

1 **MARK BRNOVICH**
2 **ATTORNEY GENERAL**
(Firm State Bar No. 14000)
3 Joseph A. Kanefield (Arizona Bar 15838)
4 Brunn (Beau) W. Roysden III (Arizona Bar
28698)
5 Drew C. Ensign (Arizona Bar 25463)
2005 N. Central Ave
6 Phoenix, AZ 85004-1592
7 Phone: (602) 542-8958
8 Joseph.Kanefield@azag.gov
9 Beau.Roysden@azag.gov
Drew.Ensign@azag.gov
10 *Attorneys for Plaintiff State of Arizona*

11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF ARIZONA**

13 State of Arizona,

14 Plaintiff,

15 v.

16 Alejandro Mayorkas in his official
17 capacity as Secretary of Homeland
18 Security; United States Department of
19 Homeland Security; Troy Miller in his
20 official capacity as serves as Senior
21 Official Performing the Duties of the
Commissioner of U.S. Customs and
Border Protection; Tae Johnson in his
official capacity as Senior Official
Performing the Duties of Director of
U.S. Immigration and Customs
Enforcement.

22 Defendants.

No. 2:21-cv-00617-DWL

**CORRECTED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

INTRODUCTION

1. This is an action challenging Defendants’ pervasive violations of the National Environmental Policy Act of 1969 (“NEPA”) as it relates to immigration policy. Although those immigration policies undeniably have significant effects on the environment, Defendants have not even attempted to comply with NEPA.

2. “NEPA ‘protects the environment by requiring that federal agencies carefully weigh environmental considerations and consider potential alternatives to the proposed action *before* the government launches any major federal action.’” *Native Vill. of Point Hope v. Jewell*, 740 F.3d 489, 493 (9th Cir. 2014) (cleaned up) (emphasis added). But here Defendants have embarked on multiple environmentally disruptive policies without performing even cursory environmental analysis.

3. Since at least 1975, the Ninth Circuit has held that population growth can be an environmental impact that agencies must consider under NEPA. *See City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975). In that case, the Court held that the Federal Highway Administration violated NEPA by failing to prepare an environmental impact statement (“EIS”) prior to the construction of a freeway interchange near an agricultural area. *Id.* at 666. As the Court explained in that case, “plain common sense” indicated that the highway interchange was likely to cause growth in the area: “The growth-inducing effects of the ... project are its *raison d’etre*, and with growth will come growth’s problems: increased population, increased traffic, increased pollution, and increased demand for services such as utilities, education, police and fire protection, and recreational facilities.” *Id.* at 675. *See also Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1139 (9th Cir. 2011) (holding that, with respect to project adding a new runway to an airport, “even if the stated purpose of the project is to increase safety and efficiency, the agencies must analyze the impacts of the increased demand attributable to the additional runway as growth-inducing effects”).

1 4. Here, however, Defendants have, on information and belief, decided to
2 (1) halt construction of hundreds of miles of border wall, leaving completely arbitrary
3 gaps between physical barriers, encouraging and abetting widespread illegal migration
4 and (2) halt the “Remain in Mexico” program, enabling tens of thousands of asylum
5 claimants to enter the United States—all without preparing an environmental impact
6 statement for *any* of these activities.

7 5. Each of these activities individually involves environmental consequences
8 that are far greater than construction of a single highway interchange or runway. But
9 Defendants have not prepared an EIS to consider any of them. Indeed, Defendants have
10 not even prepared environmental assessments (“EAs”), which are less fulsome
11 documents that can be employed where—unlike here—the actions at issue will not
12 “significantly affect[] the quality of the human environment[.]” 42 U.S.C. § 4332(C).

13 6. Put simply, Defendants have flouted compliance with NEPA and have not
14 even engaged in the pretense of performing any environmental analysis before taking
15 environmentally transformative actions.

16 7. NEPA, 42 U.S.C. § 4321 *et seq.*, establishes “a national policy [to]
17 encourage productive and enjoyable harmony between man and his environment[.]” 42
18 U.S.C. § 4321. NEPA effectuates this policy by imposing procedural requirements on
19 federal agencies, and by providing that those agencies have to analyze the environmental
20 impact of all their major actions.

21 8. NEPA is “particularly” concerned with “the profound influences of
22 population growth” on the environment. *Id.* § 4331(a). Human population is among the
23 biggest factors in environmental change. It is “plain common sense” that the number of
24 people in an area has a significant impact on the environment, through factors such as
25 urbanization, infrastructure development, pollution, and stress on natural resources. *See*
26 *City of Davis*, 521 F.2d at 675.

1 9. Federal policies on immigration, asylum, refugee admission, refugee
2 resettlement, border enforcement, and temporary workers, among others, have directly
3 impacted and will continue to impact the population—and, consequently, the
4 environment—of the State of Arizona.

5 10. As Justice Holmes explained in 1907: “the state has an interest
6 independent of and behind the titles of its citizens, in all the earth and air within its
7 domain. It has the last word as to whether its mountains shall be stripped of their forests
8 and its inhabitants shall breathe pure air.” *Georgia v. Tenn. Copper Co.*, 206 U.S. 230,
9 237 (1907). Arizona has a strong interest in ensuring that policies that affect the
10 environment of the state are enacted consistent with federal law governing
11 environmental protection.

12 11. This action challenges a collection of policies of Defendants that have the
13 direct effect of causing growth in the population of Arizona through immigration
14 (collectively, “Population Augmentation Policies”), having a direct and substantial
15 impact on the environment in Arizona. Many of these environmental impacts are
16 negative, as the Ninth Circuit explained in *City of Davis*: “increased traffic, increased
17 pollution, and increased demand for services” all result directly from population growth.
18 *See City of Davis*, 521 F.2d at 675. But migration can bring positive environmental
19 effects too: for example, increased tax revenue, which enhances resources available for
20 environmental preservation.

21 12. NEPA requires that all environmental impacts of major federal actions—
22 the good, the bad, and the ambiguous—be studied *prior* to the government taking action.
23 *See, e.g.*, 40 C.F.R. § 1501.3 (requiring federal agencies to consider “[b]oth beneficial
24 and adverse effects” under NEPA); 40 C.F.R. § 1508.1 (agencies must consider effects
25 “resulting from actions that may have both beneficial and detrimental effects, even if on
26 balance the agency believes that the effect will be beneficial”). But Defendants are

1 simply ignoring NEPA entirely while engaging in actions that are certain to have
2 dramatic impacts on the environment. This suit seeks to end these pervasive violations
3 and require that Defendants discharge their duties under NEPA. It further seeks to
4 compel Defendants to allow public participation in these processes, which is a central
5 requirement of NEPA.

6 **PARTIES**

7 13. Plaintiff State of Arizona is a sovereign state of the United States of
8 America, and is represented by Arizona Attorney General Mark Brnovich. The Attorney
9 General is the chief legal officer of the State of Arizona, and has the authority to
10 represent the State in federal court.

11 14. Defendant Alejandro Mayorkas is the Secretary of Homeland Security and
12 therefore the “head” of the United States Department of Homeland Security (“DHS”)
13 with “direction, authority, and control over it.” 6 U.S.C. § 112(a)(2). Defendant
14 Mayorkas is sued in his official capacity.

15 15. Defendant United States Department of Homeland Security is a federal
16 agency.

17 16. Defendant Troy Miller serves as Senior Official Performing the Duties of
18 the Commissioner of U.S. Customs and Border Protection (“CBP”). Defendant Miller is
19 sued in his official capacity.

20 17. Defendant Tae Johnson serves as Deputy Director and Senior Official
21 Performing the Duties of Director of U.S. Immigration and Customs Enforcement.
22 Defendant Johnson is sued in his official capacity.

23 **JURISDICTION AND VENUE**

24 18. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1346, and 1361, as
25 well as 5 U.S.C. §§ 702-703.
26

1 action. Second, it ensures that the agency will inform the public that it has indeed
2 considered environmental concerns in its decisionmaking process.” *WildEarth Guardians*
3 *v. Jewell*, 738 F.3d 298, 302 (D.C. Cir. 2013) (citing *Balt. Gas & Elec. Co. v. NRDC*, 462
4 U.S. 87, 97 (1983)) (cleaned up); accord *Robertson v. Methow Valley Citizens Council*,
5 490 U.S. 332, 349 (1989).

6 25. NEPA thus ensures that important environmental effects will not be
7 “overlooked or underestimated[.]” *Robertson*, 490 U.S. at 349. The requirement to
8 evaluate environmental impacts also provides the public with information about
9 environmental impacts, assuring the public that the agency is considering the
10 environment and providing a “springboard for public comment[.]” *Id.* Public participation
11 under NEPA serves to improve the agency’s process by ensuring that a “larger audience
12 can provide input as necessary to the agency making the relevant decisions.” *See*
13 *Department of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) (cleaned up).

14 26. NEPA’s requirements “are to be strictly interpreted to the fullest extent
15 possible in accord with the policies embodied in the Act.” *Center for Biological*
16 *Diversity v. Bernhardt*, 982 F.3d 723, 734 (9th Cir. 2020) (cleaned up).

17 27. Alongside these provisions, NEPA established the Council on
18 Environmental Quality (“CEQ”) with authority to issue regulations to assist federal
19 agencies in administering the statute’s requirements. The CEQ regulations define
20 important terms such as the “[m]ajor Federal action” and “[e]ffects or impacts[.]” 40
21 C.F.R. § 1508.1, and set up procedures for public participation in the EIS process. *See,*
22 *e.g.*, 40 C.F.R. § 1503 *et seq.* CEQ regulations also set forth the process for agencies to
23 use in determining whether NEPA applies or is otherwise fulfilled. *See* 40 C.F.R. § 1501
24 *et seq.*

25 28. Under existing CEQ regulations, environmental impacts should be
26 “considered early in the process in order to ensure informed decision making by Federal

1 agencies.” 40 C.F.R. § 1500.1(b). NEPA should be integrated with other planning “at the
2 earliest reasonable time to ensure that agencies consider environmental impacts in their
3 planning and decisions[.]” 40 C.F.R. § 1501.2(a).

4 29. Agencies may identify “categories of actions” which “normally do not
5 have a significant effect on the human environment” and which therefore do not require
6 the preparation of an EIS. 40 C.F.R. § 1501.4(a) (“categorical exclusions”). Such actions
7 are exempt from environmental review, absent extraordinary circumstances.

8 30. CEQ regulations provide that agencies should prepare an Environmental
9 Assessment (“EA”) for proposed actions that are not categorically excluded if those
10 actions are “not likely to have significant effects or when the significance of the effects
11 is unknown[.]” 40 C.F.R. § 1501.5(a). The EA may assist the agency in determining
12 whether to prepare a full-fledged EIS or whether to issue a finding of no significant
13 impact. 40 C.F.R. § 1501.5(b).

14 31. The regulations also state that agencies “shall evaluate in a single
15 environmental impact statement proposals or parts of proposals that are related to each
16 other closely enough to be, in effect, a single course of action.” 40 C.F.R. § 1502.4(a).
17 When considering such programmatic action, agencies should consider factors such as
18 whether the relevant actions are “occurring in the same general location,” and whether
19 they “have relevant similarities, such as common timing, impacts, alternatives, methods
20 of implementation, media, or subject matter.” 40 C.F.R. § 1502.4(b)(1).

21 32. CEQ regulations define the “[e]ffects or impacts” that agencies must
22 consider to include “ecological (such as the effects on natural resources and on the
23 components, structures, and functioning of affected ecosystems), aesthetic, historic,
24 cultural, economic (such as the effects on employment), social, or health effects. Effects
25 may also include those resulting from actions that may have both beneficial and
26

1 detrimental effects, even if on balance the agency believes that the effect will be
2 beneficial.” 40 C.F.R. § 1508.1(g)(1).

3 **B. The Administrative Procedure Act**

4 33. The Administrative Procedure Act (“APA”) provides for judicial review of
5 agency action. *See* 5 U.S.C. § 701 *et seq.* Under the APA, a federal court reviewing
6 agency action “shall” “hold unlawful and set aside agency action, findings, and
7 conclusions” which the court finds are “arbitrary, capricious, an abuse of discretion, or
8 otherwise not in accordance with law.”

9 34. When an agency undertakes final agency action that fails to comply with
10 NEPA, such action is unlawful and set must be aside under the APA. *See Cantrell v.*
11 *City of Long Beach*, 241 F.3d 674, 679 n.2 (9th Cir. 2001) (“Although NEPA does not
12 provide a private right of action for violations of its provisions, private parties may
13 enforce the requirements of NEPA by bringing an action against the federal agency
14 under § 10(a) of the Administrative Procedure Act.”).

15 **FACTUAL BACKGROUND**

16 35. Defendants have undertaken a number of major federal actions which,
17 collectively and in isolation, have caused and are causing significant effects to the
18 quality of the human environment in the State of Arizona. Defendants have not prepared
19 an environmental impact statement—or even an environmental assessment—for any of
20 these activities.

21 **A. Promised Termination of Border Wall Construction**

22 36. On August 5, 2020, Joe Biden declared in an NPR interview that “[t]here
23 will not be another foot of wall constructed in my administration, number one.” *See* Lulu
24 Garcia-Navarro August 5, 2020, interview of Joe Biden,
25 <https://twitter.com/i/status/1291000306915057669>; *see also* Barbara Sprunt, *Biden Would*
26 *End Border Wall Construction, But Wouldn’t Tear Down Trump’s Additions,*

1 [https://www.npr.org/2020/08/05/899266045/biden-would-end-border-wall-construction-](https://www.npr.org/2020/08/05/899266045/biden-would-end-border-wall-construction-but-wont-tear-down-trump-s-additions)
2 [but-wont-tear-down-trump-s-additions](https://www.npr.org/2020/08/05/899266045/biden-would-end-border-wall-construction-but-wont-tear-down-trump-s-additions) (last visited April 11, 2021).

3 37. He further stated, “Number 2, ... I’m gonna make sure that we have border
4 protection, but it’s going to be based on making sure that we use high-tech capacity to
5 deal with it *and at the ports of entry, that’s where all the bad stuff happens.*” See
6 <https://twitter.com/i/status/1291000306915057669> (emphasis added)

7 38. He also responded when asked about land confiscations, he responded
8 “End. Stop. Done. Over. Not gonna do it. *Withdraw the lawsuits. We’re out. We’re not*
9 *gonna confiscate the land.*” See <https://twitter.com/i/status/1291000306915057669>
10 (emphasis added).

11 39. These statements by Mr. Biden, individually and collectively, show that he
12 promised to stop all new wall construction.

13 40. On January 20, 2021, President Biden, in one of his first official actions,
14 issued a proclamation directing DHS to “pause work on each construction project on the
15 southern border wall” and to “pause immediately the obligation of funds related to
16 construction of the southern border wall[.]” See *Proclamation on the Termination Of*
17 *Emergency With Respect To The Southern Border Of The United States And Redirection*
18 *Of Funds Diverted To Border Wall Construction*, Office of the White House (Jan. 20,
19 2021), available at [https://www.whitehouse.gov/briefing-room/presidential-](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/)
20 [actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/)
21 [border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/).

22 41. This proclamation was issued without any notice and comment or
23 interagency review.

24 42. The proclamation states that Defendant Secretary Mayorkas, in
25 consultation with various other members of the cabinet and other appropriate agency and
26 department heads, “shall develop a plan for the redirection of funds concerning the

1 southern border wall[.]” *Id.* Contrary to this order, the plan has not yet been announced,
2 creating even greater uncertainty as to the status of the nation’s border security.

3 43. The proclamation justifies its policy change in stating that “building a
4 massive wall ... is not a serious policy solution” and the wall is “a waste of money that
5 diverts attention from genuine threats to our homeland security.” *Id.*

6 44. DHS has implemented this proclamation by suspending all border wall
7 projects, on information and belief leaving hundreds of miles of fencing unfinished
8 compared to what DHS had studied and planned. The termination of border wall
9 construction has literally left huge holes in the border fencing, including substantial gaps
10 across the Arizona-Mexico border.

11 45. Since January 20, machinery has been literally standing idle in some areas
12 of Arizona’s wilderness, with awkward-seeming and incomplete work in numerous
13 places. *See* Mia Jankowicz, *Biden's order to pause construction on Trump's border wall*
14 *expires on March 20. Nobody knows what happens next.*, Business Insider (Mar. 16,
15 2021, 6:47 AM), [https://www.businessinsider.com/what-happen-end-biden-60-day-](https://www.businessinsider.com/what-happen-end-biden-60-day-pause-border-wall-work-2021-3)
16 [pause-border-wall-work-2021-3.](https://www.businessinsider.com/what-happen-end-biden-60-day-pause-border-wall-work-2021-3)

17 46. One major purpose of the Defendants’ actions was to signal the relative
18 openness of the United States-Mexico border and to encourage migration.

19 47. Accordingly, DHS, following the policy prescriptions in the President’s
20 proclamation, have finally decided that the United States-Mexico border is adequately
21 secured without the wall.

22 48. Furthermore, contrary to the unsupported claims that the wall was “not a
23 serious policy solution” in the proclamation, many individuals are constantly seeking to
24 cross the United States-Mexico border, for whom the wall has served both as a
25 meaningful physical barrier and a powerful signal of the federal government’s
26 commitment to enforcing immigration law. And while DHS has reportedly

1 “consider[ed]” making changes to address gaps in particular areas or implementing
2 technology in places where the wall is finished, DHS has no intent to deviate from the
3 fundamental policy announced in the Presidential Proclamation. *See* Ryan Saavedra,
4 *Biden Admin Considers Restarting Border Wall Construction To ‘Plug Gaps’ Amid*
5 *Biden’s Border Crisis: Report*, Daily Wire (Apr. 6, 2021),
6 [https://www.dailywire.com/news/biden-admin-considers-restarting-border-wall-](https://www.dailywire.com/news/biden-admin-considers-restarting-border-wall-construction-to-plug-gaps-amid-bidens-border-crisis-report)
7 [construction-to-plug-gaps-amid-bidens-border-crisis-report](https://www.dailywire.com/news/biden-admin-considers-restarting-border-wall-construction-to-plug-gaps-amid-bidens-border-crisis-report).

8 49. As a direct and foreseeable consequence of the gaps in the nation’s border
9 wall and the signal intentionally transmitted by the President and the Defendants,
10 migrants have been crossing the border in Arizona in greater numbers than ever before.
11 CBP reported it “encountered 171,700 migrants in March, including a record number of
12 unaccompanied minors, far exceeding the prior month’s totals.” *See* Priscilla Alvarez,
13 *Border apprehensions spiked in March, including a record number of unaccompanied*
14 *migrant minors*, [https://www.cnn.com/2021/04/02/politics/us-mexico-border-](https://www.cnn.com/2021/04/02/politics/us-mexico-border-immigration-apprehended/index.html)
15 [immigration-apprehended/index.html](https://www.cnn.com/2021/04/02/politics/us-mexico-border-immigration-apprehended/index.html) (last visited Apr. 11, 2021). Indeed, “[t]he US is
16 on track to encounter more than 2 million migrants at the US-Mexico border by the end
17 of the fiscal year, according to internal government estimates[,] marking a record high.”
18 *See* Priscilla Alvarez, *US on track to encounter record 2 million migrants on the*
19 *southern border, government estimates show*,
20 <https://www.cnn.com/2021/03/31/politics/migrants-us-southern-border/index.html> (last
21 visited Apr. 11, 2021).

22 50. One border county sheriff stated that, at a particular gap in the fencing,
23 “‘five or six groups’” of migrants are able to cross a day. *See* Roman Chiarello, *Arizona*
24 *sheriff says Biden halting border wall construction left area wide open for cartels*, Fox
25 News (Mar. 5, 2021), [https://www.foxnews.com/us/arizona-sheriff-biden-border-wall-](https://www.foxnews.com/us/arizona-sheriff-biden-border-wall-construction-cartels)
26 [construction-cartels](https://www.foxnews.com/us/arizona-sheriff-biden-border-wall-construction-cartels). One news outlet reported that “[s]mugglers send groups of asylum

1 seekers through the gaps [in the fencing] to overwhelm the agents. When agents leave to
2 intercept or apprehend one group, another group scampers across.” See William La
3 Jeunesse, *Migrants stream through gaps in border wall following Biden's order to halt*
4 *construction*, Fox News (Mar. 31, 2021), [https://www.foxnews.com/politics/migrants-](https://www.foxnews.com/politics/migrants-stream-through-gaps-in-border-wall-following-bidens-order-to-halt-construction)
5 [stream-through-gaps-in-border-wall-following-bidens-order-to-halt-construction](https://www.foxnews.com/politics/migrants-stream-through-gaps-in-border-wall-following-bidens-order-to-halt-construction).

6 51. One source estimates that approximately 1,000 individuals are able to
7 evade detention and enter the United States illegally every single day, many of which are
8 able to do so because of these glaring holes in the nation's border. See Heritage Experts
9 Release New Biden Border Crisis Fact Check, Heritage Foundation (March 25, 2021),
10 [https://www.heritage.org/press/heritage-experts-release-new-biden-border-crisis-fact-](https://www.heritage.org/press/heritage-experts-release-new-biden-border-crisis-fact-check)
11 [check](https://www.heritage.org/press/heritage-experts-release-new-biden-border-crisis-fact-check). Inevitably, many of these migrants settle in Arizona, increasing the population of
12 the state.

13 52. Despite these reasonably foreseeable effects of Defendants’ policies, at no
14 time did they undertake any analysis of the environmental impacts on the human
15 environment in Arizona of leaving the wall unfinished. These effects required
16 preparation of an EIS before Defendants undertook the challenged actions. Defendants
17 violated NEPA by failing to do so.

18 53. The combined effect of (1) partially constructing a barrier (2) followed by
19 intentional refusal to complete portions of the barrier, leaving enormous “gaps,” also has
20 significant environmental impacts by itself. In particular, the barrier—with its new
21 gaps—fragments the habitat of wildlife that lives in the U.S.-Mexico border region. And
22 it does so in a manner that is completely arbitrary, unplanned, and unstudied under
23 NEPA.

24 54. Defendants are required to perform an EIS to study the effects on wildlife
25 and the environment as a result of the gaps they have now intentionally created in the
26 border barrier.

1 **B. Ending the “Remain in Mexico” Policy**

2 55. In January, 2019, DHS enacted the “Migrant Protection Protocols,” (the
3 “MPP”) commonly known as the “Remain in Mexico” policy. Under this policy,
4 “certain foreign individuals entering or seeking admission to the U.S. from Mexico –
5 illegally or without proper documentation” were “returned to Mexico [to] wait outside of
6 the U.S. for the duration of their immigration proceedings[.]” *See Migrant Protection*
7 *Protocols*, Department of Homeland Security (Jan. 24, 2019),
8 <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

9 56. Under this program, approximately 65,000 non-Mexican migrants who
10 were detained attempting to enter the United States illegally or without proper
11 documentation across the Mexican border were sent back to Mexico to await the
12 completion of their immigration processes. *See* Ted Hesson & Mimi Dwyer, *Biden to*
13 *bring in asylum seekers forced to wait in Mexico under Trump program*, Reuters (Feb.
14 12, 2021, 4:10 AM), [https://www.reuters.com/article/us-usa-biden-immigration-](https://www.reuters.com/article/us-usa-biden-immigration-asylum/biden-to-bring-in-asylum-seekers-forced-to-wait-in-mexico-under-trump-program-idUSKBN2AC113)
15 [asylum/biden-to-bring-in-asylum-seekers-forced-to-wait-in-mexico-under-trump-](https://www.reuters.com/article/us-usa-biden-immigration-asylum/biden-to-bring-in-asylum-seekers-forced-to-wait-in-mexico-under-trump-program-idUSKBN2AC113)
16 [program-idUSKBN2AC113](https://www.reuters.com/article/us-usa-biden-immigration-asylum/biden-to-bring-in-asylum-seekers-forced-to-wait-in-mexico-under-trump-program-idUSKBN2AC113).

17 57. On February 2, 2021, President Biden issued “Executive Order on Creating
18 a Comprehensive Regional Framework to Address the Causes of Migration, to Manage
19 Migration Throughout North and Central America, and to Provide Safe and Orderly
20 Processing of Asylum Seekers at the United States Border.”¹ This order, among other
21

22 ¹ *See Executive Order on Creating a Comprehensive Regional Framework to Address the*
23 *Causes of Migration, to Manage Migration Throughout North and Central America, and*
24 *to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*,
25 Office of the White House (Feb. 2, 2021), [https://www.whitehouse.gov/briefing-](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-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/)
26 [room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-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/)
[regional-framework-to-address-the-causes-of-migration-to-manage-migration-](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-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/)
[throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-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/).

1 things, ordered DHS and HHS to “reinstate the safe and orderly reception and processing
2 of arriving asylum seekers, consistent with public health and safety and capacity
3 constraints” and commanded DHS to “promptly review and determine whether to
4 terminate or modify the program known as the Migrant Protection Protocols[.]” *Id.*

5 58. On February 11, 2021, DHS announced it would process into the United
6 States individuals who had been returned to Mexico under the MPP. *See DHS Announces*
7 *Process to Address Individuals in Mexico with Active MPP Cases*, Department of
8 Homeland Security (Feb. 11, 2021), [https://www.dhs.gov/news/2021/02/11/dhs-](https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases)
9 [announces-process-address-individuals-mexico-active-mpp-cases](https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases). Beginning on February
10 19, 2021, DHS started to execute this policy and bring those individuals into to the
11 United States.

12 59. On information and belief, thousands of individuals have been released
13 and are being released into Arizona as a result of the termination of this program that
14 otherwise would never have entered the country. Many, if not most, will be able to
15 remain and reside in the state, regardless of the formal outcomes of their immigration
16 proceedings. Despite the intent to cause this outcome, at no time did Defendants
17 undertake any analysis of the environmental impacts on the human environment in
18 Arizona of this additional population.

19 **C. Impact of Increased Population on the Human Environment**

20 60. On information and belief, thousands of additional individuals have settled
21 and continue to settle in Arizona than otherwise would have as the intentional,
22 anticipated, and direct result of Defendants actions.

23 61. As stated above, NEPA expressly states that one of its purposes is to
24 “achieve a balance between population and resource use which will permit high
25 standards of living and a wide sharing of life’s amenities[.]” 42 U.S.C. § 4331(b). As the
26 drafters of NEPA recognized, population growth has significant environmental impacts.

1 Migrants (like everyone else) need housing, infrastructure, hospitals, and schools. They
2 drive cars, purchase goods, and use public parks and other facilities. Their actions also
3 directly result in the release of pollutants, carbon dioxide, and other greenhouse gases
4 into the atmosphere, which directly affects air quality. All of these activities have
5 significant environment impact which, as discussed above, courts have recognized as
6 cognizable impacts under NEPA.

7 62. Accordingly, numerous decisions have considered the impact of agency
8 actions on growth and the extent to which impacts from that growth could come within
9 the ambit of NEPA. Since at least 1975, the Ninth Circuit has recognized that population
10 growth is an environmental impact that agencies must often consider under NEPA. *See*
11 *City of Davis*, 521 F.2d at 671 (concluding that “an influx of population that will frustrate
12 the city's policy of ‘controlled growth’ and render its planning efforts to date obsolete”
13 was an “environmental consequence[.]” sufficient to grant plaintiff standing under
14 NEPA). *See also Barnes*, 655 F.3d at 1139 (holding that, with respect to project adding a
15 new runway to an airport, “even if the stated purpose of the project is to increase safety
16 and efficiency, the agencies must analyze the impacts of the increased demand
17 attributable to the additional runway as growth-inducing effects”); *City of Carmel-By-*
18 *The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997) (“Consideration of
19 the growth-inducing effects furthers the National Environmental Policy Act's information
20 and public awareness goals.”).

21 63. Population and growth effects must be considered as long as such effects
22 are “‘reasonably foreseeable[.]’” *Center for Biological Diversity*, 982 F.3d at 737. This
23 includes indirect effects and such effects as may be “‘later in time’” or “‘farther removed
24 in distance’” from the agency action in question. *Id.* For example, “[a]n increased risk of
25 an oil spill caused by an increase in crude oil tanker traffic ... is a reasonably foreseeable
26

1 indirect effect of a proposed dock extension.” *Id.* (citing *Ocean Advocates v. U.S. Army*
2 *Corps. of Eng’rs*, 402 F.3d 846, 867–70 (9th Cir. 2005)).

3 64. Where there is a question as to whether a major federal action will affect
4 the environment, “[t]he appropriate inquiry” is whether the effect at issue is so ““remote
5 and highly speculative”” that NEPA does not warrant its consideration. *See San Luis*
6 *Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 449 F.3d 1016, 1030 (9th Cir.
7 2006) (finding that Nuclear Regulatory Commission had violated NEPA by failing to
8 consider the possibility of terrorist attacks on Diablo Canyon nuclear facility).

9 65. Furthermore, “NEPA requires that an environmental analysis for a single
10 project consider the cumulative impacts of that project together with all past, present and
11 reasonably foreseeable future actions.” *See Idaho Sporting Cong., Inc. v. Rittenhouse*,
12 305 F.3d 957, 973 (9th Cir. 2002). *See also Great Basin Res. Watch v. Bureau of Land*
13 *Mgmt.*, 844 F.3d 1095, 1104 (9th Cir. 2016) (“In a cumulative impact analysis, an agency
14 must take a ‘hard look’ at all actions that may combine with the action under
15 consideration to affect the environment.”) (quoting *Te–Moak Tribe of W. Shoshone of*
16 *Nev. v. U.S. Dep’t of Interior*, 608 F.3d 592, 603 (9th Cir. 2010)) (cleaned up).

17 66. Here, all of the impacts from the actions detailed above should have been
18 considered together, along with other parts of the administration’s policy which serve to
19 encourage migration. Whether considered separately or collectively, the impact of those
20 policies, there can be little doubt, will foreseeably and directly impact the population of
21 border states like Arizona.

22 67. Notwithstanding this governing law, in formulating the policies discussed
23 above, the Defendants never took any of the specific procedures required by NEPA and
24 the CEQ regulations. Defendants at no time have ever accounted for any environmental
25 impacts of those policies or the cumulative impact of those actions in combination with
26 each other.

1 **CLAIM FOR RELIEF**

2 **NEPA Violations**

3 68. The allegations in the preceding paragraphs are reincorporated herein.

4 69. Population growth in the State of Arizona is the reasonably foreseeable,
5 direct, and proximate result of the Defendants actions, individually and when considered
6 collectively along with all past, present and reasonably foreseeable future actions.

7 70. Population growth has significant environmental effects within the State,
8 which Defendants were required to analyze under NEPA.

9 71. Each of the actions had other significant environmental effects which DHS
10 similarly failed to consider. In particular, Defendants have not prepared either an EIS or
11 EA to study the pertinent environmental effects.

12 72. In taking the above-referenced major federal actions without conducting
13 any sort of environmental analysis, Defendants have taken final agency actions that are
14 arbitrary, capricious, and otherwise not in accordance with law, or without observance of
15 procedure required by law, within the meaning of the Administrative Procedure Act. 5
16 U.S.C. § 706(2). As such, Defendants' actions should be held unlawful and set aside. *Id.*

17 **PRAYER FOR RELIEF**

18 Plaintiff respectfully request that this Court enter judgment:

- 19 A. Declaring that Defendants have violated NEPA by halting the construction of the
20 border wall in Arizona and by processing migrants into the United States who were
21 and who would have been covered by the MPP without preparing an EIS or EA;
- 22 B. Enjoining Defendants from continuing to take actions, including diverting and
23 impounding appropriated funds, to prevent the continuation of construction of border
24 wall under contracts already entered into by the United States until such time as
25 Defendants comply with NEPA;
- 26

- 1 C. Enjoining Defendants any further from processing migrants into the United States,
2 who were and who would have been covered by the MPP until such time as
3 Defendants comply with NEPA;
- 4 D. Enjoining Defendants to secure the border in Arizona to the satisfaction of this Court
5 to prevent additional unlawful migration until such time as Defendants comply with
6 NEPA;
- 7 E. Awarding Plaintiff costs of litigation, including reasonable attorneys' fees, under the
8 Equal Access to Justice Act, 28 U.S.C. § 2412; and
- 9 F. Granting any and all other such relief as the Court finds appropriate.

10
11 RESPECTFULLY SUBMITTED this 11th day of April, 2021.

12
13 **MARK BRNOVICH**
14 **ATTORNEY GENERAL**

15 By: /s/ Drew C. Ensign
16 Joseph A. Kanefield (No. 15838)
17 Brunn W. Roysden III (No. 28698)
18 Drew C. Ensign (No. 25463)

19 *Attorneys for Plaintiff State of Arizona*
20
21
22
23
24
25
26