

The Hon. Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DANIEL RAMIREZ MEDINA,
Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY, *et al.*,
Defendants.

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

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION
[DKT. NO. 147]**

TABLE OF CONTENTS

1 INTRODUCTION..... 1
 2
 3 BACKGROUND..... 1
 4 SUMMARY OF THE ARGUMENT 3
 5 ARGUMENT 4
 6 I. Standard of Review 4
 7 II. Background on Deferred Action Requests 6
 8 III. Mr. Ramirez’s motion is subject to the higher burden of a mandatory injunction to show
 9 that the facts and law clearly favor his position. 7
 10 IV. The Court lacks jurisdiction over USCIS’s December 2018 denial of Mr. Ramirez’s
 11 DACA renewal request. 9
 12 A. Mr. Ramirez’s allegations of non-discretionary process violations in the termination
 13 of his DACA are no longer relevant to the TAC. 9
 14 B. Mr. Ramirez also fails to establish the likelihood of a due process violation. 12
 15 V. USCIS denied Mr. Ramirez’s DACA request in full compliance with the DACA SOP
 16 guidance. 15
 17 A. USCIS properly relied on uncontested criminal conduct in its totality of the
 18 circumstances analysis. 16
 19 B. Mr. Ramirez’s irresponsible allegations of misconduct by counsel for Defendants are
 20 not supported by the record and do not support a finding of estoppel. 17
 21 VI. Mr. Ramirez cannot establish irreparable harm from the denial of a discretionary grant,
 22 nor does his nearly 7-month delay in seeking preliminary injunctive relief support the
 23 urgency he alleges. 19
 24 A. Mr. Ramirez cannot show harm in the discretionary denial of a DACA request. 19
 25 B. Mr. Ramirez’s months-long, multiple delays seeking emergency injunctive relief
 26 undermine the urgency necessary to grant this extraordinary relief. 20
 27 VII. Mr. Ramirez cannot establish that the denial of his DACA renewal request violated the
 28 Court’s preliminary injunction. 22
 VIII. The Remaining Preliminary Injunction Factors Favor Defendants. 23
 CONCLUSION..... 24

TABLE OF AUTHORITIES

Cases

Addy v. Sessions,
696 F. App’x 801 (9th Cir. 2017) 15

Arizona Dream Act Coalition v. Brewer,
757 F.3d 1053 (9th Cir. 2014) 20

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 14, 15

Associated Gen. Contractors of California, Inc. v. Coal. for Econ. Equity,
950 F.2d 1401 (9th Cir. 1991) 5, 19, 20

Bd. of Regents of State Colleges v. Roth,
408 U.S. 564 (1972) 14

Blantz v. Cal. Dep’t of Corr. & Rehab.,
727 F.3d 917 (9th Cir. 2013) 13, 14

Boardman v. Pac. Seafood Grp.,
822 F.3d 1011 (9th Cir. 2016) 7

Bugajska v. Lynch,
652 F. App’x 568 (9th Cir. 2016) 18

Bullen v. De Bretteville,
239 F.2d 824 (9th Cir. 1956) 10

Bundy Am., LLC v. Hawkeye Transportation,
No. C09-817Z, 2009 WL 10676371 (W.D. Wash. Dec. 1, 2009) 6

County of Los Angeles v. Davis,
440 U.S. 625 (1979) 10

Dep’t of Parks & Recreation for State of California v. Bazaar Del Mundo Inc.,
448 F.3d 1118 (9th Cir. 2006) 7

Disney Enterprises, Inc. v. VidAngel, Inc.,
869 F.3d 848 (9th Cir. 2017) 5

Doe v. Unocal Corp.,
27 F. Supp. 2d 1174 (C.D. Cal. 1998) 10

Earth Island Inst. v. Carlton,
626 F.3d 462 (9th Cir. 2010) 5

1 *Enyart v. Nat'l Conference of Bar Examiners, Inc.*,
630 F.3d 1153 (9th Cir. 2011) 19

2 *Garcia v. Google, Inc.*,
3 786 F.3d 733 (9th Cir. 2015)..... 5, 8, 20

4 *GoTo.com, Inc. v. Walt Disney Co.*,
5 202 F.3d 1199 (9th Cir. 2000) 7

6 *Inland Empire–Immigrant Youth Collective v. Nielsen*,
2018 WL 1061408 (C.D. Cal. Feb. 26, 2018) 1, 2, 3

7 *Isomedia, Inc. v. Spectrum Direct, Inc.*,
8 No. C08-1733JLR, 2009 WL 10676393 (W.D. Wash. July 1, 2009) 5

9 *Knox v. SEIU, Local*,
10 1000, 567 U.S. 298 (2012) 10

11 *Larsen v. City of San Carlos*,
No. 14-CV-04731-JD, 2014 WL 5473515 (N.D. Cal. Oct. 28, 2014) 21

12 *Lavenue v. Edmunds*,
13 No. CV 10-1479-PHX-DGC, 2010 WL 2838383 (D. Ariz. July 20, 2010) 21

14 *Lydo Enters., Inc. v. City of Las Vegas*,
15 745 F.2d 1211 (9th Cir. 1984) 5, 21

16 *Lyon v. U.S. Immigration & Customs*,
Enft, 171 F. Supp. 3d 961 (N.D. Cal. 2016) 16

17 *Mendez-Garcia v. Lynch*,
18 840 F.3d 655 (9th Cir. 2016)..... 13, 19

19 *Miller ex rel. NLRB v. Cal. Pac. Med. Ctr.*,
20 991 F.2d 536 (9th Cir. 1993)..... 21

21 *Monsanto Co. v. Geertson Seed Farms*,
561 U.S. 139 (2010)..... 5

22 *Nken v. Holder*,
23 556 U.S. 418 (2009)..... 23

24 *Nozzi v. Hous. Auth. of City of Los Angeles*,
806 F.3d 1178 (9th Cir. 2015) 13

25 *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust*,
26 636 F.3d 1150 (9th Cir. 2011) 5

27 *Regents of the Univ. of California v. U.S. Dep’t of Homeland Sec.*,
28 908 F.3d 476 (9th Cir. 2018)..... 9, 12

1 *Reno v. Am.-Arab Anti-Discrimination Comm.*,
 (“AADC”), 525 U.S. 471 (1999) 9, 24

2 *Rockwell Int’l Corp. v. United States*,
 3 549 U.S. 457 (2007) 10

4 *S. California Darts Assoc. v. S. California Darts Assoc., Inc.* ,
 5 No. CV1201899RGKJCGX, 2012 WL 12882764 (C.D. Cal. June 22, 2012) 10

6 *Salgado-Diaz v. Gonzales*,
 7 395 F.3d 1158 (9th Cir. 2005) 17

8 *Salviejo–Fernandez v. Gonzales*,
 455 F.3d 1063 (9th Cir. 2006) 15, 18

9 *Senate of State of Cal. v. Mosbacher*,
 10 968 F.2d 974 (9th Cir. 1992) 4

11 *Sierra Forest Legacy v. Rey*,
 577 F.3d 1015 (9th Cir. 2009) 7

12 *Stanley v. Univ. of S. California*,
 13 13 F.3d 1313 (9th Cir. 1994) 8

14 *Torres v. U.S. Dep’t of Homeland Sec.* ,
 15 2018 U.S. Dist. LEXIS 62366, *25-26 (S.D. Cal. Apr. 12, 2018) 13

16 *Torres v. U.S. Dep’t of Homeland Sec.* ,
 No. 17CV1840, 2018 WL 3495830 (S.D. Cal. July 20, 2018) 14

17 *United States v. Morales*,
 18 No. 2:17-PO-0137 DB, 2017 WL 2264853 (E.D. Cal. May 24, 2017) 18

19 *Univ. of Texas v. Camenisch*,
 20 451 U.S. 390 (1981) 4

21 *Valeo Intellectual Prop., Inc. v. Data Depth Corp.* ,
 368 F. Supp. 2d 1121 (W.D. Wash. 2005) 6

22 *Winter v. Nat. Res. Def. Council, Inc.* ,
 23 555 U.S. 7 (2008) 5

24 Federal Statutes

25 5 U.S.C. § 701(2) 12

26 8 U.S.C. § 1252(g) 9, 12

27 18 U.S.C. § 1001 18

28

State Statutes

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

California Vehicle Code § 14601.2(a)18
California Vehicle Code § 14601.2(d)(1)18

1 **INTRODUCTION**

2 Mr. Daniel Ramirez Medina (“Mr. Ramirez”) seeks a new preliminary injunction that
 3 would affirmatively require Defendants to “restore” Mr. Ramirez’s former grant of Deferred
 4 Action for Childhood Arrivals (“DACA”) and employment authorization (“EAD”) that expired
 5 over a year ago, and enjoin any hypothetical future denials for any reason. The Court should
 6 deny Mr. Ramirez’s motion for a preliminary injunction because such injunction would not
 7 maintain a status quo and because Defendants have exercised their discretion in a manner that
 8 bars this Court from exercising jurisdiction, but is also fully compliant with applicable law.

9 **BACKGROUND**

10 Mr. Ramirez’s Third Amended Complaint and Second Motion for Preliminary Injunction
 11 are full of hyperbole and unsupported allegations. Indeed, the only evidence of a retaliatory
 12 scheme against Mr. Ramirez or other bad intent on the part of the Government is his counsels’
 13 own misstatements throughout the course of this litigation. Instead, the Government’s position
 14 throughout this matter simply reflects the Government’s earnest conduct tied to its discretionary
 15 determinations that Mr. Ramirez should no longer receive deferred action in the form of DACA.

16 Mr. Ramirez filed his Second Amended Complaint on April 25, 2017, arguing that the
 17 termination of his DACA and EAD violated the APA and seeking, *inter alia*, injunctive and
 18 declaratory relief in the form of reinstating his DACA and EAD. *See* ECF No. 78. Defendants
 19 moved to dismiss Mr. Ramirez’s second amended complaint on June 26, 2017, and
 20 simultaneously filed the certified administrative records for U.S. Citizenship and Immigration
 21 Services (“USCIS”) and U.S. Immigration and Customs Enforcement (“ICE”) related to the
 22 automatic termination of his DACA. *See* ECF Nos. 90, 92, 93. On February 6, 2018, Mr.
 23 Ramirez sought a preliminary injunction restoring his terminated DACA and EAD. ECF No.
 24 122. Prior to this Court’s ruling on that motion, the United States District Court for the Central
 25 District of California issued a preliminary injunction in *Inland Empire–Immigrant Youth*
 26 *Collective v. Nielsen*, 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018). In that order, the court
 27 preliminarily enjoined “Defendants’ decisions after January 19, 2017 to terminate the DACA
 28 grants and EADs of class members, without notice, a reasoned explanation, or an opportunity to

1 respond prior to termination,” and ordered that “Defendants immediately will restore those
2 individuals’ DACA and EADs, subject to their original date of expiration.” 2018 WL 1061408 at
3 *22. As a member of that class, Mr. Ramirez’s DACA and EAD were restored based on the
4 *Inland* order on or about April 3, 2018. *See* ECF No. 132.

5 Thereafter, the Government issued Mr. Ramirez a Notice of Intent to Terminate (“NOIT”)
6 his restored DACA and EAD because he did “not warrant a favorable exercise of prosecutorial
7 discretion,” because it considered Mr. Ramirez’s own statements as evidence indicating gang
8 affiliation. ECF No. 126-1 at 19–20. Mr. Ramirez modified his first motion for preliminary
9 injunction to request that the government be prevented from relying on the evidence in the record
10 supporting Mr. Ramirez’s suspected gang affiliation, and the Court granted his motion. ECF No.
11 132. The Court enjoined Defendants “from asserting, adopting, or relying in any proceedings on
12 any statement or record made as of this date purporting to allege or establish that Mr. Ramirez is
13 a gang member, gang affiliated, or a threat to public safety.” *Id.* at 23. Mr. Ramirez’s restored
14 DACA expired of its own terms on May 15, 2018, the same day the Court granted the
15 preliminary injunction. *Id.* at 23 n.7.

16 Approximately one week after Mr. Ramirez’s DACA expired, he submitted a DACA
17 renewal request. TAC ¶ 83. On September 26, 2018, the government issued Mr. Ramirez a
18 Notice of Intent to Deny (“NOID”) his request, based on several incidents of criminal conduct
19 unrelated to prior allegations of gang affiliation. *See* ECF No. 147-1 at 8-10. On or around
20 October 24, 2018, Mr. Ramirez, through the assistance of counsel, submitted a response to the
21 NOID. *Id.* at 14-22.

22 On December 17, 2018, USCIS, after reviewing Mr. Ramirez’s response and consulting
23 with both USCIS headquarters and ICE, issued Mr. Ramirez a denial letter. ECF No. 144-14.
24 USCIS informed Mr. Ramirez that, based on the derogatory information in his record, his failure
25 to provide arguments or evidence to overcome that information, and ICE’s determination that he
26 is an enforcement priority and that they intend to continue to pursue his removal – when
27 considering the totality of the circumstances – a favorable exercise of prosecutorial discretion
28

1 was not warranted. *Id.* The letter also explained that USCIS was not aware of the derogatory
2 information at the time it granted Mr. Ramirez DACA in 2016. *Id.* at 4.

3 More than three months later, on March 28, 2019, Mr. Ramirez filed a motion with the
4 Court for leave to file a third amended complaint (“TAC”) to challenge the denial of his DACA
5 request, as well as the termination of his prior DACA and issuance of a NOIT on his restored
6 DACA. ECF No. 140. On May 16, 2019, the Court granted Mr. Ramirez’s motion and ordered
7 him to file his TAC within 14 days. ECF No. 143.

8 Mr. Ramirez filed his TAC on May 30, 2019, the 14th day after the Court’s order. ECF
9 No. 144. After allowing another week to pass, Mr. Ramirez filed the instant motion for
10 preliminary injunction that seeks to enjoin the Government from denying his DACA request and
11 to compel the Government to “restore” his prior DACA grant that expired more than a year ago.
12 ECF No. 147, Plaintiff’s Second Motion for Preliminary Injunction (“PI Mot.”).

13 SUMMARY OF THE ARGUMENT

14 This Court should deny Mr. Ramirez’s motion for a preliminary injunction because Mr.
15 Ramirez fails to demonstrate that the facts and law clearly support his position or that he has
16 suffered an immediate irreparable injury that warrants relief in the form of a mandatory
17 preliminary injunction. Critically, because Mr. Ramirez’s previous grant of DACA expired, so
18 that the injunction he seeks would not preserve a status quo. Rather, this injunction would
19 compel the Government to exercise its discretion in Mr. Ramirez’s favor by granting him
20 deferred action despite his last DACA grant ending more than a year ago.

21 Mr. Ramirez cannot show that the facts and law clearly support his claims that his DACA
22 was improperly denied. Nor does he make any showing at all that he has standing to challenge
23 the now-reversed termination of his 2016 DACA grant or the intermediate notice of intent to
24 terminate his reinstated DACA that was never acted on. Rather, the evidence before the Court
25 demonstrates incontrovertibly that the denial of Mr. Ramirez’s DACA request was based on
26 uncontested evidence of criminal conduct before the agency and that USCIS followed the correct
27
28

1 process to issue the denial. Additionally, as this Court previously found, courts lack jurisdiction
2 over USCIS's ultimate decision to exercise its prosecutorial discretion in one way or another.

3 Furthermore, Mr. Ramirez is unable to show irreparable injury from the denial of a
4 favorable exercise of prosecutorial discretion. His own lack of urgency also belies any argument
5 that "a drastic and extraordinary remedy" is necessary here. Mr. Ramirez sat on his rights for
6 more than three months after USCIS determined that a favorable exercise of prosecutorial
7 discretion was not warranted before filing a motion for leave to amend his complaint for a third
8 time. ECF No. 140. Despite the TAC being drafted and filed with that motion, *see* ECF 140-1,
9 Mr. Ramirez still waited the full 14 days this Court provided him to file his TAC. *See* ECF No.
10 143 at 6. Mr. Ramirez then waited another seven days after filing his TAC to file a motion for a
11 preliminary injunction. ECF No. 147.

12 Mr. Ramirez's claims of irreparable harm due to the deprivation of a constitutional right
13 to work also fail because he cannot show a protected interest in a DACA grant or employment
14 authorization, nor can he show any procedural deficiency in the processing of the DACA denial.

15 Finally, the Court should deny the motion for preliminary injunctive relief because
16 Defendants are prepared to file an administrative record and proceed with briefing a motion to
17 dismiss and/or motion for summary judgment expeditiously. Thus, there should be no need to
18 take the extraordinary and particularly disfavored step of compelling Government action here,
19 where the Court may soon reach a decision on the merits.

20 ARGUMENT

21 I. Standard of Review

22 "The purpose of a preliminary injunction is merely to preserve the relative positions of
23 the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395
24 (1981). As a result, it is generally inappropriate at the "preliminary-injunction stage to give a
25 final judgment on the merits." *Id.*; *see Senate of State of Cal. v. Mosbacher*, 968 F.2d 974, 978
26 (9th Cir. 1992) (holding that "judgment on the merits in the guise of preliminary relief is a highly
27 inappropriate result").

1 A preliminary injunction is “a drastic and extraordinary remedy, which should not be
 2 granted as a matter of course.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 142 (2010).
 3 A plaintiff seeking a preliminary injunction “must establish” that: (1) it is likely to succeed on
 4 the merits of its claims; (2) it is likely to suffer irreparable harm absent preliminary relief; (3) the
 5 balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter v. Nat.*
 6 *Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Preliminary injunctive relief is an extraordinary
 7 remedy never awarded as of right, *id.*, and the party seeking such relief bears the burden of
 8 establishing the prerequisites to this extraordinary remedy. *Earth Island Inst. v. Carlton*, 626 F.3d
 9 462, 469 (9th Cir. 2010). Likelihood of success on the merits “is the most important” *Winter*
 10 factor, so that “if a movant fails to meet this ‘threshold inquiry,’ the court need not consider the
 11 other factors.” *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017)
 12 (citing *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (*en banc*)).

13 In a mandatory injunction request such as this, where Mr. Ramirez seeks to order the
 14 Government to act rather than restore a status quo, the already high “likelihood of success”
 15 burden is “doubly demanding.” *Garcia*, 786 F.3d at 740. In such a case, the moving party “must
 16 establish that the law and facts *clearly favor* [his] position, not simply that [he] is likely to
 17 succeed.” *Id.* (emphasis added). “In plain terms, mandatory injunctions should not issue in
 18 ‘doubtful cases.’” *Id.* (citing *Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636
 19 F.3d 1150, 1160 (9th Cir. 2011)).

20 To fulfill the “irreparable harm” requirement, the moving party “must do more than
 21 merely allege imminent harm,” but “must demonstrate immediate threatened injury.” *Associated*
 22 *Gen. Contractors of California, Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir.
 23 1991). Delay in seeking relief may undercut the possibility of irreparable harm. *Lydo Enters.,*
 24 *Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (citation omitted) (“[a] preliminary
 25 injunction is sought upon the theory that there is an urgent need for speedy action to protect the
 26 plaintiff’s rights. By sleeping on its rights, a plaintiff demonstrates the lack of need for speedy
 27 action”); *Isomedia, Inc. v. Spectrum Direct, Inc.*, No. C08-1733JLR, 2009 WL 10676393, at
 28

1 *4 (W.D. Wash. July 1, 2009) (three month delay), citing *Valeo Intellectual Prop., Inc. v. Data*
 2 *Depth Corp.*, 368 F. Supp. 2d 1121, 1128 (W.D. Wash. 2005) (four month delay); *but see Bundy*
 3 *Am., LLC v. Hawkeye Transportation*, No. C09-817Z, 2009 WL 10676371, at *6–7 (W.D. Wash.
 4 Dec. 1, 2009) (finding ten-month delay to be reasonable under the circumstances involving
 5 breach of covenant not to compete).

6 **II. Background on Deferred Action Requests**

7 To the extent necessary for the Court’s review of Mr. Ramirez’s new challenge to the
 8 denial of his DACA request, Defendants incorporate by reference their previous explanation of
 9 the DACA SOP termination procedures. *See* ECF No. 90, Motion to Dismiss Second Amended
 10 Complaint, at 3-6.

11 DACA requests are adjudicated on different guidance than DACA terminations. USCIS
 12 has provided officers in the Service Center Operations directorate an internal USCIS guidance
 13 document entitled the “National Standard Operating Procedures (SOP); Deferred Action for
 14 Childhood Arrivals (DACA),” or “DACA SOP.” ECF No. 144-7. The DACA SOP is replete with
 15 instructions that an individual’s ability to meet the guidance criteria merely allows him or her to
 16 be *considered* for a DACA grant. *See, e.g.*, DACA SOP at 18; *id.* at 44 (“An individual meeting
 17 the following guidelines may be favorably considered for DACA . . .”); *id.* at 50 (“Individuals
 18 may be considered for DACA upon showing that they meet the prescribed guidelines by a
 19 preponderance of the evidence.”); *id.* at 51, 54, 55, 60 (same).

20 The DACA SOP is also clear that “the existence of deportation, exclusion, or removal
 21 proceedings may have an effect on the exercise of prosecutorial discretion for DACA.” *Id.* at 73.
 22 In adjudicating a DACA request from an individual placed into removal proceedings through
 23 issuance of a Notice to Appear (“NTA”), the DACA SOP specifically advises USCIS to consider
 24 more than just the grounds listed in the NTA. *Id.* at 77. The SOP states:

25 If a DACA requestor has been placed in proceedings on a ground that does not
 26 adversely impact the exercise of prosecutorial discretion, review the results of all
 27 routine systems, background, and fingerprint checks. If those routine checks did
 28 not reveal any additional derogatory information that impacts the exercise of
 prosecutorial discretion, the case may proceed for adjudication.

1 Do not rely solely on the grounds listed in the charging document and/or [redacted]
 2 as not all issues may have necessarily been captured, or new issues may have arisen
 3 since the charging document was issued. It is necessary to review all derogatory
 4 information in its totality and then make an informed assessment regarding the
 5 appropriate exercise of prosecutorial discretion for DACA.

6 *Id.* (emphasis added). The DACA SOP also instructs adjudicators to consider the totality of the
 7 circumstances when assessing the impact of criminal conduct that would not preclude favorable
 8 consideration for DACA. *See id.* at 83 (“Notwithstanding whether the offense is categorized as a
 9 significant or non-significant misdemeanor, the decision whether to defer action in a particular
 10 case is an individualized, discretionary one that is made taking into account the totality of the
 11 circumstances.”); *id.* at 84 (“[T]he requestor’s entire offense history,” specifically including
 12 minor traffic offenses, “can be considered along with other facts to determine whether, under the
 13 totality of the circumstances, he/she warrants an exercise of prosecutorial discretion.”).

14 In the case of a requestor who may establish that the guidelines are met but for whom the
 15 adjudicator determines nonetheless that a favorable exercise of discretion is not warranted, the
 16 DACA SOP calls for supervisory review before issuing a denial. *Id.* at 106.

17 **III. Mr. Ramirez’s motion is subject to the higher burden of a mandatory injunction to**
 18 **show that the facts and law clearly favor his position.**

19 Mr. Ramirez cannot establish a likelihood of success, much less that the facts and law
 20 clearly favor his claim that USCIS improperly denied his DACA request. A preliminary
 21 injunction is issued to “preserve the status quo ante litem” pending a court’s determination on the
 22 merits. *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1024 (9th Cir. 2016) (citing *Sierra*
 23 *Forest Legacy v. Rey*, 577 F.3d 1015, 1023 (9th Cir. 2009)). “Status quo ante litem” refers to
 24 “the last uncontested status which preceded the pending controversy.” *Id.* (citing *GoTo.com, Inc.*
 25 *v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000)). What constitutes the “uncontested
 26 status” in a given case can be subject to dispute,¹ but not here. Mr. Ramirez acknowledges that
 27 his 2016 grant of DACA was set to expire on May 4, 2018. PI Mot. at 6. Mr. Ramirez also
 28 acknowledges that his reinstated DACA, pursuant to the *Inland Empire* preliminary injunction,

¹ *See, e.g., Dep’t of Parks & Recreation for State of California v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006).

1 expired on May 15, 2018. *Id.* (mistakenly stating the expiration date was May 5, 2018); ECF No.
2 144-12, Reinstatement Notice.

3 In *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1320 (9th Cir. 1994), the Ninth Circuit
4 held that a claim to reappoint a faculty member whose contract had expired constituted a request
5 for a mandatory injunction. Like the plaintiff in *Stanley*, Mr. Ramirez was subject to a limited
6 period of DACA that expired. Thus, ordering the Government to grant Mr. Ramirez DACA
7 pending an adjudication of the merits of this litigation would not restore any previous status quo.
8 Rather, the Court would be ordering the Government to affirmatively exercise its discretion to
9 award Mr. Ramirez a grant of deferred action that he does not now have. Where the facts and law
10 do not clearly favor Mr. Ramirez's position, the Court "should deny such relief." *Garcia*, 786
11 F.3d at 740 ("As we have cautioned, a mandatory injunction 'goes well beyond simply
12 maintaining the status quo *pendente lite* [and] is particularly disfavored.") (citing *Stanley*, 13
13 F.3d at 1320).

14 Mr. Ramirez makes no showing of any error in the denial of his DACA renewal request.²
15 Rather, he argues 1) that the Government erred in relying on unlawful presence as a reason to
16 deny his DACA request; 2) that the Government should not be permitted to rely on his criminal
17 history in adjudicating his DACA request; and 3) perhaps alternatively, that the Government
18 should have weighed the record evidence of his criminal history differently than it did. PI Mot. at
19 12-14. He cannot prevail on any of these claims.

20 Far from showing that the law clearly favors his position, Mr. Ramirez fails to support
21 many of his contentions with relevant fact or law. As a threshold matter, because this third
22 amended complaint challenges the denial of a DACA request, rather than the termination of an
23 existing DACA grant, the grounds for jurisdiction the Court previously relied on are no longer
24 applicable.

25
26
27 ² As argued below, Mr. Ramirez's claims against the termination of his prior DACA grant and against the NOIT that
28 was never consummated are now moot, because this Court cannot grant any additional relief on those claims. Nor can
Mr. Ramirez establish standing to assert claims that cannot be redressed by the Court.

1 **IV. The Court lacks jurisdiction over USCIS’s December 2018 denial of Mr. Ramirez’s**
 2 **DACA renewal request.**

3 Mr. Ramirez’s current challenge is unlike his prior challenges to the process by which his
 4 DACA was terminated. Though Defendants disagree with the Court’s prior finding of
 5 jurisdiction to enjoin a future agency decision based on the Court’s “broad powers and wide
 6 discretion to frame the scope of appropriate equitable relief when issuing a preliminary
 7 injunction to preserve the status quo,” there is no status quo to preserve here. ECF No. 132 at 15-
 8 16. Similarly, though the Court found the Government’s determination that Mr. Ramirez was a
 9 suspected gang affiliate to be arbitrary and capricious based on contradictory evidence that was
 10 either never presented to USCIS or for which USCIS was prevented from considering before a
 11 final adjudication, *see id.* at 17-18 (“These conclusory findings [of suspected gang affiliation]
 12 have since been contradicted by experts and other evidence.”), Mr. Ramirez does not offer any
 13 challenge to the truth of the criminal conduct supporting the denial of his DACA request.

14 Rather, Mr. Ramirez’s TAC and motion for preliminary injunction are nothing more than
 15 a challenge to the ultimate exercise of discretion to deny his request for deferred action, and this
 16 Court has already held that it does not have jurisdiction to hear such a challenge. *See* ECF No.
 17 116 at 12 (“[T]he Court agrees with Defendants that, if Plaintiff were asking for review of the
 18 government’s ultimate discretionary decision to terminate his DACA [], section 1252(g) would
 19 strip this Court of jurisdiction to review that determination.”) (citing *Reno v. Am.-Arab Anti-*
 20 *Discrimination Comm.* (“AADC”), 525 U.S. 471, 485 (1999)). The Court’s holding is also
 21 wholly consistent with the Ninth Circuit’s decision in *Regents of the Univ. of California v. U.S.*
 22 *Dep’t of Homeland Sec.*, 908 F.3d 476, 504 (9th Cir. 2018) (finding that “individual ‘no deferred
 23 action’ decisions . . . fall exactly within Section 1252(g) as interpreted by the Court in *AADC*.”).

24 **A. Mr. Ramirez’s allegations of non-discretionary process violations in the**
 25 **termination of his DACA are no longer relevant to the TAC.**

26 The Court’s previous finding of jurisdiction, based on the narrow issue of “whether
 27 Defendants complied with their own non-discretionary procedures . . . [that] led to the issuance
 28 of an NTA, rescission of his work authorization and, ultimately, termination of his DACA

1 status,” ECF No. 116 at 12, is no longer viable given the filing of the Third Amended Complaint.
 2 *See Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 473 (2007) (when “a plaintiff files a
 3 complaint in federal court and then voluntarily amends the complaint, courts look to the
 4 amended complaint to determine jurisdiction.”); *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1180
 5 (C.D. Cal. 1998), *aff’d and adopted*, 248 F.3d 915 (9th Cir. 2001) (“It is hornbook law that an
 6 amended pleading supersedes the original, the latter being treated thereafter as non-existent.
 7 Once amended, the original no longer performs any function as a pleading.”) (internal
 8 modifications and citation omitted). None of the procedural concerns the Court expressed in its
 9 prior orders in relation to ending an individual’s existing grant of DACA and EAD are manifest
 10 here.

11 To the extent Mr. Ramirez attempts to rely on his allegations of procedural violations in
 12 relation to the February 2017 termination of his DACA and the April 2018 issuance of the Notice
 13 of Intent to Terminate his reinstated DACA, those issues are now moot. *See Knox v. SEIU, Local*
 14 *1000*, 567 U.S. 298, 307–08 (2012) (A case becomes moot “only when it is impossible for a
 15 court to grant any effectual relief whatever to the prevailing party.”) (citation and internal
 16 quotation marks omitted). In compliance with the *Inland Empire* order, USCIS reinstated Mr.
 17 Ramirez’s DACA and, in compliance with this Court’s May 2018 preliminary injunction, took
 18 no action to terminate it before it expired on its own. *See* ECF No. 132. There is no further relief
 19 this Court can grant on that issue, and where the Government has determined in its discretion not
 20 to grant Mr. Ramirez’s DACA renewal request, “‘there is no reasonable expectation . . .’ that the
 21 alleged violation will recur.” *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).³
 22
 23

24 ³ Furthermore, if Mr. Ramirez wanted to challenge the expiration of his DACA or the denial of his DACA request
 25 under the May 2018 preliminary injunction, he should have filed a motion to compel compliance with that preliminary
 26 injunction. *See S. California Darts Assoc. v. S. California Darts Assoc., Inc.*, No. CV1201899RGKJCGX, 2012 WL
 27 12882764, at *1 (C.D. Cal. June 22, 2012). Instead, he waited three months and then sought the Court’s leave to file
 28 an amended complaint that, once filed, rendered the earlier amended complaint, upon which the preliminary injunction
 was based, “non-existent.” *Bullen v. De Bretteville*, 239 F.2d 824, 833 (9th Cir. 1956), *overruled on other grounds by*
Lacey v. Maricopa Cty., 693 F.3d 896 (9th Cir. 2012). His claims now must be founded in his TAC and he may not
 look back at the prior pleadings for support. *Id.*

1 Mr. Ramirez's speculative claim that the denial decision violated the DACA Standard
2 Operating Procedures' ("DACA SOP") provisions (and the *Accardi* doctrine) with regard to
3 USCIS's Background Check Unit ("BCU") is wrong. *See* PI Mot. at 15-16 (arguing that the
4 administrative record does not support the agency's decision). Mr. Ramirez made this allegation
5 without having seen the administrative record or having actual knowledge of the internal process
6 USCIS followed in processing his DACA denial. Indeed, the administrative record supporting
7 USCIS's latest adjudication is not yet on file with the Court. Defendants' Exhibit A (attached
8 here) shows that the BCU conferred with USCIS headquarters as Mr. Ramirez alleges they were
9 required to do.

10 Furthermore, Mr. Ramirez's assertion that the Government may not rely on his past
11 criminal conduct because an email from the DACA BCU team indicates that it found no
12 criminality on a RAP sheet in March 2018, is also unavailing. PI Mot. at 13 (the evidence of his
13 criminal conduct "cannot be reconciled with the evidence before DHS.") (referring to a March
14 20, 2018 email from the BCU DACA Team that found only that there was no criminality on Mr.
15 Ramirez's rap sheet at that time). Mr. Ramirez claims that the BCU email "cannot be squared
16 with the conclusion presented in the [December 18, 2018] Decision that Mr. Ramirez's 'offense
17 history' justifies denying his renewal request." *Id.*

18 Mr. Ramirez mischaracterizes the evidence here. That the BCU DACA team did not
19 identify certain criminal conduct on a RAP sheet in March does not permit an inference that the
20 BCU DACA team could not subsequently determine that there was criminality for USCIS to
21 consider. Even if the Court agreed with such a wild inference, USCIS was certainly empowered
22 to gather relevant information as part of its adjudication of a new renewal request.

23 Regardless, Mr. Ramirez's allegations are insufficient to establish that the agency
24 guidance in the DACA SOP in any way overrides the ultimate discretion of an adjudicator to
25 deny a DACA renewal request. *See, e.g.*, ECF No. 144-2 at 19, DHS DACA FAQ at Q51:
26 "USCIS retains the ultimate discretion to determine whether deferred action is appropriate in any
27 given case even if the guidelines are met [when considering a renewal request]." Finally, Mr.

1 Ramirez’s assertion that USCIS’s denial of his renewal request is arbitrary and capricious
 2 because “99% of processed renewal requests are approved,” also does nothing to undermine
 3 USCIS’s discretionary authority recognized by the Ninth Circuit in *Regents*, and reflected in the
 4 4,318 DACA renewal requests denied in FY2018, and 4,059 in FY 2017. *See* Deferred Action
 5 for Childhood Arrivals (DACA) Quarterly Report Fiscal Year 2019, 1st Quarter, *available at*
 6 [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigrat](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_FY19_Q1_Data.pdf)
 7 [ion%20Forms%20Data/All%20Form%20Types/DACA/DACA_FY19_Q1_Data.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_FY19_Q1_Data.pdf) (last visited
 8 June 20, 2019).

9 Thus, all that remains of Mr. Ramirez’s TAC and motion are allegations against the
 10 December 2018 denial decision that amount to an impermissible challenge to how USCIS
 11 exercised its discretion, and such a challenge to discretionary action cannot provide a basis for
 12 jurisdiction. *See* 8 U.S.C. § 1252(g); 5 U.S.C. § 701(2).

13 **B. Mr. Ramirez also fails to establish the likelihood of a due process violation.**

14 Mr. Ramirez makes a confusing due process allegation that the Government’s “now-
 15 abandoned” reliance on his statements regarding gangs to terminate his previous grant of DACA
 16 somehow entitles him to greater process in the denial of his DACA renewal request. *See* PI Mot.
 17 at 17. However, the earlier termination decision was reversed and the Government was enjoined
 18 from relying on the record evidence of suspected gang affiliation, or of otherwise finding Mr.
 19 Ramirez to be a public safety threat. Mr. Ramirez’s effort to tie the present denial of his DACA
 20 to the earlier actions is misleading and unsupported by facts or law. Rather, where Mr. Ramirez
 21 received notice and an opportunity to respond to the intended denial of his DACA request—the
 22 full process that this Court found he was entitled to when he still had a valid DACA grant—he
 23 cannot show a due process violation in the Government’s exercise of its discretion not to grant
 24 him DACA again.

25 This Court previously found that a DACA *recipient* enjoys liberty and property interests,
 26 “including the right to obtain lawful employment authorization and the right to be considered
 27 lawfully present in the United States.” ECF No. 132, Order Granting Preliminary Injunction, at
 28

20 (emphasis added) (citing *Torres v. DHS*, 2018 U.S. Dist. LEXIS 62366, *25-26 (S.D. Cal. Apr. 12, 2018)).⁴ However, Mr. Ramirez points to no case that supports a liberty interest in a discretionary DACA grant, and the Ninth Circuit has found that there is none. *See Mendez-Garcia v. Lynch*, 840 F.3d 655, 665 (9th Cir. 2016) (underscoring that aliens cannot claim a cognizable due process interest in discretionary immigration relief or benefits); *see also Blantz v. Cal. Dep't of Corr. & Rehab.*, 727 F.3d 917, 922 (9th Cir. 2013) (“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”).⁵

The ultimate result sought – deferred action – is discretionary, and the Government never expressed a mutual intention to confer a protected benefit in DACA. To the contrary, the DACA Memo explicitly disclaims as much. *See* ECF NO. 144-4, DACA Memo at 3 (stating that it “confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.”); *see also* ECF No. 144-7, DACA SOP (“This PM . . . is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law, or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.”).

Furthermore, despite Mr. Ramirez’s claim to a constitutional right to pursue employment, the Supreme Court has held that even government employees with an employment contract can only have a protected property interest in their continued employment “if they have a legitimate claim to tenure or if the terms of the employment make it clear that the employee can be fired

⁴ Notably, the *Torres* court rejected the plaintiff’s challenge to the decision to terminate his DACA precisely because he received substantively the same notice and an opportunity to respond that Mr. Ramirez received here. *See id* at *26 (plaintiff “cannot prevail on his Fifth Amendment claims” since he received notice of DACA termination and an opportunity to meaningfully respond).

⁵ Mr. Ramirez’s claim that a property interest can be established by a unilateral expectation is simply wrong. *See* Pl Mot. at 17 (citing *Nozzi v. Hous. Auth. of City of Los Angeles*, 806 F.3d 1178, 1191 (9th Cir. 2015), *as amended on denial of reh’g and reh’g en banc* (Jan. 29, 2016)). The Court in *Nozzi* actually held that “A legitimate claim of entitlement is created ‘and [its] dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.’” DACA policy expressly disclaims any understanding of secure benefits.

1 only for cause.” *Blantz*, 727 F.3d at 922 (court’s emphasis) (citing *Bd. of Regents of State*
 2 *Colleges v. Roth*, 408 U.S. 564, 577 (1972)). In *Roth*, the Supreme Court found that a professor
 3 with a 1-year employment contract that was allowed to expire lacked a protected property
 4 interest in his continued employment. *Id.* at 922-23. Mr. Ramirez never had anything akin to an
 5 employment contract, nor did he even have a job at the time his DACA was terminated [*see* ECF
 6 No. 35-1 at ¶ 10]—but to the extent this Court previously found that his DACA grant engendered
 7 some kind of protected property interest in his employment authorization, controlling authority
 8 says such an interest would end with the lawful expiration of his DACA grant.

9 Mr. Ramirez’s conclusory substantive due process arguments are equally unavailing to
 10 establish this Court’s jurisdiction. PI Mot. at 18. (“The government is motivated by animus and
 11 spite toward Mr. Ramirez, not by any legitimate purpose.”). Mr. Ramirez offers no evidence of
 12 animus or spite, nor does he challenge the truth of the criminal conduct underlying the decision
 13 not to exercise prosecutorial discretion in his favor. *See Ashcroft v. Iqbal*, 556 U.S. 662, 668
 14 (2009) (a cognizable claim for relief must plead enough facts, taken as true, to allow a court to
 15 draw a reasonable inference that the defendant is more than just “possibly liable” for the alleged
 16 conduct). In a similar challenge to the termination of DACA following notice and an opportunity
 17 to respond, the *Torres* court found:

18 Here, there is no indication that Defendants engaged in any conscience-shocking or
 19 clearly arbitrary and unreasonable conduct, or that factual determinations by duly
 20 constituted administrative bodies made in the ordinary and normal course of an
 21 administrative proceeding violate the concept of “ordered liberty.” Accordingly,
 22 Plaintiff cannot prevail on his substantive due process claim.

23 *Torres v. U.S. Dep’t of Homeland Sec.*, No. 17CV1840 JM(NLS), 2018 WL 3495830, at *2 (S.D.
 24 Cal. July 20, 2018). This case similarly lacks any indicators of conscience-shocking conduct.⁶

25 ⁶ Mr. Ramirez’s claim that his DACA was terminated as an act of retaliation for his alleged First Amendment activities
 26 is pure speculation and without merit. *See* PI Mot. at 19-20 (“[T]he government appears to have viewed the otherwise-
 27 routine DACA renewal process as its first opportunity to once again try to revoke Mr. Ramirez’s status Indeed,
 28 it is hard to imagine a different rationale for the government’s unconscionable treatment of Mr. Ramirez.”). Mr.
 Ramirez fails to acknowledge that he did not have a grant of DACA at the time his renewal request was denied. Nor
 is there any reason to imagine a rationale for the denial, as the Government provided him with a detailed explanation
 and an opportunity to rebut the evidence relied on. Mr. Ramirez otherwise offers no evidence to support his conclusory
 allegation and the Court should find he cannot succeed on such a claim. *Iqbal*, 556 U.S. at 668.

1 **V. USCIS denied Mr. Ramirez’s DACA request in full compliance with the DACA SOP**
2 **guidance.**

3 Mr. Ramirez’s first claim, that USCIS relied on his unlawful presence as a reason to deny
4 his DACA request, is incorrect and based on flawed reasoning. PI Mot. at 13. Neither the NOID
5 nor the denial letter indicate that USCIS relied on Mr. Ramirez’s unlawful presence as a reason
6 to deny his DACA. Nor is there any indication that ICE made its determination that Mr. Ramirez
7 is an enforcement priority on the sole grounds contained in the NTA. *See e.g., Salviejo–*
8 *Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006) (denying due process claim where
9 the BIA found petitioner ineligible for cancellation of removal based on a conviction not alleged
10 in the NTA); *see also Addy v. Sessions*, 696 F. App’x 801, 804 (9th Cir. 2017) (rejecting
11 argument that petitioner should have been charged with removability under a different statute,
12 because “[t]he Attorney General has prosecutorial discretion over the initiation of removal
13 proceedings, and that discretion is not reviewable.”). Rather, the NOID and denial letter
14 articulate that the basis for the denial takes into consideration Mr. Ramirez’s full record of
15 criminal conduct. *See* PI Mot. at 14; ECF No. 144-14.

16 Furthermore, the DACA SOP specifically advises USCIS to “not rely solely on the
17 grounds listed in the charging document” when considering a DACA request. ECF No. 144-7 at
18 77 (“as not all issues may have necessarily been captured, or new issues may have arisen since
19 the charging document was issued.”); *see also id* at 84 (“[T]he requestor’s entire offense history,”
20 specifically including minor traffic offenses, “can be considered along with other facts to
21 determine whether, under the totality of the circumstances, he/she warrants an exercise of
22 prosecutorial discretion.”).

23 USCIS also consulted with ICE in considering Mr. Ramirez’s DACA request. ECF No.
24 144-14 at 2. ICE specifically responded to Mr. Ramirez’s request for a new grant of deferred
25 action by asserting its contrary determination that Mr. Ramirez is an enforcement priority and
26 ICE will continue pursuing his removal. *Id.* This is an entirely unremarkable exercise of ICE’s
27
28

1 authority and fully consistent with the DACA SOP, and Mr. Ramirez points to nothing in the
2 DACA SOP or otherwise that limits ICE's authority in this regard.⁷

3 Thus, where USCIS mentioned the NTA but also described the totality of the
4 circumstances analysis that it conducted and the list of criminal conduct it considered, Mr.
5 Ramirez cannot support his claim that the NTA was relied on at all, much less establish that it
6 provided the sole grounds for denying his DACA request. Any perceived violation of DACA
7 policy from the mention of the NTA would therefore be at most harmless error. *See Lyon v. U.S.*
8 *Immigration & Customs Enft*, 171 F. Supp. 3d 961, 981–82 (N.D. Cal. 2016) (The APA instructs
9 reviewing courts to take “due account . . . of the rule of prejudicial error.”) (citing 5 U.S.C.
10 § 706); *id.* (where an agency error “did not affect the outcome, if it did not prejudice the
11 petitioner, it would be senseless to vacate and remand for reconsideration.”).

12 **A. USCIS properly relied on uncontested criminal conduct in its totality of the**
13 **circumstances analysis.**

14 The Court need not even consider whether USCIS relied on Mr. Ramirez's unlawful
15 presence or ICE's determination that he is an enforcement priority, because USCIS also
16 determined in its own unreviewable discretion that exercising prosecutorial discretion in Mr.
17 Ramirez's favor was not warranted by its own analysis of the totality of the circumstances. ECF
18 No. 144-14 at 4-5. In fact, Mr. Ramirez does not dispute the veracity of any of the charges
19 contained in the NOID or denial letter, he merely argues that they should not have been
20 considered at all because an earlier investigation failed to discover them. PI Mot. at 13-14. Mr.
21 Ramirez offers no legal citations in support of this contention.⁸

22 Where Mr. Ramirez does not dispute that he had the opportunity to respond to the charges
23 in the September 2018 NOID and actually did so, he cannot establish any viable reason why the

24 ⁷ The Government recognizes that an individual in removal proceedings *may be* granted deferred action, but continues
25 to assert that there is no *requirement* that every individual in removal proceedings must receive deferred action.
Furthermore, the DACA SOP is clear that “the existence of deportation, exclusion, or removal proceedings may have
an effect on the exercise of prosecutorial discretion for DACA.” ECF No. 144-7 at 73.

26 ⁸ To the extent that Mr. Ramirez argues that reliance on these charges violated the Court's May 2018 preliminary
27 injunction, Defendants assert above in Section III.A.i that Mr. Ramirez voluntarily abandoned his right to assert claims
under that order. Alternatively, Defendants show in Section VII below that the DACA denial did not violate the
28 preliminary injunction.

1 agency was not permitted to consider his criminal conduct in adjudicating his DACA request.
 2 The timing of when USCIS first became aware of the derogatory information and first chose to
 3 rely on it in adjudicating his DACA request are irrelevant. The criminal conduct is uncontested
 4 and, as explained above, the DACA SOP provides specific guidance for its consideration.

5 **B. Mr. Ramirez’s allegations of misconduct by counsel for Defendants are not**
 6 **supported by the record and do not support a finding of estoppel.**

7 As an initial matter, equitable estoppel against the Government is “unavailable where
 8 petitioners have not lost any rights to which they were entitled.” *Byung Hoon Chung v. Holder*,
 9 312 F. App’x 950, 951 (9th Cir. 2009) (citation omitted). Where Mr. Ramirez cannot show
 10 entitlement to a favorable exercise of prosecutorial discretion, this claim must fail. Furthermore,
 11 “[a] party asserting estoppel against the government bears heavy burdens.” *Mauting v. I.N.S.*, 16
 12 F. App’x 788, 791 (9th Cir. 2001) (relief will be denied if a claim “is facially deficient, or cannot
 13 be sustained on the undisputed facts”); see *Salgado-Diaz v. Gonzales*, 395 F.3d 1158, 1166 (9th
 14 Cir. 2005) (to be estopped, the Government must engage in affirmative misconduct, meaning it
 15 must know the facts; must intend that its conduct will be acted on; the claimant must be ignorant
 16 of the true facts; and the claimant must detrimentally rely on the Government’s conduct).
 17 “Affirmative misconduct” is more than negligence, it means a “deliberate lie” or “a pattern of
 18 false promises.” *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1184 (9th Cir. 2001).

19 Mr. Ramirez makes two bald assertions, neither of which demonstrates the elements
 20 necessary for estoppel: first, that counsel for the Government lied to this Court in asserting that
 21 Mr. Ramirez was gang affiliated, *id.* at 1, 20; and second, that Counsel lied to this Court by
 22 “conceal[ing] its intent to rely on the bases cited in the NOID and the Decision.” *Id.* at 20.

23 Both of these claims lack factual support. First, the Government has been clear to the
 24 Court that USCIS’s NOIT was based on Mr. Ramirez’s own statements. See ECF No. 123 at 10;
 25 ECF No. 131 at 8-9. This is unremarkable, as it was stated by USCIS in its NOIT. See ECF No.
 26 144-13, Notice of Intent to Terminate, dated April 3, 2018. While the Government acknowledges
 27 that the Court had concerns with the sufficiency of this evidence – it is inaccurate for the Court
 28 to find that there was “no evidence” to support the Government’s assertions. Second, Mr.

1 Ramirez provides no evidence to support his claim that the Government actively concealed an
 2 intent to rely on his criminal history. Nor can he establish that he was ignorant of his own
 3 criminal conduct, the facts of which he claims were concealed from him until he filed his
 4 renewal request. Mr. Ramirez also cannot establish that he relied to his detriment on USCIS not
 5 previously raising this criminal history. In fact, undercutting Mr. Ramirez's estoppel argument is
 6 the fact that he himself had a duty to disclose his criminal conduct, and he failed to do so.^[1] *See*
 7 ECF No. 144-14 at 3 (USCIS was not aware of Mr. Ramirez's prior criminal conduct at the time
 8 it adjudicated his 2016 DACA request).

9 Finally, USCIS's knowledge of Mr. Ramirez's other criminal conduct alone is insufficient
 10 to establish that the Government had any obligation to disclose it when the Government was
 11 pursuing termination on other grounds. The Ninth Circuit has consistently rejected analogous
 12 arguments. In *Salviejo-Fernandez*, for example, the Court joined the Second and Fifth Circuits to
 13 hold that the Government does not violate due process where it denies discretionary relief from
 14 removal based on charges that were not relied on as grounds for removal. *See* 455 F.3d at 1066;
 15 *see also Bugajska v. Lynch*, 652 F. App'x 568, 571 (9th Cir. 2016) (unpublished) (immigration
 16 judge did not err in allowing the government's late-filed evidence where petitioner was granted
 17 30 days to respond). Mr. Ramirez received advance notice of the criminal grounds the
 18 Government intended to rely on for denial of his DACA request and the opportunity to respond,
 19 and he did not contest any of it. His allegation that the Government should have informed him
 20 sooner does not amount to a violation of the DACA SOP, the APA, or any potential due process
 21 right.

22
 23 ^[1] *See* ECF No. 90-3, I-821D Instructions at 4 (all renewal requests must complete the criminal information section);
 24 *id.* at 10 ("If you have been arrested for or charged with any . . . misdemeanor (i.e., a Federal, state, or local criminal
 25 offense for which the maximum term of imprisonment authorized is one year or less but greater than five days) in the
 26 United States, . . . you must submit evidence demonstrating the results of the arrest or charges brought against you.");
 27 *id.* at 13 ("If you knowingly and willfully provide materially false information on Form I-821D, you will be
 28 committing a Federal felony punishable by a fine, or imprisonment up to five years, or both, under 18 U.S.C. Section
 1001. In addition, individuals may be placed into removal proceedings, face severe penalties provided by law, and be
 subject to criminal prosecution."). "[V]iolation of California Vehicle Code section 14601.2(a) [driving without a valid
 license] carries a sentence of 'not less than 10 days and more than six months' in jail and a fine of not less than \$300
 and not more than \$1,000." *United States v. Morales*, No. 2:17-PO-0137 DB, 2017 WL 2264853, at *1 (E.D. Cal. May
 24, 2017) (citing C.V.C. § 14601.2(d)(1)) (emphasis removed).

1 Mr. Ramirez offers no explanation to support his allegation that the Government lied to
 2 him or the Court. Defendants proffer that the administrative record regarding the denial decision
 3 will be ready for filing soon and will reflect and support the findings made in the September
 4 2018 NOID and December 2018 denial decision, including USCIS's contention that it was not
 5 aware of Mr. Ramirez's prior criminal conduct when it adjudicated his 2016 DACA request.

6 **VI. Mr. Ramirez cannot establish irreparable harm from the denial of a discretionary**
 7 **grant, nor does his nearly 7-month delay in seeking preliminary injunctive relief**
 8 **support the urgency he alleges.**

9 Where, as explained above, an individual cannot establish entitlement to a discretionary
 10 grant of deferred action, he also cannot show irreparable harm from the denial of such a grant.
 11 *See Mendez-Garcia*, 840 F.3d at 665. Even if a theoretical harm could be asserted in the denial of
 12 a DACA request, Mr. Ramirez cannot “demonstrate immediate threatened injury” by asserting
 13 that, even though he did not work when he possessed DACA and an EAD, he would like to now.
 14 *See TAC* ¶ 125; *Associated Gen. Contractors of California, Inc.*, 950 F.2d at 1410. Nor can Mr.
 15 Ramirez establish the necessary showing of urgency to warrant a preliminary injunction after
 16 having waited more than seven months to seek this injunctive relief that, by his own assertions,
 17 was available to him the day his DACA expired and the day his DACA request was denied. *See,*
 18 *e.g.*, PI Mot. at 9-10, Argument IV.A, “Defendants violated the First Preliminary Injunction.”

19 **A. Mr. Ramirez cannot show harm in the discretionary denial of a DACA**
 20 **request.**

21 Regardless of whether the Court looks to the day that Mr. Ramirez's DACA expired on
 22 its own in May 2018, or to the day that his request for an exercise of prosecutorial discretion was
 23 denied in December 2018, Mr. Ramirez was not working, much less embracing the “opportunity
 24 to pursu[e] [his] chosen profession” as he alleges. *See* PI Mot. at 22 (citing *Enyart v. Nat'l*
 25 *Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011)). *Enyart*, like many of the
 26 cases Mr. Ramirez incorrectly cites to for support, was about an individual's right to continue
 27 pursuing a specific job or career (in *Enyart's* case, through a disability accommodation to allow
 28 her to take the bar exam), and not about her right to be able to work at all.

1 Similarly, in *Arizona Dream Act Coalition*, the Court found that a state policy denying all
 2 DACA recipients with valid employment authorization access to a driver's license violated the
 3 Equal Protection Clause, in part because the policy prohibited plaintiffs from utilizing the work
 4 authorizations they had already been granted. *Arizona Dream Act Coalition v. Brewer*, 757 F.3d
 5 1053, 1057-58 (9th Cir. 2014). The Court did not find that any unlawful individual was entitled
 6 to receive DACA or work authorization in the first instance or through a renewal request.

7 Nor do Mr. Ramirez's aspirational claims that he made plans to get a job to pay off his
 8 traffic fines and support his child, *see* TAC ¶ 125, "demonstrate immediate threatened injury."
 9 *Garcia*, 786 F.3d at 740; *Associated Gen. Contractors of California, Inc.*, 950 F.2d at 1410. As
 10 previously noted, Mr. Ramirez was not working when his DACA was terminated. *See* ECF No.
 11 123 at 6 (citing Mr. Ramirez's sworn statement, ECF No. 35-1 at ¶ 10).

12 Lastly, Mr. Ramirez's argument that he is "accruing time for unlawful presence" that may
 13 impact his ability to seek lawful status in the future is arguably disingenuous. *See* PI Mot. at 23.
 14 As Defendants have already made clear, at the time that Mr. Ramirez initially received DACA in
 15 2013, he had already accrued more than one year of unlawful presence as an adult. ECF No. 123
 16 at 6. Thus, he is already subject to the maximum penalty under the law for unlawful presence and
 17 cannot benefit from the Government's treatment of DACA recipients as not accruing unlawful
 18 presence. *See* 8 U.S.C. §§ 1181(a)(9)(B)(i)(II) (ten-year bar to admission for those with over one
 19 year of unlawful presence); 1182(a)(9)(B)(iii)(I) (excepting minors from the accrual of unlawful
 20 presence). Mr. Ramirez's accrual of unlawful presence is not a harm that would be in any way
 21 altered by a preliminary injunction or even by a ruling in his favor on the merits.

22 **B. Mr. Ramirez's months-long, multiple delays seeking emergency injunctive**
 23 **relief undermine the urgency necessary to grant this extraordinary relief.**

24 Even if the Court agreed that Mr. Ramirez has shown a harm from the discretionary
 25 denial of his DACA request, he cannot establish the urgent need for extraordinary injunctive
 26 relief after waiting nearly 7 months to seek this preliminary injunction—particularly while
 27 simultaneously asserting a right to have enjoined the denial of his DACA in December 2018
 28 under the Court's May 2018 preliminary injunction. The Court should find that Mr. Ramirez's

1 deliberate and unexplained delays, first in waiting three months to seek leave to file his TAC,
 2 then in waiting two more weeks to file it (despite being drafted for the motion seeking leave),
 3 and again in waiting an additional week to file the instant motion, undercut his ability to
 4 demonstrate that he faces an immediate threatened injury that must be addressed by this Court
 5 before the merits are decided. *Lydo Enters., Inc.*, 745 F.2d at 1213.

6 The Ninth Circuit has made clear that a plaintiff cannot establish the urgent need for a
 7 temporary restraining order when he waits months after the challenged action to seek relief from
 8 a district court. *Larsen v. City of San Carlos*, No. 14-CV-04731-JD, 2014 WL 5473515, at *3
 9 (N.D. Cal. Oct. 28, 2014) (denying motion for temporary restraining order or preliminary
 10 injunction where plaintiff's three month delay in filing his claim weighed strongly against a
 11 showing of irreparable harm) (citing *Miller ex rel. NLRB v. Cal. Pac. Med. Ctr.*, 991 F.2d 536,
 12 544 (9th Cir. 1993) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack
 13 of urgency and irreparable harm.")); *see also Lavenue v. Edmunds*, No. CV 10-1479-PHX-DGC,
 14 2010 WL 2838383, at *1 (D. Ariz. July 20, 2010) (plaintiff failed to establish irreparable injury
 15 where he had 90 days' notice of a trustee sale and waited until 5 days before the sale to seek a
 16 TRO); *Best Deals on TV, Inc. v. Naveed*, 2007 WL902564, *4 (N.D. Cal. 2007) (plaintiff cannot
 17 show the need for temporary restraining order without notice when he waited months after
 18 learning of the situation to file the request).

19 Mr. Ramirez provides no viable explanation for choosing not to move the Court to
 20 enforce the May 2018 preliminary injunction in a timely manner, or why he sat on his rights for
 21 three months after the denial of his DACA request to begin the lengthy process of seeking the
 22 Court's leave to file a third amended complaint. Nor does he explain why, even after receiving
 23 the Court's leave to file, he waited another three weeks to file his motion for preliminary
 24 injunction. While Mr. Ramirez is certainly free to choose a litigation strategy for any number of
 25 reasons, his chosen strategy indicates a thorough lack of urgency in seeking to address what he
 26 alleges are irreparable harms from the December 2018 denial of his DACA request. Mr. Ramirez
 27
 28

1 can no longer establish the immediacy of his alleged injuries and any relief that Mr. Ramirez
2 obtains should only come after a ruling on the merits.

3 **VII. Mr. Ramirez cannot establish that the denial of his DACA renewal request violated**
4 **the Court’s preliminary injunction.**

5 Mr. Ramirez argues that the Government violated the preliminary injunction by
6 “implicitly” finding him to be a public safety threat through its reliance on past criminal conduct
7 to deny his DACA renewal. *See* PI Mot. at 10 (“Because the substantive bases cited in the
8 Decision are fundamentally public safety-related, and were part of the record that existed long
9 before May 15, 2018, the Decision violates the Preliminary Injunction Order.”); *id.* at 13 (The
10 conclusion implicit in the reasoning presented in the Decision [are] that Mr. Ramirez poses a risk
11 to public safety”). However, Mr. Ramirez argues for an overbroad and inconsistent
12 definition of the term “public safety threat,” which, if adopted by the Court, would effectively
13 bar the use of *any* derogatory information the Government may have discovered in considering
14 Mr. Ramirez’s DACA request. *See id.* at 10 (“[T]he government is unquestionably relying on
15 statements and records dated prior to May 15, 2018 that it views as relevant to whether Mr.
16 Ramirez is a threat to public safety.”). Mr. Ramirez offers no support for his contention that the
17 listed criminal infractions considered in the denial of his DACA, including unpaid traffic
18 citations and possession of marijuana, could (or must) constitute public safety threats.

19 Contrary to Mr. Ramirez’s proposed definition, the DACA FAQs expressly distinguish
20 issues of criminality from the specific finding that someone is a public safety threat. For
21 example, Question 49, “When should I file my renewal request with U.S. Citizenship and
22 Immigration Services (USCIS)?” explains, in part, that “Factors that may affect the timely
23 processing of your DACA renewal request include, but are not limited to: [. . .] Issues of national
24 security, criminality *or* public safety discovered during the background check process that
25 require further vetting.” ECF No. 144-2 at 18, Q49 (emphasis added).⁹ Furthermore, Question
26 51, “How will USCIS evaluate my request for renewal of DACA” explains that “You may be

27 ⁹ This FAQ also publicly expresses the Government’s expectation that the renewal process may turn up derogatory
28 information not previously discovered in the initial consideration of a DACA request.

1 considered for renewal of DACA if you met the guidelines for consideration of Initial DACA . . .
 2 AND you: [. . .] Have not been convicted of a felony, a significant misdemeanor, or three or
 3 more misdemeanors, *and* do not otherwise pose a threat to national security or public safety.” *Id.*
 4 at 19, Q51 (emphasis in italics added); *id.* at 19-20, Q54 (same).

5 The DACA SOP similarly distinguishes criminality from public safety threats. *See, e.g.*,
 6 ECF No. 144-7 at 81-85, Chapter 8: Adjudication of The DACA Request, Section G: Evaluating
 7 Issues of Criminality, Public Safety, and National Security (“If the evidence establishes that an
 8 individual has a conviction for one of the above *or* may be a national security or public safety
 9 threat, USCIS will deny the request for deferred action, unless exceptional circumstances are
 10 found.”) (emphasis added); *see also id.* at 19 (Introduction); 35 (Overview of Background Check
 11 Process); 43 (DACA Overview). The DACA SOP also provides guidance on the types of
 12 criminality that might elevate an individual to be considered a public safety concern.

13 For example, an individual with multiple DUI arrests, but no convictions, could
 14 pose a significant public safety concern. Similarly, an individual arrested for
 15 multiple assaults or other violent crimes could be deemed a public safety risk even
 if he/she was never convicted for those crimes.

16 *Id.* at 89, Public Safety Concerns.

17 In this case, the Government considered the totality of Mr. Ramirez’s circumstances,
 18 excluding the evidence supporting previous gang affiliation as required by the preliminary
 19 injunction, and determined that a favorable exercise of prosecutorial discretion was not
 20 warranted. *See* ECF No. 144-14 at 2, 5. It did not determine that Mr. Ramirez was a threat to
 21 public safety, and his assertion that it did is not supported in the evidence before the Court.

22 Thus, Mr. Ramirez fails to establish that the discretionary denial of his DACA request in
 23 any way violates the preliminary injunction.

24 **VIII. The Remaining Preliminary Injunction Factors Favor Defendants.**

25 Where the Government is the opposing party, the balance of equities and public interest
 26 factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Defendants have strong interests in
 27 enforcing U.S. immigration laws effectively and consistent with the statutory removal scheme.

1 *See AADC*, 525 U.S. at 490 (“There is always a public interest in prompt execution of removal
2 orders [to end] a continuing violation of United States law.”).

3 Moreover, Mr. Ramirez’s effort to compel DACA and employment authorization renewal
4 against the Government’s intention not to defer action for an individual the Government has
5 decided is an enforcement priority would be contrary to the very nature of prosecutorial
6 discretion and its long history of protection from judicial scrutiny. Further, the efficacy of the
7 relief that Mr. Ramirez seeks is questionable because DHS and its components have already
8 exercised prosecutorial discretion to place him into removal proceedings – regardless of his
9 original or asserted continued ability to meet the threshold criteria to request DACA. This
10 interest is compounded by the fact that Mr. Ramirez now has an order of removal from the
11 immigration court that he has appealed to the Board of Immigration Appeals.

12 CONCLUSION

13 For the foregoing reasons, the Court should find it lacks jurisdiction to hear Mr.
14 Ramirez’s motion for preliminary injunction or his underlying Third Amended Complaint and
15 deny the motion. If the Court finds jurisdiction, it should still deny the motion for preliminary
16 injunction because Mr. Ramirez cannot show that the law and facts clearly support his position.
17 Nor can he establish irreparable harm in the denial of a discretionary grant or the need for urgent
18 relief by waiting nearly seven months after his alleged injuries began to file this motion.

1 DATED: July 1, 2019

Respectfully submitted,

2 JOSEPH H. HUNT
Assistant Attorney General

JEFFREY S. ROBINS
Deputy Director

3
4 WILLIAM C. PEACHEY
Director

/s/ James J. Walker
JAMES J. WALKER
Trial Attorney
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Phone: (202) 532-4468
Fax: (202) 305-7000
Email: james.walker3@usdoj.gov

Attorneys for Defendants-Appellants

CERTIFICATE OF SERVICE

1
2 I HEREBY CERTIFY that on July 1, 2019, I electronically filed the foregoing document
3 with the Clerk of the Court using CM/ECF. I also certify that the foregoing document should
4 automatically be served this day on all counsel of record *via* transmission of Notices of
5 Electronic Filing generated by CM/ECF.
6

7 /s/ James J. Walker
8 JAMES J. WALKER
9 Trial Attorney
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28