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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

COUNTY OF SAN DIEGO,

Plaintiff,

v.

KIRSTJEN M. NIELSEN, Secretary of
the Department of Homeland Security, in
her official capacity; RONALD D.
VITIELLO, Deputy Director and Senior
Official Performing Duties as
Immigration and Customs Enforcement
Director, in his official capacity;
MATTHEW T. ALBENCE, U.S.
Immigration and Customs Enforcement
Executive Associate Director, in his
official capacity; KEVIN K.
MCALEENAN, Commissioner of
Customs and Border Protection, in his
official capacity; and CARLA L.
PROVOST, Chief of Border Patrol, in her
official capacity.

Defendants.

Case No. '19CV0631 L BGS

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

[PLAINTIFF DEMANDS A JURY
TRIAL ON ANY JURY
ISSUES/CLAIMS]

1 1. The County of San Diego (“County” or “Plaintiff”) brings this action
2 because it has been harmed, and continues to be harmed, as a result of Defendants’
3 sudden and unlawful change in policy. This policy change involves the release of asylum
4 seekers from federal detention into the County while denying the asylum seekers – who
5 are present in this country legally by virtue of their asylum claims and related federal law
6 – the previously-provided assistance in reaching their final destination(s) outside the
7 County.

8 2. Before Defendants’ unlawful policy change – which violated the procedural
9 and substantive provisions and protections of the Administrative Procedure Act, 5 U.S.C.
10 § 551, et seq. – the vast majority of asylum seekers briefly passed through the County on
11 the way to their final destinations outside of the County. They lived outside the County
12 while their asylum claims were adjudicated. Now, large numbers of asylum seekers and
13 accompanying family members are forced to remain in the County, without sufficient
14 means to support themselves, because Defendants abruptly stopped providing asylum
15 seekers with assistance in reaching their final destination(s).

16 3. In response to Defendants’ sudden and unlawful change in policy, and in
17 order to mitigate against a public health crisis and harm to the health, safety, and welfare
18 of County residents and the asylum seekers and their accompanying family members, the
19 County has been forced to expend substantial funds and other resources to provide
20 medical screening and care to the asylum seekers. Additionally, the County has
21 contributed support for a shelter run by local non-governmental organizations (“NGOs”)
22 to provide lodging for the released asylum seekers, and to otherwise assist the asylum
23 seekers and their accompanying family members until they are able to contact relatives in
24 the United States to make arrangements for support while their asylum claims are being
25 processed and decided.

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1 4. The County seeks a judicial declaration that Defendants' sudden change in
2 policy to no longer providing asylum seekers assistance in reaching their final destination
3 outside the County, violated the APA both procedurally and substantively, and was thus
4 unlawful.

5 5. The County further seeks a preliminary and permanent injunction requiring
6 Defendants to resume providing asylum seekers and their accompanying family members
7 assistance in reaching their final destinations outside the County.

8 **PARTIES**

9 6. Plaintiff County of San Diego is, and at all relevant times has been, a local
10 government and a political subdivision of the State of California.

11 7. At all times relevant to this action, defendant Kirstjen M. Nielsen was and is
12 the Secretary of the United States Department of Homeland Security ("DHS"), and is
13 sued in her official capacity. In this capacity, Defendant Nielsen directs each of the
14 component agencies within DHS, including the United States Immigration and Customs
15 Enforcement ("ICE"). Defendant Nielsen is responsible for the administration of
16 immigration laws and policies pursuant to 8 U.S.C. § 1103, including those laws and
17 policies regarding the detention and release of asylum seekers.

18 8. At all times herein mentioned, defendant Ronald D. Vitiello was and now is
19 the Deputy Director and Senior Official Performing the Duties of Director of ICE, and is
20 sued in his official capacity. ICE is the sub-agency that operates the Federal
21 government's immigration detention system. In this official capacity, Defendant Vitiello
22 directs the administration of ICE's detention policies and operations, including those
23 policies and operations regarding the detention and release of asylum seekers.

24 9. At all times herein mentioned, Defendant Matthew T. Albence was and now
25 is ICE's Enforcement and Removal Operations ("ERO") Executive Associate Director
26 and Senior Official Performing the Duties of the Deputy Director, and is sued in his
27 official capacity. In this capacity, Defendant Albence oversees, directs, and coordinates
28 policies and operations throughout the nation's ERO field offices and sub-offices,

1 including those policies and operations regarding the detention and release of asylum
2 seekers.

3 10. At all times herein mentioned, Defendant Kevin K. McAleenan was and now
4 is the Commissioner of United States Customs and Border Protection (“CBP”), and is
5 sued in his official capacity. In this capacity, Defendant McAleenan directs all of the
6 departments within CBP, which is the nation’s primary border control organization.
7 Defendant McAleenan oversees, directs, and coordinates policies and operations along
8 the nation’s southwest border, including those policies and operations regarding the
9 detention and release of asylum seekers.

10 11. At all times herein mentioned, Defendant Carla L. Provost was and now is
11 the Chief of United States Border Patrol (“USBP”), and is sued in her official capacity.
12 USBP is the mobile, uniformed law enforcement arm of CBP. In this capacity,
13 Defendant Provost directs and supervises the implementation of DHS, ICE, and CBP
14 policies. Defendant Provost is responsible for the enforcement of immigration laws and
15 policies, including those laws and policies regarding the detention and release of asylum
16 seekers.

17 **JURISDICTION AND VENUE**

18 12. This Court has jurisdiction under 28 U.S.C. § 1331 because this action arises
19 under the laws of the United States, including the Administrative Procedure Act, 5 U.S.C.
20 § 551, et seq. This Court has additional remedial authority under the Declaratory
21 Judgment Act, 28 U.S.C. § 2201, et seq., and the judicial review sections of the
22 Administrative Procedure Act, 5 U.S.C. §§ 701-706.

23 13. Venue is proper in the Southern District of California pursuant to 28 U.S.C.
24 § 1391(b)(2) and (e), as each defendant is an officer or employee of the United States or
25 an agency thereof acting in his or her official capacity, and a substantial part of the events
26 or omissions giving rise to the claims in this action occurred within this District.

27 14. There exists an actual and justiciable controversy between Plaintiff and
28 Defendants requiring resolution by this Court. Plaintiff has no adequate remedy at law.

1 **FACTUAL BACKGROUND**

2 The County is informed and believes, and on the basis of such information and
3 belief alleges, that:

4 **Asylum Seeker Detention and Safe Release Program Generally**

5 15. In recent years, children and adults have fled significant, claimed
6 persecution in their home countries and arrived at Ports of Entry (“POE” or “POEs”), and
7 other points, along the U.S.-Mexico border to seek protection in the United States
8 through the asylum process. A substantial number of the asylum seekers present
9 themselves at POEs or other points along the portion of the U.S.-Mexico border that
10 abuts San Diego County.

11 16. When an individual or family unit arrives at the U.S.-Mexico border via the
12 San Ysidro or Otay Mesa POEs, which are located in the Southern District of California,
13 or encounters immigration enforcement officers at a point other than a POE, they will
14 have an initial interview. During the initial interview with USBP, CBP, or ICE, if an
15 individual or family unit claims asylum based on a well-founded fear of persecution,
16 those people are either (1) released from initial detention and given a Notice to Appear
17 (“NTA”) in immigration court; or (2) detained pending a credible fear interview.

18 17. Many asylum seekers arriving in San Diego County have family members or
19 points of contact (“POCs”) within the United States, but have not communicated with
20 those people before their arrival in the United States.

21 18. From 2009 and continuing to October 2018, ICE began and implemented a
22 policy known as “Safe Release” or “Coordinated Release” (hereafter, “Safe Release
23 policy”).

24 19. As part of this policy, during initial detention ICE (or other federal agencies)
25 provided asylum seekers assistance in reaching their final destinations outside the County
26 of San Diego, where they would reside pending adjudication of their asylum claim.

27 20. Examples of the assistance Defendants provided under the Safe Release
28 policy include: helping asylum seekers locate the contact information for relatives

1 residing in the United States and outside the County of San Diego; facilitating phone calls
2 between asylum seekers and those relatives; and transporting the asylum seekers and
3 their accompanying family members to their chosen mode of transportation to reach their
4 final destination outside the County (depending on the travel arrangements made by the
5 asylum seekers and their relatives or other points of support outside the County).

6 21. Under the Safe Release policy, asylum seekers would typically travel to their
7 final destinations within twenty-four to seventy-two hours from initial detention.

8 22. On the coordinated travel dates, ICE would transport the traveling asylum
9 seekers directly to the departure points for their pre-arranged mode of transportation,
10 such bus stations, train stations, and airports, facilitating an orderly release process. ICE
11 would also provide a minimal amount of food to asylum seekers for their journeys to
12 their final destinations.

13 23. The vast majority of asylum seekers entering through the U.S.-Mexico
14 border within San Diego County travel to locations outside San Diego County.

15 24. Relatives or other points of support outside the County would take asylum
16 seekers into their care and provide the asylum seekers (including accompanying family
17 members) with lodging and support until the asylum seekers' scheduled immigration
18 court appearances on the NTA.

19 **Abrupt End of Safe Release Program and Its Effects**

20 25. On or about October 24, 2018, San Diego NGOs Jewish Family Services
21 (“JFS”) and San Diego Rapid Response network (“SDRRN”) attended a meeting with
22 ICE, CBP, and USBP officials in San Diego.

23 26. At the meeting, officials from ICE, CBP, and USBP, with the oversight of or
24 as authorized by Defendants, abruptly announced that the Safe Release policy would be
25 ending. The federal agencies did not provide any information as to when exactly or why
26 the policy was changing or being terminated.

27 27. Within 24 hours of the meeting, and without any prior notice to or
28 coordination with relatives, POCs, local NGOs, or the County, ICE dropped off

1 approximately 40 asylum seekers and accompanying family members at a San Diego bus
2 station. These individuals, many of whom did not speak English, lacked sufficient funds
3 to travel or support themselves, and had not been afforded the opportunity or means to
4 reach out to relatives or others outside the County. They were simply left to fend for
5 themselves in a land that was foreign to them.

6 28. In October 2018, multiple news outlets reported on the sudden end of the
7 Safe Release policy, with ICE commenting after the fact that the end of the policy was
8 due to limited resources to support the program. In commenting on Safe Release's end,
9 ICE acknowledged the existence of the policy.

10 29. According to JFS and SDRRN, an average of 20 to 30 family units (60 to 80
11 parents and young children) have been released into San Diego County *each day* since
12 October 2018, with ICE – under the direction and with the authority of Defendants –
13 failing to abide by its longstanding Safe Release policy of providing asylum seekers
14 assistance in reaching their final destinations.

15 30. Some asylum seekers and accompanying families arrive in poor health with
16 children and parents suffering from the flu, upper respiratory infections, injuries
17 sustained while traveling from Central America, scabies, and/or lice, as well as emotional
18 or psychiatric injuries and conditions resulting from the persecution they are fleeing, as
19 well as adverse incidents or crimes committed against them during their travel to the
20 United States.

21 31. These poor health conditions were commented on during Defendant
22 Nielsen's testimony before the U.S. House of Representatives Homeland Security
23 Committee on March 6, 2019. From 2018 to this year, USBP projected a 158% increase
24 in migrants needing medical treatment because of the long and often arduous journey
25 from the Central or South America to the southwest border. Defendant Nielsen's own
26 testimony noted that "vulnerable populations, especially children, are coming into DHS
27 sicker than ever before."

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1 32. After ICE abruptly, arbitrarily, and capriciously ended its Safe Release
2 policy in October 2018, SDRRN, with the help of JFS, set up a migrant shelter to provide
3 shelter and food, and to help arrange travel for asylum seekers to relatives or other POCs
4 within the United States.

5 33. In November 2018, the County began providing the shelter with
6 surveillance, monitoring, training, and other support to help shelter staff address public
7 health concerns.

8 34. Beginning in December 2018, the County Health and Human Services
9 Agency (“HHSA”), in an effort to protect the health of the public, including asylum
10 seekers, began conducting health screening assessments at the shelter. On average, 76
11 screenings per day are conducted by fourteen or so County employees assigned to the
12 shelter. County employees also refer asylum seekers for outside medical care as
13 appropriate and identify and prevent the spread of communicable diseases.

14 35. The County has also expanded an existing contract with University of
15 California San Diego (“UCSD”) to screen and evaluate asylum seekers for diseases of
16 public health significance; treat or refer for any condition encountered; and transfer
17 arrivals to the general shelter population, isolation, or a higher level of care if
18 appropriate.

19 36. Additionally, the County Department of Environmental Health has provided
20 on-site assessments at the temporary shelter to ensure food safety; the County’s Public
21 Safety Group Office of Emergency Services has assisted with planning and coordination;
22 the County Sheriff’s Department provides daily report coordination; and the County
23 Department of General Services provides maintenance and support for equipment that
24 enables HHSA staff to work on site.

25 37. Projected costs for the above-described County services and assistance, that
26 the County has been forced to incur and/or expend as a direct result of Defendants’
27 unlawful policy change (i.e., suddenly, arbitrarily, and capriciously ending the Safe
28 Release policy), exceed \$1.1 million as of March 22, 2019, and will continue to increase

1 until Defendants agree to, or are required by this Court to, once again follow the
2 longstanding Safe Release policy.

3 38. With the abrupt end of Safe Release policy, federal agencies have left
4 asylum seekers and their accompanying family members to fend for themselves, and have
5 forced the County to incur and expend resources it would not have normally had to incur
6 or expend, in order to help fill the unexpected vacuum left by Defendants' sudden and
7 unlawful change in policy.

8 39. As noted above, SDRRN is the NGO running the migrant shelter. Its lease
9 on the original building used for the shelter expired on February 15, 2019. On January
10 29, 2019, the County Board of Supervisors approved the use of a county building for
11 SDRRN to run the shelter until December 2019.

12 40. As a direct result of the subject, unlawful change in policy, under the
13 direction and authority of Defendants, the County has suffered, and will continue to
14 suffer, immediate and apparent harms in combating the humanitarian and public health
15 issues caused by the sudden, arbitrary, and capricious change or termination of the Safe
16 Release policy.

17 41. The County and its residents have relied on the Safe Release policy, and the
18 adherence to that policy by Defendants and the federal agencies they oversee, specifically
19 to manage the safe and orderly release of asylum seekers and their accompanying family
20 members by assisting them in reaching their final destinations outside the County of San
21 Diego. The prior policy treated asylum seekers with care and dignity, and helped to
22 prevent a dramatic increase in the County's homeless population and accompanying
23 public health concerns and related costs and expenditures. With the sudden and unlawful
24 change or end to the policy, the County – with the help of local NGOs – was left to
25 respond to the immediate and continuing fallout of Defendants' arbitrary and capricious
26 actions. The County thus requests this Court to declare the subject policy change
27 unlawful under the Administrative Procedure Act, and order the federal government to
28 once again abide by the Safe Release policy.

1 **LEGAL BACKGROUND**

2 42. The power to set rules surrounding immigration rests with the United States
3 Federal Government rather than with the individual states. *See Chy Lung v. Freeman*, 92
4 U.S. 275, 276 (1875).

5 43 Federal law requires immigration agencies to give individuals who present
6 themselves at POEs and express a desire to apply for asylum or a fear of persecution in
7 their home countries the opportunity to seek protection in the United States without
8 unreasonable delay.

9 44. Specifically, the INA and its implementing regulations set forth a variety of
10 ways in which such individuals may seek protection in the United States. *See, e.g.*, 8
11 U.S.C. § 1157 (admission of refugees processed overseas); 8 U.S.C. § 1158 (asylum); 8
12 U.S.C. §1231(b)(3) (restriction of removal to a country where individual’s life or
13 freedom would be threatened); 8 C.F.R. §§ 208.16-18 (protection under the Convention
14 Against Torture).

15 45. The INA provides that any noncitizen “who is physically present in the
16 United States or who arrives in the United States” has a statutory right to apply for
17 asylum, irrespective of such individual’s status. 8 U.S.C. § 1158(a)(1). The INA also
18 specifies processes that must be followed when an individual states a desire to seek
19 asylum or expresses a fear of returning to his or her home country. *See* 8 U.S.C. §
20 1158(d)(1) (“The Attorney General shall establish a procedure for the consideration of
21 asylum applications filed [by individuals physically present in the United States or who
22 arrive in the United States].”).

23 46. The APA authorizes suits by “[a] person suffering legal wrong because of
24 agency action, or adversely affected or aggrieved by agency action within the meaning of
25 a relevant statute.” 5 U.S.C. § 702. The APA requires that federal agencies conduct
26 notice and comment rulemaking before engaging in action that impacts substantive rights.
27 5 U.S.C. §§ 553, 706(2)(D). The APA also provides relief for agency actions found to be
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1 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
2 law” 5 U.S.C. § 706(2)(A).

3 **FIRST CAUSE OF ACTION**

4 **Administrative Procedure Act – Notice and Comment Rulemaking**

5 **[5 U.S.C. §§ 553, 706(2)(D)]**

6 47. The above paragraphs are incorporated herein by reference.

7 48. DHS, ICE, CBP, and USBP are “agencies” under the APA, and the
8 termination of – or change to – the Safe Release policy, and actions in furtherance of the
9 termination or change constitute “rules” under the APA.

10 49. In terminating or changing the subject policy, the above-described federal
11 agencies, and Defendants who in their official capacity are in charge of the agencies,
12 have levied clear and distinct burdens on the County in the form of the substantial and
13 increased costs and expenditures resulting from the policy change or termination, as more
14 fully described above.

15 50. The APA requires administrative agencies to follow notice-and-comment
16 rulemaking procedures to promulgate substantive rules. *See* 5 U.S.C. § 553. The APA
17 defines “rule” broadly to include:

18 [T]he whole or part of an agency statement of general or particular
19 applicability and future effect designed to implement, interpret, or prescribe
20 law or policy or describing the organization, procedure, or practice
21 requirements of an agency

21 5 U.S.C. § 551(4).

22 51. The termination or change in the Safe Release policy constitutes a
23 substantive rule subject to the APA’s notice-and-comment requirements.

24 52. As the policy change or termination was undertaken without first submitting
25 the action for notice and public comment, Defendants and the federal agencies they
26 oversee have violated section 553 of the APA, and their actions constitute unlawful
27 rulemaking.

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1 53. Defendants' APA violation has caused, and will continue to cause, harm to
2 the County and its residents.

3 **SECOND CAUSE OF ACTION**

4 **Administrative Procedure Act – Agency Action That Is Arbitrary and Capricious,**
5 **an Abuse of Discretion, and Otherwise Not in Accordance with Law**

6 **[5 U.S.C. § 706(2)(A)]**

7 54. The above paragraphs are incorporated herein by reference.

8 55. Under 5 U.S.C. § 706(2), courts shall hold unlawful and set aside agency
9 action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
10 with law; contrary to constitutional right, power, privilege, or immunity; in excess of
11 statutory jurisdiction, authority, or limitations; or without observance of procedure
12 required by law.

13 56. The termination or change in the Safe Release policy constitutes final
14 agency action that is reviewable by the Court.

15 57. The termination or change in the Safe Release policy was arbitrary and
16 capricious, an abuse of discretion, and not in accordance with law because, among other
17 things, the termination or change in policy deviated from federal regulations, and
18 Defendants failed to articulate a reasonable explanation for their actions. In assessing
19 Defendants' actions under the arbitrary-and-capricious standard, a court "must consider
20 whether the decision was based on a consideration of the relevant factors and whether
21 there has been a clear error of judgment." *San Luis & Delta-Mendota Water Auth. v.*
22 *Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (citation omitted). Here, Defendants have not
23 considered the relevant factors in deciding to terminate or change the Safe Release
24 policy. Defendants also have failed to consider important aspects of the issue, including
25 the reasons and arguments in support of the Safe Release policy that were previously
26 considered and made by the federal agencies Defendants oversee.

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1 58. Defendants also disregarded the serious reliance interests engendered by the
2 Safe Release policy. Where, as here, significant reliance interests are at stake,
3 Defendants must, in addition to demonstrating that “there are good reasons” for the new
4 policy, offer “a reasoned explanation . . . for disregarding facts and circumstances that
5 underlay or were engendered by the prior policy.” *FCC v. Fox Television Stations*, 556
6 U.S. 502, 515 (2009). Defendants here have utterly failed in these obligations.

7 59. The unlawful termination of, or change to, the Safe Release policy has
8 unfairly shifted the resulting burdens to the County and its residents (among others).
9 Defendants’ APA violation has caused, and will continue to cause, harm to the County
10 and its residents.

11 **THIRD CAUSE OF ACTION**

12 **Violation of Procedural Due Process**

13 **[U.S. Const., amend. V]**

14 60. The above paragraphs are incorporated herein by reference.

15 61. Under the Fifth Amendment to the United States Constitution, no person
16 may be deprived of life, liberty, or property without due process of law.

17 62. The County has constitutionally-protected interests in the expenses it has
18 incurred and will incur, and funds that it has been forced to expend and will expend, as a
19 result of Defendants’ unlawful termination of, or change to, the Safe Release policy.

20 63. Defendants’ actions unlawfully deprive the County of these and other
21 constitutionally-protected interests without due process of law. Such deprivation
22 occurred with no notice or opportunity to be heard.

23 64. Defendants therefore have violated the Fifth Amendment to the United
24 States Constitution.

25 65. The County was harmed and continues to be harmed by these constitutional
26 violations.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Vacate and set aside the termination of, or change in, the Safe Release policy and any other related action taken by Defendants and the agencies they oversee;

2. Declare that the actions taken by Defendants and the agencies they oversee to terminate or change the Safe Release policy are void and without legal force or effect;

3. Declare that the actions taken by Defendants and the agencies they oversee to terminate or change the Safe Release policy are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and without observance of the procedure required by law, in violation of 5 U.S.C. §§ 702-706;

4. Issue a preliminary and permanent injunctions requiring Defendants, the agencies they oversee, as well as their agents, servants, employees, attorneys, and all persons in active concert or participation with any of them, to provide asylum seekers and their accompanying family members the assistance in reaching their final destinations that was provided under the Safe Release policy;

5. Require Defendants' agencies to reimburse the County the expenses that it has incurred, and will incur, as a result of Defendants' unlawful actions;

6. Award Plaintiff reasonable attorneys' fees if permitted by any applicable law; and

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

Dated: April 3, 2019

THOMAS E. MONTGOMERY, County Counsel

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