DANIEL B. ASIMOW (SBN 165661)
daniel.asimow@arnoldporter.com
MATTHEW H. FINE (SBN 300808)
matthew.fine@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, California 94111
Telephone: 415.471.3100
Facsimile: 415.471.3400

JOHN A. FREEDMAN (appearance *pro hac vice*)
john.freedman@arnoldporter.com
GAELA K. GEHRING FLORES*
gaela.gehringflores@arnoldporter.com
DAVID J. WEINER (CA SBN 219753)
david.weiner@arnoldporter.com
DANA O. CAMPOS*
dana.campos@arnoldporter.com
MATEO MORRIS*
mateo.morris@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743
Telephone: 202.942.5000
Facsimile: 202.942.5999

LINDA EVARTS (appearance *pro hac vice*)
levarts@refugeerights.org
KATHRYN C. MEYER (appearance *pro hac vice*)
kmeyer@refugeerights.org
MARIKO HIROSE (appearance *pro hac vice*)
mhirose@refugeerights.org
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
40 Rector Street, 9th Floor
New York, NY 10006
Telephone: 646.459.3057
Facsimile: 212.533.4598

Attorneys for Plaintiffs

**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

PLAINTIFFS' SUPPLEMENTAL REPLY BRIEF PURSUANT TO ORDER DATED DECEMBER 18, 2018

In opposing Plaintiffs' request for preliminary relief, Defendants misunderstand the nature of the relief sought: Plaintiffs do not seek admission to the United States, but a stay of Defendants' unlawful mass rescission—a stay that will result in the restoration of conditional parole status and the immediate resumption of processing of conditionally approved CAM applications using the procedures Defendants publicly represented that they adhered to prior to the Federal Register notice. P. Supp. Br. at 2 [ECF No. 58]; P. Supp. Proposed Order at 1 [ECF No. 58-1]. Plaintiffs have established their entitlement to this relief under the preliminary injunction factors, which Defendants do not contest. The sole evidence Defendants have introduced to oppose the relief—far too late in the case—is a carefully-worded declaration that says only that Defendants' CAM Parole contract with IOM has lapsed, *not*, as Defendants baldly claim in their brief, that IOM's "physical and human infrastructure . . . is gone," and *not* that IOM would "have to obtain space for its work and hire and train personnel" before it could process CAM Parole applications. *Compare* Rosenberg Decl. ¶¶ 6-8 [ECF No. 61-1], *with* D. Supp. Br. at 7 [ECF No. 61]. Indeed, Defendants' arguments against preliminary relief are limited to (1) objecting to the restoration of parole processing, (2) objecting to the scope of the injunction, and (3) urging remand at this preliminary stage. Each of these arguments fails.

I. PRELIMINARY INJUNCTIVE RELIEF THAT RESTORES PROCESSING FOR CONDITIONALLY PAROLED CAM APPLICANTS IS APPROPRIATE

Defendants incorrectly argue that the requested relief is inappropriate because of the passage of time since the parole rescission: in Defendants' unsupported view, this somehow means that the preliminary injunction could only preserve the suspension of CAM Parole rather than restoration of processing. *See* D. Supp. Br. at 2-3; *see also* D. Opp'n at 2, 7-9 [ECF No. 32]. But preliminary relief exists to preserve the status quo *ante litem*—which refers to "the last uncontested status which preceded the pending controversy"—and delay in challenging unlawful action does not change the meaning of status quo *ante litem*.[1] Reply ISO PI at 3-5 [ECF No. 35] (internal quotation marks

[1] Delay can be relevant to the preliminary injunction inquiry insofar as it relates to a showing of irreparable harm, but even in that context, Ninth Circuit precedent is clear: "courts are loath to withhold relief solely because of delay, which is not particularly probative in the context of ongoing worsening injuries." *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848, 866 (9th Cir. 2017) (internal quotation marks and citation omitted); *see* Reply ISO PI at 4. Here, Plaintiffs vigorously pursued relief, as they have explained. *See* Reply ISO PI at 4; Oral Argument Trans. at 44:5-45:5.

omitted); *see, e.g.*, *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (rejecting argument that infringing conduct before case filing was status quo *ante litem* because to do otherwise would lead to "absurd" results). In this case, the last uncontested status was when Defendants were processing applications in the CAM Parole program pursuant to their own rules and guidelines, and approximately 2,700 people had conditional parole status. *See* Reply ISO PI at 3. Plaintiffs have vigorously contested Defendants' January 2017 secret shutdown of the program, *see* MTD Order at 15-17, 52 [ECF No. 51], and the Court found that Plaintiffs' challenge to the secret shutdown is coterminous with their challenge to the official termination. *See id.* at 52-53.

Defendants also argue that restoring CAM processing is inappropriate because the Court "cannot enjoin the favorable exercise of discretion," D. Supp. Br. at 3, but this misses the mark; Plaintiffs do not ask the Court to mandate a particular outcome in any given CAM application, but simply to require Defendants (including Border Patrol) to follow their own procedures that were in place during the last uncontested status. This relief falls well within the Court's powers and is no different than the preliminary relief granted—and affirmed by the Ninth Circuit—in similar contexts involving a challenge to an immigration policy.[2] *See Regents of the Univ. of Cal. v. DHS*, 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018) (enjoining rescission of DACA), *aff'd*, 908 F.3d 476 (9th Cir. 2018); *E. Bay Sanctuary Covenant v. Trump*, 2018 WL 6053140, at *21 (N.D. Cal. Nov. 19, 2018) (enjoining policy limiting asylum eligibility); *Doe v. Trump*, 288 F. Supp. 3d 1045, 1085-86 (W.D. Wash. 2017) (enjoining policy suspending processing and admissions of certain refugees).

Defendants additionally argue against restoring parole processing on the basis that it would provide "greater relief . . . than [Plaintiffs] could achieve upon final judgment," D. Supp. Br. at 2, but this mischaracterizes Plaintiffs' request; at this preliminary stage, and in light of the Court's decision dismissing several of Plaintiffs' other claims without prejudice to re-pleading, Plaintiffs concede that relief should be limited to conditionally paroled applicants. After Defendants produce the full Administrative Record, Plaintiffs move for class certification, and Plaintiffs make any

[2] The cases Defendants cite do not support the proposition that courts can never mandate a favorable exercise of discretion; in fact, the Ninth Circuit has affirmed an injunction requiring the government to parole a class of foreign nationals into the country or to otherwise arrange for them to attend hearings. *See Walters v. Reno*, 145 F.3d 1032, 1050-51 (9th Cir. 1998). Regardless, the relief sought here is far more modest.

amendments to the complaint, broader relief may be warranted.[3] *See* P. Supp. Br. at 3-4.

II. PRELIMINARY INJUNCTIVE RELIEF THAT ENJOINS THE MASS RESCISSION IN ITS ENTIRETY IS APPROPRIATE

With respect to the scope of relief, as an initial matter Defendants do not dispute that Individual Plaintiffs and CASA—based on its members affected by the mass rescission—are entitled to relief under the governing legal standard. D. Supp. Br. at 3. Thus, at a minimum, Plaintiffs have demonstrated that Individual Plaintiffs and CASA members are entitled to preliminary injunctive relief. *See* P. Supp. Br. at 1-2, 4.

Moreover, Defendants are wrong on the law and the facts about the propriety of fully staying the mass rescission. Defendants assert that CASA's reputational injury has already occurred, but that harm continues and threatens CASA's sustainability, and it would be remedied if the rescission is stayed and processing of conditionally paroled CAM applications resumes. *See, e.g.*, *MySpace, Inc. v. Wallace*, 498 F. Supp. 2d 1293, 1305-06 (C.D. Cal. 2007) (holding that irreparable harm to reputation and goodwill established by past damage could be remedied by a preliminary injunction). Defendants fail to propose any narrower injunction that would provide complete relief to Plaintiffs and CASA members. Finally, Defendants cite but ignore the import of *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018), under which a showing of irreparable harm that is systemic in nature and affects non-plaintiffs and Plaintiffs alike is sufficient to support nationwide relief. *See* P. Supp. Br. at 4. Defendants do not dispute that Plaintiffs have made such a showing.

III. REMAND IS UNAVAILABLE AT THIS TIME AND IMPROPER

Defendants twist the concept of equitable relief beyond recognition when they request that this Court limit "any relief" to "remand to the agency." D. Supp. Br. at 4-7. Defendants fail to cite a case in which a court has granted remand on a plaintiff's preliminary injunction motion. Although Defendants stress that the Court has "'broad latitude in fashioning equitable relief,'" D. Supp. Br. at 5 (quoting *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004)), they omit the

[3] Defendants' curious claim in their supplemental brief that conditionally paroled CAM applicants "are unable to satisfy the requirements of parole under the standard parole process," D. Supp. Br. at 5, raises additional questions about the basis for Defendants' termination of the program, not to mention that it calls into question Defendants' claim that they would adjudicate (in good faith) newly-filed I-131 applications for all conditionally paroled applicants.

rest of the quote describing the context in which such court intervention is appropriate: "*when necessary to remedy an established wrong*." *High Sierra*, 390 F.3d at 641 (emphasis added). Here, the Court has held that Defendants' mass rescission was unlawful, *see* MTD Order at 55, and Plaintiffs have established that they have and continue to suffer irreparable harm every day that Defendants' unlawful policy remains in effect. If the Court sees fit to grant relief on Plaintiffs' motion, the purpose of such relief is to remedy the irreparable harm Defendants' unlawful actions have inflicted on Plaintiffs while the case is fully litigated—not to short-circuit the judicial process.

Indeed, Defendants do not need this Court's permission to reconsider their decision to end CAM Parole; nothing prevents them from engaging in new rulemaking. *See generally Regents,* 908 F.3d at 510 ("The government is, as always, free to reexamine its policy choices, so long as doing so does not violate an injunction or any freestanding statutory or constitutional protection."). Remand to the agency at this preliminary juncture would, however, prejudice Plaintiffs by preventing (perhaps indefinitely) the litigation from proceeding in the normal course, and thereby even further delaying an end to the irreparable harms Plaintiffs suffer. *See* P. Supp. Br. at 3-4. This is precisely why the procedural posture of the case matters, and why remand, if appropriate at all, cannot be ordered until final judgment. *See id*. at 6. Were it otherwise, Plaintiffs would effectively be made *worse off* by having successfully sought preliminary injunctive relief—a remand at this point would deprive Plaintiffs of their right to fully litigate this case.[4]

Even if this case were in final judgment posture, Defendants would not meet their burden to establish the "rare circumstances" requiring deviation from vacatur—the traditional APA remedy for unlawful agency action. *See Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010); P. Supp. Br. at 6-7. Defendants' attempt to rely on the Rosenberg Declaration fails for two reasons. First, given Defendants' representations during the motion to dismiss briefing that they are prepared to adjudicate newly-filed I-131 applications for everyone affected by the CAM Parole termination and mass rescission, D. Opp'n at 5, 16; Oral Argument Trans. at 25:4-5 [ECF No. 66]—representations on which the Court relied in dismissing some of Plaintiffs' claims, *see* MTD Order

[4] *Cf. NAACP v. Trump*, 298 F. Supp. 3d 209, 249 (D.D.C. 2018) (vacating DACA rescission at final judgment, and temporarily staying that judgment pending a limited remand).

at 47, 49—Defendants must be estopped from relying on a late-filed declaration to claim that they do not have the resources to finish processing only conditionally paroled CAM applications. *See Hamilton v. State Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) ("Judicial estoppel . . . precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position.").

Second, even if considered, the declaration establishes only that USCIS's CAM Parole contract with IOM has lapsed, Rosenberg Decl. ¶¶ 3, 8, but is silent as to whether IOM maintains the same offices and staffing in the CAM countries as it did before the mass rescission.[5] Indeed, the evidence in the record demonstrates that IOM has continued to do CAM Refugee processing work long after its CAM Parole contract lapsed. *See, e.g.*, M.C. Supp. Decl. ¶¶ 4-7 [ECF No. 24-5] (IOM worked on her request for review of the denial of her refugee claim in May and June 2018). Defendants' evidence does not begin to rise to the level of the irremediable disruption that the Ninth Circuit has held justifies a deviation from the vacatur default rule.[6] But again, that issue is not before the Court.

Finally, Defendants again made no attempt to rebut Plaintiffs' binding case law demonstrating that the retroactive mass rescission fell outside Defendants' Congressionally-delegated authority and cannot be cured on remand. *See* P. Supp. Br. at 7; Reply ISO PI at 9. Instead, Defendants mischaracterize this Court's ruling, claiming that the Court has already decided the retroactivity issue, *see* D. Supp. Br. at 4, even though the Court expressly declined to reach it when opining that DHS could belatedly consider Plaintiffs' serious reliance interests, MTD Order at 55 & n.130.

Only narrow questions remain on Plaintiffs' preliminary injunction motion. In light of the unrebutted record, Plaintiffs have demonstrated that preliminary relief is necessary and appropriate

[5] It is clear that USCIS maintains its offices involved in CAM Parole. Rosenberg Decl. ¶ 3.

[6] *Cf. Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405-06 (9th Cir. 1995) (remand without vacatur appropriate to prevent likely extinction of species); *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 994 (9th Cir. 2012) (same where vacatur would threaten power supply for the region and be "economically disastrous"); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980). As one district court succinctly put it: "[e]ven if, *arguendo*, the magnitude of the agency's error is slight, the scale still cannot swing away from vacatur if there will be no irremediable harm." *AquAlliance v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878, 882 (E.D. Cal. 2018) (emphasis omitted).

and respectfully ask that the Court enter Plaintiffs' supplemental Proposed Order.

DATED: January 29, 2019.

Respectfully submitted,

/s/ *Daniel B. Asimow*

DANIEL B. ASIMOW
MATTHEW H. FINE
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, California 94111

JOHN A. FREEDMAN (appearance *pro hac vice*)
DAVID J. WEINER
GAELA K. GEHRING FLORES*
DANA O. CAMPOS*
MATEO MORRIS*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001-3743

PHILLIP A. GERACI*
SUSAN S. HU*
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019-9710

**Pro Hac Vice* motion forthcoming

/s/ *Linda Evarts*

LINDA EVARTS (appearance *pro hac vice*)
KATHRYN C. MEYER (appearance *pro hac vice*)
MARIKO HIROSE (appearance *pro hac vice*)
INTERNATIONAL REFUGEE ASSISTANCE PROJECT
40 Rector Street, 9th Floor
New York, NY 10006

Attorneys for Plaintiffs

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