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UNITED STATES DISTRICT COURT
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

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Judge: Hon. Philip S. Gutierrez
Courtroom: 6A
Hearing: February 5, 2018
Time: 1:30 p.m.

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INTRODUCTION

Plaintiffs José Eduardo Gil Robles ("Mr. Gil"), Ronan Carlos De Souza Moreira ("Mr. Moreira"), and Jesús Alonso Arreola Robles ("Mr. Arreola") (collectively, "Plaintiffs"), along with numerous other Deferred Action for Childhood Arrivals ("DACA") recipients nationwide, have had their permission to live in the United States and employment authorization arbitrarily stripped away by the United States Citizenship and Immigration Services ("USCIS") since President Trump took office, without any notice, reasoned explanation, or opportunity to be heard. USCIS has abruptly revoked these young immigrants' valid DACA and work authorization even though they remain eligible for the program. Losing the protection of DACA and, with it, the ability to work and plan for the future, is devastating to these young immigrants who have called the United States home since they were children.

Mr. Gil is a 24-year-old who has lived in the United States for more than 19 years. USCIS found him eligible for and granted him DACA in both 2015 and 2017. His DACA allowed him to work as a bakery manager and for a logistics company, and he used his earnings to help support his five younger U.S. citizen siblings. Mr. Gil was also able to get a driver's license, which allowed him to drive to work and church, and to give his siblings rides to school. However, USCIS suddenly revoked Mr. Gil's DACA and work authorization in November 2017—just three months after USCIS renewed it—without providing him with a reasoned explanation or a process to challenge the revocation.

Mr. Moreira is also 24 years old and has lived in the United States since he was a child. In high school, Mr. Moreira was active in school sports and other activities and received various certificates of achievement for his academic performance. After Mr. Moreira graduated, USCIS granted him DACA, which allowed him to secure a good job with a flooring company, where he excelled and was quickly promoted from an assistant manager to a manager position. USCIS granted Mr. Moreira DACA twice

1 more—most recently in November 2017—just days before USCIS abruptly
2 terminated it.[1]

3 Plaintiffs are not alone. Indeed, Plaintiffs' counsel are aware of at least 17
4 DACA recipients across the country who have had their DACA and work permits
5 terminated without notice or process since January 2017, even though they still
6 qualify for the program. Declaration of Katrina L. Eiland ("Eiland Decl.") ¶¶ 3-14.
7 Hundreds of thousands more DACA recipients nationwide are at risk of having their
8 DACA terminated pursuant to Defendants' unlawful policies and practices. *Id.* ¶ 48,
9 Ex. 33.

10 Indeed, Defendants have conceded in this lawsuit that USCIS engages in a
11 practice of terminating DACA without notice or an opportunity to respond, including
12 by automatically terminating DACA based on the issuance of a Notice to Appear
13 ("NTA") in immigration court, without regard to whether the recipient remains
14 eligible for the program. *See* Doc No. 23-2, Declaration of Ron Thomas ("Thomas
15 Decl.") ¶ 4. Defendants also have conceded that this practice is widespread. In fact,
16 Defendants have represented that the number of individuals subjected to its practice is
17 such that identifying "all automatic terminations of DACA would . . . involve a
18 manual review of *hundreds* of cases." *Id.* ¶ 5 (emphasis added).

19 However, as this Court and others have ruled, USCIS's admitted practice of
20 terminating DACA without notice or process violates the agency's own rules and is,
21 therefore, arbitrary and capricious and contrary to law under the Administrative
22 Procedure Act ("APA"). As described in Plaintiffs' Motion for a Classwide
23 Preliminary Injunction, filed this same date, Defendants' termination practice is also
24 arbitrary and capricious because it fails to provide good reasons for changing course
25 with respect to the agency's determination that the individual merits DACA, and is
26 based on arbitrary, irrelevant factors. Terminating DACA without notice and an

27 [1] The termination of Mr. Arreola's DACA is described in detail in Plaintiff
28 Arreola's Memorandum of Law in Support of his Motion for a Preliminary Injunction. *See* Doc. No. 16-2 at 5-10.

opportunity to be heard also violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

A class action lawsuit is appropriate to challenge Defendants' unlawful policies and practices. Plaintiffs seek to certify the following nationwide Notice Class under Federal Rules of Civil Procedure 23(a) and 23(b)(2):

> 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.[2]

The proposed class readily satisfies the requirements of numerosity, commonality, typicality, and adequacy in Rule 23(a) and is readily ascertainable. The proposed class includes at least 17 and likely many more individuals whose DACA already has been unlawfully terminated, which is sufficient to satisfy numerosity. *See, e.g.*, *Ark. Educ. Ass'n v. Board Of Educ. of Portland, Ark. Sch. Dist*., 446 F.2d 763, 765-66 (8th Cir. 1971) (class of 17 sufficient); *Hum v. Dericks*, 162 F.R.D. 628, 634 (D. Haw. 1995) (noting that courts have certified classes with as few as 13 members). The class raises numerous common legal questions that generate common answers: namely, whether Defendants' challenged policies and practices violate the APA and the Due Process Clause. The class also raises common factual issues because Plaintiffs and class members are subject to the same policies and practices. Plaintiffs' APA and Due Process Clause claims are typical of those whom they seek to represent—that is, other DACA recipients who have or will have their DACA and work authorization terminated without notice or process pursuant to Defendants' unlawful policies and practices, despite having no disqualifying convictions. And as to adequacy, a team of seasoned attorneys from the ACLU Immigrants' Rights Project

[2] This motion does not address the proposed "Enforcement Priority" Class pled in Plaintiffs' Amended Complaint, filed this same date.

and the ACLU of Southern California, with significant experience in immigrants' rights and class action cases, represents Plaintiffs.

Plaintiffs' proposed class likewise satisfies Rule 23(b)(2) because Defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Because the government has a policy or practice of terminating DACA without notice, process, or a reasoned explanation, including based solely on the issuance of an NTA, even where a DACA recipient has never engaged in any disqualifying conduct, Defendants have necessarily acted in the same way as to all class members. Injunctive and declaratory relief to stop Defendants' unlawful practices is therefore appropriate with respect to the class as a whole.

Accordingly, this Court should grant class certification under Rule 23(b)(2) for purposes of entering Plaintiffs' requested classwide preliminary injunction.[3] *See Carrillo v. Schneider Logistics, Inc*., No. 11-cv-8557CAS-DTBX, 2012 WL 556309, at *9 (C.D. Cal. Jan. 31, 2012) ("courts routinely grant provisional class certification for purposes of entering [preliminary] injunctive relief" under Rule 23(b)(2), where the plaintiff establishes that the four prerequisites in Rule 23(a) are also met) (citing *Baharona-Gomez v. Reno*, 167 F.3d 1228, 1233 (9th Cir. 1999)).

BACKGROUND

The DACA Program[4]

Under DACA, young immigrants who entered the United States as children who meet specified educational and residency requirements, and who pass extensive criminal background checks, are eligible to receive deferred action. Doc. No. 16-4, Declaration of Dae Keun Kwon ("Kwon Decl.") ¶ 10, Ex. 9 ("Napolitano Memo" at

[3] Plaintiffs also request that they be appointed Class Representatives, and that undersigned counsel be appointed Class Counsel.

[4] Additional background about the DACA program is provided in Plaintiffs' Amended Complaint, filed concurrently with this Motion, and Plaintiff Arreola's Memorandum of Law in support of his Motion for a Preliminary Injunction, Doc No. 16-2.

1-2). The enumerated eligibility criteria include the requirements that DACA recipients not have been convicted of a felony, a significant misdemeanor,[5] or three or more other misdemeanors. Napolitano Memo at 1.

USCIS is the agency charged with making DACA determinations. *Id.* at 2-3. The DACA Standard Operating Procedures ("SOPs") set forth the uniform procedures that the agency must follow in adjudicating all DACA applications, as well as in terminating DACA and EADs granted through the program. *See* Doc No. 31, Order Granting Pl.'s Mot. for Prelim. Inj. ("PI Order") at 2; Kwon Decl. ¶ 21, Ex. 20 at 16 ("This SOP is applicable to all Service Center personnel performing adjudicative and clerical functions or review of those functions. Personnel outside of Service Centers performing duties related to DACA processing will be similarly bound by the provisions of this SOP."); *id.* ("This SOP describes the procedures Service Centers are to follow when adjudicating DACA requests."); *see also Colotl v. Kelly*, No. 17-cv-1670-MHC, 2017 WL 2889681, at *4 (N.D. Ga. June 12, 2017); *Gonzalez Torres v. U.S. Dep't of Homeland Sec.*, No. 17-cv-1840 JM(NLS), 2017 WL 4340385, at *3 (S.D. Cal. Sept. 29, 2017).

On September 5, 2017, the Department of Homeland Security ("DHS") announced that it was winding down the DACA program. Although the program is ending, DHS officials have confirmed that the same program rules continue to apply until it ends. PI Order at 1-2.

Defendants' Unlawful DACA Revocation Policies and Practices

Despite President Trump's assurances that DACA recipients "have nothing to worry about"[6] and despite the critically important interests at stake once an individual has received a grant of DACA, Defendants have engaged in a policy and practice of

[5] Significant misdemeanors are convictions for domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; and, driving under the influence; and any offense for which an individual was sentenced to time in custody of more than 90 days. Kwon Decl. ¶ 20, Ex. 19 at 20.

[6] Eiland Decl. ¶ 30, Ex. 15 (@realDonaldTrump, TWITTER (Sept. 7, 2017, 6:42 AM), https://twitter.com/realDonaldTrump/status/905788459301908480).

unlawfully revoking individuals' DACA and work permits without notice, a reasoned explanation, or an opportunity to respond, even though these individuals remain eligible for the program.

Defendants' unlawful termination of qualified individuals' DACA and work authorization involves at least two systemic policies and practices:

First, Defendants have a practice of revoking DACA without providing notice, a reasoned explanation, an opportunity to be heard prior to revocation, or a process for reinstatement where the revocation is in error. Defendants' have engaged in this practice despite the fact that USCIS's own SOPs governing the DACA program do not allow for termination without notice in the vast majority of cases, including in Plaintiffs' and the proposed class members. *See, e.g.*, *Gonzalez Torres*, 2017 WL 4340385, at *3 ("In short, except in EPS cases [i.e., certain cases involving an egregious risk to public safety], the DACA SOP requires notice and an ability to contest the [Notice of Intent to Terminate] before DACA status may be terminated.").

Second, USCIS has a practice of automatically terminating DACA and work permits based on the issuance of an NTA where the sole basis for the NTA is the individual's lack of immigration status in the United States. Defendants themselves have asserted in this litigation that USCIS has a "consistent practice" of automatically terminating DACA "with the issuance of NTAs." Doc No. 23, Defs.' Opp. to PI at 26; *see also* Thomas Decl. ¶ 4 ("The issuance of a Notice to Appear (NTA) by U.S. Immigration and Customs Enforcement (ICE) or U.S. Customs and Border Protection (CBP) automatically terminates DACA. . . . This has been USCIS' practice since FY 2013 when such terminations began."). As this Court has observed, however, all DACA recipients could be charged with unlawful presence, and DACA is available to noncitizens who are in removal proceedings. PI Order at 9.

Plaintiffs and Proposed Class Members

The termination of Plaintiffs' DACA and work authorization illustrates Defendants' unlawful policies and practices. Mr. Gil, who has lived in the United

States since he was five years old, was working for a logistics company in Minnesota and helping to support his five U.S. citizen siblings when USCIS revoked his DACA and work authorization. Declaration of José Eduardo Gil Robles ("Gil Decl.") ¶¶ 1-2, 11-12. Mr. Gil was arrested in September 2017 and ultimately charged with a misdemeanor for driving on a cancelled license, which is still pending.[7] *Id.* ¶ 14. Mr. Gil was not aware of any problem with his driver's license, which was allegedly cancelled because it required a "status check" when his previous grant of DACA expired a few weeks before. *Id.* Mr. Gil was released on bond and went back to his work and family. *Id.* ¶ 15. However, a month later, ICE appeared at his job, arrested him, and took him to an immigration detention facility. *Id.* ICE subsequently issued him an NTA charging him with being present without admission. *Id.* Mr. Gil was released on bond after an immigration judge found that he was not a danger to the community or a flight risk. *Id.* ¶¶ 18-20. However, while he was in detention, Mr. Gil received a notice from USCIS terminating his renewed DACA based on ICE's issuance of an NTA. *Id.* ¶¶ 22-23, 30, Ex. B. He received no notice or explanation beyond the single sentence in the notice, and he had no chance to respond. *Id.* ¶ 23.

Similarly, Mr. Moreira has lived in the United States since middle school, after entering on a visitor's visa. Declaration of Ronan Carlos De Souza Moreira ("Moreira Decl.") ¶ 1. His mother is a Legal Permanent Resident and his older brother, who is expecting a child, is a U.S. citizen. *Id.* ¶ 5. During middle school and high school, Mr. Moreira played soccer and tennis, participated in school clubs, and earned certificates of achievement for his academic performance and attendance. *Id.* ¶ 2. After graduating from high school and getting DACA, Mr. Moreira secured a good job with a flooring company in Georgia, working his way up to a job managing 20 flooring installers. *Id.* ¶¶ 2, 9. On November 2, 2017, Mr. Moreira was arrested after a police officer concluded that the expiration date on his license had been changed.

[7] Such traffic violations do not even count as a misdemeanor that could disqualify an individual from DACA. *See* Kwon Decl. ¶ 20, Ex. 19 at 20.

1 He was ultimately charged with a misdemeanor for possession of an altered
2 identification document, but has not been convicted. *Id.* ¶¶ 12-14. Although Mr.
3 Moreira was quickly granted bail, ICE detained him and issued him an NTA charging
4 him with overstaying a visa. *Id.* ¶ 14. Mr. Moreira was released from immigration
5 detention after about a month. When he appeared for a bond hearing, the lawyer for
6 the government conceded that he was neither a flight risk nor a danger to the
7 community, and offered him a bond, which he accepted. *Id.* ¶ 16. However, like Mr.
8 Gil, Mr. Moreira received a notice from USCIS terminating his DACA based on
9 ICE's issuance of an NTA. *Id.* ¶¶ 18, 26, Ex. B. Mr. Moreira also did not receive any
10 notice or explanation beyond the single sentence in the notice, and he had no chance
11 to respond. *Id.* ¶ 19.
12 Plaintiffs' experiences are representative of DACA terminations nationally.
13 According to government statistics, DACA revocations increased by 25 percent in the
14 first three months after President Trump's inauguration in January 2017.[8] Plaintiffs'
15 counsel are aware of at least 17 individuals around the country who, in the last ten
16 months alone, have had their DACA and work authorization terminated without
17 notice, a reasoned explanation, or an opportunity to respond, even though they
18 continue to be eligible for DACA. Eiland Decl. ¶¶ 2-14. Given that there are
19 currently nearly 700,000 DACA recipients across the country, *id.* ¶ 48, Ex. 33, there
20 are likely at least dozens—if not many more—in the same situation whose stories
21 have not reached Plaintiffs' counsel. Moreover, hundreds of thousands of individuals
22 nationwide are at risk of having their DACA and work authorization terminated
23 pursuant to Defendants' unlawful policies and practices in the future as the program
24 winds down over the next two years. In fact, Plaintiffs' counsel are aware of two
25 additional DACA recipients to whom ICE recently issued NTAs despite their
26 continued DACA eligibility, and who are at risk of receiving DACA termination

27 [8] Eiland Decl. ¶ 20, Ex. 5 (Keegan Hamilton, *Targeting Dreamers*, VICE News, Sept.
28 8, 2017, https://news.vice.com/story/ice-was-going-after-dreamers-even-before-trump-killed-daca).

letters from USCIS. *Id.* ¶ 15. In at least one of those cases, counsel for ICE has already represented that the individual's DACA has been terminated. *Id.*

Moreover, federal immigration authorities have been instructed to screen every DACA recipient they encounter. *Id.* ¶¶ 21-23, Exs. 6-8. Just recently, in early September, ten DACA recipients were detained for hours by Customs and Border Patrol ("CBP") agents in Texas even though they have valid DACA. *Id.* ¶ 23, Ex. 8. Although they were ultimately released, CBP scrutinized their records, presumably looking for a reason to hold them and revoke their DACA status. *Id.* This targeting of DACA recipients is likely to result in additional unlawful terminations.

Moreover, Defendants' actions demonstrate that they have been targeting DACA recipients for revocation even though they have committed no disqualifying conduct and remain eligible for the program. On February 20, 2017, former DHS Secretary John Kelly issued a memorandum setting forth enforcement priorities that DHS would follow in its enforcement of the immigration laws (hereinafter, the "Kelly Memo").[9] The Kelly Memo states that, "[e]ffective immediately, . . . Department personnel shall faithfully execute the immigration laws of the United States against all removable aliens." The memorandum provides that even noncitizens who have no criminal convictions, but merely have been "charged with any criminal offense that has not been resolved," as well as any noncitizen who has "committed acts which constitute a chargeable criminal offense" will be prioritized for removal from the United States. USCIS has revoked DACA grants of individuals who do not have criminal history disqualifying them from DACA under the carefully crafted DACA Memo and SOPs, but who have had minor encounters with law enforcement that could make them a priority under the Kelly Memo's general expanded enforcement priorities. *See, e.g.*, *Colotl*, 2017 WL 2889681, at *7 (N.D. Ga. June 12, 2017).

[9] Eiland Decl. ¶ 18, Ex. 3 (Memorandum from John Kelly, Enforcement of the Immigration Laws to Serve the National Interest 2 (Feb. 20, 2017), *available at* https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf).

1 The Kelly Memo and related DHS guidance, however, *expressly exempt* the
2 DACA program from the Kelly Memo's expanded priorities. *See* Eiland Decl. ¶¶ 17-
3 17, Exs. 2-3; *see also Colotl*, 2017 WL 2889681, at *7-8, *12 (finding that "the Kelly
4 Memo, by its own terms, has no application to the DACA program"). Indeed, the
5 Kelly Memo directly conflicts with the DACA Memo and SOPs, which define those
6 eligible for DACA as low enforcement priorities and provide the relevant rules for
7 termination of DACA. *See* Kwon Decl. ¶ 21, Ex. 20 at 18, 136-38. Even so, USCIS
8 has targeted for revocation individuals who remain eligible for DACA, thus further
9 reinforcing that numerous DACA recipients are at risk of unlawful termination in the
10 future.

11 **ARGUMENT**

12 A plaintiff whose suit meets the requirements of Federal Rule of Civil
13 Procedure 23 has a "categorical" right "to pursue his claim as a class action." *Shady*
14 *Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 398 (2010). To
15 meet these requirements, the "suit must satisfy the criteria set forth in [Rule 23(a)]
16 (i.e., numerosity, commonality, typicality, and adequacy of representation), and it also
17 must fit into one of the three categories described in subdivision (b)." *Id*.

18 As set forth below, Plaintiffs' proposed class satisfies all four of the Rule 23(a)
19 prerequisites, as well as the judicially implied requirement of ascertainability. The
20 proposed class likewise meets the requirements for certification under Rule 23(b)(2).

21 This Court should certify the proposed class in keeping with the numerous court
22 decisions certifying classes in similar actions challenging the federal government's
23 administration of immigration programs. *See, e.g*., *Walters v. Reno*, 145 F.3d 1032
24 (9th Cir. 1998) (affirming certification of nationwide class of individuals challenging
25 adequacy of notice in document fraud cases); *Arnott v. U.S. Citizenship &*
26 *Immigration Servs*., 290 F.R.D. 579 (C.D. Cal. 2012) (certifying nationwide class of
27 immigrant investors challenging USCIS' retroactive application of new rules
28 governing approval petitions to remove permanent residency conditions); *Santillan v.*

1 *Ashcroft*, No. 04-cv-2686MHP, 2004 WL 2297990 (N.D. Cal. Oct. 12, 2004)
2 (certifying nationwide class of lawful permanent residents challenging delays in
3 receiving documentation of their status); *Wagafe v. Trump*, No. 17-cv-0094-RAJ,
4 2017 WL 2671254, at *1 (W.D. Wash. June 21, 2017) (certifying nationwide class of
5 naturalization applicants challenging national security screening procedures); *Mendez*
6 *Rojas, et al. v. Johnson*, No. 16-cv-1024-RSM, (W.D. Wash. Jan. 10, 2017)
7 (certifying two nationwide classes of asylum seekers challenging defective asylum
8 application procedures).

9 **I. The Proposed Class Satisfies Rule 23(a)'s Requirements.**

10 **A. Numerosity: The Proposed Class Consists of at Least Seventeen and**
11 **Likely Many More DACA Recipients.**

12 Rule 23(a)(1) requires that a class be "so numerous that joinder of all members
13 is impracticable." Fed. R. Civ. P. 23(a)(1). "'[I]mpracticability' does not mean
14 'impossibility,' but only the difficulty or inconvenience of joining all members of the
15 class." *Franco-Gonzales v. Napolitano*, No. 10-cv-02211-DMG-DTBX, 2011 WL
16 11705815, at *6 (C.D. Cal. Nov. 21, 2011) (quoting *Harris v. Palm Springs Alpine*
17 *Estates, Inc.*, 329 F. 2d 909, 913-14 (9th Cir. 1964)). No fixed number of class
18 members is required. *Perez-Funez v. Dist. Dir., I.N.S.*, 611 F. Supp. 990, 995 (C.D.
19 Cal. 1984). Moreover, where a plaintiff seeks injunctive and declaratory relief, the
20 "requirement is relaxed and plaintiffs may rely on [] reasonable inference[s] arising
21 from plaintiffs' other evidence that the number of unknown and future members of
22 [the] proposed subclass . . . is sufficient to make joinder impracticable." *Arnott v. U.S.*
23 *Citizenship & Immigration Servs.*, 290 F.R.D. 579, 586 (C.D. Cal. 2012) (quoting
24 *Sueoka v. United States*, 101 Fed. App'x 649, 653 (9th Cir. 2004)).

25 Here, the number of class members far exceeds the requirement for numerosity.
26 First, Plaintiffs' counsel is aware of at least 17 DACA recipients who, in the last ten
27 months alone, have had their DACA terminated without notice or process, despite
28 remaining eligible for the program. Eiland Decl. ¶¶ 2-14. Given the increasing

1 number of DACA revocations nationwide in 2017, *see id.* ¶ 20, Ex. 5, the targeting of
2 DACA recipients by federal immigration authorities, and the overall scale of the
3 program, with hundreds of thousands of current DACA recipients, *id.* ¶ 48, Ex. 33,
4 there are likely at least dozens—if not many more—who have already had their
5 DACA terminated pursuant to Defendants' challenged practices. Indeed, Defendants
6 have submitted a declaration in the instant litigation representing that the number of
7 DACA recipients subjected to terminations without process is such that identifying
8 "all automatic terminations of DACA would . . . involve a manual review of *hundreds*
9 of cases." Thomas Decl. ¶ 5 (emphasis added). The Court can thus reasonably
10 conclude that the proposed class is sufficiently numerous. *See Cervantez v. Celestica*
11 *Corp.*, 253 F.R.D. 562, 569 (C.D. Cal. 2008) (internal quotation marks and citations
12 omitted) (noting that "where the exact size of the class is unknown but general
13 knowledge and common sense indicate that it is large, the numerosity requirement is
14 satisfied"); *see also, e.g.*, *Hum*, 162 F.R.D. at 634 (courts have certified classes with
15 as few as 13 members); *Ark. Educ. Ass'n*, 446 F.2d at 765-66 (class of 17 sufficient);
16 *Jordan v. Los Angeles Cty.*, 669 F.2d 1311, 1319 (9th Cir. 1982) (class of 39
17 sufficient), *vacated on other grounds*, 459 U.S. 810 (1982).
18 Second, in addition to the number of individuals who have already had their
19 DACA unlawfully terminated, Plaintiffs' proposed class also includes individuals who
20 *will have* their DACA terminated without notice or process, despite continuing to be
21 eligible, if Defendants' policies and practices are not enjoined. Hundreds of
22 thousands of DACA recipients are at risk of losing their deferred action if Defendants'
23 challenged practices are permitted to continue while the DACA program winds down
24 over the next two years. Indeed, Defendants themselves have conceded that USCIS
25 engages in a practice of automatically terminating DACA without notice or process,
26 based solely on the issuance of an NTA, without regard to whether the individual
27 remains eligible for DACA. *See* Thomas Decl. ¶ 4. Immigration authorities'
28 increased screening of DACA recipients, as well as the large number of already-

1 identified class members, further supports the inference that there will be additional
2 class members in the future.
3 The presence of such future class members renders joinder inherently
4 impractical, thereby satisfying the purpose behind the numerosity requirement. *See,*
5 *e.g*, *Ali v. Ashcroft*, 213 F.R.D. 390, 408 (W.D. Wash. 2003), *aff'd*, 346 F.3d 873 (9th
6 Cir. 2003), *vacated on other grounds*, 421 F.3d 795 (9th Cir. 2005) (internal quotation
7 marks and citation omitted) ("[W]here the class includes unnamed, unknown future
8 members, joinder of such unknown individuals is impracticable and the numerosity
9 requirement is therefore met, regardless of class size." (quoting *Natl. Assn. of*
10 *Radiation Survivors v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal. 1986)); *Smith v.*
11 *Heckler*, 595 F. Supp. 1173, 1186 (E.D. Cal. 1984) (in injunctive relief cases,
12 "[j]oinder in the class of persons who may be injured in the future has been held
13 impracticable without regard to the number of persons already injured"); *Hawker v.*
14 *Consovoy*, 198 F.R.D. 619, 625 (D.N.J. 2001) ("The joinder of potential future class
15 members who share a common characteristic, but whose identity cannot be
16 determined yet is considered impracticable.").
17 **B. The Class Presents Common Questions of Law and Fact.**
18 To satisfy commonality, Plaintiffs must show that "there are questions of law or
19 fact common to the class." Fed. R. Civ. P. 23(a)(2). Rule 23(a)(2)'s commonality
20 requirement "has been construed permissively." *Preap v. Johnson*, 303 F.R.D. 566,
21 585 (N.D. Cal. 2014), *aff'd*, 831 F.3d 1193 (9th Cir. 2016) (quoting *Hanlon v.*
22 *Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1998)) (internal quotation marks
23 omitted). A plaintiff "need not show . . . that every question in the case, or even a
24 preponderance of questions, is capable of class wide resolution." *Parsons v.Ryan*, 754
25 F.3d 657, 675 (9th Cir. 2014) (internal quotation marks and citation omitted). Rather,
26 even one shared legal issue can be sufficient. *See, e.g.*, *Mazza v. Am. Honda Motor*
27 *Co., Inc*., 666 F.3d 581, 589 (9th Cir. 2012) (noting that "commonality only requires a
28 single significant question of law or fact"); *Walters*, 145 F.3d at 1046 ("What makes

the plaintiffs' claims suitable for a class action is the common allegation that the INS's procedures provide insufficient notice."); *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2010) ("[T]he commonality requirement[] asks us to look only for some shared legal issue or a common core of facts."). Moreover, "[i]ndividual variation among plaintiffs' questions of law and fact does not defeat underlying legal commonality, because 'the existence of shared legal issues with divergent factual predicates is sufficient' to satisfy Rule 23." *Santillan v. Ashcroft*, No. C 04-2686 MHP, 2004 WL 2297990, at *10 (N.D. Cal. Oct. 12, 2004) (quoting *Hanlon*, 150 F.3d at 1019). The commonality standard is even more liberal in a civil rights suit like this one, in which "the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504-05 (2005).

Here, Plaintiffs' lawsuit raises numerous legal questions common to the proposed class,[10] including:

- Whether Defendants' practice of terminating DACA and work authorization without notice, a meaningful explanation, or an opportunity to be heard violates Defendants' own rules for the DACA program and is therefore arbitrary and capricious under the APA;
- Whether Defendants' practice of revoking an existing grant of DACA and work authorization without notice, a meaningful explanation, or an opportunity to be heard is arbitrary and capricious and contrary to law in violation of the APA because it fails to provide a good reason for the agency's change in position;
- Whether Defendants' practice of terminating DACA and work authorization without notice, a meaningful explanation, or an opportunity to be heard violates the Due Process Clause of the U.S. Constitution; and

[10] Plaintiffs' claims are described in greater detail in their Motion for a Classwide Preliminary Injunction, filed this same date.

1 • Whether Defendants' practice of terminating DACA and work authorization
2 based solely on the issuance of an NTA charging the individual with unlawful
3 presence in the United States, is arbitrary and capricious under the APA
4 because it is based on arbitrary, irrelevant factors.
5 Any one of these common issues, standing alone, is enough to satisfy Rule
6 23(a)(2)'s permissive standard. *See Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 257
7 (C.D. Cal. 2008) ("Courts have found that a single common issue of law or fact is
8 sufficient.") (citation omitted); *Sweet v. Pfizer*, 232 F.R.D. 360, 367 (C.D. Cal. 2005)
9 (observing that "there must only be one single issue common to the proposed class")
10 (quotation and citation omitted).
11 Plaintiffs and proposed class members also share a common core of facts: (1)
12 The determination of Plaintiffs' and class members' DACA is subject to the same
13 rules, namely the DACA Memo and SOPs; (2) Plaintiffs and proposed class members
14 all had their DACA terminated without notice, a meaningful explanation, or an
15 opportunity to respond; and (3) Plaintiffs and proposed class members do not have
16 any convictions that would disqualify them from the program.
17 Finally, Plaintiffs and proposed class members "have suffered the same injury,"
18 in that Defendants have terminated each of their DACA without notice, a meaningful
19 explanation," or an opportunity to be hear pursuant to the same unlawful policies or
20 practices. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quoting *Gen.*
21 *Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Should the Court agree that
22 Defendants' policies or practices violate the APA and/or the Due Process Clause, all
23 who fall within the class will benefit from the requested relief—a nationwide
24 injunction preventing the termination of their DACA pursuant to those practices.
25 Thus, a common answer as to the legality of the challenged policies and practices will
26 "drive the resolution of the litigation." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970,
27 981 (9th Cir. 2011) (quoting *Wal-Mart*, 564 U.S. at 350).
28

Defendants may argue that Plaintiffs cannot satisfy commonality because the agency's decision to revoke DACA is based on particular facts and circumstances unique to each recipient. But this argument would misconstrue and misapply the commonality requirement. Instead, "[w]here the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) (internal quotation marks and citation omitted); *see also Walters*, 145 F.3d at 1046 ("Differences among the class members with respect to the merits of their actual document fraud cases, however, are simply insufficient to defeat the propriety of class certification. What makes the plaintiffs' claims suitable for a class action is the common allegation that the INS's procedures provide insufficient notice."); *Arnott*, 290 F.R.D. at 586-87 (variation in business plans and investment projects did not defeat certification in light of common question of permissibility of retroactively applying new policy to those who "already received approval of I-526 petitions"). Moreover, any factual differences that may exist among Plaintiffs and proposed class members are immaterial to their claims, which challenge Defendants' common termination policies and practices as categorically violating the APA and the Due Process Clause—not the agency's ultimate exercise of discretion with respect to each recipient. *See Orantes-Hernandez v. Smith*, 541 F. Supp. 351 (C.D. Cal. 1982) (rejecting defendants' argument that certification was unwarranted because class members' suitability for relief was individualized where plaintiff challenged common agency practice, not ultimate outcome of cases).

C. Typicality: Plaintiffs' Claims Are Typical of Those of Other Class Members.

Rule 23(a)(3) requires that "the claims or defense of the representative parties [be] typical of the claims or defenses of the class." The purpose of this requirement is to "assure that the interest of the named representative aligns with the interests of the class" as a whole. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

1 "Under the rule's permissive standards, representative claims are 'typical' if they are
2 reasonably coextensive with those of the absent class members." *Parsons*, 754 F.3d at
3 685 (quoting *Hanlon*, 150 F.3d at 1020). "The test of typicality is 'whether other
4 members have the same or similar injury, whether the action is based on conduct
5 which is not unique to the named plaintiffs, and whether other class members have
6 been injured by the same course of conduct.'" *Id.* (citation omitted). As with
7 commonality, factual differences among class members do not defeat typicality.
8 *LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985) ("The minor differences in the
9 manner in which the representative's Fourth Amendment rights were violated does not
10 render their claims atypical of those of the class.")

11 Plaintiffs' claims are typical of the claims of the proposed class. Each Plaintiff,
12 just like each proposed class members, had valid DACA and work authorization that
13 USCIS terminated without notice, a meaningful explanation, or an opportunity to be
14 heard, pursuant to Defendants' unlawful policies or practices. Plaintiffs and class
15 members assert that such action was arbitrary and capricious under the APA and
16 violated the Due Process Clause. Any factual variations among Plaintiffs and
17 proposed class members in ways relevant to USCIS's ultimate decision of whether to
18 terminate DACA do not defeat typicality because, as described above, Plaintiffs'
19 claims do not implicate such differences. *See, e.g.*, *Rodriguez*, 591 F.3d at 1124 ("The
20 particular characteristics of the Petitioner or any individual detainee will not impact
21 the resolution of this general statutory question and, therefore, cannot render
22 Petitioner's claim atypical.").

23 **D. Adequacy: Plaintiffs Will Adequately Protect the Interests of the**
24 **Proposed Class, and Plaintiffs' Counsel Are More Than Qualified to**
25 **Litigate this Action.**

26 Rule 23(a)(4) requires that "[t]he representative parties will fairly and
27 adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Whether the
28 class representatives satisfy the adequacy requirement depends on 'the qualifications
of counsel for the representatives, an absence of antagonism, a sharing of interests

1 between representatives and absentees, and the unlikelihood that the suit is
2 collusive.'" *Rodriguez*, 591 F.3d at 1125 (citing *Walters*, 145 F.3d at 1046).
3 Plaintiffs' counsel are deemed qualified when they can establish their
4 experiences in previous class actions and cases involving the same area of law. *Lynch*
5 *v. Rank*, 604 F. Supp. 30, 37 (N.D. Cal. 1984), *aff'd* 747 F.2d 528 (9th Cir. 1984),
6 *amended on reh'g*, 763 F.2d 1098 (9th Cir. 1985). Here, putative Class Counsel are
7 attorneys from the ACLU Immigrants' Rights Project and ACLU of Southern
8 California. *See* Declaration of Jennifer Chang Newell ("Newell Decl.").
9 Collectively, putative Class Counsel have extensive and diverse experience in
10 complex immigration cases and class action litigation, and Class Counsel also have
11 sufficient resources to litigate this matter to completion. *Id.* ¶¶ 2-27. Attorneys from
12 the ACLU Immigrants' Rights Project and ACLU of Southern California have been
13 appointed class counsel and successfully litigated similar class action lawsuits in this
14 district and in courts across the country. *Id.*; *see also, e.g.*, *Rodriguez*, 591 F.3d at
15 1111; *Alfaro Garcia v. Johnson*, No. 14-cv-1775, 2014 WL 6657591, at *15 (N.D.
16 Cal. 2014); *Rivera v. Johnson*, 307 F.R.D. 539 at 542-43 (W.D. Wa 2015); *Franco-*
17 *Gonzales*, 2011 WL 11705815, at *1; *Preap*, 303 F.R.D. at 570; *Khoury v. Asher*, 3 F.
18 Supp. 3d 877, 878 (W.D. Wash. 2014); *RILR v. Johnson*, 80 F. Supp. 3d 164, 181
19 (D.D.C. 2015).
20 Plaintiffs will fairly and adequately protect the interests of the proposed class,
21 and therefore are adequate class representatives. Plaintiffs do not seek any unique or
22 additional benefit from this litigation that may make their interests different from or
23 adverse to those of absent class members. Instead, Plaintiffs' aim is to secure
24 injunctive relief that will protect themselves and the entire class from the Defendants'
25 challenged practices and enjoin the Defendants from further violations. *See* Arreola
26 Decl. ¶¶ 42-43; Gil Decl. ¶¶ 27-28; Moreira Decl. ¶ 23-24. Plaintiffs and Class
27 Counsel do not seek financial gain at the cost of absent class members' rights.
28 Accordingly, Plaintiffs have demonstrated that they lack any antagonism with the

1 class, that they share interests with proposed class members, and that no collusion is
2 present.

3 **E. The Class Is Sufficiently Ascertainable.**

4 Although the Ninth Circuit has not yet ruled whether the judicially implied
5 ascertainability requirement applies to classes certified under Rule 23(b)(2), other
6 circuits have found that it does not. *See Shelton v. Bledsoe*, 775 F.3d 554, 563 (3d
7 Cir. 2015) ("The nature of Rule 23(b)(2) actions, the Advisory Committee's note on
8 (b)(2) actions, and the practice of many [] other federal courts all lead us to conclude
9 that ascertainability is not a requirement for certification of a (b)(2) class seeking only
10 injunctive and declaratory relief . . . ."); *Shook v. El Paso Cnty*., 386 F.3d 963, 972
11 (10th Cir. 2004) ("[M]any courts have found Rule 23(b)(2) well suited for cases where
12 the composition of the class is not readily ascertainable."); *Cole v. City of Memphis*,
13 839 F.3d 530, 542 (6th Cir. 2016), *cert. denied* 137 S. Ct. 2220 (2017)
14 ("[A]scertainability is not an additional requirement for certification of a (b)(2) class
15 seeking only injunctive and declaratory relief."); *Yaffe v. Powers*, 454 F.2d 1362,
16 1366 (1st Cir.1972) (no ascertainability requirement for Rule 23(b)(2) classes); *see*
17 *also, e.g.*, *In re Yahoo Mail Litig*., 308 F.R.D. 577, 597 (N.D. Cal. 2015).

18 In any event, the proposed class is sufficiently ascertainable because it is
19 "administratively feasible" to ascertain whether an individual is a member. *Greater*
20 *Los Angeles Agency on Deafness, Inc. v. Reel Servs. Mgmt. LLC*, No. 13-cv-7172 PSG
21 (ASX), 2014 WL 12561074, at *5 (C.D. Cal. May 6, 2014) (Gutierrez, J.) (internal
22 quotation marks omitted) (finding ascertainable proposed class of individuals who are
23 deaf or hard of hearing and require closed captioning). Here, membership in the class
24 is defined by clear and objective criteria: (1) the individual's DACA has been or will
25 be terminated without notice, a meaningful explanation, or an opportunity to
26 respond—that is, without the issuance of a Notice of Intent to Terminate and a
27 sufficient opportunity to respond to the reason for termination and (2) the individual
28 has not been convicted of any disqualifying crime as set forth in the DACA Memo

and SOPs. *See supra* at 3. This definition is "'precise, objective, and presently ascertainable.'" *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998) (observing that class definitions of actions maintained under Rule 23(b)(2) command less precision than actions for damages requiring notice to the class); *see also, e.g.*, *Lamumba Corp. v. City of Oakland*, No. 05-cv-2712 MHP, 2007 WL 3245282, at *4 (N.D. Cal. Nov. 2, 2007) ("Plaintiffs putative class is based on the objective factors of business ownership, race, and indebtedness to the City, and therefore is sufficiently defined."). The fact that some administrative process may be required to identify class members does not undermine ascertainability. *See, e.g.*, *Moreno v. Napolitano*, No. 11-cv-5452, 2014 WL 4911938, at *6-7 (N.D. Ill. Sept. 30, 2014) (finding that the necessity of manually reviewing tens of thousands of detainer forms to identify class members did not undermine ascertainability) (citing *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 539 (6th Cir. 2012)). This is particularly true here, where USCIS keeps detailed records regarding DACA terminations, *see* Kwon Decl. ¶ 21, Ex. 20 at 138 (instructing adjudicators to update systems), and routinely evaluates whether DACA recipients have disqualifying convictions. *See Dunnigan v. Metro. Life Ins. Co.*, 214 F.R.D. 125, 136 (S.D.N.Y. 2003) (holding that even a slow and burdensome process for identifying class members would not defeat the ascertainability requirement). Moreover, Plaintiffs have proposed a practical process for implementing the requested preliminary injunction, which includes a procedure for identifying class members whose DACA USCIS has already unlawfully revoked. *See* Pls.' PI Proposed Order.

II. This Action Satisfies the Requirements of Rule 23(b)(2).

In addition to satisfying the four requirements of Rule 23(a), Plaintiffs also must meet one of the subsections of Rule 23(b). Certification of a class under Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or

corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

In the Ninth Circuit, "'[i]t is sufficient' to meet the requirements of Rule 23(b)(2) [when] 'class members complain of a pattern or practice that is generally applicable to the class as a whole.'" *Rodriguez*, 591 F.3d at 1125 (quoting *Walters*, 145 F.3d at 1047); *Lyon v. U.S. Immigration & Customs Enf't*, 308 F.R.D. 203, 213 (N.D. Cal. 2015) (injunctive or declaratory relief under Rule 23(b)(2) is appropriate when "the party opposing the class has acted or refused to act on grounds that apply generally to the class") (internal quotation marks omitted). Indeed, Rule "23(b)(2) was adopted in order to permit the prosecution of civil rights actions" like this one. *Walters*, 145 F.3d at 1047; *Rodriguez*, 591 F.3d at 1126 (finding that class of non-citizens detained during immigration proceedings met Rule 23(b)(2) criteria because "all class members' [sought] the exact same relief as a matter of statutory or, in the alternative, constitutional right").

Importantly, "[t]he rule does not require [the court] to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez*, 591 F.3d at 1125. "'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.'" *Lyon*, 308 F.R.D. at 213 (quoting *Wal-Mart Stores*, 131 S.Ct. at 2557).

Rule 23(b)(2)'s requirements are plainly met. Here, Plaintiffs ask the Court to declare Defendants' termination policies and practices, which have impacted Plaintiffs and proposed class members, to be unlawful and to enjoin USCIS from: (1) enforcing the termination of DACA and related work authorization for Plaintiffs and class members whose DACA USCIS has already unlawfully terminated and (2) terminating DACA grants and work authorization in the future based solely on the issuance of an

1 NTA charging unlawful presence or otherwise absent a fair procedure that complies
2 with the agency's rules, including notice, a reasoned explanation, and an opportunity
3 to be heard prior to termination. *See* Pls.' PI Proposed Order.
4 This relief would benefit Plaintiffs as well as all members of the proposed
5 classes in the same fashion. No individual class member would be entitled to a
6 different injunction or declaratory judgment. The requested relief would address these
7 policies or practices in a single stroke, and thus the proposed class plainly warrants
8 certification under Rule 23(b)(2). *See Parsons*, 754 F.3d at 689 (finding declaratory
9 and injunctive relief proper as to the whole class where "every [member] in the
10 proposed class is allegedly suffering the same (or at least a similar) injury and that
11 injury can be alleviated for every class member by uniform changes in . . . policy and
12 practice"); *Rodriguez*, 591 F.3d at 1126 (certifying class of immigrant detainees under
13 Rule 23(b)(2) where "relief from a single practice is requested by all class members").
14 Given the nature of Plaintiffs' claims, which challenge USCIS's centralized and
15 uniform DACA termination practices, class certification should be nationwide.
16 Defendants have indicated that USCIS has a practice of automatically terminating
17 individual DACA grants, without process. *See* Thomas Decl. ¶ 4. Plaintiffs have
18 identified at least 17 examples of Defendant's unlawful DACA terminations from
19 various states around the country (including Texas, Louisiana, Georgia, Minnesota,
20 South Dakota, North Carolina, New Jersey, and California). *See* Eiland Decl. ¶¶ 2-14.
21 And given the nationwide scope and scale of the program, there are nearly 700,000
22 DACA recipients in all 50 states who are potentially at risk of having their DACA
23 unlawfully terminated pursuant to Defendants' practices. *Id.* ¶ 48, Ex. 33.
24 Certification that is not nationwide in scope would result in Defendants continuing to
25 apply an unlawful policy to DACA recipients simply by virtue of their geographic
26 location. Such piecemeal relief would lead to arbitrary and unjust results. *See*
27 *Gorbach v. Reno*, 181 F.R.D. 642, 644 (W.D. Wash. 1998), *aff'd*, 219 F.3d 1087 (9th
28 Cir. 2000) (holding certification of a nationwide class was particularly fitting because

1 "anything less [than] a nationwide class would result in an anomalous situation
2 allowing the INS to pursue denaturalization proceedings against some citizens, but not
3 others, depending on which district they reside in").
4 Because Plaintiffs and proposed class members all have suffered or will suffer
5 the same statutory and constitutional violations as a result of the government's
6 challenged practices or policies, and because they seek singular injunctive and
7 corresponding declaratory relief that remedy those injuries, the Court should certify
8 the class under Rule 23(b)(2).
9 **CONCLUSION**
10 Plaintiffs respectfully requests that the Court grant this Motion and enter an
11 order certifying the proposed class under Rule 23(b)(2); appoint Plaintiffs as Class
12 Representatives; and appoint the Plaintiffs' Counsel from ACLU Immigrants' Rights
13 Project and the ACLU of Southern California as Class Counsel.
14
15 Dated: December 21, 2017 Respectfully submitted,
16
17 *_/s/ Katrina L. Eiland_*
Katrina L. Eiland
18 Jennifer Chang Newell
19 Michael K. T. Tan*
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