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13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

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

17 Plaintiffs,

18 v.

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

21 Defendants.

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

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO
DISMISS**

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

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INTRODUCTION

1
2 Defendants' motion to dismiss repeats arguments that this Court has already
3 rejected and asks the Court to expend its resources on issues that need not be decided.
4 The motion repeats, verbatim, statutory jurisdictional arguments that this Court has
5 already rejected twice in this case. Likewise, Defendants repeat their failed arguments
6 concerning Plaintiffs' Administrative Procedure Act ("APA") claims.
7 Notwithstanding that this Court has issued two preliminary injunctions based on
8 Plaintiffs' likelihood of success on these APA claims, Defendants argue that Plaintiffs
9 have failed even to state a claim. The Court need not consider and reject Defendants'
10 arguments for a third time, and it should summarily deny the motion.

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

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

1 Defendants' repeated arguments that Plaintiffs have failed to state a procedural
2 due process claim must also be rejected. As Plaintiffs have explained, the Supreme
3 Court has held that where the government seeks to revoke an important benefit—even
4 if that benefit is ultimately a discretionary one—it must first provide a meaningful
5 opportunity to be heard. However, the Court need not resolve this constitutional
6 question, since it has granted the preliminary relief the plaintiffs requested on other
7 grounds and potentially may grant permanent relief on those other grounds as well.
8 As the Ninth Circuit has emphasized, “We do not decide federal constitutional
9 questions where a dispositive nonconstitutional ground is available.” *Arizona*
10 *DREAM Act Coalition v. Brewer*, 855 F.3d 962, 970-71 (9th Cir. 2017) (citation and
11 quotation marks omitted), *cert denied*, --- S.Ct. ----, 2018 WL 1369140 (March 19,
12 2018). *See also id.* at 963 (“Applying the doctrine of constitutional avoidance, . . . we
13 need not and should not come to rest on the [constitutional] issue, . . . so long as there
14 is a viable alternate, nonconstitutional ground to reach the same result.”) (citation
15 omitted).

16 Accordingly, the Court should deny the motion.

17 **LEGAL STANDARD**

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

26 On a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P.
27 12(b)(6), “[a]ll factual allegations in the complaint are accepted as true, and the
28 pleadings construed in the light most favorable to the nonmoving party.” *Doe I v.*

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

3 **ARGUMENT**

4 **I. MR. ARREOLA AND IEIYC HAVE STANDING.**

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

14 **A. Mr. Arreola Had Standing at the Commencement of the Litigation and** 15 **His Claims Are Not Moot.**

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

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

1 government terminated his DACA and Employment Authorization Document, causing
2 him to lose his job and harming his ability to provide for his family. *See* Compl., Dkt.
3 1, at ¶¶ 76-83; Am. Compl., Dkt. 32, at ¶¶ 78-85. Defendants apparently do not
4 dispute that Mr. Arreola had standing at the outset, and that ends the inquiry.

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

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

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

17 ² Defendants invoke *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 473
 18 (2007), which did not concern standing and is irrelevant here. In any event, as that
 19 opinion explained, an amended complaint is only relevant for establishing jurisdiction
 20 to the extent that that complaint “withdraw[s] . . . allegations [supporting jurisdiction],
 unless they are replaced by others that establish jurisdiction.” *Id.*

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

25 ⁴ For the same reasons, Mr. Arreola’s challenge to his unlawful DACA
 26 termination remains ripe. See, e.g., *Malama Makua v. Rumsfeld*, 136 F. Supp. 2d
 27 1155, 1161 (D. Haw. 2001) (noting that ripeness “is measured at the time an action is
 28 instituted; ripeness is not a moving target affected by a defendant’s action”). Further,
 with respect to the government’s stated intent to terminate Mr. Arreola’s DACA once
 again, “a plaintiff ‘does not have to await the consummation of threatened injury to

1 Since Mr. Arreola had standing at the outset of the litigation, the only
2 conceivable question at this stage is whether his claim is moot. *See, e.g., Jackson v.*
3 *California Dept. of Mental Health*, 399 F.3d 1069, 1072 (9th Cir. 2005) (explaining
4 that “mootness” involves the question “whether, after the case had been brought,
5 something happened to cause [the plaintiff] to lose his continuing interest in the
6 case”), *amended on other grounds*, 417 F.3d 1029 (9th Cir. 2005). Defendants bear a
7 “heavy burden” in establishing mootness, *Friends of the Earth*, 528 U.S. at 189, and
8 have not remotely shouldered that burden here. The factual developments on which
9 the government relies—the reinstatement of Mr. Arreola’s DACA and the issuance of
10 a Notice of Intent to Terminate—are the results of the government’s compliance with
11 this Court’s preliminary injunction. It is clear that compliance with a preliminary
12 injunction does not moot a case; any other rule would systematically prevent courts
13 from entering final judgments. Thus, the Ninth Circuit has emphasized that “a
14 government agency’s moratorium that ‘by its terms was not permanent’ would not
15 moot ‘an otherwise valid claim for injunctive relief.’” *White*, 227 F.3d at 1243 (9th
16 Cir. 2000) (quoting *Friends of the Earth*, 528 U.S. at 190). *See also, e.g., N.L.R.B. v.*
17 *Raytheon Co.*, 398 U.S. 25, 27 (1970) (“We think it plain from the cases that the
18 employer’s compliance with an order of the [National Labor Relations] Board does
19 not render the cause moot.”); *Rosemere Neighborhood Ass’n v. EPA*, 581 F.3d 1169,
20 1173 (9th Cir. 2009) (“[T]he mere cessation of illegal activity in response to pending
21 litigation does not moot a case, unless the party alleging mootness can show that the
22 ‘allegedly wrongful behavior could not reasonably be expected to recur.’”) (quoting
23 *Friends of the Earth*, 528 U.S. at 189).

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

26
27 obtain preventive relief.” *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1015 (9th Cir.
28 2013) (quoting *Babbitt v. United Farm Workers*, 442 U.S. 289, 298 (1979) (internal
quotation marks omitted)).

1 preliminary injunction, the government could again rescind Mr. Arreola’s DACA
2 based merely on the earlier issuance of a Notice to Appear, providing no advance
3 notice or opportunity to respond. And second, despite this Court’s injunction, and far
4 from showing that its wrongful behavior will not recur, the government has expressed
5 its *formal intent*, with a Notice of Intent to Terminate, to repeat the harm that it
6 originally caused Mr. Arreola, this time by terminating his DACA on the ground that
7 he is an enforcement priority, Am. Compl., Dkt. 32, at ¶¶ 86-89—also an unlawful
8 ground for termination described in the original complaint. Compl., Dkt. 1, at ¶¶ 112,
9 117.

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

12 **B. IEIYC Has Standing on Behalf of Its Members.**

13 IEIYC clearly has standing to sue on behalf of its members, who reasonably
14 feared, at the outset of this litigation, that their DACA would be unlawfully terminated
15 as a result of the policy that this Court has enjoined. To establish standing on behalf
16 of its members, IEIYC must show that “its members would have standing to sue on
17 their own behalf, the interests at issue are germane to [its] mission, and neither the
18 substantive claim nor the remedy sought necessitates the participation of any
19 individual member of [IEIYC].” *Ocean Advocates v. U.S. Army Corps of Engineers*,
20 402 F.3d 846, 861 (9th Cir. 2005).

21 IEIYC easily satisfies all three requirements.

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

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

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

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

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

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

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

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

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

1 charge him with any crime); *id.* at ¶ 150 (describing the DACA termination of Jessica
 2 Colotl, whose only conviction was for driving without a license—a conviction she had
 3 disclosed in each of her successful DACA applications). The Ninth Circuit explained,
 4 in the case on which Defendants rely for this proposition, that “there is no tenable
 5 argument that plaintiff should avoid driving near the Mexican border in order to avoid
 6 another stop by the Border Police.” *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037,
 7 1041 (9th Cir. 1999). Here, too, there is no tenable argument that IEIYC members
 8 should cease their daily routines to avoid the checkpoints that subject them to a risk of
 9 unlawful DACA termination.

10 **II. THE IMMIGRATION AND NATIONALITY ACT AND**
 11 **ADMINISTRATIVE PROCEDURE ACT DO NOT DEPRIVE THE**
 12 **COURT OF JURISDICTION.**

13 This Court has twice correctly determined that it has jurisdiction under the INA
 14 and the APA to enjoin the unlawful termination of individuals’ DACA and work
 15 authorization. *See* Arreola PI Order, Dkt. 31, at 4-8; Class PI Order, Dkt. 61, at 22-
 16 26; *see also* Arreola PI Reply, Dkt. 25, at 2-11.⁵ The same reasoning applies on this
 17 motion to dismiss, in which Defendants’ argument is copied nearly verbatim from
 18 their opposition to the Plaintiffs’ motion for a classwide preliminary injunction.
 19 *Compare* Class PI Opp., Dkt. 54, at 6-13, *with* Mot. at 8-15. The Court need not once
 20 again explain why these identical arguments are incorrect.

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

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

1 terminations did not arise out of [the decision to initiate removal proceedings].” Mot.
2 at 4. But as this Court twice explained, and multiple courts have agreed, class
3 members are “challeng[ing] neither the issuance of NTAs nor the [government’s]
4 decision to commence removal proceedings,” but instead “USCIS’s separate and
5 independent decision to revoke [their] DACA *on the basis of an NTA*, which is
6 independent of the limited category of decisions covered by § 1252(g).” Class PI
7 Order, Dkt. 61, at 24; *see also* Arreola PI Order, Dkt. 31, at 6; *accord* Arreola PI
8 Reply at 2-6; *Ramirez Medina v. DHS*, No. 17-cv-0218, 2017 WL 5176720, at *6-7
9 (W.D. Wash. Nov. 8, 2017); *Gonzalez Torres v. DHS*, No. 17-cv-1840, 2017 WL
10 4340385, at *4 (S.D. Cal. Sept. 29, 2017); *Colotl v. Kelly*, 261 F. Supp. 3d 1328,
11 1338-40 (N.D. Ga. 2017).

12 The Court was also correct to hold that in any event, § 1252(g) does not bar
13 review of legal questions related to discretionary decisions, and that Plaintiffs’ claims
14 are therefore reviewable on that basis. Class PI Order, Dkt. 61, at 24-25; Arreola PI
15 Order, Dkt. 31, at 6. Defendants do not contest that such legal questions are
16 reviewable, but instead mischaracterize Plaintiffs’ claims as seeking to require the
17 agency to exercise its discretion not to terminate DACA. Mot. at 15 n.9. But as this
18 Court found and Plaintiffs have explained, Plaintiffs seek review not of USCIS’s
19 ultimate exercise of discretion to grant or deny DACA, but rather of the agency’s
20 compliance with its own rules, the APA, and due process. *Compare id. with* Class PI
21 Order, Dkt. 61, at 25; Arreola PI Order, Dkt. 31, at 6; *accord* Arreola PI Reply, Dkt.
22 25, at 1.

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

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

10 Finally, Defendants argue once again that USCIS need not provide notice or
11 process in terminating DACA because the decision is “committed to agency discretion
12 by law.” 5 U.S.C. § 701(a)(2); *see also* Mot. 13-15. But again, Defendants simply
13 ignore this Court’s prior decision and the controlling Ninth Circuit cases, which rely
14 on the established proposition that review is available where “discretion has been
15 legally circumscribed by various memoranda.” Class PI Order, Dkt. 61, at 23;
16 Arreola PI Order, Dkt. 31, at 4 (quoting *Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir.
17 2004)); *accord* Arreola PI Reply, Dkt. 25, at 9-11; *Ramirez Medina*, 2017 WL
18 5176720, at *8; *Colotl*, 261 F. Supp. 3d at 1340-41. As this Court correctly held,
19 “[h]ere, the decision to revoke DACA is governed by both the Napolitano Memo and
20 the DACA SOPs.” Class PI Order, Dkt. 61, at 23; Arreola PI Order, Dkt. 31, at 4.
21 Review is therefore available under those authorities, the APA, and the Constitution.

22 **III. PLAINTIFFS HAVE STATED A CLAIM UNDER THE APA.**

23 Defendants repeat, verbatim, their arguments that USCIS may automatically
24 terminate DACA on the basis of an NTA charging unlawful presence. *Compare* Mot.
25 19-23 *with* Class PI Opp., Dkt. 54, at 18-22. This Court has already rejected precisely
26 the same arguments twice. *See* Class PI Order, Dkt. 61, at 26-31; Arreola PI Order,
27
28

1 Dkt. 31, at 8-13.⁶ It should do so again here for the same reasons.

2 **IV. PLAINTIFFS HAVE STATED A PROCEDURAL DUE PROCESS**
3 **CLAIM.**

4 As explained above, the Court need not reach Plaintiffs’ due process claim
5 because it may grant permanent relief—and has already granted preliminary relief—
6 on the basis of Plaintiffs’ APA claims. If the court does reach those claims, however,
7 it should reject Defendants’ arguments, which fail to address Plaintiffs’ central
8 contentions. That procedural due process argument is based on a controlling line of
9 cases holding that, even absent a claim of entitlement to an important benefit, once it
10 is *conferred*, recipients have a protected property interest that requires a fair process
11 before the government may take that benefit away. *See* Class PI Mot., Dkt. 40, at 17
12 (citing, *inter alia*, *Bell v. Burson*, 402 U.S. 535, 539 (1971)); *see also* Class PI Reply,
13 Dkt. 58, at 9-11; Arreola PI Mot., Dkt. 16-2, at 18-21; Arreola PI Reply, Dkt. 25, at
14 19-21.⁷ Thus, even though DACA is ultimately discretionary, *once granted*, the
15 government cannot take it away without due process.

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

21 The government further argues that the DACA guidance does not give rise to a
22 protected property interest, *see* Mot. 16-18, but again this argument is a straw man.
23 The Plaintiffs do not argue that the DACA program itself establishes a protected
24 interest. Instead, they argue only that, having previously granted them DACA, the
25

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

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

1 government may not strip them of it without a fair procedure. Class PI Mot., Dkt. 40,
2 at 16-19. Defendants’ remaining arguments likewise miss the mark. The Plaintiffs do
3 not premise their claim on a substantive “right to work in the United States,” nor have
4 they alleged a “right to DACA.” Mot. at 16-17.⁸

5 Finally, Defendants do not even attempt to suggest that their actions satisfy due
6 process. Indeed, they could not since—as they concede, *see* Class PI Opp., Dkt. 54, at
7 2-3—their policy allows them to strip Plaintiffs of DACA without any process
8 whatsoever. This is especially true given that USCIS *already* provides a procedure
9 whereby DACA recipients are afforded a reasoned explanation for its actions and an
10 opportunity to present arguments and evidence. *See* Class PI Mot., Dkt. 40, at 19. In
11 sum, the termination of Plaintiffs’ DACA and EADs in the absence of a fair process
12 violates their procedural due process rights.

13 **CONCLUSION**

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

15 Dated: March 26, 2018

Respectfully submitted,

16
17 /s/ David Hausman
David Hausman
18 Jennifer Chang Newell

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

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