**No. 19-36034**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

Daniel Ramirez-Medina,
*Plaintiff-Appellant,*

v.

U.S. Department of Homeland Security, *et al.*,
*Defendants-Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON No. 2:17-cv-00218

# DEFENDANTS-APPELLEES' RESPONSE BRIEF

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
Civil Division
United States Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, DC 20044-0878

WILLIAM C. PEACHEY
Director

JEFFREY S. ROBINS
Deputy Director

JAMES J. WALKER
Trial Attorney
Civil Division
United States Department of Justice
P.O. Box 868, Ben Franklin Station
Telephone: (202) 532-4468

*Attorneys for Defendants-Appellees*

# TABLE OF AUTHORITIES

Federal Cases

**Federal Statutes**

**Federal Rules**



**Federal Regulations**

## INTRODUCTION

The Court should affirm dismissal of Appellant Daniel Ramirez Medina's ("Mr. Ramirez") Third Amended Complaint ("TAC") for lack of jurisdiction. The district court correctly found that Mr. Ramirez failed to establish that court's jurisdiction to review the discretionary denial of his Deferred Action for Childhood Arrivals ("DACA") renewal request, an action foreclosed from review in any court as a claim arising out of the decision to seek an individual's removal. Excerpts of Record ("ER") 2-28, district court ECF No. 159, Order on Pending Motions ("Order") at 20-24[1] (citing 8 U.S.C. § 1252(g); *Reno v. Am.-Arab Anti-Discrimination Comm.* ("*AADC*"), 525 U.S. 471, 483-84 (1999)). The district court also correctly found that the Government did not violate its preliminary injunction in denying Mr. Ramirez's DACA renewal request or in doing so based on Mr. Ramirez's criminal record. *Id.* at 25-26. Mr. Ramirez attempts to refute the district court's findings, but his arguments lack merit.

Mr. Ramirez first argues that the narrow scope of Section 1252(g) does not encompass his claim here, ECF No. 10, Appellant's Opening Brief ("Op. Br.") 29-31, but the Supreme Court has already found that it does. *AADC,* 525 U.S. at 485. Mr. Ramirez also argues that the denial of his DACA request violated the First and

[1] The Government cites to the original page numbers of the district court's Order, rather than the excerpts of record ("ER") page numbers.

Fifth Amendments, and that such constitutional claims overcome Section 1252(g)'s bar. Op. Br. 35. However, an individual has no due process right to a discretionary immigration benefit, *Mendez-Garcia v. Lynch*, 840 F.3d 655, 669 (9th Cir. 2016), much less a grant of deferred action. To the extent this Court may find a due process right here, the district court correctly found that Mr. Ramirez failed to establish any due process claims. Order 22-23 ("The Government followed the procedures outlined in its SOP and provided Mr. Ramirez notice and an opportunity to be heard.").

Mr. Ramirez now tries to establish a violation of a nondiscretionary duty to bypass Section 1252(g), here in the form of alleging that the wrong legal standard was applied to find him an enforcement priority—first, by ICE's reliance on the Kelly Memo instead of the USCIS DACA SOP; and second, by ICE's possible mistaken belief that Mr. Ramirez lied on his initial DACA request form about being enrolled in a GED program. Op. Br. 35-40. But ICE's discretion to determine who is an enforcement priority is not curtailed by the Napolitano Memo, the DACA SOP, or the Kelly Memo. *See* ER 507; Supplemental Excerpts of Record ("SER") 36-37. Further, USCIS recognized the error in ICE's initial statements regarding the GED program and expressly disavowed that ground as a reason to deny his DACA. ER 513. It also appears that ICE's last communication

to USCIS on this matter stated that it found Mr. Ramirez to be an enforcement priority only on his criminal records. SER 39-40.

The district court also correctly found that Mr. Ramirez failed to establish a First Amendment retaliation claim, because the Record does not establish that animus or malice alone drove the decision. *Id*. at 24-25; *see Hartman v. Moore*, 547 U.S. 250, 260 (2006).

Regardless, even if established, constitutional claims related to an individual's removal proceedings, including a claim of entitlement to deferred action, must be channeled through removal proceedings and, if necessary, raised in a petition for review of a final order of removal in a court of appeals. 8 U.S.C. §§ 1252(a)(5), (b)(9); *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016).

Finally, the district court also correctly rejected Mr. Ramirez's allegations that the Government violated the district court's preliminary injunction by implicitly finding him to be a threat to public safety. Op. Br. 48-53; Order 25 (noting the DACA SOP distinguishes between general criminal concerns and the term "public safety threat"). Where the district court dismissed the case after finding no violation in the preliminary injunction, this Court should dismiss all of Mr. Ramirez's interlocutory appeal claims as moot. *Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1075 (9th Cir. 2001).

In sum, regardless of the district court's reproachful coloring of the facts, it correctly determined that the Government's decision not to exercise prosecutorial discretion in Mr. Ramirez's favor was lawful and constitutional and not subject to judicial review. This Court should affirm.

## BACKGROUND

### I. Deferred Action

Deferred action is "a regular practice" in which the Secretary of Homeland Security exercises his or her discretion "for humanitarian reasons or simply for [her] own convenience," to notify an alien of a non-binding decision to forbear from seeking his removal for a designated period. *AADC*, 525 U.S. at 483-84. "At each stage the Executive has discretion to abandon the endeavor." *Id.;* 8 C.F.R. § 274a.12(c)(14) ("an act of administrative convenience to the government which gives some cases lower priority"). Through "[t]his commendable exercise in administrative discretion, developed without express statutory authorization," *id*. at 484 (citations omitted), a removable individual may remain present in the United States so long as DHS continues to forbear removal, but always at the discretion of the Secretary. As with other agencies exercising enforcement discretion, DHS must balance a number of complicated factors within its expertise. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

On June 15, 2012, DHS issued a memorandum entitled, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children." *See* ER 130-32, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," from Janet Napolitano, June 15, 2012 ("DACA Memo"). The DACA Memo outlines the policy of deferred action that is available to a certain subset of individuals unlawfully present in this country. The memorandum recognizes the authority of both U.S. Citizenship and Immigration Services ("USCIS") and Immigration and Customs Enforcement ("ICE") to grant deferred action. *Id*. at 132 ("For individuals who are granted deferred action by either ICE or USCIS . . . ."). The memorandum also states that DACA is granted "for a period of two years, subject to renewal." *Id*. Lastly, the memorandum clarifies that DACA "confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights." *Id*.

## II. DACA Rescission

On September 5, 2017, DHS announced a plan to wind down the DACA policy in an orderly fashion. *See* ER 177-82, "Memorandum on Rescission of Deferred Action for Child Arrivals" from Elaine C. Duke, dated Sept. 5, 2017 ("Duke Memo"). On January 9, 2018, the United States District Court for the Northern District of California entered a preliminary injunction requiring USCIS to

accept and adjudicate DACA requests from individuals who previously received DACA. *Regents of Univ. of California v. United States Dep't of Homeland Sec.*, 279 F. Supp. 3d 1011, 1048 (N.D. Cal.). The Ninth Circuit affirmed. *Regents of the Univ. of California v. U.S. Dep't of Homeland Sec*., 908 F.3d 476, 504 (9th Cir. 2018).

On June 18, 2020, the Supreme Court vacated the rescission of DACA, *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020). On July 28, 2020, Acting Secretary of Homeland Security Chad Wolf issued a memorandum entitled, "Reconsideration of the June 15, 2012 Memorandum Entitled 'Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children'" ("Wolf Memorandum"). The Wolf Memorandum rescinded the Duke Memorandum and directed USCIS to, among other things, "[a]djudicate all pending and future properly submitted DACA renewal requests and associated applications for Employment Authorization Documents from current beneficiaries." The Wolf Memorandum also limited the renewal period "of any deferred action granted pursuant to the DACA policy after the issuance of this memorandum . . . to one year."

## III. DACA Denials

Through an internal USCIS guidance document entitled the "National Standard Operating Procedures (SOP); Deferred Action for Childhood Arrivals

(DACA)" ("DACA SOP"), USCIS has provided Service Center Operations Directorate (SCOPS) officers with procedural guidance for granting or denying a request for deferred action under the DACA policy. ER 140-99, DACA SOP Chapter 8, Adjudicating DACA Requests [excerpts]; *id*. at 200-06, DACA SOP Chapter 9, Denials [excerpts]. USCIS adjudicators consider different guidance for DACA requests than for DACA terminations. *See* ER 222-24, Chapter 14, DACA Terminations [excerpts].

While DACA requests are screened for compliance with initial criteria, the DACA SOP chapter on adjudications is replete with instructions that an individual's ability to meet the guidance criteria merely allows him or her to be *considered* for a DACA grant. *See, e.g.*, *id*. at 145, 146, 149, 150, 155.

The DACA SOP is also clear that "the existence of deportation, exclusion, or removal proceedings may have an effect on the exercise of prosecutorial discretion for DACA." *Id*. at 169. In adjudicating a DACA request from an individual placed into removal proceedings through issuance of an NTA, the DACA SOP specifically advises USCIS to consider more than just the grounds listed in the NTA. ER 172. The SOP states:

> *Do not rely solely on the grounds listed in the charging document* and/or [redacted] as not all issues may have necessarily been captured, or new issues may have arisen since the charging document was issued. It is necessary to review all derogatory information in its totality and

> then make an informed assessment regarding the appropriate exercise of prosecutorial discretion for DACA.

*Id*. (emphasis added).

The DACA SOP instructs adjudicators to consider the totality of the circumstances when assessing the impact of criminal conduct that would not preclude favorable consideration for DACA. *Id.* at 178 ("Notwithstanding whether the offense is categorized as a significant or non-significant misdemeanor, the decision whether to defer action in a particular case is an individualized, discretionary one that is made taking into account the totality of the circumstances."); *Id.* at 179 ("[T]he requestor's entire offense history," including minor traffic offenses, "can be considered" under the totality of the circumstances analysis).

In the case of a requestor who may establish that the guidelines are met but for whom the adjudicator determines nonetheless that a favorable exercise of discretion is not warranted, the DACA SOP calls for the USCIS Background Check Unit ("BCU") to seek SCOPS review before issuing a denial. ER 203.

## IV. Procedural History

### A. DACA termination litigation

Plaintiff Daniel Ramirez Medina's ("Mr. Ramirez") Second Amended Complaint ("SAC") challenged the February 2017 termination of his 2016 DACA grant, which was based on finding that he was a public safety threat due to

statements he made during his arrest and detention that led ICE and USCIS to believe he was affiliated with gangs. District court ECF No. 78, April 25, 2017. The SAC sought, *inter alia*, injunctive and declaratory relief in the form of reinstating his DACA and employment authorization ("EAD"). *Id.*; district court ECF No. 122, Motion for Preliminary Injunction. Prior to the district court's ruling on Mr. Ramirez's motion for preliminary injunction, the United States District Court for the Central District of California issued a class-wide preliminary injunction in *Inland Empire-Immigrant Youth Collective v. Nielsen*, No. EDCV172048PSGSHKX, 2018 WL 1061408, at *15 (C.D. Cal. Feb. 26, 2018)).[2] As a member of that class, Mr. Ramirez's DACA and EAD were restored on or about March 30, 2018, with an expiration date of May 15, 2018. *See* district court ECF No. 132.

The Government issued Mr. Ramirez a Notice of Intent to Terminate ("NOIT") with regard to his reinstated DACA and EAD, based on the same evidence of gang affiliation, as that was still the only information before USCIS. ER 320-21. Mr. Ramirez submitted evidence and argument in response to the NOID. However, rather than let the agency consider the response, the district court intervened in the process by granting Mr. Ramirez's modified motion for

[2] The district court's order is currently on appeal. *See Inland Empire-Immigrant Youth, et al v. Kirstjen Nielsen, et al.*, No. 18-55564 (9th Cir.).

preliminary injunction, enjoining the Government "from asserting, adopting, or relying in any proceedings on any statement or record made as of this date purporting to allege or establish that Mr. Ramirez is a gang member, gang affiliated, or a threat to public safety." *Id*. at 356. The district court also acknowledged that Mr. Ramirez's restored DACA was set to expire on May 15, 2018, the same day the district court granted the preliminary injunction. *Id*. at 356 n.7.

Emails reveal that, had the district court not interfered with the DACA adjudication process, USCIS had already determined not to terminate his DACA based on its earlier suspicion of gang affiliation. SER 01-02.

**B. DACA renewal request**

On May 21, 2018, Mr. Ramirez submitted a DACA renewal request. ER 93. On June 21, 2018, in relation to Mr. Ramirez's renewal request, the USCIS Office of Chief Counsel notified SCOPS that ICE had provided information to them that Mr. Ramirez admitted having sex with an underage girl in California; admitted that he had acquired marijuana from a friend and that he keeps marijuana with him at all times; admitted that he transported marijuana in his car while driving from Washington state to California; and admitted that he has more than $4,000 in unpaid driving fines. ER 498-99. ICE also communicated that it considered Mr. Ramirez an enforcement priority and that it had learned of the derogatory

information from Mr. Ramirez in his removal proceedings and as part of his application to the immigration court for cancellation of removal. *Id*.

After gathering details of Mr. Ramirez's criminal record, the USCIS BCU adjudicator responsible for Mr. Ramirez's DACA renewal request submitted a request for adjudicative guidance ("RAG") to SCOPS headquarters, pursuant to the DACA SOP. ER 203; *id*. at 510 (August 24, 2018 email from BCU officer to ICE stating she included ICE's response in her RAG). SCOPS, through the WATS branch,[3] responded to the RAG on August 30, 2018, with a recommendation that the BCU issue Mr. Ramirez a notice of intent to deny ("NOID"). ER 507-08; *see id*. at 78-80. SCOPS determined that Mr. Ramirez was not a public safety concern in relation to the charges of sexual intercourse with a minor. *Id*. at 507-08. However, SCOPS still viewed the information "as a derogatory factor in the consideration of deferred action under the totality of the circumstances based on the fundamental underpinnings of statutory rape criminal offenses and the information in the police report." *Id.; see* SER 14-16 (Lindsay, California police report, Dec. 27, 2013).

[3] The Waivers and Temporary Services branch ("WATS") is a branch within SCOPS headquarters that oversees DACA operations, including responding to RAG requests from USCIS Service Centers adjudicating DACA requests. *See* ER 66, Declaration of Alexander King. For ease of reference, Defendants use "SCOPS" where possible.

SCOPS similarly concluded that Mr. Ramirez's "nearly $5,000 in traffic fines" did not disqualify him from consideration of DACA, but found that, "under the totality of the circumstances, . . . [the fines are] a negative factor in assessing whether Ramirez Medina . . . merits prosecutorial discretion." ER 512. SCOPS's assessment of Mr. Ramirez's traffic fines included the marijuana possession, which SCOPS noted also constituted a violation of federal law by transporting the substance across state lines. ER 513.

SCOPS then discussed USCIS's deference to ICE's finding that Mr. Ramirez is an enforcement priority. *See* SER 32-38. Specifically, SCOPS noted that both the DACA Memo and DACA SOP guide USCIS to generally defer to ICE's enforcement priority determinations, including that:

> There is a specific denial template that was created for cases where ICE considers the requestor to be an enforcement priority, and WATS did not find any guidance indicating that USCIS must inquire with ICE as to why the individual is an enforcement priority or what memorandum or piece of policy guidance the individual is an enforcement priority under.

*Id*. at SER 37. SCOPS also noted that the Kelly Memo did not limit "DHS's discretion in determining enforcement priorities under the INA," and that the DACA Memo also states that "decisions on DACA are to be made on an individual basis and that DHS cannot provide any assurance that relief will be granted in all cases." *Id*.; *see* ER 457-62, "Enforcement of the Immigration Laws to Serve the

National Interest," John Kelly, February 20, 2017 ("Kelly Memo"). SCOPS further explained, in relation to the Kelly Memo, that:

> The DHS enforcement priority memorandum in effect when DACA first started and the memorandum from 2014 both note that nothing in the memorandums "should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein."

*Id*. (citing "Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens." John Morton, March 2, 2011; "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants." Jeh Charles Johnson, November 20, 2014).

On September 26, 2018, the BCU issued Mr. Ramirez a NOID. ER 78-80. The NOID stated USCIS's intention to deny Mr. Ramirez's DACA request "because USCIS does not find that you warrant a favorable exercise of prosecutorial discretion under the totality of the circumstances." *Id*. The NOID cited ICE's determination that Mr. Ramirez is an enforcement priority and described each of Mr. Ramirez's criminal activities in detail. *Id*.

Mr. Ramirez, through counsel, submitted a response to the NOID on or around October 24, 2018. ER 84-92. Mr. Ramirez did not dispute the veracity of the criminal charges; rather, he argued that the Government may not rely on those charges at all, because it would be unfair to him. *Id.* at 90-92. Mr. Ramirez made largely the same estoppel argument that he later made to the district court in

seeking a new preliminary injunction—that he could not have known that the Government would consider his criminal record in deciding his DACA request since it had not relied on it in previous adjudications. *Id* at 88-91.

Upon consideration of Mr. Ramirez's NOID response, the BCU officer concluded that Mr. Ramirez was not precluded from consideration of DACA for failure to meet the guidance criteria in the DACA SOP. ER 506-08 (BCU Resolution Memo, November 16, 2018). The BCU officer also indicated to SCOPS on November 5, 2018 that she did not consider Mr. Ramirez to be a sexual predator or a public safety concern. *Id.* at 507-08. In response, SCOPS recommended denying Mr. Ramirez's DACA request on the basis that Mr. Ramirez's NOID response did not overcome the reasons cited in the NOID, including ICE's enforcement priority determination and the enumerated incidents of criminal conduct. *Id.* at 506-08. SCOPS explained,

> While we understand that DACA cases involving the same factual scenarios may generally have the same adjudicative results under the 2012 DACA policy, we are unware of any cases with similar fact patterns to this case that have been approved (i.e. ICE enforcement priority determination and the additional negative discretionary factors discussed in the NOID).

*Id*.

On December 19, 2018, USCIS issued Mr. Ramirez a DACA denial notice detailing the reasons for denying his DACA request and why his NOID response did not overcome the Government's findings. ER 322-25. The letter explained:

> Other than your own declaration, you have not submitted any evidence that is not already on the record. You did not submit any evidence related to your marijuana conviction. You also did not submit any new evidence related to the investigation into the unlawful sexual intercourse that resulted from the birth of your child. You did not submit any affidavits from others in support of your own claims.

*Id.* at 324. The notice also stated that the criminal information relied on in the denial was unknown to USCIS at the time of Mr. Ramirez's previous DACA grant on May 5, 2016. *Id*.

### C. Mr. Ramirez's Third Amended Complaint

On May 30, 2019, Mr. Ramirez filed a Third Amended Complaint ("TAC") [district court ECF No. 144], challenging Defendants' decision to deny his DACA renewal request and, a week later, a motion for preliminary injunction [district court ECF No. 147]. The TAC sought an order from the Court granting Mr. Ramirez an unqualified and permanent term of deferred action which the Government may not terminate with any process or for any reason. *See* district court ECF No. 144 at 39-40, Prayer for Relief ("(4) Order Defendants to reinstate Mr. Ramirez's DACA status and work authorization; (5) Enjoin Defendants from terminating or declining to renew Mr. Ramirez's DACA status and work authorization").

On October 9, 2019, the district court denied Mr. Ramirez's motion for second preliminary injunction; granted Defendant's motion to dismiss the TAC and motion for summary judgment (district court ECF No. 152) ("Mot. to Dismiss");

and dismissed all of Mr. Ramirez's claims asserted in his TAC without prejudice. *See* Order 27. The district court held that it lacked subject matter jurisdiction to review the decision to deny Mr. Ramirez's DACA renewal request. *Id.* at 20-21 ("The circumstances of this case have changed. Mr. Ramirez is no longer challenging the Government's attempt to terminate his existing DACA [. . . ] Importantly, many of the Court's previous due process concerns are mollified in this posture.").

Before dismissing Mr. Ramirez's TAC, the district court found that enforcement of its prior preliminary injunction order is no longer "procedurally appropriate" here. *Id.* at 24. The district court found that Mr. Ramirez's filing of a TAC with different claims "dissolved" the district courts previously issued preliminary injunction, but also found that, on the merits, "Mr. Ramirez does not establish a violation of the Court's previous order." *Id.* at 25. The district court also found that the preliminary injunction was mooted by dismissal of the complaint. *Id*.

On June 12, 2020, Mr. Ramirez appealed to the United States Court of Appeals for the Ninth Circuit, requesting that the district court's order granting Defendant's motion to dismiss be reversed and that the denial of his motion for injunctive relieve be vacated and remanded. Op. Br. 55.

## STANDARD OF REVIEW

This Court reviews de novo a district court's decision to grant a motion to dismiss for lack of subject matter jurisdiction. *See DaVinci Aircraft, Inc. v. U.S.*, 926 F.3d 1117, 1122 (9th Cir. 2019), *cert. denied,* 140 S. Ct. 439 (2019). All facts alleged in the complaint are accepted as true and are construed in the light most favorable to the plaintiff when reviewing a dismissal pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). *Id.* (internal citations omitted). In deciding a 12(b)(6) motion, the court will generally only consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).[4] Dismissal is proper if it appears beyond a doubt that the plaintiff cannot prove a set of facts upon which relief can be granted. *Id.*

[4] It was appropriate for the district court to consider the Administrative Record to consider, inter alia, Mr. Ramirez's allegation that "there is no evidence whatsoever in administrative record [sic] that the BCU DACA Team actually adjudicated Mr. Ramirez's most recent renewal request and reached a conclusion contrary to the March 2018 determination." District court ECF No. 144 at 31; *In re Stac Electronics Securities Litigation*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996) ("[D]ocuments whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss.") (citations omitted). Mr. Ramirez does not challenge the Record authenticity, in fact, he relies on it more than 25 times to prove his claims here. *See, e.g.*, Op. Br. 22, 39.

## JURISDICTIONAL STATEMENT

The Court has jurisdiction to review a district court grant of a motion to dismiss pursuant to 28 U.S.C. § 1291. The district court entered a final judgment on October 9, 2019, and Plaintiff-Appellant filed a Notice of Appeal on December 6, 2019, within sixty (60) days of the district court's order, and is therefore timely under Federal Rule of Appellate Procedure 4(a)(1)(B).[5]

## SUMMARY OF THE ARGUMENT

Section 1252(g) bars jurisdiction over Mr. Ramirez's challenge to USCIS's discretionary denial of his DACA request—a "no deferred action decision" foreclosed from review in any court as a claim arising out of the decision to seek an individual's removal. *Reno v. Am.-Arab Anti-Discrimination Comm*. ("*AADC*"), 525 U.S. 471, 483-84 (1999).

Mr. Ramirez's constitutional claims do not overcome the clear jurisdictional bar of Section 1252(g), because he failed to establish such violations and instead has presented only "a garden-variety administrative action" that he attempts to turn into "a case of constitutional magnitude." *Markham v. United States*, 434 F.3d 1185, 1187-88 (9th Cir. 2006). Notably, Mr. Ramirez argues only that he plausibly

[5] Mr. Ramirez's reliance on 28 U.S.C. § 2241 to assert district court jurisdiction and overcome Section 1252(g), Op. Br. 4 n.1, is foreclosed by his acknowledgement that "Mr. Ramirez is no longer bringing a petition for writ of habeas corpus." District court ECF No. 78, SAC, at 3 n.4.

alleged constitutional violations, a standard that is insufficient as a matter of law to overcome the evidence in the Administrative Record supporting the lawfulness of the denial decision here. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 254, 255 n.10 (1981).

The Record establishes that the adjudication of Mr. Ramirez's DACA request was otherwise lawful and fair, and Mr. Ramirez fails to establish either a due process violation or a First Amendment violation. First, an individual has no due process right to a discretionary immigration benefit, much less to a grant of deferred action. *Mendez-Garcia v. Lynch,* 840 F.3d 655, 669 (9th Cir. 2016). To the extent the Court may disagree, Mr. Ramirez received due process here in the notice of intent to deny his DACA request and the opportunity to respond. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Second, Mr. Ramirez's First Amendment allegations are contained only in a footnote, and are thus insufficiently pled. *Wannamaker v. Spencer*, 774 F. App'x 378, 379 n.1 (9th Cir. 2019). To the extent the Court disagrees, Mr. Ramirez still fails to overcome the Government's showing that he was denied for lawful grounds pursuant to DACA policies that are applied to thousands of individuals per year.

Mr. Ramirez also fails to identify a nondiscretionary error in the adjudication of his DACA request to establish the district court's jurisdiction. Rather, ICE's reliance on the Kelly Memo to determine that Mr. Ramirez is an

enforcement priority is not an error of law, nor is USCIS's reference to that finding in support of denying Mr. Ramirez DACA. Neither the Kelly Memo nor the USCIS DACA SOP curtail ICE's discretionary authority to determine any individual is an enforcement priority. Regardless, USCIS made its own independent determination that Mr. Ramirez did not warrant an exercise of prosecutorial discretion.

Mr. Ramirez also fails to establish a departure from general policies or an unexplained inconsistency in the adjudication of his DACA request. Rather, the DACA SOP specifically provides for consideration of an individual's status in removal proceedings, and calls for consideration of an individual's entire criminal record, even minor traffic violations, and to consult with SCOPS in such circumstances, to determine whether discretion should be exercised. Thus, USCIS properly relied on Mr. Ramirez's newly discovered criminal records and followed the correct procedures to do so.

The Court should dismiss as moot claims related to Mr. Ramirez's preliminary injunction motion, or, in the alternative, find that those claims do not establish jurisdiction. Mr. Ramirez's claim that the injunction was not dissolved along with dismissal of his complaint is wrong as a matter of law. *Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1075 (9th Cir. 2001). Equally wrong is Mr. Ramirez's argument that the district court's previous finding of jurisdiction

endures to preserve the preliminary injunction no matter the factual or legal developments in the case. *Rockwell Int'l Corp. v. United States,* 549 U.S. 457, 473 (2007).

Alternatively, the Court should find that Mr. Ramirez's DACA denial did not violate the preliminary injunction motion. The district court correctly found that the injunction would not have been violated by the agency's reliance on Mr. Ramirez's criminal record as an "implicit" finding of a public safety threat, because the term "threat to public safety" has a particular meanings in the DACA SOP. Had the district court wanted to give that term a broader meaning in the injunction, it would have had to specify as much in the order. *See Columbia Pictures Indus., Inc. v. Fung,* 710 F.3d 1020, 1047 (9th Cir. 2013).

Lastly, the district court correctly determined that Mr. Ramirez's criminal charges do not make him a public safety threat for purposes of the DACA SOP. Public safety threats in the DACA SOP include, for example, individuals "with multiple DUI arrests, . . . [or] an individual arrested for multiple assaults or other violent crimes" even without convictions." ER 185. USCIS did not rely on such charges, and in fact expressly stated that, based on the charges it did consider, Mr. Ramirez was not a threat to public safety.

Thus, this Court should affirm the district court's dismissal of the Third Amended Complaint for lack of jurisdiction pursuant to 8 U.S.C. § 1252(g), as a

direct challenge to a "no deferred action decision." Alternatively, if the Court finds that Mr. Ramirez raised a viable constitutional claim, it should still affirm dismissal pursuant to 8 U.S.C. §§ 1252(a)(5), (b)(9), which preclude raising claims challenging a final order of removal in district court.

## ARGUMENT

### I. Section 1252(g) bars jurisdiction over Mr. Ramirez's challenge to USCIS's discretionary denial of his DACA request.

This Court should affirm the district court's order dismissing Mr. Ramirez's TAC and motion for preliminary injunction because 8 U.S.C. § 1252(g) is a clear jurisdictional bar to "no deferred action decisions," such as the one raised here. Mr. Ramirez does not meet his burden to establish jurisdiction, either through his unfounded constitutional challenges or his mistaken assertion that erroneous legal standards were applied in the discretionary denial of his DACA renewal request.

The law is clear that no person with unlawful status is entitled to an exercise of prosecutorial discretion, and, when that exercise is denied, no person is entitled to bring suit in *any* court to compel the Government to exercise its discretion favorably. It is irrefutable that Congress, through the REAL ID Act and the APA, blocks access to judicial review in this way. *See* 8 U.S.C. § 1252(g) ("*no court* shall have jurisdiction to hear any cause or claim . . . arising from the decision or action . . . to commence proceedings, adjudicate cases, or execute removal orders") (emphasis added); *AADC*, 525 U.S. at 485; *Regents*, 908 F.3d at 504. Other courts in the Ninth Circuit have held the same. *Rueda Vidal v. U.S. Dep't of Homeland Sec.*, No. CV189276DMGPLAX, 2019 WL 7899948, at *9 (C.D. Cal. Aug. 28, 2019) ("Because the administrative materials in . . . the instant case preserve an agency's unfettered discretion to deny a request for deferred action *even if* an alien

satisfies certain objective criteria, this Court must adhere to Section 701(a)(2)'s presumption of unreviewability.").[6]

With Mr. Ramirez's petition for review ("PFR") of his order of removal dismissed for lack of prosecution,[7] there are no remaining barriers to his removal, save this case. A court-ordered grant of DACA here would likely have one direct and immediate consequence—a halt to the execution of Mr. Ramirez's final removal order. Thus, there can be no reasonable argument that the claim here is not one "arising from the decision or action by the [Secretary] to commence proceedings, adjudicate cases, or execute removal orders." 8 U.S.C. § 1252(g).

Accordingly, the district court appropriately held that 8 U.S.C. § 1252(g) precluded review of Mr. Ramirez's third amended complaint. Order 24 ("Mr. Ramirez has not carried his burden of establishing this Court's subject matter jurisdiction."). Mr. Ramirez contends that the district court erred because Section 1252(g) "does not preclude judicial review of the agency's denial of Mr.

---

[6] Mr. Ramirez's claim that the Government has waived a jurisdictional argument by failing to raise 8 U.S.C. §§ 1252(a)(5) and (b)(9) in its recent briefing, Op. Br. 4 n.1, is wrong as a matter of law. Subject matter jurisdiction cannot be waived. *In re Kieslich*, 258 F.3d 968, 970 (9th Cir. 2001). Were this Court to find that Mr. Ramirez has raised a justiciable claim in the denial of a request for deferred action, it should still find that he could only have raised such a claim in a PFR of a final order of removal in the proper court of appeals. *See J.E.F.M. v. Lynch*, 837 F.3d 1026, 1038 (9th Cir. 2016). The district court noted as much in its dismissal. *See* Order 20.

[7] *Ramirez-Medina v. Barr*, No. 19-72850 (9th Cir.), ECF No. 12, Order of Dismissal, July 20, 2020.

Ramirez's DACA renewal request where its denial violated Mr. Ramirez's constitutional rights and was a result of the agency's own nondiscretionary errors." Op. Br. 29. Rather, he explains, "[i]n light of the "well-settled' and 'strong presumption' of judicial review of administrative action that the Supreme Court "ha[s] 'consistently applied' . . . to immigration statutes," *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020), Section 1252(g) is "narrowly construed." *Id*. at 29-30 (citing *Kwai Fun Wong v. United States*, 373 F.3d 952, 963-64 (9th Cir. 2004)). Mr. Ramirez asserts that Section 1252(g) applies only to the decisions to "*commence* proceedings, *adjudicate* cases, or *execute* removal orders," *id*. at 30, citing *AADC*, 525 U.S. at 482, and "does not sweep in any claim that can technically be said to 'arise from' the three listed actions." *Id*. (citing *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018) (plurality op.)). Mr. Ramirez further claims that Section 1252(g) is limited to "discretionary decisions that the Attorney General actually has the power to make, as compared to the violation of his mandatory duties," *id*. at 30, citing *Arce v. United States*, 899 F.3d 796, 801 (9th Cir. 2018) (per curiam), and that in light of a strong presumption in favor of judicial review, the "general rule" is "to resolve any ambiguities in a jurisdiction-stripping statute in favor of the narrower interpretation." *Id*. at 30 (citing *Arce*, 899 F.3d at 801; *Inland Empire*, 2018 WL 1061408 at *15.

But Mr. Ramirez's contentions regarding the limitations on the applicability of Section 1252(g) are unremarkable. Mr. Ramirez's assertion of a "presumption of reviewability" in cases where a statutory provision "is reasonably susceptible to divergent interpretation" fails to overcome the clearly articulated jurisdictional bar here. Op. Br. 29 (citing *Guerrero-Lasprilla*, 140 S. Ct. 1062, 1069 (2020)). But *Guerrero-Lasprilla* says nothing about Section 1252(g). *Id*. at 1070. Instead, the Supreme Court has already spoken to the clarity of the statutory language at issue here—"individual 'no deferred action' decisions . . . fall *exactly* within Section 1252(g)" *Regents*, 908 F.3d at 504 (emphasis added) (citing *AADC*, 525 U.S. at 485).

Mr. Ramirez's citation to *Inland Empire* is also distinguishable. Op. Br. 30. That court found jurisdiction over the *termination* of an existing grant of DACA, taken without notice or an opportunity to respond—in what that court considered a violation of nondiscretionary procedures. In fact, Mr. Ramirez boldly adopts a citation from *Inland Empire* that itself cites to the earlier incarnation of this case in the SAC phase to support its finding of jurisdiction. *Id*. (citing *Inland Empire*, 2018 WL 1061408 at *15 (citing *Ramirez Medina v. DHS*, 2017 WL 5176720, at *6 (W.D. Wash. Nov. 8, 2017))). Mr. Ramirez is no longer challenging a DACA termination here, nor was his DACA request denied without notice and an opportunity to respond. Rather, the district court here found that "[t]he

Government followed the procedures outlined in its SOP," a direct contradiction of the *Inland* court's basis for finding jurisdiction. Order 22.

The other authorities that Mr. Ramirez cites fail to consider a scenario like his – a direct challenge to the denial of a request for deferred action from an individual in removal proceedings. *See* Order 20 n.113 ("deferred action, as a form of prosecutorial discretion, is particularly ill-suited for judicial review.") (citing *AADC*, 525 U.S. at 483–84, 489–90); *Kwai Fun Wong*, 373 F.3d at 965 (Section 1252(g) "does not bar review of actions that occurred prior to any decision to commence proceedings."); *Arce*, 899 F.3d at 801 ("[w]here the Attorney General totally lacks the discretion to effectuate a removal order, § 1252(g) is simply not implicated.").

Lastly, the Supreme Court's holding in *Regents*, 140 S. Ct. at 1891, that the rescission of the DACA policy is reviewable under the APA, has no effect on the jurisdictional bar of Section 1252(g) as to an *individual* no deferred action decision. The Supreme Court's only reference to Section 1252(g) in *Regents* was to note that "[t]he rescission, which revokes a deferred action program with associated benefits, is not a decision to 'commence proceedings,' much less to 'adjudicate' a case or 'execute' a removal order." 140 S. Ct. at 1907. The Supreme Court similarly found that the challenge to the rescission of DACA policy was not barred by Sections 1252(b)(9) because it does not involve any one individual's

removal proceedings. *Id*. When the issue *was* before it, the Supreme Court found that a challenge to an individual "no deferred action decision" was barred by Section 1252(g) as a challenge to removal proceedings. *AADC*, 525 U.S. at 485.

### A. Mr. Ramirez's constitutional claims do not overcome the clear jurisdictional bar of Section 1252(g)

The district court appropriately rejected Mr. Ramirez's arguments that the district court retained jurisdiction to adjudicate his constitutional claims. Order 21-23 (discussing changed circumstances in the TAC); *id*. at 21-22 ("Mr. Ramirez is no longer challenging the Government's attempt to terminate his existing DACA status based on unsupported allegations of gang affiliation. Mr. Ramirez's DACA status already expired. His current action seeks to challenge the Government's discretionary decision to deny his application to renew his DACA status. *Id*. at 22 ("many of the Court's previous due process concerns are mollified in this posture."); *id*. at 23 n.120 ("the record does not establish that animus or malice alone drove the decision.").

Mr. Ramirez argues that "Section 1252(g) 'does not prevent the district court from exercising jurisdiction over . . . due process claims.'" Op. Br. 31, citing *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (9th Cir. 1999), *supplemented*, 236 F.3d 1115 (9th Cir. 2001). But this is an overstatement, as *Walters* only recognized jurisdiction over "general collateral challenges to unconstitutional practices and policies used by the agency,"

145 F.3d at 1052, in the context of an incomprehensible notice of a document fraud charge resulting in unappealable removal orders, *id*. at 1036, and *Barahona-Gomez* similarly recognized jurisdiction only over a claim to "enforce their constitutional rights to due process in the context of those [INS removal] proceedings," 167 F.3d at 1234. Here, Mr. Ramirez's challenge to the government's exercise of prosecutorial discretion fits squarely within the scope of section 1252(g) – especially in light of Mr. Ramirez's ongoing removal proceedings that resulted in a final order of removal. *See Ramirez-Medina v. Barr*, No. 19-72850 (9th Cir.); *AADC*, 525 U.S. at 487 ("indeed, as we have discussed, the language [of Section 1252(g)] seems to have been crafted with such a challenge precisely in mind").

Mr. Ramirez also argues that "[n]on-citizens who are physically present in the United States are guaranteed protections of the First and Fifth Amendments." Op. Br. 31 (citing *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Kwong Hai Chew v. Colding*, 334 U.S. 590, 596 n.5 (1953). This proposition is also unremarkable, but Mr. Ramirez fails to address authority affirming limitations on constitutional claims that fall within the limits of section 1252(g). *See AADC*, 525 U.S. at 491 ("the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations [*i.e*., the "substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute."] can be overcome."); *Garcia Herrera v. McAleenan*, No. 2:19-CV-

0094-TOR, 2019 WL 4170826, at *7 (E.D. Wash. Sept. 3, 2019) ("USCIS retains the ultimate discretion to determine whether deferred action is appropriate in any given case even if the guidelines are met."); *Rueda Vidal*, 2019 WL 7899948 at *14 ( "the DACA Memo and other relevant administrative guidance confer upon USCIS the unfettered discretion to deny a DACA request."). Mr. Ramirez also fails to address authority concluding that there is no due process right in a discretionary process. *Mendez-Garcia*, 840 F.3d at 669.

Indeed, the Supreme Court has balanced alleged violations of constitutional rights against the applicability of Section 1252(g), holding that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." *AADC*, 525 U.S. at 488; *id.* ("We do not believe that the doctrine of constitutional doubt has any application here."). Furthermore, the district court correctly found that due process *was* satisfied, Order 22, and, in response to his claim of disparate treatment, that "the agency's in-depth consideration and discussion of the unique circumstances presented in Mr. Ramirez's case would not necessarily violate agency policy or Mr. Ramirez's rights." Order 23.

To be sure, the district court here expressed its suspicions of the Government's actions, but ultimately agreed with the Government's position that the denial was based on lawful grounds and was not driven by animus. Order 23

("Unfortunately for Mr. Ramirez, there was derogatory information for the Government to discover."); *id*. at 23 n.120 ("Regardless, the record does not establish that animus or malice alone drove the decision.").

Contrary to his framing of the issue, Mr. Ramirez is challenging the district court's conclusion that Mr. Ramirez has "not carried his burden of establishing this Court's subject matter jurisdiction," Order 24; rather than a finding that the district court lacked jurisdiction over his constitutional claims. As Mr. Ramirez notes, the district court's order concluded that "'many of the . . . due process concerns' it had previously found warranted jurisdiction were 'mollified' because Mr. Ramirez's 'DACA status . . . expired,' and the government 'provided Mr. Ramirez notice and an opportunity to be heard' regarding his renewal request.'" Op. Br. 31-32 (citing ER 22-23 [Order 21-22]).

Absent a constitutional violation, all that remains of the TAC is "a garden-variety administrative action" that Mr. Ramirez attempts to turn into "a case of constitutional magnitude." *Markham v. United States*, 434 F.3d 1185, 1187-88 (9th Cir. 2006) (citing *Czerkies v. U.S. Dep't of Labor*, 73 F.3d 1435, 1443 (7th Cir. 1996) (en banc) (Posner, C.J.); *see Bell v. Hood*, 327 U.S. 678, 682 (1946) (an alleged constitutional claim may be dismissed for lack of jurisdiction where the claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction.").

Additionally, Mr. Ramirez claims only that he has "plausibly alleged" that the denial of his DACA renewal request violated his constitutional rights, *see* Op. Br. 26-27, 30, 32, 50-51, which is insufficient as a matter of law to maintain jurisdiction in the face of the Administrative Record. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 255 n.10 (1981) (If the defendant carries its burden of introducing "evidence of legitimate, nondiscriminatory reasons for its actions," "the presumption raised by the prima facie case is rebutted [and] drops from the case.") (internal quotations omitted). Given the agency's presentation of lawful grounds for denying his DACA request, grounds Mr. Ramirez does not dispute in substance, Mr. Ramirez was required to "produce 'specific, substantial evidence of pretext'" in rebuttal. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir. 1994) (citation omitted). He has not, and his claims that the denial is "plausibly" unconstitutional are insufficient. For that reason, the Court should find that Mr. Ramirez has done no more than to dress up a garden-variety administrative claim as a constitutional challenge for the sake of trying to establish jurisdiction, and the Court should affirm the dismissal of his TAC.

Despite an obvious sympathy for Mr. Ramirez's circumstances, the district court simply recognized no way forward under the law, and dismissed for lack of jurisdiction. This Court should affirm that decision.

### B. The adjudication of Mr. Ramirez's DACA request was lawful and fair.

#### i. Mr. Ramirez fails to establish a due process violation.

Instead of specific evidence of pretext, Mr. Ramirez argues that the district court was wrong to find the denial process was conducted fairly, and that he has a due process right to have his DACA renewal request "not denied out of spite based on considerations which the government admits have not warranted denial of other, similar renewal applications." Op. Br. 32. But Mr. Ramirez overstates two points. First, while the BCU adjudicator stated she was not aware of a case where certain of Mr. Ramirez's criminal records alone, under her analysis, would have warranted a DACA denial, ER 508, SCOPS responded that it was not aware of a case where an individual with all of Mr. Ramirez's equities *was* granted DACA. Order 23; ER 506.

Second, Mr. Ramirez cites *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), for the proposition that "due process requires 'the opportunity to be heard . . . in a meaningful manner,'" Op. Br. 32. However, Mr. Ramirez received notice of the Government's intent to deny his discretionary DACA request, ER 78-80 (Notice of Intent to Deny), and he used his opportunity to respond to submit—through counsel—evidence and arguments in his defense. ER 84-92. Furthermore, the cases Mr. Ramirez then cites in support of his claim that he did not receive a fair evaluation of his renewal request made findings that fall far short or go far beyond

the allegations here. Op. Br. 32, citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980) (for right to "judicial impartiality"); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2002) (for right to "a neutral arbiter"); *Zolotukhin v. Gonzalez*, 417 F.3d 1073, 1075 (9th Cir. 2005) (for right to a decision-maker that does not "'improperly prejudge[]' a case").

Notably, the selection from *Marshall* that Mr. Ramirez quotes was a finding that the "strict requirements of neutrality" imposed on judges "cannot be the same for administrative prosecutors." 446 U.S. at 250. *Marshall* otherwise recognized generally that "traditions of prosecutorial discretion do not immunize judicial scrutiny cases in which the enforcement decision of an administrator were motivated by improper factors or were otherwise contrary to law," but offers nothing to support Mr. Ramirez's claims. *Id*. at 249. Conversely, in *Reyes-Melendez*, the court found that the immigration judge ("IJ") was "not a neutral fact finder, where the IJ "noticeably became aggressive and offered a stream of non-judicious and snide commentary, . . . Likewise the IJ order . . . was replete with sarcastic commentary and moral attacks." 342 F.3d at 1007-08. *Zolotukhin* made a similar finding of improper prejudice on the part of an immigration judge who made similar statements. 417 F.3d at 1075.

Mr. Ramirez has made no such showing that the BCU adjudicator or SCOPS were not neutral arbiters or that they prejudged his case. Op. Br. 32-33. To the

contrary, USCIS determined not to terminate Mr. Ramirez's prior grant of DACA, and then deliberated his DACA renewal request from both sides—in a series of exchanges that were professional, respectful, and focused solely on the legal implications of his criminal actions. *See* SER 01-02, 24-28, 32-38.

Truly, it is not clear whether, in the absence of Mr. Ramirez's newly revealed criminal record, *see* ER 497, USCIS would have approved his DACA renewal request. What is clear is that the agency voluntarily abandoned its intention to terminate his previous DACA grant after receiving his response to the NOID. SER 01-02; Mot. to Dismiss at 22. It is also clear from the extensive deliberations revealed in the Record that USCIS was not of a single mind in denying Mr. Ramirez's renewal request. *See* SER 24-38.

To the contrary, the BCU adjudicator initially appears to have advocated for granting the request, SER 28-29, while SCOPS disagreed. SER 27-28. While SCOPS's recommendation to deny the request prevailed, there is no evidence in the Record to support the district court's conclusions that the BCU adjudicator's "initial assessment was not credited," or that she was "overruled by her superiors." *Id*. at 15, 17; *cf*. ER 506-07 (SCOPS's two-page response to the adjudicator's analysis, complete with PowerPoint slides, beginning with: "Thank you for reviewing the NOID response and your feedback below."); SER 31 (BCU Adjudicator's email to SCOPS, beginning with: "Thank you for your very

thorough and clear response to my RAG."). This exchange in no way supports a finding that the adjudication of Mr. Ramirez's DACA request was either prejudged or driven by animus.

One of the ways in which SCOPS appears to have diverged with the BCU adjudicator was in its consideration not just of the actual charges against Mr. Ramirez, but also the nature of the conduct, for example noting that "Ramirez Medina admitted to crossing state lines with marijuana in his possession, a violation of federal law." *Id*. at 513; *cf. id*. at 508 (email from BCU adjudicator to SCOPS). Similarly, SCOPS noted, in agreement with the adjudicator, that it did not consider Mr. Ramirez to be a public safety concern based on his decision to have ostensibly consensual sex with a minor "who had just turned 17." ER 500; SER 33-34. It then stated, "[h]owever, we still view the information as a derogatory factor in the consideration of deferred action under the totality of the circumstances based on the fundamental underpinnings of statutory rape criminal offenses and the information in the police report." *Id*. at 58. These concerns, along with Mr. Ramirez's arrests for driving without a license and more than $4,000 in unpaid traffic fines, led SCOPS to determine that the totality of the circumstances did not warrant a favorable exercise of prosecutorial discretion. *Id*.

The disparities in evaluating the circumstances, and the fact that SCOPS's analysis prevailed over the adjudicator's, are simply not evidence of prejudgment

or animus. Rather, this record of deliberations demonstrates the precise reason that "the exercise of prosecutorial discretion is a type of government action uniquely shielded from and unsuited to judicial intervention." *Morales de Soto v. Lynch*, 824 F.3d 822, 828 (9th Cir. 2016).

Thus, Mr. Ramirez cannot show that the district court erred in determining that he failed to establish a claim of such due process violation. Where the grounds for denial are lawful and reasonable, and where the decisionmaking process was conducted pursuant to the DACA SOP, it is simply not for a district court or this Court to invade the province of agency discretion to decide that the BCU adjudicator had the more persuasive argument. *See* Order 23 n.120 ("the record does not establish that animus or malice alone drove the decision. At most it was one factor considered in the exercise of prosecutorial discretion. The Court cannot tinker with and tweak the decisionmaking process."); *Hartman*, 547 U.S. at 260.

#### ii. Mr. Ramirez's First Amendment allegations are insufficiently pled and wrong as a matter of law.

Mr. Ramirez argues in a footnote that "[b]y refusing to renew Mr. Ramirez's DACA status, the government unconstitutionally retaliated for Mr. Ramirez filing suit to challenge his wrongful detention and the initial revocation of his DACA status." Op. Br. 34, n.7, citing ER 96-97 ¶¶ 116–117. Mr. Ramirez further argues that the INA cannot preclude review of Mr. Ramirez's First Amendment claim.

Op. Br. 35, n.7, citing *Webster v. Doe*, 486 U.S. 592, 603 (1988). Mr. Ramirez's argument fails for several reasons.

First, a conclusory footnote is not sufficient to raise or preserve an issue for appellate review. *Wannamaker v. Spencer*, 774 F. App'x 378, 379 n.1 (9th Cir. 2019) ("We review only issues which are argued specifically and distinctly in a party's opening brief.") (quoting *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) ("Issues raised in a brief that are not supported by argument are deemed abandoned.") (citation omitted); *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, No. 12 CIV. 7372 (AT), 2020 WL 264146, at *2 (S.D.N.Y. Jan. 17, 2020) ("[C]ourts 'routinely decline[ ] to consider arguments mentioned only in a footnote on the grounds that those arguments are inadequately raised.'"

Second, even if Mr. Ramirez's first amendment retaliation claim was properly raised on appeal, Mr. Ramirez failed to state a claim. *See Chavez v. Hagel*, No. CV 16-00685 HG/KJM, 2017 WL 937144, at *6 (D. Haw. Mar. 9, 2017) (dismissing equal protection claim where plaintiff "does not allege that he is part of a protected class or set forth facts showing that he was treated differently than similarly situated service members who were separated or discharged from the military.") (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

To the extent Mr. Ramirez argues that he was treated differently than other DACA requestors, "even though 99 percent of DACA renewal applications are granted," Op. Br. 33, he offers nothing but an assertion that the Government is unable to disprove his vague theory. *Id*. at 27 ("the government's departure from its pattern of practice resulted in unexplained inconsistencies in how it treated Mr. Ramirez compared with similarly situated renewal applicants."). In fact, USCIS denied 4,318 DACA renewal requests in FY2018, and 4,059 in FY 2017. *See* district court ECF No. 148, Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction. The fact that USCIS denies DACA renewal requests undercuts Mr. Ramirez's citation to *Regents* that, given a 99% renewal rate, there "might [be] a question of fact as to whether a mutually explicit understanding of presumptive renewal existed" in a claim that an individual DACA renewal was "denied for no good reason," Op. Br. 34 (citing *Regents*, 908 F.3d at 515 (emphasis added)).

Lastly, this Court has also already addressed the substance of this claim, and found that "the reason DHS could not point to specific instances in which DACA applicants met the program criteria but were denied as a matter of discretion was that DHS did not have the ability to track and sort the reasons for DACA denials." *Regents*, 908 F.3d at 508 (citing *Texas*, 809 F.3d at 211 (King, J., dissenting).

The Court should reject Mr. Ramirez's First Amendment claim for having failed to offer sufficient argument in support, and, alternatively, find that this threadbare claim fails to overcome the clear jurisdictional bar of Section 1252(g).

## II. Mr. Ramirez fails to identify a nondiscretionary error to establish jurisdiction

Mr. Ramirez next argues that the district court had "jurisdiction to review and correct the serious nondiscretionary errors the government made in denying Mr. Ramirez's renewal application" – "it relied on the wrong legal standard as well as an unsupported enforcement priority determination. It also departed from its regular practice with regard to Mr. Ramirez, creating 'unexplained inconsistencies.'" Op. Br. 35. This line of argument fails because the government appropriately applied its standards when considering Mr. Ramirez's DACA renewal request and gave appropriate consideration to the factors considered.

As the district court held in concluding that it lacked jurisdiction, despite "many indications that give the Court pause to wonder if the Government had it out for Mr. Ramirez," that "the agency's in-depth consideration and discussion of the unique circumstances presented in Mr. Ramirez's case would not necessary violate agency policy or Mr. Ramirez's rights," and that "[i]n situations such as these, the Court has, and will continue, to defer to agency experience and expertise and trust the public servants discharging our laws." Order 23-24.

### A. The Kelly Memo does not curtail ICE's authority to determine who is an enforcement priority

As an initial matter, Mr. Ramirez's reliance on *Catholic Social Services v. I.N.S.* ("*CSS*"), 232 F.3d 1139 (9th Cir. 2000) (en banc), for jurisdiction over nondiscretionary decisions is unavailing. Op. Br. 27, 35. Unlike the challenge here, the *CSS* Court found that Section 1252(g) did not preclude jurisdiction over claims several steps removed from a *potential* decision to initiate removal proceedings. 232 F.3d at 1150.[8]

Mr. Ramirez's arguments that the "district court mistakenly concluded that the government's denial of Mr. Ramirez's renewal application was an exercise of discretion, and it disregarded uncontroverted evidence that the government committed several nondiscretionary errors" are not supported here. Op. Br. 35-36, citing ER 23 n.118. His claims that USCIS improperly relied on the Kelly Memo and that ICE was mistaken in its belief that Mr. Ramirez committed fraud in misrepresenting his GED status on his initial DACA request, Op. Br. 36-40, are incorrect and unavailing to establish nondiscretionary duties that would somehow overcome Section 1252(g).

[8] Nor does *United States v. Hovsepian* support jurisdiction here. Op. Br. 38 (citing F.3d 1144, 1155 (9th Cir. 2004). There is no "purely legal question" of ICE's ability to find Mr. Ramirez to be an enforcement priority that precedes USCIS's authority to exercise its discretion over Mr. Ramirez's DACA request.

First, USCIS correctly rejected the argument that Mr. Ramirez makes here—that the Kelly Memo somehow curtailed USCIS or ICE from determining an individual to be an enforcement priority. *See* ER 507; *id*. at SER 36-37 (also noting that the enforcement priority memo in effect at the time that DACA was established provided for agency discretion to determine enforcement priorities outside of the memo's guidance); *see also Torres v. U.S. Dep't of Homeland Sec.*, No. 17-1840, 2018 WL 3495830, at *1 n.2 (S.D. Cal. July 20, 2018) (DHS's enforcement priority guidance memoranda "neither expands nor limits DHS's authority to exercise its discretion in determining enforcement priorities under the INA and DACA.");[9] *Arpaio v. Obama*, 797 F.3d 11, 24 (D.C. Cir. 2015) ("Even after they are approved for deferred action . . . DACA beneficiaries are subject to the Department's overall enforcement priorities"). While the Government disagrees with the decision in *Coyotl v. Kelly*, 261 F. Supp. 3d 1328 (N.D. Ga. 2017), that out-of-circuit district court decision is not binding here, nor is it more persuasive than the in-circuit decision in *Torres* or the D.C. Circuit opinion in *Arpaio*. *See Engel v. CBS, Inc.*, 886 F. Supp. 728, 731 (C.D. Cal. 1995) ("Even

[9] Mr. Ramirez misstates the appeal in *Torres v. DHS*, No. 18-56037 (9th Cir.). Op. Br. 37 n.8. The question there is not whether USCIS may rely on the Kelly Memo—it did not—but whether the district court committed error in referencing the Kelly Memo as grounds to support the termination of Mr. Torres' DACA, *because* USCIS did not rely on it. No. 18-56037, ECF No. 11 at 5.

though D.C. Circuit case law is not binding on courts in this Circuit, it is more persuasive than three random district court opinions.").

Second, although Mr. Ramirez asserts that ICE's mistaken belief that he lied about his GED program is a nondiscretionary error that warrants review, Op. Br. 38-39, USCIS stated that "[t]his is not an issue in the decision on his DACA renewal." ER 513. The Record also does not show that ICE held a belief that Mr. Ramirez lied about his GED program throughout the course of USCIS's adjudication, as ICE's August 28, 2019 confirmation that it still considered Mr. Ramirez to be an enforcement priority made no mention of the GED program. SER 39-40. In support of his claim, Mr. Ramirez points only to communications that predated this August 28, 2019 communication. *See* Op. Br. 19-20 (citing ER 500 (email dated May 29, 2018), 502 (email dated June 1, 2018), 511 (email dated August 24, 2018).

Mr. Ramirez is also wrong about USCIS's "duty" to inform ICE about any mistaken impression of Mr. Ramirez's GED claim. Op. Br. 39-40 ("In fact, USCIS acknowledged that 'this [DACA SOP] policy guidance does provide operational steps should centers disagree with ICE's enforcement priority determinations.' ER507. It failed to take those steps."). The Government does not concede that the DACA SOP imposes any affirmative duty on USCIS in adjudicating a DACA request, *see* ER 132 (DACA confers no substantive rights)—but here, Mr. Ramirez

does not even point to ostensibly binding language in the SOP. Op. Br. 39 (citing ER 186-87 ("*If* the BCU disagrees with ICE's determination of whether or not the requestor is an enforcement priority, the BCU *should* ask local counsel for assistance in contacting local ICE counsel *to discuss* the reasons why USCIS disagrees with ICE's determination.") (emphasis added)). Nor does Mr. Ramirez point to a substantive disagreement that USCIS might have had with ICE's enforcement priority determination. ER 513 (SCOPS noted that the GED enrollment question "is not an issue in the decision on his DACA renewal.").

Mr. Ramirez's claim that USCIS merely "deferred to ICE's finding that he was an enforcement priority" is also wrong. Op. Br. 39-40. The Record is replete with USICS's internal deliberations on the merits of Mr. Ramirez's criminal record, *see* SER 24-38, including a statement from SCOPS that "[w]hile the decision to deny DACA based on ICE's confirmation that an individual is an enforcement priority is not automatic much the same way that approving a DACA request for an individual that meets the threshold criteria is not automatic, *WATS believes that denial of this DACA request is appropriate in the exercise of USCIS's discretion* for the reasons previously noted in our response to the RAG and included in the NOID." SER 28 (emphasis added).

Finally, ICE's possible mistaken belief that Mr. Ramirez misrepresented his GED status when requesting DACA is no more than a harmless error—one that

USCIS explicitly noted and rejected in its decision to deny Mr. Ramirez's DACA request. *See Lata v. INS,* 204 F.3d 1241, 1246 (9th Cir. 2000) ("To prevail on a due process challenge to deportation proceedings, [the alien] must show error and substantial prejudice."). To show prejudice here, "essentially a demonstration that the alleged violation affected the outcome of the proceedings," *id*., the Court would have to find not only that ICE would likely have reversed its enforcement priority finding, but that USCIS would also have reversed its decision to deny Mr. Ramirez's DACA request—a decision that already accounted for ICE's mistaken GED finding. ER 513. Where Mr. Ramirez offers no defense of his criminal record, which ICE and USCIS both cited to extensively in their respective analyses, there is no grounds for the Court to make those two giant, unlikely leaps.

### B. Mr. Ramirez does not establish a departure from general policies or an unexplained inconsistency in the adjudication of his DACA request

Mr. Ramirez's assertions that USCIS treated his DACA request "differently," and that consideration of his criminal record ran counter to "the [G]overnment's general policy governing such requests," are incorrect. *See* Op. Br. 40-41 ("Outside of this case, there is no indication that the Government would otherwise pursue non-disqualifying but derogatory information such as this") (quoting Order 23); *id*. at 55. Rather, the DACA SOP provides for the investigation that took place here, and the Record provides a reasoned explanation for the denial.

*See Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) ("a policy change violates the APA 'if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so'").

**i. The DACA SOP specifically provides for consideration of an individual's status in removal proceedings**

Mr. Ramirez argues that "the government's reliance on ICE's removal order was an irrational departure from general policy." Op. Br. 43. But as explained above, in adjudicating a DACA request from an individual placed into removal proceedings through the issuance of a Notice to Appear ("NTA"), the DACA SOP specifically advises USCIS to consider more than just the grounds listed in the NTA. ER 172 ("[d]o not rely solely on the grounds listed in the charging document . . . as not all issues may have necessarily been captured, or new issues may have arisen since the charging document was issued."). And in the case of a requestor who may establish that the guidelines are met but for whom the adjudicator determines nonetheless that a favorable exercise of discretion may not be warranted, the DACA SOP calls for the BCU to seek SCOPS review before issuing a denial. *Id*. at 203. To the extent that the *Accardi* doctrine requires an administrative agency to adhere to its own internal operating procedures, *see Church of Scientology of Cal. v. United States*, 920 F.2d 1481, 1487 (9th

Cir.1990),[10] the district court properly determined that Mr. Ramirez has not shown otherwise. Order 23 n.118 ("Mr. Ramirez's various arguments that the Government violated a non-discretionary duty under the DACA SOP fall short.").

Mr. Ramirez's claim that "the government relied on the fact that ICE is 'actively pursu[ing]' Mr. Ramirez's removal, ER514, even though a removal order based on mere unlawful presence is not sufficient for denial of DACA status," Op. Br. 42, is incorrect for the same reason stated above. While Mr. Ramirez was placed into removal proceedings with an NTA that charged him only with unlawful presence, it is not correct that ICE had no additional grounds to seek his removal.

An NTA need not provide an exhaustive list of charges, *see Addy v. Sessions*, 696 F. App'x 801, 804 (9th Cir. 2017); and here, ICE provided USCIS with a complete statement of its grounds for determining Mr. Ramirez to be an enforcement priority, including the criminal issues described above. *See* ER 515-16. The fact that Mr. Ramirez previously received DACA proves nothing here, because the revelation of his criminal record effectively reset the analysis. *See* Order 22 n.116 (Mr. Ramirez's argument would be "far more compelling in a

[10] Additionally, the *Accardi* doctrine does not apply to an agency's exercise of prosecutorial discretion. *See United States v. Lee*, 274 F.3d 485, 492–93 (8th Cir. 2001) ("Prosecutorial discretion has been treated differently than other types of agency discretion, [] and the special nature of prosecution is the reason that the *Accardi* doctrine has not been applied to criminal law enforcement policies and procedures.") (internal citation to *United States v. Armstrong*, 517 U.S. 456, 464 (1996)).

situation where the Government reverses course and denies an application without any changes in the factual record"). Truly, Mr. Ramirez's claim that "the government repeatedly relied on 'baseless' and 'speculative arguments' for which there is 'no corroborating evidence,'" Op. Br. 53, is confounding.

Where the government's denial of Mr. Ramirez's DACA renewal request based on newly-discovered criminal conduct is provided for in the DACA SOP under its totality-of-the-circumstances guidance, *see* ER 178, the denial decision is an unremarkable exercise of discretion that falls squarely within the jurisdictional bar of Section 1252(g). The district court correctly found that Mr. Ramirez failed to identify a nondiscretionary process error or a constitutional claim that would otherwise permit that court to assert jurisdiction. Order 23-24.

**ii. USCIS properly relied on Mr. Ramirez's newly discovered criminal records.**

Mr. Ramirez's claim that his criminal charges are too insignificant to justify a DACA denial is wrong. Op. Br. 9 ("Minor traffic offenses such as driving without a license are not considered misdemeanors for DACA purposes."); *id*. at 42 ("the government relied on several-years-old and minor criminal transgressions that would not otherwise disqualify [Mr. Ramirez] for DACA.").

First, Mr. Ramirez's criminal record is objectively more serious than he asserts. Though Mr. Ramirez correctly cites the BCU adjudicator's points that "traffic fines have never been evaluated as a discretionary factor which has led to

the discretionary denial of a DACA" renewal request, ER 18, and that "[p]ossession of marijuana citations are generally not disqualifying for DACA," ER 496, see Op. Br. 42, he fails to address SCOPS's reasonable analysis of those points. SCOPS found that he admitted during a police investigation that he had sex with a girl who had "just turned 17," ER 500, that he was stopped in Oregon for "dr[iving] back and forth across traffic lines," whereupon he was found to be in possession of illegally-procured marijuana and no driver's license or car insurance, *id*. at 511, that in his statement to the Oregon court, he admitted that he kept marijuana with him "at all times," including trips across state lines (a federal offense), *id*., and that he has at least three citations in two states for driving without a license and/or insurance, while accruing over $4,000 in traffic fines. *Id*. at 512; *see also* SER 14-23, 41-61.

Mr. Ramirez is also correct that the DACA SOP states that "a minor traffic offense, such as driving without a license, will not be considered a misdemeanor that counts towards the three or more non-significant misdemeanors," Op. Br. 42; but fails to acknowledge that the SOP also provides that "[t]he requestor's entire offense history," including minor traffic offenses, "can be considered" under the totality of the circumstances analysis conducted here. ER 179. The SOP also provides for consideration of traffic violations such as his, that involve drugs or alcohol. *See* ER 256, DACA SOP Appendix D ("Have you EVER been arrested

for, charged with, or convicted of a felony or misdemeanor . . . in the United States? *Do not include minor traffic violations unless they were alcohol or drug-related*.") (all emphasis in original); *see also* Mot. to Dismiss at 23-24 (showing that driving without a license in California satisfies the misdemeanor reporting requirement in the I-821D).

As such, it was appropriate for USCIS to consider the charges and to debate the relative weight of each. *See* DACA SOP at ER 169, 172, 179, 180, 203. Where Mr. Ramirez has not established that the charges are so insignificant that they can only be a pretext for a constitutional violation, this Court has no grounds to assert jurisdiction over the agency's exercise of discretion. *See* Order 23 n.120 (citing *Ragbir v. Homan*, 923 F.3d 53, 64 (2d Cir. 2019) ("To remove that decision [to execute Ragbir's final order of removal] from the scope of section 1252(g) because it was allegedly made based on unlawful considerations would allow plaintiffs to bypass § 1252(g) through mere styling of their claims.").

## III. The Court should dismiss as moot claims related to Mr. Ramirez's preliminary injunction motion, or, in the alternative, find that those claims do not establish jurisdiction.

### A. Dismissal of the complaint absorbed dismissal of the preliminary injunction motion.

In dismissing Mr. Ramirez's TAC after denying his request for preliminary injunction and his request to enforce the then-existing preliminary injunction, Order 26, the district court precluded any interlocutory appeal in addition to appeal

of the dismissal. *See Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1075 (9th Cir. 2001) ("[I]nterlocutory orders entered prior to the judgment merge into the judgment."); *see also Warren v. Wells Fargo & Co.*, No. 17-56711, 2018 WL 780722, at *1 (9th Cir. Jan. 26, 2018) ("[t]he district court entered a final judgment dismissing this action . . . . Consequently, this preliminary injunction appeal is dismissed as moot.").

Mr. Ramirez may be correct that, generally, a preliminary injunction "dissolves *ipso facto* when a final judgment is entered in the cause," Op. Br. 45-46 (citing *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1093 (9th Cir. 2010)), but that is precisely what occurred here. The district court found no violation of the preliminary injunction, found no jurisdiction to hear the TAC, and then dismissed the case. Order 24-26. Nothing Mr. Ramirez offers contradicts the propriety or lawfulness of these events.

Mr. Ramirez's alarmist claim that the district court held that the "mere *filing* of the TAC 'dissolved the [district court's] injunction,'" is incorrect. Op. Br. 46-47. The district court did not find that the injunction automatically dissolved, it found that it dissolved *here*, because the filing of the TAC asserted different claims than the SAC, and the district court lacked jurisdiction over those new claims. *See* Order 24 ("a preliminary injunction [does not] survive[] the filing of an amended complaint *without further order of the Court*.") (emphasis added).

Whether the district court correctly relied on *Ramirez v. County of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015), Order 24, is irrelevant. The district court's substantive finding that the Government did not violate the preliminary injunction and subsequent dismissal of the TAC for lack of jurisdiction render any question as to whether the preliminary injunction survived the TAC or not entirely moot. *U.S. Philips Corp.*, 590 F.3d at 1093. Additionally, Mr. Ramirez's claim that the district court's misunderstanding of this point "infected" its finding that USCIS did not violate the injunction is entirely unsupported. Op. Br. 48-49. The district court made a coherent and legally- and factually-supported finding that the DACA SOP distinguishes between issues of criminality and public safety threats, Order 25, a finding that Mr. Ramirez has not been able to refute.

Mr. Ramirez's argument that the district court's previous finding of jurisdiction endures to preserve the preliminary injunction no matter the factual or legal developments in the case, Op. Br. 47 ("the cause of action on which the existing preliminary injunction was based—Mr. Ramirez's APA claim—remained in the TAC and no final judgment on it had yet been entered."), is simply not true. *Rockwell Int'l Corp. v. United States,* 549 U.S. 457, 473 (2007). After the issues in his SAC were resolved with the reinstatement of his DACA in April 2018, district court ECF No. 78 (April 25, 2017), Mr. Ramirez's DACA expired and his DACA renewal was denied, prompting his TAC in May 2019, raising an entirely new

challenge to the denial. District court ECF No. 144 (May 30, 2019). The district court correctly found that the procedural grounds related to the termination of his DACA that it had relied on to establish jurisdiction were no longer present, and that the ultimate discretionary decision to deny a DACA request is not subject to review in any court. Order 22-23; *see also* district court ECF No. 116, Order Denying Defendants' Motion To Dismiss the SAC ("[I]f Plaintiff were asking for review of the government's ultimate discretionary decision to terminate his DACA status, section 1252(g) would strip this Court of jurisdiction to review that determination."). Thus, an injunction to preserve a status quo that no longer exists cannot reasonably perform any further function "without further order of the Court." Order 24.

Finally, Mr. Ramirez's reliance on cases where this Court enforced an existing preliminary injunction in cases that had not been dismissed are similarly unavailing. Op. Br. 48-49 (citing *Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir. 2002) (en banc); *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 944 (9th Cir. 2014)). The case here was dismissed for lack of jurisdiction and the preliminary injunction dissolved with it. *Envtl. Prot. Info. Ctr., Inc.*, 257 F.3d at 1075; *Warren*, 2018 WL 780722 at *1.

Thus, the Court should dismiss as moot Mr. Ramirez's claims challenging the denial of his Motion for Second Preliminary Injunction, or, in the Alternative,

to Compel Compliance with Preliminary Injunction Order (district court ECF No. 147), including all of Argument Section B of his opening brief, at pages 43-55.

### B. Alternatively, Mr. Ramirez's DACA denial did not violate the preliminary injunction motion.

To the extent the Court may decline to dismiss as moot Mr. Ramirez's claim that USCIS violated the preliminary injunction against finding him to be a public safety threat, it should still find the claim meritless and unavailing to establish the Court's jurisdiction. First, Mr. Ramirez's arguments that the district court's preliminary injunction order survived the filing of the TAC need not be resolved here. Op. Br. 45-48. As explained above, the district court dismissed the entire action, which necessarily dissolved the preliminary injunction and rendered the motion for a new preliminary injunction moot. Order 25 (citing *Rodriquez v. 32nd Legislature of Virgin Islands*, 859 F.3d 199, 207 (3d Cir. 2017) ("[a] preliminary injunction cannot survive the dismissal of a complaint")); *see id*. at 46 n.9 (Mr. Ramirez collecting cases that make this point).

The issue is irrelevant for the additional reason that the district court ruled on the merits of the motion before dismissing the TAC. Order 25 ("Mr. Ramirez does not establish a violation of the Court's previous order."). The district court agreed with the Government that the terms "issues of criminality" and "threat to public safety" have different meanings in the DACA SOP. *Id*. Where USCIS specifically noted more than once that it did not consider Mr. Ramirez's crimes to

amount to a threat to public safety, *see* ER 507-08, SER 34, and where that determination is squarely supported by the DACA SOP's description of public safety threat examples, *see* ER 185 (individuals "with multiple DUI arrests, . . . [or] an individual arrested for multiple assaults or other violent crimes"), there can be no reasonable argument that the denial of Mr. Ramirez's DACA request violated the preliminary injunction for finding him to be a threat to public safety.

If the district court's order intended a broader definition of "public safety threat" than the one provided in the DACA SOP, it needed to say so. *See Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1047 (9th Cir. 2013) (Federal Rule 65(d) requires "[e]very order granting an injunction" to "state its terms specifically" and to "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."). However, the district court has already established that it did not intend a broader meaning. Order 25 ("the DACA SOP does draw some distinction between the terms 'issues of criminality' and 'threat to public safety.').

For the same reason, Mr. Ramirez's additional claim that the Government violated the preliminary injunction by "constructively terminat[ing]" his DACA is meritless. Op. Br. 49, 55. Whether by accident or omission, the district court acknowledged that it issued an order that prohibited the Government from terminating Mr. Ramirez's DACA on the same day that his DACA was set to

expire, but gave no further instruction. *See* district court ECF No. 126-1 at 23 n.7. The order was not a mandate to issue Mr. Ramirez a new grant of DACA, nor can such a mandate be fairly read into the order. *See Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1086–87 (9th Cir. 2004) (Rule 65 requires that an injunction give "fair and precisely drawn notice of what the injunction actually prohibits."). As the district court made clear in dismissing his TAC, "Mr. Ramirez's DACA status already expired. His current action seeks to challenge the Government's discretionary decision to deny his application to renew his DACA status." Order 21-22.

Mr. Ramirez's general assertion that the Government was under a continuing obligation to abide by the terms of the preliminary injunction "until it has been vacated or reversed" is correct, but unhelpful. Op. Br. 53-54 (citing *GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 386 (1980); *Zapon v. U.S. Dep't of Justice*, 53 F.3d 283, 284 (9th Cir. 1995)). Neither case cited is specifically relevant here, as *GTE Sylvania, Inc.* involved a government agency withholding documents from a Freedom of Information Act request because of a validly issued preliminary injunction, 445 U.S. at 386-87; and *Zapon* involved a family that disobeyed an order of an immigration court that was not validly issued, but had not been rescinded yet. 53 F.3d at 284. As the district court correctly held, USCIS took no action that was prohibited by the preliminary injunction here.

Order 25. For the same reason, the Government had no need to seek modification of the injunction to permit denial of Mr. Ramirez's DACA renewal request under a totality-of-the-circumstances analysis.[11] *See* Op. Br. 54.

### C. Mr. Ramirez's criminal charges do not make him a public safety threat for purposes of the DACA SOP

As discussed, the DACA SOP directly contradicts Mr. Ramirez's pained effort to apply such a sprawling definition to "public safety threat" that even the most benign quality-of-life citation would render an individual ineligible for consideration of a DACA grant. *See* Op. Br. 51 ("[T]he only plausible explanation [for denying Mr. Ramirez's DACA request] is the inherent connection between criminal law and public safety."). As the district court correctly found, the DACA SOP provides descriptions of "public safety threat" that distinguish the term from lesser issues of criminality. Order 25; *see, e.g.*, ER 185 (Public safety threats include, for example, individuals "with multiple DUI arrests, . . . [or] an individual arrested for multiple assaults or other violent crimes" even without convictions.");

[11] Mr. Ramirez's claim that the district court failed to address his request for discovery is also unavailing. Op. Br. 53 n.13 (citing *California Dep't of Soc. Servs. v. Leavitt*, 523 F.3d 1025, 1034 (9th Cir. 2008)). Mr. Ramirez never moved for discovery or to supplement the administrative record, and the district court correctly found that the administrative record provided evidence of "in-depth consideration and discussion of the unique circumstances presented in Mr. Ramirez's case." Order 23.

*id*. at 232 (distinguishing between "cases that involve public safety threats, criminals, and aliens engaged in fraud.").

In addition, to be considered for a grant of DACA, an individual must establish that he or she "has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or *otherwise poses a threat to national security or public safety.*" ER 130 (emphasis added). Mr. Ramirez's rule would render all of the words besides "poses a threat to . . . public safety" in that sentence redundant. It would also swallow up much of the DACA SOP that guides consideration of an individual's criminal record, because every crime would be automatically disqualifying as a public safety threat. *See* ER 177-92, DACA SOP Chapter 8, Section G. Evaluating Issues of Criminality, Public Safety, and National Security.

Truly, it is difficult to believe that Mr. Ramirez would argue for such a damagingly-broad application of the term "public safety threat," but for his desire to establish a violation of the district court's preliminary injunction order prohibiting the Government from finding him to be a public safety threat. *See* Op. Br. 48-55; Order 24. Regardless, the sincerity and logic of Mr. Ramirez's efforts are belied by his contradictory argument that *his* crimes are too insignificant to justify denying him DACA. Op. Br. 9.

In sum, the DACA SOP instructs that, when an individual's criminal record is not disqualifying for consideration of DACA, "the requestor's entire offense history can be considered," specifically including "a minor traffic offense, such as driving without a license," under a totality-of-the-circumstances analysis. ER 180. Such analysis does not invoke the DACA SOP's definition of a public safety threat, and Mr. Ramirez's argument that it should is both meritless and potentially devastating to the DACA population as a whole.

USCIS conducted a totality-of-the-circumstances analysis here and found that Mr. Ramirez's criminal record, considered as a whole, made him an unsuitable candidate for a grant of deferred action. ER 322-25. Reliance on his record was lawful and reasonable and fully supported by the DACA SOP, and Mr. Ramirez has not established that the district court's preliminary injunction order prohibited a denial of DACA that relied on any criminal ground in existence.

## CONCLUSION

As explained above, it is impossible to know the course that Mr. Ramirez's renewal request would have taken had USCIS not learned about his criminal record when it did (or if Mr. Ramirez did not have a criminal record), but the sequence of events here tracked the DACA SOP and the grounds for denial are lawful and undisputed. There is simply no showing of malice or error to overcome the

jurisdictional bar of Section 1252(g). The Court should affirm the dismissal of the Third Amended Complaint.

DATED: September 14, 2020

JEFFREY BOSSERT CLARK
Acting Assistant Attorney General

WILLIAM C. PEACHEY
Director

Respectfully submitted,

JEFFREY S. ROBINS
Deputy Director

*/s/ James J. Walker*
JAMES J. WALKER
Trial Attorney
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Phone: (202) 532-4468
Fax: (202) 305-7000
Email: james.walker3@usdoj.gov

*Attorneys for Defendants-Appellants*

**STATEMENT OF RELATED CASES PURSUANT**

**TO NINTH CIRCUIT RULE 28-2.6**

Defendants-Appellees are unaware of any cases currently pending before this Court related to this appeal.

*/s/ James J. Walker*
JAMES J. WALKER
Trial Attorney

**CERTIFICATE PURSUANT TO FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more, and contains 13,987 words.

*/s/ James J. Walker*
JAMES J. WALKER
Trial Attorney

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 14, 2020.

*/s/ James J. Walker*
JAMES J. WALKER
Trial Attorney