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15 **Pro Hac Vice* motion forthcoming

16
17 **UNITED STATES DISTRICT COURT**
18 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
19

20 S.A.; *et al.*,

21 Plaintiffs,

22 v.

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

25 Defendants.
26
27
28

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

**PLAINTIFFS' SUPPLEMENTAL BRIEF
PURSUANT TO ORDER DATED
FEBRUARY 6, 2019**

1 Plaintiffs have identified two irreparable harms¹—prolonged family separation and children
2 at imminent risk in Central America—that demonstrate that preliminary relief is warranted on their
3 pending motion. *See* P. Supp. Br. at 1, ECF No. 58. Defendants do not contest that these harms are
4 irreparable. *See id.* at 1, 4; P. Reply at 1, 4, ECF No. 35. As explained below in response to each of
5 the Court’s questions, the irreparable harms that Plaintiffs suffer also bear “sufficient causal
6 connection” to “the activity to be enjoined”—*i.e.*, the unlawful mass rescission of conditional grants
7 of parole. Causation Order at 1, ECF No. 69 (internal quotation marks omitted). Plaintiffs explain
8 how the causal connection is present by addressing the Court’s questions in turn:

9 1. In response to Court’s first question, the causal-connection requirement is satisfied in
10 this case regardless of the fact that Plaintiffs and family members were separated and Plaintiff
11 children were located in dangerous countries before Defendants’ unlawful action. While it is true
12 that Defendants did not affirmatively separate Plaintiffs or place them in dangerous countries,
13 Defendants’ mass rescission is prolonging their separation and preventing Plaintiff children from
14 escaping danger. This is sufficient to show irreparable harm and satisfy causation.

15 In the cases granting and affirming motions to preliminarily enjoin the Trump
16 Administration’s successive travel bans, the plaintiffs were separated from their family members
17 (who were abroad, often in dangerous circumstances) well before the defendants’ actions to be
18 enjoined: the executive orders banning the issuance of visas to nationals of particular countries and
19 suspending the U.S. Refugee Admissions Program (USRAP). In those cases, just as is true here, the
20 irreparable harm caused by the defendants was the *prolongation* of family separation—not
21 affirmative separation at the outset. Further, and as is discussed more below, enjoining the
22 executive orders in no way guaranteed that the individual foreign nationals would receive visas or
23 be resettled through USRAP—in other words, the injunctions would not necessarily stop the
24 irreparable harm—because visa issuance and refugee resettlement (just like humanitarian parole)
25 are discretionary decisions with some aspects immune from judicial review. Notwithstanding these
26 realities, courts had no trouble concluding that, by taking away the possibility that foreign nationals

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28 ¹ In this context, “irreparable” means that the harm is not compensable with money damages or
some other legal (as opposed to equitable) remedy. *See Ariz. Dream Act Coal. v. Brewer*, 757 F.3d
1053, 1068 (9th Cir. 2014).

1 could escape their dangerous living conditions and be reunited with their families in the United
2 States, the executive orders caused irreparable harm that would be remedied by a preliminary
3 injunction. *See, e.g., Trump v. Int’l Refugee Assistance Project (IRAP)*, 582 U.S. —, 137 S. Ct.
4 2080, 2087 (2017) (recognizing “delay[ed] entry of [plaintiff]’s family members to the United
5 States” as irreparable harm sufficient to support preliminary injunction of travel ban with respect to
6 plaintiffs and those “similarly situated to them,” and declining to stay injunction to that extent).²

7 One of the cases the Court cited in its Order similarly concerned irreparable harm that arose
8 because of the effect of the defendants’ action on a pre-existing problem. Causation Order at 1
9 (citing *M.R. v. Dreyfus*, 697 F.3d 706 (9th Cir. 2012)). In *M.R.*, the risk that the severely disabled
10 plaintiffs would be institutionalized existed long before the defendants’ action to be enjoined: a
11 state regulation limiting certain in-home care services. The Ninth Circuit held that the irreparable
12 harm caused by the defendants was the exacerbation of that risk. *M.R.*, 697 F.3d at 728-33.

13 Here, just as in the context of the travel bans, Defendants did not cause Plaintiffs to be
14 separated or place Plaintiff children in danger at the outset, but their unlawful mass rescission has
15 prolonged Plaintiffs’ family separation and the daily danger to children’s lives.

16 2. In response to the Court’s second question, the causal-connection requirement allows
17 Plaintiffs to obtain a preliminary injunction even where the injunction will only help alleviate the
18 irreparable harm, instead of certainly alleviate it. This is evident from the travel ban cases and other
19 immigration cases in which plaintiffs have obtained preliminary injunctions even though they did
20 not ask for an order requiring a positive exercise of discretion (i.e., issuance of the ultimate benefit
21 sought). *See, e.g., Hawaii*, 878 F.3d at 702 (affirming preliminary injunction of travel ban in
22 substantial part); *Hawaii*, 859 F.3d at 789 (same); *Doe v. Trump*, 288 F. Supp. 3d at 1086

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24 ² *See also Hawaii v. Trump*, 878 F.3d 662, 698-99 (9th Cir. 2017) (recognizing plaintiffs’
25 “prolonged separation from family members” abroad as irreparable harm supporting preliminary
26 injunction of travel ban), *reversed on other grounds by Trump v. Hawaii*, 138 S. Ct. 2392 (2018);
27 *Hawaii v. Trump*, 859 F.3d 741, 782-83 (9th Cir. 2017) (same), *vacated on other grounds by Trump*
28 *v. IRAP*, 138 S. Ct. 377 (Mem.) (2017); *Washington v. Trump*, 847 F.3d 1151, 1169 (9th Cir. 2017)
(recognizing that first travel and refugee ban caused irreparable harm in part by “separat[ing]
families”—i.e., people in the United States from their family members abroad); *Doe v. Trump*, 288
F. Supp. 3d 1045, 1082 (W.D. Wash. 2017) (holding that suspension of processing and admissions
of certain refugees abroad “prolong[ed] the separation of [plaintiffs and] their family members and
. . . this is an irreparable harm”).

1 (preliminarily enjoining suspension of USRAP); *see also Kuang v. Dep't of Def.*, 340 F. Supp. 3d
2 873, 919-21 (N.D. Cal. 2018) (causal-connection requirement satisfied and enjoining government
3 policy causing delays in processing of immigrant servicemembers' naturalization petitions, even
4 though immigrants had "no 'right to naturalization'").

5 Courts considering the travel ban specifically held—in the context of the Article III standing
6 inquiry—that “enjoining [the ban] will remove a barrier to reunification” and thereby help to
7 “redress [the plaintiffs’ family separation] injury.” *Hawaii*, 859 F.3d at 762-63.³ Indeed, the
8 Supreme Court, in considering the government’s motion to stay the preliminary injunction of the
9 second travel ban, necessarily denied the government’s arguments that the plaintiffs lacked
10 standing, and held that prolonged separation of U.S.-based individuals from their foreign family
11 members abroad (who were either seeking visas or resettlement through USRAP) was a sufficiently
12 weighty irreparable harm to overcome the government’s national security interest in enforcing the
13 ban, declining to stay that portion of the injunction. *Trump v. IRAP*, 137 S. Ct. at 2088-89. It was
14 irrelevant that visa issuance and refugee resettlement, like humanitarian parole, are discretionary.

15 A similar understanding of how an injunction redresses harm is present in *M.R.* There, the
16 Ninth Circuit held the causal-connection requirement satisfied where a preliminary injunction made
17 irreparable harm in the form of institutionalization less likely, but did not eliminate the risk—which
18 the court noted would increase over time in any event as seriously disabled plaintiffs’ physical
19 conditions declined. *See M.R.*, 697 F.3d at 729.

20 Here, the Court has already determined that a favorable judicial decision would redress
21 Plaintiffs’ irreparable injuries when it held that U.S.-based Plaintiffs have Article III standing.
22 MTD Order at 35. And just as in the travel ban cases, staying Defendants’ unlawful mass rescission
23 would help alleviate the irreparable harm to Plaintiffs by removing “barriers” or “hurdles” to
24 Plaintiffs’ reunification with family members and escape from imminent danger.

25 _____
26 ³ *See also Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1150 (D. Haw. 2017) (holding that family
27 separation injury was “fairly traceable” to the ban, and that enjoining the ban would “remove a
28 barrier to reunification, satisfying redressability”), *aff’d*, *Hawaii v. Trump*, 878 F.3d at 678 n.5
(adopting reasons set forth by district court); *Doe v. Trump*, 288 F. Supp. 3d at 1064-65, 1082
(holding that prolonged family separation injury was redressable where the court’s reversal of
defendants’ suspension of refugee processing would remove at least some of the “hurdles to cross”
before the family could be reunited, and holding plaintiffs demonstrated irreparable harm).

1 Indeed, in comparison to the travel ban cases, a preliminary injunction here is *more* likely to
2 remedy the irreparable harm Plaintiffs face. While Plaintiffs do not ask the Court to mandate a
3 positive exercise of discretion, *see* P. Supp. Reply at 2, ECF. No. 67, staying the unlawful mass
4 rescission would necessarily restore Defendants’ prior decisions to positively exercise discretion by
5 granting conditional parole status. *Id.* at 1-2. And, as this Court noted, the only remaining steps in
6 the government’s process are “nondiscretionary.” MTD Order at 53-54, ECF. No. 51. Thus, under
7 Defendants’ prior policy—which would be restored with any preliminary injunction—the expected
8 outcome would be that pending those ministerial steps being successfully completed, conditionally
9 paroled individuals would receive parole for a two-year period and be reunited with their families.
10 *See* AR, Ex. 40 at AR000439 n.1, ECF No. 33-40.

11 3. In response to the Court’s third question, the reputational harm and resource
12 allocation injuries suffered by Plaintiff CASA also satisfy the causal-connection requirement.
13 While, as the Court notes, CASA suffers those injuries as a result of the government’s decision with
14 respect to a government program, that fact does not change the irreparable harm analysis, as courts
15 have recognized in similar contexts. And, for good reason: the irreparable harm inquiry focuses on
16 whether Plaintiffs are likely to suffer harm for which there is no adequate legal remedy; in contrast,
17 the APA merits inquiry limits the circumstances under which the government is susceptible to legal
18 challenge for making changes to its own programs.

19 Courts in the Ninth Circuit have recognized organizational irreparable harm in the form of
20 diversion of resources and reputational injury resulting from government changes to its programs
21 and have enjoined government action on that basis. *See, e.g., Doe v. Trump*, 288 F. Supp. 3d at
22 1082-83; *Planned Parenthood v. Dep’t of Health & Human Servs.*, 328 F. Supp. 3d 1133, 1149-51
23 (E.D. Wash. 2018). In *Doe*, the defendants argued that the government’s partial suspension of its
24 refugee admissions program did not irreparably harm organizational plaintiffs providing services to
25 refugees. *Doe*, 288 F. Supp. 3d at 1082-83. The *Doe* court easily rejected this argument, holding
26 that the plaintiffs’ evidence showing that they would “need to lay-off employees, reduce services,
27 cancel established programs, lose institutional knowledge, and ultimately lose goodwill . . .
28 ‘certainly supports a finding of the possibility of irreparable harm.’” *Id.* at 1082 (quoting *Stuhlberg*

1 *Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) and citing *Rent-A-Center,*
2 *Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991)). Similarly,
3 in *Planned Parenthood*, the court held that the government's decision to move forward the end date
4 for federal teen pregnancy program grants would irreparably harm organizational plaintiffs who
5 relied on the grants to provide services because it would "disrupt[] Plaintiffs' abilities to continue
6 operations as planned and threaten[] their relationships and goodwill with local partners in the
7 communities they serve." *Planned Parenthood*, 328 F. Supp. 3d at 1150-51.

8 Here, just like the organizational plaintiffs in *Doe* and *Planned Parenthood*, CASA has
9 demonstrated that it suffers irreparable harm in the form of damage to its reputation and forced
10 reallocation of its resources as a result of Defendants' unlawful mass rescission.⁴ *See* P. Supp. Br.
11 at 4-5. CASA's injuries are irreparable: they cannot be compensated by remedies at law and they
12 are lasting. *See, e.g., Starbucks Corp. v. Heller*, No. 14-01383, 2014 WL 6685662, at *5, *8-9
13 (C.D. Cal. Nov. 26, 2014) (granting preliminary injunction on finding harm to company's goodwill
14 and reputation would be "lasting" and were "difficult to quantify and compensate over time").

15 More generally, the irreparable harm inquiry—just like the Article III inquiry—is focused
16 on Plaintiffs' injuries: specifically, whether Plaintiffs are likely to suffer a concrete injury that is
17 fairly traceable to Defendants' conduct and would likely be redressed by a favorable court
18 decision.⁵ Concerns about whether the government is susceptible to legal challenge when it
19 changes its own programs are not relevant to the irreparable harm inquiry; they are addressed by the
20 merits inquiry. *See, e.g.,* MTD Order at 49-50 (dismissing claim in part after finding certain
21 reliance interest not cognizable under APA).

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25 ⁴ While the termination of the CAM Program also contributed to such harms, as this Court has
26 noted, "a plaintiff 'need not . . . show that that action sought to be enjoined is the exclusive cause of
the injury.'" Causation Order at 1 (quoting *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*,
886 F.3d 803, 817 (9th Cir. 2018)).

27 ⁵ The overlap between the irreparable harm and Article III standing inquiries explains why much of
28 the analysis responsive to the Court's questions about irreparable harm is found in the context of
courts addressing Article III standing. *See, e.g., Hawaii*, 859 F.3d at 762-63; *Doe*, 288 F. Supp. 3d
at 1064-67; *Hawaii*, 265 F. Supp. 3d at 1150.

1 DATED: February 11, 2019.

2 Respectfully submitted,

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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