No. 20-55777

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

CHAD WOLF, in his official capacity as Secretary of the Department of Homeland Security, and THE DEPARTMENT OF HOMELAND SECURITY,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California
(3:16-cv-02583-L-BLM)
Hon. M. James Lorenz

APPELLANTS' REPLY BRIEF

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A. DHS's argument fails to acknowledge that the establishment of procedures pursuant to which future actions must be conducted is also a "final action" for purposes of the APA.

DHS argues that the promulgation of its Manual is not a final agency action subject to APA review because it "does not represent DHS's last word under NEPA *to any DHS action*…" and thus fails the first prong of the *Bennett v. Spear* test for finality. Br. in Opp. ("BIO"), p. 19 (emphasis added). It then elaborates on what it means by "any DHS action" by describing possible outcomes of a NEPA process for particular agency actions, such as the issuance of a record of decision, a Finding of No Significant Impact ("FONSI"), or a finding that a categorical exclusion applies. *Id.* But those are not the only actions that are subject to APA review. Rather, as noted in Appellant's opening brief, the adoption of "policies and procedures" is *also* a final action subject to agency review, even if they merely "establis[h] criteria for future agency actions." Appellants' Opening Br. at 9-12 (citing 40 C.F.R. § 1508.18(a) and *Safer Chemicals, Healthy Families v. EPA*, 943 F.3d 397, 418 (9th Cir. 2019). DHS's argument simply fails to acknowledge that the adoption of binding procedures governing how future actions are to be conducted, as well as the future actions themselves, are *both* final actions for purposes of APA review.

DHS's second attack on Appellants' claim that the manual represents the consummation of the DHS's decision-making process is based on language from *Home Builders* dealing with the second *Bennett* prong, not the first. BIO at 20 (citing *Home Builders Ass'n of Greater Chicago v. U.S. Army Corps of Engineers*, 335 F.3d 607, 619 (7th Cir. 2003)). Studiously avoiding the mandatory language in the manual, DHS tries to consign its manual to a mere "guidance document." BIO at 12 (citing *Friends of Potter Marsh v. Peters*, 371 F.Supp.2d 1115, 1120 (D. Alaska 2005). But the mandatory language is dispositive. It is what makes the Manual a binding, final statement of DHS's procedures that "must" be followed when undertaking particular projects, as this Court held just last year in *Safer Chemicals*, 943 F.3d at 418. The Seventh Circuit reached the same conclusion in the *Home Builders* case on which DHS inexplicably relies, holding that even discretionary language conveying less than "untrammeled discretion" qualified as final agency action. *Home Builders*, 335 F.3d at 614 (citing *Toilet Goods Association v. Gardner*, 387 U.S. 158, 162 (1967)).

Significantly, the Seventh Circuit cited the Supreme Court's decision in *Bennett* for the proposition "that the presence of the imperative 'shall' in a challenged regulation was enough to defeat the contention that the action was discretionary and thus non-final." *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 175 (1997)). And, contrary to DHS's mischaracterization, the Seventh Circuit concluded "that the

first three provisions of the ICA, though they include substantial discretionary elements, represent a definitive pronouncement of Corps policy, rather than an agency decision 'of a merely tentative or interlocutory nature,'" and that Home Builders had thus met "the first part of the *Bennett* test for finality." *Id.* at 615 (quoting *Bennett*, 520 U.S. at 177-78).

DHS tries to sidestep this Court's clear holdings in *Safer Chemicals* and *California Sea Urchin Commission v. Bean*, 828 F.3d 1046, 1049-50 (9th Cir. 2016) by claiming that "[b]oth involved binding rules codified in the Code of Federal Regulations" rather than, apparently, in the Federal Register, as is the case here. BIO at 20. DHS is simply wrong with respect to *California Sea Urchin*. *See* 828 F.3d at 1050 ("the 2012 program cancellation was a generally applicable rule, *published in the Federal Register*" (emphasis added)). But regardless, the focus in both cases was on whether the rules were "binding," not on whether they were published in the Code of Federal Regulations instead of, as here, the Federal Register. And for that, the Manual's use of the imperative "must" is dispositive. "The question of reviewability … is a function of *the agency's intention to bind either itself* or regulated parties." *Safer Chemicals*, 943 F.3d at 417 (*quoting Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1223 (D.C. Cir. 1996), emphasis added).

DHS's next attempt to deny the finality of its action in adopting the Manual is to contend that it "merely sets out DHS's procedures for ensuring compliance with the *preexisting* requirements of NEPA in the course of agency decision-making." BIO at 21. But that claim, too, is contrary to precedent. The Supreme Court addressed that issue in *Whitman v. Am. Trucking Ass'n* when it reviewed an EPA air quality standard that EPA was obligated to establish under the Clean Air Act, holding:

> Only if the "EPA has rendered its last word on the matter" in question, *Harrison v. PPG Industries, Inc.*, *supra*, at 586, is its action "final" and thus reviewable. That standard is satisfied here. The EPA's "decisionmaking process," which began with the 1996 proposal and continued with the reception of public comments, concluded when the agency, "in light of [these comments]," and in conjunction with a corresponding directive from the White House, *adopted the interpretation* of Part D at issue here.

Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 478 (2001) (emphasis added).

Like the Clean Air standard EPA was mandated to adopt, the Manual at issue here represents DHS's "last word" on NEPA regarding its compliance with its express statutory obligation to "identify and develop methods and procedures … which will insure that presently unquantified environmental amenities and values may be given appropriate consideration…" 42 U.S.C. § 4332(2)(B). As directed by NEPA, the Council on Environmental Quality, 40 C.F.R. § 1507.3, also obligates DHS to promulgate its own NEPA procedures, in order to ensure "full compliance with [NEPA's] purposes and provisions[,]" including for example,

"[s]pecific criteria for and identification of those typical classes of action[]..." including which actions require an environmental impact statements, which actions do not require an environmental impact statement or an environmental assessment. 40 C.F.R. § 1507.3(b). Like the EPA in *Whitman*, DHS published its notice in the Federal Register, took public comments, consulted with the Council on Environmental Quality, and then adopted its interpretation of its obligations under NEPA, codified in the Manual. The Manual meets the standard of DHS's "last word" on the matter of its compliance with its statutory obligations under NEPA.

Finally, DHS objects to what it calls Appellants' "*suggest[ion]* that the Manual made a final decision to exempt immigration-related actions from NEPA review," contending instead that the Manual "does not exclude *any* actions from NEPA review." BIO at 21. Quite apart from the fact that DHS's argument appears to be a concession that its Manual is indeed the agency's final word (whether *exempting* or *mandating* NEPA review of immigration-related actions), the Manual does establish "categorical exclusions" from substantive NEPA review, and as Appellants' alleged in Counts III and IV, those categorical exclusions were relied on both facially and as applied for a host of immigration-related actions. To say that its "categorical *exclusions*" do not "*exclude* any actions from NEPA review" is a bit disingenuous, to say the least. The fact is that the Manual established DHS's final word on what actions would qualify for categorical exclusion from NEPA

review, so both that rule, as well as subsequent determinations that particular actions are categorically exempt, are "final actions" for purposes of APA review. *Cal. Sea Urchin Comm'n*, 828 F.3d at 1049.

B. The Manual binds DHS with the force of law.

DHS relies primarily upon *River Runners for Wilderness v. Martin*, 593 F.3d 104 (9th Cir. 2010), and *U.S. v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131 (9th Cir. 1982), in support of its assertion that the Manual does not bind DHS "with the force of law." BIO at 32. The *River Runners* court followed *Eclectus Parrots* for the requirement that an agency pronouncement has the force of law when 1) it prescribes substantive rules and 2) meets procedural requirements:

> To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.

River Runners, 593 F.3d at 1071.

River Runners concerned a challenge to a Management Plan alleged to violate a Park Service policy. Neither the management plan nor the policy guiding it were promulgated pursuant to APA requirements. In *Eclectus Parrots*, a Customs Manual was at issue. The customs manual was not established pursuant to any

Congressional mandate, nor was it promulgated pursuant to APA requirements.[1] As this Court made clear in *River Runners*, the manual at issue there "was intended only to provide guidance within the Park Service" and was "not intended to have the same force as binding Park Service regulations." *River Runners*, 593 F.3d at 1071.

In contrast, the DHS Manual at issue here sets forth DHS's NEPA obligations—which actions are categorically excluded from NEPA review and which actions require an Environmental Assessment or an Environmental Impact Statement. The Manual states:

> The requirements of this Instruction Manual apply to the execution of all NEPA activities across DHS. Within Components, proponents of programs, projects, and activities implement the requirements of the Directive…

[1] The other cases cited by DHS also involved mere internal guidance manuals that did not go through APA procedures and were not published in either the Federal Register or Code of Federal Regulations. *See Moore v. Apfel*, 216 F.3d 864, 869 (9th Cir. 2000) ("HALLEX was not published in either the Federal Register or the Code of Federal Regulations, indicating that the manual was not promulgated in accordance with the procedural requirements imposed by Congress for the creation of binding regulations and was not intended to be binding"); *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996) ("The [Forest Service's] Manual and Handbook are not promulgated in accordance with the procedural requirements of the Administrative Procedure Act. Neither is published in the Federal Register or the Code of Federal Regulations…. They are not subjected to notice and comment rulemaking; they are not regulations…. Nor are the Manual and Handbook promulgated pursuant to an independent congressional authority."); *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1168 (9th Cir. 2000) ("the Engineering Regulation [the text of which "provides *guidance*"] was not published in either the Code of Federal Regulations or the Federal Register, providing further evidence that the regulation was not intended to be binding.").

Department of Homeland Security, Office of the Chief Readiness Support Officer, "Instruction Manual 023-01-001-01, Revision 01, Implementation of the National Environmental Policy Act (NEPA)" "Manual") at III-1, 2-ER-129. The Manual thus establishes a binding set of legal obligations upon DHS.

Even DHS itself *admits* within this very litigation that following the Manual is mandatory. In its own memorandum in support of its cross motion for summary judgment, DHS stated that "CATEX A3 *must* be used" in conjunction with a list of extraordinary circumstances elsewhere defined in the Instruction Manual, in accordance with the requirements of the CEQ regulations. "Memorandum in Support of Defendants' Cross Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment," Dkt. #71-1, at 18 (emphasis added).

As to the second requirement, it is indisputable that the Manual was promulgated in response to both the Congressional directive set forth explicitly in NEPA itself, 42 U.S.C. § 4332(2)(B), and the Council on Environmental Quality, 40 C.F.R. § 1507.3. The Manual was also promulgated pursuant to the requirements of the APA. The complete promulgation history of the Manual is set forth in "Plaintiffs' Memorandum of Points and Authorities Opposing Defendants' Partial Motion to Dismiss Counts I and II of the Amended Complaint." (Doc. 51-1, Pages 12-21). The Manual is therefore indisputably a legislative rule that binds DHS's component agencies with respect to how they are to comply with NEPA.

II. Appellants' Challenge to DHS's Failure to Comply with NEPA Is Not a Challenge to the Programs Themselves.

In its opening brief, Appellants noted that the District Court misconstrued the Supreme Court's decision in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2005), by relying on language about "broad programmatic review[s]" contained in a portion of the *Norton* opinion that did not involve the NEPA challenge in that case. Opening Br. at 21 (citing 1-ER-26). DHS doubles down on the district court's error, citing the same "broad programmatic attack" language relied on by the district court without ever acknowledging (and thereby apparently conceding) Appellants' argument that the language was irrelevant to the NEPA claim in the case. BIO at 31. As for the NEPA claim itself, *Norton* could not have been more clear: "NEPA requires a federal agency to prepare an environmental impact statement (EIS) as part of any 'proposals for legislation *and other major Federal actions significantly affecting the quality of the human environment*.'" *Norton*, 542 U.S. at 72 (quoting 42 U.S.C. § 4332(2)(C), emphasis added). The Supreme Court rejected the NEPA claim in *Norton* not because it was a broad programmatic attack, but because there was "no ongoing 'major Federal action' that could require" a *supplemental* environmental impact report. *Id.* at 73. The Court made absolutely clear that the original land use plan, like the immigration programs at issue here,

was "a 'major Federal action' requiring an EIS." *Id.* (citing 43 C.F.R. § 1601.0-6).[2]

Neither has DHS contested Appellants' claim that it, like its predecessor agency Immigration and Naturalization Services, has never conducted any substantive NEPA review with respect to any of its actions implementing its vast delegation of legislative authority regarding the entry and settlement of millions of foreign nationals into the United States. As this Court reiterated in *California Wilderness Coalition*, "[w]hen an agency decides to proceed with an action in the absence of an EA or EIS, the agency must adequately explain its decision." *California Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011)

[2] DHS's further claim that Appellants' "disavowed bring a Section 706(1) claim" is inaccurate. Paragraph 8 of the Amended Complaint states that "Plaintiffs claim that DHS has not and is not acting in accordance with federal law. See 5 U.S.C. § 706 (2012)." Count II asserts that DHS violated the APA and NEPA "by failing to engage in any NEPA review with respect to its eight programs regulating the entry into and settlement of foreign nationals in the United States." ER 2:100. DHS had argued in its Memorandum in Support of its Motion to Dismiss Counts I and II that Appellants' failed to state a claim under subsection 706(1). In Response, Appellants asserted that DHS's "failure to state a claim" argument was erroneous because DHS had acted in an arbitrary and capricious fashion, in violation of subsection 706(2)(A), by failing to undertake any NEPA compliance. That is not a "disavowal" of subsection 706(1). Rather, it is an assertion that DHS failed to comply with NEPA. Whether couched as a failure to act under subsection 706(1), or implementation of programs in a way that was arbitrary, capricious, or contrary to law in violation of subsection 706(2)(A) because of the lack of NEPA compliance, the point is the same. DHS did not comply with NEPA in undertaking a host of immigration actions.

(quoting *Alaska Center for Environment v. U.S. Forest Service*, 189 F.3d 851, 859 (9th Cir. 1999)).

Instead of seeking to comply with NEPA, DHS argues that the Supreme Court's rulings in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), and *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2005), bar Appellants seeking relief because the programs at issue are not "agency actions" as required under the APA. Both cases are distinguishable.

In *Lujan*, the Supreme Court held that a land withdrawal review program is not agency action because it does not refer or derive from "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 as required by the FLPMA." *Lujan*, 497 U.S. at 890.

Similarly, compliance with land use plans was at issue in *Norton*. The Supreme Court again rejected such plans as final agency action subject to APA review because such plans are "tools by which 'present and future use is projected.' 43 U.S.C. §1701(a)(2) (emphasis added). …the statute and regulations confirm that a land use plan is not ordinarily the medium for affirmative decisions that implement the agency's 'project[ions]." *Norton*, 542 U.S. at 69. The Supreme Court

noted that, "Quite unlike a specific statutory command requiring an agency to promulgate regulations by a certain date, a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them." *Id.* at 71.

Such is not the case here. The programs that have received zero NEPA compliance at issue here are not mere plans; they constitute the implementation and administration of "specific statutory command[s.]" *Id.* CEQ's NEPA regulations make plain that preparation of Programmatic Environmental Impact Statements are to be encouraged for programs and policies, in order to facilitate efficiency, conservation of resources and fully informed decision-making. *See, e.g.*, 40 C.F.R. § 1502.20. DHS makes no mention of CEQ regulation 40 C.F.R. § 1508.18, which establishes that "major federal actions" includes "[a]doption of official rules, regulations, and interpretations," § 1508.18(b)(1); "[a]doption of formal plans," § 1508.18(b)(2); and "[a]doption 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," § 1508.18(b)(3). Actions include "new and continuing activities, including projects and programs." § 1508.18(a). Appellee's implementation and administration of grants of statutory authority constitute programs as defined by CEQ.

This Court's opinion in *California Wilderness* is instructive with respect to when a statutory grant of authority to an agency establishes a major federal action under NEPA. In that case, the Department of Energy was ordered to designate electric transmission corridors. It did so without engaging in any NEPA review, contending that the establishment of the corridors themselves have no environmental effect and any specific siting ultimately determined would go through NEPA review. This court rejected that argument, holding that "broad agency programs may constitute 'major Federal actions,' even though the programs do not direct any immediate ground-disturbing activity." *California Wilderness*, 631 F.3d at 1098. This Court further observed:

> DOE's primary argument appears to be that because the [designation of electric transmission corridors] do not approve any specific sites; they have no meaningful environmental impact. This perspective fails to appreciate that a decision to encourage, through a number of incentives, the siting of transmission facilities in one municipality rather than another has effects in both municipalities in terms of the values of land and proposed and potential uses of land. The effects may be difficult to measure and may be determined ultimately to be too imprecise to influence the Designation, but this is precisely the type of determination that can only be intelligently made after the preparation of at least an EA.
>
> Recognition of these consequences flowing from the [designation of electric transmission corridors] defeats most of DOE's reasons for not preparing an EA or EIS. Without such a study, it is impossible to fairly determine whether project-specific impacts are reasonably foreseeable, whether there are "programmatic effects," and whether the Designation has any impact on sensitive areas. …Thus, the alleged impact of the [designation of electric transmission corridors'] inclusion of particular areas as within the corridors, and the exclusion of

> other areas, are subject to review for environmental impacts at this time or not at all.

Id. at 1103.

So, too, with the programs at issue here. Congress has authorized DHS to implement various immigration statutes. DHS's implementation of those statutes requires environmental assessment under NEPA every bit as much as EPA's compliance with the statutory mandate to designate electronic transmission corridors was also subject to NEPA review.[3]

III. DHS's Assertions That Appellants Lack Standing Are Factually and Legally Incorrect.

[3] DHS is correct that a number of the specific actions listed in the expert report attached to (and thereby incorporated in) the First Amended Complaint occurred outside the statute of limitations window. But the point of that litany was to show that DHS had *never* undertaken the environmental assessments required by NEPA. Because 40 C.F.R. § 1508.7 required DHS to consider the "cumulative effects" of their actions, even the specific actions taken prior to the statute of limitations window should have been considered when assessing the environmental impact of actions taken within the statute of limitations window. Those actions include, particularly: the expansion of the Student Exchange Visitor Program, 80 Fed. Reg. 23680 (Apr. 29, 2015); expansion of the time F-1 visa holders can stay and work in the U.S. after graduation, 81 Fed. Reg. 13040 (Mar. 11, 2016); increase in the number of H2-B agricultural visas, 82 Fed. Reg. 32987 (July 19, 2017); creation of the international entrepreneur parole program, 82 Fed. Reg. 5238 (Jan. 17, 2017); expanding, via policy memorandum, the time seasonal workers can remain in the U.S., PM-602-0092 (Nov. 11, 2013); and the DACA program itself, adopted by policy memorandum on June 15, 2012. Janet Napolitano, Memorandum, "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (June 15, 2012), available at https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

A. DHS's principal assertion that Appellants lack standing is based on its denial of Appellants' contention that DHS policies induced immigration-related population growth generally and illegal immigration across the southern border in particular, but that contention must be accepted as true at the summary judgement stage.

DHS's principal contention that Appellants lack standing boils down to a disagreement over the factual assertions in Appellants' First Amended Complaint, as well as its refusal to acknowledge the cumulative effects of individual immigration-related rules changes. But as Appellants noted in their opening brief, "as the non-moving party for the government's summary judgement motion, their 'evidence … is to be believed, and all justifiable inferences are to be drawn in [their] favor.'" Opening Br. at 29 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006); *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)).

Appellants alleged, for example, that the four actions challenged in Count IV that DHS deemed categorically excluded from environmental assessment under NEPA "result in population growth," the environmental effects of which was a key concern of Congress's when it adopted NEPA. FAC ¶ 117, 2-ER-104. "Because each of these actions has individual and or cumulatively significant effects," Appellants further alleged, "the use of the Categorical Exclusion A3 is contrary to 40 C.F.R. §§ 1501.4, 1508.4, and 1508.27" and therefore "contrary to law, in violation of the APA." FAC ¶ 118, 2-ER-104-05.

Appellants also made allegations tying that immigration-induced population growth to specific harms they had suffered and were continuing to suffer. *See*, *e.g.*, FAC ¶ 33, 2-ER-20-21 (Alleging, on behalf of Appellant Californians for Population Stabilization ("CAPS"), a spate of environmental harms suffered by CAPS and its California-based members because of "unending population growth in California," most of which is caused by legal and illegal immigration); *see also, e.g.*, FAC ¶¶ 34-43, 2-ER-21-34 (allegations on behalf of CAPS members of specific environmental harms to them caused by immigration-induced population growth).

DHS's principal counter to these specific allegations is two-fold: First, these rules induced only temporary rather than permanent immigration to the United States; and second, none of the rules, *standing alone*, was likely to induce significant increases in population. *See, e.g.*, BIO at 42 ("Nor have Plaintiffs shown that the [School Officials Rule and the STEM Rule] are likely to induce significant numbers of F-1 and M-1 students to seek to permanently resettle in the United States"); BIO at 47 ("DHS estimated that no more than 3,000 foreign nationals could be eligible to apply to the [International Entrepreneur] program annually"); BIO at 48 ("Nor have Plaintiffs shown that the [AC21] rule is likely to meaningfully increase the temporary nonimmigrant population in the United States"). Both contentions fail to acknowledge the *cumulative* effects of immigration-inducing

rules on population growth. Once those effects are taken into account, DHS's own admissions, cited at length in Appellants' Opening Brief at 33-36, that these rules were *intended* to induce additional immigration to the United States as well as "the increased *retention* of such students in the United States," suffice to give Appellants standing to challenge the rules. DHS simply ignores Appellants' recitation of its own admissions on this score, merely contending, a bit mischievously and without any supporting authority, that "[t]he 'cumulative impacts of immigration-induced population growth' is not an 'agency action' reviewable under the APA." Appellants did not contend that the "cumulative impacts" was an agency action, of course, but rather the result of agency actions that were therefore subject to NEPA review.

DHS then reiterates an argument on standing that was not part of the district court's holding that Appellants lacked standing, namely, that even if the challenged rules contributed to population growth (as they clearly do), Appellants had not argued that they had a geographic connection to that population growth.

Appellants First Amended Complaint demonstrates otherwise. On behalf of CAPS and its California-based members, Appellants alleged, for example, that "California has the largest share of foreign born of any state in this nation," that the share of California's population who were immigrants or their minor children increased from 13% (2.6 million people) in 1970 to 37.4% (15 million people) in

2015, and that "CAPS and its members who live, work and pursue recreational activities in California are *adversely affected by the population growth resulting from the DHS actions at issue*." FAC ¶ 33, 2-ER-49 (emphasis added).

If DHS's new contention requires even greater geographic specificity, the court may take judicial notice of the fact that a large number of the schools participating in the Student and Exchange Visitor Program, for example, are in California, including the University of California at Berkeley (where CAPS member Ric Oberlink lives, FAC ¶ 37, 2-ER-54) and the University of California at Los Angeles (in Los Angeles county, where CAPS members Don Rosenberg and Claude Wiley live, FAC ¶¶ 35-36, 2-ER-51-54). *See* ICE, "SEVP Certified Schools" (last updated Feb. 10, 2021);[4] *see also* U.S. News & World Report, "Most International Students" (indicating that 13% of the students at both Berkeley and UCLA are international students).[5] Additionally, the California Court of Appeal has

[4] Available at https://studyinthestates.dhs.gov/assets/certified-school-list-02-10-21.pdf. "Under [Federal Rule of Evidence] 201, the court can take judicial notice of '[p]ublic records and government documents available from reliable sources on the Internet,' such as websites run by governmental agencies." *Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015).

[5] Available at https://www.usnews.com/best-colleges/rankings/national-universities/most-international. Whether or not judicial notice can be taken of this news account, it clearly shows that a "justifiable inference" could be drawn that rules inducing more international students to come to study in the United States would have an impact on population growth in California, where a large number of CAPS members reside.

acknowledged that greater enrollment in the UC system has local environmental impact. *See Save Berkeley's Neighborhoods v. The Regents of the University of California, et al.*, 51 Cal.App.5th 226, 237 (2020) (holding that a decision by the University of California Berkeley to increase student enrollment constituted a project requiring CEQA review and mitigation). Because "all justifiable inferences are to be drawn in [Appellants'] favor" as the non-moving party for the government's summary judgment motion, *DaimlerChrysler*, 547 U.S. at 342 n.3, Appellants' allegations are sufficient to establish standing. The same is true with respect to the International Entrepreneur Rule and the AC21 rule—it is a "justifiable inference" that a significant percentage of those visas would go to immigrants destined for California. *See*, *e.g.*, Tam Harbert, "VCs and entrepreneurs push for 'start-up visa,'" EDN Network (Feb. 23, 2010) (noting that "Historically, immigrants have been a rich source of Silicon Valley start-ups");[6] Nick Wells and Mark Fahey, "Here are the U.S. States – and the companies – that use the most H1-B visas,"

[6] Available at http://web.archive.org/web/20181128122218/https://www.edn.com/Home/PrintView?contentItemId=4312094. That the rule, adopted in the waning days of the Obama administration, was rescinded by the Trump administration before it could really take effect, *see* BIO at 47, does not alter the fact that it should have been subjected to NEPA analysis at the time it was adopted.

CNBC (Apr. 18, 2017) (noting that California was one of the top states for H1-B visas per million residents).[7]

B. The organizational plaintiffs have standing either in their own right or on behalf of their members.

DHS also asserts that Appellants did not allege that the organizational plaintiffs have standing to sue in their own right.

The allegations in the First Amended Complaint demonstrate otherwise. Appellants alleged, for example, that "CAPS's mission is to end policies and practices that cause human overpopulation and the resultant decline in Americans' quality of life in California and the rest of the United States." FAC § 33, 2-ER-47 (citing Californians for Population Stabilizatino, "About Us," http://www.capsweb.org/about/about-us (last visited Dec. 2, 2017)). Indeed, they described "reduc[ing] both legal and illegal immigration into California and the United States" as "CAPS's priority goal." *Id.* And they specifically alleged that "CAPS … [is] adversely affected by the population growth resulting from the DHS actions at issue." *Id.* Under Supreme Court precedent, those allegations are sufficient to establish the organization's standing in its own right. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (organization has standing in its own right when its mission has been "perceptibly impaired" by defendants' actions); *see*

[7] Available at https://www.cnbc.com/2017/04/18/us-states-that-use-the-most-h-1b-visas.html.

also Am. Legal Found. v. F.C.C., 808 F.2d 84, 92 (D.C. Cir. 1987) ("The organization must allege that discrete programmatic concerns are being directly and adversely affected by the defendant's actions").[8]

But even were that not the case, CAPS and the other organizational plaintiffs meet the requirements of associational standing to sue on behalf of their members.

> An association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members.

Hunt v. Washington State Apple Advertising Com'n, 432 U.S. 333, 342-43 (1977).

"CAPS members have a substantial interest in ensuring that DHS complies with federal law, including the requirements of NEPA," Appellants alleged, adding that "CAPS and its members are being, and will continue to be, harmed by the failure of DHS to make any attempt to comply with NEPA." FAC ¶ 33, 2-ER-49. The First Amended Complaint also elaborated at length on the specific harms to several of CAPS's members attributed to immigration-induced population growth

[8] The allegations regarding the other organization plaintiffs—the Whitewater Draw Natural Resource Conservation District ("WDNRCC"), the Hereford Natural Resource Conservation District ("HNRCD"), the Arizona Association of Conservation Districts ("AACD"), the New Mexico Cattlegrowers Association ("NMCA"), and Scientists and Environmentalists for Population Stabilization ("SEPS")—implied, but did not expressly allege, that DHS's actions interfered with their missions, but each organizational plaintiff also alleged harms to its members.

that resulted, cumulatively, from DHS's immigration actions. *See, e.g.*, FAC ¶¶ 34-40, 42, 2-ER-49-60.

The same is true with respect to each of the other organizational plaintiffs. "The members of the WWDNRCD, HNRCD, and AACD have been victimized and damaged by DHS's failure to comply with NEPA because their members live along the Southwest border, which has been environmentally degraded as a result of DHS's discretionary actions relating to border enforcement and immigration law," Appellants alleged. FAC ¶ 29, 2-ER-44; *see also* FAC ¶¶ 30-32, 2-ER-44-47 (alleging specific harms to individual members); FAC ¶ 42, 2-ER-57-60 (alleging harms to SEPS President Dr. Stuart Hurlbert); FAC ¶ 44, 2-ER-61-62 (alleging harms to NMCA members).

Those allegations are clearly sufficient to establish the associational standing of CAPS and the other organization plaintiffs to assert claims on behalf of their members.

C. DHS's new challenge to Appellants' standing on the DACA claim also fails.

DHS has also challenged for the first time Appellants' standing to challenge the Government's failure to conduct an environmental assessment before implementing the DACA program. Appellants alleged that DACA "allow[s] foreign nationals who have illegally entered … to remain with federal approval. Programs such as [that] not only add more settled population at the time they are

implemented, but also have further environmental impacts by encouraging future unlawful entry." FAC ¶ 68, 2-ER-83. Elaborating, Appellants made the further allegation, supported by expert affidavit, that:

> Encouraging illegal entry into and settlement in the country has significant environmental impacts both from further increased population growth and by creating incentives for large numbers of people to enter unlawfully at the border. In recent decades, such large numbers of illegal aliens have crossed the southern border illegally that the physical environment at the border has been substantially degraded. Ms. Vaughan also explains how programs that reward illegal entry into and settlement in the country lead to further mass unlawful entry, including Parole, TPS, Asylum, and DACA. See Ex. D: How Certain DHS Programs Affect Land on the Southwest Border, of Ex. 3 at 176-180. This mass entry causes physical environmental impacts to the land on the border, as documented by affidavits by Fred Davis, Peggy Davis, Caren Cowan, John Ladd, and Ralph Pope. (Ex. 6, Ex. 7, Ex. 15, Ex. 16, and Ex. 18).

FAC ¶ 60, 2-ER-83-84. In other words, Appellants alleged that DACA led to increased population growth itself and also induced further illegal immigration, which caused environmental impacts on the border, causing harm to individual plaintiffs and to the members of plaintiff associations. Because those allegations must be taken as true at the summary judgment stage, they are more than sufficient to establish Appellants' standing to challenge the Government's failure to consider environmental consequences before implementing its DACA program. *DaimlerChrysler*, 547 U.S. at 342 n.3; *Matsushita*, 475 U.S. at 586-87.

DHS counters by citing to the D.C. Circuit's decision in *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015). In that case, the Sheriff of Maricopa County,

Arizona had alleged that DACA would be a "magnet" for further illegal immigration, which would in turn increase crimes and hence costs to the Maricopa County Sheriff's office. The Court found that causal chain both too speculative and too "attenuated." *Id.* at 20. Appellants here, in contrast, have alleged a direct connection between their harms and increased illegal immigration that is a "predictable effect" of the government's action. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). And they have supported that allegation not with speculation, as was the case in *Arpaio*, but with an expert affidavit. Moreover, *Arpaio* did not involve any claim that DHS had failed to conduct environmental assessments required by NEPA. *Arpaio*, therefore, does not foreclose Appellants' standing to challenge DHS's failure to conduct NEPA-mandated environmental assessments before it implemented the DACA program.

D. DHS's argument that Appellants lack standing to challenge the programmatic EA/FONSI misconstrues Appellants' claim.

DHS's contention that Appellants do not have standing to challenge the adequacy of the environmental assessments related to the massive 2014 influx of illegal immigrants across the southern border is based on the same denial that the government's lax enforcement policies in any way contributed to the massive influx as was the case with the DACA program, discussed above. Instead of confronting Appellants' claims on their own terms, DHS merely contends that its decision to construct a detention facility did not itself cause the environmental harm from

which Appellants have suffered and are suffering. With that straw man argument, Appellants do not disagree. But the fact remains that, as alleged by Appellants, lax enforcement policy decisions by DHS itself "significantly affect[ed] the number of people attempting to cross the border illegally," that DHS policies were "a factor" in the influx of illegal immigration, that those who were enticed thereby to cross the border illegally came with the "intent to settle" and that many "have indeed settled in the United States, thereby contributing to population growth and its accompanying environmental harms. FAC ¶¶ 78, 89, 90 and Ex. 3 p. 177, 2-ER-90, 96, 260.

The logical flaw in DHS's argument is perhaps best exemplified by the following hypothetical. Suppose the Corps of Engineers opened the floodgates of Hoover Dam, and then once the predictable flood waters began wreaking environmental havoc on the lands below the dam, the Corps decided to build a new storage basin to capture some of the flood waters, conducting an environmental assessment only for the construction project itself without considering at all the ongoing effects of its earlier decision to open the floodgates. Such an environmental assessment would be wholly inadequate to fulfill NEPA's mandates. So, too, is DHS's failure to consider *at all* the environmental consequences of its "open-the-floodgates" immigration policy decisions. It is the adequacy of the environmental assessments that were conducted with respect to the induced influx itself, not any

claim of harm from the "immediate ground-disturbing activity" of construction, *California Wilderness*, 631 F.3d at 1098, that Appellants have challenged. And for that, the extensive harms alleged by the border plaintiffs in the First Amended Complaint are more than sufficient to confer standing.

CONCLUSION

The district court's dismissal of Counts I and II, and its grant of summary judgment for DHS on Counts III-V, should be reversed.

DATED: February 12, 2021.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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