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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 MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' EX PARTE APPLICATION [Docket No. 31] AND IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Hearing: February 12, 2018
Time: 10:00 a.m.
Courtroom: 5D
Judge: Jeffrey T. Miller

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I. INTRODUCTION

On December 21, 2017, just three days after receiving Plaintiff Alberto Luciano Gonzalez Torres's response to USCIS's Notice of Intent to Terminate ("NOIT") his Deferred Action for Childhood Arrivals ("DACA") status and Employment Authorization Document ("EAD"), Defendants terminated Mr. Gonzalez's status—24 hours before it was set to expire anyway. It was the second time Defendants have attempted to terminate Mr. Gonzalez's DACA status. In September, this Court vacated and preliminarily enjoined Defendants' first termination as unlawful and a violation of Defendants' own DACA Standard Operating Procedures ("SOP") and the Administrative Procedure Act ("APA"). The Court explained that the harms flowing from Mr. Gonzalez "losing his DACA status and ability to apply for renewal of that status," including losing the right to live and work lawfully in the United States, were irreparable. Accordingly, the Court ordered, in part, that (1) "Defendants shall fully comply with the DACA SOP should Defendants elect to reconsider Plaintiff's DACA status," (2) "Defendants accept Plaintiff's DACA renewal application," and (3) the Court's Preliminary Injunction "is to remain in effect pending further Order of this court."

Six weeks later, USCIS issued Mr. Gonzalez a bare-bones NOIT, seeking to terminate his DACA status and EAD without any explanation of the factors it would consider in reviewing his response. Mr. Gonzalez responded with an explanation of the NOIT's deficiencies and an explicit and unambiguous denial of any connection to what he surmised USCIS might consider in that review, *i.e.*, its purported suspicion of criminality—which, because he has never been charged with a crime (or even investigated in nearly two years) has never been tested in any competent forum—stemming from his arrest in May 2016 by CBP officers. Ultimately, USCIS purported to terminate Mr. Gonzalez's DACA status and EAD because: (1) he is in removal proceedings solely for unlawful presence in the

United States, and (2) his DACA status "is not consistent with [DHS's] enforcement priorities."

USCIS's second effort to terminate Mr. Gonzalez's DACA status demonstrates, yet again, Defendants' disregard or misreading of the plain language of the Court's Order, the DACA SOP, and DHS's publicly defined and reaffirmed "enforcement priorities." The Court ordered Defendants to "***fully***" comply with the SOP if they reconsidered Mr. Gonzalez's DACA status. But Defendants have not complied with the SOP. The issuance of a bare-bones NOIT, an opportunity to respond (without the benefit of knowing which aspects of Mr. Gonzalez's history would bear on the decision), and the issuance of a termination notice do not constitute compliance, where, as here, Defendants' stated reasons do not fall within any of the SOP's clearly defined bases for termination.

The SOP's Termination chapter identifies six potential bases for DACA termination. USCIS's second purported termination of Mr. Gonzalez's DACA status fits none of them. Merely being in removal proceedings for unlawful presence does not support termination, given that DACA expressly contemplates extending benefits even to those who have had final orders of removal issued against them. Nor, according to DHS's own policies, does mere suspicion of wrongdoing flowing from a May 2016 arrest that led to no charge or conviction and has not even been investigated in more than a year and a half, especially in the absence of a stated public safety concern.

In short, the DACA SOP does not countenance termination (1) for a DACA recipient with no criminal charges or convictions (2) on the basis of a USCIS officer's informal evaluation of criminality (3) without any stated public safety concern (4) following an NOIT that did not explain what factors would be considered in its review.

Moreover, if the Court determines that USCIS's purported termination is not a violation of the DACA Memo and DACA SOP or otherwise arbitrary and

capricious, the termination and denial of renewal should nevertheless be set aside for failure to comply with the Due Process Clause of the Fifth Amendment. Mr. Gonzalez's DACA status and EAD confer liberty and property interests, including the right to live and work lawfully in the United States and the opportunity for renewal upon consideration of the DACA criteria. Their termination requires an *adequate* procedure and a *meaningful* opportunity to respond, which Mr. Gonzalez has not received. Even if the DACA program could countenance such a result, the Fifth Amendment cannot.

The Court should reject Defendants' motion to dissolve its Preliminary Injunction and their request to permit their unlawful termination of Mr. Gonzalez's DACA status and EAD to take effect. In addition, Mr. Gonzalez seeks a preliminary injunction vacating and enjoining the purported termination, as well as the purported subsequent denial of his DACA renewal application, which by its own terms is premised on nothing more than the unlawful purported termination.[1]

II. STATEMENT OF FACTS

A. TERMS OF THE DACA PROGRAM

On June 15, 2012, DHS announced the terms of the DACA program. *See* Declaration of John C. Ulin ("Ulin Dec."; filed concurrently), Ex. A, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" ("DACA Memo"). The DACA Memo explains that the "Nation's immigration laws . . . are not designed to be blindly enforced without consideration given to the individual circumstances of each case," and that "additional measures are necessary to ensure that our enforcement resources are not expended on [] low priority cases but are instead appropriately focused on people who meet our enforcement priorities." Its purpose is to protect "certain young people who were brought to this country as children and know only this

[1] This request for a preliminary injunction has no bearing on the Court's current Injunction. Their terms are not mutually exclusive. And the harms at issue here flow both from Defendants' conduct in November and December 2017 and their unlawful actions in 2016 that gave rise to the current Injunction.

country as home [because] these individuals lacked the intent to violate the law." A DACA recipient who meets the following objectively verifiable criteria is, by definition, a "low priority case" and does not "meet [DHS's] enforcement priorities." The relevant criteria are that the recipient:

- came to the United States under the age of 16;
- continuously resided in the United States for at least five years preceding the date of the DACA Memo and was present in the United States on the date of the DACA Memo;
- is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
- "has not been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses," and does not "otherwise pose[] a threat to national security or public safety"; and
- is not above the age of 30.

DACA renewal applicants must continue to meet these criteria. Both DACA applicants and renewal applicants "must undergo biographic and biometric background checks." Ulin Dec., Ex. B, "DACA FAQ," Q22.

USCIS is charged with implementing the terms of the DACA program in a manner consistent with the DACA Memo and subsequent DHS guidance. Since DACA's inception, the objective criteria above have served as the determinative basis for USCIS's DACA decisions. *See Texas v. U.S.*, 809 F.3d 134, 171-76 (5th Cir. 2015) ("[d]enials are recorded in a 'check the box' standardized form, for which USCIS personnel are provided templates"). To govern application, termination, and renewal decisions, Defendants promulgated the DACA SOP and the DACA FAQ. "The SOP states that it is applicable to all personnel performing adjudicative functions and the procedures to be followed are not discretionary." *Coyotl v. Kelly*, 261 F. Supp. 3d 1328, 1334 (N.D. Ga. 2017). For these reasons, this Court "categorically reject[ed]" the proposition that Defendants "need not follow the DACA SOP in terminating the status of DACA recipients." *Gonzalez Torres v. DHS*, 2017 WL 4340385, at *6 (S.D. Cal. Sept. 29, 2017); *see id.* at *5

("Defendants' failure to follow the termination procedures set forth in the DACA SOP is arbitrary, capricious, and an abuse of discretion."). Defendants themselves have confirmed that conclusion. *Coyotl*, 261 F. Supp. 3d at 1334 ("confirmation from counsel for Defendants that '[t]hey are the guidelines that adjudicators are to apply'").

B. CONTINUATION OF THE DACA PROGRAM'S TERMS

DHS began a rescission and wind-down of the DACA program on September 5, 2017. *See* Ulin Dec., Ex. C, "Memorandum on Rescission of Deferred Action for Childhood Arrivals" ("Rescission Memo"). Before and after the rescission announcement, DHS has explained repeatedly that the rules governing the DACA program and DACA recipients have not changed, and that DACA recipients would not be deemed "enforcement priorities" in a manner that deviates from how that term has been defined in the DACA program since 2012:

- On February 20, 2017, DHS issued a memorandum defining its new immigration enforcement priorities:

> ***With the exception of the June 15, 2012, memorandum entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" [i.e., the DACA Memo,]*** . . . all existing conflicting directives, memoranda, or field guidance regarding the enforcement of our immigration laws and priorities for removal are hereby immediately rescinded—to the extent of the conflict.

See Ulin Dec., Ex. D, "Enforcement of the Immigration Laws to Serve the National Interest" ("Kelly Memo") (emphasis added).

- The Kelly Memo prioritizes enforcement against individuals who "have been charged with any criminal offense that has not been resolved" or allegedly "committed acts which constitute a chargeable criminal offense." But by the Memo's own terms, the directive that individuals be deemed enforcement priorities based on alleged offenses or suspicions of wrongdoing, without convictions, adverse judicial adjudications, or even criminal charges, *does not apply to DACA recipients, who continue to be governed by the DACA Memo, DACA SOP, and DACA FAQ. See id.* ("***Except as specifically noted above [i.e., as required by the DACA Memo]***, the Department no longer will exempt classes or categories of removable aliens from potential enforcement.") (emphasis added).

- On February 21, 2017, DHS again unequivocally explained that the Kelly Memo's enforcement priorities have no bearing on DACA recipients:

> Q22: Do these memoranda affect recipients of Deferred Action for Childhood Arrivals (DACA)?
> A22: No.

Ulin Dec., Ex. E, "Q&A: DHS Implementation of the Executive Order on Enhancing Public Safety in the Interior of the United States."

- On June 15, 2017, DHS issued more public guidance, explaining that "DACA recipients will continue to be eligible ***as outlined in the June 15, 2012 memorandum***." Ulin Dec., Ex. F, "Frequently Asked Questions: Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ('DAPA')" (emphasis added).
- Following the rescission, on September 8, 2017, the administration explained DHS's policy that "[d]uring this six-month time, there are no changes that are being made to the program at this point." Ulin Dec., Ex. G, "Press Briefing by Press Secretary Sarah Sanders and Homeland Security Advisor Tom Bossert."
- And again on October 3, 2017, DHS assured the Senate Judiciary Committee regarding its enforcement priorities:

> ***We rely on guidance that was put in place in 2012 when the DACA program was initiated. That's available on USCIS's website and will tell you what the priorities are for Immigration and Customs Enforcement and what they are for the Department at large. Those priorities have not changed.***

Testimony of Michael Dougherty, Assistant Secretary of DHS at 01:10:20, "Oversight of the Administration's Decision to End Deferred Action for Childhood Arrivals," *available at* https://bit.ly/2fzVNEY; *id.* at 01:11:00 (the Kelly Memo "carved out" DACA from its enforcement priorities; ***"I would tell you in good faith and complete confidence that we are relying on the same priorities that were in place in 2012 and we have not added to them for this population."***).

In short, under Defendants' own binding procedures, DACA recipients who meet the DACA Memo's objectively verifiable eligibility criteria—*i.e.*, have no disqualifying criminal offenses and do not pose a threat to public safety—remain "low priority cases," and their removal remains inconsistent with DHS's enforcement priorities. DHS has made other changes to the DACA program during its wind-down (*e.g.*, elimination of advance parole) and has re-defined enforcement priorities for non-DACA recipients. But it has *not* instructed ICE or USCIS to re-define the prioritization of DACA recipients for removal. To the contrary, DHS has reaffirmed that DACA recipients will not be prioritized in a manner inconsistent with the DACA program as it has existed since 2012.

C. CONSTRAINTS ON DEFENDANTS' DISCRETION IN IMPLEMENTING THE TERMS OF THE DACA PROGRAM

DACA recipients and renewal applicants remain subject to the heavily circumscribed discretion of USCIS personnel, who must act in accordance with:

(1) DHS's 2012 DACA Memo, which declares DHS's non-prioritization of individuals who meet the five objectively verifiable criteria that make a DACA recipient a "low priority" and have always formed the basis for USCIS's DACA status decisions;

(2) Defendants' DACA SOP, which sets forth the mandatory termination procedures and enumerates the six permissible bases for termination that USCIS personnel must follow with regard to DACA applicants and recipients;

(3) USCIS's November 7, 2011 Policy Memorandum ("Revised Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens"), Ulin Dec., Ex. H ("USCIS Memo")—which the DACA SOP incorporates as mandatory procedures for certain termination decisions;

(4) USCIS's DACA FAQ document, which (i) explains that DACA recipients are "not unlawfully present"; (ii) directs ICE and CBP "to prevent qualifying individuals from being apprehended, placed into removal proceedings, or removed"; and (iii) requires consideration of the DACA criteria for applicants who are in removal proceedings, have a final order of removal, or have a voluntary departure order, Ulin Dec., Ex. B, "DACA FAQ," Q1, Q9, Q10; and

(5) DHS's Kelly Memo and accompanying statements explaining its scope, which make clear that the DACA Memo, DAC SOP, DACA FAQ, and any guidelines incorporated or encompassed by those documents continue to govern the rights of DACA recipients and the scenarios in which Defendants may deem them enforcement priorities—*i.e.*, disqualifying criminal history and/or public

safety concerns, and ***not*** alleged offenses or suspicions of wrongdoing without conviction or other neutral adjudication, or stated public safety concerns.

D. MANDATORY DACA TERMINATION GUIDELINES

DHS's DACA SOP establishes the terms governing Defendants' implementation of the DACA program and the potential bases for DACA status and EAD termination. *See* Ulin Dec., Ex. I, Aug. 28, 2013 DACA SOP. As explained by this and other courts, the SOP is binding on all agencies and personnel administering the terms of the program. *See, e.g.*, Dkt. 12 at 5-6. The SOP incorporates the 2011 USCIS Memo, and adopts its mandatory guidelines for certain DACA termination decisions. Ulin Dec., Ex. H, USCIS Memo. Where termination is concerned, Chapter 14 of the DACA SOP and the incorporated 2011 USCIS Memo provide six potential bases for termination, and the procedures to be followed when each potential basis is implicated:

(1) "If it comes to the attention of an officer that removal was deferred under DACA in error, the officer should reopen the case on Service motion and issue" an NOIT, with 33 days to overcome the "grounds cited."

(2) "If it comes to the attention of an officer that an individual committed fraud in seeking deferral of removal under DACA, the officer should reopen the case on Service motion and issue" an NOIT, with 33 days to overcome the "grounds cited."

(3) Generally, "[i]f disqualifying criminal offenses or public safety concerns . . . arise after" DACA status is granted, the recipient must receive an NOIT and "33 days to file a brief or statement contesting the grounds cited."

(4) If USCIS suspects an Egregious Public Safety ("EPS") concern, it must send the case to the Background Check Unit DACA Team ("BCU"), which must refer the case to ICE. Ulin Dec., Ex. I, Aug. 28, 2013 DACA SOP, Ch. 14; Ex. H at 61-63, USCIS Memo. "All EPS cases must be referred to ICE" for "an opportunity to decide if, when, and how to issue an NTA . . . . USCIS will not issue an NTA in these cases if ICE declines to issue an NTA. . . . This referral process is utilized in order to give ICE the opportunity to determine the appropriate course of action before USCIS adjudicates the case." *Id.*, Ex. H at 61-63, USCIS Memo. ICE's issuance of an NTA after an EPS referral is meant to allow USCIS to "proceed with adjudication, . . . taking into account the basis for the NTA." *Id.* If ICE issues an NTA based on an EPS concern, USCIS will terminate DACA status "automatically," without an NOIT or opportunity to respond. Neither the DACA SOP nor the USCIS Memo authorizes termination without notice when CBP issues an NTA or in the absence of an EPS determination by ICE. In such instances, an NOIT and 33 days to respond are required.

(5) "If national security concerns arise after removal has been deferred under DACA, the case should go through the [Controlled Application Review and Resolution Program], through established CARRP protocols."

(6) "If after consulting with ICE, USCIS determines that exercising prosecutorial discretion after removal has been deferred under DACA is not consistent with [DHS's] enforcement priorities, and ICE does not plan to issue an NTA, the officer should refer the case to HQSCOPS, through the normal chain of command, to determine whether or not a[n] NOIT is appropriate." If USCIS issues an NOIT and "it is determined that the case warrants final termination, the officer will issue DACA 603 – Termination Notice [Enforcement Priority; Not Automatically Terminated] from the Appendix I."

E. BENEFITS CONFERRED BY DACA STATUS

DACA status confers numerous benefits on a recipient. Chief among them is "authoriz[ation] by DHS to be present in the United States, and [] therefore considered by DHS to be lawfully present during the period deferred action is in effect." Ulin Dec., Ex. B, DACA FAQ, Q1; *see Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1058-59 (9th Cir. 2014); *Texas v. U.S.*, 809 F.3d at 148. Because DACA recipients are "lawfully present," DHS and USCIS have directed ICE and CBP "to prevent qualifying individuals from being apprehended, placed into removal proceedings, or removed." Ulin Dec., Ex. B, DACA FAQ, Q9.

Another "core benefit" (Dkt. 12 at 12) of DACA status is the EAD, conferring the right to lawful employment "for the period of deferred action." Ulin Dec., Ex. B, DACA FAQ, Q1; *see* 8 C.F.R. § 274a.12, (c)(33). In addition to the "ability to financially provide for himself and his family" (Dkt. 12 at 12), the EAD provides a DACA recipient a Social Security Number, which opens the door to and encourages investment in ancillary benefits typically unavailable or difficult to obtain for undocumented immigrants, including the ability to open bank accounts, obtain credit cards, start businesses, purchase homes and cars, and obtain state financial aid for higher education. In short, "lawful presence removes the categorical bar" to employment, participation in crucial elements of social, civic, and economic life, and certain public benefits. *Texas v. U.S.*, 809 F.3d at 148.

F. MR. GONZALEZ'S DACA STATUS AND EMPLOYMENT

Mr. Gonzalez was brought to the United States from Mexico sixteen years ago, as an eight-year-old. He has lived in San Diego ever since. Declaration of Alberto Luciano Gonzalez Torres ("Gonzalez Dec.") ¶ 1. After graduating on time from Altus Charter High School in 2011, Mr. Gonzalez was unable to secure lawful employment for nearly two years because he was unwilling to misrepresent his immigration status. *Id.* ¶ 2.

But in early 2013, after extensive background and criminal record checks, USCIS granted him DACA status, an EAD, and a Social Security Number. *Id.* ¶¶ 3-4; Ulin Dec., Ex. J (initial DACA approval notice). In late 2014, after more background checks, USCIS granted renewal through December 22, 2017. *Id.* ¶ 4; Ulin Dec., Ex. K (DACA renewal approval notice).[2]

Mr. Gonzalez quickly obtained lawful employment with Gate Gourmet after being granted DACA status. *Id.* ¶ 5. Because of the nature of his work (preparing food and equipment for commercial aircraft), he had to pass additional screening, including interviews, drug tests, security clearance protocols, and EAD verification. *Id.* Mr. Gonzalez was a dutiful and trusted employee for nearly three years. *Id.* ¶¶ 5-6. He was saving up to buy his own car to more easily commute to work. *Id.* ¶ 7. When USCIS initially terminated Mr. Gonzalez's DACA status and EAD, he voluntarily informed his employers, who told him they had to let him go, but asked that he reapply upon restoration of his EAD. *Id.* ¶ 8.

Mr. Gonzalez's employers have praised his "work ethic, dedication, and consistency." One of them wrote to USCIS to "recommend that he continue to be provided the opportunity to be gainfully employed here" because he "would [be] highly recommended [] to any future employer." Ulin Dec., Ex. L at 96 (NOIT response).

[2] In 2015, USCIS further screened all DACA recipients for suspected gang affiliations and found no reason to alter Mr. Gonzalez's DACA status.

G. MR. GONZALEZ'S ARREST AND RELEASE

On May 6, 2016, an acquaintance known to Mr. Gonzalez only as "Adolfo" asked him to come to his house and care for his dogs while Adolfo was out of town. Mr. Gonzalez agreed, having done so in the past without issue. Gonzalez Dec. ¶ 9. He arrived at the house sometime between 11:30 a.m. and 1:00 p.m. *Id.* ¶ 9. He was surprised to find two other people already at the house—a man Mr. Gonzalez recognized only as "Romeo" and a woman he did not recognize. *Id.* ¶ 9. After tending to the dogs, Mr. Gonzalez considered leaving them in the care of Romeo and the woman. But without a car, he was unable to leave until his sister arrived to take him to his early-evening-to-early-morning work shift. *Id.* ¶ 10.

At roughly 4:00 p.m., law enforcement officers knocked on the front door. *Id.* ¶ 11. Mr. Gonzalez explained to the officers that it was not his home and that he could not let them in without a search warrant. *Id.* ¶ 11. The officers stopped trying to enter the house or speak to Mr. Gonzalez, though they continued to surround the house. *Id.* ¶ 11. About an hour later, a man Mr. Gonzalez did not recognize arrived, claiming to be the owner and asking Mr. Gonzalez to exit. *Id.* ¶ 12. Mr. Gonzalez had to leave for work soon, and he came outside. *Id.* ¶ 13.

Relying on Defendants' assurances—publicly and in his DACA approval notices—that DACA status barred his apprehension as long as he had not committed any crime, Mr. Gonzalez informed the officers of his DACA status and his need to get to work. *Id.* ¶ 14. He showed them his EAD with C-33 DACA classification. *Id.* ¶ 14. Nevertheless, CBP told him he was going to be detained because he was not in the country legally and his DACA status did not matter. *Id.* ¶ 15. An officer handcuffed him, while two others entered the house. *Id.* ¶¶ 16-17. A few minutes later—without further questioning or explanation—the first officer put him in a police car and took him away. Mr. Gonzalez did not see or hear that officer speak to or engage with anyone who went inside the house. *Id.* ¶ 17.

Mr. Gonzalez spent the next two days in immigration detention—threatened with vague insinuations of wrongdoing. His repeated refrain was, "I don't understand why I'm being detained." *Id.* ¶ 18. Eventually, Mr. Gonzalez agreed to let officers review his cell phone contacts and communications. As they pored over Mr. Gonzalez's innocuous contact list and text messages, he saw the disappointment in their faces. *Id.* ¶ 19. After the initial questioning, Mr. Gonzalez was twice transferred to other detention facilities, where Defendants simply ignored him for nearly a month. The questioning ceased entirely. *Id.* ¶¶ 21-22. After two days of threats, abuse, unsubstantiated accusations, and a coerced phone search, the officers clearly realized that Mr. Gonzalez was not of any interest.

On June 1, 2016, Immigration Judge McSeveney ordered Mr. Gonzalez released on just $5,000 bond after determining that he was not a public safety concern. DHS waived appeal. Mr. Gonzalez was finally released on June 3, 2016. *Id.* ¶ 23; *see* Ulin Dec., Ex. M (bond and release order of Immigration Judge).

In the course of this litigation, Defendants have subsequently alleged that CBP encountered twelve undocumented immigrants in the attic of the house, and that the next day, three of the twelve identified a person "resembling" Mr. Gonzalez in photo lineups. 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. Mr. Gonzalez has repeatedly and unambiguously disavowed any knowledge of or involvement in whatever wrongdoing might have occurred at the house—to CBP officers during his detention, to Immigration Judge McSeveney at his bond hearing, in a sworn declaration submitted to this Court, and in his response to USCIS's NOIT. Judge McSeveney determined that Mr. Gonzalez was credible and did not present a public safety concern. And Defendants' own conduct strongly suggests that they concluded long ago that he was not involved.

In nearly two years since his release, Mr. Gonzalez has never been charged with a crime or had another encounter with law enforcement. Throughout the course of this litigation, Defendants have made clear that Mr. Gonzalez has not been under investigation for any wrongdoing surrounding the events of May 6, 2016 or otherwise since those two days of questioning immediately following his arrest. Indeed, Defendants recently explained on December 8, 2017 that they "do not take issue with [Mr. Gonzalez's] ability to meet the DACA guidelines going forward" (Dkt. 23-2 at 8), establishing their admission of the obvious: Mr. Gonzalez has no disqualifying criminal offenses and does not pose a threat to national security or public safety.

H. USCIS'S UNLAWFUL "AUTOMATIC" TERMINATION OF MR. GONZALEZ'S DACA STATUS AND EAD

On May 7, 2016—just one day after Mr. Gonzalez was arrested—CBP issued him an NTA. Its sole charge was unlawful presence in the United States under 8 U.S.C. § 1182(a)(6)(A)(i). Ulin Dec., Ex. N (NTA). USCIS sent him a "Notice of Action" dated May 23, 2016, purporting to automatically terminate his DACA status and EAD. Ulin Dec., Ex. O ("Notice of Action"). On September 29, 2017, this Court vacated and preliminarily enjoined that termination as violating the DACA SOP and the APA. The Court ordered Defendants to "fully comply with the DACA SOP should Defendants elect to reconsider Plaintiff's DACA status" and to accept his DACA renewal application. Dkt. 12 at 13. Mr. Gonzalez timely submitted a renewal application upon his DACA status reinstatement.

I. THE NOIT PROCESS

Six weeks after the Court entered its current Preliminary Injunction—and a year and a half after Defendants ceased suspecting or investigating Mr. Gonzalez of criminality—on November 13, 2017, USCIS issued Mr. Gonzalez an NOIT. Its sole stated reasoning is:

> Since DHS has determined that you are an enforcement priority and ICE has informed USCIS that it is actively pursuing your removal, USCIS will not contemporaneously

> conclude that removal action should continue to be deferred in your case.

Ulin Dec., Ex. P ("NOIT").

Of the six potential bases for DACA termination defined in the DACA SOP, *see* supra at 8-9, the NOIT cites only number 6 ("exercising prosecutorial discretion after removal has been deferred under DACA is not consistent with the Department of Homeland Security's enforcement priorities"). The NOIT does not identify the asserted enforcement priorities or any source for them. Nor does it cite a single fact (other than ICE's litigation of removal proceedings for unlawful presence) on which DHS or USCIS would rely in determining whether Mr. Gonzalez indeed fits DHS's asserted enforcement priorities.[3]

Mr. Gonzalez timely responded to the NOIT. The response explains that Mr. Gonzalez continues to meet all of the objectively verifiable DACA criteria that have always informed Defendants' DACA status determinations, including the lack of any disqualifying criminal offenses and Judge McSeveney's determination that he was credible and did not pose a threat to public safety. Ulin Dec., Ex. L at 88, 92 (NOIT response). It goes on to explain Defendants' apparent agreement with the Immigration Judge's public safety determination. *Id.* at 93.

The response reminds Defendants that the litigation of removal proceedings for unlawful presence has never been a bar to DACA status under the DACA Memo, DACA SOP, and DACA FAQ, and that the litigation of those proceedings would not "provide a reasoned basis for terminating DACA." *Id.* at 89-91 (citing *Inland Empire—Immigrant Youth Collective v. Duke*, 2017 WL 5800061, at *6-7 (C.D. Cal. Nov. 20, 2017) ("*IEIYC*"); *Judulang v. Holder*, 565 U.S. 42 (2011)).

Forced to address the NOIT's assertion that he is now an "enforcement priority" even though it "does not explain why" (*id.* at 93), Mr. Gonzalez's

[3] On November 16, 2017, the Immigration Judge terminated Mr. Gonzalez's removal proceedings without prejudice. On December 8, 2017, ICE issued Mr. Gonzalez another NTA. It again alleges nothing but unlawful presence under 8 U.S.C. § 1182(a)(6)(A)(i). Ulin Dec., Ex. Q (NTA).

response recounts the facts surrounding his arrest and release by CBP in May 2016, his sworn denials of wrongdoing, and the determinations by Judge McSeveney and DHS that he does not pose a threat to public safety. He explains:

- He has never been charged with or convicted of any crime in any forum, and therefore does not have a DACA disqualifying (or any other) criminal offense.
- DHS has been fully aware of his encounter with CBP for more than a year and a half, and has allowed him to continue living freely in San Diego without ever investigating him further.
- The Kelly Memo's declaration that all persons who are not legally present in the United States or have been suspected of some wrongdoing are enforcement priorities expressly does not apply to DACA recipients—and therefore cannot form the basis of an assertion that Mr. Gonzalez is an enforcement priority because ICE initiated removal proceedings against him on the sole charge of unlawful presence.
- "[T]o the extent that the NOIT—which does not even mention any criminal allegations—might be read to import them, Mr. Gonzalez is being deprived of his due process rights, where the termination of DACA and employment authorization (and the liberty and property interests associated with the right to remain in the United States and work lawfully) hinges on un-stated and uncharged criminal suspicions informally adjudicated without the Constitutional and statutory protections of the criminal justice system." *Id.* at 94.

USCIS issued its purported termination notice within three days of receiving Mr. Gonzalez's response—on December 21, 2017, the day before his DACA status was set to expire. *See* Ulin Dec., Ex. R, "Termination Notice." The Termination Notice belatedly does what the NOIT neglected to do: it explains what facts USCIS deems relevant to its decision on Mr. Gonzalez's DACA status. It does not, however, explain why—in the absence of any disqualifying criminal offenses ***or any statement that Mr. Gonzalez poses a threat to public safety***—his continued DACA status is "not consistent with the DHS's enforcement priorities."

The Termination Notice relies on ICE's litigation of removal proceedings in Immigration Court. And it reflects a USCIS officer's determination—following an informal consideration—that Mr. Gonzalez's sworn statements disavowing criminality are "not credible." *Id.*, Ex. R at 196. That determination is based on three factors: (1) Mr. Gonzalez's presence at the house; (2) that the arrest record

issued the day after the incident describes Mr. Gonzalez as "nervous" when a slew of federal officers descended on him while he was minding his own business; and (3) "that three individuals did identify you in connection with their smuggling." *Id.* Of course, it ignores that the same arrest record: (1) explains that whoever allegedly smuggled those individuals into the house did so several hours before Mr. Gonzalez arrived; (2) identifies two other male individuals at the house when the officers arrived; and (3) sheds no light on the circumstances of the three (out of twelve) purported identifications, which have never been examined by Mr. Gonzalez or assessed by a neutral arbiter. *See* Ulin Dec., Ex. S (DHS Form I-213).

The Termination Notice acknowledges that Mr. Gonzalez has "not been charged criminally or in immigration court for any crime related to the events of May 6, 2016." And USCIS does not dispute that he "meet[s] all other DACA criteria." Ulin Dec., Ex. R at 196, Termination Notice. Indeed, nowhere does USCIS claim that Mr. Gonzalez poses a threat to national security or public safety. The Termination Notice simply asserts USCIS's unfettered "ultimate discretion to determine whether deferred action is appropriate in any given case." *Id.*[4]

III. ARGUMENT

A. PRELIMINARY INJUNCTION STANDARD

To obtain a preliminary injunction, a plaintiff must demonstrate that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Under the Ninth Circuit's sliding scale approach, "[s]erious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as" the irreparable injury and public interest elements are satisfied. *Alliance for the Wild Rockies v. Cottrell*,

[4] On December 28, 2017, USCIS issued Mr. Gonzalez a purported denial of his renewal application as well. Even though the Termination Notice has yet to go into effect, the denial notice relies solely on the unlawful termination. *See* Ulin Dec., Ex. T (purported renewal denial notice).

632 F.3d 1127, 1135 (9th Cir. 2011). In other words, "[i]f the balance of harm tips decidedly toward [Mr. Gonzalez], then [he] need not show as robust a likelihood of success on the merits as when the balance tips less decidedly." *Rep. of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988); *see Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987) ("fair chance of success on the merits" and a "significant threat of irreparable injury").

B. MR. GONZALEZ IS LIKELY TO SUCCEED ON HIS APA AND CONSTITUTIONAL CLAIMS—OR AT LEAST HAS RAISED SERIOUS QUESTIONS ABOUT THE LAWFULNESS OF HIS DACA TERMINATION

1. None of the INA's Jurisdictional Bars Apply

This Court has already correctly held that neither 8 U.S.C. § 1252(g) nor 8 U.S.C. § 1252(b)(9) strips the Court of jurisdiction to decide the claims at issue here. Section 1252(g) "does not deprive the Court of jurisdiction to entertain Plaintiff's claim that the termination of his DACA status did not comply with the non-discretionary DACA SOP" because the Court (1) may consider "a purely legal conclusion that does not challenge the Attorney General's discretionary authority, even if the answer . . . forms the backdrop against which the Attorney General later will exercise discretionary authority," and (2) "retain[s] jurisdiction to review constitutional claims, even when those claims address [agency] discretion." Dkt. 12 at 8 (citations omitted). And Section 1252(b)(9) does not apply to Mr. Gonzalez's "procedural challenge to termination of his DACA status, an issue independent from any removal proceedings." Dkt. 12 at 9.

Defendants may argue that Mr. Gonzalez is now challenging the outcome of his DACA termination proceedings. He is not. Mr. Gonzalez is again challenging Defendants' failure to abide by their own non-discretionary guidelines. He is not asking the Court to define Defendants' enforcement priorities, but merely to require Defendants to abide by their own existing definitions, as delineated in the DACA Memo, DACA SOP, Kelly Memo, and DHS statements. He also brings constitutional claims over which the Court "retains jurisdiction."

2. Mr. Gonzalez Is Likely to Succeed on the Merits of His APA Claims

Under the APA, a court must "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's failure to follow its own internal policies is a sufficient ground to set aside its action. *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004) (collecting cases requiring agencies to "abide by … internal policies," including in immigration context). Agency action must demonstrate "reasoned decision-making." *Judulang*, 565 U.S. at 52-53.

a. Defendants Ignored Their Own DACA Termination Policy

Federal agencies must comply with their own guidelines, policies, and procedures "[w]here the rights of individuals are affected." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). An agency is "bound by its regulations so long as they remain operative,"—*i.e.*, until the agency properly "repeal[s] them and substitute[s] new rules in their place." *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (discussing INS's internal deferred action instructions). Unexplained departure from established practice is arbitrary and capricious and must be set aside. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

Chapter 14 of the DACA SOP enumerates six bases for DACA termination. If a DACA termination does not comport with one of those six bases, the termination does not comply with the SOP and is therefore arbitrary action that violates the APA and must be set aside.[5]

Defendants do not assert any of the SOP's first five bases for termination—error; fraud; EPS concerns; "disqualifying criminal offenses" or "public safety concerns"; or "national security concerns—in Mr. Gonzalez's NOIT or

[5] As an initial matter, USCIS's NOIT was deficient under the SOP because it did not provide the "grounds" upon which USCIS intended to terminate Mr. Gonzalez's DACA status. Without conveying the guidance upon which the determination would be made or the facts that USCIS deemed relevant, Mr. Gonzalez was forced to guess how he might "overcome" the "adverse grounds" that the SOP contemplates an NOIT will contain. Ulin Dec., Ex. I at 80, Aug. 28, 2013 DACA SOP.

Termination Notice. *See supra* at 13-16. The only asserted basis for his termination is the sixth—that deferred action is ***"not consistent with DHS's enforcement priorities."*** In making that determination, Defendants departed from their own binding policies and thus violated the APA.

DHS has defined a two-tiered system of enforcement priorities via the Kelly Memo, under which the DACA program remains operative:

(1) DACA recipients continue to be governed by the DACA Memo and DACA SOP. If 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. A reversal of that non-priority status requires a finding that:

- DACA status was conferred in error; or
- the individual committed fraud in seeking DACA status; or
- the individual has since been convicted or adjudicated guilty of a disqualifying criminal offense (felony, significant misdemeanor, or multiple misdemeanors) or presents "significant public safety concerns"[6]; or
- the individual presents an EPS concern; or
- the individual presents a national security concern.

(2) On the other hand, an individual without DACA status may be an enforcement priority "regardless of the basis for removability" if he has merely "been charged with any criminal offense that has not been resolved" or is suspected of having "committed acts which constitute a chargeable criminal offense." Ulin Dec., Ex. D at 31, Kelly Memo.

Mr. Gonzalez's Termination Notice does not allege error or fraud, that he has a disqualifying criminal conviction or adverse adjudication, that he presents an EPS or national security concern, or that he presents a public safety concern. Indeed, the word "safety" does not appear in either the NOIT or the Termination

[6] *See* Ulin Dec., Ex. U at 209, Apr. 4, 2013 DACA SOP.

Notice; and the word "charge" appears only in acknowledging the lack of any. Rather, Defendants purport to label Mr. Gonzalez an enforcement priority on grounds applicable only to non-DACA recipients—*i.e.*, a USCIS officer's determination through informal review of an NOIT and response that Mr. Gonzalez's sworn statements disavowing criminality are "not credible" and the suspicion of that officer and one or more unidentified individuals at ICE that Mr. Gonzalez committed criminal acts, which Defendants notably have neglected even to investigate for nearly two years. This is a failure to follow unambiguous internal rules. Tellingly, the only other basis for the assertion that Mr. Gonzalez is an "enforcement priority" is ICE's issuance of an NTA against him for nothing more than unlawful presence. Of course, that is not "a reasoned basis for terminating DACA." *IEIYC*, 2017 WL 5800061, at *6-7.

In short, Defendants have applied the non-DACA definition of "enforcement priority" to a DACA recipient, in violation of their own policies in the Kelly Memo and DACA SOP. *See Coyotl*, 261 F. Supp. 3d at 1344 n.7 ("Defendants' attempt to rely on the Kelly Memo to justify their decisions reinforces the arbitrariness of their actions against Plaintiff, when the Kelly Memo expressly exempts the DACA program from its scope."); *compare* Ulin Dec., Ex. U at 208, Apr. 4, 2013 DACA SOP ("When a DACA requestor's RAP sheet indicates an arrest, it is *necessary* to determine whether the DACA requestor has been *convicted* of a crime.") (emphases added), *with* Ulin Dec., Ex. D at 31, Kelly Memo (prioritizing non-DACA recipients "*charged* with any criminal offense that has not been resolved" or *suspected* of "committ[ing] acts which constitute a chargeable criminal offense") (emphases added).[7]

[7] Defendants may argue that defining "enforcement priorities" for DACA recipients by reference to the other bases for termination renders the enforcement priority section of Chapter 14 redundant. Not so. That section simply reflects the well-settled truth that an agency "may repeal [its policies] and substitute new rules in their place." *Romeiro de Silva*, 773 F.2d at 1025. But Defendants are "bound by" the existing rules "so long as they remain operative." *Id.* Perhaps Defendants would have been within their rights to change the criteria for DACA termination or re-

b. Defendants' Action Is Arbitrary and Capricious

As Defendants repeatedly remind the Court, DACA status decisions are an exercise of discretion. An agency must exercise discretion through "reasoned decision-making." *Judulang*, 565 U.S. at 52-53. A reviewing court must "examin[e] the reasons for agency decisions—or, as the case may be, the absence of such reasons." *Id.* at 53. The exercise of discretion exercised pursuant to promulgated rules cannot be a standardless foray. On the contrary, the agency must "cogently explain why it has exercised its discretion in a given manner." *Nat'l Parks Conserv. Assoc. v. EPA*, 788 F.3d 1134, 1142 (9th Cir. 2015). Pursuant to those rules, immigration decisions must be based on "relevant factors." *Judulang*, 565 U.S. at 55. "An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC*, 556 U.S. at 515. And the agency must abide by its stated rationale, not *post hoc* rationalizations. *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156 (1962).

Defendants may disavow having applied the Kelly Memo's new enforcement priorities, and insist that their attempt to terminate Mr. Gonzalez's DACA status is based on and comports with the DACA Memo and SOP. Their action remains arbitrary, capricious, and an abuse of discretion all the same. In a single paragraph of the Termination Notice, USCIS (1) acknowledges that Mr. Gonzalez has "not been charged criminally or in immigration court for any crime related to the events of May 6, 2016," (2) does not dispute that Mr. Gonzalez "meet[s] all other DACA criteria" (which of course includes the lack of any public

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define the prioritization of certain DACA recipients in the Kelly Memo or other guidance. Indeed, they made several other changes to the DACA program, including the elimination of advance parole and the end of accepting applications. But the Kelly Memo and DHS's subsequent explanations delineate the agency's tiered priorities and make clear that the DACA guidelines remain operative without any change in DHS's stated position in the DACA Memo that DACA recipients are "low priority case[s]" and do not "meet [DHS's] enforcement priorities." *See supra* at 6 ("We rely on guidance that was put in place in 2012 when the DACA program was initiated. That's available on USCIS's website and will tell you what the priorities are for Immigration and Customs Enforcement and what they are for the Department at large. Those priorities have not changed.").

safety concerns), and (3) tells him that those considerations have no bearing on whether he is an enforcement priority. Ulin Dec., Ex. R at 196, Termination Notice. USCIS's position amounts to nothing less than assertion of the same unfettered discretion this Court already "categorically reject[ed]." Dkt. 12 at 10.

In *Nicholas v. INS*, 590 F.2d 802 (9th Cir. 1979), the Ninth Circuit explained that an internal deferred action policy with "express criteria" and "periodic review of non-priority status" "clearly and directly affects substantive rights," including "the ability of an individual subject to its provisions to continue residence in the United States." *Id.* at 807-08. Accordingly, "non-priority status" cannot be terminated "at the convenience of the [agency]." Rather, the status depends on the recipient's continued eligibility under the "relevant" guidelines. *Id.*; *see McDonald v. Gonzales*, 400 F.3d 684, 686-87 (9th Cir. 2005) ("Current INS policy is reflected in an INS memo" that "lists five factors for the agent to weigh," and "[h]ad these instructions been followed in [this] case, it is hard to image that [the plaintiff] would today be facing removal.").

Because 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 no basis in "reasoned decision-making," or factors that are relevant to DACA status decisions. It is based on a USCIS officer's failure to comply with the DACA Memo and the termination provisions of the DACA SOP. *See Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005) (agency abuses its discretion when it fails to provide a "reasoned explanation for its actions"); *NRDC, Inc. v. EPA*, 966 F.2d 1292, 1305 (9th Cir. 1992) (disparate treatment and departure from "normal . . . process based on . . . unsubstantiated assumption[s]" is "arbitrary and capricious"); *U.S. v. One 1985 Mercedes*, 917 F.2d 415, 422 (9th Cir. 1990) ("Where the government does not act in a consistent and predictable manner, it runs the risk of violating the [APA] and of having its action invalidated.").

Moreover, because the allegations in Mr. Gonzalez's arrest record and Termination Notice have never been tested in a competent forum, the Termination Notice is clearly based on incomplete information, and for that additional reason should be set aside. *See Bertelsen v. Hartford Life Ins. Co.*, 1 F. Supp. 3d 1060 (E.D. Cal. 2014) (arbitrary and capricious to revoke—based on incomplete information—eligibility for benefits that was based on previous careful examinations); *Petition of Guerrero-Morales*, 512 F. Supp. 1328, 1329-30 (D. Minn. 1981) (in reviewing denial of deferred action, court must look not only to evidence supporting administrative finding, but also take into account anything in the record that fairly detracts from its weight).

The only judicial determination of Mr. Gonzalez's credibility resulted in his immediate release from detention and a determination that he poses no threat to public safety. Defendants did not object to or appeal that determination, and have done nothing to impede Mr. Gonzalez's peaceful return to the San Diego community for nearly two years. He has not even been investigated again after two days of questioning in May 2016. Consistent with those actions, Defendants continue to acknowledge that he does not pose any safety threat. They are simply making the bare assertion that he is an "enforcement priority" in disregard for the DACA Memo and DACA SOP. By purporting to unmoor enforcement priority determinations from the carefully delineated criteria of the DACA Memo and SOP, Defendants seek to impose a "method for disfavoring deportable aliens . . . that neither focuses on nor relates to an alien's fitness to remain in the country." That is arbitrary and capricious. *Judulang*, 565 U.S. at 55.

3. Mr. Gonzalez Is Likely to Succeed on the Merits of His Due Process Claims

If the Court believes that the DACA SOP countenances Defendants' actions, it should nevertheless set aside Mr. Gonzalez's NOIT and Termination Notice for failure to comply with the Due Process Clause of the Fifth Amendment, which

applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *U.S. v. Peralta-Sanchez*, 847 F.3d 1124, 1131 (9th Cir. 2017); *see Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). The Constitution "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). DACA status confers both liberty and property interests within the meaning of the Due Process Clause, and any deprivation of those interests must comport with the "essence of due process": ***adequate*** notice and "the opportunity to be heard at a ***meaningful time*** and in a ***meaningful manner***." *Id.* at 333, 348-49 (emphases added).

a. DACA Status Confers Liberty and Property Interests

Liberty and property rights are a function of "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). Defendants have conferred meaningful legal rights on DACA beneficiaries—including lawful presence, employment authorization, and access to certain federal benefits. In so doing, they simultaneously conferred a constitutional right not to be deprived of those interests without due process. *See Regents v. DHS*, 2018 WL 339144, at *25 (N.D. Cal. Jan. 9, 2018) ("Defendants' attempt to portray DACA as a program that did not generate reliance interests is unconvincing [because] DACA recipients . . . developed expectations based on the possibility that [they] could renew their deferred action and work authorizations for additional two-year periods.").

The "Constitution itself" confers the "narrow liberty interest" of Defendants' "strict compliance" with the terms of the DACA program. *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 957 (9th Cir. 2012). More broadly, the most obvious liberty interest conferred by DACA status is the fact that DHS considers a DACA recipient—who, by definition, has lived in the United States since at least 2007—"lawfully present." As the Ninth Circuit has explained, even a person who "has

run some fifty yards into the United States" and is immediately apprehended "confronts the loss of a ***significant liberty interest***." *U.S. v. Raya-Vaca*, 771 F.3d 1195, 1203 & n.6 (9th Cir. 2014) (emphasis added). Liberty also encompasses the ability to work, raise a family, and "form the other enduring attachments of life." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). That is what the DACA program conferred when it encouraged undocumented "Dreamers" like Mr. Gonzalez to come forward and weave themselves into the country's social fabric by seeking employment, starting businesses, and buying homes and cars on the understanding that as long as they kept their word to abide by the law, Defendants would deem them lawfully present.

Property interests encompass more than tangible property and include any claim of entitlement that stems from government-created "rules or understandings that secure certain benefits." *Nozzi v. Housing Auth. of LA*, 806 F.3d 1178, 1190-91 (9th Cir. 2015). Mr. Gonzalez's employment authorization is precisely that. From 2011 to 2013, he could not find work because of his immigration status. Defendants remedied that in 2013 by granting him an EAD and Social Security Number, both of which they renewed in 2014. Once Defendants have conferred such a crucial benefit, they are compelled to provide a fair and adequate process before taking it away. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) (because a driver's license may become essential to the pursuit of one's livelihood, it cannot be revoked without due process); *Morrissey*, 408 U.S. at 482 (parole revocation requires due process because of the implicit promise that it will not be stripped absent a failure to abide by its conditions); *Singh v. Bardini*, 2010 WL 308807, at *7 (N.D. Cal. Jan. 19, 2010) ("Even if there is no constitutional right to be granted asylum, . . . once granted, asylum status can[not] be taken away without any due process protections.") (citation omitted).

In short, DACA status creates more than a unilateral expectation of lawful presence and employment authorization—it constitutes Defendants' "pledge" not

to deprive recipients of those interests without due process. *Arizona Dream Act Coalition*, 757 F.3d at 1066. Extending lawful presence to DACA recipients thus "create[s] a constitutionally protected liberty interest," *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983), and the EAD creates an equally protected property interest.

b. Defendants Have Violated Procedural Due Process

The three-part *Eldridge* test for Procedural Due Process governs the constitutionality of Defendants' deprivation of Mr. Gonzalez's liberty and property interests. The Court must balance (1) the nature of Mr. Gonzalez's interests and the degree of potential deprivation, (2) the fairness and reliability of existing procedures and the value of additional procedural safeguards, and (3) the public interest. 424 U.S. at 335. By purporting to place the determination of whether Mr. Gonzalez committed a crime nearly two years ago in the hands of a USCIS officer via an informal procedure without any hearing, opportunity to confront evidence, or cross-examine witnesses, Defendants have not provided a sufficiently fair and reliable procedure. *See McDonald*, 400 F.3d at 690 ("[I]n severity [deportation] surpasses all but the most Draconian criminal penalties. We therefore cannot deem wholly irrelevant the long unbroken tradition of the criminal law that harsh sanctions should not be imposed where moral culpability is lacking.").

First, Mr. Gonzalez's interests could hardly be more significant. DACA termination threatens to completely deprive him, *inter alia*, of his basic ability to remain in the only country he has ever called home, where he was raised; to avoid removal to an unfamiliar country where he has not lived or even visited since he was a small child; and to earn a living. *See* Dkt. 12 at 12 ("The [C]ourt concludes that Plaintiff will suffer significant irreparable harm in the absence of an injunction by losing his DACA status.").

Second, "freedom from arbitrary adjudicative procedures is a substantive element of one's liberty, and due-process safeguards must be analyzed accordingly." *Castillo v. Cnty. of Los Angeles*, 959 F. Supp. 2d 1255, 1262 (C.D.

Cal. 2013). In the absence of any criminal charge or adjudication, or a stated public safety concern, it is anything but fair or reliable to allow a USCIS officer to determine Mr. Gonzalez's credibility or his involvement in criminal conduct via an informal paper process ***nearly two years after all investigation ceased***, especially where Mr. Gonzalez's ability to defer adverse immigration action hangs in the balance. As an initial matter, Mr. Gonzalez's NOIT provided the sort of "bare notice" that is "plainly" insufficient to satisfy due process. *Gete v. INS*, 121 F.3d 1285, 1297 (9th Cir. 1997). It simply asserted, without citing to a single *fact* or source of guidance, that Mr. Gonzalez is an enforcement priority undeserving of continued DACA status. This alone suffices to illustrate the inadequacy of the process used. *Id.*

More troublingly, the Termination Notice deems Mr. Gonzalez a criminal and imposes a serious consequence—the loss of DACA status—despite his repeated and sworn declarations to the contrary. It belatedly identifies the facts that USCIS considers relevant, but offers no opportunity to rebut them. The Supreme Court has explained that in "almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Mr. Gonzalez is effectively being labeled a criminal—the paradigm case for the right to confront adverse evidence. In these circumstances, the value of additional safeguards is paramount. *See Hicks v. Colvin*, 2016 WL 7436050, at *3 (E.D. Ky. Dec. 21, 2016) (hearing devoid of opportunity to rebut government's factual assertions is not meaningful and violates due process) (citing *Armstrong v. Manzo*, 380 U.S. 545 (1965)).[8] However, Defendants have never even identified the witnesses against Mr. Gonzalez, let alone afforded him an opportunity to

[8] Because an informal determination of criminality with serious consequences is anathema to our "concept of ordered liberty," and because removal from the country in the absence of any culpability would visit such grievous harm, Defendants' actions "shock the conscience" and also amount to a violation of Mr. Gonzalez's substantive due process rights. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998).

confront them, to learn what happened to other people arrested at the house or to "Adolfo," or to test the circumstances or reliability of the photo lineups Defendants deem so important, or to examine either the three individuals who allegedly identified him in those photo lineups or the nine individuals who did not.

Third, Defendants have acknowledged the value of DACA recipients to this country, and have established procedures to protect them. The public interest is not served by arbitrarily stripping Mr. Gonzalez of his EAD, leaving him unemployed and financially vulnerable. "Complying with [their] constitutional obligations . . . would not be unduly burdensome." *Gete*, 121 F.3d at 1298. Defendants already have an avenue for administrative review of the credibility of any criminal suspicions against Mr. Gonzalez that does not amount to a full-blown criminal trial, but nevertheless puts the decision in the hands of a competent neutral arbiter whose expertise is actually suited to such determinations and allows Mr. Gonzalez to confront witnesses and test the evidence against him. Defendants can issue an NTA for something more than mere unlawful presence and adjudicate the question of whether Mr. Gonzalez was involved in the alleged criminal activity that forms the basis for his DACA termination in Immigration Court.

C. MR. GONZALEZ IS SUFFERING IRREPARABLE HARM

Defendants' termination of Mr. Gonzalez's DACA status is causing him at least three forms of immediate and irreparable harm. *First*, he is being deprived of the Government's recognition of his lawful presence in the only country he has ever called home, *Arizona Dream Act Coalition*, 757 F.3d at 1058-59, without due process. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("It is well-established that the deprivation of constitutional rights unquestionably constitutes irreparable injury.").

Second, he is being stripped of the right to lawful employment, a core benefit of DACA status, leaving him less able to provide for himself and his family. These lost opportunities are the essence of irreparable harm. *See*

Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 543 (1985) (Supreme Court has "frequently recognized the severity of depriving a person of the means of livelihood"); *Enyart v. Nat'l Conf. of Bar Examiners, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011). Mr. Gonzalez's age and socioeconomic status only increase these harms. *Arizona Dream Act Coalition*, 757 F.3d at 1068 (DACA recipients' injuries heightened by "young age and fragile socioeconomic position"; "[s]etbacks early in their careers are likely to haunt [them] for the rest of their lives"). This is simply "productive time irretrievably lost." *Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 710 (9th Cir. 1988).

Finally, these concerns are all the more pressing given Defendants' purported denial of Mr. Gonzalez's DACA renewal application on the sole stated basis of their unlawful purported Termination Notice.

D. THE BALANCE OF EQUITIES FAVORS MR. GONZALEZ, AND AN INJUNCTION IS IN THE PUBLIC INTEREST

Neither the Government nor the public has an interest in depriving Mr. Gonzalez of the right to remain lawfully present in the only country he knows, work, and pay taxes. *U.S. v. Raines*, 362 U.S. 17, 27 (1960) ("[T]here is the highest public interest in the due observance of all the constitutional guarantees."). Mr. Gonzalez has lived in the United States for sixteen years, maintained a clean criminal record, and given Defendants no reason to think he poses any threat to the public—as the Immigration Judge found he did not when releasing him on just $5,000 bond in June 2016, and Defendants reaffirmed when they acknowledged that he satisfies DACA's eligibility criteria during the course of this litigation and in the purported Termination Notice.

Moreover, it is abundantly clear that Mr. Gonzalez's DACA status was terminated in violation of Defendants' own binding procedures. The Government has an interest in maintaining adherence to its procedures, and "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013).

By contrast, Mr. Gonzalez would suffer greatly from the denial of an injunction—by losing Defendants' recognition of his lawful presence without the basic protections of due process, losing his ability to work "on the books," and having his DACA renewal application summarily denied. Mr. Gonzalez has a demonstrated history of contributing to the San Diego community and following the law. The public's interest lies in assuring that he and others who play by the rules are not deprived of their liberty and property interests without due process. *See Coyotl*, 261 F. Supp. 3d at 1344 n.7 ("Defendants argue that their interest in enforcing immigration laws outweighs any harms alleged by Plaintiff. Defendants' interest in enforcing immigration laws does not justify them running roughshod over Plaintiff by ignoring their own required procedures prior to undertaking action to deny or terminate her DACA status.").

IV. CONCLUSION

For all of these reasons, Defendants' purported termination of Mr. Gonzalez's DACA status should be enjoined and set aside. Defendants' purported denial of his DACA renewal application should also be enjoined because by its own terms it relies on nothing more than the unlawful termination.

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Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that on January 12, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

/s/ John Ulin