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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE PHILIP S. GUTIERREZ, U.S. DISTRICT JUDGE

INLAND EMPIRE - IMMIGRANT YOUTH)
COLLECTIVE, et al., on behalf)
of themselves and others similarly) Case No.
situated,) CV 17-2048-PSG
)
Plaintiffs,)
)
v.)
)
KIRSTJEN NIELSEN, Secretary,)
U.S. Department of Homeland)
Security, et al.,)
)
Defendants.)
)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MONDAY, FEBRUARY 26, 2018

2:01 P.M.

LOS ANGELES, CALIFORNIA

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1 LOS ANGELES, CALIFORNIA; MONDAY, FEBRUARY 26, 2018

2 2:01 P.M.

3 -oOo-

4

5 THE CLERK: Calling Civil 17-2048, Inland Empire
6 versus Nielsen.

7 Counsel, state your appearances.

8 MR. ROBINS: Good afternoon, Your Honor.
9 Jeffrey Robins for defendants.

10 MR. WALKER: James Walker for defendants.

11 MS. EILAND: Good afternoon, Your Honor.
12 Katrina Eiland for plaintiffs.

13 MS. CHANG NEWELL: Jennifer Chang Newell for
14 plaintiffs.

15 THE COURT: I'll give you a brief, at least
16 generally, a tentative of the Court's intention and then allow
17 counsel to argue to add any additional things that they want to
18 say.

19 At this point the Court's tentative is to grant the
20 motion for class certification and to grant plaintiffs' motion
21 for a class-wide preliminary injunction. So I'll hear from the
22 government in response to that tentative.

23 I would point out that, for example, the opposition
24 to the preliminary injunction at page 20 seems to take some
25 umbrage at the Court's prior order calling it a strained

1 reading of the memo and the associated documents and also
2 indicates that the Court's analysis was starkly oversimplified.

3 So I would suggest that those types of terms just
4 aren't going to be helpful for the government in their argument
5 today. So I can hear from the government.

6 MR. ROBINS: Thank you, Your Honor.

7 And with the Court's leave, I would just ask that
8 the Court allow myself and Mr. Walker to split the argument on
9 the two motions, if I may address the class certification
10 arguments and Mr. Walker may address the opposition to the
11 preliminary injunction?

12 THE COURT: You may.

13 MR. ROBINS: Thank you, Your Honor.

14 Your Honor, the government respectfully disagrees
15 with the Court's tentative with regard to class certification
16 on this issue. Even to the extent the Court stands by its
17 earlier rulings with regard to the preliminary injunction you
18 granted to Mr. Robles, there are numerous factors why the
19 putative class is unable to establish the requirements of
20 Rule 23(a) or 23(b) (2) with respect to class certification
21 here.

22 The government first would address the question of
23 adequacy of the class in that the three named class members do
24 not represent the claims of the entirety of this class.

25 First, with regard to Mr. Arreola, the government

1 contends that because, as a result of the grant of the PI in
2 this case, in his case, and the subsequent amendment of the
3 Complaint, that the Court would lack jurisdiction over -- well,
4 he no longer represents the claims of the class in that he no
5 longer has standing to challenge those same interests.

6 With regard to Mr. De Souza and Mr. Gil Robles,
7 those two plaintiffs as well fall outside of the class that
8 plaintiffs attempt to certify here in that their claims fall
9 within the enforcement priority exception that plaintiffs
10 intentionally -- at least in their motion. They backtrack in
11 their reply -- but seek to carve out from class certification
12 here.

13 The government notes specifically that in addition
14 on adequacy that there appear to be certain conflicts in
15 plaintiff class counsel itself as the government has provided
16 in its briefing in that class counsel represents an individual
17 that they initially claimed to be a putative member of the
18 class but then in the reply suggest may not be part of that
19 class.

20 But to the extent the Court is certifying the class
21 to the breadth that plaintiffs are seeking, that the
22 representation of an individual with slightly different claims
23 who is seeking the same relief in the Northern District of
24 Georgia of Ms. Colotl and representation of the putative class
25 here could present conflicts in how the individual case is

1 handled versus how the claims of individual putative class --
2 or how a putative class goes forward.

3 The subset of the adequacy argument that the
4 government would like to also address is that in certifying
5 (b) (2) class, there is no opportunity to opt out. And so
6 Mr. Ramirez -- Medina -- Ramirez Medina who is pursuing his
7 claims independently in the Western District in Washington,
8 Ms. Colotl, who is pursuing her claims independently in the
9 Northern District of Georgia, and other individuals that may
10 exist out there -- their claims would rise and fall with that
11 of the class certified here, and they would no longer have the
12 opportunity to pursue their individual claims. That alone
13 should counsel against class certification there.

14 Moving on from adequacy, the questions of
15 commonality and typicality also don't support the breadth of
16 the class that plaintiff intend to certify here and the Court
17 in its tentative indicates it appears willing to certify.

18 The breadth of the class plaintiffs seek to certify
19 is so broad that in their reply brief plaintiffs acknowledge
20 that numerous groupings of putative class members actually
21 might not be part of that class.

22 And while the government acknowledges that courts do
23 have jurisdiction to shape and certify different classes or to
24 identify subgroups, ultimately it's the burden on plaintiffs
25 and that putative class to identify workable classes that fit

1 the definition and the requirements of Rule 23.

2 So to the extent that plaintiffs acknowledge that
3 individuals who depart the United States who automatically lose
4 their DACA would not be part of the class, that individuals who
5 are deemed to be egregious public safety concerns with criminal
6 convictions would fall outside the class, and plaintiffs also
7 seem to suggest that even individuals deemed to be egregious
8 public safety grounds justifying the termination of their DACA
9 without notice as supported by the standard operating procedure
10 also might fall outside of the class.

11 The fact that all of these groups fall within the
12 group that plaintiffs seek to certify as a class shows that the
13 claims, indeed, are different. And while the legal issue that
14 plaintiffs seek to pose to the Court may be the same or may be
15 similar in terms of commonality and typicality, the answer to
16 each of those claims and unique defenses to those claims are
17 different.

18 Indeed, a plaintiff who has had their DACA
19 terminated, automatically the issuance of an NTA, like the case
20 of Mr. Robles, the answer to his claim and the defenses to his
21 claim is different than the plaintiff whose DACA was terminated
22 based on the procedures in the SOP, especially with regard to
23 how the government would respond to the claims under the
24 Administrative Procedure Act.

25 Plaintiffs seek to get around this by suggesting

1 that the ultimate answer to their constitutional claims would,
2 in fact, be different to the various subgroups that even
3 plaintiffs acknowledge exist in their own class. And this is
4 not the case because ultimately the question of what process is
5 due to an individual in this putative class turns on the
6 ultimate process they are due -- well, process they received,
7 process they may be due, and the prejudice by lack of that
8 process.

9 And that differs for each of these various subsets
10 because, in fact, individuals departing the United States who
11 automatically have their DACA terminated may very well be
12 entitled to less process than an individual like Mr. Robles,
13 Mr. Gil, or Mr. De Souza who had their DACA automatically
14 terminated by issuance of an NTA, not to mention the variety of
15 other types of termination that might exist in between that.
16 And on that basis, the class that plaintiffs seek to certify is
17 too broad and lacks commonality and typicality.

18 And even if the Court was inclined to suggest a
19 narrower class definition, there are two problems. The first
20 is that plaintiffs have not met their burden in showing that
21 any of those individual potential subgroups meet the definition
22 of Rule 23, and the government would ask for an opportunity to
23 brief and respond to that.

24 And even if the Court were to exercise discretion
25 and find that any of those possible subgroups could meet those

1 grounds, we turn back to the question of numerosity for those
2 subgroups. And plaintiffs have only identified in the claims
3 of the named plaintiffs a small number of individuals --

4 THE COURT: But, I mean, you have to acknowledge
5 that 23(b)(2) is a little different than 23(b)(3). You cite
6 (b)(3) cases, but --

7 MR. ROBINS: Yes, Your Honor. But the ultimate
8 question of --

9 THE COURT: The law in the circuit is different as
10 is relates to (b)(2) and numerosity, isn't it?

11 MR. ROBINS: I believe it is, Your Honor, but a
12 class of one is still something that the Supreme Court
13 recognizes or a small --

14 THE COURT: That's not what we have here though. We
15 don't have a class of one, do we?

16 MR. ROBINS: It depends on how any possible subpart
17 would be --

18 THE COURT: Tell me how we have a class of one here.

19 MR. ROBINS: Well, Your Honor, as far as plaintiffs'
20 allegations go, with regard to -- if the Court were inclined to
21 break it up into subgroups, plaintiffs haven't established
22 that there's a class of -- that that's any class for certain of
23 the possible subgroups that --

24 THE COURT: Let's talk about the group that they are
25 asking for today and that is -- will have DACA grants revoked

1 without basically any process, without notice, and they haven't
2 been convicted of anything. Is that a class of one?

3 MR. ROBINS: That is not a class of one.

4 THE COURT: So why are we talking about a class of
5 one?

6 MR. ROBINS: Because of that overbroad class --

7 THE COURT: But if we don't have a class of one --
8 they proposed a class, and so I was just curious why you are
9 talking about a class of one when that doesn't apply in this
10 case.

11 MR. ROBINS: Because if Your Honor were to
12 certify -- Your Honor, the government's arguments are focused
13 on what the government believes to be the need to certify any
14 class in this case which we disagree with.

15 THE COURT: Right.

16 MR. ROBINS: The need to break it down into
17 subclasses. The government acknowledges that, if the Court
18 were inclined to certify a class as broad as defendants seek to
19 define it, that we don't concede numerosity, but we don't argue
20 that it's a class of none or one with that regard.

21 THE COURT: Right. But I guess the point that I was
22 making in response was -- or the question that I had was (b) (2)
23 is different from (b) (3), and the standard seems to be
24 different in the circuit as it relates to (b) (2) and
25 numerosity. There seems to be the accounting for future entry

1 by other class members not yet identified. Is that accurate?

2 MR. ROBINS: Yes, Your Honor.

3 THE COURT: All right. I'm sorry to interrupt.

4 MR. ROBINS: Your Honor, I have two or three brief
5 additional points to make.

6 With regard to overall class definition, the
7 government just would like to point out the general proposition
8 that certification of a nationwide class is also, the
9 government believes, an overreach on plaintiffs' behalf here.
10 And the Supreme Court recognizes the benefit of allowing the
11 law of the circuits to develop.

12 And when there are putative class members identified
13 by plaintiffs who reside outside this circuit, those claims,
14 should they have any, should be required to proceed in the
15 jurisdictions where those plaintiffs reside. And the Court
16 should allow and limit the class here to that of, at most, the
17 Ninth Circuit.

18 The government has two brief additional points with
19 regard to the merits that we believe counsel the overall
20 consideration of the Court with regard to the questions of
21 commonality and typicality and the ultimate ability to certify
22 this class.

23 The first is with regard to plaintiffs' reference to
24 the USCIS standard operating procedure in that plaintiffs argue
25 there is only one scenario under the standard operating

1 procedure where DACA may be terminated without notice. And
2 that is not correct. The standard operating procedure identify
3 not only the enforcement -- excuse me -- not only the egregious
4 public safety procedures --

5 THE COURT: Yes, I agree --

6 MR. ROBINS: -- but also the enforcement priority
7 procedures.

8 And with regard to the enforcement priority
9 procedures, plaintiffs seek to go too far in stating and
10 arguing that the very nature of the DACA policy precludes the
11 government from ever finding that an individual is an
12 enforcement priority if they were originally granted DACA,
13 and --

14 THE COURT: But there is a process for enforcement
15 priority as well; right? You can't just remove -- because
16 somebody becomes an enforcement priority, there is a process in
17 place to carry out the enforcement priority; isn't that
18 correct?

19 MR. ROBINS: There is a process stated in the SOP
20 that doesn't necessarily require notice.

21 THE COURT: Okay, it doesn't. But was that -- for
22 example, was that process applied in, I think this case, where
23 I think the government labeled enforcement priority? Was that
24 process followed in this case?

25 MR. ROBINS: And the government contends that it

1 implicitly was, and the Court has --

2 THE COURT: What does that mean, "implicitly"?

3 MR. ROBINS: That when -- the government argues
4 that, when ICE issues a notice to appear to an individual that
5 they know to be a DACA recipient, that Immigration and Customs
6 Enforcement is speaking with the prosecutorial discretion of
7 the government and deeming someone --

8 THE COURT: What does DACA say about -- what does
9 the SOP say about enforcement and priority? What does that
10 impose?

11 MR. ROBINS: The SOP says that, if after consulting
12 with ICE, CIS determines that exercising prosecutorial
13 discretion after --

14 THE COURT: Was that done?

15 MR. ROBINS: I'm sorry, Your Honor?

16 THE COURT: Was that done in this case?

17 MR. ROBINS: No. And that is why -- not
18 specifically with regard to --

19 THE COURT: It was implicitly done is what you are
20 saying.

21 MR. ROBINS: That is the government's contention.

22 THE COURT: I don't understand the word "implicitly"
23 done. You either do it or you don't. Did the government do it
24 or they didn't do it?

25 MR. ROBINS: They did not do it, but --

1 THE COURT: How do they -- what does that mean,
2 "implicitly"? You either follow the law, or you don't follow
3 the law. You explicitly follow the law, or you don't follow
4 the law. I don't understand what the word "implicit" means in
5 this case. I understand what it means in the definition. I
6 don't need a Merriam's Dictionary for implicit --

7 MR. ROBINS: I understand --

8 THE COURT: -- but I want to know how the government
9 can implicitly follow the law --

10 MR. ROBINS: And this goes back to the government's
11 contention that the SOP does not bind the conduct of other
12 agencies under the Department of Homeland Security other than
13 U.S. Citizenship and Immigration Services. The government is
14 revisiting that argument. We believe that the SOP --

15 THE COURT: It should.

16 MR. ROBINS: Excuse me?

17 THE COURT: It should.

18 MR. ROBINS: And on that basis, it -- that is why
19 the government argues that it is implicit. Ultimately the
20 question in terms of --

21 THE COURT: I still don't know what that means. You
22 either follow DACA or you don't. You either follow the SOP or
23 you don't follow the SOP. How can you say you implicitly
24 follow something? I'm lost on that.

25 MR. ROBINS: Your Honor, again, the government

1 acknowledges that the actual conduct here did not follow the
2 SOP to the letter. The government believes it doesn't have to.

3 THE COURT: Isn't that the point of an injunction
4 though? If the government is not following the letter of the
5 law, to issue an injunction to preclude the government from
6 implicitly following the law as opposed to explicitly following
7 the --

8 MR. ROBINS: If the Court were to find that the SOP
9 were binding on ICE and CBP --

10 THE COURT: I think that's the direction I'm going,
11 isn't it?

12 MR. ROBINS: It would appear to be the case,
13 Your Honor. But there's an additional requirement to that, the
14 government would contend --

15 THE COURT: I guess -- I mean, what the plaintiffs
16 are asking for I seem to agree with is that the government
17 follow the procedure set in place. It seems simple to me. I
18 don't understand.

19 MR. ROBINS: Well, there's also a question about the
20 prejudice to the named plaintiffs and to putative class members
21 in the result -- or in any benefit they would obtain by the
22 Court enjoining the termination of those plaintiffs' DACA and
23 requiring the government to go back and follow a process in the
24 SOP.

25 And where -- the government contends that ICE has

1 already spoken on the question of whether their -- that the
2 individuals, the named plaintiffs in this case, rise to the
3 level of enforcement priorities, that even with additional
4 process under the SOP, that the result may very well be --

5 THE COURT: Well, how many -- just on that category
6 alone, whether it's EPS or enforcement priority, of the
7 hundreds of thousands of people involved in DACA or in place in
8 DACA, how many people would be under DACA, under the SOP be
9 persons that would be an enforcement priority?

10 MR. ROBINS: Your Honor, it's a case-by-case
11 assessment.

12 THE COURT: Exactly.

13 MR. ROBINS: I'm sorry, Your Honor?

14 THE COURT: Exactly.

15 MR. ROBINS: Because it's a case-by-case assessment,
16 that is why the government believes that there is no
17 commonality and typicality in this class.

18 THE COURT: Because there's some folks that -- okay.
19 Go ahead.

20 MR. ROBINS: Because there are some folks that have
21 had their DACA terminated without notice who, in fact, may be
22 enforcement priorities which we --

23 THE COURT: Are you identifying somebody?

24 MR. ROBINS: All of the named plaintiffs in this
25 case the government contends are enforcement priorities.

1 THE COURT: Exactly. But the process wasn't
2 followed. You've already acknowledged that.

3 MR. ROBINS: Yes, Your Honor.

4 THE COURT: So it's your label without any process.
5 Isn't that what we are talking about?

6 MR. ROBINS: That is what we are talking about, and
7 I --

8 THE COURT: So the government can put a label on
9 somebody, remove them without following the procedures in place
10 that was set by the government. It seems kind of -- I don't
11 know.

12 MR. ROBINS: And that is why the government does
13 turn to the ultimate question of prejudice where there is an
14 internal process in place with ICE's decision to issue NTAs to
15 individuals --

16 THE COURT: And that process is without notice and
17 so -- is the process this? Let me just make sure I understand.
18 DACA is set up. And to be a member of DACA, you can't have
19 legal status in this country. So you apply for it. You get
20 DACA.

21 So then the government decides that because your
22 status is not legal, you can be removed from DACA. Isn't that
23 the government's position?

24 MR. ROBINS: No, Your Honor.

25 THE COURT: Why isn't it?

1 MR. ROBINS: Because in the case of all three named
2 plaintiffs, while the government acknowledges that the notices
3 to appear in their removal proceedings charge only unlawful
4 presence, that that was not in each of their cases the
5 factor --

6 THE COURT: What was the factor? Driving without a
7 license? A pellet gun by a passenger? What make them an
8 enforcement priority? So one person was driving with a
9 canceled license, and the other person had somebody with a toy
10 BB gun in their car. Is that what made them an enforcement
11 priority? Or that -- crimes that weren't charged, there's
12 never been a conviction, am I wrong about that?

13 MR. ROBINS: You are not wrong that crimes that were
14 not charged and for which there is no conviction did result in
15 all three named plaintiffs being deemed enforcement priorities.

16 THE COURT: What was the conduct in each? Because
17 that's even disputed, which I find kind of funny. Even though
18 we have complaints and we have e-mails from law enforcement or
19 prosecutorial agencies, I was bewildered. No one can agree as
20 to what the conduct was that caused someone to be an
21 enforcement priority.

22 MR. ROBINS: And I believe that conduct in each of
23 the cases is outlined in the I-214s that were filed --

24 THE COURT: Refresh my memory. So as to the
25 first -- and then we'll move on to the next point. So

1 Mr. Robles, he wasn't charged with a felony; right?

2 MR. ROBINS: Correct.

3 THE COURT: He wasn't charged with a gross
4 misdemeanor.

5 MR. ROBINS: Correct.

6 THE COURT: He's never sustained three misdemeanors.

7 MR. ROBINS: That's correct.

8 THE COURT: So as I read it, it's -- he was charged
9 with driving after cancelation of a license. Is that what made
10 him an enforcement priority?

11 MR. ROBINS: No, Your Honor. It's the alleged
12 conduct of having engaged in alien harboring in --

13 THE COURT: Has he been charged for that?

14 MR. ROBINS: No, he has not.

15 THE COURT: Has the government prosecuted him for
16 that?

17 MR. ROBINS: No, it has not.

18 THE COURT: Why not? If it's egregious conduct, why
19 didn't the government --

20 MR. ROBINS: Your Honor, I cannot specifically
21 answer that question. There are any number of reasons why
22 individuals are not --

23 THE COURT: Insufficient evidence?

24 MR. ROBINS: Excuse me, Your Honor?

25 THE COURT: For example, insufficient evidence?

1 MR. ROBINS: Your Honor, I cannot speak to that.

2 THE COURT: That would be one of the possibilities;
3 right?

4 MR. ROBINS: That is one of the possibilities --

5 THE COURT: If you can make an allegation that
6 someone was smuggling or harboring somebody and then it turns
7 out that they weren't or the government couldn't prove it, and
8 charges aren't filed -- but then you are saying that the
9 government can say, because that bald allegation has been made,
10 that they can become an enforcement priority and be removed?
11 Is that what you are saying?

12 MR. ROBINS: I am, Your Honor, because --

13 THE COURT: Is that the world we live in? Someone
14 gets deported because of allegations made that can't be
15 substantiated by any facts but the -- so the U.S. Attorney says
16 we can't convict this person for harboring aliens. And then
17 the right side says, well, we do like that allegation, and we
18 are going to make them an enforcement priority and remove them
19 even though there's no facts that support the allegation. Are
20 there facts that support the allegations against Mr. Robles?

21 MR. ROBINS: The government believes there are, nor
22 is there anything in the record that would support that
23 prosecution was denied based on a lack of sufficient facts.

24 THE COURT: Well, you just told me you couldn't tell
25 me one way or the other. How can you make this -- that it

1 wasn't?

2 MR. ROBINS: I can't say specifically, Your Honor.
3 But to the extent Your Honor is assuming that it was lack of
4 sufficient facts, there are numerous other reasons -- or
5 Your Honor may assume that -- there are various other reasons
6 why prosecution might not be pursued against an individual. It
7 might not be within the enforcement priorities or guidelines
8 for local prosecution.

9 So an individual in that circumstance or that
10 situation may be a priority for purposes of immigration
11 enforcement even though they are not a priority for criminal
12 prosecution.

13 THE COURT: So what made Mr. Moreira an enforcement
14 priority then? He was arrested for forgery, but he was never
15 charged with forgery. What made him an enforcement priority?

16 MR. ROBINS: It is, again, the facts supporting the
17 allegation of forgery, having the doctored license that the
18 police report supports.

19 To be clear, Your Honor, these are facts, the
20 allegations of the underlying criminal conduct, that none of
21 the individual plaintiffs dispute.

22 THE COURT: Well, why -- so let's just skip that for
23 a moment because I think they do. I think they do dispute
24 those facts. I think that's the whole point of me being
25 confused as to why two litigants can't agree as to what the

1 underlying conduct was.

2 I guess my question then goes back to, if they are,
3 in fact, a legitimate enforcement priority, what's the big deal
4 about the government simply following the process that's in
5 place and -- what's the difficulty in just following the agency
6 process? Why not just explicitly follow the process instead of
7 implicitly following the process?

8 MR. ROBINS: Because, as an initial matter, the
9 government believes that should not be a requirement and is not
10 incumbent on the agency given the separate authority of
11 Immigration and Customs Enforcement and Customs and Border
12 Protection, which I understand Your Honor has previously
13 disagreed with.

14 THE COURT: Why don't we -- let's wrap up and hear
15 the next motion.

16 MR. ROBINS: May I just make one more point with
17 regard to class certification, Your Honor?

18 THE COURT: You may.

19 MR. ROBINS: And this is, I think, part of the crux
20 of what the Court was just inquiring about. But it, in part,
21 is plaintiffs' argument that an individual cannot be deemed an
22 enforcement priority unless they have been convicted of a
23 criminal --

24 THE COURT: That's not true.

25 MR. ROBINS: I'm sorry, Your Honor?

1 THE COURT: That's not what -- EPS you don't have to
2 have a conviction.

3 MR. ROBINS: Correct, Your Honor.

4 THE COURT: But it has to be things like murder,
5 rape, that kind of --

6 MR. ROBINS: But to be an enforcement priority you
7 also don't need to have a conviction.

8 THE COURT: Yeah, but the allegation is not a
9 doctored license or driving without a license. It's murder.
10 That's one of the categories.

11 MR. ROBINS: Your Honor, to be clear and as
12 supported by the SOP, the EPS ground for terminating DACA, if
13 we are working solely off the SOP, is found on page 137 of the
14 SOP. The --

15 THE COURT: I guess the point I was making though,
16 to be an EPS there's a limited category of alleged crimes,
17 aren't there?

18 MR. ROBINS: Yes, Your Honor.

19 THE COURT: And those include things like murder and
20 rape.

21 MR. ROBINS: And the government does not argue that
22 any of the named plaintiffs falls within that EPS category.

23 It's important to note then that, in terms of
24 certifying a class here, none of the named plaintiffs
25 demonstrate that they had their DACA terminated without notice,

1 and they were part of this EPS category.

2 THE COURT: Right. But isn't the point of what
3 plaintiffs are saying though is that -- you are right. There's
4 not that argument being made that they are not -- fall under
5 EPS. But, I guess, isn't the plaintiffs' point simply that
6 assuming that the other agencies are governed by the SOP and
7 the Napolitano memo? Isn't the plaintiffs' position just for
8 the government to follow the process that the government laid
9 in place?

10 MR. ROBINS: That is their argument, but if the
11 Court certifies the class that plaintiffs have defined, it
12 means that people for whom the government did follow the EPS
13 portion of the SOP would be entitled to potentially the
14 injunction that might follow class certification here. So that
15 is the crux of the government's overbreadth argument.

16 But the clarification the government seeks to make
17 is also that in addition to EPS grounds, there is a separate
18 and distinct enforcement priority ground for termination
19 without notice. And plaintiffs argue --

20 THE COURT: But there's a process in place without
21 notice.

22 MR. ROBINS: Yes, Your Honor. I'm just -- so
23 again --

24 THE COURT: I understand there's basically three
25 categories, the EPS enforcement priority and then the rest. I

1 understand that.

2 MR. ROBINS: Yes. And plaintiffs do argue on the
3 merits that essentially no one, unless they no longer meet the
4 DACA eligibility criteria, can be an enforcement priority. And
5 the government disputes that based on the plain reading of the
6 SOP.

7 And so even someone deemed an enforcement priority
8 under those procedures in the SOP which -- that would be a
9 distinct grouping from the portion of the class that the named
10 plaintiffs seek to represent, that that suggestion that no one
11 can be an enforcement priority is not supported by a plain
12 reading of the SOP; that the August 2013 version of the SOP
13 specifically added this enforcement priority ground in plain
14 recognition that an individual, although granted DACA, may be
15 initially deemed a low priority but that even if they continue
16 to meet those eligibility criteria, that nothing prevents them
17 and nothing prevents the government from exercising its
18 discretion to deem those individuals to be an enforcement
19 priority.

20 THE COURT: Thank you.

21 Let me ask a couple of questions of plaintiffs
22 before we go to the next motion. I'd like you to address the
23 last point. Go ahead and get settled.

24 Counsel argues that the proposed class is
25 overbroad -- the last point we were talking about -- because

1 class members that could be removed because they were EPS and
2 that it was simply information that indicates the alien is
3 under investigation for or has been arrested without
4 disposition or has been convicted of, for example, murder,
5 rape, sexual abuse, firearms trafficking, human rights
6 violations, and other very serious offenses.

7 So I think what counsel is arguing -- let's say they
8 even follow the process of enforcement priority. That somehow
9 the government can now -- if we certify this broad class, if,
10 for example, there was a member of a defined class that, in
11 fact, was being investigated, let's say, for murder or rape,
12 that the government's hands would be tied. I guess that's the
13 common way of saying it. And then the same with enforcement
14 priority. What's your response to that?

15 MS. EILAND: I have a few responses to that, and
16 I'll start by saying that the way that our class is defined
17 which includes only those individuals who have a disqualifying
18 criminal conviction -- it's very unlikely that individuals who
19 meet the EPS definition would be part of the class. It would
20 be a very small number of individuals that would both qualify
21 to the EPS and also fall within the class definition.

22 And even beyond that, defense counsel mentioned --

23 THE COURT: Let me ask a question. But the class
24 also -- the class, it says, who have not been convicted of a
25 disqualifying criminal offense. But under the EPS, you don't

1 have to be convicted of a qualifying offense.

2 MS. EILAND: Correct. So there may be some
3 individuals who have been arrested and charged with various
4 serious crimes for whom they have not yet been convicted, and
5 they could be both EPS and a member of the class.

6 However, in terms of public safety concerns or
7 concerns that the government's hands would be tied, there
8 are -- you know, most likely those individuals would be in
9 state custody pending trial, and nothing in the relief we are
10 requesting would prevent the government from putting that
11 person in immigration detention.

12 And in addition to that, the EPS is very
13 specifically defined, and the procedure within the SOPs is very
14 specifically defined, that the government needs to go through
15 in order to determine that somebody is EPS, notify ICE, and
16 when ICE issues an NTA, then that individual can be terminated
17 automatically.

18 And it's really important to point out that the
19 government hasn't pointed to a single person for whom the
20 government has actually followed this procedure. And we'll
21 note that in several instances in their briefing they pointed
22 to individuals who they claim are egregious public safety or
23 would meet the definition of egregious public safety.

24 But as Your Honor noted previously and has ruled
25 previously, those individuals like Mr. Arreola and who were

1 issued an NTA, it charged them only with being present without
2 inspection or overstaying a visa. That doesn't, you know,
3 provide a reasoned basis for the termination. They haven't
4 cited EPS. They have not issued an NTA that cites EPS
5 concerns --

6 THE COURT: Slow down.

7 MS. EILAND: So those individuals --

8 THE COURT: Slow down.

9 MS. EILAND: Apologies. Those individuals can't
10 properly be treated as EPS. So there may be some small number
11 of individuals for whom the government actually does make a
12 determination that the person is EPS and follows the procedures
13 in the SOPs.

14 And, you know, I would note that plaintiffs' other
15 claims that are not reliant on the SOPs apply equally to the
16 group of EPS individuals. But if the Court did have concerns
17 about overbreadth, it could modify the class slightly to carve
18 out that small number of individuals who may have a
19 different -- be differently situated with respect to the
20 SOP-based claim.

21 And I don't know if Your Honor also had questions
22 about the enforcement priority --

23 THE COURT: I do.

24 MS. EILAND: -- argument that counsel was making
25 there at the end. I'd like to address that as well if that's

1 all right.

2 So the enforcement priority -- the notion that the
3 government can sort of arbitrarily label someone an enforcement
4 priority without that term being grounded in anything --

5 THE COURT: I think that was my question because, it
6 seemed to me, that that's exactly what could happen. You would
7 just say this person is an enforcement priority based on
8 whatever, and they would fall into that category.

9 MS. EILAND: Right. And our position is that the
10 DACA memo and the DACA SOPs define for purposes of the DACA
11 program and this group of individuals specifically who is and
12 isn't an enforcement priority. The DACA memo says very
13 specifically that the individuals who meet the DACA criteria
14 are low priority individuals as opposed to other types of
15 individuals who may meet the enforcement priorities.

16 And so the question becomes here, where the
17 government has said, you know, these individuals are
18 enforcement priorities, the only enforcement priority document
19 that they could be referring to is the Kelly memorandum which
20 is a document that expressly on its face does not apply to the
21 DACA program. It says it in the text of the document.

22 THE COURT: Right.

23 MS. EILAND: It says it in the frequently asked
24 questions. It's a very clear question that says, "Does this
25 memorandum apply to the DACA program?"

1 Answer: "No."

2 They've said it in subsequent memoranda. This
3 memorandum does not apply to the DACA program. So the notion
4 that an undefined term in the SOPs that refers to enforcement
5 priorities could be used, that section of the SOPs would --
6 could be used or could apply to individuals who are still
7 eligible for DACA who haven't been convicted of any
8 disqualifying crimes, it just doesn't make any sense.

9 That section was not intended to apply to
10 individuals who are still eligible for DACA and haven't done
11 anything to put themselves in that position.

12 And even if the section did apply, as the Court
13 found in Gonzalez-Torres, that provision, like all the other
14 instances apart from that narrow EPS situation, like all other
15 instances in which some kind of criminal allegation arises
16 after DACA has already been granted, it also requires notice
17 and opportunity to respond just like all the other portions of
18 the SOPs.

19 THE COURT: The other question -- there were two
20 other points that were made that I'd like you to address. One
21 was the -- counsel raised the point of no opt out. Can you
22 address that? So if somebody is proceeding in a separate case
23 and they -- their ability to opt out of the class.

24 MS. EILAND: Yes, that's correct that the difference
25 between (b) (3) and (b) (2) is (b) (3) allows for an opt out, and

1 that because of the damages involved, that it's important when
2 individuals -- you know, the class is going to preclude
3 somebody's possibility of bringing a damages award or being
4 able to pursue a case separately. They should have the ability
5 to opt out.

6 That concern is not present in (b)(2) cases, and
7 that's why the -- it is also sort of difficult to have a single
8 injunction that benefits everyone. It sort of undermines the
9 purpose of being able to take care of these claims in one fell
10 swoop. And it is the most judicially economical and efficient
11 thing to do, to have these claims heard together, to have a
12 nationwide class that permits everyone who is in the same
13 position who has experienced harm from these practices to be
14 able to bring their claims together and have them heard at one
15 time and have the government's practices and policies enjoined
16 at one time.

17 It doesn't harm the class members. If the Court --
18 particularly if the Court is inclined to grant plaintiffs'
19 preliminary injunction motion, it doesn't harm plaintiffs to be
20 able to get the benefit from that lawsuit.

21 And really, when looking at the scope and the
22 appropriate scope of a class certification, the touchstone is
23 really the scope of the policy, the practice. And the
24 government here has conceded that this is its centralized
25 policy. This is what is happening at USCIS. And for that

1 reason, there's no differentiation based on geography.

2 And in this case, the only other case they've
3 pointed to where they claim there's still a live claim is also
4 in the Ninth Circuit. You are not really concerned about
5 principles of comity there at all.

6 So I'm not sure if that answered Your Honor's
7 question or if there was another --

8 THE COURT: It dovetails into the next question that
9 counsel raised in terms of a nationwide class. When we were
10 talking about the law in this circuit as it relates to
11 numerosity and 23(b)(2), that in this circuit, it views, for
12 lack of a better word, numerosity a bit more lax in terms of
13 identifying potential future members of the class. And other
14 Courts have found, for example, the threshold on a (b)(3) case
15 would be 40.

16 MS. EILAND: Right.

17 THE COURT: Not so on a (b)(2) case.

18 So then based on that, counsel makes a new request
19 to say limit the class to the Ninth Circuit.

20 MS. EILAND: And the Ninth Circuit, I think, is
21 consistent with other circuits in finding that (b)(2) cases are
22 different. It's a single injunctive relief. You are not
23 asking for money damages. You are not asking for different
24 injunctions or money damages for different individuals.

25 And there are good reasons when you are often unable

1 to ascertain the identities of class members, and you are often
2 unable to join all future members when it's an ongoing practice
3 that, if not enjoined, will continue into the future. And I
4 think those principles are common across circuits that in the
5 (b) (2) context, numerosity -- you are allowed to use reasonable
6 inferences to, sort of, look at the whole number.

7 So here it's not that there are only 22 possible
8 members of the class. It's that those are the known members.
9 And, you know, based on reasonable inferences from the evidence
10 that we've put in, it's likely to be much larger than that.
11 And I would note that the defendants have not come forward with
12 evidence that suggests that the number is actually less than
13 we've suggested.

14 And so I think on numerosity, I don't see a serious
15 issue. I think the distinction is between (b) (3) and (b) (2)
16 cases, and it's a common distinction that courts make.

17 THE COURT: Let's move on to injunction.

18 MS. EILAND: Would you like to have the
19 government --

20 THE COURT: Defendant.

21 MS. EILAND: Thank you, Your Honor.

22 MR. WALKER: Good afternoon, Your Honor.

23 Respectfully, of course the government is aware of
24 your prior position and your concerns expressed today. I would
25 respectfully like to ask the Court to entertain for a couple of

1 moments the discussion of jurisdiction again.

2 THE COURT: Sure.

3 MR. WALKER: The conversation we are having here
4 today is a very strong illustration of why this case belongs in
5 immigration court. Everything that we are discussing, the
6 issues at stake here, are the decision to issue a notice to
7 appear which is the initiation of removal proceedings.

8 Those issues Congress has clearly placed into the
9 sole jurisdiction of an immigration judge, the Board of
10 Immigration Appeals and subsequently the circuit court where
11 those -- where the Board decides that case.

12 The Supreme Court has upheld this position
13 regardless of whether there's constitutional issues at stake
14 that the immigration judge can't decide regardless of whether
15 there's policy concerns expressed within those -- within that
16 complaint in front of the immigration judge. And so these
17 issues belong in --

18 THE COURT: But the immigration judge cannot -- can
19 the immigration judge address steps that -- well, I mean, it's
20 pretty clear though that immigration judges cannot consider
21 things that we are considering today.

22 MR. WALKER: An immigration judge doesn't have the
23 authority to reinstate DACA, no, Your Honor.

24 The questions, however, we are talking about in
25 terms of what charges are listed on the NTA, that is clearly

1 within the immigration judge's purview. In the master calendar
2 hearing, an immigration judge's responsibility is to review the
3 NTA, to read the charges back to the individual, and to seek
4 correction of any errors on that NTA if it finds that there are
5 any.

6 So within that process, that's where the individuals
7 in these cases, the plaintiffs here, would have that
8 opportunity to raise their concerns about what charges are
9 listed on that NTA.

10 THE COURT: But, for example, looking at
11 Section 1252(g) where in the circuit they talked about that
12 that precludes review of the three specified discretionary
13 decisions but it does not bar review of legal questions
14 relating to those discretionary decisions.

15 So I guess my point being the immigration judge
16 cannot look to the legal questions relating to the
17 discretionary decisions; right?

18 MR. WALKER: Yes, Your Honor, that is correct.

19 THE COURT: The circuit says that we can provided we
20 are not looking at the three specified discretionary decisions.
21 But we are looking at that it does not bar the legal questions
22 relating to the discretionary decisions. So I guess the point
23 being that it shouldn't be before just an immigration judge
24 because they can't look at the legal questions involved in the
25 issues relating to discretionary decisions.

1 MR. WALKER: Well, there's two responses to that,
2 Your Honor. The first is that this -- the issue before us is
3 not a legal question. The plaintiffs have repeatedly suggested
4 that this is about eligibility, and as long as an individual
5 remains eligible for DACA, it can't be taken away. And that's
6 an incorrect proposition.

7 Eligibility gets that person through the door, and
8 then that -- the SOP states clearly at every indication that,
9 once they've reached that eligibility standard, there is then
10 the exercise of discretion and whether to grant that or not.

11 So the government's position in these cases,
12 Your Honor, is that this is not a determination of their
13 eligibility at that point that the NTA has issued. This is a
14 decision being made based on the circumstances in front of the
15 immigration officer who says, I'm aware they have DACA. I'm
16 aware that there are these criminal activity facts in front of
17 me, and I'm looking at all of those pieces and making a
18 decision to terminate their DACA by issuing an NTA.

19 So the decision is the issuance of the notice to
20 appear, the decision to say it is time to put this person into
21 removal proceedings. That deferred action decision prior to
22 that is not a bar to that officer making that decision. And
23 that's the government's position from the beginning is that ICE
24 and CBP are not constrained at that moment to say I am not
25 allowed to initiate removal proceedings against this person

1 because of a prior DACA eligibility determination that's been
2 made. And the SOP doesn't contradict that, and the DACA
3 memorandum from 2012 doesn't contradict that.

4 THE COURT: I guess the problem I have with that
5 point is that -- and that argument is that the whole purpose of
6 DACA is to include people that are here without legal status,
7 and then to say you are removed from DACA because you are here
8 unlawfully, what's the purpose? There was no -- then why have
9 DACA?

10 MR. WALKER: Yes, Your Honor. And the response to
11 that is, again, very respectfully, is that the decision to
12 issue the notice to appear is not strictly because a person is
13 here unlawfully, and --

14 THE COURT: That's been the case so far in this
15 case, isn't it?

16 MR. WALKER: The charging document, the NTA itself
17 lists just one charge on it which is unlawful presence, which,
18 again, is a prosecutorial discretionary decision that courts
19 are not historically permitted to pierce because that person,
20 that officer making that decision, is balancing those *Chaney*
21 factors, the *Heckler v. Chaney* decision, of saying that there
22 are all these allegations of resources, different
23 considerations that have to be made that are not subject to
24 judicial review.

25 And so the NTA has issued as a charge of unlawful

1 presence but there's a whole body of information backing that
2 up. And, again, if an individual disagrees with that decision,
3 the master calendar hearing is the place to raise that. An
4 immigration judge at that point has the opportunity to go back
5 to the government and say, correct NTA, put the charges on
6 there that belong. So that is where this process should be
7 taken.

8 And though the immigration judge doesn't have the
9 authority to give DACA back to that individual, that, again, is
10 suggesting that the immigration judge would tell the government
11 to stop trying to remove this person which is not how DACA was
12 ever intended to be enforced.

13 There isn't protection from removal within the DACA
14 grant. There's an acknowledgement that the government at the
15 moment is not seeking removal. But at every stage of that
16 process, from the 2012 memo until today, there's always been
17 the caveat that it can be removed or it can be terminated at
18 any time at the government's discretion.

19 So these charging decisions of the NTA, the moment
20 that that decision is made, it is not so arbitrary and is not
21 so simplified as to say you are here unlawfully and so you are
22 being placed into removal proceedings. It's to say you were
23 found committing these criminal acts, these alleged criminal
24 acts. In each of these circumstances --

25 THE COURT: Just on that point though, under DACA

1 you have EPS. We've talked about EPS. We've talked about
2 enforcement priority. But under DACA you cannot be -- as I
3 understand it. Correct me if I'm wrong. You could not be
4 subject to removal unless you were convicted of a felony, three
5 misdemeanors, or a gross misdemeanor. So doesn't that -- the
6 fact that you could allege other facts, doesn't that contradict
7 the protections that were set up in DACA?

8 MR. WALKER: Well, because there's a piece missing
9 to that statement, Your Honor. What you are saying is correct,
10 but what you have to add to the end of that sentence is by
11 USCIS, by Citizenship and Immigration Services. So --

12 THE COURT: So one branch is -- okay. So you are
13 saying one from the executive branch can basically institute a
14 policy that's kind of meaningless because it doesn't apply to
15 another agency?

16 MR. WALKER: It's not that it's meaningless,
17 Your Honor. The policy was put into place by DHS, the
18 Department of Homeland Security, which oversees each of these
19 three subagencies.

20 The authority to issue NTAs has always been
21 bifurcated between those agencies where CIS has a more
22 administrative function of examining applications for various
23 relief from removal or benefits of immigration law. And ICE
24 and CBP conduct law enforcement operations.

25 And so from the beginning, the 2012 memo from

1 Janet Napolitano, Secretary Napolitano, that memorandum clearly
2 states that ICE and CBP are to continue exercising their
3 prosecutorial discretion on a case by case basis.

4 At the same time, it instructs CIS to pursue the
5 program, to follow DACA policy within its typical parameters
6 which then compelled CIS to create this SOP for its own
7 officers.

8 CIS is the agency that created the SOP for CIS
9 officers to follow. Within that there is the condition that,
10 when an NTA issues by another agency which is ICE or CBP, CIS's
11 only role in that is to issue a notice of action, a
12 notification to an individual that their DACA terminated with
13 the initiation of removal proceedings against them.

14 Once their NTA was filed in an immigration court,
15 their DACA, their employment authorization both terminated
16 automatically. So that ability of ICE and CBP to issue the
17 NTA, to pursue removal proceedings, to exercise its
18 law enforcement mandate has never been curtailed by any DACA
19 policy, any memorandum, any effort of the Secretary of Homeland
20 Security to that say ICE or CBP would encounter --

21 THE COURT: But then, again, the agencies only
22 decided to take this approach recently.

23 MR. WALKER: The government wouldn't agree with that
24 position, Your Honor. We --

25 THE COURT: What is it then?

1 MR. WALKER: We submitted an affidavit showing how
2 there have been automatic terminations from the beginning,
3 since 2013.

4 THE COURT: Okay.

5 MR. WALKER: And so this isn't a change in policy,
6 and it's a violation of the SOP. The steps that the --

7 THE COURT: Why isn't it a change in policy?

8 MR. WALKER: I'm sorry?

9 THE COURT: That's an interesting statement. Why
10 it's not a change in policy.

11 MR. WALKER: It's not a change in policy where
12 the --

13 THE COURT: Why have we had news conferences about
14 it if it's not a change in policy?

15 MR. WALKER: In terms of the individual exercise of
16 discretion --

17 THE COURT: If you're not adopting a new policy,
18 then why would the government have news conferences about the
19 change in policy if it's not a change in policy?

20 MR. WALKER: I'm not sure what news conferences you
21 are referring to.

22 THE COURT: I seem to be remembering something from
23 the Attorney General.

24 MR. WALKER: Well, in terms of the overall DACA
25 policy --

1 THE COURT: Am I wrong? Did the Attorney
2 General announce a change in policy?

3 MR. WALKER: We changed the -- in terms of the
4 overall policy, Your Honor.

5 THE COURT: Well, that's why I'm just curious. Why
6 there's no change in policy if -- I'm wondering why would you
7 announce a change in policy if there's no change in policy?

8 MR. WALKER: Well, the change in policy is the
9 organized wind down of the DACA policy overall. So within
10 that -- there was a decision that DACA should no longer be
11 granted moving forward. That has no bearing on the exercise of
12 discretion within an --

13 THE COURT: So unwinding is not a change in policy?

14 MR. WALKER: That's not an issue before the Court
15 today, Your Honor.

16 THE COURT: I know that, but you said there's been
17 no change in policy. So I was confused by the statement,
18 because it seems unwinding is a change in policy. You are
19 right. It's not before the Court. I shouldn't get
20 sidetracked.

21 MR. WALKER: Certainly. And what I would suggest --
22 the plaintiffs did argue there is a change in policy in terms
23 of the decision to terminate DACA while someone remains
24 eligible.

25 THE COURT: Right.

1 MR. WALKER: And the government's position is that
2 is a mistaken premise on its own because eligibility is not
3 entitlement. A person being eligible for DACA does not
4 guarantee that they will receive it or maintain it.

5 And that's a point that has been made clear from the
6 very beginning, from the initiating memo, from the FAQs. The
7 letter that grants DACA to an individual states expressly on it
8 that subsequent criminal activity will likely result in the
9 termination of DACA. And that's activity, Your Honor. That's
10 not a criminal charge. That's not a criminal --

11 THE COURT: Termination of DACA though -- it feels
12 like it's circular to me. So it's not a change in policy,
13 criminal activity. But DACA still says "felony, gross
14 misdemeanor, three misdemeanors."

15 MR. WALKER: Again, Your Honor, you are talking
16 about eligibility at that moment. And whether or not a person
17 is considered for the exercise of discretion, they have to
18 reach that point first. They have to -- because a person with
19 a felony conviction, with a murder conviction on their record,
20 won't be considered for an exercise of discretion in the first
21 place.

22 THE COURT: Right.

23 MR. WALKER: However, a person who meets all of
24 those criteria and receives that exercise of discretion is not
25 at that point entitled to keep it. At that point it doesn't

1 require murder or a comparable charge for them to lose their
2 DACA.

3 And this is the crux of the government is that ICE
4 and CBP, in the exercise of their standard law enforcement
5 authority, encounter an individual who is appearing to be
6 engaged in criminal activity, have admitted to the facts of
7 their activity, they've gone through a process at that point.

8 With two of our named plaintiffs, the decision to
9 issue the NTA wasn't reviewed by supervisors before it was
10 issued. There are procedures in place for that NTA issuance.
11 And within that process, that is where Congress has clearly
12 said that the Court should not impose their will.

13 Curtailing that discretion is the harm that the
14 government is concerned about in finding jurisdiction to hear
15 this case at all but especially in granting a preliminary
16 injunction that would prevent the government from exercising
17 that authority.

18 THE COURT: Okay.

19 MR. WALKER: So that's the jurisdiction argument,
20 Your Honor.

21 And to move on from there, if you do find, again,
22 that you have jurisdiction to hear this claim, the government
23 would still argue that the plaintiffs have failed to meet
24 their -- the standard to grant the extraordinary relief of
25 preliminary injunction in terms of establishing a likelihood of

1 success on the merits.

2 The plaintiffs, again, are not disputing the
3 criminal activity that was the basis for the NTA issuance.
4 They are arguing that it doesn't matter. They are arguing that
5 regardless of their criminal activity, they remain eligible
6 because they weren't convicted. And that argument doesn't
7 satisfy the standard for issuing of an NTA, the consequence of
8 which terminates their DACA.

9 So without offering more, without having some
10 evidence available to show how that outcome should have been
11 different, they don't establish success on the merits. They
12 don't establish that the relief that this Court could offer
13 them would result in the return of their DACA under a different
14 process.

15 Again, the standard for preliminary injunction is
16 arbitrary and capricious under the Administrative Procedure
17 Act. In which case, if you do find the need -- if the Court
18 feels the need to look at the procedure, the process that was
19 followed, the Court is looking for a rational decision based on
20 the evidence before the agency officer.

21 And, again, the government would argue that where
22 this officer encountered these individuals engaged in criminal
23 activity, each of the three named plaintiffs engaged in
24 criminal activity, understood that they DACA, looked at all of
25 the facts, looked at every piece of information, had spoken

1 face to face with these individuals, had heard from these
2 individuals that they acknowledged their behavior was part of
3 this criminal activity, made a decision in that moment which
4 was a rational decision to initiate removal proceedings against
5 those individuals which then had the effect of terminating
6 their DACA which is a very logical step because the grant of
7 DACA is an acknowledgement that the government is not seeking a
8 person's removal. So the moment that the government decides to
9 seek that person's removal must be termination of that DACA
10 grant.

11 So the argument that the government is attempting to
12 make here, Your Honor, is that the plaintiffs have not shown
13 how that is an arbitrary process. And if you look past the --
14 just the language of the NTA and look to the supporting
15 documents, the things that are brought to the immigration court
16 that the immigration judge reviews with the individual at his
17 first master calendar hearing, you see that there is a process
18 in place, there is a rational basis for the decision that was
19 made, and there is an opportunity for that individual to
20 challenge that there.

21 So I've addressed the APA issue here in terms of
22 meeting that threshold for criminal activity. And, again, the
23 point that the plaintiffs have -- the plaintiffs suggest that
24 they would have offered information that would have changed the
25 government's mind had they been given notice and opportunity.

1 But they haven't offered that information here in court yet.
2 There's nothing on this record where they've expressed any
3 evidence, any facts, any change of the circumstances that were
4 before the officer at the time that would suggest a different
5 outcome.

6 And so the lack of prejudice in this decision is
7 also a factor the Court should consider when it's deciding when
8 the relief that it offers would cure any irreparable harm that
9 the plaintiffs are alleging. So when they are arguing that
10 their behavior doesn't matter, rather than that it didn't
11 happen, they haven't reached that threshold yet, Your Honor.

12 Additionally we would argue there's no
13 constitutional interest implicated in this case. And so the
14 idea that there's an irreparable harm because a protected
15 interest was taken away is also a false statement that the
16 communications of DACA from the beginning offer the same caveat
17 every time, that DACA was not protection from removal. DACA
18 was not a --

19 THE COURT: Are you moving to due process?

20 MR. WALKER: I'm sorry, Your Honor?

21 THE COURT: Are you moving to due process?

22 MR. WALKER: I'm sorry?

23 THE COURT: Are you moving on to the due process
24 argument?

25 MR. WALKER: Yes, Your Honor. I apologize. This

1 is -- part and parcel of the failure to --

2 THE COURT: Right.

3 MR. WALKER: -- show success on the merits that
4 there isn't a due process violation that the plaintiffs can
5 establish here. And the fact that there was never a mutually
6 exclusive understanding between the government and the
7 individual that DACA would protect them from removal --

8 THE COURT: I agree with you. That's less clean.

9 MR. WALKER: Thank you, Your Honor.

10 The other piece of this, Your Honor, the irreparable
11 harm that plaintiffs have to show in order to succeed on a
12 preliminary injunction requires a showing of harm that the
13 Court can relieve with an injunction.

14 And one of the elements, the prime element, that
15 plaintiffs sort of interject with their DACA termination is the
16 loss of their employment authorization document. And the
17 government offers the argument there that the employment
18 authorization document terminated automatically because of DHS
19 regulations having nothing to do with DACA. It's a regulation
20 that precedes DACA and supercedes DACA.

21 And that regulation states that any grant of
22 employment authorization based on a deferred action status or a
23 number of other statuses terminates automatically when removal
24 proceedings are initiated. And there is no review of that
25 decision, and there's no process in which that's reinstated.

1 What happens is that a person remains able to
2 reapply for work authorization during removal proceedings,
3 these plaintiffs included, if they find a fit within the number
4 of categories under 8 CFR 274a.14, a.12 --

5 THE REPORTER: Can you repeat the number.

6 MR. WALKER: I'm sorry. The individuals -- the
7 plaintiffs here as well as any individual on a deferred action
8 status may apply for work authorization if they fit within one
9 of the categories of 274a.12 which is a subsection of a DHS
10 regulation that permits work authorization for individuals
11 without an otherwise lawful status.

12 But it's a discretionary grant. It's a temporary
13 grant. And when it's been challenged in the 11th Circuit, the
14 11th Circuit affirmed that it is not a procedure that can be
15 taken into District Court for a challenge. That was issued to
16 Florida. They sent that challenge back to immigration court,
17 and the 11th Circuit affirmed that in *Gupta*.

18 THE COURT: Let me hear from the plaintiffs and wrap
19 up. Thank you.

20 MR. WALKER: Thank you, Your Honor.

21 Just the last point of -- the balance of equities
22 has to favor the government in this situation where a deferred
23 action decision shouldn't be enjoined by a court in terms of
24 whether or not a person can be removed from the country,
25 whether initiation removal proceedings can take place. So the

1 government asks again that the Court reconsider jurisdiction
2 and reconsider the equities involved.

3 THE COURT: Thank you.

4 MR. WALKER: Thank you, Your Honor.

5 MS. CHANG NEWELL: Good afternoon.

6 THE COURT: Good afternoon.

7 MS. CHANG NEWELL: So, Your Honor, as you know,
8 plaintiffs' class-wide preliminary injunction motion rests on
9 precisely the same claims that this Court have already found
10 have a likelihood of success on the merits with respect to
11 Mr. Arreola, and it involves precisely the same jurisdictional
12 questions that this Court has already addressed and put to
13 rest, and there's no reason for the Court to reach a different
14 conclusion here.

15 Were there particular -- I have some points in
16 response to the government's --

17 THE COURT: I just wanted you -- if there's briefly
18 any points you want to make. I don't have any questions.

19 MS. CHANG NEWELL: Okay. So the government
20 addressed 1252(g). You know, the Court reached the correct
21 conclusion in its preliminary injunction decision. There's two
22 separate reasons why 1252(g) doesn't apply here. The first is
23 that this case does not involve any of the three discrete
24 actions.

25 The government repeatedly talks about things that

1 ICE is doing, the issuance of the NTA or things that CBP is
2 doing. None of the plaintiffs' claims in this case challenge
3 anything that CBP or ICE is doing. It's -- we are not
4 challenging the issuance of the NTA. We are not challenging
5 the commencement of proceedings. And, indeed, the Court issued
6 a preliminary injunction.

7 With respect to Mr. Arreola, his proceedings are,
8 you know, commencing or are continuing unaffected. His NTA is
9 unaffected. There was nothing in the injunctive relief that we
10 are asking for that would impact ICE's or CVB's ability to
11 issue an NTA or even what they would have to say in the NTA.

12 So the first reason, just to sum up, is that we are
13 not challenging any of the three discrete actions that are
14 enumerated in in 1252(g).

15 And the second reason, as the Court noted earlier,
16 is that, as the Ninth Circuit held in *Hovsepian*, the en banc
17 decision, even if we were challenging one of the three discrete
18 actions in 1252(g), because our claims are legal claims,
19 1252(g) does not preclude jurisdiction here.

20 I believe opposing counsel argued that we are
21 challenging the ultimate exercise of discretion. That's not
22 what this case is about. As this Court has already held, this
23 case is about whether the government is required to comply with
24 its own rules, its own nondiscretionary procedures, procedures
25 which this Court and multiple other District Courts have

1 already found to be binding on the government.

2 And this case is about whether the government is
3 required to comply with basic requirements of the
4 Administrative Procedures Act as well as the procedural Due
5 Process clause, and all of those things are legal claims. And
6 so for that reason as well, 1252(g) does not apply.

7 The government repeatedly argues that the NTA
8 automatically terminates DACA. But as this Court already found
9 in its previous decision, there's nothing in the SOPs that
10 supports that. What the Court said was that there appears to
11 be only one narrow circumstance in which automatic termination
12 based on an NTA is appropriate, and that has already been
13 discussed where an NTA issues after USCIS determines that a
14 disqualifying offense or public safety concern is deemed to be
15 egregious public safety.

16 So this case is about what USCIS -- the decision
17 that USCIS makes in terminating DACA which is a separate and
18 independent decision. And the SOP made clear that it's USCIS
19 that makes that decision, that is charged with making that
20 decision. And the SOPs also make clear that the government's
21 claim or assertion that anytime an NTA is issued automatic
22 termination ensues is clearly incorrect as this Court found
23 previously.

24 The government also referenced the evidence that it
25 put into the record that it had terminated individuals' DACA

1 automatically without process on a number of occasions. The
2 fact that the government has a practice of violating the SOPs
3 does not make that practice lawful.

4 I note also that the government never showed that
5 the few examples that they pointed out were not EPS cases.

6 The government also talked about the change in
7 policy, and, you know, I think it's important to make clear
8 that our claim with respect to the APA change in policy
9 argument is simply -- is not that the government cannot change
10 its position but merely that, if the government wants to change
11 its position, it has to provide a reasoned explanation for
12 doing so. And that's black letter law as this Court already
13 held.

14 The government in these cases has found, at least on
15 one prior occasion and in some cases multiple occasions, that
16 these individuals are eligible for and deserving of DACA. They
17 have developed -- you know, they have developed critical
18 reliance interest in that DACA. DACA has been a critical
19 lifeline for hundreds of thousands of noncitizens in this
20 country. It has allowed them to go to work, to go to school.
21 And all we are saying in the APA claim is that, if the
22 government wants to change their position about that for these
23 individuals, they deserve a good explanation for why.

24 The government also spent some time talking about
25 various factual allegations that the government has made with

1 respect to some of the lead plaintiffs. As this Court has
2 already held, the government's post hoc rationalizations that
3 are being advanced during litigation and that were not actually
4 the reasoning that the USCIS gave in its termination notices
5 are irrelevant at this stage because, you know, under
6 controlling precedent, the Court reviews the agency decisions
7 here on the contemporaneous reasons that were given by the
8 agency at the time and on the administrative record.

9 The government's information doesn't meet those
10 standards, and so it's irrelevant. But we did put information
11 into the record in response to that just to show that, if our
12 plaintiffs had had an opportunity to respond, it may well have
13 made a difference for them.

14 Mr. Gil Robles, as the Court noted, was never
15 charged with any felony crime at all. He was charged with a
16 single misdemeanor offense of a traffic offense, a misdemeanor
17 traffic offense of driving on a canceled license. Mr. Moreira
18 similarly was only charged with a single misdemeanor of
19 possession of an altered document.

20 You know, another theme that the government
21 repeatedly addressed was this concept of prejudice. First of
22 all, there's no requirement for our APA claims that the
23 plaintiffs show prejudice. But, you know, we don't think that
24 it's correct to say that this is an empty exercise, Your Honor.

25 If Mr. Moreira and Mr. Gil Robles had had an

1 opportunity to address the government's apparently mistaken
2 information suggesting that they had somehow been charged with
3 felonies, which they haven't, they would have set the record
4 straight. And we can only hope that the government would have,
5 as the rules require, looked at all of the relevant
6 information, all of the relevant information and the totality
7 of the circumstances and reached a different conclusion.

8 And all that government counsel has attempted to
9 suggest that, you know, it really doesn't matter what people
10 would say if they had an opportunity to respond. It, of
11 course, would be improper both under the rules and under the
12 procedural Due Process clause if the government were simply to
13 prejudge these cases, to plug their ears and not listen to, you
14 know, whatever the response is or whatever the correct
15 information is that the DACA recipients might submit. For the
16 government to simply prejudge these cases would be entirely
17 improper.

18 So we don't think this is an empty exercise. This
19 process is critical and -- for these DACA recipients.

20 The government also addressed this EAD regulation
21 which, as the Court held in its previous decision, contains an
22 express exemption for certain work permits including DACA --
23 sorry -- deferred action work permits.

24 The government's -- so the government's argument
25 with respect to the EAD regulation is incorrect as the Court

1 found in Footnote 2 of the preliminary injunction decision with
2 respect to Mr. Arreola.

3 The Court need not reach the procedural due process
4 claim because, as we've argued, we believe that the APA claims
5 that we have advanced, as this Court found in its previous
6 decision, do support a preliminary injunction. But we do think
7 that, you know, were the Court to reach those claims, we have
8 the better of the argument --

9 THE COURT: It's a tougher argument.

10 MS. CHANG NEWELL: It -- you know, what the
11 government's argument, as I understand it, is is that, when you
12 have a discretionary benefit, you don't have an entitlement to
13 that benefit. And we don't dispute that. We are not arguing
14 that they have an entitlement to DACA.

15 But the cases we rely on, including *Bell versus*
16 *Burson*, the driver's license case in the Supreme Court, as well
17 as the *Alaska Airlines* case in the Ninth Circuit which involved
18 commercial airline, like, permits or licenses, those cases --
19 what those cases stand for is this concept that, even if the
20 benefit is ultimately a discretionary one, once it's been
21 granted, the government can't arbitrarily revoke it without
22 process.

23 Also, and the Supreme Court parole cases, I believe,
24 we also cited.

25 But the Court need not reach those claims, but we do

1 think that the constitutional concerns that would be raised
2 reinforce the Court's previous correct reading of the SOPs.

3 There are just a couple more points I wanted to
4 make, Your Honor.

5 The government, again, argued that -- that
6 essentially CBP and ICE can terminate DACA, and the Court has
7 already rejected that argument correctly, because their reading
8 of the DACA memo is incorrect.

9 There was a supplemental authority notice that the
10 government --

11 THE COURT: Friday.

12 MS. CHANG NEWELL: On Friday. And just very
13 briefly, that case --

14 THE COURT: You don't need to address it.

15 MS. CHANG NEWELL: Okay. Thank you.

16 And lastly, Your Honor, I just wanted to address a
17 previous question that you had about whether this injunction
18 should be limited to the Ninth Circuit or whether it should be
19 a --

20 THE COURT: I'm okay with it.

21 MS. CHANG NEWELL: Thank you, Your Honor.

22 THE COURT: Thank you. The matter will be
23 submitted.

24 (At 3:13 p.m. the proceedings adjourned.)

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CERTIFICATE OF OFFICIAL REPORTER

I, MAREA WOOLRICH, FEDERAL OFFICIAL REALTIME COURT REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT TO SECTION 753, TITLE 28, UNITED STATES CODE THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

DATED THIS 3RD DAY OF APRIL, 2018.

/S/ MAREA WOOLRICH

MAREA WOOLRICH, CSR NO. 12698, CCRR
FEDERAL OFFICIAL COURT REPORTER