CHAD A. READLER
Acting Assistant Attorney General
WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation
JEFFREY S. ROBINS
Assistant Director
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 616-1246
Email: jeffrey.robins@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALBERTO LUCIANO GONZALEZ TORRES, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*, Defendants.	Case No. 3:17-CV-01840-JM-(NLS) **DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS** DATE: March 26, 2018 TIME: 10:00 a.m. CTRM: 5D Hon. Jeffrey T. Miller

I. Plaintiff Cannot Overcome his Lack of Standing to Raise Claims Regarding the Enjoined May 2016 Termination of his DACA.

In his response to Defendants' Motion to Dismiss, Plaintiff argues that there is an ongoing harm from the initial termination of his DACA in May 2016 that confers standing to ask the Court essentially to enjoin that termination a second time. *See* Dkt. No. 50 at 10. However, Plaintiff cites to *Anderson v. Evans*, 371 F.3d 475, 479 (9th Cir. 2004), for the proposition that a claim is not *mooted* where "precedential harms continue to flow from the government's action." *Id*. *Anderson* is inapposite for two reasons. First, *Anderson* does not address standing at all, certainly not in the specific context of a plaintiff who filed an amended complaint after receiving the relief requested in his original complaint. Second, the "precedential harms" finding from *Anderson* on which Plaintiff relies is specifically based on a regulation that requires "[t]he precedential effects of past agency decisions must be considered when an agency determines whether an environmental impact statement (EIS) is required." *Anderson*, 371 F.3d at 479, citing 40 C.F.R. § 1508.27. That regulation is not applicable here.

Here, Mr. Gonzales had his DACA reinstated, and was issued a Notice of Intent to Terminate in which Defendants provided "a reasoned basis for that intent, and an opportunity to respond with argument and evidence." Compl., Prayer for Relief ¶ 4; Dkt. No. 49-1 at 13-14. Plaintiff's disagreement with the outcome of the process he sought and received does not establish standing to again challenge the now-reversed May 2016 termination of his DACA, which is no longer a final agency action or live controversy.

II. This Court Lacks Jurisdiction to Hear a Challenge to the Discretionary Decision to Terminate DACA.

In finding jurisdiction to grant Plaintiff his first preliminary injunction, this Court held that "[u]nder [8 U.S.C. § 1252(g)], the court is stripped of jurisdiction to entertain Defendants' ultimate discretionary determination as to Plaintiff's DACA status." Dkt. No. 12 at 8. The Court found only that "this provision does not deprive the court of jurisdiction to entertain Plaintiff's claim that the termination of his DACA status did not

comply with the non-discretionary DACA SOP." *Id*. Although Plaintiff incorrectly asserts that the first preliminary injunction *is* the law of the case, Dkt. No. 50 at 6, 11, there is a "general practice" that a Court "should ordinarily follow [the rules it previously decided on] during the pendency of the matter." *Id*., citing *Mayweathers v. Terhune*, 136 F. Supp. 2d 1152, 1153-54 (E.D. Cal. 2001).[1] Defendants agree that this Court should rely on its previous section 1252(g) findings to inform its decision here, albeit under the changed circumstances that existed at the time the amended complaint and new motion were filed.

The Court previously found jurisdiction on the basis that Defendants had not complied with the procedural requirements of the DACA SOP. Any defect in that process was cured with Defendants' reinstatement of Plaintiff's DACA and EAD; issuance of a Notice of Intent to Terminate that included an opportunity to respond with arguments and evidence; and issuance of a decision that invoked DHS's discretion to terminate DACA and specifically cited the section of the DACA SOP that permitted termination in this circumstance. *See* Dkt. Nos. 49 at 11; 44 at 12-13. Plaintiff now seeks to overturn that discretionary decision, an action this Court has already found it lacks jurisdiction to do.[2] Dkt. No. 12 at 8. Plaintiff's argument that nothing "relevant to the Court's jurisdictional determinations has changed since September 2017" is manifestly incorrect. *Id*. at 11.

Under the new facts of the amended complaint, the Court should find again that it lacks jurisdiction to hear a challenge to the discretionary decision to terminate DACA.

---

[1] Plaintiff's argument that Defendants' arguments should now be barred because there was no appeal of the Court's first preliminary injunction lacks merit. Here, Plaintiff filed an amended complaint based on his new circumstances, such that the first injunction is no longer operative for appeal. *See Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473 (2007) ("[C]ourts look to the amended complaint to determine jurisdiction.").

[2] Plaintiff's reliance on *United States v. Hovsepian*, remains misplaced. *Hovsepian* reaffirmed that "the district court may consider a purely legal question *that does not challenge the Attorney General's discretionary authority*." *See* 359 F.3d 1144, 1155 (9th Cir. 2004). Plaintiff here is directly "asking this Court. . . *how does the DACA program define 'enforcement priorities' for termination purposes?*" Dkt. No. 50 at 13 (emphasis in original). Because the definition and application of enforcement priorities to an individual is a discretionary authority vested in DHS, *Hovsepian* does not apply to Plaintiff's claims.

III. Plaintiff continues to misstate the Ninth Circuit on section 1252(b)(9).

As to Plaintiff's assertions that the Court should follow its prior finding that jurisdiction is not barred under section 1252(b)(9), Defendants continue to respectfully assert that finding was incorrect, and offer additional authority (both controlling and persuasive) to support their argument. *See Mayweathers*, 136 F. Supp. 2d at 1154 ("Grounds justifying departure from the law of the case include substantially different evidence, a change in controlling authority, or any error in the court's prior decision."). Plaintiff argues once again that because section 1252(b)(9) "applies only to those claims seeking judicial review of orders of removal," that he is not barred from raising a challenge related to his removal proceedings because he is not subject to a final order of removal. Dkt. No. 50 at 15, citing *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016), *Singh v. Gonzales*, 499 F.3d 969, 978 (9th Cir. 2007); *INS v. St. Cyr*, 533 U.S. 289, 313 (2001). Plaintiff also misleadingly argues again that *J.E.F.M.* found that claims could not be barred from district court review if they could not have been litigated in removal proceedings. Dkt. No. 50 at 15, citing *J.E.F.M.*, 837 F.3d at 1032.

Both claims are taken out of context, applied incorrectly here, and are thoroughly unsupported by a proper reading of *J.E.F.M.* and the case law of the Supreme Court and the Ninth Circuit. *See J.E.F.M.*, 837 F.3d at 1031-32 ("The Supreme Court has thus characterized § 1252(b)(9) as a 'zipper' clause, [] explaining that the statute's purpose 'is to consolidate judicial review of immigration proceedings into one action in the court of appeals[.]"), quoting *Reno v. Am.–Arab Anti–Discrimination Comm. (AAADC)*, 525 U.S. 471, 483 (1999) and *INS v. St. Cyr*, 533 U.S. 289, 313 & n.37 (2001).

Furthermore, another court in this District recently found that sections 1252(a)(5) and (b)(9) barred jurisdiction of constitutional and APA claims related to removal activity, regardless of whether a final order had issued or whether the claims could be adjudicated by an immigration judge. *See Castellar v. Nielsen*, No. 17-CV-0491-BAS-BGS, 2018 WL 786742, at *15 (S.D. Cal. Feb. 8, 2018) (specifically rejecting the finding in *Medina v. DHS*, No. C17-218-RSM-JPD, 2017 WL 2954719, at *14 (W.D. Wash.

Mar. 14, 2017), that *J.E.F.M.* was in conflict with *Singh* or *Nadarajah*).[3] Plaintiffs in *Castellar* raised Fourth and Fifth Amendment and APA claims regarding the delay between when they were first detained and when they were first brought before an immigration judge. *Id.* at *4-6. Plaintiffs raised the same three arguments plaintiff here raises: 1. "their claims are independent of the substantive merits of their removal proceedings;" 2. "because their claims do not require judicial review of a final order of removal, they may assert them now;" and 3. their claims "cannot be meaningfully heard in the administrative process." *Id.* at *12, *14, *15. The Court rejected all three claims:

> Neither the statute, nor its interpretation by the Ninth Circuit identifies an exception to the channeling function of Section 1252(b)(9) based on whether the asserted claims go to the "substantive merits" of a removal proceeding. [] To the contrary, the Ninth Circuit has clarified, "Congress intended to channel *all claims arising from the removal proceedings* . . . to the federal courts of appeals." *J.E.F.M.*, 837 F.3d at 1033. So long as the claims arise from the removal proceeding or any action taken to remove an alien, they are swept up by Section 1252(b)(9).

Id. at *14 (emphasis added in original).

> The jurisdictional channeling function of Section 1252(b)(9) is not defeated simply because Plaintiffs are at a stage of the removal proceedings at which no final order of removal has issued against them. Aliens cannot "bypass the immigration courts and directly proceed to district court," but rather "must exhaust the administrative process before they can access the federal courts" when their claims arise from removal proceedings.

Id. at *15, quoting *J.E.F.M.*, 837 F.3d at 1029.

> The Ninth Circuit further explained that notwithstanding the inability of an immigration judge or the BIA to order court-appointed counsel and notwithstanding a failure to raise such a claim in removal proceedings, the court of appeals would have authority to consider such a constitutional claim.

Id. at *15, quoting *J.E.F.M.*, 837 F.3d at 1038 (internal citation omitted).

[3] *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (finding jurisdiction in district court to hear a habeas challenge where plaintiff had been granted asylum but remained in detention for five years).

A. Section 1252(b)(9) still applies before a final order of removal issues.

Recent Supreme Court authority supports the proposition that section 1252(b)(9) works to bar district court jurisdiction over a claim "challenging the decision to . . . seek removal," although plaintiffs lacked final orders of removal. *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018). In his concurrence, Justice Thomas explained:

> The text of this provision is clear. Courts generally lack jurisdiction over "all questions of law and fact," both "constitutional" and "statutory," that "aris[e] from" an "action taken or proceeding brought to remove an alien." If an alien raises a claim *arising from such an action or proceeding*, courts cannot review it unless they are reviewing "a final order" under § 1252(a)(1) or exercising jurisdiction "otherwise provided" in § 1252.

id. at 853-54 (Thomas, J. concurring) (emphasis added). Thus, section 1252(b)(9) does not lie feckless until a final order of removal issues, but rather acts as a channeling provision throughout the removal process to "put an end to the scattershot and piecemeal nature of the review process." *Aguilar v. Immigration & Customs Enf't*, 510 F.3d 1, 9-10 (1st Cir. 2007) (cited favorably throughout *J.E.F.M.*, 837 F.3d 1026). In *J.E.F.M.*, the Ninth Circuit explicitly acknowledged that the plaintiffs "are at various stages of the removal process: some are waiting to have their first removal hearing, some have already had a hearing, and some have been ordered removed in absentia." 837 F.3d at 1029. There can be no dispute that a final order of removal is not a predicate for section 1252(b)(9)'s jurisdictional bar over any claim arising out of removal proceedings.

B. Plaintiff is incorrect that section 1252(b)(9) does not bar constitutional claims from district court review.

Plaintiff also cites this Court's prior finding, also based on *J.E.F.M.*, that, because "an immigration judge has no jurisdiction to reinstate DACA status, or to authorize an application for renewal of DACA status," section 1252(b)(9) cannot bar a district court from hearing a DACA challenge. Dkt. No. 50 at 15, citing Dkt. No. 12 at 11. Plaintiff is correct that *J.E.F.M.* acknowledged that the claim in *Singh v. Gonzales*, 499 F.3d 969 (9th Cir. 2007), could proceed in district court because "Singh would have had no legal avenue to obtain judicial review of [his] claim." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032

(9th Cir. 2016). However, the *J.E.F.M.* Court also explained that the reason Singh could not obtain relief in removal proceedings was because his ineffective assistance of counsel claim *arose after* those proceedings had ended. *Id*., citing *Singh*, 499 F.3d at 974. Thus, it was literally impossible for him to have raised the claim in removal proceedings. The *J.E.F.M.* Court further explained in great detail that the inability of the immigration judge to relieve a constitutional claim is absolutely not a valid reason to ignore the jurisdictional bar of 1252(b)(9). *Id*. at 1032-33. In fact, the *Singh* Court denied Singh's second ineffective assistance of counsel claim because it "arose before a final order of removal entered and [] *could and should have* been brought before the agency." *Id*. at 1032, citing *Singh*, 499 F.3d at 974 (emphasis added). The *J.E.F.M.* Court went on to explain, in considering a minor's right to counsel in removal proceedings:

> It is true that at present neither the immigration judge nor the Board of Immigration Appeals has authority to order court-appointed counsel. But the question at hand is a legal one involving constitutional rights. Even if not raised in the proceedings below, the court of appeals has authority to consider the issue because it falls within the narrow exception for "constitutional challenges that are not within the competence of administrative agencies to decide" and for arguments that are "so entirely foreclosed . . . that no remedies [are] available as of right" from the agency.

Id. at 1038. As explained above, the court in *Castellar* arrived at the same conclusion under similar circumstances, 2018 WL 786742 at *15, and this Court should as well.[4]

C. Plaintiff's Efforts to Reason Around Section 1252(b)(9) Should Fail.

In addition to challenging the applicability of section 1252(b)(9), Plaintiff also tries to circumvent that provision by alleging that his "claims would persist even if no NTA existed against him, and USCIS's termination of his DACA status is not a mandatory

[4] Plaintiff's assertion that it is Defendants' position that Mr. Gonzalez's DACA termination claim is not reviewable "in any court, at any time" pursuant to section 1252(g) is correct and unremarkable, as this Court found the same in its first Preliminary Injunction Order. Dkt. No. 12 at 8. However, even if the Court finds there is jurisdiction to consider the claim, *Castellar, J.E.F.M.*, and *Jennings* are unequivocal that Congress explicitly prohibited *this* Court from hearing the claim.

consequence of the NTA against him."[5] Dkt. No. 50 at 8. However, Plaintiff has not shown how, had no NTA issued against him, he would have lost his DACA by some independent way. Theoretically, USCIS could have learned of Plaintiff's criminal charges and initiated a review process and ultimately decided to terminate his DACA but not initiate removal proceedings, but that is simply not the situation here. Whether the Court agrees that it was permissible, it is indisputable that Defendants terminated Plaintiff's DACA based on ICE's finding him an enforcement priority and pursuing removal against him. *See* Dkt. 44 at 12-13. His challenges to that decision cannot be distinguished from a challenge to an action related to his removal proceedings such that section 1252(b)(9) would not bar this Court's jurisdiction. *Castellar*, 2018 WL 786742 at *14.[6]

IV. Plaintiff misstates important case holdings to assert APA jurisdiction.

A. *Heckler v. Chaney* does not support jurisdiction under 5 U.S.C. § 701(a)(2).

In challenging Defendants' argument that 5 U.S.C. § 701(a)(2) precludes review of the challenged actions here, Plaintiff misleadingly claims that the Supreme Court in *Heckler v. Chaney* "explained that enforcement decisions are reviewable when governed by 'clearly defined factors.'" Dkt. 50 at 18, citing *Chaney*, 470 U.S. at 834. However, the Supreme Court in that passage was actually recounting a finding of reviewability under section 701(a)(1), where "the language of the [Labor-Management Reporting and

[5] Plaintiff's reliance on the Ninth Circuit's holding in *Sissoko* is misplaced. Dkt. No. 50 at 8. The mandatory nature of Sissoko's detention as a "direct[] result[] from the decision to commence proceedings against him" supports Defendants' position that the termination of his DACA—as a direct result of the initiation of removal proceedings against him—is similarly barred by section 1252(g). *Sissoko v. Rocha*, 509 F.3d 947, 950 (9th Cir. 2007). *Sissoko* illustrates that section 1252(g) applies to claims arising out of the decision to initiate removal proceedings.

[6] Plaintiff's reliance on *Flores-Torres v. Mukasey*, 548 F.3d 708 (9th Cir. 2008), to support distinguishing his claims from his removal proceedings is inapposite. *See* Dkt. 50 at 61 n.1. *Flores-Torres* involved a habeas petitioner who brought a claim of U.S. citizenship to challenge his detention under 8 U.S.C. § 1226. 548 F.3d at 709. The Ninth Circuit reasoned that because sections 1226 and 1252 authorize the detention (and removal) of *aliens*, the petitioner could bring his "non-frivolous claim of citizenship" in district court. *Id*. at 712. Plaintiff's claim here is premised on his lack of U.S. citizenship, thus his claims may not arise outside of the jurisdiction-limiting provisions of section 1252.

Disclosure Act] indicated that the Secretary was *required* to file suit if certain 'clearly defined' factors were present." 470 U.S. 821, 834 (emphasis added); discussing *Dunlop v. Bachowski*, 421 U.S. 560 (1975). The *Heckler* Court further explained, "Our textual references to the 'strong presumption' of reviewability in *Dunlop* were addressed only to the § (a)(1) exception; we were content to rely on the Court of Appeals' opinion to hold that the § (a)(2) exception did not apply." *Id.*

Defendants maintain that subsection (a)(1) applies here because section 1252 bars jurisdiction, and thus the holding in *Chaney* Plaintiff relies on is entirely inapposite. Defendants contend that subsection (a)(2) also applies because there is no requirement that DACA be granted, or retained once granted, based on any factors, clearly defined or otherwise. As Defendants have addressed in detail, the DACA SOP provides no standards for determining who is an enforcement priority, and the ultimate decision to grant, deny, or terminate DACA is left entirely to agency discretion. *See, e.g.*, DACA SOP, Dkt. No. 39-6 at 195. Unremarkably, there is a variety of guidance that helps Defendants assess who is an enforcement priority, that guidance changes over time, and that guidance does not curtail individualized determinations that consider factors outside operative guidance. *See Arpaio v. Obama*, 797 F.3d 11, 16 (D.C. Cir. 2015) ("In making immigration enforcement decisions, the executive considers a variety of factors"); *see also* Dkt. No. 39-5 at 56 ("The decision whether to defer action in a particular case is individualized and discretionary, taking into account the nature and severity of the underlying criminal, national security, or public safety concerns."). Plaintiff cannot show that the guidance he references specifically curtails Defendants' exercise of discretion to determine that an individual is an enforcement priority.

B. Plaintiff's *Romeiro da Silva* analysis is wrong and misleading.

Plaintiff equates the DACA SOP instructions for considering a grant of deferred action to the 1978 INS instructions that were found in *Nicholas* to constrict discretion, on the basis that these two documents have "two dispositive distinctions" from the 1981 version of deferred action instructions that were found not to constrict the agency's

discretion. Dkt. No. 50 at 19-20. Plaintiff claims the 1978 version and the DACA SOP both confer "substantive benefits and [are] premised on humanitarian concerns," and that both "are replete with mandatory language," *id*., and, by silence, implies the 1981 instructions have neither. However, the *Romeiro de Silva* Court held only that the 1981 instructions had changed the referral language from 1978 ("the district director . . . *shall* recommend consideration for deferred action") to 1981 ("[t]he district director *may, in his discretion,* recommend consideration of deferred action"). *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1023 n.1 (emphasis added). Similarly, the DACA SOP repeatedly states an individual who meets DACA criteria *may be considered* for a DACA grant. *See, e.g.*, Dkt. 39-5 at 24. The Court should reject Plaintiff's attempt to discredit this controlling authority.

V. Plaintiff fails to support his Due Process claims.

Plaintiff cites only to the denial of a motion to dismiss in *Medina* for its holding that a DACA grant confers a due process right on a DACA recipient. *See Medina v. DHS*, No. C17-0218RSM, 2017 WL 5176720, at *9 (W.D. Wash. Nov. 8, 2017). The court there found that the plaintiff raised "a plausible due process claim," but left unanswered the questions of "[w]hat process is due, and whether Plaintiff received such process." *Id*. Importantly, the question in that case was whether the government could terminate DACA without notice or an opportunity to respond. *Id*. ("[T]he government emphasized that it is allowed to withdraw DACA at any time for no reason at all. [] That cannot be.").

Having received notice of the government's intent to terminate his DACA, and an opportunity to respond, Plaintiff here makes a much more invasive claim that he has a mutually explicit understanding with the government that USCIS is required to define enforcement priorities and to terminate DACA only when an individual falls within that definition. *See* Dkt. No. 50 at 18-19. Such a construction does not exist in the DACA SOP or DACA Memo, and is contradicted by the agency's core discretionary authority to determine who is an enforcement priority and when to initiate removal proceedings. *See Jeronimo v. U.S. Atty. Gen*., 330 F. *App'x* 821, 823–24 (11th Cir. 2009).

Plaintiff claims that enforcement priorities are defined in the DACA Memo and DACA SOP by virtue of those documents defining what makes an individual a "low priority" for immigration enforcement. *See* Dkt. 50 at 18. However, Plaintiff's logic that an enforcement priority definition can be reverse engineered from a list of criteria that enables an individual to be considered for deferred action simply does not follow. As the DACA SOP explains, the criteria provide guidance for who may ultimately be considered for DACA, they do not establish entitlement to DACA. While a finding that someone is an enforcement priority may encompass findings that *also* establish a person no longer meets the DACA guidelines, it also may not.

For example, the DACA SOP guidance considers whether deferred action under DACA is warranted, in part, by considering whether an individual has been *convicted* of "a felony offense, a significant misdemeanor offense, or multiple misdemeanors," *see* Dkt. No. 39-5 at 56; while also instructing that DACA may be terminated due to, among other things, a finding of EPS that may be based on "information [that] indicates the alien is under investigation for, has been arrested for (without disposition), or has been convicted of" a list of enumerated criminal actions. *See* Dkt. No. 39-4 at 69-70, 89; *see also* Dkt No. 39-6 at 32 ("A DACA requestor's criminal record may give rise to significant public safety concerns even where there is not a disposition of conviction.").

Because the enforcement priority finding is completely discretionary, committed to the judgment of DHS officers, and tied directly to the decision to initiate removal proceedings, Plaintiff cannot show that he is entitled to any process in this Court to challenge that finding.

Dated: March 16, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

WILLIAM C. PEACHEY
Director
District Court Section
Office of Immigration Litigation

/s/ Jeffrey S. Robins
JEFFREY S. ROBINS
Assistant Director
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
(202) 616-1246
jeffrey.robins@usdoj.gov

Attorneys for Defendants