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 9 UNITED STATES DISTRICT COURT
 11 SOUTHERN DISTRICT OF CALIFORNIA

13 ALBERTO LUCIANO) Case No. 3:17-CV-01840-JM-(NLS)
 14 GONZALEZ TORRES,)

15 Plaintiff,) **DEFENDANTS’ MEMORANDUM**

16 v.) **OF POINTS AND AUTHORITIES**

17) **IN OPPOSITION TO PLAINTIFF’S**
 18 U.S. DEPARTMENT OF) **MOTION TO MODIFY ORDER**
 19 HOMELAND SECURITY, *et al.*,) **GRANTING MOTION FOR**
 20) **PRELIMINARY INJUNCTION**

21 Defendants.) **[DKT. NO. 13]**

22) **Hearing: December 18, 2017**

23) **Time: 10:00 a.m.**

24) **Courtroom: 5D**

25) **Judge: Jeffrey T. Miller**

1 The Court should deny Plaintiff's motion to modify the Court's September 29,
2 2017 Order because Defendants have already substantially complied with the terms of
3 that Order by providing him additional process, subsequent administrative action in the
4 form of termination or denial of Plaintiff's DACA renewal request would require the
5 amendment of Plaintiff's complaint which would supersede the claims on which the
6 Court's Order was based, and regardless, Plaintiff has never stated a claim regarding his
7 now pending DACA renewal request or the procedures regarding the adjudication of that
8 request.

9 Here, as a result of the Court's Order at Dkt. No. 12, USCIS has reinstated
10 Plaintiff's DACA, accepted his DACA renewal request, and issued Plaintiff a Notice of
11 Intent to Terminate (NOIT) his reinstated DACA. Dkt. Nos. 14-1, 14-2, & 14-3.¹ At
12 present, there is no final agency action to review. Plaintiff's response to the NOIT is due
13 on or before December 16, 2017. Dkt. No. 14-3. At the time of this filing, Plaintiff has
14 not yet responded to the NOIT. Assuming that Plaintiff timely responds to the NOIT and
15 his response does not overcome the intended grounds for termination, USCIS anticipates
16 completing the adjudication of its intended termination of Plaintiff's reinstated DACA
17 and adjudication of his pending DACA renewal request on or before December 22, 2017.
18 Moreover, Plaintiff's now reinstated DACA would expire on its own on December 22,
19 2017, even if Defendants took no further action with regard to the NOIT.
20

21 ¹ Although Defendants have issued Plaintiff a NOIT in this matter, it is important to note
22 that the Court's Order incorrectly cites the USCIS DACA SOP as requiring that "the
23 DACA recipient must be provided with DACA Form 603, and an opportunity respond,"
24 in cases where "USCIS determines, after consulting with ICE, that exercising
25 prosecutorial discretion is not consistent with DHS's enforcement policies." Dkt. No. 12
26 at 6; *but see* Dkt. No. 2-9 at 14 (where "ICE does not plan to issue an NTA, the officer
27 should refer the case to HQSCOPS, through the normal chain of command, *to determine*
28 *whether or not a NOIT is appropriate.*") (emphasis added). The DACA 603 template
referenced by the Court is a termination notice template, not a notice of intent to
terminate template. Accordingly, the DACA 603 template does not provide an
opportunity to respond.

1 Defendants do not dispute the authority of courts to modify injunctions based on
2 changes in fact or law “as required by the circumstances of a given case,” *U.S. v.*
3 *Washington*, 853 F.3d 946, 979 (9th Cir. 2017), or the ability of parties to “request
4 modification in the future to add, upon competent proof, specific other terms” to the
5 injunction. *Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020, 1048 (9th Cir.
6 2013). The party seeking modification or dissolution of an injunction bears the burden of
7 establishing that a significant change in facts or law warrants revision or dissolution of
8 the injunction. *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000).

9 However, Plaintiff mischaracterizes his claim as a motion to modify this Court’s
10 Order.² Modification is not an appropriate frame with which to view the changed facts of
11 this case. Indeed, a court “cannot grant a preliminary injunction on the basis of claims not
12 asserted.” *Garduno's of Ariz., LLC v. Tortilla, Inc.*, No. 08-CV-1090-DGC(PHx), 2009
13 U.S. Dist. LEXIS 88025, at *3 (D. Ariz. Sept. 8, 2009); *see also Stewart v. U.S. I.N.S.*,
14 762 F.2d 193, 199 (2d Cir. 1985) (explaining that a party cannot obtain a preliminary
15 injunction for claims not asserted in its pleadings).

16 Additionally, claims for injunctive relief become moot once subsequent events
17 have made clear the conduct alleged as the basis for the requested relief “could not
18 reasonably be expected to recur,” *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 864
19 (9th Cir. 2017), and also where “interim relief or events have completely and irrevocably
20 eradicated the effects of the alleged violation.” *Lindquist v. Idaho State Bd. of*
21 *Corrections*, 776 F.2d 851, 854 (9th Cir. 1985) (quoting *Los Angeles County v. Davis*,
22 440 U.S. 625, 631 (1979)).
23
24

25
26 ²Unlike the authorities on which Plaintiff relies, nothing in this Court’s Order is vague in
27 its implementation such that clarification via modification is warranted. Indeed, this case
28 is nothing like *Records Inc. v. Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002), where
the Ninth Circuit approved of district court modification of an injunction where the initial
terms of that injunction proved ineffective for the purpose of that injunction.

1 Even the amendment of a Plaintiff's complaint in such circumstances would not
2 preserve an existing preliminary injunction because where an "amended complaint
3 supersedes the original complaint," "the asserted basis for the preliminary injunction is no
4 longer before this court."). *Clay v. Wells Fargo Home Mortg., N.A.*, No. 2:13-CV-00338-
5 KJM, 2013 WL 1189712, at *2 (E.D. Cal. Mar. 21, 2013). In fact, where an amended
6 complaint supersedes a previous complaint, courts have treated as moot pending motions
7 for injunctive relief and instead permitted parties to refile and address how amendment
8 has impacted the relief requested. *See, e.g. La Jolla Cove Inv'rs, Inc. v. GoConnect Ltd.*,
9 No. 11CV1907 JLS JMA, 2012 WL 1580995, at *1 (S.D. Cal. May 4, 2012).

11 Plaintiff now asks the Court to modify its Order to "enjoin the expiration of Mr.
12 Gonzalez's DACA status and employment authorization pending final resolution of his
13 renewal application, including any time to respond to a Notice of Intent to Deny his
14 application, and/or the litigation of any denial of his application to ensure full compliance
15 with the DACA Standard Operating Procedures ("SOP") and all other applicable laws
16 and guidelines." Dkt. No. 13-1 at 1. However, Plaintiff necessarily did not challenge a
17 then nonexistent administrative action in his complaint, nor does Plaintiff challenge
18 Defendants' procedures regarding DACA renewal requests.

19 Rather, the relief Plaintiff seeks in his complaint revolves around U.S. Customs
20 and Border Protection's May 7, 2016, issuance of a Notice to Appear to Plaintiff and
21 automatic termination of his DACA. Dkt. No. 1 at ¶¶ 84-85. Plaintiff seeks declarations
22 regarding the legality of that DACA termination under the APA and constitution, and
23 injunctive relief "set[ting] aside and enjoin[ing] Defendants' decision to terminate Mr.
24 Gonzalez's DACA status and EAD;" and "restoring Mr. Gonzalez's DACA status and
25 attending benefits . . . pending a reconsideration of its termination decision, in which
26 Defendants provide him notice of their intent to terminate, a reasoned basis for that
27 intent, and an opportunity to respond with argument and evidence." Dkt. No. 1 at 26.

1 With the reinstatement of Plaintiff's DACA and employment authorization, the
2 prior DACA termination he challenged is no longer final. Moreover, in issuing a NOIT,
3 Defendants have already provided Plaintiff the notice, basis, and opportunity to respond
4 that he seeks. Notably, the harm Plaintiff cited in support of his preliminary injunction
5 motion – his inability to seek renewal of his DACA were it not reinstated – is not tied to
6 the relief sought in the original complaint, nor could it be. In this way, Plaintiff overstates
7 the purpose of the Court's injunction when he states that it was to “remedy the irreparable
8 harm suffered by Mr. Gonzalez as a result of Defendants' unlawful revocation and to
9 provide him a fair adjudication of his renewal application. . . .” Dkt. No. 13-1 at 4.
11 Rather, other than its harm determination, the only thing the Court's order says about
12 Plaintiff's renewal application is that Defendants must accept it, which Defendants have
13 done. Dkt. No. 12 at 14; Dkt. No. 14-2.

14 Accordingly, Plaintiff has not asserted a viable basis for this Court to modify its
15 September 29, 2017 Order. First, the additional injunctive relief that Plaintiff now seeks –
16 continuation of his reinstated DACA based on allegations regarding the timing and
17 process of Defendants' adjudication of his DACA renewal – arise from claims regarding
18 Plaintiff's DACA renewal request that have never been pled. Second, the relief Plaintiff
19 does seek in his complaint regarding Defendants' termination of his DACA has already
20 been rendered moot by USCIS's subsequent actions of reinstating and issuing a NOIT,
21 and will become all the more moot by December 22, 2017, with USCIS's decision
22 regarding its NOIT or the expiration of Plaintiff's reinstated DACA in the ordinary
23 course of business.³ The mooting of those claims also moots the underlying preliminary

24 ³ The district court in *Colotl v. Duke*, No. 1:17-CV-1670-MHC (N.D. Ga.), did extend its
25 initial preliminary injunction pending briefing on a second motion for preliminary
26 injunction and defendants' motion to dismiss the amended complaint. However, that
27 decision is legal error and wholly inconsistent with that court's contemporaneous finding
28 that: 1) the filing of plaintiff's amended complaint mooted the prior complaint, and 2)
defendants' motion to dismiss that complaint as moot following adjudication of
Plaintiff's DACA renewal was consistent with that court's preliminary injunction.

1 injunction, and the need for Plaintiff to amend his complaint to raise new challenges to
2 the possible termination of his reinstated DACA and denial of his DACA renewal
3 request, would demand that Plaintiff seek new injunctive relief.

4 Additionally, even if the Court finds that Plaintiff’s complaint sufficiently states
5 claims related to Defendants’ adjudication of his DACA renewal request or that
6 Plaintiff’s initial claims are not moot or likely to become moot, the Court should still
7 deny Plaintiff’s modification request because Plaintiff has not demonstrated sufficient
8 harm. Plaintiff argues that allowing his “lawful presence and employment authorization
9 to lapse merely because he was barred from applying for renewal early . . . would cause
11 him the same irreparable harm as the revocation in the first instance and would defeat the
12 purpose of the Court’s injunction.” Dkt. No. 13-1 at 5. However, while Plaintiff asserted
13 in his motion in support of a preliminary injunction that he was working for Gate
14 Gourmet, Dkt. No. 2-1 at 7, he has offered no evidence in support of this motion that he
15 is working anywhere such that a lapse in employment authorization pending a final
16 adjudication of his DACA renewal request or subsequent litigation regarding that request
17 would cause him harm. Further, an order continuing Plaintiff’s receipt of DACA and
18 employment authorization pending adjudication and possible litigation regarding his
19 DACA renewal request would be in direct opposition to preserving the status quo ante,
20 because similarly situated DACA requestors are not afforded an extension of their DACA
21 pending adjudication of their renewal requests. *See* archived USCIS DACA FAQs 49 and
22 50 at <https://www.uscis.gov/archive/frequently-asked-questions#education> (stating that
23 renewal requests should be submitted between 150 and 120 days prior to expiration of the
24 individual’s DACA to minimize the possibility DACA will expire before a decision is
25 reached on his or her renewal request). Moreover, while the Court initially found that the
26 balance of factors weighed in Plaintiff’s favor, it is incumbent on the Court to reweigh
27 those factors in light of the additional process Plaintiff has received and cited compliance
28 to the Court’s interpretation of Defendants’ guidance and SOPs. Here, while Plaintiff

1 may ultimately not be satisfied with the result, the additional process Plaintiff has
2 received markedly diminishes Plaintiff's ability to suggest he will likely succeed on the
3 merits – and which the Court should find warrants the denial of Plaintiff's modification
4 motion.

5 Finally, Plaintiff has provided no authority to support his conclusion that he would
6 be entitled to notice and an opportunity to respond to Defendants' potential denial of his
7 DACA renewal request. Accordingly, to the extent the Court extends its preliminary
8 injunction in the manner sought by Plaintiff, imputing such procedural requirement on
9 Defendants is unfounded and unwarranted.

11 For the above stated reasons, the Court should deny Plaintiff's modification
12 motion.

13 Dated: December 4, 2017

Respectfully submitted,

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