MATTHEW D. THURLOW, D.C. Bar No. 1008014
Baker & Hostetler LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 861-1681
mthurlow@bakerlaw.com

JARED S. PETTINATO, D.C. Bar No. 496901
Jared Pettinato Law Offices
3416 13th St. NW, #1
Washington, DC 20010
(406) 314-3247
Jared@JaredPettinato.com
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEIGHBORS AGAINST BISON SLAUGHTER, et al., Plaintiffs, v. THE NATIONAL PARK SERVICE, et al., Defendants.	Case No. 1:19-cv-3144-BAH Chief Judge Beryl A. Howell PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

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INTRODUCTION

The Park Service and the Forest Service approved a dangerous hunt in the 2019 Winter Decision.[1] They abused their discretion and arbitrarily and capriciously approved that Decision by failing to acknowledge their legal authority and obligation to analyze the public safety impacts of the intensifying, concentrated bison hunt in Beattie Gulch. The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 to 4370m-12, required that analysis before acting, and now requires them to complete a supplemental environmental impact statement (EIS) of the impacts that have arisen since 2000.

Montana recognizes the bison hunt is risking the lives of hunters, property owners, residents, and visitors to Yellowstone National Park.[2] Federal Defendants incorrectly believe they lack the power to do anything. This Court need not wait until someone dies or catches undulant fever from *Brucella abortus*; its broad, equitable authority allows it to stop the hunt. The regulatory breakdown at the Park Service and the Forest Service leave this Court as the last recourse to protect property owners, residents, and Yellowstone visitors in the Beattie Gulch neighborhood.

ARGUMENT

Neighbors Against Bison Slaughter and Bonnie Lynn (Neighbors) have demonstrated fatal flaws in the decision-making process for the 2019 Winter Decision, and they have shown that the balance of the equities weighs in favor of issuing a preliminary injunction until the Park Service and the Forest Service compile their respective administrative records, and the Parties brief this case on cross-motions for summary judgment. Pls.' P. & A. in Supp. of Their Mot. for a TRO &

[1] [2019] Operating Procedures for the [Interagency Bison Management Plan (IBMP)] (Dec. 31, 2018), ECF No. 4-12.

[2] Letter from Montana Department of Fish, Wildlife and Parks (Montana Wildlife) to Interested Person (Sept. 2, 2018) (2018 Mont. Letter), ECF No. 4-11.

Prelim. Inj. (Pls.' Br.) 18-36, ECF No. 4-1. The circumstances here compel the issuance of a preliminary injunction.

I. Neighbors Will Likely Succeed on the Merits of their Claims.

Federal Defendants effectively concede that they have violated the Administrative Procedure Act (APA), 5 U.S.C §§ 701-706, by failing to explain the 2019 Winter Decision. Federal Defendants filed two declarations to explain their rationale. Decl. of Timothy C. Reid, ECF No. 25-1; Decl. of Mary C. Erickson, ECF No. 25-3. But courts reject agencies' "*post hoc* rationalizations." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* (*State Farm*), 463 U.S. 29, 50 (1983). "If the agency has not considered all relevant factors, . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Because Federal Defendants have failed to consider all relevant factors of the bison hunt at the time they made their decision to approve the 2019 Winter Decision, Neighbors will prevail on their claims.

A. Neighbor's Claims Meticulously Follow APA Procedures.

Federal Defendants appeared to express confusion over the claims Neighbors brought—whether they qualify as Section 706(1) claims or Section 706(2) claims. [Fed. Defs.'] Second Corrected Opp. to Pls.' Mot. for a TRO & Prelim. Inj. (FD Br.) 14, 19, ECF No. 34-1. Contrary to Federal Defendants' assertions, Neighbors' claims meticulously follow APA mechanics. Congress issued the APA "to organize and unify preexisting methods of obtaining judicial review of agency action, *e.g.*, by making it clear that anyone 'adversely affected or aggrieved within the meaning of a relevant statute' could obtain review of 'agency action.' 5 U.S.C. § 702." *Cousins v. Sec'y of the U.S. Dept. of Transp.*, 880 F.2d 603, 605 (1st Cir. 1989) (Breyer, J.). The APA allows judicial review of "a broad spectrum of administrative actions." *Abbott*

Labs. v. Gardner, 387 U.S. 136, 140 (1967) (quotations omitted), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Courts give the APA's "generous review provisions" a "hospitable interpretation." *Id.* at 140-41. Section 706(1) claims differ from 706(2) claims by whether the agency has failed to act or has already acted. Neighbors brought claims under both.

1. *Section 706(2) Describes the Process for Challenging Final Agency Actions.*

Neighbors brought its first three claims under Section 706(2). By signing the 2019 Winter Decision, the Park Service and Forest Service violated the Forest Service Organic Act, 16 U.S.C. § 551, and its regulations; the Yellowstone Management Act Amendments, Act of January 24, Pub. L. No. 67-395, 43 Stat. 1174, 1214 (1923), codified at 16 U.S.C. § 36; and NEPA.

Section 706(2) addresses completed, final agency actions. When a plaintiff designates a final agency action, and then demonstrates a flaw that aggrieves it, Section 706(2) directs courts to set aside that agency action. The APA defines an "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof." 5 U.S.C. § 551(13). The United States Court of Appeals for the District of Columbia Circuit called this term "expansive." *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19 (D.C. Cir. 2006). Congress intended it to "to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 478 (2001).

Under Section 706(2), plaintiffs bear the burden of specifying the final agency action that is adversely affecting or aggrieving them. 5 U.S.C. §§ 702, 704; *Fund for Animals*, 460 F.3d at 18 n.4. Agency actions qualify as final if and only if (a) they "mark the consummation of the agency's decisionmaking process" and do not qualify as "merely tentative or interlocutory," and (b) they determine "rights or obligations" or "legal consequences will flow" from them. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (quotations and citations omitted).

After a plaintiff designates a final agency action, the plaintiff bears the burden of demonstrating flaws in the decision. *City of Olmsted Falls v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002). Those flaws include arbitrary and capricious decisions, abuses of discretion, actions "not in accordance with law," actions "contrary to constitutional right, power, privilege, or immunity," actions "short of statutory right," and actions taken "without observance of procedure required by law . . . ." 5 U.S.C. § 706(2)(A)-(F). When a plaintiff shows a flaw that aggrieves it, 706(2) empowers courts to "hold unlawful and set aside" the final agency action.

Neighbors designated the 2019 Winter Decision as the final agency action that adversely affected them. That decision approved of Montana "maintain[ing] jurisdiction for management of bison outside Yellowstone National Park in Montana." 2019 Winter Decision at 5. It approved the hunting seasons for Montana and for the Tribes. *Id.* at 6-7. It decided where "bison will be allowed," approved conditions for hunting bison, promised to coordinate over hunting bison, and decided how to let bison out of Yellowstone for hunters to shoot them. *Id.* at 6-9. The 2019 Winter Decision suffers from several, major flaws.

2. *In Section 706(1), Congress Described the Process for Claiming That the Law Required an Agency to Act.*

Neighbors brought its fourth claim, for a supplemental EIS, under 706(1). NEPA required Federal Defendants to analyze new, significant impacts unforeseen in the 2000 IBMP Record of Decision (ROD), ECF No. 4-16. Section 706(1) empowers courts to "compel agency action unlawfully withheld or unreasonably delayed." But it only allows courts to compel "discrete agency action that [an agency] is *required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55 (2004) (*SUWA*). Under Section 706(1), a plaintiff bears the burden of identifying a legal duty, and then demonstrating either that the agency failed to fulfill it unlawfully, or that the agency

unreasonably delayed satisfying it. When a plaintiff does so, Section 706(1) requires the court to "compel" the agency to complete that duty.

B. The Statute of Limitations Does Not Bar Challenges to the 2019 Winter Decision.

Federal Defendants argue that the six-year statute of limitations has run. FD Br. 16-17, 24-25, 27-28, 30-31; *see* 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). They contend that the 2019 Winter Decision qualifies as an "implementation[] of the action discussed in the IBMP EIS and approved in the IBMP ROD," and that the six-year statute of limitations for the IBMP ROD protects implementations of it. *Id.* at 24; In other words, although a lack of ripeness protected the IBMP ROD until the concentrated bison hunt in Beattie Gulch escalated fifteen years later; they argue that, now, the claims are too late. The 28 U.S.C. § 2401(a) statute of limitations, however, does not bar claims like this.

In the rulemaking context, D.C. Circuit has held that, "when an agency seeks to apply the rule, those affected may challenge that application on the grounds that it conflicts with the statute from which its authority derives . . . ." *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014) (quotations omitted) (collecting cases); *Citizens for Responsibility & Ethics v. FEC*, 243 F. Supp. 3d 91, 100 (D.D.C. 2017) (Howell, C.J.) (rejecting a Section 2401(a) argument under *Weaver*). As a direct analogy here, the 2019 Winter Decision is applying the IBMP ROD through the 2019 Winter Decision, so Neighbors "may challenge that application on the grounds that [the IBMP ROD] conflicts" with the Forest Service Organic Act, the Yellowstone Management Act Amendments, and NEPA. *Id.*

The Supreme Court has reached this same conclusion in the land management context. In *Ohio Forestry Association, Inc. v. Sierra Club*, the Supreme Court dismissed a claim on a broad, programmatic decision as unripe when later, site-specific decisions would flesh out the abstract

disagreements and improve courts' ability to rule on claims. 523 U.S. 726, 736-37 (1998). Although the Court dismissed the immediate challenges to a broad, programmatic decision as premature, it recognized that plaintiffs could make those claims eventually, through site-specific plans "when harm is more imminent and more certain." *Id.* at 734; *see*, *e.g.* 40 C.F.R. § 1502.20. "Any such later challenge might also include a challenge to the lawfulness of the [broad] Plan if (but only if) the [broad] Plan then matters, *i.e.*, if the [broad] Plan *plays a causal role* with respect to the future, then-imminent, harm from [the future action]." *Ohio Forestry*, 523 U.S. at 734 (emphasis added). A plaintiff's ability to challenge broad analyses through site-specific decisions arises from the straightforward principle that an agency acts arbitrarily and capriciously by relying on an arbitrary and capricious analysis.

By pointing to the IBMP ROD to justify its analysis and decision, Federal Defendants admit that the 2000 IBMP ROD "play[s] a causal role" over the 2019 Winter Decision. FD Br. 25, 27; *Ohio Forestry*, 523 U.S. at 734. Therefore, under *Ohio Forestry*, each IBMP annual operations plan starts its own statute of limitations, and under any operations plan, the plaintiff can bring claims against the IBMP ROD.[3]

Federal Defendants contend that the statute of limitations shields all conclusions and analysis in the 2000 IBMP EIS because the 2019 Winter Decision did not "re-open" that decision. FD Br. 28. The reopening doctrine does not apply because *Weaver* controls. 744 F.3d at 145.

[3] If Federal Defendants argue that *Ohio Forestry* precludes the NEPA claims because the statute of limitations began running in 2000, that argument would misstate *Ohio Forestry*. There, the Supreme Court recognized that, "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." 523 U.S. at 737. Here, Neighbors had no standing in 2000 and the 2000 IBMP ROD did not injure anyone within six years. Only since 2015 have the problems in Beattie Gulch become apparent. Summary Report from the [IBMP] Meeting 7 (Aug. 6, 2015), ECF No. 4-47.

Even if the reopening doctrine applied, each operations plan would reopen the IBMP ROD under these circumstances. In the context of rulemaking, the D.C. Circuit has explained that courts allow plaintiffs to make "an otherwise stale challenge" when "the agency opened the issue up anew, and then reexamined and reaffirmed its prior decision." *NRDC v. EPA*, 571 F.3d 1245, 1265 (D.C. Cir. 2009) (quotations and alterations omitted). Courts also allow claims based on a "constructive reopening," if the new decision "significantly alters the stakes of judicial review as the result of a change [to the prior decision] *that could have not been reasonably anticipated*." *Id.* at 1266 (emphasis added). Constructive reopening requires a "sea change" in the circumstances. *Id.* That sea change happened here.

Neighbors are not finding legal flaws with some long-standing agency action; they are challenging new agency actions that have escalated bison hunting impacts in ways completely unforeseeable in 2000. The 2000 IBMP ROD authorized no hunting at all. IBMP ROD 15. In recent implementation decisions, like the 2019 Winter Decision, the number of bison kills has increased; the number of hunters has increased.[4] The sea change has happened. Even Montana has concluded the bison hunt in Beattie Gulch is dangerous. 2018 Mont. Letter. Because of that sea change, the 2019 Winter Decision constructively reopened the IBMP ROD to new APA claims.

Because not even one year has passed since the Park Service and Forest Service issued the 2019 Winter Decision on December 31, 2018, no statute of limitations has run.

[4] Federal Defendants dismiss Neighbors' counts of bison kills in Beattie Gulch by arguing that the numbers in the IBMP reports refer to the larger "Gardiner Hunting District." FD Br. 8-9. Their insufficiently granular records do not reflect the reality. A Forest Service Ranger acknowledge that the "[f]iring line effect (occurs just as bison step out of YNP and into Beattie Gulch)—driving bison back into the Park where they can't be hunted and preventing dispersal to a larger area available to bison throughout northern portion of the Gardiner Basin."), Summary Report from the [IBMP] Meeting 11 (Aug. 6, 2015), ECF No. 4-47.

C. The Forest Service Arbitrarily and Capriciously Failed to Explain the 2019 Winter Decision's impacts on the Safety of Property Owners, Residents, and Visitors.

In their opening brief, Neighbors showed that, in the 2019 Winter Decision, the Forest Service violated the APA by failing to explain the safety impacts on property owners, residents, and visitors by closing Beattie Gulch to bison hunting. Pls.' Br. 18-21. Neighbors pointed to the Forest Service's authority under its Organic Act, 16 U.S.C. § 551, and its regulatory authorization to close areas for "Public health or safety." 36 C.F.R. § 261.53(e). Pls.' Br. 18-21.[5] Because the Forest Service failed to consider closing Beattie Gulch for public safety, the APA directs the Court to set aside the 2019 Winter Decision.

In response, Federal Defendants argue that they "have taken no final agency action to 'approve' hunting on the Gallatin National Forest." FD Br. 14, 16.[6] The facts contradict that argument. The Forest Service approved bison hunting in Beattie Gulch by signing the 2019 Winter Decision. That document describes bison hunting operations in Beattie Gulch:

- "The IBMP members . . . have agreed that the harvest of bison will be a preferred method for managing their abundance and distribution . . . ." 2019 Winter Decision 6.
- "Each summer," IBMP agencies including the Forest Service "coordinate with each other and the [other tribes] regarding bison harvest objectives." *Id.*
- "[T]he tribal command post at Beattie Gulch may be attended by staff from [IBMP agencies including the Forest Service], depending on their availability." *Id.* at 8.

[5] This APA claim differs from the NEPA claims that the D.C. Circuit rejected in *Mayo v. Reynolds*, 875 F.3d 11, 22 (D.C. Cir. 2017) (cited by FD Br. 25-26, 29). There, the plaintiffs did not make "an arbitrary and capricious challenge to the Park Service's annual decisions," but "fault[ed] the Park Service for not preparing a NEPA analysis each year during the fifteen-year term of the 2007 Plan." *Id.* Regardless of NEPA's intricacies, the APA requires agencies to act reasonably in every final agency action. 5 U.S.C. § 706(2).

[6] Federal Defendants point to a post-decision statute to justify the 2019 Winter Decision. FD Br. 15-16; John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. 116-9 § 4102, 133 Stat. 580, 757 (2019), codified at 16 U.S.C. §§ 7912-13. That statute is irrelevant. That 2019 statute cannot demonstrate the Forest Service acted reasonably in 2018. Courts may not accept "counsel's *post hoc* rationalizations for agency action." *State Farm*, 463 U.S. at 50.

The Forest Service arbitrarily and capriciously signed the 2019 Winter Decision without considering the possibility of closing Beattie Gulch to hunting. It violated the APA by "entirely fail[ing] to consider an important aspect of the problem . . . ." *State Farm*, 463 U.S. at 43.

Federal Defendants argue that Neighbors "misunderstand[] the cooperative federalism scheme that governs wildlife management on National Forest System lands." FD Br. 17. They argue that Congress has not given the Forest Service authority "to manage bison on the Gallatin National Forest . . . ." *Id.* But it appears to be Federal Defendants that misunderstand Forest Service policy. As the Forest Service argued in a case on sage grouse:

> Federal lands are federal property, to be managed by federal agencies on the basis of valid delegations of authority pursuant to the Property Clause of the Constitution. *See*, *e.g.*, *Kleppe* [*v. New Mexico*, 426 U.S. 529, 542 (1976)]. This power to manage federal lands "includes the power to regulate and protect the wildlife living there." *Id.* at 540-41. State laws, regulations and plans may generally apply to federal lands to some degree, but they cannot displace federal laws, regulations or plans and are ultimately subject to preemption by the United States' sovereign authority. U.S. Const. art. VI, cl. 2; *Kleppe*, 426 U.S. at 543; *Wyoming v. United States*, 279 F.3d 1214, 1227 (10th Cir. 2002).

Fed. Defs.' Combined Mem. P. & A. in Supp. of Cross-Mot. for Summ. J. 23 (citation omitted), *Otter v. Jewell*, No. 1:15-cv-1566-EGS, ECF No. 55-1. Inconsistent legal positions demonstrate arbitrary and capricious decision-making. *See Bauer v. DeVos*, 325 F. Supp. 3d 74, 109 (D.D.C. 2018) (Randolph, J.). Neighbors are not asking the Forest Service to manage bison, but only to analyze the possibility of closing Beattie Gulch for the safety of property owners, residents, and visitors. The Forest Service failed at this very narrow, procedural task.

In their opening brief, Neighbors pointed out arbitrary and capricious contradictions in the Forest Service's decisions: the Forest Service claims to have no jurisdiction over bison hunting in Beattie Gulch, but it has closed some areas of Beattie Gulch to bison hunting for public safety. Pls.' Br. 18-19. In response, the Forest Service amended its previously-submitted declaration and now asserts it has "limited authority to prohibit hunting," while attaching Beattie Gulch closure

orders demonstrating the authority it previously denied having at all. FD Br. 4; ECF Nos. 25-6 to -8, 34.[7] It could make no more striking an example of arbitrariness and capriciousness.

The Forest Service's claims of "limited authority" without identifying the statute or regulation that limits their authority, contradict the broad authorities Congress gave the Forest Service to manage its lands. The 1897 Forest Service Organic Act, 16 U.S.C. § 551, and 36 C.F.R. § 261.53(e) give the Forest Service authority to close areas for public safety—regardless of bison hunting there.

Because Federal Defendants cannot explain their contradiction, they recast Neighbors' claims as claims Federal Defendants believe they can defeat. The Supreme Court, however, has recognized plaintiffs as the "masters of the complaint," so Neighbors' articulations of their own claims control. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 395 (1987).

Federal Defendants first assert that Neighbors brought a "'stand-alone' APA claim." FD Br. 18. They contend that Neighbors failed to identify a relevant statute or how any "'decision' could be 'arbitrary and capricious" when the Forest Service lacks that authority. *Id.* To be clear, Neighbors are arguing that the 2019 Winter Decision adversely affected and aggrieved them, that the Organic Act gives the Forest Service authority to close Beattie Gulch to bison hunting, and that the Forest Service failed to explain why it declined to do so to protect property owners, residents, and visitors. The Forest Service arbitrarily and capriciously ignored Montana Wildlife's conclusion that the hunt is dangerous. 2018 Mont. Letter. The Forest Service violated the APA by "entirely fail[ing] to consider an important aspect of the problem . . . ." *State Farm*,

[7] Federal Defendants argue that "no major federal action approves or implements hunting . . . ." FD Br. 28, 16 n. 10. This Court already rejected Federal Defendants' attempts like that to deny responsibility. "It is undisputed that all of the federal defendants, along with the [Wyoming Game and Fish Department] had a hand in developing the bison management plan that included this hunt." *Fund for Animals, Inc. v. Clark*, 27 F. Supp. 2d 8, 12 (D.D.C. 1998) (Urbina, J.).

463 U.S. at 43; Pls.' Br. 18. Thus, Neighbors identified the final agency action, the statutory standard, and the APA flaw that led to their aggrievement. Neighbors' argument does not qualify as a "stand-alone" APA argument.

Federal Defendants contend that Neighbors claim "that the Forest Service was required to issue a more expansive closure," that the Park Service "must" control bison hunting in Beattie Gulch, and that some unidentified force requires the Park Service to include particular "information . . . in annual operations documents like the 2019 Winter [Decision]." FD Br. 16, 20. They also contend that Neighbors has made a 706(1) claim for more "shooting closures." *Id.* at 19. They cast Neighbors' arguments as substantive. None of these descriptions matches the Complaint. Neighbors has brought only procedural claims and it does not demand the agencies do anything, except reasonably analyze and explain their decisions. Here, however, the Forest Service failed to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (quotations omitted).

Federal Defendants make the slippery-slope argument that, if the Court required the Forest Service to consider closing bison hunting in Beattie Gulch, it could require the Forest Service to consider closures on the entire Custer Gallatin National Forest. FD Br. 18. That mistakes these particular facts. Montana has not identified a dangerous bison hunt on the whole Forest—just on this quarter-mile-square area, adjacent to other areas the Forest Service already closed. 2018 Mont. Letter. Courts can only uphold agencies' decisions, "if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50. The 2019 Winter Decision nowhere articulates any reason for failing to consider public safety in Beattie Gulch.

As a last-ditch effort to make the 2019 Winter Decision unreviewable, Federal Defendants claim that their enforcement decisions not to close Beattie Gulch are unreviewable. FD Br. 18-19. Federal Defendants argue that the APA exempts enforcement decisions from judicial review as "agency action . . . committed to agency discretion by law." 5 U.S.C. § 701(a)(2); FD Br. 18-19). Decisions whether to close areas to protect "[p]ublic health or safety" do not qualify as "enforcement" decisions against any individual, and the phrase "public health and safety" provides a sufficient standard for courts to review decisions to determine whether they advance that goal. 36 C.F.R. § 261.53(e); *see Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971) (recognizing that courts can review whether agencies identified "feasible and prudent alternatives"), *abrogated on other grounds by Califano*, 430 U.S. 99.

The "very narrow" exception in Section 701(a)(2) applies in "rare circumstances," and only if the law and regulation have "no meaningful standard against which to judge the agency's exercise of discretion." *Overton Park*, 401 U.S. at 410; *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993). To be clear, a decision to close an area does not "enforce" the closure area against any particular individual, so the exception for enforcement does not apply. *See Crowley Caribbean Trans., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994). Once the Forest Service explains its decision whether to close areas, this Court can review it as "standard judicial fare" to determine whether the closures advance "[p]ublic health and safety." *Delta Air Lines, Inc. v. Exp.-Imp. Bank*, 718 F.3d 974, 977 (D.C. Cir. 2013); 36 C.F.R. § 261.53(e). No law committed all closure decisions to agency discretion.

In the absence of an explanation from the agencies for their decisions, the APA compels the Court to set aside the 2019 Winter Decision and to remand it to the Forest Service.

D. The Park Service Arbitrarily and Capriciously decided to otherwise dispose of bison.

In their opening brief, Neighbors explained that the Park Service has control over the bison leaving Yellowstone, so it arbitrarily and capriciously issued the 2019 Winter Decision without considering keeping the bison within Yellowstone for the safety of property owners, residents, and visitors. Pls. Br. 21-22. Indeed, this is exactly how the Park Service has managed bison in the past: preventing the bison from naturally migrating out of Yellowstone. *See* IBMP EIS xvi. Federal Defendants concede this argument by failing to respond to it.

Neighbors also explained that Federal Defendants arbitrarily and capriciously issued the 2019 Winter Decision by failing to consider controlling Yellowstone bison outside Yellowstone. *Id.* at 22-28. Neighbors demonstrated that Congress gave the Park Service authority to manage Yellowstone bison directly—regardless of their location—when it delegated authority to "otherwise dispose of the surplus" Yellowstone bison.[8] Pls.' Br. 22-28.

An agency abuses its discretion by making an error of law—just as a "district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996), *superseded by the* PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, 670 (2003), *as recognized in United States v. Clough*, 360 F.3d 967, 970 n.1 (9th Cir. 2004); *NLRB v. Brown*, 380 U.S. 278, 292 (1965) ("Courts must, of course, set aside [agency] decisions which rest on an erroneous legal foundation.") (quotations omitted); *Cousins*, 880 F.2d at 609. In other

[8] The full text provides:

> Hereafter the Secretary of the Interior is authorized, in his discretion and under regulations to be prescribed by him, to give surplus elk, buffalo, bear, beaver, and predatory animals inhabiting Yellowstone National Park to Federal, State, county, and municipal authorities for preserves, zoos, zoological gardens, and parks: Provided, That the said Secretary may sell or otherwise dispose of the surplus buffalo of the Yellowstone National Park herd, and all moneys received from the sale of any such surplus buffalo shall be deposited in the Treasury of the United States as miscellaneous receipts.

Yellowstone Management Act Amendments (emphasis added).

words, an agency could not have exercised its discretion reasonably if it incorrectly believed the law had foreclosed an alternative for exercising that discretion.

In response, Federal Defendants deny that they misinterpreted the Yellowstone Management Act Amendments and justify their interpretation based on the length of time they have been interpreting it. FD Br. 20-22. Implementing an incorrect statutory interpretation for ninety-five years does not somehow prove the Park Service's interpretation correct. It is applying *Chevron* deference backwards. *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

Here, the plain text of the statute controls. Under the APA, the Supreme Court applies the classic, two-step *Chevron* test to interpret statutes. Under step 1, courts ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984). Only the second step asks about the agency's interpretation.[9] Contrary to Federal Defendants' arguments, analysis of the Yellowstone Management Act Amendments never leaves the first step.

Neighbors analyzed the Yellowstone Management Act Amendments in meticulous detail to explain the statute's plain meaning and the historical forces that drove the statute. Pls.' Br. 22-28. Under step 1, courts determine Congress's intent by using those "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9; *Kisor*, Slip Op. 14. Traditional tools include these canons of construction. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018). Dictionary definitions of "otherwise" and "dispose of" each individually, and even more so together,

[9] Under step 2, if "Congress has not directly addressed the precise question at issue" and "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843; *see also Kisor v. Wilke*, No. 18-15, Slip Op. 11-19 (2019) (describing the similar process for interpreting agency regulations).

demonstrate that Congress granted broad discretion to the Park Service to manage Yellowstone bison directly. Pls.' Br. 27-28. Another canon of construction directs courts to use history to illuminate statutory meaning. *Id.* at 25-26. No ambiguities remain for the Park Service to interpret in step 2. *See In re England*, 375 F.3d 1169, 1181-1182 (D.C. Cir. 2004) (Roberts, J.) ("This calls to mind what Judge Friendly described as Felix Frankfurter's 'threefold imperative to law students' in his landmark statutory interpretation course: '(1) Read the statute; (2) read the statute; (3) read the statute!' Henry J. Friendly, Benchmarks 202 (1967)").

Federal Defendants contend that the Park Service "has no authority to manage beyond [Yellowstone's] boundaries." FD Br. 23. They cite no statute that restricts their limited jurisdiction, so they can only be arguing that nothing in the Yellowstone Management Act Amendments gives them that jurisdiction. As shown above, however, in that statute, Congress gave broad authority over Yellowstone bison—without limiting that authority by geography.

Federal Defendants argue that nothing demonstrates that Congress "inten[ded] to usurp Montana's traditional police role over hunting within its borders." FD Br. 20. Neighbors agrees. As they stated in their brief, "nothing mandates the Park Service to exercise all of its authority and to take over the entire bison management scheme from Montana . . . ." Pls.' Br. 29. But Congress left that door open to ensure the Park Service could do so, if necessary.

Even if the Park Service has discretion to allow Montana to manage bison hunting outside Yellowstone, as in 2019 Winter Decision, that does not cure the Park Service's abuse of discretion. The Park Service can reasonably exercise its discretion only based upon an accurate understanding of the law and available options. Until it recognizes its authorities, and specifically decides *whether* to use them, it acts arbitrarily and capriciously. *See NLRB*, 380 U.S. at 292; *Cousins*, 880 F.2d at 609.

E. The Park Service and Forest Service violated NEPA in the 2019 Winter Decision.

In their opening brief, Neighbors showed that the Park Service and the Forest Service violated NEPA by failing to analyze the direct, indirect, and cumulative impacts of the 2019 Winter Decision. Pls.' Br. 29-33. In particular, Neighbors argued that Federal Defendants misconceived their jurisdictional authority, and consequently segmented the bison management plan into smaller decisions to avoid their NEPA obligations. *Id.* at 30-32. They violated NEPA by failing to analyze the impacts of bison hunting, generally, and bison hunting in Beattie Gulch, in particular. *Id.* Because they failed to analyze the environmental impacts of the 2019 Winter Decision, they violated the APA. *Id.*

Federal Defendants argue that "no federal action is necessary to approve or facilitate hunting on State of Montana or National Forest System lands." FD Br. 28. While true, the Park Service and the Forest Service acted to manage bison and even to manage the bison hunt in the 2019 Winter Decision. Because that decision qualifies as a "major Federal action," *see* Pls.' Br. 29-33, NEPA requires the Park Service and the Forest Service to analyze all direct, indirect, and cumulative impacts of that decision. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8; Pls.' Br. 30. *See NRDC v. U.S. Nuclear Regulatory Comm'n*, 606 F.2d 1261, 1271 (D.C. Cir. 1979) (holding that, although the agency completed a program-level EIS on radioactive waste management, NEPA still required the agency to analyze each decision on individual waste storage tanks).

Federal Defendants argue that the *Mayo* case precludes this NEPA claim because nothing required the Forest Service and Park Service to complete a new NEPA analysis every year during the multi-year program. FD Br. 29-30. They quote *Mayo* for the principle that "[a]n agency 'is not required to repeat its analysis simply because the agency makes subsequent discretionary choices in implementing the program.'" 875 F.3d at 20-21. But there, plaintiffs "identified no significant way in which the subsequent hunting authorizations deviated from the

assessment made in 2007." *Id*. at 21. Here, the IBMP ROD never approved hunting at all, and even the IBMP EIS never analyzed the intense, concentrated hunt at Beattie Gulch that the 2019 Winter Decision approved. *Mayo* does not save Federal Defendants from complying with NEPA. They have not completed any NEPA analysis since 2000, although they have completed changes that approved bison hunting and then made it more dangerous.

Neighbors pointed out that the IBMP ROD specifically deferred their analysis of hunting impacts until Montana described the hunting parameters. Pls.' Br. 34-35 (citing IBMP ROD 15). Federal Defendants argue that the 2011 Document concluded that bison hunting was consistent with an alternative in the IBMP ROD that the Park Service and Forest Service did not choose in the IBMP ROD. FD Br. 31 n.14. But that 2011 Document relied on Montana's Environmental Assessment (EA), ECF No. 4-18; it never completed the federal analysis as NEPA requires. *See S. Fork Band Council of W. Shoshone v. U.S. Dep't of the Interior*, 588 F.3d 718, 726 (9th Cir. 2009).

Federal Defendants repeatedly argue that they lack jurisdiction to manage hunting outside Yellowstone. FD Br. 28. Likely, they argue they last jurisdiction to avoid NEPA's obligations for further review. They rely on the IBMP ROD for the conclusion that "'[o]utside the park the State of Montana has the management authority over the bison.'" *Id.* at 3 (quoting IBMP ROD 6). The ROD is wrong on this point. Federal Defendants identify no statutory authority that overcomes the statutes that Neighbors cites.

In addressing a thorny issue over criminal jurisdiction on tribal lands, one court of appeals recognized that "nearly all Americans . . . live under overlapping federal and state jurisdictions." *Negonsott v. Samuels*, 933 F.2d 818, 822 (10th Cir. 1991), *aff'd*, 507 U.S. 99 (1993). Just as Federal Defendants seek to draw bright jurisdictional lines that give jurisdiction away; the Tribes

seek bright lines that take jurisdiction. The Tribes argue that "Federal Defendants [do not] authorize[] or enforce[] Amici Tribes' Treaty hunt," because [t]hat sovereign authority is vested in Amici Tribes, who promulgate their own laws and regulations governing the Treaty hunt . . . ." Br. of Amicus Curiae [Tribes] in Supp. of [FD Br.] (Tribes' Br.) 12, ECF No. 31. They refer to the Supremacy Clause making treaties the "supreme law of the land." *Id.* at 15; U.S. Const. art. VI, cl. 2. No one doubts that legal principle—as far as it goes. It does not go far here because federal statutes also apply. They, too, qualify as the "supreme law of the land." Tensions like this commonly leave agencies and courts to resolve complex jurisdictional issues.

At the least, bison hunting in Beattie Gulch implicates the Forest Service's Organic Act and the Yellowstone Management Act Amendments. It could also implicate tribal treaties—depending on their language and application. *See* Tribes' Br. 1. These complexities, however, only magnify the Park Service's and Forest Service's NEPA failures. In their opening brief, Neighbors pointed to NEPA regulations that require agencies to analyze "[p]ossible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned." 40 C.F.R. §§ 1502.16, 1506.2(d); Pls.' Br. 30. But no NEPA analysis attempts to knit together these jurisdictional lines. That NEPA failure has led to this untenable situation in Beattie Gulch that endangers property owners, residents, and visitors.

Last year, the Supreme Court clarified the method for interpreting statutes that may conflict, and it would interpret conflicts between statutes and treaties the same way. "When confronted with two Acts of Congress allegedly touching on the same topic," courts have no "liberty to pick and choose among congressional enactments," but have a duty "to give effect to both." *Epic*, 138 S. Ct. at 1624 (citations, quotations, and alterations omitted). When a party argues that two

statutes irreconcilably conflict, and that "one displaces the other," that party "bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." *Id.* (citations, quotations, and alterations omitted).

In situations like this, Congress assigned the agencies the initial responsibility for working out these basic, management complexities. When, for example, when faced with multitudes of federal land management statutes, one court recognized federal agencies "authority to reasonably regulate" an easement over federal land. *Adams v. United States*, 3 F.3d 1254, 1260 (9th Cir. 1993). Here, instead of seeking to harmonize the supreme laws of the land, however, Federal Defendants have simply picked among them.[10] Federal Defendants failed in their duties and violated the APA. *See State Farm*, 463 U.S. at 48-49 (finding an APA violation because "[t]here are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion." (quotations omitted)).

F. The Seriously Different Picture Here Compels the Park Service and the Forest Service to Issue a Supplemental EIS.[11]

Neighbors demonstrated in their initial brief that the concentrated, dangerous hunt in Beattie Gulch no longer fits within the range of alternatives that Federal Defendants analyzed in the IBMP EIS, and that NEPA therefore requires the agencies to complete a supplemental EIS. Pls.' Br. 33-34. NEPA requires supplemental EISes under two circumstances. First, it requires a supplemental EIS if an agency's changes to its action qualify as "substantial" and "relevant to environmental concerns." 40 C.F.R. § 1502.9(c)(i). Second, it requires that analysis if new information arises, and if that new information demonstrates the remaining federal action would affect the environment "in a significant manner or to a significant extent not already considered."

[10] To be clear, Neighbors are not asking the Court to harmonize the treaties in this case. They seek the Park Service and Forest Service to complete their initial, independent NEPA obligation.

Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 374 (1989); 40 C.F.R. § 1502.9(c)(1)(ii). Again, the Park Service and the Forest Service have never analyzed the impact of new, concentrated, intense bison hunting at Beattie Gulch under NEPA.

In response, Federal Defendants argue that the circumstances here do not rise to the level of presenting a "'*seriously* different picture of the environmental landscape.'" FD Br. 30 (quoting *Nat'l Comm for the New River v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004)). They casually list analyses of impacts on viewers, on human health, and on the bison population. *Id.* at 30-31. They point to the IBMP EIS acknowledging that hunting would cause a major impact on viewers sensitive to bison killing. *Id.* They then argue that hunting on the Custer Gallatin National Forest "is not a new circumstance," and neither is bison hunting. *Id.* at 31. The IBMP EIS's superficial analysis does not let Federal Defendants evade NEPA's requirement to issue a supplemental EIS.

Federal Defendants' explanation does not survive the "hard look" that courts take at NEPA analyses. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). This situation meets the first standard because newly allowing bison hunting on a quarter-mile-square area, in Beattie Gulch, qualifies as a substantial change relevant to environmental concerns. Montana has recognized that the configuration has escalated and become dangerous. 2018 Mont. Letter. Federal Defendants arbitrarily and capriciously dismissed those concerns without a supplemental EIS.

For the second standard, Federal Defendants misunderstand the law. In determining whether a circumstance qualifies as "new," the supplemental EIS regulation asks whether it is new since the prior environmental analysis (the IBMP EIS)—not new since the history of time. *See* 1502.9(c)(1)(ii). Here, Beattie Gulch bison hunting started after 2000. It therefore qualifies as new. When NEPA asks whether that new condition causes a "significant" impact, *id.*, NEPA defines the term: "[s]ignificantly as used in NEPA requires considerations of both context and

intensity." *Id.* § 1580.27. This concentrated, intense, dangerous bison hunt contextually proximate to property owners, residents, and visitors causes a significant impact; the Forest Service and the Park Service have acted arbitrarily and capriciously by ignoring those dangers. *See* 2018 Mont. Letter. NEPA requires the Park Service and Forest Service to issue a supplemental EIS.

II. The Impending Risk of Death and Illness from Bison Hunting in Beattie Gulch Outweigh all Other Equitable Factors.

The balance of the equities weighs heavily in favor of stopping the Beattie Gulch bison hunt.

A. Neighbors Risks Irreparable Injury from the Bison Hunt in Beattie Gulch.

In their opening brief, Neighbors demonstrated that the hunting in Beattie Gulch risks their lives, risks their businesses, risks exposing them to the *Brucella abortus* bacterium, and risks traumatizing them. Pls.' Br. 36-43. In response, Federal Defendants argue that Neighbors' allegations of irreparable harm only qualify as speculative until someone dies from a bullet or contracts undulant fever. FD Br. 40. The Supreme Court has already rejected these arguments. "[A] remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). In *Helling*, the Supreme Court stopped injuries from second-hand cigarette smoking in prisons. *Id.* at 34. It observed, "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Id.* at 33. Analogous to fears of catching the *Brucella abortus* bacterium, the Supreme Court recognized that "a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery." *Id.*

Here, Neighbors relied on a well-credentialed expert, Dr. Peter Nara, who managed the Virus Control Section of the National Cancer Institute at NIH, and whom the Park Service had hand-

picked to study brucellosis in Yellowstone. Nara Decl. ¶¶ 6, 12, ECF No. 4-45. Federal Defendants dismissed him because he did not conclude that someone would certainly catch *Brucella abortus*. FD Br. 35. The Court need not wait for that certainty before enjoining the hunt. "[A]n ongoing, unstable, and looming threat to human health and safety" suffices. *See* Nara Decl. ¶ 2.

Next, Federal Defendants argue that Neighbors "offer no evidence to support their premise that the hunt is dangerous for non-hunters." FD Br. 34. Putting aside the United States' apparent callous disregard for human life, the letters recognize broad dangers. The 2018 Montana Letter talks about "hunter safety." That term means hunting safely for everyone. Montana identified danger from "20-30 or more hunters [commonly] shoot[ing] simultaneously as groups of bison cross the boundary." *Id.* Federal Defendants undermine their credibility by arguing that dozens of hunters shooting at moving targets do not endanger nearby property owners, residents, and visitors.

Neighbors demonstrated that Ms. Lynn would suffer irreparable injury from losing her ability to photograph bison from her own land. Pls.' Br. 39-40. Federal Defendants argue that does not qualify as irreparable harm because she can go to Yellowstone to photograph bison. FD Br. 37. But photographing bison from one's own land has a special meaning. *See Fund For Animals*, 27 F. Supp. 2d at 14 (enjoining bison hunts near Yellowstone because seeing "the bison . . . in an organized hunt would cause them to suffer an aesthetic injury that is not compensable in money damages.").

In their opening brief, Neighbors asserted that Ms. Lynn will suffer irreparable harm from losing one of her two rental cabins by Beattie Gulch. Pls.' Br. 40-43. Federal Defendants deny that risk as speculative and not "beyond redemption." FD Br. 37-38. They are wrong. Ms. Lynn

need not wait to lose her business before the Court can issue an injunction. *See Helling*, 509 U.S. at 33. Federal Defendants ignore the distinction between (a) losing money and (b) losing a business by tipping it to unprofitability and consequently losing title to a property that Ms. Lynn may never regain. Lynn Decl. ¶¶ 36-50; Pls.' Br. 40-43. That distinction matters for a woman using that vacation-rental-cabin, small business for her retirement plans. Pls.' Br. 40-43.

This Court's broad, equitable powers easily extend to stopping the Beattie Gulch bison hunt now. Its "equitable authority to grant remedies is at its apex when public rights and obligations are thus implicated." *Kansas v. Nebraska*, 574 U.S. 445, 472 (2015).

Federal Defendants contend that Neighbors delayed filing their motion, and that delay demonstrates a lack of irreparable harm. FD Br. 38-39. Neighbors moved as quickly as they could. Their counsel spent months interviewing over a dozen witnesses, reviewing IBMP documents, piecing together a complex record, reviewing earlier Yellowstone bison cases, and researching the law. Neighbors needed every moment to prepare adequately to challenge this negligent treatment of Beattie Gulch residents. With lives and livelihoods at stake, they took the time they needed to assemble the strongest case possible—not for purposes of gamesmanship.

Neighbors complied with the local rules by filing their motion soon enough for the Parties to brief it and for the Court to hold a hearing within twenty-one days. *See* LCvR 65.1. In their first discussion with Federal Defendants' counsel, Neighbors' counsel sought to negotiate a more relaxed briefing schedule because, they explained, bison may not leave Yellowstone until months into 2020.[12] Federal Defendants declined. Neighbors acted with appropriate haste and dispatch.

[12] *See* Bison Mgmt. Operations Winter 2018-19, at 2, IBMP (Apr. 4, 2019), ibmp.info/Library/StatusReports/20190404_YELLbison_fieldOpsMgmtSummary.pdf.

B. Federal Defendants Have Demonstrated No Irreparable Harm to Themselves.

Federal Defendants have failed to demonstrate any concrete, irreparable harm to the Park Service or to the Forest Service. They assert irreparable harm from someone stopping them from doing whatever they want regardless of the impacts. FD Br. 41 ("strong interests in preserving its fundamental management prerogatives and discretion"). They contend that stopping the bison hunt will undermine the "cooperative federalism scheme that governs wildlife management on National Forest System Lands." *Id.* That management scheme has already broken down. Montana Governor Steve Bullock recognized the "[o]n-going rancor" and inertia that consistently drags bison management to the status quo. ECF 4-23 at 7. Stopping a scheme that led to a dangerous bison hunt hardly qualifies as irreparable harm.

C. The Public Interest Weighs in Favor of Stopping the Hunt.

Neighbors argued that Congress's definition of the public interest weighs heavily in favor of temporarily stopping the bison hunt while the agencies compile their administrative records and the Parties brief the case. Pls.' Br. 44-45. Federal Defendants reveal that they care more about continuing the bison hunt than they care about hunters' lives. They shrug their shoulders, call hunting an "inherently dangerous activity," and dismiss any safety concerns. FD Br. 35.

Neighbors hold great respect for the Tribes and their treaty-based hunting rights. The Tribes argue that they will suffer irreparable harm because the United States gives them no other place to hunt bison. "Beattie Gulch is where the majority of the Amici Tribes' harvest has occurred and is anticipated to occur in the near future." Tribes Br. 12. But Federal Defendants manage numerous acres of public lands in Washington, Oregon, Idaho, and Montana. Putting the majority of the tribal bison hunting on one quarter-mile-square area at Beattie Gulch only underscores Federal Defendants' arbitrary and capricious decision-making. They are failing at their multiple-use mission. They are failing the Tribes by forcing them to risk their lives in an

unnecessarily dangerous hunt, if they want to exercise their treaty rights. *See* Summary Report from the [IBMP] Meeting 7 (Aug. 6, 2015), ECF No. 4-47. And they are forcing the tribes to settle for less than the tribes deserve under their treaties.

Neighbors does not so lightly weigh the Tribes' interests. Ms. Lynn seeks to "honor[] Native American Tribal rights." Lynn Decl. ¶ 66. Nonetheless, the hunt endangers lives: the tribal hunters, the state hunters, property owners, residents, and visitors. That uncontroverted danger to their lives and others' lives outweighs the losses from temporarily stopping the Beattie Gulch bison hunt.

CONCLUSION

For the foregoing reasons, Neighbors have demonstrated their likely success on the merits and the balance of the equities weighs heavily in favor of stopping the Beattie Gulch bison hunt.

Respectfully submitted, November 8, 2019,

MATTHEW D. THURLOW, D.C. Bar No. 1008014
Baker & Hostetler LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 861-1681
mthurlow@bakerlaw.com

/s/ Jared s. Pettinato
JARED S. PETTINATO, DC Bar No. 496901
Jared Pettinato Law Offices
3416 13th St. NW, # 1
Washington, DC 20010
(406) 314-3247
Jared@JaredPettinato.com
Attorneys for Plaintiffs