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

Attorneys for Plaintiff
ALBERTO LUCIANO GONZALEZ TORRES

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALBERTO LUCIANO GONZALEZ TORRES,

Plaintiff,

vs.

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

Defendants.

Case No. 17 CV 1840 JM(NLS)

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION [Docket No. 39]

Hearing: February 27, 2018
Time: 10:00 a.m.
Courtroom: 5D
Judge: Jeffrey T. Miller

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

I. INTRODUCTION

Defendants seek to foreclose any judicial review of Mr. Gonzalez's APA and constitutional claims by asking this Court to reconsider its jurisdictional determinations. On the merits, Defendants seek to convert the term "enforcement priorities," which is clearly defined in DACA's governing documents, into a standardless phrase that would allow them to terminate benefits whenever they feel like it. The Court should reject this unsupportable misreading of their governing procedures. And if Defendants are characterizing their policies correctly, they have applied them in a way that violates Mr. Gonzalez's right to due process.

II. THIS COURT'S JURISDICTIONAL RULINGS ARE LAW OF THE CASE; DEFENDANTS IMPROPERLY SEEK RECONSIDERATION

This Court correctly determined that neither 8 U.S.C. § 1252(g) nor 8 U.S.C. § 1252(b)(9) deprives it of jurisdiction over claims that Defendants violated their own mandatory policies and procedures, the APA, and the Constitution in purporting to terminate Mr. Gonzalez's DACA status through a process that—as the Court noted and Defendants conceded—is not subject to review in immigration court. Dkt. 12 at 8-9 (docket pagination throughout); Sept. 28, 2017 Hr'g Tr. at 16. Every court to address the issue has reached the same conclusion. *See IEIYC v. Duke*, 2017 WL 5900061 (C.D. Cal. Nov. 20, 2017); *Ramirez Medina v. DHS*, 2017 WL 5176720 (W.D. Wash. Nov. 8, 2017); *Coyotl v. Kelly*, 261 F. Supp. 3d 1328 (N.D. Ga. 2017). But Defendants rehash the same losing arguments rejected by the Ninth Circuit, which has held that a federal court has jurisdiction to "consider a purely legal question that does not challenge the Attorney General's discretionary authority, even if the answer … forms the backdrop against which the Attorney General later will exercise discretionary authority." *U.S. v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004). Defendants' arguments fail—again.

First, this Court's decisions regarding the effects of Sections 1252(g) and 1252(b)(9) are law of the case, which "requires that when a court decides on a rule, it should ordinarily follow that rule during the pendency of the matter" in the absence—as here—of "a change in controlling authority or the need to correct a clearly erroneous

decision which would work a manifest injustice." *Mayweathers v. Terhune*, 136 F. Supp. 2d 1152, 1153-54 (E.D. Cal. 2001). While the Court's order was preliminary, neither the law nor anything relevant to the Court's jurisdictional determinations has changed. *See id.* (prior preliminary injunction established law of the case). Mr. Gonzalez is still not challenging any of the "narrow[]" and "discrete actions" in Section 1252(g), Dkt. 12 at 8; and he is still not "seeking judicial review of [an] order[] of removal," *id.* at 9. He is again asserting that Defendants have violated their mandatory DACA procedures, and his claims still do not bear on the validity of his NTA or challenge his immigration court removal proceedings.[1] There is no reason to disturb this Court's decision.[2]

Second, Defendants inappropriately seek reconsideration of the Court's rulings. *See* Dkt. 44 at 16, 17, 22 n.5 ("Defendants disagree"; "prior reliance … is also misplaced"; "previous reliance … is misplaced"). Too late. *See* L.R. 7.1.i.2 ("any motion or application for reconsideration must be filed within 28 days after the entry of the ruling, order or judgment sought to be reconsidered"). In this Court, reconsideration is "disfavored unless a party shows there is new evidence, a change in controlling law, or establishes that the Court committed a clear error in the earlier ruling." Nothing of the sort has happened.

Third, regardless of the above, Defendants are wrong. On Section 1252(g), *Hovsepian*, 359 F.3d at 1155, controls. There, "the only thing standing between [the plaintiff] and deportation [was] the district court's order barring the INS from commencing deportation proceedings" on particular grounds. *Id.* Because he sought "a description of the relevant law" (applied to his criminal convictions) that would "form[]

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

[2] These principles are particularly apt given Defendants' decision not to appeal the Court's legal determinations. *See Schering Corp. v. Ill. Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996) ("Under the doctrine of the law of the case, a ruling by the trial court, in an earlier stage of the case, that could have been but was not challenged on appeal is binding in subsequent stages of the case.").

the backdrop against which the Attorney General later will exercise discretionary authority," the district court had jurisdiction—*even though* he sought an injunction against the very commencement of removal proceedings. *Id.* Mr. Gonzalez is not asking this Court to undo his NTA. He is asking the Court to (1) "consider a purely legal question" *(how does the DACA program define "enforcement priorities" for termination purposes?)* (2) "that does not challenge … discretionary authority" *(to commence proceedings, adjudicate cases, or execute removal orders).* And "even if the answer … forms the backdrop against which the Attorney General later will exercise discretionary authority" *(whether a person in Mr. Gonzalez's situation fits the definition),* this Court has jurisdiction.

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

Defendants' reliance on *Torres-Aguilar v. INS*, 246 F.3d 1267 (9th Cir. 2001) is also misplaced. On a petition for review, the Ninth Circuit simply explained that the petitioner had not alleged a "colorable" due process claim because he did "not contend that he was prevented from presenting his case before the immigration judge or the BIA, denied a full and fair hearing before an impartial adjudicator[,] or otherwise denied a basic due process right." *Id.* at 1271. Mr. Gonzalez has alleged all of these, and made clear that he is not challenging any of the three discrete actions in Section 1252(g). *See* Dkt. 39-1 at 29-34.

This Court should again quickly dispose of Defendants' reliance on Sections 1252(a)(5) and 1252(b)(9). The "explicit language" of those provisions "appl[ies] only to those claims seeking judicial review of orders of removal." *A. Singh v. Gonzalez*, 499

F.3d 969, 978 (9th Cir. 2007). They do not apply to "claims that are collateral to, or independent of, the removal process." *JEFM v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016). Mr. Gonzalez is not challenging any part of the immigration court process. His claims are not "bound up in and an inextricable part of the [immigration court] administrative process." *Id.* at 1033; *Aguilar v. ICE*, 510 F.3d 1, 11 (1st Cir. 2007) ("arises from" requires tighter nexus than "related to").

Finally, this Court must not abandon its role and construe the INA "to deny any judicial forum for a colorable constitutional claim," raising "serious constitutional concerns." *Webster v. Doe*, 486 U.S. 592, 603 (1988); *cf. JEFM*, 837 F.3d at 1035 (Plaintiffs "have not been denied all forms of meaningful judicial review.").

III. THE APA DOES NOT PRECLUDE REVIEW

Defendants' assertion that 5 U.S.C. § 701(a)(2) precludes review of Mr. Gonzalez's claims is an equally unavailing effort to circumvent the "strong presumption in favor of judicial review of administrative action." *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). Section 701(a)(2) only precludes judicial review "to the extent that" a particular "action is committed to agency discretion by law." It is a "very narrow exception" that "applies in those rare instances where … in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) ("absolutely no guidance as to how [] discretion is to be exercised"). This Court already disposed of Defendants' arguments by making clear that the DACA SOP provides law for Defendants to apply and "categorically reject[ing]" that "DHS possesses such broad prosecutorial discretion that they need not follow the DACA SOP in terminating the status of DACA recipients." Dkt. 12 at 10.

Law to apply may be found in "internal operating procedures," "policy statement[s]," and "usual practice." *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004).[3] Defendants cannot seriously contend—in the face of mounting judicial determinations and their own admissions—that the DACA Memo, DACA SOP,

[3] Indeed, "DHS's prior statements" regarding the operation of DACA provide law to apply. *Batalla Vidal v. Duke*, 2017 WL 5201116, at *11 (E.D.N.Y. Nov. 9, 2017).

DACA FAQ, and other DHS statements, memos, and policy directives do not provide law to apply with respect to DACA status decisions and enforcement priority determinations. Even if Defendants had unfettered discretion over similar decisions before DACA, their establishment of and adherence to binding procedures, definitions, and restrictions brings their compliance squarely within the purview of 5 U.S.C. § 706. *INS v. Yang*, 519 U.S. 26, 32 (1996) ("Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned" under the APA.). In addition, it is "well-established that even where agency action is committed to agency discretion by law, review is still available to determine if the Constitution has been violated." *Batalla Vidal*, 2017 WL 5201116, at *11.

Against this backdrop, Defendants attempt to reframe Mr. Gonzalez's claims as a challenge to the exercise of prosecutorial discretion—*i.e.*, to ICE's decision to issue an NTA for unlawful presence, which Mr. Gonzalez is not challenging here —rather than to their termination of his DACA status in violation of the DACA SOP. Defendants' cases regarding challenges to discretionary decisions *not* to enforce are inapposite and shed no light on whether the DACA program is bereft of "judicially manageable standards" to judge Defendants' compliance with their own mandatory policies and defined enforcement priorities when they decided to enforce the termination provisions against Mr. Gonzalez. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). In *Heckler*, the Supreme Court explained that enforcement decisions are reviewable when governed by "clearly defined factors." *Id.* at 834. Regardless of the extent of Defendants' discretion to issue an NTA for unlawful presence to a DACA

recipient, DACA termination is governed by clearly defined factors in the DACA Memo and SOP.[4] And Defendants' invocation of a "complex balancing of policy considerations," Dkt. 44 at 23, is a red herring. Nothing about reading the DACA SOP's and the Kelly Memo's definitions of who does and does not constitute an enforcement priority is "peculiarly within [USCIS's] expertise." *Heckler*, 470 U.S. at 831. Indeed, if the phrase "enforcement priorities" is as standardless as Defendants claim, no balancing of anything would be required before stripping a DACA recipient of his status. That cannot be the law.

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

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

Second, as Defendants have conceded, the DACA Memo and SOP are replete with mandatory language. *See, e.g.*, *id.* at 2-3 ("necessary to ensure" non-prioritization; "USCIS is directed to begin implementing this process within 60 days"; "USCIS process shall also be available to individuals subject to a final order of removal"). Hence, the DACA SOP's objectively verifiable criteria have been the determinative basis for USCIS's DACA decisions since its inception. *Texas v. U.S.*, 809 F.3d 134, 171 (5th Cir. 2015). The DACA program provides ample law to apply, and Defendants'

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

efforts to deprive it of meaning by asserting the right to terminate DACA whenever and however they please are contrary to law and logic.

IV. DEFENDANTS IGNORED THE DACA MEMO'S AND DACA SOP'S DEFINITIONS OF ENFORCEMENT PRIORITIES

Defendants' arguments on the merits hinge on erroneous assertions and *post hoc* rationalizations: (1) that Mr. Gonzalez has not identified how the DACA SOP defines "enforcement priorities" for DACA recipients, Dkt. 44 at 27-28; (2) that "the DACA SOP is silent as to the factors USCIS is to use in DACA termination decisions based where an individual is determined to be an enforcement priority," Dkt. 44 at 29 n.10; (3) that the law and the DACA program permit Defendants' unfettered discretion to deem a DACA recipient an enforcement priority for any reason, and USCIS is not "constrained by his lack of conviction o[r] public safety concern," Dkt. 44 at 30[5]; and (4) that Mr. Gonzalez must be an enforcement priority "based on his alleged role in an alien smuggling enterprise" because the 2011 USCIS Memo (Dkt. 39-4, Ex. H) identifies circumstances where ICE may find a DACA recipient an Egregious Public Safety ("EPS") concern, Dkt. 44 at 28.

As Mr. Gonzalez already explained—no matter the definition of enforcement priorities that may apply to individuals outside the scope of the DACA Memo, or perhaps even facially-DACA-eligible individuals who do not have DACA status—pursuant to the DACA SOP, a DACA recipient is, by definition, a "low priority" individual as long as he continues to meet the objectively verifiable DACA criteria. In other words, DACA status, once granted, cannot be terminated without a disqualifying criminal conviction, a public safety concern finding, a national security concern finding, or an EPS finding. The DACA SOP is not silent regarding what is required for a DACA recipient to be deemed an enforcement priority. Rather, it speaks simply and clearly: "these" individuals (*i.e.*, who meet the DACA criteria) are distinct from "those who meet

[5] Defendants admit, as they did in his purported termination notice, that Mr. Gonzalez does not have a criminal offense and is not a public safety concern or an EPS concern. Their effort to terminate his DACA status is not based on "relevant factors," but a failure to exercise "reasoned decisionmaking." *Judulang*, 565 U.S. at 52-53, 55.

DHS's enforcement priorities." Apr. 4, 2013 DACA SOP at 18.[6]

Defendants claim that this plain reading of the DACA SOP "would render meaningless the specific termination ground that continuation of deferred action is not consistent with DHS's enforcement priorities." Dkt. 44 at 24. Mr. Gonzalez already explained why this argument fails. *See* Dkt. 39-1 at 26 n.7. The enforcement priority termination ground reflects the reality that DHS may "repeal" its current enforcement priority policies for DACA beneficiaries and "substitute new rules in their place." *Romeiro de Silva*, 773 F.2d at 1025. But until then, Defendants remain "bound by" the "operative" rules, under which Mr. Gonzalez—as a DACA recipient without any criminal charge or conviction, or finding that he is a public safety concern—is not an enforcement priority. *Id.*; *see* Dkt. 39-1 at 11-12 (DHS explaining that DACA's enforcement priority terms remain unchanged). In truth, it is *Defendants'* argument that the enforcement priority termination ground is standardless and leaves their personnel without "constrain[t]" that would render meaningless all of the *other* DACA termination grounds. Why have specifically delineated termination categories if, as Defendants assert, enforcement priority means whatever a USCIS officer wants it to mean?

Moreover, Defendants' unmoored approach would run afoul of DHS's statutory obligation to "establish[] national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). It is Defendants' burden to define the "enforcement priorities" that justify DACA termination, and they have done so in the DACA Memo and SOP. They defined DACA recipients who meet the SOP's objectively verifiable criteria as low priority cases and enumerated a series of events—criminal convictions, findings of public safety or national security concern, or EPS findings—that could make them an enforcement priority. Including additional language that permits termination when continued DACA status is not consistent with Defendants' enforcement priorities does

[6] Indeed, "for DACA," USCIS "references" the DACA Memo to ensure compliance with the SOP. Apr. 4, 2013 DACA SOP at 16. Therefore, DACA enforcement priorities must also be defined by "reference" to the DACA Memo, which exempts a DACA recipient who meets its objective criteria from enforcement priority status.

not relieve Defendants of their obligation to say what those priorities are and to terminate DACA only when an individual falls within one of the defined categories. Defendants argue an untenable reading of the termination provision that would swallow the proverbial rule. The Court should reject the argument out of hand.[7]

Finally, the Court may not consider Defendants' *post hoc* explanation that Mr. Gonzalez is an enforcement priority by reference to the EPS section of the 2011 USCIS Memo. Nearly two years after first attempting to terminate Mr. Gonzalez's DACA status, Defendants have never found that he was an EPS case. ICE never did it. CBP never did it. And neither did USCIS. It is therefore not a proper ground for termination to raise before this Court, which may only consider "explanations offered by the agency." *Toor v. Lynch*, 789 F.3d 1055, 1064 (9th Cir. 2015). Defendants either did not consider the EPS ground or concluded, as the judge who released him 21 months ago did, that Mr. Gonzalez does not present any public safety concern, let alone an egregious one. *See Shirrod v. Director*, 809 F.3d 1082, 1087 n.4 (9th Cir. 2015) (court must "review only what the agency did, not what [it] could have done"). Defendants' *post hoc* rationalization also makes no sense. In an EPS case, they would not have issued Mr. Gonzalez an NOIT, but would have "automatically" terminated his DACA status. The enforcement priority ground of the DACA SOP is the only one before this Court. The DACA Memo and SOP define that ground. And Defendants ignored that definition.

V. IF DEFENDANTS' ACTIONS COMPORT WITH THE DACA MEMO AND SOP, THEY VIOLATE DUE PROCESS

No matter what the SOP permits, the Constitution cannot countenance DACA status termination (1) on the basis of a USCIS officer's determination on a paper record that Mr. Gonzalez is a criminal, (2) after an Immigration Judge found him credible, so that he has resumed his law-abiding life in San Diego, (3) nearly two years after he was arrested without any charges, further investigation beyond two days after his arrest in May 2016, prior or subsequent law enforcement encounters, or public safety concerns,

[7] Defendants have not come forward with a definition. Should the Court disagree with Mr. Gonzalez's (and the SOP's) definition, it should ensure that Defendants bear the burden of illuminating the correct definition, as is their statutory obligation.

(4) without the opportunity to know the facts that would guide the termination decision, confront evidence or witnesses, or rebut factual allegations, and (5) without any chance to be heard by a neutral arbiter, rather than the same one who had already issued him a seemingly pre-determined notice of intent to terminate. *See* Dkt. 39-1 at 32-34.

Once granted, Mr. Gonzalez has a constitutionally protected interest in DACA status—the result of a deal with the government, not unilateral expectation. At least one court has rejected DHS's assertion "that there can be no violation of [a DACA recipient's] Due Process rights because no process is actually due":

> In creating the DACA policy/program, the federal government recognized that there were thousands of young people unlawfully present in our country, that lacked the intent to violate the law, and that had contributed to our country in significant ways, and that its immigration enforcement resources should not be spent on low priority cases such as those. The policy then set forth criteria to be considered when determining whether to grant DACA to an applicant. These criteria established a *quid pro quo* from the federal government to the potential applicants—*i.e.*, you (applicant) make yourself known to us (federal government) and pass rigorous background checks, etc., and in return you will be considered for DACA, which in turn will allow you the opportunity to remain in the country, work, and potentially receive other state benefits. *Ramirez Medina*, 2017 WL 5176720, at *9.

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

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

Dated: February 12, 2018

Respectfully submitted,

/s/ John C. Ulin

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

Attorneys for Plaintiff
ALBERTO LUCIANO GONZALEZ TORRES

CERTIFICATE OF ELECTRONIC FILING

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

/s/ John Ulin