No. _____

In the

Supreme Court of the United States

WHITEWATER DRAW NATURAL RESOURCE CONSERVATION DISTRICT, HEREFORD NATURAL RESOURCE CONSERVATION DISTRICT, ARIZONA ASSOCIATION OF CONSERVATION DISTRICTS, CALIFORNIANS FOR POPULATION STABILIZATION, SCIENTISTS AND ENVIRONMENTALISTS FOR POPULATION STABILIZATION, NEW MEXICO CATTLE GROWERS ASSOCIATION, GLEN COLTON, and RALPH POPE,

Petitioners,

v.

ALEJANDRO MAYORKAS, in his official capacity as Secretary of the Department of Homeland Security, and the DEPARTMENT OF HOMELAND SECURITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) The National Policy Act ("NEPA"), 42 U.S.C. § 4331 et seq. (2012) mandates that all federal agencies consider environmental impacts before acting. The Council on Environmental Quality ("CEQ"), which is responsible for guiding the implementation of NEPA, has mandated that all agencies promulgate NEPA procedures through Notice and Comment rulemaking to use for their NEPA compliance. Do the final NEPA procedures so promulgated fail the two pronged test in *Bennett v. Spear*, 520 U.S. 154 (1997) for finality under the Administrative Procedures Act if they do not in themselves apply the rules they thus created to actual programs or projects?

2) Does a plaintiff have standing to challenge procedural violations of immigration related actions if the plaintiff can show: 1) the agency violated its procedural obligations; 2) these procedural obligations were meant to protect plaintiff's concrete interests, and 3) it is reasonably probable that the challenged action will threaten plaintiff's concrete interests?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

Petitioners, the plaintiffs in the district court and appellants in the Ninth Circuit, are the Whitewater Draw Natural Resource Conservation District, the Hereford Natural Resource Conservation District, the Arizona Association of Conservation Districts, Californians for Population Stabilization, Scientists and Environmentalists for Population Stabilization, New Mexico Cattle Growers Association, Glen Colton, and Ralph Pope.

The Whitewater Draw Natural Resource Conservation District and the Hereford Natural Resource Conservation District are governmental entities statutorily authorized by A.R.S. § 37 Chapter 6. The Arizona Association of Conservation Districts and Californians for Population Stabilization are 501(c)(3). Neither has a parent corporation and there is no publicly held corporation that owns 10% or more of their stock.

Scientists and Environmentalists for Population Stabilization is an unincorporated, non-governmental association.

New Mexico Cattle Growers Association is a 501(c)(5) nonprofit association. It has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Glen Colton and Ralph Pope are individuals.

Respondents are Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security and the Department of Homeland Security. The Department of Homeland Security is a federal agency.

RELATED PROCEEDINGS

United States District Court (Southern District of California)

Whitewater Draw Natural Resource Conservation District et. al v. Kirstjen Nielsen, Secretary of Homeland Security et al., Case No. 16-cv-2583 (September 30, 2018)

Whitewater Draw Natural Resource Conservation District et. al v. Kirstjen Nielsen, Secretary of Homeland Security et al., Case No. 16-cv-2583 (June 1, 2020)

United States Court of Appeals (Ninth Circuit)

Whitewater Draw Natural Resource Conservation District et al v. Alejandro Mayokas et al, No. 20-55777 (July 19, 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Whitewater Draw Natural Resource Conservation District, the Hereford Natural Resource Conservation District, the Arizona Association of Conservation Districts, Californians for Population Stabilization, Scientists and Environmentalists for Population Stabilization, New Mexico Cattle Growers Association, Glen Colton, and Ralph Pope respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DECISIONS BELOW

The Ninth Circuit's opinion was entered on July 19, 2021 and reported at 5 F.4th 991. The opinion is reproduced in the appendix hereto ("App") at 1a-46a.

The district court's September 30, 2018 opinion is reported at 2018 U.S. Dist. LEXIS 169560 and its June 1, 2020 opinion is reported at 2020 U.S. Dist. LEXIS 96483 and 2020 WL 2849943. These opinions are reproduced in the appendix hereto at App. at 47a-84a.

JURISDICTION

The Ninth Circuit entered judgment on July 19, 2021. The jurisdiction of this Court is invoked under 28 U.S. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Excerpts from the National Environmental Policy Act

42 U.S.C. 4331

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will

permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

42 U.S.C. § 4332(2)(C)

The Congress authorizes and directs that, to the fullest extent possible: ….

2) all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the

proposal through the existing agency review processes;

Excerpts from the Administrative Procedures Act

5 U.S.C. § 551(4)

"rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency

5 U.S.C. § 553

General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

5 U.S.C. § 706

… the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

Regulations

40 C.F.R. §1507.3 (1978 archived) Agency procedures. (a) Not later than eight months after publication of these regulations as finally adopted in the FEDERAL REGISTER, or five months after the establishment of an agency, whichever shall come later, each agency shall as necessary adopt procedures to supplement these regulations. When the agency is a department, major subunits are

> encouraged (with the consent of the department) to adopt their own procedures. Such procedures shall not paraphrase these regulations. They shall confine themselves to implementing procedures. Each agency shall consult with the Council while developing its procedures and before publishing them in the FEDERAL REGISTER for comment.

STATEMENT

I. Introduction

The National Environmental Policy Act, 42 U.S.C. § 4331 et seq. (2012) ("NEPA"), requires that the federal government consider the environmental impacts of their actions before making the decision to act. NEPA ensures that the agency will both have available and "carefully consider… detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

As long as NEPA has existed, federal agencies have been tempted to simply ignore its mandate. However, the courts' first major interpretation of the law made clear that NEPA is not merely aspirational. In *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, the D.C. Circuit held: "the

statute's language does not provide an "escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow discretionary. Congress did not intend the Act to be a paper tiger."449 F.2d 1109, 1114 (D.C. Cir. 1971) (citations omitted). Since this ruling, NEPA has mandated environmental review of hundreds of different kinds of actions. As explained in *A Citizens' Guide to NEPA*: "The Federal Government takes hundreds of actions every day that may be subject to NEPA, including Federal construction projects, plans to manage and develop federally owned lands, and Federal approvals of non-Federal activities such as grants, licenses, and permits." COUNCIL ON ENV'T QUALITY, A CITIZEN'S GUIDE TO NEPA 4 (2021).

However, one of the federal government's most environmentally significant policies—the government controlled addition of tens of millions of people to the population of the U.S. through immigration—has *never* been reviewed under NEPA. Even as the federal government conducts elaborate reviews of comparatively environmentally trivial federal actions on a regular basis,[1] it simply ignores the massive environmental significance of federally implemented population growth and transfer. Such a considerable

[1] To mention a few examples, federal agencies have conducted environmental assessments of programs requiring owners of antennas to register them with the Federal Aviation Administration, *see* 83 Fed. Reg. 46911 (Sept. 17, 2018)*;* the effects of a network of moored buoys and coastal stations operated by the National Oceanic and Atmospheric Administration, *see* 83 Fed. Reg. 39429, (Aug. 9, 2018); and the effects of the issuance of credit assistance under the Water Infrastructure and Finance Act, 83 Fed. Reg. 18556 (April 27, 2018).

omission would have been confounding to the architects of NEPA—the statute specifically names population growth as a key reason for NEPA's passage. *See* 42 U.S.C. § 4331(a) ("The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth..."); *id.* at § 4331(b) (describing the purpose of NEPA as "achiev[ing] a balance between population and resource use").

Concern about population growth was *the* issue animating the environmental movement when NEPA became law in 1970, and, in the U.S. today national population growth continues to lead to a host of significant effects. Examples include traffic congestion, energy consumption, water resources, wildlife and its habitats, our ecological footprint, urban sprawl and the loss of rural lands, carbon dioxide emissions, soil and air quality, vegetation, noise, recreation, visual resources (aesthetics), cultural and historic resources, and waste management (including hazardous and toxic wastes).[2] Discussion of all of these particular impacts on particular citizens and locations are frequently found within the environmental impact studies produced by the government as part of their NEPA compliance. But even when environmentalists object to the building of a new road or reservoir because of its destruction of natural habitats, proponents of these projects will often win the debate by pointing

[2] *See* Leon Kolankiewicz, *Immigration, Population Growth, and the Environment*, CTR. FOR IMMIGR. STUD. (Apr. 17, 2015), https://cis.org/Report/Immigration-Population-Growth-and-Environment.

out that population growth makes these projects necessary despite their environmental downsides.[3]

The idea that NEPA mandates discussion of the inevitable consequences of population growth but not the causes of population growth turns the purpose of NEPA on its head. The effects of continued population growth will only become more significant in the future if the United States remains on its current population growth trajectory, and Americans continue to feel the effects of ever-greater overcrowding in their daily lives. Within national boundaries, the effects of urban sprawl and farmland loss; habitat and biodiversity loss, and the increase of water demands and water withdrawals from natural systems have changed the way Americans live over the past few decades. Globally, those effects include an increase in worldwide levels of greenhouse gas emissions. Immigrants and their children almost universally are responsible for significantly more greenhouse gas emissions than they would have been if they never emigrated from their home countries.

The lack of the application of NEPA to immigration has led to erratic and inconsistent national environmental policy— the avoidance of which was one of the original statute's goals. For instance, the current Presidential Administration has placed a heightened focus on greatly augmenting the population through the expansion of the pathways of

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[3] *See* PHILIP CAFARO, HOW MANY IS TOO MANY? THE PROGRESSIVE ARGUMENT FOR REDUCING IMMIGRATION INTO THE UNITED STATES 105-107 (2015).

immigration to the U.S.[4] At the same time, it has called for the sharp reduction of national and global greenhouse emissions as a matter of imminent emergency.[5] A massive expansion in immigration acts at cross purposes to reduce U.S. greenhouse gas emissions by 50% of 2005 levels by 2030. In essence, continuing to neglect the environmental effects of immigration is incompatible with achieving NEPA's goal of environmentally enlightened decisionmaking.

Taking into account the effects of immigration on population growth is so crucial, because, in recent decades, the vast majority of national population growth has been, and continues to be, due to immigration, which is regulated by the Department of Homeland Security ("DHS").[6] DHS's actions are therefore largely the direct cause of national population growth. If any kind of federal actions at all

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[4] *See, e.g*, "Our Nation is enriched socially and economically by the presence of immigrants… The Federal Government should develop welcoming strategies that promote integration, inclusion, and citizenship E.O. 14012, Feb. 2, 2021; *see also*, policy statements that the Administration will "use every tool available" to increase the number of refugees settled in the United States. Press Release, White House, Statement by President Joe Biden on Refugee Admissions (May 3, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/03/statement-by-president-joe-biden-on-refugee-admissions/.

[5] Press Release, White House, FACT SHEET: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (April 22, 2021).

[6] *See* Steven Camarota & Karen Zeigler, *Projecting the Impact of Immigration on the U.S. Population*, CTR. FOR IMMIGR. STUD. (Feb. 4, 2019), https://cis.org/Report/Projecting-Impact-Immigration-US-Population.

should be subject to environmental review under NEPA, they would be those that implement policies adding tens of millions of people to the American population. However, DHS has not conducted *any* of the environmental impact assessments required by NEPA, allowing it to turn a blind eye for decades to the substantial environmental impacts, including cumulative impacts, resulting from immigration programs and policies.

The Ninth Circuit's and Southern District Court's opinions were animated not by a consistent application of environmental and standing case law but by an attempt to preserve this same agency blind spot to the environmental consequences of immigration from the possibility of challenge. As such, the Ninth Circuit's decision wreaks havoc on administrative law and must be overturned by this Court.

II. Procedural History

Plaintiffs are environmental activists, scientists, and ranchers who live on the border. All have personally felt the environmental impacts of immigration on their lives and submitted affidavits detailing how the environmental impacts caused by immigration to specific areas they recreate, study, or live in, have personally affected them. Some of the plaintiffs swore to the effects of immigration driven population growth, resulting from both legal and illegal immigration. Others, those who live on ranches on the southwest border, averred to the devastating impacts on their homes and communities that that

illegal border crossing, driven by deliberately lax immigration enforcement policies.

The plaintiffs brought this NEPA challenge under the Administrative Procedure Act ("APA") against DHS for failing to conduct any NEPA review of their ongoing immigration policies, for adopting NEPA procedures that fail to consider immigration, for adopting "categorical exclusions"[7] impermissibly broad, for unlawfully applying those categorical exclusions to immigration programs, and for conducting an environmental assessment of its response to the 2014 border crisis that failed to consider the environmental effects of the border crisis. DHS brought a motion to dismiss against the first two claims on the basis that the APA did not allow review of its NEPA procedures or its immigration programs, and a summary judgment motion on the final three on the basis of standing. The district court granted both of DHS' motions and the Ninth Circuit affirmed the district court's rulings, and wrote a broader opinion on standing meant to eliminate any plaintiffs' ability to challenge any immigration programs altogether.

[7] The adoption of a categorical exclusion in an agency's NEPA procedures allows an agency to promulgate actions without conducing either an "environmental assessment" to determine whether the action will have effects, or an "environmental impact statement" to study what those effects are. The action is considered to be simply part of a category of actions that generally don't have significant environmental impacts.

III. The Ninth Circuit twisted basic principles of administrative law beyond recognition to avoid the possibility of public disclosure and participation in the immigration process.

A) Legal and Factual Background of DHS's NEPA Procedures

Prior to this lawsuit, DHS (and the Immigration and Naturalization Service "INS" before it[8]) took no official position on the environmental review of immigration, it simply failed to conduct any or mention the subject. The gravamen of DHS's practical defense since this lawsuit began has been that its failure to apply NEPA to immigration has simply been too diffuse and pervasive to correct. DHS has all but admitted on a number on a number of recent occasions during its rulemaking processes that it believes it does not *have* to apply NEPA to immigration because it does not *know how* to do so.

For instance, most recently, DHS claimed in a Notice of Proposed Rulemaking that even if the Deferred Action for Childhood Arrivals (DACA) program [9] "might have effects on the environment,...

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[8] Before the Homeland Security Act of 2002, the immigration functions that are now housed in DHS were located in a subagency of the Department of Justice, the INS. In 1981, the INS promulgated extremely brief NEPA regulations that gave consideration only to the analysis of the environmental footprint of detention centers. 46 Fed. Reg. 7,953 (Jan. 26, 1981)

[9] The DACA program was one of the challenged actions in this case.

DHS believes analysis of such effects would require predicting a myriad of independent decisions by a range of actors… at indeterminate times in the future. Such predictions are unduly speculative and not amenable to NEPA analysis." 86 Fed Reg 53736 (Sept. 28, 2021). In other words, obtaining a full understanding of the environmental impacts of a program that would ultimately grant 800,000 foreign nationals the right to stay and work in the U.S. (a population greater than Washington D.C.), might require consideration of a number of factors, therefore, DHS is free from an obligation to do so.

Contrary to DHS's assertion, rather than not being "amenable to NEPA analysis," such is the very stuff of NEPA analysis. NEPA would not be necessary at all if agency decision-makers were always enlightened about the environmental effects of their decisions. Every day, agencies hire environmental scientists for projects like proposed power plants or water supply facilities in order to call upon their expertise in wide scale *trends* in energy or water consumption and to make projections buttressed by informed assumptions, of what future needs will be based on those trends. Given that population size is a fundamental factor driving basically all the needs NEPA analysts are called to project, there is a wealth of knowledge and expertise for DHS to drawn upon to project, for example, the level of infrastructure, energy, and water consumption that constitutes the environmental impact of 800,000 extra people in the population. This analysis is exactly the kind of "relevant information" NEPA aims to make "available to a larger audience that may also play a role in both

the decisionmaking process and the implementation of that decision." *Robertson* 490 U.S. at 349.

This urge to simply ignore NEPA's review requirements because an agency does not know where to start is exactly why agencies have NEPA procedures. DHS—an agency created well after the development of a great deal of NEPA precedent and practice available as a guide, had the responsibility to under the law to consider the environmental effects of its newly created mandates, to take notice and correct any blind spots of its predecessor agencies, and to set up a framework to correct them in the future. That opportunity was when it promulgated final NEPA procedures after notice and comment from the public.

Agencies are mandated to promulgate NEPA procedures that are legally adequate to ensure agency compliance with the statute. When Congress passed NEPA, it not only imposed new transparency obligations on federal agencies, but it also created an office within the Executive Office of the President—the Council on Environmental Quality ("CEQ")—to instruct these agencies how to meet these obligations. In 1978, the CEQ first issued regulations to "provide the direction" to agencies so that the NEPA process could "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." NEPA, 40 CFR Part 1500.1, (1978 archived).[10] That is, the point of these

[10] These NEPA regulations have since been substantially updated but were in effect when DHS adopted agency procedures. Available at

procedures was to make compliance with NEPA possible for agencies which did not know how to do so.

The CEQ also mandated that each agency, including, in the future, any newly formed agencies, "shall as necessary adopt procedures to supplement these regulations," which will "confine themselves to implementing procedures." § 1507.3 (1978 archived). The CEQ also mandated that "such procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations." *Id*. Then, "[o]nce in effect they shall be filed with the Council and made readily available to the public." *Id*.

Accordingly, every federal agency adopted NEPA procedures—including DHS. DHS adopted its NEPA procedures through the publication of two documents, U.S. Department of Homeland Security Directive 023-01, Rev 01, (the "Directive") and U.S. Department of Homeland Security Instruction 023-01-001-01 (the "Manual").[11] The Manual contains the substance of the compliance procedures. The adoption of NEPA procedures was not the equivalent of an employee handbook or set of guidance documents that an agency has the option to adopt if it chooses and can

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https://www.energy.gov/sites/default/files/NEPA-40CFR1500_1508.pdf

[11] These documents can be found at the DHS website at https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex, with Manual specifically available at https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf

alter at will—despite DHS's choice to name its procedures a "manual." It is binding and necessary.

Plaintiffs challenged the adoption of this manual for failing to set up any kind of framework to comply with NEPA when promulgating immigration related actions.

B) The Manual is clearly reviewable under the APA

The APA provides for judicial review of the final actions of federal agencies. 5 U.S.C. § 704. Actions are final when they: 1) mark the consummation of the agency's decision making process, and 2) create legal consequences. *Bennett v. Spear*, 520 U.S. 154 (1997). The Manual, which established the policy and procedures DHS uses to comply with NEPA, is a straightforward example of a "rule" under 5 U.S.C. § 551(4): "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." DHS followed the required rulemaking process under 5 U.S.C. § 553. As set out in § 553(b), DHS provided notice in the Federal Register that it was submitting its draft NEPA procedures for the purpose of giving interested members of the public an opportunity to participate in the rule making, as prescribed in § 553(c). 79 Fed. Reg. 32,563, 32,563 (June 5, 2014).

After a notice and comment period, DHS adopted its final NEPA procedures, "contained in" the Directive and Manual, and duly published its "Notice

of *Final* National Environmental Policy Act Implementing Procedures" 79 Fed. Reg. 70,538 (Nov. 26, 2014) (emphasis added). This notice also informed the public that these NEPA procedures would become effective after four months, on March 26, 2015. Finally, it responded to the comments it received on the draft NEPA procedures.

This history could not be any clearer than the Directive and Manual were the consummation of the agency's rulemaking process. These adopted NEPA procedures—like all NEPA procedures adopted by agencies according to the command of the CEQ, were mandatory for agency NEPA compliance, not merely hortatory. The DHS Manual explicitly sets out the procedures and requirements its constituent components "must" follow in implementing NEPA. 79 Fed. Reg. 70538, 70538 (Nov. 26, 2014) (emphasis added).

The procedures also created legal consequences. DHS still regularly uses the final NEPA procedures it adopted. For instance, DHS published a proposed rule to alter the screening procedures of the asylum program in August. 86 Fed. Reg. 46906 (Aug. 20, 2021). It stated that the Manual "establish[ed]" the policies and procedures DHS uses to comply with NEPA, and that this Manual established categorical exclusions, including categorical exclusion A3(d) and categorical exclusion A3(a).[12] Furthermore, it claimed these categorical

[12] These are the same two categorical exclusions that Plaintiffs brought claims against in this lawsuit, and are regularly used by DHS in order to claim changes to its immigration programs are categorically excluded.

exclusions gave it the right to forego analyzing its changes to the asylum program. DHS, therefore, considers the Manual to have a legal effect that establishes its right not to conduct environmental analysis of many changes to its immigration programs. DHS' classification of the Manual as "tentative" and failing to create legal consequences was so specious, it did not even maintain that posture consistently throughout this very litigation. After convincing the district court that the Manual was neither final nor binding in its motion to dismiss, DHS sought to prevail in its summary judgment motion on the basis that the agency's NEPA procedures were final and created legal consequences. App at 85a-87a[13]

C) The lower courts ruled the Manual also needed to include a specific determination of an individual project to be "final."

Ignoring the promulgation history and application of the Manual entirely, the District Court and the Ninth Circuit decided DHS' adoption of NEPA procedures failed to meet the finality test of *Bennett v. Spear*. The lower courts to a large extent conflated the two prongs of the *Bennett* test—arguing in essence that the establishment of NEPA procedures couldn't

[13] Defendants' brief defended the Categorical Exclusion A(3) from challenge by explaining that it was part of DHS's CEQ approved NEPA procedures—"published in final f[or]m in November 2014. App at 86a: The procedures were developed in "year-long process by a panel of experts" and approved by CEQ. App at 87a. Through much of its second brief DHS referred to the various legal consequences and requirements of the Manual.

be considered final *or* of legal consequence because the procedures failed to make decisions regarding individual projects or programs in advance.

For the first *Bennett* prong, the lower courts concluded that the Manual "does not make any decisions," such as about what level of review specific projects would undergo, and therefore it cannot mark the consummation of the agency's decision-making process. Appendix at 17a-18a. However, the Manual certainly made the kind of decisions appropriate for a rule of general applicability. The Manual made *hundreds* of decisions about the types of actions that would require the preparation of Environmental Assessments, such as construction projects in environmentally sensitive areas, projects that impact wetlands and federal waters, regulations for activities that impact environmentally sensitive areas, security measures that involve reduced public access, and new law enforcement activities with undetermined environmental impacts. It also specified when Supplemental Environmental Assessments shall be prepared, and when an Environmental Impact Statement or Programmatic Environmental Impact Statement is to be prepared. Manual at V-9. The Manual also adopted 152 (generally multi-part) categorical exclusions. *Id*. at A-1-A30.

The lower courts found the Manual failed the second prong of *Bennett* on the same basis: it did not identify legal consequences that would apply to particular individuals or programs. But, Manual did indeed have the appropriate kind of legal consequences for a rule. For instance, the itemization of those DHS activities that require preparation of an

Environmental Assessment or Programmatic Assessment, clearly created legal consequences, referred to above, are not only decisions, but have legal consequences. *Id*. at V-9. Legal consequences also clearly flow from the 152 categorical exclusions (many of which were multi-part) that the Manual established, giving DHS the power to forego environmental analysis in a host of situations. *Id*. at A1-A-30.

In order to conceal the insufficiencies of their reasoning, the lower courts simply pointed out cases where entirely different kinds of agency actions consummated their decision making processes in different ways. For example, the Ninth Circuit pointed out that in *Oregon Natural Desert Ass'n v. United States Forest Service*, the action at issue determined whether a permittee got to graze cattle on a certain piece of land or not, whereas DHS's NEPA procedures themselves did not decide on the destiny of individual projects. 465 F.3d 977 (9th Cir. 2006). The courts simply ignored Plaintiffs' argument that going through the Notice and Comment rulemaking process in the APA, and being published in "final" form with a future effective date,[14] is dispositive in proving an action is not "tentative or interlocutory." The Ninth Circuit attempted to ground its ruling in precedent from *Safer Chemicals, Healthy Families v. EPA*, 943 F.3d 397, 405 (9th Cir. 2019). That case ruled that the "preamble" to some rules are not final agency actions. Appendix at 18a. The Manual, however, was not a preamble to a rule—but the rule

[14] Even the Defendant admitted in its Summary Judgment brief that its "NEPA regulations were approved by CEQ… and published in final from [sic] in November 2014." App at 86a.

itself. The Ninth's Circuit's suggestion that a rule itself *is* preliminary until it has been applied to a specific project is, very simply, confusing two different kinds of actions: one that applies a rule versus one that creates a rule. Actions that *create* rules *are* final under the APA.

No court precedent has ever declared that the adoption of final NEPA procedures are not agency action under the APA. Until this case, no court had ever suggested that merely because agency NEPA procedures describe "how" an agency "will implement NEPA" rather than "prescribe any action in any particular manner" or "provide a procedural framework" they are not final agency actions. Appendix at 19a, 79a. The CEQ regulations themselves, which apply to all agencies, do not "prescribe any action in any particular manner" either, but courts do not refuse to view CEQ's regulations under the APA. *See e.g. Wild Watershed v. Hurklocker*, 961 F.3d 1119, 1122 (10th Cir. 2020) (describing how "NEPA's implementing regulations establish a tiered framework for agencies to consider in deciding whether an EIS is necessary.") Each agency's NEPA procedures constitute a supplement that binds only itself to CEQ's regulations in establishing NEPA compliance.

The document itself states: "The *requirements* of this Instruction Manual apply to the execution of all NEPA activities across DHS." Manual at III-1. The language is therefore mandatory and binding—it is *not* simply guidance that agency person. The Ninth Circuit has taken the position that the adoption of a categorical exclusion itself is a final agency action

under the APA. *See Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007). If the Instruction Manual were "tentative" and has no legal consequences, all 152 of these categorical exclusions must be void.

D) The Ninth Circuit's freewheeling use of the *Bennett* test in order to allow DHS to maintain its blindspot to the environmental effects on immigration creates extremely harmful precedent.

The Ninth's Circuit's holding that a rule has to include an application to a specific situation to be "final" under *Bennett* is akin to insisting that a criminal statute passed by the legislature and signed by the executive is not part of the law if fails to include a direction to prosecute at least one specific individual.

There is a "strong presumption" that Congress intends judicial review of agency action under the APA rather than precludes it. *Helgeson v. Bureau of Indian Affairs*, 153 F.3d 1000, 1003 (9th Cir. 1998). The agency "bears a heavy burden in attempting to show that Congress prohibited all judicial review of the agency's compliance with a legislative mandate." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (citations omitted and cleaned up). The lower courts here have dispensed with this burden altogether. If this precedent is allowed to stand and is actually applied in any other context, agencies could avoid challenges to all of their rules.

IV. The Ninth Circuit created an erroneous standing standard to allow immigration related actions to escape scrutiny

A) The Standard for Procedural Injuries in Environmental Cases

To establish Article III standing, Plaintiffs must show: (1) injury in fact, 2) causation, and 3) redressability. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc*, 528 U.S. 167, 183 (2000). *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992). In a NEPA case, in which plaintiffs assert procedural rights, the causation and redressability standards are relaxed. *Lujan* 504 at 573, n.7. Members of the public who are not the direct targets of a government action must specifically allege how the action caused them harm. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). "Environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc*, 528 U.S. 167, 183 (2000). Their concerns about their "recreational, aesthetic, and economic interests" need to be "reasonable." *Id*. at 183-184.

While this injury in fact cannot be the result of "*independent*" action of a third party not before the court, they can be the result of third party action "produced by determinative or coercive effect." *Bennett v. Spear* at 169 (emphasis in original). The "predictable effect of Government action on the

decisions of third parties" is enough to establish injury in fact in a procedural case. *DOC v. New York*, 139 S. Ct. 2551, 2566 (2019). Article III "requires no more than *de facto* causality." *Id* (citations omitted).

B) The Impossible standing standard the Ninth Circuit created for plaintiffs challenging procedural injury in immigration cases

The Ninth Circuit held in its ruling that the decisions of foreign nationals to enter, or to remain in U.S. once here are "independent," or at the most connected by an attenuated "chain of reasoning… worthy of Rube Goldberg" to immigration related actions of the federal government and therefore Plaintiffs cannot meet the standing established in *Friends of the Earth v. Laidlaw*. App at 33a. In the Ninth Circuit's view, even Plaintiffs who live on the border, subject to illegal aliens continually crossing and trashing their own property, ebbing and flowing predictably over the years in response to government policy, are not allowed to draw the obvious connection. In so holding, the Ninth Circuit erred—particular in so ruling on a disputed factual matter with no record evidence on a summary judgment motion. Plaintiffs introduced evidence to the contrary in the form of expert affidavits, border intelligence reports based on interviews with migrants, and the affidavits documenting the personal experience of those who live on the border. Contrary to the Ninth's Circuit fiat, that foreign nationals, in the aggregate, predictably respond to incentives created by DHS to cross the border.

The Ninth Circuit's conclusion that DHS' decisions have very little effect on the numbers defies common sense. The current world population is 7.8 billion, and 7.5 billion of them do not currently live in the U.S., and thus are potential candidates to immigrate, both legally and illegally. When DHS creates and expands legal pathways to enter, work, go to school, and remain in the U.S., it is eminently foreseeable that there will be large numbers foreign nationals that will take advantage of them. Furthermore, it is eminently foreseeable that when DHS takes action to make it more feasible and economically rewarding to take advantage of illegal pathways to enter and remain in the U.S., that large numbers of foreign nationals will take advantage of those too.

Throughout its analysis, the Ninth Circuit, much as DHS does itself, attempted to obscure the predictability of the effects of DHS' immigration related actions by viewing them and their various effects in strict isolation. But isolating effects and ignoring the way actions can work in concert has never been appropriate for NEPA analysis: actions that have "cumulative or synergistic environmental impact" must be considered together. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976). The U.S. is currently undergoing a massive border and immigration crisis. If allowed to stand, the Ninth Circuit's decision to create a separate and legally unsupportable standing standard that will allow DHS's procedural violations in the area of immigration to escape all scrutiny from the citizens, states, and any members of the public that bear the *costs* of its ultra vires actions will have great public consequences.

V. Conclusion

For the Foregoing reasons, Petitioners respectfully request that their writ of certiorari should be granted.

Respectfully submitted,

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