UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MASSACHUSETTS COALITION FOR IMMIGRATION REFORM, *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.* Defendants.	Case Nos. 1:20-cv-03438-TNM 1:21-cv-01198-TJK (consolidated cases)

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants, U.S. Department of Homeland Security, U.S. Department of State, and U.S. Department of Justice, move under Federal Rule of Civil Procedure 56 for summary judgment on all counts of Plaintiffs' First Amended Complaint, ECF No. 17, which alleges violations of the National Environmental Policy Act (NEPA), based on a series of policy decisions that Plaintiffs allege lead to increased immigration into the United States. Plaintiffs' claims are jurisdictionally flawed and fail on the merits in any event. The grounds for this motion are set forth below in the accompanying statement of points and authorities in support of this cross-motion for summary judgment and in opposition to Plaintiffs' motion for summary judgment.

Dated: April 13, 2023

TODD KIM
Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division

/s/ Erika Norman
ERIKA NORMAN (CA 268425)
SEAN C. DUFFY (NY 4103131)
Trial Attorneys
Natural Resources Section

150 M Street NE
Washington, DC 20002
Tel: (202) 305-0475
Fax: (202) 305-0506
erika.norman@usdoj.gov
sean.c.duffy@usdoj.gov

Attorneys for Defendants

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Introduction

Plaintiffs—Massachusetts Coalition for Immigration Reform (MCIR) and six individuals—challenge eleven alleged policies or actions taken by the Department of Homeland Security (DHS), Department of State (DOS), and the Department of Justice (DOJ). Am. Compl. for Decl. & Injunc. Relief, ECF No. 17 ("Am. Compl."). Plaintiffs claim these actions are part of a unified effort by the Biden Administration to increase the population of the United States with foreign-born individuals, which they contend have together caused deleterious environmental effects requiring an environmental analysis under the National Environmental Policy Act (NEPA). Pls.' Mot. for Summ. J., ECF No. 34 at 14-19 ("Pls.' Br.").

The entirety of this lawsuit is premised on two levels of speculation. *First*, that government actions will increase the population of the United States. *Second*, that increased population will cause significant environmental impacts. Plaintiffs have not shown that either premise is true. Plaintiffs' claims thus fail both on jurisdictional grounds and on the merits. Plaintiffs lack Article III standing because they make only generalized and conclusory allegations of injury and fail to establish a causal link between the actions they challenge and the alleged environmental harms they complain of. All of Plaintiffs' claims fail on the merits because none of the alleged actions they challenge are subject to NEPA, several are excluded from NEPA's definition of a "major federal action," and others are not final agency actions or are otherwise unreviewable under the Administrative Procedure Act (APA). Further, several claims challenge actions that are no longer in effect and those claims are moot.

I. FACTUAL BACKGROUND[1]

The pertinent facts about the eleven alleged actions or policies Plaintiffs challenge is discussed in Sections A through K, below, with citations to the administrative records.

A. Termination of the Policy of Diverting Military Construction Funds to Border Wall Construction (Count II)

On his first day in office, President Biden signed a Proclamation directing a reassessment of federal policy toward the construction of a wall along the southern border. DHS_ 8-10.[2] The Proclamation terminated the declaration of a national emergency issued by President Trump (*see* DHS_1503)—which allowed diversion of military construction funds for border wall construction—and it directed federal agencies to pause ongoing construction activities, reassess construction projects, and develop plans for the "redirection of funds concerning the southern border wall." DHS_9.

In June 2021, DHS published a plan to address how it may use its 2017-2021 border infrastructure appropriations, including by the prioritization of projects that "are needed to address life, safety, environmental, or other remediation requirements." DHS_11-15. In accordance with its plan, DHS has used congressional barrier appropriations for projects needed to address life and safety, including priority gap closures and gate installations at "funnel points for illicit cross border activity, to include narcotics and smuggling." *See* DHS_120-21 (approving

[1] Defendants are not filing a separate statement of undisputed material facts nor responding to Plaintiffs' statement of undisputed material facts, as these do not apply to cases when review is based on an administrative record. LCvR 7(h)(2).

[2] All references to Bates Numbers in the administrative records are abbreviated. For example, "DHS_0000008-0000010" is abbreviated to "DHS_8-10."

more than 30 gap closures in the Tucson Sector, including many near Sasabe). Gap closure work is ongoing.[3]

B. Termination of Migrant Protection Protocols (MPP) (Count III)

The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.* vests the Executive Branch with the authority and discretion to manage noncitizens[4] arriving in the United States. This discretion includes the authority to use expedited removal, *see* 8 U.S.C. § 1225(b)(1), or to place noncitizens into removal proceedings before an immigration judge, *id.* § 1225(b)(1)(A)(i), or detention pending removal, *id.* § 1225(b)(2)(A); *Matter of E-R-M- & L-R-M-*, 25 I. & N. Dec. 520, 523 (BIA 2011). DHS also has discretion to parole noncitizens "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). As relevant to MPP, for a noncitizen who arrives by land "from a foreign territory contiguous to the United States," DHS has discretion to "return the alien to that territory pending a [removal] proceeding." *Id.* § 1225(b)(2)(C).

MPP was announced in December 2018 and the Secretary of Homeland Security issued policy guidance for implementation of MPP the next month. DHS_584. Under MPP, "citizens and nationals of countries other than Mexico" who arrived "by land from Mexico—illegally or without proper documentation—[could] be returned to Mexico pursuant to [§ 1225(b)(2)(C)] . . . for the duration of their Section [1229a] removal proceedings." *Id.* Many categories of individuals were not eligible for MPP, including but not limited to unaccompanied children or citizens or nationals of Mexico. DHS_1365.

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[3] Plaintiffs' assertion that DHS suspended "all barrier projects between ports of entry on the southern border is incorrect. " Pls.' Statement of Undisputed Material Facts, ECF No. 34 ¶ 1 ("SUMF").

[4] This brief uses "noncitizen" as equivalent to the statutory term "alien." *See Barton v. Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. § 1101(a)(3)).

In January 2021 the Acting Secretary of Homeland Security suspended "new enrollments in [MPP], pending further review of the program." DHS_1371. President Biden later issued an Executive Order directing DHS to "promptly review and determine whether to terminate or modify the [MPP] program." DHS_1111. The Secretary of Homeland Security terminated MPP in June 2021, finding the benefits of the program are "far outweighed" by its challenges, risks, and costs. DHS_258-64 ("June 1 memoranda"). The Secretary found that MPP failed in its goal to adjudicate legitimate asylum claims and clear asylum backlogs quicker. DHS_261. The Secretary also found the program imposed additional responsibilities on border security personnel that detracted from the Department's other critical missions. *Id.* Border encounters increased during certain periods, and more than a quarter of individuals enrolled in MPP were reencountered attempting to reenter the United States. DHS_260.

The States of Texas and Missouri challenged the termination of MPP. *See Texas v. Biden*, 554 F. Supp. 3d 818 (N.D. Tex. 2021). While the procedural history of that case is long and complicated, plaintiffs obtained an injunction directing the United States to re-implement MPP. *See Texas v. Biden*, 10 F.4th 538 (5th Cir. 2021). After an unsuccessful motion for a stay pending appeal, the government began to negotiate with Mexico in good faith to restart MPP, because the program cannot be re-implemented without Mexico's consent and ongoing collaboration. *See Texas v. Biden*, No. 21-67 (N.D. Tex. Dec. 2, 2021), ECF No. 117. While working to re-implement MPP, DHS reviewed the program, and on October 29, 2021, issued two memoranda making a new decision to terminate MPP. DHS_196-99; DHS_200-38.

The October 29 memoranda—which Plaintiffs have not challenged—consist of the "Termination Memorandum" and the "Explanation Memorandum." In them, the Secretary addressed deficiencies the Northern District of Texas had identified in the June 1 memorandum

and concluded that MPP's "benefits do not justify the costs, particularly given the way in which MPP detracts from other regional and domestic goals, foreign-policy objectives, and domestic policy initiatives that better align with this Administration's values." DHS_198-99. The Secretary also explained that "[e]fforts to implement MPP have played a particularly outsized role in diplomatic engagements with Mexico, diverting attention from more productive efforts to fight transnational criminal and smuggling networks and address the root causes of migration." *Id.* Plaintiffs' assertion that DHS "admitted" that terminating MPP would increase the number of people granted asylum, Pls.' Br. 9, mischaracterizes the record. Rather, DHS explains that it was likely that some enrollees with meritorious asylum claims could not present those claims because of barriers to legal access caused by the program. DHS_220.

The Supreme Court held that the October 29 memoranda together constituted a separate, final agency action that both rescinded the June 1 decision and terminated MPP. *Biden v. Texas*, 142 S. Ct. 2528, 2544 (2022). Plaintiffs in the *Texas* case amended their complaint to challenge the October 29 memoranda and obtained a stay of its implementation. *See Texas v. Biden*, 21-67 (N.D. Tex. Aug. 8, 2022), ECF No. 148.

C. Alleged Termination of PACR and HARP (Count III)

Prior to October 2019, inadmissible noncitizens encountered at or near the border who were processed for expedited removal and who expressed a fear of a return to their home countries would be transferred from U.S. Customs and Border Protection (CBP) custody into U.S. Immigration and Customs Enforcement (ICE) custody and then referred to U.S. Citizenship and Immigration Service (USCIS) for a credible-fear screening interview.[5] Starting in October

[5] "USCIS conducts credible-fear screening interviews to determine whether aliens have a credible fear of torture, or of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, if returned to their country." DHS_9089 n.7.

2019, DHS launched the Prompt Asylum Claim Review (PACR) pilot program in the El Paso sector, to process and remove non-Mexican foreign nationals without a valid asylum claim more quickly. DHS_9091; DHS_9199-9201. Under the pilot program Border Patrol agents would complete initial assessments and noncitizens would remain in CBP custody at temporary central processing centers for USCIS to conduct credible-fear interviews. DHS_9091. PACR only enrolled individuals who were subject to the Third Country Transit Rule—a rule barring asylum eligibility for persons who cross the southern border without first having sought protection from persecution or torture in at least one country (the "third" country) through which they traveled en route to the United States. *Id.* n.14. On June 30, 2020, the U.S. District Court for the District of Columbia vacated the Third Country Transit Rule, removing the regulations identifying the population to whom PACR applied. *See Cap. Area Immigrants' Rts. Coal. v. Trump*, 471 F. Supp. 3d 25 (D.D.C. 2020); DHS_8979.

In October 2019, DHS developed guidance for the Humanitarian Asylum Review Process (HARP) pilot project. HARP, like PACR, provided that noncitizens would remain in CBP custody during the credible-fear process, but HARP applied to Mexican nationals who entered the United States between ports of entry, were processed for expedited removal, and who claimed a fear of being returned to Mexico. DHS_9091-92; DHS_9195-97; DHS_9096; DHS_9133.

In February 2021, President Biden issued Executive Order 14010, directing the Secretary of Homeland Security to "cease implementing [PACR and HARP] and consider rescinding any orders, rules, regulations, guidelines or policies implementing those programs." DHS_9034. And on September 1, 2022, based on this Executive Order, the judicial vacatur of the Third Country Transit Rule, and the non-operational status of the programs since March 2020 due to the

COVID-19 pandemic, DHS issued a memorandum directing CBP and USCIS to rescind all guidance documents implementing these programs. DHS_8978-79.

D. Termination of Asylum Cooperative Agreements (Count III)[6]

In July and September 2019, the United States entered into Asylum Cooperative Agreements (ACAs)—separate international agreements with the governments of Guatemala, El Salvador, and Honduras ("Northern Triangle Countries"). STATE_1-13; STATE_14-27; STATE_28-41. Each agreement allowed the United States to remove migrants seeking humanitarian protection to the relevant country, in coordination with that country, where the migrants could seek protection. Each agreement provided for the completion of an implementation plan before commencing operations. *See* STATE_7; STATE_20-21; STATE_34. By their terms, the ACAs could be terminated by any party by written notice three or six months in advance. *Id*. The agreements could also be suspended immediately for a period of up to three months, with the possibility of renewal. *Id.* The United States began implementing the ACA agreement with Guatemala but paused in March 2020 due to the COVID-19 pandemic. STATE_63-64. The ACA agreements with El Salvador and Honduras were never implemented and no migrants were ever removed to either country. *Id.*

In February 2021, President Biden issued an Executive Order directing the Secretary of State to "consider whether to notify the governments of the Northern Triangle . . . the United States intends to suspend and terminate the [ACAs]."[7] STATE_56-62. The State Department

[6] Plaintiffs erroneously characterize the ACAs and PACR (preceding section) as part of a broader "Remain in Mexico" policy, Am. Compl. ¶ 109, but PACR applied exclusively to persons subject to the Third Country Transit Rule (i.e., persons who are not nationals of Mexico) and the ACAs were not with Mexico.

[7] The Executive Order also directed the Attorney General and Secretary of Homeland Security to determine whether to rescind an interim final rule on "Implementing Bilateral and Multilateral

subsequently suspended and terminated the ACAs. STATE_42-44 & STATE_51-53 (El Salvador); STATE_45-47 & STATE_54-55 (Guatemala); STATE_48-50 & STATE_108-109 (Honduras). Under the terms of the agreements, suspension was effective immediately, and termination was effective after the notice period stipulated in each of the agreements—three months for the Guatemala agreement and six months for the El Salvador and Honduras agreements.

E. Alleged "Permission Slip" Policy (Count IV)

Plaintiffs challenge an alleged policy of providing "permission slips" to individuals who cross the border, allowing them to seek permanent legal status, and helping them board buses to destinations within the United States. Am. Compl. ¶¶ 110, 233. There is no such policy. Yet based on a good faith review of Plaintiffs' allegations and conferral with Plaintiffs' counsel, Defendants produced an administrative record for DHS's guidance relating to prosecutorial discretion and issuance of a Notice to Report ("NTR"), a policy that was operative at the time Plaintiffs filed the amended complaint, but no longer is.

In March 2021, to relieve overcrowding and protect its workforce and noncitizens during the COVID-19 pandemic, CBP temporarily authorized issuing NTRs to noncitizens encountered between ports of entry in lieu of Notices to Appear (NTAs) on a case-by-case basis at certain operationally strained border sectors after initial processing and biometric screening. DHS_8659-60; 8662-64. Using NTRs decreased processing time substantially. *See* DHS_8660.

Contrary to Plaintiffs' characterization, the NTR policy did not give "permission to large numbers of illegal border crossers to remain in the U.S." SUMF ¶ 13, ECF No. 34. Individuals

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[ACA's]." STATE_60; *see* 84 Fed. Reg. 63,994 (Nov. 19, 2019). Plaintiffs' First Amended Complaint does not challenge this interim final rule.

released with an NTR were instructed to report to ICE for further processing and to receive an NTA, if appropriate, instructing them to appear before an immigration judge. Ex. 2, Mem. on Parole Plus Alternative to Detention ("Nov. 2, 2021 Memo").[8] Further, Plaintiffs' assertion that the alleged policy contains a transportation component, Pls.' Mem. at 22, is incorrect and not supported by the record.

In November 2021—*after* Plaintiffs filed their amended complaint—CBP issued a memorandum ceasing the use of NTRs. Nov. 2, 2021 Memo. The memorandum outlined a narrow set of circumstances in which alternative processing may be permitted, at the discretion of individual border patrol agents, by using parole in connection with ICE's Alternatives to Detention (ATD). *Id.* at 2.

F. February 18, 2021 Interim Guidance on Civil Immigration Enforcement and Removal Priorities (Count V)

In January 2021, the Acting Secretary of Homeland Security issued a memorandum titled "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities." DHS_3899-03 (Pekoske Memo). Noting DHS resource limitations and "significant operational challenges" due to the COVID-19 pandemic, the Pekoske Memo called on DHS components to review "policies and practices concerning immigration enforcement," and to develop recommendations for "prioritizing the use of enforcement personnel, detention space, and removal assets" and "policies governing the exercise of prosecutorial discretion." DHS_3899-3900. The Pekoske Memo also adopted interim measures directing DHS to focus

[8] A court "may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," and may do so "at any stage of the proceeding." Fed. R. Evid. 201(b)(2), (d). Thus, judicial notice may be taken of official government documents, such as Exhibits 2 through 5. *See, e.g., Cannon v. District of Columbia*, 717 F.3d 200, 205 n.2 (D.C. Cir. 2013) (taking judicial notice of details from document posted on the District of Columbia's Retirement Board website).

enforcement efforts on individuals implicating national security, border security, or public safety, while authorizing enforcement activities outside those categories, DHS_3900-01, and it paused most removals for 100 days while DHS reviewed its policies. DHS_3901.

In February 2021, ICE issued a memorandum providing internal guidance on civil immigration enforcement and removal priorities, to operationalize the enforcement priorities in the Pekoske Memo. DHS_3890-96. The interim guidance confirmed that "ICE operates in an environment of limited resources," and "necessarily must prioritize" certain "enforcement and removal actions over others" to "most effectively achieve" its "critical national security, border security, and public safety mission." DHS_3891-92. The interim guidance reiterated that the interim priorities do not "prohibit the arrest, detention, or removal of any noncitizen." DHS_3892. Thus, Plaintiffs' assertion that the memorandum "prohibit[ed] ICE from detaining and removing all foreign nationals unlawfully present except those who meet a few narrow categories" (SUMF ¶ 17) is incorrect.

The interim guidance allowed DHS to shift resources to focus on individuals posing greater public safety threats and other important agency missions, such as border security. For example, "[b]etween February 18 and August 31, 2021 ICE arrested 6,046 individuals with aggravated felony convictions compared to just 3,575 in the same period in 2020." *See* Ex. 3, Mem. on Conclusions Drawn from "AART" Data (Sept. 24, 2021). Likewise, "field offices [became] more liberal in authorizing [other priority] case[s]"—"sexual assault and other sex offenses; DUIs; and assault, particularly domestic violence"—"as time [went] by." *Id.*

The States of Louisiana and Texas challenged the interim guidance under the APA and a district court issued an injunction, which was stayed pending appeal and later vacated. *Texas v. United States*, 14 F.4th 332 (5th Cir. 2021), *vacated by* 24 F.4th 407 (5th Cir. 2021). On

September 30, 2021, the agency issued revised guidance that rescinded the interim guidance. The revised guidance was also vacated on June 10, 2022; an appeal of that decision is pending with the Supreme Court. *Texas v. United States*, 606 F. Supp. 3d 437 (S.D. Tex. 2022), *certiorari granted*, 143 S. Ct. 51 (July 21, 2022) (denying stay).

G. Recission of Civil Penalties for Failure-to-Depart (Count VI)

Noncitizens who are permitted to voluntarily depart the United States but who fail to do so and noncitizens subject to final orders of removal who willfully fail or refuse to comply may be assessed a monetary civil penalty. 8 U.S.C. §§ 1229c(d)(1), 1324d(a); DHS_9206.

While the authority to assess financial penalties to individuals for failing to depart has existed for more than twenty years, DHS exercised that authority for the first time in 2018, when President Trump directed the Secretary of Homeland Security to issue guidance and promulgate regulations, "to ensure the assessment and collection of all fines and penalties . . . from noncitizens unlawfully present in the United States and from those who facilitate their presence in the United States." DHS_9206. In June 2018, upon direction from Secretary of Homeland Security Kelly, ICE executed this requirement through two delegation orders. *Id.*; DHS_9204; 9261-64.

After taking office on January 20, 2021, President Biden issued Executive Order 13993, which revised civil immigration enforcement policies and priorities. The same day, Acting Secretary Pekoske rescinded former Secretary Kelly's memorandum and ICE ceased issuing fines. DHS_9204, 06-7. In April 2021, ICE rescinded the two delegation orders relating to the collection of civil financial penalties for noncitizens who fail to depart the United States, having found "that the fines were not effective and had not meaningfully advanced the interests of the agency," and that the agency found "no indication that these penalties promoted compliance with noncitizens' departure obligations." DHS_9204.

H. Attorney General's Decision on Administrative Closure (Count VII)

Administrative closure is a "docket management tool" employed at the discretion of immigration judges in individual cases, which allows the judge to remove a case from the judge's active calendar without terminating the case. EOIR_18. In *Matter of Cruz-Valdez*, 28 I. & N. Dec. (AG 2021), the respondent—who was married to a United States citizen and had a pending noncitizen relative petition before USCIS—moved the immigration judge and later the Board of Immigration Appeals (BIA) to administratively close his removal case while his legal status was under consideration by USCIS. EOIR_18-19. The immigration judge denied his request for administrative closure based on the precedent of *Matter of Castro Tum*, 27 I. & N. Dec. 271, 283 (AG 2018), and the BIA affirmed. EOIR_24-25, 110-13.

Pursuant to 8 U.S.C. § 1103(g)(2) and 8 C.F.R. § 1003.1(h)(1)(i) (2002), the Attorney General reviewed and vacated the BIA decision, and determined that immigration judges can make individual decisions to temporarily pause a proceeding and remove the case from the judge's active calendar by applying six factors, thus overruling *Matter of Castro Tum*. EOIR_18-21. On remand, the immigration judge ordered the case to be administratively closed, EOIR_1, 10, which was not a final decision under the INA since it only temporarily paused proceedings.

I. FY2022 Notice of Funding Opportunity for Reception and Placement Program (Count VIII)

To be admitted as refugees in the United States, individuals must apply for, and be selected for, resettlement through the U.S. Refugee Admissions Program. Each refugee approved for admission is sponsored by a resettlement agency participating in DOS's Reception and Placement (R&P) Program under a cooperative agreement with DOS. STATE_67. The purpose of the R&P Program is to "promote the successful reception and placement of [refugees] who are admitted to the United States." STATE_67. The resettlement agencies must provide placement

plans that outline the capacity of their network of local affiliates to resettle their proposed caseload. STATE_69. The resettlement agencies must enter into new cooperative agreements with DOS each fiscal year. STATE_71. To that end, in April 2021, DOS published the Notice of Funding Opportunity ("Notice") for fiscal year 2022. STATE_66.

The Notice does not determine how many refugees will be admitted. The ceiling for refugees is established by the President, consistent with Section 207 of the INA (8 U.S.C. § 1157), and the number of refugees admitted is based on case-by-case determinations made by the U.S. Refugee Admissions Program. For FY2022, the President established a ceiling of 125,000 refugees, but DOS sought to award agreements that could support up to 65,000 refugee arrivals. STATE_68. And only 25,465 refugees were actually resettled in the United States. *See* Congressional Research Service, U.S. Refugee Admissions Program R47399 (Jan. 20, 2023).

Nor does the Notice determine where refugees will be resettled. Cases are assigned to each resettlement agency through a separate process administered by the Refugee Processing Center and the number of refugees assigned to a resettlement agency is determined based on a constellation of factors. STATE_70 (listing factors). Eligible resettlement agencies must have multiple locations across the United States, but the Notice does not express a preference for any geographic locations. STATE_71.

J. Re-Initiation of Central American Minors Program (Count IX)

The Central American Minors Program (CAM) was created in 2014 and allowed parents or legal guardians who are lawfully present in the United States to request access to the U.S. Refugee Admissions Program (USRAP) on behalf of their qualifying children who are nationals of El Salvador, Guatemala, and Honduras, and certain family members of those children, for possible resettlement, or if ineligible for refugee status, for possible parole in the United States. DHS_8888-89. Following President Trump's Executive Order No. 13780 (DHS_8859-69), in

August 2017 DHS terminated the parole arm of CAM, but allowed individuals who were already paroled to stay in the United States until their original parole terms expired, and then to apply for re-parole independent of the eliminated Program. DHS_8917-18; DHS_8905-08; DHS_8921-22.

President Biden's Executive Order 14010 of February 2, 2021, directed the Secretary of Homeland Security to "consider taking all appropriate actions to reverse the 2017 decision rescinding the [CAM] parole policy and terminating the CAM Parole Program . . . and consider initiating appropriate actions to reinstitute and improve upon the CAM Parole Program." DHS_8852. In March 2021, DOS and DHS re-initiated and expanded CAM. DHS_8878-79; 8898-99; 8902-03.

Since 2014, nearly 5,000 children have entered the United States under CAM. DHS_8903. CAM is not a "refugee" or "resettlement" program as Plaintiffs claim. *See* Pls.' Br. 13. Applicants to the program are first adjudicated for possible refugee resettlement and if denied are considered for parole. Individuals paroled into the United States under CAM do not have any immigration status and CAM parole does not create any pathways to lawful status. CAM Parolees are generally authorized parole for three years and they may apply to be considered for re-parole. DHS_8889. Parolees may separately apply for employment authorization. *Id*.[9]

K. Alleged "New Program" to Parole Afghan Nationals (Count X)

On August 23, 2021, the Secretary of Homeland Security issued a memorandum to CBP noting that given current circumstances in Afghanistan, the United States has been involved in the "processing, transporting, and relocating of vulnerable Afghan nationals, including many who worked for or on behalf of the United States." DHS_8961. In the memo, the Secretary

[9] On April 11, 2023, DHS and DOS published a notice in the Federal Register, Bureau of Population, Refugees, and Migration; Central American Minors Program, 88 FR 21694-21704, announcing changes to CAM.

determined that "it is an appropriate exercise of discretionary authority under [8 U.S.C. § 1182(d)(5)] for U.S. Customs and Border Protection officers to parole certain Afghan nationals [who are being moved pursuant to Operation Allies Refuge] into the United States, on a case-by-case basis, for a period of two years." *Id*. That statute provides: "The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." 8 U.S.C. § 1182(d)(5).

Parole is not legal immigration status, nor does it provide a pathway to obtain legal immigration status. Parole is for a temporary period, as was the case here, after which individuals may apply for re-parole, or seek to obtain any lawful immigration status. Afghan nationals paroled into the United States may be eligible to apply for legal status through other DHS programs. DHS_8961.

II. ARGUMENT[10]

A. Plaintiffs Have Not Met Their Burden at Summary Judgment to Show That They Have Article III Standing.

To establish standing, a plaintiff must "present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 733 (2008). Plaintiffs bear the burden of producing evidence that "affirmatively" and "clearly" demonstrates

[10] The Immigration Reform Law Institute (IRLI) has filed an amicus brief raising two new arguments not briefed by Plaintiffs. ECF No. 35-1. The Court should disregard IRLI's brief, because Plaintiffs do not mention DHS's Instruction Manual or the Minimum Standards for Driver's Licenses and Identification Cards raised by IRLI in their brief, and the amicus curiae cannot "cannot raise or implicate new issues that have not been presented by the parties." *See Russell v. Bd. of Plumbing Examiners of Cnty. of Westchester*, 74 F. Supp. 2d 349, 351 (S.D.N.Y. 1999), *aff'd*, 1 Fed. App'x 38 (2d. Cir. 2001).

that they have standing to sue. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). The task of establishing standing is "substantially more difficult" in cases such as this one, where Plaintiffs are not themselves the "object[s] of the government action or inaction [they] challenge." *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (cleaned up).

"[T]he plaintiff must meet [its] burden at the outset of each phase" of the litigation. *Scenic America, Inc. v. U.S. Dep't of Transp.*, 836 F.3d 42, 48 (D.C. Cir. 2016). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). At the summary judgment stage, however, "the plaintiff can no longer rest on such mere allegations but must set forth by affidavit or other evidence specific facts" to establishing standing." *Id.* (cleaned up). At this stage, if "the plaintiff has not introduced sufficient evidence into the record to at least raise a disputed issue of fact as to each element of standing, the court has no power to proceed and must dismiss the case." *Scenic America*, 836 F.3d at 49; *see Clapper v. Amnesty Int'l U.S.A*, 568 U.S. 398, 413 (2013) (dismissing case at summary judgment stage where plaintiffs "can only speculate" that they will suffer a cognizable injury).

Plaintiffs proffer eight declarations alleging two classes of injury: (1) injuries allegedly caused by individuals induced to cross the southern border; and (2) broad environmental and quality of life harms attributable to immigration-based population growth in their communities. Two of the declarants—Plaintiffs Steven Chase Smith and Bruce Anderson—provide unsworn declarations, which cannot be considered at the summary judgment stage. *See Asia N. Am. Eastbound Rate Agreement v. Amsia Int'l Corp.*, 884 F. Supp. 5, 6 (D.D.C. 1995) (letters "not sworn to under penalty of perjury. . . cannot be considered affidavits or other admissible documentation proper for consideration at the summary judgment stage"); *Anand v. U.S. Dep't of*

Health and Human Servs., No. 21-1635-CKK, 2023 WL 2645649, at *8-9 (D.D.C. Mar. 27, 2023).

All but one of Plaintiffs' declarations are identical to the declarations they relied on at the motion to dismiss stage. *Compare* ECF No. 22-1 through 22-8 with ECF No. 34-1 through 34-8. The Court found these declarations sufficed to survive Defendants' motion to dismiss, which "is not the occasion for evaluating empirical accuracy" and a plaintiff need only "allege facts he can prove at summary judgment." *MCIR v. U.S. DHS*, No. 1:20-cv-3438 (TNM), 2022 WL 3277349, at *5 (D.D.C. Aug. 11, 2022) (internal quotation marks and citation omitted). But they fall well short of meeting Plaintiffs' burden at summary judgment to introduce specific facts supporting each element of standing for each of the actions they challenge. *See Whitman-Walker Clinic v. U.S. Dep't of Health and Human Servs.*, 485 F. Supp. 3d 1, 18 (D.C. Cir. 2020) ("Because standing is not dispensed in gross, but instead may differ claim by claim, a plaintiff must demonstrate standing for each claim he seeks to press." (internal quotation marks and citations omitted)). Plaintiffs cannot establish standing by grouping the eleven separate actions together and claiming they have been injured by the sum of those actions.

It is important to note Plaintiffs seek to minimize their burden to demonstrate standing in several regards. First, Plaintiffs' claim to injury rests entirely on the choices of independent parties not before the court—including migrants themselves, DHS officers, and immigration judges. The Supreme Court has steadfastly refused to "endorse standing theories that rest on speculation about the decisions of independent actors, particularly speculation about future unlawful conduct." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (internal quotation marks and citations omitted). Plaintiffs claim they have shown the required "predictable effect of Government action on the decisions of third parties." Pls.' Br. 21. But they

rely on little more than the bald assertion that if immigration has increased, it must be due to the policies and actions they challenge. Immigration, however, is not subject to such simple "if then" analysis: the choice to "risk[] life and limb [to come to the United States]" turns on "myriad economic, social, and political realities." *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015). That something is claimed to be predictable is not sufficient; "the degree of predictability matters" and Plaintiffs must present "relevant evidence" tracing the specific actions they challenge to increased population. *Whitewater Draw Nat. Res. Conserv. Dist. v. Mayorkas*, 5 F.4th 997, 1017 (9th Cir. 2021); *see also Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004); *Arizona v. Biden*, 40 F.4th 375, 383 (6th Cir. 2022) ("Contingent injuries, especially those arising from the impact of regulations on third parties not before the Court, rarely create cognizable cases or controversies." (citation omitted)).

The Supreme Court's decision in *Department of Commerce v. New York* is instructive. There, States and municipalities with a large share of noncitizens asserted they would suffer diminished political representation, loss of federal funds, and diversion of resources due to a citizenship question on the census that would "depress the census response rate and lead to an inaccurate population count." 139 S. Ct. at 2565. The plaintiffs established standing by providing evidence that "established a sufficient likelihood that the reinstatement of a citizenship question would . . . cause [noncitizens] to be undercounted," injuring plaintiffs' access to federal funds distributed based on state population. *Id.* Plaintiffs here have made no similar showing that they will suffer "certainly impending" injury, or that there is a "substantial risk that the harm will occur." *Id.* Instead, they rely on speculation that the policies they challenge will increase the population, which, in turn, they speculate will harm them. "[W]here predictions are so uncertain, [the court is] prohibited from finding standing." *Arpaio*, 797 F.3d at 22.

Second, Plaintiffs attempt to reduce their burden by emphasizing the case law providing that when a plaintiff alleges a procedural injury, the redressability and immediacy requirements are relaxed. Pls.' Br. 20. But a claim of procedural injury does not entirely obviate the duty to show causation; a plaintiff must still show that the challenged decision affects its 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). To demonstrate a concrete interest sufficient to pursue a procedural injury a plaintiff must establish a "geographic nexus between the individual asserting the claim and the location suffering an environmental impact." *Whitewater Draw*, 5 F.4th 997, 1013 (citation omitted) (holding plaintiffs failed to trace challenged immigration rules to impacts on their concrete interests); *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 592 (D.C. Cir. 2019) (holding plaintiffs showed the rule they challenged was likely to harm the specific habitats in which they had interests).[11]

Finally, Plaintiffs attempt to downplay their duty to demonstrate traceability, citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000) and *California Communities Against Toxics v. EPA*, 928 F.3d 1041 (D.C. Cir. 2019) for the proposition that they need only demonstrate "reasonable concerns" or "reasonable fear" of harm. Pls.' Br. 19. But neither case substitutes a reasonable concern or fear for the obligation to show

[11] Plaintiffs rely on recent news reports and CBP data on encounters and "got aways" to show their "particularized fears." Pls.' Br. 22. The Court should not consider this information, which does not show that the encounters are traceable to the policies Plaintiffs challenge.

their alleged injuries are traceable to the actions they challenge. In *Laidlaw*, for example, the Supreme Court found plaintiffs had a "reasonable concern" about the pollution impacts where Laidlaw was discharging pollutants into a river within 3 miles of where a plaintiff liked to swim and fish. 528 U.S. at 181. And in *California Communities*, the District of Columbia Circuit found plaintiffs had standing to challenge a hazardous waste regulation based on their "reasonable fear" of the waste where they lived, worked, and recreated near generators of hazardous materials subject to the regulation. 928 F.3d at 1048-49. In both cases—unlike this case—plaintiffs established that their injuries were "fairly traceable" to the specific actions they challenged.

Plaintiffs here attempt to trace the immigration policies they challenge to two categories of declarants, those who live near the southern border and those who live in the interior of the country. As explained below, no Plaintiff has standing.

1. Plaintiffs have not established standing for the declarants who live near the southern border.

Plaintiffs proffer the unsworn declaration of Steven Chase Smith and the sworn declaration of Gail Getzwiller, both of whom own ranches near the border between Arizona and Mexico and allege a host of injuries from migrants crossing the border, ranging from trash left on their property to fear of violence and transmission of communicable diseases carried by migrants. Pls.' Br. 23-26; Decl. of Steven Chase Smith ¶¶ 10, 13, 18, ECF No. 34-1 ("Unsworn Smith Decl."); Decl. of Gail Getzwiller ¶ 6, ECF No. 34-2 ("Getzwiller Decl.). But there is no link, beyond speculation, that Plaintiffs' identified harms are *caused by* the *specific policies* that Plaintiffs oppose. *Whitewater Draw*, 5 F.4th at 1017 (noting that because the independent decision to enter the country may be based on "any number of variables" plaintiffs must offer evidence that migrants are acting "because of" the challenged action).

For example, Plaintiffs claim the suspension of certain border wall construction (Count II) and MPP (Count III) have incentivized migrants to cross the southern border, resulting in harm to them and their properties. *See* Am. Compl. ¶¶ 133, 159, 197-218; *id.* ¶ 214 ("If construction on the wall had continued, Ms. Getzwiller would not be seeing such devastation in Sasabe[,]" Arizona); Pls.' Br. 25 (terminating wall construction "increased border crossing"). But the suspension of border wall construction meant only 18 miles of planned barrier along the Arizona border was not completed prior to President Biden's Proclamation. *See* Ex. 1, Decl. of Paul Enriquez ¶¶ 8-9, 11-13 & Ex. A. And even had those 18 miles been completed, many gaps would remain in the 370-mile border between Arizona and Mexico. *Id.* ¶ 14 & Ex. A. Plaintiffs fail to carry their burden of proving that migrants "are entering the country illegally *because of* certain gaps in the border wall (which would remain gap-filled regardless of the termination decision)." *Arizona v. Mayorkas*, 600 F. Supp. 3d 994, 1004-05 (D. Ariz. 2022); *see also Whitewater Draw*, 5 F.4th at 1017 (rejecting plaintiffs inducement theory of border crossing). Nor do Plaintiffs even allege—much less demonstrate—that the migrants crossing the border and allegedly harming their interests are crossing through gaps left by the suspended barrier projects—rather than other places along the border where no barrier was proposed.

Plaintiffs' allegations of injury from the termination of the ACAs (Count III) and the PACR and HARP pilot programs (Count IV) are similarly flawed. Plaintiffs contend that these programs collectively discouraged "asylum forum shopping by curtailing the number of illegal aliens permitted into the United States to possibly make an asylum [claims]," Am Compl. ¶ 109, and that terminating the programs induced greater numbers of individuals to cross the border. But neither PACR nor HARP has been operational since March 2020, *i.e.,* prior to President Biden taking office, when Plaintiffs allege changes to immigration policies significantly affected

the environment (Am. Compl. ¶ 14). Thus termination of those programs did not change the status quo and could not have caused any injury to Plaintiffs. Similarly, the ACA with Guatemala was paused in March 2020 and the ACAs with El Salvador and Honduras were never implemented. STATE_63-64. The termination of programs that were not operating, and thus not impacting migration, when President Biden took office, cannot be the source of any injury to Plaintiffs. At the summary judgment stage Plaintiffs' speculative inducement theories do not suffice to establish causation.

Finally, Plaintiffs' challenges to the termination of wall construction, MPP, PACR, and the ACAs, stumble on fatal redressability concerns. As for the border wall, because they have not shown the gaps in the border wall are causing their injuries, Plaintiffs also cannot show that requiring the agency to complete the remaining 18 miles of planned construction would redress those injuries.[12] And PACR cannot be judicially reinstated because it relied on the now-vacated Third Country Transit Rule. As for MPP and the ACAs, at this point, there is no relief the Court could award. Plaintiffs' request that the Court "stay" termination of the ACAs and MPP is not possible because those international agreements are already terminated and cannot be reinstated without the Executive Branch negotiating new international agreements with foreign powers. That decision should be left to the Executive. *See Biden v. Texas*, 142 S. Ct. at 2543 (overturning the mandate issued by district court to try to reinstate MPP citing the "significant burden upon the Executive's ability to conduct diplomatic relations with Mexico" by court decisions that "force[d] the Executive to the bargaining table with Mexico, over a policy that both countries wish to terminate").

[12] At the time of President Biden's Proclamation, there was no ongoing barrier construction in Arizona funded by DHS—the agency Plaintiffs have sued. The 18 miles of uncompleted wall were associated with DoD-funded projects. Enriquez Decl. ¶¶ 9, 14.

In sum, while this case has progressed to summary judgment, Plaintiffs still ask the Court to assume their standing based on speculation and have not carried their burden to provide specific evidence that the harms to their interests along the southern border are fairly traceable to the specific actions they challenge.

2. Plaintiffs have not established standing for the declarants who live in the interior.

Plaintiffs also proffer the declarations of six individuals who live in the interior of the United States and who assert a host of environmental, recreational, and aesthetic harms from the immigration-based population growth where they live. Pls.' Br. 27. These harms, including urban sprawl, traffic congestion, loss of farmland, are strikingly broad and focused on changes to the environment that—if caused by immigration—are decades in the making and not traceable the actions of the Biden administration at issue.

For example, Plaintiffs Huhn, Anderson, and Meyer live in Minnesota and claim they have suffered injuries from lost recreational opportunities and biodiversity resulting from housing developments and population growth, and aesthetic injuries because of traffic congestion. Pls.' Br. 30-31; Decl. of Linda Huhn, ECF No. 34-5 ("Huhn Decl."); Decl. of Bruce D. Anderson, ECF No. 34-6 ("Unsworn Anderson Decl."); Decl. of Rob Meyer, ECF No. 34-7 ("Meyer Decl."). Members of MCIR in Massachusetts claim similar injuries based on urban sprawl in Boston and Lexington, Massachusetts. Pls.' Br. 31; Decl. of Henry Barbaro, ECF No. 34-8 ("Barbaro Decl."); Decl. of Steve Kropper, ECF No. 34-3 ("Kropper Decl."). While Plaintiffs' brief attributes these harms to recent Biden administration policies, their declarations do not substantiate as much. To the contrary, they show that the source of these alleged harms has a far longer lineage. *See, e.g.*, Huhn Decl. ¶ 2 ("Nearly all land around the town was converted from prairie to farmland before my birth"); Meyer Decl. ¶ 4 ("By the mid-1970's,

cabins were being built in the middle of the woods, not just on lakeshore, as was not previously the case" causing forest fragmentation); Kropper Decl. ¶ 6 (associating harms to "opening the floodgates in 1965" to immigration). Even assuming the broad and long-term injuries Plaintiffs allege are caused by immigration-based population growth, Plaintiffs fail to demonstrate that growth is "fairly traceable" to the specific actions before the Court.

Plaintiff Lynn claims recreational and aesthetic harms from potential refugee resettlement in Lancaster County, Pennsylvania, where he resides. Decl. of Kevin Lynn ¶ 14, ECF No. 34-4 ("Lynn Decl."). But most of Lynn's claims are supported not by personal observation as they must be but on reports and studies. *See Whitewater Draw*, 5 F.4th at 1015 (expert affidavit insufficient to establish standing without specific factual support tied to the policy being challenged). For example, Lynn cites a study that purports to show immigration will affect urban sprawl and loss of farmland. Lynn Decl. ¶ 5. Lynn cites media reports that between 2013 and 2017, Lancaster County took in "20 times more refugees per capita . . . than any other county in America." *Id.* ¶ 13. Of course, these reports pre-date the Biden Administration actions that Plaintiffs challenge. Lynn also claims to observe people camping outside the county building across the street, *id.* ¶ 14, but neither Lynn, nor Plaintiffs, try to show that those camping are doing so because of the actions Plaintiffs challenge.

While Plaintiffs' declarations from the interior of the country are inadequate on their face to establish standing for "each claim [Plaintiffs] seeks to press," *Whitman-Walker Clinic*, 485 F. Supp. 3d at 18, when reviewed in the context of the specific policies Plaintiffs challenge, they underscore just how far short of establishing standing Plaintiffs fall.

Plaintiffs contest the government's management and prioritization of removal proceedings, challenging: the alleged "permission slips" policy that they say "enable[s] . . .

unlawful entry into the country" (Count IV), DHS's policy on enforcement priorities (Count V), the decision not to issue fines for failure to depart (Count VI), and the Attorney General's decision to allow immigration judges to administratively close cases (Count VII). Am. Compl. ¶ 110. Plaintiffs assert that these policies will increase population in their communities because they mean more undocumented immigrants will refuse to leave the country when required to do so, *id.* ¶ 112, DHS agents will arrest and remove fewer aliens, *id.* ¶ 111, and immigration judges will allow larger numbers of noncitizens to remain in the country by administratively closing their cases, *id.* ¶ 118. But at summary judgment Plaintiffs must support their injury claims with "specific evidence" rather than speculation about how third-party migrants, ICE officers, and immigration judges will act. *Lujan*, 504 U.S. at 562. And even assuming the third parties act as Plaintiffs speculate, there is no basis for assuming that the immigrants will settle in—and damage—the communities of interest to Plaintiffs.

Plaintiffs also fail to establish standing to challenge the administration of refugee programs and parole actions (Counts VIII though X). First, DOS's publication of the FY2022 Notice of Funding Opportunity (Count VIII) is merely a document soliciting proposals—like a federal job posting or grant opportunity—and its issuance (the action they challenge) causes Plaintiffs no harm. Plaintiffs speculate that the solicitation will result in future cooperative agreements between DOS and successful applicants that "will increase assistance and other integration support to refugees" Am. Compl. ¶ 122, and thus "augment[] the U.S. population through the resettlement of foreign nationals," *id.* ¶ 119, but no such agreement is before this Court.

Plaintiffs lack standing to challenge CAM (Count IX) and DHS's use of parole authority for Afghan Nationals (Count X) for the same reason their challenge to the International

Entrepreneur Rule failed in *Whitewater Draw*. The Entrepreneur Rule established criteria for DHS to use its discretionary parole authority to grant temporary parole to "entrepreneurs of start-up entities" with significant potential for rapid growth and job creation. 5 F.4th at 1006 (citation omitted). There, just as here, plaintiffs alleged the rule results in population growth and that NEPA analysis should have been done. *Id.* at 1019. The Ninth Circuit found that plaintiffs lacked standing to challenge the Entrepreneur Rule because fewer than 3,000 individuals were projected to be paroled through the program and plaintiffs failed to show that any parolees settled near them in numbers that materially contribute to population growth. *Id.*

These reasons apply equally here. Since 2014 (well before the beginning of the Biden administration), around 5,000 minor beneficiaries have entered the United States under CAM, DHS_8903, and Plaintiffs offer no evidence that these children and any accompanying adults settled near them in numbers sufficient to materially contribute to population growth, or will do so in the future. And, like the Entrepreneur Rule, CAM parole is not a pathway to legal status or citizenship; it is a three-year temporary parole after which recipients may apply for re-parole if eligible or seek and be granted lawful status via another pathway to legally remain in the United States. *See* DHS_8883. Plaintiffs likewise offer no evidence that DHS's use of parole authority for Afghan Nationals has resulted or will result in the settlement of Afghans near them in numbers that materially contribute to population growth. Nor have Plaintiffs shown that Afghans paroled under DHS's memorandum have or will permanently stay in the United States. Afghans paroled into the United States were not afforded legal status or a pathway to citizenship. DHS_8961.

In sum, while Plaintiffs claim that each of the actions they challenge has the "potential to cause significant environmental effects," none of Plaintiffs' recycled declarations carries

Plaintiffs burden to specifically link the environmental injuries they assert to the specific policies they challenge. Am. Compl. ¶¶ 227, 230, 233, 236, 239, 242, 245, 248, 251.

B. Plaintiffs Mischaracterize NEPA's Requirements.

Before turning to Plaintiffs' individual claims, it is necessary to place the NEPA process in its proper context. Under NEPA, before taking any "major Federal action[] significantly affecting the quality of the human environment," a federal agency must prepare a detailed statement discussing the likely environmental impacts of the action and potential alternatives. 42 U.S.C. § 4332(2)(C); *Nat. Res. Def. Council v. U.S. Nuclear Regul. Comm'n*, 879 F.3d 1202, 1207 (D.C. Cir. 2018). This requirement is "essentially procedural," designed to ensure that agency decisions are "fully informed and well considered." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1309-10 (D.C. Cir. 2014) (citation omitted). NEPA does not mandate particular substantive outcomes. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

NEPA's requirements are triggered when a major federal action could significantly affect the quality of the human environment. 40 C.F.R. § 1500.1.[13] NEPA does not apply to non-discretionary actions, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004), or to decisions that do not alter the environmental status quo. *Fund for Animals, Inc. v. Thomas*, 127 F.3d 80, 83-84 (D.C. Cir. 1997). Nor does NEPA apply to "[j]udicial or administrative civil or criminal enforcement actions." 40 C.F.R. § 1508.1(q)(1)(iv).

Plaintiffs' claims hinge on their assertion that the actions they challenge could impact the population of the United States and, in turn, the environment. But NEPA requires consideration

[13] The NEPA regulations cited here are promulgated by the Council on Environmental Quality ("CEQ"), are binding on agencies, and are owed "substantial deference" by the courts. *Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 861 (D.C. Cir. 2006). All citations are to the 2022 regulations.

only of effects that are reasonably foreseeable and requires a reasonably close causal relationship between the proposed action and its effects. *See, e.g.*, *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983) ("whether [NEPA] requires consideration of a particular effect" requires examination of "the relationship between that effect and the change in the physical environment caused by the major federal action at issue."); *id.* at 774 (noting an effect must be "proximately related to a change in the physical environment."). Here Plaintiffs' claims of population effects turn on the independent personal decisions and actions of people who are not before this Court. And they are untethered to any specific claim that the alleged population effects will significantly impact the physical environment in any particular place. The mere possibility that some federal action may affect the number of persons who immigrate to the United States untethered to specifically identified physical impacts on the environment is not enough to trigger NEPA's requirements.[14]

Plaintiffs emphasize that the CEQ regulations list "growth inducing effects" as potentially significant impacts. Pls.' Br. 18. In doing so, they ignore the predicate requirement that any effect must be reasonably foreseeable. The Ninth Circuit's decision in *City of Davis v. Coleman*, 521 F.2d 661, 666, 671 (9th Cir. 1975), which Plaintiffs lean on for the proposition that an agency should consider population growth impacts is illustrative. Far from helping Plaintiffs, the court in *Coleman* recognized that while NEPA requires agencies to consider the foreseeable indirect effects of highway construction, such as residential and industrial growth in a specific location, it does not require agencies to "foresee[] the unforeseeable." *Id.* at 676-77.

[14] If the potential population impact of a federal program, standing alone, were enough to trigger NEPA, by the same logic that Plaintiffs employ, any federal program that promotes public health, by extending human life or reducing infant mortality, or that promotes childbearing would likewise be subject to NEPA.

Unlike the plaintiffs in *Coleman*, Plaintiffs here cannot trace reasonably foreseeable growth impacts to any specific community or to any of the specific actions they challenge.

Instead, Plaintiffs seek to aggregate the individual actions they challenge into a single "immigration agenda" that would have the cumulative effect of substantially increasing U.S. population. Pls.' Br. 17. Plaintiffs' call for a broad cumulative effects analysis is no more than a rehash of their broad programmatic challenge that this Court dismissed as unreviewable under the APA. *MCIR*, 2022 WL 3277349, at *8-9; *see Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("challenged agency action must be 'discrete'").

C. Each of Plaintiffs' Individual NEPA Claims Fails.

1. The United States is entitled to summary judgment on Plaintiffs' border wall construction claim (Count II).

Plaintiffs' claim challenging the suspension of border wall construction also fails on the merits because the decision to suspend construction does not alter the environmental status quo. *See Fund for Animals*, 127 F.3d at 83-84 (decisions that do not alter the status quo are not "major federal actions" requiring NEPA analysis) (citation omitted). Rather, "[t]he duty to prepare an EIS normally is triggered when there is a proposal to change the status quo." *Comm. for Auto Respo. v. Solomon*, 603 F.2d 992, 1002-03 (D.C. Cir. 1979). Faced with a nearly identical NEPA claim over the decision to suspend border wall construction, the United States District Court for the District of Arizona rejected the State of Arizona's request for a preliminary injunction, finding the State failed to establish a likelihood of success on the merits of the claim. *Arizona v. Mayorkas*, 584 F. Supp. 3d 783, 802-03 (D. Ariz. 2022), *appeal dismissed*, No. 22-15519, 2022 WL 6105386 (9th Cir. Sept. 12, 2022). The court explained that the correct frame is "whether the status quo had changed from the perspective of the environment." *Id.* at 803. Because the gaps in the border wall existed when the decision to suspend border wall construction was reached—and

were not altered by that decision—the court found that no NEPA analysis was required.[15] *Id*. As the court explained, a "cessation of construction activities . . . thereby preventing subsequent human interference," does not trigger NEPA. *Id.* at 804. The same is true of Plaintiffs' claim here.

Plaintiffs' challenge to the suspension of border wall construction also fails because the Secretary of Homeland Security waived NEPA for the specific border wall construction activities that were suspended. DHS_12. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter "IIRIRA," codified at 8 U.S.C. § 1103 note) vested the Secretary of Homeland Security with the discretion to determine both where and what type of border infrastructure is appropriate and granted the Secretary the "authority to waive all legal requirements [including NEPA] . . . to ensure expeditious construction of the barriers and roads under this section." IIRIRA § 102(c)(1). DHS's waiver of NEPA to construct the wall applies as well to the decision to stop construction.

Finally, Plaintiffs' request for NEPA review of a decision to suspend construction would also lead to nonsensical results in practice. For example, NEPA requires an agency to examine reasonable alternatives to the proposed action against a background of no action alternative. 40 C.F.R. § 1502.14(c); *see also Hammond v. Norton*, 370 F. Supp. 2d 226, 241 (D.D.C. 2005) (emphasis added) (citation omitted) ("The purpose of discussing the 'no action alternative' is 'to facilitate reader comparison of the beneficial and adverse impacts of other alternatives *to the applicant doing nothing*.'"). Thus, to complete a NEPA analysis of the decision to stop construction, DHS would need to conduct an after-the-fact analysis of the effects of border wall

[15] There, as here, the "environmental feature at issue" was 18 miles of gaps in the border wall. *Arizona v. Mayorkas*, 584 F. Supp. 3d at 803.

construction—the very analysis waived in the first place. *See also Arizona*, 584 F. Supp. 3d at 804-05 (rejecting the State's identical NEPA argument that agency "was not required to prepare an EIS before pursuing efforts to *construct* the border wall" but was "nevertheless required to prepare an EIS before *ending* the construction program" as "counter-intuitive (if not absurd)").

2. The United States is entitled to summary judgment on Plaintiffs' termination of MPP claim (Count III).

Under Article III of the Constitution, the power of the federal courts extends only to actual, ongoing cases, or controversies. "[W]hen an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot." *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016). Plaintiffs' challenge to the termination of MPP[16], is moot because the June 1, 2021 memorandum terminating MPP has since been rescinded and superseded by the October 29, 2021 memoranda. *See Biden v. Texas*, 142 S. Ct. at 2544-45 (confirming that the October 29 memoranda constitute a separate, final agency action that both rescinds the June 1 decision and terminates MPP). Because the October 29 memoranda terminating MPP moots Plaintiffs' challenge to the superseded June 1 decision, Defendants are entitled to summary judgment on that claim.

While the Supreme Court found the October 29 termination to be a final agency action under Section 704 of the APA, it did not address whether the termination was committed to agency discretion under Section 701 of the APA. Under Section 701, termination of MPP is unreviewable, because the APA does not permit judicial review of actions committed to agency discretion by law. 5 U.S.C. § 701(a)(2). "[T]he contiguous-territory return authority [in Section

[16] Plaintiffs challenge the June 1, 2021 memorandum terminating MPP. Am. Compl. ¶ 109 & n.48. The October 29, 2021 memoranda post-dates Plaintiffs' Amended Complaint filed September 3, 2021, and Plaintiffs have never sought to amend their complaint.

1225(b)(2)(C)][17] is discretionary." *Biden v. Texas*, 142 S. Ct. at 2543-44. And the statute provides no criteria to review the agency's exercise of that discretion. *See Heckler v. Chaney*, 470 U.S. 821, 830-31 (1985) (no basis for review "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion").

In addition, even if Plaintiffs could challenge the June 1 memorandum and even if they had challenged the October 29 memoranda, none of the memos are a major federal action subject to NEPA because "[j]udicial or administrative civil or criminal enforcement actions" are not considered major federal actions. 40 C.F.R. § 1508.1(q)(1)(iv). The INA provides DHS with enforcement discretion to return inadmissible noncitizens arriving by land to contiguous territories pending removal proceedings. 8 U.S.C. § 1225(b)(2)(C). *See* DHS_204-05 (explaining statutory basis and implementation for MPP under Section 1225(b)(2)(C)). MPP and its termination are exercises of that enforcement discretion and therefore not subject to NEPA. *See Nw. Ctr. for Alternatives to Pesticides v. U.S. Dep't of Homeland Sec.*, 552 F. Supp. 3d 1078, 1091 (D. Or. 2021) ("[T]he decision to send reinforcement personnel to a temporary hotspot to respond to criminal activity, protect people and property from criminal activity, and enforce criminal laws, falls within NEPA's exception for criminal enforcement actions."), *appeal dismissed as moot*, No. 21-35751, 2023 WL 332751 (9th Cir. 2023).[18]

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[17] "In the case of an alien described in subparagraph (A) [*i.e.*, 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 1229a of this title." 8 U.S.C. § 1225(b)(2)(C) (emphasis added).

[18] *See also United States v. Glen-Colusa Irr. Dist.*, 788 F. Supp. 1126, 1135 (E.D. Cal. 1992) ("effort to enforce compliance" with the Endangered Species Act "is not major federal action triggering NEPA"); *Calipatria Land Co. v. Lujan*, 793 F. Supp. 241, 245 (S.D. Cal. 1990) (recognizing there is "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 agency's enforcement authority is not "major Federal action" triggering NEPA review); *United States v. Rainbow Fam.*, 695 F. Supp. 314, 324

In addition, even if the MPP and its termination were not moot and were not enforcement actions excluded from NEPA, nothing in the record suggests that MPP directly caused a significant reduction in immigration. Between January 2019 and January 2021, CBP processed around 68,000 noncitizens for MPP as compared to almost 600,000 comparable cases which DHS officials declined to enroll in the program. DHS_869. More than a quarter of individuals enrolled in MPP were encountered attempting to reenter the United States. DHS_261. In March 2020, the CDC suspended the entry of covered noncitizens from Canada or Mexico in response to the COVID-19 pandemic, and enrollments in MPP shrank. DHS_260-61. Because ending MPP is not likely to cause significant environmental impacts to the human environment, NEPA would not apply even if this claim were not moot.

3. The United States is entitled to summary judgment on Plaintiffs' PACR and HARP claims and termination of the ACAs claim (Count III).

a. Summary Judgment for Defendants on the challenge to the termination of PACR and HARP is proper.

In March 2020, before President Biden took office, the PACR and HARP pilot programs ceased operations due to the COVID-19 pandemic, specifically DHS's implementation of the CDC's Order Suspending Introduction Of Certain Persons From Countries Where A Communicable Disease Exists. DHS_8980-9030.

DHS's decision to end the PACR and HARP pilot programs after eighteen months of non-operational status is not a major federal action that could significantly affect the human environment, because it does not alter the environmental status quo. An agency decision that "maintain[s] the substantive status quo" is not a "major federal action under NEPA." *Fund for*

(E.D. Tex. 1988) (recognizing that NEPA exempts agency decisions on whether to "bring a civil or criminal action to enforce Forest Service or other governmental regulations or statutes").

Animals, 127 F.3d at 83-84. NEPA applies only to "major Federal actions," even where "the environmental consequences of inaction may be greater than the consequences of action[.]"; *Defs. of Wildlife v. Andrus,* 627 F.2d 1238, 1243 (D.C. Cir. 1980). Given the non-operational status of the pilot programs due to COVID-19, the decision not to revive them—even if it were possible following judicial vacatur of the Third Country Transit Rule—should be considered agency inaction, not action. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1089-90 (9th Cir. 2014) (rejecting claim that allowing a permit to expire is a major action significantly affecting the environment for purposes of NEPA); *Mashack v. Jewell*, 149 F. Supp. 3d 11, 29 (D.C. Cir. 2016) (NEPA does not apply to decision declining to solicit a new concession contract).

It is also implausible that the pilot programs had a significant environmental impact. PACR and HARP, while they were operational between October 2019 and March 2020, changed the detention of a total of around 5,000 individuals who were already being processed for expedited removal and who claimed fear of return to their home country. DHS_9097. The programs neither admitted nor deported anyone from the United States or addressed parole decisions—they were directed mainly at which agency component maintained custody over noncitizens pending credible fear interviews.

b. Summary Judgment in favor of Defendants on the challenge to the termination of the ACAs is proper.

Judicial review of Plaintiffs' challenge to DOS's decision to terminate the ACAs is foreclosed by the political question doctrine. "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230

(1986). In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court set forth six tests for determining the presence of a nonjusticiable political question, most notably "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (cleaned up). A court need only find that one factor is "inextricably present" in these facts to conclude that the doctrine bars review. *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1362 (Fed. Cir. 2004) (citing *Baker*, 369 U.S. at 217). The D.C. Circuit has explained that making international agreements is textually committed to the political branches and thereby outside the province of the judiciary. *Antolok v. United States*, 873 F.2d 369, 381 (D.C. Cir. 1989) (making international agreements "is one of those areas of foreign relations textually committed to the political branches to the exclusion of the Judiciary."). The decision whether to reenter the ACAs does not merely "touch" foreign relations but is entirely of that nature. *See Baker*, 369 U.S. at 211 n.31. Accordingly, the Court should decline to review the termination of the ACAs.

Even if Plaintiffs' ACA claim were otherwise justiciable, the terminations of the ACAs are not reviewable final agency actions under the APA. 5 U.S.C. § 704 ("Agency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court are subject to judicial review.") (emphasis added). The ACAs were not final agency actions because they required separate implementation plans before taking effect. *See Food and Water Watch v. U.S. EPA*, 5 F. Supp. 3d 62, 85 (D.D.C. 2013) ("[W]here agency action requires separate implementation plans to make its goals come to fruition, such agency action is not final for purposes of judicial review."). *See* STATE_20 ("Until the initial implementation plan is completed, the parties do not plan to operationalize this agreement."); STATE_7 ("The Parties plan to operationalize this Agreement upon the completion of a phased implementation plan.");

STATE_33 ("In the Implementation Plan, the Parties shall work to identify appropriate individuals to be transferred pursuant to this Agreement."). Because DOS's decision to enter into the ACAs was not a final agency action under the APA, its termination of the ACAs was not either.[19]

Finally, even if termination of the ACAs were reviewable, there is no evidence that it significantly affected the environment. Because the agreements with El Salvador and Honduras were never implemented, no migrants were ever removed to either of those countries, and so those agreements had no effect on immigration, much less on the environment. With Guatemala, only 948 individuals were ever transferred under the applicable implementation agreement. *See* Ex. 4, Fiscal year 2020 Refugees and Asylees Annual Flow Report at 24 (March 8, 2022). There is no plausible basis for concluding that termination of the ACA with Guatemala had any impact on the human environment, much less a significant one triggering NEPA.

4. The United States is entitled to summary judgment on Plaintiffs' challenge to an alleged "permission slips" policy (Count IV).

Plaintiffs' challenge to the March 2021 NTR policy is moot because DHS replaced the NTR policy in November 2021 with a new policy—Parole Plus Alternative to Detention ("Parole + ATD"). *Akiachak*, 827 F.3d at 113 ("[W]hen an agency has rescinded and replaced a challenged regulation, litigation over the legality of the original regulation becomes moot."). And Parole + ATD was itself subsequently reauthorized and expanded in July 2022. Plaintiffs have never sought to amend their complaint to challenge Parole + ATD, and it is not before this Court. *Cf. Florida v. United States*, No. 3:21-cv-1066-TKW-EMT, 2022 WL 2431414, at *4

[19] As Plaintiffs do not challenge the implementation plan for the agreement with Guatemala the Court need not reach the question of whether that plan is a reviewable final agency action.

(N.D. Fla. May 4, 2022) (amending complaint after challenge to NTR policy became moot).[20] The United States is entitled to summary judgment on this claim because the NTR policy that Plaintiffs challenge has been superseded.

Even if Plaintiffs' challenge to the NTR policy was not moot, this NEPA claim fails because the policy is not a major federal action that could significantly affect the human environment. Again, the NEPA regulations that define "[m]ajor [f]ederal action" expressly exclude "[j]udicial or administrative civil or criminal enforcement actions." 40 C.F.R. § 1508.1(q)(1)(iv). The March 2021 memorandum authorized the use of "prosecutorial discretion" to release migrants arriving in the country with an NTR (to an ICE office) without immediately placing them in removal proceedings, and thus falls within the exclusion for civil and criminal enforcement actions. Courts have interpreted this exclusion broadly, consistent with its plain text. *See, e.g.*, *Nw. Ctr. for Alternatives to Pesticides*, 552 F. Supp. 3d at 1091; *Env't Prot. Info. Ctr. v. U.S. Fish & Wildlife Serv.,* No. C 04-4647 CRB, 2005 WL 3877605, at *2 (N.D. Cal. Apr. 22, 2005) (imposition of sanctions is not a major federal action under NEPA). Because the NTR policy falls within the civil and criminal enforcement exclusion, NEPA does not apply.

5. The United States is entitled to summary judgment on Plaintiffs' challenge to the February 2021 interim guidance on removal priorities (Count V).

Plaintiffs' challenge to the February 2021 interim guidance on removal priorities is moot because the guidance was replaced in September 2021 with additional guidance that differs significantly from the interim guidance. *See, e.g.*, Ex. 5, Significant Considerations in Developing Updated Guidelines for the Enforcement of Civil Immigration Law (Sept. 30, 2021)

[20] In a recently issued opinion, the district court vacated DHS's parole + ATD policy under the APA. *Florida v. United States*, No. 3:21-cv-1066-TKW-ZCB, 2023 WL 2399883, AT *35 (N.D. Fla. Mar. 8, 2023).

at 1-2, 10, 19 ("September 2021 Guidance"). Because the February 2021 interim guidance has been superseded by the September 2021 guidance, Plaintiffs' challenge to the interim guidance is moot and the United States is entitled to summary judgment on this claim. *See Akiachak*, 827 F.3d at 113.

In addition, the interim guidance is not a final agency action that Plaintiffs can challenge under the APA, 5 U.S.C. § 704, because the interim guidance does not determine anyone's legal rights, change any person's legal status, prohibit enforcement of any law, determine any legal benefits, change prior agency action, or create any right or benefit. *Arizona v. Biden*, 40 F.4th 375, 388-89 (6th Cir. 2022) (finding September 2021 Guidance likely not reviewable under the APA as a "nonbinding policy statement" that preserved officials' discretion to make decisions depending on the facts); *cf. Texas v. United States*, 555 F. Supp. 3d 351, 389-92 (S.D. Tex. 2021) (reaching the opposite conclusion that the interim guidance represented the consummation of DHS's decision-making process and determined rights and legal obligations), *appeal dismissed,* No. 21-40618, 2022 WL 517281 (5th Cir. Feb. 11, 2022). The *Florida* court also found that the interim guidance did not constitute the agency's definitive position and was "a work in progress," 540 F. Supp. 3d at 1157, which turned out true as final guidance issued in September 2021 after additional information gathering and analysis. *See* September 2021 Guidance at 2.

Plaintiffs' challenge to the interim guidance also fails under NEPA because the guidance is not a major federal action that could significantly affect the human environment. The interim guidance falls within the NEPA exception for "[j]udicial or administrative civil or criminal enforcement actions." *See* 40 C.F.R. § 1508.1(q)(1)(iv). It addresses priorities in civil immigration enforcement and removal decisions, including whether to assume custody of a

noncitizen, whether to issue a notice to appear, whether to arrest, detain, or release a noncitizen, whether to grant parole, and whether to execute final orders of removal. *See* DHS_3892. Because the NEPA regulations exclude civil and criminal enforcement decisions such as these from the definition of "Major Federal action," no NEPA is required. 40 C.F.R. § 1508.1(q)(1)(iv).

Moreover, even if the interim guidance fell outside the "enforcement actions" exclusion, the guidance itself has no environmental effect—it merely provided guidance to "officers and agents . . . to exercise their discretion thoughtfully, consistent with ICE's important national security, border security, and public safety mission." DHS_3893. The exercise of that discretion and the wisdom of how that discretion was administered when the interim guidance was in effect are not the subjects of this lawsuit. And if the exercise of that discretion results in more or fewer noncitizens in the United States, Plaintiffs offer no evidence to establish that. *See Humane Soc'y of U.S. v. Johanns*, 520 F. Supp. 2d 9, 22 (D.D.C. 2007) ("[S]ome environmental effect must be caused by the Interim Final Rule for it to come within the rubric of NEPA."). Because there is no evidence that the interim guidance had any—much less a significant—environmental effect, Plaintiffs' challenge to the interim guidance should be dismissed.

6. The United States is entitled to summary judgment on Plaintiffs' challenge to DHS's recission of orders to collect civil financial penalties for failure to depart (Count VI).

DHS's decision to stop exercising its statutory authority to collect civil penalties from noncitizens who fail to depart the United States is a "civil or criminal enforcement action" decision by law enforcement that is excluded from the NEPA regulation definition of "major federal action." *See, e.g.*, *Calipatria* 793 F. Supp. at 245. For this reason alone, Count VI should be dismissed.

Even setting aside the NEPA exclusion for discretionary civil and criminal enforcement decisions, an agency need not conduct a NEPA analysis unless the activity has an

"environmental effect," and here it does not. *See Johanns*, 520 F. Supp. 2d at 22. The record shows that the decision to enforce civil penalties did not have much of an effect on immigration, much less on the environment. *See* DHS_9207 (explaining that penalties were not "effective or beneficial" because eighty-nine percent of NTF since 2018 were either undeliverable or canceled); *id.* (ICE assessed $2,640,986 in failure to depart penalties but only collected $13,998 in total); DHS_9208 (fine issuance process can delay removal of noncitizens and prolong their time in the United States). Plaintiffs' theory that stopping enforcement of civil fines removes a deterrent to illegal entry or overstay that could result in environmental impacts is not supported by the record, which shows that ending a small-scale civil penalty program will not significantly affect the environment.

7. The United States is entitled to summary judgment on Plaintiffs' challenge to the Attorney General's decision to reinstate administrative closure (Count VII).

The Attorney General's decision to reinstate administrative closure is not a "major federal action" under NEPA, because it is not a final agency action under the INA. 40 C.F.R. § 1508.1(q)(1)(iii) (excluding decisions that are not final agency actions under the APA "or other statute"). Under the INA, finality is contingent upon "whether the agency's review of the removal order is complete." *Bhaktibhai-Patel v. Garland*, 32 F.4th 180, 194 (2d Cir. 2022); 8 U.S.C. § 1101(a)(47)(A),(B) (a removal order is final only if affirmed by the BIA or the time for appeal to the BIA has lapsed); *see also Nasrallah v. Barr*, 140 S. Ct. 1683, 1690-91 (2020) ("[A] final "order of removal" is a final order "concluding that the alien is deportable or ordering deportation."). Here, the Attorney General's decision in *Matter of Cruz-Valdez* remanded the case to the BIA for further proceedings—meaning it was not the final agency action in that case under the INA.

Additionally, the Attorney General's decision is not subject to NEPA's requirements because Plaintiffs have not identified any significant environmental effect traceable to the Attorney General's decision. *See Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 754 (2004) (explaining "NEPA requires a reasonably close causal relationship' between the environmental effect and the alleged cause."). The Attorney General's decision does not, as Plaintiffs allege, "create[] a *new pathway* for the long-term settlement of illegally present foreign nationals." *See* Pls.' Br. at 12 (emphasis added). Administrative closure does not confer legal status or terminate the noncitizen's removal case, but the Attorney General's decision did not administratively close a single case in any event. It merely restored the availability of a discretionary docket management tool immigration judges previously employed for decades. Plaintiffs do not allege it resulted in a significant environmental effect in the past and they only speculate about future effects.

Furthermore, review in this court is also barred under Sections 1252(a)(5) and 1252(b)(9), which together limit judicial review of an order of removal to the "appropriate court of appeals." The Court previously addressed reviewability under those sections and found they did not apply because "[t]he Coalition does not challenge an order of removal; it challenges the lack of NEPA analysis before the Attorney General reinstated administrative closure." *MCIR*, 2022 WL 3277349, at *10. The Court assumed, however, that the Attorney General took one final agency action not to conduct a NEPA analysis before reinstating administrative closure and then a separate one to reinstate administrative closure and that Plaintiffs challenge only the former and not the latter. But an agency's compliance with NEPA is not distinct from the underlying major federal action to which it applies (or does not apply), such as the decision to build a highway or harvest timber. *See, e.g.*, *Sierra Club v. U.S. Dep't of Energy*, 825 F. Supp.

2d 142, 156-57 (D.D.C. 2011) (dismissing challenge to a NEPA analysis alone as premature until the agency had taken final agency action). *Matter of Cruz-Valdez* is not such a decision.

In sum, Plaintiffs cannot bring a NEPA challenge to the Attorney General's decision in *Matter of Cruz-Valdez*, and even if they could, the action they challenge is exempt from NEPA's requirements and does not significantly affect the environment in any event.

8. The United States is entitled to summary judgment on Plaintiffs' challenge to DOS's issuance of a Notice of Funding Opportunity (Count VIII).

Plaintiffs' challenge to the DOS's FY2022 Notice of Funding Opportunity and their request for a "stay" of that action fails. First, it is moot. The FY2022 Notice closed, and the cooperative agreements DOS subsequently entered into are now complete. New cooperative agreements have been awarded under a separate a FY2023 Notice of Funding Opportunity that Plaintiffs do not challenge.[21]

Setting aside mootness, the FY2022 Notice is not a final agency action under the APA. For agency action to be final, it must (1) "mark the consummation of the agency's decisionmaking process" and (2) be an action "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) (cleaned up). As to the first prong, the FY2022 Notice is not the consummation of the agency's decisionmaking process, but the beginning. The Notice merely solicits proposals from resettlement agencies seeking to be awarded cooperative agreements to assist in the resettlement of refugees admitted to the United States. The Notice itself does not enter into any cooperative agreements or resettle refugees in any specific numbers or locations within the United States. For

[21] For FY2023, the Notice was published in April 2022 and submissions were due in June 2022. *See* U.S. DEP'T OF STATE, FY2023 NOTICE OF FUNDING OPPORTUNITY FOR RECEPTION AND PLACEMENT PROGRAM (2002), https://www.state.gov/fy-2023-notice-of-funding-opportunity-for-reception-and-placement-program/

those same reasons, the Notice does not determine any rights or obligations and no legal consequences flow from the Notice. It reflects a decision to seek information and proposals that will inform later decisions (not challenged by Plaintiffs).

In addition to not being a final agency action under the APA, the FY2022 Notice is not a "major federal action" that could significantly impact the human environment under NEPA. The Notice merely solicits proposals. It does not admit refugees into the United States, determine how many refugees will be admitted, or where they could be resettled. While it notes the agency's intention to enter into agreements that could later be relied on to resettle up to 65,000 refugees, that number is an estimate. The number of refugees admitted depends on individual admission decisions by the U.S. Refugee Admissions Program. Viewed another way, Plaintiffs' NEPA challenge to the FY2022 Notice is unripe because an agency's NEPA obligations mature only once the agency "reaches the critical stage of a decision which will result in irreversible and irretrievable commitments of resources to an action that will affect the environment." *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 49 (D.C. Cir. 1999) (cleaned up)). Without subsequent agency action, the FY2022 Notice "authorizes no conduct that will affect the environment at all." *Save Long Beach Island v. U. S. Dep't of the Interior*, No. 22-cv-55 (DLF), 2023 WL 2424608, at *4-5 (D.D.C. Mar. 9, 2023).

9. The United States is entitled to summary judgment on Plaintiffs' challenge to the reinitiation of CAM (Count IX).

The United States is entitled to summary judgment on Plaintiffs' claim challenging CAM because the program is not reasonably expected to impact the physical environment and therefore NEPA does not apply. "NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983). The existence of a connection

between the alleged effect and the physical environment is paramount: answering "whether [NEPA] requires consideration of a particular effect" requires examination of "the relationship between that effect and the change in the physical environment caused by the major federal action at issue." *Id.* at 773. The effect must be "proximately related to a change in the physical environment." *Id.* at 774.

As explained above, CAM only allows for temporary stays in the United States and thus does not permanently impact the population of the United States. But even assuming all of those that CAM permitted to enter the United States stayed indefinitely, since 2014 the program has only permitted around 5,000 minors to enter the United States. DHS_8903. There are no grounds for concluding that a program of that scale historically could cause a significant change in the physical environment. And thus, a NEPA analysis of the program was not required.

10. The United States is entitled to summary judgment on Plaintiffs' challenge to an allegedly "new" program to parole Afghans as part of Operation Allies Refuge (Count X).

The INA precludes judicial review of DHS's exercise of its discretionary parole authority. 8 U.S.C. § 1252(a)(2)(B)(ii). The statute's broad language encompasses decisions like the challenged memorandum, which determined Afghan nationals could be paroled into the United States under Section 1182(d)(5), which gives discretion to the Attorney General to "parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons." 8 U.S.C. § 1182(d)(5)(A). Plaintiffs cannot evade the judicial bar on review of parole decisions by recasting their claim as a challenge to an amorphous "new policy" to parole Afghan nationals. Those decisions are unreviewable individually and *en masse*. *See Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018).

Even absent Section 1252(a)(2)(B)(ii)'s jurisdictional bar, APA Section 701(a)(2) separately precludes judicial review because DHS's determination that Afghan nationals could

be paroled into the United States under the discretionary authority set forth in 8 U.S.C. § 1182(d)(5)(A) is an "agency action . . . committed to agency discretion by law" that confers plenary discretion on the Attorney General to "parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons." Plaintiffs point to no "manageable standards" that could guide the Court's review of the memorandum; their challenge is thus unreviewable under 5 U.S.C. § 701(a)(2). *See Heckler*, 470 U.S. at 830-31 (no basis for review "if no judicially manageable standards are available for judging how and when an agency should exercise its discretion").

Thus, Plaintiffs' claims are barred because 8 U.S.C. § 1252(a)(2)(B)(ii) precludes review of decisions under Section 1182(d)(5)(A) and APA review is unavailable because parole under that Section is committed to agency discretion by law.

Notwithstanding these jurisdictional bars, DHS was not required to conduct a NEPA analysis for the memorandum. First, the determination that CBP officers can exercise their discretionary authority under Section 1182(d)(5) to parole certain Afghan nationals into the United States is an "administrative civil or criminal enforcement action" excluded from NEPA analysis. 40 C.F.R. § 1508.1(q)(1)(iv). Second, Plaintiffs fail to show how the decision that officers can make discretionary case-by-case determinations to parole Afghan nationals will impact the physical environment.

Conclusion

The Court should grant Defendants' Cross-Motion for Summary Judgment, deny Plaintiffs' Motion, and enter judgment for Defendants. If the Court finds legal error, however, briefing on Plaintiffs' vague "stay" request is appropriate given the complexity of the case.

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TODD KIM
Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division

/s/ Erika Norman
ERIKA NORMAN (CA 268425)
SEAN C. DUFFY (NY 4103131)
Trial Attorneys
Natural Resources Section
150 M Street NE
Washington, DC 20002
Tel: (202) 305-0475
Fax: (202) 305-0506
email: erika.norman@usdoj.gov
sean.c.duffy@usdoj.gov

Attorneys for Defendants