

The Honorable Ricardo S. Martinez
Chief United States District Judge

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

Daniel Ramirez Medina,
Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT; U.S.
CITIZENSHIP AND IMMIGRATION
SERVICES; MATTHEW E. HICKS,
[UNKNOWN FIRST NAME] PETER,
[UNKNOWN FIRST NAME] HERNANDEZ,
and KATHLYN LAWRENCE, U.S.
Immigration and Customs Enforcement
Officers (in their individual capacities); and
JOHN DOES 1-10 (in their individual
capacities),

Defendants.

CASE NO. 2:17-CV-00218-RSM-JPD

**PLAINTIFF'S OPPOSITION TO FEDERAL
AGENCY DEFENDANTS' MOTION TO
DISMISS**

ORAL ARGUMENT REQUESTED

Noted for Consideration: August 18, 2017

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PLAINTIFF'S OPPOSITION TO FEDERAL AGENCY

DEFENDANTS' MOTION TO DISMISS

Case No. 2:17-cv-00218-RSM-JPD

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I. INTRODUCTION

The Federal Agency Defendants seek to evade any review of their egregious mistreatment of Plaintiff Daniel Ramirez Medina.¹ Mr. Ramirez was arrested without a warrant or probable cause during an ICE raid targeting another individual. ICE agents ignored that he had twice been granted protection under the Deferred Action for Childhood Arrivals (“DACA”) program, and instead handcuffed Mr. Ramirez, forcibly removed him from a private residence, and transported him to an ICE facility where he was coercively interrogated. Dkt. #78, Second Am. Compl. (“SAC”) ¶¶ 44–54.

At this facility, ICE agents confirmed that Mr. Ramirez had no criminal history, that he had passed multiple DHS background checks, and that he was considered lawfully present in the United States pursuant to DACA. Despite this knowledge, the ICE agents falsely asserted that Mr. Ramirez was gang-affiliated and on that basis summarily revoked his DACA status and work authorization without notice, justification, or due process, and in violation of established DHS procedures. The Government responded to Mr. Ramirez’s habeas corpus petition by publicly vilifying him as a “gang member” despite having no credible evidence to support that allegation. Indeed, as the Government later admitted in Immigration Court, it detained Mr. Ramirez for more than six weeks despite knowing that he poses no danger to the community. *Id.* ¶¶ 48–80.

Unable to defend its conduct, the Government invokes “agency discretion” and provisions of the Immigration and Nationality Act (“INA”) to assert that its actions are beyond judicial review. Dkt. #90, Mot. to Dismiss (“Mot.”) at 9–16. But these INA provisions do not apply to Mr. Ramirez’s claims, which are independent of the removal process and challenge only *nondiscretionary* actions that resulted in the *revocation* of his DACA and work authorization. Indeed, one district court has already rejected the exact arguments the Government now asserts in a similar case involving DACA. *See Coyotl v. Kelly*, No. 1:17-CV-1670-MHC, 2017 WL 2889681, at *10 (N.D. Ga. June 12, 2017).

The Government also argues that it complied with its own procedures, and that Mr. Ramirez fails to state a claim because he lacks protected interests. Mot. at 17–23. But Mr. Ramirez’s claims

¹ As used herein, the terms “Federal Agency Defendants,” “Defendants” and the “Government” refer collectively to the U.S. Department of Homeland Security (“DHS”), U.S. Immigration and Customs Enforcement (“ICE”), and U.S. Citizenship and Immigration Services (“USCIS”).

are supported by the Government’s own documents, which leave no doubt that federal agents violated DHS procedures and the Due Process Clause in summarily revoking his DACA status. And the interests at issue, including important public benefits and the ability to legally work in the United States, are entitled to constitutional protection under established Supreme Court precedent.

More broadly, the Government’s position that the allegations of unlawful and unconstitutional conduct here are beyond review cannot be squared with the Bill of Rights. Indeed, despite unjustly depriving Mr. Ramirez of essential benefits (including the ability to earn a living and support his family), the Government maintains that its actions here—and any other misconduct involving DACA, no matter how obvious or egregious—may be rendered immune to judicial review by initiating removal proceedings and invoking the INA. The protections of the Due Process Clause cannot be so easily cast aside, and the Government’s Motion to Dismiss should be denied.

II. BACKGROUND

A. The revocation of DACA is not fundamentally intertwined with removal proceedings.

To evade judicial review, the Government repeatedly mischaracterizes this suit as a challenge to removal proceedings that falls outside the jurisdiction of this Court. It is no such thing. On the contrary, the SAC challenges unlawful and unconstitutional actions by DHS personnel, which ultimately led to the revocation of Mr. Ramirez’s DACA status and work authorization.

The Government attempts to conflate DACA revocation with the initiation of removal proceedings by focusing on ICE’s “decision to issue a Notice to Appear” (“NTA”) on February 10, which the Government argues had the collateral effect of terminating Mr. Ramirez’s DACA status. Mot. at 1–2; *id.* at 7 (“ICE then issued an NTA, which terminated Plaintiff’s deferred action and employment authorization.”). But the formal commencement of removal proceedings did not occur until the NTA was *filed* in Immigration Court on February 14,² Dkt. #78-9, while the revocation of Mr. Ramirez’s DACA status was effected by a different agency—USCIS—which issued a Notice of Action on February 17, SAC ¶¶ 60–61. Defendants’ own communications confirm that these

² 8 CFR § 1003.14(a) (proceedings “commence[] when a charging document is filed”); *Samayoa-Martinez v. Holder*, 558 F.3d 897, 902 (9th Cir. 2009) (“[A]n alien cannot be placed in formal removal proceedings until those proceedings have been commenced with the filing of the NTA.”).

1 separate events resulted from *different actions* taken by *different agencies* on *different dates*.
 2 Dkt. #92 (“USCIS Administrative Record”), at 4 (February 13, 2017 email from ICE to USCIS
 3 noting that Mr. Ramirez “currently has DACA which needs to be terminated”). And the approval
 4 notice USCIS sent to Mr. Ramirez notes that DACA revocation is separate from the initiation of
 5 removal proceedings. Dkt. #78-7, at 1 (“Information obtained . . . will be used to determine whether
 6 termination of deferred action *and/or* removal proceedings are appropriate . . .”) (emphasis added).

7 Moreover, whether an individual has DACA is separate from the question of whether he or
 8 she is removable. Indeed, individuals in removal proceedings—including those who have received a
 9 final order of removal—can separately apply for and receive DACA. See Dkt. #78-3 (“2012
 10 Napolitano Memorandum”), at 2. And many eligible individuals fall into neither category as they
 11 lack DACA status but are not in removal proceedings. More broadly, the Government seeks to have
 12 it both ways—arguing that DACA is not a defense to removal and that “[a]n individual with deferred
 13 action remains removable at any time,” Mot. at 4, while simultaneously asserting that anything
 14 related to the revocation of Mr. Ramirez’s DACA status is immune from judicial review because
 15 DACA is inextricably intertwined with removal proceedings, *id.* at 2, 10–16. That cannot be.

16 **B. DACA confers numerous benefits that extend well beyond deferred action.**

17 In seeking to conflate DACA revocation and removal proceedings, the Government ignores
 18 that DACA confers a host of benefits beyond and separate from deferred action. These benefits
 19 include work authorization, eligibility for public benefits such as Social Security, retirement, and
 20 disability (and, in some states—including Washington—unemployment insurance, financial aid, and
 21 food assistance), and the ability to travel abroad under certain circumstances. See SAC ¶¶ 28–29, 32.
 22 DACA also serves as a gateway to numerous other important benefits and enables recipients to open
 23 bank accounts, start businesses, purchase homes and cars, and conduct other aspects of daily life that
 24 are otherwise often unavailable to them. *Id.* ¶¶ 30–31. Accordingly, revocation of DACA implicates
 25 a broad range of valuable benefits that include, but extend well beyond, the immigration context.

26 **C. DHS guidelines set forth strict procedures for revoking DACA.**

27 While DACA is premised on prosecutorial discretion, DHS’s “National Standard Operating
 28

Procedures” for DACA (the “DACA SOP”) set forth strict guidelines for revoking DACA status. *See* SAC ¶ 26; Pl’s Req. for Judicial Notice, Ex. A (attaching relevant pages of the DACA SOP).³ Most relevant here, prior to revoking DACA, the Government must provide a “Notice of Intent to Terminate” which “thoroughly explain[s]” the grounds for the proposed termination of DACA. SAC ¶ 26; DACA SOP at 16. The DACA SOP further directs that individuals served with such a notice are to be afforded “33 days to file a brief or statement contesting the grounds cited in the Notice of Intent to Terminate” prior to termination of their DACA status. SAC ¶ 26; DACA SOP at 13.

The exception to the requirements of notice and an opportunity to respond is where there are “criminal, national security, or public safety concerns” that “are deemed to be EPS.” DACA SOP at 13–15.⁴ The DACA SOP defines EPS—which stands for “Egregious Public Safety Concern”—as “[a]ny case where routine systems and background checks indicate that an individual is under investigation for, has been arrested for (without disposition), or has been convicted of, a specified crime, including but not limited to, murder, rape, sexual abuse of a minor, trafficking in firearms or explosives, or other crimes listed in the November 7, 2011 [USCIS policy memorandum regarding the issuance of NTAs (“USCIS NTA Memorandum”)].” DACA SOP at 5.

Additionally, when ICE encounters an individual who may be eligible for DACA, the agency uses a prosecutorial discretion checklist. Dkt. #93 (“ICE Administrative Record”), at 5. This checklist provides that if the “only basis for ineligibility is an alleged . . . threat to national security or public safety,” the agents should “consult with the [ICE Office of Chief Counsel].” *Id.*

D. Defendants failed to follow their own procedures in revoking Mr. Ramirez’s DACA.

The Government failed to follow any of these procedures in revoking Mr. Ramirez’s DACA status and work authorization. The Government did not provide Mr. Ramirez with either a Notice of Intent to Terminate nor any opportunity—let alone 33 days—to contest the allegations against him

³ This Request for Judicial Notice attaches excerpts from a slightly more recent version of the DACA SOP than the one which was attached to the SAC. *See* Dkt. #78-6. With the exception of a single provision not relevant here, *see infra* n.4, the cited language is substantively identical.

⁴ The DACA SOP could be read to permit revocation of DACA without notice where ICE decides *not* to issue an NTA and USCIS refers the case to its Headquarters of Service Center Operations. *See* DACA SOP at 15. The Government does not rely on this provision here, nor could it.

1 prior to revoking his DACA status. SAC ¶ 90. Nor can the Government rely on the EPS exception,
 2 as its own records demonstrate that Mr. Ramirez had “no criminal history” and the various database
 3 checks run at the time of his arrest did not reflect any flags or investigations. Dkt. #78-8 (“Form
 4 I-213”), at 3. The ICE officers who arrested Mr. Ramirez also failed to consult with the Office of
 5 Chief Counsel for further review, as is required where a “threat to . . . public safety” is the reason for
 6 DACA ineligibility. ICE Administrative Record, at 5.⁵

7 Defendants’ failure to follow their own procedures has resulted in tremendous (and entirely
 8 avoidable) harm to Mr. Ramirez and his family. One of the primary purposes of such procedures is
 9 to prevent errors like those which occurred here, which can have life-altering consequences for
 10 DACA recipients and those who rely on them. Here, Mr. Ramirez—a young father the Government
 11 now admits is no threat to public safety—was kept behind bars for more than six weeks, made to fear
 12 for his life, publicly vilified, and deprived of the ability to earn a living and support his family.⁶

13 III. LEGAL STANDARD

14 In evaluating a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and
 15 12(b)(6), the court must “accept as true all facts alleged in the complaint and construe them in the
 16 light most favorable to plaintiff[], the non-moving party.” *Snyder & Assocs. Acquisitions LLC v.*
 17 *United States*, 859 F.3d 1152, 1157 (9th Cir. 2017). Where a defendant challenges jurisdiction under
 18 Rule 12(b)(1) on the ground that the plaintiff’s allegations are “insufficient on their face . . . the court
 19 determines whether the allegations are sufficient as a legal matter to invoke the court’s jurisdiction.”

20
 21 ⁵ The checklist provides that consultation with the Office of Chief Counsel is required when an
 22 alleged public safety concern is the “only basis for ineligibility.” ICE Administrative Record at
 23 5. Here, the ICE agents checked boxes for public safety concerns and lack of enrollment in
 school. *Id.* However, under USCIS policy, Mr. Ramirez was not required to be enrolled in

24 ⁶ In recent weeks, other Dreamers have come forward with allegations that the Government is
 25 violating its own procedures in revoking DACA. *See Coyotl*, 2017 WL 2889681, at *12
 26 (enjoining the decision to terminate Plaintiff’s DACA status and noting that government agencies
 27 “failed to present any evidence that they complied with their own administrative processes and
 procedures with regard to the termination of Plaintiff’s DACA status”); *Montes Bojorquez v.*
CBP, et al., Mot. For Prelim. Inj. at 29, No. 3:17-cv-00780-GPC-NLS (S.D. Cal. July 17, 2017),
 Dkt. #29-1 (alleging that DHS unlawfully expelled the plaintiff from the United States and then
 “use[d] their own wrongful conduct as a predicate” to revoke his DACA status).

Leite v. Crane Co., 749 F.3d 1117, 1121 (9th Cir. 2014) (internal quotation marks omitted). The court must deny a motion to dismiss under Rule 12(b)(6) if the complaint contains “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

IV. ARGUMENT

A. The Court has jurisdiction to hear the claims against the Federal Agency Defendants.

Defendants seek to circumvent *any* review of their violations of Mr. Ramirez’s constitutional rights. But the jurisdiction stripping and channeling provisions of the INA and the Administrative Procedure Act (“APA”) cited by Defendants do not apply here. Indeed, interpreting them to preclude review of the Government’s misconduct would raise serious constitutional concerns.

1. The jurisdiction stripping and channeling provisions of the INA do not divest the Court of jurisdiction over the claims against the Federal Agency Defendants.

a. Section 1252(g) does not deprive the Court of jurisdiction to review Defendants’ nondiscretionary determinations.

Contrary to Defendants’ reading, 8 U.S.C. § 1252(g) “does not bar ‘all claims relating in any way to deportation proceedings.’” *Wong v. United States*, 373 F.3d 952, 964 (9th Cir. 2004) (quoting *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc)). Rather, as the Supreme Court and the Ninth Circuit have repeatedly explained, § 1252(g) is “narrowly construed” and “‘applies only to three discrete actions . . . to *commence* proceedings, *adjudicate* cases, or *execute* removal orders.’” *Wong*, 373 F.3d at 963–64 (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) (“AADC”)) (emphases added in AADC).

As the Supreme Court recognized in AADC, § 1252(g) was “designed to give some measure of protection to ‘no deferred action’ decisions and similar discretionary determinations.” 525 U.S. at 485. However, the statute did not eliminate judicial review of *nondiscretionary* actions and determinations leading up to an ultimate discretionary decision. Nondiscretionary actions include factual and legal determinations made prior to an exercise of discretion, as well as an officer’s compliance with and the validity of applicable procedures. *See, e.g., Oropeza-Wong v. Gonzales*, 406 F.3d 1135, 1143 (9th Cir. 2005) (“Petitions for statutory waivers . . . on the basis of a good faith

1 marriage involve legal and factual questions that are not subject to the pure discretion of the IJ or
 2 BIA.”); *Wong*, 373 F.3d at 963; *Gete v. INS*, 121 F.3d 1285, 1291–92 (9th Cir. 1997) (distinguishing
 3 between challenges to procedures and challenges to ultimate discretionary decisions). Moreover,
 4 “decisions that violate the Constitution cannot be ‘discretionary.’” *Wong*, 373 F.3d at 963; *see also*
 5 *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1004 (9th Cir. 2003) (“We retain jurisdiction to review
 6 constitutional claims, even when those claims address a discretionary decision.”).

7 Indeed, the Ninth Circuit has consistently held that § 1252(g) does not preclude judicial
 8 review of claims challenging nondiscretionary actions or raising constitutional issues that are related
 9 to, but nonetheless separate from, the three specific actions enumerated in the statute. For example,
 10 in *Wong*, the plaintiff claimed that INS agents violated her due process rights by, among other things,
 11 revoking her parole status and refusing to grant her request to temporarily depart the United States,
 12 all for allegedly discriminatory reasons. 373 F.3d at 959. After her parole status was revoked, Wong
 13 was placed in removal proceedings and ultimately removed from the country. *Id.* at 958–59. Yet the
 14 Ninth Circuit, “[k]eeping in mind the twin background principles that there is a strong presumption
 15 favoring judicial review of administrative decisions and that ambiguities in deportation statutes
 16 should be construed in favor of the alien,” held that § 1252(g) did not bar Wong’s claims. *Id.* at 962,
 17 964–65. The court explained that “§ 1252(g) does not bar review of the actions that occurred *prior* to
 18 any decision to ‘commence proceedings,’ . . . or to execute the removal order, such as the INS
 19 officials’ allegedly discriminatory decisions” *Id.* at 965. The court also recognized that the INS
 20 decisions at issue were *not* discretionary decisions immune from judicial review. *Id.* at 963 (“[T]he
 21 bar on review of discretionary decisions does not apply to Wong’s claims. Her claims raise only
 22 constitutional or purely legal, nondiscretionary challenges to the decisions in question.”).⁷

23 *Wong* follows a long line of cases holding that § 1252(g) does not bar review of legal and
 24 constitutional challenges to nondiscretionary actions that are separate from (although related to) the

25 ⁷ The Government’s effort to distinguish *Wong* merely confirms its applicability to this
 26 case. Although the INS decisions at issue related to Wong’s removal proceedings, Wong
 27 explained that she was not challenging the decisions to commence proceedings or execute the
 28 removal order. 373 F.3d at 964. The Ninth Circuit accepted Wong’s characterization of her
 complaint, and held that § 1252(g) did not bar her challenge to government actions taken prior to
 the decision to commence removal proceedings. *Id.* at 965.

agency's exercise of discretion. *See, e.g., United States v. Hovsepien*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc) ("The district court may consider a purely legal question that does not challenge the Attorney General's discretionary authority, even if the answer to that legal question . . . forms the backdrop against which the Attorney General later will exercise discretionary authority."); *Sulit v. Schiltgen*, 213 F.3d 449, 452–53 & n.1 (9th Cir. 2000) (holding that § 1252(g) did not bar jurisdiction over due process claim that "green cards" were seized without a hearing); *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998) (§ 1252(g) "does not prevent the district court from exercising jurisdiction over the plaintiffs' due process claims" which "constitute 'general collateral challenges to unconstitutional practices and policies used by the agency'").⁸

As these cases make clear, § 1252(g) does not apply to *nondiscretionary* decisions related to the revocation of DACA status, or determinations made *prior* to the decision to commence removal proceedings. Indeed, the *Coyotl* Court recently rejected the position advanced by the Government here, because the procedures for terminating DACA are nondiscretionary. 2017 WL 2889681, at *9 (holding § 1252(g) did not eliminate jurisdiction to consider challenge to revocation of DACA).⁹

In this case, Mr. Ramirez is not challenging the decision to commence removal proceedings against him. Rather, he is challenging nondiscretionary determinations and actions that fall outside the scope of § 1252(g), including his alleged gang affiliation and the Government's failure to comply with its own procedures. These actions and determinations occurred prior to, and ultimately resulted in, the separate decision to revoke his DACA status and work authorization. Moreover, the arbitrary

⁸ The Government's cases underscore that § 1252(g) does not eliminate jurisdiction to review questions that are *separate* from the agency's discretionary decisions. *See Chavez-Navarro v. Ashcroft*, 57 F. App'x 349 (9th Cir. 2003) (court had jurisdiction to review claim that statute was impermissibly retroactive, but not to review timing of decisions to deny asylum and commence removal proceedings); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594 (9th Cir. 2002) (same).

⁹ District courts in the Ninth Circuit, including this Court, routinely reject jurisdictional challenges based on § 1252(g). *See, e.g., Abdur-Rahman v. Napolitano*, 814 F. Supp. 2d 1087, 1096 (W.D. Wash. 2010) (Martinez, J.) (citing *Wong* and rejecting the argument that § 1252(g) applied to due process challenge to revocation of parole status); *Bobadilla Rodriguez v. Gonzales*, No. C05-2082-RSM-MJB, 2006 WL 1705905, at *3–4 (W.D. Wash. 2006) (Martinez, J., adopting report and recommendation of Benton, M.J.) (challenge to denial of extension of voluntary departure was a "collateral challenge" that did not "arise[] from" any of the actions in § 1252(g)); *Lee v. USCIS*, No. SACV 10-1423 DOC (RNBx), 2011 WL 10858556, at *6 (C.D. Cal. June 22, 2011) (challenge to USCIS actions prior to issuing NTA not barred by § 1252(g)).

1 revocation of Mr. Ramirez’s DACA status and work authorization violated the Due Process Clause
 2 and therefore could not be “discretionary.” *See Wong*, 373 F.3d at 963. Finally, there has been no
 3 adjudication in Mr. Ramirez’s removal proceedings nor is there any removal order to be executed.
 4 Accordingly, nothing divests the Court of jurisdiction to hear Mr. Ramirez’s claims. *Coyotl*, 2017
 5 WL 2889681, at *10.

6 And the Government’s own motion highlights two additional fatal flaws with its effort to
 7 restrict the Court’s jurisdiction.

8 **First**, as the Government implicitly recognizes, the cases it cites applying § 1252(g) are easily
 9 distinguishable because they address the separate question “of whether an individual should be
 10 granted DACA” in the first place.¹⁰ Mot. at 11–12. Here, by contrast, Mr. Ramirez is challenging
 11 decisions that ultimately led to the *revocation* of his DACA status. This distinction is critical. *See*,
 12 *e.g.*, *Wong*, 373 F.3d at 964–65; *Sulit*, 213 F.3d at 453; *see also Singh v. Bardini*, No. 09-cv-3382,
 13 2010 WL 308807, at *5, *7 (N.D. Cal. Jan. 19, 2010) (holding that § 1252(g) did not bar due process
 14 challenge to termination of asylum, and noting that, “[e]ven if there is no constitutional right to be
 15 granted asylum, that does not necessarily mean that, once granted, asylum status can be taken away
 16 without any due process protections”) (internal citation omitted). And the decision to *revoke* DACA
 17 implicates reliance interests that are not present before an application for DACA has been approved;
 18 once such a benefit has been conferred, it cannot be revoked without due process. *See infra* at 23.

19 **Second**, the Government also implicitly recognizes that challenges to *the process* by which a
 20 decision is made are separate from challenges to the ultimate discretionary decision itself. *See* Mot.
 21 at 13. Citing only *Sissoko v. Rocha*, 509 F.3d 947 (9th Cir. 2007) (“*Sissoko I*”), the Government
 22 seeks to sweep this distinction aside by arguing that § 1252(g) extends broadly to preclude review of
 23 claims that “arise from” the decision or action to commence proceedings. Mot. at 13. But the claim
 24 at issue in *Sissoko II*—which involved mandatory detention upon the commencement of
 25 proceedings—did not challenge the *process* by which the decision to commence proceedings was

26 ¹⁰ In further contrast to this case, plaintiffs in those cases were directly challenging final orders of
 27 removal by attempting to obtain a judicial determination that they were eligible for DACA. *See*
 28 Mot. at 11–12 (citing cases).

made; rather, it “directly challenge[d]” the *merits* of that decision. 509 F.3d at 950.¹¹ Moreover, as Defendants recognize, the claims in *Sissoko II* “arose from the decision to commence removal proceedings,” Mot. at 13 n.10 (emphasis added), whereas Mr. Ramirez’s claims here are based on actions that occurred before and were separate from the commencement of removal proceedings.

For all these reasons, § 1252(g) does not divest the Court of “jurisdiction to hear Plaintiff’s challenge to . . . the *non-discretionary* process by which [his] DACA status was terminated.” *Coyotl*, 2017 WL 2889681, at *10 (emphasis in original).

b. Sections 1252(a)(5) and (b)(9) do not bar jurisdiction over Mr. Ramirez’s claims, which are independent of the removal process.

The Government’s argument that Mr. Ramirez’s claims must be channeled through the removal process depends on a mischaracterization of those claims as challenging his removal proceedings and an overbroad reading of the Ninth Circuit’s recent decision in *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016), *petition for reh’g en banc filed*.¹² It fails for multiple independent reasons.

¹¹ *Sissoko*’s procedural history highlights the importance of this distinction. In a prior opinion decided on an incomplete record, the Ninth Circuit had held that § 1252(g) did *not* bar *Sissoko*’s challenge to his detention prior to the commencement of “regular” removal proceedings, because there was no evidence that expedited removal proceedings were commenced against him at the relevant time. *Sissoko v. Rocha*, 440 F.3d 1145, 1152–53, 1157–58 (9th Cir. 2006) (“*Sissoko I*”). On those facts, *Sissoko* appeared to be challenging the Government’s legal authority to detain him, not its discretionary decision to commence proceedings. *See id.*

However, it later came to light that expedited removal proceedings had been commenced against *Sissoko*, making his detention mandatory. *Sissoko II*, 509 F.3d at 949. In that context, *Sissoko*’s false arrest claim “directly challenge[d] *Rocha*’s decision to commence expedited removal proceedings,” and was therefore covered by § 1252(g). *Id.* at 950. Even so, the court stressed the “limited context” of the case, and noted that *Sissoko* could have challenged his detention through a habeas petition, so the application of § 1252(g) did not completely foreclose judicial relief. *Id.* at 949–51. The court also distinguished *Sissoko*’s case from *Wong*, where *Wong*’s constitutional claims were based on government actions prior to or separate from the decisions to commence removal proceedings. *Id.* at 949. Because Mr. Ramirez is challenging the Government’s unconstitutional actions and nondiscretionary determinations that were prior to and separate from its decision to issue an NTA, this case is controlled by *Wong*, not *Sissoko II*.

¹² As Chief Magistrate Judge Donohue noted, “recent Ninth Circuit caselaw discussing the scope of these statutory provisions appears somewhat inconsistent.” Dkt. #64 at 21. In particular, if “read broadly,” *J.E.F.M.* “might appear to be in conflict with cases such as *Nadarajah* and *A. Singh*, which interpreted the statutes as applying only when there is a final order of removal. . . . Nevertheless, *J.E.F.M.* did not overrule *Nadarajah* or *A. Singh*, nor did it seek to limit or distinguish those cases. . . . Indeed, as noted above, the panel cited those cases in support of its conclusion.” *Id.* at 27–28; *see also INS v. St. Cyr*, 533 U.S. 289, 313 (2001) (Section 1252(b)(9) “applies only ‘[w]ith respect to review of an order of removal under subsection (a)(1).’”).

1 **First**, the Ninth Circuit has repeatedly explained that these jurisdictional provisions do not
 2 apply to claims—like those here—which “are collateral to, or independent of, the removal process.”
 3 *J.E.F.M.*, 837 F.3d at 1032 (“§ 1252(b)(9) has built-in limits” and “excludes . . . any claim that does
 4 not arise from removal proceedings”). That includes collateral claims that exist only by virtue of the
 5 removal proceedings, such as challenges to immigration detention. *See, e.g., Flores-Torres v.*
 6 *Mukasey*, 548 F.3d 708, 711 (9th Cir. 2008) (finding jurisdiction to hear challenge to detention during
 7 removal proceedings); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1075–76 (9th Cir. 2006) (finding
 8 jurisdiction to review challenge to prolonged administrative detention). Put differently, these
 9 provisions do not preclude jurisdiction over challenges with “a basis independent of the merits of the
 10 petition for review.” *V. Singh v. Holder*, 638 F.3d 1196, 1210–12 (9th Cir. 2011); *see also A. Singh*
 11 *v. Gonzales*, 499 F.3d 969, 978–79 (9th Cir. 2007) (finding jurisdiction to review claim of ineffective
 12 assistance of counsel and explaining that “cases considering the applicability of § 1252 have also
 13 distinguished between challenges to orders of removal and challenges that arise independently”).¹³
 14 Indeed, a claim may be considered independent of removal proceedings, and thus outside the scope of
 15 these provisions, even where the resolution of that claim may impact removal proceedings. *See, e.g.,*
 16 *Flores-Torres*, 548 F.3d at 711–13 & n.6 (finding jurisdiction over citizenship claim even though it
 17 would invalidate removal proceedings if petitioner prevailed).

18 Here, Plaintiff’s claims are independent of the removal process because they relate to actions
 19 and determinations that occurred *before* removal proceedings were initiated in Immigration Court,
 20 and do not seek to disrupt those proceedings. Moreover, as discussed above, whether an individual
 21 has DACA is separate from the question of whether he or she is removable—indeed, individuals who
 22 have received a final order of removal can apply for and receive DACA—and Mr. Ramirez’s claims
 23 concern interests that are wholly independent of the removal process, including the ability to receive
 24 public benefits and work legally in the United States. *See supra* at 3. And the fact that challenges to
 25 detention *during removal proceedings* are considered collateral claims not barred by § 1252(b)(9)

26
 27 ¹³ *See also Singh v. Vasquez*, No. CV-08-1901-PHX-MHM, 2009 WL 3219266, at *4 (D. Ariz.
 28 Sept. 30, 2009) (Murguia, J.) (finding that the “REAL ID Act does not preclude judicial review of
 the 1999 revocation of [plaintiff’s] asylum by INS”), *aff’d*, 448 F. App’x 776 (9th Cir. 2011).

underscores that the claims here fall well outside the scope of the jurisdiction channeling provisions. *See, e.g., Nadarajah*, 443 F.3d at 1075; *Flores-Torres*, 548 F.3d at 711–12 & n.6.

Second, the relief requested—reinstatement of Mr. Ramirez’s DACA status and a declaratory judgment—further underscores that Mr. Ramirez’s claims are independent of the removal process. *See, e.g., A. Singh*, 499 F.3d at 979 (holding that §§ 1252(a)(5) and (b)(9) did not preclude district court review where the “only remedy would be the restarting of the thirty-day period for the filing of a petition for review with this court”). Indeed, the Government’s position is that none of the relief requested impacts whether Plaintiff is subject to removal. *See* Mot. at 4 (“An individual with deferred action remains removable at any time.”). Again, the Government seeks to have it both ways, arguing that DACA is not a defense to removal, but that revocation of DACA is immune from district court review because DACA is inextricably intertwined with the removal process. That cannot be.

Third, Defendants’ argument regarding Congressional intent underscores that these channeling provisions are inapplicable to Mr. Ramirez’s claims in this Court. Importantly, the Government agrees that Congress only intended to preclude district court review of issues “that *can be raised in removal proceedings*, and ultimately in a petition for review.” Mot. at 14 (emphasis added). That position is fatal to Defendants’ entire argument as it is undisputed that an Immigration Judge *cannot* consider the claims presented here or reinstate Mr. Ramirez’s DACA status. Tr. of Mar. 8, 2017 Hr’g at 6:10–8:24 (“COURT: [D]oes the immigration judge have the power to reinstate DACA status? MR. ROBINS: No, Your Honor.”); *In re Javier Luis Medrano-Inocence*, 2017 WL 1508874, at *2 (BIA Mar. 27, 2017) (“[W]e have no jurisdiction to grant relief under the [DACA] program.”).¹⁴ Accordingly, allowing Mr. Ramirez’s claims to be heard in this Court would not raise concerns about simultaneous review by an administrative body and a federal court, *see* Mot. at 15, nor would it interfere with Congress’s goal of “‘consolidat[ing] judicial review of immigration proceedings into one action in the court of appeals,’” *A. Singh*, 499 F.3d at 978 & n.11 (explaining that Congress intended to consolidate review of orders of removal, not independent challenges).

¹⁴ *See also In re Saldana-Flores*, 2016 WL 4976712, at *1 (BIA July 25, 2016) (“[T]he request for deferred action under the DACA program, or prosecutorial discretion, are matters beyond the jurisdiction of the Board or Immigration Judge, and will have to be pursued with the DHS.”); *Matter of Quintero*, 18 I&N Dec. 348, 350 (BIA 1982).

Accordingly, even under an expansive reading of *J.E.F.M.*, this Court has jurisdiction to consider Mr. Ramirez’s claims against the Federal Agency Defendants.

2. Adopting Defendants’ position would raise serious constitutional concerns.

“[S]erious constitutional question[s]’ . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.” *Webster v. Doe*, 486 U.S. 592, 603 (1988) (citations omitted). Indeed, it would violate due process for Congress to eliminate judicial review of a substantial claim that the government deprived an individual of a protected liberty or property interest. *See Johnson v. Robison*, 415 U.S. 361, 366 (1974); *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 963 (9th Cir. 2004) (“Congress’s exercise of its control over our jurisdiction is subject to compliance with at least the minimum requirements of the Fifth Amendment. . . . [I]t must not so exercise that power as to deprive any person of life, liberty, or property without due process of law . . .”), *abrogated in part on other grounds*; *Hamama v. Adduci*, — F. Supp. 3d —, 2017 WL 2953050 (E.D. Mich. July 11, 2017) (§ 1252(g) unconstitutional as applied to habeas claims).¹⁵

This case seeks to remedy the Government’s violations of Mr. Ramirez’s constitutional and statutory rights. Yet under the Government’s view of § 1252(g), *no* court—neither this Court, the Court of Appeals, the Immigration Court, nor the Board of Immigration Appeals—can consider Mr. Ramirez’s claims. Adopting this overly broad interpretation of the INA would violate Mr. Ramirez’s due process rights and circumvent the “strong presumption in favor of judicial review of administrative action.” *St. Cyr*, 533 U.S. at 298.

3. Defendants cannot evade judicial review by invoking “agency discretion.”

Defendants’ half-hearted contention that their actions are immune from judicial review as agency action “committed to agency discretion by law” is easily dismissed. Mot. at 16. A decision is committed to agency discretion by law only in the “rare instances” where the relevant statutes, regulations, and agency practice provide no meaningful standard, such that there is “no law to apply.”

¹⁵ Even where judicial review is channeled to a court of appeals, courts will “presume that Congress does not intend to limit [district courts’] jurisdiction if,” as here, “a finding of preclusion could foreclose all meaningful judicial review; if the suit is wholly collateral to a statute’s review provisions; and if the claims are outside the agency’s expertise.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (internal quotation marks omitted).

1 *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003) (internal quotation marks
 2 and citation omitted). By establishing policies governing a determination, the agency has “legally
 3 circumscribed” itself, and taken its right to invoke agency discretion off the table. *Alcaraz v. INS*,
 4 384 F.3d 1150, 1161 (9th Cir. 2004) (finding sufficient law to apply based on “various memoranda”
 5 used by the INS to “implement[]” a policy).

6 Here, there is no question that the DACA SOP and DHS practice provide sufficient “law to
 7 apply” to review Defendants’ actions. See *Texas v. United States*, 809 F.3d 134, 172–73 & nn.129–
 8 136 (5th Cir. 2015) (explaining that the DACA SOP effectively limits agency discretion with “nearly
 9 150 pages of specific instructions for granting or denying deferred action”) (citation omitted), *aff’d by*
 10 *an equally divided court*, 136 S. Ct. 2271 (2016); *Coyotl*, 2017 WL 2889681, at *4 (“The [DACA]
 11 SOP states that it is applicable to all personnel performing adjudicative functions and the procedures
 12 to be followed are not discretionary.”).¹⁶

13 Additionally, *even if* the ultimate determination to revoke DACA is discretionary, the same is
 14 not true as to the *process* for making that determination. Indeed, there is an “important distinction
 15 between challenges to an agency’s ultimate discretionary decision and challenges to non-
 16 discretionary administrative determinations.” *Coyotl*, 2017 WL 2889681, at *10 (“[U]ltimate
 17 discretionary authority . . . does not mean that every determination made by USCIS regarding an
 18 alien’s application for that benefit is discretionary, and hence not subject to review.”) (quotation
 19 omitted). The Ninth Circuit has similarly held that “[d]ue process . . . entitles an unlawfully present
 20 alien to consideration of issues relevant to the exercise of an immigration officer’s discretion,” even
 21 where the agency may ultimately “exercise its lawful discretion however it sees fit.” *Villa-Anguiano*
 22 *v. Holder*, 727 F.3d 873, 880–81 & n.7 (9th Cir. 2013).¹⁷ Here, “Defendants’ failure to follow the

23 ¹⁶ Courts have reached the same conclusion in other immigration cases. See, e.g., *Mendez-Gutierrez*
 24 *v. Ashcroft*, 340 F.3d 865, 868–69 (9th Cir. 2003) (finding regulations for analogous proceeding
 25 provided “meaningful standards for judicial review”); *A.A.-M. v. Gonzales*, No. C05-2012C, 2005
 26 WL 3307531, at *3 (W.D. Wash. Dec. 6, 2005) (explaining that an internal ICE memorandum
 “does provide ‘a meaningful standard against which to judge the agency’s exercise of
 discretion’”) (quoting *Mendez-Gutierrez*, 340 F.3d at 868).

27 ¹⁷ Indeed, “not every decision of the Attorney General that involves some element of discretion is
 28 automatically shielded from review,” and “if a legal standard from an appropriate source governs
 the determination in question, that determination is reviewable for a clarification of that legal

procedures detailed in the DACA SOP does not implicate agency discretion.” *Coyotl*, 2017 WL 2889681, at *10.

There is also no relevance to the Government’s argument that “an agency’s decision *not* to take enforcement action should be presumed immune from judicial review under” the APA. Mot. at 16 (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)) (emphasis added). Indeed, as *Heckler* itself recognized, review is generally available “when an agency *does* act to enforce,” which is what the revocation of DACA entails. *Heckler*, 470 U.S. at 832; *see also Villa-Anguiano*, 727 F.3d at 881 n.9 (“*Heckler* . . . does not relieve the courts of their duty to review the constitutionality of agency action, whether discretionary or otherwise, when called upon to do so.”).

B. The Federal Agency Defendants violated the APA and Mr. Ramirez’s rights.

The Government’s revocation of Mr. Ramirez’s DACA status and work authorization violated the APA in numerous respects. As explained in Count I of the SAC, the Government violated the APA because its conduct was: (1) “arbitrary, capricious, and an abuse of discretion,” SAC ¶¶ 85–89; and (2) contrary to the Government’s “own internal operating procedures” and therefore “in violation of the *Accardi* doctrine,” *id.* ¶ 90. Count II of the SAC explains that the Government violated the APA because it “violated [Mr. Ramirez’s] rights under the Due Process Clause.” *Id.* ¶¶ 92–105.

The Government argues Mr. Ramirez has failed to state a claim because (1) “there is no requirement that ICE provide notice to a recipient of DACA before issuing an NTA that terminates DACA,” and (2) because Mr. Ramirez lacks “a constitutionally protected interest in DACA or employment authorization.” Mot. at 17–23. Both of these arguments fail.

standard.” *ANA Int’l, Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004); *see also B. Singh v. Holder*, 591 F.3d 1190, 1195 (9th Cir. 2010) (holding that an Immigration Judge’s factual determination regarding the existence of extreme hardship was not discretionary, even though “the ultimate decision whether to grant a waiver” was); *Nakamoto v. Ashcroft*, 363 F.3d 874, 878 (9th Cir. 2004) (“[T]he determination of whether a petitioner committed marriage fraud is not a decision . . . [that is] entirely discretionary”); *Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997) (“[A]ssessing some of the aspects of statutory eligibility for suspension of deportation requires application of law to factual determinations. As to those elements of statutory eligibility which do not involve the exercise of discretion, direct judicial review remains.”), *superseded by statute on other grounds*.

1. Defendants effectively concede that they violated the APA.

The Government’s motion must be denied because it wholly fails to address—and thus effectively concedes—two key grounds for Mr. Ramirez’s APA claims. *First*, the Government does not (and cannot) contest that its revocation of Mr. Ramirez’s DACA status was “arbitrary” and “capricious.” *See* Mot. at 17; *see also* SAC ¶¶ 87–89 (allegations of gang affiliation run counter to the evidence before the agency, and the decision to summarily reverse prior determinations that Mr. Ramirez was eligible for DACA was arbitrary and capricious). This alone is sufficient to defeat Defendants’ assertion that Mr. Ramirez failed to state a claim with respect to Count I.¹⁸ *Second*, aside from its narrow arguments about reputational harm, the Government does not contest that DACA implicates constitutionally-protected liberty interests, thereby conceding that Mr. Ramirez adequately stated a claim with respect to Count II. *See* Mot. at 22–23; *see also* SAC ¶ 97 (“DACA grants beneficiaries the right not to be arrested or detained based solely on their immigration status during the time period that their deferred action is in effect.”).

2. Defendants violated the APA by failing to follow their own internal procedures.

“Pursuant to the *Accardi* doctrine, an administrative agency is required to adhere to its own internal operating procedures.” *Church of Scientology of Cal. v. United States*, 920 F.2d 1481, 1487 (9th Cir. 1990) (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954)). The Government failed to do so here. The Government tries to distract from its undisputed misconduct by mischaracterizing Mr. Ramirez’s arguments and advancing broad generalizations not applicable to this case. *See* Mot. at 17–19. But no amount of rhetoric can obscure the fact that Defendants acted unlawfully and in violation of the *Accardi* doctrine when they failed to adhere to their own internal procedures in summarily revoking Mr. Ramirez’s DACA status.

Here, it is undisputed that Defendants failed to provide Mr. Ramirez with either a Notice of Intent to Terminate or any opportunity—let alone 33 days—to contest the allegations against him

¹⁸ *See also Rahman v. Napolitano*, 814 F. Supp. 2d 1098, 1110 (W.D. Wash. 2011) (Martinez, J.) (revocation of approved petition to support noncitizen’s permanent resident status was “arbitrary and capricious” where “agency failed to articulate a rational explanation for its decision . . .”).

1 prior to revoking his DACA status. SAC ¶ 90. These failures violated DHS's own internal
2 guidelines as well as Mr. Ramirez's rights under the Due Process Clause.

3 In an effort to excuse this misconduct, the Government doubles down on its slander against
4 Mr. Ramirez, trying to shoehorn him into the narrow exception for EPS cases. Mot. at 6, 17–18. But
5 Mr. Ramirez was not “under investigation for,” “arrested for,” or “convicted of” any “specified
6 crime” as required under the DACA SOP. DACA SOP at 5. Moreover, in advancing this argument,
7 the Government improperly relies on a prior definition of EPS that includes those “under
8 investigation for” being “known or suspected street gang members.” Mot. at 17. But this earlier
9 definition, which is drawn from the 2011 USCIS NTA Memorandum (which was issued before
10 DACA was established), is inapplicable here, because the subsequently issued DACA SOP excludes
11 gang membership from the definition of EPS. DACA SOP at 5 (incorporating only certain
12 enumerated “*crimes*” into the definition of EPS) (emphasis added).¹⁹

13 Moreover, even if this earlier definition of EPS were applicable here (it is not), Mr. Ramirez
14 still would not fall into the EPS category for several reasons. First, there is no allegation (let alone
15 evidence) that Mr. Ramirez is a “gang member.” Rather, the Government's allegation—which
16 Mr. Ramirez denies—is that he “hangs out” with gang members. SAC ¶ 69. And the Government's
17 own records demonstrate that Mr. Ramirez was never “under investigation for,” “arrested for,” or
18 “convicted of” being a “known or suspected gang member.”²⁰

19 Neither gang membership nor affiliation is a “crime.” *United States v. Garcia*, 151 F.3d 1243,
1244 (9th Cir. 1998) (“[G]ang membership itself cannot establish guilt of a crime.”); *Munoz v.*
20 *Rowland*, 104 F.3d 1096, 1098 (9th Cir. 1997) (“Associating with gang members is not . . . a
21 crime.”); cf. USCIS NTA Memorandum at 3 (statutory definitions for crimes qualifying as EPS).

22 20 Mr. Ramirez was not suspected of gang membership at the time of his arrest. See Form I-213 at
23 3. And the ICE agents' subsequent questioning does not and cannot demonstrate that he was
24 “under investigation for” gang membership. Indeed, even under the prior definition, an EPS case
25 is defined as one “where *information indicates* the alien is *under investigation* for” certain
26 offenses, suggesting an *independent* and *pre-existing* investigation, not ad-hoc questioning or a
27 spontaneous suspicion. USCIS NTA Memorandum at 4 (emphasis added). This comports with
28 the well-established notion of an “investigation” as a formal and systematic law enforcement
inquiry. See *Investigate*, Black's Law Dictionary, 8th ed. 2004. Under any reading of the term,
there can be no argument that Mr. Ramirez was “under investigation for” gang membership as the
Government's own evidence establishes that there was no investigation at that time, see Form
I-213 at 2–3, and it has since abandoned its claim that he poses a risk to public safety, SAC ¶ 79.

On the contrary, the record demonstrates that Mr. Ramirez had “no criminal history,” and the checks run at the time of his arrest did not reflect any flags or investigations. Form I-213 at 3. More broadly, the Government’s admission that Mr. Ramirez presented no threat to public safety, SAC ¶ 79, fatally undermines its effort to cast this case as involving an “Egregious Public Safety” issue, especially where its own guidelines reserve that classification for extreme cases involving crimes like murder, rape, or trafficking in explosives. Mr. Ramirez is, at worst, guilty of having a tattoo.²¹

The Government’s undisputed failure to follow the “usual” DACA procedures, *Coyotl*, 2017 WL 2889681, at *7, cannot be justified by its “post hoc” reliance on EPS guidelines which, for the reasons set forth above, were inapplicable here, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971), *abrogated in part on other grounds as recognized in Califano v. Sanders*, 430 U.S. 99 (1977); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014) (“[W]e will not allow the agency to supply post-hoc rationalizations for its actions . . .”).

Moreover, the Government’s argument that the *Accardi* doctrine is “inapplicable in the context of internal operating guidelines that preserve the exercise of agency discretion,” Mot. at 18, is both irrelevant and incorrect.²² As discussed above, it is settled that DACA operates under strict guidelines, and the determinations at issue are nondiscretionary. *Texas*, 809 F.3d at 172–73; *Coyotl*,

Moreover, any dispute about these facts cannot be resolved on a motion to dismiss; rather, the Court must construe them in the light most favorable to Mr. Ramirez. *See supra* at 5.

²¹ In addition to failing to provide him with notice and an opportunity to respond, the ICE officers who arrested Mr. Ramirez also failed to comply with the requirements of the ICE prosecutorial discretion checklist. In particular, the ICE officers did not consult with the Office of Chief Counsel for further review, as required where a “threat . . . to public safety” is the reason for DACA ineligibility. ICE Administrative Record at 5.

²² The sole authority relied upon by the Government—*Mada-Luna v. Fitzpatrick*, 813 F.2d 1006 (9th Cir. 1987)—actually *supports* applying *Accardi* to this suit. The central question in *Mada-Luna* was whether an amendment to an agency’s procedures required notice-and-comment rulemaking, not whether the agency complied with its procedures. 813 F.2d at 1011. Far from holding that *Accardi* was inapplicable to such general statements of policy, the court explained that “whether an agency’s decisions implementing a particular directive are subject to judicial review and whether the directive itself constitutes a general statement of policy exempt from . . . notice-and-comment requirements are not necessarily interdependent,” and reaffirmed a decision holding that the previous version of the procedure created enforceable rights even though it was a general statement of policy. *Id.* at 1014–15 & n.10 (“We concluded [in *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979)] . . . that district directors were required to ‘fully and fairly weigh[]’ the facts of each case, and that if they found ‘the relevant humanitarian factors [to be] compelling,’ they were required to recommend deferred action status: this provided a basis for judicial review.”).

2017 WL 2889681, at *10. And in the Ninth Circuit, the *Accardi* doctrine “extends beyond formal regulations,” including to “internal operating procedures,” “handbook[s],” “policy statement[s],” “Order[s],” “Standards,” “Directive[s],” “Weekly Bulletin[s],” and unpromulgated rules documenting “usual practice.” *Alcaraz*, 384 F.3d at 1162 (citing cases).

Nor do courts categorically “decline[] to apply the *Accardi* doctrine in matters of prosecutorial discretion.” Mot. at 18–19.²³ Indeed, *Accardi* itself was a case about the exercise of discretion in immigration removal proceedings. *Accardi*, 347 U.S. at 261. And courts have applied *Accardi* and its principles in a wide variety of administrative and civil enforcement contexts. *See, e.g., INS v. Yang*, 519 U.S. 26, 32 (1996) (“Though the agency’s discretion is unfettered at the outset, if it announces and follows-by rule or by settled course of adjudication-a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as ‘arbitrary, capricious, [or] an abuse of discretion’ within the meaning of the [APA]”); *McDonald v. Gonzales*, 400 F.3d 684, 686 & n.5 (9th Cir. 2005) (noting that “INS is obligated to follow its own policy” when investigating potential immigration violations); *Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) (decision to debar government contractors); *NLRB v. Welcome-Am. Fertilizer Co.*, 443 F.2d 19, 20 (9th Cir. 1971) (NLRB enforcement action); *see also Vitarelli v. Seaton*, 359 U.S. 535, 539–40 (1959) (termination of employment for security reasons); *cf. Coyotl*, 2017 WL 2889681, at *10. In any event, the Government’s arguments regarding prosecutorial and agency discretion miss the mark because Mr. Ramirez is not challenging any discretionary decision to “prosecute” him by initiating removal proceedings, but rather the “*non-discretionary* process” and nondiscretionary

²³ The two out-of-circuit cases cited in support of this argument are inapplicable. In *Carranza v. INS*, 277 F.3d 65 (1st Cir. 2002), the First Circuit declined to review INS’s discretionary decision to bring removal proceedings against an aggravated felon, because the statute at issue did not establish a process that INS was required to follow in the exercise of its discretion, and Congress had revoked the statutory basis for aggravated felons to be considered for discretionary relief. *Id.* at 71–72. Unlike Mr. Ramirez, Carranza did not claim that INS failed to follow its own procedures; rather, he argued that he had a free-standing right to be considered for prosecutorial discretion. *See id.* Similarly, in *United States v. Lee*, 274 F.3d 485 (8th Cir. 2001), the Eighth Circuit found that a policy requiring the Attorney General to make the ultimate decision about whether or not to seek the death penalty did not create an enforceable right, due to the “special nature” of criminal prosecution decisions. *Id.* at 493.

determinations which ultimately resulted in the revocation of his DACA status and associated benefits. *Coyotl*, 2017 WL 2889681, at *10.

Because the Government failed to adhere to its own internal operating procedures in summarily revoking his DACA status, Mr. Ramirez has stated a claim with respect to Count I.²⁴

3. Defendants violated the APA by ignoring the Due Process Clause.

Even assuming that Defendants complied with their own established procedures (and they did not), they still violated the APA by depriving Mr. Ramirez of constitutionally-protected liberty and property interests without due process of law. SAC ¶¶ 92–105. Defendants try to brush aside this claim by arguing that Mr. Ramirez lacks any “constitutionally protected interest in employment authorization or DACA.” Mot. at 19–23. But this argument fails because the interests at issue, which include important public benefits and the ability to legally work in the United States, are entitled to constitutional protection under established Supreme Court precedent.

First, the Government’s argument that DACA recipients lack a protected property interest in their status and the associated benefits falls flat. Mot. at 20–22. As the Government notes, an individual has a protected property interest in a government benefit where he or she has a “legitimate claim of entitlement” to that benefit. *Id.* at 20; *see also Nozzi v. Hous. Auth. of L.A.*, 806 F.3d 1178, 1191 (9th Cir. 2015) (protected property interests “extend beyond tangible property and include anything to which a plaintiff has a ‘legitimate claim of entitlement’”) (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576–77 (1972)). Such property interests are created and defined by “existing rules or understandings that stem from an independent source,” including “statute[s],” “regulation[s],” “express or implied contract[s],” or “mutually explicit understanding[s].” Mot. at 21 n.14 (citing cases); *see also Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (“A person’s interest in a benefit is a ‘property’ interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.”). The Ninth Circuit has further explained that an individual has a protected property right

²⁴ The Government’s misleading argument regarding Mr. Ramirez’s “purported due process right to be with his family,” Mot. at 20, mischaracterizes the SAC and is irrelevant to whether Count I should be dismissed. Indeed, the Government’s incomplete description of the important rights it violated underscores its failure to recognize the gravity of its actions.

1 in government benefits where government regulations “greatly restrict the discretion of the people
2 who administer those benefits.” *Nozzi*, 806 F.3d at 1191 (internal quotation marks omitted) (finding
3 a protected property interest in low income housing benefits).

4 Here, there is no question that DACA recipients have a legitimate claim of entitlement to the
5 benefits conferred under the program because DACA is operated under a well-defined framework
6 and governed by highly specific criteria that “greatly restrict the discretion of the people who
7 administer those benefits.” *Id.* Notably, the 2012 Napolitano Memorandum sets forth five specific
8 criteria that define eligibility for DACA, and instructs DHS agents to prevent individuals who qualify
9 for DACA from being apprehended or placed into removal proceedings. 2012 Napolitano
10 Memorandum at 1–3; *see also* DACA FAQs, Q9. To ensure compliance with these guidelines, ICE
11 agents use a checklist to determine whether an individual qualifies for DACA. ICE Administrative
12 Record at 5. This checklist does not provide ICE agents with discretion. *Id.*

13 DHS has also greatly limited the discretion of those who administer DACA by issuing the
14 DACA SOP, which provides “nearly 150 pages of specific instructions” for managing the program.
15 *Texas*, 809 F.3d at 173 (citing the DACA SOP as evidence that DACA is not discretionary). These
16 exacting guidelines are “applicable to all personnel performing adjudicative functions and the
17 procedures to be followed are not discretionary.” *Coyotl*, 2017 WL 2889681, at *4. Indeed, many
18 decisions to deny or terminate DACA require supervisory review. DACA SOP at 13–15.

19 Mr. Ramirez also has a “legitimate claim of entitlement” to the benefits conferred under
20 DACA by virtue of the Government’s prior actions and correspondence to him, as well as the public
21 promises of numerous officials from both the Trump and Obama Administrations, which created a
22 mutually explicit understanding that he was entitled to those benefits so long as he played by the
23 rules. SAC ¶¶ 33–43, 101–02; Dkt. #78-2, at 2 (Letter from Secretary Jeh Charles Johnson stating
24 that “representations made by the U.S. government, upon which DACA applicants most assuredly
25 relied, must continue to be honored.”); *see also Orloff v. Cleland*, 708 F.2d 372, 377 (9th Cir. 1983)
26 (holding that, “[d]espite the apparent expiration date of [plaintiff’s] contract there may have arisen an
27 understanding of continued employment based on prior treatment of [plaintiff] or other VA
28

employees sufficient to constitute a *de facto* property interest,” and remanding to determine “whether a ‘mutually explicit’ understanding arose”); *Gunasekera v. Irwin*, 551 F.3d 461, 467–68 (6th Cir. 2009) (plaintiff sufficiently alleged protected property interest in his “Graduate Faculty status” where a “common practice and understanding had developed which gave him a legitimate claim to [the] status so long as he met the stated conditions”). In light of this understanding, as well as the elaborate guidance discussed above and this Court’s obligation to construe Mr. Ramirez’s allegations in the light most favorable to him, Mr. Ramirez has more than plausibly alleged that he (and other DACA beneficiaries) have a “legitimate claim of entitlement” to DACA benefits. *See Sindermann*, 408 U.S. at 599–600, 603 (“[R]espondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of ‘the policies and practices of the institution.’”); *cf. Nozzi*, 806 F.3d at 1199–1200 (remanding with instructions to enter summary judgment in plaintiffs’ favor).

The Government fails to address these highly specific criteria. Instead, in an effort to cast DACA as wholly discretionary, it cherry-picks three generalized statements from documents other than the DACA SOP. Mot. at 20–22. But even when read “in context,” *id.* at 22, these vague statements cannot defeat Mr. Ramirez’s claims, especially given the many ways the DACA SOP limits discretion.²⁵ Moreover, although the 2012 Napolitano Memorandum states that it “confers no substantive right,” 2012 Napolitano Memorandum at 3, the Ninth Circuit has held that “identification of property interests under constitutional law turns on the substance of the interest recognized, not the name given that interest by the state,” *Newman v. Sathyavaglswaran*, 287 F.3d 786, 797 (9th Cir. 2002) (finding a protected property interest despite the state’s “labeling of the interests” otherwise); *see also Whaley v. Cty. of Tuscola*, 58 F.3d 1111, 1116 (6th Cir. 1995) (finding a protected property interest despite the state’s “repeated[]” efforts to characterize the interest differently).²⁶

²⁵ Nor could these statements justify the purportedly unreviewable decision by an individual ICE officer to overrule multiple prior and more thorough analyses by DHS. Indeed, the notion of a low level officer revoking benefits promised by the government—without any notice or opportunity for review—is repugnant to the Constitution and to fundamental fairness.

²⁶ And while the DACA FAQs provide that “DHS can terminate or renew deferred action at any time, at the agency’s discretion,” DACA FAQs, Q1, they noticeably *do not* provide that DACA can be terminated “for any reason,” as in the employment case cited by the Government, *Blantz v. Cal. Dep’t of Corrs. & Rehab.*, 727 F.3d 917, 924 (9th Cir. 2013); Mot. at 20–21.

Second, the Government argues that Mr. Ramirez has failed to state a claim because “aliens do not have a constitutionally protected right to work without authorization.” Mot. at 19–20. But this argument misses the mark, as Mr. Ramirez’s claim is not premised upon any purported “fundamental right to employment authorization or DACA.” *Id.* at 19. Rather, Mr. Ramirez’s claim is based on the improper *revocation* of his work authorization that was granted by the Government. *See, e.g.*, SAC ¶¶ 91, 105. Indeed, even absent any claim of a pre-conferral “entitlement” or “promise of benefits,” Mot. at 20, once certain benefits are *conferred*, beneficiaries have interests entitled to protection under the Due Process Clause, *see, e.g., Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that “[o]nce [driver’s] licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood,” such that they cannot “be taken away without” due process); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (holding parole revocation requires due process, and noting that parolees—who, through release, gained the ability to “be gainfully employed”—had “relied on at least an implicit promise that parole [would] be revoked only if [they] failed to live up to the parole conditions”); *Gallo v. U.S. Dist. Ct. for Dist. of Ariz.*, 349 F.3d 1169, 1179 (9th Cir. 2003) (“Our case law holds that a professional license, *once conferred*, constitutes an entitlement subject to constitutional protection.”) (emphasis added).²⁷ Virtually all the authority cited by the Government is inapposite, as it involves noncitizens who—unlike Mr. Ramirez—had not been granted work authorization or anything akin to DACA, and therefore could not credibly claim deprivation of a protected property interest.²⁸

²⁷ *See also Singh*, 2010 WL 308807, at *7 (“Even if there is no constitutional right to be granted asylum, that does not necessarily mean that, once granted, asylum status can be taken away without any due process protections.”) (internal citation omitted); *Abdur-Rahman*, 814 F. Supp. 2d at 1096 (finding a “strong likelihood of succeeding on the merits of the constitutional claim of denial of due process in the revocation of [plaintiff’s Application for Reentry Permit]”).

²⁸ Notably, the only case cited by the Government involving actual *revocation* of employment authorization supports Mr. Ramirez’s position. In *WJA Realty Ltd. P’ship v. Nelson*, 708 F. Supp. 1268 (S.D. Fla. 1989), the court enjoined a regulation allowing INS to suspend foreign nationals’ employment visas while employees of their workplaces went on strike. *Id.* at 1269. Although the court recognized that foreign nationals “have no constitutional right to work without authorization,” it found that “[o]nce the alien is permitted to work, the alien has the rights to which an employee is entitled,” including rights under the Constitution. *Id.* at 1273, 1277.

Moreover, “[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss.” *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970) (internal quotation marks omitted); *see also Nozzi*, 806 F.3d at 1192–93. There is no question that the revocation of DACA constitutes an extraordinarily “grievous loss,” as it destroys an individual’s ability to function as a contributing member of society. *See* SAC ¶¶ 27–32. Indeed, the revocation of Mr. Ramirez’s DACA status wrongfully deprived him of his freedom and peace of mind and destroyed his ability to provide for his family. *Id.* ¶¶ 81–84.

Finally, the Government’s argument that Mr. Ramirez failed to state a claim “with respect to a protected liberty interest in connection with his reputation” is also easily dismissed. Mot. at 22–23. The allegations in the SAC satisfy all of the prongs of the “stigma plus” test in that (1) the Government’s allegations of gang membership are likely to “seriously damage” Mr. Ramirez’s standing and associations in the community; (2) the accuracy of those allegations is vigorously contested; (3) there indisputably has been widespread “public disclosure of the charge”; and (4) the allegations were made in connection with the revocation of Mr. Ramirez’s DACA status. *Wenger v. Monroe*, 282 F.3d 1068, 1074 (9th Cir. 2002) (citation omitted); *see also Paul v. Davis*, 424 U.S. 693, 709–12 (1976); *Goss v. Lopez*, 419 U.S. 565, 574–75 (1975). The Government’s suggestion that revocation of DACA did not alter Mr. Ramirez’s rights or legal status, Mot. at 23, is not credible, especially where it is undisputed that Mr. Ramirez was stripped of eligibility for important state and federal benefits as well as his ability to work legally in the United States.

In sum, Mr. Ramirez has pleaded compelling claims that revocation of his DACA status deprived him of liberty and property interests entitled to protection under the Due Process Clause.

V. CONCLUSION

For the reasons set forth above, Mr. Ramirez respectfully requests that the Court reject the Government’s effort to evade judicial review of its unlawful and unconstitutional conduct, and deny its Motion to Dismiss.

1 DATED: August 7, 2017
2 Seattle, Washington

3 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document should automatically be served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Theodore J. Boutrous, Jr.

The Honorable Ricardo S. Martinez
Chief United States District Judge

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

CASE NO. 2:17-CV-00218-RSM-JPD

Daniel Ramirez Medina,
Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT; U.S.
CITIZENSHIP AND IMMIGRATION
SERVICES; MATTHEW E. HICKS,
[UNKNOWN FIRST NAME] PETER,
[UNKNOWN FIRST NAME] HERNANDEZ,
and KATHLYN LAWRENCE, U.S.
Immigration and Customs Enforcement
Officers (in their individual capacities); and
JOHN DOES 1-10 (in their individual
capacities),

Defendants.

**PLAINTIFF'S REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF OPPOSITION TO
FEDERAL AGENCY DEFENDANTS'
MOTION TO DISMISS**

Noted for Consideration: August 18, 2017

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PLAINTIFF'S REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF OPPOSITION TO FEDERAL AGENCY
DEFENDANTS' MOTION TO DISMISS

Case No. 2:17-cv-00218-RSM-JPD

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1 Plaintiff Daniel Ramirez Medina respectfully submits this Request for Judicial Notice in
 2 support of his Opposition to the Federal Agency Defendants' Motion to Dismiss. Dkt. #109.
 3 Mr. Ramirez requests that this Court take judicial notice of excerpts of the August 28, 2013 version
 4 of DHS's "National Standard Operating Procedures" for DACA (the "DACA SOP"), attached hereto
 5 as Exhibit A.

6 Mr. Ramirez attached a prior version of the DACA SOP, dated April 4, 2013, as Exhibit F to
 7 his Second Amended Complaint ("SAC"). Dkt. #78-6. The Federal Agency Defendants attached
 8 excerpts of a slightly more recent version of the DACA SOP, dated August 28, 2013, as Exhibits C
 9 and D to their Motion to Dismiss and requested that the Court take judicial notice of the same.
 10 Dkt. #90 ("Motion to Dismiss"), at 9 ("Defendants submit Exhibits C and D as updated excerpts of
 11 Dkt. 78-6, Pl. Exhibit F."); Dkt. #90-4; Dkt. #90-5. Mr. Ramirez does not oppose this request.
 12 However, because the excerpts submitted by the Federal Agency Defendants omit certain relevant
 13 provisions of the DACA SOP, Mr. Ramirez requests that the Court take judicial notice of all of the
 14 pages attached hereto as Exhibit A.¹

15 Although a court's review on a motion to dismiss is generally limited to the pleadings, the
 16 Ninth Circuit has held that judicial notice of a document is appropriate if the document's
 17 "'authenticity . . . is not contested' and 'the plaintiff's complaint necessarily relies'" on it. *Lee v. City*
 18 *of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (quoting *Parrino v. FHP, Inc.*, 146 F.3d 699, 705–
 19 06 (9th Cir. 1998)); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (courts may
 20 consider documents "whose contents are alleged in a complaint and whose authenticity no party
 21 questions, but which are not physically attached to the [plaintiff's] pleading") (citation and internal
 22 quotation marks omitted). Courts also may take judicial notice of "matters of public record." *Lee*,
 23 250 F.3d at 689 (citation and internal quotation marks omitted).

24 The August 28, 2013 DACA SOP is appropriate for judicial notice because it is both a matter
 25 of public record and because Mr. Ramirez's complaint necessarily relies upon it—indeed, the

26
 27 ¹ With the exception of a single provision not relevant here, *see* Dkt. #109 at 4 n.4, the cited
 28 language in both versions is substantively identical.

Government's failure to comply with the DACA SOP is central to Mr. Ramirez's claims. Moreover, the authenticity of the DACA SOP is not contested, as both parties have now requested that the Court take judicial notice of it. Finally, as noted above, it is a more recent version of a document that Mr. Ramirez attached to his pleadings. *See Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 852 n.3 (9th Cir. 2011), *vacated on reh'g en banc on other grounds*, 678 F.3d 1013 (9th Cir. 2012) (taking judicial notice of "more current official figures" than those contained in the record).

DATED: August 7, 2017

Seattle, Washington

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document should automatically be served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Theodore J. Boutrous, Jr.

EXHIBIT A



National Standard Operating Procedures (SOP)

Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765)

Prepared by: Service Center Operations Directorate

**August 28, 2013
Version 2.0**

Chapter 1: Definitions and Applicability to DACA

Absconder	An alien who failed to surrender to DHS for removal after receiving a final order of deportation, exclusion, or removal.
Aggravated Felon	Any alien who has been convicted of a criminal offense within the definition of 101(a)(43) of the Immigration and Nationality Act (Act).
Alias	An additional name (e.g., nickname, maiden name, or married name) or an assumed name.
Ancillary Application	Applications for travel, employment authorization, or applications that do not convey an immigrant or nonimmigrant status, and are filed in connection with a primary or an underlying application or petition.
ASC	Application Support Center. The ASCs, which are located throughout the United States and its outlying territories, facilitate the capture of fingerprints and biometric data.
BCU (b)(7)(e)	Background Check Unit. A work unit located at each of the Service Centers and the National Benefits Center. The BCU is responsible for reviewing and resolving [REDACTED] its and other criminal, national security, and public safety concerns in accordance with Agency policy.
BCU DACA Team	A specialized team within the BCU that specifically reviews and adjudicates issues of criminality arising from DACA requests. The team may consist of Immigration Services Officers, as well as officers assigned to CARRP, NTA issuance, and Triage duties, and the analysts who support them.

Continued on next page

Definitions and Applicability to DACA, Continued

Brief, Casual, and Innocent Absence

A brief, casual, and innocent absence from the United States before August 15, 2012 will not interrupt continuous residence for purposes of DACA. An absence will be considered brief, casual, and innocent, if:

- (1) The absence was short and reasonably calculated to accomplish the purpose of the absence;
- (2) The absence was not the result of an order of exclusion, deportation, or removal;
- (3) The absence was not because of an order of voluntary departure, or an administrative grant of voluntary departure before the requestor was placed in exclusion, deportation, or removal proceedings; and
- (4) The purpose of the absence from the United States or actions while outside of the United States were not contrary to law.

This definition of a brief, casual, and innocent absence has its basis in case law and was codified into the regulations for the Temporary Protected Status (TPS) program. Elements of this definition of brief, casual, and innocent will be used for individuals requesting DACA. See 8 C.F.R. §244.1. See also "Continuous Residence" below for additional circumstances that will not break continuous residence.

CFDO

The Center Fraud Detection Operations (CFDO) is the Fraud Detection and National Security (FDNS) organization within Service Centers. The CFDO is comprised of FDNS officers under the direction of an FDNS supervisor who reports directly to the CFDO Assistant Center Director (ACD). While most CFDO work occurs in an office environment, some Service Centers conduct administrative investigations in support of FDNS's field operations.

CLAIMS (C3)

Computer - Linked Application Information Management System Version 3. A case management application system to track and process the adjudication of applications, petitions, and other requests for immigration benefits and services.

Continued on next page

Definitions and Applicability to DACA, Continued

Continuous Residence	The DACA requestor is to reside in the United States for the entire period specified in the guidelines for DACA to be considered. An alien shall not be considered to have failed to maintain continuous residence in the United States by reason of a brief, casual, and innocent absence as defined within this section.
CARRP	Controlled Application Review and Resolution Program. This program outlines the process to identify, record, and adjudicate applications/petitions/requests where a National Security concern is identified.
DACA	Deferred Action for Childhood Arrivals
Deferred Action	Deferred action is a discretionary determination to defer removal action of an individual as an act of prosecutorial discretion. Deferred action does not confer any lawful status.
DNR	Does Not Relate. A determination by USCIS personnel of whether a security check result relates to a DACA requestor.
Egregious Public Safety (EPS) Concern	Any case where routine systems and background checks indicate that an individual is under investigation for, has been arrested for (without disposition), or has been convicted of, a specified crime, including but not limited to, murder, rape, sexual abuse of a minor, trafficking in firearms or explosives, or other crimes listed in the November 7, 2011, memorandum entitled <u>Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens</u> .

Continued on next page

Definitions and Applicability to DACA, Continued

Evidence

Affidavits

Affidavits generally will not be sufficient on their own to demonstrate that a requestor meets the DACA guidelines. However, affidavits may be used to support the following guidelines when primary and secondary evidence are unavailable:

- A gap in the documentation demonstrating that the requestor meets the five year continuous residence requirement; and
- A shortcoming in documentation with respect to the brief, casual and innocent departures during the five years of required continuous presence.

Two or more affidavits, sworn to or affirmed by people other than the requestor, who have direct personal knowledge of the events and circumstances, can be submitted. If the affidavits are not sufficient to establish that the guideline is met, issue an RFE using RFE DACA 302 call up in Appendix D.

USCIS will not accept affidavits as proof of satisfying the following guidelines:

- The requestor is currently in school, has graduated or obtained a certificate of completion from high school, has obtained a general education development certificate, or is an honorably discharged veteran from the Coast Guard or Armed Forces of the United States;
- The requestor was physically present in the United States on June 15, 2012;
- The requestor came to the United States before reaching his/her 16th birthday;
- The requestor was under the age of 31 on June 15, 2012; and
- The requestor's criminal history, if applicable.

Weigh the assertions in the affidavit in light of the totality of all the evidence presented. When evaluating what weight to give an affidavit, take the following into consideration:

- An affidavit needs to be signed and dated;
- The identity of the affiant needs to be readily ascertainable from the information in the affidavit;
- The affidavit should state the relationship between the affiant and the DACA requestor and contain facts that are relevant to the guideline the requestor seeks to meet;
- The affidavit should state the basis of the affiant's knowledge and exhibit first-hand knowledge of the fact asserted.

Continued on next page

Definitions and Applicability to DACA, Continued

Evidence (Continued)

Preponderance of the Evidence

A DACA requestor is to establish by a preponderance of the evidence that he/she meets the guidelines for the exercise of prosecutorial discretion in the form of deferred action. Under this standard, the requestor must demonstrate that it is more likely than not that he or she meets those guidelines. The preponderance of the evidence standard is a lower standard of proof than both the "clear and convincing evidence" standard and the "beyond a reasonable doubt" standard applicable to criminal cases.

Primary Evidence

Primary evidence is evidence which, on its face, proves a fact. In the DACA context, an example of primary evidence that could be submitted to satisfy the age guideline would be a birth certificate. An example of primary evidence that could be submitted to satisfy all or part of the continuous residence guideline would be rental agreements or school records in the DACA requestor's name.

Secondary Evidence

Secondary evidence must lead the officer to conclude that it is more likely than not (in other words, probable) that the fact sought to be proven is true. For example, if an individual is unable to obtain a copy of his birth certificate to establish his date of birth, baptismal records issued by a church showing that an individual was born at a certain time would be acceptable secondary evidence of the birth for purposes of satisfying the DACA age guideline. Similarly, to satisfy the continuous residence guideline under DACA, rental agreements in the name of the DACA requestor's parent could be acceptable secondary evidence demonstrating periods of the requestor's residence in the United States, if corroborating evidence in the file (for example, school or medical records) points to the DACA requestor's residence at that address.

Sufficiency of the Evidence

The sufficiency of all evidence is judged according to its relevance, consistency, and credibility.

Continued on next page

Definitions and Applicability to DACA, Continued

Evidence (Continued)

Totality of the Evidence

For DACA, the totality of the documentary evidence should be reviewed to determine whether the facts needed to establish a specific guideline have been demonstrated. In many instances, an adjudicator may be satisfied based upon the review of all the documentary evidence, that it is more likely than not that a specific guideline has been met even if the record does not contain one specific document that, in fact, satisfies the guideline. For example, if a DACA requestor is unable to submit a specific document evidencing his/her presence in the United States on June 15, 2012, he/she may be able to satisfy this guideline by submitting various forms of credible documentation evidencing that he/she was present in the United States shortly before and shortly after June 15, 2012 from which the officer could infer, based on the totality of the evidence, that the individual was present in the United States on June 15, 2012. (Note: evidence upon which one may infer that a fact has been demonstrated is also known as "circumstantial evidence," a term that appears in many DACA public information documents).

Officers must see documentary evidence (either primary or secondary) in order to determine if the following guidelines have been met:

- Requestor was under the age of 31 on June 15, 2012; and
- Requestor is currently in school, has graduated or obtained a certificate of completion 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

Officers may not infer from other sources that either of these two guidelines have been met.

Officers should look to the totality of the evidence (meaning that facts can be inferred from one or more sources) to determine if the following guidelines have been met:

- The requestor was physically present in the United States on June 15, 2012;
- The requestor came to the United States before reaching his/her 16th birthday;
- The requestor satisfies the continuous residence requirement, (as long as he or she presented clear documentation of continuous residence in the United States for a portion of the required five-year period and any other evidence submitted supports a finding that the requestor was actually residing in the U.S. during the period for which he has not provided clear documentary evidence of such residence); and
- Any travel outside the United States during the five years of required continuous presence was brief, casual, and innocent.

Continued on next page

Definitions and Applicability to DACA, Continued

Evidence (Continued)	For the remaining guidelines, i.e., the requestor was in unlawful status on June 15, 2012, has no disqualifying criminal convictions, and does not otherwise pose a threat to public safety or national security, the information presented by the DACA requestor on his/her Form I-821D in combination with background and security checks, routine systems checks, supporting evidence submitted by the requestor, and any other information on file, may establish that these guidelines have been met.
Front End Check	Security and systems checks performed upon the receipt of an application or petition or other requests to screen for national security, EPS, fraud, or other criminal concerns.
HQ FDNS	Headquarters Office of the Fraud Detection and National Security Directorate of USCIS.
Hit	A record returned by a security or background check system in response to a query that may relate to the subject being queried.
Interpol	International Criminal Police Organization, the world's largest international police organization. This organization facilitates cross-border police cooperation and supports and assists all organizations, authorities, and services whose mission is to prevent or combat international crime.
JTTF	Joint Terrorism Task Force. The JTTF is run by the Federal Bureau of Investigation (FBI). The JTTF is comprised of small groups of highly trained, locally based members from U.S. law enforcement and intelligence agencies. JTTF is responsible for all domestic and international terrorism matters.

Continued on next page

Definitions and Applicability to DACA, Continued

KST

Known or Suspected Terrorist.

(b)(7)(e)

**National
Security
(NS)
Concern**

An NS Concern exists when an individual or organization has been determined to have an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in §§ 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B) of the Act. This determination requires that the case be handled according to the CARRP policy outlined in the memorandum issued on April 11, 2008.

NCIC

The National Crime Information Center (NCIC) is a database maintained by the FBI. NCIC includes the Interstate Identification Index (NCIC III) that allows authorized users to access criminal history information. Access to NCIC III is limited to FDNS personnel only. FDNS personnel may only access NCIC III when an individual has been determined to have, or is likely to have, a link to a current or planned criminal activity and the case is referred to FDNS for further investigation with the appropriate law enforcement agency, when a reasonable suspicion of fraud is identified that may be referred to ICE for criminal investigation or when an individual has been determined to be involved in current or planned terrorist activity. Prior to accessing NCIC III information, USCIS personnel who are users must first complete the NCIC Certification Course.

NCTC

National Counterterrorism Center. In August 2004, the President established NCTC, a multi-agency organization, to serve as the primary organization for the U.S. Government for integrating and analyzing all intelligence pertaining to terrorism and counterterrorism (CT) and to conduct strategic operational planning by integrating all instruments of national power.

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Definitions and Applicability to DACA, Continued

No Match	This annotation is used on the Record of if a query results in a hit.
Non-KST	A Non-KST NS concern includes all other NS concerns, regardless of the source, including but not limited to: associates of KSTs, unindicted coconspirators, terrorist organization members, persons involved with providing material support to terrorists or terrorist organizations, and agents of foreign governments.
(b)(7)(e)	
Primary Name and DOB	The name and date of birth provided by an applicant, petitioner, or requestor as his/her given name and date of birth. This is generally listed in the first part of the application/petition/request.
Relates	This annotation is used on the ROIQ if a query results in a hit that closely corresponds to the subject queried.
Resolution	A determination of the effect or relevance of the available information on the eligibility of the applicant, requestor, petitioner, beneficiary, or derivative for the benefit or request sought.
ROIQ	Record of IBIS Query. This form is used to record the search criteria queried and the results of those queries. The ROIQ was revised on March 5, 2013 to include checkbox "R" for requestors.
SNAP	Scheduling and Notification of Applicants For Processing. An automated system that schedules appointments for individuals to submit biometric information to ASCs.
Secretary's Memorandum	The June 15, 2012, memorandum entitled, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, issued by the Secretary of Homeland Security.

Continued on next page

Definitions and Applicability to DACA, Continued

Security Check	A specific check or a combination of checks required for each application, petition, or request conducted in accordance with Agency policy.
(b)(7)(e)	
System Match	A record returned by [REDACTED] in response to a query, the subject of which may or may not relate to the subject being queried. This is the same as a [REDACTED] hit.
TECS	TECS is formerly known as the Treasury Enforcement Communications System/Interagency Border Inspection System. TECS is an automated enforcement and inspection lookout system that combines information from multiple agencies, databases, and system interfaces to compile data relating to national security risks, public safety issues, current or past targets of investigations, and other law enforcement concerns. The system is maintained by U.S. Customs and Border Protection.
VGTOF	Violent Gang and Terrorist Organization File. The VGTOF file has been designed to provide identifying information about violent criminal gangs and terrorist organizations and members of those gangs and organizations to law enforcement personnel. This information serves to warn law enforcement officers of the potential danger posed by violent individuals and to promote the exchange of information about these organizations and members to facilitate criminal investigations. USCIS has access to VGTOF through NCIC.

Chapter 14: DACA Termination

Removal Deferred Under DACA - Requestor did not Satisfy the Guidelines

If it comes to the attention of an officer that removal was deferred under DACA in error, the officer should reopen the case on Service motion and issue a Notice of Intent to Terminate, unless there are criminal, national security, or public safety concerns (see below). The individual should be allowed 33 days to file a brief or statement contesting the grounds cited in the Notice of Intent to Terminate. The Notice of Intent to Terminate should include a statement that if deferred action for childhood arrivals is terminated, any associated employment authorization granted during the period of deferred action will be terminated for cause.

If the adverse grounds are not overcome, or no response is received to the Notice of Intent to Terminate, the officer should prepare a Termination Notice and seek supervisory review of the draft Termination Notice, prior to issuance. The Termination Notice should indicate that the individual's employment authorization is terminated for cause as of the date of the notice.

Fraud

If it comes to the attention of an officer that an individual committed fraud in seeking deferral of removal under DACA, the officer should reopen the case on Service motion and issue a Notice of Intent to Terminate. The individual should be allowed 33 days to file a brief or statement contesting the grounds cited in the Notice of Intent to Terminate. The Notice of Intent to Terminate should include a statement that if deferred action for childhood arrivals is terminated, any associated employment authorization granted during the period of deferred action will be terminated for cause.

If the adverse grounds are not overcome, or no response is received to the Notice of Intent to Terminate, the officer should prepare a Termination Notice and seek supervisory review of the draft Termination Notice prior to issuance. The Termination Notice should indicate that the individual's employment authorization is terminated for cause as of the date of the notice.

The decision to issue a Notice of Intent to Terminate based on fraud should be supported by a fully documented SOF and any other relevant documents/information. The terminated DACA case must also be appropriately recorded in FDNS-DS.

Continued on next page

DACA Termination, Continued

Criminal, National Security, or Public Safety Issues

If disqualifying criminal offenses or public safety concerns, which are deemed to be EPS, arise after removal has been deferred under DACA, the officer should forward the case to the BCU DACA Team who, in turn, will refer the case to ICE and follow the handling procedures outlined in the November 7, 2011 NTA memorandum for EPS cases. If ICE accepts the case, the issuance of the NTA will result in the termination of DACA. Upon the filing of the NTA with EOIR, the individual's employment authorization terminates automatically.

If ICE does not accept the case or if the disqualifying criminal offense is non-EPS per the November 7, 2011 NTA memorandum, the BCU DACA Team should reopen the case on Service motion and issue a Notice of Intent to Terminate. The individual should be allowed 33 days to file a brief or statement contesting the grounds cited in the Notice of Intent to Terminate. The Notice of Intent to Terminate should include a statement that if deferred action for childhood arrivals is terminated, any associated employment authorization granted during the period of deferred action will be terminated for cause.

If the adverse grounds are not overcome, or no response is received to the Notice of Intent to Terminate, the officer should prepare a Termination Notice and seek supervisory review of the draft Termination Notice prior to issuance. The Termination Notice should indicate that the individual's employment authorization is terminated for cause as of the date of the notice. Consequently, the Class of Admission (COA) code in CIS should be changed to DAT (Deferred Action Terminated) for employment verification purposes. Additionally, the BCU DACA Team should forward the individual's name to ERO.

If national security concerns arise after removal has been deferred under DACA, the case should go through the CARRP process, per established CARRP protocols.

Continued on next page

DACA Termination, Continued

**Enforcement
Priority –
DACA Not
Automatically
Terminated**

If after consulting with ICE, USCIS determines that exercising prosecutorial discretion after removal has been deferred under DACA is not consistent with the Department of Homeland Security's enforcement priorities, and ICE does not plan to issue an NTA, the officer should refer the case to HQSCOPS, though the normal chain of command, to determine whether or not a NOIT is appropriate. If it is determined that the case warrants final termination, the officer will issue DACA 603 – Termination Notice [Enforcement Priority; Not Automatically Terminated] from the Appendix I.

**System
Updates**

The following new HACs must be used as appropriate when updating a Notice of Intent to Terminate DACA and a DACA Termination Notice in C3:

(b)(7)(e)



See Appendix I for Notice of Intent to Terminate and Termination Notice.

Appendix I

NOTE: Text highlighted in **YELLOW** and bracketed by [] is hidden text that requires ISO input. The ISO should delete the highlighted bracketed [Text] and type in the necessary information, or choose the appropriate information from choices and delete the information that does not apply.

DACA 600 – Notice of Intent to Terminate

On [Date], you filed Form I-821D, Consideration of Deferred Action for Childhood Arrivals. USCIS approved your Form I-821D on [Date] deferring your removal from the United States. A review of your records reveals that [ISO should thoroughly explain why the removal was deferred under DACA in error or that it has come to the attention of USCIS that the individual committed fraud in seeking deferral of removal under DACA. If the decision to issue a Notice of Intent to Terminate is based on fraud, it should be supported by a fully documented SOF and any other relevant documents/information.]

Based on the information outlined above, USCIS is notifying you of its intent to terminate your deferred action for childhood arrivals. A final decision to terminate your deferred action for childhood arrivals will not be made for 33 days. During that time, you may submit any evidence that you feel will overcome the grounds for termination. If your response is not received within the allotted time or if your response to this notice does not overcome the grounds for termination, USCIS will terminate your deferred action for childhood arrivals. If your deferred action for childhood arrivals is terminated, any associated employment authorization granted during the period of your deferred action will be terminated for cause

DACA 601 – Termination Notice [After NOIT]

On [Date], you were notified that it was the intent of USCIS to terminate your deferred action for childhood arrivals. In response to the Intent to Terminate, you [ISO should summarize the individual's response to the Intent to Terminate or indicate that the individual did not respond within the allotted time].

Your response does not overcome the grounds for termination. [If the individual's response does not overcome the reason for the termination as outlined in the Notice of Intent to Terminate, the ISO should explain why]. Therefore, your deferred action for childhood arrivals is terminated as of the date of this notice. In addition, your employment authorization is terminated for cause as of the date of this notice.

You must return your Employment Authorization Document (EAD) to USCIS immediately. Fraudulent use of your EAD could result in a referral to law enforcement. Send a copy of this notice and your EAD to:

[Insert Service Center
Address]

DACA 602 – Termination Notice [NTA Issuance]

On [Date], you filed Form I-821D, Consideration of Deferred Action for Childhood Arrivals. USCIS approved your Form I-821D on [Date] deferring your removal from the United States.

On [Date NTA served on alien], [U.S. Citizenship & Immigration Services (USCIS)/Immigration & Customs Enforcement (ICE)] issued you a Notice to Appear (NTA).

Your deferred action as a childhood arrival and your employment authorization automatically terminated as of the date your NTA was issued. You must return your Employment Authorization Document (EAD) to USCIS immediately. Fraudulent use of your EAD could result in a referral to law enforcement. Send a copy of this notice and your EAD to:

[Insert Service Center
Address]

DACA 603 – Termination Notice [Enforcement Priority; Not Automatically Terminated]

On [Date], you filed Form I-821D, Consideration of Deferred Action for Childhood Arrivals. USCIS approved your Form I-821D on [Date] deferring your removal from the United States.

After consulting with U.S. Immigration & Customs Enforcement, USCIS has determined that exercising prosecutorial discretion in your case is not consistent with the Department of Homeland Security's enforcement priorities. Therefore, your deferred action for childhood arrivals is terminated as of the date of this notice. In addition, your employment authorization is terminated for cause as of the date of this notice.

You must return your Employment Authorization Document (EAD) to USCIS immediately. Fraudulent use of your EAD could result in a referral to law enforcement. Send a copy of this notice and your EAD to:

[Insert Service Center
Address]