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' MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, Plaintiffs Massachusetts Coalition for Immigration Reform ("MCIR"), Kevin Lynn, Linda Huhn, Bruce Anderson, Rob Meyer, Steven Chance Smith, and Gail Getzwiller hereby respectfully move this Court for summary judgment on Counts II-X of its Amended Complaint, ECF No. 17, seeking declaratory and injunctive relief. Defendants U.S. Department of Homeland Security ("DHS"), U.S. Department of State ("DOS"), and U.S. Department of Justice ("DOJ"), ("Defendants") violated the National Environmental Policy Act, 16 U.S.C. § 4321 *et seq*. ("NEPA") and the Administrative Procedure Act 5 U.S.C. § 701 *et seq*. ("APA") when they implemented a series of interrelated policies increasing pathways to entrance and settlement into the U.S. by foreign nationals without conducting any relevant environmental impact statement ("EIS"). These were major related actions with the potential to individually and cumulatively have significant environmental impacts. These actions should be stayed pending the completion of an EIS which sufficiently analyzes the environmental impacts of these actions, including their cumulative impacts.

Plaintiffs seek declaratory and injunctive relief. These actions should be stayed pending the completion of an Environmental Impact Statement ("EIS") or Environmental Impact Statements which adequately analyze the environmental impacts of the challenged actions. In support of this motion, Plaintiffs rely on the accompanying Statement of Undisputed Material Facts, Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, the declarations and exhibits in support thereof, the pleadings, the administrative record, and any other evidence and any argument thereto.

DATED: February 27, 2023

Respectfully Submitted,

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STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to LCvR 7(h), Plaintiffs Massachusetts Coalition for Immigration Reform ("MCIR"), Kevin Lynn, Linda Huhn, Bruce Anderson, Rob Meyer, Steven Chance Smith, and Gail Getzwiller hereby submit this statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment. Citations are to the Administrative Record.

1. The Department of Homeland Security ("DHS") implemented actions to suspend all barrier projects between ports of entry on the southern border pursuant to Presidential Proclamation 10142 of January 20, 2021. Proclamation No. 10142, 86 Fed. Reg. 7225 (Jan. 20, 2021). DHS_MCIR_0000008 - DHS_MCIR_0000010.

2. DHS did not invoke a categorical exclusion, or conduct an EA or an EIS, *before* suspending "the performance of all border barrier contracts and southwest border barrier construction activities, with the exception of activities related to ensuring project sites are safe and secure…" DHS_MCIR_0000012.

3. DHS announced that it would engage in environmental planning under NEPA for "all activities or projects that will continue" regardless of whether an applicable waiver applies. *Id*.

4. DHS knew at the time that its action would have at least some environmental effects, such as soil erosion and floodplain degradation. DHS_MCIR_0000075.

5. 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. DHS_MCIR_0000149-155.

6. DHS suspended all enrollments in the Migrant Protection Protocols ("MPP") on President Biden's first day in office and afterward "reviewed" "various migration-related policies," DHS_MCIR_0002282.

7. DHS Secretary Alejandro Mayorkas issued a memorandum revoking the Migrant Protection Protocols ("MPP") on June 1, 2021. DHS_MCIR_0000196.

8. After the U.S. District Court for the Northern District of Texas determined that the decision was not issued in compliance with the APA, Secretary Mayorkas issued another memorandum restating his decision to rescind MPP on October 29, 2021. *Id*.

9. In this memorandum, the Secretary admitted that MPP itself had "likely contributed to reduced migratory flows." DHS_MCIR_0000197.

10. DHS admitted that it expected that terminating MPP would increase the numbers of applicants ultimately granted asylum and thus allowed to permanently settle in the U.S. DHS_MCIR_0000220.

11. On February 2, 2021, Executive Order 14010 directed DHS to cease implementing Prompt Asylum Case Review ("PACR") and the Humanitarian Asylum Review Program ("HARP") (which had been put on temporary pause in March 2020 as unnecessary due to Covid 19 emergency restrictions) and DHS rescinded all guidance relating to those programs on September 2, 2022. DHS_MCIR_0008978.

12. On February 4, 2021, the Department of State revoked the Asylum Cooperative Agreements with El Salvador, Guatemala, and Honduras. STATE 000042- STATE 000055, STATE 000109.

13. DHS adopted a policy of giving permission to large numbers of illegal border crossers to remain in the U.S. rather than to expel or detain such foreign nationals, and this policy was referred to as "Prosecutorial Discretion" ("PD") in a memorandum from Rodney Scott, U.S. Border Patrol Chief to Troy Miller, acting as Commissioner of Customs and Border Protection ("CBP") on March 19, 2021. DHS_MCIR_0008662.

14. This memorandum stated that due to "a high-volume of encounters of persons illegally entering the United States along the southwest border" the border patrol would "exercise its discretionary authority to release subjects without placing them in removal proceedings," in a number of specific circumstances and cited 8 C.F.R. §287.3 for authority to do so. DHS_MCIR_0008662- DHS_MCIR_0008663.

15. Release of the alien under these circumstances was to take place "categorically" and an internal email on March 20, 2021 made this policy, which applied only to those aliens not subject to Title 42 "[e]ffective immediately." DHS_MCIR_000857.

16. The email contained "Instructions for Release under PD" that included searching, enrolling, providing a copy of form I-213 (Record of Deportable/Inadmissible Alien), and

releasing in coordination with Immigration and Customs Enforcement ("ICE"). DHS_MCIR_0008658.

17. In accordance with President Biden's Executive Order 13993, on February 18, 2021, acting ICE Director Tae D. Johnson wrote a memorandum to all ICE employees, prohibiting ICE from detaining and removing of all foreign nationals unlawfully present except those who meet a few narrow categories. DHS_MCIR_0003890- DHS_MCIR_0003896.

18. This order was immediately binding on ICE employees, and went into immediate effect and significantly restricted the abilities of ICE agents and attorneys to arrest and remove aliens from the interior of the United States. DHS_MCIR_0003890.

19. On April 22, 2021, DHS's subcomponent ICE issued a memorandum rescinding the authority to utilize statutorily authorized penalties to discourage civil violations of immigration law. DHS_MCIR_0009204.

20. DHS had started to enforce the provisions subjecting illegal aliens who agree to voluntary departure but then willfully fail to depart to civil penalties including a daily monetary fine and a loss of eligibility for its legal benefits. DHS_MCIR_0009207.

21. The April 22 memorandum took action to prevent Enforcement and Removal Operations ("ERO") or the Office of the Principal Legal Advisor ("OPLA") from doing so any longer. DHS_MCIR_0009208 – DHS_MCIR_0009209.

22. On July 15, 2021, the Department of Justice reinstated administrative closure in its immigration courts when the Attorney General decided *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021), as challenged by in Count VII. DOJ EOIR_MCIR_0000018- DOJ EOIR_MCIR_0000021.

23. DOS initiated an expansion of the refugee resettlement program on April 19, 2021, when DOS's Bureau of Population Refugees and Migration published the "FY 2022 Notice of Funding Opportunity for Reception and Placement Program." STATE 000066.

24. In this Notice, DOS stated its intention to award cooperative agreements for FY 2022 "to well-qualified non-profit organizations able to offer a range of services throughout networks of multiple locations across the United States." STATE 000071.

25. The goals of this DOS policy included providing reception and placement to refugees in the United States and delivering "timely and individualized services" that promote refugee integration. STATE 000067 – 000068.

26. On March 10, 2021, DOS and DHS announced that they were expanding legal pathways to enter the United States by reopening the Central American Minors (CAM) program in two phases, and in the first phase, resettlement agencies would reach out to families who filled out applications before the CAM program was closed in 2018. DHS_MCIR_0008878.

27. On June 15, 2021, DHS and DOS announced that foreign nationals meeting updated criteria could start applying for resettlement in the United States under the program. DHS_MCIR_0008848-DHS_MCIR_0008849.

28. On August 23, 2021, DHS issued a memorandum from DHS Secretary Alejandro Mayorkas to Troy Miller, Commissioner of CBP, "Guidance for the Immigration Processing of Afghan Citizens During Operation Allies Refuge," invoking Section 212(d)(5) of the Immigration and Nationality Act ("INA") for Customs and Border Protection ("CBP") officers to use parole for the "processing, transporting, and relocating" of Afghan nationals for a period of two years. DHS_MCIR_0008961.

29. Defendants conducted no compliance under NEPA prior to taking the actions in the above paragraphs, including any Environmental Impact Statement, Environmental Assessment, or the invocation of a categorical exclusion.

DATED: February 27, 2023

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. Introduction

This case is a simple one. Plaintiffs Massachusetts Coalition for Immigration Reform ("MCIR"), Kevin Lynn, Linda Huhn, Bruce Anderson, Rob Meyer, Steven Chance Smith, and Gail Getzwiller seek to hold the federal government to a very basic threshold under this nation's landmark environmental law, the National Environmental Policy Act ("NEPA"). The Nat'l. Env't. Policy Act of 1969, Pub. L. 91-190, 42 U.S.C. § 4321-4347 (Jan. 1, 1970). Upon President Biden's taking office, his Administration determined that the agencies primarily in charge of immigration policy, Defendants Department of Homeland Security ("DHS"), Department of State ("DOS"), and the Department of Justice ("DOJ") would reorient their programs in order to meet new immigration expansion goals.[1] The President stated in the directives ordering these policies that changing our policies to "develop welcoming strategies" would "enrich" the nation "socially and economically." In Executive Order 14012, President Biden wrote:

> New Americans and their children fuel our economy, working in every industry, including healthcare, construction, caregiving, manufacturing, service, and agriculture. They open and successfully run businesses at high rates, creating jobs for millions, and they contribute to our arts, culture, and government, providing new traditions, customs, and viewpoints. They are essential workers helping to keep our economy afloat and providing important services to Americans during a global pandemic.[2]

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[1] These immigration expansion goals were outlined at the very beginning of the Biden Administration through four presidential directives: 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).

[2] 86 Fed. Reg. 8277 (Feb. 2, 2021).

The agencies then accomplished this goal of increasing immigration to the country through a series of related actions, nine of which are challenged in this case (the "Immigration Actions.") Individually and cumulatively, these actions constituted an invitation to enter and settle in the U.S., which was accepted by millions of foreign nationals entering the United States through the Southwest border, producing both an immediate environmental crisis located on the Southwest border and creating "growth inducing effects and other [environmental] effects related to induced changes in the pattern of land use, population density or growth rate," within the interior of the U.S., which are named as impacts to be considered under NEPA by the Council for Environmental Quality ("CEQ"). 40 C.F.R. § 1508.1(g)(2).

NEPA requires that before implementing all actions with such potential to have major impacts on the quality of the human environment, agencies must take a "hard look" at the potential environmental impacts of these actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Rather than abide by this "hard look" standard, DHS, DOS, and DOJ employed a "no look" standard. Prior to implementing the immigration actions, these agencies not only failed to conduct an environmental impact statement ("EIS") to evaluate their environment impacts, but also failed to conduct an environmental assessment ("EA") to determine whether they might have such impacts. The agencies even failed to conduct notice and comment, which would have given them the opportunity to be notified by the public about their obligations under NEPA, and given them an opportunity to analyze whether any of their categorical exclusions applied to these actions. Many NEPA cases hinge on whether an EA or EIS adequately analyzed the reasonably foreseeable impacts of a challenged action, or whether a categorical exclusion was properly invoked. In this case, the defendant agencies simply failed to engage in NEPA compliance at any level of review. There can therefore be no dispute whether

the agencies grounded their decisions with adequate analysis to which the Court can grant deference—the Defendants did not engage in analysis.

This case is not about whether the Biden Administration was right or wrong that these actions would enrich the nation or whether these actions would have been legal if Defendants *had* followed the requirements of NEPA. Whether the Immigration Actions were beneficial or detrimental on the whole, Defendants had to comply with NEPA—whose very purpose is to help federal agencies discover the costs and benefits of their policies. Because of the Immigration Actions, millions of foreign nationals are entering the country, causing irreversible environmental damage which has affected and will continue to affect Plaintiffs personally. These Immigration Actions are ongoing. The Defendants have never considered the environmental impacts of these actions, nor their cumulative impacts with any other further immigration related actions the Administration has implemented or may implement. Nor have Defendants ever allowed the public a chance to comment on the impacts through a NEPA review. Plaintiffs are therefore entitled to declaratory and injunctive relief, preventing Defendants from continuing to execute and fund these actions until they have undergone NEPA compliance.

II. Legal Background

The National Environmental Policy Act

In 1969, Congress passed NEPA "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." 42 U.S.C. § 4321. In order to promote environmentally sensitive national policy, NEPA requires federal

agencies to "provide a detailed statement on proposals for major Federal actions significantly affecting the quality of the human environment." 40 C.F.R. § 1500.1(a). NEPA has "twin aims." *WildEarth Guardians v. Jewell*, 738 F. 3d 298, 302 (D.C. Cir. 2013). First, it obligates federal agencies "to consider every significant aspect of the environmental impact of a proposed action, and second, it ensures that the agency will "inform the public" of its environmental considerations. *Id*. The adoption of NEPA codified explicit Congressional concern for the "profound influences of population growth" on the natural environment. 42 U.S.C. §4331(a). NEPA aims to "achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities . . . ." 42 U.S.C. §4331(b)(5). Congress has never passed an exemption to NEPA for concerns related to population growth caused by immigration, which almost by definition increases national population.

The Council on Environmental Quality ("CEQ") provides direction in its regulations to "determine what actions are subject to NEPA's procedural requirements and the level of NEPA review where applicable." 40 C.F.R. § 1500.1(b). According to the statute, an agency must prepare an Environmental Impact Statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). A federal agency may prepare an Environmental Assessment ("EA") to evaluate whether an EIS is required. 40 C.F.R. §§ 1501.3, 1508.9. If a proposed action is determined to have no significant impact, the agency must issue a FONSI "accompanied by a convincing statement of reasons to explain why a project's impacts are insignificant." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1018 (9th Cir. 2007) (quoting *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001)).

An agency many only avoid preparing either an EIS or an EA when the agency action is properly "categorically excluded" from NEPA review. *See* 40 C.F.R. § 1504.4. A categorical

exclusion is a "category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect" in an agency's NEPA implementing regulations. 40 C.F.R. § 1508.4. The agency must invoke the categorical exclusion prior to approving the agency action, it cannot do at the point the action is challenged in court. *See Anacostia Watershed Soc'y v. Babbitt*, 871 F. Supp. 475, 487 (D.D.C. 1994).

A "major federal action" is defined by the Council on Environmental Quality ("CEQ") as any "activity or decision subject to Federal control and responsibility," that does not fit into a stated exception. *See* 40 C.F.R. § 1508.1(q).[3] The "effects or impacts" which must be analyzed by this impact statement are "changes to the human environment from the proposed actions" that are "reasonably foreseeable." 40 C.F.R. § 1508.1(g). Specifically included by CEQ are "indirect effects, which are caused by the action and are later in time but are still reasonably foreseeable." 40 C.F.R. § 1508.1(g)(2) Such effects "may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate…" *Id*. Furthermore, agencies must take into account cumulative effects, which result "from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions." § 1508.1(g)(3). When an agency takes several actions which will have a "cumulative or synergistic environmental impact," their environmental consequences must be considered together. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1978). That is, 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

[3] Activities or decisions that constitute exceptions are: 1) those that have effects solely outside the U.S.; 2) those that are non-discretionary; 3) those that are not final under the Administrative Procedure Act; 4) judicial or administrative civil or criminal enforcement actions; 5) non-governmental actions that receive federal funding but where the government does not control the action through the funding.

component parts, each involving action with less significant environmental effects*." Taxpayers Watchdog, Inc. v. Stanley*, 819 F. 2d 294, 298 (D.C. Cir. 1987).

Ultimately, the "action-forcing" provisions of NEPA and its implementing regulations by CEQ require that agencies take a "hard look" at the environmental consequences of their actions. *Robertson*, 490 U.S. at 350. "Simply by focusing the agency's attention on the environmental consequences" before an action is taken, NEPA "ensures important effects will not be overlooked or underestimated" and will "inevitably bring pressure to bear on agencies" to respond to the needs of environmental quality." *Id*. at 349.

III. Standard of Review

Summary judgment is warranted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Defendants' actions are reviewable under the Administrative Procedures Act ("APA"), which requires courts to "hold unlawful and set aside [an] agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and is adopted "without observance of procedure required by law." 5 U.S.C. §§ 706 (2)(A), (D). At a minimum, the agency must have reviewed the relevant data and articulated a satisfactory explanation for its action. *Huls Am. Inc., v. Browner*, 83 F. 3d 445, 452 (D.C. Cir. 1996); *Am. Trucking Ass'n, Inc. v. EPA*, 283 F. 3d 355, 362 (D.C. Cir. 2002) (agency's determinations must be "reasonable and supported by the record.")

IV. Summary of Material Facts from the Administrative Record

Shortly after the inauguration of President Joseph Biden, defendant agencies implemented nine major related actions related to immigration which the Amended Complaint challenges in Counts II-X ("the Immigration Actions.") *See* Statement of Undisputed Material Facts ("SUMF") ¶¶ 1-28. The actions were adopted in furtherance of the goals of the four

presidential directives regarding immigration policy published within the first two weeks of the Biden Administration.[4] *See* Defendant's Certified List of the Contents of the Administrative Records, D.E. # 33, Ex. 2 at 7, Ex. 3 at 5, 36, 48.

Facts Supporting Count II. DHS implemented actions to suspend all barrier projects between ports of entry on the southern border pursuant to Presidential Proclamation 10142. DHS_MCIR_0000008 - DHS_MCIR_0000010. The Administrative Record shows that DHS did not invoke a categorical exclusion, or conduct an EA or an EIS, *before* suspending "the performance of all border barrier contracts and southwest border barrier construction activities, with the exception of activities related to ensuring project sites are safe and secure…" *See* "Department of Homeland Security Border Wall Plan Pursuant to Presidential Proclamation 10142," June 9, 2021; DHS_MCIR_0000012. DHS announced that it would engage in environmental planning under NEPA for "all activities or projects that will continue" regardless of whether an applicable waiver applies. *Id*. 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

[4] 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) 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. 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).

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. DHS never analyzed whether an increase in border crossing caused by its termination of the wall could have environmental impacts.

Facts Supporting Count III. DHS and DOS collaboratively implemented actions to terminate the policies that, under the previous administration, had been put in place in order to greatly curtail the release into the U.S. of foreign nationals making an initial asylum claim. These policies included: a) the Migrant Protection Protocols ("MPP"); b) Prompt Asylum Case Review ("PACR"); c) the Humanitarian Asylum Review Program ("HARP"); and (d) the Asylum Cooperative Agreements. DHS suspended all enrollments in MPP on President Biden's first day in office. *See* DHS_MCIR_0002282, Declaration of David Shahoulian in *Texas v. Biden*, 21-cv-00067. DHS then "reviewed" "various migration-related policies," DHS_MCIR_0002282. This review, the Administrative Record reveals, never included scoping or consideration of the environmental impacts of immigration. DHS Secretary Alejandro Mayorkas issued a memorandum revoking the Migrant Protection Protocols on June 1, 2021. *See* DHS_MCIR_0000196. After the U.S. District Court for the Northern District of Texas determined that the decision was not issued in compliance with the APA, Secretary Mayorkas issued another memorandum restating his decision to rescind MPP on October 29, 2021. *Id*. In this memorandum, the Secretary admitted that MPP itself had "likely contributed to reduced migratory flows," and thus, by implication, terminating MPP would increase numbers of foreign nationals entering the country in order to settle through the southern border.

DHS_MCIR_0000197. DHS also admitted that it expected that terminating MPP would increase the numbers of applicants ultimately granted asylum and thus allowed to permanently settle in the U.S. DHS_MCIR_0000220. On February 2, 2021, Executive Order 14010 directed DHS to cease implementing PACR and HARP (which had been put on temporary pause in March 2020 as unnecessary due to Covid 19 emergency restrictions) and DHS rescinded all guidance relating to those programs on September 2, 2022. DHS_MCIR_0008978. On February 4, 2021, the Department of State revoked the Asylum Cooperative Agreements with El Salvador, Guatemala, and Honduras. STATE 000042- STATE 000055, STATE 000109.

The Administrative Record shows that DHS did not invoke a categorical exclusion, or conduct an EA or an EIS before terminating MPP, PACR, and HARP. DHS never analyzed whether an increase in entrance and settlement of foreign nationals into the U.S. because of the termination of MPP, PACR, HARP, or the Asylum Cooperative Agreements could have any kind of environmental impacts. The Administrative Record also shows there was no prior environmental analysis regarding the programs established under our immigration agencies' statutory authority to create programs that grant asylum to arriving foreign nationals, and no study of how the entrance of large numbers of foreign nationals might induce growth or affect population density even as prior programs created flows of entering aliens with the potential to create significant impacts.

Facts Supporting Count IV. DHS adopted a policy of giving permission to large numbers of illegal border crossers to remain in the U.S. and to arrange their transportation for settlement to various parts of the interior, rather than to expel or detain such foreign nationals.[5] This policy

[5] Plaintiffs were aware on the date of the Amended Complaint through their own and their counsel's investigative efforts that DHS had adopted a policy of processing illegal aliens encountered at the border, arranging their transportation into the interior, and releasing them with permission to remain on a temporary basis, but did not know the name that DHS had given to this policy, or future names to policies that likewise processed aliens encountered at

was referred to as "Prosecutorial Discretion" ("PD") in a memorandum from Rodney Scott, U.S. Border Patrol Chief to Troy Miller, acting as Commissioner of Customs and Border Protection ("CBP") on March 19, 2021. DHS_MCIR_0008662. This memorandum stated that due to "a high-volume of encounters of persons illegally entering the United States along the southwest border" the border patrol would "exercise its discretionary authority to release subjects without placing them in removal proceedings," in a number of specific circumstances. *Id*. It cited 8 C.F.R. §287.3 for authority to do so. *Id*. DHS_MCIR_0008663. Release of the alien under these circumstances was to take place "categorically." An internal email on March 20, 2021 made this policy "[e]ffective immediately." DHS_MCIR_000857. The policy only applied to those aliens not subject to Title 42. *Id*. The email contained "Instructions for Release under PD" that included searching, enrolling, providing a copy of form I-213 (Record of Deportable/Inadmissible Alien), and releasing in coordination with Immigration and Customs Enforcement ("ICE"). DHS_MCIR_0008658.

The Administrative Record shows that DHS did not invoke a categorical exclusion, or conduct an EA or an EIS before implementing this policy. DHS never analyzed whether an increase in entrance and settlement of foreign nationals into the U.S. due to agency decisions to help aliens entering illegally to settle in the United States on a long term basis rather than detain or remove them could have any kind of environmental impacts.

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the border but it is the environmental effect of releasing foreign nationals and transporting them into the interior with permission to reside in the U.S., not the name such a policy is given, that is at issue. Litigation over this policy later revealed further details about the mechanics of DHS's "release and transport" policy, which incorporated further benefits such as the granting of administrative parole to its beneficiaries. While further benefits were later added on, this policy always continued to grant border crossers the entitlement to stay in the United States with transportation assistance to the border crosser's desired destination, as described by the Amended Complaint. Starting in March 2021, DHS used discretionary authorities to facilitate the settlement of large numbers of illegal border crossers into the interior than detain or remove such aliens, and this policy continues today even if in further evolved form. By filing suit against the Biden Administration, the State of Florida discovered details about the policy, which ultimately became "Parole plus Alternatives to Detention." *See State of Florida v. United States of America,* 21-cv-1066 (N.D. Fla).

Facts Supporting Count V. DHS adopted a policy preventing ICE from detaining and removing almost all foreign nationals in the country illegally in accordance with President Biden's Executive Order 13993. On February 18, 2021, acting ICE Director Tae D. Johnson wrote a memorandum to all ICE employees, prohibiting ICE from detaining and removing of all foreign nationals unlawfully present except those who meet a few narrow categories. DHS_MCIR_0003890. This order was immediately binding on ICE employees, and went into immediate effect. This mandatory memorandum significantly restricted the abilities of ICE agents and attorneys to arrest and remove aliens from the interior of the United States. The governmental act of allowing foreign nationals to remain in the United States by definition has the potential to increase foreign national settlement in the United States.

The Administrative Record shows that DHS did not invoke a categorical exclusion, or conduct an EA or an EIS before implementing this policy. DHS never analyzed whether an increase in entrance and settlement of foreign nationals into the U.S. due to agency decisions to allow the vast majority of aliens residing illegally in the United States to stay in the United States on a long term basis rather than arrest and remove them could have any kind of environmental impacts.

Facts Supporting Count VI. On April 22, 2021, DHS's subcomponent Immigration and Customs Enforcement ("ICE") issued a memorandum rescinding the authority to utilize statutorily authorized penalties to discourage civil violations of immigration law. DHS_MCIR_0009204. Under the Immigration and Nationality Act ("INA"), illegal aliens may agree to a process known as "voluntary departure" which allows them to depart from the country without the legal consequences of an order of removal on their record such as becoming inadmissible to reenter the United States for a specified period of time. *See* 8 U.S.C. § 1229 (c).

However, illegal aliens who agree to voluntary departure but then willfully fail to depart are subject to civil penalties including a daily monetary fine and a loss of eligibility for its legal benefits. DHS_MCIR_0009207. DHS had started to enforce these provisions in 2018 under the previous administration, but the April 22 memorandum took action to prevent Enforcement and Removal Operations ("ERO") or the Office of the Principal Legal Advisor ("OPLA") from doing so any longer. DHS_MCIR_0009208 – DHS_MCIR_0009209. The Administrative Record shows that DHS did not invoke a categorical exclusion, or conduct an EA or an EIS before implementing this policy.

As described by Count VII, on July 15, 2021, the DOJ reinstated administrative closure in its immigration courts when the Attorney General decided *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021). DOJ EOIR_MCIR_0000018- DOJ EOIR_MCIR_0000021. This case overruled the previous case of *Matter of Castro-Tum*, 27 I&N Dec. 271, which had concluded that administrative closure was not properly authorized by statute, regulation, or delegation from the Attorney General. DOJ EOIR_MCIR_0000020. Prior to July 25, 2021, therefore, immigration courts did not have the ability to grant administrative closure, whereby the immigration judge removes the case from the docket without deciding the merits of it, leaving the case in adjudicatory limbo for an indefinite period of time. *Id*. This DOJ action therefore created a new pathway for the long term settlement of illegally present foreign nationals in the United States, by authorizing the previously forbidden ability to clear large numbers of cases pending in immigration courts by simply taking them all off the docket without adjudication. The Administrative Record shows that DOJ did not invoke a categorical exclusion, or conduct an EA or an EIS before implementing this policy despite its foreseeable potential to create an increase of entrance and settlement of foreign nationals in the U.S.

Facts Supporting Count VIII. DOS adopted a policy to expand the refugee resettlement program. DOS initiated the implementation of this policy on April 19, 2021, when DOS's Bureau of Population Refugees and Migration published the "FY 2022 Notice of Funding Opportunity for Reception and Placement Program." STATE 000066. In this Notice, DOS stated its intention to award cooperative agreements for FY 2022 "to well-qualified non-profit organizations able to offer a range of services throughout networks of multiple locations across the United States." STATE 000071. The goals of this DOS policy included providing reception and placement to refugees in the United States and delivering "timely and individualized services" that promote refugee integration. STATE 000067 – 000068. The Administrative Record shows that DOS did not invoke a categorical exclusion, or conduct an EA or an EIS before implementing this policy despite its foreseeable potential to create an increase of entrance and settlement of foreign nationals into the United States.

Facts Supporting Count IX. DHS and DOS adopted a policy to restart the Central American Minors ("CAM") program, a "refugee" program originally started in 2014 that used administrative parole to allow qualifying minors from El Salvador, Guatemala, and Honduras to resettle in the United States. DHS_MCIR_0008910. The CAM program was adopted in order to fill out the objectives of Executive Order 14010 and Executive Order 14012. DHS_MCIR_0008956. On March 10, 2021, DOS and DHS announced that they were expanding legal pathways to enter the United States by reopening the Central American Minors (CAM) program in two phases. DHS_MCIR_0008848. In the first phase, resettlement agency would reach out to families who filled out applications before the CAM program was closed in 2018. On June 15, 2021, DHS and DOS announced that foreign nationals meeting updated criteria could start applying for resettlement in the United States under the program.

DHS_MCIR_0008848-DHS_MCIR_0008849. The Administrative Record shows that DHS did not invoke a categorical exclusion, or conduct an EA or an EIS before implementing this policy despite its foreseeable potential to create an increase of entrance and settlement of foreign nationals into the United States.

Facts Supporting Count X. DHS adopted a policy to create a new program to allow Afghani nationals to settle in the U.S, through the use of administrative parole. On August 23, 2021, DHS issued a memorandum from DHS Secretary Alejandro Mayorkas to Troy Miller, Commissioner of CBP, "Guidance for the Immigration Processing of Afghan Citizens During Operation Allies Refuge." This memorandum invokes Section 212(d)(5) of the INA for CBP officers to use parole for the "processing, transporting, and relocating" of Afghan nationals for a period of two years. DHS_MCIR_0008961. The Administrative Record shows that DHS did not invoke a categorical exclusion, or conduct an EA or an EIS before implementing this policy despite its foreseeable potential to create an increase of entrance and settlement of foreign nationals into the United States.

V. Argument

A) Defendants violated NEPA by failing to evaluate and inform the public of the Direct, Indirect, and Cumulative Environmental Impacts of the Immigration Actions.

1) NEPA requires agencies to prepare an EIS that takes a "hard look" at the action's direct, indirect, and cumulative environmental impacts before implementing any major federal action or related set of actions that *may* affect the quality of the human environment.

NEPA imposes "action-forcing procedures" that require an agency to take a "hard look" at environmental consequences of its actions before they are implemented. *Robertson*, 490 U.S. at 350. If an agency has failed to conduct an EA that adequately determined that a proposed major action will *not* have a significant effect on the quality of the human environment, it must conduct a full EIS if that action has the *potential* to affect the quality of the human environment.

Winter v. NRDC, Inc. 555 U.S. 7, 16 (2008). A federal action "affects" the environment when it "will or *may* have an effect" on the environment. 40 C.F.R. § 1508.3 (emphasis added.) Plaintiffs do not need to show the substantial effects will "in fact occur," raising substantial questions whether the action will have a significant effect is sufficient to trigger this requirement. *Ocean Advocates v. U.S. Army Corps of Engineer*s, 402 F. 3d 846, 864-865 (9th Cir. 2005).

NEPA obligates the agency to consider not just the direct environmental effects of an action, but also the action's "indirect" environmental effects that are "reasonably foreseeable" and the action's "cumulative impact" when added "to other past, present, and reasonably foreseeable future actions regardless of what agency… or person undertakes such other actions." *Sierra Club v. Fed. Energy Reg. Comm'n*, 827 F. 3d 36, 41 (D.C. Cir. 2016); 40 C.F.R. § 1508.1(g). Reasonably foreseeable indirect effects may include "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate." §1508.1(g)(2). When an agency takes several actions which will have a "cumulative or synergistic environmental impact," their environmental consequences must be considered together. *Kleppe v. Sierra Club*, 427 U.S. at 390. That is, it is improper for an agency 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 at 298.

2) The Nine Immigration Actions were "major Federal Actions."

In the first year of the Biden Administration, Defendant agencies adopted the Immigration Actions, nine major related actions which each required NEPA compliance in order to fulfill the policy of immigration expansion that had been announced within two weeks of

President Biden taking office through four presidential directives. Specifically, the actions adopted were: 1) the suspension of all barrier projects between ports of entry on the southern border, SUMF ¶1; 2) the termination of MPP, PACR, HARP, and the Asylum Cooperative Agreements, the set of policies that, under the previous presidential administration, had been put in place to in order to greatly curtail the release into the United States of foreign nationals claiming asylum before such claims could be adjudicated as having merit, SUMF ¶¶ 6-12; 3) the granting of permission to illegal border crossers on a categorical basis and the arrangement of their transportation for settlement to various parts of the interior, SUMF ¶¶ 13-16; 4) the prohibition of detention and removal by ICE of all foreign nationals unlawfully present except those who meet a few narrow categories, SUMF ¶¶ 17-19; 5) the rescission of civil penalties for certain immigration violations, SUMF ¶¶ 20-21; 6) the reinstatement of administrative closure for deportation cases, SUMF ¶ 22; 7) the expansion of the refugee resettlement program, SUMF ¶¶ 23-25; 8) the restart of the Central American Minors program granting administrative parole to certain categories of nationals from Central American countries, SUMF ¶¶ 26-27; and 9) the creation of the Afghani National parole program granting administrative parole to certain categories of Afghani nationals, SUMF ¶ 28.

All of the Immigration actions are major federal actions subject to NEPA compliance. The CEQ defines a major federal action as any "activity or decision subject to Federal control and responsibility," that does not fit into a stated exception. *See* 40 C.F.R. § 1508.1(q). Activities or decisions that constitute exceptions are: 1) those that have effects solely outside the U.S.; 2) those that are non-discretionary; 3) those that are not final under the APA; 4) judicial or administrative civil or criminal enforcement actions; 5) non-governmental actions that receive

federal funding but where the government does not control the action through the funding. None of these exceptions apply.

3) The cumulative effects of the nine Immigration Actions had the potential to affect the quality of the human environment.

Because they were all part of a related immigration agenda adopted during the same time frame in furtherance of related presidential directives, it was reasonable for Defendants to foresee that the nine actions had the potential to work synergistically and would have cumulative effects in substantially increasing the levels of immigration to the U.S. It was reasonably foreseeable such intended substantial increase would have significant environmental impacts. What each action had in common was working either to remove barriers to entrance and settlement or to facilitate pathways to entrance and settlement. Operating "synergistically," this affect had the potential to be significantly amplified with the foreseeable possibility that over time, millions more foreign nationals would be added to the population of the U.S. The first challenged action suspended the building of a barrier whose intention was to "prevent unlawful border entry." Secure Fence Act, Pub. L. No 109-367 (2006). The Secretary of Homeland Security himself admitted that the second challenged action involved terminating a program that "likely contributed to reduced migratory flows." DHS_MCIR_0000197. The third challenged action forced agents of the border patrol to release apprehended border crossers into the interior rather than remove them from the U.S. The fourth challenged action declared that illegal aliens in the interior would no longer be removed from the U.S. The fifth challenged action removed civil penalties for failing to depart, thus removing deterrence to leave.[6] The sixth challenged

[6] While Defendants may assert the contrary in this case, the Supreme Court has "recognized on numerous occasions that 'all civil penalties have some deterrent effect.'" *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 185 (2000).

action allows immigration enforcement cases to be closed indefinitely without adjudication, As the Supreme Court has found in *INS v. Doherty*, 502 U.S. 314, 323 (1992): "in a deportation proceeding...as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." The seventh, eighth, and ninth actions, raising the refugee ceiling and creating or restarting humanitarian parole programs, have the potential to increase the number of foreign nationals in the United States by directly creating a pathway to the United States for their beneficiaries.

CEQ regulations are explicit that "growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate…" are potential significant impacts. 40 C.F.R. § 1508.1(g)(2). The immigration actions by definition are "growth inducing" and may induce changes in the pattern of land use, population density or growth rate." Far more attenuated population growth inducing effects must be evaluated under NEPA. *See, e.g., City of Davis v. Coleman*, 521 F.2d 661, 666, 671 (9th Cir. 1975) (holding that agency violated NEPA by failing to prepare EIS considering growth impacts prior to construction of freeway interchange near an agricultural area). NEPA's express statement of purpose declares that the statute is "particularly" concerned with "the profound influences of population growth" on the environment. 42 U.S.C. § 4331(a).

Furthermore, actions that encourage illegal crossing at the southern border have the potential to cause direct environmental degradation as well—the physical movement across a small area of large numbers of people has the potential to affect the quality of the human environment.

4) Defendants' failure to conduct an EIS evaluating the potential effects of the Immigration Actions was therefore arbitrary and capricious, and a violation of NEPA.

The Immigration Actions had the potential to significantly affect the quality of the environment, but Defendants failed to conduct an EIS. Rather than satisfy a "hard look"

standard, Defendants employed a "no look" strategy as a way to comply with their obligations under NEPA. The Administrative Record shows that they also did not conduct an EA and issue a FONSI or cite a categorical exclusion. They cannot do so now. *See Anacostia Watershed Soc'y v. Babbitt*, 871 F. Supp. at 487. Defendants engaged in no reasoning or analysis to satisfy their obligations under NEPA, and any assertions they should make now to absolve themselves of NEPA compliance would have no grounding. A court "cannot defer to a void." *Or. Natural Desert Ass'n v. BLM*, 625 F. 3d 1092, 1121 (9th Cir. 2010).

B) Plaintiffs have standing to challenge Defendants' violation of NEPA.

1) The standard for summary judgment in a NEPA case requires the demonstration of particularized concerns about environmental harms caused by the actions implemented without proper NEPA compliance.

To establish Article III standing, Plaintiffs must be able to show they have 1) suffered an injury in fact which was 2) caused by Defendants' illegal conduct, and 3) is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180-81 (2000). On summary judgment, testimony such as affidavits demonstrating "reasonable concerns" that the harm will occur from the agency actions are sufficient to meet the evidentiary burden. *See e.g. Laidlaw*, 528 U.S at 183-184. The "relevant showing for purposes of Article III standing" is not "injury to the environment but injury to the plaintiff." *Id.* at 181. Environmental plaintiffs "adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Id.* at 183 (cleaned up.)

Plaintiffs can also establish standing with declarations that describe "reasonable fear" of "health or environmental harms" on the part of the plaintiffs that "impairs their ability to feel safe and to enjoy the outdoors." *Cal. Cmtys. Against Toxics v. EPA*, 928 F. 3d 1041, 1049 (D.C.

Cir. 2019); Stating in their declarations that they spend "less time" outdoors doing recreational or physical activities or that they do not "enjoy" these outdoor activities as much because of "their worries about health and environmental harms" establishes injury in fact. *Id*. Likewise, declarations explaining "their individual behavioral changes" because of particularized fears of serious health and environmental consequences" establishes injury in fact for Article III standing. *Sierra Club and La. Envtl. Action Network v. EPA*, 755 F3d 968, 974 (D.C. Cir. 2014). Declarations showing plaintiffs' concerns about effects of the challenged actions on their health and spending "less time outdoors on that account" satisfies their "evidentiary burdens to demonstrate injury, causation and redressability." *NRDC v. EPA*, 755 F. 3d 1010, 1017 (D.C. Cir. 2014).

"Threats or increased risk" to the plaintiff caused by the agency's actions constitutes harm in the environmental context because threatened environmental injury is "by nature probabilistic." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp*., 204 F. 3d 149, 160 (4th Cir. 2000). Increased risks of injury to the plaintiff based on "the location of his home" can also demonstrate particularized harm. *City of Dania Beach v. FAA*, 485 F. 3d 1181, 1186 (D.C. Cir. 2019). A "substantial probability" that the substantive agency action "created a demonstrable risk, or caused a demonstrable increase in an existing risk" is what is needed. *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 669 (D.C. Cir. 1996).

In a procedural case, causation and redressability are relaxed. *Lujan* 504 U.S at 573, n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.") A party who has been deprived of a procedural protection does not have to prove that if the procedure had been followed "the substantive result would have been altered," only that "the

procedural step was connected to the substantive result." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). The "predictable effect of Government action on the decisions of third parties" is enough to establish injury in fact in a procedural case. *DOC v. New York*, 139 S. Ct. 2551, 2566 (2019). Article III "requires no more than *de facto* causality." *Id.* (citations omitted). *De facto* causality is met when because the Plaintiffs' "theory of standing" … rests not on "mere speculation about the decisions of third parties" but relies instead on the "predictable effect of Government action on the decisions of third parties." *Id. See also*; *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (The effects of actions by third parties that are not "independent" but "produced by determinative or coercive effect" of the challenged government action give standing to those harmed by the effects.)

2) Plaintiffs meet this standard because their declarations show that the Immigration Actions have caused them particularized fears about their safety or health, decrease in enjoyment of specific areas, distress at environmental damage to specific places, and their behavior has changed as a result.

Plaintiffs' declarations establish that their health, safety, recreational and aesthetic interests have personally been affected by the collective effects of the Immigration Actions, and by the possibility of further related immigration actions undertaken without NEPA analysis, such that they satisfy their evidentiary burden for Article III injury. The specific effects that have been felt by the Plaintiffs include: 1) the environmental harm caused to the southern border regions where Plaintiffs reside, by the massively increased frequency of illegal border crossing induced by the Immigration Actions and 2) the environmental harm caused to areas in the interior of the United States from immigration driven population growth where the Plaintiffs reside, work, and recreate.

As a matter of public record,[7] numbers of border crossers at the southwest border between the U.S. and Mexico soared after the Biden Administration's Immigration Actions were implemented. In FY 2021, border patrol agents had about 1.7 million encounters with illegal border crossers, about four times as many as the previous year. In FY 2022, there were about 2.4 million. In the first four months of FY 2023, there have already been 874,449.[8] Those numbers do not include "got aways," border crossers who are detected but not apprehended by border agents, but Customs and Border Protection agents have told reporters that they number at least 1.2 million during the Biden Administration.[9] DHS has admitted in the administrative record for the termination of MPP, that it is likely this action increased these migratory flows. DHS_MCIR_0000220. The amount of traffic at the border personally impacts plaintiffs in this case, causing them "particularized fears of serious health and environmental consequences," causing them to change their behavior, and damaging "aesthetic and recreational values" of areas they use. *See Laidlaw* 528 U.S at 183; *Cal. Cmtys. Against Toxics*, 928 F. 3d at 1049. *Sierra Club and La. Envtl. Action Network v. EPA*, 755 F3d at 974. Plaintiffs have satisfied their evidentiary burden through declarations detailing their personalized harms caused by this tremendous surge in border crossing at the southwest border. The mass border crossing, the "predictable effect" of the federal government's Immigration Actions "on the decisions of third

[7] Because up to date numbers of illegal crossing at the southern border could not have been available to Defendants when they adopted the Immigration Actions, and therefore could not be part of the administrative record, Plaintiffs request that judicial notice of such numbers be taken for the purpose of meeting the burden to establish standing at all stages of the litigation.
[8] Nationwide Encounter numbers may be found on the U.S. Customs and Border Protection website, at https://www.cbp.gov/newsroom/stats/nationwide-encounters.
[9] Anders Hagstrom, Bill Melugin, "*Border agents confirm 1.2 million "gotaway' migrants under Biden Administration: Illegal Immigration continues to skyrocket under President Biden*, Fox News, Jan. 22, 2023, https://www.foxnews.com/us/border-agents-confirm-1-2-million-gotaway-migrants-biden-administration.

parties" is enough to establish injury in fact in a procedural case. *DOC v. New York*, 139 S. Ct. 2551, 2566 (2019).

Plaintiff Steven Chance Smith, who works on an 87 square mile cattle ranch on the border between Arizona and Mexico near where he lives, has provided evidence that he has suffered personalized harms because of this border traffic. *See* Declaration of Chance Smith, Ex. 1 at 1. The injuries he has suffered and will continue to suffer while the Immigration Actions remain in place meet the standard created in *Laidlaw*, 528 U.S. at 183. Mr. Smith has estimated that the border traffic at his home and on the ranch increased by "eight or nine times" after these actions. *Id*. at 5. Given where he lives, the border traffic immensely affects the quality of his life and the risks he faces on a daily basis. *See City of Dania Beach*, 485 F. 3d at 1186. He personally has witnessed environmental degradation. Increased traffic means more trash left on the land, such as blankets and clothes of the migrants. Ex. 1 at 6. Not only does he encounter more border crossers than before, but the Immigration Actions have affected the behavior these border crossers are likely to engage in, causing him personal risks. The policies that have made crossing so easy have so sacrificed operational control over the border that those who cross are more likely to put him in danger. In his declaration, he says, "Not only has the border traffic gone up so dramatically since Biden was inaugurated, but the border crossers are bolder than I have ever seen before in my life." *Id*. at 8. "The cartels are in control now, and the American government allows it in order to encourage the flow of people into the interior." *Id*. at 6.

When international cartels have free run over the border, they put Mr. Smith's health and safety at increased risk, which is an environmental harm that, given where he lives and works, clearly satisfies Article III standing requirements. *See e.g. City of Dania Beach*, 485 F. 3d at 1186; *Gaston Copper Recycling Corp*., 204 F. 3d at 160. The cartels bring drugs, and are

generally armed, sometimes they even hide drugs and guns in his own backyard. Ex. 1. at 4. Mr. Smith and his family often sees people crossing nearby properties on his game cameras. *Id*. As a result, his safety and the safety of his family is threatened, clearly impairing his ability "to feel safe" and "enjoy the outdoors." *See Cal. Cmtys. Against Toxics v. EPA*, 928 F. 3d at 1049. He has to change his behavior in response to these safety dangers caused by the Immigration Actions. He started carrying a pistol with him when he rides horse back on his ranch, or whenever he leaves his house out of fears for his safety outdoors, though he does not like to carry a weapon on his person. Ex. 1 at 2-3. *See NRDC v. EPA*, 755 F. 3d 1010. His pleasure in doing his job of ranching outside diminished in other ways as well—for instance, the greater the number of illegal border crossers, the more likely someone may open gates and let out cattle he has herded—causing him to do the physical work of several days all over again—which significantly increases his mental stress, as well as the physical wear and tear he must undergo. Ex. 1 at 6.

His health in general is at greater risk while outdoors because of the border crisis. The trip that so many migrants take up the human pipeline from South America, through Central America, and Mexico, is rife with unsanitary conditions and stressful for the migrants' physical health, making it easy for them to catch communicable diseases through the journey. *Id*. at 6-7. As his land and community are on the front lines, he knows that his health, and local public health, is at greater risk for diseases he could catch from them. His fear is reasonable, not theoretical—he grew up on the border, and his father once found the dead body of a border crosser on the family property, and ended up spending months in and out of the hospital with a mystery illness. *Id*. at 7. Such "reasonable" and "particularized fears of serious health"

consequences are precisely the kind of concrete interests that provide standing in environmental cases. *Cal. Cmtys. Against Toxics v. EPA, 928 F. 3d 1049. NRDC v. EPA*, 755 F. 3d 1010.nb.

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

The aesthetic damage to this specific area satisfies the standard of particularized harm sufficient for Article III standing. *See Laidlaw*, 528 U.S at 183. Ms. Getzwiller particularly "cherishes and values the Arizona borderlands, with its unique and beautiful desert landscapes and wildlife" and which have "one of the most ecologically diverse landscapes in the nation." Ms. Getzwiller is deeply disturbed by contemplating the environmental damage caused to this unique area as it has become a "thoroughfare for migrant crossing." *Id*. The trash is not merely an aesthetic loss—"large amounts of trash cause watershed degradation, soil erosion, damage to infrastructure, and loss of vegetation and wildlife." *Id*. at 3. The trash "pollutes the water and is

bad for human health" in the area, as well as the health of her cattle. *Id*. While the trash has been a problem in the past, the larger the border crisis, the harder it is to haul away massive amounts of garbage from the middle of the desert. The uptick in trash left by the border crisis in this particular area has been so sudden that volunteers have been unable to keep up, meaning that permanent damage is being done to the "delicate ecosystem" of the Arizona border which Ms. Getzwiller depends on for enjoyment and sustenance. *Id*.

Ms. Getzwiller feels immense worry and distress living under these conditions. She also feels fear because she worries about the security risks of the unsecured border. Since she no longer feels safe outdoors, she is considering moving away from the border, but she can't imagine leaving Arizona, where she cherishes the land so much. Ex. 2 at 6-7. *See NRDC v. EPA*, 755 F. 3d 1010; *Cal. Cmtys. Against Toxics v. EPA*, 928 F. 3d at 1049.

At least one member of MCIR has also suffered personal environmental harms caused by the degradation of the environment in the Southwest border and his distress because he can no longer use the area for recreation. Co-chairman of Plaintiff MCIR Steve Kropper has developed a particularized attachment to Big Bend National Park, which he has visited nine times, to bike, walk, and hike and view its particular rich and fragile ecosystem. Declaration of Steve Kropper, Ex. 3 at 5. He has already seen that illegal border crossers, when they cross in greater numbers, trample this "pristine nature." *Id*. Mr. Kropper feels great distress over the destruction of this particularly favorite spot caused by the Immigration Actions. *Id*. at 6. He would like to go back and visit it again, but he now fears to hike at all because it is so dangerous to be a hiker in an area controlled by cartels. *Id*. at 6. The challenged actions have therefore directly harmed his recreational interests in a specific area and changed his longstanding behavior of trips to this place. *See NRDC v. EPA*, 755 F. 3d 1010; *Cal. Cmtys. Against Toxics v. EPA*, 928 F. 3d at 1049.

Plaintiffs in this case have suffered personalized harms from the environmental effects of these actions in the interior of the United States as well. Millions of foreign nationals have settled in the interior of the U.S. without any environmental analysis, and Plaintiffs have experienced and will continue to experience personalized harms from their cumulative impacts, which will inevitably grow more and more significant if the Immigration Actions continue, and if the government continues to fail to conduct environmental analysis before taking similar immigration-related actions. These plaintiffs have also met their evidentiary burden of demonstrating they are persons "for whom the aesthetic and recreational values" of specific areas will be lessened by the Immigration actions. *Laidlaw*, 528 U.S at 183.

Plaintiff Kevin Lynn in his declaration demonstrates that he has "reasonable concerns" that the "aesthetic and recreational values" of the area he lives will be harmed and his "enjoyment of the outdoors" will be decreased by the Immigration Actions and he will have to move. *See Laidlaw*, 528 U.S at 183-184. *City of Dania Beach,* 485 F. 3d at 1186; *Cal. Cmtys. Against Toxics*, 928 F. 3d at 1049. Mr. Lynn is the Executive Director of Progressives for Immigration Reform ("PFIR") and a member of a few environmental organizations. Declaration of Kevin Lynn, Ex. 4 at 1. One of them, in which he has a leadership role, is called "Respect Farmland," which is specifically dedicated to saving the bucolic, agrarian nature of Lancaster County, Pennsylvania, where he currently resides. *Id*. at 1. Lancaster County is currently being affected by the Immigration Actions and will almost certainly be affected more and more if the Immigration Actions continue. *Id*. at 7-8. Prior to the Biden Administration, Lancaster County was set to be demographically stable. *Id*. at 8. Most recent population growth had been driven by refugee resettlement, which had been largely stopped by 2020. *Id*. at 7-8. The Immigration Actions, however, restarted the potential for resettlement of Lancaster County. *Id*.

Mr. Lynn is reasonably concerned over the environmental effects of the Immigration Actions because he is extremely aware of the inevitable impacts of immigration driven population growth. In 2016, PFIR completed a three-year investigation culminating in a Programmatic Environmental Statement ("PEIS"), analyzing the long-term, cumulative effects of immigration levels on American's environmental resources, precisely the kind of report the U.S. government has never done under NEPA. *Id*. at 2. This study showed that changes to immigration policy raising the level of immigration to the U.S. would have profound effects on its natural resources, including urban sprawl and loss of farmland, loss of habitats and biodiversity, carbon dioxide emissions, and water demands. *Id*. at 2-3. Mr. Lynn knows that the Immigration Actions have now raised the rate of immigration to the U.S. significantly, with the Bureau of Labor Statistics showing in November 2022 that the foreign born population had increased by more than 3.4 million since January 2021. *Id*. at 4. If the Immigration Actions continue, Mr. Lynn understands that the "cumulative effect of the changes in immigration policy" will have significant environmental impacts. *Id*.

Mr. Lynn is also aware of the effects of immigration driven population growth, and the way it transforms the local environment and is bound to change his own behavior because of his own past personal experience. In the mid 1990's, he moved to Los Angeles County in California, where he was initially able to live in a small cabin in Malibu where he could enjoy plentiful open space, "hiking trails through unspoiled hills," and where he could go biking from his front porch. *Id*. at 4-5. As he lived in Los Angeles County, development powered by immigration driven population growth transformed the area. *Id*. at 5. Traffic got worse and worse, and it became difficult for him to enjoy nature, go to the beach, or bicycle to work. *Id*. Eventually, he moved to Pennsylvania, the state of his childhood. He would have liked to moved back to his native Bucks

County, which in his childhood had "wide and plentiful open spaces, and some of the best game lands in the country" where he had hiked, fished, and played outdoors. *Id*. at 6. He therefore chose to live in Lancaster County, specifically to be close to a rural area. *Id.* Regarding Lancaster, he states: "Lancaster is the most productive non-irrigated farming county in the United States; the soil here is tremendous and rich. I love being able to ride my bike here through fields to go buy fresh produce." *Id*. Without international migration, demographically, Lancaster County would be fairly stable. *Id.* at 8.

Lancaster County, however, is particularly vulnerable to environmental transformation "because it is so greatly affected by resettlement implemented by the non-governmental organizations (NGOs) that settle the beneficiaries of Biden immigration programs into communities in the United States." *Id*. at 7. According to the British Broadcasting Company, Lancaster County is the refugee county of America. Between 2013 and 2017, Lancaster County had taken in 20 times more refugees per capita since 2013 than any other county in America. *Id*. Mr. Lynn understands the way the immigration system works and how it leads to population growth in particular places. Federal agencies direct federal dollars to Non-governmental organizations ("NGOs") such as Church World Service Lancaster, and these NGOs "make arrangements to bring foreign nationals to specific places" like Lancaster and provide them with tax payer funded services. *Id*. Local citizens never have a chance to make their voices heard on the decision or learn about it in advance—because no NEPA compliance is conducted. *Id*. Prior to the Immigration Actions, the flow of resettlement of foreign nationals would have stopped, as the "refugee ceiling was low and there were no programs based on granting parole to Central Americans, Afghan nations, or illegal border crossers. *Id*. at 8. Mr. Lynn knows that this resettlement of foreign nationals will bring the same kind of transformation he has seen before.

Id. at 7. He is "already seeing and feeling this transformation occur, at an increasing pace in the past two years." *Id*. On an average day, he sees between six and 12 people camping outside in the county building across the street," something that didn't happen two years ago. *Id*. Mr. Lynn knows that development of affordable housing will "inevitably follow in response." *Id*. He states: "we are always on the cusp of losing permanently to developers who eagerly cite any sign of population growth to local officials to let them commence building projects." *Id*. at 8. Mr. Lynn knows he "cannot win the anti-development fight if population numbers are continually pumped up by federal agency enabled resettlement." *Id*. If the Immigration Actions continue, Mr. Lynn says, "I will have to move again to enjoy the same quality of life, environmental quality, recreation, open space, and biodiversity." *Id*. at 8-9.

Likewise, Plaintiffs Linda Huhn, Bruce Anderson, and Rob Meyer, who live in the metro area of the Twin Cities in Minnesota, an area which has undergone environmental effects because of immigration-induced population growth, can demonstrate their environmental interests are personally affected by the Immigration Actions. The resettlement of foreign nationals granted permanent residence in the U.S. due to humanitarian concerns has alone comprised an environmentally significant amount of growth in the Twin Cities. *See* Declaration of Linda Huhn, Ex. 5, Declaration of Bruce Anderson, Ex. 6, and Declaration of Rob Meyer, Ex. 7. Minnesota is the state with the most refugees per capita. Ex. 7 at 5. These Plaintiffs "aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Laidlaw* at 183. For example, Ms. Huhn, an avid nature observer and photographer has suffered the loss of environmental sites near her home which she used to photograph. Ex. 5 at 5-6. A native prairie near the Mississippi river where she photographed native wildflowers was bulldozed to make way for a light rail necessary to

accommodate population growth driven by immigration. *Id*. at 6. She found her enjoyment diminished in visiting the Helen Allison Scientific and Natural Area, about 40 minutes from her home, after a housing development was built right next to it. *Id*. at 6-7. Likewise, Plaintiff Bruce Anderson, an avid birdwatcher and nature observer, has personally observed a dramatic decline in many species due to the development caused by population growth as he explores Minnesota and Wisconsin. Ex. 6 at 4. Plaintiff Rob Meyer has personally experienced the St Croix River become less and less suitable for his recreational boating, due to local population growth. Ex. 7 at 3. The cumulative impacts of the Immigration Actions will increase the population further.

The members of Plaintiff MCIR, likewise, have found their recreational opportunities and aesthetic enjoyment of specific places lessened. Co-chairman Henry Barbaro has found that urban sprawl has changed the Boston area, replacing pastures and places to swim with strip malls and housing developments. Declaration of Henry Barbaro, Ex. 8 at 5. This overcrowding is set to grow because of the Immigration Actions. Co-chairman of Plaintiff MCIR Steve Kropper also has greatly reduced access to open space in his neighborhood of Lexington Massachusetts, because of population growth, primarily due to immigration. Declaration of Steve Kropper, Ex. 3. at 4. Lexington has a foreign born population of 17%, higher than the national average. *Id*.

The personalized environmental harms arising from the Immigration Actions implemented in violation of NEPA to which the Plaintiffs have averred are sufficient to establish Article III standing on summary judgment.

C) Plaintiffs require both declaratory and injunctive relief to avoid continued irreparable injury and to vindicate NEPA's purposes.

This Court should declare that Defendants violated NEPA and its implementing regulations by undertaking the Immigration Actions without conducting an EIS, or any NEPA compliance whatsoever. When it comes to these actions, and other actions related to immigration, the entire

purpose of NEPA, public information and environmentally enlightened decision-making, has been lost. Meanwhile, the environmental damage is ongoing and irreparable, as foreign nationals continue to pour over the southern border, and the Plaintiffs continue to suffer injury which cannot be remedied with any other method. The Court should enjoin Defendants to cease to execute these policies, and the federal funding thereof, as much as is practicable pending the agencies' completion of an environmental impact statement that adequately assesses the direct, indirect, and cumulative impacts of these actions.

VI. Conclusion

For the foregoing reasons, Plaintiffs respectfully request the Court 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.

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Respectfully submitted,

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