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18 **UNITED STATES DISTRICT COURT**

19 **DISTRICT OF ARIZONA**

20 State of Arizona,

21 Plaintiff,

22 v.

23 Alejandro Mayorkas in his official
24 capacity as Secretary of Homeland
25 Security; United States Department of
26 Homeland Security; Troy Miller in his
27 official capacity as serves as Senior
28 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

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

INTRODUCTION

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

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

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

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

¹ *Proclamation on the Termination Of Emergency With Respect To The Southern Border Of The United States And Redirection Of Funds Diverted To Border Wall Construction*, Office of the White House (Jan. 20, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/>

1 planned and funded—but unfinished—wall in Arizona, in an arbitrary and haphazard
2 manner.

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

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

14 7. On the same day the President announced he would not build any more
15 border fencing, Defendants suspended new entrants into the MPP.⁴ Previously, the MPP
16 had ensured that individuals who lacked a legal basis to be in the United States, and who
17 had passed through Mexico *en route* to the United States, had to remain in Mexico for the

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

20 ³ *Id.*

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

1 duration of their immigration proceedings (particularly as Mexico was also a country that
2 they could have applied for asylum in during their travels, but they refused to do so
3 preferring the United States).

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

11 9. These decisions were formalized on June 1, 2021, when the Administration
12 attempted to end the MPP with a seven-page memorandum,⁶ and again on October 29,
13 2021 when DHS issued a four-page termination memorandum titled “Termination of the
14 Migrant Protection Protocols”⁷ and a 39-page addendum titled “Explanation of the
15 Decision to Terminate the Migrant Protection Protocols”⁸ purporting to further explain its
16 reasons.

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

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

23 ⁷ See Memorandum from Alejandro Mayorkas, Department of Homeland Security,
24 *Termination of the Migrant Protection Protocols* (October 29, 2021), available at
[https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-](https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf)
[memo.pdf](https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf).

25 ⁸ See Memorandum from Alejandro Mayorkas, Department of Homeland Security,
26 *Explanation of the Decision to Terminate the Migrant Protection Protocols* (October 29,
2021), available at [https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-](https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-justification-memo.pdf)
[termination-justification-memo.pdf](https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-justification-memo.pdf) .

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

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

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

8 13. The impacts of population growth are by no means uniformly, or even on
9 balance, negative. Population growth, for example, has contributed substantially to
10 Arizona's remarkable economic growth over the last century. Immigrants have
11 contributed to every facet of American society in a manner that has benefited the United
12 States's economic, cultural, military, and societal strengths. This suit does not (and could
13 not) challenge population growth *per se*. Instead, this action challenges Defendants'
14 persistent failures to analyze, as federal law mandates, the entirely predictable and
15 foreseeable environmental impacts of population growth caused by Defendants' policies
16 of increasing the population of the United States through immigration.

17 14. Defendant's decisions are both arbitrary and capricious and have been
18 enacted in violation of numerous federal laws. In particular, although these policies
19 undeniably have significant effects on the environment, Defendants have not even
20 attempted to comply with the National Environmental Policy Act, ("NEPA"), 42 U.S.C.
21 § 4321 *et seq.* Defendants' policies also have unstudied impact on endangered species in
22 violation of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*

23 15. As Justice Holmes explained in 1907: "the state has an interest independent
24 of and behind the titles of its citizens, in all the earth and air within its domain. It has the
25 last word as to whether its mountains shall be stripped of their forests and its inhabitants
26 shall breathe pure air." *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). Arizona

1 has a strong interest in ensuring that policies that affect the environment of the State are
2 enacted consistent with federal law governing environmental protection.

3 16. Furthermore, the Supreme Court has recognized “the importance of
4 immigration policy to the States” and that the States “bear[] many of the consequences of
5 unlawful immigration.” *Arizona v. United States*, 567 U.S. 387, 397 (2012). The
6 additional costs of housing, educating, providing healthcare, and other social services
7 places burdens on the State of Arizona as a consequence of Defendants’ actions.

8 17. Defendant’s policies encouraging migration and downgrading enforcement
9 have subverted federal law, damaged the environment in Arizona, and have not been
10 subject to any required public process or participation. Accordingly, they should be
11 declared unlawful, vacated, and/or enjoined.

12 **PARTIES**

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

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

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

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

23 22. Defendant Troy Miller serves as Senior Official Performing the Duties of
24 the Commissioner of U.S. Customs and Border Protection (“CBP”). Defendant Miller is
25 sued in his official capacity.
26

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

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

25. Defendant Department of Defense is a federal agency.

JURISDICTION AND VENUE

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

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

28. Venue is proper within this District pursuant to 28 U.S.C. § 1391(e) because (1) Plaintiff resides in Arizona and no real property is involved and (2) “a substantial part of the events or omissions giving rise to the claim occurred” in this District.

LEGAL BACKGROUND

A. The National Environmental Policy Act

29. NEPA establishes “a national policy [to] encourage productive and enjoyable harmony between man and his environment[.]” 42 U.S.C. § 4321.

30. “NEPA has twin aims. First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision making process.” *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); accord *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

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

9 32. NEPA is “particularly” concerned with “the profound influences of
10 population growth” on the environment. 42 U.S.C. § 4331(a). Human population is among
11 the biggest factors in environmental change. It is “plain common sense” that the number
12 of people in an area has a significant impact on the environment, through factors such as
13 urbanization, infrastructure development, pollution, and stress on natural resources. *See*
14 *City of Davis v. Coleman*, 521 F.2d 661, 675 (9th Cir. 1975).

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

20 34. Population growth can have significant benefits. For example, Arizona’s
21 economy has benefited substantially from population growth over the last century. That
22 growth, effectuated by both domestic migration and international immigration, has
23 strengthened Arizona in innumerable ways. But at the same time, population growth can
24 have environmental impacts, both positive and negative. Those impacts can be particularly
25 acute when they result (as here) from haphazard policy-making that is allowed to escalate
26 into a crisis, whose existence is then repeatedly denied (punctuated by occasional

1 accidental admissions that it is, indeed, a “crisis”). NEPA mandates that federal agencies
2 analyze these environmental impacts *before* they take action. Defendants have failed to do
3 so here.

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

11 36. To accomplish its goals, NEPA creates a set of procedures which force
12 federal agencies to take account of environmental concerns. Accordingly, the statute
13 provides, in relevant part, that “all agencies of the Federal Government shall” consider the
14 environmental impacts of all “proposals . . . and other major Federal actions significantly
15 affecting the quality of the human environment[.]” 42 U.S.C. § 4332.

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

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

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

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

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

16 42. The regulations also state that agencies “shall evaluate in a single
17 environmental impact statement proposals or parts of proposals that are related to each
18 other closely enough to be, in effect, a single course of action.” 40 C.F.R. § 1502.4(a). As
19 the Supreme Court has recognized, programmatic environmental analysis is required
20 where a program is “a coherent plan of national scope, and its adoption surely has
21 significant environmental consequences.” *Kleppe v. Sierra Club*, 427 U.S. 390, 400
22 (1976). When considering such programmatic action, agencies should consider factors
23 such as whether the relevant actions are “occurring in the same general location,” and
24 whether they “have relevant similarities, such as common timing, impacts, alternatives,
25 methods of implementation, media, or subject matter.” 40 C.F.R. § 1502.4(b)(1).
26

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

8 44. NEPA requires that all environmental impacts of major federal actions—the
9 good, the bad, and the ambiguous—be studied prior to the government taking action. *See,*
10 *e.g.*, 40 C.F.R. § 1501.3 (requiring federal agencies to consider “[b]oth beneficial and
11 adverse effects” under NEPA); 40 C.F.R. § 1508.1 (agencies must consider effects
12 “resulting from actions that may have both beneficial and detrimental effects, even if on
13 balance the agency believes that the effect will be beneficial”). But Defendants here are
14 simply ignoring NEPA entirely while engaging in actions that are certain to have dramatic
15 impacts on the environment.

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

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

22 47. “NEPA protects the environment by requiring that federal agencies carefully
23 weigh environmental considerations and consider potential alternatives to the proposed
24 action *before* the government launches any major federal action.” *Native Vill. of Point*
25 *Hope v. Jewell*, 740 F.3d 489, 493 (9th Cir. 2014) (cleaned up) (emphasis added).
26

1 48. “[A] person with standing who is injured by a failure to comply with the
2 NEPA procedure may complain of that failure at the time the failure takes place, for the
3 claim can never get riper.” *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 737
4 (1998).

5 **B. The Endangered Species Act**

6 49. The ESA, passed in 1973, was enacted in order “to halt and reverse the trend
7 toward species extinction, whatever the cost.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153,
8 184 (1978). *See also* 16 U.S.C. § 1531. “As it was finally passed, the Endangered Species
9 Act of 1973 represented the most comprehensive legislation for the preservation of
10 endangered species ever enacted by any nation.” *Hill*, 437 U.S. at 180.

11 50. The ESA establishes that it is “the policy of Congress that all Federal
12 departments and agencies shall seek to conserve endangered species and threatened
13 species.” 16 U.S.C. § 1531(c)(1).

14 51. To implement this policy, Section 7 of the ESA provides that “[e]ach Federal
15 agency shall, in consultation with and with the assistance of the Secretary [of the Interior],
16 insure that any action authorized, funded, or carried out by such agency ... is not likely to
17 jeopardize the continued existence of any endangered species or threatened species or
18 result in the destruction or adverse modification of habitat of such species.” *Id.* §
19 1536(a)(2).

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

23 53. The applicable regulations define key terms for purposes of when
24 consultations under the ESA are required. For example, “action” is defined broadly, as “all
25 activities or programs of any kind authorized, funded, or carried out, in whole or in part,
26 by Federal agencies,” including “actions directly or indirectly causing modifications to the

1 land, water, or air.” 50 C.F.R. § 402.02. “Effects of the Action” are defined as “all
2 consequences to listed species or critical habitat that are caused by the proposed action,
3 including the consequences of other activities that are caused by the proposed action.” *Id.*
4 Moreover, as the Ninth Circuit has made clear, there is “agency action” for purposes of the
5 ESA whenever an agency “makes an affirmative, discretionary decision about whether, or
6 under what conditions, to allow private activity to proceed.” *Karuk Tribe of California v.*
7 *U.S. Forest Serv.*, 681 F.3d 1006, 1011 (9th Cir. 2012) (en banc).

8 54. An agency can avoid ESA Section 7 consultation only if it makes a “no effect
9 determination.” The threshold for requiring consultation is thus “relatively low”: “‘*Any*
10 *possible effect*, whether beneficial, benign, adverse or of an undetermined character,’ ”
11 triggers the requirement” of informal consultation. *Id.* at 1027 (quoting *California ex rel.*
12 *Lockyer v. USDA*, 575 F.3d 999, 1018–19 (9th Cir. 2009) (quoting 51 Fed. Reg. 19,926,
13 19,949 (June 3, 1986)) (emphasis in *Lockyer*). An agency thus cannot avoid ESA Section
14 7 consultation even if it believes that the effect of its action on endangered species will be
15 beneficial. Instead, it must engage in ESA consultation to confirm that belief.

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

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

1 **C. The Administrative Procedure Act**

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

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

13 59. Furthermore, federal administrative agencies are required to engage in
14 “reasoned decision-making.” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359,
15 374 (1998) (cleaned up). In other words, “agency action is lawful only if it rests on a
16 consideration of the relevant factors.” *Michigan v. EPA*, 576 U.S. 743, 750 (2015)
17 (cleaned up).

18 60. In reviewing an agency’s failure to act, the APA states that the Court “shall
19 compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

20 **FACTUAL BACKGROUND**

21 **A. Program to Increase Migration**

22 61. Since his presidential campaign, President Biden and his administration have
23 prioritized migration and population growth. From the earliest days of his administration,
24 Defendants have sought to further these policy priorities by enacting a program of lax
25 border enforcement and encouraging increased immigration through administrative action.
26

1 62. Defendants knew early on that their program would cause a surge in
2 migration, and only sought to manage the pace of this swell.⁹ For example, Defendant
3 Secretary Mayorkas recently pleaded with migrants merely to *delay* coming—not to stay
4 in their home countries: telling would-be migrants on March 1: “[w]e [DHS] are not saying,
5 ‘Don’t come’ ... We are saying, ‘Don’t come now.’”¹⁰ In effect, the Secretary Mayorkas
6 inadvertently said the quiet part loudly: Defendants do not wish to avoid radically increased
7 immigration; they merely wish to manage the swiftness of the increase.

8 63. There are many aspects to this program, and they all work in tandem. For
9 example, immediately after taking office, Defendants directed ICE to stop issuing any fines
10 to individuals that had been ordered to leave the country but had failed to comply.¹¹ This
11 policy reduces deterrence for the conduct in question—which is the very purpose of the
12 fines. Accordingly, this program intentionally boosts migration by eliminating this
13 deterrence effect.

14 64. In another agency action, which is part of the Population Augmentation
15 Program and designed to encourage migration, Defendants have determined to reduce a
16 key component of this country’s pandemic response, by exempting 250 migrants per day
17
18

19 ⁹ See Steven Nelson, *Joe Biden says fast immigration changes could cause ‘2 million*
20 *people on our border’*, New York Post (Dec. 22, 2020),
21 <https://nypost.com/2020/12/22/biden-says-fast-immigration-changes-could-cause-rush-at-border/>. This understanding continued as the Defendants actually enacted the program.

22 ¹⁰ See Nick Miroff, *At the border, a widely predicted crisis that caught Biden off guard*,
23 Washington Post (Apr. 26, 2021), https://www.washingtonpost.com/national/biden-border-timeline/2021/04/26/a5550aa4-a2a8-11eb-8a6d-f1b55f463112_story.html

24 ¹¹ See Press Release, Department of Homeland Security, *DHS Announces Rescission of*
25 *Civil Penalties for Failure-to-Depart* (Apr. 23, 2021), *available at*
26 <https://www.dhs.gov/news/2021/04/23/dhs-announces-rescission-civil-penalties-failure-depart>.

1 from Title 42, a public health order barring the entry of migrants without valid travel
2 documents.¹²

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

7 66. In a late-night email on February 4, 2021, Defendant Tae Johnson emailed
8 DHS personnel and told them ““Effective immediately ... *only those who meet the*
9 *[Department] priorities will be removed.*” (emphasis added). Those categories were largely
10 limited to terrorism-related activities.

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

20 ¹² See Alyssa Aquino, *US To Exempt 250 Asylum-Seekers Daily From Pandemic Rule*,
21 Law360 (May 18, 2021), available at
<https://www.law360.com/articles/1385840/print?section=immigration>.

22 ¹³ See, e.g., Press Release, Arizona Attorney General’s Office, *AG Brnovich Obtains*
23 *Records Detailing Dangerous Shift in Immigration Policies* (Apr. 28, 2021), available at
[https://www.azag.gov/press-release/ag-brnovich-obtains-records-detailing-dangerous-](https://www.azag.gov/press-release/ag-brnovich-obtains-records-detailing-dangerous-shift-immigration-policies)
24 [shift-immigration-policies](https://www.azag.gov/press-release/ag-brnovich-obtains-records-detailing-dangerous-shift-immigration-policies). See also Adam Shaw, *ICE predicted 50% drop in illegal*
25 *immigrant arrests under new DHS guidance, email shows*, Fox News (Apr. 28, 2021),
26 available at [https://www.foxnews.com/politics/ice-50-drop-illegal-immigrant-arrests-](https://www.foxnews.com/politics/ice-50-drop-illegal-immigrant-arrests-new-dhs-guidance-email)
[new-dhs-guidance-email](https://www.foxnews.com/politics/ice-50-drop-illegal-immigrant-arrests-new-dhs-guidance-email).

1 on removal of anybody other than in the first three categories?” *Id.* at 19-20 (emphasis
2 added).

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

9 69. In addition to the elements discussed above, two key aspects of this program
10 are the Defendants’ Border Wall Construction Termination and MPP Termination. These
11 decisions have enormous direct impacts on population flows, as well as indirect impacts
12 by encouraging migration. Cumulatively, the Population Augmentation Programs will
13 likely increase the population of the United States by hundreds of thousands—if not
14 millions—of people, with a disproportionate share of the increased burdens occurring in
15 Arizona.

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

17 70. On August 5, 2020, Joe Biden declared in an NPR interview that “[t]here will
18 not be another foot of wall constructed in my administration, number one.”¹⁵
19

20 ¹⁴ Miriam Jordan, *From India, Brazil and Beyond: Pandemic Refugees at the Border*, New
21 York Times (May 16, 2021), available at
22 <https://www.nytimes.com/2021/05/16/us/migrants-border-coronavirus-pandemic.html>.

23 ¹⁵ See Lulu Garcia-Navarro August 5, 2020, interview of Joe Biden,
24 <https://twitter.com/i/status/1291000306915057669>; see also Barbara Sprunt, *Biden Would*
25 *End Border Wall Construction, But Wouldn’t Tear Down Trump’s Additions*, NPR,
26 (August 5, 2020), available at [https://www.npr.org/2020/08/05/899266045/biden-would-](https://www.npr.org/2020/08/05/899266045/biden-would-end-border-wall-construction-but-wont-tear-down-trump-s-additions)
[end-border-wall-construction-but-wont-tear-down-trump-s-additions](https://www.npr.org/2020/08/05/899266045/biden-would-end-border-wall-construction-but-wont-tear-down-trump-s-additions) (last visited April 11,
2021).

1 71. He further stated, “Number 2, ... I’m gonna make sure that we have border
2 protection, but it’s going to be based on making sure that we use high-tech capacity to
3 deal with it *and at the ports of entry, that’s where all the bad stuff happens.*”¹⁶

4 72. He also responded when asked about land confiscations, he responded “End.
5 Stop. Done. Over. Not gonna do it. *Withdraw the lawsuits. We’re out. We’re not gonna*
6 *confiscate the land.*”¹⁷

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

9 74. On January 20, 2021, President Biden, in one of his first official actions, put
10 his promises into action. He issued a proclamation directing DHS to “pause work on each
11 construction project on the southern border wall” and to “pause immediately the obligation
12 of funds related to construction of the southern border wall[.]”¹⁸

13 75. This proclamation was issued without any notice and comment or
14 interagency review.

15 76. The proclamation directs Defendant Secretary Mayorkas to, in consultation
16 with various other members of the cabinet and other appropriate agency and department
17 heads, “shall develop a plan for the redirection of funds concerning the southern border
18 wall[.]” *Id.* Since then, the Administration has canceled border wall projects paid for with
19 funds diverted from Defense Department accounts.¹⁹

20 ¹⁶ See <https://twitter.com/i/status/1291000306915057669> (emphasis added)

21 ¹⁷ See <https://twitter.com/i/status/1291000306915057669> (emphasis added).

22 ¹⁸ *Proclamation on the Termination Of Emergency With Respect To The Southern Border*
23 *Of The United States And Redirection Of Funds Diverted To Border Wall Construction*,
24 Office of the White House (Jan. 20, 2021), available at
25 [https://www.whitehouse.gov/briefing-room/presidential-](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/)
26 [actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/)
[border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/proclamation-termination-of-emergency-with-respect-to-southern-border-of-united-states-and-redirection-of-funds-diverted-to-border-wall-construction/).

¹⁹ See Nick Miroff, *Biden cancels border wall projects Trump paid for with diverted*

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

4 78. DHS has implemented this proclamation by suspending all border wall
5 projects, on information and belief leaving hundreds of miles of fencing unfinished
6 compared to what DHS had studied and planned. The termination of border wall
7 construction has left huge holes in the border fencing, including substantial gaps of over
8 100 miles along the Arizona-Mexico border.

9 79. Subsequently, on April 30, the Deputy Secretary of Defense directed the
10 Secretary of the Army to “cancel all section 284 construction projects” and to use funds
11 transferred for construction to “pay contract termination costs” including costs associated
12 with activities necessary for contractor demobilization.”²⁰ Finally, the Deputy Secretary of
13 Defense issued a memorandum to the Secretary of Homeland Security reflecting that the
14 Department of Homeland Security “will accept custody of border barrier infrastructure
15 constructed pursuant to section 284, account for such infrastructure in its real property
16 records, and operate and maintain the infrastructure.”²¹ Accordingly, neither DOD nor
17 DHS has constructed or intends to construct any additional barriers.

18 80. Since January 20, machinery has been literally standing idle in some areas of
19 Arizona’s wilderness, with awkward-seeming and incomplete work in numerous places.²²

20 *military funds*, Washington Post (Apr. 30, 2021), available at
21 [https://www.washingtonpost.com/national/border-wall-cancelled/2021/04/30/98575af0-](https://www.washingtonpost.com/national/border-wall-cancelled/2021/04/30/98575af0-a9ec-11eb-b166-174b63ea6007_story.html)
22 [a9ec-11eb-b166-174b63ea6007_story.html](https://www.washingtonpost.com/national/border-wall-cancelled/2021/04/30/98575af0-a9ec-11eb-b166-174b63ea6007_story.html).

23 ²⁰ Letter from Elizabeth Prelogar, Acting Solicitor General, to Clerk of the Supreme Court
24 (Apr. 30, 2021), available at [https://www.supremecourt.gov/DocketPDF/20/20-](https://www.supremecourt.gov/DocketPDF/20/20-138/177066/20210430165630859_letter%2020-138%20%204-30-20.pdf)
25 [138/177066/20210430165630859_letter%2020-138%20%204-30-20.pdf](https://www.supremecourt.gov/DocketPDF/20/20-138/177066/20210430165630859_letter%2020-138%20%204-30-20.pdf).

26 ²¹ *Id.*

²² See Mia Jankowicz, *Biden's order to pause construction on Trump's border wall expires on March 20. Nobody knows what happens next.*, Business Insider (Mar. 16, 2021, 6:47

1 81. Concurrently with these events, on March 17, 2021, a number of U.S.
2 Senators sent a letter to Gene L. Dodaro, the Comptroller General at the Government
3 Accountability Office (GAO).²³ This letter also highlighted the January 20th suspension
4 of border wall construction, and asserted that the President’s actions froze funds that were
5 appropriated by Congress for wall construction.

6 82. As explained in that letter, in appropriations bills for fiscal years 2020 and
7 2021 Congress appropriated nearly three billion dollars for “the construction of a barrier
8 system along the southwest border.” *Id.* (*citing* Consolidated Appropriations Act, 2020,
9 Pub. L. No. 116-93, 133 Stat. 2511; Consolidated Appropriations Act, 2021, Pub L. No.
10 115-141, 132 Stat. 348). Although these laws place the obligation on Defendants to
11 execute those funds for the stated purposes, on information and belief, this
12 Administration is withholding substantial portions of those funds and has suspended all
13 construction.

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

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

22
23

AM), *available at* [https://www.businessinsider.com/what-happen-end-biden-60-day-](https://www.businessinsider.com/what-happen-end-biden-60-day-pause-border-wall-work-2021-3)
24 [pause-border-wall-work-2021-3](https://www.businessinsider.com/what-happen-end-biden-60-day-pause-border-wall-work-2021-3). *See also Work has stopped on Trump’s border wall. See*
25 *how it looks now*, CNN (May 3, 2021), *available at*
https://www.youtube.com/watch?v=q1fT_dEgoqg.

26 ²³ *See* Letter from Shelly M. Capito, et al., to Hon. Gene L. Dodaro (Mar. 17, 2021),
[https://www.appropriations.senate.gov/imo/media/doc/Capito%20GAO%20Border%20L-](https://www.appropriations.senate.gov/imo/media/doc/Capito%20GAO%20Border%20Letter.pdf)
[etter.pdf](https://www.appropriations.senate.gov/imo/media/doc/Capito%20GAO%20Border%20Letter.pdf).

1 85. One major purpose of the Defendants’ actions in affirmatively halting this
2 construction was to signal the relative openness of the United States-Mexico border and to
3 encourage migration.

4 86. None of the gaps in the border wall was the product of planning or reasoned
5 decision-making. The current state of the border is entirely arbitrary, and none of the
6 impacts flowing from Defendants’ actions were studied before taking the decision to
7 affirmatively halt construction.

8 87. Despite this, DHS, following the policy prescriptions in the President’s
9 proclamation, has finally decided that the United States-Mexico border is adequately
10 secured without the wall, in its current condition.

11 88. Furthermore, contrary to the unsupported claims that the wall was “not a
12 serious policy solution” in the Proclamation, many individuals are constantly seeking to
13 cross the United States-Mexico border, for whom the wall has served both as a meaningful
14 physical barrier and a powerful signal of the federal government’s commitment to
15 enforcing immigration law. And while DHS has reportedly “consider[ed]” making changes
16 to address gaps in particular areas or implementing technology in places where the wall is
17 unfinished, DHS has no intent to deviate from the fundamental policy announced in the
18 Presidential Proclamation.²⁴

19 89. As a direct and foreseeable consequence of the gaps in the nation’s border
20 wall and the signal intentionally transmitted by the President and the Defendants, migrants
21 have been crossing the border in Arizona in greater numbers than ever before. CBP
22 reported it “encountered 171,700 migrants in March, including a record number of
23

24 ²⁴ See Ryan Saavedra, *Biden Admin Considers Restarting Border Wall Construction To*
25 *‘Plug Gaps’ Amid Biden’s Border Crisis: Report*, Daily Wire (Apr. 6, 2021), available at
26 <https://www.dailywire.com/news/biden-admin-considers-restarting-border-wall-construction-to-plug-gaps-amid-bidens-border-crisis-report>.

1 unaccompanied minors, far exceeding the prior month's totals."²⁵ Indeed, "[t]he US is on
2 track to encounter more than 2 million migrants at the US-Mexico border by the end of the
3 fiscal year, according to internal government estimates[,] marking a record high."²⁶

4 90. One border county sheriff stated that, at a particular gap in the fencing, "'five
5 or six groups'" of migrants are able to cross a day.²⁷ One news outlet reported that
6 "[s]mugglers send groups of asylum seekers through the gaps [in the fencing] to
7 overwhelm the agents. When agents leave to intercept or apprehend one group, another
8 group scampers across."²⁸

9 91. One source estimates that approximately 1,000 individuals are able to evade
10 detention and enter the United States illegally every single day, many of whom are able to
11 do so because of these glaring holes in the border barriers.²⁹ Inevitably, many of these
12 migrants settle in Arizona, increasing the population of the state.

15 ²⁵ See Priscilla Alvarez, *Border apprehensions spiked in March, including a record*
16 *number of unaccompanied migrant minors*, CNN (April 2, 2021),
17 [https://www.cnn.com/2021/04/02/politics/us-mexico-border-immigration-](https://www.cnn.com/2021/04/02/politics/us-mexico-border-immigration-apprehended/index.html)
18 [apprehended/index.html](https://www.cnn.com/2021/04/02/politics/us-mexico-border-immigration-apprehended/index.html).

19 ²⁶ See Priscilla Alvarez, *US on track to encounter record 2 million migrants on the*
20 *southern border, government estimates show*, CNN (Apr. 11, 2021),
21 <https://www.cnn.com/2021/03/31/politics/migrants-us-southern-border/index.html>.

22 ²⁷ See Roman Chiarello, *Arizona sheriff says Biden halting border wall construction left*
23 *area wide open for cartels*, Fox News (Mar. 5, 2021),
24 <https://www.foxnews.com/us/arizona-sheriff-biden-border-wall-construction-cartels>.

25 ²⁸ See William La Jeunesse, *Migrants stream through gaps in border wall following*
26 *Biden's order to halt construction*, Fox News (Mar. 31, 2021), available at
[https://www.foxnews.com/politics/migrants-stream-through-gaps-in-border-wall-](https://www.foxnews.com/politics/migrants-stream-through-gaps-in-border-wall-following-bidens-order-to-halt-construction)
[following-bidens-order-to-halt-construction](https://www.foxnews.com/politics/migrants-stream-through-gaps-in-border-wall-following-bidens-order-to-halt-construction).

²⁹ See *Heritage Experts Release New Biden Border Crisis Fact Check*, Heritage
Foundation (March 25, 2021), available at [https://www.heritage.org/press/heritage-](https://www.heritage.org/press/heritage-experts-release-new-biden-border-crisis-fact-check)
[experts-release-new-biden-border-crisis-fact-check](https://www.heritage.org/press/heritage-experts-release-new-biden-border-crisis-fact-check).

1 92. This border control policy has been—correctly—understood worldwide as
2 an invitation. From as far as India and elsewhere in Asia, migrants have traveled to Mexico
3 and seek to enter the United States through wide gaps in the border wall around Yuma,
4 Arizona.³⁰

5 93. As the New York Times explains, these migrants are here to stay: “Most
6 migrants are being released to await immigration hearings that could take years, and if they
7 fail to win asylum, many may wind up staying anyway, adding to the millions of
8 immigrants living in the United States without permission.”³¹

9 94. On information and belief, the gaps in the wall may also have significant
10 effects on Arizona wildlife, including endangered species. Many commentators have noted
11 how the construction of the wall itself may have risked endangered species.³² However, the
12 state of affairs created by the Defendant’s sudden halt of construction has led to an
13 environment for these species which is unstudied and unknown. For example, the current
14 gaps have created a “bottleneck for species” which may affect predator patterns and harm
15 endangered species.³³ This “could lead to a variety of unknown consequences, from
16 migration and mating patterns, to throwing predator-prey relationships out of whack. It
17

18 ³⁰ See Miriam Jordan, *From India, Brazil and Beyond: Pandemic Refugees at the Border*,
19 New York Times (May 16, 2021), available at
20 <https://www.nytimes.com/2021/05/16/us/migrants-border-coronavirus-pandemic.html>.

21 ³¹ *Id.*

22 ³² See, e.g., Garet Bleir, *Endangered Species Are Casualties of Trump’s Border Wall*,
Sierra (Feb. 18, 2020), available at <https://www.sierraclub.org/sierra/endangered-species-are-casualties-trump-s-border-wall> (discussing how the border wall construction puts
23 “nearly 100 endangered species” at risk).

24 ³³ See, e.g., Nathaniel Janowitz, *Trump’s Border Wall Is Threatening Endangered Species*,
Vice (Feb. 2, 2021) [https://www.vice.com/en/article/y3gekk/trumps-border-wall-is-](https://www.vice.com/en/article/y3gekk/trumps-border-wall-is-threatening-endangered-species)
25 [threatening-endangered-species](https://www.vice.com/en/article/y3gekk/trumps-border-wall-is-threatening-endangered-species). (“Border wall construction in eastern and western
26 Arizona has created a bottleneck for species.”),

1 could also potentially eliminate endangered species who might not be able to survive the
2 change—around 90 endangered and threatened species call the area home.”³⁴

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

9 **C. The Planned Additional Border Wall Segments Would Reduce Illegal Border**
10 **Crossings into Arizona**

11 96. In 2006, Congress passed the Secure Fence Act of 2006, which requires DHS
12 to “take all actions the Secretary determines necessary and appropriate to achieve and
13 maintain operational control over the entire international land and maritime borders of the
14 United States.” Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006).
15 The Act specifically defines “operational control” to mean “the prevention of all unlawful
16 entries into the United States, including entries by terrorists, *other unlawful aliens*,
17 instruments of terrorism, narcotics, and other contraband.” *Id.* (emphasis added).

18 97. The Secure Fence Act remains in force. It enjoyed bipartisan support in both
19 houses of Congress, and passed in the Senate by an 80-19 vote, including with the backing
20 of then-Senator Biden.³⁵ Congress made its intent plain in the Secure Fence Act: DHS must
21 “take all actions ... [to] prevent[] ... all unlawful entries into the United States.”

22 98. The Secure Fence Act required DHS to construct additional reinforced
23 fencing along the southern border. The Consolidated Appropriations Act of 2008 further
24 clarified the requirement, stating that “the Secretary of Homeland Security shall construct
25

26 ³⁴ *Id.*

³⁵

https://www.senate.gov/legislative/LIS/roll_call_votes/vote1092/vote_109_2_00262.htm

reinforced fencing along not less than 700 miles of the southwest border where fencing would be most practical and effective and provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border.” Pub. L. No. 110-161, 121 Stat 1844 § 564 (2007).

99. “As of April 2010, 282 miles of pedestrian fence and 227 miles of vehicle barriers had been constructed” in partial fulfilment of Congress’s requirements in the Secure Fence Act and Consolidated Appropriations Act of 2008.³⁶ However, even though this construction of new border barrier still left substantial gaps along the 1920-mile southern border with Mexico (and most of those gaps remain currently), a comprehensive econometric analysis found that this relatively small amount of additional border barrier significantly reduced illegal border crossing: “for [Mexican] residents of a given border municipality, fence construction in that municipality reduce[d] the migration rate to the United States by 27 percent. Construction in an adjacent border municipality reduce[d] migration rates by an additional 15 percent.”³⁷ Furthermore, “fence construction reduce[d] migration rates for prospective migrants from non-border municipalities by up to 35 percent.”³⁸

100. One of the reasons that a partial barrier can so significantly reduce border crossings is that “changes in migration rates can be attributed to changes in migration costs.”³⁹ “[T]he rise in crossing costs associated with fence construction is likely quite large.”⁴⁰ Additional border barrier reduces “ease of crossing” and thus has a “deterrent

³⁶ Benjamin Feigenberg, Fenced Out: The Impact of Border Construction on US-Mexico Migration, 12 AMERICAN ECONOMIC JOURNAL: APPLIED ECONOMICS 106, 111 (2020).

³⁷ *Id.* at 107.

³⁸ *Id.*

³⁹ *Id.* at 133.

⁴⁰ *Id.* at 134.

1 effect” since “individuals ... face particularly large cost increases if forced to use alternative
2 crossing routes” because there is “high elasticity of migration with respect to fence
3 construction” and because “the number of crossing deaths per migration episode ... roughly
4 doubled” following the additional fence construction.⁴¹

5 101. These effects are particularly remarkable because decisions about where to
6 build this additional 2007-2010 fencing was based “as much on expediency and cost as on
7 [border] security concerns.”⁴² Thus, the border barrier construction projects at issue here
8 are likely to have even greater deterrent effects than the prior construction from 2007 to
9 2010, since the projects at issue in this case were chosen based strictly on border security
10 needs and not on the expediency of needing to fulfill a congressionally imposed deadline
11 for constructing a certain number of miles of border barrier.

12 102. Thus, peer-reviewed academic research shows that additional construction of
13 border barrier does not merely channel migration to remaining gaps in the barrier, but
14 actually deters migration because of increased “mortality (and perhaps apprehension) risk
15 faced by migrants who choose to go around the fence and cross in remote, topographically
16 inhospitable border segments where border fencing was more likely to be delayed.”⁴³

17 103. This makes sense: would-be migrants respond to incentives, just like
18 everyone else. Those seeking to migrate illegally choose to cross the border at the places
19 where crossing is easiest. Construction of border barriers in the places where crossing most
20 frequently occurs will make crossing more difficult. And as the difficulty of crossing
21 increases, the number of aliens choosing to cross will decrease.

24 ⁴¹ *Id.* at 107-108, 134.

25 ⁴² *Id.* at 111.

26 ⁴³ *Id.* at 119.

1 104. Additionally, a border barrier serves as a powerful symbol of border security
2 and enforcement. Its mere presence has a deterrent effect. Thus, construction of border
3 barrier in a community had a deterrent effect on illegal crossing by residents of neighboring
4 communities, even though the border next to those communities still remained unfenced.⁴⁴

5 105. Construction of additional border barrier reduces total crossings, and does
6 not merely channel crossing to the remaining gaps in the barrier. The 2007-2010 barrier
7 construction led to a “net decrease of 17.8–22.8 percent” in Mexican migrants unlawfully
8 present in the United States “over the 2007–2012 period.”⁴⁵

9 106. Further confirming the fact that the 2007-2010 partial border barrier
10 construction had a significant deterrent effect on illegal immigration is that “[s]muggler
11 prices also rose after fence construction began.”⁴⁶

12 107. Furthermore, closing more gaps in the border barrier frees up U.S. Border
13 Patrol Agents to patrol in other areas, thus acting as a force multiplier. Even Defendants
14 recognize this. For example, a DHS Categorical Exclusion (“CATEX”) document
15 prepared under NEPA requirements, and which was produced to the State of Arizona
16 pursuant to a FOIA request, justifies construction of additional border barrier to close a
17 390-foot gap in the Yuma border sector because it will “lower the number of illegal border
18 crossings in the YUM Sector,” which will “reduce the number of agents required to
19 apprehend, transport, process, and medically clear these illegal entries,” so that these
20 “YUM USBP agents could then focus on patrolling [REDACTED] to better achieve
21 operational control in the Area of Responsibility (AOR).”

22
23
24
25 ⁴⁴ *Id.* at 122.

26 ⁴⁵ *Id.* at 130.

⁴⁶ *Id.* at 116.

1 **D. DHS Has Recently Announced Plans to Restart Previously Cancelled Border**
2 **Wall Construction**

3 108. Contrary to the claims Defendants have made that walls are not effective,
4 they have decided to complete construction of unfinished border wall segments, because
5 they now apparently judge border walls to be effective. Only last week, the Biden
6 Administration reversed course and recognized publicly the value of constructing
7 additional border barrier at places of frequent crossing—even though gaps may remain in
8 other places.

9 109. On July 28, 2022, the Biden Administration announced that it had
10 “authorized completion of the Trump-funded U.S.-Mexico border wall in an open area of
11 southern Arizona near Yuma, where four wide gaps make it among the busiest corridors
12 for illegal crossings.”⁴⁷ CBP had apparently been internally requesting that the
13 Administration allow completion of border barriers in Arizona. An internal, undated DHS
14 Action Memo produced to Arizona as part of a FOIA request specifically asks Secretary
15 Mayorkas to “approve the ... Yuma Hill Gap Closure Project.”

16 110. A DHS press release announcing the Biden Administration’s decision to
17 build additional border wall in the Yuma Border Patrol sector states that “Secretary of
18 Homeland Security Alejandro N. Mayorkas has authorized U.S. Customs and Border
19 Protection (CBP) to execute the Yuma Morelos Dam Project to close four gaps located
20 within *an incomplete border barrier project* near the Morelos Dam in the U.S. Border
21 Patrol’s Yuma Sector. These projects address *operational impacts*, as well as immediate
22 life and safety risks, and will be funded with DHS’s Fiscal Year 2021 appropriations. The
23 gaps *are located within the former Yuma 6 project area, a border barrier project that was*

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25
26 ⁴⁷ Associated Press, *Biden administration to fill border wall gaps near Yuma, Arizona*,
NBC NEWS, July 29, 2022, (<https://www.nbcnews.com/politics/immigration/biden-administration-fill-border-wall-gaps-yuma-arizona-rcna40567>)

1 *previously funded by the Department of Defense's (DoD) military construction*
2 *appropriation pursuant to 10 U.S.C. § 2808.” (emphasis added.)*

3 **E. Internal DHS Documents Affirm the Effectiveness of Border Walls**

4 111. The Biden Administration has also internally acknowledged that border
5 barriers help achieve operational control of the border. DHS documents produced to the
6 State of Arizona pursuant to a FOIA request, and which were created during the Biden
7 Administration, admit that “[t]he primary goal of the border barrier [construction] and
8 associated border security elements is to gain operational control of the border. The barrier
9 provides persistent impedance of illegal cross-border activity, which offers USBP agents
10 sufficient time to respond to and resolve threats.” Additionally, “[t]he proposed border
11 barrier would afford operational control of the border, by providing persistent impedance
12 of illegal cross-border activity. This impedance would allow USBP agents sufficient time
13 to respond to and resolve threats.” These documents were referring to planned border
14 barrier construction in Texas, but the same principles apply to barrier constructed in
15 Arizona.

16 112. The Biden Administration has also acknowledged internally the problems
17 caused by its abrupt Border Wall Construction Termination. An internal DHS PowerPoint
18 presentation produced to the State through a FOIA request, dated January 13, 2022 and
19 titled “Border Barrier Plan Update,” acknowledges that, because of Defendants’ abrupt
20 cessation of construction, gaps in construction “create a security vulnerability to agent
21 safety and, without a complete operable gate providing close ingress or egress, Border
22 Patrol agents are unable to leave and/ or respond to threats.”

23 113. A DHS “Draft Communications Rollout Plan” that DHS produced to
24 Arizona pursuant to a FOIA request contains a question and answer section with the
25 following questions: “Why does DHS need to build new border barrier in order to address
26 safety needs?” and “Q: The Fiscal Year (FY) 2022 budget does not include a rescission or

1 cancellation of prior year border wall funds. Does DHS/CBP plan to construct new border
2 barrier with these funds?” Curiously, DHS redacted the answers to those questions,
3 claiming a (b)(5) FOIA exemption, which is for privileged documents, even though the
4 document does not appear to be related in any way to litigation or to seeking legal counsel
5 from an attorney.

6 **F. Defendants’ Border Wall Construction Termination Causes Environmental**
7 **Harm to the State of Arizona**

8 114. Internal DHS documents produced to the State of Arizona pursuant to a
9 FOIA request admit that the Border Wall Construction Termination has caused damage to
10 Arizona’s environment.

11 115. For example, the DHS categorical exclusion evaluating the environmental
12 impact of construction of border barrier wall to close a 390-foot gap in the Yuma border
13 sector determined that “[t]he site of the Proposed Action has been heavily disturbed, with
14 visible foot paths created from illegal border crossings, as well as vandalism of the rock
15 outcropping and the Monument 198 itself” and that construction of border wall in the area
16 “will reduce the level of ongoing disturbance in the area by closing the opening which is
17 currently being used by trans-border activity on a frequent basis.” Thus, because the area
18 was “in poor environmental condition due to heavy foot and vehicular traffic through the
19 current opening,” DHS concluded that building the border barrier “will lead to a reduction
20 in illegal crossings through this location, *which could improve the overall environmental*
21 *condition of the project area.*” (emphasis added). In other words, DHS itself acknowledges
22 that failure to close the border gaps will cause preventable harm to Arizona’s environment.

23 116. DHS documents created under the Biden Administration and produced to the
24 State pursuant to FOIA also confirm that barrier construction comes with environmental
25 improvements: “Erosion control and drainage. Earth retaining systems and erosion control
26 may be needed to control grades and could include items such as concrete or block walls,

1 erosion control mats and/or rip rap. Drainage improvements are anticipated to include, but
2 not be limited to, concrete low water crossings, reinforced concrete pipe culverts,
3 reinforced concrete box culverts, bridges drainage gates and associated scour protection
4 that may include concrete slope protection, grouted rip rap, and sheet piles.”

5 117. Internal DHS documents produced through FOIA also admit that the Biden
6 Administration’s Border Wall Construction Termination caused significant environmental
7 damage in Texas: “While the sites were secured for a temporary suspension, they were not
8 properly secured for a permanent suspension or termination. This has led to deteriorating
9 site conditions and incomplete activities which are posing serious risks to both agents and
10 the local community. The current condition of these areas pose numerous serious safety
11 risks and environmental restoration issues if not remediated.”

12 118. The same harms occurred with border wall construction sites in Arizona, and
13 Arizona has suffered the same type of environmental damage. The same document
14 acknowledges a number of actions that need to be taken because of the environmental
15 damage caused by the Border Wall Construction Termination:

16 Activities requiring remediation include, but are not limited to:

- 17 • Completion of roads to ensure safe driving surfaces and sight distances.
- 18 • Completion of roads to ensure adequate egress/ ingress is provided to and
19 through the Project sites.
- 20 • Completion of overall site grading to complete drainage and erosion control
21 measures needed to protect the integrity of constructed infrastructure and
22 maintain safety for personnel in the area to include agents and the
23 community. For the levee projects, this will help ensure the projects are able
24 to be certifiable by the U.S. Army Corps of Engineers (USACE) upon
25 completion.
- 26 • Adding missing caps to the bollards which are currently posing an
environmental risk in trapping small birds.
- Addressing and mitigating exposed rebar and sharp points which are an
impalement risk.
- Relocating and/or completing access ramps for agents, landowners and first
responders.
- Completing associated existing utility line relocations that are required to
complete make safe construction work.

- Installing canal crossings where required to maintain access for agents and landowners.
- Honoring existing real estate agreements with landowners and farmers by, among other things, remediating interruption to irrigation lines and installing access gates and ramps. If irrigation lines are not remediated, landowners and farmers will continue to lack access to water from the river, which is situated on the south side of the barrier, for crops and livestock.

119. An internal DHS PowerPoint presentation dated January 13, 2022 and titled “Border Barrier Plan Update” acknowledges the environmental harm caused by the termination of planned border barrier construction in Arizona: “[n]early all of these miles will require make safe and environmental restoration work once DoD finishes their make safe activities.” The PowerPoint acknowledges that “[a] large majority of the incomplete DoD 284 Projects are located within the Tucson Sector,” and states that “following a safety analysis by CBP, work to address life, safety, environmental, or other remediation Sector, requirements will begin there.” The PowerPoint goes on to explain that “[a]pproximately 119 miles of previously planned and approved DoD 284 projects in Tucson Sector were left in various stages of completion at the time of the pause. Activities requiring remediation include:

- Erosion control measures,
- Completion of construction gaps and gates,
- Completing and repairing damaged drainage,
- Completing Stormwater Pollution Prevention Plan measures,
- Completing hardware installation on drainage gates,
- Completing grouting of bollards and connector plates,
- Permanently filling in trenches,
- Completing and repairing automated vehicle gates and associated foundation work,
- Completing incomplete bridge construction,
- Safety work on border roads for safe passage, and
- Completing and repairing electrical systems.”

120. An internal DHS talking points document produced to Arizona through FOIA acknowledges that termination of border barrier construction in Arizona “will not address all actions that need to be taken to address life, safety, environmental, or other

1 remediation requirements at these project sites.” Some of the work that DHS internally
2 recognized as needing to be done “needed to address life, safety, environmental, and other
3 remediation requirements will include, but are not limited to, completion of drainage and
4 erosion control measures, completion of roads, remediation of temporary use areas used
5 for construction, and disposal of residual materials” and that the “first priority for these
6 activities will be Tucson Sector and open gap locations to include gates.” Furthermore, the
7 border wall created “a risk of environmental degradation related to lack of proper grading,
8 erosion control measures, and slope stabilization” and also “potential failures in the barriers
9 and roads constructed by DoD and the potential flooding of private and public lands.”⁴⁸
10 The document also promises “DHS intends to assess the extent to which border wall funds
11 may be used to remediate or mitigate environmental damage caused by past border wall
12 construction” and that “[o]pportunities for mitigation will be identified through the
13 environmental planning process.”

14 121. Notably, even though DHS knew about and acknowledged the environmental
15 harm caused by Border Wall Construction Termination, and even though internal DHS
16 talking points contain a promise to do so, DHS never actually planned to properly address
17 those harms by consulting with the States affected, including Arizona. The same
18 PowerPoint discusses how DHS conducts outreach to “involve stakeholders” and solicit
19 comments with “various NGOs, tribes, and federal agencies” and specifically, “[i]n
20 Arizona, we held tailored briefings with the Arizona Trail Association on proposed projects
21 adjacent to the trail, and we also coordinated with local and national NGOs on the barrier
22 at San Pedro River.” Astoundingly, not once does DHS mention consulting with Arizona,
23 or with any other state government.

24 122. Even worse, funding for border construction in Texas is still appropriated for
25 that purpose, yet DHS refuses to build any additional barriers there. Yet, since DHS is
26

⁴⁸ *Id.* at FOIA_CBP_AZ_0002141.

1 required to spend that money, it is intentionally slow-rolling the construction process by
2 engaging in an extensive NEPA process, with no intent to actually follow through on
3 spending the appropriated funds, in an effort to run out the clock and avoid construction of
4 the border wall. In such cases, internal DHS talking points explain that “CBP intends to
5 engage in a robust environmental planning process with potentially affected and interested
6 stakeholders for these barrier projects consistent with DHS's border barrier plan, which
7 lays out the guiding principles framing future decisions related to border barrier
8 construction. These environmental planning activities will not entail any construction of
9 new border barrier or permanent land acquisition.”

10 123. A DHS document produced through FOIA explains that the purpose of the
11 extensive NEPA analysis is because “[t]he law requires DHS to use the funds consistent
12 with their appropriated purpose.” As part of its extensive NEPA analysis for the border
13 wall in Texas, DHS explained in a letter sent to local stakeholders that “[i]n fiscal year
14 2020, Congress appropriated funds for the construction of barrier system in high priority
15 locations on the southwest border. Pub. L. 116-13, Div. D, Title II, § 209 (Dec. 20, 2019).
16 Consistent with the DHS Border Wall Plan Pursuant to Presidential Proclamation 10142
17 (June 11, 2021), CBP is conducting environmental planning concerning the proposed
18 construction. The development of the EA will not involve any construction of new border
19 barrier or permanent land acquisition.”

20 124. A DHS “Feedback Stakeholder Report” affirms that “The Biden-Harris
21 Administration has requested that Congress permanently cancel this [border wall] funding.
22 While the funds remain appropriated, and consistent with the Department of Homeland
23 Security Border Barrier Plan Pursuant to Presidential Proclamation 10142 (June 11, 2021)
24 ([https://www.dhs.gov/sites/default/files/publications/21_0611_dhs_security_border_wall_](https://www.dhs.gov/sites/default/files/publications/21_0611_dhs_security_border_wall_plan.pdf)
25 [plan.pdf](https://www.dhs.gov/sites/default/files/publications/21_0611_dhs_security_border_wall_plan.pdf)), CBP is conducting environmental planning concerning the proposed
26

1 construction, maintenance, and repair. The development of the EA will not involve any
2 construction of new border barrier or permanent land acquisition.”

3 125. An internal DHS question-and-answer document produced to Arizona
4 through FOIA acknowledges that Secretary Mayorkas “has the discretion to extend waivers
5 if needed. However, the Secretary has directed CBP conduct environmental planning under
6 NEPA for” 86 miles of border barrier that has been fully funded by Congress and that DHS
7 itself acknowledges will help DHS acquire operational control of the border. Rather than
8 issue that waiver, an internal DHS talking points document affirms that the plan is to
9 instead run out the clock with a NEPA process that will “take between nine and fifteen
10 months.”

11 126. An internal DHS email produced through FOIA acknowledges the internal
12 contradictions, with the unidentified sender writing: “Frankly, this situation is confusing
13 because we are conducting the ENV planning because we have to plan to construct, in
14 accordance with our appropriations, but the DHS Plan outlines that we will conduct
15 additional/‘robust’ planning. I know that [REDACTED] explained this during the Webinar,
16 but inherently this is confusing.”

17 127. DHS is intentionally avoiding construction of border wall in Texas, even
18 though (1) its own analysis of that potential border wall construction would help it achieve
19 the congressionally mandated command that DHS achieve operational control of the
20 border, (2) its own analysis reveals construction would ameliorate environmental harms
21 that would otherwise occur, and (3) Congress appropriated funds for that specific purpose.
22 At the same time DHS is using NEPA (unnecessarily) to prevent border wall construction
23 in Texas, it has refused to follow any of NEPA’s requirements in Arizona to address the
24 environmental harm caused by the Border Wall Construction Termination—harm that its
25 own internal documents readily acknowledge.
26

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

2 128. In 2018, the United States faced a massive surge of migrants, many from
3 Central American countries, attempting to cross through Mexico to enter the United States
4 despite having no lawful basis for admission. *See, e.g.*, 83 Fed. Reg. 55,934, 55,944-
5 55,945 (Nov. 9, 2018). This surge created a humanitarian, public safety, and security crisis
6 on the United States-Mexico border.

7 129. In response to this crisis, in January 2019, DHS enacted the “Migrant
8 Protection Protocols,” (the “MPP”) commonly known as the “Remain in Mexico” policy.
9 Under this policy, “certain foreign individuals entering or seeking admission to the U.S.
10 from Mexico – illegally or without proper documentation” were “returned to Mexico [to]
11 wait outside of the U.S. for the duration of their immigration proceedings[.]”⁴⁹

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

19 131. Under this program, approximately 65,000 non-Mexican migrants who were
20 detained attempting to enter the United States illegally or without proper documentation
21 across the Mexican border were sent back to Mexico to await the completion of their
22 immigration processes.⁵⁰

24 ⁴⁹ *See Migrant Protection Protocols*, Department of Homeland Security (Jan. 24, 2019),
available at <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

25 ⁵⁰ *See* Ted Hesson & Mimi Dwyer, *Biden to bring in asylum seekers forced to wait in*
26 *Mexico under Trump program*, Reuters (Feb. 12, 2021, 4:10 AM), available at
[https://www.reuters.com/article/us-usa-biden-immigration-asylum/biden-to-bring-in-](https://www.reuters.com/article/us-usa-biden-immigration-asylum/biden-to-bring-in-asylum-seekers-forced-to-wait-in-mexico-under-trump-program-idUSKBN2AC113)
[asylum-seekers-forced-to-wait-in-mexico-under-trump-program-idUSKBN2AC113](https://www.reuters.com/article/us-usa-biden-immigration-asylum/biden-to-bring-in-asylum-seekers-forced-to-wait-in-mexico-under-trump-program-idUSKBN2AC113).

1 132. The MPP functionally came to an end on January 20, 2021, when it was
2 rescinded by Defendants with little-to-no-explanation. On February 2, 2021, President
3 Biden issued “Executive Order on Creating a Comprehensive Regional Framework to
4 Address the Causes of Migration, to Manage Migration Throughout North and Central
5 America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United
6 States Border.”⁵¹ This order, among other things, ordered DHS and HHS to “reinstate the
7 safe and orderly reception and processing of arriving asylum seekers, consistent with public
8 health and safety and capacity constraints” and commanded DHS to “promptly review and
9 determine whether to terminate or modify the program known as the Migrant Protection
10 Protocols[.]” *Id.*

11 133. On February 11, 2021, DHS announced it would process into the United
12 States individuals who had been returned to Mexico under the MPP.⁵² Beginning on
13 February 19, 2021, DHS started to execute this policy and bring those individuals into to
14 the United States.

15 134. Finally, on June 1, 2021, the Administration formally ended the MPP with a
16 cursory seven-page memorandum.⁵³ This memorandum provides several insufficient

17 ⁵¹ See *Executive Order on Creating a Comprehensive Regional Framework to Address the*
18 *Causes of Migration, to Manage Migration Throughout North and Central America, and*
19 *to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*,
20 Office of the White House (Feb. 2, 2021), available at
21 [https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/)
22 [order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/)
23 [to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/)
24 [orderly-processing/](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/).

25 ⁵² See *Press Release, Department of Homeland Security, DHS Announces Process to*
26 *Address Individuals in Mexico with Active MPP Cases*, (Feb. 11, 2021), available at
[https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-](https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases)
[mexico-active-mpp-cases](https://www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases).

⁵³ See Memorandum from Alejandro Mayorkas, Department of Homeland Security,
Termination of the Migrant Protection Protocols, (June 1, 2021), available at

1 explanations, including that it allegedly failed to reduce resource usage at DHS and failed
2 to reduce Executive Office of Immigration Review case backlogs. *Id.* However, this
3 memorandum makes no mention of a major justification for the MPP in the first place: *i.e.*,
4 the ability of asylum applicants to file non-meritorious claims in order to stay in the
5 country, with the ultimate intent of absconding and remaining illegally.⁵⁴

6 135. The Biden Administration’s termination of MPP has continued and furthered
7 their program of expanding the population of the United States by pro-migration policies
8 and has greatly exacerbated the crisis at the southern border. This “catch and release”
9 program has bolstered cartels and other criminal operations and greatly increased the
10 sophistication and frequency of human smuggling operations.⁵⁵

11 136. Today, tens of thousands of migrants are crossing the border in Arizona with
12 the expectation they will be released in the United States to await their immigration
13 hearing.⁵⁶ They can then skip out on the hearing and disappear into the country.
14 Defendant’s action here encourages precisely the sort of meritless asylum claims that the
15 MPP program was designed to avoid.

16
17
18 https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.

19 ⁵⁴ See 83 Fed. Reg. 55,934, 55,944-55,945 (Nov. 9, 2018). See also Executive Office for
20 Immigration Review Adjudication Statistics, Credible Fear and Asylum Process: Fiscal
21 Year (FY) 2008 – FY 2019 (Oct. 23, 2019), available at
22 <https://www.justice.gov/eoir/file/1216991/download> (illustrating that only 14% of aliens
claiming credible fear are granted asylum, and 32% abscond into the United States and are
ordered removed in absentia).

23 ⁵⁵ See Dave Graham, *Exclusive: ‘Migrant president’ Biden Stirs Mexican Angst Over*
24 *Boom Time for Gangs*, Reuters (Mar. 10, 2021), <https://www.reuters.com/article/us-usa-immigration-mexico-exclusive/exclusive-migrant-president-biden-stirs-mexican-angst-over-boom-time-for-gangs-idUSKBN2B21D8>.

25 ⁵⁶ See Miriam Jordan, *From India, Brazil and Beyond: Pandemic Refugees at the Border*,
26 New York Times (May 16, 2021), <https://www.nytimes.com/2021/05/16/us/migrants-border-coronavirus-pandemic.html>

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

9 **H. The October 29, 2021 Memoranda**

10 138. On October 29, 2021, DHS issued two memoranda (the “October 29
11 Memoranda”). The first was four pages long (the “October Termination Memo”) and again
12 purported to announce the termination of MPP. The second was a 39-page addendum (the
13 “October Addendum”) providing additional reasons for the purported termination.

14 139. On June 30, 2022, the Supreme Court held that “[t]he October 29
15 Memoranda were ... final agency action for the same reasons that the June 1 Memorandum
16 was final agency action. That is, both the June 1 Memorandum and the October 29
17 Memoranda, when they were issued, marked the consummation of the agency's
18 decisionmaking process and resulted in rights and obligations [being] determined.” *Biden*
19 *v. Texas*, 142 S. Ct. 2528, 2544–45 (2022) (cleaned up).

20 140. The Supreme Court, however, did not examine whether the October 29
21 Memoranda violated the APA, but instead remanded the case to the Northern District of
22 Texas to make that determination in the first instance. *Id.* at 2548. The Supreme Court also
23 clarified that the purported rescission of the MPP did not violate section 1225 of the INA.
24 *Id.*

25 141. The October Addendum attempts to justify MPP termination by claiming that
26 “the program deterred too many meritorious asylum claims at the expense of deterring non-

1 meritorious claims” for aliens from Northern Triangle countries. October Addendum at 21.
2 Yet, the very same memo acknowledges that prior DHS estimates were that 90 percent of
3 all Northern Triangle asylum applications were non-meritorious (it also claimed, without
4 explanation, that DHS’s prior 90 percent figure was incorrect and that the correct figure
5 was actually 71 percent). *Id.* The October Memoranda juxtaposed these figures with a claim
6 that the asylum grant rate for MPP applicants was only 1.1 percent. *Id.* Yet, this is an
7 apples-to-oranges comparison. Just one page earlier, DHS itself acknowledged in a
8 parenthetical note that the overall grant rate for all other asylum applicants over the same
9 period was a similarly low 2.7 percent. *Id.* The October Addendum acknowledges that
10 these figures are so much lower than the historical grant rate from Northern Triangle
11 countries because “a policy was implemented that barred asylum for individuals who
12 transited through third countries [the “Third Country Policy”] and decisions were issued
13 that limited humanitarian protection claims based on family membership and gender; these
14 likely depressed grant rates. Additionally, the period of time being analyzed is both brief
15 and recent. OIS analysis indicates that relief-granted rates tend to increase over the first
16 three to four years after a case resulting from a credible or reasonable fear claim is initiated
17 in immigration court.” *Id.* n.87.

18 142. The October Addendum’s justification for cancelling MPP because it
19 resulted in a much lower asylum grant rate is thus pretextual. The grant rate was lower
20 because the Third Country Policy precluded virtually every asylum application from
21 Northern Triangle applicants who applied after crossing into the United States from
22 Mexico. Thus, the grant rate for aliens from non-Northern Triangle Countries was higher
23 because the third country policy would not apply to Mexicans who cross the southern
24 border, nor to asylum applicants who directly arrived in the United States from their
25 country of origin. The October Addendum does not even attempt to address these
26 discrepancies.

1 143. Furthermore, neither of the October Memoranda even mention the Secure
2 Fence Act or DHS’s statutory duty to secure operational control of the border, nor analyze
3 how MPP cancellation might affect that duty.

4 144. The October Addendum also acknowledges that there was a “notable” and
5 “sharp decrease in [southwest border] encounters during the months in which MPP was
6 fully operational.” October Addendum at 23. The only response that the October
7 Addendum offers is the weak protestation that “correlation does not equal causation.”
8 However, the Addendum offers no other plausible explanation for the “sharp decrease” in
9 border crossings following adoption and full implementation of MPP, except to note that
10 Mexico stepped up its own immigration enforcement in April of 2019. *Id.* Yet, according
11 to the Addendum itself, border crossings had already decreased before Mexico increased
12 its own enforcement. Indeed, Mexico likely increased enforcement on its side of the border
13 only after MPP started having a measurable effect precisely *because* MPP was forcing
14 Mexico to deal more directly with the consequences of so many aliens crossing through its
15 territory, as Mexico was no longer able to send those aliens on to the United States, but
16 instead was forced instead to provide care and social services for those aliens itself.

17 145. And as with Defendants’ prior attempts to terminate the MPP, the October
18 Memoranda does not engage in any environmental analysis at all.

19 **I. Defendants Have Affirmatively Degraded Their Own Detention Capacity**

20 146. The October Addendum claims that the federal government cannot detain
21 asylum applicants as an alternative to the MPP (even though detention is required by 8
22 U.S.C. § 1225) because it lacks “sufficient detention capacity to maintain in custody every
23 single person described in section 1225.” October Addendum at 28. The government
24 cannot make this claim in good faith, however, because the federal government has
25 affirmatively degraded its own detention capacity. Astonishingly, at the same time the
26 federal government has been claiming that it lacks sufficient detention capacity for aliens,

1 it also submitted a budget request to Congress that would decrease DHS’s alien detention
2 capacity by 25%.⁵⁷

3 147. The federal government further affirmatively degraded its own detention
4 capacity by cancelling contracts with private detention facilities and by closing detention
5 facilities.⁵⁸ In addition, even where DHS has capacity, it has often failed to utilize it. For
6 example, an April 12, 2022 DHS Inspector General Report explains how DHS acquired
7 detention capacity from hotels from no-bid contracts and then inexplicably failed to use it:
8 indeed, DHS “spent approximately \$17 million for hotel space and services at six hotels
9 that went largely unused between April and June 2021” and “did not adequately justify the
10 need for the sole source contract to house migrant families.”⁵⁹ Moreover, DHS has entered
11 into settlement agreements with ideologically aligned groups to hobble its detention
12 capacity further.⁶⁰

13 148. The Addendum claims that DHS cannot detain aliens as an alternative to
14 implementing MPP, but it ignores DHS’s own role in ensuring that its detention capacity
15 would be insufficient. This rationale “calls to mind the man sentenced to death for killing
16 his parents, who pleads for mercy on the ground that he is an orphan.” *Glossip*, 576 U.S.
17 at 898 (Scalia, J., concurring).

20 ⁵⁷ Eileen Sullivan, *Biden to Ask Congress for 9,000 Fewer Immigration Detention Beds*,
21 NEW YORK TIMES (Mar. 25, 2022), <https://nyti.ms/3vOI00F>.

22 ⁵⁸ *Id.*; Priscilla Alvarez, *Biden administration to close two immigration detention centers*
23 *that came under scrutiny*, CNN (May 20, 2021), <https://cnn.it/3KcxGol>.

24 ⁵⁹ DHS Off. of Inspector Gen., *ICE Spent Funds on Unused Beds, Missed COVID-19*
25 *Protocols and Detention Standards while Housing Migrant Families in Hotels* at 3, 5 (April
12, 2022) [https://www.oig.dhs.gov/sites/default/files/assets/2022-04/OIG-22-37-](https://www.oig.dhs.gov/sites/default/files/assets/2022-04/OIG-22-37-Apr22.pdf)
26 [Apr22.pdf](https://www.oig.dhs.gov/sites/default/files/assets/2022-04/OIG-22-37-Apr22.pdf)

⁶⁰ See, e.g., Rae Ann Varona, *ICE Agrees To Restrictions In COVID-19 Hot Spot*
Settlement, LAW360 (July 7, 2022), [https://www.law360.com/articles/1509393/ice-agrees-](https://www.law360.com/articles/1509393/ice-agrees-to-restrictions-in-covid-19-hot-spot-settlement)
[to-restrictions-in-covid-19-hot-spot-settlement](https://www.law360.com/articles/1509393/ice-agrees-to-restrictions-in-covid-19-hot-spot-settlement).

1 **J. Prior Programmatic Environmental Impact Statements**

2 149. The federal government has previously recognized the need to address the
3 environmental impacts of its interlocking border programs in a programmatic EIS. In 1994,
4 the Department of Justice (“DOJ”) issued a draft programmatic environmental impact
5 statement (“DPEIS”) addressing border enforcement efforts, addressing collaborative
6 efforts between the then-DOJ entities the Immigration and Naturalization Service (“INS”),
7 and the Border Patrol and DOD entity Joint Task Force Six (“JTF-6”) (now “JTF-N”). *See*
8 *Draft Programmatic Environmental Impact Statement to Continue the Program of*
9 *Protecting the Southwest Border Through the Interdiction of Illegal Drugs With the*
10 *Support of the Joint Task Force Six*, 59 FR 26322-02 (May 19, 1994). The Notice indicates
11 that “INS elected to act as lead agency for the preparation of this DPEIS” because the
12 border patrol—now a part of CBP in the DHS—was the primary “beneficiary” of most
13 JTF-6 engineering. *Id.*

14 150. The purpose of the DPEIS was “to address cumulative environmental
15 impacts of previous actions as well as those actions which may be developed within the
16 reasonably foreseeable future.” *Id.* The final programmatic EIS was issued in October
17 1994. *See Notice of Availability of the Final Programmatic Environmental Impact*
18 *Statement (DPEIS): Final Programmatic Environmental Impact Statement to Continue the*
19 *Program of Protecting the Southwest Border Through the Interdiction of Illegal Drugs*
20 *With the Support of the Joint Task Force Six*, 59 FR 50773 (Oct. 5, 1994).

21 151. In 1999, DOJ began supplementing the 1994 programmatic EIS. *See* 64 FR
22 15969 (April 2, 1999) (weekly EPA notice of EIS availability). A revised draft of the
23 supplemental programmatic EIS was issued in September 2000. *See* 65 FR 58527 (Sept.
24 29, 2000) (weekly EPA notice of EIS availability); 65 FR 63076 (Oct. 20, 2000) (corrected
25 weekly EPA notice of EIS availability).
26

1 152. On May 24, 2019, DHS withdrew both the 1994 programmatic EIS and the
2 2000 supplemental programmatic EIS. *See Notice of the withdrawal of a 1994*
3 *programmatic environmental impact statement and a 2001 supplemental programmatic*
4 *environmental impact statement regarding certain activities along the U.S. Southwest*
5 *border*, 84 Fed. Reg. 25067-01 (May 24, 2019). DHS’s explanation stated that CBP
6 “believe[s] their decision-makers are well-served by site-specific or project-specific NEPA
7 analyses. Unlike a sprawling programmatic NEPA analysis, a site specific or project-
8 specific NEPA analysis gives decision-makers concrete and tangible information regarding
9 the potential impacts of a proposed action. In addition, because every site-specific or
10 project-specific analysis includes an analysis of cumulative impacts, they also present
11 decision-makers with a larger frame of reference in which to understand those impacts.”

12 153. DHS has also completed a programmatic PEIS for the Northern U.S.-Canada
13 border. *See Notice of Intent To Prepare One Programmatic Environmental Impact*
14 *Statement for the Northern Border Between the United States and Canada* 75 FR 68810-
15 01 (Nov. 9, 2010). In the Notice announcing the intent to prepare the programmatic EIS,
16 CBP explained why it was providing a single PEIS for the entire border: “(1) CBP’s need
17 to identify a single unified proposal and alternatives for maintaining or enhancing security
18 along the Northern Border, and (2) Certain resources of concern for this PEIS extend or
19 move across the PEIS regions previously identified (e.g. habitat of various wildlife).” *Id.*

20 154. Accordingly, Defendants have recognized that, in actions involving the
21 border and immigration enforcement, their interlocking and related actions often have
22 environmental impacts that must be analyzed comprehensively in a programmatic EIS
23 under NEPA. DHS’s conclusory explanation in the 2019 withdrawal that project- and site-
24 specific analysis give more “concrete and tangible” information simply runs contrary to
25 their legal obligation to ensure that actions which “will have cumulative or synergistic
26

1 environmental impact upon a region ... must be considered together.” *Kleppe*, 427 U.S. at
2 410.

3 **K. Environmental Consequences of Defendants’ Actions**

4 155. Defendants’ actions are likely to have significant environmental impacts.
5 However, Defendants have flouted compliance with NEPA and have not even engaged in
6 the pretense of performing any environmental analysis before taking environmentally
7 transformative actions.

8 156. On information and belief, thousands of additional individuals have settled
9 and continue to settle in Arizona than otherwise would have as the intentional, anticipated,
10 and direct result of Defendants’ actions. This additional population, and the thousands of
11 individuals traveling across Arizona’s lands and wilderness, has significant negative
12 impacts on the human environment in Arizona.

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

16 158. Those environmental effects are classified below into a few main categories.

17 **a. Migration Impacts**

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

23 160. Thousands of migrants are crossing and will continue to cross across the
24 Arizona-Mexico border, concentrated at areas where there are gaps in the fencing. As the
25 New York Times has explained: “Many [migrants] are entering the United States through
26 wide openings in the border wall near Yuma, sparing them from the risky routes through

1 remote desert regions, where migrants frequently lose their bearings, or across the Rio
2 Grande in Texas.”⁶¹ This is the entirely foreseeable effect of Defendants’ actions in
3 choosing to leave gaps in the border wall—migrants seek out and cross at those gaps, and
4 in greater numbers than ever before.

5 161. Because of Defendants’ actions, migrants are crossing wilderness areas and
6 other parts of the state not intended for human migration in huge numbers. Accordingly,
7 migrants necessarily leave behind considerable refuse and can damage wildlife by their
8 passing. As the Arizona Department of Environmental Quality (“ADEQ”) has explained,
9 border trash typically includes “plastic containers, clothing, backpacks, foodstuffs,
10 vehicles, bicycles and paper. Human waste and medical products have also been found in
11 border trash.”⁶²

12 162. ADEQ estimates that each border-crosser leaves an average of six to eight
13 pounds of trash behind.⁶³

14 163. The proliferation in border trash as a result of increased unauthorized
15 crossings has numerous negative consequences for the human environment. Some are
16 articulated by the ADEQ, including: “Strewn trash and piles, Illegal trails and paths,
17 Erosion and watershed degradation, Damaged infrastructure and property, Loss of
18 vegetation and wildlife, Campfires and escaped fires, Abandoned vehicles and bicycles,
19 Vandalism, graffiti and site damage (historical and archaeological), Occurrence of bio-
20 hazardous waste.”⁶⁴

23 ⁶¹ Miriam Jordan, *From India, Brazil and Beyond: Pandemic Refugees at the Border*, New
24 York Times (May 16, 2021), available at
<https://www.nytimes.com/2021/05/16/us/migrants-border-coronavirus-pandemic.html>.

25 ⁶² *About Arizona Border Trash*, Arizona Department of Environmental Quality, available
26 at <https://www.azbordertrash.gov/about.html>.

⁶³ *Id.*

⁶⁴ *Id.*

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

7 **b. Increased Air Emissions**

8 165. Another predictable environmental impact of Defendants’ actions are
9 increased air emissions, including emissions of greenhouse gases (GHGs), the most
10 common of which is carbon dioxide. *Id.*

11 166. The United States has disproportionately high ratios of carbon emissions and
12 energy consumption to population; the U.S. represents approximately 5 percent of the
13 global population but consumes about 25 percent of the world’s energy and generates 5
14 times the world average of CO2 emissions. *Id.* On a per capita basis, U.S. residents generate
15 five times as much carbon as the average individual outside of the country.

16 167. These greater per-capita emissions substantially reflect the economic
17 strength of the United States. GHG emissions predictably increase with income, and the
18 United States is one of the wealthiest countries in the world on a per-capita basis. GHG
19 emissions have notably declined recently, with EPA reporting that they dropped 1.7% from
20 2018 to 2019, for example.⁶⁵

21 168. This discrepancy in per-capita emissions is even more pronounced with
22 individuals arriving from the countries that mostly make up the migration occasioned by
23 Defendants’ actions. According to one report, “Around four-in-ten (42%) of those
24 apprehended at the southwestern border in February were people of Mexican origin, up
25 from 13% in May 2019, the most recent peak month for monthly apprehensions. People

26 ⁶⁵ See EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks*, available at
<https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks>

1 from El Salvador, Guatemala and Honduras accounted for 46% of apprehensions in
2 February, down from 78% in May 2019.”⁶⁶ The United States population produces
3 considerably more GHG emissions per capita by comparison: compared to Mexico, 5.4
4 times; El Salvador, 21.9 times; Guatemala, 22.4 times, and Honduras, 20.3 times. *See Flood*
5 *Report* at 7.

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

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

22 171. These impacts on air emissions were a direct and foreseeable consequence
23 of Defendants’ actions. Because individuals generate substantially more air/GHG
24 emissions in the United States than they would in their countries-of-origin, policies which
25

26 ⁶⁶ See John Gramlich, *Migrant apprehensions at U.S.-Mexico border are surging again*,
Pew Research Center (Mar. 15, 2021), available at <https://www.pewresearch.org/fact-tank/2021/03/15/migrant-apprehensions-at-u-s-mexico-border-are-surging-again/>.

1 admit more individuals into the country—like the termination of the MPP—or policies
2 which permit or encourage more individuals to come to this country—like the affirmative
3 halt to the construction of the border wall—have significant environmental impacts which
4 must be addressed under NEPA.

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

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

17 174. The Working Group published interim values for SCC, SCN, and SCM on
18 February 26, 2021.

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

24 176. Defendants’ violations of their own Administration policies thus further
25 demonstrate Defendants’ apparent—and glaring—ideological blind spot to GHG
26 emissions resulting from their immigration policies. Defendants are apparently fixated on

1 reducing GHG emissions in all other contexts, but are completely oblivious or willfully
2 ignorant of them in this one particular setting. These apparent ideological blinders violate
3 NEPA.

4 **c. Growth Impacts**

5 177. Since at least 1975, the Ninth Circuit has held that population growth can be
6 an environmental impact that agencies must consider under NEPA. *See City of Davis*, 521
7 F.2d at 671. In that case, the court held that the Federal Highway Administration violated
8 NEPA by failing to prepare an EIS prior to the construction of a freeway interchange near
9 an agricultural area. *Id.* at 666. As the Ninth Circuit explained, “plain common sense”
10 indicated that the highway interchange was likely to cause growth in the area: “The growth-
11 inducing effects of the ... project are its *raison d’être*, and with growth will come growth’s
12 problems: increased population, increased traffic, increased pollution, and increased
13 demand for services such as utilities, education, police and fire protection, and recreational
14 facilities.” *Id.* at 675. *See also Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1139 (9th
15 Cir. 2011) (holding that, with respect to project adding a new runway to an airport, “even
16 if the stated purpose of the project is to increase safety and efficiency, the agencies must
17 analyze the impacts of the increased demand attributable to the additional runway as
18 growth-inducing effects”); *City of Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d
19 1142, 1162 (9th Cir. 1997) (“Consideration of the growth-inducing effects furthers the
20 National Environmental Policy Act’s information and public awareness goals.”).

21 178. To be sure, population growth also frequently provides significant benefits,
22 economic and otherwise. In particular, Arizona has benefited substantially from population
23 growth, both from internal migration and international immigration. This suit does not
24 challenge population growth, only Defendants’ failure to analyze that growth properly—
25 or, indeed, *at all*—under NEPA.
26

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

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

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

22 **d. Impacts To Wildlife**

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

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

1 184. The de facto creation of gaps in the Border Wall may affect these species by
2 concentrating their migration activities to those corridors—where they will be exposed to
3 concentrated human activity and potential predators.

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

8 **e. Summary Of Impacts**

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

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

188. Defendants—in both the context of past actions relating to the Southern Border and actions relating to the Northern Border—have conducted programmatic analyses of their actions. No such programmatic analysis was conducted here, despite the bevy of actions relating to immigration, all of which are closely related and have similar environmental impacts.

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

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

FIRST CLAIM FOR RELIEF⁶⁷

Failure To Prepare A Programmatic EIS

(Asserted Under NEPA/APA)

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

192. Defendants’ Population Augmentation Program constitutes “a coherent plan of national scope, [whose] adoption surely has significant environmental consequences.” *Kleppe*, 427 U.S. at 400.

193. Defendants were therefore required to prepare a programmatic EIS to evaluate the Population Augmentation Program.

⁶⁷ The State acknowledges that this Court has dismissed many of these claims. To the extent that they are re-asserted without amendment, it is solely to preserve potential appellate review and not to seek this Court's reconsideration of its prior orders.

1 194. Alternatively, each of the components of the Population Augmentation
2 Program: *e.g.*, eliminating fines, exempting individuals from Title 42, and drastically
3 decreasing deportation of individuals with final orders of removal, all individually have
4 significant environmental impacts requiring preparation of an EIS.

5 195. Defendants have not attempted to comply with NEPA for any of these
6 actions. Defendants have therefore violated NEPA both by failing to prepare a
7 programmatic EIS for their Population Augmentation Program, and by alternatively failing
8 to prepare EISs (or even EAs) for the individual components.

9 196. Defendants cannot rely on the 1994 programmatic EIS or the 2001
10 supplemental programmatic EIS, since both of those EISs were vacated. But even if they
11 could, the situation has so radically changed in the ensuing two decades that Defendants'
12 failure to prepare a supplemental EIS violates NEPA.

13 **SECOND CLAIM FOR RELIEF**

14 **Failure To Prepare An EIS For Border Wall Construction Termination** 15 **(Asserted Under NEPA/APA)**

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

17 198. The termination of border wall construction has significant environmental
18 effects which DHS has utterly failed to consider, in defiance of NEPA. In particular,
19 Defendants have not prepared either an EIS or EA to study the pertinent environmental
20 effects.

21 199. In taking the above-referenced major federal actions without conducting any
22 sort of environmental analysis, Defendants have taken final agency actions that are
23 arbitrary, capricious, and otherwise not in accordance with law, or without observance of
24 procedure required by law, within the meaning of the Administrative Procedure Act. 5
25 U.S.C. § 706(2). As such, Defendants' actions should be held unlawful and set aside. *Id.*
26

1 **THIRD CLAIM FOR RELIEF**

2 **Failure To Prepare An EIS For Terminating The MPP**

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

4 200. The allegations in the preceding paragraphs are reincorporated herein

5 201. Plaintiffs' cancellation of the MPP has significant environmental effects
6 which DHS has utterly failed to consider, in defiance of NEPA. In particular, Defendants
7 have not prepared either an EIS or EA to study the pertinent environmental effects. Even
8 after this suit placed them on notice of their failure to follow NEPA's requirements,
9 Defendants still refused to prepare either an EIS or EA in connection with the October
10 Memoranda.

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

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

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

18 203. The allegations in the preceding paragraphs are reincorporated herein.

19 204. Defendants' Border Wall Construction Termination will have effects on
20 endangered species without engaging in the required consultation under Section 7 of the
21 ESA.

22 205. At no point have Defendants engaged in any consultation under ESA Section
23 7 regarding potential impacts to threatened and species from the Border Wall Construction
24 Termination.

1 206. On July 9, 2021, the State sent a 60-day letter to Defendants under 16 U.S.C.
2 § 1540(g) alerting them to their violations of ESA Section 7 concerning their Border Wall
3 Construction Termination. Defendants will receive notice from those letters on July 12.

4 207. If Defendants have not remedied its ESA violations within 60 days, the State
5 intends to assert a claim under the ESA challenging Defendants’ Border Wall Construction
6 Termination.

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

10 **FIFTH CLAIM FOR RELIEF**

11 **Arbitrary and Capricious Agency Action – Lack of Reasoned Decision-Making**

12 **Border Wall Construction Termination**

13 **(Asserted Under APA)**

14 209. The allegations in the preceding paragraphs are reincorporated herein.

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

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

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

24 213. The January 20 Proclamation does not supply any meaningful analysis, and
25 instead merely announces that “building a massive wall ... is not a serious policy solution”
26 and the wall is “a waste of money that diverts attention from genuine threats to our

1 homeland security.” These *ipse dixit* assertions do not supply reasoned analysis upon which
2 Defendants could rely.

3 214. The Secure Fence Act of 2006 provides specific criteria against which DHS’s
4 Border Wall Construction Termination can be reviewed. Specifically, the Secure Fence
5 Act requires that DHS “achieve and maintain operational control over the entire
6 international land and maritime borders of the United States.” Pub. L. No. 109-367, 120
7 Stat. 2638 § 2(a) (2006). It specifically defines “operational control” to mean “the
8 prevention of all unlawful entries into the United States, including entries by terrorists,
9 other unlawful aliens, instruments of terrorism, narcotics, and other contraband.” *Id.* § 2(b).

10 215. The Border Wall Construction Termination is arbitrary and capricious for
11 several independently sufficient reasons, including:

12 216. *First*, Defendants’ Border Wall Construction Termination did the opposite
13 of what the Secure Fence Act requires. Rather than promoting operational control of the
14 border, it actively degraded operational control of the border by allowing increased
15 unlawful entries into the United States than would have happened if the planned wall
16 sections had been built.

17 217. *Second*, the Border Wall Construction Termination failed to consider the
18 negative environmental effects of termination.

19 218. *Third*, Defendants failed to estimate or account for the costs of the Border
20 Wall Construction Termination, such as the increased illegal immigration caused by the
21 termination, and the presence of much greater numbers of aliens who were able to enter
22 the United States.

23 219. *Fourth*, the Border Wall Construction Termination is arbitrary and capricious
24 because the Defendants did not consider Arizona’s reliance interests in the continuation of
25 the planned construction. The government is obligated to “turn square corners in dealing
26 with the people.” *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020). When

1 an agency changes course, as Defendants have done here, they must “be cognizant that
2 longstanding policies may have ‘engendered serious reliance interests that must be taken
3 into account.’” *Id.* at 1913 (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117,
4 2126 (2016). In fact, “[i]t would be arbitrary and capricious to ignore such matters.” *Id.*
5 (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

6 220. *Fifth*, Defendants failed to justify their deviation from prior practice. The
7 APA prohibits Defendants from “whistl[ing] past [this] factual graveyard” to “evade[]”
8 their “established pattern of agency conduct and formalized positions.” *Am. Wild Horse*
9 *Pres. Campaign*, 873 F.3d at 923-27; *see also Dillmon v. Nat’l Transp. Safety Bd.*, 588
10 F.3d 1085, 1089 (D.C. Cir. 2009) (APA requirements ensure that an agency’s “prior
11 policies and standards are being deliberately changed, not casually ignored”). Yet
12 Defendants fail to grapple with their prior actions and act as if their prior positions do not
13 exist.

14 221. *Sixth*, the Border Wall Construction Termination is arbitrary and capricious
15 because its rationales are obviously pretextual. The actions of the President, Secretary
16 Mayorkas, and other Administration officials have made clear that the intent of the
17 Administration’s immigration policies is to facilitate illegal immigration. Indeed, that the
18 Administration’s immigration policies incentivize high amounts of illegal immigration is
19 widely recognized internationally. For example, the President of Mexico called President
20 Biden the “migrant president” and observed that the Biden Administration’s policies and
21 rhetoric greatly incentivize illegal immigration.⁶⁸ Human traffickers have recognized this
22 as well. Internal Mexican government assessments “state that gangs are diversifying
23 methods of smuggling and winning clients as they eye U.S. measures that will ‘incentivize
24 migration.’”⁶⁹

25
26 ⁶⁸ Dave Graham, *Exclusive: ‘Migrant president’ Biden stirs Mexican angst over boom time for gangs*, REUTERS, Mar. 10, 2021 <https://reut.rs/3vKlk1x>.

⁶⁹ *Id.*

222. The presence of such blatant pretext is enough to render the Border Wall Construction Termination arbitrary and capricious. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019). Accepting Defendants' description of the Border Wall Construction Termination requires this Court to “exhibit a naiveté from which ordinary citizens are free.” *Id.*

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

SIXTH CLAIM FOR RELIEF

Arbitrary and Capricious Agency Action – Lack of Reasoned Decision-Making

MPP Termination

(Asserted Under APA)

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

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

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

227. Neither the January 20 suspension of the MPP nor the June 1 memorandum, nor the October Memoranda adequately explain the Defendants' departure from the previous policy.

228. Additionally, the Secure Fence Act of 2006 provides specific criteria against which DHS's MPP Termination can be reviewed. Specifically, the Secure Fence Act requires that DHS "achieve and maintain operational control over the entire international land and maritime borders of the United States." Pub. L. No. 109-367, 120 Stat. 2638 § 2(a) (2006). It specifically defines "operational control" to mean "the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband." *Id.* § 2(b).

1 229. The MPP Termination is arbitrary and capricious for several independently
2 sufficient reasons.

3 230. *First*, it did the opposite of what the Secure Fence Act requires. Rather than
4 promoting operational control of the border, it actively degraded operational control of the
5 border by incentivizing increased illegal border crossings by a population of whom the vast
6 majority (either 90 or 71 percent) make non-meritorious asylum claims in order to gain
7 illegitimate entry into the United States. Illegal crossings into the United States, and into
8 Arizona are therefore significantly higher than they would have been if MPP had not been
9 terminated.

10 231. *Second*, Defendants failed to estimate or account for the costs to Arizona of
11 the increased illegal immigration caused by the MPP Termination.

12 232. *Third*, Defendants failed to consider or arbitrarily rejected obvious
13 alternatives to the MPP, such as increasing detention capacity. In fact, Defendants have
14 affirmatively degraded their detention capacity.

15 233. *Fourth*, Defendants failed to consider Arizona's reliance interests. The
16 October Addendum claims that "[t]he Secretary takes these [State reliance] concerns
17 seriously," but does not outline any steps DHS has taken to attain operational control of
18 the border, or even to reduce the number of aliens illegally crossing the border. "Stating
19 that a factor was considered ... is not a substitute for considering it." *Texas v. Biden*, 10
20 F.4th 538, 556 (5th Cir. 2021). And Defendants' cursory nod to the existence of reliance
21 interests misses the mark. Their analysis fails to account for the actual real-world effects
22 of the MPP and how States might have legitimately relied on it. Arizona has overwhelming
23 reliance interests in federal enforcement of immigration law. Arizona's state budget and
24 resource allocations are determined in reliance on Defendants' continued enforcement of
25 immigration law and prevention of the entry of aliens with non-meritorious asylum claims.
26 Defendants did not consider whether Arizona relied on continuation of the MPP when

1 Arizona determined how it would marshal and distribute its resources to deal with the
2 number of unauthorized aliens entering their states. The MPP Termination is arbitrary and
3 capricious because it utterly ignores these reliance interests. *See Regents of the Univ. of*
4 *Cal.*, 140 S. Ct. at 1913-14.

5 234. *Fifth*, Defendants' reason for terminating the MPP is pretextual, as explained
6 above.

7 235. *Sixth*, the MPP Termination fails to account for the reality that the vast
8 majority of asylum claims have no merit and that DHS officers have a terrible track record
9 of correctly adjudicating asylum claims. Between FY2008 and FY 2019, the asylum grant
10 rate aliens claiming a credible fear was only 14%. Rather than make the system stricter to
11 solve this problem, the MPP Termination inexplicably relaxes the system and thus makes
12 it even easier for aliens with meritless claims improperly to gain entry into the United
13 States. The MPP Termination makes it significantly easier for aliens with non-meritorious
14 asylum claims to get into the United States, and it fails to consider the effect that this change
15 will have on illegal immigration rates, unemployment rates for citizens and authorized
16 aliens, and the effect on wages.

17 236. As such, Defendants' actions should be held arbitrary and capricious and set
18 aside. 5 U.S.C. § 706(2).

19 SEVENTH CLAIM FOR RELIEF

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

21 237. The allegations in the preceding paragraphs are reincorporated herein.

22 238. Under Article II, Section 3 of the Constitution, the President "shall take Care
23 that the Laws be faithfully executed." Consistent with this obligation, and Articles I and II
24 generally, when Congress allocates funds for a particular program, the President generally
25 cannot refuse to administer that program or spend those funds for purely policy or political
26

1 reasons. *See, e.g., In re Aiken County*, 725 F.3d 255, 261–66 (D.C. Cir. 2013) (Kavanaugh,
2 J., concurring). *See also* 2 U.S.C. §§ 682-88.

3 239. Congress allocated to DHS considerable funds to spend on border
4 construction, with specific instructions detailing what those funds may be used for.
5 Defendants, in violation of their obligation to take care that those laws are faithfully
6 executed, are withholding the funds and refusing to proceed with the statutorily mandated
7 program.

8 240. Accordingly, Defendants have violated the Constitution and their actions are
9 unlawful. Defendants’ actions violated the APA and are actionable independent of the
10 APA.

11 241. Defendants’ actions similarly violate the Impoundment Control Act of 1974,
12 2 U.S.C. §§ 681-88. That statute broadly prohibits the President from refusing to expend
13 moneys that Congress has appropriated. Defendants’ actions here violate this prohibition.

14 242. Nor has the President invoked his authority to pause expenditures pending
15 Congress’s consideration of a rescission bill. *See id.*

16 243. Although the General Accounting Office (“GAO”) determined on June 15
17 that the Biden Administration’s non-expenditure of funds appropriated for border wall
18 construction did not yet violate the Impoundment Control Act of 1974, that determination
19 was in error. In particular, the GAO relied upon the Biden Administration’s statement that
20 the expenditures of funds was merely “delayed in order to perform environmental reviews”
21 “such as the National Environmental Policy Act of 1969 (NEPA).” *See*
22 <https://www.gao.gov/assets/b-333110.pdf>. But NEPA required Defendants to undertake
23 NEPA analysis *before* taking irreversible action such as terminating contracts.

24 244. Moreover, it does not appear that Defendants have published any draft EAs
25 or EIS in the Federal Register, or notified the public of their intent to do so. Defendants’
26 response to GAO is thus pretextual and cannot withstand scrutiny.

1 **PRAYER FOR RELIEF**

2 Plaintiff respectfully requests that this Court enter judgment:

- 3 A. Declaring that Defendants have violated NEPA and the APA by their Border Wall
4 Construction and MPP Terminations without preparing EISs or EAs, and by failing to
5 prepare a programmatic EIS to study their Population Augmentation Program;
- 6 B. Declaring that Defendants' refusal to expend moneys appropriated by Congress for
7 construction of the border wall for actual border wall construction violates both the
8 Constitution and the Impoundment Control Act of 1974;
- 9 C. Enjoining Defendants from continuing to take actions, including diverting and
10 impounding appropriated funds, to prevent the continuation of construction of border
11 wall under contracts already entered into by the United States until such time as
12 Defendants comply with NEPA;
- 13 D. Enjoining Defendants from processing any further migrants into the United States,
14 who were and who would have been covered by the MPP until such time as Defendants
15 comply with NEPA;
- 16 E. Enjoining Defendants to secure the border in Arizona to the satisfaction of this Court
17 to prevent additional unlawful migration until such time as Defendants comply with
18 NEPA;
- 19 F. Vacating Defendants' actions that violate the APA and the Constitution;
- 20 G. Awarding Plaintiff costs of litigation, including reasonable attorneys' fees, under the
21 Equal Access to Justice Act, 28 U.S.C. § 2412; and
- 22 H. Granting any and all other such relief as the Court finds appropriate.
- 23
24
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1 RESPECTFULLY SUBMITTED this 15th of August, 2022.
2

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