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 U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA, CIVIL ACTION NO. 2:12-CV-02546, HON. DAVID G. CAMPBELL

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLEES IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: August 20, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, submits this *amicus* brief with the accompanying motion for leave to file.[1] Founded in 1981, Eagle Forum has consistently defended federalism and supported states' autonomy from the federal government in areas – like the regulation of public health and safety – that are of traditionally local concern. For the reasons set forth in the accompanying motion, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Several aliens and a membership organization (collectively, "Plaintiffs") have sued Arizona's governor and two state transportation officials (collectively, "Arizona"), to challenge Arizona policies issued in August 2012 to deny driver's licenses to some but not all alien holders of federal work authorization documents ("EADs"). By way of background, a June 2012 memorandum from the Department of Homeland Security ("DHS") announced the Deferred Action for Childhood Arrivals ("DACA") program to DHS's constituent agencies with responsibility for immigration. DACA directed those constituent agencies to provide enforcement discretion for a well-defined class of illegal aliens (*e.g.*, came to the United States

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

under 16, aged 30 or less, etc.). *See* Arizona Br. at 8 n.2 (defining contours of DACA beneficiaries). Plaintiffs argue that Arizona's denying driver's licenses to DACA EAD holders but not to other EAD holders is both (a) preempted by the Immigration and Naturalization Act ("INA"), the Immigration Reform & Control Act of 1986 ("IRCA"), and federal rules and policies issued under the color of INA's and IRCA's authority, and (b) prohibited by the Equal Protection Clause of the Fourteenth Amendment because it treats similarly situated EAD holders differently. This interlocutory appeal seeks the entry of a preliminary injunction, which the district court denied.

STATEMENT OF FACTS

Eagle Forum adopts Arizona's statement of facts. *See* Arizona Br. at 6-18

STANDARD OF REVIEW

Plaintiffs seeking interim relief must establish that they likely will succeed on the merits and likely will suffer irreparable harm without relief, that the balance of equities favors them versus the defendants' harm from interim relief, and that the public interest favors interim relief. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Further, even preliminary injunctions require jurisdiction. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983). Finally, the "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual

cases," *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976), including arguments raised solely by *amici*. *Turner v. Rogers*, 131 S.Ct. 2507, 2519-20 (2011); *accord id*. at 2521 (Thomas, J., dissenting).

SUMMARY OF ARGUMENT

For their likelihood of succeeding on the merits, Plaintiffs press only their now-dismissed preemption claim, which is not before this Court for this Court to reinstate (Section I). On the dispute as to mandatory versus prohibitory injunctions, Plaintiffs have waived their opportunity to challenge the district court's tying the *status quo ante litem* to the period before the DACA program (Section II).

Insofar as the DACA is substantively invalid under the INA and procedurally invalid under the Administrative Procedure Act ("APA"), it cannot preempt anything (Section III.A.1). As to conflict preemption, the denial of state driver's licenses is neither within any areas that the Supreme Court has held that Congress intended to leave unregulated (*e.g.*, employee-based sanctions) nor within any fields that Congress has fully occupied (*e.g.*, alien registration), which leaves this exercise of traditional state police power under the presumption against preemption and thus not preempted (Section III.A.2). With respect to "constitutional preemption," Plaintiffs misplace their reliance on district-court decisions that would require revoking the states' latitude to regulate areas of state and local concern that involve illegal aliens – as recognized in *DeCanas v. Bica*,

424 U.S. 351, 354 (1976) – that Arizona does not exceed so long as it refrains from regulating who may enter or remain in the United States (Section III.B). Significantly, DACA is substantively and procedurally unlawful (Section III.A.1), which means that Plaintiffs (with unlawful EADs) cannot establish an Equal-Protection injury vis-à-vis aliens with *lawful* EADs (Section IV.A.4). The showing required for irreparable harms subsumes but also exceeds the showing required for standing (Section IV.A.1), and the organizational Plaintiff cannot establish cognizable injury – much less irreparable injury – through the self-inflicted injury of diverted resources to combat Arizona's policies; unlike in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-73 (1982), no statute here has displaced the prudential zone-of-interests test (Section IV.A.2).

ARGUMENT

I. PLAINTIFFS' SEEKING INTERIM RELIEF BASED ONLY ON PREEMPTION IS JURISDICTIONALLY INCONSISTENT WITH THEIR FAILURE TO APPEAL THE DISMISSAL OF THEIR PREEMPTION CLAIM

The district court consolidated the hearing of Arizona's motion to dismiss Plaintiffs' two-count complaint and Plaintiffs' motion for a preliminary injunction. In a single order, the district court dismissed Plaintiffs' Supremacy-Clause count, denied Arizona's motion to dismiss Plaintiffs' Equal-Protection count, and denied the motion for a preliminary injunction. Plaintiffs filed their notice of appeal on Monday, June 17, 2013, which is thirty-two days after the district court's order

dated May 16, 2013. Pls.' Notice of Appeal, at 3 (Dkt. #131). Although the Notice of Appeal did not specify the jurisdictional basis for the appeal, Plaintiffs' opening brief (at 2) based jurisdiction on 28 U.S.C. §1292(a)(1), and Arizona concurred with Plaintiffs' jurisdictional statement. Arizona Br. at 3.

Surprisingly, Plaintiffs press their preemption claim – which the district court dismissed, and which Plaintiffs acknowledge they have not appealed, Pls.' Opening Br. at 4 n.1 – as the substantive basis for this Court to grant a preliminary injunction. To be sure, Plaintiffs rely on alleged Equal-Protection injuries as the basis for their purportedly irreparable harms, but the sole *substantive* basis on which they claim a likelihood of success on the merits is their now-dismissed preemption claim. Plaintiffs are attempting not merely to kick, but actually to ride, a dead horse. What's worse, Plaintiffs declined to avail themselves of the life-support system that 28 U.S.C. §1292(b) provided to revive the now-dismissed claim on which Plaintiffs ask this Court to grant a preliminary injunction. Under the circumstances, it appears unclear how this Court could help Plaintiffs on the theories that Plaintiffs press.

By way of background, appellate decisions that plaintiffs are likely to prevail on the merits of a claim for purposes of preliminary injunctions do not establish the law of the case: "decisions on preliminary injunctions are just that – preliminary," *S. Ore. Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th Cir.

2004) (citation omitted), and generally do not constitute the law of the case. *Id.; Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA,* 499 F.3d 1108, 1114 (9th Cir. 2007). The question presented – namely, whether a party is *likely* to prevail on the merits – differs from the question on the merits: "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Univ. of Texas v. Camenisch,* 451 U.S. 390, 395 (1981); *cf. Bay Area Addiction Research & Treatment, Inc. v. City of Antioch,* 179 F.3d 725, 737 n.13 (9th Cir. 1999) (defendant "may undo the effects of the preliminary injunction if it prevails on the merits"). As such, it would be entirely appropriate for a district court to dismiss a claim that an appellate court previously had held to warrant a preliminary injunction. It is not clear why that would not apply in the reverse (*i.e.*, why an appellate finding of *likelihood* of success would survive a district court's ruling on the merits).

Although partial dismissals of multi-count complaints do not render a final judgment appealable under 28 U.S.C. §1291 or the collateral order doctrine, *see, e.g., Van Cauwenberghe v. Biard,* 486 U.S. 517, 521-22 (1988), interlocutory relief is potentially available under 28 U.S.C. §1292(b), albeit under procedures that differ from those followed here. But even if the Court could bridge the procedural gaps, Plaintiffs expressly denied any intent to appeal the dismissal of the Supremacy-Clause count. Pls.' Opening Br. at 4 n.1. Under the circumstances, it is

unclear how this Court equitably could reinstate Plaintiffs' Supremacy-Clause count in order to grant preliminary relief under that count.

II. PLAINTIFFS SEEK A MANDATORY INJUNCTION BECAUSE THE *STATUS QUO ANTE LITEM* PREDATES THE UNLAWFUL DACA PROGRAM

The distinction between prohibitory and mandatory injunctions lies in the requested relief's effect on the *status quo ante litem* – *i.e.*, "the last, uncontested status which preceded the pending controversy." *Regents of the Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 514 (9th Cir.1984); *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009). When the injunction merely preserves that status quo, it is prohibitory (*i.e.*, it preserves the undisputed status quo). When the injunction goes beyond that, it effectively mandates defendants to change the status quo to accommodate the plaintiff's claims, which is a greater intrusion, particularly against a sovereign state.

The district court plainly (and correctly) identifies the *status quo ante litem* as "[b]efore implementation of the DACA program," ER 7, which Plaintiffs simply disregard:

> The district court erroneously concluded that the status quo in this case refers to the period *after* Arizona implemented its unconstitutional policy because Plaintiffs could not get driver's licenses prior to DACA. ER 7. But that policy is precisely what is contested in this litigation, and therefore cannot be "the last uncontested status." Further, it is undisputed that prior to the challenged policy, ADOT accepted all EADs as proof of

> authorized presence, including those presented by all deferred action grantees.

Pls.' Opening Br. at 41 (emphasis in original). Insofar as Arizona contests the *lawfulness* of Plaintiffs' EADs,[2] Plaintiffs cannot backdate the *status quo ante litem* to reflect only their grievances with Arizona's policies, while ignoring Arizona's grievances with the DACA program and Plaintiffs' EADs.

Plaintiffs' opening brief did not challenge the district court's tying the *status quo ante litem* to the pre-DACA period, *see generally* Pls.' Opening Br. at 40-42, and Plaintiffs have therefore waived the right to challenge that issue in their reply brief. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999); *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) ("[i]ssues raised for the first time in the reply brief are waived"). It does not matter whether Plaintiffs willfully feign not to understand the district court in order to sandbag Arizona in their reply brief or actually do not understand the district court's clear opinion. At this point, any challenge by Plaintiffs' in their reply brief to the pre-DACA period would leave Arizona without the opportunity to respond.

III. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THEIR PREEMPTION CLAIMS

In this section, *amicus* Eagle Forum assumes *arguendo* that Plaintiffs have a

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[2] Although Arizona is correct that Plaintiffs' EADs are unlawful, *see* Section III.A.1, *infra*, the *status quo ante litem* does not hinge on which party is right on the merits: it merely identifies the point in time when the parties did not have a dispute between them. *See* Arizona Br. at 21-23.

Supremacy-Clause claim to press against Arizona at this stage, *but see* Section I, *supra;* if they have such a claim to press, Plaintiffs are unlikely to prevail on it because Arizona's policies do not conflict with federal law – with or without the DACA program – and are not *per se* preempted for intruding into a sphere that the Constitution leaves exclusively to the federal government.

A. Arizona's Actions Do Not Conflict With Federal Law

Amicus Eagle Forum respectfully submits that DACA – as interpreted by Plaintiffs – would be an *ultra vires* program adopted without the APA-required notice-and-comment rulemaking. Moreover, and however DACA is interpreted, federal law does not conflict-preempt Arizona's driver's license policies.

1. The DACA Program Is a Legal Nullity

Whether because it is *ultra vires* federal immigration law or procedurally invalid, DACA is a legal nullity as far as establishing what Plaintiffs rely on DACA to establish (namely, their lawful presence here). Although they raise objections to judicial review of DACA, Pls.' Opening Br. at 25-26, the cited restriction on judicial review – namely, 8 U.S.C. §1252(g) – applies only to limit direct review by aliens of specific immigration actions, not to limit indirect review by affected states when immigration policies are applied in cases with independent jurisdiction. *Murphy Explor'n & Prod'n Co. v. Dep't of Interior*, 270 F.3d 957, 958-59 (D.C. Cir. 2001); *see also Nat'l Ass'n of Home Builders v. Defenders of*

Wildlife, 551 U.S. 644, 662 (2007) (repeals by implication require clear and manifest congressional intent); *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975) (canon against repeals by implication "applies with particular force" to judicial review).

a. As Viewed By Plaintiffs, DACA Is *Ultra Vires*

Through DACA, a non-enforcement agency purports to channel Plaintiffs into deferred-action under prosecutorial discretion, without initiating the statutorily mandated removal proceeding. That is *ultra vires* and thus void. Specifically, under 8 U.S.C. §1225(a)(1), "an alien present in the United States who has not been admitted … shall be deemed for purposes of this chapter an applicant for admission." That designation triggers 8 U.S.C. §1225(a)(3), which requires that all applicants for admission "shall be inspected by immigration officers," which triggers 8 U.S.C. §1225(b)(2)(A)'s mandate that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding under section 1229a of this title." In essence, DACA jumps aliens like Plaintiffs to the favorable end of the removal process, without the statutorily required process that must precede that outcome.

b. As Viewed By Plaintiffs, DACA's Promulgation Violated the APA

Even if DACA were *substantively* consistent with federal immigration law,

its promulgation nonetheless would violate the APA notice-and-comment requirements. The APA exemptions for policy statements and interpretive rules do not apply when agency action narrows the discretion otherwise available to agency staff, *General Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002), provides the basis on which to confer benefits. *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1088 (9th Cir. 2003) ("legislative" rules "create[] new rights" "[r]egardless of the agency's claims"), or effectively amends existing rules. *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). Significantly, employment authorization is a benefit that is "granted" to beneficiary aliens, 8 C.F.R. §274a.12(c)(14), under sixteen specific circumstances, 8 C.F.R. §274a.12(a)(1)-(16), none of which apply to the across-the-board DACA program. *Cf. U.S. v. Picciotto*, 875 F.2d 345, 346-49 (D.C. Cir. 1989) (agency cannot add new, specific, across-the-board conditions under general, case-by-case authority to consider changes). Under the foregoing APA criteria, DACA qualifies as a legislative rule, which agencies cannot issue by memoranda or interpretation.

Procedurally infirm rules are a nullity, *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988); *State of Ohio Dep't of Human Serv. v. U.S. Dept. of Health & Human Serv., Health Care Financing Admin.*, 862 F.2d 1228, 1237 (6th Cir. 1988); *North Am. Coal Corp. v. Director*, 854 F.2d 386, 388 (10th Cir. 1988), even if they would have been substantively valid if

promulgated via notice-and-comment rulemaking. Thus, DACA is a nullity.

2. Arizona's Denial of Driver's Licenses Does Not Conflict With Federal Law

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Courts have identified three ways in which federal law can preempt state or local laws: express preemption, "field" preemption, and implied or conflict preemption. *Cipollone v. Liggett Group,* 505 U.S. 504, 516 (1992). Here, there is no express preemption, and Plaintiffs rely only on conflict preemption – *i.e.*, not on field preemption – with respect to INA and IRCA.[3] *See* Pls.' Br. at 19-32.

In evaluating preemption claims, courts rely on two presumptions. First, preemption analysis begins with federal statutes' plain wording, which "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993). Under that analysis, the ordinary meaning of statutory language presumptively expresses that intent. *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383 (1992). Second, under *Santa Fe Elevator* and its progeny, courts apply a presumption against preemption for federal legislation, particularly in fields traditionally occupied by the states. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). The federal

[3] Plaintiffs also rely on "constitutional preemption," which *amicus* Eagle Forum discusses in Section III.B, *infra.*

government's abdication of its duties with respect to immigration and the resulting negative impacts of illegal aliens across the Nation – and especially in Arizona – have brought several preemption-related issues to the fore as states and localities attempt to protect themselves.

In the field of immigration, "the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal." *Plyler v. Doe*, 457 U.S. 202, 225 (1982). Two recent Supreme Court decisions, however, appear somewhat at odds on states' power to act. In *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1985 (2011), the Supreme Court rejected preemption challenges to state-law licensing sanctions under 8 U.S.C. §1324a(h)(2) against those who employ illegal aliens and a state-law mandate that employers use the federal E-Verify program, notwithstanding that program's voluntary nature under federal law. In *Arizona v. U.S.*, 132 S.Ct. 2492 (2012), the Court relied on field preemption to invalidate state-law crimes for failing to carry federally required registration documents and relied on conflict preemption to invalidate two state-law provisions: (1) state-law crimes for illegal aliens' knowingly applying for work or working, and (2) state-law authorization for warrantless arrests of illegal aliens reasonably thought to be removable from the United States. Although Arizona prevailed outright in *Whiting* and only partially in *Arizona*, both decisions support Arizona here.

a. The Presumption Against Preemption Applies

In all fields – and especially ones traditionally occupied by state and local government – courts apply a presumption against preemption. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Santa Fe Elevator*, 331 U.S. at 230; *cf. U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("[u]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance"); *accord Gonzales v. Oregon*, 546 U.S. 243, 275 (2006); *Nat'l Ass'n of Home Builders*, 551 U.S. at 662 ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest") (interior quotations omitted, alteration in original). When this "presumption against preemption" applies, courts do not assume preemption "unless that was the clear and manifest purpose of Congress." *Santa Fe Elevator*, 331 U.S. at 230; *Wyeth*, 555 U.S. at 565. This presumption shields Arizona's driver's-license policies from preemption.

The presumption applies in all areas (*i.e.*, with or without prior federal entry in the field), and federal courts "rely on [it] because respect for the States as independent sovereigns in our federal system leads [federal courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth*, 555 U.S. at 565 n.3 (internal quotations omitted). Thus, "[t]he presumption … accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* If states have occupied the field, the presumption plainly applies. Moreover, even if

Congress had preempted *some* state action, the presumption against preemption applies to determining the *scope* of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (interior quotations omitted). This dispute concerns driver's licenses, an area of traditional local concern under the police power, which includes public safety, negative impacts on employment, education, housing, and the local fisc. *DeCanas*, 424 U.S. at 354-55. For all but the wealthiest, the ability to work for pay is far more central to residency than the ability to drive. Since the presumption against preemption applies to the former (*i.e.*, employment) under *DeCanas*, 424 U.S. at 357-58, it plainly applies here.[4]

If the presumption against preemption applies, Plaintiffs' preemption case vanishes because the INA does not preclude Arizona's exercising its police power with respect to driver's licenses and, in all material resects, is insufficiently comprehensive to infer congressional intent to exclude state and local action. That silence and the substantive issues in the next section leaves only one possible

[4] Indeed, a 1996 appropriations bill expressly included a pilot program for states to deny driver's licenses to "aliens who are not lawfully present in the United States." Pub. L. No. 104-208, Div. C, Title V, Subtitle A, §502, 110 Stat. 3009, 3009-671 (Sept. 30, 1996). To suggest that federal law precludes that type of state action is wholly unsupported.

conclusion: Congress did not intend the INA or IRCA to preempt the local police power on which Arizona relies.

b. Congress Has Not Conflict-Preempted Local Police-Power Regulation of Driver's Licenses

Conflict preemption includes both "conflicts that make it *impossible* for private parties to comply with both state and federal law" and "conflicts that *prevent or frustrate* the accomplishment of a federal objective." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000) (interior quotations omitted, emphasis added). Because nothing prevents compliance with both federal immigration law and Arizona's driver's-license policies, Plaintiffs necessarily invoke the "prevent-or-frustrate" prong.

Conflict-preemption analysis cannot be "a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives" without "undercut[ting] the principle that it is Congress rather than the courts that preempts state law." *Whiting*, 131 S.Ct. at 1985 (interior quotations omitted). Such a freewheeling inquiry would create the real danger – from a separation-of-powers perspective – of the Judiciary's "sit[ting] as a super-legislature, and creat[ing] statutory distinctions where none were intended." *Securities Industry Ass'n v. Board of Governors of Federal Reserve System*, 468 U.S. 137, 153 (1984). *Amicus* Eagle Forum respectfully submits that this prevent-or-frustrate preemption "wander[s] far from the statutory text" and improperly "invalidates state laws

based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law." *Wyeth*, 555 U.S. at 583 (characterizing this prong as "'purposes and objectives' pre-emption") (Thomas, J., concurring). Indeed, under *Wyeth,* 555 U.S. at 576-77, procedurally defective agency action cannot preempt *any* state law.[5]

Notwithstanding federal primacy in *regulating immigration*, mere overlap with immigration does not necessarily displace state actions in areas of state concern. *DeCanas*, 424 U.S.at 354-55 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). As the Supreme Court held in *Arizona,* however, "[c]urrent federal law is substantially different from the regime that prevailed when *DeCanas* was decided." *Arizona*, 132 S.Ct. at 2504 (rejecting employee-based criminal sanctions). The question here is whether the *Arizona* difference with respect to employee-based crimes also encompasses the driver's-license issue presented here. It does not.

Prior to IRCA's amendments, INA would have allowed both employee- and employer-based sanctions under *DeCanas.* According to *Arizona*, however, Congress considered and rejected employee-based sanctions in IRCA's

[5] As Arizona explains, DACA itself refrains from classifying aliens like Plaintiffs as lawfully present, choosing instead merely to limit the further accrual of unlawful presence for admissibility purposes. *See* Arizona Br. at 45-46.

amendments. *See Arizona*, 132 S.Ct. at 2505 (citing legislative history). The Court relied on "the text, structure, and history of IRCA" to conclude "that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment." *Id.* Significantly, IRCA did not discuss preempting in the driver's-license area. Because the presumption of preemption continues to apply, this Court must presume that Congress did not intend to displace state and local authority over driver's licenses *sub silentio*, *Santa Fe Elevator*, 331 U.S. at 230, particularly while Congress addressed employment-related issues expressly. To read *Arizona* to extend beyond employment would unmoor that decision from its authority and reasoning and reach beyond driver's licenses to any manner of licensing, registration, and taxing authority.

B. The Constitution Does Not *Per Se* Preempt Arizona's Actions

In addition to conflict preemption, Plaintiffs also argue that Arizona's policies are *per se* preempted under the Constitution. Pls.' Br. at 32-39. This argument is meritless.

Under U.S. CONST. art. I, §8, cl. 4, Congress has plenary power to regulate immigration. Although the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *DeCanas v. Bica*, 424 U.S. 351, 354 (1976), the Supreme Court has never held that every "state enactment which in any way deals with aliens" constitutes "a regulation of immigration and thus [is] *per se* pre-

empted by this constitutional power, whether latent or exercised." *Id.* at 355 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration"). As long as Arizona refrains from a "regulation of immigration," Plaintiffs cannot rely on the unexercised constitutional *authority* of Congress – as distinct from particular congressional enactments like INA or IRCA – to find preemption. If unexercised constitutional authority "field preempted" Arizona's driver's license policies, the state laws at issue in *DeCanas* and *Whiting* would have been preempted, as well.

Instead, federalism's central tenet permits and encourages state and local government to experiment with measures that enhance the general welfare and public safety:

> [F]ederalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

U.S. v. Lopez, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). Absent express preemption, field preemption, or sufficient actual conflict, the federal system assumes that the states retain their role. Unless and until Congress enacts a national solution, therefore, nothing in the Constitution itself preempts Arizona from using its police power to solve its local problems.

As *DeCanas* explained, the "regulation of immigration … 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." *DeCanas,* 424 U.S. at 355 (emphasis added). For *illegal* aliens,[6] states and localities may address impacts within their borders:

> Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.

Plyler, 457 U.S. at 229. Even if Arizona's policies discourage illegal aliens from remaining *in Arizona,* those policies do not expel anyone from Arizona (much less the United States).[7]

IV. PLAINTIFFS DO NOT SATISFY THE OTHER CRITERIA FOR A PRELIMINARY INJUNCTION

Assuming *arguendo* that it gets past Plaintiffs' unlikelihood of prevailing on a preemption theory, this Court still should affirm the denial of the preliminary injunction under the remaining criteria for interim relief. Specifically, Plaintiffs

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[6] Precedents that address state regulation of *legal* aliens – while perhaps not always entirely *irrelevant* – are not very compelling: "Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'" *Plyler,* 457 U.S. at 223.

[7] The question of what – *if any* – degree of state-imposed barrier would rise to the level of conflict via *de facto* expulsion is an interesting one. As indicated, *DeCanas* held that working for pay does *not* rise to that level, notwithstanding that that restriction would bar all but the independently wealthy. Whatever that outer band might be, a driver's license clearly is well within the permissible limits.

have failed to establish irreparable harm, the balance of equities tips toward Arizona, and the public interest favors Arizona.

A. Plaintiffs Cannot Show Irreparable Harm

The district court held that Plaintiffs failed to demonstrate the irreparable harm needed to entitle them to a preliminary injunction, and Arizona ably defends that holding. Arizona Br. at 23-39. *Amicus* Eagle Forum adds to Arizona's brief only with respect to Plaintiffs' various claims related to Equal-Protection injuries and the harms alleged by the organizational Plaintiff.

1. The Showing of Irreparable Harm Needed to Justify Preliminary Injunctions Exceeds the Mere Allegations Required to Establish Standing

A plaintiff must have standing to secure *any* relief, including a preliminary injunction. *Lyons*, 461 U.S. at 103. But, whereas the standing inquiry assumes the merits of a plaintiff's claims, *Warth v. Seldin*, 422 U.S. 490, 502 (1975), plaintiffs must *demonstrate* – as opposed to merely alleging – irreparable injury:

> A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief.

Caribbean Marine Servs. Co. v. Baldrige, 844 F.2d 668, 675 (9th Cir. Cal. 1988) (emphasis in original). By contrast, "[w]hether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits." *Tyler v. Cuomo*, 236 F.3d 1124, 1133 (9th Cir. 2000).

Under these authorities, "a plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of irreparable harm necessary to obtain it." *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011). Thus, the irreparable-harm showing required for injunctive relief is considerably greater than the mere allegations of injury.

For stays pending appeal,[8] the question of irreparable injury requires a two-part "showing of a threat of irreparable injury to interests that [the plaintiff] properly represents." *Graddick v. Newman*, 453 U.S. 928, 933 (1981) (Powell, J., for the Court[9]). "The first, embraced by the concept of 'standing,' looks to the status of the party to redress the injury of which he complains." *Id.* "The second aspect of the inquiry involves the nature and severity of the actual or threatened harm alleged by the applicant." *Id.* Thus, the inquiry into irreparable harm includes an inquiry into the plaintiff's standing to raise the claim for injunctive relief, as well as the requirement to *show* a sufficiently severe injury or threatened injury.

2. The Organizational Plaintiff Cannot Establish Irreparable Injury

The organizational Plaintiff claims irreparable harm based on its expenditure

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[8] In light of the un-appealed dismissal of the count on which Plaintiffs base the request for a preliminary injunction, *see* Section I, *supra*, Plaintiffs essentially seek a stay pending appeal.

[9] Although *Graddick* began as an application to a circuit justice, the Chief Justice referred the application to the full Court. *Graddick*, 453 U.S. at 929.

of resources to counteract Arizona's policies on driver's licenses. Pls.' Br. at 58-62. These "self-inflicted" injuries are insufficient for standing, much less to show irreparable harm under the framework identified in Section IV.A.1, *supra.* Thus, while the injury may be non-compensable, it also is non-cognizable. As such, the organizational Plaintiff provides no independent basis for relief.

Under Article III, plaintiffs cannot establish standing through self-inflicted injuries. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976); *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989). Further, the standing doctrine includes the prudential requirement that the "plaintiff's complaint [must] fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (interior quotations omitted). Plaintiffs cannot meet that test here.

Relying on *Havens Realty* and its progeny, Plaintiffs argue that the organizational Plaintiff has suffered irreparable harm in the form of "diversion of resources." Pls.' Br. at 58. Plaintiffs' analysis vastly overstates the standing found in *Havens Realty*, which concerned an organizational plaintiff's statutory standing to sue under §812 of the Fair Housing Act. *See Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165 n.14 (11th Cir. 2008). That statute created a right – applicable to individuals *and associations* – to truthful, non-

discriminatory information about housing:

> [§804(d)] states that it is unlawful for an individual or firm covered by the Act "[t]o represent to *any person* because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," a prohibition made enforceable through the creation of an explicit cause of action in [§812(a)] of the Act. Congress has thus conferred on all "persons" a legal right to truthful information about available housing.

Havens Realty, 455 U.S. at 373 (emphasis in original, citations omitted). Moreover, because the *Havens Realty* statute extended "standing under § 812 … to the full limits of Art. III," "courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section," *Havens Realty*, 455 U.S. at 372, thereby collapsing the statutory-standing inquiry into the question of whether the alleged injuries met the Article III minimum of injury in fact. *Id.* The organizational Plaintiff here lacks several critical elements of *Havens Realty.*

First, the *Havens Realty* organization had a statutory right (backed by a statutory cause of action) to truthful information that the defendants denied to it. Because Congress can create rights, the denial of those rights can confer standing: "Congress may create a statutory right … the alleged deprivation of [those rights] can confer standing." *Warth*, 422 U.S. at 514. Here, the organizational Plaintiff has no claim whatsoever to any rights related to driver's licenses under INA, the Supremacy Clause, or the Equal Protection Clause.

Second, and related to the first issue, the injury that the organizational Plaintiff claims must align with the other components of its standing, *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996), notably here the allegedly cognizable right. In *Havens Realty*, the statutorily protected right to truthful housing information aligned with the alleged injury (costs to counteract false information, in violation of the statute). By contrast, nothing in INA, the Supremacy Clause, or the Equal Protection Clause even *remotely* relates to private organizations' spending.

Third, and perhaps most critically, the *Havens Realty* statute statutorily eliminated prudential standing. *Havens Realty*, 455 U.S. at 372. Here, the organizational Plaintiff has no claim whatsoever that INA, the Supremacy Clause, or the Equal Protection Clause eliminates prudential standing, and it is fanciful to suggest that any of those authorities has private spending in its zone of interests.

At bottom, the organizational Plaintiff's diverted resources are simply self-inflicted injuries, which cannot manufacture a case or controversy. *See Pennsylvania* and *Petro-Chem*, *supra*. If mere spending could manufacture standing, any private advocacy or welfare organization could establish standing against any government action, which clearly is not the law. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (organizations lack standing to defend "abstract social interests"). For *Havens Realty* to apply, Plaintiffs need – and do not have – a

statute where Congress collapses prudential limits out of the standing inquiry.

3. The Denial of Equal Treatment Does Not Constitute a *Per Se* Irreparable Harm

Plaintiffs claim that an Equal-Protection injury itself constitutes a *per se* irreparable harm, Pls.' Opening Br. at 42-45, which Arizona effectively rebuts by identifying the cited authorities as progeny of *Elrod v. Burns*, 427 U.S. 347 (1976). *Elrod* held that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373; *see* Arizona Br. at 24-26.[10] Indeed, the general rule is that preliminary injunctions are "an extraordinary remedy never awarded as a matter of right." *Winter*, 555 U.S. at 24 (citation omitted). Unlike the First Amendment context in *Elrod*, "it cannot be said that violations of plaintiffs' rights to due process and equal protection *automatically* result in irreparable harm." *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 484-85 (1st Cir. 2009) (emphasis in original); *cf. Sullivan v. Pittsburgh*, 811 F.2d 171, 185 (3d Cir. 1987) (finding irreparable injury because "evidence demonstrated that [the unequal treatment] threatened [plaintiffs] with

[10] Plaintiffs cite *Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012), as extending *Elrod* beyond the First Amendment, Pls.' Br. at 42, but that case involved what this Court held to constitute unlawful detention, *Ortega Melendres*, 695 F.3d at 1002, which is irreparable harm. *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). By comparison, the withholding of a driver's license is trivial. Plaintiffs cannot unmoor *Ortega Melendres* from its context to convert any constitutional violation into an automatically irreparable harm.

imminent physical and psychological harm"). Instead, irreparable harm must be *demonstrated*, not merely assumed. *See* Section IV.A.1, *supra*.

4. Plaintiffs Do Not Suffer an Equal-Protection Injury, Much Less an Irreparable Equal-Protection Injury

At least for purposes of establishing irreparable injury, Plaintiffs claim that they have suffered a denial of Equal-Protection rights. *See* Pls.' Opening Br. at 39-45. Unlike with the standing inquiry, however, Plaintiffs must *demonstrate* that they have been irreparably harmed. *See* Section IV.A.1, *supra*. Mere allegations are insufficient. *Id.* Here, DACA's unlawfulness distinguishes lawful EAD holders from DACA EAD holders like Plaintiffs, *see* Section III.A.1, *supra*, which puts Plaintiffs in a different group than the "test group" against whom Plaintiffs compare themselves. That alone denies Plaintiffs the ability to claim unequal treatment: "The Equal Protection Clause directs that all persons similarly circumstanced shall be treated alike," but "does not require things which are different … to be treated in law as though they were the same." *Plyler*, 457 U.S. at 216 (interior quotations omitted). Without unequal treatment, Plaintiffs' cannot possibly succeed here.

By way of background, "[t]he first step in equal protection analysis is to identify the state's classification of groups." *Country Classic Dairies, Inc. v. State of Mont., Dept. of Commerce Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). Put another way, "[i]n order to subject a law to any form of review under

the equal protection guarantee, one must be able to demonstrate that the law classifies persons in some manner." *Christy v. Hodel*, 857 F.2d 1324, 1331 (9th Cir. 1988) (*quoting* 2 R. Rotunda, J. Nowak & J. Young, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §18.4, at 343-44 (1986)). The "groups" identified in the first step "must be comprised of similarly situated persons so that the factor motivating the alleged discrimination can be identified." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005). Plaintiffs cannot state "[a]n equal protection claim … by conflating all persons not injured into a preferred class receiving better treatment than the plaintiff." *Id.* (interior quotations omitted). Plaintiffs cannot meet this test.

Arizona's classification is not *arbitrarily* Plaintiffs versus all other EAD holders. Instead, Arizona distinguishes between all EAD holders under an illegal government program (namely, DACA) and all other EAD holders. There is no evidence that Arizona would treat another unlawful deferred-action program any differently than it has treated DACA. Unless they can successfully uphold the DACA program's lawfulness, *but see* Section III.A.1, *supra*, Plaintiffs cannot meet their burden of proving that they were "intentionally treated differently from others similarly situated." *Thornton*, 425 F.3d at 1167; *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002). Because DACA is a legal nullity, *see*

Section III.A.1, *supra*, they cannot make that showing.[11]

B. The Balance of Equities Tips Heavily to Arizona

The third preliminary-injunction criterion is the balance of equities. As explained by Arizona, the balance of equities tips in Arizona's favor. Arizona Br. at 39-42. Significantly, Plaintiffs' weak showing on the merits, *see* Section III, *supra* – assuming *arguendo* that Plaintiffs even have a claim on the merits, *see* Section I, *supra* – weighs against Plaintiffs: "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012). Under the circumstances, particularly for a mandatory injunction, *see* Section II, *supra*, the balance of equities tips heavily toward Arizona.

C. The Public Interest Favors Denying a Preliminary Injunction

The fourth preliminary-injunction criterion is the public interest. In litigation like this, where the parties dispute the lawfulness of government programs, this last criterion collapses into the merits, 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRAC. & PROC. Civ.2d §2948.4; *Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112, 1126-27 (9th Cir. 2008), because there is a "greater public interest in having governmental agencies abide

[11] Even if Plaintiffs could make the required showing, they would not prevail if Arizona could show a rational basis for its actions. *Thornton*, 425 F.3d at 1167; *SeaRiver Mar. Fin. Holdings*, 309 F.3d at 679.

by the federal laws that govern their… operations." *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994). If the Court sides with Arizona, Congress, and the INA on the merits, the public interest will tilt decidedly toward Arizona: "'[I]t is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.'" *Golden Gate Rest. Ass'n*, 512 F.3d at 1127 (*quoting Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943)) (alterations in *Golden Gate Rest. Ass'n*). As Plaintiffs simply refuse to recognize, this case (like the public-interest inquiry) is a two-way street. It encompasses not only Plaintiffs' challenge to Arizona's policies but also Arizona's challenge to Plaintiffs EADs and the federal DACA program under which those EADs arise.

CONCLUSION

This Court should affirm the denial of a preliminary injunction.

Dated: August 20, 2013

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, amicus curiae Eagle Forum Education & Legal Defense Fund states that it is unaware of any pending cases in this Court related to this one.

Dated: August 20, 2013

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, and Circuit Rule 29-2(c)(2), I certify that the foregoing *amicus curiae* brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 6,977 words, including footnotes, but excluding this Brief Form Certificate, the Table of Citations, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. The foregoing brief was created in Microsoft Word 2010, and I have relied on that software's word-count feature to calculate the word count.

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CERTIFICATE OF SERVICE

I hereby certify that, on August 20, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit – as an exhibit to the accompanying motion for leave to file – by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report showed that all participants in the case were registered for CM/ECF use.

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