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10 *Attorneys for Plaintiffs Mark Brnovich and*  
11 *the State of Arizona*

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

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

17 Plaintiffs,

18 v.

19 Joseph R. Biden in his official capacity as  
20 President of the United States; Alejandro  
21 Mayorkas in his official capacity as  
22 Secretary of Homeland Security; United  
23 States Department of Homeland Security;  
Troy Miller in his official capacity as  
24 Senior Official Performing the Duties of  
the Commissioner of U.S. Customs and  
Border Protection; Tae Johnson in his  
official capacity as Senior Official  
Performing the Duties of Director of U.S.  
Immigration and Customs Enforcement.

25 Defendants.

No. 21-\_\_\_\_\_

**COMPLAINT FOR**  
**DECLARATORY RELIEF**

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## INTRODUCTION

1. This case presents circumstances that would have been unthinkable to our Founding Fathers. The Executive Branch has adopted an unconstitutional policy of *favoring* aliens that have unlawfully entered the United States over actual U.S. citizens, both native and foreign born, with the inalienable right to live here. In doing so, the Biden Administration respected the putative rights of those illegally entering the United States, while simultaneously showing contempt for the actual rights of U.S. citizens. This preference is unlawful and violates the Equal Protection Clause.

2. Specifically, the Biden Administration has disclaimed any COVID-19 vaccination requirement for unauthorized aliens, even those being released directly into the United States. Although the Department of Homeland Security (“DHS”) offers vaccination to aliens it apprehends unlawfully entering the United States, it does not insist that they be vaccinated—even if they are being released into the U.S., rather than being immediately deported. Many refuse: reporting indicates that roughly 30% decline the offer of vaccination.<sup>1</sup> That is so even though COVID-19 is prevalent among migrants: “more than 18% of migrant families who recently crossed the border tested positive for COVID before being released by Border Patrol. Another 20% of unaccompanied minors tested positive for the virus.”<sup>2</sup>

3. The upshot is that aliens unlawfully crossing into the United States are not bound by any federal vaccination requirement whatsoever. Their rights to choose to be vaccinated—*or not*—command the unadulterated respect of Defendants. Those of U.S. citizens: not so much. The same Administration that would not dream of infringing upon the right of unauthorized aliens to choose whether to be vaccinated (or not), has no equivalent regard for the rights of United States citizens.

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<sup>1</sup> Michael Lee, “Biden’s vaccination mandate doesn’t include illegal immigrants,” *Fox News* (September 9, 2021), <https://www.foxnews.com/politics/biden-plan-for-forced-vaccinations-doesnt-include-illegal-immigrants> (accessed September 10, 2021).

<sup>2</sup> *Id.*

1           4.       Instead, the Biden Administration has announced multiple, unprecedented  
2 federal mandates requiring U.S. citizens to be vaccinated against COVID-19, upon pain  
3 of losing their jobs or their livelihood. In particular, on September 9, 2021, President  
4 Biden pronounced that his “patience is wearing thin”<sup>3</sup> with Americans who choose not to  
5 receive the COVID-19 vaccine. President Biden announced plans to require that all private  
6 employers with more than 100 employees impose COVID-19 vaccine mandates on their  
7 employees; that all federal employees and contractors receive the COVID-19 vaccine; and  
8 that virtually all health care providers receive the COVID-19 vaccine.

9           5.       At the same time, driven by President Biden’s campaign promises of lax  
10 immigration enforcement and loose border security, Defendants have created a crisis at  
11 the southern border leading to an unprecedented wave of unlawful immigration into the  
12 U.S. And even though about one in five aliens arriving in the United States without  
13 authorization are infected with COVID-19, Defendants let these aliens refuse vaccination,  
14 thus protecting aliens’ freedom and bodily autonomy more than for American citizens.<sup>4</sup>

15           6.       Indeed, as Table 1 (taken from Defendants’ own website) shows, DHS  
16 encounters with unauthorized aliens are at their highest level in years, and continually  
17 increasing.

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25           <sup>3</sup> Joseph Biden, Remarks at the White House (September 9, 2021),  
26 <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/> (accessed September 10, 2021)

<sup>4</sup> *Supra*, note 1.

**Table 1: CPB Encounters With Unauthorized Aliens By Month**



U.S. Customs and Border Protection

**U.S. Customs and Border Protection (CBP) Encounters**  
 US Border Patrol (USBP) Title 8 Apprehensions,  
 Office of Field Operations (OFO) Title 8 Inadmissible Volumes,  
 and Title 42 Expulsions by Fiscal Year (FY)

FY  
All

Component  
All

Demographic  
All

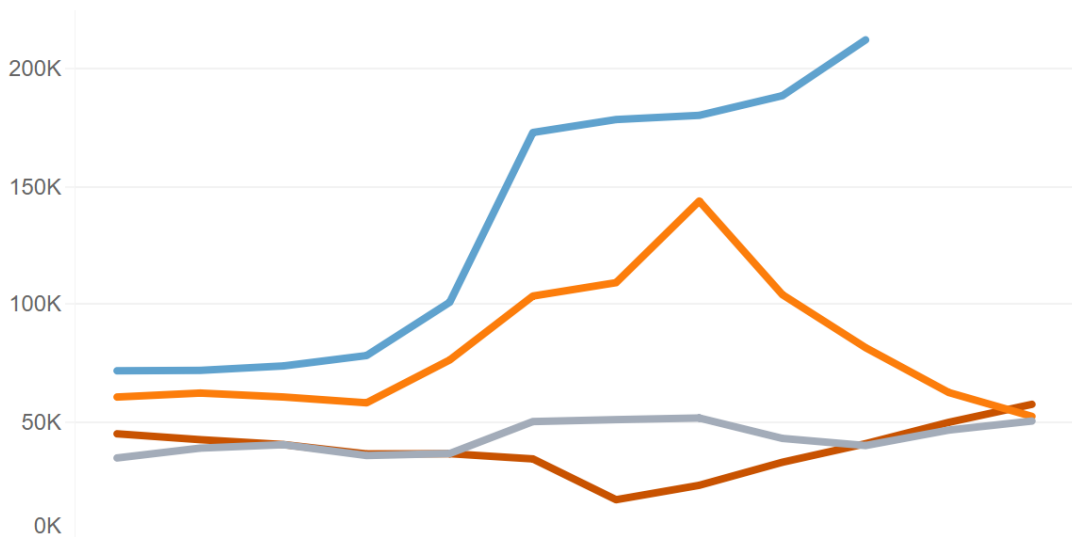
Citizenship Grouping  
All

Title of Authority  
All

**Reset Filters**

FY  2018  2019  2020  2021 (FYTD)

**FY Southwest Land Border Encounters by Month**



	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	Total
2021 (FYTD)	71,944	72,113	73,995	78,417	101,098	173,283	178,797	180,569	188,934	212,672			1,331,822
2020	45,139	42,643	40,565	36,585	36,687	34,460	17,106	23,237	33,049	40,929	50,014	57,674	458,088
2019	60,781	62,469	60,794	58,317	76,545	103,731	109,415	144,116	104,311	81,777	62,707	52,546	977,509
2018	34,871	39,051	40,519	35,905	36,751	50,347	51,168	51,862	43,180	40,149	46,719	50,568	521,090

Source: <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>

1           7.       Although the precise contours of the federal vaccination mandates are not  
2 yet clear, the violation of the Equal Protection Clause is already evident and egregious. In  
3 a nutshell: unauthorized aliens will not be subject to *any* vaccination requirements even  
4 when released directly into the United States (where most will remain), while roughly a  
5 *hundred million* U.S. citizens will be subject to unprecedented vaccination requirements.  
6 This reflects an unmistakable—and unconstitutional—brand of favoritism in favor of  
7 unauthorized aliens.

8           8.       This discrimination in favor of unauthorized aliens violates the Equal  
9 Protection Clause. Notably, alienage is a suspect class that triggers strict scrutiny. More  
10 typically (and almost invariably previously), this discrimination was *against* aliens rather  
11 than for them. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 371, 375-376 (1971);  
12 *Application of Griffiths*, 413 U.S. 717, 721 (1973). But the same principle applies to  
13 favoritism *against* U.S. citizens in favor of aliens. Defendants’ actions could never  
14 conceivably pass strict scrutiny.

15           9.       Moreover, even if only rational basis review applied, Defendants’  
16 discrimination is still unconstitutional. Given that, on information and belief, hundreds of  
17 thousands of aliens apprehended by Defendants are being released into the United States,  
18 and given Defendants’ palpable indifference to whether these aliens are vaccinated,  
19 Defendants’ simultaneous and unhealthy fixation as to whether U.S. citizens are  
20 vaccinated is irrational and indefensible. Defendants’ policy of *absolutely excluding*  
21 unauthorized aliens from *all vaccination requirements*, while subjecting U.S. citizens to  
22 *multiple, unprecedented, sweeping, and intrusive* mandates is wildly unconstitutional and  
23 should not stand.

24           10.      Because Defendants’ respect for individual rights vis-à-vis vaccination  
25 mandates appears to extend *only* to unauthorized aliens, and not U.S. citizens, their actions  
26 violate the Equal Protection Clause and should be invalidated. American citizens should

1 be entitled to treatment at least as favorable as what Defendants afford to unauthorized  
2 aliens. This Court should accordingly declare this preferential treatment unlawful and  
3 enjoin actions taken pursuant to it.

4 11. The illegality and incoherence of Defendants' policies is also apparent in  
5 their differential treatment among immigrants. Those who illegally enter the United States  
6 will not be subject to *any* vaccination mandate. In stark contrast, aliens who go through  
7 legal channels to obtain work visas, lawfully enter the United States, and are employed by  
8 a company with more than 99 workers, *will* be subject to the vaccination mandate.  
9 Defendants' policies thus discriminate between immigrants by unconstitutionally favoring  
10 those who *illegally* entered the United States over those who lawfully did so.

11 12. Defendants' unlawful actions here, however, are but one piece of a greater  
12 series of constitutionally improper actions: one of the greatest infringements upon  
13 individual liberties, principles of federalism, and separation of powers ever attempted by  
14 *any* administration in the history of our Republic. Defendants' ambitions are not limited  
15 to exceeding their delegated powers and violating the Constitution *merely* through  
16 unconstitutional discrimination alone. Instead, they intend *inter alia* to (1) violate the  
17 rights of citizens to bodily integrity, (2) violate principles of federalism, under which the  
18 federal government has only enumerated powers, by exercising the sort of general police  
19 power reserved *solely* to the States under the Tenth Amendment, and  
20 (3) unconstitutionally subvert Congress's authority by exercising quintessentially  
21 *legislative* powers, and in a manner that could never pass either (let alone both) Houses of  
22 Congress today—which is precisely why Defendants have no intent whatsoever to ask for  
23 legislative authorization to take such unprecedented actions. Under our Constitution, the  
24 President is not a king who can exercise this sort of unbridled power unilaterally. And  
25 even George III wouldn't have dreamed that he could enact such sweeping policies by  
26 royal decree alone.

1           13. Recognizing that the Federal Government lacks the authority to directly  
 2 impose a mandate, even the President’s own Chief of Staff retweeted that what the  
 3 administration was planning for citizens (but not unauthorized aliens) would be the  
 4 “ultimate work-around.”



16 Source: <https://www.foxnews.com/politics/klain-vaccine-coronavirus-mandate>

17           14. The inadvertent admission in the preceding paragraph makes all of the  
 18 administration’s actions constitutionally suspect. These other violations will be the subject  
 19 of future challenges. Courts will have an opportunity to review and invalidate those  
 20 forthcoming mandates as to private employers, federal contractors, federal employees, and  
 21 health care workers. But this particular component—*i.e.*, the unconstitutional  
 22 discrimination against U.S. citizens, lawful permanent residents, and aliens lawfully  
 23 residing and working in the U.S.—is ripe for judicial review and invalidation now.

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**PARTIES**

15. Plaintiff Mark Brnovich is the Attorney General of the State of Arizona. He is the State’s chief legal officer and has the authority to represent the State in federal court. Plaintiff State of Arizona is a sovereign state of the United States of America.

16. Arizona is one of four states on the United States-Mexico border. As a border state, it suffers disproportionately from immigration-related burdens.

17. Defendant Joseph R. Biden is the President of the United States. President Biden is sued in his official capacity.

18. Defendant Alejandro Mayorkas is the Secretary of Homeland Security. Secretary Mayorkas is sued in his official capacity.

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

20. Defendant Troy Miller serves as Senior Official Performing the Duties of the Commissioner of U.S. Customs and Border Protection (“CBP”). Acting Commissioner Miller is sued in his official capacity.

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

**JURISDICTION AND VENUE**

22. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1346, and 1361.

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

24. Venue is proper within this District pursuant to 28 U.S.C. § 1391(e) because (1) Plaintiff resides in Arizona and no real property is involved and (2) “a substantial part of the events or omissions giving rise to the claim occurred” in this District.



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**LEGAL BACKGROUND**

25. The Supreme Court established in *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954) that the Equal Protection Clause of the Fourteenth Amendment is incorporated against the federal government through the Fifth Amendment’s Due Process Clause. *See also Sessions v. Morales*, 137 S. Ct. 1678, 1686 n.1 (2017) (the Supreme Court’s “approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment”).

26. Aliens and citizens are protected classes in equal protection jurisprudence, triggering strict scrutiny when the government has a differential policy based on such classifications. *See Graham v. Richardson*, 403 U.S. 365, 371, 375-376 (1971); *Application of Griffiths*, 413 U.S. 717, 721 (1973). Generally, prior case law in this area has involved discrimination *against* aliens as a class. But the reverse preference in *favor* of authorized aliens is just as constitutionally suspect.

27. Under principles of federalism, the federal government has only enumerated powers and not the sort of general police power reserved *solely* to the States under the Tenth Amendment. *Printz v. United States*, 521 U.S. 898, 919 (1997) (“Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). “The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” *The Federalist* No. 45 (James Madison).

## FACTUAL BACKGROUND

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2 28. On September 9, 2021, President Biden announced his “new plan to *require*  
3 more Americans to be vaccinated” by imposing “new vaccination *requirements*” that  
4 “*require* all employers with 100 or more employees, that together employ over 80 million  
5 workers, to ensure their workforces are fully vaccinated or show a negative test at least  
6 once a week.” He also announced plans to “*require[e]* vaccinations” of “those who work  
7 in hospitals, home healthcare facilities, or other medical facilities — a total of 17 million  
8 healthcare workers.” He further announced that he would “sign an executive order that  
9 will now *require* all executive branch federal employees to be vaccinated — all. And I’ve  
10 signed another executive order that will *require* federal contractors to do the same.” And  
11 finally, he announced that he would “*require* all of nearly 300,000 educators in the federal  
12 paid program, Head Start program” to get vaccinated.<sup>5</sup>

13 29. Following President Biden’s remarks, the White House released a webpage  
14 with further information about Defendants’ “COVID Plan.” The White House stated that  
15 “[t]he Department of Labor’s Occupational Safety and Health Administration (OSHA) ...  
16 will issue an Emergency Temporary Standard (ETS) to implement” the requirement that  
17 “all employers with 100 or more employees to ensure their workforce is fully vaccinated  
18 or require any workers who remain unvaccinated to produce a negative test result on at  
19 least a weekly basis.” The White House webpage also stated that the Centers for Medicare  
20 & Medicaid Services (CMS) would “require COVID-19 vaccinations for workers in most  
21 health care settings that receive Medicare or Medicaid reimbursement..., apply[ing] to  
22 approximately 50,000 providers and cover[ing] a majority of health care workers across  
23 the country.”<sup>6</sup>

24 30. Upon information and belief, neither OSHA nor CMS have yet published  
25 any regulations regarding the planned vaccine mandates.

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<sup>5</sup> *Supra* note 3 (emphasis added).

<sup>6</sup> <https://www.whitehouse.gov/covidplan/> (accessed September 10, 2021)

1           31. On September 9, 2021, President Biden signed an Executive Order imposing  
2 on federal contractors “COVID [s]afety [p]rotocols” to be published at a later date by the  
3 Safer Federal Workforce Task Force.<sup>7</sup> The Executive Order did not explicitly make any  
4 provision for religious or medical exemptions to the “safety protocols.” On information  
5 and belief and based on President Biden’s prior remarks, Plaintiffs allege that the COVID-  
6 19 “safety protocols” for contractors will include a vaccine mandate.

7           32. On September 9, 2021 President Biden also signed an Executive Order  
8 requiring that “[e]ach agency shall implement ... a program to *require* COVID-19  
9 vaccination for all of its Federal employees.”<sup>8</sup> The Executive Order made no explicit  
10 provision for any religious or medical exemptions to the vaccination requirement.

11           33. Defendants have dismantled much of the country’s border enforcement  
12 infrastructure, for example, 1) by imposing a near-moratorium on alien removals through  
13 a memorandum issued on January 20, 2021, and then through interim guidance issued by  
14 DHS on February 18, 2021; 2) by abandoning the Migrant Protection Protocols (MPP)  
15 requiring that aliens from third countries requesting asylum at the border with Mexico  
16 must wait in Mexico while awaiting adjudication of their asylum application<sup>9</sup>; and 3) by  
17 abandoning construction of already-planned and funded border wall and fencing.  
18 Defendants’ actions have led to an enormous increase in attempted border crossings by  
19 eliminating disincentives to being caught.

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22 <sup>7</sup> Exec. Order No. 14042, 86 Fed. Reg. 50985, “Ensuring Adequate COVID Safety  
Protocols for Federal Contractors,” (Sept. 9, 2021).

23 <sup>8</sup> Exec. Order No. 14043, 86 Fed. Reg. 50989, “Requiring Coronavirus Disease 2019  
Vaccination for Federal Employees,” (Sept. 9, 2021).

24 <sup>9</sup> Defendants’ attempt to abandon MPP was enjoined by a district court, and both the Fifth  
25 Circuit and U.S. Supreme Court have denied the federal government’s requests for a stay  
26 pending appeal. *See Biden v. Texas*, No. 21A21, 2021 WL 3732667 (Aug. 24, 2021); *State*  
*v. Biden*, No. 21-10806, 2021 WL 3674780, at \*1 (5th Cir. Aug. 19, 2021).

1           34. DHS’s own statistics reveal the unprecedented surge of unlawful migration  
2 and the collapse of DHS’s control of the border. July 2021 had the highest number of  
3 encounters in *decades*—“the highest monthly encounter number since Fiscal Year  
4 2000.”<sup>10</sup> DHS data show that the number of border encounters in July 2021 was more than  
5 five times the July 2020 and July 2018 numbers, and roughly 2.5 times July 2019.<sup>11</sup> DHS  
6 itself has admitted that it is “encountering record numbers of noncitizens ... at the border”  
7 that “have strained DHS operations and caused border facilities to be filled beyond their  
8 normal operating capacity.”<sup>12</sup>

9           35. Secretary of Homeland Security Alejandro Mayorkas recently  
10 acknowledged that the Department of Homeland Security has lost control of the border,  
11 lamenting that the current situation is “unsustainable,” that it “cannot continue,” that the  
12 system is getting close to “breaking,” and that “we’re going to lose.”<sup>13</sup>

13           36. In addition, Defendants’ actions directly injure the State’s quasi-sovereign  
14 “interest, independent of the benefits that might accrue to any particular individual, in  
15 assuring that the benefits of the federal system are not denied to its general population,”  
16 as well as its “interest in securing residents from the harmful effects of discrimination.”  
17 *Alfred L. Snapp & Son, Inc. v. Puerto Rico (“Snapp”)*, 458 U.S. 592, 607-09 (1982).  
18 Defendants’ policies directly injure these interests, by subjecting Arizona residents to  
19 unlawful discrimination and denying them of the benefit of the Equal Protection Clause.  
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22 <sup>10</sup> Declaration of David Shahoulian (DHS Assistant Secretary for Border and Immigration  
Policy) at 1-2, *Huisha-Huisha v. Mayorkas*, No. 21-cv-100 (D.D.C. August 2, 2021)

23 <sup>11</sup> <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>

24 <sup>12</sup> *Supra*, note 10.

25 <sup>13</sup> Edmund DeMarche, Emma Colton, and Bill Melugin, “Mayorkas says border crisis  
26 'unsustainable' and 'we're going to lose' in leaked audio,” *Fox News* (August 13, 2021),  
<https://www.foxnews.com/politics/mayorkas-leaked-audio-border>.



1 United States, constitutes discrimination on the basis of national origin and alienage in  
2 violation of the Equal Protection Clause.

3 42. Defendants’ failure to articulate any justification for their differential,  
4 favorable treatment of unauthorized aliens demonstrates discriminatory intent.

5 43. Defendants’ overt statements and expressive acts, including those of  
6 President Biden stating his “patience is wearing thin” with Americans who choose not to  
7 receive the COVID-19 vaccine and his Chief of Staff retweeting that the plan was the  
8 “ultimate work-around” further indicate discriminatory intent.

9 44. There is no rational basis for Defendants’ differential, favorable treatment of  
10 unauthorized aliens. For relevant purposes, unauthorized aliens and U.S. citizens/lawful  
11 permanent residents are similarly situated.

12 45. Defendants’ differential treatment between immigrants lawfully present in  
13 the United States and unauthorized aliens—with vaccination mandates only to apply to the  
14 former—is similarly unconstitutional and irrational.

15 **PRAYER FOR RELIEF**

16 Plaintiffs respectfully request that this Court enter judgment:

- 17 A. Declaring unconstitutional, pursuant to 28 U.S.C. § 2201, Defendants’ differential  
18 COVID-19 vaccination policies regarding (1) unauthorized aliens and (2) U.S.  
19 citizens/lawful permanent residents, including by declaring that Defendants do not  
20 have authority to impose the vaccination mandate on U.S. citizens and lawful  
21 permanent residents, let alone discriminate against them as compared to unauthorized  
22 aliens;
- 23 B. Enjoining Defendants from engaging in unconstitutional discrimination against U.S.  
24 citizens, lawful permanent residents, and lawfully present aliens, and specifically  
25 enjoining Defendants from imposing on U.S. citizens, lawful permanent residents, and  
26 lawfully present aliens any COVID-19 vaccination policies different from those

1 imposed on unauthorized aliens already present in the United States and on aliens  
2 illegally entering the United States;

3 C. Awarding Plaintiffs costs of litigation, including reasonable attorneys’ fees, under the  
4 Equal Access to Justice Act, 28 U.S.C. § 2412; and

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

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7 RESPECTFULLY SUBMITTED this 14th of September, 2021.

8  
9 **MARK BRNOVICH**  
10 **ATTORNEY GENERAL**

11 By: /s/ James K. Rogers  
12 Joseph A. Kanefield (No. 15838)  
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