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

11 ALBERTO LUCIANO GONZALEZ
 12 TORRES,

Plaintiff,

13 vs.

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

18 Defendants.
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Case No. 17 CV 1840 JM(NLS)

**PLAINTIFF’S REPLY IN
 SUPPORT OF MOTION TO
 MODIFY ORDER GRANTING
 MOTION FOR PRELIMINARY
 INJUNCTION [Docket No. 13]**

**Hearing: December 18, 2017
 Time: 10:00 a.m.
 Courtroom: 5D
 Judge: Jeffrey T. Miller**

1 In its Preliminary Injunction Order of September 29, 2017, this Court held
2 that Plaintiff Alberto Luciano Gonzalez Torres (“Mr. Gonzalez”) “made a strong
3 showing that he is likely to prevail on his APA claim that Defendants acted
4 arbitrarily, capriciously, and abused their discretion by failing to follow the DACA
5 SOP” when they terminated his DACA status in May 2016. Dkt. 12 at 12. The
6 Court further concluded that “Plaintiff [would] suffer significant irreparable harm
7 in the absence of an injunction by losing his DACA status and the ability to apply
8 for renewal of that status.” *Id.* The opinion goes on to explain that Mr. Gonzalez
9 would lose his right to employment, the ability to provide financially for himself
10 and his family, and his sense of well-being, and would be subject “to a constant
11 threat of apprehension and possible removal from the only country he has called
12 home.” *Id.* For all these reasons, the Court fashioned a remedial order that was
13 intended to redress Defendants’ violations of the APA and to protect Mr. Gonzalez
14 from the harms inflicted as a result of their arbitrary and capricious actions. It
15 vacated the termination of his DACA status, ordered Defendants to comply with
16 the DACA SOP if they elected to reconsider his DACA status, and required
17 Defendants to accept (and presumably consider) his DACA renewal application.

18 In the weeks following the entry of the Preliminary Injunction, it became
19 apparent that the Court’s Order would need to be modified to achieve its goals.
20 Because Defendants had unlawfully terminated his DACA status, Mr. Gonzalez
21 was unable to submit a renewal application until this Court vacated the termination
22 and reinstated his status. As a result, he applied for renewal so close to the end
23 date of his current DACA term that he was likely to see his reinstated status expire
24 weeks or months before USCIS issued a decision on his renewal application.
25 During that time, Mr. Gonzalez would be left without DACA protection and
26 subject to the very harms identified by the Court, all as a direct result of
27 Defendants’ unlawful termination of his DACA status. Accordingly, Mr. Gonzalez
28 brought this motion to modify the Preliminary Injunction, in order to assure that it

1 would protect him adequately from the irreparable harms it was intended to
2 prevent.

3 Defendants' opposition to the Motion to Modify only reinforces the need for
4 the requested modification. Defendants explain that on November 13, 2017,
5 roughly six weeks after the Court entered its Preliminary Injunction, they issued
6 Mr. Gonzalez a Notice of Intent to Terminate ("NOIT") his current DACA status.
7 They further note that Defendant "USCIS anticipates completing the adjudication
8 of its *intended termination* of Plaintiff's reinstated DACA *and* adjudication of his
9 pending DACA renewal request on or before December 22, 2017." Dkt. 18 at 2
10 (emphasis added). In other words, during the week before Christmas, Defendants
11 intend to (1) terminate Mr. Gonzalez's DACA status and (2) either deny his DACA
12 renewal application for the same improper reasons, or (as seems more likely
13 because USCIS has not yet issued Mr. Gonzalez a Notice of Intent to Deny the
14 renewal application) declare the application moot because his preexisting DACA
15 status will have been terminated, leaving nothing to renew. It bears emphasis that
16 Defendants have undertaken this entire process so that they can terminate Mr.
17 Gonzalez's DACA status less than a week before it is already set to expire on
18 December 22.

19 Defendants' efforts to terminate Mr. Gonzalez's DACA status and
20 summarily reject his renewal application are arbitrary and capricious, violate the
21 DACA SOP, and are plainly intended to deny him the protections of the
22 Preliminary Injunction. The sole ground for termination in the NOIT is CBP's
23 issuance of an NTA against him based on unlawful presence in the United States
24 and ICE's decision to pursue the removal proceedings. But unlawful presence is
25 an irrelevant factor in determining eligibility for DACA status. All DACA
26 applicants are, by definition, unlawfully present. Accordingly, the NOIT is
27 arbitrary and capricious and provides no reasoned basis to which Mr. Gonzalez can
28 respond, and termination on the asserted grounds represents a failure to engage in

1 the mandatory exercise of discretion that the SOP requires before USCIS can make
2 a determination with respect to DACA status.

3 Mr. Gonzalez is not asking the Court to resolve the merits of these serious
4 APA and constitutional issues on this motion. He notes only that Defendants'
5 issuance of the NOIT and their subsequent statements in opposition to this motion
6 represent changed circumstances that threaten to deprive him of the intended
7 protections of the Preliminary Injunction. Mr. Gonzalez therefore asks that the
8 Court modify its injunction, as other courts in similar circumstances have done, to
9 enjoin the termination or expiration of his DACA status and denial of his renewal
10 application pending judicial determination (through and including final appellate
11 review) of whether Defendants are complying with the Preliminary Injunction and
12 the law.

13 I. LEGAL STANDARD

14 “Crafting a preliminary injunction is an exercise of discretion and judgment,
15 often dependent as much on the equities of a given case as the substance of the
16 legal issues it presents.” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct.
17 2080, 2087 (2017). “The essence of equity jurisdiction has been the power of the
18 [judge] to mould each decree to the necessities of the particular case. Flexibility
19 rather than rigidity has distinguished it.” *Weinberger v. Romero-Barcelo*, 456 U.S.
20 305, 312 (1982) (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)); *see*
21 *Northwest Environmental Defense Ctr. v. Gordon*, 849 F.2d 1241, 1244-45 (9th
22 Cir. 1988) (“courts of equity have broad discretion in shaping remedies”).
23 Accordingly, a court “may modify the scope of its injunction under its continuing
24 duty to supervise the relief granted if it is informed of new facts that require
25 additional supervisory action.” *State v. Trump*, -- F. Supp. 3d --, 2017 WL
26 2989048, at *4 (D. Haw. July 13, 2017) (quoting *Nat’l Grange of the Order of*
27 *Patrons of Husbandry v. Cal. State Grange*, 182 F. Supp. 3d 1065, 1074 (E.D. Cal.
28 2016)). As circumstances develop subsequent to the entry of a preliminary

1 injunction, the Court “has a continuing duty to maintain a status quo.” *Hoffman*
2 *for & on Behalf of NLRB v. Beer Drivers & Salesmen’s Local Union No. 888*, 536
3 F.2d 1268, 1276 (9th Cir. 1976). These directives flow from the Court’s power to
4 modify its orders when necessary to “achieve the purposes” of an injunction. *U.S.*
5 *v. United Shoe Machinery Corp.*, 391 U.S. 244, 249 (1968).

6 **II. ARGUMENT**

7 In their opposition to this motion, Defendants contend that any challenge to
8 their effort to terminate Mr. Gonzalez’s DACA status pursuant to the November
9 13, 2017 NOIT or their subsequent denial (or dismissal) of his DACA renewal
10 application is beyond the scope of the complaint in this case and therefore not
11 subject to the Preliminary Injunction. But Mr. Gonzalez’s Complaint is plainly
12 directed at preventing any termination effort that does not comply with the DACA
13 SOP and assuring a fair consideration of his renewal application. Defendants’
14 strained effort to recharacterize his claims must therefore be rejected out of hand,
15 and the Preliminary Injunction should be modified to assure that Mr. Gonzalez is
16 protected from the harms the Court has found are likely to result from any
17 unlawful efforts to deprive him of DACA status.

18 In similar circumstances, the Ninth Circuit recently affirmed a district
19 court’s modification of the district court’s preliminary injunction in response to
20 “the Government’s restricted reading of” the terms of that injunction (as modified
21 by the Supreme Court). *State v. Trump*, 871 F.3d 646, 658 (9th Cir. 2017). In that
22 case, the Supreme Court held that the Government could not apply its immigration
23 restrictions to people with a “close familial relationship” to a U.S. citizen and that
24 a mother-in-law “clearly has such a relationship.” *Id.* at 655. In implementing this
25 directive, the Government excluded a variety of familial relationships without a
26 “persuasive explanation” of why they were not at least as close as that of mother-
27 in-law. *Id.* Because the “Government unreasonably interpret[ed]” the Supreme
28 Court’s modification, *id.* at 655, the Ninth Circuit held that the district court “did

1 not err” in changing the precise terms of its injunction to cover several additional
2 relationships, *id.* at 658.

3 Here, Defendants are “unreasonably interpreting” this Court’s Preliminary
4 Injunction by (1) mischaracterizing Mr. Gonzalez’s complaint, (2) ignoring the
5 DACA SOP, and (3) doing what this Court already made clear is unlawful and
6 “indefensible”—terminating Mr. Gonzalez’s DACA status and denying his
7 renewal application without exercising reasoned discretion, on the sole ground that
8 he received a Notice to Appear in Immigration Court for unlawful presence in the
9 United States, *see* Dkt. 12 at 9-11.

10 In his Complaint, Mr. Gonzalez seeks “restor[ation of his] DACA status and
11 attendant benefits, including employment authorization, pending a reconsideration
12 of its termination decision, in which Defendants provide him notice of their intent
13 to terminate, *a reasoned basis for that intent*, and an opportunity to respond with
14 argument and evidence.” Dkt. 1 at 27 (emphasis added).¹ While citing this very
15 request, Defendants’ opposition asserts that Mr. Gonzalez’s claims are now moot
16 because USCIS issued him an NOIT (the purported “notice, basis, and opportunity
17 to respond that he seeks”), and because the “basis for the requested relief could not
18 be reasonably expected to recur.” Dkt. 18 at 3-5.

19 But the problem underlying Mr. Gonzalez’s claims is already recurring.
20 Defendants are again attempting to terminate his DACA status and to prevent him
21 from seeking renewal without providing him any reasoned basis for their decision.
22 Defendants are thus violating the DACA SOP, including its requirement that they
23 exercise reasoned discretion in making DACA status determinations. And Mr.
24 Gonzalez is subject to the same irreparable harm identified by the Court, resulting
25 from the same essential conduct that the Court enjoined as arbitrary and capricious.

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27 ¹ Mr. Gonzalez’s preliminary injunction motion similarly requested “a proper
28 procedure that accords with DHS and USCIS policies and due process” and sought
“the reasons for” any purported termination. Dkt. 2-1 at 8, 31.

1 The Court would therefore be well within its discretion, and fully justified, in
2 modifying its injunction to protect Mr. Gonzalez from the harms resulting from
3 Defendants’ APA violations and to assure that Defendants do not violate the APA
4 a second time. There is no need for an amended complaint.

5 While Mr. Gonzalez is not seeking adjudication of his APA challenges to
6 Defendants’ renewed effort to deprive him of DACA status on this motion, he has
7 serious concerns that the “process” is already irretrievably tainted. By seeking to
8 terminate his DACA status and deny his renewal application merely because a
9 CBP officer issued Mr. Gonzalez an NTA for unlawful presence and ICE chose to
10 litigate that charge in Immigration Court, Defendants are flouting (1) this Court’s
11 determination that such grounds for termination are “indefensible,” Dkt. 12 at 11,
12 and (2) the DACA SOP’s requirement that where the “DACA requestor has been
13 placed in proceedings on a ground that does not adversely impact the exercise of
14 prosecutorial discretion”—*i.e.*, unlawful presence under 8 U.S.C. §
15 1182(a)(6)(A)(i)—USCIS must “review all derogatory information *in its totality*
16 and then make an *informed assessment* regarding the appropriate exercise of
17 prosecutorial discretion,” Dkt. 20-3 at 11 (emphasis added). Unlawful presence is
18 not a relevant factor in the determination of DACA status.

19 Moreover, to the extent that the NOIT purports to terminate Mr. Gonzalez’s
20 DACA status and deny his renewal application because he is suddenly an
21 “enforcement priority,” Defendants have offered no reason for this change in
22 position, which directly contradicts their behavior in previously granting him
23 DACA status twice while he was unlawfully present, and for the last 18 months,
24 during which time they have not investigated him for any unlawful activity and
25 have allowed him to live freely in San Diego. *See* Dkt. 20 at 10. Indeed, the
26 removal proceedings against Mr. Gonzalez were terminated on November 16,
27 2017. In other words, with respect to Mr. Gonzalez’s current DACA status and his
28 renewal application, Defendants are doing exactly what Mr. Gonzalez’s Complaint

1 and the Court’s Preliminary Injunction seek to prohibit: reconsidering his DACA
2 status without a reasoned basis. *See Inland Empire—Immigrant Youth Collective*
3 *v. Duke*, -- F. Supp. 3d --, 2017 WL 5900061, at *6 (C.D. Cal. Nov. 20, 2017)
4 (“the issuance of an NTA charging presence without admission does not provide a
5 reasoned basis for terminating DACA”).

6 Defendants’ claim that their blatantly unlawful actions constitute
7 “substantial[] compli[ance]” with the Court’s Order is both wrong and beside the
8 point. For the reasons outlined above, Defendants have not substantially complied
9 with the Court’s Order or the DACA SOP, but the Court does not need to resolve
10 that substantive question now. Instead, the Court can and should modify its
11 Preliminary Injunction to enjoin the termination or expiration of Mr. Gonzalez’s
12 DACA status pending the final resolution of any judicial challenges to Defendants’
13 efforts to terminate his current DACA status and/or to deny or dismiss his renewal
14 application. Without prejudging any of those issues, the Court would thus preserve
15 the status quo and achieve the purposes of its injunction—*i.e.*, a process in which
16 “true discretion can be exercised in the manner in which that discretion is outlined
17 in the DACA SOP.” Dkt. 20-2 at 34. It would also protect Mr. Gonzalez from the
18 very harms the Court identified as flowing from Defendants’ adjudicated APA
19 violations, which the Preliminary Injunction was intended to prevent.

20 **III. CONCLUSION**

21 Defendants’ opposition effectively asks the Court to dissolve its Preliminary
22 Injunction on the basis of an illusory promise that “Defendants have already
23 provided Plaintiff the notice, basis, and opportunity to respond that he seeks.” Dkt.
24 18 at 5. In reality, they are asking the Court to countenance their repetition of
25 unlawful action in the form of a sham “procedure.” *See Cnty. of Santa Clara v.*
26 *Trump*, -- F. Supp. 3d --, 2017 WL 3086064, at *8-9 (N.D. Cal. July 20, 2017)
27 (denying the Government’s motion for reconsideration of a preliminary injunction
28 where the only basis offered was an “illusory promise” to exercise its power

1 appropriately). The Court should reject this ruse and should effectuate the
2 purposes of its Preliminary Injunction by modifying its order to enjoin any lapse of
3 Mr. Gonzalez’s DACA status pending a judicial determination (through and
4 including final appeal) of whether Defendants are complying with the DACA SOP,
5 the APA, and due process.

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Dated: December 7, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document should automatically be served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ John C. Ulin