

KEVIN MCALEENAN, Acting Secretary of the Department of Homeland Security, in his official capacity; MARK A. MORGAN, Acting Director, U.S. Immigration and Customs Enforcement, in his official capacity; MATTHEW T. ALBENCE, Deputy Director, U.S. Immigration and Customs Enforcement, in his official capacity; NATHALIE R. ASHER, Executive Associate Director for Enforcement and Removal Operations, U.S. Immigrations and Customs Enforcement, in her official capacity; and CARLA L. PROVOST, Chief of Border Patrol, in her official capacity,

Defendants.

### **MEMORANDUM OPINION AND ORDER**

**THIS MATTER** comes before the Court on the Defendants' Motion to Dismiss and Opposition to Plaintiffs Motion For Preliminary Injunction and Supporting Memorandum, filed August 12, 2019 (Doc. 10)("MTD"). The Court held a hearing on December 11, 2019. See Clerk's Minutes at 1, filed December 11, 2019 (Doc. 28). The primary issues are: (i) whether Plaintiffs State of New Mexico and City of Albuquerque have Article III standing to bring their action to enjoin Defendants Kevin McAleenan, Mark A. Morgan, Matthew T. Albence, Nathalie R. Asher, and Carla L. Provost's practice of abandoning parole asylees in cities and towns throughout New

Mexico and Albuquerque's oral motion to amend the Complaint for Declaratory and Injunctive Relief and Damages, filed June 10, 2019 (Doc. 1) ("Complaint"); and (vi) whether the Court should grant a preliminary injunction. The Court concludes that: (i) New Mexico and Albuquerque have Article III standing; (ii) sovereign immunity protects the Defendants against New Mexico and Albuquerque's APA claim; (iii) the challenged agency action is unreviewable under the APA; (iv) New Mexico and Albuquerque have not alleged a property or liberty interest that the Due Process Clause protects; (v) amending the Complaint would be futile; and (vi) because the Court lacks subject-matter jurisdiction for New Mexico and Albuquerque's APA claim, and because New Mexico and Albuquerque do not state a constitutional claim for which relief can be granted, the Court will not grant the requested preliminary injunction. The Court accordingly dismisses the Complaint without prejudice as to New Mexico and Albuquerque's APA claims, and with prejudice as to New Mexico and Albuquerque's constitutional claims.

### **FACTUAL BACKGROUND**

In the summer of 2019, the State of New Mexico and the City of Albuquerque filed this challenge to the federal government's decision to stop aiding asylum seekers trying to reach their final destinations. See Complaint at 1. Recently, an influx of adults and children from Central and South American countries have sought asylum in the United States of America. See Complaint ¶ 16, at 5. Immigration agencies typically interview and process these asylum seekers at their

as “Safe Release” that assisted asylum seekers by confirming travel plans, coordinating assistance to them from [non-governmental organizations], facilitating communication with family members, often providing food, water, and healthcare, and otherwise ensuring that asylum seekers had a means to reach their final destinations.” Complaint ¶ 20, at 6. Many asylum seekers have family members or sponsors in the United States but cannot communicate with them before seeking asylum. See Complaint ¶ 20, at 6. Under this policy, immigration agencies transported asylum seekers to bus stations, train stations, and airports near their ports of entry. See Complaint ¶ 20, at 6. Asylum seekers “would generally arrive at their final destination within three days of their initial detention.” Complaint ¶ 22, at 6.

The federal government ended the Safe Release policy in October, 2018, without warning, notice, or consultation with potentially affected entities. See Complaint ¶ 23, at 6. In April and May, 2019, immigration agencies began releasing asylum seekers in New Mexico towns near the

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<sup>1</sup>A noncitizen arriving at a United States Port of Entry is subject to expedited removal proceedings if a Customs & Border Patrol officer concludes that the noncitizen “is inadmissible for misrepresenting a material fact or lacking necessary documentation.” 8 U.S.C. § 1225(b)(1)(A)(i). The Department of Homeland Security may remove the noncitizen “without further hearing or review,” unless the noncitizen “indicates an intention to apply for asylum . . . or a fear of persecution.” 8 U.S.C. § 1225(b)(1)(A)(i). When a noncitizen indicates an intent to apply for asylum, “the officer shall refer the [noncitizen] for an interview with an asylum officer. . . .” 8 U.S.C. § 1225(b)(1)(A)(ii). A noncitizen will be removed if “the officer determines that [a noncitizen] does not have a credible fear of persecution. . . .” 8 U.S.C. § 1125(b)(1)(B)(iii).

has also realized a dramatic influx of asylum seekers” and receives about 150 to 250 asylum seekers per week. Complaint ¶ 26, at 7. It expects this flow to continue. See Complaint ¶ 27, at 7.

New Mexico and the City of Albuquerque “have been obligated to devote significant resources to fill the vacuum created by the federal government’s derogation of its duty to administer the immigration system and asylum claims.” Complaint ¶ 28, at 7. New Mexico alleges that it “has been forced to dedicate significant resources to addressing the substantial and predictable humanitarian and public health consequences of the federal government’s abrupt termination of or change to its Safe Release policy.” Complaint ¶ 29, at 7-8. Various New Mexico government agencies have provided resources and staff to address problems arising out of Safe Release’s end. See Complaint ¶ 30, at 8. New Mexico has provided \$750,000.00 in grants to local governments to help mitigate the effects of the United States’ decision to end the Safe Release program. See Complaint ¶ 31, at 8.

Albuquerque alleges that “[a] vast array of Albuquerque individuals and entities have also responded to the Defendants’ termination of the Safe Release policy and taken on Defendants’ federal responsibilities without federal funding to support such efforts.” Complaint ¶ 32, at 8. Albuquerque has assisted coordination efforts to handle the flow of asylum seekers. See Complaint ¶ 33, at 9. Albuquerque has also issued a \$250,000.00 special appropriation to help asylum seekers. See Complaint ¶ 34, at 9.

(Doc. 16)(“Response”). They also seek leave to add substantive due process and equal protections claims. See Response at 3.

**1. The MTD.**

The Defendants first argue that New Mexico and Albuquerque lack Article III standing. See MTD at 12. They argue that the New Mexico and Albuquerque “lack a judicially cognizable injury,” because the challenged action “does not command the State or its Cities to take, or refrain from taking, any action” and is instead injury from the United States’ lack of regulation ““of *someone else.*”” MTD at 12-13 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992)(emphasis in Lujan v. Defenders of Wildlife)). The Defendants further argue that New Mexico and Albuquerque’s arguments “would seem to conflict with the general principle that a plaintiff ‘lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.’” MTD at 13 (quoting Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973), and citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 897 (1984)). They also argue that the Complaint “ignores the legal implications of dual sovereignty,” MTD at 13, and that it is inconsistent with the Constitution that “a State (or City) has a legally-protected interest in avoiding effects flowing from the federal government’s actions regarding individuals who happen to be in that State or City . . . ,” MTD at 14.

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