintiffs' motion for an injunction pending appeal. Until an injunction is entered, Plaintiffs will continue to suffer unconstitutional discrimination at the hands of Defendants, and at the expense of their careers, families, and dignity.

CONCLUSION

For nearly two years, Defendants' unconstitutional policy has caused Plaintiffs a "myriad [of] personal and professional harms" that "[n]o award of damages can compensate." *ADAC*, Slip Op. at 27. These include "limiting their professional opportunities," "hurt[ing] their ability to advance in their careers," and

"diminish[ing] their opportunity to pursue their chosen professions." *Id.*, Slip Op. at 26. This Court has already found Plaintiffs meet all the requirements for injunction—holding Plaintiffs are likely to succeed on their Equal Protection claim, Plaintiffs are suffering irreparable injury, the balance of equities tips in Plaintiffs' favor, and an injunction is in the public interest. Plaintiffs respectfully request that the Court enter an injunction pending appeal to restore the status quo, enjoin the 2012 and 2013 Policies, and stem the harms suffered by Plaintiffs.

Dated: August 13, 2014

Respectfully submitted,

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/s/Karen C. Tumlin
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Exhibit A

From:	azddb_responses@azd.uscourts.gov
To:	azddb_nefs@azd.uscourts.gov
Subject:	Activity in Case 2:12-cv-02546-DGC Arizona Dream Act Coalition et al v. Brewer et al Order on Motion for Miscellaneous Relief
Date:	Friday, August 01, 2014 4:30:00 PM

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U.S. District Court

DISTRICT OF ARIZONA

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Case Name: Arizona Dream Act Coalition et al v. Brewer et al
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Docket Text:

ORDER denying [282] motion for injunction pending appeal. The Court previously held that Plaintiffs were not entitled to a preliminary injunction, stating its reasons in detail. Had Plaintiffs sought an injunction pending appeal when their appeal was first filed, the Court would have denied the request for the same reasons it denied the preliminary injunction. A panel of the Ninth Circuit has now ruled that the Court erred in denying the preliminary injunction, and Plaintiffs ask the Court to enter an injunction pending appeal on the basis of the panel's reasoning. If the panel decision was final, the Court would readily agree. But the decision is not final. The mandate has not issued, and Defendants have sought a rehearing and rehearing en banc. "Until the mandate has issued, opinions can be, and regularly are, amended or withdrawn, by the merits panel at the request of the parties pursuant to a petition for panel rehearing, in response to an internal memorandum from another member of the court who believes that some part of the published opinion is in error, or sua sponte by the panel itself." Carver v. Lehman, 558 F.3d 869, 878-79 (9th Cir. 2009). Opinions can also be changed through a rehearing en banc. Thus, even if Plaintiffs are correct that Rule 62(c) authorizes the Court to enter the requested injunction while the appeal remains pending (an issue the Court need not

decide), the basis for the requested injunction -- the panel's reasoning on the merits of the preliminary injunction -- is not final. Until it is, the Court does not find a basis for entering the injunction requested by Plaintiffs, for reasons stated in its original preliminary injunction ruling. Once the Court of Appeals renders a final decision on this matter, the Court will promptly comply with its direction. Signed by Judge David G Campbell on 8-1-14. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (DGC)

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Dated: August 13, 2014

/s/ Jorge M. Castillo
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