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May 21, 2018

Molly C. Dwyer
 Clerk of the Court
 U.S. Court of Appeals for the Ninth Circuit
 P.O. Box 193939
 San Francisco, CA 94119-3939

Re: *UC Regents, et al. v. USDHS, et al.* Nos. 18-15068, 18-15069,
 18-15070, 18- 15071, 18-15072, 18-15128, 18-15133, 18-15134
 Before Judges Wardlaw, Nguyen, and Owens

Pursuant to Federal Rules of Civil Procedure 28(j), I write on behalf of the individual plaintiffs to address a question asked at the oral argument on May 15, 2018. While discussing the APA and equal protection claims, Judge Owens asked, “When a party moves for a preliminary injunction on one ground and not on another ground in the complaint, may we consider the entire complaint, any arguments raised in the complaint, or are we stuck with the issue that’s actually put forth in the motion?” Oral Arg. Video 1:04:39-1:04:54. I responded that I would address that question in a letter brief.

Here, the district court granted the preliminary injunction based only on the plaintiffs’ APA (arbitrary and capricious agency action) claim. The district court denied the government’s motion to dismiss on the equal protection claim. The plaintiffs did not seek, and so the district court did not consider, preliminary injunctive relief based on the equal protection claim.

Of course, this Court can affirm on any grounds supported by the record. *See Fid. Fin. Corp. v. Fed. Home Loan Bank*, 792 F.2d 1432, 1437 (9th Cir. 1986). But, in this case because the parties did not present arguments on the likelihood-of-success factor and other factors necessary for preliminary injunctive relief under the equal protection claim, this Court should not simply affirm on that alternative ground. Instead, if the Court believes that the equal protection claim could support the injunction, it could remand for consideration of that claim and keep the preliminary injunction in place in aid of its jurisdiction. *See Gerling Global Reins. Corp. v. Low*, 240 F.3d 739, 754 (9th Cir. 2001) (holding that the district court erred by granting a preliminary injunction, but leaving the injunction in place so that, on remand, the district court could consider an

alternative ground); *see also United States v. Hovsepian*, 359 F.3d 1144, 1157 (9th Cir. 2004) (en banc).

That said, I respectfully submit that at this time the better course would be to affirm the preliminary injunction on APA grounds.

Sincerely,

A handwritten signature in black ink that reads "Mark D. Rosenbaum". The signature is written in a cursive, slightly slanted style.

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cc: All Counsel of Record