UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MASSACHUSETTS COALITION FOR IMMIGRATION REFORM, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY; U.S. DEPARTMENT OF STATE, and U.S. DEPARTMENT OF JUSTICE, Defendants.	Case Nos. 1:20-cv-03438-TNM 1:21-cv-01198-TJK (consolidated cases) **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT**

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INTRODUCTION

Plaintiffs profoundly disagree with decades of U.S. immigration policy and try to use the National Environmental Policy Act ("NEPA") to place that disagreement before the Court. They allege that there are nine reviewable so-called "Biden Population Actions" that will cause a significant number of foreign nationals to enter the United States or relocate to Plaintiffs' communities, leading to environmental harms. They lack standing to challenge these actions, which are not reviewable in any event. The Court thus should dismiss, leaving Plaintiffs to raise their policy disagreement with the executive or legislative branches.

Plaintiffs cannot survive a motion to dismiss by advancing their theories as fact without pleading "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although "detailed factual allegations" are not necessary to withstand a motion to dismiss, the complaint must include enough "factual enhancement [to cross] the line between possibility and plausibility." *Id.* at 555-57 (citations omitted). A claim has facial plausibility when the pleaded facts allow the court to draw the reasonable inference that the defendant is liable for the misconduct. *Id.* at 556. In deciding these questions, the reviewing court can draw upon its "judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

The Complaint does not plausibly show that Plaintiffs could be harmed by the nine actions they challenge. Plaintiffs' allegations that those actions have or will harm them are conclusory, speculative, or inconsistent with common sense, and thus cannot be credited even at the pleading stage. Indeed, as the Complaint and Plaintiffs' opposition brief make clear, Plaintiffs' grievances are largely rooted in decades of U.S. immigration policy not before the

Court, and are not plausibly traceable to the challenged actions. Plaintiffs thus lack standing to challenge the nine actions both individually and as an alleged "program."

Moreover, Plaintiffs also fail to state a cause of action under the Administrative Procedure Act ("APA"). The various actions they challenge are unreviewable for a variety of reasons, including that they do not constitute final agency action, that the agency validly waived NEPA compliance, that they implicate unreviewable enforcement discretion, and more.

The Court should dismiss.

ARGUMENT

I. Plaintiffs Lack Standing to Challenge the So-Called "Biden Population Actions."

While a plaintiff who brings a NEPA claim is not required to "establish with any certainty" that the agency would have reached a different decision after following allegedly omitted procedures, *St. John's United Church of Christ v. Federal Aviation Administration*, 520 F.3d 460, 463 (D.C. Cir. 2008), the plaintiff must still satisfy the normal—and more stringent—requirements to demonstrate redressability where it relies on injuries from a third party's actions. *See Chesapeake Climate Action Network v. Exp.-Imp. Bank of the United States*, 78 F. Supp. 3d 208, 216 (D.D.C. 2015) ("[W]here the harm to the plaintiff comes instead from . . . an independent third party not before the court, standing is ordinarily 'substantially more difficult to establish.'"); *St. John's United Church of Christ*, 520 F.3d at 463 (where plaintiffs allege agency funding to a third party violated their procedural rights, redressability standards are relaxed only as to the agency and not the third party); *Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 5 (D.C. Cir. 2005) ("The relaxation of procedural standing requirements would excuse [plaintiffs] from having to prove the causal relationship regarding the [agency] action, but [plaintiffs'] burden regarding the action of the [third party] would not change."). Plaintiffs are thus wrong to contend that the causation and redressability standards are so relaxed in NEPA

cases that they need only allege that the challenged actions will harm them to survive a motion to dismiss.[1]

A plaintiff whose alleged injury hinges on actions taken by third parties—in this case, foreign nationals crossing the southern border or settling in Plaintiffs' communities—must "adduce facts showing that those [third party] choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (citing *Warth v. Seldin*, 422 U.S. 490, 505 (1975)); *see also Clapper v. Amnesty Int'l*, 568 U.S. 398, 413-14 (2013) (emphasizing the Court's traditional "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors").

Further, a future injury—like many of the "predictable effects" of the challenged actions Plaintiffs complain of—can only support standing where it is (a) certainly impending, or (b) "there is a substantial risk that the harm will occur." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019). The "substantial risk" standard recognizes that standing exists where "a challenged regulation causes individuals to reasonably fear [future] health or environmental harms and thus prevents them from using or enjoying the aesthetic or recreational value of their area." *Cal. Cmtys. Against Toxics v. EPA*, 928 F.3d 1041, 1049 (D.C. Cir. 2019).

Plaintiffs ground their standing in two categories of alleged injuries—from irregular border crossings and from foreign-born individuals permanently settling in their communities. Neither meets the requirements of Article III.

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[1] In addition, Plaintiffs are wrong that the Court cannot dismiss their NEPA claims under Rule 12(b)(1). *See* ECF No. 22 at 5, Pls.' Opp'n to Defs.' Mot. to Dismiss First Am. Compl. ("Pls.' Opp'n"). Federal Rule of Civil Procedure 12(b)(1) provides for the dismissal of an action for lack of subject-matter jurisdiction—a requirement under Article III of the Constitution. U.S. CONST. art. III, § 2, cl. 1. *See Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003); *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987).

A. Plaintiffs' allegations of injury from southern border crossings are insufficient to establish Article III or prudential standing.

Plaintiffs are wrong that their allegations of injury from persons irregularly crossing the southern border into the United States are sufficient to establish Article III standing.[2] These claimed injuries all rest on the actions of independent third parties, such as cartels,[3] which Plaintiffs allege are transporting drugs and guns over the border, or individuals trespassing on Plaintiffs' private land and leaving behind discarded items. *See* Pls.' Opp'n 8-9. Plaintiffs' naked assertion that the government is somehow "assisting" irregular border crossing (Pls.' Opp'n 16) fails to satisfy the *Iqbal/Twombly* plausibility standard. Indeed, the Ninth Circuit has rejected a similar standing allegation that the government "enticed" third parties to irregularly cross the border, because there are myriad reasons a person would make the dangerous journey north that are detached from U.S. immigration policy. *Whitewater Draw Nat. Res. Conserv. Dist. v. Mayorkas*, 5 F.4th 997, 1014-15 (9th Cir. 2021) (citing *Arpaio*, 797 F.3d 11).

In addition to relying on an unsupported "enticement" theory, many of Plaintiffs' injuries are too speculative or implausible to support standing and the Court should reject them. For example, the allegation that persons crossing the border near a ranch owned by one Plaintiff "may open gates and let out cattle" (Pls.' Opp'n 9) is too speculative to satisfy Article III. *Physicians' Ed. Network v. Dep't of Health, Ed. & Welfare*, 653 F.2d 621, 627 (D.C. Cir. 1981) ("[U]nadorned speculation will not suffice to invoke the judicial power."). Other allegations are

[2] Plaintiffs link these alleged harms to the challenged actions in Counts II through VII of the Complaint. Pls.' Opp'n 15.

[3] Speculation that the government is encouraging unlawful conduct does not establish standing. In *Arpaio v. Obama*, the D.C. Circuit ruled that a plaintiff lacked standing to challenge federal immigration programs based on allegations that the programs would lead to more crime. 797 F.3d 11, 22 (D.C. Cir. 2015) ("But the reality is that crime is notoriously difficult to predict" and "affected by numerous factors . . . . Even "assum[ing]" a policy change "increase[s] unlawful immigration," a court "cannot further infer that [it] increase[s] crime.").

too implausible to be assumed true for purposes of a motion to dismiss, such as allegations that Plaintiffs may be subjected to "mystery illness[es]" carried by border crossers (Pls.' Opp'n 9) or that border patrol agents "assist cartels" (Pls.' Opp'n 16).

Finally, moving beyond Article III standing to prudential standing, a plaintiff who brings a claim under NEPA only has standing to sue if the interests it seeks to vindicate are within the "zone of interests" protected by NEPA. Many of Plaintiffs' alleged injuries fall well outside of NEPA's zone of interests, including claims of mental stress (Pls.' Opp'n 9), worry (*id.* 11), job satisfaction (*id.* 9), safety concerns (*id.* 9), concerns about diseases (*id.* 9), and fears about cartels, drugs, and guns (*id.* 8, 13). NEPA addresses *environmental* effects of federal actions; therefore, the injury a NEPA plaintiff asserts must "have a sufficiently close connection to the physical environment." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 778 (1983) (holding that "anxiety, tension, fear" from government action does not trigger NEPA); *Town of Stratford, Conn. v. FAA*, 285 F.3d 84, 88 (D.C. Cir. 2002) (NEPA "cannot be used as a handy stick by a party with no interest in protecting against an environmental injury to attack a defendant"); *Nuclear Info. & Res. Serv. v. Nuclear Regul. Comm'n*, 457 F.3d 941, 950 (9th Cir. 2006) ("zone of interests protected by NEPA is environmental"). Tellingly, Plaintiffs have not identified a single case where a court found standing to bring a NEPA claim based on fear, anxiety, or stress untethered to environmental harm. NEPA embraces no such interest—as the Supreme Court has held, "although NEPA states its goals in sweeping terms of human health and welfare, these goals are ends that Congress has chosen to pursue by means of protecting the physical environment," and "[i]f a harm does not have a sufficiently close connection to the physical environment, NEPA does not apply." *Metro. Edison Co.*, 460 U.S. at 767, 773, 775-79 (footnote omitted). This case is therefore distinguishable from *California Communities Against*

Toxics v. Environmental Protection Agency and *Natural Resource Defense Council v. Environmental Protection Agency*, 755 F.3d 1010 (D.C. Cir. 2014), cases cited by Plaintiffs, Pls.' Opp'n 8-9, both of which concerned the potential for *environmental* harm from hazardous materials regulated by the challenged rules.

In sum, Plaintiffs' allegations that they have been harmed from southern border crossings caused by the challenged actions fail to establish standing.

B. Plaintiffs' allegations of injury due to individuals settling in their communities are insufficient to establish Article III standing.

Plaintiffs' allegations that they have been harmed by immigrants settling in their communities and causing environmental harm are also insufficient to support standing.[4] First, many of these alleged injuries, to the extent they exist at all, arise from actions that took place far in the past and are unrelated to the challenged actions. For example, Plaintiff Lynn's alleged injuries relate (if at all) to prior government actions from years ago, *e.g.*, traffic congestion when he used to live in Los Angeles long ago or refugees that resettled in Lancaster, Pennsylvania between 2013 and 2017.[5] Pls.' Opp'n 11. Likewise, Plaintiff Huhn complains about a light rail project that resulted in a meadow being bulldozed and a housing development next to a natural area. Pls.' Opp'n 12. These projects were undertaken before the challenged actions took place. ECF No. 17 at ¶¶ 177-78, Pls.' Am. Compl. for Declaratory & Injunctive Relief. The same is true of the "dramatic decline in many species" that Plaintiff Anderson has observed over the years, Pls.' Opp'n 13, or the urban sprawl of which MCIR member Henry Barbaro complains. *Id.*

[4] Plaintiffs link these alleged harms to the actions challenged in Counts VIII through X of the Complaint. Pls.' Opp'n 17.

[5] But the number of refugees resettled following FT 2017 has decreased substantially. For example, in FY 2021, just 395 refugees resettled in the entire State of Pennsylvania. *See* https://www.wrapsnet.org/archives/ (last visited Jan. 12, 2022).

Other of Plaintiffs' allegations attributing their settlement-based injuries to the nine government actions challenged in this case are too bare and conclusory to survive a motion to dismiss. A conclusory allegation that a plaintiff "left California due to the continually increasing overcrowding, caused primarily by immigration" (Pls.' Opp'n 11), or that the Twin Cities "has undergone environmental effects because of immigration-induced population growth" (*id.* 12) is insufficient to allow the Court to draw the inference that the challenged policies caused the alleged injury.[6] *Iqbal*, 556 U.S. at 681 (conclusory allegations "not entitled to be assumed true").

Like Plaintiffs' alleged injuries from southern border crossings, Plaintiffs' "settlement" injuries are also too speculative and attenuated vis-à-vis the nine challenged actions to support standing. These include allegations that the challenged actions will lead to more refugee resettlement in Lancaster, Pennsylvania, and specifically, that local NGOs will be awarded contracts resulting in an influx of refugees. Pls.' Opp'n 18. While most refugees are resettled in the country by one of nine resettlement agencies (nonprofit groups with which the federal government has cooperative agreements), refugees can travel freely within the United States once they are initially resettled. *See, e.g., Traux v. Raich*, 239 U.S. 33 (1915); U.S. CONST. art. IV, cl. 2. Similarly, Afghan parolees—once processed at military bases—are not required to remain at a location where they are offered resettlement; they are free to resettle anywhere they

[6] *See also* Pls.' Opp'n 13 ("Steve Kropper has greatly reduced access to open space in his neighborhood . . . because of population growth, primarily due to immigration."); *id.* (with respect to Big Bend National Park, "[t]he border crisis caused by the Biden Population Actions has particularly threated [sic] this area."); *id.* at 14 (the challenged actions "ha[ve] already clearly caused a very significant increase in the number of foreign nationals that have entered and settled for long term residence into the U.S. during 2021, numbering at the very least hundreds of thousands of people.").

like. Settlement decisions are thus independent acts of individual parolees, and are not controlled by any of the challenged actions.

Other of Plaintiffs' alleged injuries are caused by third parties with no clear link to the federal government. For example, Plaintiffs have not and cannot allege that the light rail and the housing development Plaintiff Huhn complains of, Pls.' Opp'n 12, were the result of federal, rather than local or private decisionmaking. The same is true of Plaintiffs' allegations about urban sprawl. It is not plausible to infer that the "challenged actions caused urban sprawl in Boston absent specific allegations to support this claim. The same is true for secondary migration—*i.e.*, relocation to Plaintiffs' communities after initially settling somewhere else. To move from one community to another is an individual decision that is not reasonably tied to any of the challenged actions.

This case is distinguishable from *Department of Commerce v. New York* (*DOC*) on which Plaintiffs rely, where the chilling effect of a citizenship question on the census form was directly linked to a federal action by the Census Bureau, and was not further down a long chain of pure speculation with an extenuated, if any, causal connection to the federal action. 139 S. Ct. 2551, 2586-96 (2019). There, the Court needed to infer that a citizenship question would depress responses, an assumption supported by the government's information in that case. Here, Plaintiffs ask the Court to assume not only that the policies they challenge will cause more people to enter the United States, but that those individuals will remain in the country and reside in Plaintiffs' communities in such numbers as to cause environmental harm. These alleged injuries are far more speculative than the chilling effect in *DOC*. For example, Plaintiffs allege that removals have dropped by 90% since 2019 as a result of the policies they challenge. Pls.' Opp'n 15. But there are a number of reasons removals have declined in 2020 and 2021 (*e.g.*,

effects of the COVID-19 pandemic on court proceedings, increased removals under Title 42).[7] And Plaintiffs plead no facts that any decrease in removals nationally has caused increased population where they live.

C. Past actions not challenged in this lawsuit cannot establish standing to challenge current administration actions.

Finally, Plaintiffs are wrong that they have standing based on injuries caused by prior government actions and policies not challenged in this case because the agencies allegedly should have considered the "cumulative impacts" of decades of U.S. immigration policy. Pls.' Opp'n. 19-20. Past injuries not traceable to the challenged actions do not constitute an injury sufficient to establish standing. *See Summers v. Earth Island*, 555 U.S. 488, 495 (2009). And while NEPA imposes an obligation to consider cumulative impacts of past actions when performing an environmental analysis for a proposed major federal action, *TOMAC, Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006), that analytical obligation does not change the Constitution by expanding the standing doctrine to cover injuries caused by past actions not before the Court. Plaintiffs' reliance on *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) and *Grand Canyon Trust v. Federal Aviation Administration*, 290 F.3d 339 (D.C. Cir. 2002) is misplaced. Those cases concerned whether the agency in performing a NEPA analysis had identified an appropriate effects area for analyzing cumulative effects. Neither supports the novel claim that an injury caused by a past action is sufficient to establish standing when the past action might be included in the cumulative effects analysis of the action being challenged.

[7] *See* GAO, COVID-19: Improvements Needed in Guidance and Stakeholder Engagement for Immigration Courts, available at https://www.gao.gov/products/gao-21-104404 (last visited Jan. 12, 2022) ("EOIR data indicate its courts delayed nearly 600,000 hearings from March through October 2020 due to court closures.").

In sum, Plaintiffs' allegations of harm from past government actions, like their allegations concerning harm from border crossings and refugee resettlement, are insufficient to establish standing.

II. Plaintiffs' NEPA Challenge to DHS' Instruction Manual (Count I) Must Be Dismissed Because the Instruction Manual is Not a Final Agency Action.

Plaintiffs' challenge to the Department of Homeland Security ("DHS") Instruction Manual must be dismissed because—as the Ninth Circuit correctly held in *Whitewater Draw*—it is not a reviewable final agency action under the APA. As Defendants previously explained, the Manual fails both prongs of the Supreme Court's test in *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), for determining whether an agency action is final. *See* ECF No. 19 at 17-21, Defs.' Mot. to Dismiss First Am. Compl. ("Defs.' Br.").

The Instruction Manual is not the culmination of an agency decision-making process. *Bennett*, 520 U.S. at 177-78. It simply describes how DHS will implement NEPA, but makes no decision and does not dictate any particular result regarding the NEPA review for any proposed DHS action. *See Whitewater Draw*, 5 F.4th at 1009-10. While, as Plaintiffs emphasize, the Manual provides examples of activities for which DHS would normally prepare an Environmental Assessment ("EA") (Section V.C.3), and lists circumstances in which a component "may prepare" a Supplemental EA (Section V.C.5), it does not make final decisions as to when an EA, Supplemental EA, or EIS will be prepared. *See Whitewater Draw*, 5 F.4th at 1008. While the Manual provides guidance "for preparing to make NEPA-related decisions, [it is] not the 'consummation of the agency's decisionmaking process.'" *Id.* at 1009 (quoting *Bennett*, 520 U.S. at 178)). Nor does the Manual bind DHS with the force of law, *Bennett*, 520 U.S. at 177-78, because it determines no rights or obligations, and it has no legal consequences. *Whitewater Draw*, 5 F.4th at 1009-10.

Plaintiffs are wrong that the Instruction Manual's publication in the Federal Register makes the Manual a final agency action (Pls.' Opp'n 25). Case law shows otherwise. *See, e.g.*, *Nat'l Ass'n of Home Builders v. Norton*, 298 F. Supp. 2d 68, 79 (D.D.C. 2003), *aff'd*, 415 F.3d 8 (D.C. Cir. 2005) (holding agency statement published in Federal Register was not a final agency action); *Chem. Mfrs. Ass'n v. EPA*, 26 F. Supp. 2d 180, 187 (D.D.C. 1998) (holding agency guidance document failed both prongs of *Bennett* despite publication in the Federal Register).

Plaintiffs are also wrong that the inclusion of Categorical Exclusions ("CEs") in Appendix A to the Manual means that it is a final agency action. The CEs were adopted after notice and the opportunity for public comment and each has its own administrative record. *E.g.*, 71 Fed. Reg. 16,790, 16,811 (Apr. 4, 2006) (publishing CE A3). Plaintiffs have not challenged individual CEs in this case.[8]

Finally, Plaintiffs attempt to save their challenge to the Instruction Manual by arguing that the Manual is a rule under 5 U.S.C. § 551(4). Pls.' Opp'n 24. But the Manual is not a final agency action and therefore the APA does not provide for judicial review. While the APA defines "agency action" to include "agency rule," the definition of "final agency action" is set forth in *Bennett* and the Manual does not meet both prongs of *Bennett*. See *Whitewater Draw Nat. Res. Conserv. Dist. v. Nielsen*, No. 3:16-cv-02583, 2018 WL 4700494, at *4 (S.D. Cal. Sept. 30, 2018) (rejecting the same argument Plaintiffs make here), *aff'd sub nom.* 5 F.4th 997. In any event, the Manual is not a rule for the same reasons it fails the *Bennett* test—it sets forth procedures for the agency to follow and lacks the force and effect of law. *See* Defs.' Br. 18-21.

[8] Furthermore, judicial review of CE A3 would be barred by the six-year statute of limitations. *See, e.g., Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 n.5 (9th Cir. 1996), *as amended* (June 17, 1996) (challenge to CE barred by statute of limitations).

III. Plaintiffs' Challenge to DHS's Decision to Terminate Border Wall Construction (Count II) Must Be Dismissed Because the Agency Waived NEPA for the Decision.

Plaintiffs are wrong that DHS's NEPA waivers do not cover the decision to cease border wall construction. The Secretary of Homeland Security's waivers of NEPA for the border wall projects broadly exempt the projects from NEPA review "with respect to" construction. *See, e.g.*, Determination Pursuant to Section 102 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996, as Amended, 85 Fed. Reg. 14,961, 14,962-63 (Mar. 16, 2020) ("I hereby waive in [its] entirety, with respect to the construction of physical barriers and roads . . . The National Environmental Policy Act."). Decisions to modify or cease construction are clearly decisions "with respect to" construction. *See* Defs.' Br. 23. The waivers thus serve as a complete defense to Plaintiffs' NEPA claim. *See Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 35-36 (D.D.C. 2020) (dismissing Plaintiffs' NEPA claims because "[t]he Secretary waived NEPA for the challenged border wall construction" (citing *In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1213, 1221 (9th Cir. 2019) ("a valid waiver of the relevant environmental laws under section 102(c) is an affirmative defense to all the environmental claims.")).

Congress granted the Secretary of Homeland Security broad authority to waive environmental reviews for border wall projects in Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1103 note, which gives "the Secretary of Homeland Security . . . the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." *Id.* § 102(c)(1). Although the Secretary considers what is "necessary to ensure expeditious construction" in determining what "legal requirements" to waive, that determination remains "in the Secretary's sole discretion." *Id.* Congress' plain intent was to allow the Secretary to broadly waive environmental reviews for the projects.

Congress did not need to include a separate power to waive environmental reviews for decisions to stop construction because all stages of construction—including termination—are covered by the initial waiver and "effective upon being published in the Federal Register." *Id.* Inherent in the government's decision to undertake any construction project is the possibility that construction might be modified or not completed as originally contemplated. Plaintiffs are thus wrong in claiming that applying the waivers to a decision to terminate construction would exceed statutory authority.

Plaintiffs are also wrong that NEPA review is required because termination of construction would alter the environmental status quo, leading to environmental effects caused by "mass" border crossings. Even if Plaintiffs had standing to raise their "enticement" theory (*see supra* p. 4), NEPA does not apply to the agencies' decisions to not build more border wall since that is a decision to leave the environment alone. Defs.' Br. 24-25.

IV. Plaintiffs' Challenges to the Termination of the Migrant Protection Protocols and Asylum Cooperative Agreements (Count III) are Not Reviewable under the APA and Therefore Must Be Dismissed.

First, Plaintiffs are wrong that DHS's decision to terminate the Migrant Protection Protocols ("MPP") is reviewable under the APA.[9] DHS's decision to terminate MPP is statutorily committed to agency discretion by law and therefore not reviewable under the APA.

[9] The United States District Court for the Northern District of Texas issued a nationwide, permanent injunction ordering DHS to "enforce and implement MPP in good faith." *Texas v. Biden*, ___ F. Supp. 3d ___, 2021 WL 3603341, at *26-27 (N.D. Tex. Aug. 13, 2021), *aff'd* 20 F.4th 928 (5th Cir. 2021), *as revised* (Dec. 21, 2021). DHS recently published a guidance document explaining how the agency is implementing the Court's order. DHS Under Secretary Robert Silvers, Guidance regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols, December 2, 2021, *available at* https://www.dhs.gov/sites/default/files/publications/21_1202_plcy_mpp-policy-guidance_508.pdf (last visited Jan. 6, 2022). MPP thus currently exists as a court-ordered program, not as Defendants' policy or program.

See Defs.' Br. 26 (citing 8 U.S.C. § 1225(b)(2)(C)). Congress's use of the term "may" in Section 1225(b)(2)(C) confers discretion on DHS to choose whether to return noncitizens to contiguous countries, and the statute offers no criteria or standard for when the government must or should employ that discretion.

Plaintiffs rely upon the Fifth Circuit's decision, *Texas v. Biden*, 10 F.4th 538 (5th Cir. 2021), for the proposition that the MPP is reviewable. Pls.' Opp'n 31. That decision, however, is not binding on this Court and given the deep flaws in the Fifth Circuit's analysis the government has sought certiorari review. In particular, the Fifth Circuit erred in finding that Section 1225 *compels* DHS to maintain MPP, when the statute's plain text provides that when DHS encounters an applicant for admission who is not clearly entitled to be admitted, and who is arriving on land from Mexico or Canada, the Secretary "*may* return" the applicant to Mexico or Canada pending his or her removal proceedings. 8 U.S.C. § 1225 (b)(2)(C) (emphasis added).

In asserting the termination of the MPP is a final agency action, Plaintiffs also cite *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020), where the Ninth Circuit upheld a district court's grant of a preliminary injunction enjoining DHS from implementing MPP because it determined that it was likely inconsistent with the Immigration and Nationality Act ("INA"). That decision, which was later vacated, 5 F.4th 1099 (9th Cir. 2021), concerned whether the INA conferred on DHS the power to adopt and enforce MPP, not whether the decision to end MPP is reviewable under the APA.

DHS's termination of MPP is unreviewable for the additional reason that civil and criminal enforcement decisions fall outside of the definition of major federal action to which

NEPA applies.[10] 40 C.F.R. § 1508.18(a) (2019); *see also* DHS Instruction Manual 023-01-001-01, Revision 01, Implementation of the National Environmental Policy Act, at II-4 (defining "[m]ajor [f]ederal action" to be those actions "defined in 40 C.F.R. § 1508.18"). Because adoption and termination of MPP were both enforcement decisions, no NEPA analysis was required. *See* Defs.' Br. 27-28 (citing cases recognizing inapplicability of NEPA to enforcement decisions).

Second, Plaintiffs are also wrong that the suspension of the three Asylum Cooperative Agreements ("ACAs") between the United States and Guatemala, Honduras, and El Salvador, are reviewable under the APA. The ACAs are "bilateral or multilateral agreement[s]" regarding asylum applicants under 8 U.S.C. § 1158(a)(2)(A). Congress has broadly foreclosed any judicial challenge to such agreements by providing that "[n]o court shall have jurisdiction to review *any* determination . . . under [§ 1158(a)(2)(A)]." *See* 8 U.S.C. § 1158(a)(3) (emphasis added); Defs.' Br. 28-29. Even if Section 1158(a)(3) does not bar review here, because the challenged decisions fall within the Secretary's discretion under Section 1158, Section 1252(a)(2)(B)(ii) would also bar review. *Id.* at 29. It is immaterial that Plaintiffs are not seeking to challenge "*individual* aliens' cases."[11] Pls.' Opp'n 32 (emphasis in original). Indeed, Section

[10] The question of whether termination of MPP triggered NEPA was not before the Fifth Circuit in *Texas v. Biden*, 10 F.4th 538 (denying stay of preliminary injunction pending appeal) or *Texas v. Biden*, 20 F.4th 928.

[11] The Prompt Asylum Claim Review and Humanitarian Asylum Review Process were pilot programs intended to expedite processing of the asylum requests of individuals who are subject to expedited removal and who have either traveled through another country on their way to the United States or are Mexican nationals. Although a court in this district recently held these programs to be reviewable under the APA in a challenge brought by asylum-seeking families, *see Las Americas Immigrant Advocacy Center v. Wolf*, 507 F. Supp. 3d 1, 34-35 (2020), *on appeal* No. 20-5386 (D.C. Cir. Dec. 30, 2020), this Court need not reach that question, because Plaintiffs do not articulate how not continuing to use these limited programs after the pilot programs ended could adversely impact them.

1252(a)(2)(B) makes clear that "*regardless of whether the judgment, decision or action is made in removal proceedings*, no court shall have jurisdiction to review . . . any other decision or action" of the Secretary of Homeland Security "the authority for which is specified under this subchapter to be in [his] discretion." 8 U.S.C. § 1252(a)(2)(B)(ii). Furthermore, that Plaintiffs have no connection to individual immigration cases potentially affected by the decisions to suspend the ACAs further highlights that their suspension cannot reasonably be said to meaningfully affect Plaintiffs or cause them any harm.

V. Plaintiffs Cannot Challenge Decisions Committed to Agency Discretion under the APA.

Throughout the Complaint, Plaintiffs challenge discretionary decisions regarding how immigration enforcement decisions are executed and the priority that the Executive assigns to such decisions. *See, e.g.,* FAC ¶¶ 232 – 240 (Counts IV – VI), ¶¶ 247 – 252 (Counts IX – X). As Defendants previously explained, these enforcement decisions are committed to agency discretion, and they are not reviewable under the APA. *See* Def. Br. at 30-32. In their response, Plaintiffs seek to evade the plain strictures of the APA by claiming that they are "not challenging either the grant or the denial of parole to any individual alien, but rather the decisions to create these programs." Pls.' Opp'n 33. But Plaintiffs cannot avoid the prohibition on review of discretionary enforcement decisions by framing their claims as challenges to the alleged policies underlying non-reviewable enforcement decisions.

A. DHS' enforcement decisions and discretionary policies are committed to agency discretion and not reviewable under the APA (Counts IV – VI).

In Counts IV through VI, Plaintiffs challenge enforcement guidance to Customs and Border Protection ("CBP") agents to issue notices[12] requiring undocumented individuals to

[12] Plaintiffs mischaracterize these notices as "permission slips." FAC ¶¶ 110, 233.

report to Immigration and Customs Enforcement ("ICE") field offices in lieu of detaining them, FAC ¶¶ 110, 233 (Count IV); a communique to ICE employees to prioritize enforcement actions against noncitizens who pose threats to national security, public safety, and border security, *id.* ¶¶ 111, 236 (Count V); and a policy that rescinds civil penalties to noncitizens who fail to leave the country, *id.* ¶¶ 112, 239 (Count VI). In general, these guidance materials do not compel agency actions, but instead confer discretion on agency staff to exercise in specific circumstances. For example, the prioritization guidance to ICE employees states it "does not compel an action to be taken or not taken. Instead, the guidance leaves the exercise of prosecutorial discretion to the judgment of our personnel."[13]

Plaintiffs may not challenge these so-called enforcement "policies" because each involve decisions committed to agency discretion by law. 5 U.S.C. § 701(a)(2). Congress has charged the Executive with deciding "whether it makes sense to pursue removal at all," *Arizona v. United States*, 567 U.S. 387, 396 (2012), and allows the Executive "to abandon the endeavor" at "each stage" of the removal process, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999). Accordingly, these guidance materials are not subject to judicial review under the APA. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("an agency's decision not to prosecute or enforce . . . [is] generally committed to an agency's absolute discretion . . ." and "often involves a complicated balancing of a number of factors," including whether enforcement "best fits the agency's overall policies.").

Plaintiffs are wrong that their claims are reviewable because they challenge alleged "policies" that guide the exercise of enforcement decisions rather than specific enforcement

[13] https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf at 5, last accessed on January 1, 2022.

actions. Pls.' Opp'n 33. The Supreme Court in *Heckler v. Chaney* made clear that enforcement decisions committed to agency discretion are not reviewable, particularly where those decisions are part of an agency's policies. In *Heckler*, inmates in Texas and Oklahoma sentenced to death by lethal injection under the laws of those states challenged the use of the drugs used during lethal injection as "safe and effective" for human execution. 470 U.S. at 823-24. The Plaintiffs requested that the Food and Drug Administration ("FDA") take enforcement actions to prevent violations of the Food, Drug, and Cosmetic Act's "misbranding" provisions as well as to prevent interstate distribution of drugs not approved for lethal injection. *Id.* The FDA Commissioner refused to take the requested enforcement action because, as a matter of policy, such proceedings "are initiated only when there is a serious danger to the public health or a blatant scheme to defraud," neither of which were present under the State lethal injection laws. *Id.* at 824-25. The Supreme Court held FDA's decision not to initiate an enforcement action was unreviewable for "many" reasons, including that an agency's "decision not to enforce often involves a complicated balancing of a number of factors . . . within its expertise" including whether particular enforcement actions fit "the agency's overall policies." *Id.* at 831. The holding in *Heckler v. Chaney* that such discretionary decisions are not reviewable under the APA is thus not limited to individual enforcement decisions, but also encompasses the policies that guide enforcement decisions. And it applies with particular force in the removal context where the "broad discretion exercised by immigration officials" is a "principal feature of the removal system." *Arizona*, 567 U.S. at 396; *Reno*, 525 U.S. at 490; *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2418-19 (2018).

Plaintiffs rely on *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998), for the proposition that they may challenge agency policies that establish enforcement

priorities.[14] Pls.' Opp'n 33. That reliance is misplaced. *OSG Bulk Ships* addressed whether a district court had jurisdiction to consider plaintiff's challenge to an agency's interpretation of the Merchant Marine Act, not whether the plaintiff could sue under the APA to challenge agency enforcement policies. 132 F.3d at 812-817. Plaintiffs' Complaint does not challenge whether DHS' policies are consistent with underlying statutory authorities.

B. DHS's use of parole authority is unreviewable under the APA and does not constitute final agency action (Counts IX and X).

In counts IX and X, citing a memorandum issued by DHS Secretary Mayorkas and two press releases by the State Department, Plaintiffs challenge an alleged "policy" governing DHS's discretionary authority to temporarily "parole" into the United States noncitizens "applying for admission to the United States." 8 U.S.C. § 1182(d)(5)(A). FAC ¶¶ 124, 125, 126. Plaintiffs claim that they are challenging the lawfulness of programs to parole Afghan nationals into the United States for two years, and to expand access to apply for parole for certain Central American minors, FAC ¶¶ 124, 125, 126, without an environmental analysis. Pls.' Opp'n 35. Plaintiffs contend that these "programs" have the "potential to cause significant environmental effects." FAC ¶¶ 248, 251. The policies that Plaintiffs seek to challenge are not "final agency action[s]" subject to judicial review. 5 U.S.C. § 704. Agency action is final if it determines

[14] Plaintiffs also rely on *International Longshoremen's and Warehousemen's Union v. Meese* (*ILWU*) for the proposition that *Heckler's* prohibition on judicial review under the APA is limited to an agency's "refusal to prosecute or enforce a statute in a specific case." Pls.' Opp'n 33 (citing 891 F.2d 1374, 1378 n.2 (9th Cir. 1989)). However, the issue in *ILWU* was whether plaintiffs had standing to challenge an Immigration and Naturalization Service interpretation of the INA, which allowed noncitizen workers to perform labor in the United States without certification by the Secretary of Labor. *ILWU*, 891 F.2d at 1379; *see Maine State Bldg. and Const. Trades Council v. Chao*, 265 F. Supp.2d 105, 112 (D. Me. 2003), *aff'd sub nom. Maine State Bldg. & Const. Trades Council, AFL CIO v. U.S. Dep't of Lab.*, 359 F.3d 14 (1st Cir. 2004); *United States v. Richard Dattner Architects*, 972 F. Supp. 738, 746 (S.D.N.Y. 1997). Like *OSG Bulk* Ships, *ILWU* did not involve a challenge to a policy concerning discretionary enforcement authority.

legal "rights or obligations." *Bennett*, 520 U.S. at 178. Even if the memo and press releases constitute general policies, they are not final agency action, because they do not finally determine legal rights or obligations. A nonfinal agency order is one that "does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action." *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130 (1939). None of the parole "policies" satisfy this rule because they neither create legal rights nor impose legal obligations. *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014). The INA "makes clear that whether and for how long temporary parole is granted are matters entirely within the discretion" of DHS, *Wong v. United States*, 373 F.3d 952, 968 (9th Cir. 2004), and the guidance does not require CBP officers to take any specific action in any specific circumstance.

DHS's authority to parole noncitizens, who are applying for admission into the United States, whether for "urgent humanitarian reasons" or because doing so has "significant public benefit," is "committed to agency discretion by law," and not subject to judicial review under the APA. *See* 5 U.S.C. § 701(a)(2); 8 U.S.C. § 1252(a)(2)(B)(ii) (2018); *Heckler*, 470 U.S. at 830 ("[R]eview is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."); *Palacios v. Dep't of Homeland Sec.*, 407 F. Supp. 3d 691, 698 (S.D. Tex. 2019) (no "jurisdiction to review denials of parole under the [INA] because these actions are committed to agency discretion by law" (internal quotation marks and citations omitted)); *Aracely v. Nielsen*, 319 F. Supp. 3d 110, 135 (D.D.C. 2018) ("parole decisions from which this action arises are discretionary, and are therefore not reviewable by this Court").

While Plaintiffs claim they are not challenging parole determinations for asylum seekers, they are effectively challenging those individual determinations. *County of San Diego v. Nielsen*

is instructive. There, plaintiff asserted that DHS violated the APA and the Fifth Amendment of the United States Constitution when it discontinued the "safe release" program under which it provided assistance to asylum seekers in reaching their destinations within the United States pending adjudication of their asylum claims. 465 F. Supp. 3d 1073, 1078 (S.D. Cal. 2020). Plaintiff argued there, as Plaintiffs do here, that a challenge to the safe release program was not subject to Section 1252(a)'s non-reviewability principle because it did not challenge an individual parole decision. The court rejected this argument, because DHS has the discretion to change the conditions under which it paroles individuals into the United States, and therefore judicial review of those decisions under section 1252(a)(2)(B)(ii) is precluded. *Id.* Here, as in *County of San Diego*, Plaintiffs claim they are not challenging the discretionary authority to parole non-citizens into the United States, but they are. The discretionary authority to parole a noncitizen is determined by Customs and Border Protection staff case-by-case. Plaintiffs may not challenge the agency guidance that advises those individual discretionary determinations.

Plaintiffs concede that they may not challenge discretionary agency enforcement or parole decisions. They also may not challenge agency guidance that informs how the agency exercises its discretion in individual decisions. As such, Plaintiffs' challenge to enforcement decisions in counts IV-VI and parole decisions in counts IX-X should be dismissed.

VI. The INA Precludes Plaintiffs' Challenge to the Attorney General's Decision in *Matter of Cruz-Valdez* (Count VII).

In *Matter of Cruz-Valdez*, the Attorney General vacated a Board of Immigration Appeals ("BIA") removal decision and determined that immigration judges can individually determine to temporarily pause a proceeding and remove the case from the immigration judge's active calendar. 28 I&N Dec. 326 (A.G. 2021). Because Attorney General decisions arising from removal proceedings are not subject to judicial review in district court, Plaintiffs may not

challenge that decision here. *See* 8 U.S.C. §1252(a)(5); *id.* § 1252(b)(9); *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029-30, 1032, 1035 (9th Cir. 2016) (section 1252(b)(9) precludes district court review over "*any* issue . . . arising from *any* removal-related activity," including "policies-and-practices challenges" arising from any "action taken or proceeding brought to remove an alien").

Plaintiffs concede that they are not challenging an order of removal. Pls.' Opp'n 36. This admission alone precludes Plaintiffs' challenge to the decision in *Matter of Cruz-Valdez*. A private citizen does not have a "judicially cognizable interest" in another's prosecution, *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973), or "in procuring enforcement of the immigration laws" against third parties in particular ways. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984); *see also Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999) (aside from the United States, no party can litigate a challenge to removal proceedings in district court). Congress has enacted several provisions specifically aimed at protecting the Executive's discretion from the courts, *Reno*, 525 U.S. at 486-87, making clear that only noncitizens may challenge enforcement decisions, and only through their removal proceedings. Section 1252(a)(5) provides that "a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal," and section 1252(b)(9)'s requirement that all "questions of law and fact . . . arising from any action taken or proceeding brought to remove an alien" must be brought by "judicial review of a final order." Plaintiffs may not avoid the limitations of judicial review merely by characterizing the decision in *Matter of Cruz-Valdez* as a "policy."

Because the sole means to challenge any issue arising from a removal proceeding is a petition for review of a final order, Plaintiffs may not challenge the decision in *Matter of Cruz-Valdez* here. The claim in Count VII should be dismissed.

VII. Any Challenge to Expansion of the U.S. Refugee Admissions Program Should be Dismissed Because Plaintiffs do not Challenge Final Agency Action (Count VIII).

Plaintiffs erroneously argue that the State Department had to conduct an environmental analysis of the presidential action expanding the refugee program, because the expansion has "the potential to cause significant environmental effects" if and when the State Department awards new and larger cooperative agreements to NGOs that resettle refugees. FAC ¶ 245; Pls.' Opp'n 36-37.

Plaintiffs' effort to characterize their challenge to the President's expansion of the U.S. Refugee Admissions Program as an action of the Department of State fails because the APA does not apply when agencies are "merely carrying out directives of the President[.]" *Tulare Cnty. v. Bush*, 185 F. Supp. 2d 18, 28 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002) (citation omitted). Any expansion of the refugee program flows directly from the President's directive and the State Department lacks any discretion to disobey that mandate. *See Ancient Coin Collectors Guild v. U.S. Customs & Border Protection*, 801 F. Supp. 2d 383, 403 (D. Md. 2011), *aff'd*, 698 F.3d 171 (4th Cir. 2012). Because Plaintiffs' challenge to the President's expansion of the program falls outside the APA's waiver of sovereign immunity, the Court lacks subject matter jurisdiction to hear it.

Plaintiffs cannot save their claim by framing it as a challenge to the State Department's alleged award of "new and larger contracts to refugee resettlement contractors." Pls.' Opp'n 37. Plaintiffs concede that it is the NGO partners—rather than the Department of State—that will "make a host of decisions, including how many refugees will resettle in particular communities." *Id*. Where an individual refugee is resettled can be a complex decision governed by several considerations under the Refugee Act, such as the availability of job placement, affordable housing, and public and private resources for refugees. 8 U.S.C. § 1522(a). And

where those refugees reside after resettlement is ultimately an individual decision. *See supra* section I(B).

In challenging expansion of the U.S. Refugee Admissions Program, Plaintiffs identify no final agency action reviewable under the APA. 5 U.S.C. § 704. The claim in Count VIII should be dismissed.

VIII. Plaintiffs Cannot Assert a Programmatic Challenge to a Purported "Population Growth Agenda" Under the APA (Count XI).

Plaintiffs seek to bring a programmatic challenge to an amorphous collection of agency guidance, enforcement decisions, discretionary parole decisions, court administration, and executive orders that they collectively christen the "Biden Population Actions." The Supreme Court's decisions in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), and *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), expressly forbid this sort of broad, programmatic challenge under the APA. And courts cannot compel an agency to conduct programmatic NEPA analysis when the agency has not proposed a programmatic action. Defs.' Br. 40-44. *See Whitewater Draw*, 5 F.4th at 1012. Instead, Plaintiffs must "identify a particular action [they] wish to challenge under the APA," or "pursue their remedies before the agency or in Congress." *Id.* at 1012; *see also* 33 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 8322 (2d ed. 2021) ("The APA . . . does not authorize Plaintiffs to pile together a mish-mash of discrete actions into a 'program' and then sue an agency to force broad policy changes to this 'program.'" (citation omitted)).

Plaintiffs claim that the Defendant agencies *could* conduct a programmatic environmental analysis on the collection of actions they challenge. Pls.' Opp'n 39. Even if this is true, it misses the point. Because courts cannot compel an agency to undertake a programmatic NEPA analysis, Plaintiffs' programmatic challenge is not redressable. *See Sierra Club*, 427 U.S. at 412;

accord Nev. v. Dep't of Energy, 457 F.3d 78, 92 (D.C. Cir. 2006) ("[W]hether to prepare a programmatic EIS is committed to the agency's discretion"); *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 374 n.73 (D.C. Cir. 1981) (same).

National Wildlife and its progeny foreclose Plaintiffs' attempt to bring a broad programmatic challenge under the APA to an amorphous category of government decisions. And because the decision to prepare a programmatic NEPA document is entrusted to the expert agencies, courts cannot compel a programmatic NEPA analysis. Plaintiffs' programmatic challenge thus fails and the claim in Count XI should be dismissed.

CONCLUSION

For all the reasons stated, the Court should grant Defendants' Motion to Dismiss the First Amended Complaint with prejudice. At base, Plaintiffs have a wide ranging disagreement with U.S. immigration policy. But this disagreement is the province of the legislative and executive branches, not the judiciary.

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