No. 20-6393

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICCY ENRIQUEZ-PERDOMO,
Plaintiff-Appellant

v.

RICARDO NEWMAN, et al.
Defendants-Appellees

On Appeal from the United States District Court for the
Western District of Kentucky at Covington
Case No. 3:18-cv-00549-CRS-CHL
The Honorable Charles R. Simpson, Senior District Judge

APPELLANT RICCY ENRIQUEZ-PERDOMO'S BRIEF

/s/ Benjamin T. D. Pugh
Christopher D. Roach
Benjamin T.D. Pugh
Pugh and Roach Attorneys at Law, PLLC
28 West Fifth Street
Covington, KY 41011
859-291-5555
chris@prlaw.legal
tom@prlaw.legal

/s/ Michael O'Hara
Michael J. O'Hara
O'Hara, Taylor, Sloan & Cassidy
25 Town Center Blvd., Suite 201
Crestview Hills, KY 41017
859-331-2000
mohara@oharataylor.com

Counsel for Plaintiff-Appellent

CORPORATE DISCLOSURE STATEMENT

Pursuant to 6th Cir. R. 26.1, Appellant Riccy Enriquez-Perdomo makes the following disclosures: (1) that she is not a subsidiary of a publicly owned corporation, and (2) that there is no publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome.

/s/ Benjamin T. D. Pugh **February 2, 2021**
Benjamin T. D. Pugh Date

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Sixth Circuit Rule 28(b)(1)(B) and 34(a), the Appellant requests that this matter be set for oral argument. Oral argument would be helpful to address relatively novel factual and jurisdictional issues necessary to the Court's determination.

STATEMENT OF JURISDICTION

I. THE DISTRICT COURT

Appellant Riccy Enriquez-Perdomo (Plaintiff below) appeals from a Memorandum Opinion and Order granting Defendants/Appellees' motion to dismiss for lack of subject matter jurisdiction in this civil rights action, brought pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). Ms. Enriquez-Perdomo seeks redress for violation of Appellant's Right to be free from: Unconstitutional Arrest and Imprisonment, Unconstitutional Unlawful Pretrial Detention, Unconstitutional First Amendment Retaliation, Unconstitutional Due Process Violation, and Unconstitutional denial of Equal Protection of the law. The Defendant/Appellees are Ricardo Newman, Joseph Phelps, John Korkin and Shawn Byers (collectively "Defendant Agents" or "Defendants"), who were at all relevant times Agents with U.S. Immigration and Customs Enforcement ("ICE").

Defendant Agents unlawfully arrested Ms. Enriquez, without probable cause, while she was engaged in protected speech, posting bond for people who had been detained by ICE. She was singled out due to her race and national origin, and was not afforded due process while being detained and held unlawfully for approximately eight days. During this detention, conditions were horrible, and

Appellant was given only a baloney sandwich per day while being shipped to eight or nine different locations in two to four different states.

The District Court had jurisdiction pursuant to Title 28 of the United States Code, Sections 1331, 1343, and 1361, and venue was proper under 28 U.S.C. § 1391(a). On November 13, 2020, the District Court granted the motion to dismiss all claims asserted against all Defendant Agents for purported lack of jurisdiction. Notice of Appeal was timely filed on December 9, 2020. RE 64. This Court has jurisdiction over this appeal of a final decision of the District Court under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

(1) Whether the District Court erred in ruling that it lacked jurisdiction over all claims asserted in the Complaint.

(2) Whether the District Court erred in analyzing the challenge to subject-matter jurisdiction as a factual attack instead of facial attack.

(3) Whether the District Court erred in determining facts that went directly to the merits of Plaintiff's underlying claims, which would have precluded a factual attack analysis.

(4) Whether the District Court erred in finding that 8 U.S.C. 1252(g) stripped the court of subject-matter jurisdiction primarily because there was a final order of removal, without regard for Plaintiff's DACA status.

(5) Whether the District Court erred and/or abused its discretion in concluding it lacked jurisdiction without giving any weight to the facts offered by Plaintiff that contradicted the Court's factual conclusion.

STATEMENT OF THE CASE

I. STATEMENT OF MATERIAL FACTS

The District Court relied entirely on Defendant Agents' self-serving (and subject to credibility issues) affidavits, which are directly contradicted by Plaintiff's assertions in both her complaint, the Report and Affidavit filed by Plaintiff's Expert Mark Lanterman, and the Affidavit Plaintiff filed with her Response in Opposition to the Motion to Dismiss and Supplemental Memorandum in Response. First, Plaintiff was familiar with Defendant Ricardo Newman, had interacted with him in the past, and believed Newman both knew her and was aware of Enriquez-Perdomo's approved status under the Deferred Action for Childhood Arrival ("DACA") at the time she was arrested[1]. Enriquez-Perdomo Affidavit, RE 29-4, Page ID# 420-421; and see Complaint, RE 1, Page ID#, 3-4. In addition, Plaintiff provided proof of her DACA renewal immediately prior to being arrested, showing Defendants the IDs and Employment Authorization Cards that were on her person

[1] Plaintiff demonstrates below that she has presented objective proof that Newman and the other Defendants knew she had authorized DACA status, which was obtained from electronically stored information received from Defendants, and interpreted by her expert Mark Lanterman. Lanterman Declaration RE 60-2, Page ID# 552-554.

at the time of arrest. RE 29-4, Page ID# 421-422, 425. It strains credulity to believe that Defendants would not have looked at Plaintiff's DACA Employment Authorization identification card when they arrested her. The Parties do not dispute that Plaintiff did have authorized DACA status when arrested, hence her subsequent release after eight days of confinement.

The DACA Program

On June 15, 2012, former Secretary of Homeland Security Janet Napolitano announced the creation of the DACA program. Napolitano Memo, RE 29-1, Page ID#151-153; *see also Medina v. United States Dep't of Homeland Sec.*, No. C17-0218RSM, 2017 U.S. Dist. LEXIS 185367, at *8 (W.D. Wash. Nov. 8, 2017). In her memorandum, Ms. Napolitano provided the Department of Homeland Security ("DHS") with guidelines regarding the exercise of its prosecutorial discretion to focus enforcement efforts away from low priority cases, including individuals, like Plaintiff, who came to the United States as children. *Id.* The Napolitano Memo listed the following five criteria required before an individual can be considered for an exercise of prosecutorial discretion under DACA:

- came to the United States under the age of sixteen;
- has continuously resided in the United States for a least five years preceding the date of this memorandum and is present in the United States on the date of this memorandum;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;

- has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
- is not above the age of thirty.

RE 29-1, Page ID# 151. Individuals must also pass a criminal background check to be eligible for DACA, and obviously since Plaintiff has had DACA for years, and still has it, she passed all of the qualifications listed above including the criminal background check. *Id.*

The National Standard Operating Procedures ("SOP") issued by DHS describe the procedures to be followed in adjudicating DACA requests and terminating DACA status. April 4, 2013 DACA National Standard Operating Procedures ("SOP") RE 29-2, Page ID# 154-417. The SOP states that it is applicable to all personnel performing adjudicative functions and the procedures to be followed are not discretionary. *Id.,* Page ID# 169. Under the DACA program, deferred action is provided for a renewable period of two years, and DACA recipients are eligible to apply for work authorization during the period of deferred action. RE 29-1, Page ID# 153; (see also 8 C.F.R. § 274a.12(c)(14)), permitting the United States Citizen and Immigration Services ("USCIS") to establish a specific period for employment authorization for aliens who have been granted deferred action). Thus, DACA is a condition precedent to obtaining work authorization. Indeed, the SOP states:

> **For Employment Authorization:** 8 C.F.R. § 274a.12(c)(14) is the legal authority for employment authorization based on a grant of deferred action. **The (c)(33) code will be used to distinguish EAD**

> **grants under DACA from EAD grants** under other forms of deferred action. See also the Secretary's memorandum, which provides that USCIS shall accept applications to determine whether individuals whose removal has been deferred under DACA qualify for work authorization during the period of deferred action. [2]

RE 29-2, Page ID# 169. (Emphasis added.) This directive is located on the first page of the Introduction of the SOP and is very clear regarding this specific designation being applicable to DACA recipients only. *Id*. Looking at Plaintiff's Employment Authorization Cards, which she had on her person at the time of arrest and displayed to Defendant Newman at the time of her arrest,[3] the designation of 'C33' is quite visible, indicating Plaintiff had an EAD grant under DACA. RE 29-4, Page ID# 421, 425. In addition, "**For a (c)(33) EAD, the individual must be approved for DACA**." RE 29-2, Page ID# 265 (Emphasis added).

DHS has a specific procedure if DACA is to be terminated that allows the individual 33 days to respond to the Notice of Intent to Terminate. RE 29-2, Page ID# 285-287. There was no Notice of Intent to Terminate issued in Plaintiff's case and no evidence of its existence was ever presented in records and data produced by Defendants, which would be a condition precedent to terminating Plaintiff's

[2] EAD is a reference to "Employment Authorization Documents" under the DACA procedures. RE 29-2, Page ID# 201.
[3] RE 29-4, Page ID# 421.

DACA[4]. In addition, if her DACA status is terminated, "the Class of Admission (COA) code in CIS [Central Index System] should be changed to DAT (Deferred Action Terminated) for employment verification purposes." *Id*. Page ID# 287. However, as discussed, there is no evidence that was ever in the system.

Significantly, Newman, in his first declaration filed on September 28, 2019, never mentions anything about DAT, but only notes a final order of removal as the basis for her detention, also stating he could not find evidence of her renewed DACA despite her presentation of a valid Employment Authorization ID. Declaration of Ricardo Newman, RE 20-4, PageID# 86-87. It would be important for Defendant Newman to disclose that the system said DAT since he knew he had to establish a basis to arrest Plaintiff. Newman later amends his declaration on December 18, 2019, stating that he checked EARM, but not mentioning that he also checked ELIS2 as Plaintiff's expert has determined. See Amended Declaration of Ricardo Newman, RE 46-1, PageID# 496-497. And of course, Ricardo Newman files a third declaration (presumably better titled 'Second Amended Declaration'), stating he does not recall looking at ELIS2, and did not review any results from ELIS2, despite objective evidence to the contrary. See RE 61-3, PageID# 583-584; (and compare Lanterman

[4] There is no record citation here because there is simply no evidence that was presented, or could even possibly be presented, that ICE, USCIS, DHS, or any other governmental body ever issued a Notice of Intent to Terminate Plaintiff's DACA.

Declaration, RE 60-2, ¶¶. 17- 20, Page ID# 553-554, confirming Newman, in fact, accessed the ELIS2 data showing Plaintiff's authorized DACA status on the date she was arrested).

It is also important to note that Plaintiff's Employment Authorization ID is valid from 1/31/17 to 1/30/19, with the designation of C33. RE 29-4, Page ID# 425. So her arrest was some seven (7) months later, having occurred on August 17, 2017. See RE 1, PageID# 3. The Court should further note that the approval of renewal of her Employment Authorization ID is the same day of Plaintiff's DACA renewal, January 5, 2017. Both the DACA renewal and Employment authorization read as the **Source** as "ELIS2", "Renewal of request for employment authorization" and "Renewal Request – Consideration of Deferred Action for Childhood Arrivals" under **Activity**, with Activity Date of "01-05-2017," and **Result** as "Approved". Production 0061[5], RE 60-1, Page ID# 548. Subsequent Renewals also occur on the same date, e.g. September 14, 2018, further demonstrating the tandem approval. *Id*. Furthermore, "For a (c)(33) EAD [Employment Authorization ID], the individual

[5] This exhibit is hard to read and if the Court requires a magnified copy, please alert counsel. It was filed in the format in which it was produced, and one must magnify the document to read the details. The bolded and underlined words in this sentence are the headings contained in RE 60-1.

must be approved for DACA." RE 29-2, PageID# 265. (emphasis added)[6]. In other words, you cannot get an Employment Authorization ID, with a C33 designation without prior approved DACA status, both being approved on the same date, January 5, 2017 for Plaintiff. RE 60-1, Page ID# 548. Defendant Newman does not deny that Plaintiff showed her Employment Authorization ID showing that she in fact had DACA autorization. See RE 20-4, PageID# 87, where Newman concedes that Plaintiff "insisted she had renewed her DACA."

At the time of the arrest, Defendants had access to various databases that provided information confirming Plaintiffs DACA status, including CIS, PCQS, and ELIS2. Lanterman Declaration RE 60-2, Page ID# 552-554. At the time of her arrest, those databases would not have shown Plaintiff's DACA status as terminated. *Id.* In fairness, Plaintiff's presentation of her Employment Authorization ID (RE 29-4, Page ID# 425) established a presumption that Plaintiff had DACA status, and Defendants should have been looking for confirmation that her DACA status had not been terminated. In fact, it is undisputed that there is no record suggesting that Plaintiff's DACA status that was approved for renewal on January 5, 2017 was ever terminated. Instead, Defendants simply arrested her.

[6] In addition, the "Validity Period" is defined as follows: "the "valid from" date is the date of approval and the "valid to" date is 2 years minus one day from the date of approval or to the end of the deferred removal date under DACA, whichever is earlier. RE 29-2, PageID# 265.

Plaintiff and DACA

Plaintiff obtained DACA status on or about March 13, 2013 and renewed her DACA on March 20, 2015 and January 5, 2017. RE 29-4, ¶2, Page ID# 420, 425; RE 60-1, Page ID# 548. On the date of her arrest, she carried on her person all three Employment Authorization Cards, a valid Ohio Driver License, and her social security card. RE 29-4 ¶15, Page ID# 421. Plaintiff had been to this particular Immigration and Customs Enforcement ("ICE") office on at least 20 prior occasions to post bond for other individuals who had been detained by ICE and had been checked by ICE officers in the past, verifying her current DACA status. *Id*., ¶¶ 7. 11. Plaintiff was also familiar with Ricardo Newman, having interacted with him in the past. *Id*.[7] As she states under oath:

> I reasonably believed that Ricardo Newman knew of my DACA status, as he stated on the date of my arrest that "I don't understand why you are getting arrested if you have DACA status and a valid Employment Authorization Card," since you cannot get an Employment Authorization card without having some legal status to be in the United States.

Id. Page ID# 420 ¶5. Plaintiff was not told that she was being charged under 8 U.S.C. § 1182. *Id*.

Defendants use several electronic national databases provided by ICE and USCIS through the Department of Homeland Security that store information

[7] On at least one prior occasion Defendant Newman had actually asked Plaintiff to provide interpretation for him. Page ID# 421¶¶9-10.

regarding, among other things, immigration status. Those databases include: Computer-Linked Application Information Management System (CLAIMS, CLAIMS 3, CLAIMS 4); Person Centric Query Service (PCQS), CIS; Electronic Immigration System, (ELIS, ELIS 2). RE 60-2, Page ID# 552-554; Newman Dec. RE 20-4, Page ID# 86-87. In fact, Defendant Newman states in his first declaration that "Ms. Enriquez-Perdomo was promptly released after **her DACA status was confirmed in ELIS**." RE 20-4, PageID# 87, paragraph 17. Emphasis added. Plaintiff subpoenaed the electronically stored information (ESI) and associated screenshots from DHS, USCIS, and ICE. See Notice of Subpoena Duces Tecum, RE 54, DHS Subpoena, RE 54-1, ICE Subpoena, RE 54-2, USCIS Subpoena, RE 54-3, Page ID # 513-532. Defendant Newman, in his later amended and contradictory declarations, claimed that he checked on and relied on a completely different database called the ENFORCE Alien Removal Module (EARM). See RE 46-1, Page ID# 496-497, and RE 61-3, Page ID# 583-584.

Screenshots of search results provided by ICE and USCIS include a production from PCQS's second screen with the activities results from Plaintiff's person search, which includes data from Claims 3, CIS, Claims 4, ELIS, and ELIS 2. Production 0061 RE 60-1, Page ID# 548; Lanterman Declaration RE 60-2, Page ID# 552. This production also includes an entry that the renewal request for DACA status was approved on January 5, 2017. RE 60-1, Page ID# 548; RE 60-2, Page ID#

553. The date does not refer to the date of the approval, but the date in which the activity was recorded in the relevant system and able to be viewed in PCQS. RE 60-2, Page ID# 553.

Through limited discovery, Plaintiff has determined by analyzing electronically stored information on produced logs that Defendant Newman accessed the ELIS2 database, on August 17, 2017 at approximately 9:56 a.m., the day of Plaintiff's arrest by Defendants. RE 60-2, Page ID# 552-554; RE 60-1, PageID# 548. This database includes Plaintiff's approved DACA status which had been entered into the system roughly eight months prior on January 5, 2017. *Id*. After a review of the above-described evidence provided to him and his review of the data base information provided by the government, Plaintiff's expert opines:

> Therefore, the evidence that has been provided to me to date demonstrates that 1) Plaintiff's DACA status was available in at least one database (ELIS2) prior to her arrest, 2) the database could be accessed by Defendants, and 3) **Defendant Newman in fact accessed that database.**

RE 60-2, Page ID# 554. (Emphasis added).

Enriquez-Perdomo's IDs that she presented to Defendants at the time of her arrest should have been sufficient to establish Plaintiff indeed had current DACA status. That is, if her DACA status had been revoked, there would have been a Notice of Intent to Terminate DACA in the databases that Newman purportedly reviewed, per the SOP. RE 29-2, PageID# 285-287. There is no such Notice in the databases.

In addition, in the detail portion of the PCQS, a system Defendant Newman declares he reviewed, it shows that Plaintiff's Employment Authorization ID was renewed on January 31, 2017. See Production 0016, RE 60-3, PageID# 556; Declaration of Newman, RE 20-4, PageID# 86-87; Amended Declaration of Newman, RE 46-1, PageID# 496-497. Most importantly, Defendant Newman failed to disclose in his declarations that he in fact reviewed the ELIS2, which is confirmed by Plaintiff's expert. ELIS2 shows the DACA renewal. RE 60-2, Page ID# 553-554. Regardless, Defendants would have easily gleaned that from Plaintiff's Employment Authorization ID or the PCQS, which showed her C33 designation.

Furthermore, pursuant to the SOP a final order of removal does not matter when it comes to whether an individual is granted her DACA request or not:

> "USCIS will process all DACA requests, regardless of whether the individual is in removal proceedings . . . or subject to a final order of removal. Depending on when the order was issued, this could be an order of deportation, exclusion, or removal."

RE 29-2, PageID# 172. Thus, a final order of removal is not determinative of whether or not a DACA request can be granted and should have no bearing on this matter.

It is undisputed that Plaintiff has had DACA status at all relevant times and the United States has exercised prosecutorial discretion in granting Plaintiff that status. Neither Defendants nor any agent had any legal authority to countermand that discretion. Otherwise, there would be different classes of DACA recipients when

determining subject matter jurisdiction in a case such as this, i.e. one person who did not have a final order of removal prior to obtaining DACA (over whom presumably jurisdiction would be permitted) as opposed to one who did have a final order of removal prior to obtaining DACA (over whom the District Court found it had no jurisdiction). As the Secretary of Homeland Security stated, "As part of this exercise of prosecutorial discretion, the above criteria are to be considered whether or not an individual is already in removal proceedings or subject to a final order of removal." RE 29-1, PageID# 152.

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Plaintiff brought this action against Defendants Ricardo A. Newman, Joseph M. Phelps, John R. Korkin, and Shawn Byers under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Complaint, RE 1, Page ID# 1. Plaintiff made claims against Defendants under the First, Fourth, Fifth, and Eighth Amendments to the United States Constitution.

Defendants filed a Motion to Dismiss/Motion for Summary Judgment. RE 20, Page ID# 56-57; RE 20-1, Page ID# 58-82. Plaintiff responded and filed a Motion Pursuant to FRCP 56(d). RE 29, Page ID# 111-150; RE 31, Page ID# 431-434. The Court granted Plaintiff's request for limited discovery. RE 37, Page ID# 469. Plaintiff filed her Supplemental Memorandum in Response to Defendants' Motion to Dismiss/Motion for Summary Judgment. RE 60, Page ID# 541-547. Defendants

filed a Supplemental Reply in Support of Motion to Dismiss/Motion for Summary Judgment. RE 61, Page ID# 557-569. On November 13, 2020, the District Court granted Defendants' motion for lack of subject matter jurisdiction. RE 62, Page ID# 594-603; RE 63, Page ID#604. Of import, the District Court did not hear oral argument or hold an evidentiary hearing on the parties' positions. On December 9, 2020, Enriquez filed her timely appealed. Notice of Appeal, RE 64, Page ID#605.

SUMMARY OF THE ARGUMENT

Defendants assert that the only one relevant factual issue pertaining to their argument contesting subject matter jurisdiction is: "Did the databases that Defendants relied on reveal that Plaintiff lacked DACA and was subject to an active order of removal?" Response in Opposition to Plaintiff's Rule 56(d) Motion, RE 35, PageID# 461. Upon completion of limited discovery in this case, the answer to that question is unequivocally, no. Plaintiff had current DACA status, Plaintiff presented IDs indicating she had authorized DACA status, the databases showed she had such status at the time she was arrested and, thus, she was not subject to an active order of removal.

In dismissing Plaintiff's claims, the district court erred in rendering a factual finding on the elements going to the underlying merits of her constitutional claims. *Gentek Bldg. Prod., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330–31 (6th Cir. 2007).

Plaintiff's claims do not arise from, nor do they affect in any way, the final order of removal. Plaintiff's claims arise from an arrest and unlawful detention of Plaintiff while engaging in protected speech and while she was on approved DACA status. At the time of the arrest and detention/imprisonment of Plaintiff, the Defendant Agents had no discretion to detain Plaintiff, since she had approved DACA status as indicated by objective evidence on her person and contained in the computer databases. Plaintiff's claims arise strictly from Defendants' violation of Plaintiff's First, Fourth, Fifth and Eighth Amendment rights in the face of her approved DACA status. The final order of removal, thus, plays no part in this litigation and no relief sought by Plaintiff in this case will affect the removal order in any way. At the time of the arrest, there were no pending removal proceedings, or even consideration of such, that could possibly be affected by this litigation. See, 8 U.S.C. §§ 1252(b)(9) and 1252(g). Thus, nothing in the claims raised by Plaintiff should deprive the court of jurisdiction. *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999)

The District Court erred in failing to make findings of facts despite clear evidence presented by Plaintiff that she had approved DACA status at the time, sufficient to put Defendants on notice that they had no right to detain her. Defendants filed self-serving and ***contradictory*** declarations undermining the veracity and credibility of that evidence. The District Court ignored Plaintiff's objective evidence

and failed to have a hearing on the evidence presented. To the extent the Court's conclusion is considered a finding of fact it is clearly erroneous and an abuse of discretion. *United States v. Williams*, 662 F. App'x 366, 374 (6th Cir. 2016); *Plummer v. Jackson*, 491 F. App'x 671, 678 (6th Cir. 2012).

ARGUMENT

I. STANDARD OF REVIEW

The standard of review of the District Court's grant of a motion to dismiss for lack of subject matter jurisdiction depends on whether the motion is a factual attack or a facial attack.

A motion to dismiss for lack of subject-matter jurisdiction "should have been denied if facts pled in a complaint are sufficient to infer jurisdiction." *Hamdi v. Napolitano*, 620 F.3d 615, 620 (6th Cir. 2010). "Rule 12(b)(1) motions to dismiss for lack of subject-matter jurisdiction generally come in two varieties: a facial attack or a factual attack." *Gentek Bldg. Products, Inc. v. Sherwin-Williams Co*., 491 F.3d 320, 330 (6th Cir. 2007).

> A facial attack on the subject-matter jurisdiction alleged in the complaint questions merely the sufficiency of the pleading. When reviewing a facial attack, a district court takes the allegations in the complaint as true, which is a similar safeguard employed under 12(b)(6) motions to dismiss. If those allegations establish federal claims, jurisdiction exists.
>
> Where, on the other hand, there is a factual attack on the subject-matter jurisdiction alleged in the complaint, no presumptive truthfulness applies to the allegations. When a factual attack, also known as a "speaking motion," raises a factual controversy, the district court must

> weigh the conflicting evidence to arrive at the factual predicate that subject-matter does or does not exist. In its review, the district court has wide discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve jurisdictional facts.

Id. (Internal quotations and citations omitted). Obviously, Defendants have not challenged the existence of the primary factual prerequisite, i.e., that Plaintiff, in fact, had approved DACA status at the time of her arrest.

"This Court reviews facial challenges to subject matter jurisdiction de novo." *Wayside Church v. Van Buren Cty*., 847 F.3d 812, 816–17 (6th Cir. 2017)(Citing *DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004))(citing *Cob Clearinghouse Corp. v. Aetna U.S. Healthcare*, Inc., 362 F.3d 877, 880 (6th Cir. 2004)).

To the extent Defendants' challenge to jurisdiction is considered a facial attack, claiming that 8 U.S.C. § 1252(g) strips this Court of jurisdiction, the Court must take Plaintiff's allegations as true. Defendants assert they have raised a factual attack to jurisdiction. Motion to Dismiss, RE 20-1, Page ID# 61. Defendants cannot just claim it is a factual issue by merely stating so in their brief. As noted, there really is no factual dispute regarding the fact that there was no active order of removal at the time of arrest in that Plaintiff had approved DACA status. Nevertheless, Plaintiff will address both standards.

When challenged on allegations of jurisdictional facts, the parties must support their allegations by competent proof. *Hertz Corp. v. Friend*, 559 U.S. 77, 96–97 (2010).

> A factual attack, on the other hand, raises a factual controversy requiring the district court to "weigh the conflicting evidence to arrive at the factual predicate that subject-matter does or does not exist." *Gentek Bldg. Prods., Inc*., 491 F.3d at 330 (citing *Ohio Nat'l Life Ins. Co.*, 922 F.2d at 325). "Where a trial court's ruling on jurisdiction is based in part on the resolution of factual disputes, a reviewing court must accept the district court's factual findings unless they are clearly erroneous." *RMI Titanium Co. v. Westinghouse Elec. Corp*., 78 F.3d 1125, 1135 (6th Cir. 1996) (citing *Ohio Nat'l Life Ins. Co.*, 922 F.2d at 326) (additional citations omitted). "However, review of the district court's application of the law to the facts is de novo." *Id*. (citing *Ynclan v. Dep't of Air Force*, 943 F.2d 1388, 1390 (5th Cir. 1991); *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995)).
>
> Because the district court treated the challenge as a facial attack and made no factual findings in reaching its decision, the appeal is treated the same way. See *DLX, Inc*., 381 F.3d at 516. This Court thus reviews the judgment of the district court de novo. Moreover "where subject matter jurisdiction is challenged under Rule 12(b)(1), as it was here, the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Rogers v. Stratton Indus., Inc*., 798 F.2d 913, 915 (6th Cir. 1986).

Wayside Church, 847 F.3d at 816–17. In this case, the district court rendered no specific findings of fact regarding material facts that were disputed by the parties, i.e., whether any facts support Defendants' contention that they had no knowledge of Plaintiff's active DACA status. Absent such findings, *Wayside* counsels that this Court should treat the challenge as a facial challenge and the facts asserted in the complaint accepted as true. Whether treated as a factual or facial attack, the Complaint and record below compelled the District Court to find jurisdiction properly vested.

Plaintiff has submitted competent and objective proof establishing jurisdiction. Defendants' argument that the final order of removal deprives the Court of jurisdiction is a red herring. A prior removal order exists in many DACA cases. Plaintiff does not challenge her removal order in any way in this case. Indeed, it remains undisputed that prosecutorial discretion has been exercised to not enforce the final order of removal already. The essence of Defendants' contention and the District Court's conclusion here is that the Defendants' purported intent to execute an existing albeit inactive removal order despite DACA status, is in itself enough to deprive the court of jurisdiction, so long as a Defendants, without proof, suggest that they were unaware of current DACA status. Such goes well beyond any holding of this Court and the Supreme Court that guides the determination of whether this Court has jurisdiction over Plaintiff's claims.

Furthermore, the District Court made no express findings of facts or resolution of clear factual discrepancies. Memorandum Opinion RE 62, Page ID# 594-603. Plaintiff clearly stated that the final order of removal was not currently "valid" in that it had been effectively stayed by DHS through its grant of active DACA status. Yet the District Court erroneously stated she failed to dispute that. RE 62, Page ID# 602; see RE-29-4, PageID# 420-421; RE 60-2, Page ID# 553-554. The Court merely said there was a final order of removal that Defendants were acting on and that was enough to deprive the court of jurisdiction. RE 62, Page ID# 602-603.

II. THE DISTRICT COURT ERRED IN RENDERING A FACTUAL FINDING THAT GOES TO THE MERITS OF THE UNDERLYING CONSTITUTIONAL CLAIMS.

To the extent the court below treated Defendants' Motion as a factual attack on Plaintiff's claims, it erred in resolving a material dispute of fact that went to the heart of Plaintiff's constitutional claims that her arrest and imprisonment violated rights secured by the First, Fourth, Fifth, and Eighth Amendments to the United States Constitution. As noted above, when a court considers a motion to dismiss based on jurisdictional grounds a federal court is not permitted to resolve underlying factual disputes that go to the elements of a plaintiffs claims.

a. Gentek Bldg. Prod., Inc. V. Sherwin-Williams Co., And Its Progeny Require that, Where the Inquiry Is About the Merits of Plaintiff's Claim, Facts Should Be Resolved In Favor of Plaintiff.

As this Court has expressly ruled, a trial court is permitted to "[engage] in a factual inquiry regarding the complaint's allegations **only when the facts necessary to sustain jurisdiction do not implicate the merits of the plaintiff's claim**." *Gentek*, 491 F.3d at 330, *citing, Garcia v. Copenhaver, Bell & Assocs.,* 104 F.3d 1256, 1261 (11th Cir.1997) (Emphasis added). In this case the, the District Court clearly contravenes this jurisdictional rule.

There can be little doubt here that if, as Plaintiffs evidence suggests, Defendants were aware of Plaintiff's current DACA status or recklessly disregarded that information, then Plaintiffs constitutional rights were indeed violated. As noted,

Gentek prohibits a court from resolving factual disputes that go to the merits of a plaintiff's underlying claims. Such determination must be reserved for a resolution on the merits of the case.

"'In general, the existence of probable cause in a § 1983 action presents a jury question, unless there is only one reasonable determination possible.'" *Ouza v. City of Dearborn Heights*, 969 F.3d 265, 279 (6th Cir. 2020), *quoting, Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995). At the very least, the factual issue of whether there was a valid and active order of removal is inextricably intertwined with the factual issue of whether Defendants were aware of or recklessly disregarded documents confirming that Plaintiff had approved DACA status that deferred that order of removal. As this Court has held,

> A probable cause determination is based upon the totality of the circumstances and must consider both the inculpatory and exculpatory evidence. That means an **officer cannot simply turn a blind eye toward evidence favorable to the accused, nor ignore information** which becomes available in the course of routine investigations.

Jones v. Clark Cty., Kentucky, 959 F.3d 748, 757 (6th Cir. 2020)(Internal quotes and citations omitted)(Emphasis added).

The record submitted in the court below would unquestionably permit a jury to conclude that Defendants indeed turned "a blind eye" to the undisputed exculpatory record here demonstrating that, on August 17, 2017, Plaintiff was not subject to arrest and removal. "Because this factual issue regarding subject-matter

jurisdiction is intertwined with the merits, the factual attack to jurisdiction would instead be treated as an attack on the merits, **with the district court having jurisdiction**." *Gentek,* 491 F.3d at 332-33 (Emphasis added)); a*nd see Moore v. LaFayette Life Ins. Co.,* 458 F.3d 416, 444 (6th Cir.2006)(explaining that when the basis of federal jurisdiction is intertwined with the plaintiff's cause of action, the court should assume jurisdiction over the case and decide the case on the merits).

Long ranging constitutional deprivations will persist if officers are permitted to arrest (and even deport) immigrants with authorized DACA status on the basis of an old final order of removal and suffer no legal repercussions. The SOP specifically allows for individuals to qualify for DACA with a final order of removal. RE 29-2, PageID# 172. To affirm the District Court dismissal would create two classes of DACA recipients with differing constitutional protections, an absurd legal anomaly: claims for DACA recipients with no final order of removal who are unlawfully detained would be allowed, while DACA recipients with a final order of removal would not be allowed.

The District Court's failure to follow *Gentek* and *Moore* requires reversal and a remand with instructions that the court assume jurisdiction and resolve Plaintiff's constitutional tort claims on the merits.

b. These Facts Go Directly To Plaintiff's Claims.

As noted above, Plaintiff asserts claims for: wrongful arrest and imprisonment without probable cause in violation of the Fourth Amendment to the United States Constitution; unlawful detention in violation of her right to due process as protected by the Fifth Amendment to the United States Constitution; unlawful retaliation for conduct protected by the First Amendment; and violation of Plaintiff's rights protected by the Equal Protection Clause of the Fifth Amendment. RE 1, Page ID# 1-10. The District Court did not reach the issue of application of *Bivens* to Plaintiff's claims, so that issue is not before this Court. Plaintiff simply notes that these claims are being asserted against agents of ICE in their individual capacities pursuant to *Bivens v. Six Unknown Agents, supra,* and its progeny. Plaintiff will address the *Bivens* claims for the Fourth Amendment and First Amendment violations below, and for purposes of conciseness, will forgo arguing the other claims. The purpose of this appeal is to demonstrate that subject-matter jurisdiction exists, which is clear when analyzing the Fourth Amendment and First Amendment claims, and thus there is no need to address those claims at this time.

i. Plaintiff's Claims for Fourth Amendment Violations are Focused on the Primary Element of that Claim, i.e. that Defendants had no Legal Basis and no Probable Cause to Detain Plaintiff.

Plaintiffs claims are very clearly recognized under *Bivens v. Six Unknown Agents, supra*. See *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017); *Jacobs v. Alam*, 915 F.3d 1028, 1037 (6th Cir. 2019). The claim of wrongful arrest in *Jacobs* is materially

identical to the wrongful arrest claim here. Both Mr. Jacobs and Ms. Enriquez assert they were arrested in the absence of probable cause. This, of course, is the quintessential *Bivens* claim, as it is substantively identical to the constitutional claim approved in *Bivens.* 403 U.S. at 389. As the false imprisonment claim asserted by Ms. Enriquez is also premised on the absence of probable cause, it too comes well within the conventional confines of *Bivens.* See *Dellums v. Powell*, 566 F.2d 167, 175–76 (D.C. Cir. 1977); *Martinez–Aguero v. Gonzalez,* 459 F.3d 618, 625 (5th Cir.2006); *Mendia v. Garcia*, 165 F. Supp. 3d 861 (N.D. Cal. 2016). As Ms. Enriquez had legal status at the time of her arrest and detention, simple Fourth Amendment principles apply just as they did to the constitutional claims in *Bivens*..

Recognizing that Plaintiff's *Bivens* claims are actionable, the primary issue at hand is whether or not Defendants had probable cause to arrest and detain Plaintiff. See *Jacobs v. Alam*, 915 F.3d at 1042-1043; citing *Vakilian v. Shaw*, 335 F.3d 509, 517 (6th Cir. 2003), ("(1) a substantial showing that the defendant stated a deliberate falsehood or showed reckless disregard for the truth and (2) that the allegedly false or omitted information was material to the finding of probable cause."). Thus, probable cause is an essential, if not the primary, issue in Plaintiff's claims against Defendants. Plaintiff claims that she had proof of DACA on her person and that Defendant Newman knew she had DACA, and even directly observed her current DACA status in the ELIS2 database. RE 29-2, PageID# 265; RE 29-4, PageID# 420-

421, 425; RE 60-2, Page ID# 552-554. A lack of probable cause is obviously why Plaintiff has filed this lawsuit, and Plaintiff has both pled the claim AND provided sufficient facts to even survive a Rule 56 motion for summary judgment. Since this issue goes to the very heart of Plaintiff's claims, the District Court should have found that there was subject-matter jurisdiction, based on *Gentek supra* and its progeny.

Ms. Enriquez had legal status in the U.S. under DACA. RE 29-1. Ms. Enriquez has been authorized to reside in the U.S. and work here under DACA since 2013. RE 29-4. She has properly renewed that status consistently through 2019. RE 29-4, PageID# 420. Defendants were aware of her lawful DACA status when she was arrested and detained, and Plaintiff pled as much. RE 1, Page ID# 3-4; RE 29-1, Page ID# 153; RE 29-2, Page ID# 169, 265; RE 29-4, Page ID# 420, 425. Thus, Ms. Enriquez had lawful status in the U.S.

Moreover, Ms. Enriquez was not arrested as part of any initiated or pending civil immigration enforcement action. RE 29-2, Page ID# 285; RE 29-4, Page ID# 420. In this case, there were no efforts to initiate any "removal proceedings" or terminate Plaintiff's DACA, and none were pending. RE 29-2, Page ID# 285-287; RE 29-4, Page ID# 420. Ms. Enriquez denies that she was given any notice of a charge being lodged against her and was never taken before a judge or magistrate. RE 29-4, Page ID# 421-422. Nevertheless, she was arrested and detained for eight (8) days during which time she was moved to nine different locations in three (3)

different states. RE 29-4, Page ID# 422-423; RE 1, PageID# 4-6). Ms. Enriquez obtained lawful status to reside and work in the U.S. in 2013. Since that time, no deportation order has been issued, nor have any removal or deportation proceedings been initiated. RE 29-2, Page ID# 285-287; RE 29-4, Page ID# 420. Thus, *Gentek* barred the court from rendering any factual finding going to heart of those Fourth Amendment factual issues.

ii. Plaintiff's Claims for First Amendment Retaliation are also Focused on Defendants' Lack of Legal Basis to Detain Plaintiff.

Plaintiff alleges that Defendants arrested and subsequently detained Plaintiff in a variety of locations that made it impossible to get access to a court for relief. She contends that this occurred in retaliation for her advocating on behalf of other immigrants and because of her association with her organization that provides bail to immigrants in need. Such conduct contravenes Plaintiff's rights as protected by the First Amendment. RE 1, Page ID# 8. Although the availability of *Bivens* in this context has not been resolved by the District Court, it is worth noting this claim has been recognized in a *Bivens* context. See *Patterson v. United States*, 999 F. Supp. 2d 300, 308 (D.D.C. 2013); *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

Plaintiff alleges that her arrest and detention were the direct result of work with immigrants and her association with a group who assisted immigrants. See RE 1, PageID# 3-6, 8. Ms. Enriquez was a lawful resident under DACA at the time of

her arrest and lengthy detention. No charges were filed against her,[8] nor did she receive any notice of such charges or the basis therefor. RE 29-4. She was not taken before a magistrate or judge to assert any First Amendment violation or other defense to her arrest and detention. *Id*. She was moved to at least nine different locations over eight (8) days making it impossible for her to access any court or administrative officer to raise her First Amendment issues. *Id*. Thus, Ms. Enriquez had no alternative to the present action in which to raise her First Amendment claims.

Again, going to the heart of the claim here, Plaintiff was engaged in speech by posting bond for other ICE detainees, and was subsequently arrested for it. Plaintiff avers, and has submitted evidence, that Defendants intentionally ignored objective information demonstrating that Plaintiff was not subject to any final order of removal and still had DACA. Instead, in an effort to silence Plaintiff and dissuade her (or anyone else for that matter) from engaging in that speech, Defendants manufactured a baseless reason to detain her, without probable cause, and punish

[8] Although Defendant Newman states in his Declaration that he notified Ms. Enriquez that "she was being charged under 8 U.S.C. §1182," RE 20-4, Page ID# 87, Ms. Enriquez denies that she was ever informed of the charges against her. RE-29-4. It is worth noting that Mr. Newman does not identify which of the many provisions of §1182 he charged Plaintiff with, nor does he state he provided her with the detailed notice§1182(b) requires. Nor have defendants filed any documentation of any charge being lodged against the Plaintiff or the notice it was obligated to provide. Plaintiff certainly was given no such documentation. Thus, to the extent Defendants continue to assert that Plaintiff was charged, and to the extent that is a material fact in their defense of this action, there is a genuine dispute of fact.

her for her constitutionally protected conduct. Again, this should be sufficient for the District Court to establish subject-matter jurisdiction under *Gentek*, as it goes to the essential element of Plaintiff's claim of First Amendment retaliation. In any event, *Gentek* barred the court from rendering any factual finding going to heart of those First and Fourth Amendment factual issues.

III. THE DISTRICT COURT ERRED IN FINDING 8 U.S.C. § 1252(g) WAS A JURISDICTIONAL BAR WHERE THE SUPREME COURT HAS CIRCUMSCRIBED THE SCOPE OF THE JURISDICTIONAL BAR IN §1252(g) THUS ALLOWING FOR JURISDICTION IN THIS CASE

While Plaintiff's primary position is that *Gentek* should be sufficient to establish subject-matter jurisdiction, the situations in which 8 U.S.C. § 1252(g) strips the District Court of jurisdiction has been circumscribed by the Supreme Court and must be examined.

The Supreme Court has narrowed the jurisdictional hurdles of 8 U.S.C. 1252(g) to three distinct situations. The Supreme Court's decision in *Reno v. American-Arab Anti- Discrimination Committee* ("*AADC*"), 525 U.S. 471 (1999), compels the conclusion that § 1252(g) must be read narrowly. In *AADC*, the petitioners were resident aliens ordered removed on the basis of routine immigration violations under circumstances that suggested they had been targeted for removal based on their membership in a group advocating the creation of an independent Palestinian state. *Id*. at 473-74. They brought a selective enforcement claim against

the Immigration and Naturalization Service ("INS"), and the Supreme Court considered whether § 1252(g) barred the federal courts from reaching the merits of the group's claim. *Id*. at 473-76.

Although the parties assumed that § 1252(g) applied to "all or nearly all deportation claims[9]," the Supreme Court rejected this interpretation. *Id.* at 478. The provision, the Court observed, does not say "no judicial review in deportation cases unless this section provides judicial review." *Id*. at 482. Rather, it is drawn in a "much narrower" way and "applies only to three discrete actions," namely, the "**decision or action to commence proceedings, adjudicate cases, or execute removal orders**." *Id*. (Emphasis added)(*quoting* 8 U.S.C. § 1252(g)); see also *Zhislin v. Reno*, 195 F.3d 810, 813 (6th Cir. 1999). Thus, for example, the provision has no effect on a variety of other actions that may be taken before, during, and after removal proceedings "such as the decisions to open an investigation, to surveil the suspected violator, to reschedule the deportation hearing, to include various provisions in the final order that is the product of the adjudication, and to refuse reconsideration of that order." *Id.*

In the instant case, DACA status has been granted to Plaintiff. Thus, the attorney general has exercised her prosecutorial discretion already and granted

[9] Of course, this case does not involve a deportation claim. Rather, it is limited to whether Defendants arrest and imprisonment were unconstitutional.

Plaintiff DACA status, rendering the removal order unenforceable during her period of approved DACA status. This case is not about a review of that discretion, as the attorney general has already spoken: Plaintiff has qualified for and has been granted DACA. Once that discretion has been exercised by the attorney general, Defendants were under an affirmative duty to honor that discretionary decision and ignored it by arresting Plaintiff. RE 29-2, PageID# 169. Plaintiff is not challenging that discretionary decision to grant Plaintiff status under DACA; she embraces it and Defendants violated her constitutional rights by ignoring the mandatory features of DACA by arresting and imprisoning her for eight (8) days.

Until Plaintiff's lawful status under DACA is properly terminated, Defendants are deprived of any discretion to detain her. Plaintiff alleges that Defendants knew she had DACA status. Complaint RE 1, PageID# 3-4; RE 29-4, PageID# 421. Clearly, Plaintiff is not challenging the "**decision or action to commence proceedings, adjudicate cases, or execute removal orders."** Thus, the jurisdictional bar in §1252(g) has no application. *AADC,* 525 U.S. at 482.

In *Medina*, the Western District of Washington recognized the jurisdictional stripping function of § 1252(g) for discretionary decisions, and recognized that non-discretionary decisions are matters the court has the ability to review:

> As an initial matter, the Court agrees with Defendants that, if Plaintiff were asking for review of the government's ultimate discretionary decision to terminate his DACA status, section 1252(g) would strip this Court of jurisdiction to review that determination. *See Reno v. Am.-*

> *Arab Anti-Discrimination Comm.*, 525 U.S. 471, 485, 119 S. Ct. 936, 142 L. Ed. 2d 940 (1999) ("Section 1252(g) seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations, providing that if they are reviewable at all, they at least will not be made the bases for separate rounds of judicial intervention outside the streamlined process that Congress has designed."); *see also Rodriguez v. Sessions*, 677 Fed. Appx. 447, 2017 U.S. App. LEXIS 3216, 2017 WL 695192, at *1 (9th Cir. 2017) ("We lack jurisdiction to consider [the plaintiff's] eligibility for Deferred Action for Childhood Arrivals."); *Vasquez v. Aviles*, 639 F. App'x 898, 901 (3rd Cir. 2016) ("[Section 1252(g)] deprives all courts of jurisdiction to review a denial of DACA relief because that decision involves the exercise of prosecutorial discretion not to grant a deferred action.") (citing *Reno*, 525 U.S. at 485); *Fabian-Lopez v. Holder*, 540 F. App'x 760, 761 n.2 (9th Cir. 2013) (determining that Section 1252(g) deprived the court of jurisdiction to consider the plaintiff's DACA eligibility). However, the Court ultimately finds that none of the statutes relied upon by Defendants applies to the narrower issues presented in this case; specifically, whether Defendants complied with their own ***non-discretionary procedures*** when taking Plaintiff into custody and questioning him at the Tukwila facility, which then led to the issuance of an NTA, rescission of his work authorization and, ultimately, termination of his DACA status.

Medina, 2017 U.S. Dist. LEXIS 185367, at *17-18 (emphasis added).

The *Medina* court also noted other cases in which courts applied § 1252(g) were inapposite to the challenge of non- discretionary decisions. See *Coyotl v. Kelly*, 261 F. Supp. 3d 1328, 2017 U.S. Dist. LEXIS 108953 (N.D. Ga. June 12, 2017); *Torres v. United States Dep't of Homeland Sec., et al.*, 2017 U.S. Dist. LEXIS 161406 (S.D. Cal. Sept. 29, 2017). Just as in *Medina*, Plaintiff is "challenging the non-discretionary actions taken at the time of [her] arrest." *Medina*, 2017 U.S. Dist. LEXIS 185367, at *21. Stated more clearly:

> In this case, Defendants' alleged failure to follow the procedures detailed in the DACA SOP does not implicate agency discretion. Therefore, the jurisdiction- stripping provisions of 8 U.S.C. §§ 1252(g), 1252(a)(5), 1252(b)(9) and 5 U.S.C. § 701(a) are not applicable to prevent this Court from determining whether Defendants complied with their non-discretionary procedures.

Id. at *23. The *Medina* court also recognized the due process claim raised by that defendant:

> While the Court recognizes and acknowledges that DACA does not confer lawful status upon an individual, the Court also finds that the representations made to applicants for DACA cannot and do not suggest that no process is due to them, particularly in Plaintiff's case where benefits have already been conferred. What process is due, and whether Plaintiff received such process, are ultimately questions for another day. But at this stage of the proceedings the Court is satisfied that Plaintiff has raised a plausible due process claim that will not be dismissed.

Id. at *27.

The records clearly indicate that no removal proceedings had been initiated or were pending when Plaintiff was arrested. From the standpoint of termination of Plaintiff's DACA, Defendants clearly did not comply with the DACA SOP. It does not appear from the declarations submitted by Defendants that they undertook, or even intended, to initiate any DACA termination process against Plaintiff. Defendants self-serving statements in those declarations are factual issues that would need to be resolved through depositions and other discovery, and thus it is premature to rule on the merits. Plaintiff's Rule 56(d) Motion, RE 31. At the very least, the District Court has jurisdiction to hear Plaintiff's claims regarding the non-

discretionary decisions Defendants made and the various constitutional violations alleged in the Complaint.

Defendants cannot simply hang their hats on an old deportation order, when subsequent to the order Plaintiff was conferred DACA status and had that status at the time of her arrest. See 29-4, PageID# 425 (Employment Authorization ID with the designation of C33). Plaintiff's *Bivens* claims are unrelated to removal proceedings. see *Polanco v. United States*, No. 10 CV 1705 (SJ) (RLM), 2014 U.S. Dist. LEXIS 25502, at *4-7 (E.D.N.Y. Feb. 27, 2014)(DHS's decision to arrest Polanco was a decision that was separate and discrete from the Attorney General's decision to commence proceedings, adjudicate cases, or execute removal orders, and therefore claims arising from his arrest are not barred.); and *See Hernandez Najera v. United States*, No. 1:16cv459 (JCC/JFA), 2016 U.S. Dist. LEXIS 162110, at *13-16 (E.D. Va. Nov. 22, 2016)(Executive's non-discretionary decisions to detain plaintiff were not precluded by 1252(g)); *Humphries v. Various Fed. U.S.I.N.S. Employees*, 164 F.3d 936, 944-45 (5th Cir. 1999)(plaintiff's constitutional claim challenging the treatment he received while in detention bore "no more than a remote relationship" to the initial decision to execute his removal order, and was not barred by § 1252(g).); *Escobar v. Gaines*, No. 3-11-0994, 2014 U.S. Dist. LEXIS 123205, at *5 (M.D. Tenn. Sep. 4, 2014)(*Bivens* remedy available and not precluded by 1252(g)).; *Roe v. United States*, No. 18-CV-2644 (VSB), 2019 U.S. Dist. LEXIS

43124, at *7 (S.D.N.Y. Mar. 8, 2019)(*Bivens* available and 1252(g) inapplicable when discretionary authority no longer available [similar to DACA's removal of discretion when DACA granted]).

To be clear, 1252(g) does not strip the District Court of jurisdiction to hear Plaintiff's constitutional claims, and Plaintiff's Affidavit and well pled claims in the Complaint establish sufficient evidence that these claims are viable. See RE 1, PageID# 3-6, Paragraphs 10 to 15, and 18 to 28; RE 29-4, PageID# 422. In short, nothing Plaintiff alleges here will affect the **decision or action to commence proceedings or adjudicate cases, nor will it adversely affect the execution of any active removal order**. Thus, *AADC*, authorizes federal jurisdiction over the Complaint. *AADC,* 525 U.S. at 482

In a recent United States Supreme Court case, Chief Justice Roberts expounded on the nature and extent of 8 U.S.C. § 1252(g) as a jurisdictional bar:

> The Government also invokes two jurisdictional provisions of the INA as independent bars to review. Neither applies. Section 1252(b)(9) bars review of claims arising from "action[s]" or "proceeding[s] brought to remove an alien." That targeted language is not aimed at this sort of case. As we have said before, § 1252(b)(9) "does not present a jurisdictional bar" where those bringing suit "are not asking for review of an order of removal," "the decision ... to seek removal," or "the process by which ... removability will be determined." And it is certainly not a bar where, as here, the parties are not challenging any removal proceedings. Section 1252(g) is similarly narrow. That provision limits review of cases "arising from" decisions "to commence proceedings, adjudicate cases, or execute removal orders." § 1252(g). We have previously rejected as "implausible" the Government's suggestion that § 1252(g) covers "all claims arising from deportation

> proceedings" or imposes "a general jurisdictional limitation." The rescission, which revokes a deferred action program with associated benefits, is not a decision to "commence proceedings," much less to "adjudicate" a case or "execute" a removal order.

Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1907 (2020)(internal citations omitted). Justice Roberts went further to expound on the nature and extent of DACA as a whole:

> But we need not test this chain of reasoning because DACA is not simply a non-enforcement policy. For starters, the DACA Memorandum did not merely "refus[e] to institute proceedings" against a particular entity or even a particular class. Instead, it directed USCIS to "establish a clear and efficient process" for identifying individuals who met the enumerated criteria. Based on this directive, USCIS solicited applications from eligible aliens, instituted a standardized review process, and sent formal notices indicating whether the alien would receive the two-year forbearance. **These proceedings are effectively "adjudicat[ions]."** And the result of these adjudications—DHS's decision to "grant deferred action,"—**is an "affirmative act of approval," the very opposite of a "refus[al] to act,"** In short, the DACA Memorandum does not announce a passive non-enforcement policy; it created a program for **conferring affirmative immigration relief**. The creation of that program—and its rescission—is an "action [that] provides a focus for judicial review."
>
> The benefits attendant to deferred action provide further confirmation that DACA is more than simply a non-enforcement policy. As described above, by virtue of receiving deferred action, the 700,000 DACA recipients may request work authorization and are eligible for Social Security and Medicare. Unlike an agency's refusal to take requested enforcement action, **access to these types of benefits is an interest "courts often are called upon to protect."**

Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1906–07 (2020)(Emphasis added)(internal citations omitted).

That is what this case is about: Defendants, without authority and against prior adjudication of Plaintiff's DACA benefit, unilaterally sought to detain her against her will. Plaintiff is not complaining about the final order of removal, for that was superseded by an adjudication and discretionary decision by the DHS, thus there was no active final order of removal when Plaintiff was arrested. Further, Defendants' own databases confirmed that Plaintiff **was not subject to a final order of removal at the time of her arrest**. See *Dep't of Homeland Sec. v. Regents of the Univ. of California, supra.* Plaintiff's Complaint addresses the unlawful arrest and detainment by these four ICE officers, operating outside of the confines of their narrowly defined function and authority granted them. *See also*, *Gondal v. U.S. Dep't of Homeland Sec.*, 343 F. Supp. 3d 83, 92 (E.D.N.Y. 2018) ("procedural due process claim challenges the non-discretionary process by which DACA statuses are decided, not the decision to grant or deny deferred action" and does not implicate agency discretion); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016) (jurisdictional bars do not apply to claims which "are collateral to, or independent of, the removal process"); *Chaudhry v. Barr*, Case No. 19-CV-0682-TLN-DMC-P, 2019 WL 3713762, at *5 (E.D. Cal. Aug. 7, 2019)("section 1252(g) does not divest courts of jurisdiction over cases that do not address issues of prosecutorial discretion") (citing *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1118 (9th Cir. 2001));

Coyotl, 261 F. Supp. 3d 1328; *Torres*, Case No. C17-1840-JM-NLS, 2017 WL 4340385.

Even if the Court takes this as a factual attack, Plaintiff has presented very clear evidence that she had DACA at the time of her arrest, had proof she had DACA on her person, and Defendants in fact accessed the database showing she had authorized DACA at the time of her arrest. RE 29-4, Page ID# 421, 425; RE 60-2, Page ID# 545. Plaintiff has satisfied her burden to establish subject-matter jurisdiction. Most importantly, with objective evidence from her expert who, relying on Defendants' own records, found that Defendant Newman clearly accessed the ELIS2 database on August 17, 2017, at 9:56 a.m., which showed her DACA Renewal Request had been approved, and had been available on that system since January 5, 2017. See 60-2, Page ID# 552-555.

Whether considered a facial or factual attack, it is evident that the claims asserted here do not affect in any way "the **decision or action to commence proceedings, adjudicate cases, or execute removal orders**." Thus, the District Court was not deprived of jurisdiction. *AADC*, 525 U.S. at 482. Consistent with *AADC* and *Medina,* the holding below must be reversed and remanded with instructions to proceed to the merits.

IV. THE DISTRICT COURT ERRED IN DRAWING ALL INFERENCES IN FAVOR OF DEFENDANTS FACTS DESPITE CLEAR CONTRADICTIONS IN DEFENDANTS EVIDENCE AND CLEAR OBJECTIVE EVIDENCE PRESENTED BY PLAINTIFF

The District Court erred in finding that Defendants submitted sufficient evidence to preclude subject-matter jurisdiction, while ignoring the overwhelming evidence submitted by Plaintiff, supporting Plaintiff's argument that Defendants knew she had DACA status at the time of her arrest.

Specifically, without considering contrary facts in the record, the trial court accepted as true Defendant Newman's unsupported assertion in his Declaration that he was unaware of Plaintiff's DACA status and believed he was executing a "valid order of removal." See RE 62, Page ID# 603 ("Defendants mistakenly executed the valid removal order. . ."). In so holding, the court below renders a factual conclusion that is directly contradicted by the Affidavit of Enriquez-Perdomo confirming that:

> [Newman] stated on the date of my arrest that "I don't understand why you are getting arrested if you have DACA status and a valid Employment Authorization Card," since you cannot get an Employment Authorization card without having some legal status to be in the United States.

RE 29-4, PageID# 420. She further confirms that she had her DHS approved ID cards with her at the time of her arrest, which established her current DACA status. She showed those to Defendants during her initial arrest. Page ID# 421.

Additionally, as noted, Plaintiffs computer forensic expert, Mark Lanterman, reviewed from electronically stored information received from Defendants that Defendants had access to. Based on that review and specific entries found in those data bases, he concludes in his Declaration that:

> Therefore, the evidence that has been provided to me to date demonstrates that 1) Plaintiffs DACA status was available in at least one database (ELIS2) prior to her arrest, 2) the database could be accessed by Defendants, and 3) **Defendant Newman in fact accessed that database.**

RE 60-2, Page ID# 545. (Emphasis added).

All of this evidence was virtually ignored by the district court in reaching its disputed conclusion that the Defendants "mistakenly executed" an order of removal that "should not have been carried out." RE 62, Page ID# 603. In doing so, the court below contravened the constraints placed upon it by this Court in *Gentek.* As this Court explained, the rules guiding decisions on jurisdiction "are intended to allow jurisdictional dismissals only in those cases where the federal claim is clearly immaterial or insubstantial." *Gentek*, 491 F.3d at 331.

a. The Factual Conclusion Below of Mistaken Belief Ignores Objective Contrary Evidence Is Clearly Erroneous and Constitutes an Abuse of Discretion.

The majority of the evidence reviewed above that was presented by Plaintiff is not contested by Defendants, yet that evidence is not evaluated by the District Court. Plaintiff had DACA at the time of her arrest and presented multiple pieces of identification to verify she had DACA. RE 29-4, Page ID# 421, 425. In addition, "**For a (c)(33) EAD, the individual must be approved for DACA**." RE 29-2, Page ID# 265. emphasis added. One can clearly see that Plaintiff had the (c)33 designation on her Employment Authorization ID. RE 29-4, PageID# 425. Lanterman states that

this confirmation of DACA status was readily available to Defendants and actually viewed by Newman. RE 60-2, Page ID# 552-554.

The District Court assumed that there is or was a level of importance to the Case Category of '8C.' See RE 61; RE 61-3; Defs Production 0025, RE 61-4, PageID# 585; RE 62, PageID# 596, 602-603. However, if you look at the screen shot of the EARM database (which displayed her CURRENT information at the time the screen shot was taken), her case category is still listed as 'Bag and Baggage' and '8C.' The court below appears to ignore the fact that entry further states "proceed with removal: **no**". RE 61-4, PageID# 585 (Emphasis added).

So, it is clear that 'Bag and Baggage' and '8C' entries standing alone have no bearing whatsoever on whether or not Defendants honestly believed Plaintiff was removable, actually was removable, OR had approved DACA status, when they arrested her. This is so because this is a current screenshot and Plaintiff is obviously not currently subject to the final order of removal. Of course, that Plaintiff was not properly subject to an order of removal is not a point of dispute. Furthermore, that screen shot is obviously a screen shot from 2019 (the events of Plaintiff's arrest having occurred in 2017), since Plaintiff was born in 1995, and the screen lists her "Current Age" as "24." As this screen shot is from 2019, still showing '8C' and 'Bag and Baggage,' those terms have no bearing on whether Defendants could detain Plaintiff.

So whatever Defendants are saying is simply untrue or a misdirection, for Defendants have admitted that Plaintiff should not have been detained. And if this is what Plaintiff's EARM screen says right now, then what has changed? The simple answer is nothing has changed and the 8C designation has no bearing on whether Plaintiff is subject to arrest and detention. For if it did, then currently Plaintiff would be subject to arrest and deportation, which Defendants have acknowledged is not the case. Thus, those indicators have no bearing on whether or not any active ICE officer or other law enforcement individual can detain Plaintiff. It is just another red herring. Defendants argue that it was a "mistake," while the evidence in the record allows for an inference that it was reckless or intentional. This is a dispute of material fact that cannot properly be resolved by the District Court. *Ouza v. City of Dearborn Heights*, 969 F.3d at 279; *Gentek,* 491 F.3d at 330–31.

Defendants claim that the system said "Proceed with Removal: Yes" but have pointed to no objective data[10] that supports that factual contention. They offer no screenshots from their databases that have that entry at the time of Plaintiff's arrest. They rest only on the contradictory declarations of Defendant Newman. It appears the District Court relied on this despite objective evidence to the contrary provided from Plaintiff's Expert. See RE 62, PageID# 602. Very curiously, the District Court

[10] Plaintiff is not including Defendant Newman's third declaration as 'objective data,' since it is not objective and Defendant Newman's credibility is called into question as his declarations conflict with one another.

cited to RE 61-4, for the premise that it was undisputed the EARM showed "Proceed with Removal: Yes," ignoring the entry clearly stating "Proceed with Removal: No." RE 61-4, PageID# 585. Perhaps the District Court was misreading the exhibit, but this evidence supports Plaintiff's position, or at the very least, contradicts Defendants' assertions in their declarations. Without support in the data that was produced in discovery, the District Court stated that the word "No" did not appear in the EARM database until after Plaintiff was arrested, but cites only to RE 61-5, PageID# 587-589. See Memorandum Opinion RE 62, PageID# 602. This does not explain the discrepancy at all. And the District Court's reliance[11] on RE 61-5, PageID# 586, where it says "Ordered Excluded/Deported/Removed" is from 2004, which is the old final order of removal, an order that Plaintiff is no longer subject to given her authorized DACA status.

The District Court ignored what is clear: that Plaintiff presented objective, unbiased evidence that Defendant Newman accessed the ELIS2 database, which displayed Plaintiff's DACA status, not to mention the various other objective indicators that Plaintiff currently held DACA. RE 60-2, Page ID# 552-554. While Defendant Newman claims he does not recall looking at that database, that is a credibility issue to be resolved by the jury. Clearly, Defendant Newman's credibility

[11] "It is also undisputed that the populated table under EARM's tab labeled "Actions/Decisions" provided a description that Enriquez-Perdomo was "Ordered Excluded / Deported / Removed." DN 61-5 at 1." (See RE 62, PageID# 602)

is at issue, having submitted three different, and contradictory, declarations. See RE 20-4 PageID# 86-87; RE 46-1, PageID# 496-497; and RE 61-3, PageID# 583-584. The District Court was presented with incontrovertible objective data entries that Defendant Newman accessed the ELIS2 database, which clearly showed Plaintiff's DACA renewal and Employment Authorization Renewal. Yet that evidence was ignored in favor of Defendants' self-serving declarations. Instead, the District Court found that the mere presence of a final order of removal was enough to detain Plaintiff, or at least, take that unconstitutional act outside the jurisdiction of any court.

Even if the District Court's finding of Defendants' 'mistaken belief' could be considered a finding of fact, such would constitute an unquestionable abuse of discretion in light of the countervailing objective evidence reviewed above. "[A]n abuse of discretion exists where the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *ACLU v. Black Horse Pike Reg'l Bd. of Ed.*, 84 F.3d 1471, 1476 (3d Cir. 1996) (internal quotations omitted); *and see, Black Law Enf't Officers Asso. v. Akron*, 824 F.2d 475, 479 (6th Cir. 1987). "A finding of fact is 'clearly erroneous' if it leaves the reviewing court with 'the definite and firm conviction that a mistake has been committed.'" *United States v. Williams*, 662 F. App'x 366, 374

(6th Cir. 2016) *quoting Max Trucking, LLC v. Liberty Mut. Ins. Corp.*, 802 F.3d 793, 808 (6th Cir. 2015).

This Court has not been reluctant to reverse a district court's finding where it makes a factual assumption not supported by the record.

> the district court also relied upon the factual assumption that Plummer had unexpectedly changed his mind, without addressing the lack of evidentiary support for this assumption in the record. Because there is insufficient evidence in the record as to the timing of Plummer's assertion that he intended not to testify, and as to whether that assertion was inconsistent with Plummer's prior statements regarding his intent to testify, we find that the district court relied on a clearly erroneous finding of fact in its evaluation of the first prong of *Strickland*. Accordingly, we find that the district court abused its discretion in determining that Plummer's counsel had not acted unreasonably.

Plummer v. Jackson, 491 F. App'x 671, 678 (6th Cir. 2012). So, it is here. The district court accepted Defendant Newman's declaration that he failed to see the records in the Defendants' own databases that clearly confirmed Plaintiff's authorized status under DACA. The District Court ignores the Declaration of Mark Lanterman that established that Newman, in fact, accessed a database confirming Plaintiff's approved DACA status at the time of her arrest. Moreover, the court below ignored Plaintiff's contrary declaration that she showed Defendants her ID that had been issued by Homeland Security also confirming her current authorized status under DACA. The District Court assumed Newman's mistaken belief without any consideration given to objective contrary evidence. Thus, that "assumed fact"

finds no support in actual records confirming Plaintiff's status, and consistent with *Plummer,* the District Court's decision must be reversed.

Ignoring uncontradicted objective evidence recited in Lanterman's Declaration and contained in the DHS ID issued to Plaintiff and shown to Defendants at the time of arrest, while accepting the self-serving assertion of Defendants, uncorroborated by any objective evidence, would certainly constitute and abuse of discretion, itself requiring reversal and remand. *Id.*

Indeed, there is very little evidence that was presented by Plaintiff that the District Court even cites in the Memorandum Opinion RE 62. Instead, the District Court simply assumes "the Defendants mistakenly executed the valid removal order after reviewing Enriquez-Perdomo's profile in the EARM database that provided numerous indications that she was actively subject to removal. DN 61-1, 61-4." RE 62, PageID# 603. This ignores the multiple objective entries and other objective evidence in the form of ID's discussed above, confirming Plaintiff's current authorized DACA status and belying any argument that Plaintiff was subject to an active final order of removal when she was arrested by Defendants. Defendants concede as much when she was released eight days after her initial arrest.

In addition, there was no evidence in the database that indicated Plaintiff's DACA status had been terminated. Otherwise, there would have been a Notice of Intent to Terminate DACA in the databases that Newman purportedly reviewed, per

the SOP. RE 29-2, PageID# 285-287. Of course, no such Notice exists as it is undisputed that Plaintiff's DACA status had been continuously renewed without any gaps through the day she was taken into custody by Defendants. Defendants have provided no evidence of any indication in any database that termination proceedings had occurred or were pending. Yet the District Court gives no weight to any of this undisputed record in concluding the Defendants mistaken believed the removal order was currently executable. As this Court knows, intent is normally an issue of fact that must be resolved by the factfinder. See *Gregory v. City of Louisville,* 444 F.3d 725, 751(6th Cir. 2006) ("Because there exists a genuine issue of material fact about whether Katz intentionally withheld exculpatory information in order to continue Plaintiff's detention without probable cause, this Court reverses the district court's grant of summary judgment on this [malicious prosecution] claim.")

The District Court abused its discretion in rendering a clearly erroneous conclusion that Defendants 'mistakenly believed' supported a erroneous legal conclusion that Plaintiff was currently subject to a final order of removal. In the face of the objective data to the contrary, the finding by the District Court must be vacated consistent with the standards set by this Court in *Plummer v. Jackson*, 491 F. App'x at 678 and *Williams*, 662 F. App'x at. 374. The decision below must be accordingly reversed.

CONCLUSION

In Conclusion, this Court should overrule the District Court's grant of Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and allow the matter to proceed to trial, so a jury can decide these issues of fact.

Respectfully submitted,

/s/ Benjamin T. D. Pugh

Christopher D. Roach (95007)
Benjamin T.D. Pugh (94032)
Pugh and Roach Attorneys at Law, PLLC
28 West Fifth Street
Covington, KY 41011
859-291-5555
chris@prlaw.legal
tom@prlaw.legal

CERTIFICATE OF COMPLIANCE

Pursuant to Sixth Circuit Rule 32(a)(7)(c) and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type-volume limitations of Sixth Circuit Rule 32(a)(7)(b). The brief has been prepared in proportional typeface using Times New Roman 14 point.

Exclusive of the portions of the brief exempted by Sixth Circuit Rule 32(a)(7)(B)(iii), the brief contains 12,422 words. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

The undersigned understands a material misrepresentation in completing this certificate or circumvention of the type volume limits in Sixth Circuit Rule 32(a)(7), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

/s/ Benjamin T. D. Pugh
Benjamin T. D. Pugh

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2021, a true copy of the foregoing appellant brief has been sent via the Court's CM/ECF system which will serve all counsel of record.

/s/ Benjamin T. D. Pugh
Benjamin T. D. Pugh

ADDENDUM – DESIGNATION OF APPENDIX CONTENTS

Appellant, pursuant to Rules of Appellate Procedure, Rule 28(d) and 30(b), hereby designates the following portions of the record below for inclusion in the Joint Appendix:

Description of Entry	Date	Docket #	Page ID Range
Complaint	8/14/18	1	1-10
Enriquez-Perdomo Affidavit	4/26/19	29-4	420-426
Napolitano Memo	4/26/19	29-1	151-153
April 4, 2013 DACA National Standard Operating Procedures	4/26/19	29-2	154-417
Declaration of Ricardo Newman [First]	2/28/19	20-4	86-87
Amended Declaration of Ricardo Newman [Second]	12/18/19	46-1	496-497
Declaration of Ricardo Newman [Third]	9/30/20	61-3	583-584
Lanterman Declaration	9/03/20	60-2	549-555
Production 0061	9/03/20	60-1	548
Notice of Subpoena Duces Tecum	2/28/20	54	513-514
DHS Subpoena	2/28/20	54-1	515-520
ICE Subpoena	2/28/20	54-2	521-526
USCIS Subpoena	2/28/20	54-3	527-532
Production 0016	9/3/20	60-3	556

Defendants' Motion to Dismiss	2/28/19	20-1	58-82
Memorandum Opinion	11/13/20	62	594-603
Defendants' Reply in Support of Motion to Dismiss	9/30/20	61	557-569
Order Dismissing	11/13/20	63	604
Production 0025	9/30/20	61-4	585
Production 0034	9/30/20	61-5	586
Response in Opposition to Plaintiff's Rule 56(d) Motion	5/31/19	35	461-462
Motion to Dismiss	2/28/19	20	56-57
Plaintiff's Response to Motion to Dismiss	4/26/19	29	111-150
Plaintiff's Motion Pursuant to FRCP 56(d)	4/26/19	31	431-434
Memorandum Opinion and Order on Motion Pursuant to FRCP 56(d)	9/26/19	37	469-475
Plaintiff's Supplemental Response to Defendants' Motion to Dismiss	9/03/20	60	541-547
Notice of Appeal	12/09/20	64	605-606