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**Pro Hac Vice* motion forthcoming

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

S.A.; *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; *et al.*,

Defendants.

Case No. 3:18-cv-03539-LB

SUPPLEMENTAL BRIEF PURSUANT TO ORDER DATED DECEMBER 18, 2018

ORAL ARGUMENT REQUESTED

Date: February 7, 2019
Time: 9:30 a.m.
Place: Courtroom C (15th Floor)
Judge: Hon. Laurel Beeler

INTRODUCTION

Preliminary injunctive relief in this case is necessary and appropriate. In ruling that Defendants' mass rescission of conditional parole was arbitrary and capricious, ECF No. 51 at 55 (MTD Order), the Court found that Plaintiffs satisfy "the most important" preliminary injunction factor—likelihood of success on the merits. *See Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017). The remaining preliminary injunction factors are also satisfied. Conditionally approved Plaintiffs amply demonstrated that they and others like them are suffering irreparable harm as a result of the mass rescission of conditional parole[1]; indeed, Defendants did not even contest this showing. *See* PI Mot. at 22–23; Reply ISO PI at 1, 4, 15, & n.1. This harm takes the form of prolonged separation from family members and exposure of minors to grave risk of physical danger. *See Leiva-Perez v. Holder*, 640 F.3d 962, 969–70 (9th Cir. 2011) (recognizing that "important irreparable harm factors include separation from family members" and likely physical danger) (alterations and internal quotation marks omitted). The fact that the U.S. government granted this group of people conditional parole—after determining that they have close family in the United States and they are at risk of harm in their own countries—in itself demonstrates that all those who were conditionally approved suffer the same irreparable harms.

Likewise, the record shows that the balance of equities favors granting relief to conditionally paroled Plaintiffs and others like them. Defendants put forth no evidence of any burden they would

[1] Plaintiffs submitted nine declarations of individual Plaintiffs who were conditionally approved or whose children were conditionally approved, one declaration of a conditionally approved child of a Plaintiff, a declaration from organizational Plaintiff CASA, a declaration from former U.S. Ambassador Feeley, a declaration from former UNHCR Officer Yungk, and a substantial record of articles and reports demonstrating that Defendants' unlawful mass rescission has and continues to irreparably harm Plaintiffs and others like them. *See* Declaration of J.C. ¶¶ 7–9 (ECF No. 6-17) (after mass rescission, teenage boy beaten until unconscious by MS-13 members and required emergency surgery); Declaration of M.C. ¶¶ 22–28 (ECF No. 6-15) (before and after mass rescission, teenage girl had to go "into hiding" to avoid rape by MS-13 member); Declaration of J.A. ¶¶ 22–24 (ECF No. 6-13) (adult daughter and her baby son fled to San Salvador close in time to mass rescission to escape constant threats of gang member); *see also* Declaration of S.A. (ECF No. 6-12); Declaration of R.C. (ECF No. 6-11); Supplemental Declaration of M.C. (ECF No. 24-5); Declaration of D.D. (ECF No. 6-10); Declaration of G.E. (ECF No. 6-18); Declaration of B.E. (ECF No. 6-16); Declaration of A.D. (ECF No. 24-7); Declaration of George Escobar, Chief of Programs for CASA (ECF No. 24-2); Declaration of John Feeley (Feeley Decl.) (ECF No. 24-3); Declaration of Lawrence Yungk (Yungk Decl.) (ECF No. 24-4); Declaration of Daniel B. Asimow ISO Motion (ECF No. 25); Declaration of Daniel B. Asimow ISO Reply (ECF No. 35-1).

suffer if they were enjoined from enforcing the mass rescission, despite having ample opportunity to do so. Indeed, had Defendants raised arguments regarding burden, such arguments would have conflicted with their representation that they were prepared to adjudicate newly-filed I-131 applications for all conditionally approved CAM applicants (*see* Opp. at 16)—representations that the Court relied on to dismiss certain of Plaintiffs' claims. *See* MTD Order at 47. Defendants therefore relied solely on the legal argument that an injunction would "interfere with the executive branch's ability to enforce the U.S. immigration laws" (Opp. at 9, 20–21)—an argument that holds no water in light of the Court's ruling. Defendants have no legitimate interest in violating federal law, (*see* Reply at 14), and "[t]he public interest is served by compliance with the APA." *California v. Azar*, — F.3d —, No. 18-15144, 2018 WL 6566752, at *14 (9th Cir. Dec. 13, 2018); *see also Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D.D.C. 2018) (same). Preliminary relief exists as a procedural device precisely for this type of situation.

I. DEFENDANTS' UNLAWFUL MASS RESCISSION OF PAROLE SHOULD BE STAYED

The necessary and appropriate preliminary relief in this case is staying the unlawful mass rescission in its entirety while Plaintiffs efficiently move the case forward toward final judgment. This is the default remedy under the APA, it is necessary to provide complete preliminary relief to Plaintiffs, and it is appropriate to avoid patchwork enforcement of immigration policy.

As this Court has recognized, under Ninth Circuit precedent, the "ordinary result" when a court sustains an arbitrary and capricious challenge to agency action under the APA "is that the rules are vacated—*not* that their application to the individual petitioners is proscribed." ECF No. 52 at 2 (quoting *Regents of the Univ. of Cal. v. DHS*, 908 F.3d 476, 511 (9th Cir. 2018)) (emphasis added; internal quotation marks omitted); *see Regents*, 908 F.3d at 512 (noting that the government had failed to "provide compelling reasons to deviate from the normal rule in APA cases"). Indeed, this result is required by the plain text of the APA. 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary [and] capricious[.]"); *see also Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) (such remedy was "compelled by the text of the Administrative Procedure Act"), *rev'd in*

part on other grounds, 555 U.S. 488 (2009).

While setting aside an unlawful agency rule is the ordinary remedy *at final judgment*, at the preliminary injunction stage, the ordinary remedy is enjoining the agency from enforcing the unlawful policy and restoring the status quo ante litem. *See* 5 U.S.C. § 705 ("On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."). Such preliminary relief is routine. *See, e.g.*, *Regents*, 908 F.3d at 510 (affirming preliminary injunction of agency policy based on likelihood of success of arbitrary and capricious claim); *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1076 (N.D. Cal. 2018) (granting preliminary injunction of rule, already in effect, based on likelihood of success of arbitrary and capricious claims); *Kuang v. U.S. Dep't of Defense*, — F. Supp. 3d —, No. 18-cv-03698-JST, 2018 WL 6025611, at *34 (N.D. Cal. Nov. 16, 2018) (preliminarily enjoining agencies "from taking any action continuing to implement the October 13 Memo" and ordering "Defendants to return to the pre-October 13, 2017 practices"); *Calvillo Manriquez v. Devos*, — F. Supp. 3d — , No. 17-cv-07210-SK, 2018 WL 3399269, at *21 (N.D. Cal. May 25, 2018) (preliminarily enjoining new rule as violative of the APA); *see also E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255–56 (9th Cir. 2018) (denying emergency stay of temporary restraining order enjoining agency policy based on likelihood of success of APA claims and noting that such relief is "commonplace in APA cases"). This case is in just such a preliminary posture. After the Court rules on Plaintiffs' preliminary injunction motion, Plaintiffs anticipate expeditiously moving the case forward to final judgment, which will include moving for class certification and for a comprehensive administrative record,[2] and may include moving to

[2] After oral argument on the preliminary injunction motion, Plaintiffs' counsel received documents responsive to a FOIA request that suggest that Defendants have yet to produce the entire administrative record for this case. *See Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) ("The whole administrative record . . . is not necessarily those documents that the *agency* has compiled and submitted as the administrative record . . . [but rather] consists of all documents and materials directly or *indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position.") (citations and internal quotation marks omitted; emphasis in original).

amend the complaint in light of new facts.[3]

In its recent decision in *California v. Azar*, the Ninth Circuit explained that for a court to enjoin an unlawful policy across the board at the preliminary stage, such relief must be necessary to provide complete relief to plaintiffs or, at a minimum, plaintiffs must demonstrate that the harms they and non-plaintiffs suffer are sufficiently similar. 2018 WL 6566752, at *17. Here both conditions are met. First, the extensive and unrebutted record presented to the Court in this case demonstrates that the irreparable harm is systemic in nature and affects Plaintiffs and non-plaintiffs alike. *See* Mot. at 4–5; Feeley Decl. ¶¶ 13–56; Yungk Decl. ¶¶ 43–44, 47, 50–56.[4] Second, enjoining Defendants' unlawful mass rescission in its entirety is necessary to provide complete preliminary relief to parent Plaintiffs who are spread out across the country, *see* Reply ISO PI at 15, and to organizational Plaintiff CASA. CASA is the largest membership-based immigrant rights organization in the mid-Atlantic region with more than 90,000 members in Maryland, Virginia, Pennsylvania, and the Washington D.C. metropolitan area. Escobar Decl. ¶¶ 3–4 (ECF No. 24-2). Hundreds of CASA's members applied for the CAM program, and CASA members were directly harmed by Defendants' unlawful mass rescission. *Id.* ¶¶ 10, 17, 19–21; *see* Mot. at 23–24. Moreover, CASA itself suffered and suffers injuries that cannot be remedied without a nationwide injunction. The Government provided no funding to resettlement agencies for their CAM parole work, resulting in substantial delays in CAM application filing and monitoring[5]; CASA filled the void and ensured the CAM program's success in the mid-Atlantic region. *See* Mot. at 24 (citing Escobar Decl. ¶¶ 15–18); *see also* Escobar Decl. ¶¶ 8–15 (describing how CASA recruited a

[3] The recent (heavily redacted) FOIA disclosures also call into question Defendants' stated reason for terminating the CAM Parole program generally and mass rescinding conditional parole specifically. The complete administrative record may yield information related to Plaintiffs' other claims such that a motion to amend would be appropriate.

[4] *See also* Kevin Sieff, *When Death Awaits Deported Asylum Seekers*, WASH. POST, Dec. 26, 2018, https://wapo.st/2CO6nRC (describing concerns expressed by then-Secretary of State Tillerson and Central American government officials about the inability of local governments to protect their citizens from gangs).

[5] *See* Asimow Decl. ISO PI, Ex. 6 (ECF No. 25-7) (USCIS Ombudsman's Report on the CAM Program) at 6, 20, 25, 39, 42 (identifying "insufficient funding" for resettlement agencies as a "key issue of concern" and discussing its connection to lengthy processing times for application filing and uncertainty about program eligibility and case processing).

resettlement agency partner, raised funding for that partner, loaned its own staff members to the resettlement agency when the agency was overwhelmed with CAM work, and followed up with applicant families and the CAM program to ensure smooth processing). After CASA made such a significant and public investment in the CAM program, its reputation in the community—and corresponding ability to raise funds to maintain its operations—was damaged by the mass rescission, *and* its resources were wasted and had to be further diverted. *Id.* ¶¶ 8–18; *see also* Mot. at 24. The Ninth Circuit has recognized that the need to provide full relief to organizational plaintiffs like CASA may require setting aside unlawful rules in their entirety. *See e.g.*, *Regents*, 908 F.3d at 512 (citing *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (affirming preliminary injunction of most of the challenged policy where "the government fail[ed] to explain how the district court could have crafted a narrower injunction that would provide complete relief to the plaintiffs, including the entity plaintiffs."). Here, as in *Regents* and *Washington*, Defendants have never identified a workable, narrower alternative to enjoining enforcement of Defendants' unlawful action in its entirety that would give full preliminary relief to CASA.

Finally, that this case concerns an immigration policy supports Plaintiffs' request for enjoining Defendants' unlawful action in its entirety. The Supreme Court and the Ninth Circuit have repeatedly affirmed or declined to stay similar preliminary injunctions of unlawful immigration policies, reasoning in part that immigration policy should not be patchwork. *See, e.g.*, *Trump v. E. Bay Sanctuary Covenant*, — U.S. — , No. 18A615, 2018 WL 6713079, at *1 (Dec. 21, 2018) (mem.) (declining to stay nationwide preliminary injunction of policy prohibiting granting asylum to certain immigrants); *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d at 1255–56 (same); *Regents*, 908 F.3d at 510–11 (affirming preliminary injunction enjoining agency's rescission of DACA program, while acknowledging agency had the power to enact such policy so long as it did so lawfully).[6] Indeed, the Ninth Circuit declined to modify a preliminary injunction enjoining an

[6] *See, e.g.*, *Trump v. IRAP*, — U.S. — , 137 S. Ct. 2080, 2087–89 (2017) (declining to stay nationwide injunction of second travel ban except as to individuals who lacked a bona fide relationship to a person or entity in the United States); *Hawaii v. Trump*, 878 F.3d 662, 701 (9th Cir. 2017), *rev'd on other grounds*, — U.S. —, 138 S. Ct. 2392 (2018) (affirming in substantial part preliminary injunction enjoining third travel ban); *Washington v. Trump*, 847 F.3d 1151, 1166–67 (9th Cir. 2017) (declining to stay preliminary injunction enjoining first travel ban); *see also Texas v.*

unlawful policy partially suspending refugee processing even where that injunction resulted in refugees in final stages of processing being admitted to the United States. *See Doe v. Trump*, No. 18-35015, 2018 WL 1774089 (9th Cir. Mar. 29, 2018) (remanding cases to district court to address mootness and declining to vacate preliminary injunction).

II. REMAND TO THE AGENCY IS INAPPROPRIATE

Defendants have indicated that they will ask the Court to stay the action and remand to the agency to provide the agency the opportunity to reconsider its action. Remand would be inappropriate in this case for multiple reasons:

First, remand to the agency is appropriate, if at all, only at final judgment. *Compare* 5 U.S.C. § 705 (discussing court actions to prevent irreparable harm "pending conclusion of the review proceedings"), *with* 5 U.S.C. § 706(2) (discussing court action after final determination of APA claim). The possibility of remand does not figure into the preliminary injunction analysis, where the question is whether and how to preserve the status quo and avoid irreparable harm to plaintiffs while the case proceeds in the normal course. Indeed, in a host of APA cases in preliminary injunction posture, the Supreme Court and the Ninth Circuit have not once considered whether to substitute the preliminary relief granted to plaintiffs with remand to the agency. *See, e.g.*, *Trump v. E. Bay Sanctuary Covenant*, 2018 WL 6713079, at *1 (declining to stay nationwide preliminary injunction of policy prohibiting granting asylum to certain immigrants); *see also supra* at pp. 5–6 & note 6; *cf. NAACP v. Trump*, 298 F. Supp. 3d 209, 245, 249 (D.D.C. 2018) (on granting summary judgment to plaintiffs in APA case, staying order vacating agency action for 90 days to "afford DHS an opportunity to better explain its view that DACA is unlawful.").

Second, as explained above, even at final judgment vacatur is the default remedy. *See supra* at pp. 2–3, 6; *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121–22 (9th Cir. 2018) (considering on summary judgment whether "presumption of vacatur" applied and concluding vacatur was required). Remand without vacatur is reserved for "limited circumstances" and a court "only" leaves an invalid rule in place "when equity demands that [it] do so." *Pollinator*

United States, 809 F.3d 134, 187–88 (5th Cir. 2015) (affirming preliminary injunction enjoining DAPA program and DACA expansion); Reply at 15.

Stewardship Council v. EPA, 806 F.3d 520, 532 (9th Cir. 2015) (internal quotation marks omitted) (concluding vacatur of agency action was required). Defendants have made no showing of special circumstances justifying a departure from the ordinary rule.

Finally, remand, at any juncture, would be inappropriate in this case because the agency acted outside the scope of its Congressionally-delegated authority in *retroactively* mass revoking conditional grants of parole. No opportunity for reconsideration will cure this substantive defect. Defendants have never disputed that the Federal Register notice's mass rescission is retroactive on its face, nor could they. *See* Mot. at 13; *see e.g.*, *Landgraf*, 511 U.S. at 270–71 (citing the example of *Chew Heong v. United States*, 112 U.S. 536 (1884), holding that a statute excluding Chinese laborers from entering the U.S. could not be construed to retroactively bar a laborer who left the country before its enactment at a time when the laborer was allowed to re-enter). Agencies can *only* engage in retroactive rulemaking where Congress has conveyed that power in explicit, clear terms. Mot. at 12; *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208–09 (1988) (explaining that rulemaking authority "will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms"); *INS v. St. Cyr*, 533 U.S. 289, 316–17 (2001) (to express retroactive intent, Congress's statutory language must be "so clear that it could sustain only one interpretation"). Here, Congress did not explicitly and clearly delegate to the agencies authority to retroactively rescind conditional parole *en masse*, for at least two reasons. First, Congress gave the agency limited authority to retroactively rescind parole when a parolee is *already in the United States* and being returned to U.S. immigration custody,[7] but such power does not authorize the retroactive action Defendants took here. Second, even if Congress implicitly authorized the agency to rescind conditional parole abroad (contrary to the clear statement requirement), Congress gave the agency power to act *only* on a *case-by-case basis*. Thus, any *mass* rescission would be *ultra vires* and impermissibly retroactive for the same reason that the Supreme Court affirmed invalidation of the agency action in *Bowen*. 488 U.S. at

[7] 8 U.S.C. § 1182(d)(5)(A) (After an "alien" is granted parole "on a case-by-case basis," "when the purposes of such parole shall, in the opinion of the [DHS Secretary], have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant . . . .").

208–09 (agency rule was impermissibly retroactive where the statute "on its face permit[ted] some form of retroactive action" but "applie[d] only to case-by-case adjudication, not to rulemaking").

* * *

In sum, Plaintiffs seek a narrow remedy at this stage—preliminarily enjoining Defendants' unlawful mass rescission in its entirety for the duration of the case so as to prevent the irreparable harm to the narrow slice of individuals in the CAM Parole program who were already conditionally approved for parole. The temporary relief Plaintiffs originally sought when they filed their preliminary injunction motion back in June 2018—enjoining the Federal Register notice terminating the Central American Minors Parole program and mass rescinding conditional parole, *see* ECF No. 24-8 (Plaintiffs' Proposed Order)—would have benefitted many thousands of people. This Court has significantly narrowed Plaintiffs' claims, in part based on its analysis about how frequently parole was granted under the program.[8] As a result, the number of individuals who stand to benefit from the ordinary, and necessary, preliminary relief from Defendants' unlawful action is limited. *See* Exhibit A (Supplemental Proposed Order). Plaintiffs respectfully request that the Court now grant their preliminary injunction motion and enjoin Defendants from enforcing the mass rescission of those conditionally approved for parole, and then to permit the case to proceed in the ordinary course.

[8] Plaintiffs note that contrary to the Court's finding that "the Program approved approximately 99% of beneficiaries who were interviewed and considered for parole" (*see* MTD Order at 37 & n. 97), the Administrative Record shows that less than 75% of such individuals were conditionally paroled. Specifically, the Administrative Record ("AR") shows that nearly all of the post-interview CAM applicants who "*have been issued decisions*" were approved for refugee resettlement or parole (AR, Ex. 9 (ECF No. 33-9) at AR000048 (A11) (emphasis added)), but USCIS exercised discretion by declining to issue decisions to an estimated 1,000 post-interview CAM applicants, apparently indefinitely. Asimow Decl. ISO PI, Ex. 11 (ECF No. 25-12) at 68 (between December 2014 and March 2017, 14 percent of post-interview applications placed on hold); *see id.* at 70 (estimating that by March 2017, USCIS made "final decisions" on only 6,300 applicants' cases). Thus, the number of CAM applicants who were granted parole or conditionally paroled—4,179 as of July 2017 (*see* AR, Ex. 9 at AR000047, AR000048 (A8 & A9))—constituted only 57% of those interviewed by USCIS (4,179 / 7,306) and 74% of those interviewed by USCIS and not approved for refugee resettlement (4,179 / 5,679). *See id*. (A8, A9, A10). USCIS rejected or disqualified another 600 CAM applications (5% of the total received) prior to USCIS interview. *Id.* at 67.

DATED: January 8, 2019.

Respectfully submitted,

/s/ *Daniel B. Asimow*

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ATTESTATION OF CONCURRENCE IN THE FILING

Pursuant to Civil Local Rule 5-1(i)(3), I declare that concurrence has been obtained from all signatories to file this document with the Court.

/s/ *Daniel B. Asimow*
DANIEL B. ASIMOW