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; and U.S. CITIZENSHIP AND IMMIGRATION SERVICES,

Defendants.

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

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

Noted for Consideration: March 2, 2018

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I. INTRODUCTION

Plaintiff Daniel Ramirez Medina was wrongly stripped of his DACA status and work authorization by the government, and faces the prospect of removal and separation from his family due to Defendants' unlawful actions. And now, Defendants' wrongs prevent Mr. Ramirez from taking advantage of a recently issued nationwide injunction, applicable to all DACA recipients, that would allow him to extend his DACA status and work authorization for another two-year period.

Mr. Ramirez accepted the quid pro quo the government offered him in applying for and renewing DACA status, and he played by the rules of the program. He stepped forward, provided the government sensitive personal information, passed multiple DHS background checks, paid substantial fees, and stayed out of trouble. Through DACA, Mr. Ramirez was able to provide for his family and rest easy knowing that he would not be arrested or detained based solely on his immigration status. But on February 10, 2017, the government broke its deal with Mr. Ramirez by unlawfully arresting him and revoking his DACA status, detaining him for weeks without cause, and trying to justify its wrongdoing with false and unsubstantiated claims that he was a gang member. The government has not made amends for—or even admitted—its wrongdoing, and Mr. Ramirez continues to suffer from this arbitrary and unlawful conduct.

Compounding Mr. Ramirez's ongoing harm and heightening the need for immediate injunctive relief is the fact that on January 9, 2018, a court in the Northern District of California issued a preliminary injunction requiring the government to maintain the DACA program on a nationwide basis and to allow DACA recipients to renew their DACA status. *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, Case No. 3:17-CV-05211-WHA, Dkt. 234, Order, at 43 (N.D. Cal. Jan. 9, 2018) (the "Injunction"). The court recognized that, "[b]efore DACA, [DACA holders], brought to America as children, faced a tough set of life and career choices turning on the comparative probabilities of being deported versus remaining here. DACA gave them a more tolerable set of choices, including joining the mainstream workforce. Now, absent an injunction, they will slide back to the pre-DACA era and associated hardship." *Id.*

Mr. Ramirez is in this precise predicament—the Defendants' wrongful conduct has forced him "back to the pre-DACA era and associated hardship" of not being able to work and support his

family, and of being threatened with exile, despite the deal he made with the government. Without immediate relief from this Court, Mr. Ramirez cannot benefit from the Injunction, as Defendants wrongfully stripped him of his DACA status, and thus he cannot seek renewal of that status pursuant to the Injunction, or otherwise receive the benefits of DACA status.

Mr. Ramirez respectfully requests that this Court order the government to reinstate Mr. Ramirez's DACA status and his work permit. Other district courts throughout the country—including two in the Ninth Circuit—have granted similar injunctions in recent months, recognizing the serious harm that wrongfully terminating DACA causes to those who meet the program's criteria.[1] The case before this Court is no different and presents similar, if not more compelling circumstances, warranting immediate relief.

II. BACKGROUND

A. The establishment of DACA

On June 15, 2012, then-Secretary of Homeland Security Janet Napolitano issued a memorandum establishing the DACA program (the "2012 DACA Memorandum"). Dkt. 78-3, at 1. Under DACA, individuals who were brought to the United States as young children and meet certain specific criteria may request deferred action for a period of two years, subject to renewal. In exchange, applicants are required to provide the government with highly sensitive personal information, submit to a rigorous background check, and pay a considerable fee. The 2012 DACA Memorandum explained that DACA covers "certain young people who were brought to this country as children and know only this country as home" and that the immigration laws are not "designed to remove productive young people to countries where they may not have lived or even speak the language." *Id.* at 1–2.

Like other forms of deferred action, DACA serves the government's interests by allowing the government to prioritize its resources and exercise discretion for its own convenience and to advance sound policies. As the government has recognized, our nation "continue[s] to benefit . . . from the

[1] *See Inland Empire-Immigrant Youth Collective v. Duke*, 2017 WL 5900061, at *10 (C.D. Cal. Nov. 20, 2017) (enjoining "USCIS's decision to terminate Plaintiff's status under [DACA]"); *Gonzalez Torres v. U.S. Dep't of Homeland Sec.*, 2017 WL 4340385, at *7 (S.D. Cal. Sept. 29, 2017) (same); *Coyotl v. Kelly*, 261 F. Supp. 3d 1328, 1344–45 (N.D. Ga. June 12, 2017) (same).

contributions of those young people who have come forward and want nothing more than to contribute to our country and our shared future." Dkt. 78-2, at 2 (Letter from Secretary Jeh Charles Johnson to Rep. Judy Chu (Dec. 30, 2016)).

1. The DACA application process

To apply for DACA, applicants must submit extensive documentation establishing that they meet the criteria. Dkt. 78-1, at 9–15 (USCIS DACA FAQs, Q28–41). They must also undergo a thorough background check, in which DHS reviews the applicant's biometric and biographic information "against a variety of databases maintained by DHS and other federal government agencies." *Id.* at 7 (USCIS DACA FAQs, Q23). If any information "indicates that [the applicant's] presence in the United States threatens public safety or national security," the applicant is ineligible for DACA absent "exceptional circumstances." *Id.* at 23 (USCIS DACA FAQs, Q65).

Indicators that an individual poses a safety threat include "gang membership." *Id.* Accordingly, "[a]ll DACA requests presenting information that the requestor is or may be a member of a criminal street gang are referred to the Background Check Unit (BCU)." Dkt. 78-5, at 1 (Letter from USCIS Director León Rodríguez to Senate Judiciary Committee Chairman Charles E. Grassley (Apr. 17, 2015)) ("USCIS Letter"). If gang membership is confirmed, the DACA application is denied absent a determination by USCIS that an exception should be made given the totality of the circumstances. *Id.* at 2. In 2015, USCIS conducted an additional screening of all individuals granted deferred action under DACA—including Mr. Ramirez—"to identify records that contained information indicating known or suspected gang association." *Id.* at 4.

2. Limitations on revoking an individual's DACA status

DHS's "National Standard Operating Procedures" set forth strict guidelines for revoking DACA status. *See* Dkt. 78-6 ("DACA SOP"). Most relevant, before revoking DACA, the government must provide a "Notice of Intent to Terminate" ("NIT") which "thoroughly explain[s]" the grounds for the proposed DACA termination. *Id.* at 132 and Appendix I. The DACA SOP then directs that individuals served with an NIT are to be afforded "33 days to file a brief or statement contesting the grounds cited in the [NIT]" before their DACA status is terminated. *Id.* at 132.

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." *Id.* at 132–33. 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")]." *Id.* at 8.

Additionally, when ICE encounters an individual who may be eligible for DACA, the agency uses a prosecutorial discretion checklist. Dkt. 93, at 5 ("ICE AR"). 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.* (emphasis omitted).

B. Mr. Ramirez benefitted from his DACA status

1. Mr. Ramirez was twice granted DACA status

In late 2013, Mr. Ramirez first applied for deferred action and work authorization pursuant to DACA. Dkt. 78-15 ¶ 3 (Declaration of Daniel Ramirez Medina ("Ramirez Decl.")). As part of this process, Mr. Ramirez provided the government with his birth certificate, school records, and information about where he lived, and was required to attend a biometrics appointment so that USCIS could take his fingerprints and photographs. *Id.* Mr. Ramirez was granted deferred action and work authorization in 2014. *Id.* ¶ 6. In 2016, Mr. Ramirez reapplied for DACA, and was again granted deferred action and work authorization after being once again subject to rigorous vetting. *Id.* ¶ 9.

The government sent Mr. Ramirez an approval notice (the "2016 Approval Notice"), providing that, "[u]nless terminated, this decision to defer removal action will remain in effect for 2 years" and is valid to May 4, 2018. Dkt. 78-7. The 2016 Approval Notice advised Mr. Ramirez that his deferred action could be terminated if he engaged in "[s]ubsequent criminal activity." *Id.* DHS has therefore confirmed on three separate occasions that Mr. Ramirez does not pose a threat to national security or public safety—first in 2014, when he applied for DACA; then again in 2015, when USCIS conducted an additional screening of all DACA beneficiaries; and finally in 2016, when he reapplied for DACA. This finding was again confirmed by the government's lawyer on March 28,

2017, when he stated in immigration court that the government had no evidence that Mr. Ramirez was a threat to public safety. And two different immigration judges made findings that Mr. Ramirez 1) was not a threat to public safety, and 2) was not a gang member.[2] Declaration of Nathaniel L. Bach ("Bach Decl.") ¶ 2; Dkt. 78-22, at 1 (Notice to EOIR); *see also* 8 C.F.R. § 236.1(c)(8) (2017).

2. Mr. Ramirez received many benefits from DACA

DACA confers many benefits beyond deferred action, many of which Mr. Ramirez received and took advantage of. Ramirez Decl. ¶¶ 5-7. These benefits include work authorization, eligibility for public benefits such as Social Security, retirement, and disability and, under Washington law, unemployment insurance, financial aid, and food assistance. SAC ¶¶ 28-29, 32. DACA also allows beneficiaries access to other important benefits, enabling recipients to open bank accounts, start businesses, purchase homes and cars, and conduct other aspects of daily life that are otherwise often unavailable to them. *See* SAC ¶¶ 30–31. Accordingly, revocation of DACA implicates a broad range of valuable benefits that include, but extend well beyond, the immigration context.

C. The government's unlawful and arbitrary conduct

1. Mr. Ramirez's unlawful arrest and detention

On February 10, 2017, a team of ICE agents arrested Mr. Ramirez's father outside of the apartment where Mr. Ramirez, his father, and his brother were then living. Ramirez Decl. ¶ 14. The ICE agents then entered the apartment and began to question Mr. Ramirez. He told the agents his name and birthdate, and that he was born in Mexico. *Id.* ¶ 15. At this point, one of the agents handcuffed Mr. Ramirez. *Id.* Mr. Ramirez told the ICE agents repeatedly that he had a valid work permit, but the ICE agents refused to release him. *Id.* Mr. Ramirez's father also repeatedly told the ICE agents that Mr. Ramirez had a valid work permit, and questioned why he was being detained. Dkt. 78-16 ¶ 11 (Declaration of Josue L. ("Josue L. Decl.")). The ICE agents did not ask any questions at the apartment regarding whether Mr. Ramirez was involved with a gang, nor did they ask him about his tattoo. Ramirez Decl. ¶ 16. Despite being told repeatedly that Mr. Ramirez was authorized to be in the United States, the agents took him into custody and brought him to a holding

[2] Relevant portion of January 17 ,2018 Immigration Court hearing transcript will be submitted to the Court once it becomes available to counsel.

facility in Tukwila, Washington. *Id.* ¶¶ 16–17; *see also* Dkt. 78-8, at 3 ("Form I-213").

At the holding facility, the ICE agents confiscated Mr. Ramirez's work permit. Ramirez Decl. ¶ 17. This permit was marked with a "C33" designation, which identified Mr. Ramirez as a DACA recipient with work authorization. *See* Dkt. 78-6, at 112. The ICE agents also fingerprinted Mr. Ramirez and used this information to access his records, which revealed that Mr. Ramirez had no criminal history, had twice been granted DACA status, and possessed valid employment authorization through May 4, 2018. *See* Ramirez Decl. ¶ 17. When Mr. Ramirez again protested that he had a work permit, he was told by Defendants' agents that it did not matter because he "was not from the United States." *Id.* Defendants subsequently cited Mr. Ramirez's receipt of DACA as evidence of his "illegal" status in the Form I-213. Form I-213 at 3.

The ICE agents further interrogated Mr. Ramirez, asking him at least five times whether he was in a gang, and each time he denied any gang affiliation. Ramirez Decl. ¶¶ 19–22. The ICE agents repeatedly pressed him as to whether he had ever known anyone who was a gang member. *Id.* Under pressure from the agents' aggressive interrogation, Mr. Ramirez told them that, when he was in high school, he used to "hang out with" some people who were in gangs, but that he himself was not gang affiliated and never had been. *Id.* ¶ 22.

The ICE agents also interrogated Mr. Ramirez about the tattoo on his forearm. *Id.* ¶ 23. He got this tattoo when he was 18 years old, before he first applied for DACA. *Id.* The tattoo consists of the words "La Paz – BCS"—his birthplace in Baja California Sur—and a nautical star. *Id.* ¶¶ 23–24. During the interrogation, one of the ICE agents said that if Mr. Ramirez was from Fresno, he was "definitely a gang member" because everyone in Fresno is a member of the "bulldogs" gang, and that Mr. Ramirez's tattoo was a "bulldogs" tattoo. *Id.* ¶¶ 21–25. Mr. Ramirez repeatedly told the ICE agents that the tattoo is not a gang tattoo, but they refused to believe him. *Id.* ¶ 25.

Mr. Ramirez was then transferred to Northwest Detention Center, where he remained in custody for the next 47 days. Pursuant to an order of this Court, Mr. Ramirez received a bond hearing in Immigration Court on March 28, 2017. *See* Dkt. 69, at 3. At the bond hearing, the government did not offer any evidence to show that Mr. Ramirez a gang member and instead conceded that Mr. Ramirez is not a danger to the community. Bach Decl. ¶ 2 ("I don't believe from

this record there is enough for us to argue that he's a danger to the community . . . ."). The Immigration Judge concluded that Mr. Ramirez is neither a flight risk nor a danger to the community and should be released on bond. Dkt. 78-22, at 1 (Notice to EOIR); *see also* 8 C.F.R. § 236.1(c)(8) (2017). Mr. Ramirez was released on March 29, 2017. Dkt. 78-22, at 1.

Defendants have not produced any evidence to support their false claim that Mr. Ramirez is "gang affiliated." Indeed, Mr. Ramirez's attorneys have repeatedly asked the government to produce any evidence to establish that Mr. Ramirez is a gang member, but Defendants failed to do so time and again. Declaration of Mark D. Rosenbaum, ¶¶ 4-7. And Mr. Ramirez has submitted extensive evidence demonstrating that he is not, and never has been, a gang member. In addition to evidence demonstrating that he successfully passed three separate DHS background checks, Mr. Ramirez submitted numerous sworn declarations attesting to the fact that he has never had any gang affiliation. *E.g.*, Ramirez Decl. ¶¶ 19–20; Josue L. Decl. ¶ 4; Dkt. 78-17 ¶¶ 8–9 (Declaration of Luz L.); Dkt. 78-18 ¶ 8 (Declaration of Nancy L.).

Additionally, three independent experts rebutted Defendants' claims that Mr. Ramirez is gang affiliated. Martin Flores, who has served as a gang expert in more than 700 cases, stated that he has "never seen a gang member with a similar tattoo nor would [he] attribute this tattoo to have any gang-related meaning." Dkt. 78-19 ¶ 11 (Declaration of Martin M. Flores ("Flores Decl.")). Another gang expert, Dr. Edwina Barvosa, similarly stated that there is "no apparent evidence that Mr. Ramirez Medina has ever been a gang member himself." Dkt. 78-20 ¶ 10 (Declaration of Edwina Barvosa, PhD ("Barvosa Decl.")). And Carlos García, a Mexican researcher who has written extensively on gangs in California and Central America, noted that "'[a]ny argument about gang ties based on [Mr. Ramirez's] tattoo is weak at best; this tattoo does not show any gang affiliation.'" Dkt. 78-21, at 4 (Jonathan Blitzer, *A Case That Could Determine the Future for Dreamers*, The New Yorker (Mar. 15, 2017), https://goo.gl/SWDUhs).

2. The unlawful and arbitrary revocation of Mr. Ramirez's DACA status

Defendants issued a Notice to Appear on February 10, 2017, alleging as the basis for removal that Mr. Ramirez was unlawfully present in the United States. Dkt. 78-9, at 1 ("NTA"). USCIS sent Mr. Ramirez a Notice of Action dated February 17, 2017. Dkt. 78-10, at 1 ("NOA"). The NOA

states that Mr. Ramirez's deferred action and employment authorization terminated "automatically" on the date the NTA was issued, and provides that "[a]n appeal or motion to reopen/reconsider this notice of action may not be filed." *Id.*

As explained above, DHS policy requires the government to provide an NIT and 33 days for a response prior to terminating DACA status, unless the case involves an EPS issue. DACA SOP at 132 and Appendix I. Mr. Ramirez was never provided with an NIT, nor was he given 33 days—or any time at all—to respond to such a notice or otherwise contest the revocation of his DACA status or work permit. The government's own records demonstrated that Mr. Ramirez had "no criminal history" and the various database checks run at the time of his arrest did not reflect any flags or investigations, making any claim on the government's part that this was an EPS case highly unlikely. Form I-213 at 4. Further, the ICE officers who arrested Mr. Ramirez failed to consult with the Office of Chief Counsel for further review, as is required where a purported "threat to . . . public safety" is the reason for DACA ineligibility. ICE AR at 5 (emphasis omitted).[3]

Defendants' arbitrary decision and failure to follow their own procedures resulted in tremendous, and entirely avoidable, harm to Mr. Ramirez. One of the primary purposes of such procedures is to prevent errors like those that occurred here, which can have life-altering consequences for DACA recipients and their families. Here, Mr. Ramirez—a young father the government now admits is no threat to public safety—was kept behind bars for more than six weeks and is being deprived of the ability to earn a living and support his family, as well as the other benefits that DACA status provides, like protection from the removal now facing him because of the removal order issued on January 17, 2018.[4] *See* Third Suppl. Decl. of Ramirez Medina ¶ 2.

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[3] The checklist provides that consultation with the Office of Chief Counsel is required when an alleged public safety concern is the "only basis for ineligibility." ICE AR at 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 school after his initial request for DACA was approved. *See* USCIS DACA FAQs, Q54.

[4] Other courts have held that the government is violating its own procedures in revoking DACA. *See Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. 3:17-cv-05211-WHA, Dkt. 111, Mot. For Prelim. Inj. (N.D. Cal. Nov. 1, 2017) (and related cases); *Coyotl*, 261 F. Supp. 3d at 1343 (enjoining decision to terminate Plaintiff's DACA status and noting that government agencies "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*, No. 3:17-cv-00780-GPC-NLS, Dkt. 29-1, Mot. for Prelim. Inj. at 22 (S.D. Cal. July 17, 2017) (alleging that DHS unlawfully expelled plaintiff from United States and then "use[d] their own wrongful conduct as a predicate" to revoke his DACA status).

III. LEGAL STANDARD

A preliminary injunction is warranted where the plaintiff establishes that (1) he is "likely to succeed on the merits," (2) he is "likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities" tips in his favor, and (4) an "injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (quoting *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

In addition, under the Ninth Circuit's sliding scale approach, "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as" the irreparable injury and public interest elements are satisfied. *All. for the Wild Rockies*, 632 F.3d at 1135 (internal quotation marks omitted). In other words, "[i]f the balance of harm tips decidedly toward [Mr. Ramirez], then [he] need not show as robust a likelihood of success on the merits as when the balance tips less decidedly." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (internal quotation marks omitted).

IV. ARGUMENT

A. Mr. Ramirez is likely to succeed on the merits.

Mr. Ramirez is likely to establish that the government's revocation of his DACA status and work authorization violated the APA in several ways. Specifically, the government violated the APA because its conduct was: (1) "arbitrary, capricious, [and] an abuse of discretion," SAC ¶¶ 85–89; (2) contrary to its own internal operating procedures and therefore in violation of the *Accardi* doctrine, *id.* ¶ 90; and (3) in violation of Mr. Ramirez's rights under the Due Process Clause, *id.* ¶¶ 92–105.

1. The revocation of Mr. Ramirez's DACA status was arbitrary and capricious.

The APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin v. Massachusetts,* 505 U.S. 788, 796 (1992). To ensure that agency actions are reasonable and lawful, a court must conduct a "thorough, probing, in-depth review" of the agency's reasoning and a "searching and careful" inquiry into the factual underpinnings of the agency's decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971). A court "shall" set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Butte*

Envtl. Council v. U.S. Army Corps of Eng'rs, 620 F.3d 936, 945 (9th Cir. 2010).

Agency action is "arbitrary and capricious" if the agency "[1] relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

While the government asserted "that it is allowed to withdraw DACA at any time for no reason at all," *Ramirez Medina v. U.S. Dep't of Homeland Sec.*, 2017 WL 5176720, at *9 (W.D. Wash. Nov. 8, 2017), the APA nevertheless requires the government to "exercise its discretion in a reasoned manner" and make discretionary decisions "based on non-arbitrary, 'relevant factors,'" *Judulang v. Holder*, 565 U.S. 42, 53, 55 (2011). Indeed, the Supreme Court emphasized that, even where agencies retain substantial discretion, "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Id.* at 53. In such circumstances, courts "must assess, among other matters, 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* (citation and internal punctuation omitted).[5] That task "involves examining the reasons for agency decisions—or, as the case may be, the absence of such reasons." *Id.* (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (noting "the requirement that an agency provide reasoned explanation for its action")). Here, the government's abrupt and unsupported decision to revoke Mr. Ramirez's DACA was arbitrary, capricious, and unlawful for multiple reasons. 5 U.S.C. § 706(2)(A).

[5] The Supreme Court's decision in *Judulang* is especially instructive. There, the Court considered a Board of Immigration Appeals ("BIA") rule governing eligibility for suspension of deportation. 565 U.S. at 46–47. The Court made clear that, although the relief was ultimately within the agency's discretion, "the BIA's approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system." *Id.* at 55. The Court emphasized that "[a] method for disfavoring deportable aliens . . . that neither focuses on nor relates to an alien's fitness to remain in the country—is arbitrary and capricious." *Id.* Ultimately, the Court invalidated the BIA rule because it was based on "a matter irrelevant to the alien's fitness to reside in this country," and concluded that the BIA therefore "has failed to exercise its discretion in a reasoned manner." *Id.*

a. Defendants' reliance on unlawful presence was arbitrary and capricious.

The government's one-page NOA states that Mr. Ramirez's DACA and employment authorization were "terminated automatically" based upon the issuance of a NTA. NOA at 1. The NTA, in turn, alleges only that Mr. Ramirez is subject to removal as "an alien present in the United States without being admitted or paroled." NTA at 1. But lack of lawful immigration status is a *predicate* to DACA eligibility and common among every DACA recipient. For this reason, "the issuance of an NTA charging presence without admission does not provide a reasoned basis for terminating DACA." *Inland Empire*, 2017 WL 5900061, at *6 (internal quotation marks omitted). On the contrary, the government's failure to provide any reasoning in the NTA or NOA for "automatically" terminating Mr. Ramirez's DACA demonstrates that its decision was arbitrary and irrational. *See id.* at *7 ("[G]iven that *all* DACA recipients are necessarily removable due to their unauthorized presence, '[t]he agency's reliance on an NTA citing [Plaintiff's] presence without admission simply fails to explain, much less justify, the agency's decision to reverse course and terminate his DACA." (citation omitted)): *cf. Gonzalez Torres*, 2017 WL 4340385, at *6. For this reason alone, Mr. Ramirez is likely to succeed on the merits of his APA claim.

b. Defendants' claim that Mr. Ramirez poses an egregious public safety concern is contradicted by the administrative record.

The government's rationalizations for revoking Mr. Ramirez's DACA status—none of which appears on the face of the NTA or the NOA—are also insufficient, as they are contradicted by the administrative record. It is black letter law that courts review agency action according to the contemporaneous reasons given by the agency, and disregard any alternative rationales presented during litigation. *See Overton Park*, 401 U.S. at 419; *see also SEC v. Chenery Corp.*, 318 U.S. 80, 87–88 (1943). The Ninth Circuit further explained that "[t]he rule barring consideration of *post hoc* agency rationalizations operates where an agency has provided a particular justification for a determination at the time the determination is made, but provides a different justification for that same determination when it is later reviewed by another body." *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 511 (9th Cir. 1997).[6] Moreover, agency action is arbitrary and capricious if the

[6] *Accord Toor v. Lynch*, 789 F.3d 1055, 1064 (9th Cir. 2015) (agency action may only be affirmed based on the

contemporaneous reasons underlying the decision "run[] counter to the evidence before the agency." *Ranchers Cattlemen*, 499 F.3d at 1115 (internal quotation marks omitted).

The government asserts that ICE officers determined—based on information obtained during his arrest—that Mr. Ramirez was "affiliated with a gang" and that his DACA was therefore subject to immediate termination on EPS grounds. *See, e.g.*, Dkt. 90, at 18 (Motion to Dismiss); *see also id.* at 6 ("ICE may issue an NTA if a disqualifying criminal offense or public safety concern, deemed to be an Egregious Public Safety ('EPS') issue, arises after removal has been deferred under DACA." (footnote omitted)). But any such conclusion—which is fundamentally at odds with multiple prior analyses concluding that Mr. Ramirez did not present an EPS threat—plainly "runs counter to the evidence before the agency" and presents the sort of inconsistency that is the hallmark of arbitrary action. *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 833 F.3d 1136, 1146 (9th Cir. 2016) (internal quotation marks omitted).

First, the administrative record does not support the assertion that the information available to ICE—including information gained "through Plaintiff's arrest and detention process"—indicated Mr. Ramirez was a gang member or was "affiliated with a gang." Dkt. 90, at 18. According to the Form I-213, an ICE field agent purportedly determined that Mr. Ramirez "does not qualify" for DACA "due to gang association." Form I-213 at 3; *see also* ICE AR at 25. But the Form I-213 includes only the following conclusory paragraph regarding purported "gang activity":

> Subject was asked if he is or has been involved with any gang activity. Subject stated "No not no more". Subject was questioned further regarding the gang tattoo on his forearm. Subject then stated that he used to hang out with the Sureno's in California. Subject stated that he fled California to escape from the gangs. Subject stated that he still hangs out with the Paizas in Washington State.

Form I-213 at 3.[7] These assertions—even if they were true—do not support the conclusion that Mr. Ramirez is gang-affiliated. For example, although the Form I-213 asserts (without explanation) that

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contemporaneous "explanations offered by the agency") (internal quotation marks omitted) (quoting *Arrington v. Daniels*, 516 F.3d 1106, 1112–13 (9th Cir. 2008)); *Shirrod v. Dir., Office of Workers' Comp. Programs*, 809 F.3d 1082, 1087 n.4 (9th Cir. 2015) (court must "review only what [the agency] did, not what [it] could have done").

[7] All references herein are to the first-filed Form 1-213. As this Court has recognized, the government has submitted two different 1-213 forms, both of which purport to be signed on the same day, by the same person, but the second-filed of which omits language that is harmful to the government's defense. *See* Dkt 93, at ICE CAR 000023–29. This conduct is a prime example of the government's shifting narrative and lack of real evidence to support their contentions.

Mr. Ramirez had a "gang tattoo," the tattoo in question consists merely of the words "La Paz – BCS" and a nautical star. "La Paz" is Mr. Ramirez's birthplace, "BCS" stands for Baja California Sur (the region in which La Paz is located), and the nautical star is a popular symbol. Indeed, Martin Flores, who has served as a gang expert in more than 700 cases, indicated that he has "never seen a gang member with a similar tattoo nor would [he] attribute this tattoo to have any gang-related meaning." Flores Decl. ¶ 11.[8] And despite being confronted with contrary evidence, the government has offered no explanation, let alone evidence (contemporaneous or otherwise) to support its assertion that the tattoo in question is a "gang tattoo." Similarly, the claims that Mr. Ramirez "*used to hang out* with the Sureno's in California," "fled California to escape from the gangs," and "still *hangs out* with the Paizas in Washington State" do not support the conclusion he was affiliated with any gang, as opposed to just having known gang-affiliated individuals (which cannot be avoided for individuals living in certain neighborhoods). Barvosa Decl. ¶ 9; *see also* Ramirez Decl. ¶ 22.

And none of these vague assertions was remotely sufficient to rebut or supersede the formal findings of three separate DHS background checks, spread over two years, including the additional screening of all DACA recipients that was *specifically* meant to uncover evidence of "known or suspected gang association." USCIS Letter at 4. The careful and thorough vetting and the ultimate findings of these three separate background checks cannot be overridden or ignored based upon "the fortuity of an individual official's decision" regarding gang activity. *Judulang*, 565 U.S. at 58; *cf. id.* (reversing agency decision where "[a]n alien appearing before one official may suffer deportation[, while] an identically situated alien appearing before another may gain the right to stay in this country"); *cf. also Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) (recognizing the "high and momentous" stakes for an immigrant who has long resided in this country, and reversing a decision that would "make his right to remain here dependent" on "fortuitous and capricious" circumstances).

Underscoring Defendants' bad faith efforts to fabricate this *post hoc* justification is the government's recent evidentiary submission made to the Immigration Court in connection with Mr.

[8] Two other experts have also opined that Mr. Ramirez is not associated with a gang. Barvosa Decl. ¶ 10 (stating that there is "no apparent evidence that Mr. Ramirez Medina has ever been a gang member himself"); Blitzer, *supra* (quoting expert Carlos García as explaining that "[a]ny argument about gang ties based on [Mr. Ramirez's] tattoo is weak at best; this tattoo does not show any gang affiliation").

Ramirez's January 17, 2018 hearing. The so-called evidence proffered amounts to nothing more than random articles regarding gang membership that bear no relation to Mr. Ramirez and stand for nothing more than the abstract propositions that gang members often do not willingly admit gang membership, and that some gangs discourage their members from obtaining tattoos. Bach Decl. ¶ 5, at 37, 42 (DHS's Second Submission of Evidence). In any event, many of those articles relate to Central American gangs (from El Salvador, Guatemala or Honduras), and Mr. Ramirez is from Mexico. *Id*. at 40–43. Without evidence of gang affiliation, the government has apparently shifted tactics to claiming that Mr. Ramirez's denials of gang affiliation and *absence* of gang tattoos should be considered evidence of gang affiliation. These attempts were rightly rejected by the Immigration Judge, who made a specific finding that Mr. Ramirez is not a gang member.[9]

Second, even if the evidence did suggest that Mr. Ramirez "was affiliated with a gang," Dkt. 90, at 18, which it does not, the further conclusion that Mr. Ramirez ***presented an EPS issue*** would still "run[] counter to the evidence before the agency." *Ctr. for Biological Diversity*, 833 F.3d at 1146 (internal quotation marks omitted). Importantly, under the governing DACA SOP, an individual presents an EPS issue only when "routine systems and background checks indicate that [he or she] [1] is under investigation for, [2] has been arrested for (without disposition), or [3] 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 NTA Memorandum]." DACA SOP at 8 (emphases added). Here, nothing in the administrative record suggests that, at the time of his unlawful arrest—or at any other time—"routine systems and background checks" indicated Mr. Ramirez was "under investigation for," "arrested for," or "convicted of" any "specified crime." *See* Form I-213 at 1–4.[10] Indeed, the government does not argue otherwise. Rather, as stated above, the government maintains only that "information [obtained] through Plaintiff's arrest and detention process, including interviews with Plaintiff," "suggested . . .

[9] *See* n.2, *supra*.

[10] Neither gang membership nor gang 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. Rowland*, 104 F.3d 1096, 1098 (9th Cir. 1997) ("Associating with gang members is not . . . a crime."); *cf.* USCIS NTA Mem. at 3 (statutory definitions for crimes qualifying as EPS).

that [Plaintiff] was ***affiliated*** with a gang." Dkt. 90, at 18 (emphasis added). But gang affiliation does not fall within the narrow exception for EPS cases under the DACA SOP.

The record shows that Mr. Ramirez had "no criminal history," and that checks run at the time of his arrest did not reflect any flags or investigations. *See* Form I-213 at 3. Indeed, the government's more recent admission that Mr. Ramirez presents no "danger to the community," *see* Bach Decl. ¶ 2 ("I don't believe from this record there is enough for us to argue that he's a danger to the community . . . ."), fatally undermines its claim that Mr. Ramirez presents an "Egregious Public Safety" issue, especially where its own guidelines reserve that classification for extreme cases involving *actual* crimes, like murder, rape, or trafficking in explosives. Any conclusion to the contrary runs counter to the evidence before the government at the time it terminated Mr. Ramirez's DACA, and should be disregarded.[11] At worst, Mr. Ramirez is guilty of having a tattoo.

For all these reasons, DHS's decision to terminate Mr. Ramirez's DACA was arbitrary and capricious and in violation of the APA. *See, e.g.*, *Abdur-Rahman v. Napolitano*, 814 F. Supp. 2d 1098, 1110 (W.D. Wash. 2011) (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").

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

Defendants also acted unlawfully and violated the *Accardi* doctrine as they failed to adhere to their own internal operating procedures by summarily revoking Mr. Ramirez's DACA status and work authorization. *See 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)). "Pursuant to the *Accardi* doctrine, an administrative agency is required to adhere to its own internal operating procedures." *Id.* And in the Ninth Circuit, the *Accardi* doctrine "extends beyond formal regulations," to include "internal operating procedures," "[h]andbook[s]," "policy statement[s],"

[11] At times in this litigation, *e.g.*, Dkt. 90, at 17, the government has improperly relied upon a prior, now-superseded definition of EPS that includes those who are (1) "under investigation for" being (2) "***known or suspected street gang members***," *id.* (internal quotation marks omitted; emphasis added). This earlier definition, which is drawn from the 2011 USCIS NTA Memorandum (issued before DACA was established), is inapplicable here, because the subsequently issued DACA SOP excludes gang membership from the definition of EPS. *See* DACA SOP at 8 (incorporating only certain enumerated "*crimes*" into the definition of EPS) (emphasis added).

"Order[s]," "Standards," "Directive[s]," "Weekly Bulletin[s]," and unpromulgated rules documenting "usual practice." *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004) (internal quotation marks omitted; citing cases).[12] As discussed above, DACA operates under strict guidelines, and the determinations at issue here are nondiscretionary. *Texas v. United States*, 809 F.3d 134, 172–73 (5th Cir. 2015); *Coyotl*, 261 F. Supp. 3d at 1340.

Here, it is undisputed that Defendants failed to provide Mr. Ramirez with either an NIT or any opportunity—let alone 33 days—to contest the allegations against him prior to revoking his DACA status. In addition, the ICE officers who arrested Mr. Ramirez also failed to comply with the requirements of the ICE prosecutorial discretion checklist. In particular, the officers did not consult with the Office of Chief Counsel for further review, as required where a purported "threat to . . . public safety" is the reason for DACA ineligibility. ICE AR at 5 (emphasis omitted). These failures violated DHS's internal guidelines, and, therefore, the *Accardi* doctrine. *See* DACA SOP at 132–33; *see also Inland Empire*, 2017 WL 5900061, at *6–8; *Gonzalez Torres*, 2017 WL 4340385, at *5–6.

The government's undisputed failure to follow the "usual" DACA procedures, *Coyotl*, 261 F. Supp. 3d at 1337, cannot be justified by its "post hoc" reliance on inapplicable EPS guidelines. *See Overton Park*, 401 U.S. at 419; *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014). And indeed, as other district courts have recognized, the government cannot bypass the comprehensive requirements of the DACA SOP by overturning USCIS's reasoned decision on an individual officer's whim. *See Inland Empire*, 2017 WL 5900061, at *7–8 ("[N]othing in the Napolitano Memo supports the notion that, once USCIS implemented the DACA adjudication process and made a considered judgment to grant an individual DACA, the decision could be unilaterally undone by any ICE or CBP officer—indeed, if such were the case, then the SOPs' careful

[12] Indeed, *Accardi* itself was 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*, 261 F. Supp. 3d at 1340.

and detailed procedures governing DACA terminations would be negated." (internal quotation marks omitted)); *see also Gonzalez Torres*, 2017 WL 4340485, at *6. Because the government failed to adhere to its own internal operating procedures in summarily revoking his DACA status, Mr. Ramirez is likely to succeed on the merits of this claim.

3. Defendants violated the APA by disregarding Mr. Ramirez's Due Process rights

Even assuming that Defendants complied with their own established procedures, they still violated the APA by depriving Mr. Ramirez of constitutionally protected liberty and property interests—including important public benefits and the ability to legally work in the United States—without due process of law. The Due Process Clause of the Fifth Amendment "protect[s] every person within the nation's borders from deprivation of life, liberty or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 781 (9th Cir. 2014) (en banc) (quoting *Mathews v. Diaz*, 426 U.S. 67, 77 (1976)) (internal quotation marks omitted).

"[T]he first question in any case in which a violation of procedural due process is alleged is whether the plaintiffs have a protected property or liberty interest and, if so, the extent or scope of that interest." *Nozzi v. Hous. Auth. of City of L.A.*, 806 F.3d 1178, 1190–91 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 52 (2016). The property interests protected by the Due Process Clause "extend beyond tangible property and include anything to which a plaintiff has a 'legitimate claim of entitlement.'" *Id*. at 1191 (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 576–77 (1972)). "A legitimate claim of entitlement is created 'and [its] dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *Id.* (quoting *Roth*, 408 U.S. at 577). This independent source may be a statute, a regulation, "[e]xplicit contractual provisions," "implied" agreements, or "rules or mutually explicit understandings." *Perry v. Sindermann*, 408 U.S. 593, 601–02 (1972). The Ninth Circuit has further explained that an individual has a protected property interest in government benefits where regulations "greatly restrict the discretion of the people who administer those benefits." *Nozzi*, 806 F.3d at 1191 (internal quotation marks omitted).

Here, there is no question that Mr. Ramirez has a legitimate claim of entitlement to his DACA status and the benefits that status conferred for numerous reasons. Specifically, DHS rules and the government's operation of the program, the government's communications with Mr. Ramirez regarding DACA, and many government officials' public promises, collectively created an understanding that Mr. Ramirez was entitled to DACA and its related benefits as long as he played by the rules. *See Perry*, 408 U.S. at 601 ("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 . . . .").

First, the rules and guidelines governing DACA, and the government's operation of the program, evidence Mr. Ramirez's legitimate claim of entitlement to his DACA status and related benefits. For example, the 2012 DACA Memorandum set forth five specific criteria that defined eligibility for the program, and explicitly instructed DHS agents to prevent individuals who met those criteria from being apprehended or placed into removal proceedings. Dkt. 78-3, at 1–3; *see also* Dkt. 78-1, at 5 (USCIS DACA FAQs, Q9) ("[I]f an individual meets the guidelines for DACA, CBP or ICE should exercise their discretion on a case-by-case basis to prevent qualifying individuals from being apprehended, placed into removal proceedings, or removed."). The government also operated a special hotline—"staffed 24 hours a day, 7 days a week"—to assist individuals who met the DACA criteria but were apprehended or placed into removal proceedings. Dkt. 78-1, at 5 (USCIS DACA FAQs, Q9). As a result, the overwhelming majority of applicants who met the basic criteria and properly submitted their application were granted DACA status.[13] *See, e.g.*, USCIS, Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals (Sept. 30, 2017), goo.gl/8AeEcR.

[13] Boilerplate language in the 2012 DACA Memorandum suggesting that it "confers no substantive right" does not disturb Mr. Ramirez's legitimate claim of entitlement. As the Ninth Circuit has explained, the "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 Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (allowing the state to unilaterally limit property interests by providing limited procedures would "reduce[]" the Due Process Clause "to a mere tautology"). And such boilerplate language is routinely rejected or ignored. *See, e.g.*, *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (finding agency action to be "final" despite "boilerplate" disclaimer that action "[did] not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party" (internal quotation marks omitted)); *see also Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 56 (D.C. Cir. 2016) (finding agency action to be "final" despite "boilerplate" disclaimer that agency "may provide further guidance in the future as a result of additional information" (internal quotation marks omitted)).

Second, DACA is operated under a well-defined framework and governed by highly specific criteria that "greatly restrict the discretion of the people who administer," which further underscores Mr. Ramirez's legitimate claim of entitlement to his DACA status and related benefits. *Nozzi*, 806 F.3d at 1191 (finding protected property interest where "regulations closely circumscribe[d] [the agency's] discretion" (internal quotation marks omitted)).[14] For example, to ensure compliance with the criteria set forth in the 2012 DACA Memorandum, ICE agents were required to use a checklist to determine whether an individual qualified for DACA.[15] ICE AR at 5. This checklist did not provide ICE agents with discretion. *Id.* DHS also greatly limited the discretion of those who administer DACA by issuing the DACA SOP, which provides nearly 150 pages of specific instructions for managing the program. *See* Dkt. 78-6. These exacting guidelines are "applicable to all personnel performing adjudicative functions and the procedures to be followed are not discretionary." *Coyotl*, 261 F. Supp. 3d at 1334; *see also Gonzalez Torres*, 2017 WL 4340385, at *4 (noting that the DACA SOP is "non-discretionary"). Indeed, the decision to deny or terminate DACA status is subject to written limitations and, absent special circumstances, requires supervisory review, thereby further evidencing Mr. Ramirez's legitimate claim of entitlement.[16] Dkt. 78-6, at 132–34; *see, e.g.*, *Wedges/Ledges*, 24 F.3d at 64 ("substantive limitation on the discretion" of government officials to revoke licenses created a "protectible property interest").

Third, public statements and actions from government officials of both political parties reinforced the understanding that eligible individuals would be granted DACA and that the government would honor its promises under the program. In December 2016, then-Secretary of Homeland Security Jeh Johnson publicly stated that "representations made by the U.S. government, upon which DACA applicants most assuredly relied, must continue to be honored." Dkt. 78-2, at 1.

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[14] *See also Wedges/Ledges of Cal., Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 63 (9th Cir. 1994) ("narrow . . . criterion at the heart of the [city's] licensing statute" created a protected property interest); *Griffeth v. Detrich*, 603 F.2d 118, 121 (9th Cir. 1979) (finding protected property interest where "detailed" regulations "greatly restrict[ed] the discretion of" decisionmaker).

[15] The use of mandatory language in the 2012 DACA Memorandum further underscores the existence of a protected property interest. *See, e.g.*, *Wedges/Ledges*, 24 F.3d at 63; *Griffeth*, 603 F.2d at 121.

[16] The requirement in the DACA SOP that individuals be provided with notice and an opportunity to respond prior to revocation of their DACA status further underscores that DACA confers interests that are entitled to protection under the Due Process Clause. *See Nozzi*, 806 F.3d at 1191.

Public statements and actions affirming this understanding continued following the change in Administrations. In February 2017, the new Administration specifically exempted DACA from a DHS memorandum "immediately rescind[ing]" all prior immigration directives that conflicted with President Trump's January 25, 2017 Executive Order on immigration enforcement. Dkt. 78-4, at 2. In March 2017, then-Secretary Kelly reaffirmed that "DACA status" is a "commitment . . . by the government towards the DACA person, or the so-called Dreamer." Ted Hesson & Seung Min Kim, *Wary Democrats Look to Kelly for Answers on Immigration*, Politico (Mar. 29, 2017), https://goo.gl/TqyWrn (internal quotation marks omitted). Shortly thereafter, President Trump emphasized that "dreamers should rest easy" and confirmed that the "policy of [his] administration [is] to allow the dreamers to stay." The Associated Press, *Excerpts from AP Interview with President Donald Trump*, U.S. News & World Report (Apr. 21, 2017), https://goo.gl/xsqHj3.

Fourth, the government reiterated these promises in its official correspondence to Mr. Ramirez, vowing that he would not lose DACA's benefits absent specified misconduct. For example, the DACA approval notice sent to Mr. Ramirez lists only "fraud or misrepresentation" in the application process or "[s]ubsequent criminal activity" as grounds for revoking DACA. Dkt. 78-7. In so doing, the government further confirmed that Mr. Ramirez was entitled to retain his DACA status as long as he played by the rules. *See, e.g.*, *Wedges/Ledges*, 24 F.3d at 64.

Ultimately, as this Court has already found, "the representations made to [Mr. Ramirez and other] applicants for DACA cannot and do not suggest that no process is due to them, particularly in [Mr. Ramirez's] case where benefits have already been conferred."[17] *Ramirez Medina*, 2017 WL 5176720, at *9; *Singh v. Bardini*, 2010 WL 308807, at *7 (N.D. Cal. Jan. 19, 2010) ("Even if there is no constitutional right to be granted asylum, that does not mean that, once granted, asylum status can

[17] Indeed, once certain benefits are conferred, beneficiaries, including non-citizens, 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] fail[ed] to live up to the parole conditions"); *Gallo v. U.S. Dist. Court 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."); *see also Singh v. Bardini*, 2010 WL 308807, at *7 (N.D. Cal. Jan. 19, 2010); *Abdur-Rahman v. Napolitano*, 814 F. Supp. 2d 1087, 1096 (W.D. Wash. 2010) (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]").

be taken away without any due process protections." (internal citation omitted)). Mr. Ramirez should have been afforded at least the pre-termination process that DHS normally provides—*i.e.*, adequate notice and an opportunity to respond—and not merely an NOA informing him that his DACA had been "terminated automatically." Dkt. 78-10, at 1; *see Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *cf. Singh v. Vasquez*, 2009 WL 3219266, at *5 (D. Ariz. Sept. 30, 2009) (Murguia, J.) (noting "there is a substantial risk of erroneous deprivation through the procedures utilized by INS in rescinding asylum via a mailed letter" because "[t]his manner of termination does not account for anything other than post hoc notice . . . that he or she is no longer entitled to protection"), *aff'd*, 448 F. App'x 776 (9th Cir. 2011); *see also id.* at *6 ("[A]ll of the *Mathews* factors weigh in favor of a finding that due process requires more than sending an after the fact letter of rescission when the government terminates a grant of asylum.").

In sum, Mr. Ramirez is likely to succeed on his claims that the government impermissibly deprived him of liberty and property interests entitled to protection under the Due Process Clause, and thereby violated the APA by wrongfully depriving him of his DACA status.

B. Mr. Ramirez has suffered and continues to suffer irreparable harm

Mr. Ramirez has experienced, and continues to experience, ongoing irreparable harm, weighing heavily in favor of provisional relief. Indeed, all three courts to consider this issue have recognized that the harm caused by the unwarranted revocation of an individual's DACA status justifies preliminary injunctive relief. *Inland Empire*, 2017 WL 5900061, at *9–10; *Gonzalez Torres*, 2017 WL 4340385, at *6–7; *Coyotl*, 261 F. Supp. 3d at 1343–44. And on January 9, 2018, in enjoining the government to continue to maintain the DACA program on a nationwide basis, the Northern District of California found that individual plaintiffs who would be deprived of DACA benefits after program's rescission "have clearly demonstrated that they are likely to suffer serious irreparable harm" absent an injunction. Injunction at 43. The same reasoning applies here.

First, "[i]t is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017) (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)). Mr. Ramirez has demonstrated that the government's arbitrary revocation of his DACA status violated his Fifth Amendment due process

rights. As with the unlawfully detained immigrants in *Hernandez* and *Melendres*, "it follows inexorably from [the] conclusion that the government's [action is] likely unconstitutional" that Mr. Ramirez "ha[s] also carried [his] burden as to irreparable harm." *Hernandez*, 872 F.3d at 995.

Second, the revocation of his DACA status has injured and continues to injure Mr. Ramirez in several other ways, each of which is irreparable and sufficient to warrant an injunction here.[18] For example, and as discussed more thoroughly below, he is not able to apply for renewal of his DACA status, and thus take advantage of the opportunity that currently exists under the Injunction. Further, because his DACA status was unlawfully revoked, Mr. Ramirez is currently accruing time for unlawful presence, which may affect his ability to pursue legal presence or status in the United States through other avenues in the future. *See* Dkt. 78-1, at 3 (USCIS DACA FAQs, at Q5); 8 U.S.C. § 1182(a)(9)(B)–(C). Mr. Ramirez is also being denied access to DACA's many public benefits, such as paying into Social Security, retirement, and disability accounts, and the ability to take advantage of unemployment insurance, financial aid, and food assistance. *See* SAC ¶¶ 28–29, 32.

After spending more than six weeks in detention and more than six months staying with family, dependent on them for everything, Mr. Ramirez is still unable to earn an income due to his lack of work authorization, leaving his family in a debilitating state of financial insecurity. Third Suppl. Decl. of Ramirez Medina ¶ 3. And should he not recover the benefits that DACA status affords, he will again suffer additional harm by separation from family, as he did when he was wrongfully detained. *See Hawaii v. Trump*, 878 F.3d 662, 669 (9th Cir. 2017) ("prolonged separation from family members" is a harm not compensable with money damages and therefore weighs in favor of finding irreparable harm (internal quotation marks omitted)). These practical injuries are continuing irreparable harms that justify injunctive relief. *See Ariz. Dream Act Coal.*, 757 F.3d at 1068; *Inland Empire*, 2017 WL 5900061, at *9–10; *Gonzalez Torres*, 2017 WL 4340385, at *6.

Third, the emotional harm Mr. Ramirez is enduring is seriously affecting his well-being. Third Suppl. Decl. of Ramirez Medina ¶¶ 3–4. DACA provides recipients with a sense of security,

[18] *See, e.g.*, *Hernandez*, 872 F.3d at 995 (recognizing "the economic burdens imposed on detainees and their families" as supporting injunctive relief); *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014), *permanent injunction aff'd*, 855 F.3d 957 (9th Cir. 2017); *Enyart v. Nat'l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1166 (9th Cir. 2011).

which the government has wrongfully taken away from Mr. Ramirez. *See Gonzalez Torres*, 2017 WL 4340385, at *6 ("The loss of DACA status also undermines one's sense of well-being and subjects Plaintiff to a constant threat of apprehension and possible removal from the only country he has called home."); *Coyotl*, 261 F. Supp. 3d at 1343–44. Also, until his DACA status is restored and he can re-establish himself as a productive member of society, Mr. Ramirez will continue to be viewed as an alleged gang member and "'Daniel from the news.'" Dkt. 50 ¶ 6 (Second Suppl. Decl. of Ramirez Medina). These emotional and psychological injuries constitute irreparable harm warranting provisional relief. *See, e.g.*, *Chalk v. U.S. Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701, 710 (9th Cir. 1988); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1192 (N.D. Cal. 2015).

Finally, while he is deprived of his DACA status, Mr. Ramirez cannot take advantage of any benefits that might be conferred to DACA holders by federal legislation or by the courts. As already described, just weeks ago the Injunction required the government "to maintain the DACA program on a nationwide basis on the same terms and conditions as were in effect before the rescission on September 5, 2017, including allowing DACA enrollees to renew their enrollments." Injunction at 46. Within days, USCIS began processing renewal applications. Bach Decl. ¶ 4. However, Mr. Ramirez is not able to take advantage of this opportunity to extend his DACA benefits for two more years. *Cf. Gonzalez Torres*, 2017 WL 4340385, at *6 (loss of the "ability to apply for renewal" of DACA status found to be irreparable harm); *Coyotl*, 261 F. Supp. 3d at 1343–44. While this litigation is pending, Mr. Ramirez should not be required to forgo the benefits that the government *twice* conferred on him, particularly should the legal or political landscape shift again so as to foreclose DACA holders' opportunity to renew their status.

C. The balance of equities and public interest weigh heavily in favor of provisional relief

The final two elements of the preliminary injunction test—the balance of the equities and the public interest—merge when the government is a party. *See League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014). Here, these factors weigh overwhelmingly in favor of provisional relief. *See Inland Empire*, 2017 WL 5900061, at *10. The government will face no harm if a preliminary injunction is granted. First, the government has no interest in enforcing unlawful rules or failing to follow its own non-discretionary

procedures. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) ("[Government] cannot suffer harm from an injunction that merely ends an unlawful practice."); *Ariz. Dream Act Coal.*, 855 F.3d at 978 ("[I]t is clear that it would not be equitable or in the public's interest to allow the state to violate the requirements of federal law, especially when there are no adequate remedies available." (quoting *Valle del Sol, Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013)). Moreover, as described in detail above, the government has twice granted DACA status to Mr. Ramirez, and his qualifications upon which those decisions were based have not changed. As such, restoring the status quo while this litigation is pending cannot and will not harm the government.

In any event, a violation of constitutional rights *per se* weighs in favor of granting a preliminary injunction. "[B]y establishing a likelihood that Defendants' policy violates the U.S. Constitution, Plaintiffs have also established that both the public interest and the balance of the equities favor a preliminary injunction." *Ariz. Dream Act Coal.*, 757 F.3d at 1069; *see also Melendres*, 695 F.3d at 1002 ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (internal quotation marks omitted)). Here, this Court has already held that Mr. Ramirez was owed due process. Dkt. 116, at 18 (Order Denying Mot. to Dismiss) (noting it "cannot" be that "no process is due" to DACA recipients, "particularly . . . where benefits have already been conferred"). And as explained above, the arbitrary revocation of his DACA status violated these due process rights—and his rights under the APA. Accordingly, both the balance of the equities and the public interest favor provisional relief.

V. CONCLUSION

For the reasons set forth above, Mr. Ramirez respectfully requests that the Court award provisional relief directing the government to restore his DACA status and work authorization pending a decision on the merits of his claims.

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Seattle, Washington

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2018, 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.*