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9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION
12

13 S.A.; J.A.; A.B.; R.C., on behalf of himself and
as Guardian Ad Litem for J.C., a minor child;
14 M.C.; D.D.; G.E., on behalf of himself and as
Guardian Ad Litem for B.E., a minor child; J.F.
15 on behalf of himself and as Guardian Ad Litem
for H.F. and A.F., minor children, on behalf of
16 themselves and on behalf of a class of all
similarly situated individuals, and CASA,

17 Plaintiffs,

18 v.

19 DONALD J. TRUMP, in his official capacity as
20 President of the United States; U.S.
DEPARTMENT OF HOMELAND
21 SECURITY; U.S. CITIZENSHIP AND
IMMIGRATION SERVICES; U.S.
22 DEPARTMENT OF STATE; KIRSTJEN
NIELSEN, in her official capacity as Secretary
23 of Homeland Security; MICHAEL R.
POMPEO, in his official capacity as Secretary
24 of State; L. FRANCIS CISSNA, in his official
capacity as Director of U.S. Citizenship and
25 Immigration Services; UNITED STATES OF
AMERICA,

26 Defendants.
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Case No. 18-CV-03539 LB

**DEFENDANTS' RESPONSIVE
SUPPLEMENTAL BRIEF**

The Honorable Laurel Beeler

1 **I. THIS CASE REMAINS INAPPROPRIATE FOR PRELIMINARY INJUNCTIVE**
2 **RELIEF.**

3 As set forth in defendants' opposition to plaintiffs' motion for a preliminary injunction (ECF 32),
4 the "extraordinary remedy" of preliminary injunctive relief remains inappropriate. Defendants will not
5 repeat those arguments here (*id.* at 15-16), but to summarize:

- 6 • The CAM Parole Program was terminated by agency decision of August 16, 2017, almost a
7 year before plaintiffs filed their motion for extraordinary relief. (ECF 33-1.)
- 8 • Plaintiffs do not seek to preserve the status quo pending litigation, but seek, instead, to require
9 that the agency re-open a program that closed over 17 months ago.

10 The proper function of a preliminary injunction is to preserve the status quo pending litigation.
11 "The hearing is not to be transformed into a trial of the merits of the action upon affidavits, and it is not
12 usually proper to grant the moving party the full relief to which he might be entitled if successful at the
13 conclusion of a trial." *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808-09 (9th Cir. 1963). It
14 would be an improper use of an "extraordinary remedy" for the Court to order the agency to reinstate a
15 program that was disbanded almost a year before plaintiffs sought injunctive relief.

16 As the Court noted, the CAM Parole Program was placed in a holding pattern of sorts following
17 the change of administrations in January 2017 and the February 17, 2017 memorandum issued by then-
18 Homeland Security Secretary Kelly. (ECF 51 at 15-18.) No new medical appointments were scheduled
19 or travel plans made during that time. If the Court were to stay the August 2017 agency decision
20 terminating that CAM Parole Program, as Plaintiffs request, the natural result would be for the program
21 to return to the holding pattern it was in prior to that decision, not to active processing.

22 If, instead, Plaintiffs are requesting that the Court require United States Citizenship &
23 Immigration Services ("USCIS") to finish the processing of the applicants who have received
24 conditional approval and permit them to travel to the United States, such an injunction would go well
25 beyond maintaining the status quo that existed at the time of the agency's final decision. Moreover, the
26 ultimate parole decision is made at the port of entry when the applicant presents himself or herself for
27 entry into the United States. By statute, parole decisions are left to the discretion of the Secretary of
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1 Homeland Security. 8 U.S.C. § 1182(d)(5). The Court cannot enjoin the favorable exercise of
2 discretion. See *United States v. Leal-Del Carmen*, 697 F.3d 964, 975 (9th Cir. 2012); *Hassan v. Chertoff*,
3 593 F.3d 785, 789-90 (9th Cir. 2010); *Garcia-Jimenez v. ICE Field Office Director*, 2015 WL 5693716
4 at * 2 (W.D. Wash. 2015) (“[T]he Court does not have jurisdiction to grant petitioner the parole he
5 seeks.”).

6 Plaintiffs argue that an injunction staying the agency’s decision in its entirety is necessary. (ECF
7 58 at 4-5.) At the core of this argument is a claim that the organizational plaintiff, CASA, suffered harm
8 that will be remediated only through nationwide relief as to the entirety of the agency’s decision.
9 Plaintiffs are overstepping here. The purpose of preliminary injunctive relief is to prevent irreparable
10 harm from occurring during the pendency of an action. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008);
11 *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1037 (N.D. Cal. 2018)
12 (*Regents I*), *aff’d*, 908 F.3d 476 (9th Cir. 2018) (*Regents III*). Plaintiffs fail to explain why it is necessary
13 to stay the entirety of the agency’s decision during the remainder of this action in order to prevent
14 irreparable harm from occurring to CASA. The harm claimed at pages 4-5 has already occurred, is
15 unlikely to recur, and is unlikely to be remedied by a temporary stay.

16 Moreover, plaintiffs’ request for broad injunctive relief is significantly weakened following the
17 Court’s December 10, 2018 order dismissing all of plaintiffs’ claims with respect to the termination of
18 the CAM Parole Program, except the Administrative Procedure Act (“APA”) claim as to rescission of
19 conditional approvals. In light of the Court’s December 10, 2018 order, there should be no preliminary
20 injunctive relief that would provide greater relief to plaintiffs than they could achieve upon final
21 judgment, such as would occur should the Court require the agency to resume processing parole
22 applications for individuals who had not yet received conditional approval.

23 In *California v. Azar*, 911 F.3d 558, 582-4 (9th Cir. 2018), the Ninth Circuit reversed the district
24 court’s entry of nationwide injunctive relief, finding that it was broader than necessary to address the
25 needs of the specific state plaintiffs and holding that, where there is no class certification, relief should
26 be only as broad as is necessary to afford relief to the parties before the court. The Court should deny
27 any request for injunctive relief that seeks to stay the entirety of the agency’s decision to terminate the
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1 CAM Parole Program, as such an injunction would be unnecessarily broad in scope.

2 **II. TO THE EXTENT ANY RELIEF IS APPROPRIATE AT THIS JUNCTURE IT IS**
3 **REMAND TO THE AGENCY FOR CONSIDERATION OF THE RELIANCE**
4 **INTERESTS OF THOSE WHO RECEIVED CONDITIONAL APPROVAL PRIOR TO**
5 **AUGUST 2017**

6 In ruling on defendants' motion to dismiss, the Court held that "when DHS mass-rescinded the
7 conditional parole approvals of CAM Parole Program participants, it did not adequately take into
8 account and address the participants' serious reliance interests." (ECF 51 at 55.) The Court went on to
9 recognize that the "'serious reliance interests' requirement does not mean that DHS lacks the authority
10 to rescind conditional approvals of parole for CAM Parole Program participants, notwithstanding the
11 participants' reliance on their approvals. DHS has that authority." (*Id.*) Prior to exercising that
12 authority, however, "DHS must recognize and acknowledge that Program participants who were
13 approved for parole had serious reliance interests in that parole, take those reliance interests into
14 account, and explain why it felt it appropriate to nonetheless mass-rescind their parole in the faces of
15 that reliance. This ensures transparency and accountability. If DHS thinks that Program participants'
16 reliance on their parole is less important than its new policies in mass-rescinding that parole, it can make
17 that choice, so long as it explains its reasons so that it can be held accountable." (*Id.*)

18 Plaintiffs argue in their supplemental brief that the APA violation here is irreparable. (ECF 58 at
19 7.) However, the Court has held otherwise. In its December 10, 2018 order, the Court expressly
20 recognizes that the agency has the authority to rescind the conditional approvals, provided that it
21 undertakes the necessary evaluation and fully considers the serious reliance interests of those individuals
22 who received conditional approval. Given that the APA violation identified by the Court is potentially
23 curable, the Court should afford the agency an opportunity to fully consider the serious reliance interests
24 identified by the Court in its December 10, 2018 order, and, after undertaking that examination,
25 determine the best course of action for those individuals who received conditional approval prior to
26 August 2017. The Court should give the agency this opportunity prior to considering any injunctive
27 relief that would require the agency to re-start a program that has been closed for 17 months.

28 Remand is especially appropriate here, in light of the fact that the law entrusts the Secretary of

1 Homeland Security with full discretion concerning parole, 8 U.S.C. § 1182(d)(5), and the Court does not
2 have jurisdiction to enjoin the defendants to parole into the United States the individuals who were
3 granted conditional approval. *See United States v. Leal-Del Carmen*, 697 F.3d at 975. Even if the Court
4 required a resumption in processing, the Secretary could exercise her discretionary authority to deny
5 final parole approval to any applicant. In light of the termination of the CAM Parole Program, it would
6 be irresponsible for the Secretary to exercise her discretion in favor of granting parole to individuals
7 who are unable to satisfy the requirements for parole under the standard parole process, because she
8 would be doing so knowing that they would have no lawful means to remain here past the expiration of
9 the initial parole period. Finally, as the Supreme Court noted in *Fiallo v. Bell*, 430 U.S. 787, 792
10 (1977), it has “long recognized the power to expel or exclude aliens as a fundamental sovereign attribute
11 exercised by the Government’s political departments largely immune from judicial control.”

12 Plaintiffs argue that remand is inappropriate at this stage of the proceedings. (ECF 58 at pp. 6-
13 7.) Defendants disagree, particularly given the scope of the Court’s December 10, 2018 order. *See*
14 *Trump v. Int’l Refugee Assistance Project*, ___ U.S. ___, 137 S. Ct. 2080, 2087 (2017) (“Crafting a
15 preliminary injunction is an exercise of discretion and judgment, often dependent as much on the
16 equities of a given case as the substance of the legal issues it presents.”); *California v. Azar*, 911 F.3d at
17 582. The stay sought by plaintiffs is the functional equivalent of vacatur of the August 2017 final
18 agency decision to terminate the CAM Parole Program. While the injunctive remedies of vacatur and
19 remand more commonly occur following judgment, injunctive relief is a creature of equity and the
20 courts are afforded broad latitude in crafting equitable relief. *High Sierra Hikers Ass’n v. Blackwell*,
21 390 F.3d 630, 641 (9th Cir. 2004). “The essence of equity jurisdiction is the power of the court to
22 fashion a remedy depending upon the necessities of the particular case.” *United States v. Odessa Union*
23 *Warehouse Co-op*, 833 F.2d 172, 175 (9th Cir. 1987); *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d
24 at 809 (“The infinite variety of situations in which a court of equity may be called upon for interlocutory
25 injunctive relief requires that the court have considerable discretion in fashioning such relief.”). Here
26 the Court may, and should, afford the agency an opportunity to undertake the analysis required by the
27 Court’s December 10, 2018 order in conjunction with, or prior to, taking action to stay or vacate the
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1 agency's August 2017 decision. If the Court is inclined to enter any injunctive relief at this stage of the
2 proceedings, defendants request that the Court consider whether remand, vacatur, or a combination of
3 both best serves the interests of this case.

4 “Whether agency action should be vacated depends on how serious the agency’s errors are and
5 the disruptive consequences of an interim change that may itself be changed.” *California Communities*
6 *Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012) (remanding without vacatur, as the
7 “trouble vacatur would cause [is] severe”) (internal quotation marks omitted); *Allied-Signal, Inc. v. U.S.*
8 *Nuclear Reg. Comm’n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (“The decision whether to vacate depends
9 on the seriousness of the order’s deficiencies . . . and the disruptive consequences of an interim change
10 that may itself be changed.”) (internal quotation marks omitted.) “We have commonly remanded
11 without vacating an agency's rule or order where the failure lay in lack of reasoned decisionmaking, but
12 also where the order was otherwise arbitrary and capricious. *Int'l Union, United Mine Workers of Am. v.*
13 *Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 966–67 (D.C. Cir. 1990) (internal citations omitted).

14 The facts here strongly favor remand over vacatur. First, there is a significant likelihood that the
15 agency can cure the APA violation found by the Court in its December 10, 2018 order. *See NAACP v.*
16 *Trump*, 298 F. Supp. 3d 209, 244 (D.D.C. 2018) (a non-trivial likelihood that an APA defect can be
17 cured favors remand over vacatur). Second, it would be disruptive to require the agency to revive part
18 of a program that has been closed for 17 months, particularly in light of the program’s termination,
19 which has been confirmed as lawful in all respects, save in regards to those who received conditional
20 approval prior to its termination.

21 Much of the processing done during the CAM Parole Program, including the coordination of
22 medical exams and travel, was done by the International Organization for Migration (“IOM”), an inter-
23 governmental organization, under contract with USCIS. (*See, e.g.*, ECF 33-25; Declaration of Ronald
24 M. Rosenberg (“Rosenberg Decl.”) at ¶ 6.) The documents in the administrative record regarding the
25 tasks that IOM performed for the CAM Parole Program demonstrate the detailed nature of those tasks
26 and establish that IOM had to undertake significant training with its employees in order for them to learn
27 to complete those tasks properly. (*See* ECF 33-35 - 33-40; Rosenberg Decl. at ¶¶ 6-8.) The contract
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1 terminated at the end of the 2017 fiscal year, September 30, 2017. (Rosenberg Decl. at ¶ 8.)

2 At a minimum, resurrecting this program as to those who previously received conditional
3 approval would require that USCIS enter into a new contract with IOM or another organization,
4 following which the contractor would have to obtain space for its work and hire and train personnel.
5 Work that had already been done on individual cases, such as medical reports and background checks,
6 may need to be redone due to the passage of time. In its “Parole Counseling Script,” which IOM used
7 with individuals who had received conditional approval, IOM advised that it could be a few months
8 before travel occurred and counseled that those with conditional approval should make no changes to
9 daily routines or sell their possessions until travel had been booked. (*See* ECF 33-25, AR000141.) It
10 would take more than a few months now, because the physical and human infrastructure that was in
11 place for the CAM Parole Program applicant processing, through the USCIS contract with IOM, is gone.
12 After a 17-month hiatus, requiring USCIS to resume processing for the CAM Parole applicants who
13 received conditional approval would be highly disruptive. Disruption favors remand over vacatur.
14 *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm’n*, 988 F.2d at 150-51.

15 **III. CONCLUSION**

16 Both of the factors that the Court must consider when deciding whether to vacate an agency
17 decision or remand to the agency for further action support the conclusion that remand, without vacatur,
18 is the preferred route here. Therefore, if the Court finds that injunctive relief is appropriate at this
19 juncture, it should remand the matter to the agency for further action in light of the December 10, 2018
20 order. Any concerns the Court or plaintiffs may have about unwarranted delay following remand could
21 be ameliorated through the setting of a reasonable deadline by the Court. *Cf. NAACP v. Trump*, 298 F.
22 Supp. 3d at 249 (vacating agency decision but staying the order of vacatur for 90 days “to afford DHS

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28 DEFENDANTS’ RESPONSIVE SUPPLEMENTAL BRIEF
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1 an opportunity to better explain its view that DACA is unlawful.”).

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3 DATED: January 22, 2019

Respectfully submitted,

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5 /s/ Alison E. Daw
6 ALISON E. DAW
Assistant United States Attorney
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