

1 TODD KIM  
2 Assistant Attorney General  
3 United States Department of Justice  
4 Environment and Natural Resources Division

4 TYLER M. ALEXANDER (CA Bar No. 313188)  
5 Trial Attorney  
6 Natural Resources Section  
7 150 M St. NE, Third Floor  
8 Washington, D.C. 20002  
9 (202) 598-3314  
10 tyler.alexander@usdoj.gov

11 *Attorneys for Defendants*

12 **THE UNITED STATES DISTRICT COURT**  
13 **DISTRICT OF ARIZONA**  
14 **PHOENIX DIVISION**

14 State of Arizona, 15 16 Plaintiff, 17 v. 18 Alejandro Mayorkas, in his official capacity 19 as Secretary of Homeland Security, <i>et al.</i> , 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000	Case No. 2:21-cv-00617-PHX-DWL  <b>MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT (RULES 12(b)(1), (6))</b>
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INTRODUCTION

1  
2 Arizona asks this Court to unwind decisions by the Department of Defense (DoD)  
3 to cancel border wall projects along the State’s southern border with Mexico and by the  
4 Department of Homeland Security (DHS) to end the Migrant Protection Protocols (MPP).  
5 But the State lacks standing to bring its claims, so this Court must dismiss Arizona’s  
6 complaint for want of jurisdiction. Even if the State had standing, its claims are  
7 inconsistent and incorrect. While the State argues (wrongly) that the agencies’ decisions  
8 require environmental review under the National Environmental Policy Act (NEPA), it  
9 also contends (again inaccurately) that the Take Care Clause and Impoundment Control  
10 Act compel DHS to undertake *less* environmental planning. Neither theory passes  
11 muster, and this Court should dismiss the entire Complaint.

12 First, Arizona lacks standing. The State asserts that the decisions to halt border  
13 wall construction and terminate MPP have encouraged unlawful migration that will lead  
14 to harmful environmental effects. First Am. Compl. for Declaratory and Inj. Relief ¶¶  
15 116-42, ECF No. 13 (“First Am. Compl.”). But this same “enticement theory” was only  
16 weeks ago rejected by the Ninth Circuit. *Whitewater Draw Nat. Res. Conservation Dist.*  
17 *v. Mayorkas (Whitewater Draw)*, 5 F.4th 997, 1014-16 (9th Cir. 2021). The only other  
18 injury theory the State offers is the facially implausible suggestion that preserving  
19 migration corridors—diminished as they may be by previous construction—is somehow  
20 worse for wildlife than more border wall. First Am. Compl. ¶¶ 139-42. These  
21 conclusory allegations do not meet the State’s burden to establish standing, and the Court  
22 should dismiss Arizona’s First Amended Complaint under Rule 12(b)(1).

23 Second, even if Arizona had standing, its claims lack merit. In seeking a  
24 preliminary injunction, Arizona pressed only its NEPA claims—that a programmatic  
25 NEPA analysis is required for the administration’s alleged “Population Augmentation  
26 Program,” and that NEPA analyses were required before terminating MPP and cancelling  
27 certain border wall construction projects. *See* Mt. for Prelim. Inj. ECF No. 17. The  
28 Court should dismiss each; they fail for the reasons discussed in Defendants’ Opposition

1 to Arizona’s Motion for a Preliminary Injunction. *See* Defs.’ Opp’n to Pl.’s Mt. for  
2 Prelim. Inj. ECF No. 24 (“Defs.’ Opp’n”).

3 The claims Arizona omitted from its emergency motion are weaker still.<sup>1</sup>  
4 Arizona’s fifth and sixth claims for relief assert freestanding arbitrary and capricious  
5 theories that are not cognizable in this circuit; they should be dismissed under Rule  
6 12(b)(6). Arizona’s seventh claim for relief tries to evade the APA’s limits on review  
7 and invoke a cause of action reserved to the Comptroller General. Those claims are  
8 similarly unavailable and should also be dismissed.

9 For the reasons stated in Defendants’ earlier briefing and the reasons stated below,  
10 this Court should dismiss Arizona’s First Amended Complaint.

### 11 LEGAL STANDARDS

#### 12 **I. Dismissal under Rule 12(b)(1) for Lack of Subject-Matter Jurisdiction**

13 Federal Courts are courts of limited jurisdiction, and Rule 12(b)(1) allows a  
14 defendant to challenge the Court’s subject-matter jurisdiction to hear the case. A  
15 challenge may be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).  
16 For facial attacks, the reviewing court must dismiss for lack of subject matter jurisdiction  
17 if—accepting the plaintiff’s allegations as true and drawing all reasonable inferences in  
18 the plaintiff’s favor—the allegations do not establish jurisdiction. *Pride v. Correa*, 719  
19 F.3d 1130, 1133 (9th Cir. 2013). By contrast, when a motion to dismiss presents “a  
20 factual attack on subject matter jurisdiction . . . [n]o presumptive truthfulness attaches to  
21 plaintiff’s allegations, and the existence of disputed material facts will not preclude the  
22 trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the  
23 plaintiff will have the burden of proof that jurisdiction does in fact exist.” *Thornhill*  
24 *Publ’g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (quoting  
25 *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977)).  
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27 <sup>1</sup> Arizona’s fourth contingent claim for relief alleging a violation of Section 7 of the  
28 Endangered Species Act was withdrawn by stipulation. *See* Order ¶ 4, ECF No. 20.

1 **II. Dismissal under Rule 12(b)(6) for Failure to State a Claim**

2 A motion to dismiss for failure to state a claim upon which relief can be granted  
 3 under Federal Rule of Civil Procedure 12(b)(6) may be based on either a “lack of a  
 4 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal  
 5 theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988) (citing  
 6 *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984)). In addition,  
 7 a complaint that fails to provide the grounds for the requested relief beyond labels and  
 8 conclusions will not survive a motion challenging the sufficiency of a complaint’s  
 9 statement of the claim for relief under Rule 12(b)(6). *Bell Atl. Corp. v. Twombly*, 550  
 10 U.S. 544, 555 (2007); *see also Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th  
 11 Cir. 2001), *opinion amended on denial of reh’g*, 275 F.3d 1187 (9th Cir. 2001) (“Nor is  
 12 the court required to accept as true allegations that are merely conclusory, unwarranted  
 13 deductions of fact, or unreasonable inferences.”).

14 When a plaintiff fails to assert a cognizable legal theory in support of a claim, the  
 15 claim must be dismissed. Moreover, while a plaintiff’s material factual allegations are  
 16 assumed to be true, district courts may not assume the truth of legal conclusions “merely  
 17 because they are cast in the form of factual allegations.” *W. Mining Council v. Watt*, 643  
 18 F.2d 618, 624 (9th Cir. 1981). In deciding a motion to dismiss, courts may consider the  
 19 facts alleged in the complaint, documents either attached to or relied on by the complaint,  
 20 and facts on which the court may take judicial notice. *Lee v. City of L.A.*, 250 F.3d 668,  
 21 688-89 (9th Cir. 2001). A court may dismiss a claim under Rule 12(b)(6) if the plaintiff  
 22 does not fall within the zone of interests protected by the law invoked. *Maya v. Centex*  
 23 *Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

24 **ARGUMENT**

25 **I. Arizona Lacks Standing to Sue**

26 Defendants’ Opposition to Arizona’s Motion for a Preliminary Injunction  
 27 explained how Arizona lacks standing for its NEPA claims because: (1) Arizona’s  
 28 generic and speculative affidavits do not show an imminent, concrete injury to the State’s



1 interests and (2) Arizona cannot show that its alleged harms are fairly traceable to the  
2 challenged decisions or redressable by a Court order. Defs.' Opp'n 11-21, ECF No. 24.  
3 These same defects require dismissal of the remaining claims for relief.

4 Three of the State's alleged injuries are foreclosed by the Ninth Circuit's opinion  
5 in *Whitewater Draw*. Arizona alleges that the government's actions have enticed  
6 noncitizens to enter the country, leading to: (1) impacts from unlawful migration, and  
7 most specifically litter left behind by migrants crossing the southern border, First Am.  
8 Compl. ¶¶ 116-21, ECF No. 13; (2) increased greenhouse gas emissions, First Am.  
9 Compl. ¶¶ 122-33<sup>2</sup>; and (3) increased demands on the State's infrastructure and other  
10 alleged impacts from long-term population growth, First Am. Compl. ¶¶ 134-138. Again,  
11 these generic and speculative statements cannot meet the State's burden to establish  
12 standing. *See* Defs.' Opp'n 12-14. And even if these ambiguous claims of harm from  
13 litter or greenhouse gas emissions were cognizable injuries, Arizona cannot show that  
14 they are caused by the challenged decisions rather than the result of the "myriad  
15 economic, social, and political realities' that might influence an alien's decision to 'risk[]  
16 life and limb' to come to the United States." *Whitewater Draw*, 5 F.4th at 1015 (quoting  
17 *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015)). Indeed, the State's own citations  
18 concede that "most of the migrants do not necessarily understand the intricacies of U.S.  
19 border policy," First Am. Compl. ¶ 68 (citing Miriam Jordan, *From India, Brazil and*  
20 *Beyond: Pandemic Refugees at the Border*, New York Times (May 16, 2021),  
21 <https://www.nytimes.com/2021/05/16/us/migrants-border-coronavirus-pandemic.html>),  
22 and instead erroneously perceive a "limited-time offer to enter the United States." *Id.*

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25 <sup>2</sup> Arizona never explicitly says how increased air emissions harm the State. Presumably  
26 the State is alleging that greenhouse gasses associated with immigration are a  
27 contributing factor to climate change. But Arizona has not tried to show how climate  
28 change has harmed the State's concrete interests. *Cf. Massachusetts v. EPA*, 549 U.S.  
497, 522-23 (2007) (finding that climate change leads to rising sea levels that injured  
plaintiff state's interests as a landowner by diminishing coastal property).

1 Because Arizona cannot show that its alleged injuries are traceable to the challenged  
2 decisions, the State cannot meet its burden on standing.

3 Finally, Arizona offers the facially implausible allegation that preserving  
4 remaining migration corridors along the southern border will somehow cause greater  
5 harm to endangered species than more border wall construction. First Am. Compl. ¶¶  
6 139-42. Arizona makes no real attempt to explain this theory beyond asserting that  
7 unfenced areas could serve as “a ‘bottleneck for species’ which may affect predator  
8 patterns and harm endangered species.” *Id.* ¶ 94. But more border wall construction  
9 would only *further* narrow migration corridors and thus exacerbate the “bottleneck”  
10 effect the state alleges. And if a contiguous border wall were ever completed, cross-  
11 border migration for some species might be impossible. *See* 50 C.F.R. § 17.95 (showing  
12 designated jaguar critical habitat along Arizona’s border with Mexico); United States  
13 Fish and Wildlife Service, *News Release: Jaguar photographed in southern Arizona’s*  
14 *Cochise County* (March 2, 2017), [https://www.fws.gov/news/ShowNews.cfm?ref=jaguar-](https://www.fws.gov/news/ShowNews.cfm?ref=jaguar-photographed-in-southern-arizona%E2%80%99s-cochise-county&_ID=35988)  
15 [photographed-in-southern-arizona%E2%80%99s-cochise-county & \\_ID=35988.](https://www.fws.gov/news/ShowNews.cfm?ref=jaguar-photographed-in-southern-arizona%E2%80%99s-cochise-county&_ID=35988)

16 Arizona cannot show that any impacts associated with increased migration are  
17 fairly traceable to the challenged decisions. And the State’s wildlife injury theory is  
18 unsupported and conclusory. Arizona has not met its burden on standing, and this Court  
19 should dismiss the State’s First Amended Complaint under Rule 12(b)(1).

## 20 **II. Arizona’s NEPA Claims Should be Dismissed**

21 Defendants’ earlier briefing showed that Arizona’s first three claims for relief, if  
22 considered, fail. Arizona’s NEPA challenge to the decision to terminate the remaining 18  
23 miles of planned border wall construction in Arizona fails because: (1) NEPA was  
24 waived under the Illegal Immigration Reform and Immigrant Responsibility Act  
25 (IIRIRA), Defs.’ Opp’n 23-26, ECF No. 24; (2) IIRIRA’s jurisdictional bar forecloses  
26 judicial review of APA claims challenging the waivers, *id.* at 26-27; (3) the decision to  
27 not build more border wall does not alter the environmental status quo, *id.* at 28-29; and  
28 (4) Arizona may not invoke APA review to challenge the policy directives of the

1 President, *id.* at 29-31. Arizona’s NEPA challenge to the termination of MPP fails  
2 because: (1) returning certain noncitizens to contiguous countries pending their removal  
3 proceedings is committed to DHS’s discretion by law, *id.* at 32-33; (2) the decision to  
4 terminate MPP is not a reviewable final agency action, *id.* at 34-37; and (3) the decision  
5 to terminate MPP is an enforcement decision, and so not a “major federal action”  
6 requiring NEPA analysis, *id.* at 37-39. Finally, Arizona’s challenge to its contrived  
7 “Population Augmentation Program” claim is an impermissible programmatic challenge  
8 barred under Supreme Court and Ninth Circuit precedent, *id.* at 40-45, and none of the  
9 components of the so-called “program” are reviewable, *id.* at 45-47. For these same  
10 reasons, which Defendants incorporate here, this Court should dismiss Arizona’s first,  
11 second, and third claims for relief, First Am. Compl. ¶¶ 148-59, ECF No. 13, under Rule  
12 12(b)(6).

### 13 **III. Arizona’s Stand-Alone APA Claims are Not Cognizable**

14 Arizona’s fifth claim for relief argues that the decision to terminate border wall  
15 construction was “issued on the first day of the new administration[,]” which “precludes  
16 any thoughtful analysis by Defendants” and “is accordingly arbitrary and capricious” in  
17 violation of the APA. First Am. Compl. ¶¶ 169, 171 (citing 5 U.S.C. § 706(2)).

18 Arizona’s sixth claim for relief argues that Secretary Mayorkas’ decision to terminate  
19 MPP did not provide “sufficient justification” or “consider Arizona’s reliance interest<sup>3</sup> on  
20 the MPP,” and so is also “arbitrary and capricious” under the APA. *Id.* ¶¶ 173-77 (citing  
21 5 U.S.C. § 706(2)). Because the Ninth Circuit does not recognize standalone APA  
22 claims, neither states a claim upon which relief may be granted.

23 The APA provides a limited waiver of sovereign immunity, a cause of action, and  
24 a standard of review for claims challenging final agency action. 5 U.S.C. §§ 701-706.  
25 But it does not provide the substantive law for a court to apply in deciding whether a  
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27 <sup>3</sup> Arizona’s First Amended Complaint does not allege any actions taken by the State  
28 relying on MPP.

1 decision is arbitrary and capricious; that must come from another statute. *Or. Nat. Res.*  
2 *Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996). As the Ninth Circuit has explained,  
3 a court may not review an agency action or find that agency action is arbitrary and  
4 capricious “in the absence of a statutory benchmark against which to measure an  
5 agency’s exercise of discretion.” *Int’l Bhd. of Teamsters v. U.S. Dep’t of Transp.*, 861  
6 F.3d 944, 955 (9th Cir. 2017); *see also Nat’l Tr. for Historic Pres. v. Suazo*, No. CV–13–  
7 01973–PHX–DGC, 2015 WL 1432632, at \*9 (D. Ariz. Mar. 27, 2015) (dismissing  
8 standalone APA claim).

9 Arizona has not identified any statutory criteria against which this Court could  
10 review the challenged decisions. And, indeed, none exist. Congress has vested in the  
11 Secretary of Homeland Security discretion over if, how, and where to install border  
12 infrastructure. *See Consolidated Approbations Act, 2008, Pub. L. No. 110-161, §*  
13 *564(2)(D), 121 Stat 1844, 2091 (2007) (codified at 8 U.S.C. § 1103 note) (“nothing in*  
14 *this paragraph shall require the Secretary of Homeland Security to install fencing,*  
15 *physical barriers, roads, lighting, cameras, and sensors in a particular location along an*  
16 *international border of the United States, if the Secretary determines that the use or*  
17 *placement of such resources is not the most appropriate means to achieve and maintain*  
18 *operational control over the international border at such location”). And, as explained in*  
19 *Defendants’ earlier briefing, whether to return certain noncitizens to Mexico pending*  
20 *removal proceedings is committed to DHS’s discretion by statute and by well-established*  
21 *precedent foreclosing judicial review of enforcement decisions. See Defs.’ Opp’n 31-33,*  
22 *ECF No. 24. With no identified statutory criteria, there is no law to apply, and Arizona’s*  
23 *claims fall beyond the APA’s limited waiver of sovereign immunity. See Or. Nat. Res.*  
24 *Council, 92 F.3d 798-99; see also id. at 798 n.11 (in order “[t]o have standing under APA*  
25 *§ 702, a claimant must show he ‘suffer[ed] legal wrong because of agency action . . .*  
26 *within the meaning of a relevant statute.’ . . . As plaintiffs ‘arbitrary and capricious’*  
27  
28

1 claims don't invoke any other statute, plaintiffs have no standing to raise them under  
2 section 702" (quoting 5 U.S.C. § 702)).<sup>4</sup>

3 Arizona's standalone APA claims are not cognizable, and the State's fifth and  
4 sixth claims for relief should be dismissed.

5 **IV. Arizona's Take Care Clause and Impoundment Control Act Claims Fail**

6 Arizona's seventh claim for relief asserts that Defendants have violated the Take  
7 Care Clause of the Constitution and the Impoundment Control Act of 1974 by failing to  
8 spend appropriated funds on construction of more border barrier. These allegations fail  
9 as a matter of law. Even assuming standing, the Take Care Clause does not provide a  
10 private right of action against the Executive, and the State may not circumvent Congress'  
11 prescribed mechanism for judicial review—the APA—by characterizing its claim as a  
12 constitutional violation. Similarly, only the Comptroller General of the United States  
13 may sue to enforce the provisions of the Impoundment Control Act—which protects  
14 Congress' power of the purse and not Arizona's interests in slowing population growth.  
15 Arizona's seventh claim for relief should be dismissed.

16 **a. The Take Care Clause does not create a cause of action.**

17 Article II, Section 3 of the Constitution provides that the President "shall take Care  
18 that the Laws be faithfully executed." Arizona alleges that Defendants have violated this  
19 Take Care Clause by refusing to spend moneys that Congress has appropriated. First  
20 Am. Compl. ¶¶ 179-81, ECF No. 13. These allegations fail to state a claim for at least  
21 three reasons. First, the Take Care Clause is not judicially enforceable against the  
22 Executive. Second, the state may not use the Take Care Clause to bypass the APA's  
23 limits on review. And third, DHS's decisions to close out existing projects and engage in  
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26 <sup>4</sup> And for these same reasons, even if there were such an animal as a freestanding APA  
27 claim, Arizona's claims would still fail because the siting of border infrastructure and the  
28 exercise of DHS's return to contiguous territory authority are committed to agency  
discretion by law. *See* 5 U.S.C. § 701(a)(2).

1 environmental planning for any future border infrastructure is not a “refus[al] to spend  
2 moneys that Congress has appropriated.”

3 For over 150 years, the Supreme Court has adhered to the rule that “the duty of the  
4 President in the exercise of the power to see that the laws are faithfully executed” is not  
5 judicially enforceable. *Mississippi v. Johnson*, 71 U.S. 475, 499 (1866); *accord id.* at  
6 501 (courts have “no jurisdiction of a bill to enjoin the President in the performance of  
7 his official duties”); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (holding that it  
8 would be improper for the courts to police the President’s duty to “take Care that the  
9 Laws be faithfully executed” (citation omitted)). As far as Defendants can tell, no court  
10 has ever held that the Take Care Clause provides a mechanism to obtain affirmative relief  
11 against the Executive. *Cf. Citizens for Resp. & Ethics in Wash. v. Trump*, 302 F. Supp.  
12 3d 127, 130 (D.D.C. 2018), *aff’d*, 924 F.3d 602 (D.C. Cir. 2019) (“Whether claims  
13 brought directly under the Take Care Clause are even justiciable is open to debate.”); *Am.*  
14 *Fed’n of Gov’t Employees, AFL-CIO v. Trump*, 318 F. Supp. 3d 370, 439 (D.D.C. 2018),  
15 *rev’d and vacated on other grounds*, 929 F.3d 748 (D.C. Cir. 2019) (“As an initial matter,  
16 it is not at all clear that a claim under the Take Care Clause presents a justiciable  
17 claim[...]). Courts confronted with the question have either failed to resolve it or else  
18 answered in the negative.

19 *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013), does not help the State. First  
20 Am. Compl. ¶ 179, ECF No. 13. There, in granting mandamus, the D.C. Circuit held that  
21 the Nuclear Regulatory Commission’s refusal to move ahead with the Department of  
22 Energy’s license application for a nuclear waste storage facility at Yucca Mountain in  
23 Nevada violated the Nuclear Waste Policy Act. *Aiken County*, 725 F.3d at 384-86. The  
24 court did not suggest that the Commission’s failure to act violated the Take Care Clause  
25 or that the Take Care Clause provides a cause of action. Rather, the court discussed how  
26 the Take Care Clause provides the President with “significant independent authority to  
27 assess the constitutionality of a statute” and so sometimes may permit “the President (and  
28 subordinate executive agencies supervised and directed by the President) [to] decline to

1 follow [a] statutory mandate or prohibition if the President concludes that it is  
2 unconstitutional.” *Id.* at 261. The government has not argued that appropriations by  
3 Congress for border infrastructure are unconstitutional, and so *Aiken County* has nothing  
4 to say here.

5 The Court should also reject Arizona’s Take Care Clause claim as an  
6 impermissible attempt to circumvent the limitations on APA review. Arizona’s claim  
7 challenges DHS’s spending decisions. *See* First Am. Compl. ¶¶ 81-82 (alleging DHS  
8 has not spent funds appropriated to the agency by the Consolidated Appropriations Act of  
9 2020 and Consolidated Appropriations Act of 2021); *see also* Defs.’ Opp’n Ex. 3 ECF  
10 No. 24-3 and Defs.’ Opp’n Ex. 4 ECF No. 24-4. Congress, through the APA, 5 U.S.C.  
11 §§ 701-706, has provided the mechanism for review of agency actions. The State may  
12 not circumvent APA review and its limitations (*e.g.*, the finality requirement, the zone-of-  
13 interests test, and the highly deferential “arbitrary and capricious” standard of review)  
14 under the guise of a constitutional claim. *See, e.g., Dalton v. Specter*, 511 U.S. 462, 472  
15 (1994) (rejecting the argument that “every action by the President, or by another  
16 executive official, in excess of his statutory authority is *ipso facto* in violation of the  
17 Constitution”). The Constitution is implicated if executive officers rely on it as an  
18 independent source of authority to act—which is not the case here—or if the officers rely  
19 on a statute that itself violates the Constitution, also not the case here. *Id.* at 473 & n.5.  
20 But claims alleging that “the President has exceeded his statutory authority are not  
21 ‘constitutional’ claims.” *Id.* at 473; *see* First Am. Compl. ¶ 180 (alleging Take Care  
22 Clause violation because Defendants are “refusing to proceed with the statutorily  
23 mandated program”). Were it otherwise, any plaintiff could bypass the APA—and,  
24 indeed, any statutory limits on review—by framing a claim against the government as a  
25 violation of the Take Care Clause.

26 Finally, DHS has violated no statute by reaching the decisions to prioritize closing  
27 out existing border barrier projects and to engage in environmental planning before  
28 building more border barrier. Defs.’ Opp’n Ex. 4, 4-5. Arizona, citing a letter sent by



1 several United States Senators, argues that the Consolidated Appropriations Acts of 2020  
2 and 2021 provided nearly three billion dollars for border barrier construction. First Am.  
3 Compl. ¶¶ 81-82. But the State offers no theory as to how DHS’s June 9, 2021 Border  
4 Wall Plan—which explains how those funds will be used—violates those laws or any  
5 others. *See* Defs.’ Opp’n Ex. 4. The Secretary of Homeland Security has broad  
6 discretion over the siting and construction of border infrastructure. *See* IIRIRA, Pub. L.  
7 No. 104–208, § 102(b), 110 Stat 3009, 554-55. DHS does not violate the appropriations  
8 acts or the Take Care Clause by using its appropriated funds to close out existing projects  
9 or to prepare environmental reviews to guide future exercises of that discretion.

10 In sum, the Take Care Clause is not judicially enforceable and, in any event,  
11 cannot be used to recast statutory claims against federal agencies as constitutional  
12 violations. Even if considered, Arizona’s allegations do not state a plausible claim for  
13 relief because DHS has violated no law by using appropriated funds to close out existing  
14 border barrier projects or by deciding to carry out environmental reviews before  
15 approving future projects. Arizona’s Take Care Clause claim should therefore be  
16 dismissed under Rule 12(b)(6).

17 **b. Arizona cannot state a claim under the Impoundment Control Act.**

18 Arizona alleges that the Impoundment Control Act of 1974, 2 U.S.C. §§ 681-88,  
19 “broadly prohibits the President from refusing to expend moneys that Congress has  
20 appropriated,” First Am. Compl. ¶ 182, and that Defendants have violated the Act  
21 through “non-expenditure of funds appropriated for border wall construction.” *Id.* ¶ 184.  
22 This claim fails for at least three reasons. First, the Impoundment Control Act confers no  
23 private right of action. Second, Arizona’s alleged injuries fall outside the zone of  
24 interests protected by the Act. And third, the delays in DHS’s obligation and expenditure  
25 of appropriated funds are programmatic delays, not impoundments.

26 The Impoundment Control Act does not create a private right of action. Just the  
27 opposite; 2 U.S.C. § 681 provides that “[n]othing contained in this Act, or in any  
28 amendments made by this Act, shall be construed as . . . affecting in any way the claims



1 or defenses of any party to litigation concerning any impoundment.” As one court  
2 explained, “[t]his section represents a rather blatant disclaimer of any Congressional  
3 design to provide for a private right of action.” *Pub. Citizen v. Stockman*, 528 F. Supp.  
4 824, 828 (D.D.C. 1981). The Act also empowers the Comptroller General “to bring a  
5 civil action in the United States District Court for the District of Columbia” to enforce the  
6 Act. 2 U.S.C. § 687. “It is a fundamental axiom of statutory construction that where a  
7 statute ‘limits a thing to be done in a particular mode, it includes the negative of any other  
8 mode.’” *Pub. Citizen*, 528 F. Supp. at 828 (quoting *Botany Worsted Mills v. United*  
9 *States*, 278 U.S. 282, 289 (1929)). Read together, Congress’ express disavowal of any  
10 private right of action—and express grant of authority to the Comptroller General—  
11 foreclose Arizona’s attempt to sue under the Act. *See id.* at 829-30 (discussing the  
12 legislative history of the Act); *Rogers v. United States*, 14 Cl. Ct. 39, 50 (1987), *aff’d*,  
13 861 F.2d 729 (Fed. Cir. 1988) (“Although the Impoundment Control Act does manifest  
14 congressional disapproval of unauthorized impoundments by the Executive Branch, an  
15 examination of the statute indicates that Congress did not intend to create a private cause  
16 of action in cases of unauthorized impoundments. Instead, Congress expressly provided  
17 that lawsuits based on the Impoundment Control Act must be brought by the Comptroller  
18 General in the United States District Court for the District of Columbia.”).

19 Even if Arizona could sue under the Impoundment Control Act, Arizona’s alleged  
20 injuries fall outside the Act’s zone of interests. The zone-of-interests test limits causes of  
21 action, requiring the plaintiff to show that his alleged injuries fall within the “zone of  
22 interests” Congress sought to protect in enacting a statute. *See Lexmark Int’l, Inc. v.*  
23 *Static Control Components, Inc.*, 572 U.S. 118, 129-30 (2014); *see also Bennett v. Spear*,  
24 520 U.S. 154, 175-76 (1997) (explaining that the zone-of-interests requirement must be  
25 applied “by reference to the particular provision of law upon which the plaintiff relies”).  
26 The Impoundment Control Act protects Congress’ power of the purse from Executive  
27 overreach. Nothing in the Act suggests an intent to protect Arizona from the alleged  
28 impacts of population growth.

1 Finally, the nonpartisan Government Accountability Office (GAO)—headed by  
2 the Comptroller General, “an agent of the Congress,” *Bowsher v. Synar*, 478 U.S. 714,  
3 731 (1986) (citation omitted)—recently concluded that DHS did not violate the  
4 Impoundment Control Act by halting border wall construction for more review. *See*  
5 GAO Decision Ex. 1 at 1; *see also Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201  
6 (D.C. Cir. 1984) (Scalia, J.) (stating that the GAO’s conclusion reflects the “expert” view  
7 of an independent arm of Congress on fiscal issues that the Court should “prudently  
8 consider”). As the GAO concluded, any delays in expenditures from stakeholder  
9 engagement and environmental review are programmatic delays, not impoundments.  
10 GAO Decision Ex. 1 at 11-12. Arizona argues that the GAO erred because “NEPA  
11 required Defendants to undertake NEPA analysis *before* taking irreversible action such as  
12 terminating contracts.” First Am. Compl. ¶ 184, ECF No. 13. (emphasis in original). But  
13 the only contracts terminated in Arizona were those funded through *DoD’s* Drug  
14 Interdiction and Counter-Drug Activities authority at 10 U.S.C. § 284. Defs.’ Opp’n Ex.  
15 1 ¶¶ 6-14, ECF No. 24-1. Those terminations have nothing to do with Congress’  
16 appropriations to *DHS*.

17 Arizona also argues that DHS has not “published any draft EAs or EIS[es] in the  
18 Federal Register, or notified the public of their intent to do so[,]” and so DHS’s “response  
19 to GAO is thus pretextual and cannot withstand scrutiny.” First Am. Compl. ¶ 185. This  
20 statement both misunderstands the publicly available DHS plan and the timeline for  
21 NEPA analysis. Under its plan, DHS intends to first use its border infrastructure  
22 appropriations to cover cost overruns and closeouts for existing projects, including those  
23 soon to be turned over by DoD. Defs.’ Opp’n Ex. 4, 3-5, ECF No. 24-4. For DHS’s  
24 work on DoD military construction funded barrier projects (10 U.S.C. § 2808), DHS will  
25 engage in standard environmental planning including taking certain actions consistent  
26 with NEPA. *Id.* at 4. Because NEPA was waived for the DoD counter-drug projects (10  
27 U.S.C. § 284), DHS has no NEPA obligation for those activities. Still, DHS intends to  
28 engage in standard environmental planning where appropriate. *Id.* at 4-5. DHS will use

1 any remaining fiscal year 2021 appropriations “to begin the sequential project planning  
 2 process for the next highest priority barrier segments,” which “will begin with  
 3 environmental planning that complies with NEPA.” *Id.* at 5; *see also* GAO Decision Ex.  
 4 1 at 13 (“the previous Secretary of Homeland Security exercised statutory authority to  
 5 waive laws such as NEPA . . . . [t]he current Secretary of Homeland Security will not  
 6 . . . . [t]herefore, prior to obligating 2021 barrier funds on contracts for new projects,  
 7 DHS must first comply with applicable laws.”). The public participation process for  
 8 future projects will begin at the scoping stage and will eventually include publication of  
 9 draft EAs or EISes.

10 Thus, Arizona lacks a cause of action to sue for any alleged violation of the  
 11 Impoundment Control Act, and the State’s alleged injuries fall outside the zone of  
 12 interests protected by the Act. The State has also failed to allege facts supporting a  
 13 plausible violation of the Act because, as the GAO found, the decision to not obligate  
 14 funds pending environmental planning is a programmatic delay, not an impoundment.  
 15 The Court should dismiss this claim under Rule 12(b)(6).

### CONCLUSION

17 Arizona has not met its burden to prove a concrete injury-in-fact fairly traceable to  
 18 the actions of Defendants. Even if Arizona had standing, none of its theories are  
 19 cognizable. This Court should dismiss the State’s First Amended Complaint.

20 Submitted this 1st day of October, 2021,

21 TODD KIM  
 22 Assistant Attorney General  
 23 U.S. Department of Justice  
 Environment & Natural Resources Division

24 /s/ Tyler M. Alexander  
 25 TYLER M. ALEXANDER  
 26 Trial Attorney  
 27 Natural Resources Section  
 150 M St. NE, Third Floor  
 28 Washington, D.C. 20002  
 (202) 598-3314

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tyler.alexander@usdoj.gov

*Attorneys for Defendants*