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9 UNITED STATES DISTRICT COURT  
11 SOUTHERN DISTRICT OF CALIFORNIA  
12

13 ALBERTO LUCIANO ) Case No. 3:17-CV-01840-JM-(NLS)  
14 GONZALEZ TORRES, )  
15 )  
16 Plaintiff, ) **DEFENDANTS' OPPOSITION TO**  
17 v. ) **PLAINTIFF'S EX PARTE**  
18 U.S. DEPARTMENT OF ) **APPLICATION [DKT. NO. 22]**  
19 HOMELAND SECURITY, *et al.*, ) **Courtroom: 5D**  
20 ) **Judge: Jeffrey T. Miller**  
21 Defendants. )  
22 )  
23 )  
24 )  
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28 )

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1 The Court should deny Plaintiff's "Ex Parte Application for Leave to File Letter  
2 Alerting the Court of News that is Pertinent to Concerns Expressed by the Court at the  
3 Hearing on Plaintiff's Motion to Modify Preliminary Injunction." Dkt. No. 26. This is the  
4 second time Plaintiff has attempted to present an argument to the Court in a matter that  
5 serves an improper purpose and by which Defendants would not have the opportunity to  
6 respond.<sup>1</sup>

7 Plaintiff's *ex parte* application improperly seeks to present the Court with one  
8 newly published news article, a second older article that Plaintiff has not previously cited,  
9 as well as letter briefing that contains arguments far in excess of the new article on which  
10 Plaintiff bases his *ex parte* application.

11 In the analogous context of Rule 28(j) letters submitted pursuant to the Fed. R.  
12 App. P., arguments raised for the first time in such supplemental authority are deemed  
13 waived. *Pawlyk v. Wood*, 248 F.3d 815, 822 n.5 (9th Cir. 2001) (citations omitted). Here,  
14 Plaintiff seeks to respond directly to concerns raised by the Court during the December  
15 12, 2017, hearing on Plaintiff's motion to modify this Court's September 29, 2017,  
16 Order. *See* Dkt. No. 26-2 at 2 ("we write briefly to address a few of the concerns that  
17 Your Honor raised at Tuesday's hearing"); ("this Court is right to be concerned about the  
18 potential for grievous adverse consequences for Mr. Gonzalez once his DACA status is  
19 terminated or expires . . ."); *id.* at 3 (responding to the Court's suggestion at hearing "that  
20 such further order might be a 'ministerial act,' by arguing "that it would be anything but  
21 ministerial."); ("the risk of non-compliance is increased by the unusual pace at which  
22 Defendants seek to adjudicate his NOIT and renewal application."). These issues were  
23 raised by the Court during the course of a ninety minute hearing on Plaintiff's motion  
24 where the Court acknowledged that it was inquiring and informing itself about issues that  
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26 <sup>1</sup> Plaintiff's *ex parte* application also violates Local Rule 83.3(g), in that Plaintiff allowed  
27 only thirteen minutes to elapse between his counsel's message regarding the intended *ex*  
28 *parte* application and filing with this Court.

1 were not squarely before the Court in Plaintiff's motion. These issues appear to have  
2 been raised by the Court *sua sponte*, and Plaintiff does not and cannot point to prior  
3 briefing on these issues.<sup>2</sup> For this reason alone, the Court should deny Plaintiff's *ex parte*  
4 application. The Court should also deny Plaintiff's *ex parte* application to the extent it  
5 submits, discusses, and argues an eight month old article from April 17, 2017, that  
6 Plaintiff appears to have never cited in this matter. *See* Dkt. No. 26-4.

7 The Court should deny Plaintiff's *ex parte* application not only because Plaintiff's  
8 argument regarding the newly cited article exceeds the scope of Plaintiff's prior  
9 arguments, and the newly alleged harms are not related to the issues before the Court in  
10 Plaintiff's complaint and the Court's September 29, 2017, Order, but also because the  
11 new article fails to meet the legal standard for judicial notice. Taking judicial notice of  
12 publications is not appropriate with respect to "whether the contents of those articles  
13 were in fact true." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954,  
14 960 (9th Cir. 2010). "This is because often, the accuracy of information in newspaper  
15 articles and press releases cannot be readily determined and/or can be reasonably  
16 questioned." *Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1028 (C.D.  
17 Cal. 2015), citing Fed. R. Evid. 201.

18  
19 Were the Court to consider the newly cited article for its truth, the Court should  
20 also consider the further development in Mr. Enriquez's case that ICE has moved to

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21  
22 <sup>2</sup> With regard to the merits of Plaintiff's new arguments, these arguments are based on  
23 Plaintiff's same misconceptions regarding the claims in his complaint and this Court's  
24 September 29, 2017 Order, and Defendants' response from prior briefing is unchanged.  
25 *See* Dkt. No. 23-2 at 8 ("Not only are these challenges premature, they are also distinct  
26 from the challenge raised in Plaintiff's complaint to the automatic termination of his DACA  
27 based on U.S. Customs and Border Protection's NTA."); Dkt. No. 18 at 1 ("Plaintiff has  
28 never stated a claim regarding his now pending DACA renewal request or the procedures  
regarding the adjudication of that request."); *id.* at 3 ("Plaintiff necessarily did not  
challenge a then nonexistent administrative action in his complaint, nor does Plaintiff  
challenge Defendants' procedures regarding DACA renewal requests.").

1 dismiss the Notice to Appear as improvidently issued. *See* Exhibit 1. Moreover, the  
2 harms Plaintiff asserts regarding Mr. Enriquez at the time of his arrest are different from  
3 any harm Plaintiff could assert because Plaintiff is already subject to removal  
4 proceedings.<sup>3</sup> Accordingly, even if the Court considers the article regarding Mr.  
5 Enriquez's case, it fails to supports Plaintiff's new arguments regarding hypothetical  
6 injuries.

7 For the above stated reasons, the Court should deny Plaintiff's *ex parte* application.

8 Dated: December 15, 2017

Respectfully submitted,

9  
10 CHAD A. READLER  
Acting Assistant Attorney General

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

15  
16 /s/ Jeffrey S. Robins  
JEFFREY S. ROBINS  
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23

24  
25 <sup>3</sup> Plaintiff was the subject of removal proceedings during most of his litigation before this  
26 Court – from the original NTA issuance by CBP in August 2017 until the Immigration  
27 Court's November 17, 2017, termination of proceedings without prejudice on the basis of  
28 this Court's Order reinstating his DACA, and again beginning on December 12, 2017, with  
the issuance of a new NTA by ICE. A December 15, 2017, call by undersigned counsel to  
the Executive Office for Immigration Review's Case Status Number at 1-800-898-7180,  
states that Plaintiff's next hearing date in immigration court is March 20, 2018 at 1 p.m.

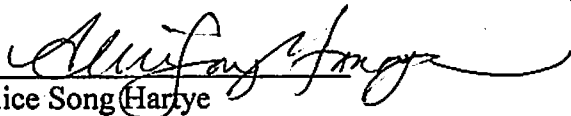
# **EXHIBIT 1**





**CERTIFICATE OF SERVICE**

I hereby certify that one (1) copy of DHS's MOTION TO DISMISS the Notice to Appear was served upon Respondent or Respondent's counsel by placing it in a sealed envelope with postage fully pre-paid, in either the United States mail or inter-office mail at 3400 Concord Rd, York, PA 17402

  
Alice Song Hartye  
Assistant Chief Counsel  
York, PA

December 15, 2017



**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
OFFICE OF THE IMMIGRATION JUDGE  
YORK, PA**

**In the Matter of**

**██████████ ENRIQUEZ  
Respondent**

**File No. ██████████  
In Removal Proceedings**

**ON BEHALF OF THE DEPARTMENT  
Alice Song Hartye, Esq.  
Assistant Chief Counsel  
DHS, ICE, York**

**ON BEHALF OF RESPONDENT  
██████████**

**ORDER**

And Now, this \_\_\_\_\_ day of \_\_\_\_\_, 2017, it is hereby

**ORDERED** that the Department's Motion to Dismiss NTA is hereby

\_\_\_\_\_ **GRANTED.**

\_\_\_\_\_ **DENIED.**

\_\_\_\_\_  
**U.S. Immigration Judge  
York, Pennsylvania**