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 (Hon. Ricardo S. Martinez)
Case No. 2:17-cv-00218

APPELLANT DANIEL RAMIREZ-MEDINA'S REPLY BRIEF

ETHAN D. DETTMER
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105
Telephone: 415.393.8200

MARK D. ROSENBAUM
JUDY LONDON
KATHRYN A. EIDMANN
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, CA 90005
Telephone: 213.385.2977

THEODORE J. BOUTROUS, JR.
KATHERINE M. MARQUART
NATHANIEL L. BACH
ANDREW J. WILHELM
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: 213.229.7000

Attorneys for Daniel Ramirez-Medina

(Additional Counsel Listed On Inside Cover)

ERWIN CHEMERINSKY
echemerinsky@law.berkeley.edu
UNIVERSITY OF CALIFORNIA, BERKELEY SCHOOL OF LAW
**Affiliation for identification purposes only*
215 Law Building
Berkeley, CA 94720-7200
Telephone: 510.642.6483

LEAH M. LITMAN
lmlitman@umich.edu
UNIVERSITY OF MICHIGAN LAW SCHOOL
**Affiliation for identification purposes only*
701 South State Street
Ann Arbor, MI 48109
Telephone: 734.647.0549

LAURENCE H. TRIBE
tribe@law.harvard.edu
HARVARD LAW SCHOOL
**Affiliation for identification purposes only*
1575 Massachusetts Avenue
Cambridge, MA 02138
Telephone: 617.495.1767

LUIS CORTES ROMERO
lcortes@ia-lc.com
IMMIGRANT ADVOCACY & LITIGATION CENTER, PLLC
19309 68th Avenue South, Suite R-102
Kent, WA 98032
Telephone: 253.872.4730
Facsimile: 253.237.1591

MATT ADAMS
matt@nwirp.org
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Suite 400
Seattle, WA 98104
Telephone: 206.957.8611

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

Statutes

Other Authorities

INTRODUCTION

The district court made two reversible errors in dismissing Daniel Ramirez's Third Amended Complaint ("TAC").

First, despite making factual findings that the government launched a "crusade" against Mr. Ramirez and "hounded" him for more than a year following "baseless" accusations of gang affiliation, the district court found that it lacked subject matter jurisdiction under 8 U.S.C. § 1252(g). The government argues that United States Citizenship and Immigration Services ("USCIS") exercised unreviewable discretion in denying Mr. Ramirez's DACA renewal request, but it offers no limiting principle for its purported exercise of discretion. According to the government, neither the Standard Operating Procedures ("SOPs") nor enforcement-priority memoranda from the Secretary of Homeland Security limit USCIS's discretion. Under the government's theory, even the most egregious constitutional violations are immune from judicial review. But that is not the law. Indeed, Congress and courts have made clear that categories of unreviewable conduct are exceedingly narrow. The government's crusade here—grounded in constitutional violations and rife with nondiscretionary errors—is not one of them.

Second, the district court erred in not enforcing the Preliminary Injunction Order. The government does not dispute that, if Section 1252(g) does not preclude review, this Court should remand for the district court to consider whether to enter

additional injunctive relief. Regardless, the district court retained jurisdiction to enforce its Preliminary Injunction Order, which the government violated.

ARGUMENT

A. The district court erred in granting the government's motion to dismiss

The district court committed reversible legal error in concluding that 8 U.S.C. § 1252(g) bars judicial review of Mr. Ramirez's constitutional and nondiscretionary error claims.

The government does not dispute that Section 1252(g) is "narrowly construed," *Kwai Fun Wong v. United States*, 373 F.3d 952, 963–64 (9th Cir. 2004), and that any ambiguity must result in finding jurisdiction, *Arce v. United States*, 899 F.3d 796, 801 (9th Cir. 2018) (per curiam); *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) ("strong presumption" of judicial review applies to immigration statutes). Section 1252(g) "applies only to three discrete actions": the Attorney General's "'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'" *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999) ("*AADC*"). Section 1252(g) does not apply to the "many other decisions or actions that may be part of the deportation process." *Id.* Regardless of how the government characterizes its conduct, courts may review alleged violations of "mandatory duties," *Arce*, 899 F.3d at 801, and "outrageous" discrimination, *AADC*, 525 U.S. at 491; *Ragbir v. Homan*, 923 F.3d 53, 73 (2d Cir. 2019). This is

precisely the type of conduct Mr. Ramirez challenges, and his claims are therefore reviewable.

1. Mr. Ramirez's constitutional claims are reviewable

As the government concedes, the First and Fifth Amendments apply to Mr. Ramirez. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953); Gov't Br. ("GB") 29. Section 1252(g) does not prevent review of constitutional claims that (as here) arise from agency practices and procedures. *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998). Indeed, despite the government's attempt to immunize itself from constitutional claims, even "legislation that [purports to] completely immunize[] an agency's practices and procedures from due process challenges 'would raise difficult constitutional issues.'" *Id.* (quoting *Catholic Soc. Servs., Inc. v. Reno*, 134 F.3d 921, 927 (9th Cir. 1997)); *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1234 (9th Cir. 1999) (due process claims in immigration proceedings are reviewable).

a. The government attempts to evade liability by asserting that it acted against one individual rather than taking programmatic or class-wide action, thereby distinguishing this case from the DACA rescission litigation. GB 26–28. But the number of plaintiffs is irrelevant. *See Kwai Fun Wong*, 373 F.3d at 975 (reviewing constitutional claim of single plaintiff); *Ragbir*, 923 F.3d at 57 (same); *Garcia Herrera v. McAleenan*, 2019 WL 4170826, at *1 (E.D. Wash. Sept. 3, 2019) (same).

The government invokes this Court's now-partially-vacated decision in *Regents of the University of California v. DHS*, 908 F.3d 476 (9th Cir. 2018) for the proposition that Section 1252(g) precludes review of "individual 'no deferred action' decisions." GB 26–27. But *Regents* makes clear that constitutional due process claims *are* reviewable—this Court reviewed a due process claim by "individual DACA recipients." 908 F.3d at 514. Mr. Ramirez's due process claim is grounded in different conduct from the claim in *Regents*, but *Regents* did not alter *Walters*' holding that Section 1252(g) does not preclude review of due process claims that (as here) arise from agency practices and procedures.

b. Next, the government argues that "a direct challenge to the denial of a request for deferred action from an individual in removal proceedings" is unreviewable. GB 27. But Mr. Ramirez is not challenging a *discretionary* denial. Courts may review a legal question "even if the answer to that legal question . . . forms the backdrop against which the Attorney General later will exercise discretionary authority." *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004). Here, Mr. Ramirez raises two legal questions about whether "the Attorney General actually ha[d] the power to make" the decisions he made: To what constitutional due process was Mr. Ramirez entitled, and what procedures must the government follow in adjudicating his DACA renewal request? *Arce*, 899 F.3d at 801.

Multiple district courts are in accord. In *Garcia Herrera*, the noncitizen plaintiff had received DACA status, but the government later denied his renewal request despite no change in his eligibility requirements. 2019 WL 4170826, at *1. Garcia Herrera sued under the Due Process Clause and Administrative Procedure Act ("APA"), and the court rejected the same Section 1252(g) argument the government invokes here. Like Mr. Ramirez, Garcia Herrera did not challenge "the ultimate fact that his DACA renewal was not granted; instead, he challenge[d] Defendants' alleged failure to follow agency procedure when making the decision to deny Plaintiff's application. This kind of procedural challenge does not fall within the scope of the limited discretionary actions the Court cannot review." *Id.* at *4 (citations omitted). Where (as here) "the face of the complaint seeks relief for alleged failures to follow agency procedures . . . . § 1252(g) does not bar judicial review." *Id.*

Similarly, *Inland Empire—Immigrant Youth Collective v. Nielsen*, 2018 WL 1061408, at *15 (C.D. Cal. Feb. 26, 2018), reiterated that even "a claim closely related to the initiation of removal proceedings is not barred by § 1252(g), so long as it does not challenge the decision to commence proceedings itself." Because Section 1252(g) "does *not* bar review of legal questions relating to those discretionary decisions," the court found USCIS's revocation of DACA on the basis of a Notice to Appear ("NTA") to be reviewable. *Id.* at *15–*16. Similarly,

Mr. Ramirez does not "challenge . . . the issuance of the NTA[]" and instead "challenge[s] the USCIS's separate and independent decision to [deny] DACA [renewal] *on the basis of an NTA*, which is independent of the category of decisions covered by § 1252(g)." *Id.* at *15. Although *Inland Empire* concerned DACA terminations rather than renewal denials, the government's narrow focus on USCIS's 2018 renewal denial ignores Mr. Ramirez's continuous challenges to the government's "vendetta" against him, beginning with ICE unlawfully arresting and detaining him in February 2017, and USCIS's subsequent wrongful termination of his DACA on the basis of NTA issuance. The district court found that the government's vendetta did not suddenly stop when Mr. Ramirez requested DACA renewal. Rather, the government "continued [its] crusade," resulting in a denial that was "not . . . just." ER12, ER27.

The district court's factual findings are correct—USCIS's 2018 renewal denial is inseparable from the government's precipitating acts. ICE detained Mr. Ramirez in February 2017 "without any indication of criminal history" and initiated removal proceedings based on false and baseless speculation about gang affiliation. ER2–ER3. Despite multiple courts intervening to enjoin the government from stripping Mr. Ramirez (and others, in *Inland Empire*) of DACA, the government denied Mr. Ramirez's renewal application "against the individual adjudicator's conclusions" based solely on information that was available to it for

years: "several-year-old and minor criminal transgressions that would not otherwise disqualify him for DACA." ER3. Mr. Ramirez's claims, therefore, arise from the government's decision—beginning in 2017—to "hound[]" him and retaliate for filing this lawsuit challenging his unlawful detention and initial DACA termination. ER27; *see Young Sun Shin v. Mukasey*, 547 F.3d 1019, 1023–24 (9th Cir. 2008) (reviewing "actions taken . . . prior to any decision made by the Attorney General to commence proceedings"); *Alvarez v. ICE*, 818 F.3d 1194, 1204 (11th Cir. 2016) (reviewing actions taken after decision to execute removal order).[1] Because the government's vendetta against Mr. Ramirez infected its decision to deny him DACA renewal, it denied him fair consideration in his renewal application and violated his constitutional rights.[2]

c. The government next cites several cases for the proposition that not all constitutional claims escape Section 1252(g)'s jurisdictional bar. GB 29–30. But none supports it.

---

[1] The government's assertion that, following dismissal of Mr. Ramirez's petition for review ("PFR"), this case is the only "barrier[] to his removal," GB 24, is wrong and irrelevant because were Mr. Ramirez's DACA restored, he would be similarly situated to other DACA recipients with removal notices. Regardless, Mr. Ramirez's motion to reinstate the PFR is pending before this Court in *Ramirez-Medina v. Barr*, No. 19-72850.

[2] The merits of the due process claim in *Inland Empire* (GB 26) are irrelevant to reviewability. Regardless, Mr. Ramirez's due process claim is stronger than that in *Inland Empire*.

In *AADC*, the Court recognized that Section 1252(g) may permit review of "rare case[s]" alleging "outrageous" discrimination by the agency. 525 U.S. at 491. This is certainly such a case. As the district court found, the government "pursued a nearly three-year vendetta" against Mr. Ramirez, "provided no corroborating evidence" to support its gang-affiliation theory even though it falsely told the media that Mr. Ramirez was in a gang, detained him for 47 days with gang members, engaged in "baseless" attempts to strip his DACA status, and "hounded" him, giving the district court an "uneasy feeling that the Government did not honestly consider the facts of Mr. Ramirez's case to arrive at a just conclusion." ER2, ER3, ER27. The government's characterization of its conduct as "immaterial," "garden-variety administrative action," GB 31–32, is plainly contradicted by the district court's factual findings.

In *Rueda Vidal v. DHS*, 2019 WL 7899948 (C.D. Cal. Aug. 28, 2019), *rev'd on other grounds sub nom. Rueda Vidal v. Bolton*, 822 F. App'x 643 (9th Cir. 2020), noncitizen Rueda Vidal was detained and later released. Rueda Vidal's subsequent DACA application was denied, and she sued under the Due Process Clause and APA. *Id.* at *3. Rueda Vidal alleged "that USCIS denied her DACA application . . . in retaliation for her active and ongoing public criticism of the federal government's immigration practices and policies." *Id.* at *7. The court concluded that if Rueda Vidal "ultimately proves that these allegations are true, then USCIS has

interfered with constitutional rights that are of the highest order of importance." *Id.* Thus, Rueda Vidal "sufficiently alleged that the denial of her DACA application was outrageous for the purposes of *AADC*." *Id.* at *6. So too here, where the government continued its crusade against Mr. Ramirez by denying his renewal request after his case attracted national media coverage when he challenged his wrongful detention and initial DACA revocation. *See* ER510 (government recognizing "national interest in this case").

Mendez-Garcia v. Lynch, 840 F.3d 655, 658 (9th Cir. 2016) (cited at GB 19), says nothing about DACA or Section 1252(g), and this Court concluded that it had subject matter jurisdiction over the due process claim at issue. Of course, whether the claim ultimately succeeds is distinct from the threshold jurisdictional inquiry. Indeed, the government's assertion that the district court here "correctly found that due process *was* satisfied" (GB 30) demonstrates the error in both the government's and district court's analyses. Determining whether due process is satisfied can occur only if the court has jurisdiction over the due process claim.[3]

---

[3] *Markham v. United States*, 434 F.3d 1185, 1186 (9th Cir. 2006), did not involve immigration or Section 1252(g). Moreover, the plaintiff in *Markham* made "wholly insubstantial constitutional allegations to frame otherwise unreviewable administrative decisions." In any event, *Markham* favors Mr. Ramirez, recognizing that "[c]ourts retain jurisdiction to consider constitutional challenges" even in the face of jurisdiction-stripping statutes, and that "an administrative procedure can give rise to a due process violation." *Id.* at 1187–

d. The government next argues that Mr. Ramirez needed to present evidence to survive a motion to dismiss. GB 32. Not so. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (plaintiffs opposing Rule 12(b)(1) motions are "not required to provide evidence outside the pleadings"). Any confusion likely arises because the government moved to dismiss the operative TAC under Rule 12(b)(1) or, alternatively, for summary judgment. ER59. The district court analyzed only the 12(b)(1) motion and found that it lacked jurisdiction, but without explanation also granted summary judgment. ER27.

In evaluating Rule 12(b)(1) motions, this Court must accept as true all facts alleged in the TAC and construe them in Mr. Ramirez's favor. *Snyder & Assocs. Acquisitions LLC v. United States*, 859 F.3d 1152, 1157 (9th Cir. 2017). Because the government facially challenges subject matter jurisdiction, the Court must determine the sufficiency of "*allegations* . . . as a *legal* matter." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (citation omitted, emphases added). To the

88. And *Bell v. Hood*, 327 U.S. 678, 683 (1946), held that judicial review was available where the alleged constitutional violations "are not immaterial but form rather the sole basis of the relief sought." So too here, where the crux of Mr. Ramirez's complaint is a deprivation of his constitutional rights.

extent the district court dismissed the TAC because Mr. Ramirez failed to submit evidence, that was reversible error.[4]

Although the evidence should not have impacted the district court's decision whether to grant a 12(b)(1) motion, if this Court considers evidence to be relevant, it should vacate and remand because Mr. Ramirez was entitled to seek to have the administrative record ("AR") supplemented, as well as to conduct discovery.

In response to Mr. Ramirez's TAC, the government submitted a woefully incomplete AR *after* Mr. Ramirez's Motion for Second Preliminary Injunction was fully briefed and one day before the government's motion to dismiss and for summary judgment. While courts generally should consider only the materials in the government-prepared AR, several exceptions exist that permit a plaintiff to seek discovery to augment or complete the AR. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985). Courts may "admit extra-record evidence: (1) if admission is necessary to determine 'whether the agency has considered all relevant factors and has explained its decision,' (2) if 'the agency has relied on documents not in the record,' . . . or (4) 'when plaintiffs make a showing of agency bad faith.'" *Lands*

---

[4] The government's cases—*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *Wallis v. J.R. Simplot Co.*, 26 F.3d 885 (9th Cir. 1994)—say nothing about Section 1252(g), let alone its interplay with constitutional claims. Nor do they discuss the motion to dismiss standard—*Burdine* went to trial, and *Wallis* involved a summary judgment motion.

Council v. Powell, 395 F.3d 1019, 1030 (9th Cir. 2005) (citation omitted). Each exception applies here.

As Mr. Ramirez explained to the district court, the government's AR was over-redacted and lacked key documents, including documents referred to in some portions of the AR and documents that were included as part of previous ARs in this action. Most glaringly, the government omitted the March 20, 2018 USCIS email that confirms that Mr. Ramirez is not a gang member or public safety concern. FER3. Nor does the AR include a referenced email from USCIS to ICE that requested non-gang-related reasons to adjudge Mr. Ramirez as a public safety risk unworthy of DACA (and related correspondence). *Id.* The government also improperly over-redacted the AR in an apparent attempt to use it as both a sword and shield, FER4, and Mr. Ramirez thus requested a privilege log and in-camera review, ER56–ER57. The government's bad faith is also established by the district court's findings, ER12, ER24, and provides an additional basis for seeking extra-record evidence. *Lands Council*, 395 F.3d at 1030.

All of these issues should have been explored by a motion to compel and to supplement the record. Indeed, Mr. Ramirez challenged the government's prior AR in 2018 as incomplete, forcing the government to supplement it. ER490. To the extent evidence was considered on the motion to dismiss, Mr. Ramirez should have

been permitted to seek supplementation of the AR and/or discovery, but he was not. *See* FER2–FER4.

e. Finally, Mr. Ramirez did not waive his First Amendment claim, which flows from the same conduct underlying his due process claim. *See* GB 38. As the TAC explains, litigation seeking to expose government wrongdoing is "'a matter of public concern' . . . protected by the First Amendment." ER97 ¶ 117 (quoting *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 927 (9th Cir. 2004)). Mr. Ramirez alleged that, after he filed this lawsuit challenging his wrongful detention and initial DACA termination, the government retaliated against him by denying his renewal request. ER96–ER97 ¶¶ 116–117. Regardless, this Court should exercise its discretion to consider Mr. Ramirez's First Amendment claim because failure to do so would result in manifest injustice and would not prejudice the government. *United States v. Ullah*, 976 F.2d 509, 514 (9th Cir. 1992). As in *Rueda Vidal*, if Mr. Ramirez "ultimately proves that these allegations are true, then USCIS has interfered with constitutional rights that are of the highest order of importance." 2019 WL 7899948, at *7.[5]

---

[5] The government's cases are distinguishable. In *Wannamaker v. Spencer*, 774 F. App'x 378, 379 n.1 (9th Cir. 2019), this Court declined to review a district court's ruling that was totally unchallenged on appeal. Mr. Ramirez has challenged the district court's denial of his constitutional claims here—both the First Amendment and Fifth Amendment claims. *See* Opening Brief ("OB") 26. In

The government's argument that Mr. Ramirez "failed to state a claim" under the First Amendment (GB 38) is irrelevant to subject matter jurisdiction. The government chose not to file a Rule 12(b)(6) motion. Regardless, as with his due process allegations, Mr. Ramirez's retaliation allegations are confirmed by even the limited evidence before the court: The government continued to "hound[]" Mr. Ramirez (ER27), including by leaking statements to the media about evidence that did not exist (ER94 ¶ 65 n.60), giving the district court an "uneasy feeling" that the government failed to "honestly consider the facts of Mr. Ramirez's case to arrive at a just conclusion" (ER27).

2. The government's nondiscretionary errors are reviewable

Just as Mr. Ramirez's constitutional claims are reviewable, so are his nondiscretionary error claims. Section 1252(g) "applies only to . . . three specific *discretionary* actions." *Catholic Soc. Servs.*, 232 F.3d at 1150 (emphasis added). The government made several *nondiscretionary* errors here, and the district court erred in finding them unreviewable.

Martinez-Serrano v. INS, 94 F.3d 1256, 1259 (9th Cir. 1996), the appellant raised an issue in his brief's statement of the case but not in the argument section. Here, Mr. Ramirez discussed why his constitutional claims are reviewable throughout his argument. *See* OB 31–35. And in *Financial Guaranty Insurance Co. v. Putnam Advisory Co.*, 2020 WL 264146, at *2 (S.D.N.Y. Jan. 17, 2020), the defendant raised a wholly distinct argument in a footnote. Mr. Ramirez's First Amendment claim flows from the same factual and legal analysis as his Fifth Amendment claim, which he indisputably preserved.

a) The government erroneously relied on the Kelly Memo and ICE's enforcement priority determination

Section 1252(g) does not preclude review of Mr. Ramirez's claim that ICE relied on the Kelly Memo, and thus applied the wrong standard, to deny his DACA renewal. *See Coyotl v. Kelly*, 261 F. Supp. 3d 1328, 1340 (N.D. Ga. 2017) (Section 1252(g) does not "divest[]" courts of jurisdiction over challenges to "*non-discretionary* process" by which DACA renewal requests are determined). Under the INA, the Secretary of Homeland Security must "[e]stablish[] national immigration enforcement policies and priorities." 6 U.S.C. § 202(5). In exercising that authority, the Napolitano Memo provides that an individual eligible for DACA generally is *not* an enforcement priority, even if that individual "is already in removal proceedings or subject to a final order of removal." ER131; *see also* ER132. The Kelly Memo, issued pursuant to the same statute, carved out the Napolitano Memo from its enforcement-priority changes. *See* ER458; ER60.

Nonetheless, ICE erroneously relied on the Kelly (rather than the governing Napolitano) Memo to deny Mr. Ramirez's DACA renewal. OB 36. ICE had no discretion to disregard the Napolitano Memo's enforcement-priority standard. Doing so renders the Secretary's immigration-enforcement policies and procedures meaningless and effectively permits ICE to establish its own policy in contravention of the INA. Mr. Ramirez's challenge to ICE's decision to flout these directives and apply the wrong legal standard is reviewable. *Hovsepian*, 359 F.3d at 1155 (district

court may consider a "purely legal question" that informs how "the Attorney General later will exercise discretionary authority").

The government mis-frames the question as whether the "Kelly Memo somehow curtailed USCIS or ICE from determining an individual to be an enforcement priority." GB 42. The issue is whether the district court has subject matter jurisdiction over Mr. Ramirez's claim that ICE incorrectly denied his renewal request under the Kelly Memo, when it was bound by the Napolitano Memo's enforcement-priority standard. OB 36; *id.* at 10 & n.3. To *that* argument, the government offers no response.

Nor do the government's cases suggest that Section 1252(g) precludes review of ICE's application of the wrong legal standard. GB 42. *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015), was issued prior to the Kelly Memo and says nothing about Section 1252(g). In *Torres v. DHS*, 2017 WL 4340385, at *4 (S.D. Cal. Sept. 29, 2017), the court determined that Section 1252(g) did not preclude consideration of a plaintiff's "claim that the termination of his DACA status did not comply with the non-discretionary DACA SOP." In later granting the government's *Rule 12(b)(6)* motion, the court reviewed that legal question and concluded that the government had "considered all relevant factors in determining that [p]laintiff was an enforcement priority within the meaning of the DACA SOP and Kelly Memo." 2018 WL 1757668, at *8 (S.D. Cal. Apr. 12, 2018). Like the plaintiff in *Torres*, Ramirez

plausibly alleges that the government made a nondiscretionary error. The district court erred in departing from *Torres*' jurisdictional finding.[6]

At bottom, the government offers nothing to suggest that Section 1252(g) precludes review of the "purely legal question" of whether ICE applied the wrong legal standard. *Hovsepian*, 359 F.3d at 1155.

USCIS made a second nondiscretionary error by relying on ICE's enforcement priority determination despite knowing that the factual basis for ICE's determination was wrong. It is undisputed that ICE found Mr. Ramirez to be an enforcement priority based on its mistaken belief that he committed DACA fraud by misrepresenting his General Educational Development ("GED") status. ER500 (ICE concluding that Mr. Ramirez was "not eligible for DACA because he dropped out of the GED program"); ER511. In the government's words, "USCIS[] defer[red] to" ICE's determination, ER60, even though USCIS's legal counsel advised that the underlying facts were "not accurate," ER499; ER 513, and USCIS already determined that "[t]here is NOT sufficient evidence to conclude that this person is an EPS concern," ER98. USCIS should have—but did not—contact ICE about its factual error. ER186–ER187.

---

[6] Whether or not USCIS relied on the Kelly Memo to terminate the plaintiff's DACA status in *Torres* (GB 42 n.9), *Torres* says nothing about whether ICE legally erred here when it relied on the Kelly Memo's enforcement-priority standard.

The government first responds that ICE's factual mistake is "'not an issue'" in USCIS's renewal denial. GB 43 (quoting ER513). But USCIS refused to "look behind" or "preempt[] ICE's determination of enforcement priorities." ER513. Thus, even if USCIS did not specifically consider Mr. Ramirez's GED, it indisputably deferred to ICE's overall enforcement priority determination—grounded in the wrong memorandum and wrong facts—in denying the renewal request.[7]

Second, the government denies that USCIS needed to contact ICE regarding its factual mistake. GB 43. The SOP, however, provides that where USCIS "disagrees with ICE's determination," it "should . . . contact[] local ICE counsel to discuss the reasons why USCIS disagrees with ICE's determination." ER186–ER187. Despite knowing that ICE's stated facts were "not accurate," USCIS did not contact local ICE counsel. The government argues without support that the SOP is not binding on USCIS. GB 44. But the word "should" "express[es] obligation." Merriam-Webster's Online Dictionary, *Should*. The government also faults Mr. Ramirez for not "point[ing] to a substantive disagreement that USCIS might

[7] The government argues that ICE continued to view Mr. Ramirez as an enforcement priority in August 2019, but it cites an email from August 2018. *See* GB 43 (citing SER39–SER40). In any event, the email reflects ICE's continued reliance on the discredited gang-affiliation theory. Its failure to mention the GED is unsurprising, given that the email discusses follow-up communications with law enforcement entities regarding unrelated violations.

have had with ICE's enforcement priority determination." GB 44. But ICE's mistake was a predicate to its determination, and USCIS knew of that mistake. ER499. If that disagreement is not substantive, few disagreements are.

Third, despite telling the district court that "USCIS[] defer[red]" to ICE's priority determination, ER60, the government now argues that USCIS did *not* "merely 'defer[]'" to ICE because USCIS engaged in various internal deliberations regarding Mr. Ramirez's "criminal record," GB 44. The deliberation the government cites, however, states that USCIS denied Mr. Ramirez's renewal request "for the reasons previously . . . included in the NOID." SER28. The NOID, in turn, told Mr. Ramirez that "ICE considers you an enforcement priority." ER514. The evidence is consistent with the government's original position: USCIS deferred to ICE, despite knowing of ICE's mistake.

Finally, the government makes a "harmless error" argument, GB 44, but it was far from harmless. The record shows—and the government does not contest—that USCIS knew that a key factual determination underlying ICE's priority determination was wrong, and USCIS did not contact ICE to correct the record. The government cannot prove what would have occurred if ICE had known the truth: that Mr. Ramirez did not commit DACA fraud. ICE may well not have labeled Mr. Ramirez an enforcement priority—indeed should not have labeled him as

such—and USCIS would not have been able to cite ICE's priority designation in stripping Mr. Ramirez of his DACA.

The district court's order, for its part, failed to consider this fully briefed argument. At minimum, this Court should vacate and remand to allow the district court to analyze the issue in the first instance. *See Sherman v. Network Commerce, Inc.*, 94 F. App'x 574, 575 (9th Cir. 2004) (remanding when district court failed to consider relevant conduct in dismissing case).

b) The government's departure from its general policies was further nondiscretionary error

"'Unexplained inconsistency'" in agency actions is further reason to set them aside. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)). Even where an agency has discretion, where it announces a general policy governing its discretion, "an irrational departure from that policy" violates the APA. *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996). Reviewing such departures does not run afoul of Section 1252(g). *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Wong*, 373 F.3d at 963–64.

Here, USCIS's policy required it to apply discretion "consistently," so that "similar fact patterns . . . yield similar results." ER508. Mr. Ramirez plausibly alleged an irrational departure from that policy—specifically, that the government relied on (i) stale, minor criminal transgressions, (ii) ICE's active pursuit of

Mr. Ramirez's removal, and (iii) "baseless," "speculative arguments" lacking any "corroborating evidence." ER2–ER3. That is enough to create subject matter jurisdiction.

The government wrongly focuses on the merits of Mr. Ramirez's claim rather than the plausibility of his allegations under Rule 12(b)(1). In any event, the district court found no indication that the government treated Mr. Ramirez consistently with *anyone* else. ER24. Regardless of whether USCIS could "consider more than just the grounds listed in the NTA" (GB 46) or how "serious" Mr. Ramirez's record was (*id.* at 48), the government indisputably had access to Mr. Ramirez's years-old criminal record when it granted his initial DACA application and renewal request. To sandbag Dreamers like Mr. Ramirez with minor criminal charges years later completely undercuts DACA's purpose—to allow Dreamers to obtain education, provide for their families, "improve our economy, and give back to our communities." ER129. And the government's reliance on partially unpaid traffic fines, *after* wrongfully terminating Mr. Ramirez's work authorization, defies common sense. ER79–ER80.

The government also contends that ICE had "additional grounds to seek [Mr. Ramirez's] removal" beyond unlawful presence. GB 47. But the only "additional grounds" the government cites are the stale "criminal issues described above." *Id.* The government provides no authority for its position that the mere

"revelation" of years-old evidence that was available to it should "reset the analysis." *Id.* This was no reset. It was retaliation. And—regardless of the ultimate outcome on the merits—it was judicially reviewable.

B. The district court erred in denying Mr. Ramirez's motion for injunctive relief

In denying injunctive relief, the district court determined that (i) it lacked jurisdiction and (ii) the government did not violate its Preliminary Injunction Order. Both determinations constituted reversible error.

1. The district court had jurisdiction to enter additional injunctive relief

The district court erroneously concluded that it could not enter additional injunctive relief because it lacked subject matter jurisdiction. ER20–ER25; OB 44. But Section 1252(g) does not bar judicial review here, and thus remand is appropriate for the district court to determine whether to enter additional injunctive relief. Indeed, the government does not dispute that, if this Court reverses on the jurisdictional issue, it should remand on the preliminary-injunction issue.

2. Regardless, the district court should have enforced its existing Preliminary Injunction Order

Even if, *arguendo*, Section 1252(g) applied, that does not absolve the district court's failure to enforce its Preliminary Injunction Order. The filing of an amended complaint did not "dissolve" the Preliminary Injunction Order, and the government violated that order.

a) The filing of an amended complaint did not "dissolve" the Preliminary Injunction Order

The government does not dispute that the filing of an amended complaint does not automatically "dissolve" a preliminary injunction. Rather, it mischaracterizes the district court's order as finding that the Preliminary Injunction Order "dissolved *here*, because the filing of the TAC asserted different claims than the SAC, and the district court lacked jurisdiction over those new claims." GB 51. In fact, the district court stated that "[t]he injunction was entered on the allegations of the [SAC]," and that "Mr. Ramirez has now filed a [TAC] and does not establish that a preliminary injunction survives the *filing* of an amended complaint without further order of the Court." ER25 (emphasis added). The government does not—and cannot—defend the district court's conclusion that the *filing* of an amended complaint dissolves an existing injunction. *See U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1093 (9th Cir. 2010).

The government also argues that the question of whether the Preliminary Injunction Order survived the TAC is "moot" in light of the district court's findings that the government did not violate the Preliminary Injunction Order and that the court lacked jurisdiction. GB 52. But both findings were wrong: the government *did* violate the preliminary injunction (*see* pp. 25–30), and the district court *did* have jurisdiction to enforce the Preliminary Injunction Order (*see* pp. 2–22). Neither issue is moot; both are challenged on appeal.

Further, Mr. Ramirez does not assert 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." GB 52. Far from "an entirely new challenge," *id.* at 52–53, the TAC builds on the same factual predicate as the SAC, beginning with the government's unlawful detention of Mr. Ramirez in February 2017, its baseless gang affiliation allegations, and its continued misconduct ever since, *see* ER94, ER97. That is far from a "fundamentally different . . . scheme" alleged in an amended complaint, which occurred in *Rockwell International Corp. v. United States*, 549 U.S. 457, 473 (2007) (cited at GB 52).

Finally, the government fails to distinguish *Paulson v. City of San Diego*, 294 F.3d 1124, 1128 (9th Cir. 2002) and *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 774 F.3d 935, 944 (9th Cir. 2014). GB 53. The fact that the preliminary injunctions may dissolve when a case is *dismissed* does not alter the fact that the Preliminary Injunction Order was in force *when the government violated it*. Thus, the district court's dismissal is irrelevant to its ability to enforce a violation of the preliminary injunction that occurred prior to dismissal, as are the cases the government cites for the proposition that the appeal of an order *granting or denying* a preliminary injunction is mooted by the dismissal of an action. GB 51 (citing *Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1075 (9th Cir. 2001); *Warren v. Wells Fargo & Co.*, 2018 WL 780722, at *1 (9th Cir. Jan. 26, 2018)).

b) The government violated the Preliminary Injunction Order

By constructively terminating Mr. Ramirez's DACA before the merits of his legal claims were resolved, and by doing so based on a false public-safety rationale, the government violated two separate prongs of the Preliminary Injunction Order. *See* OB 48–55.

The Preliminary Injunction Order was designed to protect Mr. Ramirez's DACA pending "a final decision . . . on the merits of his claims." ER356. The district court issued the Preliminary Injunction Order on May 15, 2018—the same day Mr. Ramirez's DACA was otherwise set to expire. *See* ER319, ER356. Indeed, the district court needed to act quickly to protect Mr. Ramirez because the government had only just reinstated his DACA under the *Inland Empire* injunction. *See* ER319, ER320. And it did so by issuing the Preliminary Injunction Order preventing the government from "terminat[ing] [Mr. Ramirez's] DACA status and work authorization pending a final decision by [the district court] on the merits of his claims." ER356.

This Order was not intended to be rendered moot by the DACA's expiration the same day the Order was filed; rather, the Order was intended to *protect* Mr. Ramirez "pending adjudication on the merits of his case." ER334. And, as the government had declared its intent to terminate his DACA shortly after reinstating it under *Inland Empire*, the Order was intended to protect against that too. The

government therefore violated the Order when it constructively terminated Mr. Ramirez's DACA midway through the litigation by denying his routine renewal application—99% of which, the government admits, are approved. *See* OB 8; GB 39.

The definition of "terminate" reinforces that the Preliminary Injunction Order protected Mr. Ramirez's DACA until a final resolution on the merits. "Terminate" means "to bring to an end," or "to form the conclusion of." Merriam-Webster's Online Dictionary, *Terminate*. The antonyms of "terminate" include "continue," "extend," and "prolong." Merriam-Webster's Online Thesaurus, *Terminate*. That is what the government was ordered to do: continue Mr. Ramirez's DACA until the district court could finally resolve his claims. But the government did the opposite.[8]

The government argues that an obligation to maintain Mr. Ramirez's DACA pending a final decision cannot "be fairly read into the order." GB 56. But the district court said its order would last until a "final decision," ER356, which is the only interpretation that makes sense, given that the order was issued the same day Mr. Ramirez's DACA was otherwise set to expire. It makes no sense for the district court to order Mr. Ramirez's DACA protected "pending a final decision," and to

[8] Maintaining Mr. Ramirez's DACA status through the resolution of his claims was particularly apt because the government's unlawful termination of his DACA and employment authorization in February 2017 deprived Mr. Ramirez of their benefits for more than a year of that two-year DACA period.

issue that order *on the day his DACA was otherwise going to expire*, only to allow the government to take away his DACA immediately.

The government's citation to *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075 (9th Cir. 2004), for the proposition that an injunction must provide "fair and precisely drawn notice of what the injunction actually prohibits," GB 56, does not help it, because the Preliminary Injunction Order clearly prohibited the government's premature termination of Mr. Ramirez's DACA. In fact, *Fortyune* supports Mr. Ramirez, because the Court disagreed that the "district court must also elucidate *how* to enforce the injunction." 364 F.3d at 1087. Likewise here: the district court enjoined the government from ending Mr. Ramirez's DACA until the litigation completed; the court was not required to also specify every way the government should not end his DACA, such as by affirmatively cancelling it, failing to renew it, or claiming it had expired.

Even if any ambiguity in the Preliminary Injunction Order's *text* existed (it does not), its *spirit* was crystal clear. The government does not even respond to Mr. Ramirez's multiple authorities establishing that it is proper to "find a breach of the decree in a violation of the spirit of the injunction, even though its strict letter may not have been disregarded." *John B. Stetson Co. v. Stephen L. Stetson Co.*, 128 F.2d 981, 983 (2d Cir. 1942); *Inst. of Cetacean Research*, 774 F.3d at 949. Here,

both the spirit and the letter of the injunction were clear, and the government violated both.

Beyond violating the district court's order not to "terminate [Mr. Ramirez's] DACA," ER356, the government violated the part of the order preventing it from "relying in any proceedings on any statement or record made as of [May 15, 2018] purporting to allege or establish that Mr. Ramirez is . . . a threat to public safety," *id.* As the district court recognized, the government's assertion that its "offense history" rationale was not based on "public safety" concerns rested on "an apparently meaningless distinction." ER3–ER4. Nonetheless, the government doubles down on that distinction. GB 57–59. Despite the close connection between the DACA SOP's treatment of criminal offenses (including "non-significant misdemeanor[s]") and public safety concerns, *see* ER177, ER185, the government argues that its denial of Mr. Ramirez's renewal application in this case was not based on public safety grounds, GB 54–55.

But the government *still* offers no explanation for why Mr. Ramirez's stale "offense history" is relevant to its "totality-of-the-circumstances analysis," GB 59, if not for the inherent connection between criminal law and public safety. For example, the government points without elaboration to "'the fundamental underpinnings of statutory rape criminal offenses and the information in the police report.'" GB 11 (quoting SER34). But the "fundamental underpinnings" of

"criminal offenses" are merely that they pose a threat to public safety. And the government cannot reasonably rely on the police report as a negative factor, because that report actually described Mr. Ramirez *favorably*, noting that his relationship with the mother of his child was entirely consensual, that they lived together and planned to get married, that "they both have a good relationship and the baby is healthy and [they] have plenty of baby supplies," and that the mother of his child "stated that she has a good relationship with [Mr. Ramirez] who is very supportive and helps her with the baby." SER15. The government does not explain how any of this information reflects negatively on Mr. Ramirez under its "totality-of-the-circumstances analysis."

To be clear, Mr. Ramirez is not and never has been a public safety threat, and his minimal interactions with police would not establish him as a public safety threat under the DACA SOP. The government violated the Preliminary Injunction Order by citing Mr. Ramirez's "offense history" to deny his renewal request, because the government fails to identify anything about Mr. Ramirez's record that is actually materially negative, leaving the criminal law's inherent connection to public safety as the only remaining explanation.

The government argues that relying on Mr. Ramirez's offense history was not improper reliance on "record[s] . . . purporting to . . . establish [he] [was] . . . a threat to public safety." ER356; GB 54. But the government's use of his "offense history"

was *itself* a manufactured basis for denying renewal. As the district court found, during the government's "crusade" against Mr. Ramirez, "[w]hen [its] manufactured basis for action dissolved, it searched for a new basis," resulting in his renewal request being "treated differently" than normal. ER12; ER24. The government's "new basis" was Mr. Ramirez's miniscule "offense history," for which "[t]he Government does not indicate that it has ever denied renewal applications on similar concerns outside of Mr. Ramirez's case," ER24, and which described Mr. Ramirez quite favorably, SER15. With nothing left, the government's "offense history" rationale boils down to its reliance on records purporting to establish that Mr. Ramirez is a threat to public safety—a rationale that squarely violated the Preliminary Injunction Order. *See* ER356.

CONCLUSION

This Court should reverse the district court's order granting the government's motion to dismiss. It should vacate and remand the district court's order denying Mr. Ramirez's motion for injunctive relief.

Dated: November 4, 2020

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.

ETHAN D. DETTMER
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105
Telephone: 415.393.8200
Facsimile: 415.393.8306

MARK D. ROSENBAUM
JUDY LONDON
KATHRYN A. EIDMANN
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, CA 90005
Telephone: 213.385.2977

ERWIN CHEMERINSKY
echemerinsky@law.berkeley.edu
UNIVERSITY OF CALIFORNIA,
BERKELEY SCHOOL OF LAW
**Affiliation for identification purposes only*
215 Law Building
Berkeley, CA 94720-7200
Telephone: 510.642.6483

LEAH M. LITMAN
lmlitman@umich.edu
UNIVERSITY OF MICHIGAN LAW SCHOOL
**Affiliation for identification purposes only*
701 South State Street
Ann Arbor, MI 48109
Telephone: 734.647.0549

THEODORE J. BOUTROUS, JR.
KATHERINE M. MARQUART
NATHANIEL L. BACH
ANDREW J. WILHELM
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: 213.229.7000
Facsimile: 213.229.7520

LAURENCE H. TRIBE
tribe@law.harvard.edu
HARVARD LAW SCHOOL
**Affiliation for identification purposes only*
1575 Massachusetts Avenue
Cambridge, MA 02138
Telephone: 617.495.1767

LUIS CORTES ROMERO
lcortes@ia-lc.com
IMMIGRANT ADVOCACY & LITIGATION CENTER, PLLC
19309 68th Ave. South, Suite R-102
Kent, WA 98032
Telephone: 253.872.4730
Facsimile: 253.237.1591

MATT ADAMS
matt@nwirp.org
NORTHWEST IMMIGRANT RIGHTS PROJECT
615 Second Ave., Suite 400
Seattle, WA 98104
Telephone: 206.957.8611

CERTIFICATE OF COMPLIANCE

I certify that pursuant Fed. R. App. P. 32(a)(5)(A), the attached brief is proportionately spaced, has a typeface of 14 points, and complies with the page limitations set forth in Ninth Circuit Rule 32-1 because it contains 6,999 words.

Dated: November 4, 2020

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

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 November 4, 2020.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 4, 2020

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.