

MARK BRNOVICH
ATTORNEY GENERAL
(Firm State Bar No. 14000)

Joseph A. Kanefield (No. 15838)
Brunn (Beau) W. Roysden III (No. 28698)
Drew C. Ensign (No. 25463)
James K. Rogers (No. 27287)
2005 N. Central Ave
Phoenix, AZ 85004-1592
Phone: (602) 542-8540
Joseph.Kanefield@azag.gov
Beau.Roysden@azag.gov
Drew.Ensign@azag.gov
James.Rogers@azag.gov

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

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Mark Brnovich, in his official capacity as
Attorney General of Arizona; *et al.*,

Plaintiffs,

v.

Joseph R. Biden in his official capacity as
President of the United States; *et al.*,

Defendants.

No. 2:21-cv-01568-MTL

**PLAINTIFFS' MOTION FOR
JURISDICTIONAL DISCOVERY**

INTRODUCTION

In their Motion to Dismiss filed on January 3, 2022, and again in their Reply filed on March 15, 2022, Defendants argued that Plaintiffs (hereinafter “Arizona”) lack Article III standing (*see* Doc. 146 at 5-7; Doc. 174 at 1-8) to assert Counts IX through XIII of the Third Amended Complaint (*see* Doc. 134 ¶¶ 216-234) (the “Immigration Claims”). Press reports published after Defendants filed their Reply have provided additional information confirming the broad scope of Defendants’ Non-Detention and Parole Policies and that those policies are being applied unlawfully in a programmatic fashion to parole aliens en masse into the United States. Those reports also illustrate the enormous harms that Defendants’ policies are inflicting upon Arizona by waving into the country tens of thousands of unauthorized aliens. Those press reports, however, focused on Defendants’ actions on Texas’s border with Mexico. Arizona should be permitted to explore whether Defendants are undertaking equivalent (or worse) actions on Arizona’s border.

As information related to jurisdiction and standing is uniquely in the custody and control of the Federal government, Arizona respectfully moves for targeted jurisdictional discovery for the purpose of establishing its standing as to the Immigration Claims.

As the Ninth Circuit has explained, jurisdictional discovery should be granted where “discovery on th[e] issue might well demonstrate facts sufficient to constitute a basis for jurisdiction.” *Harris Rutskey & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003) (emphasis added). Indeed, that court held that a district court had abused its discretion in denying jurisdictional discovery where a mere possibility (“might well demonstrate”) of discovering useful evidence existed. *Id.* More than such a mere possibility is manifestly present here.

Indeed, this Court ordered discovery in *Arizona v. DHS*, No. CV-21-00186—the exact same discovery sought here—which turned up evidence that this Court found sufficient to support the State’s APA-based immigration claims. Far from being speculative, Arizona has every expectation that jurisdictional discovery will similarly produce sufficient evidence of standing here. Internal DHS documents providing such evidence have already been leaked to

the press. At a bare minimum, the Ninth Circuit’s “might well demonstrate” standard is met here, and Arizona’s request should accordingly be granted.

LEGAL STANDARD

Courts have concluded that jurisdictional discovery is appropriate in this context. As the Ninth Circuit has explained, jurisdictional discovery should be granted where “discovery on th[e] issue *might well* demonstrate facts sufficient to constitute a basis for jurisdiction.” *Harris Rutsky*, 328 F.3d at 1135 (emphasis added). “Discovery should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.” *Butcher’s Union Local No. 498 v. SDC Investment, Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) (cleaned up). The Ninth Circuit has reversed a court’s refusal to countenance jurisdictional discovery where such discovery would be merely “useful” for purposes of establishing federal subject matter jurisdiction. *Laub v. U.S. Dep’t of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (denial of discovery not an abuse of discretion only when “it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction”).

ARGUMENT

Shortly after Arizona filed its Response to Defendants’ Motion to Stay (Doc. 176), additional facts became public that illustrate in stark terms Defendants’ continued and brazen abuse of the parole authority. Specifically, a news story broke¹ (attached hereto as Exhibit A) reporting that Defendant DHS is engaging in “mass parole releases” at the southern border and has authorized the programmatic, en masse parole of entire categories of aliens who illegally cross the southern border, thus exacerbating the crisis at the border: “There were 164,973 encounters in February, compared to 101,099 encounters in February last year, a month that preceded a massive surge in numbers in the spring and summer months... [P]reliminary Customs and Border Protection (CBP) data indicates that authorities are on track

¹ Bill Melugin, “Biden admin OKs mass releases of Cubans, Venezuelans, Nicaraguans into US as authorities face migrant surge,” Fox News (Mar. 24, 2022) at <https://www.foxnews.com/politics/biden-admin-cubans-venezuelans-nicaraguans-authorities-migrant-surge>

1 to have encountered more than 200,000 in March, compared to 173,277 in March last year.”²

2 The news was based on a leaked Border Patrol (“BP”) email dated Sunday, March 20
3 that authorizes Parole + ATD for “CVNs,” which refers to aliens from Cuba, Venezuela, and
4 Nicaragua. The email also authorizes Parole + ATD for “Columbian FMUs,” which refers to
5 aliens from Columbia who are traveling as a family unit. Attached hereto as Exhibit B is a copy
6 of that email, a journalist’s inquiry about the email, and CBP’s official response to the
7 journalist’s inquiry in which CBP does not deny the email’s authenticity.³

8 On March 25, another journalist released a nearly identical internal email from a
9 different BP sector also “authoriz[ing] mass release of Cubans, Venezuelans, Nicaraguans &
10 some Colombians via parole.”⁴ The journalist’s source for the email explained that the purpose
11 of the mass-grant of parole was to “mov[e] people as fast as they get them to avoid
12 overcrowding.”⁵ Attached as Exhibit C is a copy of that email and CBP’s response to the
13 journalist, in which CBP does not deny the email’s authenticity.⁶

14 Both emails also contain instructions for the treatment of “Columbian SAs,” which
15 appears to refer to single adult aliens from Columbia. The emails instruct that “T42” is
16 authorized for such aliens, apparently referring to expulsion of aliens on public health grounds
17 under Title 42 of the U.S. Code. For Columbian single adults for whom return flights are not
18 available, the emails offer two options: “WA/NTA or NTA/OR,” which appear to mean the
19 issuance of a notice to appear together, respectively, with either a warrant for arrest or on the
20 aliens’ own recognizance. The issuance of a warrant for arrest would appear to imply detention
21 of the alien. Thus, even though the INA requires mandatory detention for *all* the categories
22 of aliens discussed in the email, the email instructs that only a small subset of a subset actually
23 be detained in conformity with the law.

24 The leaked emails further illustrate the vast extent of Defendants’ disregard for the
25 clear requirements established by Congress in the INA. Defendants’ own public data confirms

26 ² *Id.*

27 ³ <https://twitter.com/BillFOXLA/status/1507043819702738969>

28 ⁴ <https://twitter.com/alibradleytv/status/1507391298960965635>

⁵ *Id.*

⁶ *Id.*

1 that they are paroling into the United States *tens of thousands of aliens per month* (Doc. 167 at 1),
2 whereas former BP Chief Rodney Scott has stated that the prior norm was to issue only about
3 *5 to 10 paroles per year*.⁷ And now, these leaked emails demonstrate that, instead of complying
4 with the INA’s clear command that parole be granted “only on a case-by-case basis for urgent
5 humanitarian reasons or significant public benefit,” 8 U.S.C. § 1182(d)(5)(A), Defendants are
6 using crude national origin criteria to grant parole programmatically by national-origin-based
7 classifications en masse.

8 These DHS documents and reports illustrate Defendants’ misuse of their limited parole
9 power, and how that abuse is causing real harm by bringing into the United States tens of
10 thousands of aliens who force significant costs on the States.

11 The press reports and leaked emails relate to border sectors in Texas. Arizona should
12 be entitled to seek discovery on how Defendants are implementing the Non-Detention and
13 Parole Policies in Arizona border sectors.

14 There are thus several strong reasons to believe that discovery would reveal facts
15 pertinent to jurisdiction as to Arizona’s Immigration Claims. *First*, federal government officials
16 are in the best position to know the extent of application of its Non-Detention and Parole
17 Policies, how often programmatic grants of parole have been approved in Arizona border
18 sectors, the number of aliens admitted under these policies, and aliens’ compliance with
19 requirements.

20 As the Supreme Court has observed, federal government authority over migration to
21 the United States is exclusive. *See Galvan v. Press*, 347 U.S. 522, 531 (1954) (“Policies pertaining
22 to the entry of aliens and their right to remain here are ... entrusted exclusively to Congress.”);
23 *Truax v. Raich*, 239 U.S. 33, 42 (1915) (“The authority to control immigration—to admit or
24 exclude aliens—is vested solely in the Federal Government.”). Plaintiffs challenge Defendants’
25 immigration policies, and Defendants are the sole custodians of information about those
26 policies’ implementation and their effect. For example, CBP is charged with securing the
27

28 ⁷ <https://twitter.com/BillFOXLA/status/1507044171512569865>

1 nation's border, and it collects unparalleled statistics on border encounters and migration.⁸

2 *Second*, Defendants complain that Arizona is engaging in “undeveloped speculation”
 3 about the nature and implementation of Defendants’ Parole and Non-Detention Policies
 4 (Doc. 146 at 25) and that Arizona’s claim that “Defendants’ alleged policies induce illegal
 5 immigration is ... speculative.” (Doc. 174 at 8.) The federal government, in making the
 6 decisions challenged in this case, assuredly considered these precise issues. Deterrence is
 7 certainly an “important aspect of the problem” confronting the agency with respect to its
 8 border decisions. *Cf. Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463
 9 U.S. 29, 43 (1983). The effect of Defendants’ policies is the question presented by standing.
 10 The federal government clearly has a view on this question, and that view bears directly on
 11 Arizona’s standing. Arizona should be permitted to explore Defendants’ own documents
 12 regarding that view. Indeed, Defendants cannot fairly assert that Arizona is relying on
 13 “undeveloped speculation” and then refuse to provide documents that would allow Arizona
 14 to develop its claims with non-speculative evidence uniquely in Defendants’ possession.

15 *Third*, DHS’s November Memo requires that Border Patrol sectors in Arizona must
 16 receive “approval from the USBP Chief and the CBP Commissioner prior to implementation”
 17 of programmatic parole policies and that the Non-Detention and Parole Policies “will be
 18 reassessed by USBP HQ **on a daily basis.**” (Doc 167-1 at 3 (emphasis added).) Similarly,
 19 DHS’s January 31, 2022 letter states that “Parole + ATD ... includes accountability measures.”
 20 (Doc. 167-2 at 2.) DHS thus likely has communications and other documents that detail its
 21 decisions to approve use of the Non-Detention and Parole Policies in Arizona border sectors,
 22 as well as quantitative information about the extent of the policies’ applications and aliens’
 23 compliance (or non-compliance) with requirements that aliens report to the federal
 24 government and appear for hearings. This information would shed light on the impact of
 25 Defendants’ border decisions.

26 The discovery requested here is *precisely* the same as that which this Court ordered with
 27

28 ⁸ See, e.g., CBP Enforcement Statistics Fiscal Year 2022,
<https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics>.

respect to Arizona's challenge to the federal government's February 18, 2021 Interim Guidance, which permitted Arizona to serve five requests for production, five interrogatories and take up to three depositions. *See Arizona v. DHS*, No. 21-CV-00186, ECF No. 42 (D. Ariz. Apr. 8, 2021), attached hereto as Exhibit D. As here, the Interim Guidance challenged in that case involved the government disputing the court's jurisdiction and Arizona's standing. However, in the Interim Guidance case, the discovery the Court granted ultimately showed that the State *had* standing to pursue its challenge. *See Arizona v. DHS*, No. 21-CV-00186, 2021 WL 2787930, at *7 (D. Ariz. June 30, 2021). Accordingly, here, Arizona moves for the court to issue an order permitting Arizona to:

- Serve five requests for production;
- Serve five interrogatories;
- Take up to three depositions;
- Obtain the administrative record.

This narrow scope of discovery—*far* less than what the rules authorize in typical civil cases—will shed light on Arizona's injury from the Non-Detention and Parole Policies without imposing a substantial burden on Defendants and ensure Arizona's claims are not dismissed prematurely.

This case presents the important question of whether Defendants' decision to stop enforcing our nation's laws at the border harms Arizona. Arizona should be permitted to further develop the evidence on this important question.⁹

CONCLUSION

For the foregoing reasons, this Court should grant Arizona's request for targeted jurisdictional discovery.

⁹ This Court is not limited to the administrative record (which has not been produced) in ascertaining the State's standing. *See, e.g., Nw. Envir. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997). Indeed, courts routinely rely on extra-record evidence to support standing in APA cases. *See, e.g., Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153-54 (2010) (relying on declarations to find that plaintiffs had Article III standing in an APA case); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010) (same).

1 RESPECTFULLY SUBMITTED this 28th day of March, 2022.

2
3 **MARK BRNOVICH**
4 **ATTORNEY GENERAL**

5 By: /s/ James K. Rogers

6 Joseph A. Kanefield (No. 15838)

7 Brunn W. Roysden III (No. 28698)

8 Drew C. Ensign (No. 25463)

9 James K. Rogers (No. 27287)

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

I hereby certify that on this 28th day of March, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all Defendants who have appeared are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

/s/ James K. Rogers
*Attorney for Plaintiffs Mark Brnovich, in his official
capacity as Attorney General of Arizona; and the State of
Arizona*

Exhibit A



Print Close

Biden admin OKs mass releases of Cubans, Venezuelans, Nicaraguans into US as authorities face migrant surge

By Bill Melugin, Adam Shaw

Published March 24, 2022

Fox News

The Biden administration is releasing Cubans, Venezuelans, Nicaraguans and some Colombians into the United States via a humanitarian parole pathway, Fox News has learned, just as authorities are facing increasing migrant numbers that are overwhelming agents and overcrowding facilities.

A DHS source in Rio Grande Valley (RGV) Sector told Fox News that the federal government has started releasing nationals from the four countries – with the exception of Colombian single adults – into the U.S. after an email went out that said agents were authorized to give humanitarian parole to those nationalities.

DHS REQUESTING ADDITIONAL PENTAGON SUPPORT AT BORDER AMID FEARS OF MASSIVE MIGRANT SURGE

Sources told Fox News that mass parole releases are already taking place in both RGV and Del Rio Sectors.

Federal law says parole authority is to be used on a case-by-case basis for "urgent humanitarian purposes" and "significant public benefit." Typically, only a handful of parole cases are granted by officials, but the Biden administration has been using it more broadly to release tens of thousands of migrants into the interior as it looks to deal with a crisis that has seen monthly encounter numbers at more than 150,000-a-month for nearly a year.

MIGRANT NUMBERS PICKING UP STEAM AT THE BORDER AS DEMS PUSH BIDEN ADMIN TO END TITLE 42 RESTRICTIONS

Colombian single adults are being returned under Title 42, a public health order used since the Trump administration to expel migrants at the border due to the COVID-19 pandemic. The Biden administration has kept it in place, returning more than half of all migrants encountered at the border in February, but is believed to be considering allowing the order to expire at the end of the month.

CBP said in a statement that those migrants who cannot be expelled under Title 42 and do not have a legal basis to stay in the U.S. are placed in removal proceedings.



Jan. 23, 2022: Fox News footage shows migrants being released into the US. (Fox News)

"Although some facilities have reached capacity, CBP continues to safely, efficiently and effectively process individuals encountered

in the Del Rio Sector," a spokesperson said, adding that migrants go thorough background checks in order to continue to keep public safety threats in custody.

DHS PUTS OUT CALL FOR EMPLOYEES TO VOLUNTEER AT SOUTHERN BORDER AMID 'LARGE NUMBERS' OF MIGRANTS

The new releases come amid reports that the Biden administration is bracing for a dramatic surge in migrants at the border that could eclipse last year's overwhelming surge -- particularly if the administration ends Title 42.

There were 164,973 encounters in February, compared to 101,099 encounters in February last year, a month that preceded a massive surge in numbers in the spring and summer months. The Washington Post [reported](#) this week that preliminary Customs and Border Protection (CBP) data indicates that authorities are on track to have encountered more than 200,000 in March, compared to 173,277 in March last year.

Meanwhile, a top Pentagon official on Thursday told lawmakers DHS had requested additional support from the Pentaton to help deal with a potential increase in migrants, while DHS officials have put out a call to staff to volunteer at the border as the agency says it "continues to encounter large numbers of individuals at the Southwest Border."

CLICK HERE TO GET THE FOX NEWS APP

The Post reported that internal emails show concern over a "mass migration event," after [Axios recently reported](#) that DHS is preparing a "war room" to deal with the influx. Meanwhile, photographs have emerged showing the release of migrants due to [overcrowded facilities in Texas](#).

One Border Patrol agent in Del Rio told Fox News that "we are overrun."

"We are now doing paroles. I want to be p---ed about it, but at this point we are simply overrun."

Bill Melugin currently serves as a national correspondent for FOX News Channel based out of the Los Angeles bureau.

 **Print**  **Close**

URL

<https://www.foxnews.com/politics/biden-admin-cubans-venezuelans-nicaraguans-authorities-migrant-surge>

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Exhibit B

From: GRAME, MONIQUE R <ML
Sent: Sunday, March 20, 2022 9:31:04 PM
To:

Subject: For Immediate Action: Processing Pathway

All,

Effective immediately, HQ has authorized the following:

PATD is authorized for CVNs, all demographics.

PATD is authorized for Colombian FMUs.

T42 is authorized for Colombian SAs

WA/NTA or NTA/OR Colombian SAs who cannot get on an expulsion flight.

Please reach out to ERO to coordinate ATD and releases. Please make the timeframe for the parole conditions 60 days unless ICE would prefer shorter.

If there are any questions as to processing pathways, please let us know.

Monique

12:53

5G



Subject: FOX News Inquiry

Good evening,

I am hearing from Border Patrol sources in the RGV that [beginning Sunday](#), agents were authorized to begin mass releasing migrants from Colombia, Venezuela, and Nicaragua via the parole pathway, and I am in possession of an email instructing agents as such, notifying them that it has been "authorized by HQ".

I'm told this is already in progress and many bus loads of hundreds of these migrants have already been released via parole.

I'm told by Border Patrol sources in Del Rio sector that they are also beginning mass parole releases.

Does CBP deny this?

And under federal law, parole is to be granted only in a case by case basis for "significant public benefit" or "urgent humanitarian reasons".

How does CBP justify these mass releases given the law?

Thank you for your time,

Bill Melugin

National Correspondent

CBP Statement

DHS continues to expel migrants under CDC's Title 42 authority. Those who cannot be expelled under Title 42 and do not have a legal basis to remain are placed in expedited or full removal proceedings.

Although some facilities have reached capacity, CBP continues to safely, efficiently, and effectively process individuals encountered in the Del Rio sector. As part of the process for effectuating removals, Border Patrol agents collect biometric and biographic information and run a background check to identify and continue to detain those who pose a public safety risk.

Exhibit C

Good morning,

As stated in this morning's call, below is the change of processing pathway for all VCNs.

Effective immediately, we are now authorized for the following:

PATD is authorized for VCNs.

Delayed T42 is authorized for Colombian SAs. WA/NTA or NTA/OR Colombian SAs who cannot get on an expulsion flight

Timeframe for the parole conditions is 60 days.

ERO has been made aware and should be onboard. However, if any issues arise, please let us know as soon as possible.

V/r,


DIVISION CHIEF

LAW ENFORCEMENT OPERATIONAL PROGRAMS

CBP Statement

DHS continues to expel migrants under CDC's Title 42 authority. Those who cannot be expelled under Title 42 and do not have a legal basis to remain are placed in expedited or full removal proceedings. Although some facilities have reached capacity, CBP continues to safely, efficiently, and effectively process individuals encountered in the Del Rio sector. As part of the process for effectuating removals, Border Patrol agents collect biometric and biographic information and run a background check to identify and continue to detain those who pose a public safety risk.

On background:

The migrant populations being released include family units and single adults with no prior criminal history.

Exhibit D

DISTRICT JUDGE'S CIVIL MINUTES
IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA – PHOENIX

U.S. District Judge: Susan R. Bolton

Date: April 8, 2021

Case Number: CV-21-00186-PHX-SRB

Arizona, State of et al v. United States Department of Homeland Security et al

APPEARANCES: <u>David M. Dewhirst, Brunn Wall Roysden and Anthony Roman Napolitano (all appearing telephonically)</u> Plaintiff(s) counsel	<u>Brian C. Rosen-Shaud and Michael Fraser Knapp (both appearing telephonically)</u> Defense counsel
--	---

Also present telephonically: Cody Wofsy and Noorulain Zafar for Amicus American Civil Liberties Union

This is the time set for Motion Hearing re: Plaintiffs' Motion for Preliminary Injunction (Doc. 17).
Argument held.

For reasons as stated on the record, IT IS ORDERED denying as moot Plaintiffs' Motion for Preliminary Injunction regarding Section C of the January 20, 2021, Memorandum entitled Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities.

With respect to Plaintiff's Motion regarding the February 18, 2021 Interim Guidance, additional briefing will be allowed to separately address the request for a preliminary injunction of the Interim Guidance. The Court will also permit Plaintiffs' counsel and Defendants' counsel to serve five requests for production, five interrogatories and take up to three depositions before the additional briefing.

IT IS ORDERED directing counsel to confer and file a joint notice no later than **April 12, 2021,** regarding agreed upon dates for the filing of the administrative record, completion of discovery and further briefing.

Deputy Clerk: Maureen Williams
Court Reporter: Hilda Lopez

**Start: 10:31 AM
Stop: 11:43 AM**

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Mark Brnovich, in his official capacity as
Attorney General of Arizona; *et al.*,

Plaintiffs,

v.

Joseph R. Biden in his official capacity as
President of the United States; *et al.*,

Defendants.

No. 2:21-cv-01568-MTL

[PROPOSED] ORDER

1 Having considered Plaintiffs' Motion for Jurisdictional Discovery,

2 **IT IS HEREBY ORDERED**, the Court will permit Plaintiffs to serve five requests
3 for production, five interrogatories, and take up to three depositions.

4 **IT IS FURTHER ORDERED** that Defendants shall produce the Administrative
5 Record for Plaintiffs' Immigration Claims within 21 days of this order.
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