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15 UNITED STATES DISTRICT COURT
 16 CENTRAL DISTRICT OF CALIFORNIA

18 INLAND EMPIRE –)	Case No. 5:17-cv-2048- PSG-SHK
19 IMMIGRANT YOUTH)	
20 COLLECTIVE and JESUS)	
21 ALONSO ARREOLA ROBLES,)	DEFENDANTS’ NOTICE OF
22 on behalf of himself and others)	MOTION & MEORANDUM OF
23 similarly situated,)	POINTS AND AUTHORITIES IN
24 Plaintiff,)	SUPPORT OF DEFENDANTS’
25 v.)	MOTION TO DISMISS AMENDED
26 KIRSTJEN NIELSEN, Secretary of)	Judge: Hon. Philip S. Gutierrez
27 Homeland Security, <i>et al.</i> ,)	Courtroom: 6A
28 Defendants.)	Hearing: March 26, 2018
)	Time: 1:30pm

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on March 26, 2018 at 1:30 p.m., or as soon thereafter as the parties may be heard, Defendants will bring for hearing a motion to dismiss. The hearing will take place before the Honorable Philip S. Gutierrez in Courtroom 6A, 350 W 1st Street, Suite 4311 Los Angeles, CA, 90012. This motion is based on the memorandum of points and authorities attached hereto, all pleadings, papers and files in this action, and such oral argument as may be presented at the hearing on the motion. This motion is also made following conferences between counsel for the Plaintiffs and Defendants pursuant to L.R. 7-3, which took place via e-mail on December 12, 19, 20, and 21, 2017, on December 29, 2017, and again on January 9 and 12, 2018.

DATED: February 5, 2018

Respectfully Submitted,

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 On December 21, 2017, organizational plaintiff Inland Empire – Immigrant Youth
4 Collective (“Inland Empire” or “IEIYC”) and individual Plaintiffs Jesús Alonso Arreola
5 Robles (“Mr. Arreola”), José Eduardo Gil Robles (“Mr. Gil”), and Ronan Carlos De
6 Souza Moreira (“Mr. Moreira”), filed an amended class action complaint [Dkt. No. 32],
7 following Defendants’ restoration of Plaintiff Arreola’s Deferred Action for Childhood
8 Arrivals (“DACA”) and employment authorization document (“EAD”), per this Court’s
9 November 21, 2017, Order. [Dkt. No. 31].

10 Plaintiffs’ amended complaint alleges Defendants “have targeted numerous DACA
11 recipients and unlawfully revoked the grants of deferred action and work permits they
12 have received even though these individuals have abided by all the program rules and
13 have not engaged in any conduct that would disqualify them from the program.” Dkt. No.
14 32 at ¶ 1. On this basis, Plaintiffs seek the extraordinary relief of forcing DHS to reinstate
15 their DACA and enjoining the Government from terminating DACA in the future for the
16 individual plaintiffs as well as for a nationwide class of those similarly situated.

17 However, Plaintiffs’ allegations fall apart when examined in full context. Each
18 Plaintiff was arrested for engaging in criminal activities, determined to be an enforcement
19 priority, and placed into removal proceedings, which had the unremarkable effect of
20 terminating their DACA. Every step of the process Defendants followed is accounted for
21 in DACA policy and immigration law, and Plaintiffs were forewarned of the risk to their
22 DACA for engaging in criminal activity. Plaintiffs offer no support for their claim that
23 Defendants are “targeting” DACA grantees for wholesale automatic termination.

24 The Court should dismiss Plaintiffs’ amended complaint as a challenge to the
25 Government’s authority to initiate removal proceedings, which this Court lacks
26 jurisdiction to review. Furthermore, Congress has made clear that any claims the Court
27 may find cognizable, including constitutional claims, related to the initiation or conduct
28 of removal proceedings against Plaintiffs, must be raised *in those proceedings* before an

1 immigration judge, and appealed to a court of appeals through the for review process if
2 necessary. If the Court were to find jurisdiction to hear these challenges to the initiation
3 of removal proceedings, it should still dismiss for failing to state a claim for which relief
4 can be granted. Deferred action is an entirely discretionary grace, not an immigration
5 benefit nor a protection from removal.

6 **BACKGROUND**

7 When U.S. Immigration and Customs Enforcement (“ICE”) or U.S. Customs and
8 Border Protection (“CBP”) issues a notice to appear (“NTA”) to a DACA grantee,
9 regardless of the reason, there is no requirement in the DACA SOP or elsewhere for
10 USCIS to make a separate decision to terminate the individual’s DACA or EAD.¹ Rather,
11 the decision to issue an NTA to an individual with DACA *is* the decision to no longer
12 defer action against that individual, and the charge selected for the NTA does not have to
13 reflect DHS’s full reasoning. Nothing restricts DHS’s authority to issue an NTA because
14 someone was previously found to warrant a favorable exercise of prosecutorial discretion
15 in the form of deferred action, nor is a criminal conviction or criminal charge necessary
16 to justify termination of DACA. While the Napolitano Memo and DACA SOP identify
17 and explain threshold criteria for DACA consideration, nothing limits DHS’s discretion
18 to grant, deny, or terminate DACA on a case by case basis.² Nor is the DACA SOP the
19 only authority establishing the process by which deferred action terminates.

20 Plaintiff Arreola had his DACA and EAD terminated automatically through the
21 issuance of an NTA, after CBP law enforcement officers encountered him engaged in
22

23 ¹ Defendants incorporate by reference the explanation of the DACA policy, the EAD application process
24 for individuals with no lawful status, and the process by which removal proceedings are initiated through
25 NTA issuance, provided in Defendants’ Opposition to Plaintiffs Motion for Class Certification, Section
II.A and B. Dkt. No. 53 at 7-13.

26 ² In fact, USCIS may still grant DACA to an individual with a disqualifying criminal conviction, *See* Dkt.
27 No. 53-1 at 70; or deny DACA to an individual with no criminal history. *Id.* at 38 (“Individuals may be
28 considered for DACA upon showing that they meet the prescribed guidelines . . .”); *id.* at 78 (“USCIS
lacks the authority to consider requests from individuals who are in immigration detention under the
custody of ICE at the time of filing”).

1 alien smuggling, the facts of which he conceded in an interview with Border Patrol
2 Agents. *See* Dkt. 23-2 at 26, 56-57. Mr. Arreola’s DACA and EAD were then reinstated
3 on November 22, 2017, and on December 20, 2017, DHS issued a Notice of Intent to
4 Terminate pursuant to this Court’s Order. *See* Dkt. No. 31; Dkt. No. 32 at ¶ 87.

5 On September 20, 2017, Plaintiff Gil was arrested and charged with two felonies,
6 including assault in the first degree and transferring a firearm without a background
7 check to a prohibited person. *See* Dkt. No. 53-1 at 4-7, 9-15. On November 6, 2017,
8 ICE issued Gil an NTA charging him with unlawful presence. *Id.* On November 14,
9 2017, USCIS issued him a Notice of Action, stating his DACA and EAD terminated
10 automatically with the NTA. *See* Dkt. No. 32 at ¶ 109.

11 On November 3, 2017, Plaintiff De Souza was arrested for forgery in the first
12 degree, a felony.³ *See* Dkt. 53-1 at 17-18, 20-24. De Souza admitted to police that he
13 had altered the expiration date on his driver’s license due to it expiring. *Id.* On
14 November 5, 2017, ICE issued De Souza an NTA charging unlawful presence, and on
15 November 10, 2017, USCIS issued a Notice of Action informing De Souza his DACA
16 and EAD terminated automatically with the NTA. Dkt. No. 32 at ¶ 129.

17 Organizational Plaintiff Inland Empire claims no injury of its own, and only
18 prospective harm to its members. *See, e.g.*, Dkt. No. 32 at ¶ 135 (“Defendants’ unlawful
19 termination policies and practices are likely to harm IEIYC DACA recipients.”).

20 **SUMMARY OF THE ARGUMENT**

21 Regardless of how the arguments are framed, Plaintiffs directly challenge DHS’s
22 authority to initiate removal proceedings, which this Court should dismiss for lack of
23 subject matter jurisdiction pursuant to the Administrative Procedure Act (“APA”) and 8
24 U.S.C. § 1252. By definition, a demand to restore deferred action terminated by the
25 initiation of removal proceedings challenges the agency’s determination to initiate
26 removal proceedings. Any interpretation of these statutes that permits district court

27 _____
28 ³ Plaintiffs incorrectly assert that Plaintiff De Souza was arrested for “possession of an altered
identification document—a misdemeanor.” Dkt. No. 32 at ¶ 101.

1 challenges to actions inextricably linked to the initiation of removal proceedings would
 2 run counter to Congress’s intent, to Supreme Court case law, and to the law of this
 3 Circuit. Plaintiffs’ due process challenges must also fail, because they cannot show a
 4 protected interest in DACA or EADs. In fact, reinstating Plaintiffs’ EADs following the
 5 institution of removal proceedings would violate duly-enacted DHS regulations that
 6 operate independent of, and superior to, DACA policy.

7 Additionally, Plaintiffs Arreola and Inland Empire lack standing in this matter.

8 Most importantly, and contrary to Plaintiffs’ unsupported allegations, DHS issued
 9 Plaintiffs NTAs based on individualized determinations that Plaintiffs’ criminal conduct
 10 rendered them enforcement priorities, and it did so with the knowledge of each Plaintiffs’
 11 DACA. Thus, the decision to initiate removal proceedings preceded the consequence of
 12 Plaintiffs’ DACA and EAD terminating, and no reasonable argument can be made that the
 13 terminations did not arise out of that decision, such that 8 U.S.C. § 1252(g) prevents this
 14 Court from reviewing either step. To the extent this Court may find Plaintiffs have any
 15 viable legal claims arising from the “decision[s] or action[s]” of DHS to initiate removal
 16 against these Plaintiffs, Congress enacted 8 U.S.C. §§ 1229a and 1252 to channel those
 17 claims to an immigration court and ultimately to the appropriate court of appeals.

18 ARGUMENT

19 I. Standard of Review

20 A. Dismissal pursuant to Fed. R. Civ. P. 12(b)(1)

21 Because federal courts have limited jurisdiction, a court must dismiss any case if it
 22 lacks subject matter jurisdiction over the claims. Fed. R. Civ. P. 12(b)(1); *Owen Equip. &*
 23 *Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). “A federal court is presumed to lack
 24 jurisdiction in a particular case unless the contrary affirmatively appears.” *Stock W., Inc.*
 25 *v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).
 26 The elements necessary to establish standing “must be supported in the same way as any
 27 other matter on which the plaintiff bears the burden of proof.” *Lujan v. Defenders of*
 28 *Wildlife*, 504 U.S. 555, 561 (1992). Moreover, when the issue of jurisdiction is separable

1 from the merits of the case, no presumption of truthfulness attaches to a plaintiff's
2 allegations, and the plaintiff bears the burden of proving that jurisdiction exists. *Thornhill*
3 *Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

4 The "irreducible constitutional minimum of standing" to assert federal court
5 jurisdiction requires "the plaintiff must have suffered an injury in fact . . . which is . . .
6 concrete and particularized, . . . the injury has to be fairly traceable to the challenged
7 action of the defendant, and . . . it must be likely . . . that the injury will be redressed by a
8 favorable decision." *Lujan*, 504 U.S. at 560 (internal citations and modifications omitted).
9 "Allegations of possible future injury do not satisfy the requirements of Art[icle] III."
10 *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d
11 1228, 1235 (9th Cir. 2017), citing *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1141
12 (2013). Finally, while an imminent future harm may establish standing, the harm alleged
13 cannot be the result of plaintiff's own unlawful conduct. *Id.* at 1042, quoting *O'Shea v.*
14 *Littleton*, 414 U.S. 488, 497 (1974).

15 An organization suing on its own behalf must also show that the claimed injury is
16 "both a diversion of its resources and a frustration of its mission." *La Asociacion de*
17 *Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010).
18 An organization suing on behalf of its members must show that: "(1) its members would
19 otherwise have standing to sue in their own right; (2) the interests it seeks to protect are
20 germane to the organization's purpose; and (3) neither the claim asserted nor the relief
21 requested requires the participation of individual members in the lawsuit." *Int'l Union,*
22 *United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 282
23 (1986).

24 **B. Dismissal pursuant to Fed. R. Civ. P. 12(b)(6)**

25 To survive dismissal under Rule 12(b)(6), "the complaint must allege sufficient
26 facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*,
27 550 U.S. 544, 555-56 (2007). Although the Court must accept as true all well-pleaded
28 factual allegations when determining the legal sufficiency of a claim, it need not credit

1 “legal conclusion couched as a factual allegation.” *Id.* at 555. “Threadbare recitals of the
2 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
3 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). .

4 **II. Plaintiff Inland Empire should be dismissed for lack of standing**

5 Plaintiff Inland Empire lacks standing on its own and lacks standing on behalf of
6 its members. Inland Empire describes the work that it has done for and with DACA
7 recipients, both as members and as clients, since the policy’s inception. *See* Dkt. No. 32
8 at 29-31. However, Inland Empire makes no claim that the Government’s actions have
9 diverted its resources or frustrated its mission in the service of members who have lost
10 DACA without advanced notice or an opportunity to respond. *See La Asociacion de*
11 *Trabajadores de Lake Forest*, 624 F.3d at 1088. Nor does Inland Empire identify a single
12 member of its organization who has lost DACA with or without advanced notice. In fact,
13 Plaintiff is clear that its sole concern in this matter is the prospective harm its members
14 may possibly face in the future. Dkt. No. 32 at ¶ 135 (“Defendants’ unlawful termination
15 policies and practices are likely to harm IEIYC DACA recipients.”); *Or. Prescription*
16 *Drug Monitoring Program*, 860 F.3d at 1235.

17 Thus, Inland Empire has not shown organizational injury, and it may not represent
18 its individual members unless those members themselves would have standing as
19 plaintiffs, and *then* only if those individual members would not be required to participate
20 in the lawsuit. *Brock*, 477 U.S. at 282. Here, Plaintiffs’ amended complaint does not
21 establish standing for even one of Inland Empire’s members. Even if it did, the very fact-
22 specific inquiry necessary to determine why such a fictional plaintiff lost his or her
23 DACA, and whether he or she would be entitled to additional process before such
24 termination, would require that person to participate in the lawsuit. Plaintiffs offer no
25 rationale to overcome these requirements. Furthermore, while Inland Empire alleges
26 future potential harm to its members even if they do not commit any disqualifying
27 conduct, the only present harm plaintiffs allege in their complaint is DACA termination
28

1 that was based on the unlawful conduct of the plaintiffs.⁴ And a plaintiff may not assert
2 standing based on future harm that would only occur if the plaintiff first engages in
3 unlawful behavior. *Hodgers-Durgin, v. de la Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999).
4 Plaintiffs offer no examples of a DACA recipient whose DACA automatically terminated
5 without having first engaged in criminal activity. Thus, they show no basis for standing
6 on the premise that such an action might occur to one of their members sometime in the
7 future. Because Plaintiff Inland Empire fails to meet the standing requirements for an
8 individual or an organization, it should be dismissed from this action.

9 **III. Plaintiff Arreola Robles should be dismissed from this action for lack of**
10 **standing and because his claim is no longer ripe**

11 Because Plaintiff Arreola's DACA and EAD were reinstated on November 22,
12 2017, pursuant to this Court's Order, and he subsequently filed an amended complaint on
13 December 21, 2017, the grounds he asserted for standing in his original complaint are no
14 longer before this Court, and he has failed to establish any injury in the amended
15 complaint ripe for this Court's adjudication. *See* Dkt. Nos. 31, 32. As discussed in the
16 previous section, the Court may not find standing based on the possibility of future harm
17 to cure his present lack of standing, particularly if that possible future harm is predicated
18 on Plaintiff's future unlawful conduct.

19 When "a plaintiff files a complaint in federal court and then voluntarily amends the
20 complaint, courts look to the amended complaint to determine jurisdiction." *Rockwell*
21 *Int'l Corp. v. United States*, 549 U.S. 457, 473 (2007). Thus, the fact that Plaintiff Arreola
22 had a valid DACA grant at the time he filed his amended complaint means he lacks
23 standing to assert any injury from the termination of his DACA in the present action.

24 Furthermore, where Defendants have issued Plaintiff Arreola a Notice of Intent to
25 Terminate his DACA, along with an opportunity to respond to their intended action, the
26 possibility that he will experience automatic termination of his DACA without such
27 notice and opportunity in the future (or that such a termination would be based on

28 ⁴ As explained below, the particular charge of unlawful presence on each plaintiff's NTA is not the only
reason the NTA was issued, and the lack of additional charges on the NTA does not infirm the process.

1 something other than his criminal conduct) is essentially nil. Additionally, Plaintiff
 2 Arreola’s challenge to his ongoing NOIT process – intending to terminate his DACA
 3 based on the determination that he is an enforcement priority – is not ripe because
 4 Defendants’ action is not final. *See* 5 U.S.C. § 704 (“Agency action made reviewable by
 5 statute and final agency action for which there is no other adequate remedy in a court are
 6 subject to judicial review.”); *Kings Cty. v. Surface Transp. Bd.*, 694 F. App’x 472, 473
 7 (9th Cir. 2017) (“We have neither Constitutional jurisdiction nor statutory jurisdiction
 8 because the Declaratory Order was not final. Expressing our views regarding that order
 9 would amount to an advisory opinion, which would not resolve ‘concrete legal issues,
 10 presented in actual cases, not abstractions.’”) (citations omitted). Plaintiff Arreola now
 11 has the opportunity to argue to USCIS that his DACA should not be terminated. Though
 12 Defendants maintain that the decision to terminate any individual’s DACA is committed
 13 to agency discretion and ultimately unreviewable, the lack of a final agency decision in
 14 Plaintiff Arreola’s case is an additional basis for this Court to dismiss him from this
 15 action.

16 **IV. This Court must dismiss the amended complaint because Plaintiffs fail to**
 17 **establish this Court’s jurisdiction**

18 The Court lacks jurisdiction over Plaintiff’s APA and Constitutional claims. First, this
 19 Court lacks jurisdiction to review any challenge to DHS’s discretionary determination to issue
 20 an NTA, which had the result of automatically terminating DACA and EAD. Second, Plaintiffs
 21 cannot state a claim because there is no protected entitlement to DACA or employment
 22 authorization. Finally, nothing in the APA or constitutional jurisprudence, nor Defendants’ own
 23 policies and guidance, supports a right to review or constrain DHS’s exercise of discretion or to
 24 grant Plaintiffs procedural rights other than those available through removal proceedings.

25 **A. DHS’s discretion to initiate removal proceedings and their effect on the**
 26 **termination of Plaintiffs’ DACA is not reviewable.**

27 The APA permits persons aggrieved by final agency action to obtain judicial review in
 28 federal court where “there is no other adequate remedy in a court.” *See* 5 U.S.C. §§ 702, 704. A
 reviewing court shall set aside agency action found to be “arbitrary, capricious, an abuse of

1 discretion, or otherwise not in accordance with law,” or “without observance of procedure
 2 required by law.” 5 U.S.C. § 706(2)(A), (D). However, the APA precludes judicial review of
 3 agency decisions when “statutes preclude judicial review,” or when the decision is “committed
 4 to agency discretion by law.” 5 U.S.C. § 701(a)(1), (a)(2); *see Heckler v. Chaney*, 470 U.S. 821,
 5 830 (1985) (“even where Congress has not affirmatively precluded review, review is not to be
 6 had if the statute is drawn so that a court would have no meaningful standard against which to
 7 judge the agency's exercise of discretion.”).

8 Thus, there are two reasons APA jurisdiction is not available here. First, there is no
 9 separate decision to terminate DACA *in these cases* because a DHS law enforcement officer
 10 decided, in consideration of each plaintiff’s criminal activity, to initiate removal proceedings
 11 and issued an NTA that automatically terminated DACA; and second, even if the Court found a
 12 separate decision was made, there is still no standard in the SOP or otherwise by which the
 13 Court may review a decision that deferring action is no longer in the Government’s interest.

14 Additionally, the Court lacks jurisdiction over Plaintiffs’ constitutional claims
 15 because Plaintiffs necessarily lack a protected constitutional interest in the process by
 16 which their DACA is terminated, because the ultimate relief they seek – deferred action –
 17 is discretionary. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005).

18 **i. Judicial review is barred under 5 U.S.C. § 701(a)(1) because the INA**
 19 **limits review of Plaintiffs’ claims, which arise from DHS’s decision**
 20 **to commence Plaintiffs’ removal proceedings.**

21 Congress eliminated judicial review over “any cause or claim by or on behalf of
 22 any alien . . . arising from the decision or action . . . to . . . adjudicate cases . . .” 8 U.S.C.
 23 § 1252(g). The issuance of an NTA is a necessary predicate to commencing removal
 24 proceedings. 8 U.S.C. § 1229(a). Through section 1252(g), Congress explicitly precluded
 25 judicial review of any challenge *arising from* any decision or action to commence
 26 removal proceedings. *See Reno v. Am.-Arab Anti-Discrimination Comm.* (“AADC”), 525 U.S.
 27 471, 483-85 (1999) (finding section 1252(g) also precludes review of the discretionary decision
 28 to *not* initiate removal proceedings); *see, e.g., Vilchiz-Soto v. Holder*, 688 F.3d 642, 644 (9th
 Cir. 2012) (holding section 1252(g) barred jurisdiction to review the BIA’s discretionary

1 decision to not reopen removal proceedings to consider a DACA request).⁵ The Supreme
2 Court explained that section 1252(g) was “directed against a particular evil: attempts to
3 impose judicial constraints upon prosecutorial discretion.” *AADC* 588 F.3d at 485 n.9; *id.*
4 at 485 (treating “‘no deferred action’ decisions” as “discretionary determinations”); *cf.*
5 *Silva v. United States*, 866 F.3d 938, 940 (8th Cir. 2017) (section 1252(g) precludes
6 review of decision to execute removal order even where claim that agency lacked
7 discretion because removal violated law).

8 Section 1252(g) encompasses “cause[s] or claim[s]” that *arise from* the decision
9 “or action” to “commence proceedings” against any individual. *See, e.g., Sissoko v.*
10 *Rocha*, 509 F.3d 947, 948-50 (9th Cir. 2007) (finding claim of money damages arose
11 from decision or action to commence removal proceedings and was, thus, barred by 8
12 U.S.C. § 1252(g)); *see, e.g., Alcaraz v. INS*, 384 F.3d 1150, 1160-61 (9th Cir. 2004)
13 (finding review of the reopening of removal proceedings, but not the administrative
14 closure of proceedings, was barred from review as an action related to the decision to
15 commence removal); *Botezatu v. INS*, 195 F.3d 311, 314 (7th Cir. 1999) ((discussing the
16 scope of 8 U.S.C. § 1252(g) as including “various decision . . . leading up to order
17 consequent upon final orders of deportation.”) (citations and quotations omitted).⁶ A
18 DACA grant is acknowledgement that DHS is not presently pursuing removal against an
19 individual. Thus, when DHS finds an individual has become an enforcement priority and
20 issues an NTA, DACA will logically terminate and such consequence falls squarely
21 within the province of section 1252(g). *See, e.g., Alcaraz*, 384 F.3d at 1160-61. To hold
22 otherwise would render section 1252(g) a dead letter because any individual could seek
23 to enjoin or otherwise challenge the commencement of removal proceedings through this

24 _____
25 ⁵ This authority is consistent with earlier case law interpreting the 1981 Operating Instructions, a previous
26 policy that provided guidelines for the exercise of deferred action. *See Romeiro de Silva v. Smith*, 773
27 F.2d 1021, 1025 (9th Cir. 1985).

28 ⁶ *Wong v. United States*, 373 F.3d 952 (9th Cir. 2004), is distinguishable from this case and *Sissoko*, where
the issuance of Plaintiffs’ NTAs occurred before, and were the direct cause of, termination of Plaintiffs’
DACA and EADs.

1 type of creative pleading. *See Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001)
2 (holding that “a petitioner may not create the jurisdiction that Congress chose to remove
3 simply by cloaking [a claim] in constitutional garb”).⁷

4 Applied to the context of this case, a challenge to the decision to terminate DACA
5 by the issuing an NTA is a necessarily a challenge that arises out of the decision or action
6 to initiate removal proceedings because the NTA is the document that is used to initiate
7 removal proceedings. *See* 8 U.S.C. § 1252(g). Thus, 8 U.S.C. § 1252(g) necessarily bars
8 judicial review. *See Vilchiz-Soto*, 688 F.3d at 644.

9 To the extent that Plaintiffs have any viable claims, the REAL ID Act, codified at 8
10 U.S.C. §§ 1252(a)(5) and 1252(b)(9), bars them from raising those claims in district
11 court, regardless of whether a final order of removal has issued. Section 1252(a)(5),
12 entitled “[e]xclusive means of review,” requires that “a petition for review filed with an
13 appropriate court of appeals . . . shall be the sole and exclusive means for judicial review
14 of an order of removal” 8 U.S.C. § 1252(a)(5). Section 1252(b)(9) provides
15 “[j]udicial review of all questions of law and fact, including interpretation and application
16 of constitutional and statutory provisions, *arising from any action taken or proceeding*
17 *brought to remove an alien from the United States* under this subchapter shall be available
18 only in judicial review of a final order under this section.” 8 U.S.C. § 1252(b)(9)
19 (emphasis added); *see, e.g., J.E.F.M.*, 837 F.3d at 1038 (district court lacked jurisdiction
20 over challenge to adequacy of removal procedures, and instead court of appeals has
21 authority to resolve questions of constitutional rights on review of a final removal order).

22 Importantly, the Ninth Circuit found that Section 1252(b)(9) is “a clear statutory
23 prescription against district court review” of challenges arising from removal proceedings
24 for plaintiffs who had not yet received final orders of removal. *See J.E.F.M.*, 837 F.3d at
25

26 ⁷ In analogous circumstances, the Eleventh Circuit Court of Appeals affirmed the applicability of Section
27 1252(g) to bar district court review of the automatic termination of discretion-based employment
28 authorization documents following the commencement of removal proceedings, in accordance with 8
C.F.R. § 274a.14(a)(1)(ii). *See Gupta v. Holder*, No. 611CV1731ORL35GJK, 2011 WL 13174873, at *1
(M.D. Fla. Oct. 31, 2011), *aff’d sub nom. Gupta v. U.S. Atty. Gen.*, 485 F. App’x 386 (11th Cir. 2012).

1 1035-38 (“The minors . . . attempt to get around [section 1252(b)(9)] by claiming that
2 they have been (*or will be*) denied meaningful judicial review in light of their juvenile
3 status.”) (emphasis added). While the Court acknowledged that “an unrepresented minor
4 in immigration proceedings poses an extremely difficult situation,” it also found “these
5 considerations cannot overcome a clear statutory prescription against district court
6 review. Relief is through review in the court of appeals or executive or congressional
7 action.” *Id.* at 1036-1038.⁸

8 Congress’s intent was simple and uncontroversial: if the issue is one that can be
9 raised in removal proceedings, and ultimately in a petition for review, then the statute
10 precludes district court review. *See id.* at 1034 (citing H.R. Rep. No. 109-72, at 173
11 (statute was “intended to preclude all district court review of any issue raised in a removal
12 proceeding”)); *cf. Aguilar*, 510 F.3d at 9-10 (“Congress plainly intended to put an end to
13 the scattershot and piecemeal nature of the review process . . .”). This approach
14 effectuates the general rule precluding simultaneous review of a question by both an
15 administrative body and a federal court. *See Acura of Bellevue v. Reich*, 90 F.3d 1403,
16 1408-9 (9th Cir. 1996).

17 Here, the sequence of events could not be more clear: Plaintiffs engaged in criminal
18 conduct, DHS determined their conduct rendered them enforcement priorities, DHS issued
19 each an NTA, the respective NTA caused each Plaintiff’s DACA and EAD to terminate,
20 and Plaintiffs filed this challenge. There can be no doubt that DHS’s discretionary
21 decision to issue NTAs was the direct cause of Plaintiffs’ DACA terminations. *See Dkt.*

22
23 ⁸ The Court’s previous reliance on *Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007), to support section
24 1252(b)(9) applying only to a final order of removal is misplaced because that language is dicta and
25 conflicts with the plain language of the statute. Dkt. No. 31 at 7. *Singh* brought a challenge of ineffective
26 assistance of counsel through a habeas petition, and the Court found that the challenge was not tied to
27 removal proceedings, so section 1252(b)(9) did not apply regardless of whether a final order had issued.
28 *Singh*, 499 F.3d at 978-79. To interpret *Singh* as permitting district court challenges such as those raised
here runs counter to Congressional intent, and would effectively excise the words “any action taken” from
the statute. *See Aguilar*, 510 F.3d at 10; *cf. Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012) (an
APA claim “challeng[ing] the procedure and substance of an agency determination that is ‘inextricably
linked’ to the order of removal” must be channeled through the petition for review process).

1 53-1 at 4-24. Thus, Plaintiffs' challenges necessarily arise from "action taken or
2 proceedings brought to remove an alien," for which district courts lack jurisdiction.

3 **ii. Judicial review of Plaintiffs' claims is also barred under 5 U.S.C.**
4 **§ 701(a)(2), because how and when an NTA issues is committed to**
5 **agency discretion**

6 There is no judicial review under the APA of decisions that "courts traditionally
7 have regarded as 'committed to agency discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 192
8 (1993) (quoting 5 U.S.C. § 701(a)(2)). These decisions are typically unreviewable
9 because there exists "no meaningful standard against which to judge the agency's
10 exercise of discretion." *Chaney*, 470 U.S. at 830. This bar applies even when "the agency
11 gives a 'reviewable' reason for otherwise unreviewable action." *ICC v. Bhd. of*
12 *Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) ("BLE").

13 The decisions committed to executive discretion include "an agency's exercise of
14 enforcement power." *Chaney*, 470 U.S. at 831. Such judgments involve "a complicated
15 balancing of factors which are peculiarly within [an agency's] expertise," including
16 "whether agency resources are best spent on this violation or another, whether the agency
17 is likely to succeed if it acts, whether the particular enforcement action requested best fits
18 the agency's overall priorities, and, indeed, whether the agency has enough resources to
19 undertake the action at all." *Id.* As there is "no meaningful standard against which to
20 judge the agency's exercise of discretion" in weighing these factors, an agency's exercise
21 of enforcement powers is "presumed immune from judicial review under § 701(a)(2)." *Id.*
22 at 830, 832.

23 An agency's decision to enforce the law against a particular individual is likewise
24 presumptively unreviewable. Just as "the decision whether or not to prosecute"
25 presumptively "rests entirely in [the prosecutor's] discretion," *United States v. Armstrong*,
26 517 U.S. 456, 464 (1996) (citation omitted), an agency's decision to bring a civil
27 enforcement action is generally not open to judicial scrutiny. Considerations such as the
28 *Chaney* factors are equally present in enforcement decisions as in nonenforcement

1 decisions. *See Chaney*, 470 U.S. at 831; *see also Wayte v. United States*, 470 U.S. 598,
2 607-8 (1985) (“[T]he decision to prosecute is particularly ill-suited to judicial review”).

3 One form of that broad discretion is deferred action, a “discretionary and
4 reversible” decision to notify an alien that DHS has chosen not to seek his removal for a
5 specific period of time. *Arpaio v. Obama*, 797 F.3d 11, 17 (D.C. Cir. 2015). Like other
6 agency nonenforcement decisions, grants of deferred action rest on a complex balancing
7 of policy considerations that cannot serve as “meaningful standard against which to judge
8 the agency’s exercise of discretion.” *Chaney*, 470 U.S. at 831. The converse is equally
9 true: denials of deferred action are also committed to agency discretion. *See AADC*, 525
10 U.S. at 485 (treating “‘no deferred action’ decisions” as “discretionary determinations”).
11 Because “[g]ranting an illegally present alien permission to remain and work in this
12 country” is fundamentally “a dispensation of mercy,” there are “no standards by which
13 judges may patrol its exercise.” *Perales v. Casillas*, 903 F.2d 1043, 1051 (5th Cir. 1990)
14 (INS’s decision not to grant pre-hearing voluntary departures and work authorizations to
15 a group of aliens was non-justiciable).

16 Even where an agency has promulgated regulations or provided internal guidance,
17 decisions involving the exercise of prosecutorial discretion are generally not subject to
18 judicial review. *See Pasquini v. Morris*, 700 F.2d 658, 659 (11th Cir. 1983) (holding that
19 Immigration and Naturalization Service (“INS”) Operating Instructions regarding
20 deferred action did not confer substantive rights on an alien and courts could not review a
21 claim that INS failed to comply with these internal instructions).

22 Thus, individual DACA terminations, especially where based on issuance of NTAs,
23 fall squarely within that category of agency discretion for which judicial review is
24 improper. *See Chaney*, 470 F.3d at 830; *see also Morales de Soto v. Lynch*, 824 F.3d 822,
25 828 (9th Cir. 2016) (noting that “the exercise of prosecutorial discretion is a type of
26 government action uniquely shielded from and unsuited to judicial intervention”). In
27 Plaintiffs’ cases, there is no legal question with regard to the DACA guidelines, because
28 the DACA guidelines merely allow an individual to seek a discretionary administrative

1 grace in the form of DACA. *See* Dkt. No. 53-1 at 38 (“Individuals may be considered for
2 DACA upon showing that they meet the prescribed guidelines . . .”). DACA is unlike
3 immigration benefits where eligibility is found in statute or regulation, and which Courts
4 have found that the non-discretionary denial of such benefits may be reviewed.⁹

5 Here, Plaintiffs are challenging DHS’s exercise of its enforcement power granted
6 by Congress. *See* Dkt. 32 Prayer for Relief (seeking to “Enjoin Defendants from revoking
7 the DACA grants and EADs . . . based on the filing of an NTA charging solely” unlawful
8 presence). This is a classic challenge to DHS’s exercise of its prosecutorial discretion.
9 *See Chaney*, 470 U.S. at 831. This type of enforcement decision involves a balancing of
10 factors committed to agency discretion by law, including how to allocate agency
11 resources. *See id.*; *Armstrong*, 517 U.S. at 464. The question for DHS was not whether it
12 *could* exercise its discretion in favor of the Plaintiffs, but rather whether it *should* do so in
13 each case. Because this type of discretionary determination is committed to DHS
14 discretion by law, this Court lacks jurisdiction to review Plaintiffs’ claims.

15 **iii. Plaintiffs cannot state a constitutional claim because the termination**
16 **of DACA does not implicate a constitutional interest.**

17 Plaintiffs assert incorrectly that “[i]ndividuals who have been granted DACA have
18 important constitutionally protected interests in their DACA grant and employment
19 authorization.” Dkt. No. 32 at ¶ 164. However, Plaintiffs necessarily lack a protected
20 constitutional interest in their DACA and in the process to terminate DACA because the
21 ultimate result sought – deferred action – is discretionary, and because the Government
22 never expressed a mutual intention to confer a protected benefit in DACA.

23
24 ⁹ The Court’s reliance on *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc) and
25 *Madu v. U.S. Attorney Gen.*, 470 F.3d 1362 (11th Cir. 2006) is misplaced. In both cases, courts reviewed
26 a “purely legal question” that set the stage for a discretionary decision. However, the DACA SOP
27 identifies threshold criteria for DACA consideration, but it does not mandate granting DACA if those
28 threshold criteria are met. *See* Dkt. No. 53-1 at 38 (“Individuals may be considered for DACA upon
showing that they meet the prescribed guidelines . . .”). Even if the Court finds those criteria enforceable,
they are not the subject of the exercises of prosecutorial discretion to issue NTAs, which terminate DACA
notwithstanding compliance with the threshold criteria.

1 The “Due Process Clause does not protect everything that might be described as a
2 ‘benefit.’” *Castle Rock*, 545 U.S. at 756. Particular due process rights must be established
3 on the basis of entitlement to a property or liberty interest, the risks of loss associated
4 with deprivation of that interest, and the competing interests of the government in not
5 providing that interest. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (quoting *Mathews v.*
6 *Eldridge*, 424 U.S. 319, 334-335 (1976)). The Court may view DACA recipients’
7 circumstance as unfortunate, but neither the Constitution nor Congress provides an
8 individual in unlawful status a protected interest in living or working in the United States,
9 or in discretionary relief from removal. *Cf. Hoffman Plastic Compounds, Inc. v. NLRB*,
10 535 U.S. 137, 151-52 (2002) (holding, as a general matter, an individual who is not
11 authorized to work in the United States does not have a right to work); *see also Garcia v.*
12 *Holder*, No., 07-60271, 320 F. App’x 288, 290 (9th Cir. April 9, 2009).

13 Nor can Plaintiffs claim an entitlement in this case that creates a Constitutional
14 interest. “To have a property interest in a benefit, a person clearly must have more than an
15 abstract need or desire for it. He must have more than a unilateral expectation of it. He
16 must, instead, have a legitimate claim of *entitlement* to it.” *Blantz v. Cal. Dep’t of Corr. &*
17 *Rehab.*, 727 F.3d 917, 922 (9th Cir. 2013) (citing *Bd. of Regents of State Colleges v. Roth*,
18 408 U.S. 564, 577 (1972)); *see also Mendez-Garcia v. Lynch*, 840 F.3d 655, 665 (9th Cir.
19 2016) (underscoring that aliens cannot claim a cognizable due process interest in
20 discretionary immigration relief or benefits). The Supreme Court, however, has held that
21 even a practice of “generously” granting a “wholly and *expressly* discretionary state
22 privilege” does not create a legal entitlement to that benefit. *See Regents*, 2018 WL
23 339144 at *4 (citing *Gerhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1020-21 (9th Cir.
24 2011)) (“A person’s belief of entitlement to a government benefit, no matter how
25 sincerely or reasonably held, does not create a property right if that belief is not mutually
26 held by the government.”).

27 Plaintiffs possess no lawful status, thus no protected interest in living or working in
28 the United States. DACA policy has never purported to alter that, and nor may this Court.

1 *Landon*, 459 U.S. at 35 (“The role of the judiciary . . . does not extend to imposing
2 procedures that merely displace congressional choices of policy.”). Because DACA is
3 discretionary, it does not give rise to a protected right to work in the United States. *See*
4 Dkt. No. 16-28 at 2 (“This [DACA grant] does not constitute employment authorization,
5 nor may it be used in place of an [EAD].”). Nor does DACA confer lawful status. *See*
6 Dkt. No. 16-13 (“This memorandum confers no substantive right, immigration status or
7 pathway to citizenship.”). DACA is not protection from removal. *See* Dkt. No. 16-23
8 (“DACA is an exercise of prosecutorial discretion and deferred action may be terminated
9 at any time, with or without a Notice of Intent to Terminate, at DHS’s discretion.”).

10 Plaintiffs’ claims regarding an interest in employment authorization and other
11 public benefits like driver’s licenses are particularly misplaced, because there is no right
12 to the receipt of either, and no judicial review of the decision to terminate an EAD once
13 granted. *See* Dkt. No. 32 at ¶ 35; *Pilapil v. INS*, 424 F.2d 6, 11 (10th Cir. 1970); *see also*
14 *Perales*, 903 F.2d at 1047-48 (“[T]here is nothing in the [INA] expressly providing for
15 the grant of employment authorization . . . to aliens who are the beneficiaries of approved
16 petitions”) (vacating the challenged portion of the injunction); *Gupta*, 2011 WL
17 13174873 at *1 (finding a challenge to the termination of EAD upon initiation of removal
18 proceedings was an impermissible challenge to the discretionary decision to initiate
19 removal proceedings). In the context of Plaintiffs’ claims here that they have a right to
20 DACA and therefore EADs, the Ninth Circuit has refused the same proposition. *See Neri*,
21 229 F. App’x at 508 (an individual “has no substantive due process right to discretionary
22 relief from removal or deportation.”); *Munoz v. Ashcroft*, 339 F.3d 950, 954 (9th Cir.
23 2003) (finding no liberty interest in discretionary forms of relief from deportation).

24 In fact, every individual with employment authorization based on 8 C.F.R.
25 § 274a.12(c), including those with deferred action, is subject to automatic termination of
26 their EAD upon institution of removal proceedings in an immigration court. *See* 8 C.F.R.
27 § 274a.14(a)(1)(ii); 8 C.F.R. §§ 1003.13, 1003.14. No notice or opportunity to respond is
28 afforded to any deferred action recipient in this posture, and Plaintiffs point to nothing

1 that supports a contrary finding. *Cf. Gupta*, 2011 WL 13174873 at *1 (denying challenge
 2 to automatic EAD termination). Because EAD termination is not tied to operation of the
 3 DACA SOP, Plaintiffs’ claims of harm regarding EAD loss must fail. Further, the DACA
 4 SOP instructs USCIS to defer to existing law and regulations where there is any conflict
 5 with the SOP. *See* Dkt. No. 16-24 at 17, DACA SOP Chapter One (“Any provision of the
 6 [INA] or 8 C.F.R. found . . . to be in conflict with this SOP will take precedence over the
 7 SOP.”). Thus, it would be inappropriate for the Court to find the SOP requires a process
 8 before termination of a DACA-based EAD due to NTA issuance by CBP or ICE, which is
 9 contrary to the plain language of the duly promulgated regulation.

10 Furthermore, under DHS regulations, an individual with deferred action who has
 11 lost his EAD due to having been placed into removal proceedings may reapply for an
 12 EAD if he or she becomes eligible again under a category of subsection 274a.12(c). Only
 13 if employment authorization is granted again would the individual then be eligible to
 14 apply to their state authority for a driver’s license or Social Security card. *ADAC*, 757
 15 F.3d at 1061. Thus, the peripheral benefits Plaintiffs cite to illustrate the urgency of the
 16 relief they seek are two steps removed from the relief this Court can grant.¹⁰

17 For these reasons, and because Plaintiffs by definition concede removability and
 18 challenge only termination of a discretionary temporary grant of deferred action from
 19 removal, “the Court cannot conclude that the government has deprived [plaintiffs] of
 20 [their] liberty interest in remaining in the United States without due process of law.”
 21 *Mendez de Leon v. Reno*, No. C 97-02482 CW, 1998 WL 289321, at *7 (N.D. Cal. Mar.
 22 26, 1998).

23 **B. Plaintiff’s Fail to State a Claim Under the APA.**

24 Even if this Court finds that it would have jurisdiction over any of Plaintiffs’
 25 claims, the Court should still dismiss Plaintiffs’ amended complaint because Plaintiffs’
 26 fail to state a claim upon which relief can be granted. Plaintiffs cannot establish either an

27 _____
 28 ¹⁰ None of the provisions that Plaintiffs cite at 8 U.S.C. §§ 1611(b)(2)–(3) and 1621(d) depends directly
 on the receipt of DACA. Dkt. No. 32 at ¶ 35.

1 administrative or a constitutional right to receive any process regarding the termination of
2 DACA because deferred action is necessarily an exercise of the Executive’s prosecutorial
3 discretion. *See Chaney*, 470 U.S. at 831; *Regents*, 2018 WL 339144 at *18 (“Congress has
4 been free to constrain DHS’s discretion with respect to granting deferred action, but it has yet to
5 do so.”). In fact, DHS acted based on that discretion by issuing NTAs based on Plaintiffs’
6 criminal activity. Thus, the limited grace a temporary grant of DACA serves to recognize
7 was overridden by the Government’s determination that Plaintiffs had become
8 enforcement priorities. *See* Dkt. No. 53-1 at 4-7, 17-18. Defendants respectfully disagree with
9 the Court’s prior order granting a preliminary injunction to Plaintiff Arreola, *see* Dkt. No. 31,
10 and endeavor to address that order here. *Id.* at 9, 11, 12.

11 **i. DACA termination by NTA is provided for in the DACA SOP and**
12 **policy documents, and in DHS policy and regulations.**

13 There is no support in the Napolitano Memo for the proposition that DACA policy
14 limits ICE or CBP’s authority to issue NTAs that will have the effect of terminating
15 grants of deferred action, like DACA. *See* Dkt. No. 16-13. Contrary to the Court’s
16 previous finding, the Napolitano memo does not limit this authority only for the period
17 “as DACA was developed.” Dkt. No. 31 at 12.

18 Nor does DHS guidance prevent immigration enforcement agencies from
19 terminating DACA by issuing an NTA. The authority to issue an NTA is vested with all
20 DHS immigration officers. *See* 8 C.F.R. § 239.1(a). However, DHS divides NTA issuance
21 responsibility between USCIS in its administrative capacity, and ICE and CBP in their
22 law enforcement capacities. *See* 2011 NTA Memo, Dkt. No. 16-25. USCIS is required to
23 refer all cases involving criminal conduct, not limited to Egregious Public Safety
24 (“EPS”), to ICE. *Id.* at 5. USCIS’s decision to issue an NTA on its own under such
25 circumstances must follow ICE’s lead. *Id.* at 5 & 6 (“USCIS *will not* issue an NTA in
26 these cases if ICE declines to issue an NTA.”) (emphasis added); *id.* at 2 (“USCIS must
27 ensure that its issuance of NTAs fits within and supports the Government’s overall
28 removal priorities . . .”). When a case is referred by USCIS, ICE may issue an NTA that

1 automatically terminates DACA, with no additional notice or opportunity to respond. *See*
2 Dkt. No. 16-24 at 39.

3 The effect of NTA issuance on DACA termination is unremarkable, and is
4 recognized elsewhere in the DACA SOP. *See* Dkt. No. 53-1 at 91-92 (providing that
5 USCIS will deny, without advance notice and an opportunity to respond, a DACA request
6 from an individual in immigration detention who ICE intends to release but who ICE
7 indicates is an enforcement priority). While the SOP instructs USCIS to “discuss” a
8 disagreement it may have with ICE’s finding, *id.*, there is no provision permitting USCIS
9 to reverse ICE’s decision. *See Vasquez v. Aviles*, 639 F. App’x 898, 901 (3d Cir. 2016)
10 (finding no jurisdiction based on Section 1252(g) to review an ICE officer’s unilateral
11 denial of a DACA request to a detained individual because “that decision involves the
12 exercise of prosecutorial discretion not to grant a deferred action.”)¹¹

13 Indeed, where DHS has worked to ensure that ICE’s determination that someone is
14 an enforcement priority would not be conflicted by a later discretionary exercise by
15 USCIS to grant deferred action in the form of DACA, and where the Napolitano Memo
16 specifically preserves the NTA authority of ICE and CBP upon consideration of the
17 DACA guidelines, it takes a particularly strained reading of the Napolitano Memo and
18 DACA SOP to find that ICE and CBP cannot issue NTAs that have the effect of
19 terminating DACA. In fact, the Court’s and Plaintiffs’ interpretation of Defendants’
20 guidance creates an absurd scenario in which ICE would institute new administrative
21 removal proceedings against an individual while that individual seeks additional separate
22 legal process regarding the termination of their DACA. That scenario also strips the
23

24 ¹¹ The Court’s prior order improperly concludes that the SOP termination chapter requires USCIS to
25 adjudicate a termination after ICE has issued an NTA for EPS. Dkt. No. 31 at 9. While the NTA Memo
26 states “ICE’s issuance of an NTA *allows* USCIS to proceed with adjudication . . . ,” Dkt. No. 16-25 at 5
27 (emphasis added), the guidance is optional and the DACA SOP explicitly diverges from it in important
28 ways. The DACA SOP termination chapter instructs USCIS to follow the NTA Memo, but also states that
ICE’s issuance of an NTA on an EPS referral from USCIS “will result in the termination of DACA.” Dkt.
No. 16-24 at 38; *see also id.* at 34 (“USCIS “*will deny* the DACA request.”) (emphasis added).

1 immigration enforcement agencies of their most critical authority. *Regents*, 2018 WL
 2 339144, at *1 (“One of the key enforcement tools under the INA is removal, i.e.,
 3 deportation. In turn, ‘[a] principal feature of the removal system is the broad discretion
 4 exercised by immigration officials.’”(citing *Arizona v. United States*, 567 U.S. 387, 396
 5 (2012))).¹²

6 DHS’s discretion to initiate removal proceedings that have the effect of terminating
 7 DACA is not impeded by DACA policy or immigration law in any way, and so this Court
 8 should dismiss Plaintiffs’ amended complaint alleging otherwise.

9 **ii. There is no requirement that an NTA charge more than unlawful**
 10 **presence, nor is it arbitrary to rely on the decision to issue an NTA.**

11 Plaintiffs argue, and this Court agreed, that USCIS impermissibly relies on only
 12 unlawful presence as the charge listed in an NTA as the sole basis to terminate DACA.
 13 Dkt. No. 31 at 6, 10; Dkt. No. 32 at ¶¶ 159, 165. However, that conclusion relies on a
 14 starkly oversimplified consideration of the NTA decision process. *See, e.g.*, Dkt. No. 53-1
 15 at 9-15, 20-24 (summaries of the information considered in Plaintiffs’ NTA issuances).
 16 There is no basis in the SOP or other DACA-related guidance for the Court to find that an
 17 NTA charging removability on the basis of presence without admission is not sufficient to
 18 terminate DACA. Nor can Plaintiffs establish that an individual in receipt of an NTA
 19 based on unlawful presence cannot also have been found to be an enforcement priority.

20 First, the charges listed in an NTA are not dispositive of the reasons for issuing an
 21 NTA.¹³ DHS is under no obligation to charge an individual with anything more than

22 ¹² The fact that USCIS may grant DACA to nondetained aliens in removal proceedings or with final orders
 23 of removal does not change this analysis. Just as USCIS has the discretion to grant DACA to those
 24 requestors based on the totality of circumstances, nothing in DHS policy or guidance prohibits ICE, CBP,
 25 or USCIS from similarly exercising discretion to terminate DACA on a case by case basis as an exercise
 of agency discretion.

26 ¹³ This proposition is wholly consistent with the denial portion of the DACA SOP, which provides that,
 27 while to be considered, the charges filed in an NTA are not determinative to the ultimate discretion
 28 decision regarding DACA. Dkt. No. 53-1 at 65 (“Do not rely solely on the grounds listed in the charging
 document [. . .]; review all derogatory information [in its totality and then make an informed assessment
 regarding the appropriate exercise of prosecutorial discretion for DACA.”).

1 unlawful presence. *Addy v. Sessions*, 696 F. App'x 801, 804 (9th Cir. 2017) (rejecting
2 argument that petitioner should have been charged with removability under a different
3 statute, because “[t]he Attorney General has prosecutorial discretion over the initiation of
4 removal proceedings, and that discretion is not reviewable.”). Rather, the decision to
5 issue an NTA is based on the immigration officer’s experience and information, and –
6 most importantly – his or her discretion. *See Hernandez v. Gonzales*, 221 F. App'x 588,
7 589–90 (9th Cir. 2007) (“Absent evidence to the contrary, we presume that the
8 immigration officers properly discharged their duties when issuing Hernandez’s NTA.”).
9 Notably, an NTA also need not include charges used to support the denial of relief from
10 removal. *Salviejo–Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006) (denying
11 due process claim where the BIA found petitioner ineligible for cancellation of removal
12 based on a conviction not alleged in the NTA).

13 Here, the discretion exercised in issuing an NTA that has the effect of terminating
14 DACA is nothing like the arbitrary process this Court cited to in *Judulang v. Holder*, 565
15 U.S. 42 (2011). The *Judulang* Court rejected the BIA process of interpreting and
16 comparing the removability charges on an individual’s NTA against a list of charges
17 under 8 U.S.C. § 1182 that composed grounds for exclusion of an arriving alien, to
18 determine whether the individual facing removal was eligible for a form of discretionary
19 relief from removal originally reserved for arriving aliens. 565 U.S. at 489-90. The Court
20 equated the process to flipping a coin, such that some violent criminals would be eligible
21 for relief while some lawful permanent residents (“LPR”) with lesser offenses would be
22 excluded. *Id.* at 487 (finding the process had “no connection to the goals of the
23 deportation process or the rational operation of the immigration laws.”). Here, DACA
24 termination does not hinge on how the NTA is selected, but rather *whether* it is selected.

25 Moreover, the facts here demonstrate that DHS’s decision to issue NTAs that have
26 the result of terminating DACA are not “happenstance,” Dkt. No. 31 at 10; but rather,
27 NTA issuance that results in the termination of DACA represents a valid and thoughtful
28 exercise of agency discretion. The facts here demonstrate that immigration enforcement

1 officers: (1) were specifically aware of each Plaintiffs' DACA, *see* Dkt. No. 53-1 at 9-15,
2 20-24; (2) did not rely solely on unlawful presence in decisions to initiate removal against
3 Plaintiffs. *Id.*; *see also* Dkt. No. 23-2 at 26; and (3) may issue NTAs after supervisory
4 review or consultation with agency counsel. *See* Dkt. No 53-1 at 6 ¶ 11.

5 **CONCLUSION**

6 In sum, Plaintiffs Arreola and Inland Empire have failed to establish standing to
7 raise the claims in their amended complaint, and all Plaintiffs have failed to establish
8 jurisdiction for this Court to consider their challenges to the NTA process, which
9 Congress expressly precluded through section 1252. Nor can Plaintiffs show that, in the
10 termination of their DACA grants they were entitled to any additional process either
11 through statute or the Constitution. For these reasons, the Court should dismiss Plaintiffs
12 Arreola and Inland Empire and dismiss this entire action for lack of jurisdiction.

13 DATED: February 5, 2018

Respectfully Submitted,

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18

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