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10 *Attorneys for Plaintiffs State of Arizona*
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12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF ARIZONA**

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

17 Plaintiffs,

18 v.

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

Defendants.

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**pro hac vice granted*

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No. 2:21-cv-00186-SRB

**PLAINTIFFS' 3-PAGE
SUPPLEMENT TO THEIR
SUPPLEMENTAL BRIEF [DKT. 64]**

**(Hearing Set for May 27, 2021, at
10:00 a.m.)**

1 Discovery has uncovered additional evidence supporting Plaintiffs’ burden, further
2 demonstrating both likely success on the merits and irreparable injury in the absence of
3 preliminary relief. This brief supplements the factual record.

4 A core factual dispute here is whether the Interim Guidance merely tells ICE
5 employees to work on certain “priority” cases first and then use remaining time on “other
6 priority” cases with preapproval (*i.e.* a true procedural rule of prioritization based on
7 limited resources), or whether it sets substantive categories of aliens for whom
8 enforcement is presumptively disfavored irrespective of resources.¹ Closely related to
9 this, Plaintiffs contend the limited-resources rationale is pre-textual for the *actual*
10 changes at issue. Dkt. 64 at 10-11. And unlike the mine run non-enforcement challenge,
11 Congress has unequivocally commanded that once an alien receives a final removal
12 order, DHS “shall remove the alien” within 90 days. 8 U.S.C. §1231(a)(1)(A).²

13 If Plaintiffs’ are correct about the Interim Guidance’s purpose and effect, then it is
14 hardly distinguishable from Section C of the January 20 Memorandum, which established
15 a 100-day moratorium on removals for all but certain categories of aliens and was swiftly
16 enjoined by a federal court because it was contrary to §1231(a)(1)(A), arbitrary and
17 capricious, and improperly issued without notice and comment, Dkt. 12-1 at 32-39—
18 conclusions Defendants did not appeal. While ICE, like everyone, operates under limited
19 resources, that truism does not confer *carte blanche* to ignore Title 8 statutes or the APA.

20 **First**, Plaintiffs have already established through the administrative record that
21 (1) the Interim Guidance is unsupported by any tenable rationale, and (2) the scant
22 limited-resources explanation that was given is demonstrably pretextual. Dkt. 64 at 2-4;
23 *see also* Exhibit CC. The January 20 Memorandum was promulgated with no analysis by
24 DHS whatsoever. Section C was swiftly enjoined, at which point ICE briefly returned to

25
26 ¹ *E.g.*, Dkt. 64 at 12 (A rule is not procedural if it “encodes a substantive value judgment”
27 thereby “putting a stamp of [agency] approval or disapproval on a given type of
28 behavior.”); *Colwell v. HHS*, 558 F.3d 1112, 1124 (9th Cir. 2009) (procedural rule must
“*genuinely* leave[] ... decision-makers free to exercise discretion” (emphasis added)).

² Dkt. 70 at 8 (non-enforcement is reviewable when agency has adopted a general policy
that amounts to an abdication of its statutory responsibilities).

1 “normal removal operations,” including removal flights. Dkt. 64 at 3. That quickly upset
2 certain activist groups, who concluded it was “thwart[ing] the new administration’s
3 priorities,” particularly in light of Black History month. *Id.* Then, in the dead of night on
4 2/4, the Acting ICE Director (on whose orders it is unclear) sent an unmistakable signal
5 to senior ICE leadership: “Effective immediately ... only those who meet the [Section B]
6 priorities will be removed.” *Id.* And that substantive value judgment was carried forward
7 to the 2/18 Interim Guidance. Nowhere in the record did DHS actually analyze resource
8 constraints on removals, how the priority categories relate to those constraints, or
9 consider alternatives. *Id.* at 7-8.

10 **Second**, statistical evidence and testimony from Acting Phoenix ICE Director
11 Albert Carter confirm that the changes imposed by the Interim Guidance caused a “big
12 drop off” in various core ICE missions, harming public safety. In February 2021, ICE
13 was only conducting book-ins at 41% and removals at 55% of pre-February 2021 levels.
14 Dkt. 64 at 4-5 (citing Exhibits S, T). And it was only issuing immigration detainers at a
15 similarly small fraction. Dkt. 70 at 4 (citing Exhibit BB). Director Carter’s testimony³
16 confirmed these drop-offs and the Interim Guidance as their sole cause:

17 ICE Arrests: He agreed there was a “big drop-off in ICE arrests from before” 2/2021
18 to after 2/2021. Ex. DD 73:10-14. He confirmed that, prior to 2/2021, ICE was
19 already prioritizing arrests of aliens who threaten national security, were more recent
20 entrants into the country, or have significant criminal records. *Id.* at 73:21-74:7. He
21 agreed with data showing 86% and 92% of ICE arrests in recent years were for aliens
22 with criminal convictions or charges. *Id.* at 67:19-23, 157:14-22. Importantly, he
23 testified that, other than the Interim Guidance priorities, he cannot think of any new
24 factor that was in effect in 2/2021 that could account for the sudden dropoff, including
25 COVID-19. *Id.* at 74:15-75:15. And he confirmed that he has sufficient monetary
and other resources to effect his mission. *Id.* at 76:10-16, 77:15-22. Finally, he agreed
that if ICE is not booking in as many people, there is a high likelihood the number of
removals will go down, as there is a direct correlation. *Id.* at 77:23-78:6.

26 ³ Acting ICE Phoenix Field Office Director Albert Carter is a career law enforcement
27 officer and prior to that served in the Army. Ex. DD at 18:15-19:19. Approximately a
28 week before his deposition, he resumed serving as Deputy Phoenix ICE Director, a
position he has held since 2009, but his first-hand experience as Acting Director spans
the relevant time period, December 2020 to early-May 2021. *Id.*; *see also id.* at 15:20-24.

1 ICE Immigration Detainers Lodged: He explained a detainer is lodged when an ICE
 2 officer encounters someone in a correctional or jail institution and determines
 3 probable cause the person is amenable to arrest by ICE. *Id.* at 79:9-15. He agreed
 4 there was a “big drop-off in immigration detainers being issued from before” 2/2021
 to after 2/2021. *Id.* at 81:10-82:8; *id.* at 82:14-83:12 (Phoenix-specific). He
 confirmed the only factor for the change was the Interim Guidance. *Id.* at 83:13-84:5.

5 ICE Removal of Criminal Aliens: He testified that the drop off of removals in March
 6 2020 was due to the COVID-19 pandemic. *Id.* at 86:1-24. And on top of the
 7 “substantially down” number of removals due to COVID-19, he agreed there was a
 8 further “big drop off in removals from from before” 2/2021 to after 2/2021. *Id.* at
 87:1-88:1. He agreed pre-2/2021, ICE was already prioritizing removals of aliens
 9 who threatened national security, with significant criminal records, and more recent
 entrants. *Id.* at 88:9-19. He testified the “only factor” he could think of for the drop-
 10 off in 2/2021 was the enforcement priorities, he did not observe any contributing
 factor, and further that resource constraints were not responsible. *Id.* at 88:20-89:11.⁴

11 **Third**, relevant to standing and irreparable injury, Director Carter testified ICE’s
 12 core missions are “absolutely” important to public safety and reducing these missions
 13 will likely harm public safety. *Id.* at 66:22-67:14 (arresting crim. aliens); 79:16-24
 14 (lodging of immigration detainers); 85:9-18 (removing crim. aliens); 89:15-90:4 (at-large
 15 arrests and serving crim. warrants); *see also id.* at 157:23-158:10 (“Absolutely” agreeing
 16 that removing aliens with criminal charges is important to public safety and if interior
 17 removals drop, aliens with convictions/charges are not going to be removed). He
 18 confirmed all of the missions on the “day in the life chart” are important to public safety.
 19 *Id.* at 90:5-8; Exhibit EE (day in the life). Finally, as relevant to ADCRR, he stated ICE
 20 is releasing detainers for aliens who do not fit Interim Guidance priorities, and when
 21 detainers are released, jails have to put aliens on supervisory release or just release them
 22 into the community. Ex. DD at 84:6-14. Carter’s testimony thus further supports
 23 Plaintiffs’ standing and incurrence of irreparable harm.

24
 25 ⁴ The tiny number of removal requests produced further supports Plaintiffs: only 17
 26 requests for “other priority” as opposed to “priority” removal cases in Phoenix for the
 27 entire discovery period (2/22/21 to 4/15/21)—about 9 per month. Ex. FF. Although
 28 Mr. Carter testified he thought there *should* be more (perhaps 3/day), that still would only
 be around 90/month (and also proof-less). But Phoenix had a drop-off in removals of
 about 330-month post-2/2021, Ex. DD at 94:25-95:15; *id.* at 90:23-95:23—far in excess
 of any requests for “other priority” removals. This comparatively small number of
 requests shows ICE officers are not in fact genuinely able to exercise discretion.

1 RESPECTFULLY SUBMITTED this 18th day of May, 2021.

2
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5 By /s/ Brunn W. Roysden III

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

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18 *Solicitor General*

19 **Pro hac vice granted*

20 *Attorneys for Plaintiff State of Montana*

21 CERTIFICATE OF SERVICE

22 I hereby certify that on May 18, 2021, I emailed the attached document to counsel
23 for Defendants. I further hereby certify that on May 20, 2021, I electronically
24 transmitted the attached document to the Clerk's office using CM/ECF System for filing.
25 Notice of this filing is sent by email to all parties by operation of the Court's electronic
26 filing system.

27 /s/ Brunn W. Roysden III