ARNOLD & PORTER KAYE SCHOLER LLP
JOHN C. ULIN (SBN 165524)
john.ulin@arnoldporter.com
JABA TSITSUASHVILI (SBN 309012)
jaba.tsitsuashvili@arnoldporter.com
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
T: (213) 243-4000
F: (213) 243-4199

Attorneys for Plaintiff
ALBERTO LUCIANO GONZALEZ TORRES

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALBERTO LUCIANO GONZALEZ TORRES,

Plaintiff,

vs.

U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. CITIZENSHIP AND IMMIGRATION SERVICES; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; U.S. CUSTOMS AND BORDER PROTECTION; Does 1-10, inclusive,

Defendants.

Case No. 17 CV 1840 JM(NLS)

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT [Docket No. 49]

Hearing: March 26, 2018
Time: 10:00 a.m.
Courtroom: 5D
Judge: Jeffrey T. Miller

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I. INTRODUCTION

In his First Amended Complaint ("FAC"), Plaintiff Alberto Luciano Gonzalez Torres ("Mr. Gonzalez") asserts APA and constitutional claims arising from Defendants' unlawful attempt to terminate his DACA status, employment authorization, and other benefits without complying with the procedures governing DACA termination. In their Motion to Dismiss ("MTD"), Defendants repeat meritless jurisdictional arguments previously rejected by this Court and otherwise attempt to mischaracterize Mr. Gonzalez's claims in this case, all in an effort to convince the Court to foreclose any judicial review of the serious legal violations asserted in the FAC. The Court has already told Defendants that it has jurisdiction to consider Mr. Gonzalez's claims—a decision Defendants chose not to challenge on appeal. Nothing has changed since the Court made that decision in September, and Defendants' MTD should be denied in its entirety.

In granting Mr. Gonzalez's first motion for a preliminary injunction under the original complaint, this Court made clear that the arguments Defendants raise in support of their motion under Rule 12(b)(1) fail under controlling Ninth Circuit law. The Court held that neither 8 U.S.C. § 1252(g) nor 8 U.S.C. § 1252(b)(9) strips it of jurisdiction to decide claims challenging the termination of DACA status. Dkt. 12 at 8-9 (docket pagination throughout). In addition, the Court explained that the DACA SOP provides mandatory procedures governing the termination of DACA status, *id.* at 9-11, which constitute law to apply and render 5 U.S.C. § 701(a)(2) inapplicable here. These conclusions regarding the Court's jurisdiction to decide claims premised on the unlawful termination of DACA status are law of the case. They are also clearly correct and apply with full force to the FAC. Unsurprisingly, every court to consider these issues has agreed with this Court's determinations. *See IEIYC v. Duke*, 2017 WL 5900061 (C.D. Cal. Nov. 20, 2017) ("*IEIYC I*"); *IEIYC v. Nielsen*, 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018) ("*IEIYC II*"); *Ramirez Medina v. DHS*, 2017

WL 5176720 (W.D. Wash. Nov. 8, 2017); *Coyotl v. Kelly*, 261 F. Supp. 3d 1328 (N.D. Ga. 2017).

Defendants' Rule 12(b)(6) argument that Mr. Gonzalez cannot state a constitutional claim as to the termination of his DACA status is also at odds with settled law and the operation of the DACA program. To hold otherwise would countenance the perverse notion that Defendants may terminate DACA status on a whim or without regard to DACA's governing documents—which this Court has rightly rejected, *see* Dkt. 12 at 10. The only court to decide, so far, whether DACA status, once granted, confers constitutionally protected interests squarely held that it does and rejected Defendants' contrary position. *See Ramirez Medina*, 2017 WL 5176720, at *9.

For all of these reasons, the MTD should be denied in its entirety.

II. BACKGROUND

Mr. Gonzalez has provided a comprehensive "Statement of Facts" in his pending motion for a preliminary injunction, calendared for hearing by the Court on the same day as Defendants' MTD. *See* Dkt. 39-1 at 9-22. In the interest of brevity, that entire history is not recounted here. In short, Mr. Gonzalez alleges in his FAC that Defendants' first termination of his DACA status in May 2016, which this Court previously declared unlawful, and their purported second termination of his DACA status in December 2017—following the Court's preliminary injunction and USCIS's issuance of a bare-bones Notice of Intent to Terminate ("NOIT")—must both be set aside under the APA for violating the mandatory terms of the DACA SOP and being arbitrary and capricious. In addition, because Defendants' purported denial of Mr. Gonzalez's DACA renewal application was premised solely on their unlawful December 2017 termination, it too must be set aside. And if the Court determines that Defendants have not violated the DACA SOP or acted in an arbitrary and capricious manner, they have nevertheless violated Mr. Gonzalez's procedural and

substantive due process rights by issuing him an NOIT with no indication of what facts USCIS would consider in deciding whether to terminate his DACA status, and then adjudging him a criminal and imposing serious consequences—*i.e.*, the loss of DACA status and attendant benefits—based on, *inter alia*, a bureaucrat's informal suspicion of wrongdoing, without any hearing, presentation of evidence, opportunity to confront witnesses or challenge the photographic lineup upon which Defendants apparently place great reliance, or criminal charges ever having been filed against him in any forum.

As this Court will recall, DACA termination decisions (1) are made by USCIS (a division of the Department of Homeland Security) and are independent of any proceedings before the Immigration Court (which is part of the Department of Justice); and (2) are governed by the mandatory requirements of the DACA Memo and SOP. DACA status may be granted to a person in removal proceedings or with a final order of removal, and it may be properly terminated even if a DACA recipient is never issued a Notice to Appear ("NTA") in Immigration Court. Mr. Gonzalez's claims would persist even if no NTA existed against him, and USCIS's termination of his DACA status is not a mandatory consequence of the NTA against him. Mr. Gonzalez's claims in this case therefore do not challenge or arise from ICE's decision to issue an NTA. And his challenges to USCIS's repeated violations of the DACA SOP are collateral to the Immigration Court process.

The manner in which Defendants have operated the DACA program for nearly six years makes clear that DACA does not exist solely for the administrative convenience of the government, but rather confers benefits based on mutually explicit understandings. DACA status is based on a *quid pro quo* between the DACA beneficiary and the government—the DACA beneficiary hands over significant personal information, pays large fees, and passes rigorous background checks; the government assures lawful presence, employment authorization, and other benefits, in the absence of a disqualifying criminal offense or public safety or national security

concern. DACA status, once granted, thus confers constitutionally protected interests.

III. ARGUMENT

A. LEGAL STANDARDS

In evaluating Defendants' MTD under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the Court must "accept as true all facts alleged in the [FAC] and construe them in the light most favorable to [Mr. Gonzalez]." *Snyder & Assocs. Acquisitions LLC v. U.S.*, 859 F.3d 1152, 1156-57 (9th Cir. 2017). The Court must resolve Defendants' "facial attack" under Rule 12(b)(1) by "determin[ing] whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). As a "general rule," the plaintiff is "master of a complaint for jurisdictional purposes." *Hawaii ex rel. Louie v. HSBC Bank Nevada, N.A.*, 761 F.3d 1027, 1040 (9th Cir. 2014). The Court must deny Defendants' Rule 12(b)(6) argument if the FAC contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

B. MR. GONZALEZ HAS ARTICLE III STANDING TO CHALLENGE DEFENDANTS' MAY 2016 AUTOMATIC TERMINATION OF HIS DACA STATUS

Mr. Gonzalez maintains standing to seek a final declaratory judgment and permanent injunction against Defendants' automatic termination of his DACA status in May 2016. The harms flowing from Defendants' unlawful actions in May 2016 are inextricably linked to Mr. Gonzalez's ongoing injuries. Defendants' desire to vindicate the lawfulness and propriety of that initial termination is shaping their actions with respect to Mr. Gonzalez's reinstated DACA status and his DACA renewal application. Indeed, by its own terms, Mr. Gonzalez's NOIT explains Defendants' view that the NOIT and opportunity to respond were "not strictly

required by the DACA SOP" and were provided only "to comply with the court order" in this case. Dkt. 39-6 at 10. Because the unlawful May 2016 termination informs Defendants' current actions—*i.e.*, the sham procedure by which they have purported to terminate Mr. Gonzalez's DACA status for a second time—the harms flowing from the initial termination are ongoing and must be remedied by a final declaratory judgment and permanent injunction. *See Anderson v. Evans*, 371 F.3d 475, 479 (9th Cir. 2004) (where "[p]recedential harms continue to flow from the government's action," a claim is not moot).

C. THIS COURT'S JURISDICTIONAL RULINGS ARE LAW OF THE CASE, AND NO CLEAR ERROR OR CHANGED CIRCUMSTANCES WARRANT A DIFFERENT OUTCOME

This Court correctly determined last September that neither 8 U.S.C. § 1252(g) nor 8 U.S.C. § 1252(b)(9) deprives it of jurisdiction over claims that Defendants violated their own mandatory policies and procedures, the APA, and the Constitution in purporting to terminate Mr. Gonzalez's DACA status through a process that—as the Court noted and Defendants conceded—is not subject to review in Immigration Court. *See* Dkt. 12 at 8-9; Sept. 28, 2017 Hr'g Tr. at 16. The Court also disposed of Defendants' reliance on 5 U.S.C. § 701(a)(2)—which creates a narrow exception to the presumption of judicial review of agency action—by making clear that the DACA SOP provides law to apply to Mr. Gonzalez's challenge and "categorically reject[ing]" Defendants' assertion that "DHS possesses such broad prosecutorial discretion that they need not follow the DACA SOP in terminating the status of DACA recipients." Dkt. 12 at 10.

Defendants contend that the Court should reconsider these determinations because of "clear error" and "changed circumstances." Dkt. 49-1 at 11 n.2. Not so. The Court's jurisdictional rulings were correct, as explained below, and consistent with the results in other cases challenging DACA status determinations. And the relevant circumstances have not changed: Mr. Gonzalez is still not challenging any

of the three specific actions enumerated in Section 1252(g), but rather Defendants' failure to comply with the clear and mandatory terms of the DACA Memo and SOP; his claims are still collateral to the Immigration Court process; and the DACA SOP still provides the relevant law that Defendants must apply in making DACA termination determinations. Defendants' arguments that the Court should revisit its jurisdictional rulings should be rejected for at least the following reasons:

First, this Court's decisions regarding Sections 1252(g) and 1252(b)(9) are law of the case, which "requires that when a court decides on a rule, it should ordinarily follow that rule during the pendency of the matter" in the absence—as here—of "a change in controlling authority or the need to correct a clearly erroneous decision which would work a manifest injustice." *Mayweathers v. Terhune*, 136 F. Supp. 2d 1152, 1153-54 (E.D. Cal. 2001). While the Court's order was preliminary, neither the law nor anything relevant to the Court's jurisdictional determinations has changed since September 2017. *See id.* (prior preliminary injunction established law of the case). Mr. Gonzalez is still not challenging any of the "narrow[]" and "discrete actions" in Section 1252(g), Dkt. 12 at 8; and he is still not "seeking judicial review of [an] order[] of removal," *id.* at 9. He is again asserting that Defendants have violated their mandatory DACA procedures, and his claims still do not bear on the validity of his NTA or challenge his Immigration Court removal proceedings.[1] There is no reason to disturb this Court's decision that Sections 1252(g) and 1252(b)(9) do not deprive it of jurisdiction. Far from "working a manifest injustice," the Court correctly applied the law.[2]

[1] An Immigration Judge's past or future discretionary decision to terminate or administratively close Mr. Gonzalez's removal proceedings after being apprised of his situation does not change the fact that his claims in this Court are entirely collateral to and independent of the removal proceedings. Indeed, a claim may be independent of removal proceedings even when its resolution might invalidate the proceedings. *See Flores-Torres v. Mukasey*, 548 F.3d 708, 711-13 & n.6 (9th Cir. 2008).

[2] These principles are particularly apt given Defendants' decision not to appeal the Court's legal determinations. *See Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996) ("Under the doctrine of the law of the case, a ruling by the trial

Second, Defendants' MTD inappropriately seeks reconsideration of the Court's rulings. *See* Dkt. 49-1 at 16, 17, 22 n.5 ("Defendants disagree with the Court's prior citation to *United States v. Hovsepian*"; "the Court's prior reliance on *Ramirez-Perez v. Ashcroft* … is also misplaced"; "[t]he Court's previous reliance on *Singh v. Gonzales* … is misplaced"). The motion comes too late. *See* L.R. 7.1.i.2 ("any motion or application for reconsideration must be filed within 28 days after the entry of the ruling, order or judgment sought to be reconsidered"). Moreover, in this Court, reconsideration is "disfavored unless a party shows there is new evidence, a change in controlling law, or establishes that the Court committed a clear error in the earlier ruling." None of those factors is present here.

D. NEITHER SECTION 1252(g) NOR SECTION 1252(b)(9) STRIPS THE COURT OF JURISDICTION OVER CLAIMS REGARDING THE DACA SOP'S TERMINATION PROVISIONS

Even beyond the insurmountable procedural barriers they face, Defendants' jurisdictional arguments are wrong on the merits.

1. Section 1252(g)

The Ninth Circuit has made clear that "even a claim closely related to the initiation of removal proceedings is not barred by [Section] 1252(g), so long as it does not challenge the decision to commence proceedings itself." *IEIYC II*, 2018 WL 1061408, at *15 (citing *Alcaraz v. INS*, 384 F.3d 1150, 1160-61 (9th Cir. 2004)).

U.S. v. Hovsepian, 359 F.3d 1144 (9th Cir. 2004) is illustrative and controlling. There, "the only thing standing between [the plaintiff] and deportation [was] the district court's order barring the INS from commencing deportation proceedings" on particular grounds. *Id.* at 1155. Because he sought "a description of the relevant law" (as applied to his criminal convictions) that would "form[] the backdrop against which the Attorney General later will exercise discretionary authority," the Ninth

court, in an earlier stage of the case, that could have been but was not challenged on appeal is binding in subsequent stages of the case.").

Circuit held that the district court had jurisdiction—*even though* the plaintiff sought an injunction against the commencement of removal proceedings. *Id.* In the FAC, Mr. Gonzalez is not asking this Court to undo his NTA. Indeed, he is not challenging any aspect of the Immigration Court proceedings against him in this case. He is asking this Court to (1) "consider a purely legal question" *(was the termination of his DACA status unlawful—i.e., how does the DACA program define "enforcement priorities" for termination purposes?)* (2) "that does not challenge [Defendants'] discretionary authority" *(to commence proceedings, adjudicate cases, or execute removal orders).* *Id.* And "even if the answer … forms the backdrop against which the Attorney General later will exercise discretionary authority," this Court has jurisdiction. *Id.* at 1155.

Sissoko v. Rocha, 509 F.3d 947 (9th Cir. 2007) confirms that Mr. Gonzalez's claims are properly before this Court. There, the Ninth Circuit held that Section 1252(g) barred jurisdiction in the "limited context" of a challenge to detention that was statutorily "mandatory" upon the commencement of expedited removal proceedings, and therefore "arose from" that commencement. *Id.* at 949-50. By contrast, it is not "mandatory" that the commencement of removal proceedings for unlawful presence terminates DACA status—as made clear by this Court and every other to address the issue—so Mr. Gonzalez's challenge to USCIS's actions does not "arise from" that commencement. *See* Dkt. 12 at 11.

To sidestep this clear Ninth Circuit law, Defendants (1) assert that "the denial of DACA is a step 'leading up to' a final order of removal," (2) mischaracterize Mr. Gonzalez's claims as a challenge to ICE's "decision to pursue his removal," and (3) caution that "were the Court to find that a final removal against [Mr. Gonzalez] 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." Dkt. 49-1 at 20-21. Each of these arguments is meritless.

Point (1) is simply wrong. Immigration Court proceedings and DACA status operate independently—*i.e.*, a person with a final order of removal may receive DACA status, *see* Dkt. 39-4 at 3, and a person who has never been issued an NTA may have his DACA status properly terminated, *id.* at 90. Point (2) ignores the text of the FAC, which challenges "*USCIS's* purported termination decision" and "a *USCIS* agent's determinations of credibility and criminality without a hearing or the ability to confront evidence." Dkt. 38 at 39, 42 (emphases added). Mr. Gonzalez is "master of [his] complaint," *Hawaii ex rel. Louie*, 761 F.3d at 1040, and nowhere in the FAC does he seek to undo ICE's actions. Finally, point (3) both (a) mischaracterizes the relief Mr. Gonzalez seeks in the FAC—which does not ask the Court to make any finding about the enforceability of a speculative, future removal order that an Immigration Judge might issue against him—and (b) ignores the fact that this Court has jurisdiction over questions of law "even if the answer … forms the backdrop against which the Attorney General later will exercise discretionary authority," *Hovsepian*, 359 F.3d at 1155. Indeed, "[w]hile [Section 1252(g)] bars courts from reviewing certain exercises of discretion by the attorney general, it does not proscribe substantive review of the underlying legal bases for those discretionary decisions and actions." *IEIYC II*, 2018 WL 1061408, at *16 (quoting *Madu v. U.S. Atty. Gen.*, 470 F.3d 1362, 1368 (11th Cir. 2006)).

Defendants' reliance on *Torres-Aguilar v. INS*, 246 F.3d 1267 (9th Cir. 2001) is similarly misplaced. There, on a petition for review, the Ninth Circuit simply explained that the petitioner had not alleged a "colorable" due process claim because he did "not contend that he was prevented from presenting his case before the immigration judge or the BIA, denied a full and fair hearing before an impartial adjudicator[,] or otherwise denied a basic due process right." *Id.* at 1271. Mr. Gonzalez's FAC does allege, *inter alia*, that he was prevented from presenting his case before an impartial adjudicator, and makes clear that he is not challenging any of the three discrete actions in Section 1252(g). *See* Dkt. 38 at 39-43.

2. Section 1252(b)(9)

The Court should again quickly dispose of Defendants' reliance on Sections 1252(a)(5) and 1252(b)(9). The "explicit language" of those provisions "appl[ies] only to those claims seeking judicial review of orders of removal." *A. Singh v. Gonzales*, 499 F.3d 969, 978 (9th Cir. 2007); *see INS v. St. Cyr*, 533 U.S. 289, 313 (2001) (same). They do not apply to "claims that are collateral to, or independent of, the removal process." *JEFM v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016). Because Mr. Gonzalez is not and never has been subject to an order of removal and is not challenging any part of the Immigration Court proceedings in this Court, his claims are not "bound up in and an inextricable part of [that] administrative process." *Id.* at 1033; *see Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007) ("arises from" requires tighter nexus than "related to").

In *JEFM*, the Ninth Circuit explained that Section 1252(b)(9) does not deprive district courts of jurisdiction where a claim could not have been litigated in removal proceedings, thus providing "no legal avenue to obtain judicial review of [the] claim." 837 F.3d at 1032. Accordingly, this Court explained that "contrary to [D]efendants' position that immigration removal proceedings are the proper forum for Plaintiff to raise his DACA termination status, an immigration judge has no jurisdiction to reinstate DACA status, or to authorize an application for renewal of DACA status, as acknowledged by Defendants at oral argument." Dkt. 12 at 11. Therefore, this Court should again reject Defendants' cynical invitation to construe the INA "to deny any judicial forum for [Mr. Gonzalez's] colorable constitutional [and APA] claim[s]." *Webster v. Doe*, 486 U.S. 592, 603 (1988). Such a reading of the statute would raise "serious constitutional concerns." *Id.*[3]

[3] To be clear, Defendants assert the radical position that Mr. Gonzalez's claims are ***not reviewable in any court, at any time***. To the extent they posit that a constitutional challenge may be appropriate on a Petition for Review in the Court of Appeals following the Immigration Court removal process, *see* Dkt. 49-1 at 22, they ignore that the Court of Appeals (1) would lack an adequate record on which to address Mr. Gonzalez's claims and (2) is institutionally ill-suited and statutorily prohibited to "order the taking of additional evidence," 8 U.S.C. § 1252(a)(1).

E. SECTION 701(a)(2) DOES NOT PRECLUDE REVIEW OF CLAIMS REGARDING THE DACA SOP'S TERMINATION PROVISIONS

Defendants' assertion that 5 U.S.C. § 701(a)(2) precludes review of Mr. Gonzalez's claims is an equally unavailing effort to circumvent the "strong presumption in favor of judicial review of administrative action." *St. Cyr*, 533 U.S. at 298. Section 701(a)(2) only precludes judicial review "to the extent that" a particular "action is committed to agency discretion by law." It is a "very narrow exception" that "applies in those rare instances where … in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). It only applies where the agency has "*absolutely no guidance* as to how [] discretion is to be exercised." *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) (emphasis added). In the Ninth Circuit, law to apply may be found in "internal operating procedures," "policy statement[s]," and "usual practice"—*i.e.*, "where discretion has been legally circumscribed by various memoranda." *Alcaraz*, 384 F.3d at 1161-62. The absence of a specific statute or regulation "does not … mean that there are no meaningful standards against which to evaluate" an agency's actions. *Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003); *see ASSE Intern., Inc. v. Kerry*, 803 F.3d 1059, 1069 (9th Cir. 2015) ("Even where statutory language grants an agency 'unfettered discretion,' its decision may nonetheless be reviewed if regulations or agency practice provide a 'meaningful standard by which this court may review its exercise of discretion.'").

Here, the question before the Court is whether the DACA Memo and SOP provide *any* guidance as to how USCIS must make DACA termination determinations. They plainly do. This Court already disposed of Defendants' arguments by making clear that the DACA SOP provides law to apply and "categorically reject[ing]" that "DHS possesses such broad prosecutorial discretion that they need not follow the DACA SOP in terminating the status of DACA recipients." Dkt. 12 at 10. Every other court to address the issue has reached the

same conclusion. *See IEIYC II*, 2018 WL 1061408, at *14-15 (citing this Court's order and collecting cases; explaining that "the decision to revoke DACA is governed by both the Napolitano [DACA] Memo and the DACA SOP"); *Batalla Vidal v. Duke*, 2017 WL 5201116, at *11 (E.D.N.Y. Nov. 9, 2017) ("DHS's prior statements" regarding the operation of DACA provide law to apply).

Defendants cannot seriously contend—in the face of mounting judicial determinations and their own admissions—that the DACA Memo, DACA SOP, DACA FAQ, and other DHS statements, memos, and policy directives do not provide law to apply with respect to DACA termination determinations. *See Coyotl*, 261 F. Supp. 3d at 1334 ("confirmation from counsel for Defendants that '[t]hey are the guidelines that adjudicators are to apply'"). Even if Defendants had unfettered discretion over similar deferred action decisions before DACA, their establishment of and adherence to binding procedures, definitions, and restrictions brings their compliance squarely within the purview of 5 U.S.C. § 706. *See INS v. Yang*, 519 U.S. 26, 32 (1996) ("Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned" under the APA.). In addition, it is "well-established that even where agency action is committed to agency discretion by law, review is still available to determine if the Constitution has been violated." *Batalla Vidal*, 2017 WL 5201116, at *11.

Against this backdrop, Defendants attempt to reframe Mr. Gonzalez's claims as a challenge to the exercise of prosecutorial discretion—*i.e.*, to ICE's decision to issue an NTA for unlawful presence, which the FAC does not challenge—rather than to USCIS's termination of his DACA status in violation of the DACA Memo and SOP. The effort fails. Defendants' cases regarding challenges to discretionary decisions *not* to enforce are inapposite and shed no light on whether the DACA program is

bereft of "judicially manageable standards" to judge Defendants' compliance with their own mandatory policies and defined enforcement priorities when they decided to enforce the termination provisions against Mr. Gonzalez. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

In *Heckler*, the Supreme Court explained that enforcement decisions are reviewable when governed by "clearly defined factors." *Id.* at 834. Regardless of the extent of Defendants' discretion to issue an NTA for unlawful presence to a DACA recipient, DACA termination is governed by clearly defined factors in the DACA Memo and SOP.[4] And Defendants' invocation of a "complex balancing of policy considerations," Dkt. 49-1 at 23, is a red herring. Nothing about reading the DACA SOP's and the Kelly Memo's definitions of who does and does not constitute an enforcement priority is "peculiarly within [USCIS's] expertise." *Heckler*, 470 U.S. at 831. Indeed, if the phrase "enforcement priorities" is as standardless as Defendants claim, no balancing of anything would be required before stripping a DACA recipient of his status. That cannot be the law.

Moreover, Defendants' unmoored approach would run afoul of DHS's statutory obligation to "establish[] national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), against which such determinations must be made. It is Defendants' burden to define the "enforcement priorities" that justify DACA termination, and they have done so in the DACA Memo and SOP. They defined DACA recipients who meet the DACA Memo's and SOP's objectively verifiable criteria as low priority cases and enumerated a series of events—criminal convictions, findings of public safety or national security concern, or EPS findings—that could make them an enforcement priority. Including additional language that permits

[4] Therefore, *Morales de Soto v. Lynch*, 824 F.3d 822 (9th Cir. 2016) has no application here. There, to secure the favorable exercise of prosecutorial discretion, the plaintiff was challenging a valid reinstatement of removal issued in Immigration Court, and her claims were entirely bound up in what was happening in her removal proceedings. *Id.* at 825. By contrast, in the FAC Mr. Gonzalez is not challenging any agency's decision to issue an NTA or prosecute that NTA in Immigration Court.

termination when continued DACA status is not consistent with Defendants' enforcement priorities does not relieve Defendants of their obligation to say what those priorities are and to terminate DACA only when an individual falls within one of the defined categories. Defendants argue an untenable reading of the termination provision that would swallow the proverbial rule. The Court should reject the argument out of hand.

Finally, Defendants' attempt to equate the DACA SOP with the 1981 deferred action instructions at issue in *Romeiro de Silva v. Smith*, 773 F.2d 1021 (9th Cir. 1985) ignores two dispositive distinctions. First, like the 1978 version at issue in *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979), DACA status confers substantive benefits and is premised on humanitarian concerns:

- DACA status confers lawful presence, the right to work in the United States, and access to various federal and state benefits.
- Defendants have taken affirmative steps and expended significant resources to, *e.g.*, (1) conduct an "ongoing review of pending removal cases [and] offer[] administrative closure to many of them," Dkt. 39-4 at 2; (2) operate a special hotline "staffed 24 hours a day, 7 days a week" to assist DACA-eligible individuals in removal proceedings, *id.* at 10; and (3) establish the comprehensive SOP to greatly circumscribe discretion regarding DACA status.
- The DACA Memo opens by explaining that DHS intends to protect "certain young people who were brought to this country as children and know only this country as home" and "lacked the intent to violate the law." Dkt. 39-4 at 2.

Second, as Defendants have conceded, the DACA Memo and SOP are replete with mandatory language. *See Coyotl*, 261 F. Supp. 3d at 1334 ("confirmation from counsel for Defendants that '[t]hey are the guidelines that adjudicators are to apply'"); *see, e.g.*, Dkt. 39-4 at 2-3 ("necessary to ensure" non-prioritization of individuals who meet the DACA criteria). The DACA Memo's and SOP's objectively verifiable criteria have therefore been the determinative basis for USCIS's DACA decisions since its inception. *See Texas v. U.S.*, 809 F.3d 134, 171-76 (5th Cir. 2015). The DACA Memo and SOP provide ample law for USCIS to apply and against which this Court may judge USCIS's actions when making DACA status and termination determinations. Defendants' efforts to deprive those standards of

meaning by asserting the right to terminate DACA whenever and however they please are contrary to law and logic. Section 701(a)(2) imposes no barrier to this Court's consideration of Mr. Gonzalez's claims.

F. ONCE GRANTED, DACA STATUS CONFERS CONSTITUTIONALLY PROTECTED INTERESTS

Once granted, Mr. Gonzalez has a constitutionally protected interest in his DACA status, which is the result of a deal with the government, not unilateral expectation. So far, the only court to directly address whether DACA status, once conferred, may be terminated without any process under the Fifth Amendment has rejected DHS's assertion "that there can be no violation of [a DACA recipient's] Due Process rights because no process is actually due":

> In creating the DACA policy/program, the federal government recognized that there were thousands of young people unlawfully present in our country, that lacked the intent to violate the law, and that had contributed to our country in significant ways, and that its immigration enforcement resources should not be spent on low priority cases such as those. The policy then set forth criteria to be considered when determining whether to grant DACA to an applicant. These criteria established a *quid pro quo* from the federal government to the potential applicants—*i.e.*, you (applicant) make yourself known to us (federal government) and pass rigorous background checks, etc., and in return you will be considered for DACA, which in turn will allow you the opportunity to remain in the country, work, and potentially receive other state benefits.

Ramirez Medina, 2017 WL 5176720, at *9.

Defendants' behavior in operating DACA for the last six years is not consonant with a program that exists solely for the administrative convenience of the government, but rather one that confers benefits based on "mutually explicit understandings." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). Indeed, DHS recently explained that it views DACA status as "confer[ring] affirmative benefits." Pet. for Writ of Cert. at 12, *DHS v. Regents*, No. 17-1003 (U.S. Jan. 18, 2018), *available at* https://goo.gl/Tjvaqg.

DACA's well-defined framework, specific operating procedures, and mandatory language "greatly restrict the discretion of the people who administer it"

and underscore the property interests conferred by DACA status. *Nozzi v. Housing Auth. of LA*, 806 F.3d 1178, 1191 (9th Cir. 2015); *Wedges/Ledges of Calif., Inc. v. Phoenix*, 24 F.3d 56, 63 (9th Cir. 1994). And the DACA Memo's boilerplate that it "confers no substantive right" is plainly not determinative. The question "turns on the substance of the interest recognized, not the name given that interest by the state." *Newman v. Sathyavaglswaran*, 287 F.3d 786, 797 (9th Cir. 2002).

The precise process that is due in Mr. Gonzalez's circumstances need not be determined on Defendants' MTD, which by its nature only addresses the threshold question of whether any process is due at all. But Mr. Gonzalez emphasizes here that the Constitution cannot countenance a DACA status termination:

- on the basis of a USCIS officer's suspicion, on a paper record, that Mr. Gonzalez engaged in criminal misconduct;
- after an Immigration Judge found him credible and not a threat to public safety, and released him on a $5,000 bond to resume his law-abiding life in San Diego;
- nearly two years after he was arrested but never charged, with no further investigation beyond the two days of questioning following his May 2016 arrest, and no prior or subsequent law enforcement encounters or public safety concerns;
- without Mr. Gonzalez having the opportunity to know the facts that would guide the termination decision, to test the evidence against him or confront adverse witnesses, or rebut factual allegations; and
- without his having a hearing or any chance to persuade a neutral arbiter, rather than the same one who had already issued him a seemingly pre-determined notice of intent to terminate.

See Dkt. 39-1 at 32-34; *Kaur v. Holder*, 561 F.3d 957, 960-62 (9th Cir. 2009) (summary stating only that "reliable confidential sources have reported that [the immigrant] has conspired to engage in alien smuggling; has attempted to obtain fraudulent documents; and has engaged in immigration fraud by conspiring to supply false documents for others" was "fundamentally unfair and violated her due process rights"). Based on the allegations of the FAC, Mr. Gonzalez has stated a plausible constitutional claim that must survive Defendants' motion under Rule 12(b)(6).

IV. CONCLUSION

For the reasons stated herein, and in Mr. Gonzalez's briefing in support of his pending motion for a preliminary injunction, *see* Dkt. 39-1, 46, his briefing in support of his original motion for preliminary injunction, *see* Dkt. 2-1, 10, and this Court's Order of September 29, 2017, *see* Dkt. 12, Defendants' MTD should be denied in its entirety.

Dated: March 9, 2018

Respectfully submitted,

/s/ John C. Ulin
John C. Ulin (SBN 165524)
john.ulin@arnoldporter.com
Jaba Tsitsuashvili (SBN 309012)
jaba.tsitsuashvili@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
T: (213) 243-4000
F: (213) 243-4199

Attorneys for Plaintiff
ALBERTO LUCIANO GONZALEZ TORRES

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that on March 9, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ John Ulin