UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

THE STATE OF MISSOURI, and	§	
	§	
THE STATE OF TEXAS,	§	
	§	Case No. 7:21-cv-00420
Plaintiffs,	§	(formerly No. 6:21-cv-00052)
	§	(consolidated with No. 7:21-cv-00272)
v.	§	
	§	
JOSEPH R. BIDEN, JR., in his official capacity as President of the United States of America, *et al.*,	§	
	§	
Defendants.	§	

PLAINTIFF STATES' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants repeatedly claim that the border wall *will* be built, but not before they complete environmental activities that take an average of almost five years to complete. But that's pure pretext—the hallmark of unlawful agency action. At this stage, the Court need not look beyond the President's own Proclamation: (1) "building a massive wall that spans the entire southern border is not a serious policy solution"; (2) it's "a waste of money"; (3) "It shall be the policy of my Administration that no more American taxpayer dollars be diverted to construct a border wall"; (4) and DHS "shall develop a plan for the redirection of funds concerning the southern border wall," including "terminating or repurposing contracts with private contractors engaged in wall construction[.]" App.021-022. None of this comes close to sounding like the current Administration has any plans to build a wall.

Indeed, DHS has interpreted the Proclamation to mean that further construction is unauthorized. *See, e.g.*, ECF 24-2, at 2 (outlining activities that are "consistent with President Biden's commitment that 'no more American taxpayer dollars [should] be diverted to construct a border wall'") (alteration in original); App.025 (expressing DHS's intention to "end wall expansion"); ECF 24-3, at 24 ("These projects do not involve building new border barriers[.]"). To that end, Defendants have modified contracts awarded during the prior Administration to "remove the construction portion of the contracts," outright cancelled all remaining construction contracts, and, for other prior projects, intends to "fill[ ] exposed trenches, cut[ ] exposed rebar, and remov[e] materials from the project sites." ECF

24-3, at 8-9, 29-30. And the current Administration has repeatedly "call[ed] on Congress to cancel remaining border wall funding and instead fund smart border security measures[.]" *Id.* at 25, 29. Again, this is the exact opposite of the plain and ordinary meaning of "construction." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 489 (2002) (to build or erect something).

Defendants' actions, therefore, are arbitrary and capricious, unlawful, and unconstitutional, and the States easily fall within the zone of interests of the statutes and constitutional provisions they invoke here.

Defendants spend pages arguing that the Court shouldn't reach the merits of the States' claims, invoking standing, reviewability, and claim splitting. Defendants have spent more time and resources putting up barriers to the States' lawsuit than they have on putting them up at the border. Those efforts are futile here: according to recent, binding Fifth Circuit precedent, the States have standing; Defendants' actions are reviewable; and the Court has already soundly concluded that the two suits before it involve "dissimilar" plaintiffs. ECF 32, at 6.

Finally, Defendants claim that the States' proposed preliminary injunction is too broad and unworkable. But there's nothing impractical about a negative injunction that forbids Defendants from implementing the January 20 Proclamation as applied to DHS's 2020 and 2021 appropriations. Courts routinely issue such injunctions, and doing so here to preserve the status quo pending final trial on the merits is anything but inappropriate. Because—as Defendants concede—spending on border infrastructure *is* immigration policy, that policy must be uniform and thus

nationwide relief is warranted under binding Fifth Circuit precedent.

The Court should grant the States' motion for a preliminary injunction.

ARGUMENT

I. Plaintiff States are likely to prevail on the merits.

Four days ago, the Fifth Circuit issued its unanimous, binding precedent affirming the Northern District of Texas's nationwide permanent injunction in litigation brought by Missouri and Texas challenging DHS's termination of the Migrant Protection Protocols ("MPP"). *See Texas v. Biden*, --- F.4th ----, 2021 WL 5882670 (5th Cir. Dec. 13, 2021). In a meticulous, 117-page opinion, the Fifth Circuit addressed and rejected similar arguments DHS raises here on standing, reviewability, and the merits. *See id.* For the reasons that follow, *Texas* is outcome-determinative and strongly supports the issuance of a preliminary injunction here.

A. The States have standing.

"A preliminary injunction, like final relief, cannot be requested by a plaintiff who lacks standing to sue. At earlier stages of litigation, however, the manner and degree of evidence required to show standing is less than at later stages. At the preliminary injunction stage, the movant must clearly show only that each element of standing is likely to obtain in the case at hand." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 329–30 (5th Cir. 2020) (citing *Lujan v. Def's of Wildlife*, 504 U.S. 555, 561 (1992)). The States readily meet this standard here.

Defendants assert (at 17) that Plaintiff States were required to introduce "evidence in the record" to support their claim of standing based on the now-familiar

driver's license rationale. But the Fifth Circuit recently rejected this argument in *Texas*. There, the court explained why cases such as this one do not require specific evidence that the presence of aliens imposing costs on the States will increase as a result of the agency action:

> The Government says … Texas has not shown it has already issued any licenses to immigrants who became eligible because of MPP's termination. Tellingly, however, it offers no hint as to how Texas could make that showing—nor why we should require it to do so. Imagine Texas had produced copies of driver's license applications from paroled aliens. Would that have counted as evidence that Texas had, in the Government's words, "issued a single additional driver's license as a result" of MPP's termination? Of course not: There would always remain some possibility that *any given parolee* would have been paroled even under MPP. MPP is precisely the sort of large-scale policy that's amenable to challenge using large-scale statistics and figures, rather than highly specific individualized documents. And Texas's standing is robustly supported by just such big-picture evidence. There is nothing "conjectural" or "hypothetical" about that. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (quotation omitted); *cf.* [*Texas v. United States*, 809 F.3d 134, 161–62 (5th Cir. 2015)] ("The state must allege an injury that has already occurred or is certainly impending; it is easier to demonstrate that some DAPA beneficiaries would apply for licenses than it is to establish that a particular alien would." (quotation omitted)). To the contrary, given both MPP's effect of increasing the number of parolees and the fact that many of those parolees will apply for Texas licenses, it's impossible to imagine how the Government could terminate MPP *without* costing Texas any money. *See* [*Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)] ("[T]hreatened injury must be certainly impending to constitute injury in fact." (emphasis omitted)). And in all events, *Massachusetts* [*v. EPA*] countenanced a far less obvious injury than this one. 549 U.S. [497,] 522–23 [(2007)].

Texas, 2021 WL 5882670, at *26 (cleaned up).

Contrary to Defendants' assertion (at 20) that "the States point to no evidence to suggest that these yet-to-be-started construction projects would have made any

impact on the States social service costs," given DHS's own prior assessments that border barriers are effective in deterring illegal immigration, App.007-08; App.011-12, it is "plausible" that at least some aliens would be prevented from crossing the border through the construction of new border barriers. *See Texas*, 2021 WL 5882670, at *22 (upholding reliance on "DHS's own publications" in determining that the "termination of MPP has increased the total number of aliens paroled into the United States").

And in its MPP ruling, the Fifth Circuit recognized that it is "hardly speculative that individuals would apply for driver's licenses upon becoming eligible to do so," and that the same evidence introduced in this case indicated that the States incur costs both from receiving applications and in actually issuing licenses. *Id.* at *24. Similarly, the court found sufficient for standing the States' increased healthcare costs. *Id.* ("The Government appears to concede the obvious—that *if* the total number of in-State aliens increases, the States will spend more on healthcare. The Government's objection, instead, boils down to repeating its claim that MPP's termination can't have caused either an increase in entries or an increase in parolees. Because *those* district court findings were not clearly erroneous, this objection goes nowhere.").

The Fifth Circuit also reaffirmed that the States were entitled to special solicitude in challenging the federal government's failure to fulfill is duties to control the border: "If nothing else, that means imminence and redressability are easier to establish here than usual." *Id.* at *25. And while Defendants here question (at

17) Plaintiff States' ability to meet the traceability requirement, the Fifth Circuit reasoned that

> the district court found that many newly arrived aliens will apply for licenses upon becoming eligible. That is a simple causal inference based on a simple change in incentives. The district court was not speculating but instead describing "the predictable effect of Government action on the decisions of third parties." [*Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019)]; *see also Massachusetts*, 549 U.S. at 523, 127 S.Ct. 1438 (finding traceability where the EPA's challenged action may have caused people to drive less fuel-efficient cars, which may in turn contribute to a prospective rise in sea levels, which may in turn cause the erosion of Massachusetts's shoreline).

Texas, 2021 WL 5882670, at *28 (cleaned up).

"Basic economic logic"—for example, that "increased competition almost surely injures a seller in one form or another"—is sufficient for standing to challenge federal regulatory activity. *Am. Inst. of Certified Pub. Accts. v. I.R.S.*, 804 F.3d 1193, 1198 (D.C. Cir. 2015) (cleaned up). Such logic is sufficient even where there was "no evidence that the competitive harm has yet occurred, [as] our precedent imposes no such requirement because [plaintiff] need not wait until allegedly illegal transactions hurt him competitively before challenging the … governmental decision that increases competition." *Id.*

Plaintiff States here ask only that the Court make similar "simple causal inference[s]" as to the effects of incentives on illegal immigration—as DHS's own assessments have found—and that at least some additional aliens (an increased number than would be present in the absence of the border barriers) will impose costs on the States through driver's license costs, healthcare, and education.

The Fifth Circuit's MPP ruling also found that redressability was satisfied, because an injunction would

> help to alleviate Texas's driver's license- and healthcare-based injuries. *Cf. Massachusetts*, 549 U.S. at 525, 127 S.Ct. 1438 ("While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it.").

Texas, 2021 WL 5882670, at *28.

The Fifth Circuit has found redressability under less-certain facts than this case. In *Hanson v. Veterans Administration*, 800 F.2d 1381 (5th Cir. 1986), a plaintiff claimed discriminatory appraisals undervalued his property, located in a racially mixed neighborhood. *Id.* at 1384. The $7,000 difference between the appraised value and contract price prevented the plaintiff from securing necessary financing. *Id.* at 1385. Although it was uncertain whether a discrimination-free appraisal would result in a higher valuation, the Court found redressability because it "*might* permit [plaintiff] to purchase" the house. *Id.* at 1386 (emphasis added). Under that standard, Plaintiff States' injuries are clearly redressable.

Defendants point (at 18) to an increase in illegal immigration at the same time that there has been an increase in the amount of border barriers as undercutting Plaintiff States' arguments for traceability and redressability. But this aspect of the Fifth Circuit's MPP ruling rejects such an attempt—there is no need to show that border barriers will by themselves reduce illegal immigration (particularly when the Biden Administration has reduced enforcement across many areas, it would be difficult to isolate the effect of any particular policy)—only that it would be of *some*

help in alleviating the harm (which DHS's own assessments support). *Texas*, 2021 WL 5882670, at *28; *see also Planned Parenthood of Greater Texas Surgical Health Servs. v. City of Lubbock, Texas*, No. 5:21-CV-114-H, 2021 WL 4775135, at *7 (N.D. Tex. Oct. 13, 2021) (Hendrix, J.) ("For redressability purposes, a court's remedy need not forestall *every* injury a plaintiff will suffer, *accord Massachusetts v. EPA*, 549 U.S. 497, 525 (2007)") (emphasis in original).

Defendants also cite (at 18) *El Paso Cty., Texas v. Trump*, 982 F.3d 332, 344 (5th Cir. 2020), for the proposition that a non-state "plaintiff lacked standing to challenge border wall construction where declaration did not link alleged harm to a specific construction project." But this case is unlike *El Paso*. There, "enjoining the Government from spending the diverted funds on border wall construction [would] not necessarily result in the Government's use of those funds on the Fort Bliss project. Congress did not directly appropriate $20 million for the Fort Bliss project. Instead, funds for a defense access roads project are sourced from a lump-sum appropriation for the construction of defense access roads generally." *El Paso*, 982 F.3d at 341. But here, the FY 2020 DHS Appropriations Act earmarks funds solely for border barrier construction that "are constructed in the highest priority locations as identified in the Border Security Improvement Plan." P.L 116-93, 133 Stat. 2511, Div. D, § 209 (b); App.016. That has historically included barrier projects in locations along the Texas border. *See, e.g.*, App.006. Though "El Paso County ha[d] not alleged any facts demonstrating that it is likely that the DoD would exercise its discretion to go forward with the Fort Bliss project if the Government were enjoined from spending the

diverted funds on border wall construction," *El Paso*, 982 F.3d at 341, it is evident here that injunctive relief after trial on the merits would compel Defendants to spend appropriated funds for actual construction of border barriers along the Texas border.

Defendants also fault (at 21-22) Texas's allegations of injury from its loss of revenues from its franchise tax from the now-canceled border barrier construction contracts that were to be performed in the State. But the cases they cite are where plaintiff governments alleged general harm to their economies, and consequent downstream effects on tax revenues as a result. *See El Paso*, 982 F.3d at 338–40 (discussing the cases cited (at 21) by Defendants); *see also New York v. Yellen*, 15 F.4th 569, 576–77 (2d Cir. 2021) (same; finding standing for States challenging loss of real estate transfer tax revenue from cap on state and local tax deduction).

The loss of franchise tax revenue to Texas is direct from the cancelation of the construction contracts. As in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), Defendants' cancelation "directly affects" Texas's "ability to collect" a specific tax—the franchise tax. *Id.* at 451. Defendants misapply the Fifth Circuit's decision in *El Paso*. There, El Paso County merely asserted that "the economy of the county at large will be harmed, resulting in a reduction in general tax revenues for the county." *El Paso*, 982 F.3d at 340. Here, however, Texas has alleged a "direct link between the state's status as a collector and recipient of revenues and the … action being challenged, such as the loss of a specific tax revenue to have standing." *Id.* at. 341 (quotations omitted). And Defendants' own submissions put specific numbers on the loss of that taxable revenue: the canceled construction projects would be performed

in in Texas—making them subject to the State's franchise tax—and involved billions of dollars. ECF 24-3, at ¶¶ 12–20; *see Yellen*, 15 F.4th at 577 (finding standing where States had specific estimates of lost revenue).

Defendants also argue (at 20) that Plaintiff States lack standing because there is presently no injury as they have several years to allocate the earmarked funds for border barriers. But Defendants have made clear that they have no intention of building any additional border barriers. *See, e.g.*, App.026; App.055. Statutes, regulations, and ordinances are frequently challenged before they are even enforceable. *See, e.g., Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988) (plaintiffs had standing even though newly enacted law had not become effective and no enforcement action had been brought or threatened under it); *Ass'n of Amer. Physicians & Surgeons, Inc. v. Sebelius*, 901 F.Supp.2d 19, 37 (D.D.C. 2012) (finding challenge to individual mandate ripe where "individuals who will be affected by this provision will need to start preparing in advance of the date it actually takes effect"); *Thomas More Law Center v. Obama*, 651 F.3d 529, 536-38 (6th Cir. 2011), *cert. denied*, 567 U.S. 951 (2012), *and abrogated on other grounds by NFIB v. Sebelius*, 567 U.S. 519 (2012) (finding Article III ripeness because the case concerned a "pre-enforcement facial challenge" to the individual mandate and the fact that "[b]y permitting this lawsuit to be filed three and one-half years before the effective date . . . the only thing that changes is that all three layers of the federal judiciary will be able to reach considered merits decisions … before the law takes effect").

Challenges have been allowed to go forward even though the complaints were

filed years before the laws went into effect. *See New York v. United States*, 505 U.S. 144, 153–54 (1992) (filed six years before); *Pierce v. Society of Sisters*, 268 U.S. 510, 530, 536 (1925) (three years; "The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable."); *Village of Bensenville v. Fed. Aviation Admin.*, 376 F.3d 1114, 1119 (D.C. Cir. 2004) (over thirteen years; "Nor do we think the municipalities' alleged injury too attenuated or distant to represent a constitutionally-sufficient injury-in-fact … [because] Chicago will not start collecting the passenger facility fee the FAA authorized until 13 years from now. … The FAA's order is final and [in] 2017 Chicago will begin collecting the passenger facility fee; accordingly, the impending threat of injury [to the municipalities] is sufficiently real to constitute injury-in-fact and afford constitutional standing.").

If Plaintiff States were to wait until the end of the period for which Defendants could disburse the appropriated funds, it would be too late for any court to redress the harm—the egg could not be unscrambled. Given Defendants' clearly stated intention to not spend the funds as required by Congress, the injury is impending, particularly given the reduced imminence requirements given the special solicitude for the States.

B. Texas has not engaged in claim splitting.

Defendants next attempt to argue (at 22-26) that the State of Texas is engaged in improper claim-splitting through these consolidated actions. This Court's Opinion and Order on Consolidation already acknowledged that "only the Attorney General of Texas (or a county or district attorney) may file suit on behalf of and represent Texas … and it is highly doubtful that the General Land Office can do so on Texas's behalf, or has any such assertable sovereign interests." ECF 32, at 6. "[T]he Court agrees with Plaintiffs Missouri and Texas that they are distinct from Plaintiffs Texas General Land Office and Commissioner George P. Bush. Plaintiffs are dissimilar." *Id*. The Court also noted that, contrary to Defendants' attempt here, ECF 24, at 23, the fact that the General Land Office is an arm of the State for purposes of sovereign immunity does not mean that it is empowered to represent the State of Texas in litigation. ECF 32, at 6.

This Court's reasoning was sound. Defendants analogize (at 23) the claim-splitting rule to that of res judicata for purposes of determining whether parties are the same. That different entities exercising State power are distinct for purposes of claim splitting is supported by cases involving the application of res judicata. The Fifth Circuit has found that res judicata applied between suits against "officers of the same government entity." *Fregia v. Bright*, 750 F. App'x 296, 300 (5th Cir. 2018) (privity between parties for res judicata purposes found between different officials of Texas Parks and Wildlife Department). "Privity existed in these cases because the plaintiff sought to relitigate the same agency action against different officers *of*

the same agency. … [but] the Fifth Circuit has never adopted a rule that privity exists between officers of the same government simply because they are coworkers. *Clyce v. Farley*, 836 F. App'x 262, 270–71 (5th Cir. 2020) (emphasis added). So, for example, if the General Land Office and Land Commissioner Bush had separate suits against Defendants, that would constitute improper claim splitting.

Courts also examine whether two parties are the "same party" for purposes of allowing former testimony to be admitted under Fed. R. Evid. 801(b)(1). They have repeatedly found different parts of the same government to be distinct parties for this purpose. *See, e.g., United States v. Baker*, 923 F.3d 390, 401 (5th Cir. 2019) (finding two federal agencies—the SEC and the Department of Justice—to not be the same party; "The SEC is an independent agency with its own litigating authority."); *id*. at 399 ("The case law on this issue is limited, and no court has expressly held that the SEC and the DOJ are the same party."); *United States v. North*, 910 F.2d 843, 906 (D.C. Cir. 1990) (Congress and an independent counsel in the executive branch were not the "same party," despite being part of the federal government, in part because the independent counsel "has no powers of control over the Congress."); *FDIC v. Glickman*, 450 F.2d 416, 418 (9th Cir. 1971) (FDIC and United States not the same party where former was thus acting in its capacity as a receiver of the bank and not in its capacity as a Government actor, as it would have been if it were "represented in [the] litigation by the United States Attorney.").

Here, the General Land Office is empowered to litigate on behalf of its interests, such as the particular harm to the GLO Farm. While the State of Texas

owns public lands, the General Land Office has the power and duty to administer those lands. *See Bush v. Lone Oak Club, LLC*, 601 S.W.3d 639, 644 n.4 (Tex. 2020) ("The GLO is a constitutionally created agency empowered to supervise and manage state-owned lands.") (citing TEX. CONST. art. XIV, § 1). The sovereign interests of the State of Texas, however, are litigated by the Attorney General of Texas. *See* ECF 28-1, at 4.

Perhaps the case most damning for Defendants' claim-splitting theory is *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247 (2011). There, the Supreme Court upheld the viability of a lawsuit of one Virginia State agency against another, even though "federal courts have not often encountered lawsuits brought by state agencies against other state officials." *Id.* at 260. Under Defendants' theory, the Supreme Court of the United States blessed a lawsuit of a party against itself, which would appear to violate basic limitations on Article III.

Defendants attempt (at 26) to bootstrap an argument against the ability of the State of Texas to remain in this case into the analysis of whether venue is proper in this District. Where, as here, "a defendant is an officer or employee of the United States," venue is proper "in any judicial district in which … a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(e)(1). In their Complaint, Plaintiff States alleged that "[v]enue is proper in this district" because "[t]he State of Texas is a resident of this judicial district and a substantial part of the

events or omissions giving rise to this complaint occurred and continue to occur within the Southern District of Texas." ECF 1, at ¶ 47.

Defendants' gambit is erroneous. The conflation of standing with venue conflicts with the well-established rule that "venue [is] determined at the outset of litigation and [is] not affected by subsequent events." *Smilde v. Snow*, 73 F. App'x 24, 26 (5th Cir. 2003); *see also Holmes v. Energy Ca-tering Servs., L.L.C.*, 270 F. Supp. 2d 882, 885 n.1 (S.D. Tex. 2003) (concluding that "[u]nder section 1391, venue is determined when the suit is filed and is not affected by subsequent events such as the dismissal of a defendant, as occurred here"). Even if the Court found that Texas had to be dismissed, this would not affect the propriety of venue for Missouri—which is harmed by illegal immigration that comes through the Texas border, ECF 19, at 37—because the canceled border barrier construction contracts were to be performed within this venue. *See* 28 U.S.C. § 1391(e)(1) (venue proper where "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated").

In Wright and Miller's *Federal Practice and Procedure*, the only two instances listed for venue being improper under § 1391(e) in cases involving multiple plaintiffs is where (1) venue is based on the joinder of a plaintiff with a frivolous claim, or (2) a plaintiff has been improperly and collusively joined for the purpose of creating venue in the district. 14D Charles Alan Wright, *et al., Federal Practice and Procedure* § 3815 (4th ed.). Neither circumstance is even alleged by Defendants here.

C. The States' APA claims are reviewable.

Defendants make no argument that a statute precludes judicial review, 5 U.S.C. § 701(a)(1), so they are limited to arguing (at 26-29) that the challenged actions here are examples of "those rare administrative decisions traditionally left to agency discretion" by 5 U.S.C. § 70(a)(2). *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891, 1905 (2020). Defendants rely (at 27-29) on the extension of the unreviewable category of nonenforcement actions set forth in *Heckler v. Chaney*, 470 U.S. 821 (1985), to lump-sum appropriations in *Lincoln v. Vigil*, 508 U.S. 182 (1993).

Of course, the appropriations provisions here are not lump-sum appropriations, taking it out of the category of unreviewability. But Defendants gamely cite *Milk Train, Inc., v. Veneman*, 310 F.3d 747 (D.C. Cir. 2002), as their sole authority to extending this presumption to appropriations for a specific program. But even that case is inapposite to the situation here. In *Milk Train*, the relevant appropriation provided enormous discretion to the Secretary of Agriculture. *Id.* at 751 (appropriated funds were to be used "to provide assistance directly to … dairy producers, in a manner determined appropriate by the Secretary."). And *Milk Train*'s finding of unreviewability due to the breadth of the phrase "in a manner determined appropriate by the Secretary" is irreconcilable with a recent decision of the Supreme Court. *See Dep't of Com.*, 139 S. Ct. at 2567–68 (holding a statute granting the Secretary of Commerce broad discretion to take the census "in such form and content as he may determine" did not commit the decision to reinstate a citizenship question to the Secretary's discretion (quotation omitted)).

The Fifth Circuit's MPP ruling sets out the limits even within the categories where executive discretion is presumed, such as lump-sum appropriations:

> the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. In other words, the executive *cannot* look at a statute, recognize that the statute is telling it to enforce the law in a particular way or against a particular entity, and tell Congress to pound sand.

Texas, 2021 WL 5882670, at *35.

The appropriations at issue here provide that the designated amounts "shall" only be available for barrier systems. App.015-19. "Congress may always circumscribe agency discretion to allocate resources by putting restrictions in operative statutes." *Lincoln*, 508 U.S. at 193. It is difficult to see how these provisions are not such limits on agency discretion. Defendants attempt to wiggle out of the limits Congress placed by arguing (at 29) that "[t]he statutes do not preclude or require other activities related to the purpose of the appropriation like environmental planning, stakeholder consultation, or land acquisition." But that's beside the point. The agencies can engage in those activities so long as they are furthering Congress's unambiguous command to ultimately spend funds earmarked for "the construction of barrier system along the southwest border." App.015. Although land acquisition for purposes of building a border barrier would be within the earmark, other activities not involving construction may not—and such activities cannot be funded with the monies limited to construction.

Defendants next argue (at 30) that there is no final agency action to challenge here. But their own filings show the opposite.

"[A]gency action" under 5 U.S.C. § 706 "includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act … thereof." 5 U.S.C. § 551(13). This list is expansive. It is "meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001). "[T]he Supreme Court has explained that "'failure to act,' is … properly understood as a failure to take an *agency action*—that is, a failure to take one of the agency actions (including their equivalents) earlier defined in § 551(13)."' *Doe v. United States*, 853 F.3d 792, 799-800 (5th Cir. 2017) (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004)).

"Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (quotations omitted). "For that reason, [the Supreme] Court applies a 'strong presumption' favoring judicial review of administrative action." *Id.* In APA cases, this presumption is "guided by the Supreme Court's interpretation of the APA's finality requirement as 'flexible' and 'pragmatic.'" *Qureshi v. Holder*, 663 F.3d 778, 781 (5th Cir. 2011) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 149–50 (1967)).

Agency action is considered "final" under the APA where the action first, "mark[s] the consummation of the agency's decisionmaking process," and second, is "one by which rights or obligations have been determined, or from which legal consequences will flow." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (quotations omitted)

Defendants conceded that they have canceled the construction contracts for the

border barriers that would be constructed in Texas. ECF 24-3, at ¶¶ 24–27. That DHS may have several years to allocate the appropriated funds for border barriers does not make these actions non-final, given the clear statements that the Administration is opposed to any further border barriers being constructed. App.021-56. Discretion to reverse course in the future, by itself, is insufficient to convert an action that is final to one that is nonfinal. *See Hawkes Co.*, 136 S. Ct. at 1814 ("The Corps may revise an approved [jurisdictional determination] within the five-year period based on 'new information.' That possibility, however, is a common characteristic of agency action and does not make an otherwise definitive decision nonfinal.").

"[A]dministrative inaction [that] has precisely the same impact on the rights of the parties as denial of relief" is final agency action despite the ability of Defendants to possibly use the funds for the purposes Congress mandated because their "actions suggest the [Defendants have] made up [their] mind, yet [they] seek[ ] to avoid judicial review by holding out a vague prospect of reconsideration." *Friedman v. Fed. Aviation Admin.*, 841 F.3d 537, 543 (D.C. Cir. 2016); *John Doe, Inc. v. Gonzalez*, Civil Action No. 06-966 (CKK), 2006 WL 1805685, at *13 (D.D.C. June 29, 2006), *aff'd sub nom. John Doe, Inc. v. Drug Enf't Admin.*, 484 F.3d 561 (D.C. Cir. 2007) ("DEA's denial of Plaintiff's import permit application is not tentative; rather, the DEA has explicitly stated that the import permit request 'was being cancelled,'" and supported a finding of final agency action).

D. Defendants' actions are arbitrary and capricious.

As the Fifth Circuit recently explained in *Texas*, this Court's review under the APA for arbitrary and capricious agency action "is not toothless" and, "[i]n fact, after" *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), "it has serious bite." *Texas*, 2021 WL 5882670, at *41 (cleaned up). Applying that standard here, Defendants' actions implementing the January 20 Proclamation fail to pass muster under the APA.

1. *Defendants' explanation is both pretextual and post-hoc rationalization.*

Defendants first argue (at 31) that their "decision to engage in thorough environmental review and stakeholder consultation before engaging in any new construction" is not arbitrary and capricious agency action. In other words, Defendants say that the border wall *will* be built, but not before these analyses are complete. There are at least three fundamental problems with this argument.

First, Defendants' argument directly conflicts with their own prior statements. The President stated in his Proclamation that new construction of a border wall (1) "is not a serious policy solution"; (2) is "a waste of money"; and thus (3) "no more American taxpayer dollars" will be spent on such construction. App.021-022. Moreover, the President's Budget for Fiscal Year 2022 proposed the cancellation of all prior year border barrier construction funding that remains unobligated at the time of enactment of the Appropriations Act for Fiscal Year 2022. *See* U.S. Gov't Accountability Office, *Matter of Off. of Mgmt. & Budget & U.S. Dep't of Homeland Sec.-Pause of Border Barrier Constr. & Obligations*, B-333110.1, 2021 WL 2451823

(Comp. Gen. June 15, 2021).

Further, when asked recently why the current Administration "did not build a barrier, such as a wall, to keep [Haitian] migrants out," Secretary Mayorkas replied that "[i]t is not the policy of this administration" because "[w]e do not agree with the building of a wall."[1] DHS has expressed its intention to "end wall expansion[.]" App.025. And the current Administration has repeatedly "call[ed] on Congress to cancel remaining border wall funding and instead fund smart border security measures[.]" ECF 24-3, at 25, 29. These statements, taken individually and collectively, support the States' theory that the Administration has no intention to build the wall.

Second, Defendants' actions confirm that they have no plans to build a wall. The DHS Plan outlines activities that are "consistent with President Biden's commitment that 'no more American taxpayer dollars [should] be diverted to construct a border wall.'" ECF 24-2, at 2 (alteration in original). Indeed, those projects, according to DHS, "do not involve building new border barriers[.]" ECF 24-3, at 24. To that end, DHS (1) has modified contracts awarded during the prior Administration to "remove the construction portion of the contracts," (2) has outright cancelled all remaining construction contracts, and (3) for other prior projects, intends to "fill[ ] exposed trenches, cut[ ] exposed rebar, and remov[e] materials

[1] Teaganne Finn, *Homeland Security chief Mayorkas defends Biden administration over treatment of Haitian migrants*, NBC NEWS (Sept. 26, 2021, 10:53 AM), https://tinyurl.com/y2y9uz82.

from the project sites." ECF 24-3, at 8-9, 29-30.[2] Put simply, "hard hats and safety goggles, this is not." *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 617 n.20 (5th Cir. 2021). These actions, taken individually and collectively, support the States' theory that the Administration has no intention to build the wall.

"In reviewing agency pronouncements, courts need not turn a blind eye to the statements of those issuing such pronouncements." *BST Holdings*, 17 F.4th at 614 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). "In fact, courts have an affirmative duty *not* to do so." *Id.* Defendants thus cannot ignore their own prior statements—i.e., no wall will be built—simply because they prefer to contrive a new justification—i.e., a wall will be built *later*. Such blatant pretext renders Defendants' actions arbitrary and capricious. *Dep't of Com.*, 139 S. Ct. at 2575–76; *see also BST Holdings*, 17 F.4th at 614 (identifying pretext as a "hallmark[] of unlawful agency actions"). Indeed, these kinds of "sudden[] revers[als]" of course "create[] the plausible inference that political pressure may have caused the agency to take action it was not otherwise planning to take." *Connecticut v. Dep't of Interior*, 363 F. Supp. 3d 45, 64–65 (D.D.C. 2019).

Third, even accepting as true Defendants' explanation that a wall will be built later, that's the kind of post-hoc rationalization the APA prohibits. *See, e.g.*, *Regents*,

[2] Notably, just last week, the Court authorized the Government's return of land acquired for construction of the border wall. *United States v. 6.584 Acres of Land, more or less, Hidalgo Cty., Texas*, No. 7:20-cv-00244, ECF 83 (S.D. Tex. Dec. 7, 2021) (Alvarez, J.); *see Kellogg Co. v. Mattox*, 763 F. Supp. 1369, 1386 (N.D. Tex.) (courts can take judicial notice of their own records under Fed. R. Evid. 201), *aff'd sub nom. Kellogg Co. v. Morales*, 940 F.2d 1530 (5th Cir. 1991).

140 S. Ct. at 1907, 1909 (holding that it is a "foundational principle of administrative law" to reject an agency's "impermissible *post hoc* rationalizations"). As the Fifth Circuit just said in *Texas*, courts "can consider only the reasoning articulated by the agency itself" when it acted and thus "cannot consider *post hoc* rationalizations." 2021 WL 5882670, at *41 (cleaned up). As explained above, the Administration has made it abundantly clear that no wall will be built. *See supra* Part I.D.1. Defendants' arguments in this litigation can only be seen as *post hoc* rationalization "for a decision … made many months earlier[.]" *Texas v. Biden*, 10 F.4th 538, 559 (5th Cir. 2021) (per curiam). Their arguments, therefore, are "not a good faith explanation for [the] decision[.]" *Id.*

2. *Defendants' change in course without any explanation is arbitrary and capricious.*

Defendants concede (at 31-32) that DHS previously found a causal connection between building walls and decreases in apprehensions. Defendants, however, try to explain away the materials the States have cited and argue that any reduction in illegal activity due to past construction projects has no bearing to whether any *new* construction will have a similar effect. *See id.* There are two problems with this argument.

First, other than repeating the January 20 Proclamation's "commitment that 'no more American taxpayer dollars [should] be diverted to construct a border wall[,]' " ECF 24-3, at 18 (first alteration in original)—a Proclamation that simply dismissed such construction as a "waste of money" and "not a serious policy solution[,]" App.021—Defendants didn't provide any justification to explain *why* they

were halting new construction—much less the explanation they give now in litigation. That alone makes Defendants' actions here arbitrary and capricious under the APA. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."); *cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (rejecting "[d]eference to what appears to be nothing more than an agency's convenient litigating position" as "entirely inappropriate" especially "where the agency itself has articulated no position on the question"). Because Defendants failed to provide reasoned grounds for their actions, they are precluded from asserting new ones before this Court.

Second, where, as here, "an agency changes course, … it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters." *Regents*, 140 S. Ct. at 1913 (cleaned up).[3] The States were entitled to rely on DHS's prior findings that building walls results in decreases in apprehensions—particularly where such effective border security measures are directly tied to the States' costs for providing social services to illegal aliens. *Accord Texas*, 2021 WL 5882670, at *42 (Supreme Court in *Regents* "faulted" DHS for ignoring States' reliance interests

[3] Defendants claim (at 33) that *Regents* doesn't apply here because they are "not trying to undo previous construction projects" and are instead "deferring new construction" pending environmental review and thus the States "cannot claim reliance interests based on future construction activities" that haven't happened but will. But as explained above, *supra* Part I.D.1, this deferral is merely a pretext for not building the wall, as the Administration's prior statements clearly show.

in losing tax revenue due to change in immigration policy).[4]

Defendants concede (at 33)—as they must—that the costs the States have alleged here are "factors relevant to border wall construction[.]" But they "ignore[d] such matters[,]" *Regents*, 140 S. Ct. at 1913 (cleaned up), opting to forge ahead with implementing a policy that "no more American taxpayer dollars be diverted to construct a border wall." App.021 (cited in ECF 24-3, at 18). Defendants' failure to consider the States' reliance interests here is particularly troubling in light of the Administration's statements in the Proclamation calling construction of a border wall a "waste of money" and "not a serious policy solution." App.021.

As the Fifth Circuit just held four days ago in the MPP litigation brought by the same States here, "any" agency "action premised on reasoning that fails to account for relevant factors" "must [be] set aside" under the APA. *Texas*, 2021 WL 5882670, at *41. Even if Defendants concluded that "other interests and policy concerns"—environmental review and stakeholder consultation— "outweigh" fiscal burdens on States, such costs were still relevant factors the agency had to consider but didn't—even though it was its job to do so. *Texas v. Biden*, --- F.Supp.3d ----, 2021

[4] Defendants' actions are also arbitrary and capricious for an additional reason: they changed course without consulting the States. Defendants know consultation is essential in this context; indeed, it will consult with certain stakeholders—none of which include States and all of whom likely oppose further construction—during the environmental planning phase. ECF 24-2, at 4. Defendants' decision to exclusively hear from "interested parties" likely opposed to further border wall construction, "while completely ignoring evidence from interested parties in" favor of further construction, is impermissible. *Missouri v. Biden*, No. 4:21-CV-01329-MTS, 2021 WL 5564501, at *10 (E.D. Mo. Nov. 29, 2021) (citing *Consumers Union of U. S., Inc. v. Consumer Prod. Safety Comm'n*, 491 F.2d 810, 812 (2d Cir. 1974) (noting agency "must not ignore evidence placed before it by interested parties")).

WL 3603341, at *19 (N.D. Tex. Aug. 13, 2021) (citing *Regents*, 140 S. Ct. at 1914), *aff'd*, --- F.4th ----, 2021 WL 5882670, at *3, *55 (5th Cir. Dec. 13, 2021).

Defendants' departure from the prior policy is especially problematic here in light of their failure to consider DHS's own prior assessments before changing course. Whether or not Defendants agreed with those prior assessments, their total failure to consider them, standing alone, was also arbitrary and capricious. *See Texas*, 2021 WL 5882670, at *43-44 (DHS's failure to consider prior assessment highlighting the benefits of prior Administration's immigration policy was arbitrary and capricious because DHS simply changed policies without "a more detailed justification") (cleaned up).

Defendants argue (at 32) that "[i]mplicit" in the choice to undergo environmental planning activities before construction is their "awareness" that they're changing course "with respect to the border wall" and that "there are good reasons for the new policy." But any implicit consideration on behalf of the agency is, by definition, a concession that it failed to "expressly mention, let alone meaningfully discuss," its decision *to* change course. *Texas*, 10 F.4th at 554; *see also Fox*, 556 U.S. at 515 ("An agency may not … depart from a prior policy *sub silentio*[.]"). Indeed, Defendants' *sub silentio* departure from the prior policy is per se arbitrary and capricious agency action, "particularly when the prior policy has engendered serious reliance interests." *BST Holdings*, 17 F.4th at 614 (cleaned up). As the Fifth Circuit aptly put it this week, Defendants must "show[their] work and actually consider[ ] the factor[s] on paper." *Texas*, 2021 WL 5882670, at *45.

Finally, it bears mentioning that the most troubling aspect about Defendants' arguments here is that they recognize (at 33) that, under *Regents*, they *have* an obligation to consider the States' reliance interests. Defendants, however, cabin that obligation to the environmental review phase, and completely ignore that it applies to their actions implementing the January 20 Proclamation. Defendants cannot choose to comply with the APA when it's convenient and choose to ignore the APA when it's not. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part & dissenting in part) (agencies must engage in reasoned decision-making, must act "within the bounds established by Congress," and "may not choose not to enforce laws of which it does not approve, or to ignore statutory standards in carrying out its regulatory functions").

For all these reasons and those explained in the States' initial memorandum, Defendants' implementation of the January 20 Proclamation is arbitrary and capricious.

E. Defendants' actions are contrary to federal law.

The States are also likely to prevail on the merits of their statutory claims. Defendants argue (at 34, 40) that the States do not fall within the zone of interests of the statutes at issue and, even if they did, they have failed to show that Defendants are violating those statutes. Defendants are incorrect.

1. *The States fall within the zone of interests of the statutes at issue.*

The Fifth Circuit's recent decision in *Texas* is instructive again: "The States

must have a cause of action to sue. And because this is an APA case, the States' claims must fall within the zone of interests of the" appropriations at issue and the Impoundment Control Act. 2021 WL 5882670, at *29. This "zone-of-interests inquiry is not especially demanding." *Id.* (cleaned up). Indeed,

> to satisfy the test, the States must show only that their asserted interest is arguably within the zone of interests to be protected or regulated by the statutes they claim have been violated. And though the test is rooted in legislative intent, the States need not point to any indication of congressional purpose to benefit them. Instead, the test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Id. (cleaned up). The States here "easily clear this low bar." *Id.*

First, termination of border wall construction "poses imminent and actual harm to" the States' fisc. *Id.* Because—as Defendants concede—spending on border infrastructure *is* immigration policy, *see, e.g.*, ECF 24-3, at 3 (construction of border infrastructure—such as a barrier system—is "necessary to deter and prevent illegal entry on the southern border"), "[i]t's clear that the [statutes] aimed, at least in part, to protect States from just those kinds of harms." *Texas*, 2021 WL 5882670, at *29; *cf. City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018) ("Congress's power to spend is directly linked to its power to legislate.").

Defendants' concession is consistent with DHS's own prior assessments in 2018 and 2020 highlighting that there's a direct causal link between border infrastructure and decreased border apprehensions. *See, e.g.*, App.011 ("[B]order crossings … have decreased in areas where barriers are deployed."); *id.* at 007-08 ("When it comes to stopping drugs and illegal aliens from crossing our borders, border walls have proven

to be extremely effective."); *id.* at 010 (citing empirical data and concluding that border walls "have proved to be a critical component in gaining operational control of the border"); *id.* at 011 (in one location alone "that has never had any border infrastructure," "apprehensions have decreased since the construction of the border wall system"); *id.* at 012 (noting almost 80% "decrease in apprehensions" in one area alone "since the completion of border wall system").

Based on DHS's findings, it's no coincidence that Congress appropriated billions of dollars for the "construction of barrier system along the southwest border[.]" *Id.* at 015-16. Thus, ending construction of the southwest border wall has pernicious effects for Missouri, Texas, and their citizens. *See, e.g.*, App. 003 ¶11, 064-83, 098–128, 129-63; 098–128.

Indeed, the Fifth Circuit's recent decision in *Texas* reaffirmed its prior holding in DAPA on this very point: Texas fell "within the INA's zone of interests because" it sought "to participate in notice and comment before the Secretary changes the immigration classification of millions of illegal aliens in a way that forces the state to the Hobson's choice of spending millions of dollars to subsidize driver's licenses or changing its statutes." *Texas*, 2021 WL 5882670, at *29 (cleaned up). "Under the Supreme Court's lenient test for APA cases, that is more than enough." *Id.*

Second, Missouri and Texas fall within the zone of interests of the appropriations at issue here just as California and New Mexico fell within the zone of interests of the appropriation at issue in *California v. Trump*, 963 F.3d 926 (9th Cir. 2020). In *California*, the States challenged the Department of Defense's

diversion of funds to pay for construction of the wall on the Southern border. *Id.* at 931. The States alleged the diversion violated the constitutional separation of powers, the Appropriations Clause, and the Administrative Procedure Act. *Id.* at 934. The Government argued that the States had no cause of action under the APA to challenge the diversion of funds because they did not fall within the zone of interest of the DoD appropriation. *Id.* at 941.

The Ninth Circuit rejected that argument. *Id.* While the court acknowledged that the appropriation did "not confer a private right of action[,]" delegated "a narrow slice of Congress's appropriation power to DoD[,]" and ultimately imposed obligations upon DoD, the Court concluded that the States were allowed to sue over whether DoD "satisf[ied] these obligations." *Id.* Noting Congress's intent to "make agency action presumptively reviewable" and giving the "benefit of any doubt" to the States, *id.* at 942 (cleaned up), the court found that California and New Mexico fell within the zone of interest of the DoD appropriation for two primary reasons.

First, although in enacting the appropriation, "Congress primarily intended to benefit itself and its constitutional power to manage appropriations[,]" the States were "suitable challengers" to enforce the statute because "their interests [were] congruent with those of Congress" and were not "inconsistent with the purposes implicit in the statute." *Id.* (cleaned up). While the statute's "obligations were intended to protect Congress," the States' lawsuit in *California* furthered "Congress's intent to tighten congressional control of the reprogramming process." *Id.* (cleaned up).

Second, the States' challenge in *California* sought "to reinforce the same structural constitutional principle Congress sought to protect through [the DoD appropriation]: congressional power over appropriations." *Id.* Indeed,

> California and New Mexico's interest in reinforcing these structural separation of powers principles is unique but aligned with that of Congress because just as those principles are intended to protect each branch of the federal government from incursion by the others, the allocation of powers in our federal system also preserves the integrity, dignity, and residual sovereignty of the States, because federalism has more than one dynamic. This interest applies with particular force here because the use of [the DoD appropriation statute] here impacts California's and New Mexico's ability to enforce their state environmental laws.

Id. at 943 (cleaned up).

Because the appropriation in *California* "protect[ed]" the States' "sovereign interests," the Ninth Circuit held that the States "easily fall within the zone of interests of" the DoD appropriation "and are suitable challengers to enforce its obligations." *Id.* at 943–44.

Applying *California* here, Missouri and Texas "easily fall within the zone of interests of" the DHS appropriations at issue and are thus "suitable challengers to enforce" them. *Id.* at 943–44. The States' interests here in enforcing Congress's obligation on Defendants—the "construction of barrier system along the southwest border" —are plainly "congruent with those of Congress" and Defendants do not (and cannot) claim that the States' interests are "inconsistent with the purposes implicit in the statute." The States' lawsuit here furthers Congress's intent to "tighten" control over the border. *Cf.* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115, 100 Stat 3359, 3384 (1986) ("[T]he immigration laws of the United

States should be enforced vigorously and uniformly."). And the States' challenge here seeks to reinforce Congress's power over appropriations, which "is directly linked to its power to legislate" in the immigration context. *San Francisco*, 897 F.3d at 1231. To be sure, the States' interest in reinforcing constitutional separation-of-powers principles "is unique"; "but [it's] aligned with that of Congress" and "those principles" not only protect Congress, but "also preserves the integrity, dignity, and residual sovereignty of the States[.]" *California*, 963 F.3d at 943 (cleaned up). The States' interest "applies with particular force here because the" DHS appropriations "impact[]" Missouri's and Texas's budgets. *Id.*

Because the appropriations here "protect" the States' "sovereign interests," the States "easily fall within the zone of interests of" the DHS appropriations "and are [thus] suitable challengers to enforce [Defendants'] obligations." *Id.* at 943–44.

The same conclusion extends to the ICA, which Defendants concede (at 39) was enacted to "protect[] Congress's power of the purse[.]" Defendants cite (at 39) *Public Citizen v. Stockman*, 528 F. Supp. 824 (D.D.C. 1981), but that case didn't involve States. And while the court in *Public Citizen* held that the plaintiffs there lacked standing under 5 U.S.C. § 702 of the APA, *id.* at 830 n.1, binding Fifth Circuit precedent has held that States "fall well within" § 702. *Texas*, 809 F.3d at 152. Because the States' interests are congruent with those of Congress and, indeed, seek to safeguard them, the States arguably fall within the zone of interests sought to be protected by the ICA. *California*, 963 F.3d at 941–44; *cf. Public Citizen*, 528 F. Supp. at 830 n.1; *Maine v. Goldschmidt*, 494 F. Supp. 93, 98–99 (D. Me. 1980) (state suit

involving whether ICA authorized agency action deferring obligation of funds); *see also* ECF 24, at 53 (citing *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987) (involving non-APA challenge by non-state plaintiff over deferral of funds under the ICA).

Defendants' arguments to the contrary are meritless. They first argue (at 34–35) that the States' "financial interests in minimizing the costs of providing driver's licenses and other state-funded services are not within the zone of interests protected by Congress's appropriations to DHS for border wall construction or Congress's oversight of Executive Branch funding impoundments." But this is directly contrary to the Fifth Circuit's recent decision in *Texas*, as explained above. It's also too narrow of a focus; the statutes at issue must be viewed "as a whole." *Texas*, 2021 WL 5882670, at *30.

Defendants further argues (at 36–39) that nothing in the text or structure of the statutes at issue suggests that Congress had the States' interests in mind—either benefiting them or saving them from attenuated financial burdens. But that same argument was soundly rejected in *Texas*. 2021 WL 5882670, at *30. The Court should do the same here. Again, this argument "focuses too narrowly on" the statutes at issue, *id.*, and, in any event, it's a "rehash" of Defendants' "failed standing arguments" rejected in *Texas*. *Id.* Defendants' "cases to the contrary are entirely inapposite"—none of them even involved States. *Id.* (citing *INS v. Legalization Assistance Project*, 510 U.S. 1301, 1302, 1305 (1993) (O'Connor, J., in chambers), and explaining that *INS* was "a suit that did not involve States").

Finally, Defendants argue (at 38) that the GAO has determined that "DHS did not unlawfully impound funds from its border infrastructure appropriations while implementing the President's Proclamation[,]" so the States fall outside the zone of interests of the statutes. Three problems with that argument. First, it improperly conflates the merits with whether the States have a cause of action under the APA. *See Texas*, 2021 WL 5882670, at *29 (distinguishing the merits from the zone-of-interests inquiry). Second, the Court is not bound by GAO's determinations—much less on questions of law. *See Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005) (GAO's findings are "not binding" on courts) (cleaned up). Third, GAO's June 15, 2021, decision simply could not (and certainly did not) address whether non-parties to that proceeding—the States here—fell within the zone-of-interests of the ICA. *See Pause of Border Barrier Constr. & Obligations*, 2021 WL 2451823, at *1.

2. *Defendants' actions violate the 2020 and 2021 CAAs and the ICA.*

Defendants concede (at 41) that delays in spending funds Congress appropriated "constitutes an unlawful impoundment[.]" They further concede that deferrals of funds "based on policy disagreements with Congress … are prohibited by the ICA[.]" *Id.* Defendants argue, however, that their actions here merely constitute what the GAO calls a "legitimate programmatic delay" because Defendants are "taking reasonable and necessary steps to implement" the appropriations at issue. *Id.* (cleaned up).

Setting aside that Defendants fail to point to any *text* in the ICA that mentions "programmatic delays," even assuming such delays were in fact authorized, the

States here are likely to show that the delay here is illegitimate because Defendants have no intention to implement the construction of a border wall. That puts Defendants' actions here more in line with an impermissible deferral of funds due to a policy disagreement with Congress. Put differently, any programmatic delay assumes Defendants intend to actually build the wall, but their prior statements paint a very different picture.

The Court need not look any further than the DHS Plan. There, DHS repeats the January 20 Proclamation's "commitment that 'no more American taxpayer dollars [should] be diverted to construct a border wall[.]'" ECF 24-3, at 18 (first alteration in original). The whole purpose of the DHS Plan is to implement the Proclamation—a document that simply dismisses border wall construction as a "waste of money" and "not a serious policy solution[,]" App.021. As stated previously, Defendants' litigation position that a wall will be built *after* environmental planning and stakeholder consultation is pretext to hide the Administration's true policy that no wall will be built at all. *See supra* Part I.D.1.

Lest there be any doubt, it's of no coincidence that the five-year appropriations at issue expire in 2024 and 2025, but environmental activities take an average of almost five years. *See* EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL IMPACT STATEMENT TIMELINES (2010-2018), at p.1 (June 12, 2020) (finding average NEPA environmental impact statement completion time to be 4.5 years). Once those appropriations lapse, Defendants will have successfully avoided building a wall. If the current Administration shared the

prior Administration's goal of securing the border through "extremely effective" measures such as walls,[5] then waivers would be issued without hesitation. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 102(c)(1), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (codified as amended at 8 U.S.C. § 1103 note) (Secretary has "the authority to waive all legal requirements"—including NEPA—that, in his "sole discretion" are "necessary to ensure expeditious construction" of physical barriers along the border).

To be sure, the States will probe Defendants' intention to build the border wall during the discovery phrase of this case. In the meantime, however, the status quo should be preserved pending trial on the merits and Defendants should be enjoined from implementing the January 20 Proclamation to avoid ongoing irreparable harms to the States. *See Collum v. Edwards*, 578 F.2d 110, 113 (5th Cir. 1978) ("[T]he function of a preliminary injunction is to preserve the status quo pending a trial on the merits.").

Finally, that the GAO concluded in its June 15 decision that DHS hadn't unlawfully impounded the appropriations at issue but rather had engaged in programmatic delays makes no difference. As Defendants concede (at 47), the GAO's decision is not binding on this Court. *See Nevada*, 400 F.3d at 16. And while such a decision would ordinarily be entitled to "special weight," *id.*, the Court should not give it weight here. Critically, the GAO's decision failed to mention, much less analyze, the significance of the Proclamation's statements that support the States' theory of

[5] App.007.

pretext here: (1) "building a massive wall that spans the entire southern border is not a serious policy solution"; (2) it's "a waste of money"; and (3) "[i]t shall be the policy of [the Biden] Administration that no more American taxpayer dollars be diverted to construct a border wall[.]" *See supra* Part I.D.1; *see also Pause of Border Barrier Constr. & Obligations*, 2021 WL 2451823, at *3-4 (discussing Proclamation without mentioning any of these statements). More fundamentally, Congress vested this Court—not the GAO—with determining whether agency action was arbitrary and capricious, contrary to federal law, and contrary to the Constitution. 5 U.S.C. § 706. Unlike the GAO, this Court can (and should) determine through the adversarial system whether Defendants' delay in building the wall is made in good faith or mere pretext.

F. Defendants' actions are contrary to the Constitution.

Because the States are likely to succeed on their statutory arguments, the Court need not reach their constitutional claims. *BST Holdings*, 17 F.4th at 611. But if the Court does reach them, it should conclude that the States' are likely to prevail on their constitutional claims because, as Defendants concede (at 49–50), the States' likelihood of success on their constitutional claims "hinges" on their likelihood of success on their statutory claims.[6]

[6] To be sure, the Proclamation contains several savings clauses directing agency action "to the extent permitted by law" and "consistent with applicable law." But this language does not rehabilitate the Proclamation's unconstitutionality. *San Francisco*, 897 F.3d at 1240 ("If 'consistent with law' precludes a court from examining whether the Executive Order is consistent with law, judicial review is a meaningless exercise, precluding resolution of the critical legal issues."). Defendants' arguments (at 50-51) on this score are thus without merit.

Defendants argue (at 48) that the States do not fall within the zone of interests of the constitutional provisions they invoke for the same reasons Defendants argue the States purportedly do not fall within the zone of interests of the statutes they invoke. For the reasons the States provide above, *supra* Part I.E.1, the Court should reject Defendants' argument here too. *Accord California*, 963 F.3d at 943 (under the APA, States have an "interest in reinforcing … structural separation of powers principles"); *San Francisco*, 897 F.3d at 1233–34 (separation-of-powers considerations in the appropriation context also raise considerations under the take care clause).

Defendants appear to deny (at 50) that there is an equitable cause of action against federal officials for violating the law, but they ignore the long history of federal courts granting relief on such claims. *See, e.g.*, *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902); *Stark v. Wickard*, 321 U.S. 288, 310 (1944). "Nothing in the subsequent enactment of the APA altered the *McAnnulty* doctrine of review. It does not repeal the review of *ultra vires* actions recognized long before, in *McAnnulty*." *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988). "When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." *Id.* Thus, Plaintiffs can bring a "non-statutory review action," and courts have authority to review federal executive action that violates statutory commands. *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1327–32 (D.C. Cir. 1996).

Contrary to Defendants' argument (at 48, citing *Dalton v. Specter*, 511 U.S.

462, 471 (1994)), Plaintiffs States' constitutional claims are not that the President is acting "in excess of his statutory authority" but "that the President's actions affirmatively displaced a congressional[] mandate[.]" *Make the Rd. N.Y. v. Pompeo*, 475 F. Supp. 3d 232, 258 (S.D.N.Y. 2020) They therefore implicate "constitutional separation of powers concerns not present in *Dalton*" and should be "appropriately considered as constitutional claims subject to judicial review." *Id.* at 258–59; *see also San Francisco*, 897 F.3d at 1232 (President "may not decline to follow a statutory mandate … simply because of policy objections") (cleaned up).

Mississippi v. Johnson does not preclude review either because Plaintiff States do not seek an order directing the President's "exercise of judgment." 71 U.S. (4 Wall.) 475, 499 (1867). Instead, Plaintiff States seek an injunction prohibiting implementation of unlawful agency action. Because Congress has removed any discretion the Executive Branch might have previously had to spend or not spend funds on construction of a border wall in these circumstances, there is no "exercise of judgment" with which an injunction could interfere.

What's more, courts can and do enforce the presidential duty to faithfully execute congressional commands through relief granted against his subordinates. Because the termination of border wall construction necessarily causes Defendants to violate the law, terminating construction is, in these circumstances, to claim "a dispensing power, which has no countenance for its support in any part of the constitution." *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838). "To contend that the obligation imposed on the President to see the laws faithfully

executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible." *Id.*; *cf. Texas*, 2021 WL 5882670, at *35 (discussing *Kendall* in the context of reviewability under the APA).

*Texas v. United States,*106 F.3d 661 (5th Cir. 1997), is not to the contrary. When a plaintiff challenges an entire programmatic scheme of enforcement, rather than specific agency action, there may be "no workable standard against which to judge the agency's exercise of discretion." *Id.* at 667. But that does not apply here. The workable standard is that the Executive Branch cannot take steps that prevent its compliance with congressional mandates.

II. Plaintiff States can readily show irreparable harm.

Defendants begin their argument on this prong by rehashing their attacks on the Plaintiff States' standing—asserting that they "have failed to show that they are likely to suffer any injury as a result of policy changes with respect to border barrier construction, much less the sort of 'substantial and immediate' injury that would justify entry of a preliminary injunction." ECF 23, at 52. In the previous discussion on standing, Plaintiff States have shown that they are injured by Defendants' failure to follow Congress's commands. And "when 'the threatened harm is more than de minimis, it is not so much the magnitude but the irreparability that counts for purposes of a preliminary injunction.'" *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012) (quoting *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985)). There is no question that Plaintiff States have no avenue to recover their damages from Defendants.

Defendants next fault Plaintiff States for a supposed delay in seeking relief. ECF 24, at 52. Tellingly, Defendants cite as the baseline only the Proclamation and the DHS Plan. *Id*. But the key final agency action here is the cancelation of the construction contracts at the Texas border—which occurred, according to Defendants' own filing, on September 22 and October 8. ECF 24-3, at ¶¶ 24–27. Plaintiffs filed their complaint on October 21, and the motion for preliminary injunction on November 8, which is sufficiently prompt. *Compare Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 297 (5th Cir. 2012) (analyzing what "caused" the plaintiff's "four-month delay" and rejecting the defendant's argument that the plaintiff was "not suffering irreparable harm").

III. The equities and public interest favor the States.

The equities and public interest overwhelmingly favor the States.[7] Defendants claim (at 53-54) that environmental planning and stakeholder consultation before further construction means these factors favor them. Not so. These activities are pretextual and should thus not be afforded any weight. *See Texas*, 2021 WL 5882670, at *53 (citing *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021) (per curiam) ("[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends.")); *BST Holdings*, 17 F.4th at 614 (identifying pretext as a "hallmark[] of unlawful agency actions"). Even if Congress required appropriated funds to be spent

[7] Defendants argue (at 54) that the States' "equities in this case are limited to [their] fiscal harms" and thus their interests "are only remotely connected to the policy at issue in this case[.]" But this argument is simply a "rehash" of Defendants' "failed standing arguments," which were soundly rejected by the Fifth Circuit in *Texas*. 2021 WL 5882670, at *30. So too here.

by a certain time, the salient point is that Congress required the funds to *be* spent—something Defendants have no intention of doing.

IV. A negative nationwide injunction to preserve the status quo is reasonable and warranted.

Defendants claim (at 54) that the States' proposed preliminary injunction is too broad and unworkable. There's nothing impractical about a negative injunction that forbids Defendants from implementing the January 20 Proclamation as applied to DHS's 2020 and 2021 appropriations. ECF 19-2, at 1. Courts routinely issue such injunctions, and doing so here to preserve the status quo pending final trial on the merits is anything but inappropriate.[8] Because, as Defendants concede, border infrastructure is intertwined with immigration policy, ECF 24-3, at 3, that policy must be uniform and thus nationwide relief is warranted under binding Fifth Circuit precedent. Indeed, nationwide injunctive relief has been the standard remedy in analogous immigration cases. *See Texas*, 809 F.3d at 187–88; *Texas v. United States*, 524 F.Supp.3d 598, 666–68 (S.D. Tex. 2021) (Tipton, J.); *see also Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (the "scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff

[8] Plaintiffs have no objection if the Court reserves ruling on the propriety of a positive injunction—i.e., compelling DHS to obligate and spend appropriated funds for "construction of barrier system along the southwest border," among other things, ECF 19-2, at 1–2—until after trial on the merits. *Cf. Texas v. United States*, No. 6:21-CV-00016, 2021 WL 3683913, at *63 n.61 (S.D. Tex. Aug. 19, 2021) (Tipton, J.) ("The States also request that the Court issue a positive injunction. … The Government is opposed. … The Court reserves ruling on this issue until later in the litigation.").

class"); *Texas*, 2021 WL 3603341, at *27–28 (issuing nationwide *permanent* negative and positive injunction in "immigration related case[]"), *aff'd*, 2021 WL 5882670, at *1, *3, & *55 (5th Cir. Dec. 13, 2021) (noting Supreme Court "affirmed … denial" of stay over injunction). The same relief is warranted here.

Defendants argue (at 55-56) for a geographically limited injunction, but that argument contradicts governing Fifth Circuit precedent. In the DAPA case, the Government "claim[ed] that the nationwide scope of the injunction is an abuse of discretion and requests that it be confined to Texas or the plaintiff states." *Texas*, 809 F.3d at 187. The Fifth Circuit rejected this argument: "the Constitution requires 'an *uniform* Rule of Naturalization'; Congress has instructed that 'the immigration laws of the United States should be enforced vigorously and *uniformly*'; and the Supreme Court has described immigration policy as 'a comprehensive and *unified* system.' " *Id.* at 187–88 (emphases added by the Fifth Circuit) (citing U.S. CONST art. I, § 8, cl. 4; Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 115(1), 100 Stat. 3359, 3384; and *Arizona v. United States*, 567 U.S. 387, 401 (2012)); *see also Texas*, 524 F.Supp.3d at 666-68. "Partial implementation of DAPA would detract from the integrated scheme of regulation created by Congress, and there is a substantial likelihood that a geographically-limited injunction would be ineffective because [aliens] would be free to move among states" once inside the United States. *Texas*, 809 F.3d at 188 (quotation marks omitted); *see also Washington v. Trump*, 847 F.3d at 1166–67 (holding that "a fragmented immigration policy would run afoul of the constitutional and statutory requirement for uniform immigration law and

policy"); *Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015) (rejecting a "patchwork system").

The same concerns for a nationally uniform immigration policy,[9] and the problem that the mobility of aliens among the States would render narrower relief ineffective for fully redressing Plaintiff States' injuries, are equally applicable here.[10]

CONCLUSION

As the Court recently recognized, "urgent issues are involved" here "that call for prompt resolution." ECF 26, at 3. To that end, Plaintiff States do not believe oral argument is necessary and, therefore, Plaintiff States respectfully request that the Court grant their motion for preliminary-injunctive relief solely on the papers.

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[9] Defendants argue (at 55) that an interest in uniformity is inapplicable here because "[t]his case focuses solely on DHS's execution of its spending authority[.]" But they view this case too narrowly and, in any event, they've conceded that *spending* on border infrastructure *is* immigration policy. *See, e.g.*, ECF 24-3, at 3 (construction of border infrastructure—such as a barrier system—is "necessary to deter and prevent illegal entry on the southern border").

[10] Defendants argue (at 55) that the Supreme Court "has repeatedly stayed nationwide injunctions that prevented the Executive Branch from pursuing its immigration policies," citing *Texas v. United States*, 14 F.4th 332, 341 (5th Cir. 2021), *vacated by* --- F.4th ----, 2021 WL 5578015 (5th Cir. Nov. 30, 2021) (en banc) (mem.). But here, Defendants are violating, not enforcing, federal law. Because "[t]here is always a public interest in prompt" enforcement of the law, *Nken v. Holder*, 556 U.S. 418, 436 (2009), that interest would be served by granting preliminary injunctive relief here. There is simply no public interest in abdicating statutory obligations. *Cf. Texas*, 2021 WL 5882670, at *35.

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Respectfully submitted,

ERIC S. SCHMITT
Attorney General of Missouri

D. JOHN SAUER, #58720MO*
Solicitor General

/s/ *Jesus A. Osete*
JESUS A. OSETE, #69267MO*
Deputy Attorney General
for Special Litigation

MADDIE M. GREEN, #73724MO*
Assistant Attorney General
for Special Litigation

OFFICE OF THE ATTORNEY GENERAL
Supreme Court Building
207 West High Street
P.O. Box 899
Jefferson City, Missouri 65102
Tel. (573) 751-1800
Fax (573) 751-0774
John.Sauer@ago.mo.gov
Jesus.Osete@ago.mo.gov
Maddie.Green@ago.mo.gov

Counsel for Plaintiff State of Missouri

*Admitted *pro hac vice*

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

PATRICK K. SWEETEN
Deputy Attorney General for Special Litigation
Tex. State Bar No. 00798537

WILLIAM T. THOMPSON
Deputy Chief, Special Litigation Unit
Tex. State Bar No. 24088531

AARON F. REITZ
Deputy Attorney General for Legal Strategy
Texas Bar No. 24105704
Southern Dist. of Texas Bar No. 3653771

/s/ *Ryan D. Walters*
RYAN D. WALTERS
Attorney-in-Charge
Special Counsel, Special Litigation Unit Texas
Bar No. 24105085
Southern Dist. of Texas Bar No. 3369185

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
Tel.: (512) 936-1414
Fax: (512) 936-0545
patrick.sweeten@oag.texas.gov
will.thompson@oag.texas.gov
aaron.reitz@oag.texas.gov
ryan.walters@oag.texas.gov

Counsel for Plaintiff State of Texas

CERTIFICATE OF SERVICE

I certify that on December 17, 2021, a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) and served on all counsel of record.

/s/ *Jesus A. Osete*
Counsel for Plaintiffs