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15 UNITED STATES DISTRICT COURT  
16 SOUTHERN DISTRICT OF CALIFORNIA  
17 SAN DIEGO DIVISION

18 WHITEWATER DRAW NATURAL  
19 RESOURCE CONSERVATION  
20 DISTRICT, *et al.*,

21 Plaintiffs,

22 v.

23 KEVIN K. MCALEENAN,<sup>1</sup> *et al.*,  
24 Federal Defendants.

25 **Case No. 3:16-cv-2583**

26 **MEMORANDUM IN SUPPORT  
27 OF DEFENDANTS' CROSS-  
28 MOTION FOR SUMMARY  
JUDGMENT AND IN  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT**

Hon. M. James Lorenz

<sup>1</sup> Under Fed. R. Civ. P. 25(d), Acting Secretary Kevin K. McAleenan is substituted for former Secretary Kirstjen M. Nielsen.

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## INTRODUCTION

1  
2 Plaintiffs brought this suit blaming immigration-driven population growth  
3 for a host of environmental harms, and claiming broadly that the Department of  
4 Homeland Security (“DHS”) failed to comply with the National Environmental  
5 Policy Act (“NEPA”) in the “administration of immigration law and policy.” Pls.’  
6 Mem. in Supp. of Mot. for Summ. J. (“Pl. Br.”) at 1, ECF No. 70-1. But, courts  
7 have long recognized that NEPA challenges are a particularly unsuitable vehicle for  
8 the pursuit of broad policy agendas—especially those as environmentally  
9 attenuated as Plaintiffs’. *See Metro. Edison Co. v. People Against Nuclear Energy*,  
10 460 U.S. 766, 777 (1983) (“The political process, and not NEPA, provides the  
11 appropriate forum in which to air policy disagreements.”). This Court has already  
12 dismissed Plaintiffs’ wide-ranging claims that all of DHS’s immigration-related  
13 functions are conducted in violation of the statute. *See Order Granting Defs.’ Partial*  
14 *Mot. to Dismiss*, ECF No. 55. The Court should now reject Plaintiffs’ request for  
15 summary judgment on their remaining claims and grant Defendants’ cross-motion,  
16 bringing to a close Plaintiffs’ effort to use NEPA to pursue policy goals far afield  
17 from the core purposes of the statute.

18 In the wake of the Court’s prior Order, only six discrete agency actions  
19 remain: the issuance of a NEPA Categorical Exclusion, the application of that  
20 Categorical Exclusion to four regulations, and DHS’s NEPA evaluation of a  
21 decision to construct a temporary housing facility in response to a 2014 influx of  
22 children and families crossing the southwestern border without authorization.  
23 Plaintiffs’ challenges to these six decisions should be rejected.

24 First, Plaintiffs’ remaining claims must be rejected for lack of standing.  
25 Plaintiffs allege the broadest possible harms, asserting that decades of immigration  
26 policy *writ large* has caused them a host of injuries. But this Court has dismissed  
27 the only claims that could even potentially correspond to such generalized harms.  
28



1 Meanwhile, Plaintiffs’ remaining claims are completely untethered to their broad  
2 population-growth based harms. For example, Plaintiffs make no attempt to  
3 demonstrate that the *specific* decision to construct a temporary housing facility, or  
4 the few rule amendments they challenge, will actually cause them injury. Thus,  
5 Plaintiffs have failed to carry their burden of demonstrating that their alleged harms  
6 are “fairly traceable” to the actions before the Court.

7         Second, even if Plaintiffs had standing, several of their claims have additional  
8 jurisdictional defects. Plaintiffs’ challenge to the NEPA Categorical Exclusion is  
9 barred by the statute of limitations. And, Plaintiffs’ challenges to the NEPA  
10 Categorical Exclusion and the Designated School Officials Rule are barred by their  
11 failure to raise their concerns in the public comment process.

12         Finally, even if Plaintiffs’ could overcome these jurisdictional defects, their  
13 claims would fail on the merits. The record shows that DHS followed the law and  
14 applicable regulations, and drew reasoned opinions from the facts, in making the  
15 challenged decisions. Plaintiffs’ attempt to leverage minor revisions of existing  
16 rules and programs—where those revisions have insignificant incremental  
17 environmental impacts—into a wholesale review of the environmental impact of  
18 the existing rules and programs themselves, based solely on an attenuated and  
19 unsupported belief that the rules indirectly cause environmental impacts, stretches  
20 NEPA beyond recognition. NEPA does not require speculative analysis of highly  
21 attenuated indirect effects. Nor does it require agencies to wholesale revisit long-  
22 past agency decisions anytime the agency makes an environmentally insignificant  
23 adjustment to a program. Such a reading of NEPA ignores the categorical exclusion  
24 process created by the CEQ, and would ossify decision-making, discouraging  
25 agencies from making minor—and potentially environmentally beneficial—  
26 revisions to their regulations for fear of triggering an obligation to undertake a time-  
27 and resource-consuming NEPA study of the entire underlying program. Plaintiffs’  
28

1 attempt to so deform NEPA should be rejected, along with their remaining claims.

## 2 BACKGROUND

### 3 I. Legal Background

4 Congress enacted NEPA to establish a process through which federal  
5 agencies must consider the consequences of their actions upon the environment. *See*  
6 42 U.S.C. §§ 4321-4370. NEPA requires federal agencies to prepare a detailed  
7 “environmental impact statement” (“EIS”) for all “major Federal actions  
8 significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C).  
9 An EIS must include a “detailed written statement” concerning “the environmental  
10 impact of the proposed action” and “any adverse environmental effects which  
11 cannot be avoided.” *Id.*; *see also* 40 C.F.R. §§ 1502.1, 1508.11.

12 NEPA also established the Council on Environmental Quality (“CEQ”). 42  
13 U.S.C. § 4342. CEQ’s implementing regulations provide that in order to determine  
14 whether a proposed major federal action requires preparation of an EIS, the agency  
15 may conduct a preliminary examination, called an environmental assessment  
16 (“EA”). 40 C.F.R. §§ 1501.4, 1508.9. The EA “serves to . . . [b]riefly provide  
17 sufficient evidence and analysis” to determine whether the action will have a  
18 “significant” effect on the environment. *Id.* at 1508.9. If the agency determines that  
19 the effects will not be significant, it issues a “finding of no significant impact”  
20 (“FONSI”) in lieu of preparing an EIS. *Id.* at 1508.13.

21 CEQ’s regulations also instruct agencies to identify classes of actions,  
22 referred to as “categorical exclusions” (“CATEXs”), that normally “do not  
23 individually or cumulatively have a significant effect on the human environment”  
24 and are therefore excluded from the requirement of preparing an EA or an EIS. *Id.*  
25 at §§ 1508.4, 1507.3(b)(2). An agency’s procedures regarding categorical  
26 exclusions must “provide for extraordinary circumstances in which a normally  
27 excluded action may have a significant environmental effect,” and therefore  
28

1 requires preparation of an EA or EIS. *Id.* at § 1508.4. Thus, for each proposed action  
2 that might fit a categorical exclusion, the agency must determine on a case-by-case  
3 basis whether the proposed action triggers any extraordinary circumstances that  
4 would preclude application of the category.

## 5 **II. Factual Background**

### 6 **A. Litigation Background**

7  
8 Plaintiffs filed suit in October 2016, challenging DHS's compliance with  
9 NEPA for a broad range of "discretionary actions" "concerning the entry and  
10 settlement of multitudinous foreign nationals into the United States." ECF No. 1,  
11 ¶1. Defendants moved to dismiss, arguing that most of the actions challenged were  
12 not reviewable because they were moot, not final agency actions, or precluded from  
13 review by statute, and because Plaintiffs failed to state a claim under NEPA. ECF  
14 No. 39-1. In response, Plaintiffs filed an amended complaint. *See* ECF 40, ECF 44.

15 After reviewing Plaintiffs' amended complaint, DHS moved to dismiss two  
16 of Plaintiffs' five claims; Count I, which sought review of an internal agency  
17 guidance document, and Count II, which brought a sweeping programmatic  
18 challenge to DHS's NEPA compliance for broad areas of immigration authority,  
19 including: "1) employment based immigration; 2) family based immigration; 3)  
20 long-term nonimmigrant visas; 4) parole; 5) Temporary Protected Status ("TPS");  
21 6) refugees; 7) asylum; and 8) Deferred Action for Childhood Arrivals ("DACA")."  
22 ECF No. 44, ¶ 1. The Court granted Defendants' motion, dismissing Count I  
23 because it did not challenge a reviewable final agency action, and dismissing Court  
24 II because it failed to identify discrete agency actions, and sought impermissible  
25 programmatic review of the continuing and operations of DHS. ECF No. 55 at 8.

26 In the wake of the Court's Order, three claims challenging six separate  
27 agency actions remain. Count III brings a facial challenge to the promulgation of a  
28 NEPA Categorical Exclusion, CATEX A3. Count IV challenges the application of

1 CATEX A3 to four agency regulations, the DSO Rule, the STEM Rule, the  
2 International Entrepreneur Rule, and the AC21 Rule. Count V challenges DHS’s  
3 compliance with NEPA in issuing a programmatic EA for its 2014 Response to an  
4 Influx of Unaccompanied Children and Families and a supplemental EA for  
5 construction of temporary housing at Dilley, Texas.

6 Defendants lodged the administrative records for the six decisions, and the  
7 matter is before the Court on the parties’ cross-motions for summary judgment.<sup>2</sup>

## 8 **B. The Challenged Decisions**

### 9 **1. Categorical Exclusion A3**

10 In 2004, DHS published proposed NEPA procedures in the Federal Register  
11 for public comment. 69 Fed. Reg. 33,043 (June 14, 2004).<sup>3</sup> The proposed  
12 procedures included a Categorical Exclusion—CATEX A3—for “[p]romulgation  
13 of rules [and] issuance of rulings or interpretations . . . of the following nature: (a)  
14 Those of a strictly administrative or procedural nature;” and “(d) Those that  
15 interpret or amend an existing regulation without changing its environmental  
16 effect.” *Id.* at 33,056. The proposed NEPA procedures, including CATEX A3, were  
17 approved by the CEQ in March 2006. *See* Letter from Connaughton to Chertoff  
18 (March 23, 2006).<sup>4</sup> DHS published its NEPA procedures in final form in April 2006.  
19 71 Fed. Reg. 16,790 (Apr. 4, 2006).

20 In 2014, DHS published draft revised NEPA procedures for public comment.  
21 DIR00001. The proposed revised procedures included both new Categorical

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22 <sup>2</sup> To facilitate review of the record, Defendants are filing herewith an Appendix  
23 containing those record materials cited in this brief.

24 <sup>3</sup> The administrative record for DHS’s 2006 NEPA procedures is available on  
25 DHS’s website. [https://www.dhs.gov/publication/national-environmental-policy-  
26 act-nepa](https://www.dhs.gov/publication/national-environmental-policy-act-nepa) (last visited May 23, 2019). Cited excerpts are included in Defendants’  
27 Appendix.

28 <sup>4</sup> [https://www.dhs.gov/sites/default/files/publications/Mgmt\\_NEPA\\_CEQConformit  
yLetter\\_20060324\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/Mgmt_NEPA_CEQConformityLetter_20060324_0.pdf) (last visited May 23, 2019).

1 Exclusions and Categorical Exclusions, including CATEX A3, which DHS  
2 proposed to retain unchanged from the prior procedures. DIR00002. No member of  
3 the public, including Plaintiffs, commented on CATEX A3. *See* DIR00270-288  
4 (public comments); DIR00288-90 (addressing public comments).

5 As required by CEQ regulations, DHS consulted with CEQ. DIR00291-92.  
6 After reviewing the procedures, CEQ concluded that they conform with NEPA and  
7 the CEQ's regulations. *Id.* The NEPA procedures were published in final form in  
8 November 2014. DIR00288.

## 9 **2. The Designated School Officials Rule**

10 DHS's Student and Exchange Visitor Program ("SEVP") manages the  
11 process under which American educational institutions interact with foreign  
12 students studying in the United States under F-1 and M-1 visas. DSO00009.  
13 Students studying under F-1 and M-1 visas are visiting to attend school. They are  
14 not immigrants to the United States.

15 In April 2015, after notice and comment rulemaking, DHS issued a rule  
16 entitled Adjustments to Limitations on Designated School Official Assignment and  
17 Study by F-2 and M-2 Nonimmigrants" (the "DSO" Rule). DSO00009. The rule  
18 made two changes to improve administration of the SEVP. *Id.* First, the rule allows  
19 school officials greater ability to increase the number of DSOs at each school.  
20 DSO00010. DSOs are school employees who work as liaisons between the visiting  
21 students, the schools, and the U.S. Government. *Id.* DHS found that having more  
22 DSOs in particular schools could enhance the ability of DSOs to oversee the SEVP  
23 and report necessary student information to the U.S. Government. *Id.* Second, the  
24 rule allows spouses and children of visiting students to take classes, so long as they  
25 are not taking a full course load. DSO00011. DHS concluded this change would  
26 make studying in the United States. *Id.* With regard to NEPA, DHS concluded the  
27 rule fell within CATEX A3 because it amended an existing rule "without changing  
28

1 its environmental effect,” and there were no extraordinary circumstances creating  
2 the potential for significant environmental effects. DSO00017.

### 3 **3. The STEM Rule**

4 On March 11, 2016, DHS issued a final rule entitled “Improving and  
5 Expanding Training Opportunities for F-1 Nonimmigrant Students With STEM  
6 Degrees and Cap-Gap Relief for All Eligible F-1 Students” (“STEM Rule”).  
7 STEM000055. The STEM Rule modified the regulations applicable to  
8 nonimmigrant students with degrees in STEM fields—science, technology,  
9 engineering, or mathematics—from U.S. universities to allow such students to  
10 participate in practical training opportunities for an additional 24 months.  
11 STEM000056. The Rule also strengthened reporting requirements to help DHS  
12 track students in the program. *Id.* With regard to NEPA, DHS concluded that the  
13 Rule fell within CATEX A3 because it was a rule “of strictly administrative or  
14 procedural nature,” amended an existing rule “without changing its environmental  
15 effect,” and there were no extraordinary circumstances creating the potential for  
16 significant environmental effects. STEM000132.

### 17 **4. International Entrepreneur Rule**

18 In January 2017, DHS issued a final rule establishing criteria for the use of  
19 DHS’s discretionary authority to temporarily parole into the United States, on a  
20 case-by-case basis, individual entrepreneurs of start-up entities with significant  
21 potential for rapid growth and job creation. IER00041 (82 Fed. Reg. 5,238 (Jan.17,  
22 2017)) (“International Entrepreneur Rule”). DHS found the Rule fell within  
23 CATEX A3 and no extraordinary circumstances were present. IER00075,  
24 IER00088. DHS also noted that the Rule would impact fewer than 3,000 individuals  
25 per year, a number insignificant in the context of the overall U.S. population.  
26 IER00088. On May 29, 2018, DHS proposed a rule ending the International  
27 Entrepreneur parole program and removing the applicable regulations. *See* 83 Fed.  
28



1 Reg. 24,415 (May 29, 2018).

## 2 **5. The AC21 Rule**

3 In November 2018, after public notice and comment, DHS issued a rule  
4 entitled Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program  
5 Improvements Affecting High-Skilled Nonimmigrant Workers (“AC21 Rule”).  
6 AC00142. The AC21 Rule amended provisions of several existing employment-  
7 based visa programs to better enable U.S. employers to employ highly skilled  
8 workers with employment-based visas, and to increase the ability of visa-holding  
9 workers to change positions or employers. *Id.* With regard to NEPA, DHS  
10 determined that the Rule would primarily affect immigrant and nonimmigrant  
11 workers who are already in the United State and have been present for a number of  
12 years, and it that would not significantly impact the environment. AC000218-219.  
13 The agency also found the Rule fell within the CATEX A3(d) because it only  
14 “interpret[s] or amend[s] an existing regulation without changing its environmental  
15 effect.” *Id.*

## 16 **6. Programmatic EA for Response to Influx of** 17 **Unaccompanied Children and Families and Supplemental** 18 **EA for Housing at Dilley, Texas**

19 In 2014, DHS prepared a programmatic EA and issued a FONSI assessing  
20 the impacts of accelerating expansion of its infrastructure—temporary detention  
21 space, transportation and medical care—to address an influx of children and  
22 families crossing the southwestern border. UAC00534-58, UAC00568-71. The  
23 programmatic EA defined the parameters for when more detailed NEPA analysis  
24 of site-specific proposals would be required. UAC00550-58. In August 2014, DHS  
25 prepared a supplemental EA to consider the environmental impacts of the  
26 construction of a facility near Dilley, Texas, which would house up to 2,400 women  
27 and children pending the disposition of their immigration proceedings. UAC00775-  
28 948. DHS concluded the facility would not have significant environmental impacts,

1 and issued a FONSI. UAC00948.

## 2 STANDARD OF REVIEW

3 Agency decisions are reviewed under the judicial review provisions of the  
4 Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-06. *Lands Council v.*  
5 *McNair*, 537 F.3d 981, 987 (9th Cir. 2008). Under the APA, agency decisions may  
6 be set aside if they are “arbitrary, capricious, an abuse of discretion, or otherwise  
7 not in accordance with law.” 5 U.S.C. § 706(2)(A). In accordance with that  
8 standard, an agency’s decision will be overturned

9 [O]nly if the agency relied on factors which Congress has not intended it to  
10 consider, entirely failed to consider an important aspect of the problem, or  
11 offered an explanation for its decision that runs counter to the evidence before  
12 the agency or is so implausible that it could not be ascribed to a difference in  
view or the product of agency expertise.

13 *McFarland v. Kempthorne*, 545 F.3d 1106, 1110 (9th Cir. 2008) (citations and  
14 quotation marks omitted).<sup>5</sup> The arbitrary and capricious standard requires affirming  
15 the agency action if a reasonable basis exists for its decision. *Indep. Acceptance Co.*  
16 *v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000).

## 17 ARGUMENT

### 18 I. Plaintiffs Lack Standing

19 To establish Article III standing, Plaintiffs must demonstrate an injury that is  
20 (1) “concrete, particularized, and actual or imminent,” (2) “fairly traceable to the  
21 challenged action,” and (3) “redressable by a favorable ruling.” *Clapper v. Amnesty,*  
22 *Int’l*, 568 U.S. 398, 409 (2013) (citing *Monsanto Co. v. Geertson Seed Farms*, 561  
23 U.S. 139 (2010)).

24 The party seeking jurisdiction bears the burden of establishing standing, and  
25 “must ‘set forth’ by affidavit or other evidence ‘specific facts’” establishing their

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26 <sup>5</sup> The Ninth Circuit has endorsed the use of Rule 56 motions for summary  
27 judgment in reviews of agency administrative decisions, under the APA. *Nw.*  
28 *Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir. 1994).



1 standing. *Clapper*, 568 U.S. at 409 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S.  
2 555, 561 (1992)). Because federal courts are courts of limited jurisdiction, the  
3 presumption is that they lack jurisdiction unless the party asserting jurisdiction  
4 establishes it. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).  
5 The task of establishing standing is ““substantially more difficult”” in cases such as  
6 this one, where Plaintiffs are not themselves the “object[s] of the government action  
7 or inaction [they] challenge.” *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009)  
8 (quoting *Lujan*, 504 U.S. at 562).

9 Plaintiffs—who proffer no argument in their summary judgment brief in  
10 support of standing—fall well short of demonstrating that they have standing. With  
11 their amended complaint Plaintiffs submitted numerous affidavits alleging two  
12 classes of injury: (1) broad environmental and quality of life harms allegedly  
13 attributable to immigration induced population growth,<sup>6</sup> and (2) injuries allegedly  
14 caused by individuals illegally crossing the southwestern border.<sup>7</sup> But Plaintiffs

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15  
16 <sup>6</sup> See Aff. of Richard D. Lamm, ECF No. 44-9, ¶ 8 (alleging harms to the quality  
17 of life in Colorado caused by “mass foreign immigration”); Aff. of Don  
18 Rosenberg, ECF No. 44-10, ¶ 9 (alleging population growth in California in the  
19 past 30 years has harmed the environment and quality of life); Aff. of Claude  
20 Wiley, ECF No. 44-11 (asserting quality of life is decreased by population  
21 growth); Aff. of Ric Oberlink, ECF No. 44-12 (alleging harms from traffic and  
22 crowding in California caused by population growth); Aff. of Richard Schneider,  
23 ECF No. 44-13 (asserting injuries from increased development and traffic caused  
24 by population growth in California); Aff. of Stuart Hurlbert, ECF No. 44-14  
25 (alleging environmental and aesthetic harms in California from population  
26 growth); Aff. of Glen Colton, ECF No. 44-15 (alleging harms in Colorado from  
27 population growth since 1975); Aff. of John Oliver, ECF No. 44-18 (alleging  
28 broad harms in Florida from population growth since 1970).

<sup>7</sup> See Aff. of Fred Davis, ECF No. 44-7 (alleging environmental, property, and  
health impacts caused by illegal border crossers); Aff. of Peggy Davis, ECF 44-8  
(alleging environmental, property, and health impacts caused by illegal border  
crossers); Aff. of Caren Cowan, ECF No. 44-16 (alleging fear and property  
destruction near the border caused by illegal border crossing); Aff. of John Ladd,

1 make no attempt to demonstrate that these injuries are “fairly traceable” to the six  
2 decisions before the Court. Plaintiffs instead rely on a broad policy-level argument,  
3 reasoning that: (1) DHS is charged with “enforcing and administering our  
4 immigration laws,” (2) immigration “drives population growth,” and (3) population  
5 growth has negative environmental impacts. *See* Pl. Br. at 1. While this broad policy  
6 concern may be appropriate “in the offices of the Department or the halls of  
7 Congress,” *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), it does not  
8 suffice to carry Plaintiffs’ burden of demonstrating a “concrete and particularized”  
9 injury that is “fairly traceable” to the decisions under review by the Court. *Clapper*,  
10 568 U.S. at 409.

11 First, Plaintiffs fail to even allege, much less demonstrate, that any of the  
12 challenged actions have a direct impact on population growth or border crossings  
13 and thus could cause the harms they allege. And indeed, there is no such direct  
14 causal link. The DSO and STEM rules pertain only to students temporarily studying  
15 in the United States, not immigrants adding to the permanent population and not  
16 individuals illegally crossing the southwestern border. The AC21 Rule primarily  
17 addresses a population of immigrant and nonimmigrant visa holders who are  
18 already in the United States, not new immigrants or illegal border crossers.  
19 AC00218. The International Entrepreneur Rule is expected to impact an  
20 insignificant number of immigrants per year, and it has no relation to individuals  
21 illegally crossing the border. IER00088. And, DHS’s 2014 decision to construct  
22 temporary housing near Dilley, Texas, does not increase immigration; it is a  
23 *response* to people entering the country illegally. It does not influence whether the  
24 individuals housed in the facility will ultimately be allowed to immigrate.

25  
26 \_\_\_\_\_  
27 ECF No. 44-17 (alleging environmental, property and emotional injury caused by  
28 illegal border crossing); and Aff. of Ralph D. Pope, ECF No. 44-19, (alleging  
harm from “ecosystem degradation” caused by illegal border crossers).

1           Instead of attempting to provide argument or facts supporting a claim that the  
2 actions they challenge directly increase population, Plaintiffs rely on an  
3 unsupported assumption that the actions they challenge will induce permanent  
4 immigration and induce an increase in border crossings. *See, e.g.*, Pl. Br. at 2.  
5 Plaintiffs ask the Court to assume, for example, that the changes in the DSO Rule  
6 or the STEM Rule will make it more likely that visiting students will remain in the  
7 country permanently, either by illegally remaining and successfully evading  
8 removal, or by seeking and being granted more permanent long-term status.  
9 Similarly, Plaintiffs ask the Court to assume that the challenged decisions will  
10 induce more individuals to attempt to illegally cross the southwestern border and  
11 will increase the number of individuals who are permitted to stay in the country or  
12 who succeed in staying the county illegally.

13           But standing cannot rest on speculation about the actions of independent third  
14 parties—the Court should not have to guess the motivations of individuals seeking  
15 to immigrate legally or illegally or to divine the future conclusions of officials  
16 deciding questions related to immigration benefits or enforcement. *See Lujan*, 504  
17 U.S. at 555 (An injury “has to be fairly traceable to the challenged action of the  
18 defendant, and not . . . th[e] result [of] the independent action of some third party  
19 not before the Court.”). Where a plaintiff alleges that government action “caused  
20 injury by influencing the conduct of third parties . . . more particular facts are needed  
21 to show standing.” *Mendia v. Garcia*, 768 F.3d 1009 (9th Cir. 2014) (citation  
22 omitted). Specifically, without relying on “speculation” or “guesswork” about the  
23 third parties’ motivations, a plaintiff must offer facts showing that the government’s  
24 unlawful conduct “is at least a substantial factor motivating the third parties’  
25 actions.” *Id.*

26           Rather than meeting their heightened burden of showing “more particular  
27 facts” demonstrating the influence of the challenged decisions on the actions of  
28

1 independent third parties, Plaintiffs present no facts at all showing that the six  
2 decisions it issue—rather than broader economic and geopolitical forces—are the  
3 cause of their injuries. Plaintiffs’ declarants instead attribute their injuries to  
4 generalized harms occurring over decades or trace their injuries to specific DHS  
5 actions not before the Court, including the DACA policy, TPS decisions, and  
6 “amnesty programs.” *See, e.g.*, Aff. of Glen Colton, ECF No. 44-15 (alleging harms  
7 from population growth since 1975); Aff. of Don Rosenberg, ECF No. 44-10, ¶ 9  
8 (alleging harms from population growth over past 30 years); Aff. of Fred Davis,  
9 ECF No.44-7(tracing injury to “lax interior enforcement policies,” “amnesty  
10 programs,” and DACA); Aff. of Don Rosenberg , ECF No. 44-10, ¶ 10 (tracing  
11 death of his son to individual who entered the United States illegally in 1999 and  
12 was granted TPS); Ladd Aff., ECF No. 44-17, ¶ 12 (tracing injury to “catch and  
13 release policies,” “Morton Memos in 2011,” DACA, and “decisions to cut back on  
14 worksite enforcement in 2009”). This Court has already rejected Plaintiffs’ attempt  
15 to challenge these broad programs, and Plaintiffs cannot now base their standing to  
16 challenge the six discrete decisions before the Court on injuries allegedly traceable  
17 to broad claims no longer before the Court. *See* ECF No. 55 at 7 (dismissing  
18 Plaintiffs’ challenges to “long term nonimmigrant visas, parole, Temporary  
19 Protected Status, refugees, and asylum, and DACA”); *see also Musacchio v. United*  
20 *States*, 136 S. Ct. 709, 716 (2016) (“The law-of-the-case doctrine generally  
21 provides that when a court decides upon a rule of law, that decision should continue  
22 to govern the same issues in subsequent stages in the same case.” (quotation  
23 omitted)).

24 Finally, even had Plaintiffs demonstrated that population growth was fairly  
25 traceable to the challenged decisions, they still fall short of demonstrating the links  
26 of causation between that population growth and their alleged injuries. Plaintiffs  
27 allege population-based harms—increased traffic, increasing crowding in particular  
28

1 parks—in specific areas of California, Colorado and Florida. *See, e.g.*, Willey Aff.,  
2 ECF No. 44-10 (alleging harms in Los Angeles area); Ric Oberlink, ECF No. 44-  
3 12 (alleging injuries to use of Redwood Regional Park, Yosemite, and Mt.  
4 Whitney). But Plaintiffs adduce no evidence that, assuming the challenged  
5 decisions induce population growth, that growth will occur in these areas or will  
6 occur in manner causing Plaintiffs harm; i.e. that individuals will locate in areas  
7 used by Plaintiffs, drive on the highways used by Plaintiffs, or use the parks and  
8 other resources used by Plaintiffs. Plaintiffs appear to ask the Court to simply  
9 assume that any population growth anywhere in the country will necessarily harm  
10 their interests. But the Supreme Court has squarely rejected reliance on this sort of  
11 probabilistic link to injury. *Summers*, 555 U.S. at 498 (basing standing on the  
12 “statistical probability that some of [plaintiffs’] members are threatened with  
13 concrete injury . . . would make a mockery of our prior cases”).

14 In sum, Plaintiffs proffer a collection of alleged injuries that they tie only in  
15 conclusory fashion to immigration policies *writ large*, or to specific DHS programs  
16 not before the Court. These broad and untethered allegations fall short of the  
17 requirement that an injury be “fairly traceable” to the government action  
18 challenged, and Plaintiffs’ complaint should be dismissed for want of standing.

## 19 **II. Plaintiffs Have Waived Any Challenge to Two of the Actions Before the** 20 **Court**

21 Even if Plaintiffs have standing, their challenge to two of the agency  
22 decisions—CATEX A3 and the DSO Rule—are precluded by Plaintiffs’ failure to  
23 raise their concerns in the public comment process for the decisions.

24 A party seeking to challenge an agency’s compliance with NEPA must  
25 structure its participation in the administrative process to alert the agency to the  
26 party’s contentions so that the agency may give the concerns meaningful  
27 consideration. *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004). Failure  
28 to adequately identify and discuss a particular issue during the public comment

1 period constitutes waiver of the right to pursue that issue in court. *Id.*; *see also*  
2 *Oregon Nat. Desert Ass'n v. Jewell*, 840 F.3d 562 (9th Cir. 2016) (holding plaintiffs  
3 barred from litigating issue not clearly presented in public comments).

4 In this case Plaintiffs failed to comment on the DHS's promulgation of NEPA  
5 Procedures (including CATEX A3) in either 2006 or 2014, and also failed to  
6 comment on the DSO Rule *See* DIR00270-287 (public comments on draft NEPA  
7 procedures); DSO00271-329 (public comments on DSO Rule). Because Plaintiffs  
8 failed to present their claims that these decisions might have significant effects on  
9 U.S. population growth during the public comment process, they have waived their  
10 right to challenge the decisions on that basis in this Court.

### 11 **III. Plaintiffs' Facial Challenge to CATEX A3 Fails**

12 Plaintiffs bring a facial challenge to DHS's CATEX A3, asserting that (1) the  
13 category is overly broad; (2) DHS failed to engage in "scoping" procedures when  
14 promulgating the Categorical Exclusion, and that the promulgation of the  
15 Categorical Exclusion violates DHS's own NEPA procedures. These claims fail,  
16 first because the Plaintiffs' challenge to CATEX A3 is barred by the statute of  
17 limitations, and second, because the DHS fully complied with NEPA when it  
18 promulgated the category.

#### 19 **A. Plaintiffs' Facial Challenge is Untimely**

20 Because neither NEPA nor the APA contains a statute of limitation, the  
21 general six-year statute of limitations in 28 U.S.C. § 2401(a) applies. *Sierra Club v.*  
22 *Penfold*, 857 F.2d 1307 (9th Cir. 1988). Facial challenges to a regulation accrue on  
23 the date that the challenged regulation was promulgated. *P & V Enterprises v. U.S.*  
24 *Army Corps of Eng'rs*, 516 F.3d 1021 (D.C. Cir. 2008). CATEX A3 was  
25 promulgated in 2006. 71 Fed. Reg. 16790 (Apr. 4, 2006). The statute of limitations  
26 for a facial challenge to CATEX A3 thus ran in 2012, four years before Plaintiffs  
27 filed suit. *See Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 n.5  
28



1 (9th Cir. 1996) (holding challenge to categorical exclusion barred by statute of  
2 limitations).

3 **B. CATEX A3 is Not Arbitrary or Capricious**

4 Should the Court conclude that Plaintiffs' facial challenge to CATEX 3 is  
5 justiciable, the record demonstrates the category was properly developed consistent  
6 with the applicable law and following CEQ and DHS procedures.

7 In order to establish a Categorical Exclusion, the CEQ requires that an  
8 agency: (1) publish the proposed category in the Federal Register, (2) provide an  
9 opportunity for public comment on the proposal, and (3) submit the proposed CE  
10 to CEQ for review and approval. 40 C.F.R. § 1507.3(a). Here DHS properly  
11 followed the CEQ regulations when it established CATEX A3.

12 The proposed Categorical Exclusion was published in the Federal Register  
13 for public comment in 2004. 69 Fed. Reg. 33,043. The category was approved by  
14 the CEQ in March 2006. *See* Letter from Connaughton to Chertoff (March 23,  
15 2006). DHS published its NEPA regulations in final form in April 2006. 71 Fed.  
16 Reg. 16790 (Apr. 4, 2006). In 2014 DHS published draft revised NEPA regulations,  
17 which retained CATEX A3, for public comment. *See* DIR00001. These regulations  
18 were approved by CEQ, DIR00291, and published in final form in November 2014.  
19 DIR00288.

20 As demonstrated below, Plaintiffs' critiques of CATEX A3—that it is  
21 improperly broad, didn't comply with NEPA scoping requirements, and violates  
22 DHS's own NEPA procedures—are all unavailing.

23 **1. CATEX A3 is Properly Defined**

24 Plaintiffs first contend that CATEX A3 is contrary to CEQ regulations  
25 requiring that Categorical Exclusions include “[s]pecific criteria for and  
26 identification of those typical classes of action” which normally do not require  
27 preparation of an EIS or an EA. Pl. Br. at 9; *see also* 40 C.F.R. § 1507.3(b)(2)(iii).  
28

1 CATEX A3, however, properly identifies a class of actions—rules, interpretations,  
2 policies, orders, directives, notices, procedures, manual, advisory circulars, and  
3 other guidance documents—and then identifies specific criteria for identifying  
4 typical examples within that class; for example, those “of a strictly administrative  
5 or procedural nature,” or those that “interpret or amend an existing regulation  
6 without changing its environmental effect.” DIR00355 (A3(a), (d)).

7 While Plaintiffs deem CATEX A3 contrary to the dictionary definition of  
8 “specific,” *see* Pl. Br. at 9, the category plainly comports with the CEQ regulations.  
9 Indeed, the CEQ has explicitly discouraged the use of “detailed lists of specific  
10 activities” and encouraged agencies to instead identify “broadly defined criteria  
11 which characterize types of actions that, based on the agency’s experience,”  
12 normally do not have “significant environmental effects.” 48 Fed. Reg. 34,263,  
13 34,265 (July 28, 1983). Compellingly, CEQ itself reviewed DHS’s NEPA  
14 procedures, including CATEX A3, and determined that they conform to NEPA and  
15 the CEQ’s own regulations. *See* Letter from Connaughton to Chertoff (March 23,  
16 2006); DIR00291. The CEQ’s interpretation of its own regulations is entitled to  
17 “great deference” from the Court. *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir.  
18 2007) (quoting *Heartwood, Inc. v. U.S. Forest Service*, 230 F.3d 947 (7th Cir.  
19 2000)).

20 Plaintiffs’ related suggestion that the Category A3 is arbitrary and capricious  
21 because it could theoretically include actions with significant cumulative effects,  
22 *see, e.g.*, Pl. Br. at 10, is not persuasive. First, as a legal matter, the fact that it is  
23 *possible* to speculate circumstances in which a regulation could be applied  
24 improperly does not constitute grounds for finding the regulation facially invalid.  
25 *See, e.g., Babbitt v. Sweet Home*, 515 U.S. 687, 709 (1995) (O’Connor, J.,  
26 concurring) (noting that “there is no need to strike a regulation on a facial challenge  
27 out of concern that it is susceptible of erroneous application”); *Anderson v.*  
28



1 *Edwards*, 514 U.S. 143, 156 n.6 (1995) (noting plaintiffs “could not sustain their  
2 burden [of showing regulation facially invalid] even if they showed that a possible  
3 application of the rule . . . violated federal law”).

4 Second, Plaintiffs ignore that CATEX A3 must be used in conjunction with  
5 the “extraordinary circumstances” inquiry, which provides a “safety-valve” that  
6 prevents proposals with significant effects from being issued under the category.  
7 *See, e.g., Utah Env'tl. Cong. v. Bosworth*, 443 F.3d 732 (10th Cir. 2006). As required  
8 by CEQ regulations, the DHS NEPA procedures contain a list of “extraordinary  
9 circumstances” that identify conditions where a proposal may have significant  
10 impacts and use of a categorical exclusion would be improper. DIR00330-32.  
11 Directly responsive to Plaintiffs’ concern, one of the listed extraordinary  
12 circumstances is “whether the action is related to other actions with individually  
13 insignificant but cumulatively significant impacts.” DIR00332.

## 14 **2. DHS Did Not Violate the NEPA Scoping Requirements**

15 Plaintiffs contend, based on the Ninth Circuit’s decision in *Sierra Club v.*  
16 *Bosworth*, that DHS erred in not conducting a “scoping” process prior to the  
17 establishment of CATEX A3. Pl. Br. at 11. This claim fails. The DHS was not  
18 required to conduct scoping for CATEX A3 and the agency properly documented  
19 its determination that the category would not have significant effects.

20 “Scoping” is a NEPA process designed to gather input as to the “scope of the  
21 issues to be addressed and for identifying the significant issues related to a proposed  
22 action.” 40 C.F.R. § 1501.7. Under the CEQ regulations, scoping is required only  
23 for actions requiring preparation of an EIS. *Id.* (scoping applies “[a]s soon as  
24 practicable after [the agency’s] decision to prepare an environmental impact  
25 statement”).<sup>8</sup> The CEQ regulations do not extend the scoping obligation to the  
26

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27 <sup>8</sup> *See also* CEQ Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,265  
28 (1983) (“The purpose of this [scoping] process is to determine the scope of the EIS

1 creation of categorical exclusions. 40 C.F.R. § 1507.3(a).

2 In *Bosworth*, the court did, as Plaintiffs note, fault the Forest Service for  
3 failing to conduct scoping during the creation of a categorical exclusion. 510 F.3d  
4 1016, 1026 (9th Cir. 2007). That holding, however, is not generalizable to other  
5 agencies because it rests on the court's belief that the Forest Service's NEPA  
6 procedures had extended the scoping requirements beyond EISs to "all proposed  
7 actions." In applying the scoping requirement the *Bosworth* court relied the Forest  
8 Service's Handbook ("FSH") and on *Alaska Center for Environment v. United*  
9 *States Forest Service*, which found that the FSH requires the agency to "conduct  
10 scoping for 'all proposed actions, including those that would appear to be  
11 categorically excluded.'" 189 F.3d 851, 858 (9th Cir. 1999) (emphasis added).

12 In contrast to the Forest Service-specific procedures at issue in *Bosworth*,  
13 DHS's NEPA procedures explicitly require scoping only for EISs. DIR00195. For  
14 creation of Categorical Exclusions, DHS NEPA procedures require only "CEQ  
15 review and public comment." DIR00199 (Paragraph 3(a)(iii)). This Court should  
16 decline Plaintiffs' invitation to engraft onto DHS's NEPA procedures an obligation  
17 not required by the statute. See *Vermont Yankee Nuclear Power Corp. v. Nat.*  
18 *Resources Def. Council*, 435 U.S. 519, 525 (1978) (holding courts should not  
19 impose their "own notions of proper procedures upon agencies entrusted with  
20 substantive functions by Congress").

21 To the extent that Plaintiffs intend their "scoping" claim to be a challenge to  
22 the administrative record underlying CATEX A3, that challenge also fails. Plaintiffs  
23 contend that CATEX A3 is intended to include "the entire scope of [DHS's] myriad  
24 actions governing the administration of the U.S. immigration laws," and that the  
25 administrative record does not demonstrate that "all of DHS'[s] immigration related  
26 actions[] have no potential to individually or cumulatively impact the 'human  
27

28 so that preparation of the documents can be effectively managed.").

1 environment.” Pl. Br. at 11. This argument is a strawman. CATEX A3 establishes  
2 a general category for types of rules and interpretations that do not have significant  
3 environmental effects. The category itself is not related to immigration, and it can  
4 be used by any DHS component for any qualifying rule. *See* DIR00309 (noting  
5 procedures apply to all components of DHS). Nowhere does DHS assert that the  
6 category is intended to encompass all immigration related activities; DHS will  
7 determine and conduct the appropriate level of NEPA analysis for its actions at the  
8 time they are proposed.<sup>9</sup> *See* DIR00293 (noting NEPA procedures apply to DHS  
9 “programs, projects, and other activities”). Because CATEX A3 does not purport  
10 to cover “all of DHS’[s] immigration-related actions,” Pl. Br. at 11, there was no  
11 need for DHS to establish a record that any and all immigration-related actions have  
12 no potential to impact the environment.

13 Contrary to Plaintiffs’ assertions, CATEX A3 is well-supported by the  
14 record. DHS’s 2006 NEPA procedures, including CATEX A3, were developed  
15 over a year-long process by a panel of experts. *See* 69 Fed. Reg. 33,043. In  
16 particular, the panel developed CATEX A3 through comparison to long-standing  
17 categories used by multiple other agencies, a process explicitly recommended by  
18 the CEQ. *See* Admin. R. for Categorical Exclusions;<sup>10</sup> 71 Fed. Reg. 16,790, 16791  
19 (Apr. 4, 2006) (“The CATEXs were developed on the basis of an administrative  
20 record from the components that comprise the Department and the expertise of the  
21 Panel members); 75 Fed. Reg. 75,628, 75,629 (Dec. 6, 2010) (CEQ guidance  
22 encouraging agencies “to consider information and records from other private and  
23 public entities, including other Federal agencies”). CEQ reviewed and approved the

24 \_\_\_\_\_  
25 <sup>9</sup> For example, in this case, DHS prepared a programmatic EA and Supplemental  
26 EA to analyze the environmental effects of adding infrastructure to address the  
influx of children and families along the southwestern border.

27 <sup>10</sup>

28 [https://www.dhs.gov/sites/default/files/publications/Mgmt\\_NEPA\\_AdminRecdetailedCATEXsupport\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/Mgmt_NEPA_AdminRecdetailedCATEXsupport_0.pdf)

1 DHS’s 2006 NEPA procedures, including CATEX A3. *See* Letter from  
2 Connaughton to Chertoff (March 23, 2006).

3 In sum, when it established CATEX A3, DHS was not required to conduct  
4 scoping, nor was it required to demonstrate that all of the Departments’  
5 immigration-related actions have no potential to impact the human environment.  
6 The category was developed and supported by a process approved by the CEQ.

### 7 **3. Category A3(d) Complies with DHS’s NEPA Requirements**

8 Finally Plaintiffs assert that CATEX A3(d) is facially inconsistent with  
9 DHS’s NEPA procedures because it allows categorical exclusion of rules that  
10 “interpret or amend an existing regulation without changing its environmental  
11 effect” while the DHS’s NEPA procedures prohibit the agency from using a  
12 categorical exclusion on a proposed action that is “a piece of a larger action.” Pl.  
13 Br. at 12-13. Plaintiffs submit that any amendment or interpretation is necessarily  
14 “a piece of the larger action”—the existing rule and the “larger regulatory  
15 framework.” *Id.* This reading misconstrues DHS’s NEPA procedures.

16 In requiring that a Categorical Exclusion not be applied to “a piece of a larger  
17 action” DHS did not intend to preclude use of a Categorical Exclusion in any  
18 instance where the proposed action is, in any manner, “connected to” the “larger  
19 regulatory framework.” Pl. Br. at 13. Were that the case, the exception would  
20 quickly swallow the rule, as all DHS actions are arguably connected to the  
21 Department’s larger regulatory framework. Instead, as the DHS policy itself makes  
22 clear, the “not a piece of a larger action” requirement precludes “segmentation”—  
23 the artificial division of a single proposed action into smaller components to escape  
24 the application of NEPA to some of the segments or to reduce the perceived impacts  
25 of the whole action. *See* DIR00331 (“It is not appropriate to segment a proposed  
26 action or connected actions by division into smaller parts in order to avoid a more  
27 extensive evaluation of the potential for environmental impacts under NEPA”); *see*  
28

1 *also Sensible Traffic Alternatives v. Fed. Transit Admin.*, 307 F. Supp. 2d 1149 (D.  
2 Haw. 2004) (defining segmentation).

3 To engage in impermissible segmentation, an agency must be aware of the  
4 scope of the entire action at the time it is proposed. *See, e.g., O'Reilly v. U.S. Army*  
5 *Corps of Eng'rs*, 477 F.3d 225, 237 (5th Cir. 2007) (“improper segmentation is  
6 usually concerned with projects that have reached the proposal stage.”); *Env'tl Def.*  
7 *Fund v. Marsh*, 651 F.2d 983 (5th Cir 1981) (finding no impermissible  
8 segmentation where one project is proposed and the other is still being studied). The  
9 later discovery of a need to amend an existing regulation is not segmentation of a  
10 single proposed action, it is a simply a separate later decision. Tellingly, Plaintiffs  
11 cite to no caselaw for their untenable theory that a later amendment to a regulation  
12 should be considered part of the initial regulation for NEPA purposes.

13 Moreover, even if a later amendment could be deemed connected to the initial  
14 rule for purposes of a segmentation analysis, that would not provide a basis for the  
15 facial invalidation of CATEX A3(d) because its use is still explicitly limited to  
16 circumstances where the amendment or interpretation does not alter the  
17 environmental impact of the original rule. So, by its own terms, CATEX A3(d) still  
18 cannot be used for actions with significant environmental effects.

19 In sum, Plaintiffs' facial challenge to the validity of CATEX A3 fails. The  
20 category is properly defined, was created under a process approved by the CEQ,  
21 and is not in conflict with DHS's NEPA procedures. Federal Defendants are  
22 entitled to summary judgment on Count III.

#### 23 **IV. DHS Properly Applied CATEX A3 to the Four Rules Challenged by** 24 **Plaintiffs**

25 Drawing from disparate and inapplicable provisions of NEPA and inapposite  
26 caselaw, Plaintiffs contend that DHS erred in concluding that the promulgation of  
27 four regulations—the DSO Rule, the STEM Rule, the AC21 Rule, and the  
28 International Entrepreneur Rule—fell within CATEX A3. Considered under the

1 appropriate standards, however, the record makes clear that the DHS properly  
2 applied CATEX A3 to all four rules.

3 **A. Plaintiffs Misconstrue the Applicable Standards**

4 When applying a categorical exclusion to a proposed action an agency must  
5 show: (1) that the proposed action fits within the established category; and (2) that  
6 there are no extraordinary circumstances requiring preparation of an EA or EIS.  
7 *Alaska Ctr.*, 189 F.3d at 858. DHS's NEPA procedures add a third determination,  
8 that the action not be segmented from "a larger action." DIR00331.

9 The purpose of the categorical exclusion process is to save agency resources  
10 for actions with significant impacts, and thus the requirements for documenting the  
11 application of a CATEX are minimal; the agency need only "adequately explain its  
12 decision." *Alaska Ctr.*, 189 F.3d at 859. So long as there is "a rational connection  
13 between the facts and the conclusion made, the [agency] has not acted arbitrarily."  
14 *Id.* The agency's application of a categorical exclusion need not follow any specific  
15 form. *See, e.g., California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002) ("In many  
16 instances, a brief statement that a categorical exclusion is being invoked will  
17 suffice."); *Ctr. for Food Safety v. Johanns*, 451 F. Supp. 2d 1165, 1174 (D. Haw.  
18 2006) (when applying a categorical exclusion, "the agency must simply explain its  
19 decision in a reasoned manner"); *Back Country Horsemen of Am. v. Johanns*, 424  
20 F. Supp. 2d 89, 99 (D.D.C. 2006) (upholding use of a categorical exclusion where  
21 the agency did not document the decision). "Once the agency considers the proper  
22 factors and makes a factual determination on whether the impacts are significant or  
23 not, that decision implicates substantial agency expertise and is entitled to  
24 deference." *Alaska Ctr.*, 189 F.3d at 859.

25 Ignoring that the function of categorical exclusions is to reduce paperwork  
26 and delay, 40 C.F.R. §§ 1500.4(p), 1500.5(k), Plaintiffs seek to impose additional  
27 procedural obligations, asserting that DHS must conduct "scoping" and a  
28



1 cumulative effects analysis when applying a categorical exclusion to a proposed  
2 action. Pl. Br. at 17-18. Neither process is applicable here. First, with regard to  
3 scoping, Plaintiffs mistakenly rely on a line of cases that rest on Forest Service-  
4 specific NEPA regulations, which extend scoping obligations to “all proposed  
5 actions.” See Pl. Br. at 18 (citing *Citizens for Better Forestry v. USDA*, 481 F. Supp.  
6 2d 1059, 1082 (N.D. Cal. 2007) (“the Forest Service is required to conduct scoping  
7 of ‘all proposed actions, including those that would appear to be “categorically  
8 excluded”” citing *Alaska Ctr.*, 189 F.3d at 859)). These cases are inapplicable here,  
9 because neither NEPA itself, nor CEQ regulations, nor DHS procedures, extend the  
10 scoping process to the use of categorical exclusions.

11 Plaintiffs’ contention that DHS is required to conduct a cumulative effects  
12 analysis when applying a categorical exclusion is also misplaced. By definition  
13 categorical exclusions are categories of actions which the agency has already  
14 determined “do not individually or cumulatively have a significant effect on the  
15 human environment.” 40 C.F.R. § 1508.4. Obligating agencies to conduct a  
16 cumulative effects analysis when using the category would thus “effectively render  
17 useless the purpose of categorical exclusions,” *Utah Env’tl. Cong. v. Bosworth*, 443  
18 F.3d at 740, and the Ninth Circuit has squarely rejected any such obligation. See  
19 *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085 (9th Cir. 2013) (holding  
20 application of 40 C.F.R § 1508.25 –which requires consideration of connected,  
21 cumulative and similar actions—“is inconsistent with the efficiencies that the  
22 abbreviated categorical exclusion process provides”); *Sequoia Forestkeeper v. U.S.*  
23 *Forest Service*, 2010 WL 5059621 (holding cumulative effects analysis not required  
24 when applying categorical exclusions).<sup>11</sup>

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25  
26 <sup>11</sup> Plaintiffs deride the fact that agencies are not required to conduct a cumulative  
27 effects analysis when applying a categorical exclusion as a “cynical tautology.” Pl.  
28 Br. at 19. But CEQ created categorical exclusions to “reduce paperwork and delay,  
so that EAs or EISs are targeted toward proposed actions that truly have the

1 In short, to properly apply CATEX A3, DHS was required only to determine  
2 that the proposed rules fell within the category, there were no extraordinary  
3 circumstances, and the rules were not “a piece of a larger action.” This Court should  
4 decline to impose on the agency additional procedures not required by statute or  
5 regulations. *Vermont Yankee*, 435 U.S. at 525.

6 **B. DHS Reasonably Applied CATEX A3(d) to All Four Rules**

7 Plaintiffs assert that the DHS improperly determined that the rules at issue  
8 fall within CATEX A3(d), which covers rules that “amend an existing regulation  
9 without changing its environmental effect.” Pl. Br. at 20. Plaintiffs contend DHS’s  
10 use of CATEX A3(d) was improper because they believe: (1) the category cannot  
11 be used unless the rule being amended has itself undergone NEPA analysis; (2) the  
12 rules are parts of a larger action; and (3) the rules may have significant impacts on  
13 the population of the United States. None of these arguments are persuasive.

14 **1. CATEX A3(d) Does Not Require NEPA Review of the**  
15 **Underlying Rule**

16 Plaintiffs first argue that DHS cannot use CATEX A3(d) to amend existing  
17 regulations if the underlying regulations never received NEPA review. Pl. Br. at 20-  
18 21. Nothing in CATEX A3(d) itself or elsewhere in the DHS’s NEPA procedures,  
19 however, imposes any such restriction. By its terms, CATEX A3(d) only requires  
20 that the proposed amendment not change the environmental effect of the existing  
21 rule. The Court should not add procedural requirements not found in the text of the  
22 category itself. *Vermont Yankee*, 435 U.S. at 525.

23 Plaintiffs suggest that in the absence of a NEPA analysis of the underlying  
24 rule, DHS cannot understand the “original impact of the regulation.” Pl. Br. at 21.

25  
26 potential to cause significant environmental effects.” 75 Fed. Reg. 75,628, 75,631  
27 (Dec. 6, 2010). Requiring the agencies to conduct a cumulative effects analysis for  
28 each project before applying a categorical exclusion would subvert the very intent  
of the exception process. *Utah Env'tl. Cong. v. Bosworth*, 443 F.3d at 740.



1 This argument misapprehends the categorical exclusion. CATEX 3A(d) does not  
2 require DHS to show that prior rule *including* the proposed amendment lacks  
3 significant environmental effects, only that the incremental change to the rule being  
4 proposed will not *change* the effects of the underlying rule. That conclusion does  
5 not require a NEPA analysis of the underlying rule, it only requires that the change  
6 itself be of nominal impact.<sup>12</sup> Here, as set forth below, the DHS provided an  
7 adequate explanation of its conclusion that the four rules will not significantly  
8 change the effects of the underlying rules on population growth (the only  
9 environmental effect alleged by Plaintiffs).

## 10 2. The Four Rules are Not Pieces of a Larger Action

11 Plaintiffs' second claim is that DHS's conclusion that the four rules are  
12 covered by CATEX A3(d) is arbitrary or capricious because DHS's NEPA  
13 procedures preclude the use of categorical exclusions when the proposed action is  
14 a "piece of a larger action." DIR00331. In a reprise of their facial challenge to  
15 CATEX A3(d), Plaintiffs claim that each the four rules are by definition a "piece of  
16 a larger action"—the rule or policy they amend—and thus cannot be categorically  
17 excluded. As explained above, this argument misconstrues the "no piece of a larger  
18 action" provision of DHS's NEPA regulations. *See supra* at 21.

19 DHS's prohibition on using a categorical exclusion on an action that is "a  
20 piece of a larger action" is designed to avoid segmentation—dividing a single  
21 proposed action into smaller parts to reduce the perceived impact of the action and  
22 avoid more detailed NEPA analysis. Issuance of a new rule amending a rule or a  
23

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24 <sup>12</sup> Plaintiff cites *Kern v. United States Bureau of Land Management*, 284 F.3d  
25 1062 (9th Cir. 2002), for the proposition that by applying CATEX A3(d) where  
26 there is not a NEPA analysis of the underlying rule, DHS is inappropriately relying  
27 on a "prior analysis that never occurred." *Kern*, however, concerns circumstances  
28 where the agency was attempting to "tier" a project-specific EIS to a non-NEPA  
environmental analysis. Here, as noted above, the invocation of CATEX A3(d)  
does not rely on any prior analysis.

1 policy that has been in place for years, as each the four challenged rules does here,  
2 cannot be an attempt to avoid NEPA review of a single proposed “larger action”  
3 because the current amendments were not part of the proposed action at the time  
4 the original rule was issued. For example, the 2015 DSO Rule amends a 2002 rule  
5 limiting the number of Designated School Officials. DSO00010. These two actions  
6 are not improperly segmented from one another, because the 2015 amendment was  
7 not part of the 2012 proposal. *See, e.g., O’Reilly*, 477 F.3d at 237 (“improper  
8 segmentation is usually concerned with projects that have reached the proposal  
9 stage.”). DHS reasonably concluded that each of the four rules were not a “piece  
10 of a larger action.” DSO00017, AC2100219, IER00088, STEM000132.

### 11 **3. The Record Supports DHS’s Conclusion that the Four Rules** 12 **Do Not Have Significant Environmental Effects**

13 Finally, Plaintiffs claim DHS erred in applying CATEX A3(d) because the  
14 rules will allegedly cause population growth substantial enough to cause significant  
15 environmental impacts. The record belies this claim.

16 **The DSO Rule.** The DSO Rule amends prior regulations to improve the  
17 experience of visiting foreign students by giving universities the ability to seek to  
18 increase the number of DSOs working at the university and by allowing spouses  
19 and children of visiting students to take limited coursework while they are in the  
20 country. DSO00009. The record shows that the Rule would not have direct effects  
21 on the population. DSOs are already citizens or long-term permanent residents, and  
22 increasing their numbers would simply improve oversight of visiting students, not  
23 increase the number of individuals entering the country. DSO00010. Similarly,  
24 allowing spouses and children to take classes simply increases the opportunities  
25 available to members of the family who are entering the country anyway to  
26 accompany visiting students. DSO00011. The Rule does not directly increase the  
27 number of individuals entering the country.  
28

1           Rather than asserting the DSO Rule will directly impact the U.S. population  
2 or the environment, Plaintiffs appear to rely on an attenuated theory that the Rule  
3 will indirectly induce significant population growth. Specifically, Plaintiffs appear  
4 to suggest that by improving the visiting student experience, the Rule will  
5 significantly increase the number of foreign students with families desiring to study  
6 in the U.S., that a significantly increased number of those students will be permitted  
7 to study in the U.S., that an increased number of those students will attempt to stay  
8 in the country upon completion of their studies either by seeking permanent resident  
9 status or by remaining illegally, and that DHS will grant an increased number of  
10 applications for permanent residence or countenance an increased number of  
11 individuals remaining illegally in the U.S. And, finally, even if the DSO Rule  
12 induced population growth, Plaintiffs’ theory of indirect effects requires the  
13 additional speculative assumption that the induced population will settle in places  
14 and engage in behaviors causing significant environmental effects.

15           Although NEPA requires agencies to consider indirect effects, this chain of  
16 effects—which rests on independent decisions of multiple individuals and  
17 agencies—stretches the NEPA duty to examine “reasonably foreseeable” indirect  
18 effects well beyond the breaking point. 40 C.F.R. § 1508.8(b). NEPA requires “a  
19 reasonably close causal relationship between a change in the physical environment  
20 and the effect at issue.” *Presidio Golf Club v. Nat’l Park Serv.*, 155 F.3d 1153, 1163  
21 (9th Cir. 1998) (quoting *Metro. Edison Co.*, 460 U.S. at 774). Here the effect of the  
22 DSO Rule—improving the study experience for visiting students—does not have  
23 “a reasonably close causal relationship” to the environmental effects alleged by  
24 Plaintiffs—the harms of population growth. *See also Ground Zero Ctr. for Non-*  
25 *Violent Action v. U.S. Dep’t of Navy*, 383 F.3d 1082, 1090 (9th Cir. 2004) (noting  
26 agencies “need not discuss remote and highly speculative consequences”). DHS’s  
27 conclusion that the Rule would not have significant effects was not arbitrary or  
28

1 capricious.

2 **STEM Rule.** The record also demonstrates that the STEM Rule will not have  
3 significant direct or indirect effects on the U.S. population. First, the STEM Rule  
4 concerns a small group of non-immigrant students, who must leave the country after  
5 completion of their practical training period. STEM000086. The STEM Rule thus  
6 does not have a significant direct impacts on the U.S. population or the environment

7 Nor is there a basis for concluding that the STEM Rule is likely to indirectly  
8 induce significant population growth. First, the record provides no evidence that the  
9 Rule is likely to induce significantly more people to participate in STEM practical  
10 training programs. DHS observed that while the new longer training period  
11 available under the Rule could induce some additional participation, the increased  
12 requirements on employers and students could have a countervailing effect and  
13 suppress participation. STEM005298. DHS also noted that found that program  
14 participation depends on variables outside the control of the DHS and unaffected  
15 by the Rule, including the strength of the global economy and the growth of STEM  
16 jobs in the U.S. and globally. *Id.* Second, even were the STEM Rule to induce  
17 increased participation in STEM practical training programs, there is not the  
18 requisite “reasonably close causal relationship” between an increase in participation  
19 in the training program and an increase in permanent residence in the United States.  
20 As with the DSO Rule, Plaintiffs’ allegation that the STEM Rule will cause  
21 population increases rests on an attenuated chain of causation which includes  
22 speculation over whether individual program participants will seek to stay in the  
23 country (whether by remaining illegally or by seeking more permanent status) and  
24 speculation over the decisions of the officials taking enforcement actions or  
25 deciding applications for long-term resident status. This attenuated chain of  
26 causation stretches well beyond the “reasonably foreseeable” indirect effects that  
27 an agency must consider under NEPA, and DHS’s conclusion that the STEM Rule  
28

1 would not have significant effects was not arbitrary or capricious.

2       **AC21 Rule.** The administrative record shows that the AC 21 Rule will not  
3 have significant impacts on the U.S. population. The record explains that the AC21  
4 Rule is designed to improve processes applicable to workers who have already  
5 obtained employment-based visas by improving the ability of U.S. employers to  
6 hire and retain such workers and increasing the ability of the workers to change  
7 positions or employers. AC00142. The Rule does not change the immigrant or  
8 nonimmigrant numerical limits set by the Immigration and Naturalization Act, or  
9 change the classes of foreign workers who qualify for employment-based visas.  
10 AC00157. Thus, DHS concluded that the Rule will not increase U.S. population  
11 because “the population affected by this rule is primarily comprised of immigrants  
12 and nonimmigrants who are already in the United States and have been present for  
13 a number of years.” AC00218. Plaintiffs present no basis for a finding that this  
14 conclusion is arbitrary or capricious.

15       To the extent that Plaintiffs assert that the AC21 Rule will induce behavior  
16 that will ultimately increase the population, that argument runs aground on the same  
17 overly speculative chain of causation present in Plaintiffs’ challenges to the DSO  
18 and STEM rules. There is simply not the “reasonably close causal relationship”  
19 between the Rule and population growth or environmental effects required to trigger  
20 NEPA analysis.

21       **International Entrepreneur Rule.** Finally, the record also demonstrates  
22 that DHS reasonably found the International Entrepreneur Rule would not have a  
23 significant impact on the overall U.S. population. The International Entrepreneur  
24 Rule established criteria under which the Secretary could use his or her  
25 discretionary parole authority to allow qualifying individuals to stay temporarily in  
26 the United States to oversee his or her start-up business in the United States.  
27 IER00041. DHS found this case-by-case adjudicatory process was likely to affect  
28

1 fewer than 3,000 individuals, “an insignificant number in the context of the  
2 population of the United States.” Plaintiffs point to no record evidence to  
3 demonstrate this conclusion was arbitrary or capricious.

4 In sum, DHS’s properly applied CATEX A3(d) to all four rules, and  
5 Defendants are entitled to summary judgment on Court IV.

6 **C. DHS Properly Applied CATEX A3(a) to the STEM Rule and the**  
7 **International Entrepreneur Rule**

8 In addition to concluding that all four rules fell within CATEX A3(d), DHS  
9 found that the International Entrepreneur Rule and the STEM Rule also fell within  
10 CATEX A3(a), which covers rules “of a strictly administrative or procedural  
11 nature.” DIR00355.<sup>13</sup> Plaintiffs contend that DHS’s use of CATEX A3(a) is  
12 inappropriate because the two rules “made substantive changes to the conditions  
13 upon which foreign nationals may enter and remain in the country.” Pl. Br. at 20.<sup>14</sup>  
14 This claim fails.

15 DHS’s determination that the International Entrepreneur Rule falls within the  
16 CATEX A3(a) is reasonable. IER000088. The Immigration and Nationality Act, 8  
17 U.S.C. § 1182(d)(5), vests the Secretary of Homeland Security with discretionary  
18 authority to parole individuals into the United States temporarily on a case-by-case  
19 basis for urgent humanitarian reasons or where parole would be a significant public  
20 benefit. IER00041. The International Entrepreneur Rule merely sets forth criteria  
21 for the Secretary to consider when determining whether to parole particular  
22 individuals based on the public benefit of their entrepreneurial activities. *Id.* The  
23 Rule does not alter the Secretary’s substantive discretion to grant or deny parole.

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24  
25 <sup>13</sup> DHS NEPA procedures provide that the proposed action should “clearly fit[]  
26 within *one or more* of the CATEXs.” DIR00331 (emphasis added).

27 <sup>14</sup> Because the two rules are also covered by CATEX A3(d), a finding that DHS  
28 misapplied CATEX A3(a) would not invalidate either rule. Plaintiffs must show  
invocation of both CATEX A3(a) and A3(d) was arbitrary or capricious.



1 Nor does it create new rights in potential applicants for parole. IER00041, 48. A  
2 rule that creates an application process under which the agency can exercise existing  
3 discretion is quintessentially administrative in nature and DHS’s decision to invoke  
4 CATEX A3(a) was not arbitrary or capricious.

5 DHS’s application of CATEX A3(a) to the STEM Rule was also reasonable.  
6 STEM000132-33. The STEM Rule generally authorizes students to continue to  
7 engage in an extended period of practical training subject to reporting requirements  
8 for students, school officials, and employers that are intended to help DHS track  
9 students to limit abuse of the program and safeguard U.S. workers in STEM fields.  
10 STEM000057, STEM000086. These reporting provisions fall squarely within the  
11 “administrative or procedural” ambit of CATEX A3(a).

12 **V. DHS Prepared Appropriate NEPA Analyses of the Agency’s Actions**  
13 **to Address an Increased Influx of Unaccompanied Children and**  
14 **Families Across the Southwest Border**

15 Plaintiffs allege that DHS failed to comply with NEPA with regard to its  
16 efforts in 2014 to address the need to add additional infrastructure—particularly  
17 temporary housing—in response to an influx of families and unaccompanied  
18 children crossing the southwestern border. Pl. Br. at 24-25. Specifically Plaintiffs  
19 assert DHS was obligated to analyze the impact of “tens of thousands of individuals  
20 . . . on the impacts on the ecosystems through which they passed,” and the  
21 population impacts of the potential “resettlement” of those individuals. Pl. Br. at  
22 25. These claims fail because the DHS infrastructure improvements under review  
23 do not *cause* individuals to cross the border into the United States; they are a  
24 response to individuals who have already done so. Similarly, the DHS actions under  
25 review are not related to whether individuals who have crossed the border will  
26 ultimately be permanently resettled in the United States; that determination is based  
27 on individual immigration adjudications. Because the “impacts” identified by  
28 Plaintiffs are not causally related to the DHS actions at issue, DHS was not

1 obligated to include them in its NEPA analysis, and Defendants are entitled to  
2 summary judgment on Count V.

3 In 2014, the United States faced an increase in the number of unaccompanied  
4 children and families being apprehended crossing the southwestern border and  
5 entering the United States without authorization. UAC01167. This influx created a  
6 need to expand DHS's existing infrastructure for safely housing children and  
7 families pending the outcome of their immigration proceedings. UAC00534. To  
8 analyze the impacts of expanding its infrastructure, DHS prepared a programmatic  
9 EA which found that if future projects fell with specified criteria they would not  
10 have significant impacts, and DHS therefore issued a FONSI. UAC00534-567,  
11 UAC00568-571.

12 Tiering to the programmatic analysis, DHS also prepared a supplemental EA  
13 to consider the environmental impacts of construction of a facility outside of Dilley,  
14 Texas which would house up to 2,400 women and children pending the disposition  
15 of their immigration proceedings. UAC00773-948.<sup>15</sup> In its supplemental EA DHS  
16 considered the impacts of the housing facility on a wide range of resources,  
17 including land use patterns, water, air, climate change, and wildlife. UAC00779-  
18 813. In addition to the direct impacts of the 2,400 people living in the facility while  
19 awaiting their judicial proceedings, DHS considered the impacts of the facility on  
20 the population of Dilley and Frio County and concluded that while there would be  
21 a short-term increase in population as the facility was constructed the overall impact  
22 would not be significant. UAC00808. Concluding that the project would not have  
23 significant environmental impacts, DHS issued a FONSI. UAC00769 (FONSI).

24 NEPA requires that an agency disclose the effects, both direct and indirect,  
25 that are *caused by* its proposed action. Direct effects” are “caused by the action and

26 \_\_\_\_\_  
27 <sup>15</sup> “Tiering” refers the coverage of general matter in a broad environmental analysis  
28 subsequent narrower statements focusing solely on the issues specific to the  
subsequent proposal. 40 C.F.R. § 1508.28.



1 occur at the same time and place.” 40 CFR § 1508.8(a). “Indirect effects” are  
2 “caused by the action and are later in time or farther removed in distance, but are  
3 still reasonably foreseeable.” 40 CFR § 1508.8(b). The test of whether an effect is  
4 reasonably foreseeable is measured similarly to the tort law’s proximate cause  
5 doctrine—whether there is a “reasonably close causal relationship” between the  
6 agency’s action and the environmental effect. *Public Citizen*, 541 U.S. 752; *see also*  
7 *Ctr. for Biological Div. v. BLM.*, 937 F. Supp. 2d 1140 (N.D. Cal. 2013).

8 The impacts individuals have as they cross the border and the impacts of  
9 potential resettlement of those individuals are not *caused* directly or indirectly by  
10 DHS’s decision to construct a housing facility in Dilley, Texas. To the contrary, the  
11 purpose of the facility is to *respond* to individuals who have already determined to  
12 cross the border and the need to house those individuals pending resolution of their  
13 immigration proceedings. *See* UAC00776 (The purpose of the action is to “rapidly  
14 provide appropriate housing requirements for family units as part of the  
15 Department’s overall response to the influx of unaccompanied children . . . and  
16 family units across the southwest border.”); UAC00547 (“The need for the  
17 Proposed Action is based on the existing and expected increase in the number of  
18 apprehended persons being processed that may exceed the then current capacity of  
19 the DHS support infrastructure.”). In other words, the DHS facility challenged by  
20 Plaintiffs is not the *cause* of increased border crossings but their *effect*.

21 Nor was DHS required to consider—as an impact of a proposal to build  
22 temporary housing—the impacts of the “potential resettlement” of individuals  
23 crossing the border. Pl. Br. at 25. As noted above, the Supplemental EA  
24 appropriately discloses the impacts of housing approximately 2,500 people at the  
25 Dilley facility while their immigration proceedings are pending. But predicting the  
26 outcome of those individual immigration proceeding—i.e. how many individuals  
27 will ultimately be allowed to stay in the United States or will be returned to their  
28

1 country of origin, and if allowed to stay, where in the United States they might  
2 settle—would be a speculative endeavor well outside of DHS’s NEPA obligations.  
3 *Warm Springs Task Force v. Gribble*, 621 F.2d 1017, 1026 (9th Cir. 1980) (NEPA  
4 does not require discussion of “remote and highly speculative consequences.”).

5 Because DHS fully complied with NEPA in analyzing its proposal to add  
6 infrastructure in response to an influx of families and children crossing the  
7 southwestern border, the agency is entitled to summary judgment on Count V.

#### 8 **VI. Plaintiffs’ Requested Remedy is Overbroad and Premature**

9 Plaintiffs broadly ask that the Court vacate CATEX A3, all of “its  
10 invocations,” and the 2014 NEPA analyses underlying the Dilley Facility. Pl. Br. at  
11 25. This request is unwarranted and inappropriate. Vacatur is not automatically  
12 imposed upon a finding of a legal defect in an agency’s analysis. *Cal. Communities*  
13 *Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012). To the contrary, vacatur  
14 is an equitable remedy that requires a court to balance “how serious the agency’s  
15 errors are” against the “disruptive consequences” of vacating the decision. *Id.* In  
16 this case, the rules at issue have been in place and relied on by DHS and numerous  
17 third parties for years, and the Dilley facility has been constructed and is in use.  
18 Under these circumstances, a broad vacatur order would be highly disruptive.  
19 Therefore, while Defendants believe the decisions before the Court should be  
20 upheld, if the Court finds any violation of law, we request further briefing on  
21 remedy so that the Court is afforded the opportunity to weigh the equities and  
22 determine whether vacatur is appropriate.

23 May 24, 2019

Respectfully Submitted,

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26 /s/ Barclay T. Samford  
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28 Trial Attorney

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