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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

INLAND EMPIRE – IMMIGRANT YOUTH COLLECTIVE, *et al*., on behalf of themselves and others similarly situated, Plaintiffs, v. KIRSTJEN NIELSEN, Secretary, U.S. Department of Homeland Security, *et al*., Defendants.	Case No. 5:17-cv-02048-PSG-SHK **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** DATE: February 5, 2018 TIME: 1:30 p.m. JUDGE: Philip S. Gutierrez Courtroom: 6A

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INTRODUCTION

Plaintiffs propose a mandatory, nationwide class of individuals who have had, or who will have, their Deferred Action for Childhood Arrivals ("DACA") grant terminated without advanced notice and an opportunity to respond even though no regulation or policy requires such notice, nor does any regulation or policy limit Defendants from withdrawing putative class members' DACA by the procedures they challenge. The effect of such an injunction would be to prevent DACA from being promptly rescinded when removal proceedings are initiated, a state of affairs that turns immigration law – where enforcement action is only *deferred* until enforcement action *commences* – on its head. It would create a court-imposed obstacle to immigration enforcement where Congress has spoken clearly and instructed Courts to stay their hand until removal proceedings have been concluded. Such an order would be inconsistent with the law, and Plaintiffs' request should be rejected.

Defendants ask this Court to deny Plaintiffs' motion for class certification for failure to meet the requirements of Federal Rules of Civil Procedure 23(a) and (b). First, Plaintiffs assert an overbroad class and fail to meet the numerosity or commonality requirements, because the class definition unnecessarily seeks nationwide certification and relies on faulty legal and factual premises. Second, the three named Plaintiffs were all arrested committing crimes, subsequently determined to be enforcement priorities, and issued NTAs that had the effect of terminating their DACA and employment authorizations automatically. Their claims are in no way representative of this proposed class of individuals plaintiffs assert had or will have their DACA terminated despite no "disqualifying conduct," rendering class certification impossible. Third, relatedly, the facts underlying each putative plaintiff's situation require individualized analysis, disqualifying their claims from class treatment.

BACKGROUND

On December 21, 2017, Plaintiffs filed an amended complaint claiming Defendants "have targeted numerous DACA recipients and unlawfully revoked the grants

of deferred action and work permits they have received even though these individuals have abided by all the program rules and have not engaged in any conduct that would disqualify them from the program." Amended Complaint, Dkt. No. 32 at 3. Plaintiffs moved to certify a class they define as follows:

> All recipients of Deferred Action for Childhood Arrivals ("DACA") who, after January 19, 2017, have had or will have their DACA grant and employment authorization revoked without notice or an opportunity to respond, even though they have not been convicted of a disqualifying criminal offense.

Class Cert. Motion, Dkt. No. 39 at 3; *see also* Dkt. No. 39-1 at 9 n.2 ("This motion does not address the proposed 'Enforcement Priority' Class pled in Plaintiffs' Amended Complaint.").

Plaintiff Arreola had his DACA and EAD terminated automatically through the issuance of an NTA, after U.S. Customs and Border Protection ("CBP") encountered him engaged in alien smuggling, the facts of which he conceded to in an interview with CBP agents. *See* Dkt. 23-2 at 26, 56-57. Mr. Arreola's DACA and EAD were then reinstated on November 22, 2017, and on December 20, 2017, DHS issued a Notice of Intent to Terminate pursuant to this Court's Order. *See* Dkt. No. 31; Dkt. No. 32 at ¶ 87.

Named Plaintiffs Gil Robles and De Souza Moreira were found to be enforcement priorities upon investigation by ICE, following plaintiffs' respective arrests for felony crimes. *See* Exhibits A, Decl. of Jeremy Anderson; A.1, Gil-Robles Notice to Appear ("NTA") and Form I-213, dated Oct. 23, 2017; B, Decl. of Derrick A. Eleazer; B.1, De Souza-Moreira NTA and Form I-213, dated Nov. 5, 2017. On September 20, 2017, Plaintiff Gil-Robles was arrested and charged with two felonies, including First Degree Assault and transferring a firearm without a background check to a prohibited person. *See* Exhibit A. On Nov. 6, 2017, ICE issued Gil-Robles an NTA charging him with unlawful presence, and on Nov. 14, 2017, USCIS issued him a Notice of Action, stating his DACA and EAD terminated automatically with the NTA. Dkt. No. 32 at ¶ 109.

On November 3, 2017, Plaintiff De Souza was arrested for Forgery in the First Degree, a felony.[1] Exhibit B. Plaintiff admitted to police that he had altered the expiration date on his driver's license due to it expiring. *Id*. On November 5, 2017, ICE issued De Souza an NTA charging unlawful presence, and on November 10, 2017, USCIS issued him a Notice of Action explaining his DACA and EAD terminated automatically with the NTA. *Id.*; Dkt. No. 32 at ¶ 129.

Contrary to Plaintiffs' allegations, the DHS law enforcement officers who issued each Plaintiffs' NTA relied on the criminal conduct described herein, and were also aware of Plaintiffs' previous DACA grants. *See* Exhibits A, B; Dkt. No 23-2 at 34, 62. As explained below, the decision to charge only unlawful presence on their respective NTAs is not indicative of the full reasoning DHS employed to issue the NTAs.

Putative class member Jessica Colotl, Dkt. No. 39-13, Eiland Decl., at ¶ 7, is not subject to DACA termination. Rather, following the issuance of a preliminary injunction in her case, USCIS reinstated her previous DACA grant, which subsequently expired. USCIS denied Ms. Colotl's DACA renewal request after providing her with notice of its intent to do so, and an opportunity to respond. *See Colotl v. Kelly*, No. 1:17-CV-1670-MHC (N.D. Ga.) at Dkt. No. 50-2.

Putative class member Felipe Abonza Lopez, had his DACA terminated automatically through the issuance of an NTA after CBP encountered him engaged in alien smuggling. Dkt. No. 39-13 at ¶ 11; *see* 2011 NTA Memo, Dkt. No. 16-25, at 4-5 (classifying an alien who engages in an "offense relating to alien smuggling" as a "top immigration enforcement priority").[2]

[1] Plaintiffs incorrectly assert that Plaintiff De Souza was arrested for "possession of an altered identification document—a misdemeanor." Dkt. No. 40-1 at 12.

[2] In their motions for class certification and class-wide preliminary injunction and supporting briefs [Dkt. Nos. 39, 39-1, and 40, 40-1], Plaintiffs cite to the exhibits they previously filed with their first motion for injunctive relief [Dkt. Nos. 16, 16-2 and 16-4 (Kwon Decl.) to 16-29]. For the sake of judicial efficiency, Defendants do the same in their response briefs to both motions.

Putative class member Daniel Ramirez Medina, Dkt. No. 39-13 at ¶ 13, had his DACA terminated automatically after DHS issued him an NTA based on statements he made indicating gang affiliation. *See* Exhibit C, Decl. of Michael A. Melendez at ¶¶ 4-5; Dkt. No. 16-25 at 4-5 (classifying a "known or suspected street gang member" as a "top immigration enforcement priority"). Of the remaining seven proposed class members, two of them have not had their DACA terminated at all. Dkt. No. 39-13 at ¶¶ 14-15.

SUMMARY OF THE ARGUMENT

As an initial matter, the Court should deny Plaintiffs' motion for class certification to the extent that Plaintiffs' claims are subject to dismissal. Congress enacted 8 U.S.C. § 1252(g) with the specific intent of preventing judicial review of the Department of Homeland Security's ("DHS") prosecutorial discretion to decide whether and when to initiate removal proceedings, as well as actions and decisions that arise out of that decision.[3] Congress also mandated through 8 U.S.C. §§ 1252(a)(5) and (b)(9) a single opportunity in a court of appeals for individuals to challenge their removal orders, including claims of constitutional violations arising from the initiation of or conduct of their removal proceedings. Any interpretation of these statutes that permits a district court challenge to actions inextricably linked to the initiation of removal proceedings, such as Plaintiffs' challenge here, would run counter to Congress's intent, to Supreme Court case law, and to the law of this Circuit.

Even if the Court believes that it would have jurisdiction over Plaintiffs' claims, it should nonetheless deny the motion for class certification where Plaintiffs fail to meet any of the requirements of Fed. R. Civ. P. 23(a) or (b)(2). To begin with, Plaintiffs offer an overbroad definition of their putative class based on an incorrect understanding of DACA policy, such that it captures many DACA terminations not requiring any notice or

[3] Plaintiffs imply at least some of their class members have or will have lost DACA and EADs automatically without the issuance of an NTA, but fail to identify any examples or offer any argument in support of such a possible class member. Regardless, all three named plaintiffs' DACA was terminated as a consequence of NTA issuance based on criminal conduct, so there is no class representative for an individual whose DACA was terminated for some reason other than an NTA issuance based on criminal conduct.

opportunity to respond, while also carving out a significant subcategory of DACA terminations based on DHS finding an individual to be an enforcement priority. *See* Pls.' Mem. in Supp. of Class Certification, Dkt. No. 39-1 at 9 n.2 ("This motion does not address the proposed 'Enforcement Priority' Class pled in Plaintiffs' Amended Complaint, filed this same date."). Because the enforcement priority exception would exclude all three of the named plaintiffs, and likely most of the unnamed potential class members; and because any relief a potential class member may be entitled to differs depending on an individual analysis of the facts and law pertaining to their DACA terminations, Plaintiffs fail to meet the numerosity, commonality, typicality, or adequacy of representation requirements of Fed. R. Civ. P. 23(a) or (b)(2). For these reasons, class certification should be denied.

ARGUMENT

I. Standard of Review for Class Certification

Courts should take great care in determining whether to certify a class, especially a nationwide class against the federal government. Although the Supreme Court declined to adopt a blanket prohibition on such classes, it cautioned that "a federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts." *Califano v. Yamasaki*, 442 U.S. 682, 702-03 (1979). The Court further acknowledged "the force of the [government's] contentions that nationwide class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges, and of increasing, in certain cases, the pressures on this Court's docket." *Id*. at 702; *see also United States v. Mendoza*, 464 U.S. 154, 160 (1984) ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."). Other class challenges to immigration policies in this Court have decidedly not sought the certification of a nationwide class. *See, e.g., Franco-Gonzales v. Napolitano*, No. CV 10-

02211 DMG DTBX, 2011 WL 11705815, at *1 (C.D. Cal. Nov. 21, 2011); *Rodriguez v. Hayes*, 591 F.3d 1105, 1111 (9th Cir. 2010).

A party seeking certification of a proposed class must demonstrate the existence of the four required elements set forth in Rule 23(a) of the Federal Rules of Civil Procedure. Specifically, the moving party must show that:

> (1) the class is so numerous that joinder of all members is impracticable ("numerosity");
> (2) there are questions of law or fact common to the class ("commonality");
> (3) the claims or defenses of the named plaintiffs are typical of claims or defenses of the class ("typicality"); and
> (4) the named plaintiffs will fairly and adequately protect the interests of the class ("adequacy of representation").

See Fed. R. Civ. P. 23(a); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011) ("Class certification is governed by Federal Rule of Civil Procedure 23."). In addition to meeting the requirements set forth in Rule 23(a), the proposed class must also qualify under Rule 23(b)(1), (2), or (3). *Dukes*, 564 U.S. at 345; *see also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Plaintiffs seek certification under Rule 23(b)(2). Dkt. No. 17 at 25-29. Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds that generally apply to the class." Fed. R. Civ. P. 23(b)(2). The "key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Id.* at 360 (citation omitted).

The party seeking class certification bears the burden of proof to demonstrate that it has met all four Rule 23(a) prerequisites and that the class lawsuit falls within one of the three types of actions permitted under Rule 23(b). *Zinser*, 253 F.3d at 1186. Moreover, a complaint's failure to meet "*any one* of Rule 23's requirements destroys the alleged class action." *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975) (emphasis added). The Supreme Court has held that "actual, not presumed, conformance with Rule 23(a) [is] indispensable." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147,

160 (1982); *Zinser*, 253 F.3d at 350 (Rule 23 "does not set forth a mere pleading standard."). A court should only certify a class "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Zinser*, 253 F.3d at 350-51 (internal quotation omitted).

A district court, therefore, must conduct a rigorous analysis to determine that an action meets all the requirements of Rule 23. *Gen. Tel. Co.*, 457 U.S. at 161. Even if a court finds that an action meets all of Rule 23's requirements, that court retains "broad discretion" to determine whether it *should* certify the proposed class. *Zinser*, 253 F.3d at 1186. Toward that end, a court may "probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co.*, 457 U.S. at 160. This is because "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* (internal quotation omitted). Nonetheless, the ultimate decision regarding class certification must necessarily "involve[] a significant element of discretion." *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1090 (9th Cir. 2010).

II. Deferred Action and the DACA Policy

A. The Notice to Appear process

The Immigration and Nationality Act ("INA") charges the Secretary of Homeland Security "with the administration and enforcement" of the INA and "all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1). Individuals are removable if, *inter alia*, "they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012); *see* 8 U.S.C. §§ 1182(a), 1227(a). The issuance of a Notice to Appear ("NTA") is a necessary predicate step to commencing removal proceedings. *See* 8 U.S.C. § 1229(a); 8 C.F.R. § 1003.14(a). The authority to issue an NTA is vested with all DHS immigration officers. *See* 8 C.F.R. § 239.1(a). However, DHS divides NTA issuance responsibility between U.S. Citizenship and Immigration Services ("USCIS") in its administrative capacity, and U.S. Immigration and

Customs Enforcement ("ICE") and U.S. Customs and Border Protection ("CBP") in their law enforcement capacities. *See* Dkt. No 16-25, USCIS Memorandum: Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens, ("NTA Memo") dated Nov. 7, 2011. In adjudicating applications for immigration benefits, USCIS is authorized to issue an NTA in cases where a statute or regulation requires it, such as in the termination of Conditional Permanent Resident Status or the termination of refugee status; or where "a Statement of Findings ("SOF") substantiating fraud" is part of the individual's record. *Id*. at 3-4.

In *any* case where USCIS has "information indicat[ing an individual] is under investigation for, has been arrested for (without disposition), or has been convicted of" a crime, whether defined as an Egregious Public Safety ("EPS") case or not, USCIS is required to refer the case to ICE. *Id*. at 5 ("All EPS cases must be referred to ICE . . . ."); *id*. at 6 ("[F]or a criminal offense not included on the EPS list, USCIS will complete the adjudication and then refer the case to ICE."). The memo is clear: "USCIS *will not* issue an NTA in these cases if ICE declines to issue an NTA." *Id*. at 5 and 6 (emphasis added); *see id*. at 2 ("USCIS must ensure that its issuance of NTAs fits within and supports the Government's overall removal priorities . . . .").

B. Deferred Action

The federal government cannot practicably remove every removable alien. Rather, "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 132 S. Ct. at 2499. DHS, "as an initial matter, must decide whether it makes sense to pursue removal at all." *Id*. "At each stage the Executive has discretion to abandon the endeavor." *Reno v. Am.-Arab Anti-Discrimination Comm*., 525 U.S. 471, 483 (1999) ("*AADC*"). As with other agencies exercising enforcement discretion, DHS must balance a number of factors within its expertise. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Deferred action is "a regular practice" in which the Secretary exercises her discretion "for humanitarian reasons or simply for [her] own convenience," to notify an

alien of a non-binding decision to forbear from seeking his removal for a designated period. *See AADC*, 525 U.S. at 483-84; 8 C.F.R. § 274a.12(c)(14) ("an act of administrative convenience to the government which gives some cases lower priority"). Through "[t]his commendable exercise in administrative discretion, developed without express statutory authorization," *AADC*, 525 U.S. at 484 (citations omitted), a removable individual may remain present in the United States so long as DHS continues to forbear, but always at the discretion of the Secretary.

It is important to note, of course, that deferred action does not confer lawful immigration status or provide any defense to removal. *Cf. Chaudhry v. Holder*, 705 F.3d 289, 292 (7th Cir. 2013) (discussing the difference between "unlawful presence" and "unlawful status" as two distinct concepts). An individual with deferred action remains removable at any time, and DHS never surrenders or otherwise loses the discretion to revoke deferred action unilaterally. *See AADC*, 525 U.S. at 484-85.

On June 15, 2012, DHS issued a memorandum entitled, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (the "Napolitano Memo"). *See* Pl. Exhibit 9, Dkt. No. 16-13. That memorandum outlines a policy known as Deferred Action for Childhood Arrivals ("DACA") that is available to a certain subset of individuals unlawfully present in this country. The Napolitano Memo recognizes both USCIS and ICE authority to grant DACA. *Id*. at 4 ("For individuals who are granted deferred action by either ICE or USCIS . . . ."). The memo also clarifies that DACA "confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights." *Id*. at 3. Conversely, the Napolitano Memo does not address the topics of arrest by DHS or the grounds that DHS will consider in terminating deferred action. Rather, it directs ICE and CBP agents to "immediately exercise their discretion, on an individual basis" to determine whether to issue an NTA or defer action, without reference to whether an individual already has deferred action. *Id*. ("With respect to individuals who meet the above criteria, ICE and CBP should immediately exercise their discretion, on an

individual basis, in order to prevent low priority individuals from being placed into removal proceedings."). Thus, CBP or ICE have discretion to issue an NTA if the facts and circumstances available at the time an individual is encountered counsel against the continuation of deferred action, including where there is a criminal offense or public safety concern presented. *Id.*; *see Regents of Univ. of California v. United States Dep't of Homeland Sec*. ("*Regents*"), No. C 17-05211 WHA, 2018 WL 339144, at *27-28 (N.D. Cal. Jan. 9, 2018) ("Nothing in this order [enjoining termination of DACA policy] prohibits the agency from proceeding to remove any individual, including any DACA enrollee, who it determines poses a risk to national security or public safety, or otherwise deserves, in its judgment, to be removed."); *Arpaio v. Obama*, 797 F.3d 11, 16, 24 (D.C. Cir. 2015) ("Even after they are approved for deferred action . . . beneficiaries are subject to the Department's overall enforcement priorities"), *cert. denied*, 136 S. Ct. 900, (2016), *reh'g denied*, 136 S. Ct. 1250 (2016).

In mid-August 2012, USCIS published on its website a webpage entitled, "Frequently Asked Questions," which is now archived on the USCIS webpage.[4] *See* Pl. Exhibit 19, Dkt. No. 16-23. These FAQs provide guidance on the DACA policy and state, "DACA is an exercise of prosecutorial discretion and deferred action may be terminated at any time, with or without a Notice of Intent to Terminate, at DHS's discretion." *Id*. at Q:27. The FAQs also explain that the phrase "national security or public safety threat" includes but is not limited to "gang membership, participation in criminal activities, or participation in activities that threaten the United States." *See id.* at Q:65. The Form I-821D, entitled, "Instructions for Consideration of Deferred Action for Childhood Arrivals" states, "[i]ndividuals who receive deferred action will not be placed into removal proceedings or removed from the United States for a specified period of time, unless the Department of Homeland Security (DHS) chooses to terminate the deferral." *See* Form I-821D Instructions, Dkt. No. 23-2 at 4.

DACA, as a form of deferred action, confers the ability to apply for an

[4] Available at https://www.uscis.gov/archive/frequently-asked-questions (last visited Jan. 30, 2018).

employment authorization document ("EAD") which may be granted upon a showing of economic necessity for employment. *See* 8 C.F.R. § 274a.12(c)(14). While regulations provide for automatic and largely unconditional employment authorization for some individuals with a legal status, such as legal permanent residents and some temporary visa holders, *see* 8 C.F.R. § 274a.12(a)-(b), individuals with no lawful status, including those with any form of deferred action, must apply for temporary and conditional employment authorization. 8 C.F.R. § 274a.12(c). Regulations also provide that employment authorization granted under subsection (c) is automatically terminated, without notice, upon the institution of removal proceedings. 8 C.F.R. § 274a.14(a)(1)(ii).

Through an internal USCIS guidance document entitled the "National Standard Operating Procedures (SOP); Deferred Action for Childhood Arrivals (DACA)," USCIS has provided officers in the Service Center Operations directorate with procedural guidance for terminating deferred action in three circumstances, one of which includes issuing a Notice of Intent to Terminate ("NOIT") and providing a chance for a DACA recipient to respond, and two in which such notice and an opportunity to respond is not required, including when the individual is served with an NTA. *See* Pl. Exhibit 20, National Standard Operating Procedures, Deferred Action for Childhood Arrivals ("DACA SOP") dated Aug. 28, 2013, Dkt. No. 16-24 at 37-39; *id*. at 41-44, Appendix I.

Nothing in the Napolitano Memo limits CBP or ICE from exercising their authority to issue an NTA to an individual with DACA. Rather, pursuant to the DACA SOP and Appendix I, and in conjunction with the NTA Memo, when USCIS discovers certain conduct that suggests DACA should be terminated, USCIS should refer such conduct to ICE, who may issue an NTA that automatically terminates DACA, with no additional notice or opportunity to respond. *See* Dkt. No. 16-24 at 38-39. Logically, lawfully, and pursuant to the Napolitano Memo, where an ICE or CBP officer encounters an individual engaged in criminal behavior, the officer may issue an NTA or defer action without consulting with USCIS, who in any event would be required to refer the case back to ICE to decide whether to issue an NTA – creating an absurd circular result.

Thus, USCIS's only role in a case where ICE or CBP issues an NTA is to issue a "Notice of Action" to the individual, informing him or her that deferred action under DACA and his or her EAD automatically terminated as of the date the NTA was issued. *Id.* at 42. This "Notice of Action" serves only as an administrative notice. USCIS, through the Notice of Action, does not "decide" to terminate DACA or the EAD, which are likely already terminated by the time USCIS becomes involved.

Analogously, the DACA SOP provides that if a DACA requestor is in immigration detention and ICE intends to release the individual, USCIS will deny the DACA request if ICE notifies USCIS that the requestor is an enforcement priority. *See* Exhibit D, Decl. of Brandon M. Robinson; D.1, DACA SOP, Chapter 8, dated August 28, 2013, at 47-49.[5] In those cases, and in conjunction with the 2011 NTA Memo and the Napolitano Memo, USCIS makes no further examination of the reason for detention or for the basis of the initiation of removal proceedings. *Id*. USCIS may "discuss" its disagreement with ICE, but the SOP does not say that USCIS may override ICE's determination. *Id*. at 48. Additionally, if USCIS refers a non-detained DACA requestor to ICE as an EPS case and ICE declines to act, USCIS is required to deny the DACA request. *Id*. at 49. In both cases, the individual is provided no additional reasons for the denial, nor a notice of intent to deny, nor an opportunity to respond.

On September 5, 2017, DHS announced a plan to end the DACA policy in an orderly fashion. *See* Pl. Exhibit 14, "Memorandum on Rescission of Deferred Action for Child Arrivals" from Elaine C. Duke, dated Sept. 5, 2017 ("Duke Memo"), Dkt. No. 16-18. The memorandum, *inter alia,* provides that DHS will "adjudicate – on an individual, case by case basis – properly filed pending DACA renewal requests and associated applications for Employment Authorization Documents . . . from *current* beneficiaries whose benefits will expire between the date of this memorandum and March 5, 2018 that have been accepted by the Department as of October 5, 2017." *Id*. (emphasis added). On

[5] Exhibit D.1 is an updated and more complete version of the DACA SOP Chapter 8, including sections excluded by Plaintiffs' Exhibit 16-24, at 7-28 ("Determining if Guidelines are Met"), and 42-54 ("Evaluating Issues of Criminality, Public Safety, and National Security").

Jan. 9, 2018, the court in *Regents*, ordered a preliminary injunction requiring USCIS to receive and adjudicate DACA requests from individuals who previously received DACA. *See Regents*, 2018 WL 339144 at *27-28. USCIS issued guidance thereafter that allows, in part, individuals who previously received DACA and whose DACA expired on or after Sept. 5, 2017 to file a DACA renewal request, and individuals who previously received DACA which expired before Sept. 5, 2016 or whose DACA was previously terminated to submit an initial DACA request.[6]

III. This Court must deny class certification because Plaintiffs fail to satisfy the requirements of Fed. R. of Civ. P. 23(b)(2).

Plaintiffs cannot demonstrate that "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," thus the Court should find Plaintiffs cannot meet the requirements of Fed. R. Civ. P. 23(b)(2) and deny certification. *Dukes*, 564 U.S. at 360; *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (Rule 23(b)(2) requires the court "only to look at whether class members seek uniform relief from a practice applicable to all of them.").

Class certification will fail under Rule 23(b)(2) if a class definition is overbroad.[7] Not only must the challenged practice apply to all class members, but it must be readily ascertainable that the practice has injured every member. *Santos v. TWC Admin. LLC*, No. CV1304799MMMCWX, 2014 WL 12558009, at *11 (C.D. Cal. Aug. 4, 2014) (collecting cases); *Colapinto*, 2011 WL 913251 at *4 ("Plaintiffs fail to define an ascertainable class because Plaintiffs' proposed class definition includes members who

[6] Available at https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction (last visited Jan. 30, 2018).

[7] The overbroad analysis applies in overlapping contexts under Rules 23(a) and 23(b)(3), either of which will also prevent class certification if not met. *See Dukes*, 564 U.S. at 345; *Colapinto v. Esquire Deposition Servs., LLC*, No. CV 09-07584 SJO PLAX, 2011 WL 913251, at *4 (C.D. Cal. Mar. 8, 2011) (denying class under Rule 23(a) where ascertaining numerosity was impeded by a class definition that included uninjured members); *Flores v. CVS Pharmacy, Inc.*, No. 2:07-CV-05326-JHN-EX, 2010 WL 3656807, at *7 (C.D. Cal. Sept. 7, 2010) (denying Rule 23(b)(3) class as overbroad where it would be necessary "to conduct mini-trials to separate the class members from non-class members."), *aff'd sub nom. Flores v. Supervalu, Inc.*, 509 F. App'x 593 (9th Cir. 2013). Plaintiffs' definition is overbroad in all three contexts.

are unharmed."); *Flores*, 2010 WL 3656807 at *7 ("Plaintiff has not identified a single case in which a court certified an overbroad class that included both injured and uninjured parties.").

Class certification is also inappropriate where "individualized factual inquiries would dominate." *Id*. at *7. Where the issues contributing to the alleged injury "are contingent on a number of human factors and individual idiosyncrasies and have little to do with an overarching policy [. . .] common issues do not predominate. *Id*., citing *Forrand v. Federal Exp. Corp.*, No. CV 08-1360 DSF (PJWx), 2009 WL 648966, at *3 (C.D. Cal. Feb. 18, 2009) (class certification denied where "Plaintiffs fail to propose a method of common proof that would show that FedEx's policies prevent more than 21,000 class members from taking meal and rest breaks").

Plaintiffs' proposed class captures individuals for whom it is necessary to analyze their claims on a case by case basis to determine whether they have similarly been impacted by the policy challenged by the putative class. *See Forrand*, 2009 WL 648966, at *3 (denying class certification for employees claiming FedEx prevented them from taking meal breaks because it would have had to determine not just whether an employee did not take breaks, but the reasons why). Plaintiffs define their class as all DACA recipients who have had their DACA terminated without advanced notice or an opportunity to respond, and "without a disqualifying criminal conviction." Dkt. No. 39 at 3; *see also* Dkt. No. 32 (asserting the requirement to terminate DACA is a "disqualifying criminal conviction"). Additionally, Plaintiffs carve out of that proposed group individuals who had their DACA terminated without notice due to DHS's determination that the individual is an enforcement priority. Dkt. No. 39 at 9 n.2.[8]

[8] Plaintiffs misapply the term "enforcement priority" to distinguish a sub-class of individuals who received an NTA and are no longer "eligible" for DACA, from those who received an NTA but remain "eligible" for DACA. *See, e.g.*, Dkt. No. 32 at 21 ("Defendants' decision to terminate DACA based on the conclusion that the individual is an enforcement priority even though he remains eligible for DACA violates the rules for the DACA program"). In reality, DHS considers every individual it issues an NTA to an enforcement priority. Further, Plaintiffs point out the obvious sticking point that contradicts their claim that DHS is applying stricter enforcement priority definitions to target DACA grantees:

This definition does not in itself identify an injury common to the putative class, because DACA policy provides for automatic termination in several scenarios, regardless of a criminal conviction. In addition to Defendants' position that an NTA issued by ICE and CBP works to automatically terminate DACA, DACA also terminates automatically if a DACA recipient travels outside the United States on or after August 15, 2012 without first receiving advance parole. Dkt. No. 16-23 at Q57. Additionally, DACA may also be terminated without advanced notice and an opportunity to respond when DHS deems a DACA recipient an enforcement priority or when USCIS finds that a person is an EPS concern but ICE declines to issue an NTA. *See* Dkt. No 16-24 at 39. Conversely, the DACA SOP provides that USCIS should notify an individual of its intent to terminate DACA and provide an opportunity to respond to intended DACA termination when USCIS believes there was error in the DACA grant, the requestor committed fraud in seeking DACA, or when subsequent criminal activity comes to USCIS's attention that is not EPS or if ICE does not accept the case, and the circumstances require additional information to resolve USCIS's concerns. Dkt. No. 16-24 at 38-39.

The Court here would have to determine not just that an individual's DACA was terminated without advance notice and an opportunity to respond, but the reason why no advance notice and opportunity to respond was provided, and what process was followed prior to termination. Such mini-trials of each DACA termination makes class certification impractical and underscores the inappropriateness of adding an additional layer of process that Congress explicitly precluded – process that is entirely outside of the

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> "Among other things, applying DHS' new enforcement priorities to DACA recipients would eviscerate the DACA program because DACA recipients by definition lack a lawful immigration status, and a large number of them have engaged in activities related to their lack of status—such as entering the country without authorization or driving without a license—that would make them an immigration enforcement priority were the Memorandum to apply to them."

Dkt. No. 32 at 40. Relying on a proposed class where the named plaintiffs were all issued NTAs as a result of their criminal conduct fails to demonstrate how DHS is implementing one set of enforcement priorities or another, or that DHS is "targeting" DACA grantees. *See* Dkt. No. 32 at ¶¶ 8, 138, 146, 160; Dkt. No. 39-1 at 15, 16, 18.

established removal proceeding process. Similarly, Plaintiffs indicate only that putative class members lost DACA despite having no "disqualifying criminal convictions," which is insufficient to determine whether each individual was an enforcement priority, received some sort of process, or whether the DACA SOP provides for process prior to termination in their cases. Rather, given the nature of the proposed class and the limited facts provided by Plaintiffs, each claim would have to be assessed individually – which counsels against class certification. *Flores*, 2010 WL 3656807 at *5. As explained above, even a cursory review of Plaintiffs' proposed putative class members identifies the problem with Plaintiffs' class. Here, numerous of the putative class members identified by Plaintiffs can claim no injury, and Rule 23(b)(2) requires that the challenged practice result in a readily ascertainable injury to every member. Were the Court to grant the class that Plaintiffs seek, countless individuals could not receive relief for insufficient injuries. For example, putative class member Jessica Colotl, can no longer claim an injury based on the termination of her DACA because, following the issuance of a preliminary injunction in her case, USCIS denied her DACA renewal request after notice and an opportunity respond. Dkt. No. 39-13, Eiland Decl., at ¶ 7. Relatedly, at least two proposed class members (unnamed by Plaintiffs) have not had their DACA terminated at all. *Id*. at ¶ 15. Thus, Plaintiffs' class definition encompasses individuals who were not subject to the challenged policy, and therefore have not been injured. *Colapinto*, 2011 WL 913251 at *4.

Moreover, even under Plaintiffs' incorrect interpretation of the DACA SOP, automatic termination of DACA absent a criminal offense or criminal conviction does not necessarily violate the SOP. And the named Plaintiffs cannot dispute that their treatment – having their DACA terminated following arrest on criminal grounds that ICE has deemed enforcement priorities – distinguishes Defendants' treatment of their DACA terminations from its treatment of other putative class members. Even if the Court found that the automatic termination by NTA of Gil's and De Souza's DACA could be unlawful, there remain putative class members for whom the DACA SOP provides for

termination of DACA without notice, and even by NTA, following proscribed procedures. *See* Dkt. No. 16-24 at 37-39; *id*. at 41-44. This distinction clarifies that Plaintiffs cannot show that Defendants have acted consistently such that "a single injunction [could] protect all class members' . . . rights." *Saravia v. Sessions*, No. 17-CV-03615-VC, 2017 WL 5569838, at *23 (N.D. Cal. Nov. 20, 2017) (citing *Dukes*, 564 U.S. at 360). This Court must deny Plaintiffs' motion, therefore, because they have failed to meet their burden under Rule 23(b)(2).

IV. This Court must deny the motion for class certification because Plaintiffs fail to satisfy the requirements of Federal Rule of Civil Procedure 23(a).

A. The Proposed Class Lacks Numerosity.

To satisfy the numerosity requirement, Plaintiffs must show "that joinder of all members is impracticable.'" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (quoting Fed. R. Civ. P. 23(a)(1)). In their attempt to do so, Plaintiffs baldly state that '[t]he proposed class readily satisfies the requirements of numerosity . . . and is readily ascertainable." Dkt. No. 39-1 at 9. They specify that the proposed class includes "at least 17 DACA recipients who, in the last ten months alone, have had their DACA terminated without notice or process" and add, with no support, that the proposed class includes "likely many more individuals whose DACA already has been unlawfully terminated, which is sufficient to satisfy numerosity." *Id.* (citing *Ark. Educ. Ass'n v. Board Of Educ. of Portland, Ark. Sch. Dist.*, 446 F.2d 763, 765-66 (8th Cir. 1971); *Hum v. Dericks*, 162 F.R.D. 628, 634 (D. Haw. 1995). However, at least seven of the 17 individuals Plaintiffs assert belong in the class – including all named Plaintiffs – are not properly considered as members of the class Plaintiffs seek to certify. *See* Dkt. No. 39-13, Eiland Decl., at ¶¶ 3-15. As discussed above, the named plaintiffs are disqualified from representing the proposed group, while proposed class members Lopez and Ramirez were issued NTAs because of conduct rendering each a "top enforcement priority." *See* NTA Memo, Dkt. No. 16-25 at 4-5. At least two more of the remaining proposed class members have not had their DACA terminated, Dkt. No 39-13 at ¶ 15, and, absent an actionable injury, they are also not appropriate class members. *See Hodgers-Durgin v. de*

la Vina, 199 F.3d 1037, 1045 (9th Cir. 1999).

Of the remaining ten proposed class members, Plaintiffs indicate only that they are aware that these individuals lost DACA despite having no "disqualifying criminal convictions," which, as explained above, is insufficient to determine whether each individual received process or whether the DACA SOP provides for process prior to termination in their cases. Rather, given the nature of the proposed class and the limited facts provided by Plaintiffs, each claim would have to be assessed individually – which counsels against class certification. *Flores*, 2010 WL 3656807 at *5.

Notably, Plaintiffs cite no Ninth Circuit cases to support their claim that 17 – much less 10 – identified class members meet the numerosity requirement, which is understandable, as, "in general, courts find the numerosity requirement satisfied when a class includes at least 40 members." *Rannis v. Recchia*, 380 Fed. Appx. 646, 651 (9th Cir. 2010); *Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042, 1051 (9th Cir. 2003) ("The Supreme Court has held fifteen is too small. The certification of those classes must be vacated on numerosity grounds."), citing *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980); *Santos*, 2014 WL 12558009 at *11 ("As a general rule, [however,] classes of 20 are too small."). Instead, they assert that, because Plaintiffs' proposed class also includes individuals who will have their DACA terminated without notice or process, despite continuing to be eligible, if Defendants' policies and practices are not enjoined," the proposed class contains "[h]undreds of thousands of DACA recipients." Dkt. No. 33-1 at 18. This figure is utter speculation, however, and the Court should give it no credit.

Moreover, contrary to Plaintiffs' mistaken characterization, Defendants did not "represent[] that . . . identifying 'all automatic terminations of DACA would . . . involve a manual review of *hundreds* of cases.'" Dkt. No. 39-1 at 8 (Plaintiffs' emphasis). Defendants' actually stated that, in contrast to identifying 14 automatic DACA terminations based on the issuance of an NTA by ICE or CBP over five years, "[c]onducting a more fulsome *review of all automatic terminations* of DACA would be burdensome, because it would involve a manual review of hundreds of cases." Dkt. No.

23-2 at ¶ 5 (emphasis added). Far from supporting Plaintiffs' claim to a unified class of hundreds of individuals suffering the same harm, the statement demonstrates various avenues of automatic DACA termination for various reasons, very few of which on their surface correspond to the proposed class definition. There is no way to confirm, without individual analysis, whether an individual's automatic DACA termination would fit the proposed class, and, if so, whether that person would be entitled to the relief sought here.

Finally, although "the number of class members is the most important factor, the ultimate question concerns the practicability of their joinder." S. Gensler, Federal Rules of Civil Procedure, Rules and Commentary at 540 (2017). Plaintiffs have proffered no argument whatsoever to suggest that joinder of those affected by the Government's actions at issue in this case would not be practicable. Plaintiffs rely only on the "presence of . . . future class members" to argue that joinder is "inherently impracticable," Dkt. No. 33-1 at 19, however the various injuries that could be asserted by future members of Plaintiffs' proposed class – who may be impacted differently by Defendants' DACA termination policies and is a shrinking population given the wind down of the DACA policy – only demonstrates that joinder would not be appropriate, not that joinder is impracticable.

B. The Proposed Class Lacks Commonality.

As Plaintiffs note, commonality requires them to show that "there are questions of law or fact common to the class" (Dkt. No. 33-1 at 19, citing Fed. R. Civ. P. 23(a)(2)) and some courts have construed the commonality requirement "permissively." *Id*. (citing *Preap v. Johnson*, 303 F.R.D. 566, 585 (N.D. Cal. 2014), aff'd, 831 F.3d 1193 (9th Cir. 2016) (quoting *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1998)) (internal quotation marks omitted). Other courts, of course, have construed it more "rigorous[ly]." *See, e.g.*, *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512 (9th Cir. 2013) (citation omitted).

Here, however, Plaintiffs face two obstacles to meeting their burden to show commonality, which forecloses a finding of commonality under a permissive or rigorous

approach. First, the individualized analysis underlying each putative plaintiff's claim renders this action inapt for class consideration. It is not enough, as Plaintiffs proffer, to allege that they "have suffered the same injury." Dkt. No. 33-1 at 21. Rather, the Supreme Court has clarified that:

> [w]hat matters to class certification. . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate *common answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Dukes, 564 U.S. at 350 (emphasis added). Plaintiffs cannot plausibly argue that the Government is barred outright from terminating an individual's DACA. *See, e.g.*, Dkt. No. 16-24 at 37-39. Moreover, as applied here, Plaintiffs cannot dispute that DHS may determine before an individual's DACA expires that prosecutorial discretion is no longer warranted. *Id.* An individual whose conduct qualifies him or her as an "enforcement priority" may no longer merit a favorable exercise of prosecutorial discretion through continued receipt of deferred action under DACA, and such an individual would lack standing to challenge the termination of their DACA. *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 976 (9th Cir. 2017) ("the INA is replete with provisions that confer prosecutorial discretion on the Executive to establish its own enforcement priorities . . . . Third parties generally may not contest the exercise of this discretion.") (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). Finally, Plaintiffs are incorrect that DACA cannot be terminated without notice and an opportunity to respond outside of having a "disqualifying" criminal conviction. *See* Dkt. No. 16-24 at 37-39; Dkt. No. 16-23 at Q57. Determining whether an individual's DACA terminated because of the issuance of an NTA or because of some other discretionary decision would require precisely the type of individualized analysis the Supreme Court recognized could prevent a finding of commonality. *Dukes*, 564 U.S. at 350. Indeed, Plaintiffs' tortured effort to develop "sub-classes" to avoid the differing circumstances presented by those DACA

recipients who engage in criminal activity or who are enforcement priorities only underscores the lack of commonality here.

Further, the SOP describes the procedures USCIS should follow for USCIS to terminate DACA, but it does not void the effects of an NTA issued by ICE or CBP agents in terminating DACA. *See, e.g.*, Dkt. No. 16-13 at 3 (directing ICE and CBP agents to "exercise their discretion, on an individual basis" to determine whether to issue an NTA or defer action, without reference to whether an individual already has deferred action). Defendants, then, have never limited the discretion of ICE or CBP agents to issue an NTA to an individual regardless of whether the individual has deferred action – of which DACA is only one form. The SOP, therefore, does not relate to those individuals, but only to those putative class members who come to the attention of USCIS before the issuance of an NTA so that USCIS could act using the steps the SOP describes.

Additionally, even if the Court overlooked Plaintiffs' carve out of enforcement priority terminations without notice and an opportunity to respond, like named Plaintiffs Gil and De Souza, they would still lack commonality with any individual whose DACA was terminated without advance notice and an opportunity to respond but was not found to be an enforcement priority (under Plaintiffs' mistaken application of that term). Other putative class members may be in removal proceedings as a result of termination of their DACA by NTA issuance, and some may even have an administratively final order of removal or have already been removed. The status of these removal proceedings demonstrates further commonality problems for the proposed class because some individuals may be eligible to seek relief from removal in the course of their removal proceedings, like cancellation of removal, that could result in a benefit that removes the need for DACA, and those removed may no longer be eligible to have their DACA and employment authorization reinstated.

These "dissimilarities," then, "impede the generation of common answers," such that class certification is not appropriate. *See Dukes*, 564 U.S. at 350. Because Plaintiffs cannot meet their burden to show they have met the commonality requirement of Fed. R.

Civ. P. 23(a), the Court must deny their motion to certify a class. *See Preap v. Johnson*, 303 F.R.D. 566, 584 (N.D. Cal. 2014), *aff'd*, 831 F.3d 1193 (9th Cir. 2016) (citing *Dukes*, 564 U.S. at 350*; Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

C. The Proposed Class Lacks Typicality.

To establish typicality, Plaintiffs must show "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). The typicality requirement is not met if the proposed class representatives are subject to unique defenses. *Id.*

Here, the Court cannot find typicality. An order requiring the Defendants to provide the notice that Plaintiffs seek cannot afford many of the putative plaintiffs – as well as the named Plaintiffs - with any relief whatsoever.[9] As explained above, the DACA SOP provides for termination of DACA without advance notice and an opportunity to respond in some circumstances, as well as automatically through NTA issuance, but the circumstances by which DACA is terminated without advance notice and an opportunity to respond may differ. For example, Defendants maintain that individuals like Plaintiffs Gil Robles and De Souza Moreira are subject to automatic termination of DACA by NTA due to a determination that each was an enforcement priority. Even if the Court ignored that Plaintiffs have carved out enforcement priority cases from their class definition, the SOP nonetheless supports a different path for automatic termination of DACA by NTA issuance for other putative class members following referral by USCIS based on EPS or USCIS's enforcement priority finding. Dkt. No. 16-24 at 38. Injunctive relief ordering Defendants to provide additional process to

[9] Defendants' typicality argument essentially mirrors its argument that Plaintiffs have failed to meet their commonality requirement. The "commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co.*, 457 U.S. at 157 n.13. "Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.*

those individuals, therefore, would contradict the SOP, involve a different issue than the claims raised by Plaintiffs Gil and De Souza, and demand a different result. *See Hanon*, 976 F.2d at 508 ("class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation.").

Moreover, the unique defenses required to respond to the various procedures by which DACA may be terminated without notice counsel against class certification. *See, e.g.*, *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) ("The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.") (marks and citation omitted); *Arnott v. U.S. Citizenship & Immigration Servs.*, 290 F.R.D. 579, 587 (C.D. Cal. 2012) (the injunctive and declaratory relief sought must "resolve an issue that is central to the validity of each one of the [class members'] claims.") (citing *Dukes*, 564 U.S. at 350). For example, unlike Defendants' defense of DACA termination by NTA issued by ICE or CBP, the defense of an EPS or enforcement priority termination would be different both with regard to the APA, because of the specific guidance provided in the DACA SOP and the record supporting USCIS's compliance with that SOP, and, under Plaintiffs' incorrect due process theory, with regard to the Constitution, because of the SOP's impact on any expectations that could give rise to a Constitutional claim and on the *Matthews* analysis.

Accordingly, where putative class members cannot allege the same injuries by the same course of conduct, and where the defenses to the various potential sources of the putative class's injuries are unique, the Court should find Plaintiffs' proposed class lacks typicality and deny Plaintiffs' motion for class certification.

D. Plaintiffs are not Adequate Representatives.

The Plaintiffs are not adequate class representatives because their interests may conflict with the interests of other putative class members. The adequacy requirement serves to protect the due process rights of absent class members who will be bound by the

judgment. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). A determination of legal adequacy is based on two inquiries: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Id.* Indeed, "uncovering conflicts of interest between the named parties and the class they seek to represent is a critical purpose of the adequacy inquiry." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). This notion is compounded by the nature of a class certified pursuant to Rule 23(b)(2), the members of which do not have a right to opt out of their class. *See Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir. 2003) (citing *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (per curiam)). Additionally, where a class representative is not entitled to the relief sought, adequacy of representation is not satisfied. *See Hodgers-Durgin*, 199 F.3d at 1045 ("Unless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief.").

First, not even the three named Plaintiffs are properly part of the class that Plaintiffs seeks to certify. Plaintiff Arreola's DACA and EAD were reinstated pursuant to Court order and he has been provided notice and opportunity to respond to his intended termination, and Plaintiffs Gil and De Souza were issued NTAs by ICE after being found to be enforcement priorities due to criminal conduct, making them part of the sub-class that Plaintiffs specifically carve out of this class certification motion. Additionally, because the claims each of the named Plaintiffs is subject to dismissal, as discussed in Defendants' accompanying opposition to Plaintiffs' motion for preliminary injunction, and to be addressed in Defendants' forthcoming motion to dismiss, class certification on the basis of their claims is also inappropriate at this time. *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1023 (9th Cir. 2003).

The Court should also deny Plaintiffs' motion for class certification due to the divergent interests between Plaintiffs and the proposed class members. In fact, at least two of the individuals Plaintiffs identify as putative class members, Ramirez Medina and

Colotl, have pursued their own lawsuits that are well ahead of this action. In fact, the advanced stage of her proceeding combined with the fact that Colotl is represented by the same counsel in this proceeding also raises the question of conflicts of interests for proposed class counsel. *See Colotl v. Kelly*, No. 1:17-CV-1670-MHC (N.D. Ga.); *Lerwill v. Inflight Motion Pictures, Inc*., 582 F.2d 507, 512 (9th Cir. 1978). Finally, potentially many other putative class members, even with ongoing removal proceedings, may be able to reapply for DACA and could receive additional process, which may prove more expedient than waiting for the outcome of this litigation, which may ultimately prove unsuccessful to the class as a whole. Still others may have obtained dismissal of the NTA that resulted in the automatic termination of their DACA and then reapplied for deferred action, and potentially many others, even with removal proceedings ongoing, may be able to request DACA again pursuant to the injunction in *Regents*, while the injunction remains in place, and could receive additional process, which may prove more expedient than waiting for the outcome of this litigation.

CONCLUSION

Plaintiffs have proffered a class that is overbroad under Federal Rule 23(b)(2) and that fails to meet any of the requirements of Rule 23(a). Rather, Plaintiffs cannot show that Defendants have failed or refused to act in a way that affects the class as a whole, or that a single injunction could benefit every member of the putative class; and the named plaintiffs are situated so dramatically differently – whether because they do not face the same prospect of imminent harm or because they fall into an "enforcement priority" – from other members of the putative class that they cannot adequately represent the interests of those individuals. Moreover, Plaintiffs would require the Court to engage in an individualized inquiry into each claim to determine the rationale behind each putative plaintiff's DACA termination. Plaintiffs are therefore not entitled to proceed as a class, and the Court must deny their motion.

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