UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MASSACHUSETTS COALITION FOR IMMIGRATION REFORM, *et al.,* Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.* Defendants.	Case. Nos. 20-cv-3438 TNM 20-cv-1198 TKJ (consolidated cases)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT; AND STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Plaintiffs Massachusetts Coalition for Immigration Reform (MCIR), Kevin Lynn, Linda Huhn, Bruce Anderson, Rob Meyer, Steven Chance Smith, and Gail Getzwiller hereby oppose Defendants' Motion under Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure to dismiss the First Amended Complaint (Doc. 17). Plaintiffs have alleged particularized harms sufficient for standing and all of Plaintiffs' claims are reviewable under the Administrative Procedures Act and the National Environmental Policy Act. The grounds for this opposition are set forth below in the accompanying memorandum of points and authorities.

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I. Introduction

This challenge under the National Environmental Policy Act ("NEPA") is not about whether or not the Plaintiffs in this case support or oppose the immigration policies of the current Administration. The Nat'l. Env't. Policy Act of 1969, Pub. L. 91-190, 42 U.S.C. 4321-4347 (Jan. 1, 1970). Rather, it is about whether federal agencies can make certain significant policy changes, even with the knowledge those changes will create an environmental crisis, without conducting any environmental review whatsoever. In 1969, driven by a concern over "the profound influences of population growth," Congress passed NEPA to provide a mechanism that would provide a degree of public transparency and accountability over the environmentally significant decisions of the federal bureaucracy. 42 U.S.C, § 4331(a). Despite this explicit congressional concern, federal agencies never initiated NEPA review for any of their immigration actions, even as increasingly higher immigration levels became responsible for a larger and larger proportion of the country's total population growth.

In the context of immigration, over the decades, federal agencies utterly failed to "provide a springboard for public comment" to ensure "a larger audience" is able to "provide input as necessary to the agency making the relevant decisions." *Dept. of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004). NEPA was intended to guarantee that the "larger audience" that will play a role in both the decision-making process itself and the implementation of the resulting decisions will have access to all the relevant information. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). This larger audience includes not just the public, but "the President, who is responsible for the agency's policy, and Congress, which has authorized the agency's actions.'" *Protect Our Cmtys. Found. v Chu,* 2014 U.S. Dist. LEXIS 42410, *13

(citations omitted). The blunt tool of the ballot box is meant to be aided by, at the very least, public disclosure requirements on the federal bureaucracy.

When it comes to immigration, transparency is sorely lacking. Over the years, a complicated "patchwork of promulgations" implementing the nation's immigration statutes has developed, largely out of sight of the American public, by a "myriad government agencies." RICHARD BOSWELL, ESSENTIALS OF IMMIGRATION LAW 1 (2d ed. 2009). Rather than solely, or largely, worked out "in the halls of Congress," by the beginning of 2021, administrative agency decisions regarding immigration play an extremely significant role determining the pathways of migration taken by hundreds of thousands of foreign nationals entering and settling into the U.S. At the beginning of 2021, without any statutory change to U.S. immigration laws, Defendants Department of Homeland Security ("DHS"), Department of State ("DOS"), and Department of Justice ("DOJ"), in accordance with campaign promises and executive orders by President Joseph Biden, engaged in a sharp and sudden change in immigration policy.

Defendants carried out, and continue to carry out, this change in policy through a series of specific actions which have been challenged in this case (the "Biden Population Actions.") These actions have both substantially augmented the population of the U.S. and caused an environmental, humanitarian, and security crisis on the U.S. border with Mexico as hundreds of thousands of people from all over the world have crossed over the border to take advantage of these policies. Because DHS, the federal government's lead agency for immigration policy, adopted flawed procedures that implemented inadequate NEPA compliance in 2014, Defendants have entirely omitted to initiate NEPA compliance at any level before implementing any of these actions, despite their clearly foreseeable potential to create significant environmental impacts, both at the border and through population growth. DHS Directive 02301, Implementation of the

National Environmental Policy Act ("Directive"), and Instruction Manual 023-01-001-01 ("Instruction Manual"). This case does not challenge these policies on their merits, but because they were implemented without procedural protections guaranteed by NEPA.

An illustrative example of the kind of routine failure to initiate review, which is challenged, in this case can be found in DHS Secretary Alejandro Mayorkas' review of one the specific challenged policies. In a memorandum produced in response to a court order, Secretary Mayorkas reviewed the termination of the policy whereby asylum seekers at the southern border await hearings in Mexico rather than after being released into the interior of the United States. Memorandum from Alejandro Mayorkas, Secretary, Dept. of Homeland Security, to Tae Johnson, Acting Director, U.S. Immigr. and Customs Enf't, et al, (Oct 29, 2021), [1] In his memorandum, the DHS Secretary explained that, in initiating a review of whether to continue the program, he had consulted with a variety of "internal and external stakeholders" and ultimately decided that the "costs on the individuals who were exposed to harm while waiting in Mexico" outweighed the costs to the American public of increased "migratory flows." If DHS had complied with NEPA in conducting this review, it would have included, at the least, an environmental assessment that gave the public a chance to comment.

In Defendants' motion to dismiss Plaintiffs' amended complaint, Defendants argue that Plaintiffs do not have standing because they cannot separate the harms caused by these particular policies from the harms caused by past "decades of prior policy decisions," also carried out without the benefit of any NEPA analysis, Doc. 19 ("Def. Br.") Defendants' attempts to characterize the environmental costs of its immigration policies as too comprehensive and "general" to provide standing to citizens affected by them are unavailing. This argument lacks

[1] This memorandum can be found at https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf.

merit. Not only does it fail to recognize that one of the very purposes of NEPA is to analyze the cumulative impacts of agency policies but, also, it fails because these Plaintiffs clearly include those who are disproportionately and particularly impacted by the specific policies at issue here. Plaintiffs, such as ranchers on the border of Mexico dealing with the fallout of the border crisis daily, and those who live in the specific local communities where foreign nationals are currently being settled through the active participation of the federal government, have tied their environmental harms to all of the actions challenged.

Defendants also attempt to paint Plaintiffs' challenges as non justiciable by the operation of various provisions in the Immigration and Nationality Act ("INA") preventing or restricting judicial review of the individual cases of foreign nationals who have been ordered deported, or denied asylum. These claims fail for largely the same reasons—Plaintiffs are not challenging individual decisions to allow or not allow individual foreign nationals to enter or remain in the United States. Plaintiffs are challenging the ability of Defendants to make policy decisions with significant and substantial consequences without the procedural safeguards guaranteed to the American citizenry by NEPA.

II. Standard of Review

The issue presented by a motion to dismiss is whether a claimant is entitled to offer evidence to support the claims, not whether the plaintiff will ultimately prevail. *Caribbean Broad. Sys. Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1086 (D.C. Cir. 1998). A claim therefore may only be dismissed if, "taking as true the facts alleged," it appears "beyond doubt" the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *Rochon v. Gonzales*, 438 F. 3d 1211, 1216 (D.C. Cir. 2006).

The appropriate procedural vehicle by which to move to dismiss a violation of NEPA and the Administrative Procedure Act ("APA") is Rule 12(b)(6) rather than Rule 12(b)(1). Both NEPA and the APA "raise a federal question covered by 28 U.S.C. § 1331." *Nat. Res. Def. Council, Inc. ("NRDC"). v. U.S. Dep't. of State*, 658 F. Supp. 2d 105, 108 (D.D.C. 2009). If "the crux of defendants' various arguments is not whether the [agency] has presented federal claims, but whether those claims are enforceable against the [agency]," then "the court must assume jurisdiction before deciding whether a cause of action exists." *Id*. at 108-09. The APA provides the only avenue for judicial review of agency action, and there is a "strong presumption" that Congress intends such judicial review. *Helgeson v. Bureau of Indian Affairs*, 153 F.3d 1000, 1003 (9th Cir.1998) (citations omitted).

III. Standing

A) The standard for review in NEPA cases requires plaintiffs only to allege concrete harms to their personal aesthetic and recreational interests caused by the government actions implemented without proper NEPA compliance.

To establish Article III standing, Plaintiffs must show: (1) injury-in-fact, (2) causation, and (3) redressability. *Friends of the Earth, Inc. v. Laidlaw*, 528 U.S. 167, 180-81 (2000); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). In a NEPA case, in which Plaintiffs assert procedural rights, the causation and redressability standards are relaxed. *Lujan* 504 U.S at 573, n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.")

The first prong of standing, injury-in-fact, refers to a "concrete" and "particularized" interest of the plaintiff that is not shared by the whole public at large. *Mendoza v. Perez*, 754 F. 3d 1002, 1010, n.6 (D.C. Cir. 2014). It may either have already occurred or imminent. In a NEPA claim, the "zone" of the concrete interest that has been or threatens to be injured

"encompasses environmental values, read, of course, very broadly." *Gunpowder Riverkeeper v. FERC*, 807 F. 3d 267 (D.C. Cir. 2015) "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). Particularized environmental harms sufficient to establish standing include "reasonable fear" of "health or environmental risks" on the part of the plaintiffs that "impairs their ability to feel safe and to enjoy the outdoors." *Cal. Cmtys. Against Toxics v. EPA*, 928 F. 3d 1041, 1049 (D.C. Cir. 2019) Plaintiffs can establish these fears by showing they spend less time outdoors exercising, walking their dogs, gardening, or fishing, or simply that they no longer enjoy these activities as much because of their worries. *Id*. If a challenged action causes "particularized fears of serious health and environmental consequences" to individuals, and "their individual behavioral changes," that establishes injury in fact for Article III standing. *NRDC v. EPA*, 755 F. 3d 1010 (D.C. Cir. 2014).

Where plaintiffs seek to enforce procedural rather than substantive rights, Plaintiffs need only meet the threshold that an "action taken without required procedural safeguards" threatens their "concrete" interest, one that is not "common to all members of the public." *Mendoza v. Perez*, 754 F. 3d 1010, n.6 "Once that threshold is satisfied, the normal standards for immediacy and redressability are relaxed." *Id*. If the plaintiffs can "demonstrate a causal relationship between the final agency action and the alleged injuries, the court will assume the causal relationship between the procedural defect and the final agency action." *Id*. (cleaned up.)

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). *De facto* causality is

met when because the Plaintiffs' "theory of standing" … rests not on "mere speculation about the decisions of third parties" but relies instead on the "predictable effect of Government action on the decisions of third parties." *Id. See also*; *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (The effects of actions by third parties that are not "independent" but "produced by determinative or coercive effect" of the challenged government action give standing to those harmed by the effects.)

Importantly, in evaluating plaintiffs' standing at the motion to dismiss stage the courts "must assume that the plaintiffs state a valid legal claim and must accept the factual allegations in the complaint as true." *Holistic Candlers and Consumers Ass'n v. FDA*, 664 F.3d 940, 943 (D.C. Cir. 2012) That is, at the motion to dismiss stage, an agency cannot prevail against plaintiffs' factual pleadings regarding the predictable effects of the challenged action on third parties.

Furthermore, to establish jurisdiction, the court need only find one plaintiff who has standing. *Comcast Corp. v. FCC* 579 F.3d 1, 6 (D.C. Cir. 2009). In evaluating plaintiffs' standing at the motion to dismiss stage the courts "must assume that the plaintiffs state a valid legal claim and must accept the factual allegations in the complaint as true." *Holistic Candlers* 664 F.3d at 943.

B) Plaintiffs' particularized fears about their safety and health, their decrease in enjoyment of the outdoors in particular places, their distress at environmental damage to specific cherished areas, and their changes in behavior in response establish injury-in-fact.

Plaintiffs have alleged precisely the kind of particularized harms, tied to specific places, required to establish injury-in-fact in NEPA cases. Mass immigration, both legal and illegal, has the potential to cause a wide variety of potential environmental consequences. However, the instant Plaintiffs have been specifically harmed by two in particular: 1) the environmental harm

caused to a particular area where a significant number of migrants pass through in order to enter the country (here, the border between Mexico and the U.S.); and 2) the environmental harm caused to a particular area where a significant number of migrants settle on a long term basis after they enter the country. Neither one of these two categories—that is, environmental damage from border crossers or regional population growth, affects "the public at large" on an equal basis. Immigrants do not settle in every square area of the U.S. at the same rate—population growth through immigration is unevenly distributed. Furthermore, the Plaintiffs in this case can not only point to particularized harms created by immigration driven population growth, but by growth particularly created or augmented by the specific programs that are at issue in this case.

For instance, Plaintiff Steven Chance Smith, who works on an 87 square mile cattle ranch on the border between Arizona and Mexico, and lives nearby, has clearly averred that he uses an area affected particularly by the six Biden Actions that have made crossing the border and staying in the interior easier, the standard created in *Laidlaw*, 528 U.S. at 183. *See* Declaration of Chance Smith, Ex. 1 at 1. Mr. Smith sees "eight or nine times" the border traffic at his home and on the ranch than he did before these actions. *Id*. at 5. This substantial increased affects the quality of his life. He also notes "Not only has the border traffic gone up so dramatically since Biden was inaugurated, but the border crossers are bolder than I have ever seen before in my life." *Id*. at 8. "The cartels are in control now, and the American government allows it in order to encourage the flow of people into the interior." *Id*. at 6. The cartels bring drugs, and are generally armed, sometimes they even hide drugs and guns in his own backyard. *Id*. at 4. Mr. Smith and his family often sees people crossing nearby properties on his game cameras. *Id*. As a result, his safety and the safety of his family is threatened, clearly impairing his ability "to feel safe" and "enjoy the outdoors." *See Cal. Cmtys. Against Toxics v. EPA*, 928 F. 3d 1049. He has

to change his own individual behavior in response to these safety dangers. For instance, he carries a pistol with him when he rides horse back on his ranch, or whenever he leaves his house, though he prefers not to carry a weapon, out of fears for his safety outdoors. Ex. 1 at 2-3. *See NRDC v. EPA*, 755 F. 3d 1010. His pleasure in doing his job of ranching outside diminished in other ways as well—for instance, the greater the number of illegal border crossers, the more likely someone may open gates and let out cattle he has herded—causing him to do the physical work of several days all over again—which significantly increases his mental stress, as well as the physical wear and tear he must undergo. Ex. 1 at 6.

He also has greater worries for his health in general while outdoors. The trip that so many migrants take up the human pipeline from South America, through Central America, and Mexico, is rife with unsanitary conditions and stressful for the migrants' physical health, making it easy for them to catch communicable diseases through the journey. *Id*. at 6-7. As his land and community are on the front lines, he knows that his health, and local public health, is particularly endangered by diseases he could catch from them. His fear is reasonable, not theoretical—he grew up on the border, and his father once found the dead body of a border crosser on the family property, and ended up spending months in and out of the hospital with a mystery illness. *Id*. at 7. Such "reasonable" and "particularized fears of serious health" consequences are *precisely* the kind of concrete interests that provide standing in environmental cases. *Cal. Cmtys. Against Toxics v. EPA*, 928 F. 3d 1049. *NRDC v. EPA*, 755 F. 3d 1010.nb.

Mr. Smith also suffers concrete harms because of environmental damage to the land. Increased traffic means more trash left on the land, such as blankets and clothes of the migrants. Ex. 1 at 6. Furthermore, the border crossers sometimes start fires, which sometimes damage vast parts of the land he ranches on. *Id*. at 7.

Plaintiff Gail Getzwiller also clearly has averred particularized harms caused by the border crisis that are sufficient under the *Laidlaw* standard. Ms. Getzwiller lives in Arizona, and manages a ranch in Benson Arizona, about 30 miles from the border with Mexico, and a ranch in Sonoita, about 15 miles from the border. *See* Declaration of Gail Getwiller, Ex. 2 at 1. The six Biden Administration actions, which have significantly increased border traffic, have caused environmental damage to areas she uses and values, particularly in two hotspots for crossing, Sasabe, Arizona (which is located right next to the gap in the border wall and thus affected by termination of construction to a very particular degree) and Three Points, Arizona, both in Pima County. *Id* at 2. In this area, local volunteers have picked up 10,000 tons of trash, including items like diapers, backpacks, bottles left by border crossers in the past three years. *Id* at 3. Ms. Getzwiller regularly joins this massive effort of volunteers, driving to both Three Points and Sasabe to offer logistical support such as food and water for those who pick up the trash. *Id*. at 2.

Ms. Getzwiller "cherishes and values the Arizona borderlands, with its unique and beautiful desert landscapes and wildlife" and which have "one of the most ecologically diverse landscapes in the nation." Ms. Getzwiller is deeply disturbed by contemplating the environmental damage caused to this unique area as it has become a "thoroughfare for migrant crossing." *Id*. The trash is not merely an aesthetic loss—"large amounts of trash cause watershed degradation, soil erosion, damage to infrastructure, and loss of vegetation and wildlife." *Id.* at 3. The trash "pollutes the water and is bad for human health" in the area, as well as the health of her cattle. *Id*. While the trash has been a problem in the past, the larger the border crisis, the harder it is to haul away massive amounts of garbage from the middle of the desert. The uptick in trash left by the 2021 border crisis in this particular area has been so sudden that volunteers have been

unable to keep up, meaning that permanent damage is being done to the "delicate ecosystem" of the Arizona border which Ms. Getzwiller depends on for enjoyment and sustenance. *Id*.

Ms. Getzwiller feels immense worry and distress living under these conditions. She also feels fear because she worries about the security risks of the unsecured border. Since she no longer feels safe outdoors, she is considering moving away from the border, but she can't imagine leaving Arizona, where she cherishes the land so much. Ex. 2 at 6-7.

The other Plaintiffs have alleged concrete, particularized environmental harm caused to a particular area where a significant number of migrants have settled on a long term basis after they enter the country, that is, population growth. For example, Plaintiff Kevin Lynn experienced numerous environmental harms in Los Angeles County, a place with far more immigration driven population growth than most places in the U.S. Declaration of Kevin Lynn, Ex. 3 at 3. He grew attached to the hiking trails, "unspoiled hills," and plentiful open space living in Malibu, California, in the 1990's, and but found it "ruined recreationally and aesthetically" a few years later. *Id*. He left California due to the continually increasing overcrowding, caused primarily by immigration. *Id*. at 3-4. He moved to Lancaster County, Pennsylvania in order to live a more rural existence, to be able to enjoy the open space and recreation than immigration had diminished in California, to be able to return to the activities overcrowding had made him need to stop doing in California, such as ride his bike for fresh produce. *Id*. He deeply cherishes the lovely, unique character of the area, with the its lovely, bucolic countryside and a large Amish population. *Id*. at 5. In order to preserve the rural character of the local area that he values, Mr. has been involved in local activism to prevent developers from transforming the farmland, which he has had success with so far. *Id*. at 6. Lancaster County is also, however, a place that is being particularly and significantly affected by refugee resettlement. *Id*. Between 2013 and 2017,

Lancaster took in 20 times more refugees per capita than any other county in America, and will imminently be resuming this resettlement rate because of the Biden Population Actions. *Id*. at 5-6. Biden Administration's actions expanding the refugee resettlement program, and creating parole programs whose beneficiaries are also eligible for refugee resettlement, will allow Lancaster non-governmental organizations (NGOs) to substantially resettle the area. In a rural area like Lancaster, this resettlement will allow the development to go forward which Mr. Lynn has so far been able to prevent. *Id*. Mr. Lynn's concrete aesthetic and recreational interests in living in Lancaster are threatened, and he may have to move again. *Id*. at 7.

Plaintiffs Linda Huhn, Bruce Anderson, and Rob Meyer live in the metro area of the Twin Cities in Minnesota, an area which has undergone environmental effects because of immigration-induced population growth, with refugee resettlement specifically also comprising an environmentally significant amount of growth in the Twin Cities. *See* Declaration of Linda Huhn, Ex. 4, Declaration of Bruce Anderson, Ex. 5, and Declaration of Rob Meyer, Ex. 6. Minnesota is the state with the most refugees per capita. Ex. 6 at 5. These Plaintiffs "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." *Laidlaw* at 183. For example, Ms. Huhn, an avid nature observer and photographer has suffered the loss of environmental sites near her home which she used to photograph. Ex. 6 at 5-6. For instance, a native prairie near the Mississippi river where she photographed native wildflowers was bulldozed to make way for a light rail necessary to accommodate population growth driven by immigration. *Id*. at 6. She found her enjoyment diminished in visiting the Helen Allison Scientific and Natural Area, about 40 minutes from her home, after a housing development was built right next to it. *Id*. at 6-7. Likewise, Plaintiff Bruce Anderson, an avid birdwatcher and nature observer, has personally

observed a dramatic decline in many species due to the development caused by population growth as he explores Minnesota and Wisconsin. Ex. 5 at 4. Plaintiff Rob Meyer has personally experienced the St Croix River become less and less suitable for his recreational boating, due to local population growth. Ex. 6 at 3.

The members of Plaintiff MCIR, likewise, have found their recreational opportunities and aesthetic enjoyment of specific places lessened. Co-chairman Henry Barbaro has found that urban sprawl has changed the Boston area, replacing pastures and places to swim with strip malls and housing developments. Declaration of Henry Barbaro, Ex. 7 at 5. This overcrowding is set to grow because of the Biden Population actions. Co-chairman of Plaintiff MCIR Steve Kropper has greatly reduced access to open space in his neighborhood of Lexington Massachusetts, because of population growth, primarily due to immigration. Declaration of Steve Kropper, Ex. 8. at 4. Lexington has a foreign born population of 17%, higher than the national average. *Id*. He also has developed a particularized attachment to Big Bend National Park, which he has visited nine times, to bike, walk, and hike and view its particular rich and fragile ecosystem. *Id*. at 5. He has already seen that illegal border crossers, when they cross in greater numbers, trample this "pristine nature." *Id*. Mr. Kropper feels great distress over the destruction of this particularly favorite area, as the border crisis caused by the Biden Population Actions has particularly threated this area. *Id*. at 6. He would like to go back and visit it again, but he now fears to hike at all because it is so dangerous to be a hiker in an area controlled by cartels. *Id*. at 506. The challenged actions have therefore directly harmed his recreational interests in this particular area.

C) Plaintiffs have met the relaxed standard necessary for a procedural challenge to meet causation and redressability.

Plaintiffs have met the redressability and causation standard necessary to challenge the procedural defects of failing to consider the environmental consequences of immigration under

NEPA because they have averred facts sufficient at this stage of litigation to establish "*de facto*" causality between Defendants challenged actions and the concrete interests described above. *See DOC v. New York* at 2566. Plaintiffs do not have to show that if NEPA analysis had been conducted, the actions would not have been taken.

In their amended complaint, Plaintiffs have specifically challenged DHS's NEPA procedures, and nine major individual policies ("the Biden Population Actions") that have so far played a major role in the implementation of the Biden Administration's policy of augmenting the population of the United States through the mass migration of foreign nationals. DHS' NEPA procedures, the substance of which are contained in the Instruction Manual, provide the mandatory "framework" for "implementing NEPA in DHS." Directive at 1. Functionally, therefore, the Instruction Manual ensured that immigration related DHS component agencies, specifically, U.S. Immigration and Customs Enforcement ("ICE"), U.S. Customs and Border Protection ("CBP"), and U.S. Citizenship and Immigration Services ("USCIS") (and by extension, other agencies jointly implementing immigration actions with DHS) would have no way to incorporate the environmental effects of immigration into their NEPA compliance.[2]

The implementation of the nine Biden Population actions has 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. The effects of these policies are not in doubt. Data obtained by the Center for Immigration studies through the Freedom of Information Act show that ICE removals have

[2] *See* Department of Homeland Security Directive 023-01, Revision 01, *Implementation of the National Environmental Policy Act*., at 1, and Department of Homeland Security Instruction 023-01-001-01 Rev 01, *Implementation of the National Environmental Policy Act* (the "Instruction Manual"). Defendants have already created an exhibit containing the Instruction Manual, Exhibit B, of their motion to dismiss.

declined 90% since 2019, the last normal year for ICE operations.[3] Not removing foreign nationals from the population has the "determinative" effect of increasing the numbers who stay. *See e.g. Bennett v. Spear*. These actions have demonstrably, not speculatively caused increased population growth.

Six of these actions (Counts II-VII of Plaintiffs' amended complaint), specifically, terminating border barrier construction, termination of Remain in Mexico, adopting new CBP encounter policies, adopting new detention and removal policies for ICE, removing civil penalties, and reinstating administrative closure, have not only *de facto* caused signification population growth, but also have caused a humanitarian and environmental crisis on the southern border that particularly impacts Plaintiffs. The border crisis has caused Mr. Smith and Ms. Getzwiller's injuries, which have all occurred in the area of the borderlands Arizona and Mexico, as detailed above, as well as to a member of Plaintiff MCIR. Mr. Cropper, who has regularly visited Big Bend in Texas in the past and developed a deep attachment to its landscape and ecology, is now afraid to visit because of fears for his security. These policies have, working together, made it much easier to cross the border, and much easier to remain in the United States, and without them, the mass crossings that have occurred since January 2021 would not have occurred. As of August, agents at the Southwest border apprehended 1.276 million aliens—more than any year since 2000.[4] The effect of these policies is not "speculative" or "conjectural" or "attenuated."

The eminently "predictable effect" of the government facilitating the passage and settlement into the U.S. is that the numbers of people settling in the U.S. rise. When that

[3] See Jessica M. Vaughan, *Deportations Plummet Under Biden Enforcement Policies,* CTR FOR IMMIGR. Stud. (Dec. 2021), https://cis.org/Report/Deportations-Plummet-Under-Biden-Enforcement-Policies.
[4] Andrew R. Arthur, *Incredibly, Biden's Border Disaster Got Even Worse in July*, CTR. FOR IMMIGR. STUD. (Aug. 13, 2021), https://cis.org/Arthur/Incredibly-Bidens-Border-Disaster-Got-Even-Worse-July.

government facilitation takes the form of assisting the passage of crossing into the country in between ports of entry, the numbers of border crossers specifically will rise, causing environmental degradation in the area of passage as well. *See DOC v. New York*. Not only was the border crisis itself predictable, it was predicted. DHS itself issued a Homeland Security assessment in October 2020 that warned of a border crisis. U.S. Dept. of Homeland Sec., Homeland Threat Assessment (Oct. 2020). This report named as a factor likely to drive the next mass migration influx: migrant "perceptions of U.S. and Mexican immigration and enforcement policies" due to ongoing "inter-governmental division and inconsistent messaging." *Id*. at 24.

When Defendants follow up this messaging with action, they are fully aware that those contemplating migration will respond. Todd Bensman, Center for Immigration Studies Senior National Security Fellow, has extensively reported on the ongoing mass migration that has been occurring at the Southern Border since January 2021, and has developed substantial expertise regarding the cause of the border crisis due to his on-the-ground reporting. He reports that prior to January 2020, there were 70,000 foreign nationals waiting in Mexico who had applied for Mexican asylum, the majority of which were waiting to enter the United States after the Biden Administration ended the Remain in Mexico policy. Declaration of Todd Bensman, Ex. 9 at 6-7. During several trips to the U.S. border with Mexico, Mr. Bensman witnessed the clear effects of the Biden Population Actions repeatedly. Rather than preventing mass illegal crossing, he watched as the CBP agents processed, released, and loaded border crossers onto buses, headed towards locations all over the interior of the country. Ex. 9 at 8-20. Border Patrol agents, on orders from the administration, act as a "virtual conveyor belt of mass immigration into the interior." *Id*. at 19. Rather than working against human traffickers, agents of the federal government now assist cartels to transport their human cargo across the Rio Grande into the

interior. *Id*. These policies unquestionably motivate ever migrants to make the journey. *Id*. Even the Secretary of Homeland Security himself has admitted that border crossing has risen because of Biden Administration policy. In a memorandum written in response to litigation, Secretary Mayorkas stated that the Remain in Mexico policy "likely contributed to reduced migratory flows."[5]

The final three Biden Population Actions (Counts VIII-X of Plaintiffs' amended complaint): expanding the refugee program, creating a Central American Minor (CAM) parole program, and creating an Afghan parole program, also have a specific and "determinative" effect on local communities.[6] Contractors chosen by federal agencies are, and will continue, to directly bring nationals from foreign countries and resettle them in chosen U.S. communities, including those of several of the Plaintiffs. *See, Bennett v. Spear.* Because the Biden Administration has increased the refugee ceiling, DOS has taken, and will continue to take actions to award cooperative agreements to non-governmental organizations (NGOs), who will resettle refugees in specific local communities. The beneficiaries of the CAM parole program and the Afghan parole program are *likewise* resettled into specific American communities by the local NGOs that resettle refugees.

Plaintiffs Kevin Lynn, Linda Huhn, Bruce Anderson, and Rob Meyer all live in communities which have already had significant refugee resettlement by local NGOs, with the cumulative effect of resettlement by local NGOs (even if in any given year small) substantial

[5] Memorandum from Alejandro Mayorkas, Secretary, Dept. of Homeland Security, to Tae Johnson, Acting Director, U.S. Immigr. and Customs Enf't, et al, (Oct 29, 2021), https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf.

[6] *See Bennett v. Spear* 520 U.S. 169. The effects of actions by third parties that are not "independent" but "produced by determinative" effect of the challenged government action give standing to those harmed by the effects. In the refugee and parole programs, the federal government literally brings foreign nationals from foreign countries into American communities.

enough to change the character and aesthetics of the local communities. Lancaster County, Pennsylvania, the rural community where Mr. Lynn lives, has 20 times the national per capita rate of refugee resettlement. Meanwhile, Minnesota, where Ms. Huhn, Mr. Anderson, and Mr. Meyer live, is both the state with the most resettled refugees per capita and the number one state for "secondary migration"—refugees moving to Minnesota after their initial resettlement. Ex. 6 at 7. This significant refugee resettlement in their communities has already occurred, it is actual, not speculative. Furthermore, continued resettlement in the future through the expanded refugee program and the parole programs are not mere speculation. From long experience, Plaintiffs are aware that when DOS offers increased opportunities for refugee resettlement, NGOs in their area will certainly apply for them. Although DOS has not made the information rewarding the award of resettlement contracts available, local news reports in the areas where these plaintiffs live, the Twin Cities of Minnesota and Lancaster County Pennsylvania, have already confirmed Afghan nationals have been resettled locally, and many more are expected in the future.[7] These Afghan nationals are certainly, not conjecturally, being resettled in Plaintiffs' community as a direct result of the creation of the Afghan parole program, one of the challenged actions.

Explanations of why a significant number of refugees have already resettled in Plaintiffs' own communities over other places in the U.S. are not "speculation" and "conjecture" as to whether they will or not. NGOs choose communities to resettle refugees because of their characteristics making it suitable for refugee settlement. One of the criteria (set by DOS) for awarding contracts is whether DOS can match specific needs of refugees with specific resources

[7] Eva Anderson, *Minnesota resettlement agencies prepare to welcome Afghan refugees,* Kare 11, Nov. 14, 2021, https://www.kare11.com/article/news/local/minnesota-resettlement-agencies-to-welcome-afghan-refugees/89-774a7556-3c9a-46b2-b813-160099002078; Kim Lemon, *Afghan refugees to resettle in Lancaster County*, WGAL 8, Sept. 19, 2021, https://www.wgal.com/article/afghan-refugees-to-resettle-in-lancaster-county/37639896.

available in U.S. communities.[8] The local NGOs in Plaintiffs' areas are practiced in the application for resettlement contracts, and Plaintiffs know beyond speculation that these NGOs will be found eligible because the eligibility criteria will not change from year to year. These Plaintiffs certainly have a geographic nexus to significant refugee resettlement in a particular area, that affects their "concrete" interests, that are not "common to all members of the public." *Mendoza v. Perez*, 754 F. 3d 1002, 1010, n.6 (D.C. Cir. 2014) It is not mere conjecture that the foreign nationals who have entered the country will either pass through or settle in Plaintiff's local communities—it has already happened, and it is virtually guaranteed to continue to happen if the policies continue.

Furthermore, by insisting that the specific harms felt by Plaintiffs because of population growth are not fairly traceable to actions that induce population growth, particularly if the population growth occurred in the past, Defendants ignore that NEPA also requires the analysis of cumulative impacts. *See Kleppe v. Sierra Club*, 427 U.S. 390 (1976). "A cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . undertakes such other actions. 40 C.F.R. § 1508.7." *Tomac v. Norton*, 433 F. 3d 852, 864 (D.C. Cir. 2006) (citations omitted). Cumulative impact analysis should include: 1) the identification of the area in which effects will be felt; 2) the impacts expected in that area; 3) other actions, past, present, and proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area; 4) the impacts or expected impacts from these other

[8] See, e.g. U.S. Department of State, Reception and Placement, Bureau of Population, Refugees and Migration, https://www.state.gov/refugee-admissions/reception-and-placement/, last accessed on Dec. 13, 2021.

actions, and 5) the overall impact that can be expected if the individual impacts are allowed to accumulate. *Grand Canyon Trust v. FAA*, 290 F. 3d 339, 345 (D.C. Cir. 2002).

In the context of the massive impacts of population growth created by immigration, it is improper to attempt to analyze each smaller action in a vacuum, without considering the multiplying and synergistic effects over time and of many actions. NEPA requires analysis of predictable, long term effects. Population growth is known to amplify its effects over a long period. The new actions are demonstrably adding to damage that has already been done. None of the actions, *standing alone*, need to create significant increases in population if they do so *cumulatively.* The Biden Population actions were intended to induce additional immigration to the United States as well as to cause the increased retention of non-citizens in the United States. That suffices to give Plaintiffs who have been particularly effected by the population induced or augmented by such actions standing to challenge them.

Plaintiffs have clearly shown *de facto* causality between the Biden immigration actions, collectively and individually, enabled by flawed DHS NEPA procedures, and the damages described by the Plaintiffs. The immigration related actions taken by Defendants had a "predictable" effect on the actions of foreign nationals in deciding to enter the United States. *DOC v. New York*. The choices to come were by no means "independent" but "produced by determinative" effect by Defendants.

IV. Defendants cannot use waiver authority granted by Congress to build border barriers for the very opposite purpose (Count II).

In the past, Congress has recognized the harms caused massive illegal crossing at the southern border, and has passed legislation to prevent delay of border construction. As Defendants point out, Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, gives DHS the authority "to ensure *expeditious construction* of the

barriers and roads under this section" by waiving laws like NEPA. as Pub. L. 104-208, 110 Stat. 3009 (1996) (emphasis added). This authority, by its plain language, must to be read to support the building of a barriers and roads—not to prevent them from being built.

The previous Secretary of Homeland Security used this authority to waive NEPA in order to promote the construction of barriers and roads. The terms of DHS's waiver apply to all actions "with respect to the construction of physical barriers and roads." Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 85 FR 14961, 14,962-63 (Mar. 16, 2020). An illustrative list of examples is provided, including "accessing the project areas, creating and using staging areas, the conduct of earthwork, excavation, fill, and site preparation, and installation and upkeep of physical barriers, roads, [and] supporting elements…" *Id*. This language cannot be read, especially in connection with the illustrative list, to include a decision to terminate construction barriers permanently. *See Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2488 (2021) ("The Government contends that the first sentence of § 361(a) gives the CDC broad authority … But the second sentence informs the grant of authority by illustrating the kinds of measures that could be necessary."). The remainder of the text of the waiver provides further context showing that it cannot cover Defendants' decision to end all barrier construction. The Secretary explains the waiver is needed because of "an acute and immediate need to construct physical barriers and roads in the vicinity of the border of the United States in order to prevent unlawful entries." *Id*. A "acute and immediate need to construct physical barriers" cannot possibly be served by cancelling construction of these barriers. Furthermore, if the waiver's language *did* cover cancelling construction permanently, it would not have been legal. Congress conferred authority only to "ensure expeditious construction." Abruptly terminating construction cannot be considered to

expedite construction. Because cancelling construction does not fall within either the scope of the existing waivers or DHS's actual statutory authority, Defendants' waiver arguments fail.

Defendants' alternative argument that, even without waiver, terminating the wall would not "alter the substantive environmental status quo" further demonstrates their lack of understanding of their own NEPA duties. Def. Br. at 24. This argument makes clear that they can only conceive environmental effects caused by the government as the environmental effects of a physical building built by through the actions of government. That is, they make the claim that if there is no physical border barrier—the environment will remain pristine and undisturbed. However, if the *cancelling* of a border barrier creates or exacerbates a border crisis which itself has its own significant environmental impact, that cancelling of construction does not maintain the environmental status quo at all. That mass crossing has had, and continues to have, massive environmental effects—terminating the wall therefore, in no way, "leave[s] the world as it is." *Id*. Defendants' insistence, without ever having done analysis, that the act of cancelling a border barrier has the effect of merely leaving the world as it is precisely why NEPA mandates that agencies "take a hard look" at the effects of their actions. *See e.g. Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 368 (1989). When it comes to the effects of immigration, agencies have not taken any look at all.

V. Plaintiffs' claims are justiciable under the APA.

The APA creates a "basic presumption of judicial review." *DHS v. Regents of the Univ. of Cal.,* 140 S. Ct. 1891, 1905, 207 L. Ed. 2d 353 (2020) (quotation omitted). 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). Defendants have failed to meet this burden on all counts.

A) Plaintiffs may challenge DHS' adoption of NEPA procedures (Count I).

All agencies, including DHS, are under a legal obligation 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 § 1500.1, (1978 archived).

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." 40 CFR §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, which, because it was newly created as a Department by the Homeland Security Act of 2002, was able to first promulgate NEPA procedures with the experience of the decades of federal agency NEPA practice to examine. DHS promulgated its NEPA procedures through the publication of two documents, the Directive and the Instruction Manual. The Instruction Manual contains the substance of the compliance procedures and is the subject of challenge by Count I.

The APA provides for judicial review of the final actions of federal agencies, including rules. *See* 5 U.S.C. § 704. The final Instruction Manual, as it 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." *See, e.g. Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) ("A 'legislative rule' is one the agency has duly promulgated in compliance with the procedures laid down in the statute or in the Administrative Procedure Act.") Furthermore, the Instruction Manual is also a rule with counterparts in every other federal agency, which all have adopted NEPA procedures through CEQ mandate, and are all legally binding.

Despite the Instruction Manual's clear status as an action reviewable under the APA because it is a final rule, Defendant attempts to cast it as non-final under the APA by misapplying the two-prong test set out by the Supreme Court in *Bennett v. Spear* for determining (in more ambiguous circumstances, such as when there is no notice and comment) whether an agency action is final and thus subject to judicial review under the APA. 520 U.S. 154, 177-78 (1997). The first prong is that an agency action must "mark the consummation of the agency's decisionmaking process." The second prong requires that the action must be "one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* Such consequences need not be to a "third party" but may be to the agency itself. *See, e.g., Gen. Elec. Co. v. Evntl. Prot. Agency*, 290 F.3d 377, 382 (D.C. Cir. 2002) (explaining that the question of APA review turns on whether "the agency action binds private parties or the *agency itself* with the force of law") (citations omitted) (emphasis added). The Instruction Manual,

which was promulgated as a final version and had legal import, easily meets both of these prongs, as an examination of both its promulgation history and its content reveals.

1) The Instruction Manual's promulgation history clearly establishes its finality.

In cases where an agency promulgates a legislative rule in accordance with the APA notice and comment requirements set forth in 5 U.S.C. § 553(c), the adoption of the final rule is clearly the consummation of the agency decision making process. In accordance with the mandate set out by CEQ regulations, on Thursday, June 5, 2014, DHS provided a notice in the Federal Register that it was submitting its draft NEPA procedures for the purpose of soliciting comments from the public for a one-month period. National Environmental Policy Act Implementing Procedures, 79 Fed. Reg. 32,563, 32,563 (June 5, 2014). After a process including review of the public comments on the draft version and obtaining the permission from CEQ, DHS adopted its final policy and procedures for implementing the National Environmental Policy Act of 1969, and duly issued its "Notice of Final National Environmental Policy Act Implementing Procedures" on November 26, 2014 (the "Notice"). Environmental Planning and Historic Preservation Program, 79 Fed. Reg. 70,538, 70,538 (Nov. 26, 2014). In its summary, DHS stated:

> The purpose of this notice is to inform the public that the Department of Homeland Security (DHS or the Department) is issuing the final update to its policy and procedures for implementing the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), as amended, and the Council on Environmental Quality (CEQ) regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500-1508). The Department's NEPA procedures are contained in Directive 023-01, Rev. 01 and Instruction Manual 023-01-001-01, Rev. 01, Implementation of the National Environmental Policy Act . . . .

In the Notice, DHS explained that the revised Instruction Manual is final and intended to bind the agency: "the revised Instruction establishes the procedures for ensuring [DHS's

compliance with NEPA] is implemented in an effective and efficient manner." *Id*. DHS emphasized that the revised procedures including the Instruction Manual were the consummation of a long process:

> DHS invested over three years in developing the proposed revision to its NEPA procedures. The draft revised Directive and Instruction were provided to CEQ in the fall of 2013 for review and discussion prior to the June 5, 2014 publication for public comment. DHS provided its proposed final revised Directive and Instruction to CEQ in early September 2014; CEQ responded with a letter dated November 10, 2014 prior to this publication of the final Directive and Instruction as required under 40 CFR 1507.3(a), indicating that the Department's revised procedures conform to NEPA and the CEQ regulations.
>
> *Id* at 70,539.

The Notice definitively establishes that the Instruction Manual, along with the Directive, marked the "consummation of the agency's decisionmaking process," and thus meets the first prong of *Bennett*. *Id*. at 70,538.

Defendants attempt to muddy these very clear waters by looking to circumstances when a component agency later sets out to *apply* the procedures of the Instruction Manual to a future, unrelated situation, and noting that consulting the Instruction Manual is the "beginning," rather than the end, of its process.[9] Def. Br. at 19. The Instruction Manual itself, Defendants point out, does not include the issuance of "a record of decision, a finding of no significant impact, or a determination that the proposed action falls under a categorical exclusion." *Id*. Defendants overlook the very obvious problem that an agency that adopts a rule, and then later applies that rule to a specific situation, has engaged in two final actions under the APA, not one. It would be irrational, and, indeed, inappropriate, for any agency's NEPA procedures, that is, the general

[9] Defendants point out that the Ninth Circuit adopted this flawed reasoning in *Whitewater Draw Nat. Res. Conserv. Dist. v. Mayorkas,* 5 F.4th 997, 1019 (9th Cir. 2021). This court is not bound by the Ninth Circuit and should decline to follow its tortured reasoning or its uncritical acceptance of misrepresentations by the Defendants regarding the genuine role of the Instruction Manual in DHS NEPA compliance.

rules that govern its NEPA compliance, to include decisions about specific situations. DHS could hardly, for example, issue a "finding of no significant impact" for the decision to lease of a particular detention center that had not yet been proposed. This reasoning, 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 law if fails to include a direction to prosecute at least one specific individual.

2) The Instruction Manual's content demonstrates its legal consequences.

The Instruction Manual meets the second prong of *Bennett* because, by its own language, legal consequences have flowed and continue to flow from its adoption. The Instruction Manual is not voluntary, it is binding. It 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 document itself states: "The requirements of this Instruction Manual apply to the execution of all NEPA activities across DHS." *Id.* at 19. *See, e.g*., *Safer Chemicals, Healthy Families v. EPA*, "mandatory language in a rule establishing criteria for future agency actions "clearly qualif[ies] as final agency action." 943 F.3d 397, 418 (9th Cir. 2019). Given that the Instruction Manual is not internal—it needed to be approved by CEQ, and it likewise, cannot be changed without CEQ's permission, DHS has no choice but to follow it as written. Merely because the Instruction Manual provides DHS and its employees with flexibility rather than rigidity in the operation of its NEPA compliance does not make it voluntary. The Manual integrates NEPA with "review and compliance requirements under other Federal laws, regulations, Executive Orders, and other requirements for the stewardship and protection of the human environment…" Instruction Manual at IV-1. It states that "compliance with NEPA does not relieve DHS from complying with these other requirements." *Id*.

Compliance with these requirements certainly does not depend on NEPA for enforcement; rather it relies on the Manual itself to ensure that DHS's many employees do so. This document, the primary tool DHS uses to guarantee that its employees comply with a variety of federal laws and requirements, is clearly a final agency action.

Since its promulgation, "legal consequences" have flowed and continue to flow from the Instruction Manual, because it does indeed determine which DHS activities receive NEPA analysis, the scope of NEPA analysis to be accorded each action, and which DHS activities are automatically excluded from NEPA analysis. Contrary to Defendants' assertions, merely offering DHS a degree of "flexibility" in the way it complies with NEPA does not turn the Instruction Manual into a voluntary document that merely "facilitates" DHS's ability to carry out its obligations. The Instruction Manual makes a large number of decisions that are binding on DHS. It itemizes those DHS activities that "normally" require preparation of an Environmental Assessment or Programmatic Assessment; it delegates numerous authorities to the DHS Sustainability and Environmental Programs Director; it specifies when Supplemental Environmental Assessments are to be prepared, and when an Environmental Impact Statement or Programmatic Environmental Impact Statement is to be prepared, among many others.

Significantly, the Instruct Manual adopted 152 (generally multi-part) categorical exclusions. *Id*. at A-1-A30. Legal consequences also clearly flow from these decisions, especially the categorical exclusions, which give DHS authority to forego environmental analysis in a host of situations. *Id*. at A1-A-30. The *Whitewater Draw* court is therefore wrong in stating that the decisions in the Instruction Manual do not "augment or diminish DHS's NEPA obligations." Def. Br. at 21. The Instruction Manual in fact gives DHS employees authority to forego conducting NEPA review in a wide variety of situations.

DHS' regular use of its adopted NEPA procedures in its decision-making process, including in the immigration decision-making process, demonstrates that it does indeed regard the Instruction Manual as having legal consequences. 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 had established categorical exclusions, including categorical exclusion A3(d) and categorical exclusion A3(a). The establishment of these categorical exclusions, DHS stated, gave the agency the right to forego analyzing the changes to the asylum program contained within the proposed rule. 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.

B) Defendants repeatedly misapply INA provisions which merely restrict the judicial review of agency decisions in specific cases of *individual* aliens to falsely claim that the challenged actions, which all affect wide classes of aliens, cannot be reviewed.

1) The terminations of the Migrant Protection Protocols, the Prompt Asylum Claim Review, the Asylum Cooperative Agreements, and the Humanitarian Asylum Review Program are all reviewable under the APA. (Count III).

Plaintiffs have described the four companion actions that, collaboratively, created a policy that allowed the INA's asylum program to function without loopholes that create a permanent environmental, security, and humanitarian crisis of mass crossing on the border between the U.S. and Mexico as the "Remain in Mexico Policy."[10] These actions are the Migrant

[10] Generally, aliens apprehended entering the U.S. illegally or without proper documents are subject to "expedited removal," which means they can be removed quickly by DHS without appearing before an immigration judge. But aliens who claim a "credible fear," of persecution if returned, are sent for an interview by an asylum officer. If the asylum officer determines that alien does have a "credible fear," the alien is placed into removal proceedings before an immigration judge to file an asylum claim. Prior to the "Remain in Mexico" policy being instituted, this loophole allowed those with fraudulent asylum claims to simply overwhelm the system, as large number of illegal aliens were simply released into the interior with notices to appear in immigration court at a future date, though the government lacked the resources to enforce these notices. These loopholes therefore provide a powerful incentive for migrants without a valid

Protection Protocols ("MPP" the most well-known of the four actions), the Prompt Asylum Claim Review ("PACR"), the Asylum Cooperative Agreements ("ACR"), and the Humanitarian Asylum Review Program ("HARP"). The MPP meant non-Mexican aliens seeking to enter the country unlawfully were returned to Mexico to wait there for the duration of their INA § 240 removal proceedings. The ACAs with Honduras, Guatemala, and El Salvador gave aliens apprehended at the U.S. southern border the option to seek humanitarian relief in a regional country closer to the home country they were allegedly fleeing from persecution. PACR expedited credible fear screenings for non-Mexicans, and HARP, which applied to Mexicans, more efficiently handled asylum screenings at the southern border.

Taken together, these initiatives discouraged asylum forum shopping by curtailing the number of illegal aliens permitted into the United States to possibly make an asylum defense against removal. The actions terminating each of the four prongs of the policy that closed the asylum loophole therefore create "synergistic" impacts as they were meant to work together. Defendants apparently concede that PACR and HARP are reviewable under the APA, but argue that the termination of MPP and the ACAs are not. All four prongs of the policy are reviewable under the APA and should be reviewed for their cumulative and synergistic impacts under NEPA.

Defendants argue that the agency's decision to terminate MPP via memorandum on June 1, 2021, is unreviewable under 5 U.S.C. § 701(a)(2), which creates an exception from judicial review from actions absolutely committed to agency discretion. This exception from review is

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claim for asylum under the law, such as economic migrants, to cross the border illegally, and inevitably becomes self-reinforcing as an overwhelmed system becomes less and less able to screen fraudulent claims from valid ones. Likewise, the terminations of these four actions work collaboratively to establish a new and even larger environmental, security, and humanitarian crisis of mass crossing at the southern border.

extremely narrow, applying only in the "*rare circumstances* where the relevant statute 'is drawn so that a court would have *no meaningful standard* against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (emphasis added)).

The Fifth Circuit persuasively explained why this argument fails regarding MPP in *State v. Biden*, 10 F. 4th 538, 550-552 (5th Cir. 2021).[11] In that case, as they do in their motion to dismiss, Defendants attempted to ground this claim in the discretion conferred to DHS by § 1225(b)(2)(C), which provides:

> In the case of *an* alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the [Secretary of DHS] may return *the* alien to that territory pending a proceeding under section 1229a of this title [removal proceedings]. (emphasis added).

As the Fifth Circuit noted, this provision *does* provide DHS discretion to choose between several detention and non-detention options for individual aliens placed in removal proceedings. *Id*. But the Plaintiffs are not challenging any decision regarding any particular alien for being made without any NEPA analysis, they are challenging DHS's decision to rescind "a government program that creates rules and procedures for *entire classes* of aliens" without doing any NEPA analysis. *Id*. at 550. The INA does not commit such decisions to agency discretion. As the Fifth Circuit says, "Section 1225(b)(2)(C) certainly confers discretion, but there is no reason to think that discretion is infinite—just as there is no reason to think the discretion extends beyond the bounds of individualized, case-by-case determinations to begin with." *Id*. at 551.

[11] The Supreme Court denied DHS's application for a stay pending appeal of this case by a 6-3 vote. Biden *v*. *Texas*, No. 21A21, 2021 WL 3732667 (U.S. Aug. 24, 2021).

Defendants' argument that the termination of MPP falls outside of the "NEPA definition of major federal actions" because it is merely an "enforcement decision" also fails for the same reason. Neither MPP itself, or the termination of MPP, were merely "non-enforcement decisions." *Id*. at 552. MPP, "replete with rules procedures and dedicated infrastructure" was a "government program." *Id*. The elimination of such a program cannot be "dismissed as mere 'non-enforcement.'" *Id*.[12] As the Fifth Circuit stated: "the termination of MPP was simply not a non-enforcement decision. MPP was a government program—replete with rules procedures and dedicated infrastructure." *Texas*, 10 F.4th at 552. The instances where courts have found NEPA challenges precluded involve enforcement decisions of a temporary or singular nature, not permanent programs with rules and infrastructure like the MPP termination. Nothing in the statute or the regulations implementing it evidenced an intent to exclude such major federal actions from the ambit of NEPA.

Defendants' argument that the termination of the ACRs are foreclosed by Congress by § 1158 (a)(2)(A) fails for the same reason. This provision bars judicial review regarding the removal of "an alien" that is removed pursuant to a bilateral or multilateral agreement—that is, it precluded review of the application of removal or non-removal of a specific individual under the agreement—not the decision to enter into the agreement itself. Likewise, § 1252(a)(2)(b)(ii), which Defendants claim bars review, applies to challenges to *individual* aliens' cases.

[12] The termination of MPP would be reviewable in the Ninth Circuit as well, as the Ninth Circuit has found that the MPP's enactment was reviewable under the APA. *See generally Innovation Law Lab*, 951 F.3d 1073. If its enactment was reviewable, its revocation is equally reviewable. See, *e.g., State Farm*, 463 U.S. at 42 (holding that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change" and reviewing proffered reasons).

2) Defendants mistakenly rely on precedent precluding review of *individual* agency enforcement decisions to argue Plaintiffs' claims against policy enactments cannot be reviewed (Counts IV-VI).

Defendants uses a similar flawed argument that 5 U.S.C. § 701(a)(2) prevents review of Defendants' major policy changes if they relate to enforcement of the law. Defendants cite *Heckler v. Chaney* for the proposition that "an agency's decision not to prosecute or enforce, whether through civil or criminal process" is "generally committed to an agency's absolute discretion" and therefore unsuitable for judicial review. Def. Br. at 31. But *Heckler v. Chaney* applies to non-enforcement decisions in individual cases. It does not apply to an adoption of a general enforcement policy. *See, e.g.*, *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (explaining that "an agency's adoption of a general enforcement policy is subject to review," thereby distinguishing Heckler's presumption of unreviewability as applying only to individual cases of non-enforcement); *see also ILWU v. Meese*, 891 F.2d 1374, 1378 n.2 (9th Cir. 1989) (describing *Heckler* as applying to "an agency's refusal to prosecute or enforce a statute in a specific case."

Defendants' argument fails because none of Plaintiffs' challenges are to mere non-enforcement decisions in individual cases. Count IV challenges the adoption of a broad policy instructing CBP agents how to carry out their duties—not individual decisions over detaining and removing aliens. Count V also challenges the adoption of a new standard for ICE by a policy memorandum for the detention and removal of aliens, not the detention or removal of individual aliens.[13] Count VI challenges the adoption of a new standard for levying fines—not the levying of an individual fine.

[13] Plaintiffs' Amended Complaint challenges DHS' February 18, 2021 memorandum, labeled Policy Number 11090.1, which has been superseded by a new memorandum on September 30, 2021, which suffers the same procedural flaws under NEPA and the APA as DHS' original memorandum.

3) Defendants' wholesale creation of a new program that creates the ability for new classes of aliens to enter the country by programmatic use of the parole authority is reviewable under the APA. (Counts IX and X).

Defendants claim that the INA bars review of DHS' administrative creation of two new immigration programs, one for Afghan nationals and one for Central American minors (CAM) through the use of the parole authority granted to DHS. INA Section 212(d)(5)(A) provides that the Secretary of Homeland Security, "may … in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States[.]" 8 U.S.C. § 1182(d)(5)(A). The CAM program allows certain categories of aliens without lawful status to petition to bring their minor children to the United States.[14] The Afghan program instructs CBP officers to use parole for the "processing, transporting, and relocating of Afghan nationals for a period of two years." Memorandum from Alejandro Mayorkas, Secretary of DHS to Troy Miller, Commissioner of CBP (Aug. 23, 2021).

Defendants claim that their actions that created these two programs are not reviewable under the APA because of the INA provision, 8 U.S.C. § 1252(a)(2)(B)(ii), which prevents individuals from challenging the denial of discretionary relief from orders of removal. Yet again, Defendants ignore that Plaintiffs are simply not challenging either the grant or the denial of parole to any individual alien, but rather, to the decisions to create these programs, with their own set of rules and procedures, and classes of aliens that qualify, without NEPA review. Reviewing the decision to create a parole program does not constitute the review of an individual parole decision.

[14] U.S. Citizenship and Immigration Services, Central American Minors (CAM) Refugee and Parole Program, https://www.uscis.gov/CAM, last accessed on Dec. 17, 2021.

Defendants rely on egregious misreading of precedent to suggest that courts have generally accepted their argument. For instance, Defendants state that this Court has accepted their principle in *Aracely v. Nielsen*, 319 F. Supp. 3d 110, 135 (D.D.C. 2018). In fact, the *Aracely* court held the very reverse, and heard the plaintiff's challenge on the grounds that "[w]hile § 1252(a)(2)(B)(ii) undoubtedly bars judicial review of *individual* parole decisions, courts have declined to apply it to claims challenging the *legality of policies and processes* governing discretionary decisions under the INA." (emphasis added). *Id*. Likewise, the court in *Palacios v. Department of Homeland Security* did not, as Defendants imply, rule that the plaintiffs could not challenge DHS' decision not to renew their parole application under the CAM program because the termination of the program was not reviewable under the APA. 407 F. Supp. 3d 691 (S.D. Tex. 2019). Rather, that court found that the plaintiffs would not be successful in challenging DHS' policy of terminating the CAM program, as it had explained its decision to terminate the CAM program, "with its near 100% acceptance rate," did not grant parole on a case-by-case basis, as the Immigration and Nationality Act requires." *Id*. at 697.

Defendants' second argument, that the Court does not have a "clear benchmark," to review DHS's parole decisions, reveals a willful misunderstanding of Plaintiffs' claims. Def. Br. at 34. Plaintiffs are not challenging the lawfulness of Defendants' actions in creating these programs themselves (though they do not concede the creation of the program was otherwise lawful under the authorizing statute), but the lawfulness of creating these programs without any level of NEPA review whatsoever, even the citation of a categorical exclusion.

4) Limitations upon appeals of deportation orders in the INA do not preclude judicial review of DOJ's reinstatement of the policy of administrative closure (Count VII).

Defendants again mistakenly seek to bar judicial review of the adoption of a policy on the basis of provisions of the INA that provide limitations to aliens seeking to stay in the U.S. despite a deportation order. INA Section 1252 in its entirety refers to limitations on when an alien may seek judicial review of an order of removal. 8 U.S.C. § 1252. INA Section 1252(b)(9) merely states that an alien seeking relief must address all issues in a challenge to a final removal order. Defendants entirely misstate the nature of the rulings interpreting this provision on the legislative history of the provisions of INA § 1252(a)(5) and § 1252(b)(9), which set limitations on how aliens can seek relief from deportation, and channel judicial review of final orders to the circuit rather than the district court. *J.E.F.M. v. Lynch*, 837 F. 3d 1026 (9th Cir. 2016). Plaintiffs are not aliens who have received an order of removal, and therefore, this provision of the INA simply has no relevance to this case whatsoever. Plaintiffs are challenging the creation of a new final policy of wide applicability, not the removal of a single alien.

5) Plaintiffs do not challenge the President's Expansion of the Refugee Admissions Program but rather the agency actions carrying out that expansion via discretionary decisions that will have *local* environmental impacts (Count VIII).

All of Defendants' arguments regarding Plaintiffs' ability to challenge the actions of a President are irrelevant, because Plaintiffs are not doing so. Plaintiffs challenge not the decision to raise the refugee ceiling by President Biden himself, but the final decisions by DOS, the agency that implements this decision through the award of contracts to NGOs. Plaintiffs are not challenging President Biden for failing to carry out a NEPA analysis before raising the ceiling (even though his decision may have national environmental impacts). Nor are the Plaintiffs arguing that DOS needs to conduct an environmental analysis of his decision before he sets the

number. However, when a President substantially raises the refugee ceiling and promises to substantially raise it further in the next three years, DOS will *certainly* be awarding new and larger contracts to refugee resettlement contractors. The setting of terms and the award to specific grantees of these contracts are decisions that will have environmental impacts to local American communities—including those in which the Plaintiffs reside.

Defendants' second contention, that DOS is "merely carrying out directives of the president" when it comes to implementing the refugee resettlement program is simply factually mistaken. Def. Br. at 38. The Defendants' notion that DOS lacks any discretion over the refugee resettlement program (particularly in the NEPA context) depends on the absurd notion that the *only* meaningful decision that will have any *specific* environmental impacts is the yearly number that the President sets. On the contrary, the ultimate impacts will very much depend on decisions made by DOS and other agencies, as well as by the Non-governmental organizations ("NGOs") that actually resettle refugees in specific American communities.[15] DOS chooses the criteria by which to award contracts to local NGO affiliates, and these affiliates will make a host of decisions, including how many refugees will resettle in particular communities. These are the decision points where NEPA requires transparency and the opportunity for the affected public to comment.

C) Programmatic claims are also justiciable under NEPA.

Finally, Defendants falsely claim that Plaintiffs have failed to cite any "regulations, rules, orders, public notices, or policy statements" but are seeking "across-the-board relief" because identifying "specific actions" would be too "frustrating." Def. Br. at 43. On the contrary, in

[15] NEPA also applies to the actions taken by these NGOs, even though they are nonfederal entities. NEPA applies when a federal agency provides federal financial assistance for an activity or project to be carried out by a nonfederal entity. *See e.g Indian River Cty. v. Rogoff*, 201 F. Supp. 3d 1 (D.D.C 2016).

Counts II-X, Plaintiffs clearly identify and categorize discrete reviewable final agency actions, which constitute components of the general policy of the Biden Administration to increase the numbers of people entering and remaining in the United States. Plaintiffs have demonstrated that the combination of these policies do constitute a discrete programmatic action. Under the CEQ regulations, "major federal action" is defined to include the "Adoption of programs, such as a group of concerted actions to implement a specific policy or plan: systematic and connected agency decisions allocating agency resources to implement a specific statutory program or *executive directive*." *See* 40 C.F.R. § 1508.1(q)(3)(iii) (emphasis added).

Plaintiffs have alleged that the Biden Population Actions are components of a *de facto* program specifically carrying out the executive directives of the Biden Administration, which can be found in President Biden's executive orders and are often otherwise referred to in public documents and statements. One of these is President Biden's Executive Order 14012 of February 2, 2021, which directs the "Secretary of State, the Attorney General, and the Secretary of Homeland Security to "develop welcoming strategies that promote integration, inclusion, and citizenship" for foreign nationals who have entered the country" because the U.S. is "enriched socially and economically" by the presence of foreign nationals who permanently settle in the U.S. E.O. 14012, Feb. 2, 2021. This order directed the "Secretary of State, the Attorney General, and the Secretary of Homeland Security" to review all of existing "review existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions)," for inconsistencies with this policy. The Biden Population actions comprise the Defendants' implementation of that review. The Biden Population Actions are also carrying out President Biden's Executive Order 14010, which states that those who cross the border with the intention of permanently settling in the United States have "made our Nation better and

stronger." In addition, on May 3, President Biden stated that his Administration would "use every tool available" to increase the number of refugees settled in the United States.[16] The challenged Biden Population actions which flowed from these directions to defendant agencies DHS, DOS, and DOJ are therefore no "amorphous collection" of unrelated actions collected together and labeled a program but are a set of systematic and connected agency decisions allocating agency resources adopted in order to carry out specific executive directives. At this stage of the litigation, such allegations are sufficient.

The Supreme Court precedent cited by Defendants is inapposite. In *Lujan*, the Court rejected a broad challenge to the "continuing (and thus constantly changing) operations of the [Bureau of Land Management]" because these operations were not an "identifiable agency action" under the APA. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 (1990). In *SUWA*, where compliance with land use plans was also at issue, the Supreme Court rejected a challenge to the BLM's alleged failure to manage off-road vehicle use in certain wilderness areas. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("*SUWA*"). This challenge sought to hold the agency to account for "failure to act," but the Court concluded that the plaintiffs had failed to point to a "legally binding commitment" requiring defendants to act. *Id.* at 55, 72.

In contrast, Defendants could comply with NEPA here by conducting a programmatic environmental impact study on these interrelated actions taken to implement the Biden Administration immigration actions, including at the least, the Biden Population Actions. However, the components are individually reviewable as well. Plaintiffs have alleged that Defendants have violated NEPA by failing to either conduct an environmental assessment or an

[16] 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/.

environmental impact statement on each individual component (Counts II-X), or, alternatively, failing to prepare a programmatic environmental impact statement that adequately addresses the interrelated effects of these actions (Count XI). Plaintiffs do not allege that Defendants have no discretion in the manner they choose to conduct NEPA review over these actions. But Defendants do not have the discretion to ignore the requirements of NEPA before implementing these actions altogether.

VI. Conclusion

For the foregoing reasons, the Court should deny Defendant's Motion to Dismiss the First Amended Complaint. Plaintiffs are not challenging "immigration policy," but the failure to initiate any form of NEPA compliance upon the adoption of specific, environmentally significant programs.

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Respectfully submitted,

/s/ Julie B. Axelrod
D.C. Bar No. 1001557
Center for Immigration Studies
1629 K Street, NW, Suite 600
Washington, DC, 20006
Telephone: 202-466-8185
FAX: 202-466-8076
Email: jba@cis.org

Counsel for Plaintiffs