TODD KIM
Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division

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

Attorneys for Defendants

THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
PHOENIX DIVISION

State of Arizona, Plaintiff, v. Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security, *et al.,* Defendants.	Case No. 2:21-cv-00617-PHX-DWL **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT (RULES 12(b)(1), (6))**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Arizona argues that decisions by the Departments of Defense and Homeland Security to terminate border wall projects and end the Migrant Protection Protocols (MPP)[1] have increased migration and harmed the state. To have standing, the State must show that the challenged decisions *caused* "the alleged influx in immigration" and were not merely part of the "'myriad economic, social, and political realities' that might influence an alien's decision to 'risk[ ] life and limb' to come to the United States." *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1015 (9th Cir. 2021) (quoting *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015)). Arizona falls well short of that mark, and the Court should dismiss the First Amended Complaint under Rule 12(b)(1).

Even if it had standing, Arizona's claims fail. The National Environmental Policy Act (NEPA) does not apply to a decision to terminate border wall projects, Defs.' Opp'n to Pl.'s Mot. for Prelim. Inj. 22-31, ECF No. 24 ("Defs.' Opp'n"), or to enforcement decisions, *id.* at 31-39, and Arizona's "programmatic" claim is foreclosed by binding Supreme Court and Ninth Circuit precedent, *id.* at 40-47. Likewise, the State's non-NEPA claims fail absent substantive guideposts for review and because the challenged decisions are committed to agency discretion by law. And *Dalton v. Specter* bars Arizona's attempts to recast alleged statutory violations as constitutional claims. Rule 12(b)(6) thus also demands dismissal of the First Amended Complaint.

---

[1] The United States District Court for the Northern District of Texas issued a nationwide, permanent injunction ordering the Department of Homeland Security (DHS) to "enforce and implement MPP in good faith." *Texas v. Biden*, ___ F. Supp. 3d ___, 2021 WL 3603341, at *26-27 (N.D. Tex. Aug. 13, 2021). DHS recently published a guidance document explaining how the agency would implement the Court's order. DHS Under Secretary Robert Silvers, Guidance regarding the Court-Ordered Reimplementation of the Migrant Protection Protocols, December 2, 2021, available at https://www.dhs.gov/sites/default/files/publications/21_1202_plcy_mpp-policy-guidance_508.pdf. MPP thus currently exists as a court-ordered program, not as Defendants' policy or program.

ARGUMENT

I. Arizona Has Not Met Its Standing Burden

Defendants' opening brief explained how the Ninth Circuit's decision in *Whitewater Draw* and the D.C. Circuit's opinion in *Arpaio* impose a heavy burden on litigants alleging increased-migration injuries. Arizona's attempts to distinguish those cases are unavailing, Pl.'s Resp. to Defs.' Mot. to Dismiss 3, ECF No. 33 ("Pl.'s Opp'n"), as is its argument that it need not prove causation following *Massachusetts v. EPA*, Pl.'s Opp'n 4-5.

In both *Arpaio* and *Whitewater Draw*, the plaintiffs advanced similar theories of standing to Arizona's: that a change in immigration policy (there, deferred action and other policies) would increase immigration and have unwanted effects on the relevant localities (*e.g.*, alleged increases in crime in *Arpaio* or detrimental environmental impacts in *Whitewater Draw*). *See Whitewater Draw*, 5 F.4th at 1014 (citing *Arpaio*, 797 F.3d at 14). In both cases, the Court of Appeals rejected the claims, holding that the plaintiffs had failed to establish standing because they had not sufficiently alleged a causal connection between the policy change and increased migration. *See Arpaio*, 797 F.3d at 20 (plaintiff failed to show "any legitimate causal connection" between challenged policies and migration); *Whitewater Draw,* 5 F.4th at 1014-15 (the claims "lack[ed] sufficient factual support" to show that the challenged policies "caused illegal immigration and w[ere] not merely one of the 'myriad economic, social, and political realities' that might influence an alien's decision to 'risk[] life and limb' to come to the United States.") As the D.C. Circuit explained in *Arpaio*, a plaintiff's "reliance on the anticipated action of unrelated third parties makes it considerably harder to show the causation required to support standing." 797 F.3d at 21; *accord id.* at 21 (the Sheriff's theory "suffers from the logical fallacy *post hoc ergo propter hoc* . . . . [j]ust as we do not infer that the rooster's crow triggers the sunrise, we cannot infer based on chronology alone that DACA triggered the migrations that occurred two years later."). And the *Whitewater Draw* plaintiffs' reliance on NEPA claims did not cure the defect;

"[a]lthough causation and redressability requirements are relaxed when a plaintiff has established injury in fact under NEPA, the causation requirement remains implicated 'where the concern is that an injury caused by a third party is too tenuously connected to the acts of the defendant.'" 5 F.4th at 1015 (citation omitted).

There is no meaningful distinction between Arizona's theory and those rejected in *Arpaio* or *Whitewater Draw*. In its response, Arizona leans on its declarations as proof that large numbers of migrants are entering the state through unfenced areas. Pl's. Opp'n 3-4. But this misses the point.

Even accepting Arizona's amorphous and speculative statements that migration leads to litter and population increases,[2] *see* Defs.' Opp'n 13-14, Arizona alleges no facts showing Defendants' actions have *caused* migration. *Arpaio*, 797 F.3d at 20. Indeed, the First Amended Complaint concedes that "most of the migrants do not necessarily understand the intricacies of U.S. border policy[.]" First Am. Compl. for Declaratory & Injunctive Relief ¶ 68, ECF No. 13 ("First Am. Compl."). The State's conclusory declarations do not help.[3] *See* Pl.'s Opp'n 3-4. Like the inadequate declaration in *Whitewater Draw*, the State's declarants mistake correlation for causation and fail to link

---

[2] Arizona also argues that the Court must accept its conclusory wildlife allegations as true at 12(b). Pl's Opp'n at 4. But the State again declines to explain how *preserving* remaining wildlife corridors by ceasing wall construction will injure its interests in wildlife. The Court need not credit this implausible and unsupported conclusion. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (courts are not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." (citation omitted)).

[3] The Court should not consider the new declarations submitted with Arizona's Reply in Support of its Motion for Preliminary Injunction. *See, e.g.*, *Sunburst Minerals, LLC v. Emerald Copper Corp.*, 300 F. Supp. 3d 1056, 1060 (D. Ariz. 2018) (citing cases showing "the rule against introducing new facts on reply"); *Larson v. United Natural Foods W., Inc.*, No. CV–10–185–PHX–DGC, 2010 WL 5297220, at *2 (D. Ariz. Dec. 20, 2010) (explaining that Local Rule 7.2(m) "do[es] not permit the moving party to submit *additional* facts in reply"). But even if considered, they do not move the needle on standing.

the challenged decisions to increased migration (or, for that matter, to environmental harm). *Compare* 5 F.4th at 1015 ("Plaintiffs rely on an affidavit from their expert . . . in which she claims that . . . [deferred action] and 'other discretionary actions by DHS have had the effect of significantly increasing the number of illegal border crossings, which has resulted in significant environmental impacts.' But [the expert] does not detail any facts linking the alleged influx in immigration to [deferred action].") *with* Napier Decl. ¶ 12, ECF No. 14-5 (claiming "[i]t is reasonable and rational to connect" the decision to terminate border wall construction with migration); Second Lamb Decl. ¶ 12, ECF No. 29-5 (offering the declarant's unsupported "professional opinion" that "large gaps where the planned border wall is not present or areas where all features of the wall are not operational, contributes to an increase in volume of illegal crossing activity"); Dannels Decl. ¶ 19, ECF No. 29-4 (asserting without factual support that "the unfinished state of the border wall project has contributed to increased illegal traffic across the United States-Mexico border").

Nor does *Massachusetts v. EPA*, 549 U.S. 497, 511-14 (2007), bolster the State's standing argument. That case did not involve a claim that government action was inducing independent third parties to harm the plaintiffs, or the attendant "substantially more difficult" standing burden. *Whitewater Draw*, 5 F.4th at 1013-14 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992)). And while the Supreme Court there did explain that states asserting procedural rights need not "meet[] all the normal standards for *redressability and immediacy*," *Wash. Envtl. Council. v. Bellon*, 732 F.3d 1131, 1144 (9th Cir. 2013) (quoting *Massachusetts*, 549 U.S. at 517-18) (emphasis added), the Court did not suggest a lower burden for *causation*. *See Lujan*, 504 U.S. at 560-61 (describing the "*irreducible* constitutional minimum of standing" to require the plaintiff prove "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" (citation omitted) (emphasis added)).

Arizona's out-of-circuit authorities are not to the contrary. In *Texas v. United States*, the Southern District of Texas credited historical recidivism rates, concluding that the plaintiff states had shown a connection between memoranda guiding DHS enforcement priorities and alleged harms to Texas and Louisiana. *Texas v. United States*, ___ F. Supp. 3d ___, 2021 WL 3683913, at *17 (S.D. Tex. Aug. 19, 2021). Even assuming similar evidence would suffice under *Whitewater Draw*—the law of this circuit—Arizona has come forward with none. And while the Southern District of Texas also held that special solicitude reduced the states' burden on imminence and redressability, *Texas*, 2021 WL 3683913, at *19-20 (citing *Lujan*, 504 U.S. at 572 n.7), that court did not suggest a lower standard on causation. Neither did the Fifth Circuit in *Texas v. Biden*. 10 F.4th 538, 549 (5th Cir. 2021) (citing Fifth Circuit precedent on "driver's-license-based injury" and concluding "[t]hat solicitude means *redressability* is easier to establish for certain state litigants than for other litigants" (emphasis added)).

In short, Arizona has not shown that its alleged injuries are caused by—or fairly traceable to—the challenged decisions. And *Massachusetts v. EPA* does not absolve the state of that "irreducible" burden. *Lujan*, 504 U.S. at 560. Arizona lacks standing to sue, and this Court should dismiss the First Amended Complaint.

II. Arizona's NEPA Claims Lack Merit

Defendants again incorporate by reference Defendants' Opposition to Arizona's Motion for a Preliminary Injunction 26-47, ECF No. 24, which explains in detail why the Court should dismiss Arizona's NEPA claims.

III. Arizona Has Not Identified Meaningful Standards for Review of the Challenged Decisions, which are Committed to Agency Discretion by Law

Arizona's fifth and sixth claims for relief allege freestanding Administrative Procedure Act (APA) challenges to the decisions to terminate the border wall projects and MPP. First Am. Compl. ¶¶ 166-77. These claims fail; Arizona cannot identify statutory standards for this Court's review because Congress has committed these decisions to agency discretion by law.

When a plaintiff alleges that agency action is arbitrary and capricious, *see id.* (alleging "arbitrary and capricious agency action"), it must also identify "a statutory benchmark against which to measure an agency's exercise of discretion." *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 861 F.3d 944, 955 (9th Cir. 2017). For example, in *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.*, the Supreme Court explained that an agency decision "would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem." 463 U.S. 29, 43 (1983). But this requires a statute to guide review, because "[w]hether an agency has overlooked 'an important aspect of the problem,' . . . turns on what a relevant substantive statute makes 'important.' In law, unlike religion or philosophy, there is nothing which is necessarily important or relevant." *Or. Nat. Res. Council v. Thomas*, 92 F.3d 792, 798 (9th Cir. 1996).

Arizona argues it need not allege a statutory violation so long as the decision challenged is not committed to agency discretion by law. Pl.'s Opp'n 7-8. But each case the State cites considered alleged violations of substantive statutes. *See id.* at 8-9. *DHS v. Regents of the University of California* did not involve a free-standing APA claim but arose under the Immigration and Nationality Act (INA). 140 S. Ct. 1891, 1910 (2020) (citing 8 U.S.C. § 1103(a)(1)).[4] The Court explained that, while the statute reserved legal questions for the Attorney General, it preserved discretion on implementation for the Secretary. *Id*. at 1910. And because the Acting Secretary failed to appreciate that discretion—as well as reliance interests for deferred action enrollees—her decision to terminate the deferred action program was arbitrary and capricious. *Id.* at 1913-14.[5]

---

[4] The Court also rejected a Fifth Amendment Equal Protection claim. *Id.* at 1915-16.

[5] Arizona's First Amended Complaint alleges that the Secretary of Homeland Security "failed to consider Arizona's reliance interest on the MPP." First. Am. Compl. ¶ 175. But Arizona, as a state, was not enrolled in MPP, and the State still does not allege acting in reliance on MPP. *Cf. Regents*, 140 S. Ct. at 1913 (agencies changing course must "be

Trout Unlimited v. Pirzadeh did not contain a freestanding APA claim; it was a Clean Water Act challenge to EPA's reversal of a decision to prohibit mineral development. 1 F.4th 738, 743-44 (9th Cir. 2021). And *Organized Village of Kake v. U.S. Department of Agriculture* was a NEPA case, 795 F.3d 956, 962 (9th Cir. 2015) ("In 2009, the Organized Village of Kake and others . . . filed this suit in the District of Alaska, alleging that the Tongass Exemption violated NEPA and the APA."), where the Ninth Circuit—applying *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)—held that the agency had failed to adequately explain a change in position. *Organized Village of Kake*, 795 F.3d at 969 ("The 2003 ROD does not explain why an action that it found posed a prohibitive risk to the Tongass environment only two years before [following preparation of an Environmental Impact Statement] now poses merely a 'minor' one.").

Department of Commerce v. New York, 139 S. Ct. 2551 (2019), was also not a standalone APA case, but involved claims that the Secretary of Commerce's decision to reinstate the citizenship census question violated the Constitution and the Census Act. *Id.* at 2563-65. The trial court dismissed the constitutional claims, but held the agency had violated the Census Act and offered a pretextual explanation for its decision. *Id.* at 2564-65. On certiorari, the Supreme Court first held that Census Act provides meaningful standards for review, *id.* at 2568-69, and that "[t]he taking of the census is not one of those areas traditionally committed to agency discretion." *Id.* at 2568. Proceeding to the merits, the Court reversed as to the Census Act claims, but affirmed the trial court's pretext finding because the record revealed that the explanation for reinstating the citizenship question was "contrived." *Id.* at 2575-76. *Department of Commerce* thus does not support standalone APA claims; it provides only that if a court—during APA

---

cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" (citation omitted)).

review applying statutory standards (*e.g.*, the Census Act)—discovers that the agency's rationale is pretextual, the court may remand. *See id.* at 2575.[6]

In any event, the parties agree that APA review is unavailable for decisions committed to agency discretion by law. *See* 5 U.S.C. § 701(a)(2); Pl.'s Opp'n 7-8. And Congress has committed the challenged decisions to the Secretary of Homeland Security's discretion. In its opposition, Arizona concedes that the Secretary's authority over border wall projects flows from the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Pl.'s Opp'n 9-11; *see also* Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 564(2)(D), 121 Stat. 1844, 2091 (2007) (codified at 8 U.S.C. § 1103 note). The State argues that IIRIRA "constrain[s] the Defendants' authority in important ways," postulating that DHS "could not, for example, build fencing around the District of Arizona Courthouse, because such a wall would not 'deter illegal crossings.'" Pl.'s Opp'n 10-11. That might be relevant if the State were seeking to *halt* construction. But Arizona asks this Court to *compel* construction, which Congress has forbidden. IIRIRA § 102(b)(1)(D) ("nothing in this paragraph shall require the Secretary of Homeland Security to install fencing . . . if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location."). IIRIRA does not provide standards for reviewing a decision to terminate border wall projects, but commits those decisions to the Secretary's discretion.

The INA likewise: (1) commits the Secretary's return-to-contiguous territory authority to his discretion, 8 U.S.C. § 1225(b)(2)(C) (using the permissive "may"), and

---

[6] Further, because the Supreme Court's decision in *Department of Commerce* does not explicitly endorse standalone APA claims, it is not "clearly irreconcilable" with the Ninth Circuit's prohibition on standalone APA review set forth in *Oregon Natural Resources Council*. *See Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (the trial court may only "reexamine the holding of a prior panel" where "the relevant court of last resort [has] undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.").

(2) prohibits judicial review, *id.* § 1252(a)(2)(B)(ii) ("no court shall have jurisdiction to review . . . any other decision o[f] . . . the Secretary of Homeland Security the authority for which is specified under this subchapter to be in [his] discretion . . . ."). Enforcement decisions—like whether to exercise the return-to-contiguous-territory authority—involve a "complicated balancing" of factors "peculiarly within [the Executive's] expertise," including how to best expend limited "agency resources" and whether a "particular enforcement action . . . fits the agency's overall policies." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The Secretary balanced those concerns and decided that "agency resources are best spent on . . . [other]" programs for managing immigration. *Id.* He had discretion to do so, and both the INA and precedent forbid reviewing that decision. *Id.* at 830-31.

Arizona's APA claims cannot proceed absent statutory guideposts for review. *Or. Nat. Res. Council*, 92 F.3d at 798-99. None exist for the challenged decisions, which Congress—through IIRIRA and the INA—has committed to agency discretion. *See* 5 U.S.C. § 701(a)(2); *see also Lincoln v. Vigil*, 508 U.S. 182, 191 (1993). The Court should dismiss the State's Fifth and Sixth claims for relief.

IV. Arizona's Take Care Clause Claim is Not Cognizable[7]

In its opposition, Arizona explains that its Take Care Clause claim alleges that "Congress appropriated nearly $3 billion" for border barrier construction and that "Defendants have—consistent with the President's proclamation—determined not to spend these funds." Pl.'s Opp'n 12. Again, "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims." *Dalton v. Specter*, 511 U.S. 462, 473-74 (1994). The Supreme Court has carefully "distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." *Id.* at 472 (citing cases). The Constitution is only implicated if

[7] Arizona has abandoned its Impoundment Control Act claim. Pl.'s Opp'n 12 n.5.

relied on by executive officers as a source of authority to act or if the officers rely on an unconstitutional statute. *Id.* at 473 & n.5.

Neither situation is present here. DHS is executing a border wall plan in accordance with its statutory authorizations under IIRIRA and its border infrastructure appropriations, not under the sort of independent Article II authority at issue in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *See* Defs.' Mot. to Dismiss Pl.'s First Am. Compl. 10-11, ECF No. 27; *cf. Dalton*, 511 U.S. at 473 ("In *Youngstown*, the Government disclaimed any statutory authority for the President's seizure of steel mills." (citation omitted)); *City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1233-34 (9th Cir. 2018) (citing *Youngstown* and explaining that the President's "power is at its lowest ebb" where the president relied on Article II powers to withhold grant monies). Arizona does not contend that these statutes are themselves unconstitutional. So *Dalton*'s reasoning applies with full force. *See Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 51-54 (D.D.C. 2020) (following *Dalton* and dismissing "constitutional" challenge to border wall funding).

Arizona argues that the Take Care Clause is implicated "where the agency seeks to dispense with a law in order to pursue some contrary policy goal." Pl.'s Opp'n 15-16. But this is the same separation-of-powers argument the Supreme Court rejected in *Dalton*. The State's Take Care Clause allegations hinge on whether DHS violated statutes. Pl.'s Opp'n 12 (alleging appropriations act violations). That question does not involve any unique constitutional principles. Under Arizona's approach, every statutory violation would be a constitutional Take Care Clause claim, and any litigant could evade the APA by alleging the violation advances a contrary policy goal. Pl.'s Opp'n 16. This is not the law.

Finally, Arizona argues this Court should ignore the publicly available DHS border wall plan and instead unquestioningly accept the State's contention that DHS is refusing to spend appropriated monies. Pl.'s Opp'n 16. But Arizona's First Amended Complaint lacks well-pleaded facts supporting its conclusion. First Am. Compl. ¶ 82

(alleging only that "this Administration is withholding substantial portions of [border barrier] funds" on "information and belief"); *see also id.* ¶¶ 180 (same), 184 (Government Accountability Office (GAO) has determined that DHS did not unlawfully impound funds from its border infrastructure appropriations while implementing the President's Proclamation); ECF No. 27-1 (GAO decision). The Court may judicially notice DHS's publicly available Border Wall Plan, which shows that DHS is not withholding border barrier funding but will use its funding to—among other things—close out project sites and remediate environmental harm from past construction. *See Snyder v. HSBC Bank, USA, N.A.*, 913 F. Supp. 2d 755, 768 (D. Ariz. 2012) ("a court may take judicial notice of matters of public record . . . . 'at any stage of the proceeding' and . . . . [t]aking judicial notice, however, does not convert a motion to dismiss into one for summary judgment." (citations omitted)); *ACI L. Grp. PLLC v. ACI L. Grp. PC*, No. CV-21-00098-PHX-DWL, 2021 WL 4263692, at *10 (D. Ariz. Sept. 20, 2021) ("on a 12(b)(6) motion, a court does not need to accept as true allegations that are contradicted by 'matters properly subject to judicial notice or by exhibit'" (quoting *Sprewell*, 266 F.3d at 988)).

CONCLUSION

Arizona has not met its burden on standing; the State cannot show that its alleged injuries from migration are fairly traceable to the Defendants actions. Even if Arizona had standing, its allegations do not state a cognizable claim. This Court should dismiss the State's First Amended Complaint.

Submitted this 10th day of December, 2021,

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

/s/ Tyler M. Alexander
TYLER M. ALEXANDER
Trial Attorney
Natural Resources Section

150 M St. NE, Third Floor
Washington, D.C. 20002
(202) 598-3314
tyler.alexander@usdoj.gov

Attorneys for Defendants