**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| MASSACHUSETTS COALITION FOR IMMIGRATION REFORM, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*,<br><br>Defendants. | Case No. 1:20-cv-3438 (TNM) |

**MEMORANDUM OF LAW OF IMMIGRATION REFORM LAW INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

CHRISTOPHER J. HAJEC
D.C. Bar No. 492551
MATT A. CRAPO
D.C. Bar No. 473355
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org
mcrapo@irli.org

Counsel for Amicus Curiae
Immigration Reform Law Institute

## DISCLOSURE STATEMENT

Pursuant to LCvR 7(o)(5) and Fed. R. App. P. 29(a)(4), *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

3) The following entity has an interest in the outcome of this case: Immigration Reform Law Institute, whose mission is: to defend responsible immigration policies in court, before administrative agencies, and before legislative bodies on behalf of the American people; to serve as a watchdog to safeguard against abuses of power; and to educate the American people about the threat of unchecked mass migration to themselves and their communities.

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## INTEREST OF *AMICUS CURIAE*[1]

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens, and also to assisting courts in understanding and accurately applying federal immigration law. For more than twenty years, the Board of Immigration Appeals has solicited supplementary briefing, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 579 U.S. 547 (2016); *Arizona Dream Act Coal. v. Brewer*, 855 F.3d 957 (9th Cir. 2017); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 518 F. Supp. 3d 448 (D.D.C. 2021); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

## SUMMARY OF ARGUMENT

As Plaintiffs demonstrate in their motion for summary judgment, Defendants failed to meet the procedural requirements that the National Environmental Policy Act ("NEPA"). Despite the potential environmental consequences of the predictable upsurge in population caused by the challenged immigration actions, Defendant Department of

[1] No counsel for a party in this case authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Homeland Security ("DHS") failed to conduct an Environmental Assessment ("EA"), prepare an Environmental Impact Statement ("EIS"), or determine that the challenged actions fell within a designated categorical exclusion ("CATEX") to NEPA. Because of these failures, the actions were both adopted without observance of procedure required by law and arbitrary and capricious.

The challenged actions were arbitrary and capricious for two other reasons, as well. First, even DHS's own Instruction Manual for NEPA Compliance makes clear that the challenged actions require NEPA review prior to implementation. This manual only excludes from NEPA review actions that do not substantively change immigration policies or guidelines. But the actions challenged here either reverse or terminate entire programs or policies designed to reduce unlawful immigration. DHS's failure to explain its sharp departure from its own manual renders its actions arbitrary and capricious.

Second, the challenged actions have predictably resulted in the influx of millions of unlawful immigrants, thereby creating substantial population growth and its attendant environmental consequences. DHS's failure to conduct an EA, prepare an EIS, or determine that the challenged actions fell within a designated CATEX to NEPA with respect to the challenged actions stands in stark contrast to its adherence to NEPA procedures in a far less consequential action: its recent delay of an enforcement deadline regarding federal identification card standards. DHS's inconsistent practice, for which it gave no explanation, also renders its failure to comply with NEPA here arbitrary and capricious.

## ARGUMENT

### I. In failing to perform NEPA review, DHS did not account for its departures from its own Instruction Manual.

In partially granting Defendants' motion to dismiss, this Court ruled that DHS's Instruction Manual 023-01-001-01, Revision 01, implementing NEPA (the "Manual")[2] is not a final agency action subject to APA review. ECF Doc. 27 at 13-16. In this Court's description, the Manual is not the culmination of DHS's decision-making process, but "the beginning" of that process. *Id.* at 15. Although this Court decided that the Manual is not binding on DHS, *see id.*, the Manual still establishes guidance for NEPA compliance, and, under precedent of the D.C. Circuit, DHS must either follow that guidance or reasonably explain any departure from it. DHS did neither.

As the district court in *Indian River Cty. v. DOT* observed:

> The D.C. Circuit has sent mixed signals as to "[w]hether an agency must account for a departure" from its non-binding guidance. *See Friends of Blackwater v. Salazar*, 691 F.3d 428, 435, 402 U.S. App. D.C. 276 (D.C. Cir. 2012) (describing the question as "not entirely clear" and citing conflicting authority). In *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 340 U.S. App. D.C. 383 (D.C. Cir. 2000), for example, it explained that because the guidance in question "does not bind the Board," "the relevant question is whether, quite apart from the [guidance], the Board acted unreasonably." *Id.* at 1182. In *Edison Electric Institute v. EPA*, 391 F.3d 1267, 364 U.S. App. D.C. 60 (D.C. Cir. 2004), by contrast, the Circuit stated that "the real question is whether [the agency] adequately accounted for any departures" from non-binding guidance because "any deviation from [such guidance] is not *per se* arbitrary and capricious." *Id.* at 1269 & n.3.

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[2] The Manual was attached as Exhibit B to Defendants' motion to dismiss. *See* ECF Doc. 19-2. It is also available online at: https://www.dhs.gov/sites/default/files/publications/DHS_Instruction%20Manual%20023-01-001-01%20Rev%2001_508%20Admin%20Rev.pdf (last visited Mar. 28, 2023).

348 F. Supp. 3d 17, 56 (D.D.C. 2018) (alterations in original). Though the requirement to account for departures from nonbinding guidance is not "entirely clear," the "mixed signals" from the D.C. Circuit can be reconciled—indeed, can only be reconciled—in a way that preserves that requirement. Though deviation from nonbinding guidance is not "*per se* arbitrary and capricious," and the "relevant question" is whether the agency acted reasonably even as it deviated from such guidance, a crucial part of that "relevant question" can still be whether the agency accounted adequately for its departures. Indeed, although the Manual is nonbinding, DHS's decision to disregard its own Manual is "tantamount to the inconsistent treatment of similar situations. Simply put, [DHS's] nonbinding [Manual] state[s] one thing, while [DHS] is doing another." *Sierra Club v. Salazar*, 177 F. Supp. 3d 512, 537-538 (D.D.C. 2016).

Here, the agency did not account *at all* for its departures from its own guidance. And those departures were conspicuous. Of course, nothing in the Manual suggests that immigration policy decisions fall outside the reach of NEPA. Instead, the Manual explicitly recognizes that "NEPA applies to the majority of DHS actions," and that "[e]xamples of situations in which NEPA is not triggered are very few and include cases of statutory exemption, executive branch waiver of compliance when such waiver authority has been granted by Congress and properly exercised, or when the action does not constitute a major Federal action …." Manual at V-1 (ECF Doc. 19-2 at 31).[3]

[3] Page number citations are to the ECF header pagination, not the original document pagination.

As Plaintiffs point out in their motion for summary judgment, *see* ECF Doc. 34 at 17-18, absent a statutory exemption or a properly invoked waiver authorized by Congress, NEPA requires federal agencies to prepare either an EA or EIS before taking any major federal action unless such action is properly determined to fall within a categorical exclusion to NEPA. Absent a statutory exclusion, the Manual similarly recognizes any NEPA analysis must result in one of these three potential outcomes. *See* Manual at V-3 (ECF Doc. 19-2 at 33). The Manual further provides that CATEXs "enable DHS to avoid unnecessary efforts, paperwork, and delays and concentrate on those proposed actions having real potential for environmental impact." *Id.* at V-4 (ECF Doc. 19-2 at 34). The Manual does not, however, prescribe any particular outcome regarding NEPA review of proposed actions—including whether any CATEX applies to a specific action.

Nevertheless, the list of CATEXs in the Manual does provide insight to the kinds of actions that could be excluded from NEPA analysis and, by contrary implication, those actions that would require further environmental analysis. Most pertinent with respect to Counts III through V[4] is CATEX A3, which excludes from NEPA certain rules, policies, orders, directives, and other guidance documents. *See* Manual at A-1--A-2 (ECF Doc. 19-2 at 59-60). Under CATEX A3(c), DHS categorically excludes only such actions that

[4] Counts III through V involve substantive policy changes regarding the "Remain in Mexico" policies, the granting to illegal border-crossers temporary permission to stay in the country, and re-prioritizing ICE's interior enforcement guidelines.

"implement, *without substantive change*, procedures, manuals, and other guidance documents." (emphasis added).

Each of the immigration actions challenged here, by contrast, substantively changed or reversed an existing policy. For example, DHS terminated the Migrant Protection Protocols ("MPP") (one of the "Remain in Mexico" policies under Count III). The February 18, 2021, memorandum from ICE Director Tae D. Johnson to all ICE employees restricted immigration enforcement to aliens who fall within three narrow categories.[5] DHS_MCIR_0003893-94. Such policy reversals or substantial enforcement restrictions cannot be deemed "without substantive change" from the then-existing policies or guidelines, and cannot therefore be deemed to fall within CATEX A3 of the Manual.

Further, Defendants cannot show that any of the challenged immigration actions fall within a statutory exemption or a properly invoked statutory NEPA waiver. Therefore, its own Manual calls on DHS to conduct an EA, prepare an EIS, or properly invoke a CATEX. Without any explanation, DHS did none of these things. DHS's failure

[5] The February 18, 2021, memorandum served to provide guidance for implementing the priorities established in a January 20, 2021, memorandum by then-Acting Secretary David Pekoske ("the Pekoske Memo"). Both the February and Pekoske Memo were rescinded by a subsequent memorandum by DHS Secretary Mayorkas. *See* September 30, 2021, Memorandum Re: Guidelines for the Enforcement of Civil Immigration Law at 6 (stating that the guidance in that memorandum "will serve to rescind" the Pekoske Memo and the February 18, 2021, memorandum) (available at: https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf) (last visited Mar. 29, 2023). Secretary Mayorkas' September 2021 memorandum has been vacated by a federal district court. *See Texas v. United States*, 2022 U.S. Dist. LEXIS 104521, 2022 WL 2109204 (S.D. Tex. June 10, 2022), *appeal argued*, No. 22-58 (U.S. Nov. 29, 2022).

to give any account of its sharp departures from its own Manual is another reason for holding its actions arbitrary and capricious.

## II. DHS's failure to comply with NEPA with respect to its immigration actions stands in stark contrast to its recent NEPA compliance in its notice extending the enforcement date for minimum identification card standards.

NEPA requires federal agencies to consider, before taking major federal action, the environmental effects of the proposed action that are "reasonably foreseeable," including the action's "cumulative impact" when added "to other past, present, and reasonably foreseeable future actions …." *Sierra Club v. Fed. Energy Reg. Comm'n*, 827 F. 3d 36, 41 (D.C. Cir. 2016); 40 C.F.R. § 1508.1(g). Of particular importance here are predictable (if not certain) indirect effects relating to population growth. *See* 40 C.F.R. § 1508.1(g)(2) ("Indirect effects may include growth inducing effects and other effects related to … population density or growth rate ….").

As Plaintiffs explain, the challenged immigration actions were taken to implement specific executive directives. ECF Doc. 34 at 14-15; *see also id.* at 19-20 ("The actions were adopted in furtherance of the goals of the four presidential directives regarding immigration policy published within the first two weeks of the Biden Administration."). The Council on Environmental Quality ("CEQ") regulations define major federal action to include agency actions to implement a specific policy, plan, or executive directive. *See* 40 C.F.R. § 1508.1(q)(3)(iii) ("Adoption of programs, such as a group of concerted actions to implement *a specific policy or plan*; systematic and connected agency decisions allocating agency resources to implement a specific statutory program *or executive directive*.") (emphases added).

There is little question that the challenged actions resulted in foreseeable and substantial population growth via immigration. Following trial, a federal district court recently found that several of the actions challenged here resulted in an "unprecedented 'surge' of aliens that started arriving at the Southwest Border almost immediately after President Biden took office and that has continued unabated over the past two years [and] was a predictable consequence of these actions." *Florida v. United States*, 2023 U.S. Dist. LEXIS 40169, *16, 2023 WL 2399883 (N.D. Fla. Mar. 8, 2023); *see also id.* at *14-21 (discussing cessation of border wall construction, the termination of the "Remain in Mexico" policies, the Pekoske Memo, and the non-detention policies which include the March 19, 2021, "Prosecutorial Discretion" memorandum from Rodney Scott).[6] The district court in *Florida* found that the Border Patrol alone had "released more than one million aliens at the Southwest Border" since the Biden administration took office. *Id.* at *38. At least one study has estimated around 5.5 million illegal aliens have entered the country since the Biden administration took office. *See* FAIR Analysis: 5.5 Million Illegal Aliens Have Crossed our Borders Since Biden Took Office—How is Secretary Mayorkas Still Employed?, Oct. 25, 2022 (available at: https://www.fairus.org/press-releases/border-security/fair-analysis-55-million-illegal-aliens-have-crossed-our-borders) (last visited Mar. 29, 2023).

[6] As Plaintiffs note in the motion for summary judgment, ECF Doc. 34 at 22 n.5, the March 19, 2021 Prosecutorial Discretion memorandum evolved into the "Parole + ATD" program that was vacated by the district court in *Florida*. *See* 2023 U.S. Dist. LEXIS 40169 at *91-95 (concluding that vacatur of the "Parole + ATD" policy is the appropriate remedy).

In contrast with DHS's approach to the challenged immigration actions, which have resulted in a predictable population growth of several million people, DHS recently treated the mere extension of the enforcement date for federal standards for driver's licenses and identification cards as a major federal action that triggered NEPA compliance. *See* Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Extending Enforcement Date, 88 Fed. Reg. 14473, 14476 (Mar. 9, 2023). There, DHS explained that the CEQ regulations (40 CFR parts 1500 through 1508) "allow Federal agencies to establish, with CEQ review and concurrence, categories of actions ('categorical exclusions') which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require" an EA or EIS. *Id.* (citing 40 C.F.R. §§ 1507.3(b)(2)(ii), 1508.4). DHS also relied on the Manual to find that the requisite conditions for an action to be categorically excluded from NEPA review were met. *See id.* (citing Manual section V.B(2)(a)-(c)).

DHS determined that the delay effectuated by that rule "fits within categorical exclusion A3(a) 'Promulgation of rules . . . of a strictly administrative or procedural nature.'" *Id.* (quoting Manual, Appendix A, Table 1). Because that rule was "not part of a larger action and present[ed] no extraordinary circumstances creating the potential for significant environmental impacts," DHS concluded that the rule was "categorically excluded from further NEPA review." *Id.*

Here, even though the challenged immigration actions predictably caused substantial population growth, DHS was silent, making no determination whatsoever of

whether these actions were, or were not, excluded from further NEPA review. DHS's sharply inconsistent practice with regard to NEPA review requirements is another reason for finding its failure to assess the environmental consequences of the challenged immigration actions arbitrary and capricious. Indeed, it would appear that DHS only wants to comply with NEPA when doing so does *not* require it to assess the massive environmental impacts of its actions. This Court should grant Plaintiffs' motion for summary judgment and vacate the challenged actions.

## CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment.

Respectfully submitted on April 5, 2023,

/s/ Christopher J. Hajec
CHRISTOPHER J. HAJEC
D.C. Bar No. 492551
MATT A. CRAPO
D.C. Bar No. 473355
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
(202) 232-5590
chajec@irli.org
mcrapo@irli.org

**CERTIFICATE OF COMPLIANCE**

The foregoing brief complies with LCvR 7(o)(4) because it does not exceed 25 pages in length.

/s/ Christopher J. Hajec
CHRISTOPHER J. HAJEC

**CERTIFICATE OF SERVICE**

I hereby certify that on April 5, 2023, a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) and served on all counsel of record.

/s/ Christopher J. Hajec
CHRISTOPHER J. HAJEC