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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' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [DKT. 40].** DATE: February 26, 2018 TIME: 1:30 p.m. JUDGE: Philip S. Gutierrez Courtroom: 6A

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INTRODUCTION

Contemporaneous to the filing of their amended complaint and motion for certification of a mandatory, nationwide class, *see* Dkt. Nos. 32, 39, Plaintiffs' seek a class-wide preliminary injunction for their proposed class of individuals who have had, or who will have, their Deferred Action for Childhood Arrivals ("DACA") and employment authorization document ("EAD") terminated without notice or an opportunity to respond. Dkt. No. 40-1, Memorandum of Law in Support of Plaintiffs' Motion for a Classwide Preliminary Injunction ("PI Motion"). In a separate filing, Defendants oppose the proposed class for lack of jurisdiction and for failure of the proposed class to meet the requirements of Federal Rules of Civil Procedure 23(a) and (b). *See* Dkt. No. 53.

The Court should deny Plaintiff's motion for injunctive relief because the class should not be certified, and even if it is, Plaintiffs' fail to establish that they can succeed on the merits of their claim. This Court lacks jurisdiction to review actions that are predicates to commencing removal proceedings, Plaintiffs cannot state a Constitutional claim, and Defendants have fully complied with their internal policies, which Plaintiffs misrepresent and misconstrue. In sum, Plaintiffs cannot establish that an NTA based on unlawful presence is insufficient to terminate DACA without advanced notice, particularly where the decision to issue the NTA is based on additional findings that the DACA recipient is an EPS concern, or otherwise an enforcement priority. Additionally, the balance of the equities weigh against Plaintiffs.

BACKGROUND

When U.S. Immigration and Customs Enforcement ("ICE") or U.S. Customs and Border Protection ("CBP") issues a notice to appear ("NTA") to a DACA grantee, regardless of the reason selected, there is no requirement in the DACA SOP or elsewhere for USCIS to make a separate decision to terminate the individual's DACA or EAD.[1]

1 Defendants incorporate by reference the explanation of the DACA policy, the EAD application process for individuals with no lawful status, and the process by which removal proceedings are initiated through

Rather, the decision to issue an NTA to an individual with DACA *is* the decision to no longer defer action against that individual, and the charge selected for the NTA does not have to reflect DHS's full reasoning. Nothing restricts DHS's authority to issue an NTA because someone was previously found to warrant a favorable exercise of prosecutorial discretion in the form of deferred action, nor is a criminal conviction or criminal charge necessary to justify termination of DACA. While the Napolitano Memo and DACA SOP identify and explain threshold criteria for DACA consideration, nothing limits DHS's discretion to grant, deny, or terminate DACA on a case by case basis.[2] Nor is the DACA SOP the only authority establishing the process by which deferred action terminates.

On September 20, 2017, Plaintiff Gil-Robles was arrested and charged with two felonies, including Assault in the First Degree and transferring a firearm without a background check to a prohibited person. *See* Exhibits A, Decl. of Jeremy Anderson, Dkt. No. 53-1 at 4-7; A.1, Gil-Robles Notice to Appear ("NTA") and Form I-213, dated Oct. 23, 2017, Dkt. No. 53-1 at 9-15. On November 6, 2017, ICE issued Gil-Robles an NTA charging him with unlawful presence. *Id*. On November 14, 2017, USCIS issued Plaintiff a Notice of Action, stating his DACA and EAD terminated automatically with the NTA. *See* Pl. Amended Complaint, Dkt. No. 32 at ¶ 109.

On November 3, 2017, Plaintiff De Souza was arrested for Forgery in the First Degree, a felony.3 *See* Exhibits B, Decl. of Derrick A. Eleazer, Dkt. 53-1 at 17-18; B.1, De Souza-Moreira NTA and Form I-213, dated Nov. 5, 2017, Dkt. No. 53-1 at 20-24.

NTA issuance, provided in Defendants' Opposition to Plaintiffs Motion for Class Certification, Section II.A and B. Dkt. No. 53 at 7-13.

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

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

De Souza 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 a Notice of Action informing De Souza his DACA and EAD terminated automatically with the NTA. *Id.*

SUMMARY OF THE ARGUMENT

Regardless of how the arguments are framed, Plaintiffs directly challenge DHS's authority to initiate removal proceedings, which this Court should dismiss for lack of subject matter jurisdiction pursuant to the Administrative Procedure Act ("APA") and 8 U.S.C. § 1252. A claim to restore deferred action that terminated by the initiation of removal proceedings by definition challenges the agency's determination to initiate removal proceedings. Any interpretation of these statutes that permits district court challenges to actions inextricably linked to the initiation of removal proceedings would run counter to Congress's intent, to Supreme Court case law, and to the law of this Circuit. Plaintiffs' due process challenges must also fail, because they cannot show a protected interest in DACA or EAD. In fact, to reinstate individual EADs would violate DHS regulations that operate independent of, and superior to, DACA policy. Since ICE already issued NTA's with the knowledge of each Plaintiffs' DACA, and based on DHS's determinations that Plaintiffs' criminal conduct rendered them enforcement priorities, there is no reason to expect a different result on a second review.

Were the Court to find it has jurisdiction over these challenges, it should deny Plaintiffs' motion for failing to meet the requirements necessary to grant a preliminary injunction. Plaintiffs fail to show a likelihood of success on the merits of their claims, or an irreparable harm that this Court can relieve. First, contrary to Plaintiffs' arguments, DACA policy guides ICE and CBP to continue exercising their prosecutorial discretion on a case-by-case basis, and the DACA SOP explicitly recognizes, in multiple places, the effect of NTA issuance on DACA termination. When an NTA issues, DACA terminates

with no input from USCIS. Plaintiffs point to nothing that supports their charge that USCIS must do more, nor have they overcome the presumption that an NTA, even one charging only unlawful presence, is properly issued.

Though it may be a harsh reality, neither Congress nor the Constitution has provided these Plaintiffs a protected interest in remaining or working in the United States.[4] There is nothing remarkable about these cases: Plaintiffs were apprehended in the commission of various criminal actions, which DHS law enforcement officers determined warranted their removal, regardless of any prior eligibility for deferred action. Any claims arising out of those decisions and actions must be brought in immigration court, and then in a petition for review in a court of appeals if necessary. For these reasons, the Court should deny Plaintiffs' motion for preliminary injunction.

ARGUMENT

I. Standard of Review

"The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). As a result, it is generally inappropriate at the "preliminary-injunction stage to give a final judgment on the merits." *Id*.; *see Senate of State of Cal. v. Mosbacher*, 968 F.2d 974, 978 (9th Cir. 1992) (holding that "judgment on the merits in the guise of preliminary relief is a highly inappropriate result").

An injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 142 (2010). A plaintiff seeking a preliminary injunction "must establish" that: (1) it is likely to succeed on the merits of its claims; (2) it is likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in

4 Nor is the Government actively pursuing DACA recipients for wholesale termination. Plaintiffs and nearly every putative class member they describe had their DACA terminated by DHS because of their involvement in criminal activity, a consequence each was informed of since the inception of DACA policy.

the public interest. *Winter*, 555 U.S. at 20. Preliminary injunctive relief is an extraordinary remedy never awarded as of right, *id*., and the party seeking such relief bears the burden of establishing the prerequisites to this extraordinary remedy. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). In a mandatory injunction request such as this, where Plaintiffs seek to order the Government to act, a moving party "must establish that the law and facts *clearly favor* [their] position, not simply that [they] [are] likely to succeed." *Garcia v. Google, Inc*., 786 F.3d 733, 740 (9th Cir. 2015).

II. To the extent the Court does not certify a class, a preliminary injunction providing class-wide relief is inappropriate.

Where an injunction provides class-wide relief, "effective review of the injunction requires review of the class certification." *Paige v. California*, 102 F.3d 1035, 1039 (9th Cir. 1996). *Melendres v. Arpaio*, 695 F.3d 990, 999 (9th Cir. 2012); s*ee also Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983). Because class certification is inappropriate here, *see* Dkt. No. 53, this Court should find granting Plaintiffs' class-wide relief is also inappropriate.[5] Relatedly, even if a class is certified, "system-wide injunctive relief is not available based on alleged injuries to unnamed members of a proposed class." *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999) (citations omitted).

III. Plaintiffs are not likely to succeed on the merits.

Plaintiffs are not likely, and indeed, cannot succeed on the merits of their claims because the Court lacks jurisdiction over Plaintiff's APA and Constitutional claims, and Plaintiff's arguments fail on the merits. First, this Court lacks jurisdiction to review any putative class member's challenge to DHS's discretionary determination to issue an NTA which had the result of automatically terminating DACA and EADs. The putative class cannot state a claim because there is no protected entitlement to DACA or employment authorization.

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5 Defendants maintain that no class should be certified. In part, DHS found all three named plaintiffs to be enforcement priorities, which disqualifies them from joining the putative class, and certainly from representing class members. 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.").

Finally, nothing in the APA or constitutional jurisprudence, nor Defendants' own policies and guidance, supports a right to review or constrain DHS's exercise of discretion or to grant Plaintiffs procedural rights other than those available through removal proceedings.

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

The APA permits persons aggrieved by final agency action to obtain judicial review in federal court where "there is no other adequate remedy in a court." *See* 5 U.S.C. §§ 702, 704. A reviewing court shall set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). However, the APA precludes judicial review of agency decisions when "statutes preclude judicial review," or when the decision is "committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (a)(2); *see Heckler v. Chaney*, 470 U.S. 821, 830 (1985) ("even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.").

Congress enacted 8 U.S.C. § 1252(g) to specifically preclude judicial review of the discretionary decision to initiate removal proceedings, and the actions and decisions arising out of such decisions. *See Reno v. Am.-Arab Anti-Discrimination Comm.* ("*AADC*"), 525 U.S. 471, 483-85 (1999) (finding section 1252(g) also precludes review of the discretionary decision to *not* initiate removal proceedings). Furthermore, in *Heckler*, the Supreme Court held that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)." 470 U.S. 821, 832. Thus, there are two reasons APA jurisdiction is not available here. First, there is no separate decision to terminate DACA *in these cases* because a DHS law enforcement officer decided, in consideration of each plaintiff's felonious criminal activity, to initiate removal proceedings and issued an NTA that automatically terminated DACA; and second, even if the Court found a separate decision was

made, there is still no standard in the SOP or otherwise by which the Court may review a decision that deferring action is no longer in the Government's interest.

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

i. The INA Limits Review of Plaintiffs' Claims, which Arise from DHS's Decision to Commence Plaintiffs' Removal Proceedings.

Congress eliminated judicial review over "any cause or claim by or on behalf of any alien . . . arising from the decision or action . . . to . . . adjudicate cases . . ." 8 U.S.C. § 1252(g). The issuance of an NTA is a necessary predicate to commencing removal proceedings. 8 U.S.C. § 1229(a). Through section 1252(g), Congress explicitly precluded judicial review of any challenge *arising from* any decision or action to commence removal proceedings. *See AADC*, 525 U.S. 471, 483-85. The Supreme Court explained that section 1252(g) was "directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *Id.* at 485 n.9; *see AADC*, 525 U.S. at 485 (treating "'no deferred action' decisions" as "discretionary determinations"); *cf. Silva v. United States*, 866 F.3d 938, 940 (8th Cir. 2017) (§ 1252(g) precludes review of decision to execute removal order even where claim that agency lacked discretion because removal violated law).

Section 1252(g) encompasses "cause[s] or claim[s]" that *arise from* the decision "or action" to "commence proceedings" against any individual. *See, e.g., Sissoko v. Rocha*, 509 F.3d 947, 948-50 (9th Cir. 2007) (finding claim of money damages arose from decision or action to commence removal proceedings and was, thus, barred by 8 U.S.C. § 1252(g)).[6] A DACA grant is acknowledgement that DHS is not presently

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

pursuing removal against an individual. Thus, when DHS finds an individual has become an enforcement priority and issues an NTA, DACA will logically terminate.

Indeed, because issuance of an NTA and termination of DACA are steps "leading up to" a final order of removal, they are squarely within the scope of 8 U.S.C. § 1252(g). *See, e.g.*, *Botezatu v. INS*, 195 F.3d 311, 314 (7th Cir. 1999) (citing *AADC*, 525 U.S. at 944 (discussing the scope of 8 U.S.C. § 1252(g) as including "various decision . . . leading up to order consequent upon final orders of deportation.")); *Alcaraz v. INS*, 384 F.3d 1150, 1160-61 (9th Cir. 2004) (finding review of the reopening of removal proceedings, but not the administrative closure of proceedings, was barred from review as an action related to the decision to commence removal). To hold otherwise would render section 1252(g) a dead letter because any individual could seek to enjoin or otherwise challenge the commencement of removal proceedings through this type of creative pleading. *See Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001) (holding that "a petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking [a claim] in constitutional garb").[7]

There can be no reasonable argument that DACA termination by NTA issuance does not *arise out of* the decision to initiate removal proceedings, such that 8 U.S.C. § 1252(g) would not bar this Court from reviewing that hypothetical second decision. *See, e.g.*, *Vilchiz-Soto v. Holder*, 688 F.3d 642, 644 (9th Cir. 2012) (holding section 1252(g) barred jurisdiction to review the BIA's discretionary decision to not reopen removal proceedings to consider a DACA request).[8]

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7 In analogous circumstances, the Eleventh Circuit Court of Appeals affirmed the applicability of Section 1252(g) to bar district court review of the automatic termination of discretion-based employment authorization documents following the commencement of removal proceedings, in accordance with 8 C.F.R. § 274a.12(c). *See Gupta v. Holder*, No. 611CV1731ORL35GJK, 2011 WL 13174873, at *1 (M.D. Fla. Oct. 31, 2011), *aff'd sub nom. Gupta v. U.S. Atty. Gen.*, 485 F. App'x 386 (11th Cir. 2012)

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

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

Importantly, the Ninth Circuit found that Section 1252(b)(9) is "a clear statutory prescription against district court review" of challenges arising from removal proceedings for plaintiffs who had not yet received final orders of removal. *See J.E.F.M.*, 837 F.3d at 1035-38 ("The minors . . . attempt to get around [section 1252(b)(9)] by claiming that they have been (*or will be*) denied meaningful judicial review in light of their juvenile status.") (emphasis added). While the Court acknowledged that "an unrepresented minor in immigration proceedings poses an extremely difficult situation," it also found "these considerations cannot overcome a clear statutory prescription against district court review. Relief is through review in the court of appeals or executive or congressional action." *Id.* at 1036-1038.[9]

9 The Court's previous reliance on *Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007), to support section 1252(b)(9) applying only to a final order of removal is misplaced because that language is dicta and conflicts with the plain language of the statute. Dkt. No. 31 at 7. *Singh* brought a challenge of ineffective assistance of counsel through a habeas petition, and the Court found that the challenge was not tied to removal proceedings, so section 1252(b)(9) did not apply regardless of whether a final order had issued.

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

Here, Plaintiffs challenge the Secretary's discretion to issue NTAs that have the effect of terminating DACA. *See* Dkt. No. 40-1 at 8-9. Thus, Plaintiffs' challenges necessarily arise from "action taken or proceedings brought to remove an alien," for which district courts lack jurisdiction. Accordingly, this Court should find that Plaintiffs cannot show either a likelihood of success or that the law and facts clearly favor their position. *Garcia*, 786 F.3d at 740.

ii. Judicial Review of DACA Termination Based on NTA Issuance is also Barred under 5 U.S.C. § 701(a)(2).

There is no judicial review under the APA of decisions that "courts traditionally have regarded as 'committed to agency discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (quoting 5 U.S.C. § 701(a)(2)). These decisions are typically unreviewable because there exists "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). This bar applies even when "the agency gives a 'reviewable' reason for otherwise unreviewable action." *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) ("BLE").

Singh, 499 F.3d at 978-79. To interpret *Singh* as permitting district court challenges such as those raised here runs counter to Congressional intent, and would effectively excise the words "any action taken" from the statute. *See Aguilar*, 510 F.3d at 10; *cf. Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012) (an APA claim "challeng[ing] the procedure and substance of an agency determination that is 'inextricably linked' to the order of removal" must be channeled through the petition for review process).

The decisions committed to executive discretion include "an agency's exercise of enforcement power." *Chaney*, 470 U.S. at 831. Such judgments involve "a complicated balancing of factors which are peculiarly within [an agency's] expertise," including "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall priorities, and, indeed, whether the agency has enough resources to undertake the action at all." *Id*. As there is "no meaningful standard against which to judge the agency's exercise of discretion" in weighing these factors, an agency's exercise of enforcement powers is "presumed immune from judicial review under § 701(a)(2)." *Id.* at 830, 832. For instance, an "agency decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id*. at 831.

An agency's decision to enforce the law against a particular individual is likewise presumptively unreviewable. Just as "the decision whether or not to prosecute" presumptively "rests entirely in [the prosecutor's] discretion," *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citation omitted), an agency's decision to bring a civil enforcement action is generally not open to judicial scrutiny. Considerations such as the *Chaney* factors are equally present in enforcement decisions as in nonenforcement decisions. *See Chaney*, 470 U.S. at 831; *see also Wayte v. United States*, 470 U.S. 598, 607-8 (1985) ("[T]he decision to prosecute is particularly ill-suited to judicial review").

One form of that broad discretion is deferred action, a "discretionary and reversible" decision to notify an alien that DHS has chosen not to seek his removal for a specific period of time. *Arpaio v. Obama*, 797 F.3d 11, 17 (D.C. Cir. 2015). Like other agency nonenforcement decisions, grants of deferred action rest on a complex balancing of policy considerations that cannot serve as "meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 831. The converse is equally true: denials of deferred action are also committed to agency discretion. *See AADC*, 525

U.S. at 485 (treating "'no deferred action' decisions" as "discretionary determinations"). Because "[g]ranting an illegally present alien permission to remain and work in this country" is fundamentally "a dispensation of mercy," there are "no standards by which judges may patrol its exercise." *Perales v. Casillas*, 903 F.2d 1043, 1051 (5th Cir. 1990) (INS's decision not to grant pre-hearing voluntary departures and work authorizations to a group of aliens was non-justiciable).

Even in situations in which an agency has promulgated regulations or provided internal guidance, decisions involving the exercise of prosecutorial discretion are generally not subject to judicial review. *See Pasquini v. Morris*, 700 F.2d 658, 659 (11th Cir. 1983) (holding that Immigration and Naturalization Service ("INS") Operating Instructions regarding deferred action did not confer substantive rights on an alien and courts could not review a claim that INS failed to comply with these internal instructions); *see also Carranza, v. I.N.S.*, 277 F.3d 65, 72-3 (1st Cir. 2002) ("Whether or not the INS exercised its discretion is therefore beside any relevant point" as "petitioner did not have a right to demand the exercise of this discretion in the first place"); *cf. United States v. Lee*, 274 F.3d 485, 492 (8th Cir. 2001) (reversing a finding that a criminal defendant can force the Department of Justice to comply with its death penalty protocol).

Thus, individual DACA terminations, especially where based on issuance of NTAs, fall squarely within that category of agency discretion for which judicial review is improper. *See Chaney*, 470 F.3d at 830; *see also Morales de Soto v. Lynch*, 824 F.3d 822, 828 (9th Cir. 2016) (noting that "the exercise of prosecutorial discretion is a type of government action uniquely shielded from and unsuited to judicial intervention").[10] In the cases of putative class members, there is no legal question with regard to the DACA

10 Plaintiffs' reliance on cases that discuss violations of non-discretionary procedures in agency regulations are inapposite where deferred action and related employment authorization are entirely discretionary concepts not tied to statute or regulation. *See* Dkt. No. 16-2 at 18, 20, citing *Singh v. Bardini*, No. 09-cv-3382, 2010 WL 308807, at *7 (N.D. Cal. Jan. 19, 2010) & *Singh v. Vasquez*, No. 08-cv-1901, 2009 WL 3219266, at *5 (D. Ariz. Sept. 30, 2009), aff'd 448 F. App'x 776 (9th Cir. 2011) (both addressing questions of regulatory procedures for asylum termination outside of removal proceedings).

guidelines, because the DACA guidelines merely allow an individual to seek a discretionary administrative grace in the form of DACA. *See* Dkt. No. 53-1 at 38 ("Individuals may be considered for DACA upon showing that they meet the prescribed guidelines . . ."). DACA is unlike immigration benefits where eligibility is defined by statute or regulation, and for which Courts have found that review of the non-discretionary denial of such benefits may be reviewed.[11]

Here, Plaintiffs are challenging DHS's exercise of its enforcement power granted by Congress. *See* Dkt. 40-1 at 30 (seeking to "enjoin Defendants from terminating Plaintiffs' and proposed class members' DACA and EADs"). This is a classic challenge to DHS's exercise of its prosecutorial discretion. *See Chaney*, 470 U.S. at 831. This type of enforcement decision involves a balancing of factors committed to agency discretion by law, including how to allocate agency resources. *See id.*; *Armstrong*, 517 U.S. at 464. The question for DHS was not whether it *could* exercise its discretion in favor of the Plaintiffs, but rather whether it *should* do so under the circumstances of each case. Because this type of discretionary determination is committed to DHS discretion by law, this Court lacks jurisdiction to review Plaintiffs' claims.

iii. Plaintiffs Cannot State a Constitutional Claim because the Termination of DACA does not Implicate a Constitutional Interest.

Plaintiffs assert incorrectly that they have "gained a protected interest in their DACA, which authorized them to live and work in the United States until the expiration date of their DACA grants, and therefore have a right to a fair procedure before it can be revoked." Dkt. No. 40-1 at 21. However, Plaintiffs necessarily lack a protected

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

constitutional interest in their DACA and in the process to terminate DACA, because the ultimate relief sought – deferred action – is discretionary, and because the Government never expressed a mutual intention to confer a protected benefit in DACA.

The "Due Process Clause does not protect everything that might be described as a 'benefit.'" *Castle Rock*, 545 U.S. at 756. Particular due process rights must be established on the basis of entitlement to a property or liberty interest, the risks of loss associated with deprivation of that interest, and the competing interests of the government in not providing that interest. *Landon v. Plasencia*, 459 U.S. 21, 34 (1982), quoting *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976). DACA recipients face these circumstances given that they are living illegally in a country where they are not citizens. The Court may view this circumstance as unfortunate, but neither the Constitution nor Congress provides an individual in unlawful status a protected interest in living or working in the United States, or in discretionary relief from removal. *Garcia v. Holder*, No., 07-60271, 320 F. App'x 288, 290 (9th Cir. April 9, 2009); *Pilapil v. INS*, 424 F.2d 6, 11 (10th Cir. 1970), *cert denied*, 400 U.S. 908 (1970).

Nor can Plaintiffs claim a Constitutional interest based on entitlement. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of *entitlement* to it." *Blantz v. Cal. Dep't of Corr. & Rehab.*, 727 F.3d 917, 922 (9th Cir. 2013) (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)); *see also Mendez-Garcia v. Lynch*, 840 F.3d 655, 665 (9th Cir. 2016) (underscoring that aliens cannot claim a cognizable due process interest in discretionary immigration relief or benefits). The Supreme Court has held that even a practice of "generously" granting a "wholly and *expressly* discretionary state privilege" does not create a legal entitlement to that benefit. *See Regents of Univ. of California v. United States Dep't of Homeland Sec*. ("*Regents*"), No. C 17-05211 WHA, 2018 WL 339144, at *4 (citing *Gerhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1020-21 (9th Cir. 2011)) ("A

person's belief of entitlement to a government benefit, no matter how sincerely or reasonably held, does not create a property right if that belief is not mutually held by the government.").

Plaintiffs' proposed class consists exclusively of individuals with no lawful status, thus no protected interest in living or working in the United States. DACA policy has never purported to alter that, nor may this Court. *Landon,* 459 U.S. at 35 ("The role of the judiciary . . . does not extend to imposing procedures that merely displace congressional choices of policy."). Because DACA is discretionary, it does not give rise to a protected right to work in the United States. *See* Dkt. No. 16-28, Pl. Exhibit 24, DACA Grant Approval letter, dated August 20, 2016, at 2 ("This form does not constitute employment authorization, nor may it be used in place of an [EAD]."). Nor does DACA confer lawful status. *See* Dkt. No. 16-13, Pl. Exhibit 9, 2012 Napolitano Memo ("This memorandum confers no substantive right, immigration status or pathway to citizenship."). A grant of DACA is not protection from removal. *See* Dkt. No. 16-23, DACA FAQ at Q:27 ("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.").

Plaintiffs' claims regarding an interest in employment authorization and other public benefits like driver's licenses are particularly misplaced, because there is no right to the receipt of either, and no judicial review of the decision to terminate EAD once granted. *Pilapil,* 424 F.2d at 11; *see also Perales,* 903 F.2d at 1047-48 ("[T]here is nothing in the [INA] expressly providing for the grant of employment authorization . . . to aliens who are the beneficiaries of approved petitions") (vacating the challenged portion of the injunction); *Gupta,* 2011 WL 13174873 at *1 (finding a challenge to the termination of EAD upon initiation of removal proceedings was an impermissible challenge to the discretionary decision to initiate removal proceedings). In the context of Plaintiffs' claims here that they have a right to DACA and therefore EADs, the Ninth Circuit has refused the same proposition. *See Neri,* 229 F. App'x at 508 (an individual

"has no substantive due process right to discretionary relief from removal or deportation."); *Munoz v. Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003) (finding no liberty interest in discretionary forms of relief from deportation).

Plaintiffs' reference to cases addressing U.S. citizens' constitutional interest in choosing their own field of employment, *see* Dkt. No. 40-1 at 25, simply misses the point. Noncitizens who are here illegally do not have a constitutional right to remain in the United States, much less a right to work in the United States. *Cf. Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151-52 (2002) (holding, as a general matter, an individual who is not authorized to work in the United States does not have a right to work). In fact, every individual with employment authorization based on 8 C.F.R. § 274a.12(c), including those with deferred action, is subject to automatic termination of their EAD with the filing of an NTA with an immigration court. *See* 8 C.F.R. § 274a.14(a)(1)(ii); 8 C.F.R. §§ 1003.13, 1003.14. No notice or opportunity to respond is afforded to any deferred action recipient in this posture, and Plaintiffs point to nothing that supports a contrary finding. *Cf. Gupta*, 2011 WL 13174873 at *1 (denying challenge to automatic EAD termination). Because EAD termination is not tied to operation of the DACA SOP, Plaintiffs' claims of harm regarding EAD loss must fail. Further, the DACA SOP instructs USCIS to defer to existing law and regulations where there is any conflict with the SOP. *See* Dkt. No. 16-24 at 17, DACA SOP Chapter One ("Any provision of the [INA] or 8 C.F.R. found . . . to be in conflict with this SOP will take precedence over the SOP."). Thus, it is inappropriate to find the SOP's silence regarding termination of DACA-based EAD due to NTA issuance by CBP or ICE creates entitlement to a process not provided for by the duly promulgated regulation.

Furthermore, under DHS regulations, an individual with deferred action who has lost his EAD due to having been placed into removal proceedings may reapply for an EAD if he or she becomes eligible again under a category of subsection 274a.12(c). Only if employment authorization is granted again would the individual then be eligible to

apply to their state authority for a driver's license or Social Security card. *ADAC*, 757 F.3d at 1061; *Texas v. United States*, 809 F.3d 134, 149 (5th Cir. 2015) (an individual's access to a Social Security number is predicated on possession of EAD, not DACA). Thus, the peripheral benefits Plaintiffs cite to illustrate the urgency of the relief they seek are two steps removed from the relief this Court can grant.[12]

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

B. Nothing in the Constitution or APA Establishes a Right that Constrains DHS's Exercise of Discretion.

Even if this Court finds that it would have jurisdiction over any of Plaintiffs' claims, the Court should still deny Plaintiffs' motion for injunctive relief because Plaintiffs' merits claims fail as a matter of law. Here, Plaintiffs cannot establish either an administrative or a constitutional right to receive any process regarding the termination of DACA because deferred action is necessarily an exercise of the Executive's prosecutorial discretion. *See Regents*, 2018 WL 339144 at *18 ("Congress has been free to constrain DHS's discretion with respect to granting deferred action, but it has yet to do so."). In fact, DHS acted based on that discretion by issuing an NTA based on Plaintiffs' criminal activity. At that point, the limited grace a temporary grant of DACA serves to recognize was overridden by the Government's determination that Plaintiffs had become enforcement priorities. *See* Dkt. No. 53-1 at 4-7, 17-18. Defendants respectfully disagree with the Court's prior order

12 None of the provisions that Plaintiffs cite at 8 U.S.C. §§ 1611(b)(2)–(3) and 1621(d) depends directly on the receipt of DACA.

granting a preliminary injunction to Plaintiff Arreola, *see* Dkt. No. 31, and endeavor to address that order here. *Id*. at 9, 11, 12.

i. Agency Guidance Places no Limit on ICE or CBP's Authority to Act Against Identified Enforcement Priorities by Issuing an NTA that terminates DACA.

Plaintiffs frame their argument as a challenge to USCIS's failure to follow procedures required by the DACA SOP before terminating their DACA and EADs. *See* Dkt. No. 40-1 at 15-17. Plaintiffs argue that there is no process in the SOP that provides for termination of DACA based solely on an NTA issued by ICE or CBP. *Id*. at 16. The Court too, has similarly accepted this argument, finding that:

> There appears to be only one narrow circumstance in which automatic termination based on an NTA is appropriate—when an NTA is issued after USCIS determines that a disqualifying offense or public safety concern is deemed to be "Egregious Public Safety" ("EPS"). *DACA SOP* at 137. This is not the case here, as Plaintiff's NTA was issued on the basis of presence without admission, not EPS.

Dkt. No. 31 at 11. These conclusions are inconsistent with the law and agency policy for the reasons stated below.

ii. DACA termination by NTA is provided for in the DACA SOP and policy documents, and in DHS policy and regulations.

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

Nor does DHS guidance prevent immigration enforcement agencies from terminating DACA by issuing an NTA. 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 USCIS in its administrative capacity, and ICE and CBP in their law enforcement capacities. *See* 2011 NTA Memo, Dkt. No. 16-25. USCIS is

required to refer all cases involving criminal conduct, not limited to Egregious Public Safety ("EPS"), to ICE. *Id*. at 5. USCIS's decision to issue an NTA on its own under such circumstances must follow ICE's lead. *Id*. at 5 & 6 ("USCIS *will not* issue an NTA in these cases if ICE declines to issue an NTA.") (emphasis added); *id*. at 2 ("USCIS must ensure that its issuance of NTAs fits within and supports the Government's overall removal priorities . . . ."). When a case is referred by USCIS, ICE may issue an NTA that automatically terminates DACA, with no additional notice or opportunity to respond. *See* Dkt. No. 16-24 at 39.

The effect of NTA issuance on DACA termination is unremarkable, and is recognized elsewhere in the DACA SOP. *See* Dkt. No. 53-1 at 91-92 (providing that USCIS will deny, without advance notice and an opportunity to respond, a DACA request from an individual in immigration detention who ICE intends to release but who ICE indicates is an enforcement priority). While the SOP instructs USCIS to "discuss" a disagreement it may have with ICE's finding, *id*., there is no provision permitting USCIS to reverse ICE's decision. *See Vasquez v. Aviles*, 639 F. App'x 898, 901 (3d Cir. 2016) (finding no jurisdiction based on Section 1252(g) to review an ICE officer's unilateral denial of a DACA request to a detained individual because "that decision involves the exercise of prosecutorial discretion not to grant a deferred action.").[13]

Indeed, where DHS has worked to ensure that ICE's determination that someone is an enforcement priority would not be conflicted by a later discretionary exercise by USCIS to grant deferred action in the form of DACA, and where the Napolitano Memo specifically preserves the NTA authority of ICE and CBP upon consideration of the

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

DACA guidelines, it takes a particularly strained reading of the Napolitano Memo and DACA SOP to find that ICE and CBP cannot issue NTAs that have the effect of terminating DACA. In fact, the scenario that the Court's and Plaintiffs' interpretation of Defendants' guidance would create, that ICE would institute new administrative removal proceedings against an individual while that individual seeks additional separate legal process regarding the termination of their DACA, is absurd – stripping the immigration enforcement agencies of their most critical authority. *Regents*, 2018 WL 339144, at *1 ("One of the key enforcement tools under the INA is removal, i.e., deportation. In turn, '[a] principal feature of the removal system is the broad discretion exercised by immigration officials.'"), citing *Arizona v. United States*, 567 U.S. 387, 396 (2012).[14]

DHS's discretion to initiate removal proceedings that have the effect of terminating DACA is not impeded by DACA policy in any way. Accordingly, the Court should deny Plaintiffs' motion for a preliminary injunction.

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

Plaintiffs argue, and this Court agreed, that USCIS impermissibly relies on only unlawful presence as the charge listed in an NTA as the sole basis to terminate DACA. Dkt. No. 31 at 6, 10: Dkt. No. 32 at ¶¶ 159, 165. However, that conclusion relies on a starkly oversimplified consideration of the NTA decision process. *See, e.g.*, Dkt. No. 53-1 at 9-15, 20-24 (summaries of the information considered in Plaintiffs' NTA issuances). Plaintiffs also assert an inaccurate reading of *Judulang v. Holder*, 565 U.S. 42 (2011), for the mistaken proposition that an immigration officer's charging decision to issue an NTA that only charges unlawful presence is categorically capricious and cannot be the basis to terminate an individual's DACA and EAD. Dkt. No. 40-1 at 14-18. There is no basis in

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

the SOP or other DACA-related guidance for the Court to find that an NTA charging removability on the basis of presence without admission is not sufficient to terminate DACA. Nor can Plaintiffs establish that an individual in receipt of an NTA based on unlawful presence cannot also have been found to be an EPS concern, or otherwise an enforcement priority.

First, the charges listed in an NTA are not dispositive of the reasons for issuing an NTA.[15] DHS is under no obligation to charge an individual with anything more than unlawful presence. *Addy v. Sessions*, 696 F. App'x 801, 804 (9th Cir. 2017) (rejecting argument that petitioner should have been charged with removability under a different statute, because "[t]he Attorney General has prosecutorial discretion over the initiation of removal proceedings, and that discretion is not reviewable."). Rather, the decision to issue an NTA is based on the immigration officer's experience and information, and – most importantly – his or her discretion. *See Hernandez v. Gonzales*, 221 F. App'x 588, 589–90 (9th Cir. 2007) ("Absent evidence to the contrary, we presume that the immigration officers properly discharged their duties when issuing Hernandez's NTA.") (citations omitted). Notably, an NTA also need not include charges used to support the denial of relief from removal. *Salviejo–Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006) (denying due process claim where the BIA found petitioner ineligible for cancellation of removal based on a conviction not alleged in the NTA).

Here, the nature of discretion exercised in issuing an NTA that has the effect of terminating DACA is nothing like the process the *Judulang* Court found arbitrary. The *Judulang* Court rejected the BIA process of interpreting and comparing the removability charges on an individual's NTA against a list of charges under 8 U.S.C. § 1182 that

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

composed grounds for exclusion of an arriving alien, to determine whether the individual facing removal was eligible for a form of discretionary relief from removal originally reserved for arriving aliens. 565 U.S. at 489-90. The Court equated the process to flipping a coin, such that some violent criminals would be eligible for relief while some LPRs with lesser offenses would be excluded. *Id*. at 487 (finding the process had "no connection to the goals of the deportation process or the rational operation of the immigration laws."). Here, DACA termination does not hinge on how the NTA is selected, but rather *whether* the NTA is selected.

Moreover, the facts here demonstrate that immigration officer decisions to issue NTAs that have the result of terminating DACA are not "happenstance," Dkt. No. 40-1 at 17; but rather, NTA issuance that results in the termination of DACA represents a valid and thoughtful exercise of agency discretion. The facts here demonstrate that immigration enforcement officers: (1) were specifically aware of each Plaintiffs' DACA, *see* Dkt. No. 53-1 at 9-15, 20-24; (2) did not rely solely on unlawful presence in decisions to initiate removal against Plaintiffs. *Id*.; *see also* Dkt. No. 23-2 at 26 ("Prosecution for Alien Smuggling was declined for ARREOLA."); *id*. (Agency chief "approved removal proceedings for ARREOLA in the furtherance of the United States Government interest."); and (3) may issue NTAs after supervisory review or consultation with agency counsel. *See* Dkt. No 53-1 at 6 ¶ 11.

iv. DACA termination by NTA is not a reversal of agency policy.

Plaintiffs' charge that the termination of their DACA is a "reversal" in violation of the APA is also mistaken. *See* Dkt. No 40-1 at 18, citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). *Fox* only applies to changes in agency policy. *See* 556 U.S. at 514 (holding that when an agency changes policy, it must show no more than that it "examine[d] the relevant data and articulate a satisfactory explanation for its action."). Here, Defendants' policy has not changed. The initial grant of DACA is heavily qualified with warnings that it is not protection from removal or a change in legal status, and that it

may be terminated at any time, specifically for subsequent criminal activity. *See, e.g.*, Dkt. No. 16-23, DACA FAQ at Q:27 (DACA "may be terminated at any time, with or without a Notice of Intent to Terminate, at DHS's discretion."); Dkt. No. 16-28 (DACA termination is "likely" following subsequent criminal activity). The automatic termination of Plaintiffs' DACA and EADs here, as a result of the decision to pursue removal proceedings against plaintiffs due to criminal activity, is well within DACA SOP policy and practice, and demonstrates that there is no change in policy or practice as it applies to the putative class or individuals. Dkt. No. 23-2, *Declaration of Ron Thomas*, ¶ 5 (identifying examples of automatic termination of DACA due to NTA issuance going back to 2013); *see also Chemehuevi Indian Tribe v. Brown*, No. EDCV161347JFWMRWX, 2017 WL 2971864, at *8 (C.D. Cal. Mar. 30, 2017) ("The agency's consistent practice of approving compacts with duration provisions . . . in an area within its expertise is itself entitled to at least traditional deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), due, in part, to the agency's specialized experience in [these] matters."). Indeed, all that has happened in cases like those of the putative class is that DHS has determined that those DACA recipients have become enforcement priorities, often based on their unlawful activity. Such entirely appropriate changes of mind regarding this exercise of discretion are analogous to the Ninth Circuit's holding that *Fox* did not apply to an agency's "evolving analysis" that "was not a change in a published regulation or official policy"). *Sierra Club v. Bureau of Land Management*, 786 F.3d 1219, 1226 (9th Cir. 2015).

Even if *Fox* were applicable, the notices of action issued by USCIS following NTA issuance that automatically terminate DACA are not arbitrary and capricious under *Fox*, because USCIS demonstrates an awareness that it has taken a different position regarding a putative class member's DACA, *see, e.g.*, Dkt. No. 16-12 (acknowledging prior DACA grant and notifying recipient "that your deferred action as a childhood arrival and your employment authorization terminated as of the date your NTA was issued."); and that

there is a good reason for the different position, *see id*. (basing the termination on ICE's issuance of an NTA). *Fox* requires nothing more. 556 U.S. at 515 (requiring an agency "display awareness that it is changing position," and "show that there are good reasons for the new policy. . . .", but the agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute").

C. The Remaining Preliminary Injunction Factors Favor Defendants.

Where the Government is the opposing party, the balance of equities and public interest factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Defendants have strong interests in enforcing U.S. immigration laws effectively and consistent with the statutory removal scheme. *See AADC*, 525 U.S. at 490 ("There is always a public interest in prompt execution of removal orders [to end] a continuing violation of United States law."). Here, the process Plaintiffs have received is adequate given the ultimately discretionary policy at issue and the Government's strong interest regarding immigration enforcement. And while the loss of the ability to work is a significant harm, it is outweighed by the need for Defendants to pursue removal for individuals like the named Plaintiffs who have misused the trust given to them with the administrative grace of DACA.

Moreover, Plaintiffs' effort to reinterpret DHS's consistent position regarding NTA issuance and DACA and EAD terminations would create absurd results. First, a class-wide injunction requiring the reinstatement of DACA and employment authorization would be contrary to DHS regulations regarding the termination of employment authorization upon the initiation of removal proceedings. Second, the efficacy of the additional process that Plaintiffs seek is questionable because DHS and its components have already exercised prosecutorial discretion to end the putative class members' DACA by deciding instead to place them into removal proceedings – regardless of their original or continued ability to meet the threshold criteria to request DACA. Indeed, where Plaintiffs hang everything on proving that they meet the threshold

DACA guidelines, they fail to establish any likelihood Defendants would come to a different conclusion were the Court to order such a re-adjudication of their claims.

CONCLUSION

Where injunctive relief is not appropriate to the extent the Court denies Plaintiffs' motion for class certification, and alternatively, where Plaintiffs can neither meet the lesser burden of establishing a likelihood of success on the merits to be granted a temporary injunction nor the higher standard necessary to obtain a permanent reversal of Defendants' termination of their DACA through issuance of NTAs, the Court should deny Plaintiffs' motion for class-wide injunctive relief.

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