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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
22 Commissioner of U.S. Customs and
23 Border Protection; Tae Johnson in his
24 official capacity as Senior Official
Performing the Duties of Director of U.S.
Immigration and Customs Enforcement;
United States Department of Defense;
Lloyd Austin in his official capacity as
Secretary of Defense.

Defendants.

No. 2:21-cv-00617-DWL

**FIRST AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

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INTRODUCTION

1. This is an action challenging Defendants’ pervasive violations of law related to immigration policy.

2. Defendants, driven by the President’s campaign promises to enact lax immigration enforcement and loosen border security, have found themselves with a crisis at the southern border. Undeterred, they have moved ahead with a policy of loosening migration restrictions and enforcement, causing the number of migrants to surge. This surge has strained the resources and damaged the environment of Plaintiff, the State of Arizona (the “State”).

3. This complaint focuses on the Defendant’s entire program causing increased migration, while also identifying two policies which have played a major role in causing this sudden influx of migrants: Defendant’s decisions to terminate construction of border barriers and cancel contracts regarding same (“Border Wall Construction Termination”); and the defendant’s decision to terminate, with minimal explanation, the Migrant Protection Protocols (“MPP”).

4. On January 20, 2021, President Biden, in one of his first official actions, issued a proclamation directing Defendants to “pause work on each construction project on the southern border wall” and to “pause immediately the obligation of funds related to construction of the southern border wall[.]”¹ Following this proclamation, Defendants stopped all work on any border fencing or associated structures, leaving over 100 miles of planned and funded—but unfinished—wall in Arizona, in an arbitrary and haphazard manner.

¹ *Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction*, Office of the White House (Jan. 20, 2021), available at <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/>

1 5. Subsequently, on April 30, the Deputy Secretary of Defense directed the
2 Secretary of the Army to “cancel all section 284 construction projects” and to use funds
3 transferred for construction to “pay contract termination costs” including costs associated
4 with activities necessary for contractor demobilization.”² Finally, the Deputy Secretary of
5 Defense issued a memorandum to the Secretary of Homeland Security reflecting that the
6 Department of Homeland Security “will accept custody of border barrier infrastructure
7 constructed pursuant to section 284, account for such infrastructure in its real property
8 records, and operate and maintain the infrastructure.”³

9 6. Defendants’ termination of any building connected to the wall has also meant
10 the end of all wall-related construction by DHS, notwithstanding the fact that there remain
11 unspent funds which were allocated for wall construction by Congress.

12 7. On the same day the President announced he would not build any more
13 border fencing, Defendants suspended new entrants into the MPP.⁴ Previously, the MPP
14 had ensured that individuals who lacked a legal basis to be in the United States, and who
15 had passed through Mexico *en route* to the United States, had to remain in Mexico for the
16 duration of their immigration proceedings (particularly as Mexico was also a country that
17 they could have applied for asylum in during their travels, but they refused to do so
18 preferring the United States).

19 _____
20 ² Letter from Elizabeth Prelogar, Acting Solicitor General, to Clerk of the Supreme Court
21 (Apr. 30, 2021), *available at* https://www.supremecourt.gov/DocketPDF/20/20-138/177066/20210430165630859_letter%2020-138%20%204-30-20.pdf.

22 ³ *Id.*

23 ⁴ Memorandum from David Pekoske, Department of Homeland Security, *Review of and*
24 *Interim Revision of Civil Immigration Enforcement and Removal Policies and Priorities*
25 (Jan. 20, 2021), *available at* [https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-](https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf)
26 [memo_signed.pdf](https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf); Jaclyn Diaz, *Biden Suspends Deportations, Stops 'Remain In Mexico' Policy*, NPR (Jan. 21, 2021), [https://www.npr.org/sections/president-biden-takes-](https://www.npr.org/sections/president-biden-takes-office/2021/01/21/959074750/biden-suspends-deportations-stops-remain-in-mexico-policy)
[office/2021/01/21/959074750/biden-suspends-deportations-stops-remain-in-mexico-](https://www.npr.org/sections/president-biden-takes-office/2021/01/21/959074750/biden-suspends-deportations-stops-remain-in-mexico-policy)
[policy](https://www.npr.org/sections/president-biden-takes-office/2021/01/21/959074750/biden-suspends-deportations-stops-remain-in-mexico-policy).

1 8. Defendants then announced they would process into the United States
2 individuals who had previously been returned to Mexico under the MPP.⁵ Beginning on
3 February 19, 2021, DHS started to execute this policy and bring those individuals into to
4 the United States. DHS has also continued processing new migrants arriving across the
5 Mexican border who would previously have been covered by the MPP. The result is the
6 admission of tens of thousands of aliens that otherwise would have been excluded from the
7 U.S. pending resolution of their asylum claims (the vast majority of which fail).

8 9. These decisions were formalized on June 1, 2021, when the Administration
9 ended the MPP with a seven-page memorandum.⁶

10 10. At no point in the process of terminating border wall construction and the
11 MPP did Defendants ever consider any environmental impacts of those actions.

12 11. Defendants also failed to consider the degree to which the State relied on
13 both previous policies, and failed adequately to explain its abrupt reversal in course.

14 12. Furthermore, these decisions are both pieces of Defendant's overarching
15 program of encouraging migration and augmenting the U.S. population. This *de facto*
16 program has enormous impacts on the people and environment of Arizona.

17 13. The impacts of population growth are by no means uniformly, or even on
18 balance, negative. Population growth, for example, has contributed substantially to
19 Arizona's remarkable economic growth over the last century. Immigrants have
20 contributed to every facet of American society in a manner that has benefited the United
21 States's economic, cultural, military, and societal strengths. This suit does not (and could

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23 ⁵ See Press Release, Department of Homeland Security, *DHS Announces Process to*
24 *Address Individuals in Mexico with Active MPP Cases*(Feb. 11, 2021), available at
[https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-](https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases)
25 [mexico-active-mpp-cases](https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases).

26 ⁶ See Memorandum from Alejandro Mayorkas, Department of Homeland Security, *Termination of the Migrant Protection Protocols*, (June 1, 2021), available at
[https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_progr](https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf)
[am.pdf](https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf).

1 not) challenge population growth *per se*. Instead, this action challenges Defendants'
2 persistent failures to analyze, as federal law mandates, the entirely predictable and
3 foreseeable environmental impacts of population growth caused by Defendants' policies
4 of increasing the population of the United States through immigration.

5 14. Defendant's decisions are both arbitrary and capricious and have been
6 enacted in violation of numerous federal laws. In particular, although these policies
7 undeniably have significant effects on the environment, Defendants have not even
8 attempted to comply with the National Environmental Policy Act, ("NEPA"), 42 U.S.C.
9 § 4321 *et seq.* Defendants' policies also have unstudied impact on endangered species in
10 violation of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*

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

17 16. Furthermore, the Supreme Court has recognized "the importance of
18 immigration policy to the States" and that the States "bear[] many of the consequences of
19 unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). The
20 additional costs of housing, educating, providing healthcare, and other social services
21 places burdens on the State of Arizona as a consequence of Defendants' actions.

22 17. Defendant's policies encouraging migration and downgrading enforcement
23 have subverted federal law, damaged the environment in Arizona, and have not been
24 subject to any required public process or participation. Accordingly, they should be
25 declared unlawful, vacated, and/or enjoined.
26

PARTIES

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2 18. Plaintiff State of Arizona is a sovereign state of the United States of
3 America, and is represented by its Attorney General Mark Brnovich. The Attorney
4 General is the chief legal officer of the State of Arizona, and has the authority to represent
5 the State in federal court.

6 19. Arizona is one of four states on the United States-Mexico border. As a
7 border state, it suffers disproportionately from immigration-related burdens.

8 20. Defendant Alejandro Mayorkas is the Secretary of Homeland Security.
9 Defendant Mayorkas is sued in his official capacity.

10 21. Defendant United States Department of Homeland Security is a federal
11 agency.

12 22. Defendant Troy Miller serves as Senior Official Performing the Duties of
13 the Commissioner of U.S. Customs and Border Protection (“CBP”). Defendant Miller is
14 sued in his official capacity.

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

18 24. Defendant Lloyd Austin is the Secretary of Defense. Defendant Austin is
19 sued in his official capacity.

20 25. Defendant Department of Defense is a federal agency.

21 **JURISDICTION AND VENUE**

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

24 27. The Court is authorized to award the requested declaratory and injunctive
25 relief under 5 U.S.C. § 706, 28 U.S.C. § 1361, and 28 U.S.C. §§ 2201–2202.
26

1 urbanization, infrastructure development, pollution, and stress on natural resources. *See*
2 *City of Davis v. Coleman*, 521 F.2d 661, 675 (9th Cir. 1975).

3 33. This action challenges, among other things, a collection of policies of
4 Defendants that have the direct effect of causing growth in the population of the United
5 States generally, and Arizona specifically, through immigration (collectively, “Population
6 Augmentation Policies”). These policies have a direct and substantial impact on the
7 environment in the United States, with particularly acute effects in Arizona.

8 34. Population growth can have significant benefits. For example, Arizona’s
9 economy has benefited substantially from population growth over the last century. That
10 growth, effectuated by both domestic migration and international immigration, has
11 strengthened Arizona in innumerable ways. But at the same time, population growth can
12 have environmental impacts, both positive and negative. Those impacts can be particularly
13 acute when they result (as here) from haphazard policy-making that is allowed to escalate
14 into a crisis, whose existence is then repeatedly denied (punctuated by occasional
15 accidental admissions that it is, indeed, a “crisis”). NEPA mandates that federal agencies
16 analyze these environmental impacts *before* they take action. Defendants have failed to do
17 so here.

18 35. NEPA declares that “it is the continuing responsibility of the Federal
19 Government to ... improve and coordinate” federal programs in order to, among other
20 things, “fulfill the responsibilities of each generation as trustee of the environment for
21 succeeding generations;” “assure for all Americans safe, healthful, productive, and
22 esthetically and culturally pleasing surroundings;” and, significantly, to “achieve a
23 balance between population and resource use which will permit high standards of living
24 and a wide sharing of life’s amenities[.]” 42 U.S.C. § 4331(b).

25 36. To accomplish its goals, NEPA creates a set of procedures which force
26 federal agencies to take account of environmental concerns. Accordingly, the statute

1 provides, in relevant part, that “all agencies of the Federal Government shall” consider the
2 environmental impacts of all “proposals . . . and other major Federal actions significantly
3 affecting the quality of the human environment[.]” 42 U.S.C. § 4332.

4 37. Under NEPA, agencies must make a “detailed statement” on those impacts,
5 addressing, among other things, alternatives to the proposed action. *Id.* This detailed
6 statement is generally known as an environmental impact statement (“EIS”).

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

15 39. Under existing CEQ regulations, environmental impacts should be
16 “considered early in the process in order to ensure informed decision making by Federal
17 agencies.” 40 C.F.R. § 1500.1(b). NEPA should be integrated with other planning “at the
18 earliest reasonable time to ensure that agencies consider environmental impacts in their
19 planning and decisions[.]” 40 C.F.R. § 1501.2(a).

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

24 41. CEQ regulations provide that agencies should prepare an Environmental
25 Assessment (“EA”) for proposed actions that are not categorically excluded if those
26 actions are “not likely to have significant effects or when the significance of the effects is

1 unknown[.]” 40 C.F.R. § 1501.5(a). The EA may assist the agency in determining whether
2 to prepare a full-fledged EIS or whether to issue a finding of no significant impact. 40
3 C.F.R. § 1501.5(b).

4 42. The regulations also state that agencies “shall evaluate in a single
5 environmental impact statement proposals or parts of proposals that are related to each
6 other closely enough to be, in effect, a single course of action.” 40 C.F.R. § 1502.4(a). As
7 the Supreme Court has recognized, programmatic environmental analysis is required
8 where a program is “a coherent plan of national scope, and its adoption surely has
9 significant environmental consequences.” *Kleppe v. Sierra Club*, 427 U.S. 390, 400
10 (1976). When considering such programmatic action, agencies should consider factors
11 such as whether the relevant actions are “occurring in the same general location,” and
12 whether they “have relevant similarities, such as common timing, impacts, alternatives,
13 methods of implementation, media, or subject matter.” 40 C.F.R. § 1502.4(b)(1).

14 43. CEQ regulations define the “[e]ffects or impacts” that agencies must
15 consider to include “ecological (such as the effects on natural resources and on the
16 components, structures, and functioning of affected ecosystems), aesthetic, historic,
17 cultural, economic (such as the effects on employment), social, or health effects. Effects
18 may also include those resulting from actions that may have both beneficial and
19 detrimental effects, even if on balance the agency believes that the effect will be
20 beneficial.” 40 C.F.R. § 1508.1(g)(1).

21 44. NEPA requires that all environmental impacts of major federal actions—the
22 good, the bad, and the ambiguous—be studied prior to the government taking action. *See*,
23 *e.g.*, 40 C.F.R. § 1501.3 (requiring federal agencies to consider “[b]oth beneficial and
24 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 here are

1 simply ignoring NEPA entirely while engaging in actions that are certain to have dramatic
2 impacts on the environment.

3 45. This suit seeks to end these pervasive violations and require that Defendants
4 discharge their duties under NEPA. It further seeks to compel Defendants to allow public
5 participation in these processes, which is a central requirement of NEPA.

6 46. NEPA's requirements "are to be strictly interpreted to the fullest extent
7 possible in accord with the policies embodied in the Act." *Center for Biological Diversity*
8 *v. Bernhardt*, 982 F.3d 723, 734 (9th Cir. 2020) (cleaned up).

9 47. "NEPA protects the environment by requiring that federal agencies carefully
10 weigh environmental considerations and consider potential alternatives to the proposed
11 action *before* the government launches any major federal action." *Native Vill. of Point*
12 *Hope v. Jewell*, 740 F.3d 489, 493 (9th Cir. 2014) (cleaned up) (emphasis added).

13 48. "[A] person with standing who is injured by a failure to comply with the
14 NEPA procedure may complain of that failure at the time the failure takes place, for the
15 claim can never get riper." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737
16 (1998).

17 **B. The Endangered Species Act**

18 49. The ESA, passed in 1973, was enacted in order "to halt and reverse the trend
19 toward species extinction, whatever the cost." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153,
20 184 (1978). *See also* 16 U.S.C. § 1531. "As it was finally passed, the Endangered Species
21 Act of 1973 represented the most comprehensive legislation for the preservation of
22 endangered species ever enacted by any nation." *Hill*, 437 U.S. at 180.

23 50. The ESA establishes that it is "the policy of Congress that all Federal
24 departments and agencies shall seek to conserve endangered species and threatened
25 species." 16 U.S.C. § 1531(c)(1).
26

1 51. To implement this policy, Section 7 of the ESA provides that “[e]ach Federal
2 agency shall, in consultation with and with the assistance of the Secretary [of the Interior],
3 insure that any action authorized, funded, or carried out by such agency ... is not likely to
4 jeopardize the continued existence of any endangered species or threatened species or
5 result in the destruction or adverse modification of habitat of such species.” *Id.* §
6 1536(a)(2).

7 52. An agency violates this section when it fails to consult with an applicable
8 agency about an action which could be potentially harmful to endangered species. *See, e.g.,*
9 *Washington Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005).

10 53. The applicable regulations define key terms for purposes of when
11 consultations under the ESA are required. For example, “action” is defined broadly, as “all
12 activities or programs of any kind authorized, funded, or carried out, in whole or in part,
13 by Federal agencies,” including “actions directly or indirectly causing modifications to the
14 land, water, or air.” 50 C.F.R. § 402.02. “Effects of the Action” are defined as “all
15 consequences to listed species or critical habitat that are caused by the proposed action,
16 including the consequences of other activities that are caused by the proposed action.” *Id.*
17 Moreover, as the Ninth Circuit has made clear, there is “agency action” for purposes of the
18 ESA whenever an agency “makes an affirmative, discretionary decision about whether, or
19 under what conditions, to allow private activity to proceed.” *Karuk Tribe of California v.*
20 *U.S. Forest Serv.*, 681 F.3d 1006, 1011 (9th Cir. 2012) (en banc).

21 54. An agency can avoid ESA Section 7 consultation only if it makes a “no effect
22 determination.” The threshold for requiring consultation is thus “relatively low”: “‘Any
23 possible effect, whether beneficial, benign, adverse or of an undetermined character,’ ”
24 triggers the requirement” of informal consultation. *Id.* at 1027 (quoting *California ex rel.*
25 *Lockyer v. USDA*, 575 F.3d 999, 1018–19 (9th Cir. 2009) (quoting 51 Fed. Reg. 19,926,
26 19,949 (June 3, 1986)) (emphasis in *Lockyer*). An agency thus cannot avoid ESA Section

1 7 consultation even if it believes that the effect of its action on endangered species will be
2 beneficial. Instead, it must engage in ESA consultation to confirm that belief.

3 55. There is no indication that Defendants have considered effects on threatened
4 and endangered species from their challenged actions whatsoever, let alone reached a
5 formal no-effect finding commanding any deference (even under the “relatively low” no-
6 effect threshold).

7 56. The ESA has a citizen suit provision, allowing individuals to bring suit to
8 “enjoin any person, including the United States and any other governmental instrumentality
9 or agency...who is alleged to be in violation of any provision of this chapter or regulation
10 issued under authority thereof.” 16 U.S.C. § 1540(g)(1). *See also Bennett v. Spear*, 520
11 U.S. 154, 173 (1997) (“§ 1540(g)(1)(A) is a means by which private parties may enforce
12 the substantive provisions of the ESA against regulated parties—both private entities and
13 Government agencies”).

14 **C. The Administrative Procedure Act**

15 57. The Administrative Procedure Act (“APA”) provides for judicial review of
16 agency action. *See* 5 U.S.C. § 701 *et seq.* Under the APA, a federal court reviewing agency
17 action “shall” “hold unlawful and set aside agency action, findings, and conclusions” that
18 the court finds are “arbitrary, capricious, an abuse of discretion, or otherwise not in
19 accordance with law.” *Id.* § 706.

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

26

1 63. There are many aspects to this program, and they all work in tandem. For
2 example, immediately after taking office, Defendants directed ICE to stop issuing any fines
3 to individuals that had been ordered to leave the country but had failed to comply.⁹ This
4 policy reduces deterrence for the conduct in question—which is the very purpose of the
5 fines. Accordingly, this program intentionally boosts migration by eliminating this
6 deterrence effect.

7 64. In another agency action, which is part of the Population Augmentation
8 Program and designed to encourage migration, Defendants have determined to reduce a
9 key component of this country’s pandemic response, by exempting 250 migrants per day
10 from Title 42, a public health order barring the entry of migrants without valid travel
11 documents.¹⁰

12 65. In another policy, which is also part of the Population Augmentation
13 Program and designed to encourage migration, recent disclosures from the federal
14 government reveal that defendants are detaining fewer migrants than ever, including
15 migrants with serious felony convictions.¹¹

16 66. In a late-night email on February 4, 2021, Defendant Tae Johnson emailed
17 DHS personnel and told them ““Effective immediately ... *only those who meet the*
18 _____

19 ⁹ See Press Release, Department of Homeland Security, *DHS Announces Rescission of*
20 *Civil Penalties for Failure-to-Depart* (Apr. 23, 2021), available at
[https://www.dhs.gov/news/2021/04/23/dhs-announces-rescission-civil-penalties-failure-](https://www.dhs.gov/news/2021/04/23/dhs-announces-rescission-civil-penalties-failure-depart)
21 [depart](https://www.dhs.gov/news/2021/04/23/dhs-announces-rescission-civil-penalties-failure-depart).

22 ¹⁰ See Alyssa Aquino, *US To Exempt 250 Asylum-Seekers Daily From Pandemic Rule*,
23 *Law360* (May 18, 2021), available at
<https://www.law360.com/articles/1385840/print?section=immigration>.

24 ¹¹ See, e.g., Press Release, Arizona Attorney General’s Office, *AG Brnovich Obtains*
25 *Records Detailing Dangerous Shift in Immigration Polices* (Apr. 28, 2021), available at
[https://www.azag.gov/press-release/ag-brnovich-obtains-records-detailing-dangerous-](https://www.azag.gov/press-release/ag-brnovich-obtains-records-detailing-dangerous-shift-immigration-polices)
26 [shift-immigration-polices](https://www.azag.gov/press-release/ag-brnovich-obtains-records-detailing-dangerous-shift-immigration-polices). See also Adam Shaw, *ICE predicted 50% drop in illegal*
immigrant arrests under new DHS guidance, email shows, Fox News (Apr. 28, 2021),
available at [https://www.foxnews.com/politics/ice-50-drop-illegal-immigrant-arrests-](https://www.foxnews.com/politics/ice-50-drop-illegal-immigrant-arrests-new-dhs-guidance-email)
[new-dhs-guidance-email](https://www.foxnews.com/politics/ice-50-drop-illegal-immigrant-arrests-new-dhs-guidance-email).

1 *[Department] priorities will be removed.*” (emphasis added). Those categories were largely
2 limited to terrorism-related activities.

3 67. At a hearing on May 27, 2021, this Court explained that “[W]hat the evidence
4 ... shows is ... that *Immigration and Customs Enforcement lifted detainers* that were
5 previously in place, *has not placed detainers on individuals* that ... they know or can know
6 with ease are in detention or incarceration that have final orders of removal and, most
7 significantly, that *they have only removed some incredibly small number* -- seven or ten –
8 nonpriority [cases].” 5/27/21 Tr. at 14-15 (emphasis added). This Court further explained
9 that “So, of 325 individuals *who, before February 18th, would have been put into*
10 *immigration detention and removed, only seven have.* Doesn’t that sound like a prohibition
11 on removal of anybody other than in the first three categories?” *Id.* at 19-20 (emphasis
12 added).

13 68. Migrants and human smugglers understand that Defendants have enacted a
14 program to encourage migration. As the New York Times recently explained: “While most
15 of the migrants do not necessarily understand the intricacies of U.S. border policy, many
16 said in interviews that they perceived a limited-time offer to enter the United States. Friends
17 and family members already in the country, along with smugglers eager to cash in, have
18 assured them that they will not be turned away—and this is proving to be true.”¹²

19 69. In addition to the elements discussed above, two key aspects of this program
20 are the Defendants’ Border Wall Construction Termination and MPP Termination. These
21 decisions have enormous direct impacts on population flows, as well as indirect impacts
22 by encouraging migration. Cumulatively, the Population Augmentation Programs will
23 likely increase the population of the United States by hundreds of thousands—if not
24

25 _____
26 ¹² Miriam Jordan, *From India, Brazil and Beyond: Pandemic Refugees at the Border*, New
York Times (May 16, 2021), available at
<https://www.nytimes.com/2021/05/16/us/migrants-border-coronavirus-pandemic.html>.

1 millions—of people, with a disproportionate share of the increased burdens occurring in
2 Arizona.

3 **B. Promised Termination of Border Wall Construction**

4 70. On August 5, 2020, Joe Biden declared in an NPR interview that “[t]here will
5 not be another foot of wall constructed in my administration, number one.”¹³

6 71. He further stated, “Number 2, ... I’m gonna make sure that we have border
7 protection, but it’s going to be based on making sure that we use high-tech capacity to
8 deal with it *and at the ports of entry, that’s where all the bad stuff happens.*”¹⁴

9 72. He also responded when asked about land confiscations, he responded “End.
10 Stop. Done. Over. Not gonna do it. *Withdraw the lawsuits. We’re out. We’re not gonna*
11 *confiscate the land.*”¹⁵

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

14 74. On January 20, 2021, President Biden, in one of his first official actions, put
15 his promises into action. He issued a proclamation directing DHS to “pause work on each
16 construction project on the southern border wall” and to “pause immediately the obligation
17 of funds related to construction of the southern border wall[.]”¹⁶

18 ¹³ See Lulu Garcia-Navarro August 5, 2020, interview of Joe Biden,
19 <https://twitter.com/i/status/1291000306915057669>; see also Barbara Sprunt, *Biden Would*
20 *End Border Wall Construction, But Wouldn’t Tear Down Trump’s Additions*, NPR,
21 (August 5, 2020), available at [https://www.npr.org/2020/08/05/899266045/biden-would-](https://www.npr.org/2020/08/05/899266045/biden-would-end-border-wall-construction-but-wont-tear-down-trump-s-additions)
22 [end-border-wall-construction-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).

23 ¹⁴ See <https://twitter.com/i/status/1291000306915057669> (emphasis added)

24 ¹⁵ See <https://twitter.com/i/status/1291000306915057669> (emphasis added).

25 ¹⁶ *Proclamation on the Termination Of Emergency With Respect To The Southern Border*
26 *Of The United States And Redirection Of Funds Diverted To Border Wall Construction*,
Office of the White House (Jan. 20, 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/)
[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/)
[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/).

1 75. This proclamation was issued without any notice and comment or
2 interagency review.

3 76. The proclamation directs Defendant Secretary Mayorkas to, in consultation
4 with various other members of the cabinet and other appropriate agency and department
5 heads, “shall develop a plan for the redirection of funds concerning the southern border
6 wall[.]” *Id.* Since then, the Administration has canceled border wall projects paid for with
7 funds diverted from Defense Department accounts.¹⁷

8 77. The President’s Proclamation justifies its policy change by stating that
9 “building a massive wall ... is not a serious policy solution,” and the wall is “a waste of
10 money that diverts attention from genuine threats to our homeland security.” *Id.*

11 78. DHS has implemented this proclamation by suspending all border wall
12 projects, on information and belief leaving hundreds of miles of fencing unfinished
13 compared to what DHS had studied and planned. The termination of border wall
14 construction has left huge holes in the border fencing, including substantial gaps of over
15 100 miles along the Arizona-Mexico border.

16 79. Subsequently, on April 30, the Deputy Secretary of Defense directed the
17 Secretary of the Army to “cancel all section 284 construction projects” and to use funds
18 transferred for construction to “pay contract termination costs” including costs associated
19 with activities necessary for contractor demobilization.”¹⁸ Finally, the Deputy Secretary of
20 Defense issued a memorandum to the Secretary of Homeland Security reflecting that the
21 Department of Homeland Security “will accept custody of border barrier infrastructure
22

23 ¹⁷ See Nick Miroff, *Biden cancels border wall projects Trump paid for with diverted*
24 *military funds*, Washington Post (Apr. 30, 2021), available at
25 [https://www.washingtonpost.com/national/border-wall-cancelled/2021/04/30/98575af0-](https://www.washingtonpost.com/national/border-wall-cancelled/2021/04/30/98575af0-a9ec-11eb-b166-174b63ea6007_story.html)
[a9ec-11eb-b166-174b63ea6007_story.html](https://www.washingtonpost.com/national/border-wall-cancelled/2021/04/30/98575af0-a9ec-11eb-b166-174b63ea6007_story.html).

26 ¹⁸ Letter from Elizabeth Prelogar, Acting Solicitor General, to Clerk of the Supreme Court
(Apr. 30, 2021), available at [https://www.supremecourt.gov/DocketPDF/20/20-](https://www.supremecourt.gov/DocketPDF/20/20-138/177066/20210430165630859_letter%2020-138%20%204-30-20.pdf)
[138/177066/20210430165630859_letter%2020-138%20%204-30-20.pdf](https://www.supremecourt.gov/DocketPDF/20/20-138/177066/20210430165630859_letter%2020-138%20%204-30-20.pdf).

1 constructed pursuant to section 284, account for such infrastructure in its real property
2 records, and operate and maintain the infrastructure.”¹⁹ Accordingly, neither DOD nor
3 DHS has constructed or intends to construct any additional barriers.

4 80. Since January 20, machinery has been literally standing idle in some areas of
5 Arizona’s wilderness, with awkward-seeming and incomplete work in numerous places.²⁰

6 81. Concurrently with these events, on March 17, 2021, a number of U.S.
7 Senators sent a letter to Gene L. Dodaro, the Comptroller General at the Government
8 Accountability Office (GAO).²¹ This letter also highlighted the January 20th suspension
9 of border wall construction, and asserted that the President’s actions froze funds that were
10 appropriated by Congress for wall construction.

11 82. As explained in that letter, in appropriations bills for fiscal years 2020 and
12 2021 Congress appropriated nearly three billion dollars for “the construction of a barrier
13 system along the southwest border.” *Id.* (citing Consolidated Appropriations Act, 2020,
14 Pub. L. No. 116-93, 133 Stat. 2511; Consolidated Appropriations Act, 2021, Pub L. No.
15 115-141, 132 Stat. 348). Although these laws place the obligation on Defendants to
16 execute those funds for the stated purposes, on information and belief, this
17 Administration is withholding substantial portions of those funds and has suspended all
18 construction.

19
20
21 ¹⁹ *Id.*

22 ²⁰ See Mia Jankowicz, *Biden's order to pause construction on Trump's border wall expires*
23 *on March 20. Nobody knows what happens next.*, Business Insider (Mar. 16, 2021, 6:47
24 AM), available at <https://www.businessinsider.com/what-happen-end-biden-60-day-pause-border-wall-work-2021-3>. See also *Work has stopped on Trump's border wall. See how it looks now*, CNN (May 3, 2021), available at https://www.youtube.com/watch?v=q1fT_dEgoqg.

25
26 ²¹ See Letter from Shelly M. Capito, et al., to Hon. Gene L. Dodaro (Mar. 17, 2021), <https://www.appropriations.senate.gov/imo/media/doc/Capito%20GAO%20Border%20Letter.pdf>.

1 83. On information and belief, the order to halt construction on the wall in
2 Arizona involved the sudden termination of several large contracts. Contractors who were
3 ready to work received a stand-down order from the Army Corps of Engineers on January
4 21. These contractors remain ready to return to work, but the Administration and
5 Defendants have given no indication that this is going to be forthcoming.

6 84. As a result of this termination of wall construction, countless employers and
7 workers in the State of Arizona have been put out of work, directly harming them, and
8 costing the State valuable tax revenue.

9 85. One major purpose of the Defendants' actions in affirmatively halting this
10 construction was to signal the relative openness of the United States-Mexico border and to
11 encourage migration.

12 86. None of the gaps in the border wall was the product of planning or reasoned
13 decision-making. The current state of the border is entirely arbitrary, and none of the
14 impacts flowing from Defendants' actions were studied before taking the decision to
15 affirmatively halt construction.

16 87. Despite this, DHS, following the policy prescriptions in the President's
17 proclamation, has finally decided that the United States-Mexico border is adequately
18 secured without the wall, in its current condition.

19 88. Furthermore, contrary to the unsupported claims that the wall was "not a
20 serious policy solution" in the Proclamation, many individuals are constantly seeking to
21 cross the United States-Mexico border, for whom the wall has served both as a meaningful
22 physical barrier and a powerful signal of the federal government's commitment to
23 enforcing immigration law. And while DHS has reportedly "consider[ed]" making changes
24 to address gaps in particular areas or implementing technology in places where the wall is
25
26

1 unfinished, DHS has no intent to deviate from the fundamental policy announced in the
2 Presidential Proclamation.²²

3 89. As a direct and foreseeable consequence of the gaps in the nation's border
4 wall and the signal intentionally transmitted by the President and the Defendants, migrants
5 have been crossing the border in Arizona in greater numbers than ever before. CBP
6 reported it "encountered 171,700 migrants in March, including a record number of
7 unaccompanied minors, far exceeding the prior month's totals."²³ Indeed, "[t]he US is on
8 track to encounter more than 2 million migrants at the US-Mexico border by the end of the
9 fiscal year, according to internal government estimates[,] marking a record high."²⁴

10 90. One border county sheriff stated that, at a particular gap in the fencing, "five
11 or six groups" of migrants are able to cross a day.²⁵ One news outlet reported that
12 "[s]mugglers send groups of asylum seekers through the gaps [in the fencing] to
13 overwhelm the agents. When agents leave to intercept or apprehend one group, another
14 group scampers across."²⁶

15
16 ²² See Ryan Saavedra, *Biden Admin Considers Restarting Border Wall Construction To*
17 *'Plug Gaps' Amid Biden's Border Crisis: Report*, Daily Wire (Apr. 6, 2021), available at
18 [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)
[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).

19 ²³ See Priscilla Alvarez, *Border apprehensions spiked in March, including a record*
20 *number of unaccompanied migrant minors*, CNN (April 2, 2021),
21 [https://www.cnn.com/2021/04/02/politics/us-mexico-border-immigration-](https://www.cnn.com/2021/04/02/politics/us-mexico-border-immigration-apprehended/index.html)
[apprehended/index.html](https://www.cnn.com/2021/04/02/politics/us-mexico-border-immigration-apprehended/index.html).

22 ²⁴ See Priscilla Alvarez, *US on track to encounter record 2 million migrants on the*
23 *southern border, government estimates show*, CNN (Apr. 11, 2021),
24 <https://www.cnn.com/2021/03/31/politics/migrants-us-southern-border/index.html>.

25 ²⁵ See Roman Chiarello, *Arizona sheriff says Biden halting border wall construction left*
26 *area wide open for cartels*, Fox News (Mar. 5, 2021),
<https://www.foxnews.com/us/arizona-sheriff-biden-border-wall-construction-cartels>.

²⁶ See William La Jeunesse, *Migrants stream through gaps in border wall following*
Biden's order to halt construction, Fox News (Mar. 31, 2021), available at
[https://www.foxnews.com/politics/migrants-stream-through-gaps-in-border-wall-](https://www.foxnews.com/politics/migrants-stream-through-gaps-in-border-wall-following-bidens-order-to-halt-construction)
[following-bidens-order-to-halt-construction](https://www.foxnews.com/politics/migrants-stream-through-gaps-in-border-wall-following-bidens-order-to-halt-construction).

1 91. One source estimates that approximately 1,000 individuals are able to evade
2 detention and enter the United States illegally every single day, many of whom are able to
3 do so because of these glaring holes in the border barriers.²⁷ Inevitably, many of these
4 migrants settle in Arizona, increasing the population of the state.

5 92. This border control policy has been—correctly—understood worldwide as
6 an invitation. From as far as India and elsewhere in Asia, migrants have traveled to Mexico
7 and seek to enter the United States through wide gaps in the border wall around Yuma,
8 Arizona.²⁸

9 93. As the New York Times explains, these migrants are here to stay: “Most
10 migrants are being released to await immigration hearings that could take years, and if they
11 fail to win asylum, many may wind up staying anyway, adding to the millions of
12 immigrants living in the United States without permission.”²⁹

13 94. On information and belief, the gaps in the wall may also have significant
14 effects on Arizona wildlife, including endangered species. Many commentators have noted
15 how the construction of the wall itself may have risked endangered species.³⁰ However, the
16 state of affairs created by the Defendant’s sudden halt of construction has led to an
17 environment for these species which is unstudied and unknown. For example, the current
18 gaps have created a “bottleneck for species” which may affect predator patterns and harm
19

20 ²⁷ See *Heritage Experts Release New Biden Border Crisis Fact Check*, Heritage
21 Foundation (March 25, 2021), available at [https://www.heritage.org/press/heritage-](https://www.heritage.org/press/heritage-experts-release-new-biden-border-crisis-fact-check)
22 [experts-release-new-biden-border-crisis-fact-check](https://www.heritage.org/press/heritage-experts-release-new-biden-border-crisis-fact-check).

23 ²⁸ See Miriam Jordan, *From India, Brazil and Beyond: Pandemic Refugees at the Border*,
24 New York Times (May 16, 2021), available at
<https://www.nytimes.com/2021/05/16/us/migrants-border-coronavirus-pandemic.html>.

25 ²⁹ *Id.*

26 ³⁰ See, e.g., Garet Bleir, *Endangered Species Are Casualties of Trump’s Border Wall*,
Sierra (Feb. 18, 2020), available at [https://www.sierraclub.org/sierra/endangered-species-](https://www.sierraclub.org/sierra/endangered-species-are-casualties-trump-s-border-wall)
are-casualties-trump-s-border-wall (discussing how the border wall construction puts
“nearly 100 endangered species” at risk).

1 endangered species.³¹ This “could lead to a variety of unknown consequences, from
2 migration and mating patterns, to throwing predator-prey relationships out of whack. It
3 could also potentially eliminate endangered species who might not be able to survive the
4 change—around 90 endangered and threatened species call the area home.”³²

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

11 **C. Ending the “Remain in Mexico” Policy**

12 96. In 2018, the United States faced a massive surge of migrants, many from
13 Central American countries, attempting to cross through Mexico to enter the United States
14 despite having no lawful basis for admission. *See, e.g.*, 83 Fed. Reg. 55,934, 55,944-
15 55,945 (Nov. 9, 2018). This surge created a humanitarian, public safety, and security crisis
16 on the United States-Mexico border.

17 97. In response to this crisis, in January 2019, DHS enacted the “Migrant
18 Protection Protocols,” (the “MPP”) commonly known as the “Remain in Mexico” policy.
19 Under this policy, “certain foreign individuals entering or seeking admission to the U.S.
20 from Mexico – illegally or without proper documentation” were “returned to Mexico [to]
21 wait outside of the U.S. for the duration of their immigration proceedings[.]”³³

23 ³¹ *See, e.g.*, Nathaniel Janowitz, *Trump’s Border Wall Is Threatening Endangered Species*,
24 *Vice* (Feb. 2, 2021) [https://www.vice.com/en/article/y3gekk/trumps-border-wall-is-
threatening-endangered-species](https://www.vice.com/en/article/y3gekk/trumps-border-wall-is-threatening-endangered-species). (“Border wall construction in eastern and western
25 Arizona has created a bottleneck for species.”),

26 ³² *Id.*

³³ *See Migrant Protection Protocols*, Department of Homeland Security (Jan. 24, 2019),
available at <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

1 98. The purpose of this program, among other things, was to alleviate crushing
2 burdens on the U.S. immigration detention system and to eliminate a “key incentive” for
3 illegal immigration—the ability of aliens to stay in the United States during lengthy
4 immigration proceedings, regardless of the validity of their asylum claims. Moreover,
5 many, if not most, will skip their court dates and instead attempt to stay in the country for
6 as long as possible: either attempting to remain undetected or, if found, avoid
7 enforcement/deportation under the policies of the current administration.

8 99. Under this program, approximately 65,000 non-Mexican migrants who were
9 detained attempting to enter the United States illegally or without proper documentation
10 across the Mexican border were sent back to Mexico to await the completion of their
11 immigration processes.³⁴

12 100. The MPP functionally came to an end on January 20, 2021, when it was
13 rescinded by Defendants with little-to-no-explanation. On February 2, 2021, President
14 Biden issued “Executive Order on Creating a Comprehensive Regional Framework to
15 Address the Causes of Migration, to Manage Migration Throughout North and Central
16 America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United
17 States Border.”³⁵ This order, among other things, ordered DHS and HHS to “reinstate the
18 safe and orderly reception and processing of arriving asylum seekers, consistent with public
19

20 ³⁴ See Ted Hesson & Mimi Dwyer, *Biden to bring in asylum seekers forced to wait in*
21 *Mexico under Trump program*, Reuters (Feb. 12, 2021, 4:10 AM), available at
22 [https://www.reuters.com/article/us-usa-biden-immigration-asylum/biden-to-bring-in-](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)
[asylum-seekers-forced-to-wait-in-mexico-under-trump-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).

23 ³⁵ See *Executive Order on Creating a Comprehensive Regional Framework to Address the*
24 *Causes of Migration, to Manage Migration Throughout North and Central America, and*
25 *to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*,
26 Office of the White House (Feb. 2, 2021), available at
[https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-](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/)
[order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-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/)
[to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-](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/)
[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 health and safety and capacity constraints” and commanded DHS to “promptly review and
2 determine whether to terminate or modify the program known as the Migrant Protection
3 Protocols[.]” *Id.*

4 101. On February 11, 2021, DHS announced it would process into the United
5 States individuals who had been returned to Mexico under the MPP.³⁶ Beginning on
6 February 19, 2021, DHS started to execute this policy and bring those individuals into to
7 the United States.

8 102. Finally, on June 1, 2021, the Administration formally ended the MPP with a
9 cursory seven-page memorandum.³⁷ This memorandum provides several insufficient
10 explanations, including that it allegedly failed to reduce resource usage at DHS and failed
11 to reduce Executive Office of Immigration Review case backlogs. *Id.* However, this
12 memorandum makes no mention of a major justification for the MPP in the first place: *i.e.*,
13 the ability of asylum applicants to file non-meritorious claims in order to stay in the
14 country, with the ultimate intent of absconding and remaining illegally.³⁸

15 103. The Biden Administration’s termination of MPP has continued and furthered
16 their program of expanding the population of the United States by pro-migration policies
17 and has greatly exacerbated the crisis at the southern border. This “catch and release”
18

19 ³⁶ See Press Release, Department of Homeland Security, *DHS Announces Process to*
20 *Address Individuals in Mexico with Active MPP Cases*, (Feb. 11, 2021), available at
21 [https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-](https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases)
22 [mexico-active-mpp-cases](https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases).

23 ³⁷ See Memorandum from Alejandro Mayorkas, Department of Homeland Security,
24 *Termination of the Migrant Protection Protocols*, (June 1, 2021), available at
25 [https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_progr](https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf)
26 [am.pdf](https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf).

³⁸ See 83 Fed. Reg. 55,934, 55,944-55,945 (Nov. 9, 2018). See also Executive Office for
Immigration Review Adjudication Statistics, *Credible Fear and Asylum Process: Fiscal*
Year (FY) 2008 – FY 2019 (Oct. 23, 2019), available at
<https://www.justice.gov/eoir/file/1216991/download> (illustrating that only 14% of aliens
claiming credible fear are granted asylum, and 32% abscond into the United States and are
ordered removed in absentia).

1 program has bolstered cartels and other criminal operations and greatly increased the
2 sophistication and frequency of human smuggling operations.³⁹

3 104. Today, tens of thousands of migrants are crossing the border in Arizona with
4 the expectation they will be released in the United States to await their immigration
5 hearing.⁴⁰ They can then skip out on the hearing and disappear into the country.
6 Defendant's action here encourages precisely the sort of meritless asylum claims that the
7 MPP program was designed to avoid.

8 105. On information and belief, thousands of individuals have been released and
9 are being released into Arizona as a result of the termination of this program that otherwise
10 would never have entered the country. Many, if not most, will be able to remain and reside
11 in the State, regardless of the formal outcomes of their immigration proceedings. Despite
12 the intent to cause this outcome, as well as its ready foreseeability, at no time did
13 Defendants undertake any analysis of the environmental impacts on the human
14 environment, in Arizona specifically and the United States generally, of this additional
15 population and the additional migration.

16 **D. Prior Programmatic Environmental Impact Statements**

17 106. The federal government has previously recognized the need to address the
18 environmental impacts of its interlocking border programs in a programmatic EIS. In 1994,
19 the Department of Justice ("DOJ") issued a draft programmatic environmental impact
20 statement ("DPEIS") addressing border enforcement efforts, addressing collaborative
21 efforts between the then-DOJ entities the Immigration and Naturalization Service ("INS"),
22

23 ³⁹ See Dave Graham, *Exclusive: 'Migrant president' Biden Stirs Mexican Angst Over*
24 *Boom Time for Gangs*, Reuters (Mar. 10, 2021), <https://www.reuters.com/article/us-usa-immigration-mexico-exclusive/exclusive-migrant-president-biden-stirs-mexican-angst-over-boom-time-for-gangs-idUSKBN2B21D8>.

25 ⁴⁰ See Miriam Jordan, *From India, Brazil and Beyond: Pandemic Refugees at the Border*,
26 New York Times (May 16, 2021), <https://www.nytimes.com/2021/05/16/us/migrants-border-coronavirus-pandemic.html>

1 and the Border Patrol and DOD entity Joint Task Force Six (“JTF-6”) (now “JTF-N”). *See*
2 *Draft Programmatic Environmental Impact Statement to Continue the Program of*
3 *Protecting the Southwest Border Through the Interdiction of Illegal Drugs With the*
4 *Support of the Joint Task Force Six*, 59 FR 26322-02 (May 19, 1994). The Notice indicates
5 that “INS elected to act as lead agency for the preparation of this DPEIS” because the
6 border patrol—now a part of CBP in the DHS—was the primary “beneficiary” of most
7 JTF-6 engineering. *Id.*

8 107. The purpose of the DPEIS was “to address cumulative environmental
9 impacts of previous actions as well as those actions which may be developed within the
10 reasonably foreseeable future.” *Id.* The final programmatic EIS was issued in October
11 1994. *See Notice of Availability of the Final Programmatic Environmental Impact*
12 *Statement (DPEIS): Final Programmatic Environmental Impact Statement to Continue the*
13 *Program of Protecting the Southwest Border Through the Interdiction of Illegal Drugs*
14 *With the Support of the Joint Task Force Six*, 59 FR 50773 (Oct. 5, 1994).

15 108. In 1999, DOJ began supplementing the 1994 programmatic EIS. *See* 64 FR
16 15969 (April 2, 1999) (weekly EPA notice of EIS availability). A revised draft of the
17 supplemental programmatic EIS was issued in September 2000. *See* 65 FR 58527 (Sept.
18 29, 2000) (weekly EPA notice of EIS availability); 65 FR 63076 (Oct. 20, 2000) (corrected
19 weekly EPA notice of EIS availability).

20 109. On May 24, 2019, DHS withdrew both the 1994 programmatic EIS and the
21 2000 supplemental programmatic EIS. *See Notice of the withdrawal of a 1994*
22 *programmatic environmental impact statement and a 2001 supplemental programmatic*
23 *environmental impact statement regarding certain activities along the U.S. Southwest*
24 *border*, 84 Fed. Reg. 25067-01 (May 24, 2019). DHS’s explanation stated that CBP
25 “believe[s] their decision-makers are well-served by site-specific or project-specific NEPA
26 analyses. Unlike a sprawling programmatic NEPA analysis, a site specific or project-

1 specific NEPA analysis gives decision-makers concrete and tangible information regarding
2 the potential impacts of a proposed action. In addition, because every site-specific or
3 project-specific analysis includes an analysis of cumulative impacts, they also present
4 decision-makers with a larger frame of reference in which to understand those impacts.”

5 110. DHS has also completed a programmatic PEIS for the Northern U.S.-Canada
6 border. *See Notice of Intent To Prepare One Programmatic Environmental Impact*
7 *Statement for the Northern Border Between the United States and Canada* 75 FR 68810-
8 01 (Nov. 9, 2010). In the Notice announcing the intent to prepare the programmatic EIS,
9 CBP explained why it was providing a single PEIS for the entire border: “(1) CBP’s need
10 to identify a single unified proposal and alternatives for maintaining or enhancing security
11 along the Northern Border, and (2) Certain resources of concern for this PEIS extend or
12 move across the PEIS regions previously identified (e.g. habitat of various wildlife).” *Id.*

13 111. Accordingly, Defendants have recognized that, in actions involving the
14 border and immigration enforcement, their interlocking and related actions often have
15 environmental impacts that must be analyzed comprehensively in a programmatic EIS
16 under NEPA. DHS’s conclusory explanation in the 2019 withdrawal that project- and site-
17 specific analysis give more “concrete and tangible” information simply runs contrary to
18 their legal obligation to ensure that actions which “will have cumulative or synergistic
19 environmental impact upon a region ... must be considered together.” *Kleppe*, 427 U.S. at
20 410.

21 **E. Environmental Consequences of Defendants’ Actions**

22 112. Defendants’ actions are likely to have significant environmental impacts.
23 However, Defendants have flouted compliance with NEPA and have not even engaged in
24 the pretense of performing any environmental analysis before taking environmentally
25 transformative actions.
26

1 113. On information and belief, thousands of additional individuals have settled
2 and continue to settle in Arizona than otherwise would have as the intentional, anticipated,
3 and direct result of Defendants’ actions. This additional population, and the thousands of
4 individuals traveling across Arizona’s lands and wilderness, has significant negative
5 impacts on the human environment in Arizona.

6 114. Arizona has not attempted (and need not attempt) to “conduct the same
7 environmental investigation that he seeks in his suit to compel the agency to undertake.”
8 *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 972 (9th Cir. 2003).

9 115. Those environmental effects are classified below into a few main categories.

10 **a. Migration Impacts**

11 116. The first main category of environmental impacts includes all effects from
12 migrants crossing in the particular areas left open by Defendants’ actions. In particular, this
13 category includes the proliferation of garbage and refuse as a result of the transit of
14 hundreds of thousands of migrants through the passageways in the border fencing created
15 by Defendants’ actions, particularly their actions in affirmatively halting wall construction.

16 117. Thousands of migrants are crossing and will continue to cross across the
17 Arizona-Mexico border, concentrated at areas where there are gaps in the fencing. As the
18 New York Times has explained: “Many [migrants] are entering the United States through
19 wide openings in the border wall near Yuma, sparing them from the risky routes through
20 remote desert regions, where migrants frequently lose their bearings, or across the Rio
21 Grande in Texas.”⁴¹ This is the entirely foreseeable effect of Defendants’ actions in
22 choosing to leave gaps in the border wall—migrants seek out and cross at those gaps, and
23 in greater numbers than ever before.

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25
26 ⁴¹ Miriam Jordan, *From India, Brazil and Beyond: Pandemic Refugees at the Border*, New
York Times (May 16, 2021), available at
<https://www.nytimes.com/2021/05/16/us/migrants-border-coronavirus-pandemic.html>.

1 118. Because of Defendants’ actions, migrants are crossing wilderness areas and
2 other parts of the state not intended for human migration in huge numbers. Accordingly,
3 migrants necessarily leave behind considerable refuse and can damage wildlife by their
4 passing. As the Arizona Department of Environmental Quality (“ADEQ”) has explained,
5 border trash typically includes “plastic containers, clothing, backpacks, foodstuffs,
6 vehicles, bicycles and paper. Human waste and medical products have also been found in
7 border trash.”⁴²

8 119. ADEQ estimates that each border-crosser leaves an average of six to eight
9 pounds of trash behind.⁴³

10 120. The proliferation in border trash as a result of increased unauthorized
11 crossings has numerous negative consequences for the human environment. Some are
12 articulated by the ADEQ, including: “Strewn trash and piles, Illegal trails and paths,
13 Erosion and watershed degradation, Damaged infrastructure and property, Loss of
14 vegetation and wildlife, Campfires and escaped fires, Abandoned vehicles and bicycles,
15 Vandalism, graffiti and site damage (historical and archaeological), Occurrence of bio-
16 hazardous waste.”⁴⁴

17 121. These impacts are the direct result of Defendants’ actions. By encouraging
18 migrants to come with a host of policies which encourage migration and advertise the
19 relative openness of the border, combined with actively reducing physical security
20 measures in certain areas of the Arizona desert, Defendants certainly caused migrants to
21 cross, and with their crossing, bring huge quantities of trash and litter. These impacts must
22 be addressed pursuant to the process provided by NEPA.

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25 ⁴² *About Arizona Border Trash*, Arizona Department of Environmental Quality, available
26 at <https://www.azbordertrash.gov/about.html>.

⁴³ *Id.*

⁴⁴ *Id.*

1 **b. Increased Air Emissions**

2 122. Another predictable environmental impact of Defendants' actions are
3 increased air emissions, including emissions of greenhouse gases (GHGs), the most
4 common of which is carbon dioxide. *Id.*

5 123. The United States has disproportionately high ratios of carbon emissions and
6 energy consumption to population; the U.S. represents approximately 5 percent of the
7 global population but consumes about 25 percent of the world's energy and generates 5
8 times the world average of CO₂ emissions. *Id.* On a per capita basis, U.S. residents generate
9 five times as much carbon as the average individual outside of the country.

10 124. These greater per-capita emissions substantially reflect the economic
11 strength of the United States. GHG emissions predictably increase with income, and the
12 United States is one of the wealthiest countries in the world on a per-capita basis. GHG
13 emissions have notably declined recently, with EPA reporting that they dropped 1.7% from
14 2018 to 2019, for example.⁴⁵

15 125. This discrepancy in per-capita emissions is even more pronounced with
16 individuals arriving from the countries that mostly make up the migration occasioned by
17 Defendants' actions. According to one report, "Around four-in-ten (42%) of those
18 apprehended at the southwestern border in February were people of Mexican origin, up
19 from 13% in May 2019, the most recent peak month for monthly apprehensions. People
20 from El Salvador, Guatemala and Honduras accounted for 46% of apprehensions in
21 February, down from 78% in May 2019."⁴⁶ The United States population produces
22 considerably more GHG emissions per capita by comparison: compared to Mexico, 5.4
23

24 _____
25 ⁴⁵ See EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks*, available at
<https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks>

26 ⁴⁶ See John Gramlich, *Migrant apprehensions at U.S.-Mexico border are surging again*,
Pew Research Center (Mar. 15, 2021), available at <https://www.pewresearch.org/fact-tank/2021/03/15/migrant-apprehensions-at-u-s-mexico-border-are-surging-again/>.

1 times; El Salvador, 21.9 times; Guatemala, 22.4 times, and Honduras, 20.3 times. *See Flood*
2 *Report* at 7.

3 126. Furthermore, migrants driven to come across the border by Defendants'
4 actions are largely coming for economic opportunity. While enhanced economic
5 opportunity in the United States undoubtedly makes migrants better off individually,
6 collectively, this can have a significant impact on GHG output. *Id.*

7 127. The increased emissions resulting from immigrants reflects migrants'
8 understandable—and laudable—desires to improve their economic conditions. Many
9 migrants, for example, could not afford in their origin countries to purchase automobiles
10 or gasoline, or to heat or cool their residences, or to purchase many products (such as meat).
11 But their improved economic circumstances in the United States frequently permits
12 immigrants to undertake many activities previously unavailable to them. That
13 commendable desire for—and realization of—economic improvement is one of the
14 fundamental components of American history and the American Dream. But it also
15 predictably leads to increased air emissions—potentially resulting in increased smog, acid
16 rain, unhealthy levels of particulate matter and ozone, and GHG emissions—which NEPA
17 requires analysis of. But Defendants have completely failed to conduct that analysis that
18 NEPA requires.

19 128. These impacts on air emissions were a direct and foreseeable consequence
20 of Defendants' actions. Because individuals generate substantially more air/GHG
21 emissions in the United States than they would in their countries-of-origin, policies which
22 admit more individuals into the country—like the termination of the MPP—or policies
23 which permit or encourage more individuals to come to this country—like the affirmative
24 halt to the construction of the border wall—have significant environmental impacts which
25 must be addressed under NEPA.
26

1 129. Defendants’ refusal to consider GHG emissions from additional immigration
2 is particularly baffling in light of the Administration’s otherwise-ubiquitous fixation with
3 GHG emissions. For example, as one of his first actions in office, President Biden issued
4 Executive Order 13,990 on January 20, 2021. That order explains, for example, that “*It is*
5 *essential that agencies capture the full costs of greenhouse gas emissions* as accurately as
6 possible, including by taking global damages into account.” Exec. Order 13,990 § 5(a)
7 (Jan. 20, 2021) (emphasis added).

8 130. That Executive Order also called for the creation of an Interagency Working
9 Group to promulgate values for “‘social cost of carbon’ (SCC), ‘social cost of nitrous
10 oxide’ (SCN), and ‘social cost of methane’ (SCM), to “publish an interim SCC, SCN, and
11 SCM within 30 days of the date of this order,” and “publish a final SCC, SCN, and SCM
12 by no later than January 2022.” *Id.* § 5.

13 131. The Working Group published interim values for SCC, SCN, and SCM on
14 February 26, 2021.

15 132. Defendants have made no attempt to analyze the putative social costs—or
16 any environmental impacts whatsoever—from increased air emissions that directly result
17 from their challenged conduct. In doing so, Defendants have not only violated the Biden
18 Administration’s own policies (a violation not directly challenged here), but violated
19 NEPA as well (which is challenged).

20 133. Defendants’ violations of their own Administration policies thus further
21 demonstrate Defendants’ apparent—and glaring—ideological blind spot to GHG
22 emissions resulting from their immigration policies. Defendants are apparently fixated on
23 reducing GHG emissions in all other contexts, but are completely oblivious or willfully
24 ignorant of them in this one particular setting. These apparent ideological blinders violate
25 NEPA.
26

1 **c. Growth Impacts**

2 134. Since at least 1975, the Ninth Circuit has held that population growth can be
3 an environmental impact that agencies must consider under NEPA. *See City of Davis*, 521
4 F.2d at 671. In that case, the court held that the Federal Highway Administration violated
5 NEPA by failing to prepare an EIS prior to the construction of a freeway interchange near
6 an agricultural area. *Id.* at 666. As the Ninth Circuit explained, “plain common sense”
7 indicated that the highway interchange was likely to cause growth in the area: “The growth-
8 inducing effects of the ... project are its *raison d’etre*, and with growth will come growth’s
9 problems: increased population, increased traffic, increased pollution, and increased
10 demand for services such as utilities, education, police and fire protection, and recreational
11 facilities.” *Id.* at 675. *See also Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1139 (9th
12 Cir. 2011) (holding that, with respect to project adding a new runway to an airport, “even
13 if the stated purpose of the project is to increase safety and efficiency, the agencies must
14 analyze the impacts of the increased demand attributable to the additional runway as
15 growth-inducing effects”); *City of Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d
16 1142, 1162 (9th Cir. 1997) (“Consideration of the growth-inducing effects furthers the
17 National Environmental Policy Act’s information and public awareness goals.”).

18 135. To be sure, population growth also frequently provides significant benefits,
19 economic and otherwise. In particular, Arizona has benefited substantially from population
20 growth, both from internal migration and international immigration. This suit does not
21 challenge population growth, only Defendants’ failure to analyze that growth properly—
22 or, indeed, *at all*—under NEPA.

23 136. Each of the Defendant’s policies focused on below individually involves
24 environmental consequences that are far greater than construction of a single highway
25 interchange or runway. But Defendants have not prepared an EIS to consider any of them.
26 Indeed, Defendants have not even prepared EAs.

1 137. As stated above, NEPA expressly states that one of its purposes is to
2 “achieve a balance between population and resource use which will permit high standards
3 of living and a wide sharing of life’s amenities[.]” 42 U.S.C. § 4331(b). As the drafters of
4 NEPA recognized, population growth has significant environmental impacts. Migrants
5 (like everyone else) need housing, infrastructure, hospitals, and schools. They drive cars,
6 purchase goods, and use public parks and other facilities. Their actions also directly result
7 in the release of pollutants, carbon dioxide, and other greenhouse gases into the
8 atmosphere, which directly affects air quality. All of these activities have significant
9 environment impact which, as discussed above, courts have recognized as cognizable
10 impacts under NEPA.

11 138. Population and growth effects must be considered as long as such effects are
12 “‘reasonably foreseeable[.]’” *Center for Biological Diversity*, 982 F.3d at 737. This
13 includes indirect effects and such effects as may be “‘later in time’” or “‘farther removed
14 in distance’” from the agency action in question. *Id.* For example, “[a]n increased risk of
15 an oil spill caused by an increase in crude oil tanker traffic ... is a reasonably foreseeable
16 indirect effect of a proposed dock extension.” *Id.* (citing *Ocean Advocates v. U.S. Army*
17 *Corps. of Eng’rs*, 402 F.3d 846, 867–70 (9th Cir. 2005)).

18 **d. Impacts To Wildlife**

19 139. Another major impact is to wildlife and endangered species from migration
20 and wildlife being concentrated in particular corridors. *See Flood Report* at 5-6.

21 140. In particular, threatened and endangered species such as Mexican gray wolf,
22 jaguar, ocelot, and Sonoran pronghorn, are located in Arizona-Mexico border region.

23 141. The de facto creation of gaps in the Border Wall may affect these species by
24 concentrating their migration activities to those corridors—where they will be exposed to
25 concentrated human activity and potential predators.
26

1 142. Indeed, the Border Wall Construction Termination may create *de facto*
2 predator corridors where prey species (including the Sonoran pronghorn) will be forced to
3 “run the gauntlet” of predators that may simply park themselves at the gaps in the Border
4 Wall and feast upon the resulting abundance of prey that passes through.

5 **e. Summary Of Impacts**

6 143. Where there is a question as to whether a major federal action will affect the
7 environment, “[t]he appropriate inquiry” is whether the effect at issue is so “remote and
8 highly speculative” that NEPA does not warrant its consideration. *See San Luis Obispo*
9 *Mothers for Peace v. Nuclear Regulatory Comm’n*, 449 F.3d 1016, 1030 (9th Cir. 2006)
10 (finding that Nuclear Regulatory Commission had violated NEPA by failing to consider
11 the possibility of terrorist attacks on Diablo Canyon nuclear facility). At the very least,
12 “[i]ndirect impacts need only to be ‘reasonably foreseeable’ to require an assessment of the
13 environmental impact.” *Friends of the Earth, Inc. v. U.S. Army Corps of Engineers*, 109 F.
14 Supp. 2d 30, 41 (D.D.C. 2000).

15 144. Furthermore, “NEPA requires that an environmental analysis for a single
16 project consider the cumulative impacts of that project together with all past, present and
17 reasonably foreseeable future actions.” *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d
18 957, 973 (9th Cir. 2002). *See also Great Basin Res. Watch v. Bureau of Land Mgmt.*, 844
19 F.3d 1095, 1104 (9th Cir. 2016) (“In a cumulative impact analysis, an agency must take a
20 ‘hard look’ at all actions that may combine with the action under consideration to affect
21 the environment.”) (quoting *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of*
22 *Interior*, 608 F.3d 592, 603 (9th Cir. 2010)) (cleaned up).

23 145. Defendants—in both the context of past actions relating to the Southern
24 Border and actions relating to the Northern Border—have conducted programmatic
25 analyses of their actions. No such programmatic analysis was conducted here, despite the
26

1 bevy of actions relating to immigration, all of which are closely related and have similar
2 environmental impacts.

3 146. All of the impacts from the actions detailed above should have been
4 considered together, along with other parts of the administration's policy which serve to
5 encourage migration. In addition, whether considered separately or collectively, the impact
6 of those policies, there can be little doubt, will foreseeably and directly impact the
7 population and environments of border-states like Arizona.

8 147. Notwithstanding this governing law, in formulating the policies discussed
9 above, the Defendants never took any of the specific procedures required by NEPA and the
10 CEQ regulations. Defendants at no time have ever accounted for any environmental
11 impacts of those policies or the cumulative impact of those actions in combination with
12 each other.

13 **FIRST CLAIM FOR RELIEF**

14 **Failure To Prepare A Programmatic EIS**

15 **(Asserted Under NEPA/APA)**

16 148. The allegations in the preceding paragraphs are reincorporated herein.

17 149. Defendants' Population Augmentation Program constitutes "a coherent plan
18 of national scope, [whose] adoption surely has significant environmental consequences."
19 *Kleppe*, 427 U.S. at 400.

20 150. Defendants were therefore required to prepare a programmatic EIS to
21 evaluate the Population Augmentation Program.

22 151. Alternatively, each of the components of the Population Augmentation
23 Program: *e.g.*, eliminating fines, exempting individuals from Title 42, and drastically
24 decreasing deportation of individuals with final orders of removal, all individually have
25 significant environmental impacts requiring preparation of an EIS.
26

1 158. Plaintiffs’ cancellation of the MPP has significant environmental effects
2 which DHS has utterly failed to consider, in defiance of NEPA. In particular, Defendants
3 have not prepared either an EIS or EA to study the pertinent environmental effects.

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

9 **FOURTH (CONTINGENT) CLAIM FOR RELIEF**

10 **Violation of ESA – Border Wall Construction Termination**

11 160. The allegations in the preceding paragraphs are reincorporated herein.

12 161. Defendants’ Border Wall Construction Termination will have effects on
13 endangered species without engaging in the required consultation under Section 7 of the
14 ESA.

15 162. At no point have Defendants engaged in any consultation under ESA Section
16 7 regarding potential impacts to threatened and species from the Border Wall Construction
17 Termination.

18 163. On July 9, 2021, the State sent a 60-day letter to Defendants under 16 U.S.C.
19 § 1540(g) alerting them to their violations of ESA Section 7 concerning their Border Wall
20 Construction Termination. Defendants will receive notice from those letters on July 12.

21 164. If Defendants have not remedied its ESA violations within 60 days, the State
22 intends to assert a claim under the ESA challenging Defendants’ Border Wall Construction
23 Termination.

24 165. This claim for relief is intended to become operative automatically on
25 September 10, 2021—*i.e.*, 60 days after receipt of the State’s July 9, 2021 60-day letter. If
26 necessary, the State will formally amend this First Amended Complaint to do so.

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FIFTH CLAIM FOR RELIEF

**Arbitrary and Capricious Agency Action – Lack of Reasoned Decision-Making
Border Wall Construction Termination
(Asserted Under APA)**

166. The allegations in the preceding paragraphs are reincorporated herein.

167. The APA prohibits agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

168. Defendants’ Border Wall Construction Termination was not the product of reasoned decision-making. In particular, that halt has left gaps in border barriers that are entirely unstudied and arbitrary.

169. The timing of the Border Wall Construction Termination—being issued on the first day of the new administration—precludes any thoughtful analysis by Defendants. Instead, Defendants only had time to follow the President’s January 20 Proclamation without engaging in meaningful thought.

170. The January 20 Proclamation does not supply any meaningful analysis, and instead merely announces that “building a massive wall ... is not a serious policy solution” and the wall is “a waste of money that diverts attention from genuine threats to our homeland security.” These *ipse dixit* assertions do not supply reasoned analysis upon which Defendants could rely.

171. Defendants’ Border Wall Construction Termination is accordingly arbitrary and capricious, and should be set aside. 5 U.S.C. § 706(2)

SIXTH CLAIM FOR RELIEF

**Arbitrary and Capricious Agency Action – Lack of Reasoned Decision-Making
MPP Termination
(Asserted Under APA)**

172. The allegations in the preceding paragraphs are reincorporated herein.

1 173. The APA prohibits agency action that is “arbitrary, capricious, an abuse of
2 discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

3 174. Defendants previously provided a robust justification for the MPP. Current
4 DHS policy represents an abrupt departure from this policy without sufficient justification.

5 175. Defendants have also failed to consider Arizona’s reliance interest on the
6 MPP.

7 176. Neither the January 20 suspension of the MPP nor the June 1 memorandum
8 adequately explains the Defendants departure from the previous policy.

9 177. As such, Defendants’ actions should be held arbitrary and capricious and set
10 aside. 5 U.S.C. § 706(2).

11 SEVENTH CLAIM FOR RELIEF

12 Violation of the Constitution And The Impoundment Control Act Of 1974

13 178. The allegations in the preceding paragraphs are reincorporated herein.

14 179. Under Article II, Section 3 of the Constitution, the President “shall take Care
15 that the Laws be faithfully executed.” Consistent with this obligation, and Articles I and II
16 generally, when Congress allocates funds for a particular program, the President generally
17 cannot refuse to administer that program or spend those funds for purely policy or political
18 reasons. *See, e.g., In re Aiken County*, 725 F.3d 255, 261–66 (D.C. Cir. 2013) (Kavanaugh,
19 J., concurring). *See also* 2 U.S.C. §§ 682-88.

20 180. Congress allocated to DHS considerable funds to spend on border
21 construction, with specific instructions detailing what those funds may be used for.
22 Defendants, in violation of their obligation to take care that those laws are faithfully
23 executed, are withholding the funds and refusing to proceed with the statutorily mandated
24 program.

- 1 B. Declaring that Defendants’ refusal to expend moneys appropriated by Congress for
2 construction of the border wall for actual border wall construction violates both the
3 Constitution and the Impoundment Control Act of 1974;
- 4 C. Enjoining Defendants from continuing to take actions, including diverting and
5 impounding appropriated funds, to prevent the continuation of construction of border
6 wall under contracts already entered into by the United States until such time as
7 Defendants comply with NEPA;
- 8 D. Enjoining Defendants from processing any further migrants into the United States,
9 who were and who would have been covered by the MPP until such time as Defendants
10 comply with NEPA;
- 11 E. Enjoining Defendants to secure the border in Arizona to the satisfaction of this Court
12 to prevent additional unlawful migration until such time as Defendants comply with
13 NEPA;
- 14 F. Vacating Defendants’ actions that violate the APA and the Constitution;
- 15 G. Awarding Plaintiff costs of litigation, including reasonable attorneys’ fees, under the
16 Equal Access to Justice Act, 28 U.S.C. § 2412; and
- 17 H. Granting any and all other such relief as the Court finds appropriate.

18
19 RESPECTFULLY SUBMITTED this 12th of July, 2021.

20
21 **MARK BRNOVICH**
22 **ATTORNEY GENERAL**

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