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

Defendants, U.S. Department of Homeland Security, U.S. Department of State, and U.S. Department of Justice, hereby move under Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure to dismiss the First Amended Complaint (ECF No. 17) in these consolidated cases with prejudice because Plaintiffs lack standing and have failed to state a claim upon which relief can be granted. The grounds for this motion are set forth below in the accompanying statement of points and authorities.

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I. INTRODUCTION

Plaintiffs oppose U.S. immigration policies, which they contend "augment the American Population" and lead to widespread environmental harms such as urban sprawl, traffic, crowds, and pollution. First Amended Complaint (FAC) ¶¶ 22, 87. Plaintiffs challenge nine actions by the Biden administration, which Plaintiffs allege require project-level or—collectively—programmatic analysis under the National Environmental Policy Act (NEPA). Plaintiffs also challenge whether the NEPA Instruction Manual issued by the Department of Homeland Security (DHS)[1] is consistent with NEPA's statutory requirements and with the Council on Environmental Quality's implementing regulations.

At their core, Plaintiffs' claims are a collection of non-justiciable challenges to executive policies they dislike, and which they believe will "increase[e] the . . . population of the United States." FAC ¶ 97. Plaintiffs lack standing to bring their claims for many reasons. Their complaint alleges highly speculative and generalized grievances related to the effects of population increases. Such grievances are non-cognizable. Further, the complaint fails to plausibly allege that any of the harms of which they complain are traceable to the policies they challenge, as opposed to broader socioeconomic and geopolitical forces and decades of prior policy decisions, and are redressable by this Court.

Even if Plaintiffs had standing to challenge these policies, none are reviewable for a variety of reasons. The DHS Instruction Manual (Count I) is not a final agency action that can be challenged under the Administrative Procedure Act (APA). Plaintiffs cannot challenge termination of border wall construction (Count II) because the prior administration waived

[1] Instruction Manual 023-01-001-01, Revision 01, *Implementation of the National Environmental Policy Act*.

NEPA requirements regarding border wall construction and halting construction is not itself a major federal government action subject to NEPA. Six of the nine "policies" that Plaintiffs challenge (Counts III-VI, IX-X) are not reviewable because they are enforcement decisions or otherwise committed to agency discretion by law. By statute, this Court lacks jurisdiction to hear any challenge to how the Attorney General administers the administrative closure process for removal proceedings (Count VII). Similarly, under established Supreme Court precedents, Plaintiffs cannot challenge under the APA the President's decision to increase the number of refugees who may be admitted to the United States (Count VIII). Finally, Plaintiffs cannot circumvent the defects in their challenges to each of the separate policies by bringing a broad programmatic challenge to the policies in gross.

This Court should dismiss Plaintiffs' First Amended Complaint.

II. BACKGROUND[2]

Plaintiffs are the Massachusetts Coalition for Immigration Reform (MCIR), an organization whose members favor policies that will sharply reduce immigration, and individuals from several states who allege that immigration is causing environmental harms. Am. Compl. for Decl. and Inj. Relief ¶¶ 25-36, ECF No. 17 ("FAC"). Plaintiffs assert that for decades the federal government has chosen "to create population growth through immigration . . . yielding significant and foreseeable environmental consequences" (*id.* ¶ 13) including urban sprawl; loss of farmland, habitat, and biodiversity; and increases in greenhouse gas emissions, water usage, and pollution. *E.g.*, *id.* ¶¶ 87-92.

[2] The statements in this section are based on the allegations in Plaintiffs' complaint.

The First Amended Complaint ("Complaint") challenges nine "actions taken by the Biden Administration to augment the American population," which Plaintiffs denominate the "Biden Population Actions." *Id.* ¶ 22. The actions Plaintiffs allege are: (1) termination of the border wall construction (Count II); (2) termination of the "Remain in Mexico" policy (Count III); (3) a policy allowing border patrol agents to grant temporary permission to undocumented persons to stay in the United States and to arrange transportation for those individuals (Count IV); (4) a policy forbidding the detention and removal of "the vast majority" of undocumented persons (Count V); (5) a policy to stop fining persons subject to removal orders for failing to depart the United States (Count VI); (6) the Attorney General's reinstatement of the administrative closure process in immigration courts (Count VII); (7) an expansion of the refugee resettlement program (Count VIII); (8) DHS's "restart[ing]" a program to use parole authority for Central Americans (Count IX); and (9) DHS's creation of a "new" program to use parole authority for Afghan nationals (Count X). FAC ¶¶ 226-52.

For each of these alleged actions, Plaintiffs argue that NEPA required the government to prepare an environmental impact statement (EIS) or environmental assessment (EA). *See id.* Plaintiffs also challenge the nine so-called "Biden Population Actions" collectively, arguing that NEPA required the government to prepare a nationwide, programmatic EIS evaluating the environmental impacts as a programmatic action. *See id.* ¶¶ 253-257 (Count XI). Finally, Plaintiffs assert that DHS failed to address immigration policy in its NEPA "Instruction Manual" (Count I), an internal document that guides DHS personnel on NEPA compliance. *See id.* ¶¶ 220-25 (Count I).

III. STATUTORY BACKGROUND

A. The National Environmental Policy Act

In enacting NEPA, Congress was concerned with the potential impacts of major federal actions significantly affecting the physical environment. *See* 42 U.S.C. § 4332(C). NEPA does not apply to every action involving a federal agency, only those that propose "major Federal action." *See Macht v. Skinner*, 916 F.2d 13, 16-17 (D.C. Cir. 1990), *abrogated on other grounds by Karst Env't Educ. & Prot. v. EPA*, 475 F.3d 1291, 1296 (D.C. Cir. 2007). NEPA imposes procedural rather than substantive requirements, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 129 (D.C. Cir. 1987), requiring federal agencies to prepare a detailed environmental impact statement or "EIS" for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). When it is not clear whether a proposed major federal action requires preparation of an EIS, the agency may conduct a shorter preliminary examination, called an environmental assessment or "EA." 40 C.F.R. §§ 1501.5, 1508.1(h). Agencies may also comply with NEPA through a "categorical exclusion" for actions that the agency has determined categorically do not have a significant impact, and therefore do not require preparation of an EA or EIS. *Id*. §§ 1501.4, 1508.1(d). An agency's compliance with NEPA is bounded by a "rule of reason" to "ensure[] that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (citation omitted).

B. U.S. Immigration Law, as Relevant to this Case

The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, delegates authority to the Secretary of Homeland Security for the administration and enforcement of laws relating to

the immigration and naturalization of noncitizens, and authorizes the Secretary to promulgate regulations and rules for carrying out this responsibility. *See* 8 U.S.C. § 1103(a)(1)-(3). The Attorney General can promulgate certain other regulations, review administrative determinations, delegate authority, and perform other such acts as deemed necessary to effectuate the authority to grant discretionary relief. 8 U.S.C. §§ 1103(g)(1)&(2).

When DHS seeks to remove a noncitizen from the United States, it generally issues a "notice to appear" that explains the "charges against the alien and the statutory provisions alleged to have been violated." 8 U.S.C. § 1229. Under 8 U.S.C. § 1229a, immigration judges decide whether noncitizens are removable and resolve claims seeking relief or protection from removal, including claims for asylum. 8 U.S.C. § 1229a(a)(1). A noncitizen may appeal an immigration judge's decision to the Board of Immigration Appeals (BIA) and seek judicial review of the BIA's decision through a petition for review with a federal circuit court of appeals. 8 U.S.C. § 1252(a)(5), (b)(2); 8 C.F.R. § 1003.38. A petition for review is the exclusive means for judicial review of any question of law or fact—or interpretation or application of any statutory provision—that arises from an action or proceeding in immigration court. *Id.* § 1252(a)(5), (b)(9).

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which, under Section 102(a) of the Act, required the Attorney General to "take such actions as may be necessary to install additional physical barriers and roads . . . in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." Pub. L. No. 104–208, Div. C., Title I, § 102(a), 110 Stat. 3009, 3009–554 (1996), codified at 8 U.S.C. § 1103 note. IIRIRA Section 102(c), as originally enacted, authorized the Attorney General to waive NEPA when it "was necessary to ensure expeditious

construction of the barriers and roads . . ." *Id.* § 102(c). The Homeland Security Act of 2002 transferred responsibility to construct border barriers, and the corresponding NEPA-waiver authority, from the Attorney General to DHS. Pub. L. No. 107–296, 116 Stat. 2135 (2002). In 2005, the REAL ID Act amended the waiver authority of section 102(c) expanding the Secretary of DHS's authority to waive "all legal requirements" that the Secretary, in his or her own discretion, determines "necessary to ensure expeditious construction of the barriers and roads under this section." Pub. L. No. 109–13, Div. B, Title I, § 102(c)(1), 119 Stat. 231, 302, 306 (2005). All claims challenging these waivers must be filed in the District Court within 60 days and the only permissible causes of action are those alleging a violation of the United States Constitution. *Id.* § 102(c)(2)(A)-(B); *Ctr. for Biological Diversity v. McAleenan*, 404 F. Supp. 3d 218, 235 (D.D.C. 2019).

IV. STANDARD OF REVIEW

A. Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)

Before the Court can consider the merits of a case, it must determine whether Plaintiffs have properly invoked the Court's jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause."). A federal court is presumed to lack subject matter jurisdiction and the burden of establishing the contrary rests on the plaintiff. *Turner v. Bank of N.A.*, 4 U.S. 8, 10 (1799) ("the fair presumption is . . . that a cause is without its jurisdiction, until the contrary appears"). A federal court has no subject matter jurisdiction where the plaintiff lacks standing. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1286 (D.C. Cir. 2005); *Hunter Innovations Co. v. Travelers Indem. Co. of Conn.*, 605 F. Supp. 2d 170, 172 (D.D.C. 2009). Therefore, a motion to dismiss based on lack of standing is properly considered as a motion to dismiss for lack of

subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Id.* Plaintiffs must establish each element of standing, and standing is determined on a claim-by-claim basis. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

Under Federal Rule of Civil Procedure 12(b)(6), the moving party must demonstrate that a plaintiff has failed to state a claim for which relief may be granted. *Kimberlin v. U.S. Dep't of Justice*, 150 F. Supp. 2d 36, 41 (D.D.C. 2001), *aff'd*, 318 F.3d 228 (D.C. Cir. 2003).

Under either Rule 12(b)(1) or 12(b)(6), the Court must accept the well-pleaded factual allegations as true, and must give Plaintiffs the benefit of all inferences to be drawn from those allegations. But it need not "assume the truth of legal conclusions [or] accept inferences that are unsupported by the facts set out in the complaint." *Attias v. CareFirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017) (citation and quotation omitted). To survive a motion to dismiss under Rule 12(b)(6), the plaintiff must provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007)), to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (omission in original). Instead, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw [a] reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

If "the court finds that plaintiffs have failed to allege all the material elements of their cause of action," then the court may dismiss the complaint without prejudice, *Taylor v. FDIC*,

132 F.3d 753, 761 (D.C. Cir. 1997), or with prejudice, if the court "determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency," *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (internal quotation marks and citations omitted).

B. Judicial Review Under the Administrative Procedure Act

The APA provides for judicial review of challenges to a federal agency's compliance with NEPA. *Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1297 (D.C. Cir. 2007). The APA waives federal sovereign immunity over claims brought by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . ." 5 U.S.C. § 702. "Agency action" . . . "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.]" 5 U.S.C. § 551(13).

Jurisdiction under the APA is limited to review of "[a]gency action made reviewable by statute and final agency action for which there is no adequate remedy in a court . . . ." 5 U.S.C. § 704; *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). The APA carves out an exception to judicial review "to the extent that ... agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). For an agency action to be a "final agency action" reviewable under § 706(2), the action must both "mark the consummation of the agency's decisionmaking process," and "be one by which rights or obligations have been determined, or from which legal consequences will flow[.]" *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (internal quotation marks and citations omitted). To state a cognizable claim under § 706(2) of the APA, a plaintiff must identify a final agency action that is arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law. *Nevada v. Dep't of Energy*, 457 F.3d 78, 87-88 (D.C. Cir. 2006).

IV. ARGUMENT

A. Plaintiffs Lack Standing Under Article III to Pursue Their Claims.

The standing doctrine arises from Article III's "cases" and "controversies" limitation on the subject matter jurisdiction of federal courts. U.S. CONST. art. III, § 2, cl. 1. The "irreducible constitutional minimum" for standing requires: (1) a legally cognizable, concrete injury-in-fact; (2) that is fairly traceable to the conduct of the defendant; (3) and that may be redressed by a favorable order from a court. *Defs. of Wildlife*, 504 U.S. at 560-61. Plaintiffs bear the burden of establishing standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). As explained below, Plaintiffs fail to meet their burden for any of their NEPA theories.

Where, as here, a plaintiff alleges a procedural injury, the redressability and immediacy requirements are relaxed. *See Defs. of Wildlife*, 504 U.S. at 572 n.7. But the plaintiff must still show that the challenged decision affects their concrete interests. The mere "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers,* 555 U.S. at 496; *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("a bare procedural violation, divorced from any concrete harm," cannot satisfy the injury-in-fact requirement). Further, plaintiffs have an obligation to tie their alleged injuries to the effects of the rule they challenge on the specific places they use to establish a "geographic nexus." *See Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 592 (D.C. Cir. 2019). For example, in the *American Fuel* case, the D.C. Circuit found that plaintiffs had standing to challenge an EPA rule setting renewable fuel standards *because* their declarants established the rule was likely to harm "the particular habitats of the

whooping cranes and Gulf sturgeon in which [the declarants] have interests." *Id.* at 593-94 (noting plaintiffs showed land conversions caused by the rule "near and within *the very areas* that [the declarant] visits to observe whooping cranes. . . .") (emphasis added).

Standing is "ordinarily substantially more difficult to establish," in cases such as this one, where the existence of one or more elements "depends on the unfettered choices made by independent actors not before the courts." *Defs. of Wildlife*, 504 U.S. at 562. In these circumstances, the plaintiff must "adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.*; *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the U.S.*, 894 F.3d 1005, 1012 (9th Cir. 2018); *St. John's United Church of Christ v. FAA*, 520 F.3d 460, 463 (D.C. Cir. 2008).

1. Plaintiffs Allege Injuries That are Too Speculative and Generalized to Support Standing.

Plaintiffs speculate that the so-called "Biden Population Actions" will cause noncitizens to locate or relocate within their individual communities and cause various types of widespread harm. Plaintiffs' allegations about speculative and generalized harms do not support standing.

Four members of Plaintiff MCIR—Henry Barbaro, Steve Kropper, David Holzman, and Mike Hanauer—claim to have experienced "environmental degradation to places and environments they value because of DHS's . . . NEPA procedures." *Id.* ¶ 142. Mr. Barbaro alleges that his ability to enjoy outdoor activities in New England has declined "because of overcrowding caused by population growth" due to decades of federal immigration policy. *Id.* ¶¶ 145-47. As to the Biden Population Actions his organization challenges here, Mr. Barbaro claims Boston is "a fairly popular destination for those arriving on buses and planes from the border" and for new asylum seekers. *Id.* ¶¶ 150-51. Mr. Kropper alleges population growth has increased greenhouse gas emissions and traffic and contributed to the loss of biodiversity. *Id.* ¶¶

153, 155. He also complains of trash in Big Bend National Park allegedly left by those irregularly crossing the border who have been enticed to do so by the Biden Population Actions. *Id.* ¶¶ 157-60. Mr. Holzman complains of lost open spaces, increased noise, and fewer butterflies—impacts he claims will intensify through the Biden Population Actions as "an unknown number" of new residents head to the Boston area. *Id.* ¶¶ 161-64. Mr. Hanauer alleges that immigration-driven population growth has diminished his ability to bike and enjoy nature. *Id.* ¶ 165.

The allegations of Plaintiffs Lynn, Huhn, Meyer, and Anderson are similarly general and focused on changes to the environment that—if caused by immigration—are decades in the making. Mr. Lynn complains of years of increasing traffic and commuting time in Los Angeles. FAC ¶¶ 166-69. Mr. Lynn further alleges his current home, Lancaster County, Pennsylvania, stands to be "transform[ed]" by the Biden Administration's actions on refugee resettlement. *Id.* ¶¶ 169-72. Ms. Huhn complains of noticing more foreign nationals in Minneapolis in the 2000's and 2010's than in the 1990's and asserts that "[n]ow that the Biden Administration has raised the refugee ceiling . . . [she] expects the refugee program to have continuing, increasing effects," such as more sprawl. *Id.* ¶¶ 174-79. Ms. Huhn also blames the alleged extinction of the Karner Blue Butterfly from Minnesota on "population growth created by the refugee program." *Id.* ¶ 177. Mr. Meyer, also from Minnesota, complains of increased development near his family's cabin in northwest Wisconsin, suburban sprawl, traffic congestion, and increased crowds and pollution at his favorite recreation spots. *Id.* ¶¶ 182-85. Mr. Anderson, a birdwatcher and nature enthusiast also from Minnesota advances similar complaints about sprawl and development, and more ATVs on nature trails. FAC ¶¶ 190-93.

Finally, Plaintiffs Chance Smith and Gail Getzwiller claim injuries specific to irregular immigration along the southern border where they live and work on cattle ranches. Mr. Smith claims that some of the Biden Population Actions have enticed border crossers and smugglers that trespass on the ranch. FAC ¶¶ 199-204. Ms. Getzwiller points to large quantities of trash left behind by those crossing the border irregularly. *Id.* ¶¶ 206-09. Ms. Getzwiller also complains about what she perceives as decreased border protection activity and more lax treatment of those apprehended at the border by "hand[ing] them over to . . . Catholic Services who take them . . . and board them onto buses or planes to all sorts of places in the interior." *Id.* ¶¶ 215-16.

Plaintiffs repeatedly present theories of injury too conjectural to establish injury in fact. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (noting injury must be "certainly impending" and that "possible future injury" does not suffice); *Steel Co.*, 523 U.S. at 103 (same). For example, Plaintiffs speculate that the actions they complain about may cause many noncitizens to locate or relocate within their communities to the detriment of the local environment. *See, e.g.*, FAC ¶ 164 (Mr. Barbaro "feels that many more millions *may* come in over the next three and a half years if the actions continue") (emphasis added); *id.* ¶ 151 ("if this Boston docket [of the Boston Immigration Court] gets too full, Boston immigration judges *may* simply choose to clear their dockets without ordering deportations . . . ") (emphasis added); *id.* ¶ 176 (Ms. Huhn "*wonders* whether the numerous local NGO's in Minnesota will ultimately also take Afghan[] nationals from the new parole program") (emphasis added). *See also id.* ¶¶ 181, 188, 191, 193 (Plaintiffs expressing their "fears" of possible future increases in the number of noncitizens where they live). These speculative concerns about the future fall well short of establishing an injury in fact. *See Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) (finding

no injury based on "conjectural and conclusory" allegations that federal immigration policy increased irregular immigration resulting in more crime). As the Ninth Circuit has recently held in a case bringing claims similar to Count I and XI here, a court "may not find standing based on the Plaintiffs' cumulative speculation about their injuries in fact." *Whitewater Draw Nat. Res. Conserv. Dist. v. Mayorkas*, 5 F.4th 997, 1019 (9th Cir. 2021).

Nor does speculation that the number of refugees will increase because local NGOs work to resettle refugees (*e.g.*, FAC ¶¶ 170, 175, 189) or that there are desirable medical and social services in the United States (*e.g.*, *id.* ¶ 187) establish the requisite geographic nexus between the government actions Plaintiffs challenge and the areas where they live. Plaintiffs do not plead facts showing that the number of refugees that will resettle in the areas where they live will increase because of the actions they challenge or that those refuges will cause the harms they complain of, *e.g.*, more traffic, pollution, and crowds. *See Whitewater Draw*, 5 F.4th at 1017 ("Plaintiffs have not shown a reasonable probability that . . . rules [pertaining to opportunities for foreign students] cause population growth *anywhere* in a manner that affects Plaintiffs' interests") (emphasis in original).

Instead, Plaintiffs ask the Court to assume that noncitizens—whether refugees, paroled noncitizens, or undocumented persons apprehended at the border—will establish residence in areas where Plaintiffs live or visit in numbers that meaningfully contribute to the environmental effects about which Plaintiffs complain. Plaintiffs offer no allegations that plausibly support that inference. And the Court cannot presume that any population growth anywhere in the country will harm Plaintiffs' interests. *See Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 667 (D.C. Cir. 1996); *see also Summers*, 555 U.S. at 498 (basing standing on the "statistical probability that

some of [plaintiffs'] members are threatened with concrete injury . . . would make a mockery of our prior cases").

Further, to have standing, Plaintiffs must show that the specific actions they challenge threaten them "in a personal and individual way." *Defs. of Wildlife*, 504 U.S. at 560 n.1. The Supreme Court has made clear that "standing to sue may not be predicated upon an interest . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974). But plaintiffs repeatedly allege broad, environmental harms (*see* FAC ¶¶ 143-196) without showing the invasion of a legally protected interest that is concrete and particularized. Resolving such "generally available" grievances "is the function of Congress and the Chief Executive," not the courts. *Defs. of Wildlife*, 504 U.S. at 576. The "injury (if any) to a citizen qua citizen from admission of an alien is an injury common to the entire population, and seems particularly well-suited for redress in the political rather than the judicial sphere." *Fed'n for Am. Immigr. Reform v. Reno*, 93 F.3d 897, 901 (D.C. Cir. 1996). *See also Sadowski v. Bush*, 293 F. Supp. 2d 15, 19 (D.D.C. 2003) ("merely alleging that [a plaintiff] lives in an area affected by illegal immigration is not enough to show standing.").

In sum, Plaintiffs cannot establish standing through their theories of speculative and generalized injury instead of the necessary concrete and particularized injury that is actual or imminent.

2. Plaintiffs' Alleged Injuries Are Not Fairly Traceable to the Agency Actions They Challenge, or Redressable by this Court.

Even assuming Plaintiffs have established an injury in fact, their asserted injuries from population growth are not "fairly traceable" to the actions they challenge, or for similar reasons redressable by this Court. The APA requires a plaintiff to "show that he has 'suffer[ed] legal

wrong' *because of* the challenged agency action, or is 'adversely affected or aggrieved' by that action[.]" *Nat'l Wildlife*, 497 U.S. at 883 (quoting 5 U.S.C. § 702) (emphasis added). Here, that means Plaintiffs must plead sufficient facts that the challenged government actions meaningfully contribute to population growth, and that this population growth is *causing* the alleged harm, such that the Court by setting aside the actions can redress Plaintiffs' injuries. Plaintiffs have not done so.

First, Plaintiffs fail to plead sufficient facts demonstrating that the actions they challenge—rather than broader socioeconomic and geopolitical forces or decades of policy decisions across the government regarding infrastructure, energy, and climate, and so on—are the cause of their injuries. The urban sprawl, development, crowds, loss of open space, loss of biodiversity, traffic, noise, and pollution of which Plaintiffs complain have many contributing causes. While population growth may be one cause of these alleged injuries (and immigration may in turn be one cause of population growth), Plaintiffs do not allege facts showing that the nine policies they challenge meaningfully contribute to population growth that will harm their concrete interests. Taking MCIR member Kropper as an example, Plaintiffs plead no facts showing that his alleged increased commuting time from 18 minutes to an hour is tied to immigration, or that recent government actions "will create even more congestion." FAC ¶ 154. All of Plaintiffs' alleged injuries suffer from the same fundamental flaw: Plaintiffs have failed to connect their alleged harms to any of the challenged policies, despite their burden to do so.

Second, Plaintiffs' alleged injuries each flow from the voluntary actions of third parties, increasing Plaintiffs' burden of proving traceability. *See, e.g.*, FAC ¶¶ 159, 214 (alleging that six actions "encourage" irregular border crossing at the southern border with Mexico). Plaintiffs cannot meet that heightened burden through bare speculation. "An action by a third party not

before the court may cause injury for Article III standing [only] when that action is the result of a determinative or coercive effect upon that third party." *Nat'l Ass'n of Home Builders v. U.S. Fish & Wildlife Serv.*, 34 F. Supp. 3d 50, 59 (D.D.C. 2014); *see also Fla. Audubon* Soc'y, 94 F.3d at 669-70 (affirming dismissal of plaintiffs' claim that expanded tax credit for ethanol-based gasoline additives would lead to increased agricultural pollution "because of the number of speculative links that must hold for the chain to connect the challenged acts to the asserted particularized injury"). As the Ninth Circuit explained in affirming the district court's dismissal of functionally identical claims lacking standing:

> Where, as here, an asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed to demonstrate causation and redressability. In that case, the plaintiffs must adduce facts showing that [the choices of independent actors not before the courts] have been or will be made in such manner as to produce causation and permit redressability of injury. In such circumstances, involving independent actors, the Court has cautioned that standing is not precluded but it is ordinarily substantially more difficult to establish.

Whitewater Draw, 5 F.4th at 1013-14 (quotation marks and citations omitted). There, the Ninth Circuit found that plaintiffs failed to show that the Deferred Action for Childhood Arrivals (DACA) policy—one of the actions they challenged—"caused illegal immigration and was not merely one of the 'myriad economic, social, and political realities' that might influence an alien's decision to 'risk[] life and limb' to come to the United States." *Id.* at 1015 (citing *Arpaio*, 797 F.3d at 20 (also rejecting a DACA challenge based in part on allegations of increased crime)).

Plaintiffs here advance the same "enticement" theory the Ninth Circuit rejected in *Whitewater Draw*, arguing that the actions they challenge "encourage" irregular immigration. It should be rejected for the same reason: "any number of variables might influence an alien's independent decision to resettle" and Plaintiffs have not shown that any noncitizen made an

immigration decision that harmed Plaintiffs' interests "*because* of" the actions they challenge. *Whitewater Draw*, 5 F.4th at 1017.

Indeed, Plaintiffs' injuries are even more attenuated than those rejected by the D.C. Circuit in *Arpaio*. Even assuming Plaintiffs' alleged injuries were caused in part by population growth, they have not pleaded that population growth *where they live* is caused by the challenged government actions rather than the independent choices of third parties who locate or relocate in Plaintiffs' communities. *Cf. Arpaio*, 797 F.3d at 21 (alleging some foreign citizens will illegally enter the United States and settle in Maricopa County where they will commit crimes). Plaintiffs thus fail to put forth sufficient allegations that their claimed injuries are "a predictable effect" of the challenged government actions rather than "a product of independent, third-party decision making." *Whitewater Draw*, 5 F.4th at 1019. "Plaintiffs' speculation lengthens the causal chain beyond the reach of NEPA" and should be rejected as not fairly traceable to the government actions they challenge. *Id.* at 1015-16 (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 775 (1983)).

In short, Plaintiffs lack Article III and APA standing to assert claims against any of the actions they challenge in this lawsuit.

B. The Instruction Manual (Count I) Is Not a Final Agency Action.

The Court should also dismiss Count I because the DHS Instruction Manual is not "final agency action" reviewable under the APA. NEPA claims are reviewed under the APA, which limits judicial review to "final agency action." 5 U.S.C. § 704; *Trudeau v. FTC*, 456 F.3d 178, 185, 187 (D.C. Cir. 2006); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61–62 (2004) (SUWA). The Supreme Court has established a two-part test for determining whether agency action is final: the action must (1) "mark the consummation of the agency's decisionmaking

process" and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett,* 520 U.S. at 177-78 (internal quotation marks and citations omitted). The Instruction Manual satisfies neither requirement. Indeed, for those reasons, the Ninth Circuit recently upheld the dismissal of the same claim in *Whitewater Draw*. 5 F.4th at 1008-10. There is no reason for a different outcome here.

1. The Instruction Manual Does Not Mark the Consummation of DHS's Decision-Making Under NEPA.

To satisfy the first prong of the *Bennett* test, the challenged agency action must represent the consummation of the agency's decision-making process. 520 U.S. at 177-78. Courts have examined several factors to ascertain whether an action marks the consummation of an agency's decision-making process and the Instruction Manual satisfies none.

The Instruction Manual together with DHS Directive 023-01, *Implementation of the National Environmental Policy Act,* establish DHS's "policy and procedures" for complying with NEPA when the agency proposes an action. Instruction Manual at III-1.[3] The Directive 023-01 and the Instruction Manual provide "a flexible framework for implementing NEPA" to "ensure the integration of environmental stewardship into DHS decision making as required by NEPA." Directive 023-01 at 1. Agency action that "establishes only the procedural framework under

[3] For the Court's convenience, copies of DHS Directive 023-01 and DHS Instruction Manual 023-01-001-01, are attached to this memorandum. *See* Exs. A-B. The Court may consider them for purposes of this motion given that the complaint refers to them. *Whiting v. AARP*, 637 F.3d 35, 363 (D.C. Cir. 2011) (in a dispute over meaning of insurance contract, court could consider promotional materials extrinsic to the contract itself, as the materials were "referred to and relied on in the complaint" and were attached to defendant's motion to dismiss); *see also Int'l Bhd. of Teamsters v. Atlas Air, Inc.*, 435 F. Supp. 3d 128, 135 (D.D.C. 2020) (On a motion to dismiss, the Court may consider "documents attached as exhibits or incorporated by reference in the complaint" and "documents attached to a motion to dismiss if their authenticity is not disputed, they are referred to in the complaint, and they are integral to the plaintiff's claims.")

which the [agency] intends to operate" is not reviewable under the APA. *Home Builders Ass'n v. U.S. Army Corps of Eng'rs*, 335 F.3d 607, 619 (7th Cir. 2003). As the Ninth Circuit found, "the [DHS Instruction] Manual does not make any decision. Rather, it establishes the procedures for ensuring DHS's compliance with NEPA." *Whitewater Draw*, 5 F.4th at 1008 (internal quotation marks omitted).

An action may mark the consummation of an agency's decision-making process if it constitutes the agency's "last word on the matter." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). The Instruction Manual is not a final statement of position on any matter. Rather, the Instruction Manual sets out DHS's procedures for ensuring compliance with *preexisting* requirements of NEPA in agency decision-making. *See, e.g.*, Instruction Manual, section V ("Procedures for Implementing NEPA"). For any proposed action, regardless of subject, the Instruction Manual explains that DHS components must determine "the appropriate analytical approach, including whether NEPA applies." *Id.* at V-1. The Manual "facilitates the *beginning* of the NEPA review process for proposed DHS actions." *Whitewater Draw*, 5 F.4th at 1009. As the Ninth Circuit explained, "[t]his is not the stuff of final agency decisionmaking." *Id*.

In determining whether an agency action is final, a court may ask whether an agency has "arrived at a definitive position on the issue that inflicts an actual, concrete injury[.]" *Darby v. Cisneros*, 509 U.S. 137 (1993). DHS's NEPA obligations generally conclude when the agency issues a record of decision, a finding of no significant impact, or a determination that the proposed action falls under a categorical exclusion. *See* Instruction Manual at V-1 to V-2. The Instruction Manual itself is not a final decision under NEPA for any DHS action: the Manual, through "very general instructions," "describes how DHS will implement NEPA, but it does not

prescribe any action in any particular matter." *Whitewater Draw*, 5 F.4th at 1008. "It is a manual for *preparing* to make NEPA-related decisions," but does not itself decide. *Id.* at 1009.

As held by the Ninth Circuit in *Whitewater Draw,* the DHS Instruction Manual fails the first prong of the *Bennett* test for finality, because it is not the consummation of the agency's decision-making process.

2. The Instruction Manual Does Not Bind DHS with the Force of Law.

The Manual also fails the second prong of the *Bennett* test because it determines no rights or obligations, and it has no legal consequences. *See* 520 U.S. at 177–78. A challenge to an agency action fails the second prong of the *Bennett* test if the challenged action "establishes only the procedural framework under which the [agency] intends to operate." *Home Builders Ass'n*, 335 F.3d at 619. Internal policy memoranda and guides for agency operations—which lack the force of law—do not constitute reviewable final agency actions. *See Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 713 (D.C. Cir. 2015) (finding FAA notice on expanded use of passenger portable electronic devices does not constitute a final agency action, because it does not amend any FAA regulation and "merely provides guidance to aviation safety inspectors who enforce FAA regulations"); *Broadgate Inc. v. U.S. Citizenship & Immigr. Servs.*, 730 F. Supp. 2d 240, 247 (D.D.C. 2010) (holding internal guidelines used by USCIS in determining eligibility for H-1B visa program were not "final agency action"); *see also RCM Techs., Inc. v. U.S. Dep't of Homeland Sec.*, 614 F. Supp. 2d 39, 44 (D.D.C. 2009) (finding plaintiffs' challenge to USCIS's policy that required foreign occupational and physical therapists to have master's degrees in order to obtain non-immigrant visas not justiciable, because plaintiffs were challenging a policy, not a specific denial of a visa made under that policy).

Here, the Instruction Manual provides a set of procedures to be followed for NEPA review but dictates no particular outcome. For example, the Instruction Manual (i) generally describes how the NEPA process should be integrated with DHS's missions (Instruction Manual at IV-1), (ii) provides a narrative overview of NEPA's requirements (*id.* at V-1), (iii) contains a nonexclusive list of examples of the actions that normally require NEPA review (id.*id.* at V-9, V-14), and (iv) explains that DHS components determine the appropriate level of NEPA analysis for any action (*id.* at IV-1). In other words, "[t]he Manual does not augment or diminish DHS's NEPA obligations; it simply facilitates DHS's fulfillment of those obligations." *Whitewater Draw*, 5 F.4th at 1009.

No legal consequences flow from the Instruction Manual. The Manual makes no final determination under NEPA about any DHS action or exempt any action from NEPA review; it does not authorize (or prohibit) any third-party activity; and because it merely establishes a "flexible framework for implementing NEPA," Directive 023-01, it does not impose binding legal obligations on third parties or on DHS itself. As the Ninth Circuit observed, [i]n a proper action against DHS for failure to comply with NEPA, DHS would face liability for noncompliance with NEPA or other federal laws, not for its noncompliance with the Manual." *Whitewater Draw*, 5 F.4th at 1009.

In sum, "[b]ecause the Manual does not impose new legal requirements or alter the legal regime to which DHS is subject . . . the Manual fails *Bennett*'s second prong" as well as the first prong. *Id.* at 1010. The Court should dismiss Count I.

C. Because DHS Waived NEPA for Border Wall Construction and the Decision to Suspend Construction Does Not Alter the Environmental Status Quo, Plaintiffs Cannot Challenge Termination of that Project Under NEPA (Count II).

Plaintiffs' challenge to the decision to terminate border wall projects should also be dismissed both because the Secretary of Homeland Security waived NEPA review for the border wall projects pursuant to his statutory authority and because the termination of wall construction is not a major federal action affecting the environment.

Upon taking office, the President issued Presidential Proclamation 10142 terminating the former President's proclamation of a national emergency on the southern border.[4] The President ordered the Secretaries of Defense ("DoD") and Homeland Security to immediately pause all border wall construction, to the extent permitted by law, while the agencies reviewed the remaining construction contracts and developed a plan to redirect and repurpose those funds. 86 Fed. Reg. at 7,225-26. In response, DoD cancelled all border wall projects funded by DoD appropriations and DHS announced a plan to conduct further environmental review before resuming projects funded by its appropriations. Action Memo, "Plan for the Use of Funding from Projects Authorized Pursuant to Sections 284 and 2808 of Title 10, U.S. Code" at 10, attached as Ex. C; Department of Homeland Security, "Border Wall Plan Pursuant to Presidential Proclamation 10142" at 1-2, attached as Ex. D. In Arizona, where two plaintiffs live and work, the agencies had completed most of the planned border wall construction before the Presidential

[4] *See* Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction, 86 Fed. Reg. 7225 (Jan. 20, 2021); *see also* Proclamation 9844, Declaring a National Emergency Concerning the Southern Border of the United States, 84 Fed. Reg. 4949 (Feb. 15, 2019); Continuation of the National Emergency With Respect to the Southern Border of the United States, 85 Fed. Reg. 8715 (Feb. 13, 2020); Continuation of the National Emergency With Respect to the Southern Border of the United States, 86 Fed. Reg. 6557 (Jan. 15, 2021).

Proclamation. Declaration of Paul Enriquez ("Enriquez Decl.") ¶¶ 8, 13.[5] There remain only 18 miles of uncompleted planned barrier in Arizona along its 370 mile border with Mexico. *Id.* Ex. A.

As IIRIRA allows, the Secretary of Homeland Security waived NEPA analysis for the border wall projects carried out by DHS funded by DoD under 10 U.S.C. § 284. *See, e.g.*, Determination Pursuant to Section 102 of [IIRIRA], 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 . . . [NEPA] . . ."") (emphasis added). A decision to stop construction is a decision "with respect to" construction. Indeed, that language shows that the Secretary meant broadly to waive NEPA as to the entire construction projects. *See Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 502 (9th Cir. 2005) (interpreting the phrase "with respect to" as similar to the broad language "relates to"). Because these waivers exempt the border wall projects in their entirety from NEPA review, they preclude Plaintiffs' claim that DHS was obligated to prepare a NEPA analysis of the environmental effect of terminating wall construction. *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 Env't. Litig. v. U.S. Dep't of Homeland Sec.*, 915 F.3d 1213, 1221 (9th Cir. 2019) ("a valid waiver of the relevant environmental laws under section 102(c) is an affirmative

[5] Mr. Enriquez's declaration was submitted in support of the United States' opposition to Plaintiff's motion for a preliminary injunction in *State of Arizona v. Mayorkas*, No. 2:21-cv-00617-PHX-DWL (D. Ariz.), where the State of Arizona challenged the termination of the border wall projects and of the "Remain in Mexico" policy under NEPA and the APA. Arizona's claims are much like Counts II and III in this case. The Enriquez declaration is attached to this memorandum as Exhibit E.

defense to all the environmental claims.")). This result makes sense: it would be exceedingly odd for NEPA to apply to the cancellation or pause of projects to which NEPA did not apply.

Moreover, all claims challenging these waivers must be filed in the District Court within 60 days and the only permissible causes of action are those alleging a violation of the United States Constitution. *Id.* § 102(c)(2)(A)-(B); *Ctr. for Biological Diversity v. McAleenan*, 404 F. Supp. 3d 218, 235 (D.D.C. 2019). And every court to have addressed the question has upheld the DHS Secretary's exercise of his waiver authority. *Id.*; *see also In re Border Infrastructure Env't Litig.*, 284 F. Supp. 3d 1092 (S.D. Cal.), *cert. denied sub nom. Animal Legal Def. Fund v. Dep't of Homeland Sec.*, 139 S. Ct. 594 (2018) and *aff'd*, 915 F.3d 1213 (9th Cir. 2019); *Save Our Heritage Org. v. Gonzales*, 533 F. Supp. 2d 58 (D.D.C. 2008); *Cnty. of El Paso v. Chertoff*, No. EP-08-CA-196-FM, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008); *Defs. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007); *Sierra Club v. Ashcroft*, No. 04CV0272-LAB (JMA), 2005 WL 8153059 (S.D. Cal. Dec. 13, 2005).

Even if the termination of construction was not covered by the waivers, it does not alter the substantive environmental status quo and cannot be a "major Federal action[] . . . significantly affecting the quality of the human environment," under NEPA, 42 U.S.C. § 4332(2)(c)(i), so no analysis is required. Discretionary agency action that does not alter the environmental status quo does not require an EIS. *See Fund for Animals v. Thomas*, 127 F.3d 80, 83-84 (D.C. Cir. 1997); *see also Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1505 (9th Cir. 1995) ("We find that NEPA procedures do not apply to federal actions that do nothing to alter the natural physical environment."). Plaintiffs' complaint ostensibly asserts that DHS must prepare a NEPA analysis considering the effects of leaving the world as it is. But "an EIS is not required 'in order to leave nature alone.'" *Douglas Cnty.*, 48 F.3d at 1505 (quoting *Nat'l Ass'n*

of Prop. Owners v. United States, 499 F. Supp. 1223, 1265 (D. Minn. 1980), *aff'd sub nom. Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981)). President Biden's Proclamation did not change the environmental status quo on the Southern Border; its natural features and man-made disturbances remained. Nor was the environmental status quo altered by the eventual decision to terminate the remaining border wall projects in Arizona. The agencies' decisions to *not* build more border wall "do[] not alter the natural, untouched physical environment at all," *id.*, and so NEPA does not apply.

D. Because the Migrant Protection Protocols and Related Policies are not Reviewable Under the APA, Count III Should be Dismissed.

In Count III, Plaintiffs challenge the termination of four policies they describe as the "Remain in Mexico" policy, including the Migrant Protection Protocols, Prompt Asylum Claim Review, the Humanitarian Asylum Review Process, and Asylum Cooperative Agreements. The government, however, has only ever described the Migrant Protection Protocols as the "Remain in Mexico" policy; there is no umbrella policy that included all four programs. In any event, Count III should be dismissed because the terminations of the Migrant Protection Protocols and Asylum Cooperative Agreements are not reviewable under the APA, and Plaintiffs lack standing to challenge termination of Prompt Asylum Claim Review and Humanitarian Asylum Review Process.[6]

[6] The Prompt Asylum Claim Review and Humanitarian Asylum Review Process were programs intended to expedite processing of fear claims 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, respectively. Under the programs, noncitizens processed for expedited removal remained in U.S. Customs and Border Protection (CBP) custody, as opposed to being transferred to the U.S. Immigration and Customs Enforcement (ICE), during their credible fear interviews, and were afforded only one full calendar day to prepare for the interview. *See Las Ams. Immigrant Advoc. Ctr. v. Wolf*, 507 F. Supp. 3d 1, 9 (D.D.C. 2020), *on appeal* No. 20-5386 (D.C. Cir. Dec. 30, 2020). Although a court in this district recently held these programs to be reviewable under the APA in a challenge brought by asylum-seeking families, *id.* at 34-35,

1. Plaintiffs' Challenge to the Termination of the Migrant Protection Protocols is not Reviewable Under the APA.[7]

The Migrant Protection Protocols (MPP) authorized immigration officers to exercise discretion regarding whether to return certain classes of noncitizens arriving on land from Mexico pending removal proceedings under 8 U.S.C. § 1229a. 84 Fed. Reg. 6,811-01 (Feb. 28, 2019).

The APA precludes review of agency actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *accord Lincoln v. Vigil*, 508 U.S. 182, 190-91 (1993). A decision is committed to agency discretion by law when "a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Such is the case here for DHS's contiguous-territory-return authority. *See Make the Rd. N.Y. v. Wolf*, 962 F.3d 612, 632 (D.C. Cir. 2020) (APA review of DHS's designation decision under section 1225(b)(1)(A)(iii)(I) is precluded based on Congress's intent to confer to the agency "sole and unreviewable discretion" over that determination).

Returning noncitizens to contiguous countries pending removal proceedings is committed to DHS's discretion by law: "[i]n the case of an alien described [not clearly and beyond a doubt entitled to admission] who is arriving on land . . . from a foreign territory contiguous to the United States, [DHS] *may* return the alien to that territory pending a proceeding under section

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Plaintiffs' challenge must be dismissed on standing grounds because Plaintiffs do not articulate how the termination of these policies will impact them. *See supra* p. 13. Allegations that policy changes, like the termination of these programs, will entice large numbers of individuals to cross irregularly into the United States are too conjectural to establish injury-in-fact for standing purposes. *Id.*; *Whitewater Draw*, 5 F.4th at 1014.

[7] The District Court for the Northern District of Texas has issued a nationwide injunction requiring DHS to work in good faith to reinstate the Migrant Protection Protocols. *Texas v. Biden*, No. 2:21-CV-067, 2021 WL 3603341, at *26-28 (N.D. Tex. Aug. 13, 2021). That case is currently on appeal. No. 21-10806 (5th Cir. Aug. 16, 2021).

1229a of this title." 8 U.S.C. § 1225(b)(2)(C) (emphasis added). Congress's use of the term "may" 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. *See Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 346 (2005) ("The word 'may' customarily connotes discretion"); *see also Heckler*, 470 U.S. at 831. And the INA expressly prohibits review of any "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). In other words, "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*, 508 U.S. at 191 (quoting *Heckler*, 470 U.S. at 830).

Here, the Secretary exercised both statutory discretion over whether to invoke § 1225(b)(2)(C)'s return authority and inherent discretion to cease conducting returns. DHS's decision to terminate the Migrant Protection Protocols is statutorily committed to agency discretion and not reviewable under the APA.

Plaintiffs' MPP NEPA claim fails for the additional reason that civil and criminal enforcement decisions fall outside of the NEPA definition of major federal actions. 40 C.F.R. § 1508.18(a) (2019); *see also* DHS Instruction Manuel 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"). As discussed above, the authority for MPP was Congress's grant of *discretionary* authority to return noncitizens to contiguous territories pending removal proceedings. 8 U.S.C. § 1225(b)(2)(C). Because adoption and termination of MPP were both enforcement decisions, no NEPA analysis was required.

Requiring NEPA for enforcement decisions "would lead to a highly impractical result in which any decision of a law enforcement agency—whether to go forward with an action or forbear from action—would require a NEPA analysis." *Nw. Ctr. for Alts. to Pesticides v. U.S. Dep't of Homeland* Sec'y, No. 3:20-CV-01816-IM, __ F. Supp. 3d __, 2021 WL 3374968, at *9 (D. Or. Aug. 3, 2021) (quoting *United States v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126, 1135 (E.D. Cal. 1992)). Many courts have recognized the inapplicability of NEPA to enforcement decisions. *See, e.g.*, *Tucson Rod & Gun Club v. McGee*, 25 F. Supp. 2d 1025, 1029 (D. Ariz. 1998) ("Administrative enforcement actions . . . do not require performance of a NEPA analysis . . . ."); *Calipatria Land Co. v. Lujan*, 793 F. Supp. 241, 245 (S.D. Cal. 1990) (recognizing that there "can be no question that the enforcement itself of" Fish and Wildlife Service anti-baiting regulations through injunction is exempt from NEPA review); *Sierra Club v. Penfold*, 857 F.2d 1307, 1314 (9th Cir. 1988) (recognizing that Bureau of Land Management's enforcement authority is not "major Federal action" triggering NEPA review); *United States v. Rainbow Family*, 695 F. Supp. 314, 324 (E.D. Tex. 1988) (recognizing that NEPA exempts from review agency decisions about whether to "bring a civil or criminal action to enforce Forest Service or other governmental regulations and statutes").

2. Asylum Cooperative Agreements are not Reviewable Under the APA.

The Asylum Cooperative Agreements (ACAs) are three bilateral international agreements between the United States and Guatemala, Honduras, and El Salvador, respectively, which allowed—but did not require—U.S. immigration officials to remove certain humanitarian protection seekers arriving at or between U.S. ports of entry to an ACA partner country to seek asylum or equivalent temporary protection there, rather than allowing them to seek protection in the United States. *See* Exs. F-H; 84 Fed. Reg. 63,994, 63,994-64,011 (Nov. 19, 2019)

(implementing the Asylum Cooperative Agreements). The United States suspended all three ACAs in 2021. *See* U.S. Department of State Press Statement, "Suspending and Terminating the Asylum Cooperative Agreements with the Governments El Salvador, Guatemala, and Honduras," *available at* https://www.state.gov/suspending-and-terminating-the-asylum-cooperative-agreements-with-the-governments-el-salvador-guatemala-and-honduras/ (last visited Oct. 28, 2021).

Plaintiffs lack standing to challenge the termination of the ACAs because they have not plead sufficient facts to show that ending these limited arrangements harmed Plaintiffs' concrete interests. Plaintiffs are not asylum or humanitarian protection seekers. *See* FAC ¶¶ 25-36. Nor have Plaintiffs adduced any facts showing that termination of the ACAs has caused (or will imminently cause) environmental harm.

Even if Plaintiffs had standing, this Court may not review the United States' decisions to enter into—or terminate—"bilateral or multilateral agreement[s]" regarding asylum applicants. 8 U.S.C. § 1158(a)(2)(A). Congress has foreclosed those claims. *Id.* § 1158(a)(3) ("[n]o court shall have jurisdiction" to review any determination of the Attorney General or Secretary of Homeland Security made under any of the provision within Section 208(a)(2)). Finally, 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. *See* 8 U.S.C. § 1252(a)(2)(b)(ii) ("no court shall have jurisdiction to review . . . any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title").

E. DHS' Enforcement Decisions and Discretionary Policies Are Committed to Agency Discretion and Not Reviewable Under the APA.

1. DHS' Enforcement Decisions are not Reviewable (Counts IV – VI).

Counts IV through VI challenge several alleged enforcement decisions to which APA review again does not apply. Count IV challenges an alleged new policy adopted by Customs and Border Protection agents to "giv[e] permission slips[8] to seek more permanent legal status to those illegal border crossers they meet, and help[] them board buses to destinations within the interior of the country." FAC ¶¶ 110, 233. Count V challenges a change in enforcement policy communicated to all Immigration and Customs Enforcement (ICE) employees to detain and remove only those noncitizens meeting certain criteria.[9] *Id.* ¶¶ 111, 236. Count VI challenges DHS's decision to rescind civil penalties for failure to leave the country. *Id.* ¶¶ 112, 239. But section 706(2)(A) of the APA does not apply to agency actions, like these, which are "committed to agency discretion by law." 5 U.S.C. 701(a)(2).

Heckler v. Chaney is instructive. 470 U.S. 821, 831 (1985). The Court there considered a challenge to the decision of the Food and Drug Administration not to bring an enforcement action targeting the "unapproved use of approved drugs" for capital punishment. *Id.* The Court

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[8] Border patrol agents do not issue "permission slips." They may issue a Notice to Report form, which directs and requires the undocumented individual to report to an Immigration and Customs Enforcement (ICE) field office and confers no legal status on the individual in the interim. This is one example of the many factual inaccuracies and mischaracterizations in the Complaint that the Court need not resolve to grant the motion to dismiss.

[9] Plaintiffs mischaracterize the priorities memorandum, FAC n.51, which merely articulates a set of enforcement priorities for allocating ICE's limited law enforcement resources to three priority categories (national security, border security, and public safety). In exercising their enforcement discretion, officers can and do pursue enforcement actions against noncitizens who fall outside of those categories. On September 30, 2021, DHS issued superseding enforcement guidelines. *See* https://www.dhs.gov/news/2021/09/30/secretary-mayorkas-announces-new-immigration-enforcement-priorities (last visited Oct. 22, 2021).

declined to review the agency's decision under the APA, because "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 "unsuitab[le] for judicial review." *Id*. The Court explained that a decision not to enforce "often involves a complicated balancing of several factors peculiarly within [the agency's] expertise," including "whether agency resources are best spent on this violation or another" and whether enforcement in a particular scenario "best fits the agency's overall policies." *Id.* The Court noted, in addition, that agency enforcement discretion "shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch." *Id.* at 832.[10]

DHS's decisions whether to detain and remove (Count IV and V) and whether to fine (Count VI)[11] are exactly the type of agency enforcement decisions that have traditionally been understood as unsuitable for judicial review and therefore "committed to agency discretion" under Section 701(a)(2). Such decisions "often involve[] a complicated balancing" of factors that are "peculiarly within [the] expertise" of the agency, including determining how the agency's resources are best spent in light of its overall priorities. *Chaney*, 470 U.S. at 831. These concerns apply with particular force here, in enforcement of the immigration laws, where the "broad discretion exercised by immigration officials" has become a "principal feature of the

[10] 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. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999).

[11] ICE has had the ability to assess failure to depart penalties for over twenty years (*see* 8 U.S.C. § 1324d), but only did so starting in 2018 as a direct result of Executive Order 13,768 (Jan. 25, 2017). That Executive Order was revoked by Executive Order 13,768. 86 Fed. Reg. 7,051 (Jan. 20, 2021).

removal system." *Arizona v. United States*, 567 U.S. 387, 396 (2012); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 490 (Scalia, J.) (explaining that prosecutorial discretion is "greatly magnified" in the removal context); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2418-19 (2018) ("Because decisions in these matters may implicate 'relations with foreign powers,' or involve 'classifications defined in the light of changing political and economic circumstances,' such judgments 'are frequently of a character more appropriate to either the Legislature or the Executive.'") (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

A decision to adopt a "nonenforcement" policy is akin to changes in policy on criminal prosecutorial discretion—a "special province of the Executive Branch." *Chaney*, 470 U.S. at 832. There is no "law to apply" to judge these exercises of broad enforcement discretion. *Id.* at 833-34.

2. DHS' Discretionary Use of Parole Authority is not Reviewable Under the APA (Counts IX – X).

Plaintiffs, pointing to a memorandum issued by DHS Secretary Mayorkas and two press releases issued by the State Department, Compl. ¶¶ 124, 125, 126, seek to challenge exercises of DHS's discretionary authority to temporarily "parole" into the United States "on a case-by-case basis for urgent humanitarian reasons or significant public benefit" noncitizens "applying for admission to the United States." 8 U.S.C. § 1182(d)(5). Plaintiffs contend that a new DHS "program" to parole Afghan nationals into the United States for two years, Compl. ¶ 124, and a DHS "program" that expands access to apply for parole for certain Central American minors, *id.* ¶ 126, create "another pathway for Afghan[] nationals to enter the U.S.," *id.* ¶ 124, and are part

of an "agenda to promote migration from Central America . . . ," *id.* ¶ 127.[12] Plaintiffs claim that DHS needed to analyze the environmental effects of these parole "programs" because they have the "potential to cause significant environmental effects." *Id.* ¶¶ 248, 251.

These claims lack merit for at least two reasons. First, 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. 5 U.S.C. § 701(a)(2). This principle of nonreviewability in the APA is backed up by the INA, which provides that, aside from exceptions not applicable here, "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 the discretion of . . . the Secretary of Homeland Security." 8 U.S.C. § 1252(a)(2)(B)(ii) (2018); *see United States v. Bush*, No. Cr.-12-92 (W.D. Pa. Nov. 23, 2015), 2015, WL 7444640 at *1 (finding that review of parole decision would be unavailable because the "statute explicitly denies courts the jurisdiction to review these types of discretionary decisions").

Palacios v. Department of Homeland Security is instructive. 407 F. Supp. 3d 691 (S.D. Tex. 2019). There, plaintiffs, who were paroled noncitizens, sought review of the termination of the Central American Minors parole program under the APA. But the court, looking to APA section 701 and the jurisdiction-stripping provision of the INA, concluded that it "lack[ed] jurisdiction to review denials of parole under the [INA] because these actions are committed to

[12] Plaintiffs misapprehend "parole." Parole is not a "pathway" to enter, nor an admission, into the United States. Rather a discretionary grant of parole is determined by Customs and Border Protection on a case-by-case basis when a noncitizen arrives at a port-of-entry.

agency discretion by law." *Id.* at 698 (internal quotation marks and citations omitted). This Court has also recognized this principle. *See 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"). And other courts have reached the same conclusion. *See, e.g., Cnty. of San Diego v. Nielsen*, 465 F. Supp. 3d 1073, 1085 (S.D. Cal. 2020) (concluding that DHS has "discretion to change the conditions under which they parole individuals, including whether they provide travel and basic necessities"). In sum, Plaintiffs may not challenge DHS' discretionary application of its parole authority just because they disagree with how DHS exercises its discretion.

Second, even if the Court could review DHS' parole decisions, there would be "no meaningful standard against which to judge the agency's exercise of discretion" because the statute authorizing parole does not provide a clear benchmark. *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."). Plaintiffs do not point to any statutory standard this Court could employ to determine the lawfulness of DHS' actions to parole individuals under conditions it deems appropriate. And they acknowledge that the INA gives the Secretary of Homeland Security discretionary authority to parole individuals into the United States. FAC ¶ 124, n. 65. As a result, this Court lacks jurisdiction to review these claims.

In sum, the enforcement actions challenged in Counts IV through VI, and the use of parole authority in Counts IX and X are committed to agency discretion and are not reviewable under the APA.

F. Under the INA this Court Lacks Jurisdiction to Hear Challenges to the Conduct of Removal Proceedings (Count VII)

In Count VII, Plaintiffs challenge the reauthorization of administrative closure in immigration courts by a decision of the Attorney General in *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021). FAC ¶¶ 113-118, 242. *Matter of Cruz-Valdez* arose from a removal proceeding where the respondent moved the immigration judge and later the Board of Immigration Appeals to administratively close[13] his case while he applied for legal status with another federal agency. 28 I&N Dec. at 326, 327. Pursuant to 8 U.S.C. § 1103(g)(2) and 8 C.F.R. § 1003.1(h)(1)(i), the Attorney General reviewed and vacated the Board's decision denying respondent's request and determined that immigration judges can make individual determinations whether to temporarily pause a proceeding and remove the case from the immigration judge's active calendar using a set of factors. *Id*. at 326-29.

Plaintiffs' claim fails because the INA does not allow Attorney General decisions *arising from* removal proceedings, like *Matter of Cruz-Valdez*, to be subject to judicial review in district court. Although "[l]itigants generally may seek review of agency action in district court under any applicable jurisdictional grant," "[i]f a special statutory review scheme exists . . . it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies." *Jarkesy v. SEC*, 803 F.3d 9, 15 (D.C. Cir. 2015). The INA provides such a scheme through sections 1252(a)(5) and (b)(9). Specifically, the INA provides that, "notwithstanding any other provision of law," "a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review

[13] Administrative closure is a "docket management tool." 28 I&N Dec. 326. "It does not terminate or dismiss the case, but rather removes a case from the judge' active calendar." *Id*. at 326 (internal citations omitted).

of an order of removal." 8 U.S.C. §1252(a)(5). And section 1252(b)(9) bars jurisdiction to "review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, *arising from* any action taken or proceeding brought to remove an alien" other than through "judicial review of a final order." *Id.* § 1252(b)(9) (emphasis added).

Courts have broadly construed section 1252(b)(9) to preclude 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." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029-30, 1032, 1035 (9th Cir. 2016); *Nat'l Immigr. Project of Nat'l Laws. Guild (NIPNLG) v. Exec. Off. of Immigr. Rev.*, 456 F. Supp. 3d 16, 29-30 (D.D.C. 2020). "As its text makes manifest, [8 U.S.C. § 1252(b)(9)] was designed to consolidate and channel review of *all* legal and factual questions that arise from the removal of an alien into the administrative process, with judicial review of those decisions vested exclusively in the courts of appeals." *Aguilar v. U.S. Immigr. & Customs Enf't*, 510 F.3d 1, 9 (1st Cir. 2007).

"Taken together, § 1252(a)(5) and § 1252(b)(9) mean that *any* issue—whether legal or factual—arising from *any* removal-related activity can be reviewed *only* through the [petition for review] process." *J.E.F.M.*, 837 F.3d at 1031 (collecting cases). Indeed, in enacting section 1252(b)(9), Congress plainly intended to "put an end to the scattershot and piecemeal nature of the review" of challenges to removal proceedings. *Aguilar*, 510 F.3d at 8 (citing H.R. Rep. No. 109-72, at 174 (2005)) (Conf. Rep.).

Here, Plaintiffs' challenge to the Attorney General's decision to reinstate administrative closure clearly falls within section 1252(b)(9)'s bar of district court review of claims "arising from any action taken or proceeding brought to remove an alien" and must be dismissed. First, the Attorney General's decision arose from a removal proceeding in the immigration courts. *See*

J.E.F.M., 837 F.3d at 1035 (section 1252(b)(9)'s bar applies to any "action taken or proceeding brought to remove an alien"). *Matter of Cruz-Valdez* is such an action; it began as a removal proceeding. Second, Plaintiff "challeng[es] policies and practices that are applied during the course of a removal proceeding." *NIPNLG*, 456 F. Supp. 3d at 29. Administrative closure is a tool that is applied exclusively in removal proceedings. Third, Plaintiffs' claim "[is] bound up in and an inextricable part of the administrative process." *J.E.F.M.*, 837 F.3d at 1033. Indeed, it *is* the process by which an immigration judge would remove a case from their docket.

Because Congress has acted to foreclose Plaintiffs' challenge to the Attorney General's decision in *Matter of Cruz-Valdez* and their claim must be dismissed.[14]

G. The APA Does Not Waive Sovereign Immunity to Allow Plaintiffs to Challenge the President's Expansion of the Refugee Admissions Program (Count VIII).

Plaintiffs allege that President Biden raised the ceiling on the number of refugees permitted to be admitted into the United States to 62,500 in fiscal year 2021 and that the President has stated that he intends to set a refugee ceiling of 125,000 refugees for fiscal year 2022. FAC ¶ 119. Plaintiffs contend that the President's actions will substantially enlarge the U.S. Refugee Admissions Program and "augment[] the U.S. population through settlement of foreign nationals in various communities across the United States . . . ," *id.* ¶ 120. They argue that the State Department had to analyze the President's decision under NEPA because the

[14] Congress has further made clear that, aside from the United States, no party can litigate a challenge to removal proceedings in district court. *See Saavedra Bruno v. Albright*, 197 F.3d 1153, 1162 (D.C. Cir. 1999). This is another, separate reason why Plaintiffs lack any cognizable cause of action to raise challenges to the handling of removal proceedings in this district court.

expansion of the refugee program has "the potential to cause significant environmental effects." *Id.* ¶ 245.

Plaintiffs cannot challenge the President's actions under the APA, and even if they could, the INA gives the President plenary authority to determine the maximum number of refugees who may be admitted into the United States in a given year. *See* 8 U.S.C. § 1157(a)(2) ("the number of refugees who may be admitted . . . shall be such number as the President determines . . . is justified by humanitarian concerns or is otherwise in the national interest."). The President is not an agency and presidential actions are not subject to review under the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992); *accord Dalton v. Specter*, 511 U.S. 462, 469 (1994) ("here, as in *Franklin*, the prerequisite to review under the APA—'final agency action'—is lacking[;] . . . the action that "will directly affect" the military bases, is taken by the President, when he submits his certification of approval to Congress" (internal citation omitted)); *Detroit Int'l Bridge Co. v. Gov't of Can.*, 189 F. Supp. 3d 85, 98-104 (D.D.C. 2016), *aff'd*, 875 F.3d 1132 (D.C. Cir. 2017) (holding issuance of NITC/DRIC Presidential Permit by USDS pursuant to an Executive Order not reviewable under APA, because it involved an exercise of discretionary authority committed to the President by law).

Plaintiffs' effort to characterize their challenge to the President's expansion of the refugee admissions program as an action of the Department of State fares no better. Courts have held that 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) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992);*Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991)); s*ee also Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of the Navy*, 383 F.3d 1082, 1087-89 (9th Cir. 2004) (no APA review of deployment

of missile systems where Navy was carrying out a 1994 Presidential Decision Directive). Because the expansion of the refugee admission program flows directly from the President's policy, the State Department lacks any discretion to disobey and there is no NEPA obligation to consider impacts flowing from that decision. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004).

For example, in *Tulare County*, the plaintiffs challenged President Clinton's proclamation declaring the Giant Sequoia National Monument and the United States Forest Service's implementation of that proclamation. 185 F. Supp. 2d at 21. The court rejected plaintiffs' APA challenges to actions taken by the Forest Service: "[a]ny argument suggesting that this action is agency action would suggest the absurd notion that all presidential actions must be carried out by the President him or herself in order to receive the deference Congress has chosen to give to presidential action." *Id.* at 28-29 (citing *Franklin*, 505 U.S. at 800-01; *Armstrong*, 924 F.2d at 289). Likewise, in *Ancient Coin Collectors Guild v. U.S. Customs & Border Protection*, the court held that APA review is unavailable where agencies act based on delegations of power entrusted to the President—whether those powers flow from the President's inherent constitutional powers or from statutory grants of authority by Congress—because "when those agencies act on behalf of the President, the separation of powers concerns [articulated in *Franklin*] ordinarily apply with full force." 801 F. Supp. 2d 383, 403 (D. Md. 2011), *aff'd*, 698 F.3d 171 (4th Cir. 2012).

The APA does not provide for review of actions by the President. If the State Department needs to expand reception and placement services to accommodate a greater number of refugees, it is "merely carrying out the directives of the President, and the APA does not apply to presidential action." *Tulare Cnty.*, 185 F. Supp. 2d at 28. Plaintiffs' challenges to the

President's expansion of the Refugee Assistance Program fall outside the APA's waiver of sovereign immunity and this Court lacks subject matter jurisdiction to hear them.

H. The APA Does Not Allow Plaintiffs to Assert a Broad, Programmatic Challenge to a so-called "Population Growth Agenda" and Such a Claim is Not Redressable in Any Event (Count XI)

Finally, in Count XI, Plaintiffs claim that NEPA compels Defendants to prepare a programmatic EIS for a so-called "population growth agenda." FAC ¶¶ 105, 106, 256. Plaintiffs contend that the actions they challenge, and others they do not identify, work "synergistically" to advance a "population growth agenda." *Id.* ¶ 105. This claim fails for at least two reasons. First, the Supreme Court's decisions in *National Wildlife* and *SUWA* expressly forbid broad, programmatic APA challenges. Second, even if Plaintiffs had identified some category of reviewable, final agency action, courts cannot compel an agency to conduct a programmatic NEPA analysis when the agency has not itself proposed a programmatic action.

Plaintiffs ask this Court to compel a programmatic EIS for the amorphous collection of agency guidance, enforcement decisions, exercises of agency discretion, court administration, and presidential actions they characterize to as the "Biden Population Actions." The APA, however, does not permit this sort of broad, programmatic challenge to agency actions.

In *National Wildlife*, the Supreme Court held that the APA's requirement of a discrete "final agency action" precludes broad, programmatic NEPA challenges where the agency has not itself proposed a programmatic action. 497 U.S. at 899. There, the plaintiff alleged that the Bureau of Land Management's (BLM) practice of reclassifying public lands previously "withdrawn" from mineral leasing violated NEPA and the Federal Land Policy and Management Act. The plaintiff dubbed this practice—which consisted of 1,250 completed and contemplated land classifications and withdrawal revocation actions—the "land withdrawal review program,"

and alleged that BLM had failed to "provide adequate environmental impact statements." *Id.* at 890−91.

The Supreme Court held that it was "impossible" for the plaintiff to challenge the "land withdrawal review program" because the "program" was not an "agency action" under the APA:

> The term 'land withdrawal review program' . . . does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans . . . . It is no more an identifiable 'agency action'—much less a 'final agency action'—than a 'weapons procurement program' of the [DoD] or a 'drug interdiction program' of the Drug Enforcement Administration.

Id. at 890. The Supreme Court also made clear that, even if one of the land status determinations qualified as a "final agency action," the plaintiff could not predicate its sweeping programmatic challenge on that single action: "the flaws in the entire 'program'—consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA, simply because one of them . . . is ripe for review." *Id.* at 892-93.

In *SUWA*, the Court reaffirmed the APA's bar on diffuse programmatic challenges. There, plaintiffs argued that BLM failed to undertake supplemental NEPA analyses for certain wilderness study areas where off-road vehicle use had increased. *SUWA*, 542 U.S. at 60-61. The Supreme Court held that the claims did not fall within the APA scope of review because plaintiffs did not seek to compel legally required, discrete actions. The Court explained that the APA's "limitation to discrete agency action precludes . . . broad programmatic attack[s]." *SUWA*, 542 U.S. at 64; *see also Whitewater Draw*, 5 F.4th at 1010-11 (the APA's definition of

agency action "precludes 'broad programmatic attack[s],' whether couched as a challenge to an agency's action or 'failure to act.'" (quoting *SUWA*, 542 U.S. at 64-65)).

The Ninth Circuit recently reiterated the APA's prohibition on programmatic attacks. In *Whitewater Draw*, plaintiffs "seek[ing] to reduce immigration into the United States because it causes population growth, which in turn, they claim, has a detrimental effect on the environment" sued, alleging that "DHS implements eight 'programs' in violation of NEPA." 5 F.4th at 1005-11. As here, the plaintiffs "d[id] not cite any regulations, rules, orders, public notices, or policy statements that authorize or enforce these 'programs[,]'" but relied on "81 DHS regulations and five policy memoranda" that they claimed "implement the[] programs." *Id.* at 1010. The Ninth Circuit held that plaintiffs' alleged programs were not "in any way distinguishable from the broad programmatic attack" rejected by the Supreme Court in *National Wildlife*. *Id.* at 1010-12. As in *National Wildlife*, the *Whitewater Draw* "[p]laintiffs [could not] obtain review of all of DHS's individual actions pertaining to, say, 'employment-based immigration' in one fell swoop by simply labeling them a 'program.'" *Id.* at 1012.

Plaintiffs' challenge here is as broad as, and even more ill-defined than, that of the *Whitewater Draw* plaintiffs. Plaintiffs allege a "population growth agenda" composed of various discretionary actions by DHS, the State Department, and the President, as well as the administration of the immigration courts. Plaintiffs believe these various actions are aimed at augmenting the population of the United States with "a very large population of foreign nationals." FAC ¶ 106. As in *Whitewater Draw*, Plaintiffs cite no regulations, rules, or orders that authorize or enforce the so-called "agenda" that they challenge, *Whitewater Draw*, 5 F.4th at 1010, but rely instead on actions they expect agencies to take. The same claim compels the same result; Plaintiffs must either "identify a particular action by [an agency] that [they] wish to

challenge under the APA, or [they] must pursue [their] remedies before the agency or in Congress." *Whitewater Draw*, 5 F.4th at 1012.

Although this "case-by-case approach" may be "understandably frustrating" to plaintiffs who are seeking "across-the-board" relief, "this is the traditional, and remains the normal, mode of operation of the courts." *Nat'l Wildlife*, 497 U.S. at 894. Thus, plaintiffs seeking "wholesale improvement" of agency programs must pursue those changes from the agency itself or "[in] the halls of Congress, where programmatic improvements are normally made." *Id.* at 891; *see also* 33 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 8322 (2d ed. 2021) ("The APA authorizes challenges to specific actions—such as a particular rule or order. It does not authorize plaintiffs to pile together a mish-mash of discrete actions into a 'program' and then sue an agency to force broad policy changes to this 'program.' Those wishing to obtain broad policy changes should instead seek them from agencies or Congress." (citation omitted)).

Even had Plaintiffs identified some category of reviewable, final agency action, courts cannot compel an agency to undertake a programmatic NEPA analysis, and so Plaintiffs' programmatic challenge is not redressable. *See Juliana v. United States*, 947 F.3d 1159, 1171-72 (9th Cir. 2020) ("[I]t is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. . . . [A]ny effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches"). Courts have held that whether to prepare a programmatic NEPA document "requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies." *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976); *accord Nev. v. Dep't of Energy*, 457 F.3d 78, 92 (D.C. Cir. 2006) ("The decision whether 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) ("Even when the proposal is one of a series of closely related proposals, the decision whether to prepare a programmatic impact statement is committed to the agency's discretion."); *Citizens for Clean Energy v. U.S. DOI*, 384 F. Supp. 3d 1264, 1281 (D. Mont. 2019) (holding that federal courts cannot compel preparation of a programmatic EIS).

There is no "population growth agenda." *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.

V. CONCLUSION

For all the reasons stated, the Court should grant Defendants' Motion to Dismiss the First Amended Complaint. The dismissal should be with prejudice, because Plaintiffs seek to challenge immigration policy, which is appropriately considered by the legislature and the executive, not by the courts.

Dated: November 3, 2021

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