UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	EDCV 17-2048 PSG (SHKx)	Date	April 19, 2018
Title	Inland Empire – Immigrant Youth Collective et al. v. Kirstjen Nielsen et al.		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): Order DENYING Defendants' motion to dismiss

Before the Court is a motion to dismiss filed by Defendants Kirstjen Nielsen, James McCament, Mark J. Hazuda, Susan M. Curda, Thomas D. Homan, David Marin, and Kevin K. McAleenan ("Defendants"). *See* Dkt. # 59 ("*Mot.*"). Plaintiffs Inland Empire – Immigrant Youth Collective, Jesús Alonso Arreola Robles, José Eduardo Gil Robles, and Ronan Carlos De Souza Moreira ("Plaintiffs") oppose the motion, *see* Dkt. # 73 ("*Opp.*"), and Defendants replied, *see* Dkt. # 75 ("*Reply*"). A hearing in this matter was held on April 16, 2018. Having considered the moving papers and oral arguments, the Court **DENIES** Defendants' motion.

I. Background

The Court previously recounted the factual background of the Deferred Action for Childhood Arrivals ("DACA") program in general and this action in particular in its order granting Plaintiff Arreola's motion for a preliminary injunction, *see* Dkt. # 21 ("*Arreola Order*"), at 1–3, and its order certifying a nationwide class and issuing a classwide preliminary injunction, *see* Dkt. # 61 ("*Class Order*"), at 1–7. It will now relate only those facts germane to Defendants' motion, cognizant that "[g]enerally, the scope of review on a motion to dismiss for failure to state a claim is limited to the contents of the complaint." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

A. Factual History

i. The DACA Program

Plaintiffs allege that "federal immigration authorities have targeted numerous DACA recipients and unlawfully revoked the grants of deferred action and work permits they have received even though these individuals have abided by all the program rules and have not engaged in any conduct that would disqualify them from the program." *See First Amended*

Complaint, Dkt. # 32 ("*FAC*"), ¶ 1. Under the DACA program, which was established pursuant to a 2012 memorandum ("the Napolitano Memo") issued by Secretary Janet Napolitano of the Department of Homeland Security ("DHS"), "individuals who were brought to the United States as children and meet certain specific criteria may request deferred action for a renewable period of two years." *Id.* ¶ 26. Under DACA, young immigrants who entered the United States as children and meet specified educational and residency requirements, and who pass extensive criminal background checks, are eligible to receive deferred action. *Id.* ¶¶ 28, 31; *see also Declaration of Dae Keun Kwon*, Dkt. # 16-4 ("*Kwon Decl.*"), ¶ 10, Ex. 9 ("Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children") at 1–2 ("*Napolitano Memo*").[1] A necessary predicate for DACA eligibility is that an individual must lack a lawful immigration status. *FAC* ¶ 29; *see also Kwon Decl.* ¶ 21, Ex. 20 ("National Standard Operating Procedures (SOP): Deferred Action for Childhood Arrivals (DACA)") at 44 ("*DACA SOP*").[2] In addition, DACA recipients cannot have been convicted of a felony, a significant misdemeanor, or three or more other misdemeanors. *See Napolitano Memo* at 1. DHS's DACA Standard Operating Procedures ("the DACA SOP") set forth the procedures that U.S. Citizenship and Immigration Services ("USCIS") must follow in both granting and terminating DACA. *See DACA SOP* at 16; *see also Colotl v. Kelly*, 261 F. Supp. 3d 1328, 1334 (N.D. Ga. 2017) ("The SOP states that it is applicable to all personnel performing adjudicative functions and the procedures to be followed are not discretionary.").

Deferred action under DACA is granted to qualifying individuals for a period of two years, subject to renewal. *FAC* ¶ 26; *Napolitano Memo* at 2–3. In addition to submitting documentation relating to the various DACA criteria, applicants also submit a Form I-765 Application for Employment Authorization; if work authorization is granted, DACA recipients are issued federal employment authorization documents ("EADs") and can apply for Social Security Numbers and other benefits, such as driver's licenses and unemployment insurance. *FAC* ¶¶ 31–32, 35.

Plaintiffs assert that

[1] The Napolitano Memo is incorporated by reference into Plaintiffs' complaint, *see FAC* ¶ 26 n. 6, and can thus be considered on a motion to dismiss. *See In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014) (noting that a court may utilize "attached exhibits, documents incorporated by reference, and matters properly subject to judicial notice"); *Marder*, 450 F.3d at 448 ("A court may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.").

[2] The DACA Standard Operating Procedures are also incorporated by reference into the complaint. *See FAC* ¶ 80.

> [a] decision to grant or deny a DACA application or renewal is separate and independent from any removal proceedings in immigration court. A noncitizen who is in removal proceedings can apply for DACA separately and simultaneously. If that application is granted, the removal proceedings continue unless the immigration judge closes or terminates the proceedings. Further, an immigration judge has no power to grant or deny DACA, or to review or reverse USCIS' decision to deny DACA.

Id. ¶ 34 (citing *Napolitano Memo* at 2).

ii. Plaintiff Arreola

Plaintiff Arreola was born in Mexico and has lived in the United States since the age of one, when his parents entered the United States without being inspected at a border crossing. *FAC* ¶ 45. His parents have since obtained lawful permanent resident statuses, and his three younger sisters, all of whom were born in the United States, are U.S. citizens. *Id.* ¶¶ 47, 49–50. Arreola has received deferred action through DACA three times—in 2012, 2014, and 2016. *Id.* ¶¶ 51–53. This final grant was set to be valid until August 19, 2018. *Id.* ¶ 54. Using the accompanying EAD, Plaintiff worked two jobs, as a dishwasher and then a cook at the Chateau Marmont in West Hollywood and as a driver for Uber and Lyft. *Id.* ¶ 55. He shared the earnings with his family and paid half the rent for their home. *Id.* ¶ 56. Plaintiffs assert that Arreola "has never been charged with or convicted of any crime." *Id.* ¶ 58.

In February 2017, Plaintiffs claim that a friend asked Arreola to drive his cousin from the Los Angeles area to the San Diego area, to pick up the friend's uncle and another cousin and bring them back to Los Angeles—a task for which Arreola would be paid $600. *Id.* ¶¶ 59–60. Arreola accepted, and while he and his customer were near San Diego, the latter was arrested by an agent of the U.S. Customs and Border Patrol ("CBP"). *Id.* ¶¶ 61–63. Although Arreola claims that he informed the CBP agent of his DACA status, he was also arrested on suspicion of aiding in the smuggling of undocumented immigrants. *Id.* ¶ 64. CBP detained Arreola and issued him a Notice to Appear ("NTA"), initiating removal proceedings and charging him as removable due to his presence in the United States without admission under the Immigration and Nationality Act ("INA"). *Id.* ¶¶ 66–70. Plaintiffs assert that Arreola was not, however, charged with any crime. *Id.* ¶ 71. On March 2, 2017, Arreola received a bond hearing before an immigration judge and was released from immigration detention the following day. *Id.* ¶¶ 73–77. Shortly thereafter, on March 6, Arreola received a Notice of Action from USCIS notifying him that his DACA and EAD were "terminated automatically as of the date [his NTA] was issued." *Id.* ¶ 78. Plaintiffs claim that Arreola was not provided with prior notice of his DACA termination, a reasoned explanation for the decision, or an opportunity to respond to the

Notice of Action or otherwise contest the decision. *Id.* ¶¶ 79–80. Subsequent efforts by Plaintiff to seek redress from USCIS were unsuccessful. *Id.* ¶¶ 81–82.

iii. Plaintiff Gil

Plaintiff Gil has lived in the United States since 1998 when, at the age of five, he entered the country without inspection at a border crossing. *Id.* ¶ 90. He eventually settled in Minnesota and graduated from high school in the Minneapolis area, and has five younger siblings, all of whom were born in the United States and are U.S. citizens. *Id.* ¶ 91. Gil first applied for DACA in 2015; it was granted in August of that year and was valid until August 2017. *Id.* ¶¶ 95–96. In April 2017, he applied for DACA renewal, which was approved and valid until August 13, 2019. *Id.* ¶ 97. Using the work authorization that accompanies DACA, Gil first worked as a baker and then began employment with a logistics company. *Id.* ¶¶ 98–99. He also obtained a Social Security Number and a driver's license. *Id.* ¶ 100.

Plaintiffs assert that Gil was arrested on September 20, 2017 and charged with the misdemeanor traffic offense of driving on a cancelled license, which is still pending. *Id.* ¶ 101. While in ICE detention, Gil received a Notice to Appear, which charged him with being removable because he was present in the United States without admission. *Id.* ¶ 103. Plaintiffs note that "ICE put Mr. Gil in deportation proceedings even though Mr. Gil had been granted a two-year DACA renewal just two months before, and a minor traffic offense, like driving on a cancelled license, did not disqualify him from DACA." *Id.* After being released from detention on November 28, 2017, Gil learned that he had received another Notice of Action that terminated his DACA and EAD "as of the date [his] NTA was issued." *Id.* ¶¶ 107, 109. Plaintiffs assert that no additional notice or explanation was provided, and that Gil was not provided a chance to respond. *Id.* ¶ 110.

iv. Plaintiff Moreira

Plaintiff Moreira was born in Brazil and entered the United States in 2006, along with his two brothers and mother, on a visitor's visa. *Id.* ¶ 113. His mother is a Legal Permanent Resident and his older brother is a U.S. citizen. *Id.* ¶ 117. Moreira attended public schools in Marietta, Georgia and graduated from high school in 2012. *Id.* ¶ 114. He first applied for DACA in 2013, and applied for and received renewals in 2015 and 2017. *Id.* ¶ 119. In August 2014, after leaving college due to his finances and working several temporary jobs, Moreira began his employment at a flooring company, eventually becoming a manager. *Id.* ¶¶ 121–22. He also received a Social Security Number and a driver's license. *Id.* ¶ 123.

On November 2, 2017, Plaintiffs claim that Moreira was charged with the misdemeanor of possession of an altered identification document. *Id.* ¶¶ 124–25. He subsequently spent a month in ICE detention. *Id.* ¶ 128. During this time, USCIS sent him a Notice of Action terminating his DACA and work permit "automatically as of the date [his] NTA was issued" and stating that an "appeal or motion to reopen/reconsider this notice of action may not be filed." *Id.* ¶ 129. Plaintiffs again assert that Moreira was provided no prior notice, no additional explanation, and no opportunity to respond. *Id.* ¶ 130.

v. Plaintiff Inland Empire – Immigrant Youth Collective

Plaintiff Inland Empire – Immigrant Youth Collective ("IEIYC") is "a grassroots, immigrant youth-led organization located in Ontario, California. IEIYC serves the immigrant community in the Inland Empire region, which encompasses Riverside and San Bernardino Counties." *Id.* ¶ 132. Plaintiffs state that IEIYC's mission is

> to advocate for the needs of the undocumented immigrant community in the Inland Empire, including equal access to higher education for undocumented youth, and to achieve justice for immigrant communities by empowering those most affected by immigration policy. Since 2010, IEIYC has focused its efforts on creating a safe space for undocumented youth to share resources; organizing other youth to educate and mobilize their peers; and advocating for regional, state, and federal policies that benefit immigrant communities, including DACA recipients.

Id. Since 2012, IEIYC has coordinated DACA workshops through which "5,000 individuals [] received immigration consultation and assistance with their DACA applications," and counts "[a]t least 18" DACA recipients among its members. *Id.* ¶¶ 133, 135. Accordingly, Plaintiffs allege that "Defendants' unlawful termination policies and practices are likely to harm IEIYC DACA recipients" because they "live, work, attend school, and carry out IEIYC work throughout the Inland Empire, where there is a significant CBP presence." *Id.* ¶ 135.

B. Procedural History

Plaintiffs IEIYC and Arreola originally filed their class action complaint on October 5, 2017. *See* Dkt. # 1. The following month, on November 20, 2017, the Court granted Arreola's motion for a preliminary injunction, enjoining USCIS's decision to terminate his DACA. *See Arreola Order* at 15–16. Subsequently, Plaintiffs filed a first amended complaint ("FAC") on December 21, 2017, which included Plaintiffs Gil and Moreira.

In their FAC, Plaintiffs assert that "Defendants have engaged in a widespread practice of unlawfully revoking individuals' DACA grants and work permits, apparently based on unsubstantiated suspicions of criminal activity or minor criminal history, even though these individuals have not violated the terms of the program and continue to be eligible for it." *FAC* ¶ 137. They identify "three systemic practices" that constitute this allegedly "unlawful termination" of DACA grants. *Id.* ¶ 157. First, that "Defendants have a practice of revoking DACA grants without providing notice, a reasoned explanation, or an opportunity to be heard prior to revocation, and without providing a process for reinstatement where the revocation is in error," which represents an impermissible "reversal of the agency's position"; second, that "Defendants have engaged in a widespread practice of automatically terminating DACA grants and work permits of individuals who remain eligible for DACA based on the filing of a Notice to Appear by immigration authorities," which is not permitted by controlling regulations and memoranda; and third, that "Defendants have targeted DACA recipients for revocation, even though they have committed no disqualifying conduct." *Id.* ¶¶ 158–60. They argue that "Defendants' failure to provide DACA recipients with notice, a reasoned explanation, and an opportunity to be heard prior to revocation, as well as a process for reinstatement where the revocation is in error, violates the Due Process Clause and the rules governing the DACA program, and is arbitrary and capricious and contrary to law in violation of the" Administrative Procedure Act ("APA"). *Id.* ¶ 164. They also contend that "Defendants' practice of automatically terminating DACA when immigration authorities file a Notice to Appear—including based solely on presence without admission to the United States or overstaying a visa—is arbitrary and capricious and contrary to law in violation of the APA." *Id.* ¶ 165.

Plaintiffs assert two causes of action: violation of the APA, *id.* ¶¶ 180–85, and violation of the due process clause of the Fifth Amendment to the U.S. Constitution, *id.* ¶¶ 186–88.

On February 26, 2018, the Court issued an order in which it certified a nationwide class of DACA recipients "who, after January 19, 2017, have had or will have their DACA grant and employment authorization revoked without notice or an opportunity to respond, even though they have not been convicted of a disqualifying criminal offense." *Class Order* at 6, 21. The Court also issued a preliminary injunction that enjoined Defendants from terminating DACA grants "absent a fair procedure that complies with" the DACA SOP and the Napolitano Memo. *Id.* at 34–37.

Defendants filed this motion to dismiss on February 14, 2018, arguing that Plaintiffs IEIYC and Arreola lack standing; that this Court lacks subject matter jurisdiction pursuant to the APA and INA; and that Plaintiffs have failed to state claims under the APA and the due process clause. *See generally Mot.*

II. Legal Standard

A. Rule 12(b)(1)

Federal courts have limited jurisdiction and therefore only possess power authorized by Article III of the United States Constitution and statutes enacted by Congress pursuant thereto. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Thus, federal courts cannot consider claims for which they lack subject matter jurisdiction. *See Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992).

Federal Rule of Civil Procedure 12(b)(1) provides for a party, by motion, to assert the defense of "lack of subject-matter jurisdiction." Fed. R. Civ. P. 12(b)(1). This defense may be raised at any time, and the Court is obligated to address the issue sua sponte. *See* Fed. R. Civ. P. 12(h)(1) (providing for waiver of certain defenses but excluding lack of subject matter jurisdiction); *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 571 (2004) ("Challenges to subject-matter jurisdiction can of course be raised at any time prior to final judgment."); *Moore v. Maricopa Cty. Sheriff's Office*, 657 F.3d 890, 894 (9th Cir. 2011) ("The Court is obligated to determine *sua sponte* whether it has subject matter jurisdiction."). The plaintiff bears the burden of establishing that subject matter jurisdiction exists. *See United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1157 (9th Cir. 2010). If the Court finds that it lacks subject matter jurisdiction at any time, it must dismiss the action. *See* Fed. R. Civ. P. 12(h)(3).

Furthermore, the question of standing is an "essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Standing is not subject to waiver and therefore must be considered by the court regardless of whether or not it is raised by the parties. *See United States v. Hays*, 515 U.S 737, 742 (1995). For each claim and each form of relief, the burden lies on the plaintiff to establish standing. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Hays*, 515 U.S. at 743 (noting that the burden is on the party seeking exercise of jurisdiction to "clearly . . . allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute"). To establish standing, a party must demonstrate an "invasion of a legally protected interest" that is "concrete and particularized," "actual and imminent," and that is "fairly traceable to the challenged action" and "redressable by a favorable ruling." *Arizona State Leg. v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663 (2015).

B. Rule 12(b)(6)

To survive a motion to dismiss under Rule 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In assessing the adequacy of the complaint, the court must accept all pleaded facts as true and construe them in the light most favorable to the plaintiff. *See Turner v. City & Cty. of S.F.*, 788 F.3d 1206, 1210 (9th Cir. 2015); *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). The court then determines whether the complaint "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. Accordingly, "for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

III. Discussion

A. Standing

Defendants argue that both Plaintiff IEIYC and Plaintiff Arreola lack standing to bring this action. *See Mot.* 6:4–8:15.

The Court first notes that it need not consider these standing arguments at this time. Defendants do not dispute, and the Court sees no reason to question, that Plaintiffs Gil and Moreira have standing. Gil and Moreira experienced revocation of their DACA statuses, allegedly without proper notice and procedure and therefore in violation of the APA and due process clause, which is the basis of Plaintiffs' action. Their injuries are therefore "fairly traceable to the challenged action" and "redressable by a favorable ruling." *Arizona State Leg.*, 135 S. Ct. at 2663. "Because [these] individual plaintiffs have standing, we need not consider whether the [other plaintiffs] ha[ve] standing." *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1086 (9th Cir. 2003); *see also Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 52 n. 2 (2006) ("*FAIR*") ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 912 (9th Cir. 2004) ("As our jurisdiction and our duty to answer the questions raised here would be unaffected by the resolution of Idaho's challenge to Planned Parenthood's standing, we decline to decide the issue."). Because Defendants do not dispute that Plaintiffs Gil and Moreira have standing, and because the Court concludes that they do, the standing requirement is therefore satisfied and whether or not Plaintiffs Arreola and IEIYC have standing need not be resolved at this time.

However, the Court will nevertheless engage the standing issues on the merits. The standing of Plaintiffs IEIYC and Arreola might need to be established at some point prior to entry of final judgment. *See Wasden*, 376 F.3d at 918 n. 6 (citing Fed. R. Civ. P 65(d)) ("[O]n remand, when the district court enters the appropriate injunctive relief against enforcement of the statute, it may need to decide whether Planned Parenthood is a proper plaintiff. Only a proper party to an action can enforce an injunction that results from a final judgment."). In addition, the line of precedent upon which the Supreme Court relied in *FAIR* suggests, albeit elliptically, that the standing of other parties need not be considered *only if* their positions are identical to the plaintiffs who have standing. *See FAIR*, 547 U.S. at 52 n. 2 (citing *Bowsher v. Synar*, 478 U.S. 714, 721 (1986)); *Bowsher*, 478 U.S. at 721 (citing *Secretary of Interior v. California*, 464 U.S. 312, 319 n. 3 (1984)); *California*, 464 U.S. at 319 n. 3 ("Since the State of California clearly does have standing, we need not address the standing of the other respondents, whose position here is *identical* to the State's.") (emphasis added). Given these considerations, the Court concludes that it is prudent to determine whether Plaintiffs IEIYC and Arreola have standing at this time.

i. Plaintiff IEIYC

Defendants contend that IEIYC "lacks standing on its own" as well as "standing on behalf of its members." *Mot.* 6:5–6.

"An organization suing on its own behalf can establish an injury when it suffered both a diversion of its resources and a frustration of its mission." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). Although the Court determines that Defendants' alleged misconduct would frustrate IEIYC's mission of assisting its members with the DACA process, *see FAC* ¶¶ 132–33, at no point does the organization plead that this misconduct led to a diversion of its resources. Absent clear indication that IEIYC has suffered both a frustration of its mission *and* a diversion of its resources, the Court agrees that it has not established standing on its own behalf.

Instead, Plaintiffs argue that "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." *Opp.* 7:13–15. To establish organizational standing on the behalf of its members, IEIYC must demonstrate 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 Eng'rs*, 402 F.3d 846, 861 (9th Cir. 2005) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 169 (2000)). Each of these requirements will be considered in turn.

a. Members' Standing

As to the first requirement—that IEIYC's members would themselves have standing—Plaintiffs argue that the members "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." *Opp.* 7:22–25. In short, Plaintiffs argue that IEIYC's members can assert claims based on speculative, future harm; unlike Arreola, Gil, and Moreira, who have had their DACA grants revoked in alleged violation of the APA and due process clause, there is no indication that any of IEIYC's members have actually experienced similar revocations. Plaintiffs identify two components of this "imminent" harm. The first is Defendants' "admitted . . . practice of automatically terminating DACA based solely on the issuance of a Notice to Appear," *FAC* ¶ 156, as well as the allegedly systematic targeting of undocumented individuals in general and DACA recipients in particular. *See id.* ¶ 140 ("In June 2017, Defendant Homan said, 'If you're in this country illegally, and you committed a crime by entering this country, you should be uncomfortable . . . . You should look over your shoulder.'"); *id.* ¶ 141 ("In August 2017, ICE spokeswoman Sarah Rodriguez confirmed that 'ICE does not exempt classes or categories of removable aliens from potential enforcement. All of those in violation of the immigration laws may be subject to immigration arrest, detention and, if found removable by final order, removal from the United States.'"); *id.* ¶ 142 ("In September 2017, the former Acting Secretary of DHS, Elaine Duke, reportedly stated that she has never seen DHS guidance telling DACA applicants that their information would not be used for immigration enforcement purposes."). The second component is more specific to IEIYC and its members: that they are "*particularly* likely to be subjected to USCIS's policy of unlawful terminations" because of the prevalence of CBP activity in the Inland Empire. *Opp.* 8:12–14 (emphasis in original); *see also FAC* ¶ 135 ("IEIYC DACA recipients live, work, attend school, and carry out IEIYC work throughout the Inland Empire, where there is a significant CBP presence. For example, there are three CBP sub-stations in Riverside County, located in Murrieta, Temecula, and Indio, and a new Border Patrol complex is under construction in the Moreno Valley of Riverside County.").

Plaintiffs suggest that "[t]his evidence of a systematic practice" and the resulting fear it instills in IEIYC members is sufficient to create standing. The Court agrees. Although the Ninth Circuit, following the lead of the Supreme Court, has emphasized that "threatened injury must be *certainly impending* to constitute injury in fact, and . . . [a]llegations of *possible* future injury are not sufficient" to convey standing, *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1235 (9th Cir. 2017) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)) (alterations and emphases in original), it is also "well-established that, although a plaintiff 'must demonstrate a realistic danger of sustaining a direct

injury as a result of a statute's operation or enforcement,' a plaintiff 'does not have to await the consummation of threatened injury to obtain preventive relief.'" *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1015 (9th Cir. 2013) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)); *see also Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) ("[I]t is sufficient for standing purposes that the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest and that there is a credible threat that the challenged provision will be invoked against the plaintiff.") (internal quotation marks omitted). The Ninth Circuit's decision in *Valle del Sol* is instructive. There, a pastor who provided transportation and shelter to members of her congregation, including those who were unauthorized aliens, feared prosecution under an Arizona law that made it unlawful to transport and harbor illegal aliens. *See Valle del Sol*, 732 F.3d at 1013–15. She therefore alleged that she feared prosecution under the Arizona law, and the district court concluded that her "allegations are sufficient to demonstrate a reasonable likelihood that [the law] could be enforced against her." *Id.* at 1015. The Ninth Circuit agreed:

> Santiago has established a credible threat of prosecution under this statute, which she challenges on constitutional grounds. She alleges that she provides, and plans to continue to provide, shelter and transportation to her congregants, most of whom are unauthorized aliens, on a daily basis. . . . Because the injury alleged—a credible threat of prosecution under [the Arizona law]—is clearly traceable to [the Arizona law], and can be redressed through an injunction enjoining enforcement of that provision, Santiago has standing to challenge it.

Id. at 1015–16. Here, similarly, Plaintiffs have alleged that Defendants have a practice of unlawfully terminating DACA grants in violation of the APA and due process clause. Their alleged injury—a credible threat of unlawful revocation—is clearly traceable to Defendants' practices that are challenged in this suit, and can be redressed through an injunction enjoining the allegedly unlawful conduct. Therefore, the Court concludes that IEIYC members have sufficiently pleaded a credible fear that establishes standing to challenge Defendants' actions. *See Hawaii v. Trump*, 859 F.3d 741, 762 (9th Cir. 2017), *vacated*, 874 F.3d 1112 (9th Cir. 2017) (finding that a plaintiff had standing where he "understandably and reasonably fear[ed]" enforcement of travel ban); *Georgia Latino All. for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1258–59 (11th Cir. 2012) (finding standing where plaintiffs faced a "credible threat" of prosecution and detention). The first standing requirement is thus satisfied.[3]

[3] Defendants suggest that *Valle del Sol*, *Hawaii*, and *Georgia Latino Alliance* are all inapposite because "to the extent those decisions address organizational standing, those findings are based on allegations of frustration of their missions, and both opinions cite to evidence offered by the organizations of diversion of their resources in an effort to respond to the alleged harms." *Reply* 9:3–7. It is true that each of these cases *also* featured an organizational plaintiff that itself had

Alternatively, Defendants contend that IEIYC members do not have standing because "a plaintiff may not assert standing based on future harm that would only occur if the plaintiff first engaged in unlawful behavior." *Mot.* 7:1–3. It is true that the automatic revocation of Arreola's, Gil's, and Moreira's DACA grants were preceded by an independent encounter with authorities. *See FAC* ¶¶ 59–77, 101–09, 124–27. It is also true that the Supreme Court has determined that standing does not exist where the risk of future injury hinges on hypothetical contingencies. *See City of L.A. v. Lyons*, 461 U.S. 95, 106 (1983); *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1041–42 (9th Cir. 1999) (characterizing *Lyons* as precluding standing where there is a "string of contingencies necessary to produce an injury"). However, the Court agrees with Plaintiffs that Defendants' argument "assumes away the central allegations in this case." *Opp.* 10:25. Plaintiffs allege that Defendants have a practice of terminating DACA grants as to individuals who *lack* disqualifying criminal convictions, which includes those like Arreola, Gil, and Moreira, who were arrested and charged with criminal acts, as well as those who were not. Plaintiffs do not allege that *only* DACA recipients who are arrested or otherwise interact with law enforcement experience automatic termination, which would make this cause analogous to *Lyons*. Instead, Plaintiffs allege that *any* DACA recipient might experience unlawful revocation, and so this case is comparable to *Hodgers-Durgin*. There, the Ninth Circuit determined that plaintiffs had standing to challenge allegedly unlawful Border Patrol stops because the case was "notably different from *Lyons* in that plaintiffs did nothing illegal to prompt the stops by the Border Patrol." *Hodgers-Durgin*, 199 F.3d at 1041; *see also id.* ("Given this interpretation of *Lyons* by the Supreme Court, it is by no means certain that plaintiffs in this case have failed to assert a cognizable injury under Article III. Unlike in *Lyons*, in this case it is uncontested that both plaintiffs engaged in entirely innocent conduct, and there is no tenable argument that plaintiffs should avoid driving near the Mexican border in order to avoid another stop by the Border Police."). Similarly, Plaintiffs here allege that even DACA recipients who are engaged in entirely innocent conduct may nevertheless be subjected to unlawful revocation. Therefore, the future injury alleged by IEIYC members requires neither engagement in illegal conduct nor a string of contingencies necessary to produce the harm.

b. Germaneness to Mission

As to the second requirement for organizational standing—that "the interests at stake are germane to the organization's purpose," *Friends of the Earth*, 528 U.S. at 181—Defendants do not dispute, and the Court concludes, that the claims in this case are germane to IEIYC's mission

standing because it suffered a diversion of its resources and a frustration of its mission. *See Valle del Sol*, 732 F.3d at 1018–19; *Hawaii*, 859 F.3d at 763–66; *Georgia Latino All.*, 691 F.3d at 1259–60. However, IEIYC is not asserting organizational standing *itself*, but is instead asserting organizational standing on behalf of its members. Therefore, because each of these decisions discussed standing for *individuals* like IEIYC members, they are nonetheless relevant.

of "advocat[ing] for the needs of the undocumented immigrant community in the Inland Empire." *FAC* ¶ 132. This second requirement is therefore satisfied.

c. Participation of Individual Members

Lastly, "neither the claim[s] asserted nor the relief requested [can] require[] the participation of individual members" of IEIYC. *Friends of the Earth*, 528 U.S. at 181.

Defendants suggest that this requirement is not satisfied here because of "the very fact-specific inquiry necessary to determine why [a member] lost his or her DACA, and whether he or she would be entitled to additional process before such termination," which would require the member's participation in the lawsuit. *Mot.* 6:21–24. However, the Court previously addressed these concerns when it certified the nationwide class in this action, concluding that "this is not a case where rigorous, individualized inquiries are necessary." *Class Order* at 20. That some individual determinations might be required to determine whether a given IEIYC member is a member of the certified class does not preclude standing. *See International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 288 (1986) ("[T]hough the unique facts of each UAW 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, the UAW can litigate this case without the participation of those individual claimants and still ensure that the remedy, if granted, will inure to the benefit of those members of the association actually injured.") (internal quotation marks omitted).

Because the Court agrees with Plaintiffs that this action does not rely on the participation of individual IEIYC members, the third requirement is satisfied, and therefore IEIYC has standing to bring this case on behalf of its members.

ii. Plaintiff Arreola

Defendants also contend that "[b]ecause Plaintiff Arreola's DACA and EAD were reinstated on November 22, 2017, pursuant to this Court's Order, and he subsequently filed an amended complaint on December 21, 2017, the grounds he asserted for standing in his original complaint are no longer before this Court, and he has failed to establish any injury in the amended complaint ripe for this Court's adjudication." *Mot.* 7:1–14.

This argument uncovers a curious issue within standing doctrine. On one hand, as Defendants correctly note, standing is a jurisdictional issue, *see Lujan*, 504 U.S. at 559–60, and the Supreme Court has held that "when a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine

jurisdiction." *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473–74 (2007); *see also Civil Rights Educ. & Enf't Ctr. v. Hospitality Props. Tr.*, 867 F.3d 1093, 1102 (9th Cir. 2017) ("[T]he proper focus in determining jurisdiction are the facts existing at the time the complaint *under consideration* was filed.") (emphasis in original). From this standpoint, Defendants contend that Arreola lacks standing. The FAC indicates that "Defendants reinstated [his] DACA grant and employment authorization" pursuant to the Court's preliminary injunction. *FAC* ¶¶ 86–87. Therefore, Defendants conclude, he no longer has an injury "fairly traceable to the challenged action" and "redressable by a favorable ruling," *Arizona State Leg.*, 135 S. Ct. at 2663, because his new DACA grant has not been terminated. Under this analysis, Arreola would no longer have standing to challenge the revocation of his DACA grant based on the facts pleaded in the FAC.

The Court notes an immediate problem with this logic and Defendants' position: if standing needed to be reassessed with the filing of every pleading, then a Court would lose jurisdiction over a case whenever a complaint is filed following the issuance of a preliminary injunction, because presumably then the justiciable controversy would have been (temporarily) redressed. Final injunctive relief would therefore be impossible in cases, like this, where preliminary relief is granted before an amended complaint is filed. It is likely for this reason that, despite *Rockwell*'s dictates, courts have determined that "Article III standing is evaluated by considering the facts as they existed at the time of the commencement of the action," even in a case where defendants "challenge [a plaintiff's] standing, based on the facts as they exist as of the filing of" an amended complaint. *McFalls v. Purdue*, No. 3:16-cv-2116-SI, 2018 WL 785866, at *8 (D. Or. Feb. 8, 2018); *see also Northwest Envtl. Def. Ctr. v. U.S. Army Corps of Eng'rs*, No. 3:10-cv-01129-AC, 2013 WL 1294647, at *7 (D. Or. Mar. 27, 2013) (rejecting defendants' argument that standing should be considered based on facts at the time of an amended complaint and determining that the "inquiry [was] one of mootness, rather than standing"). This position is consistent with the general approach of orienting the standing inquiry at the time an action commenced. *See, e.g.*, *Friends of the Earth*, 528 U.S. at 180 ("[W]e have an obligation to assure ourselves that [plaintiff] had Article III standing at the outset of the litigation."); *Barry v. Lyon*, 834 F.3d 706, 714 (6th Cir. 2016) ("To uphold the constitutional requirement that federal courts hear only active cases or controversies, as required by Article III, section 2 of the federal constitution, a plaintiff must have a personal interest at the commencement of the litigation (standing) that continues throughout the litigation (lack of mootness)."); *Becker v. Federal Election Comm'n*, 230 F.3d 381, 386 n. 3 (1st Cir. 2000) (rejecting the requirement that "a plaintiff . . . retain [standing] throughout the litigation" because it ignores the language in *Lujan* and "conflates questions of standing with questions of mootness: while it is true that a plaintiff must have a personal interest at stake throughout the litigation of a case, such interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter").

Under this usual approach, because Arreola indisputably had standing at the time the action commenced, the appropriate inquiry at this time is mootness, not standing. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1972)) ("A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'"); *Jackson v. California Dep't of Mental Health*, 399 F.3d 1069, 1072 (9th Cir. 2005) (explaining that "mootness" involves "whether, after the case had been brought, something happened to cause [plaintiff] to lose his continuing interest in the case"). Defendants bear a "heavy burden" in establishing mootness, as the Supreme Court has noted that "the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189 (internal quotation marks omitted). Plaintiffs assert, Defendants do not dispute, and the Court agrees that Defendants cannot meet this burden at this time. As Plaintiffs note, "[t]he 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," *Opp.* 6:8–11, and 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 v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) (quoting *Friends of the Earth*, 528 U.S. at 190); *see also Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 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.") (internal quotation marks omitted). Because mootness and not standing is the appropriate inquiry as to Arreola at this stage of litigation, and because Defendants have not demonstrated that their allegedly wrongful conduct will not recur, Arreola retains a continuing interest in this action.

Furthermore, even if the Court were to adopt Defendants' *Rockwell*-inspired approach and conclude that standing must be reestablished with the FAC, then Arreola would nevertheless satisfy Article III for the reasons that IEIYC's members have standing. Like the IEIYC members discussed above, Arreola possesses a credible fear of unlawful conduct; indeed, this concern is illustrated in the FAC, which describes the Notice of Intent to Terminate Arreola received after the Court issued its preliminary injunction and notes that it "misstates the relevant facts of Mr. Arreola's case in numerous respects, and erroneously alleges among other things that Mr. Arreola admitted to smuggling undocumented immigrants." *FAC* ¶¶ 87–89. As discussed above, Arreola "does not have to await the consummation of threatened injury to obtain preventive relief." *Valle del Sol*, 732 F.3d at 1015. He possesses a sufficiently credible

fear as described in the operative pleading, and thus has standing to bring his claims even under the facts as pleaded in the FAC.

In summation, Arreola had standing to bring this action at the time it commenced—an interest that has not been rendered moot in the interim—or, alternatively, he has standing to bring this action under the facts pleaded in the FAC due to his credible fear of unlawful DACA revocation. Either way, Arreola should not be dismissed from this action due to lack of standing.

B. Jurisdiction

i. Section 701(a)(1)

Review under the APA is not permissible if "statutes preclude judicial review." 5 U.S.C. § 701(a)(1). Accordingly, Defendants argue that two sections of the INA limit the Court's ability to hear Plaintiffs' APA claim. *See Mot.* 9:18–13:2.

a. Section 1252(g)

First, Defendants cite § 1252(g), which mandates that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien." 8 U.S.C. § 1252(g). The Supreme Court has explained that § 1252(g) is "directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485 n. 9 (1999). Defendants summarize § 1252(g)'s applicability as follows: "A DACA grant is acknowledgement that DHS is not presently pursuing removal against an individual. Thus, when DHS finds an individual has become an enforcement priority and issues an NTA, DACA will logically terminate and such consequence falls squarely within the province of section 1252(g)." *Mot.* 10:17–21.

However, the Court concludes that Defendants interpret § 1252(g) too broadly, as evidenced by the Supreme Court's *Reno* decision. There, in response to the "unexamined assumption that § 1252(g) covers the universe of deportation claims—that it is a 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review,'" the Supreme Court opined that "what § 1252(g) says is much narrower." *Reno*, 525 U.S. at 482. It concluded that "[t]he provision applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Id.* (emphases in original). Section 1252(g) does *not* preclude review of "many other decisions or actions that may be part of the deportation process." *Id*. Consistent

with this guidance, the Ninth Circuit has narrowly construed § 1252(g), distinguishing between the narrow category of actions that courts cannot review and those adjacent actions that are within their jurisdiction. In *Alcaraz v. Immigration & Naturalization Service*, 384 F.3d 1150 (9th Cir. 2004), for example, the Ninth Circuit held that even a claim closely related to the initiation of removal proceedings is not barred by § 1252(g), so long as it does not challenge the decision to commence proceedings itself. *See id.* at 1160–61. Other Ninth Circuit decisions have similarly "narrowly construed § 1252(g)." *Wong v. United States*, 373 F.3d 952, 964 (9th Cir. 2004); *see also Maharaj v. Ashcroft*, 295 F.3d 963, 965 (9th Cir. 2002) ("[T]he reference to 'execut[ing] removal orders' appearing in that provision should be interpreted narrowly, and not as referring to the underlying merits of the removal decision."); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1120–21 (9th Cir. 2001) (holding that § 1252(g) does not bar judicial review of decisions or actions that occur *during* the formal adjudicatory process, because they are separate from the "decision to adjudicate"); *Catholic Soc. Servs. v. Immigration & Naturalization Serv.*, 232 F.3d 1139, 1150 (9th Cir. 2000) ("[Section 1252(g)] applies only to the three specific discretionary actions mentioned in its text, not to all claims relating in any way to deportation proceedings."); *Sulit v. Schiltgen*, 213 F.3d 449, 452–53 (9th Cir. 2000) (determining that § 1252(g) did not bar the due process claims of aliens alleging that their green cards were improperly seized without a hearing, that the INS failed to provide them with notice requiring them to surrender for deportation, and that their counsel failed to notify them of the issuance of the court's decision).

Defendants reference several cases from this and other circuits in which courts have applied § 1252(g) to various actions stemming from removal proceedings. *See Sissoko v. Rocha*, 509 F.3d 947, 948–50 (9th Cir. 2007) (finding that the district court did not have jurisdiction over a false arrest claim that "arose from defendant's decision to commence expedited removal proceedings"); *Alcaraz*, 384 F.3d at 1160–61 (finding that § 1252(g) barred review of the reopening of removal proceedings); *Botezatu v. Immigration & Naturalization Serv.*, 195 F.3d 311, 313 (7th Cir. 1999) (quoting *Reno*, 525 U.S. at 485) ("[T]he Supreme Court has . . . treat[ed] denial of a stay of deportation as one of 'various decisions . . . leading up to or consequent upon final orders of deportation' which was within the scope of § 1252(g)."). However, each of these cases is distinguishable from Plaintiffs' because each stemmed *directly* from removal proceedings implicated by § 1252(g). Here, by contrast, Plaintiffs challenge neither the issuance of NTAs nor the CBP's decisions to commence removal proceedings, review of which would indeed be barred by § 1252(g). Instead, Plaintiffs challenge the USCIS's separate and independent decision to revoke DACA *on the basis of an NTA*, which is independent of the limited category of decisions covered by § 1252(g). *See Ramirez Medina v. U.S. Dep't of Homeland Sec.*, No. C17-0218RSM, 2017 WL 5176720, at *6 (W.D. Wash. Nov. 8, 2017) ("[T]he Court ultimately finds that none of the statutes relied upon by Defendants applies to the narrower issues presented in this case; specifically, whether Defendants complied

with their own non-discretionary procedures."); *Gonzalez Torres v. U.S. Dep't of Homeland Sec.*, No. 17cv1840 JM(NLS), 2017 WL 4340385, at *4–5 (S.D. Cal. Sept. 29, 2017). Defendants caution that this conclusion "render[s] section 1252(g) a dead letter because any individual could seek to enjoin or otherwise challenge the commencement of removal proceedings through this type of creative pleading." *Mot.* 10:22–11:1; *see also Torres-Aguilar v. Immigration & Naturalization Serv.*, 246 F.3d 1267, 1271 (9th Cir. 2001) ("[A] petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking [a claim] in constitutional garb."). The Court does not agree that Plaintiffs' and the Court's position on this point constitutes a means of inventively maneuvering around § 1252(g). Fundamentally, the practice that Plaintiffs are challenging under the APA—automatic revocation of DACA—is *independent of* the decision to commence or adjudicate removal proceedings. This construction is consistent with both the Ninth Circuit's admonition that § 1252(g) it to be "narrowly construed," *Wong*, 373 F.3d at 964, and the cases cited above that did not bar claims that, although related to removal proceedings, were ultimately ancillary to them.

Furthermore, the Ninth Circuit has held that while § 1252(g) precludes review of the three specified discretionary decisions, it does *not* bar review of legal questions relating to those discretionary decisions. *See United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc) ("The district court may consider a purely legal question that does not challenge the Attorney General's discretionary authority, even if the answer to that legal question—a description of the relevant law—forms the backdrop against which the Attorney General later will exercise discretionary authority."); *Madu v. U.S. Attorney Gen.*, 470 F.3d 1362, 1368 (11th Cir. 2006) ("While this provision bars courts from reviewing certain exercises of discretion by the attorney general, it does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions."). Here, Plaintiffs bring their legal challenges under the APA and the due process clause; specifically, whether automatic revocation of DACA upon the issuance of an NTA violates the APA and the due process clause. This is the sort of purely legal question that, although related to a discretionary decision, is nevertheless permitted.

Because Plaintiffs mount legal challenges to decisions that are not within the limited category of discretionary actions enumerated by the statute, the Court concludes that § 1252(g) does not deprive it of jurisdiction over their claims.

b. Sections 1252(a)(5) and 1252(b)(9)

Next, Defendants contend that "[t]o the extent that Plaintiffs have any viable claims, the REAL ID Act, codified at 8 U.S.C. §§ 1252(a)(5) and 1252(b)(9), bars them from raising those claims in district court, regardless of whether a final order of removal has issued." *Mot.* 11:9–11.

Section 1252(a)(5) requires that "a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter." 8 U.S.C. § 1252(a)(5). Section 1252(b)(9) further provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9). As one court characterized this statutory scheme, it was designed to "put an end to the scattershot and piecemeal nature of the review process that previously had held sway in regard to removal proceedings." *Aguilar v. U.S. Immigration & Customs Enf't*, 510 F.3d 1, 9 (1st Cir. 2007). The Ninth Circuit has characterized § 1252(b)(9) as "a clear statutory prescription against district court review" of certain cases. *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1038 (9th Cir. 2016).

> Defendants' argument proceeds as follows:
>
> > Plaintiffs engaged in criminal conduct, DHS determined their conduct rendered them enforcement priorities, DHS issued each an NTA, the respective NTA caused each Plaintiff's DACA and EAD to terminate, and Plaintiffs filed this challenge. There can be no doubt that DHS's discretionary decision to issue NTAs was the direct cause of Plaintiffs' DACA terminations. Thus, Plaintiffs' challenges necessarily arise from "action taken or proceedings brought to remove an alien," for which district courts lack jurisdiction.

Mot. 12:17–13:2. Once again, they paint with too broad a brush and interpret the statute too expansively, in particular the "arising from" language, which Defendants interpret to seemingly include all claims incidentally related to a removal proceeding.[4] Although the Supreme Court has explained that the purpose of § 1252(b)(9) is "to consolidate 'judicial review' of immigration proceedings into one action in the court of appeals," it "applies only '[w]ith respect to review of an order of removal under subsection (a)(1).'" *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 313 (2001). Section 1252(a)(1), like § 1252(a)(5), refers to "[j]udicial review of a final removal" order. 8 U.S.C. § 1252(a)(1); *see also Singh v. Gonzalez*, 499 F.3d 969, 978 (9th

[4] Defendants would do well to consider the Supreme Court's recent admonishment that "[i]n past cases, when confronted with capacious phrases like '"arising from,"' we have eschewed '"uncritical literalism"' leading to results that '"no sensible person could have intended."'" *Jennings*, 138 S. Ct. at 840 (quoting *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 942–43 (2016)).

Cir. 2007) ("By virtue of their explicit language, both §§ 1252(a)(5) and 1252(b)(9) apply only to those claims seeking judicial review of orders of removal."). Accordingly, § 1252(b)(9)

> has built-in limits. By channeling only those questions "arising from any action taken or proceeding brought to remove an alien," the statute excludes from the [petition for review] process any claim that does not arise from removal proceedings. Accordingly, claims that are independent of or collateral to the removal process do not fall within the scope of § 1252(b)(9).

J.E.F.M., 837 F.3d at 1032.

Plaintiffs do not seek judicial review of orders of removal; indeed, as stated above, their challenges are independent of any removal proceedings, and thus are not inextricably linked with the removal process. *See Gonzalez Torres*, 2017 WL 4340385, at *5 ("Plaintiff brings a procedural challenge to termination of his DACA status, an issue independent from any removal proceedings."). It is for this reason that the Court's citation to the Ninth Circuit's *Singh* decision is particularly apt, despite Defendants' assertion to the contrary. *See Mot.* 12 n. 8. In *Singh*, the plaintiff brought ineffective assistance of counsel claims through a habeas petition, which, like the DACA revocation claims here, were fundamentally independent of removal proceedings; the court determined that the challenge was not tied to removal proceedings and hence § 1252(b)(9) did not apply. *See Singh*, 499 F.3d at 978–79. Defendants suggest that *Singh* is distinguishable from this case, and point instead to *Martinez v. Napolitano*, 704 F.3d 620 (9th Cir. 2012), in which the Ninth Circuit determined that an APA claim that "challenge[d] the procedure and substance of an agency determination that is 'inextricably linked' to the order of removal . . . is prohibited by section 1252(a)(5)." *Id.* at 623. However, although Defendants repeatedly characterize this action as "inextricably linked" to removal proceedings, for the reasons discussed throughout this order, the Court disagrees and concludes that Plaintiffs' claims are independent of removal proceedings for purposes of the jurisdictional statutes.

Furthermore, the Ninth Circuit has held that § 1252(b)(9) does not deprive district courts of jurisdiction where a claim could not have been litigated in removal proceedings and the noncitizen would otherwise "have had no legal avenue to obtain judicial review of [the] claim." *J.E.F.M.*, 837 F.3d at 1032; *see also Mamigonian v. Biggs*, 710 F.3d 936, 945 (9th Cir. 2013) (permitting an APA action where the immigration judge "would be without jurisdiction" to adjudicate the claim and so "review would be unavailable" to plaintiff). Defendants themselves seem to note this limitation in their motion, writing that "*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.* 12:8–10 (emphasis added). The "if" makes all the difference. An 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. *See Gonzalez Torres*, 2017 WL 4340385, at *6 ("[A]n immigration judge has no jurisdiction to reinstate DACA status."); *see also Napolitano Memo* at 2–3 (conveying power to grant DACA to agencies); *Matter of Quintero*, 18 I. & N. Dec. 348, 350 (B.I.A. 1982) ("[N]either the immigration judge nor the Board may grant [deferred action] status or review a decision of the District Director to deny it."). Therefore, Plaintiffs could not have challenged the revocation of their DACA statuses at a removal proceeding, and so under Ninth Circuit precedent, jurisdiction is not barred.

In their reply, Defendants allude to "new authorities that give new shape to [their] arguments for why this Court should grant the motion to dismiss," suggesting that two recent decisions "clarify and reinforce Defendants' arguments that section 1252 bars this Court's jurisdiction over the claims asserted here, and instead channels those claims through the Petition for Review process Congress designated." *Reply* 1:5–7, 1:11–16. The Court does not agree either that these cases provide novel legal analysis or that they support Defendants' position.

The first new case cited by Defendants is *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), in which the Supreme Court "interpret[ed] three provisions of U.S. immigration law that authorize the Government to detain aliens in the course of immigration proceedings." *Id.* at 836. *Jennings* did not reframe, reconsider, or reinterpret § 1252(b)(9) or § 1252(a)(5). It merely reiterated what previous decisions have already made clear:

> [R]espondents are not asking for review of an order of removal; they are not challenging the decision to detain them in the first place or to seek removal; and they are not even challenging any part of the process by which their removability will be determined. Under these circumstances, § 1252(b)(9) does not present a jurisdictional bar.

Id. at 840–41. In reaching this conclusion, the Supreme Court compared § 1252(b)(9) with § 1252(g), noting that both contain similar "arising from" language and thus suggesting a similarly narrow interpretation. *See id.* (citing *Reno*, 525 U.S. at 482–83) ("We did not interpret this language to sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General. Instead, we read the language to refer to just those three specific actions themselves.").

Although Defendants contend that "[t]here can be no serious argument here that Plaintiffs are not challenging a part of the process by which their removability will be determined," *Reply* 2:18–19, that is precisely the case here, and *Jennings* consequently supports Plaintiffs' position. Plaintiffs are not challenging the decision to detain or remove them or any part of the removal process. Instead, they are challenging the separate decision to automatically terminate DACA as

a consequence of issuing an NTA. Therefore, because that is an independent action that does not directly arise from removal proceedings, § 1252(b)(9) precludes this action no more than it did the action in *Jennings*.

Furthermore, the *Jennings* decision emphasizes why § 1252(b)(9) *cannot* be interpreted as broadly as Defendants urge. The plurality opinion reads in part:

> [T]he applicability of § 1252(b)(9) turns on whether the legal questions that we must decide "aris[e] from" the actions taken to remove these aliens.
>
> It may be argued that this is so in the sense that if those actions had never been taken, the aliens would not be in custody at all. But this expansive interpretation of § 1252(b)(9) would lead to staggering results. Suppose, for example, that a detained alien wishes to assert a claim under *Bivens* . . . based on allegedly inhumane conditions of confinement. Or suppose that a detained alien brings a state-law claim for assault against a guard or fellow detainee. Or suppose that an alien is injured when a truck hits the bus transporting aliens to a detention facility, and the alien sues the driver or owner of the truck. The "questions of law and fact" in all those cases could be said to "aris[e] from" actions taken to remove the aliens in the sense that the aliens' injuries would never have occurred if they had not been placed in detention. But cramming judicial review of those questions into the review of final removal orders would be absurd.
>
> Interpreting "arising from" in this extreme way would also make claims of prolonged detention effectively unreviewable. By the time a final order of removal was eventually entered, the allegedly excessive detention would have already taken place. And of course, it is possible that no such order would ever be entered in a particular case, depriving that detainee of any meaningful chance for judicial review.

Id. at 840 (citation omitted). This portion of the Supreme Court's discussion is relevant to this action. The automatic revocation of a DACA grant is, like the hypotheticals articulated above, a consequence of removal that does *not* "aris[e] from" removal, and so it would be similarly "absurd" to deny Plaintiffs the opportunity to vindicate their rights under the APA and due process clause just because the decision to automatically revoke DACA upon the issuance of an NTA is incidentally related to the commencement of removal proceedings. *Jennings* suggests both that DACA revocation does not "aris[e] from" removal proceedings for purposes of

§ 1252(b)(9) and that stripping the Court of jurisdiction over this action would be an unfavorable outcome.[5]

The second "new authorit[y]" that purportedly "clarify[ies] and reinforce[s] Defendants' arguments that section 1252 bars this Court's jurisdiction over" Plaintiffs' claims, *Reply* 1:5, 1:12–15, is *Castellar v. Nielsen*, No. 17-cv-0491-BAS-BGS, 2018 WL 786742 (S.D. Cal. Feb. 8, 2018), a recent district court decision. The Court notes at the outset that a decision from the Southern District is not binding and constitutes at best only persuasive authority. *See, e.g.*, *Rush v. Denco Enters., Inc.*, No. EDCV 11-0030 DOC (DTBx), 2012 WL 3206674, at *3 (C.D. Cal. Aug. 3, 2012) ("[D]istrict courts are not bound by the unpublished decisions of other district courts; even published district court decisions are only persuasive authority."); *Kohler v. Hyatt Corp.*, No. EDCV 07-782-VAP (CWx), 2008 WL 8779743, at *7 (C.D. Cal. July 23, 2008) (noting that a district court is "not bound by the decisions of sister district courts"). This limited effect notwithstanding, the Court concludes that *Castellar* presents no novel arguments or interpretations of § 1252, and instead merely rearticulates the points already discussed in this order. To begin, it reiterates that § 1252(g), consistent with the Supreme Court's decision in *Reno* and subsequent Ninth Circuit decisions, has limited application: "These decisions reinforce the principle that while a federal court cannot exercise jurisdiction over claims arising from the discrete decisions Section 1252(g) identifies, a federal court's construction and consequent application of Section 1252(g)'s jurisdictional bar must be narrow." *Id.* at *7. It then goes on to analyze §§ 1252(a)(5) and 1252(b)(9), the latter of which is broader than § 1252(g)—an "unmistakable zipper clause," *id.* at *11 (quoting *Reno*, 525 U.S. at 483)—but nevertheless includes the "built-in limit[]" that excludes "claims that are independent of or collateral to the removal process." *Castellar*, 2018 WL 786742, at *12 (quoting *J.E.F.M.*, 837 F.3d at 1032). That the *Castellar* court ultimately concluded that its plaintiffs' Fourth and Fifth Amendment claims were *not* "independent of or collateral to removal proceedings" does not alter the Court's conclusion here that Plaintiffs' challenge to automatic DACA revocation *is* independent of removal. *Castellar*, 2018 WL 786742, at *14.

[5] In his concurrence to *Jennings*, Justice Thomas advocates a more expansive reading of § 1252(b)(9) that would generally "prohibit[] courts from reviewing aliens' claims related to their removal." *Jennings*, 138 S. Ct. at 852. However, even this broader interpretation would seemingly *not* preclude claims, like Plaintiffs', that are independent of removal proceedings. *See id.* at 855 ("[M]y conclusion that § 1252(b)(9) covers an alien's challenge to the *fact* of his detention (an action taken in pursuit of the lawful objective of removal) says nothing about whether it also covers claims about inhumane treatment, assaults, or negligently inflicted injuries suffered *during* detention (actions that go beyond the Government's lawful pursuit of its removal objective).") (emphases in original). Here, Plaintiffs are not challenging the *fact* of removal, but instead the decision to automatically revoke DACA on that basis.

Defendants emphasize one aspect of *Castellar* in particular: that it "addressed and rejected as 'selective reading' the assertion that *J.E.F.M.* permits challenges to be raised in the district court '[w]here a plaintiff "would have no legal avenue to obtain judicial review" of his claims.'" *Reply* 3:22–26 (quoting *Castellar*, 2018 WL 786742, at *15 n. 6). However, the Court does not endorse this "selective" interpretation of *J.E.F.M.*; rather, as discussed above, the key inquiry is not whether a plaintiff can obtain judicial review, but rather whether a claim can be reviewed as part of the petition for review process. This is precisely the conclusion drawn by the *Castellar* court in reconciling *J.E.F.M.* with cases like *Singh*: "Both *Nadarajah* and *Singh* underscore that when claims cannot be reviewed in a petition for review of a final order of removal, they are not subject to Sections 1252(a)(5) and 1252(b)(9)." *Castellar*, 2018 WL 786742, at *15 n. 6. That is why the Court's ability to hear Plaintiffs' claims is *not* precluded by §§ 1252(a)(5) and 1252(b)(9). Because an 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, *see Gonzalez Torres*, 2017 WL 4340385, at *6, this case, by *Castellar*'s formulation, is not subject to these sections.

In summation, the two "new" authorities on which Defendants rely in their reply paper do not alter the Court's analysis or its conclusion. Because Plaintiffs here are not challenging removal proceedings, and because their claims could not have been brought in removal proceedings, §§ 1252(a)(5) and 1252(b)(9) do not apply and do not deprive this Court of jurisdiction.

ii. Section 701(a)(2)

Defendants also contend that another provision of the APA, § 701(a)(2), deprives the Court of subject matter jurisdiction. *See Mot.* 13:3–15:14.

Although the APA permits judicial review of agency actions where "there is no other adequate remedy in a court," 5 U.S.C. § 704, it also precludes review of agency decisions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *see also Lincoln v. Vigil*, 508 U.S. 182, 191–92 (1993). Defendants note that the Supreme Court has held that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Similarly, the Supreme Court has also held that "the decision to prosecute is particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607 (1985). Deferred action in the immigration context is "discretionary and reversible." *Arpaio v. Obama*, 797 F.3d 11, 17 (D.C. Cir. 2015). Thus, Defendants conclude that "[i]ndividual DACA terminations, especially where based on issuance of NTAs, fall squarely within that category of agency discretion for which judicial review is improper." *Mot.* 14:22–24.

The Court disagrees. The jurisdictional bar cited by Defendants applies only where there is "no meaningful standard against which to judge the agency's exercise of discretion." *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003) (quoting *Heckler*, 470 U.S. at 830). By contrast, a court can review an agency decision when, like here, there are "statutes, regulations, established agency policies, or judicial decisions that provide a meaningful standard against which to assess" an agency's action. *Mendez-Gutierrez*, 340 F.3d at 868; *see also ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1069 (9th Cir. 2015) (quoting *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003); *Socop-Gonzalez v. Immigration & Naturalization Serv.*, 208 F.3d 838, 844 (9th Cir. 2000)) ("Even where statutory language grants an agency 'unfettered discretion,' its decision may nonetheless be reviewed if regulations or agency practice provide a 'meaningful standard by which this court may review its exercise of discretion.'").

Here, the decision to revoke DACA is governed by both the Napolitano Memo and the DACA SOP, and the Ninth Circuit has repeatedly found that APA jurisdiction exists where "discretion has been legally circumscribed by various memoranda." *Alcaraz*, 384 F.3d at 1161; *see also Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 719 (9th Cir. 2011) (looking to an agency's interim certification standards to "supply the standard against which we can judge the agency's decision-making"); *Mendez-Gutierrez*, 340 F.3d at 868 (noting that the absence of a specific statute or regulation "does not . . . mean that there are no meaningful standards against which to evaluate" an agency's decision where other rules and regulations apply). Other courts that have similarly examined the Napolitano Memo and the DACA SOP have also concluded that they contain the sort of detailed policy directives that provide courts with the standards needed to review DACA revocation. *See Gonzalez Torres*, 2017 WL 4340385, at *5 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Alcaraz*, 384 F.3d at 1162) ("Defendants' failure to follow the termination procedures set forth in the DACA SOP is arbitrary, capricious, and an abuse of discretion."); *Colotl*, 261 F. Supp. 3d at 1340 ("Defendants' argument that § 701(a) of the APA bars this Court from reviewing an agency's non-discretionary review process fails."); *see also Texas v. United States*, 809 F.3d 134, 170 (5th Cir. 2015) (determining that the "grant of lawful presence and accompanying eligibility for benefits is a substantive rule").

As the Court continues to emphasize, Plaintiffs challenge the decision to automatically terminate DACA on the basis of the issuance of an NTA, *not* enforcement decisions. Because DACA eligibility and revocation are governed by existing regulations, the Court has a meaningful standard with which to scrutinize the revocation decision, and so judicial review is not barred by § 701(a)(2). *See Ramirez Medina*, 2017 WL 5176720, at *8 ("Defendants' alleged failure to follow the procedures detailed in the DACA SOP does not implicate agency discretion.

Therefore, the jurisdiction-stripping provisions of . . . § 701(a) are not applicable to prevent this Court from determining whether Defendants complied with their non-discretionary procedures.").

C. APA Claim

Because the Court concludes that it has jurisdiction over Plaintiffs' claims, it will now consider whether they have pleaded viable causes of action under the APA and due process clause.

Under the APA, "agency action must be based on non-arbitrary, 'relevant factors.'" *Judulang v. Holder*, 565 U.S. 42, 55 (2011) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)). The "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Judulang*, 565 U.S. at 53. "When reviewing an agency action, [the Court] must assess, among other matters, 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* (quoting *State Farm*, 463 U.S. at 43).

Defendants argue that automatic DACA termination due to the issuance of an NTA is not impermissibly arbitrary because it is provided for in the DACA SOP and other DHS regulations. *See Mot.* 19:11–21:8. The Court disagrees with this assertion for several reasons. First, based on the Napolitano Memo and the DACA SOP, a noncitizen's deportability due to unauthorized presence in the United States—the basis for the NTAs at issue here—provides no relevant basis for terminating DACA. These guidelines enumerate the relevant considerations for a DACA grant, and not only is unauthorized presence an unmentioned factor, but the program was *specifically designed* for persons without lawful immigration status. *See, e.g.*, *DACA SOC* at 44 (indicating that an individual "may be favorably considered for DACA if" he/she "[e]ntered without inspection" or his/her "lawful immigration status expired"). The program's rules also make clear that even noncitizens who are, have been, or will be placed in removal proceedings are nonetheless eligible for DACA. *See Napolitano Memo* at 2; *DACA SOP* at 71 ("Individuals in removal proceedings may file a DACA request."). The same is true for individuals with final removal orders, and even individuals who have "reenter[ed] the United States illegally after having been removed or after leaving voluntarily under an order of removal." *DACA SOP* at 74–75.

Furthermore, if an NTA is issued against an applicant while her application is pending with USCIS—even if the NTA is based on a public safety concern—DACA can still be conferred on the applicant. *See DACA SOP* at 93. In such cases, USCIS is required to review all relevant circumstances, and may still grant a DACA request despite an NTA "[i]f a DACA

requestor has been placed in proceedings on a ground that does not adversely impact the exercise of prosecutorial discretion." *DACA SOP* at 75; *see also id.* at 74 ("Final removal orders . . . should be reviewed carefully to examine the underlying grounds for removal.").

There are a few, narrow circumstances when DACA grants can be terminated automatically, without notice and an opportunity to be heard. For example, as the Court previously observed in its order granting Arreola's motion for a preliminary injunction, automatic termination based on the issuance of an NTA is appropriate "when an NTA is issued after USCIS determines that a disqualifying offense or public safety concern is deemed to be 'Egregious Public Safety' ["EPS"]." *Arreola Order* at 11 (citing *DACA SOP* at 137). Otherwise, "'unless there are criminal, national security, or public safety concerns,' the DACA termination guidelines prescribe the issuance of a Notice of Intent to Terminate and require that '[t]he individual should be allowed 33 days to file a brief or statement contesting the grounds cited.'" *Arreola Order* at 11 (quoting *DACA SOP* at 137–38) (alteration in original); *see also Gonzalez Torres*, 2017 WL 4340385, at *3 ("[E]xcept in EPS cases, the DACA SOP requires notice and an ability to contest the [Notice of Termination] before DACA status may be terminated."). In addition, DACA can also terminate automatically if a DACA recipient travels outside the United States without first receiving advance parole. *See DACA SOP*, App. I at 2.

However, Defendants point to no provision in the DACA SOP that permits automatic termination as a result of an NTA based solely on unauthorized presence, which is the issue in this action. Instead, they discuss ICE's and CBP's authority to issue NTAs, *see Mot.*19:17–20:12, and note that "there is no provision permitting USCIS to reverse ICE's decision," *id.* 20:8–9, but such assertions are not relevant—the issue is not how or when DHS or its component agencies can issue NTAs, but instead whether USCIS can terminate DACA automatically *solely on that basis*.[6] The Court maintains that it cannot. Although an NTA filed on the basis of an EPS designation *can* result in automatic DACA termination, *see DACA SOP* at 137, "if the disqualifying criminal offense is non-EPS" then "[t]he individual should be allowed 33 days to file a brief or statement contesting the grounds cited in the Notice of Intent to Terminate." *Id.*; *see also Gonzalez Torres*, 2017 WL 4340385, at *6 (noting that NTAs based on an EPS designation and NTAs based on unauthorized presence "are not fungible, or 'flip sides of the same coin'"). Defendants contend that "it takes a particularly strained reading of the

[6] Defendants argue that the Court's conclusion "relies on a starkly oversimplified consideration of the NTA decision process," and provide additional information as to how NTAs are issued. *Mot.* 21:10–23:4. Again, neither Plaintiffs nor the Court suggest that the NTA process itself is arbitrary or capricious, but instead that the decision to automatically terminate DACA solely on the basis of an NTA is inconsistent with the applicable guidelines and regulations.

Napolitano Memo and DACA SOP to find that ICE and CBP cannot issue NTAs that have the effect of terminating DACA." *Mot.* 20:17–19. Despite their insistence, the Court disagrees.[7]

Accordingly, the Court concludes that automatic revocation on the basis of an NTA is not permitted by the applicable regulations. Given that the issuance of an NTA against a DACA applicant, or even the issuance of a final order of removal against a DACA applicant, does not render the individual ineligible for the program, Defendants' practice of automatically terminating DACA on this basis is consequently arbitrary and irrational, and Plaintiffs have therefore stated a viable APA claim.

D. Due Process Claim

Lastly, Defendants argue that Plaintiffs cannot state a viable due process claim because they "necessarily lack a protected constitutional interest in their DACA and in the process to terminate DACA because the ultimate result sought—deferred action—is discretionary, and because the Government never expressed a mutual intention to confer a protected benefit in DACA." *Mot.* 15:18–21.

As Defendants observe, "[t]he procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit': 'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 756 (2005) (quoting *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)). "A person's belief of entitlement to a government benefit, no matter how sincerely or reasonably held, does not create a property right if that belief is not mutually held by the government. The Supreme Court has explained, '[a] constitutional entitlement cannot be created—as if by estoppel—merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past.'" *Gerhart v. Lake Cty., Mont.*, 637 F.3d 1013, 1020–21 (9th Cir. 2011) (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981)) (emphasis and alteration in original). Using these principles as a foundation, Defendants conclude that "Plaintiffs possess no lawful status, thus no protected interest in living or working in the United States," and "[b]ecause DACA is

[7] Defendants suggest that "the Court's . . . interpretation of Defendants' guidance creates an absurd scenario in which ICE would institute new administrative removal proceedings against an individual while that individual seeks additional separate legal process regarding the termination of their DACA." *Mot.* 20:19–22. The Court disagrees that such a result would be absurd, for the reason emphasized at length throughout this order: because the decision to initiate removal proceedings *is separate from and independent of* the decision to revoke DACA.

discretionary, it does not give rise to a protected right to work in the United States." *Mot.* 16:27–17:3.

However, both this analysis and the conclusion Defendants reach mischaracterize the premise of Plaintiffs' procedural due process claim. It is true, as Defendants argue and the cases they cite support, that discretionary benefits generally do not give rise to a protected property interest. However, Plaintiffs instead argue 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." *Opp.* 14:8–11 (emphasis in original). This is consistent with a line of cases involving the conferral of benefits that do not constitute entitlements of substantive rights. *See, e.g.*, *Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Once [driver's] licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without [] procedural due process."); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) ("The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. . . . The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. . . . Its termination calls for some orderly process, however informal."); *Nnebe v. Daus*, 644 F.3d 147, 158 (2d Cir. 2011) (recognizing that "a taxi driver has a protected interest in his license" that requires due process before suspension); *Singh v. Bardini*, No. C-09-3382 EMC, 2010 WL 308807, at *7 (N.D. Cal. Jan. 19, 2010) ("Even if there is no constitutional right to be granted asylum, that does not necessarily mean that, once granted, asylum status can be taken away without any due process protections.") (citation omitted). This requirement of due process is especially pronounced in cases where, as here, the conferred benefit engenders substantial reliance. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 348–49 (1976) ("The essence of due process is the requirement that a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.") (internal quotation marks omitted); *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 986 (9th Cir. 1991) (quoting *Bell*, 402 U.S. at 539) ("A license [permitting flight allocations], which is not the subject of an absolute entitlement but which nevertheless becomes 'essential in pursuit of a livelihood,' is 'not to be taken away without that procedural due process required by the fourteenth amendment.'"); *Jones v. City of Modesto*, 408 F. Supp. 2d 935, 950–51 (E.D. Cal. 2005) ("Courts have long recognized that licenses which enable one to pursue a profession or earn a livelihood are protected property interests for purposes of a Fourteenth Amendment analysis."). In short, the fact that there is "no substantive due process right to stay in the United States," *Munoz v. Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003), does *not* necessarily mean that a DACA recipient is entitled to no process before deferred action is terminated.

Determining the procedure necessary to satisfy procedural due process requirements

involves evaluation of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Consideration of these factors confirms that Plaintiffs have pleaded a plausible due process claim. First, Plaintiffs' FAC demonstrates the significant private interests at stake for DACA recipients, and the deleterious effects of DACA termination. *See, e.g.*, *FAC* ¶¶ 35–39, 83–84, 111, 131. Second, the practice of automatic termination—which, as discussed above, is in contravention of internal guidelines and regulations—creates an unacceptably high risk of erroneous deprivation. As one court reasoned in the analogous context of asylum rescission,

> [T]here is a substantial risk of erroneous deprivation through the procedures utilized by [the agency] in rescinding asylum via a mailed letter. This manner of termination does not account for anything other than post hac notice to the asylee that he or she is no longer entitled to any protection. This method does not account for any errors in transmission, even minor typographical mistakes. Furthermore, there is a great deal of value that is added when the government complies, or comes close to complying, with the dictates of [applicable regulations].

Singh v. Vasquez, No. CV-08-1901-PHX-MHM, 2009 WL 3219266, at *5 (D. Ariz. Sept. 30, 2009). Lastly, Plaintiffs' experiences as described in the FAC demonstrate the value of "an opportunity to contest the [] determination at a meaningful time," *Villa-Anguiano v. Holder*, 727 F.3d 873, 882 (9th Cir. 2013), as their arrests and detentions generated confusion and uncertainty that might have been resolved through the proper process. *See, e.g.*, *FAC* ¶ 76 (noting that the immigration judge in Arreola's case questioned the conclusions of the CBP agents who arrested him); *id.* ¶¶ 110, 130 (noting that Gil and Moreira did not have the opportunities to contest the grounds for DACA termination).[8] Accordingly, the three *Mathews* factors indicate that Plaintiffs

[8] The Court agrees with an argument advanced by Plaintiffs in an earlier motion: "The fact that DHS' rules already provide for [] basic pre-deprivation protections in most circumstances reinforces both that the value of such safeguards is high, and that providing such limited process would not place undue fiscal or administrative burdens on the government." *See* Dkt. # 40-1, at 19.

have plausibly pleaded that a DACA grant is the sort of benefit that, once conferred, entitles a recipient to due process before revocation. *See Vasquez*, 2009 WL 3219266, at *6 ("To conclude, all of the *Mathews* factors weigh in favor of a finding that due process requires more than sending an after the fact letter of rescission when the government terminates a grant of asylum.").[9]

Defendants argue that, because there is no substantive right to remain in the United States or receive deferred action, Plaintiffs' due process claim must necessarily fail. However, because Plaintiffs have sufficiently demonstrated that the grant of DACA constitutes a conferred benefit that requires procedural safeguards before it can be terminated, the Court concludes that the due process claim should not be dismissed on this basis.

V. Conclusion

For the foregoing reasons, the Court **DENIES** Defendants' motion to dismiss.

IT IS SO ORDERED.

[9] Defendants also suggest that Plaintiffs have no property interest in their EADs because "every individual with employment authorization based on 8 C.F.R. § 274a.12(c), including those with deferred action, is subject to automatic termination of their EAD upon institution of removal proceedings in an immigration court." *Mot.* 17:24–26. However, although the regulations do provide for termination of work authorization when an NTA is issued in some cases, *see* 8 C.F.R. § 274a.14(1)(ii), it also contains an exception for work permits granted to, among others, "alien[s] who [have] been granted deferred action." 8 C.F.R. § 274a.12(c)(14); *see also Alfaro-Orellana v. Ilchert*, 720 F. Supp. 792, 794 (N.D. Cal. 1989) (noting that § 274a.14(a)(1)(ii) "is itself ambiguous, because it creates an exception for appropriate work authorizations under § 274a.12(c)").