UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JESSICA M. COLOTL COYOTL,	)	**Case No. 1:17-cv-1670-MHC**
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JOHN F. KELLY, Secretary, Department of Homeland Security; MARK J. HAZUDA, Director, Nebraska Service Center, U.S. Citizenship and Immigration Services; JAMES McCAMENT, Acting Director, U.S. Citizenship and Immigration Services; THOMAS D. HOMAN, Acting Director, U.S. Immigration and Customs Enforcement; SEAN W. GALLAGHER, Atlanta Field Office Director, U.S. Immigration and Customs Enforcement.	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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INTRODUCTION

This case challenges the government's arbitrary and unlawful revocation of the Deferred Action for Childhood Arrivals ("DACA") status of Plaintiff Jessica Mayeli Colotl Coyotl. Ms. Colotl is an exceptional young woman who, though originally from Mexico, has lived in the United States since she was eleven years old. For the past seven years, federal immigration authorities have repeatedly granted Ms. Colotl permission to live and work in this country in the form of deferred action, most recently through the DACA program. Ms. Colotl has relied on her multiple grants of deferred action to build a life in the United States, earning a Bachelor's degree from Kennesaw State University in Kennesaw, Georgia, working as a paralegal, attending church, and doing community service.

Federal immigration authorities determined that Ms. Colotl was eligible for deferred action five separate times over the last seven years. Yet the government has now arbitrarily revoked Ms. Colotl's DACA and denied her application for renewal. In so doing, the government has reversed its prior, repeated conclusion that she meets the DACA program's enumerated eligibility requirements, even though the facts remain the same and the eligibility standards have not changed. Defendants now apparently claim that a dismissed charge relating to a 2010 traffic incident constitutes a felony conviction that renders Ms. Colotl ineligible. But that

is legally incorrect. Moreover, Defendants have, contrary to their own procedures, provided no notice of or meaningful explanation for their departure from their previous consistent position, nor any opportunity to contest these adverse decisions.

Plaintiff is likely to succeed in showing that the government's decision to terminate Ms. Colotl's DACA and deny her renewal application violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, as well as the Fifth Amendment's Due Process Clause. This Court should temporarily enjoin that revocation and denial, along with any attempts by the government to arrest or detain Ms. Colotl, pending a readjudication of her DACA eligibility under the program's existing criteria.

BACKGROUND

I. The DACA Program

Deferred action is a longstanding form of administrative action by which the federal Executive Branch decides, for humanitarian or other reasons, to refrain from seeking a noncitizen's removal and to authorize her continued presence in the United States. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999). On June 15, 2012, the Secretary of the Department of Homeland Security ("DHS") announced DACA—a deferred action program specifically for young

immigrants who came to the United States as children and are present in the country without formal immigration status.[1] As former President Barack Obama explained, these young immigrants "are Americans in their heart, in their minds, in every single way but one: on paper."[2] Similarly, President Trump has described DACA recipients as "absolutely incredible kids," who have "worked here" and "gone to school here," and publicly stated that they "should rest easy" about being permitted to remain in the country.[3]

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

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[1] Declaration of Charles H. Kuck ("Kuck Decl.") ¶ 12, Ex. 11 (Janet Napolitano, Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012)) ("Napolitano Memo") at 2.

[2] Kuck Decl. ¶ 16, Ex. 15 at 1.

[3] Kuck Decl. ¶ 17, Ex. 16 at 2; *id*. ¶ 19, Ex. 18 at 30; *id*. ¶ 22, Ex. 21 at 16.

[4] A significant misdemeanor is a conviction for an offense of "domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence; or . . . [a conviction] for which the individual was sentenced to time in custody of more than

Under the DACA program, deferred action is provided for a renewable period of two years, and DACA recipients may obtain work authorization and a Social Security Number. *See id.* A decision to grant or deny a deferred action application or renewal is independent of any proceedings in immigration court; a noncitizen who is in removal proceedings can apply for DACA separately and simultaneously. *Id.* at 2.

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

II. Ms. Colotl's Life in the United States, 2010 Traffic Arrest, and Participation in a Pretrial Diversion Program

Plaintiff Jessica Colotl, a resident of Georgia, is a 28-year-old citizen of Mexico who has lived in the United States since she was first brought here in 1999,

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90 days." Kuck Decl. ¶ 18, Ex. 17 (U.S. Citizenship and Immigration Services, Frequently Asked Questions about Deferred Action for Childhood Arrivals (updated Apr. 25, 2017)) at 20.

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

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

when she was 11 years old. Declaration of Jessica M. Colotl Coyotl ("Colotl Decl.") ¶ 1. She graduated from Lakeside High School in DeKalb County, Georgia, in May 2006, with honors. *Id.* ¶ 2. She then earned a Bachelor's degree in political science from Kennesaw State University in 2011. *Id.* ¶ 4. In college, Ms. Colotl excelled academically and was active in community service. *Id.* ¶ 3.

Since graduating, Ms. Colotl has worked as a paralegal at Kuck Immigration Partners LLC and aspires to attend law school and become an immigration lawyer. *Id.* ¶ 5. She has continued to serve the community, volunteering for the Annual Latino Youth Leadership Conference, donating platelets at the Northside Hospital in Atlanta, Georgia, and fundraising for St. Jude Children's Hospital. *Id.* ¶ 6. She is also a member of Saint Patrick's Catholic Church in Norcross, Georgia, and a passionate advocate for immigrants' rights and immigration reform. *Id.* ¶¶ 6, 8.

In March 2010, months away from college graduation, Ms. Colotl was pulled over by campus police for allegedly blocking traffic while waiting for a parking space. *Id.* ¶ 9. She was unable to produce a driver's license.[7] *Id.* The next day, she was arrested on the charges of impeding the flow of traffic and driving

[7] At the time, Ms. Colotl was not eligible to obtain a driver's license in Georgia due to her lack of immigration status. However, attending school and other routine activities are effectively impossible in many areas of Georgia without the ability to drive, given the limited public transportation infrastructure.

without a license, and booked into the Cobb County jail. *Id.* ¶ 10. In November 2010, Ms. Colotl was acquitted of impeding the flow of traffic, but found guilty of driving without a license, for which she served three days in jail and paid a fine. *Id.*

Subsequently, in February 2011, Ms. Colotl was separately indicted for allegedly making a false statement when she was booked into the county jail on the traffic violation charges. *Id.* ¶ 11. The felony charge alleged that Ms. Colotl knowingly provided a false address during booking. *Id.* However, Ms. Colotl never made any false statement during the booking process. When she was being booked, a police officer recorded address information from a vehicle insurance card that the officer took from Ms. Colotl's purse. *Id.* ¶ 12. The officer never asked Ms. Colotl to provide any address information, and she never made any statement to the officer regarding her address. *Id.* The address the officer recorded from Ms. Colotl's insurance card was, in fact, her correct permanent home address while she attended school. *Id.* ¶ 13.

Ms. Colotl pleaded not guilty. The District Attorney offered Ms. Colotl the option of entering into a pretrial diversion program as an alternative to prosecution, whereby she would not be required to enter a guilty plea, and the charge would be dismissed upon completion. *Id.* ¶ 14. Although the charge was baseless, Ms. Colotl

decided to resolve the case by agreeing to perform community service, rather than undertake the risk of going to trial. *Id.*

The diversion program required Ms. Colotl and the District Attorney to sign a "Diversion Agreement" documenting their arrangement—i.e., Ms. Colotl would perform community service hours in exchange for the District Attorney dismissing the charges "nolle prosequi." Kuck Decl. ¶ 23, Ex. 22 at 84-86. The form document contained a boilerplate statement that the signatory understood that by "[her] participation in the program [she was] admitting guilt to the charge(s) against [her]." *Id.* at 86. However, Ms. Colotl never pled guilty or admitted to any facts that would support the charge. Colotl Decl. ¶ 16.

The Diversion Agreement was never signed by the court. In fact, aside from formally removing the case from the active docket and dismissing the case upon completion of the program, the state judge was not involved in the resolution of Ms. Colotl's case. Ms. Colotl successfully completed the diversion program, and the charge was dismissed in January 2013. Kuck Decl. ¶ 2, Ex. 1. She was never convicted of the charge. Ms. Colotl has no other criminal history. Colotl Decl. ¶ 18.

III. Ms. Colotl's Immigration Proceedings and Grants of Deferred Action

After Ms. Colotl was arrested for the traffic violation in March 2010, she was referred to the immigration authorities and placed in removal proceedings. *Id.* ¶ 19. Ultimately, she accepted an order of voluntary departure, which permitted her to leave the United States within 30 days without being ordered removed. *Id.* ¶ 21. After receiving her voluntary departure, however, Ms. Colotl was granted deferred action by U.S. Immigration and Customs Enforcement ("ICE"), allowing her to remain in the United States and complete her degree. *Id.* ¶ 22.

DHS continued to grant her deferred action over the next seven years: DHS renewed her original grant of deferred action twice, and also granted and renewed her deferred action status under the DACA program in 2013 and 2015. *Id.* ¶¶ 28-29. Each time she applied for deferred action Ms. Colotl expressly disclosed all relevant information regarding her criminal history. *See id.* ¶ 32; Kuck Decl. ¶¶ 23-25, Exs. 22-24. In particular, she included a copy of her pretrial diversion agreement in each of her DACA applications, and DHS repeatedly found her eligible for DACA. Kuck. Decl. ¶ 23, Ex. 22 at 84-86; *id.* ¶ 24, Ex. 23 at 28-30; *id.* ¶ 25, Ex. 24 at 40-42.

Ms. Colotl's circumstances remain unchanged with respect to her eligibility for DACA. However, in early May, USCIS terminated Ms. Colotl's DACA and

denied her application for DACA renewal. Colotl Decl. ¶¶ 33-34. The termination notice stated that granting her DACA would not be consistent with the government's enforcement priorities. Kuck Decl. ¶ 11, Ex. 10 at 6. DHS has since stated publicly to multiple news outlets that Ms. Colotl's DACA was terminated because of a felony conviction. *See* Kuck Decl. ¶ 30, Ex. 29 (New York Times); *id.* ¶ 27, Ex. 26 (Atlanta Journal-Constitution); *id.* ¶ 26, Ex. 25 (Associated Press). The termination notice, however, failed to provide any explanation for the change in the government's longstanding position that Ms. Colotl was eligible for DACA—and therefore not an enforcement priority—or any reasons why Ms. Colotl no longer meets DACA's eligibility criteria. *Id.* ¶ 11, Ex. 10 at 6. Nor did the notice provide Ms. Colotl with a means to challenge the government's decision, which was effective immediately. *Id.*

ARGUMENT

This Court should issue a temporary restraining order. To win a temporary restraining order, Plaintiff must show: (1) a likelihood of success on the merits, (2) likely irreparable harm in the absence of such relief, (3) that the balance of equities tips in her favor, and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Ms. Colotl satisfies all four factors.

I. MS. COLOTL IS LIKELY TO SUCCEED ON THE MERITS.

Two bedrock principle of administrative law are that "[t]he agency must follow its own rules," *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 549 (2009) (citation omitted), and if an agency is going to depart from its prior policies or precedents, it "is obligated to supply a reasoned analysis for the change." *Motor Vehicle Mfgs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *See also Fox Television Stations, Inc.*, 556 U.S. at 515 ("the agency must show that there are good reasons for the new policy."). In this case, Ms. Colotl is likely to succeed in showing that DHS has violated both of these fundamental requirements.

First, DHS' determination that Ms. Colotl is no longer eligible for DACA because she has a disqualifying criminal conviction is legally incorrect and contrary to the agency's own expressly enumerated standards for disqualifying criminal history under the DACA program.

Second, DHS' decision that Ms. Colotl is ineligible for DACA is a total reversal of its prior conclusions that she was eligible—made in 2013 and 2015 based on identical facts. DHS' "approach here is a complete about-face." *Ramaprakash v. FAA*, 346 F.3d 1121, 1126 (D.C. Cir. 2003). Yet DHS has both failed to acknowledge its change in position and failed to provide a reasoned basis for reaching the opposite conclusion when the facts have not changed. Ms. Colotl

is therefore likely to succeed in showing that DHS' decisions to terminate her DACA and deny her renewal application are arbitrary and capricious.

Ms. Colotl is also likely to succeed on her claim that DHS' failure to provide her with any notice or an opportunity to contest the decisions—contrary to its own rules—deprived Ms. Colotl of her constitutional right to procedural due process.

A. DHS' Revocation and Denial Decisions Are Contrary to the DACA Eligibility Criteria.

Since the inception of the DACA program, eligibility determinations have been governed by the same expressly enumerated criteria. In 2013 and again in 2015, DHS applied DACA's eligibility requirements to the same facts and concluded that Ms. Colotl was eligible for the program. Ms. Colotl continues to meet the criteria for DACA, and DHS' contrary determination is inconsistent with the DACA policy and is "not in accordance with law." 5 U.S.C. § 706(2)(A).

1. The DACA Eligibility Criteria Concerning Felony Convictions Are Not Discretionary.

The DACA memorandum specifically enumerates nondiscretionary criteria—including age, education, residency, and lack of a disqualifying criminal conviction—that the agency must consider in determining whether a noncitizen is eligible for a grant of deferred action. *See* Napolitano Memo at 1 ("The following criteria *should be satisfied before* an individual is considered for an exercise of

prosecutorial discretion pursuant to this memorandum[.]") (emphasis added); *id.* at 2 ("[T]he above criteria *are to be* considered whether or not an individual is already in removal proceedings or subject to a final order of removal.") (emphasis added). *See also Texas v. United States*, 809 F.3d 134, 170-73 (5th Cir. 2015) (holding that the DACA eligibility criteria are not discretionary), *aff'd by an equally divided Court*, *United States v. Texas*, No. 15-674 (June 23, 2016).

Specifically, whether a noncitizen has a felony conviction that would disqualify her from DACA is a question of law governed by clear standards. DHS' standard operating procedures ("SOP"), which immigration officers are required to follow in adjudicating DACA applications, *see* Kuck Decl. ¶ 15, Ex. 14 at 2, set out the rules for evaluating whether an individual has a felony conviction, *see id.* at 4-7. The SOP provides that the inquiry is controlled by the definition of "conviction" set forth in 8 U.S.C. § 1101(a)(48)(A), *see* Kuck Decl. ¶ 15, Ex. 14 at 5, which is a question of law, *see Estrada-Ramos v. Holder*, 611 F.3d 318, 321 (7th Cir. 2010); *Cole v. U.S. Atty. Gen.*, 712 F.3d 517, 523-24 (11th Cir. 2013).

Notably, although the *ultimate* decision whether to grant deferred action pursuant to DACA is discretionary, that is separate from the threshold determination of whether an individual has a felony conviction that would render her *ineligible* to be considered for DACA. As the Eleventh Circuit has explained,

"simply because the Secretary has the ultimate discretionary authority to grant an immigration benefit does not mean that every determination made by USCIS regarding an alien's application for that benefit is discretionary." *Mejia Rodriguez v. DHS*, 562 F.3d 1137, 1143 (11th Cir. 2009). Instead, threshold "eligibility decisions are not ones that involve discretion." *Id.*; *see also INS v. St. Cyr*, 533 U.S. 289, 307-08 (2001) ("Eligibility that was 'governed by specific statutory standards' provided 'a right to a ruling on an applicant's eligibility,' even though the actual granting of relief was . . . a matter of grace.'"). Here, the question whether Ms. Colotl has a felony conviction involves applying a legal standard—not discretion. *See, e.g.*, *Perez v. USCIS*, 774 F.3d 960, 965 (11th Cir. 2014) (explaining that "purely legal questions [] do not implicate agency discretion").

2. DHS' Determination that Ms. Colotl Is Ineligible Is Incorrect.

DHS's determination that Ms. Colotl is ineligible for DACA because she has a felony conviction is incorrect, and therefore contrary to law. Although Ms. Colotl has yet to receive an official explanation of DHS' adverse decisions, DHS has publicly stated to the press that she has a felony conviction based on her participation in the pretrial diversion program for the false statement charge.[8] Yet

[8] *See, e.g.*, Kuck Decl. ¶ 30, Ex. 29 (New York Times article reporting statement by ICE that Ms. Colotl "admitted guilt to a felony charge in August 2011

DHS determined that Ms. Colotl was eligible for DACA in 2013 and again in 2015, notwithstanding her participation in the diversion program. DHS was aware of all relevant facts, including the Diversion Agreement, when it approved and renewed it her previous DACA application. The agency's own repeated determinations that Ms. Colotl is eligible for DACA based on the same facts make clear that she has no felony conviction or other disqualifying criminal history.

The agency's recent reversal of its prior consistent position is contrary to its own DACA policy. *See* Kuck Decl. ¶ 15, Ex. 14 at 5 (incorporating the Immigration and Nationality Act's definition of "conviction"). The applicable statutory provision provides two alternative definitions of what constitutes a criminal "conviction" for purposes of immigration law. First, a conviction will be found if the individual's record reflects a "formal judgment of guilt" entered by a court. 8 U.S.C. § 1101(a)(48)(A). Second, a conviction will be found if "adjudication of guilt has been withheld," *and* (i) "a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt" *and* (ii) "the judge has

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of making a false statement to law enforcement in Cobb County, Ga." and "was subsequently allowed to enter a diversionary program by local authorities; however, under federal law her guilty plea is considered a felony conviction for immigration purposes").

ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed." *Id*. § 1101(a)(48)(A)(i)-(ii); *see also Cole*, 712 F.3d at 524-25.

As DHS concluded twice before, neither definition is met in Ms. Colotl's case. Indeed, DHS's own policy explicitly provides that "pretrial diversion programs . . . *do not constitute a conviction for immigration purposes*." *See* Kuck Decl. ¶ 15, Ex. 14 at 6 (emphasis added); *see also id.* (a "nolle prosequi" dismissal is not "a conviction for immigration purposes"); *Pinho v. Gonzales*, 432 F.3d 193, 196-97, 213-15 (3d Cir. 2005) (finding no conviction where prior conviction was vacated for defect and defendant then entered pretrial diversion); *Matter of Grullon*, 20 I. & N. Dec. 12, 13-15 (BIA 1989) (finding no conviction where defendant did not plead guilty and charges were dismissed without prejudice following completion of pretrial intervention program).

Applying the applicable standard, it is obvious why DHS' SOPs provide that participation in a pretrial diversion program does not constitute a conviction. Here, there was no "formal adjudication of guilt" under the first definition. Thus, the only way that Ms. Colotl can be found to have a conviction would be pursuant to the second definition under § 1101(a)(48)(A), which requires that "adjudication of guilt has been withheld"—but that definition is not satisfied either.

For immigration purposes, a "withheld" or deferred adjudication refers to a case disposition where a defendant pleads guilty to a charge, but final adjudication of guilt is withheld pending successful completion of certain requirements imposed by the court. *See, e.g.*, *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321, 330 (5th Cir. 2004). Here, by contrast, Ms. Colotl pled not guilty; the voluntary diversion program in which she participated was "an alternative" to prosecution, *see* Ga. Code Ann. § 15-18-80(b); the District Attorney dropped the charge upon her successful completion; and the court never imposed any requirements whatsoever. This disposition does not constitute a withheld adjudication under DHS' own policy. *See* Kuck Decl. ¶ 15, Ex. 14 at 5-6 (distinguishing between "withheld" adjudication and pretrial diversion). Accordingly, the second definition pertaining to withheld adjudications is not even implicated here.

Further, even if adjudication of guilt was "withheld," Ms. Colotl's case still does not satisfy the second definition of "conviction" because the *judge never ordered* any form of punishment, penalty, or restraint on Ms. Colotl's liberty, as required by subsection (ii). *See Griffiths v. I.N.S.*, 243 F.3d 45, 54 (1st Cir. 2001) (finding that subsection (ii) requires state judge to "impose[] some form of punishment"); *Retuta v. Holder*, 591 F.3d 1181, 1188 (9th Cir. 2010) (holding that "the definition of 'conviction' does not include criminal judgments" where the

only court-imposed punishment is "a suspended non-incarceratory sanction"). Rather, entry into the program was at the sole discretion of the prosecutor,[9] the diversion agreement was never signed by the court, Kuck. Decl. ¶ 23, Ex. 22 at 84-86 (Diversion Agreement), and the court ordered no punishment in the case, *id.* ¶ 3, Ex. 2 (Criminal Docket).[10] Thus, Ms. Colotl's record does not satisfy the requirement in § 1101(a)(48)(A)(ii) that there be some judicially imposed penalty, and therefore there was no conviction in her case.[11]

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[9] *See* Ga. Code Ann. § 15-18-80(c) (pretrial diversion "shall be at the discretion of the prosecuting attorney based upon written guidelines").

[10] *See also AA-Prof'l Bail Bonding v. Deal*, 332 Ga. App. 857, 859, 775 S.E.2d 217, 219-20 (2015) (pretrial diversion program under Ga. Code Ann. § 15-18-80 not "court ordered" for purposes of bond statute).

[11] Although the lack of a judge-ordered punishment ends the inquiry under the second definition of conviction, it is worth noting that the requirements for subsection (i) are not met either. 8 U.S.C. § 1101(a)(48)(A)(i). Ms. Colotl was not found guilty by a judge or jury, and she did not enter a guilty plea in the case. The boilerplate statement regarding guilt in the District Attorney's then-standard pretrial diversion agreement is not equivalent to admitting "sufficient *facts* to warrant a finding of guilt," within the meaning of the definition. *See Iqbal v. Bryson*, 604 F. Supp. 2d 822, 826 (E.D. Va. 2009) (emphasis added) (boilerplate admission of responsibility in standard diversion agreement was "not case specific and thus cannot be deemed to recite sufficient facts to warrant a finding of guilt").

The boilerplate language also does not constitute a guilty plea. The diversion agreement, signed outside of the court with no judicial oversight, cannot supersede Ms. Colotl's formal plea of not guilty. *See* Ga. Code Ann. § 17-7-93 (requiring numerous procedural safeguards before a court may accept a guilty plea, including the court's determination that a defendant "is freely entering the plea with an understanding that if he or she is not a citizen of the United States, then the plea may have an impact on his or her immigration status").

Thus, because Ms. Colotl's dismissed charge does not constitute a conviction as a matter of law, the agency's conclusion is contrary to its own policy.

B. DHS's Unexplained Departure From its Prior Position Is Arbitrary and Capricious in Violation of the APA.

Furthermore, even apart from the incorrectness of its decisions, DHS has departed from its prior policy without "a reasoned analysis for the change," in violation of the APA. *See, e.g.*, *Motor Vehicle Mfgs. Ass'n*, 463 U.S. at 42; *see also* 5 U.S.C. § 706(2). "[T]he requirement that an agency provide reasoned explanation" means that the agency must "display awareness that it *is* changing position" and prohibits it from "depart[ing] from a prior policy *sub silentio* or simply disregard[ing] rules that are still on the books." *Fox Television Stations, Inc.*, 556 U.S. at 515. Here, DHS has provided no explanation whatsoever for its departure from its prior policy in Ms. Colotl's case and has not even acknowledged that it has reversed course. Its complete failure to satisfy this minimum requirement violates the APA. Indeed, DHS has specifically assured the public that its new enforcement priorities do not affect the DACA program. *See supra* note 6. DHS' failure is particularly egregious here, where its new conclusion directly contradicts its prior consistent position from 2013 through 2017 that Ms. Colotl lacked a disqualifying criminal conviction. And its failure is even more outrageous because the DACA grant at issue has engendered serious reliance interests: Ms.

Colotl has lived in the United States since childhood, and has relied on DACA to build a life and a career for herself as a young adult. *See infra* Argument Point II; *see also Fox Television Stations, Inc*., 556 U.S. at 515. DHS' failure to provide a reasoned explanation for its change in position is arbitrary and capricious.

C. DHS' Revocation and Denial of Ms. Colotl's DACA Violates Procedural Due Process.

Finally, the government's sudden termination of Ms. Colotl's DACA and denial of her renewal application violate her due process rights. Ms. Cototl has a protected property interest in her DACA, which has authorized her to live and work in the United States for years, and therefore has a right to a fair procedure to establish her continued eligibility for the program. Yet DHS has reversed its decision without following its own rules, which require it to provide Ms. Colotl with adequate notice, a reasoned explanation for its decision, and an opportunity to present arguments and evidence to demonstrate that she remains eligible. *See* Kuck Decl. ¶ 15, Ex. 14 at 3,8 (officers "will issue" a Request for Evidence or Notice of Intent to Deny, provide applicant with 33 days to respond, and issue a denial only where response was insufficient to "establish eligibility"); *id*. at 9 (if DACA granted in error, officer directed to issue a "Notice of Intent to Terminate," allow recipient "33 days to file a brief or statement contesting the grounds cited in [the notice]," and terminate only where the adverse grounds are not overcome).

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause . . . ." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Even absent a claim of entitlement to a benefit, once an important benefit is conferred, recipients have a protected property interest sufficient to require a fair process before the government may take it away. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that,"[o]nce [driver's] licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood," such that they cannot "be taken away without" due process); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (holding that parole revocation requires due process; parolees may "have been on parole for a number of years and may be living a relatively normal life[,]" all the while "[having] relied on at least an implicit promise that parole will be revoked only if [the parolee] fails to live up to the parole conditions"); *Nnebe v. Daus*, 644 F.3d 147, 158 (2d Cir. 2011) (recognizing that taxi drivers have a protected property interest in the continued possession of their operating licenses, such that suspending licenses without a hearing violated due process); *Singh v. Bardini*, No. 09-cv-3382, 2010 WL 308807, at *7 (N.D. Cal. Jan. 19, 2010) ("Even if there is no constitutional right to be granted asylum, that does not mean that,

once granted, asylum status can be taken away without any due process protections.") (internal citation omitted).

Ms. Colotl's grant of DACA and work authorization are essential to her ability to remain in the United States and earn a livelihood. *See, e.g.*, *Green v. Brantley*, 719 F. Supp. 1570, 1575 (N.D. Ga. 1989) (flight examiner certificate was "valuable Fifth Amendment property right because it affords the plaintiff the means by which he earns his living"). In continuing to build her life in the United States, Ms. Colotl has reasonably relied on the implicit promise that she could retain DACA so long as she satisfied the program's eligibility requirements. *See Morrissey*, 408 U.S. at 482. The government's reversal of its decision inflicts precisely the kind of "serious loss" that requires due process protections. *Mathews*, 424 U.S. at 348 (internal quotation marks omitted).

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

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

Id. at 335.

Evaluation of these factors demonstrates that Ms. Colotl must be afforded at least the process provided for in DHS' own rules—i.e., adequate notice of the allegedly adverse grounds and an opportunity to respond and contest the decision. The private interest at stake for Ms. Colotl could not be more significant. The termination of Ms. Colotl's DACA rescinds her longstanding authorization to live and work in the United States—the country she has called home for the last eighteen years. *See infra* Background Points II-III. Instead of following its own prescribed process, DHS terminated Ms. Colotl's DACA suddenly and without adequate notice of the reasons for its decision. Nor has DHS afforded her any opportunity to contest its action, creating an unacceptably high risk that she will suffer an erroneous deprivation. Providing Ms. Colotl with a reasoned explanation of the government's actions and an opportunity to present arguments and evidence will facilitate appropriate evaluation of her eligibility for DACA. Indeed, the fact that DHS's rules already require these basic protections reinforces both that the value of such safeguards is high, and that providing such limited process would not place undue fiscal or administrative burdens on the government.

II. MS. COLOTL WILL SUFFER IRREPARABLE HARM.

Absent an injunction restoring Ms. Colotl's DACA pending an adjudication that complies with the APA and due process, Ms. Colotl will experience irreparable harm that cannot be cured by ultimate success on the merits in this case.

An injury is irreparable "if it cannot be undone through monetary remedies." *Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010) (internal quotations omitted). The revocation of Ms. Colotl's DACA has resulted in lost educational, professional, and civic engagement opportunities. The "loss of opportunity to pursue [one's] chosen profession" constitutes irreparable harm. *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) ("We have frequently recognized the severity of depriving a person of the means of livelihood."). Because she has lost her work permit, Ms. Colotl has had to leave her job as paralegal. Colotl Decl. ¶ 36. Ms. Colotl's ability to maintain DACA is integral to her ability to continue her career and support herself. *Id*. Such harm is more than enough to justify an injunction in this circuit. *See, e.g.*, *America's Health Ins. Plans v. Hudgens*, 742 F.3d 1319, 1334 (11th Cir. 2014) (holding that increased employee resources required to comply with statute constituted irreparable harm to insurance companies). Moreover, setbacks at this early moment

in Ms. Colotl's career may never be recoverable: time without DACA is "productive time irretrievably lost" that Ms. Colotl could be spending working, paying taxes, volunteering in her community, and brightening the future for herself and her family. *Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 710 (9th Cir.1988); *see also Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) ("The irreparable nature of Plaintiffs' injury is heightened by Plaintiffs' young age and fragile socioeconomic position. Setbacks early in their careers are likely to haunt Plaintiffs for the rest of their lives."). And even if Ms. Colotl could later recover her lost income, her emotional distress in the interim constitutes an irreparable injury in itself. *Chalk*, 840 F.2d at 709.

Finally, Ms. Colotl reasonably fears arrest and detention by ICE, Colotl Decl. ¶ 37, and "unnecessary deprivation of liberty clearly constitutes irreparable harm." *United States v. Bogle*, 855 F.2d 707, 710-11 (11th Cir. 1998).

III. THE REMAINING FACTORS SUPPORT PRELIMINARY RELIEF.

Preliminary relief will not harm the government. The government will not be adversely affected by temporarily restoring Ms. Colotl's DACA and readjudicating her application according to its own procedures and existing eligibility rules.

By contrast, the public interest strongly favors a temporary restraining order. Ms. Colotl's friends, clients, family, coworkers, and community rely on her. As an

immigration paralegal, Ms. Colotl regularly communicated with and supported the legal representation of her clients in critically important matters related to their right to enter or remain in the United States. Her years of experience made her a crucial resource to her colleagues, many of whom look to her for guidance and mentorship. Colotl Decl. ¶ 36. Ms. Colotl is also actively involved in her community and in the lives of her nieces and nephews, who are U.S. citizens and also live in Georgia and depend on her love and attention as a stable presence in their lives. *Id*. Separating Ms. Colotl from her profession and her family and stripping her of her freedom is not in the public interest.

More generally, the public interest is served when the government complies with its obligations under the APA and the Constitution. *See America's Health Ins. Plans*, 742 F.3d at 1334 n.19; *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006).

CONCLUSION

For the reasons given, the Court should grant Plaintiff's Emergency Motion for a Temporary Restraining Order and/or Preliminary Injunction.

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Respectfully submitted,

Jennifer Chang Newell*
Katrina L. Eiland+
ACLU FOUNDATION
IMMIGRANTS' RIGHTS
PROJECT
39 Drumm Street
San Francisco, CA 94111
Phone: (415) 343-0770
Fax: (415) 395-0950

Michael K. T. Tan*
Lee Gelernt*
ACLU FOUNDATION
IMMIGRANTS' RIGHTS
PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2660
Fax: (212) 549-2654

/s/ Charles H. Kuck
Charles H. Kuck
Georgia State Bar No. 429940
Danielle M. Claffey
Georgia State Bar No. 222292
KUCK IMMIGRATION PARTNERS LLC
365 Northridge Road, Suite 300
Atlanta, GA 30350
Phone: (404) 816-8611
Fax: (404) 816-8615

Sean J. Young*#
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF GEORGIA, INC.
P.O. Box 77208
Atlanta, GA 33057
Phone: (770) 303-8111
Fax: (770) 303-0060

Attorneys for Plaintiff

*Application for admission Pro Hac Vice forthcoming
+ Application for admission Pro Hac Vice pending
#Georgia bar application pending