UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

At the pleading "stage [a plaintiff] need only allege facts that he can prove at summary judgment." *Mass. Coal. for Immigr. Reform v. U.S. Dep't of Homeland Sec.*, 621 F. Supp. 3d 84, 93 (D.D.C. 2022). But at the summary judgment stage, a plaintiff can no longer rest on mere allegations and must set forth by affidavit or other evidence "specific facts" to establish standing. Falling well short of that mark, Plaintiffs continue to pursue a lawsuit supported by nothing but speculation. Plaintiffs speculate that the actions they challenge have directly increased the population of the United States and that the alleged influx of migrants has harmed the environment and caused a "humanitarian crisis on the southern border." Trying to stitch together discreet actions undertaken at various times by three federal agencies, Plaintiffs also speculate that the Biden Administration has designed a single "program" to enlarge the population of the United States with foreign-born persons. Of course, just as Frankenstein's monster was a creature of Shelley's imagination, so too is Plaintiffs' population program.

As a threshold matter, Plaintiffs lack standing to bring their nine remaining claims. Plaintiffs must establish standing for each of their claims and cannot, as they try to do, amalgamate their alleged injuries for all claims. In this way, Plaintiffs conflate Article III's standing requirements with the merits requirement of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, to consider cumulative impacts, and impermissibly attempt to revive the programmatic challenge (Count XI) the Court has already dismissed. As to standing, Plaintiffs' declarations describe general grievances about the realities of modern urban life, and even where Plaintiffs get more specific, they only speculate that policies they challenge will cause increased immigration, and immigration will cause population growth and environmental harms that affect them. This is insufficient at summary judgment.

Even if Plaintiffs could get past the insurmountable jurisdictional barrier of standing, several of their claims are also moot or otherwise jurisdictionally barred. And all of Plaintiffs' claims fail on the merits. NEPA does not apply to every federal action; instead, an action must meet several criteria. The action must be major, final, discretionary, and, importantly, have the potential to significantly affect the quality of the human environment. No action meets these criteria. Defendants' position is not that NEPA is "too burdensome," as Plaintiffs say, but that NEPA does not apply. Five of the actions at issue are expressly exempt from NEPA's definition of a "major federal action." Plaintiffs do not respond to this argument and thus concede the five claims. The remaining actions are also not subject to NEPA's requirements.

In sum, Defendants are entitled to summary judgment on all of Plaintiffs' claims. Plaintiffs have had ample opportunity to establish that this Court has jurisdiction and to bring valid challenges under the APA to actions that are subject to NEPA. The Court should not, as Plaintiffs suggest, now afford them a second opportunity to amend their Complaint or prolong this litigation with jurisdictional discovery.

I. Plaintiffs Lack Article III Standing as to All of Their Nine Remaining Claims.

To sue in federal court, a plaintiff must show injury, causation, and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," *id.* at 561, and the Court "presumes that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990). At the pleading "stage [a plaintiff] need only allege facts that he can prove at summary judgment." *Mass. Coal. for Immigr. Reform*, 621 F. Supp. 3d at 93.

However, a "plaintiff's burden to demonstrate standing grows heavier at each stage of the litigation." *Osborn v. Visa Inc.*, 797 F.3d 1057, 1063 (D.C. Cir. 2015). At the summary judgment

stage, "the plaintiff can no longer rest on such mere allegations but must set forth by affidavit or other evidence specific facts" to establish standing. *Scenic Am., Inc. v. U.S. Dep't of Transp.*, 836 F.3d. 42, 48 (cleaned up). At this stage, if "the plaintiff has not introduced sufficient evidence into the record to at least raise a disputed issue of fact as to each element of standing, the court has no power to proceed and must dismiss the case." *Id.* at 49; *see Clapper v. Amnesty Int'l U.S.A.*, 568 U.S. 398, 413 (2013) (dismissing case at summary judgment stage where plaintiffs "can only speculate" they will suffer a cognizable injury). Dismissal is required here. Plaintiffs fail to introduce specific facts to support each element of standing for each action they challenge and rely instead on the declarations filed with their motion to dismiss. *See* Defs.' Cross-Mot. for Summ. J. & Opp'n to Pls.' Mot. for Summ. J. 20-27, ECF No. 37 ("Defs.' XMSJ").

A. Plaintiffs fail to establish standing for their individual claims.

1. Plaintiffs do not show that they have standing as to any claim.

Plaintiffs have not established standing to challenge any of their individual claims. First, as to Plaintiffs who own ranches in Arizona and allege injuries caused by migrants crossing the border, Plaintiffs speculate that government actions are causing the alleged harms but fail to show that the alleged harms are traceable to any policies they challenge in this lawsuit. *See* Defs.' XMSJ 20-22.

As for the suspension of border barrier construction (Count III), Plaintiffs fail to show how the suspension of construction of only 18 miles of planned barrier on Arizona's 370-mile border with Mexico has caused increased migration, and that increased migration caused their alleged injuries. *Id.* at 21; *see Arizona v. Mayorkas*, 600 F. Supp. 3d 994, 1004-05 (D. Ariz. 2022) (finding Arizona lacked standing to challenge termination of border wall construction because the State failed to produce evidence that migrants were entering the country "*because of* certain gaps in the border wall (which would remain gap-filled regardless of the termination

decision)"); *see also Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1017 (9th Cir. 2021) (rejecting plaintiffs' inducement theory of border crossing).

Plaintiffs also fail to demonstrate traceability with regard to termination of the Asylum Cooperative Agreements (ACAs) (Count III) and the Prompt Asylum Claim Review (PACR) and Humanitarian Asylum Review Process (HARP) pilot programs (Count IV). Indeed, none of these agreements were operational when President Biden took office, so their termination cannot be the cause any alleged increase in immigration during this administration. Defs.' XMSJ 21-22. Beyond the failure to show that that any of their alleged harms can be traced to the termination of the ACAs, PACR, and HARP, Plaintiffs have also made no showing that a judicial ruling in their favor could redress those harms. PACR depends on the Third Country Transit Rule, which was vacated, enjoined, and ultimately rescinded. *See* 88 Fed. Reg. 31,314, 31,319 (May 16, 2023). The Court cannot "stay" termination of the ACAs and MPP—as Plaintiffs request—because they rest on international arrangements that cannot be judicially reinstated. Defs.' XMSJ 22.

Plaintiffs' claims to injuries to individual ranch owners on the border is also undercut because they rely on a declaration submitted by Plaintiff Steven Chase Smith, who has not sworn under penalty of perjury that the allegations in the declaration are true and accurate. Because the declaration is unsworn, this Court cannot consider its contents to establish Article III standing. A declaration "not sworn to under penalty of perjury. . . [is not] admissible documentation proper for consideration at the summary judgment stage." *Asia N. Am. Eastbound Rate Agreement v. Amsia Int'l Corp.*, 884 F. Supp. 5, 6 (D.D.C. 1995). Defendants raised this issue in their opening brief on April 13, 2023. Defs.' XMSJ 16. In their reply, Plaintiffs do not dispute the deficiency in their declaration, but claim to have not provided a sworn declaration because of "issues with Federal Express" and "high crime" near the declarant's home. Pls.' Resp. in Opp'n to Defs.'

Cross Mot. for Summ. J. & Reply in Supp. of Pls.' Mot. for Summ. J. 17-18, ECF No. 43 ("Pls.' Reply"). As of filing, Plaintiffs have still not produced a sworn declaration and should be prohibited from doing so now, after briefing is complete.

Second, as for Plaintiffs who live further from the southern border, they too fail to show, beyond their initial speculation, that their alleged harms are caused by challenged government actions. Plaintiffs broadly allege losses of recreational opportunities, farmland, and biodiversity and aesthetic harms due to increased population, urban sprawl, and traffic congestion. *See* Defs.' XMSJ 23. While Plaintiffs' briefing attributes these harms to the nine challenged Biden administration actions, their declarations establish that population growth, urban sprawl, and attendant congestion have been increasing over a much longer period for reasons that have nothing to do with the challenged actions. *Id.* at 23-24. Plaintiffs speculate that an alleged "permission slip" policy (Count IV), a change in enforcement priorities (Count V), a policy not to issue fines (Count VI), and permission for immigration judges to administratively close cases (Count VII) will increase immigrant populations in their communities, but they fail to offer "specific evidence" to back up their speculation showing how migrants, Immigration and Customs Enforcement (ICE) officers, and judges will act in response to these policies. *Id.* at 24-25; s*ee Lujan*, 504 U.S. at 562.

Similarly, Plaintiffs fail to establish standing to challenge refugee and parole actions (Counts VIII through X). Like all of Plaintiffs' claims, these claims depend on Plaintiffs' speculation: that the State Department's publication of the FY2022 Notice of Funding Opportunity (Count VIII) will result in increased settlement of foreign nationals in the United States; and that the relatively small numbers of individuals who have entered the United States through Central American Minors (CAM) parole (Count IX) or Afghan parole (Count X) will

settle near Plaintiffs in sufficient numbers to cause the harms they allege. *Id.* at 25-26. But again, Plaintiffs offer no proof that these actions will increase population, much less in numbers and in areas that will harm them.

In sum, Plaintiffs' speculation that the actions they challenge will increase immigration, and that increase will cause environmental harms impacting their interests, is not enough to carry Plaintiffs' burden to introduce evidence sufficient to satisfy each element of standing.

2. Plaintiffs' alleged harms are based on speculation about increased immigration due to the independent actions of third parties.

Plaintiffs claim harm based on choices independent parties, who are not before the Court, may make in response to policies Plaintiffs oppose. However, standing cannot "rest on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414. And it particularly cannot rest on "speculation about future unlawful conduct." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019) (cleaned up). Here, Plaintiffs ask the Court to assume that increases in immigration are caused by actions they challenge rather than other U.S. government policies, conditions in migrants' home countries, individual decisions to come to the United States, and "myriad economic, social, and political realities" behind those decisions. *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015). Speculation of this nature is not enough at the summary judgment stage. Rather, Plaintiffs must present "relevant evidence" tracing the specific actions they challenge to increased population and downstream environmental harms that affect Plaintiffs, which they failed to do. *Whitewater Draw*, 5 F.4th at 1017. "Contingent injuries, especially those arising from the impact of regulations on third parties not before the Court, rarely create cognizable cases or controversies," and they have not done so here. *Arizona v. Biden*, 40 F.4th 375, 383 (6th Cir. 2022); *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004); *cf. Dep't of Com. v. New York*, 139 S. Ct. at 2565 (finding

standing where evidence "established a sufficient likelihood that the reinstatement of a citizenship question would . . . cause [noncitizens] to be undercounted," injuring plaintiffs' access to population-based federal funding).

At bottom, Plaintiffs' claims are rooted in their prediction that policies they challenge will cause increased migration and that migration will cause environmental harms that affect them. However, "where predictions are so uncertain, [the court is] prohibited from finding standing." *Arpaio*, 797 F.3d at 22. Here, Plaintiffs' predictions are highly uncertain and far too uncertain to support Article III standing.

3. Plaintiffs may not aggregate their claims to establish standing.

"Standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Instead, "a plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (cleaned up); *see also Whitman-Walker Clinic v. U.S. Dep't of Health and Human Servs*., 485 F. Supp. 3d 1, 18 (D.C. Cir. 2020). In addition, "a plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc.*, 528, U.S. 167, 185 (2000).

Rather than attempt to establish standing as to each claim, Plaintiffs contend they do not have to do so because their claims are "interrelated components of a coherent and explicit larger action"—an "agenda of immigration policy"—that "neither caused injury in isolation nor are addressed in isolation." Pls.' Reply 8, 12. This argument appears to suggest that the individual actions Plaintiffs challenge result from four directives—one Presidential Proclamation and three Executive Orders. *Id.* at 10 & n.6, 7.[1] But Plaintiffs have not asserted claims challenging any of

[1] The four directives are: (1) Presidential Proclamation 10142, Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction (Jan. 20, 2021), 86 Fed. Reg. 7225; 2) Executive Order 13993, Revision of Civil Immigration Enforcement Policies and Priorities (Jan. 20, 2021), 86 Fed. Reg. 7051; (3)

the four directives. Nor could they: the President is not subject to the APA, *see Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992), and the directives are not agency actions.

Plaintiffs assert that the injury-in-fact and causation prongs of Article III standing "may result from a group of actions, rather than one in isolation." Pls.' Reply 8. And they claim that redressability "is accomplished on a joint rather than on a count by count basis if the actions are a concerted group that implement an executive directive." *Id.* at 9. But Plaintiffs offer no legal support for their assertion that separate legal claims can be amassed in this way to establish standing, and the Supreme Court and Circuit precedents cited above make clear that Plaintiffs are required to establish standing for each claim. Plaintiffs' argument that they may establish standing by claiming to be injured by the sum of all the actions they challenge is simply incorrect as a matter of law. The Court should dismiss all the claims for lack of standing.[2]

B. Plaintiffs conflate their obligations to demonstrate Article III standing with NEPA's separate requirements.

Much of Plaintiffs' argument on Article III standing relies on concepts specific to NEPA. But whether a plaintiff has standing to assert a claim and whether an agency complies with NEPA are distinct and independent legal concepts.

Executive Order 14010, 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 (Feb. 2, 2021), 86 Fed. Reg. 8267; and (4) Executive Order 14012, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans (Feb. 2, 2021), 86 Fed. Reg. 8277.

[2] NEPA is a procedural statute, but that does not obviate Plaintiffs' duty to show causation. The "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right in vacuo—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). A plaintiff must establish a "geographic nexus between the individual asserting the claim and the location suffering an environmental impact." *Whitewater Draw*, 5 F.4th 997, 1013 (citation omitted); *see also Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 592 (D.C. Cir. 2019).

In support of their claim that they need not establish standing for each claim, Plaintiffs cite the Fourth Circuit's decision in *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 316 (4th Cir. 2016), for the proposition that agencies are required to examine the environmental effects of wide-ranging and systematic programs. Pls.' Reply 8-9. Standing was not at issue in *Piedmont*. Instead, the court considered plaintiffs' claim that FERC was required to prepare a programmatic environmental impact statement (EIS) rather than project-specific environmental assessments (EAs) when it granted permits for the construction or modification of electric transmission facilities. *Piedmont*, 558 F.3d at 316. The merits of a NEPA claim—whether agency action requires preparation of a programmatic or a site-specific NEPA analysis—is unrelated to the Article III standing inquiry as to whether the challenged action caused Plaintiffs' alleged harm.

Plaintiffs assert they can establish standing by grouping the challenged actions—which they call "component actions"—into an "agenda of immigration policy change." Pls.' Reply 12. But Plaintiffs cannot circumvent their obligation to establish standing for each claim by aggregating individual actions under the umbrella of an alleged immigration "agenda." This "agenda" is materially no different from the programmatic challenge (Count XI) the Court dismissed, where Plaintiffs claimed NEPA compels Defendants to prepare a programmatic EIS for a so-called "population growth agenda." Am. Compl. For Decl. & Inj. Relief, ¶¶ 105, 106, 256, ECF No. 17 ("FAC"). Plaintiffs claimed the various actions worked "synergistically" to advance a single "population growth agenda." *Id.* ¶ 105. In moving to dismiss, Federal Defendants pointed out that the APA does not allow Plaintiffs to bring broad, programmatic challenges. Defs.' Mot. to Dismiss First Am. Compl. 40-44, ECF No. 19; *see Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (APA's "limitation to discrete agency action precludes . . . broad programmatic attack[s]."); *Nat'l Wildlife Fed'n*, 497 U.S. at 899 (APA requirement of

discrete "final agency action" precludes broad, programmatic NEPA challenges where the agency has not itself proposed a programmatic action.). Following Supreme Court precedent, and a recent Ninth Circuit case addressing a programmatic challenge like the one Plaintiffs bring here—*Whitewater Draw*, 5 F.4th 997—this Court dismissed Plaintiffs' programmatic challenge. *Mass. Coal. for Immigr. Reform*, 621 F. Supp. 3d at 96-97.

Plaintiffs' discussion and the authorities they cite concerning the use of programmatic NEPA analyses do not apply here. *See* Pls.' Reply 10 (citing 40 C.F.R. 1502.4(b)(1)(ii) (2022)); Pls.' Reply 14 (citing *Wildearth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013) and *Western Watersheds Project v. Salazar*, Civ. No. 08-435-E-BLW, 2010 WL 375003 (D. Idaho Jan. 25, 2010)); Pls.' Reply 22-23 (discussing use of programmatic NEPA analyses). In *Western Watersheds*, a court found that plaintiffs there (like Plaintiffs here) satisfied standing on a motion to dismiss. 2010 WL 375003 at *2. Plaintiffs argue it would bolster their standing here if they could bring a programmatic challenge, but *Western Watersheds* did not base standing on a forbidden programmatic challenge. Likewise, Plaintiffs in *Wildearth Guardians* satisfied the standing requirements where they challenged a single EIS rather than a programmatic challenge. The question of when an agency may prepare a programmatic EIS under NEPA and NEPA's regulations is unrelated to the question of whether Plaintiffs have established Article III standing for each of their claims. And cases showing that Plaintiffs can establish standing under NEPA in other contexts where they meet Article III's requirements provide no help to Plaintiffs here.

Plaintiffs rely on the D.C. Circuit's decision in *Taxpayers Watchdog, Inc. v. Stanley* for the proposition that an agency cannot "avoid the requirements of *NEPA* by 'segmentation.'" Pls.' Reply 13-14 (quoting *Stanley*, 819 F.2d at 298). In *Stanley*, the D.C. Circuit affirmed the district court's conclusion that the 4-mile subway project was not improperly segmented from the

envisioned larger transit system. That decision says nothing about Plaintiffs' standing to challenge the environmental analysis here. Plaintiffs also reference the NEPA regulations' definition of "tiering," Pls.' Reply 21, which refers to the practice of incorporating general matters by reference. *See* 40 C.F.R. § 1508.1(ff) (2022). Tiering is not at issue here.

Finally, Plaintiffs cite the regulatory requirement that agencies consider cumulative impacts, *i.e.*, the "incremental effects of an action when added to the effects of other past, present, and reasonably foreseeable actions. . ." 40 C.F.R. § 1508.1(f) (2002). They also cite *League of Wilderness Defenders ("LOWD") v. United States Forest Serv.*, 549 F.3d 1211 (9th Cir. 2008) for the proposition that failing to consider past actions in an environmental analysis violates NEPA's substantive requirements. Pls.' Reply 16. This requirement to consider cumulative effects in environmental analyses is not relevant to whether Plaintiffs established standing to bring their claims. Standing was not at issue in *LOWD*. What was at issue was how the Forest Service analyzed prior and future timber-sales and other impacts in its analysis of cumulative environmental effects. *LOWD*, 549 F.3d at 1216-23.

Plaintiffs' claims about how an agency may satisfy NEPA by conducting a programmatic analysis and how it satisfies NEPA's requirement to analyze cumulative impacts are not relevant to the threshold jurisdictional question of whether Plaintiffs have shown they have Article III standing to challenge agency actions in the first place. Because Plaintiffs have not shown that they have Article III standing, they cannot avail themselves of the Court's jurisdiction and the Court need not reach the question of how the agencies comply with NEPA's substantive standards as to each action Plaintiffs challenge.

II. On the merits, Plaintiffs continue to mischaracterize NEPA's requirements.

NEPA serves the dual purpose of informing agency decision makers of the environmental effects of proposed federal actions and ensuring that relevant information is made available to

the public so that they "may also play a role in both the decision making process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). To assist agencies in meeting these goals, NEPA requires preparation of an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.3. NEPA's implementing regulations allow an agency first to prepare an EA to determine whether a contemplated action will have significant effects. 42 U.S.C. § 4332(C); 40 C.F.R. §§ 1501.4, 1508.9. If the agency determines, based on an EA, that the effects will not be significant, it issues a "finding of no significant impact" (FONSI) and no EIS is required. 40 C.F.R. § 1508.13. NEPA regulations also allow agencies to identify classes of actions that fall within "categorical exclusions" ("CEs") and that the agency has determined normally do not have significant environmental effects. *Id.* § 1508.4.

The crux of Plaintiffs' case is their assumption that NEPA applies to the actions they challenge. *See* Pls.' Reply 20 (agencies "must have, at the very least, either conducted an [EA] or cited a categorical exclusion"). But Plaintiffs' assumption is wrong. NEPA does not apply to every government decision or action; NEPA only applies to major federal actions that could significantly impact the human environment. And agencies may make a threshold determination of whether the proposed action could significantly impact the human environment without preparing a NEPA analysis.

NEPA requires consideration only of reasonably foreseeable environmental effects that have a reasonably close causal relationship to the proposed government action. *See, e.g.*, *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983) ("whether [NEPA] requires consideration of a particular effect" requires examination of "the relationship between that effect and the change in the physical environment caused by the major federal action at

issue."); *id.* at 774 (noting an effect must be "proximately related to a change in the physical environment."). Here, Plaintiffs' claims of population effects turn on independent actions by many people who are not before this Court. And Plaintiffs do not show that these third-party actions will significantly impact the physical environment in any particular place. Instead they speculate, for example, that the policies they challenge "might . . . allow[] larger amounts of controlled substances to pass into the [United States]." Pls.' Reply 20. But for NEPA to apply there must be a reasonably foreseeable connection between government action and an impact on physical environment. Mere speculation that a federal action may affect the number of persons who immigrate to the United States who may, in turn, have a physical effect on the environment is not enough to trigger NEPA's requirements.

Plaintiffs' attempts to connect the policies they challenge to significant environmental impacts fails because they do not connect foreseeable growth impacts to any specific community or specific action they challenge. Plaintiffs claim that where immigrants "are likely to settle and create growth pressures" is known because DHS publishes annual statistics on the metropolitan areas where new arrivals settle, and that projecting environmental impacts of immigration impacts is easily done. Pls.' Reply 24-25. But Plaintiffs' argument betrays a key error in how they have framed the government's obligations under NEPA. Federal agencies are not required to analyze the individual choices immigrants make on their own to move within the country.

Ultimately, Plaintiffs seek to aggregate the decisions individuals make to migrate to the United States into a single "immigration agenda" that Defendants must analyze to determine whether those decisions cumulatively have the effect of increasing U.S. population, and then cumulatively have environmental impacts somewhere. Pls.' Reply 25-26. But NEPA does not require that agencies aggregate myriad individual decisions before, during, and after migration to

the United States to determine the environmental impacts of those choices. Plaintiffs' call for a broad cumulative effects analysis under NEPA is no more than a rehash of their programmatic challenge that this Court dismissed as unreviewable under the APA. *Mass. Coal. for Immigr. Reform*, 621 F. Supp. 3d at 96-97; *see Norton*, 542 U.S. at 64 ("challenged agency action must be 'discrete'").

III. Defendants are Entitled to Summary Judgment on the Merits of Each of Plaintiffs' Claims, Counts II-X.

Plaintiffs' opposition brief fails to seriously grapple with Defendants' substantive arguments on the merits of each of the nine remaining counts, even leaving some of Defendants' specific arguments unanswered[3] and purporting to respond to other arguments Defendants never made. As Defendants explain systematically in the sections that follow and have already explained in parts C.1. through C.10 of their opening brief, the government is entitled to summary judgment on the merits of each of Counts II through X.

A. Defendants are entitled to summary judgment on the merits of Plaintiffs' border wall claim (Count II).

In Count II, Plaintiffs challenge DHS's Plan (DHS_11-15) to pause ongoing border barrier construction projects in response to Presidential Proclamation 10142, in which President Biden directed federal agencies to pause ongoing construction activities, reassess construction projects, and develop plans for the "redirection of funds concerning the southern border wall." DHS_ 8-10. The Proclamation also terminated the emergency declaration that allowed the diversion of military construction funds for border barrier construction. *See* DHS_8-10. At the

[3] The Court should treat such arguments as conceded. *See Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014) ("[I]f a party files an opposition to a motion and therein addresses only some of the movant's arguments, the court may treat the unaddressed arguments as conceded.") (cleaned up).

time of the Proclamation, however, there was no ongoing barrier construction within the State of Arizona, where Plaintiffs Smith and Getzwiller reside, funded by DHS. Defs.' XMSJ, Ex. 1, ¶ 9.[4] This fact alone should be fatal to Plaintiffs' claim against DHS, because DHS did not take the action—suspension of border wall construction in Arizona—that Plaintiffs allege harmed them.

In any event, Plaintiffs' border wall claim fails on the merits for two reasons. *See* Defs.' XMSJ 29-30. *First*, the decision to suspend construction does not alter the environmental status quo and is thus not a "major federal action" to which NEPA applies. *See Arizona v. Mayorkas*, 584 F. Supp. 3d 783, 802-04 (D. Ariz. 2022), *appeal dismissed*, No. 22-15519, 2022 WL 6105386 (9th Cir. Sept. 12, 2022) (considering a nearly identical claim and finding the "cessation of construction activities . . . thereby preventing subsequent human interference" does not trigger NEPA). *Second*, Plaintiffs' challenge fails because the Secretary of Homeland Security waived NEPA for the specific border wall construction activities that were suspended, DHS_12, and DHS's waiver applies to the decision to stop construction.

Plaintiffs counter that DHS's actions *did* change the status quo, because "DHS knew at the time that its action would have at least some environmental effects, such as soil erosion and floodplain degradation." Pls.' Reply 26. The risks of soil erosion and floodplain degradation are not environmental effects from the decision to halt construction, however; they are the result of *past* construction and represented the status quo at the time the suspension decision was made. At the time DHS paused border barrier construction, there were "improper compaction of soil/construction materials adjacent to the border barrier and associated road" causing erosion along a 14-mile stretch of new barrier. DHS_76-77. The status quo is measured at the time of the

[4] By contrast, the Department of Defense ("DoD"), which is not a defendant, suspended approximately 18 miles of border barrier construction in Arizona. Defs.' XMSJ, Ex. 1, ¶ 14.

challenged decision,[5] and at the time of DHS's decision the effects of previous and ongoing border barrier construction—such as erosion or the risk of future erosion—existed on the landscape. The decision to go no further did not itself cause those environmental effects.[6]

Plaintiffs cite *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992 (D.C. Cir. 1979) and *Humane Society of the United States v. Johanns*, 520 F. Supp. 2d 8 (D.D.C. 2007) in support their argument that the decision changed the "legal or regulatory status quo" and thereby triggered a duty to comply with NEPA's procedural requirements. Pls.' Reply 27. Neither case is on point. The court in *Committee for Auto Responsibility* determined that GSA's decision to lease the Great Plaza area to a parking management firm without any changes in parking policy did not alter the status quo and was thus not a major federal action significantly affecting the environment. 603 F.2d at 1003 ("To compel GSA to formulate an EIS under these circumstances would trivialize NEPA's EIS requirement and diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment."). By contrast, *Johanns* did concern a change to the status quo, in the form of a new regulatory framework for ante-mortem inspections of slaughtered horses. 520 F. Supp. 2d at 26-27. In both cases, the federal agency took action, rather than suspended it.

Plaintiffs argue that suspension of barrier construction changed the legal or regulatory status quo, because "[i]f Defendants had not adopted these actions the border wall would have been completed." Pls.' Reply 27. This is legally incorrect, as nothing about the decision to

[5] Under the APA, agency actions are judged by the reviewing court on the record before the agency *at the time* the agency made its decision. *See, e.g., Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008).

[6] In their brief, Plaintiffs mischaracterize the gap closure work as needed "to correct environmental hazards created by the hastiness of the initial decision." Pls.' Reply 5. The gap closure work was to address illicit activity not environmental damage. *See, e.g.*, DHS_120-21.

suspend construction changes any law or regulation. It is also factually incorrect with respect to DHS's activities in Arizona, which were already complete at the time of the Proclamation. Further, even if the remaining 18 miles of DoD-funded barrier had been completed, significant portions of the Arizona border are unfenced. Finally, the Proclamation itself (not the challenged suspension decision) terminated the emergency declaration that had allowed the diversion of military construction funds for some of the DoD-funded construction projects.[7]

Finally, Plaintiffs brush aside Defendants' point that requiring NEPA review of a decision to suspend construction would lead to nonsensical results in practice, where DHS would need to conduct an after-the-fact analysis of the effects of border wall construction—the very analysis waived in the first place. *See Arizona v. Mayorkas*, 584 F. Supp. 3d at 804-05 (acknowledging that such a result would be "counter-intuitive (if not absurd)"). Plaintiffs assert that there is nothing incongruous about allowing a waiver of NEPA for construction but not "its opposite," because that disparity reflects congressional intent that the executive branch be able to expeditiously secure the border. Pls.' Reply 29. But Plaintiffs' simple, "NEPA doesn't apply to construction but does apply to halting construction" rubric is unworkable in reality. For example, it would require NEPA analysis—and thus slow expeditious securing of the border—where there was a sudden, urgent need to build a barrier somewhere else along the border that required the agency to halt construction one place to move resources to the more urgent area. In fact, a similar scenario played out in this case in which DHS undertook several projects under the original waivers after the initial suspension of construction, such as levee remediation. *See, e.g.*, DHS_75-78. To avoid such absurdities the waivers must be read to apply to all aspects of

[7] Plaintiffs do not challenge the termination of the national emergency under the APA; nor could they, as it is a Presidential decision.

construction (including changing the project or terminating it). In sum, Plaintiffs' border wall NEPA claim fails on the merits.

B. Defendants are entitled to summary judgment on the merits of Plaintiffs' MPP claim (Count III).

In Count III, Plaintiffs challenge DHS's June 1, 2021 decision to terminate the Migrant Protection Protocols (MPP), by which "citizens and nationals of countries *other than Mexico*" who arrived "by land from Mexico—illegally or without proper documentation—[could] be returned to Mexico" during their removal proceedings. DHS_584. As explained in the United States' opening brief, the June 2021 termination decision was challenged in another lawsuit on different grounds and stayed. Defs.' XMSJ 4. Subsequently, DHS issued the October 29 memoranda, which again terminated MPP and analyzed the new decision. *Id.* at 5. The Supreme Court held that the October 29 memoranda constituted a separate, final agency action from the June 1 decision that both superseded and rescinded the earlier decision and terminated MPP. *Biden v. Texas*, 142 S. Ct. 2528, 2544 (2022). That lawsuit continues as a challenge to the October 29 memoranda. *See* Defs.' XMSJ 5. DHS has stopped new enrollments in MPP and Mexico has stated that it is unwilling to restart the program.

The United States is entitled to summary judgment on Plaintiffs' MPP claim for the simple reason that Plaintiffs' challenge to the June 1 decision is moot. While Plaintiffs choose not to acknowledge the Supreme Court's decision (Pls.' Reply 32), this Court is bound by it. *See Biden v. Texas*, 142 S. Ct. at 2544-45. Defendants are also entitled to summary judgment on this claim for three additional reasons.

First, the termination of MPP is committed to agency discretion by law. 5 U.S.C. § 701(a)(2). In the decision Plaintiffs fail to acknowledge, the Supreme Court found that "the contiguous-territory return authority [under which MPP was implemented] is discretionary."

Biden v. Texas, 142 S. Ct. at 2543-44. Further, the provision of the Immigration and Nationality Act (INA) under which MPP was implemented, 8 U.S.C. § 1225(b)(2)(C), provides no "judicially manageable standards . . . for judging how and when an agency should exercise its discretion," thereby precluding judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 830-31 (1985). Plaintiffs respond that "they are not challenging any individual enforcement decision applying to an individual, but . . . the adoption of a new standard or policy that applies to an entire class of aliens." Pls.' Reply 30. But the June 1 decision to terminate MPP is itself a discretionary enforcement decision to cease exercising DHS's contiguous-territory return authority under that program. This Court earlier rejected this argument because it interpreted Plaintiffs' lawsuit as "not challenging the recission of the MPP itself, but the decision to rescind it without performing NEPA analysis." Order at 26, ECF No. 27. This reasoning, however, rests on the factual misconception that there are two agency actions—a decision not to perform a NEPA analysis and a separate, subsequent decision to undertake the action. But there was only one final agency action—the decision to terminate MPP. A plaintiff cannot challenge an agency's compliance with NEPA in the absence of a reviewable final agency action. Because NEPA contains no right of action, a NEPA challenge must be brought under the review provision of the APA, which requires a final agency action. *Tulare Cnty. v. Bush*, 306 F.3d 1138, 1143 (D.C. Cir. 2002).

Second, neither termination decision is a major federal action to which NEPA applies because they constitute "[j]udicial or administrative civil or criminal enforcement actions," and are thereby exempt from NEPA's definition of "major federal action." 40 C.F.R. § 1508.1(q)(1)(iv) (2022). MPP and its termination(s) are exercises of DHS's enforcement discretion to return inadmissible noncitizens arriving by land to contiguous territories pending

removal proceedings. *See* Defs.' XMSJ 32 & n.18 (citing cases including *Nw. Ctr. for Alts. to Pesticides v. U.S. Dep't of Homeland Sec.*, 552 F. Supp. 3d 1078, 1091 (D. Or. 2021), *appeal dismissed as moot*, No. 21-35751, 2023 WL 332751 (9th Cir. 2023)).

Third, NEPA does not apply when the decision will not have a significant effect on the environment. *See* Defs.' XMSJ 32-33. Plaintiffs counter that an alleged "surge of migration due to the lifting of the public health order . . . rebuts Defendants' point that terminating MPP also had no effect on the environment." Pls.' Reply 27. However, their assertion that the Court should look to the alleged impacts from the 2023 expiration of the Title 42 order as evidence of a foreseeable environmental effect of the 2021 termination of MPP defies logic—NEPA compliance is measured at the time of the decision (*see supra*, p. 16) and at the time of its termination MPP had been near dormant for more than a year and its formal termination had no environmental effect.

C. Defendants are entitled to summary judgment on the merits of Plaintiffs' ACA claim (Count III).

In Count III, Plaintiffs challenge DOS's decision to terminate three ACAs—separate international agreements—with the governments of Guatemala, El Salvador, and Honduras. *See* Defs.' XMSJ 6-7. Each agreement gave the United States permission to remove certain migrants to that country, although only the ACA with Guatemala was ever implemented, and only for a short time, as it was paused in March 2020. *See id.* The binding international agreements—like treaties—cannot be revived unilaterally, nor is it likely that DOS would want to do so, having found them antithetical to a "mutually respectful approach to managing migration across the region." STATE_63. Defendants are entitled to summary judgment on this count for three separate reasons.

First, judicial review of this claim is foreclosed by the political question doctrine because the decision to terminate an international agreement is textually committed to the political branches and dominated by foreign relations considerations. *See* Defs.' XMSJ 34-35. Plaintiffs claim they are not challenging the decision to terminate the ACAs—which Plaintiffs appear to concede would be problematic—but rather DOS's alleged decision not to follow undertake an environmental analysis when doing so. *See* Pls.' Reply 31. This argument fails because as Plaintiffs themselves concede there is only one agency decision at issue—the decision to terminate the agreement. *See id.* ("Plaintiffs are challenging the final decision to terminate the agreement altogether."). Plaintiffs cannot skirt the political question doctrine by conjuring two separate agency actions—a non-reviewable decision to terminate the ACAs and a theoretically reviewable, but nonexistent decision not to prepare a NEPA analysis. *See supra*, p. 19.

Second, the terminations are not final agency actions under the APA, because the ACAs required separate implementation plans before taking effect. Defs.' XMSJ 35-36. Plaintiffs counter that even if the agreements themselves were not reviewable, the decisions to terminate them were final agency actions. Pls.' Reply 30-31. But Plaintiffs cite no legal authority for the proposition that decisions to terminate unreviewable non-final agency actions can themselves be reviewable final agency actions under the APA. To the contrary, terminating an agency process prior to its implementation, as was the case for the agreements with El Salvador and Honduras, would not satisfy the *Bennett v. Spear* test for final agency action because the action is not one that determines rights or obligations or from which legal consequences flow. 520 U.S. 154, 177-78 (1997); *see Humane Soc'y of the U.S. v. U.S. Dep't of Agric.*, 474 F. Supp. 3d 320, 336 (D.D.C. 2020) (holding that placing rule that never became final on an "inactive list" was not a final agency action, because no legal consequences flowed from such action).

Third, the terminations are not subject to NEPA because all three agreements were non-operational at the time of the decisions to terminate them and two had never been implemented—the point in time when potential environmental effects are measured. *See* Defs.' XMSJ 31. Plaintiffs respond generally that Defendants "change[d] the legal or regulatory status quo" and appear to suggest that DOS's decision to terminate the ACAs should have been included in a "cumulative analysis." Pls.' Reply 28. But, as explained, there must be a connection between the action taken and effects on the physical environment for NEPA to apply. Unfounded speculation by Plaintiffs that an action has "the potential to increase the population of the U.S.," Pls.' Reply 28, does not suffice. In sum, Defendants are entitled to summary judgment on the merits of Plaintiffs' ACA claim.

D. Defendants are entitled to summary judgment on the merits of Plaintiffs' PACR/HARP claim (Count III).

In Count III, Plaintiffs challenge DHS's decision to terminate the PACR and HARP pilot programs by which certain eligible individuals were kept in CBP custody during their credible-fear process rather than transferred to ICE custody. Defs.' XMSJ 5-6. In February 2021, President Biden directed DHS to "cease implementing [PACR and HARP]" and "consider rescinding" any implementation guidance. DHS_9034. In September 2022, more than a year later, and after the operative Complaint was filed, DHS issued a memorandum rescinding all guidance documents implementing the programs. DHS_8978-79. At that time, however, PACR and HARP had not been operational since March 2020 due to the COVID-19 pandemic. *See id.* As explained in the United States' opening brief, Defendants are entitled to summary judgment on this claim for two separate reasons.

First, DHS's decision to formally rescind all guidance implementing the PACR and HARP pilot programs after eighteen months of non-operational status is not a "major federal

action" to which NEPA applies, because like the parking lease at issue in *Committee for Auto Responsibility*, it does not alter the environmental status quo. Further, the decision to rescind the guidance for non-operational programs is far closer to agency inaction than action. Defs.' XMSJ 33-34. Plaintiffs respond that DHS's actions "changed the legal or regulatory status quo" and that "[w]ithout action to terminate PACR and HARP, they would be in operation." Pls.' Reply 27. This is incorrect. PACR and HARP would not be in operation because DHS would have had to act to re-start them following the COVID-19 pandemic and President Biden's order that DHS "cease implementing" them.

Second, NEPA applies only to actions that could have a significant impact on the environment. *See supra* pp. 12-13. Rescinding implementation guidance for non-operational programs whose implementation was already "cease[d]" by Presidential decree is *not* an action that could harm the environment. *See* Defs.' XMSJ 34. Further, even when they were operational, PACR and HARP only changed the detention *location* of approximately 5,000 individuals who were going through the credible fear process. DHS_9097. The programs did not admit, parole, or deport a single individual. Defs.' XMSJ 34. Plaintiffs' argument that "without [PACR and HARP], more foreign nationals will cross the border" is baseless speculation. Pls.' Reply 27. As explained, the programs only concerned which DHS component would maintain custody of certain individuals during the credible fear process. Defs.' XMSJ 5-6. In sum, Defendants are entitled to summary judgment on the merits of the PACR/HARP claim.

E. Defendants are entitled to summary judgment on the merits of Plaintiffs' "permission slip" claim (Count IV).

In Count IV, Plaintiffs challenge DHS's guidance relating to prosecutorial discretion and issuance of Notices to Report (NTRs). The policy authorized CBP Border Patrol agents to issue NTRs to noncitizens encountered between ports of entry in lieu of Notices to Appear (NTAs)

when certain conditions were met. Defs.' XMSJ 8-9. The NTR instructed the individual to report to ICE for further processing and to receive an NTA, if appropriate, whereas an NTA initiates removal proceedings and notices an appearance before an immigration judge. *Id.* Defendants are entitled to summary judgment on this claim for two reasons.

First, the NTR policy is excluded from NEPA's definition of "major federal action," as a "[j]udicial or administrative civil or criminal enforcement action[]." 40 C.F.R. § 1508.1(q)(1)(iv). The NTR policy authorized the use of "prosecutorial discretion" to release migrants arriving in the country with an NTR to an ICE office, effectively delaying initiating removal proceedings. *See* Defs.' XMSJ 37. Plaintiffs fail to address this argument in their opposition brief.

Second, Plaintiffs' challenge to the NTR policy is moot because that policy was rescinded and replaced in November 2021 with a new policy—Parole Plus Alternative to Detention ("Parole + ATD").[8] Defs.' XMSJ 36. Plaintiffs argue their claim is not moot because Parole + ATD is "functionally equivalent" to the NTR policy. *See* Pls.' Reply 32. Even if that were true, there is no "functional equivalent" exception to the mootness doctrine. In any event, Parole + ATD was a distinct agency action with its own reasoning and analysis, *see* Defs.' XMSJ, Ex. 2, and with its own administrative record—a record not before the court. Under Parole + ATD, immigration officials would not issue NTRs (the crux of the NTR policy) and would instead parole individuals on a case-by-case basis for a certain time during which they must report to ICE. *See id.* at 1-2.

[8] As noted in Defendants' opening brief, that policy was also vacated, although the government has appealed the decision.

F. Defendants are entitled to summary judgment on the merits of Plaintiffs' interim guidance claim (Count V).

In Count V, Plaintiffs challenge DHS's February 18, 2021 Interim Guidance on Civil Immigration Enforcement and Removal Priorities. The Interim Guidance directed immigration officials to focus their enforcement efforts on certain categories of individuals that pose the greatest security and public safety threat. *See* Defs.' XMSJ 9-10. Defendants are entitled to summary judgment on Count V for four independent reasons.

First, Plaintiffs' challenge to the February 2021 guidance is moot because the interim guidance was rescinded and replaced in September 2021 with new revised guidance. Even if there were a "functionally equivalent" exception to the mootness doctrine (there is not), Plaintiffs' response that the September guidance is "functionally equivalent" to the interim guidance is not supported by the record. Pls.' Reply 32. Taking just one example, the September guidance rejected a categorical approach to the definition of a public safety threat in favor of a case-by-case assessment guided by aggravating and mitigating factors. Defs.' XMSJ, Ex. 5 at 19; *see also id.* at 1-2, 10 (containing additional analysis of considerations raised in federal district court's decision to enjoin the February guidance).

Second, the interim guidance is not a final agency action under the APA, because it neither marked the consummation of the agency's decision-making process, *see Florida v. United States*, 540 F. Supp. 3d 1144, 1157 (M.D. Fla. 2021), nor determined any individual's legal rights or immigration status. *See Arizona*, 40 F.4th at 388-89. Plaintiffs do not specifically respond to this argument or the cited authorities. Instead, they point to a lack of "evidence" that this and other actions are not final. *See* Pls.' Reply 30. The "evidence," of course, is the February guidance in the administrative record, which Defendants explain has the hallmarks of a non-final agency action. Defs.' XMSJ 10-11, 38.

Third, interim guidance falls within NEPA's exception for "[j]udicial or administrative civil or criminal enforcement actions." *See* 40 C.F.R. § 1508.1(q)(1)(iv). It would be difficult to conceive of a more perfect example of this exception than a law enforcement agency's decision to prioritize certain individuals the agency deems the greatest threat to the nation's security and public safety for arrest, detention, and/or removal. Indeed, Plaintiffs do not respond to this argument, instead completely mischaracterizing it as an APA judicial review argument, which Defendants do not make on summary judgment. Pls.' Reply 30.

Fourth, the interim guidance—which addressed *who* should be prioritized for arrest and removal and not *how many* individuals—has no foreseeable effects on the human environment. *See* Defs.' XMSJ 38-39; *see also id.* at 10 (significantly more individuals with serious criminal convictions were arrested after the guidance was published). Plaintiffs do not seriously contend with this argument or identify any effect the guidance—which was in effect for only six months—had on the environment. Pls.' Reply 28. In sum, Defendants are entitled to summary judgment on the merits of Count V.

G. Defendants are entitled to summary judgment on the merits of Plaintiffs' fines claim (Count VI).

In Count VI, Plaintiffs challenge DHS's decision to stop enforcing civil financial penalties against noncitizens who fail to depart the United States, having found the fines did not serve the interests of the agency and were ineffective. *See* DHS_9204. Prior to 2018, DHS had never exercised its statutory authority to assess civil penalties for failure to depart. Defs.' XMSJ 11. As explained in the government's opening brief, Defendants are entitled to summary judgment on this claim for two independent reasons. Plaintiffs do not even address one of them.

First, DHS's decision is a "civil or criminal enforcement action" and is thereby excluded from the NEPA's regulatory definition of "major federal action." *See* 40 C.F.R. §

1508.1(q)(1)(iv). Plaintiffs do not respond to this argument in their opposition brief. The Court's inquiry could end here—the decision whether to enforce civil fines is a civil enforcement action not subject to NEPA. *Second*, DHS's decision is also not subject to NEPA because there are no reasonably foreseeable effects on the environment. Defs.' XMSJ 40. Plaintiffs respond that the decision (among others) has "the potential to increase the population of the U.S.," but identify no specific impact on the physical environment. Pls.' Reply 28. If "potential to increase the population of the U.S."—no matter how small or attenuated—were the test for whether NEPA applies, it would apply to every government decision. It does not. *See supra*, pp. 12-13.

H. Defendants are entitled to summary judgment on the merits of Plaintiffs' administrative closure claim (Count VII).

In Count VII, Plaintiffs challenge the Attorney General's decision in *Matter of Cruz-Valdez*, 28 I. & N. Dec. (AG 2021) that reviewed and vacated a Board of Immigration Appeals (BIA) decision that denied Mr. Cruz-Valdez's request that his immigration case be administratively closed while his noncitizen relative petition was pending before U.S. Citizenship and Immigration Services (USCIS) and held that immigration judges can temporarily pause a proceeding. This decision overruled a prior decision of the Attorney General in *Matter of Castro Tum*. EOIR_18-21. The *Matter of Cruz-Valdez* decision did not administratively close a single case or provide a pathway for noncitizens to obtain permanent legal status; rather, the decision affords immigration judges the discretion to use a docket management tool to pause proceedings as informed by six factors.

There are three reasons why NEPA does not apply to the Attorney General's *Matter of Cruz-Valdez* decision. Plaintiffs barely responded to any of them. *First*, the Attorney General's decision to reinstate administrative closure is not a "major federal action" under NEPA, because the case was remanded to the BIA for further proceedings—meaning it was not the final agency

action under the INA. *See* Defs.' XMSJ 40 (explaining the NEPA regulations exclude decisions that are not final agency actions under the APA "or other statute"); 8 U.S.C. § 1252(d)(1) (requiring exhaustion of administrative remedies and a final removal order prior to Article III review); *Abdisalan v. Holder*, 774 F.3d 517, 526 (9th Cir. 2014) (en banc) ("When the BIA remands to the IJ for any reason, no final order of removal exists until all administrative proceedings have concluded."). Plaintiffs do not respond to this argument. *See* Pls.' Reply 30 (responding instead to an argument Defendants did not make on summary judgment).

Second, the Attorney General's decision is not subject to NEPA's requirements because like GSA's decision in *Committee for Auto Responsibility*, it could have no foreseeable effects on the human environment. *See* Defs.' XMSJ 41. Plaintiffs respond that the action "change[s] the legal or regulatory status quo," Pls.' Reply 28, but as Defendants have already explained, *see supra* pp. 12-13, there must be a reasonably foreseeable significant environmental effect for NEPA to apply. Plaintiffs have not articulated any such effect from the remand of Mr. Cruz-Valdez's case for further proceedings.[9]

Third, review in this court is barred under Sections 1252(a)(5) and 1252(b)(9) of Title 8 of the U.S. Code, which together limit judicial review of an order of removal to the "appropriate court of appeals." *See* Defs.' XMSJ 41-42. Defendants explained in their opening brief how the Court's rejection of this argument at the motion to dismiss stage incorrectly assumed that the Attorney General took one final agency action not to conduct a NEPA analysis before reinstating

[9] To the extent Plaintiffs have modified their position to argue that the potential environmental effects of *Matter of Cruz-Valdez*—assuming there are any—should have been analyzed by the Defendant agencies as part of a "cumulative analysis" (*see, e.g.*, Pls.' Opp'n 28), that argument too has no merit. As Defendants have explained, *see supra* pp. 13-14, Plaintiffs cannot create their own Frankenstein's monster of independent agency actions they dislike and compel a programmatic or cumulative impacts analysis of their impacts.

administrative closure and then a separate one to reinstate administrative closure and that Plaintiffs challenge only the former and not the latter. *See id.* Plaintiffs offer no response. In sum, Defendants are entitled to summary judgment on the merits of Count VII.

I. Defendants are entitled to summary judgment on the merits of Plaintiffs' notice of funding opportunity claim (Count VIII).

In Count VIII, Plaintiffs challenge DOS's issuance of a Notice of Funding Opportunity for Reception and Placement Program for fiscal year 2022 (FY2022 Notice). Defs.' XMSJ 12-13. As explained in Defendants' opening brief, the notice is merely a request for proposals and does not contain decisions about which resettlement agencies will receive contracts or where to resettle individual refugees. *Id.* Defendants are entitled to summary judgment for three separate reasons.

First, the FY2022 Notice is not a final agency action under the APA, because the Notice marks the beginning—not the consummation—of the agency's decisionmaking process concerning which resettlement agencies will be awarded contracts to resettle refugees, and the Notice itself determines no rights or obligations. *See* Defs.' XMSJ. 42-43. Plaintiffs respond that the FY2022 Notice was a final agency action insofar as it "established final eligibility criteria" and that "legal consequences" flowed from it because organizations may have been excluded from applying based on those criteria. Pls.' Reply 34. But Plaintiffs are not challenging the FY2022 Notice because they wished to make an application and were deemed ineligible to do so. They are challenging the FY2022 Notice under NEPA to compel DOS to analyze the environmental effects of refugee resettlement. *See* Am. Compl. Count VIII. The problem, however, is that the FY2022 Notice renders no final decision about which resettlement agencies will receive contracts and for what capacity, much less where individual refugees will be resettled. In this respect, Plaintiffs' NEPA challenge as they have chosen to frame it is unripe.

Second, the FY2022 Notice is not a *major* federal action under NEPA. The decision to merely solicit proposals—which is all the Notice does—is not itself a decision that could have environmental effects. *See* Defs.' XMSJ 43. Plaintiffs do not respond to this argument. They assert that the FY2022 Notice is "a crucial step in the future resettlement of foreign nationals." Pls.' Reply 34. That may be so, but the only question before the Court is whether that step triggered an obligation to conduct an environmental analysis under NEPA. It did not.

Third, any challenge to the FY2022 Notice is now moot, as the solicitation period has closed, and any resulting contracts are also now terminated. Defs.' XMSJ 42. Plaintiffs make two arguments in response. First, Plaintiffs argue that the Court is still able to award meaningful injunctive relief because "DOS will still be making decisions under these cooperative agreements that affect how many refugees are settled in specific areas." Pls.' Reply 34. This statement is factually incorrect. The cooperative agreements under the FY2022 Notice were for fiscal year 2022 and expired; applicants needed to re-compete for funding for fiscal year 2023. STATE_70. Second, Plaintiffs argue that the "capable of repetition, yet evading review" exception to the mootness doctrine applies. Pls.' Reply 35. It does not because the time during which the FY2022 Notice and cooperative agreements are operative is not so short as to evade review. This Circuit "requires a plaintiff to make a full attempt to prevent his case from becoming moot, an obligation that includes filing for preliminary injunctions." *Newdow v. Roberts*, 603 F.3d 1002, 1009 (D.C. Cir. 2010). Plaintiffs, by contrast, have taken a lackadaisical approach to this litigation, allowing this claim to turn stale as FY2022 turned into FY2023 and now approaches FY2024.

J. Defendants are entitled to summary judgment on the merits of Plaintiffs' CAM claim (Count IX).

In Count IX, Plaintiffs challenge the re-initiation of the CAM program, which allows certain eligible noncitizens residing in the United States to petition for their children and certain

other family members to apply for refugee resettlement in the United States and, if found ineligible for refugee resettlement, to be considered on a case-by-case basis for parole. *See* Defs.' XMSJ 13-14. Since 2014, about 5,000 people have entered the United States under CAM as parolees or refugees. DHS_8903. The CAM program is similar in size to the International Entrepreneur Rule (as estimated in the final rule), which the Ninth Circuit found plaintiffs lacked standing to challenge in *Whitewater Draw*, 5 F.4th at 1019. *See* Defs.' XMSJ 25-26. This Court should follow *Whitewater Draw*, which Plaintiffs do not address in their response.

On the merits, Defendants are entitled to summary judgment because NEPA does not apply to actions—like the CAM program—that do not have foreseeable effects on the human environment. *See supra*, pp. 12-13. Plaintiffs respond that the CAM program's small size is "irrelevant," because "[t]he point is to have a system which catches incremental impacts somewhere, because cumulatively, there are not so small." Pls.' Reply 26. Plaintiffs, however, specifically challenge the re-initiation of the CAM program, not U.S. immigration policy generally, and therefore the only relevant inquiry is whether the re-initiation of the CAM program alone was subject to NEPA's requirements. It was not.

K. Defendants are entitled to summary judgment on the merits of Plaintiffs' Afghan parole claim (Count X).

In Count X, Plaintiffs challenge DHS's determination in August 2021 during Operation Allies Refuge that "it is an appropriate exercise of [the agency's existing] discretionary authority under [8 U.S.C. § 1182(d)(5)] for U.S. Customs and Border Protection officers to parole certain Afghan nationals into the United States, on a case-by-case basis, for a period of two years." DHS_8961. Afghan nationals that were paroled into the United States under this authority were not afforded legal status. *Id.* Along with a lack of standing under the Ninth Circuit's decision in

Whitewater Draw (*see supra* p. 10), the United States is entitled to summary judgment for four separate reasons. Plaintiffs respond only to two of them.

First, judicial review of DHS's determination that it could exercise its discretionary humanitarian parole authority for certain Afghan nationals is prohibited by the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(B)(ii). That provision, which broadly exempts "any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security" from judicial review, encompasses DHS's determination that it could parole Afghan nationals into the United States under 8 U.S.C. § 1182(d)(5). *See* Defs.' XMSJ at 44. Plaintiffs do not respond to this argument.

Second, the APA, 5 U.S.C. § 701(a)(2), separately precludes judicial review of DHS's determination that it could exercise its discretionary humanitarian parole authority for Afghans. *See* Defs.' XMSJ 44. Plaintiffs respond that "they are not challenging any individual enforcement decision applying to an individual, but . . . the adoption of a new standard or policy that applies to an entire class of aliens." Pls.' Reply 30. Plaintiffs mischaracterize DHS's determination as a "new" policy. DHS determined its existing "urgent humanitarian reasons or significant public benefit" parole authority could be applied to Afghan nationals following Operation Allies Refuge, i.e., there were "urgent humanitarian reasons or significant public benefit" to parole those individuals into the country.

Third, DHS's determination was an "administrative civil or criminal enforcement action" excluded from NEPA's definition of a "major federal action." 40 C.F.R. § 1508.1(q)(1)(iv). Like all of Defendants' other arguments invoking this NEPA exclusion, Plaintiffs do not address it.

Fourth, DHS's determination is not subject to NEPA because there are no reasonably foreseeable effects on the human environment. The challenged decision provides a process under which immigration officials exercise discretion to parole qualifying Afghans into the country temporarily, but the challenged decision itself does not make any parole decisions. Even if it did, Plaintiffs erroneously assume a decision that could result in any number of individuals coming into the county would automatically trigger the obligation to perform a NEPA review or a "cumulative analysis" of some sort. Pls.' Reply 28. But "more people" is not synonymous with environmental effects under the statute. *See supra,* pp. 12-13. For NEPA to apply there must be reasonably foreseeable effects on the physical environment for the agency to analyze—not mere speculation that population growth could be at the end of a long chain of events involving the challenged action. *See id.*[10]

IV. Plaintiffs May Not Rely on Deposition Testimony from a Different Lawsuit to Support Their Claims in this APA Case.

Plaintiffs ask this Court to conclude Defendants' policies "are responsible for the increase in immigration" based on deposition testimony given by a CBP official in another lawsuit, *Florida v. United States*, No. 3:21-cv-1066-TKW-ZCB, 2023 WL 2399883 (N.D. Fla. Mar. 8, 2023), and on the district court's findings of fact and conclusions of law. Pls.' Reply 5-7, 12-13. Plaintiffs assert that the "permission slip" policy they challenge in Count IV is the same policy the Florida district court vacated. Pls.' Reply 5. Plaintiffs quote barbs from the district court's opinion and cherry-pick alleged "admissions" from deposition testimony as though they are uncontroverted material facts. *See id.* at 7-8, 12-13. In fact, the Court should consider none of it.

[10] Plaintiffs' references to other allegedly "new" processes for Ukrainians and others is irrelevant. Pls.' Opp'n 33. None of those processes are challenged in this lawsuit.

Plaintiffs' lawsuit is brought entirely under the APA, which means the Court's review is limited—with few narrow exceptions—to the record(s) the agency presents to the reviewing court. *See Hill Dermaceuticals, Inc. v. Food & Drug Admin*., 709 F.3d 44, 47 (D.C. Cir. 2013) (characterizing this principal as "black-letter administrative law"); *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) (calling the exceptions "quite narrow and rarely invoked"). The Florida district court's findings and deposition testimony given in another case are not part of the record, and Plaintiffs have invoked none of the exceptions. *See Silver State Land, LLC v. Beaudreau*, 59 F. Supp. 3d 158, 172 (D.D.C. 2014) (denying motion for judicial notice of court order where it "does not qualify for supplementation of the administrative record or extra-record review").

In any event, the "facts" Plaintiffs proffer fail to satisfy the requirements of Federal Rule of Evidence 201. That rule allows judicial notice of adjudicative facts "not subject to reasonable dispute" where the fact: "(1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(a), (b). First, the materials Plaintiffs proffer are not "adjudicative facts" because they are irrelevant to the disposition of this case. *See Larson v. Dep't of State*, 565 F.3d 857, 870 (D.C. Cir. 2009). The *Florida* case concerned a separate and distinct agency decision—"Parole + ATD"—that Plaintiffs do not challenge here. *See Florida v. United States*, No. 3:21-cv-1066-TKW-ZCB, 2023 WL 2399883 (N.D. Fla. Mar. 8, 2023); *see supra* p. 33.[11]

Second, the accuracy of the facts Plaintiffs proffer is disputed. Defendants disagree with many of the district court's findings in its opinion vacating the Parole + ATD policy, including the snippets quoted in Plaintiffs' opposition, and have filed a notice of appeal. *Florida v. United*

[11] Plaintiffs do not mention collateral estoppel, and so forfeit any reliance on it, but Defendants note that the doctrine would not apply here, because the "issues" in the two cases are not the same.

States, No. 23-11528, 2023 WL 3813774 (11th Cir. June 5, 2023). Further, the fact that the trial court judge sought to resolve disputed factual contentions underscores that those facts could be subject to reasonable dispute and are therefore not subject to Rule 201. Finally, as to the deposition testimony of Mr. Ortiz specifically, Plaintiffs' attempted use of that deposition is prohibited by Federal Rule of Civil Procedure 32(a)(8), because both the parties and the subject matter (*i.e.*, the agency decision at issue) are different in the two lawsuits.

V. There are Serious Problems with Plaintiffs' Requested Remedies.

Plaintiffs ask the Court to "[e]njoin Defendants from continuing to carry out and fund these actions pending their full compliance with NEPA." Pls.' Reply 35. An injunction, however, is an impossibility where, as is the case for most of the challenged actions, the action is finished, and there is nothing left for the Court to enjoin. This is the case for PACR/HARP (Count III), ACAs (Count III), NTRs (Count IV), interim guidance (Count V), civil penalties (Count VI), the FY2022 Notice (Count VIII), and Afghan parole (Count X).[12] Plaintiffs suggest that for the ACAs, "[a]t 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." Pls.' Reply 31. NEPA, however, is intended to inform prospective federal action and does not mandate post-hoc analysis. Courts have declined to award injunctive relief where the project is complete, finding the NEPA challenge to be moot. *E.g.*, *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 893-94 (8th Cir. 2004); *Finca Santa Elena*, *Inc. v. U.S. Army Corps of Eng'rs,* 62 F. Supp. 3d 1, 5 (D.D.C. 2014). As for administrative closure, it is unclear what relief Plaintiffs are asking this Court to order.

[12] Ironically, for Plaintiffs' border wall claim (Count II), an injunction could mean stopping gap closure work. *See supra* pp. 14-15.

Several times Plaintiffs ask the Court to allow them to amend rather than rule on the pending summary judgment motions. *See, e.g.*, Pls.' Reply 32, 34. This request is inappropriate. The parties have fully briefed cross-motions for summary judgment. As to each claim, the Court can only grant summary judgment for one party and deny it as to the other. If they do not prevail, Plaintiffs may draft a different complaint and file a new action subject to the rules of estoppel.

Similarly, the Court should deny Plaintiffs' request for limited discovery should the Court find Plaintiffs lack standing to bring some or all of their claims. Pls.' Reply 4. This Court afforded Plaintiffs the option of responding to Defendants' opening summary judgment brief *or* moving for limited discovery. Minute Order (Jan. 26, 2023). Plaintiffs chose to move forward with summary judgment and now the Court can and should resolve this case.

Finally, if the Court finds any legal error, Defendants request the opportunity to brief the issue of an appropriate legal remedy given the factual complexities of the case, equitable and public interest concerns surrounding immigration policies, and ambiguity over exactly what relief Plaintiffs ask the Court to impose as to each action.

Conclusion

For all the reasons set forth above and in Defendants' opening brief, the Court should deny Plaintiffs' motion for summary judgment, grant Defendants' cross-motion for summary judgment, and enter judgment for Defendants.

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