No. 20-55777

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WHITEWATER DRAW NATURAL RESOURCE CONSERVATION DISTRICT, et al.,
Plaintiffs/Appellants,

v.

CHAD F. WOLF, Acting Secretary of Homeland Security, et al.,
Defendants/Appellees.

Appeal from the United States District Court for the Southern District of California
No. 3:16-cv-02583 (Hon. M. James Lorenz)

APPELLEES' ANSWERING BRIEF

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GLOSSARY

AC21	American Competitiveness in the Twenty-First Century Act
APA	Administrative Procedure Act
CATEX	Categorical Exclusion
CEQ	Council on Environmental Quality
DACA	Deferred Action for Childhood Arrivals
EA	Environmental Assessment
EIS	Environmental Impact Statement
FONSI	Finding of No Significant Impact
DHS	Department of Homeland Security
NEPA	National Environmental Policy Act
STEM	Science, technology, engineering, and math

INTRODUCTION

Plaintiffs are organizations and individuals opposed to immigration. They seek to use the National Environmental Policy Act (NEPA) to force changes to federal immigration policy. The district court held that Plaintiffs' claims are not justiciable under the Administrative Procedure Act (APA) and Article III of the Constitution. That holding was correct and should be affirmed.

At bottom, this lawsuit is incompatible with the limited role of the courts under the APA and Article III. The APA does not provide a cause of action for the judicial resolution of disagreements over immigration policy; the resolution of such disputes is for the political branches. The APA instead requires plaintiffs to target a discrete "final agency action" that is causing them harm. 5 U.S.C. § 704. Article III likewise requires plaintiffs to show that the challenged final agency action threatens their concrete interests. Plaintiffs here have not satisfied those basic requirements: they challenge an internal Department of Homeland Security (DHS) manual that is not a *final* agency action; they challenge broad immigration "programs" instead of *discrete* action; and to the extent that Plaintiffs' remaining claims do target discrete final agency actions, Plaintiffs have not shown that any of those actions threaten imminent harm to their concrete environmental interests.

The district court's judgment dismissing Plaintiffs' claims as nonjusticiable should be affirmed.

STATEMENT OF JURISDICTION

(a) Plaintiffs alleged subject matter jurisdiction under 28 U.S.C. § 1331 because their claims arose under NEPA, 42 U.S.C. §§ 4321 et. seq.; and the APA 5 U.S.C. §§ 551 et seq. 2-ER-34. But as explained in the Argument below, the district court correctly held that two of Plaintiffs' claims were not reviewable under the APA, and that Plaintiffs lacked Article III standing to pursue their remaining claims. 1-ER-3–27. Therefore, the district court lacked jurisdiction over all of Plaintiffs' claims.

(b) The district court's judgment was final because it disposed of all claims against all defendants. 1-ER-1–2. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The judgment was entered on June 1, 2020. 1-ER-1–2. Plaintiffs filed their notice of appeal on July 30, 2020, or 59 days later. 4-ER-676–78. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether a manual containing DHS's internal procedures for ensuring compliance with NEPA is "final agency action" reviewable under the APA.

2. Whether DHS's ongoing implementation of seven broad immigration "programs" is discrete "agency action" reviewable under the APA.

3. Whether Plaintiffs lack standing under Article III and the APA to challenge the DHS actions at issue in the remainder of the amended complaint.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are included in the Addendum to the Appellants' Opening Brief (Opening Brief).

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. Immigration and Nationality Act

The Immigration and Nationality Act, 8 U.S.C. §§ 1101 et seq., charges the Secretary of Homeland Security "with the administration and enforcement" of the immigration laws. *Id*. § 1103(a)(1). The Secretary is vested with the authority to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the Act, and he is given "control, direction, and supervision" of DHS. *Id*. § 1103(a)(2), (3).

2. National Environmental Policy Act

Under NEPA, federal agencies must prepare an "environmental impact statement" (EIS) for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). An EIS must include a "detailed written statement" concerning "the environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided," and "alternatives to

the proposed action." *Id*. When an EIS is prepared, the NEPA process concludes with the agency's issuance of a record of decision. 40 C.F.R. § 1502.2.[1]

To determine whether a proposed federal action requires an EIS, an agency may first prepare an environmental assessment (EA). 40 C.F.R. §§ 1501.4, 1508.9. The EA serves to "[b]riefly provide sufficient evidence and analysis" to determine whether the proposed action will have a "significant" effect on the environment. *Id*. § 1508.9. If the agency determines that the effects will not be significant, it issues a "finding of no significant impact" (FONSI) in lieu of preparing an EIS and a record of decision. *Id*. § 1508.13.

An agency may also identify "categorical exclusions," which are categories of actions that the agency has determined do not "individually or cumulatively have a significant effect on the human environment." *Id*. § 1508.4. For such categorically excluded actions, "neither an [EA] nor an [EIS] is required." *Id*.

Each agency is required to adopt, as necessary and after the opportunity for public comment, "procedures to supplement" NEPA regulations, which must be confined "to implementing procedures." *Id*. § 1507.3(a). DHS's procedures for implementing NEPA are contained in an agency directive and manual that were

[1] NEPA regulations, which are promulgated by the Council on Environmental Quality (CEQ), were amended effective September 14, 2020. *See* 85 Fed. Reg. 43,304 (July 16, 2020). This brief refers to the regulations in effect in December 2017, when the amended complaint was filed.

most recently amended in 2014 (hereinafter the "NEPA Manual" or "Manual"). 2-ER-112–80; 4-ER-615–17. The directive and Manual "provide for a flexible framework for implementing NEPA in DHS." 2-ER-112.

B. Factual background

Plaintiffs' amended complaint challenges (1) the NEPA Manual, (2) DHS's ongoing administration of various immigration "programs," and (3) seven specific DHS actions. Background on those seven actions is provided below.

1. Deferred Action for Childhood Arrivals

"Deferred action" is a practice by which DHS exercises enforcement discretion to notify an alien of the agency's decision to forbear from seeking the alien's removal for a designated period. *See Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 484 (1999). In 2012, DHS announced the policy known as Deferred Action for Childhood Arrivals (DACA), which is challenged in a portion of Count II of the amended complaint. *See* 2-ER-73, 100, 254–58. DACA made deferred action available to individuals "who were brought to this country as children," who have continuously resided here since 2007, and who satisfy other guidelines such that DHS considers them a "low priority" for removal. 2-ER-254–56. After a background check and other review, successful requestors receive deferred action for a period of two years, with the possibility of renewal. 2-ER-255. The policy "confers no substantive right, immigration

status or pathway to citizenship" on anyone granted deferred action. 2-ER-256. Plaintiffs allege in an attachment to their amended complaint that 690,000 individuals in the United States are DACA beneficiaries. 2-ER-209.

In September 2017, DHS attempted to rescind the DACA policy. 2-ER-190. That decision was challenged under the APA. The Supreme Court eventually held that DHS had violated the APA in attempting to rescind the policy, vacated the agency's decision, and remanded to DHS to "consider the problem anew." *DHS v. Regents of University of California*, 140 S. Ct. 1891, 1916 (2020).

In July 2020, DHS announced that it was reconsidering the DACA policy and that, in the interim, it would not accept any new initial requests for DACA and renewals would be limited to one year. *See Batalla Vidal v. Wolf*, No. 16-CV-4756, 2020 WL 6695076, at *2 (E.D.N.Y. Nov. 14, 2020). The July 2020 memorandum has been the subject of ongoing litigation. *See id*. In *Batalla Vidal*, the district court recently held that the July 2020 memorandum is unlawful and set it aside. *See id*.; *see also* 2020 WL 7121849 (E.D.N.Y. Dec. 4, 2020). The 2012 DACA memorandum itself is also the subject of ongoing litigation. *See Texas v. United States*, 328 F. Supp. 3d 662 (S.D. Tex. 2018).

2. Categorical Exclusion A3

In April 2006, after notice and the opportunity for public comment, DHS adopted Categorical Exclusion A3 (CATEX A3), which is challenged in Count III

of the amended complaint. *See* 2-ER-101–03, 175–76; *see also* SER-7–10; 71 Fed. Reg. 16,790, 16,811 (Apr. 4, 2006). CATEX A3 applies to DHS's issuance of rules, orders, and guidance documents that are "strictly administrative or procedural" in nature or that "interpret or amend an existing regulation without changing its environmental effect." 2-ER 175–76. DHS included CATEX A3 without change in an appendix to its revised NEPA Manual issued in November 2014. *See id.*; *see also* SER-11–12; 4-ER-616–17.

3. The four applications of CATEX A3 challenged in Count IV of the amended complaint.

In Count IV, Plaintiffs challenge four rules that DHS determined were covered by CATEX A3. Background on each rule is provided below.

a. The Designated School Officials Rule

DHS's Student and Exchange Visitor Program governs the process under which foreign students temporarily study at American universities under F-1 (academic) and M-1 (vocational) visas. 4-ER-618. In April 2015, DHS issued a rule (the "Designated School Officials Rule") that made two changes to the regulations governing the program. *Id.*

First, the Designated School Officials Rule grants program-certified schools greater flexibility to increase the number of designated officials at their schools. 4-ER-619. Designated school officials are school employees who work as liaisons between the visiting students, the schools, and the federal government. *Id.* The

prior regulations (issued in 2002) set a limit of ten designated school officials per campus. *Id.* The new rule removed that limit and allows schools to nominate an appropriate number of designated school officials for DHS approval based upon the specific needs of each school. *Id.*

Second, the rule expanded the educational opportunities available to spouses and children of visiting F-1 and M-1 students. 4-ER-620. The 2002 regulations permitted spouses and children (classified as F-2 or M-2 nonimmigrants) to pursue part-time "avocational and recreational study" beyond secondary school. *Id.* The new rule eliminates the "avocational and recreational" restriction for F-2 and M-2 nonimmigrants who are engaged in part-time study at schools that are certified to participate in the Student and Exchange Visitor Program. *Id.*

With regard to NEPA, DHS concluded that the Designated School Officials Rule was covered by CATEX A3 because the rule amended existing regulations without changing their environmental effects. 4-ER-626.

b. The STEM Rule

In March 2016, DHS issued a rule that expanded the practical training opportunities available to visiting F-1 students with degrees in science, technology, engineering, or mathematics (STEM) from U.S. universities (the "STEM Rule"). 4-ER-628. Under a prior interim rule that was challenged in federal court and set aside on procedural grounds, a visiting F-1 student with a STEM degree who had

been granted 12 months of post-degree practical training could apply to DHS for a 17-month extension of his or her training. 4-ER-628–29. The STEM Rule now allows such a student to apply for a 24-month extension. *Id*. The rule also enhances DHS oversight of practical training by requiring employers to implement formal training plans, adding wage and other protections for qualifying F-1 students and for U.S. workers, and limiting eligibility for training extensions to F-1 students with degrees from accredited schools. *Id*.

DHS concluded that the STEM Rule was covered by CATEX A3 because it was strictly administrative or procedural and because it amended an existing rule without changing its environmental effect. SER-15–16.

c. The International Entrepreneur Rule

The Immigration and Nationality Act vests DHS with authority to parole individuals into the United States temporarily for urgent humanitarian reasons or where such parole would yield a significant public benefit. 8 U.S.C. § 1182(d)(5); *see also* 4-ER-652. In January 2017, DHS issued a rule establishing the criteria for granting such parole to entrepreneurs of start-up entities with significant potential for rapid growth and job creation (the "International Entrepreneur Rule"). 4-ER-652. If granted, parole authorizes the grantee to stay in the United States for up to 30 months' time (with a possible 30-month extension) to oversee and grow his or her start-up entity. *Id*.

DHS concluded that the rule was covered by CATEX A3 because it was strictly administrative or procedural and because it interpreted or amended existing authority without changing its environmental effect. SER-20, 22.

In May 2018, DHS published a proposal to repeal the International Entrepreneur Rule. *See* 83 Fed. Reg. 24,415 (May 29, 2018). At the time, DHS had received a total of only 13 parole applications and had granted none of them. *See id*. at 24,418. DHS has not yet taken final action on its proposal.

d. The AC21 Rule

In November 2016, DHS issued a rule amending the regulations governing several employment-based visa programs. 4-ER-638. These amendments are designed to better enable U.S. employers to employ and to retain highly skilled workers with employment-based visas, and to increase the ability of visa-holding workers to change positions or employers. *Id*. The rule codifies "longstanding DHS policies and practices" that the agency established under various statutes, including the American Competitiveness in the Twenty-First Century Act of 2000, and is referred to as the "AC21 Rule." *See* 4-ER-639–40.

The AC21 Rule primarily benefits "immigrants and nonimmigrants who are already in the United States and have been present for a number of years." SER-27–28. The rule does not change the numerical limits on immigrant or nonimmigrant employment-based visas set by the Immigration and Naturalization Act. SER-26.

Nor does the rule change the classes of foreign workers who are eligible to qualify for employment-based visas. *Id.*

With regard to NEPA, DHS concluded the AC21 Rule was covered by CATEX A3 because the rule interprets or amends existing regulations without changing their environmental effects. SER-28.

4. The EA/FONSI for infrastructure improvements

In 2014, DHS faced an unprecedented increase in unaccompanied children and families who were apprehended after illegally crossing the southwestern border. 3-ER-540. This influx created a need to expand DHS's existing infrastructure (i.e., temporary detention space, transportation, and medical care) in order to safely house such children and families pending the outcome of their immigration proceedings. *Id.* DHS prepared a programmatic EA under NEPA; it determined that if future infrastructure projects met certain criteria, the projects would not have significant environmental impacts. 3-ER-540–73. DHS therefore issued a FONSI for such projects. SER-29–32. Plaintiffs challenge the programmatic EA and FONSI in Count V of the amended complaint. 1-ER-106–07.

DHS also prepared a supplemental EA to consider the impacts of constructing and operating a specific facility outside of Dilley, Texas to temporarily house up to 2,400 women and children detainees pending the outcomes of their immigration proceedings. SER-33–74. DHS concluded that the facility would not have any

significant environmental impacts and issued a FONSI. 3-ER-575–78. The Dilley facility is the only project that DHS has completed under the programmatic EA and FONSI challenged in Count V.

C. Proceedings below

Plaintiffs commenced this lawsuit in October 2016. 4-ER-690. In December 2017, Plaintiffs filed an amended complaint alleging that DHS's immigration policies and programs have allowed millions of foreign nationals to settle in the United States, which has significantly increased the population and caused myriad environmental impacts. Plaintiffs further allege that DHS has "turned a blind eye" to the impacts of its immigration programs, which blindness is "epitomized by" the agency's alleged violation of NEPA. 2-ER-29–30, 69–72.

The amended complaint contains five counts brought under Section 706(2) of the APA, which authorizes a reviewing court to hold unlawful and set aside "agency action" that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also* 2-ER-41–42. Count I alleges that DHS's NEPA Manual arbitrarily and unlawfully fails to require NEPA compliance for DHS's immigration-related actions. 2-ER-98–100.

Count II consists of two parts. The first alleges that DHS is implementing seven statutory "programs" in violation of NEPA. Plaintiffs label these programs (1) "employment based immigration"; (2) "family based immigration"; (3) "long-

term nonimmigrant visas"; (4) "parole"; (5) "temporary protective status"; (6) "refugees"; and (7) "asylum." 2-ER-100–101. The second component of Count II alleges that DHS is implementing the 2012 DACA policy in violation of NEPA. *Id.*; 2-SER-73 n.6.

Count III alleges that CATEX A3 violates NEPA and CEQ regulations because it is overly broad and because key terms are undefined. 2-ER-101–103. Count IV challenges the four applications of CATEX A3 described above: the Designated School Officials Rule, the STEM Rule, the International Entrepreneur Rule, and the AC21 Rule. 2-ER-103–106. Plaintiffs allege that the four rules do not qualify for CATEX A3 because the rules are controversial and will lead to population growth with significant environmental impacts. 2-ER-105–06.

Count V challenges DHS's programmatic EA/FONSI for infrastructure improvements in response to the 2014 influx of unaccompanied alien children and families. 2-ER-106–07. Plaintiffs allege that the EA is inadequate because it fails to consider "population and border impacts." *Id.*

The amended complaint seeks declaratory and injunctive relief, including (1) an order directing DHS to "comply fully with NEPA" with respect to the "programs" challenged in Count II; and (2) an order requiring DHS to "pause" those "active programs" pending NEPA compliance. 2-ER-108. Plaintiffs also seek vacatur of the DHS actions challenged in Counts IV and V. 2-ER-108–09.

1. The district court's dismissal of Counts I and II

DHS moved to dismiss Counts I and II for lack of subject matter jurisdiction and for failure to state a justiciable claim. DHS argued that the NEPA Manual challenged in Count I is not *final* "agency action" reviewable under the APA, 5 U.S.C. § 704, and that Plaintiffs' programmatic challenge in Count II does not target *discrete* "agency action" as required by the APA. DHS also argued that the DACA policy challenged in Count II represents an unreviewable exercise of DHS's enforcement discretion. 3-ER-580.

In September 2018, the district court granted DHS's motion. 1-ER-19–27. The court held that the NEPA Manual is not "final" agency action because it does not represent DHS's final decision under NEPA with respect to any action, and because it does not impose obligations on DHS that are not already imposed by NEPA itself. 2-ER-23–24. The court further held that Count II does not target discrete "agency action" as required by the APA; rather, it impermissibly seeks "broad programmatic review of DHS actions under seven immigration statutes and a non-enforcement policy." 2-ER-26. The court therefore dismissed Counts I and II for failure to state a claim reviewable under the APA. 2-ER-25–27.[2]

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[2] The district court dismissed Counts I and II pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim rather than under Rule 12(b)(1) for lack of jurisdiction based on its conclusion that the APA's "final agency action" requirement is not jurisdictional. 1-ER-21. That conclusion was incorrect. "In this circuit, the final agency action requirement has been treated as jurisdictional."

2. The district court's summary judgment order

The parties subsequently filed cross-motions for summary judgment on Plaintiffs' remaining claims. In addition to contesting the claims on the merits, DHS argued that Plaintiffs lack standing to pursue their claims; that Plaintiffs' challenge to CATEX A3 is time-barred; and that Plaintiffs forfeited their objections to CATEX A3 and to the Designated School Officials Rule by failing to raise those objections during the administrative process. SER-4–6.

On June 1, 2020, the district court denied Plaintiffs' motion for summary judgment and granted DHS's cross-motion, holding that Plaintiffs lack standing to pursue the claims in Counts III, IV, and V of the amended complaint. 1-ER-3–18. The court held that Plaintiffs' asserted injuries from population growth and illegal border crossings were not fairly traceable to the challenged actions: the actions did not authorize any immigration to the United States, and the resettlement or illegal entry of foreign nationals into this country hinged on the discretionary choices of independent actors not before the court. 1-ER-13–18.

The district court entered a final judgment in favor of DHS. 1-ER-1. This appeal followed.

San Francisco Herring Ass'n v. U.S. Department of Interior, 946 F.3d 564, 571 (9th Cir. 2019). The issue is not material to the outcome of this appeal, however, because dismissals under both Rule 12(b)(1) and Rule 12(b)(6) are reviewed de novo. *See Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1156 (9th Cir. 2007).

SUMMARY OF ARGUMENT

1. The district court correctly held that the NEPA Manual is not "final" agency action reviewable under the APA, 5 U.S.C. § 704. The Manual establishes DHS's internal policy and procedures for ensuring compliance with NEPA in the course of the agency's decision-making. The Manual itself does not represent the consummation of DHS's decision-making under NEPA with respect to any action, and it does not bind DHS with the force of law or have other legal consequences. The Manual therefore fails the two-part test for finality established in *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

2. The district court correctly held that DHS's ongoing administration of various statutory "programs" involving immigration is not reviewable under the APA. The APA requires the claimant to "direct its attack against some particular 'agency action' that causes it harm." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990). The alleged flaws in an entire "program" cannot be laid before the courts for "wholesale correction." *Id*. at 893. That Plaintiffs have identified some discrete agency actions within the challenged "programs" is immaterial because Plaintiffs do not target each discrete action individually; rather, they seek review of the ongoing "programs" in their entirety. The APA prohibits such programmatic review. Those seeking programmatic changes to federal immigration policy (or to any other federal policy) instead must pursue such

changes before the agency or "in the halls of Congress, where programmatic improvements are normally made." *Id*. at 891.

3. Although Plaintiffs' remaining claims do target discrete DHS actions, Plaintiffs lack standing under Article III and the APA to challenge any of those actions. Plaintiffs' declarants allege broad quality-of-life harms from decades of population growth allegedly caused by federal immigration policy writ large. Plaintiffs fail to establish, however, that any of *the specific DHS actions at issue* threatens their concrete environmental interests. Plaintiffs' allegations instead amount to a "generally available grievance" about immigration policy, "seeking relief that no more directly and tangibly benefits [them] than it does the public at large." *Lujan v. Defenders of Wildlife*, 504 U.S. 573–74 (1992). As with Plaintiffs' programmatic claims, the resolution of such grievances "is the function of Congress and the Chief Executive," not the courts. *Id*. at 576.

For all of these reasons, the district court's judgment should be affirmed.

STANDARD OF REVIEW

Dismissals under Federal Rule of Civil Procedure 12(b)(1) or Rule 12(b)(6) are reviewed de novo. *Rhoades*, 504 F.3d at 1156. This Court also "reviews a district court's grant of summary judgment on the basis of standing de novo." *People for Ethical Treatment of Animals v. Department of Health & Human Services*, 917 F.2d 15, 17 (9th Cir. 1990).

ARGUMENT

I. The DHS NEPA Manual is not final agency action.

Count I of Plaintiffs' amended complaint alleges that DHS's NEPA Manual unlawfully fails to require NEPA review for DHS's actions involving immigration. 2-ER-98–100. The district court dismissed Count I on the ground that the Manual is not "final agency action" reviewable under the APA. 1-ER-22–25. That ruling is correct and should be affirmed.

Because NEPA does not provide a private cause of action to enforce its provisions, NEPA claims against a federal agency must be brought under the APA. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939 (9th Cir. 2005). The APA provides a right of action to a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Where (as here) "no other statute provides a private right of action, the 'agency action' complained of must [also] be '*final* agency action.'" *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 61–62 (2004) (quoting 5 U.S.C. § 704).

The Supreme Court has established a two-part test for determining whether agency action is final: the action must (1) "mark the consummation of the agency's decisionmaking process" and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*,

520 U.S. at 177–78 (internal quotation marks omitted). The NEPA Manual does not satisfy either requirement.

A. The Manual does not mark the consummation of DHS's decision-making under NEPA.

To satisfy the first prong of the *Bennett* test, the challenged agency action must represent the consummation of the agency's decisionmaking process. *See* 520 U.S. at 177–78. The challenged action "must not be of a merely tentative or interlocutory nature," *id.* at 178, and must represent the agency's "last word on the matter," *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 465 F.3d 977, 984 (9th Cir. 2006). "The manner in which an agency's governing statutes and regulations structure its decisionmaking processes is a touchstone of the finality analysis." *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1269 (D.C. Cir. 2018). Because the Manual does not represent DHS's last word under NEPA with respect to any DHS action, the Manual fails the first prong of the *Bennett* test for finality.

Agency decision-making under NEPA generally concludes with the issuance of a record of decision, a FONSI, or a determination that the proposed action is covered by a categorical exclusion. 2-ER-147–49.[3] Although the revised Manual is the end product of a distinct administrative process, *see* 4-ER-615–17, it is not a

[3] An appendix to the Manual contains the categorical exclusions adopted by DHS to date. *See* 2-ER-175–76. Although Plaintiffs bring a facial challenge to CATEX A3 in Count III of the amended complaint, Count I does not challenge DHS's decision to adopt any particular CATEX. *See* 2-ER-98–100.

final decision under NEPA with respect to any DHS action. The Manual instead establishes DHS's "policy and procedures" for complying with NEPA in the course of the agency's decision-making. 2-ER-129. The Manual provides "a flexible framework for implementing NEPA" to "ensure the integration of environmental stewardship into DHS decision making as required by NEPA." 2-ER-112.

Agency action is not final where, like the Manual here, it "establishes only the procedural framework under which the [agency] intends to operate." *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 619 (7th Cir. 2003); *see also Friends of Potter Marsh v. Peters*, 371 F. Supp. 2d 1115, 1120 (D. Alaska 2005) (agency guidance documents "do not consummate the decision-making process," but are "merely steps relied on to reach a decision"). Such intermediate procedural actions are reviewable (if at all) on review of a final decision made pursuant to those procedures. *See* 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action . . . not directly reviewable is subject to review on the review of the final agency action.").

The two cases cited by Plaintiffs, *see* Opening Brief at 12, do not suggest otherwise. Both involved binding rules codified in the Code of Federal Regulations. *See Safer Chemicals, Healthy Families v. EPA*, 943 F.3d 397, 418-26 (9th Cir. 2019); *California Sea Urchin Commission v. Bean*, 828 F.3d 1046, 1049-50 (9th Cir. 2016). "Formally promulgated rules are the bread and butter of final agency

actions." *Safer Chemicals*, 943 F.3d at 417. Both rules also prescribed substantive criteria that constrained (or allegedly constrained) agency decision-making. *See id.* at 418–26 (resolving claim that challenged regulation unlawfully circumscribed the scope of EPA's risk assessments); *California Sea Urchin*, 828 F.3d at 1047–48 (addressing regulation that created a sea otter translocation program and prescribed substantive criteria for program termination). Those binding regulations bear no resemblance to the Manual, which merely sets out DHS's procedures for ensuring compliance with the *preexisting* requirements of NEPA in the course of agency decision-making. *See* 2-ER-112, 129.

Although Plaintiffs suggest that the Manual made a final decision to exempt immigration-related actions from NEPA review, *see* 2-ER-98, that is also incorrect. The Manual does not exclude *any* actions from NEPA review. *See* 2-ER-147–74. Instead, it simply states that "NEPA applies to the majority of [DHS] actions," and that examples "of situations in which NEPA is not triggered are very few." 2-ER-147; *see also* 2-ER-129. The Manual also makes clear that for any proposed action, regardless of subject matter, DHS components must determine "the appropriate analytical approach, including whether NEPA applies." 2-ER-147.

Because the Manual does not represent DHS's last word under NEPA for any proposed action, it fails the first prong of the *Bennett* finality test.

B. The Manual does not bind DHS with the force of law.

The Manual also fails the second prong of the *Bennett* test because it does not determine any rights or obligations, and it has no legal consequences. *See* 520 U.S. at 177–78. As explained, the Manual does not make any final determination under NEPA with respect to any DHS action or exempt any action from NEPA review. It does not authorize (or prohibit) any third-party activity. And because it merely establishes a "flexible framework for implementing NEPA," 2-ER-112, it does not impose binding legal obligations on third parties or on DHS itself.

Although Plaintiffs argue that the Manual *is* binding on DHS, *see* Opening Brief at 12-17, Plaintiffs are wrong. To bind an agency with the force of law, an agency pronouncement must "prescribe[s] substantive rules—not interpretive rules, general statements of policy *or rules of agency organization, procedure or practice*." *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1071 (9th Cir. 2010) (emphasis added) (quoting *United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982)). The Manual does not satisfy that requirement because it imposes no new substantive rules. *See id.*

River Runners is instructive. There, the Court held that the Park Service's management policies did not bind the agency with the force of law, even though the policies used mandatory language and were the product of notice-and-comment procedures. The Court explained that the policies contained only internal "priorities,

practices, and procedures to be followed by Park Service personnel in administering the national park system," and they did not "purport to create substantive individual rights or obligations for persons or entities outside the Park Service." 593 F.3d at 1072. Although the Park Service had solicited comments on a draft and published notice of availability of the final policies, the agency did not publish the policies themselves in the Federal Register or (more importantly) in the Code of Federal Regulations, indicating that the agency "did not intend to announce substantive rules enforceable by third parties in federal court." *Id.*

River Runners is consistent with other decisions of this Court holding that a manual or handbook establishing an agency's internal operating procedures does not bind the agency with the force of law. *See, e.g.*, *Moore v. Apfel*, 216 F.3d 864, 868–69 (9th Cir. 2000) (manual not binding because it created "no substantive rights" and instead provided agency staff "with internal procedures"); *Western Radio Services Co. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996) (agency manual and handbook not binding because they were not "substantive in nature" and contained only "[p]rocedures for the conduct of [agency] activities"); *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1168 (9th Cir. 2000) (internal engineering regulation not binding because "it was not intended to have the force of law, but was instead a policy statement to guide the practice of [agency] engineers"); *Eclectus Parrots*, 685 F.2d at 1136–37 (agency manual not binding because it established "internal

procedure" and "was not intended as a substantive rule . . . eliminating, narrowing or redefining [the appellant's] statutory rights").

Those cases apply here. DHS's NEPA Manual does not bind the agency with the force of law because the Manual establishes only internal agency "policies and procedures" for implementing NEPA. 2-ER-129. The Manual has no impact on third parties, and it does not purport "to create substantive individual rights or obligations for persons or entities outside" of DHS. *River Runners*, 593 F.3d at 1072. As the district court held, to the extent the Manual references any substantive requirements at all, they are requirements imposed by NEPA and CEQ regulations, not new requirements created by the Manual. 1-ER-24.

Plaintiffs argue otherwise, *see* Opening Brief at 16-17, citing the Manual's statement that DHS "integrates the NEPA process with review and compliance requirements under other Federal laws, regulations, Executive Orders, and other requirements for the stewardship and protection of the human environment." 2-ER-130; *see also* 2-ER-115. This argument lacks merit: although the Manual contemplates integrating the NEPA process with other *preexisting* "compliance requirements," the Manual itself imposes no such requirements. *See id*. Agency action is not final where (as here) it references substantive requirements that are "a pervasive feature of the regulatory landscape, not something that the [agency action] created." *Home Builders Ass'n of Greater Chicago*, 335 F.3d at 617.

Plaintiffs argue that the Manual is binding because it refers to its provisions as "requirements." *See* Opening Brief at 14 (citing 2-ER-129). That argument also fails. The occasional use of mandatory language in a document does not bind an agency where (as here) it is used to describe internal "rules of agency organization, procedure or practice," rather than to prescribe new "substantive requirements." *Eclectus Parrots*, 685 F.2d at 1136; *see also River Runners*, 593 F.3d at 1071-73 (agency management policies not binding despite use of mandatory language).

Because the Manual does not bind DHS with the force of law or have any other legal consequences, it fails the second prong of *Bennett*'s test for finality as well as the first prong. The district court therefore correctly held that the Manual is not final agency action reviewable under the APA.

II. DHS's ongoing implementation of seven statutory "programs" is not discrete agency action reviewable under the APA.

Count II of Plaintiffs' amended complaint has two components. The first challenges DHS's ongoing implementation of seven statutory "programs" that allegedly "regulate the entry into and settlement of millions of foreign nationals in the United States." 2-ER-29. Plaintiffs label these programs "employment based immigration," "family based immigration," "long term nonimmigrant visas," "parole," "Temporary Protective Status," "refugees," and "asylum." 2-ER-29, 72–74, 100–01. The district court held that Plaintiffs' programmatic challenge

was not reviewable under the APA because it did not target discrete "final agency action." 2-ER-25–27. That holding is correct and should be affirmed.

As discussed above, the APA provides a right of judicial review to a person "adversely affected or aggrieved by *agency action*." 5 U.S.C. § 702 (emphasis added), *see also id*. §§ 704, 706(2). "Agency action" is a statutory term of art that is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id*. § 551(13). "All of those categories involve circumscribed, discrete agency actions, as their definitions make clear." *Southern Utah Wilderness Alliance*, 542 U.S. at 62 (citing 5 U.S.C. § 553(4), (6), (8), (10), (11)). Consequently, a person seeking judicial review under the APA must target some discrete "agency action" that "affects him in the specified fashion; it is judicial review 'thereof' to which he is entitled." *National Wildlife Federation*, 497 U.S. at 882 (quoting 5 U.S.C. § 702).

That requirement prohibits the kind of broad, programmatic attack that Plaintiffs have brought in Count II. In *National Wildlife Federation*, for example, the plaintiff brought a similar challenge to what it called the "land withdrawal review program" of the Bureau of Land Management (BLM). This "program" consisted of BLM's land status determinations and other actions taken under the Federal Land Policy and Management Act. *Id*. at 877. The plaintiff alleged that BLM was carrying out the "program" in violation of that Act and NEPA, *id*. at

879, including by failing "to provide adequate environmental impact statements," *id*. at 891. Attached to the complaint was a list of "1,250 or so" allegedly unlawful actions that BLM had taken under the challenged "program." *Id*. at 879, 890.

The Court held that the "program" was not reviewable under the APA because it was "not an 'agency action' within the meaning of § 702, much less a final agency action' within the meaning of § 704." *Id*. at 890. The "program" did "not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations," and was "no more an identifiable 'agency action' . . . than a 'weapons procurement program' of the Department of Defense or a 'drug interdiction program' of the Drug Enforcement Administration." *Id*. at 890. The "flaws in the entire 'program'—consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction," *id*. at 892-93, the Court explained, because the APA authorizes courts to intervene "only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect," *id*. at 891. Although this "case-by-case approach" may be "understandably frustrating" to plaintiffs who are seeking "across-the-board" relief, "this is the traditional, and remains the normal, mode of operation of the courts." *Id*. at 894. Consequently, plaintiffs seeking "wholesale improvement"

of agency programs must pursue such changes from the agency or "in the halls of Congress, where programmatic improvements are normally made." *Id*. at 891.

Plaintiffs here have brought the same kind of improper programmatic attack that was held to be non-justiciable in *National Wildlife Federation*. DHS's ongoing administration of "employment based immigration," "family based immigration," etc., is "not an 'agency action' within the meaning of § 702, much less final agency action' within the meaning of § 704." 497 U.S. at 890. Thus, such administration cannot be "laid before the courts for wholesale correction," *id*. at 892-93.

Plaintiffs contend that their claim is justiciable because a list attached to the amended complaint identifies 80 or so actions that DHS has taken since 1981 as part of the challenged "programs." Opening Brief at 5-6, 19-20 (discussing 2-ER-76–77, 216–22). The APA's requirements are not so easily evaded. Plaintiffs' list is no different from the list of "1,250 or so" actions attached to the complaint in *National Wildlife Federation*. As in that case, Count II does not challenge each listed action individually; it improperly challenges the entirety of the "programs" under which those actions were taken. *See* 2-ER-29–30, 33, 72–84, 100–01.

Plaintiffs likewise seek broad, programmatic relief in Count II, including an order requiring DHS to bring the challenged "programs" into compliance with NEPA and to "pause" the "active programs regulating the entry into and settlement of foreign nationals in the United States pending NEPA compliance." 2-ER-108.

That request confirms that Count II improperly challenges ongoing "programs" rather than any of the particular actions on Plaintiffs' list.

Any doubt about the programmatic scope of Count II is dispelled by the remainder of the amended complaint. Four of the actions on Plaintiffs' list are *already challenged* in Count IV, demonstrating unequivocally that those actions are *not* the subject of Count II. *Compare* 2-ER-104 *with* 2-ER-220–21. At most, the listed actions merely serve as examples of actions that DHS has taken in furtherance of the broad "programs" that *are* at issue in Count II. *See* 2-ER-76 (alleging that Plaintiffs' list "does not purport to have identified every single instance" in which DHS acted to revise the "programs"). Under the APA, a plaintiff may not "challenge an entire program by simply identifying specific allegedly-improper final agency actions within that program." *Sierra Club v. Peterson*, 228 F.3d 559, 567 (5th Cir. 2000). "The APA authorizes challenges to specific actions—such as a particular rule or order. It does not authorize plaintiffs to pile together a mish-mash of discrete actions into a 'program' and then sue an agency to force broad policy changes to this 'program.' Those wishing to obtain broad policy changes should instead seek them from agencies or Congress." 33 Charles Alan Wright et al., *Federal Practice and Procedure* § 8322 (2d ed. 2019) (citing *National Wildlife Federation*, 497 U.S. at 891).

The actions on Plaintiffs' list also present their own justiciability problems, which Plaintiffs undoubtedly seek to avoid by bringing an improper programmatic challenge to all of DHS's actions "cumulatively." Opening Brief 20, 23. At least 60 of the listed actions were taken more than six years before this lawsuit commenced. *See* 2-ER-216–22; 4-ER-690. A NEPA challenge to any of those actions would be time barred. *See* 28 U.S.C. § 2401(a); *accord Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988). Other listed actions are largely ministerial; one, for example, merely changed the locations where forms and petitions may be filed. 2-ER-220 (citing 76 Fed. Reg. 28,303 (May 17, 2011)). Plaintiffs cannot show that are "adversely affected or aggrieved" by such actions. 5 U.S.C. § 702. The Court need not address those defects, however, because the APA requires the claimant to direct its attack "against some particular 'agency action' that causes him harm," *National Wildlife Federation*, 497 U.S. at 891, and Count II does not comply with that basic requirement.

Nor can Plaintiffs salvage their claim by recasting it as a challenge under 5 U.S.C. § 706(1) to DHS's alleged *failure* to act. *See* Opening Brief 7-8, 18, 22-23. A plaintiff may not evade the APA's requirements "with complaints about the sufficiency of an agency action dressed up as an agency's failure to act." *Ecology Center, Inc. v. U.S. Forest Service*, 192 F.3d 922, 926 (9th Cir. 1999) (internal quotation marks omitted); *see also Sierra Club*, 228 F.3d at 568. In *Sierra Club*,

for example, the court held that the plaintiffs could not maintain their programmatic challenge under the alternative theory that the agency had "failed to act" where the record showed that the agency "has been acting, but the [plaintiffs] simply do not believe its actions have complied with" the law. *Id.* Here as well, DHS's ongoing implementation of seven "active programs," 2-ER-108, cannot legitimately be characterized as "inaction." That undoubtedly explains why Plaintiffs disavowed bringing a Section 706(1) claim in district court. *See* SER-76 n.3; 2-ER-41–42.

Regardless, the APA precludes the programmatic challenge brought in Count II whether it is cast as a challenge to affirmative action *or* to inaction. In *Southern Utah Wilderness Alliance*, the Supreme Court made clear that the plaintiffs in *National Wildlife Federation* "would have fared no better" if they had characterized BLM's alleged failure to bring its "program" into compliance with NEPA and the other statute at issue "in terms of 'agency action unlawfully withheld' under § 706(1), rather than agency action 'not in accordance with law' under § 706(2)." 542 U.S. at 64-65. Either way, the APA precludes "the kind of broad programmatic attack" that the Plaintiffs have brought here. *Id*. at 64.

Because Plaintiffs' challenge to DHS's ongoing implementation of seven statutory "programs" involving immigration is not reviewable under the APA, the district court properly dismissed that portion of Count II.

III. Plaintiffs lack standing under Article III and the APA to pursue their remaining claims.

The rest of the amended complaint does challenge several discrete DHS actions. The remainder of Count II challenges the 2012 DACA memorandum. 2-ER-73, 100. Count III brings a facial challenge to CATEX A3. 2-ER-101–03. Count IV challenges four rules that apply CATEX A3. 2-ER-103–06. Count V challenges DHS's programmatic EA and FONSI for infrastructure improvements. 2-ER-206–07. As demonstrated below, however, Plaintiffs lack standing under Article III and the APA to challenge any of those actions.

A. Plaintiffs must separately establish standing for each agency action they seek to challenge.

The " 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Defenders of Wildlife*, 504 U.S. at 560). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* "This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103–04 (1998) (footnote omitted).

Standing "is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). A plaintiff instead must separately establish standing "for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). Because a claim brought under the APA must target discrete "final agency action," 5 U.S.C. § 704, "[e]ach specific final agency action should be treated as giving rise to an independent claim, and thus named plaintiffs must allege that each challenged action has caused some injury to them." *Donelson v. U.S. Department of Interior*, 730 Fed. Appx. 597, 602 (10th Cir. 2018). The APA independently obligates the plaintiff to "show that he has 'suffer[ed] legal wrong' *because of the challenged agency action*, or is 'adversely affected or aggrieved' *by that action*." *National Wildlife Federation*, 497 U.S. at 883 (emphasis added) (quoting 5 U.S.C. § 702). At the summary judgment-stage, "a plaintiff must offer evidence and specific facts demonstrating each element" of standing for each of his claims. *Center for Biological Diversity v. Export-Import Bank of the United States*, 894 F.3d 1005, 1012 (9th Cir. 2018); (citing *Defenders of Wildlife*, 504 U.S. at 561); *see also National Wildlife Federation*, 497 U.S. at 884–89.

When the plaintiff alleges a violation of NEPA's procedural requirements, the redressability prong of standing is relaxed. Nevertheless, the plaintiff first must demonstrate "that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing."

Western Watersheds Project v. Kraayenbrink, 632 F.3d 472, 485 (9th Cir. 2011). The mere "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in vacuo—is insufficient to create Article III standing." *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009).

For an environmental interest to be "concrete," there must be a "geographic nexus between the individual asserting the claim and the location suffering an environmental impact." *Western Watersheds*, 632 F.3d at 485. NEPA plaintiffs must establish "they will suffer harm by virtue of their geographic proximity to and use of areas that will be affected" by the challenged action. *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 971 (9th Cir. 2003). Thus, "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare" a NEPA analysis, but standing would be lacking "for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam." *Defenders of Wildlife*, 504 U.S. at 572 n.7.

NEPA plaintiffs who satisfy the concrete interest test need not meet "all the normal standards for redressability and immediacy." *Id.* The person living next to the proposed dam, for example, would have standing to pursue his NEPA claim even though he "cannot establish with any certainty" that the licensing agency's preparation of an EIS "will cause the license to be withheld or altered, and even

though the dam will not be completed for many years." *Id*. NEPA plaintiffs thus "can often establish redressibility with little difficulty, because they need to show only that the relief requested—that the agency follow the correct procedures—may influence the agency's ultimate decision of whether to take or refrain from taking" the challenged action. *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226-27 (9th Cir. 2008).

Standing is "ordinarily substantially more difficult to establish," however, when the existence of one or more elements "depends on the unfettered choices made by independent actors not before the courts." *Defenders of Wildlife*, 504 U.S. at 562. In those circumstances, the plaintiff must "adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.*; *Export-Import Bank*, 894 F.3d at 1012; *St. John's United Church of Christ v. FAA*, 520 F.3d 460, 463 (D.C. Cir. 2008).

Here, Plaintiffs submitted standing declarations from the two individual Plaintiffs and from members of the Plaintiff organizations. Although the case is captioned in the name of the Whitewater Draw Natural Resource Conservation District, an entity chartered under Arizona law, the amended complaint did not allege (and Plaintiffs did not attempt to prove) that the Conservation District or any other Plaintiff organization has standing to sue in its own right. *See* 1-ER-12–18; 2-ER-42–47, 62–63; *see also* Opening Brief 45–48.

Plaintiffs' declarants reside in California, Colorado, or Arizona. The California and Colorado declarants assert broad environmental and quality-of-life harms allegedly caused by decades of immigration-induced population growth.[4] The Arizona declarants assert damage to private property from foreign nationals illegally crossing the southwest border.[5] Plaintiffs also submitted "expert reports" contending that federal immigration policy has contributed to population growth and environmental harm.[6]

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[4] *See* Affidavit of Richard D. Lamm, 3-ER-403–10 (alleging diminished quality of life in Colorado caused by decades of "mass foreign immigration"); Affidavit of Don Rosenberg, 3-ER-414–17 (alleging diminished quality of life in Southern California from 30 years of population growth); Affidavit of Claude Wiley, 3-ER-429–37 (alleging diminished quality of life in Pasadena, California from population growth and increased traffic, crowds, and air pollution); Affidavit of Ric Oberlink, 3-ER-440–44 (alleging diminished quality of life in Berkeley, California from population growth, traffic, and overcrowding of parks and trails); Affidavit of Richard Schneider, 3-ER-458–62 (alleging diminished quality of life in Oakland, California from population growth and increased development and traffic); Affidavit of Stuart Hurlbert, 3-ER-471–79 (alleging diminished quality of life in Southern California from population growth, increased traffic, overcrowded parks, diminished beach access, and degradation of Salton Sea); Affidavit of Glen Colton, 3-ER-490–95 (alleging diminished quality of life in Colorado from population growth since 1975 and increased traffic, pollution, and crowds).

[5] *See* Affidavits of Fred and Peggy Davis, 3-ER-380–95 (alleging property, environmental, and health impacts from aliens illegally crossing the border and trespassing onto private property); Affidavit of Caren Cowan, 3-ER-502–04 (same); Affidavit of John Ladd, 3-ER-509–14 (same); and Affidavit of Ralph D. Pope, 3-ER-520–33 (alleging recreational and aesthetic harm from "ecosystem degradation" caused by aliens illegally crossing the southwestern border).

[6] *See* Affidavit of Jessica Vaughan, 2-ER-183–215 (describing eight DHS immigration programs that allegedly have contributed to significant population growth in recent decades); *Impact of Immigration on U.S. Population Growth*,

Plaintiffs' declarations do not establish their standing to challenge any of the seven DHS actions at issue in the remainder of the amended complaint.

B. Plaintiffs lack standing to challenge the 2012 DACA memorandum.

Plaintiffs lack standing to challenge the DACA policy because they have not shown that the policy threatens their concrete interests. Although DHS did not contest Plaintiffs' standing to challenge the policy in the district court, 1-ER-25–27, a plaintiff's lack of standing may be raised at any time, including for the first time on appeal. *United States v. Viltrakis*, 108 F.3d 1159, 1160 (9th Cir. 1997).

The DACA policy does not authorize any immigration that could lead to population growth. The policy applies only to individuals who entered the country as children prior to 2007, 2-ER-254, and it was closed to new requestors when the amended complaint was filed in December 2017, which is the point at which standing is assessed, *Civil Rights Education & Enforcement Center v. Hospitality Properties Trust*, 867 F.3d 1093, 1102 (9th Cir. 2017). Although Plaintiffs assert that the policy will entice foreign nationals to enter the country illegally, *see* Opening Brief at 28–29, that allegation is insufficient to establish standing as a matter of law.

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by Steven A. Camarota, Ph.D., 2-ER- 265–70 (asserting that the primary driver of U.S. population growth is international migration); *Environmental Impact of Immigration into the United States*, by Philip Cafaro, Ph.D., 2-ER-279–372 (asserting that population growth has a large environmental impact).

As the D.C. Circuit explained in rejecting the same theory, the decisions of foreign nationals "to enter the United States unlawfully lack any legitimate causal connection" to DACA. *Arpaio v. Obama*, 797 F.3d 11, 20 (D.C. Cir. 2015) (county sheriff lacked standing to challenge DACA where alleged harm from individuals crossing the border and committing crimes was not fairly traceable to the policy). "Just as the law does not impose liability for unreasonable reliance on a promise, . . . it does not confer standing to complain of harms by third parties the plaintiff expects will act in unreasonable reliance on current governmental policies that concededly cannot benefit those third parties." *Id*.

Plaintiffs' enticement theory is also entirely speculative. Plaintiffs have adduced no "specific facts," *Defenders of Wildlife*, 504 U.S. at 561, showing that foreign nationals are likely to enter the country illegally because of DACA rather than because of "the myriad economic, social, and political realities in the United States and in foreign nations." *Arpaio*, 797 F.3d at 21. Plaintiffs cite a 2014 newspaper article and "internal Border Patrol intelligence memo" suggesting that foreign nationals were illegally crossing the southern border at that time because they had heard that the government would grant them permission to stay. *See* Opening Brief at 28–29 (citing 2-ER-261–62). Putting aside that past injury does not confer standing to seek prospective relief, *Arpaio*, 797 F.3d at 19, Plaintiffs' declarant attributes the 2014 influx to policies unrelated to DACA. *See* 2-ER-261.

This case is therefore readily distinguishable from *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), *cited in* Opening Brief at 38–39. There, the Supreme Court held that states had standing to challenge DHS's decision to reinstate a citizenship question on the decennial census. The district court's factual findings in support of standing were not clearly erroneous, the Court held, because the trial record indicated that the citizenship question would depress the census response rate and lead to an inaccurate population count, which would injure the states by depriving them of certain benefits. *See id*. at 2586-66.

Here, in contrast, nothing in the record supports the counterintuitive notion that in December 2017, the DACA policy (which at that time was closed to first-time requestors) was likely to entice foreign nationals to risk life and limb to illegally cross the southern border, even though they concededly could not benefit from the policy. Moreover, even if it is conceivable that inaccurate knowledge of DACA might encourage such illegal activity, Supreme Court precedent "requires more than illogic or 'unadorned speculation' before a court may draw" that inference. *Arpaio*, 797 F.3d at 21 (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976)).

Plaintiffs likewise presented no evidence that the presence of *current* DACA beneficiaries in the United States threatens their concrete interests, or that their alleged injuries would be redressed by a favorable ruling. To be sure, DHS could

choose to reconsider the DACA policy after preparing a court-ordered NEPA analysis. But even a full rescission of the policy would not directly result in the removal of a single DACA beneficiary from the United States. Furthermore, the *subsequent* decision whether to commence removal proceedings against any particular individual would remain committed to DHS's sole discretion.

DHS lacks the resources to remove every removable alien, *Arpaio*, 797 F.3d at 24, and a "principal feature of the removal system is the broad discretion exercised by immigration officials," *Arizona v. United States*, 567 U.S. 387, 396 (2012). For any alien subject to removal, immigration officials must first "decide whether it makes sense to pursue removal at all." *Id*. As part of that decision, DHS—like any other agency exercising enforcement discretion—must engage in "a complicated balancing of a number of factors which are peculiarly within its expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Because DACA beneficiaries are a "low priority" for removal, 2-ER-254, it is speculative (at best) to assume that immigration officials would target them for removal even if the DACA policy were set aside or rescinded. It adds yet another layer of speculation to assume that immigration officials would target DACA beneficiaries who happen to reside in the same localities as Plaintiffs' declarants, *and* that DHS ultimately would remove a sufficient number of individuals from those localities to redress declarants' alleged injuries. "There is no redressability,

and thus no standing, where (as is the case here) any prospective benefits depend on an independent actor who retains broad and legitimate discretion the courts cannot presume either to control or to predict." *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006) (internal quotation marks omitted).

Plaintiffs lack standing to challenge the 2012 DACA memorandum.

C. Plaintiffs lack standing to challenge CATEX A3 and the four rules applying it.

Plaintiffs lack standing to pursue their facial challenge to CATEX A3 in Count III of the amended complaint because CATEX A3 authorizes no action that could threaten Plaintiffs' concrete interests. *See* 1-ER-13; 2-ER-175–76. Plaintiffs argue that the evidence supporting their standing to challenge the four rules applying CATEX A3 at issue in Count IV also gives them standing to challenge CATEX A3 itself. *See* Opening Brief at 41–42. This argument fails because, as demonstrated below, Plaintiffs lack standing to challenge any of the four rules.

1. Plaintiffs lack standing to challenge the Designated School Officials Rule and the STEM Rule.

Plaintiffs lack standing to challenge the Designated School Officials Rule and the STEM Rule because neither rule threatens their concrete interests.

The Designated School Officials Rule made two changes to regulations governing the Student and Exchange Visitor Program: (1) it granted program-

certified schools greater flexibility in nominating designated officials for their schools; and (2) it expanded the educational opportunities available to spouses and children of visiting F-1 and M-1 students. 4-ER-618–20. The STEM Rule allows F-1 students with STEM degrees who are engaged in practical training in the United States to apply for a 24-month extension of their training, whereas the prior interim rule allowed for a 17-month extension. 4-ER-628–29.

Neither rule authorizes any permanent immigration. Nor have Plaintiffs shown that the rules are likely to induce significant numbers of F-1 and M-1 students to seek to permanently resettle in the United States, which would require separate federal authorization and thus would not be a consequence of the rules. Where (as here) causation and redressability hinge on the response of regulated third parties and others to the challenged agency action, the plaintiff must "adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Defenders of Wildlife*, 504 U.S. at 562. Plaintiffs have not made such a showing. Indeed, as the district court noted, Plaintiffs' declarants do not even allege that the F-1 and M-1 student visa programs *as a whole* have led to any significant immigration or population growth. *See* 1-ER-16; 2-ER-196, 211–12, 214.

Plaintiffs nevertheless argue that they have standing because both rules were designed to entice more foreign students to *temporarily* study in the United States,

and an "increase in population, even if only temporary, has environmental impacts." Opening Brief 34. This argument fails for two reasons.

First, Plaintiffs cite no evidence that either rule is likely to meaningfully increase the overall number of international students temporarily residing in the United States. Plaintiffs argue that they need not present evidence of environmental harm. *Id.* at 30. At a minimum, however, Plaintiffs *are* required to show that the challenged agency action meaningfully contributes to the population growth that allegedly is *causing* the harm. *See Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013) (even under relaxed standing test that applies in procedural injury cases, plaintiffs would be required to show that the challenged action made a "meaningful contribution" to greenhouse gas emissions allegedly causing global warming). Plaintiffs have not made such a showing. The STEM Rule in particular is potentially applicable only to a relatively small number of F-1 students nationwide who are already participating in practical training programs. SER-14. Furthermore, DHS observed that while the longer training extension available under the rule could induce some additional participation in such programs, the increased requirements on employers and students could *suppress* participation. SER-17. Plaintiffs cite no contrary evidence.

Second, even assuming that the rules are likely to meaningfully increase the number of F-1 and M-1 students temporarily residing in the United States, Plaintiffs

have not shown that their declarants "will suffer harm by virtue of their geographic proximity to and use of areas that will be affected." *Citizens for Better Forestry*, 341 F.3d at 971. Plaintiffs have not shown, for example, that any of their declarants resides near a university that (1) is certified to participate in the Student and Exchange Visitor Program and (2) has experienced a significant increase in visiting F-1 or M-1 students because of the challenged rules.

Nor do Plaintiffs contend that an increase in the number of international students *somewhere* in the United States is likely to have adverse environmental effects *everywhere* in the country. And the mere "statistical probability" that one of Plaintiffs' declarants might stumble across an area that is significantly impacted by the rules (if there is such an area) does not suffice. *Summers*, 555 U.S. at 497; *see also National Wildlife Federation*, 497 U.S. at 889 (standing not established by allegation that one of plaintiff's members "uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action"); *Wilderness Society, Inc. v. Rey*, 622 F.3d 1251, 1257 (9th Cir. 2010) (standing not established where there was "no indication that the [challenged project] would affect the particular area . . . that [the declarant] plans to use in the future, or that it would otherwise impact his personal recreational or aesthetic interests in the land"); *Ashley*

Creek, 420 F.3d at 939 (standing not established where there was a "geographic disconnect" between the plaintiff's property holdings and the challenged project).

Because Plaintiffs have not shown that the challenged rules threaten their declarants "in a personal and individual way," *Defenders of Wildlife*, 504 U.S. at 560 n.1, Plaintiffs' complaints about population growth allegedly caused by federal immigration policy writ large amount to a "generally available grievance about government—claiming only harm to [their] and every citizen's interest in [the] proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [them] than it does the public at large." *Id*. at 573–74. The resolution of such grievances "is the function of Congress and the Chief Executive," not the federal courts. *Id*. at 576; *see also Federation for American Immigration Reform v. Reno*, 93 F.3d 897, 901 (D.C. Cir. 1997) (noting that the "injury (if any) to a citizen qua citizen from admission of an alien is an injury common to the entire population, and for that reason seems particularly well-suited for redress in the political rather than the judicial sphere").

Plaintiffs also argue that they have standing because a now-repealed NEPA regulation required agencies to consider the cumulative impacts of their actions, and because Plaintiffs' declarants are harmed by the "cumulative impacts of immigration-induced population growth." Opening Brief 34, 37; *see also supra* n.1. This argument goes nowhere. The "cumulative impacts of immigration-

induced population growth" is not an "agency action" reviewable under the APA. Moreover, whatever the scope of the analysis that may have been required under the repealed regulation—which is a merits issue that the Court need not address—neither the regulation nor NEPA itself can create a right of action in persons who are affected by "population growth" generally, but who are not perceptibly harmed *by the challenged agency action itself*. *See Defenders of Wildlife*, 504 U.S. at 565–66 (even though the Endangered Species Act protects ecosystems, that does not mean "that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question"); *see also Ashley Creek*, 420 F.3d at 939 ("NEPA does not provide for a private right of action").

Article III requires the plaintiff to show that he has suffered a concrete and particularized injury that is "fairly traceable to the challenged action of the defendant." *Summers*, 555 U.S. at 493. That requirement "is a hard floor of Article III jurisdiction that cannot be removed by statute." *Id*. at 497. The APA also requires the plaintiff to "show that he has 'suffer[ed] legal wrong' because of the challenged agency action, or is 'adversely affected or aggrieved' by that action." *National Wildlife Federation*, 497 U.S. at 883 (quoting 5 U.S.C. § 702). Because Plaintiffs have not made the required showing, they lack Article III and APA standing to challenge the Designated School Officials Rule and the STEM Rule.

2. Plaintiffs lack standing to challenge the International Entrepreneur Rule

Plaintiffs lack standing to challenge the International Entrepreneur Rule because they have not shown that the rule threatens their concrete interests.

The rule establishes the criteria under which DHS exercises its discretionary authority to temporarily parole international entrepreneurs into the United States. 4-ER-652. The rule does not authorize any immigration to the United States. Nor have Plaintiffs adduced facts showing that the rule is likely to induce a significant number of foreign nationals to seek to permanently resettle in this country, which would require separate federal authorization in any event and would not be a consequence of the rule. *See* 1-ER-14; 2-ER-200–03, 211, 213.

Although the rule is designed to bring qualified international entrepreneurs to the United States *temporarily*, Plaintiffs have not shown that the rule is likely to meaningfully increase the temporary nonimmigrant population in the country as a whole or, more importantly, in any particular area that Plaintiffs' declarants use and enjoy. DHS estimated that no more than 3,000 foreign nationals could be eligible to apply to the program annually, SER-19, 21, "an insignificant number in the context of the population of the United States," SER-22. As of May 2018, when DHS proposed to rescind the rule, only 13 applications had been submitted and none had been granted. *See* 83 Fed. Reg. at 24,418.

Because Plaintiffs have not established a "geographic nexus" between their declarants and any particular area allegedly affected by the rule, Plaintiffs lack standing to challenge the rule. *Western Watersheds Project*, 632 F.3d at 485.

3. Plaintiffs lack standing to challenge the AC21 Rule

Plaintiffs lack standing to challenge the AC21 Rule because they have not shown that the rule threatens their concrete environmental interests.

The AC21 rule largely codified "longstanding DHS policies and practices" aimed at (1) improving the ability of U.S. employers to retain highly-skilled workers with employment-based visas and (2) increasing the ability of visa-holding workers to change positions. SER-24; *see also* SER-23, 25–26. DHS found that the rule will not increase the U.S. population because "the population affected by this rule is primarily comprised of immigrants and nonimmigrants who are already in the United States and have been present for a number of years." SER-27–28. Plaintiffs cite no contrary evidence. Nor have Plaintiffs shown that the rule is likely to meaningfully increase the *temporary* nonimmigrant population in the United States as a whole or, more importantly, in any specific area used by Plaintiffs' declarants.

Without evidence of a geographic nexus between their declarants and any area affected by the AC21 Rule, Plaintiffs lack standing to challenge the rule.

D. Plaintiffs lack standing to challenge the programmatic EA/FONSI for infrastructure improvements.

Plaintiffs also lack standing to challenge the 2014 programmatic EA/FONSI because they have not demonstrated that the projects analyzed in those documents threaten their concrete environmental interests.

DHS prepared the EA/FONSI to analyze infrastructure improvements in response to the unprecedented increase in 2014 of children and families illegally crossing the southwestern border. 3-ER-540. Plaintiffs do not contend that they are injured by the Texas facility that DHS constructed under the EA/FONSI; as the district court noted, Plaintiffs' declarants do not even reside in Texas. 1-ER-17. The challenged NEPA documents also do not authorize anyone who may be temporarily housed in the Texas facility to immigrate to the United States, which would require separate federal authorization. *See* 1-ER-18.

Although Plaintiffs assert that their declarants are harmed by illegal border crossings, Opening Brief at 45–48, Plaintiffs have not shown that those injuries are fairly traceable to the challenged EA/FONSI or to the Texas facility. *See Defenders of Wildlife*, 504 U.S. at 560 (standing requires that the plaintiff's injury "be fairly traceable to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court" (internal quotation marks omitted)). The infrastructure improvements that DHS analyzed, and the subsequent construction of the Texas facility, were a *response* to illegal

border crossings, not the *cause* of such crossings. 3-ER-540; SER-36. The 2014 newspaper article cited by Plaintiffs does not suggest otherwise because it has nothing to do with the studied infrastructure improvements, 2-ER-261, *cited in* Opening Brief at 44—a fact Plaintiffs subsequently appear to admit, *id.* at 50.

Plaintiffs also complain about the alleged "environmental effects of the government-induced influx itself," which they attribute to unspecified "government policy decisions." *Id.* Those complaints are irrelevant. Plaintiffs must show that they are harmed "because of the challenged agency action," *National Wildlife Federation*, 497 U.S. at 883, regardless of the alleged consequences of federal immigration policy in general. Plaintiffs have not made such a showing.

* * * * *

Plaintiffs lack standing under Article III and the APA to challenge the 2012 DACA memorandum at issue in Count II of the amended complaint, CATEX A3 at issue in Count III, the four rules applying CATEX A3 at issue in Count IV, and the programmatic EA/FONSI at issue in Count V.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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