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## On the Fence About Immigration and Overpopulation: "Environmentalists" Challenge DHS Policies on NEPA Basis in Whitewater Draw Natural Resource Conservation District v. Mayorkas

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ON THE FENCE ABOUT IMMIGRATION AND  
OVERPOPULATION: “ENVIRONMENTALISTS” CHALLENGE  
DHS POLICIES ON NEPA BASIS IN *WHITEWATER DRAW*  
*NATURAL RESOURCE CONSERVATION DISTRICT V. MAYORKAS*

I. IS DHS CROSSING THE LINE? AN INTRODUCTION TO  
ENVIRONMENTAL GUIDELINES FOR IMMIGRATION POLICIES

Since the late 1990s, anti-immigration forces based on environmental concerns have been prevalent in the United States.<sup>1</sup> Referred to as “the greening of hate,” organizations like the Sierra Club – one of the nation’s most significant environmental organizations – have identified immigrants as the leading cause of overpopulation as well as urban sprawl, greenhouse gas emissions, and other forms of environmental degradation.<sup>2</sup> Although there is little evidence to support a correlation between United States immigrant communities and these environmental concerns, reporters have noted links between environmentally based anti-immigration movements and white supremacy, nativism, and even deadly shootings.<sup>3</sup>

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1. See Betsy Hartmann, *Conserving Racism: The Greening of Hate at Home and Abroad*, COLOURS OF RESISTANCE ARCHIVE, <http://www.coloursofresistance.org/361/conserving-racism-the-greening-of-hate-at-home-and-abroad/> (last visited Oct. 21, 2022) (acknowledging wave of anti-immigration Sierra Club has encouraged). Some have characterized the Sierra Club as a membership-based environmental organization with conservative leadership who has deployed right-wing strategies in the past. See *id.* (listing board members and their conservationist beliefs); see also Susie Cagle, *Bees, Not Refugees: The Environmentalist Roots of Anti-Immigrant Bigotry*, THE GUARDIAN (Aug. 16, 2019, 1:00 AM), <https://www.theguardian.com/environment/2019/aug/15/anti> (providing background for anti-immigrant ideology). Overpopulation and resource depletion have historically been at the center of anti-immigrant movements. See *id.* (summarizing timeline of movement placing responsibility for environmental deterioration on overpopulation).

2. See Hartmann, *supra* note 1 (introducing phrase “greening of hate,” which describes illogical connection between immigration and environmental degradation); see also Diane L. Slifer, Comment, *Growing Environmental Concerns: Is Population Control the Answer?*, 11 VILL. ENV’T L.J. 111, 135 (2000) (arguing use of immigrants as scapegoats for environmental problems is ineffective measure for handling environmental problems). Notably, wealthy individuals are some of the largest energy consumers and, in turn, environmental degradation internationally. See David Roberts, *Why Rich People Use So Much More Energy*, VOX (Mar. 20, 2020, 9:30 AM), <https://www.vox.com/energy-and-environment/2020/3/20/21184814/climate-change-energy-income-inequality> (suggesting direct correlation between wealth and “energy intensive goods”).

3. See Cagle, *supra* note 1 (emphasizing dangerous link between eco-nativist arguments and recent mass shootings). A suspect in an El Paso shooting penned a hate-filled document expressing “mass murder” would be the “best course of environmental action.” *Id.* (reporting links between eco-nativist rhetoric and mass shootings). Further, a suspect in a California festival shooting owned an Instagram account complaining about “migrant-driven sprawl.” *Id.* (noting pattern of mass

Regardless of whether eco-nativists believe restricting immigration will save the environment or they are participating in the greening of hate, their rhetoric is destructive and contributes to “us versus them” mentalities.<sup>4</sup>

The Department of Homeland Security (DHS) is one of the leading forces in administering the nation’s immigration system.<sup>5</sup> Under Administrative Procedure Act (APA) guidelines, DHS promulgates national security regulations focusing on immigration enforcement actions.<sup>6</sup> Congress affords DHS broad discretion in its actions, which has only increased in recent years.<sup>7</sup>

As agency discretion has increased, so too has opposition to DHS’s immigration policies, with multiple environmental groups aggressively suing various federal agencies to limit immigration.<sup>8</sup> Environmental groups and individuals, claiming immigration policies have resulted in negative environmental impacts, brought suit against DHS, criticizing its application of the National Environmen-

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shooters with anti-immigrant beliefs); *see also* Hartmann, *supra* note 1 (refuting Western notion that humans inherently cause environmental degradation).

4. *See* Cagle, *supra* note 1 (recognizing inevitable outcome of anti-immigration arguments); *see also* Hartmann, *supra* note 1 (denouncing certain overpopulation narratives as simplistic). Western policy has a history of exclusionary ideologies, blaming and oppressing minority populations for national crises. *See generally id.* (indicating history of lower class and minority population marginalization in United States). Arguments suggesting immigration is harmful to the environment fail to acknowledge the importance of utilizing cultures outside of Western high-consumption lifestyles for environmental sustainability. *See* Guizhen Ma, *The Environmental Impact of Immigration in the United States* 146 (May 2020) (Ph.D. dissertation, Utah State University) (on file with the Digital Commons, Utah State University) (recognizing cultural diversity as “valuable resource” for environmentalism).

5. For a further discussion of DHS and its background, *see infra* notes 43-54 and accompanying text.

6. For a further discussion of DHS’s focus on immigration policy, *see infra* notes 48-54 and accompanying text.

7. For a discussion of federal agencies’ broad discretion, *see infra* notes 71-95, 161-71 and accompanying text.

8. *See* Philip Marcelo, *Judge: Suit by Group Critical of Immigration Can Proceed*, ASSOCIATED PRESS NEWS (Aug. 17, 2022), <https://apnews.com/article/mexico-boston-lawsuits-donald-trump-18c3118901ce9812a204e71caabda438> (discussing lawsuit alleging NEPA violations in halting construction on U.S. southern border). In addition to the Massachusetts Coalition for Immigration Reform, the Whitewater Draw Natural Resource Conservation District, Hereford Natural Resource Conservation District, Arizona Association of Conservation Districts, Californians for Population Stabilization, Scientists and Environmentalists For Population Stabilization, and New Mexico Cattlegrowers’ Association also challenged DHS’s immigration policies. Complaint for Declaratory & Injunctive Relief at 15-42, *Whitewater Draw Nat. Res. Conservation Dist. v. Johnson*, No. 3:16-CV-02583 (S.D. Cal. 2016) (No. 3:16-CV-02583), 2016 WL 6140704 (listing plaintiffs who attacked DHS immigration policies).

tal Policy Act (NEPA).<sup>9</sup> This Note addresses one such case: *Whitewater Draw Natural Resource Conservation District v. Mayorkas* (*Whitewater Draw*).<sup>10</sup> *Whitewater Draw* involved organizations and individuals seeking to reduce immigration into the United States by challenging DHS's application of NEPA procedures to several of the agency's actions.<sup>11</sup> The plaintiffs primarily expressed concern about overpopulation and its potentially detrimental effects on the environment.<sup>12</sup> In July 2021, the Ninth Circuit responded to this concern, affirming a decision dismissing the plaintiffs' challenges and holding DHS's considerations of environmental impacts in its rulemaking processes were sufficient.<sup>13</sup>

This Note analyzes the Ninth Circuit's decision in *Whitewater Draw* and the impact of broad agency discretion on immigration policy.<sup>14</sup> Part II provides the relevant facts of the case that are important for understanding the environmentalists' basis for alleging a NEPA violation.<sup>15</sup> Part III presents the historical background of DHS and a brief overview of the statutory framework related to administrative agency action.<sup>16</sup> In Part IV, this Note describes the Ninth Circuit's analysis in dismissing the plaintiffs' claims in favor of DHS's discretion.<sup>17</sup> Part V analyzes, and ultimately supports, the Ninth Circuit's decision granting DHS deference in issuing immigration actions.<sup>18</sup> Finally, Part VI discusses the implications of the Ninth Circuit's decision on future challenges to agency actions and immigration policy at large.<sup>19</sup>

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9. See generally *Whitewater Draw*, 5 F.4th at 1003-06 (providing background of case and plaintiffs' argument DHS violated NEPA); see also Marcelo, *supra* note 8 (noting lawsuit in favor of border wall construction).

10. *Whitewater Draw*, 5 F.4th at 1003 (explaining plaintiffs' argument seeking to reduce immigration because of alleged negative impacts on environment).

11. See *id.* at 1005 (introducing plaintiffs).

12. *Id.* at 1005-06 (outlining plaintiffs' complaints).

13. See *id.* at 1020 (affirming lower court's decision in favor of DHS).

14. For a further discussion of *Whitewater Draw*'s impact on immigrants in the United States, see *infra* notes 175-97 and accompanying text.

15. For a further discussion of the facts of *Whitewater Draw*, see *infra* notes 20-36 and accompanying text.

16. For a further discussion of *Whitewater Draw*'s legal background, see *infra* notes 37-95 and accompanying text.

17. For a narrative analysis of the Ninth Circuit's decision in *Whitewater Draw*, see *infra* notes 96-151 and accompanying text.

18. For a critical analysis of the court's decision in *Whitewater Draw*, see *infra* notes 152-74 and accompanying text.

19. For a further discussion of the potential impact of the Ninth Circuit's decision in *Whitewater Draw*, see *infra* notes 175-97 and accompanying text.

## II. CONSERVATIONISTS POPULATE THE COURTS: THE FACTS OF *WHITEWATER DRAW*

In 1970, Congress enacted NEPA, which requires federal agencies to consider the environmental impacts of their proposed actions.<sup>20</sup> Consequently, DHS has implemented policies and procedures to ensure it incorporates environmental assessments when regulating immigrants entering and settling in the United States.<sup>21</sup> DHS's regulation of immigration has a profound impact on the environment, in part because DHS's immigration programs influence population growth which in turn may produce detrimental effects on the human environment.<sup>22</sup>

Whitewater Draw Natural Resource Conservation District (Whitewater) is one of many self-identified environmental conservation groups located in Arizona, New Mexico, Colorado, and California concerned about the significant environmental impacts of immigration.<sup>23</sup> These organizations and individuals believe immigration into the United States is the primary cause of population growth, which has supposedly caused "urban sprawl, loss of biodiversity, and increasing CO<sub>2</sub> emissions."<sup>24</sup> In 2016, Whitewater – along with several other conservationist groups, individual scientists, and environmentalists – filed a complaint in the United States District Court for the Southern District of California.<sup>25</sup>

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20. *What is the National Environmental Policy Act?*, U.S. ENV'T PROT. AGENCY (Oct. 26, 2022), <https://www.epa.gov/nepa/what-national-environmental-policy-act> (providing overview of NEPA history and requirements).

21. See Chris Cummiskey, *Implementation of the National Environmental Policy Act*, DEP'T OF HOMELAND SEC. 1-4 (Oct. 31, 2014), [https://www.dhs.gov/sites/default/files/publications/DHS\\_Directive%20023-01%20Rev%2001\\_508compliantversion.pdf](https://www.dhs.gov/sites/default/files/publications/DHS_Directive%20023-01%20Rev%2001_508compliantversion.pdf) (establishing DHS policy for implementing requirements of NEPA); see also JEFFERY ORNER, DEP'T OF HOMELAND SEC., INSTRUCTION MANUAL 023-01-001-01, REVISION 01, IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA), DIRECTIVE NO. 023-01 at V-1 to -21 (2014) (delineating DHS procedures for complying with NEPA).

22. See *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1005 (9th Cir. 2021) (connecting U.S. population growth to negative environmental impacts). Little empirical evidence supports the belief that foreign-born populations cause worse environmental conditions than their native-born counterparts. See Ma, *supra* note 4, at iii-iv (indicating main points against arguments that immigration is harmful to environment).

23. *Whitewater Draw*, 5 F.4th at 1005 (introducing plaintiffs seeking to reduce immigration into United States).

24. *Id.* (summarizing plaintiffs' concerns).

25. Complaint for Declaratory & Injunctive Relief at 15-42, *Whitewater Draw Nat. Res. Conservation Dist. v. Johnson*, No. 3:16-CV-02583 (S.D. Cal. 2016) (No. 3:16-CV-02583), 2016 WL 6140704 (presenting plaintiffs filing complaint for declaratory and injunctive relief).

The plaintiffs alleged DHS ignored the environmental impacts of its actions relating to the entry and settlement of people into the United States in violation of NEPA and the APA.<sup>26</sup> Further, the plaintiffs claimed that DHS allowed mass numbers of people to settle in the United States, which inflicted immediate and cumulative environmental harm throughout the nation.<sup>27</sup> In 2018, the District Court for the Southern District of California granted DHS's partial motion to dismiss, ruling that two of the plaintiffs' five claims failed to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure.<sup>28</sup> The court agreed with DHS's arguments that these claims did not meet the "final agency action" test.<sup>29</sup> Subsequently, the court dismissed the plaintiffs' three remaining claims for lack of subject matter jurisdiction and Article III standing.<sup>30</sup>

On appeal to the Ninth Circuit, the plaintiffs argued they met the standing requirement because they had an interest in the environment.<sup>31</sup> The court determined, however, that the plaintiffs' inability to cite a concrete example of a direct injury did not sufficiently demonstrate causation for Article III standing.<sup>32</sup> Additionally, the plaintiffs failed to show a connection between the DHS programs and the increasing amounts of immigration because the programs at issue generally applied to immigrants who had already established roots in the United States.<sup>33</sup>

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26. *Id.* at 2-3 (summarizing plaintiffs' complaints).

27. *See id.* at 3-4 (criticizing DHS's NEPA procedures as ineffective when applied to recent expansive measures).

28. *Whitewater Draw Nat. Res. Conservation Dist. v. Nielsen*, No. 3:16-CV-02583, 2018 WL 4700494, at \*2, \*5 (S.D. Cal. Sept. 30, 2018) (providing procedural background for dismissal).

29. For a further discussion of the "final agency action" test, see *infra* notes 138-45 and accompanying text.

30. *Whitewater Draw Nat. Res. Conservation Dist. v. U.S. Dep't of Homeland Sec.*, No. 16-CV-2583, 2020 WL 2849943, at \*9 (S.D. Cal. June 1, 2020) (granting defendants' motion for summary judgment). Article III of the U.S. Constitution only grants federal courts jurisdiction to review cases and controversies where plaintiffs have suffered the requisite injury. *See generally* Matthew C. Porterfield, *Agency Action, Finality and Geographical Nexus: Judicial Review of Agency Compliance With NEPA's Programmatic Environmental Impact Statement Requirement After Lujan v. National Wildlife Federation*, 28 U. RICH. L. REV. 619, 631 (1994) (detailing standing requirements generally and for environmental plaintiffs in particular).

31. *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1012 (9th Cir. 2021) (indicating plaintiffs' appeal of district court's entire holding).

32. *See id.* at 1012-14 (considering plaintiffs' Article III standing for Counts II and III).

33. *See id.* at 1015, 1018-19 (rebutting plaintiffs' allegations about immigration-induced population growth). The court noted the plaintiffs failed to allege that DHS's Deferred Action for Childhood Arrivals (DACA) program and application of categorical exclusions to other programs encouraged illegal immigration

Accordingly, the Ninth Circuit affirmed the lower court's ruling, holding the plaintiffs failed to present sufficient evidence supporting allegations that DHS violated NEPA and the law's corresponding regulations.<sup>34</sup> The Ninth Circuit held that DHS's considerations of environmental impacts in its actions satisfied NEPA's procedural requirements.<sup>35</sup> Shortly after, the Supreme Court denied the plaintiffs' petition for a writ of certiorari.<sup>36</sup>

### III. BORDERLINE MADNESS: UNDERSCORING BROAD AGENCY DISCRETION

The procedure for reviewing the environmental impact of federal agency actions has continuously evolved since the late 1950s.<sup>37</sup> These efforts to protect the human environment bind federal agencies such as DHS: the agency tasked with protecting the country's borders and implementing immigration policies.<sup>38</sup> Since Congress and regulators created NEPA's environmental procedures, courts have heard several cases centered on agencies' application of such procedures during rulemaking.<sup>39</sup> As with many suits implicating questions of environmental law, challenges brought against agencies' implementation of NEPA guidelines require courts to address a complex web of statutes.<sup>40</sup> Most notably, the APA guides the administrative processes federal agencies use to promulgate regulations.<sup>41</sup> Given the complicated process for review, contextualizing the court's analysis in *Whitewater Draw* requires discussion of rele-

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and, in turn, in population growth. *Id.* at 1015 (disputing connections between DACA and population increase).

34. *Whitewater Draw Nat. Res. Conservation Dist. v. Nielsen*, No. 3:16-CV-02583, 2018 WL 4700494, at \*1, \*5 (S.D. Cal. Sept. 30, 2018) (granting summary judgment and dismissing Counts III through V); *see also Whitewater Draw*, 5 F.4th at 1020 (affirming district court's denial).

35. *Whitewater Draw*, 5 F.4th at 1020 (holding in favor of DHS).

36. *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 142 S. Ct. 713, 713 (2021) (denying plaintiffs' request for Supreme Court review).

37. For a further discussion of the development and implementation of NEPA, see *infra* notes 55-70 and accompanying text.

38. For a further discussion of DHS's background and its promulgation of immigration policies, see *infra* notes 43-54 and accompanying text.

39. *See Zachary Green, NEPA in the Supreme Court: A History of Defeat 1* (2015) (M.A. thesis, North Carolina State University) (on file with the N.C. State Repository, North Carolina State University) (noting seventeen Supreme Court NEPA cases as of 2015 since statute's enactment).

40. *See generally Whitewater Draw*, 5 F.4th at 1006 (addressing plaintiffs' need for review under APA arising from NEPA's lack of statutory review provision).

41. For a further discussion of APA background and objectives, see *infra* notes 71-95 and accompanying text.

vant agency background, regulations, and administrative procedure.<sup>42</sup>

#### A. The Department of Homeland Security

Shortly after the terrorist attacks on September 11, 2001, President George W. Bush formed DHS as an agency designed to organize national homeland security efforts and safeguard the country against future attacks.<sup>43</sup> Concerns of a disunited defense system against imminent terrorist threats prompted the agency's creation to protect the country utilizing "aviation security, border control, emergency response[,] and cybersecurity."<sup>44</sup> The agency combined a patchwork of federal activity into a single, unified homeland security structure.<sup>45</sup> DHS has a definitive organizational structure consisting of four divisions: (1) Border and Transportation Security; (2) Emergency Preparedness and Response; (3) Chemical, Biological, Radiological and Nuclear Countermeasures; and (4) Information Analysis and Infrastructure Protection.<sup>46</sup> The APA authorizes DHS to promulgate regulations within the scope of these responsibilities.<sup>47</sup>

According to its mission statement, DHS's core security goals are to "prevent terrorism and enhance security," "secure and manage . . . borders," "enforce and administer . . . immigration laws," "safeguard and secure cyberspace," and "ensure resilience to disasters."<sup>48</sup> One of DHS's main tasks involves eliminating obstacles to efficient border security so that the agency can effectively prevent

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42. For a further discussion of the legislative and regulatory background to *Whitewater Draw*, see *infra* notes 43-95 and accompanying text.

43. See *Creation of the Department of Homeland Security*, DEP'T OF HOMELAND SEC. (June 3, 2022), <https://www.dhs.gov/creation-department-homeland-security> (summarizing DHS's origins).

44. See Ben Cole, *U.S. Department of Homeland Security (DHS)*, TECHTARGET (July 2013), <https://www.techtarget.com/searchcio/definition/US-Department-of-Homeland-Security-DHS> (defining DHS as federal agency designed to protect United States against terrorist threats).

45. See *Creation of the Department of Homeland Security*, *supra* note 43 (providing key documents relevant to DHS creation); see also *Proposal to Create the Department of Homeland Security*, DEP'T OF HOMELAND SEC. 1 (June 2002), [https://www.dhs.gov/sites/default/files/publications/book\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/book_0.pdf) (listing President George W. Bush's proposals for transforming national homeland security strategy).

46. *Proposal to Create the Department of Homeland Security*, *supra* note 45, at 2-3 (describing responsibilities amongst proposed agency's separate divisions).

47. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 102(e), 116 Stat. 2135 (2002) (delegating DHS Secretary's function to issue regulations).

48. Cole, *supra* note 44 (listing DHS's five core objectives).



dangerous people and cargo from entering the country.<sup>49</sup> With an increasing number of other borderless threats to America's safety – such as natural disasters, pandemics, cyberattacks, and white supremacy – DHS has evolved into an agency responsible for overseeing several additional national security issues.<sup>50</sup> Despite expanding beyond its original counterterrorism goals, DHS's principal focus remains on immigration.<sup>51</sup> DHS's fixation on immigration enforcement is so strong, in fact, that DHS limits its attention to its service provider obligations, including the administration of effective citizenship.<sup>52</sup> Further, limitations from the agency's authorizing statutes make immigration DHS's top priority.<sup>53</sup> Regardless of the realm it regulates, DHS must abide by administrative procedure when promulgating rules.<sup>54</sup>

## B. The National Environmental Policy Act

In the late 1950s and into the 1960s, public concern grew regarding human activity's impact on the environment.<sup>55</sup> As senti-

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49. See *Proposal to Create the Department of Homeland Security*, *supra* note 45, at 4-5 (noting DHS responsibility inherited from different agency no longer in existence).

50. See *Redefining Homeland Security: A New Framework for DHS to Meet Today's Challenges*, CTR. FOR AM. PROGRESS (June 16, 2021), <https://www.americanprogress.org/article/redefining-homeland-security-new-framework-dhs-meet-todays-challenges/> [hereinafter *Redefining Homeland Security*] (offering solutions to DHS's ineffective means of fulfilling its purpose beyond preventing terrorist attacks against country).

51. *From Al Qaeda to QAnon: How the Department of Homeland Security Has Had to Evolve Since 9/11*, NBC NEWS (Sept. 9, 2021, 12:00 PM), <https://www.nbcnews.com/politics/national-security/al-qaeda-qanon-how-department-homeland-security-has-had-evolve-n1278796> [hereinafter *From Al Qaeda to QAnon*] (acknowledging DHS's outdated focus on international terrorist threats); see also *Redefining Homeland Security*, *supra* note 50 (critiquing DHS's "disproportionate[ ]" focus on both international terrorism and immigration enforcement).

52. See *Redefining Homeland Security*, *supra* note 50 (suggesting DHS implement balanced and effective approach to immigration and border management).

53. See *id.* (presenting scope of DHS activities due to disparate nature of DHS authorizing entities); see also *From Al Qaeda to QAnon*, *supra* note 51 (recognizing DHS's inability to investigate and prosecute Americans domestically). The Homeland Security Act, the original legislation that created DHS, only gives the agency power to protect the United States from threats outside of the country. See *Redefining Homeland Security*, *supra* note 50 (listing primary functions with which Act tasked DHS). The FBI and Justice Department oversee any threats from people within the country's borders. *From Al Qaeda to QAnon*, *supra* note 51 (explaining DHS's attention to immigration laws).

54. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 102(e), 116 Stat. 2135 (2002) (constraining DHS regulatory powers to procedures in APA and other relevant laws).

55. Linda Luther, *The National Environmental Policy Act: Background and Implementation*, CONG. RSCH. SERV. 1 (Feb. 29, 2008), <https://sgp.fas.org/crs/misc/RL33152.pdf> (identifying NEPA as product of increasing public concern). The

ments of conservation and preservation expanded to more comprehensive environmental protection efforts, congressional leaders urged the President and Congress to make the quality of the environment a top priority.<sup>56</sup> In response, President Richard Nixon signed NEPA into law as America's first national environmental policy in 1970.<sup>57</sup> President Nixon heralded NEPA as an opportunity for America to "pay[ ] its debt to the past by reclaiming the purity of its air, its waters[,] and [its] . . . living environment."<sup>58</sup> Overall, NEPA aims to "promote efforts which will prevent or eliminate damage to the environment and . . . stimulate the health and welfare of man" by requiring agencies to take a "hard look" at environmental consequences throughout their rulemaking processes.<sup>59</sup>

To enforce its procedures, NEPA established the Council on Environmental Quality (CEQ), which promulgates regulations to implement the statute and supports the President in monitoring the environment.<sup>60</sup> CEQ regulations require agencies to choose from three types of action to determine the appropriate level of

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environmental movement gained momentum in the 1960s, focusing on preserving and protecting the environment in its natural state by controlling pollution and other hazards of industrial society. See Daniel Geary, *Environmental Movement*, ENCYCLOPEDIA.COM (May 18, 2018), <https://www.encyclopedia.com/earth-and-environment/ecology-and-environmentalism/environmental-studies/environmental-movement#:~:text=the%201960s%20was%20a%20period,1960%20to%2019%2C000%20in%201970> (summarizing environmental movement). Congress debated issues pertaining to protecting the environment for aesthetic, historic, and health purposes for at least ten years prior to NEPA's passing. See generally Luther, *supra*, at 3, 7 (listing problems NEPA ultimately addressed after approximately decade of preparation).

56. See Jim Kershner, *NEPA, The National Environmental Policy Act*, HISTORYLINK.ORG (Aug. 27, 2011), <https://www.historylink.org/File/9903> (outlining arguments for national environmental policy). Prior to the word "environment" taking on its present expansive meaning in the 1960s, laws focused on conserving natural resources rather than encouraging general sustainable behavior. See *id.* (summarizing expansion of political understandings of environment).

57. Luther, *supra* note 55, at 1 (declaring legislation key option to address national environmental concerns).

58. Kershner, *supra* note 56 (proposing 1970s as years for American environmental focus).

59. 42 U.S.C. § 4321 (1970) (declaring congressional purpose of NEPA); see also *Ohio Valley Env't Coal. v. Aracoma Coal Co.*, 556 F. 3d 177, 191 (4th Cir. 2009) (explaining NEPA's "hard look" requirement). NEPA is a procedural statute rather than "results-driven," allowing agency action even with adverse environmental effects if the agency considers those effects. *Id.* (justifying NEPA's "hard look" requirement).

60. Luther, *supra* note 55, at 6, 8 (identifying establishment of CEQ as one of NEPA's primary goals); see also *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1004 (9th Cir. 2021) (describing role of CEQ in NEPA process).

NEPA review for their proposed action.<sup>61</sup> If the agency finds that a significant environmental impact would result from its action, NEPA's default requirement is for the agency to prepare an Environmental Impact Statement (EIS).<sup>62</sup> An EIS is a detailed statement addressing "any adverse environmental effects [of the proposed action] which cannot be avoided" and other factors related to the environmental impact of the agency's action.<sup>63</sup> The EIS is the most commonly recognized NEPA requirement, and its language has become part of American vernacular, despite accounting for only a small portion of agency actions' NEPA compliance.<sup>64</sup>

When it is unclear whether an agency's proposed action would have a significant environmental impact, the agency may prepare an Environmental Assessment (EA), a concise document that determines whether an EIS is appropriate.<sup>65</sup> Alternatively, if the agency finds that its proposed action would not "individually or cumulatively have a significant effect," the agency may opt for a Categorical Exclusion (CATEX) to exclude the action from requiring an EIS or EA.<sup>66</sup> Federal agencies' compliance with NEPA's default EIS requirement, or lack thereof, created an avenue for citizens to challenge the administrative system and its impact on the environment.<sup>67</sup> An interested party may assert a claim against an agency's application of an EIS, EA, or CATEX action if the party properly demonstrates an injury-in-fact and follows all procedural guidelines.<sup>68</sup> Such a challenge is easily accessible when the plaintiff

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61. See Luther, *supra* note 55, at 17 (classifying three distinct levels of NEPA review available to agencies under CEQ regulations).

62. *Id.* (summarizing types of actions requiring EIS).

63. See *Whitewater Draw*, 5 F.4th at 1004 (quoting 42 U.S.C. § 4332(2)(C)) (identifying EIS as default action for agencies' NEPA compliance).

64. See Luther, *supra* note 55, at 17 (highlighting small number of EISs filed in given year); see also Kershner, *supra* note 56 (indicating EIS punch lines in popular culture).

65. See Luther, *supra* note 55, at 17 (distinguishing actions requiring EA); see also *Whitewater Draw*, 5 F.4th at 1004 (noting EA as alternative to EIS in certain circumstances).

66. See Luther, *supra* note 55, at 17 (identifying categorical exclusions as final action option in agency's analysis of environmental impact); see also *Whitewater Draw*, 5 F.4th at 1005 (describing CATEX A3 exclusions in context of NEPA process). Most federal actions require an EA or avoid the EIS requirement because they are "categorically excluded." Luther, *supra* note 55, at 17 (noting CEQ's estimate that vast majority of proposed actions circumvent EIS).

67. See Kershner, *supra* note 56 (detailing NEPA's long-range effects among lawmakers and citizens).

68. See *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005) (citing *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 970-72, 978 (9th Cir. 2003)) (allowing plaintiffs to assert procedural injury in previous case). Though plaintiffs have the right to sue, the Supreme Court accords agen-

has a local connection to the environmental harm as established in *Sierra Club v. Morton*,<sup>69</sup> where the Supreme Court rejected the Sierra Club's general quality of life arguments.<sup>70</sup>

### C. The Administrative Procedure Act

The Administrative Procedure Act (APA) of 1946 expanded administrative agencies' power by establishing a framework for agency decision-making.<sup>71</sup> Before the twentieth century, the United States had not established a uniform administrative law system, largely out of concern for awarding the government overbearing power over citizens.<sup>72</sup> Despite lacking a comprehensive procedural framework governing agency action, administrative agency power increased dramatically during the New Deal.<sup>73</sup> The New Deal created numerous regulatory agencies in the 1930s after the Supreme Court relaxed its stance on nondelegation, allowing Congress to delegate legislative power to administrative agencies as long as Congress provided standards to guide rulemaking.<sup>74</sup> When Democrats lost their majorities in the House and the Senate in 1946, concerns about losing control of Congress and the White House incentivized the party to reform administrative procedure to preserve the New Deal.<sup>75</sup> Congress eventually passed the APA, pro-

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cies broad discretion to interpret the language of statutes if plaintiffs do not meet the stringent procedural requirements. See DANIEL T. SHEDD & TODD GARVEY, CONG. RSCH. SERV., R43203, CHEVTON DEFERENCE: COURT TREATMENT OF AGENCY INTERPRETATIONS OF AMBIGUOUS STATUTES 1 (Aug. 28, 2013) (outlining agency ability to interpret ambiguous statutes). For a further discussion of a plaintiff's authority to challenge agency actions and requirements to claim procedural injury under NEPA, see *infra* notes 77-95, 101-51 and accompanying text.

69. See *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (serving as leading case on issue of geographic standing).

70. *Id.* at 734-35 (requiring personal environmental injury).

71. Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENV'T L. REV. 207, 207 (2016) (introducing expansion of administrative power as most important development in twentieth-century American politics).

72. *Id.* at 208 (acknowledging Americans' resistance to creation of formal administrative state).

73. *Id.* at 209 (providing background for skepticism about administrative agencies).

74. Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 150 DÆDALUS J. AM. ACAD. ARTS & SCIENCES 33, 34-35 (2021) (addressing Supreme Court shift from strict interpretation of separation of powers to current notions of administrative state).

75. See Elias, *supra* note 71, at 212 (providing historical context to administrative procedure reform in 1946). With the end of World War II and the transfer of presidential power from President Roosevelt to Harry Truman, a less persuasive replacement, Democrats had the impetus to initiate progress towards reforming administrative procedure in 1946. *Id.* at 211-12 (stating factors that led to proposal of APA).

viding procedures for agencies to follow when creating and adjudicating cases, as well as judicial review standards for courts when analyzing final agency actions.<sup>76</sup>

A crucial measure toward accomplishing the statute's objective to protect individual rights against potentially overbroad agency power was its authorization of substantive judicial review.<sup>77</sup> In particular, the APA provides that "[a]ny person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action . . . shall be entitled to judicial review thereof."<sup>78</sup> This provision embodies the general belief that Congress intended judicial review of administrative action.<sup>79</sup> The APA authorizes courts to hold agency actions unlawful and set them aside in certain circumstances, including when an action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>80</sup> This arbitrary and capricious standard is the most common standard of review courts apply in claims against agency actions, but its application is limited, "narrow," and fact-based.<sup>81</sup> Courts only apply the standard to invalidate an agency action when the agency fails to provide a rational connection between the relevant data and the action.<sup>82</sup> To overcome an arbitrary and capricious review, an agency need only justify its decision-making process by adequately explaining the outcome.<sup>83</sup> Further, as *Lujan v. National Wildlife Federation*<sup>84</sup> demonstrated, legislators intended the standard to apply

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76. TODD GARVEY, CONG. RSCH. SERV., A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW, R41546, 1 (2017) (establishing APA as providing general procedures for agency rulemaking authority).

77. Elias, *supra* note 71, at 221, 224 (highlighting use of APA provision of judicial review to manage agency power).

78. Administrative Procedure Act of 1946, ch. 324, Pub. L. No. 404-79, § 10(a) (establishing power for judicial review under certain circumstances).

79. See GARVEY, *supra* note 76, at 13 (providing presumption favoring judicial review of rules and regulations promulgated under APA).

80. 5 U.S.C. § 706(2)(A) (1966) (defining courts' scope of review of agency action).

81. GARVEY, *supra* note 76, at 14 (characterizing arbitrary and capricious standard of review as "catch-all"). For a further discussion of the limits on arbitrary and capricious review, see *infra* notes 82-95 and accompanying text.

82. See *id.* (applying rule from Supreme Court's decision which emphasizes courts' lack of authority to substitute judgment for that of agency's); see also *Motor Vehicle Mfrs. Ass'n v. State Farm Auto Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (providing considerations for arbitrary and capricious review).

83. See GARVEY, *supra* note 76, at 15 (summarizing agency explanation required in response to arbitrary and capricious claim).

84. 497 U.S. 871, 899-900 (1990) (denying § 702 judicial review to plaintiffs).

precisely to individual challenges rather than broadly encompass actions against agency programs.<sup>85</sup>

Moreover, the APA limits judicial review of agency action to “[a]gency action made reviewable by statute and *final* agency action for which there is no other adequate remedy in a court . . . .”<sup>86</sup> In *Bennett v. Spear*,<sup>87</sup> the Supreme Court established the “final agency action” test, which is a two-part test for answering the threshold question of whether an agency action is final.<sup>88</sup> The action must: (1) “mark the ‘consummation’ of the agency’s decision-making process [and] must not be of a merely tentative or interlocutory nature”; and (2) determine rights or obligations, or create legal consequences.<sup>89</sup> Effectively, a court may only employ judicial review when the agency states a clear position in the challenged action or the action has direct practical and legal impacts.<sup>90</sup> If the court determines the challenged action is not final, which would mean the plaintiff has no standing, the court may grant or allow retention of agency discretion over the action.<sup>91</sup>

Additionally, if Congress is silent or ambiguous regarding a specific issue, courts may defer to an agency’s interpretation of a statute.<sup>92</sup> As *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>93</sup> states, agencies have express authority to use their expertise and judgment to fill gaps Congress left in a statute.<sup>94</sup> Ultimately,

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85. See Porterfield, *supra* note 30, at 620 (reporting claims of *National Wildlife’s* end to lawsuits attacking entire programs).

86. 5 U.S.C. § 704 (1966) (emphasis added) (defining actions reviewable by courts).

87. 520 U.S. 154, 177-78 (1997) (addressing question of whether agency’s action at issue is “final”).

88. *Id.* (establishing agency action as final); see also *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorikas*, 5 F.4th 997, 1007 (9th Cir. 2021) (applying *Bennett* test to plaintiffs’ claim of DHS’ arbitrary and capricious action).

89. *Bennett*, 520 U.S. at 177-78 (providing two conditions for agency action to be “final”).

90. See *Or. Nat. Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (establishing alternate rule for determining whether agency action is final).

91. See *Whitewater Draw*, 5 F.4th at 1016 (maintaining DHS’s discretion over DACA removal proceedings). For a further discussion of agency discretion as the default, see *infra* notes 184-86 and accompanying text.

92. SHEDD & GARVEY, *supra* note 68, at 6 (describing *Chevron* step two as stage to consider whether agency’s interpretation of statute is “permissible”).

93. 467 U.S. 837, 845 (1984) (examining appellate court’s role and Congress’s intent regarding permit program).

94. See *id.* at 843-44 (indicating long history of weight in agencies’ statutory interpretations).

courts favor agency discretion over judicial review; therefore, many challenges to agency actions are unsuccessful.<sup>95</sup>

#### IV. THE PATH TO NEPA CHALLENGES: THE NINTH CIRCUIT'S ANALYSIS IN *WHITEWATER DRAW*

In *Whitewater Draw*, the Ninth Circuit focused primarily on DHS's interpretation of NEPA and the APA's requirements.<sup>96</sup> After providing an overview of NEPA's requirements and DHS's actions, the Ninth Circuit addressed the plaintiffs' NEPA and APA claims.<sup>97</sup> The opinion centered on whether the plaintiffs suffered a "procedural injury," ultimately holding the immigrants' environmental impact did not harm plaintiffs directly.<sup>98</sup> In reaching its decision in favor of DHS, the court's analysis turned on two main points: (1) whether the plaintiffs identified a causal connection between DHS's actions and population growth; and (2) whether the plaintiffs challenged final, discrete actions.<sup>99</sup> In reviewing the lower court's rationale, the Ninth Circuit ultimately affirmed the decision, deeming DHS's considerations of environmental impacts sufficient.<sup>100</sup>

##### A. NEPA Claims

The Ninth Circuit noted that while NEPA requires federal agencies to take a "hard look" at the environmental consequences of their actions, the statute does not itself mandate particular results.<sup>101</sup> Instead of arguing that a more thorough consideration of environmental impacts would have limited the generally adverse effects of DHS's actions, the plaintiffs in *Whitewater Draw* could only discuss their personal procedural injury because of the injury-in-fact requirement for procedural claims.<sup>102</sup> Accordingly, the court's

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95. For a further discussion of the background of broad agency discretion, see *infra* notes 152-74 and accompanying text.

96. For a further discussion of the facts of *Whitewater Draw*, see *supra* notes 20-36 and accompanying text.

97. See *Whitewater Draw*, 5 F.4th at 1007-20 (contesting plaintiffs' claims throughout discussion).

98. See *id.* at 1013 (emphasizing NEPA restricted plaintiffs to solely claiming "procedural injury").

99. For a further discussion of the criteria in the Ninth Circuit's decision, see *infra* notes 101-51 and accompanying text.

100. See *Whitewater Draw*, 5 F.4th at 1020 (affirming district court judgment against plaintiffs' NEPA and APA challenges).

101. For a further discussion of NEPA's "hard look" requirement, see *supra* note 59 and accompanying text.

102. *Whitewater Draw*, 5 F.4th at 1013 (emphasizing NEPA's notable lack of results requirements).

analysis focused specifically on the necessary standing elements the Constitution requires for claims of procedural defects.<sup>103</sup>

The court noted the plaintiffs needed to establish Article III standing to bring their actions against DHS in the District Court for the Southern District of California.<sup>104</sup> Article III of the Constitution limits the judicial power of federal courts to cases where plaintiffs can show a concrete and particularized injury-in-fact, a causal connection between the conduct and the injury, and a likelihood that the injury is redressable.<sup>105</sup> The Ninth Circuit held that the plaintiffs did not meet these requirements.<sup>106</sup> Because the plaintiffs failed to establish Article III standing, the Ninth Circuit could not mediate DHS's administrative actions and, therefore, afforded DHS discretion.<sup>107</sup>

### 1. *The Injury-in-Fact Test*

Plaintiffs must first establish Article III standing by satisfying the injury-in-fact element when claiming a procedural injury under NEPA.<sup>108</sup> To satisfy this element, plaintiffs must show (1) that the procedures they are challenging aim to protect their threatened "concrete interest;" and (2) the probability that the action jeopardizes their interest.<sup>109</sup> A procedural violation claim is invalid when the plaintiffs have no clear interest which the challenged agency action protects.<sup>110</sup>

To establish an environmental interest as concrete, plaintiffs must prove a geographic nexus: this is a connection between the individual or organization asserting the claim and the local environment the proposed action impacts.<sup>111</sup> The Supreme Court exem-

103. *Id.* (noting added layer to court's analysis).

104. *See id.* at 1006 (dismissing plaintiffs' claims over lack of Article III standing).

105. *See Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 937 (9th Cir. 2005) (citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 180-81 (2000)) (summarizing requirements of Article III standing).

106. *See Whitewater Draw*, 5 F.4th at 1012-20 (recalling district court's grant of summary judgment in favor of DHS due to lack of Article III standing).

107. *See id.* at 1012-13, 1020 (providing origin and purpose of Article III standing and holding in favor of DHS). For a further discussion of agency discretion when plaintiffs fail to establish standing, see *infra* notes 184-86 and accompanying text.

108. *Id.* at 1012-13 (recognizing injury-in-fact elements as applicable to plaintiffs' procedural claim).

109. *Id.* at 1013 (outlining two-step injury-in-fact test).

110. *See Ashley Creek*, 420 F.3d at 938 (denying procedural injury claim based on allegation unrelated to agency action).

111. *See id.* (describing concrete interest requirement as easy to establish when plaintiffs use area proposed action threatens); see also Appellees' Answering



plified how plaintiffs can use a geographic nexus to establish an environmental interest in *Sierra Club v. Morton*.<sup>112</sup> The court in that case adopted a regional approach to the requirement, determining that a mere interest in a problem is insufficient to establish standing.<sup>113</sup> While aesthetic, conservational, recreational, and economic values are valid interests, they must also be specific to the plaintiffs to provide a sufficient basis for standing.<sup>114</sup> Physical proximity to the area the procedural injury impacts is fundamental to satisfying the geographic nexus test.<sup>115</sup> Establishing a concrete injury through a geographic nexus is a stringent requirement for plaintiffs to establish Article III standing, which the Ninth Circuit determined the plaintiffs did not meet.<sup>116</sup> Instead of establishing a close enough tie to the relevant geographical area, the plaintiffs in *Whitewater Draw* argued for a general framework that would allow anyone living near states with high immigration populations to challenge DHS's policies under NEPA.<sup>117</sup>

To show a reasonable probability of a threat to their concrete interests, plaintiffs must prove the challenged procedural violation is likely to cause harm to their interest in the future rather than immediately.<sup>118</sup> The degrees of separation between the agency action and the eventual harm are not relevant to establishing such a reasonable probability.<sup>119</sup> If the plaintiffs can provide a connection between the challenged procedural violation and their concrete in-

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Brief at \*34, *Whitewater Draw Nat. Res. Conservation Dist. v. Wolf*, No. 20-55777, 2020 WL 7907106 (S.D. Cal. Dec. 23, 2020) (detailing requirement that NEPA plaintiffs establish harm through geographic proximity).

112. See *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (introducing additional categories of standing).

113. See *id.* (discarding notion that widely shared injuries are sufficient for judicial review); see also Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247, 1249 (1996) (identifying *Sierra Club* "localist approach" to emphasize physical presence).

114. See *Sierra Club*, 405 U.S. at 738 (approving cases authorizing judicial review of injuries other than economic harm).

115. Farber, *supra* note 113, at 1249 (summarizing *Sierra Club*'s physical proximity test for environmental claims).

116. See *Wolf*, 2020 WL 7907106, at \*46 (arguing plaintiffs lack standing because they did not show concrete and particularized injury traceable to DHS).

117. See *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1020 (9th Cir. 2021) (scrutinizing plaintiffs' geographic nexus to border, where damage occurred). Many of the plaintiffs in *Whitewater Draw* did not live in the states they were claiming faced procedural injury. *Id.* (reporting non-Texas plaintiffs' complaints of environmental damage along southwest border).

118. See *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 972 (9th Cir. 2003) (emphasizing plaintiffs' ability to enforce procedural requirements without immediacy).

119. See *id.* at 975 (reiterating number of steps that occur before harm is irrelevant).

terests, they satisfy this prong of the injury-in-fact test.<sup>120</sup> The Ninth Circuit did not analyze whether the plaintiffs in *Whitewater Draw* satisfied the second prong of the injury-in-fact test because the plaintiffs did not satisfy the first prong.<sup>121</sup>

## 2. *Causation and Redressability*

Once a NEPA plaintiff establishes an injury-in-fact, the plaintiff must demonstrate causation and redressability by citing facts showing the agency's failure to consider a proposed action's environmental consequences affects them.<sup>122</sup> Article III standing becomes substantially more difficult to establish when a plaintiff's asserted procedural injury arises from an agency's regulation of someone other than the plaintiff personally.<sup>123</sup> This difficulty is because courts only grant standing to plaintiffs for establishing a procedural harm injures them more than the public at large.<sup>124</sup>

In addition to the procedural injury requirements in Article III, the APA's requirement that plaintiffs show an adverse effect or grievance from the agency action they are challenging also binds NEPA plaintiffs.<sup>125</sup> Under the APA, plaintiffs must raise more than generally available grievances and specify a personal injury.<sup>126</sup> Accordingly, the court ruled against the *Whitewater Draw* plaintiffs' claim that DHS enticed non-natives to come into the United States, holding this was not a sufficient personal injury to prove causation and redressability.<sup>127</sup>

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120. *See id.* (noting reasonable probability as satisfying test to enforce procedural requirement).

121. *See Whitewater Draw*, 5 F.4th at 1016-17 (assessing that plaintiffs did not identify particular project to satisfy concrete interest prong).

122. *See id.* at 1013 (requiring *Whitewater Draw* plaintiffs to make showing of DHS's impact on them). The plaintiffs' showing does not have to be an immediate effect, but it must have a direct environmental consequence on them, which DHS could have resolved had DHS "properly" considered the action's environmental impact. *See id.* (acknowledging environmental effects may take many years to manifest).

123. *Id.* at 1013-14 (cautioning against circumstances involving independent actors' choices not before the court). Once a plaintiff establishes injury-in-fact, however, the court relaxes causation and redressability because plaintiffs must only show that the agency considered environmental consequences in its decision. *See id.* at 1013 (describing requirements of plaintiffs' procedural injury claims).

124. *See id.* at 1014 (rejecting plaintiffs' general claims).

125. *See Whitewater Draw Nat. Res. Conservation Dist. v. Wolf*, No. 20-55777, 2020 WL 7907106, at \*46 (S.D. Cal. Dec. 23, 2020) (rejecting plaintiffs' Article III and APA standing to challenge DHS programs).

126. For a further discussion of the APA's specificity requirements, see *infra* notes 128-51 and accompanying text.

127. *See Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1020 (9th Cir. 2021) (denying plaintiffs' enticement theory). The Ninth Cir-

## B. The APA's "Final Agency Action" Requirement

The APA's judicial review provisions determined the scope of the Ninth Circuit's review, particularly because NEPA does not provide any special statutory review standards.<sup>128</sup> These provisions provide that a plaintiff challenging an agency action must allege they have suffered a "legal wrong" or that an agency action "adversely affected" or "aggrieved" them.<sup>129</sup> The statute further provides that, for a court to review an action, the agency action must be final instead of "preliminary, procedural, or intermediate."<sup>130</sup> Moreover, the statute prohibits judicial review of broad programmatic actions, requiring plaintiffs to instead direct their attack at a distinct agency action.<sup>131</sup>

### 1. *Legal Wrong or Adverse Effect*

The APA requires plaintiffs to suffer a "legal wrong" or for an agency to either "adversely affect[ ]" or "aggrieve[ ]" them before they can invoke their right to judicial review.<sup>132</sup> Supreme Court precedent has held this requirement means plaintiffs must raise a claim alleging individual impact instead of a general grievance.<sup>133</sup> To determine whether a plaintiff's claim satisfies this requirement, the court must look to whether the plaintiff is within the "zone of

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cuit observed no evidence that DHS's actions caused illegal immigration. *Id.* (rejecting plaintiffs' arguments). Rather, DHS's actions were a response to manage the existing illegal immigrant population. *Id.* (disputing plaintiffs' arguments that DHS actions offer non-citizens opportunity to remain in United States).

128. *See id.* at 1006 (providing Ninth Circuit's scope and standard of review).

129. 5 U.S.C. § 702 (1966) (describing plaintiffs' right of review). For a further discussion of the APA's legal wrong or adverse effect requirement, see *infra* notes 132-37 and accompanying text.

130. *See* 5 U.S.C. § 704 (1966) (authorizing review of final agency action). For a further discussion of the APA's final agency action requirement, see *supra* notes 86-91, *infra* notes 138-45 and accompanying text.

131. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) (precluding broad programmatic attacks Supreme Court previously rejected). For a further discussion of the APA's discrete agency action requirement, see *infra* notes 146-50 and accompanying text.

132. 5 U.S.C. § 702 (1966) (addressing how plaintiffs receive right of review).

133. *See Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939-40 (9th Cir. 2005) (citing *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)) (recognizing Supreme Court's prudential standing requirement); *see also* Jessica Smith, *Standing Requirements in Federal Court*, HOLLAND & HART (Sept. 18, 2019), <https://www.hollandhart.com/standing-requirements-in-federal-court#:~:text=Prudential%20standing%20requires%20plaintiffs%20to,prudential%20rather%20than%20constitutional%20constraints> (defining prudential standing as preventing parties from bringing claim based upon someone else's legal rights).

interests” the statute protects or regulates.<sup>134</sup> For example, because NEPA is an environmental protection statute, a NEPA violation claim must allege that the agency action harmed the plaintiff’s particular environmental interest.<sup>135</sup> Injuries to purely economic interests do not satisfy the zone of interests test for a NEPA claim.<sup>136</sup> Considering this long-standing rule, the Ninth Circuit concluded the plaintiffs’ broad assertions of quality of life harms from decades of population growth were not specific enough to indicate an environmental interest in *Whitewater Draw*.<sup>137</sup>

## 2. *Final Agency Action*

While the two-part test *Bennett* established guides the APA’s final agency action requirement, the finality element is flexible.<sup>138</sup> In determining the finality of an agency’s action, the court must first look at the level of completion of the agency’s decision-making process.<sup>139</sup> The action is final if it “‘amounts to a definitive statement of the agency’s position . . . .’”<sup>140</sup> Next, the court looks at the action’s direct effect on the parties challenging the action.<sup>141</sup> If the action immediately affects the parties’ day-to-day operations, the court may consider the action final.<sup>142</sup> Lastly, a court may determine whether an action is final if the party expects “immediate compliance.”<sup>143</sup> Overall, *Bennett*’s final agency action test requires the court to interpret the finality element broadly and pragmati-

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134. See *Ashley Creek*, 420 F.3d at 939-40 (relaying Supreme Court’s interpretation of “adversely affected” requirement).

135. See *id.* at 940 (describing NEPA’s zone of interests as environmental).

136. *Id.* (rejecting exclusively financial interests as within NEPA’s scope).

137. See *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1014, 1020 (9th Cir. 2021) (requiring more than general grievance to grant plaintiffs standing); see also *Whitewater Draw Nat. Res. Conservation Dist. v. Wolf*, No. 20-55777, 2020 WL 7907106, at \*36 (S.D. Cal. Dec. 23, 2020) (summarizing plaintiffs’ arguments).

138. For a further discussion of *Bennett*’s final agency action test, see *supra* notes 86-91, *infra* notes 139-45 and accompanying text. See also *Whitewater Draw*, 5 F.4th at 1007 (citing *Or. Nat. Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006)) (stating finality element is “pragmatic” and “flexible”).

139. See *Or. Nat. Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (identifying three-part test to determine whether agency’s action is final).

140. See *id.* (citing *Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 646 (9th Cir. 2005) (analyzing first way to establish agency action as final)).

141. See *id.* (providing second option for establishing final agency action).

142. See *id.* (indicating impact on parties’ day-to-day operations as factor).

143. See *id.* (noting final way to obtain judicial review of agency action).

cally, focusing on the legal and practical effects of the action.<sup>144</sup> Despite the flexibility of the finality element, the Ninth Circuit determined DHS's manual implementing NEPA guidelines was merely preparatory and did not require the agency to enter the decision-making stage, thus dismissing the plaintiffs' claim for not satisfying the final agency action requirement.<sup>145</sup>

### 3. *Discrete Agency Action*

In addition to the final agency action requirements under the APA, the action plaintiffs attack must be discrete and particular.<sup>146</sup> The APA requires plaintiffs to identify a "specific rule, order, license, sanction, or relief" that causes them harm.<sup>147</sup> Whether plaintiffs are challenging an agency action or an agency's failure to act, the action must be discrete, which often limits plaintiffs' claims.<sup>148</sup> This limitation stops plaintiffs from making broad challenges to entire programs and alleging those programs are unlawful agency action.<sup>149</sup> The Ninth Circuit, therefore, found that several of the plaintiffs' claims were not reviewable because they did not identify a particular project or action connected to their alleged injury.<sup>150</sup> Affirming the district court's decision, the Ninth Circuit rejected the plaintiffs' claims because they failed to satisfy NEPA, APA, and Article III requirements and granted DHS discretion to implement its immigration policies.<sup>151</sup>

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144. See *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1007 (9th Cir. 2021) (citing *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (focusing on general impact of agency action).

145. *Id.* at 1009 (stating manual did not bind DHS).

146. See *id.* at 1010 (describing plaintiffs' requirement to identify circumscribed and discrete agency action as "axiomatic").

147. See *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004) (listing five categories of decisions agencies have implemented). Each category of decisions contains language that makes their finality and future effect clear. *Id.* (emphasizing definitions' identification of circumscribed, discrete agency actions).

148. See *id.* (defining agency action as action itself or failure to act).

149. See *id.* at 64 (limiting several kinds of challenges with discrete agency action requirement); see also *Whitewater Draw*, 5 F.4th at 1010 (prohibiting plaintiffs from making "broad programmatic attack[s]").

150. See *Whitewater Draw*, 5 F.4th at 1012 (indicating similarities of plaintiffs' challenges to DHS programs to broad programmatic attack in prior Supreme Court case). In *National Wildlife*, the Supreme Court held that the National Wildlife Federation improperly challenged entire Bureau of Land Management programs rather than a discernable agency action. See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 900 (1990).

151. *Id.* at 1020 (affirming lower court's judgment).

V. THE NINTH CIRCUIT PROPERLY GRANTS DHS ITS AGENCY  
DISCRETION GREEN CARD: A CRITICAL ANALYSIS

In reaching its conclusion in *Whitewater Draw*, the Ninth Circuit correctly upheld strict applications of APA and Article III requirements, continuing the precedent of broad agency discretion.<sup>152</sup> The court stood firmly against judicial review of agency actions by affirming the district court's decision.<sup>153</sup> Affording DHS complete discretion over how the agency adheres to NEPA guidelines is consistent with precedent applying the APA's discrete and final agency action requirements and Article III's concrete injury requirement.<sup>154</sup> This broad discretion, however, contrasts with the original intentions of NEPA and APA procedures.<sup>155</sup>

While the Ninth Circuit's decision is consistent with previous courts' limited role in agency action, the analysis is likely rooted in courts' favoring agency discretion over the APA's procedural guidelines.<sup>156</sup> The APA's language and legislative history, though, do not signify the creation of a system of broad agency discretion.<sup>157</sup> The APA's language guides judicial review of agency actions, which commentators did not interpret to require expansive deference to agencies at the time of its adoption.<sup>158</sup> Instead, the legislative history reveals that the APA intended to codify the existing system, which included extensive judicial review.<sup>159</sup> Though the APA never in-

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152. For a discussion of the strict NEPA and APA guidelines, see *supra* notes 101-50 and accompanying text.

153. For a further discussion of the extensive requirements for judicial review of NEPA claims, see *supra* notes 77-150 and accompanying text.

154. For a further discussion of the APA's final agency action requirement, see *supra* notes 128-50 and accompanying text. For a further discussion of Article III's injury-in-fact test, see *supra* notes 108-21 and accompanying text.

155. For a further discussion of NEPA and APA's legislative intent, see *infra* notes 157-65 and accompanying text.

156. For a discussion of today's courts' deference to agencies, see *infra* notes 166-71 and accompanying text.

157. See *The Chevron Doctrine: Constitutional and Statutory Questions in Judicial Deference to Agencies: Hearing on H.R. Misc. Doc. No. 114-68 Before the Subcomm. on Regul. Reform, Com. & Antitrust L. of the H. Comm. on the Judiciary*, 114th Cong. 45-46 (2016) [hereinafter *Hearing*] (statement of George Shepherd, Professor of L., Emory Univ. Sch. Of L.) (observing current system of deference to agencies as inconsistent with APA).

158. See 5 U.S.C. § 701-706 (providing succinct guidance on judicial review); see also *Hearing*, *supra* note 157, at 52 (speculating *Chevron's* role in contemporary agency discretion standards).

159. See *Hearing*, *supra* note 157, at 55 (concluding *Chevron* is inconsistent with APA intention to codify relevant judicial review standards from the 1940s, decades before *Chevron*). The APA came after the Walter-Logan bill, which the House and Senate passed in 1940, to grant courts broad standing for judicial review of agency action; President Roosevelt, however, vetoed the bill out of fear it would "paralyze"

tended for judicial review to “supplant” the expertise of administrative agencies, it placed great emphasis on the need to balance private interests opposed to extensive agency action with agencies’ flexibility in overseeing their respective areas.<sup>160</sup>

In the NEPA context, there has been uncertainty about when courts should review agency actions in determining when agencies are complying with NEPA.<sup>161</sup> In particular, the Supreme Court’s decision in *National Wildlife* obscured courts’ understanding of the requirements for reviewing programmatic environmental lawsuits.<sup>162</sup> The APA and Article III requirements of plaintiffs who want to claim procedural injuries resulting from agency violations of NEPA compounds this confusion.<sup>163</sup> A look into the legislative intent behind NEPA reveals, however, that legislators designed NEPA to avoid careless decision-making causing environmental harm.<sup>164</sup> Thus, Congress intended to establish broad judicial review of violations – including programmatic attacks – through NEPA’s creation.<sup>165</sup>

The Supreme Court’s decision in *Chevron* is the foundation of modern judicial deference to agencies in instances of statutory interpretation.<sup>166</sup> In the *Chevron* decision and subsequent cases, the Supreme Court limited courts’ roles in reviewing an agency’s interpretation of a statute.<sup>167</sup> Further, the decision limited judicial review of how agencies implement Congress’s delegation to create

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agencies. *Id.* at 49 (identifying APA’s current judicial review provisions as compromise).

160. *See id.* at 49 (indicating need for judicial review of agency action for power balance).

161. *See* Porterfield, *supra* note 30, at 666 (suggesting confusion in federal courts over judicial review in NEPA context).

162. *See* Porterfield, *supra* note 30, at 619-21 (reporting questioning of programmatic suits after *National Wildlife*).

163. *See id.* at 621 (citing doctrines precluding judicial review of environmental cases).

164. *See id.* at 666 (indicating harm NEPA is intended to prevent as clarity for finality and geographical nexus issues).

165. *See id.* at 667 (noting little support for preclusion of judicial review of agency compliance).

166. *See* SHEDD & GARVEY, *supra* note 68, at 1-3 (arguing *Chevron* test is pillar of administrative law); *see also* Hearing, *supra* note 157, at 45 (acknowledging *Chevron*’s position as foundation of current agency deference system). In *Chevron*, the Supreme Court reversed a decision which adopted a static judicial definition of an ambiguous term, normalizing the need for agencies to fill gaps left by Congress. SHEDD & GARVEY, *supra* note 68, at 3.

167. *See* Hearing, *supra* note 157, at 45 (noting how *Chevron* impacted contexts of statutory interpretation).

policies in favor of agencies' technical expertise.<sup>168</sup> While the *Chevron* decision may be inconsistent with the legislative intentions behind the APA and NEPA, it has made broad agency discretion the norm.<sup>169</sup> Judicial deference to the administrative state is so expansive today that critics deem it unconstitutional and, alternatively, a fourth branch of government the Constitution does not explicitly define.<sup>170</sup> Regardless of constitutional arguments, critics unanimously acknowledge the courts' resistance to judicially imposed procedural requirements in favor of administrative power.<sup>171</sup>

Although APA and NEPA procedures seemingly authorized the Ninth Circuit to review the plaintiffs' claims in *Whitewater Draw*, the court's deference to DHS was consistent with the favorable interest in agency discretion in previous Supreme Court and Ninth Circuit cases.<sup>172</sup> Moreover, discretion is necessary for the agency experimentation and innovation needed to create effective regulations.<sup>173</sup> By affording DHS latitude to control how it enforces NEPA, the Ninth Circuit correctly authorized the agency to balance NEPA objectives with the necessities of immigration policies.<sup>174</sup>

#### VI. DEPORTING OVERPOPULATION ALARMISM: THE IMPACT OF *WHITEWATER DRAW* ON FUTURE NEPA CHALLENGES TO IMMIGRATION POLICIES

As the Ninth Circuit acknowledged through its critical tone of the plaintiffs' arguments in *Whitewater Draw*, the stakes of its deci-

168. See SHEDD & GARVEY, *supra* note 68, at 4 (emphasizing agencies' superior position to make policy decisions).

169. For a further discussion of the legislative intent of the APA and NEPA, see *supra* notes 157-65 and accompanying text.

170. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) (regarding post-New Deal administrative state as death of constitutional government); see also Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 579, 667 (1984) (rejecting notion that government fits neatly into three branches).

171. See Lawson, *supra* note 170, at 1247 (speculating modern administrative adjudication as judicial action); see also Strauss *supra* note 170, at 574 (observing growth of administrative power in past century); See generally PETER L. STRAUSS, TODD D. RAKOFF, GILLIAN E. METZGER, DAVID J. BARRON, & ANNE JOSEPH O'CONNELL, GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 280 (Robert C. Clark et al. eds., 12th ed. 2018) (discussing Supreme Court's demand that judges rarely impose extraneous requirements).

172. See generally *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1084 (2010) (holding that agency's management policies without force and effect of law were not final agency action).

173. See Lawrence E. Susskind & Joshua Secunda, *The Risks and the Advantages of Agency Discretion: Evidence from EPA's Project XL*, 17 UCLA J. ENV'T L. & POL'Y 67, 112 (proposing more discretion for market efficiency).

174. See *id.* at 112-13 (arguing discretion is "crucial" for tailored solutions).



sion were high.<sup>175</sup> Allowing the plaintiffs' vague and erroneous reasoning to stand would grant "environmentalists" the right to attack immigrant communities with little basis for their arguments.<sup>176</sup> Instead, the Ninth Circuit required the plaintiffs' claims of injury from agencies' NEPA violations to be specific, granting the agency broad discretion otherwise.<sup>177</sup> The Ninth Circuit's decision guides courts in deciphering their role in the administrative law process by upholding strict requirements for plaintiffs challenging agency regulations.<sup>178</sup> Furthermore, the decision protects immigrants against allegations of their negative impacts on the environment and the nation as a whole.<sup>179</sup> It importantly acts to reinforce DHS's discretion over implementation of immigration policies and removal proceedings.<sup>180</sup>

By upholding the district court's decision, the Ninth Circuit's holding preserves a critical instrumentality for protecting agencies from plaintiffs seeking redress for loose connections to immigrant communities.<sup>181</sup> This decision represses the use of civil litigation as a means of attacking immigration policies, including broad programmatic attacks anti-immigrant plaintiffs often make.<sup>182</sup> *Whitewater Draw* reinforces the complex burden plaintiffs have in proving agency actions directly impact their lives and, ultimately, the difficulty they have to establish standing in NEPA cases.<sup>183</sup>

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175. See *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1015 (9th Cir. 2021) (criticizing plaintiffs' reasoning and noting lack of "well-pleaded facts").

176. See *id.* at 1020 (acknowledging danger of plaintiffs' framework which would allow many Americans to have standing).

177. For a further discussion of plaintiffs' specificity requirements and the default agency discretion for NEPA claims, see *supra* notes 96-86, *infra* notes 184-186 and accompanying text.

178. For a further discussion of the role of judicial review in administrative law, see *supra* notes 76-79 and accompanying text.

179. See generally *Whitewater Draw*, 5 F.4th at 1016 (protecting immigrants from negative allegations by affording DHS discretion).

180. See *id.* (retaining agency discretion over prioritization of future immigrant removal).

181. See Morgan Conley, *High Court Won't Disturb Immigration Enviro Review Ruling*, LAW360 (Dec. 13, 2021, 1:47 PM), <https://www.law360.com/articles/1448066> (reiterating plaintiffs' false accusations and court's high bar for establishing Article III standing).

182. For a further discussion of requirements preventing broad programmatic attacks, see *supra* notes 146-50 and accompanying text.

183. Alyssa Aquino, *DHS Can Exempt Immigration Programs From Enviro Review*, LAW360 (June 2, 2020, 10:00 PM), <https://www.law360.com/articles/1279019> (emphasizing rejection of general environmental impacts as proof of injury). For a further discussion of plaintiffs' requirements to establish standing for NEPA claims, see *supra* notes 101-50 and accompanying text.

The broad scope of the Ninth Circuit's holding also has the potential to add momentum to the existing movement toward expanding agency deference.<sup>184</sup> Ultimately, *Whitewater Draw* makes agencies' discretionary authority the default for courts when analyzing whether a plaintiff can successfully claim they suffered a procedural harm.<sup>185</sup> Allowing *Whitewater Draw*'s precedent to stand in other non-NEPA contexts would reinforce the indisputable requirements of Article III and APA jurisdiction and likely lead to more judgments in favor of agencies.<sup>186</sup>

*Whitewater Draw* not only represents a substantial victory for immigrants in NEPA challenges but has considerable implications for immigrants on a large scale.<sup>187</sup> By retaining DHS's sole discretion over its actions relating to immigration, *Whitewater Draw* protects immigrants living in and entering the United States by preventing officials from deporting them because of false accusations that their presence in the country leads to environmental degradation.<sup>188</sup> Thwarting allegations of immigrants' negative impacts on the environment is a step towards debunking myths about immigrants' effects in other areas including employment, crime, and economic mobility.<sup>189</sup>

Here in Pennsylvania, immigrants' contributions to the economy may fill a void a declining population has left.<sup>190</sup> Throughout

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184. For a further discussion of the trend toward agency discretion, see *supra* notes 166-74 and accompanying text.

185. See Jennifer Doherty, *9th Circ. Backs DHS in Immigration Environmental Impact Row*, LAW360 (July 19, 2021, 9:02 PM), <https://www.law360.com/articles/1404417/> (noting multiple DHS wins due to plaintiffs' lack of standing). By upholding agency power when plaintiffs lack standing, the Ninth Circuit set the precedent that courts should not strike down agencies' discretionary actions unless plaintiffs challenge them properly. See *Whitewater Draw*, 5 F.4th at 1020 (prohibiting plaintiffs from challenging DHS's actions under NEPA and APA).

186. *Whitewater Draw Nat. Res. Conservation Dist. v. Wolf*, No. 20-55777, 2020 WL 7907106, at \*46 (S.D. Cal. Dec. 23, 2020) (declaring Article III particularized injury requirements as "hard floor").

187. See Conley, *supra* note 181 (citing plaintiffs' concerns of decisions' ability to allow DHS to escape future challenges); see also Aquino, *supra* note 183 (listing range of programs plaintiffs attacked through dismissed claims).

188. Aquino, *supra* note 183 (reporting that DHS's exemptions are proper because they do not lead to higher immigration numbers).

189. See Scott Fein, *Data Debunks Insidious Myths About Immigration*, BLOOMBERG LAW (Nov. 1, 2021, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/data-debunks-insidious-myths-about-immigration-1> (disproving accusations that immigrants negatively impact United States). For a further discussion of immigrants' positive impact in Pennsylvania, see *infra* notes 190-97 and accompanying text. For a further discussion of the nation's history of anti-immigrant practices, see *supra* notes 1-4 and accompanying text.

190. See John D'Agostino, *Pennsylvania Begins to Sense an Urgency Over Population*, THE POST-JOURNAL (Nov. 26, 2021), <https://www.post-journal.com/news/>

the last few decades, Pennsylvania has emerged as a prominent location for immigrants to settle in the United States.<sup>191</sup> This influx of immigrants has bolstered the state's population by almost eighty thousand individuals, which helps support Pennsylvania's businesses with customers and taxpayers.<sup>192</sup> These "New Pennsylvanians" are vital to the state's overall economy.<sup>193</sup> Most notably, they strengthen the life sciences sector, crop production, and manufacturing.<sup>194</sup> Despite local officials' attempts to reduce the state's immigrant population, the Supreme Court and Congress have collectively protected immigrant communities in the state.<sup>195</sup> The Supreme Court struck down ordinances designed to make living and working in Pennsylvania more difficult for undocumented immigrants, and members of the Welcoming PA Caucus of the Pennsylvania House of Representatives proposed the creation of the Office of New Pennsylvanians.<sup>196</sup> The United States as we know it

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page-one/2021/11/pennsylvania-begins-to-sense-an-urgency-over-population/ (predicting immigration as solution to Pennsylvania's declining population numbers); see also Raymond G. Lahoud, *Pennsylvania Lawmakers Propose New State Office to Support Immigrants*, NAT'L L. REV. (Mar. 1, 2022), <https://www.natlawreview.com/article/pennsylvania-lawmakers-propose-new-state-office-to-support-immigrants> (noting slower population growth in Pennsylvania compared to rest of United States at only 2.4% since 2010).

191. *The Contributions of New Americans in Pennsylvania*, NEW AM. ECON. 1 (Aug. 2016), <https://research.newamericaneconomy.org/wp-content/uploads/2017/02/nae-pa-report.pdf> (introducing demographics as area of immigrant contribution in Pennsylvania).

192. *Id.* (reporting Pennsylvania's potential population decline of seventy-eight thousand between 2010 and 2014 if immigrants did not migrate to state).

193. Lahoud, *supra* note 190 (noting "New Pennsylvanians" term and highlighting lawmakers' belief that state needs to welcome immigrants).

194. See *The Contributions of New Americans in Pennsylvania*, *supra* note 191, at 9 (stating role of immigrants in broader workforce). As of 2014, "immigrants were 25.5% more likely to work than native-born Pennsylvanians," often filling roles where employers struggled to find enough interested native-born workers. *Id.* at 8-9 (detailing immigrants' function as complement to existing American workers).

195. See *Lozano v. City of Hazleton*, 724 F.3d 297, 300-01 (2013) (summarizing background of litigation involving ordinances City of Hazleton enacted attempting to regulate employment and housing of unauthorized aliens). For a further discussion of the Supreme Court and Congress' actions protecting immigrants in Pennsylvania, see *infra* note 196 and accompanying text.

196. See *City of Hazleton v. Lozano*, 571 U.S. 1237, 1237 (2014) (denying certiorari in favor of rulings finding anti-immigrant ordinances unconstitutional). The *Hazleton* case was influential across the country because the ordinances "served as a model for similar anti-immigrant laws nationwide." *Lozano v. Hazleton*, ACLU (Feb. 5, 2015), <https://www.aclu.org/cases/lozano-v-hazleton> (recounting closely watched case's procedural history); see also Sara Innamorato & Joseph C. Hohenstein, *Welcoming PA Caucus Introduces Bill to Create Office of New Pennsylvanians*, PA HOUSE OF REPS (Feb. 9, 2022), <https://www.pahouse.com/InTheNews/NewsRelease/?id=122683> (announcing lawmakers' proposal to establish Office of New Pennsylvanians). The Office of New Pennsylvanians would attract, retain, and

today would not exist without immigrants; thus, we should make every effort to impede illegitimate challenges to immigration policies.<sup>197</sup>

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embrace immigrants in Pennsylvania by guiding their transition in housing, employment, and education. *See id.* (outlining duties of proposed office).

197. *See* Fein, *supra* note 189 (suggesting flow of immigrants and refugees is essential to fabric of United States).

\* J.D. Candidate, May 2024, Villanova University Charles Widger School of Law; B.A., Sociology, 2021, Temple University. I dedicate this Note to all the Black lawyers who paved the way for this opportunity. I would be remiss in not acknowledging how momentous it is that I'm one of likely few Black women Staff Writers selected for publication in the *Villanova Environmental Law Journal*. Much appreciation for the 2022-2023 Executive Board and Staff Writers for their valuable insight on my piece and recognizing its potential. Most of all, thank you to my family and friends, especially my parents, Rebecca and Darryl Williams, for their unwavering support. Everything I do is for my village.