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 MOTION TO STAY THE MANDATE PENDING FILING OF A PETITION FOR A WRIT OF CERTIORARI

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Appellees Governor Brewer, Director Halikowski, and Assistant Director Stanton (collectively, "ADOT") respectfully move this Court to stay the issuance of its mandate pending the timely filing of a petition for a writ of certiorari with the United States Supreme Court.

This Court denied ADOT's Petition for Rehearing and Rehearing *En Banc* on November 24, 2014 (Doc. 82); thus, the mandate is scheduled to issue on December 1, 2014. *See* Fed. R. App. P. 41(b). A stay is warranted because ADOT's certiorari petition will present substantial questions and there is good cause for stay. *See* Fed. R. App. P. 41(d)(2)(A). Notably, these questions to be raised in the certiorari petition raise basic and important issues concerning the Equal Protection Clause, the Supremacy Clause and federal immigration law. Specifically, the petition will raise questions regarding the proper application of the rational basis standard under the Equal Protection Clause, the existence of a "heightened" rational basis review standard, and the preemptive force of informal federal agency actions. A stay is further warranted because ADOT will be irreparably harmed absent a stay.

LEGAL STANDARD

Under Federal Rule of Appellate Procedure 41, "[a] party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court." Fed. R. App. P. 41(d)(1). Staying the issuance of the mandate pending

application for a writ of certiorari is appropriate where "the certiorari petition would present a substantial question and . . . there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). A substantial question is present and good cause exists to stay issuance of a mandate where there is: (1) a "reasonable probability" that the Supreme Court will grant certiorari, finding the underlying issues "sufficiently meritorious"; (2) a "significant possibility" the movant will prevail on the merits; and (3) "a likelihood that irreparable harm will result if that decision is not stayed." *See Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., as Circuit Justice, in chambers). If this Court grants a stay, and the party who obtained the stay timely files a certiorari petition, "the stay continues until the Supreme Court's final disposition." Fed. R. App. P. 41(d)(2)(B).

Although a stay of the mandate pending petition to the Supreme Court is not "granted as a matter of course", *see* 9th Cir. R. 41-1, "a party seeking a stay of the mandate following this [C]ourt's judgment need not demonstrate that exceptional circumstances justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989). The Comments to Circuit Rules indicate that a stay is only denied where the petition would be "frivolous or filed merely for delay." *See* 9th Cir. R. 41-1.

The Supreme Court is likely to grant a petition for a writ of certiorari when a United States court of appeals has:

> decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court.

Sup. Ct. R. 10(c).

Applying the relevant factors here dictates that this Court's mandate should be stayed pending the filing of a petition for certiorari. As demonstrated below, the certiorari petition would not be frivolous or filed merely for delay.

LEGAL ANALYSIS

I. The Certiorari Petition Will Present Substantial Questions Warranting Certiorari.

A. There Is A Reasonable Probability The Supreme Court Will Grant Certiorari Because The Opinion Addresses Issues of Exceptional Importance.

This case involves substantial issues involving the Equal Protection Clause, the Supremacy Clause and federal immigration law. First, ADOT's certiorari petition will present issues relating to the proper application of rational basis review under the Equal Protection Clause – including the issue of whether courts can apply a more exacting application of the rational basis standard which is inconsistent with the highly deferential review historically and properly applied by federal courts. Second, ADOT's certiorari petition will present issues relating to the scope of conflict preemption, specifically addressing what agency actions have the preemptive force of federal law. Equal protection and preemption issues are

often, and aptly, reviewed by the Supreme Court. *See, e.g., F.C.C. v. Beach Commc'ns, Inc*., 508 U.S. 307 (1993) (equal protection); *Heller v. Doe*, 509 U.S. 312 (1993) (same); *Vance v. Bradley*, 440 U.S. 93 (1979) (same); *Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456 (1981) (same); *Wyeth v. Levine*, 555 U.S. 555 (2009) (explaining that it was persuaded, in part, to grant certiorari due to the "importance of the pre-emption issue"); *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968 (2011) (preemption); *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990) (same).

This Court's rigorous and improper application of rational basis review arguably ensures that many types of State action will fail even under minimal scrutiny, a result that is contrary to well-settled principles of Equal Protection Clause jurisprudence. Further, the Court's preemption analysis creates precedent implying that agency policy decisions that are not subject to any formal rulemaking procedure have the preemptive force of federal law and can preempt State action in contexts that have long been reserved to the States. These constitutional issues undoubtedly present substantial questions that are of exceptional importance for the constitutional balance of powers and responsibilities between the federal government and the States; issues the Supreme Court is likely to review on certiorari.

Moreover, these constitutional issues and the subject matter of this case implicate federal immigration law and State's rights. For the very reasons the Supreme Court gave for granting certiorari in *Arizona v. United States*, 132 S. Ct. 2492, the Supreme Court is likely to grant review here. 132 S. Ct. at 2498 ("This Court granted certiorari to resolve important questions concerning the interaction of state and federal power with respect to the law of immigration and alien status.").

B. This Court's Exacting Application Of Rational Basis Review Conflicts With Supreme Court Precedent And Its Related Determination Is Likely To Be Reversed.

ADOT submits this Court's rigorous application of rational basis review to the ADOT policy at issue presents a substantial question for the Supreme Court's consideration. Although the Court purportedly employed a traditional rational basis review, it did not. Rather, the Court relied largely on *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). *See* Opinion at 22-25. However, the majority's opinion in *Cleburne* is a departure from traditional rational basis review. *Id.* 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. Bowe*rs, 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 such, there is a reasonable

probability the Supreme Court would grant certiorari to determine whether a "heightened" rational basis review standard is applicable to review the ADOT policy – or ever permissible.

While the district court expressly stated that it applied "heightened" rational basis review (albeit with doubts that such a standard was appropriate), this Court purported to apply traditional rational basis review and determined that ADOT's policy is unlikely to survive even this highly deferential review. *See* Opinion at 22. However, this Court's analysis is either a wholly improper application of traditional rational basis review or an unstated application of heightened rational basis review. In either case, there is a reasonable probability the Supreme Court will review this Court's purported application of rational basis review and a significant possibility ADOT will prevail on the merits.

This Court's application of rational basis is in serious conflict with the Supreme Court's decisions in *F.C.C. v. Beach Commc'ns, Inc*., 508 U.S. 307 (1993); *Heller v. Doe*, 509 U.S. 312 (1993); *Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456 (1981); and *Vance v. Bradley*, 440 U.S. 93 (1979). In all of the four preceding opinions, the Supreme Court applied a highly deferential form of rational basis review and upheld the challenged laws as constitutional. *See, e.g.*, *F.C.C.*, 508 U.S. at 313, 317 (finding there were at least two "conceivable" bases for the challenged distinction and explaining that "[i]n 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."); *Heller*, 509 U.S. at 320 (finding the State proffered "adequate justifications" and reiterating that a classification "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").

Further, although the Supreme Court has established that "[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, and "[a] State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification[,]" *Heller*, 509 U.S. at 320, the Opinion summarily disregarded ADOT's stated rational bases for an alleged want of supporting evidence. *See, e.g.*, Opinion at 23.

The Opinion's rigorous application of traditional rational basis review conflicts with the controlling Supreme Court cases, which apply a highly deferential form of rational basis review. Under such review, ADOT's policy should have been upheld if *any* conceivable reason supports the decision. The Supreme Court is likely to grant review where, as here, a court of appeals "has decided an important federal question in a way that conflicts with relevant

decisions of [the Supreme] Court." Sup. Ct. R. 10(c). Because of this conflict, there is also a significant possibility that the Supreme Court will reverse the decision.

C. The Court's Preemption Analysis Conflicts With Supreme Court Precedent And Ninth Circuit Precedent And Is Likely To Be Reversed.

Whether an internal federal policy directive has the preemptive force and effect of federal law presents a substantial question warranting certiorari. Although this Court stated it did not need to rely upon Plaintiffs' preemption claim in determining whether Plaintiffs established a likelihood of success on the merits, the Court proceeded to analyze the preemption issue, arguably creating binding Ninth Circuit precedent that will widely expand the scope of conflict preemption.[1]

The Opinion states that "[i]f Plaintiffs can ultimately show adequate proof of the link between driver's licenses and the ability to work in Arizona, [the Court would] agree that Defendants' policy would be conflict-preempted." Opinion at 15. The Opinion goes on to say that if "Plaintiffs submit adequate proof that

[1] *See* Petition for Rehearing and Rehearing *En Banc* (Doc. 63-1) (citing *Spears v. Stewart*, 283 F.3d 992, 1006 (9th Cir. 2002) for the proposition that "[w]hether 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.").

Defendants' policy interferes with the DHS Secretary's directive that DACA recipients be permitted . . . to work, they will, in turn, show that Defendants' policy interferes with Congress's intention that the Executive determine when noncitizens may work in the United States." Opinion at 16. Regardless of whether this Court purported to reach the issue of whether ADOT's policy was preempted, this Court's analysis erroneously assumes that Secretary Napolitano's DACA memorandum (the "DACA Memorandum") creates federal law with preemptive force.

The Supreme Court is likely to grant certiorari because this Court's conclusion that a federal agency's policy decision can preempt state law is inconsistent with binding Supreme Court and Ninth Circuit precedent, including *United States v. Mead Corp.*, 533 U.S. 218 (2001) and *River Runners for Wilderness v. Martin*, 593 F.3d 1064 (9th Cir. 2010).

This Court's analysis extends the doctrine of conflict preemption beyond its proper boundaries. Not all agency actions have the preemptive effect of law. On the contrary, agency action can only have preemptive effect when it arises from a formal rulemaking procedure. *See United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) ("Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."). In

fact, the Ninth Circuit has established a two-part test to determine when agency pronouncements have the force and effect of law:

> To have the force and effect of law, enforceable against an agency in federal court, the agency pronouncement must (1) prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice—and (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.

River Runners for Wilderness v. Martin, 593 F.3d 1064, 1071 (9th Cir. 2010) (citation omitted).

The Court's analysis failed to consider that the DACA Memorandum was not subject to notice and comment rule making, is merely an internal directive providing a general policy statement regarding DHS's current enforcement priorities, and 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." *See* ER205. In fact, the DACA Memorandum acknowledges that it merely "set[s] forth policy" to focus resources on higher priority cases through the exercise of prosecutorial discretion. *Id*.

Indeed, the amicus brief filed by the United States at the invitation of this Court, addressing ADOT's Petition for Rehearing and Rehearing *En Banc*, serves to highlight that even though the district court dismissed Plaintiffs' preemption

claim, preemption is still a central focus in this case and a substantial question for the Supreme Court to review. The United States argued that rehearing was unwarranted because ADOT's policy is preempted by "[f]ederal [l]aw." United States' Amicus Brief, Doc. 75, at 8. The United States admittedly reached its conclusions based "on preemption principles without addressing the question of equal protection." Amicus Brief at 2.[2] The fact the United States also contends that the DACA Memorandum creates preemptive federal law further substantiates that this issue is a substantial question the Supreme Court is likely to review.

Due to the conflict between the Opinion and Supreme Court precedent, it is likely the Supreme Court would consider the underlying issues sufficiently meritorious for the grant of certiorari, *see* Sup. Ct. R. 10(c), and there is, further, a significant possibility that ADOT would prevail on the merits of this issue.

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[2] Notably, the United States failed to analyze the relevant equal protection issues present in this case. This avoidance is likely because the federal government itself distinguishes between DACA recipients and recipients of other forms of deferred action. For example, the U.S. Department of Health and Human Services ("HHS") differentiates between DACA recipients and recipients of other forms of deferred action for the 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"). HHS determined that DACA recipients are not eligible for ACA.

II. There Is Good Cause For Stay.

ADOT respectfully submits that good cause supports this motion due to the irreparable harm that will ensue if the mandate is not stayed pending ADOT's filing of a certiorari petition.

The Court remanded this case to the district court "with instruction to enter a preliminary injunction prohibiting Defendants from enforcing any policy by which the Arizona Department of Transportation refuses to accept *Plaintiffs'* Employment Authorization Documents, issued to *Plaintiffs* under DACA." Opinion at 28-29 (emphasis added). ADOT interprets this Court's instruction to mean that a preliminary injunction must be limited to the issuance of licenses to the named Plaintiffs.[3] *See, e.g., Zepeda v. INS*, 753 F.2d 719, 727-28 (9th Cir. 1985) ("On remand, the injunction must be limited to apply only to the individual plaintiffs unless the district judge certifies a class of plaintiffs . . . our legal system does not automatically grant individual plaintiffs standing to act on behalf of all citizens similarly situated.") (citations omitted). Contrary to ADOT's interpretation, Plaintiffs have taken the position that the injunction ordered by this Court requires ADOT to issue a driver's license to anyone who presents a Category Code C33 employment authorization document ("EAD").

[3] Plaintiffs, properly, dropped their class action allegations.

Significantly, on November 20, 2014, the United States Secretary of Homeland Security issued a memorandum widely expanding the DACA program and the use of deferred action in general. This new memorandum, entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Whose Parents are U.S. Citizens or Permanent Residents*, instructs USCIS and its related agencies to exercise prosecutorial discretion and grant deferred action to a significantly larger group of undocumented immigrants. Specifically, the memorandum: (1) removes the age restriction that was formally in place under the DACA Memorandum, and (2) expands the use of deferred action to parents who have children that are U.S. Citizens or lawful permanent residents and meet certain other criteria.

Regardless of which interpretation the district court applies, the failure to stay the mandate effectively forces ADOT to issue state driver's licenses to individuals whom the State asserts are not entitled to such credentials. Moreover, due to the current administration's recent expansion of the DACA program and the use of deferred action generally, Plaintiffs will argue that this Court's order to the district court to issue a preliminary injunction and supporting rationale must be applied more expansively, requiring the Department to issue driver's licenses to a

large group of undocumented immigrants, beyond those whom this Court originally contemplated.

Issuing driver's licenses to recipients of deferred action will cause irreparable injury for several reasons. First, ADOT would need to establish a procedure for issuing driver's licenses to, at a minimum, Category Code C33 EAD holders in a hurried manner that is likely to cause serious administrative difficulties and costs that are not contained in its budget.

More importantly, if the Supreme Court grants a writ of certiorari and determines that Plaintiffs have not met their burden for obtaining a preliminary injunction, ADOT will be forced to also establish a procedure to recall and cancel the wrongfully issued driver's licenses.

Further, if the district court interpreted this Court's decision to require ADOT to issue driver's licenses to DACA recipients, that injunction will unquestionably cause confusion and discord. ADOT determined that, in addition to DACA recipients, recipients of regular deferred action and deferred enforced departure cannot demonstrate authorized presence under federal law and does not accept Category A11 EADs or Category C14 EADs for the purpose of obtaining a driver's license. Ordering ADOT to issue driver's licenses to DACA recipients will assuredly cause confusion in dealing with the questions to recipients of other forms of deferred action.

The recent change to federal immigration policies only exacerbates Director Halikowski's concerns about the expansive scope of the DACA program and the problems raised by issuing driver's licenses. Indeed, the administration's recent revisions of its stated immigration policy underscores the fact such policies, which are not law, are easily revised and changed. Issuing driver's licenses to deferred action recipients before this issue is reviewed by the Supreme Court is imprudent, given the changeable nature of DHS policy, prior to Congressional action.

Absent a stay, irreparable injury will result. Due to *current* administration's recent changes to *current* immigration policies, the full extent of the impending irreparable injury is unknown and may only increase in magnitude.

CONCLUSION

For the foregoing reasons, ADOT respectfully requests that this Court stay the issuance of its mandate pending the filing and disposition of a timely petition for writ of certiorari.

RESPECTFULLY SUBMITTED: November 28, 2014.

FENNEMORE CRAIG, P.C.

By *s/ Timothy Berg*

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Circuit Rules 32-1 and 40-1, the foregoing Motion to Stay the Mandate Pending Filing Of A Petition For A Writ of Certiorari is proportionately spaced, has a typeface of 14 points or more and contains 3,410 words (according to the Microsoft Word word count function).

RESPECTFULLY SUBMITTED: November 28, 2014.

s/ Timothy Berg
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 Motion to Stay the Mandate Pending Filing Of A Petition For A Writ of Certiorari 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 November 28, 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/ Timothy Berg
Attorney for Appellees
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