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Submitted Via Federal eRulemaking Portal at www.regulations.gov

Samantha Deshommes
Chief, Regulatory Coordination Division Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security

Re: Public Comment in Response to DHS/USCIS Notice of Proposed Rulemaking "Deferred Action for Childhood Arrivals," CIS No. 2691-21, DHS Docket No. USCIS-2021-0006, RIN 1615-AC64

Dear Ms. Deshommes:

We write on behalf of the American Civil Liberties Union Foundation (ACLU) Immigrants' Rights Project and the ACLU of Southern California in response to the United States Citizenship and Immigration Services (USCIS) - Department of Homeland Security's Proposed Rulemaking: Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53,736, 53,769 (published Sept. 28, 2021) (hereinafter, the "proposed rule").

We strongly support the agency's efforts to preserve and fortify Deferred Action for Childhood Arrivals (DACA). Protecting DACA is critical to the hundreds of thousands of young immigrants that the program has enabled to live and work in the place they call home and to their families and communities. But DACA is not a permanent solution, and the administration and Congress must continue to work toward legislation with a pathway to citizenship.

We write here to address specific issues in the proposed rule, including the agency's proposed provisions regarding the termination of DACA grants and associated employment authorization. As explained below, we are counsel in *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. 17-cv-2048 (C.D. Cal.) ("*Inland Empire*"), a lawsuit challenging certain DACA termination practices that the agency proposes to codify. We have significant experience with these policies and their negative impact on DACA recipients and their families. We urge the agency to abandon these harmful policies and adopt adequate pre-termination procedures in their place. We also urge the agency to require that USCIS make considered, independent DACA decisions for both detained and non-detained individuals, and eliminate categorical criminal bars to the DACA program. As explained below, these changes are critical to ensuring that DACA adheres to principles of due process, fairness, and racial justice, and fully protects the reliance interests of DACA recipients and their communities.

I. Proposed Rule Background

The proposed rule would incorporate the categorical criminal eligibility bars from existing DACA guidance. 86 Fed. Reg. at 53,768. It also states that USCIS "may terminate a grant of DACA at any time if it determines that the recipient did not meet the threshold criteria; there are criminal, national security, or public safety issues; or there are other adverse factors resulting in a determination that continuing to exercise prosecutorial discretion is no longer warranted." *Id*. at 53,769. The proposed rule would thus permit the agency to terminate DACA and work permits immediately in any case, without providing a Notice of Intent to Terminate (NOIT) or opportunity to respond, including where an individual remains eligible for DACA. These terminations without process would include cases where USCIS terminates DACA automatically (1) based solely on Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP) filing a Notice to Appear (NTA) in immigration court placing a DACA recipient in removal proceedings and (2) where an individual departs the country without advance parole. *Id*. The proposed rule would also prevent USCIS from approving or renewing DACA for any individual in immigration detention. *Id*. Finally, the proposed rule does not ensure cooperation of DHS sub-agencies regarding the treatment of individuals with DACA and removal proceedings.

We urge the agency to reject these proposals and address the gaps in the proposed rule.

- First, the agency should not disqualify people categorically from DACA based on criminal convictions, but instead assess their fitness for DACA in each case. Maintaining categorical criminal bars to DACA raises serious racial justice concerns by importing into DACA decisions the significant racial disparities that plague the criminal legal system.

- Second, the agency should adopt basic pre-termination procedures for all DACA recipients, including where ICE or CBP has filed an NTA charging someone with being present without inspection or overstaying a visa. Terminating DACA without notice, a reasoned explanation, and a fair opportunity to respond undermines due process, fairness, and accuracy in decisionmaking. Adequate pre-termination procedures are also necessary to account for DACA recipients' reliance on its protections to make key life decisions about employment, education, housing, and family. And such procedures are especially critical given that ICE and CBP routinely file NTAs after an individual's contact with the criminal legal system, even if those contacts are minor and not disqualifying. Allowing ICE and CBP to effectively terminate DACA based on such contacts alone would further perpetuate the significant racial bias in the criminal legal system.

- Third, the agency should not allow for termination of DACA solely due to ICE or CBP filing an NTA placing someone in removal proceedings based

on their presence without admission or overstaying a visa. Terminating DACA on this basis conflicts with the rule that USCIS have exclusive jurisdiction over DACA decisions and is arbitrary and capricious in light of the overall DACA scheme.

- Fourth, the agency should allow USCIS to reassess someone's fitness for DACA and not automatically deny renewal due to a prior termination, and also make an independent decision about whether someone in immigration detention warrants DACA.

- Fifth, departure from the United States in certain exigent circumstances and without an advance parole document should not automatically result in DACA termination.

- Finally, the agency should adopt additional provisions to provide for cooperation among DHS sub-agencies with respect to removal proceedings to ensure that DACA recipients are treated consistently, fairly, and in keeping with USCIS's DACA decisions.

II. The ACLU Commenters and Their Experience with the Agency's DACA Termination Practices

For nearly 35 years, the ACLU Immigrants' Rights Project has been at the forefront of almost every major legal struggle for immigrants' rights, focusing on challenging laws that deny immigrants access to the courts, impose indefinite and mandatory detention, and discriminate based on nationality. In addition, we have challenged constitutional abuses that arise from immigration enforcement at the federal, state, and local levels, including anti-immigrant "show me your papers" laws at the state level and unconstitutional enforcement tactics by federal and local agencies. The ACLU of Southern California is the Southern California affiliate of the ACLU and maintains one of the most robust immigrants' rights programs in the country. The ACLU's work is animated by the principle that the fundamental protections of due process and equal protection embodied in our Constitution and Bill of Rights apply to every person, regardless of immigration status.

The undersigned are counsel in *Inland Empire*, *see supra*. The litigation challenges two termination practices currently enjoined by the federal court as to class members, which the agency now proposes to re-adopt and formalize in regulation. 86 Fed. Reg. at 53,751. Those two policies are (1) termination of DACA without giving notice, a reasoned explanation, or a chance to respond and (2) termination of DACA based solely on ICE's or CBP's issuance of an NTA initiating removal proceedings based on someone's presence without admission or overstaying a visa.[1]

[1] The agency's proposed rule provides for automatic termination upon *filing* of that NTA with the immigration court and not upon the *issuance* of the NTA, the policy at issue in *Inland Empire*.

Undersigned counsel filed *Inland Empire* after receiving widespread reports beginning in March 2017 about USCIS terminating DACA recipients' DACA grants and work permits without any process, even though they were still eligible for the program. Many of these terminations followed a similar pattern: ICE or CBP placed the DACA recipient in removal proceedings following the person's interaction with the criminal legal system, such as an arrest or pending misdemeanor charge. The DACA recipient subsequently received a notice from USCIS stating that their DACA had been terminated automatically because ICE or CBP issued an NTA placing them in removal proceedings. They were not provided with any other explanation for their sudden termination.

Many of these DACA recipients were never convicted of a serious or disqualifying offense but nonetheless lost their DACA and ability to work and fully participate in their communities. In one instance, a DACA recipient was arrested by ICE and placed in removal proceedings after paying a misdemeanor ticket for possession of fireworks on the Fourth of July.[2] USCIS responded to the NTA by automatically terminating the individual's DACA without notice and without making an independent judgment about his continued suitability for DACA. One of the named plaintiffs in *Inland Empire* lost his long-term job as a cook, which prevented him from helping to support his family and prepare for the birth of his first child, even though he had no criminal charges or convictions whatsoever.[3] Many DACA recipients lost the ability to drive in states where their license eligibility was based on having DACA. Still others were wrongly deported or forced to take voluntary departure, ripping their families apart. For example, a young North Carolinian DACA recipient and Eagle Scout was convicted of a non-disqualifying misdemeanor conviction; even though he was still eligible for DACA, ICE arrested, detained, and placed him in removal proceedings, and USCIS then automatically terminated his DACA.[4] Because ICE refused to release him from detention, he was ultimately forced to accept voluntary departure before his DACA could be reinstated through the *Inland Empire* injunction.[5]

These and many other former DACA recipients were left without any way to get their DACA and work permits back even if they believed the agency had made a mistake or did not have full information about the circumstances.[6] Counsel

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However, the court's reasoning for finding that termination policy arbitrary and capricious applies equally to termination based on the filing of an NTA.

[2] Pangea Team, *4th of July Celebration Ends in Possible Deportation of DACA Recipient*, Pangea Legal Services (July 20, 2017), https://www.pangealegal.org/news-and-updates/2017/7/20/4th-of-july-celebration-ends-in-possible-deportation-of-daca-recipient; *see also Inland Empire*, No. 17-cv-2048 (C.D. Cal.), ECF No. 30-13 ¶ 8.

[3] Mem. of Law in Supp. of Pl. Jesus Alonso Arreola Robles's Mot. for a Prelim. Inj., *Inland Empire*, No. 18-55564 (9th Cir. Dec. 14, 2018), ECF No. 16.

[4] *Inland Empire*, No. 17-cv-2048 (C.D. Cal.), ECF No. 39-13 ¶ 6.

[5] *Id.*

[6] This situation resulted, in part, because USCIS does not have a reconsideration procedure and has followed a policy of denying DACA renewals to anyone in immigration detention or with a previous termination, regardless of the circumstances. As explained below, USCIS should adopt a policy

later learned through the litigation that these dozens of cases were just the tip of the iceberg—USCIS had terminated DACA without process for over 1,000 DACA recipients in just the first 14 months of the Trump administration.[7]

Counsel filed *Inland Empire* in October 2017 and amended it in December 2017 to add class claims and move for a classwide injunction.[8] Plaintiffs challenged the agency's practices of (1) terminating DACA without giving the recipient notice, a reasoned explanation, and a chance to respond, and (2) terminating DACA based solely on ICE's or CBP's issuance of an NTA charging someone with being present without admission or overstaying a visa.[9] Plaintiffs argued that these practices were arbitrary and capricious in violation of the Administrative Procedure Act (APA) in light of the agency's rules requiring notice and a chance to respond in most cases and under the scheme as a whole, and that these practices violated DACA recipients' due process rights.[10] On February 26, 2018, the court certified a nationwide class and granted a nationwide preliminary injunction against these termination practices, concluding that they were arbitrary and capricious, but declining to reach Plaintiffs' due process claim.[11] The injunction required the agency to reinstate class members' DACA and work permits and to treat them as though they were not previously terminated in adjudicating DACA renewal requests.[12]

Following the injunction, roughly 450[13] of the approximately 1,000 DACA recipients were deemed class members[14] who were still eligible for DACA, had no pending serious criminal charges that would have excluded them from class membership, and were still in the United States. USCIS reinstated their DACA grants under the injunction. Approximately 100 more individuals would have been class members and reinstated had they not been removed or taken voluntary departure before the court granted the injunction.[15] None of these more than 550 individuals had disqualifying criminal history; indeed, dozens had no criminal convictions whatsoever.[16] Following reinstatement of their terminated DACA,

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that requires USCIS to reconsider someone's fitness for a DACA renewal *de novo*, even if they were previously terminated.

[7] This and other information cited in this comment is on file with undersigned counsel based on data provided by the government about putative class membership (hereinafter "Class Data").

[8] *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. CV-17-2048 PSG (SHKx), 2018 WL 1061408, at *4 (C.D. Cal. Feb. 26, 2018).

[9] *Id.* at *2.

[10] *Id*. at *8.

[11] *Id.* at *14, 19–20.

[12] *Id.* at *23.

[13] *See* Class Data.

[14] The *Inland Empire* class covers DACA recipients who (1) have not been convicted of a disqualifying criminal offense; (2) do not have certain pending criminal charges referenced in the USCIS 2011 NTA policy memorandum or for certain terrorism and security crimes; (3) have not departed the United States without advance parole or under an order of removal, voluntary departure, or voluntary return agreement; and, (4) have not obtained immigration status. 86 Fed. Reg. at 53,751.

[15] *See* Class Data.

[16] *Id.*

USCIS granted certain class members renewals, including individuals still in removal proceedings or with final orders of removal.[17]

Undersigned counsel has been involved in monitoring injunction compliance over the past nearly four years. As class counsel, we have communicated with dozens of class members and their lawyers about their experiences with DACA termination, immigration detention, and applying for renewal. Through this work, we have gained considerable familiarity with the agency's termination practices and the disastrous consequences of terminating DACA and work permits without process for DACA recipients and their families.

III. The Agency Should Eliminate Categorical Criminal Bars to DACA Eligibility.

As a preliminary matter, the agency should eliminate all categorical criminal bars to DACA from the final rule. Under the proposed rule, an individual would be automatically disqualified from DACA if she has been convicted of any felony, certain misdemeanors, or three or more misdemeanors that do not occur on the same day nor arise from the same act or scheme of conduct. 86 Fed. Reg. at 53,739. But the proposed rule already accounts for any concerns about public safety by disqualifying any individuals deemed "to pose a threat to national security or public safety." *Id*. Conversely, the fact of a conviction does not necessarily indicate whether an individual poses a threat to persons or property, and otherwise does not warrant deferred action. For instance, the proposed criminal bars could sweep in whole categories of non-violent crimes including simple possession of marijuana and petty theft. In addition, the proposed rule does not fully account for other possible mitigating factors, such as a lesser sentence imposed or evidence of rehabilitation. For instance, a DACA recipient would be disqualified for any felony conviction even if sentenced to only several days or weeks. *Id*. at 53,768.

By adopting categorical criminal bars, the agency prevents itself from considering mitigating circumstances or humanitarian concerns. This is inconsistent with the proposed rule's guiding principle that USCIS make a true "totality of the circumstances" determination in each case. *Id*. at 53,765. Further, reliance on categorical criminal bars unfairly reproduces racial biases and inequities, including the racial disparities in arrest, charging, and other decisions that exist within that system. For example, a 2020 study assessing nearly a 100 million traffic stops across the country found persistent racial bias in police stop and search decisions.[18] Other studies demonstrate vast racial disparities throughout

[17] This and other evidence is on file with undersigned counsel. It was obtained through correspondence and conversations with named plaintiffs, class members, and/or their legal representatives during the course of investigating the case and monitoring injunction compliance (hereinafter, "Class Correspondence").

[18] Emma Pierson, et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NAT. HUM. BEHAV. 736, 737, 739 (2020) (detailing results of analysis of "approximately 95 million traffic stops from 21 state patrol agencies and 35 municipal police departments" from 2011 through 2018); *see also* Alex Chohlas-Wood, et al., *An Analysis of the*

all stages of the criminal legal system from arrest through sentencing.[19] DACA recipients are primarily Black, Latinx, and/or other people of color who are negatively impacted by this widespread racial bias in policing and prosecution.

In Executive Order 13985, President Biden directed executive departments and agencies to "redress inequities in their policies and programs that serve as barriers to equal opportunity."[20] Indeed, DHS lists "equity" as one of the goals of the proposed rule and states that it is "keenly alert to distributive impacts." 86 Fed. Reg. at 53,796. In addition, DHS Secretary Alejandro Mayorkas recently emphasized the need to avoid perpetuating the racial biases and injustices of the criminal legal system in immigration decisions.[21] To further these aims, USCIS should institute a case-by-case review for all DACA requestors, regardless of any criminal conviction, to avoid undue reliance on flawed decisions from a racially biased system.

At the very least, the agency should continue to exclude convictions that have been expunged or set aside and should not bar individuals from DACA for any single offense. If the agency continues to bar individuals for a single conviction, it should provide a transparent definition of an "offense of domestic violence," 86 Fed. Reg. at 53,768, to promote fair and consistent adjudications. The agency could, for example, use the definition of a "crime of domestic violence" from the deportation ground in the INA, 8 U.S.C. § 1227 (a)(2)(E)(i), which requires (1) a conviction (2) of a crime of violence as defined in 18 U.S.C. § 16(a), in a qualifying domestic situation. It should also eliminate "driving under the influence," 86 Fed. Reg. at 53,768, as an automatic bar to DACA due to lack of transparency and variations in state law that have led to unfair and arbitrary denials.

IV. The Final Rule Should Provide for Notice, A Reasoned Explanation, and An Opportunity to Respond Before the Agency Terminates Any DACA Grant.

As described above, the proposed rule allows the agency to terminate DACA immediately—without providing a NOIT with a reasoned explanation or

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Metropolitan Nashville Police Department's Traffic Stop Practices, STAN. COMPUTATIONAL POL'Y LAB 2 (Nov. 19, 2018), https://policylab.stanford.edu/media/nashville-traffic-stops.pdf (noting that "the stop rate for black drivers in Nashville in 2017 was 44% higher than the stop rate for white drivers," and the disparity increased to 68% for non-moving violations, e.g., broken taillights or expired registration tags).

[19] Nick Petersen, et al., *Unequal Treatment: Racial and Ethnic Disparities in Miami-Dade Criminal Justice*, ACLU, FLA. GREATER MIA. 39 (Jul. 2018), https://www.aclufl.org/sites/default/files/aclufl_unequaltreatmentreport2018.pdf (finding racial and ethnic disparities within Miami-Dade County's criminal justice system at arrest, bond and pretrial detention, charging and disposition, and sentencing).

[20] Exec. Order No. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (Jan. 20, 2021).

[21] Alejandro Mayorkas, Dep't of Homeland Sec. Sec'y, U. of Cal. Los Angeles, Ctr. for Immigr. Law and Pol'y (Apr. 30, 2021), *available at* https://www.c-span.org/video/?511376-1/homeland-security-secretary-alejandro-mayorkas-immigration, 40:07.

opportunity to respond—in its discretion in any case. 86 Fed. Reg. at 53,769. This would include cases where USCIS terminates DACA based solely on ICE's or CBP's filing of an NTA placing an individual in removal proceedings, which has typically occurred following a DACA recipient's alleged contact with the criminal legal system. The agency should reject this policy and adopt the basic procedural protections of notice, a reasoned explanation, and an opportunity to respond before terminating any DACA grant.

A. Promoting Fairness, Accuracy, and Racial Justice

Providing basic process is essential to ensure fairness and accuracy of the weighty decision to terminate a person's DACA, and to mitigate serious racial justice concerns.[22] The agency elsewhere has recognized the importance of providing notice and an opportunity to respond before denying or revoking grants. For example, USCIS provides these procedural protections before terminating immigration benefits and status in multiple contexts, such as asylum.[23] The agency has provided no adequate rationale for diverging from those processes for DACA. Moreover, the proposed rule is inconsistent with binding agency regulations. Under 8 C.F.R. § 103.2(b)(8), before undertaking an adverse decision based on "derogatory information . . . of which the [individual] is unaware," USCIS "shall" advise the individual of that information and offer "an opportunity to rebut" it before rendering a decision. Yet the proposed rule would permit termination of a person's DACA based on derogatory information that she may not be aware of and can therefore not correct or address. This significantly undermines the fairness and accuracy of the resulting decisions.

Notice is especially important because the agency has frequently terminated DACA without process in response to alleged derogatory information—primarily alleged contacts with the criminal legal system such as arrests or criminal charges. However, records regarding initial contacts with the criminal legal system are often inaccurate, incomplete, or do not reflect actual criminal conduct or how a criminal case may ultimately be resolved. Indeed, statistics show that criminal charges are frequently dismissed outright or lowered. For example, a 2013 report by the Bureau of Justice Statistics assessed adjudication outcomes for felony defendants in the 75 largest counties in the United States: of the 48,939 cases reported within a one-year timeframe, 35% were not convicted while a quarter of charges were outright

[22] *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (holding that the Constitution "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests").

[23] *See, e.g.*, 8 C.F.R. §§ 208.24(c) (requiring "notice of intent to terminate, with the reasons therefor" prior to the termination of a grant of asylum or withholding of deportation or removal); 245a.2(u)(2)(i) (requiring advance notice and "an opportunity to offer evidence in opposition to the grounds alleged for termination of" temporary resident status); 216.3(a) (providing for "opportunity to review and rebut the evidence" prior to notice of termination of conditional residence); 2012.19(k)(3) (providing notice of intent to terminate parole for entrepreneurs and their family members).

dismissed.[24] In 2019, out of the 356,333 adults arrested in the State of New York, only 28.8% were sentenced.[25] The percentage for felony arrests was even lower, with only 10.16% of the 125,663 felony arrests resulting in sentencing.[26]

Law enforcement and ICE records are also often inaccurate or incomplete as to the nature of individual criminal histories.[27] "[P]eople of color are especially disadvantaged by faulty" criminal records such as the FBI's databases "because they are consistently arrested at higher rates tha[n] whites, and large numbers of their arrests never lead to a conviction."[28] DHS often terminates in response to receiving arrest and charging records. But these types of records, such as police reports, are especially unreliable sources for making weighty DACA decisions. Police reports often contain gaps, inconsistences, and mistakes which are partly a result of biases and insufficient investigation.[29] For this reason, the Board of Immigration Appeals (BIA) has held that police reports should not be given substantial weight in making discretionary decisions absent a conviction or other corroborating evidence.[30] Given these realities, permitting notice and a chance to respond is necessary to ensure fairness and accuracy in termination decisions.

Moreover, a core principle of the proposed rule is that USCIS should have full information to allow for a true "totality of the circumstances" determination. 86 Fed. Reg. at 53,765. Providing process before any termination decision is necessary to further that objective. Notice of the grounds for proposed termination would give DACA recipients the chance to respond to any derogatory information presented. If criminal conduct is alleged, the DACA recipient would have the opportunity to provide a fuller picture beyond bare records; explain the circumstances of any arrest, charge(s), or convictions; correct inaccuracies that could otherwise be driving the agency's intent to terminate; and provide positive

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[24] Brian A. Reaves, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., *Felony Defendants in Large Urban Counties, 2009—Statistical Tables* 22, 24 (2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf.

[25] *NYS Adult Arrests and Prison Sentences by Race/Ethnicity in 2019*, N.Y. Div. of Crim. Just. Serv. (2019), https://www.criminaljustice.ny.gov/crimnet/ojsa/comparison-population-arrests-prison-demographics/2019%20Population%20Arrests%20Prison%20by%20Race.pdf.

[26] *Id.*

[27] *Faulty FBI Background Checks for Employment: Correcting FBI Records is Key to Criminal Justice Reform*, Nat'l Empl. Law Project (Dec. 2015), https://www.nelp.org/publication/faulty-fbi-background-checks-for-employment/ (finding that, e.g., nearly half of FBI rap sheets failed to include disposition information after an arrest, "for example, whether a charge was dismissed or otherwise disposed of without a conviction, or if a record was expunged").

[28] *Id.*

[29] *See* Mary Holper, *Confronting Cops in Immigration Court*, 23 Wm. & Mary Bill Rts. J. 675, 682–88 (Mar. 2015) (describing unreliability of police reports).

[30] *Matter of Arreguin*, 21 I. & N. Dec. 38, 42 (BIA 1995); *see also Avila-Ramirez v. Holder*, 764 F.3d 717, 725 (7th Cir. 2014) ("Denial of discretionary relief . . . by . . . giving substantial weight to arrest report absent conviction or corroborating evidence . . . was not harmless, requiring remand."); *Matter of Teixeira*, 21 I. & N. Dec. 316, 316 (BIA 1996) (holding that "[a] police report, standing alone, is not part of a 'record of conviction,' nor does it fit any of the regulatory descriptions found at 8 C.F.R. § 3.41 (1995) for documents that are admissible as evidence in any proceeding before an Immigration Judge in proving a criminal conviction . . . .").

information about their community ties, education, and employment. Without such an opportunity, USCIS may unfairly revoke an individual's DACA protections without complete or accurate information.

The opportunity to provide context where criminal activity is alleged is critical to promoting racial justice. As explained above, the criminal legal system suffers from significant racial disparities that disproportionately impact DACA recipients, who are primarily Black, Latinx, and/or other people of color. Terminating DACA based on alleged criminal conduct without adequate procedural protections further perpetuates these inequalities.

The proposed provision allowing ICE and CBP to force USCIS to automatically terminate DACA simply by filing an NTA is particularly unfair and arbitrary. The decision to issue an NTA is made by ICE or CBP in the field, often following reports of a DACA recipient's alleged minor interactions with the criminal legal system, including arrests or charges that are not proof of criminal conduct. These decisions are frequently made without the benefit of complete or accurate information that USCIS may possess.[31] Providing for automatic termination under these circumstances increases the risk of error and is also inconsistent with the proposed rule's mandate that "*USCIS* has exclusive jurisdiction to consider requests for [DACA]," 86 Fed. Reg. at 53,815 (emphasis added), and must make decisions in the "the totality of the circumstances," *id.* at 53,765. As the proposed rule recognizes, *USCIS* is in the best position to make DACA determinations based on considered agency policy. *See id*. at 53,815–16. And yet the proposed rule would allow ICE and CBP to overrule USCIS's determinations about a person's fitness for DACA with the stroke of a pen, based on limited information and without accountability, creating unfair and arbitrary results. Requiring USCIS to provide process and make an independent judgment about whether to continue DACA where an NTA is filed ensures that the agency's discretion is exercised in a consistent manner, in line with adjudication guidance.

The experience of one of the *Inland Empire* plaintiffs illustrates the importance of providing this pre-termination process. ICE arrested the plaintiff and placed him in removal proceedings based on being present without admission, following ICE's mistaken belief that he had been charged with felony assault and a firearms-related charge.[32] USCIS responded by automatically terminating his DACA without providing any process. However, the plaintiff was never in fact arrested or charged with any felony crimes.[33] Instead, he was charged only with the minor traffic offense of driving on a cancelled license, which had recently lapsed due to his failure to re-verify his DACA with the motor vehicle department.[34]

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[31] *See Inland Empire*, No. 17-cv-2048 (C.D. Cal.), ECF Nos..34-1; 39-1; 39-13; 57-1; *see also* Class Correspondence.
[32] Br. for Defs. at 2, *Inland Empire*, No. 17-cv-2048 (C.D. Cal. Feb. 1, 2018), ECF No. 54 (advancing this explanation).
[33] Br. for Pls.-Appellees at 13 n.7 & 8, *Inland Empire*, No. 18-55564 (9th Cir. Dec. 14, 2018), ECF No. 19.
[34] *Inland Empire*, No. 17-cv-2048 (C.D. Cal.), ECF No. 57-5.

That charge was subsequently dismissed after he complied with certain court requirements.[35] Had USCIS provided the plaintiff with notice of its intended termination and an opportunity to respond, he could have corrected the agency's mistaken conclusions before he lost his DACA and work permit and, with them, his ability to drive and support his family, including five U.S. citizen siblings.

In short, permitting pre-termination notice and an opportunity to respond would promote fairness, accuracy, and uniformity in termination decisions and mitigate the impact of racial inequities in the criminal legal system.

B. Protecting Reliance Interests

Second, providing notice and an opportunity to respond would account for important reliance interests. As the Supreme Court has recognized, the consequences of DACA rescissions are significant and "radiate outward" beyond DACA recipients to their families, employers, schools, local and state governments, and more.[36] It is therefore in the interest of the agency, DACA recipients, and their communities to provide basic process before upending DACA recipients' lives.

In its preamble, the proposed rule recognizes the significant reliance interests involved, including but not limited to:

- The fact that more than 825,000 DACA recipients, many of whom know the United States as their only home, have "built lives for themselves and their loved ones" here;
- The substantial life decisions that DACA recipients have made "[i]n reliance of DACA," including enrolling in degree programs, starting businesses, obtaining professional licenses, seeking treatment for long-term health issues, and purchasing homes;
- The substantial contributions in taxes and economic activity of DACA recipients in all 50 States and the District of Columbia, including work "on the frontlines during the COVID-19 pandemic"; and,
- DACA recipients' long-term civic engagement and investment in local communities.

86 Fed. Reg. at 53,737-39. Just as there are "legitimate reliance interests" in the continued implementation of the DACA program itself, *id*. at 53,739, there are also significant reliance interests in the continuation of existing DACA grants. As the agency acknowledges, people make consequential decisions based on the two-year grants of deferred action. *Id*. at 53,738. Further, many other people rely on DACA recipients for financial, emotional and other support. *Id*. (noting that over 250,000 U.S. born children have at least one parent who is a DACA recipient and about 1.5 million people share a home with a DACA recipient). Approximately 15% of

[35] *Id*.
[36] *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1914 (2020).

DACA recipients age 25 and older own a home and rely on work authorized employment to pay their mortgages.[37] Such reliance interests are too important to have termination decisions made by the agency without complete information.

An *Inland Empire* class member's experience illustrates the devastating consequences of DACA termination without notice and an opportunity to respond. In 2017, USCIS suddenly terminated the DACA and work permit of a mother of two who was then pregnant with her third child.[38] She had no known criminal history, and USCIS failed to provide her with any explanation of the reasons for her termination.[39] Without a work permit, she was let go from her job and, as a result, was unable to make her mortgage payments, causing her and her family to lose their home.[40] Had USCIS provided her with notice of the grounds and an opportunity to respond, she would have received at least a chance to demonstrate that she still warranted DACA and avoid the ruinous consequences of having her DACA terminated.

C. Promoting Due Process

Third, and relatedly, providing these procedures would provide DACA recipients basic due process. Even when grants are discretionary, as with DACA and related employment authorization, courts have held that terminating a benefit requires a higher degree of due process than an initial grant because of the reliance interests engendered.[41] As explained above, DACA grants are essential to recipients' ability to earn a living, support family members, and make other significant life decisions.[42] DACA recipients reasonably rely on the implicit

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[37] Tom K. Wong et al., *Results from 2017 National DACA Study* (Oct. 7. 2017), *available at* https://cdn.americanprogress.org/content/uploads/2017/11/02125251/2017_DACA_study_economic_report_updated.pdf

[38] *Inland Empire*, No. 17-cv-2048 (C.D. Cal.), ECF No. 39-13 ¶ 10; *see also* Class Correspondence.

[39] *Id.*

[40] *See* Class Correspondence.

[41] *Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that driver's licenses "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 discretionary operating licenses and are entitled to 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).

[42] *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

promise from the agency that they can retain their DACA grant and associated protections so long as they continue to satisfy the program's eligibility requirements. Thus, reversal of any previous DACA grant inflicts precisely the kind of "serious loss" that requires due process protections.[43] Moreover, providing procedural protections still preserves the agency's ultimate discretion regarding deferred action and termination decisions. And as explained below, pre-termination notice is not administratively difficult to achieve; indeed, it has already been provided to a large subset of DACA recipients for nearly the past four years. *See infra* at Section VI.[44]

V. Terminating DACA Based Solely on an NTA Is Arbitrary and Capricious.

The agency should reject the termination of DACA based solely on the filing of an NTA for the additional reason that it is arbitrary and capricious in violation of the APA. 5 U.S.C. § 706(2)(A). The APA requires that "agency action must be based on non-arbitrary, 'relevant factors.'"[45] As recognized by the court in *Inland Empire*, automatically terminating DACA based on an NTA charging the DACA recipient with presence without admission or overstaying a visa—as has been ICE and CBP's practice—is arbitrary, capricious, and contrary to law.[46]

This is made clear by the reasoning of the Supreme Court's ruling in *Judulang v. Holder*. In *Judulang*, the Supreme Court considered a BIA rule governing eligibility for a form of relief—suspension of deportation—which was not provided for in the Immigration and Nationality Act and was therefore entirely discretionary.[47] Although the relief was ultimately within the agency's discretion, the Supreme Court made clear that the rules applied by the agency must still reflect reasoned decision-making. 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."[48] The Court invalidated the BIA rule because it was based on "a matter irrelevant to the alien's fitness to reside in this country," and concluded that the BIA therefore "has failed to exercise its discretion in a reasoned manner."[49]

Like the policy in *Judulang*, the practice of terminating DACA based solely on an NTA charging presence without inspection or overstaying a visa is arbitrary

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applied-for license, constitutes a legitimate entitlement of which one cannot be deprived without due process.")).

[43] *See Mathews*, 424 U.S. at 348 (internal quotation marks omitted).

[44] For many of the same reasons, the agency should also require a Notice of Intent to Deny or Request for Evidence and allow a fair chance to respond before denying an initial or renewal request where possible derogatory information is behind the agency's decision to deny DACA.

[45] *Judulang v. Holder*, 565 U.S. 42, 55 (2011) (citation omitted).

[46] *Inland Empire*, 2018 WL 1061408, at *17-18.

[47] 565 U.S. at 46-47.

[48] *Id.* at 55.

[49] *Id.* at 53.

and capricious. First, the practice is arbitrary because, under the DACA program, "a noncitizen's deportability due to unauthorized presence in the United States . . . provides no relevant basis for terminating DACA."[50] Nothing in the DACA rules suggests that the fact that a noncitizen is subject to removal because he lacks a lawful immigration status is a basis for denial or termination. Indeed, the DACA rules indicate the opposite: the lack of a lawful immigration status is a *predicate* for eligibility for DACA and is a fact that is therefore true of every DACA recipient. 86 Fed. Reg. at 53,767. Because the lack of a lawful immigration status is required to obtain DACA, that same fact cannot also indicate that an individual is no longer deserving of DACA. Accordingly, an NTA charging presence without admission or visa overstay is not a reasoned basis for terminating DACA.

Second, "[t]he program's rules also make clear that even noncitizens who are, have been, or will be placed in removal proceedings are nonetheless eligible for DACA."[51] The rules thus reinforce the conclusion that an NTA alleging lack of status in the United States does not provide a reasoned basis for DACA termination, and is therefore arbitrary. The proposed rule provides that "[a]n alien who is in removal proceedings may request [DACA] regardless of whether those proceedings have been administratively closed." 86 Fed. Reg. at 53,815. Indeed, even individuals with final removal orders can be granted DACA. *See id.* (explaining that "[a] voluntary departure order or a final order of exclusion, deportation, or removal is not a bar to requesting [DACA]").[52] Given that placement in removal proceedings or even a final order of removal does not render the individual ineligible for the program, the practice of automatically terminating DACA on this basis—that is, treating it as conclusive of whether an individual merits DACA—is arbitrary.

Third, the practice is arbitrary and capricious because USCIS fails, despite an individual's continued eligibility for the program, to consider the relevant facts and circumstances and exercise individualized discretion. This failure to consider an individual's specific circumstances undermines the core mandate in the proposed rule that *USCIS* consider "the totality of the circumstances" in making DACA decisions. 86 Fed. Reg. at 53,765.

Finally, USCIS's proposal is arbitrary and capricious because it leaves the question of whether an individual continues to warrant DACA solely up to a CBP or ICE officer's charging decision. In *Judulang*, the Supreme Court emphasized that an additional reason why the BIA's rule was arbitrary was that under the agency's rule, whether a noncitizen would be granted discretionary relief may "rest on the happenstance of an immigration official's charging decision."[53] The same is true here: where an individual's DACA is revoked automatically due to the filing

[50] *Inland Empire*, 2018 WL 1061408, at *17.
[51] *Id.*; *accord Gonzalez v. Garland*, No. 20-1924, 2021 WL 4888394, at *9 (4th Cir. Oct. 20, 2021).
[52] *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").
[53] 565 U.S. at 57.

of the NTA, everything hangs on the fortuity of one officer's decision. Because all DACA recipients are potentially removable for unlawful presence in the United States, the proposed policy of categorically terminating whenever an immigration officer happens to initiate removal proceedings on that basis is arbitrary.[54]

VI. The Agency Should, at a Minimum, Continue Protections Provided in the *Inland Empire* Injunction.

However, if the agency is not inclined to provide notice in all cases and reject automatic termination based on an NTA for all, USCIS should, at the very least, incorporate into the final rule the terms of the *Inland Empire* injunction.[55] This would ensure that DACA recipients who are still eligible for the program and lack certain pending charges receive (1) notice of an intent to terminate, an explanation of the grounds for proposed termination, and a fair opportunity to respond and (2) cannot have their DACA terminated based solely on an NTA charging them with being present without admission or overstaying a visa.

The agency has provided no reason why it should not continue to provide these important protections to *Inland Empire* class members. For nearly four years, the agency has complied with the injunction, providing these basic procedures without any reported issues—as recognized by the proposed rule itself. 86 Fed. Reg. at 53,751. These safeguards have provided DACA-eligible individuals for whom the agency has presented allegedly derogatory information the critical opportunity to correct inaccuracies, demonstrate extenuating circumstances, and provide information about equities to allow for a fully informed and accurate adjudication. This opportunity is meaningful: following reinstatement of DACA for class members, USCIS did not seek to re-terminate the DACA of many class members after providing the required process. Counsel is also aware of multiple cases where the agency initiated the termination process but chose not to terminate DACA after receiving an individual's response.[56]

One class member's experience illustrates the critical protections of the injunction. The class member, who uses a prosthetic leg, was riding in a car with relatives and police officer pulled them over.[57] The DACA recipient showed the officer his identification and explained that he had DACA. Nonetheless, the officer arrested him and turned him over to a nearby ICE detention center where he was issued an NTA charging him with being present without admission. He remained in detention for a month, scared and unable to understand how he had ended up

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[54] Critically, rejecting a policy of automatic termination does not impact ICE's ability to issue an NTA and place an individual in removal proceedings.
[55] *Inland Empire*, 2018 WL 1061408, at *23.
[56] *See* Class Correspondence.
[57] Br. of Catholic Legal Immigration Network, Inc. as Amicus Curiae in Support of Pls.-Appellees, Doc. 27,
Inland Empire, No. 18-55564 (9th Cir. Dec. 21, 2018),
https://cliniclegal.org/resources/litigation/inland-empire-immigrant-youth-collective-et-al-v-kirstjen-nielsen-et-al-amicus.

there. He suffered sharp pain in his leg, and he could not sleep comfortably because he had to remove his prosthesis and constantly feared it would be stolen while he slept. When he requested medical attention, detention center staff mocked his disability, saying things like, "You can put a broomstick in his leg and he can sweep."[58]

While in detention, he learned that the government had revoked his DACA based on the NTA, without any chance for him to respond or challenge that action, even though he was never charged with a crime, and an immigration judge ordered him released on bond after finding that he did not pose a flight risk or danger to the community.[59] After his release from detention, without DACA, he was unable to return to the job he had held at Amazon.[60]

However, through *Inland Empire*, USCIS reinstated this class member's DACA. Soon thereafter, he secured a job as a manufacturing associate at a heating company, which enabled him to obtain health insurance. He also began taking engineering classes at a community college, with hopes to transfer to a university, obtain a bachelor's degree in engineering, and become a computer engineer.[61] Thereafter, USCIS did not attempt to re-terminate his DACA after providing notice.[62] Had the injunction been in place at the time of the original termination, USCIS may very well have chosen not to terminate his DACA to begin with.

VII. Prior Automatic Termination Should Not Lead to Automatic Renewal Denial.

In the past, USCIS followed a practice of denying renewal requests to anyone whose DACA had been terminated previously, regardless of the circumstances. This was an informal practice that was not provided for in the agency's official Standard Operating Procedures. This policy meant that individuals who lost their DACA had no way to have it restored, even where the termination relied on incomplete or mistaken information, they were never convicted of a disqualifying crime, or the equities had significantly changed. The practice was especially troubling because, in many cases, the person's DACA was terminated automatically following ICE's or CBP's issuance of an NTA and not based on USCIS's independent judgment as to the individual's continued fitness for DACA. As explained above, many DACA grants have been terminated following arrests or charges that did not result in any disqualifying or serious criminal conviction. The factors going to the totality of the circumstances may also shift over time. Thus, a prior automatic termination may not accurately reflect an individual's fitness for another discretionary grant of deferred action and is not sufficient on its own to justify the denial of a renewal request.

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[58] *Id.* at 5.
[59] *Id.* at 6.
[60] *Id.*
[61] *Id.*
[62] *See* Class Correspondence.

USCIS should adopt a rule that requires the agency to independently decide whether to renew an individual's DACA, based on a *de novo* review of the totality of circumstances and the submitted evidence. Such a rule would be consistent with other provisions requiring USCIS to make decisions "in the totality of the circumstances."[63] 86 Fed. Reg. at 53,765. It would also be consistent with the proposed rule permitting someone denied DACA—even in the agency's discretion—to reapply for DACA in the future. *Id*. at 53,769. There is no principled reason to permit someone denied DACA in the first instance to apply for DACA again, but not someone whose DACA was terminated. The fact that some *Inland Empire* class members secured renewals after reinstatement of their DACA reflects the importance of USCIS's careful *de novo* review.

VIII. Individuals in Immigration Detention Should Be Eligible for DACA.

The rule proposes to codify USCIS's existing practice of denying DACA to any individual who is in immigration detention when the request is adjudicated. 86 Fed. Reg. at 53,769. The agency should reject this policy as it leads to arbitrary and unfair results, and conflicts with the mandate that *USCIS* make DACA decisions "in the totality of the circumstances."[64] *Id*. at 53,765.

The number of people detained by ICE continues to be high, ensuring that many individuals eligible for DACA will end up in immigration detention. The proposed policy means that, whether someone detained can be granted DACA, initially or as a renewal, depends on whether they are able to secure release from detention in a timely way. ICE's decision-making process regarding releases from detention is notoriously arbitrary and disorganized[65]—meaning that securing release could take months or never happen at all—depriving an eligible individual of DACA. Whether someone can secure release depends on a variety of factors that may not bear on individual fitness for DACA: among other things, whether the individual is eligible for release on bond or parole, the discretion of individual ICE officials setting bond or making parole decisions, the immigration judge reviewing bond determinations, and whether the individual has the ability to pay a bond.

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[63] *See Frequently Asked Questions, Consideration of Deferred Action for Childhood Arrivals Process*, Official Website of the Dept. of Homeland Sec'y, https://www.uscis.gov/humanitarian/consideration-of-deferred-action-for-childhood-arrivals-daca/frequently-asked-questions (last updated Aug. 31, 2021)

[64] *Id*.

[65] *See, e.g.*, ACLU et al., *Practice Advisory: Damus v. Nielsen Parole of Arriving Asylum Seekers Who Have Passed Credible Fear* at 3 (July 9, 2018), https://www.aclu.org/sites/default/files/field_document/damus_parole_advisory_final.pdf (describing how parole *grants* from upward of 92% of arriving asylum seekers changed to *denials* in 92 to 100% of cases); Transactional Recs. Access Clearinghouse, Syracuse U., *Three-fold Difference in Immigration Bond Amounts by Court Location* (July 2, 2018), https://trac.syr.edu/immigration/reports/519/.

For example, several *Inland Empire* class members who had their DACA reinstated under the injunction were unable to get DACA renewals despite being otherwise eligible, simply because they were in detention.[66] In the case of two class members, ICE treated them as arriving aliens because of their last manner of entry into the country (advance parole and through the Visa Waiver Program, respectively). This prevented them from securing bond, even though their manner of entry had nothing to do with whether they were a flight risk or danger or whether they should be granted DACA. Moreover, even for those eligible for bond, bond decisions are often inconsistent and arbitrary, and many people are unable to afford the bonds they are assigned. The likelihood of someone receiving a bond that they cannot afford to pay varies between states, cities, courts, and judges. Since 2018, some immigration judges set bonds that a third of immigrants did not pay within 30 days; others set bonds that were paid by immigrants that same day almost every time. The differences between cities are also striking: since 2018, in Detroit, only 17% of immigrants given bond did not pay within five days of the judge's order; in Portland, 72% failed to pay.[67]

This aspect of the proposed rule weakens the uniformity and consistency of DACA decisions and takes the decisions out of USCIS's considered judgment based on consistent guidelines. For the same reasons ICE and CBP should not be able to force USCIS to terminate DACA automatically, it should not be permitted to prevent granting of DACA by holding individuals in detention. *See supra* at Sections IV & V. We urge the agency to empower USCIS to make full adjudications for both detained and non-detained DACA applicants based on the totality of the circumstances.

IX. DACA Should Not Be Terminated When Someone Departs from the United States Without Advance Parole Inadvertently or in an Emergency.

The proposed rule provides that USCIS will automatically terminate DACA upon a DACA recipient's departure from the United States without an advance parole document. However, DHS states that it is considering creating an exception to automatic termination where someone departs the country without advance parole inadvertently or under exigent circumstances. 86 Fed. Reg. at 53,771. We support the agency creating such an exception to automatic termination, as well as making a corresponding change to the eligibility criteria to provide that leaving the country under such circumstances does not make someone ineligible for DACA. Recent high-profile incidents highlight why providing this exception is critical to protecting DACA recipients from harsh and disproportionate consequences.[68]

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[66] *See* Class Correspondence.
[67] ACLU Analytics & Immigrants' Rights Project, *Discretionary Detention by the Numbers*, ACLU, https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/discretionary-detention (showing rates at which noncitizens remain detained due to inability to post bond amount).
[68] *See* Suzanne Gamboa, *Flight attendant, a DACA recipient, released by ICE*, CBS News (Mar. 22, 2019), https://www.nbcnews.com/news/latino/flight-attendant-daca-gets-airline-s-ok-fly-mexico-

For example, DACA recipient Orr Yakobi, a University of California, San Diego student who has lived in the United States since he was five years old, was detained by CBP in January 2018, after he and a friend made a wrong turn leaving a shopping center located along the southern U.S. border in San Ysidro, California.[69] Turning onto the wrong highway led their vehicle out of the United States and into Mexico. Although Orr's departure was brief and accidental, CBP detained him and ICE and CBP were poised to report his situation to USCIS for DACA termination before advocates intervened and convinced the agency to release him and not rescind his DACA.

Instead of automatic termination, the agency should adopt a policy that provides for case-by-case review of any departure from the United States without advance parole that considers whether the departure was inadvertent or exigencies prevented the individual from obtaining advance parole before departing.

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X. The Agency Should Adopt Procedures for Coordination Among Sub-Agencies to Prevent Erosion of DACA Protections.

Finally, the agency should adopt two additional policies to ensure that DHS sub-components coordinate to provide uniform and fair treatment of DACA recipients related to removal proceedings, consistent with USCIS's DACA decisions:

1. DHS should generally not issue NTAs against DACA recipients unless and until USCIS terminates their DACA (following the procedures described above); and,

2. DHS should generally exercise favorable prosecutorial discretion by joining motions by DACA recipients to, e.g., reopen or administratively close removal proceedings.[70]

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then-n986351; Christina Bravo & Associated Press, *UCSD Student Detained After Making Wrong Turn at US-Mexico Border Released*, NBC San Diego (updated Jan. 13, 2018), https://www.nbcsandiego.com/news/local/ucsd-student-released-detained-wrong-turn-us-mexico-border-released/48485/.

[69] Christina Bravo & Associated Press, *UCSD Student Detained After Making Wrong Turn at US-Mexico Border Released*, NBC San Diego (updated Jan. 13, 2018), https://www.nbcsandiego.com/news/local/ucsd-student-released-detained-wrong-turn-us-mexico-border-released/48485/.

[70] These protections would be in line with guidance issued by the ICE Office of the Principal Legal Advisor recognizing the appropriateness of dismissal in cases of noncitizens likely to be granted temporary or permanent relief or who present compelling humanitarian factors, and by recent decisions recognizing immigration judges' authority to administratively close and terminate removal proceedings. *See* Memorandum from John D. Trasviña, Principal Legal Advisor, Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities, at 9 n.18 (May 27, 2021), https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf; *Chavez Gonzalez v. Garland*, 16 F.4th 131 (4th Cir. 2021) (abrogating *Matter of S-O-G- & F-D-B-*, 27 I. & N. Dec. 462 (A.G. 2018), and concluding

These protections would ensure that, at the same time that USCIS approves an individual's DACA request, a separate component of DHS not charged with making DACA determinations does not work at cross-purposes to USCIS by simultaneously pressing for the removal of that individual. The protections would both promote efficiency and consistency, and further the administration's stated goal of preserving and fortifying DACA.

First, with respect to efficiency, it is costly for ICE to litigate removal proceedings against DACA recipients and DACA-eligible individuals. The proposed rule states that "the DACA program simplifies many encounters between DHS and certain noncitizens, reducing the burden upon DHS of vetting, tracking, and potentially removing DACA recipients." 86 Fed. Reg. at 53,794. But these cost savings are nullified if individual ICE officers issue NTAs against DACA recipients and DACA-eligible individuals, and if individual ICE attorneys oppose, for example, motions to administratively close the removal proceedings of DACA recipients and DACA-eligible individuals.[71]

Second, the proposed rule assumes that ICE acts in a manner consistent with DACA protections, stating that "ICE relies on the fact that a noncitizen has received DACA in determining whether to place the noncitizen into removal proceedings or, if the noncitizen is already in removal proceedings, in determining whether to agree to continue, administratively close, or dismiss the removal proceedings without prejudice." 86 Fed. Reg. at 53,752. However, past practice demonstrates that ICE and CBP have issued NTAs to DACA recipients who were, under the DACA guidance, by definition, *not* enforcement priorities. Without regulatory language directing these DHS sub-agencies to act consistently with USCIS's DACA decisions and eligibility guidelines, DACA recipients will continue to be subject to individual ICE officers' *de facto* veto power over a DACA grant.[72] Codifying the above-listed protections would promote the efficiency goals of the proposed rule to "reduce resource burdens on ICE attorneys and the immigration courts, provide more immediate respite to those who present low or no risk to the country, or avoid costs associated with detaining and ultimately removing a noncitizen." *Id*. at 53,752.

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that agency erred in denying administrative closure without addressing Mr. Chavez Gonzalez's DACA, noting that "colorable arguments can be made that administrative closure is appropriate and necessary" in the case of a DACA recipient); *Matter of Cruz-Valdez*, 28 I. & N. Dec. 326 (A.G. 2021) (reversing *Matter of Castro-Tum*, 27 I. & N. Dec. 271 (A.G. 2018), and recognizing general administrative closure authority of immigration judges and the BIA).

[71] *See Chavez Gonzalez*, 16 F.4th at 144, 146 (granting DACA recipient's petition for review where DHS had opposed administrative closure, resulting in over three years of litigation and the Fourth Circuit decision remanding for the agency to consider termination and administrative closure).

[72] *See* Memorandum from Alejandro N. Mayorkas, Guidelines for the Enforcement of Civil Immigration Law (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf (lifting constraints that had required pre-approval to arrest nonpriority individuals, and leaving enforcement decisions to ICE officers' individual discretion).

XI. Conclusion

In sum, we reiterate our support for the agency's efforts to codify DACA in the proposed rule, and urge the agency to reconsider the policies and practices set out above. The criminal bars, automatic termination practices, and lack of procedural protections contemplated by the proposed rule will cause real harm to DACA recipients and their communities, and undermine the agency's goals of ensuring equity, promoting fairness and consistency, and maximizing efficiencies across the agency. We hope that the agency will learn from the errors of the prior administration and lessons from the *Inland Empire* injunction and adopt the critical protections outlined above.

Please do not hesitate to contact Katrina Eiland, ACLU Immigrants' Rights Project, at keiland@aclu.org or (415) 343-0782 to follow up on any of the issues discussed herein.

Sincerely,

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On behalf of the ACLU Immigrants' Rights Project and the ACLU of Southern California