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 RESPONSE TO UNITED STATES' BRIEF AS AMICUS CURIAE IN OPPOSITION TO REHEARING *EN BANC*

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INTRODUCTION

The fact that the United States dedicated its *entire* brief to preemption (rather than any of the other issues raised in the petition for rehearing) underscores the significance of this issue, requiring a closer look through *en banc* rehearing. Pre-emption must be considered against the backdrop of Supreme Court precedent holding that States "are independent sovereigns in our federal system" and, as such, courts "assum[e] that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *CTS Corp. v. Waldburger*, 134 S.Ct. 2175, 2188 (2014) (citations omitted); *see also Wyeth v. Levine*, 555 U.S. 555, 565, n. 3 (2009) ("We rely on the presumption [against preemption] because respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state-law causes of action.'") (citations omitted).

Heightened federalism concerns exist, in particular, where there is no agency regulation at issue. Here, the purportedly preemptive "federal law" is a memo from an agency expressing a policy decision about how best to use agency resources and not enforce an existing federal statute. The DACA memo "set[s] forth how, in the exercise of [the Department of Homeland Security's ("DHS")] prosecutorial discretion, [DHS] should enforce the Nation's immigration laws against certain" persons. (ER 203) The memorandum lists the criteria that each

applicant must satisfy before the applicant can even be considered for an exercise of prosecutorial discretion but further notes DHS cannot "provide any assurance that relief will be granted in all cases." (ER 203-204) In essence, the DACA memo outlines an administrative policy that allows DHS to focus "enforcement resources" on individuals who meet the DHS Secretary's current "enforcement priorities." (ER 203) Importantly, the DHS Secretary's memorandum reinforced the temporary and non-substantive nature of deferred action. (ER 205) ("This memorandum confers no substantive right, immigration status, or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights."). The DACA memo – as characterized by the DHS Secretary – is a "policy" that does not confer any "substantive right."

Pursuant to well-established and common sense principles of federalism and preemption, the DACA memo does not preempt the traditional state police power at issue; namely, the issuance of driver's licenses. The United States erroneously asserts that Governor Brewer issued an executive order barring ADOT from accepting certain employment authorization documents as proof of authorized presence under federal law. To the contrary, the announcement of the DACA memo – and not any action taken by Governor Brewer – first prompted ADOT Director Halikowski and his advisors to begin reviewing the potential impacts that the DACA memo might have on ADOT's enforcement and administration of

Arizona's driver's license statute.[1] (SER 770) Director Halikowski's independent review, which included seeking advice from, among other sources, United States Citizenship and Immigration Services ("USCIS") as to whether the federal government considered EADs for DACA recipients as identical to EADs for other forms of deferred action, gave him significant concerns that DACA recipients could not demonstrate authorized presence under federal law. Ultimately, this review led the Director (not the Governor) to determine that DACA recipients are ineligible for Arizona driver's licenses.[2] (SER 770-773)

Rehearing is warranted because the panel exceeded the Supreme Court's preemption precedent by holding 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) Under the panel's reasoning, a state driver's license policy is now preempted by a federal agency's policy memorandum.

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[1] Significantly, Plaintiffs did not challenge the State's driver's license statute. A.R.S. § 28-3153 provides: "[T]he department shall not issue to or renew a driver license or nonoperating identification license for a person who does not submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law."

[2] Discovery that occurred subsequent to the appeal (and which is not in the appellate record) demonstrates that Governor Brewer would have deferred to the Director's determination regardless of his finding as to the DACA recipients' eligibility for licenses. As Defendants have argued any number of times, remand to the district court is appropriate for full consideration of the merits before issuing any temporary, interim relief in advance of a final judgment.

I. The DACA memo lacks preemptive force.

The United States argues that rehearing is unwarranted because Arizona's policy is preempted by "[f]ederal [l]aw." (*See* Am. Br. at 8) Throughout its brief, however, the United States ignores the fact that no federal *law* is at issue here; rather, an agency's policy memo, which was issued without notice and comment or subjected to any formal rulemaking processes, is the document alleged to have preemptive effect. (*See generally* Am. Br. at 8-17)

Implied conflict preemption arises when state law or policy obstructs "the accomplishment and execution of the full purposes and objectives of *Congress*." *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (emphasis added) (citations omitted). Because Plaintiffs' argument necessarily relies on the DACA memo as the "execution of the full purposes and objectives of Congress," the Court must analyze whether that memo actually carries preemptive force of law. *See Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1985 (2011) ("Implied preemption analysis does not justify a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives; such an endeavor would undercut the principle that it is Congress rather than the courts that preempts state law.") (citations and internal quotations omitted).[3]

[3] The United States argues that Arizona has improperly assumed for itself the "federal prerogative of classifying noncitizens" in assessing whether DACA recipients have authorized presence. As Judge Campbell noted last year, however,

Agency action can only have preemptive effect when it arises from "formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." *See United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). As Judge Campbell correctly reasoned in the district court, agency actions carry preemptive force of law "only when they prescribe substantive rules and are promulgated through congressionally-mandated procedures such as notice-and-comment rulemaking." *Arizona Dream Act Coalition v. Brewer*, 945 F. Supp. 2d 1049, 1059 (D. Ariz. 2013); *see also Wyeth*, 555 U.S. at 577 (holding that the FDA finalized a rule without notice and comment that "articulated a sweeping position on" the pre-emptive effect of a federal law, which the Court found "inherently suspect in light of this procedural failure."); *United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982) (to have the "force and effect of law," agency policy "must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress").

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even if Arizona disagrees with the DACA memo, the validity of any purported disagreement is irrelevant unless "some form of preemption" is at issue: "if Arizona disagrees with the federal government on whether or not they're authorized under federal law, that disagreement itself doesn't make their inaction invalid, right? You have to have some form of preemption in play before that disagreement makes the Arizona law invalid." (SER 768-69)

The DACA memo "does not purport to establish substantive rules . . . and it was not promulgated through any formal procedure." *Arizona Dream Act Coalition*, 945 F. Supp. 2d at 1059. By its own terms, it was merely an "exercise of [the agency's] prosecutorial discretion[.]" (ER 203) Rather than purporting to carry force of law akin to a formally-crafted rule, Secretary Napolitano explained that the DACA memo simply supposes that immigration law should not be "blindly enforced without consideration given to the individual circumstances of each case." (ER 204) Clarifying its nature as a mere statement of agency policy, the DACA memo concludes by explaining that it

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

(ER 205)

Secretary Napolitano explained that the memorandum was a measure taken to "ensure that [agency] enforcement resources are not expended on . . . low priority cases but are instead appropriately focused on people who meet our enforcement priorities." (*See* ER 203) Plaintiffs' own expert reiterated as much. (*See* ER 174) (Declaration of Bo Cooper) (enforcement discretion is necessary to permit "allocation of limited resources available to the agency" and to "enable the

agency to respond to changing circumstances and balance . . . policy goals . . . ."). According to Plaintiffs' expert Bo Cooper:

> Shifts in enforcement priorities [like that described in the DACA memo] may emerge from within the agency as it reconsiders primary objectives or shifts may arise from external pressures from Congress or domestic and international concerns. In either case, the federal government requires flexibility to adjust . . . as circumstances change.

Id.

It defies reason (as well as the law) to ascribe preemptive force to an agency policy memo premised on the agency leadership's subjective, and easily reversed, determinations as to how to best ration limited agency resources given "shift[ing]" priorities. *See Wyeth*, 555 U.S. at 600-01 ("[N]o agency or individual Member of Congress can pre-empt a State's judgment by merely musing about goals or intentions not found within or authorized by the statutory text.") (Breyer, J., concurring) (citation omitted). The United States argued in a recent case that state law is preempted when inconsistent with a federal agency's current enforcement priorities, but "[t]hose priorities . . . are not law. They are nothing more than agency policy." *Arizona*, 132 S. Ct. at 2527 (Alito, J., concurring in part and dissenting in part) ("I am aware of no decision of this Court recognizing that mere policy can have pre-emptive force."). "If [ADOT's policy] 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?" *See id.* (recognizing that agency's enforcement priorities "change from administration to administration") (emphasis added). Just as in *Arizona v. United States*, the breadth of the United States' pre-emption argument here is squarely inconsistent with the law and concepts of federalism:

> If accepted, the United States' pre-emption argument 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. This argument, to say the least, is fundamentally at odds with our federal system.

Id. Simply stated, under the Supremacy Clause, "pre-emptive effect [should] be given only those to federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures." *Wyeth*, 555 U.S. at 586 (Breyer, J., concurring) (citation omitted).

Further, the United States' position that the DACA memo preempts ADOT's policy rings hollow due to the fact that another federal agency passed a regulation that states that DACA recipients are not lawfully present in the United States. On August 28, 2012, the U.S. Department of Health and Human Services ("HHS") explicitly carved out DACA recipients from recipients of other forms of deferred action in HHS's definition of who is "lawfully present" for purposes of participating in the Pre-Existing Condition Insurance Plan Program contained in

the Patient Protection and Affordable Care Act, Public Law 111-148, and the Health Care and Education Reconciliation Act, Public Law 111-152 (collectively, "ACA"). *See* Answering Brief at 11. The fact that there may be disagreement among federal government agencies about the import of the DACA memo underscores why one policy memo of one agency cannot preempt state action here.

The DACA memo does not have the force of law and cannot preempt ADOT's policy change concerning the issuance of driver's licenses. *See generally Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 329-30 (1994) ("Executive Branch communications [like press releases, letters and amicus briefs] that express federal policy but lack the force of law cannot render unconstitutional [a State's] otherwise valid, congressionally condoned" action); *Arizona* , 132 S. Ct. at 2527 (citing *Barclays Bank* to support the proposition that mere agency policy does not have pre-emptive effect) (Alito, J., concurring in part and dissenting in part).[4]

[4] Indeed, the only Congressionally-enacted *law* that relates to driver's licenses (the REAL ID Act) reserves to States the ability to regulate driver's licenses. *See* Petition for Rehearing at 9-10. In allowing voluntary compliance with the act, Congress recognizes that issuing driver's licenses is a traditional state function even if doing so creates tension between federal control over immigration and state regulation of licenses. *See CTS Corp.*, 134 S.Ct. at 2188 (holding that "in light of Congress' decision to leave . . . many areas of state law untouched, statutes of repose" do not "pose an unacceptable obstacle to the attainment of CERCLA's purposes" and noting that "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field

II. ADOT has not created a new immigration classification.

The United States characterizes Arizona's driver's license policy as an attempt to decide that DACA recipients are not authorized to be present in the United States, arguing that in denying driver's licenses to DACA recipients, Arizona has "created a new" immigration classification by defining "authorized presence." (*See* Am. Br. at 11-13) Arizona's policy is not, however, a regulation of immigration—it is simply a determination as to who may obtain a driver's license from the state of Arizona. It addresses a state interest in an area of traditional state concern.

Rather than creating new immigration classifications, ADOT had to analyze which individuals are authorized to be present in the country under federal immigration law. Because the INA—the primary law regulating immigration—does not define "lawful" or "authorized" presence (as the United States admits), ADOT must rely on federal guidance on deferred action, which makes clear that "deferred action does not confer a lawful immigration status . . . ." (ER 366) (USCIS response to "Frequently Asked Questions"); (*see also* SER 785) (USCIS Adjudicator's Field Manual states that the fact that a DACA recipient does not accrue unlawful presence for purposes of future bars to admissibility does not mean that a person's presence is actually lawful); (ER 442) (Congressional

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of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.").

Research Service memorandum states that although DACA recipients obtain social security numbers and employment authorization documents they are "not otherwise authorized to reside in the United States.").

Even if ADOT's assessment were not so well supported by federal guidance, its resulting driver's license policy cannot be characterized as a back-door regulation of immigration. Unlike certain policy provisions that were found to be preempted in *Arizona v. United States*, ADOT's driver's license policy does not concern the arrest, prosecution, or removal of aliens.

In *DeCanas v. Bica*, where the Supreme Court held that a state law prohibiting employers from employing certain aliens "not entitled to lawful residence in the United States" was not preempted, the Court stressed that "the fact that aliens are the subject of a state statute does *not* render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." 424 U.S. 351, 352, 354-55 (1976) (emphasis added). This is true even where state regulation has "purely speculative and indirect impact on immigration . . . ." *Id.* at 355. As in *Lopez-Valenzuela v. County of Maricopa*, which the United States attempts to rely on here for the proposition that ADOT has created new immigration classifications, ADOT's policy does not regulate immigration because it neither determines who should be admitted into the country nor sets conditions

for individuals to remain. *See* 719 F.3d 1054, 1070 (9th Cir. 2013). "Arizona state officials are not directly facilitating immigration removals and their immigration status decisions for the purposes of [ADOT's driver's license policy] are not binding in subsequent proceedings within the federal immigration system." *Id.*

ADOT's policy also does not bear on any Congressionally-sanctioned goal. The panel relies on Congress's grant of broad discretion to the Executive "to determine when noncitizens may work in the United States[]" as the basis for its pre-emption analysis. (Op. at 13) As an initial matter, the panel failed to recognize that the cited code provisions do not provide evidence of any *Congressional* intent that conflicts with the purpose underlying ADOT's driver's license policy. (*See* Petition for Rehearing at 7-10)

Further, the panel's reasoning to the contrary—that ADOT's policy could result in Arizona DACA recipients being "generally obstructed from working"—was grounded in part on the panel's assumption that a certain percentage of Arizona workers commute to work by car. (Op. at 15) Whether a state law impinges on federal prerogatives, and thereby is preempted, cannot depend on a consideration that is so contextual. If ADOT's policy impedes DHS's determination that DACA recipients should work because enough Arizonans commute to work via car rather than by another form of transportation, would a similar policy be preempted if implemented in a jurisdiction where a greater

percentage of workers commute via public transit (*e.g.*, San Francisco)?

Even assuming *arguendo* that there may be some "link between driver's licenses and the ability to work," it is not so strong as to permit the inference that a state driver's license policy unconstitutionally impinges on agency discretion to determine when noncitizens may work in the United States such that preemption is warranted. *See Whiting*, 131 S. Ct. at 1985 ("Our precedents 'establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act.'") (citation omitted).

III. ADOT'S policy is tailored to address state, rather than federal, concerns.

The United States conflates preemption and equal protection analyses when it argues that Arizona cannot show that ADOT's policy addresses a "substantial state interest" and is "reasonably adapted to the purposes for which the state desires to use it." (*See* Am. Br. at 13-17) It cites *Plyler v. Doe* for the proposition that Arizona must make such a showing but that language appeared in *Plyler's* equal protection, not preemption, analysis. *See Plyler v. Doe*, 457 U.S. 202, 226 (1982).

The United States also mischaracterizes *DeCanas v. Bica* when it offers that case as authority for the notion that courts assess the "strength" of the state's interest being vindicated by the allegedly preempted policy. (*See* Am. Br. at 13) In *DeCanas*, the Supreme Court simply conceded that California's law prohibiting

the knowing hiring of certain aliens addressed interests "particularly acute in California in light of the significant influx into that State of illegal aliens . . . ." *See* 424 U.S. at 357. The Court accepted that the law was an "attempt[] to protect California's fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens . . . ." *Id*. Indeed, *DeCanas* re-affirmed the principle that "state regulation designed to protect vital state interests must give way to paramount federal legislation" but state law only cedes to federal law when "either that the nature of the regulated subject matter permits no other conclusion, or . . . the Congress has unmistakably so ordained." *Id.* at 356.

Nowhere in *DeCanas* (or *Plyler*) is there support for the notion that the allegedly offending state law should be subjected to scrutiny of the sort applied in the *equal protection* context as part of a court's *preemption* analysis. The United States here offers the panel's objections to the rationales supporting ADOT's policy as support for its argument that Arizona has failed to make the aforementioned showing (*see* Am. Br. at 13-17), but the panel raised those objections in the course of its equal protection (not preemption) analysis.

The motivations behind ADOT's policy included preventing improper access to public benefits consistent with the understanding that DHS did not intend the DACA program to confer substantive benefits to those who obtained deferred

action under the program, avoiding administrative upheaval at ADOT in the event that DHS decided to terminate the DACA program in the future, and avoiding potential liability for the improper issuance of driver's licenses. (*See* SER 771) The policy was an attempt to protect ADOT's own fiscal and administrative interests rather than an encroachment on the federal immigration prerogative. Regardless of whether it provides a rational basis for purposes of equal protection analysis (and it does), there is no "clear and manifest purpose of Congress" to preempt ADOT's policy through a "complete ouster of state power" to adopt policies aimed at state interests. *See DeCanas*, 424 U.S. at 357.

IV. The United States' failure to address the equal protection analysis is significant.

The fact that the United States did not address equal protection in its amicus brief reveals one likely truism: it cannot take the position that DACA recipients are similar to others who receive deferred action because the federal government itself treats DACA recipients dissimilarly from other EAD holders. For example, in response to ADOT's inquiry to the USCIS, ADOT learned that USCIS itself had expressly distinguished DACA recipients from recipients of other forms of deferred action with regard to applications for EADs. (SER 772) Specifically, ADOT learned that USCIS had designated a separate code for DACA recipients to use in filling out USCIS form I-765, the application form used to apply for an

EAD.[5] (SER 773) Additionally, as explained above, notwithstanding the fact that deferred action recipients generally are eligible for ACA, HHS determined that DACA recipients were not, exempting such individuals from eligibility. Federal law supports ADOT's view that DACA recipients are not similarly situated to other EAD holders. The United States' silence on this component of the equal protection analysis is revealing.

CONCLUSION

Regardless of whether the Executive has "long exercised its discretion to decline to pursue removal of particular aliens based on humanitarian concerns, resource constraints, and other policy considerations," (Am. Br. at 9) the Executive's discretionary decision made in response to these considerations cannot be accorded the force of a federal law that would preempt Arizona's long-recognized authority to regulate the issuance of drivers' licenses. This is

[5] Further, on or around January 18, 2013, USCIS took the position that any "lawful presence" conferred by the DACA Program related only to stopping the *accrual* of unlawful presence used to calculate the length of future bars to admissibility. (ER 366-67) USCIS also made clear that, even if the DACA Program confers "authorized" or "lawful" presence for the expressly limited purpose of stopping the accrual of unlawful presence for future bars to admissibility, it does not purport to define such terms in other contexts, such as state driver's licensing laws. *Id.* ("Apart from the immigration laws, 'lawful presence,' 'lawful status,' and similar terms are used in various other federal and state laws. For information on how those laws affect individuals who receive a favorable exercise of prosecutorial discretion under DACA, please contact the appropriate federal, state or local authorities.").

particularly true here where the federal decision is merely a statement of agency policy, and ADOT's policy does not intrude on federal immigration regulation or violate any Congressionally-sanctioned federal prerogative.

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

RESPECTFULLY SUBMITTED: October 14, 2014.

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Rule 32(a)(7)(C), Fed. R. App. P., and Circuit Rule 29-2(c)(2), and this Court's August 1, 2014 Order, the foregoing Response to United States' Brief As Amicus Curiae in Opposition to Rehearing *En Banc* is proportionately spaced, has a typeface of 14 points or more and contains 3,978 words (according to the Microsoft Word word count function).

RESPECTFULLY SUBMITTED: October 14, 2014.

/s/ Timothy Berg
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Response to United States' Brief As Amicus Curiae in Opposition to 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 October 14, 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.

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