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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALBERTO LUCIANO GONZALEZ TORRES, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants.	Case No. 3:17-CV-01840-JM-(NLS) **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [DKT. 39].**

TABLE OF CONTENTS

TABLE OF AUTHORTIES

CASES

STATUTES

REGULATIONS

I. Introduction

Plaintiff's Second Amended Complaint challenges U.S. Citizenship and Immigration Services' ("USCIS") discretionary termination of his DACA and employment authorization after notice and an opportunity respond. Plaintiff now seeks an injunction setting aside Defendants' termination of Plaintiff's DACA, and subsequent denial of his DACA renewal request. Dkt. No. 39-1 at 30.

The Court must deny Plaintiff's motion because the Court should not allow Plaintiff to overturn, even temporarily, a decision clearly based in Defendants' discretion, exercised in a manner that is fully compliant with Defendants' established procedures. Nor should the Court recognize constitutional rights where none exist. This Court lacks jurisdiction over Plaintiff's claims because: the Immigration and Nationality Act ("INA") precludes review over Defendants' decision and actions regarding the adjudication of Plaintiff's removal proceedings – including the termination of DACA – and any claims the INA preserves for review must be channeled through Plaintiff's removal proceedings; Defendants' exercise of prosecutorial discretion is not appropriate for judicial review; and the Plaintiff cannot establish a constitutional interest sufficient to proceed on his Due Process claims. Even were the Court to find jurisdiction, Plaintiff cannot demonstrate a likelihood of success on the merits because the process Defendant received and the ultimate decision terminating his DACA were fully compliant with the U.S. Constitution and administrative process. A decision granting Plaintiff the relief he seeks would be tantamount to a finding that Defendants lack the discretion to terminate Plaintiff's DACA – a proposition that is both unsupported by the corresponding agency guidance, and is also contrary to Ninth Circuit and Supreme Court precedent.

II. Background

Here, as a result of the Court's September 29, 2017 Order, USCIS reinstated Plaintiff's DACA, accepted his DACA renewal request, issued Plaintiff a Notice of Intent to Terminate (NOIT) his reinstated DACA, Dkt. Nos. 14-1 & 14-2; Dkt. No. 39-6 at 191-

192, and have now issued a Termination Decision ("Decision") that will terminate Plaintiff's DACA as of December 21, 2017, upon further order of this Court. *See* Dkt. No. 39-6 at 194-197. That Decision specifically referenced the DACA SOP, Dkt. No. 39-6 at 195 ("If after consulting with ICE, USCIS determines that exercising prosecutorial discretion after removal has been deferred under DACA is not consistent with the Department of Homeland Security's enforcement priorities . . . ."), quoting Dkt. No. 2-9 at 15, and goes on to consider Plaintiff's arguments in response to USCIS's NOIT before concluding, the agency's discretion, that termination of DACA is warranted.

ARGUMENT

I. Standards of Review

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

A plaintiff seeking a preliminary injunction "must establish" that: (1) it is likely to succeed on the merits of its claims; (2) it is likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 20 (2008). Preliminary injunctive relief is an extraordinary remedy never awarded as of right, *id*. at 20, and the party seeking such relief bears the burden of establishing the prerequisites to this extraordinary remedy. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). Alternatively, a party must show "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff," as well as a likelihood of irreparable harm, and that the injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011). Showing "serious questions going to the merits"

requires a plaintiff to demonstrate a "substantial case for relief on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011).

III. Plaintiff Cannot Sustain the Requirements for Injunctive Relief.

A. Plaintiff is not Likely to Succeed on the Merits.

Whether viewed as a preliminary or permanent injunction, the Court cannot grant Plaintiff relief because he cannot succeed on the merits. This Court lacks jurisdiction to review Defendant's discretionary determination to terminate Plaintiff's DACA. Additionally, nothing in the Administrative Procedure Act ("APA") or constitutional jurisprudence establishes a right to review or constrain DHS's exercise of discretion or to grant Plaintiff procedural rights other than those available to him through his removal proceedings.

1. This Court Lacks Jurisdiction, and any Judicial Challenges to Removal Must be Brought in a Petition for Review.

The APA permits persons aggrieved by final agency action to obtain judicial review in federal court where "there is no other adequate remedy in a court." *See* 5 U.S.C. §§ 702, 704. A reviewing court shall set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). However, the APA precludes judicial review of agency decisions when "statutes preclude judicial review," or when the decision is "committed to agency discretion by law." 5 U.S.C. § 701(a)(1), (a)(2); *see Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (explaining that "even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.").

Congress enacted section 1252(g) to specifically preclude judicial review of the discretionary decision to initiate removal proceedings, and the actions and decisions arising out of such decisions. *See Reno v. Am.-Arab Anti-Discrimination Comm.* ("*AADC*"), 525 U.S. 471, 483-85 (1999) (finding section 1252(g) also precludes review of the discretionary decision to *not* initiate removal proceedings). Furthermore, in *Heckler*, the Supreme Court held that "an

agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)." 470 U.S. 821, 832.

Here, the INA specifically precludes review of the actions that Plaintiff challenges. Moreover, the challenged action, an individual DACA decision, falls squarely within that category of actions for which there is no law to apply like: decision implicating prosecutorial discretion. *See Heckler*, 470 F.3d at 830; *see also Morales de Soto v. Lynch*, 824 F.3d 822, 828 (9th Cir. 2016) (noting that "the exercise of prosecutorial discretion is a type of government action uniquely shielded from and unsuited to judicial intervention"); *accord Arpaio v. Obama*, 797 F.3d 11, 16 (D.C. Cir. 2015) (explaining that "[i]n making immigration enforcement decisions, the executive considers a variety of factors"), *cert. denied*, 136 S. Ct. 900, (2016), *reh'g denied*, 136 S. Ct. 1250 (2016). Contrary to Plaintiff's arguments, Defendants' guidance does not curtail the well-recognized discretion with regard to deferred action decisions.

Additionally, the Court lacks jurisdiction over Plaintiff's constitutional claims because Plaintiff necessarily lacks a protected constitutional interest in the DACA termination process, because the ultimate relief he seeks – deferred action – is discretionary. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005).

a. The INA Limits Review of Plaintiff's Claims which Arise from DHS's Decision to Commence and Adjudicate Plaintiff's Removal Proceedings.

Through the INA, as amended by the REAL ID Act of 2005 and codified at 8 U.S.C. § 1252(g), Congress explicitly eliminated judicial review over "any cause or claim by or on behalf of any alien . . . arising from the decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. § 1252(g). Section 1252(g) was "directed against a particular evil: attempts to impose judicial constraints upon prosecutorial discretion." *AADC*, 525 U.S. at 485 n.9; *cf. Silva v. United States*, 866 F.3d 938, 940 (8th Cir. 2017) (rejecting contention that section 1252(g) applies only to discretionary decisions of the Secretary).

The fact that Plaintiff frames his claim as a challenge to a DACA determination rather than expressly requesting the enjoining of adjudication of his removal proceedings is irrelevant because section 1252(g) precludes judicial review of "any" claim "arising" from "the decision or action" to adjudicate cases (not just express challenges to the adjudication itself). *See, e.g., Alcaraz v. INS*, 384 F.3d 1150, 1160-61 (9th Cir. 2004) (finding review of the reopening of removal proceedings, but not the administrative closure of proceedings, was barred from review as an action related to the decision to commence removal); *Botezatu v. INS*, 195 F.3d 311, 314 (7th Cir. 1999) (citing *AADC*, 525 U.S. at 944 (discussing the scope of section 1252(g) as including "various decisions . . . leading up to order consequent upon final orders of deportation.")).

Additionally, the Court should reject, as contrary to section 1252(g), Plaintiff's contention that he is challenging the Government's decision-making process rather than the final decision itself. Dkt. No. 39-1 at 17. Section 1252(g) is not limited to claims arising from the adjudication of cases or that his claims nor is it limited to only discretionary actions. *Cf. Silva*, 866 F.3d at 940. Defendants disagree with the Court's prior citation to *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004), for the proposition that judicial review is preserved for purely legal conclusions. Dkt. No. 12 at 8. There, the Ninth Circuit held that section 1252(g) did not apply because "the gravamen of [the alien's] claim does not arise from the Attorney General's decision or action to commence proceedings, adjudicate cases, or execute removal orders." *Hovsepian*, 359 F.3d at 1155 (9th Cir. 2004).[1] Additionally, *Colotl v. Kelly*, 261 F. Supp. 3d 1328 (N.D. Ga. June 12, 2017), is of no assistance here. There, the court noted that section 1252(g)

[1] *Hovsepian* considered a purely legal question preceding a discretionary decision. Here, however, the DACA SOP identifies threshold criteria for DACA consideration, but it does not mandate granting DACA if those threshold criteria are met. *See* DACA SOP Chapter 8 at 45 (April 2013 version) ("Individuals may be considered for DACA upon showing that they meet the prescribed guidelines . . ."), available at https://cliniclegal.org/sites/default/files/attachments/daca_sop_4-4-13.pdf (last visited Feb. 5, 2018).

eliminates "jurisdiction to review the government's ultimate discretionary determination as to Plaintiff's DACA [ ]." *Colotl*, 261 F. Supp. 3d at 1339 (citations omitted).

Moreover, Plaintiff's claim that constitutional claims are preserved notwithstanding section 1252(g) similarly fails. *See* Dkt. No. 39-1 at 17. On this point, the Court's prior reliance on *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001 (9th Cir. 2003), is also misplaced. *See* Dkt. No. 12 at 8. There, the Ninth Circuit did not even consider section 1252(g) and analyzed only the jurisdiction limitation statute at section 1252(a)(2)(B)(i) holding that "[w]hether the BIA's interpretation of the hardship standard violates due process is not a "judgment regarding the granting of" cancellation of removal relief." *Ramirez-Perez*, 336 F.3d at 1005. In contrast, the Ninth Circuit has held that "a petitioner may not create the jurisdiction that Congress chose to remove simply by cloaking [a claim] in constitutional garb." *See Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001). And, even for a court to find that section 1252(g) does not preclude review of constitutional claims, those claims must "not arise from 'a decision or Action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien,' but instead constitute 'general collateral challenges to unconstitutional practices and policies used by the agency.'" *Walter v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998) (quoting *McNary v. Haitian Refugee Cir., Inc.*, 498 U.S. 479 (1991)). Rather, claims that fall within the limitations of section 1252(g) are not subject to review, even if cast as constitutional claims. *See Sissoko v. Rocha*, 509 F.3d 947, 951 (9th Cir. 2007) (finding no jurisdiction over constitutional tort claim because the plaintiff's detention arose from the decision to commence removal proceedings).[2]

[2] In *Sissoko*, the Ninth Circuit distinguished between these types of claims and those raised in an earlier Ninth Circuit case discussing 8 U.S.C. § 1252(g), *Wong v. United States*, 373 F.3d 952 (9th Cir. 2004). In *Wong*, plaintiff's counsel expressly disclaimed any challenge to the execution of removal and explained that her claims only implicated "actions other than that removal, or the commencement of proceedings . . .," 373 F.3d at 964, for which the court held that the claims at issue in *Wong* did not implicate the agency's prosecutorial discretion and did not pose a threat of "obstruction of the institution of removal proceedings or the execution of removal orders . . . ." *Id.* at 970. *Wong* is distinguishable where Plaintiff is in removal proceedings and DACA termination could have a direct result in his removal from the United States.

Courts have held that section 1252(g) applies to bar jurisdiction over DACA determinations. *See Garcia-Herrera v. Asher*, 585 F. App'x 439, 440 (9th Cir. 2014) (holding under section 1252(g) that petitioner's challenge to ICE's decision not to delay his removal proceeding pending the adjudication of his DACA request constituted a challenge to ICE's decision to execute a removal order); *Vasquez v. Aviles*, 639 F. App'x 898, 901 (3d Cir. 2016) (finding no jurisdiction to review a denial of a DACA request because "that decision involves the exercise of prosecutorial discretion not to grant a deferred action."); *see also Vilchiz-Soto v. Holder*, 688 F.3d 642, 644 (9th Cir. 2012) ("[W]e lack jurisdiction to review petitioners' contention that the agency abused its discretion in denying the motion to reopen to seek prosecutorial discretion based on the recent order of President Obama."); *Rodriguez v. Sessions*, No. 15-72487, 2017 WL 695192, at *1 (9th Cir. Feb. 22, 2017); *Fabian-Lopez v. Holder*, No. 11-71513, 540 F. App'x 760, 761 n.2 (9th Cir. Apr. 29, 2013); *cf. Sanchez v. Holder*, No. 15CV0089-GPC WVG, 2015 WL 4249446 (S.D. Cal. July 13, 2015) (district court lacked jurisdiction to stay removal and make determination on deferred action eligibility).

This recent authority is consistent with earlier case law interpreting the 1981 Operating Instructions, a previous policy that provided guidelines for the exercise of deferred action. That authority concluded that district courts lack jurisdiction to review the district director's decision not to recommend deferred action. *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985). Plaintiff ignores that holding and instead relies on *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979) for the purported reviewability of an internal deferred action policy with "'express criteria' and 'periodic review of non-priority status' [that] 'clearly and directly affects substantive rights,' including 'the ability of an individual subject to its provisions to continue residence in the United States.'" Dkt. No. 39-1, citing *Nicholas*, 590 F.2d at 807-08.[3] There, the Ninth Circuit held that the five

[3] Notably, even in *Nicholas*, the Court ultimately denied the appeal on Nicholas' claim to eligibility for non-priority status as defined in the INS's 1978 Operating Instructions because he could not meet his

express humanitarian factors in the 1978 Operating Instructions,[4] the effect of a grant of such non-priority status to provide an indefinite delay in deportation, and the directive nature of the language ("'In Every case'" where relief is appropriate, the District Director 'Shall recommend' deferred action category"), made it "obvious that this procedure exists out of consideration for the convenience of the petitioner, and not that of the INS." *Id*. at 806-07. While the Ninth Circuit considered periodic review an important factor, it conditioned its analysis in consideration that "the Instruction plainly contemplates a scheme where the status would preclude any deportation as long as the relevant humanitarian factors are still compelling, rather than being subject to termination at the convenience of the INS." *Id*. at 807.

In contrast to *Nicholas*, Romeiro de Silva's request for deferred action was denied after "[t]he INS district director considered each of these factors." *Romeiro de Silva*, 773 F.2d at 1023. The Ninth Circuit, however, acknowledged the weight of authority finding that deferred action determinations under the 1978 operating instructions unreviewable, and held that under the 1981 Operating Instructions "the district court lacked jurisdiction to review the district director's decision not to recommend deferred action status for Romeiro de Silva," because "it is no longer possible to conclude that [the instruction] is intended to confer any benefit upon aliens, rather than [to operate] merely for the INS's own convenience." *Id*. at 1024-25.

The Supreme Court's decision in *AADC* held that section 1252(g) applied to bar these same types deferred action determinations. *AADC*, 525 U.S. at 483-87 ("At each

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burden to show that the Government's decision "deviated from an established pattern without reason" notwithstanding the presence of humanitarian factors. 590 F.2d at 808. Nicholas's request was verbally denied, apparently without further explanation or process. *Id*. at 804.

[4] "When determining whether a case should be recommended for deferred action category, consideration should include the following: (1) advanced or tender age; (2) many years' presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States effect of expulsion; (5) criminal, immoral, or subversive activities or affiliations recent conduct." *Nicholas*, 590 F.2d at 806-807, citing 1978 INS Operating Instruction at 103.1(a)(1)(ii).

stage the Executive has discretion to abandon the endeavor, and at the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as "deferred action") of exercising that discretion for humanitarian reasons or simply for its own convenience."). There, the Government ended prior grants of deferred action by charging, and then pursuing deportation for only routine status violations against six of the eight plaintiffs. *Id*. at 474. Importantly, the Court held that aliens unlawfully in the United States and subject to deferred action had "no constitutional right to assert selective enforcement as a defense against his deportation," under the First or Fifth Amendments to the U.S. Constitution. *Id*. at 489.

Here, the similarities to both the policies and procedures addressed by the Ninth Circuit and Supreme Court are too strong for the Court to reason around Congress's clear intent. Plaintiff's claims are barred by section 1252(g) because he is asserting claims arising from the commencement of and adjudication of his removal proceedings. Because Plaintiff claims that it was improper for DHS to terminate his DACA because "ICE's litigation of removal proceedings for unlawful presence against a DACA recipient was not a valid basis for USCIS to terminate DACA under the SOP," and "removal from the country in the absence of any culpability would visit such grievous harm," Dkt. No. 38 at ¶¶ 136; 14, he is necessarily challenging the "commencement" and "adjudicat[ion]" of his ongoing removal proceedings. *See* 8 U.S.C. § 1252(g). Indeed, because the denial of DACA is a step "leading up to" a final order of removal, it is squarely within the scope of section 1252(g). *Id*. Plaintiff's effort to shroud his claims in procedural terms is further undone by his challenge to ICE's identification of Plaintiff as a removal priority and decision to pursue his removal because "[o]nly individuals who do not qualify for DACA status may be considered enforcement priorities [based on the Kelly Memo]." Dkt. No. 38 ¶ 169. Finally, were the Court to find that a final removal against Plaintiff could not be executed based in some way on his claimed entitlement to DACA, then the issues raised here are certainly those for which this Court lacks jurisdiction.

Regardless of how Plaintiff frames the issue, section 1252(g) precludes judicial review of the Government's exercise of its prosecutorial discretion. Accordingly, the decisions of DHS to issue an NTA and place Plaintiff in removal proceedings, and thereby terminate DACA, and subsequent decision to terminate Plaintiff's DACA following advance notice and an opportunity to respond are not subject to judicial review, and the Court should reject Plaintiff's motion for preliminary relief. To hold otherwise would render section 1252(g) a dead letter because any individual could seek to enjoin or otherwise challenge the commencement of removal proceedings through this type of creative pleading.

To the extent that Plaintiff has any viable claims, the REAL ID Act, codified at 8 U.S.C. §§ 1252(a)(5) and 1252(b)(9), bars him from raising those claims in district court, even before a final order of removal issues. Section 1252(a)(5), entitled "[e]xclusive means of review," requires that "a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal . . . ." 8 U.S.C. § 1252(a)(5). Section 1252(b)(9) provides "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, *arising from any action taken or proceeding brought to remove an alien from the United States* under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9) (emphasis added); *see, e.g.*, *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1038 (9th Cir. 2016) (district court lacked jurisdiction over challenge to adequacy of removal procedures, and instead court of appeals has authority to resolve questions of constitutional rights on review of a final removal order).

Section 1252(b)(9) is "a clear statutory prescription against district court review" of challenges arising from removal proceedings for plaintiffs who had not yet received final orders of removal. *J.E.F.M.*, 837 F.3d at 1035-38. While the Court acknowledged that "an unrepresented minor in immigration proceedings poses an extremely difficult situation," it also found "these considerations cannot overcome a clear statutory

prescription against district court review. Relief is through review in the court of appeals or executive or congressional action." *Id*. at 1036-38.[5]

Here, Plaintiff challenges the Secretary's discretion to terminate DACA following the decision to issue Plaintiff an NTA. *See* Dkt. No. 39-1 at 1-2; Dkt. 38 ¶¶ 136; 14. Thus, Plaintiff's challenge necessarily arises from "action taken or proceedings brought to remove an alien," for which district courts lack jurisdiction. Accordingly, this Court should find that Plaintiff cannot show either a likelihood of success or that the law and facts clearly favor his position. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015).

b. Judicial Review of DACA Termination Based on NTA Issuance is also Barred under 5 U.S.C. § 701(a)(2).

There is no judicial review under the APA of decisions that "courts traditionally have regarded as 'committed to agency discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (quoting 5 U.S.C. § 701(a)(2)). These decisions are typically unreviewable because there exists "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). This bar applies even when "the agency gives a 'reviewable' reason for otherwise unreviewable action." *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) ("*BLE*"). The decisions committed to executive discretion include "an agency's exercise of enforcement power," including resource allocation and overall priorities. *Chaney*, 470 U.S. at 831. As there is "no meaningful standard against which to judge the agency's exercise of discretion" in weighing these factors, an agency's exercise of enforcement powers is "presumed immune from judicial review under § 701(a)(2)." *Id*. at 830, 832.

[5] The Court's previous reliance on *Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007), is misplaced. Dkt. No. 31 at 7. *Singh* challenged ineffective assistance of counsel through habeas, and the court held that section 1252(b)(9) did not apply because the challenge was not tied to removal proceedings. *Singh*, 499 F.3d at 978-79. To interpret *Singh* as permitting district court challenges such as those raised here runs counter to Congressional intent, and would effectively excise the words "any action taken" from the statute. *See Aguilar*, 510 F.3d at 10; *cf. Martinez v. Napolitano*, 704 F.3d 620, 623 (9th Cir. 2012) (an APA claim "challeng[ing] the procedure and substance of an agency determination that is 'inextricably linked' to the order of removal" must be channeled through the petition for review process).

Just as "the decision whether or not to prosecute" presumptively "rests entirely in [the prosecutor's] discretion," *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citation omitted), an agency's decision to bring a civil enforcement action is generally not open to judicial scrutiny. Considerations such as the *Chaney* factors are equally present in enforcement decisions as in nonenforcement decisions. *See Chaney*, 470 U.S. at 831; *see also Wayte v. United States*, 470 U.S. 598, 607-8 (1985) ("[T]he decision to prosecute is particularly ill-suited to judicial review").

One form of that broad discretion is deferred action, a "discretionary and reversible" decision to notify an alien that DHS has chosen not to seek his removal for a specific period of time. *Arpaio v. Obama*, 797 F.3d 11, 17 (D.C. Cir. 2015). Like other agency nonenforcement decisions, grants of deferred action rest on a complex balancing of policy considerations that cannot serve as "meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 831. The converse is equally true: denials of deferred action are also committed to agency discretion. *See AADC*, 525 U.S. at 485 (treating "'no deferred action' decisions" as "discretionary determinations"). Because "[g]ranting an illegally present alien permission to remain and work in this country" is fundamentally "a dispensation of mercy," there are "no standards by which judges may patrol its exercise." *Perales v. Casillas*, 903 F.2d 1043, 1051 (5th Cir. 1990) (INS's decision not to grant pre-hearing voluntary departures and work authorizations to a group of aliens was non-justiciable). Thus, individual DACA terminations fall squarely within that category of agency discretion for which judicial review is improper. *See Chaney*, 470 F.3d at 830; *see also Morales*, 824 F.3d at 822 (explaining that the exercise of prosecutorial discretion is different from other types of agency action).

Here, Plaintiff is challenging DHS's exercise of its enforcement power, including specifically the factors it relied on, and argues that instead of seeking to remove him from this country, DHS should decide to continue to defer action with respect to him. See, e.g., Dkt. No. 39-1 at 20 ("Defendants have applied the non-DACA definition of 'enforcement

priority' to a DACA recipient;") *Id*. at 26 ("DACA termination threatens to completely deprive him, *inter alia*, of his basic ability to remain in the only country he has ever called home."). This is a classic challenge to DHS's exercise of its prosecutorial discretion. *See Chaney*, 470 U.S. at 831. There is no meaningful standard to judge whether DHS should continue to defer action as to Plaintiff and, instead, prioritize the removal of other aliens. *See id*.[6] Indeed, Plaintiff's tortured reading of the DACA SOP along with the Kelly Memo would render meaningless the specific termination ground that continuation of deferred action is not consistent with DHS's enforcement priorities. *See* Dkt. No. 39-1 at 19-22. Rather, this type of enforcement decision involves a balancing of factors, including factors as to how to allocate agency resources, that is committed to agency discretion by law. *See id*., *Armstrong*, 517 U.S. at 464. The question for DHS was not whether it *could* continue to exercise its discretion in favor of the Plaintiff, but rather whether it *should* have under the circumstances of this case. Because this type of discretionary determination is committed to DHS by law, this Court lacks jurisdiction to review Plaintiff's claims.

c. Plaintiff Cannot State a Constitutional Claim because the Termination of DACA and Employment Authorizations does not Implicate a Constitutional Interest.

Plaintiffs cannot have a protected constitutional interest in DACA because it purely discretionary. *See, e.g.*, *Velasco-Gutierrez v. Crossland*, 732 F.2d 792, 798 (10th Cir. 1984) (holding that deferred action guidance "places no effective limitations on official discretion, and thus creates no protected liberty interest in deferred action"); *cf. Arpaio*, 797 F.3d at 17 (quoting DACA Memo for the proposition that "deferred action remains

[6] It is irrelevant for this Court's jurisdiction that DHS has guidance regarding grants of deferred action under DACA. The existence of criteria that an agency is to consider is not enough to provide a meaningful standard of review, *see Pasquini v. Morris*, 700 F.2d 658, 659 (11th Cir. 1983), and, moreover, the exercise of prosecutorial discretion is not amenable to judicial review even when an agency has established procedures. *See Carranza, v. I.N.S.*, 277 F.3d 65, 72-3 (1st Cir. 2002); *United States v. Lee*, 274 F.3d 485, 492 (8th Cir. 2001) (reversing a finding that a criminal defendant can force the Department of Justice to comply with its death penalty protocol); *Wayte*, 470 U.S. at 607-8.

discretionary and reversible, and 'confers no substantive right, immigration status or pathway to citizenship.'")

The Supreme Court has held that, for due process purposes, a benefit "is not a protected entitlement" where "government officials may grant or deny it in their discretion." *Castle Rock*, 545 U.S. at 756. For Due Process purposes, statutes or regulations limit discretion only when they contain "'explicitly mandatory language'"—*i.e.*, "specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Ky. Dep't of Corrs. v. Thompson*, 490 U.S. 454, 462–63 (1989) (citation omitted). Nor does the provision of certain procedures by an agency itself give rise to a federal constitutional dimension. *See, e.g., Olim v. Wakinekona*, 461 U.S. 238, 250-51 (1983) ("[a] liberty interest . . . cannot be the right to demand needless formality. Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.").

Neither the constitution nor Congress provides an individual in unlawful status a protected interest in family reunification, living or working in the United States, or in discretionary relief from removal. *See De Mercado v. Mukasey*, 566 F.3d 810, 816 (9th Cir. 2009). *Garcia v. Holder*, No., 07-60271, 320 F. App'x 288, 290 (9th Cir. April 9, 2009); *Pilapil v. INS*, 424 F.2d 6, 11 (10th Cir. 1970), *cert denied*, 400 U.S. 908 (1970).[7] Nor can Plaintiff claim an entitlement in this case that creates a Constitutional interest. "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." *Blantz v. Cal. Dep't of Corr. & Rehab.*, 727 F.3d 917, 922 (9th Cir. 2013) (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)); *see also Mendez-Garcia v. Lynch*, 840 F.3d 655, 665

[7] While Plaintiff cites *Morrissey v. Brewer*, 408 U.S. 471 (1972), to discuss "other enduring attachments of life," the extensions that Plaintiff argues for here conflict with the cited rulings.

(9th Cir. 2016) (underscoring that aliens cannot claim a cognizable due process interest in discretionary immigration relief or benefits). Even a practice of "generously" granting a "wholly and expressly discretionary state privilege" does not create a legal entitlement to that benefit. *See Regents of Univ. of Cal. v. United States Dep't of Homeland Sec.* ("*Regents*"), No. C 17-05211 WHA, 2018 WL 339144, at *4 (N.D. Cal. Jan. 9, 2018) (citing G*erhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1020-21 (9th Cir. 2011)) ("A person's belief of entitlement to a government benefit, no matter how sincerely or reasonably held, does not create a property right if that belief is not mutually held by the government.").[8]

The DACA policy and related guidance create no such mutually held expectation regarding the terms for termination, *id.*, nor do they contain no "explicitly mandatory language," *Thompson*, 490 U.S. at 462–63. The policy is codified in no statute or regulation.[9] Its source—the DACA Memo—describes it as a "policy" for the "exercise of prosecutorial discretion." Dkt. No. 39-4 at 3; *see Omar v. McHugh*, 646 F.3d 13, 22 (D.C. Cir. 2011) (the "use of the word 'policy'"—"rather than a word such as 'right'—reinforces the conclusion that Congress did not intend to create an 'entitlement'"). And the agency's public guidance makes clear that, under DACA, deferred action "may be terminated at any time, with or without a Notice of Intent to Terminate, at DHS's

[8] Plaintiff's reliance on cases that discuss violations of non-discretionary procedures in agency regulations are inapposite where deferred action and related employment authorization are discretionary concepts not tied to statute or regulation. *See* Dkt. No. 39-1 at 24-25 (citing *United States v. Raya-Vaca*, 771 F.3d 1195, 1203 & n.6 (9th Cir. 2014) (liberty interest arising from risk of removal on an expedited removal order, not the loss of something conferred by a discretionary policy)); *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 957 (9th Cir. 2012) ("An extraditee thus possesses a narrow liberty interest: that the Secretary comply with her statutory and regulatory obligations [to consider an extraditees' torture claim]."); *Singh v. Bardini*, No. 09-cv-3382, 2010 WL 308807, at *7 (N.D. Cal. Jan. 19, 2010) (addressing questions of regulatory procedures for asylum termination outside of removal proceedings).

[9] The only regulation that references deferred action, 8 C.F.R. § 274a.12(c)(14), long predates the DACA policy, and only allows aliens with deferred action to apply for employment authorization if they can demonstrate an economic need for employment.

discretion." Dkt. No. 39-4 at 5; *see also Arpaio*, 797 F.3d at 17 (noting that the grant of deferred action is discretionary).

Because DACA is discretionary and "may be terminated at any time, with or without" notice, Plaintiff necessarily cannot have a legitimate claim of entitlement to the favorable exercise of discretion regarding DACA. Even assuming *arguendo* that deferred action is viewed as a benefit, Plaintiff lacks any protected constitutional interest in deferred action. *See Castle Rock*, 545 U.S. at 756; *Velasco-Gutierrez*, 732 F.2d at 798.

2. Plaintiff is Not Likely to Succeed on His Claims under the APA or Constitution.

a. USCIS's DACA Termination Fully Complied with its SOP and Other Policies.

Plaintiff can state no claim under the APA because USCIS's Decision fully complied with its SOP and other policies, and the APA in general. First, USCIS's Decision specifically quotes the SOP provision on which it is based. Dkt. No. 39-6 at 195. Second, USCIS's Decision demonstrates adherence to all the procedural steps in the cited SOP guidelines: consultation with ICE; consideration of whether continuing DACA is inconsistent with DHS's enforcement priorities; and USCIS's consideration of Plaintiff's response and the agency's voluntary consideration of his supplemental response to that NOIT. *Id*. Following that review, USCIS found "that continuing to exercise prosecutorial discretion to defer removal action against you is not consistent with DHS's enforcement priorities. Therefore USCIS does not find that you merit a favorable exercise of prosecutorial discretion and will not continue to defer DHS removal action against you under DACA." *Id*. at 3.

Plaintiff, without citation, attempts to reconstruct the DACA SOP to argue that: "[i]f a DACA recipient meets the DACA Memo's objectively verifiable criteria, he or she remains, by definition, a 'low priority case.' In other words, that individual is not an enforcement priority." Dkt. No. 39-1 at 19. Plaintiff goes on to paraphrase the various grounds for DACA termination discussed in the SOP, but omits the ground applied to

him: "Enforcement Priority." *Id*. at 19; *see also* Dkt. No. 39-4 at 79-81. Notably, this DACA termination provision was in the August 2013 version of the SOP, well before the Kelly Memo issued in January 2017. Accordingly, Plaintiff cannot support his claim that "Defendants purport to label Mr. Gonzalez an enforcement priority on grounds applicable only to non-DACA recipients. . . . This is a failure to follow unambiguous internal rules." Dkt. No. 39-1 at 20. While Defendants maintain that the operative DACA SOP allows for a fluid definition of enforcement priorities and that nothing precludes Defendants from determining an individual is an enforcement priority on a case-by-case basis, the Court need not even consider those arguments to find that Plaintiff cannot succeed here because Plaintiff's alleged role in an alien smuggling enterprise is clearly identified as an enforcement priority in USCIS's 2011 NTA guidance. *See* Dkt. No. 39-4 at 62.

Plaintiff next argues that "ICE's issuance of an NTA against him for nothing more than unlawful presence" is not "'a reasoned basis for terminating DACA.'" Dkt. No. 39-1 at 20 (citing *Inland Empire—Immigrant Youth Collective v. Duke*, No. EDCV 17–2048, 2017 WL 5900061, at *6-7 (C.D. Cal. Nov. 20, 2017) ("*IEIYC*")). While Defendants disagree with the court's grant of a preliminary injunction in *IEIYC*, it followed the automatic termination of DACA based on NTA issuance alone, which is no longer the case here. Moreover, Defendants' Termination makes clear that it is based on more than "ICE's issuance of an NTA against him for nothing more than unlawful presence." Dkt. No. 39-1 at 20. Rather, USCIS stated:

> USCIS does not rely solely on the ground listed in the charging document as it may not reflect all derogatory information and/or the assessment of whether or not you are considered an enforcement priority.

Dkt. No. 39-6 at 196. Accordingly, Plaintiff has not and cannot demonstrate that Defendants have ignored their own DACA termination policy.[10]

[10] Plaintiff also appears to argue that the DACA SOP requires a criminal conviction to support DACA termination, whereas the Kelly Memo prioritizes charged or suspected criminal conduct. Dkt. No. 39-1 at 20, citing Dkt. No. 39-6 at 208. However, even the provision that Plaintiff cites only supports a

b. USCIS's DACA Termination was Neither Arbitrary Nor Capricious.

Plaintiff also challenges USCIS's Decision as arbitrary and capricious because USCIS's discretion is not based on "reasoned decision-making," and that USCIS has improperly departed "from a prior policy *sub silentio* or simply disregard[ed] rules that are still on the books." Dkt. No. 39-1 (citations omitted). Additionally, Plaintiff accuses USCIS's termination of amounting "to nothing less than assertion of the same unfettered discretion this Court already "categorically reject[ed]." *Id*., citing Dkt. No. 12 at 10.

As an initial matter, Plaintiff misrepresents this Court's prior order. The position that the Court "categorically rejected" was what the Court characterized as Defendants' argument that "DHS possesses such broad prosecutorial discretion they need not follow the DACA SOP in terminating the status of DACA recipients." *Id*. The Court's prior conclusion then has no application to Defendants exercise of the discretion provided by the SOP – to terminate DACA where a recipient is deemed to be an enforcement priority.

Indeed, Plaintiff's arguments make it clear that he is not challenging the process by which USCIS terminated his DACA, but he is instead challenging how USCIS exercised its discretion – an action for which this Court lacks jurisdiction. Plaintiff's arbitrary and capricious analysis suffers from the same flaw as his argument about Defendants' compliance with the SOP – he concludes that USCIS failed "to comply with the DACA Memo and the termination provision of the DACA SOP," Dkt. No. 39-1 at 22, but offers

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requirement that USCIS adjudicators investigate beyond a RAP sheet to ascertain whether a DACA requestor has actually been convicted of a crime. *Id*. Notably the same SOP provision that Plaintiff cites indicates that certain criminal conduct may render an individual "not eligible for consideration of DACA," but states that "the requestor's entire offense history can be considered along with other facts to determine whether, under the totality of the circumstances, he/she warrants an exercise of prosecutorial discretion." *Id*. at 204. Ultimately, the DACA SOP is silent as to the factors USCIS is to use in DACA termination decisions based where an individual is determined to be an enforcement priority, and the DACA SOP and related guidance support that DACA may be terminated on a discretionary case-by-case basis even where a DACA recipient otherwise meets the guidelines. Dkt. No. 39-4 at 81; *id*. at 11 ("DACA is an exercise of prosecutorial discretion and deferred action may be terminated at any time, with or without a Notice of Intent to Terminate, at DHS's discretion.").

no cogent explanation why USCIS's Termination fails in this regard. Indeed, Plaintiff again states, without citation, that "[b]ecause Defendants have acknowledged that Mr. Gonzalez has never been convicted of a crime and does not pose a threat to public safety, their decision to rescind his DACA because he is somehow an 'enforcement priority' has not basis is reasoned decision-making." *Id*. However, where Plaintiff has not and cannot demonstrate that Defendants' discretion to determine that he is an enforcement priority is constrained by his lack of conviction of public safety concern, his argument fails.

Plaintiff also attempts to add requirements to Defendants' discretionary exercise by analogy to other cases. However, none of these cases change the nature of USCIS's discretion regarding DACA termination on enforcement priority grounds. *See* Dkt. No. 39-1 at 22-23. In *Movsisian v. Ashcroft*, 395 F.3d 1095 (9th Cir. 2005), the Ninth Circuit held that the Board of Immigration Appeals ("BIA") abused its discretion when it denied a motion to reopen without articulating *any* reasons. 395 F.3d at 1098. In *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 966 F.2d 1292 (9th Cir. 1992), the Ninth Circuit was not reviewing an exercise of discretion, but instead found arbitrary and capricious an agency rulemaking that relied on an "unsubstantiated assumption." *Id*. at 1305. Nor was the Ninth Circuit reviewing a discretionary action in *United States v. One 1985 Mercedes*, 917 F.2d 415 (9th Cir. 1990), where it cited the unremarkable proposition that "agency policy must be implemented and rules enforced consistently and predictably." *Id*. at 423. Rather, key to the Ninth Circuit's holding in *One 1985 Mercedes* was that the claimant there "must establish that the policy in question had the force and effect of law, i.e., that the policy '(1) prescribe[d] substantive rules—*not* interpretive rules, general statements of policy or rules of agency organization, procedure or practice—and, (2) conform[ed] to certain procedural requirements.'" *Id*. (citing *Rank v. Nimmo,* 677 F.2d 692, 698 (9th Cir. 1982), *cert. denied*, 459 U.S. 907 (1982)) (emphasis in original). That *Bertelsen v. Hartford Life Insurance Co.*, 1 F. Supp. 3d 1060 (E.D. Cal. 2014), found that an administrative decision denying disability benefits was arbitrary and

capricious because it was based on incomplete information following previous careful examinations is of no help to Plaintiff here because the standards demanding such explanation in the decision were based on statute and regulation and case law interpreting those requirements. *Id*. at 1071. And finally, Plaintiff's reliance on *In re Guerreo-Morales*, 512 F. Supp. 1328 (D. Minn. 1981), is misplaced where subsequent controlling authority analyzes guidance more like the DACA policy to find no jurisdiction over deferred action decisions. *See, e.g.*, *Raffington v. Cangemi*, No. CIV. 04-3846, 2004 WL 2420642, at *5 (D. Minn. Oct. 6, 2004) (recognizing that revised Operating Instructions superseded *In re Guerreo-Morales*), *aff'd.* 399 F.3d 900 (8th Cir. 2005). In contrast to this authority, here, USCIS articulated its reasons for termination in a manner consistent with the DACA SOP. Here, while Plaintiff may disagree with USCIS's assessment of the facts, USCIS's Decision is not based on an unsubstantiated assumption. Here, not only is the policy that Plaintiff challenges not a substantive rule that has conformed to no procedural requirement, but Plaintiff fails to even allege that Defendant has applied its enforcement priority DACA termination provision inconsistently or unpredictably. Thus, Plaintiff's claim is not bolstered by citation to inapposite authority.

Additionally, Plaintiff's reliance on *Judulang v. Holder*, 565 U.S. 42, 53 (2011), to argue that Defendants' NOIT indicates a failure to engage (or potentially engage) in "reasoned decision-making," also lacks merit. Dkt. No. 39-1 at 18-23. In *Judulang*, the Supreme Court held that "[b]y hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories - a matter irrelevant to the alien's fitness to reside in this country - the BIA has failed to exercise its discretion in a reasoned manner." *Judulang*, 565 U.S. at 54. Plaintiff's claims are unlike the *Judulang* Court's concerns about the relationship of the exercise of discretion to the purpose of the immigration laws. Here, Plaintiff cannot show that the approach of the DACA termination SOP regarding individuals identified as enforcement priorities is untied from the non-statutory and non-regulatory DACA policy and guidance that allow for case-by-

case discretionary determinations whether individuals have become enforcement priorities after their receipt of DACA. Indeed, the only way for Plaintiff to attempt to make this argument is for him to inaccurately re-characterize the Termination. Neither the plain text of the Termination nor the circumstances that gave rise to the NTA issuance support Plaintiff's re-characterization. *See* Dkt. No. 39-6 at 194-97.

Finally, Plaintiff can also not prevail on his passing citations to *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502 (2009), and conclusory analysis that "[u]nexplained departure from established practice is arbitrary and capricious and must be set aside," Dkt. No. 39-1 at 18, 21. Rather, Defendants' conclusion that Plaintiff is now an enforcement priority is not a change in policy that calls for the application of *Fox*, 556 U.S. at 514–16. In *Fox*, the Supreme Court held that the APA "makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action." *Fox*, 556 U.S. at 515 (reversing on this basis). Instead, what the Supreme Court required in *Fox* is that when reviewing changes in agency policy, an agency must "display awareness that it is changing position" and must show that there are "good reasons for the new policy." *Fox*, 556 U.S. at 515. *Fox* only applies to changes in agency policy. *See* 556 U.S. at 514 (holding that when an agency changes policy, it must show no more than that it "examine[d] the relevant data and articulate a satisfactory explanation for its action.").

Here, USCIS's policies regarding DACA termination and enforcement priorities have not changed – USCIS has merely changed its view regarding how its existing discretion should be exercised in Plaintiff's case. Moreover, even if *Fox* applied here, the Termination displays an awareness to terminate an existing grant of DACA ("USCIS finds that continuing to exercise prosecutorial discretion to defer removal action against you is not consistent with the DHS's enforcement priorities"), and provides good reasons for the intended termination ("USCIS does not find that you merit a favorable exercise of

prosecutorial discretion and will not continue to defer DHS removal action against you under DACA."). Dkt. No. 39-6 at 196.

c. Plaintiff Received All the Process He is Due.

Where the alleged deprivation at the center of Plaintiff's claim is removal from the United States that have impacted the termination of his DACA, Plaintiff must challenge the initiation of removal proceedings through the course of those removal proceedings. *e.g.*, *J.E.F.M.*, 837 F.3d at 1038. And, Plaintiff's claim for "freedom from arbitrary adjudicative procedures," Dkt. No. 39-1 at 26 (citing *Castillo v. Cnty. of Los Angeles*, 959 F. Supp. 2d 1255, 1262 (C.D. Cal. 2013)), cannot be sustained where the adjudicative procedures he challenges allow for such discretion.

Even if the Court finds that Plaintiff can plead a viable constitutional claim, here, he fails on the merits of that that claim because he has received all the process he is due. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). There are three factors to balance in determining what process is constitutionally due: 1) the private interest affected; 2) the risk of erroneous deprivation of such interest and the probable value of additional procedural safeguards; and 3) the government interest at stake. *Id*. at 931–2 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

First, Plaintiff's interest in the continuation of a discretionary policy that could delay his removal from the United States is minimal. Such interest must be evaluated within the context of Plaintiff's unlawful status in the United States and the overall discretionary nature of DACA policy, and the nature of his alleged criminal conduct. In this way, Plaintiff's interest in the process by which USCIS exercises its discretion adjudicating DACA, if more than minimal, must still be evaluated on the basis that it is "part and parcel of the DHS's authority" to "initiat[e] removal proceedings on aliens without authority to remain in the United States." *Jeronimo v. U.S. Atty. Gen.*, 330 F. *App'x* 821, 823–24 (11th Cir. 2009); *see also Wilkinson v. Austin*, 545 U.S. 209, 225–29

(2005) ("Prisoners held in lawful confinement have their liberty curtailed by definition, so the procedural protections to which they are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all.").[11]

Second, the process Plaintiff received is sufficient to avoid the risk of erroneous deprivation. Indeed, "[w]hen a government-created property interest is at stake, due process principles require at least notice and an opportunity to respond in some manner, whether in writing or at an oral hearing, before termination of that interest." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). That notice and opportunity to respond "are among the most important procedural mechanisms for avoiding erroneous deprivations." *Wilkinson*, 545 U.S. at 226 (citations omitted). Here, Plaintiff argues that USCIS offers no opportunity to rebut the facts that USCIS considers relevant, and that additional safeguards are paramount in his circumstance because he "is effectively being labeled a criminal." Dkt. No. 39-1 at 27.

There can be no dispute, however, that Plaintiff has had notice and an opportunity to respond. Dkt. No. 39-6 at 191-2. Plaintiff was also constructively on notice that his arrest on allegations of alien harboring gave rise to CBP's NTA and was considered in USCIS's adjudicatory process. This information has been conveyed at various times, in the course of Plaintiff's removal proceedings. *See* Dkt. No. 23-2 at 10-11. These statements gave Plaintiff actual notice regarding the basis for USCIS's issuance of the NOIT. *See* Dkt. No. 39-6 at 191-192 ("USCIS has consulted with U.S. Immigration and Customs Enforcement (ICE) and has determined that exercising prosecutorial discretion to defer removal action in your case is not consistent with DH's enforcement priorities. ICE does not plan to issue you an NTA because CBP already issued an NTA to you on May 7, 2016, and ICE has informed USCIS that it is actively pursuing your removal.").

[11] Plaintiff's reliance on *MacDonald*, Dkt. 39-1 at 26 (citing 400 F.3d at 690), is misplaced because the Court there specifically considered the threat of deportation as the harsh sanction at issue. Here, Plaintiff should not be allowed to disassociate his DACA challenge from his removal proceedings but allege harm from the risk of removal.

Additionally, Plaintiff cannot argue that he has not received sufficiently constructive notice of why he is an enforcement priority and that his opportunity to respond has been impeded, or that his is prejudiced by the lack of such notice because Plaintiff addressed these facts in his response to USCIS's NOIT. *See* Dkt. No. 39-5 at 91, 93-94.[12]

Nor can Plaintiff show that the lack of additional process he seeks has prejudiced him. *See Zolotukhin v. Gonzales*, 417 F.3d 1073, 1076 (9th Cir.2005); *Ali v. United States*, 849 F.3d 510, 515 (1st Cir. 2017) ("There is no reason to think that, if an evidentiary hearing occurred, USCIS would not continue to rely on its own official records contemporaneous to the 1999 interview, as well as Lewis' signature affirming what appears to be her own handwritten statement . . . .").[13] Like in *Ali*, Plaintiff has not given any reason to think that additional process would result in a different outcome. Indeed, Plaintiff has offered no explanation for his nervous conduct described by Border Patrol Agents when Plaintiff was in the house, and only offers his self-serving statement. That declaration refers to Plaintiff's sister, the acquaintance he allegedly dog-sat for, Adolfo, and two people in the house when he arrived, a woman, and a man named Romeo, who he has seen before, s*ee* Dkt. No. 39-5 at 178-181, but Plaintiff included no statements from any of these potential witnesses to USCIS. Additionally, while Plaintiff seeks to examine all twelve individuals arrested at the house, Dkt. No. 39-1 at 12 ("Tellingly, Defendants neither name the three witnesses who allegedly identified Mr. Gonzalez nor disclose the results of the photo lineups shown to the other nine individuals, who presumably did not identify him."), Plaintiff ignores USCIS's statement that "the I-

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[12] Plaintiff's analogy to *Gete v. INS*, 121 F.3d 1285, 1297 (9th Cir. 1997), to argue that Defendants' termination here is based on a similarly "bare" notice lacks merit. Dkt. No. 39-1 at 28. Here, Plaintiff was on direct notice of the reason for his DACA termination, based on an enforcement priority finding, and Defendants specifically cited to the grounds and procedures in the Notice of Intent to Terminate.

[13] Notably, even if Plaintiff's challenge to the Termination was reviewable, review would be based on substantial evidence – "more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997) (citation and internal quotations marks omitted).

213 records for all the individual detained for being present in the United States without admission do not indicate that all 12 individuals were asked to identify you in the photographic line-up"). Dkt. No. 39-6 at 196. Accordingly, Plaintiff cannot succeed on the merits of his due process claim because Plaintiff cannot show additional process likely to result in a different result to Defendants' exercise of discretion.

Finally, when assessing the constitutionality of the process provided to Plaintiff, the Court should also consider the strong state interest in maintaining discretion to enforce U.S. immigration laws effectively and consistent with the statutory removal scheme. See *AADC*, 525 U.S. at 490 ("There is always a public interest in prompt execution of removal orders. . . ."); *cf. Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

Here, the process Plaintiff has received is more than adequate given the ultimately discretionary policy at issue, a record that sufficiently supports Defendants' concerns regarding Plaintiff's alleged criminal conduct, and the Government's strong interest regarding immigration enforcement.

B. The Remaining Preliminary Injunction Factors Favor Defendants.

Where the Government is the opposing party, the balance of equities and public interest factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). This balancing in large part mirrors the discussion of the Governmental interest in opposition to the merits of Plaintiff's constitutional claim. Notably, it would be inappropriate for the Court to enjoin the Government from terminating Plaintiff's DACA where the Government exercised its discretion in conformity with all applicable guidance and policies, and indeed, there are no applicable statutes or regulations.[14]

[14] The relief Plaintiff seeks with regard to the reinstatement of his employment authorization is all the more troubling because the termination of employment authorization is tied to commencement of removal proceedings, not to the termination of Plaintiff's DACA. *See* 8 C.F.R. § 274a.14(a)(1)(ii).

Dated: February 5, 2018

Respectfully submitted,

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