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15 **UNITED STATES DISTRICT COURT**
16 **DISTRICT OF ARIZONA**

17 State of Arizona,
18 Plaintiff,
19 v.

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

Defendants.

No. 2:21-cv-00617-DWL

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

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INTRODUCTION

1
2 Defendants offer little substantive defense of their actions under NEPA. That is
3 unsurprising: given the scope of the actions challenged here and their obvious and
4 enormous environmental impacts—which dwarf prior instances where the Ninth Circuit
5 has mandated preparation of full-blown EISs—Defendants’ refusal to perform any NEPA
6 analysis whatsoever is indefensible. As a result, Defendants have “raise[d] an avalanche of
7 procedural objections in service of avoiding adjudication of the merits here,” as the State
8 anticipated. Doc. 17 (“PI Br.”) at 18. But those near-ceaseless procedural arguments fare
9 no better than their skeletal merits ones.

10 DHS’s chief defense to the State’s Border Barrier claim appears to be an Alice-in-
11 Wonderland-level distortion of DHS’s waiver authority that flirts with the surreal. Section
12 102(c) of the IIRIRA provides DHS authority to waive compliance with NEPA and other
13 laws for a *single* and *explicit* purpose: “*to ensure expeditious construction* of the barriers
14 and roads under this section.” (emphasis added). But DHS asserts that it can invoke that
15 authority to ensure construction is *permanently cancelled*. DHS can, in other words, read
16 Congress’s *explicit* limitation out of the statute completely and employ that authority
17 *precisely opposite its sole permissible usage*.

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

27 By DHS’s instant logic, a veterinarian could “implement” a dog owner’s
28 instructions to “take any steps necessary with respect to my dog’s health to save its life”

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

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

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

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

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

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

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

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

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

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

19 Once Defendants’ sprawling justiciability and reviewability arguments are properly
20 rejected, the few remaining obstacles to a preliminary injunction are readily dispatched.
21 Defendants’ cursory defense of their admitted failures to prepare EISs or EAs violates
22 NEPA and results in irreparable injury. And because environmental harms here are
23 “sufficiently likely ... the balance of harms will usually favor the issuance of an injunction
24 to protect the environment.” *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545
25 (1987). That is just so here.

26 ARGUMENT

27 I. This Court Can Review Arizona’s NEPA Claims

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

1 bevy of procedural arguments. They thus contend: (1) that the State lacks standing, Opp.11-
2 21, (2) that IIRIRA shields their actions from NEPA and judicial review, Opp.23-28, and
3 that (3) *all* of the State’s claims are somehow unreviewable under the APA, Opp.29-40;
4 45-47. But what these arguments possess in bulk, they lack in merit. Defendants’
5 compliance with NEPA is reviewable by this Court (and should fail under that review).

6 **A. Arizona’s Border Wall NEPA Claim Is Justiciable**

7 **1. Arizona’s Border Wall Claim Is Not Barred By IIRIRA**

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

11 **a. Cancelling Construction Does Fall Within Its Existing Waivers 12 Or Its Waiver Authority To “Ensure Expeditious Construction”**

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

19 The terms of DHS’s waiver are clear: it applies to all actions “with respect to the
20 construction of physical barriers and roads.” *Determination Pursuant to Section 102 of the*
21 *Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended*, 85 FR
22 14961-01 (Mar. 16, 2020). An illustrative list of examples is provided, including
23 “accessing the project areas, creating and using staging areas, the conduct of earthwork,
24 excavation, fill, and site preparation, and installation and upkeep of physical barriers, roads,
25 [and] supporting elements...” *Id.* This language cannot be read, especially in connection
26 with the illustrative list, as including the Defendants’ decision to terminate construction of
27 barriers. *See Alabama Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2488 (2021) (“The
28 Government contends that the first sentence of § 361(a) gives the CDC broad authority ...

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

3 The remainder of the waiver’s text provides further context explaining that the
4 waiver cannot be stretched to encompass Defendants’ decision to end all barrier
5 construction. In the waiver, among other things, the Secretary explains that it is needed
6 because there “is presently an acute and immediate need to construct physical barriers and
7 roads in the vicinity of the border of the United States in order to prevent unlawful entries.”
8 85 Fed. Reg. at 14961-01. But that “acute and immediate need to construct physical
9 barriers” is not even conceivably served by permanently cancelling construction.

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

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

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

24
25 ¹ The context and history of this provision further confirm the absurdity of Defendants’
26 instant interpretation. The Section creating DHS’s waiver power is titled “Improvement of
27 Barriers at Border” and it provides that, “in general,” the Secretary is to “take such actions
28 as may be necessary to install additional physical barriers and roads ... to deter illegal
crossings in areas of high illegal entry.” 8 U.S.C. § 1103 note (a). The original IIRIRA
statute from 1996 confirms the purpose is to “waive[] to the extent the Attorney General
determines necessary to ensure expeditious construction” of border barriers. Omnibus
Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009 (1996).

1 on that authority to sustain its actions.

2 **c. IIRIRA Does Not Preclude Judicial Review Here**

3 For the similar reasons, the jurisdictional bar in IIRIRA § 102(c) is not implicated
4 here. Arizona’s claim does not “aris[e] from” the waiver provision as Defendants contend
5 (at 26). The jurisdictional bar only applies when “claims challenge either the merits of
6 the waivers themselves, or the Secretary’s authority to issue the waivers under section
7 102(c).” *In re Border Infrastructure Env’t Litig.*, 915 F.3d 1213, 1221 (9th Cir. 2019)
8 (jurisdictional bar does not impact challenge to “initial decision to build” rather than “later
9 decision to issue a waiver”).

10 Arizona challenges neither the merits of the waivers nor the Secretary’s authority.
11 To the extent that Defendants wish to take actions actually within the scope of their
12 waivers/waiver authority, they may rely upon Section 102(c). But permanent termination
13 of construction does no such thing (particularly as the Ninth Circuit has given Section
14 102(c) a narrow construction, *see id.*). In any event, because Defendants did not actually
15 invoke their waiver authority contemporaneously, and thus cannot invoke it *post hoc* in a
16 brief to preclude judicial review.

17 **2. Arizona’s Border Wall Claim Is Reviewable Under the APA**

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

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

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

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

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

17 **3. Arizona Has Standing To Bring Its Border Wall Claim**

18 To have standing, “a plaintiff must show that [it] is under threat of suffering ‘injury
19 in fact’ that is concrete and particularized; the threat must be actual and imminent, not
20 conjectural or hypothetical; it must be fairly traceable to the challenged action of the
21 defendant; and it must be likely that a favorable judicial decision will prevent or redress
22 the injury.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Because the state
23

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

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

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

15 **a. Defendants’ Termination Of Border Wall Construction**
16 **Without Conducting Any Environmental Analysis Is**
17 **Inflicting An Injury-In-Fact On The State**

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

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

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

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

15 The government does not seriously contest any of these facts and does not point to
16 any contrary evidence. Instead, the Defendants merely assert (at 14) that these impacts are
17 "generic, amorphous, and speculative," citing only only *Arpaio v. Obama*, 797 F.3d 11, 21
18 (D.C. Cir. 2015) and *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th
19 997 (9th Cir. 2021). Those objections are actually traceability contentions, which fail as
20 discussed below and for the reasons discussed by the *Texas* decision that Defendants

21 _____
22 adverse environmental impacts. *See, e.g., Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d
23 215, 247 (5th Cir. 2006); *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 15 (2d Cir. 1997).
24 Since the agency did not consider environmental impacts at all in its decision (it did not
25 even prepare a FONSI), this Court has no other evidence with which to evaluate the
26 environmental claims at issue. Moreover, this evidence also addresses the State's standing
27 and *Winter* factors, which are never limited to the administrative record.

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

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

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

5 In *Arpaio*, the Plaintiff, an Arizona county sheriff, challenged DACA and DAPA
6 and argued that he had standing based on what he alleged would be a resulting increase in
7 migration and, in turn, alleged concomitant increase in crime. *Arpaio*, 797 F.3d at 21-22.
8 Similarly, in *Whitewater Draw*, Plaintiffs brought a NEPA claim challenging DACA,
9 seeking to connect DACA and other immigration policies to increased U.S. population and
10 environmental impacts. *Whitewater Draw*, 5 F.4th at 1014-15. In both cases there was
11 considerable attenuation between the 2012 DACA policy, subsequent immigration, and the
12 alleged impacts. For example, in *Arpaio*, the court faulted the plaintiff for not “explain[ing]
13 how increased migration would interact” with the many factors affecting crime rates.
14 *Arpaio*, 797 F.3d at 22. In *Whitewater Draw*, the court noted the lack of a “concrete link”
15 between the complained-of policies and population growth. *Whitewater Draw*, 5 F.4th at
16 1019. Neither case—unlike here—provided meaningful evidence of anything more than a
17 passing relationship to the complained-of policy.

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

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

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

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

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

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

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

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

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

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

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

28 As in the recent *Texas* case, “the links between the States’ injuries and the

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

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

13 **B. The State’s MPP Claim Is Justiciable**

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

17 **1. Arizona’s MPP Claim Is Justiciable Under the APA**

18 The Northern District of Texas and the Fifth Circuit have both expressly found that
19 the MPP Termination is reviewable under the APA. *Texas v. Biden*, 10 F.4th 538, 549-52
20 (5th Cir. 2021). The Supreme Court implicitly agreed by denying Defendants’ application
21 for a stay pending appeal by a 6-3 vote. *Biden v. Texas*, No. 21A21, 2021 WL 3732667
22 (U.S. Aug. 24, 2021). For all of the reasons explained by those courts, Defendants’ recycled
23 reviewability arguments fail here as well despite how doggedly Defendants continue to
24 press them—notwithstanding their uniform and complete failure in doing so to date. And
25 while Defendants are correct that these decisions are not (yet) binding on this Court, their
26 reasoning is persuasive and likely to be adopted by the Supreme Court formally if it ever
27 even gets that far.

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

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

5 **2. Arizona Has Standing To Bring Its MPP Claim**

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

10 **a. The Termination of the MPP Inflicts a Legally Cognizable 11 Injury-in-Fact on the State**

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

1 quality of life for city residents. Noise, traffic, overburdened mass transportation systems,
2 crime, congestion ... all affect the urban ‘environment.’” *Hanly v. Mitchell*, 460 F.2d 640,
3 647 (2d Cir. 1972).

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

16 Similarly, case law confirms the sufficiency of Arizona’s growth impact allegations.
17 As explained previously (at 33-34), the growth impacts here are far more significant than
18 would be occasioned by any highway interchange or new runway that the Ninth Circuit
19 have found reviewable. *See, e.g., City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir.
20 1975) (holding that Federal Highway Administration violated NEPA by failing to prepare
21 EIS considering growth impacts prior to construction of freeway interchange near an
22 agricultural area); *Barnes v. U.S. DOT*, 655 F.3d 1124, 1139 (9th Cir. 2011) (holding that,
23 with respect to project adding new runway to airport, “the agencies must analyze the
24 impacts of the increased demand attributable to the additional runway as growth-inducing
25 effects”). Arizona has shown that the MPP is leading to thousands of new migrants, both
26 indirectly through changed incentives and directly by releasing individuals into the country
27 who otherwise would be removed. A highway interchange *may lead* to additional growth
28 in an area. But adding additional people *directly is growth*. It is certain that there will be

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

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

13 **b. These Injuries Are Traceable to Defendants’ Actions in**
14 **Terminating the MPP**

15 Defendants also argue that these injuries are not traceable to the termination of the
16 MPP. In making that argument, they again rely on *Arpaio* and *Whitewater Draw*, and assert
17 that Arizona’s MPP injury relies on an attenuated chain of reasoning involving speculation
18 about the decisions of independent actors. Opp. 18 (citing *Clapper v. Amnesty Int’l USA*,
19 568 U.S. 398, 414 (2013)). This argument fails for two main reasons.

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

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

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

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

18 **C. The State’s Programmatic Claim Is Also Justiciable**

19 **1. Arizona’s Programmatic Claim Is Reviewable Under The APA**

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

23 In *Lujan*, the Supreme Court rejected a challenge to BLM’s so-called “land
24 withdrawal review program;” as the Court explained, this program was not a “final agency
25 action” within the meaning of § 704. *See Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 890
26 (1990). *Lujan* makes clear that Plaintiffs must challenge agency action and cannot seek
27 broad programmatic improvement to agencies under the APA. Similarly, in *SUWA*, the
28 Supreme Court rejected a challenge to the BLM’s alleged failure to manage off-road

1 vehicle use in certain wilderness areas. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64
2 (2004) (“*SUWA*”). This challenge sought to hold the agency to account for “failure to act,”
3 but the Court concluded that the plaintiffs had failed to point to a “legally binding
4 commitment” requiring defendants to act. *Id.* at 55, 72.

5 Neither of these cases bears any relationship to Arizona’s challenge. Unlike in
6 *Lujan*, here the challenged program actually exists. Defendants repeatedly refer to the
7 program as one that is of Arizona’s “own making,” Opp. 43, but this is not the case. Rather,
8 the elements alleged by the Plaintiffs and supported with evidence point to the existence of
9 a discrete programmatic action, which accordingly is subject to NEPA. *See* 40 C.F.R.
10 § 1508.1(q)(3)(iii) (defining “Major Federal Action” as tending to include the “Adoption
11 of programs, such as a group of concerted actions to implement a specific policy or plan;
12 systematic and connected agency decisions allocating agency resources”).

13 Indeed, this Court’s recent opinion in *Center for Biological Diversity v. Mayorkas*
14 confirms that Arizona’s challenge here is cognizable. As that court explained, “the
15 requirement of an environmental impact statement is fact based rather than guided by
16 superficial program labels.” *See Mayorkas*, 2021 WL 3726502, at *6 (D. Ariz. Aug. 23,
17 2021). Furthermore, that decision acknowledges the plain truth that, for decades, “there has
18 been major federal action in the form of border-enforcement activity along a 50-mile-wide
19 border corridor in four states, including Arizona.” *Id.* at *7. The State has standing to
20 challenge Defendants’ failure to prepare/supplement a programmatic EIS here for all of the
21 same reasons as in *Center for Biological Diversity*.

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

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

5 **2. The Components Of The Population Augmentation Program Are** 6 **Individually Reviewable**

7 Alternatively, even if the Population Augmentation Program is not reviewable as an
8 overall program, its individual components are. Defendants initially attempt (at 46-47) to
9 invoke issue preclusion as to the Interim Guidance, focusing on the State not prevailing on
10 whether that program was "committed to agency discretion." But that decision only one
11 component of the alleged Program. Furthermore, that decision is not final, no judgment has
12 been issued, and it is on appellate review, and this Court therefore need not apply
13 preclusion. *See* §4432 Finality—Traditional Requirement, 18A Fed. Prac. & Proc. Juris. §
14 4432 (3d ed.) ("[P]reclusion would be folly, as to decisions that are merely tentative and
15 that contemplate further proceedings.") (citing cases).

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

22 More generally, Defendants recycle (at 31-33) their arguments that this entire field
23 is filled with enforcement decisions that are completely discretionary and immune from
24 judicial review. But the committed-to-agency-discretion exception applies only in the
25 "*rare circumstances* where the relevant statute 'is drawn so that a court would have
26 *no meaningful standard* against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830
27 (1985) (emphasis added)).
28

1 This Court should therefore reject those committed-to-agency-discretion arguments
2 for the same reason that the Northern and Southern Districts of Texas and the Fifth Circuits
3 have. *See Texas*, 10 F.4th at 550; *Texas v. United States*, No. 6:21-CV-00016, 2021 WL
4 3683913, at *26 (S.D. Tex. Aug. 19, 2021); *State v. Biden*, No. 2:21-CV-067-Z, 2021 WL
5 3603341, at *16 (N.D. Tex. Aug. 13, 2021). In particular, these cases do not involve
6 challenges to individual enforcement decisions, but instead sweeping policy enactments
7 that *are* subject to review. *See, e.g., OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808,
8 812 (D.C. Cir. 1998) (explaining that “an agency’s adoption of a general enforcement
9 policy is subject to review,” thereby distinguishing *Heckler’s* presumption of
10 unreviewability as applying only to individual cases of non-enforcement); *see also ILWU*
11 *v. Meese*, 891 F.2d 1374, 1378 n.2 (9th Cir. 1989) (describing *Heckler* as applying to “an
12 agency’s refusal to prosecute or enforce a statute in a *specific case*” (emphasis added)).

13 **II. Arizona Is Likely to Succeed On The Merits**

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

19 **A. Defendants Actions Are Major Federal Actions**

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

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

1 because it is an enforcement decision that falls outside NEPA’s scope. Opp.37-40 (citing
2 40 C.F.R. § 1508.1(q)(1)(iv)).

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

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

15 **B. Defendants’ Actions Have Significant Environmental Effects**

16 As the Ninth Circuit has held: “an EIS must be prepared if ‘substantial questions are
17 raised as to whether a project may cause significant degradation of some human
18 environmental factor.’” *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864
19 (9th Cir. 2005) (cleaned up); *accord High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630,
20 639 (9th Cir. 2004). Given the litany of impacts discussed previously and above, there is

21
22 ⁵ *See, e.g., Nw. Ctr. for Alternatives to Pesticides v. DHS*, No. 3:20-CV-01816-IM, 2021
23 WL 3374968, at *8 (D. Or. Aug. 3, 2021) (“Sending additional law enforcement officers
24 to address criminal activity on a temporary basis” is enforcement action); *Tucson Rod &*
25 *Gun Club v. McGee*, 25 F. Supp. 2d 1025, 1028 (D. Ariz. 1998) (“order temporarily
26 suspending all shooting and archery activities” was enforcement action); *Calipatria Land*
27 *Co. v. Lujan*, 793 F. Supp. 241, 245 (S.D. Cal. 1990) (“enforcement itself of [extant]
28 regulations at this time is not a major federal action”).

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

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

3 **1. Termination of Border Wall Construction Has A Significant** 4 **Environmental Effect**

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

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

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

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

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

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

18 The third in-circuit case cited by Defendants, *Kootenai Tribe of Idaho v. Veneman*,
19 313 F.3d 1094, 1115 (9th Cir. 2002), actually refutes Defendants’ arguments. In *Kootenai*
20 *Tribe*, the Ninth Circuit held that the environmental status quo had *not* been preserved
21 when the Forest Service promulgated the so-called “Roadless Rule,” which banned
22 roadbuilding in parts of national forests. *Id.* at 1105-06. There, the agency’s decision
23 arguably only preserved the existing status quo. But the Ninth Circuit recognized that the
24 action “alter[ed] how the Forest Service manages inventoried roadless areas” and this
25 change in regulatory posture alone was sufficient to require NEPA analysis. *Id.*

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

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

4 **2. The MPP and Population Augmentation Program Have Significant** 5 **Environmental Impacts**

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

27 **III. The Remaining Requirements For Injunctive Relief Are Satisfied Here**

28 Defendants argue (at 47) that Arizona merely “regurgitates” and “makes no attempt”

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

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

22 On the balance of the equities, Defendants make two main arguments. First, they
23 argue that issuance of injunctions here would “interfer[e] with core executive and
24

25 ⁷ *See, e.g., Env’t Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 992 (9th Cir. 2020) (injunction
26 appropriate under NEPA to force preparation of EIS for removal of fire damaged trees near
27 roads); *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*,
28 752 F.3d 755, 767 (9th Cir. 2014) (enjoining timber sale to prevent threatened irreparable
injury to elk habitat); *S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep’t of
Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (NEPA preliminary injunction on mining
project necessary to prevent irreparable harm from “inadequate study of the serious effects
of processing refractory ore and exhausting scarce water resources”).

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

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

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

1 ‘likely.’” *Id.* at 642. In doing so, it held that both the balance of harms and public interest
2 favored injunctive relief. *Id.*

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

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

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

9 **A. Requiring Defendants To Prepare An EIS Is Appropriate Relief**

10 As the State previously explained, “[c]ourts have routinely recognized the
11 appropriateness of injunctive relief requiring the preparation or completion of an EIS or
12 SEIS.” PI at 39 (quoting *Ross v. Federal Highway Admin.*, 162 F.3d 1046, 1054 (10th Cir.
13 1998)). Defendants do not appear to raise any argument that such relief is unwarranted if a
14 preliminary injunctive relief issues. Such relief should therefore be part of any preliminary
15 injunction issued by this Court.

16 **B. Defendants Should Be Enjoined From Taking Any Other Irreversible 17 Actions Or Making Other Irretrievable Commitments**

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

24 **C. The State Seeks Neither Specific Performance Nor Mandatory Relief**

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

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

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

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

12 **D. The State’s Request For A Preliminary Injunction Regarding The MPP**
13 **Termination Is Not Moot**

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

26 **CONCLUSION**

27 The State’s motion for a preliminary injunction should be granted.
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RESPECTFULLY SUBMITTED this 15th day of October, 2021.

MARK BRNOVICH
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CERTIFICATE OF SERVICE

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

s/ Drew C. Ensign
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