No. 21-16118

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA; MARK BRNOVICH, in his official capacity as Attorney General of Arizona; STATE OF MONTANA,
Plaintiffs-Appellants,
v.
U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES OF AMERICA; ALEJANDRO N. MAYORKAS, in his official capacity as Secretary of Homeland Security; TROY A. MILLER, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection; TAE JOHNSON, in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement; TRACY RENAUD, in her official capacity as Acting Director of U.S. Citizenship and Immigration Services,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona

RESPONSE TO EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

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INTRODUCTION

The "federal power to determine immigration policy is well settled." *Arizona v. United States*, 567 U.S. 387, 395 (2012). Congress has constructed a highly reticulated and complex immigration system. Consistent with the reality that federal officials charged with enforcing those laws have severely limited resources that must be deployed across numerous areas of responsibility, a "principal feature" of the system is the "broad discretion exercised by immigration officials." *Id.* at 395-96.

Earlier this year, the Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE), a component of DHS, issued two memoranda that, consistent with longstanding practice across many decades and multiple Administrations, articulated a framework to guide agency officials' allocation of resources across the enforcement system. The memoranda state that, given the agencies' resource limitations and other factors constraining the agency's operations, officials should prioritize enforcement against noncitizens who pose the greatest threats to national security, border security, and public safety. And the memoranda authorize officials to take enforcement actions against noncitizens beyond the presumed priorities, based on the facts of individual cases.

Arizona and Montana challenged those memoranda, claiming primarily that the Immigration and Nationality Act (INA) requires the Secretary to remove every noncitizen within 90 days after a final order of removal, 8 U.S.C. § 1231(a), and that the memoranda contradict that supposed mandate. But the statute says no such thing.

Indeed, the statute and the Supreme Court explicitly recognize that DHS cannot remove all such noncitizens within the 90-day period—nor has Congress appropriated sufficient resources to allow DHS to fulfill that supposed mandate, much less to do so while also fulfilling its responsibilities over the many other aspects of immigration enforcement. And to reinforce the point, Congress has provided that neither these plaintiffs nor anyone else may enforce that statutory provision against the United States. *Id.* § 1231(h).

In nevertheless seeking to require the agencies to remove more individuals, Arizona and Montana would arrogate to themselves the discretion that lies solely with the Executive. An injunction imposing such a requirement would not merely undermine the Executive's fundamental enforcement discretion; any injunction based on plaintiffs' narrow focus on one aspect of immigration enforcement could impair the government's ability to enforce other aspects of the immigration system.

STATEMENT

A. LEGAL BACKGROUND

The INA, 8 U.S.C. § 1101 *et seq.*, authorizes the United States to remove certain noncitizens from within its borders. *Id.* § 1182; *see id.* § 1227 (setting forth various "classes of deportable aliens"). The removal process generally begins when DHS initiates a removal proceeding, *id.* § 1229(a), a discretionary decision that requires DHS to account for the enforcement policies and priorities that Congress has directed the Secretary to establish, *cf.* 6 U.S.C. § 202(5). An immigration judge then determines

whether the noncitizen is removable, and if so, whether to enter an order of removal. 8 U.S.C. § 1229a(c)(1)(A); *see* 8 C.F.R. § 1240.12. The noncitizen can obtain review of such an order, first through an administrative appeal and then through a petition for review in the courts of appeals. *See* 8 U.S.C. §§ 1101(a)(47), 1252(a); 8 C.F.R. § 1003.1(b).

Once an order of removal becomes administratively final (and any stay pending judicial review expires), the noncitizen generally becomes subject to removal by DHS. 8 U.S.C. § 1231(a). Section 1231 sets a "removal period" of 90 days and provides that, once the removal order is final, the Secretary generally "shall remove the alien from the United States within" that removal period. *Id.* § 1231(a)(1). The statute explicitly recognizes that not all noncitizens will be removed within 90 days and provides direction regarding supervision of noncitizens beyond that period. *Id.* § 1231(a)(3). And the INA provides that "[n]othing" in § 1231 "shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." *Id.* § 1231(h).

"A principal feature of th[is] removal system is the broad discretion exercised by immigration officials." *Arizona*, 567 U.S. at 396. Such discretion is not merely a function of the Framers' constitutional design. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (discussing the "deep-rooted nature of law-enforcement discretion"). It also reflects the reality of limited resources and the Executive's need to allocate those resources among many aspects of immigration enforcement. As just

one example of the agencies' resource challenges, as of March 2021, ICE is "manag[ing] the caseload of over 3.2 million noncitizens" in removal proceedings or with final orders of removal. Suppl.Add.27. Yet Congress has appropriated money to fund just "34,000 detention beds." *Id.*

B. FACTUAL AND PROCEDURAL BACKGROUND

1. This appeal concerns two memoranda that establish interim priorities to guide DHS's and ICE's enforcement decisions. The first was issued by the then-Acting Secretary of Homeland Security on January 20, 2021. Add.111 (DHS Memorandum). That memorandum explained that, because of the COVID-19 pandemic, the United States was "fac[ing] significant operational challenges at the southwest border," requiring DHS to "surge resources to the border" to "ensure safe, legal and orderly processing"; to "adopt appropriate public health guidelines"; and to "prioritize responding to threats to national security, public safety, and border security." *Id.*

Given those challenges and other factors, the memorandum recognized that, "[d]ue to limited resources, DHS cannot respond to all immigration violations or remove all persons unlawfully in the United States." Add.112. Instead, DHS must exercise discretion in allocating its resources across the range of enforcement responsibilities, including initiating and participating in removal proceedings; stopping, arresting, and detaining noncitizens; determining whether to grant deferred action or parole; and executing final orders of removal. The memorandum thus

instructed DHS components to prioritize (pending a more comprehensive review) enforcement actions "protecting national security, border security, and public safety". *Id.* Specifically, the memorandum urged components to focus enforcement efforts on individuals who threaten "national security"; individuals who were not present in the United States before November 1, 2020 (or are apprehended entering the country after that date); and certain noncitizens who were convicted of an "aggravated felony" as defined by the INA and who pose a public-safety threat. *Id.*; *see also* Add.104 (expanding this category to include "qualifying members of criminal gangs and transnational criminal organizations").

The second memorandum was issued by ICE on February 18, 2021. Add.104 (ICE Memorandum). That memorandum implemented, and offered further guidance concerning, the DHS Memorandum. The memorandum recognized that "ICE operates in an environment of limited resources" and that, as a result, "ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others." Add.105. The memorandum further explained that ICE's mission has been rendered "particularly complex" due to "several other factors," including

> ongoing litigation in various fora; the health and safety of the ICE workforce and those in its custody, particularly during the current COVID-19 pandemic; the responsibility to ensure that eligible noncitizens are able to pursue relief from removal under the immigration laws; and the requirements of, and[] relationships with, sovereign nations, whose laws and expectations can place additional constraints on ICE's ability to execute final orders of removal.

Id. "[T]o most effectively achieve" ICE's mission in light of those factors, the memorandum instructed officers to focus enforcement actions on the categories specified in the DHS Memorandum. Add.106-08.

In addition, both memoranda provided that the priorities do not prohibit the removal of noncitizens who fall outside the presumed-priorities categories. Add.106, 113. And the ICE Memorandum further provided that agents may take enforcement actions against individuals outside the presumed priorities by obtaining supervisory preapproval (or, in "exigent circumstances," by obtaining later approval), a process that requires providing a "written justification through the chain of command" explaining why the requested action "constitutes a justified allocation of limited resources." Add.109. Through that process, approval has "regularly" been granted. Supp.Add.26. Finally, both memoranda noted that the priorities "are not intended to, do not, and may not be relied upon to create any" enforceable "right or benefit." Add.110, 114.

2. Plaintiffs challenged the memoranda in district court. As relevant here, they moved for a preliminary injunction, asserting that the priorities violated the Administrative Procedure Act (APA). The district court granted the government's motion to dismiss the complaint, and denied plaintiffs' motion as moot. Add.1-22.

At the threshold, the district court concluded that Arizona had established standing to sue because, in the court's view, Arizona had demonstrated that the priorities will likely cause a decrease in the number of noncitizens with criminal

convictions removed from Arizona and a concomitant increase in costs that Arizona must spend on community supervision of those noncitizens. Add.10-15. The court based that conclusion primarily on evidence presented by Arizona that it "has already been forced to place at least four noncitizens" on community supervision who would have been removed but for the interim guidance, and that Arizona spends an average of approximately $4000 annually per supervised individual. Add.11-12. In addition, beyond the four individuals identified by Arizona, the district court speculated, primarily based on evidence about the relatively large number of noncitizens in Arizona criminal custody, that the priorities would result in the nonremoval of some number of additional noncitizens subject to community supervision. Add.12-13.

On the merits, the district court concluded that the memoranda are not subject to APA review because the exercise of enforcement discretion is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2). Add.15-19. The court explained that, under *Heckler v. Chaney*, 470 U.S. 821 (1985), the priorities are presumptively unreviewable. Add.15-16. And the court rejected plaintiffs' argument that the presumption was overcome here by the statute's statement that "when an alien is ordered removed, the [Secretary] shall remove the alien from the United States within a period of 90 days," 8 U.S.C. § 1231(a)(1)(A). The court explained that, in the context of statutes relating to enforcement decisions, the bare use of "shall" does not generally constitute a "statutory mandate" and that the particular statutory language,

context, and history here confirmed that the 90-day target does not represent a judicially enforceable mandate. Add.16-18.

On that basis, the court dismissed plaintiffs' complaint without prejudice and denied plaintiffs' motion for a preliminary injunction as moot. Add.20-21. Plaintiffs filed a notice of appeal and a motion for injunction pending appeal.

ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008). To justify that relief, a movant must show that it is "likely to succeed on the merits," that it "is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Id.* at 20. Plaintiffs have failed to carry that burden.[1]

[1] This Court may also lack appellate jurisdiction. Plaintiffs' complaint invoked 28 U.S.C. § 1346, which provides jurisdiction over certain contract claims against the United States. *See* Suppl.Add.5-6. In the complaint and preliminary injunction motion before the district court—but not in the current motion—plaintiffs claimed that the memoranda were inconsistent with agreements signed by the States and a senior DHS official in the previous Administration. *See* Suppl.Add.15. Those purported agreements are void, and plaintiffs' attempt to rely on them was inconsistent with § 1346's limited grant of jurisdiction over certain claims for money damages. But (with exceptions not relevant here) the U.S. Court of Appeals for the Federal Circuit has "exclusive jurisdiction" over any appeal from a district court decision "if the jurisdiction of that court was based, in whole or in part, on" § 1346. 28 U.S.C. § 1295(a); *id.* § 1292(c)(1). This Court's uncertain jurisdiction counsels against issuance of an injunction at this stage. *Munaf v. Geren*, 553 U.S. 674, 690-91 (2008).

A. PLAINTIFFS HAVE FAILED TO DEMONSTRATE STANDING, MUCH LESS SUFFICIENT HARM TO WARRANT AN INJUNCTION

1. To establish standing, a plaintiff must prove that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct," and "(3) that is likely to be redressed by a favorable" decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The injury alleged must be "concrete, particularized, and actual or imminent." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation omitted). Plaintiffs have not demonstrated that Arizona will incur any costs traceable to the memoranda or redressable by a favorable decision.

Plaintiffs rely on evidence that the initial effect of the priorities has been an overall reduction in removal of noncitizens, and they point to four noncitizens who they claim would not be subject to Arizona's community supervision but for the priorities, Add.11-12. But that evidence does not demonstrate that a "*certainly* impending" effect, *Clapper*, 568 U.S. at 409 (quotation omitted), of the memoranda will be any increase in costs. The anecdotal reference to four individuals does not demonstrate a net increase in supervision costs compared to any alternative exercise of discretion by DHS in allocating its limited resources. The memoranda require agency officials to prioritize enforcement actions against those noncitizens who pose the greatest risks to national security, border security, and public safety—presumably including many noncitizens who would otherwise be subject to community supervision. And, even assuming that the memoranda will cause a marginal increase in

the group of noncitizens subject to Arizona's supervision, plaintiffs have cited no evidence proving that Arizona has incurred (or will incur) any specific additional cost—by, for example, having to hire additional staff—traceable to that increase.

Moreover, even if plaintiffs could show some such cost, they have failed to demonstrate redressability. Because ICE has limited enforcement resources, "ICE has always prioritized, and necessarily must prioritize, certain enforcement and removal actions over others." Add.105. Even if the specific priorities contained in the memoranda were enjoined, the agencies could pursue enforcement against only a fraction of removable noncitizens and would have to either implement a different priorities scheme or leave prioritization to the ad hoc decisions of individual officers. Plaintiffs have not explained how either alternative would reduce Arizona's purported supervision costs.

Plaintiffs also briefly suggest (Mot. 18) that they will incur additional law-enforcement costs related to increased crime by noncitizens who are not removed. The district court correctly declined to rely on that argument. Plaintiffs' generic recidivism evidence says nothing about the likelihood of criminal activity among the specific group of noncitizens who fall outside the agencies' interim priorities, which are designed to direct enforcement resources toward those noncitizens posing the greatest threat to public safety. And plaintiffs have failed to introduce any evidence establishing the asserted derivative financial harm from any marginal increase in future criminal activity. Finally, that theory is especially anomalous in light of the Supreme

Court's repeated admonition that standing is "ordinarily substantially more difficult to establish" when the asserted injury rests on "the decision of an independent third party." *California v. Texas*, 141 S. Ct. 2104, 2117 (2021) (quotation omitted).

2. Even assuming that plaintiffs had demonstrated some sufficiently impending, redressable financial injury to support standing, that injury could not support preliminary injunctive relief, much less an injunction pending appeal. Plaintiffs have demonstrated, at most, that the memoranda will require Arizona to spend some additional unspecified sum on community supervision. Such marginal financial costs do not support plaintiffs' claims of substantial injury. In contrast to that marginal impact, enjoining the priorities framework would work grave harm on the Executive. Such an injunction would "invade" the Executive's immigration-enforcement discretion, a "special province" that Article II commits to the President. *Reno v. American-Arab Anti-Discrimination Comm.* (*AADC*), 525 U.S. 471, 489 (1999); *see also Jama v. ICE*, 543 U.S. 335, 348 (2005) (decisions regarding removal touch on "our relations with foreign powers" and implicate the "customary policy of deference to the President in matters of foreign affairs"); Add.105 (discussing the Executive's need to consider the "requirements of, and[] relationships with, sovereign nations" as one justification for the priorities framework). Moreover, any such injunction would have serious on-the-ground consequences for DHS and ICE. It could prevent ICE's legal office from "litigat[ing] removal proceedings in a fashion that ensures the issuance of removal orders" to noncitizens who pose the gravest threats. Suppl.Add.28-29. It

would also sow confusion among the agencies' rank-and-file officers, resulting in "disparate prioritization across the country and a lack of consistency in enforcement actions." Suppl.Add.29. That inconsistency would not only work unfair and inefficient results but could also "affect ICE's relationship with state and local stakeholders" and "undermine the authority of career leadership within ICE." Suppl.Add.29-30. Finally, any such injunction could have broad-reaching consequences by requiring the agencies to divert resources from enforcing other aspects of the INA, even though the INA throughout reflects Congress's judgment that the agencies—and not plaintiffs or the courts—are best positioned "to deal with the many variables involved in the proper ordering of [their] priorities." *Heckler*, 470 U.S. at 831-32; *cf.* 6 U.S.C. § 202(5) (directing the Secretary to establish "national immigration enforcement policies and priorities").

In light of those substantial harms both to the Executive and to the public interest in efficient administration of the immigration laws, any potential marginal financial impact on plaintiffs cannot tip the balance of the equities in their favor.

B. PLAINTIFFS' CLAIMS FAIL AT THE THRESHOLD

1. The district court correctly held that the memoranda are unreviewable as "committed to agency discretion by law," 5 U.S.C. § 701(a)(2). Add.15-19. The choice to determine how best to allocate limited enforcement resources is "generally committed to an agency's absolute discretion." *Heckler*, 470 U.S. at 831. Such decisions require the "complicated balancing of a number of factors" within the

agency's expertise, including "whether agency resources are best spent on this violation or another" and "whether the particular enforcement action requested best fits the agency's overall policies." *Id.* Particularly in a world of limited resources, the agencies are best positioned "to deal with the many variables involved in the proper ordering of [their] priorities." *Id.* at 831-32. That general principle applies with heightened force in the immigration context. In addition to the usual factors requiring the exercise of discretion, immigration policy can also "affect trade, investment, tourism, and diplomatic relations for the entire Nation, as well as the perceptions and expectations of aliens in this country who seek the full protection of its laws." *Arizona*, 567 U.S. at 395; *cf.* Add.105 (discussing similar factors in explaining the need for the priorities framework). And directing immigration enforcement requires the agencies to allocate resources across a wide-ranging and complicated statutory scheme.

In recognition of those considerations, Congress constructed a removal system that relies heavily on the Executive's exercise of discretion. *Arizona*, 567 U.S. at 396. That system gives the Executive Branch the discretion to decide "whether it makes sense to pursue removal at all," *id.*, and allows the Executive "to abandon the endeavor" at "each stage" of the removal process, *AADC*, 525 U.S. at 483. Consistent with that sweeping grant of discretion, Congress empowered the Secretary of Homeland Security to establish "national immigration enforcement policies and priorities," 6 U.S.C. § 202(5), and to "issue such instructions" and "perform such

other acts as he deems necessary for carrying out his authority" under the INA, 8 U.S.C. § 1103(a)(3). To underscore the extent of that discretion, Congress sought to "protect[] the Executive's discretion from the courts" in general and from "attempts to impose judicial constraints upon prosecutorial discretion" in particular. *AADC*, 525 U.S. at 485-86, 485 n.9 (addressing 8 U.S.C. § 1252(g), which prohibits courts from hearing any claim "by or on behalf of any alien" that arises from the discretionary decisions "to commence proceedings, adjudicate cases, or execute removal orders").

Plaintiffs principally argue (Mot. 10-13) that the statute here is an exception to the general rule that immigration-enforcement decisions are committed to the Executive's unreviewable discretion because 8 U.S.C. § 1231(a)(1)(A) says that the Secretary "shall remove" a noncitizen with a final order of removal "within a period of 90 days." The Supreme Court has repeatedly emphasized the error of that argument.

Enforcement discretion has "long coexisted with apparently mandatory arrest statutes," and the "deep-rooted nature of law-enforcement discretion" persists "even in the presence of seemingly mandatory legislative commands." *Gonzales*, 545 U.S. at 760-61. Relying on that principle, the Supreme Court has repeatedly rejected arguments that a bare statutory "shall" overcomes enforcement discretion. *See, e.g.*, *id.* at 761; *City of Chicago v. Morales*, 527 U.S. 41, 47 n.2, 62 n.32 (1999); *Heckler*, 470 U.S. at

835. Instead, the Court has explained, some "stronger indication," *Gonzales*, 545 U.S. at 761, than the word "shall" is required to circumscribe enforcement discretion.

The INA includes no such "stronger indication." To the contrary, the statutory text, context, and history confirm that Congress did not intend § 1231(a)(1)(A) to create any judicially enforceable mandate. For one, a different subsection of § 1231(a) contains provisions governing the supervision of noncitizens who are not removed within the 90-day period, *see* 8 U.S.C. § 1231(a)(3), demonstrating an express recognition that not "all reasonably foreseeable removals could be accomplished in that time," *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001). Indeed, there are today more than 1.2 million noncitizens in the United States with a final order of removal, Add.176, and plaintiffs do not (and could not) contend that Congress has appropriated the agencies anywhere near sufficient resources to feasibly remove all or most of them within 90 days, even apart from the other considerations identified in the memoranda. Moreover, the conclusion that Congress did not intend to create a judicially enforceable mandate is underscored by § 1231(h), which provides that "[n]othing" in that section creates "any substantive or procedural right or benefit that is legally enforceable by any party against the United States."

And even beyond § 1231 itself, the broader structure of the INA further confirms that Congress did not intend to mandate the immediate removal of every noncitizen with a final order of removal. The INA is a highly reticulated scheme, and the agencies are charged with enforcing a wide range of provisions in the statute

against different groups of noncitizens. *See, e.g.*, 8 U.S.C. § 1225(b)(1)(A)(i) (providing that certain inadmissible noncitizens "who [are] arriving in the United States" "shall" be ordered expeditiously removed); *id.* § 1226(c) (providing that the Secretary "shall take into custody" certain defined noncitizens). But Congress has neither provided the agencies sufficient resources to fully enforce every aspect of the statutory scheme against all removable noncitizens nor instructed the agencies to prioritize some aspects of the scheme over others. Those choices reflect Congress's understanding that the agencies must determine how to allocate their limited resources to accommodate enforcement responsibilities across the entire statutory scheme. *Cf.* 6 U.S.C. § 202(5).

Plaintiffs argue (Mot. 11-12) that various judicial decisions describe § 1231(a)(1)(A) as creating a mandatory duty. But the language they refer to does not address or decide the issue presented here. As the district court recognized, *see* Add.18, none of the cases cited by plaintiffs involved challenges to enforcement-discretion standards, and none had occasion to specifically consider whether the statute creates a judicially enforceable duty. Passing references to § 1231(a)(1)(A) in cases addressing other issues—such as which provision of the INA governs detention of noncitizens in particular circumstances, *see, e.g.*, *Johnson v. Guzman-Chavez*, 141 S. Ct. 2271 (2021)—do not purport to authorize States to seek an injunction that would dictate how DHS should prioritize its limited enforcement resources. "Unlike statutes, judicial opinions are not usually written with the knowledge or expectation that each

and every word may be the subject of searching analysis" and so "must be read in light of the facts before" the court. *Hamad v. Gates*, 732 F.3d 990, 1000 (9th Cir. 2013) (quotation omitted); *see also Borden v. United States*, 141 S. Ct. 1817, 1833 n.9 (2021) (explaining that the "language of an opinion" is "not always to be parsed as though [the court] were dealing with language of a statute" (quotation omitted)). This Court should reject plaintiffs' attempt to leverage cherry-picked language from inapt court opinions as a way to circumscribe the Executive's discretion.

2. Plaintiffs' claims fail at the threshold for the additional reason that plaintiffs do not fall within the zone of interests of 8 U.S.C. § 1231, the statute they seek to enforce. The zone-of-interests inquiry asks whether Congress intended for a particular plaintiff to invoke a "particular provision of law" to challenge agency action, *Bennett v. Spear*, 520 U.S. 154, 175-76 (1987), or whether, instead, that plaintiff's "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987). And here, nothing in § 1231 suggests that Congress intended to permit plaintiffs to rely on that provision to contest federal immigration enforcement policies based on attenuated financial impacts on the States. To the contrary, § 1231 specifically reflects Congress's determination that third parties should not enforce that provision, *see* 8 U.S.C. § 1231(h)—a determination that is consistent with the broader principle evident throughout the INA that immigration enforcement is exclusively the province of the Executive.

3. Plaintiffs' APA claims also fail because the memoranda are not final agency action subject to judicial review. 5 U.S.C. § 704. An action is "final" only if, among other things, it determines legal "rights or obligations," *Bennett*, 520 U.S. at 178 (quotation omitted). The memoranda articulate a set of priorities and related internal procedures to guide agency officials' exercise of enforcement discretion. The mere existence of agency priorities and procedures does not alter any noncitizen's rights or obligations, and no noncitizen may rely on the priorities as a defense in enforcement proceedings. Indeed, both memoranda state that they do not "create any right or benefit, substantive or procedural, enforceable at law." Add.110, 114. And although the memoranda might have downstream practical consequences, any such practical effects do not constitute the "direct and appreciable legal" consequences that the APA's finality inquiry requires. *Bennett*, 520 U.S. at 178.

Plaintiffs claim (Mot. 17-18), relying on *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977, 982 (9th Cir. 2006), that the memoranda are final because they have had an effect on the agencies' day-to-day operations, and rank-and-file agents were expected to immediately comply with their terms. But plaintiffs misread that case, which states only that agency action "may be final" if it has a "direct and immediate" effect on "the subject party." 465 F.3d at 987 (quotation omitted). Even under plaintiffs' theory, the memoranda have no direct and immediate effect on any particular noncitizen, let alone the States themselves. It is thus not enough for plaintiffs to claim (Mot. 17) that the memoranda have had an effect on "Defendants'

day-to-day operations." *Cf. National Mining Ass'n v. McCarthy*, 758 F.3d 243, 250, 252 (D.C. Cir. 2014) (explaining that agency action is nonfinal if it has no legal effect "on regulated entities," even where it provides "instruction[s] to [agency] staff"). In short, the memoranda do not "require" any regulated entity or third party (such as a State) "to do anything," nor do they "prohibit" any third party "from doing anything." *Id.* at 252.

C. PLAINTIFFS' CLAIMS FAIL ON THE MERITS

1. Plaintiffs first claim (Mot. 14) that the memoranda violate 8 U.S.C. § 1231(a)(1)(A)'s purported mandate to remove all noncitizens within 90 days after a final order of removal. That claim fails for three reasons.

First, as explained in more detail above, § 1231 does not contain any mandatory command overcoming the agency's enforcement discretion. Particularly in light of the statutory structure and context, Congress's use of the word "shall" cannot overcome the "deep-rooted nature of law-enforcement discretion." *Gonzales*, 545 U.S. at 760-61.

Second, plaintiffs may not enforce § 1231. Congress has provided that "[n]othing" in that section creates any "right or benefit that is legally enforceable by any party against the United States." 8 U.S.C. § 1231(h). Yet plaintiffs seek to accomplish exactly what § 1231(h) forbids: they rely on § 1231 to assert a right to compel the government to remove certain noncitizens.

Third, even if this Court were to assume that § 1231 created an enforceable command, plaintiffs could not prevail because the memoranda would not violate such

a command. They do not forbid the removal of any particular noncitizen but instead create a process for rank-and-file officers to request and obtain supervisory approval to pursue enforcement actions against any noncitizen who falls outside the presumed priorities when such enforcement constitutes a "justified allocation of limited resources" (and to pursue such actions without preapproval in exigent circumstances). Add.109. Thus, the memoranda do not violate even plaintiffs' (incorrect) interpretation of § 1231 because they do not prohibit any official from taking any action that plaintiffs believe the statute requires.

2. Next, plaintiffs claim (Mot. 15-16) that the memoranda were improperly issued without notice and comment. But notice-and-comment procedures are not required when an agency issues "general statements of policy," 5 U.S.C. § 553(b)(3)(A), that "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power," *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (quotation omitted). The "critical factor" for determining whether an action is a general statement of policy is the extent to which it "leaves the agency, or its implementing official, free to exercise discretion to follow, or not to follow, the [announced] policy in an individual case." *Regents of the Univ. of Cal. v. DHS*, 908 F.3d 476, 507 (9th Cir. 2018) (alteration in original) (quotation omitted), *rev'd in part on other grounds*, 140 S. Ct. 1891 (2020).

Here, the memoranda preserve two levels of discretion. The Secretary retains the discretion to revoke or amend the guidance at any time, and no noncitizen may

rely on it as a defense in any given action. *Cf.* Add.110, 114. And each individual agent retains the ability to "exercise their discretion thoughtfully" and to consider "all relevant facts and circumstances" when deciding whether to pursue any particular enforcement action. Add.106.

To rebut that conclusion, plaintiffs rely (Mot. 15-16) almost entirely on isolated testimony and statistics from the earliest days of the policies' implementation, suggesting that the priorities are in effect "a blanket and exception-less prohibition" on certain removals. But that argument is triply misplaced. First, plaintiffs' APA claims must be assessed "based on the record the agency presents to the reviewing court," *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985), and plaintiffs may not rely on extra-record evidence. Second, even on its own terms, plaintiffs' evidence is unconvincing: as the district court recognized, the record demonstrates a significant increase in preapproval requests for removal of other-priority noncitizens as officials became familiar with the priority scheme, Add.19 n.14, and the testimony that plaintiffs rely on repeatedly emphasizes that the relevant determinations are made on a "case-by-case basis on the totality of the facts," Add.205. Third, in any event, and as plaintiffs do not dispute, the Secretary himself has properly retained the discretion to revoke, amend, or direct the non-application of the guidance in particular cases.

3. Finally, plaintiffs briefly claim (Mot. 16-17) that the memoranda are arbitrary and capricious. But "[r]eview under the arbitrary and capricious standard is deferential," requiring "only a rational connection between facts found and

conclusions made." *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 920 (9th Cir. 2018) (quotation omitted). The memoranda provide a rational explanation for the priorities. They explain that the agencies have "limited resources," Add.112, and that other factors, including health and safety concerns and foreign relations considerations, constrain agency operations, Add.105. They identify enforcement priorities to focus limited resources on ensuring the agencies' ability to meet their mission to "protect[] national security, border security, and public safety." Add.112. And they provide for case-by-case approvals of other enforcement actions when particular circumstances justify such an allocation of scarce resources. App.109. In short, the agencies identified a particular problem (limited resources complicated by other factors) and explained their solution in a rational way, with reference to their overarching mission and most important goals. That explanation more than provides the requisite rational connection.

Plaintiffs nevertheless argue (Mot. 16-17) that the explanation was insufficient—or even pretextual—because it did not include sufficient detail about the agencies' limited resources and because one agency officer testified that his field office was not constrained by resource limitations. Those arguments are unpersuasive. For one, the agencies are not required to make any detailed evidentiary showing but instead may reasonably "rely on [their] experience, even without having quantified it in the form of a study." *Sacora v. Thomas*, 628 F.3d 1059, 1068-69 (9th Cir. 2010); *cf. FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021). And plaintiffs do not

seriously dispute that the agencies suffer from severe resource limitations, *cf.* Berg Decl. ¶¶ 13-14. Indeed, the government has repeatedly discussed those limitations in justifying its policies over the last four decades. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 218 n.17 (1982); *Arpaio v. Obama*, 797 F.3d 11, 16 (D.C. Cir. 2015). And the testimony from a single former Field Office Director—extra-record evidence that is inadmissible when evaluating plaintiffs' APA claims—cannot cast any serious doubt on the agencies' understanding of their nationwide resource constraints or undermine the rationality of the memoranda (much less could it demonstrate that the memoranda's explanation constitutes pretext, a demanding standard that would require plaintiffs to show that the explanation was wholly "contrived," *Department of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019)).

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' motion.

Respectfully submitted,

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JULY 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 5600 words. This Motion complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

/s/ Sean Janda
SEAN JANDA

No. 21-16118

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA; MARK BRNOVICH, in his official capacity as Attorney General of Arizona; STATE OF MONTANA,
Plaintiffs-Appellants,
v.
U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES OF AMERICA; ALEJANDRO N. MAYORKAS, in his official capacity as Secretary of Homeland Security; TROY A. MILLER, in his official capacity as Acting Commissioner of U.S. Customs and Border Protection; TAE JOHNSON, in his official capacity as Acting Director of U.S. Immigration and Customs Enforcement; TRACY RENAUD, in her official capacity as Acting Director of U.S. Citizenship and Immigration Services,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona

SUPPLEMENTAL ADDENDUM TO RESPONSE TO EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

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

Plaintiffs,

v.

United States Department of Homeland Security; United States of America; Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security; Troy Miller, in his official capacity as Acting Commissioner of United States Customs and Border Protection; Tae Johnson, in his official 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

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is a suit to enforce bedrock requirements of immigration and administrative law, as well as binding commitments made by the U.S. Department of Homeland Security ("DHS") to Arizona and Montana.

2. On January 20, 2021, DHS's Acting Secretary announced a policy that flouts entire swaths of immigration law for 100 days. Exhibit A. Specifically, Defendants intend to halt nearly all deportations during that time, including all or nearly all deportations of unauthorized aliens not lawfully present in Arizona. As long as those unauthorized aliens have not committed crimes related to terrorism and espionage, they are not subject to deportation under this policy.[1] And because DHS detention capacity is limited, on information and belief, a necessary consequence of DHS's policy is that individuals will be released into Arizona communities. On information and belief, DHS has already admitted that some aliens were released in the very first days of the 100-day moratorium.

3. Arizona, as a border state, will be directly impacted by Defendants' decision to flout their legal obligations. Arizona's law enforcement community is particularly concerned that aliens who have been charged or convicted of crimes will be released as a result of DHS's 100-day moratorium. Moreover, Arizona's law enforcement community is particularly concerned that releasing individuals during the COVID-19 pandemic will further stress hospitals, jails, and other social services at the local and county level.

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[1] While the DHS has created a limited exception for aliens for whom "removal is required by law," that requires an "individualized determination" by the Acting Director of ICE following consultation with the General Counsel, which is unlikely to encompass more than a very small group of people. Also, while the memorandum also provides an exception (at 4 n.2) for "voluntary waiver," which it states "encompasses noncitizens who stipulate to removal as part of a criminal disposition," that would not apply to aliens who refuse to stipulate to removal. The fact that DHS has not included serious violent crimes within the express exceptions to its policies indicates that DHS has not excluded unauthorized aliens that have committed such crimes from its 100-day moratorium.

4. Montana will be directly impacted by Defendants' decision to abdicate their legal obligations. Montana's law enforcement community is particularly concerned that DHS's 100-day moratorium will exacerbate the serious drug trafficking problems associated with illegal immigration that have afflicted communities across the state. Drug trafficking and the resulting drug-related crime and drug use threaten public safety and put a strain on Montana's limited law enforcement resources.

5. Federal law on this issue is clear: "[W]hen an alien is ordered removed, the Attorney General *shall* remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a) (emphasis added). But, in Defendants' view, "shall" does not really mean "shall" or "must," but instead merely "may." In other words, despite a clear mandate of federal statutory law, Defendants believe that there are literally no constraints whatsoever on their authority, and they may release individuals, including those charged with or convicted of crimes, even when immigration courts have already ordered their removal from the United States.

6. A federal court in Texas has already considered similar claims brought by the State of Texas. *See Texas v. United States*, Case No. 6:21-cv-00003 (S.D. Tex., filed January 22, 2021). That court concluded that Defendants likely violated applicable legal requirements and entered a 14-day nationwide temporary restraining order on January 26, 2021. Dkt. No. 21, __ F. Supp. 3d. ___, 2021 WL 247877 (S.D. Tex. Jan. 26, 2021), attached as Exhibit B. This suit raises many of the same claims asserted by Texas, including those that the Southern District of Texas concluded are likely meritorious in its initial order. *Id.* at *3-*5.

7. On February 23, 2021, the Texas court also issued a memorandum opinion and order granting Texas's motion for preliminary injunction. Dkt. No. 85, 2021 WL 723856 (S.D. Tex. Feb. 23, 2021), Exhibit K.

8. This challenged policy is called the "Immediate 100-Day Pause on Removals" by DHS, which was promulgated by the "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities" memorandum issued January 20, 2021 by Acting Secretary Pekoske (the "Memorandum"), attached as Exhibit A.

9. This action also challenges the "Interim Guidance," issued by the Acting Director of ICE on February 18, 2021, which purports to supersede the Memorandum to the extent the two conflict. *See* Exhibit G. This Interim Guidance was simply an attempt to quickly paper over the sparse administrative record without materially changing the Memorandum's substance, and it cannot cure the glaring legal defects in underlying the Memorandum.

10. Although the moratorium in the Memorandum is purportedly for 100 days, and in the Interim Guidance for 90 days, no apparent limiting factor is explained: if this action is permitted to stand, DHS could re-assert this suspension power for a longer period or even indefinitely, thus allowing the current Administration to unilaterally amend the immigration laws as applied to the vast majority of the removable or inadmissible aliens in this country without the required congressional act. The Constitution and controlling statutes prevent such a seismic change to this country's immigration laws by mere memorandum.

PARTIES

11. Plaintiff State of Arizona is a sovereign state of the United States of America represented by Arizona Attorney General Mark Brnovich. Arizona sues to vindicate its sovereign, quasi-sovereign, and proprietary interests. The Attorney General is the chief legal officer of the State of Arizona, and has the authority to represent the State in federal court.

12. Mark Brnovich is the Attorney General of Arizona. He directs and controls the Arizona Attorney General's Office and Arizona Department of Law, which are parties to the "Agreement Between the Department of Homeland Security and the Arizona Attorney General's Office and the Arizona Department of Law" effective January 8, 2021 (the "Arizona Agreement"), attached as Exhibit C.

13. Plaintiff State of Montana is a sovereign state of the United States of America represented by Montana Attorney General Austin Knudsen. The Attorney General is the chief legal officer of the State of Montana, chief law enforcement officer, and director of the Montana Department of Justice, and has the authority to represent the State in federal court. Montana sues to vindicate its sovereign, quasi-sovereign, and proprietary interests.

14. The State of Montana is party to the "Agreement Between the Department of Homeland Security and the State of Montana" (the "Montana Agreement") effective on or about January 11, 2021, attached as Exhibit H.

15. Plaintiffs Arizona and Montana are required to spend state monies on Emergency Medicaid, including for unauthorized aliens. 42 C.F.R. § 440.255(c). Plaintiffs Arizona and Montana are also required to spend state monies on detention facilities. On information and belief, the immigration moratorium will require Plaintiff States to spend at least some money on healthcare, detention, and other services that would otherwise not have to be spent.

16. Defendant United States Department of Homeland Security is a federal agency.

17. Defendant the United States of America is sued under 5 U.S.C. §§ 702–703 and 28 U.S.C. § 1346.

18. Defendant Alejandro Mayorkas is the Secretary of Homeland Security and therefore the "head" of DHS with "direction, authority, and control over it." 6 U.S.C. § 112(a)(2). Defendant Mayorkas is sued in his official capacity.

19. Defendant Troy Miller serves as Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection. Defendant Miller is sued in his official capacity.

20. Defendant Tae Johnson serves as Deputy Director and Senior Official Performing the Duties of Director of U.S. Immigration and Customs Enforcement. Defendant Johnson is sued in his official capacity.

21. Defendant Tracy Renaud serves as the Senior Official Performing the Duties of the Director for U.S. Citizenship and Immigration Services. Defendant Renaud is sued in her official capacity.

JURISDICTION AND VENUE

22. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1346, and 1361, as well as 5 U.S.C. §§ 702-703.

23. The Court is authorized to award the requested declaratory and injunctive relief under 5 U.S.C. § 706, 28 U.S.C. § 1361, and 28 U.S.C. §§ 2201–2202.

24. Venue is proper within this federal district pursuant to 28 U.S.C. § 1391(e) because (1) Plaintiffs State of Arizona and Attorney General Mark Brnovich reside in Arizona and no real property is involved and (2) a "substantial part of the events and omissions giving rise to the claim occurred" in this District—*i.e.*, the non-deportation of aliens and consequent release into Arizona communities.

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FACTUAL AND LEGAL BACKGROUND

The Impact of Immigration on Arizona and DHS's Agreement With Arizona Law Enforcement Agencies

25. As a border state, Arizona is acutely affected by modifications in federal policy regarding immigration. Arizona is required to expend its scarce resources when DHS fails to carry out its statutory duty to deport aliens as provided by law. This includes resources expended by Arizona's law enforcement community.

26. Based on DHS's own response to the preliminary injunction in *Texas v. United States*, there are over a million individuals with administratively final orders of removal in the United States.

27. Arizona bears substantial costs of incarcerating unauthorized aliens, which amounts to tens of millions of dollars each year, as reflected by Arizona's State Criminal Assistance Program (SCAAP) requests, the great majority of which are not reimbursed by the federal government.

28. Any delay or pause in the removal of aliens subject to final orders of removal from the United States increases the unreimbursed costs to Arizona of continuing to incarcerate unauthorized aliens who commit crimes due to multiple factors including recidivism.

29. The Memorandum orders DHS to pause removals, including removals of criminal aliens, by 100 days and therefore through recidivism and other factors, will increase the costs to Arizona jails and prisons.

30. By instituting the pause as an officially announced DHS policy, the Memorandum encourages a greater influx of unauthorized aliens into Arizona, further increasing law enforcement costs in Arizona, including costs related to coordinated activity between federal and state law enforcement agencies in the pursuit of suspected unauthorized aliens.

31. Federal law also requires that emergency medical services be provided to unlawfully present aliens. 42 C.F.R. § 440.255(c).

32. Arizona emergency medical providers deliver millions of dollars in medical services to unlawfully present aliens each year. These costs are not fully reimbursed by the federal government or the aliens themselves.

33. While these costs are impactful in typical years, the COVID-19 pandemic makes the potential for harm to Arizona through additional emergency healthcare costs to unauthorized aliens exceptionally high.

34. Any delay or pause in the removal of aliens subject to final orders of removal from the United States necessarily increases the number of unlawfully present aliens in Arizona who are subject to receiving such medical care at the expense of Arizona's healthcare institutions.

35. The Memorandum orders DHS to pause removals, and therefore will increase Arizona's costs of providing emergency medical care to these individuals who would otherwise be removed. Additionally, by instituting the pause as an officially announced DHS policy, the Memorandum encourages a greater influx of unauthorized aliens into Arizona, further increasing the population of unauthorized aliens for whom Arizona must bear the cost of emergency medical care.

36. In light of this state of affairs, the Arizona Attorney General's Office and Arizona Department of Law, agencies of the State of Arizona, through Attorney General Mark Brnovich, entered into the Arizona Agreement with DHS. Ex. C.

37. DHS recognized in the Arizona Agreement that Plaintiffs are "directly and concretely affected by changes to DHS rules and policies that have the effect of easing, relaxing, or limiting immigration enforcement. Such changes can negatively impact [Plaintiff]'s law enforcement needs and budgets ... [and] other important health, safety, and pecuniary interests of the State of Arizona." Ex. C at 1.

38. DHS specifically recognized that "a decrease or pause on ... removals of removable or inadmissible aliens" "result[s] in direct and concrete injuries to [Plaintiff]." Ex. C at 2.

39. Plaintiff committed to "provide information and assistance to help DHS perform its border security, legal immigration, immigration enforcement, national security, and other law enforcement missions in exchange for DHS's commitment to consult [Plaintiff] and consider its views before taking any action ... that could: ... pause or decrease the number of returns or removals of removal or inadmissible aliens from the country." Ex. C at 2.

40. Specifically, DHS is to "[p]rovide [Plaintiff] with 180 days' written notice ... of the proposed action and an opportunity to consult and comment on the proposed action, before taking any such action." Ex. C at 4.

41. In the event of doubt, the Arizona Agreement commits DHS to "err on the side of consulting with" Plaintiff. Ex. C at 4.

42. The Arizona Agreement specifically entitles its parties to injunctive relief "if the parties fail to comply with any of the obligations ... imposed" by the Arizona Agreement. Ex. C at 5.

43. On January 20, 2021, Acting Secretary Pekoske issued the Memorandum, purporting to institute an "Immediate 100-Day Pause on Removals." Ex. A at 3.

44. The Memorandum establishes a "Comprehensive Review of Enforcement Policies and Priorities" to be conducted within 100 days from the date of the Memorandum. Ex. A at 2.

45. During, and "pending the completion of the review set forth," Acting Secretary Pekoske "direct[s] an immediate pause on removals of any noncitizen with a final order of removal ... for 100 days to go into effect as soon as practical and no later than January 22, 2021." Ex. A at 3.

46. "The pause on removals applies to any noncitizen present in the United States when this directive takes effect with a final order of removal except one who: ... has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to the national security of the United States; or" was not "physically present" or voluntarily waived "any rights to remain," or "[f]or whom the Acting Director of ICE ... makes an individualized determination that removal is required by law." Ex. A at 3-4.

DHS's Refusal to Even Consult with Arizona Law Enforcement Notwithstanding its Agreement

47. Defendant DHS did not consult with Plaintiffs prior to the Memorandum, nor did it provide 180 days written notice of the policies embodied in the Memorandum.

48. Plaintiff Mark Brnovich wrote Acting Secretary Pekoske on January 26, 2021, requesting that DHS comply with the Arizona Agreement before instituting the policy change described in the Memorandum. Exhibit D.

49. After the Arizona Attorney General's Office received no response, the Chief Deputy Attorney General sent a follow-up email on February 1, 2021, on behalf of Attorney General Brnovich, reiterating the request to at least participate in the consultative process agreed to by the parties before DHS change immigration enforcement in Arizona. Exhibit E.

50. On February 2, 2021, the Attorney General's Office received a response signed by Acting Secretary Pekoske completely refusing to engage in any consultative process, provide any further reasoning as to why DHS adopted the 100-day pause, and instead instructing the Arizona Attorney General to "direct any further correspondence concerning the [Arizona Agreement] to the Department of Justice." Exhibit F.

The Impact of Unremoved Illegal Immigrants on Montana's Finances and Public Safety and DHS's Agreement with Montana

51. Plaintiff Montana is acutely affected by modifications in federal policy regarding immigration. Montana is required to stretch its scarce resources even further when DHS fails to carry out its statutory duty to deport aliens as required by law. This includes resources expended by Montana's law enforcement community to combat drug trafficking, drug-related crime, and drug use.

52. Montana has approximately 4,000-5,000 unauthorized aliens living in the state.[2]

53. In addition to the law-enforcement costs incurred by cooperating with DHS immigration enforcement, the State of Montana bears the costs of unauthorized aliens, including their US-born children, and is forced to expend resources on education, healthcare, public assistance, and general government services.

54. Because Montana has no state sales tax, many unauthorized aliens pay virtually no state taxes. Therefore, the costs of all the public services they consume are borne by lawfully present taxpayers.

55. Massive quantities of illegal drugs are transported into the United States across the southern border. These drugs end up in many states, including Montana.

56. Unauthorized aliens crossing the southern border and illegally present in the United States facilitate the trafficking of lethal drugs such as methamphetamine and heroin into Montana.

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[2] The number of unauthorized aliens is notoriously difficult to calculate. Several studies, however, estimate the number of unauthorized aliens in Montana to be in this approximate range. *See, e.g.*, *Unauthorized Immigrant Population Profiles*, Migration Policy Institute, https://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles#MT (4,000); *U.S. unauthorized immigrant population estimates by state*, Pew Research Center (2016), https://www.pewresearch.org/hispanic/interactives/u-s-unauthorized-immigrants-by-state/ (less than 5,000); *The Fiscal Burden of Illegal Immigration*, Federation for American Immigration Reform (2017), http://fairus.org/sites/default/files/2017-09/Fiscal-Burden-of-Illegal-Immigration-2017.pdf (less than 6,000).

57. The influx of illicit drugs, as well as the gangs and cartels that traffic it across the southern border, have led to a sharp increase in drug use and drug-related crime in Montana.

58. The drug trafficking, drug-related crime, and drug use associated with illegal immigration are a direct threat to public safety in Montana's residents and communities.

59. To protect its citizens and help stem the tide of drug trafficking and drug-related crime, Montana entered into the Montana Agreement with DHS on or about January 11, 2021. Exhibit H. The terms of the Montana Agreement between Plaintiff Montana and DHS are identical to the terms of the Arizona Agreement between Plaintiff Arizona and DHS. Exhibit C, Exhibit H.

60. In the Montana Agreement, DHS recognized that Montana, "like other states and municipalities, is directly and concretely affected by changes to DHS rules and polices that have the effect of easing, relaxing, or limiting immigration enforcement." Exhibit H at 1.

61. DHS further acknowledged that "[s]uch changes can negatively impact [Plaintiff Montana's] law enforcement … needs and budgets … as well as its other health, safety, and pecuniary interests." Exhibit H at 1. Specifically, DHS agreed that "a decrease or pause on returns or removals of removable or inadmissible aliens" was one of several actions that would "result in direct and concrete injuries to [Plaintiff Montana], including increasing the rate of crime." Exhibit H at 1-2.

62. Plaintiff Montana agreed to "provide information and assistance to help DHS perform its border security, legal immigration, immigration enforcement, national security, and other law enforcement missions in exchange for DHS's commitment to consult [Plaintiff Montana] and consider its views before taking any action ... that could:

... pause or decrease the number of returns or removals of removal or inadmissible aliens from the country." Exhibit H at 2.

63. Specifically, DHS is to "[p]rovide [Plaintiff Montana] with 180 days' written notice ... of the proposed action and an opportunity to consult and comment on the proposed action, before taking any such action." Exhibit H at 3.

64. In the event of doubt, the Montana Agreement commits DHS to "err on the side of consulting with" Plaintiff Montana. Exhibit H at 4.

65. The Montana Agreement specifically entitles its parties to injunctive relief "if the parties fail to comply with any of the obligations ... imposed" by the Agreement. Exhibit H at 4.

66. On January 20, 2021, Acting Secretary Pekoske issued the Memorandum, purporting to institute an "Immediate 100-Day Pause on Removals." Ex. A at 3.

67. During, and "pending the completion of the review set forth," Acting Secretary Pekoske "direct[s] an immediate pause on removals of any noncitizen with a final order of removal ... for 100 days to go into effect as soon as practical and no later than January 22, 2021." Ex. A at 3.

68. "The pause on removals applies to any noncitizen present in the United States when this directive takes effect with a final order of removal except one who: ... has engaged in or is suspected of terrorism or espionage, or otherwise poses a danger to the national security of the United States; or" was not "physically present" or voluntarily waived "any rights to remain," or "[f]or whom the Acting Director of ICE ... makes an individualized determination that removal is required by law." Ex. A at 3-4.

DHS's Failure to Consult with Montana Law Enforcement Pursuant to the Montana Agreement

69. Defendant DHS did not consult with Plaintiffs prior to the Memorandum, nor did it provide 180 days written notice of the policies embodied in the Memorandum.

70. Plaintiff Montana's Governor and Attorney General wrote Acting Secretary Pekoske on February 1, 2021, requesting that DHS comply with the Montana Agreement before instituting the policy change described in the Memorandum. Exhibit I.

71. On February 2, 2021, the Montana Attorney General's Office received a response signed by Acting Secretary Pekoske completely refusing to engage in any consultative process, provide any further reasoning as to why DHS adopted the 100-day pause, and instead instructing the Montana Attorney General to "direct any further correspondence concerning the [Montana Agreement] to the Department of Justice." Exhibit J.

DHS's Issuance of the Interim Guidance and Failure to Consult with Arizona or Montana Law Enforcement Pursuant to the Agreements

72. On February 18, 2021 the Acting Director of ICE, issued "Interim Guidance," which purports to supersede the Memorandum to the extent the two conflict. *See* Exhibit G.

73. This Interim Guidance did not materially change the substance of the Memorandum as far as pausing removals of all but a few narrow categories of unauthorized aliens with final removal orders, and instead was simply an attempt to quickly paper over the sparse administrative record without materially changing the Memorandum's substance.

74. DHS did not provide prior notice or consult with the Arizona Attorney General, Arizona Attorney General's Office, or Arizona Department of Law prior to the Acting ICE Director issuing the Interim Guidance.

75. DHS did not provide prior notice or consult with the Montana Governor, Montana Attorney General, or Montana Attorney General's Office prior to the Acting ICE Director issuing the Interim Guidance.

CLAIMS FOR RELIEF

COUNT I

Failure To Provide Notice And Consult Per The Agreements

76. The allegations in the preceding paragraphs are reincorporated herein.

77. The Memorandum was promulgated without providing notice to or consulting with Plaintiffs, as required by both the Arizona Agreement and the Montana Agreement. Exhibit C at 3-4, Exhibit H at 3-4.

78. The Interim Guidance likewise was promulgated without providing notice to or consulting with Plaintiffs, as required by both the Arizona Agreement and the Montana Agreement.

79. Thus, the Memorandum and Interim Guidance are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the Administrative Procedures Act ("APA"). 5 U.S.C. § 706(2)(A).

80. Thus, the Memorandum and Interim Guidance were issued "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

81. Due to the Memorandum and Interim Guidance, Plaintiffs "will be irreparably damaged and will not have an adequate remedy at law" and are thus also "entitled to injunctive relief." Exhibit C at 5.

COUNT II

Violation Of 8 U.S.C. § 1231

82. The allegations in the preceding paragraphs are reincorporated herein.

83. The Memorandum and Interim Guidance pause the operation of the vast majority of extant removal orders for 100 days.

84. Federal statute requires "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A).

85. Each removal order affected by, and not individually exempted from, the "pause" is incapable of being fulfilled within the required statutory period.

86. 8 U.S.C. § 1231 does not empower Defendants to alter the 90-day deadline, and compliance with the deadline may only be excused based on malfeasance by the alien. *See* 8 U.S.C. § 1231(a)(1)(C).

87. The Memorandum and Interim Guidance therefore violate the APA, as they are both "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(A), (C).

COUNT III

Failure To Follow Notice And Comment

88. The allegations in the preceding paragraphs are reincorporated herein.

89. The Memorandum and Interim Guidance are rules obligated to follow notice-and-comment rulemaking under the APA. 5 U.S.C. § 553.

90. The Memorandum and Interim Guidance are not interpretive rules, general statements of policy, nor are they rules of agency organization, procedure, or practice otherwise exempt from notice-and-comment rulemaking.

91. Thus, the Memorandum and Interim Guidance must be "held unlawful and set aside" as they were promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

COUNT IV

Arbitrary and Capricious Agency Action

92. The allegations in the preceding paragraphs are reincorporated herein.

93. APA prohibits agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

94. The Memorandum and Interim Guidance represent a sharp departure from DHS's previous policy. Because Defendants have not provided a reasoned justification for their sudden change in policy, the issuance of the Memorandum and Interim Guidance is arbitrary and capricious.

95. There is no indication that Defendants considered the costs of adopting the Memorandum and Interim Guidance, including the threats to public safety. This failure renders the resulting agency action arbitrary and capricious.

96. There is also no indication that Defendants considered alternative approaches that would allow at least some additional removals to continue beyond the extremely limited exceptions in the Memorandum and Interim Guidance. This would include aliens charged or convicted of crimes. The Supreme Court recently held that a DHS immigration action was arbitrary and capricious where it was issued "'without any consideration whatsoever' of a [more limited] policy." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912 (2020) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983)). The same result should obtain here.

COUNT V

Pre-textual Agency Action

97. The allegations in the preceding paragraphs are reincorporated herein.

98. The Interim Guidance that the Acting Director of ICE issued on February 18, 2021 was simply an attempt to quickly paper over the sparse administrative record without changing the Removal Moratorium's substance.

99. The Interim Guidance cannot cure the glaring legal defects in underlying the Removal Moratorium, and therefore the Memorandum and Interim Guidance must be remanded to DHS. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019) (uncontested that decision resting on "pretextual basis" "warrant[s] a remand to the

agency").

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court enter judgment:

A. Declaring that the Memorandum and Interim Guidance were issued in violation of the Arizona Agreement;

B. Declaring that the Memorandum and Interim Guidance were issued in violation of the Montana Agreement;

C. Declaring that the Memorandum and Interim Guidance were issued in violation of 8 U.S.C. § 1231;

D. Declaring that the Memorandum and Interim Guidance were issued without observance of procedure required by law;

E. Postponing the effective date of the Memorandum and Interim Guidance pursuant to 5 § U.S.C. 705.

F. Vacating the Memorandum and Interim Guidance and enjoining Defendants from applying it;

G. Declaring that the pretextual nature of the Interim Guidance warrants a remand to DHS.

H. Awarding Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, pursuant to 28 U.S.C. § 2412; and

I. Granting any and all other such relief as the Court finds appropriate.

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RESPECTFULLY SUBMITTED this 8th day of March, 2021.

MARK BRNOVICH
ATTORNEY GENERAL

By /s/ *Anthony R. Napolitano*
Joseph A. Kanefield (No. 15838)
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/s/ David M.S. Dewhirst (with permission)
David M.S. Dewhirst*
Solicitor General
**Pro hac vice application forthcoming*

Attorneys for Plaintiff State of Montana

Exhibit 2

Declaration of Peter B. Berg

ECF No. 23-3, Florida v. United States, No. 8:21-cv-541 (M.D. Fla.)

March 23, 2021

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

STATE OF FLORIDA, Plaintiff, v. The UNITED STATES OF AMERICA, et al., Defendants.	Civil Docket No. 8:21-cv-541-CEH-SPF

DECLARATION OF PETER B. BERG

I, Peter B. Berg, declare the following under 28 U.S.C. § 1746, and state that under penalty of perjury the following is true and correct to the best of my knowledge and belief:

I. Personal Background

1. I am currently employed by the U.S. Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) as the Acting Deputy Executive Associate Director. I have held this position since October 5, 2020. As Acting Deputy Executive Associate Director, I oversee the mission of ERO's seven Headquarters divisions: Enforcement, Removal, Custody Management, Field Operations, ICE Health Service Corp, Law Enforcement Systems and Analysis, and Operations Support.
2. Prior to this position, I served as the Assistant Director for Field Operations from June 21, 2020 through October 4, 2020. In this capacity, I was responsible for the oversight, direction, and coordination of immigration enforcement activities, programs, and initiatives carried out by ERO's 24 Field Offices. I further managed ERO's Field

Operations Headquarters components, including Domestic Operations, Special Operations, and Law Enforcement Systems and Analysis.[1]

3. I have been a career law enforcement officer since 1996, serving in various capacities with both ICE and the former Immigration and Naturalization Service (INS). Other leadership positions I have held within ICE include: Field Office Director and Deputy Field Office Director for the ERO St. Paul Field Office, Acting Deputy Assistant Director for the ERO Headquarters Criminal Alien Division, and Acting Deputy Assistant Director for the ERO Headquarters Field Operations Division.

4. This declaration is based on my personal knowledge and experience as a law enforcement officer and on information provided to me in my official capacity.

II. Overview of ERO

5. Following enactment of the Homeland Security Act of 2002, ICE was created from elements of several legacy agencies, including INS and the U.S. Customs Service. ICE is the principal investigative arm of DHS, and its primary mission is to promote homeland security and public safety through the enforcement of criminal and civil federal laws governing border control, customs, trade, and immigration. Within ICE, ERO oversees programs and conducts operations to identify and apprehend removable noncitizens, to detain these individuals when necessary, and to remove noncitizens with final orders of removal from the United States. ERO manages and oversees all aspects of the removal process within ICE, including domestic transportation, detention, alternatives to detention programs, bond management, supervised release, and removal to more than 170 countries around the world. As part of the removal process, ERO manages a non-detained docket

[1] ERO Law Enforcement Systems and Analysis has since become a separate ERO Headquarters division.

of more than 3.2 million cases, which includes noncitizens currently in removal proceedings and those who have already received removal orders and are pending physical removal from the United States.

6. ERO's detention network includes over 200 detention facilities nationwide. Under normal conditions, ERO generally detains near the border "short-term" cases apprehended at the border (for example, those who are detained pending the expedited removal and credible fear process). ERO generally transfers into the interior "longer-term" cases (for example, those who are detained pending removal proceedings before an immigration judge). ERO removes from the United States noncitizens who are subject to a final order of removal issued either by the Department of Justice's Executive Office for Immigration Review (EOIR) or an immigration officer. Removals can require a combination of significant resources, and the process varies depending on the destination country. ERO must ensure that the noncitizen to be removed has the appropriate paperwork and/or travel documents required by the destination country; in some instances, this requires an in-person interview at the destination country's consulate. ERO effectuates escorted and unescorted removals using charter flights and commercial airlines. ERO also conducts routine domestic transfer and removal missions utilizing a Commercial Aviation Services contract with an air charter provider commonly referred to as ICE Air. In addition to removals by air, ERO also removes noncitizens via ground transportation to contiguous countries. This process involves planning and coordinating removals across the country and developing and implementing strategies to support the return of removable noncitizens to their country of origin. At the onset of the COVID-19 pandemic, airport closures and commercial flight cancellations caused a significant

reduction in the ability of ICE to utilize commercial flights for removals. In addition, ERO set a nationwide goal to reduce the capacity usage of all dedicated ICE facilities to under 70% to help mitigate the impact of COVID-19.

III. Guidance for Immigration Enforcement and Removal Actions

7. On January 20, 2021, President Biden issued Executive Order (EO) 13993, Revision of Civil Immigration Enforcement Policies and Priorities, setting out an immediate "reset [of] policies and practices for enforcing civil immigration laws." *See* 86 Fed. Reg. 7051 (Jan. 25, 2021). That same day, Acting Secretary of Homeland Security David Pekoske issued a memorandum titled, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Pekoske Memorandum), to implement the EO by ordering a review of enforcement policies and redirecting resources to new priorities in the interim. In Section C of the Pekoske Memorandum, the Acting Secretary ordered a 100-day pause on the execution of most removal orders so that "DHS's limited resources" could be shifted to "provide sufficient staff and resources to enhance border security" and other operations at the southwest border and to "protect the health and safety of DHS personnel" and the public in light of the ongoing COVID-19 pandemic. However, the 100-day pause set forth in Section C of the Pekoske memorandum was enjoined and is not currently in effect.[2] Even absent the injunction, the removal pause would expire on April 30, 2021.

[2] On January 26, 2021, the U.S. District Court for the Southern District of Texas issued a temporary restraining order (TRO) enjoining DHS and its components from enforcing and implementing Section C of the Interim Memorandum titled, *Immediate 100-Day Pause on Removals*. *See Texas v. United States*, --- F. Supp. 3d ---, 2021 WL 247877 (S.D. Tex. 2021); *see also Texas v. United States*, 2021 WL 411441 (S.D. Tex. Feb. 8, 2021) (extending TRO to Feb. 23, 2021). On February 23, 2021, the district court issued an order preliminarily enjoining DHS from "enforcing and implementing the policies described in . . . Section C." *Texas v. United States*, No. 6:21-00003, ECF No. 85 (S.D. Tex. Feb. 23, 2021).

8. Although noting that "nothing in th[e] memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not identified as priorities[,]" the Pekoske Memorandum set forth interim priorities applicable to "not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action or parole." Those priorities include: (1) "national security" cases, defined as "[i]ndividuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension, arrest and/or custody is otherwise necessary to protect the national security of the United States"; (2) "border security" cases, defined as "[i]ndividuals apprehended at the border or ports of entry while attempting to unlawfully enter the United States on or after November 1, 2020, or who were not physically present in the United States before November 1, 2020"; and (3) "public safety" cases, defined as "[i]ndividuals incarcerated within federal, state, and local prisons and jails released on or after the issuance of this memorandum who have been convicted of an 'aggravated felony,' as that term is defined in section 101(a) (43) of the Immigration and Nationality Act at the time of conviction, and are determined to pose a threat to public safety."

9. On February 18, 2021, ICE's Acting Director, Tae D. Johnson, issued interim guidance titled, *Civil Immigration Enforcement and Removal Priorities.* Tae D. Johnson, Acting Director, *Interim Guidance*: *Civil Immigration Enforcement and Removal Priorities* (Johnson Memorandum) (Feb. 18, 2021), which implements with revisions the priorities set forth in the Pekoske Memorandum. This guidance is in place until such time as

Secretary Mayorkas issues new guidance. The Johnson Memorandum lays out a process to allocate ICE's limited law enforcement resources to achieve its mission by focusing on three "presumed priorities": national security, border security, and public safety. Further, the Johnson Memorandum emphasizes that there are additional enforcement priorities outside of the three noted above. Under the Johnson Memorandum, ICE has continued the arrest and removal of individuals who meet the three presumed priorities, as well as those who constitute "other priorities." Under this guidance, no immigration enforcement action or removal is categorically prohibited. Rather, actions that do not meet the described priority criteria require approval by the responsible ERO Field Office Director or Homeland Security Investigations Special Agent in Charge. Since the effective date of the Johnson Memorandum, law enforcement actions have regularly been approved in other priority cases; examples range from non-aggravated felon sexual predators, individuals with warrants from foreign governments identified by an INTERPOL issued "Red Notice", and individuals with violent criminal convictions such as aggravated assault. ICE has been gathering data and developing metrics based on its operationalization of these interim priorities. This data will assist in developing the department-wide guidance, which ICE expects in the next two or three months.

IV. Harm to ICE from Grant of Preliminary Injunction

10. I am aware that Plaintiff is seeking a preliminary injunction of the Johnson Memorandum.[3] An injunction enjoining implementation of the Johnson Memorandum would impact ICE in a number of ways.

[3] Plaintiff also seeks an injunction of Section C of the Pekoske Memorandum, *Immediate 100-day Pause of Removals*, but that has already been enjoined and is not effect. And, it will expire on its own terms on April 30, 2021.

Inability to Prioritize Use of Finite Resources

11. Without the nationwide perspective of HQ, individual immigration officers may prioritize different types of cases based upon only their local experiences, which will of course vary. This could force ICE to revert to a policy that is not tailored to the current operational realities faced by ICE and the resources available to the agency.

12. For these reasons, the INS, one of DHS's predecessor agencies, has exercised prosecutorial discretion and had policies guiding such exercise since as early as 1909. *See* Department of Justice Circular Letter Number 107, dated September 20, 1909, dealing with the institution of proceedings to cancel naturalization; *see also* Sam Bernsen, INS General Counsel, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* (July 15, 1976). DHS has continued to issue guidance on prosecutorial discretion and enforcement priorities throughout its history. *See* Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to All Field Office Directors, All Special Agents in Charge, All Chief Counsel (June 17, 2011).

13. ERO is predominately responsible for the enforcement of immigration law in the interior of the United States. Accordingly, ERO arrests, detains, and removes noncitizens who have been ordered removed from the United States and manages the oversight of the lifecycle of the DHS enterprise-wide caseload of individuals in removal proceedings or subject to a final order of removal. At present, ERO manages the caseload of over 3.2 million noncitizens currently in removal proceedings or who have been issued final orders of removal.

14. ERO is currently appropriated to fund 34,000 detention beds to support its mission to enforce immigration law. Due to this finite number of detention beds, ERO is positioned

to prioritize its detention resources to support the detention of noncitizens who are generally convicted criminals, subject to mandatory detention under immigration law, and/or recent border entrants.

15. The implementation of the enforcement priorities set forth in the Pekoske Memorandum and the Johnson Memorandum assisted ERO in re-tasking personnel to support operations in the Southwest Border and address the current situation at the border. At present, ERO is supporting the law enforcement activity effectuated by CBP and its associated 482,371 enforcement actions that have occurred in Fiscal Year 2021 up to February. *See* CBP Enforcement Statistics Fiscal Year 2021, https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics (last visited Mar. 19, 2021).

16. Like the career immigration officers employed by ICE, the ICE legal office, the Office of the Principal Legal Advisor (OPLA), would be specifically impacted if the Pekoske Memorandum and Johnson Memorandum are enjoined. By statute, 6 U.S.C. § 252(c), OPLA serves as the legal representative of DHS in removal proceedings before the immigration courts and the Board of Immigration Appeals.

17. The current nationwide immigration court docket stands at nearly 1.3 million cases that are adjudicated by over 500 immigration judges. The docket size has more than doubled since 2016, and the number of immigration judges has nearly done so, while OPLA's own more modest appropriations levels have not allowed it to keep pace with the growth of the docket or immigration bench. Specifically, per ICE's workload staffing model, OPLA's Congressionally authorized staffing level is approximately 220 attorneys short of

that needed to adequately support the workload associated with the current number of judges.

18. As a consequence, OPLA faces genuine constraints on its ability to meaningfully prepare for all cases set for hearings or even attend every such hearing, particularly once the current COVID-19 restrictions that have closed a number of immigration courts continue to lift.

19. The Pekoske Memorandum and Johnson Memorandum provide parameters for OPLA to focus its finite litigation resources on a clear, manageable continuum of cases, while limiting the number of non-priority matters that are added to the docket. If enjoined, the dockets will continue to grow and OPLA will not be in the position to litigate removal proceedings in a fashion that ensures the issuance of removal orders to those who threaten national security, border security, or public safety and the entry of relief orders to noncitizens who merit it.

Lack of Clear Guidance for Nationwide Workforce

20. An injunction would also likely cause confusion among the nearly 6,000 immigration officers employed by ERO regarding whether, and to what extent, any specific policy guidance applies. Absent clear priorities, the nearly 6,000 immigration officers employed by ERO may be left with only very general guidance on the exercise of their discretion, leading to disparate prioritization across the country and a lack of consistency in enforcement actions.

21. Any potential policy or operational confusion due to an injunction could additionally affect ICE's relationship with state and local stakeholders. As a result of its nationwide jurisdiction, ICE must cultivate relationships with numerous state and local partners. To

allow individual states to impose their individual preferences on all stakeholders, as Florida seeks to do, could impair ICE's relationships with those partners.

22. This confusion could, in turn, undermine the authority of career leadership within ICE. To manage a nationwide workforce, these leaders must balance consistency in operations with changing operational needs. An injunction would impair the ability of leadership to adjust to changing conditions.

Adverse Impact on Agency's Deliberative Process

23. The injunction of the interim guidance sought by Plaintiff could interfere with the agency's ongoing deliberative process. The interim guidance issued by Acting Director Johnson seeks to facilitate a dialogue between ICE's field offices, senior leadership, and DHS HQ, about what DHS's immigration enforcement priorities should be, and how they should be expressed. This dialogue will be informed by data, which ICE is gathering through internal approval and tracking tools that are keyed to the interim guidance. Requiring ICE to revert to previous policies could frustrate the agency's ability to evaluate certain enforcement priorities.

This declaration is based upon my personal and professional knowledge, information obtained from other individuals employed by ICE, and information obtained from various records and systems maintained by DHS. I provide this declaration based on the best of my knowledge, information, belief, and reasonable inquiry for the above captioned case.

Signed on this 23rd day of March, 2021.

PETER B BERG Digitally signed by PETER B BERG Date: 2021.03.23 16:47:37 -04'00'

Peter B. Berg
Acting Deputy Executive Associate Director
ICE Enforcement and Removal Operations