No. 19-36034

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DANIEL RAMIREZ-MEDINA,

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,

Defendants-Appellees.

On Appeal From The United States District Court
For The Western District Of Washington (Hon. Ricardo S. Martinez)
Case No. 2:17-cv-00218

APPELLANT DANIEL RAMIREZ-MEDINA'S OPENING BRIEF

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INTRODUCTION

This appeal stems from the government's extraordinary assertion that it has the power to strip anyone, including appellant Daniel Ramirez-Medina, of Deferred Action for Childhood Arrivals ("DACA") status completely free from judicial review. According to the government's extreme position, courts have no power to review adverse DACA decisions that are based on even the most egregious rationales, such as gross racial stereotypes, fabricated evidence, or retaliation. That position is as dangerous as it is wrong, and the district court's ultimate acceptance of the government's argument that it could repeatedly deny appellant Daniel Ramirez-Medina his DACA status—contrary to U.S. Citizenship and Immigration Services' ("USCIS") own operating procedures and internal findings, and after the USCIS repeatedly granted him DACA on the same record—was legal error.

Initially, the district court correctly found that it had authority to review the government's actions against Mr. Ramirez. ER385. It subsequently concluded that "the Government has pursued a nearly three-year vendetta against" Mr. Ramirez—a campaign that was based in large part on known falsehoods—to strip him of the deferred action and work authorization he received under the DACA program. ER2. Ample evidence supported the court's finding that the government had targeted Mr. Ramirez and pursued a vendetta against him. For example, the government (i) terminated Mr. Ramirez's DACA status based on unsupported speculation that

he was gang-affiliated because he had a tattoo, ER3; ER10–11; (ii) pressed its gang-affiliation theory even though it recognized in contemporaneous internal communications that Mr. Ramirez was "NOT" "a known or suspected gang member" and that there was no criminality in his record, ER98; and (iii) improperly detained Mr. Ramirez for 47 days despite this knowledge. The district court found "no evidence" to support the government's baseless gang-affiliation theory and thus enjoined the government from (i) terminating Mr. Ramirez's DACA status and (ii) asserting or relying on any statement or record to suggest that Mr. Ramirez is gang-affiliated or a threat to public safety. ER352; ER356.

After Mr. Ramirez sought judicial redress and his case gained widespread media attention, the government continued its "crusade" against him. ER12. When its manufactured gang-affiliation theory dissolved, the government nevertheless denied Mr. Ramirez's routine DACA renewal request by considering only those facts that supported "its desired and preordained conclusion." ER14; ER24; ER27. This led the district court to conclude that the government "had it out for Mr. Ramirez" and "treated [him] differently" from similarly situated renewal applicants. ER24.

The government continued to argue that its conduct was immune from judicial review. Despite rejecting that argument in 2017, the district court adopted it in 2019. It thus denied Mr. Ramirez's request for injunctive relief while granting the

government's motion to dismiss—a result the district court acknowledged was "unjust" and failed to provide "equal justice under law." ER27. Yet the court failed to explain the limiting principle in its decision, *i.e.*, why the government's initial unlawful actions were reviewable but its continued unlawful actions were not.

The district court's conclusion that it was powerless to provide equal justice under law rested on two principal legal errors: (1) that the Immigration and Nationality Act, 8 U.S.C. § 1252(g) ("INA"), prohibited judicial review; and (2) that the court lacked jurisdiction to enjoin the government's misdeeds.

The INA does not preclude judicial review. As with all jurisdiction-stripping statutes, Section 1252(g) is interpreted narrowly, and it does not apply here for two reasons. First, Mr. Ramirez brings two colorable constitutional claims. Second, the government made nondiscretionary—indeed, intentional—errors in denying Mr. Ramirez's routine renewal request by (i) applying the wrong legal standard from USCIS's DACA operating procedures; (ii) relying on Immigration and Customs Enforcement's ("ICE") designation of Mr. Ramirez as an enforcement priority, even though it knew that the facts underlying the priority designation were false; and (iii) failing to explain the inconsistency in how it treated Mr. Ramirez compared with other similarly situated individuals. Indeed, the district court found that the government's action may have been infected with animus against Mr. Ramirez. ER24 n.120. Adopting the government's theory of Section 1252(g) would have

consequences far beyond DACA by shielding review of *any* constitutional claims related to *any* manner of removal proceedings. That is not the law.

The district court committed two more reversible errors in denying Mr. Ramirez's request for injunctive relief to require the government to reinstate his unlawfully denied DACA renewal application and work authorization. First, it wrongly concluded that it lacked jurisdiction to enjoin the government's denial of Mr. Ramirez's renewal application. Second, it wrongly concluded that it could not and should not enforce its existing injunction against the government, which prevented the government from relying on the assertion that Mr. Ramirez was a threat to public safety, as the district court already concluded that such an assertion was false.

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701–706 because Mr. Ramirez brought claims under the United States Constitution and the Administrative Procedure Act.[1]

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[1] In moving to dismiss Mr. Ramirez's first amended complaint and habeas petition, the government initially argued that Mr. Ramirez was required to bring his constitutional claims in immigration court rather than district court. The district court disagreed. *See* ER430. The government then waived that argument by failing to assert it in any subsequent motion to dismiss. *See* Dkt. 90; ER59. But in any event, INA's administrative exhaustion requirement applies to final orders of removal, *see* 8 U.S.C. § 1252(d)(1), and this case does not involve a challenge

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1) because Mr. Ramirez appeals from the district court's final decision as well as its interlocutory decision refusing injunctive relief.

This appeal is timely because the district court entered its "Order on Pending Motions" on October 9, 2019, and Mr. Ramirez filed his Notice of Appeal on December 6, 2019. Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the district court erred in finding that the INA precluded judicial review where Mr. Ramirez (i) asserted constitutional claims and (ii) challenged the government's nondiscretionary errors.

2. Whether the district court erred in refusing to enjoin the government's denial of Mr. Ramirez's routine DACA renewal application where (i) it had jurisdiction to enter further injunctive relief and (ii) in any event, it had power to enforce the existing preliminary injunction, which the government clearly violated.

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to such an order. In addition, the habeas statute, 28 U.S.C. § 2241, "does not specifically require petitioners to exhaust" remedies "before filing petitions for habeas corpus." *Castro-Cortez v. INS*, 239 F.3d 1037, 1047 (9th Cir. 2001), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 36 (2006). The "prudential" rule that habeas petitioners are generally required to "exhaust available . . . administrative remedies," *id.*, does not eliminate a federal court's habeas jurisdiction over challenges that are collateral to, or independent of, removal orders. Because Mr. Ramirez's claims are independent of the removal process, he was not required to exhaust those claims.

CONSTITUTIONAL AND STATUTORY AUTHORITIES

All pertinent constitutional and statutory authorities appear in an Addendum to this brief.

STATEMENT OF FACTS

A. The establishment and rescission of DACA

In 2012, then-Secretary of the Department of Homeland Security ("DHS") Janet Napolitano issued a memorandum establishing the DACA program. ER130–32 ("Napolitano Memo"). Under DACA, individuals who were brought to the United States as young children and meet certain criteria may request deferred action for a period of two years, subject to renewal. In exchange, applicants must provide the government with sensitive personal information, submit to a rigorous background check, and pay a considerable fee. The Napolitano Memo explained 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." ER130–31.

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 public policies. The government itself recognized that our nation "continue[s] to benefit . . . from the contributions of those young people who have come forward and want nothing more than to contribute to

our country and our shared future." ER129 (Letter from DHS Secretary Jeh Johnson).

In February 2017, then-Secretary of DHS John Kelly issued a memorandum setting forth the new administration's immigration enforcement priorities. ER457–62 ("Kelly Memo"). The Kelly Memo prioritized removal of (among others) those who "have committed acts which constitute a chargeable criminal offense" or "are subject to a final order of removal." ER458. The Kelly Memo rescinded all existing conflicting memoranda except for the Napolitano Memo and a related memo not relevant here. *Id.*

In September 2017, then-Acting Secretary Elaine Duke issued a memorandum rescinding the DACA program (the "Rescission Memo"), announcing the government's intent to terminate the DACA program as of March 2018. *See* DHS, *Memorandum on Rescission of Deferred Action for Childhood Arrivals* (Sept. 5, 2017), https://bit.ly/3enrdr6. However, various nationwide preliminary injunctions and orders of vacatur—including one upheld by this Court, *see Regents of Univ. of Cal. v. DHS*, 908 F.3d 476 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019)—require the government to maintain DACA for existing DACA recipients on substantially the same terms that existed prior to the Rescission Memo.

1. The DACA application and renewal process

USCIS administers the DACA program. Before the Rescission Memo, when the government was still processing new DACA requests, applicants were required to submit extensive documentation establishing that they meet specific criteria. Dkt. 144-2 ("DACA FAQs"); *see* ER109–15 (Q28–41). They also had to undergo a thorough background check in which DHS reviewed each applicant's biometric and biographic information "against a variety of databases maintained by DHS and other federal government agencies." ER107 (Q23).

The government uses the same criteria to evaluate DACA renewal requests as it used to evaluate initial applications. ER118 (Q51). Additionally, it requires that the renewal applicant (1) has not departed the United States since August 2012 without advance parole; (2) has continuously resided in the United States since the applicant's most recent DACA request was approved; (3) has not been "convicted of a felony, a significant misdemeanor, or three or more misdemeanors," and (4) does not otherwise "pose a threat to national security or public safety." *Id.* When Mr. Ramirez applied for DACA renewal in 2018, approximately 99 percent of adjudicated DACA renewal applications were approved.[2]

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[2] USCIS, *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake and Case Status* (Sept. 30, 2019), https://bit.ly/3bEjFOJ.

For DACA purposes, a "significant misdemeanor" is an offense for which the maximum possible prison term is between 6 and 365 days and is either "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 an offense for which the applicant was sentenced to more than 90 days in prison. ER122 (Q62). Minor traffic offenses such as driving without a license are not considered misdemeanors for DACA purposes. ER123 (Q64). Additionally, applicants whose background check indicates that their "presence in the United States threatens public safety or national security" are ineligible for DACA renewal absent "exceptional circumstances." *Id.* (Q65). Indicators that an individual poses a safety threat include "gang membership, participation in criminal activities, or participation in activities that threaten the United States." *Id.*

2. Limitations on denying an individual's DACA renewal request

DHS's DACA National Standard Operating Procedures ("DACA SOP") set forth detailed guidelines for Notices of Intent to Deny a DACA renewal request ("NOID"), though virtually all of these guidelines are redacted by the government. *See* ER201. Specifically, before denying a DACA renewal application, the government must prepare a NOID and provide the recipient with 33 days to respond. ER140; ER270 (App'x E); ER313 (App'x J).

The DACA SOP governs evaluations of "issues of criminality, public safety, and national security." ER177–92 (capitalization omitted). The USCIS Background Check Unit ("BCU") DACA Team is responsible for evaluating DACA applications that present "issues of criminality." ER138. If the BCU DACA Team determines that an application raises issues of criminality, the DACA request must be categorized as either an Egregious Public Safety Concern ("EPS") or non-EPS. ER189.[3]

B. Mr. Ramirez was twice granted DACA status

In 2013, Mr. Ramirez first applied for deferred action and work authorization under DACA. ER397 ¶ 3. To do so, Mr. Ramirez provided the government with his birth certificate, school records, and information about where he lived, and attended a biometrics appointment so USCIS could take his fingerprints and photographs. *Id.* Mr. Ramirez was granted deferred action and work authorization in 2014. ER398 ¶ 6. In 2016, Mr. Ramirez applied for DACA renewal, and was again granted deferred action and work authorization after being once again subject

[3] The DACA SOP defines EPS 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 [relevant] memorandum." ER138.

to rigorous vetting. *Id.* ¶ 9. Mr. Ramirez also underwent additional vetting in 2015, when USCIS screened all DACA beneficiaries for gang affiliation. ER136.

C. The government's initial unlawful actions

1. Mr. Ramirez's unlawful arrest and detention

In February 2017, during an immigration raid targeting his father, ICE agents questioned Mr. Ramirez and, despite his valid work permit, brought him to a holding facility in Tukwila, Washington. ER399–400 ¶¶ 11–17; ER520 (Form I-213). At the holding facility, ICE agents confiscated Mr. Ramirez's work permit that identified him as a DACA recipient, fingerprinted him, and accessed 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* ER400 ¶ 17. The agents ignored Mr. Ramirez's repeated protestations regarding his work authorization. ER399–400 ¶¶ 15, 17.

The ICE agents further interrogated Mr. Ramirez, repeatedly asking him whether he was in a gang or had ever known any gang members. ER400–01 ¶¶ 19–22. Each time he denied any gang affiliation. *Id.* The agents also interrogated Mr. Ramirez about the "La Paz—BCS" tattoo on his forearm, which refers to his birthplace in Baja California Sur. ER401 ¶¶ 23–24. Mr. Ramirez repeatedly stated that the tattoo is not gang-related, but they refused to believe him. ER401–02 ¶ 25; *see* ER11 n.53.

Mr. Ramirez was then transferred to the Northwest Detention Center, where he remained in custody for the next 47 days. ER402 ¶ 27; ER318.[4]

2. USCIS unlawfully revokes Mr. Ramirez's DACA status

Mr. Ramirez's 2016 grant of DACA status and work authorization was to remain in effect until May 4, 2018. ER316. But as soon as the government unlawfully arrested and detained Mr. Ramirez in February 2017, it began a sustained campaign to permanently revoke his DACA status and repeatedly took action against him based on false allegations of gang membership. ER362–65.

For example, USCIS issued a Notice to Appear ("NTA"), alleging as the basis for removal that Mr. Ramirez was unlawfully present in the United States. ER518–19. Then, one week later, USCIS sent Mr. Ramirez a Notice of Action ("NOA")

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[4] Mr. Ramirez's case quickly attracted significant media attention, with ICE leaking statements to the media that it had corroborating evidence of Mr. Ramirez's purported gang affiliation—which it never produced, because such evidence does not exist. *See* ER94 ¶ 65 n.60 (*First 100 Days: Chaffetz: We Want Inspector General to Investigate Leaks; Attorney for Arrested 'Dreamer' Speaks Out*, FoxNews.com (Feb. 15, 2017), https://fxn.ws/2AclbdS); *id.* ¶ 66 n.61 (*'DREAMer' Protected Under Obama Detained in Seattle Area*, CBSnews.com (Feb. 15, 2017), https://cbsn.ws/2X4E4si); *see also, e.g.*, Dan Levine & Kristina Cooke, *Mexican 'DREAMer' Nabbed in Immigrant Crackdown*, Reuters (Feb. 14, 2017), https://reut.rs/2LHvU2F; Dara Lind, *Daniel Ramirez Medina: What We Know About the DREAMer Trump Is Trying to Deport*, Vox (Feb. 16, 2017), https://bit.ly/2LBSLwz; Tessa Stuart, *Meet the DREAMer Who Delivered a Powerful Rebuttal to Trump's Speech*, Rolling Stone (Mar. 1, 2017), https://bit.ly/2LFlssq; Melissa Santos, *Don't Let Dreamers Become Collateral in Trump's War of Words with MS-13*, Seattle Times (May 18, 2018), https://bit.ly/3g1rlho.

stating that his deferred action and employment authorization terminated "automatically" in February 2017 and that no appeal or request to reconsider could be filed. ER317. The NOA contradicted the DACA SOP's requirement that USCIS provide DACA recipients with an opportunity to respond before their status may be terminated. ER222; ER309 (App'x I).

D. The current litigation

1. Mr. Ramirez secures his release

Mr. Ramirez filed this lawsuit in February 2017 to secure his release from the Northwest Detention Center. The district court ordered, and Mr. Ramirez received, a bond hearing in Immigration Court in March 2017 where the government offered no evidence of Mr. Ramirez's supposed gang affiliation and conceded that Mr. Ramirez is not a public danger. *See* ER408; ER384; *see also* ER11 n.53. Because the Immigration Judge concluded that Mr. Ramirez is neither a flight risk nor a public danger, Mr. Ramirez was released on bond. ER318; *see also* 8 C.F.R. § 236.1(c)(8).

2. The district court finds that it has jurisdiction

Mr. Ramirez filed a second amended complaint ("SAC") in April 2017 that asserted claims under the Administrative Procedure Act ("APA") for both arbitrary and capricious action as well as unconstitutional action under the Fifth Amendment (among other claims). In June 2017, the government moved to dismiss the SAC for lack of subject matter jurisdiction under 8 U.S.C. § 1252(g) and other statutes not at

issue here. In November 2017, the district court denied the government's motion because it concluded that Section 1252(g) did not foreclose judicial review of (i) Mr. Ramirez's challenge to "the non-discretionary actions" taken during his arrest, questioning, and detention and (ii) allegations that the government "did not follow [its] own internal policies and procedures in taking such actions." ER391–92; *see also* ER389.

3. The district court enjoins the government from terminating Mr. Ramirez's DACA status

After the district court denied the government's motion to dismiss, Mr. Ramirez moved for a preliminary injunction. ER361 (the "First Preliminary Injunction Motion"). He argued that he was likely to succeed on the merits of his APA claim because: (i) the revocation of his DACA status was arbitrary and capricious; (ii) the government failed to follow its own internal procedures; and (iii) the government violated Mr. Ramirez's due process rights. ER366–78. Mr. Ramirez explained that he experienced "ongoing irreparable harm," ER378, that "[t]he government will face no harm if a preliminary injunction is granted," ER380, and that "a violation of constitutional rights *per se* weighs in favor of granting a preliminary injunction," ER381.

In March 2018—while the First Preliminary Injunction Motion remained pending—Mr. Ramirez's DACA status and work authorization were reinstated and extended to May 15, 2018 pursuant to a class-wide injunction entered in *Inland*

Empire–Immigrant Youth Collective v. Duke, No. 5:17-cv-2048, Dkt. 61 (C.D. Cal. Feb. 26, 2018); ER319. However, less than a week later, USCIS sent Mr. Ramirez a Notice of Intent to Terminate ("NOIT") his DACA status. ER320. The NOIT relied on the government's continued, unsupported falsehood that Mr. Ramirez threatened public safety because he was gang-affiliated. ER320–21.

But as reflected in a March 2018 internal email (which the government produced several months later under court order), USCIS determined *before* issuing the NOIT that Mr. Ramirez posed no threat:

> Description of Current Criminal History: No criminality on rap sheet. Gang information obtained from EARM, ICE interview of DACA recipient. **HOWEVER, there is not sufficient evidence to conclude he is currently a known or suspected gang member**. If this was a pending case, it would have been further vetted and likely referred to a field office for a gang interview. **There is NOT sufficient evidence to conclude this person is an EPS concern**.

ER98 (capitalization in original; bolding added). USCIS thus ignored its own determination that Mr. Ramirez was not a gang member when, just two weeks later, it issued an NOIT on the basis of gang affiliation.

In May 2018, the district court granted Mr. Ramirez's First Preliminary Injunction Motion, ordering that the government "shall not terminate Plaintiff's DACA status and work authorization pending a final decision by this Court on the merits of his claims," and enjoining the government from "asserting, adopting, or relying in any proceedings on any statement or record made as of this date purporting

to allege or establish that Mr. Ramirez is a gang member, gang affiliated, or a threat to public safety." ER356 (the "Preliminary Injunction Order"). In doing so, the court found that Mr. Ramirez was likely to succeed on the merits of the claims advanced in the then-operative SAC because the government's continued reliance on "unfounded allegations" of gang affiliation was arbitrary, capricious, and an abuse of discretion and also implicated Mr. Ramirez's constitutional right to be heard in a meaningful matter. ER349–54. But "[m]ost troubling" to the court was the government's "continued assertion that Mr. Ramirez is gang-affiliated, despite providing no [supporting] evidence" to the Immigration Court or to the district court "four months later." ER352.

At that time, neither the district court nor Mr. Ramirez knew about USCIS's March 2018 internal email confirming it knew "there is not sufficient evidence to conclude [Mr. Ramirez] is currently a known or suspected gang member." ER98. Nevertheless, the government told the district court in May 2018 that there is no "record that establishes, one way or the other, with absolute conclusiveness, about Mr. Ramirez's gang affiliations or the lack thereof." ER360:4–7. The evidence—concealed by the government at the time—shows that statement was false. *See* ER98–100.

4. The government violates the Preliminary Injunction Order by denying Mr. Ramirez's May 2018 DACA renewal request

In May 2018, Mr. Ramirez timely applied to renew his DACA status and work authorization. ER76 ¶ 2. In response, according to internal communications later produced, the government started looking for "other grounds . . . independent of the gang statements" to deny his application. ER503. And the government was aware that, due to the public outrage its prior improper termination of Mr. Ramirez's DACA caused, it needed to proceed carefully, with one BCU agent advising ICE that "there is national interest in this case, [so] a lot of people will likely need to weigh in." ER510.

In September 2018, the government issued a NOID notwithstanding the Preliminary Injunction Order. ER78–80. Mr. Ramirez timely responded in a letter describing why a denial of his renewal request on the grounds articulated in the NOID would violate the Preliminary Injunction Order and the APA. ER84–92. Nevertheless, the government denied Mr. Ramirez's renewal request in December 2018. ER322–25 ("Decision"). The Decision stated that Mr. Ramirez's "response does not sufficiently overcome the discretionary factors outline[d] in the NOID," apparently because Mr. Ramirez did not submit "any evidence that is not already on the record" apart from his own declaration. ER324.

The Decision concluded that Mr. Ramirez no longer "warrant[ed] a favorable exercise of prosecutorial discretion" based on four justifications. ER325. First, ICE

was actively pursuing Mr. Ramirez's removal (ER322), notwithstanding that an order of removal based on mere unlawful presence is not independently sufficient for termination of DACA status, *see* ER131; ER103–04 (Q7). Second, Mr. Ramirez had sexual intercourse with his son's mother in 2013 (resulting in his son's conception), when he was 20 years old and his son's mother was 17 years old, even though no charges were filed, the relationship was consensual, and both sets of parents approved of the relationship and the pregnancy that resulted therefrom. ER322–23. Third, Mr. Ramirez was cited for possession of a small quantity of marijuana in 2014. ER323. And fourth, Mr. Ramirez had not fully paid off certain fines he incurred for minor traffic violations, ER323–24, even though the government's own wrongful denial of Mr. Ramirez's work authorization, in large measure, prevented him from paying his fines, ER76 ¶ 5.

5. The government determines that Mr. Ramirez is an enforcement priority based on legal and factual error

The DACA adjudicator reviewing Mr. Ramirez's renewal application initially found each one of the derogatory factors listed in the NOID to be insufficient to deny Mr. Ramirez's renewal request, ER508, but was overruled by the Branch Chief of the Waivers and Temporary Services Branch, Alexander King, at USCIS Service

Center Operations Directorate ("SCOPS").[5] Mr. King advised the adjudicator that SCOPS was "unaware of any cases with similar fact patterns to this case that have been approved (i.e. *ICE enforcement priority* determination and the additional negative discretionary factors discussed in the NOID)." ER506 (emphasis added). Mr. King instructed the adjudicator that "[t]he DACA SOP does not require USCIS to look behind ICE enforcement priority determinations or require ICE to point to specific memorandums in making an enforcement priority determination." ER513. According to the government, USCIS "defer[s] to ICE's enforcement priority determinations" under the Napolitano Memo and DACA SOP. ER60.

In communicating with the USCIS adjudicator, ICE explained that its decision to designate Mr. Ramirez as an enforcement priority was based on the Kelly Memo (rather than the Napolitano Memo), which prioritizes removal of non-citizens who "are subject to a final order of removal but have not complied with their legal obligation to depart the United States." ER511; *see also* ER458; ER511 (ICE informing USCIS that it "prioritizes the removal" of Mr. Ramirez because a Seattle Immigration Court had ordered his removal to Mexico in January 2018).

In addition, ICE explained, Mr. Ramirez was an enforcement priority because he committed DACA fraud by lying about his General Educational Development

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[5] SCOPS was "the division of USCIS tasked with adjudicating Mr. Ramirez's [DACA renewal] application." ER15.

("GED") program. *See* ER500; ER502; ER511. USCIS concluded in internal communications, however, that this ground was "not accurate." ER499.

6. Mr. Ramirez files a third amended complaint

In light of the government's denial of his 2018 renewal application, in March 2019, Mr. Ramirez moved for leave to file a third amended complaint ("TAC") to: (1) plead additional facts related to the 2018 denial; (2) add an equitable estoppel claim; and (3) add a First Amendment claim. ER333.

Over the government's objection, the district court granted leave to file the TAC, noting the government's "[u]ncharacteristic[]" denial of Mr. Ramirez's "relatively routine" DACA renewal application. ER328. Contrary to the government's urging, the district court was then "not persuaded that it lacks jurisdiction." ER330. Mr. Ramirez filed his TAC in May 2019. ER93.

7. The order on appeal

a) Mr. Ramirez's motion for additional injunctive relief

In June 2019, Mr. Ramirez moved for additional injunctive relief on two bases. ER67 ("Second Injunction Motion").

First, the government's denial of his DACA renewal application—based on manufactured public safety-related rationales using records known to the government long before the district court's Preliminary Injunction Order—violated the letter and spirit of that order. ER68–69.

Second, the denial violated the APA because the government: (i) arbitrarily and capriciously relied on Mr. Ramirez's unlawful presence, and its remaining justifications were unsupported by the record; (ii) failed to follow its own internal procedures; (iii) ignored Mr. Ramirez's due process rights; (iv) violated Mr. Ramirez's First Amendment rights; and (v) was equitably estopped from denying Mr. Ramirez's renewal request. ER69–70.

b) The government's motion to dismiss

In August 2019, the government moved to dismiss the TAC and, alternatively, moved for summary judgment. ER59. The government argued that two statutes precluded judicial review: 8 U.S.C. § 1252(g) and 5 U.S.C. § 701(a)(2). ER61–64.[6] On the same day, the government filed under seal a heavily redacted administrative record. ER495.

Mr. Ramirez opposed the government's motion, explaining that Sections 1252(g) and 701(a)(2) do not preclude judicial review of his TAC for several reasons. First, the NOID's substitution of Mr. Ramirez's "offense history" for the

[6] Because the court determined that it lacked subject matter jurisdiction under Section 1252(g), it did not reach the Section 701(a)(2) issue or the government's alternative motion for summary judgment. *See* ER64. Section 701(a)(2) precludes judicial review when "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). As the district court explained in a prior order, Section 701(a)(2) does not apply here because the government's "alleged failure to follow the procedures detailed in the DACA SOP does not implicate agency discretion." ER392.

now-discredited gang affiliation and "public safety" allegations was pretext. ER51. Second, the TAC "challenges the failed process and non-discretionary government actions" that culminated in the denial of Mr. Ramirez's renewal request. ER55. Third, as the district court recognized, Mr. Ramirez's 2018 renewal application claims "'likely turn[] on factual issues that are interconnected to Mr. Ramirez's previous claims'" over which Section 1252(g) does not preclude review. *Id.* (alteration in original) (quoting ER330–31). Fourth, the heavily redacted, incomplete administrative record shows that the government wrongly applied the Kelly Memo, which does not apply to DACA recipients (and failed to use the proper standard for EPS from the Napolitano Memo). ER57.

c) The district court's decision

The district court held a hearing on the two motions in September 2019 at which Mr. Ramirez reiterated that the government's denial of his renewal request violated his constitutional right to due process, ER38:18–24, as well as a number of nondiscretionary procedures, ER37:24–38:1; ER41:11–18; ER42:19–43:2; ER43:19–20; ER45:2–9; ER45:20–23, and resulted in unexplained inconsistencies regarding how Mr. Ramirez was treated compared with similarly situated renewal applicants, ER44:19–23.

In October 2019, the district court granted the government's motion to dismiss and denied Mr. Ramirez's request for injunctive relief. ER2–28. The court made

dozens of factual findings about the government's conduct, including (among others) that:

- "[T]he Government has pursued a nearly three-year vendetta against [Mr. Ramirez]" (ER2);
- "[T]he Government provided no corroborating evidence" to support its claim that Mr. Ramirez "was a threat to public safety because of 'gang affiliations'" (ER3);
- "[T]he Government's actions [in attempting to terminate Mr. Ramirez's DACA status were] baseless" (*id.*);
- The government's denial of Mr. Ramirez's routine renewal application constituted "questionable treatment" that, when "examined in closer detail, . . . cultivate[s] and nourish[es] suspicion" (ER4);
- The government's "attempt to justify prior actions" was "misguided" due to "an overzealous enforcement philosophy" (*id.*);
- "[T]he Government wants [Mr. Ramirez] deported" despite the fact that his "parents brought him to this country when he was ten years old," he "has never left the United States," and "[h]is family and his son are here" (*id.*);
- "Mr. Ramirez was never interested in gang life and did not join a gang" (ER5);
- "No charges were ever filed, and Mr. Ramirez was never detained or arrested" following an investigation into the birth of his son to his seventeen-year-old girlfriend (ER7–8);
- In 2016, the government granted Mr. Ramirez's routine renewal request after "perform[ing] another background check" and "rais[ing] no concerns" (ER9);
- In February 2017, "ICE agents arrested Mr. Ramirez's father outside of the apartment where Mr. Ramirez, his father, and his brother were living." When ICE agents "jolted" Mr. Ramirez from sleep and questioned him, he "answered honestly." He was handcuffed and transported to a processing facility despite the fact that "ICE agents had no proof, probable cause, or reasonable suspicion of any criminal activity" other than "his official legal status" (ER9–11);

- At the processing facility, ICE agents "confirmed that Mr. Ramirez had no known criminal history and had twice been granted DACA status," but they "chose to interrogate Mr. Ramirez" further about gang membership. "Without any corroborating evidence ICE concluded that Mr. Ramirez had gang affiliations, detained him in the Northwest Detention Center, and initiated removal proceedings" (*id.*);

- "At the subsequent custody redetermination hearing, the Government did not present any evidence substantiating its continued assertions that Mr. Ramirez was affiliated with gangs" (ER11);

- After being released by order of the immigration judge, "Mr. Ramirez was burdened with the Government's continued crusade against him" (ER12);

- The USCIS adjudicator initially responsible for Mr. Ramirez's 2018 renewal application "called into question the importance of the transgressions" cited as bases to deny his renewal application (ER16);

- "[T]he adjudicator's initial assessment was not credited," and she became "[r]esigned to her loss of control" over Mr. Ramirez's case (ER16–17);

- "SCOPS HQ determined that Mr. Ramirez was not a 'public safety concern'" (ER17 (footnote omitted));

- After Mr. Ramirez responded to the NOID, "the adjudicator . . . appeared inclined to grant the renewal and advocated her case within the agency," but "the adjudicator was overruled by her superiors" (ER18);

- "When the Government's manufactured basis for action dissolved, it searched for a new basis" (ER24);

- "The Government does not indicate that it has ever denied renewal applications on similar concerns outside of Mr. Ramirez's case" (*id.*);

- "The Government gives no indication it is normal for an adjudicator['s] apparent opinions to be cast aside by other agency staff" (*id.*);

- "After a questionable detention, the Government hounded Mr. Ramirez for close to three years," leaving the district court "with the uneasy feeling that the Government did not honestly consider the facts of Mr. Ramirez's case to arrive at a just conclusion" (ER27);

- "[I]t appears that the Government considered only whether the facts supported its desired and preordained conclusion," which "is not a just exercise of prosecutorial discretion" (*id.*).

Despite these factual findings—each and every one of them adverse to the government—the district court determined that Section 1252(g) precluded judicial review.

The district court acknowledged its previous conclusion that Section 1252(g) did not apply, ER21, but found that "circumstances . . . have changed" because Mr. Ramirez no longer challenged the government's attempts to terminate his existing DACA status based on its unsupported gang-affiliation theory, ER22. The district court determined that the government followed the SOP's procedural requirements, ER23, though it only briefly noted Mr. Ramirez's several contrary arguments, ER23 n.118. And despite evidence that the government knew of Mr. Ramirez's investigations and civil infractions that it cited in its NOID years before its denial, *see* ER9, the court found that Mr. Ramirez "cannot establish that the Government previously knew of the transgressions," ER23–24.

The district court also found that it could not enforce the Preliminary Injunction Order because it was issued under the SAC and "dissolved" when Mr. Ramirez filed the TAC. ER25–26. The district court further determined that Mr. Ramirez failed to establish that the government violated the Preliminary

Injunction Order because the DACA SOP draws "some distinction between the terms 'issues of criminality' and 'threat to public safety.'" *Id.*

Thus, the court denied injunctive relief and dismissed the case—a result it acknowledged was "unjust" and a failure of "equal justice under law." ER27. Mr. Ramirez timely filed his Notice of Appeal. ER29.

SUMMARY OF ARGUMENT

The government's theory that courts may not review its adverse DACA determinations—no matter what—is not the law, would lead to absurd and unjust results, and runs counter to the weight of authority in this Circuit. The INA's narrow bar to judicial review does not apply to the government's denial of Mr. Ramirez's renewal application for at least two independent reasons.

First, the INA does not preclude review of Mr. Ramirez's constitutional claims. The district court did not question that Mr. Ramirez has a right to due process under the Fifth Amendment, and the INA "does not prevent the district court from exercising jurisdiction over . . . due process claims." *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998); *accord Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (9th Cir. 1999), *supplemented*, 236 F.3d 1115 (9th Cir. 2001). Mr. Ramirez plausibly alleged that the government's denial of his routine renewal application violated due process and his First Amendment rights, *see, e.g.*, ER95–96 ¶ 114, and the district court should have exercised jurisdiction over those claims.

Second, it is settled that the INA does not preclude review of the government's nondiscretionary actions. *Catholic Social Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000). Section 1252(g) "applies only to the three specific *discretionary* actions mentioned in its text," not to other, nondiscretionary actions. *Id.* (emphasis added). Here, the government made several nondiscretionary errors in denying Mr. Ramirez's DACA renewal. First, it relied on the Kelly Memo that prioritized removal of certain non-citizens even though the Kelly Memo specifically kept in place the Napolitano Memo regarding DACA recipients and does not apply to agency DACA determinations. Second, it relied on ICE's determination that Mr. Ramirez was an enforcement priority even though it knew that at least one basis for that determination—Mr. Ramirez's alleged DACA fraud—was false. Third, the government's departure from its pattern of practice resulted in unexplained inconsistencies in how it treated Mr. Ramirez compared with similarly situated renewal applicants. Such unexplained inconsistencies include the government's reliance on:

- Years-old minor offenses that did not pose any problem in his 2014 and 2016 applications;
- Mr. Ramirez's order of removal even though the Napolitano Memo makes clear that such removal orders do not preclude DACA status; and
- "[B]aseless" and "speculative arguments" for which there is "no corroborating evidence." ER2–3.

The district court also erred in denying injunctive relief—relief that Mr. Ramirez established was warranted per his Second Injunction Motion—for at least two reasons. *First*, because the INA and APA did not strip the court of jurisdiction, the district court had the power to enter additional injunctive relief to prevent the government's further misdeeds. *Second*, even if the district court lacked jurisdiction to enter further injunctive relief (it did not), the court nevertheless erred in refusing to enforce the existing Preliminary Injunction Order. The court had jurisdiction to enforce that order. The mere filing of an amended complaint does not terminate a preliminary injunction order, and the district court's own order stated that the preliminary injunction remained in effect until a final determination on the merits of Mr. Ramirez's claims. The government violated the Preliminary Injunction Order by doing just what the court prohibited—relying on the prior record to assert that Mr. Ramirez posed a public safety threat. The court therefore erred in denying Mr. Ramirez's request to enforce the injunction.

STANDARDS OF REVIEW

This Court reviews de novo orders granting motions to dismiss, *ASW v. Oregon*, 424 F.3d 970, 974 (9th Cir. 2005), and district courts' statutory interpretation, *Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012).

This Court reviews the denial of a preliminary injunction for abuse of discretion, but it reviews "[t]he district court's interpretation of the underlying legal

principles" de novo. *Cuviello v. City of Vallejo*, 944 F.3d 816, 825–26 (9th Cir. 2019) (quotation marks omitted). "[A] district court abuses its discretion when it makes an error of law." *Id.* at 826 (quotation marks and citation omitted).

This Court reviews factual findings for clear error. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013).

ARGUMENT

A. The district court erred in granting the government's motion to dismiss

Contrary to the government's blanket assertion that courts are powerless to review DACA adjudications, the INA, 8 U.S.C. § 1252(g), does not preclude judicial review of the agency's denial of Mr. Ramirez's DACA renewal request where its denial violated Mr. Ramirez's constitutional rights and was a result of the agency's own nondiscretionary errors.

Section 1252(g) provides in relevant part, "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g). In light of the "'well-settled' and 'strong presumption'" of judicial review of administrative action that the Supreme Court "ha[s] 'consistently applied' . . . to immigration statutes," *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020), Section 1252(g) is "narrowly construed," *Kwai Fun Wong v. United States*, 373 F.3d

952, 963–64 (9th Cir. 2004). Section 1252(g) "applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Reno v. AADC*, 525 U.S. 471, 482 (1999). It is not triggered by "all claims arising from deportation proceedings," *id.*, and does not "sweep in any claim that can technically be said to 'arise from' the three listed actions of the Attorney General," *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (plurality op.).

This Court recently reiterated that Section 1252(g) is limited "to discretionary decisions that the Attorney General actually has the power to make, as compared to the violation of his mandatory duties." *Arce v. United States*, 899 F.3d 796, 801 (9th Cir. 2018) (per curiam). In light of "the strong presumption in favor of judicial review," the "general rule" is "to resolve any ambiguities in a jurisdiction-stripping statute in favor of the narrower interpretation." *Id.* (citations and quotation marks omitted); *cf. Inland Empire–Immigrant Youth Collective v. Nielsen*, 2018 WL 1061408, at *15 (C.D. Cal. Feb. 26, 2018) ("USCIS's separate and independent decision to revoke DACA on the basis of [a Notice to Appear] is independent of the limited category of decisions covered by § 1252(g)" (emphasis omitted) (citing *Ramirez Medina v. DHS*, 2017 WL 5176720, at *6 (W.D. Wash. Nov. 8, 2017))).

Here, Section 1252(g) does not apply to Mr. Ramirez's plausible allegations that the government violated his constitutional rights, nor does it shield review of

the government's nondiscretionary errors. Indeed, by failing to follow its nondiscretionary requirements, the government rendered its actions reviewable. Therefore, this Court can review the government's "unexplained inconsistency" in how it has treated Mr. Ramirez compared with similarly situated renewal applicants and its nondiscretionary failure to apply the correct EPS standard from the Napolitano Memo (as opposed to the wrong standard from the Kelly Memo).

1. Mr. Ramirez's constitutional claims are reviewable

Section 1252(g) "does not prevent the district court from exercising jurisdiction over . . . due process claims." *Walters*, 145 F.3d at 1052. Courts have jurisdiction where (as here) a plaintiff seeks "to enforce [his] constitutional rights to due process in the context of [immigration] proceedings." *Barahona-Gomez*, 167 F.3d at 1234 (quotation marks omitted).

Non-citizens who are physically present in the United States are guaranteed the protections of the First and Fifth Amendments. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953). The district court did not question that Mr. Ramirez was entitled to due process. *See* ER22 n.115. Indeed, the district court had previously concluded that the government's wrongful termination of Mr. Ramirez's DACA "implicates [his] right to an opportunity to be heard in a 'meaningful manner.'" ER353. But in dismissing the TAC, the court concluded that "many of the . . . due process concerns" it had

previously found warranted jurisdiction were "mollified" because Mr. Ramirez's "DACA status . . . expired," and the government "provided Mr. Ramirez notice and an opportunity to be heard" regarding his renewal request. ER22–23; *see Ramirez Medina v. DHS*, 313 F. Supp. 3d 1237, 1247 (W.D. Wash. 2018).

That conclusion was wrong. Mr. Ramirez had—and has—a due process right to have his DACA renewal application treated *fairly*; not denied out of spite based on considerations which the government admits have not warranted denial of other, similar renewal applications. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (due process requires "the opportunity to be heard . . . in a meaningful manner" (quotation marks omitted)); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980) (judicial impartiality—both actual and perceived—"serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime"); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003) (a neutral arbiter is "one of the most basic due process protections" (quotation marks omitted)); *Zolotukhin v. Gonzales*, 417 F.3d 1073, 1075 (9th Cir. 2005) (due process is violated if a decisionmaker "improperly prejudge[s]" a case). Mr. Ramirez plausibly alleged that the government improperly prejudged his renewal request. *See, e.g.*, ER95–96 ¶ 114. Having an "opportunity to be heard" is meaningless when the government decides it will deny your application no matter what you say. *See Zolotukhin*, 417 F.3d at 1075.

In fact, the district court recognized that the government "pursued a nearly three-year vendetta" against Mr. Ramirez, starting with its unlawful arrest and detention, which Mr. Ramirez challenged and thereby obtained his release, even as the government trumpeted its knowingly false narrative of gang affiliations to the media. ER2–3. ICE eventually "conced[ed] that [Mr. Ramirez] was not a threat to public safety and releas[ed] him on bond," yet Mr. Ramirez's DACA was summarily and unlawfully terminated. ER3. Then, after being forced by court order "to reinstate Mr. Ramirez's DACA status[,] . . . the Government immediately sought to terminate his DACA status." *Id.* The district court found that *that* attempt to terminate Mr. Ramirez's DACA was "without supporting evidence" and "implicate[d] [his] right to an opportunity to be heard in a 'meaningful manner,'" and enjoined the termination from taking effect. *Ramirez Medina*, 313 F. Supp. 3d at 1251; *see also* ER14.

Undeterred, the government then denied Mr. Ramirez's renewal request, even though 99 percent of DACA renewal applications are granted, *see supra* p. 8, the denial was "seemingly against the individual adjudicator's conclusions," and it relied on "several-years-old and minor criminal transgressions that would not otherwise disqualify [Mr. Ramirez] for DACA." ER3; *see also* ER9 ("his history would not have been disqualifying"); ER16, ER18 (adjudicator twice recommending to approve Mr. Ramirez's renewal application).

These allegations of prejudice and unfair treatment—many of which the district court accepted as factual findings—stated a claim that the government failed to give Mr. Ramirez's DACA renewal application the fair and impartial consideration required by the Due Process Clause. *See Reyes-Melendez*, 342 F.3d at 1008 (due process violated where immigration judge "failed to act as a neutral fact-finder," which was "not an exercise of discretion"); *Zolotukhin*, 417 F.3d at 1075 (due process violated where immigration judge "improperly prejudged" the case). For that reason, Section 1252(g) did not strip the district court of jurisdiction to hear this claim. *Walters*, 145 F.3d at 1052.

Moreover, this Court has recognized that district courts potentially could adjudicate claims that the government's conduct created a "mutually explicit understanding of presumptive renewal" and that "individual DACA renewals were denied for no good reason." *Regents of Univ. of Cal. v. DHS*, 908 F.3d 476, 515 (9th Cir. 2018), *cert. granted*, 139 S. Ct. 2779 (2019). The record here is clear: Mr. Ramirez's DACA renewal request was denied for no good reason in violation of his due process rights.[7]

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[7] In addition to violating Mr. Ramirez's due process rights, the denial of his DACA renewal request also violated the First Amendment. By refusing to renew Mr. Ramirez's DACA status, the government unconstitutionally retaliated for Mr. Ramirez filing suit to challenge his wrongful detention and the initial revocation of his DACA status. *See* ER96–97 ¶¶ 116–117. The INA cannot

By refusing to exercise jurisdiction over Mr. Ramirez's constitutional claims, the district court committed reversible legal error.

2. The government's nondiscretionary errors are reviewable

Not only did the district court have jurisdiction over Mr. Ramirez's constitutional claims, but it also had jurisdiction to review and correct the serious nondiscretionary errors the government made in denying Mr. Ramirez's renewal application. The government made several such errors—it relied on the wrong legal standard as well as an unsupported enforcement priority determination. It also departed from its regular practice with regard to Mr. Ramirez, creating "unexplained inconsistencies."

a) The government erroneously relied on the Kelly Memo and ICE's enforcement priority determination

Section 1252(g) "applies only to the three specific *discretionary* actions mentioned in its text," not to other, nondiscretionary actions. *Catholic Social Servs.*, 232 F.3d at 1150 (emphasis added). The district court mistakenly concluded that the government's denial of Mr. Ramirez's renewal application was an exercise of

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preclude review of Mr. Ramirez's First Amendment claim. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (explaining that "serious constitutional question[s]" would arise if a federal statute, such as Section 1252(g), "were construed to deny any judicial forum for a colorable constitutional claim" (quotation marks omitted)).

discretion, and it disregarded uncontroverted evidence that the government committed several nondiscretionary errors. ER23 n.118.

1. ICE erred when it treated Mr. Ramirez as an enforcement priority based on the Kelly Memo and Mr. Ramirez's order of removal. ER503; ER510–11. ICE told USCIS that because a Seattle immigration judge had ordered Mr. Ramirez removed to Mexico, "[i]n accordance with the DHS Secretary [Kelly] memorandum, ICE prioritizes the removal of Ramirez-Medina." ER511. ICE's reliance on the Kelly Memo was a nondiscretionary error because the Kelly Memo expressly carved out the Napolitano Memo from its enforcement-priority changes. *See* ER458; ER60. And the Napolitano Memo provides that an individual eligible for DACA generally is *not* an enforcement priority, "whether or not [that] individual is already in removal proceedings or subject to a final order of removal." ER131; *see also* ER132 (making DACA "available to individuals subject to a final order of removal regardless of their age").

Thus, ICE violated the then-governing Napolitano Memo by determining that Mr. Ramirez was an enforcement priority because he was subject to a final order of removal. During oral argument, Mr. Ramirez explained that, in denying his renewal application, "ICE used the enforcement priority standard from 2017, which is the wrong standard for ICE to examine. It's the 2012 memorandum, the Napolitano

memorandum, which is the relevant inquiry for DACA evaluation and adjudication." ER41:11–15; *see also* ER41:16–18; ER45:2–9; ER58.

At least one court has held that the government's "attempt to rely on the Kelly Memo to justify [its] decisions [to simultaneously terminate an existing DACA and deny a DACA renewal application] reinforces the arbitrariness of their actions against Plaintiff, when the Kelly Memo expressly exempts the DACA program from its scope." *Coyotl v. Kelly*, 261 F. Supp. 3d 1328, 1344 n.7 (N.D. Ga. 2017), *reconsid. denied*, 2017 WL 4956419, at *3 (N.D. Ga. July 31, 2017).[8] In rejecting the government's Section 1252(g) argument and granting a preliminary injunction, the *Coyotl* court observed that the government had "presented no evidence . . . which justifies the failure to follow [its] own procedural guidelines prior to denying Plaintiff's application for renewal of her DACA status and terminating that status." *Id.* And in denying reconsideration, the court explained that "it was not improper for the [c]ourt to raise the fact that the Kelly Memo, by its own terms, specifically excepts the Napolitano Memo from its coverage because Defendants themselves raised the applicability of the Kelly Memo as a basis for their decision not to renew and to terminate Plaintiff[']s DACA status." *Coyotl*, 2017 WL 4956419, at *3.

[8] The question of whether USCIS can rely on the Kelly Memo's enforcement priority with respect to DACA recipients is currently before this Court in the fully briefed appeal *Torres v. DHS*, No. 18-56037 (9th Cir.).

Here, too, Section 1252(g) did not strip the district court of subject matter jurisdiction over the government's application of the wrong legal standard. Committing such legal error is not a lawful exercise of agency discretion because, as this Court has held, Section 1252(g) does not prevent "[t]he district court [from] consider[ing] a purely legal question that does not challenge the Attorney General's discretionary authority, even if the answer to that legal question—a description of the relevant law—forms the backdrop against which the Attorney General later will exercise discretionary authority." *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004).

2. USCIS made another nondiscretionary error by relying on the fact that ICE considered Mr. Ramirez to be an enforcement priority. *See* ER60 (discussing "USCIS's deference to ICE's finding that Mr. Ramirez is an enforcement priority"). ICE's "enforcement priority" determination was based on a factual error. Specifically, ICE twice stated that Mr. Ramirez had lied about his participation in a GED program and thus failed to meet DACA's educational requirements. *See* ER500; ER511. This was wrong—indeed, USCIS's own legal counsel advised the DACA adjudicator that "the facts underlying" ICE's assertion that Mr. Ramirez engaged in DACA fraud "are not accurate" because Mr. Ramirez "was not dis-enrolled from his GED program until after he requested DACA, so he didn't appear to have engaged in fraud or misrep[resentation] in requesting DACA." ER499.

Notably, while *USCIS* knew that ICE's claim was "not accurate," nothing in the administrative record shows that *ICE* was aware of its mistake of fact, or whether it would have continued to treat Mr. Ramirez as an enforcement priority once its misunderstanding was corrected. *See* ER515–16 (Aug. 24, 2018 email from ICE to DACA adjudicator stating that ICE "considers Daniel Ramirez an enforcement priority" because, among other things, "[i]n his work authorization applications he falsely claimed that he was 'in school'").

Mr. Ramirez's adjudicator questioned the validity of his enforcement priority status, but her supervisor stated that "DACA policy guidance and SOP indicate that DACA requests will generally be denied when ICE considers the person to be an enforcement priority." ER507. Where (as here) USCIS had reason to question ICE's enforcement priority label, USCIS had a duty to follow up with ICE. *See* ER186–87 ("If the BCU disagrees with ICE's determination of whether or not the requestor is an enforcement priority, the BCU should ask local counsel for assistance in contacting local ICE counsel to discuss the reasons why USCIS disagrees with ICE's determination."). In fact, USCIS acknowledged that "this [DACA SOP] policy guidance does provide operational steps should centers disagree with ICE's enforcement priority determinations." ER507. It failed to take those steps.

The government argued below that ICE's enforcement priority determination was not "tainted" because "[t]he Government cannot be bound by its own pre-

decisional deliberations and early determinations." ER47 n.5. That is wrong. In denying Mr. Ramirez's renewal application, USCIS deferred to ICE's finding that he was an enforcement priority, ER60, and the record contains no evidence that USCIS made ICE aware—whether as part of "pre-decisional deliberations" or otherwise—that Mr. Ramirez had not committed DACA fraud. Had ICE known that Mr. Ramirez did not commit DACA fraud, it may well not have designated him an enforcement priority—indeed, the government has offered no other legitimate reasons why he should be an enforcement priority.

Although these issues were fully briefed, *see* ER58, the district court failed to consider them in its jurisdictional analysis. The error warrants reversal because the DACA SOP imposed a duty on USCIS to alert ICE to any issues with its enforcement priority designation of Mr. Ramirez. *See* ER507; ER186–87. It failed to do so.

b) The government's departure from its general policies was further nondiscretionary error

"'Unexplained inconsistency' between agency actions is 'a reason for holding an interpretation to be an arbitrary and capricious change.'" *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015). Even if an "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'" under the APA. *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (alteration in original).

When a court requires the government to follow its own policies and practices, it is "not . . . reviewing and reversing the manner in which *discretion* was exercised." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954) (emphasis added). As a result, Section 1252(g) does not bar judicial review of unexplained departures from general agency practice. *See Wong*, 373 F.3d at 963–64; *Catholic Social Servs.*, 232 F.3d at 1150.

The district court thus had jurisdiction to review the government's denial of Mr. Ramirez's DACA renewal request as arbitrary and capricious because it runs counter to the government's general policy governing such requests. As the USCIS adjudicator highlighted, binding guidance stated that "discretion should be applied consistently and similar fact patterns should yield similar results." ER18 (quotation marks omitted). The district court correctly concluded that the government violated that guidance here. ER24 ("Outside of this case, there is no indication that the Government would otherwise pursue non-disqualifying but derogatory information such as this. The Government does not indicate that it has ever denied renewal applications on similar concerns outside of Mr. Ramirez's case.").

Several aspects of the record supported the district court's conclusion that the government's treatment of Mr. Ramirez differed from its treatment of other DACA renewal applicants.

First, the government relied on "several-years-old and minor criminal transgressions that would not otherwise disqualify [Mr. Ramirez] for DACA." ER3. As the USCIS adjudicator explained, the government had previously "approved DACA requests with similar situations" to the investigation into the consensual sexual relationship Mr. Ramirez had with his son's mother. ER16 (quotation marks omitted). The adjudicator further noted that "traffic fines have never been evaluated as a discretionary factor which has led to the discretionary denial of a DACA" renewal request, ER18 (quotation marks omitted), and "[p]ossession of marijuana citations are generally not disqualifying for DACA," ER496; *see also* ER512 (government conceding that the SOP states that "a minor traffic offense, such as driving without a license, will not be considered a misdemeanor that counts towards the three or more non-significant misdemeanors" (quotation marks omitted)).

Second, the government relied on the fact that ICE is "actively pursu[ing]" Mr. Ramirez's removal, ER514, even though a removal order based on mere unlawful presence is not sufficient for denial of DACA status. *See Inland Empire—Immigrant Youth Collective v. Duke*, 2017 WL 5900061, at *7 (C.D. Cal. Nov. 20, 2017) ("[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.'" (second and third alterations in original)); ER504. Indeed, lack of lawful immigration status is a predicate to DACA eligibility and common among every DACA recipient, and DACA always has been available to individuals subject to removal orders. *See* ER131 (Napolitano Memo); ER103–04 (DACA FAQs, Q7). There can be no doubt that the government's reliance on ICE's removal order was an irrational departure from its general policy.

Third, as explained above, the government repeatedly relied on "baseless" and "speculative arguments" for which there is "no corroborating evidence." ER2–3; *see supra* pp. 23–25. At the very least, the government's treatment of Mr. Ramirez was "questionable," and its actions "cultivate and nourish suspicion." ER4. At a bare minimum, therefore, the government's mantra of unreviewability is proved wrong through its series of plainly reviewable, nondiscretionary acts. To the extent this Court has any doubts, it should be guided "by the strong presumption in favor of judicial review." *Arce*, 899 F.3d at 801 (quotation marks omitted).

B. The district court erred in denying Mr. Ramirez's motion for injunctive relief

The district court should have granted Mr. Ramirez's Second Injunction Motion, and it could have done so either as (1) a new, second preliminary injunction

or, alternatively, (2) enforcement of its existing Preliminary Injunction Order. The district court erred in finding that it lacked jurisdiction to order injunctive relief, and it further erred in finding that the government did not violate the Preliminary Injunction Order.

1. The district court had jurisdiction to enter additional injunctive relief

For the reasons explained above, *see* pp. 29–43, the district court had jurisdiction over Mr. Ramirez's claims, including jurisdiction to enter the second preliminary injunction Mr. Ramirez requested to remedy the government's unlawful denial of his DACA renewal application, *see* ER69.

The district court refused to enter a second injunction because it concluded—erroneously—that Section 1252(g) precluded it from doing so. ER20–25. The district court did not expressly state whether it would enter further injunctive relief if it had jurisdiction to do so, but its order is replete with suggestions that such relief is warranted. *See, e.g.*, ER2 ("The [c]ourt does not endorse the Government's actions in this matter."); ER24 (record capable "of a more sinister reading"); *id.* ("There are, frankly, many indications that give the [c]ourt pause to wonder if the Government had it out for Mr. Ramirez."); ER27 ("[I]t appears the Government considered only whether the facts supported its desired and preordained conclusion. This is not a just exercise of prosecutorial discretion.").

Thus, if this Court concludes that Section 1252(g) does not preclude judicial review of the government's actions, it should remand for the district court to determine in the first instance whether to grant Mr. Ramirez's Second Injunction Motion.

2. Regardless, the district court should have enforced its existing Preliminary Injunction Order

Even if Section 1252(g) precluded the district court from entering a second injunction (it did not), the district court nevertheless erred in failing to enforce its first injunction. Its error was twofold: first, the court wrongly found that the filing of the TAC dissolved its first injunction, which was originally based on the allegations in the SAC. ER25–26. Second, the court erred in finding that the government did not violate the first injunction. ER26.

a) The filing of an amended complaint did not "dissolve" the Preliminary Injunction Order

Although this Court "review[s] for abuse of discretion the district court's decision not to enforce an injunction," "[t]he district court abuses its discretion if (among other things) it bases its decision on an erroneous legal standard." *Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir. 2002) (en banc).

The district court erred as a matter of law in determining that the Preliminary Injunction Order automatically "dissolved" when Mr. Ramirez filed the TAC. This Court has set forth "the controlling rule governing the lifespan of a preliminary

injunction: A preliminary injunction . . . dissolves *ipso facto* when *a final judgment is entered in the cause*." *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1093 (9th Cir. 2010) (emphasis added); *see also* 11A Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2947 (3d ed.) ("A preliminary injunction remains in effect until a final judgment is rendered or the complaint is dismissed, unless it expires earlier by its own terms, or is modified, stayed, or reversed."). This rule "stems from the very purpose of a preliminary injunction, which is to preserve the status quo and the rights of the parties until a final judgment issues in the cause." *U.S. Philips Corp.*, 590 F.3d at 1094 (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held.")).

The district court erroneously concluded that Mr. Ramirez's mere *filing* of the TAC "dissolved the [district court's] injunction," reasoning that "where a complaint is dismissed, an injunction based on that complaint is dissolved." ER26. But a complaint's *dismissal* is entirely different from its *amendment*.[9] Whereas the former

[9] Indeed, the cases on which the district court relied all dealt with instances in which the complaint was *dismissed* and/or the action had effectively ended. *See Rodriguez v. 32nd Legislature of Virgin Islands*, 859 F.3d 199, 207 (3d Cir. 2017) (preliminary injunction had dissolved when district court had dismissed the action as moot); *Venezia v. Robinson*, 16 F.3d 209, 211 (7th Cir. 1994)

effectively nullifies the action and bars the subsequent filing of an amended complaint, the latter simply "supersedes" the original complaint without mooting the entirety of the case or cause of action.[10] *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997) (quotation marks omitted). Thus, when the TAC was filed, the district court's Preliminary Injunction Order remained in effect because there was no "'dismissal of the complaint or the entry of a final decree in the cause.'" *U.S. Philips Corp.*, 590 F.3d at 1094. Indeed, the cause of action on which the existing preliminary injunction was based—Mr. Ramirez's APA claim—remained in the TAC and no final judgment on it had yet been entered.[11]

(preliminary injunction did not survive district court's dismissal of complaint due to lack of service); *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1253 n.10 (10th Cir. 2006) (noting it was unclear whether preliminary injunction orders continued to have any legal validity given that the district court had "issued a final judgment terminating the case" in which they were issued); *Fundicao Tupy S.A. v. United States*, 841 F.2d 1101, 1103 (Fed. Cir. 1988) (preliminary injunction was moot because the merits of the case had been decided).

[10] The district court also relied on *Ramirez v. County of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015), for the proposition that "an amended complaint supersedes the original, the latter being treated thereafter as non-existent." *Id.* (quotation marks omitted). But *Ramirez* merely dealt with the situation in which the filing of a second amended complaint mooted the defendant's motion to dismiss the first amended complaint. *Id.* It has no bearing on whether the filing of an amended complaint moots a preliminary injunction.

[11] In any event, the government's violation of the district court's preliminary injunction occurred *before* Mr. Ramirez filed his TAC. Thus, even if the district court's logic regarding the preliminary injunction's termination were correct (it is not), the government still would have violated the order.

The district court's rule would lead to absurd results, forcing parties who had successfully obtained preliminary injunctive relief to rush to re-litigate that relief every time an amendment to the operative pleading may be required, simply to maintain the status quo. It would also provide perverse incentives for enjoined wrongdoers to engage in new, different wrongdoing thereby inviting amendment with the purpose of dissolving a prior, warranted injunction.

This Court should reverse the district court's erroneous decision that the filing of an amended pleading dissolves an otherwise valid preliminary injunction.

b) The government violated the Preliminary Injunction Order

The government's denial of Mr. Ramirez's routine DACA renewal application violated the plain terms of the district court's Preliminary Injunction Order. The district court's contrary conclusion was infected by its mistaken belief that it lacked subject matter jurisdiction and that the injunction had been dissolved by the filing of the TAC, *see* ER25–26, discussed above. The court's *non*-jurisdictional reasons for failing to enforce the injunction were similarly mistaken.

The Ninth Circuit's en banc decision in *Paulson* is especially instructive: In that case, the district court enjoined San Diego from maintaining a cross in a mountaintop park, but declined to enforce its injunction when the city tried to sell the land to a private party in order to maintain the cross. 294 F.3d at 1128. This Court reversed, explaining that the "Plaintiff premised his motion to enforce the

injunction on [two] similar, but distinct, constitutional provisions, yet the court failed to analyze the sale separately under each provision," *id.* at 1129, and the sale was unconstitutional under at least one of the provisions, *id.* at 1133. This Court does not hesitate to correct a legal mistake preventing the proper enforcement of an injunction. *See id*. at 1128; *see also Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 944 (9th Cir. 2014) (enforcing injunction after concluding special master's contrary recommendation was legally erroneous).

Here, the district court's preliminary injunction provided in relevant part that "Defendants shall not terminate [Mr. Ramirez's] DACA status and work authorization pending a final decision by this Court on the merits of his claims," and, in particular, that "Defendant USCIS is ENJOINED from asserting, adopting, or relying in any proceedings on any statement or record made as of [May 15, 2018] purporting to allege or establish that Mr. Ramirez is a gang member, gang affiliated, *or a threat to public safety*." ER356 (emphasis added).

Notwithstanding that order, the government constructively terminated Mr. Ramirez's DACA by denying his routine renewal application. In so doing, the government cited: (1) a 2013 police report related to his consensual relationship with the mother of his child; (2) a 2014 incident report regarding Mr. Ramirez's possession of a small amount of marijuana which resulted in a civil citation in Oregon; and (3) minor traffic citations issued between 2012 and 2016. ER78–80.

According to the government, these records meant that Mr. Ramirez did not "warrant a favorable exercise of prosecutorial discretion," *id.*, but each record was created before May 15, 2018. And the government's pretextual justifications for denying Mr. Ramirez's renewal application indeed portray Mr. Ramirez—falsely—as a public safety risk. This is exactly what the Preliminary Injunction Order prohibits the government from doing.

The government's stated justification for denying Mr. Ramirez's DACA renewal was based on public-safety factors, even if it took pains to avoid using words that mechanically violated the terms of the injunction. But that is a distinction without a difference. To justify denying renewal here, the government cited the California Penal Code, a federal criminal statute, and traffic-safety citations in California and Oregon. ER78–80. The government emphasized the seriousness of offenses under these statutes. *See id.* ("The report indicates that the unlawful act resulted in a pregnancy and birth of a child which was reported by Child Welfare Services."); *id.* ("Possessing and transporting marijuana across state lines is a chargeable federal offense under 21 U.S. Code § 844.").

The government clearly invoked Mr. Ramirez's years-old records to *implicitly* argue what the district court prohibited it from stating *explicitly*: that Mr. Ramirez was a public safety threat. Notably, the government provided no rationale for *why* Mr. Ramirez's stale, minor reports and citations warranted taking away the DACA

status for which he repeatedly had qualified in the past; the only plausible explanation is the inherent connection between criminal law and public safety. This violated the preliminary injunction. *See Inst. of Cetacean Research*, 774 F.3d at 949 ("The fact that the injunction's terms did not specifically forbid Sea Shepherd US's acts of assistance does not immunize Sea Shepherd US from liability."); *John B. Stetson Co. v. Stephen L. Stetson Co.*, 128 F.2d 981, 983 (2d Cir. 1942) ("In deciding whether an injunction has been violated it is proper to observe the objects for which the relief was granted and to find a breach of the decree in a violation of the spirit of the injunction, even though its strict letter may not have been disregarded.").

Indeed, the district court *agreed* with Mr. Ramirez that the government's position that "the denial was not on the basis that he was a threat to public safety, but because his 'offense history' made him unsuitable for favorable prosecutorial discretion" rested on "an apparently meaningless distinction." ER3–4. However, the district court erroneously rejected the conclusion that follows—that the government violated the injunction—because "the DACA SOP does draw some distinction between the terms 'issues of criminality' and 'threat to public safety.'" ER26.

This warrants reversal. Each of the examples from the DACA SOP and FAQs that the government (and by extension the district court)[12] relied on to show a supposed *distinction* between "issues of criminality" and being a "threat to public safety" in fact shows their close *connection*. For example, the DACA SOP's section on "Public Safety Concerns" begins by referencing "[t]he scope of *criminal offenses* deemed to be" Egregious Public Safety concerns. ER185 (emphasis added) (cited by ER47). The DACA SOP continues, "[a] DACA requestor's *criminal record* may give rise to significant public safety concerns even where there is not a disposition of conviction," and "[a]rrests and/or convictions that took place outside the United States are also significant unfavorable factors in evaluating public safety concerns, under the totality of the circumstances." *Id.*; *see also* ER177 (DACA SOP, § 8.G: Issues of Criminality); ER117–18 (DACA FAQs, Q49, Q51, Q54). The rules governing the DACA program are therefore clear that "issues of criminality" are relevant *because they may indicate that an individual poses a risk to the public*—the very rationale the government was forbidden to invoke with respect to information preceding May 15, 2018.

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[12] The district court did not explain its reasoning on this point, apart from the language quoted above and a footnote citation to the government's reply brief. The parties and this Court are left to guess at what "distinction" in the DACA SOP or FAQs the district court found sufficient to support the government's newfound "offense history" rationale.

The district court also questioned whether its "preliminary injunction should be read so broadly as to[] encompass information that was never before the [district court]." ER26. But the terms of the injunction could not have been clearer: USCIS was enjoined from "relying in any proceedings on *any statement or record* made as of [May 15, 2018] *purporting to allege or establish that Mr. Ramirez is* a gang member, gang affiliated, or *a threat to public safety*." ER356 (emphases added). Nothing in the injunction's broad terms limited its scope to records that had previously been presented to the district court; indeed, such a limitation would have defeated the very purpose of the injunction, which was to stop the government from wrongfully denying Mr. Ramirez DACA protection by mischaracterizing his past and wrongfully portraying him as a threat to the public.[13]

So long as the preliminary injunction was in effect, the government was required to abide by it. "[P]ersons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v.*

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[13] The district court also did not address Mr. Ramirez's request for additional discovery regarding redacted portions of the administrative record, which could have revealed additional misconduct in the government's campaign against him. *Compare* ER66 & n.3, *and* ER56 & n.1, *with* ER2–28. This, too, was error. *See Cal. Dep't of Soc. Servs. v. Leavitt*, 523 F.3d 1025, 1036 (9th Cir. 2008) (reversing district court's denial of motions to enforce judgment "insofar as the court failed to address the request to authorize discovery").

Consumers Union of U.S., Inc., 445 U.S. 375, 386 (1980); *see also Zapon v. DOJ*, 53 F.3d 283, 285 (9th Cir. 1995) ("[O]bedience to even an assertedly void (not merely voidable) order is required unless and until it has been vacated or reversed."). But here, the government ignored—or even deliberately contravened—the plain terms of the injunction while it was indisputably in effect. These circumstances demanded enforcement of the injunction.

Of course, before running roughshod over it, the government could have moved to modify or dissolve the injunction if it believed that it lacked clarity or that changed circumstances warranted reconsideration of its terms. *See Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 2019) ("'A party seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction.'" (quoting *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000))). But that is not what happened here. Instead, the district court effectively modified the injunction that it previously found supported by the facts and equities without explaining why the modification was lawful or equitable. *See* ER26. This was legal error. *See Karnoski*, 926 F.3d at 1198; *Sharp*, 233 F.3d at 1170; *accord U.S. Philips Corp.*, 590 F.3d at 1093 ("A district court cannot . . . modify a preliminary injunction *nunc pro tunc* retroactively to expand or vitiate rights the parties have already accrued under an injunction.").

At root, the government's violation of the Preliminary Injunction Order, and the district court's failure to enforce it, merits reversal because it goes to the heart of the government's ongoing "vendetta" against Mr. Ramirez. ER2. The government was ordered not to terminate Mr. Ramirez's DACA until there was a *final ruling on the merits* of Mr. Ramirez's case. It was ordered not to use old documents to wrongfully portray Mr. Ramirez as a public safety threat, when it knew that he was no such thing. Yet that is exactly what the government did, when it constructively terminated his DACA by failing to approve his routine renewal application on public-safety grounds before this case was finally resolved on the merits.

The district court acknowledged that the "outcome here" was "inequitable"; that the government waged a "crusade" against Mr. Ramirez; that "Mr. Ramirez's [renewal] application was treated differently" than normal; and that "[w]hen the Government's manufactured basis for action dissolved, it searched for a new basis" to deny Mr. Ramirez's DACA. ER4; ER12; ER24. The government asserted that the court was powerless to review its unlawful actions, and the court committed error when it agreed. The court then compounded that error with a mistaken analysis of the scope of the injunction and the procedure for modifying or dissolving it. This Court should hold that the government's denial of Mr. Ramirez's DACA renewal application was reviewable and violated the clear terms of the Preliminary Injunction Order.

CONCLUSION

This Court should reverse the district court's order granting the government's motion to dismiss. It should vacate and remand the district court's order denying Mr. Ramirez's motion for injunctive relief.

Dated: June 12, 2020

Respectfully submitted,

s/ Theodore J. Boutrous, Jr.

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ADDENDUM

UNITED STATES CODE

5 U.S.C. § 701(a):

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
> (1) statutes preclude judicial review; or
> (2) agency action is committed to agency discretion by law.

8 U.S.C. § 1252(g):

> Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

UNITED STATES CONSTITUTION

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Mr. Ramirez states that he is not aware of any related cases pending before this Court.

Dated: June 12, 2020

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

CERTIFICATE OF COMPLIANCE

I certify that pursuant Fed. R. App. P. 32(a)(5)(A), the attached brief is proportionately spaced, has a typeface of 14 points, and complies with the page limitations set forth in Ninth Circuit Rule 32-1 because it contains 12,948 words.

Dated: June 12, 2020

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 12, 2020.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 12, 2020

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.