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\*\*admitted pursuant to Ariz. Sup. Ct. R. 38(f)

**UNITED STATES DISTRICT COURT**

**DISTRICT OF ARIZONA**

State of Arizona, *et al.*,

*Plaintiffs,*

v.

Case No. 2:21-cv-00186-SRB

United States Department  
of Homeland Security, *et al.*,

*Defendants.*

**UNOPPOSED MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU  
OF ARIZONA, AND ACLU OF MONTANA FOR LEAVE TO FILE BRIEF AS  
AMICI CURIAE**

The American Civil Liberties Union (ACLU), ACLU of Arizona, and ACLU of  
Montana respectfully request the Court's permission to file the attached brief of amici curiae.  
Both parties have consented in writing to this motion.

## I. Identity and Interests of *Amici Curiae*

The ACLU is a nationwide, nonpartisan, public interest organization of nearly 2 million members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by U.S. law to all persons. The ACLU Foundation of Arizona is a state affiliate of the ACLU and is a nonpartisan, nonprofit organization with a long history of protecting the constitutional rights of people in Arizona. It has filed lawsuits and amicus curiae briefs in both state and federal courts on a wide range of constitutional and other civil rights issues, including defending the rights of immigrants. The ACLU of Montana Foundation, Inc. is a state affiliate of the ACLU and is a nonpartisan, nonprofit corporation whose mission is to support and protect civil liberties in Montana. It has a long history of advocating in support of the rights of immigrants and against aggressive and unnecessary enforcement actions.

Amici have extensive experience with the immigration removal system and have litigated dozens of cases involving attempts by states to regulate immigration or engage in immigration enforcement. The policies and legal issues in this case are of significant interest to amici and their members.

## II. Why the Motion Should be Granted

“Amicus briefs are considered at the discretion of the Court.” *Miracle v. Hobbs*, 333 F.R.D. 151, 156 (D. Ariz. 2019). “The classic role of *amici* is threefold: (1) to assist in a case of general public interest; (2) to supplement the efforts of counsel; and (3) to draw the court’s attention to law that has escaped consideration.” *Dible v. City of Chandler*, 2004 WL 7336848, at \*1 (D. Ariz. Dec. 23, 2004) (citing *Miller-Wohl Co. v. Comm’r of Labor & Indus., State of Montana*, 694 F.2d 203, 204 (9th Cir. 1982)).

1 This case involves claims by Plaintiffs that threaten the liberty interests of persons  
2 subject to immigration enforcement in Arizona, Montana, and across the country. Amici  
3 bring decades of expertise representing immigrants and litigating a variety of issues related  
4 to immigration enforcement. *See, e.g., Arizona v. U.S.*, 567 U.S. 387 (2012) (amicus brief of  
5 ACLU and ACLU of Arizona); *Make the Rd. New York v. Wolf*, 962 F.3d 612 (D.C. Cir.  
6 2020); *Gonzalez v. United States Immigr. & Customs Enf't*, 975 F.3d 788 (9th Cir. 2020);  
7 *Ibrahim v. Acosta*, 2018 WL 582520 (S.D. Fla. Jan. 26, 2018). This expertise, as reflected in  
8 the attached brief, will assist the Court in resolving Plaintiffs' claims. The brief expands  
9 upon several key arguments in this case: that the 100-day deportation pause does not violate  
10 8 U.S.C. § 1231(a)(1), that in any event any injunction must be limited to those individuals  
11 in the removal period, and that the pause was not arbitrary and capricious and did not require  
12 notice and comment. Amici believe these arguments will be useful to the Court in resolving  
13 Plaintiffs' preliminary injunction motion.  
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17 Accordingly, amici respectfully request the Court's leave to file the attached brief.  
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1 Dated: March 26, 2021

Respectfully submitted,

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18 *\*pro hac vice forthcoming*

19 *\*\*admitted pursuant to Ariz. Sup. Ct. R.*  
20 *38(f)*  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 26, 2021, I electronically filed the foregoing with the Clerk of the Court by using the District Court CM/ECF system. A true and correct copy of this motion has been served via the Court’s CM/ECF system on all counsel of record.

/s/ Victoria Lopez  
Victoria Lopez

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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

State of Arizona, *et al.*,

*Plaintiffs,*

v.

United States Department  
of Homeland Security, *et al.*,

*Defendants.*

Case No. 2:21-cv-00186-SRB

**[PROPOSED] ORDER GRANTING MOTION FOR  
LEAVE TO FILE AMICUS BRIEF**

This matter comes before the Court on motion for leave for the ACLU, ACLU of Arizona, and ACLU of Montana to file an amicus brief regarding Plaintiffs’ Motion for Preliminary Injunction (Doc. \_\_\_\_). Having reviewed the parties’ arguments and the proposed brief, the Court exercises its discretion to **GRANT** the motion. The amicus brief is deemed filed.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2021.

\_\_\_\_\_  
Susan R. Bolton  
United States District Judge

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9 **UNITED STATES DISTRICT COURT**

10 **DISTRICT OF ARIZONA**

11  
12 State of Arizona, *et al.*,

13 *Plaintiffs,*

14  
15 v.

Case No. 2:21-cv-00186-SRB

16 United States Department of  
17 Homeland Security, *et al.*,

18 *Defendants.*  
19

20 **BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, ACLU OF**  
21 **ARIZONA, AND ACLU OF MONTANA IN SUPPORT OF DEFENDANTS**

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1 **INTRODUCTION**

2 Weeks before an interim immigration policy—already blocked by another court—  
3 is set to expire, Arizona and Montana bring this lawsuit seeking to enjoin it. Specifically,  
4 Plaintiffs challenge a 100-day pause of certain types of removals that prioritizes other  
5 removals and enforcement actions while the administration develops longer-term  
6 immigration policies. In doing so, they seek to upend the federal government’s discretion  
7 to temporarily stay certain removals and determine immigration enforcement priorities.  
8 Plaintiffs’ case relies on legal errors, misunderstandings of the policy at issue, and  
9 baseless speculation. It should be rejected.  
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12 Amici ACLU, ACLU of Arizona, and ACLU of Montana submit this brief to  
13 address several reasons why Plaintiffs’ arguments fail. First, 8 U.S.C. § 1231(a)(1)(A)  
14 does not override the Executive’s longstanding discretion to stay removals and, even if  
15 the Court finds otherwise, any injunction would apply to only a small subset of  
16 individuals. Second, Plaintiffs cannot enforce the unlawful and invalid Agreement  
17 signed by an outgoing Department of Homeland Security (“DHS”) official immediately  
18 before a change in administrations. Third, when properly understood in the context of the  
19 entire immigration system, the pause is not arbitrary and capricious because it funnels  
20 DHS’s limited resources to prioritize removals at the border. And finally, interim  
21 policies such as this one that pause agency action while it sorts out long term priorities  
22 are procedural rules exempt from notice and comment.  
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## BACKGROUND

### A. Removal Orders

When an immigration judge determines that a person is removable and denies any relief from removal, the judge enters a removal order. This order becomes administratively final once the person either loses their administrative appeal or declines to file one. At this point, the order is a “final removal order.” But this term of art obscures the fact that a final order is often far from the end of the process. *See* Declaration of Claudia Valenzuela, ECF No. 82-1 (“Valenzuela Decl.”) ¶¶ 17–20, *Texas v. U.S.*, No. 6:21-cv-00003 (S.D. Tex. *filed* Feb. 12, 2021). The noncitizen may seek judicial review of the final order with the appropriate federal Court of Appeals. *Id.* ¶ 18; 8 U.S.C. § 1252(a)(1). Final orders may also be reopened by the executive branch for such matters as lack of a hearing notice, new evidence of danger in the country where a person would be removed, or new eligibility for a form of immigration relief. *Texas v. U.S.*, No. 6:21-cv-00003 (S.D. Tex. *filed* Feb. 10, 2021). Thus, individuals with “final” orders arising from regular removal proceedings under § 240 of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1229a, often remain in the country for months or years, with real prospects of permanent immigration relief. Valenzuela Decl. ¶ 19–20; Berg Decl. ¶ 12.

There are approximately 11 million individuals without regular immigration status in the United States—“undocumented” persons. Valenzuela Decl. ¶ 9. Of those, approximately 1.19 million have final removal orders. Berg Decl. ¶ 8. Through many administrations, there has been a substantial number of individuals with outstanding final

1 removal orders. *Id.* ¶ 12 (only 17.73% of removal orders that became final since January  
2 2019 have been executed); Valenzuela Decl. ¶¶ 17–20. There are many reasons for this:  
3 some people are pursuing judicial review, others have been granted deferred action for  
4 various reasons, and others have simply not been a high priority. Berg Decl. ¶ 8;  
5 Valenzuela Decl. ¶ 17. By contrast, at any given time only a tiny proportion of overall  
6 removal orders have become final within the last 90 days—meaning a tiny proportion are  
7 within the removal period described in 8 U.S.C. § 1231(a)(1). Declaration of David  
8 Hausman, ECF No. 82-2 (“Hausman Decl.”) ¶ 18, *Texas v. U.S.*, No. 6:21-cv-00003  
9 (S.D. Tex. filed Feb. 12, 2021). The vast majority of people with removal orders are  
10 outside of the removal period.  
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### 13 **B. The 100-Day Deportation Pause**

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15 On January 20, 2021, the Acting Secretary of Homeland Security issued a  
16 memorandum (“DHS Memorandum”) setting interim policies while the agency  
17 undertakes a review of federal immigration enforcement policies and priorities. As part  
18 of those interim policies, the DHS Memorandum directed a 100-day pause on the  
19 removal of certain noncitizens with final orders of removal so that “DHS’s limited  
20 resources [can] be prioritized to: (1) provide sufficient staff and resources to enhance  
21 border security and conduct immigration and asylum processing at the southwest border  
22 fairly and efficiently; [] (2) comply with COVID-19 protocols to protect the health and  
23 safety of DHS personnel and those members of the public with whom DHS personnel  
24 interact;” and (3) “ensure that . . . removal resources are directed to the Department’s  
25 highest enforcement priorities.” ECF No. 12-1, Ex. A at 3. Among other exceptions, the  
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1 pause does not cover noncitizens who have entered the country after November 1, 2020.

2 On February 18, 2021, the Acting Director of ICE issued interim guidance  
3 (“Interim Guidance”) implementing the enforcement priorities of the DHS Memorandum.  
4 The Interim Guidance “does not implement, nor take into account” the 100-day removal  
5 pause. ECF No. 12-1, Ex. G at 2.<sup>1</sup>

## 7 ARGUMENT

### 8 I. The Deportation Pause Is Not Contrary To Section 1231(a)(1).

#### 9 A. Section 1231(a)(1)(A) does not override the discretion to stay removals

10 Plaintiffs misconstrue 8 U.S.C. § 1231(a)(1)(A) to *require* removal of all  
11 noncitizens with final removal orders within 90 days. PI Br. 13 (citing *Texas v. United*  
12 *States*, No. 6:21-cv-00003, 2021 WL 247877, at \*3 (S.D. Tex. Jan. 26, 2021)). But this  
13 position flatly contradicts Supreme Court precedent establishing that the Executive has  
14 the authority to prioritize removals and stay its own hand as it sees fit. Nothing in  
15 § 1231(a)(1) overrides that discretion, as confirmed by the statutory context and past  
16 agency practice.  
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20 The Supreme Court has already recognized that under the very statute on which  
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22 <sup>1</sup> Plaintiffs purportedly seek to enjoin the 100-day pause and the Interim Guidance and  
23 seek to enjoin the pause “including as embodied by the Interim Guidance.” PI Br. 3, 6.  
24 Yet, the Interim Guidance explicitly does not include any aspect of the deportation pause,  
25 *see* ECF No. 12-1, Ex. G at 2, 3 n.3, or contain a removal moratorium. Thus, Plaintiffs’  
26 claims are limited solely to the 100-day pause in the DHS Memorandum, and Amici  
27 address only that policy. Having not raised any argument as to why the Interim Guidance  
28 is illegal, Plaintiffs are foreclosed from raising any new such argument on reply because  
they failed to brief it in their initial filing. *See In re Rains*, 428 F.3d 893, 902 (9th Cir.  
2005) (“issues cannot be raised for the first time in a reply brief”) (citing *Coleman v.*  
*Quaker Oats Co.*, 232 F.3d 1271, 1289 n. 4 (9th Cir.2000)).



1 Plaintiffs rely, the executive branch retains its longstanding discretion to stay removal. In  
2 *Reno v. American-Arab Anti-Discrimination Cmte.*, 525 U.S. 471, 484 (1999) (“AADC”),  
3 the Court explained that “execut[ing] removal orders” is part of “the deportation  
4 process,” and “[a]t each stage the Executive has discretion to abandon the endeavor.” *Id.*  
5 at 483 (first alteration in original). The Court thus made clear that executive branch  
6 authorities “may . . . decline to execute a final order of deportation.” *Id.* at 484. It further  
7 noted that the 1996 statute was enacted against the backdrop of the executive branch’s  
8 prior “regular practice . . . of exercising that discretion for humanitarian reasons or  
9 simply for its own convenience.” *Id.* at 483–84; *see also Nken v. Holder*, 556 U.S. 418,  
10 439–40 (2009) (Alito, J., dissenting) (“Once an order of removal has become final, it may  
11 be executed at any time”—but “the Executive Branch” may still “stay its own hand.”);  
12 *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957, 967 (9th Cir. 2017) (“the federal  
13 statutory and regulatory scheme, as well as federal case law, vest the Executive with very  
14 broad discretion to determine enforcement priorities”).

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Contrary to Plaintiffs’ contention, a single word in § 1231(a)(1)(A)—“shall”—  
does not disturb this longstanding discretion to execute removals. PI Br. 13. Law  
enforcement statutes providing that an agency “shall” engage in an enforcement action  
generally do *not* create mandatory, enforceable duties. In *Town of Castle Rock v.*  
*Gonzales*, 545 U.S. 748, 760 (2005), the Supreme Court confronted a statute providing  
that a police officer “*shall arrest*” or “*seek a warrant*” in case of certain violations. *Id.* at  
754, 759. Justice Scalia, writing for the Court, explained that “[t]he deep-rooted nature  
of law-enforcement discretion” means that officers continue to have discretion not to take

1 enforcement actions “even in the presence of seemingly mandatory commands.” *Id.* at  
2 761; *see also Chicago v. Morales*, 527 U.S. 41, 62 n.32 (1999); *City of Seabrook v.*  
3 *Costle*, 659 F.2d 1371, 1374 n.3 (5th Cir. Unit A 1981) (“the word ‘shall’” imposes no  
4 mandate “when duties within the traditional realm of prosecutorial discretion are  
5 involved”); *Grainger v. Ensley*, 2019 WL 1997485, at \*5 (D. Or. Feb. 15, 2019), *report*  
6 *and rec. adopted*, 2019 WL 1993530 (D. Or. May 6, 2019) (same).

7  
8 The *Texas* court recognized that *Castle Rock* speaks to the statutory question at  
9 issue, but inexplicably refused to apply its holding. Instead, the court contrived a new  
10 doctrine that a “shall” in a law enforcement statute *is* indeed mandatory “if the statute’s  
11 manifest purpose is to protect the public or private interests of innocent third parties.”  
12 *Texas v. United States*, No. 6:21-cv-00003, 2021 WL 723856, at \*35 (S.D. Tex. Feb. 23,  
13 2021). But this would swallow the *Castle Rock* rule because presumably all law  
14 enforcement directives aim at protecting third parties from crime. No court has ever  
15 adopted this gloss on *Castle Rock*, where the directive was found not to be mandatory  
16 despite the statute’s obvious purpose to “protect . . . [the] interests of innocent third  
17 parties”—domestic violence survivors—by promoting robust enforcement of restraining  
18 orders. *Id.*; *cf. id.* at 779 (Stevens, J., dissenting) (describing legislature’s “unmistakable  
19 goal of eliminating police discretion in this area . . . for the benefit of the narrow class of  
20 persons who are beneficiaries of domestic restraining orders”).

21  
22 The *Castle Rock* presumption that “shall” is not mandatory has long been true in  
23 the removal context. “It is common for the term ‘shall’ to mean ‘may’ when it relates to  
24 decisions made by the Executive Branch” that pertain to “DHS’s exercise of its  
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1 prosecutorial discretion.” *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 522 (BIA  
2 2011); *see also Asika v. Ashcroft*, 362 F.3d 264, 268 n.5 (4th Cir. 2004) (per curiam).  
3  
4 DHS and its predecessors have therefore exercised their discretion to stay removals for  
5 decades. *See generally* BEN HARRINGTON, CONG. RESEARCH SERV., R45158, AN  
6 OVERVIEW OF DISCRETIONARY REPRIEVES FROM REMOVAL: DEFERRED ACTION, DACA,  
7 TPS, AND OTHERS (Apr. 10, 2018) (providing overview of the historical and  
8 contemporary practice of staying removal). Contemporary DHS regulations and policies  
9 make clear that the agency has the authority to “grant a stay of removal or deportation” to  
10 “an alien under a final order” “for such time and under such conditions as [the agency]  
11 “may deem appropriate.” 8 C.F.R. § 241.6(a); *see also id.* § 1241.6(a); ICE Form 246,  
12 Application for a Stay of Deportation or Removal (Nov. 2020), <https://bit.ly/3d3BR7j>.  
13  
14 And the agency has developed special procedures to stay the removal of certain  
15 categories of individuals on humanitarian and law enforcement grounds. *See, e.g.*, 8  
16 C.F.R. § 214.11(d)(1)(ii) (T-visa applicants); *id.* § 214.14(c)(1)(ii) (U-visa applicants).  
17

18 This discretion encompasses categorical reprieves from removal, which are  
19 regularly granted by every presidential administration. *See, e.g.*, Presidential  
20 Memorandum of January 19, 2021: Deferred Enforced Departure for Certain  
21 Venezuelans, 86 Fed. Reg. 6,845 (Jan. 25, 2021) (directive by prior administration  
22 staying removal of Venezuelans for 18 months); Exec. Order No. 12,711, Policy  
23 Implementation With Regard to Nationals of the People’s Republic of China, 55 Fed.  
24 Reg. 13,897 (Apr. 11, 1990) (deferring removal of Chinese nationals as response to the  
25 Tiananmen Square protests); *Devitri v. Cronen*, 290 F. Supp. 3d 86, 89 (D. Mass. 2017)  
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1 (approximately 100 Indonesian Christians with final removal orders granted annual stays  
2 of removal routinely for seven years); *Ibrahim v. Acosta*, 2018 WL 582520 at \*1 (S.D.  
3 Fla. Jan. 26, 2018) (similar, for approximately 4,800 Somali nationals with final removal  
4 orders).

5  
6 Plaintiffs do not mention this century of Supreme and Circuit Court precedent and  
7 consistent government practice. Instead, they cite inapposite cases that did not consider  
8 *AADC*, *Castle Rock*, or the weight of historical practice. See PI Br. 13 (citing *Ulysse v.*  
9 *Dep't of Homeland Sec.*, 291 F. Supp. 2d 1318, 1325 (M.D. Fla. 2003) (only addressing  
10 *when* the removal period began for purposes of detention authority); *Tran v. Mukasey*,  
11 515 F.3d 478, 481 (5th Cir. 2008) (not interpreting discretionary power to stay removal  
12 or *Castle Rock*); and *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320  
13 (2020) (interpreting “shall” in a distinct context).

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15  
16 **B. Any violation of § 1231(a)(1)(A) is insufficient to support the broad**  
17 **injunction Plaintiffs seek.**

18 Even if the Court holds that § 1231(a)(1) overrides the government’s discretion to  
19 stay removals, by the plain terms of the statute that duty could only apply during the  
20 “removal period”—generally the 90 days after an order becomes final. See 8 U.S.C. §  
21 1231(a)(1)(A), (B); see also *id.* § 1231(a)(1)(C) (limited exception). Plaintiffs do not,  
22 and could not, offer any argument that the government is under a statutory obligation to  
23 remove individuals who are outside the removal period within a specific period of time.  
24 The vast majority of individuals with final orders of removal are well past the 90-day  
25 removal period. See Hausman Decl. ¶ 18 (estimating that removal orders issued through  
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28

1 regular removal proceedings that are currently in the removal period represent just 0.84%  
2 of all outstanding removal orders). As such, the broad injunctive relief Plaintiffs seek is  
3 unwarranted. *See* PI Br. 3.  
4

5 “[T]he scope of injunctive relief is dictated by the extent of the violation  
6 established.” *E. Bay Sanctuary Covenant v. Biden*, 18-17274, 2020 WL 8970552, at \*25  
7 (9th Cir. Feb. 28, 2020) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). “[I]t  
8 must be narrowly tailored to remedy the specific harm shown.” *Bresgal v. Brock*, 843  
9 F.2d 1163, 1170 (9th Cir. 1987). The Court cannot and should not enjoin the entire pause  
10 based on a legal claim that at most impacts a small subset of people to whom the pause  
11 applies. Any injunction must instead be limited to the small subset of people who are  
12 still within the 90-day removal period.<sup>2</sup>  
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## 15 **II. The States’ Agreements Are Unenforceable and Invalid.**

16 The States briefly invoke a “SAFE Agreement” they signed with an outgoing DHS  
17 official just days before the end of the prior administration. PI Br. 14. The Agreement  
18 purports to give the States a 6-month veto over *any* changes to the prior administration’s  
19 immigration enforcement policies, a stunning and unprecedented attempt to sign away the  
20 incoming administration’s constitutional and statutory power over immigration. *See* ECF  
21 No. 12-1, Exs. C, H at § III.A.1, 2, 3. The Court should reject this Agreement as  
22 emphatically as possible. It is unenforceable, invalid, and unconstitutional.  
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25 \_\_\_\_\_  
26 <sup>2</sup> The *Texas* court did not address the limits of Plaintiffs’ statutory theory, despite the fact  
27 that Intervenors fully briefed it. *See Texas*, 2021 WL 723856, at \*35–38; Intervenors’ PI  
28 Opp., *Texas v. United States*, No. 6:21-cv-00003, 2021 WL 723856, ECF No. 82 at 16–  
18 (S.D. Tex. *filed* Feb. 12, 2021).

1           1. There is no jurisdiction over this claim, because for over 70 years, it has been  
2 “settled that sovereign immunity bars a suit against the United States for specific  
3 performance of a contract.” *Bowen v. Massachusetts*, 487 U.S. 879, 921 (1988) (Scalia,  
4 J., dissenting) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704  
5 (1949)). The APA incorporates this bar on the equitable enforcement of contracts, as the  
6 Ninth Circuit and every other Circuit to consider the issue has held. *See Tucson Airport*  
7 *Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 646–47 (9th Cir. 1998); *Alabama Rural*  
8 *Fire Ins. Co. v. Naylor*, 530 F.2d 1221, 1228 (5th Cir. 1976) (same); *Robbins v. U.S.*  
9 *Bureau of Land Mgmt.*, 438 F.3d 1074, 1082 (10th Cir. 2006) (same and collecting  
10 further cases from the First, Second, Third, and D.C. Circuits). As the Ninth Circuit has  
11 explained, Congress waived sovereign immunity for contract claims seeking *damages*,  
12 but intentionally did not for contract claims seeking declaratory and injunctive relief; 5  
13 U.S.C. § 702(2) therefore bars the States’ contract claim. *Tucson Airport*, 136 F.3d at  
14 646; *see Robbins*, 438 F.3d at 1083 (same).

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18           The States cannot evade this rule by dressing their claim in the garb of the APA.  
19 *See* PI Br. 14. The APA does not allow a plaintiff to bring “a disguised contract action”  
20 where the contract provides “the source of the rights” the plaintiff seeks to enforce, and  
21 the plaintiff simply argues that the contract violation also amounts to an APA violation.  
22 *Perry Cap. LLC v. Mnuchin*, 864 F.3d 591, 619 (D.C. Cir. 2017); *see Int’l Eng’g Co.,*  
23 *Div. of A-T-O v. Richardson*, 512 F.2d 573, 576, 580 n.10 (D.C. Cir. 1975) (cutting  
24 through such “plumage”).  
25  
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27           2. The Agreement is also substantively invalid because it impermissibly purports  
28

1 to sign away an enormous swath of the federal government’s immigration power. The  
2 “reserved powers” doctrine imposes a common-sense rule: a government may not “enter  
3 into an agreement that limits its power to act in the future” where the agreement  
4 “surrenders an essential attribute of its sovereignty.” *U.S. Tr. Co. of New York v. New*  
5 *Jersey*, 431 U.S. 1, 23 & n.20 (1977). As the Supreme Court explained in *Stone v.*  
6 *Mississippi*, “agencies can govern according to their discretion . . . while in power; but  
7 they cannot give away nor sell the discretion of those that are to come after them.” 101  
8 U.S. 814, 820 (1879). Thus, the government “may not contract away an essential  
9 attribute of sovereignty.” *United States v. Winstar Corp.*, 518 U.S. 839, 888–89 (1996)  
10 (plurality opinion) (internal quotation marks omitted); *id.* at 922–23 (Scalia, J.,  
11 concurring in the judgment) (“certain core governmental powers cannot be surrendered”);  
12 *N. Am. Commercial Co. v. United States*, 171 U.S. 110, 137 (1898) (same).

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16 The Agreement here plainly violates that principle. It purports to give the States a  
17 veto over “the National Government’s constitutional power” to regulate immigration,  
18 implicating its “inherent power as sovereign to control and conduct relations with foreign  
19 nations.” *Arizona v. United States*, 567 U.S. 387, 394–95. That kind of sovereign  
20 function lies at the core of the powers that may not be contracted away under the reserved  
21 powers doctrine. *Cf. U.S. Trust Co.*, 431 U.S. at 24–25 (explaining that certain “purely  
22 financial” contracts fall outside the doctrine). The “new administration” can ignore such  
23 a contract, because the agency “could not lawfully commit itself to the continued  
24 enforcement of [] existing [policies].” *Gardner v. City of Dallas*, 81 F.2d 425, 426 (5th  
25 Cir. 1936).  
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1           3. Most fundamentally, the Agreement threatens the basic principles of our  
2 constitutional system. The Constitution provides that the “executive Power” is “vested”  
3 in the President. Const. art. II, § 1, cl. 1. But the Agreement would divest the President  
4 of that authority in significant ways. If it were valid, then *every* agency could lock in  
5 *every* policy whenever power is set to change hands, preventing the next Executive from  
6 exercising its constitutional duties. Simply by finding a contracting partner—a State, or  
7 an advocacy group, or even an individual—executive officials could hobble their  
8 successors indefinitely. The Supreme Court has consistently rejected such attempts by  
9 the President or agencies to give away their own authority. *See, e.g., New York v. United*  
10 *States*, 505 U.S. 144, 181–82 (1992) (“the Executive Branch,” cannot “narrow[]” its own  
11 “constitutional authority”); *Freytag v. Comm’r*, 501 U.S. 868, 880 (1991) (similar);  
12 *Printz v. United States*, 521 U.S. 898, 922 (1997) (President cannot “transfer[] th[e]  
13 responsibility” to administer federal law).

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17           Even more troubling, the Agreement’s surrender of authority strikes at the heart of  
18 our Constitution’s guarantee of democratic governance. Mechanisms that “bind . . .  
19 officials to the policy preferences of their predecessors” prevent future administrations  
20 from “fulfill[ing] their duties as democratically-elected officials.” *Horne v. Flores*, 557  
21 U.S. 433, 449 (2009) (quotation marks omitted) (warning against agreements that  
22 represent “collusion between advocacy groups and executive officials who *want* to bind  
23 the hands of future policymakers”) (emphasis added) (citing *Nw. Env’t Advoc. v. EPA*,  
24 340 F.3d 853, 855 (9th Cir. 2003) (Kleinfeld, J., dissenting)). And, conversely, the  
25 Agreement would deprive the People of their basic ability to bring about change by  
26  
27  
28



1 voting for officials who promise to change policy. The Agreement thus cannot be  
2 squared with the bedrock principle that “both state and federal officials” must “remain  
3 accountable to the people.” *New York*, 505 U.S. at 168.  
4

### 5 **III. Plaintiffs’ Arbitrary and Capricious Argument Lacks Merit.**

6 Plaintiffs’ arbitrary and capricious arguments are predicated on a fundamental  
7 misunderstanding of the policy. Plaintiffs allege that the 100-day pause “creates a default  
8 *against* removal” and amounts to “a broad no-removal policy.” PI Br. 8. But this is  
9 incorrect: the policy directs resources to border processing and in doing so, *prioritizes* the  
10 removals of recent arrivals over the removal of people who have been in the United  
11 States longer.  
12

13  
14 The majority of removals result from rapid, summary procedures applied to recent  
15 arrivals at the border—generally expedited removal and reinstatement of removal.  
16 Valenzuela Decl. ¶¶ 21, 26–27. Expedited removal permits the entry of a removal order  
17 by a Customs and Border Protection (“CBP”) officer, subject to a limited asylum  
18 screening conducted by a DHS asylum officer and reviewed by an Immigration Judge.  
19 *Id.* ¶¶ 22–23; 8 U.S.C. § 1225(b)(1). Reinstatement of removal applies where an  
20 individual previously ordered removed reenters unlawfully, in which case DHS can  
21 reinstate and execute the prior removal order without a new hearing. Valenzuela Decl. ¶  
22 25; 8 U.S.C. § 1231(a)(5). The DHS Memorandum allows most of these streamlined  
23 deportations at the border to continue, because it allows removals of people who have  
24 arrived and continue to arrive since November 2020. DHS Memorandum at 3. These  
25 removals at the border represent the majority of *all* removals nationwide, *see* Valenzuela  
26  
27  
28

1 Decl. ¶ 27, and by transferring resources to the border, the Memorandum *prioritizes* this  
2 largest category of removals over others.<sup>3</sup>

3  
4 Thus, understood in the context of the *entire* immigration removal system,  
5 Plaintiffs’ claims that the agency failed to explain how the pause “accomplishes its stated  
6 goals” and “ignored the harms its policy will cause” fall apart. PI Br. 8–9. DHS has  
7 chosen to prioritize certain removals over others by freeing up resources from interior  
8 removals and redirecting them to the agency’s identified priorities of border processing,  
9 border removals, and public health protection. There was nothing arbitrary about that  
10 decision.

#### 12 **IV. The Deportation Pause Is Exempt From Notice And Comment.**

13 Plaintiffs additionally claim that the 100-day pause was subject to notice and  
14 comment. PI Br. 11–12. Not so. The pause is a procedural rule “primarily directed  
15 toward improving the efficient and effective operations of an agency.” *Batterton v.*  
16 *Marshall*, 648 F.2d 694, 702 n.34 (D.C. Cir. 1980). It does not bar anyone’s eventual  
17 removal, but instead briefly prioritizes some removals over others while the agency sorts  
18 out its long-term enforcement policies.

19  
20  
21 Courts have rejected similar notice-and-comment claims and “declined to upset  
22 freezes on” agency activity “pending completion of” longer-term policymaking. *Kessler*

23  
24 <sup>3</sup> The *Texas* court resisted this uncontested evidence, emphasizing that DHS expanded  
25 expedited removal in 2019 to encompass people who have been in the country up to two  
26 years, and concluding that as a result the pause would “inevitably cancel a substantial  
27 number of expedited removals ICE would have performed in the interior of the United  
28 States.” *Texas*, 2021 WL 723856, at \*14. But that conclusion is simply wrong. The  
expansion was entirely enjoined until late last year, *see Make the Rd. New York v. Wolf*,  
962 F.3d 612 (D.C. Cir. 2020), and all available public information indicates that use of  
the expansion in the months since has been extremely limited—and may soon be  
discontinued all together, *see* 86 Fed. Reg. 8267 (Feb. 2, 2021).

1 v. *FCC*, 326 F.2d 673, 680–82 (D.C. Cir. 1963) (collecting cases). *Kessler* held that  
2 notice and comment was not required for a policy temporarily pausing decisions on  
3 broadcast permit applications so that the agency could promulgate new substantive  
4 criteria for deciding applications. *Id.* The court agreed that “a temporary limited halt” in  
5 regulatory action “was a necessary adjunct to any efficient and effective” policymaking  
6 process. *Id.* at 680–81. The same is true here.  
7

8 Nor does the pause “grant[] rights and creat[e] obligations.” PI Br. 12. It does not  
9 dictate that individuals subject to the pause will or will not be ultimately deported; it  
10 simply postpones such a decision. Notice and comment is not required for a policy like  
11 this that simply “funnel[s] . . . agency [enforcement] resources” and does not decide the  
12 ultimate “rights and obligations” of regulated parties. *U.S. Dep’t of Lab. v. Kast Metals*  
13 *Corp.*, 744 F.2d 1145, 1155 (5th Cir. 1984); *see also Am. Hosp. Ass’n v. Bowen*, 834 F.2d  
14 1037, 1050 (D.C. Cir. 1987) (agency “enforcement plan” to “concentrate” its “limited  
15 resources on particular areas” is a “classic procedural rule[]”).  
16  
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## 18 CONCLUSION

19 The Court should deny Plaintiffs’ request for a preliminary injunction.  
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1 Dated: March 26, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2021 I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court’s electronic filing system.

/s/Victoria Lopez  
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