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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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| INLAND EMPIRE – IMMIGRANT YOUTH COLLECTIVE and JESUS ALONSO ARREOLA ROBLES, on behalf of himself and others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>KIRSTJEN NIELSEN, Secretary of Homeland Security, *et al.*,<br><br>Defendants. | Case No. 5:17-cv-2048- PSG-SHK<br><br>**DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**<br><br>**Judge**: Hon. Philip S. Gutierrez<br>**Courtroom**: 6A<br>**Hearing**: April 16, 2018<br>**Time**: 1:30pm |

Given the Court's prior decisions to grant Plaintiff Arreola's first preliminary injunction, then Plaintiffs' motions for class certification and a class wide preliminary injunction, Defendants recognize that a version of some of the arguments made in this motion were offered and rejected in prior filings. Plaintiffs, however, in asking this Court to "summarily deny the motion," ignore the subsequent events and new authorities that give new shape to Defendants' arguments for why this Court should grant the motion to dismiss the amended complaint, or, alternatively, to dismiss Plaintiffs Arreola and Inland Empire from the complaint if it is allowed to go forward. In fact, the Court has yet to address any of Defendants' arguments in the context of Defendants' standing arguments against Plaintiffs Arreola and Inland Empire.

Additionally, the Court has yet to decide its jurisdiction over Plaintiffs' claims in light of the recent decisions in *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) and *Castellar v. Nielsen*, No. 17-CV-0491-BAS-BGS, 2018 WL 786742 (S.D. Cal. Feb. 8, 2018). As explained below, both cases clarify and reinforce Defendants' arguments that section 1252 bars this Court's jurisdiction over the claims asserted here, and instead channels those claims through the Petition for Review process Congress designated. Defendants would be remiss in forgoing the opportunity to present the Court with these new cases, particularly in light of the Parties' changed circumstances, in the hopes of persuading the Court to reach a different conclusion than it did on the facts and law as they were previously understood.

To be clear, Defendants' position is that Congress has spoken unequivocally on the matter of *when* and *where* a claim "arising from any removal-related activity" may be raised; and it is not before the administrative process has concluded and a final order of removal has issued, and it is not in a district court. *See Castellar*, 2018 WL 786742 at *15. It is Defendants' continuing position that the issues raised by Plaintiffs here, termination of their DACA as a consequence of the initiation of removal proceedings against them—itself a consequence of each plaintiff's criminal activity—falls squarely into the category of "removal-related activity" that this Court may not hear, and that no

court may hear until Plaintiffs have exhausted their administrative remedies through the removal process.[1]

**I. New Supreme Court authority supports dismissal of Plaintiffs' claims.**

In addition to ignoring the changed circumstances that now apply to Defendants' arguments, Plaintiffs continue to rely on incomplete selections from the Ninth Circuit's holding in *J.E.F.M.* to assert that section 1252(b)(9)'s jurisdiction channeling provision only applies after a final order of removal is issued, and that it does not bar review of issues that an immigration judge has no authority to decide. *See* Dkt. No. 73 at 16. However, recent decisions from the Supreme Court and the District Court for the Southern District of California directly support Defendants' substantive arguments that sections 1252(a)(5) and (b)(9) bar this Court's jurisdiction over Plaintiffs' claims. *See Jennings v. Rodriguez*, 138 S. Ct. 830 (2018); *Castellar v. Nielsen*, No. 17-CV-0491-BAS-BGS, 2018 WL 786742 (S.D. Cal. Feb. 8, 2018).

In Part II of the plurality opinion in *Jennings*, Justice Alito (joined by Chief Justice Roberts and Justice Kennedy) concluded that section 1252(b)(9) did not apply because the respondents in that case were not challenging "the decision . . . to seek removal [. . . or] any part of the process by which their removability will be determined." 138 S. Ct. at 841. There can be no serious argument here that Plaintiffs are not challenging a part of the process by which their removability will be determined. *See, e.g.*, Dkt. No. 73 at 13 ("The risk of being placed in removal proceedings is particularly high for IEIYC members who have had or will have contact with local law enforcement, since CBP officials may place DACA recipients whom they encounter in removal proceedings—even on the basis of an arrest.") (internal citations omitted). In addition, in his concurrence, Justice Thomas (joined by Justice Gorsuch) explained:

[1] Defendants also maintain that the decision to initiate removal proceedings, and, to the extent the Court finds a separate decision is made, the decision to terminate DACA, are both entirely discretionary and barred from review in any court, pursuant to Congress' intent under 8 U.S.C. § 1252 and longstanding and uncontroversial principles of agency discretion. *See Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

> The text of [§ 1252(b)(9)] is clear. Courts generally lack jurisdiction over "all questions of law and fact," both "constitutional" and "statutory," that "aris[e] from" an "action taken or proceeding brought to remove an alien." If an alien raises a claim *arising from such an action or proceeding*, courts cannot review it unless they are reviewing "a final order" under § 1252(a)(1) or exercising jurisdiction "otherwise provided" in § 1252.

138 S. Ct. at 853-54 (Thomas, J. concurring) (emphasis added). Thus, section 1252(b)(9) does not lie feckless until a final order of removal issues, but rather acts as a channeling provision throughout the removal process to "put an end to the scattershot and piecemeal nature of the review process." *Aguilar v. Immigration & Customs Enf't*, 510 F.3d 1, 9-10 (1st Cir. 2007) (cited favorably throughout *J.E.F.M.*, 837 F.3d 1026). Whether the Court agrees that it was permissible, it is indisputable that Defendants terminated each Plaintiff's DACA based on the initiation of removal proceedings against each Plaintiff. Challenges to those decisions cannot be separated from the "action taken or proceeding brought to remove" them, such that section 1252(b)(9) would not bar this Court's jurisdiction. *Jennings*, 138 S. Ct. at 853-54; *Castellar*, 2018 WL 786742 at *14.

Furthermore, in *J.E.F.M.*, the Ninth Circuit explicitly acknowledged that the plaintiffs "are at various stages of the removal process: some are waiting to have their first removal hearing, some have already had a hearing, and some have been ordered removed in absentia." 837 F.3d at 1029; *see also Castellar*, 2018 WL 786742 at *14 ("The jurisdictional channeling function of Section 1252(b)(9) is not defeated simply because Plaintiffs are at a stage of the removal proceedings at which no final order of removal has issued against them."), citing *J.E.F.M.*, 837 F.3d at 1029.

Additionally, the *Castellar* Court addressed and rejected as "selective reading" the assertion that *J.E.F.M.* permits challenges to be raised in the district court "[w]here a plaintiff 'would have no legal avenue to obtain judicial review' of his claims, section 1252(b)(9) does not bar those claims." *Castellar*, 2018 WL 786742 at *15 n.6, citing *J.E.F.M.*, 837 F.3d at 1032 and *Singh v. Gonzalez*, 499 F.3d 969, 979–80 (9th Cir.

2007);[2] *see* Dkt. No. 73 at 18 ("Because Plaintiffs are unable to challenge the termination of their DACA in removal proceedings, §§ 1252(b)(9) and 1252(a)(5) do not preclude them from raising their challenge in district court.").

*Castellar* placed the Ninth Circuit's holding into proper context, and explained that Section 1252(b)(9) did not bar district court jurisdiction in the "unique situation" of *Singh* only because his ineffective assistance of counsel claim arose *after* his removal proceedings had ended. *Id*. Thus, rather than the issue being that the immigration judge could not grant the relief Singh sought, as Plaintiffs argue, the Ninth Circuit found that it was literally impossible for Singh to have raised his claim in removal proceedings at all. In fact, *Singh* denied Singh's second ineffective assistance of counsel claim because it "arose before a final order of removal entered and [] *could and should have* been brought before the agency." *J.E.F.M.*, 837 F.3d at 1032, citing *Singh*, 499 F.3d at 974 (emphasis added).

Importantly, *J.E.F.M.* also explained that the inability of the immigration judge to relieve a constitutional claim is not a valid reason to ignore the jurisdiction channeling functions of sections 1252(a)(5) and (b)(9). *Id*. at 1032-33. *Castellar* relied on *J.E.F.M.* to find that, under sections 1252(a)(5) and (b)(9), "[b]eyond the[] limited and unusual circumstances [of *Singh* and *Nadarajah*,][3] . . . claims arising *from any removal-related activity* must be raised through the petition for review process." *Castellar*, 2018 WL 786742 at *15 (emphasis added). Plaintiffs cannot show that the unusual issues in *Singh*

[2] Plaintiffs in *Castellar* raised Fourth and Fifth Amendment and APA claims regarding the delay between when they were detained and when they were first brought before an immigration judge to begin their removal proceedings. *Id*. at *4-6. *Castellar* plaintiffs raised the same three arguments raised here: (1) "their claims are independent of the substantive merits of their removal proceedings;" (2) "because their claims do not require judicial review of a final order of removal, they may assert them now"; and (3) their claims "cannot be meaningfully heard in the administrative process." *Id*. at *12, *14, *15. *Castellar* relied on *J.E.F.M.* to reject all three claims.

[3] *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (finding jurisdiction in district court to hear a habeas challenge where plaintiff had been granted asylum but remained in detention for five years).

or *Nadarajah* apply here, and so this Court should grant Defendants' motion to dismiss in its entirety.

**II. Standing**

Defendants' motion to dismiss Plaintiffs Arreola and Inland Empire is an alternative argument that assumes the Court rejected Defendants' main argument that the Court lacks subject-matter jurisdiction in this matter entirely. In that context, Plaintiffs' argument that it is "wholly irrelevant" that Plaintiffs Arreola and Inland Empire lack standing is incorrect. Dkt. No. 73 at 8, citing *Rumsfeld v. Forum for Academic & Institutional Rights Inc.* ("*FAIR*"), 547 U.S. 47, 53 n.2 (2006). In fact, the Supreme Court in *FAIR* was only affirming the Third Circuit's finding that it possessed subject-matter jurisdiction at all. *See* 547 U.S. 47, 53 n.2 ("Because we also agree that FAIR has standing, we similarly limit our discussion to FAIR."). Moreover, the key reasoning on which Plaintiffs appear to rely only supports standing for parties who are identically positioned. *See id*., citing *Bowsher v. Synar*, 478 U.S. 714, 721 (1986), citing *Sec'y of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984) ("Since the State of California clearly does have standing, we need not address the standing of the other respondents, whose position here is identical to the State's.")

Here, Plaintiff Arreola presents entirely different arguments than those of the certified class—arguments he lacks standing to raise on his own and which, if allowed, will "waste [this Court's] scarce judicial resources." *State of Cal., By & Through Brown v. Watt*, 683 F.2d 1253, 1271 (9th Cir. 1982) (emphasis added), *rev'd on other grounds sub nom. Sec'y of the Interior v. California*, 464 U.S. 312 (1984). The class is defined as individuals who have lost DACA without notice or an opportunity to respond, while Plaintiff Arreola argues he *may lose* his DACA at some time in the future based on allegations of an inadequate process that is not yet final. Dkt. No. 73 at 11-12. Similarly, Plaintiff Inland Empire offers no argument to overcome its lack of organizational standing.

**a. Plaintiff Arreola's claims became moot under the original complaint, and he thus lacks standing to assert an identical claim in an amended complaint.**

Plaintiffs incorrectly assert that the outset of the litigation is the only "relevant point in time for determining standing." Dkt. No. 73 at 6, 8. As Defendants noted in their motion, when "a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." Dkt No. 55at 17, citing *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473 (2007).[4] This Court has previously found just the opposite, holding that "the reasoning in *Rockwell* did not indicate that the original complaint was irrelevant for purposes of determining jurisdiction; rather, it recognized that jurisdiction must be present throughout the duration of the litigation, and not just at the initial filing of the Complaint." *United States ex rel. Lee v. Corinthian Colleges*, No. CV071984PSGMANX, 2013 WL 12114015, at *8 (C.D. Cal. Mar. 15, 2013) (Gutierrez, J.), *aff'd sub nom. United States v. Corinthian Colleges*, 652 F. App'x 503 (9th Cir. 2016); *Lim v. Helio, LLC*, No. CV119183PSGACRX, 2012 WL 12884439, at *1 (C.D. Cal. Apr. 18, 2012) (Gutierrez, J.) ("On April 4, 2011, the Court . . . deemed Plaintiff's First Amended Complaint ('FAC') filed. Accordingly, the FAC is the operative pleading."); *see also Civil Rights Educ. & Enf't Ctr. v. Hosp. Properties Tr.*, 867 F.3d 1093, 1102 (9th Cir. 2017) (standing is determined on the amended complaint, because "the proper focus in determining jurisdiction are the facts existing at the time the complaint *under consideration* was filed") (emphasis in original) (citation omitted).

Plaintiffs instead select half of a quote from *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc. ("FOE")*, 528 U.S. 167 (2000), to make the incorrect assertion

[4] Plaintiffs' argument that *Rockwell* concerns jurisdiction but not standing is incorrect. Standing is the "irreducible constitutional minimum" necessary to assert federal court jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Determining a court's subject-matter jurisdiction necessarily encompasses the question of standing. *Preston v. Heckler*, 734 F.2d 1359, 1363 (9th Cir. 1984) ("The standing doctrine is one component of the case or controversy requirement" to establish jurisdiction under Article III.).

that the Supreme Court has held that standing is established once at the start of a case and then, apparently, may not be challenged throughout the litigation. Dkt. No. 73 at 9. Where no amended complaint had been filed in *FOE*, the Supreme Court in that case had no reason to discuss whether an amended complaint required new consideration of a plaintiff's standing. 528 U.S. at 189. When it did address that issue subsequently, the Court found, as has the Ninth Circuit and this Court, that jurisdiction must be established from the allegations in an amended complaint. *Rockwell Int'l Corp.*, 549 U.S. at 473.

While the amended complaint re-alleged all of the harms Plaintiff Arreola listed in the original complaint, Dkt. No. 32 at ¶¶ 78-85, it also acknowledged that Defendants reinstated his DACA grant and employment authorization and issued him a Notice of Intent to Terminate ("NOIT") his DACA and work authorization, as well as a reason for the decision and an opportunity to respond. *Id*. at 87; Dkt. No. 73 at 12. The harm of losing his DACA and EAD that established his standing at the outset of this litigation simply no longer exists, and, given the issuance of the NOIT, the potential for Defendants to terminate his DACA without notice is too speculative and remote to establish standing. *Or. Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1235 (9th Cir. 2017).

Unless and until Defendants actually terminate Plaintiff Arreola's DACA again, he has no standing to challenge the intermediate step of Defendants issuing him a NOIT. *Preston v. Heckler*, 734 F.2d 1359, 1363–64 (9th Cir. 1984) ("An essential element of the standing requirement is that 'the plaintiff . . . show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'") (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)).

Furthermore, from the time of filing the amended complaint to the present, there is no final agency action that has caused Plaintiff Arreola any harm upon which to base this Court's jurisdiction under the Administrative Procedure Act ("APA"). *See Ceja v. Napolitano*, No. EDCV1200466VAPOPX, 2012 WL 12881988, at *1 (C.D. Cal. May 15, 2012) ("[W]ithout a final agency action, 28 U.S.C. § 1331 and § 704 of the APA do not

vest the district court with jurisdiction . . ."), citing *Nippon Miniature Bearing Corp. v. Weise*, 230 F.3d 1131, 1137 (9th Cir. 2000).

For these reasons, Plaintiff Arreola should be dismissed from this matter.

**b. Inland Empire lacks standing under both the original complaint and the amended complaint.**

Plaintiff Inland Empire continues to assert only speculative injury to its members, based on the premise that Defendants have terminated the DACA of individuals who have not engaged in criminal activity, which Plaintiffs have yet to establish through a single example. Dkt. No. 32 at 31 ("IEIYC DACA recipients are at risk of coming into contact with CBP officers and being screened for possible revocation of their DACA when carrying out their day-to-day activities."); Dkt. No. 73 at 13 ("The risk of being placed in removal proceedings is particularly high for IEIYC members who have had or will have contact with local law enforcement, since CBP officials may place DACA recipients whom they encounter in removal proceedings—even on the basis of an arrest.") (citations omitted). The cases Plaintiffs cite to do not overcome this deficiency, and largely do not even apply to Plaintiffs' arguments.

First, Plaintiffs misstate the Ninth Circuit's holding in *Valle del Sol Inc. v. Whiting*, claiming the Court found organizational standing based on the organization's fear that its members would be arrested under a new Arizona law. Dkt. No. 73 at 14. In reality, the Court found standing "[b]ecause the organizational plaintiffs have shown that their missions have been frustrated and their resources diverted as a result of § 13–2929." 732 F.3d 1006, 1019 (9th Cir. 2013). As Defendants pointed out in their motion and Plaintiffs fail to address in their opposition, Plaintiff Inland Empire has not alleged any frustration in its mission or diversion of its resources due to Defendants' alleged DACA termination practices.

Second, Plaintiffs' citations to *Hawaii v. Trump*, 859 F.3d 741, 762 (9th Cir.), *vacated*, 874 F.3d 1112 (9th Cir. 2017) and *Georgia Latino All. for Human Rights v. Governor of Georgia* ("*GLAHR*"), 691 F.3d 1250, 1260 (11th Cir. 2012), are equally

misstated. Dkt. No. 73 at 14-15. Plaintiffs in those cases relied on individual standing to assert a harm, rather than organizational standing. *See Hawaii*, 859 F.3d at 762; *GLAHR*, 691 F.3d at 1260. Furthermore, to the extent those decisions address organizational standing, those findings are based on allegations of frustration of their missions, and both opinions cite to evidence offered by the organizations of diversion of their resources in an effort to respond to the alleged harms. *See Hawaii*, 859 F.3d at 763-66; *GLAHR*, 691 F.3d at 1259-61. Thus, neither case supports Plaintiffs' organizational standing arguments, and consequently, Inland Empire's claims should be dismissed

**c. Plaintiffs fail to address the Ninth Circuit and Supreme Court holdings that standing cannot be established on the fear of future harm that will only arise from a plaintiff's unlawful conduct.**

Even if Plaintiffs Arreola and Inland Empire established more than "[a]llegations of possible future injury" necessary to create standing, *Or. Prescription Drug Monitoring Program*, 860 F.3d at 1235, they cannot overcome the fact that they have only presented plaintiffs who have lost DACA due to having engaged in illegal conduct. Plaintiffs' response to Defendants' assertion that standing cannot be based on a future harm that will only result from a plaintiff's own illegal behavior, *see* Def.'s Motion at 17, is to assert again that the government concedes it may terminate DACA for an individual without a criminal conviction. Dkt. No. 73 at 15-16. Plaintiffs miss the point. The Ninth Circuit in *Hodgers-Durgin v. de la Vina* did not hold—and Defendants do not assert—that behavior resulting in a criminal conviction is necessary to preclude Article III standing to challenge a future harm. 199 F.3d 1037, 1042 (9th Cir. 1999) ("denial of Article III standing in *Lyons* [was] based on the plaintiff's ability to avoid engaging in illegal conduct."), citing *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Here, Plaintiff Inland Empire argues that it has organizational standing on the basis that its members are at risk of encountering an immigration enforcement officer, that officer arresting them, and then placing them in removal proceedings that would cause their DACA to terminate. Dkt. No. 73. However, this scenario is entirely speculative and based on the exact type of "string

of contingencies" the Ninth Circuit rejected in *Hodgers-Durgin*. 199 F.3d at 1042 ("In *Lyons*, further injury would have required another stop by the police, followed by post-stop behavior culminating in a chokehold.").

Nor do Defendants suggest that, as Plaintiffs' allege, individuals "should avoid driving near the Mexican border in order to avoid another stop by the Border Police." Dkt. No. 73 at 16, citing 199 F.3d at 1041 (finding "untenable" the suggestion that an individual avoid engaging in "entirely innocent conduct" to avoid a future harm). Ultimately, Plaintiffs fail to address the fact that they have failed to identify one named or putative class member who lost DACA without having first engaged in illegal conduct. Thus, Plaintiff Inland Empire's fear of speculative future harm to their members, based only on proximity to Border Patrol agents, lacks the imminence or certainty required for Article III standing, and it should be dismissed as a party.

DATED: April 2, 2018

Respectfully Submitted,

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