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

RESPONSE BRIEF OF PLAINTIFFS-APPELLANTS TO DEFENDANTS-APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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For more than two years, Defendants-Appellees ("Defendants") have unlawfully denied driver's licenses to recipients of Deferred Action for Childhood Arrivals ("DACA"), fundamentally hindering their ability to live and work freely in Arizona. In a carefully reasoned opinion, a panel of this Court held Defendants' policy likely to be unconstitutional based on a fact-specific application of the rational basis test set forth in *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432 (1985), and ordered the policy enjoined using the traditional preliminary injunction factors. *See* Ariz. Dream Act Coal. v. Brewer, No. 13-16248, slip. op. (9th Cir. July 7, 2014) (hereinafter, "Op.").

Defendants now petition for panel rehearing and rehearing *en banc* based on a grab bag of arguments—many of which were previously rejected by both the District Court and panel—that completely fail to satisfy the rehearing standards. Defendants identify no error of fact or law that warrants panel rehearing, much less a conflict with Supreme Court or this Court's precedent or an issue of exceptional importance that warrants *en banc* review. *See* Fed. R. App. P. 35, 40. Indeed, the panel's fact-bound decision—although of great significance to the DACA recipients who live and work within Arizona—will have little impact on other cases, both within this Circuit and nationwide. Only *one* other state in the entire country—which is not located in this Circuit—denies driver's licenses to DACA

recipients; the other 48 states already provide DACA recipients with driver's licenses.[1] Rehearing should not be granted.

STANDARD OF REVIEW

The Federal Rules of Appellate Procedure allow for panel rehearing when there exists a "point of law or fact that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(a)(2). Petitions for panel rehearing serve the "limited purpose" of ensuring that the reviewing court properly considered "all relevant information in rendering its decision." *Armster v. U.S. District Court, C.D. Cal.*, 806 F.2d 1347, 1356 (9th Cir. 1986) (internal citation omitted). However, a petition for panel rehearing is not a means by which to "reargue [a party's] case anew." *Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir. 1962).

The Federal Rules provide for rehearing *en banc* where "(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court . . . and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or (B) the proceeding involves one or more questions of exceptional importance . . . ." Fed. R. App. P. 35(b)(1). Here too, it is not the function of *en banc* rehearing "to review alleged errors for the

[1] *See* Nat'l Immigration Law Ctr., *Are Individuals Granted Deferred Action under the Deferred Action for Childhood Arrivals (DACA) Policy Eligible for State Driver's Licenses?* (June 19, 2013), http://www.nilc.org/dacadriverslicenses.html.

benefit of losing litigants." *United States v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974).

ARGUMENT

I. The Panel's Application of the Rational Basis Test Does Not Warrant Rehearing.

Neither rehearing nor rehearing *en banc* of the panel's equal protection holding is warranted. In holding that Plaintiffs demonstrated a likelihood of success on their equal protection claim, the panel simply affirmed the district court's fact-specific application of the traditional requirement that a state policy be "rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440. The panel decision is consistent with the Supreme Court's and this Court's previous applications of this standard, which has resulted in the invalidation of several discriminatory state policies. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996) (in striking down state ballot initiative, noting that "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained"); *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) (overturning Arizona statute limiting eligibility for family health care coverage to married heterosexual employees).

Nonetheless, Defendants assert that rehearing is necessary because the panel improperly applied *heightened* scrutiny to find Arizona's policy unlawful. *See* Appellee's Pet. for Reh'g and Reh'g En Banc at 14-15 (hereinafter "Pet."). This

assertion is meritless: the panel expressly found that the Arizona policy failed rational basis review, and therefore declined to address whether a heightened level of scrutiny might apply in these circumstances. Op. at 19-20.

Instead, it is *Defendants*—and not the panel—that contradict Supreme Court precedent by asserting that the Supreme Court in *Cleburne* did not apply rational basis review even though it expressly stated that it was doing so, and therefore that the panel was wrong to follow that case. *See* Pet. at 14-15 (asserting, based on Justice Marshall's partial concurrence and dissent, that *Cleburne* "depart[ed] from traditional rational basis review"). Indeed, Defendants' argument has been rejected by the Supreme Court in one of the very cases they rely on. In *Heller v. Doe*, the Court cited *Cleburne* and explained that "[w]e have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill" and did not "purport to apply a different standard of rational-basis review from that just described." 509 U.S. 312, 321 (1993).

Ultimately, because Defendants are unhappy with the Supreme Court and this Court's case law, they propose a novel theory of rational basis review in which state actors must always prevail. *See* Pet. at 14 (asserting that courts that "apply a traditional rational basis review, but nonetheless strike down state action" have not engaged in a "true application[] of rational basis review"). But, contrary to Defendants' assertions, rational basis review is not "toothless," *Mathews v. Lucas*,

427 U.S. 495, 510 (1976), as the Supreme Court and this Court's precedent demonstrate. *See, e.g.*, *Romer*, 517 U.S. at 623; *Dep't of Agric. v. Moreno*, 413 U.S. 528, 529 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972); *Diaz*, 656 F.3d at 1014-15.

Defendants further assert that the panel "dramatic[ally] depart[ed]," Pet. at 11, from the rational basis test by asking whether there was at least some factual basis for two of the Defendants' purported rationales for their policy: (1) the state's potential liability for issuing licenses to "unauthorized noncitizens," and (2) the risk that driver's licenses would allow DACA recipients to access public benefits for which they are ineligible. Pet. at 12-13 (citing *Heller*, 509 U.S. at 320).[2] But this is hardly novel. As the Supreme Court in explained in *Heller* itself, "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." 509 U.S. at 321; *accord* *Romer*, 517 U.S. at 632-33 (classification must be "grounded in a sufficient factual context for [the Court] to ascertain some relation between the classification and the purpose it serve[s]"). For example, the Court in *Heller* did not simply allow Kentucky to speculate that mental retardation is more likely to manifest itself earlier, and be easier to diagnose, than mental illness. Instead, the Court relied

[2] Notably, Defendants do not contest the panel's conclusion that their other asserted rationales are invalid, nor do they even address the panel's finding that their policy was likely motivated by illegitimate animus toward DACA recipients and the DACA program. *See* Op. at 23-25.

upon a long list of diagnostic manuals and journals in determining for itself that Kentucky had legislated on the basis of reasonably conceivable facts and not stereotypes or misunderstandings. *See Heller*, 509 U.S. at 321-25.

Here, applying *Cleburne*, two courts have now found that Defendants' rationales for their policy lack rational basis, and Defendants do not allege that the panel misapprehended or overlooked facts underlying the panel's analysis. Regarding liability, Defendants do not dispute they have granted tens of thousands of driver's licenses to noncitizens who have used federal employment authorization documents ("EADs") to demonstrate their authorization by the federal government to live and work in the United States. Yet Defendants have never identified a single instance in which they faced liability for issuing licenses to noncitizens who were not authorized to be present in the United States. Op. at 23. And regarding unauthorized access to benefits, Defendants Halikowski and Stanton themselves admitted that they have *no basis* to believe that a driver's license alone could be used to establish eligibility for public benefits. *Id.* The panel was not required to ignore this uncontested evidence.

Defendants also "reargue [] anew" that federal immigration law justifies their discriminatory treatment of DACA recipients as compared to applicants for cancellation of removal and adjustment of status—who hold EADs with the codes

(c)(9) and (c)(10), respectively. *Anderson*, 300 F.2d at 297; *see* Pet. at 13.[3] But as the panel explained, DACA recipients' EADs establish that they are authorized to be present in the United States to the same extent that (c)(9) and (c)(10) EADs do: "in both cases, the federal government has allowed noncitizens to remain in the United States, has pledged not to remove them during the designated period"—whether during the period of the deferred action grant, or the period while their relief applications are still pending—"and has authorized them to work in this country." Op. at 22.

As both the district court and panel found, federal law does *not* provide a basis for Defendants' discrimination against DACA recipients on the grounds that they lack a so-called "path to status." As the panel explained, (c)(9) and (c)(10) applicants for immigration relief "often have little hope of obtaining formal immigration status in the foreseeable future." Op. at 18-19 (citing *Guevara v. Holder*, 649 F.3d 1086, 1095 (9th Cir. 2011)). The panel also found that Defendants have failed to "define[] 'a path to lawful status' in a meaningful way," as "applications [for immigration relief] are often denied" and "so the supposed 'path' may lead to a dead end." Op. at 20. As this Court has previously noted, "the submission of an application does not connote that the alien's immigration

[3] Defendants do not contest that there must be "some basis in *federal* law" for their discriminatory treatment of DACA recipients, as "'[t]he States enjoy no power with respect to the classification of aliens.'" Op. at 21 (quoting *Plyler v. Doe*, 457 U.S. 202 (1982)).

status has changed, as the very real possibility exists that the INS will deny the alien's application altogether." Op. at 18 (quoting *Vasquez de Alcantar v. Holder*, 645 F.3d 1097, 1103 (9th Cir. 2011)).[4] The panel's conclusions were amply supported by the uncontested facts and established precedent.

Finally, Defendants re-assert their claim that the panel should have remanded to the district court for consideration of Arizona's revised 2013 policy. *See* Pet. at 15-16. This assertion lacks merit, as it did when Defendants first raised it in supplemental briefing. *See* Suppl. Br. of Appellees at 4-5, Ariz. Dream Act Coal. v. Brewer, No. 13-16248 (9th Cir. Jan. 7, 2014). There is no dispute that both the 2012 and 2013 policies bar DACA recipients from obtaining licenses while continuing to allow holders of (c)(9) and (c)(10) EADs, among others, to obtain them. The panel's analysis applies equally to both policies, which suffer from the same irrational discrimination. No additional evidence would affect the panel's decision, much less change the result, and nowhere do Defendants explain how any of the new evidence they list would do so.[5] *See* Pet. at 16.

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[4] Furthermore, as the panel explained, whereas a grant of DACA represents a decision by the Executive not to initiate removal proceedings against an individual (or to abandon any removal proceedings that are currently pending), many such individuals are "already in removal proceedings" and may well be ordered removed, making them "more, not less, likely to be removed in the near future than DACA recipients." Op. at 19.

[5] The cases Defendants cite in support of remand are wholly distinguishable. In *Fusari v. Steinberg*, the legislature had, among other things, "completely altered the structure of the Connecticut system of administrative review," making it

In short, there is no misapprehended law, no overlooked fact, and no conflict with precedent that warrants rehearing of the panel's equal protection analysis.

II. The Panel's Finding of Irreparable Harm Does Not Warrant Rehearing.

In determining that Plaintiffs have demonstrated irreparable injury, the panel relied on binding Ninth Circuit precedent, which squarely holds that the "loss of opportunity to pursue [one's] chosen profession" *does* constitute irreparable harm. *See* Op. 26-27 (citing *Enyart v. Nat'l Conference of Bar Exam'r.s, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011), and *Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 709-10 (9th Cir. 1988)). Defendants neither dispute that this is the law of the circuit nor allege that the panel misapplied the law.

Instead, Defendants seek *en banc* rehearing on the grounds that this circuit is in conflict with a footnote in the Third Circuit's decision in *Morton v. Beyer*, 822 F.2d 364 (3d Cir. 1987). But, in fact, Third Circuit precedent is in harmony with Ninth Circuit case law. Prior to deciding *Morton*, the Third Circuit held that a plaintiff who had shown that the defendant's action had the effect of denying him the ability to pursue his chosen profession suffered irreparable harm. *Fitzgerald v.*

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impossible to determine the "promptness and adequacy of review under the new system" for due process purposes. 419 U.S. 379, 385, 389 (1975). In *Reed v. Town of Gilbert*, the court dealt with new time, place, and manner restrictions that were "different in nature" than the restrictions the plaintiff originally challenged. 707 F.3d 1057, 1077 (9th Cir. 2013). Here, however, the 2012 and 2013 policies are identical to the extent that both unlawfully deny licenses to DACA recipients while granting them to similarly situated noncitizens.

Mountain Laurel Racing, Inc., 607 F.2d 589, 601 (3d Cir. 1979) (finding irreparable injury to licensed harness racing trainer and driver as a result of his eviction from race track). Similarly, Defendants' unlawful denial of driver's licenses to DACA recipients has had the effect of preventing Plaintiffs from pursuing their chosen professions. *See* Op. at 26 (noting that "Plaintiffs' lack of driver's licenses has prevented them from applying for desirable entry-level jobs, and from remaining in good jobs where they faced possible promotion"); *see also id.* (noting that one Plaintiff, who owns his own business, "has been unable to expand his business to new customers who do not live near his home."). In this regard, the Third Circuit is in alignment with *Enyart* and *Chalk*.

Defendants' attempt to manufacture a circuit split based on *Morton* is misplaced. In *Morton*, the Third Circuit rejected the plaintiff's claims of irreparable harm based on his suspension from his job as a corrections officer for two reasons. First, *Morton* explained that, although the district court had found irreparable harm based on the plaintiff's loss of his salary, "loss of income alone" could not "constitute[] irreparable harm." 822 F.2d at 372; *accord* Op. at 26 (citing *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991)). Second, the Third Circuit panel rejected plaintiff's argument, made on appeal, that the damage to his "name and reputation as a corrections officer" caused by his illegal suspension constituted irreparable harm.

822 F.2d at 372, n.13. The Court found that this injury, though having the potential to impair his continued employment and thus, his salary, was not comparable to the harm in *Fitzgerald*. *Id*.

Morton has no bearing on Plaintiffs' injuries here. As with the plaintiffs in *Enyart*, *Chalk*, and *Fitzgerald*, and unlike the plaintiff in *Morton*, Defendants' policy causes Plaintiffs to suffer irreparable harm by barring them from their chosen professions, injuries that "money cannot atone for." *Morton*, 822 F.2d at 372 (internal quotation marks and citation omitted); *accord Chalk*, 840 F.2d at 709-10. The record shows that Plaintiffs have been barred from entry-level jobs and potential promotions in their desired professions, and from the ability to expand their businesses because they have no licenses and are not able to drive legally. Op. at 26. Moreover, as the panel found, Plaintiffs' "young age and fragile socioeconomic position" exacerbate these harms because "[s]etbacks early in their careers are likely to haunt Plaintiffs for the rest of their lives." Op. at 27. These harms are precisely the type of injury that the Third and Ninth Circuits have held to be irreparable.

Defendants proceed to accuse the panel of "improperly substitut[ing] its judgment for the district court's" by declining to defer to the district court's factual findings. Pet. at 17. This is a mischaracterization of the panel decision. The panel did not reverse the district court because of a disagreement with its factual

findings, but rather held that the district court committed *legal error* by holding that the injunction Plaintiffs sought was mandatory, rather than prohibitory, and then requiring Plaintiffs to show the harm they suffered was "extreme or very serious," instead of simply irreparable. *See* Op. at 11-12, 27-28. Notably, Defendants do not contest the panel's rulings on these issues.

Moreover, the panel correctly found that the undisputed record contained "ample evidence" of the irreparable harm their policy has inflicted on Plaintiffs' professional opportunities. Op. at 26. Defendants' argument to the contrary, based on cherry-picked facts, assumes that the mere fact that Plaintiffs have been able to find work in some form means they have not been irreparably harmed. *See* Pet. at 17-18. But that is beside the point. As the panel explained, it is Plaintiffs' "'loss of opportunity to pursue [their] chosen profession[s]'"—and not the inability to work at all—that constitutes irreparable harm. Op. at 26 (quoting *Enyart*, 630 F.3d at 1165). Defendants do not, and cannot, refute the fact that Plaintiffs' inability to obtain driver's licenses has limited their professional opportunities. *See id.*; *see also* ER 606 (Plaintiff could not apply to entry-level jobs requiring a driver's license); ER 676-77 (same, for another Plaintiff); ER 672, 675 (Plaintiff had to leave job while training for a promotion because he does not drive without a license and had no reliable transportation to his workplace); ER 634-35, 638-39, 640-42 (Plaintiff unable to expand business).

Again, Defendants have shown no mistake of law, unconsidered fact, or conflict with precedent that merits rehearing of the panel's finding of irreparable harm.

III. The Panel's Preemption Analysis Does Not Warrant Rehearing.

Finally, Defendants seek both panel and *en banc* rehearing on Plaintiffs' preemption claim, even though, as Defendants concede, the panel did not even reach, much less grant relief on this basis. *See* Pet. at 2; *see also* Op. at 16 & n.3.[6] As a result, *en banc* review is inappropriate here.

In addition, Defendants misconstrue the panel's preemption analysis. Defendants assert that the panel's "preemption analysis rests on the flawed assumption" that the DHS memorandum establishing DACA has "preemptive force." Pet. at 3. But the panel did not "rest" its analysis on the DACA memorandum. Instead, the panel relied on Congress' decision—as reflected in the Immigration and Nationality Act ("INA")—to empower the Attorney General to authorize noncitizens to work in the United States, and the Executive Branch's decision—pursuant to that congressional grant of authority—to provide work authorization to DACA recipients (and, indeed, *require* DACA recipients to apply

[6] At most, the panel held that—contrary to the holding of the district court—Plaintiffs had presented a "plausible" theory of conflict preemption. Op. at 13. Notably, Plaintiffs could not and did not appeal the district court's dismissal of their preemption claim. *See* Appellants' Opening Br. at 4 n.1, Ariz. Dream Act Coal. v. Brewer, No. 13-16248 (9th Cir. July 15, 2013).

for it). *See* Op. at 13-14; *see also* 8 U.S.C. § 1324a(h)(3) (providing that persons may be authorized for employment by statute "*or by the Attorney General*" (emphasis added)).[7] Defendants' arguments about whether the DACA memorandum has the force of law are entirely irrelevant.

Ultimately, the panel's analysis represents an ordinary application of the longstanding principle that a state law is conflict preempted "whenever it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Op. at 13 (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012)). Notably, Defendants do not even acknowledge this principle or related case law cited by the panel holding that "'preemption analysis must contemplate the practical result of the state law, not just the means that a state utilizes to accomplish the goal.'" Op. at 15 (quoting *United States v. Alabama*, 691 F.3d 1269, 1296 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013)). Here, the panel properly concluded that, were Plaintiffs ultimately to prove that Defendants' policy interferes with the Department of Homeland Security's ("DHS") directive that DACA recipients be permitted to work, that policy would be preempted. *See* Op. 14-16.

[7] *See also* 8 U.S.C. § 1324a(h)(1) (providing that Attorney General is responsible for certifying aliens' right to work in the United States); 8 U.S.C. § 1324a(b)(1)(C)(ii) (providing that a document is valid as evidence of employment authorization if "the Attorney General finds [it], by regulation, to be acceptable" for that purpose); 8 C.F.R. § 274a.12 (establishing classes of noncitizens authorized to work in the United States).

At bottom, Defendants simply appear to take issue with the panel's analysis of Congress' purpose in empowering the Executive to grant work authorization. But here Defendants' arguments are plainly incorrect, and fail to establish any basis for panel rehearing or *en banc* review.

First, the employment authorization provisions of the Immigration Reform and Control Act of 1986 ("IRCA") direct the Attorney General to determine which noncitizens are authorized to work. *See* 8 U.S.C. §§ 1324a(b)(1)(C)(ii), 1324a(h)(1), 1324a(h)(3). Thus, the panel's ruling is consistent with federal law, and Defendants' argument that IRCA's provisions attend "solely for the purpose of determining which employers to prosecute for employing unauthorized aliens," Pet. at 8, is patently incorrect and contrary to IRCA's plain language.

Second, Defendants attack the panel's cite to the INA's general grant of authority to the Attorney General. Pet. at 8-9; *see also* 8 U.S.C. § 1103(g)(2). But the panel merely cited the provision as further evidence, from the overall statutory scheme, that Congress empowered the Attorney General to authorize individuals to work. Op. at 14. Defendants' attempt to argue that the panel's preemption decision turns on this INA provision simply mischaracterizes the decision.

Finally, the mere fact that Congress permitted states to opt-out of the REAL ID Act's scheme for driver's licenses that are valid as federal identification in no way undermines Congress' intent that the Executive be able to authorize

individuals to work. Consequently, Defendants' argument that the REAL ID Act precludes the preemption of otherwise illegal state drivers' license policies is baseless. *See* Pet. at 9-10.[8]

CONCLUSION

For the foregoing reasons, Defendants' petition for panel rehearing and rehearing *en banc* should be DENIED.

[8] Defendants' citations to *Wyeth v. Levine*, 555 U.S. 555 (2009), and *Rhodes v. Stewart*, 705 F.2d 159 (6th Cir. 1983), are completely inapposite. *See Wyeth*, 555 U.S. at 574-75 (reasoning that Federal Food, Drug, and Cosmetic Act did not preempt state tort drug labeling lawsuits where Congress was "certain[ly] aware[] of the prevalence of state tort litigation," and yet had enacted no preemption provision during the Act's 70-year history); *Rhodes*, 705 F.2d at 162-63 (Congress did not preempt state bankruptcy exemptions when it expressly vested authority in the states to create its own exemptions).

Defendants also assert that the panel opinion "elevates a privilege (i.e., a driver's license) to a fundamental right." Pet. at 9 n.1. This assertion is meritless. The panel merely recognized that if Plaintiffs ultimately were to prove that Arizona's policy sufficiently interferes with DACA recipients' ability to work, that policy would be preempted. Op. at 14-16.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. PROC. 32(C)(2) AND NINTH CIRCUIT RULES 35-4 AND 40-1(A)

I certify that pursuant to Fed. R. App. Proc. 32(c)(2) and Ninth Circuit Rules 35-4 and 40-1(a), this Response Brief of Plaintiffs-Appellants to Defendants-Appellees' Petition for Panel Rehearing and Rehearing *En Banc* is double spaced, was printed in a proportionately spaced typeface of 14 points, and contains 3,937 words.

Dated: August 21, 2014

/s/ Michael K. T. Tan
MICHAEL K. T. TAN

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 August 21, 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.

I declare under penalty of perjury that the above is true and correct.

Dated: August 21, 2014

/s/ Michael K. T. Tan
MICHAEL K. T. TAN