

1 **MARK BRNOVICH**  
2 **ATTORNEY GENERAL**  
(Firm State Bar No. 14000)

**AUSTIN KNUDSEN**  
**MONTANA ATTORNEY GENERAL**

3 Joseph A. Kanefield (No. 15838)  
4 Brunn (Beau) W. Roysden III (No. 28698)  
5 Drew C. Ensign (No. 25463)  
6 Anthony R. Napolitano (No. 34586)  
7 Robert Makar (No. 33579)  
2005 N. Central Ave  
8 Phoenix, AZ 85004-1592  
9 Phone: (602) 542-8958  
10 Joe.Kanefield@azag.gov  
11 Beau.Roysden@azag.gov  
12 Drew.Ensign@azag.gov  
13 Anthony.Napolitano@azag.gov  
14 Robert.Makar@azag.gov

David M. Dewhirst\*  
*Solicitor General*  
215 N Sanders St.  
Helena, MT 59601  
Phone: (406) 444-4145  
David.Dewhirst@mt.gov

*\*pro hac vice granted*

*Attorneys for Plaintiff State of Montana*

*Attorneys for Plaintiffs State of Arizona and  
Mark Brnovich in his official capacity*

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF ARIZONA**

15 State of Arizona; State of Montana; and  
16 Mark Brnovich, in his official capacity as  
17 Attorney General of Arizona,

18 Plaintiffs,

19 v.

20 United States Department of Homeland  
21 Security; United States of America;  
22 Alejandro Mayorkas, in his official  
23 capacity as Secretary of Homeland  
24 Security; Troy Miller, in his official  
25 capacity as Acting Commissioner of  
26 United States Customs and Border  
27 Protection; Tae Johnson, in his official  
28 capacity as Acting Director of United  
States Immigration and Customs  
Enforcement; and Tracy Renaud, in her  
official capacity as Acting Director of U.S.  
Citizenship and Immigration Services,

Defendants.

No. 2:21-cv-00186-SRB

**PLAINTIFFS' NOTICE AND  
RESPONSE TO FEDERAL  
DEFENDANTS' NOTICE (DOC. 87)**

**NOTICE/RESPONSE TO NOTICE**

1  
2 Plaintiffs, the States of Arizona and Montana, hereby respond to Federal  
3 Defendants' citation of *California v. Texas*, No. 19-840 (U.S. June 17, 2021), and  
4 arguments under the same (Doc. 87).

5 According to Federal Defendants, *California v. Texas* “underscores that Arizona  
6 and Montana cannot establish standing” because their costs “are not fairly traceable to the  
7 policies that the States challenge, the February 18, 2021 ICE Memorandum,” and “the  
8 States have not met their evidentiary burden to establish that third parties will take any  
9 specific actions because of that memorandum.” Doc. 87 at 2. But Defendants' reliance on  
10 *California v. Texas* is not only unavailing, it also continues Federal Defendants'  
11 remarkable evasions as to what the evidentiary record in this case actually establishes—  
12 which, indeed, this Court has also recognized. Federal Defendants' notice should  
13 therefore be rejected for four reasons.

14 *First*, the bulk of the acts and omissions at issue are not those of “third parties”  
15 (Doc. 87 at 2), but rather those of Defendants themselves. When Defendants—contrary  
16 to the unambiguous obligation of 8 U.S.C. § 1231(a)(1)(A)—refuse to deport recently  
17 released felons with final orders of removal, it is *their* actions that cause the States to incur  
18 community supervision cost. Not those of any “third party.” Nor was it third parties that  
19 issued the Interim Guidance and Moratorium without complying with APA notice-and-  
20 comment requirements.

21 Notably, this Court had little trouble recognizing that Defendants were the direct  
22 cause of Plaintiffs' injuries at the May 27 hearing: “[W]hat the evidence ... shows is ...  
23 that *Immigration and Customs Enforcement lifted detainers* that were previously in place,  
24 *has not placed detainers on individuals* that ... they know or can know with ease are in  
25 detention or incarceration that have final orders of removal and, most significantly, that  
26 *they have only removed some incredibly small number -- seven or ten -- nonpriority*  
27 *[cases].*” 5/27/21 Tr. at 14-15 (emphasis added). Those are not the actions of “third  
28 parties” but rather those of Defendants themselves. Defendants do not even attempt to

1 square this Court’s observations with their instant arguments.

2       *Second*, the record is clear that the harms to the States are directly caused by change  
3 in substantive policies effectuated by the Interim Guidance, and not the pretextual “scarce  
4 resources” justification offered by the Interim Guidance or other governmental actions.  
5 As previously explained, the testimony of Acting ICE Phoenix Field Office Director  
6 Albert Carter directly establishes the causal chain between the Interim Guidance and the  
7 resulting harms to the States. *See* Doc. 79 at 2-3. Director Carter testified the “*only factor*”  
8 he could think of for the dropoff in 2/2021 was the enforcement priorities, he did not  
9 observe any contributing factor, and further that resource constraints were not responsible.  
10 *Id.* at 3 (quoting Carter Deposition (Dkt. 79-1 Exhibit DD at 88:20-89:1)).

11       Similarly, Director Tae Johnson’s wee-hours email of February 4, 2021 belies  
12 Defendants’ attempt to portray the relevant drop in deportations as anything other than the  
13 predictable *and intentionally sought* effect of Defendants’ actions. Specifically—in the  
14 clearest possible terms—Director Johnson commanded: “Effective immediately ... *only*  
15 *those who meet the [Section B] priorities will be removed.*” Dkt. 64 at 5 (emphasis added).  
16 The causal chain from this unambiguous command and the subsequent and dramatic drop  
17 in deportations is neither difficult to discern nor runs through the actions of third parties.  
18 Moreover, Defendants’ filing today also notably continues their unbroken refusal to  
19 acknowledge this crucial email and even attempt to offer any explanation of how it could  
20 possibly be lawful.

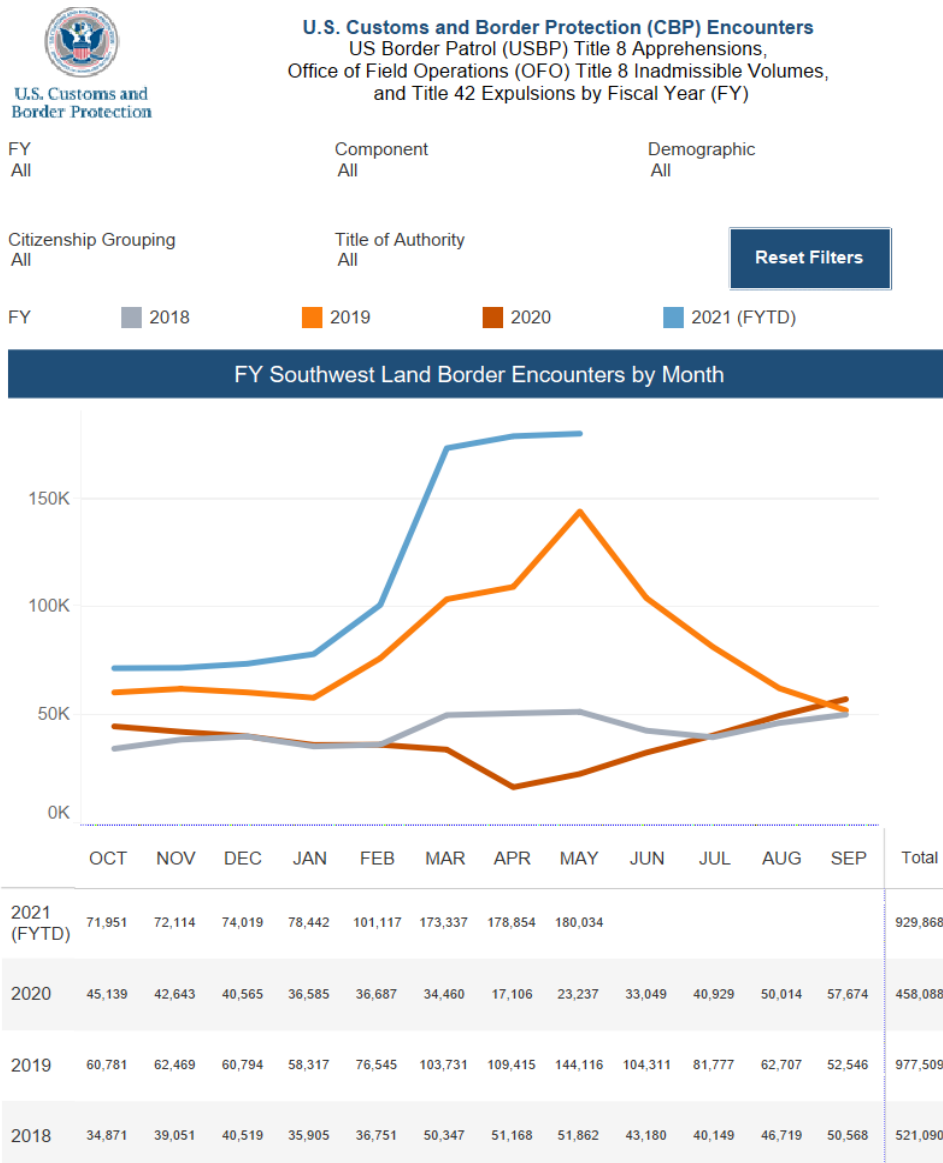
21       This Court has similarly recognized the direct causal relationship between the  
22 February 18 Interim Guidance and the resulting decreases in deportations. Specifically,  
23 this Court has explained that “So, of 325 individuals *who, before February 18th, would*  
24 *have been put into immigration detention and removed, only seven have.* Doesn’t that  
25 sound like a prohibition on removal of anybody other than in the first three categories?”  
26 5/27/21 Tr. at 19-20 (emphasis added). Defendants make no attempt to reconcile their  
27 current causation arguments with this Court’s recognition of but-for causation.

28       *Third*, even as to third parties, *California v. Texas* still provides standing can be

1 established based on third-party actions where the “third parties will likely react in  
2 predictable ways.” Slip op. at 11 (quoting *Department of Commerce v. New York*, 139 S.  
3 Ct. 2551, 2566 (2019)). Defendants’ policies have affirmatively signaled reduced  
4 enforcement, which has quite predictably resulted in dramatically increased border  
5 crossings as would-be immigrants react to the clear message encoded in the Interim  
6 Guidance (and Moratorium before that). As set forth by DHS’s own data in Figure 1  
7 below, the entirely predictable—and subsequently observed—effect of Defendants’  
8 actions was a drastic spike in CPB encounters beginning in February 2021 and continually  
9 ramping up thereafter. This Court has similarly recognized that “[T]he numbers [of  
10 removals] seemed to have been declining from February 18th for each month through the  
11 middle of April.” 5/27/21 Tr. at 21. Third parties may have reasonably noticed as well.

12 *Fourth*, Defendants’ apparent suggestion that the States’ decisions to enforce their  
13 own criminal laws and sentences is some form of non-cognizable self-inflicted injury is  
14 specious. Specifically, Defendants contend (at 2) that the States injury results from “the  
15 obligation to provide community supervision pursuant to a state criminal sentence,” and  
16 not the Interim Guidance. But the evidence is clear (and this Court has recognized) that  
17 *but for* the Interim Guidance, hundreds of aliens with criminal convictions and final orders  
18 of removal would be deported—obviating any need for the Plaintiff States to incur costs  
19 of community supervision. *Supra* at 1. And the Defendants’ implicit premise—*i.e.*, that  
20 the State should simply elect not to enforce its criminal laws and decline to enforce the  
21 criminal sentences imposed by their courts, and thereby avoid the harms of the Interim  
22 Guidance—is, quite frankly, bizarre. Defendants unsurprisingly have not cited a *single*  
23 *decision* where a State’s “decision” to carry out the final criminal sentences of its courts  
24 has been held to be a form of self-inflicted injury that breaks the causal Article III standing  
25 chain. There is no reason for this case to be the first. (But Defendants’ suggestion is  
26 perhaps not too surprising as it comes from parties that regard carrying out the unequivocal  
27 law-enforcement mandate of 8 U.S.C. § 1231(a)(1)(A) as being merely optional.)  
28

1 **Figure 1: CPB Encounters With Aliens Per Month**



17 Source: <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

18 **CONCLUSION**

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22 For the foregoing reasons, Plaintiffs' reliance on *California v. Texas* to defeat the

23 States' standing is unavailing and directly contrary to the evidentiary record here.

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1 RESPECTFULLY SUBMITTED this 17th day of June, 2021.

2  
3 **MARK BRNOVICH**  
4 **ATTORNEY GENERAL**

5 By /s/ Anthony R. Napolitano

6 Joseph A. Kanefield (No. 15838)

7 Brunn W. Roysden III (No. 28698)

8 Drew C. Ensign (No. 25463)

9 Anthony R. Napolitano (No. 34586)

10 Robert J. Makar (No. 33579)

11 *Assistant Attorneys General*

12 *Attorneys for Plaintiffs Arizona and Arizona*  
13 *Attorney General Mark Brnovich*

14 **AUSTIN KNUDSEN**  
15 **ATTORNEY GENERAL OF MONTANA**

16 /s/ David M.S. Dewhirst (with permission)

17 David M.S. Dewhirst\*

18 *Solicitor General*

19 *\*Pro hac vice granted*

20 *Attorneys for Plaintiff State of Montana*

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I hereby certify that on June 17, 2021, I electronically transmitted the attached document to the Clerk's office using CM/ECF System for filing. Notice of this filing is sent by email to all parties by operation of the Court's electronic filing system.

/s/ Anthony R. Napolitano