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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ALBERTO LUCIANO GONZALEZ  
TORRES,  
  
Plaintiff,  
  
v.  
  
U.S. DEPARTMENT OF  
HOMELAND SECURITY; U.S.  
CITIZENSHIP AND IMMIGRATION  
SERVICES; U.S. IMMIGRATION  
AND CUSTOMS ENFORCEMENT;  
and U.S. CUSTOMS AND BORDER  
PROTECTION,  
  
Defendants.

CASE NO. 17cv1840 JM(NLS)

ORDER DENYING PLAINTIFF’S  
MOTION FOR PRELIMINARY  
INJUNCTION; GRANTING  
DEFENDANTS’ MOTION TO  
DISSOLVE PRELIMINARY  
INJUNCTION; GRANTING  
DEFENDANTS’ MOTION TO  
DISMISS

Plaintiff Alberto Luciano Gonzalez Torres seeks a preliminary injunction to enjoin Defendants from terminating the legal status obtained by Plaintiff pursuant to the Deferred Action for Childhood Arrivals (“DACA”) program. Defendants U.S. Department of Homeland Security (“DHS”), U.S. Citizenship and Immigration Services (“USCIS”), U.S. Immigration and Customs Enforcement (“ICE”), and U.S. Customs and Border Protection (“CBP”) oppose the motion and separately move to dissolve this court’s September 29, 2017 Order Granting Motion for Preliminary Injunction (“Order”) and to dismiss the First Amended Complaint (“FAC”) for failure to state a claim. Having carefully considered the matter presented, the court record, the

1 arguments of counsel and, for the reasons set forth below, the court denies the motion  
2 for preliminary injunction, grants the motion to dissolve the original preliminary  
3 injunction, and grants the motion to dismiss the FAC without leave to amend.

#### 4 **BACKGROUND**

5 On September 11, 2017, Plaintiff commenced this declaratory and injunctive  
6 relief action seeking a declaration that the automatic termination of his DACA status  
7 on May 7, 2016, without notice or an opportunity to contest the termination, (1) failed  
8 to comply with the DACA Standard Operating Procedures (“DACA SOP”); (2) violated  
9 the arbitrary, capricious, and abuse of discretion standard of the Administrative  
10 Procedure Act (“APA”); and (3) violated Plaintiff’s Procedural Due Process rights  
11 under the Fifth Amendment. (ECF 1).<sup>1</sup>

12 Following oral argument on Plaintiff’s motion for a temporary restraining order,  
13 on September 29, 2017, the court granted the motion for injunctive relief and  
14 provisionally ordered: (1) the reinstatement of Plaintiff’s DACA status; (2) the  
15 reinstatement of Plaintiff’s employment authorization; (3) the Defendants to comply  
16 with the DACA Standard Operating Procedures (“SOP”) “should Defendants elect to  
17 reconsider Plaintiff’s DACA status;” and, (4) Defendants to accept Plaintiff’s DACA  
18 renewal application. (ECF 12). Defendants complied with the Order by reinstating  
19 Plaintiff’s DACA status and employment authorization, and accepting his DACA  
20 renewal application. The parties dispute whether the second DACA termination  
21 violated the DACA SOP.

22 On November 13, 2017, USCIS issued Plaintiff a second Notice of Intent to  
23 Terminate (“NOIT”) informing him, among other things, that his DACA status was  
24 being revoked because he was an enforcement priority in light of his suspected  
25 involvement with alien smuggling. The central issue relevant to the present motions  
26 is whether Defendants complied with the DACA SOP when terminating Plaintiff’s  
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28 <sup>1</sup> Citations refer to the Electronic Case File Docket Number (“ECF”) and, where applicable, to an Exhibit or to the scanned header page number.

1 DACA status a second time, after this court had invalidated Defendants' initial  
2 termination of Plaintiff's DACA status. After providing Plaintiff with notice and an  
3 opportunity to respond to the NOIT, on December 21, 2017, Defendants revoked and  
4 terminated Plaintiff's DACA status for a second time.

5 The FAC, filed on January 12, 2018, alleges four claims for relief arising out of  
6 the revocation of his DACA status: (1) violation of the APA, based upon the May 2016  
7 DACA violation; (2) violation of the APA, based upon the December 21, 2017 DACA  
8 violation; (3) violation of the due process clause of the Fifth Amendment; and (4)  
9 declaratory relief, seeking a declaration that the revocation of his DACA was unlawful.  
10 The following provides background relevant to the parties' arguments.

#### 11 Plaintiff Obtains DACA Status

12 Plaintiff is a 24-year-old citizen of Mexico who was brought to the United States  
13 by his family when he was eight years old. Plaintiff and his family entered the United  
14 States without authorization from the Attorney General. Since his entry into the United  
15 States, Plaintiff has lived in San Diego, California where he graduated from Altus  
16 Charter High School in 2011. From 2011 to 2013, Plaintiff was unable to obtain lawful  
17 employment due to his immigration status. Plaintiff has no criminal convictions and  
18 had never been arrested until the 2016 detention in this case.

19 In June 2012, the Obama Administration created the DACA program which  
20 allowed certain immigrants to avoid deportation and obtain work permits for a period  
21 of two years, renewable upon good behavior. The contours of the DACA program  
22 were set out in a June 15, 2012 Memorandum from former Secretary of the DHS, Janet  
23 Napolitano, and which became known as the "Napolitano Memo." The Napolitano  
24 Memo provided the criteria to be satisfied before an individual could be considered for  
25 an exercise of prosecutorial discretion. In broad brush, one qualified for DACA status  
26 upon showing that the individual:

- 27 - entered the United States before his or her 16th birthday and prior to June 2007;
- 28 - lived continuously in the United States during the previous five years;

- 1 - was currently in school, a high school graduate or was honorably discharged  
2 from the military;  
3 - was under the age of 31 as of June 15, 2012; and  
4 - had not been convicted of a felony, significant misdemeanor, three or more  
5 misdemeanors, nor posed a threat to national or public safety.

6 The program did not, and still does not, provide lawful status or a path to citizenship,  
7 nor does it provide eligibility for federal welfare or student aid. (ECF 39-4, Exh. A).

8 In early 2013, satisfying all prerequisites for DACA status, Plaintiff applied for,  
9 and was granted, DACA status. Having obtained DACA status, Plaintiff was  
10 considered “lawfully present” in the country and granted an Employment Authorization  
11 Document (“EAD”) and Social Security Number, which allowed Plaintiff to be  
12 lawfully employed. The approval letter issued by USCIS informed Plaintiff that “in the  
13 exercise of its prosecutorial discretion, [USCIS] has decided to defer action on” his  
14 case for a period of two years. “Deferred action does not confer or alter any  
15 immigration status.” (*Id.* Exh. I). In 2014, DHS renewed Plaintiff’s DACA status.

16 Upon receipt of DACA status, Plaintiff obtained full-time employment in the  
17 airline food packaging industry and worked in that industry from 2013 until May 2016,  
18 working the 7:00 p.m. to 4:00 a.m. shift. The hiring process involved interviews, drug  
19 tests, background checks, and verification of employment authorization. Plaintiff used  
20 a portion of his income to financially support his family. In May 2016, Plaintiff’s  
21 DACA status was purportedly revoked by the USCIS in a Notice of Action. Plaintiff  
22 informed his employer of the loss of DACA status and was, in turn, terminated by his  
23 employer. Plaintiff’s employer did, however, inform Plaintiff he could re-apply for  
24 employment once he obtained work authorization.

#### 25 The First Revocation of Plaintiff’s DACA Status

26 On May 6, 2016, Plaintiff declares that an acquaintance named Adolfo asked  
27 him, as he had in the past, to look after his dogs while he was out of town. Plaintiff  
28 went to Adolfo’s home, took care of the dogs, and encountered two other individuals

1 at the home. Plaintiff planned to have his sister pick him up from Adolfo's house and  
2 drive him to work by 7:00 p.m., the shift start time. At 4:00 p.m., a few hours after  
3 arriving at Adolfo's house, USCBP officers knocked on the door and asked Plaintiff  
4 if they could search the premises. He informed the USCBP officers that they needed  
5 a search warrant to enter the home as he did not believe he "had permission to let them  
6 in because it was not my house." (ECF 39-2, Gonzalez Decl. ¶11). The Officers did  
7 not enter the home, but remained outside.

8 Around 5:00 p.m. a man not known to Plaintiff arrived, represented that he was  
9 the owner of the house, and asked Plaintiff to exit his home. Outside the home,  
10 Plaintiff was interviewed by USCBP officers and informed them that he possessed  
11 DACA status and a valid EAD. According to Plaintiff, he was then arrested,  
12 handcuffed, and spent the next two days being "aggressively" interrogated by two  
13 officers. The officers asked him about "wrongdoing at the house that I did not  
14 understand. I kept asking them for details and telling them, 'I don't understand why  
15 I'm being detained.'" (*Id.* ¶18). "No one interrogated [Plaintiff] after those first two  
16 or three days," or after his release from custody.

17 After two or three days, Plaintiff was transferred to another facility. On June 1,  
18 2016, Plaintiff was provided with a bond hearing before Immigration Judge  
19 McSeveney, and released two days later on a \$5,000 bond. Since his release, Plaintiff  
20 has not had any law enforcement contacts.

21 To provide additional context to Plaintiff's declaration, Defendants represent that  
22 Plaintiff (and another individual arrested at the searched house) was arrested on May  
23 6, 2016, for harboring illegal aliens in violation of 8 U.S.C. §1324(a)(1)(A)(iii) and  
24 §1182(a)(6)(E)(i). Once the owner of the home arrived at Adolfo's residence, the  
25 owner consented to permit USCBP agents to search the residence (the renters were not  
26 at home). Inside, USCBP discovered 12 illegal aliens (five from China and seven from  
27 Mexico) hiding in the attic. The record of Deportable/Inadmissible Alien documents  
28 indicate that three material witnesses identified Plaintiff as the individual who told

1 them to hide in the attic.

2 On May 7, 2016, USCIS issued Plaintiff a Notice to Appear (“NTA”) charging  
3 him as “inadmissible” to the United States (i.e. Plaintiff was deemed unlawfully  
4 present in the country) pursuant to 8 U.S.C. §1182(a)(6)(A)(i). On May 23, 2016,  
5 USCIS provided Plaintiff with a Notice of Action informing him that his DACA status  
6 and employment authorization had been automatically terminated as of the date of the  
7 NTA (May 7, 2016).

#### 8 The DACA SOP

9 The DACA SOP issued by DHS sets forth the procedures for adjudicating  
10 DACA applications, renewals, and the termination of participation in DACA. Among  
11 other things, the DACA SOP provision at issue here provides for termination of DACA  
12 status in the event the recipient is considered an enforcement priority by USCIS, after  
13 consultation with ICE:

14 If after consulting with ICE, USCIS determines that exercising  
15 prosecutorial discretion after removal has been deferred under DACA is  
16 not consistent with the Department of Homeland Security's enforcement  
17 priorities, and ICE does not plan to issue an NTA, the officer should refer  
18 the case to HQSCOPS, through the normal chain of command, to  
determine whether or not a NOIT is appropriate. If 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.

19 In addition, the DACA recipient must be provided with notice and an ability to contest  
20 the NOIT before DACA status may be terminated.

#### 21 Recent DACA Related Events

22 On September 5, 2017, Defendant DHS announced a plan to eliminate DACA,  
23 beginning in March 2018. DACA recipients whose status would expire on or before  
24 March 5, 2018, could have applied for a two-year renewal, but renewal applications  
25 were due on or before October 5, 2017. (ECF 39-4, Exh. C).<sup>2</sup>

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27 <sup>2</sup> The court notes that two federal courts have enjoined the termination of the  
28 DACA program. See Batalla-Vidal v. Nielsen, 16cv4756 (E.D.N.Y. February 13,  
2018); Regent of University of Cal. v. DHS, 17cv05221 WHA (N.D. Cal. January 9,  
2018).

1 On February 20, 2017, Secretary of Homeland Security John Kelly issued a  
2 memorandum entitled Enforcement of the Immigration Laws to Serve the National  
3 Interest (the “Kelly Memo).” The Kelly Memo prioritizes enforcement against  
4 individuals who “have been charged with any criminal offense that has not been  
5 resolved” or allegedly “committed acts which constitute a chargeable criminal offense.”  
6 The Kelly Memo also provides that DHS is authorized to commence enforcement  
7 actions against removable aliens.

8 Unless otherwise directed, Department personnel may initiate  
9 enforcement actions against removable aliens encountered during the  
10 performance of their official duties and should act consistently with the  
11 President's enforcement priorities identified in his Executive Order and  
12 any further guidance issued pursuant to this memorandum. Department  
13 personnel have full authority to arrest or apprehend an alien whom an  
immigration officer has probable cause to believe is in violation of the  
immigration laws. They also have full authority to initiate removal  
proceedings against any alien who is subject to removal under any  
provision of the INA, and to refer appropriate cases for criminal  
prosecution.

14 (ECF 39-4, Exh. D at 4). The Memo also highlights that prosecutorial discretion  
15 should be exercised on a case-by-case basis:

16 The exercise of prosecutorial discretion with regard to any alien who is  
17 subject to arrest, criminal prosecution, or removal in accordance with law  
18 shall be made on a case-by-case basis in consultation with the head of the  
19 field office component, where appropriate, of CBP, ICE, or USCIS that  
20 initiated or will initiate the enforcement action, regardless of which entity  
actually files any applicable charging documents: CBP Chief Patrol  
Agent, CBP Director of Field Operations, ICE Field Office Director, ICE  
Special Agent-in-Charge, or the USCIS Field Office Director, Asylum  
Office Director or Service Center Director.

21 In light of the numerous recent government issued memoranda concerning  
22 modifications to immigration policies, laws, regulations and procedures, the court notes  
23 that these memoranda preserve the DACA program. On June 15, 2017, Secretary Kelly  
24 issued a memorandum rescinding the Deferred Action for Parents of Americans and  
25 Lawful Permanent Residents (“DAPA”), but temporarily leaving the DACA program  
26 in place. (ECF 39-4, Exh. I).

27 The Second Revocation of Plaintiff’s DACA Status

28 As noted above, following this court’s September 29, 2017 Order granting

1 injunctive relief, Defendants reinstated Plaintiff's DACA status and employment  
2 authorization. Thereafter, on December 21, 2017, USCIS issued Plaintiff a NOIT,  
3 informing him that his DACA status was being terminated. The NOIT informed  
4 Plaintiff that USCIS had consulted with ICE and "determined that exercising  
5 prosecutorial discretion to defer removal action in your case is not consistent with  
6 DHS's enforcement policies." (ECF 39-6). In support of its decision, USCIS cited the  
7 following DACA SOP to support its position:

8 If after consulting with ICE, USCIS determines that exercising  
9 prosecutorial discretion after removal has been deferred under DACA is  
10 not consistent with the Department of Homeland Security's enforcement  
11 priorities, and ICE does not plan to issue an NTA, the officer should refer  
12 the case to HQSCOPS, through the normal chain of command, to  
determine whether or not a NOIT is appropriate. If 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.

13 The NOIT articulated Plaintiff's involvement in "what appeared to be a  
14 smuggling event" on May 6, 2017. The NOIT provided Plaintiff with notice that he  
15 was an enforcement priority in light of his suspected criminal activity. The NOIT also  
16 identified Plaintiff's involvement in suspected alien smuggling, including statements  
17 by several of the illegal immigrants that Plaintiff directed them to hide in the attic when  
18 the CBP officers arrived on the site.

19 On December 14, 2017, Plaintiff filed a response to the NOIT. In the main, the  
20 response represented that Plaintiff continued to satisfy all objectively verifiable DACA  
21 criteria. Notably, Plaintiff denies any involvement in alien smuggling.

#### 22 The Termination Notice

23 After receipt of Plaintiff's response to the NOIT, on December 21, 2017, USCIS  
24 issued a Termination Notice to Plaintiff. The Termination Notice informed Plaintiff  
25 that USCIS consulted with ICE and determined that exercising prosecutorial discretion  
26 was "not consistent with the DHS's enforcement priorities." (ECF 39-6). In reaching  
27 the conclusion to revoke Plaintiff's DACA status, the Termination Notice repeated and  
28 expanded upon the "derogatory information" concerning the alien smuggling events



1 of May 6, 2016. The Termination Notice referred to the I-213 forms (Record of  
2 Deportable/Inadmissible Alien) which identified Plaintiff's purported involvement in  
3 alien smuggling activities. Plaintiff was also informed that he would have the  
4 opportunity to contest his removal in Immigration Court pursuant to INA §240.

#### 5 Pending Immigration Proceedings

6 On May 7, 2016, CBP provided Plaintiff with a Notice to Appear ("NTA"),  
7 thereby commencing removal proceedings against him pursuant to INA §240. On  
8 November 7, 2016, the immigration proceedings against Plaintiff were terminated.  
9 However, "ICE once again confirmed it still views [Plaintiff] as an enforcement  
10 priority and issued [Plaintiff] a new NTA on December 8, 2017." (Pls. Exh. R).  
11 Plaintiff had a hearing scheduled before an Immigration Judge calendared for March  
12 20, 2018, but that date has been continued.

#### 13 Procedural History of This Action

14 On September 29, 2017, the court granted Plaintiff's Motion for Preliminary  
15 Injunction and (1) vacated Defendants' initial DACA revocation; (2) reinstated  
16 Plaintiff's employment authorization; (3) instructed Defendants to comply with the  
17 DACA SOP, in the event Defendants were to elect to revoke Plaintiff's DACA status;  
18 and (4) ordered Defendants to accept Plaintiff's DACA renewal application. The  
19 dispute amongst the parties centers on whether the second revocation of Plaintiff's  
20 DACA status complied with the DACA SOP.

### 21 **DISCUSSION**

#### 22 **Legal Standards**

##### 23 Preliminary Injunction

24 To obtain preliminary or temporary injunctive relief, the party must satisfy one  
25 of two tests: (1) a combination of probable success and the possibility of irreparable  
26 harm, or (2) the party raises serious questions and the balance of hardship tips in its  
27 favor. Arcamuzi v. Continental Air Lines, Inc., 819 F.2d 935, 937 (9th Cir. 1987).  
28 "These two formulations represent two points on a sliding scale in which the required

1 degree of irreparable harm increases as the probability of success decreases." Id.  
2 Under both formulations, however, the party must demonstrate a "fair chance of  
3 success on the merits" and a "significant threat of irreparable injury." Id.; Miller v.  
4 California Pac. Med. Ctr., 19 F.3d 449, 456 (9th Cir. 1994 (en banc)). The court also  
5 considers the public interest in the issues raised by the parties. Winter v. NRDC, Inc.,  
6 555 U.S. 7, 20 (2008).

#### 7 Review under the APA

8 Under the APA, "[a] person suffering legal wrong because of agency action, or  
9 adversely affected or aggrieved by agency action within the meaning of a relevant  
10 statute, is entitled to judicial review." 5 U.S.C. §702. The APA further states  
11 "[a]gency action made reviewable by statute and final agency action for which there  
12 is no other adequate remedy in a court are subject to judicial review." Id. § 704.  
13 Section 706 instructs the court reviewing agency action to "decide all relevant  
14 questions of law, interpret constitutional and statutory provisions, and determine the  
15 meaning or applicability of the terms of an agency action." Not only shall the  
16 reviewing court compel agency action unlawfully withheld but shall also "hold  
17 unlawful and set aside agency action, findings, and conclusions found to be – (A)  
18 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."  
19 Id. §§706(1) and (2)(A).

#### 20 Motion to Dismiss

21 Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in  
22 "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir.  
23 1981). Courts should grant 12(b)(6) relief only where a plaintiff's complaint lacks a  
24 "cognizable legal theory" or sufficient facts to support a cognizable legal theory.  
25 Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Courts should  
26 dismiss a complaint for failure to state a claim when the factual allegations are  
27 insufficient "to raise a right to relief above the speculative level." Bell Atlantic Corp.  
28 v. Twombly, 550 U.S. 544, 555 (2007) (the complaint's allegations must "plausibly

1 suggest[ ]” that the pleader is entitled to relief); Ashcroft v. Iqbal, 556 U.S. 662 (2009)  
2 (under Rule 8(a), well-pleaded facts must do more than permit the court to infer the  
3 mere possibility of misconduct). “The plausibility standard is not akin to a ‘probability  
4 requirement,’ but it asks for more than a sheer possibility that a defendant has acted  
5 unlawfully.” Id. at 678. Thus, “threadbare recitals of the elements of a cause of action,  
6 supported by mere conclusory statements, do not suffice.” Id. The defect must appear  
7 on the face of the complaint itself. Thus, courts may not consider extraneous material  
8 in testing its legal adequacy. Levine v. Diamantheset, Inc., 950 F.2d 1478, 1482 (9th  
9 Cir. 1991). The courts may, however, consider material properly submitted as part of  
10 the complaint. Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542, 1555  
11 n.19 (9th Cir. 1989).

12 Finally, courts must construe the complaint in the light most favorable to the  
13 plaintiff. Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116  
14 S. Ct. 1710 (1996). Accordingly, courts must accept as true all material allegations in  
15 the complaint, as well as reasonable inferences to be drawn from them. Holden v.  
16 Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). However, conclusory allegations of  
17 law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6) motion. In  
18 Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

### 19 **The APA Claim**

20 The determinative issue raised in all three pending motions is whether the second  
21 DACA revocation complied with the DACA SOP. In its September 29, 2017 Order,  
22 the court instructed Defendants to “fully comply with the DACA SOP should  
23 Defendants elect to reconsider Plaintiff’s DACA status.” (ECF 12; Order at p.13:27-  
24 28). Defendants then issued a new NOIT to Plaintiff, afforded him an opportunity to  
25 respond, considered Plaintiff’s response, and terminated Plaintiff’s DACA status as of  
26 December 22, 2017, subject to further order of this court. Defendants represent that  
27 the record demonstrates they complied with the provisions of the DACA SOP such that  
28 the agencies’ conduct was neither arbitrary, capricious, nor a violation of law. Plaintiff

1 takes a contrary view.

2 Defendants assert that they fully complied with the following DACA SOP in  
3 revoking Plaintiff's DACA status a second time:

4 If after consulting with ICE, USCIS determines that exercising  
5 prosecutorial discretion after removal has been deferred under DACA is  
6 not consistent with the Department of Homeland Security's enforcement  
7 priorities, and ICE does not plan to issue an NTA, the officer should refer  
8 the case to HQSCOPS, through the normal chain of command, to  
9 determine whether or not a NOIT is appropriate. If it is determined that  
10 the case warrants final termination, the officer will issue DACA 603 -  
11 Termination Notice [Enforcement Priority; Not Automatically  
12 Terminated] from the Appendix I.

9 Defendants make a substantial showing that they complied with this DACA  
10 SOP. The NOIT identifies the above provision of the DACA SOP as the ground for  
11 terminating Plaintiff's DACA status, and represents that USCIS consulted with ICE  
12 and determined that "exercising prosecutorial discretion to defer removal action in your  
13 case is not consistent with DHS's enforcement policies." (ECF at 39-6). The basis for  
14 Defendants' argument that Plaintiff is an "enforcement priority" arises from Plaintiff's  
15 purported involvement with alien smuggling on May 6, 2016.

16 Plaintiff challenges and seeks to limit the term "enforcement priority," as applied  
17 to DACA recipients, to mean "a disqualifying criminal conviction, a public safety  
18 concern finding, a national security concern finding or an EPS (Egregious Public  
19 Safety) finding." (Reply at p.7:20-23). In other words, because Plaintiff has not been  
20 convicted of a crime, he contends that he is not an enforcement priority and, therefore,  
21 he has been wrongfully dispossessed of his DACA status. Further, Plaintiff argues that  
22 he is entitled to retain his "low enforcement priority" status under DACA. This  
23 argument is unpersuasive.

24 While DACA expressly identifies that DACA recipients are considered low  
25 enforcement priority, the DACA SOP identifies several ways that a DACA recipient  
26 loses that protected status. Not only does the DACA SOP identify that a DACA  
27 recipient loses DACA status once the recipient becomes an enforcement priority, but  
28 the Kelly Memo expressly identifies that alien individuals who "have committed acts

1 which constitute a chargeable criminal offense” are enforcement priorities. (ECF 39-4,  
2 Exh.D at p. 31).<sup>3</sup> Furthermore, the November 7, 2011 USCIS Notice to Appear  
3 guidelines identify that an alien’s alleged role in alien smuggling (a violation of INA  
4 §§101(a)(43)(N) and (O)) is one of the offenses that triggers the characterization of an  
5 alien as a “top immigration enforcement priority,” even without a conviction. (ECF 39-  
6 4 at 61-62).

7 The arbitrary and capricious standard of 5 U.S.C. §706(2)(A) is a narrow one.  
8 Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 418 U.S. 281, 285  
9 (1974). The court’s role under the APA is to determine whether the agency considered  
10 all relevant factors and whether there has been a clear error of judgment. “Although  
11 this inquiry into the facts is to be searching and careful, the ultimate standard of review  
12 is a narrow one. The court is not empowered to substitute its judgment for that of the  
13 agency.” Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The  
14 agency must articulate a “rational connection between the facts found and the choice  
15 made.” Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

16 Here, the court concludes that Defendants considered all relevant factors in  
17 determining that Plaintiff was an enforcement priority within the meaning of the  
18 DACA SOP and Kelly Memo. The record before the court reveals that relevant  
19 agencies (USCIS, ICE, and CBP) consulted with each other and determined that  
20 Plaintiff committed acts which constitute a chargeable criminal offense. Defendants  
21 determined that several of the material witness aliens detained on May 6, 2016,  
22 identified Plaintiff as one of the individuals actively engaged in human trafficking  
23 conduct. The Termination Notice rationally articulates Plaintiff’s perceived  
24 involvement in human trafficking, in violation of relevant statutes and regulations, and  
25 therefore, supports Defendants’ determination that Plaintiff engaged in conduct

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26  
27 <sup>3</sup> While the government does not rely on the Kelly Memo to buttress its decision,  
28 the Kelly Memo is instructive in that it expressly instructs that DHS “no longer will  
exempt classes or categories of removable aliens from potential enforcement,” and  
highlights that ICE, CBP, and USCIS have the discretion “to prioritize enforcement  
activities.” Id.

1 constituting a chargeable criminal offense. See Judulang v. Holder, 562 U.S. 42, 52-53  
2 (2011) (an agency must exercise reasoned decision-making).

3 The DACA SOP, the Kelly Memo, and the INA provide a clear indication that  
4 the Defendant agencies possess substantial discretion to determine whether the  
5 revocation of an individual's DACA status is consistent with DHS's enforcement  
6 priorities. The DACA program specifically provides that ICE and USCIS possess the  
7 discretion to determine whether the continued exercise of prosecutorial discretion is  
8 consistent with DHS's enforcement priorities in any particular case. (ECF 39-4 at 81).  
9 The INA also provides that "[t]he Attorney General shall be charged with the  
10 administration and enforcement" of the statute and that the "determination and ruling  
11 by the Attorney General with respect to all questions of law shall be controlling." 8  
12 U.S.C. § 1103(a)(1). The court notes that some deference is due Defendants'  
13 interpretations and determinations under the circumstances of this case, particularly  
14 where agency action is committed to agency discretion by law. See 5 U.S.C. §701(a);  
15 8 U.S.C. §1252(g). Judicial deference to the Executive Branch is especially  
16 appropriate in the immigration context. See I.N.S. v. Aguirre-Aguirre, 526 U.S. 415,  
17 425 (1999). Here, the court cannot conclude that Defendants violated the APA by  
18 determining that Plaintiff's involvement in alien smuggling made him an enforcement  
19 priority for purposes of the DACA program. Defendants articulated a rational  
20 connection between Plaintiff's involvement with alien smuggling and the decision to  
21 revoke Plaintiff's DACA status.

22 Additionally, Plaintiff makes the argument that the allegations in Plaintiff's  
23 arrest record have yet to be tested in a competent forum. However, this is not the  
24 appropriate forum to test the veracity of Defendants' underlying assertions that Plaintiff  
25 engaged in conduct that constituted a violation of the immigration laws. Pursuant to  
26 8 U.S.C. §1252(g) and 5 U.S.C. §701(a)(2), this court lacks jurisdiction to entertain a  
27 determination on the merits of Plaintiff's alleged criminal conduct. See Rodriguez v.  
28 Sessions, 677 Fed.Appx. 447, —, 2017 WL 695192, at \*1 (9th Cir. 2017) ("We lack

1 jurisdiction to consider [the plaintiff's] eligibility for Deferred Action for Childhood  
2 Arrivals.”); Vasquez v. Aviles, 639 Fed.Appx. 898, 901 (3rd Cir. 2016) (“[Section  
3 1252(g) ] deprives all courts of jurisdiction to review a denial of DACA relief because  
4 that decision involves the exercise of prosecutorial discretion not to grant a deferred  
5 action.”); Fabian-Lopez v. Holder, 540 Fed.Appx. 760, 761 n.2 (9th Cir. 2013)  
6 (determining that Section 1252(g) deprived the court of jurisdiction to consider the  
7 plaintiff's DACA eligibility). Plaintiff may obtain review of this claim by filing a  
8 petition for review with the Ninth Circuit. See 8 U.S.C. §1252(a)(5).

9 In the prior Order, the court concluded that Defendants violated the APA when  
10 they failed to comply with the DACA SOP. The court did not reach, nor does it now,  
11 the merits of Plaintiff’s underlying conduct on May 6, 2016. Defendants have made  
12 a sufficient showing that they followed the DACA SOP, consulted with the appropriate  
13 agencies, issued a DACA compliant Notice of Termination, provided Plaintiff with the  
14 opportunity to respond to the Notice of Termination, considered Plaintiff’s response,  
15 and provided Plaintiff a Termination Notice explaining the reasons for the termination  
16 of his DACA status. Under APA review, the court cannot conclude that such agency  
17 action was arbitrary, capricious, or a violation of law under 5 U.S.C. §706(2)(A)  
18 because Defendants complied with the DACA SOP.

### 19 **The Constitutional Claim**

20 The bedrock principle underlying procedural due process is clear: “Parties whose  
21 rights are to be affected are entitled to be heard; and in order that they may enjoy that  
22 right they must be notified.” Baldwin v. Hale, 1 Wall 223, 233 (1863). Equally  
23 fundamental to the right to notice is the opportunity to be heard at a meaningful time  
24 in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Mathews v.  
25 Eldridge, 424 U.S. 319, 332 (1976). When protected liberty or property interests are  
26 implicated, the individual is entitled to “some kind of prior hearing” before the  
27 termination of such interests. Board of Regent of State Colleges v. Roth, 408 U.S. 564,  
28 (1972).

1           The court is unpersuaded by Defendants' argument that DACA is purely  
2 discretionary such that recipients of DACA possess no liberty, property, or other  
3 constitutional interest. The Napolitano Memo provides five criteria that must be  
4 satisfied before an illegal immigrant qualifies to obtain DACA status (entered the  
5 United States before their 16th birthday and prior to June 2007; lived continuously in  
6 the United States during the previous five years; was currently in school, a high school  
7 graduate or was honorably discharged from the military; was under the age of 31 as of  
8 June 15, 2012; and not have been convicted of a felony, significant misdemeanor, three  
9 or more misdemeanors, nor posed a threat to national or public safety). Once these  
10 objective and non-discretionary criteria are satisfied, the DACA recipient enjoys  
11 significant liberty and property interests, including the right to obtain lawful  
12 employment authorization and the right to be considered lawfully present in the United  
13 States.

14           In light of the liberty and property interests at stake, the court concludes that  
15 Plaintiff, under the Due Process Clause of the Fifth Amendment, is entitled to notice  
16 of a DACA termination hearing and an opportunity to meaningfully respond to the  
17 notice of DACA termination before DACA status is revoked. These are the same  
18 procedural due process protections that DACA specifically provides for and which  
19 were afforded to Plaintiff. Accordingly, Plaintiff cannot prevail on his Fifth  
20 Amendment claims.<sup>4</sup>

### 21 **Motion to Dissolve Preliminary Injunction**

22           The Preliminary Injunction entered on September 29, 2017: (1) vacated  
23 Defendants' initial DACA revocation; (2) reinstated Plaintiff's employment  
24 authorization; (3) instructed Defendants to comply with the DACA SOP, in the event  
25

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26  
27           <sup>4</sup> The court does not accept Plaintiff's contention that procedural due process  
28 requires something akin to a formal judicial proceeding wherein Plaintiff has the  
opportunity to present evidence and cross-examine witnesses. The court also notes  
Plaintiff may seek judicial review of his claims by filing a petition for review pursuant  
to 8 U.S.C. §1252.



1 Defendants were to elect to revoke Plaintiff's DACA status; and (4) ordered  
2 Defendants to accept Plaintiff's DACA renewal application. For the above stated  
3 reasons, Defendants fully complied with the injunction, including the manner in which  
4 they revoked Plaintiff's DACA status a second time. Accordingly, the court grants the  
5 motion to dissolve the September 29, 2017 preliminary injunction.

6 **Motion for Preliminary Injunction**


7 In light of the court's conclusion that Defendants did not violate the APA by  
8 revoking Plaintiff's DACA status a second time, Plaintiff fails to make the requisite  
9 showing of a likelihood of success on the merits. Accordingly, the court denies  
10 Plaintiff's motion for a preliminary injunction.

11 **Motion to Dismiss**

12 Defendants move to dismiss all four claims alleged in the FAC. The first two  
13 claims for violation of APA arise from the May 2016 and December 2017 revocations  
14 of Plaintiff's DACA status, respectively. As Plaintiff has received a remedy for the  
15 May 2016 violation of the DACA SOP, this claim is now moot. Dismissal is  
16 appropriate on the second cause of action because the second DACA revocation, for  
17 the above stated reasons, did not violate the APA. The third claim for violation of the  
18 Fifth Amendment also fails because Plaintiff received the Notice of Intent to  
19 Terminate, an opportunity to respond, and an informed Notice of Termination. For the  
20 above stated reasons, nothing more is required by the Fifth Amendment. The fourth  
21 claim for declaratory relief, for the above stated reasons is moot. Accordingly, the  
22 court grants the motion to dismiss the action with prejudice.

23 In sum, the court denies Plaintiff's motion for a preliminary injunction, grants  
24 Defendants' motion to dissolve the September 29, 2018 preliminary injunction, and  
25 grants Defendants motion to dismiss the FAC without leave to amend. The Clerk of  
26 Court is instructed to close the file.

27 DATED: April 12, 2018

28   
Hon. Jeffrey T. Miller  
United States District Judge