Jennifer Chang Newell (SBN 233033)
jnewell@aclu.org
Katrina L. Eiland (SBN 275701)
keiland@aclu.org
ACLU FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 343-0770
Facsimile: (415) 395-0950

Michael K. T. Tan*
mtan@aclu.org
David Hausman*
dhausman@aclu.org
ACLU FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
Telephone: (212) 549-2660
Facsimile: (212) 549-2654

Attorneys for Plaintiffs (Additional counsel listed on following page)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

INLAND EMPIRE – IMMIGRANT YOUTH COLLECTIVE, et al., on behalf of themselves and others similarly situated,

Plaintiffs,

v.

KIRSTJEN NIELSEN, Secretary, U.S. Department of Homeland Security, et al.,

Defendants.

Case No. 5:17-cv-2048-PSG-SHK

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Judge: Hon. Philip S. Gutierrez
Courtroom: 6A
Hearing: April 16, 2018
Time: 1:30 p.m.

Ahilan T. Arulanantham (SBN 237841)
aarulanantham@aclusocal.org
Michael Kaufman (SBN 254575)
mkaufman@aclusocal.org
Dae Keun Kwon (SBN 313155)
akwon@aclusocal.org
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West 8th Street
Los Angeles, CA 90017
Telephone: (213) 977-5232
Facsimile: (213) 977-5297

Attorneys for Plaintiffs

*Admitted *pro hac vice*

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INTRODUCTION

Defendants' motion to dismiss repeats arguments that this Court has already rejected and asks the Court to expend its resources on issues that need not be decided. The motion repeats, verbatim, statutory jurisdictional arguments that this Court has already rejected twice in this case. Likewise, Defendants repeat their failed arguments concerning Plaintiffs' Administrative Procedure Act ("APA") claims. Notwithstanding that this Court has issued two preliminary injunctions based on Plaintiffs' likelihood of success on these APA claims, Defendants argue that Plaintiffs have failed even to state a claim. The Court need not consider and reject Defendants' arguments for a third time, and it should summarily deny the motion.

The remaining arguments Defendants raise simply need not be decided, and the Court should therefore deny the remainder of Defendants' motion as well. Defendants ask the Court to hold that Plaintiffs Arreola and Inland Empire-Immigrant Youth Collective (IEIYC) lack standing, yet Defendants do not dispute that Plaintiffs Gil and Moreira, whose DACA grants were terminated and whose work permits were canceled, have standing to sue. Defendants' standing arguments as to Mr. Arreola and IEIYC are not only meritless, they are wholly irrelevant: it is black letter law that "[t]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Academic & Institutional Rights*, Inc., 547 U.S. 47, 53, n.2 (2006). As a result, because Mr. Gil and Mr. Moreira indisputably have standing, the Court need not decide whether additional plaintiffs have standing.

In any event, were the Court to reach the issue, it is clear that Mr. Arreola and IEIYC have standing. Defendants do not dispute that Mr. Arreola had standing at the outset of the litigation—the relevant point in time for determining standing—and his claim is not moot just because Defendants' unlawful actions have been preliminarily enjoined by this Court. And IEIYC clearly has standing on behalf of its members, who are DACA recipients at risk of being subjected to Defendants' illegal practices.

Defendants' repeated arguments that Plaintiffs have failed to state a procedural due process claim must also be rejected. As Plaintiffs have explained, the Supreme Court has held that where the government seeks to revoke an important benefit—even if that benefit is ultimately a discretionary one—it must first provide a meaningful opportunity to be heard. However, the Court need not resolve this constitutional question, since it has granted the preliminary relief the plaintiffs requested on other grounds and potentially may grant permanent relief on those other grounds as well. As the Ninth Circuit has emphasized, "We do not decide federal constitutional questions where a dispositive nonconstitutional ground is available." *Arizona DREAM Act Coalition v. Brewer*, 855 F.3d 962, 970-71 (9th Cir. 2017) (citation and quotation marks omitted), *cert denied*, --- S.Ct. ----, 2018 WL 1369140 (March 19, 2018). *See also id.* at 963 ("Applying the doctrine of constitutional avoidance, . . . we need not and should not come to rest on the [constitutional] issue, . . . so long as there is a viable alternate, nonconstitutional ground to reach the same result.") (citation omitted).

Accordingly, the Court should deny the motion.

LEGAL STANDARD

"For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (citation and quotation marks omitted). Moreover, even "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the Court] presum[es] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

On a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), "[a]ll factual allegations in the complaint are accepted as true, and the pleadings construed in the light most favorable to the nonmoving party." *Doe I v.*

Nestle USA, Inc., 766 F.3d 1013, 1018 (9th Cir. 2014) (citation and quotation marks omitted).[1]

ARGUMENT

I. MR. ARREOLA AND IEIYC HAVE STANDING.

Because Defendants do not dispute that Plaintiffs Gil and Moreira have standing to sue, there is no need for the Court to consider Defendants' standing arguments as to the remaining plaintiffs. Where "one plaintiff ha[s] standing to bring the suit, the court need not consider the standing of the other plaintiffs." *Laub v. U.S. Dept. of Int.*, 342 F.3d 1080, 1086 (9th Cir. 2003). Defendants' standing arguments can be summarily rejected on this basis alone, without prejudice to their ability to renew these arguments should they ever become relevant. Should the Court reach the question, however, as shown below, it is clear that Mr. Arreola and IEIYC have standing to sue.

A. Mr. Arreola Had Standing at the Commencement of the Litigation and His Claims Are Not Moot.

The Supreme Court has repeatedly instructed that standing is the "requisite personal interest that must exist *at the commencement of the litigation*." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation and quotation marks omitted and emphasis added). *See also, e.g., White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) ("Standing is examined at 'the commencement of the litigation.'") (quoting *Friends of the Earth*, 528 U.S. at 189). Mr. Arreola had standing at the commencement of this litigation because the

[1] Defendants' motion, in arguing that Plaintiffs' complaint should be dismissed for failure to state a claim, improperly attempts to rely on evidence that Defendants have submitted into the record. *See, e.g.*, Mot. at 3, 22-23 (citing exhibits). However, it is well established that a motion to dismiss for failure to state a claim must be decided on the basis of the allegations in the complaint. *See, e.g., Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) ("[A] district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.") (citation and quotation marks omitted).

government terminated his DACA and Employment Authorization Document, causing him to lose his job and harming his ability to provide for his family. *See* Compl., Dkt. 1, at ¶¶ 76-83; Am. Compl., Dkt. 32, at ¶¶ 78-85. Defendants apparently do not dispute that Mr. Arreola had standing at the outset, and that ends the inquiry.

Attempting to avoid this simple point, Defendants argue that Plaintiffs, by amending Mr. Arreola's complaint to add allegations concerning subsequent events and additional plaintiffs, somehow defeated Mr. Arreola's original standing in the case. But the fact that Mr. Arreola filed an amended complaint, which contains additional procedural history concerning the preliminary injunction and the government's subsequent actions, does not change his undisputed injury at the outset of the litigation. The fact that a plaintiff who had standing at the commencement of the case has amended his complaint to include additional allegations does not somehow negate his standing—which, as discussed, is determined at the *outset*. *See, e.g.*, *McFalls v. Purdue*, No. 16-2116, 2018 WL 785866, at *8 (D. Or. Feb. 8, 2018); *N.W. Envtl. Def. Ctr. v. U.S. Army Corps of Engineers*, No. 3:10-01129, 2013 WL 1294647, at *7 (D. Or. Mar. 27, 2013).

For example, in *McFalls*, the district court considered and rejected precisely the argument raised by Defendants here. 2018 WL 785866, at *8 (explaining that defendants "challenge Plaintiffs' standing, based on the facts as they exist as of the filing of the Second Amended Complaint"). The district court explained that "Article III standing is evaluated by considering the facts as they existed at the time of the commencement of the action." *Id.* (citing *Friends of the Earth*, 528 U.S. at 180). Accordingly, the court held that notwithstanding the filing of an amended complaint reflecting subsequent events, "Plaintiffs had standing at the time they commenced the action." *Id.* at *9. The court concluded that the defendants' arguments based on subsequent events alleged in the amended complaint were properly analyzed under mootness principles. *Id.* *Accord N.W. Envtl. Def. Ctr.*, 2013 WL 1294647, at *7 (rejecting defendants' argument that standing should be considered based on the facts

at the time of the amended complaint, and explaining the difference between standing and mootness). In *N.W. Envtl. Def. Ctr.*, the court specifically rejected the notion that the inclusion of additional allegations in an amended complaint could defeat standing that existed at the outset of the case. 2013 WL 1294647, at *7 (explaining that the "claim alleged in the Second Amended Complaint is nearly identical to that in the original Complaint except that it has been supplemented by an additional paragraph . . . . The addition of this paragraph does little, if anything, to change the contours of [the] claim and does not deprive this court of jurisdiction on the basis of standing").[2] *See also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91-92 (2013) (holding that where subsequent events occurred that "call[ed] into question the existence of any continuing case or controversy," those events did not require a reappraisal of the parties' standing but rather raised questions of mootness).[3] The amended complaint in this case, far from withdrawing the allegations explaining Mr. Arreola's original DACA termination, repeated them. *Compare* Compl., Dkt. No. 1, at ¶¶ 43-83 *with* Am. Compl., Dkt. No. 32, at ¶¶ 45-85. It therefore did nothing to alter Mr. Arreola's standing.[4]

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[2] Defendants invoke *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473 (2007), which did not concern standing and is irrelevant here. In any event, as that opinion explained, an amended complaint is only relevant for establishing jurisdiction to the extent that that complaint "withdraw[s] . . . allegations [supporting jurisdiction], unless they are replaced by others that establish jurisdiction." *Id.*

[3] Where there were standing deficiencies in a plaintiff's original complaint, of course, a court may look to an amended complaint to cure those deficiencies. *See, e.g., United Union of Roofers, Waterproofers, and Allied Trades No. 40 v. Ins. Corp. of Am.*, 919 F.2d 1398, 1402 (9th Cir. 1990). Once a plaintiff has demonstrated standing, either in an original or an amended complaint, the burden shifts to the defendant to show that a cause has become moot.

[4] For the same reasons, Mr. Arreola's challenge to his unlawful DACA termination remains ripe. *See, e.g., Malama Makua v. Rumsfeld*, 136 F. Supp. 2d 1155, 1161 (D. Haw. 2001) (noting that ripeness "is measured at the time an action is instituted; ripeness is not a moving target affected by a defendant's action"). Further, with respect to the government's stated intent to terminate Mr. Arreola's DACA once again, "a plaintiff 'does not have to await the consummation of threatened injury to

Since Mr. Arreola had standing at the outset of the litigation, the only conceivable question at this stage is whether his claim is moot. *See, e.g.*, *Jackson v. California Dept. of Mental Health*, 399 F.3d 1069, 1072 (9th Cir. 2005) (explaining that "mootness" involves the question "whether, after the case had been brought, something happened to cause [the plaintiff] to lose his continuing interest in the case"), *amended on other grounds*, 417 F.3d 1029 (9th Cir. 2005). Defendants bear a "heavy burden" in establishing mootness, *Friends of the Earth*, 528 U.S. at 189, and have not remotely shouldered that burden here. The factual developments on which the government relies—the reinstatement of Mr. Arreola's DACA and the issuance of a Notice of Intent to Terminate—are the results of the government's compliance with this Court's preliminary injunction. It is clear that compliance with a preliminary injunction does not moot a case; any other rule would systematically prevent courts from entering final judgments. Thus, the Ninth Circuit has emphasized that "a government agency's moratorium that 'by its terms was not permanent' would not moot 'an otherwise valid claim for injunctive relief.'" *White*, 227 F.3d at 1243 (9th Cir. 2000) (quoting *Friends of the Earth*, 528 U.S. at 190). *See also, e.g.*, *N.L.R.B. v. Raytheon Co.*, 398 U.S. 25, 27 (1970) ("We think it plain from the cases that the employer's compliance with an order of the [National Labor Relations] Board does not render the cause moot."); *Rosemere Neighborhood Ass'n v. EPA*, 581 F.3d 1169, 1173 (9th Cir. 2009) ("[T]he mere cessation of illegal activity in response to pending litigation does not moot a case, unless the party alleging mootness can show that the 'allegedly wrongful behavior could not reasonably be expected to recur.'") (quoting *Friends of the Earth*, 528 U.S. at 189).

The government must therefore show that, absent the preliminary injunction, it would not attempt to terminate Mr. Arreola's DACA unlawfully. First, without the

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obtain preventive relief.'" *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1015 (9th Cir. 2013) (quoting *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979) (internal quotation marks omitted)).

preliminary injunction, the government could again rescind Mr. Arreola's DACA based merely on the earlier issuance of a Notice to Appear, providing no advance notice or opportunity to respond. And second, despite this Court's injunction, and far from showing that its wrongful behavior will not recur, the government has expressed its *formal intent*, with a Notice of Intent to Terminate, to repeat the harm that it originally caused Mr. Arreola, this time by terminating his DACA on the ground that he is an enforcement priority, Am. Compl., Dkt. 32, at ¶¶ 86-89—also an unlawful ground for termination described in the original complaint. Compl., Dkt. 1, at ¶¶ 112, 117.

Mr. Arreola's standing was established at the outset of this case, and his claim is clearly not moot.

B. IEIYC Has Standing on Behalf of Its Members.

IEIYC clearly has standing to sue on behalf of its members, who reasonably feared, at the outset of this litigation, that their DACA would be unlawfully terminated as a result of the policy that this Court has enjoined. To establish standing on behalf of its members, IEIYC must show that "its members would have standing to sue on their own behalf, the interests at issue are germane to [its] mission, and neither the substantive claim nor the remedy sought necessitates the participation of any individual member of [IEIYC]." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 861 (9th Cir. 2005).

IEIYC easily satisfies all three requirements.

IEIYC's members would themselves have standing because they plainly face imminent injury: this case is about a widespread practice of unlawful DACA terminations that the government has explicitly acknowledged and that IEIYC members may be subjected to at any time. That injury is imminent because IEIYC members are DACA recipients and the government has an admitted policy of terminating DACA without notice or process, even where a recipient has not violated the program rules. Indeed, for example, the government has "*admitted* that USCIS

has a practice of automatically terminating DACA based solely on the issuance of a Notice to Appear." Am. Compl., Dkt. 32, at ¶ 156 (emphasis added). And if these unlawful practices were not enough, DHS officials have repeatedly made clear that they do not intend to exempt DACA recipients from their enforcement efforts. For example, Defendant Homan has stated that "[i]f you're in this country illegally, . . . [y]ou should look over your shoulder," *id.* at ¶ 140, and an ICE spokeswoman has confirmed that "ICE does not exempt classes or categories of removable aliens from enforcement," *id.* at ¶ 141. Indeed, the former Acting Secretary of DHS has even said that she is unaware of any guidance stating that DHS will not use DACA recipients' confidential information to remove them. *Id.* at ¶ 142. *See also, e.g.*, *id.* at ¶¶ 138-39 (similar statements from administration officials).

Those fears are all the more reasonable, and the members' injuries all the more imminent, because IEIYC members are *particularly* likely to be subjected to USCIS's policy of unlawful terminations. There are multiple CBP sub-stations in Riverside County (in Murrieta, Temecula, and Indio), and multiple CBP checkpoints and roving patrols, *id.* at ¶ 135, as well as a new border patrol complex under construction in Moreno Valley, *id*. IEIYC members therefore are forced to "live, work, attend school, and carry out IEIYC work" in an area with pervasive CBP presence. *Id.* That presence poses a direct threat to IEIYC members, since "[a] September 6, 2017 CBP memorandum directs that, after encountering a DACA recipient, immigration agents must run various systems checks to determine whether removal proceedings are appropriate," *id.* at ¶ 144 (citation and quotation marks omitted). The risk of being placed in removal proceedings is particularly high for IEIYC members who have had or will have contact with local law enforcement, *id.* at ¶ 136, since CBP officials may place DACA recipients whom they encounter in removal proceedings—even on the basis of an arrest, *id.* at ¶ 144. And that risk is compounded by USCIS's practice of automatically terminating DACA on the basis of the issuance of a Notice to Appear in removal proceedings. *Id.* at ¶ 159.

This evidence of a systematic practice is more than enough to support standing. For example, in *Valle del Sol Inc*., 732 F.3d 1006, 1018 (9th Cir. 2013), the Ninth Circuit held—at the more demanding summary judgment stage—that two organizations faced imminent injury from an Arizona law prohibiting the transportation of undocumented immigrants in furtherance of their illegal presence. The organizations alleged that they feared their staff would be prosecuted because they provide transportation to undocumented immigrants. *Id.* The court held that the organizations had standing, and IEIYC's members have standing for the same reason: they reasonably fear that the government, absent an injunction, will continue its established practice by unlawfully terminating their DACA. Similarly, in *Hawai'i v. Trump*, 859 F.3d 741 (9th Cir. 2017), *vacated*, 138 S. Ct. 377 (2017), the Ninth Circuit held that family members of visa applicants "understandably and reasonably fear[ed]" that the President's ban would prevent their reunification with family members, *id.* at 762, even though that ban allowed them to apply for waivers.

Indeed, courts have held that similarly situated plaintiffs had standing to challenge policies even where the risk of enforcement was far lower than the risk here. For example, in *Georgia Latino Alliance for Human Rights* (*GLAHR*) *v. Gov. of Georgia*, 691 F.3d 1250 (11th Cir. 2012), the plaintiffs challenged (among other things) a provision of state law that allowed officers to detain individuals for immigration purposes where the officer had probable cause to believe the individual had committed a crime. The court held that an individual plaintiff with deferred action status faced an imminent injury because she lacked required immigration documentation—even though she never suggested that she would commit a crime or that an officer would have probable cause to arrest her on that basis. *Id.* at 1258-60. The injuries facing IEIYC members are far more imminent: the government asserts that it may terminate their DACA for any reason or no reason, and at any time, without notice or an opportunity to respond. Like the plaintiff in *GLAHR*, who feared being stopped and detained by state officers, *id.*; the plaintiffs in *Valle del Sol*, who

feared their staff would be arrested and prosecuted for transporting undocumented immigrants, 732 F.3d at 1014-15; and the family members of visa applicants in *Hawai'i*, 859 F.3d at 762, who feared that they would not be provided waivers from the travel ban and thereby be separated from their family; IEIYC members fear that their DACA will be terminated pursuant to the government's conceded practices, and therefore have standing.

IEIYC also meets the second requirement for standing on behalf of its members: Defendants do not even dispute (nor could they) that the claims in this case are germane to IEIYC's mission.

Finally, IEIYC meets the third requirement: its members would not be required to participate in this challenge. Defendants suggest that IEIYC's members would need to participate because determining whether an individual's DACA has been unlawfully terminated requires a "very fact-specific inquiry." Mot. 6. But this Court has *already* found that "this is not a case where rigorous, individualized inquiries are necessary." Class PI Order, Dkt. No. 61, at 20. The fact that determinations of class membership might be necessary is not an obstacle to membership standing. Indeed, in the very case on which Defendants rely, the Supreme Court held that a union had standing on behalf of its members to challenge a guideline interpretation that limited their access to benefits, even "though the unique facts of each [union] member's claim will have to be considered by the proper state authorities before any member will be able to receive the benefits allegedly due him." *Intl. Union, United Auto., Aerospace and Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 288 (1986).

Finally, Defendants assert that IEIYC members lack standing because the harm they fear "would only occur if [they] first engage[] in unlawful behavior." Mot. 7. That assumes away the central allegations in this case: that the government has a policy of unlawfully terminating DACA for individuals who *lack* disqualifying criminal convictions. *See, e.g.*, Am. Compl., Dkt. 32, at ¶¶ 78-85 (describing the termination of Mr. Arreola's DACA despite the government's decision never to

charge him with any crime); *id.* at ¶ 150 (describing the DACA termination of Jessica Colotl, whose only conviction was for driving without a license—a conviction she had disclosed in each of her successful DACA applications). The Ninth Circuit explained, in the case on which Defendants rely for this proposition, that "there is no tenable argument that plaintiff should avoid driving near the Mexican border in order to avoid another stop by the Border Police." *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1041 (9th Cir. 1999). Here, too, there is no tenable argument that IEIYC members should cease their daily routines to avoid the checkpoints that subject them to a risk of unlawful DACA termination.

II. THE IMMIGRATION AND NATIONALITY ACT AND ADMINISTRATIVE PROCEDURE ACT DO NOT DEPRIVE THE COURT OF JURISDICTION.

This Court has twice correctly determined that it has jurisdiction under the INA and the APA to enjoin the unlawful termination of individuals' DACA and work authorization. *See* Arreola PI Order, Dkt. 31, at 4-8; Class PI Order, Dkt. 61, at 22-26; *see also* Arreola PI Reply, Dkt. 25, at 2-11.[5] The same reasoning applies on this motion to dismiss, in which Defendants' argument is copied nearly verbatim from their opposition to the Plaintiffs' motion for a classwide preliminary injunction. *Compare* Class PI Opp., Dkt. 54, at 6-13, *with* Mot. at 8-15. The Court need not once again explain why these identical arguments are incorrect.

First, Defendants again suggest that review of USCIS's failure to provide notice and process in terminating DACA is precluded by 8 U.S.C. § 1252(g). Yet that provision insulates from review only a "'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (quoting 8 U.S.C. § 1252(g)). Defendants again assert that "no reasonable argument can be made that the

[5] Plaintiffs incorporate their previous jurisdictional arguments, *see* Arreola PI Reply, Dkt. 25, at 2-11, by reference here.

terminations did not arise out of [the decision to initiate removal proceedings]." Mot. at 4. But as this Court twice explained, and multiple courts have agreed, class members are "challeng[ing] neither the issuance of NTAs nor the [government's] decision to commence removal proceedings," but instead "USCIS's separate and independent decision to revoke [their] DACA *on the basis of an NTA*, which is independent of the limited category of decisions covered by § 1252(g)." Class PI Order, Dkt. 61, at 24; *see also* Arreola PI Order, Dkt. 31, at 6; *accord* Arreola PI Reply at 2-6; *Ramirez Medina v. DHS*, No. 17-cv-0218, 2017 WL 5176720, at *6-7 (W.D. Wash. Nov. 8, 2017); *Gonzalez Torres v. DHS*, No. 17-cv-1840, 2017 WL 4340385, at *4 (S.D. Cal. Sept. 29, 2017); *Colotl v. Kelly*, 261 F. Supp. 3d 1328, 1338-40 (N.D. Ga. 2017).

The Court was also correct to hold that in any event, § 1252(g) does not bar review of legal questions related to discretionary decisions, and that Plaintiffs' claims are therefore reviewable on that basis. Class PI Order, Dkt. 61, at 24-25; Arreola PI Order, Dkt. 31, at 6. Defendants do not contest that such legal questions are reviewable, but instead mischaracterize Plaintiffs' claims as seeking to require the agency to exercise its discretion not to terminate DACA. Mot. at 15 n.9. But as this Court found and Plaintiffs have explained, Plaintiffs seek review not of USCIS's ultimate exercise of discretion to grant or deny DACA, but rather of the agency's compliance with its own rules, the APA, and due process. *Compare id. with* Class PI Order, Dkt. 61, at 25; Arreola PI Order, Dkt. 31, at 6; *accord* Arreola PI Reply, Dkt. 25, at 1.

Second, Defendants once again repeat their suggestion that Plaintiffs' claims are precluded by 8 U.S.C. §§ 1252(b)(9) and 1252(a)(5), which require that challenges to removal orders be raised through a petition for review of a final removal order in the courts of appeal. Yet Defendants fail even to acknowledge this Court's observation that "[a]n immigration judge in a removal proceeding does *not* have the power to grant or deny deferred action, or to review or reverse an agency's decision to

revoke it." Class PI Order, Dkt. 61, at 26; Arreola PI Order, Dkt. 31, at 7. That fact alone is decisive because, in the government's own words, "*if* the issue is one that can be raised in removal proceedings, and ultimately in a petition for review, then the statute precludes district court review." Mot. at 12 (emphasis added); *accord* Arreola PI Reply, Dkt. 25, at 7. Because Plaintiffs are unable to challenge the termination of their DACA in removal proceedings, §§ 1252(b)(9) and 1252(a)(5) do not preclude them from raising their challenge in district court. *Accord* Arreola PI Reply, Dkt. 25, at 6-8; *Ramirez Medina*, 2017 WL 5176720, at *8; *Gonzalez Torres*, 2017 WL 4340385, at *5; *Colotl*, 261 F. Supp. 3d at 1339-40.

Finally, Defendants argue once again that USCIS need not provide notice or process in terminating DACA because the decision is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *see also* Mot. 13-15. But again, Defendants simply ignore this Court's prior decision and the controlling Ninth Circuit cases, which rely on the established proposition that review is available where "'discretion has been legally circumscribed by various memoranda.'" Class PI Order, Dkt. 61, at 23; Arreola PI Order, Dkt. 31, at 4 (quoting *Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004)); *accord* Arreola PI Reply, Dkt. 25, at 9-11; *Ramirez Medina*, 2017 WL 5176720, at *8; *Colotl*, 261 F. Supp. 3d at 1340-41. As this Court correctly held, "[h]ere, the decision to revoke DACA is governed by both the Napolitano Memo and the DACA SOPs." Class PI Order, Dkt. 61, at 23; Arreola PI Order, Dkt. 31, at 4. Review is therefore available under those authorities, the APA, and the Constitution.

III. PLAINTIFFS HAVE STATED A CLAIM UNDER THE APA.

Defendants repeat, verbatim, their arguments that USCIS may automatically terminate DACA on the basis of an NTA charging unlawful presence. *Compare* Mot. 19-23 *with* Class PI Opp., Dkt. 54, at 18-22. This Court has already rejected precisely the same arguments twice. *See* Class PI Order, Dkt. 61, at 26-31; Arreola PI Order,

Dkt. 31, at 8-13.[6] It should do so again here for the same reasons.

IV. PLAINTIFFS HAVE STATED A PROCEDURAL DUE PROCESS CLAIM.

As explained above, the Court need not reach Plaintiffs' due process claim because it may grant permanent relief—and has already granted preliminary relief—on the basis of Plaintiffs' APA claims. If the court does reach those claims, however, it should reject Defendants' arguments, which fail to address Plaintiffs' central contentions. That procedural due process argument is based on a controlling line of cases holding that, even absent a claim of entitlement to an important benefit, once it is *conferred*, recipients have a protected property interest that requires a fair process before the government may take that benefit away. *See* Class PI Mot., Dkt. 40, at 17 (citing, *inter alia*, *Bell v. Burson*, 402 U.S. 535, 539 (1971)); *see also* Class PI Reply, Dkt. 58, at 9-11; Arreola PI Mot., Dkt. 16-2, at 18-21; Arreola PI Reply, Dkt. 25, at 19-21.[7] Thus, even though DACA is ultimately discretionary, *once granted*, the government cannot take it away without due process.

The government makes no attempt to refute this principle. Instead, it cites cases holding that, as a general matter, discretionary benefits do not give rise to a protected property interest. *See* Mot. 15-18 (citing cases). But the Plaintiffs never make that contention, and none of those cases involve the *revocation* of a discretionary benefit that has *already* been conferred.

The government further argues that the DACA guidance does not give rise to a protected property interest, *see* Mot. 16-18, but again this argument is a straw man. The Plaintiffs do not argue that the DACA program itself establishes a protected interest. Instead, they argue only that, having previously granted them DACA, the

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[6] Plaintiffs incorporate by reference their previous arguments with respect to the APA claims. *See* Class PI Mot., Dkt. 40, at 8-16; Class PI Reply, Dkt. 58, at 4-9.

[7] Plaintiffs incorporate the procedural due process arguments made in prior filings by reference here.

government may not strip them of it without a fair procedure. Class PI Mot., Dkt. 40, at 16-19. Defendants' remaining arguments likewise miss the mark. The Plaintiffs do not premise their claim on a substantive "right to work in the United States," nor have they alleged a "right to DACA." Mot. at 16-17.[8]

Finally, Defendants do not even attempt to suggest that their actions satisfy due process. Indeed, they could not since—as they concede, *see* Class PI Opp., Dkt. 54, at 2-3—their policy allows them to strip Plaintiffs of DACA without any process whatsoever. This is especially true given that USCIS *already* provides a procedure whereby DACA recipients are afforded a reasoned explanation for its actions and an opportunity to present arguments and evidence. *See* Class PI Mot., Dkt. 40, at 19. In sum, the termination of Plaintiffs' DACA and EADs in the absence of a fair process violates their procedural due process rights.

CONCLUSION

For these reasons, the Court should summarily deny the motion to dismiss.

Dated: March 26, 2018

Respectfully submitted,

/s/ David Hausman
David Hausman
Jennifer Chang Newell

[8] Defendants also half-heartedly attempt to suggest, again and incorrectly, that a federal regulation provides for automatic termination of a DACA EAD when an NTA is filed with the immigration court. Mot. 17 (citing 8 C.F.R. § 274a.14(a)(1)(ii)).)). This Court has already rejected that argument twice. Class PI Order, Dkt. 61, at 31 n.13; Arreola PI Order, Dkt. 31, at 11 n.2. Although the cited regulation provides for termination in some cases, it also contains a specific exception stating that "this shall not preclude the authorization of employment pursuant to § 274a.12(c) of this part *where appropriate*." 8 C.F.R. § 274a.14(a)(1)(ii)) (emphasis added). *See Alfaro-Orellana v. Ilchert*, 720 F. Supp. 792, 794 (N.D. Cal. 1989)1989) (recognizing that 8 C.F.R. § 274a.14(a)(1)(ii)) "creates an exception for appropriate work authorizations under § 274a.12(c))."). In any event, the Supreme Court has held that the government "may not constitutionally authorize the deprivation of [a property] interest, once conferred, without appropriate procedural safeguards." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541-42 (1985).).

Katrina L. Eiland
Michael K. T. Tan
ACLU FOUNDATION
IMMIGRANTS' RIGHTS PROJECT

Ahilan T. Arulanantham
Michael Kaufman
Dae Keun Kwon
ACLU FOUNDATION
OF SOUTHERN CALIFORNIA

Attorneys for Plaintiffs