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. No. 20-cv-3438 TNM

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. Introduction

Defendants Department of Homeland Security ("DHS"), Department of State ("DOS"), and Department of Justice ("DOJ") use the word "speculation" as a talisman to disclaim their duties under NEPA and deny that Plaintiffs Massachusetts Coalition for Immigration Reform ("MCIR") and six individuals have been harmed by those failures. Defendants' Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment, ECF No. 38 at 1 ("Def. Br.").[1] Neither standing precedent nor obligations under the National Environmental Policy Act ("NEPA") depend on metaphysical certainty. The potential of Defendants' immigration policies to have significant environmental impacts are manifest and not plausibly deniable. Only because Defendants have never tried to evaluate any of the environmental effects of their immigration policies, can they claim that their policies either do not have any effects or that those effects are so hard to foresee that studying them beforehand could result in more environmentally enlightened decision making. It is easy to fail to see effects when one's eyes are closed. But the purpose of NEPA was to precisely to mandate that agencies give at least *some* such thought to their environmental impact because neither they nor the public may know what they are beforehand. If Defendants can absolve themselves of their duties under NEPA by stating neither Plaintiffs nor themselves already know precisely what the environmental effects of each of their individual actions, the entire statute would be a nullity.

If Defendants believe that NEPA compliance is too great a burden, they should argue for repeal or waiver before the halls of Congress, not the courts. For instance, Congress has allowed

[1] Plaintiffs respectively move for leave to file this Opposition brief 13 hours out of time. Plaintiffs were ready to file on time but ECF was not working. Plaintiffs continued to try to file after midnight but ECF continued to be down. Plaintiffs' counsel respectfully apologizes to the Court for the delay.

waivers of NEPA to build barrier on the southern border to prevent unauthorized crossing. But no such NEPA waiver has been passed by Congress to ensure that an Administration can take proactive steps to increase migration through the southern border. In the absence of a waiver, agencies may not instead simply apply NEPA only to disfavored programs but not those they wish to expedite. NEPA requires some minimal level of public transparency and analysis on the part of the administrative state before it makes profound changes to the immigration system that bring millions of people into the country because those changes have profoundly significant environmental impacts.

While Defendants imply that they have no "immigration agenda" with aggregate and cumulative effects, this contention by Defendants is belied by the contents of the four executive directives adopted in the first two weeks of the Biden Administration.[2] Def Br at 29. The challenged actions were interrelated steps taken to accomplish the immigration goals outlined in these directives. If Defendants had appropriately compiled with NEPA for any of the challenged actions, they would have had to, at some level of NEPA review, analyze the potential cumulative environmental impacts of all of them. Together, these actions had synergistic effects which cumulatively harmed Plaintiffs within the zone of interests NEPA was passed to protect. Collectively, they were responsible for a significant increase in immigration to the United States

[2] 1) Presidential Proclamation 10142, January 20, 2021: Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction; 2) Executive Order 13993, January 20, 2021: Revision of Civil Immigration Enforcement Policies and Priorities; 3) Executive Order 14010 of February 2, 2021: Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border; and 4) Executive Order 14012 of February 2, 2021: Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans. See 86 Fed. Reg. 7225 (Jan. 27, 2021); 86 Fed. Reg. 7051 (Jan. 25, 2017); 86 Fed. Reg. 8267 (Feb. 2, 2021); and 86 Fed. Reg. 8277 (Feb. 2, 2021). 86 Fed. Reg. 8277 (Feb. 2, 2021).

and an environmental and humanitarian crisis on the southern border. The severity of the collective impacts to the public caused by these actions inspired a significant number of states to bring challenges against several of them, and through the course of litigation relevant facts regarding the causes and effects of these actions came to light. Under the Administrative Procedure Act ("APA") and NEPA, Plaintiffs cannot simply challenge these executive directives. *See, e.g*. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004). But they can challenge any and all of the discrete violations of the procedural protection afforded to the public by NEPA during the execution of actions adopted to implement these executive directives. They have done so in Counts II-X of their Amended Complaint.

Defendants, for both merits and standing, rely on a misinterpretation of NEPA precedent. It is the challenge to procedural violations under the APA and NEPA that must be specific and discrete, not Defendants' obligations under NEPA, which does apply to broad programmatic actions, and not Plaintiffs' environmental injuries, which can be caused by the cumulative and synergistic effects of multiple actions. Injuries in the zone of interests protected by NEPA take place in the real world—and in the real world, the combination of related actions can be the cause of environmental harms rather than actions standing alone. Review by a court under the APA, on the other hand, must be reduced to "manageable proportions." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). That need to reduce the controversy to manageable proportions is why Plaintiffs cannot simply challenge Defendants' implementation of their immigration agenda.

Defendants fail to rebut Plaintiffs' contention that the current record, which includes the administrative record, Plaintiffs' declarations, and facts which may be judicially noticed such

those uncovered by related litigation, are sufficient to satisfy Plaintiffs' burden.[3] But Defendants' arguments in its own cross motion for summary judgment fail even more overwhelmingly to meet their own burden. At this stage, therefore, if there are any individual counts for which Plaintiffs have not established their burden, the next appropriate stage is limited discovery on those counts rather than summary judgment for Defendants. Defendants' theory that they are entitled to summary judgment, on all of the counts or on any, depends on improperly segmenting the effects of its actions and then restricting review to the administrative record. However, a NEPA case by its nature is a procedural challenge to as to the sufficiency of the administrative record—whether the Defendants properly analyzed the impacts of the proposed action and made an informed decision. Defendant never analyzed the effects of its actions, even though they could have done so, were obligated to do so, and might have uncovered facts Plaintiffs could have used to oppose the arguments Defendants have used in their cross motion for summary judgment on the merits and standing.

II. Factual Background

Defendants present a few misinterpretations of the record in their factual background section. First, Defendants state that Plaintiffs incorrectly assert DHS suspended all barrier projects between ports of entry on the southern border, because "gap closure work is ongoing." Def Br at 3. Plaintiffs' challenge was to the initial decision to suspend barrier projects without doing any environmental analysis of any of the impacts. Those impacts could include immediate impacts of

[3] Fed. R, Evid. 201(b) states that a court may judicially notice a fact that is not subject to reasonable dispute because it is "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."

an abrupt halt in construction as well as the environmental impacts of creating a crisis of unlawful border crossing by foreign nationals. Plaintiffs' statement did not imply that the immediate suspension was never later followed by gap closure work instituted to correct environmental hazards created by the hastiness of the initial decision.

Second, Defendants state that there is no "such policy" of providing permission to foreign nationals at the southern border and arranging their transportation to the interior. Def. Br. at 8. While Defendants' policy of catch, release, and transport of foreign nationals at the southern border to the interior has been given an evolving series of names and has differed in some details since first instituted in its basic form in March 2021, it does exist, has not been functionally suspended, and has, in every form it has taken, caused the same type of environmental impacts. Available factual information about this policy is not restricted to the limited administrative record prepared by Defendants for this case. Def. Br. at 9. The State of Florida has also challenged this policy, and, after a bench trial, the court issued an opinion vacating the policy with a number of relevant findings of fact about it.[4] *Florida v. U.S.A.*, 2023 U.S. Dist. LEXIS 40169.

The court found that this policy began as a NTR (which stands for Notice to Report) policy in March 2021, and became the Parole+ ATD (which stands for alternatives to detention) policy in November 2021. *Id*. at *21-24. From a practical standpoint, the Parole+ATD pathway was indistinguishable from the NTR pathway. *Id*. at *25. Discovery obtained during this case also establishes Plaintiffs are also not incorrect, as Defendants maintain, to state that the policy contains a transportation component. Def. Br. at 9. In a deposition, Chief of the Border Patrol

[4] The government filed a Notice of Appeal of the decision vacating this policy on May 5, 2023. *See* ECF # 159 in *State of Florida v. USA*, 21-cv-1066, N.D. Florida.

Raul Ortiz testified to busing and flying family units encountered at the southern border in Del Rio to other processing centers. *State of Florida v. USA*, 21-cv-1066, Docket Entry # 78-3 at 65-66.

III. Argument

A) Defendants' substantive arguments that Plaintiffs lack Article III standing rely on misinterpretations of NEPA and its arguments based on procedural errors in Plaintiffs' Declaration procedure are irrelevant and will be corrected.

1) The involvement of third parties does not prevent traceability between the challenged actions and Plaintiffs' injuries.

Because of *DOC v. New York*, Defendants cannot simply argue that Plaintiffs do not have Article III standing because the choices of foreign nationals to immigrate to the United States are separated by a step in the chain of causation between Defendants' actions and their environmental injuries. 139 S. Ct. 2551 (2019). Defendants must go farther and show that there is not a "sufficient likelihood" that those actions contributed to those choices to immigrate as the court found establishes standing in *DOC v. York*. *Id*. at 2565. Defendants therefore claim that there is evidence that a citizenship question would depress the response rate in New York but not that Biden Administration's immigration actions caused the border crisis. *Id*., Def. Br. at 17-18. But even without a trial in this case, as was held in *DOC v. New York*, the evidence that Defendants' actions caused the rise in immigration is abundant. 139 S. Ct. at 2565. Aside from the evidence in Plaintiffs' declarations, admissions in the administrative record, and the obvious inferences that can be made from Defendants' own publicly available border and interior enforcement statistics, a trial on these very actions *has* very recently been held. In that trial, the federal government had a recent opportunity to rebut the evidence that the Biden Administrations' actions caused the increase in unlawful border crossing and came up empty.

Florida v. U.S.A., 2023 U.S. Dist. LEXIS 40169. The factual findings—being based in part on significant admissions made by high ranking officials at DHS, belie Defendants' argument that only "bald assertion" shows that Defendant's policies are responsible for the increase in immigration. Def. Br. at 18. In fact it is immigration cases holding the opposite that rely on bald assertion.

The district court held a bench trial on January 9-12, 2023 and issued pertinent and convincing set of findings of fact. *Florida v. U.S.A.*, 2023 U.S. Dist. LEXIS 40169 at *6 -*43. The court concluded that "the evidence" establishes that the Biden Administration had "effectively turned the Southwest Border into a meaningless line in the sand." *Id*. at *5-6. Noting that candidate Joe Biden had campaigned on adopting very different policies on immigration from the Trump Administration, such as suspending the building of the border wall, ending Remain in Mexico, and ending detention, the court found that "President Biden was true to his word," and issued a series of executive orders in his first two weeks in office changing immigration policy. *Id*. at *15-16. "Collectively, these actions were akin to posting a flashing 'Come In, We're Open' sign on the southern border." *Id*. at 1*8. The "unprecedented 'surge' of aliens that started arriving at the Southwest Border" was a "predictable consequence of these actions." *Id*. at *19. During the course of the case, the U.S. Border Patrol Chief Ortiz "credibly testified based on his experience that there have been increases in migration 'when there are no consequences and migrant populations believe they will be released into the country." *Id*. Therefore, the court judge reasoned that even if other factors "contributed" to the surge of aliens at the border, the crisis was "largely" the government's "own making." *Id*.

Significantly, Chief Ortiz also testified that the current surge differs from prior surges that he had over his lengthy career because most of the aliens are turning themselves in rather

than trying to escape the border patrol. *Id*. at *20. The court pointed out that it is not just reasonable but "common sense" to infer along with Chief Ortiz that they are turning themselves in because they know they will be expeditiously processed and released into the country." *Id*. More evidence can be found by examining the deposition in which Border Patrol Chief Ortiz made these admissions under oath. *See State of Florida v. USA*, 21-cv-1066, Docket Entry # 78-3. In that deposition, taken July 28, 2022, Chief Ortiz admitted that the Biden Administration immigration policies generally had affected the decisions of foreign nationals to come to the U.S., and within the deposition he even discussed the policies challenged in Counts III and IV of the instant case specifically. *Id*. These sworn admissions regarding the specific policies in this case conclusively determine Plaintiffs' entitlement to summary judgment on Counts III and IV at least even by Defendants' own standards. *Id*. at 14, 95-96, 113-118, 140, 143, 146-147, 187, 196, 204-206, 212, 228-231. Statements by judges in earlier immigration related cases cited by Defendants which allowed no discovery nor trial, are simply less persuasive than the admissions against interest of high ranking officials from the Biden Administration who have been directly responsible for implementing the very policies currently at issue.

2) Plaintiffs do not have to establish standing for each count in isolation, because they are interrelated components of a coherent and explicit larger action, and thus neither caused the injury in isolation nor are redressed in isolation.

In a world of complex causation, the first two prongs of Article III standing, causation and injury in fact, may result from of a group of actions, rather than one in isolation. (For the requirements of Article III standing, *see e.g*. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)) That is why, under CEQ regulations and NEPA precedent, agencies are required to examine the environmental effects of interrelated actions, including "wide-ranging and systemic" federal programs. *Piedmont Environmental Council v. FERC*, 558 F.3d 304, 316 (4th Cir. 2009)

citing *National Wildlife Federation v. Appalachian Regional Commission*, 677. F. 2d 883 (D.C. Cir. 1981). The CEQ regulations define major federal actions as including "adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive." 40 C.F.R. § 1508.1 (3)(iii). What this means is that failure to do legally adequate analysis when adopting a *group* of concerted actions that implement a specific executive directive can amount to a violation of NEPA. Furthermore, because the agency *must* take into account cumulative and synergistic impacts of actions, it does not have the choice to simply break up the related actions that implement a specific executive directive and never consider how the impacts as a whole affect the environment. *See Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

Because of agency obligation not to view related actions in isolation, the third prong of Article III standing, redressability, is also accomplished on a joint rather than a count by count basis if the actions are a concerted group that implement an executive directive. Violations of NEPA that injure together are therefore redressed together. If a court were to order the agency to conduct an analysis on any one of the counts, that analysis would have to at least consider the impacts of all the others as well. This proposition holds true whether the agency chooses programmatic environmental impact statements or individual environmental impact statements for each count, because agencies cannot escape their cumulative impact obligations. *See Kleppe*.

The counts in this case precisely fit the CEQ's definition of concerted actions for which compliance can be done programmatically.[5] CEQ provides guidance for how to conduct such

[5]Though choosing programmatic compliance is not mandatory, CEQ has encouraged more frequent use of programmatic rather than project specific federal NEPA compliance, such as in

compliance: "Environmental impact statements may be prepared for programmatic Federal actions, such as the adoption of new agency programs. When agencies prepare such statements, they should be relevant to the program decision and timed to coincide with meaningful points in agency planning and decision making." 40 C.F.R. § 1502.4(b). The CEQ states it may be useful to evaluate if actions "have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter." 40 C.F.R. § 1502.4(b)(1)(ii).

Notwithstanding the utility of programmatic impact statements in appropriate situations, agencies do have discretion over the decision of when a programmatic impact statement is necessary so long as their decision is not arbitrary and capricious. *See Kleppe v. Sierra Club*; *Environmental Def. Fund, Inc. v. Higginson*, 655 F. 2d 1244 (D.C. Cir. 1981); *Izaak Walton League of America v. Marsh*, 655 F. 2d 344 (D.C. Cir. 1981). In this case, Plaintiffs are not challenging an agency decision to conduct a project specific impact statement rather than a programmatic one, but rather to conduct no NEPA compliance of any sort when implementing several actions that do fit the definition of a program. When a group of concerted actions with environmental significance exists, agencies have no choice but to evaluate their combined effects even though they have considerable choice in how to conduct that evaluation.

As Plaintiffs have previously pointed out, the Biden Administration adopted four related immigration directives in its first two weeks in office.[6] These four directives were the fulfillment

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the NEPA Task Force Report to the Council of Environmental Quality: Modernizing NEPA Implementation Chapter 3 (Sept. 2003)

[6] The four directives were: 1) the Presidential Proclamation 10142, January 20, 2021: Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction; 2 ; 3) Executive Order 14010 of February 2, 2021: Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border; and 4) Executive Order

of campaign promises to expand immigration and curtail enforcement. They were carried out, however, through discrete agency actions regarding immigration. The claims in this case, all taken early on in the Administration, were all part of the concerted group of actions that carried out those directives, though likely there were other actions Plaintiffs missed and certainly there were actions taken after Plaintiffs amended their complaint. These actions were not taken in isolation from each but meant to have synergistic effects.

The interrelated character of the Defendants' immigration actions is not a matter of speculation by Plaintiffs. Not only did President Biden campaign as having an immigration plan, but on February 2, 2021, the White House published a press release stating that the Administration had taken a "broad, whole of government effort to finally reform our immigration system" and is "announcing a series of additional actions it is taking to rebuild and strengthen our immigration system."[7] This press release explains that the February 2 executive directives "build on [the two] executive actions the President took his first day in office." *Id*. The Administration explained that it would "begin to roll back the most damaging policies adopted by the prior administration, while taking effective action to manage migration across the region." *Id*. The press release explained the fundamentally interrelated nature of the actions the administration would be taking, stating that the order "directs a series of actions to restore the

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14012 of February 2, 2021: Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans. 86 Fed. Reg. 7225 (Jan. 27, 2021); 86 Fed. Reg. 7051 (Jan. 25, 2017); 86 Fed. Reg. 8267 (Feb. 2, 2021); 86 Fed. Reg. 8277 (Feb. 2, 2021).

[7] The White House, *Fact Sheet: President Biden Outlines Steps to Reform Our Immigration System by Keeping Families Together, Addressing the Root Causes of Irregular Migration, and Streamlining the Legal Immigration System*, Feb. 2, 2021, at https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/02/fact-sheet-president-biden-outlines-steps-to-reform-our-immigration-system-by-keeping-families-together-addressing-the-root-causes-of-irregular-migration-and-streamlining-the-legal-immigration-syst/

U.S. asylum system, including by rescinding and directing agency review of a host of Trump Administration proclamations, rules, and guidance documents." All of the specific, discrete actions identified in the counts of Plaintiffs' Amended Complaint were explicitly component actions of the agenda of immigration policy change adopted by these four companion executive directives. They meet the CEQ's definition from 40 C.F.R. § 1508.1 (3)(iii).

Defendants' insistence that Plaintiffs' injuries cannot have occurred as a result of the sum of nine separate actions together mischaracterizes standing in NEPA precedent. After claiming that Plaintiffs do not have standing as a matter of law because the choices of immigrants depend on "myriad" factors rather than a "simple 'if then'" analysis, Defendants shift gears and insist that Plaintiffs must be able to show each individual count to have effects all on its own, rather than in combination with the others and possibly related actions at a very minute level. Def Br. at 21. Defendants practically suggest Plaintiffs have to interview every foreign national crossing the border about where precisely they crossed. Standing in NEPA simply does not require certainty regarding such minute interactions at any stage of litigation. Defendants' position ignores the common sense reality that a series of mutually reinforcing welcoming policies can and will collectively create a border crisis and significant population growth in the places in the United States where they enter and settle in large numbers. If this border crisis or immigration induced population growth causes Plaintiffs to be personally harmed within the appropriate zone of interests, those plaintiffs have Article III standing to bring a NEPA challenge.

Defendants' position that immigration policy as a whole could not have caused this crisis has also been contradicted by Border Patrol Chief Ortiz in *Florida v. U.S.A.* Chief Ortiz admitted that at least some aliens will refrain from coming to the U.S. if they have an "unfavorable" view of immigration policies, but will change their mind if policies become more favorable. *See* 21-

cv-1066, Docket Entry 78-3 at 59 (N.D. Fla). He also admitted that those aliens who cite "favorable immigration policy" during the Biden Administration have an accurate perception of what is happening in the United States. *Id*. at 67-68. In his experience, there are increases in people moving to the U.S. "when there are no consequences." *Id*. at 171-172. Because of "word of mouth" and "social media," news of extremely specific, real time changes to U.S. immigration policy now immediately influence the behavior of foreign nationals on their way to the U.S. *Id*. at 62-64. Therefore, a series of policies favoring increased immigration will, cumulatively, do more to convince foreign nationals to make the choice to come, which, Defendant points out, can entail considerable risk. Def. Br. at 18. Every policy factored into that risk calculation contributes to the accurate perception that there are no consequences and all foreign nationals who wish to come are welcome.

Defendants are attempting to confuse reviewability requirements under the APA with Plaintiffs' burdens on standing. For the purposes of reviewability under the APA, Plaintiffs did not have the option to simply name the four directives and allege that no NEPA compliance was taken when it came to agencies carrying out those directives. *See, e.g. Norton*. Plaintiffs were required to actually identify the discrete actions undertaken—a considerably more difficult task in a case such as this one, where Defendants failed to comply even with the APA's notice and comment requirements. But the requirements of reviewability under the APA do not mean that specific actions taken in implementation of an executive directive, do not or could not have *effects* in a collective manner. That is why an agency is not allowed to avoid the requirements of NEPA by "segmentation," where the combined environmental effect of a set of agency actions is overlooked by "dividing an overall plan into component parts, each involving action with less

significant environmental effects*." Taxpayers Watchdog, Inc. v. Stanley*, 819 F. 2d 294, 298 (D.C. Cir. 1987); *Kleppe v. Sierra Club*, 427 U.S. 390.

Defendants cite *Whitman-Walker Clinic, Inc. v. United States HHS*, for the claim that plaintiffs must demonstrate standing for each claim on a completely individual basis. 485 F. Supp. 3d 1 (D.D.C. 2020). But this case, like other cases that do not allow "standing in gross" is not a NEPA case, and the injuries in *Whitman-Walker Clini*c are not cumulative. In the instant case, Plaintiffs' injuries result from the collective policy change that was accomplished by the set of discrete actions challenged. While each count represents a separate and individual procedural violation under NEPA for the purposes of pleading, these procedural violations all do stem from the same error—that that immigration actions never require NEPA compliance. While, on an individual level, actions such as the end of the Remain in Mexico policy, or the release instead of detention of most border crossers, would have impacts even if they were not accompanied by any others, all of the counts taken together have even more significant cumulative impacts. A programmatic impact analysis that included all of these actions and any related actions, would redress Plaintiffs' procedural injury. Thus the Plaintiffs have Article III standing.

NEPA cases regarding programmatic activities are the type of cases apposite here. For example, in *Wildearth Guardians v. Jewell*, the court found that the plaintiffs had standing to argue all of the alleged procedural deficiencies in a programmatic analysis, because the insufficient analysis as a whole was what caused their injuries. 738 F. 3d 298 (D.C. Cir. 2013). Likewise, in *Western Watersheds Project v. Salazar*, the plaintiffs challenged 600 specific decisions for failings common to the EIS in each, and the court found they had standing. 2010 U.S. Dist. LEXIS 5557. It is illustrative to imagine if Defendants' error here had been far less egregious, and they had conducted an EIS that properly covered all of the actions, but committed

the same NEPA violation, such as neglecting to consider the effects of the actions on greenhouse gas emissions.[8] The standing analysis would have applied to the EIS as a whole and whether the increase in greenhouse gas admissions created by all of the actions together had affected the Plaintiffs, not whether individual actions had in isolation. It would be an absurd result for agencies to be more shielded from scrutiny over their NEPA compliance the more blatantly they failed their obligations. Interconnected actions which are adopted as part of an executive directive with cumulative impacts do not cease to be a program under NEPA because the agencies ignored the statute altogether rather than partially. Here, as in *Wildearth Guardians*, the collective insufficient analysis of the set of immigration actions caused the injuries.

Collectively, the number of people who have settled in the United States include millions. Plaintiffs are entitled to summary judgment on all of these actions because they have actually felt the cumulative effects of these actions. Plaintiffs do not have to have the results of the impact statement that Defendants failed to do in order to seek an order from the court to conduct this analysis.

3) Defendants similarly misinterpret NEPA's requirements about the effects of past actions when creating injury.

[8] Defendants, of course, have in fact neglected to consider the collective effect of their immigration actions on greenhouse gas emissions. The immigration of foreign nationals to the United States generally increases their carbon emissions and the immigration of millions of foreign nationals may result in a significant increase in such emissions. This is an excellent example of how cumulative effects may be significant when incremental effects are not and they can be made up of the combined effects of many diffuse sources. Furthermore, the Biden Administration has explicitly and recently directed agencies to "quantify" the greenhouse gas emissions of proposed actions in the CEQ's National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, CEQ-2022-0005-0023, January 9, 2023.

Defendants are wrong to argue that Plaintiffs have not demonstrated standing because some of the environmental harms Plaintiffs experience have been exacerbated by the cumulative effect of similar actions of "long lineage." Def. Br. at 23. Defendants have the obligation under NEPA to consider the effects of their current actions when combined with past actions. The CEQ explains in 40 CFR 1508.1(f) that the "cumulative effects" which must be analyzed include:

> effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time.

Failing to adequately consider the effects of past actions in an area is a violation of NEPA. *See e.g. League of Wilderness Defenders v. United States Forest Serv*. 549 F. 3d 1211 (9th Cir. 2008). Plaintiffs Linda Huhn, Bruce Anderson, Rob Meyer, and Kevin Lynn all live in specific places where the resettlement of foreign nationals by non-governmental organizations through contractual arrangements with Defendants has had a particularly measurable effect over time on the local environment. As *Amicus Curiae* for the Defendants, the International Refugee Assistance Project, Inc, related, the federal government has been funding the resettlement of foreign nationals in the interior of the United States for more than 40 years through the same authorities granted by the Refugee Act, 8 U.S.C. § 1522(b)(1)(A)(ii).[9] Those past effects, regardless of what agency or person undertook them, must be added to the incremental effects of the actions carried out by the Biden Administration. 40 CFR 1508.1(f). Such funding from DOS now goes to parole programs as well. In fact, most if not all of the challenged actions have the

[9] HHS outlines how both parolees and refugees are eligible for refugee resettlement program benefits on its website, see Office of Refugee Resettlement, Status and Document Requirements for the ORR Refugee Resettlement Program, available at https://www.acf.hhs.gov/orr/policy-guidance/status-and-documentation-requirements-orr-refugee-resettlement-program, last accessed on May 11, 2023.

foreseeable potential to increase such resettlement by non-governmental organizations because DHS now also disperses funds to the established non-governmental organizations through grants that assist foreign nationals who have crossed the southern border.[10] Foreign nationals who have entered the U.S. through refugee programs, advance parole programs, and those who have been released after encounters at the southern border all are therefore all now assisted in resettlement through such organizations.

4) Defendants' points about Plaintiffs' Declarations do not defeat Plaintiffs' standing.

As Defendants point out, Plaintiffs established their particularized grievances that establish their standing through eight declarations.[11] Defendants argue that Plaintiff Steven Chance Smith and Plaintiff Bruce Anderson's declarations cannot be considered at the summary judgment stage because they are "unsworn." Def. Br. at 16. Plaintiffs' counsel regrets the error in failing to notice that the signed and dated Declarations of Steven Chance Smith and Bruce Anderson accidently left out the line "I hereby declare under penalty of perjury the foregoing is true and correct." Plaintiffs are resubmitting corrected copies of these declarations as soon as possible. Mr. Anderson's corrected Declaration is attached to this brief as Exhibit 1, Corrected Declaration of Bruce Anderson. Mr. Smith's Corrected Declaration has been delayed through issues with

[10] See Department of Homeland Security Press Release, *The Department of Homeland Security Awards $350 Million for Humanitarian Assistance Through the Emergency Food and Shelter Program,* February 28, 2023, available at https://www.dhs.gov/news/2023/02/28/department-homeland-security-awards-350-million-humanitarian-assistance-through.

[11] Defendants note that Plaintiffs used seven of the declarations before at the motion to dismiss stage but does not argue that Plaintiffs' are forbidden to use the same declarations at two stages of litigation. Plaintiffs believe the sufficiency of the evidence in the declarations as a whole to satisfy Plaintiffs' burden at the summary judgment stage is what matters, and the previous declarations along with the new declaration are more than sufficient to do so.

Federal Express in part because of high crime around the area where he lives, but Plaintiffs will submit the corrected Declaration as soon as delivery is successful.

B) Defendants, not Plaintiffs, are the ones to mischaracterize NEPA's general requirements.

1) Defendants attempt to redefine foreseeable as equivalent to "already known to a certainty."

Defendants insist that Plaintiffs have mischaracterized NEPA but fail to follow up with a mischaracterization. Def. Br. at 27. After describing what Defendants characterize as the "proper context" of the NEPA process in a way generally consistent with Plaintiffs' past characterization of NEPA's legal standards, Defendants state that Plaintiffs' claims "hinge" on the argument that the challenged actions "could impact the population of the United States and in turn, the environment." *Id*. Rather than a supposed mischaracterization of the legal requirements of NEPA, Defendants appear to be arguing that there is a factual dispute over whether immigration related actions 1) could increase the population of the United States and 2) whether increasing the population of the United States could have environmental effects. Plaintiffs find it hard to envision a scenario where the act of facilitating the entrance and settlement of millions of foreign nationals to the United States has no ability to impact its population and in turn, the environment. Defendants' argument seems akin to saying that opening the door and saying "come in," when a visitor knocks could never affect how many people are in a house. If such a result does not meet the foreseeability standard of NEPA, no action does.[12] As to the second part of the argument that

[12] Defendants attempt to introduce a parade of horribles by suggesting that if government actions that directly increase the population by bringing in foreign population could trigger NEPA, government actions that far more indirectly increase the population could someday be found to trigger NEPA. Defendants should address their concerns to Congress, as NEPA explicitly states that population growth is a primary concern of NEPA, as well as the CEQ under the Biden Administration, which specifically restored language instructing agencies to analyze growth inducing impacts. This is not a new requirement.

Defendant relies upon, that increasing the population *could not* have effects on the environment, Plaintiffs would suggest that Defendants read the beginning of NEPA's Congressional declaration of national environmental policy, which starts by declaring that Congress passed NEPA because it recognized "the profound impact of man's activity on the interrelations of all components of the natural environment, *particularly the profound influences of population growth…*" 42 U.S. § 4331 (emphasis added).

Defendants' argument that *City of Davis v. Coleman* rebuts Plaintiffs' case appears to amount to an implausible argument that indirect impacts are foreseeable but direct impacts are not. 521 F. 2d 661, 671 (9th Cir. 1975). Def. Br. at 28. Defendants conclude through mere assertion that future population growth created by construction is more quantifiable than population growth created by immigration. Defendants have not conducted the scoping, analysis, or data collection necessary to understand the subject. As articulated by the Supreme Court in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." 463 U.S. 29, 43 (1983)

Defendants are also mistaken in their argument that Plaintiffs' arguments "hinge" on "population impacts, standing alone." Def. Br. at 27-28. On the contrary, several of the actions that Defendants took to implement the President's immigration directives opened the southern border to easier passage. The environmental effects of opening the southern border did not merely allow the passage of foreign nationals wishing to settle in the United States on a long term basis. It also facilitated the passage of anything else the people passing through might want to bring in with them, and enabled the damage they might do along the way. For instance,

opening the border also allows larger amounts of controlled substances to pass into the country, which may have health consequences on communities struggling with addiction. These consequences may be unintended, but one of NEPA's aims was to reduce unintended consequences. Government agencies that fail to take a hard look at the environmental consequences of their actions are liable to not realize what those consequences are. *See, e.g. Robertson v. Methow Valley Citizens*, 490 U.S. 332 (1989).

2) Defendants conflate NEPA compliance with conducting an EIS.

Defendants also mischaracterize NEPA's basic framework. In Defendants' conception, only major federal actions that have significant impacts "trigger" NEPA compliance. Actually, only major federal actions that actually do have the potential to have significant impacts *require an EIS.* But NEPA compliance does not allow agencies to simply declare in court for the first time that a federal action does not have significant impacts and therefore does not require an EIS—it must have, at the very least, either conducted an environmental assessment ("EA") or cited a categorical exclusion. As first explained by the D.C. Circuit soon after the law was first passed, "NEPA's procedural requirements" are not "discretionary," *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F. 2d 1109, 1114 (D.C. Cir. 1971). "Congress did not intend the Act to be such a paper tiger." *Id*. "An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment." *The Steamboaters v. F.E.R.C.*, 759 F.2d 1382, 1393 (9th Cir. 1985). Defendants attempt to avoid this basic obligation by pointing to case law regarding what kinds of environmental impacts NEPA requires to be addressed in an analysis—not whether an agency must conduct an analysis at all. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

Defendants' failure to follow NEPA's basic procedural framework means that Plaintiffs do not need to prove that these actions would require a full EIS to show a violation. But Defendants' arguments are woefully inadequate even to demonstrate that immigration increasing actions cannot possibly have the kind of impacts that would require a full EIS. Defendants claim that environmental analysis is not required: 1) because third parties ultimately create the impacts, and 2) the impacts will not be limited to a specific place already known by Plaintiffs because immigrants could settle in various places. Def. Br. at 28-29. But requirements for environmental analysis under NEPA includes impacts caused by third parties that occur over broad areas. NEPA and its accompanying regulations clearly recognize impacts created by third parties may "reasonably foreseeably" occur in diffuse places. NEPA obligations do not come into play only when it is already known to a certainty, apparently to the public *as well as* to the agencies themselves, exactly what and where the environmental effects of that action were going to be. On the contrary, the agency may cover "general matters in broader environmental impact statements or environmental assessments (such as national program or policy statements) with subsequent narrower statements or environmental analyses." 40 C.F.R. 1508.1 (ff), a process known as "tiering."

3) Foreseeable impacts must be analyzed even if they result from third party action.

In another early case applying NEPA, the D.C. Circuit, pointing out that the "statutory phrase 'actions significantly affecting the quality of the environment' is intentionally broad," explained that there is federal action within the meaning of the statute "whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment*." Scientists' Inst. for Public Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079,

1088-89 (D.C. Cir. 1973). Certainly the specific effects involved do not have to be already known to the public in order to require analysis. The court noted that, though an agency "need not foresee the unforeseeable," it cannot "avoid drafting an impact statement simply because describing the environmental effects of and alternatives to particular agency action involves some degree of forecasting." *Id.* at 1093. Significantly, the court found that "one of the functions of a NEPA statement is to indicate the extent to which environmental effects are essentially unknown." *Id*. Rather than an excuse not to do an impact statement, predicting the environmental effects before they are fully known is the reason the impact statement is done. "Reasonable forecasting and speculation is thus implicit in NEPA." *Id*.

4) NEPA applies to actions that cause diffuse impacts.

Defendants incorrectly contend that NEPA applies only to projects whose effects are located to only a specific community. Def. Br. at 29. To the contrary, broad, programmatic EIS's and EA's are feasible and anticipated by NEPA, and many have been reviewed by the courts. *See e.g*. *National Airport plan in Environmental Defense Fund, Inc. v. Adams* 434 F. Supp. 403 (D.D.C. 1977); *Citizens For Better Forestry v. United States Dep't of Agric*. 481 F. Supp. 1059, 1085. (N.D.C.A. 2007. Nationwide programmatic reviews are a routine part of NEPA and often require estimation of where effects will take place. For example, the National Oceanic and Atmospheric Administration ("NOAA") analyzed the environmental effects of all of the National Ocean Service's ("NOS") surveying and mapping activities over a five-year period within the Economic Exclusion Zone of the entire United States.[13] This analysis required guessing where

[13] Final Programmatic Environmental Assessment for the Office of Coast Survey Hydrographic Survey Projects (May 2013), Nat'l Oceanic and Atmospheric Admin., https://nauticalcharts.noaa.gov/about/docs/regulations-and-policies/2013-18-nepa-ocs-final-pea.pdf.

adverse impacts might take place on marine mammals whose locations were unknown. Other examples include PEAs of: federal support for broadband in rural communities nationwide; the effects of a nationwide program requiring owners of antennas to register them with the Federal Aviation Administration; the effects of a worldwide network of moored buoys and coastal stations operated by the NOAA; and the effects of the issuance of credit assistance under the Water Infrastructure and Finance Act.[14]

Broad, programmatic analysis under NEPA is therefore well accepted. The CEQ even published a guidance on programmatic reviews in 2014. Council on Environmental Quality, *Memorandum for Heads of Federal Departments and Agencies: Effective Use of Programmatic NEPA Reviews*, December 18, 2014. In this guidance, CEQ explained that programmatic analyses "have value by setting out the broad view of environmental impacts and benefits for a proposed decision" and "should result in clearer and more transparent decision-making." *Id*. at 6-7. CEQ recommends that agencies "give particular consideration to preparing a PEA or PEIS when "initialing or revising a national or regional rulemaking, policy, plan or program," particularly when that would help the agency "avoid segmenting the overall program from subsequent individual actions." *Id*. at 15-16.

Nevertheless, for all the benefits of programmatic reviews, Plaintiffs do *not,* in the remaining Counts II-X, improperly call specifically for a "broad cumulative effects analysis"—

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[14] Programmatic Env't Assessment, Broadband Deployment to Rural America, U.S. Department of Agriculture (Sept. 2018); Final Programmatic Env't Assessment for the Office of Coast Survey Hydrographic Survey Projects, Nat'l Oceanic and Atmospheric Admin., (May 2013); Programmatic Environmental Assessment for NDBC Operations, National Data Buoy Center (Jan. 2018); Programmatic Environmental Assessment: Finding of No Significant Impact, Env't Protection Agency (Apr. 2018).

what Plaintiffs specifically call for is simply compliance with NEPA, in any rational form. Def. Br. at 29. While Plaintiffs believe that Defendants' ability to use a programmatic review here rebuts their claims that they have no way to analyze these actions, Defendants do have the discretion to choose any way of doing so that ultimately covers the foreseeable direct, indirect, and cumulative impacts of those actions, and a programmatic analysis may or may not be the most sensible way to do so in terms of preventing duplicative analysis.[15] There are many ways to make such a review less arduous than Defendants may imagine by adopting a programmatic review: "Once an agency has taken a hard look at every significant aspect of the environmental impact of a proposed major action, it is not required to repeat its analysis simply because the agency makes subsequent discretionary choices in implementing the program." *Mayo v. Reynolds*, 875 F. 3d 11, 21-22 (D.C. Cir. 2017) (cleaned up). But Plaintiffs do not assert that it is impossible for Defendants to rationally comply NEPA with a series of EISs and EAs. Plaintiffs acknowledge that Defendants have substantial discretion in how they comply with NEPA when it comes to immigration related actions. But they do not have the discretion to fail to comply with NEPA at all. F

5) Estimating where immigrants will settle is more feasible than portrayed by Defendants.

Defendants are also simply wrong to argue there is no way to "trace reasonably foreseeable growth impacts to any specific community." Def. Br. at 29. Based on recent experience and available Census and DHS data, DHS could certainly project where new immigrants are likely to settle and create growth pressures, both on the local and regional scales,

[15] Plaintiffs admittedly do hold the view that a PEIS of Defendants' immigration related actions is more likely to produce a rational analysis than nine EISs, which is why Plaintiffs originally pleaded Count XI in the alternative.

and then cumulatively, on a national scale. In fact, DHS already publishes annual statistics on the metropolitan areas in which new arrivals settle.[16] Patterns of immigration settlement have remained relatively consistent for many decades, and thus, projecting the population impacts of our immigration is feasible. In addition, the Census Bureau data offer rich and even more detailed statistics on the settlement patterns of immigrants. From there, reasonable predictions about the environmental impacts of immigration driven population growth can easily be produced. Not only could the environmental impacts of our immigration policies be estimated, but there is already ample data already collected and published that could be used to do so. Furthermore, some of the challenged actions, such as the refugee resettlement related actions, will themselves settle immigrants in specific areas where they will create growth pressures, as detailed by several of the Plaintiff declarations.

Defendants improperly shift the burden of scoping "reasonably foreseeable growth impacts" to the Plaintiffs themselves but NEPA puts such burdens on the agencies not the public. Def. Br. at 29. Even so, one of the Plaintiffs did actually direct a three-year investigation culminating in a Programmatic Environmental Assessment Statement analyzing the long-term, cumulative effectives of immigration levels on the nation's environmental resources. *See* Dec. of Kevin Lynn, ECF # 34-4. As with Defendants' arguments on standing, Defendants appear to be improperly introducing reviewability requirements under the APA into a discussion of the requirements agencies must actually meet under NEPA. NEPA undoubtedly applies to broad, far reaching programs. It also applies to actions, such as some of the Counts in this case, whose incremental effects may be small but have the potential for significant impacts when combined

[16] *See* Department of Homeland Security, Yearbook of Immigration Statistics, https://www.dhs.gov/immigration-statistics/yearbook

with many others. Thus it is irrelevant that CAM program, for instance, is relatively small in number. The point is to have a system which catches incremental impacts somewhere, because cumulatively, they are not so small.

C) Defendants attacks on Plaintiffs' Individual NEPA Claims Fail.

1) All of Defendants' threshold claims that previously failed still fail at summary judgment because no evidence in the administrative record rebuts them.

a) Defendants still cannot show that any of the actions do not change the status quo.

Defendants argue, as they did previously, that several of the individual actions are not subject to NEPA because they do not "change the status quo," including the decision to halt border wall construction, and ending the Prompt Asylum Case Review ("PACR") and Humanitarian Asylum Review Process ("HARP") program and the Asylum Cooperation Agreements ("ACAs"). Def. Br. at 30, 33. When it comes to the border wall, the administrative record shows definitively that the environmental status quo *was* changed. DHS knew at the time that its action would have at least some environmental effects, such as soil erosion and floodplain degradation. *See* Memorandum by Troy Miller, Request for Exceptions to Border Wall Construction Proclamation to Avert Immediate Physical Dangers: Levee Construction In Rio Grande Valley, Texas, and Erosion-Control Measures in San Diego, California, April 29, 2021. DHS_MCIR_0000075. In its post hoc environmental assessments conducted after the suspension of barrier construction DHS contemplated the immediate and localized environmental impacts (such as damage to drainage systems and erosion control measures) of leaving projects left "in various stages of completion. Troy Miller Memorandum Requesting Approval to Remediate Barrier Projects, November 30, 2021. DHS_MCIR_0000149-155. These changes do not even take into account the potential environmental impacts created should suspending the border wall

massively increase border crossing, not only specifically through gaps in the border wall that otherwise would not exist but by the message sent by the Biden Administration that the federal government does not wish to prevent border crossing but encourage it.

In addition, Defendants misapply NEPA precedent. The line of cases from *Comm. for Auto Responsibility v. Solomon*, F. 2d 992 (D.C. Cir. 1979) which require a change in the "status quo" to trigger the duty to prepare an EIS refers to the "legal or regulatory status quo." *Humane Soc'y of the United States v. Johanns,* 520 F. Supp. 2d 8. (D.D.C. 2007). These actions have changed the legal or regulatory status quo. If Defendants had not adopted these actions the border wall would have been completed, and would be serving to secure the border rather than allowing the ongoing crisis. Likewise, even if PACR and HARP was unnecessary while the Center for Disease Control's Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exist was in effect, this order is now lifted. Defendants DHS and DOJ have admitted in their recent proposed rule "Circumvention of Lawful Pathways" that they anticipate "a potential surge of migration at the southwest border ('SWB') of the United States following the eventual termination of the Centers for Disease Control and Prevention's ('CDC') public health order. 88 Fed. Reg. 11704 (Feb. 23, 2023). Without action to terminate PACR and HARP, they would be in operation, and without them, more foreign nationals will cross the border. This surge of migration due to the lifting of the public health order also indisputably rebuts Defendants' point that terminating MPP also had no effect on the environment because enrollments in MPP shrank after the CDC instituted its public health order. Def. Br. 33. Defendants cannot use the effectiveness of the Trump Administration's public health bans against border crossing to demonstrate other Trump Administration policies are not needed to keep the border secure when Defendants have removed all of the effective policies.

Similarly, Defendants claim that terminating the ACAs, adopting a policy to release aliens with a Notice to Report, adopting the interim guidance on removal priorities, canceling the authority to enact civil penalties, reinstating administrative closure, soliciting applications to enter into agreements to resettle aliens, and creating new parole programs do not have impacts on the environment. These actions all change the legal or regulatory status quo. All of them do so in ways that have the potential to increase the population of the U.S. If these changes have the potential to impact the environment, they trigger the requirement to conduct an EIS. *Humane Soc'y of the United States v. Johanns,* 520 F. Supp. 2d 8. (D.D.C. 2007). Defendants assert without having engaged in reasoning that all of these actions do not have environmental effects, either by simply denying that they will affect the regulatory status quo in a meaningful way, or insisting that the programs are too small to have a meaningful effect. Such assertions ignore the requirements of NEPA to engage in cumulative analysis.

Furthermore, Defendants again conflate the question of whether an action triggers a full EIS with whether an action requires NEPA compliance at all. Defendants now claim that these actions did not have environmental impacts, but the administrative record shows they have not considered the matter, either through invoking a categorical exclusion or conducting an EA. They merely assert after the fact that they do not. NEPA requires that agencies assess the environmental consequences "by following certain procedures during the decision-making process." *City of Alexandria, Va. v. Slater,*198 F.3d 862, 866 (D.C. Cir. 1999). "An agency cannot invoke a categorical exclusion for the first time in legal briefings when no such invocation exists in the record." *Human Soc'y v. Johanns* at 33. Perhaps it would have been a reasonable decision to invoke categorical exclusions for some of these individual actions, or perhaps, given a proper framework, Defendants could have tiered a programmatic NEPA review

in such a way that no further analysis would have been required on the point of adopting some of these actions. But having engaged in no such analysis previously, nor taken any steps to show that any particular action was too insignificant in effect to trigger an EIS or even an EA, Defendants cannot do so now.

b) Defendants still cannot prevail on their NEPA waiver argument.

Defendants again argue that the Trump Administration's waiver of NEPA to construct the border wall also encompasses the Biden Administration's waiver to suspend building the wall. Def. Br. at 29-30. However, they can point to nothing in the administrative record that proves that the justification for an action can justify its opposite. Nor does Defendants' argument that the asymmetry of the legal situation where Defendants must prepare an analysis before ceasing construction of the border wall but not of starting it carry weight. Def. Br. at 30-31. It is not a compelling point that DHS would need to conduct an after-the-fact analysis of the effects of the border wall construction that was waived in the first place. *Id*. NEPA is a creature of statute—Congress created it, and Congress can likewise adopt exemptions based on policy considerations that are not necessarily symmetrical. Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, gives DHS the authority "to ensure *expeditious construction* of the barriers and roads under this section" by waiving laws like NEPA. Pub. L. 104-208, 110 Stat. 3009 (1996) (emphasis added) Congress thus authorized the exemption to NEPA because it wanted to give authority to the executive branch to expeditiously secure the border during a crisis of unlawful crossing. But Congress has never found a compelling need to make the border easier to cross such that it has seen fit to authorize an exemption for suspending construction on a border wall. To the extent the waiver creates an odd situation, it is one that is

likely to be created only when administrative agencies make choices that have never had enough popular support to be affirmed by Congress.

c) The administrative record supports the reviewability all of the actions under the APA.

Defendants again argue as they did in their Motion to Dismiss that termination of MPP and the ACAs, adopting a policy to release aliens with a Notice to Report, adopting the interim guidance on removal priorities, reinstating administrative closure, and creating new parole programs are not final agency actions or are precluded from review under the APA because they are committed to agency discretion by law under *Heckler v. Chaney*, 470 U.S. 821 (1985). Def. Br. at 31-32, 34-35, 38, 40, 42, 44-45. As Plaintiffs have previously argued, they are not challenging any individual enforcement decision applying to an individual, but for all of these actions, challenging the adoption of a new standard or policy that applies to an entire class of aliens. For most of these actions, Defendants do not point to any evidence in the administrative record to show these actions are not final or are legally precluded from review, and therefore cannot establish that Plaintiffs' prior arguments in Opposition to their Motion to Dismiss are deficient. Plaintiffs' Opp. Br. EFF #22. At this stage, evidence is necessary to show that these actions are not final, Defendants have not pointed to any in most of these claims that would entitle them to summary judgment.

Regarding the one action where Defendants do point to evidence in the administrative record newly available in order to make the case they are entitled to summary judgment, the evidence does not favor their position. Defendant argues that the termination of the ACAs is not a final agency action because the ACAs themselves state that the parties will not "operationalize" the plans until more steps would be taken. Def. Br. at 35. However, Plaintiffs are not challenging

provisions in the agreement that themselves have not been finalized. Plaintiffs are challenging the final decision to terminate the agreement altogether. That termination decision is final—Defendants have already determined that there are no future plans, and that decision is not conditional or tentative, depending on the specifics of the "phased implementation plan" which is not yet complete. By terminating the agreement altogether, no further decisions in the ACA will be made. Defendants also make the novel argument that judicial review of the ACAs is foreclosed by the political question doctrine. Def. Br. at 34. However, NEPA is merely a procedural statute, and Plaintiffs' do not challenge the substance of the decision to terminate the ACAs and therefore consideration of the environmental impacts will not touch upon the "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. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). At the very least, Defendants could analyze the impact that the termination had on the environment even if injunctive relief on this one action is inappropriate.

d) Defendants cannot establish their heavy burden that any of these actions are moot.

The "crucial question" in determining whether a case is moot is whether granting "a present determination of the issues offered will have some effect in the real world." *Kan. Judicial Review v. Stout*, 562 F.3d 1240, 1245 (10th Cir. 2009) (cleaned up). Even the availability of a partial remedy is sufficient to prevent a case from being moot. *Calderon v. Moore*, 518 U.S. 149, 150 (1996). Only if the court can no longer offer any effective relief whatsoever is there no longer a case or controversy under Article III. For a claim to be moot, defendants must meet the "heavy burden" of showing that the allegedly wrongful behavior "could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Courts have been clear that "a defendant's voluntary cessation of a challenged

practice does not deprive a federal court of its power to determine the legality of the practice" because if it did, the defendant would be "free to return to his old ways." *Id*. Courts have pointed out, in the context of NEPA, that it would be unacceptable if defendants could "ignore the requirements of NEPA," complete an action before the case gets to court, and then "hide behind the mootness doctrine." *Or. Natural Res. Council v. United States BLM*, 470 F. 3d 818, 821 (9th Cir. 2006).

None of Defendants' arguments regarding mootness come close to meeting the Defendants' heavy burden. For several, including Count III's termination of the Migrant Protection Protocols ("MPP"), Count IV's release policy, and Count V's removal priorities policy, Defendants argue for mootness on the basis one policy with has been superseded by another policy that is functionally equivalent, or if not entirely functionally equivalent, one that is likely to have very similar environmental impacts. Def. Br. at 31-34, 37. In these cases, not only could the allegedly wrongful behavior "be expected to recur," it already has. *See Laidlaw*. It would not serve the interests of judicial economy and would make far too easy for Defendants to indefinitely avoid review if Plaintiffs had to amend their complaint every time Defendants adopted a new memorandum with functionally similar effects to the superseded one, particularly in a NEPA case where the environmental analysis would be conducted in a very similar fashion. However, if the court decides that any of these counts are moot for such reasons, Plaintiffs do seek leave to amend their complaint to challenge the latest iterations of the policies in question.

For all of these policies, however, even those that cannot be revoked, the Court is able to grant relief that will have some effect in the real world and offer at least a partial remedy in a way that would prevent mootness. In this case, even an after the fact environmental analysis of the cumulative effects of these major actions would be such a partial remedy, even if the actions

were not stayed. Though an after the fact analysis standing alone would not be sufficient to meet Defendants' NEPA obligations to carry out environmental analysis *before* completing the proposed action, such an analysis would at least offer some protection. The increased entrance and settlement of foreign nationals into the United States due to the collective effect of the challenged Biden Administration's immigration actions is ongoing. But, in addition, Defendants continue to adopt related actions, such as creating "Uniting for Ukraine," a new parole program for Ukrainians, "Processes for Cubans, Haitians, Nicaraguans, and Venezuelans," a new parole program for Cubans, Haitians, and Venezuelans, a new refugee program Welcome Corp,[17] or lifting the public health restrictions at the southern border.[18] Taking an adequate "hard look" at the effects of the challenged actions would, at the least, ensure that Defendants could no longer continue these actions nor continue to adopt related ones intended to create further legal pathways into the United States without any awareness of these actions' environmental impacts.

e) Both Defendants' and Amicus' arguments about the refugee program fail to demonstrate Defendants' entitlement to summary judgment.

Defendants and Amicus International Refugee Assistance Project claim both the action in Count V challenging the DOS' FY 2022 Notice of Funding Opportunity" regarding the refugee programs are moot (and yet, inconsistently, not ripe) because DOS has already awarded funding for FY 2022, and that they are not final under the *Bennet v. Spear* test (which states that for an agency action to be final it must "mark the consummation of the agency's decision making process" and must be "one by which rights or obligations have been determined, or from which legal consequences will flow.") 520 U.S. 154, 177-78 (1997). Def. Br. at 43. Defendants are

[17] See https://welcomecorps.org/
[18] Information on the new parole programs may be found at U.S. Citizenship and Immigration Services website at https://www.uscis.gov/ukraine and https://www.uscis.gov/CHNV.

wrong. While DOS will, at a later date, enter into a separate decision making process when it awards the grants, the Notice itself is the consummation of the process that set the terms of the funding opportunity. It did not merely solicit proposals, it established final eligibility criteria. Legal consequences flowed from that decision. Any organizations not fitting the criteria would be excluded from competing for the funding opportunity. However, if Plaintiffs must sue over the Notice of Funding Opportunity and any contracts awarded under that Notice, they seek leave to amend Count V in order to do so, and to add FY 2023 Notice of Funding Opportunity, which had not been published when Plaintiffs filed their Amended Complaint.

While the action itself does not admit refugees, it is a crucial step in the future resettlement of foreign nationals to the United States. It does not have to be the only step in the process to be subject to NEPA compliance. In making their argument that the Notice is therefore unripe for NEPA review, Defendants again make the mistake of confusing the triggering of a full EIS with the triggering of NEPA compliance. Def. Br. at 43. It is, again, the entire lack of NEPA compliance at every related final action in the refugee program that causes Defendants to so misunderstand their obligations under NEPA.

Count V is not moot either. Because the FY2022 Notice closed and DOS entered into cooperative agreements that were completed during the pendency of litigation, this claim offers an illustrative example of how agencies could "ignore the requirements of NEPA," complete an action before the case gets to court, and then "hide behind the mootness doctrine." *Or. Natural Res. Council* 470 F. 3d at 821. However, despite the award of the FY 2022 funding having already been made, Plaintiffs would still be able to obtain partial remedy from the Court. Defendants themselves explain why when they state that DOS will still be making decisions under these cooperative agreements that affect how many refugees are settled in specific areas

because of individual (and, currently, entirely hidden to the public) decisions by the U.S. Refugee Admissions Program. Def. Br. at 43. A court order to conduct environmental analysis on the impacts of this Notice will, at the very least, achieve one of the goals of NEPA, public transparency, by providing members of the public the opportunity to weigh in on federal actions affecting the environment they live in before the ultimate commitments are "irreversible and irretrievable." Without such analysis, the public is in the dark about the federal actions that will impact them, such as the contracts that are awarded and the numbers of refugees that will be headed to their own communities. These are precisely the protections NEPA was passed to ensure.

Alternatively, because this notice happens yearly and the duration of time the Notice remains open is so short, this claim easily fits into the exception to the mootness doctrine for cases that are "capable of repetition, yet evading review" because the duration of challenged actions is too short for full litigation and there is a reasonable expectation the plaintiffs will be subject to the challenged action again each fiscal year. *Native Vill. of Nuiqsut v. BLM*, 9 F.4th 1201, 1209 (9th Cir. 2021).

IV. Conclusion

For the foregoing reasons, Plaintiffs respectfully request the Court grant the Plaintiffs' Motion for Summary Judgment on all Counts and Deny the Defendants' Cross-Motion for Summary Judgment on all counts, to declare the Defendant's adoption of nine immigration actions arbitrary and capricious and in violation of NEPA and its implementing regulations and enjoin Defendants from continuing to carry out and fund these actions pending their full compliance with NEPA. If the Court should find Plaintiffs have not been able to satisfy their burdens on summary judgment on some or all counts, Plaintiffs request limited standing

discovery on those counts before ruling on Defendants' Cross Motion for Summary Judgment on those Counts.

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Respectfully submitted,

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