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12 **UNITED STATES DISTRICT COURT**
 13 **DISTRICT OF ARIZONA**

14 STATE OF ARIZONA and MARK
 15 BRNOVICH, in his official capacity as
 16 Attorney General of Arizona,

17 Plaintiffs,

18 v.

19 UNITED STATES DEPARTMENT OF
 20 HOMELAND SECURITY; UNITED
 21 STATES OF AMERICA; ALEJANDRO
 22 MAYORKAS, in his official capacity as
 23 Secretary of Homeland Security; TROY
 24 MILLER, in his official capacity as
 25 Acting Commissioner of United States
 26 Customs and Border Protection; TAE
 27 JOHNSON, in his official capacity as
 28 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. _____

**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’s law enforcement community, through its Attorney General.

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

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.

1 COVID-19 pandemic will further stress hospitals and social services at the local and
2 county level.

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

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

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

24 7. Although the moratorium is purportedly for 100 days, no apparent limiting
25 factor is explained: if this action is permitted to stand, DHS could re-assert this
26 suspension power for a longer period or even indefinitely, thus allowing the current

1 Administration to unilaterally amend the immigration laws as applied to the vast
2 majority of the removable or inadmissible aliens in this country without the required
3 congressional act. The Constitution and controlling statutes prevent such a seismic
4 change to this country’s immigration laws by mere memorandum.

5 **PARTIES**

6 8. Plaintiff State of Arizona is a sovereign state of the United States of
7 America represented by Arizona Attorney General Mark Brnovich. The Attorney
8 General is the chief legal officer of the State of Arizona, and has the authority to
9 represent the State in federal court.

10 9. Mark Brnovich is the Attorney General of Arizona. He directs and
11 controls the Arizona Attorney General’s Office and Arizona Department of Law, which
12 are parties to the “Agreement Between the Department of Homeland Security and the
13 Arizona Attorney General’s Office and the Arizona Department of Law” effective
14 January 8, 2021 (the “Agreement”), attached as Exhibit C.

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

17 11. Defendant the United States of America is sued under 5 U.S.C. §§ 702–
18 703 and 28 U.S.C. § 1346.

19 12. Defendant Alejandro Mayorkas is the Secretary of Homeland Security and
20 therefore the “head” of DHS with “direction, authority, and control over it.” 6 U.S.C.
21 § 112(a)(2). Defendant Mayorkas is sued in his official capacity.

22 13. Defendant Troy Miller serves as Senior Official Performing the Duties of
23 the Commissioner of U.S. Customs and Border Protection. Defendant Miller is sued in
24 his official capacity.
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1 14. Defendant Tae Johnson serves as Deputy Director and Senior Official
2 Performing the Duties of Director of U.S. Immigration and Customs Enforcement.
3 Defendant Johnson is sued in his official capacity.

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

7 **JURISDICTION AND VENUE**

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

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

12 18. Venue is proper within this federal district pursuant to 28 U.S.C. § 1391(e)
13 because (1) Plaintiffs reside in Arizona and no real property is involved and (2) a
14 “substantial part of the events and omissions giving rise to the claim occurred” in this
15 District—*i.e.*, the non-deportation of aliens and consequent release into Arizona
16 communities.

17 **FACTUAL AND LEGAL BACKGROUND**

18 **The Impact of Immigration on Arizona and DHS’s Agreement**
19 **With Arizona Law Enforcement Agencies**

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

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

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

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

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

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

18 25. In the event of doubt, the Agreement commits DHS to “err on the side of
19 consulting with” Plaintiff. Ex. C at 4.

20 26. The Agreement specifically entitles its parties to injunctive relief “if the
21 parties fail to comply with any of the obligations ... imposed” by the Agreement. Ex. C
22 at 5.

23 27. On January 20, 2021, Acting Secretary Pecoske issued the Memorandum,
24 purporting to institute an “Immediate 100-Day Pause on Removals.” Ex. A at 3.
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1 28. The Memorandum establishes a “Comprehensive Review of Enforcement
2 Policies and Priorities” to be conducted within 100 days from the date of the
3 Memorandum. Ex. A at 2.

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

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

14 **DHS’s Refusal to Even Consult with Arizona Law Enforcement Notwithstanding**
15 **its Agreement**

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

18 32. Plaintiff Mark Brnovich wrote Acting Secretary Pekoske on January 26,
19 2021, requesting that DHS comply with the Agreement before instituting the policy
20 change described in the Memorandum. Exhibit D.

21 33. After the Arizona Attorney General’s Office received no response, the
22 Chief Deputy Attorney General sent a follow-up email on February 1, 2021, on behalf of
23 Attorney General Brnovich, reiterating the request to at least participate in the
24 consultative process agreed to by the parties before DHS change immigration
25 enforcement in Arizona. Exhibit E.
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1 42. Federal statute requires “when an alien is ordered removed, the Attorney
2 General shall remove the alien from the United States within a period of 90 days.”
3 8 U.S.C. § 1231(a)(1)(A).

4 43. Each removal order affected by, and not individually exempted from, the
5 “pause” is incapable of being fulfilled within the required statutory period.

6 44. 8 U.S.C. § 1231 does not empower Defendants to alter the 90-day
7 deadline, and compliance with the deadline may only be excused based on malfeasance
8 by the alien. *See* 8 U.S.C. § 1231(a)(1)(C).

9 45. The Memorandum therefore violates the APA, as it is both “arbitrary,
10 capricious, an abuse of discretion, or otherwise not in accordance with law” and “in
11 excess of statutory jurisdiction, authority, or limitations.” 5 U.S.C. § 706(2)(A), (C).

12 **COUNT III**

13 **Failure To Follow Notice And Comment**

14 46. The allegations in the preceding paragraphs are reincorporated herein.

15 47. The Memorandum is a rule obligated to follow notice-and-comment
16 rulemaking under the APA. 5 U.S.C. § 553.

17 48. The Memorandum is not an interpretive rule, a general statement of policy,
18 nor is it a rule of agency organization, procedure, or practice otherwise exempt from
19 notice-and-comment rulemaking.

20 49. Thus, the Memorandum must be “held unlawful and set aside” as it was
21 promulgated “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

22 **COUNT IV**

23 **Arbitrary and Capricious Agency Action**

24 50. The allegations in the preceding paragraphs are reincorporated herein.

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

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

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

RESPECTFULLY SUBMITTED this 3rd day of February, 2021

MARK BRNOVICH
ATTORNEY GENERAL

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