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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

INLAND EMPIRE – IMMIGRANT YOUTH COLLECTIVE and JESUS ALONSO ARREOLA ROBLES on behalf of himself and others similarly situated,

Plaintiffs,

v.

ELAINE C. DUKE, Acting Secretary, U.S. Department of Homeland Security; JAMES McCAMENT, Acting Director, U.S. Citizenship and Immigration Services; MARK J. HAZUDA, Director, Nebraska Service Center, U.S. Citizenship and Immigration Services; SUSAN M. CURDA, Los Angeles District Director, U.S. Citizenship and Immigration Services; THOMAS D. HOMAN, Acting Director, U.S. Immigration and Customs Enforcement; DAVID MARIN, Los Angeles Field Office Director, U.S. Immigration and Customs Enforcement; KEVIN K. McALEENAN, Acting Commissioner, U.S. Customs and Border Protection,

Defendants.

Case No. 5:17-cv-2048-MWF-SHK

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF JESUS ALONSO ARREOLA ROBLES'S MOTION FOR A PRELIMINARY INJUNCTION

Judge: Hon. Michael W. Fitzgerald
Courtroom: 5A
Hearing: November 20, 2017
Time: 10 a.m.

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Cases

Statutes

INTRODUCTION

Plaintiff Jesús Alonso Arreola Robles is a 23-year-old resident of the Los Angeles area who has lived in the United States since he was a year old. Mr. Arreola was granted permission three times to live and work in the United States through the Deferred Action for Childhood Arrivals ("DACA") program—in 2012, 2014, and 2016. Mr. Arreola used his DACA to work two jobs to help support his family—one as a cook at the famed Chateau Marmont in West Hollywood, and one as a driver for Uber and Lyft. Mr. Arreola's earnings helped support his parents, both of whom are lawful permanent residents, and his three U.S. citizen sisters, one of whom has significant disabilities.

In March 2017, the government abruptly terminated Mr. Arreola's DACA grant and work permit, without notice, a reasoned explanation, or any opportunity to contest the decision. The government revoked Mr. Arreola's DACA even though Mr. Arreola does not have a single criminal conviction—or even a criminal charge—on his record and he continues to meet all of the DACA eligibility requirements. Mr. Arreola's DACA was revoked after he was arrested by U.S. Customs and Border Patrol ("CBP") while he was working as a driver—and CBP mistakenly believed he had been involved in alien smuggling. CBP detained Mr. Arreola and initiated removal proceedings against him by issuing him a "Notice to Appear." However, shortly afterward, an immigration judge rejected the government's allegation and concluded that CBP had been mistaken, ordering Mr. Arreola released on bond. The government nonetheless subsequently terminated Mr. Arreola's DACA and work permit, without considering its own immigration judge's findings. In fact, the government has indicated that it terminated Mr. Arreola's DACA automatically—without any reasoning whatsoever—because CBP had issued Mr. Arreola a Notice to Appear, which charged him as removable for being present in the United States without admission. However, under the terms of the DACA program, neither placement in removal proceedings nor the lack of a lawful immigration status disqualifies an

individual from the DACA program. Indeed, as with all DACA recipients, Mr. Arreola's lack of a lawful immigration status is the reason he applied for DACA in the first place, and DACA was expressly made available to noncitizens in removal proceedings.

The government's revocation of Mr. Arreola's DACA and employment authorization is arbitrary, capricious, contrary to law, and conflicts with its own rules, in violation of the Administration Procedure Act ("APA"). The revocation also violates the Fifth Amendment's Due Process Clause. The government's actions have caused Mr. Arreola ongoing irreparable harm: he lost his job and his ability to help support his family.

Two different federal courts have recently issued preliminary injunctions against the government's revocation of individual DACA grants without process. *See Gonzalez Torres v. DHS*, No. 17-cv-1840, 2017 WL 4340385, at *7 (S.D. Cal. Sept. 29, 2017); *Colotl v. Kelly*, No. 17-cv-1670, 2017 WL 2889681, at *13 (N.D. Ga. June 12, 2017). These decisions reinforce not only that Mr. Arreola has a high likelihood of success on the merits of his claims, but also that the government's termination of DACA causes serious irreparable harm that warrants preliminary injunctive relief.

Issuance of a preliminary injunction is particularly urgent, not only because of the ongoing serious harms to Mr. Arreola, but because his terminated DACA grant would have expired in August 2018. Thus, without preliminary relief enjoining the government's unlawful termination of his DACA and work permit, Mr. Arreola may lose all opportunity for a meaningful remedy.

For these reasons, and because Mr. Arreola satisfies the other injunction factors, Mr. Arreola respectfully asks this Court to grant a preliminary injunction and vacate Defendants' unlawful revocation of his DACA and work permit or, in the alternative, order Defendants to temporarily reinstate his DACA and work permit pending a fair procedure—including notice, a reasoned explanation, and an opportunity to be heard.

BACKGROUND

I. The DACA Program

Deferred action is a longstanding form of administrative action by which the federal Executive Branch decides, for humanitarian or other reasons, to refrain from seeking a noncitizen's removal and to authorize his continued presence in the United States. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999). On June 15, 2012, the Secretary of the Department of Homeland Security ("DHS") announced DACA—a deferred action program specifically for young immigrants who came to the United States as children and are present in the country without formal immigration status.[1] As former President Barack Obama explained, these young immigrants "are Americans in their heart, in their minds, in every single way but one: on paper."[2] Similarly, President Trump has described DACA recipients as "absolutely incredible kids," who have "worked here" and "gone to school here," and he publicly stated that they "should rest easy" about being permitted to remain in the country.[3]

Under DACA, young immigrants who entered the United States as children who meet specified educational and residency requirements, and who pass extensive criminal background checks, are eligible to receive deferred action. Napolitano Memo at 1-2. These enumerated eligibility criteria include the requirements that DACA recipients not have been convicted of a felony, significant misdemeanor,[4] or three or

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[1] Declaration of Dae Kuen Kwon ("Kwon Decl.") ¶ 10, Ex. 9 at 2 (Janet Napolitano, Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children, (June 15, 2012) ("Napolitano Memo").

[2] Kwon Decl. ¶ 11, Ex. 10 at 2.

[3] Kwon Decl. ¶ 12, Ex. 11 at 2; Kwon Decl. ¶ 18, Ex. 17 at 30; Kwon Decl. ¶ 19, Ex. 18 at 16.

[4] A significant misdemeanor is a conviction for an offense of "domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence; or . . . [a conviction] for which the individual was sentenced to time in custody of more than 90 days." Kwon Decl. ¶ 20, Ex. 19 at 20 (U.S. Citizenship and Immigration Services, Frequently

more other misdemeanors. *Id*.

A predicate for eligibility for the DACA program is that the individual must lack a lawful immigration status (because he or she is present without admission, or overstayed a visa). Kwon Decl. ¶ 21, Ex. 20 at 44 (DHS DACA Standard Operating Procedures). In addition, the fact that a noncitizen is, has been, or will be in removal proceedings does not disqualify the individual from the program. Napolitano Memo at 2.

Deferred action through DACA is provided for a renewable period of two years, and DACA recipients may obtain an Employment Authorization Document ("EAD") and a Social Security Number. *See id.* A decision to grant or deny a deferred action application or renewal is independent of any proceedings in immigration court; a noncitizen who is in removal proceedings can apply for DACA separately and simultaneously. *Id. See also, e.g.*, *Gonzalez Torres*, 2017 WL 4340385, at *6 (noting that "an immigration judge has no jurisdiction to reinstate DACA status, or to authorize an application for renewal of DACA status"). The United States Citizenship and Immigration Services ("USCIS") is the division of DHS responsible for evaluating requests for DACA. DHS' DACA Standard Operating Procedures ("DACA SOPs") set forth the procedures that the agency must follow in adjudicating and granting DACA applications, as well as in terminating DACA and EADs granted through the program. Kwon Decl. ¶ 21, Ex. 20 at 16 ("This SOP is applicable to all Service Center personnel performing adjudicative and clerical functions or review of those functions. Personnel outside of Service Centers performing duties related to DACA processing will be similarly bound by the provisions of this SOP."); *id.* ("This SOP describes the procedures Service Centers are to follow when adjudicating DACA requests."). *See also Colotl*, 2017 WL 2889681, at *4 ("The SOP states that . . . procedures to be followed are not discretionary."); *Gonzalez Torres*, 2017 WL

Asked Questions about Deferred Action for Childhood Arrivals (updated Apr. 25, 2017)).

4340385, at *3.

On February 20, 2017, DHS Secretary John Kelly issued a memorandum setting forth DHS' immigration enforcement priorities.[5] Although that memorandum rescinded other existing DHS guidance, it expressly kept the DACA program in place.[6]

On September 5, 2017, DHS announced that it was rescinding the DACA program and winding it down.[7] Although the program is soon ending, DHS officials have confirmed that the same program rules continue to apply until it ends.[8]

II. Mr. Arreola's Background

Mr. Arreola was born in Mexico and was brought to the United States by his

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[5] Kwon Decl. ¶ 13, Ex. 12 at 2 (Memorandum from John Kelly, Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017)).

[6] *See id.*; *accord* Kwon Decl. ¶ 14, Ex. 13 at 9 (U.S. Department of Homeland Security, Q&A: DHS Implementation of the Executive Order on Enhancing Public Safety in the Interior of the United States (Feb. 21, 2017)) ("Q22: Do these memoranda affect recipients of Deferred Action for Childhood Arrivals (DACA)? A22: No.").

[7] Kwon Decl. ¶ 15, Ex. 14 (Memorandum from Acting Secretary Elaine C. Duke, Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (Sept. 5, 2017)).

[8] *See* Kwon Decl. ¶ 16, Ex. 15 at 15 (*Press Briefing by Press Secretary Sarah Sanders and Homeland Security Advisor Tom Bossert, 9/8/2017, #11*, The White House, Office of the Press Secretary (explaining that "[d]uring this six-month time, there are no changes that are being made to the program at this point"); *see also* Kwon Decl. ¶ 17, Ex. 16 (Testimony of Michael Dougherty, Assistant Secretary of DHS, Committee of the Judiciary, Oversight of the Administration's Decision to End Deferred Action for Childhood Arrivals (Oct. 3, 2017), https://www.c-span.org/video/?435059-1/trump-administration-officials-testify-decision-rescind-daca at 56:46) (stating, in response to Senator Feinstein's question about the status of DACA recipients during the phasing out of the program: "We rely on guidance that was put in place in 2012 when the DACA program was instantiated. That's available on USCIS's website and will tell you what the priorities are for Immigration Customs enforcement and what they are for the Department at large. Those priorities have not changed.").

parents in 1995, when he was one year old. Declaration of Jesús Alonso Arreola Robles ("Arreola Decl.") ¶ 1. They entered without being inspected at a border crossing. *Id.* He has lived in the United States continuously since his arrival. Mr. Arreola attended and graduated from Los Angeles-area elementary, middle, and high schools. *Id.* ¶ 2. He also attended a year of college at Glendale Community College, but could not continue his studies as he had to work full-time to help support his family. *Id.*

Mr. Arreola has three younger sisters, who are all U.S. citizens by birth. *Id.* ¶ 3. He also has a long-term partner who is a U.S. citizen and is expecting a child in December. *Id.* His oldest sister is seventeen years old. *Id.* ¶ 4. Since birth, she has had several disabilities—including progeria, autism, Down's syndrome, and diabetes—and she requires special care, around the clock. *Id.* Mr. Arreola has played a critical role in caring for her, including checking her blood; giving her insulin shots; helping her move around the house; and driving her to the hospital when she needs medical care. *Id.*

Mr. Arreola's parents now have lawful permanent resident status, having obtained immigration relief in the form of cancellation of removal under 8 U.S.C. § 1229a(b). *Id.* ¶ 6. Mr. Arreola is the only member of his family without permanent lawful immigration status in the United States. *Id.* ¶ 7. America is the only place he can call home. *Id.* ¶ 1.

Mr. Arreola's Grant and Renewals of DACA Status

After rigorous vetting, DHS granted Mr. Arreola DACA in 2012, 2014, and again in 2016. *Id.* ¶¶ 10-11; Kwon Decl. ¶¶ 5-6, 23-25, Exs. 4-5, 22-25. Mr. Arreola's 2016 approval notice provides that "[u]nless terminated, this decision to defer removal action will remain in effect for 2 years" and is valid to August 19, 2018. Kwon Decl. ¶ 25, Ex. 24. The approval notice informed Mr. Arreola that his deferred action could be terminated if he engaged in "[s]ubsequent criminal activity." *Id.*

Since he was granted DACA, Mr. Arreola has used his EAD to help his family by working two jobs. Starting in approximately 2013, he worked at the Chateau Marmont in West Hollywood, California, first as a dishwasher and then as a cook. Arreola Decl. ¶¶ 13-14. In 2016, he began working as a driver for Uber and Lyft to make extra money. *Id.* ¶ 15. Mr. Arreola shared his earnings with his family and paid half the rent in his family home. *Id.* ¶ 16.

Mr. Arreola has never been charged with or convicted of any crime. *Id.* ¶ 17.

Mr. Arreola's Arrest by Immigration Authorities

As a driver, Mr. Arreola regularly provided rides to customers for a fee, both through the Uber and Lyft apps and through referrals from friends. *Id.* ¶ 18. In February 2017, a friend asked Mr. Arreola to drive his cousin from the Los Angeles area to the San Diego area to pick up the friend's uncle and another cousin, and bring them back to the Los Angeles area. *Id.* The friend offered to pay Mr. Arreola $600 for the long-distance ride. *Id.*

Mr. Arreola agreed and picked up his customer—his friend's cousin—near North Hollywood. *Id.* ¶ 19. Mr. Arreola had never previously met the customer. *Id.* ¶ 26. The customer entered an address near San Diego into Mr. Arreola's GPS and told him to drive to that location. *Id.* ¶ 19. Mr. Arreola was unfamiliar with the San Diego area and so relied on the GPS instructions to route him to the customer's destination. *Id.* ¶ 20.

After driving for about three and a half hours, Mr. Arreola and his customer reached the destination. *Id.* After the customer exited the car to get his uncle and cousin, the customer encountered a CBP agent who arrested him. *Id.* ¶¶ 21-23. Although Mr. Arreola informed the CBP agent that he had valid DACA status and had permission to live and work in the United States, the CBP agent also arrested Mr. Arreola, apparently suspecting that he was aiding in smuggling undocumented immigrants into the United States. *Id.* ¶ 23. However, Mr. Arreola did not know the immigration status of his friend's uncle and cousin whom he was supposed to pick up.

Id. ¶ 27. As a driver, it was not Mr. Arreola's practice to ask about the immigration status of his customers. *Id.*

CBP detained Mr. Arreola and issued him a Notice to Appear ("NTA"), initiating removal proceedings against him and charging him as removable because he was present in the United States without admission under the Immigration and Nationality Act ("INA") § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i). Kwon Decl. ¶ 4, Ex. 3. Mr. Arreola was never charged with any crime or any smuggling-related ground of removability. Arreola Decl. ¶ 29.

On March 2, 2017, Mr. Arreola received a bond hearing before an immigration judge. *Id.*¶ 32. During the bond hearing, the DHS attorney suggested that Mr. Arreola was a danger to the community because he attempted to smuggle undocumented immigrants into the United States. Kwon Decl. ¶ 7, Ex. 6 at 52, 54. However, Mr. Arreola testified, just as he had told CBP after he was arrested, that he regularly worked as a driver, *id.* at 8-9, and that a friend offered him $600 to pick up his friend's uncle and cousin near the San Diego area and drive them back to the Los Angeles area, *id.* at 12-16. He further testified that he had no knowledge of the immigration status of the individuals he was supposed to pick up, *id.* at 16-17, 38, and denied the DHS attorney's allegations that he was involved with smuggling unauthorized persons into the United States, *id.* at 38-39.

The immigration judge rejected the DHS attorney's arguments, found Mr. Arreola credible, determined that he was not a flight risk or danger to the community, and ordered Mr. Arreola's release on $2,500 bond. *Id.* at 58-59. The immigration judge stated that he was "not going to accept the conclusions" by the CBP agents that Mr. Arreola was involved in "smuggling aliens for financial gains." *Id.* at 58. The immigration judge observed that Mr. Arreola is "an Uber and Lyft driver. He's in Hollywood, some three, three and a half hours away. Somebody is going to pay him to go all that way and come back." *Id.* The immigration judge added that the CBP agents made the incorrect "assumption that [Mr. Arreola] was being paid to smuggle" the

uncle and cousin "as opposed to pick up a fare, what would have been a lucrative fare." *Id.*

Mr. Arreola posted bond and was released from immigration detention. He spent a total of 21 days in detention. Arreola Decl. ¶¶ 35-36. He has been living in the Los Angeles area since being released. *Id.* ¶ 36.

Termination of Mr. Arreola's DACA and Work Permit

After his release, on March 6, 2017, Mr. Arreola received a Notice of Action from USCIS notifying him that his DACA and EAD were "terminated *automatically* as of the date [his] NTA was issued."[9] Mr. Arreola was never provided with any prior notice that USCIS intended to terminate his DACA and EAD, a reasoned explanation for this decision, or any opportunity to respond to such a notice or otherwise contest the termination of his DACA or EAD. Arreola Decl. ¶ 38.

On March 17, 2017, Mr. Arreola's counsel submitted a letter to USCIS requesting that USCIS reopen and reconsider the termination of his DACA and EAD. Kwon Decl. ¶ 26, Ex. 25. On May 9, 2017, USCIS declined to revisit the issue. USCIS stated that, among other things, that "when [U.S. Immigration and Customs Enforcement ("ICE")] issues and *serves* the Notice to Appear on the DACA requestor during the DACA validity period, that action alone terminates the DACA. USCIS will send a Notice of Action and update our system as Deferred Action Terminated but that is only as a follow up to ICE's action of termination." Kwon Decl. ¶ 3, Ex. 2. However, Mr. Arreola's NTA was issued by CBP, not ICE. Kwon Decl. ¶ 4, Ex. 3.

Mr. Arreola has suffered and continues to suffer significant and irreparable harm as a result of Defendants' actions. After Mr. Arreola was stripped of his DACA and EAD, he lost his job with Chateau Marmont, and he is no longer able to work as a

[9] Kwon Decl. ¶ 9, Ex. 8 (U.S. Citizenship and Immigration Services, *Notice of Action to Jesus Alonso Arreola Robles Re I-821D, Deferred Action for Childhood Arrivals* (Mar. 6, 2017)).

driver for Lyft or Uber. Arreola Decl. ¶ 40. Losing his DACA and EAD has been especially difficult for Mr. Arreola because he and his partner are expecting their first child later this year. Defendants' actions have prevented him from saving for his family and planning for their future. *Id.*

ARGUMENT

This Court should issue a preliminary injunction. To prevail, Plaintiff must show: (1) a likelihood of success on the merits, (2) likely irreparable harm in the absence of such relief, (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public interest. *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1060 (9th Cir. 2014) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)). Mr. Arreola satisfies all four factors.

I. MR. ARREOLA IS LIKELY TO SUCCEED ON THE MERITS.

Mr. Arreola is likely to succeed on his APA and procedural due process claims. Defendants' revocation decision was arbitrary and capricious in violation of the APA. Defendants automatically terminated Mr. Arreola's DACA on the basis of an NTA issued by CBP, despite the Napolitano Memorandum's explicit provision that noncitizens in removal proceedings—and even noncitizens with final orders of removal—remain eligible for DACA. Moreover, the agency reversed its previous position on Mr. Arreola's eligibility for DACA without explanation and without accounting for the serious reliance interests at stake. Defendants' automatic termination of Mr. Arreola's DACA and EAD was also arbitrary and capricious because they did not follow the agency's own termination procedures, as dictated by the DACA SOPs. Finally, Defendants' actions also violated the Due Process Clause by failing to provide Mr. Arreola with notice and a meaningful process by which to contest the termination.

A. DHS' Automatic Termination of Mr. Arreola's DACA Based on the Issuance of an NTA Is Arbitrary and Capricious in Violation of the APA.

Defendants have indicated that they terminated Mr. Arreola's DACA based on

the issuance of an NTA—one that charges Mr. Arreola with being removable because of presence without admission in the United States. For multiple reasons, that decision was arbitrary and capricious and contrary to law in violation of the APA. 5 U.S.C. § 706(2)(A).

The Supreme Court has made clear that under § 706(2)(A), "agency action must be based on non-arbitrary, 'relevant factors.'" *Judulang v. Holder*, 565 U.S. 42, 55 (2011). *Judulang* emphasized that "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Id.* at 53. "When reviewing an agency action, we 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).

In *Judulang*, the Supreme Court considered a Board of Immigration Appeals ("BIA") rule governing eligibility for a form of relief—suspension of deportation—which was not provided for in the INA, and was therefore entirely discretionary. 565 U.S. at 46-47. Although the relief was ultimately within the agency's discretion, the Court made clear that the rules applied by the agency with respect to that relief must still reflect reasoned decisionmaking. 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.* at 55. The Supreme Court ultimately 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.* at 53.

Here, DHS' March 6, 2017 decision to terminate Mr. Arreola's DACA and EAD "automatically" because an NTA was issued against him charging presence without admission fails this test for multiple reasons. *First*, and fundamentally, DHS' decision was arbitrary and irrational because a noncitizen's deportability for presence without admission to the United States does not provide a relevant basis for terminating a DACA grant. The Napolitano Memorandum and DACA SOPs

enumerate the relevant considerations for a DACA grant, and none of those rules suggests that the fact that a noncitizen is subject to removal because he is present without admission, and therefore lacks a lawful immigration status, is a basis for denial or termination. Indeed, the DACA rules indicate the opposite—the fact that a person is present without admission is irrelevant. *See, e.g.*, DACA SOPs at 44. This is because the lack of a lawful immigration status in the United States is a predicate for eligibility for DACA and is a fact that is therefore true of every DACA recipient. *Id.* Because the lack of a lawful immigration status is a factor common to every single DACA recipient, and is wholly irrelevant to whether an individual is eligible for DACA, the issuance of an NTA charging presence without admission does not provide a reasoned basis for terminating DACA.

Second, the program rules make clear that noncitizens who are, have been, or will be placed in removal proceedings continue to be eligible for DACA. The rules thus reinforce the conclusion that an NTA based on presence without admission to the United States does not provide a reasoned basis for termination. The Napolitano Memorandum itself requires that the eligibility "criteria are to be considered whether or not an individual is already in removal proceedings or subject to a final order of removal." Napolitano Memo at 2. *See also* Kwon Decl. ¶ 17, Ex. 16 (Dougherty Statement) ("The 2012 memorandum also made clear that individuals could be considered for DACA even if they were already in removal proceedings or were subject to a final removal order."). Implementing this command, the SOPs provide that "[i]ndividuals in removal proceedings may file a DACA request." DACA SOPs at 71. Indeed, even individuals with final removal orders can be granted DACA. *See, e.g.*, *id.* at 74 (providing that individuals with final removal orders may be considered for DACA); *id.* at 75 (providing that an individual who has been removed after issuance of a final removal order, re-entered, and is subject to reinstatement of that removal order continues to be eligible for DACA). *Cf. Matter of Quintero*, 18 I. & N. Dec. 348, 350 (BIA 1982) (explaining in context of removal proceedings that "the

respondent can request deferred action status at any stage in the proceeding"). Further, the DACA SOPs provide that if an NTA is issued against a DACA applicant while his application is pending with USCIS—even if the NTA is based on a public safety concern—USCIS should "proceed with adjudication . . . , taking into account the basis for the NTA." *See* Kwon Decl. ¶ 22, Ex. 21 (Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens (Nov. 7, 2011)) , at 4 ("ICE's issuance of an NTA allows USCIS to proceed with adjudication . . . , taking into account the basis for the NTA"); DACA SOPs at 93 (providing that if ICE accepts a case referred to it by USCIS during the DACA application process, then USCIS "will follow the standard protocols outlined in the November 7, 2011 NTA memorandum").

In such cases, USCIS is required to review all relevant circumstances, and may grant the DACA request "[i]f a DACA requestor has been placed in proceedings on a ground that does not adversely impact the exercise of prosecutorial discretion." DACA SOPs at 75. *See also id.* at 74 (providing that for DACA applicants with final removal orders, "[f]inal removal orders . . . should be reviewed carefully to examine the underlying grounds for removal"). Given that the filing of an NTA against a DACA applicant, or even the issuance of a final order of removal against a DACA applicant, does not render noncitizens ineligible for the program, DHS' decision to find Mr. Arreola ineligible on this basis and automatically terminate his DACA is arbitrary and irrational.

Third, DHS' decision to automatically and categorically terminate Mr. Arreola's DACA is arbitrary and capricious because the agency failed, despite Mr. Arreola's continued eligibility for the program, to consider the relevant facts and circumstances and exercise its individualized discretion. This failure to consider Mr. Arreola's specific circumstances undermines the very purpose of the DACA program. *See* Napolitano Memorandum at 2 (explaining that the purpose of DACA was to ensure that "[o]ur Nation's immigration laws . . . . are not designed to be blindly

enforced without consideration given to the individual circumstances of each case"). The agency's failure to exercise its individualized discretion is also inconsistent with its own rules, as described above. Those rules make clear that if someone is the subject of an NTA, USCIS should consider all of the relevant circumstances, including the ground for removal charged in the NTA, to determine whether DACA is appropriate or whether the individual is disqualified. The DACA rules also make clear that when the ground in the NTA does not adversely impact a DACA grant—including, presumably, when the ground is one that all or most DACA recipients could be charged with—the individual is not disqualified from DACA. DHS' failure to consider all the relevant circumstances and exercise its discretion is all the more problematic where, as here, prior to the decision to terminate DACA, an immigration judge had already considered and rejected the government's allegations that Mr. Arreola had committed any criminal conduct. *Cf. Villa-Anguiano v. Holder*, 727 F.3d 873, 881-82 (9th Cir. 2013) (explaining that "[d]ue process . . . entitles an unlawfully present alien to consideration of issues relevant to the exercise of an immigration officer's discretion," including "new, relevant circumstances [that] had arisen").

Fourth, USCIS's decision to terminate DACA automatically based on the filing of an NTA was arbitrary and capricious because it left the question of whether Mr. Arreola continued to warrant a DACA grant and EAD solely up to a CBP officer's charging decision in issuing an NTA. In *Judulang*, the Supreme Court emphasized that an additional reason why the BIA's rule was impermissibly arbitrary was that under the rule, whether a noncitizen would be granted discretionary relief may "rest on the happenstance of an immigration official's charging decision." 565 U.S. at 57. *See also id.* at 58 (recognizing "the high stakes for an alien who has long resided in this country," and noting that the Court has "reversed an agency decision that would make his right to remain here dependent on circumstances so fortuitous and capricious") (citing *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947)) (internal quotation marks omitted). The same is true here.

Finally, in terminating Mr. Arreola's DACA grant and EAD and finding that the NTA automatically rendered him ineligible for DACA, DHS departed from its prior position without "a reasoned analysis for the change," in violation of the APA. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). *See also* 5 U.S.C. § 706(2). An agency may depart from its prior decision, but it is black letter law that if it does so, it "is obligated to supply a reasoned analysis for the change." *State Farm*, 463 U.S. at 42. *See also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he agency must show that there are good reasons for the new policy.").

DHS' settled position—spanning about half a decade, from 2012 to 2017, was that Mr. Arreola warrants a grant of DACA and an EAD. In 2012, 2014, and again in 2016, DHS carefully evaluated Mr. Arreola's applications for DACA and repeatedly determined that he was eligible for a grant of deferred action and an EAD. Arreola Decl. ¶¶ 10-11; Kwon Decl. ¶¶ 5-6, 23-25, Exs. 4-5, 22-24. The agency reached this conclusion after evaluating Mr. Arreola's school records and other circumstances, as well as conducting extensive background checks. Mr. Arreola's most recent approval notice, from 2016, provides that "[u]nless terminated, this decision to defer removal action will remain in effect for 2 years" and is valid to August 19, 2018. Arreola Decl. ¶ 12; Kwon Decl. ¶ 25, Ex. 24. The approval notice informed Mr. Arreola that his deferred action could be terminated if he engaged in "[s]ubsequent criminal activity." Kwon Decl. ¶ 25, Ex. 24.

However, in March 2017, the agency abruptly reversed course, concluding that Mr. Arreola's DACA and EAD should be automatically revoked. Now, as before, Mr. Arreola continues to be eligible for DACA; now, as before, Mr. Arreola has never engaged in any criminal activity or been convicted of (or even charged with) any crime. Nonetheless, in its March 6, 2017 Notice of Action, USCIS notified Mr. Arreola that his DACA and EAD were "terminated automatically" because an NTA was issued charging him with presence without admission. Kwon Decl. ¶ 9, Ex. 8.

USCIS's one-sentence explanation, however, fails to acknowledge that Mr. Arreola remains eligible for DACA under the applicable criteria, much less provide "good reasons" for the agency's change in position, as required by the APA. *Fox Television Stations, Inc.*, 556 U.S. at 515. *See also, e.g., Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) (explaining that the agency is "required to provide a 'reasoned explanation . . . for disregarding' the 'facts and circumstances' that underlay its previous decision") (citations omitted). As discussed above, the vast majority of DACA recipients, like Mr. Arreola, are removable due to "presence without admission" or for overstaying a visa, and this was true of Mr. Arreola every time he applied for and received DACA. The agency's reliance on an NTA citing Mr. Arreola's presence without admission simply fails to explain, much less justify, the agency's decision to reverse course and terminate his DACA.

The agency's failure to explain its decision is also invalid because it fails to mention, let alone account for, Mr. Arreola's serious reliance interests: Mr. Arreola has lived in the United States since infancy, and has relied on DACA to build a life, obtain rewarding employment as a young adult, and help support his family, who are all United States citizens or lawful permanent residents. *See Fox Television Stations, Inc.*, 556 U.S. at 515 (explaining that an agency must give a "more detailed justification" for a policy change if its "prior policy has engendered serious reliance interests that must be taken into account"). DHS' failure to provide a reasoned explanation for its change in position is arbitrary and capricious. *See, e.g., Organized Vill. of Kake*, 795 F.3d at 967-68 (holding that the defendant agency failed to provide "good reasons" for reversing its old policy).

For all these reasons, DHS' decision to change its position and terminate Mr. Arreola's DACA based merely on an NTA charging presence without admission was arbitrary and capricious in violation of the APA.

B. DHS' Automatic Revocation of Mr. Arreola's DACA and EAD Violates Its Own Procedures and Mr. Arreola's Procedural Due Process Rights.

1. DHS' Revocation Without Notice Violates Its Own Rules.

DHS' automatic termination of Mr. Arreola's DACA and EAD without notice or an opportunity to be heard also violates DHS' own rules and is therefore arbitrary and capricious. Indeed, two district courts in closely analogous cases have held that the government's failure to comply with the termination procedures in the DACA SOPs violates the APA. *See Gonzalez Torres*, 2017 WL 4340385, at *5 ("Defendants' failure to follow the termination procedures set forth in the DACA SOP is arbitrary, capricious, and an abuse of discretion."); *Colotl*, 2017 WL 2889681, at *12 n.6 ("Defendants' actions were likely arbitrary and capricious in violation of the APA by . . . terminating her DACA status in contravention of DHS's own procedures.").

The DACA SOPs provide that USCIS generally will not terminate a recipient's DACA and EAD without prior notice and an opportunity to respond. *See, e.g.*, DACA SOPs Chapter 14, Termination, at 136-38 (if DACA granted in error, or granted as a result of fraud, officer is directed to issue a "Notice of Intent to Terminate," allow recipient "33 days to file a brief or statement contesting the grounds cited in [the notice]," and terminate only where the adverse grounds are not overcome). *See also Colotl*, 2017 WL 2889681, at *7 ("[T]he SOP provides that, in the usual circumstance, a termination of an individual's DACA status will not occur without prior notice to that individual."). Although the DACA SOPs contain a procedure for termination of DACA if ICE issues an NTA, such termination is permitted only under narrow circumstances involving certain public safety concerns, and only after DHS follows specific procedures that did not occur here. *See Gonzalez Torres*, 2017 WL 4340385, at *6 (finding that USCIS' termination of DACA in response to "NTA issued by USCBP in connection with removal proceedings" charging recipient with being present without admission did not comply with DACA SOPs); *see also* DACA SOPs Chapter 14, Termination, at 137 (enumerating procedures to be followed in cases

involving disqualifying criminal offenses or public safety concerns). In sum, because Defendants wholly failed to follow their own termination procedures, the revocation of Mr. Arreola's DACA and EAD was arbitrary and capricious.

2. DHS' Automatic Revocation Violates Mr. Arreola's Due Process Rights.

In addition to violating its own procedures, DHS' sudden revocation of Mr. Arreola's DACA violates his procedural due process rights. Mr. Arreola has gained a protected interest in his DACA, which authorized him to live and work in the United States for the last five years and until August 2018, and therefore has a right to a fair procedure before it can be revoked. Yet DHS has reversed its decision without providing Mr. Arreola with adequate notice, a reasoned explanation for its decision, or an opportunity to present arguments and evidence to demonstrate that he remains eligible for the program and did not engage in any disqualifying criminal activity.

The Constitution "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Regardless of whether the individual had a claim of entitlement before it was granted, once an important benefit is conferred, recipients have a protected property interest sufficient to require a fair process before the government may take it away. *See 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 that parole revocation requires due process; parolees may "have been on parole for a number of years and may be living a relatively normal life[,]" all the while "[having] relied on at least an implicit promise that parole will be revoked only if [the parolee] fails to live up to the parole conditions"); *Nnebe v. Daus*, 644 F.3d 147, 158 (2d Cir. 2011) (recognizing that taxi drivers have a protected property interest in the continued possession of their operating licenses, such that suspending licenses without a hearing

violated due process); *Singh v. Bardini*, No. 09-cv-3382, 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 be taken away without any due process protections.") (internal citation omitted).

Mr. Arreola's DACA and EAD are essential to his ability to remain lawfully present in the United States and earn a livelihood to support himself and his family. *See Alaska Airlines, Inc. v. Long Beach*, 951 F.2d 977 (9th Cir. 1992) (finding ordinance permitting airport to automatically reduce flights already allocated to air carriers by license violated air carriers' due process rights where allocations were crucial to enterprise); *Jones v. City of Modesto*, 408 F. Supp. 2d 935, 951 (E.D. Cal. 2005) (finding that city could not revoke existing massage license without due process) (citing *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 975 (9th Cir. 1994) ("The Ninth Circuit specifically recognized that an existing license, in contrast to an applied for license, constitutes a legitimate entitlement of which one cannot be deprived without due process."). In continuing to build his life in the United States, Mr. Arreola has reasonably relied on the implicit promise that he could retain his DACA grant and EAD so long as he satisfied the program's eligibility requirements. *See Morrissey*, 408 U.S. at 482. The government's reversal of its previous decision that he was eligible for and warranted DACA inflicts precisely the kind of "serious loss" that requires due process protections. *Mathews*, 424 U.S. at 348 (internal quotation marks omitted).

Determining the procedure necessary to meet constitutional standards requires evaluation of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

Evaluation of these factors demonstrates that Mr. Arreola must be afforded at least the pre-termination process that DHS generally provides for under its own rules—i.e., adequate notice of the allegedly adverse grounds and an opportunity to respond and contest the decision. The private interest at stake for Mr. Arreola could not be more significant. The termination of Mr. Arreola's DACA rescinds his longstanding authorization to live and work in the United States—the country he has called home since he was an infant. Instead of following its own prescribed process, DHS terminated Mr. Arreola's DACA suddenly and without notice, based solely on CBP's issuance of an NTA charging him with being present without admission. Nor has DHS afforded him any opportunity to contest its action, creating an unacceptably high risk—in Mr. Arreola's case, a certainty—of erroneous deprivation. *See Singh v. Vasquez*, No. 08-cv-1901, 2009 WL 3219266, at *5 (D. Ariz. Sept. 30, 2009), *aff'd*, 448 F. App'x 776 (9th Cir. 2011) ("[T]here is a substantial risk of erroneous deprivation through the procedures utilized by INS in rescinding asylum via a mailed letter. This manner of termination does not account for anything other than post hoc notice that . . . he or she is no longer entitled to protection."). Providing Mr. Arreola with a reasoned explanation for the government's actions and an opportunity to present arguments and evidence could make all the difference in his case, because it will allow him to demonstrate that CBP's suspicions were mistaken, as the government's own immigration judge concluded, and that he has not engaged in any disqualifying criminal activity (or even been charged with any crime) and remains eligible for DACA. Mr. Arreola's circumstances highlight the value of the "an opportunity to contest the termination determination at a meaningful time." *Villa-Anguiano*, 727 F.3d at 882. *See also id.*at 881 (holding that the BIA "must consider all favorable and unfavorable factors relevant to the exercise of its discretion; failure to do so constitutes an abuse of discretion"). The fact that DHS' rules already provide for these basic pre-deprivation protections in most circumstances reinforces both that the value of such safeguards is high, and that providing such limited process would not

place undue fiscal or administrative burdens on the government. *Vasquez*, 2009 WL 3219266, at *6 ("To conclude, all 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.").

II. MR. ARREOLA IS SUFFERING IRREPARABLE HARM.

Absent an injunction restoring Mr. Arreola's DACA, he will continue to experience irreparable harm that cannot be cured by his ultimate success on the merits in this case.

The revocation of Mr. Arreola's DACA has derailed Mr. Arreola's career. The Ninth Circuit has made clear that the "loss of opportunity to pursue [one's] chosen profession" constitutes irreparable harm. *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) ("We have frequently recognized the severity of depriving a person of the means of livelihood."). Because he has lost his EAD, Mr. Arreola has had to leave his job as a cook at Chateau Marmont, and because CBP took possession of his car, he has been unable to work as a driver. Arreola Decl. ¶ 40. Such harm is more than enough to justify an injunction in this circuit. In *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014), for example, the Ninth Circuit reversed a district court's denial of a preliminary injunction on harm grounds, and held that the DACA recipients had established irreparable harm because the defendants' policy had "diminished [plaintiffs'] opportunity to pursue their chosen professions." *Id.* at 1068. *See also Enyart*, 630 F.3d at 1165; *Gonzalez Torres*, 2017 WL 4340385, at *6 (finding that irreparable harm caused by defendants' termination of DACA without notice "includes the loss of employment, a core benefit under DACA" and that such "deprivation of employment impacts Plaintiff's ability to financially provide for himself and his family"). Moreover, setbacks at this early moment in Mr. Arreola's career may never be recoverable: before he lost his job at the Chateau Marmont, Mr. Arreola expected to move up through the ranks. Arreola Decl.

¶¶ 14, 41. Time without DACA is "productive time irretrievably lost" that Mr. Arreola could be spending in his chosen career path, building toward the future for himself and his family. *Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 710 (9th Cir.1988). *See also Arizona Dream Act Coal.*, 757 F.3d at 1069 ("The irreparable nature of Plaintiffs' injury is heightened by Plaintiffs' young age and fragile socioeconomic position. Setbacks early in their careers are likely to haunt Plaintiffs for the rest of their lives."). As it is, Mr. Arreola is unable to plan for his family or save to provide for his child. Arreola Decl. ¶ 40. Even if Mr. Arreola could later recover his lost income, his emotional distress in the interim constitutes an irreparable injury in itself. *See* Arreola Decl. ¶ 40; *Chalk*, 840 F.2d at 709. *See also Colotl*, 2017 WL 2889681, at *12 ("Plaintiff's emotional distress . . . is another factor in determining that Plaintiff will suffer irreparable injury without the entry of a preliminary injunction.").

III. THE REMAINING FACTORS SUPPORT PRELIMINARY RELIEF.

Preliminary relief will not harm the government. The government will not be adversely affected by restoring Mr. Arreola's DACA, since he remains eligible for the program, the government's own immigration judge found that the CBP's allegations against him were unfounded, and there has been no relevant change in circumstances.

By contrast, the public interest strongly favors a preliminary injunction. The public interest is served when the government complies with its obligations under the APA and the Constitution and follows its own procedures. As the Ninth Circuit has emphasized, "[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." *Arizona Dream Act Coal.*, 757 F.3d at 1068 (citation and internal quotation marks omitted) (alteration and ellipsis in original). *See also Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.") (citation and internal quotation marks omitted); *Colotl*, 2017 WL 2889681, at *12 ("[T]he public has an interest in government agencies being required to comply with their own

written guidelines instead of engaging in arbitrary decision making."). Further, stripping Mr. Arreola of his profession and his family is not in the public interest. Mr. Arreola's family relies on him heavily. He plays a critical role in the care of his sister who has serious disabilities, and he contributes to the support of his family. Arreola Decl. ¶¶ 4-5, 16. He was also a valued employee at the Chateau Marmont. *Id.* ¶¶ 14, 40-41.

CONCLUSION

For the reasons given, the Court should grant Plaintiff's Motion for a Preliminary Injunction, vacate Defendants' unlawful revocation of Plaintiff's DACA and EAD or, in the alternative, order Defendants to temporarily reinstate Mr. Arreola's DACA and work authorization pending a fair procedure—including reasonable notice, a reasoned explanation, and an opportunity to be heard—through which he may challenge the revocation decision consistent with the APA and the Due Process Clause.

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Respectfully submitted,

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