MARK BRNOVICH
ATTORNEY GENERAL
(Firm State Bar No. 14000)

Joseph A. Kanefield (No. 15838)
Brunn (Beau) W. Roysden III (No. 28698)
Drew C. Ensign (No. 25463)
Robert J. Makar (No. 33579)
2005 N. Central Ave
Phoenix, AZ 85004-1592
Phone: (602) 542-8958
Joe.Kanefield@azag.gov
Beau.Roysden@azag.gov
Drew.Ensign@azag.gov
Robert.Makar@azag.gov
Attorneys for Plaintiff State of Arizona

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

State of Arizona,

Plaintiff,

v.

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

Defendants.

No. 2:21-cv-00617-DWL

REPLY IN SUPPORT OF THE STATE'S MOTION FOR PRELIMINARY INJUNCTION (DOC. 17)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

INTRODUCTION

Defendants offer little substantive defense of their actions under NEPA. That is unsurprising: given the scope of the actions challenged here and their obvious and enormous environmental impacts—which dwarf prior instances where the Ninth Circuit has mandated preparation of full-blown EISs—Defendants' refusal to perform any NEPA analysis whatsoever is indefensible. As a result, Defendants have "raise[d] an avalanche of procedural objections in service of avoiding adjudication of the merits here," as the State anticipated. Doc. 17 ("PI Br.") at 18. But those near-ceaseless procedural arguments fare no better than their skeletal merits ones.

DHS's chief defense to the State's Border Barrier claim appears to be an Alice-in-Wonderland-level distortion of DHS's waiver authority that flirts with the surreal. Section 102(c) of the IIRIRA provides DHS authority to waive compliance with NEPA and other laws for a *single* and *explicit* purpose: "*to ensure expeditious construction* of the barriers and roads under this section." (emphasis added). But DHS asserts that it can invoke that authority to ensure construction is *permanently cancelled*. DHS can, in other words, read Congress's *explicit* limitation out of the statute completely and employ that authority *precisely opposite its sole permissible usage*.

Defendants' audacity is astounding. Unlike many APA suits, Defendants are not merely stretching statutes to achieve ends near or beyond the outermost definitional possibilities of statutory language. Instead, DHS is quite literally employing a statute giving it power for a singular purpose to accomplish the antithesis of that purpose. And not only that, but the discretion DHS has arrogated to itself is purportedly both unreviewable and essentially unlimited: notably nothing under DHS's interpretation would prevent it from invoking the same authority to waive *all* legal requirements for *tearing down all* barriers on the Mexican and Canadian border no matter what the resulting environmental consequences. That cannot be—and is not—the law.

By DHS's instant logic, a veterinarian could "implement" a dog owner's instructions to "take any steps necessary with respect to my dog's health to save its life"

by euthanizing the dog without ever attempting any actual medical care. That, after all, would be an action "with respect to the dog's health"—even if it is precisely opposite to the express and sole purpose of the pet owner's grant of authority. So it is here. DHS's pretense that it can invoke a single-purpose authority to effectuate the *antithetical outcome* warrants decisive judicial rejection. The act of using a statutory provision to accomplish its antithesis is not one of interpretation but rather of transgression.

Outside of this litigation, not even DHS appears to believe this belated interpretation. Just seven days ago DHS itself issued a press release announcing two key actions: "cancel[ling] the remaining border barrier contracts" in two sectors and announcing that it would therefore "then begin environmental planning and actions consistent with … NEPA." 3d Makar Decl. Ex. GG. DHS thus demonstrated publicly its own understanding that cancelling border barrier construction contracts results in environmental impacts triggering NEPA review, which are *not* waived. *See also id.* Exs. PP, QQ (incomplete wall sections cause independent environmental harm).

DHS also advances several standing arguments further seeking to avoid this Court's review. But those arguments ignore the Supreme Court's determination in *Massachusetts v. EPA* that States have special solicitude when challenging the violation of a Congressionally bestowed procedural right. Furthermore, DHS's arguments barely even acknowledge the State's actual contentions and evidence. And—despite the vehemence with which DHS asserts them—its arguments frequently contravene the determination of other courts that have already rejected equivalent standing and reviewability arguments.

In particular, DHS steadfastly refuses to address *Texas v. United States* whatsoever, even though it involves strikingly similar standing and reviewability arguments. __ F.Supp.3d __, 2021 WL 3683913, at *9-42 (S.D. Tex. 2021). While Judge Tipton's decision may not be a quick read, it is comprehensive, well-reasoned, and often directly applicable here. And Defendants have no apparent response—even though they specifically sought an extension and expansion of their page limit putatively to address that decision *inter alia*. *See* Doc. 22. Indeed, while Defendants specifically complained that

they need more time/space because the State had submitted "nearly 200 pages of additional materials," *id.*, a full 160 of those 191 pages were simply the *Texas* decision alone. *See* Doc. 21-1 Ex. FF. Having—quite correctly—underscored the importance of answering the *Texas* decision themselves here, Defendants' complete refusal to address *any of* Judge Tipton's reasoning is all the more striking. Indeed, it all-but concedes standing here.

DHS's standing arguments also frequently attack strawmen. DHS repeatedly suggests that the State is relying on an inducement-only theory of standing and largely ignores the States' evidence of direct environmental damage. And just as a dollar of injury is sufficient to establish Article III standing, so too is a single pound of litter left as a direct result of Defendants' challenged actions. Nor do Defendants offer any rebuttal to the State's demonstration that, on average, each migrant unlawfully crossing into/through Arizona leaves 6-8 pounds of trash along the way. Thus, to prevail on its standing defense, DHS would essentially need to be arguing that, absent the challenged actions, not one fewer immigrant would have crossed into Arizona leaving trash along the way.

That thoroughly implausible premise is a necessary predicate of DHS's standing arguments. For example, while DHS may quibble with how effective the additional border barriers might be, the proposition that no additional migrants would have been thwarted by those barriers is outlandish. Nor is the State relying solely on an inducement theory: the border barrier would have *directly* prevented such crossings. The State is *not* relying on border barriers as a purely psychological obstacle to illegal immigration, but rather principally as a *physical* and difficult-to-surmount *literal* wall. And Defendants' own statistics and Secretary Mayorkas's hot-mic-but-completely-ignored-here admissions that DHS has effectively lost control of the border powerfully show otherwise.

Defendants' standing arguments also train their fire on the wrong aspects of standing doctrine. While they focus heavily on injury-in-fact, the literal tons of trash are, for example, cognizable environmental injury-in-fact. Defendants' arguments thus actually attack traceability and redressability. But these arguments runs headlong into *Massachusetts*. As the Supreme Court explained in that case, traceability and redressability

are doubly relaxed where a State asserts procedural claims under a Congressional statute. Defendants' arguments cannot be reconciled with those legal mandates. Moreover, Defendants' traceability arguments are distinctly implausible. Contrary to their contentions, illegal crossing did not suddenly skyrocket after Inauguration to their highest levels in decades due to mere coincidences, "seasonal" variations (during the height of the summer no less), or any other fifteen-minute-lasting Psaki-isms. They rose because no one—least of all would-be immigrants entering unlawfully—had the slightest difficultly in perceiving Defendants' policies made unlawful entry into, and remaining unlawfully in, the United States far easier to accomplish.

As to the MPP, multiple courts have already concluded that the MPP revocation is reviewable and that states have standing under equivalent theories, including the Fifth Circuit explicitly, and the Supreme Court implicitly. And while DHS invites this Court to disagree with those courts in further service of its mission to avoid all judicial scrutiny of its actions, those courts' conclusions are plainly correct. Moreover, the Ninth Circuit expressly held that MPP's enactment was reviewable under the APA. *See generally Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir. 2020). There is no reason why a repeal of that rule is not equally reviewable. *See*, *e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-43 (1983).

Once Defendants' sprawling justiciability and reviewability arguments are properly rejected, the few remaining obstacles to a preliminary injunction are readily dispatched. Defendants' cursory defense of their admitted failures to prepare EISs or EAs violates NEPA and results in irreparable injury. And because environmental harms here are "sufficiently likely … the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 545 (1987). That is just so here.

ARGUMENT

I. This Court Can Review Arizona's NEPA Claims

Seeking to avoid judicial review of their NEPA violations, Defendants advance a

bevy of procedural arguments. They thus contend: (1) that the State lacks standing, Opp.11-21, (2) that IIRIRA shields their actions from NEPA and judicial review, Opp.23-28, and that (3) *all* of the State's claims are somehow unreviewable under the APA, Opp.29-40; 45-47. But what these arguments possess in bulk, they lack in merit. Defendants' compliance with NEPA is reviewable by this Court (and should fail under that review).

A. Arizona's Border Wall NEPA Claim Is Justiciable

1. Arizona's Border Wall Claim Is Not Barred By IIRIRA

Defendants' lead argument is Orwellian in its torturing of language: *i.e.*, they can rely on authority to "ensure expeditious construction of barriers" to ensure that NEPA is waived for the precise *opposite* purpose. That is statutory violation, not construction.

a. Cancelling Construction Does Fall Within Its Existing Waivers Or Its Waiver Authority To "Ensure Expeditious Construction"

Section 102 of IIRIRA gives DHS authority "to ensure expeditious construction of the barriers and roads under this section." Pub. L. 104-208, 110 Stat. 3009 (1996). Defendants correctly observe (at 24) that DHS has waived compliance with NEPA and other laws with respect to prior construction of barriers. But Defendants wrongly suggest that their *permanent cancellation* of construction falls within either the scope of these prior waivers, or within the DHS Secretary's waiver authority under Section 102.

The terms of DHS's waiver are clear: it applies to all actions "with respect to the construction of physical barriers and roads." *Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended*, 85 FR 14961-01 (Mar. 16, 2020). An illustrative list of examples is provided, including "accessing the project areas, creating and using staging areas, the conduct of earthwork, excavation, fill, and site preparation, and installation and upkeep of physical barriers, roads, [and] supporting elements…" *Id.* This language cannot be read, especially in connection with the illustrative list, as including the Defendants' decision to terminate construction of barriers. *See Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2488 (2021) ("The Government contends that the first sentence of § 361(a) gives the CDC broad authority …

But the second sentence informs the grant of authority by illustrating the kinds of measures that could be necessary.").

The remainder of the waiver's text provides further context explaining that the waiver cannot be stretched to encompass Defendants' decision to end all barrier construction. In the waiver, among other things, the Secretary explains that it is needed because there "is presently an acute and immediate need to construct physical barriers and roads in the vicinity of the border of the United States in order to prevent unlawful entries." 85 Fed. Reg. at 14961-01. But that "acute and immediate need to construct physical barriers" is not even conceivably served by permanently cancelling construction.

Even if the waiver's language could somehow encompass cancelling construction permanently, it then would be *ultra vires* since Congress conferred authority only to "ensure expeditious construction." That authority is not a blank check, but rather a one-way ratchet if NEPA compliance is to be waived.[1]

Defendants' mistake is encapsulated by their argument (at 24-25) that "Congress did not need to include a separate power to waive environmental reviews for decisions to stop construction because all stages of construction—including termination—are covered by the initial waiver." But termination is not a "stage of construction." Termination is the very *antithesis* of construction. If, for example, a home builder permanently stopped construction of a buyer's home midway through, sent the workers home, and removed all construction equipment, the buyer would not regard that permanent cancellation as merely a "stage of construction," and quite properly so.

Because cancelling construction does not fall within either the scope of the existing waivers or DHS's actual statutory authority, Defendants' waiver arguments fail.

---

[1] The context and history of this provision further confirm the absurdity of Defendants' instant interpretation. The Section creating DHS's waiver power is titled "Improvement of Barriers at Border" and it provides that, "in general," the Secretary is to "take such actions as may be necessary to install additional physical barriers and roads … to deter illegal crossings in areas of high illegal entry." 8 U.S.C. § 1103 note (a). The original IIRIRA statute from 1996 confirms the purpose is to "waive[] to the extent the Attorney General determines necessary to ensure expeditious construction" of border barriers. Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009 (1996).

b. DHS's Invocation Of Its Waiver Authority Is An Impermissible *Post Hoc* Justification

DHS's attempt to rely on its waiver authority also fails for an independent reason: it appears to be an impermissible *post hoc* rationalization. Federal "courts may not accept [the agency's] counsel's *post hoc* rationalizations for agency action." *State Farm*, 463 U.S. at 50. Courts therefore "evaluate an agency's contemporaneous explanation for its actions and not '[its] counsel's *post hoc* rationalizations.'" *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1351 (D.C. Cir. 2014) (citation omitted).

But DHS has not cited *any* contemporaneous evidence here that it actually relied on its waiver authority and existing waivers when it cancelled all construction without performing any NEPA analysis. Given the scope of that action—affecting the landscape of tens or hundreds of miles of border and tens of thousands of acres of land (or more)—the complete absence of any documentation that DHS actually relied upon its waivers at the time is telling. Its instant attempt to rely on its waiver authority here is thus impermissible *post hoc* rationalization that violates the APA.

Moreover, it appears that even *after* advancing this waiver argument in this Court, DHS does not actually believe it. Just last Friday, DHS announced it was "cancel[ling] the remaining border barrier contracts" in two sectors and therefore "will then begin environmental planning and actions consistent with … NEPA." 3d Makar Decl. Ex. GG. DHS thus demonstrated publicly its own understanding that cancelling border barrier construction contracts results in environmental impacts triggering NEPA review, which are *not* waived by IIRIRA and DHS's implementing waivers.

If DHS actually had confidence in its instant waiver arguments, why it is conducting NEPA analyses without any hint that such analyses are not legally required? DHS's prior and recent actions thus suggest that the instant waiver arguments are not even the agency's *post hoc* rationalizations. That is dispositive here, as "a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 576 U.S. 743, 758 (2015). Without any evidence that DHS actually invoked its waiver authority when cancelling border barrier construction, this Court should not allow it to rely

on that authority to sustain its actions.

c. IIRIRA Does Not Preclude Judicial Review Here

For the similar reasons, the jurisdictional bar in IIRIRA § 102(c) is not implicated here. Arizona's claim does not "aris[e] from" the waiver provision as Defendants contend (at 26). The jurisdictional bar only applies when "claims challenge either the merits of the waivers themselves, or the Secretary's authority to issue the waivers under section 102(c)." *In re Border Infrastructure Env't Litig.*, 915 F.3d 1213, 1221 (9th Cir. 2019) (jurisdictional bar does not impact challenge to "initial decision to build" rather than "later decision to issue a waiver").

Arizona challenges neither the merits of the waivers nor the Secretary's authority. To the extent that Defendants wish to take actions actually within the scope of their waivers/waiver authority, they may rely upon Section 102(c). But permanent termination of construction does no such thing (particularly as the Ninth Circuit has given Section 102(c) a narrow construction, *see id.*). In any event, because Defendants did not actually invoke their waiver authority contemporaneously, and thus cannot invoke it *post hoc* in a brief to preclude judicial review.

2. Arizona's Border Wall Claim Is Reviewable Under the APA

Defendants also argue (at 29) that Arizona's suit impermissibly challenges the President's policy directive on the wall directly, which is not reviewable under the APA. That is specious. The State is not challenging the Presidential Directive itself, but the *agency action* implementing it—which it is very much reviewable under the APA.

Defendants are correct that the Supreme Court has held that the President himself is not subject to the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992). But that does not immunize *agency* actions from review simply because they are authorized by the President. As the D.C. Circuit has explained, "*Franklin* is limited to those cases in which the President has final constitutional or statutory responsibility for the final step necessary for the agency action directly to affect the parties." *See Public Citizen v. U.S. Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993). Here, the President's action set

the stage and provided the impetus and explanation for the agency's action, but it had no actual legal effect by itself. If DHS had ignored the Presidential Directive, nothing would have happened and there would be nothing here to challenge.

Rather, it was *Defendants'* final agency action terminating wall construction that caused Arizona's harm. *See, e.g.*, FAC ¶¶ 78-79; 83; Makar Decl. Ex. C (agency announcements of alternative uses of border wall funds); *id.* Exs. II, JJ (illegal Yuma border crossings up 2,300% in August, year-over-year). As explained in the State's motion (at 26-27), these actions are final agency actions with substantial legal consequences. The fact that they implement an executive order does not immunize them from judicial review. *See*, *e.g.*, *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 770 (9th Cir. 2018).

In contrast, the cases cited by the Defendants address circumstances where the President did not simply issue a policy proclamation, but rather his decision was explicitly final under the relevant statute.[2] Here there is no equivalent statute vesting final (and hence unreviewable) authority in the President himself, rather than his subordinates. Indeed, the statutory waiver provision at issue here vests I decision-making authority with the DHS Secretary—not the President. *Supra* Section I.A.1.

3. Arizona Has Standing To Bring Its Border Wall Claim

To have standing, "a plaintiff must show that [it] is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Because the state

[2] In *Tulare Cnty. v. Bush*, 185 F. Supp. 2d 18, 28 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002), the court addressed a challenge to a Presidential proclamation establishing the Great Sequoia National Monument. But the Antiquities Act gave the President the final authority to designate federal lands as national monuments. *Id.* at 21 (citing 16 U.S.C. § 431). Those designations were thus not reviewable under the APA. *Id.* at 28-29. Likewise, in another case relied on by Defendants, *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., DHS*, 801 F. Supp. 2d 383, 401 (D. Md. 2011), *aff'd,* 698 F.3d 171 (4th Cir. 2012), the presence of a statute giving the President discretion was the key factor for shielding the case from review. *Id.*

asserts procedural injury, causation and redressability are "loosen[ed]," *id.* at 497, and the State merely "must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 969 (9th Cir. 2003).

Arizona's standing regarding the Construction Termination is straightforward: that termination has severe environmental impacts which should have been studied under NEPA. As a result of that NEPA violation, Arizona's concrete interests in its own environment have been injured. This is sufficient to establish injury-in-fact. *Id.* And, combined with the relaxation of causation and redressability inherent in NEPA, the State has standing. *See Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001) (observing that "a person living near the site for construction … has standing to challenge the agency's failure to prepare an EIS"). Moreover, even if the State would lack standing under ordinary standards, it is entitled to "special solicitude" that is dispositive here. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

a. Defendants' Termination Of Border Wall Construction Without Conducting Any Environmental Analysis Is Inflicting An Injury-In-Fact On The State

Defendants first argue (at 12-14) that the termination of wall construction does not inflict any injury on Arizona, respond specifically to two of Arizona's injuries stemming from the border wall termination: the injury stemming from additional migration; and the injury in local wildlife harmed by the presence of unplanned and arbitrary wall corridors.

Arizona alleged and provided evidence and support for a host of impacts directly resulting from migration at wall gaps. For example, as explained in Arizona's expert report, individuals crossing at the gaps in the border wall dump enormous quantities of trash along the way.[3] *See* Flood Report at 5. The more individuals that cross, the more trash that is

[3] Defendants, without meaningful support, acerbically denigrate the credentials of Arizona's expert as a mere "Forester from Montana." This blanket objection is applied without reference to any of Ms. Flood's specific conclusions or the evidence underlying those conclusions. Defendants also challenge the admissibility of the Expert Report as it is not in the administrative record. But while not in the administrative record, courts allow such evidence if it is necessary to determine whether an agency has adequately considered

dumped. *Id.* (citing Arizona Department of Environmental Quality report estimating border-crossers drop 6-8 pounds of trash on average along the way). The Cochise County Sheriff's Office also attested to the reality of trash dumping and other physical impacts at gaps in the border wall because of masses of individuals crossing. *See* Napier Decl. at 4-5. And, contrary to Defendants' results-oriented speculation, these impacts are directly attributable to the significant gaps left by Defendants, which allowing migrants to engage in dumping, cutting trails, cutting animal fences, and otherwise creating hazards. Dannels Decl. at 2; Chilton Decl. at 2-3. In its supplemental filing, the State also submitted evidence that the termination of wall construction has led to an increase in fentanyl coming into the state. *See* Rassas Decl. Each of these impacts standing alone would be sufficient to establish standing.[4] *See Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (holding that a state "has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.").

The government does not seriously contest any of these facts and does not point to any contrary evidence. Instead, the Defendants merely assert (at 14) that these impacts are "generic, amorphous, and speculative," citing only only *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) and *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997 (9th Cir. 2021). Those objections are actually traceability contentions, which fail as discussed below and for the reasons discussed by the *Texas* decision that Defendants

---

adverse environmental impacts. *See, e.g.*, *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 247 (5th Cir. 2006); *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 15 (2d Cir. 1997). Since the agency did not consider environmental impacts at all in its decision (it did not even prepare a FONSI), this Court has no other evidence with which to evaluate the environmental claims at issue. Moreover, this evidence also addresses the State's standing and *Winter* factors, which are never limited to the administrative record.

Defendants are of course free to disagree with Ms. Flood's environmental analyses if and when they finally discharge their duties under NEPA. But having abjectly refused to conduct any environmental analyses under NEPA analyses themselves, they are now casting stones from glass houses, and their instant contentions about environmental impacts are simply "*post hoc* rationalizations f[rom] agency action." *State Farm*, 463 U.S.

[4] The decision to terminate barrier construction also has injured Arizona in other ways, primarily by increasing migration and the associated growth impacts. *Infra* at 18.

conspicuously ignore. *See* 2021 WL 3683913, at *11 ("Therefore, although the Government's third-party causation concerns will need to be addressed, the Court reserves its analysis on those issues for discussion of the traceability of the States' alleged injuries."). But both cases are distinguishable in any event.

In *Arpaio*, the Plaintiff, an Arizona county sheriff, challenged DACA and DAPA and argued that he had standing based on what he alleged would be a resulting increase in migration and, in turn, alleged concomitant increase in crime. *Arpaio*, 797 F.3d at 21-22. Similarly, in *Whitewater Draw*, Plaintiffs brought a NEPA claim challenging DACA, seeking to connect DACA and other immigration policies to increased U.S. population and environmental impacts. *Whitewater Draw*, 5 F.4th at 1014-15. In both cases there was considerable attenuation between the 2012 DACA policy, subsequent immigration, and the alleged impacts. For example, in *Arpaio*, the court faulted the plaintiff for not "explain[ing] how increased migration would interact" with the many factors affecting crime rates. *Arpaio*, 797 F.3d at 22. In *Whitewater Draw*, the court noted the lack of a "concrete link" between the complained-of policies and population growth. *Whitewater Draw*, 5 F.4th at 1019. Neither case—unlike here—provided meaningful evidence of anything more than a passing relationship to the complained-of policy.

By contrast, here there is no need to extrapolate at all from construction termination to the impacts in question. The State is supported by specific evidence that migrants have been and are crossing—in incredible and unprecedented numbers—in the areas where Defendants have terminated border wall construction. *See, e.g.*, Napier Decl. at 2-4; 3d Makar Decl. Exs. OO. Unlike in *Arpaio* and *Whitewater Draw*, Arizona is not speculating on how a years-old program that offers deferred removal to existing resident parents and children affects not-eligible migrant decision-making. Arizona does not rely on "tortured" inferences about migrant's incentives or mindsets. Rather, by terminating the border wall, the government has eliminated an important *physical* barrier and no speculation is required to see that migrants are crossing in those areas where barrier construction was terminated.

That migrants inflict harm on the environment as they cross is no surprise; tens or

hundreds of thousands of people can hardly cross an area of wilderness without considerable detritus. And, "once the desert is disturbed, it can never be restored." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1124 (9th Cir. 2005). Moreover, Arizona has provided evidence that such is the case here. Arizona's interest in preventing trash dumping and other environmental damage is squarely within the scope of injuries that NEPA is designed to protect against. *See Citizens for Better Forestry*, 341 F.3d at 969-70. And Defendants' failure to follow NEPA's procedures has undermined that interest.

On Arizona's wildlife impacts, the government argues (at 13) that Arizona's allegations are too unsubstantiated and "generic." But Arizona only need show "a credible threat of harm." *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010). That standard is easily met. Arizona has described a credible theory by which wildlife could be injured by Defendants' actions. Furthermore, Cochise County's Sheriff confirms that the states of the wall construction sites are *worse* than they were before Defendants' actions. Dannels Decl. at 2. That this arbitrary situation might harm wildlife is a very reasonable inference. Indeed, Defendants' implicit contrary premise—that unprecedented levels of illegal migration not seen in decades across wilderness and private lands not able to accommodate it—will not affect wildlife *at all* is fanciful.

b. This Procedural Injury Is Both Traceable And Redressable Under Ninth Circuit Precedents and *Massachusetts v. EPA*

Defendants also argue that the States' injuries are not traceable to their construction termination, and that this Court cannot redress those injuries. That fails for two reasons.

First, Defendants never meaningfully grapple with *Massachusetts v. EPA*—which found state standing in circumstances *far, far* more attenuated than here. *Massachusetts* held that states are entitled to "special solicitude" in the standing analysis, particularly when asserting procedural injuries. 549 U.S. at 520. They therefore could "assert [a statutory procedural] right without meeting all the normal standards for redressability and immediacy.'" *Id.* at 498 (citation omitted).

Under that analysis, Massachusetts had standing to challenge EPA's decision not to

regulate greenhouse gases based on Massachusetts's interest in protecting its physical territory against potential sea level rise *over the next century*. *Id.* at 523-25. This was true although the EPA's (unknown) regulation of greenhouse gases in U.S. motor vehicles could be at most an "incremental step" (and a very small one) toward addressing global warming and could at most "slow the pace" of global warming. *Id.* at 524-26. If Massachusetts can challenge EPA's non-regulation of carbon dioxide in a manner that might modestly affect its coastline sometime *over the next century*, how can Arizona lack standing to challenge DHS's actions that are directly affecting its environment *today*, and for which causation/redressability is *considerably* less attenuated?

Second, Defendants fail to consider that this is a NEPA case. Arizona does not need to show that the Defendants would have made a different decision. Arizona "need only show that the decision[s] *could be influenced* by the environmental considerations that NEPA requires an agency to study." *Laub v. DOI*, 342 F.3d 1080, 1087 (9th Cir. 2003) (citation omitted) (emphasis added).

When these principles are considered, Defendants' objections to causation and redressability ring hollow. For example, Defendants argue there is no traceability because the cancelled portions of the border wall still leave gaps along Arizona's 370-mile border with Mexico. Opp.28. But under *Massachusetts*, Arizona does not have to show that compliance with NEPA would have fully remedied its injuries. It is sufficient to show that it would be an "incremental step" towards a remedy and that it would "slow the pace" of the harm. *Massachusetts*, 549 U.S. at 524-26. Moreover, the barriers that would otherwise have built would have provided meaningful relief. As the attached declaration from the Cochise County Sheriff's Office explains, the Nogales border wall gap is particularly troublesome and injurious it is located in a high-crossing area—which, policing the bordering county, it would know. Dannels Decl. at 3 (describing Nogales section as "of particular significance" and a "popular illegal crossing point"); 2d Lamb Decl. at 1-2 (identifying Nogales area as "of special concern").

As in the recent *Texas* case, "the links between the States' injuries and the

[challenged action] here are not perceptibly frailer than in Massachusetts and likely are firmer." 2021 WL 3683913, at *20. Furthermore, Arizona need not show that, if the additional miles of border wall had been built, they would have prevented all relevant impacts—only that the decision to terminate construction "could [have been] influenced by" environmental considerations. *Laub*, 342 F.3d at 1087. The same is true on redressability. It simply does not matter that, as Defendants allege (at 16) "gaps in the wall would persist." All that matters for standing is whether NEPA *could* have affected the government's decision-making. That is plainly true here.

Moreover, if Defendants had any answer to this on-point reasoning from the *Texas* court, they steadfastly refuse to provide it despite obtaining additional pages for that precise purpose. Defendants' silence is difficult to read as anything other than a concession that the *Texas* court's standing analysis is correct.

B. The State's MPP Claim Is Justiciable

Defendants also failed to conduct any NEPA analysis when terminating the MPP, despite its considerable environmental impacts. As with the border wall claim, Defendants attempt to shield this decision from judicial review. Those attempts fail too.

1. Arizona's MPP Claim Is Justiciable Under the APA

The Northern District of Texas and the Fifth Circuit have both expressly found that the MPP Termination is reviewable under the APA. *Texas v. Biden*, 10 F.4th 538, 549-52 (5th Cir. 2021). The Supreme Court implicitly agreed by denying Defendants' application for a stay pending appeal by a 6-3 vote. *Biden v. Texas*, No. 21A21, 2021 WL 3732667 (U.S. Aug. 24, 2021). For all of the reasons explained by those courts, Defendants' recycled reviewability arguments fail here as well despite how doggedly Defendants continue to press them—notwithstanding their uniform and complete failure in doing so to date. And while Defendants are correct that these decisions are not (yet) binding on this Court, their reasoning is persuasive and likely to be adopted by the Supreme Court formally if it ever even gets that far.

Moreover, the Ninth Circuit has already concluded that the MPP's enactment was

reviewable under the APA. *See generally Innovation Law Lab*, 951 F.3d 1073. If its enactment was reviewable, its revocation is equally reviewable. *See*, *e.g.*, *State Farm*, 463 U.S. at 42 (holding that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change" and reviewing proffered reasons).

2. Arizona Has Standing To Bring Its MPP Claim

Defendants argue that Arizona lacks standing to bring its MPP claim for two reasons. First, they argue that Arizona has not demonstrated any injury from the additional migration caused by the MPP. Second, they argue that Arizona has not demonstrated that any additional migration is traceable to the termination of the MPP. Both arguments fail.

a. The Termination of the MPP Inflicts a Legally Cognizable Injury-in-Fact on the State

First, Arizona has argued that the MPP termination encourages migration, including through the holes in border fencing, since migrants know that if they are caught, they can always claim asylum, and thereby likely avoid deportation or detention. *See, e.g.*, Makar Decl. Ex. G (explaining that many migrants come with the specific expectation that they will be able to abscond from their hearings). Second, the MPP termination itself directly places more residents in the United States than otherwise would be in the country. Beyond the 65,000 previous enrollees in the MPP, the decision to terminate the program will lead to thousands more migrants entering the country and likely remaining than would have otherwise. *See* Napier Decl. at 4; 3d Makar Decl. Ex. MM ("160,000 illegal immigrants have been released [by DHS] into the U.S. … since March"). All these additional individuals have numerous environmental impacts. For example, more migrants means increased air emissions, including emissions of greenhouse gases ("GHGs"). As the State's expert explained, migrants are responsible for emitting notably more GHG emissions in the U.S. than they would in their countries-of-origin. Flood Report at 6-7. Policies that admit more individuals into the country therefore have significant environmental impacts in the form of increased air emissions, including GHG emissions. Another impact is on growth; as the drafters of NEPA recognized, population growth has significant environmental consequences. NEPA "must be construed to include protection of the

quality of life for city residents. Noise, traffic, overburdened mass transportation systems, crime, congestion … all affect the urban 'environment.'" *Hanly v. Mitchell*, 460 F.2d 640, 647 (2d Cir. 1972).

Defendants, as with their objections to Arizona's injuries from the wall termination, try to discount these impacts as unduly speculative and amorphous. But there is nothing speculative about Arizona's claims. On the climate impacts, Arizona relies on the evidence in the Flood Report that migrants are likely to generate more emissions in the United States than they would in their home countries. Defendants do not offer *any* contrary evidence of their own. Furthermore, Arizona's argument makes intuitive sense; these increased emissions are, in large measure, the byproduct of economic improvement in the lives of the migrants. Many, for example, will able to afford cars and gasoline, to heat and cool their homes, and to purchase more products than they could previously in their origin countries. This conclusion is not amorphous at all; it is, in fact, almost identical to the conclusion found sufficient in *Massachusetts v. EPA*. 549 U.S. at 522 (finding standing from EPA's failure to regulate automobile greenhouse gas emissions).

Similarly, case law confirms the sufficiency of Arizona's growth impact allegations. As explained previously (at 33-34), the growth impacts here are far more significant than would be occasioned by any highway interchange or new runway that the Ninth Circuit have found reviewable. *See, e.g.*, *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975) (holding that Federal Highway Administration violated NEPA by failing to prepare EIS considering growth impacts prior to construction of freeway interchange near an agricultural area); *Barnes v. U.S. DOT*, 655 F.3d 1124, 1139 (9th Cir. 2011) (holding that, with respect to project adding new runway to airport, "the agencies must analyze the impacts of the increased demand attributable to the additional runway as growth-inducing effects"). Arizona has shown that the MPP is leading to thousands of new migrants, both indirectly through changed incentives and directly by releasing individuals into the country who otherwise would be removed. A highway interchange *may lead* to additional growth in an area. But adding additional people *directly is growth*. It is certain that there will be

environmental impacts from additional people—which is why NEPA itself focuses expressly on population growth as a key value.

Defendants also distinguish the Fifth Circuit's holding that Texas and Missouri had standing (at 19 n.14) by caricaturing the State's standing theories as relying on "'growth-inducing effects'" alone, and not driver's licenses. This is a distinction without a difference, since both Arizona's and Texas's impacts flow naturally from migrant presence in the State. But furthermore, the State's standing theories here include increased education, health care, and law enforcement expenditures and crime. PI Br. at 20-21. Those very same injuries were held to establish standing to challenge the MPP Termination in *Texas v. Biden*, 10 F.4th at 547 (holding states had standing, *inter alia*, due to increased educational expenditures, health care expenses, and increased "costs on the state's correctional apparatus"). Arizona's injuries here are indistinguishable.

b. These Injuries Are Traceable to Defendants' Actions in Terminating the MPP

Defendants also argue that these injuries are not traceable to the termination of the MPP. In making that argument, they again rely on *Arpaio* and *Whitewater Draw*, and assert that Arizona's MPP injury relies on an attenuated chain of reasoning involving speculation about the decisions of independent actors. Opp. 18 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013)). This argument fails for two main reasons.

First, Arizona's argument is a straightforward chain of causation, which is neither complex nor attenuated. Arizona argues that MPP termination directly and indirectly causes more migrants to enter and stay in the United States, including Arizona. Those individuals affect Arizona's environment. This is unlike the DACA cases; for example, Arizona's chain of causation does not require speculation on the mindset of potential migrants or on their behavior when they arrive in the United States. Rather, the MPP termination *directly* admits additional people into the U.S. who would, without the policy, be removed, and ensures that people who want to come to the country know they will be allowed to remain. And migrants here do not have to do anything unusual to have an

environmental effect—they, like all other people, impact the natural environmental by their crossing and their ordinary daily activities.

Second, the government's standing argument here again makes a mockery of *Massachusetts v. EPA*. Neither *Whitewater Draw* nor *Arpaio* involved a state plaintiff asserting their quasi-sovereign interests, but in *Massachusetts*, a state plaintiff sought to require the EPA to regulate greenhouse gas emissions in automobiles. In that case, several unknowns, including the actions of third parties, existed in the chain of causation between the agency action sought and the alleged impacts. Those unknowns included the content of any EPA regulations, the responses of potential regulated parties, and the responses of other nations, all of which would have a significant effect on whatever impact the EPA's regulations could have. And yet Massachusetts *still* had standing. It beggars belief that the causal chain here—involving Defendants' direct admission of migrants to the U.S. themselves—is too attenuated while Massachusetts' chain sufficed.

Unsurprisingly, the Fifth Circuit had little trouble rejecting equivalent contentions by Defendants, holding that the injury at issue there was "traceable to the Government's termination of MPP.… MPP's termination has caused an increase in unlawful immigration into Texas." *Texas*, 10 F.4th at 548. The same result should obtain here.

C. The State's Programmatic Claim Is Also Justiciable

1. Arizona's Programmatic Claim Is Reviewable Under The APA

Defendants rely on *Lujan v. Nat'l Wildlife Fed'n* and *SUWA* to assert that Arizona's Programmatic Claim cannot proceed. According to the government, Arizona's claim is the "sort of broad, programmatic challenge" that is not cognizable under the APA. Not so.

In *Lujan*, the Supreme Court rejected a challenge to BLM's so-called "land withdrawal review program;" as the Court explained, this program was not a "final agency action" within the meaning of § 704. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 (1990). *Lujan* makes clear that Plaintiffs must challenge agency action and cannot seek broad programmatic improvement to agencies under the APA. Similarly, in *SUWA*, the Supreme Court rejected a challenge to the BLM's alleged failure to manage off-road

vehicle use in certain wilderness areas. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("*SUWA*"). This challenge sought to hold the agency to account for "failure to act," but the Court concluded that the plaintiffs had failed to point to a "legally binding commitment" requiring defendants to act. *Id.* at 55, 72.

Neither of these cases bears any relationship to Arizona's challenge. Unlike in *Lujan*, here the challenged program actually exists. Defendants repeatedly refer to the program as one that is of Arizona's "own making," Opp. 43, but this is not the case. Rather, the elements alleged by the Plaintiffs and supported with evidence point to the existence of a discrete programmatic action, which accordingly is subject to NEPA. *See* 40 C.F.R. § 1508.1(q)(3)(iii) (defining "Major Federal Action" as tending to include the "Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources").

Indeed, this Court's recent opinion in *Center for Biological Diversity v. Mayorkas* confirms that Arizona's challenge here is cognizable. As that court explained, "the requirement of an environmental impact statement is fact based rather than guided by superficial program labels." *See Mayorkas*, 2021 WL 3726502, at *6 (D. Ariz. Aug. 23, 2021). Furthermore, that decision acknowledges the plain truth that, for decades, "there has been major federal action in the form of border-enforcement activity along a 50-mile-wide border corridor in four states, including Arizona." *Id.* at *7. The State has standing to challenge Defendants' failure to prepare/supplement a programmatic EIS here for all of the same reasons as in *Center for Biological Diversity*.

This ongoing action, of course, should be subject to NEPA and should be analyzed programmatically—as the government recognized when it prepared a programmatic EIS in 1994 and a supplemental programmatic EIS in 2001, but then abruptly rescinded those in 2018. And Defendants' instant snark aside, how exactly did they prepare programmatic EISs analyzing programs that purportedly exist only as a "figment of the State's imagination?" Opp.20. Their demonstrated ability to prepare programmatic EISs for that program makes plain that Defendants' enforcement/non-enforcement of border controls at

the southern border is, indeed, a program under NEPA that actually exists. And if Defendants' true objection is only to the State's defined term terminology, the State will happily accept Defendants' own proffered defined terms from their 1994/2001 Programmatic EISs if that will finally secure their belated compliance with NEPA.

2. The Components Of The Population Augmentation Program Are Individually Reviewable

Alternatively, even if the Population Augmentation Program is not reviewable as an overall program, its individual components are. Defendants initially attempt (at 46-47) to invoke issue preclusion as to the Interim Guidance, focusing on the State not prevailing on whether that program was "committed to agency discretion." But that decision only one component of the alleged Program. Furthermore, that decision is not final, no judgment has been issued, and it is on appellate review, and this Court therefore need not apply preclusion. *See* §4432 Finality—Traditional Requirement, 18A Fed. Prac. & Proc. Juris. § 4432 (3d ed.) ("[P]reclusion would be folly, as to decisions that are merely tentative and that contemplate further proceedings.") (citing cases).

Moreover, Defendants strikingly fail to mention that they too lost this issue in the *Texas* decision. *See Texas*, 2021 WL 3683913, at *26-36. Thus both sides come to this Court having lost their respective reviewability arguments in non-precedential cases with appeals currently ongoing. In that posture, application of issue preclusion is distinctly inequitable. And Defendants should have acknowledged their own loss on that precise issue when seeking to apply estoppel.

More generally, Defendants recycle (at 31-33) their arguments that this entire field is filled with enforcement decisions that are completely discretionary and immune from judicial review. But the committed-to-agency-discretion exception applies only in the "*rare circumstances* where the relevant statute 'is drawn so that a court would have *no meaningful standard* against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (emphasis added)).

This Court should therefore reject those committed-to-agency-discretion arguments for the same reason that the Northern and Southern Districts of Texas and the Fifth Circuits have. *See Texas*, 10 F.4th at 550; *Texas v. United States*, No. 6:21-CV-00016, 2021 WL 3683913, at *26 (S.D. Tex. Aug. 19, 2021); *State v. Biden*, No. 2:21-CV-067-Z, 2021 WL 3603341, at *16 (N.D. Tex. Aug. 13, 2021). In particular, these cases do not involve challenges to individual enforcement decisions, but instead sweeping policy enactments that *are* subject to review. *See*, *e.g.*, *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (explaining that "an agency's adoption of a general enforcement policy is subject to review," thereby distinguishing *Heckler's* presumption of unreviewability as applying only to individual cases of non-enforcement); *see also ILWU v. Meese*, 891 F.2d 1374, 1378 n.2 (9th Cir. 1989) (describing *Heckler* as applying to "an agency's refusal to prosecute or enforce a statute in a *specific case*" (emphasis added)).

II. Arizona Is Likely to Succeed On The Merits

Once Defendants' extensive justiciability and waiver arguments are rejected, the remainder of their opposition can be readily dispatched. The challenged actions are "major federal actions" under any conceivable understanding of that term, the environmental impacts here dwarf those previously held to require preparation of an EIS, and Defendants offer no other defensible reason for their admitted failure to prepare any NEPA analyses.

A. Defendants Actions Are Major Federal Actions

Each of the challenged actions is a "major federal action" subject to NEPA. CEQ regulations define a "[m]ajor [f]ederal action" as "an activity or decision subject to Federal control and responsibility." See 40 C.F.R. § 1508.1(q). This "may include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies." *Id.* Major federal actions include "formal documents establishing an agency's policies which will result in or substantially alter agency programs." *Id.*

Defendants do not seriously contest that most of the challenged actions fit in these categories. However, Defendants do argue that the MPP is not a "major federal action"

because it is an enforcement decision that falls outside NEPA's scope. Opp.37-40 (citing 40 C.F.R. § 1508.1(q)(1)(iv)).

This argument simply recapitulates the arguments above in a different form and fails for the same reasons. As the Fifth Circuit stated: "the termination of MPP was simply not a non-enforcement decision. MPP was a government program—replete with rules procedures and dedicated infrastructure." *Texas,* 10 F.4th at 552. The instances where courts have found NEPA challenges precluded involve enforcement decisions of a temporary or singular nature, not broad, permanent programs with rules and infrastructure like the MPP termination.[5]

A broad, programmatic policy like MPP and the memorandum terminating it are exactly the sort of major federal actions that NEPA targets.[6] This is "a government program that creates rules and procedures for *entire classes* of aliens." *Id.* at 550. Nothing in the statute or the regulations implementing it evidenced an intent to exclude such major federal actions from the ambit of NEPA.

B. Defendants' Actions Have Significant Environmental Effects

As the Ninth Circuit has held: "an EIS must be prepared if 'substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor.'" *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005) (cleaned up); *accord High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 639 (9th Cir. 2004). Given the litany of impacts discussed previously and above, there is

---

[5] *See, e.g.*, *Nw. Ctr. for Alternatives to Pesticides v. DHS*, No. 3:20-CV-01816-IM, 2021 WL 3374968, at *8 (D. Or. Aug. 3, 2021) ("Sending additional law enforcement officers to address criminal activity on a temporary basis" is enforcement action); *Tucson Rod & Gun Club v. McGee*, 25 F. Supp. 2d 1025, 1028 (D. Ariz. 1998) ("order temporarily suspending all shooting and archery activities" was enforcement action); *Calipatria Land Co. v. Lujan*, 793 F. Supp. 241, 245 (S.D. Cal. 1990) ("enforcement itself of [extant] regulations at this time is not a major federal action").

[6] Defendants point out that if the termination of the MPP should have been subject to NEPA, so should the imposition of the MPP. Opp.39. Even if this is true, it is irrelevant to Arizona's challenge. The Supreme Court has squarely rejected this "two wrongs make a right" theory of the APA. *See DHS v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1909 (2020) ("The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted.").

little question that these actions raise the requisite "substantial questions" about whether they "may cause" degradation of "some human environmental factor."

1. Termination of Border Wall Construction Has A Significant Environmental Effect

The termination of the border wall will have significant environmental effects, including trash dumping, wilderness trampling, effects on endangered species, and other impact from the number of additional migrants funneled into these crossings, as detailed above. Indeed, environmental groups have long complained that the construction (and, by extension, termination) of the Border Wall would have significant environmental impacts beyond those listed. *See*, *e.g.*, Makar Decl. Ex. Y.

Defendants do not meaningfully contest whether the impacts from terminating the border wall are significant enough to require NEPA analysis. Instead, against these substantial impacts, Defendants argue that their termination "does not alter the status quo" and that, as a result, NEPA does not apply. Opp.28 (citing *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343-44 (9th Cir. 1995)).

Defendants' conception of the "status quo" cannot withstand scrutiny. Defendants do not—and could not—really contest that, in terminating wall contracts and in finally determining not to build any additional wall construction, they have taken an agency action within the ambit of the APA and a major federal action within the ambit of NEPA. The reason this action was taken was because the "status quo"—*i.e.*, the state of the world before the challenged actions were taken—was private contractors performing construction under executed contracts. Absent Defendants taking action, those contracts would have been performed and the relevant border barriers would have been completed. Construction was essentially on auto-pilot from the federal government's perspective.

That all rapidly changed when President Biden took office and acted affirmatively to *alter* the status quo, by *inter alia*: terminating contracts, removing construction equipment, paying termination costs, designating alternative uses for funds, planning remediation projects, and taking a host of other subsidiary actions to effectuate their

decision. If the government were simply maintaining the status quo, none of this would have been necessary. Indeed, Defendants' position rightly should be met with incredulity: is DHS's/DOJ's position *really* that President Biden actually preserved the status quo vis-à-vis border barriers that he inherited from President Trump?

This situation is unlike the cases cited by Defendants. For example, in *National Wildlife Fed'n*, the Ninth Circuit concluded that NEPA did not apply to the transfer of a plot of land from one holder to another where the two holders use the land for the same purpose. 45 F.3d at 1343. Similarly, in another case cited by Defendants, *Douglas Cty. v. Babbitt*, the court determined that no EIS was necessary when the Secretary of the Interior designated certain federal land as a critical habitat for an endangered species. In both cases, the government had effectively done nothing but lock in the actual status quo as it existed and *would have existed* had the government not taken the agency action. Here, the government has executed a 180-degree turn of federal policy. That the government believes that the consequences benefit the environment does not excuse NEPA compliance. *See* 40 C.F.R. § 1508.1(g)(1) ("Effects may also include those resulting from actions that may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.").

The third in-circuit case cited by Defendants, *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1115 (9th Cir. 2002), actually refutes Defendants' arguments. In *Kootenani Tribe*, the Ninth Circuit held that the environmental status quo had *not* been preserved when the Forest Service promulgated the so-called "Roadless Rule," which banned roadbuilding in parts of national forests. *Id.* at 1105-06. There, the agency's decision arguably only preserved the existing status quo. But the Ninth Circuit recognized that the action "alter[ed] how the Forest Service manages inventoried roadless areas" and this change in regulatory posture alone was sufficient to require NEPA analysis. *Id.*

Defendants' actions represent a complete change in policy, and do not "preserve" anything. Indeed, it is hard to square the "status quo" argument with Defendants' urgency to enact their decision, which was practically one of their first actions after taking office.

Clearly this was necessary because Defendants understood that the construction of the border wall was the status quo, and they sought to change it. This change, however, failed to comply with NEPA.

2. The MPP and Population Augmentation Program Have Significant Environmental Impacts

The MPP termination and Population Augmentation Program (both as a whole and as to each individual component) also have significant environmental impacts. They both directly result in growth effects far more direct than those in *City of Davis* and *Barnes*, which the Ninth Circuit held must be analyzed under NEPA. PI Br.33; *see also See* 3d Makar Decl. Exs. LL, NN (in one mass migration episode 13,000 Haitian migrants remain in the U.S. while a couple thousand were flown back to Haiti by DHS). And that population growth causes all manner of environmental impacts. Defendants never deny, for example, that migrants will typically have greater greenhouse gas emissions in the United States than they had in their countries of origin, thereby causing environmental impacts. They similarly do not deny that additional population will result in construction of additional houses, schools, hospitals, roads, etc., all with their own environmental impacts. *See* PI Br.16. And while they (at 14) call those impacts "amorphous and speculative" for standing purposes, they are far more concrete, certain, and imminent than those in *Massachusetts v. EPA*. *Supra* at 13. In any event, (1) Defendants do not seem to contest that if the State has standing, these impacts would need to be studied under NEPA and (2) the State, as a NEPA plaintiff, need not prove "that the challenged federal project will have particular environmental effects, … [since that] would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake." *Citizens for Better Forestry*, 341 F.3d at 972; *accord* 3d Makar Decl. Ex. KK at *01026 (CPB previously asserted, regarding a small section of border fencing that "Indirect beneficial impacts ... are expected as a result of decreased illegal traffic.")

III. The Remaining Requirements For Injunctive Relief Are Satisfied Here

Defendants argue (at 47) that Arizona merely "regurgitates" and "makes no attempt"

to satisfy the *Winter* factors. Not so, and has, in fact, has amply satisfied both the irreparable harm element and the balance of harms.

On irreparable harm, Defendants merely cross reference their argument on injury-in-fact, discussed *supra*. But this ignores the actual arguments Arizona made on irreparable injury in its Motion as well as the substance of the injuries which are at stake. *See* PI Br.38. For example, Arizona explained that the environmental injury is here is particularly acute given the delicate nature of desert ecosystems. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1124 (9th Cir. 2005). *Save Our Sonoran* expressly balanced the same *Winter* equitable factors, observing that "when environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Id.* at 1125 (cleaned up). And that court concluded that the irreparable harm requirement was satisfied where the disturbance consisted merely of building "794 single-family homes" on 608 acres of undeveloped land, filling in "7.5 acres of natural waterways." *Id.* at 1118. Here there are literally tens of thousands—if not more—people crossing the Arizona desert, leaving "trash and other waste," "cut[ting] unauthorized trails," "damag[ing] plants and habitats," inhibiting the ability of local ranchers to graze their cattle properly, and a huge variety of impacts. Dannels Decl. at 2; Chilton Decl. at 2; Napier Decl. at 4. These injuries are typical—or worse—than the type of injuries which regularly rise to NEPA injunctions in the Ninth Circuit.[7] And Defendants only "answer" to *Save our Sonoran* and its careful balancing of the harms/public interest is to ignore that case entirely.

On the balance of the equities, Defendants make two main arguments. First, they argue that issuance of injunctions here would "interfer[e] with core executive and

[7] *See, e.g.*, *Env't Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 992 (9th Cir. 2020) (injunction appropriate under NEPA to force preparation of EIS for removal of fire damaged trees near roads); *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 767 (9th Cir. 2014) (enjoining timber sale to prevent threatened irreparable injury to elk habitat); *S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (NEPA preliminary injunction on mining project necessary to prevent irreparable harm from "inadequate study of the serious effects of processing refractory ore and exhausting scarce water resources").

legislative prerogatives." Opp.48. As Arizona explained in its Motion, however, the relief sought by Arizona can be tailored to preserve those prerogatives as much as possible while still requiring Defendants to comply with their statutory obligations under NEPA. Motion at 39-40. This *furthers* the public interest by advancing the twin aims of NEPA—ensuring that agencies consider environmental impact and advancing public participation. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 302 (D.C. Cir. 2013) (*citing Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983)) (cleaned up). Furthermore, Defendants' objections about interference with these prerogatives or the United States' relationship with Mexico rings somewhat empty as they acknowledge that the Fifth Circuit has already refused to stay (in the face of these same arguments) a very similar injunction to that requested by Arizona here. *See Texas v. Biden*, 10 F.4th at 559 ("The public interest [is] in having governmental agencies abide by the federal laws that govern their existence and operations."). Whatever additional interference would be required to ensure Defendants comply with their statutory obligations would be minimal.

Defendants' arguments are also belied by their implicit acknowledgments—outside their briefing here—that their actions in terminating construction have themselves caused environmental harm. As discussed in Arizona's supplemental filing, DHS announced in July that it had approved four projects in the Rio Grande Valley, San Diego, and El Centro sectors of the Southern Border. *See* 2d Makar Decl. Ex. A. These major environmental remediation projects were necessary because of the Defendants' action in terminating ongoing wall building and show the need for NEPA. The Defendants' response merely characterizes this as "exaggerated" but essentially admits that the unfinished and arbitrarily terminated nature of the border wall project created several problems, including locals without power, dangerous drainage situations, and risks to wildlife. Opp. Exhibit 1 at 6-7.

Similarly, the Ninth Circuit held that injunctive relief was warranted in *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630 (9th Cir. 2004). That case involved granting of a *limited* number of permits for commercial packstopping operations, which the Ninth Circuit acknowledged meant that "environmental injury to the wilderness areas [was]

'likely.'" *Id.* at 642. In doing so, it held that both the balance of harms and public interest favored injunctive relief. *Id.*

The amount of trampling upon wilderness areas here exceeds—likely by *multiple orders of magnitude*—the limited amounts at issue in *High Sierra*. No reasonable balancing of harms/public interest could support an injunction in *High Sierra* but preclude one here.

IV. The Relief Sought By The State Is Appropriate And Warranted

Defendants also partially contest the specific relief sought by the State. Its objections are not well-taken.

A. Requiring Defendants To Prepare An EIS Is Appropriate Relief

As the State previously explained, "[c]ourts have routinely recognized the appropriateness of injunctive relief requiring the preparation or completion of an EIS or SEIS." PI at 39 (quoting *Ross v. Federal Highway Admin.*, 162 F.3d 1046, 1054 (10th Cir. 1998)). Defendants do not appear to raise any argument that such relief is unwarranted if a preliminary injunctive relief issues. Such relief should therefore be part of any preliminary injunction issued by this Court.

B. Defendants Should Be Enjoined From Taking Any Other Irreversible Actions Or Making Other Irretrievable Commitments

Defendants also do not appear to contest that an appropriate component of preliminary relief would be a prohibitory injunction precluding Defendants "from taking any actions that irretrievably commit themselves to particular courses of action before the required EISs are prepared." PI Br.40. In particular, this Court should enjoin Defendants from (1) further permanently cancelling any construction contracts and (2) taking any actions that would prejudice the full range of options to be analyzed under NEPA.

C. The State Seeks Neither Specific Performance Nor Mandatory Relief

Defendants also argue (at 1) that the State "seeks mandatory preliminary relief" and (at 17) "specific performance" of construction contracts. Defendants are mistaken.

The State seeks only *judicial invalidation* of Defendants' recission of construction contracts. That is classic prohibitory relief. When, for example, the federal government

awards leases to exploit federal lands in violation of NEPA, courts do not hesitate to invalidate those leases without *ever* considering such relief mandatory in nature. *See*, *e.g.*, *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006) (leases issued in violation of NEPA "must be undone").

It is true that the effect of invalidating the contract rescissions would have the effect of resuming construction of border barriers (assuming the contractors were still willing and able to perform, and that Defendants have not taken affirmative actions to obstruct that construction). But restoration of the prior legal regime is the default remedy any time the subsequent regime is found unlawful, and that does not render such relief mandatory. And such relief is no more mandatory than "mandating" the Interior Department rescind leases issued in violation of NEPA.

D. The State's Request For A Preliminary Injunction Regarding The MPP Termination Is Not Moot

Defendants also appear to suggest at (31) that the State's request for a preliminary injunction against the MPP Termination is moot because a Texas district court has preliminarily enjoined it. That is incorrect for three reasons. *First*, that case is still ongoing and that *preliminary* injunction could dissolve in an instant. There is no reason that Arizona should be at the mercy of the vicissitudes of Texas's litigation. *Second*, Arizona has no ability to enforce *Texas*'s injunction, and Texas has no institutional interest in ensuring compliance with its preliminary injunction in the Arizona sector. Because a preliminary injunction confers upon the State effective relief it otherwise lacks, there is no mootness. *See Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (mootness exists "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (cleaned up)). *Third*, the *Texas* PI does not require Defendants to comply with NEPA by preparing an EIS; the State's requested relief would, and properly so.

CONCLUSION

The State's motion for a preliminary injunction should be granted.

RESPECTFULLY SUBMITTED this 15th day of October, 2021.

MARK BRNOVICH
ATTORNEY GENERAL

By: /s/ Drew C. Ensign
Joseph A. Kanefield (No. 15838)
Brunn W. Roysden III (No. 28698)
Drew C. Ensign (No. 25463)
Robert J. Makar (No. 33579)
Assistant Attorneys General
Attorneys for Plaintiff State of Arizona

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all parties are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

s/ Drew C. Ensign
Attorney for the State of Arizona