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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**

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**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.<sup>1</sup> 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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<sup>1</sup> 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.

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

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

15           6.       A federal court in Texas has already considered similar claims brought by  
16 the State of Texas. *See Texas v. United States*, Case No. 6:21-cv-00003 (S.D. Tex., filed  
17 January 22, 2021). That court concluded that Defendants likely violated applicable legal  
18 requirements and entered a 14-day nationwide temporary restraining order on January 26,  
19 2021. Dkt. No. 21, \_\_\_ F. Supp. 3d. \_\_\_, 2021 WL 247877 (S.D. Tex. Jan. 26, 2021),  
20 attached as Exhibit B. This suit raises many of the same claims asserted by Texas,  
21 including those that the Southern District of Texas concluded are likely meritorious in its  
22 initial order. *Id.* at \*3-\*5.

23           7.       On February 23, 2021, the Texas court also issued a memorandum opinion  
24 and order granting Texas’s motion for preliminary injunction. Dkt. No. 85, 2021 WL  
25 723856 (S.D. Tex. Feb. 23, 2021), Exhibit K.  
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1           12. Mark Brnovich is the Attorney General of Arizona. He directs and controls  
2 the Arizona Attorney General’s Office and Arizona Department of Law, which are parties  
3 to the “Agreement Between the Department of Homeland Security and the Arizona  
4 Attorney General’s Office and the Arizona Department of Law” effective January 8, 2021  
5 (the “Arizona Agreement”), attached as Exhibit C.

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

18           43. On January 20, 2021, Acting Secretary Pecoske issued the Memorandum,  
19 purporting to institute an “Immediate 100-Day Pause on Removals.” Ex. A at 3.

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

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



1                   **The Impact of Unremoved Illegal Immigrants on Montana’s Finances and**  
2                                   **Public Safety and DHS’s Agreement with Montana**

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

8           52. Montana has approximately 4,000-5,000 unauthorized aliens living in the  
9 state.<sup>2</sup>

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

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

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

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

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22  
23 <sup>2</sup> The number of unauthorized aliens is notoriously difficult to calculate. Several studies,  
24 however, estimate the number of unauthorized aliens in Montana to be in this approximate  
25 range. See, e.g., *Unauthorized Immigrant Population Profiles*, Migration Policy Institute,  
26 <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).

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

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

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

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

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

22           62. Plaintiff Montana agreed to “provide information and assistance to help  
23 DHS perform its border security, legal immigration, immigration enforcement, national  
24 security, and other law enforcement missions in exchange for DHS’s commitment to  
25 consult [Plaintiff Montana] and consider its views before taking any action ... that could:  
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1 ... pause or decrease the number of returns or removals of removal or inadmissible aliens  
2 from the country.” Exhibit H at 2.

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

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

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

11 66. On January 20, 2021, Acting Secretary Pecoske issued the Memorandum,  
12 purporting to institute an “Immediate 100-Day Pause on Removals.” Ex. A at 3.

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

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

23 **DHS’s Failure to Consult with Montana Law Enforcement Pursuant to the**  
24 **Montana Agreement**

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

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

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

10           **DHS’s Issuance of the Interim Guidance and Failure to Consult with Arizona or**  
11                           **Montana Law Enforcement Pursuant to the Agreements**

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

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

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

23           75. DHS did not provide prior notice or consult with the Montana Governor,  
24 Montana Attorney General, or Montana Attorney General’s Office prior to the Acting ICE  
25 Director issuing the Interim Guidance.  
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**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).







1 agency”).

2 **PRAYER FOR RELIEF**

3 Plaintiffs respectfully request that this Court enter judgment:

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

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

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

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

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

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

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

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

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

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1 RESPECTFULLY SUBMITTED this 8th day of March, 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)

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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 application forthcoming*

20 *Attorneys for Plaintiff State of Montana*