THOMAS A. SAENZ – Cal. Bar No. 159430*
tsaenz@maldef.org
ERNEST I. HERRERA – Tex. Bar No. 24094718*
eherrera@maldef.org
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF)
634 S. Spring St.
11th Floor
Los Angeles, CA 90014
Telephone: (213) 629-2512 ext. 121
Facsimile: (213) 629-0266

E. MARTIN ESTRADA – Cal. Bar No. 223802*
martin.estrada@mto.com
BRANDON E. MARTINEZ – Cal. Bar No. 318749*
brandon.martinez@mto.com
ABRAHAM REJWAN OVED – Cal. Bar No. 335927*
avi.oved@mto.com
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue
50th Floor
Los Angeles, CA 90071
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

DANIEL R. ORTEGA JR. – Ariz. Bar No. 005015
danny@ortegalaw.com
ORTEGA LAW FIRM, P.C.
361 East Coronado Road, Ste. 101
Phoenix, Arizona 85004
Telephone: (602) 386-4455
Facsimile: (602) 386-4480

* *Pro Hac Vice* forthcoming

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Puente Human Rights Movement; Chicanos Por La Causa, Inc.; and The Florence Immigrant & Refugee Rights Project, Inc., *Plaintiffs,* v.	No. **COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

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

Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security;,

David Pekoske, in his official capacity as Senior Official Performing the Duties of Deputy Secretary of Homeland Security;

Tracy Renaud, in her official capacity as Senior Official Performing the Duties of the Director of U.S. Citizenship and Immigration Services;

Tae D. Johnson, in his official capacity as Acting Director for U.S. Immigration and Customs Enforcement;

Troy Miller, in his official capacity as Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection;

United States Department Of Homeland Security;

United States Citizenship And Immigration Services;

United States Immigration And Customs Enforcement;

and

United States Customs And Border Protection,

Defendants.

INTRODUCTION

1. In the waning days of the Trump Administration, Kenneth T. Cuccinelli ("Cuccinelli"), in his purported former capacity as Senior Official Performing the Duties of the Deputy Secretary of Homeland Security, and Defendant Mark Brnovich, the Arizona Attorney General, signed the Sanctuary for Americans First Enactment Agreement ("SAFE Agreement"), which attempts to prevent the new administration from departing from the Trump Administration's immigration policies. Plaintiffs Puente Human Rights Movement, Chicanos Por La Causa, Inc., and Florence Immigrant & Refugee Rights Project, Inc. ("Plaintiffs") bring this action to declare unlawful, vacate, and enjoin enforcement of the unlawful SAFE Agreement.

2. Because Cuccinelli assumed the position of Senior Official Performing the Duties of the Deputy Secretary of Homeland Security in violation of the Homeland Security Act ("HSA") and the Federal Vacancies Reform Act ("FVRA"), he lacked the authority to bind Defendants Department of Homeland Security ("DHS"), U.S. Customs and Border Protection ("CBP"), U.S. Immigration and Customs Enforcement ("ICE"), and U.S. Citizenship and Immigration Services ("USCIS") to the SAFE Agreement, rendering it *ultra vires*, without force or effect, and void.

3. Following the election of a new administration, the SAFE Agreement is now being wielded by Arizona, through its Attorney General, Defendant Brnovich, as a weapon to disrupt the constitutional balance between the federal government and States; demean Congress's carefully wrought immigration framework; and devastate the missions of many non-profit organizations across the country. Arizona has already filed and is prosecuting a lawsuit demanding the enforcement of this unlawful Agreement, requiring Defendant DHS to give it notice of changes to federal immigration policy and six months to review such changes and submit comments. Under the SAFE Agreement, were it enforceable, only after this review and a signed agreement from Arizona confirming compliance with the Agreement can the DHS move forward with the proposed changes.

4. Shortly after the Biden Administration took office on January 20, 2021, President Biden issued an executive order that directed federal agencies to "reset the policies and practices for enforcing civil immigration laws."[1]

5. Based on that order, Acting Secretary of Homeland Security David Pekoske issued a memorandum to senior leadership directing a review of immigration-enforcement policies and setting interim policies ("DHS Memo"). Among other measures, the DHS Memo paused certain removals for one hundred days. The Memo also directed Defendant Tae D. Johnson, Acting Director of Defendant ICE, to issue operational guidance on implementing this pause. This included a process for individualized review of alternatives to removal, such as "staying or reopening cases, alternative forms of detention, custodial detention, whether to grant temporary deferred action, or other appropriate action." Finally, the DHS Memo rescinded and superseded several DHS memoranda issued during the prior administration.

6. On February 2, 2021, President Biden issued two more executive orders that revoked several Trump-era border-enforcement executive orders[2] and directed federal agencies to consider changes to the Trump Administration's public-charge rule[3] ("Trump Administration's Public Charge Rule") and Migrant Protection Protocols ("MPP").[4]

7. Although President Biden's executive orders, as well as the DHS Memo, have provided Plaintiffs and their clients promise and some respite from the Trump

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[1] *See* Exec. Order 13993 § 1, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7,051, 7,052 (Jan. 20, 2021).

[2] *See* Exec. Order 14010 § 4(ii)(F), Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 Fed. Reg. 8,267, 8,269-8,270 (Feb. 2, 2021).

[3] *See* Exec. Order 14012 § 4, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 Fed. Reg. 8,277, 8,278 (Feb. 2, 2021).

[4] *See* Exec. Order 14010 § 4(ii)(F), Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 Fed. Reg. 8,267, 8,269-8,270 (Feb. 2, 2021).

Administration's draconian immigration policies, whether that hope and relief will endure—and whether Arizona will be able to hamstring the federal government's authority over the Nation's immigration policies—now rests in the hands of this Court.

8. On behalf of himself and Arizona, Defendant Brnovich has filed a lawsuit to block President Biden's immigration reforms on the ground that they violate the SAFE Agreement executed by Brnovich and Cuccinelli—an action that was *ultra vires*, without force or effect, and void.

9. As a direct consequence of Defendant Brnovich's efforts to enforce the unlawful SAFE Agreement, Plaintiffs and their clients could imminently be denied further protections from the draconian immigration policies imposed by the Trump Administration, on top of the harm they have already endured. Thus, Plaintiffs have no choice but to divert their scant resources to address and ameliorate the impact of these immigration policies on their clients.

10. These lost financial and staffing resources are unrecoverable. Plaintiffs have no established funding streams to make up for the squeeze on their funding and people power because humanitarian-grant opportunities are scarce, particularly during the economic distress caused by the COVID-19 pandemic.

11. Absent injunctive relief and, ultimately, vacatur of the SAFE Agreement, Plaintiffs, and other similarly situated immigrant-services organizations across the country, will continue to suffer these irreparable injuries.

12. Accordingly, Plaintiffs request that this Court vacate the unlawful SAFE Agreement on the ground that it is *ultra vires*, has no force or effect, and is void because Cuccinelli lacked authority under the HSA and the FVRA to bind the federal government to the Agreement, and an agreement entered into without lawful authority is no agreement at all.

PARTIES

Plaintiffs

13. Plaintiff Puente Human Rights Movement ("Puente") is a non-profit membership organization operating exclusively in Arizona and primarily serving immigrant communities in the state. Puente is a grassroots human rights organization centered on improving the quality of life for Arizona's most marginalized communities. Its mission is to educate, organize, and empower communities—undocumented people; families of mixed immigration status; youth; people affected by the criminal justice system; and people of color affected by racist practices.

14. Plaintiff Chicanos Por La Causa, Inc. ("CPLC") is a non-profit organization that provides programs, by and through itself and its controlled affiliates, to individuals and families in accessing healthcare, affordable housing, quality education, meaningful work opportunities, and political representation. CPLC is headquartered in Phoenix, Arizona, and its mission is to drive economic and political empowerment, including confronting discrimination against Mexican Americans, to advocate for the needs of the communities it serves, including Latino and Spanish-speaking populations.

15. Plaintiff Florence Immigrant & Refugee Rights Project, Inc. ("FIRRP") is a non-profit organization dedicated to providing free legal services and social services to adults and children in immigration custody in Arizona. FIRRP's mission is to ensure that every person facing removal proceedings has access to counsel, understands their rights under the law, and is treated fairly and humanely.

Defendants

16. Defendant Mark Brnovich is the Attorney General of the State of Arizona. The Arizona Attorney General "shall have charge of and direct the department of law and shall serve as chief legal officer of the [S]tate [of Arizona]." Ariz. Rev. Stat. Ann. § 41-192(A). Defendant Brnovich signed Arizona's SAFE Agreement in his capacity as Arizona Attorney General and is party to that agreement. Plaintiffs sue Defendant Brnovich in his official capacity.

17. Defendant Alejandro Mayorkas serves as Secretary of Homeland Security and therefore as the "head" of the Department of Homeland Security with "direction, authority, and control over it." *See* 6 U.S.C. § 112(a)(2). He exercises the duties and functions of the Secretary of Homeland Security and has "the authority to make contracts, grants, and cooperative agreements" for the Department of Homeland Security. *See* 6 U.S.C. § 112(b)(2). Defendant Mayorkas is responsible for implementing and enforcing changes to federal immigration policy that, but for Brnovich's enforcement of Arizona's purported rights under the SAFE Agreement, will relieve Plaintiffs and their clients of the draconian, irreparable burdens of the Trump Administration's immigration policies. Plaintiffs sue Defendant Mayorkas in his official capacity.

18. Defendant David Pekoske serves as the Senior Official Performing the Duties of Deputy Secretary of Homeland Security. He is the successor to the office that Cuccinelli purported to hold when he signed the SAFE Agreement. On information and belief, Defendant Pekoske is responsible for implementing and enforcing changes to federal immigration policy that, but for Defendant Brnovich's enforcement of Arizona's purported rights under the SAFE Agreement, will relieve Plaintiffs and their clients of the draconian, irreparable burdens of the Trump Administration's immigration policies. Plaintiffs sue Defendant Pekoske in his official capacity.

19. Defendant Tracy Reunaud serves as Senior Official Performing the Duties of the Director of U.S. Citizenship and Immigration Services. On information and belief, Defendant Reunaud is responsible for implementing and enforcing changes to federal immigration policy that, but for Defendant Brnovich's enforcement of Arizona's purported rights under the SAFE Agreement, will relieve Plaintiffs and their clients of the draconian, irreparable burdens of the Trump Administration's immigration policies. Plaintiffs sue Defendant Reunaud in her official capacity.

20. Tae D. Johnson serves as Acting Director of U.S. Immigration and Customs Enforcement. On information and belief, Defendant Johnson is responsible for implementing and enforcing changes to federal immigration policy that, but for Defendant

Brnovich's enforcement of Arizona's purported rights under the SAFE Agreement, will relieve Plaintiffs and their clients of the draconian, irreparable burdens of the Trump Administration's immigration policies. Plaintiffs sue Defendant Johnson in his official capacity.

21. Troy Miller serves as Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection. On information and belief, Defendant Miller is responsible for implementing and enforcing changes to federal immigration policy that, but for Defendant Brnovich's enforcement of Arizona's purported rights under the SAFE Agreement, will relieve Plaintiffs and their clients of the draconian, irreparable burdens of the Trump Administration's immigration policies. Plaintiffs sue Defendant Miller in his official capacity.

22. Defendant Department of Homeland Security is the executive department principally charged with administering the federal immigration laws. *See, e.g.*, 6 U.S.C. §§ 202(5), 251; 8 U.S.C. § 1103(a)(1), (5). Defendant DHS is party to the SAFE Agreement.

23. Defendant United States Citizenship and Immigration Services is a component agency of Defendant DHS. *See* 6 U.S.C. § 271. Defendant USCIS is party to the SAFE Agreement.

24. Defendant United States Immigration and Customs Enforcement is a component agency of Defendant DHS. It is responsible for, among other functions, enforcing the federal immigration laws. *See* 6 U.S.C. § 251-52. Defendant ICE is party to the SAFE Agreement.

25. Defendant United States Customs and Border Protection is a component agency of Defendant DHS. It is responsible for, among other functions, "enforc[ing] and administer[ing] all immigration laws" in "coordination with U.S. Immigration and Customs Enforcement and United States Citizenship and Immigration Services" as well as "the detection, interdiction, [and] removal" of "persons unlawfully entering, or who have recently unlawfully entered, the United States." 6 U.S.C. § 211(c)(8). Defendant CBP is party to the SAFE Agreement.

JURISDICTION AND VENUE

26. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331.

27. Venue is proper in this district under 28 U.S.C. §§ 1391(b)(2) and (e)(1).

LEGAL AND FACTUAL BACKGROUND

I. CUCCINELLI ASSUMES OFFICE AS SENIOR OFFICIAL PERFORMING THE DUTIES OF THE DEPUTY SECRETARY IN VIOLATION OF THE HOMELAND SECURITY ACT AND THE FEDERAL VACANCIES REFORM ACT

a. The HSA and FVRA Prescribe The Proper Procedure for Designating Acting Deputy Secretaries of Homeland Security

28. Two federal statutes govern the order of succession for Acting Secretary of Homeland Security: the Homeland Security Act, 6 U.S.C. § 101 *et seq.*, and the Federal Vacancies Reform Act, 5 U.S.C. § 3345 *et seq.*

29. Under 6 U.S.C. § 113(a)(1)(A) and 5 U.S.C. § 3345(a)(1), the Deputy Secretary of Homeland Security, a Presidentially nominated and Senate-confirmed official, assumes the office of Acting Secretary of Homeland Security in the event the Secretary of Homeland Security dies, resigns, or is otherwise unable to perform the functions and duties of the office.

30. Under 6 U.S.C. § 113(g)(1), the Under Secretary for Management of the Department of Homeland Security, a Presidentially nominated and Senate-confirmed official, assumes the office of Acting Secretary of Homeland Security in the event neither the Secretary of Homeland Security nor the Deputy Secretary of Homeland Security is available to exercise the functions and duties of Secretary.

31. Under 6 U.S.C. § 113(g)(2), the Secretary of Homeland Security may designate other officers of the Department of Homeland Security in further order of succession to serve as Acting Secretary in the event neither the Secretary, the Deputy Secretary, nor the Under Secretary for Management is available to exercise the functions and duties of Secretary.

32. Under 6 U.S.C. § 113(a)(1)(A), the Deputy Secretary of Homeland Security "shall be the Secretary's first assistant for purposes of subchapter III of chapter 33 of Title 5"—that is, for purposes of designation to the office of Acting Secretary of Homeland Security under the FVRA.

33. Under 5 U.S.C. § 3346(a)(1), acting officials "may serve in the office . . . for no longer than 210 days beginning on the date the vacancy occurs." After these 210 days elapse, "the office shall remain vacant," *id.* § 3348(b)(1), and any action taken thereafter by someone purporting to hold that office shall have neither force nor effect and cannot be ratified, *see id.* § 3348(d)(2).

b. The Trump Administration Fails to Appoint DHS Leadership After Secretary Nielsen's Departure

34. Until April 2019, the order of succession at DHS beyond the Deputy Secretary and Under Secretary for Management was governed by two documents: Executive Order 13753 ("Executive Order 13753"), dated December 9, 2016, and DHS Delegation Number 00106 ("Directive 00106"), dated December 15, 2016 and issued under then-Secretary Jeh Johnson's authority under 6 U.S.C. § 113(g)(2).

35. Executive Order 13753 designated the order of DHS officials who would become Acting Secretary "during any period in which the Secretary has died, resigned, or otherwise become unable to perform the functions and duties of the office of Secretary," provided they could assume office consistent with the FVRA and were not already holding office in an acting capacity.[5]

36. Section II.A of Directive 00106 adopted the order of succession laid out in Executive Order 13753 "[i]n case of the Secretary's death, resignation, or inability to perform the functions of the Office."

37. Section II.B of Directive 00106, however, imposed a separate and different order of succession for Acting Secretary in the event the Secretary becomes "unavailable to

[5] *See* Exec. Order 13753 § 1, Amending the Order of Succession in the Department of Homeland Security, 81 Fed. Reg. 90,667, 90,667 (Dec. 9, 2016).

act during a disaster or catastrophic emergency." This second order of succession for disasters and emergencies was laid out in an appendix to Directive 00106 called "Annex A." Directive 00106 and Annex A's order of succession remained unchanged until April 9, 2019.

38. Then-President Donald J. Trump nominated Kirstjen Nielsen to be Secretary of Homeland Security on October 11, 2017. On December 5, 2017, the Senate confirmed her nomination.

39. On April 15, 2018, Deputy Secretary of Homeland Security Elaine Duke resigned.

40. On April 7, 2019, Secretary Nielsen announced via Twitter that she had resigned that office effective that day.[6] A little over three hours later, however, she tweeted that she had "agreed to stay on as Secretary through Wednesday, April 10th to assist with an orderly transition and ensure that key DHS missions are not impacted."[7]

41. Before Secretary Nielsen departed office on April 10, 2019, she signed a memorandum that amended Directive 00106 by striking the text of Annex A and replacing it with a new order of succession for Secretary of Homeland Security. This memorandum purported to be issued "[p]ursuant to Title 6, United States Code, Section 113(g)(2)."[8]

42. Secretary Nielsen's memorandum did not amend the text of Directive 00106 itself. It left intact the language in Sections II.A and B of Directive 00106 providing, respectively, that Executive Order 13753 would govern the order of succession for the Secretary "[i]n case of the Secretary's death, resignation, or inability to perform the

[6] *See* @SecNielsen, Twitter (Apr. 7, 2019, 4:02 PM), https://twitter.com/SecNielsen/status/1115027147893235712.

[7] @SecNielsen, Twitter (April 7, 2019, 7:36 PM), https://twitter.com/SecNielsen/status/1115080823068332032.

[8] The United States produced a copy of Nielsen's April 9, 2019 memorandum amending Directive 00106 in litigation in the District of Maryland. *See* Neal J. Swartz Decl. Ex. 1, ECF No. 41-2, *Casa de Maryland, Inc. v. Wolf*, No. 8:20-cv-02118-PX (D. Md.).

functions of the Office" and that Annex A would govern the order only in the event the Secretary is "unavailable to act during a disaster or catastrophic emergency."[9]

43. Under Secretary Nielsen's new Annex A, the CBP Commissioner, a position then held by Kevin McAleenan, became third in line to serve as Acting Secretary in the event of the Secretary's unavailability due to a disaster or catastrophic emergency, after the Deputy Secretary and Under Secretary for Management.

44. Under the unamended Section II.A, however, which retained the order of succession laid out in Executive Order 13753, Commissioner McAleenan was seventh in line to become Acting Secretary in the event of the Secretary's *resignation*—after the Deputy Secretary of Homeland Security; the Under Secretary for Management; the Administrator of the Federal Emergency Management Agency ("FEMA"); the Under Secretary for National Protection and Programs (also known as Director of the Cybersecurity and Infrastructure Security Agency ("CISA")); the Under Secretary for Science and Technology; and the Under Secretary for Intelligence and Analysis, to the extent those positions were filled by Presidentially nominated and Senate-confirmed appointees.

45. On April 10, 2019, the offices of Deputy Secretary of Homeland Security, Under Secretary for Management, FEMA Administrator, and Under Secretary for Science and Technology were vacant. The offices of Under Secretary for National Protection (also known as CISA Director) and Programs and the Under Secretary for Intelligence and Analysis were not.

46. Because Secretary Nielsen resigned her office as Secretary and had not become "unavailable to act during a disaster or catastrophic emergency," two other Senate-confirmed officials—Christopher Krebs, then the Senate-confirmed CISA Director,

[9] A copy of Directive 00106 as amended by Secretary Nielsen in April 2019 is available as Enclosure B to a November 15, 2019 letter from Representatives Bennie G. Thompson and Carolyn B. Maloney to the Comptroller General of the United States. That letter is in turn available here: https://oversight.house.gov/sites/democrats.oversight.house.gov/files/191115%20T%20Dodaro%20re%20Letter%20to%20GAO%20on%20Wolf-Cuccinelli%20Appointment.pdf.

followed by David Glawe, at the time the Senate-confirmed Under Secretary for Intelligence and Analysis—were lawfully designated to succeed Secretary Nielsen under Section II.A of Directive 00106.

47. Nonetheless, in obvious contravention of Directive 00106 and Executive Order 13753, on April 10, 2019, CBP Commissioner McAleenan purported to assume Nielsen's office as Acting Secretary of Homeland Security.

48. On or around June 10, 2019, Commissioner McAleenan purported to create the position of Principal Deputy Director of Defendant USCIS and purported to appoint Kenneth Cuccinelli to that office. Before his appointment to that office, Cuccinelli had never been employed by the federal government.

49. On the same day he purported to appoint Cuccinelli as Principal Deputy Director of Defendant USCIS, Commissioner McAleenan also issued an order amending the text of Annex D to Directive 00106, which governed the order of succession to the office of Director of Defendant USCIS. Under McAleenan's purported revision, the Principal Deputy Director of USCIS was designated "the First Assistant and most senior successor to the Director of USCIS" for purposes of the FVRA, *see* 5 U.S.C. § 3345(a)(1).

50. When Cuccinelli was purportedly appointed Principal Deputy Director of Defendant USCIS, the office of Director was vacant. Thus, on the same day of his purported appointment as Principal Deputy Director, Cuccinelli also purported to assume office as the Acting Director of USCIS.

51. On March 1, 2020, the United States District Court for the District of Columbia held that "Cuccinelli was designated to serve as the acting Director of USCIS in violation of the FVRA" because the office to which Commissioner McAleenan had purportedly appointed him—"Principal Deputy Director"—was not the "first assistant" to the Director of USCIS within the meaning of the FVRA, and he had never been designated Acting Director by the President. *See L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 23-30 (D.D.C. 2020), *judgment entered*, No. CV 19-2676 (RDM), 2020 WL 1905063 (D.D.C. Apr. 16, 2020), *appeal dismissed*, No. 20-5141, 2020 WL 5358686 (D.C. Cir. Aug. 25, 2020).

52. On October 11, 2019, President Trump tweeted that Commissioner McAleenan would be departing DHS.

53. On November 8, 2019—212 days after Nielsen vacated the office of Secretary of Homeland Security and 2 days past the 210 days allotted under 5 U.S.C. § 3346(a)(1)—Commissioner McAleenan issued an order in his purported capacity as Acting Secretary purporting to further amend Directive 00106 by striking the text of Section II.A and replacing it with language providing that Annex A would govern the order of succession for the Secretary "[i]n case of the Secretary's death, resignation, or inability to perform the functions of the Office," rather than only in the event of the Secretary's unavailability due to a disaster or catastrophic emergency.[10]

54. Pursuant to his purported authority as Acting Secretary under 6 U.S.C. § 113(g)(2), Commissioner McAleenan's order also struck the text of Annex A to Directive 00106 and replaced it with a new order of succession in which the CBP Commissioner and the Under Secretary for Strategy, Policy, and Plans would become third and fourth in line to serve as Acting Secretary, respectively, after the Deputy Secretary and Under Secretary for Management.

55. On November 8, 2019, the offices of Deputy Secretary, Under Secretary for Management, and Under Secretary for Strategy, Policy, and Plans were vacant. But President Trump's nomination of Chad Wolf as Under Secretary for Strategy, Policy, and Plans was already pending in the Senate.

56. The Senate confirmed Wolf as Under Secretary for Strategy, Policy, and Plans on November 13, 2019.

[10] A copy of Commissioner McAleenan's order purportedly amending Directive 00106 is available as Enclosure A to a November 15, 2019 letter from Representatives Bennie G. Thompson and Carolyn B. Maloney to the Comptroller General of the United States. That letter is in turn available here: https://oversight.house.gov/sites/democrats.oversight.house.gov/files/191115%20T%20Dodaro%20re%20Letter%20to%20GAO%20on%20Wolf-Cuccinelli%20Appointment.pdf.

57. On November 13, 2019—216 days after Nielsen vacated the office of Secretary and 6 days past the 210 days allotted under 5 U.S.C. § 3346(a)(1)—Commissioner McAleenan resigned as Acting Secretary of Homeland Security. Because the Deputy Secretary, Under Secretary of Management, and CBP Commissioner positions were vacant, Wolf purported to take office that same day as Acting Secretary of Homeland Security under Commissioner McAleenan's November 8, 2019 order purportedly amending Directive 00106.

58. On November 13, 2019, the same day that Wolf unlawfully assumed the role of Acting Secretary, he amended the text of Annex B to Directive 00106, which governed the order of succession to the office of Deputy Secretary of Homeland Security. Under Wolf's purported revision, the Under Secretary for Management and then the Principal Deputy Director of USCIS would assume the office of Acting Deputy Secretary in the event of a vacancy in that office.

59. Pursuant to Wolf's purported amendment to Annex B, and because the office of Under Secretary for Management was then vacant, Cuccinelli, who had been purportedly serving as the Acting Director of USCIS, purported to assume the office of the "Senior Official Performing the Duties of Deputy Secretary of Homeland Security."

60. On November 15, 2019, Bennie G. Thompson, Chairman of the House Committee on Homeland Security, and Carolyn B. Maloney, then the Acting Chairwoman of the House Committee on Oversight and Reform, wrote the United States Comptroller General—head of the United States Government Accountability Office ("GAO")—expressing skepticism that Commissioner McAleenan lawfully assumed office as Acting Secretary of Homeland Security consistent with 6 U.S.C. § 113(g); that he lawfully amended Directive 00106 on November 8, 2019 consistent with the Federal Vacancies Reform Act, 6 U.S.C. § 3345 *et seq.*; that Wolf lawfully purported to succeed Commissioner McAleenan as Acting Secretary; and that Wolf lawfully changed the order of succession to the office of Acting Deputy Secretary so that Cuccinelli could assume that office. The letter requested that the GAO "conduct an expedited review to resolve whether Mr. Wolf and Mr.

Cuccinelli," who were then "engaged in decision-making that impact[s] the security of every American," were "legally serving in the position" of Acting Secretary of Homeland Security and Senior Official Performing the Duties of Deputy Secretary of Homeland Security, respectively.[11]

61. On August 14, 2020, the GAO's General Counsel issued a decision in response to Representatives Thompson and Maloney's letter. The decision observed that, although Commissioner "McAleenan assumed the title of Acting Secretary upon the resignation of Secretary Nielsen," "the express terms of the existing designation" governing the order of succession to the office of Secretary of Homeland Security "required another official to assume that title." "As such," the report explained, Commissioner "McAleenan did not have the authority to amend the Secretary's existing designation" to permit Mr. Wolf to succeed McAleenan as Acting Secretary.

62. "Accordingly," the August 14, 2020, GAO decision concluded, "Messrs. Wolf and Cuccinelli were named to their respective positions of Acting Secretary and Senior Official Performing the Duties of Deputy Secretary by reference to an invalid order of succession."[12]

63. The GAO decision also noted that, when Cuccinelli purported to assume the office of Senior Official Performing the Duties of Deputy Secretary according to Wolf's invalid amendment to Annex B to Delegation 00106, the FVRA required instead that the office remain vacant because the office had been vacant since April 10, 2019—well over the 210 days provided by the FVRA, *see* 5 U.S.C. § 3346(a)(1).[13]

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[11] Letter from U.S. Reps. Bennie G. Thompson, Chairman, Homeland Security Committee, and Carolyn Maloney, Acting Chairwoman, Committee on Oversight & Reform, to U.S. Comptroller General Gene Dodaro (Nov. 15, 2019), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/191115%20T%20Dodaro%20re%20Letter%20to%20GAO%20on%20Wolf-Cuccinelli%20Appointment.pdf.

[12] U.S. Gov't Accountability Office, B-3321650, Decision Letter (Aug. 14, 2020) at 11, https://www.gao.gov/assets/710/708830.pdf.

[13] *See id*. n.14.

64. Cuccinelli purported to serve as Acting Director of USCIS and as Senior Official Performing the Duties of Deputy Secretary of Homeland Security through the end of the Trump Administration on January 20, 2021.

II. CUCCINELLI PURPORTS TO BIND DEFENDANT DHS TO THE SAFE AGREEMENT

65. In January 2021, acting in his purported capacity as Senior Official Performing the Duties of Deputy Secretary of Homeland Security, Cuccinelli executed SAFE Agreements with multiple jurisdictions, including several states and at least one local jurisdiction.[14]

66. On January 8, 2021, Cuccinelli executed one such SAFE Agreement with Arizona. Arizona's Attorney General, Defendant Brnovich, signed the Agreement on behalf of Arizona, his office, and the Arizona Department of Law on December 29, 2020.

67. On the first signature page of the Arizona SAFE Agreement, the heading at the top states, "Signature for the Department of Homeland Security." Below that heading is a signature line for "Kenneth T. Cuccinelli II," the "Senior Official Performing the Duties of the Deputy Secretary." Cuccinelli applied his signature on that signature line. Below Cuccinelli's title is the phrase "Signed individually and collectively," followed by a footnote. The footnote states the following:

> "Signed individually and collectively" as used here indicates that the agency is entering into the Agreement both (1) for itself, independently, and (2) along with the other entities that comprise DHS, collectively. Should one agency, for whatever reason, cease to be a party to this Agreement, this Agreement shall still survive for all other parties and be read and interpreted as if the removed party had never been a party to this Agreement.

68. The SAFE Agreement purports to bind Defendants DHS, CBP, ICE, and USCIS to several obligations described therein.

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[14] Cuccinelli also signed SAFE Agreements with representatives of Louisiana, Montana, Texas, and Indiana, and the Rockingham County, North Carolina Sheriff's Office.

69. The stated purpose of the SAFE Agreement is to mitigate the supposed harms to Arizona that supposedly result from changes to Defendant DHS's rules and policies "that have the effect of easing, relaxing, or limiting immigration enforcement." These include alleged increases in the "rate of crime, consumption of public benefits and services, strain upon the healthcare system, and harm to the environment, as well as increased economic competition with [Arizona's] current residents for . . . employment, housing, goods, and services," that supposedly accompany immigration to this country.

70. The SAFE Agreement provides that, in return for the "support, cooperation, [and] assistance" of Arizona and its signatories, Defendant DHS is obligated to:

(1) use its maximum authority to enforce strict immigration laws;[15]

(2) consult with Arizona before implementing various immigration rules and practices;[16]

(3) provide 180-day, written notice to Arizona of any such proposed actions;

(4) consider Arizona's input on such actions and provide Arizona with a detailed written explanation for any decision to reject its input; and

(5) err on the side of consulting with Arizona when in doubt as to whether a proposed action implicates the Agreement.

71. The SAFE Agreement also provides that, in the event any party fails to comply with any of its obligations under the Agreement, the "aggrieved party will be irreparably damaged," "will not have an adequate remedy at law," and "shall, therefore, be entitled to injunctive relief . . . including specific performance, to enforce such obligations." This

[15] This includes enforcing the immigration laws to prohibit the entry into or promote the removal of aliens; to prioritize detention over release; to apprehend or arrest; to eliminate incentives for illegal immigration; to limit the eligibility for asylum and other relief; to refuse asylum and other relief.

[16] This includes "policies, practices, or procedures which have as their purpose or effect" reducing or modifying immigration enforcement, decreasing the number of ICE agents, pausing or decreasing the number of removals, increasing or declining to decrease the number of releases, decreasing the number of criteria for detention for removable aliens, decreasing or pausing apprehensions, increasing or declining to decrease the number of aliens, or otherwise negatively impacting Arizona.

effectively guarantees Arizona the right to block changes to federal immigration policies with which it disagrees.

72. Finally, by signing the SAFE Agreements, Cuccinelli warranted that he was "authorized to execute th[e] Agreement[s] on behalf of DHS and all its Components."

73. On information and belief, Defendant Brnovich knew or should have known that Cuccinelli lacked authority to bind the federal Defendants to the SAFE Agreement. Defendant Brnovich nonetheless signed the Agreement and allowed it to purportedly take effect as though it were a binding agreement between Arizona and the federal Defendants.

III. SIGNATORY STATES SUE TO ENFORCE THE SAFE AGREEMENTS AND STYMIE THE BIDEN ADMINISTRATION'S EXERCISE OF IMMIGRATION-ENFORCEMENT DISCRETION

74. On January 20, 2021, newly inaugurated President Biden designated Defendant David Pekoske to the office of Acting Secretary of Homeland Security while Defendant Mayorkas awaited confirmation as Secretary of Homeland Security. President Biden also issued an executive order that directed federal agencies to "reset the policies and practices for enforcing civil immigration laws."[17]

75. That same day, Defendant Pekoske issued the DHS Memo, based on President Biden's executive order, officially entitled "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities." The DHS Memo "directs Department of Homeland Security components to conduct a review of policies and practices concerning immigration enforcement" and "sets interim policies during the course of that review." The DHS Memo also ordered "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."

76. On January 22, 2021, the State of Texas sued Defendant DHS in the United States District Court for the District of Texas to block the DHS Memo's moratorium on removals. *See* Compl., *Texas v. United States*, No. 6:21-CV-00003 (S.D. Tex. Jan. 22,

[17] *See* Exec. Order 13993 § 1, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7,051, 7,052 (Jan. 20, 2021).

2021), ECF No. 1. Among other claims, Texas alleged that the pause on removals violated a SAFE Agreement signed by Cuccinelli and representatives of Texas that is substantively identical to the Arizona SAFE Agreement. *See id.* ¶¶ 38-42; *see also id.* Ex. A (Texas SAFE Agreement). On Texas's application, the Southern District of Texas entered a temporary restraining order and then a preliminary injunction blocking the DHS Memo's pause on removals nationwide, though the Court did not opine on the validity of Texas's SAFE Agreement. *See Texas v. United States*, 2021 WL 247877, at *2 (S.D. Tex. Jan. 26, 2021) (granting temporary restraining order but deferring comment on Texas's claim based on its SAFE Agreement, "which should not be construed as an indication of the Court's view of [the claim's] merits"); *Texas v. United States*, 2021 WL 723856 (S.D. Tex. Feb. 23, 2021) (granting preliminary injunction without comment on Texas's SAFE Agreement).

77. On February 2, 2021, President Biden issued two more executive orders that revoked several Trump-era border enforcement executive directives[18] and ordered federal agencies to consider changes to the Trump Administration's Public Charge Rule[19] and the MPP.[20]

78. The first of the February 2, 2021 orders, Executive Order 14010, was entitled "Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border." Among other things, the order

[18] *See* Exec. Order 14010 § 4(ii)(F), Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 Fed. Reg. 8,267, 8,269-8,270 (Feb. 2, 2021).

[19] *See* Exec. Order 14012 § 4, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 Fed. Reg. 8,277, 8,278 (Feb. 2, 2021).

[20] *See* Exec. Order 14010 § 4(ii)(F), Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 Fed. Reg. 8,267, 8,269-8,270 (Feb. 2, 2021).

requires Defendant Mayorkas to "promptly review and determine whether to terminate or modify" the MPP.[21]

79. The second of the February 2, 2021 orders, Executive Order 14012, was entitled "Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans." Among other things, the order requires various federal agencies, including Defendant DHS, to conduct a top-to-bottom review of the Trump Administration's Public Charge Rule; to "identify appropriate agency actions" to "address concerns about the current public charge policies' effect on the integrity of the Nation's immigration system and public health"; and "recommend steps that relevant agencies should take to clearly communicate current public charge policies and proposed changes" that will "reduce fear and confusion among impacted communities."[22]

80. On February 3, 2021, Arizona and Defendant Brnovich, the Arizona Attorney General, filed a lawsuit seeking to vacate and enjoin enforcement of the DHS Memo on the ground that its pause on removals violates the Arizona SAFE Agreement, among other claims. *See* Compl., *Arizona v. U.S. Dep't of Homeland Sec.*, No. 2:21-CV-00186-SRB (D. Ariz. Feb. 2, 2021), ECF No. 1.

81. On March 8, 2021, Arizona and Defendant Brnovich amended their complaint to add the State of Montana as a plaintiff. *See* Am. Compl., *Arizona v. U.S. Dep't of Homeland Sec.*, No. 2:21-CV-00186-SRB (D. Ariz. Mar. 8, 2021), ECF No. 12. Arizona then filed a motion to preliminarily enjoin the DHS Memo's pause on removals on the ground that it allegedly violates those states' SAFE Agreement, among other claims. *See* Mot. for Prelim. Inj., *Arizona v. U.S. Dep't of Homeland Sec.*, No. 2:21-CV-00186-SRB (D. Ariz. Mar. 8, 2021), ECF No. 13.

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[21] *See* Exec. Order 14010 § 4(a)(ii)(B), Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 Fed. Reg. 8,267, 8,269-8,270 (Feb. 2, 2021).

[22] *See* Exec. Order 14012 § 4, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans, 86 Fed. Reg. 8,277, 8,278 (Feb. 2, 2021).

82. On March 10, 2021, Arizona and Defendant Brnovich, along with several States' attorneys general, filed a motion in the U.S. Court of Appeals for the Ninth Circuit to intervene in an appeal presenting a challenge to the Trump Administration's Public Charge Rule. In its motion, Arizona and Defendant Brnovich sought leave to intervene to defend the Public Charge Rule and "file a petition for certiorari seeking review of [the Ninth Circuit's] December 2, 2020 decision" affirming an injunction against the Public Charge Rule. *See* Mot. to Intervene, *City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs.*, No. 19-17213 (9th Cir. Mar. 10, 2021), ECF No. 143.

IV. ARIZONA'S ENFORCEMENT OF THE SAFE AGREEMENT DOES AND WILL CONTINUE TO GRAVELY INJURE PLAINTIFFS

83. Plaintiff Puente provides advocacy to people facing deportation and clemency proceedings; helps those formerly incarcerated reintegrate into society; educates a broad swath of communities, including undocumented people, about their rights and issues affecting them; organizes campaigns to change laws and policies; and exposes human rights violations in immigration detention facilities.

84. Consistent with its mission, Puente maintains a staff of eight people, four of whom are dedicated to advocating for members who have been detained by immigration authorities or are at risk of removal from the United States. It also maintains a crisis hotline for members who require Puente's immigration advocacy, including members who have been detained in immigration-detention facilities. Puente also commits substantial staffing resources to educating members about their rights in the event they are detained by immigration authorities or otherwise put at risk of removal from the United States.

85. Puente does not charge any fees for these services. Its mission is to offer these services for free to every member who seeks them.

86. Through its advocacy work, Puente has successfully persuaded immigration authorities not to pursue or to close removal cases for approximately 475 of its members.

87. When the DHS Memo went into effect, the number of calls that Puente fielded daily through its crisis hotline dropped significantly. The DHS Memo's 100-day pause on

most removals decreased the number of Puente's members who either were in removal proceedings or at risk of being placed in removal proceedings.

88. Since the DHS Memo's pause on removals was enjoined and Defendant Brnovich filed his lawsuit also seeking to enjoin the pause on removals, Puente's staff have had to devote a substantial portion of their limited hours to providing advice to members and their families regarding the quickly evolving status of the law governing removals and addressing members' fears of impending removal proceedings. The number of calls that Puente has fielded daily from members through its crisis hotline has increased significantly since the DHS Memo's pause on removals was enjoined—to more than one hundred calls per day. And Puente's staff now spends twenty additional hours per week fielding calls and correspondence from Puente's members and advising them about changes in the status of the pause on removals. These are hours the staff would not have had to expend but for the unlawful SAFE Agreement and Defendant Brnovich's prosecution of a lawsuit to enforce Arizona's SAFE Agreement.

89. Moreover, Puente has been forced to divert substantial staffing resources away from educating its members about their rights apart from the prospect of imminent removal to defending them from impending removal. Since the DHS Memo's pause on removals was enjoined, Defendant DHS has reopened two of the approximately 475 removal cases that Puente had earlier persuaded DHS to close or not pursue—meaning that these members are now at risk of deportation.

90. As a result of the two reopened removal cases and the likely reopening of more cases, Puente has been forced to redirect a substantially greater portion of its limited staffing resources from the organization's vital prophylactic education work to advocacy on behalf members in immigration detention or otherwise at risk of imminent removal. Each of the removal cases that Defendant DHS has reopened has required Puente to redirect the working hours of four different Puente staff members, such that each must spend approximately twenty hours—a total of approximately eighty hours—per week doing defense work instead of education work they would otherwise perform. Puente's staff must also now reach out to

other members with closed removal cases to inform them of potential risks of deportation and to prospectively develop a defensive strategy. Unless the unlawful SAFE Agreement is invalidated and the DHS Memo's pause on removals is reinstated, this significant diversion of limited staffing resources will continue for the foreseeable future, especially if more of Puente's members are placed into removal proceedings that require Puente's defense.

91. These ongoing and imminent harms negatively affect Puente's ability to fulfill its core mission, an essential part of which is to offer free immigration education and advocacy to each and every one of its members, free of charge. The SAFE Agreement has made it substantially more costly for Puente to serve the needs of its members, jeopardizing and irreparably impeding its ability to carry out its core organizational mission of serving as many members as need support.

92. These harms to Puente also directly harm its members. If Puente is forced to expend a substantially greater portion of its resources to serve members who are in immigration detention or at risk of removal from the United States, it will have fewer resources available to educate other members about their rights as immigrants, among other vital services. Without no-cost advocacy and education from Puente, many of its members will be at grave risk of unemployment; separation from their families, friends, and communities; immigration detention; or removal from this country.

93. But for the unlawful SAFE Agreement and Defendant Brnovich's efforts to enforce it, Puente would not be forced to undertake this substantial diversion of its limited organizational resources from education to affirmative advocacy.

94. Plaintiff CPLC provides direct services—in education, economic development, affordable housing, and social services—affecting almost 625,000 lives annually in Arizona, Nevada, New Mexico, and Texas. CPLC's direct services include programs that help reunite families that have been divided by international borders or with mixed immigration statuses. Because most of its clients are of very modest means, CPLC offers a range of low- and no-cost services, including consultations; informational sessions; and assistance with citizenship and naturalization applications, Deferred Action for

Childhood Arrivals ("DACA") renewals, green-card renewals (I-90 Permanent Resident card renewal), work-permit renewals, family petitions, applications for adjustment of status, applications for U-Visas, and applications for Violence Against Women Act ("VAWA") benefits.

95. CPLC has been assisting clients with filling out I-944 Declaration of Self-Sufficiency forms, which Defendant USCIS has until recently been using to determine whether an applicant for permanent residency in the United States (commonly referred to as a "green card") is likely to become a "public charge"—that is, a person who uses government-funded benefits—in the future. If USCIS officials decided that an applicant was likely to become a public charge, they could deny the applicant a green card.

96. The Trump Administration's Public Charge Rule broadened the scope of what constitutes a "public charge" by radically expanding the list of qualifying government-funded programs to include social services that offer access to food, health care, education, and shelter. The Rule also required applicant families to meet a certain income threshold, making it easier for USCIS to deny green-card applications.

97. Because the Trump Administration's Public Charge Rule placed a substantially greater burden on green-card applicants to show that they were not a public charge, the rule forced CPLC's staff to spend approximately three additional hours per client gathering documents to be submitted with each green-card application. Just in the last month, CPLC has handled two hundred and fifty requests for this service alone.

98. And while the Biden Administration stopped enforcing the Trump Administration's Public Charge Rule on March 9, 2021[23] and formally announced its rescission two days later, Defendant Brnovich has since filed a motion to intervene in a pending Ninth Circuit proceeding seeking to reinstate the rule.

[23] Department of Homeland Security, "2019 Public Charge Rule Vacated and Removed" (Mar. 11, 2021), https://www.dhs.gov/news/2021/03/11/2019-public-charge-rule-vacated-and-removed-dhs-withdraws-proposed-rule-regarding.

99. If Arizona succeeds in blocking the Biden Administration's rescission of the Trump Administration's Public Charge Rule, CPLC's clients will lose the benefits of that rescission and continue to be subjected to Defendant DHS's inhumane denial of green-card applications under the Rule, and CPLC's staff will continue to have to expend additional staff hours to help each of those clients attempt to satisfy the rule.

100. Since Arizona filed suit in this district to enforce its purported rights under the SAFE Agreement, CPLC's staff has had to devote a substantially greater portion of its limited staffing resources to advise clients and their families of the evolving status of the Trump Administration's Public Charge Rule—hours the staff would not have had to expend but for the unlawful SAFE Agreement that Cuccinelli executed in the waning days of the Trump Administration.

101. CPLC continues to pour its limited staffing resources into assisting clients with obtaining the requisite documentation to meet the heightened burden of the Trump Administration's Public Charge Rule and to educate clients about the status of the immigration laws and their respective rights under them, thereby substantially reducing the resources it is able to expend assisting other clients with other immigration-related proceedings or issues.

102. These ongoing and imminent harms negatively affect CPLC Immigration Services' ability to fulfill its core mission: to empower the lives of each and every eligible person who seeks its assistance by providing reduced-cost immigration services. Arizona—through Defendant Brnovich—has shown that it will aggressively litigate to enforce its purported rights under the SAFE Agreement. As a result, the Agreement imminently threatens to deprive CPLC and its clients of the relief of the Biden Administration's rescission of the Trump's Administration's Public Charge Rule and thus to jeopardize and irreparably impede CPLC's ability to carry out its organizational mission.

103. These harms to CPLC also directly harm its clients. If CPLC is deprived of the relief of the Biden Administration's rollback of the Trump Administration's Public Charge Rule and is thereby forced to continue to expend a substantially greater portion of

its resources to serving clients with green-card applications, it will have fewer resources available to assist other clients with other immigration-related proceedings or issues. Without reduced-cost services from CPLC, many of CPLC's clients will be at grave risk of unemployment; separation from their families, friends, and communities; immigration detention; or removal from this country.

104. But for the unlawful SAFE Agreement and Defendant Brnovich's efforts to enforce it, CPLC will not be forced to undertake this substantial diversion of its limited organizational resources.

105. Plaintiff FIRRP maintains a staff of more than 150 attorneys, social workers, and support staff for the approximately 7,000 detained adults and children facing removal in Arizona on any given day. FIRRP works in all areas of detained removal defense, providing legal and social services both to adults in ICE custody and unaccompanied children in the custody of the Office of Refugee Resettlement ("ORR"). FIRRP attorneys also serve as appointed counsel for individuals deemed mentally incompetent to represent themselves in removal proceedings, maintaining a caseload of approximately one hundred such clients throughout Arizona. Additionally, since 2017, FIRRP's Border Action Team has delivered legal services and orientation to migrants in Nogales, Sonora, Mexico by accompanying clients who present themselves at the port-of-entry and representing such individuals if they are detained and placed in removal proceedings.

106. FIRRP does not charge any fees for these services. Consistent with its objective of ending immigration detention, FIRRP's mission is to offer these services for free to every person who is in immigration detention and at risk of removal from this country.

107. In 2019, the Trump Administration announced the Migrant Protection Protocols ("MPP"), which "are a U.S. Government action whereby certain foreign individuals entering or seeking admission to the U.S. from Mexico—illegally or without

proper documentation—may be returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings."[24]

108. The vast majority of individuals restrained under the MPP face unique due process complications, among other legal issues, that frequently require intensive legal and strategic work to resolve. Consistent with its mission, FIRRP has dedicated a team of staff to assist individuals who, under the MPP, are awaiting entry to the United States in Nogales, Mexico.

109. President Biden's Executive Order 14010 requires Defendant DHS, among other agencies, to review the MPP,[25] and the Biden Administration has already begun to roll back the MPP at ports of entry in Texas and California, with plans to extend that rollback to ports of entry in Arizona.

110. FIRRP has expended considerable resources in anticipation of the Biden Administration's rolling back the MPP in Arizona and finally allowing individuals subject to MPP to enter the United States via Arizona's border with Mexico to apply for asylum and other relief. Among other things, FIRRP has hired an additional, full-time staff member to assist individuals who currently are awaiting entry in Mexico because of the MPP and who will soon be able to enter the United States for immigration processing. Its staff have spent substantial time mobilizing and training volunteers and meeting and coordinating with representatives from the White House, Defendant DHS, providers of humanitarian aid, and other stakeholders on both sides of the U.S.–Mexico border to prepare for the elimination of the MPP at Arizona ports of entry. And it has expended considerable resources to expand services to people subject to the MPP, including by providing telephonic consultations and case screenings to people at smaller crossing points along Arizona's border with Mexico.

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[24] Department of Homeland Security, "Migrant Protection Protocols" (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols (last accessed Mar. 9, 2021).

[25] *See* Exec. Order 14010 § 4(ii)(F), Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, 86 Fed. Reg. 8,267, 8,269-8,270 (Feb. 2, 2021).

111. But Arizona's actions imminently threaten to put this rollback—and thus FIRRP's ability to assist those held in Nogales, Mexico because of the MPP—at risk. On February 17, 2021, Arizona's Governor, Doug Ducey, wrote a letter to Defendant Mayorkas condemning the "repealing [of] the [MPP]."[26] And Arizona has sued to enjoin the DHS Memo's pause on removals, indicating its intent to aggressively enforce its purported rights under the SAFE Agreement to block President Biden's immigration-policy reforms and thereby deny FIRRP and its clients reprieve from the MPP, among other draconian policies.

112. These imminent harms negatively impact FIRRP's ability to fulfill its core mission, an essential part of which is to offer no-cost immigration legal services and orientation to each and every eligible person who seeks its assistance. Because Arizona—through its senior official, Defendant Brnovich—has shown that it will aggressively litigate to enforce its purported rights under the SAFE Agreement, the Agreement imminently threatens to deprive FIRRP and its clients of the relief of the Biden Administration's anticipated rollbacks of the MPP and thus to jeopardize and irreparably impede FIRRP's ability to carry out its core organizational mission. But for the unlawful SAFE Agreement and Defendant Brnovich's efforts to enforce it, FIRRP will not be subjected to this substantial harm to its organizational mission.

113. These harms to FIRRP also directly harm its clients. If Arizona blocks the Biden Administration's rollback of the MPP in Arizona, then FIRRP's MPP clients in Nogales, Mexico will be unable to enter the United States for immigration processing, and FIRRP will be prevented from assisting those clients with that process. Those clients will continue to be at grave risk of violence, privation, and exposure to COVID-19 while they await entry to the United States or are forced to undertake dangerous journeys to reach alternative ports of entry where the MPP has already been rolled back by the Biden

[26] Letter from Doug Ducey, Governor of Arizona, to Alejandro Mayorkas, Secretary of Homeland Security (Feb. 17, 2021), *available at* https://azgovernor.gov/sites/default/files/02.17.21_usdhs_mpp.pdf.

Administration. But for the unlawful SAFE Agreement and Defendant Brnovich's efforts to enforce it, FIRRP's clients will not be subjected to this grave risk.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

Ultra Vires Agency Action; 5 U.S.C. § 3348(d)(1)

114. Plaintiffs repeat and incorporate by reference the preceding allegations.

115. Cuccinelli's purported accession to the office of Senior Official Performing the Duties of Deputy Secretary of Homeland Security violated the Homeland Security Act, as follows:

116. When he purported to assume the office of Acting Secretary of Homeland Secretary on April 10, 2019, upon Secretary Kirstjen Nielsen's resignation, former CBP Commissioner McAleenan did so in violation of the DHS directive governing the order of succession to that office issued by Secretary of Homeland Security Jeh Johnson and amended by Secretary Nielsen under the Homeland Security Act, 6 U.S.C. § 113(g)(2). Therefore, Commissioner McAleenan was never lawfully designated Acting Secretary of Homeland Security and never lawfully assumed the functions, duties, and powers of that office.

117. Because Commissioner McAleenan never lawfully assumed the functions, duties, and powers of the office of Acting Secretary of Homeland Security, he lacked lawful authority to further amend the DHS directive governing the order of succession to that office under 6 U.S.C. § 113(g)(2).

118. Moreover, 6 U.S.C. § 113(g)(2) authorizes only a permanent Secretary of Homeland Security, and not an Acting Secretary, to establish the order of succession to that office.

119. Thus, McAleenan's November 8, 2019 order purporting to do so was *ultra vires*, without force or effect, and void.

120. Chad Wolf purported to assume office as Acting Secretary of Homeland Security, and could only have done so, under Commissioner McAleenan's November 8,

2019 order purportedly amending the DHS directive governing the order of succession to that office according to 6 U.S.C. § 113(g)(2). Because Commissioner McAleenan's order was *ultra vires*, without force or effect, and void, however, Chad Wolf was never lawfully designated Acting Secretary of Homeland Security and purported to assume the functions, duties, and powers of that office in violation of the Homeland Security Act.

121. Because Wolf never lawfully assumed the functions, duties, and powers of the office of Acting Secretary of Homeland Security, Wolf lacked lawful authority to amend the DHS directive governing the order of succession to the office of Deputy Secretary. Thus, his November 13, 2019 order purporting to do so was *ultra vires*, without force or effect, and void.

122. Cuccinelli purported to assume office as Senior Official Performing the Duties of Deputy Secretary of Homeland Security, and could only have done so, according to Wolf's November 13, 2019 order purportedly amending the DHS directive governing the order of succession to the office of Deputy Secretary according to 6 U.S.C. § 113(g)(2). Because Wolf's order was *ultra vires*, without force or effect, and void, however, Cuccinelli was never lawfully designated Senior Official Performing the Duties of Deputy Secretary of Homeland Security and purported to assume the functions, duties, and powers of that office in violation of the Homeland Security Act.

123. Cuccinelli's purported accession to the office of Senior Official Performing the Duties of Deputy Secretary of Homeland Security also violated the Federal Vacancies Reform Act, as follows:

124. *First*, when Cuccinelli purported to assume office as Senior Official Performing the Duties of Deputy Secretary of Homeland Security on November 13, 2019, the office of Acting Secretary of Homeland Security had been vacant since Deputy Elaine Duke resigned on April 15, 2018—that is, for 577 days. Under the Federal Vacancies Reform Act, 5 U.S.C. §§ 3346(a)(1), 3348(b)(1), the office was to "remain vacant" unless and until a permanent Deputy Secretary of Homeland Security was nominated and

confirmed. Cuccinelli purported to assume office as Senior Official Performing the Duties of Deputy Secretary of Homeland Security in violation of these provisions.

125. *Second*, when Commissioner McAleenan purported to amend the DHS directive governing the order of succession to the office of Secretary of Homeland Security on November 8, 2019, the office had been vacant since Secretary Nielsen departed on April 10, 2019—that is, for 212 days. The office was therefore "vacant" under the Federal Vacancies Reform Act, 5 U.S.C. §§ 3346(a)(1), 3348(b)(1), and Commissioner McAleenan's November 8, 2019 order claiming to amend the order of succession lacked "force or effect," *id.* § 3348(d)(2). Because Commissioner McAleenan's order lacked force or effect, and because Wolf purported to assume office as Acting Secretary and could only have done so under that order, Wolf was never lawfully designated Acting Secretary of Homeland Security and purported to assume the functions, duties, and powers of that office in violation of the Federal Vacancies Reform Act. Under 5 U.S.C. § 3348(d), Wolf's November 13, 2019 amendment to the order of succession to the office of Deputy Secretary of Homeland Security had no force or effect and cannot be ratified. Because Wolf's amendment lacked force or effect, and because Cuccinelli purported to assume office as Acting Secretary and could only have done so under that amendment, Cuccinelli was never lawfully designated Senior Official Performing the Duties of Deputy Secretary of Homeland Security and purported to assume the functions, duties, and powers of that office in violation of the Federal Vacancies Reform Act.

126. *Third*, when Wolf purported to amend the DHS directive governing the order of succession to the office of Deputy Secretary of Homeland Security on November 13, 2019, the office of Secretary of Homeland Security had been vacant for at least 216 days. The office was therefore "vacant" under the Federal Vacancies Reform Act, 5 U.S.C. §§ 3346(a)(1), 3348(b)(1), and Wolf's November 13, 2019 order claiming to amend the order of succession to the office of Deputy Secretary of Homeland Security lacked "force or effect," *id.* § 3348(d)(1). Because Wolf's order lacked force or effect, and because Cuccinelli purported to assume office as Senior Official Performing the Duties of Deputy

Secretary of Homeland Security and could only have done so under that order, Cuccinelli was never lawfully designated Senior Official Performing the Duties of Deputy Secretary of Homeland Security and purported to assume the functions, duties, and powers of that office in violation of the Federal Vacancies Reform Act.

127. *Fourth*, because the office of "Principal Deputy Director of USCIS" was not the "first assistant" to the office of Director of USCIS within the meaning of 5 U.S.C. § 3345(a)(1), Cuccinelli assumed office as the Acting Director of USCIS in violation of the Federal Vacancies Reform Act. And because Cuccinelli assumed office as Senior Official Performing the Duties of Deputy Secretary of Homeland Security only by virtue of his purported service as Acting Director of USCIS, he was never lawfully designated Senior Official Performing the Duties of Deputy Secretary of Homeland Security and purported to assume the functions, duties, and powers of that office in violation of the Federal Vacancies Reform Act.

128. Wolf was never designated Acting Secretary of Homeland Security by the President under 5 U.S.C. § 3345 or any other statute, and he never served as "first assistant" to the Secretary of Homeland Security.

129. Cuccinelli was never designated Acting Director of USCIS or Senior Official Performing the Duties of Deputy Secretary of Homeland Security by the President under 5 U.S.C. § 3345 or any other statute, and he never served as "first assistant" to either the Director of USCIS or the Deputy Secretary of Homeland Security.

130. Because Cuccinelli never lawfully assumed the office of Senior Official Performing the Duties of Deputy Secretary of Homeland Security and never lawfully assumed the functions, duties, and powers of that office, he lacked any lawful authority to execute the SAFE Agreement. The SAFE Agreement is therefore *ultra vires*, without force or effect, and void.

131. Plaintiffs are suffering and will continue to suffer irreparable injury resulting from Defendants' implementation and enforcement of the unlawfully executed SAFE Agreement.

SECOND CAUSE OF ACTION

Administrative Procedure Act

132. Plaintiffs repeat and incorporate by reference the preceding allegations.

133. The Administrative Procedure Act requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

134. Cuccinelli's execution of each of the SAFE Agreement was a final agency action.

135. Cuccinelli signed the SAFE Agreement in his purported capacity as Senior Official Performing the Duties of Deputy Secretary of Homeland Security.

136. Because Cuccinelli assumed that office in violation of the Federal Vacancies Reform Act and the Homeland Security Act, he was never lawfully designated Senior Official Performing the Duties of Deputy Secretary of Homeland Security and never lawfully assumed the functions, duties, and powers of that office. As a result, he lacked any lawful authority to execute the SAFE Agreement.

137. The SAFE Agreement was executed "not in accordance with law," "in excess of statutory . . . authority," and/or "short of statutory right" and must be vacated. 5 U.S.C. § 706(2)(A), (C).

138. Plaintiffs are suffering and will continue to suffer irreparable injury resulting from Defendants' implementation and enforcement of the unlawfully executed SAFE Agreement.

THIRD CAUSE OF ACTION

Supremacy Clause, Article VI, Clause 2, of the United States Constitution

139. Plaintiffs repeat and incorporate by reference the preceding allegations.

140. The federal government has sole and exclusive power to regulate immigration. The federal government's exclusive power over immigration matters inheres in the Nation's sovereignty and derives from the U.S. Constitution's grant to the federal government the

power to "establish an uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4, and to "regulate Commerce with foreign Nations," *id.* cl. 3.

141. As part of its immigration power, the federal government has exclusive authority to enact and enforce regulations concerning which noncitizens to admit, exclude, remove, or allow to remain in the United States. The federal government also has exclusive authority over the terms and conditions of a noncitizen's stay in the United States. Further, the federal government has exclusive authority to classify noncitizens, which includes determining the categories of noncitizens who are granted federal authorization to remain in the United States. In contrast, state governments have none of these powers.

142. Under its powers, the federal government has established a comprehensive system of laws, regulations, procedures, and administrative agencies that determine, subject to judicial review, whether and under what conditions a noncitizen may enter and live in the United States, when a noncitizen may be subject to removal, and when a noncitizen may be eligible for relief from removal, either temporarily or permanently. *See* Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*; *see also* Homeland Security Act, 6 U.S.C. § 101 et seq.; *Arizona v. United States*, 567 U.S. 387, 395 (2012) ("Federal governance of immigration and alien status is extensive and complex.").

143. The Supremacy Clause—Article VI, Clause 2—mandates that federal law preempts state law or policy in any area over which Congress expressly or impliedly has reserved exclusive authority or which is constitutionally reserved to the federal government, including where state law conflicts or interferes with federal law.

144. Under the Supremacy Clause, federal law preempts state regulation of any area over which Congress has expressly or impliedly exercised exclusive authority or which is constitutionally reserved to the federal government.

145. Under the federal immigration system, the federal government can exercise prosecutorial discretion to establish enforcement policies or authorize noncitizens to remain in the United States for a period of time and to work in the United States.

146. Defendant Brnovich, in his official capacity as Arizona Attorney General, signed the SAFE Agreement that purports to bind Defendant DHS "to consult [Defendant Brnovich and the Arizona Department of Law] and consider [their] views before taking any action, adopting or modifying a policy or procedure, or making any decision" regarding multiple categories of immigration policy. These categories include immigration enforcement, the number of ICE agents present within a state, the number of or pause in removals from the country, release from immigration detention, and standards for granting asylum and other immigration benefits.

147. The SAFE Agreement that Defendant Brnovich signed also purports to require DHS to "[u]tilize its immigration authorities" to enact certain immigration policy priorities, including "enforcing the immigration laws of the United States to prohibit the entry into, and promote the return or removal from, the United States" and "eliminating the incentives and so-called 'pull factors' for illegal immigration."

148. The SAFE Agreement that Defendant Brnovich signed purports to entitle Defendant Brnovich to injunctive relief to enforce Defendant DHS's purported obligations under the agreement.

149. Execution of the SAFE Agreement by Defendant Brnovich created a new schema of immigration policy that conflicts with, frustrates, and serves as an obstacle to federal immigration law, goals, and policies by, inter alia, dictating to Defendant DHS what its immigration policy priorities should be and forcing DHS to consult with Defendant Brnovich beyond the requirements of the HSA, APA, and other federal law.

150. By entering into the SAFE Agreement, Defendant Brnovich and the Arizona Department of Law created their own state-based set of immigration enforcement and benefits policies. Defendant Brnovich has also sought to enforce those purported priorities and other requirements of the Agreement against Defendant DHS in federal court. Defendant Brnovich's creation of his own immigration enforcement and benefits policy priorities and his lawsuit seeking injunctive relief against Defendant DHS to enforce the

Agreement impermissibly intrude on the federal government's exclusive authority to regulate immigration, and therefore violate the Supremacy Clause.

151. Because the SAFE Agreement signed by Defendant Brnovich and Defendant Brnovich's lawsuit to enforce the agreement are preempted by federal law, they violate the Supremacy Clause.

152. Plaintiffs move for relief on this claim directly under the U.S. Constitution.

FOURTH CAUSE OF ACTION

Right to Uniform System of Naturalization and Immigration Policy—Article I, Section 8, Clause 4, of the United States Constitution; Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*; Homeland Security Act, 6 U.S.C. § 101 *et seq.*; 42 U.S.C. § 1983

153. Plaintiffs repeat and incorporate by reference the preceding allegations.

154. Under the U.S. Constitution, the federal government has the power to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. The federal government has enacted a complex system of laws that enable the government to have such a uniform system of immigration. *See* Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq.; *see also* Homeland Security Act, 6 U.S.C. § 101 *et seq.*

155. The Secretary of Homeland Security, Under Secretary of Homeland Security, and Attorney General have various powers and responsibilities to establish regulations, issue instructions, and perform other acts to carry out their authority under the INA. *See generally* 8 U.S.C. § 1103.

156. Persons who are not U.S. citizens and subject to immigration law are entitled to various privileges and benefits as these immigration law allow, in addition to being subject to detention and removal under immigration law. *See, e.g.*, 8 U.S.C. § 1182 (setting forth provisions for persons who do not qualify for visas but are eligible to be admitted to the United States); *see also* 8 U.S.C. § 1101(a)(17) (defining "immigration laws" as "this chapter and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, expulsion, or removal of aliens").

157. These persons who are subject to immigration law have a right to a uniform system of laws, regulation, and policies determined by the officials to whom Congress has delegated these powers with their powers under the U.S. Constitution. Consequently, under the Constitution, the INA, and the HSA, these persons who are subject to immigration law also have a right to not have regulations and policies imposed on them by a separate sovereign power such as a state.

158. Defendant Brnovich, by entering into the SAFE Agreement with Kenneth Cuccinelli and purporting to bind Defendant DHS to policies, priorities, and procedural obligations not set by federal government officials under immigration law, has sought to impose a separate set of laws, regulations and policies on persons who are not U.S. citizens and subject to federal immigration law.

159. Defendant Brnovich entered into such agreement with an official, Kenneth Cuccinelli, who had no authority to bind Defendant DHS or the federal government to such obligations.

160. Defendant Brnovich thereby deprives these persons of their right to a uniform system of laws, regulations and policies determined by the federal government.

161. Defendant Brnovich entered into the SAFE Agreement in his official capacity as Arizona Attorney General and the director of the Arizona Department of Law, which represents the State of Arizona in federal court. By seeking to enforce purported SAFE Agreement policies and obligations against Defendant DHS in federal court, Defendant Brnovich acts under color of law to deprive Plaintiffs—who represent and serve persons subject to immigration law and, in the case of Plaintiff Puente, have such persons as members—of a uniform system of naturalization and immigration law and policy that is established by the federal government.

162. Plaintiffs move for relief on this claim directly under the U.S. Constitution and also as an action seeking redress of the deprivation of statutory rights under the color of state law, under 42 U.S.C. § 1983.

FIFTH CAUSE OF ACTION

Equal Protection Clause, Fourteenth Amendment to the U.S. Constitution; 42 U.S.C. § 1983

163. Plaintiffs repeat and incorporate by reference the preceding allegations.

164. The Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

165. Under the Equal Protection Clause, where plaintiffs are not a suspect class, a state law withstands rational basis review where it is "rationally related to a legitimate state interest." *See Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

166. Defendant Brnovich, by entering into the SAFE Agreement with a federal official who had no legal authority to bind Defendant DHS and the federal government, created an immigration enforcement regime that has no basis in federal legal authority. The Attorney General of Arizona has no legitimate state interest in creating such a regime. Therefore, there is no rational basis for a legal immigration enforcement regime that rests on an agreement without authority such as the SAFE Agreement.

167. Similarly, because Mr. Cuccinelli had no authority to enter into the SAFE Agreement, Defendant Brnovich has no legitimate interest in creating and enforcing an immigration legal regime in an area of law that is within the exclusive power of the federal government. Therefore, there is no rational basis for a legal regime that is determined by a state with respect to an area of law that is exclusively within federal power.

168. By entering into the SAFE Agreement and seeking to enforce it in federal court, Defendant Brnovich seeks to apply this state-created, unlawful immigration legal regime that has no rational basis to those who reside in Arizona, including Plaintiffs and those whom Plaintiffs represent and serve. Defendant Brnovich thereby seeks to enforce the SAFE Agreement against Plaintiffs in violation of the Equal Protection Clause of the Fourteenth Amendment.

169. Defendant Brnovich has no other rational basis for creating an immigration legal regime that rests on an agreement signed a federal official with no authority to sign

such an agreement and based on shared authority in an exclusively federal area of law between the federal government and the State of Arizona.

170. Plaintiffs move for relief on this claim directly under the U.S. Constitution and also as an action seeking redress of the deprivation of statutory rights under the color of state law, under 42 U.S.C. § 1983.

SIXTH CAUSE OF ACTION

Declaratory Judgment Act

171. Plaintiffs repeat and incorporate by reference the preceding allegations.

172. Plaintiffs are suffering and will continue to suffer irreparable injury resulting from the implementation and enforcement of the unlawfully executed SAFE Agreement.

173. The Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, provides that "[i]n a case of actual controversy within its jurisdiction . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *Id.* § 2201(a).

174. This Court has equitable jurisdiction to enjoin "violations of federal law by federal officials." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015).

175. Cuccinelli assumed the office of Senior Official Performing the Duties of Deputy Secretary of Homeland Security in violation of the Federal Vacancies Reform Act and Homeland Security Act. Plaintiffs are entitled to a declaration that Cuccinelli's designation as Senior Official Performing the Duties of Deputy Secretary of Homeland Security violated federal law and that the SAFE Agreement is therefore invalid and unenforceable against any party.

176. Plaintiffs are further entitled to a declaration that Defendant Brnovich's lawsuit seeking to enforce the unlawful SAFE Agreement violates the Supremacy Clause of the United States Constitution; unlawfully deprives Plaintiffs of a uniform system of naturalization and immigration law and policy that is established by the federal government, as guaranteed to them by the United States Constitution, the Immigration and Nationality

Act, the Homeland Security Act, and other federal laws; and violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

177. The SAFE Agreement, which Cuccinelli unlawfully executed under his purported authority as Senior Official Performing the Duties of Deputy Secretary of Homeland Security, harms Plaintiffs for the reasons stated above.

178. Defendant Brnovich's lawsuit seeking to enforce the unlawful SAFE Agreement harms Plaintiffs for the reasons stated above.

REQUEST FOR RELIEF

For the foregoing reasons, Plaintiffs request that the Court:

1 Declare that the SAFE Agreement was signed in violation of the Federal Vacancies Reform Act and the Homeland Security Act and is therefore *ultra vires*, has no force or effect, and is void;

2 Declare that the SAFE Agreement was executed not in accordance with law, in violation of the Administrative Procedure Act;

3 Vacate the SAFE Agreement;

4 Immediately and permanently enjoin Defendants and all their officers, employees, agents, and successors from implementing, applying, or seeking to enforce the SAFE Agreement;

5 Award Plaintiffs their costs and reasonable attorneys' fees; and

6 Grant such further and other relief as this Court deems just and proper.

Dated: March 16, 2021

Respectfully submitted,

ORTEGA LAW FIRM, P.C.

By: */s/ Daniel R. Ortega Jr.*
DANIEL R. ORTEGA JR.

DANIEL R. ORTEGA JR.
danny@ortegalaw.com
ORTEGA LAW FIRM, P.C.
361 East Coronado Road, Ste. 101
Phoenix, Arizona 85004
Telephone: (602) 386-4455
Facsimile: (602) 376-4480

E. MARTIN ESTRADA
Martin.Estrada@mto.com
(*Pro Hac Vice* forthcoming)
BRANDON E. MARTINEZ
Brandon.Martinez@mto.com
(*Pro Hac Vice* forthcoming)
ABRAHAM REJWAN OVED
avi.oved@mto.com
(*Pro Hac Vice* forthcoming)
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue, 50th Floor
Los Angeles, California 90017
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

THOMAS A. SAENZ
tsaenz@maldef.org
(*Pro Hac Vice* forthcoming)
ERNEST I. HERRERA
eherrera@maldef.org
(*Pro Hac Vice* forthcoming)
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 South Spring Street
Los Angeles, California 90014
Telephone: (213) 629-2512
Facsimile: (213) 629-0266

Counsel for Plaintiffs