No. 20-138

# In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

*v.*

SIERRA CLUB, ET AL.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

*v.*

STATE OF CALIFORNIA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**PETITION FOR A WRIT OF CERTIORARI**


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## QUESTIONS PRESENTED

In Section 8005 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999, Congress authorized the Secretary of Defense to transfer certain appropriated funds between Department of Defense (DoD) appropriations accounts "[u]pon determination by the Secretary * * * that such action is necessary in the national interest." Section 8005 contains a proviso stating "[t]hat such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." *Ibid.* In 2019, the Acting Secretary of Defense transferred approximately $2.5 billion pursuant to Section 8005 and another similar provision to make funds available for DoD to respond to a request from the Department of Homeland Security for counterdrug assistance under 10 U.S.C. 284, including in the form of construction of fences along the southern border of the United States. The questions presented are as follows:

1. Whether respondents have a cognizable cause of action to obtain review of the Acting Secretary's compliance with Section 8005's proviso in transferring funds internally between DoD appropriations accounts.

2. Whether the Acting Secretary exceeded his statutory authority under Section 8005 in making the transfers at issue.

## PARTIES TO THE PROCEEDING

In *Sierra Club*, petitioners (defendants-appellants below) are Donald J. Trump, in his official capacity as President of the United States; Steven T. Mnuchin, in his official capacity as Secretary of the Treasury; Mark T. Esper, in his official capacity as Secretary of Defense; and Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security. Respondents (plaintiffs-appellees below) are the Sierra Club and the Southern Border Communities Coalition.

In *California*, petitioners (defendants-appellants and cross-appellees below) are Donald J. Trump, in his official capacity as President of the United States; Steven T. Mnuchin, in his official capacity as Secretary of the Treasury; Mark T. Esper, in his official capacity as Secretary of Defense; David Bernhardt, in his official capacity as Secretary of the Interior; Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security; Ryan D. McCarthy, in his official capacity as Secretary of the Army; Kenneth J. Braithwaite, in his official capacity as Secretary of the Navy; Barbara M. Barrett, in her official capacity as Secretary of the Air Force; the United States; the Department of the Treasury; the Department of Defense; the Department of the Interior; and the Department of Homeland Security.[*] Respondents (plaintiffs-appellees and, with respect to California and New Mexico, cross-appellants below) are the State of California; the State of Colorado; the State of Connecticut; the State of Delaware; the State of Hawaii; the State of Illinois; the State of Maine; the State of Maryland; the State of Massachusetts; Dana Nessel,

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[*] Secretaries Braithwaite and Barrett are substituted as parties for their predecessors in office pursuant to Rule 35.3 of the Rules of this Court.

in her official capacity as Attorney General of Michigan; the State of Minnesota; the State of New Jersey; the State of New Mexico; the State of New York; the State of Nevada; the State of Oregon; the State of Rhode Island; the State of Vermont; the Commonwealth of Virginia; and the State of Wisconsin.

**RELATED PROCEEDINGS**

United States District Court (N.D. Cal.):

*Sierra Club* v. *Trump*, No. 19-cv-892 (May 24, 2019) (preliminary injunction)

*Sierra Club* v. *Trump*, No. 19-cv-892 (June 28, 2019) (partial final judgment)

*California* v. *Trump*, No. 19-cv-872 (June 28, 2019) (partial final judgment)

*California* v. *Trump*, Nos. 19-cv-872 and 19-cv-892 (Dec. 11, 2019) (related litigation)

United States Court of Appeals (9th Cir.):

*Sierra Club* v. *Trump*, Nos. 19-16102 and 19-16300 (July 3, 2019) (denying stay pending appeal)

*Sierra Club* v. *Trump*, Nos. 19-16102 and 19-16300 (June 26, 2020) (affirming on merits)

*California* v. *Trump*, Nos. 19-16299 and 19-16336 (June 26, 2020) (affirming on merits)

*California* v. *Trump*, Nos. 19-17501 and 20-15044 (argued Mar. 10, 2020) (related litigation)

Supreme Court of the United States:

*Trump* v. *Sierra Club*, No. 19A60 (July 26, 2019) (granting stay pending appeal)

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**PETITION FOR A WRIT OF CERTIORARI**

The Acting Solicitor General, on behalf of Donald J. Trump, President of the United States, et al., respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these related cases. The government is filing a "single petition for a writ of certiorari" because the "judgments * * * sought to be reviewed" are from "the same court and involve identical or closely related questions." Sup. Ct. R. 12.4.

## OPINIONS BELOW

In *Sierra Club*, the opinion of the court of appeals (App., *infra*, 1a-77a) is reported at 963 F.3d 874. An earlier order of the court of appeals (App., *infra*, 206a-299a) is reported at 929 F.3d 670. The order of the district court (App., *infra*, 174a-188a) is unpublished but available at 2019 WL 2715422. Earlier orders of the district court (App., *infra*, 302a-304a, 305a-385a) are available or reported at, respectively, 2019 WL 2305341 and 379 F. Supp. 3d 883.

In *California*, the opinion of the court of appeals (App., *infra*, 78a-173a) is reported at 963 F.3d 926. The order of the district court (App., *infra*, 189a-203a) is unpublished but available at 2019 WL 2715421. An earlier order of the district court (App., *infra*, 386a-437a) is reported at 379 F. Supp. 3d 928.

## JURISDICTION

The judgments of the court of appeals were entered on June 26, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 8005 of the Department of Defense Appropriations Act, 2019 (DoD Appropriations Act), Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999, provides:

> Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed $4,000,000,000 of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military func-

> tions (except military construction) between such appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred: *Provided*, That such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress: *Provided further*, That the Secretary of Defense shall notify the Congress promptly of all transfers made pursuant to this authority or any other authority in this Act: *Provided further*, That no part of the funds in this Act shall be available to prepare or present a request to the Committees on Appropriations for reprogramming of funds, unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which reprogramming is requested has been denied by the Congress: *Provided further*, That a request for multiple reprogrammings of funds using authority provided in this section shall be made prior to June 30, 2019: *Provided further*, That transfers among military personnel appropriations shall not be taken into account for purposes of the limitation on the amount of funds that may be transferred under this section.

*Ibid.*

The Appropriations Clause of the U.S. Constitution provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, Cl. 7. Other pertinent

provisions are reproduced in the appendix to this petition. App., *infra*, 438a-449a.

## STATEMENT

In 2019, the Acting Secretary of Defense transferred certain already appropriated funds between Department of Defense (DoD) appropriations accounts in order to respond to a request from the Department of Homeland Security (DHS) for counterdrug assistance at the southern border of the United States pursuant to 10 U.S.C. 284. DoD used the transferred funds to undertake the construction of more than 100 miles of fencing, along with roads and lighting. See 10 U.S.C. 284(b)(7). The district court held that the Acting Secretary had exceeded the scope of his authority to transfer funds, and that respondents in these two companion cases—a group of States and two environmental groups—are proper parties to enforce the limits on that authority. In the environmental groups' case, the court enjoined DoD and DHS from using the transferred funds to "construct a border barrier." App., *infra*, 188a. This Court stayed that injunction, holding that "the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with" the transfer statute. 140 S. Ct. 1, 1. Yet a divided panel of the Ninth Circuit concluded otherwise and affirmed in both cases. App., *infra*, 1a-77a (*Sierra Club*); *id.* at 78a-173a (*California*).

### A. Statutory Background

In August 2018, Congress enacted the DoD Appropriations Act, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999, to fund DoD's operations for the 2019 fiscal year. Like most annual appropriations laws, the DoD

Appropriations Act directs funds to discrete, named accounts to be used for specified purposes. See James V. Saturno et al., Cong. Research Serv., R42388, *The Congressional Appropriations Process: An Introduction* 12 (updated Nov. 30, 2016) (*Appropriations Process*). Thus, for example, Congress appropriated approximately $42 billion to an account entitled "Military Personnel, Army" to be used "[f]or pay * * * for members of the Army." 132 Stat. 2982 (capitalization altered).

During the annual budgeting process, DoD requests appropriations for each such account by describing the amounts it will need to execute the various programs, projects, and activities funded by the account. See, *e.g.*, Office of Mgmt. & Budget, *An American Budget: FY 2019: Appendix* 213-214 (2018) (DoD's request for appropriations to "Military Personnel, Army" account for fiscal year 2019). When it submits a budget, DoD identifies items of expenditure to be paid from each account—for example, "Pay and Allowances of Officers" as an item to be funded from the military personnel account. *Id.* at 214. Congress may require or prohibit the use of funds for particular proposed items; legislators also commonly use committee reports to memorialize their expectations about how appropriated funds will be used for particular items in DoD's budget. See, *e.g.*, H.R. Conf. Rep. No. 952, 115th Cong., 2d Sess. 161-164 (2018) ("Military Personnel, Army" example); cf. *Appropriations Process* 12.

DoD's budget requests are based on estimates, and its actual needs may change during the ensuing fiscal year for a variety of reasons, from price fluctuations to new national-security threats. To address that problem, Congress often authorizes DoD to "transfer amounts provided in appropriation Acts," 10 U.S.C.

2214(a)—*i.e.*, from one account to another. See Gov't Accountability Office, *Principles of Federal Appropriations Law* 2-38 (4th ed. rev. 2016) (*GAO Red Book*) (explaining transfers and noting that "agencies have a legitimate need for a certain amount of flexibility").

Section 8005 of the DoD Appropriations Act confers transfer authority for the funds appropriated by that Act. It authorizes the Secretary of Defense, "[u]pon determination * * * that such action is necessary in the national interest," to transfer up to $4 billion between appropriations made by the DoD Appropriations Act. 132 Stat. 2999. Section 8005 contains a proviso, however, stating that funds may not be transferred under that provision "unless for higher priority items, based on unforeseen military requirements," and "in no case where the item for which funds are requested has been denied by the Congress." *Ibid.* Congress provided additional transfer authority in Section 9002, which permits the Secretary to "transfer up to $2,000,000,000 between the appropriations or funds made available" in Title IX of the DoD Appropriations Act. 132 Stat. 3042. That authority is "subject to the same terms and conditions as the authority provided in section 8005." *Ibid.*

The DoD Appropriations Act also appropriated funds to an account for "Drug Interdiction and Counter-Drug Activities, Defense." 132 Stat. 2997 (capitalization altered). The funds appropriated to that account are available "[f]or drug interdiction and counter-drug activities of the Department of Defense," *ibid.*, including activities undertaken pursuant to 10 U.S.C. 284. Under that statute, the "Secretary of Defense may provide support for the counterdrug activities * * * of any other department or agency of the Federal Government," if "such support is requested * * * by the official

who has responsibility for the counterdrug activities." 10 U.S.C. 284(a)(1)(A). As relevant here, DoD may provide assistance in the form of "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. 284(b)(7).

**B. The Challenged Transfers**

On February 15, 2019, the President declared a national emergency on the southern border of the United States under the National Emergencies Act, 50 U.S.C. 1601 *et seq.*, based in part on his determination that the border remains "a major entry point" for "illicit narcotics." 84 Fed. Reg. 4949, 4949 (Feb. 20, 2019); see Memorandum on Securing the Southern Border of the United States, 2018 Daily Comp. Pres. Doc. 2 (Apr. 4, 2018) (directing DoD to "support [DHS] in securing the southern border and taking other necessary actions to stop the flow of deadly drugs"). On February 25, 2019, DHS submitted a request for DoD's assistance, under 10 U.S.C. 284(a), "with the construction of fences[,] roads, and lighting" to block drug-smuggling corridors on the southern border. C.A. E.R. 272.

The Acting Secretary of Defense approved DHS's request for assistance under Section 284 with respect to seven projects in Arizona, California, and New Mexico. App., *infra*, 83a; cf. C.A. E.R. 219. The projects are located in sectors of the border where, in the 2018 fiscal year, DHS made hundreds of drug-related arrests and seized thousands of pounds of illegal narcotics. See, *e.g.*, C.A. E.R. 274 (Yuma Sector). The projects consist in part of replacing existing pedestrian fencing or vehicle barriers that had proven to be ineffective with 30-foot-high steel bollard fencing. See *ibid.*; *id.* at 278-279, 294-298.

To ensure adequate funds to complete the first tranche of approved projects, the Acting Secretary invoked his authority under Section 8005 of the DoD Appropriations Act to transfer $1 billion of funds from two personnel accounts to the appropriations account for "Drug Interdiction and Counter-Drug Activities, Defense." C.A. E.R. 285. The Acting Secretary determined that the transfer satisfied Section 8005 because it would be "in the national interest" and "[t]he items to be funded * * * are a higher priority than the item for which funds and authority are transferred (excess Army military personnel funds)." *Ibid.* The Acting Secretary also explained that, for purposes of Section 8005's proviso, there was an "unforeseen military requirement" because DoD's need to provide support to DHS was "not known at the time of" DoD's earlier budget requests to Congress; he further explained that Congress had not "denied" any request for DoD to provide this assistance to DHS. *Id.* at 285-286. To fund a second tranche of projects, the Acting Secretary later transferred an additional $1.5 billion, invoking both Sections 8005 and 9002 of the DoD Appropriations Act. *Id.* at 172-173.

**C. Prior Proceedings**

Respondents brought these suits to challenge the Acting Secretary's internal transfers of funds, as well as other governmental actions to construct physical barriers along the southern border. The challenges to the Secretary's transfers proceeded along similar tracks before the same district court judge and were consolidated for briefing and argument in the court of appeals. See App., *infra*, 204a-205a.

**1. *Sierra Club* v. *Trump***

a. The district court first addressed the challenges brought by respondents the Sierra Club and the Southern Border Communities Coalition (collectively, Sierra Club). Sierra Club contended that the construction of fencing and roads in drug-smuggling corridors along the southern border would impair its members' interests in "hiking, birdwatching, photography, and other professional, scientific, recreational, and aesthetic activities." App., *infra*, 12a.

The district court issued a preliminary injunction forbidding federal officials from "taking any action to construct a border barrier * * * using funds reprogrammed by DoD under Section 8005," App., *infra*, 385a; see *id.* at 305a-385a, and later incorporated the same reasoning into an order granting a permanent injunction and entering partial final judgment, see *id.* at 174a-188a. The court held that it had "authority to review" challenges to the Acting Secretary's transfers pursuant to its equitable power to enjoin government officials from violating federal law, rather than under a specific grant of statutory authority, such as the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* App., *infra*, 345a. The court concluded, on that basis, that Sierra Club need not demonstrate that its asserted injuries "fall within the 'zone of interests'" protected by Section 8005's proviso, because the court viewed that requirement as applicable only "to statutorily-created causes of action." *Id.* at 347a.

The district court then determined that the Acting Secretary exceeded his authority under Section 8005 in transferring the funds at issue. The court stated that Congress had "denied" funds for the projects within the meaning of Section 8005's proviso, see p. 6, *supra*, when

Congress appropriated only $1.375 billion to DHS in February 2019 for DHS to construct fencing in the Rio Grande Valley pursuant to DHS's own separate authority to construct such fencing. App., *infra*, 350a-354a; see Department of Homeland Security Appropriations Act, 2019, Pub. L. No. 116-6, Div. A, Tit. II, § 230, 133 Stat. 28. The court also reasoned that DoD's need to provide assistance to DHS was not "unforeseen" for purposes of Section 8005's proviso because, even though DHS had not requested DoD's support under Section 284 until February 2019, the "government as a whole" had made other funding requests for border-wall construction in 2018. App., *infra*, 356a-357a.

b. The district court declined to stay its permanent injunction pending appeal. App., *infra*, 188a; see *id.* at 302a-304a. A divided panel of the court of appeals also declined to stay the injunction, although for different reasons. *Id.* at 206a-299a. The panel majority stated that Sierra Club was not required to demonstrate that its members' putative recreational and aesthetic interests fall within the zone of interests protected by Section 8005's proviso because, in the majority's view, Sierra Club "allege[s] a constitutional violation." *Id.* at 234a. In particular, Sierra Club alleged that any use of funds transferred improperly under Section 8005 "would cause funds to be 'drawn from the Treasury' not 'in Consequence of Appropriations made by Law,'" in violation of the Appropriations Clause. *Id.* at 246a (quoting U.S. Const. Art. I, § 9, Cl. 7). The majority accepted that theory and reasoned that the relevant question is whether Sierra Club's asserted interests "fall within the zone of interests of the Appropriations Clause," *id.* at 264a—a test it found satisfied, see *id.* at 265a-267a. Judge N.R. Smith dissented, explaining that

when Sierra Club's "claim is properly viewed as alleging a statutory violation" of Section 8005, Sierra Club has "no mechanism to challenge [DoD's] actions." *Id.* at 276a; see *id.* at 274a-299a.

On July 26, 2019, this Court stayed the district court's injunction pending appeal and, if necessary, the disposition of a petition for a writ of certiorari filed by the government. 140 S. Ct. at 1. The Court stated that "[a]mong the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Ibid.* Justice Breyer concurred in part and dissented in part. *Id.* at 1-2. He would have stayed the injunction to the extent it prohibited the government from finalizing the contracts at issue. *Id.* at 2. Justices Ginsburg, Sotomayor, and Kagan would have denied a stay. *Id.* at 1.

c. On the merits, a different panel of the court of appeals affirmed by a divided vote. App., *infra*, 1a-77a.

The panel majority first concluded that Section 8005 did not authorize the transfers at issue, based on the panel's reasoning in a companion opinion issued in the States' case. App., *infra*, 17a; see p. 14, *infra*. The majority then turned to addressing "whether Sierra Club is a proper party to challenge the Section 8005 transfers." App., *infra*, 18a. Notwithstanding this Court's stay order, the majority held that Sierra Club "has both a constitutional and an *ultra vires* cause of action" to claim that the Acting Secretary exceeded his authority in transferring the funds. *Id.* at 19a. On the former, the majority elaborated that the Appropriations Clause itself confers an implied cause of action to challenge allegedly unlawful spending. *Id.* at 20a-25a. Finally, the

majority concluded that Sierra Club need not demonstrate that its asserted interests are within the zone of interests protected by Section 8005's proviso for the same reasons the motions panel had given in denying a stay—*i.e.*, because the zone-of-interests requirement either does not apply at all here or because the zone of interests is determined based on the Appropriations Clause rather than Section 8005. See *id.* at 31a-34a.

Judge Collins dissented. App., *infra*, 40a-77a. He would have held that Sierra Club "lack[s] any cause of action to challenge the transfers." *Id.* at 41a. He explained that Sierra Club lacks a cause of action under the APA because the APA "incorporates the familiar zone-of-interests test," *id.* at 53a, and the relevant zone is set by Section 8005's proviso, see *id.* at 56a ("*All* of [Sierra Club's] theories for challenging the transfers * * * rise or fall based on whether DoD has transgressed the limitations on transfers set forth in § 8005."). He further explained that Sierra Club's "asserted recreational, aesthetic, and environmental interests clearly lie outside the zone of interests protected by § 8005," which "does not mention" such interests or "require the Secretary to consider" them before transferring funds. *Id.* at 60a. And he would have rejected Sierra Club's effort to "evade" that limitation by invoking an implied constitutional or equitable cause of action rather than the APA. *Id.* at 74a. In his view, Sierra Club lacks any distinct constitutional claim because its Appropriations Clause claim "is effectively the very same § 8005-based claim dressed up in constitutional garb." *Id.* at 65a. And regardless, he would have held that any implied constitutional or equitable cause of action "would still be governed by the same zone of interests defined by the relevant limitations in § 8005." *Ibid.*;

see *id.* at 74a-76a. In all events, Judge Collins concluded that "the transfers were lawful," as explained in his parallel dissent in the States' case. *Id.* at 41a; see pp. 15-16, *infra*.

**2. *California* v. *Trump***

a. In the companion case, a group of States challenged the same internal DoD transfers under the APA and other theories. Two States—California and New Mexico—asserted that construction of the projects funded by the transfers within those States would harm their environmental interests and their sovereign interests in the enforcement of state environmental laws. App., *infra*, 90a, 94a. DHS had invoked Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-555, as amended, to waive the application of any state environmental laws to these projects. See App., *infra*, 83a (noting DHS's express authority under IIRIRA to "'waive all legal requirements' that would otherwise apply to the border wall construction projects") (citation omitted). The district court entered a declaratory judgment in the States' favor on their challenge to the transfers based largely on the reasoning of its prior order in *Sierra Club*, while declining to grant an injunction. *Id.* at 189a-203a.

b. The same panel of the court of appeals that had affirmed on the merits in *Sierra Club* also affirmed in the States' case, with Judge Collins again dissenting. App., *infra*, 78a-173a.

The panel majority held that the States have a cause of action under the APA to challenge the Acting Secretary's compliance with Section 8005 because their asserted interests in enforcing state environmental laws are within the zone of interests protected by Section

8005. App., *infra*, 100a-106a. The majority recognized that the proviso in Section 8005 limiting the Secretary's transfer authority is "primarily intended to benefit" Congress. *Id.* at 102a. But it reasoned that "[t]he field of suitable challengers must be construed broadly in this context" in light of "restrictions on congressional standing." *Id.* at 103a. And it found that "California and New Mexico are suitable challengers," because it viewed their interests as "congruent with those of Congress," *ibid.*, stressing the "unique" role of States in the constitutional scheme and the fact that state environmental laws had been preempted for these projects, see *id.* at 104a-105a. In light of that holding, the majority declined to address the States' alternative theory that they have "an equitable *ultra vires* cause of action." *Id.* at 100a n.12.

The panel majority also held that Section 8005 did not authorize the transfers at issue for the reasons given by the district court—namely, that DoD's need to provide support to DHS was not "unforeseen" in light of the "history of the President's efforts to build a border wall," App., *infra*, 109a-110a, and that Congress had "denied" the relevant "item" when it declined to appropriate the full amount of funds the President had requested for the 2019 fiscal year for DHS to construct border barriers, *id.* at 116a-117a. The majority also concluded that providing counterdrug support to DHS did not qualify as a "military requirement" within the meaning of Section 8005's proviso, see *id.* at 112a-116a, notwithstanding that Congress authorized the military to provide such support, see 10 U.S.C. 284(b)(7).

Judge Collins dissented. App., *infra*, 119a-173a. He would have held that the States' "asserted environmen-

tal interests clearly lie outside the zone of interests protected by § 8005," which, again, "does not mention environmental interests." *Id.* at 138a; see *id.* at 139a (observing that Section 8005 did not require the Acting Secretary "to give even the slightest consideration to whether [the challenged transfers] would result in the death of more flat-tailed horned lizards"). As to the States' asserted interest in the enforcement of state environmental law, Judge Collins explained that "the ultimate preemption of state law occurred, not as a result of § 8005, but rather as a result of DHS's separate determination" to waive any application of those laws to these projects under IIRIRA, "a completely separate statute." *Id.* at 140a; see p. 13, *supra*.

Judge Collins also would have held that the challenged transfers complied with Section 8005, when correctly interpreted in light of the backdrop of federal appropriations law. App., *infra*, 156a-173a (Collins, J., dissenting). He explained that, in Section 8005's proviso forbidding a transfer to fund an "item" that has "been denied by the Congress," 132 Stat. 2999, the term "item" refers to the "itemizations * * * as set forth in the already existing budgetary documents exchanged and generated during the appropriations process for DoD." App., *infra*, 161a. Under that reading, he observed that "this case is easy" because, during the budgeting process, DoD never proposed and Congress never denied any item of expenditure for DoD to provide assistance to DHS under Section 284. *Id.* at 162a-163a. He further explained that the transfers at issue were "based on unforeseen military requirements." DoD Appropriations Act § 8005, 132 Stat. 2999. He reasoned that the requirements were "military" in nature be-

cause Congress assigned the task of providing counterdrug support to the armed forces, App., *infra*, 165a-169a, and that the requirements were "unforeseen" because "funding for the DoD assistance" was never "requested, proposed, or considered during DoD's appropriations process," *id.* at 171a.*

**REASONS FOR GRANTING THE PETITION**

The court of appeals erred in concluding that respondents are proper parties to challenge whether the Acting Secretary of Defense exceeded his authority in making internal transfers of appropriated funds under Section 8005 of the DoD Appropriations Act. As this Court already preliminarily concluded with respect to Sierra Club, respondents "have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." 140 S. Ct. 1, 1. The APA does not permit such a suit because respondents' asserted recreational, aesthetic, environmental, or sovereign interests are not even arguably within the zone of interests protected by Section 8005's proviso, which concerns the intergovernmental budgetary process between DoD and Congress. Nor can respondents evade the zone-of-interests limitation by "dress[ing] up" their statutory claims "in constitutional garb." App., *infra*, 65a (Collins, J., dissenting). That is the lesson of this Court's decisions in *Dalton* v. *Specter*, 511 U.S. 462 (1994), and *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), which the Ninth Circuit disregarded.

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* After the court of appeals' decisions, Sierra Club moved for this Court to lift its prior stay of the district court's injunction. The Court denied that motion. See Order, *Trump* v. *Sierra Club*, No. 19A60 (July 31, 2020). Justices Breyer, Ginsburg, Sotomayor, and Kagan would have granted the motion. *Ibid.*

In any event, the court of appeals further erred in finding any violation of Section 8005. The Acting Secretary determined that the challenged transfers were "necessary in the national interest," DoD Appropriations Act § 8005, 132 Stat. 2999, to respond to a request from DHS for assistance with drug interdiction efforts at the southern border. And the transfers were fully consistent with Section 8005's proviso regarding "unforeseen military requirements" and "item[s]" not previously "denied" by Congress. *Ibid.* Indeed, the nonpartisan Government Accountability Office (GAO)—which is headed by the Comptroller General, "an agent of the Congress," *Bowsher* v. *Synar*, 478 U.S. 714, 731 (1986) (citation omitted)—reached that same conclusion in response to an inquiry from lawmakers during the pendency of this litigation. *Department of Defense—Availability of Appropriations for Border Fence Construction*, B-330862, 2019 WL 4200949, at *1 (Comp. Gen. Sept. 5, 2019) (*GAO Opinion*).

At a minimum, the decisions below concern a matter of exceptional national importance. This Court regularly grants certiorari to address interference with Executive Branch conduct that is of "importance * * * to national security." *Department of the Navy* v. *Egan*, 484 U.S. 518, 520 (1988). That standard is plainly met by this injunction against the transfer of military funds to assist in the construction of fences on the southern border to stanch the flow of illegal drugs. Indeed, the Court's earlier orders granting a stay and declining to lift it reflect that the Court has already found "a reasonable probability" that certiorari is warranted. *Maryland* v. *King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers) (citation omitted).

## I. THE DECISIONS BELOW ARE INCORRECT

### A. Respondents Lack Any Cause Of Action To Obtain Judicial Review Of Whether The Acting Secretary Exceeded His Transfer Authority Under Section 8005

Respondents are not proper parties to bring suit claiming that the Acting Secretary exceeded his transfer authority under Section 8005. Respondents cannot invoke any express or implied cause of action to do so because their asserted interests are not even arguably within the zone of interests protected by Section 8005's proviso, which governs DoD's internal transfers of already appropriated funds as part of Congress's regulation of DoD's budget. The recreational, aesthetic, environmental, and sovereign interests that respondents assert are entirely outside the contemplation of Section 8005. Nor can respondents avoid that conclusion by invoking the Appropriations Clause. Respondents have no constitutional claim distinct from their challenge to whether the Acting Secretary exceeded the statutory authority conferred in Section 8005. In any event, the zone-of-interests requirement applies no differently to an implied equitable cause of action asserting a violation of the Appropriations Clause premised on non-compliance with Section 8005's proviso.

1. The "zone-of-interests" requirement limits the plaintiffs who "may invoke [a] cause of action" authorized by Congress. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 129-130 (2014). It reflects the common-sense intuition that Congress does not intend to extend a cause of action to "plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions" they seek to enforce. *Thompson* v. *North Am. Stainless, LP*, 562 U.S. 170, 178 (2011). "Congress is

presumed to 'legislate against the background of' the zone-of-interests limitation," which excludes putative plaintiffs whose interests do not "'fall within the zone of interests protected by the law invoked.'" *Lexmark*, 572 U.S. at 129 (brackets and citations omitted).

Under this Court's interpretation of the APA's express cause of action, 5 U.S.C. 702, a plaintiff's asserted interest need only be "arguably within the zone of interests" of the provision to be enforced; suit is foreclosed only where the asserted interest is "marginally related to or inconsistent with the purposes implicit in the [provision]." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 224, 225 (2012) (citations omitted). But where a plaintiff asserts an implied cause of action in equity, see *Armstrong*, 575 U.S. at 327-328, this Court has suggested that a heightened zone-of-interests standard applies, requiring the plaintiff to be the intended beneficiary of the provision to be enforced. See *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987).

Here, under either the APA or an implied cause of action, respondents are not proper plaintiffs because their asserted interests are entirely unrelated to the proviso in Section 8005 that they claim the Acting Secretary violated. Sierra Club has asserted that construction of fencing and roads in drug-smuggling corridors along the southern border, using funds transferred pursuant to Section 8005, will impair its members' "scientific, recreational, and aesthetic activities" in the project areas, such as birdwatching. App., *infra*, 12a. The States have asserted that construction of the projects funded by the challenged transfers will cause harm to the environment in California and New Mexico and will

impair those States' sovereign interests in the enforcement of state environmental law. *Id.* at 90a-98a. As Judge Collins recognized in dissent, Section 8005 "does not mention" any such interests, "nor does it require the Secretary" to consider them before transferring funds. *Id.* at 60a; see *id.* at 138a.

Instead, Section 8005 protects the interests of DoD and Congress. The provision authorizes the Secretary of Defense to transfer up to $4 billion of certain funds between "appropriations or funds * * * to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which" the transfer is made, if the Secretary determines that the transfer "is necessary in the national interest." 132 Stat. 2999. The proviso at issue here states that the Secretary's transfer authority "may not be used unless for higher priority items, based on unforeseen military requirements, than those for which [the transferred funds were] originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." *Ibid.* The statute additionally requires the Secretary to "notify the Congress promptly of all transfers made pursuant to this authority or any other authority" in the DoD Appropriations Act. *Ibid.*

Nothing about Section 8005's text or context suggests that Congress intended to permit enforcement of the proviso by parties who, like respondents here, assert that a transfer would indirectly result in harm to their recreational, aesthetic, environmental, scientific, or sovereign interests based on the otherwise authorized activity on which transferred funds are ultimately spent. Section 8005 does not require the Secretary to consider those kinds of interests before transferring

funds. To the contrary, it empowers the Secretary to make transfers in order to fund any type of activities that Congress has authorized DoD to perform. And Congress conditioned the Secretary's transfer authority on judgments about national security that are uniquely within the Executive Branch's expertise and that courts and third parties are ill-suited to second guess—*e.g.*, that the transfer is "necessary" for the "national interest" and for a "higher priority" item of defense spending. DoD Appropriations Act § 8005, 132 Stat. 2999; see *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1861 (2017) (cautioning that courts should be "reluctant to intrude upon the authority of the Executive in military and national security affairs") (citation omitted).

Section 8005's congressional-notification requirement confirms that the proviso is primarily if not exclusively intended to protect Congress's interests in the appropriations process. For example, if Congress disagrees with a particular transfer after receiving notice of it, Congress may enact legislation to override the transfer or to modify DoD's transfer authority. The history of Section 8005 further confirms that the proviso principally safeguards the interests of Congress. When DoD was first given this transfer authority, a committee report explained that legislators imposed conditions on it in order to "tighten *congressional* control of the reprogramming process." H.R. Rep. No. 662, 93d Cong., 1st Sess. 16-17 (1973) (House Report) (emphasis added).

Permitting any private party who meets the bare minimum of Article III injury to bring suit to challenge a transfer under Section 8005 could often be antithetical to the interests of Congress. Opportunistic litigation by private parties (or States) may frustrate the desirable

"flexibility," *GAO Red Book* 2-38, that Congress intended to confer in granting transfer authority—as illustrated by this case, where the GAO determined that the challenged transfers were permissible. See p. 17, *supra*. Private enforcement of Section 8005's proviso also runs the risk of excessive court-ordered remedies even for minor or technical violations—which Congress itself may well have viewed as inconsequential, or at least insufficient to warrant the wastefulness of bringing to a halt statutorily authorized projects for which funds have already been expended.

2. The court of appeals erred in holding that the States satisfy the zone-of-interests requirement for Section 8005. App., *infra*, 100a. The panel majority began by reasoning that the "field of suitable challengers must be construed broadly in this context" in light of "restrictions on congressional standing [that] make it difficult for Congress to enforce these obligations itself." *Id.* at 103a. But the majority should not have taken it upon itself to relax the zone-of-interests requirement to achieve what it perceived to be the optimal number of "suitable challengers." *Ibid.*

The federal courts "are not entitled to bend the otherwise applicable—and already lenient—standards to ensure that someone will be able to sue in this case or others like it." App., *infra*, 145a (Collins, J., dissenting). As this Court has repeatedly admonished in the standing context, "the assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 420 (2013) (citation omitted); cf. *United States* v. *Richardson*, 418 U.S. 166, 179 (1974) ("[T]he absence of any particular individual or class to litigate these claims gives support to the argument that

the subject matter is committed to the surveillance of Congress, and ultimately to the political process.").

The panel majority additionally held that the States' asserted interests are "congruent" with the interests protected by Section 8005. App., *infra*, 103a. But this too was error.

First, the panel majority reasoned that "this challenge actively furthers Congress's intent to 'tighten congressional control of the reprogramming process,'" because two congressional committees "expressly disapproved of DoD's use of the [Section 8005] authority" after the Acting Secretary made the transfers challenged here. App., *infra*, 103a (citation omitted); see *id.* at 86a. That reasoning—which has nothing to do with the environmental or sovereign interests asserted by the States—is effectively "tautological." *Id.* at 144a (Collins, J., dissenting). Any plaintiff with Article III injury who asserts a violation of Section 8005 could be said to have the same congruence of interests with Congress in avoiding Section 8005 violations. The majority was also wrong to equate the actions of two committees with the interests of Congress as a whole; as explained above, Congress has the necessary legislative tools to protect its own interests, without any need for proxy litigation by States or private parties, whose interests may well diverge from Congress's position. See pp. 21-22, *supra*.

Second, the panel majority reasoned that the States are proper parties to sue to enforce Section 8005's proviso because of their "unique" interest in enforcing the "structural separation of powers"—an interest the majority found to apply with "particular force" here because of the preemption of state environmental laws. App., *infra*, 104a-105a. But the States do not have any

"unique" interest in enforcing the limits of Section 8005, which does not mention States or otherwise require the Secretary to take their interests into account before transferring funds. The majority also erred in relying on the preemption of state law as a basis for finding the zone-of-interests requirement satisfied. The Section 8005 transfers did not themselves preempt any state law, and Section 8005 does not reflect any interest in protecting States from lawful federal preemption. DHS—not DoD—invoked an entirely separate statute to waive the application of any state environmental laws to the construction of the projects funded by the challenged transfers. See *id.* at 140a (Collins, J., dissenting); p. 13, *supra* (discussing IIRIRA).

3. No court has found that Sierra Club's asserted recreational and aesthetic interests in the project areas are within the zone of interests protected by Section 8005. The district court declined to apply any zone-of-interests requirement at all. See App., *infra*, 347a. The panel majority likewise excused Sierra Club from having to satisfy the zone-of-interests requirement with respect to Section 8005. The majority first reasoned that Sierra Club has "a constitutional cause of action" under the Appropriations Clause as well as "an equitable *ultra vires* cause of action," *id.* at 20a, 25a; it then further reasoned that, under either theory, the Appropriations Clause prescribes the relevant zone of interests, "[i]f the zone of interests test applies at all," *id.* at 33a. The earlier panel that denied a stay pending appeal had adopted essentially the same reasoning, which this Court already rejected. 140 S. Ct. at 1. For good reason, as it is flawed at every level.

a. To start, respondents do not allege any distinct constitutional violation. The Appropriations Clause prohibits expenditures only if not "made by Law," U.S. Const. Art. I, § 9, Cl. 7, and thus the gravamen of respondents' claim is necessarily that the transfers "amounted to drawing funds from the Treasury without *authorization by statute*" in light of Section 8005's proviso. App., *infra*, 18a (emphasis added; citation and internal quotation marks omitted). Any putative constitutional claim in these circumstances is "effectively the very same § 8005-based claim dressed up in constitutional garb." *Id.* at 65a (Collins, J., dissenting).

Indeed, the panel majority's attempt to recast Sierra Club's claim as sounding in the Constitution is contrary to this Court's decision in *Dalton* v. *Specter*, *supra*. There, the plaintiffs "sought to enjoin the Secretary of Defense * * * from carrying out a decision by the President" to close a military facility pursuant to a federal statute. 511 U.S. at 464. The court of appeals had permitted the suit to proceed on the assumption that the plaintiffs were effectively seeking "review [of] a presidential decision." *Id.* at 467 (citation omitted). After this Court held that the President is not an "agency" for APA purposes, see *id.* at 468-469, the court of appeals adhered to its decision on constitutional grounds—reasoning, based on *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), "that whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." *Dalton*, 511 U.S. at 471.

This Court unanimously rejected that theory. The Court explained that not "every action by the President, or by another executive official, in excess of his statu-

tory authority is *ipso facto* in violation of the Constitution." *Dalton*, 511 U.S. at 472. Instead, this Court has carefully "distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." *Ibid.* (collecting cases). The Constitution is implicated if an executive official relies on it as an independent source of authority to act, as in *Youngstown*, or if the official relies on a statute that itself violates the Constitution. See *id.* at 473 & n.5. But claims alleging simply that an official has "exceeded his statutory authority are not 'constitutional' claims." *Id.* at 473.

The same reasoning fully applies here. This dispute concerns whether the Acting Secretary "exceeded his statutory authority" in authorizing the disputed transfers under Section 8005, and "no 'constitutional question whatever' is raised," "'only issues of statutory interpretation.'" *Dalton*, 511 U.S. at 473-474 & n.6 (citation omitted). The Acting Secretary did not invoke the Constitution as a basis to transfer funds, and Sierra Club does not challenge the constitutionality of Section 8005. Sierra Club's claim is therefore "properly classified as 'a statutory one.'" App., *infra*, 67a (Collins, J., dissenting) (quoting *Dalton*, 511 U.S. at 474).

The panel majority's effort to distinguish *Dalton* is unavailing. The majority stated that "*Dalton* suggests that a constitutional violation may occur when an officer violates an express prohibition of the Constitution," citing the Court's discussion of *Bivens* claims. App., *infra*, 23a (citing *Dalton*, 511 U.S. at 472). But Sierra Club's claim does not remotely resemble a *Bivens* claim. On Sierra Club's own theory of the case, no violation of the Appropriations Clause has occurred *unless* the Acting Secretary exceeded his authority under Section 8005.

That claim is necessarily and unavoidably statutory, not constitutional.

b. In any event, the Appropriations Clause itself "certainly does not create a cause of action," *Armstrong*, 575 U.S. at 325, much less one that lacks a zone-of-interests requirement. Like the Supremacy Clause—the provision at issue in *Armstrong*—the Appropriations Clause "is silent regarding who may enforce [it] in court, and in what circumstances they may do so." *Ibid.* Rather than flowing from the Appropriations Clause itself, "[t]he ability to sue to enjoin unconstitutional actions by * * * federal officers is the creation of courts of equity." *Id.* at 327. Although the panel majority suggested that this Court has held that "certain structural constitutional provisions" themselves "give rise to causes of action," the cited cases all instead involved either the assertion of a constitutional *defense* to a government enforcement action or a *statutory* cause of action. See App., *infra*, 20a; see also *id.* at 69a-71a (Collins, J., dissenting).

Nor was the panel majority correct to suggest that the zone-of-interests requirement may not apply at all to judicially implied causes of action. App., *infra*, 31a-33a. The zone-of-interests requirement is "'of general application,'" reflecting a limitation on appropriate plaintiffs that "Congress is presumed" to intend in authorizing suit in federal court. *Lexmark*, 572 U.S. at 129 (quoting *Bennett* v. *Spear*, 520 U.S. 154, 163 (1997)). This Court's statement in *Lexmark* that the requirement applies to all "statutorily created" causes of action, *ibid.*, encompasses judicially implied equitable causes of action, because the equitable powers of federal district courts are themselves conferred by statute, see *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance*

*Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). *Lexmark* therefore did not silently abrogate this Court's precedents recognizing that the zone-of-interests requirement applies to equitable actions seeking to enjoin constitutional violations. See, *e.g.*, *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 469, 475 (1982) (Establishment Clause); *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977) (Dormant Commerce Clause).

Implied equitable suits are instead subject to "express and implied statutory limitations," *Armstrong*, 575 U.S. at 327, and the zone-of-interests requirement reflects Congress's refusal to accept the "absurd consequences [that] would follow" "[i]f any person injured in the Article III sense by a [statutory or constitutional] violation could sue," even where the person's interests are entirely unrelated to the provision being enforced, *Thompson*, 562 U.S. at 176-177. Congress would no more accept such absurd results under its statutory grant of equity jurisdiction than under the APA. See *Hernandez* v. *Mesa*, 140 S. Ct. 735, 747 (2020) ("It would be 'anomalous to impute . . . a judicially implied cause of action beyond the bounds Congress has delineated for a comparable express cause of action.'") (brackets and citation omitted). If anything, this Court has indicated that, in light of the heightened separation-of-powers concerns with judicially implied causes of action, see *Abbasi*, 137 S. Ct. at 1855-1858, it would be appropriate to apply a more rigorous zone-of-interests standard requiring that the provision at issue be intended for the "*especial* benefit" of the plaintiff seeking to enforce it, *Clarke*, 479 U.S. at 400 n.16 (citation omitted); see *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283-285 (2002).

c. Finally, neither the Appropriations Clause nor an equitable "ultra vires" theory alters the conclusion that the focus of the zone-of-interests requirement is Section 8005's proviso. The zone-of-interests requirement must be applied "by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175-176. The Appropriations Clause provides that appropriations must be "made by Law," U.S. Const. Art. I, § 9, Cl. 7, and respondents do not dispute that the obligation of funds properly transferred under Section 8005 would satisfy that requirement. Because a violation of Section 8005's proviso is thus a necessary element of their claim, that is the "provision whose violation forms the legal basis for [the] complaint." *Bennett*, 520 U.S. at 176 (quoting *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990)) (emphasis omitted).

In concluding otherwise, the panel majority dismissed Section 8005 as "relevant only because, to the extent it applies, it authorizes executive action that otherwise would be unconstitutional or *ultra vires*." App., *infra*, 33a. But that is precisely the point: whether the Acting Secretary's conduct was unlawful turns entirely on the applicability of Section 8005's proviso, not the Appropriations Clause. Sierra Club's (and the States') asserted interests must fall within the zone of interests protected by Section 8005's proviso to maintain this suit. They do not.

**B. The Acting Secretary Fully Complied With Section 8005**

The court of appeals also erred in finding a violation of Section 8005. That provision authorizes the Secretary to transfer, "[u]pon determination * * * that such action is necessary in the national interest," up to $4 billion from certain appropriations made available in the

DoD Appropriations Act. 132 Stat. 2999. The panel majority did not dispute that the Acting Secretary made the requisite national-interest determination. The majority instead held that the transfers violated the proviso in Section 8005 stating "[t]hat such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." *Ibid.*; see App., *infra*, 17a, 105a-118a. That conclusion—which the GAO rejected, see p. 17, *supra*—is inconsistent with the statutory text, history, and purpose of the proviso.

*Item not denied by Congress*. For purposes of the proviso, Congress has not previously "denied" the "item" for which funds are requested. DoD never requested appropriations for the item of providing this counterdrug assistance to DHS, and Congress never denied any request for that item of expenditure. *GAO Opinion*, 2019 WL 4200949, at *8.

The panel majority reached a contrary conclusion only by interpreting the term "item" to refer to additional funding for a "border wall" writ large, which the majority understood Congress to have "denied" when it appropriated only $1.375 billion to another agency—DHS—for construction of fencing in other sectors of the border pursuant to DHS's own distinct statutory authorities. App., *infra*, 116a-117a. That interpretation is inconsistent with the context of Section 8005. "[T]he 'items' at issue under § 8005 must be understood against the backdrop of the sort of familiar item-level analysis" that has long been part of the budgeting process. *Id.* at 162a (Collins, J., dissenting). During that process, DoD identifies particular items for which it proposes to use

each appropriation; Congress appropriates funds in light of those budget requests; and Congress may decline to fund specific items. See p. 5, *supra*. Congress never did so with respect to these particular projects.

The history of the proviso confirms its roots in the exchange of itemized budget documents. Congress first imposed limitations on DoD's transfer authority for "denied" items in 1974, to ensure that DoD would not transfer funds for items in its budget that "ha[d] been *specifically deleted* in the legislative process." House Report 16 (emphasis added). The proviso thus functions to protect the choices Congress makes in "delet[ing]" (*ibid.*) items requested by DoD during the appropriations process. But Congress never considered, let alone deleted, any request by DoD to use counterdrug appropriations to assist DHS in this manner.

*Unforeseen*. DoD's need to provide counterdrug support to DHS was an "unforeseen" military requirement within the meaning of the proviso because, when DoD made its budget requests to Congress for the 2019 fiscal year, DoD did not know and could not have anticipated that DHS would later request its support under Section 284 for these projects. *GAO Opinion*, 2019 WL 4200949, at *6. The panel majority asserted that "[n]either the problem" of illegal narcotics crossing the southern border "nor the President's purported solution[]" of physical barriers "was unanticipated or unexpected." App., *infra*, 108a. But the specific requirement that prompted DoD to transfer these funds was a request from DHS for assistance under Section 284 with a discrete set of identified projects—a request that came only six months *after* the enactment of the DoD Appropriations Act. See pp. 4, 7, *supra*. Whether the "President's efforts to build a border wall" (App., *infra*,

109a) were foreseeable is irrelevant. See *id.* at 170a-172a (Collins, J., dissenting).

*Military requirement.* Responding to a request from DHS for counterdrug assistance under Section 284 also qualified as a "military requirement" under the proviso. In this context, "military requirement" is a term of art referring generally to an "established need justifying the timely allocation of resources to achieve a capability to accomplish approved military objects, missions, or tasks." *GAO Opinion*, 2019 WL 4200949, at *7 (citation omitted). When DoD "accepted DHS's request, the provision of support constituted a military requirement." *Ibid.* The panel majority asserted that the projects at issue are not "military requirement[s]" because they were undertaken "to support a civilian agency" and are not, in the majority's view, "needed or essential to the armed forces, soldiers, arms, or any sort of war effort." App., *infra*, 113a, 115a-116a. That judgment was not one for the majority to make. Providing counterdrug assistance under Section 284 is a "military" undertaking because Congress expressly assigned the task to the military. See *id.* at 165a-169a (Collins, J., dissenting). As the title of the relevant chapter of the U.S. Code makes clear, Section 284 is one of a number of provisions authorizing "Military Support for Civilian Law Enforcement Agencies." *Id.* at 115a.

## II. THE QUESTIONS PRESENTED WARRANT REVIEW

In granting a stay, this Court necessarily determined that, at that stage of the litigation, a reasonable probability of certiorari existed. See, *e.g.*, *King*, 567 U.S. at 1301 (Roberts, C.J., in chambers). The same considerations counsel in favor of now granting review, as suggested by this Court's decision not to lift the stay after the decisions below were issued.

First, the decisions below conflict with relevant decisions of this Court. Sup. Ct. R. 10(c). Like the earlier stay panel's decision, the merits panel's effort to transform Sierra Club's statutory claim into a constitutional violation is "flatly contradicted" by this Court's decision in *Dalton*, App., *infra*, 278a (N.R. Smith, J., dissenting), which teaches that garden-variety claims that an official acted in excess of his delegated statutory authority should not be treated as constitutional in nature. Recognizing a cause of action under the Appropriations Clause itself would also be contrary to this Court's decision in *Armstrong*, which confirmed that implied suits to enjoin alleged constitutional violations by public officials are "the creation of courts of equity" and are therefore subject to "express and implied statutory limitations." 575 U.S. at 327. As to the States, the panel majority effectively held that they satisfy the zone-of-interests requirement merely because they allege that Section 8005 was violated. App., *infra*, 103a-104a. Nothing in this Court's precedent supports such a "tautological" approach. *Id.* at 144a (Collins, J., dissenting).

Second, the questions presented are important for all federal agencies with transfer authority. Transfer statutes like Section 8005 are commonplace. See Michelle D. Christensen, Cong. Research Serv., R43098, *Transfer and Reprogramming of Appropriations* 3-4 (June 6, 2013); *GAO Red Book* 2-39 to 2-40. They reflect Congress's longstanding judgment that the Executive Branch must have some flexibility to redirect appropriations during "the lengthy and overlapping cycles of the budget process," *GAO Redbook* 2-44 (citation omitted), in light of unforeseen events or changed priorities. If a private party could sue to enjoin the exercise of such a transfer provision without demonstrating that the party

falls within the zone of interests protected by the provision's limitations, the courthouse doors would be open to a wide variety of challenges that Congress neither contemplated nor authorized.

Third, if allowed to stand, the decisions below would frustrate steps that the Acting Secretary determined to be "necessary in the national interest," DoD Appropriations Act § 8005, 132 Stat. 2999, to stanch the flow of illegal drugs across the southern border. The challenged transfers have allowed DoD to undertake the construction of more than 100 miles of fencing (and associated roads and lighting) in areas identified by DHS as drug-smuggling corridors, where DHS has seized thousands of pounds of heroin, cocaine, and methamphetamine between ports of entry in recent years. See C.A. E.R. 237-280. Whether the Acting Secretary exceeded his authority under Section 8005 when he made the transfers at issue is a question of significant practical importance to the Executive Branch's national-security efforts at the southern border. Cf. *Hernandez*, 140 S. Ct. at 745-746; *Egan*, 484 U.S. at 520.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2020

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Nos. 19-16102, 19-16300
D.C. No. 4:19-cv-00892-HSG

SIERRA CLUB; SOUTHERN BORDER COMMUNITIES COALITION, PLAINTIFFS-APPELLEES

*v.*

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; MARK T. ESPER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEFENSE; CHAD F. WOLF, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF HOMELAND SECURITY; STEVEN TERNER MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF THE TREASURY, DEFENDANTS-APPELLANTS

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Argued and Submitted: Nov. 12, 2019
San Francisco, California
Filed: June 26, 2020

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Appeal from the United States District Court
for the Northern District of California
Haywood S. Gilliam, Jr., District Judge Presiding

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**OPINION**

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Before: SIDNEY R. THOMAS, Chief Judge, and KIM MCLANE WARDLAW and DANIEL P. COLLINS, Circuit Judges.

Opinion by Chief Judge THOMAS; Dissent by Judge COLLINES

THOMAS, Chief Judge:

We consider in this appeal challenges by the Sierra Club and the Southern Border Communities Coalition ("SBCC")[1] to the Department of Defense's budgetary transfers to fund construction of the wall on the southern border of the United States in California, New Mexico, and Arizona. Specifically, we consider whether Section 8005 and Section 9002 of the Department of Defense Appropriations Act of 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018) ("Section 8005")[2] authorized the budgetary transfers. In a companion appeal, *State of California, et al. v. Trump et al.*, Nos. 19-16299 and 19-16336, we considered similar challenges filed by a collective group of States. However, because Sierra Club asserts different legal theories, and this case, when presented, was in a different procedural posture, we treat this appeal separately. We conclude that the transfers were not authorized, and that plaintiffs have a cause of action. We affirm the judgment of the district court.

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[1] We refer throughout this opinion to Sierra Club and SBCC together as "Sierra Club," unless otherwise noted.

[2] For simplicity, because the transfer authorities are both subject to Section 8005's substantive requirements, this opinion refers to these authorities collectively as Section 8005, as did the district court and the motions panel. Our holding in this case therefore extends to both the transfer of funds pursuant to Section 8005 and Section 9002.

I

We recounted the essential underlying facts in the companion case. However, we briefly outline them here for convenience of reference.

The President has long supported the construction of a border wall on the southern border between the United States and Mexico. Since the President took office in 2017, however, Congress has repeatedly declined to provide the amount of funding requested by the President.

The debate over border wall funding came to a head in December of 2018. During negotiations to pass an appropriations bill for the remainder of the fiscal year, the President announced that he would not sign any legislation that did not allocate substantial funds to border wall construction. On January 6, 2019, the White House requested $5.7 billion to fund the construction of approximately 234 miles of new physical barrier.[3] Budget negotiations concerning border wall funding reached an impasse, triggering the longest partial government shutdown in United States history.

After 35 days, the government shutdown ended without an agreement to provide increased border wall funding in the amount requested by the President. On February 14, 2019, Congress passed the Consolidated Appropriations Act of 2019 ("CAA"), which included the Department of Homeland Security Appropriations Act for Fiscal Year 2019, Pub. L. No. 116-6, div. A, 133 Stat. 13 (2019). The CAA appropriated only $1.375 billion

[3] Some form of a physical barrier already exists at the site of some of the construction projects. In those places, construction would reinforce or rebuild the existing portions.

for border wall construction, specifying that the funding was for "the construction of primary pedestrian fencing . . . in the Rio Grande Valley Sector." *Id.* § 230(a)(1). The President signed the CAA into law the following day.

The President concurrently issued a proclamation under the National Emergencies Act, 50 U.S.C. §§ 1601-1651, "declar[ing] that a national emergency exists at the southern border of the United States." Proclamation No. 9,844, 84 Fed. Reg. 4949 (Feb. 15, 2019).[4] An accompanying White House Fact Sheet explained that the President was "using his legal authority to take Executive action to secure additional resources" to build a border wall, and it specified that "the Administration [had] so far identified up to $8.1 billion that [would] be available to build the border wall once a national emergency [was] declared and additional funds [were] reprogrammed." The Fact Sheet identified several funding sources, including $2.5 billion of Department of Defense ("DoD") funds that could be transferred to provide support for counterdrug activities of other federal government agencies under 10 U.S.C. § 284 ("Section 284").[5]

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[4] Subsequently, Congress adopted two joint resolutions terminating the President's emergency declaration pursuant to its authority under 50 U.S.C. § 1622(a)(1). The President vetoed each resolution, and Congress failed to override these vetoes.

[5] Section 284 authorizes the Secretary of Defense to "provide support for the counterdrug activities . . . of any other department or agency of the Federal Government" if it receives a request from "the official who has responsibility for the counterdrug activities." 10 U.S.C. §§ 284(a), 284(a)(1)(A). The statute permits, among other things, support for "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *Id.* § 284(b)(7).

Executive Branch agencies began using the funds identified by the Fact Sheet to fund border wall construction. On February 25, the Department of Homeland Security ("DHS") submitted to DoD a request for Section 284 assistance to block drug smuggling corridors. In particular, it requested that DoD fund "approximately 218 miles" of wall using this authority, comprised of numerous projects. On March 25, Acting Secretary of Defense Patrick Shanahan approved three border wall construction projects: Yuma Sector Projects 1 and 2 in Arizona and El Paso Sector Project 1 in New Mexico. On May 9, Shanahan approved four more border wall construction projects: El Centro Sector Project 1 in California and Tucson Sector Projects 1-3 in Arizona.

At the time Shanahan authorized Section 284 support for these border wall construction projects, the counter-narcotics support account contained only $238,306,000 in unobligated funds, or less than one tenth of the $2.5 billion needed to complete those projects. To provide the support requested, Shanahan invoked the budgetary transfer authority found in Section 8005 of the 2019 DoD Appropriations Act to transfer funds from other DoD appropriations accounts into the Section 284 Drug Interdiction and Counter-Drug Activities-Defense appropriations account.

For the first set of projects, Shanahan transferred $1 billion from Army personnel funds. For the second set of projects, Shanahan transferred $1.5 billion from "var-

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DoD's provision of support for other agencies pursuant to Section 284 does not require the declaration of a national emergency.

ious excess appropriations," which contained funds originally appropriated for purposes such as modification of in-service missiles and support for U.S. allies in Afghanistan.

As authority for the transfers, DoD invoked Section 8005, which provides, in relevant part that:

> Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed $4,000,000,000 of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction) between such appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred.[6]

Section 8005 also explicitly limits when its authority can be invoked: "*Provided*, That such authority to transfer may not be used unless for higher priority items, based

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[6] The other authority invoked by the Federal Defendants, Section 9002 provides that: "Upon the determination of the Secretary of Defense that such action is necessary in the national interest, the Secretary may, with the approval of the Office of Management and Budget, transfer up to $2,000,000,000 between the appropriations or funds made available to the Department of Defense in this title: *Provided*, That the Secretary shall notify the Congress promptly of each transfer made pursuant to the authority in this section: *Provided further*, That the authority provided in this section is in addition to any other transfer authority available to the Department of Defense and is subject to the same terms and conditions as the authority provided in section 8005 of this Act."

on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress."

Although Section 8005 does not require formal congressional approval of transfers, historically DoD had adhered to a "gentleman's agreement," by which it sought approval from the relevant congressional committees before transferring the funds. DoD deviated from this practice here—it did not request congressional approval before authorizing the transfer. Further, the House Committee on Armed Services and the House Committee on Appropriations both wrote letters to DoD formally disapproving of the reprogramming action after the fact. Moreover, with respect to the second transfer, Shanahan expressly directed that the transfer of funds was to occur "without regard to comity-based policies that require prior approval from congressional committees."

In the end, Section 8005 was invoked to transfer $2.5 billion of DoD funds appropriated for other purposes to fund border wall construction.

II

On February 19, 2019, Sierra Club filed a lawsuit challenging the Executive Branch's funding of the border wall.[7] Sierra Club pled theories of violation of the

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[7] California, New Mexico, and fourteen other states had filed a lawsuit the previous day challenging the same border wall funding. Both lawsuits named as defendants Donald J. Trump, President of the United States, Patrick M. Shanahan, former Acting Secretary of Defense, Kirstjen M. Nielsen, former Secretary of Homeland Security, and Steven Mnuchin, Acting Secretary of the Treasury in their

2019 CAA, violation of the constitutional separation of powers, violation of the Appropriations Clause, violation of the Presentment Clause, violation of the National Environmental Policy Act ("NEPA"), and *ultra vires* action.

Sierra Club subsequently filed a motion requesting a preliminary injunction to enjoin the transfer of funds pursuant to Section 8005 to construct a border wall in Arizona's Yuma Sector and New Mexico's El Paso Sector. The district court held that Sierra Club had standing to assert its Section 8005 claims, and granted the preliminary injunction motion. The Federal Defendants timely appealed the preliminary injunction order. Sierra Club subsequently sought a supplemental preliminary injunction to block additional construction planned in California's El Centro Sector and Arizona's Tucson Sector.

Sierra Club also filed a motion requesting partial summary judgment, a declaratory judgment, and a permanent injunction to enjoin the transfer of funds pursuant to Section 8005 to construct a border wall in Arizona's Yuma and Tucson Sectors, California's El Centro Sector, and New Mexico's El Paso Sector. The Federal Defendants cross-moved for summary judgment and opposed Sierra Club's motion. The district court granted Sierra Club's motion for partial summary judgment and granted its request for a declaratory judgment and a permanent injunction. The Federal Defendants requested that the district court certify the judgment for appeal under Fed. R. Civ. P. 54(b). The district court

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official capacities, along with numerous other Executive Branch officials (collectively referenced as "the Federal Defendants").

considered the appropriate factors, made appropriate findings, and certified the order as final pursuant to Rule 54(b). *See Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 574-75 (9th Cir. 2018) (explaining when certification is appropriate under Rule 54). The Federal Defendants timely appealed the district court decision.

The Federal Defendants initially filed a motion to stay the district court's preliminary injunction, and in their later briefing on summary judgment, they requested that the district court stay any permanent injunction granted pending appeal. The district court denied both requests. The Federal Defendants filed an emergency motion for stay of the preliminary injunction pending appeal in this Court and subsequently sought a stay of the permanent injunction, relying on the same arguments. *Sierra Club v. Trump*, 929 F.3d 670, 685 (9th Cir. 2019). An emergency motions panel of this Court considered whether to stay the injunction pending appeal, and held that a stay was not warranted. *Id.* at 677. The Federal Defendants then filed an application for a stay pending appeal with the Supreme Court. The Supreme Court granted the application, noting that "[a]mong the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.).

We now consider the merits of the Federal Defendants' appeal of the district court's grant of partial summary judgment, grant of a declaratory judgment, and

grant of a permanent injunction to Sierra Club.[8] We review the existence of Article III standing *de novo*. *See California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 420 (9th Cir. 2019). We review questions of statutory interpretation *de novo*. *See United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017).

III

Sierra Club has Article III standing to pursue its claims. To establish Article III standing, a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).[9] An organization has standing to sue on behalf of its members when "its members would otherwise have standing to sue in their own right," and when "the interests it seeks to protect are germane to the organization's purpose." *United Food and Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S.

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[8] We dismiss the Federal Defendants' appeal of the district court's grant of the preliminary injunction as moot. *See Planned Parenthood Ariz. Inc. v. Betlach*, 727 F.3d 960, 963 (9th Cir. 2013) ("The district court's entry of final judgment and a permanent injunction moots Arizona's appeal of the preliminary injunction."); *see also Planned Parenthood of Cent. & N. Ariz. v. Arizona*, 718 F.2d 938, 949-50 (9th Cir. 1983); *SEC v. Mount Vernon Mem'l Park*, 664 F.2d 1358, 1361-62 (9th Cir. 1982).

[9] The Federal Defendants do not challenge Sierra Club's Article III standing in these appeals. However, "the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009).

544, 553 (1996) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 434 U.S. 333, 343 (1977)).[10] An organization has standing to sue on its own behalf when it suffers "both a diversion of its resources and a frustration of its mission." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (quoting *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)). It must "show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *Id.* At summary judgment, a plaintiff cannot rest on mere allegations, but "must set forth by affidavit or other evidence specific facts." *Clapper v. Amnesty Int'l. USA*, 568 U.S. 398, 412 (2013) (quotations and citation omitted). However, these specific facts "for purposes of the summary judgment motion will be taken to be true." *Lujan*, 504 U.S. at 561.

Here, Sierra Club and SBCC have alleged facts that support their standing to sue on behalf of their members. Sierra Club has alleged that the actions of the Federal Defendants will cause particularized and concrete injuries to its members, and SBCC has shown that it has suffered a concrete injury itself.

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[10] *United Food and Commercial Workers* held that those two requirements were based on constitutional demands, but held that the third prong of *Hunt*'s test for organizational standing, whether the claim or relief requested requires the participation of individual members in the lawsuit, was prudential only. *Id.* at 555. In any case, because the claim and relief requested here do not require the participation of Sierra Club or SBCC members, even this prudential consideration supports plaintiffs' standing here.

Sierra Club has more than 400,000 members in California, over 9,700 of whom belong to its San Diego Chapter. Sierra Club's Grand Canyon Chapter, which covers the State of Arizona, has more than 16,000 members. Sierra Club's Rio Grande Chapter includes over 10,000 members in New Mexico and West Texas. These members visit border areas such as the Tijuana Estuary (California), the Otay Mountain Wilderness (California), the Jacumba Wilderness Area (California), the Sonoran Desert (Arizona), Cabeza Prieta National Wildlife Refuge (Arizona), and the Chihuahan Desert (New Mexico).

Sierra Club's thousands of members live near and frequently visit these areas along the U.S.-Mexico border for hiking, birdwatching, photography, and other professional, scientific, recreational, and aesthetic activities. They obtain recreational, professional, scientific, educational, and aesthetic benefits from their activities in these areas, and from the wildlife dependent upon the habitat in these areas. The construction of a border wall and related infrastructure will acutely injure these interests because DHS is proceeding with border wall construction without ensuring compliance with any federal or state environmental regulations designed to protect these interests.

Sierra Club has adequately set forth facts and other evidence by declaration, which taken as true, support these allegations for the purpose of Article III standing.

Sierra Club members Orson Bevins and Albert Del Val have alleged that they will be injured by construction of Yuma Project 1. Bevins avers that he visits the area several times per year and is concerned that the wall "would disrupt the desert views and inhibit [him]

from fully appreciating [the] area," and that the additional presence of U.S. Customs and Border Protection agents "would further diminish[] [his] enjoyment of these areas" and "deter[] [him] from further exploring certain areas." Del Val worries that "construction and maintenance of the border wall will limit or entirely cut off [his] access to [] fishing spots" along the border, where he has fished for more than 50 years.

Sierra Club member Elizabeth Walsh has alleged that construction of El Paso Sector Project 1 would injure her because "[a]s part of [her] professional and academic work [she] routinely visit[s] and stud[ies]" the area where the project would be built to "supervise several ongoing and long-term biology studies in this area with graduate students on the aquatic diversity of ephemeral wetlands known locally as playas." Among other things, she is worried that border wall construction would "negatively impact the scientific playa studies . . . because a wall could impede vital natural drainage patterns for the playas."

Sierra Club member Carmina Ramirez has alleged that she "will be harmed culturally and aesthetically" if El Centro Sector Project 1 is built because she has spent her entire life in the area surrounding the U.S.-Mexico Border, including the El Centro Sector, and she believes that border wall construction would "drastically impact [her] ability to enjoy the local natural environment," because she would "see a high border wall instead of [the] beautiful landscape," and "drastically impact [her] cultural identity by fragmenting [her] community." Construction will make her "less likely to hike Mount Signal and enjoy outdoor recreational activities; and when [she

does] undertake those activities, [her] enjoyment of them will be irreparably diminished."

Sierra Club member Ralph Hudson "recreat[es] in the wilderness areas along the U.S.-Mexico border" in the area referred to as the Tucson Sector and has done so for 20 years. He uses the land "to hike, take photos, and explore the natural history." He is "extremely concerned that Tucson Projects 1 and 2 will greatly detract from [his] ability to enjoy hiking, camping, and photographing these landscapes."

Sierra Club member Margaret Case lives a few miles from the border, and she asserts that she will be injured by the construction of Tucson Sector Project 3. "With each increase and escalation in enforcement along the border, [her] and other border residents' quality of life decreases" and "[t]he proposed wall will . . . extend an already unwanted eyesore in the middle of a landscape whose beauty [she] treasure[s], irrevocably harming [her] enjoyment of that landscape."

Additionally, the interests of Sierra Club's members in this lawsuit are germane to the organization's purpose. Sierra Club is a national organization "dedicated to exploring, enjoying, and protecting the wild places of the earth; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives." Sierra Club's organizational purpose is at the heart of this lawsuit, and it easily satisfies this secondary requirement.

SBCC has also alleged facts that support that it has standing to sue on behalf of itself and its member organ-

izations. SBCC alleged that since the Federal Defendants proposed border wall construction, it has had to "mobilize[] its staff and its affiliates to monitor and respond to the diversion of funds and the construction caused by and accompanying the national emergency declaration." These "activities have consumed the majority of SBCC staff's time, thereby interfering with SBCC's core advocacy regarding border militarization, Border Patrol law-enforcement activities, and immigration reform," but it has had no choice because it "must take these actions in furtherance of its mission to protect and improve the quality of life in border communities."

SBCC Director Vicki Gaubeca confirms these allegations. She has stated that a "border wall, as a physical structure and symbol, is contrary to the goals of SBCC and the needs of border communities." She avers that the "emergency declaration and the threat and reality of construction have caused [SBCC] to reduce the time [it] spend[s] on [its] core projects, including public education about border policies, community engagement on local issues, and affirmative advocacy for Border Patrol accountability and immigration reform." SBCC and its member organizations have instead "been forced to devote substantial time to analyze and respond to the declaration and the promise to build border walls across the southern border" "at a substantial monetary and opportunity cost."

These allegations are sufficient to establish that, if funds are transferred to the border wall construction projects, Sierra Club members and SBCC will each suffer injuries in fact.

Sierra Club and SBCC have also shown that such injuries are "fairly traceable to the challenged action of the [Federal Defendants], and [are] not the result of the independent action of some third party not before the court." *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). It makes no difference that the border wall construction is the product of other statutory provisions, such as Section 284, in addition to Section 8005. "Causation may be found even if there are multiple links in the chain connecting the defendant's unlawful conduct to the plaintiff's injury, and there's no requirement that the defendant's conduct comprise the last link in the chain." *Id.* The Federal Defendants could not build the border wall projects challenged by Sierra Club without invoking Section 8005's transfer authority—without this authority, there was no money to build these portions of the border wall; therefore, construction is fairly traceable to the Section 8005 transfers.

The injury to Sierra Club members and SBCC is likely to be redressed by a favorable judicial decision. A judicial order prohibiting the Federal Defendants from spending the money transferred pursuant to Section 8005 would stop construction, thereby preventing the harm alleged by Plaintiffs. Thus, Sierra Club and SBCC have established that their members satisfy the demands of Article III standing to challenge the Federal Defendants' actions.

## IV

First, we consider whether Section 8005 or any constitutional provision authorized DoD to transfer the funds at issue. We hold they did not.

A

Section 8005 provides DoD with limited authority to transfer funds between different appropriations accounts, but it provides no such authority "unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." In the opinion filed today in the companion case, *State of California, et al. v. Trump, et al.*, Nos. 19-16299 and 19-16336, slip op. at 37 (9th Cir. filed June 26, 2020), we hold that Section 8005 did not authorize the transfer of funds at issue here because "the border wall was not an unforeseen military requirement," and "funding for the wall had been denied by Congress." We reaffirm this holding here and conclude that Section 8005 did not authorize the transfer of funds.

B

The "straightforward and explicit command" of the Appropriations Clause[11] "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quotation and citation omitted). The Clause is "a bulwark of the Constitution's separation of powers." *U.S. Dep't. Of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012); *see also United States v. McIntosh*, 833 F.3d 1163, 1174-75 (9th Cir. 2016). It "assure[s] that public funds will be spent according to the letter of the

[11] "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . . " U.S. Const. art. I, § 9, cl. 7.

difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *Office of Pers. Mgmt.*, 496 U.S. at 427-28. Without it, "the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure." *Id.* at 427 (quoting Joseph Story, 2 Commentaries on the Constitution of the United States § 1348 (3d ed. 1858)).

Accordingly, "[t]he United States Constitution exclusively grants the power of the purse to Congress, not the President." *City and Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018) (citing U.S. Const. art. I, § 9, cl. 7). "[W]hen it comes to spending, the President has none of 'his own constitutional powers' to 'rely' upon." *Id.* at 1233-34 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

Here, the Executive Branch lacked independent constitutional authority to authorize the transfer of funds. These funds were appropriated for other purposes, and the transfer amounted to "drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause." *McIntosh*, 833 F.3d at 1175.

Therefore, the transfer of funds here was unlawful.

V

All that is left for us to decide, then, is whether Sierra Club is a proper party to challenge the Section 8005 transfers. Sierra Club asserts that it has a number of viable

causes of action—including a constitutional cause of action and an *ultra vires* cause of action—while the Federal Defendants assert that Sierra Club has none.

The Supreme Court stay order suggests that Sierra Club may not be a proper challenger here. *See Sierra Club*, 140 S. Ct. at 1. We heed the words of the Court, and carefully analyze Sierra Club's arguments. Having done so, we conclude that Sierra Club has both a constitutional and an *ultra vires* cause of action.

In reaching this result, we realize that this is a rare case in which the "judiciary may . . . have to intervene in determining where the authority lies as between the democratic forces in our scheme of government." *Youngstown*, 343 U.S. at 597 (1952) (Frankfurter, J. concurring). In doing so, we remain "wary and humble," *id.*, for "[i]t is not a pleasant judicial duty to find that the President has exceeded his powers," *id.* at 614. But where, as here, "Congress could not more clearly and emphatically have withheld [the] authority," *id.* at 602, exercised by DoD, "with full consciousness of what it was doing and in the light of much recent history," *id.*, and Sierra Club satisfies the rigors of Article III standing, our "obligation to hear and decide [this] case is virtually unflagging," *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quotations and citation omitted). "All we can do is, to exercise our best judgment, and conscientiously to perform our duty." *Cohens v. State of Virginia*, 19 U.S. 264, 404 (1821).

A

First, we consider whether Sierra Club has a constitutional cause of action to challenge the Federal Defendants' transfer. We hold that it does.

Certain provisions of the Constitution give rise to equitable causes of action. Such causes of action are most plainly available with respect to provisions conferring individual rights, such as the Establishment Clause or the Free Exercise Clause. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018); *Flast v. Cohen*, 392 U.S. 83 (1968). But certain structural provisions give rise to causes of action as well. *See Nat. Labor Relations. Bd. v. Noel Canning*, 573 U.S. 513, 556-57 (2014) (cause of action based on the Recess Appointments Clause); *Bond v. United States*, 564 U.S. 211, 225-26 (2011) (cause of action based on structural principles of federalism); *Clinton v. City of New York*, 524 U.S. 417, 434-36 (1998) (cause of action based on the Presentment Clause); *INS v. Chadha*, 462 U.S. 919, 943-44 (1983) (cause of action based on the constitutional requirement of bicameralism and presentment); *McIntosh*, 833 F.3d at 1174-75 (cause of action based on the Appropriations Clause).

In *Bond*, the Supreme Court articulated why certain structural constitutional provisions give rise to causes of action. The Court considered "whether a person indicted for violating a federal statute has standing to challenge its validity on the grounds that, by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States." 564 U.S. at 214. The Court held that "[j]ust as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balances constraints, so too may a litigant, in a proper case, challenge

a law as enacted in contravention of constitutional principles of federalism." *Id.* at 223-24. It reasoned that the challenge was permissible because "structural principles secured by the separation of powers protect the individual as well," and "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance . . . when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Id.* at 222. In other words, an individual who otherwise meets the requirements of Article III standing may challenge government action that violates structural constitutional provisions intended to protect individual liberties.

We have held that the Appropriations Clause contains such a cause of action. *See McIntosh*, 833 F.3d at 1173-74. In *McIntosh*, defendants moved to enjoin their prosecutions for federal marijuana offenses on the grounds that a congressional appropriations rider prohibited the Department of Justice from spending federal funds on such prosecutions. *Id.* at 1168. We held that "[the Appropriations Clause] constitutes a separation-of-powers limitation that Appellants can invoke to challenge their prosecutions." *Id.* at 1175. The opinion reasoned that so long as a litigant satisfies the Article III standing requirements, he or she can challenge Appropriations Clause violations because "[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for . . . the courts to enforce them when enforcement is sought." *Id.* at 1172 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978)). In *McIntosh*, we also reaffirmed the Supreme Court's statement in *Bond* that "both federalism and separation-of-powers constraints in the Constitution serve to protect individual liberty, and a litigant

in a proper case can invoke such constraints '[w]hen government acts in excess of its lawful powers.'" *Id.* at 1174 (quoting *Bond*, 564 U.S. at 222).[12]

The cause of action available to the plaintiffs in *McIntosh* is available to Sierra Club here. Congress decided the order of priorities for border security. In doing so, it chose to allocate $1.375 billion to fund the construction of pedestrian fencing in Texas. *See* 2019 CAA § 230(a)(1). It declined to provide additional funding for projects in other areas, and it declined to provide the full $5.7 billion sought by the President: it is for the courts to enforce Congress's priorities, and we do so here. Where plaintiffs, like Sierra Club, establish that they satisfy the requirements of Article III standing, they may invoke separation-of-powers constraints, like the Appropriations Clause, to challenge agency spending in excess of its delegated authority.

The Federal Defendants argue that *Dalton v. Specter*, 511 U.S. 462 (1994) forecloses this result. They assert that *Dalton*'s proposition that not "every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution," means that when there is a claim that an

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[12] The Federal Defendants incorrectly characterize *McIntosh*'s constitutional holding as dicta. The *McIntosh* Court discussed the availability of a constitutional cause of action, analogizing to *Bond* and *Canning*, and stating that "Appellants have standing to invoke separation-of-powers provisions of the Constitution to challenge their criminal convictions." 833 F.3d at 1174. Because the Court "confront[ed] an issue germane to the eventual resolution of the case," and "resolve[d] it after reasoned consideration in a published opinion," *McIntosh*'s constitutional holding is "the law of the circuit." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) (quotations and citation omitted).

Executive Branch official acted in excess of his statutory authority, there is no constitutional violation. *Id.* at 472. But *Dalton* does not hold that *every* action in excess of statutory authority is *not* a constitutional violation.[13] Rather, *Dalton* suggests that some actions in excess of statutory authority may be constitutional violations, while others may not. Specifically, *Dalton* suggests that a constitutional violation may occur when an officer violates an express prohibition of the Constitution. *Id.* (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396-97 (1971) for the distinction between "actions contrary to [a] constitutional prohibition," and those "merely said to be in excess of the authority delegated . . . by the Congress"). The Appropriations Clause contains such a constitutional prohibition, declaring that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . . " U.S. Const. art. 1, § 9, cl. 7. Under *Dalton*, then, violations of the

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[13] Notably, the plaintiffs in *Dalton* never alleged that the President violated the Constitution and sought review "exclusively under the [Administrative Procedure Act ("APA")]." *Id.* at 471. Only the Court of Appeals "sought to determine whether non-APA review, based on either common law or constitutional principles, was available." *Id.* The Supreme Court did not consider whether the President had violated a specific constitutional prohibition; instead, it took issue only with the Court of Appeals' contention that "whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." *Id.* The Supreme Court's objection to this conclusion is unsurprising in the context of the Defense Base Closure and Realignment Act of 1990 at issue in *Dalton*. The Constitution divides authority with respect to the military between Congress and the President. Here, in contrast, the Constitution delegates exclusively to Congress the power of the purse.

Appropriations Clause may give rise to viable causes of action.

*Dalton*'s discussion of *Youngstown* only underscores this point. The Court determined that *Youngstown* could not stand for the proposition "that an action taken by the President in excess of his statutory authority *necessarily* violates the Constitution" because in *Youngstown* "no statutory authority was claimed." *Dalton*, 511 U.S. at 473 (emphasis added). The Court concluded only that "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review." *Id.* Thus, *Dalton* and its discussion of *Youngstown* do not address situations in which the President exceeds his or her statutory authority, and in doing so, *also* violates a specific constitutional prohibition, as is the case here.

Neither does *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), require an opposite result here. In *Armstrong*, the Supreme Court rejected the argument that the Supremacy Clause created a private right of action. *Id.* at 325-27. But the Supremacy Clause is not the Appropriations Clause: while the Supremacy Clause "only declares a truth, which flows immediately and necessarily from the institution of a Federal Government," *id.* at 325 (citing The Federalist No. 33, p. 207 (J. Cooke ed. 1961)), the Appropriations Clause contains an explicit prohibition, which protects individual liberty, because "[a]ny exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury," *McIntosh*, 833 F.3d at 1175. "The individual loses liberty in a real

sense if [the appropriations power] is not subject to traditional constitutional constraints." *Clinton v. City of New York*, 524 U.S. at 451 (Kennedy, J., concurring). Thus, while it might be "strange" "to give a clause that makes federal law supreme a reading that *limits* Congress's power to enforce that law," *Armstrong*, 575 U.S. at 326, it is entirely sensible to give a clause that restricts the power of the federal government as a whole a reading that safeguards individual liberty.

Therefore, because the Federal Defendants not only exceeded their delegated authority, but also violated an express constitutional prohibition designed to protect individual liberties, we hold that Sierra Club has a constitutional cause of action here.

B

Second, we consider whether Sierra Club has an equitable *ultra vires* cause of action to challenge the Federal Defendants' transfer. We hold that it does.

Whether Sierra Club can assert an equitable *ultra vires* cause of action turns on "whether the relief [it] request[s] . . . was traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). Equitable actions to enjoin *ultra vires* official conduct do not depend upon the availability of a statutory cause of action; instead, they seek a "judge-made remedy" for injuries stemming from unauthorized government conduct, and they rest on the historic availability of equitable review. *Armstrong*, 575 U.S. at 327. "The substantive prerequisites for obtaining an equitable remedy . . . depend on traditional principles of equity jurisdiction."

*Grupo Mexicano*, 527 U.S. at 318-19 (quotations and citation omitted).

The relief Sierra Club requests has been traditionally available. "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 575 U.S. at 327 (citing Jaffe & Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. Rev. 345 (1956)); *see also Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958) ("Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers."). Such causes of action have been traditionally available in American courts: "[w]hen Congress limits its delegation of power, courts infer (unless the statute clearly directs otherwise) that Congress expects this limitation to be judicially enforced." *Dart v. United States*, 848 F.2d 217, 223 (D.C. Cir. 1988).

The passage of the APA has not altered this presumption. "Prior to the APA's enactment . . . courts had recognized the right of judicial review of agency actions that exceeded authority," and "[n]othing in the subsequent enactment of the APA altered [that] doctrine of review," to "repeal the review of *ultra vires* actions." *Id.* at 224. "When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." *Id.*

That Sierra Club has a cause of action to enjoin the unconstitutional actions at issue here is best illustrated by *Youngstown*. There, Congress passed numerous statutes authorizing the President to take personal and

real property under specific conditions. 343 U.S. at 585-86. During the Korean War, however, President Truman signed an executive order seizing most of the nation's steel mills, even though the conditions of the statutes had not been satisfied as a matter of fact. *Id.* at 582, 586. It fell to the Supreme Court to determine whether the President had constitutional authority to seize the steel mills—it held he did not and affirmed the district court injunction. *Id.* at 588-589. The Court never questioned that it had the authority to provide the requested relief.

Such is the case here. Section 8005 authorizes DoD to transfer funds under certain conditions; however, as explained previously, DoD failed to satisfy those conditions. Likewise, as explained previously, the Executive Branch lacks independent constitutional authority to fund border wall construction. If an equitable *ultra vires* action was available to the plaintiffs in *Youngstown*, it surely must be available to Sierra Club here.

A number of D.C. Circuit cases reaffirm that review is ordinarily available when an agency exceeds its delegation of authority. In *Chamber of Commerce of the United States v. Reich*, the D.C. Circuit considered whether the Chamber of Commerce had a cause of action to challenge an executive order barring the federal government from contracting with employers who hire permanent replacements during a lawful strike. 74 F.3d 1322, 1325-26 (D.C. Cir. 1996). The government argued that the Chamber of Commerce lacked a statutory cause of action and that APA review was not available because the challenge was directed at the President's statutory authority to issue the executive order, and the President is not an agency within the meaning

of the APA. *See id.* The court agreed that APA review was not available, but it held that non-statutory review remained available. *See id.* at 1327. The court held that "[i]f a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision, he may still be able to institute a non-statutory review action." *Id.* The court reasoned in part that "[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Id.* (quoting *Stark v. Wickard*, 321 U.S. 288, 310 (1944)).

Likewise, in *Dart v. United States*, the D.C. Circuit considered whether the plaintiff could challenge the Secretary of Commerce's decision to impose civil sanctions for a violation of the Export Administration Act ("EAA"). *See* 848 F.2d at 219. The court held that even though the EAA expressly limited judicial review, the court retained the ability to review whether the Secretary exceeded the authority delegated by the statute. *See id.* at 223-34. It explained that "the presumption of judicial review is particularly strong where an agency is alleged to have acted beyond its authority." *Id.* at 223. It ultimately concluded that the Secretary had done just that and invalidated the sanctions he imposed.

These cases support our holding here that Sierra Club has an equitable *ultra vires* cause of action to challenge DoD's transfer of funds. Where it is alleged that DoD has exceeded the statutory authority delegated by Section 8005, plaintiffs like Sierra Club can challenge this agency action.

The Federal Defendants contend that an equitable cause of action is not available to Sierra Club here because equitable remedies are available only when they have been "traditionally available in the *specific circumstances presented*," and that the remedies sought here have not been traditionally available in the specific circumstances presented by this case.

The Federal Defendants cite *Grupo Mexicano* in support of this argument, but that case provides little support for their position. In *Grupo Mexicano*, the Court considered whether a district court had the power to issue a preliminary injunction to prevent the transfer of assets in which no lien or equitable interest was claimed. *See* 527 U.S. at 318. The Court concluded it did not. *See id.* at 333. It held that a district court cannot grant relief that "has never been available before —and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent," particularly when "there is absolutely nothing new about debtors' trying to avoid paying their debts, or seeking to favor some creditors over others." *Id.* at 322; *see id.* at 333.

Here, however, the plaintiffs request a type of relief that is consistent with our longstanding precedent. Indeed, as explained above, the Supreme Court has actually granted injunctive relief in circumstances very similar to these. *See*, *e.g.*, *Youngstown*, 343 U.S. at 589. Further, unlike attempts to avoid paying debts, instances of Executive Branch *ultra vires* action are, fortunately, relatively rare, and unlikely to occur in contexts likely to repeat themselves precisely. Thus, the

justifications for limiting equitable relief in *Grupo Mexicano* are not present here, and courts are able to grant the relief sought by Sierra Club.

We therefore hold that Sierra Club may assert an equitable *ultra vires* cause of action to challenge DoD's transfer of funds.

C

The Federal Defendants raise a number of additional arguments. We address them here.

First, the Federal Defendants assert that Sierra Club's challenge must be construed as an APA claim, rather than as a constitutional or *ultra vires* cause of action. But neither of the two cases cited by the Federal Defendants compel this conclusion. The Federal Defendants cite *Hoefler v. Babbitt*, 139 F.3d 726, 728 (9th Cir. 1998) for the proposition that "[t]he APA is the sole means for challenging the legality of federal agency action," but there, we did not consider whether plaintiffs had a constitutional or *ultra vires* cause of action; rather, we considered whether the action was properly considered under the APA or the Quiet Title Act. *See id.* at 728-29. We ultimately held that the former was appropriate. *See id.* at 729. To extrapolate from a general statement made in this context, as the Federal Defendants do here, goes too far.

Likewise, in *Bennett v. Spear*, 520 U.S. 154, 175 (1997), the Court did not consider whether plaintiffs had a constitutional cause of action; rather, the Court considered whether the citizen-suit provision of the Endangered Species Act ("ESA") provided an exclusive statutory remedy, or whether a cause of action was also available under the APA. The Court ultimately determined that

"[n]othing in the ESA's citizen-suit provision expressly precludes review under the APA, nor do we detect anything in the statutory scheme suggesting a purpose to do so." *Id.* If anything, this case underscores that the APA is not to be construed as an exclusive remedy. Thus, the APA does not displace all constitutional and equitable causes of action.

Second, the Federal Defendants assert that the zone of interests test must apply to any challenge brought by Sierra Club, and that Section 8005 prescribes the relevant zone of interests. We reject this argument.

The zone of interests test limits which plaintiffs can invoke statutorily created causes of action. Although earlier cases, such as *Association of Data Processing Services Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), suggested that the test applied to constitutional causes of action, the Supreme Court's most recent zone of interests case, *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), clarifies that the test applies only to statutory causes of action and causes of action under the APA. *See id.* at 129 ("[T]he modern 'zone of interests' formulation originated . . . as a limitation on the cause of action for judicial review conferred by the [APA]," but "[w]e have since made clear, however, that it applies to *all statutorily created causes of action*." (emphasis added)).

Common sense supports this approach. As Judge Bork explained in *Haitian Refugee Center v. Gracey*,

> Appellants need not, however, show that their interests fall within the zones of interests of the constitutional and statutory powers invoked by the President in order to establish their standing to challenge the

> interdiction program as *ultra vires*. Otherwise, a meritorious litigant, injured by *ultra vires* action, would seldom have standing to sue *since the litigant's interest normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest*. For example, were a case like *Youngstown*, to arise today, the steel mill owners would not be required to show that their interests fell within the zone of interests of the President's war powers in order to establish their standing to challenge the seizure of their mills as beyond the scope of those powers.

809 F.2d 794, 811 n.14 (D.C. Cir. 1987) (emphasis added). We agree with Judge Bork.[14] It would make little sense to require Sierra Club to demonstrate that it falls within the zone of interests of Section 8005. Congress may not have contemplated the environmental advocacy group when it included Section 8005 in the defense budget, but nevertheless, Sierra Club has asserted a legally cognizable injury. The fact Congress did not have Sierra Club

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[14] While the dissent asserts that we rely on the wrong portion of Judge Bork's opinion, we disagree. Section 8005 cannot merely be read as a statutory provision limiting the authority conferred when it is simultaneously a statutory power invoked by the President. In any case, as explained below, the relevant limitation here is not the inapplicable statutory power invoked by the Executive—Section 8005—but instead the restriction on unlawful action—the Appropriations Clause. *See also Ctr. for Biodiversity v. Trump*, No. 1:19-cv-00408, 2020 WL 1643657 at *25 (D.D.C. Apr. 2, 2020) (quoting the same language from *Haitian Refugee Center* and holding that plaintiffs "thus need not satisfy the zone of interests test for their *ultra vires* claims.").

as a particular plaintiff in mind when it authorized Section 8005's transfer authority does not make its injury less real, nor DoD's action more lawful.

If the zone of interests test applies at all, the Appropriations Clause of the Constitution defines the zone of interests because it is the "particular provision of law upon which [Sierra Club] relies" in seeking relief. *Bennett*, 520 U.S. at 175-76. Section 8005 is relevant only because, to the extent it applies, it authorizes executive action that otherwise would be unconstitutional or *ultra vires*. That a statute is relevant does not transform a constitutional claim into a statutory one. Sierra Club's cause of action stems from the Federal Defendants' violation of the Appropriations Clause because it seeks to enforce the limits mandated by the clause.

To the extent the zone of interests test ever applies to constitutional causes of action, it asks only whether a plaintiff is "arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977) (quoting *Data Processing*, 397 U.S. at 153). This renders the test nearly superfluous: so long as a litigant is asserting an injury in fact to his or her constitutional rights, he has a cause of action. *See* ERWIN CHEMERINKSY, FEDERAL JURISDICTION 112 (7th ed. 2016) (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 446 (3d ed. 2000)).

Applying that generous formulation of the test here, Sierra Club falls within the Appropriations Clause's zone of interests. Here, Sierra Club is an organization within the United States that is protected by the Constitution. The Appropriations Clause is a "bulwark of the Constitution's separation of powers," *U.S. Dep't. of Navy*

*v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012), and the "separation of powers can serve to safeguard individual liberty," *McIntosh*, 833 F.3d at 1174 (quoting *Noel Canning*, 573 U.S. at 525). The unconstitutional transfer of funds here infringed upon Sierra Club's members' liberty interests, harming their environmental, aesthetic, and recreational interests. Thus, Sierra Club falls within the Clause's zone of interests, and Sierra Club has a cause of action to challenge the transfers.

VI

Finally, we consider whether the district court abused its discretion in granting Sierra Club a permanent injunction enjoining the Federal Defendants from spending the funds at issue. We hold it did not, and we affirm the district court injunction.

A permanent injunction is appropriate when: (1) a plaintiff will suffer an irreparable injury absent injunction, (2) remedies available at law are inadequate,[15] (3) the balance of hardships between the parties supports an equitable remedy, and (4) the public interest would not be disserved. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). When the government is a party to the case, the court should consider the balance of hardships and public interests factors together. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Although injunctive relief "does not follow from success on the merits as a matter of course," *Winter v. NRDC, Inc.*, 555 U.S. 7, 32 (2008), we review a district

[15] The parties do not contest this factor and so we do not address it.

court's decision to grant a permanent injunction for abuse of discretion, *see eBay*, 547 U.S. at 391.

The district court did not abuse its discretion in weighing these factors and determining that injunctive relief was warranted. First, we agree with the district court that Sierra Club would suffer irreparable harm to its recreational and aesthetic interests absent injunction. An organization can demonstrate irreparable harm by showing that the challenged action will injure its members' enjoyment of public lands. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding irreparable harm when the Forest Service's proposed project would harm the Alliance's members' ability to "view, experience, and utilize" national forest areas in an undisturbed state). We conclude that Sierra Club sufficiently demonstrated that the Federal Defendants' proposed use of funds would harm its members ability to recreate and enjoy public lands along the border such that it will suffer irreparable harm absent injunction.

The Federal Defendants' arguments to the contrary are unpersuasive. The Federal Defendants submit that Sierra Club will not be irreparably harmed because its members have plenty of other space to enjoy. We have already rejected the essence of the Federal Defendants' argument. *See All. for the Wild Rockies*, 632 F.3d at 1135 (concluding that the Forest Service's argument that plaintiffs can "view, experience, and utilize other areas of the forest" "proves too much," because its logical extension is that a "plaintiff can never suffer irreparable injury resulting from environmental harm in a forest as long as there are other areas of the forest that are not harmed" (internal citations omitted)).

Moreover, we agree with the district court that the balance of equities and the public interest favor injunctive relief here. The public has an important interest in "ensuring that statutes enacted by their representatives are not imperiled by executive fiat." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018) (quotations and citation omitted). By passing the CAA, Congress made a calculated choice to fund only one segment of border barrier. The public interest favors enforcing this decision. In contrast, the Federal Defendants cannot suffer harm "from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (citing *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983) ("[T]he INS cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations.")). We agree with the district court that the Federal Defendants' position essentially "boils down to an argument that the Court should not enjoin conduct found to be unlawful because the ends justify the means." No matter how great the collateral benefits of building a border wall may be, the transfer of funds for construction remains unlawful. The equitable maxim "he who comes in equity must come with clean hands" would be turned on its head if unlawful conduct by one party precluded a court from granting equitable relief to the opposing party. The district court properly concluded that the balance of equities and the public interest favor injunctive relief.

The Federal Defendants' additional arguments do not compel a different result. First, the Supreme Court's decision in *Winter* does not require us to vacate the injunction. In *Winter*, the Supreme Court reversed a preliminary injunction enjoining the Navy from using a

particular type of sonar that was essential to its training exercises because it violated NEPA and a number of federal environmental laws. 555 U.S. at 16-17. Key distinctions between this case and *Winter* render it inapposite. There, plaintiffs' "ultimate legal claim [was] that the Navy must prepare an [environmental impact statement], not that it must cease sonar training" because the use of the sonar had otherwise been sanctioned by law. *Id.* at 32. Having determined that the "continuation of the exercises . . . was 'essential to national security,'" *id.* at 18, the President had used his statutory authority to "exempt from compliance those elements of the Federal agency activity that [were] found by the Federal court to be inconsistent with an approved State program," 16 U.S.C. § 1456(c)(1)(B). In addition, the Council on Environmental Quality ("CEQ") had authorized the Navy to implement alternative arrangements to NEPA compliance that would allow the Navy to conduct its training exercises under mitigation procedures, but it imposed additional notice, research, and reporting requirements. *Winter*, 555 U.S. at 18-19.

By contrast, here, Sierra Club's ultimate legal claim is that DoD cannot legally use Section 8005 to fund construction of the border wall, and moreover, that no such exemption applies. If anything, Section 8005 itself is a defense against the Executive Branch's unconstitutional transfer of funds; however, as discussed previously, it offers no such legal cover here. Therefore, while the use of the sonar was not unlawful at the time the Supreme Court vacated the injunction in *Winter*, DoD's transfer of funds here is. While the injunction here "merely ends an unlawful practice," *Rodriguez*, 715 F.3d at 1145, the injunction in *Winter* enjoined conduct that had been sanctioned by law, *see Winter*, 555 U.S. at 32.

Moreover, the public interest at issue in *Winter* more clearly favored vacating the injunction. "Antisubmarine warfare [was] [] the Pacific Fleet's top war-fighting priority." *Winter*, 555 U.S. at 12. Accordingly, the use of MFA sonar during training missions was deemed "mission-critical," *id.* at 14, because it is not only the "most effective technology," *id.* at 13, but "the only proven method of identifying submerged diesel-electric submarines operating on battery power," *id.* at 14. On the other side of the equation, "the most serious possible injury [to plaintiffs] would be harm to an unknown number of marine mammals." *Id.* at 26. The Court reasonably concluded that the "balance of equities and consideration of the overall public interest . . . tip strongly in favor of the Navy." *Id.*

The balance of interests does not so starkly favor the Federal Defendants here. Although they allege that the injunction "frustrates the government's ability to stop the flow of drugs across the border," unlike the government in *Winter*, the Federal Defendants have failed to demonstrate that construction of the border wall would serve this purpose, or alternatively, that an injunction would inhibit this purpose. The Federal Defendants cite drug trafficking statistics, but fail to address how the construction of additional physical barriers would further the interdiction of drugs. The Executive Branch's failure to show, in concrete terms, that the public interest favors a border wall is particularly significant given that Congress determined fencing to be a lower budgetary priority and the Department of Justice's own data

points to a contrary conclusion.[16] The district court properly accorded this interest little weight.[17] Therefore, we hold that the district court did not abuse its discretion, and we affirm the grant of the permanent injunction.

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[16] According to the U.S. Department of Justice's Drug Enforcement Administration's 2018 National Drug Threat Assessment Report, the "most common method employed by [Mexican Transnational Criminal Organizations] involves transporting illicit drugs through U.S. [ports of entry] in passenger vehicles with concealed compartments or commingled with legitimate goods on tractor trailers." *2018 National Drug Threat Assessment*, U.S. Dep't of Just. Drug Enforcement Admin. at 99 (2018). Opioids like heroin and fentanyl are most commonly smuggled across the southwest border into the U.S. through legal ports of entry. *Id.* at 19-20, 33; *see also* Joe Ward & Anjali Singhvi, *Trump Claims There is a Crisis at the Border. What's the Reality?*, NEW YORK TIMES (Jan. 11, 2019) (analyzing U.S. Customs and Border Patrol data and finding that "[m]ost drugs are seized at ports of entry, not along the open border").

[17] We are likewise unconvinced by Defendants argument, citing *Maryland v. King*, 567 U.S. 1301 (2012), that "there is 'irreparable harm' whenever a government cannot enforce its own laws." The Ninth Circuit has recognized that there is "some authority" for the idea that "a state may suffer an abstract form of harm whenever one of its acts is enjoined," but, "to the extent that is true . . . it is not dispositive of the balance of harms analysis." *Latta v. Otter*, 771 F.3d 496, 500 (9th Cir. 2014) (quoting *Indep. Living Ctr. of So. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009), *vacated and remanded on other grounds*, 132 S. Ct. 1204 (2012) (alterations adopted)); *see also id.* at 500 n.1 (noting that "[i]ndividual justices, in orders issued from chambers, have expressed the view that a state suffers irreparable injury when one of its laws is enjoined, [but] [n]o opinion for the Court adopts this view" (citations omitted)).

VII

In sum, we affirm the district court. We conclude that Sierra Club and SBCC have Article III standing to file their claims, that the Federal Defendants violated Section 8005 in transferring DoD appropriations to fund the El Paso, Yuma, El Centro, and Tucson Sectors of the proposed border wall, and that Sierra Club and SBCC have a constitutional cause of action under the Appropriations Clause and an *ultra vires* cause of action to challenge the Section 8005 transfers. We also decline to reverse the district court's decision to impose a permanent injunction. Given our resolution of this case founded upon the violations of Section 8005, we need not—and do not—reach the merits of any other theory asserted by Sierra Club, nor reach any other issues presented by the parties.

**AFFIRMED.**

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COLLINS, Circuit Judge, dissenting:

This case involves similar claims to those presented in *California v. Trump*, Nos. 19-16299 & 19-16336, __ F.3d __ (9th Cir. 2020). In each case, a distinct group of plaintiffs brought suit challenging the Acting Secretary of Defense's invocation of § 8005 and § 9002 of the Department of Defense Appropriations Act, 2019 ("DoD Appropriations Act"), Pub. L. No. 115-245, Div. A, 132 Stat. 2981, 2999, 3042 (2018), to transfer $2.5 billion in funds that Congress had appropriated for other purposes into a different Department of Defense ("DoD") appropriation that could then be used by DoD for construction of border fencing and accompanying roads and

lighting. In *California v. Trump*, the relevant plaintiffs are the States of California and New Mexico, who challenged two such construction projects, and here the plaintiffs are the Sierra Club and the Southern Border Communities Coalition ("SBCC") (collectively, the "Organizations"), who challenge six projects. The district court granted declaratory relief to both sets of plaintiffs invalidating the transfers, but it granted permanent injunctive relief only to the Organizations. The majority concludes that the Organizations have Article III standing; that they have a cause of action to challenge the transfers under the Appropriations Clause of the Constitution as well as a cause of action under an equitable ultra vires theory; that the transfers were unlawful; and that the district court properly determined that the Organizations are entitled to declaratory and injunctive relief. I agree that at least the Sierra Club has established Article III standing, but in my view the Organizations lack any cause of action to challenge the transfers. And even assuming that they had a cause of action, I conclude that the transfers were lawful. Accordingly, I would reverse the district court's partial judgment for the Organizations and remand for entry of partial summary judgment in favor of the Defendants. I respectfully dissent.[1]

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[1] There is considerable overlap between the substantive issues presented in this case and in *California v. Trump*, and my disagreements with the majority in this case largely parallel my disagreements in the other case. But rather than simply cross-reference all of the discussion in my dissent in *California v. Trump*, I will follow the majority and will rely on cross-reference only when it does. The result is a fair amount of verbatim repetition between this dissent and my dissent in *California v. Trump*, but proceeding in this way avoids the awkwardness of directing the reader to a separate

**I**

The parties' dispute over DoD's funding transfers comes to us against the backdrop of a complex statutory framework and an equally complicated procedural history. Before turning to the merits, I will briefly review both that framework and that history.

**A**

Upon request from another federal department, the Secretary of Defense is authorized to "provide support for the counterdrug activities" of that department by undertaking the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. § 284(a), (b)(7). On February 25, 2019, the Department of Homeland Security ("DHS") made a formal request to DoD for such assistance. Noting that its counterdrug activities included the construction of border infrastructure, *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 102(a), 110 Stat. 3009-546, 3009-554 (1996) (codified as amended as a note to 8 U.S.C. § 1103), DHS requested that "DoD, pursuant to its authority under 10 U.S.C. § 284(b)(7), assist with the construction of fences[,] roads, and lighting" in several specified "Project Areas" in order "to block drug-smuggling corridors across the international boundary between the United States and Mexico."

On March 25, 2019, the Acting Defense Secretary invoked § 284 and approved the provision of support for

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published opinion when that reader wants to see what my response is to a particular point made by the majority in its opinion in this case.

DHS's "El Paso Sector Project 1" (which would involve DoD construction of border fencing, roads, and lighting in Luna and Doña Ana Counties in New Mexico), as well as for, *inter alia*, DHS's "Yuma Sector Project 1" (which would involve DoD construction of similar border infrastructure in Yuma County, Arizona). Thereafter, the Secretary of Homeland Security invoked his authority under § 102(c) of IIRIRA to waive a variety of federal environmental statutes with respect to the planned construction of border infrastructure in the relevant portions of the El Paso Sector and the Yuma Sector, as well as "all . . . state . . . laws, regulations, and legal requirements of, deriving from, or related to the subject of," those federal laws. *See* 84 Fed. Reg. 17185, 17187 (Apr. 24, 2019); 84 Fed. Reg. 17187, 17188 (Apr. 24, 2019).

Subsequently, on May 9, 2019, the Acting Defense Secretary again invoked § 284, this time to approve DoD's construction of similar border infrastructure to support DHS's "El Centro Sector Project 1" in Imperial County, California, and DHS's "Tucson Sector Projects 1, 2, and 3" in Pima and Cochise Counties in Arizona. Less than a week later, the Secretary of Homeland Security again invoked his authority under IIRIRA § 102(c) to waive federal and state environmental laws, this time with respect to the construction in the relevant sections of the El Centro Sector and the Tucson Sector. *See* 84 Fed. Reg. 21800, 21801 (May 15, 2019); 84 Fed. Reg. 21798, 21799 (May 15, 2019).

Although § 284 authorized the Acting Defense Secretary to provide this support, there were insufficient funds in the relevant DoD appropriation to do so. Specifically, for Fiscal Year 2019, Congress had appropriated for "Drug Interdiction and Counter-Drug Activities,

Defense" a total of only $670,271,000 that could be used for counter-drug support. *See* DoD Appropriations Act, Title VI, 132 Stat. at 2997 (appropriating, under Title governing "Other Department of Defense Programs," a total of "$881,525,000, of which $517,171,000 shall be for counter-narcotics support"); *id.*, Title IX, 132 Stat. at 3042 (appropriating $153,100,000 under the Title governing "Overseas Contingency Operations"). Accordingly, to support the El Paso Sector Project 1 and Yuma Sector Project 1, the Acting Secretary on March 25, 2019 invoked his authority to transfer appropriations under § 8005 of the DoD Appropriations Act and ordered the transfer of $1 billion from "excess Army military personnel funds" into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation. That transfer was accomplished by moving $993,627,000 from the "Military Personnel, Army" appropriation and $6,373,000 from the "Reserve Personnel, Army" appropriation.

To support the El Centro Sector Project 1 and Tucson Sector Projects 1, 2, and 3, the Acting Secretary on May 9, 2019 again invoked his transfer authority to move an additional $1.5 billion into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation. Pursuant to § 8005 of the DoD Appropriations Act, DoD transferred a total of $818,465,000 from 12 different DoD appropriations into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation. Invoking the Secretary's distinct but comparable authority under § 9002 to transfer funds appropriated under the separate Title governing "Overseas Contingency Operations," DoD transferred $604,000,000 from the "Afghanistan Security Forces Fund" appropri-

ation and $77,535,000 from the "Operation and Maintenance, Defense-Wide" appropriation into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation.

**B**

The complex procedural context of this case involves two parallel lawsuits and four appeals to this court, and it has already produced one published Ninth Circuit opinion that was promptly displaced by the Supreme Court.

**1**

The Organizations filed this action in the district court against the Acting Defense Secretary, DoD, and a variety of other federal officers and agencies. In their March 18, 2019 First Amended Complaint, they sought to challenge, *inter alia*, any transfer of funds by the Acting Secretary under § 8005 or § 9002. California and New Mexico, joined by several other States, filed a similar action, and their March 13, 2019 First Amended Complaint also sought to challenge any such transfers. Both sets of plaintiffs moved for preliminary injunctions in early April 2019. The portion of the States' motion that was directed at the § 8005 transfers was asserted only on behalf of New Mexico and only with respect to the construction on New Mexico's border (*i.e.*, El Paso Sector Project 1). The Organizations' motion was likewise directed at El Paso Sector Project 1, but it also challenged Yuma Sector Projects 1 and one other project ("Yuma Sector Project 2").

After concluding that the Organizations were likely to prevail on their claims that the transfers under § 8005 were unlawful and that these organizational plaintiffs

had demonstrated a "likelihood of irreparable harm to their members' aesthetic and recreational interests," the district court on May 24, 2019 granted a preliminary injunction enjoining Defendants from using transferred funds for "Yuma Sector Project 1 and El Paso Sector Project 1."[2] In a companion order, however, the district court denied preliminary injunctive relief to the States. Although the court held that New Mexico was likely to succeed on its claim that the transfers under § 8005 were unlawful, the court concluded that, in light of the grant of a preliminary injunction against El Paso Sector Project 1 to the Organizations, New Mexico would not suffer irreparable harm from the denial of its duplicative request for such relief. On May 29, 2019, Defendants appealed the preliminary injunction in favor of the Organizations, and after the district court refused to stay that injunction, Defendants moved in this court for an emergency stay on June 3, 2019. New Mexico did not appeal the district court's denial of its duplicative request for a preliminary injunction.

**2**

While the Defendants' emergency stay request was being briefed and considered in this court, the Organizations moved for partial summary judgment on June 12, 2019. The motion was limited to the issue of whether the transfers under § 8005 and § 9002 were lawful, and it requested corresponding declaratory relief, as well as a permanent injunction against the use of transferred funds for all six projects (El Paso Sector Project 1, El

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[2] By the time the district court ruled, DoD had decided not to use funds transferred under § 8005 for any construction in Yuma Sector Project 2, and so the request for a preliminary injunction as to that project was moot.

Centro Sector Project 1, Yuma Sector Project 1, and Tucson Sector Projects 1, 2, and 3). California and New Mexico (but not the other States) filed a comparable summary judgment motion that same day, directed only at El Paso Sector Project 1 and El Centro Sector Project 1. Defendants filed cross-motions for summary judgment on the legality of the transfers under § 8005 and § 9002 with respect to the corresponding projects at issue in each case.

On June 28, 2019, the district court granted partial summary judgment and declaratory relief to both sets of plaintiffs, concluding that the transfers under § 8005 and § 9002 were unlawful. The court granted permanent injunctive relief to the Organizations against all six projects, but it denied any such relief to California and New Mexico. The district court concluded that California and New Mexico had failed to prove a threat of future demonstrable environmental harm. The court expressed doubts about the States' alternative theory that they had demonstrated injury to their sovereign interests, but the court ultimately concluded that it did not need to resolve that issue. As before, the district court instead held that California and New Mexico would not suffer any irreparable harm in light of the duplicative relief granted to the Organizations. The district court denied Defendants' cross-motions for summary judgment in both cases. Invoking its authority under Federal Rule of Civil Procedure 54(b), the district court entered partial judgments in favor of, respectively, the Sierra Club and SBCC, and California and New Mexico. The district court denied Defendants' request to stay the permanent injunction pending appeal.

On June 29, 2019, Defendants timely appealed in both cases and asked this court to stay the permanent injunction based on the same briefing and argument that had been presented in the preliminary injunction appeal. California and New Mexico timely cross-appealed nine days later. On July 3, 2019, this court consolidated Defendants' appeal of the judgment and permanent injunction with Defendants' pending appeal of the preliminary injunction.[3] That same day, a motions panel of this court issued a 2-1 published decision denying Defendants' motion for a stay of the permanent injunction (which had overtaken the preliminary injunction). *See Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019).

Defendants then applied to the Supreme Court for a stay of the permanent injunction pending appeal, which the Court granted on July 26, 2019. *See Trump v. Sierra Club*, 140 S. Ct. 1 (2019). That stay remains in effect "pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is timely sought." *Id.* at 1. In granting the stay, the Court concluded that "the Government has made a sufficient showing at this stage that [the Sierra Club and SBCC] have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Id.*

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[3] This court later consolidated the appeal and cross-appeal in the States' case with the already-consolidated appeals in this case.

**II**

Defendants have not contested the Article III standing of the Sierra Club and SBCC on appeal, but as the majority notes, "'the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties.'" *See* Maj. Opin. at 17 n.9 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)). As "an indispensable part of the plaintiff's case, each element" of Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife* (*Lujan v. Defenders*), 504 U.S. 555, 561 (1992). Thus, although well-pleaded allegations are enough at the motion-to-dismiss stage, they are insufficient to establish standing at the summary-judgment stage. *Id.* "In response to a summary judgment motion, . . . the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Id.* (simplified).

In reviewing standing *sua sponte* in the context of cross-motions for summary judgment, it is appropriate to apply the more lenient standard that takes the *plaintiffs'* evidence as true and then asks whether a reasonable trier of fact could find Article III standing. *Lujan v. Defenders*, 504 U.S. at 563 (applying this standard in evaluating whether Government's cross-motion for summary judgment should have been granted). In their briefs below concerning the parties' cross-motions, the Sierra Club and SBCC each asserted that Defendants'

allegedly unlawful conduct caused harm to their members' recreational, aesthetic, and environmental interests. Accepting the Organizations' evidence as true, and drawing all reasonable inferences in their favor, a reasonable trier of fact could conclude that at least the Sierra Club has associational standing under *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333 (1977).[4] Under the *Hunt* test, an association has standing if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343. The Sierra Club has presented sufficient evidence as to each of these three requirements.

To establish that its members would suffer irreparable harm absent a permanent injunction, the Sierra Club presented declarations from members who regularly visit the respective project areas. These members described how the construction and the resulting border barriers would interfere with their enjoyment of the surrounding landscape and would impede their ability to fish, to hunt, to monitor and document wildlife and vegetation for educational purposes, and to participate in other activities near the project sites. These injuries to the members' recreational, aesthetic, and environmental interests are sufficient to constitute an injury-

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[4] The district court explicitly addressed Article III standing only in connection with the preliminary injunction motion. Although Article III standing was not revisited when the Organizations subsequently moved for summary judgment and a permanent injunction, the Organizations' showing of injury in support of a permanent injunction provides a sufficient basis for evaluating their Article III standing.

in-fact for Article III purposes. *See Lujan v. Defenders*, 504 U.S. at 562-63 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."). Moreover, these injuries are fairly traceable to the construction, and an injunction blocking the transfers would redress those injuries by effectively stopping that construction. *See id.* at 560-61. This evidence is therefore sufficient to establish that these members would have Article III standing to sue in their own right.

The other *Hunt* requirements are also satisfied. These members' interests are clearly germane to the Sierra Club's mission to protect the natural environment and local wildlife and plant life. And in seeking declaratory and injunctive relief, the lawsuit does not require the participation of individual members. *See Hunt*, 432 U.S. at 343.

Because the Sierra Club satisfies the applicable standing requirements as to all of the challenged projects, we may proceed to the merits without having to address SBCC's standing. *See Secretary of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984) ("Since the State of California clearly does have standing, we need not address the standing of the other [plaintiffs], whose position here is identical to the State's."). And given my view that the Organizations' legal challenges fail, I perceive no obstacle to entering judgment against *both* the Sierra Club and SBCC without determining whether the latter has standing. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 98 (1998).

**III**

After examining the Article III standing of the Organizations, the majority then proceeds straight to the merits of whether the transfers were unlawful. *See* Maj. Opin. at 23. But we ought not address that issue unless we have first determined that the Organizations have asserted a viable cause of action that properly brings that issue before us. *See Air Courier Conf. v. American Postal Workers Union AFL-CIO*, 498 U.S. 517, 530-31 (1991). The majority belatedly gets to that question in Section V of its opinion, holding that the Organizations have two viable causes of action: an equitable cause of action under the Constitution and an ultra vires cause of action. *See* Maj. Opin. at 25. I disagree with that conclusion, and I also disagree with the Organizations' alternative argument that they have a valid cause of action under the Administrative Procedure Act ("APA"). *See Trump v. Sierra Club*, 140 S. Ct. at 1 ("[T]he Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005.").[5]

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[5] In its merits analysis, the majority scarcely cites the motions panel's published decision, which addressed the Organizations' likelihood of success on the merits of many of the same issues before us. I agree with the majority's implicit rejection of the Organizations' contention that the motions panel's opinion bars this merits panel from examining these issues afresh. Although the motions panel decision is a precedent, it remains subject to reconsideration by this court until we issue our mandate. *See United States v. Houser*, 804 F.2d 565, 567-68 (9th Cir. 1986) (distinguishing, on this point, between reconsideration of a prior panel's decision "during the course of a single appeal" and a decision "on a prior appeal"); *cf. Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc)

**A**

Although the Organizations invoke the APA only as a fallback to their preferred non-statutory claims, I think it is appropriate to first consider whether they have a *statutory* cause of action under the APA. *Cf. Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326-27 (D.C. Cir. 1996) (suggesting that, if a plaintiff relies on both the APA and non-statutory-review claims, the APA claim should be considered first). Even assuming *arguendo* that the APA does not displace reliance upon alternative non-statutory causes of action, *see infra* at 69, the contours of any express cause of action under the APA certainly provide appropriate context for the consideration of any non-statutory claim.

In authorizing suit by any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, the APA incorporates the familiar zone-of-interests test, which reflects a background principle of law that always "applies unless it is expressly negated," *Bennett v. Spear*, 520 U.S. 154, 163 (1997); *see also Lexmark Int'l, Inc. v. Static Control*

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(three-judge panel lacks authority to overrule a decision in a prior appeal in the same case). To the extent that *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015), suggests otherwise, that suggestion is dicta and directly contrary to our decision in *Houser*. *See East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1261-65 (9th Cir. 2020). In all events, the precedential force of the motions panel's opinion was largely, if not entirely, vitiated by the Supreme Court's subsequent decision to grant the very stay that the motions panel's opinion denied. I do not agree, however, with the majority's disregard of the Supreme Court's order in this case—a disregard that hardly befits the "wary and humble" attitude the majority professes. *See* Maj. Opin. at 25-26.

*Components, Inc.*, 572 U.S. 118, 129 (2014).[6] That test requires a plaintiff to "establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. NWF*, 497 U.S. at 883 (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396-97 (1987)). This test "is not meant to be especially demanding." *Clarke*, 479 U.S. at 399. Because the APA was intended to confer "generous review" of agency action, the zone-of-interests test is more flexibly applied under that statute than elsewhere, and it requires only a showing that the plaintiff is "*arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Serv. Orgs., Inc. v. Camp* (*Data Processing*), 397 U.S. 150, 153, 156 (1970) (emphasis added); *see also Bennett*, 520 U.S. at 163 ("what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes") (simplified). Because an APA plaintiff need only show that its interests are "arguably" within the relevant zone of interests, "the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v.*

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[6] The Supreme Court has not squarely addressed whether the zone-of-interests test applies to a plaintiff who claims to have "suffer[ed] legal wrong because of agency action," which is the other class of persons authorized to sue under the APA, 5 U.S.C. § 702. *See Lujan v. National Wildlife Fed.* (*Lujan v. NWF*), 497 U.S. 871, 882-83 (1990). The Organizations have not invoked any such theory here, so I have no occasion to address it.

*Patchak*, 567 U.S. 209, 225 (2012). Although these standards are generous, the Organizations have failed to satisfy them.

**1**

In applying the zone-of-interests test, we must first identify the "statutory provision whose violation forms the legal basis for [the] complaint" or the "gravamen of the complaint." *Lujan v. NWF*, 497 U.S. at 883, 886; *see also Air Courier Conf.*, 498 U.S. at 529. That question is easy here. The Organizations' complaint alleges that the challenged transfers are not authorized by § 8005 and § 9002 because "[t]he diversion of funding to build a border wall or fence is not based on unforeseen military requirements"; "the building of a permanent border wall is not a 'military requirement'"; and "Congress has denied funding for Defendants' planned wall construction, thus barring the Department of Defense from using transfers to fund it."[7] The Organizations allege that, because Congress thus "has not authorized the Department of Defense to transfer additional Defense funds into the Drug Interdiction and Counter-Narcotics Activities account for the purpose of supporting another agency, rather than for military requirements," the Appropriations Clause bars the transfers and "Defendants are acting ultra vires in seeking to transfer funds into the Drug Interdiction and Counter-Narcotics Activities account for the purpose of building a permanent border wall." Given that the case turns on whether the transfers met the criteria in § 8005, that statute is plainly the

[7] Because the limitations on transfers set forth in § 8005 also apply to transfers under § 9002, *see* 132 Stat. at 3042, the parties use "§ 8005" to refer to both provisions, and I will generally do so as well.

"gravamen of the complaint," and it therefore defines the applicable zone of interests. *Lujan v. NWF*, 497 U.S. at 886.

Although the Organizations invoke the Appropriations Clause and the constitutional separation of powers in contending that Defendants' actions are unlawful, any such constitutional violations here can be said to have occurred *only if* the transfers violated the limitations set forth in § 8005: if Congress authorized DoD to transfer the appropriated funds from one account to another, and to spend them accordingly, then the money has been spent "in Consequence of Appropriations made by Law," U.S. CONST. art. I, § 9, cl. 7, and the Executive has not otherwise transgressed the separation of powers.[8] *All* of the Organizations' theories for challenging the transfers—whether styled as constitutional claims or as statutory claims—thus rise or fall based on whether DoD has transgressed the limitations on transfers set forth in § 8005. As a result, § 8005 is obviously the "statute whose violation is the gravamen of the complaint." *Lujan v. NWF*, 497 U.S. at 886. To maintain a claim under the APA, therefore, the Organizations must establish that they are within the zone of interests of § 8005.[9]

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[8] The only possible exception is the Organizations' argument that § 8005 *itself* violates the Presentment Clause. As explained below, that contention is frivolous. *See infra* at 71-72.

[9] The Organizations briefly contend that DoD has exceeded its authority under § 284 and has violated the National Environmental Policy Act ("NEPA"), but even assuming *arguendo* that the Organizations have a cause of action to raise any such challenges, they are patently without merit. The Organizations note that § 284 contains

**2**

Having identified the relevant statute, our next task is to "discern the interests arguably to be protected by the statutory provision at issue" and then to "inquire whether the plaintiff's interests affected by the agency action in question are among them." *National Credit Union Admin. v. First Nat'l Bank & Trust Co.* (*NCUA*), 522 U.S. 479, 492 (1998) (simplified). Identifying the interests protected by § 8005 is not difficult, and here the Organizations' asserted interests are not among them.

Section 8005 is a grant of general transfer authority that allows the Secretary of Defense, if he determines "that such action is necessary in the national interest" and if the Office of Management and Budget approves,

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a special reporting requirement for "small scale construction" projects, which are defined as projects costing $750,000 or less, 10 U.S.C. § 284(h)(1)(B), (i)(3), and they argue that this shows that Congress did not authorize projects on the scale at issue here. The inference is a non sequitur: the fact that Congress requires special reporting of these smaller projects does not mean that they are the *only* projects authorized. Congress may have imposed such a unique reporting requirement in order to capture the sort of smaller-scale activities that might otherwise have escaped its notice. And the fact that past expenditures under § 284 have happened to be for more modest projects is irrelevant, because nothing in the text of § 284 imposes any such size limits on the projects authorized by that statute. The Organizations' reliance on NEPA is likewise meritless. We have upheld DHS's waiver of NEPA under § 102(c) of IIRIRA, *see In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1213, 1225 (9th Cir. 2019), and the district court correctly concluded that the waiver applies to construction that DoD undertakes under § 284 to "provide support" to DHS at DHS's "request[]," 10 U.S.C. § 284. *See Sierra Club v. Trump*, 379 F. Supp. 3d 883, 922-23 (N.D. Cal. 2019).

to transfer from one DoD "appropriation" into another up to $4 billion of the funds that have been appropriated under the DoD Appropriations Act "for military functions (except military construction)." *See* 132 Stat. at 2999. Section 8005 contains five provisos that further regulate this transfer authority, and the only limitations on the Secretary's authority that the Organizations claim were violated here are all contained in the first such proviso. That proviso states that "such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." *Id.*[10] The remaining provisos require prompt notice to Congress "of all transfers made pursuant to this authority or any other authority in this Act"; proscribe the use of funds to make requests to the Committees on Appropriations for reprogrammings that are inconsistent with the restrictions described in the first proviso; set a time limit for making requests for multiple reprogrammings; and exempt "transfers among military personnel appropriations" from counting towards the $4 billion limit. *Id.*

Focusing on "the particular provision of law upon which the plaintiff relies," *Bennett*, 520 U.S. at 175-76, makes clear that § 8005 as a whole, and its first proviso in particular, are aimed at tightening congressional control over the appropriations process. The first proviso's general prohibition on transferring funds for any item that "has been denied by the Congress" is, on its

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[10] Similar language has been codified into permanent law. *See* 10 U.S.C. § 2214(b). No party contends that § 2214(b) alters the relevant analysis under the comparably worded provision in § 8005.

face, a prohibition on using the transfer authority to effectively reverse Congress's specific decision to deny funds to DoD for that item. 132 Stat. at 2999. The second major limitation imposed by the first proviso states that the transfer authority is not to be used unless, considering the items "for which [the funds were] originally appropriated," there are "higher priority items" for which the funds should now be used in light of "military requirements" that were "unforeseen" in DoD's request for Fiscal Year 2019 appropriations. *Id.* The obvious focus of this restriction is likewise to protect congressional judgments about appropriations by (1) restricting DoD's ability to *reprioritize* the use of funds differently from how Congress decided to do so and (2) precluding DoD from transferring funds appropriated by Congress for "military functions" for purposes that do not reflect "military requirements." The remaining provisos, including the congressional reporting requirement, all similarly aim to maintain congressional control over appropriations. And all of the operative restrictions in § 8005 that the Organizations invoke here are focused *solely* on limiting DoD's ability to use the transfer authority to reverse the congressional judgments reflected in *DoD's* appropriations.

In addition to preserving congressional control over DoD's appropriations, § 8005 also aims to give DoD some measure of flexibility to make necessary changes. Notably, in authorizing the Secretary to make transfers among appropriations, § 8005's first proviso specifies only *one* criterion that he must consider in exercising that discretion: he must determine whether the item for which the funds will be used is a "*higher priority* item[]" in light of "unforeseen *military* requirements." 132 Stat. at 2999 (emphasis added). Under the statute, he need

not consider any other factor concerning either the original use for which the funds were appropriated or the new use to which they will now be put.

In light of these features of § 8005, the "interests" that the Organizations claim are "affected by the agency action in question" are not "among" the "interests arguably to be protected" by § 8005. *NCUA*, 522 U.S. at 492 (simplified). In particular, the Organizations' asserted recreational, aesthetic, and environmental interests clearly lie outside the zone of interests protected by § 8005. The statute does not mention recreational, aesthetic, and environmental interests, nor does it require the Secretary to consider such interests. On the contrary, the statute requires him only to consider whether an item is a "higher priority" in light of "military requirements," and it is otherwise entirely neutral as to the uses to which the funds will be put. Indeed, that neutrality is reflected on the face of the statute, which says that, once the transfer is made, the funds are "merged with and . . . available *for the same purposes*, and for the same time period, *as the appropriation or fund to which transferred*." 132 Stat. at 2999 (emphasis added). Because the alleged recreational, aesthetic, and environmental harms that the Organizations assert here play no role in the analysis that § 8005 requires the Secretary to conduct, and are not among the harms that § 8005's limitations seek to address or protect, the Organizations' interests in avoiding these harms are not within § 8005's zone of interests.

Moreover, focusing on the specific interests for which the Organizations have presented sufficient evidentiary support at the summary-judgment stage, *see Lujan v.*

*NWF*, 497 U.S. at 884-85, further confirms that, in deciding whether to redirect excess military personnel funds under § 8005 to assist DHS by building fencing to stop international drug smuggling, the Acting Secretary of Defense did not have to give even the slightest consideration to whether that reprogramming of funds would disrupt views of the desert landscape or affect local flora and fauna. Put simply, the Organizations' recreational, aesthetic, and environmental interests are "'so marginally related to . . . the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Patchak*, 567 U.S. at 225 (quoting *Clarke*, 479 U.S. at 399).

**3**

The Organizations nonetheless claim that they fall within § 8005's zone of interests because § 8005 was "aimed at tightening congressional control over executive spending," and the Organizations' interests do not "meaningfully diverge from Congress's interests in enacting the statute." This contention fails. As the Supreme Court made clear in *Lujan v. NWF*, the zone-of-interests test requires the plaintiff to make a factual showing that the plaintiff itself, or someone else whose interests the plaintiff may properly assert, has a cognizable interest that falls within the relevant statute's zone of interests. 497 U.S. at 885-99 (addressing whether the interests of NWF—or of any of its members, whose interests NWF could validly assert under *Hunt*'s associational standing doctrine—had been shown to be within the relevant zone of interests). I am aware of no precedent that would support the view that these Organizations can *represent* the interests of Congress (akin to NWF's representation of the interests of its

members), much less that they can do so merely because they are sympathetic to Congress's perceived policy objectives.[11] But the Organizations do not actually rely on such a novel theory. Instead, the Organizations suggest that, merely because their overall litigation objectives here do not diverge from those of Congress, they have thereby satisfied the zone-of-interests test with respect to their *own* interests. This theory is clearly wrong.

The critical flaw in the Organizations' analysis is that it rests, not on the *interests* they are asserting (preservation of landscape, flora, fauna, etc.), but on the *legal theory* that the Organizations invoke to protect those interests here. But the zone-of-interests test focuses on the former and not the latter. *See Lujan v. NWF*, 497 U.S. at 885-89. Indeed, if the Organizations were correct, that would effectively eliminate the zone-of-interests test. By definition, *anyone* who alleges a violation of a particular statute has thereby invoked a legal theory that does not "meaningfully diverge" from the interests of those *other* persons or entities who *are* within that statute's zone-of-interests. Such a tautological congruence be-

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[11] Even if the Organizations could assert Congress's interests in some representational capacity, they could do so only if the injury to Congress's interests satisfied the requirements of Article III standing. *See Air Courier Conf.*, 498 U.S. at 523-24 (zone-of-interests test is applied to those injuries-in-fact that meet Article III requirements). I express no view on that question. *Cf. U.S. House of Reps. v. Mnuchin*, 379 F. Supp. 3d 8 (D.D.C. 2019) (holding that House lacks Article III standing to challenge the transfers at issue here), *appeal ordered heard en banc*, 2020 WL 1228477 (D.C. Cir. 2020).

tween the Organizations' legal theory and Congress's institutional interests is not sufficient to satisfy the zone-of- interests test here.

The Organizations suggest that their approach is supported by the D.C. Circuit's decision in *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356 (D.C. Cir. 1996), but that is wrong. As the opinion in that case makes clear, the D.C. Circuit was relying on the same traditional zone-of-interests test, under which a plaintiff's interests are "outside the statute's 'zone of interests' only 'if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" 87 F.3d at 1360 (quoting *Clarke*, 479 U.S. at 399). The court mentioned "congruence" in the course of explaining why the plaintiff's interests in that case were "not more likely to frustrate than to further statutory objectives," *i.e.*, why those interests were not *inconsistent* with the purposes implicit in the statute. *Id.* (simplified). It did not thereby suggest—and could not properly have suggested—that the mere lack of any such inconsistency is alone sufficient under the zone-of-interests test. Here, the problem is not that the Organizations' interests are inconsistent with the purposes of § 8005, but rather that they are too "marginally related" to those purposes. *See supra* at 66.

The Organizations also suggest that we must apply the zone-of-interests test broadly here, because—given Congress's inability to enforce the limitations of § 8005 directly—the agency's transfers would otherwise be effectively "unreviewable." The assumption that no one will ever be able to sue for any violation of § 8005 seems

doubtful, *cf. Sierra Club v. Trump*, 929 F.3d at 715 (N.R. Smith, J., dissenting) (suggesting that "those who would have been entitled to the funds as originally appropriated" may be within the zone of interests of § 8005), but in any event, we are not entitled to bend the otherwise applicable—and already lenient—standards to ensure that someone will be able to sue in this case or others like it.

**B**

As noted earlier, the Organizations only invoke the APA as a fallback option, and they instead insist that they may assert claims under the Constitution, as well as an equitable cause of action to enjoin "ultra vires" conduct. The Organizations do not have a cause of action under either of these theories.

**1**

The Organizations contend that they are not required to satisfy any zone-of-interests test to the extent that they assert non-APA causes of action to enjoin Executive officials from taking *unconstitutional* action.[12] Even assuming that an equitable cause of action to enjoin unconstitutional conduct exists alongside the APA's cause

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[12] It is not entirely clear that the Organizations are alternatively contending that *APA claims* to enjoin *unconstitutional* conduct, *see* 5 U.S.C. § 706(2)(B), are exempt from the zone-of-interests test. To the extent that they are so contending, the point seems doubtful. *See Data Processing*, 397 U.S. at 153 (zone-of-interests test requires APA claimant to show that its interest "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"). But in all events, any such APA-based claim to enjoin unconstitutional conduct would fail for the same reasons as the Organizations' purported free-standing equitable claim to enjoin such conduct.

of action, *see Juliana v. United States*, 947 F.3d 1159, 1167-68 (9th Cir. 2020); *Navajo Nation v. Department of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017); *but see Sierra Club v. Trump*, 929 F.3d at 715-17 (N.R. Smith, J., dissenting), it avails the Organizations nothing here. The Organizations have failed to allege the sort of constitutional claim that might give rise to such an equitable action, because their "constitutional" claim is effectively the very same § 8005-based claim dressed up in constitutional garb. And even if this claim counted as a "constitutional" one, it would still be governed by the same zone of interests defined by the relevant limitations in § 8005.

**a**

The Organizations assert three constitutional claims in their operative complaint: (1) that Defendants have violated the constitutional separation of powers by "usurp[ing] Congress's legislative authority"; (2) that Defendants have violated the Presentment Clause by "modify[ing] or repeal[ing] Congress's appropriations legislation by executive proclamation, rather than by law"; and (3) that Defendants have violated the Appropriations Clause by "allocat[ing] money from the Department of the Treasury by executive proclamation, rather than by law, and in contravention of restrictions contained in Congress's appropriations' laws."

As clarified in their subsequent briefing, the Organizations assert both what I will call a "strong" form of these constitutional arguments and a more "limited" form. In its strong form, the Organizations' argument is that, *even if § 8005 authorized the transfers in question here*, those transfers nonetheless violated the Pre-

sentment Clause. In its more limited form, the Organizations' argument is that the transfers violated the separation of powers, the Presentment Clause, and the Appropriations Clause *because* the transfers were not authorized by § 8005.

I need not address whether the Organizations have an equitable cause of action to assert the strong form of their constitutional argument, because in my view that argument on the merits is so "wholly insubstantial and frivolous" that it would not even give rise to federal jurisdiction. *Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *see also Steel Co.*, 523 U.S. at 89. If § 8005 *allowed* the transfers here, then that necessarily means that the Executive has properly spent funds that Congress, by statute, has *appropriated* and allowed to be spent for *that* purpose. *Cf. Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) ("allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion"). By transferring funds after finding that the statutory conditions for doing so are met, an agency thereby "execut[es] the policy that Congress had embodied in the statute" and does not unilaterally alter or repeal any law in violation of the Presentment Clause or the separation of powers. *See Clinton v. City of New York*, 524 U.S. 417, 444 (1998). If anything, it is the Organizations' theory—that the federal courts must give effect to an alleged broader congressional judgment against border funding *regardless* of whether that judgment is embodied in binding statutory language—that would offend separation-of-powers principles.

That leaves only the more limited form of the Organizations' argument, which is that, *if* § 8005 did not authorize the transfers, *then* the expenditures violated the Appropriations Clause, the Presentment Clause, and the separation of powers. Under *Dalton v. Specter*, 511 U.S. 462 (1994), this theory—despite its constitutional garb—is properly classified as "a statutory one," *id.* at 474. It therefore does not fall within the scope of the asserted non-APA equitable cause of action to enjoin *unconstitutional* conduct.[13]

In *Dalton*, the Court addressed a non-APA claim to enjoin Executive officials from implementing an allegedly unconstitutional Presidential decision to close certain military bases under the Defense Base Closure and Realignment Act of 1990. 511 U.S. at 471.[14] But the claim in *Dalton* was not that the President had directly transgressed an applicable constitutional limitation; rather, the claim was that, *because* Executive officials "violated the procedural requirements" of the statute on which the President's decision ultimately rested, the President thereby "act[ed] in excess of his statutory authority" and therefore "violate[d] the constitutional separation-of-powers doctrine." *Id.* at 471-72. The Supreme Court rejected this effort to "eviscerat[e]" the

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[13] There remains the Organizations' claim that *statutory* violations may be enjoined under a non-APA ultra vires cause of action for equitable relief, but that also fails for the reasons discussed below. *See infra* at 79-80.

[14] The plaintiffs in *Dalton* also asserted a claim under the APA itself, but that claim failed for the separate reason that the challenged final action was taken by the President personally, and the President is not an "agency" for purposes of the APA. *See* 511 U.S. at 469.

well-established "distinction between claims that an official exceeded his *statutory* authority, on the one hand, and claims that he acted in violation of the *Constitution*, on the other." *Id.* at 474 (emphasis added). As the Court explained, its "cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution." *Id.* at 472. The Court distinguished *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), on the ground that there "the Government disclaimed any statutory authority for the President's seizure of steel mills," and as a result the Constitution itself supplied the rule of decision for determining the legality of the President's actions. *Dalton*, 511 U.S. at 473. Because the "only basis of authority asserted was the President's inherent constitutional power as the Executive and the Commander in Chief of the Armed Forces," *Youngstown* thus "necessarily turned on *whether the Constitution authorized* the President's actions." *Id.* (emphasis added). By contrast, given that the claim in *Dalton* was that the President had violated the Constitution *because* Executive officials had "violated the terms of the 1990 Act," the terms of that statute provided the applicable rule of decision and the claim was therefore "a statutory one." *Id.* at 474. And because those claims sought to enjoin conduct on the grounds that it violated *statutory* requirements, it was subject to the "longstanding" limitation that non-APA "review is not available when the statute in question commits the decision to the discretion of the President." *Id.*

Under *Dalton*, the Organizations' purported "constitutional" claims—at least in their more limited version—are properly classified as *statutory* claims that do *not*

fall within any non-APA cause of action to enjoin unconstitutional conduct. 511 U.S. at 474. Here, as in *Dalton*, Defendants have "claimed" the "statutory authority" of § 8005, and any asserted violation of the Constitution would occur *only if, and only because,* Defendants' conduct is assertedly not authorized by § 8005. *Id.* at 473. The rule of decision for *this* dispute is thus not supplied, as in *Youngstown*, by the Constitution; rather, it is supplied only by § 8005. *Id.* at 473-74. Because these claims by the Organizations are thus "statutory" under *Dalton*, they may only proceed, if at all, under an equitable cause of action to enjoin ultra vires conduct, and they would be subject to any limitations applicable to such claims. *Id.* at 474. The Organizations do assert such a fallback claim here, but it fails for the reasons I explain below. *See infra* at 79-80.

**b**

But even if the Organizations' claims may properly be classified as *constitutional* ones for purposes of the particular equitable cause of action they invoke here, those claims would still fail.

To the extent that the Organizations argue that the Constitution *itself* grants a cause of action allowing *any plaintiff with an Article III injury* to sue to enjoin an alleged violation of the Appropriations Clause, the Presentment Clause, or the separation of powers, there is no support for such a theory. None of the cases cited by the Organizations involved putative plaintiffs, such as the Organizations here, who are near the outer perimeter of Article III standing. On the contrary, these cases involved either allegedly unconstitutional agency actions *directly targeting* the claimants, *see Bond v.*

*United States*, 564 U.S. 211, 225-26 (2011) (criminal defendant challenged statute under which she was convicted on federalism and separation-of-powers grounds); *United States v. McIntosh*, 833 F.3d 1163, 1174-75 (9th Cir. 2016) (criminal defendants sought to enjoin, based on an appropriations rider and the Appropriations Clause, the Justice Department's expenditure of funds to prosecute them), or they involved a suit based on an express *statutory* cause of action, *see Clinton v. City of New York*, 524 U.S. at 428 (noting that right of action was expressly conferred by 2 U.S.C. § 692(a)(1) (1996 ed.)).

Moreover, the majority's novel contention that the Constitution *requires* recognizing, in this context, an equitable cause of action that extends to the outer limits of Article III cannot be squared with the Supreme Court's decision in *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015). There, the Court rejected the view that the Supremacy Clause itself created a private right of action for equitable relief against preempted statutes, and instead held that any such equitable claim rested on "judge-made" remedies that are subject to "express and implied statutory limitations." *Id.* at 325-27. The Supremacy Clause provides a particularly apt analogy here, because (like the Appropriations Clause) the asserted "unconstitutionality" of the challenged action generally depends upon whether it falls *within or outside the terms of a federal statute*: a state statute is "unconstitutional under the Supremacy Clause" only if it is "contrary to federal law," *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1361-62 (9th Cir. 1998), and here, the transfers violated the Appropriations Clause only if they were barred by the limitations in § 8005. And just as the Supremacy Clause protects Congress's "broad discretion with regard to the

enactment of laws," *Armstrong*, 575 U.S. at 325-26, so too the Appropriations Clause protects "congressional control over funds in the Treasury," *McIntosh*, 833 F.3d at 1175. It is "unlikely that the Constitution gave Congress such broad discretion" to enact appropriations laws only to simultaneously "*require[]* Congress to permit the enforcement of its laws" by *any* "private actor[]" with even minimal Article III standing, thereby "*limit-[ing]* Congress's power" to decide how "to enforce" the spending limitations it enacts. *Armstrong*, 575 U.S. at 325-26.[15]

The Appropriations Clause thus does not itself create a constitutionally required cause of action that extends to the limits of Article III. On the contrary, any equitable cause of action to enforce that clause would rest on a "judge-made" remedy: as *Armstrong* observed, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." 575 U.S. at

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[15] The majority asserts that *Armstrong* is distinguishable on the grounds that the Appropriations Clause is supposedly more protective of individual liberty than the Supremacy Clause. *See* Maj. Opin. at 30-31. Nothing is cited to support this comparative assertion, which seems highly doubtful: there is no reason to think that Congress's ability, in the exercise of its enumerated powers, to preempt potentially oppressive state laws is any *less* protective of individual liberty than is Congress's ability to insert riders in appropriations bills. Moreover, to the extent that these clauses protect individual liberty, they both do so only as a consequence of protecting congressional authority within our overall constitutional structure. *Armstrong*'s core point—that it would be "strange indeed" to construe a clause that protects congressional power as simultaneously saddling Congress with a particular enforcement method—remains equally applicable to both. 575 U.S. at 326.

327. At least where, as here, the contours of the applicable constitutional line (under the Appropriations Clause) are defined by and parallel a statutory line (under § 8005), any such judge-made equitable cause of action would be subject to "express and implied statutory limitations," as well as traditional limitations governing such equitable claims. *Id.*

One long-established "'judicially self-imposed limit[] on the exercise of federal jurisdiction'"—including federal equitable jurisdiction—is the requirement "that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett*, 520 U.S. at 162 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). This limitation is *not* confined to the APA, but rather reflects a "prudential standing requirement[] of general application" that always "applies unless it is expressly negated" by Congress. *Id.* at 163.[16] Because Congress has not expressly negated that

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[16] The majority wrongly contends that, by quoting this language from *Bennett*, and stating that the zone-of-interests test therefore "applies to all *statutorily* created causes of action," *Lexmark*, 572 U.S. at 129 (emphasis added), the Court in *Lexmark* thereby intended to signal that the test *only* applies to statutory claims and not to non-statutory equitable claims. *See* Maj. Opin. at 36-37. Nothing in *Lexmark* actually suggests any such negative pregnant; instead, the Court's reference to "statutorily created causes of action" reflects nothing more than the fact that only statutory claims were before the Court in that case. *See* 572 U.S. at 129. Moreover, *Lexmark* notes that the zone-of-interests test's roots lie in the common law, *id.* at 130 n.5, and *Bennett* (upon which *Lexmark* relied) states that the test reflects a "prudential standing requirement[] of general application" that applies to any "exercise of federal jurisdiction," 520 U.S. at 162-63.

test in any relevant respect, the Organizations' equitable cause of action to enforce the Appropriations Clause here remains subject to the zone-of-interests test. *Cf. Thompson v. North American Stainless, LP*, 562 U.S. 170, 176-77 (2011) (construing a cause of action as extending to "any person injured in the Article III sense" would often produce "absurd consequences" and is for that reason rarely done). And given the unique nature of an Appropriations Clause claim, as just discussed, *the line between constitutional and unconstitutional conduct* here is defined entirely by the limitations in § 8005, and therefore the relevant zone of interests for the Organizations' Appropriations-Clause-based equitable claim remains defined by *those* limitations. Thus, contrary to the majority's conclusion, *see* Maj. Opin. at 39-40, the Organizations are outside the applicable zone of interests for this claim as well.

In arguing for a contrary view, the Organizations rely heavily on *United States v. McIntosh*, asserting that there we granted non-APA injunctive relief based on the Appropriations Clause without inquiring whether the claimants were within the zone of interests of the underlying appropriations statute. *McIntosh* cannot bear the considerable weight that the Organizations place on it.

In *McIntosh*, we asserted interlocutory jurisdiction over the district courts' refusal to enjoin the expenditure of funds to prosecute the defendants—an expenditure that allegedly violated an appropriations rider barring the Justice Department from spending funds to prevent certain States from "'implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.'" 833 F.3d at 1175;

*see also id.* at 1172-73. We held that the defendants had Article III standing and that, if the Department was in fact "spending money in violation" of that rider in prosecuting the defendants, that would produce a violation of the Appropriations Clause that could be raised by the defendants in challenging their prosecutions. *Id.* at 1175. After construing the meaning of the rider, we then remanded the matter for a determination whether the rider was being violated. *Id.* at 1179. Contrary to the Organizations' dog-that-didn't-bark theory, nothing can be gleaned from the fact that the zone-of-interests test was never discussed in *McIntosh*. *See Cooper Indus., Inc. v. Aviall Servs, Inc.*, 543 U.S. 157, 170 (2004) ("'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'") (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). Moreover, any such silence seems more likely to have been due to the fact that it was so overwhelmingly obvious that the defendants *were* within the rider's zone of interests that the point was incontestable and uncontested. An asserted interest in not going to prison for *complying* with state medical-marijuana laws seems well within the zone of interests of a statute prohibiting interference with the implementation of such state laws.

**2**

The only remaining question is whether the Organizations may evade the APA's zone-of-interests test by asserting a non-APA claim for ultra vires conduct in excess of *statutory* authority. Even assuming that such a cause of action exists alongside the APA, *cf. Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 189-90 (D.C.

Cir. 2006), I conclude that it would be subject to the same zone-of-interests limitations as the Organizations' APA claims and therefore likewise fails.

For the same reasons discussed above, any such equitable cause of action rests on a judge-made remedy that is subject to the zone-of-interests test. *See supra* at 74-79. The Organizations identify no case from the Supreme Court or this court affirmatively holding that the zone-of-interests test does *not* apply to a non-APA equitable cause of action to enjoin conduct allegedly in excess of express statutory limitations on *statutory* authority, and I am aware of none. Indeed, it makes little sense, when evaluating a claim that Executive officials exceeded the *limitations* in a federal statute, not to ask whether the plaintiff is within the zone of interests protected by those statutory limitations. *Cf. Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) (although plaintiff asserting ultra vires claim may not need to show that its interests "fall within the zones of interests of the constitutional and statutory *powers* invoked" by Executive officials, when "a particular constitutional or statutory provision was intended to protect persons like the litigant by *limiting* the authority conferred," then "the litigant's interest may be said to fall within the zone protected by the *limitation*") (emphasis added).[17] Here, those limitations are supplied

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[17] The majority thus relies on the wrong portion of Judge Bork's opinion in *Haitian Refugee Center*. *See* Maj. Opin. at 37-39. This case turns on a "statutory provision" that "limit[s] the authority conferred." 809 F.2d at 811 n.14. If the Executive had contended that it had power to transfer the funds regardless of § 8005, then this case would look more like *Youngstown*, but no such extravagant claim has been pressed in this case. On the contrary,

by § 8005, and the Organizations are not within the zone of interests of that statute.[18]

* * *

Given that each of the Organizations' asserted theories fail, the Organizations lack any cause of action to challenge the DoD's transfer of funds under § 8005.

**IV**

Alternatively, even if the Organizations had a cause of action, their claims would fail on the merits, because the challenged transfers did not violate § 8005 or § 9002. In the companion appeal, *California v. Trump*, the majority concluded that § 8005 and § 9002 did not authorize the transfers at issue, and I concluded that these provisions did authorize the transfers. Just as the majority "reaffirm[s] this holding here and conclude[s] that Section 8005 did not authorize the transfer of funds," Maj. Opin. at 24, I reaffirm my previous conclusion that § 8005 and § 9002 authorized the transfers.

**V**

Based on the foregoing, I conclude that at least the Sierra Club has Article III standing, but that the Organizations lack any cause of action to challenge these

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Defendants concede that, if the requirements of § 8005 were not met, then the transfers were unlawful.

[18] Even if the Organizations were correct that the zone-of-interests test does not apply to a non-APA equitable cause of action, that would not necessarily mean that such equitable jurisdiction extends, as the Organizations suggest, to the outer limits of Article III. Declining to apply the APA's generous zone-of-interests test might arguably render applicable the sort of narrower review of agency action that preceded the APA standards articulated in *Data Processing*, 397 U.S. at 153. *See also Clarke*, 479 U.S. at 400 n.16.

§ 8005 and § 9002 transfers. Alternatively, if the Organizations did have a cause of action, their claims fail on the merits as a matter of law because the transfers complied with the limitations in § 8005 and § 9002. I therefore would reverse the district court's partial grant of summary judgment to the Organizations and would remand the matter with instructions to grant Defendants' motion for summary judgment on this set of claims. Because the majority concludes otherwise, I respectfully dissent.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 19-16299
D.C. No. 4:19-cv-00872-HSG

STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF MAINE; STATE OF MINNESOTA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEVADA; STATE OF NEW YORK; STATE OF OREGON; COMMONWEALTH OF VIRGINIA; STATE OF ILLINOIS; STATE OF MARYLAND; DANA NESSEL, ATTORNEY GENERAL, ON BEHALF OF THE PEOPLE OF MICHIGAN; STATE OF WISCONSIN; STATE OF MASSACHUSETTS; STATE OF VERMONT; STATE OF RHODE ISLAND, PLAINTIFFS-APPELLEES

*v.*

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF DEFENSE; MARK T. ESPER, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF DEFENSE; RYAN D. MCCARTHY, SENIOR OFFICIAL PERFORMING THE DUTIES OF THE SECRETARY OF THE ARMY; RICHARD V. SPENCER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NAVY; HEATHER WILSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE AIR FORCE; UNITED STATES DEPARTMENT OF THE TREASURY; STEVEN TERNER MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR; U.S. DEPARTMENT OF HOMELAND

SECURITY; CHAD F. WOLF, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF HOMELAND SECURITY, DEFENDANTS-APPELLANTS

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Filed: June 26, 2020

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No. 19-16336
D.C. No. 4:19-cv-00872-HSG

STATE OF CALIFORNIA; STATE OF NEW MEXICO, PLAINTIFFS-APPELLANTS

*v.*

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF DEFENSE; MARK T. ESPER, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF DEFENSE; RYAN D. MCCARTHY, SENIOR OFFICIAL PERFORMING THE DUTIES OF THE SECRETARY OF THE ARMY; RICHARD V. SPENCER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NAVY; HEATHER WILSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE AIR FORCE; UNITED STATES DEPARTMENT OF THE TREASURY; STEVEN TERNER MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF HOMELAND SECURITY, DEFENDANTS-APPELLEES

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Argued and Submitted: Nov. 12, 2019
San Francisco, California

Filed: June 26, 2020

Appeal from the United States District Court
for the Northern District of California
Haywood S. Gilliam, Jr., District Judge, Presiding

**OPINION**

Before: SIDNEY R. THOMAS, Chief Judge, and KIM MCLANE WARDLAW and DANIEL P. COLLINS, Circuit Judges.

Opinion by Chief Judge SIDNEY R. THOMAS; Dissent by Judge COLLINS

THOMAS, Chief Judge:

This appeal presents the question of whether the Department of Defense Appropriations Act of 2019 authorized the Department of Defense ("DoD") to make budgetary transfers from funds appropriated by Congress to it for other purposes in order to fund the construction of a wall on the southern border of the United States in California and New Mexico. We conclude that the transfers were not authorized by the terms of the Act, and we affirm the judgment of the district court.[1]

I

The President has long supported the construction of a border wall on the southern border between the

[1] There are companion appeals concerning some of the same issues in *Sierra Club, et. al. v. Trump et. al.*, Nos. 19-16102 and 19-16300. Those appeals will be the subject of a separate opinion.

United States and Mexico. Since the President took office in 2017, however, Congress has repeatedly declined to provide the amount of funding requested by the President.

The debate over border wall funding came to a head in December of 2018. During negotiations to pass an appropriations bill for the remainder of the fiscal year, the President announced that he would not sign any legislation that did not allocate substantial funds to border wall construction. On January 6, 2019, the White House requested $5.7 billion to fund the construction of approximately 234 miles of new physical barrier.[2] Budget negotiations concerning border wall funding reached an impasse, triggering the longest partial government shutdown in United States history.

After 35 days, the government shutdown ended without an agreement to provide increased border wall funding in the amount requested by the President. On February 14, 2019, Congress passed the Consolidated Appropriations Act of 2019 ("CAA"), which included the Department of Homeland Security Appropriations Act for Fiscal Year 2019, Pub. L. No. 116-6, div. A, 133 Stat. 13 (2019). The CAA appropriated only $1.375 billion for border wall construction, specifying that the funding was for "the construction of primary pedestrian fencing . . . in the Rio Grande Valley Sector." *Id.* § 230(a)(1). The President signed the CAA into law the following day.

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[2] Some form of a physical barrier already exists at the site of some of the construction projects. In those places, construction would reinforce or rebuild the existing portions.

The President concurrently issued a proclamation under the National Emergencies Act, 50 U.S.C. §§ 1601-1651, "declar[ing] that a national emergency exists at the southern border of the United States." Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).[3] An accompanying White House Fact Sheet explained that the President was "using his legal authority to take Executive action to secure additional resources" to build a border wall, and it specified that "the Administration [had] so far identified up to $8.1 billion that [would] be available to build the border wall once a national emergency [was] declared and additional funds [were] reprogrammed." The Fact Sheet identified several funding sources, including $2.5 billion of Department of Defense ("DoD") funds that could be transferred to provide support for counterdrug activities of other federal government agencies under 10 U.S.C. § 284 ("Section 284").[4] Executive Branch agencies began using the funds identified by the Fact Sheet to fund border wall construction. On February 25, the Department of Homeland Security

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[3] Subsequently, Congress adopted two joint resolutions terminating the President's emergency declaration pursuant to its authority under 50 U.S.C. § 1622(a)(1). The President vetoed each resolution, and Congress failed to override these vetoes.

[4] Section 284 authorizes the Secretary of Defense to "provide support for the counterdrug activities . . . of any other department or agency of the Federal Government" if it receives a request from "the official who has responsibility for the counterdrug activities." 10 U.S.C. §§ 284(a), 284(a)(1)(A). The statute permits, among other things, support for "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *Id.* § 284(b)(7). DoD's provision of support for other agencies pursuant to Section 284 does not require the declaration of a national emergency.

("DHS") submitted to DoD a request for Section 284 assistance to block drug smuggling corridors. In particular, it requested that DoD fund "approximately 218 miles" of wall using this authority, comprised of numerous projects, including the El Centro Sector Project 1 in California and the El Paso Sector Project 1 in New Mexico, as relevant to this case. On March 25, Acting Secretary of Defense Patrick Shanahan approved three border wall construction projects: Yuma Sector Projects 1 and 2 in Arizona and El Paso Sector Project 1 in New Mexico. On May 9, Shanahan approved four more border wall construction projects: El Centro Sector Project 1 in California and Tucson Sector Projects 1-3 in Arizona.

Because these projects were undertaken to construct barriers and roads in furtherance of border security, Acting Secretary of Homeland Security Kevin McAleenan invoked the authority granted to him by Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 102(c), 110 Stat. 3009-546, 3009-554 (1996) (codified as amended as a note to 8 U.S.C. § 1103), to "waive all legal requirements" that would otherwise apply to the border wall construction projects "to ensure . . . expeditious construction." 84 Fed. Reg. 17185-01 (April 24, 2019). On April 24, with respect to the El Paso Sector, he "waive[d] in their entirety, with respect to the construction of physical barriers and roads" a long list of statutes, "including all federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of" "[t]he National Environmental Policy Act" "(42 U.S.C. 4321 et seq.)," "the Endangered Species Act" "(16 U.S.C. 1531 et seq.)," "the Federal Water Pollution Control Act (commonly

referred to as the Clean Water Act (33 U.S.C. 1251 et seq.)),” and “the Clean Air Act (42 U.S.C. 7401 et seq.).” *Id.* He executed a similar Section 102(c) waiver with respect to the El Centro Sector on May 15. 84 Fed. Reg. 21800-01 (May 15, 2019).

At the time Shanahan authorized these border wall construction projects, the counter-narcotics support account contained only $238,306,000 in unobligated funds, or less than one tenth of the $2.5 billion needed to complete those projects. To provide the support requested, Shanahan invoked the budgetary transfer authority found in Section 8005 of the 2019 DoD Appropriations Act to transfer funds from other DoD appropriations accounts into the Section 284 Drug Interdiction and Counter-Drug Activities-Defense appropriations account.

For the first set of projects, Shanahan transferred $1 billion from Army personnel funds. For the second set of projects, Shanahan transferred $1.5 billion from “various excess appropriations,” which contained funds originally appropriated for purposes such as modification of in-service missiles and support for U.S. allies in Afghanistan.

As authority for the transfers, DoD specifically relied on Section 8005 and Section 9002 of the Department of Defense Appropriations Act of 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018) (“Section 8005”).[5]

Section 8005 provides, in relevant part, that:

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[5] For simplicity, because the transfer authorities are both subject to Section 8005’s substantive requirements, this opinion refers to these authorities collectively as Section 8005, as did the district court and the motions panel. Our holding in this case therefore extends to both the transfer of funds pursuant to Section 8005 and Section 9002.

> Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed $4,000,000,000 of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction) between such appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred.[6]

Section 8005 also explicitly limits when its authority can be invoked: "*Provided*, That such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress."

Although Section 8005 does not require formal congressional approval of transfers, historically DoD had adhered to a "gentleman's agreement," by which it sought approval from the relevant congressional committees

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[6] Section 9002 provides that: "Upon the determination of the Secretary of Defense that such action is necessary in the national interest, the Secretary may, with the approval of the Office of Management and Budget, transfer up to $2,000,000,000 between the appropriations or funds made available to the Department of Defense in this title: *Provided*, That the Secretary shall notify the Congress promptly of each transfer made pursuant to the authority in this section: *Provided further*, That the authority provided in this section is in addition to any other transfer authority available to the Department of Defense and is subject to the same terms and conditions as the authority provided in section 8005 of this Act."

before transferring the funds. DoD deviated from this practice here—it did not request congressional approval before authorizing the transfer. Further, the House Committee on Armed Services and the House Committee on Appropriations both wrote letters to DoD formally disapproving of the reprogramming action after the fact. Moreover, with respect to the second transfer, Shanahan expressly directed that the transfer of funds was to occur "without regard to comity-based policies that require prior approval from congressional committees."

In the end, Section 8005 was invoked to transfer $2.5 billion of DoD funds appropriated for other purposes to fund border wall construction.

II

On February 18, 2019, sixteen states,[7] including California and New Mexico, filed a lawsuit challenging the Executive Branch's funding of the border wall. The States pled theories of violation of the constitutional separation of powers, violation of the Appropriations Clause, *ultra vires* action, violations of the Administrative Procedure Act ("APA"), and violations of the National Environmental Policy Act ("NEPA"). The next day, Sierra Club and the Southern Border Communities

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[7] Specifically, the action was filed by the following states: California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, the Commonwealth of Virginia, and Attorney General Dana Nessel on behalf of the People of Michigan. The complaint was later amended to add the following states: Rhode Island, Vermont, Wisconsin, and the Commonwealth of Massachusetts. State parties are collectively referenced as "the States."

Coalition filed a separate action challenging the same border wall funding.[8]

The States subsequently filed a motion requesting a preliminary injunction to enjoin the transfer of funds to construct a border wall in New Mexico's El Paso Sector. The district court held that New Mexico had standing, but it denied without prejudice the preliminary injunction motion. The court based part of its reasoning on the fact that it had already imposed a preliminary injunction in the *Sierra Club* action such that the grant of a preliminary injunction in favor of the States would be duplicative. California subsequently filed another motion requesting a preliminary injunction to enjoin the transfer of funds to construct a border wall in California's El Centro Sector.

California and New Mexico then moved for partial summary judgment on their declaratory judgment action as to the El Centro and El Paso Sectors, and additionally moved for a permanent injunction to enjoin funding the construction of these sectors. The Federal Defendants filed a cross-motion for summary judgment on all claims. The district court granted California and New Mexico's motion for partial summary judgment, and issued declaratory relief, holding the Section 8005 transfer of funds as to the El Centro and El Paso sectors unlawful. The district court denied the Federal Defendants' motion for summary judgment.

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[8] Both lawsuits named as defendants Donald J. Trump, President of the United States, Patrick M. Shanahan, former Acting Secretary of Defense, Kirstjen M. Nielsen, former Secretary of Homeland Security, and Steven Mnuchin, Secretary of the Treasury in their official capacities, along with numerous other Executive Branch officials (collectively referenced as "the Federal Defendants").

The court also denied California and New Mexico's motion for a permanent injunction, this time basing its reasoning, in part, on the permanent injunction ordered by the district court in the companion *Sierra Club* case.[9]

The Federal Defendants requested that the district court certify its order as a final judgment for immediate appeal pursuant to Fed. R. Civ. P. 54(b). In response, the district court considered the appropriate factors, made appropriate findings, and certified the order as final pursuant to Rule 54(b). *See Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 574 (9th Cir. 2018) (listing factors). The Federal Defendants timely appealed the district court's judgment, and the States timely cross-appealed the district court's denial of injunctive relief. The district court's Rule 54(b) certification was proper; therefore, we have jurisdiction under 28 U.S.C. § 1291. *See Durfey v. E.I. DuPont De Nemours & Co.*, 59 F.3d 121, 124 (9th Cir. 1995) (appeal is proper upon certification as a final judgment pursuant to Rule 54(b)).

We review the existence of Article III standing *de novo*. *See California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 420 (9th Cir. 2019). We review questions of statutory interpretation *de novo*. *See United States v. Kelly*, 874 F.3d 1037, 1046 (9th Cir. 2017).

## III

California and New Mexico have Article III standing to pursue their claims. In order to establish Article III standing, a plaintiff must have (1) suffered an injury in

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[9] The Supreme Court subsequently granted a stay of the district court's permanent injunction in the separate companion case, *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.).

fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).[10] At summary judgment, a plaintiff cannot rest on mere allegations, but "must set forth by affidavit or other evidence specific facts." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 412 (2013) (internal quotations and citations omitted). These specific facts, set forth "for purposes of the summary judgment motion[,] will be taken to be true." *Lujan*, 504 U.S. at 561.

States are "entitled to special solicitude in our standing analysis." *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). As a quasi-sovereign, a state "has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). Thus, a state may sue to assert its "quasi-sovereign interests in the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). In addition, "[d]istinct from but related to the general well-being of its residents, the State has an interest in securing observance

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[10] The Federal Defendants do not challenge California's and New Mexico's Article III standing in these appeals. However, "the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009).

The Federal Defendants challenged New Mexico's standing before the district court, but conflated its challenge with the APA "zone of interest" requirement, which we will discuss later. The district court held that New Mexico had established Article III standing.

of the terms under which it participates in the federal system." *Id.* at 607-08.

A

Here, California and New Mexico have alleged that the actions of the Federal Defendants will cause particularized and concrete injuries in fact to the environment and wildlife of their respective states as well as to their sovereign interests in enforcing their environmental laws.

1

The El Centro Sector Project 1 involves the Jacumba Wilderness area. California contends that this area is home to a large number of sensitive plant and animal species that are listed as "endangered," "threatened," or "rare" under the federal Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*, or the California Endangered Species Act, Cal. Fish & Game Code § 2050 *et seq.* California alleges that "[t]he construction of border barriers within or near the Jacumba Wilderness Area . . . will have significant adverse effects on environmental resources, including direct and indirect impacts to endangered or threatened wildlife." One such species is the federally and state-endangered peninsular desert bighorn sheep. Another is the flat-tailed horned lizard, a California species of special concern.[11]

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[11] A species of special concern is "a species, subspecies, or distinct population of an animal native to California that currently satisfies one or more of the following (but not necessarily mutually exclusive) criteria: is extirpated from the State . . . ; is listed as Feder-

California has adequately set forth facts and other evidence, which taken as true, support these allegations for the purpose of Article III standing. According to the California Department of Fish and Wildlife 2018 annual report addressing sheep monitoring in the Jacumba Wilderness area, "[t]he Jacumba ewe group is dependent on resources both within the US and Mexico. A fence along the US-Mexico border would prohibit movement to, and use of, prelambing and lamb-rearing habitat and summer water sources," and the development of energy projects adjacent to the Jacumba Mountains "combined with disturbance by border security activities" "will have significant adverse impacts on this ewe group." California contends that road construction; grading and construction of equipment storage and parking areas; and off road movement of vehicle and equipment involved in construction will alter the normal behavior of peninsular bighorn sheep, with the most significant effect on the endangered peninsular bighorn sheep being the permanent reduction of its north-south movement across the U.S.-Mexico border. California further avers that the effects of a border wall will place additional pressure on the survival and recovery of the bighorn sheep because the unimpeded movement of the

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ally-, but not State-, threatened or endangered; meets the State definition of threatened or endangered but has not formally been listed; is experiencing, or formerly experienced, serious (noncyclical) population declines or range retractions (not reversed) that, if continued or resumed, could qualify it for State threatened or endangered status; has naturally small populations exhibiting high susceptibility of to risk from any factor(s), that if realized, could lead to declines that would qualify it for State threatened or endangered status." CAL. DEPT. OF FISH AND WILDLIFE, SPECIES OF SPECIES CONCERN, https://wildlife.ca.gov/Conservation/SSC#394871324-what-is-there-lationship-between-sscs-and-the-california-wildlife-action-plan.

peninsular bighorn sheep between the United States and Mexico is important for increasing and maintaining their genetic diversity. It contends that as the number of animals that move between these two countries declines or ceases, the species will begin to suffer the deleterious effects of inbreeding and reduced genetic diversity.

Likewise, California asserts that the flat-tailed horned lizard lives within the project footprint and surrounding area, and that the extensive trenching, construction of roads, and staging of materials proposed in the area will harm or kill lizards that are either active or in underground burrows within the project footprint. It claims that the construction of the border wall will also greatly increase the predation rate of lizards adjacent to the wall by providing a perch for birds of prey and will effectively sever the linkage that currently exists between populations on both sides of the border.

New Mexico alleges that "[t]he construction of a border wall in the El Paso Sector along New Mexico's southern border will have adverse effects on the State's environmental resources, including direct and indirect impacts to endangered or threatened wildlife." Such harm "would include the blocking of wildlife migration, flooding, and habitat loss." It notes that the Chihuahuan desert is bisected by the New Mexico-Mexico border, and this "bootheel" region is the most biologically diverse desert in the Western Hemisphere, containing numerous endangered or threatened species. Such species include the Mexican gray wolf and the jaguar, both of which coexist in this region along the U.S.-Mexico border.

New Mexico has adequately set forth facts and other evidence, which taken as true, support these allegations for the purpose of Article III standing. It contends that the construction of El Paso Sector Project 1 may have a number of adverse effects on the Mexican wolf, including injury, death, harm, and harassment due to construction and related activities, as well as abandonment of the area for essential behaviors such as feeding, resting, and mating due to night lighting and the elimination of food sources and habitat in the area. Moreover, New Mexico avers that the construction of El Paso Sector Project 1 would interrupt the movement of the Mexican wolf across the U.S.-Mexico border, putting additional pressure on the species' survival and recovery in the wild because the unimpeded movement of Mexican wolves between the United States and Mexico is important for increasing and maintaining their genetic diversity. New Mexico notes that the documented movement of a radio-collared Mexican wolf across the border in the areas where border wall construction is planned demonstrates that construction will indeed cause such an interruption.

Additionally, the jaguar is considered endangered by the U.S. Fish and Wildlife Service ("USFWS"). New Mexico avers that jaguars were formerly widespread in the southwest United States, but were extirpated by hunting. It claims that, in recent decades, small numbers of individuals have dispersed north from breeding populations in northern Mexico, with some reaching the mountains in southwestern New Mexico west of Luna County. New Mexico contends that, if further long-term recolonization of jaguars continues, areas in Doña Ana and Luna counties include suitable habitat, but construction of El Paso Sector Project 1 would stop jaguar

movement through the region, potentially limiting recolonization.

For these reasons, we conclude that California and New Mexico have each provided sufficient evidence which, if taken as true, would allow a reasonable factfinder to conclude that both states will suffer injuries in fact to their environmental interests, and in particular, to protected species within their borders.

2

In addition, California and New Mexico have alleged that the Federal Defendants' actions have interfered with their respective abilities to enforce their environmental laws, thus interfering with the terms under which they participate in the federal system. They alleged that they have suffered, and will continue to suffer, injuries to their concrete, quasi-sovereign interests relating to the preservation of wildlife resources within their boundaries, including but not limited to wildlife on state properties.

California and New Mexico have adequately set forth facts and other evidence, which taken as true, support these allegations for the purpose of Article III standing. They have demonstrated that border wall construction injures their quasi-sovereign interests by preventing them from enforcing their environmental laws.

Under California law, the California Water Resources Control Board and nine regional boards establish water quality objectives and standards, and for construction projects like El Centro Sector Project 1, where dredge and fill activities are expected to occur, a regional board must ordinarily certify compliance with water quality

standards. The record indicates that, absent the Secretary of Homeland Security's Section 102(c) IIRIRA waiver of the Clean Water Act requirements for the project, El Centro Project 1 could not proceed without completing certification issued by a regional water board because the El Centro Project 1 will occur within or near the Pinto Wash and will traverse at least six ephemeral washes that have been identified as waters of the United States. The record further indicates that, due to the nature and location of construction, El Centro Project 1 would also require enrollment in the State Water Board's statewide National Pollutant Discharge Elimination General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities.

Likewise, the Section 102(c) waiver of the Clean Air Act's requirements undermines California's enforcement of its air quality standards for complying with the Clean Air Act as set forth in California's State Implementation Plan ("SIP"). In particular, but for the waiver, in order to move forward with El Centro Project 1, the Federal Defendants "would be obligated to comply with Rule 801 [of the SIP], which requires the development and implementation of a dust-control plan for construction projects to prevent, reduce, and mitigate [fine particulate matter] emissions."

Moreover, the Section 102(c) waiver exempts the Federal Defendants from complying with laws designed to protect endangered or threatened species. For instance, it exempts the Federal Defendants from consulting with the USFWS to ensure that El Centro Sector Project 1 "is not likely to jeopardize the continued existence of any endangered species or threatened species or

result in the destruction or adverse modification of habitat of such species" that are identified as endangered under California and federal law. 16 U.S.C. § 1536(a)(2). As we have noted, California contends that the El Centro Sector Project 1 is likely to harm federal and California endangered species such as the peninsular bighorn sheep and the flat-tailed horned lizard. The presence of these species led the USFWS, Bureau of Land Management ("BLM"), California Department of Fish and Wildlife, and California State Parks to develop and implement the "Flat-Tailed Horned Lizard Rangewide Management Strategy," which imposes restrictions on projects resulting in large-scale soil disturbances in the project area and prohibits activities that restrict the lizards' interchange with lizard populations across the border. Without the Section 102(c) waiver, this management strategy would impose certain restrictions and mitigation measures on the border wall construction projects.

Under New Mexico law, the Federal Defendants, absent the Section 102(c) waiver of the Clean Air Act's requirements, would normally be required to comply with New Mexico's fugitive dust control rule and High Wind Fugitive Dust Mitigation Plan that New Mexico adopted under the Clean Air Act. *See* N.M. Admin. Code §§ 20.2.23.109-.112 (mandating that "[n]o person . . . shall cause or allow visible emissions from fugitive dust sources that: pose a threat to public health; interfere with public welfare, including animal or plant injury or damage, visibility or the reasonable use of property" and "[e]very person subject to this part shall utilize one or more control measures . . . as necessary to meet

the requirements of [this section]"). The waiver, however, prevents New Mexico from enforcing these air quality rules.

New Mexico further contends that, absent the Section 102(c) waiver, the Federal Defendants would also normally be required to consult with the USFWS to protect species such as the Mexican wolf that are endangered under both federal and New Mexico Law. Moreover, the USFWS's management plan for the species—the "Mexican Wolf Recovery Plan-First Revision"—which is designed to "facilitate the wolf's revival," "calls for a minimum of 320 wolves in the United States and 200 in Mexico to meet recovery goals." The "binational recovery strategy" of this plan was developed by the USFWS "in coordination with federal agencies in Mexico and state, federal, and Tribal agencies in the United States," and "[e]ffective recovery requires participation by multiple parties within Federal, state, and local governments." USFWS, MEXICAN WOLF RECOVERY PLAN-FIRST REVISION at 10, 16 (2017). Construction undermines this plan because it inhibits the "utilization of habitat" and does not promote "meta-population connectivity."

The Section 102(c) waiver likewise prevents New Mexico from enforcing its Wildlife Corridors Act. Portions of El Paso Project 1 cross New Mexico State Trust Lands, and New Mexico contends that the planned pedestrian fencing disrupts habitat corridors in New Mexico—contravening to the Wildlife Corridors Act. The Act "requires New Mexico state agencies to create a 'wildlife corridors action plan' to protect species' habitat." New Mexico further avers that New Mexico's State Trust Lands in and around the El Paso Project 1

site form an important wildlife corridor for numerous species such as mule deer, javelina, pronghorn, bighorn sheep, mountain lion, bobcat, coyote, bats, quail, and other small game like rabbits.

In sum, we conclude that California and New Mexico have each provided sufficient evidence which, if taken as true, would allow a reasonable fact-finder to conclude that they have both suffered injuries in fact to their sovereign interests.

B

Turning to the causation requirement, we conclude that California has alleged environmental and sovereign injuries "fairly traceable" to the Federal Defendants' conduct. To satisfy this requirement, California and New Mexico "need not show that [Section 8005 is] 'the very last step in the chain of causation.'" *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 953 (9th Cir. 2013) (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). "A causal chain does not fail simply because it has several 'links,' provided those links are 'not hypothetical or tenuous' and remain 'plausib[le].'" *Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011) (quoting *Nat'l Audubon Soc., Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002)).

With respect to most of the environmental injuries, causation is apparent—for instance, as explained above, the construction and presence of the border wall will separate the peninsular bighorn sheep and Mexican wolf populations, decreasing biodiversity, and harming these species.

Although slightly more attenuated, we also conclude that the causation requirement is likewise satisfied

for the injuries to California's and New Mexico's quasi-sovereign interests. It makes no difference that the Section 102(c) waiver is most directly responsible for these injuries because without Section 8005, there is no waiver. That is, without the Section 8005 funding to construct El Centro Sector Project 1 and El Paso Sector Project 1, there would be no basis to invoke Section 102(c), and therefore, no resulting harm to California's and New Mexico's sovereign interests. Thus, we conclude that these injuries too are fairly traceable to the Section 8005 transfers of funds.

C

A ruling in California and New Mexico's favor would redress their harms. Without the Section 8005 funds, DoD had inadequate funding to finance construction of these projects; presumably, without this funding, construction of El Centro Sector Project 1 and El Paso Sector Project 1 would cease. This would prevent both the environmental injuries and the sovereign injuries alleged.

Thus, these facts would allow a reasonable fact-finder to conclude that, if funds are diverted to construct border wall projects in the El Centro and El Paso Sectors, California and New Mexico will each suffer environmental and quasi-sovereign injuries in fact that are fairly traceable to the challenged conduct of the Federal Defendants and likely to be redressed by a favorable judicial decision. California and New Mexico have established the requisite Article III standing to challenge the Federal Defendants' actions.

IV

The Federal Defendants argue that California and New Mexico lack the right to challenge the transfer of funds under the APA. We disagree.[12]

The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Where a statute imposes obligations on a federal agency but the obligations do not "give rise to a 'private' right of action against the federal government[,] [a]n aggrieved party may pursue its remedy under the APA." *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005). California and New Mexico must, however, establish that they fall within the zone of interests of the relevant statute to bring an APA claim. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) ("This Court has long held that a person suing under the APA must satisfy not only Article III's standing requirements, but an additional test: The interest he asserts must be 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." (quoting *Ass'n of*

[12] The States argue that they have both an equitable *ultra vires* cause of action and a cause of action under the APA. Although each of the claims can proceed separately, *see Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1170 (9th Cir. 2017), we do not need to address the *ultra vires* claims here. The States seek the same scope of relief under both causes of action and they prevail under the APA.

*Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970))).

Section 8005 does not confer a private right of action. Instead, it delegates a narrow slice of Congress's appropriation power to DoD to allow the agency to respond flexibly to unforeseen circumstances implicating the national interest. In doing so, the statute imposes certain obligations upon DoD—*i.e.*, DoD cannot invoke Section 8005 unless there is an unforeseen military requirement and unless Congress did not previously deny the item requested. California and New Mexico argue that DoD did not satisfy these obligations. We agree. Therefore, as aggrieved parties, California and New Mexico may pursue a remedy under the APA, so long as they fall within Section 8005's zone of interests.

As a threshold matter, Section 8005 is the relevant statute for the zone of interests test. "Whether a plaintiff's interest is 'arguably . . . protected . . . by the statute' within the meaning of the zone-of-interests test is to be determined *not by reference to the overall purpose of the Act* in question . . . but by reference to the *particular provision of law* upon which the plaintiff relies." *Bennett*, 520 U.S. at 175-76 (emphasis added). Here, for purposes of their APA claim, California and New Mexico rely on Section 8005's limitations. Thus, Section 8005 is the relevant statute for the zone of interests test.

The Supreme Court has clarified that, in the APA context, the zone of interests test does "not require any 'indication of congressional purpose to benefit the would-be plaintiff.'" *Patchak*, 567 U.S. at 225 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987)). It has repeatedly emphasized that the zone of interests

test is "not 'especially demanding'" in the APA context. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (quoting *Patchak*, 567 U.S. at 225). Instead, for APA challenges, a plaintiff can satisfy the test in either one of two ways: (1) "if it is among those [who] Congress expressly or directly indicated were the intended beneficiaries of a statute," or (2) "if it is a suitable challenger to enforce the statute—that is, if its interests are sufficiently congruent with those of the intended beneficiaries that the litigants are not more likely to frustrate than to further . . . statutory objectives." *Scheduled Airlines Traffic Offices, Inc. v. Dep't of Def.*, 87 F.3d 1356, 1359 (D.C. Cir. 1996) (alterations in original) (quotations and citations omitted). "The test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Patchak*, 567 U.S. at 225 (quoting *Clarke*, 479 U.S. at 399). "We apply the test in keeping with Congress's 'evident intent' . . . 'to make agency action presumptively reviewable[,]'" and note that "the benefit of any doubt goes to the plaintiff." *Id.* (quoting *Clarke*, 479 U.S. at 399).

In enacting Section 8005, Congress primarily intended to benefit itself and its constitutional power to manage appropriations. The obligations imposed by the section limit the scope of the authority delegated to DoD, reserving to Congress in most instances the power to appropriate funds to particular DoD accounts for specific purposes. This conclusion is reinforced by the legislative history. Congress first imposed limits on DoD's transfer authority in order to "tighten congressional

control of the reprogramming process." H.R. Rep. No. 93-662, at 16 (1973).

The field of suitable challengers must be construed broadly in this context because, although Section 8005's obligations were intended to protect Congress, restrictions on congressional standing make it difficult for Congress to enforce these obligations itself. *See Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979), *vacated and remanded on other grounds*, 44 U.S. 996 (1979) (explaining that a member of Congress has standing only if "the alleged diminution in congressional influence . . . amount[s] to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity"). Indeed, the House of Representatives filed its own lawsuit in the U.S. District Court for the District of Columbia challenging this same transfer of funds, but the court held that the House lacked standing to sue. *See U.S. House of Reps. v. Mnuchin*, 379 F. Supp. 3d 8, 11 (D.D.C. 2019) ("And while the Constitution bestows upon Members of the House many powers, it does not grant them standing to hale the Executive Branch into court claiming a dilution of Congress's legislative authority.").

California and New Mexico are suitable challengers because their interests are congruent with those of Congress and are not "inconsistent with the purposes implicit in the statute." *Patchak*, 567 U.S. at 225. First, this challenge actively furthers Congress's intent to "tighten congressional control of the reprogramming process." H.R. Rep. No. 93-662, at 16 (1973). In particular, this challenge furthers this intent because, even though Section 8005 does not require formal congressional approval to reprogram funds, the congressional

committees expressly disapproved of DoD's use of the authority here.

Second, California and New Mexico's challenge strives to reinforce the same structural constitutional principle Congress sought to protect through Section 8005: congressional power over appropriations. *See* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . . "); *see also Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (explaining that this "straightforward and explicit command" "'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress'" (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937))). California and New Mexico's interest in reinforcing these structural separation of powers principles is unique but aligned with that of Congress because just as those principles are intended "to protect each branch of [the federal] government from incursion by the others," the "allocation of powers in our federal system [also] preserves the integrity, dignity, and residual sovereignty of the States," because "[f]ederalism has more than one dynamic." *Bond v. United States*, 564 U.S. 211, 221-22 (2011). This interest applies with particular force here because the use of Section 8005 here impacts California's and New Mexico's ability to enforce their state environmental laws. *See Massachusetts v. EPA*, 549 U.S. at 518-19 ("'[T]he State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.'" (quoting *Tenn. Copper Co.*, 206 U.S. at 237)); *see also*

*Maine v. Taylor*, 477 U.S. 131, 151 (1986) ("[A state] retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources."). Here, the use of Section 8005 allows the government to invoke Section 102(c) of IIRIRA to waive state environmental law requirements for purposes of building the border wall.[13] Thus, Section 8005's limitations protect California's and New Mexico's sovereign interests, just as they protect Congress's constitutional interests, because they ensure that, ordinarily, Executive action cannot override these interests without congressional approval and funding. Therefore, just as Section 8005's limitations serve Congress to preserve the "equilibrium the Constitution sought to establish—so that 'a gradual concentration of the several powers in the same department,' can effectively be resisted," they likewise serve California and New Mexico as well. *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) (quoting Federalist No. 51, p. 321 (J. Madison)).

Moreover, that the states regularly benefit from DoD's use of Section 8005 reinforces that California and New Mexico's interests are *not* "so marginally related" that "it can[] reasonably be assumed that Congress intended to permit suit." *Patchak*, 567 U.S. at 225. For instance, in 2004 DoD invoked Section 8005 to transfer funds to pay for storm damages incurred by airforce bases across Florida during Hurricane Charley. Office of

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[13] As we explained with respect to Article III standing, California and New Mexico have provided sufficient evidence by declaration to establish that they have suffered cognizable injuries to their sovereign interests and that this injury is fairly traceable to the Federal Defendants' use of Section 8005.

the Under Sec'y of Def. (Comptroller), FY 04-37 PA, Reprogramming Action (2004). Likewise, in 2008 DoD invoked Section 8005 to finance costs incurred by the National Guard in responding to Hurricane Gustav in Louisiana, Texas, Mississippi, and Alabama, as well as operations related to Hurricane Ike in Texas and Louisiana. Office of the Under Sec'y of Def. (Comptroller), FY 08-43 PA, Reprogramming Action (2008). The historical use of Section 8005 supports that states are "reasonable" and "predictable" challengers to its use, and this instance is no anomaly. *Patchak*, 567 U.S. at 227.

For these reasons, California and New Mexico easily fall within the zone of interests of Section 8005 and are suitable challengers to enforce its obligations. We therefore affirm the grant of summary judgment to the States. To conclude otherwise would effectively hold that no entity could fall within Section 8005's zone of interests, and that no agency action taken pursuant to Section 8005 could ever be challenged under the APA. Such a conclusion is not tenable, and a result Congress surely did not intend.

V

The district court correctly held that Section 8005 did not authorize DoD's budgetary transfer to fund construction of the El Paso and El Centro Sectors.

In construing a statute, we begin, as always, with the language of the statute. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1026 (9th Cir. 2013). "When terms are not defined within a statute, they are accorded their plain and ordinary meaning, which can be deduced through reference sources such as general usage dictionaries." *Id.* Of course, "[s]tatutory

language must always be read in its proper context," *id.* (quotations and citation omitted), as courts must look to the "design of the statute as a whole and to its object and policy," *id.* (quotations and citation omitted), and "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (quotations and citation omitted).

Section 8005's transfer authority cannot be invoked "unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." Two limitations are important to our analysis: (1) that the transfer must be "based on unforeseen military requirements," and (2) that the transfer authority cannot be invoked if the "item for which funds are requested ha[d] been denied by the Congress." We conclude that the district court correctly determined that the border wall was not an unforeseen military requirement, that funding for the wall had been denied by Congress, and therefore, that the transfer authority granted by Section 8005 was not permissibly invoked.

A

Section 8005 authorizes the transfer of funds only in response to an "unforeseen military requirement." The district court properly concluded that the need for a border wall was not unforeseen. We also conclude that the need was unrelated to a military requirement.

1

Section 8005 does not define "unforeseen." Therefore, we start by considering the ordinary meaning of

the word. Something is unforeseen when it is "not anticipated or expected." *Unforeseen*, MERRIAM-WEBSTER ONLINE DICTIONARY (2020). By contrast, to foresee is "to see (something, such as a development) *beforehand*." *Foresee*, MERRIAM-WEBSTER ONLINE DICTIONARY (2020) (emphasis added). Prior use of this authority confirms this meaning. Previously, DoD has invoked its Section 8005 authority to transfer funds to repair hurricane and typhoon damage to military bases— natural disasters that inflict damage that may not be anticipated or expected ahead of time. We conclude that an unforeseen requirement is one that DoD did not anticipate or expect.

Neither the problem, nor the President's purported solution, was unanticipated or unexpected here. The smuggling of drugs into the United States at the southern border is a longstanding problem. U.S. CUSTOMS AND BORDER PATROL, BORDER PATROL HISTORY, https://www.cbp.gov/border-security/along-us-borders/history (last visited June 16, 2020) ("By [the early 1960's] the business of alien smuggling began to involve drug smuggling also. The Border Patrol assisted other agencies in intercepting illegal drugs from Mexico."); *United States v. Flores-Montano*, 541 U.S. 149, 153 (2004) ("That interest in protecting the borders is illustrated in this case by the evidence that smugglers frequently attempt to penetrate our borders with contraband secreted in their automobiles' fuel tank. Over the past 5 1/2 fiscal years, there have been 18,788 vehicle drug seizures at the southern California ports of entry."). Indeed, the federal Drug Enforcement Administration was created over four decades ago in 1974 in large part to address the smuggling of illegal drugs into the United States.

*See* Reorganization Plan No. 2 of 1973, 87 Stat. 1091, as amended Pub. L. 93-253, § 1, 88 Stat. 50 (1974).

Congress's joint resolution terminating the President's declaration of a national emergency only reinforces this point: there was no unanticipated crisis at the border. Nothing prevented Congress from funding solutions to this problem through the ordinary appropriations process—Congress simply chose not to fund this particular solution.

The long, well-documented history of the President's efforts to build a border wall demonstrates that he considered the wall to be a priority from the earliest days of his campaign in 2015. *See, e.g.*, *Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015) ("I would build a great wall . . . I will build a great, great wall on our southern border."); *Transcript of Donald Trump's Immigration Speech*, NEW YORK TIMES (Sept. 1, 2016) ("On day one, we will begin working on an impenetrable, physical, tall, power, beautiful southern border wall."). Moreover, his repeated pronouncements on the subject made clear that federal agencies like DoD might be tasked with the wall's funding and construction. Congress's repeated denials of funding only drew national attention to the issue and put agencies on notice that they might be asked to finance construction. *See* Securing America's Future Act of 2018, H.R. 4760, 115th Cong. § 1111 (2018); Border Security and Immigration Reform Act of 2018, H.R. 6136, 115th Cong. § 5101 (2018); American Border Act, H.R. 6415, 115th Cong. § 4101 (2018); Fund and Complete the Border Wall Act, H.R. 6657, 115th Cong. § 2 (2018); Build the Wall, Enforce the Law Act of 2018, H.R. 7059, 115th Cong. § 9 (2018); 50 Votes for the Wall

Act, H.R. 7073, 115th Cong. § 2 (2018); WALL Act of 2018, S. 3713, 115th Cong. § 2 (2018). In short, neither the conditions at the border nor the President's position that a wall was needed to address those conditions was unanticipated or unexpected by DoD.

The Federal Defendants' arguments to the contrary are unpersuasive. They assert that "an agency's *request*" "will be foreseen" only "when *it is received* by DoD in time to include in the submission to Congress [for the yearly budget]," and that therefore, the transfer at issue here complied with the text of the statute. (emphasis added). There are two problems with the Federal Defendants' position.

First, Section 8005 permits transfers based only on unforeseen military *requirements*—not unforeseen budgetary *requests*. A requirement that gives rise to a funding request is distinct from the request itself. Here, the requirement that gave rise to the Section 284 requests is a border wall. Thus, to invoke the statute, the need for a border wall must have been unforeseen. To hold otherwise—*i.e.*, to conclude that transfers are permitted under Section 8005 if they are based on unforeseen budgetary requests—would undermine the narrowness of the statute and potentially encourage DoD and other agencies to submit budgetary requests after DoD has submitted its final budget to Congress in order to skirt the congressional appropriations process. This result is inconsistent with the purpose of Section 8005: to "tighten congressional control of the reprogramming process." H.R. Rep. No. 93-662, at 16 (1973). If this interpretation prevailed, the exception would swallow the rule and undermine Congress's constitutional appropriations power.

Second, even if we were to accept the government's definition of "requirement" as equivalent to "request," DHS's specific Section 284 requests were both anticipated and expected, even within the confines of the appropriations context. Nearly six months before the enactment of the 2019 DoD Appropriations Act, the President wrote the following in a memorandum to the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security: "The Secretary of Defense shall support the Department of Homeland Security in securing the southern border and taking other necessary actions to stop the flow of deadly drugs and other contraband . . . into this country." Further, in a response to a request for information from the House Armed Services Committee, DoD wrote that the "DoD Comptroller with[held] over 84% ($947 million) of [counterdrug] appropriated funds for distribution until the 4th Quarter for possible use in supporting Southwest Border construction last fiscal year." As explained by the Staff Director of the House Armed Services Committee, this "suggests that DoD was considering using its counterdrug authority under 10 U.S.C. § 284 for southern border construction in early 2018." Further still, because Section 284 only allows DoD to provide support that is *requested* by other agencies, DoD's retention of funds suggests it likely anticipated such a request. *See* 10 U.S.C. § 284(a)(1) ("The Secretary of Defense may provide support . . . if . . . such support is requested.").

The Federal Defendants also unpersuasively equate "foreseen" with "known." "[T]o know" means "to perceive directly: have direct cognition of." *Know*, MERRIAM-WEBSTER ONLINE DICTIONARY (2020). This interpretation effectively eliminates any element of anticipation

or expectation. "'Congress' choice of words is presumed to be deliberate' and deserving of judicial respect." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018) (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013)). Thus, we must presume that Congress's use of the word "unforeseen" is deliberate. Congress could have easily specified that a transfer is permitted only when based on "unknown" requirements, but it did not. Instead, Congress specified that Section 8005 permits a transfer only where a requirement was unforeseen—*i.e.*, unanticipated or unexpected. We decline to read into the text a lower standard based on actual knowledge.[14]

In sum, both the requirement to build a wall on the southern border as well as the DHS request to DoD to build that wall were anticipated and expected. Thus, neither was "unforeseen" within the meaning of Section 8005.

2

Section 8005 not only mandates that the requirement be unforeseen, but also that it be a *military requirement*. Under relevant definitions, the construction of El Centro and El Paso projects does not satisfy any definition of a "military requirement."

The 2019 Appropriations Act does not define "military." Therefore, we start by considering its ordinary

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[14] Indeed, in DoD parlance, the possibility that border funding from the DoD budget might be requested was a "known unknown," as opposed to "unforeseeable," which would be an "unknown unknown," a category which former Secretary of Defense Rumsfeld described as including a "genuine surprise." DONALD RUMSFELD, KNOWN AND UNKNOWN: A MEMOIR, p. xiv. (2011).

meaning: "of or relating to soldiers, arms, or war." *Military*, MERRIAM-WEBSTER ONLINE DICTIONARY (2020). The border wall construction projects here plainly fail to satisfy this definition because the Federal Defendants have argued neither that the border wall construction projects are related to the use of soldiers or arms, nor that there is a war on the southern border.

The administrative record underscores this point, and supports that the border wall construction projects are not military ones. The record demonstrates that the diverted funding is primarily intended to support DHS—a civilian agency entirely separate from any branch of the armed forces. The Assistant Secretary of Defense stated that the funds were transferred "to provide assistance to DHS to construct fencing to block drug-smuggling corridors in three project areas along the southern border of the United States." He also explained that the purpose of the transfer was to "support DHS's efforts to secure the southern border." By contrast, the transfer of funds for border wall construction does little to assist DoD with any of its operations. Even to the extent it might, it does so only insofar as it helps DoD assist DHS: as summarized by the Chairman of the Joint Chiefs of Staff and DHS, border wall projects "allow DoD *to provide support to DHS* more efficiently and effectively." (emphasis added). In short, the fact that construction is intended to support a civilian agency, as opposed to DoD itself or any branch of the armed forces, emphasizes that the transfer fails to meet the plain meaning of "military."

The border wall construction projects do not even satisfy a statutory definition specifically invoked by the Federal Defendants. *See also* WILLIAM N. ESKRIDGE

ET AL., LEGISLATION AND STATUTORY INTERPRETATION 273 (2d ed. 2006) ("A word or clause that is ambiguous at first glance might be clarified if 'the same terminology is used elsewhere in a context that makes its meaning clear'" and such coherence arguments may be invoked "across as well as within statutes" (quoting *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988))).

The Federal Defendants have also invoked 10 U.S.C. § 2808 ("Section 2808") to fund other border wall construction projects on the southern border. Section 2808 incorporates the definition of "military construction" provided by 10 U.S.C. § 2801(a): it defines "military construction" as construction associated with a "military installation" or "defense access road." Section 2801(c)(4) further defines "military installation" as "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department."[15]

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[15] To be sure, Section 8005 states that it applies only to transfers between appropriations for "military functions," as opposed to the phrase "military construction" used in Section 2808. However, the statutes address similar subject matter, and it is of some significance that the Federal Defendants have invoked Section 2808 for functionally identical projects, claiming that such projects constitute "military construction" within the meaning of that statute, while also asserting that such projects satisfy the term "military" within the meaning of Section 8005. And, as we know, "'statutes addressing the same subject matter' should be construed *in pari materia*." *Fed. Trade Comm'n v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 433 n.2 (9th Cir. 2018) (O'Scannlain, J., concurring) (quoting *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315 (2006)). Under that doctrine, related statutes should "be construed as if they were one law." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (quotations and

The border wall construction projects at issue in this appeal are not carried out with respect to a "military installation." The projects themselves are not a base, camp, station, yard, or center, and unlike the projects considered by the Federal Defendants' related Section 2808 appeal, the projects at issue in this appeal have not been brought under military jurisdiction. Moreover, there are no military installations in the El Centro or El Paso project areas, nor any claim of a requirement for a defense access road; instead, as we have noted, the projects affect open wilderness areas—the El Centro Sector project involves the Jacumba Wilderness areas, and the El Paso Sector project involves the Chihuahuan desert. The fact that the construction projects fail to meet Section 2808's definition of military construction supports that these projects fail to satisfy any meaningful definition of "military."

Even if we were to afford some consideration to the subchapter title for Section 284 authorizing "Military Support for Civilian Law Enforcement Agencies," there is a distinction to be drawn between "military support," and what the statute requires: a "military requirement." Requirement ordinarily means "something wanted or needed," or "something essential to the existence or occurrence of something else." *Requirement*, MERRIAM-WEBSTER ONLINE DICTIONARY (2020). The border wall construction projects are not something needed or essential to the armed forces, soldiers, arms, or any sort

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citation omitted). Further, even apart from *in pari material* considerations, the Supreme Court "has previously compared nonanalogous statutes to aid its interpretation of them." *Nat'l Fed'n of Fed. Emps., Local 1309 v. Dep't of Interior*, 526 U.S. 86, 105 (1999) (O'Connor, J., dissenting) (citing *Overstreet v. North Shore Corp.*, 318 U.S. 125, 131-32 (1943)).

of war effort. Rather, as explained above, they are designed to "provide assistance" and "support" to DHS, a civilian agency. While providing such support may be appropriate under Section 284, a request for this support without connection to any military function fails to rise to the level of a military requirement for purposes of Section 8005. Simply because a civilian agency requests support in furtherance of a particular objective, even when such support is authorized by statute, does not mean that the military itself *requires* that objective.

To conclude that supporting projects unconnected to any military purpose or installation satisfies the meaning of "military requirement" would effectively write the term out of Section 8005. Therefore, we conclude that the transfers at issue here do not satisfy Section 8005's military purpose requirement.

B

In addition, Section 8005 authorizes the transfer of funds only when "the item for which funds are requested has [not] been denied by the Congress." The question here is whether by declining to provide sufficient funding for the border wall, Congress denied the item for which funds were requested within the meaning of the statute.

As we have explained, Congress declined to fund the border wall numerous times in a variety of ways. Congress failed to pass seven different bills, *see supra at* 37-38, that were proposed specifically to fund the wall. Congress also refused to appropriate the $5.7 billion requested by the White House in the CAA; instead, Congress appropriated $1.375 billion, less than a quarter of the funds requested, for "the construction of primary

pedestrian fencing . . . in the Rio Grande Valley Sector." CAA at § 230(a)(1).

The Federal Defendants assert that the Section 8005 transfer would be invalid only if Congress had denied a Section 284 budgetary line item request to fund the border wall. But "[i]n common usage, a general denial of something requested can, and in this case does, encompass more specific or narrower forms of that request." *Sierra Club v. Trump*, 929 F.3d 670, 691 (9th Cir. 2019). Here, Congress refused to provide the funding requested by the President for border wall construction: a general denial. This general denial necessarily encompasses narrower forms of denial—such as the denial of a Section 284 budgetary line item request. We decline to impose upon Congress an obligation to deny every possible source of funding when it refuses to fund a particular project—surely when Congress withheld additional funding for the border wall, it intended to withhold additional funding for the wall, regardless of its source. "No" means no.

To hold that Congress did not previously deny the Executive Branch's request for funding to construct a border wall would be to "find secreted in the interstices of legislation the very grant of power which Congress consciously withheld." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring). Regardless of how specific a denial may be in some circumstances, Congress's broad and resounding denial resulting in a 35-day partial government shutdown must constitute a previous denial for purposes of Section 8005. This history precludes the use of Section 8005's transfer authority.

C

In sum, Section 8005 did not authorize the transfer of funds challenged by California and New Mexico. Absent such statutory authority, the Executive Branch lacked independent constitutional authority to transfer the funds at issue here. *See City and Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1233-34 (9th Cir. 2018) ("[W]hen it comes to spending, the President has none of 'his own constitutional powers' to 'rely' upon." (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring))). Therefore, the transfer of funds at issue here was unlawful. We affirm the district court's declaratory judgment to California and New Mexico.

VI

Finally, we consider the district court's denial of California and New Mexico's request for injunctive relief, a decision we review for an abuse of discretion. *See Midgett v. Tri-Cty. Metro. Transp. Dist. of Or.*, 254 F.3d 846, 849 (9th Cir. 2001). The district court denied the States' request for a permanent injunction primarily because the relief sought was duplicative of the relief the district court had already granted in the *Sierra Club* matter. That decision, which is the only one before us in this appeal, was certainly not an abuse of discretion. As we have noted, however, subsequent to the district court's decision, the Supreme Court stayed the *Sierra Club* permanent injunction. *See Sierra Club*, 140 S. Ct. at 1.

Nevertheless, given the totality of the considerations at issue in this case, we continue to see no abuse of discretion in the district court's order, even though at this moment, the injunction in *Sierra Club* no longer affords

the States protection. We emphasize, however, that depending on further developments in these cases, the States are free to seek further remedies in the district court or this Court.

VII

In sum, we affirm the district court. We conclude that California and New Mexico have Article III standing to file their claims, that California and New Mexico are sufficiently within Section 8005's zone of interests to assert an APA claim, and that the Federal Defendants violated Section 8005 in transferring DoD appropriations to fund the El Centro and El Paso Sectors of the proposed border wall. We also decline to reverse the district court's decision against imposing a permanent injunction, without prejudice to renewal. Given our resolution of this case founded upon the violations of Section 8005, we need not—and do not—reach the merits of any other theory asserted by the States, nor reach any other issues presented by the parties.

**AFFIRMED.**

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COLLINS, Circuit Judge, dissenting:

In the judgment under review, the district court granted summary judgment and declaratory relief to California and New Mexico on their claims challenging the Acting Secretary of Defense's invocation of § 8005 and § 9002 of the Department of Defense Appropriations Act, 2019 ("DoD Appropriations Act"), Pub. L. No. 115-245, Div. A, 132 Stat. 2981, 2999, 3042 (2018), to transfer $2.5 billion in funds that Congress had appropriated for other purposes into a different Department of Defense ("DoD") appropriation that could then be used by DoD

for construction of border fencing and accompanying roads and lighting. The States allege that the transfers were not authorized under § 8005 and § 9002 and that, as a result of the construction activities made possible by the unlawful transfers, the States have suffered injuries to their sovereign and environmental interests. The majority concludes that the States have Article III standing; that they have a cause of action to challenge the transfers under the Administrative Procedure Act ("APA"); that the transfers were unlawful; and that the district court properly determined that the States are not entitled to any relief beyond a declaratory judgment. I agree that at least California has established Article III standing, but in my view the States lack any cause of action to challenge the transfers, under the APA or otherwise. And even assuming that they had a cause of action, I conclude that the transfers were lawful. Accordingly, I would reverse the district court's partial judgment for the States and remand for entry of partial summary judgment in favor of the Defendants. I respectfully dissent.

**I**

The parties' dispute over DoD's funding transfers comes to us against the backdrop of a complex statutory framework and an equally complicated procedural history. Before turning to the merits, I will briefly review both that framework and that history.

**A**

Upon request from another federal department, the Secretary of Defense is authorized to "provide support for the counterdrug activities" of that department by undertaking the "[c]onstruction of roads and fences and

installation of lighting to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. § 284(a), (b)(7). On February 25, 2019, the Department of Homeland Security ("DHS") made a formal request to DoD for such assistance. Noting that its counterdrug activities included the construction of border infrastructure, *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 102(a), 110 Stat. 3009-546, 3009-554 (1996) (codified as amended as a note to 8 U.S.C. § 1103), DHS requested that "DoD, pursuant to its authority under 10 U.S.C. § 284(b)(7), assist with the construction of fences[,] roads, and lighting" in several specified "Project Areas" in order "to block drug-smuggling corridors across the international boundary between the United States and Mexico."

On March 25, 2019, the Acting Defense Secretary invoked § 284 and approved the provision of support for, *inter alia*, DHS's "El Paso Sector Project 1," which would involve DoD construction of border fencing, roads, and lighting in Luna and Doña Ana Counties in New Mexico. Thereafter, the Secretary of Homeland Security invoked his authority under § 102(c) of IIRIRA to waive a variety of federal environmental statutes with respect to the planned construction of border infrastructure in the El Paso Sector, as well as "all . . . state . . . laws, regulations, and legal requirements of, deriving from, or related to the subject of," those federal laws. *See* 84 Fed. Reg. 17185, 17187 (Apr. 24, 2019).

Subsequently, on May 9, 2019, the Acting Defense Secretary again invoked § 284, this time to approve DoD's construction of similar border infrastructure to support, *inter alia*, DHS's "El Centro Sector Project 1"

in Imperial County, California. Less than a week later, the Secretary of Homeland Security again invoked his authority under IIRIRA § 102(c) to waive federal and state environmental laws, this time with respect to the construction in the relevant section of the El Centro Sector. *See* 84 Fed. Reg. 21800, 21801 (May 15, 2019).

Although § 284 authorized the Acting Defense Secretary to provide this support, there were insufficient funds in the relevant DoD appropriation to do so. Specifically, for Fiscal Year 2019, Congress had appropriated for "Drug Interdiction and Counter-Drug Activities, Defense" a total of only $670,271,000 that could be used for counter-drug support. *See* DoD Appropriations Act, Title VI, 132 Stat. at 2997 (appropriating, under Title governing "Other Department of Defense Programs," a total of "$881,525,000, of which $517,171,000 shall be for counter-narcotics support"); *id.*, Title IX, 132 Stat. at 3042 (appropriating $153,100,000 under the Title governing "Overseas Contingency Operations"). Accordingly, to support the El Paso Sector Project 1, the Acting Secretary on March 25, 2019 invoked his authority to transfer appropriations under § 8005 of the DoD Appropriations Act and ordered the transfer of $1 billion from "excess Army military personnel funds" into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation. That transfer was accomplished by moving $993,627,000 from the "Military Personnel, Army" appropriation and $6,373,000 from the "Reserve Personnel, Army" appropriation.

To support the El Centro Sector Project 1, the Acting Secretary on May 9, 2019 again invoked his transfer authority to move an additional $1.5 billion into the "Drug

Interdiction and Counter-Drug Activities, Defense" appropriation. Pursuant to § 8005 of the DoD Appropriations Act, DoD transferred a total of $818,465,000 from 12 different DoD appropriations into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation. Invoking the Secretary's distinct but comparable authority under § 9002 to transfer funds appropriated under the separate Title governing "Overseas Contingency Operations," DoD transferred $604,000,000 from the "Afghanistan Security Forces Fund" appropriation and $77,535,000 from the "Operation and Maintenance, Defense-Wide" appropriation into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation.

**B**

The complex procedural context of this case involves two parallel lawsuits and four appeals to this court, and it has already produced one published Ninth Circuit opinion that was promptly displaced by the Supreme Court.

**1**

California and New Mexico, joined by several other States, filed this action in the district court against the Acting Defense Secretary, DoD, and a variety of other federal officers and agencies. In their March 13, 2019 First Amended Complaint, they sought to challenge, *inter alia*, any transfer of funds by the Acting Secretary under § 8005 or § 9002. The Sierra Club and the Southern Border Communities Coalition ("SBCC") filed a similar action, and their March 18, 2019 First Amended Complaint also sought to challenge any such transfers. Both sets of plaintiffs moved for preliminary injunctions

in early April 2019. The portion of the States' motion that was directed at the § 8005 transfers was asserted only on behalf of New Mexico and only with respect to the construction on New Mexico's border (*i.e.*, El Paso Sector Project 1). The Sierra Club motion was likewise directed at El Paso Sector Project 1, but it also challenged two other projects in Arizona ("Yuma Sector Projects 1 and 2").

After concluding that the Sierra Club and SBCC were likely to prevail on their claims that the transfers under § 8005 were unlawful and that these organizational plaintiffs had demonstrated a "likelihood of irreparable harm to their members' aesthetic and recreational interests," the district court on May 24, 2019 granted a preliminary injunction enjoining Defendants from using transferred funds for "Yuma Sector Project 1 and El Paso Sector Project 1."[1] In a companion order, however, the district court denied preliminary injunctive relief to the States. Although the court held that New Mexico was likely to succeed on its claim that the transfers under § 8005 were unlawful, the court concluded that, in light of the grant of a preliminary injunction against El Paso Sector Project 1 to the Sierra Club and SBCC, New Mexico would not suffer irreparable harm from the denial of its duplicative request for such relief. On May 29, 2019, Defendants appealed the preliminary injunction in favor of the Sierra Club and SBCC, and after the district court refused to stay that

[1] By the time the district court ruled, DoD had decided not to use funds transferred under § 8005 for any construction in Yuma Sector Project 2, and so the request for a preliminary injunction as to that project was moot.

injunction, Defendants moved in this court for an emergency stay on June 3, 2019. New Mexico did not appeal the district court's denial of its duplicative request for a preliminary injunction.

**2**

While the Defendants' emergency stay request was being briefed and considered in this court, California and New Mexico (but not the other States) moved for partial summary judgment on June 12, 2019. The motion was limited to the issue of whether the transfers under § 8005 and § 9002 were lawful, and it requested corresponding declaratory relief, as well as a permanent injunction against the use of transferred funds for El Paso Sector Project 1 and El Centro Sector Project 1. The Sierra Club and SBCC filed a comparable summary judgment motion that same day, directed at those two projects, as well as at Yuma Sector Project 1 and three other Arizona projects ("Tucson Projects 1, 2, and 3"). Defendants filed cross-motions for summary judgment on the legality of the transfers under § 8005 and § 9002 with respect to the corresponding projects at issue in each case.

On June 28, 2019, the district court granted partial summary judgment and declaratory relief to both sets of plaintiffs, concluding that the transfers under § 8005 and § 9002 were unlawful. The court granted permanent injunctive relief to the Sierra Club and SBCC against all six projects, but it denied any such relief to California and New Mexico. The district court concluded that California and New Mexico had failed to prove a threat of future demonstrable environmental harm. The court expressed doubts about the States' alternative theory that they had demonstrated injury to

their sovereign interests, but the court ultimately concluded that it did not need to resolve that issue. As before, the district court instead held that California and New Mexico would not suffer any irreparable harm in light of the duplicative relief granted to the Sierra Club and SBCC. The district court denied Defendants' cross-motions for summary judgment in both cases. Invoking its authority under Federal Rule of Civil Procedure 54(b), the district court entered partial judgments in favor of, respectively, the Sierra Club and SBCC, and California and New Mexico. The district court denied Defendants' request to stay the permanent injunction pending appeal.

**3**

On June 29, 2019, Defendants timely appealed in both cases and asked this court to stay the permanent injunction in the *Sierra Club* case based on the same briefing and argument that had been presented in the preliminary injunction appeal in that case. California and New Mexico timely cross-appealed nine days later. On July 3, 2019, this court consolidated Defendants' appeal of the judgment and permanent injunction in the *Sierra Club* case with Defendants' pending appeal of the preliminary injunction.[2] That same day, a motions panel of this court issued a 2-1 published decision denying Defendants' motion for a stay of the permanent injunction (which had overtaken the preliminary injunction). *See Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019).

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[2] This court later consolidated the appeal and cross-appeal in the States' case with the already-consolidated appeals in the *Sierra Club* case.

Defendants then applied to the Supreme Court for a stay of the permanent injunction pending appeal, which the Court granted on July 26, 2019. *See Trump v. Sierra Club*, 140 S. Ct. 1 (2019). That stay remains in effect "pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is timely sought." *Id.* at 1. In granting the stay, the Court concluded that "the Government has made a sufficient showing at this stage that [the Sierra Club and SBCC] have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Id.*

**II**

The Government has not contested the Article III standing of California and New Mexico on appeal, but as the majority notes, "'the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties.'" *See* Maj. Opin. at 19 n.10 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)). As "an indispensable part of the plaintiff's case, each element" of Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife* (*Lujan v. Defenders*), 504 U.S. 555, 561 (1992). Thus, although well-pleaded allegations are enough at the motion-to-dismiss stage, they are insufficient to establish standing at the summary-judgment stage. *Id.* "In response to a summary judgment motion, . . . the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or

other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Id.* (simplified).[3]

In reviewing standing *sua sponte* in the context of cross-motions for summary judgment, it is appropriate to apply the more lenient standard that takes the *plaintiffs'* evidence as true and then asks whether a reasonable trier of fact could find Article III standing. *Lujan v. Defenders*, 504 U.S. at 563 (applying this standard in evaluating whether Government's cross-motion for summary judgment should have been granted). In their briefs below concerning the parties' cross-motions, California and New Mexico asserted that Defendants' allegedly unlawful conduct caused both harm to the States' sovereign interests in enforcing their environmental laws as well as actual environmental harm to animals and plants within the States. I agree that at least the second of these two asserted injuries—the threatened occurrence of actual environmental harm—is sufficient to establish Article III standing in this case, at least as to California.[4] Although the district court correctly

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[3] I favor the general practice of reciting the language of the quoted source as if that source were stating those exact words for the first time, thereby disregarding any indicia of quotations within quotations (such as brackets, ellipses, and multiple layers of quotation marks). Going forward, I will use the word "simplified" rather than "cleaned up," because it seems less colloquial and it avoids suggesting that the more precise quotation format needed "cleaning." Of course, if I make any changes to the simplified quotation, then those would be shown with brackets or ellipses.

[4] As the majority notes, *see* Maj. Opin. at 19 n.10, the district court explicitly addressed Article III standing to challenge the transfers only in the context of New Mexico's request for a preliminary injunction. Although Article III standing was not revisited when both

recognized that the States' evidence of injury was very thin, *see infra* note 6, California's evidence is sufficient to establish standing at the summary-judgment stage.

Even assuming *arguendo* that the States must show a threat of injury to a protected *species* within their borders, rather than merely injury to individual animals or plants belonging to such a species,[5] I think that California has made a sufficient showing. Accepting the States' evidence as true, and drawing all reasonable inferences in their favor, a reasonable trier of fact could conclude that the construction activities associated with El Centro Sector Project 1 in California could materially adversely affect the local population of flat-tailed horned lizards, which California has classified as a "Species of Special Concern." Specifically, California presented declarations from two biologists explaining how DoD's construction activities, and the resulting border barrier, would materially harm the lizard population by increasing opportunities for natural predators to catch lizards, by creating a "genetic break" between the populations within the species' small range area on either side of the barrier, and by accidentally killing a potentially significant number of lizards during the construction itself.

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California and New Mexico subsequently moved for summary judgment and a permanent injunction, the States' showing of injury in support of a permanent injunction provides a sufficient basis for evaluating their Article III standing.

[5] There are aspects to the States' arguments below—and of the majority opinion here—that seem implicitly to rest on the expansive view that the States would suffer cognizable injury-in-fact if there is harm to a *single* protected animal or to *any* of the plants in the construction area. Such theories push the outermost limits of plausible injury-in-fact, *cf. Lujan v. Defenders*, 504 U.S. at 566-67, but it is unnecessary to rely on them here.

This evidence is sufficient to establish an injury-in-fact to California's environmental interests. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 521 (2007) (significant harm to ecosystem is an injury to the State for Article III standing purposes).[6]

California's showing of a material risk to a "Species of Special Concern" is fairly traceable to the challenged funding transfers and would be redressed by a favorable decision. *Lujan v. Defenders*, 504 U.S. at 560-61. It therefore suffices to give us Article III jurisdiction to address the merits of the States' causes of action. We thus may proceed to do so without having to address New Mexico's standing. *See Secretary of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984) ("Since the State of California clearly does have standing, we need not address the standing of the other [plaintiffs], whose position here is identical to the State's."). And given my view that the States' legal challenges fail, I perceive

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[6] At the permanent-injunction stage, the district court found unpersuasive California's evidence of potential harm to this lizard species, especially when weighed against the Government's countervailing evidence of mitigation efforts. I do not necessarily disagree with that weighing of the competing evidence, but it addresses the injury issue in a different posture under different standards. The district court's denial of permanent injunctive relief reflected an exercise of *remedial discretion* after the court had found the transfers invalid as a matter of law. Accordingly, in weighing the States' evidence of injury in deciding how to exercise that discretion, the district court was not required to, and did not, evaluate the States' evidence of injury in the light most favorable to them (as we must do as to the standing issue here). *See Continental Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1102 (9th Cir. 1994) (where district court granted summary judgment and permanent injunction, power to issue injunction was reviewed de novo, but "the district court's exercise of that power" was reviewed "for abuse of discretion").

no obstacle to entering judgment against *both* California and New Mexico without determining whether the latter has standing. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 98 (1998).[7]

**III**

Our first task is to determine whether the States have asserted a viable cause of action that properly brings the lawfulness of the transfers before us. *See*

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[7] By contrast, New Mexico's standing is relevant to the scope of relief that can be afforded if, as the majority concludes, the § 8005 and § 9002 transfers are *invalid*. California suffers no injury from the construction activities concerning the El Paso Sector Project 1, and so California lacks standing to request or obtain relief that extends to that separate project. *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established."). Accordingly, before affirming the district court's declaratory judgment that the use of funds transferred under § 8005 and § 9002 "for El Paso Sector Project 1 . . . is unlawful," the majority properly examines New Mexico's standing. I express no view as to whether the majority is correct in concluding that New Mexico's evidence of environmental harm was sufficient, notwithstanding the district court's conclusion that this evidence rested largely on unsupported speculation. *See* Maj. Opin. at 23-24; *cf. California v. Trump*, 2019 WL 2715421, at *4 (N.D. Cal. June 28, 2019) ("New Mexico's speculation that a border barrier *might* prevent interbreeding, which *might* hamper genetic diversity, which *might* render Mexican wolves *more susceptible* to diseases falls far short of the necessary demonstrable evidence of harm to a protected species"). However, for the reasons expressed below, I disagree with the majority's conclusion that New Mexico and California have standing based on their inability to enforce their environmental laws. Maj. Opin. at 24-28. Given that this asserted injury is due to the Secretary of Homeland Security's waiver under § 102 of IIRIRA, and not to the funding transfers, it would not be redressed by an injunction aimed only at the transfers. *See infra* at 68-70.

*Air Courier Conf. v. American Postal Workers Union AFL-CIO*, 498 U.S. 517, 530-31 (1991). The majority holds that California and New Mexico have a valid cause of action under the APA. *See* Maj. Opin. at 30. I disagree with that conclusion, and I also disagree with the States' alternative arguments that they may assert either an equitable cause of action under the Constitution or an "ultra vires" cause of action.[8]

**A**

In authorizing suit by any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, the APA incorporates

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[8] In its merits analysis, the majority scarcely cites the motions panel's published decision, which addressed the Sierra Club's and SBCC's likelihood of success on the merits of many of the same issues before us. I agree with the majority's implicit conclusion that the motions panel's opinion does not prevent this merits panel from examining these issues afresh. Although the motions panel decision is a precedent, it remains subject to reconsideration by this court until we issue our mandate. *See United States v. Houser*, 804 F.2d 565, 567-68 (9th Cir. 1986) (distinguishing, on this point, between reconsideration of a prior panel's decision "during the course of a single appeal" and a decision "on a prior appeal"); *cf. Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc) (three-judge panel lacks authority to overrule a decision in a prior appeal in the same case). To the extent that *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015), suggests otherwise, that suggestion is dicta and directly contrary to our decision in *Houser*. *See East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1261-65 (9th Cir. 2020). In all events, the precedential force of the motions panel's opinion was largely, if not entirely, vitiated by the Supreme Court's subsequent decision to grant the very stay that the motions panel's opinion denied.

the familiar zone-of-interests test, which reflects a background principle of law that always "applies unless it is expressly negated," *Bennett v. Spear*, 520 U.S. 154, 163 (1997); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014).[9] That test requires a plaintiff to "establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. NWF*, 497 U.S. at 883 (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396-97 (1987)). This test "is not meant to be especially demanding." *Clarke*, 479 U.S. at 399. Because the APA was intended to confer "generous review" of agency action, the zone-of-interests test is more flexibly applied under that statute than elsewhere, and it requires only a showing that the plaintiff is "*arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Serv. Orgs., Inc. v. Camp* (*Data Processing*), 397 U.S. 150, 153, 156 (1970) (emphasis added); *see also Bennett*, 520 U.S. at 163 ("what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes") (simplified). Because an APA plaintiff need only show that its interests

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[9] The Supreme Court has not squarely addressed whether the zone-of-interests test applies to a plaintiff who claims to have "suffer[ed] legal wrong because of agency action," which is the other class of persons authorized to sue under the APA, 5 U.S.C. § 702. *See Lujan v. National Wildlife Fed.* (*Lujan v. NWF*), 497 U.S. 871, 882-83 (1990). The States have not invoked any such theory here, so I have no occasion to address it.

are "arguably" within the relevant zone of interests, "the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). Although these standards are generous, the States have failed to satisfy them.

**1**

In applying the zone-of-interests test, we must first identify the "statutory provision whose violation forms the legal basis for [the] complaint" or the "gravamen of the complaint." *Lujan v. NWF*, 497 U.S. at 883, 886; *see also Air Courier Conf.*, 498 U.S. at 529. That question is easy here. The States' complaint alleges that the transfers made by DoD "do not satisfy the criteria under section 8005"; that Defendants therefore "have acted ultra vires in seeking to transfer funding pursuant to section 8005"; that DoD consequently "acted unconstitutionally and in excess of [its] statutory authority in diverting federal funds" pursuant to § 8005; and that therefore "these actions are unlawful and should be set aside under 5 U.S.C. section 706."[10] Section 8005 is plainly the "gravamen of the complaint," and it therefore defines the applicable zone of interests. *Lujan v. NWF*, 497 U.S. at 886.

Although the States invoke the Appropriations Clause and the constitutional separation of powers in contending that Defendants' actions are "unlawful" within the meaning of the APA, any such constitutional violations here can be said to have occurred *only if* the

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[10] Because the limitations on transfers set forth in § 8005 also apply to transfers under § 9002, *see* 132 Stat. at 3042, the parties use "§ 8005" to refer to both provisions, and I will generally do so as well.

transfers violated the limitations set forth in § 8005: if Congress authorized DoD to transfer the appropriated funds from one account to another, and to spend them accordingly, then the money has been spent "in Consequence of Appropriations made by Law," U.S. CONST. art. I, § 9, cl. 7, and the Executive has not otherwise transgressed the separation of powers.[11] *All* of California's theories for challenging the transfers under the APA—whether styled as constitutional claims or as statutory claims—thus rise or fall based on whether DoD has transgressed the limitations on transfers set forth in § 8005. As a result, § 8005 is obviously the "statute whose violation is the gravamen of the complaint." *Lujan v. NWF*, 497 U.S. at 886. To maintain a claim under the APA, therefore, California must establish that it is within the zone of interests of § 8005. On this point, the majority and I are in apparent agreement. *See* Maj. Opin. at 30-31.[12]

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[11] The only possible exception is the States' argument that § 8005 *itself* violates the Appropriations Clause and the constitutional separation of powers. As explained below, that contention is frivolous. *See infra* at 76-77.

[12] The States briefly contend that DoD has exceeded its authority under § 284, but even assuming *arguendo* that the States have a cause of action to raise such a challenge, it is patently without merit. The States note that § 284 contains a special reporting requirement for "small scale construction" projects, which are defined as projects costing $750,000 or less, 10 U.S.C. § 284(h)(1)(B), (i)(3), and they argue that this shows that Congress did not authorize projects on the scale at issue here. The inference is a non sequitur: the fact that Congress requires special reporting of these smaller projects does not mean that they are the *only* projects authorized. Congress may have imposed such a unique reporting requirement in order to capture the sort of smaller-scale activities that might otherwise have escaped its notice.

**2**

Having identified the relevant statute, our next task is to "discern the interests arguably to be protected by the statutory provision at issue" and then to "inquire whether the plaintiff's interests affected by the agency action in question are among them." *National Credit Union Admin. v. First Nat'l Bank & Trust Co.* (*NCUA*), 522 U.S. 479, 492 (1998) (simplified). Identifying the interests protected by § 8005 is not difficult, and here the States' asserted interests are not among them.

Section 8005 is a grant of general transfer authority that allows the Secretary of Defense, if he determines "that such action is necessary in the national interest" and if the Office of Management and Budget approves, to transfer from one DoD "appropriation" into another up to $4 billion of the funds that have been appropriated under the DoD Appropriations Act "for military functions (except military construction)." *See* 132 Stat. at 2999. Section 8005 contains five provisos that further regulate this transfer authority, and the only limitations on the Secretary's authority that the States claim were violated here are all contained in the first such proviso. That proviso states that "such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." *Id.*[13] The remaining provisos require prompt notice to Congress "of all transfers made pursuant to this authority or any other authority in this Act";

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[13] Similar language has been codified into permanent law. *See* 10 U.S.C. § 2214(b). No party contends that § 2214(b) alters the relevant analysis under the comparably worded provision in § 8005.

proscribe the use of funds to make requests to the Committees on Appropriations for reprogrammings that are inconsistent with the restrictions described in the first proviso; set a time limit for making requests for multiple reprogrammings; and exempt "transfers among military personnel appropriations" from counting towards the $4 billion limit. *Id.*

Focusing on "the particular provision of law upon which the plaintiff relies," *Bennett*, 520 U.S. at 175-76, makes clear that § 8005 as a whole, and its first proviso in particular, are aimed at tightening congressional control over the appropriations process. The first proviso's general prohibition on transferring funds for any item that "has been denied by the Congress" is, on its face, a prohibition on using the transfer authority to effectively reverse Congress's specific decision to deny funds to DoD for that item. 132 Stat. at 2999. The second major limitation imposed by the first proviso states that the transfer authority is not to be used unless, considering the items "for which [the funds were] originally appropriated," there are "higher priority items" for which the funds should now be used in light of "military requirements" that were "unforeseen" in DoD's request for Fiscal Year 2019 appropriations. *Id.* The obvious focus of this restriction is likewise to protect congressional judgments about appropriations by (1) restricting DoD's ability to *reprioritize* the use of funds differently from how Congress decided to do so and (2) precluding DoD from transferring funds appropriated by Congress for "military functions" for purposes that do not reflect "military requirements." The remaining provisos, including the congressional reporting requirement, all similarly aim to maintain congressional control over appropriations. And all of the operative restrictions in

§ 8005 that the States invoke here are focused *solely* on limiting DoD's ability to use the transfer authority to reverse the congressional judgments reflected in *DoD's* appropriations.

In addition to preserving congressional control over DoD's appropriations, § 8005 also aims to give DoD some measure of flexibility to make necessary changes. Notably, in authorizing the Secretary to make transfers among appropriations, § 8005's first proviso specifies only *one* criterion that he must consider in exercising that discretion: he must determine whether the item for which the funds will be used is a "*higher priority* item[]" in light of "unforeseen *military* requirements." 132 Stat. at 2999 (emphasis added). Under the statute, he need not consider any other factor concerning either the original use for which the funds were appropriated or the new use to which they will now be put.

In light of these features of § 8005, the "interests" that the States claim are "affected by the agency action in question" are not "among" the "interests arguably to be protected" by § 8005. *NCUA*, 522 U.S. at 492 (simplified). In particular, the States' asserted environmental interests clearly lie outside the zone of interests protected by § 8005. The statute does not mention environmental interests, nor does it require the Secretary to consider such interests. On the contrary, the statute requires him only to consider whether an item is a "higher priority" in light of "military requirements," and it is otherwise entirely neutral as to the uses to which the funds will be put. Indeed, that neutrality is reflected on the face of the statute, which says that, once the transfer is made, the funds are "merged with and . . . available *for the same purposes*, and for the same

time period, *as the appropriation or fund to which transferred*." 132 Stat. at 2999 (emphasis added). Because the alleged environmental harms that the States assert here play no role in the analysis that § 8005 requires the Secretary to conduct, and are not among the harms that § 8005's limitations seek to address or protect, the States' interests in avoiding these harms are not within § 8005's zone of interests.

Moreover, focusing on the specific interests for which the States have presented sufficient evidentiary support at the summary-judgment stage, *see Lujan v. NWF*, 497 U.S. at 884-85, further confirms that, in deciding whether to redirect excess military personnel funds under § 8005 to assist DHS by building fencing to stop international drug smuggling, the Acting Secretary of Defense did not have to give even the slightest consideration to whether that reprogramming of funds would result in the death of more flat-tailed horned lizards.[14] Put simply, the States' environmental interests are "'so marginally related to . . . the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Patchak*, 567 U.S. at 225 (quoting *Clarke*, 479 U.S. at 399).

For similar reasons, the States' invocation of their *sovereign* interests is also insufficient. The majority finds that these interests "app[ly] with particular force" because the Secretary's transfer of funds *ultimately*

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[14] It is unnecessary to exhaustively review whether California or New Mexico has provided the requisite factual support with respect to their claims of potential harms to *other* species of animals or plants, *see supra* note 7, because there is no basis in law or logic for concluding that it would make any difference to the zone-of-interests analysis under § 8005.

had an effect on "California's and New Mexico's ability to enforce their state environmental laws," *see* Maj. Opin. at 34, but that consideration plays no role—not even indirectly—in the analysis that § 8005 requires. Section 8005 authorizes the Secretary to move funds from one appropriation to another if (1) that transfer is consistent with the appropriations-process-based constraints discussed earlier; and (2) the transfer is for items that the Secretary deems to be "higher priority" in light of "military requirements." 132 Stat. at 2999. The statute does not itself mention or contemplate the displacement of state laws as a result of the transfer, nor does it require that any such derogation from state sovereignty be considered in evaluating the proposed transfer. Moreover, here the ultimate preemption of state law occurred, not as a result of § 8005, but rather as a result of DHS's separate determination, under a completely separate statute (*viz.*, IIRIRA § 102(c)), that state (and federal) environmental laws would be waived. The States might perhaps be within the zone of interests with respect to *that* statute, but they do not challenge the validity of that waiver under § 102(c) in this case, and in any event, California has already brought (and lost) a challenge to an earlier § 102(c) waiver with respect to a similar border fencing project. *See In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1213 (9th Cir. 2019).

The States nonetheless insist that they are within § 8005's zone of interests because the actual *activities* that are taking place under the valid waiver, in derogation of their sovereignty, are only occurring because the § 8005 transfer was approved. This argument fails. Once a valid § 102(c) waiver has been issued, the States' laws have been definitively set aside as a *de jure* matter

under the Supremacy Clause, and halting construction will *not* bring those laws back into force or redress that injury to the States' sovereignty. The residual interest on which the States rely, therefore, is not an injury to their sovereignty, but merely the interest in ensuring that activities that the States consider undesirable do not occur. But the Supreme Court has consistently held that "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning," *Lujan v. Defenders*, 504 U.S. at 576 (simplified), and an interest that is not cognizable for Article III purposes is irrelevant for zone-of-interests purposes as well, *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). Similarly, to the extent that the States rely on an interest in "hav[ing] the Government act in accordance with law" such as § 8005, *see Lujan v. Defenders*, 504 U.S. at 575, such an interest is not cognizable under Article III and cannot satisfy the zone-of-interests test here.

**3**

The majority makes two main arguments as to why the States nonetheless fall within § 8005's zone of interests, but neither has merit.

First, the majority contends that "the states regularly benefit from DoD's use of Section 8005," and it cites several past examples in which the statute was used to transfer funds that allowed the military to assist in addressing storm damage from hurricanes that occurred in various States. *See* Maj. Opin. at 35-36. This argument is foreclosed by the Supreme Court's decision in *Lujan v. NWF*. The Court in that case held that, be-

cause satisfaction of the zone-of-interests test is an element of the cause of action that the plaintiff seeks to invoke, the plaintiff at the summary-judgment stage has the burden "to set forth specific facts (even though they may be controverted by the Government) showing that he has satisfied its terms," *i.e.*, that "the injury he complains of (*his* aggrievement, or the adverse effect *upon him*)" falls within the relevant statute's zone of interests. 497 U.S. at 883-84. Here, in opposing summary judgment, California and New Mexico made no showing whatsoever that, in the absence of these transfers to the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation, the funds in question would otherwise have been transferred for the direct benefit of either State. Absent such an evidentiary showing, the States have failed to show that they satisfy the zone-of-interests test under such a theory. *Id.* at 882-99 (exhaustively analyzing the evidence presented at summary judgment and concluding that the plaintiffs had failed to carry their burden under the zone-of-interests test).

Second, the majority asserts that California and New Mexico fall within § 8005's zone of interests because § 8005 was "primarily intended to benefit [Congress] and its constitutional power to manage appropriations," and the States' "interests are *congruent* with those of Congress." *See* Maj. Opin. at 32-33 (emphasis added). This theory also fails. As the Supreme Court made clear in *Lujan v. NWF*, the zone-of-interests test requires the plaintiff to make a factual showing that the plaintiff itself, or someone else whose interests the plaintiff may properly assert, has a cognizable interest that falls within the relevant statute's zone of interests. 497 U.S. at 885-99 (addressing whether the interests of

NWF—or of any of its members, whose interests NWF could validly assert under the associational standing doctrine of *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333 (1977)—had been shown to be within the relevant zone of interests). I am aware of no precedent that would support the view that California and New Mexico can *represent* the interests of Congress (akin to NWF's representation of the interests of its members), much less that the States can do so merely because they are sympathetic to Congress's perceived policy objectives.[15] But I do not read the majority opinion as actually relying on such a novel theory. Instead, the majority suggests that, merely because the States' overall litigation objectives here are sufficiently congruent with those of Congress, the States have thereby satisfied the zone-of-interests test with respect to the States' *own* interests. This contention is clearly wrong.

The critical flaw in the majority's analysis is that it rests, not on the *interests* asserted by the States (preservation of the flat-tailed horned lizard, etc.), but on the *legal theory* that the States invoke to protect those interests here. But the zone-of-interests test focuses on the former and not the latter. *See Lujan v. NWF*, 497 U.S. at 885-89. Indeed, if the majority were correct, that would effectively eliminate the zone-of-interests

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[15] Even if the States could assert Congress's interests in some representational capacity, they could do so only if the injury to Congress's interests satisfied the requirements of Article III standing. *See Air Courier Conf.*, 498 U.S. at 523-24 (zone-of-interests test is applied to those injuries-in-fact that meet Article III requirements). I express no view on that question. *Cf. U.S. House of Reps. v. Mnuchin*, 379 F. Supp. 3d 8 (D.D.C. 2019) (holding that House lacks Article III standing to challenge the transfers at issue here), *appeal ordered heard en banc*, 2020 WL 1228477 (D.C. Cir. 2020).

test. By definition, *anyone* who alleges a violation of a particular statute has thereby invoked a legal theory that is "congruent" with the interests of those *other* persons or entities who *are* within that statute's zone-of-interests. Such a tautological congruence between the States' legal theory and Congress's institutional interests is not sufficient to satisfy the zone-of-interests test here.

The majority suggests that its approach is supported by the D.C. Circuit's decision in *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356 (D.C. Cir. 1996), *see* Maj. Opin. at 32, but that is wrong. As the opinion in that case makes clear, the D.C. Circuit was relying on the same traditional zone-of-interests test, under which a plaintiff's interests are "outside the statute's 'zone of interests' only 'if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" 87 F.3d at 1360 (quoting *Clarke*, 479 U.S. at 399). The court mentioned "congruence" in the course of explaining why the plaintiff's interests in that case were "not more likely to frustrate than to further statutory objectives," *i.e.*, why those interests were not *inconsistent* with the purposes implicit in the statute. *Id.* (simplified). It did not thereby suggest—and could not properly have suggested—that the mere lack of any such inconsistency is alone sufficient under the zone-of-interests test. Here, the problem is not that the States' interests are inconsistent with the purposes of § 8005, but rather that they are too "marginally related" to those purposes. *See supra* at 68-69.

Lastly, the majority suggests that we must apply the zone-of-interests test "broadly in this context," because—given the difficulties that congressional plaintiffs have in establishing Article III standing—otherwise "no agency action taken pursuant to Section 8005 could ever be challenged under the APA." *See* Maj. Opin. at 33, 36. The assumption that no one will ever be able to sue for any violation of § 8005 seems doubtful, *cf. Sierra Club v. Trump*, 929 F.3d at 715 (N.R. Smith, J., dissenting) (suggesting that "those who would have been entitled to the funds as originally appropriated" may be within the zone of interests of § 8005), but in any event, we are not entitled to bend the otherwise applicable—and already lenient—standards to ensure that someone will be able to sue in this case or others like it.

**B**

In addition to asserting claims under the APA, California and New Mexico also purport to assert claims under the Constitution, as well as an equitable cause of action to enjoin "ultra vires" conduct. The States do not have a cause of action under either of these theories.

**1**

The States contend that they are not required to satisfy any zone-of-interests test to the extent that they assert non-APA causes of action to enjoin Executive officials from taking *unconstitutional* action.[16] Even as-

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[16] It is not entirely clear that the States are contending that their *APA claims* to enjoin *unconstitutional* conduct, *see* 5 U.S.C. § 706(2)(B), are exempt from the zone-of-interests test. To the extent that they are so contending, the point seems doubtful. *See*

suming that an equitable cause of action to enjoin unconstitutional conduct exists alongside the APA's cause of action, *see Juliana v. United States*, 947 F.3d 1159, 1167-68 (9th Cir. 2020); *Navajo Nation v. Department of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017); *but see Sierra Club v. Trump*, 929 F.3d at 715-17 (N.R. Smith, J., dissenting), it avails the States nothing here. The States have failed to allege the sort of constitutional claim that might give rise to such an equitable action, because their "constitutional" claim is effectively the very same § 8005-based claim dressed up in constitutional garb. And even if this claim counted as a "constitutional" one, it would still be governed by the same zone of interests defined by the relevant limitations in § 8005.

**a**

The States assert two constitutional claims in their operative complaint: (1) that Defendants have violated the Presentment Clause, and the constitutional separation of powers more generally, by "unilaterally diverting funding that Congress already appropriated for other purposes to fund a border wall for which Congress has provided no appropriations"; and (2) that Defendants have violated the Appropriations Clause "by funding construction of the border wall with funds that were not appropriated for that purpose." As clarified in their

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*Data Processing*, 397 U.S. at 153 (zone-of-interests test requires APA claimant to show that its interest "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"). But in all events, any such APA-based claim to enjoin unconstitutional conduct would fail for the same reasons as the States' purported free-standing equitable claim to enjoin such conduct.

subsequent briefing, the States assert both what I will call a "strong" form of these constitutional arguments and a more "limited" form. In its strong form, the States' argument is that, *even if § 8005 authorized the transfers in question here*, those transfers nonetheless violated the separation of powers, the Presentment Clause, and the Appropriations Clause. In its more limited form, the States' argument is that the transfers violated the separation of powers, the Presentment Clause, and the Appropriations Clause *because* the transfers were not authorized by § 8005.

I need not address whether the States have an equitable cause of action to assert the strong form of their constitutional argument, because in my view that argument on the merits is so "wholly insubstantial and frivolous" that it would not even give rise to federal jurisdiction. *Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *see also Steel Co.*, 523 U.S. at 89. If § 8005 *allowed* the transfers here, then that necessarily means that the Executive has properly spent funds that Congress, by statute, has *appropriated* and allowed to be spent for *that* purpose. The States cite no authority for the extraordinary proposition that the Appropriations Clause itself constrains *Congress's* ability to give agencies latitude in how to spend appropriated funds, and I am aware of no such authority. *Cf. Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) ("allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion"). And by transferring funds after finding that the statutory conditions for doing so are met, an agency thereby "execut[es] the policy that Congress had embodied in the statute" and does not unilaterally alter or repeal any law in violation of the Presentment Clause or the separation of powers. *See*

*Clinton v. City of New York*, 524 U.S. 417, 444 (1998). If anything, it is the States' theory—that the federal courts must give effect to an alleged broader congressional judgment against border funding *regardless* of whether that judgment is embodied in binding statutory language—that would offend separation-of-powers principles.

That leaves only the more limited form of the States' argument, which is that, *if* § 8005 did not authorize the transfers, *then* the expenditures violated the Appropriations Clause, the Presentment Clause, and the separation of powers. Under *Dalton v. Specter*, 511 U.S. 462 (1994), this theory—despite its constitutional garb—is properly classified as "a statutory one," *id.* at 474. It therefore does not fall within the scope of the asserted non-APA equitable cause of action to enjoin *unconstitutional* conduct.[17]

In *Dalton*, the Court addressed a non-APA claim to enjoin Executive officials from implementing an allegedly unconstitutional Presidential decision to close certain military bases under the Defense Base Closure and Realignment Act of 1990. 511 U.S. at 471.[18] But the claim in *Dalton* was not that the President had directly transgressed an applicable constitutional limitation; ra-

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[17] There remains the States' claim that *statutory* violations may be enjoined under a non-APA ultra vires cause of action for equitable relief, but that also fails for the reasons discussed below. *See infra* at 84-85.

[18] The plaintiffs in *Dalton* also asserted a claim under the APA itself, but that claim failed for the separate reason that the challenged final action was taken by the President personally, and the President is not an "agency" for purposes of the APA. *See* 511 U.S. at 469.

ther, the claim was that, *because* Executive officials "violated the procedural requirements" of the statute on which the President's decision ultimately rested, the President thereby "act[ed] in excess of his statutory authority" and therefore "violate[d] the constitutional separation-of-powers doctrine." *Id.* at 471-72. The Supreme Court rejected this effort to "eviscerat[e]" the well-established "distinction between claims that an official exceeded his *statutory* authority, on the one hand, and claims that he acted in violation of the *Constitution*, on the other." *Id.* at 474 (emphasis added). As the Court explained, its "cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution." *Id.* at 472. The Court distinguished *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), on the ground that there "the Government disclaimed any statutory authority for the President's seizure of steel mills," and as a result the Constitution itself supplied the rule of decision for determining the legality of the President's actions. *Dalton*, 511 U.S. at 473. Because the "only basis of authority asserted was the President's inherent constitutional power as the Executive and the Commander in Chief of the Armed Forces," *Youngstown* thus "necessarily turned on *whether the Constitution authorized* the President's actions." *Id.* (emphasis added). By contrast, given that the claim in *Dalton* was that the President had violated the Constitution *because* Executive officials had "violated the terms of the 1990 Act," the terms of that statute provided the applicable rule of decision and the claim was therefore "a statutory one." *Id.* at 474. And because those claims sought to enjoin conduct on the grounds that it violated *statutory* requirements, it was

subject to the "longstanding" limitation that non-APA "review is not available when the statute in question commits the decision to the discretion of the President." *Id.*

Under *Dalton*, the States' purported "constitutional" claims—at least in their more limited version—are properly classified as *statutory* claims that do *not* fall within any non-APA cause of action to enjoin unconstitutional conduct. 511 U.S. at 474. Here, as in *Dalton*, Defendants have "claimed" the "statutory authority" of § 8005, and any asserted violation of the Constitution would occur *only if, and only because,* Defendants' conduct is assertedly not authorized by § 8005. *Id.* at 473. The rule of decision for *this* dispute is thus not supplied, as in *Youngstown*, by the Constitution; rather, it is supplied only by § 8005. *Id.* at 473-74. Because these claims by the States are thus "statutory" under *Dalton*, they may only proceed, if at all, under an equitable cause of action to enjoin ultra vires conduct, and they would be subject to any limitations applicable to such claims. *Id.* at 474. The States do assert such a fallback claim here, but it fails for the reasons I explain below. *See infra* at 84-85.

**b**

But even if the States' claims may properly be classified as *constitutional* ones for purposes of the particular equitable cause of action they invoke here, those claims would still fail.

To the extent that the States argue that the Constitution *itself* grants a cause of action allowing *any plaintiff with an Article III injury* to sue to enjoin an alleged violation of the Appropriations Clause, the Presentment

Clause, or the separation of powers, there is no support for such a theory. None of the cases cited by the States involved putative plaintiffs, such as the States here, who are near the outer perimeter of Article III standing. On the contrary, these cases involved either allegedly unconstitutional agency actions *directly targeting* the claimants, *see Bond v. United States*, 564 U.S. 211, 225-26 (2011) (criminal defendant challenged statute under which she was convicted on federalism and separation-of-powers grounds); *United States v. McIntosh*, 833 F.3d 1163, 1174-75 (9th Cir. 2016) (criminal defendants sought to enjoin, based on an appropriations rider and the Appropriations Clause, the Justice Department's expenditure of funds to prosecute them), or they involved a suit based on an express *statutory* cause of action, *see Clinton v. City of New York*, 524 U.S. at 428 (noting that right of action was expressly conferred by 2 U.S.C. § 692(a)(1) (1996 ed.)).

Moreover, any claim that the Constitution *requires* recognizing, in this context, an equitable cause of action that extends to the outer limits of Article III seems difficult to square with the Supreme Court's decision in *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015). There, the Court rejected the view that the Supremacy Clause itself created a private right of action for equitable relief against preempted statutes, and instead held that any such equitable claim rested on "judge-made" remedies that are subject to "express and implied statutory limitations." *Id.* at 325-27. The Supremacy Clause provides a particularly apt analogy here, because (like the Appropriations Clause) the asserted "unconstitutionality" of the challenged action generally depends upon whether it falls *within or outside the terms of a federal statute*: a state statute is

"unconstitutional under the Supremacy Clause" only if it is "contrary to federal law," *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1361-62 (9th Cir. 1998), and here, the transfers violated the Appropriations Clause only if they were barred by the limitations in § 8005. And just as the Supremacy Clause protects Congress's "broad discretion with regard to the enactment of laws," *Armstrong*, 575 U.S. at 325-26, so too the Appropriations Clause protects "congressional control over funds in the Treasury," *McIntosh*, 833 F.3d at 1175. It is "unlikely that the Constitution gave Congress such broad discretion" to enact appropriations laws only to simultaneously "*require[]* Congress to permit the enforcement of its laws" by *any* "private actor[]" with even minimal Article III standing, thereby "*limit[ing]* Congress's power" to decide how "to enforce" the spending limitations it enacts. *Armstrong*, 575 U.S. at 325-26.

The Appropriations Clause thus does not itself create a constitutionally required cause of action that extends to the limits of Article III. On the contrary, any equitable cause of action to enforce that clause would rest on a "judge-made" remedy: as *Armstrong* observed, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." 575 U.S. at 327. At least where, as here, the contours of the applicable constitutional line (under the Appropriations Clause) are defined by and parallel a statutory line (under § 8005), any such judge-made equitable cause of action would be subject to "express and implied statutory limitations," as well as traditional limitations governing such equitable claims. *Id.*

One long-established "'judicially self-imposed limit[] on the exercise of federal jurisdiction'"—including federal equitable jurisdiction—is the requirement "that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett*, 520 U.S. at 162 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). This limitation is *not* confined to the APA, but rather reflects a "prudential standing requirement[] of general application" that always "applies unless it is expressly negated" by Congress. *Id.* at 163.[19] Because Congress has not expressly negated that test in any relevant respect, the States' equitable cause of action to enforce the Appropriations Clause here remains subject to the zone-of-interests test. *Cf. Thompson v. North American Stainless, LP*, 562 U.S. 170, 176-77 (2011) (construing a cause of action as extending to "any person injured in the Article III sense" would often produce "absurd consequences" and is for that reason rarely done). And given the unique nature of an Appropriations Clause claim, as just discussed, *the line between*

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[19] The States wrongly contend that, by quoting this language from *Bennett*, and stating that the zone-of-interests test therefore "applies to all *statutorily* created causes of action," *Lexmark*, 572 U.S. at 129 (emphasis added), the Court in *Lexmark* thereby intended to signal that the test *only* applies to statutory claims and not to non-statutory equitable claims. Nothing in *Lexmark* actually suggests any such negative pregnant; instead, the Court's reference to "statutorily created causes of action" reflects nothing more than the fact that only statutory claims were before the Court in that case. *See id.* at 129. Moreover, *Lexmark* notes that the zone-of-interests test's roots lie in the common law, *id.* at 130 n.5, and *Bennett* (upon which *Lexmark* relied) states that the test reflects a "prudential standing requirement[] of general application" that applies to any "exercise of federal jurisdiction," 520 U.S. at 162-63.

*constitutional and unconstitutional conduct* here is defined entirely by the limitations in § 8005, and therefore the relevant zone of interests for the States' Appropriations-Clause-based equitable claim remains defined by *those* limitations. The States are thus outside the applicable zone of interests for this claim as well.

In arguing for a contrary view, the States rely heavily on *United States v. McIntosh*, asserting that there we granted non-APA injunctive relief based on the Appropriations Clause without inquiring whether the claimants were within the zone of interests of the underlying appropriations statute. *McIntosh* cannot bear the considerable weight that the States place on it.

In *McIntosh*, we asserted interlocutory jurisdiction over the district courts' refusal to enjoin the expenditure of funds to prosecute the defendants—an expenditure that allegedly violated an appropriations rider barring the Justice Department from spending funds to prevent certain States from "'implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.'" 833 F.3d at 1175; *see also id.* at 1172-73. We held that the defendants had Article III standing and that, if the Department was in fact "spending money in violation" of that rider in prosecuting the defendants, that would produce a violation of the Appropriations Clause that could be raised by the defendants in challenging their prosecutions. *Id.* at 1175. After construing the meaning of the rider, we then remanded the matter for a determination whether the rider was being violated. *Id.* at 1179. Contrary to the States' dog-that-didn't-bark theory, nothing can be gleaned from the fact that the zone-of-interests test was never discussed in *McIntosh*. *See Cooper Indus., Inc.*

*v. Aviall Servs, Inc.*, 543 U.S. 157, 170 (2004) ("'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'") (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). Moreover, any such silence seems more likely to have been due to the fact that it was so overwhelmingly obvious that the defendants *were* within the rider's zone of interests that the point was incontestable and uncontested. An asserted interest in not going to prison for *complying* with state medical-marijuana laws seems well within the zone of interests of a statute prohibiting interference with the implementation of such state laws.

**2**

The only remaining question is whether the States may evade the APA's zone-of-interests test by asserting a non-APA claim for ultra vires conduct in excess of *statutory* authority. Even assuming that such a cause of action exists alongside the APA, *cf. Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 189-90 (D.C. Cir. 2006), I conclude that it would be subject to the same zone-of-interests limitations as the States' APA claims and therefore likewise fails.

For the same reasons discussed above, any such equitable cause of action rests on a judge-made remedy that is subject to the zone-of-interests test. *See supra* at 79-84. The States identify no case from this court affirmatively holding that the zone-of-interests test does *not* apply to a non-APA equitable cause of action to enjoin conduct allegedly in excess of *statutory* authority, and I am aware of none. Indeed, it makes little sense, when evaluating a claim that Executive officials exceeded

the *limitations* in a federal statute, not to ask whether the plaintiff is within the zone of interests protected by those statutory limitations. *Cf. Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) (although plaintiff asserting ultra vires claim may not need to show that its interests "fall within the zones of interests of the constitutional and statutory *powers* invoked" by Executive officials, when "a particular constitutional or statutory provision was intended to protect persons like the litigant by *limiting* the authority conferred," then "the litigant's interest may be said to fall within the zone protected by the *limitation*") (emphasis added).[20]

* * *

Given that each of the States' asserted theories fail, the States lack any cause of action to challenge the DoD's transfer of funds under § 8005.

**IV**

Alternatively, even if the States had a cause of action, their claims would fail on the merits, because the challenged transfers did not violate § 8005 or § 9002. The States argue that the transfers violated the first proviso of § 8005, which states that the transfer authority granted by that section "may not be used unless for higher priority items, based on unforeseen military requirements,

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[20] Even if the States were correct that the zone-of-interests test does not apply to a non-APA equitable cause of action, that would not necessarily mean that such equitable jurisdiction extends, as the States suggest, to the outer limits of Article III. Declining to apply the APA's generous zone-of-interests test might arguably render applicable the sort of narrower review of agency action that preceded the APA standards articulated in *Data Processing*, 397 U.S. at 153. *See also Clarke*, 479 U.S. at 400 n.16.

than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." 132 Stat. at 2999. The requirements of this proviso likewise limit the transfer authority under § 9002. *See id.* at 3042 (stating that the transfer authority in § 9002 is in addition to that specified in § 8005, but "is subject to the same terms and conditions as the authority provided in section 8005 of this Act"). The States argue, and the majority agrees, that two of the requirements in this proviso are not met, because (1) the transfers were for an item for which Congress has denied funding; and (2) they were not for "unforeseen military requirements." *See* Maj. Opin. at 37-47. I disagree.

**A**

The proviso states that the Secretary may not transfer funds for an admittedly "higher priority item[] . . . than those for which originally appropriated" if "the item for which funds are requested has been denied by the Congress." 132 Stat. at 2999. In my view, the Secretary's transfers did not violate this condition.

Determining whether Congress "denied" the relevant "item" at issue here turns on the meaning of the phrase "the item for which funds are requested." According to the States, the relevant "item" should be broadly defined to include any "border barrier construction," and Congress should be held to have "denied" that item except to the extent that it appropriated funds for "primary pedestrian fencing" in § 230(a)(1) of the Department of Homeland Security Appropriations Act, 2019, *see* Pub. L. No. 116-6, Div. A, § 230(a)(1), 133 Stat. 13, 28 (2019). The States' reading is implausible, because it ignores

the context of the appropriations process that § 8005 addresses.

As a provision designed to preserve Congress's authority over the appropriations process, § 8005's restriction on transfers can only be understood against the backdrop of that process and of the role of transfers and reprogrammings in it. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (simplified). That process is usefully set forth in Chapter 2 of the GAO's authoritative *Principles of Federal Appropriations Law*, otherwise known as the "Red Book," and I borrow heavily from that treatise in setting forth that relevant context. *See Lincoln*, 508 U.S. at 192 (citing Red Book in addressing suit challenging reallocation of funds).

While Congress ordinarily appropriates funds annually for agencies to use in specified amounts for enumerated purposes, Congress has also recognized that "a certain amount of flexibility" is sometimes warranted. *See* 2 U.S. GOV'T ACCOUNTABILITY OFF. ("GAO"), PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (4th ed. 2016 rev.) ("RED BOOK"), pt. B, § 7, 2016 WL 1275442, at *1. Two ways in which such flexibility may be achieved are through "transfer and reprogramming." *Id.* A "transfer"—which is the specific subject of § 8005—refers to "the shifting of funds between appropriations," and it is generally prohibited in the absence of specific statutory authority. *Id.*; *see also* 31 U.S.C. § 1532. By contrast, a "reprogramming shifts funds *within* a single appropriation," and in the absence of

specific statutory limitations on reprogramming, agencies have broad discretion to do so "as long as the resulting obligations and expenditures are consistent with the purpose restrictions applicable to the appropriation." *See* RED BOOK, 2016 WL 1275442, at *6 (emphasis added) (citing *Lincoln*, 508 U.S. at 192). In contrast to a transfer—which is easy to identify, because it shifts funds between separate appropriations that are "well-defined and delineated with specific language in an appropriations act"—it is more difficult to identify what counts as a reprogramming within an appropriation, because the appropriations act itself "does not set forth the subdivisions that are relevant to determine whether an agency has reprogrammed funds." *See id.* at *6. There is only a need to identify a "reprogramming" when Congress has sought to place limits on an agency's ability to do so. *See*, *e.g.*, Pub. L. No. 111-80, § 712, 123 Stat. 2090, 2120-21 (2009) (requiring 15-days advance notice to Congress before certain "reprogramming[s] of funds" may be made by various agriculture-related agencies). In such cases, whether a shift of funds within an appropriation counts as a reprogramming is ordinarily determined by considering how the reallocation of funds compares to the allocation of funds that was contemplated during the appropriations process: "Typically, *the itemizations and categorizations in the agency's budget documents* as well as statements in committee reports and the President's budget submission, contain the subdivisions within an agency's appropriation that are relevant to determine whether an agency has reprogrammed funds." RED BOOK, 2016 WL 1275442, at *7 (emphasis added). GAO's Red Book illustrates the point with an example, drawn from a prior opinion letter:

> For instance, for FY 2012, the Commodity Futures Trading Commission (CFTC) received a single lump-sum appropriation. *Id.* CFTC's FY 2012 *budget request* included an *item* within that lump sum to fund an Office of Proceedings. A reprogramming would occur if CFTC shifted amounts that it had previously designated to carry out the functions of the Office of Proceedings to carry out *different* functions.

*Id.* (citing GAO, B-323792, *Commodity Futures Trading Commission—Reprogramming Notification* (Jan. 23, 2013)) (emphasis added).

Against this backdrop, the import of § 8005's first proviso is clear. In evaluating a transfer from one appropriation to another, the Secretary must justify the transfer, not at the broad level of each overall appropriation itself (*i.e.*, not by comparing the statutory appropriation category for "Drug Interdiction and Counter-Drug Activities, Defense" versus that for "Military Personnel, Army"), but rather at the same "*item*" level at which the Secretary would have to justify a reprogramming within an appropriation. *See* Pub. L. No. 115-245, Div. A, § 8005, 132 Stat. at 2999 (requiring Secretary to compare whether the item to which the transferred funds will be directed is a "higher priority" than the items "for which originally appropriated"). The point of reference for determining whether the destination "item" justifies the transfer is therefore, as with a reprogramming, "the itemizations and categorizations in the agency's budget documents as well as statements in committee reports and the President's budget submission." RED BOOK, 2016 WL 1275442, at *7.

Several features of the language of § 8005 confirm this reading. The statutory reference to "those [items]

for which *originally* appropriated," 132 Stat. at 2999 (emphasis added), is unmistakably a reference to the familiar concept of the itemizations contained *within* the current appropriation, as set forth in the already existing budgetary documents exchanged and generated during the appropriations process for DoD. *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 248 (2014) ("It is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken.") (simplified). And because those "original[]" items are to be compared with the new "items" for which the transfer authority is to "be used," 132 Stat. at 2999, these latter "items" must likewise be understood as a reference to the destination items *within* the transferee DoD appropriation. *Law v. Siegel*, 571 U.S. 415, 422 (2014) ("[W]ords repeated in different parts of the same statute generally have the same meaning").

The destination item is also referred to in the statute as "the item for which funds are *requested*," which is an unusual way to refer to a transfer that an agency approves on its own. 132 Stat. at 2999 (emphasis added). But the use of that term makes perfect sense when the language is again construed against the background of the appropriations process, because it is a common practice for agencies—despite the decision in *INS v. Chadha*, 462 U.S. 919 (1983)—to "request" the appropriations committees' approval for transfers and reprogrammings as a matter of comity. *See Lincoln*, 508 U.S. at 193 ("[W]e hardly need to note that an agency's decision to ignore congressional expectations [concerning the use of appropriations] may expose it to grave political consequences"). That reading is confirmed by § 8005's

third proviso, which enforces the exclusivity of the first proviso by barring DoD from using any appropriated funds to "prepare or present a *request* to the Committees on Appropriations for reprogramming of funds," unless it meets the requirements of the first proviso. 132 Stat. at 2999 (emphasis added). This language also confirms what is already otherwise apparent, which is that any transfer under § 8005 is to be analyzed, and papered, as a request for "*reprogramming* of funds." *Id.* (emphasis added). Indeed, although DoD made a conscious decision to depart from the comity-based practice of making a request in this case, the House Committee on Appropriations nonetheless proceeded to construe DoD's notification of the transfer as a "requested reprogramming action" and "denie[d] the request." *See* House Comm. on Appropriations, *Press Release: Visclosky Denies Request to Use Defense Funds for Unauthorized Border Wall* (Mar. 27, 2019), https://appropriations.house.gov/news/press-releases/visclosky-denies-request-to-use-defense-funds-for-unauthorized-border-wall.

For all of these reasons, the "items" at issue under § 8005 must be understood against the backdrop of the sort of familiar item-level analysis required in a budgetary reprogramming, and the benchmark for evaluating the proposed destination item is therefore, as with any reprogramming, the *original* allocation among items that is reflected in the records of the DoD appropriations process. Accordingly, when § 8005 requires a consideration of whether "the item for which funds are requested has been denied by the Congress," it is referring to whether Congress, *during DoD's appropriations process*, denied an "item" that corresponds to the "item for which funds are requested." Under that standard, this case is easy. The States do not contend

(and could not contend) that Congress ever "denied" such an item to DoD during DoD's appropriations process.

Instead, the States argue that a grant of funds to *another* agency (DHS) in its appropriations, in an amount less than that agency requested, should be construed as a *denial* of an analogous item to DoD under its entirely separate authorities and appropriations. This disregards the appropriations-law context against which § 8005 must be construed, which makes clear that the relevant clause refers only to denials that are applicable to DoD within the context of *its* appropriations process. Taking into account the broader context of the political struggle between the President and the Congress over DHS's requests for border-barrier funding, the majority concludes that Congress thereby issued a "general denial" of "border wall" funding, which should be construed as "necessarily encompass[ing] narrower forms of denial—such as the denial of a Section 284 budgetary line item request." *See* Maj. Opin. at 46-47. But § 8005's proviso only applies if, during the DoD appropriations process, such an item "has been denied by the Congress," 132 Stat. at 2999, and that manifestly did not occur here, given that (1) no such request was presented and denied during that process; and (2) indeed, that process *ended* several months *before* the ultimate "denial" that the majority claims we should now retroactively apply to DoD's transfer authority.

More fundamentally, the majority is quite wrong in positing that § 8005 assigns to us the task of discerning the contours of the larger political struggle between the President and the Congress over border-barrier funding (including by reviewing campaign speeches and the

like), *see* Maj. Opin. at 39, and then giving legal effect to what we think, based on that review, is "Congress's broad and resounding denial resulting in a 35-day partial government shutdown," *id.* at 47. Our job under § 8005 is the more modest one of determining whether a proposed item of DoD spending was presented to Congress, and "denied" by it, during DoD's appropriations process, and all agree that that did not occur here. Any action that Congress took in the separate appropriations process concerning DHS would create a "denial" as to DoD only if there is some language in the DHS Appropriations Act that somehow extends that Act's denial vis-à-vis DHS to *other* agencies.[21] But the only relevant limitation in that Act that even arguably extends beyond DHS is a prohibition on the construction of "pedestrian fencing" in five designated parks and refuge areas, *see* Pub. L. No. 116-6, Div. A, § 231, 133 Stat. at 28 ("None of the funds made available by this Act *or prior Acts* are available" for such construction) (emphasis added), but no one contends that this limitation is being violated here. Beyond that, it is not our role under § 8005 to give effect to a perceived big-picture "denial" that we think is implicit in the "real-world events in the months and years leading up to the 2019 appropriations bills." *Sierra Club v. Trump*, 929 F.3d at 691.

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[21] Nor is this a situation in which DoD is invoking the transfer authority to move funds *into DHS's appropriations*. The destination item here involves the authority under § 284 for *DoD* to undertake "[c]onstruction of roads and fences" along the border. 10 U.S.C. § 284(b)(7). Indeed, § 8045(a) of the DoD Appropriations Act specifically forbids DoD from "transferr[ing] to any other department" any funds available to it for "counter-drug activities," except "as specifically provided in an appropriations law." 132 Stat. at 3012.

**B**

The majority alternatively holds that, even if Congress did not deny the "item" in question, the transfers were still unlawful because the requirements invoked by the Secretary here to justify the transfers were neither "military" in nature nor "unforeseen." *See* Maj. Opin. at 37-46. The majority is wrong on both counts.

**1**

The DoD's provision of support for counterdrug activities under § 284 is plainly a "military" requirement within the meaning of § 8005. As the majority notes, § 8005 does not define the term "military," *see* Maj. Opin. at 42, and so the word should be given its ordinary meaning. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). In common parlance, the word "military" simply means "[o]f, relating to, or involving the armed forces." *Military*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also Military*, AMERICAN HERITAGE DICTIONARY (5th ed. 2018) ("Of, relating to, or characteristic of members of the armed forces"; "Performed or supported by the armed forces"); *Military*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) ("WEBSTER'S THIRD") ("of or relating to soldiers, arms, or war"; "performed or made by armed forces"). Because Congress, by statute, has formally assigned to DoD the task of providing "support for the counterdrug activities" of other departments through the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States," 10 U.S.C. § 284(a), (b)(7), that task "relat[es] to" and "involv[es] the armed

forces," and is "[p]erformed or supported by the armed forces." As such, it is a "military" task.[22]

Two other textual clues support this conclusion. First, the chapter heading for the chapter of Title 10 that includes § 284 is entitled, "*Military Support* for Civilian Law Enforcement Agencies," thereby further confirming that the support authorized to be provided under § 284 counts as *military* support. *See Henderson v. Shinseki*, 562 U.S. 428, 439 (2011) (title of subchapter aided in resolving ambiguity concerning provision in that subchapter). Second, the DoD Appropriations Act *itself* classifies the activities carried out under § 284 as "military" activities. The Act recognizes, on its face, that funds appropriated for "Drug Interdiction and Counter-Drug Activities, Defense," may be transferred *out* of that appropriation under § 8005. *See* DoD Appropriations Act, § 8007(b)(6), 132 Stat. at 3000 (exempting transfers of funds out of this appropriation from an otherwise applicable prohibition on transferring funds under § 8005). Given that the transfer authority granted by § 8005 applies *only* to "funds made available in this Act to the Department of Defense for *military* functions (except military construction)," 132 Stat. at 2999 (emphasis added), the Act necessarily deems funds in the

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[22] The majority is wrong in suggesting that the Government has never argued that the construction projects "are related to the use of soldiers." *See* Maj. Opin. at 42. The Government affirmatively argues in its brief that "the *military* may be, and here is, required to assist in combatting" drug trafficking under § 284 (emphasis added). Moreover, the evidence submitted to the district court showed that the construction was to be carried out by the U.S. Army Corps of Engineers. Even granting that most of that agency's employees are civilians, the agency remains within the Department of the Army and is led by a military officer. *See* 10 U.S.C. §§ 7011, 7036, 7063.

"Drug Interdiction and Counter-Drug Activities, Defense" appropriation to be for "military functions." The majority's insistence that such counter-drug functions are not "military" activities thus flatly contradicts the statute itself.

The majority is also wrong in relying on the distinctive definition given in 10 U.S.C. § 2801 for the phrase "military construction." *See* Maj. Opin. at 44-45. At the outset, this makes little sense, because § 8005 states on its face that it applies only to transfers between appropriations for "military *functions*" and *not* for "military construction." 132 Stat. at 2999 (emphasis added). Indeed, Congress has long handled appropriations for "military construction" separately from those for military functions, and it did so again for Fiscal Year 2019: appropriations for "military construction" were made in a *separate* appropriations statute enacted one week before the DoD Appropriations Act. *See* Pub. L. No. 115-244, Div. C, Title I, 132 Stat. 2897, 2946 (2018). Of all the terms to consider in construing "military" for purposes of the DoD Appropriations Act, "military construction" may be the least appropriate.

Moreover, the majority fails to recognize that "military construction" is a term of art, with its own unique definition, and it therefore provides an inapt guide for trying to discern the meaning of "military" in a different phrase in a different context. Absent a special definition, one would have thought that the phrase "military construction" embraces any "construction" that is performed by or for the "military." *See supra* at 94 (quoting definitions of "military"). But § 2801 more narrowly defines "military construction" as generally refer-

ring only to "construction . . . carried out with respect to a military installation . . . or any acquisition of land or construction of a defense access road," and it defines a "military installation" as a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." 10 U.S.C. § 2801(a), (c)(4). Nothing about this distinctive definition of "military construction" creates or reflects a general gloss on the word "*military*," much less does it suggest that the ordinary meaning of "military" in other contexts carries all of this baggage with it. The majority's effort to import the specific features of this term of art ("military construction") into one of the *component* words of that phrase makes neither linguistic nor logical sense, and it is therefore irrelevant whether or not the § 284 activities at issue here meet that definition.[23]

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[23] The majority notes that the phrase "military construction" is used in 10 U.S.C. § 2808, which "[t]he Federal Defendants have also invoked . . . to fund other border wall construction projects on the southern border." Maj. Opin. at 44. But that statute was invoked only with respect to a *different* set of funds to be used for activities that Defendants contend *do* qualify as "military construction" for purposes of DoD's additional construction authority after a declaration of a national emergency. *See* 10 U.S.C. § 2808(a). The States also challenged the use of that separate set of funds in their suit below, but these challenges form no part of the Rule 54(b) partial judgment now before us, and any issue concerning them has no bearing on the distinct questions presented here. Relatedly, the President's proclamation declaring such an emergency is relevant only to that other set of funds and has no legal bearing on the Secretary's transfers here. *Cf.* Maj. Opin. at 12-13, 39 (discussing the declaration). And Congress's joint resolutions attempting to terminate the emergency declaration, *see id.* at 39, are irrelevant for the further reason that they were vetoed and never became law.

The majority also contends that, even if the activities involved here are "military" ones, they still did not involve "military *requirements*." *See* Maj. Opin. at 45-45 (emphasis added). That is wrong. The term "requirement" is not limited to those tasks that DoD is *compelled* to undertake, nor is it limited to those actions that DoD undertakes *for itself*. The term also includes "something that is wanted or needed" or "something called for or demanded," *see Requirement*, WEBSTER'S THIRD; *see also Requirement*, BLACK'S LAW DICTIONARY (11th ed. 2019) (listing, as an alternative definition, "[s]omething that someone needs or asks for"), and that readily applies to the request for assistance that was made to DoD in this case under § 284. We should be cautious before adopting an unduly crabbed reading of what constitutes a military "requirement," especially when Congress has explicitly assigned a task to the military, as it did in § 284. *Cf. Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008) ("great deference" is generally given to the military's judgment of the importance of a military interest).

Accordingly, DoD's provision of support to DHS under § 284 involves a "military requirement[]" within the meaning of § 8005. The majority errs in concluding otherwise.

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*See id.* at 12 n.3; *see also* 50 U.S.C. § 1622(a)(1) (congressional termination requires "enact[ing] into law a joint resolution terminating the emergency"); *Chadha*, 462 U.S. at 946-48.

**2**

The majority is likewise wrong in contending that DoD's need to provide assistance to DHS for these projects under § 284 was not "unforeseen" within the meaning of § 8005. *See* Maj. Opin. at 37-42.

Once again, the majority fails to construe § 8005 against the backdrop of the appropriations process. In ordinary usage, "foresee" means "to see (as a future occurrence or development) as *certain or unavoidable*: look forward to *with assurance*." *Foresee*, WEBSTER'S THIRD (emphasis added). In the context of the appropriations process, an "item" has been *seen as certain or unavoidable* only if it is reflected in DoD's budgetary submissions or in Congress's review and revision of those submissions. Conversely, it is "unforeseen" if it is *not* reflected as an item in any of those materials. The Red Book confirms this understanding. In explaining the need for reprogramming, it quotes the Deputy Defense Secretary's statement that reprogramming allows agencies to respond to "unforeseen changes" that *are not reflected in the "budget estimates" on which the final appropriations are based*:

> "The defense budget does not exist in a vacuum. There are forces at work to play havoc with even the best of budget estimates. The economy may vary in terms of inflation; political realities may bring external forces to bear; fact-of-life or programmatic changes may occur. The very nature of the lengthy and overlapping cycles of the budget process poses continual threats to the integrity of budget estimates. Reprogramming procedures permit us to respond to these unforeseen changes and still meet our defense requirements."

RED BOOK, 2016 WL 1275442, at *5 (citation omitted). As the GAO has explained, the question is not whether a particular item "was unforeseen *in general*"; "[r]ather, the question under section 8005 is whether it was unforeseen at the time of the budget request and enactment of appropriations." U.S. GAO, B-330862, *Department of Defense—Availability of Appropriations for Border Fence Construction* at 7-8 (Sept. 5, 2019) (emphasis added), https://www.gao.gov/assets/710/701176.pdf. Under this standard, the items at issue here were "unforeseen"; indeed, the States do not contend that funding for the DoD assistance at issue here was ever requested, proposed, or considered during DoD's appropriations process.

In reaching a contrary conclusion, the majority makes two legal errors. First, it makes precisely the mistake the GAO identified, namely, it examines whether the "problem" (drug smuggling) and the "solution" (a border barrier) were foreseen *in general*, rather than whether they were foreseen *within the appropriations process*. *See* Maj. Opin. at 40-41. Thus, in concluding that DoD's need to provide assistance under § 284 was not "unforeseen," the majority relies on the general premises that "the conditions at the border" have been known to be a problem since at least the 1960s and that "the President's position that a wall was needed to address those conditions" was publicly known well before he took office. *Id.* at 35, 37. Second, by rejecting the view that "foreseen" is equivalent to "known" or that it requires "actual knowledge," *id.* at 39-40, the majority effectively rewrites the statute as if it said "*foreseeable*" rather than "foreseen." Contrary to the majority's view that requiring foreknowledge would "effectively eliminate[] any element of anticipation or expectation," *see id.* at 39,

"foreseen" is commonly understood to be interchangeable with "foreknown." *See*, *e.g.*, *Foresee*, WEBSTER'S THIRD (listing "foreknow" as a synonym). By wrongly shifting the focus away from whether a current need matches up with the assumptions on which the budget and appropriations were based, the majority's errors would preclude DoD from making transfers based on *any* factors that were anticipated within the larger society and, as a result, would essentially reduce the transfer power in § 8005 to a nullity.

**3**

DoD's transfers here were thus based on "military" "requirements" that were "unforeseen" within the meaning of § 8005. The States do not otherwise contest the Secretary's determination that the items in question were "higher priority" items than "those for which originally appropriated." This element of § 8005's first proviso was therefore also satisfied here.

**C**

The States contend that, even if the transfers complied with the conditions in § 8005, the particular transfer that was made under § 9002, *see supra* at 52-53, did not satisfy that section's additional requirement that transfers under that section be made only "between the appropriations or funds made available to the Department of Defense *in this title*." 132 Stat. at 3042 (emphasis added). According to the States, the appropriations under that title are only for "Overseas Contingency Operations," and the transferee appropriation does not count. This argument is plainly incorrect. The separate title in the DoD Appropriations Act that is entitled "Overseas Contingency Operations" contains

within it a specific appropriation for "Drug Interdiction and Counter-Drug Activities, Defense," 132 Stat. at 3042, which is the appropriation to which the funds were transferred. The fact that the amounts in that fund are designated as funds for "Overseas Contingency Operations/Global War on Terrorism" *for purposes of calculating budgetary caps* under § 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. § 901(b)(2)(A)(ii), does not thereby impose an additional limitation on the purposes for which such funds may be expended.

**V**

Based on the foregoing, I conclude that at least California has Article III standing, but that the States lack any cause of action to challenge these § 8005 and § 9002 transfers. Alternatively, if the States did have a cause of action, their claims fail on the merits as a matter of law because the transfers complied with the limitations in § 8005 and § 9002. I therefore would reverse the district court's partial grant of summary judgment to the States and would remand the matter with instructions to grant the Government's motion for summary judgment on this set of claims. Because the majority concludes otherwise, I respectfully dissent.

**APPENDIX C**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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Case No. 19-cv-00892-HSG

SIERRA CLUB, ET AL., PLAINTIFFS

*v.*

DONALD J. TRUMP, ET AL., DEFENDANTS

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Filed: June 28, 2019

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**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT, CERTIFYING JUDGMENT FOR APPEAL, AND DENYING REQUEST TO STAY**
**Re: Dkt. Nos. 168, 181**

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Pending before the Court are cross-motions for partial summary judgment filed by Plaintiffs Sierra Club and Southern Border Communities Coalition, and Defendants Donald J. Trump, in his official capacity as President of the United States; Mark T. Esper, in his official capacity as Acting Secretary of Defense[1]; Kevin

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[1] Acting Secretary Esper is automatically substituted for former Acting Secretary Patrick M. Shanaham. *See* Fed. R. Civ. P. 25(d).

K. McAleenan, in his official capacity as Acting Secretary of Homeland Security[2]; and Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury, briefing for which is complete. Dkt. Nos. 168 ("Pls.' Mot."), 181 ("Defs.' Mot."), 192 ("Pls.' Reply"). The only issue presently before the Court concerns Defendants' intended reprogramming of funds under Sections 8005 and 9002 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018), and subsequent use of such funds under 10 U.S.C. § 284 ("Section 284") for border barrier construction.[3]

After carefully considering the parties' arguments, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' motion, and **DENIES** Defendants' motion.[4] The Court also certifies this judgment for immediate appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Last, the Court **DENIES** Defendants' request for a stay of any injunction pending appeal.

## I. LEGAL STANDARD

Summary judgment is proper when a "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of

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[2] Acting Secretary McAleenan is automatically substituted for former Secretary Kirstjen M. Nielsen. *See* Fed. R. Civ. P. 25(d).

[3] The relevant background for this motion is essentially unchanged since the Court's preliminary injunction order. The Court thus incorporates in full here the factual background and statutory framework as set forth in that order. *See* Dkt. No. 144.

[4] In light of the extended oral argument regarding these issues at the preliminary injunction hearing, *see* Dkt. No. 138, the Court finds these matters appropriate for disposition without oral argument and the matters are deemed submitted, *see* Civil L.R. 7-1(b).

law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And a dispute is "genuine" if there is evidence in the record sufficient for a reasonable trier of fact to decide in favor of the nonmoving party. *Id.* But in deciding if a dispute is genuine, the court must view the inferences reasonably drawn from the materials in the record in the light most favorable to the nonmoving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986), and "may not weigh the evidence or make credibility determinations," *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997), *overruled on other grounds by Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008). If a court finds that there is no genuine dispute of material fact as to only a single claim or defense or as to part of a claim or defense, it may enter partial summary judgment. Fed. R. Civ. P. 56(a).

The parties agree that the issue presently before the Court is properly resolved on their cross-motions for partial summary judgment. Pls.' Mot. at 8-9; Defs.' Mot. at 9.

## II. DISCUSSION

In their motion, Plaintiffs request that the Court (1) enter final judgment in their favor "declaring unlawful Defendants' transfer of Fiscal Year 2019 appropriated funds to the Department of Defense's [("DoD's")] Section 284 account, the use of those funds for construction of a border wall, and Defendants' failure to comply with NEPA for this construction"; (2) issue a permanent injunction prohibiting Defendants from so funding border barrier construction "prior to complying with NEPA";

and (3) enjoin such unlawful use of funds generally. Pls.' Mot. at 1. Defendants' motion seeks a final determination that their intended use of funds under Sections 8005, 9002, and 284 for border barrier construction is lawful. Defs.' Mot. at 2. Defendants also request that the Court certify this judgment for appeal under Rule 54(b). *Id.* at 24-25.

**A. Declaratory Relief**

Plaintiffs seek a declaratory judgment finding unlawful Defendants' (1) reprogramming of funds under Sections 8005 and 9002, (2) use of those funds for border barrier construction under Section 284, and (3) failure to comply with NEPA before pursuing any such construction. *See* Pls.' Mot. at 1.

**1. Sections 8005, 9002, and 284**

Starting with Section 8005, the Court previously held that Plaintiffs were likely to succeed on their arguments that Defendants' intended reprogramming of funds under Section 8005 to the Section 284 account to fund border barrier construction in El Paso Sector 1 and Yuma Sector 1 is unlawful. In particular, the Court found that Plaintiffs were likely to show that (1) the item for which funds are requested has been denied by Congress; (2) the transfer is not based on "unforeseen military requirements"; and (3) accepting Defendants' proposed interpretation of Section 8005's requirements would raise serious constitutional questions.[5] Dkt. No. 144 ("PI Order") at 31-42.

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[5] The Court did not consider whether Defendants' reprogramming of funds was for a "higher priority item"—an independently necessary requirement under Section 8005—because Defendants'

The Court previously only considered Defendants' reprogramming and subsequent use of funds for border barrier construction for El Paso Sector Project 1 and Yuma Sector Project 1. It did not consider Defendants' more-recently announced reprogramming and subsequent diversion of funds for border barrier construction for the El Centro Sector Project and Tucson Sector Projects 1-3, pending further development of the record as to those projects. *See id.* at 12. To fund these projects, Defendants again invoked Section 8005, as well as DoD's "special transfer authority under section 9002 of the Department of Defense Appropriations Act, 2019, and section 1512 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019." *See* Dkt. No. 118-1 ("Rapuano Second Decl.") ¶ 7. Defendants' Section 9002 authority, however, is subject to Section 8005's limitations. *See* Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, § 9002, 132 Stat. 2981, 3042 (2018) (providing that "the authority provided in this section is in addition to any other transfer authority available to the Department of Defense and is subject to the same terms and conditions as the authority provided in section 8005 of this Act"); *see also* Defs.' Mot. at 10 n.4 (acknowledging that Section 9002 is subject to Section 8005's requirements). Because Defendants agree that all such authority is subject to Section 8005's substantive requirements, the Court refers to these requirements collectively by reference to Section 8005.

In their pending motion, "Defendants acknowledge that the Court previously rejected [their] arguments

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planned use of such reprogrammed funds failed multiple other Section 8005 requirements. The Court similarly does not consider the "higher priority item" requirement here.

about the proper interpretation of § 8005 in its [preliminary injunction] order." Defs.' Mot. at 10. Defendants contend that the Court's findings were wrong for two reasons: (1) "Plaintiffs fall outside the zone of interests of § 8005 and thus cannot sue to enforce it"; and (2) "DoD has satisfied the requirements set forth in § 8005." *Id.* at 10-13. But Defendants here offer no evidence or argument that was not already considered in the Court's preliminary injunction order. For example, Defendants continue to argue that under *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), the zone-of-interests test applies to Plaintiffs' claims. *Compare* Opp. at 10, *with* Dkt. No. 64 at 14-15. And the Court continues to find that the test has no application in an *ultra vires* challenge, which operates outside of the APA framework, and the Court incorporates here its prior reasoning on this point. PI Order at 29-30.

Defendants also continue to assert that DoD did not transfer funds for an item previously denied by Congress and that the transfer was for an "unforeseen" requirement. *Compare* Opp. at 11-13, *with* Dkt. No. 64 at 16-18. But Defendants again present no new evidence or argument for why the Court should depart from its prior decision, and it will not. The Court thus stands by its prior finding that Defendants' proposed interpretation of the statute is unreasonable, and agrees with Plaintiffs that Defendants' intended reprogramming of funds under Section 8005—and necessarily under Section 9002 as well—to the Section 284 account for border barrier construction is unlawful. *See* PI Order at 31-42. Because no new factual or legal arguments persuade the Court that its analysis in the preliminary

injunction order was wrong, Plaintiffs' likelihood of success on the merits has ripened into actual success. The Court accordingly **GRANTS** Plaintiffs' request for declaratory judgment that such use of funds reprogrammed under Sections 8005 and 9002 for El Paso Sector Project 1, Yuma Sector Project 1, El Centro Sector Project, and Tucson Sector Projects 1-3 is unlawful.[6]

Turning to Section 284, the Court finds that it need not determine whether Plaintiffs are entitled to declaratory judgment that Defendants' invocation of Section 284 is also unlawful. When a party requests declaratory judgment, "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Having determined that Defendants' proposed reprogramming of funds under Sections 8005 and 9002 is unlawful, no immediate adverse legal interests warrant a declaratory judgment concerning Section 284. Defendants acknowledge that all of the money they plan to spend on border barrier construction under Section 284 is money transferred into the relevant account under Sections 8005 and 9002. *See* Dkt. No. 131 at 4. Given this acknowledgment, the Court's ruling as

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[6] Plaintiffs' motion seeks a broader declaratory judgment that any use of reprogrammed funds for border barrier construction, even outside of these particular sectors, is unlawful. *See* Mot. at 23-24. Given that Defendants have not yet authorized any border barrier construction outside of the contested sectors, the Court declines to issue such a declaratory judgment.

to Sections 8005 and 9002 obviates the need to independently assess the lawfulness of Defendants' invocation of Section 284.

**2. NEPA**

Separate and apart from whether Defendants' invocations of Sections 8005, 9002, and 284 to fund border barrier construction conform with respective statutory requirements, Plaintiffs seek a declaratory judgment deeming unlawful Defendants' failure to comply with NEPA before pursuing such construction. *See, e.g.*, Pls.' Mot. at 24. Plaintiffs acknowledge that they present identical arguments previously raised and rejected by the Court in its preliminary injunction order. *See id.* at 18 n.3. Presented with no new evidence or argument that was not already considered in the Court's preliminary injunction order, the Court continues to find that the pertinent waivers issued by DHS are dispositive of the NEPA claims, for the reasons detailed in the Court's previous order. *See* PI Order at 46-48.

**B. INJUNCTIVE RELIEF**

It is a well-established principle of equity that a permanent injunction is appropriate when: (1) a plaintiff will "suffer[] an irreparable injury" absent an injunction; (2) available remedies at law are "inadequate;" (3) the "balance of hardships" between the parties supports an equitable remedy; and (4) the public interest is "not disserved." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Defendants do not dispute that available remedies at law are inadequate. The Court thus only considers the remaining factors.

**1. Plaintiffs Have Shown They Will Suffer Irreparable Harm Absent a Permanent Injunction.**

Plaintiffs contend that absent an order permanently enjoining the contemplated border barrier construction in the areas designated El Paso Sector 1, Yuma Sector 1, El Centro Sector, and Tucson Sectors 1-3, its members "will suffer irreparable harm to their recreational and aesthetic interests." Mot. at 20-22. The Court agrees and finds that Plaintiffs have shown that they will suffer irreparable harm to their members' aesthetic and recreational interests in the identified areas absent injunctive relief. As the Court previously noted, it is well-established in the Ninth Circuit that an organization can demonstrate irreparable harm by showing that the challenged action will injure its members' enjoyment of public land. *See* PI Order at 49. And Plaintiffs here provide declarations from their members detailing how Defendants' proposed use of funds reprogrammed under Sections 8005 and 9002 will harm their ability to recreate in and otherwise enjoy public land along the border. *See* Pls.' Mot. at 21-22 (citing Dkt. No. 168-1 Ex. 1 (Bevins Decl.) ¶ 7; *id.* Ex. 2 (Del Val Decl.) ¶¶ 9-10; *id.* Ex. 3 (Bixby Decl.) ¶ 6; *id.* Ex. 4 (Munro Decl.) ¶¶ 9, 11; *id.* Ex. 5 (Walsh Decl.) ¶¶ 12, 15; *id.* Ex. 6 (Evans Decl.) ¶ 8; *id.* Ex. 7 (Armenta Decl.) ¶¶ 6-8; *id.* Ex. 8 (Ramirez Decl.) ¶¶ 5, 8; *id.* Ex. 9 (Hartmann Decl.) ¶¶ 8, 9; *id.* Ex. 10 (Hudson Decl.) ¶¶ 10-11; *id.* Ex. 11 (Dahl Decl.) ¶ 8; *id.* Ex. 13 (Gerrodette Decl.) ¶¶ 6, 8; *id.* Ex. 14 (Case Decl.) ¶¶ 10-12; *id.* Ex. 17 (Tuell Decl.) ¶¶ 7, 10; Ex. 18 (Ardovino Decl.) ¶ 6).

Defendants do not contest the truthfulness of Plaintiffs' declarants' assertions that the challenged border

barrier construction will harm their recreational interests. Defendants instead contend that Plaintiffs' alleged recreational harms are insufficient because even with the proposed border barrier construction, Plaintiffs' members have plenty of other space to enjoy. *See* Defs.' Mot. at 21-22. In their words, border barrier construction "will not impact land uses in the thousands of acres surrounding the limited project areas, where the forms of recreation Plaintiffs enjoy will remain possible." *Id.* at 22. Defendants' argument—unsupported by any case law—proves too much. *See All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (holding this argument's "logical extension is that a plaintiff can never suffer irreparable injury resulting from environmental harm in [one] area as long as there are other areas [] that are not harmed"). Given that Plaintiffs' declarants' characterization of the harm they will suffer is undisputed as a factual matter, the result under Ninth Circuit law is that Plaintiffs have shown they will suffer irreparable harm absent a permanent injunction.

**2. Balance of Hardships and Public Interest Support a Permanent Injunction**

The parties agree that the Court should consider the balance of the equities and public interest factors together, because the government is a party to the case. *See* Pls.' Mot. at 22; Defs.' Mot. at 23-24; *see also Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). As they did at the preliminary injunction stage, Defendants here contend that these factors tilt in their favor because the Government has a strong interest in border security. Defs.' Br. at 23. Defendants also contend that an injunction would "permanently deprive

DoD of its authorization to use the funds at issue to complete the projects, because the funding will lapse at the end of the fiscal year" and that DoD will "incur unrecoverable fees and penalties" while construction is suspended. *Id.* at 23-24.

As the Court explained in its preliminary injunction order, the Ninth Circuit has recognized that "the public has a 'weighty' interest 'in efficient administration of the immigration laws at the border,'" and the Court does not minimize this interest. *See E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018) (quoting *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)). But "the public also has an interest in ensuring that statutes enacted by their representatives are not imperiled by executive fiat." *Id.* (internal quotation marks and brackets omitted). And the Court notes that Congress considered all of Defendants' proffered needs for border barrier construction, weighed the public interest in such construction against Defendants' request for taxpayer money, and struck what it considered to be the proper balance—in the public's interest—by making available only $1.375 billion in funding, which was for certain border barrier construction not at issue here. *See* Consolidated Appropriations Act of 2019, Pub. L. No. 116-6, § 230(a)(1), 133 Stat. 13, 28 (2019). Most important, Defendants overlook that these factors are informed by the Court's finding that Defendants do not have the purported statutory authority to reprogram and use funds for the planned border barrier construction. Absent such authority, Defendants' position on these factors boils down to an argument that the Court should not enjoin conduct found to be unlawful because the ends justify the means. No case supports this principle.

Because the Court finds Defendants' proposed use of funds reprogrammed under Sections 8005 and 9002 unlawful, the Court finds that the balance of hardships and public interest favors Plaintiffs, and counsels in favor of a permanent injunction.

### C. Certification for Appeal

Finally, Defendants request that the Court certify this judgment for appeal under Rule 54(b). Appellate courts generally only have jurisdiction to hear appeals from final orders. *See* 28 U.S.C. § 1291. Rule 54(b) allows for a narrow exception to this final judgment rule, permitting courts to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Entry of judgment under Rule 54(b) thus requires: (1) a final judgment; and (2) a determination that there is no just reason for delay of entry. *See Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 574 (9th Cir. 2018) (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7-8 (1980)).

#### 1. Finality of Judgment

A final judgment is "a decision upon a cognizable claim for relief" that is "an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Curtiss-Wright Corp.*, 446 U.S. at 7 (citing *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956)). The Court finds this requirement satisfied because the Court's award of partial summary judgment in this order is "an ultimate disposition" of Plaintiffs' claims related to Defendants' purported reliance on Sections 8005, 9002, and 284 for border barrier construction.

**2. No Just Reason for Delay**

As the Ninth Circuit has explained, "[j]udgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties." *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). Accordingly, an explanation of findings "should include a determination whether, upon any review of the judgment entered under the rule, the appellate court will be required to address legal or factual issues that are similar to those contained in the claims still pending before the trial court." *Id.* at 965. "The greater the overlap the greater the chance that [the Court of Appeals] will have to revisit the same facts —spun only slightly differently—in a successive appeal." *Wood v. GCC Bend, LLC*, 422 F.3d 873, 882 (9th Cir. 2005). "[P]lainly, sound judicial administration does not require that Rule 54(b) requests be granted routinely." *Id.* at 879 (internal quotation marks omitted).

The Court finds there is no just reason for delay under the circumstances. In their motion, Defendants contend that "[t]he legal and factual issues do not 'intersect and overlap' with the outstanding claims in this case, which focus on separate statutory authorities, and final judgment on these claims will not result in piecemeal appeals on the same sets of facts." Defs.' Mot. at 25. The Court agrees. Whether Defendants' actions comport with the statutory requirements of Sections 8005 and 9002 and whether Defendants' actions comport with the remaining statutory requirements related to outstanding claims are distinct inquiries, largely based

on distinct law. The Court also recognizes that Defendants' appeal of the Court's preliminary injunction order is currently pending before the Court of Appeals, which recently issued an order holding the briefing on that appeal in abeyance pending this order. *See Sierra Club v. Trump*, No. 19-16102 (9th Cir. 2019), ECF Nos. 65-66. This suggests to the Court that the Court of Appeals agrees that "sound judicial administration" is best served by the Court certifying this judgment for appeal, in light of the undisputedly significant interests at stake in this case. *See Wood*, 422 F.3d at 879.

## III. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' motion for partial summary judgment and **DENIES** Defendants' motion for partial summary judgment. Specifically, the Court **GRANTS** Plaintiffs' request for declaratory judgment that Defendants' intended use of funds reprogrammed under Sections 8005 and 9002 of the Department of Defense Appropriations Act, 2019, for border barrier construction in El Paso Sector 1, Yuma Sector 1, El Centro Sector, and Tucson Sectors 1-3, is unlawful. The Court **DENIES** Plaintiffs' request for declaratory judgment concerning Defendants' (1) invocation of Sections 8005 and 9002 beyond these sectors, (2) invocation of Section 284, and (3) compliance with NEPA.

The terms of the permanent injunction are as follows[7]: Defendants Mark T. Esper, in his official capacity as Acting Secretary of Defense, Kevin K. McAleenan, in

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[7] The Court finds that an injunction against the President personally is not warranted here. *See Cty. of Santa Clara*, 250 F. Supp. 3d at 549-40.

his official capacity as Acting Secretary of Homeland Security, Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury, and all persons acting under their direction, are enjoined from taking any action to construct a border barrier in the areas Defendants have identified as El Paso Sector 1, Yuma Sector 1, El Centro Sector, and Tucson Sectors 1-3 using funds reprogrammed by DoD under Sections 8005 and 9002 of the Department of Defense Appropriations Act, 2019.

The Clerk is directed to enter final judgment in favor of Plaintiffs and against Defendants with respect to Defendants' purported reliance on Sections 8005, 9002, and 284 to fund border barrier construction. This judgment will be certified for immediate appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

Last, for these reasons and those set out in the Court's May 30, 2019 order, the Court declines Defendants' request to stay the injunction pending appeal. *See* Dkt. No. 152.

**IT IS SO ORDERED.**

Dated: 6/28/2019

/s/ HAYWOOD S. GILLIAM, JR.
HAYWOOD S. GILLIAM, JR.
United States District Judge

**APPENDIX D**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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Case No. 19-cv-00872-HSG

STATE OF CALIFORNIA, ET AL., PLAINTIFFS

*v.*

DONALD J. TRUMP, ET AL., DEFENDANTS

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Filed: June 28, 2019

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**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT, AND CERTIFYING JUDGMENT FOR APPEAL**
**Re: Dkt. Nos. 176, 182**

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Pending before the Court are cross-motions for partial summary judgment filed by Plaintiff States California and New Mexico, and Defendants Donald J. Trump, in his official capacity as President of the United States; the U.S. Department of Defense ("DoD"); Mark T. Es-

per, in his official capacity as Acting Secretary of Defense[1]; Ryan D. McCarthy, in his official capacity as Acting Secretary of the Army[2]; Richard V. Spencer, in his official capacity as Secretary of the Navy; Heather Wilson, in her official capacity as Secretary of the Air Force; the U.S. Department of the Treasury; Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury; the U.S. Department of the Interior; David Bernhardt, in his official capacity as Secretary of the Interior[3]; the U.S. Department of Homeland Security ("DHS"); and Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security,[4] briefing for which is complete. Dkt. Nos. 176 ("Pls.' Mot."), 182 ("Defs.' Mot."), 183 ("Pls.' Reply"). The only issue presently before the Court concerns Defendants' intended reprogramming of funds under Sections 8005 and 9002 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018), and subsequent use of such funds under 10 U.S.C. § 284 ("Section 284") for border barrier construction.[5]

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[1] Acting Secretary Esper is automatically substituted for former Acting Secretary Patrick M. Shanaham. *See* Fed. R. Civ. P. 25(d).

[2] Acting Secretary McCarthy is automatically substituted for former Secretary Esper. *See* Fed. R. Civ. P. 25(d).

[3] Secretary Bernhardt was named in his then-capacity as Acting Secretary, but was subsequently confirmed as Secretary by the U.S. Senate on April 11, 2019.

[4] Acting Secretary McAleenan is automatically substituted for former Secretary Kirstjen M. Nielsen. *See* Fed. R. Civ. P. 25(d).

[5] The relevant background for this motion is essentially unchanged since the Court's preliminary injunction orders in this and the related case, *Sierra Club v. Trump,* No. 4:19-cv-00892-HSG (N.D.

After carefully considering the parties' arguments, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' motion, and **DENIES** Defendants' motion.[6] The Court also certifies this judgment for immediate appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

## I. LEGAL STANDARD

Summary judgment is proper when a "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And a dispute is "genuine" if there is evidence in the record sufficient for a reasonable trier of fact to decide in favor of the nonmoving party. *Id.* But in deciding if a dispute is genuine, the court must view the inferences reasonably drawn from the materials in the record in the light most favorable to the nonmoving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986), and "may not weigh the evidence or make credibility determinations," *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997), *overruled on other grounds by Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008). If a court finds that

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Cal.). The Court thus incorporates in full here the factual background and statutory framework as set forth in the preliminary injunction order in the related case. *See* Order, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. May 24, 2019), ECF No. 144.

[6] In light of the extended oral argument regarding these issues at the preliminary injunction hearing, *see* Dkt. No. 159, the Court finds these matters appropriate for disposition without oral argument and the matters are deemed submitted, *see* Civil L.R. 7-1(b).

there is no genuine dispute of material fact as to only a single claim or defense or as to part of a claim or defense, it may enter partial summary judgment. Fed. R. Civ. P. 56(a).

The parties agree that the issue presently before the Court is properly resolved on their cross-motions for partial summary judgment. Pls.' Mot. at 9; Defs.' Mot. at 9.

## II. DISCUSSION

In their motion, Plaintiffs request that the Court (1) enter final judgment in their favor declaring unlawful Defendants' transfer of Fiscal Year 2019 appropriated funds to the DoD's Section 284 account and those funds' subsequent use for border barrier construction; and (2) enjoin such unlawful use of funds. Pls.' Mot. at 1. Defendants' motion seeks a final determination that their intended use of funds under Sections 8005, 9002, and 284 for border barrier construction is lawful. Defs.' Mot. at 2. Defendants also request that the Court certify this judgment for appeal under Rule 54(b). *Id.* at 24-25.

### A. Declaratory Relief

Plaintiffs seek a declaratory judgment finding unlawful Defendants' (1) reprogramming of funds under Sections 8005 and 9002, and (2) use of those funds for border barrier construction under Section 284. *See* Pls.' Mot. at 1. Plaintiffs contend that Defendants' actions "(1) are ultra vires; (2) violate the United States Constitution's separation of powers principles, including the Appropriations and Presentment Clauses; and (3) violate the Administrative Procedure Act (APA)." *Id.*

Starting with Section 8005, the Court previously held that Plaintiffs were likely to succeed on their arguments that Defendants' intended reprogramming of funds under Section 8005 to the Section 284 account to fund border barrier construction in El Paso Sector 1 is unlawful. In particular, the Court found that Plaintiffs were likely to show that (1) the item for which funds are requested has been denied by Congress; (2) the transfer is not based on "unforeseen military requirements"; and (3) accepting Defendants' proposed interpretation of Section 8005's requirements would raise serious constitutional questions.[7] Dkt. No. 165 ("PI Order") at 13-24.

The Court previously only considered Defendants' reprogramming and subsequent use of funds for border barrier construction for El Paso Sector Project 1. It did not consider Defendants' more-recently announced reprogramming and subsequent diversion of funds for border barrier construction for the El Centro Sector Project, pending further development of the record as to this project. *See id.* at 13 n.9. To fund this project, Defendants again invoked Section 8005, as well as DoD's "special transfer authority under section 9002 of the Department of Defense Appropriations Act, 2019, and section 1512 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019." *See* Dkt. No. 118-1 ("Rapuano Second Decl.") ¶ 7. Defendants' Section 9002 authority, however, is subject to Section 8005's

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[7] The Court did not consider whether Defendants' reprogramming of funds was for a "higher priority item"—an independently necessary requirement under Section 8005—because Defendants' planned use of such reprogrammed funds failed multiple other Section 8005 requirements. The Court similarly does not consider the "higher priority item" requirement here.

limitations. *See* Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, § 9002, 132 Stat. 2981, 3042 (2018) (providing that "the authority provided in this section is in addition to any other transfer authority available to the Department of Defense and is subject to the same terms and conditions as the authority provided in section 8005 of this Act"); *see also* Defs.' Mot. at 9 n.3 (acknowledging that Section 9002 is subject to Section 8005's requirements). Because Defendants agree that all such authority is subject to Section 8005's substantive requirements, the Court refers to these requirements collectively by reference to Section 8005.

In their pending motion, "Defendants acknowledge that the Court previously rejected [their] arguments about the proper interpretation of § 8005 in its [preliminary injunction order]." Defs.' Mot. at 9. Defendants contend that the Court's findings were wrong for two reasons: (1) "Plaintiffs fall outside the zone of interests of § 8005 and thus cannot sue to enforce it"; and (2) "DoD has satisfied the requirements set forth in § 8005." *Id.* at 9-12. But Defendants here offer no evidence or argument that was not already considered in the Court's preliminary injunction order. For example, Defendants continue to argue that under *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), the zone-of-interests test applies to Plaintiffs' claims. *Compare* Opp. at 9-10, *with* Dkt. No. 89 at 18-19. And the Court continues to find that the test has no application in an *ultra vires* challenge, which operates outside of the APA framework, and the Court incorporates here its prior reasoning on this point. PI Order at 11-12.

Defendants also continue to assert that DoD did not transfer funds for an item previously denied by Congress and that the transfer was for an "unforeseen" requirement. *Compare* Opp. at 10-11, *with* Dkt. No. 89 at 19-20. But Defendants again present no new evidence or argument for why the Court should depart from its prior decision, and it will not. The Court thus stands by its prior finding that Defendants' proposed interpretation of the statute is unreasonable, and agrees with Plaintiffs that Defendants' intended reprogramming of funds under Section 8005—and necessarily under Section 9002 as well—to the Section 284 account for border barrier construction is unlawful. *See* PI Order at 13-24. Because no new factual or legal arguments persuade the Court that its analysis in the preliminary injunction order was wrong, Plaintiffs' likelihood of success on the merits has ripened into actual success. The Court accordingly **GRANTS** Plaintiffs' request for declaratory judgment that such use of funds reprogrammed under Sections 8005 and 9002 for El Paso Sector Project 1 and El Centro Sector Project is unlawful.[8]

Turning to Section 284, the Court finds that it need not determine whether Plaintiffs are entitled to declaratory judgment that Defendants' invocation of Section 284 is also unlawful. When a party requests declaratory judgment, "the question in each case is whether the facts alleged, under all the circumstances, show that

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[8] Plaintiffs' motion seeks a declaratory judgment that any use of reprogrammed funds for border barrier construction is unlawful as (1) *ultra vires*; (2) unconstitutional, and (3) in violation of the APA. Given that the Court determines Defendants' use of such funds is *ultra vires*, which resolves Plaintiffs' claim concerning such use of funds, the Court declines to issue a broader declaratory judgment.

there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Having determined that Defendants' proposed reprogramming of funds under Sections 8005 and 9002 is unlawful, no immediate adverse legal interests warrant a declaratory judgment concerning Section 284. Defendants acknowledge that all of the money they plan to spend on border barrier construction under Section 284 is money transferred into the relevant account under Sections 8005 and 9002. *See* Dkt. No. 151 at 4. Given this acknowledgment, the Court's ruling as to Sections 8005 and 9002 obviates the need to independently assess the lawfulness of Defendants' invocation of Section 284.

**B. INJUNCTIVE RELIEF**

It is a well-established principle of equity that a permanent injunction is appropriate when: (1) a plaintiff will "suffer[] an irreparable injury" absent an injunction; (2) available remedies at law are "inadequate;" (3) the "balance of hardships" between the parties supports an equitable remedy; and (4) the public interest is "not disserved." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Defendants do not dispute that available remedies at law are inadequate. The Court thus need only consider the remaining factors. But because the Court finds that Plaintiffs have not established irreparable injury—an independently necessary burden for Plaintiffs—the Court does not consider the balance of hardships and public interest factors.

Plaintiffs present two theories of irreparable injury: (1) that California and New Mexico will be irreparably

harmed by their inability to enforce state laws concerning the protection of environmental and natural resources; and (2) that border barrier construction will harm California and New Mexico's animals and plants. *See* Pls.' Mot. at 19-24.

The Court begins with Plaintiffs' second theory. With respect to the El Centro Sector Project, California contends that border barrier construction will threaten various animal and plant species. Pls.' Mot. at 21-22. Of particular concern to California is that construction in this sector potentially could hinder the migration of Peninsular bighorn sheep across the southern border and that pregnant ewes might be scared away by construction activities. *Id.* But Plaintiffs' supporting declarations do not indicate that Defendants' challenged action poses the requisite "threat of future demonstrable harm to a protected species." *See* PI Order at 31. To start, Plaintiffs only contend that Peninsular bighorn sheep have crossed the southern border "*west* of the project area," and that pregnant ewe populations may seek a critical area "adjacent" to the project site. Pls' Mot. at 21-22. In other words, Plaintiffs do not even allege that the protected species crosses the southern border where the challenged construction would occur. Finally, as to the potential disturbance caused by construction activities, Plaintiffs only allege that pregnant ewes may be "adversely affected." *Id.* But reference to a tenuous adverse effect is insufficient to explain why temporary construction would pose a threat of demonstrable harm to the species. All told, California has failed to carry its burden of presenting evidence that the

challenged action would pose a threat of future demonstrable harm to the Peninsular bighorn sheep.[9]

New Mexico similarly fails to prove a threat of future demonstrable harm. With respect to the El Paso Sector Project, New Mexico primarily contends that construction might hamper repopulation efforts of the Mexican wolf because genetic interchange benefits the species. *See* Pls.' Mot. at 23-24. As an initial matter, the Court has some doubt that New Mexico's purported interest in the international travels of a few animals between its state and another sovereign nation could ever justify a permanent injunction against the U.S. government. But even setting that aside, New Mexico only identifies two instances of Mexican wolves crossing the border, one of which returned to Mexico, and neither of which Plaintiffs contend are known to have bred with Mexican wolves on the other side of the border. *Id.* at 23. New Mexico's speculation that a border barrier *might* prevent interbreeding, which *might* hamper genetic diversity, which *might* render Mexican wolves *more susceptible* to diseases falls far short of the neces-

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[9] California's other purported harms to its wildlife are similarly unavailing. It is not enough, for example, for California to argue that construction could possibly disrupt plant life or harm Flat-tailed horned lizards and burrowing owls, especially when Defendants present evidence that relevant agencies regularly implement mitigation measures that successfully prevent such harm. *See* Defs.' Mot. at 21-22.

sary demonstrable evidence of harm to a protected species, and thus does not entitle New Mexico to a permanent injunction.[10]

Turning to Plaintiffs' first theory, the crux of the parties' dispute concerns whether Defendants' issuance of IIRIRA waivers related to the challenged border barrier construction projects nullifies the States' interest in enforcing their laws concerning the protection of the environment. Defendants contend that California and New Mexico cannot establish irreparable injury to their enforcement of state laws because the IIRIRA waivers set aside all such legal requirements, such that California and New Mexico lack a legal interest capable of being irreparably harmed. *See* Defs.' Mot. at 19-20; *see also* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 17,185-01 (Apr. 24, 2019) (waiving state laws related to the El Paso Sector Project); Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,800 (May 15, 2019) (waiving state laws related to the El Centro Sector Project); REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 231, 306 (May 11, 2005) (amending Section 102(c) to reflect that the Secretary "ha[s] the authority to waive all legal requirements" that, in the "Secretary's sole discretion," are "necessary to ensure expeditious construction" of barriers and roads). Plaintiffs counter that the waivers' effectiveness depends on

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[10] New Mexico's purported harm to other wildlife from construction activity fails for the same reasons that California's similar allegations fail. *See supra* note 9.

Defendants first having authority to use funds in a certain manner. *See* Pls.' Reply at 12-13. As Plaintiffs put it, "without the funds to proceed with construction, [an] IIRIRA waiver is meaningless." *Id.* at 12.

Whether the relevant waivers deprive states of their sovereign interests in enforcing state laws for purposes of an irreparable injury analysis, or merely deprive states of their ability to bring suit to vindicate those interests, is unclear as a legal matter. The Court need not resolve this issue, however, because whether or not the border barrier construction at issue in this order could harm California and New Mexico's sovereign interests, the contested use of funds for such construction will not occur in the absence of injunctive relief. This is because the Court has permanently enjoined the relevant Defendants in the related action from proceeding with such construction. *See* Order at 10, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. June 28, 2019), ECF No. 185 (permanently enjoining the use of reprogrammed funds for border barrier construction for El Paso Sector Project 1 and the El Centro Sector Project). Accordingly, no irreparable harm to California and New Mexico will result from the denial (without prejudice) of their duplicative requested injunction.

**C. Certification for Appeal**

Finally, Defendants request that the Court certify this judgment for appeal under Rule 54(b). Appellate courts generally only have jurisdiction to hear appeals from final orders. *See* 28 U.S.C. § 1291. Rule 54(b) allows for a narrow exception to this final judgment rule, permitting courts to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just

reason for delay." Entry of judgment under Rule 54(b) thus requires: (1) a final judgment; and (2) a determination that there is no just reason for delay of entry. *See Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 574 (9th Cir. 2018) (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7-8 (1980)).

**1. Finality of Judgment**

A final judgment is "a decision upon a cognizable claim for relief" that is "an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Curtiss-Wright Corp.*, 446 U.S. at 7 (citing *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956)). The Court finds this requirement satisfied because the Court's award of partial summary judgment in this order is "an ultimate disposition" of Plaintiffs' claims related to Defendants' purported reliance on Sections 8005, 9002, and 284 for border barrier construction.

**2. No Just Reason for Delay**

As the Ninth Circuit has explained, "[j]udgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties." *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). Accordingly, an explanation of findings "should include a determination whether, upon any review of the judgment entered under the rule, the appellate court will be required to address legal or factual issues that are similar to those contained in the claims still pending before the trial court." *Id.* at 965. "The greater the overlap the greater the chance that

[the Court of Appeals] will have to revisit the same facts—spun only slightly differently—in a successive appeal." *Wood v. GCC Bend, LLC*, 422 F.3d 873, 882 (9th Cir. 2005). "[P]lainly, sound judicial administration does not require that Rule 54(b) requests be granted routinely." *Id.* at 879 (internal quotation marks omitted).

The Court finds there is no just reason for delay under the circumstances. In their motion, Defendants contend that "[t]he legal and factual issues do not 'intersect and overlap' with the outstanding claims in this case, which focus on separate statutory authorities, and final judgment on these claims will not result in piecemeal appeals on the same sets of facts." Defs.' Mot. at 25. The Court agrees. Whether Defendants' actions comport with the statutory requirements of Sections 8005 and 9002 and whether Defendants' actions comport with the remaining statutory requirements related to outstanding claims are distinct inquiries, largely based on distinct law. The Court also recognizes that Defendants' appeal of the Court's preliminary injunction order in the related case, *Sierra Club v. Trump*, is currently pending before the Court of Appeals, which recently issued an order holding the briefing on that appeal in abeyance pending partial summary judgment orders. *See Sierra Club v. Trump*, No. 19-16102 (9th Cir. 2019), ECF Nos. 65-66. This suggests to the Court that the Court of Appeals agrees that "sound judicial administration" is best served by the Court certifying this judgment for appeal, in light of the undisputedly significant interests at stake in this case. *See Wood*, 422 F.3d at 879.

## III. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' motion for partial summary judgment and **DENIES** Defendants' motion for partial summary judgment. Specifically, the Court **GRANTS** Plaintiffs' request for declaratory judgment that Defendants' intended use of funds reprogrammed under Sections 8005 and 9002 of the Department of Defense Appropriations Act, 2019, for border barrier construction in El Paso Sector 1 and El Centro Sector is unlawful. The Court **DENIES** Plaintiffs' requests for (1) any broader declaratory judgment, and (2) a permanent injunction.

The Clerk is directed to enter final judgment in favor of Plaintiffs and against Defendants with respect to Defendants' purported reliance on Sections 8005, 9002, and 284 to fund border barrier construction. This judgment will be certified for immediate appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

**IT IS SO ORDERED.**

Dated: 6/28/2019

/s/ HAYWOOD S. GILLIAM, JR.
HAYWOOD S. GILLIAM, JR.
United States District Judge

**APPENDIX E**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Nos. 19-16102, 19-16300
D.C. No. 4:19-cv-00892-HSG
Northern District of California, Oakland

SIERRA CLUB; SOUTHERN BORDER COMMUNITIES COALITION, PLAINTIFFS-APPELLEES

*v.*

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; ET AL, DEFENDANTS-APPELLANTS

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Nos. 19-16299, 19-16336
D.C. No. 4:19-cv-00872-HSG
Northern District of California, Oakland

STATE OF CALIFORNIA; ET AL., PLAINTIFFS-APPELLEES

*v.*

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; ET AL, DEFENDANTS-APPELLANTS

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[Filed: July 15, 2019]

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**ORDER**

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Before: CLIFTON, N.R. SMITH, and FRIEDLAND, Circuit Judges.

We grant Defendants' Unopposed Motion to Consolidate Appeals and Establish Briefing Schedule. Appeal Nos. 19-16102, 19-16300, 19-16299, and 19-16336 are consolidated.

In accordance with Defendants' proposed briefing schedule: Defendants' opening brief is due July 31, 2019. Sierra Club Case plaintiffs' response brief, and States Case plaintiffs' response brief and opening brief on cross-appeal, are due August 30, 2019. Defendants' reply brief and response brief to States Case plaintiffs' cross-appeal is due September 20, 2019. States Case plaintiffs' reply brief on cross-appeal is due October 11, 2019.

We request that the parties promptly inform this Court of any developments affecting this appeal. In particular, if there are developments that may moot any or all of the issues, this Court should be notified immediately.

**APPENDIX F**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Nos. 19-16102, 19-16300
D.C. No. 4:19-cv-00892-HSG
Northern District of California, Oakland

SIERRA CLUB; SOUTHERN BORDER COMMUNITIES COALITION, PLAINTIFFS-APPELLEES

*v.*

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; ET AL., DEFENDANTS-APPELLANTS

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[Filed: July 3, 2019]

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**ORDER**

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Before: CLIFTON, N.R. SMITH, and FRIEDLAND, Circuit Judges.

Order by Judges CLIFTON and FRIEDLAND

Dissent by Judge N.R. SMITH

CLIFTON and FRIEDLAND, Circuit Judges:

This emergency proceeding arises from a challenge to a decision by the President and certain of his cabinet members (collectively, "Defendants")[1] to "reprogram"

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[1] When federal officials are parties to litigation, we usually refer to them collectively as "the Government." That terminology seems

funds appropriated by Congress to the Department of Defense ("DoD") for Army personnel needs and to redirect those funds toward building a barrier along portions of our country's southern border.

This reprogramming decision was made after President Trump had repeatedly sought appropriations from Congress for the construction of a border barrier. Although Congress provided some funding for those purposes, it consistently refused to pass any measures that met the President's desired funding level, creating a standoff that led to a 35-day partial government shutdown. The President signed the budget legislation that ended the shutdown, but he then declared a national emergency and pursued other means to get additional funding for border barrier construction beyond what Congress had appropriated. One of those means, and the one at issue in this emergency request for a stay, was a reprogramming of funds by DoD in response to a request by the Department of Homeland Security ("DHS").

Specifically, DoD relied on section 8005 of the Department of Defense Appropriations Act of 2019 and related provisions to reprogram approximately $2.5 billion, moving the funds from DoD to DHS, for the purpose of building border barriers in certain locations

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inapt in this proceeding given that the question before us is whether the Executive Branch of the federal government is attempting to exercise authority that is allocated by the Constitution to the Legislative Branch of the federal government, and whether the Executive Branch is doing so without authorization from the Legislative Branch. And the House of Representatives, which is part of the Legislative Branch, has filed an amicus brief opposing the Executive Branch's position. To avoid confusion, we therefore refer to the President and the cabinet members sued here collectively as "Defendants."

within Arizona, California, and New Mexico. Section 8005 authorizes the Secretary of Defense to transfer funds for military purposes if the Secretary determines that the transfer is "for higher priority items, based on unforeseen military requirements" and "the item for which funds are requested has [not] been denied by the Congress." Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018) (hereinafter "section 8005").

The Sierra Club and the Southern Border Communities Coalition (collectively, "Plaintiffs") sued Defendants to enjoin the reprogramming and the funds' expenditure. They argued that the requirements of section 8005 had not been satisfied and that the use of the funds to build a border barrier was accordingly unsupported by any congressional appropriation and thus unconstitutional. A federal district court agreed with Plaintiffs and enjoined Defendants from using reprogrammed funds to construct a border barrier. Defendants now move for an emergency stay of the district court's injunction.

To rule on Defendants' motion, we consider several factors, including whether Defendants have shown that they are likely to succeed on the merits of their appeal, the degree of hardship to each side that would result from a stay or its denial, and the public interest in granting or denying a stay.

We conclude, first, that Defendants are not likely to succeed on the merits of their appeal. The Appropriations Clause of the Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art I., § 9, cl. 7. Defendants assert that, through section 8005,

Congress authorized DoD to reprogram the funds at issue. We agree with Plaintiffs, however, that the requirements of section 8005 have not been met. Specifically, the need for which the funds were reprogrammed was not "unforeseen," and it was an item for which funds were previously "denied by the Congress." Defendants do not argue that their contrary interpretation of section 8005 is entitled to any form of administrative deference, and we hold that no such deference would be appropriate in any event.

Because section 8005 did not authorize DoD to reprogram the funds—and Defendants do not and cannot argue that any other statutory or constitutional provision authorized the reprogramming—the use of those funds violates the constitutional requirement that the Executive Branch not spend money absent an appropriation from Congress.

Defendants contend that these Plaintiffs are unlikely to prevail because they lack a cause of action through which to challenge the reprogramming. We disagree. Plaintiffs either have an equitable cause of action to enjoin a constitutional violation, or they can proceed on their constitutional claims under the Administrative Procedure Act, or both. To the extent any zone of interests test were to apply to Plaintiffs' constitutional claims, we hold that it would be satisfied here.

Considering the remaining factors relevant to Defendants' request for a stay—the degree of hardship that may result from a stay or its denial, and the public interest at stake—we are not persuaded that a stay should be entered. There is a strong likelihood that Plaintiffs will prevail in this litigation, and Defendants

have a correspondingly low likelihood of success on appeal. As for the public interest, we conclude that it is best served by respecting the Constitution's assignment of the power of the purse to Congress, and by deferring to Congress's understanding of the public interest as reflected in its repeated denial of more funding for border barrier construction. We therefore hold that a stay of the district court's order granting Plaintiffs an injunction is not warranted.

## I. Factual & Procedural Background

President Trump has made numerous requests to Congress for funding for construction of a barrier on the U.S.-Mexico border. In his proposed budget for Fiscal Year 2018, for example, the President requested $2.6 billion for border security, including "funding to plan, design, and construct a physical wall along the southern border." Office of Mgmt. & Budget, Exec. Office of the President, *Budget of the United States Government, Fiscal Year 2018*, at 18 (2017). Congress partially obliged, allocating in the 2018 Consolidated Appropriations Act $1.571 billion for border fencing, "border barrier planning and design," and the "acquisition and deployment of border security technology." Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. F, tit. II, § 230(a), 132 Stat. 348, 616 (2018). Throughout 2018, House and Senate lawmakers introduced numerous bills that would have authorized or appropriated additional billions for border barrier construction. Specifically, Congress considered and rejected the Securing America's Future Act of 2018, H.R. 4760, 115th Cong. § 1111 (2018) (instructing the Secretary of Homeland Security to take necessary actions to build a physical barrier on

the southern border); the Border Security and Immigration Reform Act of 2018, H.R. 6136, 115th Cong. § 5101 (2018) (appropriating $16.625 billion for a border wall); the American Border Act, H.R. 6415, 115th Cong. § 4101 (2018) (same); the Fund and Complete the Border Wall Act, H.R. 6657, 115th Cong. § 2 (2018) (creating a "Secure the Southern Border Fund" for appropriations for border barrier construction); the Build the Wall, Enforce the Law Act of 2018, H.R. 7059, 115th Cong. § 9 (2018) (again, appropriating $16.625 billion for a "border wall system"); the 50 Votes for the Wall Act, H.R. 7073, 115th Cong. § 2 (2018) (establishing a "Border Wall and Security Trust Fund" of up to $25 billion to "construct a wall (including physical barriers and associated detection technology, roads, and lighting)" along the U.S.-Mexico border); and the WALL Act of 2018, S. 3713, 115th Cong. § 2 (2018) (appropriating $25 billion for the construction of a border wall). Lawmakers spent countless hours considering these various proposals, but none ultimately passed.

The situation reached an impasse in December 2018. During negotiations with Congress over an appropriations bill to fund various parts of the federal government for the remainder of the fiscal year, the President announced his unequivocal position that "any measure that funds the government must include border security." C-SPAN, *Farm Bill Signing* (Dec. 20, 2018), https://www.cspan.org/video/?456189-1/president-government-funding-bill-include-moneyborder-wall. He declared that he would not sign any funding bill that did not allocate substantial funding for a physical barrier on the U.S.-Mexico border. Erica Werner et al., *Trump Says He Won't Sign Senate Deal to Avert Shutdown, Demands Funds for Border Security*, Wash. Post (Dec. 21, 2018),

https://wapo.st/2EIpkHu?tid=ss_tw&utm_term=.6e7c259f6857 ("Werner et al."). The President also stated that he was willing to declare a national emergency and use other mechanisms to get the money he desired if Congress refused to allocate it. *Remarks by President Trump in Meeting with Senate Minority Leader Chuck Schumer and House Speaker-Designate Nancy Pelosi*, The White House (Dec. 11, 2018, 11:40 A.M.), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-senate-minority-leader-chuck-schumer-house-speaker-designate-nancy-pelosi/. On December 20, 2018, the House of Representatives passed a continuing resolution that allocated $5.7 billion in border barrier funding. H.R. 695, 115th Cong. § 141 (2018) ("[T]here is appropriated for 'U.S. Customs and Border Protection—Procurement, Construction, and Improvements' $5,710,357,000 for fiscal year 2019."). But the Senate rejected the bill. The President could not reach an agreement with lawmakers on whether the spending bill would include border barrier funding, triggering what would become the nation's longest partial government shutdown. Werner et al., *supra*; Mihir Zaveri et al., *The Government Shutdown Was the Longest Ever. Here's the History.*, N.Y. Times (Jan. 25, 2019), https://nyti.ms/2RATHG9.

On January 6, 2019, during the shutdown, the President "request[ed] $5.7 billion for construction of a steel barrier for the Southwest border" in a letter to the Senate Committee on Appropriations, explaining that the request "would fund construction of a total of approximately 234 miles of new physical barrier," including in the top ten priority areas in the Border Security Improvement Plan created by Customs and Border Protection ("CBP"). Letter from Russell T. Vought, Acting

Dir. of the Office of Mgmt. and Budget, to Richard Shelby, Chairman of the Senate Comm. on Appropriations (Jan. 6, 2019). This represented a $4.1 billion increase over the President's February 2018 request for $1.6 billion for the Fiscal Year 2019 budget, which had been for the construction of "65 miles of border wall in south Texas." Office of Mgmt. & Budget, Exec. Office of the President, *Budget of the U.S. Government, Fiscal Year 2019*, 58 (2018).

After 35 days, the government shutdown ended without an agreement providing increased border barrier funding. Remarks Delivered by President Trump on the Government Shutdown (Jan. 25, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-government-shutdown/. Congress passed and the President signed a stopgap spending measure to reopen for three weeks the parts of the Government that had been shut down. H.R.J. Res. 28, 116th Cong. (2019). But the President made clear that he still intended to build a border barrier, with or without funding from Congress. As the Acting White House Chief of Staff explained, the President was prepared to both reprogram money and declare a national emergency to obtain a total sum "well north of $5.7 billion." Gregg Re, *Border Wall Talks Break Down Ahead of Second Possible Government Shutdown*, Fox News (Feb. 10, 2019), https://fxn.ws/2SmNK0I.

Congress passed the Consolidated Appropriations Act of 2019 ("CAA") on February 14, 2019, which included the Department of Homeland Security Appropriations Act for Fiscal Year 2019. Pub. L. No. 116-6, div. A, 133 Stat. 13 (2019). The CAA appropriated only $1.375 billion of the $5.7 billion the President had sought

in border barrier funding and specified that the $1.375 billion was "for the construction of primary pedestrian fencing . . . in the Rio Grande Valley Sector." *Id.* § 230(a)(1), 133 Stat. at 28. Congress also imposed several limitations on the use of those funds, including by not allowing construction within certain wildlife refuges and parks. *Id.* § 231, 133 Stat. at 28.

The President signed the CAA into law the following day. *Statement by the President*, The White House (Feb. 15, 2019), https://www.whitehouse.gov/briefings-statements/statement-by-the-president-28/. He concurrently issued a proclamation under the National Emergencies Act, 50 U.S.C. §§ 1601-1651, "declar[ing] that a national emergency exists at the southern border of the United States." Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) ("Proclamation No. 9844").

Proclamation No. 9844 described "a border security and humanitarian crisis that threatens core national security interests" because the border served as a major entry point for criminals, gang members, and illicit narcotics and the number of family units entering the United States had recently increased. *Id.* It declared that this "emergency situation" necessitated support from the Armed Forces. *Id.* The proclamation made available to DoD "the construction authority provided in" 10 U.S.C. § 2808, which is limited to presidential declarations "that require[] use of the armed forces," *id.* § 2808(a).

An accompanying White House Fact Sheet explained that the President was "using his legal authority to take Executive action to secure additional resources" to build a border barrier. *President Donald J. Trump's Border Security Victory*, The White House (Feb. 15, 2019), https://

www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/. It continued: "Including funding in Homeland Security appropriations, the Administration has so far identified up to $8.1 billion that will be available to build the border wall once a national emergency is declared and additional funds have been reprogrammed." *Id.* The fact sheet specifically identified three funding sources: (1) "[a]bout $601 million from the Treasury Forfeiture Fund," 31 U.S.C. § 9705(a); (2) "[u]p to $2.5 billion under the Department of Defense [reprogrammed] funds transferred [to DHS] for Support for Counterdrug Activities" pursuant to 10 U.S.C. § 284 ("section 284");[2] and (3) "[u]p to $3.6 billion reallocated from [DoD] military construction projects under the President's declaration of a national emergency" pursuant to 10 U.S.C. § 2808 ("section 2808"), which provides that the Secretary of Defense may authorize military construction projects whenever the President declares a national emergency that requires use of the armed forces. *Id.*

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[2] Title 10, Chapter 15 of the U.S. Code describes various forms of military support for civilian law enforcement agencies. Within that chapter, section 284 authorizes the Secretary of Defense to "provide support for the counterdrug activities . . . of any other department or agency of the Federal Government" if it receives a request from "the official who has responsibility for the counterdrug activities." 10 U.S.C. §§ 284(a), 284(a)(1)(A). The statute permits, among other things, support for "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *Id.* § 284(b)(7). DoD's provision of support for other agencies pursuant to section 284 does not require the declaration of a national emergency.

The House and Senate adopted a joint resolution terminating the President's declaration of a national emergency pursuant to Congress's authority under 50 U.S.C. § 1622(a)(1). H.R.J. Res. 46, 116th Cong. (2019). The President vetoed the joint resolution, *Veto Message to the House of Representatives for H.J. Res. 46*, The White House (Mar. 15, 2019), https://www.whitehouse.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/, and a vote in the House to override the veto fell short of the required two-thirds majority, 165 Cong. Rec. H2799, H2814-15 (2019).

Almost immediately, executive branch agencies began to use the funds identified in Proclamation 9844 for border barrier construction. The same day the President issued the proclamation, the Department of the Treasury approved DHS's December 2018 request to use treasury forfeiture funds to enhance border security infrastructure, providing up to $601 million in funding.[3] Letter from David F. Eisner, Assistant Sec'y for Mgmt., U.S. Dep't of the Treasury, to the House and Senate Appropriations Comms.' Subcomms. on Fin. Servs. & Gen. Gov't (Feb. 15, 2019). Then, on February 25, DHS submitted a request to DoD for assistance, pursuant to section 284, with construction of fences, roads, and lighting within eleven drug-smuggling corridors identified by DHS along the border. Memorandum re: Request for Assistance Pursuant to 10 U.S.C. § 284 from Christina

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[3] The three funding sources the White House had identified were to "be used sequentially and as needed." *President Donald J. Trump's Border Security Victory*, The White House (Feb. 15, 2019). In other words, the government first began spending the treasury forfeiture funds, followed by DoD funding reprogrammed under section 8005 and transferred to DHS pursuant to section 284, and finally military construction funds reallocated under section 2808.

Bobb, Exec. Sec'y, DHS, to Capt. Hallock N. Mohler, Jr., Exec. Sec'y, DoD, (Feb. 25, 2019). In response to that request, on March 25, the Acting Secretary of Defense, Patrick Shanahan, approved the transfer of up to $1 billion in funds from DoD to DHS for the three highest priority drug-smuggling corridors: the Yuma Sector Project 1 and Yuma Sector Project 2 in Arizona, and the El Paso Sector Project 1 in New Mexico.[4] Letter from Patrick M. Shanahan, Acting Sec'y of Def., DoD, to Kirstjen Nielsen, Sec'y of Homeland Sec., DHS (Mar. 25, 2019).

To fund the approved projects, Shanahan invoked section 8005 of the Department of Defense Appropriations Act of 2019 and section 1001 of the John S. McCain National Defense Authorization Act ("NDAA") for Fiscal Year 2019 to "reprogram" approximately $1 billion from Army personnel funds to the counter-narcotics support budget, which Shanahan asserted then made those funds available for transfer to DHS pursuant to section 284. Section 8005 authorizes the Secretary of Defense to transfer up to $4 billion "of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction)." The Secretary must first determine that "such action is necessary in the national interest" and obtain approval from the White House Office of Management and Budget. Section 8005 further provides that the authority to transfer may only be used "for higher priority items, based on unforeseen military requirements, than those

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[4] The U.S. Army Corps of Engineers, which is tasked with initial project scoping and construction, has since decided not to fund or construct Yuma Project 2 under § 284.

for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress."[5] It also imposes a "prompt[]" congressional notification requirement for all transfers made under its authority. Reprogramming of funds under section 8005 does not require the declaration of a national emergency.

A memo from Shanahan asserted that the statutory requirements for reprogramming under section 8005 had been met: that the items to be funded were a higher priority than the Army personnel funds; that the need to provide support for the Yuma and El Paso Projects was "an unforeseen military requirement not known at the time of the FY 2019 budget request"; and that support for construction of the border barrier in these areas "ha[d] not been denied by Congress." Memorandum re: Funding Construction in Support of the Department of Homeland Security Pursuant to 10 U.S.C. § 284 from Patrick M. Shanahan, Acting Sec'y of Def., DoD, to Under Sec'y of Def. (Comptroller)/Chief Fin. Officer (Mar. 25, 2019). Specifically, DoD concluded that "Army personnel funds were available for transfer because expenditures for service member pay and compensation, retirements benefits, food, and moving expenses through the end of fiscal year 2019 [would] be lower than originally budgeted." As required by section 8005, Shanahan also formally notified Congress of the reprogramming authorization, explaining that the reprogrammed

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[5] Equivalent language restricting the circumstances in which reprogramming is permitted has been included in defense appropriations statutes since 1974. *See* Pub. L. No. 93-238, § 735, 87 Stat. 1026, 1044 (1974); H.R. Rep. No. 93-662, at 16 (1973).

funds were "required" so that DoD could provide DHS the support it requested under section 284.[6]

The next day, both the House Committee on Armed Services and the House Committee on Appropriations formally disapproved of DoD's section 8005 reprogramming. The Armed Services Committee wrote in a letter to DoD that it "denie[d] this [reprogramming] request," and that the committee "[did] not approve the proposed use of Department of Defense funds to construct additional physical barriers and roads or install lighting in the vicinity of the United States border." Letter from Adam Smith, Chairman of the U.S. House of Representatives Comm. on Armed Servs., to David L. Norquist, Under Sec'y of Def., Comptroller, and Chief Fin. Officer (Mar. 26, 2019). The Appropriations committee similarly denied the reprogramming request. Letter from Peter J. Visclosky, Chairman of the Def. Subcomm. of the U.S. House of Representatives Comm. on Appropriations (Mar. 26, 2019).

Officials at DoD and DHS pressed forward with reprogramming-enabled border barrier construction plans. In early April, DoD awarded contracts for work in the Yuma and El Paso Project areas, and the agencies began environmental planning and consultation. *Contracts for Apr. 9, 2019*, U.S. Dep't of Def. (Apr. 9, 2019), https://dod.defense.gov/News/Contracts/Contract-View/Article/1809986/.

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[6] DoD had previously adhered to a "gentlemen's agreement" with Congress where it sought approval from the relevant committees *before* reprogramming funds, rather than simply notifying them after the decision had been finalized. House Armed Services Committee Holds Hearing on Fiscal 2020 Defense Authorization, CQ Cong. Transcripts (Mar. 26, 2019).

Meanwhile, Shanahan reported on May 8 that DoD and DHS had secured funding for DHS to build about 256 miles of border barrier using both treasury forfeiture funds and reprogrammed monies. *Acting Defense Secretary Shanahan Testimony on Fiscal Year 2020 Budget Request* (C-SPAN May 8, 2019), https://www.c-span.org/video/?460437-1/acting-defensesecretary-shanahan-testifies-2020-budget-request. DoD also reported selecting twelve companies to compete for up to $5 billion worth of border barrier construction contracts. *Contracts for May 8, 2019*, U.S. Dep't of Def. (May 8, 2019), https://dod.defense.gov/News/Contracts/Contract-View/Article/1842189/. On May 9, Shanahan invoked section 8005 and section 1001 of the NDAA again —along with related reprogramming provisions, section 9002 of the Department of Defense Appropriations Act of 2019 and section 1512 of the NDAA[7]—to authorize an additional $1.5 billion in reprogramming to fund four

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[7] Section 9002 of the Department of Defense Appropriations Act of 2019 authorizes the Secretary of Defense to transfer up to $2 billion between the appropriations or funds made available to DoD if he determines "that such action is necessary in the national interest" and obtains approval from the Office of Management and Budget. Pub. L. No. 115-245, § 9002, 132 Stat 2981, 3042 (2018). Section 9002 "is subject to the same terms and conditions as the authority provided in section 8005." *Id.* Section 1512 of the NDAA likewise provides a special transfer authority for up to $3.5 billion upon determination that it is "necessary in the national interest," and, under section 1001 of the NDAA, is subject to identical terms and conditions as 8005. Pub. L. No. 115-232, § 1512, 132 Stat. 1636, 2096 (2018). Because it is uncontested that all of these reprogramming provisions are subject to section 8005's requirements, we refer to these requirements collectively by reference to section 8005. *See* Order Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment, *Sierra Club v. Trump*, No. 19-cv-00892-HSG, 2019 WL 2715422, at *2 (N.D. Cal. June 28, 2019).

more projects. Memorandum re: Additional Support to the Dep't of Homeland Security from Patrick M. Shanahan, Acting Sec'y of Def., DoD (May 9, 2019). The new projects, El Centro Project 1 and Tucson Sector Projects 1, 2, and 3, are located in California and Arizona. Around the same time, the President indicated that he expected to approve additional projects using funds authorized by the national emergency declaration pursuant to section 2808, although no concrete action has been taken in that regard. *See* White House Memorandum on Sequencing of Border Barrier Construction Authorities (Mar. 4, 2019).

On February 19, 2019, the Sierra Club and Southern Border Communities Coalition filed a lawsuit against Donald J. Trump, in his official capacity as President of the United States; Patrick M. Shanahan, in his official capacity as Acting Secretary of Defense; Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security; and Steven Mnuchin, in his official capacity as Secretary of the Treasury (collectively, "Defendants," *see supra* n.1).[8] This lawsuit followed closely on the heels of a related action brought by a coalition of states against the same group of Defendants and others.

Plaintiffs are two nonprofit organizations who sued on behalf of themselves and their members. The Sierra Club is dedicated to enjoyment of the outdoors and environmental protection, and it engages in advocacy and public education on issues such as habitat destruction, land use, and the human and environmental impact of

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[8] The current Acting Secretary of Defense, Mark Esper, has been automatically substituted for Shanahan. The current Acting Secretary of Homeland Security, Kevin K. McAleenan, has been automatically substituted for Nielsen.

construction projects, including the proposed construction of the border barrier. SBCC is a program of Alliance San Diego that brings together organizations from California, Arizona, New Mexico, and Texas to promote policies aimed at improving the quality of life in border communities, including border enforcement and immigration reform policies.

Plaintiffs' operative Complaint alleges that Defendants exceeded the scope of their constitutional and statutory authority by spending money in excess of what Congress allocated for border security; that Defendants' actions violated separation of powers principles as well as the Appropriations Clause and Presentment Clause of the Constitution; and that Defendants failed to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. Plaintiffs also allege that Defendants are acting *ultra vires* (without authority) in seeking to divert funding without statutory authority to do so.

Plaintiffs allege that Defendants' use of the reprogrammed funds would injure their members because the noise of construction, additional personnel, visual blight, and negative ecological effects that would accompany a border barrier and its construction would detract from their ability to hike, fish, enjoy the desert landscapes, and observe and study a diverse range of wildlife in areas near the U.S.-Mexico border. Plaintiffs also allege that they participated in the legislative process by "devot[ing] substantial staff and other resources towards legislative advocacy leading up to the appropriations bill passed by Congress in February 2019, specifically directed towards securing Congress's denial of substan-

tial funding to the border wall." The Complaint requests declaratory and permanent injunctive relief to prevent construction of the border barrier using the funding at issue in the lawsuit.

On April 4, Plaintiffs filed a motion for a preliminary injunction, asking the district court to enter a "preliminary injunction prohibiting Defendants and all persons associated with them from taking action to build a border wall using funds or resources from the Defense Department; and specifically enjoining construction of the wall segments in the . . . 'Yuma Sector Projects 1 and 2 and El Paso Sector Project 1 [areas].'" In particular, Plaintiffs moved to enjoin Defendants from using DoD's reprogramming authority in section 8005 to transfer funds from Army personnel into the counterdrug appropriations line, from subsequently using section 284 to divert those funds from DoD's counterdrug appropriations line to be used by DHS for border barrier construction, from invoking section 2808 to divert funds appropriated to military construction projects, and from taking any further action before complying with NEPA's procedural requirements. Plaintiffs argued that a preliminary injunction was necessary because Defendants had already diverted funds, and that Plaintiffs would be irreparably harmed if Defendants proceeded with their threatened construction during the pendency of the district court proceedings. After receiving briefing from both sides, the district court held a multiple-hour hearing on May 17, 2019.

On May 24, the district court issued an order granting the motion in part and denying it in part. *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG, 2019 WL 2247689

(N.D. Cal. May 24, 2019). After concluding that Plaintiffs had standing to bring their challenge, the district court held that Plaintiffs were entitled to a preliminary injunction with respect to the section 8005 reprogramming authority because they would likely succeed in arguing that Defendants acted *ultra vires*, they had demonstrated that they would be irreparably harmed, and the balance of equities weighed in their favor. *Id.* at *13-23, *27-28, *29. The court declined to rule on Plaintiffs' likelihood of success on their section 2808 arguments, however, because Defendants had not yet disclosed a plan for diverting funds under that authority. *Id.* at *25, *28-29. Finally, the court concluded that Plaintiffs were unlikely to succeed on their NEPA argument. *Id.* at *26. It accordingly granted the following preliminary injunction:

> Defendants Patrick M. Shanahan, in his official capacity as Acting Secretary of Defense, Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security, Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury, and all persons acting under their direction, are enjoined from taking any action to construct a border barrier in the areas Defendants have identified as Yuma Sector Project 1 and El Paso Sector Project 1 using funds reprogrammed by DoD under Section 8005 of the Department of Defense Appropriations Act, 2019.

*Id.* at 30.[9]

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[9] The district court simultaneously denied the motion for a preliminary injunction in the related case brought by states, explaining that there was no likelihood of irreparable injury once it had granted

Defendants filed a motion in the district court to stay the preliminary injunction pending appeal. The district court denied that motion, concluding that Defendants were unlikely to prevail on the merits and that the "request to proceed immediately with the enjoined construction would not preserve the status quo" but rather would "effectively moot [Plaintiffs'] claims." *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG, 2019 WL 2305341, at *1 (N.D. Cal. May 30, 2019).

On June 3, 2019, Defendants filed an emergency motion with this court requesting a stay pending appeal. Defendants implored our court to act as quickly as possible because they were incurring daily fees and penalties from contractors due to the suspension of construction and because, if the injunction remained in place, Defendants would need to begin the process of reprogramming the funds again by the end of June or else face the risk of being deprived of the use of those funds entirely.[10]

Initial briefing on the stay motion was completed on June 14, and we heard oral argument on June 20. On June 24, we requested supplemental briefing from the parties on issues that arose during oral argument but

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the injunction in the *Sierra Club* case. *See State v. Trump*, No. 4:19-cv-00872-HSG, 2019 WL 2247814, at *17 (N.D. Cal. May 24, 2019).

[10] We note that Defendants did not file any motion to expedite the appeal itself, and as explained below, actually filed a motion to delay the expedited briefing schedule our court had issued for the preliminary injunction appeal, asking us to let the parties wait until *after* further anticipated decisions in the district court and our court's decision on their stay motion to propose a new briefing schedule that could govern "any" full appeal.

that had not been briefed. That briefing was completed on June 28.

Meanwhile, proceedings continued in the district court. On May 29, Plaintiffs filed a motion for a supplemental preliminary injunction to block the additional planned construction in California and Arizona using funds reprogrammed under sections 8005 and 9002 of the Department of Defense Appropriations Act of 2019, as well as section 1512 of the 2019 NDAA. Plaintiffs acknowledged that the motion "present[ed] virtually identical legal questions regarding whether the proposed plan for funding border barrier construction exceeds the Executive Branch's lawful authority" to the ones that the court had decided in its May 24 order granting in part Plaintiffs' motion for a preliminary injunction. On June 12, 2019, Plaintiffs moved for partial summary judgment, seeking a permanent injunction based on the same arguments made in their initial and supplemental motions for a preliminary injunction. Defendants cross-moved for summary judgment, resting on the same arguments they had made against the preliminary injunction. Briefing on those motions was completed on June 24.

On June 28, the district court issued an order granting in part and denying in part Plaintiffs' motion for partial summary judgment, and denying Defendants' cross-motion for partial summary judgment. *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG, 2019 WL 2715422 (N.D. Cal. June 28, 2019). In that order, the court issued a permanent injunction prohibiting Defendants from using reprogrammed funds to construct a border barrier in the El Paso and Yuma Sectors (the subject of the initial preliminary injunction) as well as the more recently-

announced El Centro and Tucson Sector areas (the subject of the motion for a supplemental preliminary injunction).[11] *Id.* at *6. The district court concluded that Plaintiffs' legal challenge was meritorious, that Plaintiffs had shown that they would suffer irreparable harm absent a permanent injunction, and that the balance of hardships and the public interest supported a permanent injunction. *Id.* at *4-5. The court heeded Defendants' request to certify the judgment for immediate appeal, *see* Fed. R. Civ. P. 54(b), and it denied Defendants' request to stay the injunction pending appeal. *Id.* at *5-6.

Defendants filed an immediate notice of appeal from that decision. At Defendants' request, we consolidated their new appeal with the pending appeal of the preliminary injunction. Defendants now seek a stay of the permanent injunction pending appeal, resting on the

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[11] The terms of the permanent injunction are identical to those of the preliminary injunction, but it also covers funds reprogrammed under sections 8005 and 9002 for construction in the El Centro and Tucson sectors. In full, the permanent injunction states:

> Defendants Mark T. Esper, in his official capacity as Acting Secretary of Defense, Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security, Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury, and all persons acting under their direction, are enjoined from taking any action to construct a border barrier in the areas Defendants have identified as El Paso Sector 1, Yuma Sector 1, El Centro Sector, and Tucson Sectors 1-3 using funds reprogrammed by DoD under Sections 8005 and 9002 of the Department of Defense Appropriations Act, 2019.

*Sierra Club*, 2019 WL 2715422, at *6.

same arguments they made about the preliminary injunction because the underlying legal questions are identical.

## II. Issues Not Before the Court

Before turning to the merits, we highlight what is not at issue in this appeal. First, Defendants at oral argument acknowledged that they are "not challenging [Article III] standing for purposes of the stay motion." Thus, Defendants do not dispute that Plaintiffs have suffered an "actual or imminent," "concrete and particularized," "injury in fact" that is "fairly traceable" to Defendants' actions and that will "likely" be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotation marks and alterations omitted); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). We have satisfied ourselves that Defendants' assessment is correct. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (discussing a court's *sua sponte* obligation to assure itself that it has jurisdiction before proceeding to the merits). Plaintiffs have alleged enough to satisfy the requirements for standing under Article III at this stage of the litigation. *Id.* at 181-83 (holding that the plaintiffs' injuries from environmental harm were sufficient for standing).

Second, although Defendants may have access to other funding sources to build a border barrier, the only source at issue in this stay motion is section 8005 reprogramming.[12] The district court's preliminary injunc-

[12] As noted above, the parties do not contest that the related reprogramming provisions—section 9002 of the Department of Defense

tion order discussed various other potential sources, including the Treasury Forfeiture Fund and money reallocated after a national emergency declaration for "military construction projects" under section 2808. *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG, 2019 WL 2247689, at *11 (N.D. Cal. May 24, 2019). The injunction, however, only concerns section 8005 reprogramming for border barrier construction in Yuma Sector Project 1, El Paso Sector 1, El Centro Sector 1, and Tucson Sectors 1-3. We have not been asked to expand the scope of the injunction, and the parties have not addressed in this stay motion any non-section 8005 funding sources. Accordingly, our decision does not address any sources of funds Defendants might use to build a border barrier except those reprogrammed under section 8005.

Third, as the district court observed in the preliminary injunction order,

> The case is not about whether the challenged border barrier construction plan is wise or unwise. It is not about whether the plan is the right or wrong policy response to existing conditions at the southern border of the United States. These policy questions are the subject of extensive, and often intense, differences of opinion, and this Court cannot and does not express any view as to them.

*Sierra Club,* 2019 WL 2247689, at *1. Our consideration is limited to legal questions regarding the authority

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Appropriations Act of 2019 and section 1512 of the NDAA—are subject to section 8005's requirements. We accordingly refer to these requirements collectively by reference to section 8005.

of the Executive Branch under the Constitution and under statutes enacted into law by Congress.

### III. Justiciability

Defendants have not argued that jurisdiction over this action is lacking. Nor have they asserted that Plaintiffs' challenge to the section 8005 reprogramming presents a nonjusticiable "political question." They have contended, however, that "[t]he real separation-of-powers concern is the district court's intrusion into the budgeting process," which "is between the Legislative and Executive Branches—not the judiciary." We consider, therefore, whether it is appropriate for the courts to entertain Plaintiffs' action in the first place. We conclude that it is.

"Cases" and "controversies" that contain "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *Baker v. Carr*, 369 U.S. 186, 217 (1962), or "revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch," *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986), present a "narrow exception" to our responsibility to decide cases properly before us, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012).

Nowhere does the Constitution grant Congress the exclusive ability to determine whether the Executive Branch has violated the Appropriations Clause. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990). Nor does the Constitution leave the Executive Branch to police itself. Rather, the judiciary "appropriately exercises" its constitutional function "where the question is

whether Congress or the Executive is 'aggrandizing its power at the expense of another branch.'" *Zivotofsky*, 566 U.S. at 197 (quoting *Freytag v. Comm'r,* 501 U.S. 868, 878 (1991)).

The current action does not ask us to decide whether the projects for which Defendants seek to reprogram funds are worthy or whether, as a policy judgment, funds should be spent on them. Instead, we are asked whether the reprogramming of funds is consistent with the Appropriations Clause and section 8005. That "is a familiar judicial exercise." *Id*. at 196.

Chief Justice Marshall's answer to "whether the legality of an act of the head of a department be examinable in a court of justice" or "only politically examinable" remains the same: "[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, . . . the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803). Pursuant to its exclusive power of appropriation, Congress imposed on the Executive Branch a duty—contained in section 8005—not to transfer funds unless certain circumstances were present. As discussed above, *see supra* Section II, Defendants have not disputed that Plaintiffs have sufficiently alleged injuries that satisfy Article III's standing requirement to enable them to pursue this action. Although "our decision may have significant political overtones," *Japan Whaling Ass'n*, 478 U.S. at 230, "courts cannot avoid their responsibility merely 'because the issues have political implications,'" *Zivotofsky*, 566 U.S. at 196 (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)). In

sum, it is appropriate for this action to proceed in federal court.

### IV. Stay Standards

We decide whether to issue a stay by considering four factors, reiterated by the Supreme Court in *Nken v. Holder*, 556 U.S. 418 (2009):

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*Id.* at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two factors "are the most critical," and we only reach the last two "[o]nce an applicant satisfies the first two factors." *Id.* at 434-35.

The requirement that an applicant for a stay make a "strong showing" may be explained at least in part by the fact that "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Id.* at 433 (quoting *Virginian Ry. Co. v. United States,* 272 U.S. 658, 672 (1926)). Indeed, "[a] stay is an intrusion into the ordinary processes of administration and judicial review." *Id.* at 427 (quotation marks omitted). Issuing a stay is therefore "an exercise of judicial discretion" not to be issued "reflexively," but rather based on the circumstances of the particular case. *Id.* at 427, 433. "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34. Here, Defendants carry those burdens because it is Defendants who have sought a stay.

That being said, the unusual circumstances of this case complicate our typically restrained approach to assessing the merits in this procedural posture. When deciding whether to issue a stay, we usually speak about the merits in probabilistic "likelihood" terms, in part because we recognize that the "ordinary processes of administration and judicial review" best ensure "careful review and a meaningful decision." *Id.* at 427 (quotation marks omitted). Particularly given a recent increase in emergency petitions asking for injunctive relief or stays of injunctive relief, we think it is especially important for courts to strive to follow the traditional process of judicial review. Otherwise, we are forced to decide "justice on the fly." *Id.*

Here, however, both sides contend that we must evaluate the merits of this case now to preserve their interests —both agree that there is no time for the "ordinary" course of appellate review.[13] As Defendants represented in their briefing and again at oral argument, if the injunction remains in place, DoD's authority to spend the remaining challenged funds on border barrier construction, or to redirect them for other purposes, will lapse. At the same time, as the district court noted, allowing Defendants to move forward with spending the funds will allow construction to begin, causing immediate, and likely irreparable, harm to Plaintiffs. *Sierra*

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[13] The dissent suggests that we should not be analyzing the merits at this stage because there will be a fuller appeal later. Dissent at 2 n.1. That argument depends on disbelieving Defendants' assertions that the Executive Branch will lose its ability to spend the reprogrammed money by the beginning of July, if not earlier. To the extent Defendants' representations about their imminent injury are not credible, Defendants certainly do not deserve the equitable relief of a stay.

*Club v. Trump*, No. 4:19-cv-00892-HSG, 2019 WL 2247689, at *27-28 (N.D. Cal. May 24, 2019). In either scenario, many of the issues in this case may become moot or largely moot before fuller litigation of the appeal can be completed. Accordingly, we proceed to evaluate the merits more fully than we otherwise might in response to a stay request.[14]

### V. Likelihood of Success on the Merits

In their operative Complaint, Plaintiffs framed their claim in various ways. Plaintiffs asserted constitutional claims based on violations of separation of powers principles, the Appropriations Clause, and the Presentment Clause; a claim that Defendants acted *ultra vires*; and a statutory claim under the Consolidated Appropriations Act of 2019.[15] Because we conclude that Plaintiffs' claim is, at its core, one alleging a constitutional violation, we focus on that issue. More than one legal doctrine offers Plaintiffs a cause of action to raise that claim, and Plaintiffs' success under each depends on whether Defendants' actions indeed violate the Constitution.

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[14] In an appeal from a district court's grant of a permanent injunction, we may "affirm the district court on any ground supported by the record." *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 608 (9th Cir. 2000) (quoting *Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc.*, 810 F.2d 869, 874 (9th Cir. 1987)). Evaluating whether Defendants have a likelihood of success on appeal therefore requires assessing whether there are clear grounds for affirmance supported by the record.

[15] Plaintiffs also separately asserted a NEPA claim. The parties have not made any arguments about the NEPA claim in these stay proceedings, so we do not address it.

### A. Plaintiffs' Constitutional Claim

The Constitution's Appropriations Clause provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. In addition to safeguarding "the public treasure, the common fund of all," and providing "a most useful and salutary check upon . . . corrupt influence and public peculation," it ensures that the "the executive [does not] possess an unbounded power over the public purse of the nation." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342 (Boston, Hilliard, Gray & Co. ed. 1833).

This approach to the power of the purse comported with the Founders' "declared purpose of separating and dividing the powers of government," namely "to 'diffus[e] power the better to secure liberty.'" *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (alteration in original) (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring)); *see also INS v. Chadha*, 462 U.S. 919, 949-50 (1983) (collecting sources and explaining the Founders' belief in "the need to divide and disperse power in order to protect liberty"). In response to critiques that his proposed Constitution would dangerously concentrate power in a single central government, James Madison argued that the risk of abuse of such power was low because "the sword and purse are not to be given to the same member" of the government. 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 393 (Jonathan Elliot ed., 2d ed. 1836). Instead, Madison explained that "[t]he purse is in the hands of the representatives of the people," who "have the appropriation of all moneys." *Id.*

Plaintiffs' principal legal theory is that Defendants seek to spend funds for a different purpose than that for which Congress appropriated them, thereby violating the Appropriations Clause.[16] Defendants' defense to this claim is that, through section 8005, Congress allowed Defendants to make this reallocation. If Defendants were correct that section 8005 allowed this spending reallocation, Plaintiffs' claim would fail, because the spending would be consistent with Congress's appropriation legislation. If section 8005 does not authorize the reallocation, however, then Defendants are acting outside of any statutory appropriation and are therefore spending funds contrary to Congress's appropriations decisions. We believe Plaintiffs are correct that there is no statutory appropriation for the expenditures that are the subject of the injunction. Reprogramming and spending those funds therefore violates the Appropriations Clause.

**1. Section 8005's Meaning**

Defendants argue that they are likely to prevail on appeal because Congress has authorized DoD to reprogram funds, the planned use of funds is consistent with that reprogramming authorization, and this spending is therefore authorized by an appropriation from Congress as the Appropriations Clause requires. We disagree. DoD's proposed expenditures are not authorized by the

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[16] Throughout this litigation, Plaintiffs' claim has been framed in various ways. The lack of compliance with section 8005 has sometimes been labeled *ultra vires* as outside statutory authority or as outside the President's Article II powers, and spending without an appropriation has been described as a violation of the Appropriations Clause. However their claim is labeled, Plaintiffs' theory is ultimately the same.

applicable reprogramming statute. They therefore are not "in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7.

At bottom, this constitutional issue turns on a question of statutory interpretation. Section 8005 of the Department of Defense Appropriations Act of 2019 provides that the Secretary of Defense may reprogram funds for certain military functions other than those for which they were initially appropriated, but it limits the Secretary's ability to do so to a narrow set of circumstances. Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018).[17] Transferred funds must address "higher

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[17] Section 8005 provides, in relevant part:

> Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed $4,000,000,000 of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction) between such appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred: *Provided*, That such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress . . . *Provided further*, That no part of the funds in this Act shall be available to prepare or present a request to the Committees on Appropriations for reprogramming of funds, unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which reprogramming is requested has been denied by the Congress.

priority items, based on unforeseen military requirements, than those for which originally appropriated." *Id.* And "in no case" may the Secretary use the funds "where the item for which reprogramming is requested has been denied by the Congress." *Id.* We conclude, as Plaintiffs argue, that those requirements are not satisfied.

**i. "Unforeseen"**

Plaintiffs argue that the President's repeated and unsuccessful requests for more border barrier funding make the request here obviously not unforeseen. Defendants assert in response, without citation, that "[a]n expenditure is 'unforeseen' . . . if DoD was not aware of the specific need when it made its budgeting requests." Defendants contend that DoD could not have foreseen the "need to provide support" to DHS for border barrier construction in the relevant sectors when it made its budget requests for 2019, before DHS's own budget was even finalized.

Defendants mistakenly focus on the assertion that DoD "could not have anticipated that DHS would request specific support for roads, fences, and lighting." Even assuming that is true, the fact remains that DHS came to DoD for funds because Congress refused to grant DHS itself those funds. And when properly viewed as applying to the broader "requirement" of a border wall, not to DHS's specific need to turn to an entity other than Congress for funds, it is not credible that DoD did not foresee this requirement. The long history of the President's efforts to build a border barrier and of Congress's refusing to appropriate the funds he requested makes it implausible that this need was unforeseen.

**ii. "Denied by the Congress"**

Even if there could be doubt about how to interpret "unforeseen," it is clear that Congress denied this request. Because each of section 8005's conditions must be satisfied for DoD's reprogramming and spending to be constitutionally permissible, this conclusion alone undermines Defendants' likelihood of success on the merits on appeal.

Defendants urge that "an 'item for which funds are requested'" refers to "a *particular* budget item" for section 8005 purposes, so "Congress's decisions with respect to DHS's more general request for border-wall funding [are] irrelevant." But this interpretation, which would require that a specific funding request be explicitly rejected by Congress, is not compatible with the plain text of section 8005. First, the statute refers to "item[s] . . . denied by the Congress," not to *funding requests* denied by the Congress, suggesting that the inquiry centers on what DoD wishes to spend the funds on, not on the form in which Congress considered whether to permit such spending. Second, Defendants give the term "denied" a meaning other than its "ordinary, contemporary, and common" one. *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998). In common usage, a general denial of something requested can, and in this case does, encompass more specific or narrower forms of that request. To illustrate, if someone offered a new job asks her potential future employer for a larger compensation package than was included in the job offer and the request is denied, she has been denied a five percent higher salary even if her request did not specifically ask for that amount.

As the district court noted, Defendants' reading of section 8005 also would produce the perverse result that DoD could, by declining to present Congress with a particular line item to deny, reprogram funds for a purpose that Congress refused to grant another agency elsewhere in the budgeting process.[18] In other words, it would simply invite creative repackaging. But putting a gift in different wrapping paper does not change the gift. Identifying the request to Congress as having come previously from DHS instead of from DoD does not change what funding was requested for: a wall along the southern border.

Construing section 8005 with an eye towards the ordinary and common-sense meaning of "denied," real-world events in the months and years leading up to the 2019 appropriations bills leave no doubt that Congress considered and denied appropriations for the border barrier construction projects that DoD now seeks to finance using its section 8005 authority. Long before the emergency declaration and DoD's reprogramming at issue here, the President made plain his desire to construct a border barrier, requesting $5.7 billion from Congress to do so. Throughout 2018, Congress considered multiple bills that would have supported construction of such a barrier; it passed none of them. *See supra* Section I.

That DoD never specifically requested from Congress the specific sums at issue here for the specific purpose of counterdrug funding at the southern border (and

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[18] That result would hardly comport with Congress's stated desire in drafting the language currently in section 8005 "to tighten congressional control of the reprogramming process." H.R. Rep. No. 93-662, at 16 (1973).

that Congress therefore never had cause to deny that specific request) is of no moment. The amount to be appropriated for a border barrier occupied center stage of the budgeting process for months, culminating in a prolonged government shutdown that both the Legislative and Executive Branches clearly understood as hinging on whether Congress would accede to the President's request for $5.7 billion to build a border barrier.

In sum, Congress considered the "item" at issue here —a physical barrier along the entire southern border, including in the Yuma, El Paso, Tucson, and El Centro sectors—and decided in a transparent process subject to great public scrutiny to appropriate less than the total amount the President had sought for that item. To call that anything but a "denial" is not credible.

**2. Defendants' Interpretation and Agency Deference**

Defendants did not argue in their briefing to the district court, their stay motion, or their supplemental briefing that their contrary interpretation of section 8005 is entitled to agency deference. Even setting aside whether Defendants' failure to raise such an argument may operate as a waiver or forfeiture, we conclude that their position is unworthy of deference when evaluated under traditional standards for reviewing agency action.

Under the two-step framework articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a reviewing court will often defer to an agency's interpretation of an ambiguous statute administered by the agency. *Id.* at 843. To determine whether the *Chevron* framework governs at all, however, there is a threshold "step zero" inquiry in

which we ask whether "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and [whether] the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). "Delegation of such authority may be shown in a variety of ways, [such] as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." *Id.* at 227. And to evaluate whether the agency exercised its authority, we look to "the interpretive method used and the nature of the question at issue," considerations that may include "the interstitial nature of the legal question, the related expertise of the [a]gency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the [a]gency has given the question over a long period of time." *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). If we determine that (1) Congress did not intend to delegate interpretive authority to the agency, or (2) that the agency did not take the challenged action in exercise of that authority, we defer to the agency only to the extent that the agency's reasoning is persuasive. *Mead*, 533 U.S. at 234 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

Under this framework, DoD's current interpretation of section 8005 is not entitled to deference. First, it does not appear that Congress intended to delegate to DoD the power to interpret section 8005. DoD's authorizing and appropriating statutes do not contain an explicit grant of rulemaking power to the agency. Section 8005 could suggest a potential congressional intent to delegate to DoD the authority to interpret the phrase

"higher priority items, based on unforeseen military requirements," because these are subjects about which DoD has expertise. But the same is not true of the "denied by the Congress" limitation, given that DoD has no clear expertise in assessing what "denied by the Congress" might mean. Moreover, as discussed above, Congress's intent in inserting the "denied by the Congress" limitation in the first place was to tighten the fiscal reins and retain congressional control over the appropriations process. *See supra* n.18.

Second, the agency has not advanced its interpretation in a manner that would typically trigger review under *Chevron*. There is no question that DoD did not conduct notice-and-comment rulemaking or other formalized procedures in interpreting section 8005. *See Mead*, 533 U.S. at 230 ("[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication."). Nor were there any other features in DoD's interpretive process here that might otherwise justify *Chevron* deference. *See Barnhart*, 535 U.S. at 222. There is no indication that DoD's decision was the product of "careful consideration . . . over a long period of time" or any other procedural rigor that would more closely approximate a formal rulemaking. *Id.* On the contrary, DoD's interpretation appears to have emerged in a matter of weeks. And to the extent that DoD has mustered further support for its interpretation during this litigation, that litigating position is not entitled to *Chevron* deference. *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 830 (9th Cir. 2012) (en banc) ("Without a basis in agency regulations or other binding agency interpretations, there is usually no justification for attributing to an agency litigating position 'the force

of law.'" (quoting *Mead*, 533 U.S. at 227)). Accordingly, we conclude that *Chevron* deference to DoD's interpretation of section 8005 is not warranted.

An agency action not entitled to *Chevron* deference may nevertheless carry persuasive weight based on the factors that the Supreme Court enumerated in *Skidmore*, 323 U.S. at 140. *See Mead*, 533 U.S. at 234-35. Under *Skidmore*, we look to "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." 323 U.S. at 140.

DoD's interpretation of section 8005 does not warrant deference under *Skidmore*'s standards either. The two documents in the record that appear to contain DoD's analysis of the section 8005 requirements—the official reprogramming action and a related memorandum to DoD's comptroller—are entirely conclusory. The reprogramming action merely parrots the statute without analysis:

> This reprogramming action provides funding in support of higher priority items, based on unforeseen military requirements, than those for which originally appropriated; and is determined to be necessary in the national interest. It meets all administrative and legal requirements, and none of the items has previously been denied by the Congress.

The memorandum contains little more, stating that "[t]he need to provide support . . . was . . . not known at the time of the [Fiscal Year] 2019 budget request" and that Congress had not denied funding for the

items. The Supreme Court has found unpersuasive under *Skidmore* agency determinations containing far more reasoning than that which we confront here. *See Gonzales v. Oregon,* 546 U.S. 243, 253-54 (2006) (rejecting as unpersuasive under *Skidmore* an interpretive rule announced by the Attorney General that "[i]ncorporat[ed] the legal analysis of a memorandum he had solicited from his Office of Legal Counsel"); *Christensen v. Harris County*, 529 U.S. 576, 581, 587 (2000) (rejecting as unpersuasive under *Skidmore* an interpretation in an opinion letter containing brief textual analysis and citation to operative regulations).

Defendants' interpretation also fails to rest on the sort of expertise that might inspire deference. *See Gonzales,* 546 U.S. at 269 ("[*Skidmore*] deference here is tempered by the Attorney General's lack of expertise in this area."); *cf. Kisor v. Wilkie*, No. 18-15, 2019 WL 2605554, at *9 (U.S. June 26, 2019) (explaining that when an agency interprets its own regulation, its "interpretation must in some way implicate its substantive expertise" to be entitled to deference); *compare Mead*, 533 U.S. at 235 ("There is room at least to raise a *Skidmore* claim here, where . . . [the agency] can bring the benefit of specialized experience to bear on the subtle questions in this case.").

* * *

Without section 8005's statutory authorization to reprogram funds for section 284 security measures, no congressional action permits Defendants to use those funds to construct border barriers. "The President's power . . . must stem either from an act of Congress or from the Constitution itself. There is no statute that

expressly authorizes the President to [act] as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied." *Youngstown*, 343 U.S. at 585. Defendants' attempt to reprogram and spend these funds therefore violates the Appropriations Clause and intrudes on Congress's exclusive power of the purse, for it would cause funds to be "drawn from the Treasury" not "in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7.

### B. Whether Plaintiffs Have a Cause of Action

Defendants argue that none of the foregoing analysis matters because Plaintiffs lack a cause of action to challenge the reprogramming of funds at issue here. We disagree. Plaintiffs may bring their challenge through an equitable action to enjoin unconstitutional official conduct, or under the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, as a challenge to a final agency decision that is alleged to violate the Constitution, or both. Either way, Plaintiffs have an avenue for seeking relief.

#### 1. Equitable Cause of Action

The Supreme Court has "long held that federal courts may in some circumstances grant injunctive relief against" federal officials violating federal law. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) ("[I]njunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally."). "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a

long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 135 S. Ct. at 1384; *see also Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999) ("[T]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief . . . depend on traditional principles of equity jurisdiction." (quoting 11A Charles Alan Wright et al., Federal Practice and Procedure § 2941, at 31 (2d ed. 1995)).

In *Youngstown*, for example, the Supreme Court heard a challenge to a wartime presidential order directing the Secretary of Commerce to seize and operate a majority of the nation's steel mills. 343 U.S. at 582. Acting pursuant to the presidential order, the Secretary of Commerce issued possessory orders that required the seized companies to operate according to the Secretary's direction. *Id.* at 583. The plaintiff steel mill owners challenged the order as amounting to lawmaking, a function that "the Constitution has expressly confided to the Congress and not to the President." *Id.* at 582. The President contended that his order was "necessary to avert a national catastrophe." *Id.* In addressing the dispute, the Court held that there was no statute that authorized the order, and that "[t]he order [could not] properly be sustained as an exercise of the President's military power," or any other constitutional grant of power to the President. *Id.* at 587. The Court therefore held that "th[e] seizure order [could not] stand." *Id.* at 589.

More recently, in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court heard a challenge to a presi-

dential proclamation restricting the entry of certain foreign nationals into the United States on the ground that it violated the Establishment Clause of the First Amendment. *Id.* at 2403. Plaintiffs were individuals who alleged that they were injured by being separated from relatives barred from entering the country. *Id.* at 2416. Without discussing whether a cause of action existed to challenge the alleged constitutional violation, the Court reached the merits of the plaintiffs' Establishment Clause claim. *See id.* at 2416-17. The government had contended that the plaintiffs' claims were not justiciable because the Establishment Clause did not give them a legally protected interest in the admission of particular foreign nationals, but the Court rejected this argument and proceeded to evaluate the merits of the plaintiffs' claim. *Id.* at 2416. *Trump v. Hawaii* and *Youngstown* therefore support the conclusion that Plaintiffs may seek equitable relief to remedy an alleged constitutional violation.

Consistent with these cases, our court allowed an equitable action to enforce the Appropriations Clause in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). In *McIntosh*, appellants were criminal defendants who had been federally indicted on marijuana-related offenses. *Id.* at 1168-69. They sought to enjoin their prosecutions, claiming that a congressional appropriations rider prohibited the Department of Justice ("DOJ") from spending money on their prosecutions because their marijuana-related activities were licensed under state law. *Id.* at 1169, 1177. We held that the defendant-appellants could properly "enjoin their prosecutions on the grounds that [DOJ] [was] prohibited from spending funds to prosecute them" if they could demonstrate that their conduct was authorized by state

law and thus fell within what the appropriations rider was enacted to protect. *Id.* at 1169, 1174. As we explained: "Congress has enacted an appropriations rider that specifically restricts DOJ from spending money to pursue certain activities," and it had acted within its "'exclusive province'" in doing so. *Id.* at 1172 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978)). Once Congress has so acted, "it is for . . . the courts to enforce" its decisions. *Id.* (quoting *Tenn. Valley Auth.*, 437 U.S. at 194). Contrary to the dissent's characterization, we did not in *McIntosh* treat the alleged constitutional violation only "as a *defense* for criminal defendants." Dissent at 21. Instead we held that "Appellants . . . can seek—and have sought—to enjoin [an agency] from *spending funds*" contrary to Congress's restrictions. *McIntosh*, 833 F.3d at 1172.

Relying on *Dalton v. Specter*, 511 U.S. 462 (1994), Defendants argue that there cannot be a constitutional cause of action here. *Dalton* involved a challenge to the President's discretionary decision to agree to a specific military base closure included in a base closure package proposed by an independent commission pursuant to the Defense Base Closure and Realignment Act of 1990 ("DBCRA"). *Id.* at 464-66. The Supreme Court held that the plaintiff's statutory challenge to the President's decision failed because the statute gave the President unfettered discretion. *Id.* at 474-76. The Court then also rejected the argument that because the President had allegedly violated the statute, he had acted unconstitutionally. *Id.* at 472-74. In explanation, the Court stated that "every action by the President, or by another executive official, in excess of his statutory authority is [not] *ipso facto* in violation of the Constitution." *Id.* at

472. The Court did not say, however, that action in excess of statutory authority can *never* violate the Constitution or give rise to a constitutional claim. Statutory and constitutional claims are not mutually exclusive. Indeed, the Court went on in *Dalton* to state that *Youngstown* "cannot be read for the proposition that an action taken by the President in excess of his statutory authority *necessarily* violates the Constitution." *Id.* at 473 (emphasis added). There would have been no reason for the Court to include the word "necessarily" if the two claims were always mutually exclusive.

In *Dalton*, the President's authority was put at issue because of the contention that he had violated requirements set by DBCRA. It was only because Congress had enacted a statutory process for closing bases that the Court considered whether it could review the President's compliance with DBCRA and ultimately concluded that it could not because the statute gave the President unreviewable discretion. *Id.* at 474-76. It was in that context that the Court explained that an allegation that the President had not complied with the statute would not necessarily become a constitutional claim through an *ultra vires* theory. *Id.* at 472-73. Because DBCRA authorized unfettered discretion by the President to either approve or disapprove the package of base closures as a whole, the Court had no occasion to consider the constitutional implications of violating statutes, such as section 8005, that authorize executive action contingent on satisfaction of certain requirements.[19] Here, unlike in *Dalton*, Plaintiffs' claim is not

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[19] The dissent notes that when Congress appropriates funds in lump-sum amounts, and leaves it to the unfettered discretion of the agency to re-allocate funds, no judicial review is available. Dissent

one "*simply* alleging that the President has exceeded his statutory authority." *Id.* at 473 (emphasis added). Rather, Plaintiffs claim that to the extent Defendants did not have statutory authority to reprogram the funds, they acted in violation of constitutional separation of powers principles because Defendants lack any background constitutional authority to appropriate funds—making Plaintiffs' claim fundamentally a constitutional one.[20] *Dalton* therefore does not foreclose Plaintiffs' constitutional claim here.[21]

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at 8 (citing *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993)). That principle has no bearing here. Section 8005 does not involve a lump sum whose allocation is committed to the agency's discretion, but instead imposes restrictions on when and for what purposes the agency may use reprogrammed funds.

[20] Defendants rely on *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975), in which the Fourth Circuit held that the claims of several individual taxpayers who alleged that the government was spending money in violation of two statutes did not satisfy the test for taxpayer standing enunciated in *Flast v. Cohen*, 392 U.S. 83 (1968), because they "present[ed] no constitutional challenge to any congressional appropriation," *Harrington*, 528 F.2d at 457. *Harrington* is largely inapposite, because Plaintiffs do not rely on taxpayer standing here. The court in *Harrington* noted, however, that "[i]f there were a clear and flagrant violation of congressional limitations upon expenditures, a court in a taxpayer suit might find its intervention appropriate." *Id.* at 458. Thus, if *Harrington* has any persuasive value here, we think it is in suggesting that Plaintiffs *do* have a cause of action because, as we have discussed, there has been a clear violation of Congress' limits on expenditures.

[21] The dissent suggests that *Train v. City of New York*, 420 U.S. 35 (1975), supports the proposition that a claim attacking the Executive Branch's reading of an appropriations statute sounds only in that statute and not in the Constitution. Dissent at 8-9. But the plaintiffs in *Train* argued not that the Executive Branch was spending money that Congress had never appropriated, rather that the

Defendants also cannot be right in their apparent contention that as long as an official identifies some statutory authorization for his actions, doing so makes any challenge to those actions statutory and precludes constitutional review. It cannot be that simply by pointing to any statute, governmental defendants can foreclose a constitutional claim. At the risk of sounding tautological, only if the statute *actually* permits the action can it *even possibly* give authority for that action.[22] For the reasons explained above, section 8005 does not permit the action here.

Congress may, of course, limit a court's equitable power to enjoin acts violating federal law. *See Armstrong*, 135 S. Ct. at 1385 (explaining that an equitable remedy is not available where Congress has demonstrated an "intent to foreclose" that form of relief, as

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Executive Branch was *refusing* to allot money Congress had specifically *instructed* it to spend. 420 U.S. at 42. There was thus no constitutional claim at issue in *Train*, and if there had been, it would have had nothing to do with the prohibitions on unauthorized spending imposed by the Appropriations Clause. The Supreme Court in *Train* considered only the statutory question whether an Executive Branch agency had failed to comply with a specific statutory mandate because that was the only issue in that case, not because the existence of a statute had any bearing on constitutional reviewability.

[22] Although in *Youngstown* the President *conceded* that no statute authorized his actions, and relied only on his Article II powers, 343 U.S. at 587, we do not see how Defendants' willingness or unwillingness to concede that a particular statute does not authorize their actions should affect whether Plaintiffs in this case have a cause of action—particularly when, as we have discussed, we think it quite clear that section 8005 does not authorize the reprogramming. Thus, we do not think that the concession in *Youngstown* was determinative, or that the lack of a concession is determinative here.

where a statutory provision (1) expressly provided a method of enforcing a substantive right, or (2) lacked a judicially administrable standard (quoting *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002))). But Defendants do not argue that Congress has demonstrated any such intent to limit equitable remedies here, and we have identified no statute that does so. Indeed, to foreclose a remedy for a constitutional violation, Congress must demonstrate its intent by "clear and convincing evidence." *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975) (quoting *Johnson v. Robinson*, 415 U.S. 361, 373 (1974)); *see also City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 183 (1997) ("[J]udicial review of [federal] administrative action is the rule, and nonreviewability an exception which must be demonstrated." (alterations in original) (quoting *Barlow v. Collins*, 397 U.S. 159, 166 (1970)).

**2. Administrative Procedure Act Cause of Action**

Plaintiffs' claim is also cognizable under the APA. The APA provides for judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Here, Plaintiffs have a cause of action under the APA as long as there has been final agency action, and as long as Congress has not limited review of such actions through other statutes or committed them to agency discretion. Neither of these bars to APA relief is present here. *See* 5 U.S.C. §§ 701(a), 704, 706; *Bennett v. Spear*, 520 U.S. 154, 175 (1997).

The APA mandates that a court "shall . . . hold unlawful and set aside agency action . . . found to be . . . contrary to constitutional right, power, privilege,

or immunity." 5 U.S.C. § 706(2)(B). Plaintiffs' challenge is to a final agency action and alleges that the action violates the Appropriations Clause, so it falls within the APA's scope.[23]

Although section 701(a)(2) of the APA "preclude[s] judicial review of certain categories of administrative decisions," this case does not involve such an "administrative decision traditionally regarded as committed to agency discretion." *Lincoln v. Vigil*, 508 U.S. 182, 191-92 (1993). In their emergency stay motion and related supplemental briefing, Defendants do not argue that DoD's actions were committed to "agency discretion by law," so as to preclude review under the APA. We agree with Defendants' implicit concession that this is not a case involving a "statute . . . drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

Any constitutional challenge that Plaintiffs may advance under the APA would exist regardless of whether they could also assert an APA claim that DoD's applica-

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[23] Defendants argue that DoD's reprogramming action is not a final agency action in part because it "imposes no obligations and confers no rights upon plaintiffs." **Exec. Tan Br. at 14.** But the question we must ask in determining finality is whether the agency action imposes obligations on the agency, not whether it imposes obligations on Plaintiffs. *See Bennett*, 520 U.S. at 177 (holding that the challenged agency actions were final because they "alter[ed] the legal regime *to which the action agency* [wa]s subject" (emphasis added)). Here, as we have discussed, the reprogramming action purports to affect DoD's legal right to use particular funds to build a border barrier instead of the purpose for which they were originally appropriated.

tion of section 8005 was "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C); *see Webster v. Doe*, 486 U.S. 592, 602-04 (1988) (holding that a plaintiff may raise under the APA a constitutional challenge to agency action even where the plaintiff lacks an avenue under the APA to argue that the same agency action is invalid for statutory or procedural reasons). If "Congress intends to preclude judicial review of constitutional claims[,] its intent to do so must be clear." *Webster*, 487 U.S. at 603. Congress has not done so here.

**3. Survival of at Least One Cause of Action**

The dissent argues that Plaintiffs' claim is necessarily one encompassed by the APA, and that the availability of an APA cause of action precludes Plaintiffs' equitable claim. We do not think that the APA forecloses Plaintiffs' equitable claim. And even if it did, then for the reasons we have discussed, Plaintiffs would have an APA claim. Either way, it cannot be that both an equitable claim and an APA claim foreclose the other, leaving Plaintiffs with no recourse.

It is true that the APA is the general mechanism by which to challenge final agency action. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (noting the "basic presumption of judicial review [created by the APA] for one 'suffering legal wrong because of agency action'" (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)). But this does not mean the APA forecloses other causes of action. In *Navajo Nation v. Department of the Interior*, 876 F.3d 1144 (9th Cir. 2017), we explained that "a court is foreclosed by [APA section] 704 from entertaining claims *brought under the APA* seeking review of non-final agency action

(and not otherwise permitted by law)," but that this final agency action limitation does not apply "to other types of claims (like . . . constitutional claims)." *Id.* at 1170.

Likewise, in *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989), we allowed constitutional claims to proceed without even deciding whether an APA cause of action was available. There, plaintiff churches brought claims for injunctive relief against the United States, DOJ, and the Immigration and Naturalization Service ("INS") and certain INS officials, alleging violations of their First and Fourth Amendment rights by INS agents' surreptitious recording of their church services. *Id.* at 520. The district court dismissed the plaintiffs' claims as, in relevant part, barred by sovereign immunity. *Id.* at 521. We reversed, holding that APA section 702 waived the government defendants' sovereign immunity for claims seeking non-monetary relief. *Id.* at 523-24. We further explained that this waiver of sovereign immunity was not limited to suits involving an "agency action" as defined under the APA. *Id.* at 525. We therefore did not reach the question whether the actions challenged in that case were ones for which the APA would provide a cause of action. *Id.* at 525 n.8. Rather, we remanded for further analysis of standing and mootness, and, if the district court determined it had jurisdiction, for evaluation of the plaintiffs' constitutional claims. *Id.* at 529. *Navajo Nation* and *Presbyterian Church* clearly contemplate that claims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA.

In fact, the APA provides for judicial review only of "[a]gency action made reviewable by statute and final

agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Here, no statute expressly makes Plaintiffs' claims reviewable, but, as we have explained, Plaintiffs do have an adequate remedy in a court: an equitable cause of action for injunctive relief. If either form of their claim precludes the other, it would therefore seem that their equitable claim to enjoin unconstitutional action would preclude their APA claim to enjoin unconstitutional action. But even if it is the other way around, these causes of action cannot possibly be the legal equivalent of baking soda and vinegar —when they come in contact, there is no reason to believe they both go up in smoke.

### C. Zone of Interests

Defendants argue that even if a cause of action generally exists to challenge the reprogramming, Plaintiffs must satisfy a "zone of interests" test to establish that *they*, specifically, have a cause of action for the constitutional violation they allege here. Defendants argue that this test would apply to Plaintiffs' claim whether characterized as an equitable cause of action to enjoin a constitutional violation or as an APA claim. We are doubtful that a zone of interests test applies to Plaintiffs' equitable cause of action. Although we recognize that the APA generally does carry a zone of interests test, there is some lack of clarity with respect to what that might look like in a constitutional context. We need not resolve these ambiguities in the case law, however, because we believe Plaintiffs fall within any zone of interests test that may apply.

### 1. Applicability of a Zone of Interests Test

Courts apply the zone of interests test to "determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). To determine whether a plaintiff satisfies this test we ask whether the plaintiff's "interests fall within the zone of interests protected by the law invoked." *Id.* at 129 (quotation marks omitted). In answering this question, we recognize that "the breadth of the [applicable] zone of interests varies according to the provisions of law at issue." *Id.* at 130 (quoting *Bennett*, 520 U.S. at 163).

The zone of interests test derives from the Supreme Court's decision in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), where the Court articulated a limit on causes of action conferred by the APA. But the Court clarified in *Lexmark* that the test "applies to *all* statutorily created causes of action . . . and that Congress is presumed to 'legislate against the background of' the zone-of-interests limitation, 'which applies unless it is expressly negated.'" *Lexmark*, 572 U.S. at 129 (emphasis added) (quoting *Bennett*, 520 U.S. at 163).[24]

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[24] Many pre-*Lexmark* cases refer to the zone of interests test—and the broader question whether a particular plaintiff has a cause of action—as a part of the standing inquiry (and, more specifically, as a component of "prudential standing"). *See Lexmark*, 572 U.S. at 126-27. In *Lexmark*, however, the Court clarified that the zone of interests test does not go to a plaintiff's standing but rather to whether the plaintiff has a cause of action. *Id.* at 127, 128 n.4. The Court suggested that holding otherwise would be "in some tension with [the Court's] recent affirmation of the principle that 'a federal

We are doubtful that any zone of interests test applies to Plaintiffs' equitable cause of action to enjoin a violation of the Appropriations Clause, particularly after *Lexmark*.

As an initial matter, we are skeptical that there could be a zone of interests requirement for a claim alleging that official action was taken in the absence of all authority, like that which Plaintiffs assert here. The D.C. Circuit's decision in *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987), explains why it does not make sense to treat such claims as carrying a zone of interests requirement. There, the court heard a challenge to a government program for intercepting ships carrying undocumented immigrants, in which the plaintiffs argued that the program exceeded authority granted by statute or the Constitution. *Id.* at 797-98. The court ultimately held that the plaintiffs lacked standing. *Id.* at 800-01. But, citing *Youngstown* in its discussion, the D.C. Circuit noted that the plaintiffs were not required to "show that their interests [fell] within the zones of interests of the constitutional and statutory powers invoked by the President in order to . . . challenge the . . . program as *ultra vires*." *Id.* at 811 n.14. "Otherwise," the court explained, "a meritorious litigant, injured by *ultra vires* action, would seldom have standing to sue since the litigant's interest normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest." *Id.* In other words,

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court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Id.* at 126 (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013).

where the very claim is that *no* statutory or constitutional provision authorized a particular governmental action, it makes little sense to ask whether *any* statutory or constitutional provision was written for the benefit of any particular plaintiffs.

Consistent with this logic, *Youngstown* did not apply a zone of interests test. Although we acknowledge that *Youngstown* was decided before the Supreme Court had formally articulated a zone of interests test, *Youngstown* did not address any similar concept, either. Rather, the Court held that the President had unlawfully intruded on the lawmaking function reserved to Congress without ever discussing whether the plaintiffs, steel mill owners whose property was ordered to be seized, were the intended beneficiaries of the structural provisions in Article II.

Similarly, in *Clinton v. City of New York*, 524 U.S. 417 (1998), which addressed a Presentment Clause challenge, the Supreme Court said nothing about a zone of interests requirement. In that case, two sets of plaintiffs challenged the constitutionality of the Line Item Veto Act, which allowed the President to veto only particular provisions in enacted laws, rather than the entire law. *Id.* at 420-21. One set of plaintiffs consisted of the City of New York, a hospital and two hospital associations, and unions representing hospital employees. *Id.* at 425. Another consisted of a cooperative of Idaho potato growers, and an individual potato farmer. *Id.* All the plaintiffs alleged that they were injured by the President's cancellation of particular line items in the budget that would have inured to their financial benefit. *Id.* at 421. The Supreme Court held that the Act vio-

lated the structural protections provided by the Presentment Clause, without asking whether the plaintiffs fell within any zone of interests of that clause. *Id.* at 436-48.

The Appropriations Clause likewise operates as a structural protection built into our constitutional system. Just as the Court in *Clinton* treated as sufficient that the plaintiffs were concretely injured as a result of the alleged Presentment Clause violation, we believe it is likely sufficient here that Plaintiffs would be concretely injured by the alleged Appropriations Clause violation, and that no zone of interests test applies to their claim.

Even if a zone of interests test may have been applied to some cases considering constitutional claims like Plaintiffs' prior to *Lexmark*, we think that *Lexmark* has called into question its continuing applicability to constitutional claims. *Lexmark* focuses on *Congress's intent* in creating statutory causes of action, casting doubt on Defendants' argument that a zone of interests test has any role to play here, where Plaintiffs' theory derives from the Constitution. The Court in *Lexmark* described the purpose of the zone of interests test as being to discern whether a statutory cause of action exists—specifically, "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." 572 U.S. at 127. Because the Constitution was not created by any act of Congress, it is hard to see how the zone of interests test would even apply.[25]

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[25] Defendants argue that an equitable cause of action to enjoin a constitutional violation is, at its root, a creation of statute, and is

Indeed, in its recent decision in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, No. 18-96, 2019 WL 2605555 (U.S. June 26, 2019), in which the plaintiffs alleged a violation of the dormant Commerce Clause, the Supreme Court did not even mention the zone of interests test. Given that the Court did apply a zone of interests test in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), a pre-*Lexmark* dormant Commerce Clause case, *Tennessee Wine* supports the idea that *Lexmark* has changed the landscape. *See* 429 U.S. at 602 n.3.

For all of these reasons, we doubt that any zone of interests test applies to Plaintiffs' equitable cause of action.

We recognize that the Supreme Court has consistently applied a zone of interests test to causes of action arising under the APA. When the Court has applied the zone of interests test in APA actions, however, it has

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therefore encompassed within *Lexmark*'s references to causes of action created by statute. Although Defendants are correct that Congress granted federal courts equity jurisdiction by statute, *see Grupo Mexicano*, 527 U.S. at 318 ("The Judiciary Act of 1789 conferred on the federal courts jurisdiction over all suits . . . in equity." (quotation marks omitted)); *see also* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."), we think it a stretch to conclude that the traditional equitable cause of action to enjoin a constitutional violation was therefore *created by statute*. Indeed, the lower federal courts are created entirely by statute, *see* An Act to Establish the Judicial Courts of the United States §§ 2-6, 1 Stat. 73 (1789), but this does not mean that all constitutional claims filed in a federal district court are really statutory claims. *See, e.g.*, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (recognizing "a cause of action under the Fourth Amendment" for damages).

analyzed the zone of interests of the statute the agency is alleged to have violated, not any zone of interests of the APA itself. In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), for example, the Court examined an APA action alleging that the government had exceeded its statutory authority to take title to a piece of property "for the purpose of providing land for Indians." *Id.* at 211 (quoting the Indian Reorganization Act, 25 U.S.C. § 465 (2012) (current version at 25 U.S.C. § 5108)). It concluded that the plaintiff, who lived near land that had been acquired by the Secretary of the Interior for an Indian tribe seeking to open a casino, was "arguably within the zone of interests to be protected or regulated by" the Indian Reorganization Act, which "authorize[d] the acquisition of property 'for the purpose of providing land for Indians.'" *Id.* at 211-12, 224-26 (first quoting *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153, then quoting 25 U.S.C. § 465 (2012) (current version at 25 U.S.C. § 5108)). In so doing, it departed from the reasoning of the district court, which had concluded that the plaintiff fell outside the Act's zone of interests because he was "not an Indian, nor [did] he purport to seek to protect or vindicate the interests of any Indians or Indian tribes." *Patchak v. Salazar*, 646 F. Supp. 2d 72, 77 (D.D.C. 2009). And in *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991), the Court asked whether postal workers bringing a claim under the APA were within the zone of interests protected by the Private Express Statutes on which their claims depended.[26]

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[26] In *Bennett*, the Court noted that because the zone of interests test "varies according to the provisions of law at issue, . . . what

Here, rather than looking at a statute underlying an APA action to determine the relevant zone of interests, we would need to look at the Appropriations Clause. Because, as we have discussed, we are doubtful that any zone of interests test applies to claims seeking to enjoin a violation of the Appropriations Clause, we think it is possible that the present type of APA claim is distinct from typical APA claims and that there is no zone of interests requirement here. We need not decide that question, however, because we believe that, even if a zone of interests test applied here, it would be satisfied.

**2. Whether Any Zone of Interests Test Is Satisfied**

Defendants argue that Plaintiffs cannot satisfy the zone of interests test because their claims fall outside the zone of interests of section 8005. Although Plaintiffs' Complaint did assert a claim under section 8005, it also asserted constitutional claims, including a claim for a violation of the Appropriations Clause. To the extent any zone of interests test applies to that constitutional claim (whether brought in equity or under the APA), it requires us to ask whether Plaintiffs fall within the zone of interests of the Appropriations Clause, not of section 8005. And when the Supreme Court has applied a zone of interests test to claims about structural provisions of

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comes within the zone of interests of a statute for purposes of obtaining judicial review . . . under the 'generous review provisions' of the APA may not do so for other purposes." 520 U.S. at 163 (quoting *Clark v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987)). We read this not to suggest that a particular zone of interests test applies to *all* APA actions, but that when analyzing whether a plaintiff falls within the zone of interests of a particular statute, courts should be particularly lenient if a violation of that statute is being asserted through an APA claim.

the Constitution, it has applied a very lenient version of that test.

For example, in *Boston Stock Exchange*, the Court held that plaintiff businesses that alleged financial injury from a state tax that discriminated against out-of-state businesses fell within the zone of interests of the implied dormant Commerce Clause, which functions as a limit on a state's power relative to that of Congress to regulate interstate commerce. 429 U.S. at 320 n.3. Although the suit was not brought by Congress seeking to protect its Commerce Clause authority, or even by another state alleging harm from the defendant state's tax law, the Court held that the plaintiffs were permitted to assert that the state defendant had acted in a manner that infringed on Congress's constitutional authority. *Id.*

More recently, in *McIntosh*, we allowed criminal defendants charged with marijuana-related offenses to seek an injunction prohibiting DOJ from spending funds in violation of the Appropriations Clause. 833 F.3d at 1168, 1172. We explained: "When Congress has . . . expressly prohibit[ed] DOJ from spending funds on certain actions, federal criminal defendants may seek to enjoin the expenditure of those funds, and we may exercise jurisdiction over a district court's direct denial of a request for such injunctive relief." *Id.* at 1172-73. To the extent we implicitly applied a zone of interests test to the criminal defendants, it was not a restrictive one—indeed, our primary concern was to confirm that the defendants had standing to challenge the Appropriations Clause violation (and we concluded they did). *Id.* at 1173-74.

Accordingly, if Plaintiffs must fall within a zone of interests served by the constitutional provision they seek to vindicate, we are persuaded that they do. The Appropriations Clause is a vital instrument of separation of powers, which has as its aim the protection of individual rights and liberties—not merely separation for separation's sake. *See supra* section V.A. As Justice Kennedy put it in *Clinton*:

> [I]f a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened. . . . The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints.

524 U.S. at 451 (Kennedy, J., concurring). Because "individuals, too, are protected by the operations of separation of powers and checks and balances," it follows that "they are not disabled from relying on those principles in otherwise justiciable cases and controversies." *Bond v. United States*, 564 U.S. 211, 223 (2011).

Plaintiffs assert that if Defendants' allegedly unconstitutional spending proceeds, they will suffer injuries to their environmental, professional, aesthetic, and recreational interests. Those individual rights and interests resemble myriad interests that the Supreme Court has concluded—either explicitly or tacitly—fall within any applicable zone of interests encompassed by structural constitutional principles like separation of powers. *See, e.g.*, *Chadha*, 462 U.S. at 935-36, 951-52 (allowing a plaintiff with an interest in avoiding deportation to bring a constitutional claim based on bicameralism and presentment requirements); *Bos. Stock Exch.*, 429 U.S. at

602 n.3 (allowing a plaintiff stock exchange with an interest in avoiding a state tax to bring a claim enforcing Congress's dominion over the regulation of interstate commerce). Plaintiffs' claim that their rights or liberties were infringed by a violation of the Appropriations Clause therefore falls within any zone of interests required to enforce that clause's provisions.

**VI. The Remaining Stay Factors**

Our focus to this point has been on the first of the four factors to be considered in deciding a motion to stay, "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009). The second factor, "whether the applicant will be irreparably injured absent a stay," was identified in *Nken* together with the first factor as "the most critical." *Id.*

The Supreme Court observed in *Nken* that the third and fourth factors—whether issuance of a stay will substantially injure other parties and where the public interest lies—"merge when the Government is the opposing party." *Id.* at 435. That case involved an application for a stay of removal by a noncitizen who was facing deportation. The motion before us presents a variant on that situation. Here, it is Defendants who seek a stay, so the question whether Defendants will be irreparably injured absent a stay may, in practical terms, merge with consideration of the public interest.

Public interest is a concept to be considered broadly. The Court noted in *Nken*, for example, that there is a public interest in "preventing aliens from being wrongfully removed," but also that there is "always a public

interest in prompt execution of removal orders." *Id.* at 436.

Defendants have discussed these three remaining factors together in terms of the "equitable balance of harms." There is logic in that, so we will do the same, considering the respective impacts on Defendants, Plaintiffs and others interested in the proceedings, and the general public.

The primary harm cited by Defendants if a stay is not granted is that a "delay in the construction of border fencing pending appeal will create irreparable harm" because "deadly drugs [will] flow into this country in the interim." They argue that CBP has recorded over 4,000 "drug-related events" between border crossings in the El Paso, El Centro, Tucson, and Yuma Sectors in Fiscal Year 2018 and cites CBP's seizure of thousands of pounds of marijuana and lesser amounts of other illegal substances, including cocaine, heroin, methamphetamine, and fentanyl.

We do not question in the slightest the scourge that is illegal drug trafficking and the public interest in combatting it. Our circuit includes several border states, and our courts deal with no small number of cases involving illegal drugs crossing those states' borders.

Defendants have not actually spoken to the more relevant questions, however. What will be the impact of building the barriers they propose? Even more to the point, what would be the impact of delaying the construction of those barriers? If these specific leaks are plugged, will the drugs flow through somewhere else? We do not know, but the evidence before us does not support a conclusion that enjoining the construction of

the proposed barriers until this appeal is fully resolved will have a significant impact.

To begin with, the statistics cited by Defendants describe drug trafficking that CBP has detected with existing barriers and law enforcement efforts. They do not tell us how much gets through undetected or what additional amounts would be stopped by the proposed barriers.

As Plaintiffs point out, according to the Drug Enforcement Administration's most recent assessment, the "majority of the [heroin] flow is through [privately operated vehicles] entering the United States at legal ports of entry, followed by tractor-trailers, where the heroin is comingled with legal goods." Drug Enforcement Admin., *2018 National Drug Threat Assessment* 19 (2018), https://www.dea.gov/sites/default/files/2018-11/DIR-032-18%202018%20NDTA%20final%20low%20resolution.pdf. Only "a small percentage of all heroin seized by [CBP] along the land border was between Ports of Entry." *Id.* Fentanyl transiting the southern border is likewise most commonly smuggled in "multi-kilogram loads" in vehicles crossing at legal ports of entry. *Id.* at 33. Defendants have not disputed these assessments.

That does not lead to a conclusion that leaks should not be plugged. It does suggest, however, that Defendants' claim that failing to stay the injunction pending appeal will cause significant irreparable harm is supported by much less than meets the eye. Congress could have appropriated funds to construct these barriers if it concluded that the expenditure was in the public interest, but it did not.

For similar reasons, we are unmoved by Defendants' contention that "the injunction threatens to permanently deprive DoD of its authorization to use the funds at issue to complete" the selected projects, including "approximately $1.1 billion it has transferred for these projects but has not yet obligated via construction contracts," because "the funding will likely lapse during the appeal's pendency." A lapse in funding does not mean that the money will disappear from the Treasury. The country will still have that money. It could be spent in the future, including through appropriations enacted by Congress for the next fiscal year. The lapse simply means that Defendants' effort to justify spending those funds based on the appropriations act for the current fiscal year and the authority to reprogram funds under section 8005 may be thwarted.

Defendants' identification of this lapse as a factor that should tip the balance of harms in their favor actually serves instead to illustrate the underlying weakness in their position. Defendants' rush to spend this money is necessarily driven by their understanding that Congress did not appropriate requested funding for these purposes in the current budget and their expectation that Congress will not authorize that spending in the next fiscal year, either. The effort by Defendants to spend this money is not consistent with Congress's power over the purse or with the tacit assessment by Congress that the spending would not be in the public interest.

Finally, Defendants maintain that a stay is necessary because DoD "is incurring unrecoverable fees and penalties of hundreds of thousands of dollars to its contractors for each day that construction is suspended." But that liability resulted from Defendants' own decisions

about how to proceed in the face of litigation. Plaintiffs filed their motion for a preliminary injunction on April 4, 2019, and a hearing was held on May 17. When DoD awarded contracts on April 9 for El Paso Project Sector 1, and May 15 for Yuma Project Sector 1 and Tucson Project Sectors 1-3, DoD knew this litigation was pending and that the district court had been asked to enter a preliminary injunction. Placing significant weight on financial obligations that Defendants knowingly undertook would, in effect, reward them for self-inflicted wounds.

Moving to the impacts on the Plaintiffs, Defendants denigrate those impacts as limited to "aesthetic and recreational injuries." As noted above, *see supra* Section II, Defendants have elected not to dispute that Plaintiffs' interests are sufficiently substantial to support Article III standing. Environmental injuries have been held sufficient in many cases to support injunctions blocking substantial government projects. The Supreme Court has observed that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

As to the public interest, we conclude that the public interest weighs forcefully against issuing a stay. The Constitution assigns to Congress the power of the purse. Under the Appropriations Clause, it is Congress that is to make decisions regarding how to spend taxpayer dollars. As we have explained, *see supra* Section V.C.2.,

the Appropriations Clause serves as a check by requiring that "not a dollar of [money in the Treasury] can be used in the payment of any thing not thus previously sanctioned" by Congress," as "[a]ny other course would give to the fiscal officers a most dangerous discretion." *Reeside v. Walker*, 52 U.S. 272, 291 (1850). In the words of then-Judge Kavanaugh, the Appropriations Clause is

> a bulwark of the Constitution's separation of powers among the three branches of the National Government. It is particularly important as a restraint on Executive Branch officers: If not for the Appropriations Clause, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.

*U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.) (quotation marks omitted). The Clause prevents the Executive Branch from "even inadvertently obligating the Government to pay money without statutory authority." *Id.* The public interest in ensuring protection of this separation of powers is foundational and requires little elaboration. *See supra* Section V.A.

Similarly, when Congress chooses how to address a problem, "[i]t is quite impossible . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld," as doing so is "not merely to disregard in a particular instance the clear will of Congress," but "to disrespect the whole legislative process and the constitutional division of authority between President and Congress." *Youngstown*, 343 U.S. at 609 (1952) (Frankfurter, J., concurring). Congress did not appropriate money to build the border

barriers Defendants seek to build here. Congress presumably decided such construction at this time was not in the public interest. *See id.*; *supra* Section V.A.1.ii. It is not for us to reach a different conclusion.

The public interest and the balance of hardships do not support granting the motion to stay.

## VII. Conclusion

In his concurrence in *Youngstown*, Justice Jackson made eloquent comments that seem equally apt today:

> The essence of our free Government is "leave to live by no man's leave, underneath the law"—to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. . . . With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.
>
> Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

343 U.S. at 654-55 (Jackson, J., concurring).

Heeding Justice Jackson's words, we deny Defendants' motion for a stay.

N.R. SMITH, Circuit Judge, dissenting:

The majority here takes an uncharted and risky approach—turning every question of whether an executive officer exceeded a *statutory* grant of power into a *constitutional* issue. This approach is in contradiction to the most fundamental concepts of judicial review. The majority has created a constitutional issue where none previously existed. *See Dalton v. Specter*, 511 U.S. 462, 472-74 (1994). We have no right to expand the Judiciary's role in this manner and, as explained in greater detail below, the majority's approach has been expressly rejected by the Supreme Court.

Turning to the merits of the case before us, we are asked solely whether we should stay a permanent injunction prohibiting Defendants from transferring certain funds within the budget of the Department of Defense (DoD) to support counterdrug activities, while the parties await a final ruling on the merits of the permanent injunction order. We are not, as the majority claims, "evaluat[ing] the merits more fully that we otherwise might." Maj. Op. at 31. In fact, the parties have expressly informed the court that they will be presenting an expedited briefing schedule for the merits panel by July 8, 2019, Dkt. No. 65 at 4—four days after the parties anticipate a decision from the current panel.[1]

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[1] The majority ignores this declaration. Maj. Op. at 31. The parties have asked us to expedite our decision, but they have not asked us to make a merits decision in contravention of traditional procedure. *Nken v. Holder*, 556 U.S. 418, 427 (2009) (recognizing that the "ordinary processes of administration and judicial review" best ensure "careful review and a meaningful decision" (citation omitted)). Whether an issue may become moot during the course of an appeal does not change the scope of our review for a motion to

Because Defendants have satisfied their burden to obtain the requested relief when Plaintiffs' claim is properly cast as a statutory issue, the majority should grant Defendants' motion to stay the permanent injunction until the matter is finally determined on appeal.

In deciding whether to stay an injunction pending appeal, we must consider: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies," *Nken*, 556 U.S. at 434 (citation omitted). "[H]arm to the opposing party and weighing the public interest . . . merge when the Government" is one of the parties. *Id.* at 435. Although "[t]he first two factors . . . are the most critical," *id.* at 434, we must "give serious consideration to the public interest factor," *Nat. Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 863 (9th Cir. 2007). In any event, the decision to grant or deny a stay is discretionary. *Nken*, 556 U.S. at 433-34. Here, each factor favors issuing a stay.[2]

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stay. Even though the parties rely on their previous briefs for purposes of this motion, they do not suggest that they do not have additional arguments for the merits of appeal. We should not be deciding the merits of these issues (potentially binding the merits panel).

[2] Whether Defendants are likely to succeed on the merits of this appeal ultimately turns on whether the district court abused its discretion in issuing the permanent injunction. *See La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 879 (9th Cir. 2014). Thus, even though this is only a motion to stay, we review the district court's grant of a permanent injunction for abuse of discretion, and we review its legal conclusions de novo. *Aircraft Serv. Int'l, Inc. v. Int'l Bhd. of Teamsters*, 779 F.3d 1069, 1072 (9th Cir. 2015) (en banc).

## I. Defendants are Likely to Succeed on the Merits

The district court granted a permanent injunction in Plaintiffs' favor based on a purported statutory claim under the DoD Appropriations Act for Fiscal Year 2019, Pub. L. No. 115-245, §§ 8005, 9002, 132 Stat. 2981, 2999. *See* Permanent Injunction Order at 3-4, 6-8. The district court analyzed only whether Defendants exceeded their statutory authority under § 8005, without discussing whether they also separately violated any constitutional provision. *See generally id.* Nevertheless, the majority views Plaintiffs' claim as, "at its core, one alleging a constitutional violation." Maj. Op. at 32. As discussed below, viewing Plaintiffs' claim as alleging a statutory violation is the proper approach. *Dalton*, 511 U.S. at 472-74.

When their claim is properly viewed as alleging a statutory violation, Plaintiffs have no mechanism to challenge Defendants' actions. Plaintiffs have neither an implied statutory cause of action under § 8005, nor an equitable cause of action. *See generally Dalton*, 511 U.S. at 472-76. Nor do Plaintiffs have a cause of action to challenge the DoD's § 8005 reprogramming under the Administrative Procedure Act (APA), as they fall outside of the zone of interests for such a claim. Consequently,

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"It is an abuse of discretion to apply the wrong legal standard." *United States v. Emmett*, 749 F.3d 817, 819 (9th Cir. 2014). As explained in greater detail below, the district court abused its discretion here by failing to analyze Plaintiffs' claim under the Administrative Procedure Act. *See, e.g.*, Permanent Injunction Order at 4 ("[T]he Court continues to find that the [zone of interests] test has no application in an *ultra vires* challenge, which operates outside of the APA framework."). The majority does not defend the district court's decision, but rules in Plaintiffs' favor under a completely different—yet equally faulty—legal theory.

Defendants have made a strong showing that they are likely to succeed on the merits of their appeal.

**1. Plaintiffs Claim Is Properly Viewed as Alleging a Statutory Violation**

Because we are allowed to affirm the permanent injunction "on any ground supported by the record," *Sony Comput. Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 608 (9th Cir. 2000) (citation omitted), the majority denies Defendants' motion for a stay by re-characterizing Plaintiffs' claim as a constitutional violation—despite the contrary ground relied on by the district court in its decision[3]—which the majority now analyzes on the fly.

The majority's primary mistake is drawing no distinction between a claim that an agency is violating a statute and a claim that an agency is violating the Constitution:

> If section 8005 does not authorize the reallocation, however, then Defendants are acting outside of any statutory appropriation and are therefore spending funds contrary to Congress's appropriations decisions. . . . The lack of compliance with section 8005 has sometimes been labeled *ultra vires* as outside statutory authority or as outside the President's

[3] The district court construed Plaintiffs' claim as an *ultra vires* action to enforce § 8005. Permanent Injunction Order at 4. It determined that principles of constitutional avoidance required it to first analyze whether § 8005 supported the reprogramming, and reach the constitutional analysis only if necessary. *Sierra Club v. Trump*, No. 19-CV-00892-HSG, 2019 WL 2247689, *18 (N.D. Cal. March 24, 2019); Permanent Injunction Order at 5 ("[N]o new factual or legal arguments persuade the Court that its analysis in the preliminary injunction order was wrong."). Thus, the court never conducted a constitutional analysis of this question.

> Article II powers, and spending without an appropriation has been described as a violation of the Appropriations Clause. However their claim is labeled, Plaintiffs' theory is ultimately the same.

Maj. Op. at 34 & n.16. This approach is flatly contradicted by *Dalton* and related cases, which clarified the distinction between "claims of constitutional violations and claims that an official has acted in excess of his statutory authority" and declared that "[o]ur cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution." *Dalton*, 511 U.S. at 472.

Indeed, recasting Plaintiffs' challenge—fundamentally a dispute about whether the DoD erred in deciding that the pre-conditions of § 8005 were met—as a constitutional claim against the DoD for violating the Appropriations Clause contradicts several lines of caselaw.

First, *Dalton* clarifies that cases such as *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) involve constitutional violations, because "[t]he only basis of authority asserted was the [executive's] inherent constitutional power." *Dalton*, 511 U.S. at 473. In those instances, "the case necessarily turned on whether *the Constitution* authorized the [executive's] actions," only "[b]ecause no statutory authority was claimed." *Id.* (emphasis added).

This is not that type of case. As noted by the majority, Plaintiffs' claim entirely rises or falls on whether the DoD complied with the limitations in § 8005. Maj. Op. at 34 ("If Defendants were correct that section 8005 allowed this spending reallocation, Plaintiffs' claim would

fail, because the spending would be consistent with Congress's appropriation legislation. If section 8005 does not authorize the reallocation, however, then Defendants are acting outside of any statutory appropriation and are therefore spending funds contrary to Congress's appropriations decisions."). The DoD offers no other source of authority *besides* a statute. Accordingly, this case "concern[s] *only* issues of statutory interpretation" and "*no constitutional question whatever is raised*." *Dalton*, 511 U.S. at 474 n.6 (emphasis added) (citation and internal quotation marks omitted).

Second, applying *Dalton* to the Appropriations Clause context requires us to reject the majority's logic, which relies on the assumption that every violation of an appropriations statute is *necessarily* a constitutional violation. In *Dalton*, Congress granted the President discretion to take certain actions, and the plaintiffs asserted that he had exceeded that authority. *Id.* at 474. The plaintiffs further claimed that, *because* the President had exceeded his statutory authority, he had also violated the Constitution. *Id.* That is precisely the majority's approach in this case. *See* Maj. Op. at 51 ("Plaintiffs claim that to the extent Defendants did not have statutory authority to reprogram the funds, they acted in violation of constitutional separation of powers principles because Defendants lack any background constitutional authority to appropriate funds."). The Supreme Court rejected this type of constitutional claim, flatly reminding us that "[t]he distinction between claims that an official exceeded his statutory authority, on the one hand, and claims that he acted in violation of the Constitution, on the other, is too well established to permit this sort of evisceration." *Dalton*, 511 U.S. at 474.

Finally, the distinction between an Appropriations Clause violation and a non-constitutional "exceeding statutory authority" claim turns on the degree of discretion Congress has provided to the agency or President in appropriating funds. On the one hand, if Congress has entirely withdrawn agency discretion over the who, what, when, where, and why of agency spending, an Appropriations Clause violation may lie. *See, e.g.*, *United States v. McIntosh*, 833 F.3d 1163, 1172, 1175 (9th Cir. 2016). On the other hand, if Congress has merely appropriated a lump-sum amount and leaves it to the agency to re-allocate funds toward a particular statutory purpose, Congress has provided such discretion to the agency that, not only could there be no *constitutional* violation, a challenger does not even have a viable "exceeding statutory authority" claim.[4] *See Lincoln v. Vigil*, 508 U.S. 182, 193 (1993). Section 8005, which appropriates funds to the DoD and makes allocating those funds incumbent on the Secretary's determination of the "national interest" and other factors, falls somewhere in the middle. Unlike the appropriations language in *McIntosh*, which we observed "*specifically* restricts [the Department of Justice (DOJ)] from spending money to pursue certain activities," 833 F.3d at 1172 (emphasis added), or the non-discretionary "not to exceed" and "shall be allotted" language in *Train v. City of New York*, 420 U.S. 35, 42 (1975), § 8005 provides some discretion over the who, what, when, where, and why of agency spending. Yet, unlike the virtually unfettered discretion of the agency to reallocate funds towards particular statutory purposes in *Lincoln*, 508 U.S. at 192-

[4] The statutory claims in *Dalton* ultimately failed on this basis. *See Dalton*, 511 U.S. at 474-76.

93, § 8005 constrains the discretion and the DoD is "not free simply to disregard *statutory* responsibilities." *Id.* at 193 (emphasis added). Accordingly, the DoD's reprogramming of funds is a judicially reviewable statutory claim. The majority overlooks these points.

In attempting to distinguish *Dalton*, the majority misstates the chronology of the Supreme Court's decision, claiming that "[t]he Supreme Court held that the plaintiff's statutory challenge to the President's decision failed because the statute gave the President unfettered discretion . . . [and] then also rejected the argument that because the President had allegedly violated the statute, he had acted unconstitutionally." Maj. Op. at 49. However, the Supreme Court declared *first* that there was no constitutional issue, *Dalton*, 511 U.S. at 472-74, and only thereafter determined that the plaintiffs' statutory claim failed based on the President's unfettered discretion, *id.* at 474-76. Consequently, the Court's conclusion that "no constitutional question whatever is raised" did not stem from its later conclusion that the President had, in fact, acted within his statutory authority in that case. *Id.* at 474 n.6; *see also id.* at 476-77 ("In sum . . . [t]he claim that the President exceeded his authority under the 1990 Act *is not a constitutional claim, but a statutory one*. Where a statute, such as the 1990 Act, commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available." (emphasis added)).

The majority also attempts to distinguish *Dalton* on the grounds that it "did not say . . . that action in excess of statutory authority can *never* violate the Constitution or give rise to a constitutional claim." Maj. Op.

at 49. Albeit true that claims alleging statutory violations and those alleging constitutional violations are not mutually exclusive, *Dalton* expressly discussed when the two may be asserted together—by pointing to cases where the constitutionality of the authorizing statute itself is called into question. *Dalton*, 511 U.S. at 473 n.5; *see, e.g.*, *Chamber of Commerce of United States v. Reich*, 74 F.3d 1322, 1325 (D.C. Cir. 1996) (determining that a claim raised a constitutional violation, because it alleged that the relevant statutory authority itself was "an unconstitutional delegation" of Congressional power). But Plaintiffs have not alleged that § 8005 is itself unconstitutional.

The majority's approach would turn our current system of administrative review on its head, directing courts in this circuit to deem *unconstitutional* any reviewable executive actions (i.e., any actions that are not entirely within the actor's discretion) that exceed a *statutory* grant of authority. Such an approach directly contradicts the Supreme Court's declaration that "[o]ur cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution."[5] *Dalton*, 511 U.S. at 472. For those reasons, the majority's approach is flawed; no claim of a constitutional violation exists in this case.

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[5] The majority's approach is also directly contradicted by the D.C. Circuit. In *Mountain States Legal Foundation v. Bush*, our sister circuit determined that "[n]o constitutional . . . claim is before us, as the President exercised his delegated powers *under the Antiquities Act*," precisely because "that statute includes intelligible principles to guide the President's actions." 306 F.3d 1132, 1137 (D.C. Cir. 2002) (emphasis added).

**2. Plaintiffs have no Implied Statutory Claim**

Whether Plaintiffs have an implied statutory cause of action under § 8005 turns on "whether Congress intended to create a private cause of action." *Karahalios v. Nat'l Fed'n of Fed. Emps., Local 1263*, 489 U.S. 527, 532 (1989) (citation and internal quotation marks omitted).

Here, "[t]here is no express suggestion" that Congress intended a direct judicial remedy for a § 8005 violation, and "neither the language nor the structure of the Act shows any congressional intent to provide a private cause of action to" judicially enforce such a violation. *Id.* at 532-33. Likewise, "[n]othing in the legislative history of [§ 8005] has been called to our attention indicating that Congress contemplated direct judicial enforcement." *Id.* at 533.

Furthermore, § 8005 is directed not at private parties or individuals, but at the Secretary of Defense; creates no apparent individual rights, much less an individual remedy; and "lacks the sort of rights-creating language needed to imply a private right of action." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387 (2015).

**3. Plaintiffs have no APA Claim**

With *Dalton* limiting our ability to construe Plaintiffs' claim as alleging a constitutional violation, and with no implied statutory cause of action to challenge the agency's action as a violation of § 8005, Plaintiffs are left with challenging the DoD's reprogramming under the APA as an "abuse of discretion," "not in accordance with law," or "in excess of statutory jurisdiction." *See* 5 U.S.C. § 706(2)(A), (C). *See Clouser v. Espy*, 42 F.3d

1522, 1527 n.5 (9th Cir. 1994) (construing a plaintiff's challenge to Forest Service rulings "as issued without statutory authority" to be "a claim challenging agency action 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right' under 5 U.S.C. § 706(2)(C)"). However, although the APA is the proper vehicle for challenging the DoD's § 8005 reprogramming, Plaintiffs are not a proper party to bring such a claim, as they fall outside § 8005's zone of interests. The majority errs by fashioning an equitable claim to bypass the APA's limitations.

**a. The APA is the Proper Vehicle for Challenging the DoD's Action**

Where a statute imposes obligations on a federal agency but "does not give rise to a 'private' right of action against the federal government[,] [a]n aggrieved party may pursue its remedy under the APA." *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1096-99 (9th Cir. 2005) (explaining how a federal action is nearly always reviewable under the APA for conformity with statutory obligations even absent a "private right of action"). In other words, the APA opens the door for judicial review provided: (1) the agency's action is "final," 5 U.S.C. § 704; (2) the statute imposing obligations on the federal agency does not "preclude judicial review," *id.* § 701(a)(1); and (3) the agency action is not "committed to agency discretion by law," *id.* § 701(a)(2). *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). Each element is satisfied here.

First, the agency's action satisfies the test for "final agency action" for purposes of 5 U.S.C. § 704. The fi-

nality of an agency's action turns on whether the decision represents the "consummation of the agency's decisionmaking process" and whether it determines rights or obligations, or from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted). After approving the Department of Homeland Security's (DHS) request for support under 10 U.S.C. § 284, the Secretary of Defense concluded support could be funded through the reprogramming of funds under § 8005. The Secretary found the § 8005 criteria were met. Following the necessary procedures, the DoD transferred the funds to the Drug Interdiction and Counter-Drug Activities, Defense, appropriation account. Because the DoD committed those funds for § 284(b)(7) support, "legal consequences [began to] flow." *See Bennett*, 520 U.S. at 178 (citation omitted). Indeed, Defendants acknowledge that the § 8005 transfer was necessary for authorizing support under § 284 and constructing the wall.

Second, as explained above, § 8005 does not "preclude judicial review." *See* 5 U.S.C. § 701(a)(1). Further, neither party presented "clear and convincing evidence" that § 8005 precludes APA's default remedy. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

Finally, the DoD's reprogramming of funds under § 8005 is not "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Defendants do not argue to the contrary, nor would such an argument succeed. The APA embodies a broad presumption of judicial review of agency action. *Abbott Labs.*, 387 U.S. at 140-41. Out of concern that "legal lapses and violations occur, and

especially so when they have no consequence," *Weyerhaeuser Co.*, 139 S. Ct. at 370 (quoting *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1652-53 (2015)), the Supreme Court "read[s] the [phrase 'committed to agency discretion'] quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Id.* (quoting *Lincoln*, 508 U.S. at 191).

The appropriation scheme governing § 8005 allows the DoD to reprogram funds provided the transferred funds address "higher priority items, based on unforeseen military requirements, than those for which originally appropriated."[6] § 8005. And "in no case" may the Secretary use the funds "where the item for which reprogramming is requested has been denied by the Congress." *Id.* Thus, we do not confront one of those rare circumstances where a court would have no meaningful standard for judging the agency's exercise of discretion. *See Weyerhaeuser*, 139 S. Ct. at 371-72 (citing *Lincoln*, 508 U.S. at 191); *accord Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). For example, whether the "item" to be funded by the reprogrammed funds was "denied" by Congress turns on a meaningful question of statutory interpretation —i.e., what does "item" and "denied" mean?[7] This court is generally required to provide some deference to such

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[6] Section 9002 is subject to these same limitations.

[7] Unlike in *Lincoln*, the appropriation scheme governing Plaintiffs' claims does not involve a lump-sum appropriation designed with merely a general, overarching goal and no specific strings attached to the money. 508 U.S. at 189-92.

an interpretation, depending on the circumstance, *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944),[8] but the phrase undoubtedly places a judicially reviewable constraint on the DoD's actions.

**b. Plaintiffs are Not the Proper Party to Bring an APA Claim**

However, to bring a valid APA claim, Plaintiffs must establish that they "fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (citation omitted). They have failed to do so.[9]

The zone of interests test requires a court to determine whether, "in view of Congress' evident intent to

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[8] In determining whether Defendants violated § 8005, we should defer to the DoD's interpretation under *Skidmore*. *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 487 (2004). *Skidmore* deference operates like a sliding scale, meaning the degree of deference we give the agency's interpretation of a statute "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. We also consider whether the agency has changed its position or whether its interpretation "was framed for the specific purpose of aiding a party in this litigation." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 400 (2008).

[9] Because the majority concludes Plaintiffs' APA claim is constitutional, we disagree as to what zone of interests applies. However, as a statutory claim, Plaintiffs must fall within the zone of interests of § 8005. They have failed to do so. Because this claim should not be viewed as a constitutional claim under the Appropriations Clause, it is not necessary to decide whether Plaintiffs could (or would need to) fall within that zone of interests.

make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987). "[T]he relevant zone of interests is not that of the APA itself, but rather the zone of interests to be protected or regulated by the statute that the plaintiff says was violated." *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1244 (9th Cir. 2018) (alteration omitted) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012)). "[W]e first discern the interests arguably to be protected by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them." *Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 492 (1998) (alteration and internal quotation marks omitted).

Although, "in the APA context, . . . the test is not 'especially demanding,'" *Lexmark*, 572 U.S. at 130, it "is not toothless," *Nw. Requirements Utils. v. FERC*, 798 F.3d 796, 808 (9th Cir. 2015). "In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399. Even under this generous standard, we have found certain APA claims fail the zone of interests test.[10] *See, e.g.*, *Ashley Creek*

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[10] Plaintiffs cite the D.C. Circuit's decision in *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356 (D.C. Cir. 1996) as "illustrat[ing] the expansive zone of interests for claims

*Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005) ("[P]urely economic interests do not fall within [the National Environmental Policy Act's (NEPA)] zone of interests" because "the zone of interests that NEPA protects [is] environmental."); *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1166-67 (9th Cir. 2018) (recognizing that the plaintiff's environmental interests fell outside the Mining Act's zone of interests, but within the Federal Land Policy and Management Act's zone of interests); *Nw. Requirements Util*s., 798 F.3d at 809 (determining zone of interests test not satisfied where the plaintiffs' goals were likely to frustrate rather than further statutory objectives).

Here, Plaintiffs' interests fall outside § 8005's zone of interests. Section 8005 operates only to authorize the Secretary of Defense to transfer previously-appropriated funds between DoD accounts, based upon certain conditions and circumstances. This statute arguably protects Congress and those who would have been entitled to the funds as originally appropriated; and as a budgetary statute regarding the transfer of funds among DoD accounts, it arguably protects economic interests. Plaintiffs have not asserted that they would have been entitled to the funds but for the transfer, nor have they raised any other economic interests. Rather, they assert aesthetic, recreational, and generalized environmental interests that will be affected, not by the transfer

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arising under statutes protecting Congress's control over appropriations decisions." However, that case merely applied the same zone of interests test that we do here to determine that the plaintiff's economic interests were "sufficiently congruent" with the statute and fell within the zone of interests. *Id.* at 1360.

of funds, but by the building of the border wall. Nothing in § 8005 requires that aesthetic, recreational, or environmental interests be considered before a transfer is made, nor does the statute even address such interests. At best, Plaintiffs' interests are only "marginally related to . . . the purposes implicit in the statute [such] that it cannot reasonably be assumed that Congress intended to permit the suit," *Clarke*, 479 U.S. at 399, and they fall outside § 8005's zone of interests. Thus, Plaintiffs may not bring this APA claim, because their interests are not protected by the relevant statute.

**c. The Existence of an APA Claim Also Precludes an Equitable Constitutional Claim**

Even though *these* Plaintiffs lack a cause of action under the APA, this court cannot save their claim by fashioning an "equitable" work-around to assert a constitutional claim, as the majority has done. Even if we ignored the discretion § 8005 provides to the DoD and thus could reframe Plaintiffs' claim as a constitutional one, the APA's "scope of review" provision would cover it. Those provisions provide that a reviewing court shall:

> [H]old unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) *contrary to constitutional right, power, privilege, or immunity*;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]

5 U.S.C. § 706(2) (emphasis added). Where courts can review an agency action under the APA to ensure the

agency has not abused its discretion, violated the Constitution, or otherwise operated outside its authority, we have no business devising additional "equitable" causes of action. Here, an avenue for challenging the DoD's reprogramming action exists under the APA—just not for these Plaintiffs. Thus, there is no reason to resort to the extraordinary step of implying an equitable cause of action for these Plaintiffs.

As the majority recognizes, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity." *See Armstrong*, 135 S. Ct. at 1384-85. However, this "judge-made remedy" does not provide courts the unfettered power to enjoin executive action; our power "is subject to express and implied statutory limitations." *Id.* at 1385. The majority ignores this limitation, relying on inapposite cases to conclude that a federal court's "equity" jurisdiction allows any would-be plaintiff to avoid proceeding under the APA. Maj. Op. at 46-47. That the Supreme Court considered challenges to a *president*'s action in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) and *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) lends the majority no support; the APA does not apply to the President, *see Dalton*, 511 U.S. at 468, so *no plaintiff* would have an APA claim in those cases. Yet this case is about an *agency* action, and therefore the APA applies. Moreover, *McIntosh* arose in a very different context; our court did not "allow[] an equitable action to enforce the Appropriations Clause," Maj. Op. at 48, we considered the Appropriations Clause as a *defense* for criminal defendants indicted for federal marijuana offenses, *McIntosh*, 833 F.3d at 1168 ("We are asked to decide whether criminal defendants may avoid prosecution for various federal marijuana offenses on

the basis of a congressional appropriations rider that prohibits the United States Department of Justice from spending funds to prevent states' implementation of their own medical marijuana laws."). Allowing defendants to invoke constitutional principles as a defense is common, *see, e.g.*, *Bond v. United States*, 564 U.S. 211, 225-26 (2011), and distinguishable from the affirmative enforcement that the majority provides here.[11]

The majority's reliance on *Armstrong* highlights its fundamental misunderstanding of cases involving a court's equitable power to enjoin acts violating federal law. Maj. Op. at 52-53. Congress has not *displaced* the possibility of judge-made equitable remedies against federal agencies through the APA, *see Armstrong*, 135 S. Ct. at 1385, it *codified* judicial review of agency action.[12] *Cf. W. Radio Servs. Co. v. U.S. Forest Serv.*, 578

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[11] The majority misunderstands my point about the distinguishing features of *McIntosh*. Maj. Op. at 48. The question facing the *McIntosh* court was whether criminal defendants could halt their prosecutions by attacking how the DOJ was funding the prosecutions. 833 F.3d at 1172-73. All of the defendants "filed motions to dismiss or to enjoin on the basis of the rider." *Id.* at 1170. In granting relief, the court stated that it "need not decide in the first instance exactly how the district courts should resolve claims that the DOJ is spending money to prosecute a defendant in violation of an appropriations rider. We therefore take no view on the precise relief required and leave that issue to the district courts in the first instance." *Id.* at 1172 n.2. As such, *McIntosh* simply did not address or contemplate an injunction to enjoin spending funds parallel to the pending criminal proceedings.

[12] Without supporting authority, the majority even suggests that the availability of an equitable cause of action would *preclude* an APA claim under the APA provision providing for judicial review when "there is no other adequate remedy in a court." Maj. Op. at 57 (quoting 5 U.S.C. § 704).

F.3d 1116, 1123 (9th Cir. 2009) ("The fact that APA's procedures are available where no other adequate alternative remedy exists further indicates Congress's intent that courts should not devise additional, judicially crafted default remedies."); *San Carlos Apache Tribe*, 417 F.3d at 1096-97 ("[C]reating a direct private action against the federal government makes little sense in light of the administrative review scheme set out in the APA.").[13]

The majority's failure to channel Plaintiffs' claims through the APA's framework for challenging agency action will inevitably lead to peculiar results. What prevents future plaintiffs from simply challenging any agency action "equitably," thereby avoiding the APA's limited judicial review under the "arbitrary and capricious" standard, so that a court may substitute its own judgment for that of the agency? *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The majority offers no reason to distort decades of ad-

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[13] The majority's reliance on *Navajo Nation v. Department of the Interior*, 876 F.3d 1144 (9th Cir. 2017) and *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989) is misplaced. *Presbyterian Church* reserved the determination of whether there was "agency action" within the meaning of the APA, 870 F.2d at 525 n.8, meaning there was no "alternative" APA claim. *Navajo Nation* addressed the limits of the APA's waiver of sovereign immunity, but offered no guidance about the propriety of bringing parallel claims espousing the same theory under two different causes of action (under the APA and "equitably"). 876 F.3d at 1171-72. Thus, neither case stands for the proposition that, where (as here) an agency action *is* reviewable under the APA, Plaintiffs may bring a parallel "equitable" claim.

ministrative law practice to recognize Plaintiffs' "equitable" action when the APA provides for review of the DoD's reprogramming actions.

Although it may seem unjust that Plaintiffs have no viable recourse for their asserted injuries, "[t]he judicial power of the United States conferred by Article III of the Constitution is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute." *Dalton*, 511 U.S. at 477. Plaintiffs' relief has been permissibly foreclosed here, and Defendants have accordingly demonstrated a strong likelihood of success on the merits of their appeal.

**II. The Other Relevant Factors Also Favor a Stay**

To reemphasize, the issue before us is a motion to stay the district court's injunction under Federal Rule of Appellate Procedure 8. We are limited to decide only whether a stay should be granted until the appeal on the merits is final. Although "[a] stay is not a matter of right, even if irreparable injury might otherwise result," it is "an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken*, 556 U.S. at 433 (citations, alteration, and quotation marks omitted). Here, the circumstances of this case merit our discretionary relief pending appeal.

Even if Defendants had failed to show a strong likelihood of success on the merits, they "may be entitled to prevail if [they] can demonstrate a 'substantial case on the merits' and the second and fourth factors [irreparable injury and public interest] militate in [their] favor."

*Winter*, 502 F.3d at 863. Because Plaintiffs have no viable claim for relief, Defendants have more than demonstrated a substantial case on the merits.[14] Therefore, our panel must "give serious consideration" to the second and fourth factors. *Id.*

As to irreparable harm, Defendants argue that without a stay they will be prevented from ever using the enjoined funds to complete the identified projects addressed by the permanent injunction. Defendants are likely correct. The funding for those projects will lapse on September 30th, and even if Defendants prevail in this court's final ruling, we could not order or permit Defendants to spend funds granted in a lapsed appropriation. *See, e.g.*, *City of Houston v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1424, 1426-27 (D.C. Cir. 1994). No one appears to dispute that this will likely be the practical consequence if a stay is denied. Congress may opt to appropriate new funds for these projects in the future, but that possibility is irrelevant. Simply, the permanent injunction will certainly render Defendants unable to use the funds at issue here under

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[14] As to the discretionary standard of review, the district court did not apply the second and fourth factors (for the short period of time for which this appeal would be pending) to the request for the permanent injunction. Thus, its factual findings are not clear as to the motion before us. It did have the occasion to apply these two factors in its analysis of the stay of the preliminary injunction. However, in its analysis of that stay, it chose to ignore these factors, concluding that, "[b]ecause the Court finds that Defendants have not met their burden to make a strong showing that they are likely to succeed on the merits of their appeal, the Court need not further address the other *Nken* factors." *Sierra Club v. Trump*, No. 19-CV-00892-HSG, 2019 WL 2305341, at *2 n.2 (N.D. Cal. May 30, 2019). This conclusion was an abuse of discretion. *See Winter*, 502 F.3d at 862.

§ 284(b)(7). Thus, there is a "possibility that . . . corrective relief will [not] be available at a later date, in the ordinary course of litigation." *See Sampson v. Murray*, 415 U.S. 61, 90 (1974). Therefore, Defendants have demonstrated that they will be irreparably injured if a stay is not issued. *See id.*

As to the public interest, Defendants argue that their interests in preventing drug trafficking easily outweigh Plaintiffs' aesthetic, recreational, and generalized environmental injuries. In the narrow context of this stay motion, Defendants are correct. Even though environmental injuries may be significant in the long term, the injunction will only be stayed for a short period.[15] If the DoD is precluded from obligating these funds in the 2019 fiscal year, it must forgo providing support under § 284(b)(7). Defendants have adequately demonstrated that the public interest weighs in their favor for supporting § 284(b)(7) for at least three reasons.[16]

First, no one disputes that Defendants have broad authority to carry out a variety of actions aimed at disrupting the cross-border flow of narcotics in the affected areas. *Cf. United States v. Guzman-Padilla*, 573 F.3d 865, 889 (9th Cir. 2009). Nor does anyone dispute that Defendants are authorized by statute to construct fencing and other barriers for that purpose in the areas at

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[15] As previously noted, the parties have suggested that an expedited briefing schedule will be requested. Given the need for a timely resolution of this case, this case should be resolved shortly.

[16] Whether the district court appropriately balanced these interests when it issued the permanent injunction is not before us. Our inquiry is limited to the motion to stay, and the final determination on the balance on interests is one that the merits panel will ultimately decide.

issue in this lawsuit. *See* 10 U.S.C. § 284(b)(7). Nor even does anyone seriously dispute the DoD's determination that drug trafficking along our southern border (including in the project areas at issue here) threatens the safety and security of our nation and its citizens. *See Winter*, 502 F.3d at 862 ("We customarily give considerable deference to the Executive Branch's judgment regarding foreign policy and national defense." (citing *Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988))); *see also Franklin*, 505 U.S. at 818. Given this significant national security interest, the public would benefit more from a stay that—while this appeal is pending—permits Defendants to effect the policies that it has determined are necessary to minimize that threat, than it would from a decision that hampers Defendants' ability to combat this threat throughout the present appellate process.[17]

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[17] The record does not reflect that Congress "denied" funding under § 284. The funds at issue here will be used solely to "provide support for the counterdrug activities." § 284. The fact that there were numerous discussions surrounding the building of a wall, during the budgetary negotiations and the shut down of the government, does not alter what Congress set forth in its appropriations bill for the DoD. *See Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 200 (2012) ("An agency's discretion to spend appropriated funds is cabined only by the 'text of the appropriation,' not by Congress' expectations of how the funds will be spent, as might be reflected by legislative history." (citation omitted)). Nowhere in the DoD Appropriations Act are there limitations on its ability to act under § 284. Moreover, the transfer of funds stays within the DoD's allotted appropriations and does not increase the appropriations of the DHS. Even if we should look to all appropriation acts, the only limitations placed on the DHS "for the construction of pedestrian fencing" were for geographic areas and "funds made available by this

Second, if the injunction is allowed to remain in effect, it will, for reasons outlined above, potentially cause irreparable harm to Defendants. On the other hand, the irreparable harm to Plaintiffs during this relatively short period (if a stay is granted) is less clear. Defendants have represented to this court that the projects at issue are needed to protect national security and must go forward even if there is a possibility that a merits panel may eventually order them to remove whatever was constructed while a stay was in place. This is not the sort of determination that courts will ordinarily second guess. *See Winter*, 502 F.3d at 862; *Franklin*, 505 U.S. at 818 (recognizing "the principle of judicial deference that pervades the area of national security"); *see also Munaf v. Geren*, 553 U.S. 674, 689 (2008) ("We therefore approach these questions cognizant that 'courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.'" (quoting *Egan*, 484 U.S. at 530)). It is difficult to determine that Plaintiffs' inability to recreate in and otherwise enjoy this public land would outweigh the claimed national interests during the limited period of time the requested stay would be in place—especially considering Plaintiffs do not have a viable cause of action to challenge Defendants' actions under § 8005.

Third, the district court's reasoning that the public interest does not favor Defendants, because the public has a generalized interest in ensuring that the Executive acts within the limits imposed by statute and by the Constitution, simply begs the question. If a court accepts the premise that Defendants exceeded statutory

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Act or prior Acts." *See* Pub. L. No. 116-6, § 231, 133 Stat. 13, 28. *see also id.* § 232.

or constitutional limitations on its authority, then the public has an interest in seeing that the Executive Branch is "reined in." However, if Defendants show that they did not exceed those bounds, then the public interest articulated by Plaintiffs and the district court has no merit. Moreover, when considering whether to grant a stay, the public interest factor cannot rise or fall on how the appeal is ultimately resolved on its merits. That analysis would collapse the public interest factor into the first element of the four-part test.

In conclusion, because Defendants have more than demonstrated a substantial case on the merits, and because the second and fourth factors "militate in [their] favor," we should exercise our discretion and issue a stay pending the appeal of the district court's permanent injunction. *See Winter*, 502 F.3d at 863. It makes little sense to tie Defendants' hands while the appellate process plays out, especially given Plaintiffs' lack of a viable claim and given the national security considerations present in this case.

**APPENDIX G**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Nos. 19-16102, 19-16300
D.C. No. 4:19-cv-00892-HSG
Northern District of California, Oakland

SIERRA CLUB; SOUTHERN BORDER COMMUNITIES COALITION, PLAINTIFFS-APPELLEES

*v.*

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; ET AL., DEFENDANTS

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No. 19-16299
D.C. No. 4:19-cv-00872-HSG
Northern District of California, Oakland

STATE OF CALIFORNIA; ET AL., PLAINTIFFS-APPELLEES

*v.*

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA; ET AL., DEFENDANTS-APPELLANTS

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[Filed: July 3, 2019]

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**ORDER**

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Before: CLIFTON, N.R. SMITH, and FRIEDLAND, Circuit Judges.

The motion to consolidate appeal Nos. 19-16102 and 19-16300 is granted. We defer resolution of the request to consolidate appeal No. 19-16299, which will be addressed by separate order.

Briefing is stayed in these appeals pending further order.

**APPENDIX H**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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Case No. 19-cv-00892-HSG

SIERRA CLUB, ET AL., PLAINTIFFS

*v.*

DONALD J. TRUMP, ET AL., DEFENDANTS

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Filed: May 30, 2019

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**ORDER DENYING MOTION**
**TO STAY PRELIMINARY INJUNCTION**
**Re: Dkt. Nos. 146, 147**

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Pending before the Court is Defendants' Motion to Stay Preliminary Injunction Pending Appeal. *See* Dkt. No. 146 ("Mot."). Defendants seek a stay of the Court's May 24, 2019 preliminary injunction order pending the outcome of their recently filed appeal to the United States Court of Appeals for the Ninth Circuit. *See* Dkt. No. 144 ("Order"). The Order enjoined Defendants from "taking any action to construct a border barrier in the areas Defendants have identified as Yuma Sector Project 1 and El Paso Sector Project 1 using funds reprogrammed by DoD under Section 8005 of the Department of Defense Appropriations Act, 2019." *Id.* at 55.[1]

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[1] Reasonably, Defendants "request that the Court rule on this motion expeditiously," without a response from Plaintiffs, and without

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotation marks omitted). Instead, it is "an exercise of judicial discretion," and "the propriety of its issue is dependent upon the circumstances of the particular case." *Id.* (internal quotation and alteration marks omitted). The party seeking a stay bears the burden of justifying the exercise of that discretion. *Id.* at 433-34.

Whether to grant a stay pending appeal involves a similar inquiry as whether to issue a preliminary injunction. *Tribal Vill. of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988). Courts consider four familiar factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434 (noting overlap with *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008)). The first two factors "are the most critical." *Id.*

The Court will not stay its preliminary injunction order pending Defendants' appeal. The Court does not find that Defendants are likely to prevail on the merits of their appeal. In granting the preliminary injunction, the Court rejected all of the arguments Defendants now

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oral argument, so that Defendants may promptly seek relief in the Ninth Circuit if the Court denies the motion to stay. Mot. at 1. The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. *See* Civil L.R. 7-1(b). The Court further finds that no response from Plaintiffs is necessary.

advance regarding their intended use of funds reprogrammed by DoD under Section 8005, and found that Plaintiffs, not Defendants, were likely to succeed on the merits of their respective arguments. The Court incorporates that reasoning here. Moreover, Defendants' request to proceed immediately with the enjoined construction would not preserve the status quo pending resolution of the merits of Plaintiffs' claims, and would instead effectively moot those claims. Finally, the Court continues to see no reason that the merits of this case cannot be resolved expeditiously, enabling the parties to litigate a final judgment on appeal, rather than a preliminary injunction.

For these reasons, the Court **DENIES** Defendants' Motion to Stay.[2] Defendants' Motion to Shorten Time is **TERMINATED AS MOOT**. *See* Dkt. No. 147.

**IT IS SO ORDERED.**

Dated: 5/30/2019

/s/ HAYWOOD S. GILLIAM, JR.
HAYWOOD S. GILLIAM, JR.
United States District Judge

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[2] Because the Court finds that Defendants have not met their burden to make a strong showing that they are likely to succeed on the merits of their appeal, the Court need not further address the other *Nken* factors.

**APPENDIX I**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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Case No. 19-cv-00892-HSG

SIERRA CLUB, ET AL., PLAINTIFFS

*v.*

DONALD J. TRUMP, ET AL., DEFENDANTS

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Filed: May 24, 2019

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**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**
**Re: Dkt. No. 29**

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On February 19, 2019, Sierra Club and Southern Border Communities Coalition ("SBCC") (collectively, "Citizen Group Plaintiffs" or "Citizen Groups") filed suit against Defendants Donald J. Trump, in his official capacity as President of the United States; Patrick M. Shanahan, in his official capacity as Acting Secretary of Defense; Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security[1]; and Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury (collectively, "Federal Defendants"). Dkt. No. 1. This action followed a related

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[1] Acting Secretary McAleenan is automatically substituted for former Secretary Kirstjen M. Nielsen. *See* Fed. R. Civ. P. 25(d).

suit brought by a coalition of states (collectively, "Plaintiff States" or "States") against the same—and more—Federal Defendants. *See* Complaint, *California v. Trump*, No. 4:19-cv-00872-HSG (N.D. Cal. Feb. 18, 2019), ECF No. 1. Plaintiffs here filed an amended complaint on March 18, 2019. Dkt. No. 26 ("FAC").

Now pending before the Court is Plaintiffs' motion for a preliminary injunction, briefing for which is complete. *See* Dkt. Nos. 29 ("Mot."), 64 ("Opp."), 91 ("Reply"). The Court held a hearing on this motion on May 17, 2019. *See* Dkt. No. 138. In short, Plaintiffs seek to prevent executive officers from using redirected federal funds for the construction of a barrier on the U.S.-Mexico border.

It is important at the outset for the Court to make clear what this case is, and is not, about. The case is not about whether the challenged border barrier construction plan is wise or unwise. It is not about whether the plan is the right or wrong policy response to existing conditions at the southern border of the United States. These policy questions are the subject of extensive, and often intense, differences of opinion, and this Court cannot and does not express any view as to them. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (indicating that the Supreme Court "express[ed] no view on the soundness of the policy" at issue there); *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092, 1102 (S.D. Cal. 2018) (noting that the court "cannot and does not consider whether underlying decisions to construct the border barriers are politically wise or prudent"). Instead, this case presents strictly legal questions regarding whether the proposed plan for

funding border barrier construction exceeds the Executive Branch's lawful authority under the Constitution and a number of statutes duly enacted by Congress. *See In re Aiken Cty.*, 725 F.3d 255, 257 (D.C. Cir. 2013) ("The underlying policy debate is not our concern. . . . Our more modest task is to ensure, in justiciable cases, that agencies comply with the law as it has been set by Congress.").

Assessing whether Defendants' actions not only conform to the Framers' contemplated division of powers among co-equal branches of government but also comply with the mandates of Congress set forth in previously unconstrued statutes presents a Gordian knot of sorts. But the federal courts' duty is to decide cases and controversies, and "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule." *See Marbury v. Madison*, 1 Cranch 137, 177 (1803). Rather than cut the proverbial knot, however, the Court aims to untie it—no small task given the number of overlapping legal issues. And at this stage, the Court then must further decide whether Plaintiffs have met the standard for obtaining the extraordinary remedy of a preliminary injunction pending resolution of the case on the merits.

After carefully considering the parties' arguments, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' motion.

## I. FACTUAL BACKGROUND

The President has long voiced support for a physical barrier between the United States and Mexico. *See, e.g.*, Request for Judicial Notice, *California v. Trump*, No. 4:19-cv-00872-HSG (N.D. Cal. Apr. 8, 2019), ECF

No. 59-4 ("States RJN") Ex. 3 (June 16, 2016 Presidential Announcement Speech) ("I would build a great wall, and nobody builds walls better than me, believe me, and I'll build them very inexpensively, I will build a great, great wall on our southern border. And I will have Mexico pay for that wall.").[2] Upon taking office in 2017, the President's administration repeatedly sought appropriations from Congress for border barrier construction. *See, e.g.*, *Budget of the U.S. Government: A New Foundation for American Greatness: Fiscal Year 2018*, Office of Mgmt. & Budget 18 (2017), https://www.whitehouse.gov/wp-content/uploads/2017/11/budget.pdf (requesting "$2.6 billion in high-priority tactical infrastructure and border security technology, including funding to plan, design, and construct a physical wall along the southern border"). Congress provided some funding, including $1.571 billion for fiscal year 2018. *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. F, tit. II, § 230(a) 132 Stat. 348 (2018). And

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[2] Defendants do not oppose the Plaintiff States' request to take judicial notice of various documents. The Court finds it may take judicial notice of documents from Plaintiff States' request that are cited in this order, all of which are: (1) statements of government officials or entities that are not subject to reasonable dispute; (2) bills considered by Congress or other legislative history; or (3) other public records and government documents available on reliable internet sources, such as government websites. *See DeHoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 763 n.5 (9th Cir. 2018) (taking "judicial notice of government documents, court filings, press releases, and undisputed matters of public record"); *Hawaii v. Trump*, 859 F.3d 741, 773 n.14 (9th Cir. 2017) (taking judicial notice of President's tweets), *vacated on other grounds*, 138 S. Ct. 377 (2017); *Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) ("Legislative history is properly a subject of judicial notice.").

Congress considered several bills that, if passed, would have authorized or otherwise appropriated billions of dollars more for border barrier construction. *See* States RJN Exs. 14-20. None passed.

In December 2018—as Congress and the President were negotiating an appropriations bill to fund various federal departments for what remained of the fiscal year—the President announced that he would not sign any funding legislation that lacked substantial funds for border barrier construction. *Farm Bill Signing*, C-SPAN (Dec. 20, 2018), https://www.c-span.org/video/?456189-1/president-government-funding-bill-include-money-border-wall ("I've made my position very clear. Any measure that funds the government must include border security. . . . Walls work whether we like it or not. They work better than anything."). Congress did not pass a bill with the President's desired border barrier funding and, due to this impasse, the United States entered into the nation's longest partial government shutdown.

The President and those in his administration stated on several occasions before, during, and after the shutdown that, although Congress should make the requisite funds available for border barrier construction, the President was willing to use a national emergency declaration and other reprogramming mechanisms as funding backstops. For example, during a December 11, 2018 meeting with congressional representatives, the President stated that "if we don't get what we want [for border barrier construction funding], one way or the other—whether it's through [Congress], through a military, through anything you want to call [sic]—I will shut down the government. Absolutely." States RJN Ex.

21. The White House initially requested only $1.6 billion for border barrier construction for the fiscal year 2019 budget, for sixty-five miles of border barrier construction "in south Texas." *See* Supplemental Request for Judicial Notice, *California v. Trump*, No. 4:19-cv-00872-HSG (N.D. Cal. Apr. 8, 2019), ECF No. 112-1, Ex. 51, at 58. However, the White House increased its request on January 6, 2019, when the Acting Director of the Office of Management and Budget transmitted a letter to the U.S. Senate Committee on Appropriations, "request[ing] $5.7 billion for construction of a steel barrier for the Southwest border," and explaining that the request "would fund construction of a total of approximately 234 miles of new physical barrier." *See* Dkt. No. 36 ("Citizen Groups RJN") Ex. A, at 1.[3] The increased request specified that "[a]ppropriations bills for fiscal year (FY) 2019 that have already been considered by the current and previous Congresses are inadequate to fully address these critical issues," including the need for border barrier construction funds. *Id.* Days later, the President explained: "If we declare a national emergency, we have a tremendous amount of funds—tremendous—if we want to do that, if we want to go that route. Again, there is no reason why we can't come to a deal. . . . [Congress] could stop this problem in 15 minutes if they wanted to." States RJN Ex. 13.

After the government shutdown ended, the President and others in his administration reaffirmed their intent

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[3] The Court takes judicial notice of documents submitted by the Citizen Group Plaintiffs, consideration of which Defendants do not oppose, and the accuracy of the contents of which similarly "cannot be questioned." *See* discussion *supra* note 2.

to fund a border barrier, with or without Congress's blessing. On February 9, 2019, the President explained that even if Congress provided less than the requested funding for a border barrier, the barrier "[would] get built one way or the other!" Citizen Groups RJN Ex. C. The next day, the Acting White House Chief of Staff explained that the Administration intended to accept whatever funding Congress would offer and then use other measures to reach the President's desired funding level for border barrier construction:

> The President is going to build a wall. You saw what the Vice-President said there, and that's our attitude at this point, which is: We'll take as much money as you can give us, and then we'll go off and find the money someplace else, legally, in order to secure that southern barrier. But this is going to get built, with or without Congress.

*See* Fox News, *Mick Mulvaney on chances of border deal, Democrats ramping up investigation of Trump admin*, YouTube (Feb. 10, 2019), https://www.youtube.com/watch?v=l_Z0xx_zS0M. He went on to detail that the Administration was prepared to both reprogram money and declare a national emergency to unlock funds:

> There are other funds of money that are available to [the President] through what we call reprogramming. There is money that he can get at and is legally allowed to spend, and I think it—needs to be said again and again that all of this is going to be legal. There are statutes on the books as to how any President can do this. . . . There are certain funds of money that he can get to without declaring a national emergency and other funds that he can only get to after declaring a national emergency.

*Id.* All told, the "whole pot" of such funds was "well north of $5.7 billion." *Id.* And with respect to a national emergency declaration in particular, the Acting White House Chief of Staff explained: "The President doesn't want to do it. . . . He would prefer legislation because that's the right way to go, and it's the proper way to spend money in this country." *Id.*

On February 14, 2019, Congress passed the Consolidated Appropriations Act of 2019 ("CAA"), Pub. L. No. 116-6, 133 Stat. 13 (2019). The CAA consolidated separate appropriations acts related to different federal agencies into one bill, including for present purposes the DHS Appropriations Act for Fiscal Year 2019. *See id.*, div. A. The CAA made available $1.375 billion—less than one quarter of the $5.7 billion sought by the President—"for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector." *Id.* § 230(a)(1), 133 Stat. at 28. Congress limited the use of these funds both as to the type of pedestrian fencing—only "operationally effective designs deployed as of the date of the Consolidated Appropriations Act, 2017 . . . such as currently deployed steel bollard designs"—and geographically—no funds were available for construction within (1) the Santa Ana Wildlife Refuge, (2) the Bentsen-Rio Grande Valley State Park, (3) La Lomita Historical park, (4) the National Butterfly Center, or (5) within or east of the Vista del Mar Ranch tract of the Lower Rio Grande Valley National Wildlife Refuge. *Id.* §§ 230(b), 231, 133 Stat. at 28. The CAA further imposed notice and comment requirements prior to the use of any funds for the construction of barriers within certain city limits. *Id.* § 232, 133 Stat. at 28-29. Section 739 of the CAA provided:

> None of the funds made available in this or any other appropriations Act may be used to increase, eliminate, or reduce funding for a program, project, or activity as proposed in the President's budget request for a fiscal year until such proposed change is subsequently enacted in an appropriation Act, or unless such change is made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act.

*Id.* § 739, 133 Stat. at 197.

On February 15, 2019, the President not only signed the CAA into law but also issued a proclamation "declar-[ing] that a national emergency exists at the southern border of the United States." Proclamation No. 9844, 84 Fed. Reg. 4,949 (Feb. 15, 2019). In announcing the national emergency declaration, the President declared that although he "went through Congress" for the $1.375 billion in funding, he was "not happy with it." States RJN Ex. 50. The President added: "I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster. . . . And I think that I just want to get it done faster, that's all." *Id.*

The proclamation itself provided:

> The current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency. The southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is longstanding, and despite the executive branch's exercise

> of existing statutory authorities, the situation has worsened in certain respects in recent years. In particular, recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending. If not detained, such aliens are often released into the country and are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate. In response to the directive in my April 4, 2018, memorandum and subsequent requests for support by the Secretary of Homeland Security, the Department of Defense has provided support and resources to the Department of Homeland Security at the southern border. Because of the gravity of the current emergency situation, it is necessary for the Armed Forces to provide additional support to address the crisis.

Proclamation No. 9844, 84 Fed. Reg. 4,949. The proclamation then invoked and made available to relevant Department of Defense ("DoD") personnel two statutory authorities. First, the proclamation made available the authority to "order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve . . . to active duty for not more than 24 consecutive months," under 10 U.S.C. § 12302. *Id.* Second, the proclamation made available "the construction authority provided in [10 U.S.C. § 2808]." *Id.* As is necessary to invoke Section 2808, the proclamation "declar[ed] that this emergency requires use of the Armed Forces." *Id.*; *see also* 10 U.S.C. § 2808(a) (limiting construction authority to presidential declarations "that require[] use of the armed forces").

As additional information regarding the national emergency declaration, the White House simultaneously issued a "fact sheet[]," which explained that "the Administration [had] so far identified up to $8.1 billion that will be available to build the border wall once a national emergency is declared." Citizen Groups RJN Ex. G. The White House specifically identified three funding sources, purportedly to be used sequentially:

- "About $601 million from the Treasury Forfeiture Fund" ("TFF");
- "Up to $2.5 billion under the Department of Defense funds transferred for Support for Counterdrug Activities" (10 U.S.C. § 284) ("Section 284"); and
- "Up to $3.6 billion reallocated from Department of Defense military construction projects under the President's declaration of a national emergency" (10 U.S.C. § 2808) ("Section 2808").

*Id.*

In declaring a national emergency, the President invoked his authority under the National Emergencies Act ("NEA"), Pub. L. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601-1651). This appears to have been the first time in American history that a President declared a national emergency to secure funding previously withheld by Congress. As another historical first, Congress passed a joint resolution to terminate the President's declaration of a national emergency. *See* H.R.J. Res. 46, 116th Cong. (2019). The President vetoed Congress's joint resolution on

March 15, 2019.[4] *See Veto Message to the House of Representatives for H.J. Res. 46*, The White House (Mar. 15, 2019), https://www.whitehouse.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/. The House voted 248-181 to override the President's veto, which fell short of the required two-thirds majority. 165 Cong. Rec. 2,799, 2,814-15 (2019).

Following the President's national emergency declaration, executive officers reaffirmed what the President and his administration had been saying for months: the Administration was content to first request border barrier construction funding from Congress, and then augment whatever they received with funds from alternative sources. Then-Secretary of Homeland Security Nielsen described this mindset on March 6, 2019, while testifying before the House Homeland Security Committee: "[The President] hoped Congress would act, that it didn't have to come to issuing an emergency declaration, if Congress had met his request to fund the resources that [U.S. Customs and Border Protection ("CBP")] has requested." *3/6/2019 Nielsen Testimony*, C-SPAN (Mar. 6, 2019), https://www.c-span.org/video/?c4787939/362019-nielsen-testimony.

Since the national emergency declaration, Defendants have taken significant steps toward using the funds at issue in this motion for border barrier construction. On February 15, 2019, the Treasury approved a request from the Department of Homeland Security ("DHS") to make available up to $601 million from the Treasury Forfeiture Fund, which Defendants "intend[] to obligate

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[4] As described below, the Congress that passed the NEA did not contemplate the possibility of a presidential veto.

. . . before the end of Fiscal Year 2019." *See* Case No. 4:19-cv-00872-HSG, ECF No. 89-8 ("Flossman Second Decl.") ¶¶ 9, 11. On February 25, 2019, DHS submitted a request to DoD for assistance blocking drug-smuggling corridors under Section 284. *See* Dkt. No. 64-8 ("Rapuano Decl.") ¶ 3; States RJN Ex. 33. And on March 25, 2019, in response to DHS's request, the Acting Secretary of Defense—Defendant Shanahan—approved the diversion of funds from DoD's counter-narcotics support budget for three "drug-smuggling corridors" identified by DHS: one located in New Mexico—El Paso Project 1—and two located in Arizona—Yuma Sector Projects 1-2.[5] Rapuano Decl. ¶¶ 4, 7-9. Construction related to these projects may begin as soon as May 25, 2019. *See id.* ¶ 10 (providing that construction "will begin no earlier than May 25, 2019").

To fund the Section 284 diversion, Defendant Shanahan simultaneously invoked Section 8005 of the most-recent DoD appropriations act to "reprogram" $1 billion from Army personnel funds to the counter-narcotics support budget. *See id.* ¶ 5; States RJN Ex. 34; *see also* Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018). Defendant Shanahan also formally notified Congress of the authorization, explaining that reprogrammed funds under Section 8005 were "required" so that DoD could provide DHS the support it requested under Section 284. States RJN Ex. 32, at 1; *see also id.* Ex. 33, at 2 (DHS's February 25, 2019 request for support under Section 284).

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[5] Defendants have since elected not to fund or construct Yuma Project 2 using funds reprogrammed or diverted under Sections 8005 or 284. *See* Dkt. No. 118-1 ("Rapuano Second Decl.") ¶ 4.

The next day, Defendant Shanahan appeared before the House Armed Services Committee to testify in support of the President's budget request for fiscal year 2020. *See* Case No. 4:19-cv-00872-HSG, ECF No. 89-12. The Committee Chairman asked Defendant Shanahan why DoD did not first seek approval from relevant congressional committees before reprogramming funds under Section 8005, as would have been consistent with a "gentlemen's agreement[]" between Congress and the Executive. *Id.* at 13 ("But one of the sort of gentlemen's agreements about [giving reprogramming authority for up to $4 billion last year] was if you reprogram money, you will not do it without first getting the approval of all for [sic] relevant committees. . . . For the first time since we've [given such reprogramming authority]. . . . you are not asking for our permission."). The Chairman noted that "the result of" ignoring the gentlemen's agreement likely would be Congress declining to provide such broad reprogramming authority in the future. *Id.* Defendant Shanahan conceded that "discretionary reprogramming" was "traditionally done in coordination" with Congress, but explained that the Administration discussed unilateral reprogramming "prior to the declaration of a national emergency," recognized "the significant downsides of the [sic] losing what amounts to a privilege," and nonetheless decided to move forward with unilaterally reprogramming funds despite that risk. *Id.* at 14. The same day as the hearing, both the House Committee on Armed Services and the House Committee on Appropriations formally disapproved of the Section 8005 reprogramming. *See* States RJN Ex. 35 ("The committee denies this request. The committee does not approve the proposed use of [DoD] funds to construct additional

physical barriers and roads or install lighting in the vicinity of the United States border."); *id.* Ex. 36 ("The Committee has received and reviewed the requested reprogramming action. . . . The Committee denies the request.").

On April 24, 2019, Defendant McAleenan, the Acting Secretary of Homeland Security, published in the Federal Register notices of determination concerning the "construction of barriers and roads in the vicinity of the international land border in Luna County, New Mexico and Doña Ana County, New Mexico," and "in Yuma County, Arizona"—in other words, areas encompassed by the El Paso Sector and Yuma Sector Projects. *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 17,185, 17,186 (Apr. 24, 2019); Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 17,187 (Apr. 24, 2019). The Acting Secretary invoked his authority under Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")[6] "to waive all legal requirements that [he], in [his] sole discretion, determine[d] necessary to ensure the expeditious construction of barriers and roads authorized by section 102 of IIRIRA." *See, e.g.*, 84 Fed. Reg. at 17,186. The waiver asserts that "areas in the vicinity

[6] Pub. L. No. 104-208, div. C, 110 Stat. 3009, 3009-554 (Sept. 30, 1996), as amended by the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302, 306 (May 11, 2005), as amended by the Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, 2638-39 (Oct. 26, 2006), as amended by the Department of Homeland Security Appropriations Act, 2008, Pub. L. No. 110-161, div. E, tit. V, § 564, 121 Stat. 1844, 2090-91 (Dec. 26, 2007).

of the United States border, located in [these regions], are areas of high illegal entry," for which "[t]here is presently an acute and immediate need to construct physical barriers and roads." *See id.* The designated "Project Areas" encompass all portions of New Mexico and Arizona for which Defendants presently intend to construct physical barriers. Finding this action "necessary," the Acting Secretary invoked Section 102(c) to waive "in their entirety" numerous federal laws—including the National Environmental Policy Act ("NEPA"), Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370b)—"with respect to the construction of physical barriers and roads . . . in the project area[s]." *See id.*

On May 8, 2019, Defendant Shanahan, appearing before the Senate Defense Appropriations Subcommittee, testified: "We now have on contract sufficient funds to build about 256 miles of barrier," explaining that this funding derived in part from "treasury forfeiture funds, as well as reprogramming." *Acting Defense Secretary Shanahan Testifies on 2020 Budget Request*, C-SPAN (May 8, 2019), https://www.c-span.org/video/?460437-1/acting-defense-secretary-shanahan-testifies-2020-budget-request. Defendant Shanahan estimated that "sixty-three new miles will come online" from these contracts in the next six months, or "half a mile a day." *Id.* The same day, DoD reported selecting twelve companies to compete for up to $5 billion worth of border barrier construction contracts. Contracts for May 8, 2019, U.S. Dep't of Def. (May 8, 2019), https://dod.defense.gov/News/Contracts/Contract-View/Article/1842189/.

The next day, Defendant Shanahan authorized an additional $1.5 billion in funding for border barrier construction, in further response to DHS's February 25, 2019 request for support under Section 284, for four projects: one located in California—El Centro Project 1—and three located in Arizona—Tucson Sector Projects 1-3. *See* Rapuano Second Decl. ¶ 6; *see also* Rapuano Decl. Ex. A, at 3, 6-7 (describing project locations). To fund these projects, Defendant Shanahan again invoked Section 8005, "as well as DoD's special transfer authority under section 9002 of the Department of Defense Appropriations Act, 2019, and section 1512 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019."[7] Rapuano Second Decl. ¶ 7. Defendants anticipate that construction will begin with these funds as early as July 2019. *Id.* ¶¶ 10-11 (noting Defendants' expectation of awarding contracts by May 16, 2019, forty-five days after which construction may begin). And on May 15, 2019, Defendant McAleenan issued NEPA waivers for the El Centro Sector and Tucson Sector Projects. *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,798 (May 15, 2019) (waiving NEPA require-

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[7] Defendants' Section 9002 authority is, at a minimum, subject to Section 8005's limitations. *See* Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, § 9002, 132 Stat. 2981, 3042 (2018) (providing that "the authority provided in this section is in addition to any other transfer authority available to the Department of Defense and is subject to the same terms and conditions as the authority provided in section 8005 of this Act"); *see also* Dkt. No. 131, at 4 (acknowledging that Section 9002 "incorporates the requirements of [Section] 8005 by reference").

ments for Tucson Sector Projects); Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,800 (May 15, 2019) (waiving NEPA requirements for El Centro Sector Project).

At the hearing on this motion, the parties agreed that the Court need not yet address the lawfulness of Defendants' newly announced reprogramming and subsequent diversion of funds for border barrier construction in the El Centro Sector and Tucson Sector Projects, pending further development of the record as to those projects.

## II. STATUTORY FRAMEWORK

### A. The National Emergencies Act

In 1976, Congress enacted the National Emergencies Act "to insure that the exercise of national emergency authority is responsible, appropriate, and timely." Comm. on Gov't Operations & the Special Comm. on Nat'l Emergencies & Delegated Emergency Powers, 94th Cong., 2d Sess., The National Emergencies Act (Public Law 94-412) Source Book: Legislative History, Texts, and Other Documents, at 1 (1976) ("NEA Source Book"). The NEA rescinded several existing national emergencies, repealed many statutes, and created procedural guidelines for congressional oversight over future presidents' declarations of national emergencies.

The NEA first permits that after "specifically declar-[ing] a national emergency," the president may exercise emergency powers authorized by Congress in other federal statutes. 50 U.S.C. § 1621. To exercise any statutory emergency power, the president must first specify the power or authority under which the president or

other officers will act, "either in the declaration of a national emergency, or by one or more contemporaneous or subsequent Executive orders published in the Federal Register and transmitted to the Congress." *Id.* § 1631.

Section 1622 then establishes a procedure for Congress to terminate any declared national emergency through a joint resolution.[8] As initially drafted, Congress meant for the joint resolution to terminate the declared national emergency by itself—the NEA did not require a presidential signature on the joint resolution, nor was it subject to a presidential veto. In part because Congress had power under the NEA to terminate national emergencies with a simple majority in both houses, Congress neither defined the term "national emergency," nor "ma[de] any attempt to define when a declaration of national emergency is proper." NEA Source Book at 9, 278-92. In rejecting a proposed amendment to the NEA that would have "spelled out" for the executive what may constitute a national emergency, the House of Representatives observed the "impossibility" of future presidents vetoing any joint resolution. *Id.* at 279-80. House members there observed:

> Mr. Conyers. . . . Mr. Chairman, my final participation in this debate revolves around the reason of this question: What happens if the President of the United States vetoes the congressional termination

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[8] The initial version of the NEA referred to a "concurrent resolution." That language was changed to "joint resolution" in 1985. *See* Foreign Relations Authorization Act, "22 USC 2651 note" Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 801(1)(A), 99 Stat. 405, 448 (1985). For simplicity's sake, the Court only uses the term "joint resolution," as the statute now reads.

> of the emergency power? Is that contemplatable within the purview of this legislation?
>
> . . .
>
> Mr. Flowers. Mr. Chairman, on the advice of counsel we have researched that thoroughly. A concurrent resolution would not require Presidential signature of acceptance. It would be an impossibility that it would be vetoed.
>
> Mr. Conyers. So there would be no way that the President could interfere with the Congress?
>
> Mr. Flowers. The gentleman is correct.

*Id.*

Congress's unilateral power under the NEA to terminate national emergency declarations ended in 1983, when the Supreme Court in *INS v. Chadha* ruled that the president must have power to approve or veto congressional acts, such as a terminating joint resolution under the NEA. *See* 462 U.S. 919 (1983). Two years later, Congress amended the NEA to reflect that the joint resolution must be "enacted into law" to terminate an emergency, thereby rendering the NEA *Chadha*-compliant. *See* Pub. L. No. 99-93, § 801(1)(A), 99 Stat. 405, 448 (1985).

By some estimates, there are 123 statutory powers available to a president who declares a national emergency. *See A Guide to Emergency Powers and Their Use*, Brennan Ctr. for Justice (2019), www.brennancenter.org/sites/default/files/legislation/Emergency%20Powers_Printv2.pdf. And in the more than forty years since Congress enacted the NEA, presidents have declared

almost sixty national emergencies. *See Declared National Emergencies Under the National Emergencies Act, 1978-2018*, Brennan Ctr. for Justice (2019), www.brennancenter.org/sites/default/files/analysis/NEA%20Declarations.pdf.

Until now, Congress had never invoked its emergency termination powers.

**B. Section 284**

Under Section 284, "[t]he Secretary of Defense may provide support for the counterdrug activities . . . of any other department or agency of the Federal Government" if "such support is requested . . . by the official who has responsibility for [such] counterdrug activities." 10 U.S.C. § 284(a), (a)(1)(A). Section 284 defines permissible "[t]ypes of support" under the statute, including support for "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *Id.* § 284(b)(7). The statute also mandates congressional notification before the Secretary of Defense provides certain—but not all—types of support. *Id.* § 284(h). For one, Section 284 requires the Secretary of Defense to submit to the appropriate congressional committee "a description of any small scale construction project for which support is provided." *Id.* § 284(h)(1)(B). Section 284 defines "small scale construction" as "construction at a cost not to exceed $750,000 for any project." *Id.* § 284(i)(3).

Congress first provided DoD with authority to support such counterdrug activities in 1991, in what is commonly referred to as "Section 1004." *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L.

No. 101-510, § 1004, 104 Stat. 1485, 1629-30 (1990). The initial iteration of Section 1004 made available $50 million in funds for fiscal year 1991 alone, and contained no congressional notification requirement or per-project cap on the provision of support. *Id.* § 1004(g), 104 Stat. at 1630. Congress subsequently renewed Section 1004 on a regular basis.[9] Congress ultimately codified Section 1004 at 10 U.S.C. § 284 in 2016. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1011(a)(1), 130 Stat. 2000, 2381 (2016), *renumbered § 284 by id.* § 1241(a)(2), 130 Stat. at 2497.

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[9] Congress extended the provision of funds under Section 1004 on eight occasions, the last of which provided funds through fiscal year 2017. *See* National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 1088(a), 105 Stat. 1290, 1484 (1991) (extending funding through fiscal year 1993); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1121, 107 Stat. 1547, 1753-54 (1993) (extending funding through fiscal year 1995); National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 1011, 108 Stat. 2663, 2836-37 (1994) (extending funding through fiscal year 1999); Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1021, 112 Stat. 1920, 2120 (1998) (extending funding through fiscal year 2002); National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 1021, 115 Stat. 1012, 1212-15 (2001) (extending funding through fiscal year 2006); John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1021, 120 Stat. 2083, 2382 (2006) (extending funding through fiscal year 2011); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1005, 125 Stat. 1298, 1556-57 (2011) (extending funding through fiscal year 2014); Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1012, 128 Stat. 3292, 3483-84 (2014) (extending funding through fiscal year 2017).

In fiscal year 2019, Congress appropriated $881 million in funds to DoD "[f]or drug interdiction and counter-drug activities," $517 million of which was "for counter-narcotics support." *See* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, div. A, tit. VI, 132 Stat. 2981, 2997 (2018). All funds DoD now purports to make available for support to DHS under Section 284 come from the counter-narcotics support line of appropriation, out of what is known as the "drug interdiction fund." Rapuano Decl. ¶ 5, Ex. D. But when Secretary Shanahan first authorized support to DHS under Section 284 on March 25, 2019, the counter-narcotics support line only contained $238,306,000 in unobligated funds. *See* Dkt. No. 131 at 4 (citing Rapuano Decl. ¶ 5, Ex. D, at 2). Therefore, although DoD seeks to make available $2.5 billion in support to DHS "under Section 284," Defendants have not used—and do not intend to use in the near future—any of the counter-narcotics support funds appropriated by Congress in fiscal year 2019 for border barrier construction. *Id.* (noting that all $2.5 billion in border barrier construction support to DHS under Section 284 is attributable to Section 8005 and 9002 reprogramming). In other words, every dollar of Section 284 support to DHS and its enforcement agency, CBP, is attributable to reprogramming mechanisms.

DoD's provision of support under Section 284 does not require a national emergency declaration.

**C. Section 8005**

"An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law." 31

U.S.C. § 1532. Section 8005 of the fiscal year 2019 Department of Defense Appropriations Act authorizes the Secretary of Defense to transfer up to $4 billion "of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction)." § 8005, 132 Stat. at 2999. The Secretary must first determine that "such action is necessary in the national interest." *Id.* Section 8005 further provides that such authority to transfer may only be used (1) for higher priority items than those for which originally appropriated, and (2) based on unforeseen military requirements, but (3) in no case where the item for which funds are requested has been denied by the Congress.[10] *Id.*

DoD's Section 8005 transfer authority has existed in largely the same form since at least fiscal year 1974. *See* Department of Defense Appropriation Act, 1974, Pub. L. No. 93-238, § 735, 87 Stat. 1026, 1044 (1974). That year, Congress added the "denied by Congress" provision "to tighten congressional control of the reprogramming process," and in response to incidents where "[DoD] [had] requested that funds which have been specifically deleted in the legislative process be restored through the reprogramming process." H.R. Rep. No. 93-662, at 16 (1973). The House Committee on Appropriations "believ[ed] that to concur in such actions would place committees in the position of undoing the work of the Congress," and that "henceforth no such requests will be entertained." *Id.*

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[10] 10 U.S.C. § 2214(b) contains identical transfer authority.

On February 25, 2019, DHS submitted a request to DoD for assistance blocking drug-smuggling corridors under Section 284. *See* Rapuano Decl. ¶ 3; States RJN Ex. 33. And on March 25, 2019, DoD invoked Section 8005 to transfer $1 billion from funds Congress previously appropriated for military personnel costs to the drug interdiction fund, which DoD then intends to use to provide DHS's requested "assistance" by constructing border barriers using its Section 284 authority. *See* Rapuano Decl. ¶ 5, Ex. D. Despite the recent dispute between the President and Congress over funding for border barrier construction, and although the President had directed DoD nearly a year prior to support DHS "in securing the southern border and taking other necessary actions," including the provision of "military personnel," Federal Defendants purported to invoke Section 8005 "based on unforeseen military requirements." *Id.*; *see also* States RJN Ex. 27 (April 4, 2018 presidential memorandum). On May 9, 2019, Defendants invoked Section 8005 and a related reprogramming provision to authorize the transfer of an additional $1.5 billion in funding into the drug interdiction fund, which then is slated to be used under Section 284 for border barrier construction. *See* Rapuano Second Decl. ¶¶ 6-7, Ex. C.

The reprogramming of funds under Section 8005 does not require a national emergency declaration.

**D. Section 2808**

Under Section 2808, the Secretary of Defense "may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law." 10 U.S.C. § 2808(a). Section 2808

requires that the President first declare a national emergency under the NEA "that requires use of the armed forces." *Id.* And the Secretary of Defense must use the funds for "military construction projects . . . that are necessary to support such use of the armed forces." *Id.*

Congress defined the term "military construction" as it is used in Section 2808 to "include[] any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road (as described in section 210 of title 23)." 10 U.S.C. § 2801(a). And Congress defined the term "military installation" to "mean[] a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control." *Id.* § 2801(c)(4).

Presidents have twice invoked Section 2808's military construction authority. In 1990, President George H.W. Bush authorized emergency construction authority "to deal with the threat to the national security and foreign policy of the United States caused by the invasion of Kuwait by Iraq." Exec. Order No. 12,734, 55 Fed. Reg, 48,099 (Nov. 14, 1990). President George W. Bush later authorized emergency construction authority in the aftermath of the September 11, 2001 terrorist attacks. Exec. Order. No. 13,235, 66 Fed. Reg. 58,343 (Nov. 16, 2001). To date, DoD has only once used its Section 2808 military construction authority domestically, when

it authorized $35 million in funds to secure weapons of mass destruction in five states. *See* Michael J. Vassalotti, Brendan W. McGarry, *Military Construction Funding in the Event of a National Emergency*, Cong. Research Serv. 2 & tbl. 1 (January 11, 2019).

According to Defendants, the Acting Secretary of Defense "has not yet decided to undertake or authorize any barrier construction projects under section 2808." Rapuano Decl. ¶ 14. DoD undertook an internal review process, to identify "existing military construction projects of sufficient value to provide up to $3.6 billion of funding." *Id.* ¶ 15. The review process identified such funding for border barrier construction, but the Acting Secretary nevertheless "has taken no action on this information and has not yet decided to undertake or authorize any barrier construction projects under section 2808." *See* Dkt. No. 131-2 ("Rapuano Third Decl.") ¶ 6. Defendants have represented that they "will inform the Court" once a decision is made to use Section 2808 to fund border barrier construction. *See* Dkt. No. 131 at 3.

**E. Treasury Forfeiture Fund (Section 9705)**

Through 31 U.S.C. § 9705, Congress established in the Treasury of the United States a separate fund known as the "Department of the Treasury Forfeiture Fund." 31 U.S.C. § 9705(a). Funds are generally available to the Secretary of the Treasury "with respect to seizures and forfeitures made pursuant to [applicable] law," and for certain "law enforcement purposes." *Id.* State and local law enforcement agencies that participate in the seizure or forfeiture of property may receive "[e]quitable sharing payments." *Id.* § 9705(a)(1)(G). Section 9705(a)(1)(G) details three statutory avenues for

the provision of such equitable sharing payments: "Equitable sharing payments made to other Federal agencies, State and local law enforcement agencies, and foreign countries pursuant to section 616(c) of the Tariff Act of 1930 (19 U.S.C. 1616a(c)), section 981 of title 18, or subsection (h) of this section, and all costs related thereto." Equitable sharing payments are statutorily capped, however, by the value of seized property. 31 U.S.C. § 9705(b)(2). After the TFF has accounted for not only the current fiscal year's mandatory expenses—which include equitable sharing payments—but also set aside adequate funds for the following fiscal year's mandatory expenses, unobligated balances are available to the Secretary of the Treasury, to be used "in connection with the law enforcement activities of any Federal agency." 31 U.S.C. § 9705(g)(4)(B). This is commonly referred to as "Strategic Support." *See* Case No. 4:19-cv-00872-HSG, ECF No. 89-9 ("Farley Decl.") ¶ 11.

In late December 2018[11]—during the government shutdown and just before the Administration sought $5.7 billion from Congress to fund border barrier construction—DHS requested $681 million in Strategic Support funding "for border security." *Id.* ¶ 24; *see also* States RJN Ex. 25 (January 6, 2019 request for $5.7 billion in funding for border barrier construction). The Treasury ultimately determined that it could make available to CBP, DHS's enforcement agency, up to $601 million from the TFF, in two tranches. Farley Decl. ¶¶ 24-25;

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[11] The exact date of the request is unclear due to Defendants' inconsistent representations. *Compare* Flossman Second Decl. ¶ 9 (indicating the request was made on December 26, 2018), *with* Farley Decl. ¶ 24 (indicating the request was made on December 29, 2018).

Opp. at 9. The first tranche—$242 million—was made available for obligation on March 14, 2019. *See* Opp. at 9. Save for a small portion "for program support on the TFF funded projects," CBP intends to obligate the first tranche "on an Interagency Agreement (IAA) with the U.S. Army Corps of Engineers . . . by June 2019." Dkt. No. 131-1 ("Flossman Third Decl.") ¶ 4. Defendants represent that "CBP intends to obligate all available TFF funds before the end of Fiscal Year 2019 or, if not, before the end of the 2019 calendar year." Flossman Second Decl. ¶ 11. The second tranche—$359 million —"is expected to be made available for obligation at a later date upon Treasury's receipt of additional anticipated forfeitures." *See* Opp. at 9. CBP intends to use funds from the TFF "exclusively for projects in the Rio Grande Valley Sector," in Texas. *See* Flossman Third Decl. ¶ 5.

The Secretary of Treasury's use of funds in the TFF for Strategic Support does not require a national emergency declaration.

**F. National Environmental Policy Act**

NEPA establishes a "national policy which will encourage productive and enjoyable harmony between man and his environment[,] to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. To this end, NEPA compels federal agencies to assess the environmental impact of agency actions that "significantly affect[ ] the quality of the human environment." *Id.* § 4332(C). NEPA

> serves two fundamental objectives. First, it "ensures that the agency, in reaching its decision, will

> have available, and will carefully consider, detailed information concerning significant environmental impacts." And, second, it requires "that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision."

*WildEarth Guardians v. Provencio*, No. 17-17373, 2019 WL 1983455, at *7 (9th Cir. May 6, 2019) (quoting *WildEarth Guardians v. Mont. Snowmobile Ass'n*, 790 F.3d 920, 924 (9th Cir. 2015)). NEPA does not establish substantive environmental standards; rather, it sets "action-forcing" procedures that compel agencies to take a "hard look" at environmental consequences. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-50 (1989). "NEPA's purpose is to ensure that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'" *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989)). And the Ninth Circuit commands that courts "strictly interpret" NEPA's procedural requirements "to the fullest extent possible," as consistent with NEPA's policies. *Churchill Cty. v. Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001) (quoting *Lathan v. Brinegar*, 506 F.2d 677, 687 (9th Cir. 1974) (en banc)). "[G]rudging, pro forma compliance will not do." *Id.* (quoting *Lathan*, 506 F.2d at 693).

Where an agency's project "*might* significantly affect environmental quality," NEPA compels preparation of what is known as an Environmental Impact Statement ("EIS"). *Provencio*, 2019 WL 1983455, at *7 (emphasis added). To prevail on a claim that an agency violated

its duty to prepare an EIS, a plaintiff need only raise "substantial questions whether a project may have a significant [environmental] effect." *Id.* (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)). An action's "significance" depends on "both context and intensity." 40 C.F.R. § 1508.27; *see also id.* § 1508.27(b) (setting forth ten factors to "consider[] in evaluating intensity"). Even where a project does not require an EIS, agencies generally must prepare an Environmental Assessment ("EA") which, in part, serves to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." *See* 40 C.F.R. § 1508.9(a)(1).

"[A]gency action taken without observance of the procedure required by law will be set aside." *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

**III. LEGAL STANDARD**

A preliminary injunction is a matter of equitable discretion and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking preliminary injunctive relief must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Id.* at 20. Alternatively, an injunction may issue where "the likelihood of success is such that serious questions going to the merits were raised and the balance of hardships tips sharply in [the plaintiff's] favor," provided that the plaintiff can also demonstrate the other two *Winter* factors. *All. for the*

*Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011) (citation and internal quotation marks omitted). Under either standard, Plaintiffs bear the burden of making a clear showing that they are entitled to this extraordinary remedy. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). The most important *Winter* factor is likelihood of success on the merits. *See Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017).

## IV. ANALYSIS

In the pending motion, Plaintiffs seek to enjoin Defendants from using certain diverted federal funds and resources for border barrier construction. Specifically, Plaintiffs move to enjoin Defendants from (1) invoking Section 8005's reprogramming authority to channel funds into DoD's drug interdiction fund, (2) invoking Section 284 to divert monies from DoD's drug interdiction fund for border barrier construction on the southern border of Arizona and New Mexico, (3) invoking Section 2808 to divert monies from appropriated DoD military construction projects for border barrier construction,[12] and (4) taking any further action related to border barrier construction until Defendants comply with NEPA.

Defendants oppose each basis for injunctive relief. Defendants further contend that the Plaintiffs lack standing to bring their Sections 8005 and 2808 claims. The Court addresses these threshold issues first before turning to Plaintiffs' individual bases for injunctive relief.

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[12] Only the Citizen Group Plaintiffs challenge the diversion of funds under Section 2808.

### A. Article III Standing

A plaintiff seeking relief in federal court bears the burden of establishing "the irreducible constitutional minimum" of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). First, the plaintiff must have "suffered an injury in fact." *Id.* This requires "an invasion of a legally protected interest" that is concrete, particularized, and actual or imminent, rather than conjectural or hypothetical. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). Second, the plaintiff's injury must be "fairly traceable to the challenged conduct of the defendant." *Spokeo*, 136 S. Ct. at 1547. Third, the injury must be "likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan*, 504 U.S. at 560-61).

#### 1. Plaintiffs Have Standing for Their 8005 Claim.

Defendants argue that Plaintiffs lack standing to challenge Defendants' invocation of Section 8005 to reprogram funds into the drug interdiction fund, so that Defendants can then divert that money wholesale to border barrier construction using Section 284. *See* Opp. at 14.[13] Defendants do not dispute that Plaintiffs have standing to challenge the use of funds from the drug interdiction fund for border barrier construction under Section 284. Defendants nonetheless reason that harm from construction using drug interdiction

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[13] Defendants also argue Plaintiffs lack standing because they fall outside Section 8005's "zone of interests." *See* Opp. at 18-19. Because the Court finds Defendants' "zone of interests" challenge derivative of Defendants' misunderstanding of *ultra vires* review, the Court addresses those matters together, below. *See infra* Section IV.B.1.

funds under Section 284 does not establish standing to challenge Defendants' use of Section 8005 to supply those funds. *Id.* Defendants argue that standing requires that the plaintiff be the "object" of the challenged agency action, but that the Section 8005 augmentation of the drug interdiction fund and the use of that money for construction are two distinct agency actions. *Id.* (citing *Lujan*, 504 U.S. at 562). According to Defendants, the "object" of the Section 8005 reprogramming was "simply mov[ing] funds among DoD's accounts." *Id.* (citing *Lujan*, 504 U.S. at 562).

Defendants' logic fails in all respects. As an initial matter, it is not credible to suggest that the "object" of the Section 8005 reprogramming is anything but border barrier construction, even if the reprogrammed funds make a pit stop in the drug interdiction fund. Since Defendants first announced that they would reprogram funds using Section 8005, they have uniformly described the object of that reprogramming as border barrier construction. *See* Rapuano Decl. ¶ 5 (providing that "the Acting Secretary of Defense decided to use DoD's general transfer authority under section 8005 . . . to transfer funds between DoD appropriations to fund [border barrier construction in Arizona and New Mexico]"); *id.* Ex. D, at 1 (notifying Congress that the "reprogramming action" under Section 8005 is for "construction of additional physical barriers and roads in the vicinity of the United States border").

Nor does *Lujan* impose Defendants' proffered strict "object" test. The *Lujan* Court explained that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to

establish." 504 U.S. at 562 (internal quotation marks omitted). And the Supreme Court was concerned in particular with "causation and redressability," which are complicated inquiries when a plaintiff's standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Id.* (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (Kennedy, J.)). As concerns causation, the Ninth Circuit recently explained that Article III standing only demands a showing that the plaintiff's injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). "Causation may be found even if there are multiple links in the chain connecting the defendant's unlawful conduct to the plaintiff's injury, and there's no requirement that the defendant's conduct comprise the last link in the chain. As we've said before, what matters is not the length of the chain of causation, but rather the plausibility of the links that comprise the chain." *Id.* (internal quotation marks and citations omitted).

No complicated causation inquiry is necessary here, as there are no independent absent actors. More important, if there were ever a case where standing exists even though the challenged government action is nominally directed to some different "object," this is it. Neither the parties nor the Court harbor any illusions that the point of reprogramming funds under Section 8005 is to use those funds for border barrier construc-

tion. And under Ninth Circuit law, there is no requirement that the challenged conduct be the last link in the causal chain. Rather, even if there is an intervening link between the Section 8005 reprogramming and the border barrier construction itself, any injury caused by the border barrier construction is nonetheless "fairly traceable" to the Section 8005 reprogramming under the circumstances. *See id.* The Court thus cannot accept the Government's "two distinct actions" rationale as a basis for shielding Defendants' actions from review.

**2. Plaintiffs Have Standing for Their Section 2808 Claim.**

Defendants argue that Plaintiffs lack standing to challenge Defendants' diversion of funds under Section 2808 "because the Acting Secretary of Defense has not yet decided to undertake or authorize any barrier construction projects under [Section] 2808." Opp. at 21. Defendants describe the status of the Section 2808 diversion as follows:

> The Acting Secretary of Defense has not yet decided to undertake or authorize any barrier construction projects under section 2808. To inform the Acting Secretary's decision, on March 20, 2019, the Secretary of Homeland Security provided a prioritized list of proposed border-barrier-construction projects that DHS assesses would improve the efficiency and effectiveness of the armed forces supporting OHS in securing the southern border. On April 11, 2019, as a follow-up to the Chairman's preliminary assessment of February 10, 2019, the Acting Secretary instructed the Chairman of the Joint Chiefs of Staff to provide, by May 10, 2019, a detailed assessment of whether and how specific military construction projects could

> support the use of the armed forces in addressing the national emergency at the southern border.
>
> Also on April 11, 2019, the Acting Secretary instructed the DoD Comptroller, in consultation with the Secretaries of the military departments, the Chairman of the Joint Chiefs of Staff, the Under Secretary of Defense for Acquisition and Sustainment, the Under Secretary of Defense for Policy, and the heads of any other relevant DoD components to identify, by May 10, 2019, existing military construction projects of sufficient value to provide up to $3.6 billion of funding for his consideration.

Rapuano Decl. ¶¶ 14-15. According to Defendants, absent some express decision to authorize or undertake a particular project, Plaintiffs' injury is speculative: "It is entirely possible that no barrier projects will be constructed pursuant to [Section] 2808, and that, if they are, they will be [sic] built in any location where Plaintiffs would have a claim to a cognizable injury." Opp. at 21.

Defendants ask too much of Plaintiffs. A plaintiff need not present undisputable proof of a future harm. The injury-in-fact requirement instead permits standing when a risk of future injury is "at least *imminent*." *See Lujan*, 504 U.S. at 564 n.2. And while courts must ensure that the "actual or imminent" measure of harm is not "stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes," *see id.*, the Ninth Circuit has consistently held that a "'credible threat' that a probabilistic harm will materialize" is enough, *see Nat. Res. Def. Council v. EPA*, 735 F.3d 873, 878 (9th Cir. 2013) (quoting *Covington v. Jefferson Cty.*, 358 F.3d 626, 641 (9th Cir. 2004)).

At this stage, Plaintiffs have carried their burden to demonstrate that there is a "credible threat" that Defendants will divert funds under Section 2808 for border barrier construction in a location where Plaintiffs would have a claim to a cognizable injury. As detailed in Defendants' supporting declaration, a decision on the use of Section 2808 to authorize border barrier construction is forthcoming, as the DoD has now received necessary information which it intends to use to make decisions. *See* Rapuano Third Decl. ¶ 6. Further, the Court cannot ignore that the President invoked Section 2808 to enable the diversion of funds for border barrier construction. *See* Citizen Groups RJN Ex. D. The White House in fact provided in February 2019 that funds under Section 2808 "will be available." *Id.* Ex. G. There is thus no speculation necessary for the Court to find that Defendants will continue with their current course of conduct and exercise their authority under Section 2808 in the manner directed by the President. *See Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002) ("Although [*Nelsen v. King County*, 895 F.2d 1248, 1251-52 (9th Cir. 1990)] certainly requires us to consider all the circumstances related to a threatened future harm, including whether the threatened harm may result from a chain of contingencies, the possibility that defendants may change their course of conduct is not the type of contingency to which we referred in *Nelsen*.").

Finally, as to Defendants' claim that they might use Section 2808 funds in a location where Plaintiffs would not have a claim to a cognizable injury, it is highly unlikely that this would be the case, as Plaintiffs have demonstrated that their members span the entire U.S.-Mexico border. *See, e.g.*, Dkt. No. 32 ¶ 3 ("SBCC's

membership spans the borderlands from California to Texas.”).

### B. Plaintiffs Have Shown They Are Entitled to a Preliminary Injunction.

Applying the *Winter* factors, the Court finds Plaintiffs are entitled to a preliminary injunction as to Defendants’ use of Section 8005’s reprogramming authority to channel funds into the drug interdiction fund so that those funds may be ultimately used for border barrier construction in El Paso Sector Project 1 and Yuma Sector Project 1.

#### 1. Likelihood of Success on the Merits

The crux of Plaintiffs’ case is that Defendants’ methods for funding border barrier construction are unlawful. And Plaintiffs package that core challenge in several ways. For present purposes, Plaintiffs contend that Defendants’ actions (1) violate Congress’s most-recent appropriations legislation, (2) are unconstitutional, (3) exceed Defendants’ statutory authority—in other words, are *ultra vires*—and (4) violate NEPA.

The Court begins with a discussion of the law governing the appropriation of federal funds. Under the Appropriations Clause of the Constitution, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. art. I, § 9, cl. 7. “The Clause’s words convey a ‘straightforward and explicit command’: No money ‘can be paid out of the Treasury unless it has been appropriated by an act of Congress.’” *U.S. Dep’t of Navy v. FLRA*, 665 F.3d 1339, 1346 (D.C. Cir. 2012) (quoting *OPM v. Richmond*, 496 U.S. 414, 424 (1990)). “The Clause has a

'fundamental and comprehensive purpose . . . to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents.'" *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) (quoting *Richmond*, 496 U.S. at 427-28). It "protects Congress's exclusive power over the federal purse," and "prevents Executive Branch officers from even inadvertently obligating the Government to pay money without statutory authority." *FLRA*, 665 F.3d at 1346-47 (internal quotation marks and citations omitted).

"Federal statutes reinforce Congress's control over appropriated funds," and under federal law "appropriated funds may be applied only 'to the objects for which the appropriations were made.'" *Id.* at 1347 (quoting 31 U.S.C. § 1301(a)). Moreover, "[a]n amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law." 31 U.S.C. § 1532. "[A]ll uses of appropriated funds must be affirmatively approved by Congress," and "the mere absence of a prohibition is not sufficient." *FLRA*, 665 F.3d at 1348. In summary, "Congress's control over federal expenditures is 'absolute.'" *Id.* (quoting *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 185 (D.C. Cir. 1992)).

Rather than dispute these principles, Defendants contend that the challenged conduct complies with them. *See* Opp. at 26 ("The Government is not relying on independent Article II authority to undertake border construction; rather, the actions alleged are being undertaken pursuant to express statutory authority."). Accordingly, one of the key issues in dispute is whether

Congress in fact provided "express statutory authority" for Defendants' challenged actions.

Turning to Plaintiffs' claims, it is necessary as a preliminary matter to outline the measure and lens of reviewability the Court applies in assessing such broad challenges to actions by executive officers. As a first principle, the Court finds that it has authority to review each of Plaintiffs' challenges to executive action. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 1 Cranch at 177. In determining what the law is, the Court has a duty to determine whether executive officers invoking statutory authority exceed their statutory power. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). And even where executive officers act in conformance with statutory authority, the Court has an independent duty to determine whether authority conferred by act of the legislature nevertheless runs afoul of the Constitution. *See Clinton v. City of New York*, 524 U.S. 417, 448 (1998).

Once a case or controversy is properly before a court, in most instances that court may grant injunctive relief against executive officers to enjoin both *ultra vires* acts —that is, acts exceeding the officers' purported statutory authority—and unconstitutional acts. The Supreme Court recently reaffirmed this core equitable power:

> It is true enough that we have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law. But that has been true not only with respect to violations of federal law by state officials, but also with respect to violations of federal law by federal officials. . . . What our

> cases demonstrate is that, in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer.
>
> The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.

*Armstrong*, 135 S. Ct. at 1384 (internal quotation marks and citations omitted).

Misunderstanding the presumptive availability of equitable relief to enforce federal law, Defendants contend that Plaintiffs fail to identify a statutory private right of action, that Plaintiffs must challenge Defendants' conduct through the framework of the APA, and that to the extent *ultra vires* review is available, "Plaintiffs [must] show that the challenged action 'contravene[s] clear and mandatory statutory language.'" *See* Opp. at 12-13. But as Plaintiffs detail at length in their reply brief, *ultra vires* review exists outside of the APA framework, and Defendants' heightened standard for *ultra vires* review only applies where Congress has foreclosed judicial review, which is not the case here. *See* Reply at 2-5; *see also* Dkt. No. 107 (Brief of *Amici Curiae* Federal Courts Scholars).[14]

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[14] Congress may displace federal courts' equitable power to enjoin unlawful executive action, but a precluding statute must at least display an "intent to foreclose" injunctive relief. *Armstrong*, 135 S. Ct. at 1385. Courts have found such implied foreclosure where (1) the statute provides an express administrative remedy, and (2) the statute is otherwise judicially unadministrable in nature. *Id.* at 1385-86. No party contends that the statutes at issue in this

Due to their mistaken framing of the scope of *ultra vires* review, Defendants also incorrectly posit that Plaintiffs must establish that they fall within the "zone of interests" of a particular statute to challenge actions taken by the government under that statute. *See* Opp. at 14-15. The "zone of interests" test, however, only relates to statutorily-created causes of action. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (explaining that "[t]he modern 'zone of interests' formulation. . . . applies to all statutorily created causes of action"). The test has no application in an *ultra vires* challenge, which operates outside of the APA framework. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) ("Appellants need not, however, show that their interests fall within the zones of interests of the constitutional and statutory powers invoked by the President in order to establish their standing to challenge the interdiction program as *ultra vires*."); *see also* 33 Charles Alan Wright et al., Federal Practice and Procedure § 8302 (2d ed. 2019) (explaining that the "zone of interests" test is to determine whether a plaintiff "seeks to protect interests that 'arguably' fall within the 'zone of interests' protected by that provision"). In other words, where a plaintiff seeks to vindicate a right protected by a statutory provision, the plaintiff must demonstrate that it arguably falls within the zone of interests Congress meant to protect by enacting that provision. But where a plaintiff seeks equitable relief against a defendant for exceeding its statutory authority, the zone-of-interests test is inapposite. Any other

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case either expressly foreclose equitable relief or provide an express administrative remedy, which might warrant a finding of implied foreclosure of equitable relief.

interpretation would lead to absurd results. The very nature of an *ultra vires* action posits that an executive officer has gone beyond what the statute permits, and thus beyond what Congress contemplated. It would not make sense to demand that Plaintiffs—who otherwise have standing—establish that Congress contemplated that the statutes allegedly violated would protect Plaintiffs' interests. It is no surprise, then, that the Supreme Court's recent discussion of *ultra vires* review in *Armstrong* did not once reference this test.

In reviewing the lawfulness of Defendants' conduct, the Court thus begins each inquiry by determining whether the disputed action exceeds statutory authority. For unless an animating statute sanctions a challenged action, a court need not reach the second-level question of whether it would be unconstitutional for Congress to sanction such conduct. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (explaining the "well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case") (quoting *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)). This is not to say, however, that the yardstick of statutory authority overlooks constitutional concerns entirely. "The so-called canon of constitutional avoidance . . . counsel[s] that ambiguous statutory language be construed to avoid serious constitutional doubts." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). Nonetheless, a court presented with both *ultra vires* and constitutional claims should begin by determining whether the statutory authority supports the action challenged, and only reach the constitutional analysis if necessary.

**a. Sections 284 and 8005**

At the President's direction, Defendants intend to divert $2.5 billion, $1 billion of which is the subject of the pending motion, to the DoD's drug interdiction fund for border barrier construction.[15] To do so, Defendants rely on Section 284(b)(7), which authorizes the Secretary of Defense to support other federal agencies for the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *See The Funds Available to Address the National Emergency at Our Border*, The White House, https://www.whitehouse.gov/briefings-statements/funds-available-address-national-emergency-border (Feb. 26, 2019). To satisfy the President's directive, Defendants intend to rely on their reprogramming authority under Section 8005, and plan to "augment" the drug interdiction fund with the entire $2.5 billion in funds that DoD will then use for the construction. *Id.*

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[15] The Court here only considers the lawfulness of Defendants' March 25, 2019 invocation of Section 8005 to reprogram $1 billion, given the parties' agreement that this order need not address Defendants' recently announced intent to use Sections 8005, 9002, and 284 to fund border barrier construction in the El Centro Sector and Tucson Sector Projects. The parties reached this agreement after counsel for Defendants represented at the hearing on this motion that "no construction will start [with those funds] until at least 45 days from" the May 17, 2019 hearing date. *See* Dkt. No. 138 at 55:16-17. The parties confirmed that they would agree to a schedule to supplement the record, to permit the Court to review in a timely manner the lawfulness of the new reprogramming, under the framework set forth in this order. *Id.* at 59:14-60:2. The parties have since agreed on a schedule. *See* Dkt. No. 142.

Plaintiffs challenge both the augmentation of the drug interdiction fund through Section 8005 and the use of funds from the drug interdiction fund under Section 284. Turning first to the augmentation of funds, Section 8005 authorizes the reprogramming of up to $4 billion "of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense." The transfer must be (1) either (a) DoD working capital funds or (b) "funds made available in this Act to the [DoD] for military functions (except military construction)," (2) first determined by the Secretary of Defense as necessary in the national interest, (3) for higher priority items than those for which originally appropriated, (4) based on unforeseen (5) military requirements, and (6) in no case where the item for which funds are requested has been denied by Congress. Plaintiffs argue that Defendants' actions fail the last three requirements. The Court first considers whether the reprogramming Defendants propose here is for an item for which funds were requested but denied by Congress.

**i. Plaintiffs are Likely to Show That the Item for Which Funds Are Requested Has Been Denied by Congress.**

Plaintiffs argue that Defendants are transferring funds for a purpose previously denied by Congress. Mot. at 16. Defendants dispute, however, whether Congress's affirmative appropriation of funds in the CAA to DHS constitutes a "denial" of appropriations to DoD's "counterdrug activities in furtherance of DoD's mission under [Section] 284." Opp. at 16. In their view, "the item" for which funds are requested, for present purposes, is counterdrug activities under Section 284. *Id.* And

Defendants maintain that "nothing in the DHS appropriations statute indicates that Congress 'denied' a request to fund DoD's statutorily authorized counter-drug activities, which expressly include fence construction." *Id.* In other words, even though DoD's counterdrug authority under Section 284 is merely a pass-through vessel for Defendants to funnel money to construct a border barrier that will be turned over to DHS, Citizen Groups RJN Ex. I, at 10, Defendants argue that the Court should only consider whether Congress denied funding to DoD.

Plaintiffs have shown a likelihood of success as to their argument that Congress previously denied "the item for which funds are requested," precluding the proposed transfer. On January 6, 2019, the President asked Congress for "$5.7 billion for construction of a steel barrier for the Southwest border," explaining that the request "would fund construction of a total of approximately 234 miles of new physical barrier." Citizen Groups RJN Ex. A, at 1. The request noted that "[a]ppropriations bills for fiscal year (FY) 2019 that have already been considered by the current and previous Congresses are inadequate to fully address these critical issues," to include the need for barrier construction funds. *Id.* The President's request did not specify the mechanics of how the $5.7 billion sought would be used for the proposed steel barrier construction. *Id.* Nonetheless, in the CAA passed by Congress and signed by the President, Congress appropriated only $1.375 billion for the construction of pedestrian fencing, of a specified type, in a specified sector, and appropriated no other funds for barrier construction. The Court agrees with Plaintiffs that they are likely to show that the proposed transfer is for an item for which Congress denied

funding, and that it thus runs afoul of the plain language of Section 8005 and 10 U.S.C. § 2214(b) ("Section 2214").[16]

As Defendants acknowledge, in interpreting a statute, the Court applies the principle that "the plain language of [the statute] should be enforced according to its terms, in light of its context." *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1210 (9th Cir. 2015). In its *amicus* brief, the House recounts legislative history that provides critical context for the Court's interpretative task. The House explains that the "denied by the Congress" restriction was imposed on DoD's transfer authority in 1974 to "tighten congressional control of the reprogramming process." Dkt. No. 47 ("House Br.") at 10 (citing H.R. Rep. No. 93-662, at 16 (1973)). The House committee report on the appropriations bill from that year explained that "[n]ot frequently, but on some occasions, the Department ha[d] requested that funds which have been specifically deleted in the legislative process be restored through the reprogramming process," and that "[t]he Committee believe[d] that to concur in such actions would place committees in the position of undoing the work of the Congress." H.R. Rep. No. 93-662, at 16. Significantly, the Committee stated that such a position would be "untenable." *Id.* Consistent with this purpose, Congress has described its in-

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[16] *See* Fox News, *Mick Mulvaney on chances of border deal, Democrats ramping up investigation of Trump admin*, YouTube (Feb. 10, 2019), https://www.youtube.com/watch?v=l_Z0xx_zS0M (statement by Acting White House Chief of Staff that "[w]e'll take as much money as you can give us, and then we'll go off and find the money someplace else, legally, in order to secure that southern barrier. But this is going to get built, with or without Congress.").

tent that appropriations restrictions of this sort be "construed strictly" to "prevent the funding for programs which have been considered by Congress and for which funding has been denied." *See* H.R. Rep. No. 99-106, at 9 (1985) (discussing analogous appropriations restriction in Pub. L. No. 99-169, § 502(b), 99 Stat. 1005 (codified at 50 U.S.C. § 3094(b)).

The Court finds that the language and purpose of Section 8005 and Section 2214(b) likely preclude Defendants' attempt to transfer $1 billion from funds Congress previously appropriated for military personnel costs to the drug interdiction fund for the construction of a border barrier. Defendants argue that "Congress never denied DoD funding to undertake the [Section] 284 projects at issue," Opp. at 16, such that Section 8005 and Section 2214(b) are satisfied. But in the Court's view, that reading of those sections is likely wrong, when the reality is that Congress was presented with—and declined to grant—a $5.7 billion request for border barrier construction. Border barrier construction, expressly, is the item Defendants now seek to fund via the Section 8005 transfer, and Congress denied the requested funds for that item. *See* 10 U.S.C. § 2214(b) (explaining that transfer authority "may not be used if *the item to which the funds would be transferred* is an item for which Congress has denied funds") (emphasis added). And Defendants point to nothing in the language or legislative history of the statutes in support of their assertion that only explicit congressional denial of funding for "[Section] 284 projects," or even DoD projects generally, would trigger Section 8005's limitation. Opp. at 16. It thus would be inconsistent with the purpose of these provisions, and would subvert "the difficult judgments reached by Congress," *McIntosh*, 833 F.3d

at 1175, to allow Defendants to circumvent Congress's clear decision to deny the border barrier funding sought here when it appropriated a dramatically lower amount in the CAA. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring) ("It is quite impossible . . . when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.").

**ii. Plaintiffs are Likely to Show That the Transfer is Not Based on "Unforeseen Military Requirements."**

Plaintiffs next argue that any need for border barrier construction—to the extent there is a need—was long "foreseen," noting that the President supported his fiscal year 2019 budget request for border barrier funding with a description that such a barrier "is critical to combating the scourge of drug addiction that leads to thousands of unnecessary deaths." Mot. at 16 (quoting Citizen Groups RJN Ex. R, at 16).

In response, Defendants again seek to minimize the pass-through nature of DoD's counter-drug activities authority under Section 284. While not disputing that the President requested—and was denied—more-comprehensive funds for border barrier construction, Defendants instead note that "[t]he President's 2019 budget request did not propose additional funding for DoD's counterdrug activities under [Section] 284."

Opp. at 16. Defendants then argue that because DHS only formally requested Section 284 support in February 2019, the need for Section 284 support only become foreseen in February 2019. *Id.* at 16-17.

Separate and apart from the Court's analysis above regarding whether Congress previously denied funding for the relevant item, Plaintiffs also have shown a likelihood of success as to their argument that Defendants fail to meet the "unforeseen military requirement" condition for the reprogramming of funds under Section 8005. As the House notes in its *amicus* brief, DoD has used this authority in the past to transfer funds based on unanticipated circumstances (such as hurricane and typhoon damage to military bases) justifying a departure from the scope of spending previously authorized by Congress. House Br. at 10 (citing Office of the Under Secretary of Defense (Comptroller), DoD Serial No. FY 04-37 PA, Reprogramming Action (Sept. 3, 2004)). Here, however, Defendants claim that what was "unforeseen" was "[t]he need for DoD to exercise its [Section] 284 authority to provide support for counter-drug activities," which "did not arise until February 2019, when DHS requested support from DoD to construct fencing in drug trafficking corridors." Opp. at 16.

Defendants' argument that the need for the requested border barrier construction funding was "unforeseen" cannot logically be squared with the Administration's multiple requests for funding for exactly that purpose dating back to at least early 2018. *See* Citizen Groups Ex. R (February 2018 White House Budget Request describing "the Administration's proposal for $18 billion to fund the border wall"); *see also* States RJN Exs. 14-20 (failed bills); *id.* Ex. 21 (December 11, 2018

transcript from a meeting with members of Congress, where the President stated that "if we don't get what we want [for border barrier construction funding], one way or the other—whether it's through you, through a military, through anything you want to call [sic]—I will shut down the government"); Case No. 4:19-cv-00872-HSG, ECF No. 89-12, at 14 (testimony of Defendant Shanahan before the House Armed Services Committee explaining that the Administration discussed unilateral reprogramming "prior to the declaration of a national emergency"). Further, even the purported need for DoD to provide DHS with support for border security has similarly been long asserted. *See* States RJN Ex. 27 (April 4, 2018 presidential memorandum directing the Secretary of Defense to support DHS "in securing the southern border and taking other necessary actions" due to "[t]he crisis at our southern border"). Defendants' suggestion that by not specifically seeking border barrier funding under Section 284 by name, the Administration can later contend that as far as DoD is concerned, the need for such funding is "unforeseen," is not likely to withstand scrutiny.

Interpreting "unforeseen" to refer to the request for DoD assistance, as opposed to the underlying "requirement" at issue, also is not reasonable. By Defendants' logic, *every* request for Section 284 support would be for an "unforeseen military requirement," because only once the request was made would the "need to exercise authority" under the statute be foreseen. There is no logical reason to stretch the definition of "unforeseen military requirement" from requirements that the government as a whole plainly cannot predict (like the need to repair hurricane damage) to requirements that plainly *were* foreseen by the government as a whole (even if

DoD did not realize that it would be asked to pay for them until after Congress declined to appropriate funds requested by another agency). Nothing presented by the Defendants suggests that its interpretation is what Congress had in mind when it imposed the "unforeseen" limitation, especially where, as here, multiple agencies are openly coordinating in an effort to build a project that Congress declined to fund. The Court thus finds it likely that Plaintiffs will succeed on this claim.[17]

**iii. Accepting Defendants' Proposed Interpretation of Section 8005's Requirements Would Likely Raise Serious Constitutional Questions.**

The Court also finds it likely that Defendants' reading of these provisions, if accepted, would pose serious problems under the Constitution's separation of powers principles. Statutes must be interpreted to avoid a serious constitutional problem where another "construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (internal quotation marks and citations omitted). Constitutional avoidance is "thus a means of giving effect to congressional intent," as it is presumed that Congress did not intend to create an alternative interpretation that would raise serious constitutional concerns. *Clark v. Martinez*, 543 U.S. 371, 382 (2005). Courts thus "have read significant limitations into . . .

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[17] Because the Court has found that Plaintiffs are likely to succeed on their argument that the reprogramming violates the two Section 8005 conditions discussed above, it need not reach at this stage their argument that the border barrier project is not a "military requirement" at all.

statutes in order to avoid their constitutional invalidation." *Zadvydas*, 533 U.S. at 689 (citation omitted).

As Plaintiffs point out, the upshot of Defendants' argument is that the Acting Secretary of Defense is authorized to use Section 8005 to funnel an additional $1 billion to the Section 284 account for border barrier construction, notwithstanding that (1) Congress decided to appropriate only $1.375 billion for that purpose; (2) Congress's *total* fiscal year 2019 appropriation available under Section 284 for "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States" was $517 million, much of which already has been spent; and (3) Defendants have acknowledged that the Administration considered reprogramming funds for border barrier construction even before the President signed into law Congress's $1.375 billion appropriation. *See* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, div. A, tit. VI, 132 Stat. 2981, 2997 (2018) (appropriating $881 million in funds "[f]or drug interdiction and counter-drug activities" in fiscal year 2019, $517 million of which is "for counter-narcotics support"); Dkt. No. 131 at 4 (indicating that Defendants have not used—and do not intend to use in the near future—any funds appropriated by Congress for counter-narcotics support for border barrier construction); Case No. 4:19-cv-00872-HSG, ECF No. 89-12, at 14 (testimony of Defendant Shanahan before the House Armed Services Committee explaining that the Administration discussed unilateral reprogramming "prior to the declaration of a national emergency"). Put differently, according to Defendants, Section 8005

authorizes the Acting Secretary of Defense to essentially triple—or quintuple, when considering the recent additional $1.5 billion reprogramming—the amount Congress allocated to this account for these purposes, notwithstanding Congress's recent and clear actions in passing the CAA, and the relevant committees' express disapproval of the proposed reprogramming. *See* States RJN Ex. 35 ("The committee denies this request. The committee does not approve the proposed use of [DoD] funds to construct additional physical barriers and roads or install lighting in the vicinity of the United States border."); *id.* Ex. 36 ("The Committee has received and reviewed the requested reprogramming action. . . . The Committee denies the request."). Moreover, Defendants' decision not to refer specifically to Section 284 in their $5.7 billion funding request deprived Congress of even the *opportunity* to reject or approve this funding item.[18]

The Court agrees with Plaintiffs that reading Section 8005 to permit this massive redirection of funds under these circumstances likely would amount to an "unbounded authorization for Defendants to rewrite the federal budget," Reply at 14, and finds that Defendants'

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[18] Defendants do not convincingly explain why the amount now sought to be transferred under Section 8005 could not have been sought directly from Congress as part of the fiscal year 2019 appropriation to the DoD Section 284 account to cover requests for counterdrug support, given that the President has consistently maintained since before taking office that border barrier funding is necessary. If the answer is that the Administration expected, or hoped, that Congress would appropriate the funds to DHS directly, that highlights rather than mitigates the present problem with Defendants' position.

reading likely would violate the Constitution's separation of powers principles. Defendants contend that because Congress did not reject (and, indeed, never had the opportunity to reject) a specific request for an appropriation to the Section 284 drug interdiction fund, DoD can use Section 8005 to route anywhere up to the $4 billion cap set by that statute, to be spent for the benefit of DHS via Section 284. But this reading of DoD's authority under the statute would render meaningless Congress's constitutionally-mandated power to assess proposed spending, then render its binding judgment as to the scope of permissible spending. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (holding that the interpretation of statutes "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude"); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.") (internal quotation marks omitted). This is especially true given that Congress has repeatedly rejected legislation that would have funded substantially broader border barrier construction, as noted above, deciding in the end to appropriate only $1.375 billion. *See City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018) ("In fact, Congress has frequently considered and thus far rejected legislation accomplishing the goals of the Executive Order. The sheer amount of failed legislation on this issue demonstrates the importance and divisiveness of the policies in play, reinforcing the Constitution's 'unmistakable expression of a determination that legislation by the national Congress

be a step-by-step, deliberate and deliberative process.'") (citing *Chadha*, 462 U.S. at 959). In short, the Constitution gives Congress the exclusive power "not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation," *McIntosh*, 833 F.3d at 1172, and "Congress cannot yield up its own powers" in this regard, *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring). Defendants' interpretation of Section 8005 is inconsistent with these principles.

While Defendants argue that the text and history of Section 284 suggest that their proposed transfer and use of the funds are within the scope of what Congress has permitted previously, Opp. at 18, that argument only highlights the serious constitutional questions that accepting their position would create. First, Defendants note that in the past DoD has completed what they characterize as "large-scale fencing projects" with Congress's approval. Opp. at 18 (citing H.R. Rep. No. 103-200, at 330-31 (1993)). But Congress's past approval of relatively small expenditures, that were well within the total amount allocated by Congress to DoD under Section 284's predecessor, speaks not at all to Defendants' current claim that the Acting Secretary has authority to redirect sums over a hundred orders of magnitude greater to that account in the face of Congress's appropriations judgment in the CAA. Similarly, whether or not Section 284 formally "limits" the Secretary to "small scale construction" (defined in Section 284(i)(3) as "construction at a cost not to exceed $750,000 for any project"), reading the statute to suggest that Congress requires reporting of tiny projects but nonetheless has delegated authority to DoD to conduct the massive funnel-and-spend project proposed here is implausible, and likely

would raise serious questions as to the constitutionality of such an interpretation. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (noting that Congress "does not, one might say, hide elephants in mouseholes").

Similarly, if "unforeseen" has the meaning that Defendants claim, Section 8005 would give the agency making a request for assistance under Section 284 complete control over whether that condition is met, simply by virtue of the timing of the request. As here, DHS could wait and see whether Congress granted a requested appropriation, then turn to DoD if Congress declined, and DoD could always characterize the resulting request as raising an "unforeseen" requirement because it did not come earlier. Under this interpretation, DoD could in essence make a de facto appropriation to DHS, evading congressional control entirely. The Court finds that this interpretation likely would pose serious problems under the Appropriations Clause, by ceding essentially boundless appropriations judgment to the executive agencies.

Finally, the Court has serious concerns with Defendants' theory of appropriations law, which presumes that the Executive Branch can exercise spending authority unless Congress explicitly restricts such authority by statute. Counsel for Defendants advanced this theory at the hearing on this motion, arguing that when Congress passed the recent DoD appropriations act containing Section 8005, it "could have" expressly "restrict[ed] that authority" to preclude reprogramming funds for border barrier construction. *See* Dkt. No. 138 at 76:16-77:3. According to Defendants: "If Congress had wanted to deny DOD this specific use of that [repro-

gramming] authority, that's something it needed to actually do in an explicit way in the appropriations process. And it didn't." *Id.* at 77:21-24. But it is not Congress's burden to prohibit the Executive from spending the Nation's funds: it is the Executive's burden to show that its desired use of those funds was "affirmatively approved by Congress." *See FLRA*, 665 F.3d at 1348 ("[A]ll uses of appropriated funds must be affirmatively approved by Congress," and "the mere absence of a prohibition is not sufficient."). To have this any other way would deprive Congress of its absolute control over the power of the purse, "one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several departments.'" *Id.* at 1346-47 (quoting The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961)).

To the extent Defendants believe the Ninth Circuit's decision in *McIntosh* suggests anything to the contrary, the Court disagrees. Defendants appeared to argue at the hearing on this motion that *McIntosh* stands for the principle that the Executive enjoys unfettered spending power unless Congress crafts an appropriations rider cabining such authority. *See* Dkt. No. 138 at 75:5-10. As counsel for Defendants put it, "[Plaintiffs] want to say that something was denied by Congress if it wasn't funded by Congress. . . . But that is just not how these statutes are written and that's not how [*McIntosh*] tells us we interpret the appropriations statute." *Id.* at 75:13-20. But Defendants overlook that no party in *McIntosh* disputed that the government's use of funds was authorized but for the appropriations rider at issue in that case. *See* 833 F.3d at 1175 ("The parties dispute whether the government's spending money on their prosecutions violates [the appropriations rider]."). It is thus

unremarkable that when faced with a dispute exclusively concerning whether the government's otherwise-authorized spending of money violated an appropriations rider, the Ninth Circuit held that "[i]t is a fundamental principle of appropriations law that we may only consider the text of an appropriations rider." *Id.* at 1178; *see also* Dkt. No. 138 at 75:5-10 (defense counsel relying on this language from *McIntosh*).

Unlike in *McIntosh*, where the sole dispute concerned the scope of an external limitation on an otherwise-authorized spending of money, the present dispute concerns the scope of limitations within Section 8005 itself on the authorization of reprogramming funds. Whether Congress gives authority in the first place is not the same issue as whether Congress later restricts that authority. And it cannot be the case that Congress must draft an appropriations rider to breathe life into the internal limitations in Section 8005 establishing that the Executive may only reprogram money based on unforeseen military requirements, and may not do so where the item for which funds are requested has been denied by Congress. To adopt Defendants' position would read out these limitations entirely, which the Court cannot do. *See Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 740 (2017) ("Whenever possible, however, we should favor an interpretation that gives meaning to each statutory provision."). To give meaning to—and thus to construe the scope of—these internal limitations is wholly consistent with *McIntosh*, which explained that the Executive's authority to spend is at all times limited "by the text of the appropriation." 833 F.3d at 1178 (internal quotation marks omitted).

For all of these reasons, the Court finds that Plaintiffs have shown a likelihood of success as to their argument that the reprogramming of $1 billion under Section 8005 to the Section 284 account for border barrier construction is unlawful.[19]

**b. Section 2808**

At the President's direction, the DoD intends to use up to $3.6 billion in military construction funding to facilitate border barrier construction. Defendants rely on Section 2808, under which the Secretary of Defense may "undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law." 10 U.S.C. § 2808(a). As is relevant here, Section 2808 requires that (1) the President first declare a national emergency in accordance with the NEA that "requires use of the armed forces," (2) the

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[19] Defendants have now acknowledged that all of the money they plan to spend on border barrier construction under Section 284 is money transferred into that account under Section 8005. *See* Dkt. No. 131 at 4. Given this acknowledgment, and the Court's finding that Plaintiffs are likely to show that the Section 8005 reprogramming is unlawful, the Court need not at this stage decide whether Defendants would have been permitted to use for border barrier construction any remaining funds that Congress appropriated to the Section 284 account for fiscal year 2019. The Court notes that the House confirmed in its own lawsuit that it "does not challenge the expenditure of any remaining appropriated funds under section 284 on the construction of a border wall." United States House of Representatives' Application for a Preliminary Injunction at 30, *U.S. House of Representatives v. Mnuchin*, No. 1:19-cv-00969 (TNM) (D.D.C. Apr. 23, 2019), ECF No. 17; *see also* House Br. at 17 (requesting preliminary injunction "prohibiting defendants from transferring and spending funds in excess of what Congress appropriated for counter-narcotics support under 10 U.S.C. § 284").

use of funds be for "military construction projects," and (3) the military construction projects be "necessary to support such use of the armed forces." *Id.* Plaintiffs contend that Defendants' plan to use Section 2808 to build a barrier on the U.S.-Mexico border fails all three requirements.

Under the circumstances, it is unclear how border barrier construction could reasonably constitute a "military construction project" such that Defendants' invocation of Section 2808 would be lawful. Section 2808 authorizes the Secretary of Defense to "undertake military construction projects." And Congress defined the term "military construction," as it is used in Section 2808, to "include[] any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road." 10 U.S.C. § 2801(a). Congress in turn defined the term "military installation" to "mean[] a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control." *Id.* § 2801(c)(4).

Plaintiffs reason that border barrier construction does not constitute construction "carried out with respect to a military installation," because (1) the U.S.-Mexico border is not a military "base, camp, post, station, yard, center" or "defense access road;" and (2) securing the border is not an "activity under the jurisdiction of the

Secretary of a military department." Mot. at 14. Instead, Congress assigned responsibility for "[s]ecuring the borders" to DHS. *See* 6 U.S.C. § 202. Defendants respond that although the statute defines both "military construction" and its nested term, "military installation," "[b]road terms defining military construction as 'includ[ing]' (but not limited to, *see* 10 U.S.C. § 101(f)(4)) construction with respect to a military installation, and defining military installation to include non-specified 'other activity,' are not the kind of clear and mandatory statutory language that is a necessary predicate to an ultra vires claim." Opp. at 23.

Defendants' arguments prove too much. As explained above, Defendants misunderstand the standard for *ultra vires* review. More to the merits, the plain language of the relevant statutory definitions does not demonstrate the sort of unbounded authority that Defendants suggest. Turning first to the statutory definition of "military construction," that it uses the word "includes" when it provides that military construction "includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation" is irrelevant. No one disputes that border barrier construction constitutes "construction." What matters is that Section 2801(a) limits such construction—however broad that term might be—to construction related to a military installation. In other words, the critical language of Section 2801(a) is not the word "includes," it is the condition "with respect to a military installation."

Turning next to the statutory definition of "military installation," Section 2801(c)(4) provides in relevant

part that it "means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." And Defendants make no attempt to characterize the U.S.-Mexico border or a border barrier as a "base, camp, post, station, yard, [or] center." Nor could they. Defendants instead contend that border barrier construction is authorized under the catch-all term "other activity." *See* Dkt. No. 138 at 92:9-93:22.

In interpreting Section 2801 to determine whether Defendants' plan to construct a barrier on the U.S.-Mexico border falls within the "other activity" category, the Court applies "traditional tools of statutory construction." *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257 (9th Cir. 1994), *amended on denial of reh'g by* 99 F.3d 321 (9th Cir. 1996). The Court "begin[s] with the statute's language, which is conclusive unless literally applying the statute's text demonstrably contradicts Congress's intent." *Chemehuevi Indian Tribe v. Newsom*, 919 F.3d 1148, 1151 (9th Cir. 2019). "When deciding whether the language is plain, courts must read the words in their context and with a view to their place in the overall statutory scheme." *Id.* (quoting *Rainero v. Archon Corp.*, 844 F.3d 832, 837 (9th Cir. 2016) (internal quotation marks and alterations omitted)).

Applying traditional tools of statutory construction, Section 2801 likely precludes treating the southern border as an "other activity." Defendants on this point fail to appreciate that the words immediately preceding "or other activity" in Section 2801(c)(4)—"a base, camp, post, station, yard, [and] center"—provide contextual limits on

the catch-all term. The Court thus relies on the doctrine of *noscitur a sociis*, "which is that a word is known by the company it keeps." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995). Courts apply this rule "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Id.* (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). The Supreme Court has relied on this canon of statutory interpretation many times when construing detailed statutory lists followed by catch-all-type terms. Most recently, in *Epic Systems Corp. v. Lewis*, the Court limited the term "other concerted activities" in Section 7 of the National Labor Relations Act to refer to "things employees 'just do' for themselves in the course of exercising their right to free association in the workplace," rather than any concerted activity whatsoever—including class and collective actions—because the term appeared at the end of a detailed list of specific activities, none of which "speak[] to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum." 138 S. Ct. 1612, 1625 (2018). Before that, in *Gustafson*, the Supreme Court construed the word "communication" as used in Section 2(10) of the Securities Act of 1933 to "refer[] to a public communication" and not any communication whatsoever, because the word followed a list of other terms—"prospectus, notice, circular, advertisement, [and] letter"—in consideration of which "it [was] apparent that the list refers to documents of wide dissemination." 513 U.S. at 575.

*Noscitur a sociis* applies with equal force in the present circumstance. The term "other activity" appears

after a list of closely related types of discrete and traditional military locations: "a base, camp, post, station, yard, [and] center." It is thus proper to construe "other activity" as referring to similar discrete and traditional military locations. The Court does not readily see how the U.S.-Mexico border could fit this bill.

The Court also finds relevant the *ejusdem generis* canon of statutory interpretation, which counsels that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dept. of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001)). At the hearing on this motion, Defendants argued that the term "other activity" "capture[s] everything under the jurisdiction of the secretary of a military department." Dkt. No. 138 at 92:9-13. The Court disagrees. Had Congress intended for "other activity" in Section 2801(c)(4) to be so broad as to transform literally any activity conducted by a Secretary of a military department into a "military installation", there would have been no reason to include a list of specific, discrete military locations. *See Yates v. United States*, 135 S. Ct. 1074, 1087 (2015) ("Had Congress intended 'tangible object' in § 1519 to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to 'record' or 'document.' The Government's unbounded reading of 'tangible object' would render those words misleading surplusage."); *CSX Transp., Inc. v. Ala. Dept. of Revenue*, 562 U.S. 277, 295 ("We typically

use *ejusdem generis* to ensure that a general word will not render specific words meaningless.”).

To be clear, “other activity” is not an empty term. Congress undoubtedly contemplated that military installations would encompass more than just “a base, camp, post, station, yard, [or] center.” But the Court need not stake out the term’s outer limits here. All that matters for present purposes is that, in context and with an eye toward the overall statutory scheme, nothing demonstrates that Congress ever contemplated that “other activity” has such an unbounded reading that it would authorize Defendants to invoke Section 2808 to build a barrier on the southern border.

Despite its concerns with Defendants’ arguments on this point, the Court need not now address whether Plaintiffs are likely to succeed on the merits of their claim that Defendants’ ultimate plan to divert funds under Section 2808 is *ultra vires*. That is because, as discussed below, Plaintiffs have not met their independently necessary burden of showing a likelihood of irreparable harm from the use of funds under Section 2808 for construction at as-yet-unspecified locations so as to be entitled to a preliminary injunction.

**c. NEPA**

After Plaintiffs filed the instant motion—and one day before Defendants filed their opposition—the Acting Secretary of Homeland Security invoked his authority under Section 102(c) of IIRIRA to waive any NEPA requirements for construction in the El Paso and Yuma sectors. *See* Opp. at 25-26; *see also* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended,

84 Fed. Reg. 17185-01 (Apr. 24, 2019); REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 231, 306 (May 11, 2005) (amending Section 102(c) to reflect that the Secretary "ha[s] the authority to waive all legal requirements" that, in the "Secretary's sole discretion," are "necessary to ensure expeditious construction" of barriers and roads). The Acting Secretary later waived NEPA requirements for the El Centro and Tucson Sectors Projects as well, on the same basis. *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,798 (May 15, 2019); Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,800 (May 15, 2019).

Defendants contend that such waivers preclude Plaintiffs from advancing a NEPA claim. Opp. at 26 (citing *In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1213, 1221 (9th Cir. 2019)). Plaintiffs respond that DHS's authority to waive NEPA requirements for construction under IIRIRA does not extend to construction undertaken by DoD under its own spending authority. Reply at 18-19. Plaintiffs further contend that "Defendants' argument is incompatible with their own claim that they are not constructing the El Paso and Yuma sections of border wall under IIRIRA authority, but instead under the wholly separate DoD authority," and suggest that "Defendants cannot have it both ways." Reply at 18-19.

Neither set of Plaintiffs appears to contest that the waivers, if applicable, would be dispositive of the NEPA claims. *See, e.g.*, Plaintiff States' Reply at 16, *California v. Trump*, No. 4:19-cv-00872-HSG (N.D. Cal. May 2,

2019), ECF No. 112 ("States Reply") ("Plaintiffs do not dispute *DHS's* ability to waive NEPA compliance when constructing barriers pursuant to [IIRIRA], with funds specifically appropriated by Congress to be used for that construction.") (emphasis in original); *see also In re Border Infrastructure Envtl. Litig.*, 915 F.3d at 1221 ("[A] valid waiver of the relevant environmental laws under section 102(c) is an affirmative defense to all the environmental claims [including NEPA claims]," and is "dispositive of [those] claims."). But Plaintiffs contend that "the DHS Secretary's waiver under IIRIRA does not waive *DOD's* obligations to comply with NEPA prior to proceeding with El Paso Project 1 under *DOD's* statutory authority, 10 U.S.C. § 284, and using *DOD's* appropriations," so that "DHS's waiver has no application to this project." States Reply at 16 (emphasis added); *see also* Reply at 19 ("Defendants identify no statutory authority for a waiver for 'expeditious construction' under DOD's § 284 authority, and none exists.").

The Court finds that Plaintiffs are not likely to succeed on their NEPA argument because of the waivers issued by DHS. DoD's authority under Section 284 is derivative. Under the statute, DoD is limited to providing support (including construction support) to other agencies, and may invoke its authority only in response to a request from such an agency. *See* 10 U.S.C. § 284 ("The Secretary of Defense may provide support for the counterdrug activities . . . of any other department or agency of the Federal Government," including support for "[c]onstruction of roads and fences," if "such support is requested . . . by the official who has responsibility for the counterdrug activities."). Here, DHS has made such a request, invoking "its authority

under Section 102 of IIRIRA to install additional physical barriers and roads" in designated areas, seeking support for its "ability to impede and deny illegal entry and drug smuggling activities." Citizen Groups RJN Ex. I, at 1. DHS requested DoD's assistance "[t]o support DHS's action under Section 102." *Id.* at 2. Plaintiffs' argument would require the Court to find that even though it is undisputed that DHS could waive NEPA's requirements if it were paying for the projects out of its own budget, that waiver is inoperative when DoD provides support in response to a request from DHS. The Court finds it unlikely that Congress intended to impose different NEPA requirements on DoD when it acts in support of DHS's Section 102 authority in response to a direct request under Section 284 than would apply to DHS itself.[20] *See Defs. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 121, 129 (D.D.C. 2007) (finding DHS's Section 102 waiver authority authorized the DHS Secretary to waive legal requirements where the U.S. Army Corps of Engineers, a federal agency within the DoD, was constructing border fencing "on behalf of DHS").[21]

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[20] Plaintiff States argue that "[i]n another context, Congress explicitly allows the DOD Secretary to request 'the head of another agency responsible for the administration of navigation or vessel-inspection laws to waive compliance with those laws to the extent the Secretary considers necessary.'" States Reply at 17 (citing 46 U.S.C. § 501(a)). The Court finds this statute to be irrelevant to the issue here. In this case, DoD is acting solely in response to DHS's request for support under Section 102; DHS has undisputed authority to issue waivers under that section; and it would not make sense to make NEPA compliance a condition of DoD's derivative support notwithstanding DHS's waiver.

[21] To the extent Plaintiffs' argument is that the government "cannot have it both ways," the Court agrees, to the extent it found a

### 2. Likelihood of Irreparable Injury

Plaintiffs advance three theories of irreparable harm: (1) harm to their members' aesthetic and recreational interests in areas threatened by border barrier construction; (2) constitutional harm; and (3) harm to Plaintiff SBCC and its member organizations' ability to carry out their missions. Mot. at 22-25; Reply at 19-24. Critical to this analysis is that while Defendants have committed to fund border barrier construction in the El Paso Sector 1 and Yuma Sector 1 projects using funds reprogrammed and subsequently used under Sections 8005 and 284, Defendants have not committed to fund any border barrier construction using Section 2808. Because of this distinction, the Court addresses the two categories separately.

#### a. Sections 8005 and 284

The Court finds that Plaintiffs have demonstrated a likelihood of irreparable harm to their members' aesthetic and recreational interests in the areas known as El Paso Sector Project 1 and Yuma Sector Project 1.

As the Ninth Circuit has explained, "it would be incorrect to hold that all potential environmental injury warrants an injunction." *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014). "Environmental injury," however, "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 545 (1987).

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likelihood of success as to Plaintiffs' Section 8005 argument, as discussed in Section IV.B.1.a, above.

Plaintiffs must nonetheless demonstrate that irreparable injury "is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. Mere "possibility" of irreparable harm does not merit a preliminary injunction. *Id.* But it is well-established in the Ninth Circuit that an organization can demonstrate irreparable harm by showing that the challenged action will injure its members' enjoyment of public land. *See All. for Wild Rockies*, 632 F.3d at 1135.

Turning to Plaintiffs' aesthetic and recreational interests, Plaintiffs provide declarations from several members, detailing how Defendants' proposed use of funds reprogrammed under Section 8005 and then used under Section 284 for border barrier construction will harm their ability to recreate in and otherwise enjoy public land along the border. *See* Dkt. No. 30 ("Del Val Decl.") ¶¶ 7-9 (alleging harm from border barrier construction and the accompanying lighting in the Yuma Sector Project 1 to declarant's "ability to fish" and general enjoyment of natural environment); Dkt. No. 31 ("Munro Decl.") ¶ 11 (alleging harm from border barrier construction in El Paso Sector Project 1 to declarant's "happiness and sense of fulfillment," which she "derive[s] from visiting these beautiful landscapes"); Dkt. No. 34 ("Bixby Decl.") ¶¶ 6, 12 (alleging harm from border barrier construction in El Paso Sector Project 1 to declarant's hiking and camping interests); Dkt. No. 35 ("Walsh Decl.") ¶¶ 8-12 (alleging harm from border barrier construction in El Paso Sector Project 1 to declarant's recreational interests, including "bird watching and hiking").

Defendants argue that Plaintiffs' alleged recreational harms are insufficient for two reasons. First, Defendants argue that Plaintiffs have not demonstrated "that any species-level impacts are likely as a result of border wall construction." *See* Opp. at 29. But Defendants here misunderstand Plaintiffs' theory. Plaintiffs' declarants nowhere state that their recreational interest is merely the enjoyment of a particular species. Defendants' second argument is that their planned "replacement of existing pedestrian border infrastructure . . . will not change conditions where Mr. Del Val fishes." *Id.* at 30-31. But Defendants here understate the effects of what they now characterize as mere "replacement of existing pedestrian border infrastructure." By Defendants' own description, they intend to replace four-to-six-foot vehicle barriers in the Yuma Sector Project 1 area with a thirty-foot "bollard wall," where "[t]he bollards are steel-filled concrete that are approximately six inches in diameter and spaced approximately four inches apart" and accompanied by lighting. *See* Dkt. No. 64-9 ("Enriquez Decl.") ¶ 12 & Ex. C, at 2-1. Even if the characteristics of the wall were unchanged—which is not the case—Mr. Del Val alleges recreational harms from not only the bollard wall construction but also the accompanying lighting, which does not currently exist. *See* Del Val Decl. ¶ 9. Because the Court finds that Defendants' proposed construction in Yuma Sector Project 1 constitutes a change in conditions for Mr. Del Val, it rejects Defendants' second challenge to Plaintiffs' alleged recreational harms.

Plaintiffs have shown that Defendants' proposed construction will lead to a substantial change in the environment, the nature of which will harm their members' aes-

thetic and recreational interests. The funding of border barrier construction, if indeed barred by law, cannot be remedied easily after the fact, and yet Defendants intend to commence construction immediately and complete it expeditiously. Thus, "[t]he harm here, as with many instances of this kind of harm, is irreparable for the purposes of the preliminary injunction analysis." *See League of Wilderness Defenders/Blue Mountains Biodiversity Project*, 752 F.3d at 764.

**b. Section 2808**

Because Defendants have not disclosed a plan for diverting funds under Section 2808 for border barrier construction, the Court cannot now determine a likelihood of harm to Plaintiffs' members' aesthetic and recreational interests. The Court thus turns to Plaintiffs' other theories of irreparable injury.

To start, to the extent Plaintiffs rely on *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058-59 (9th Cir. 2009), for the principle that a constitutional violation alone suffices to show irreparable harm, the Court finds that principle unavailing. *See* Mot. at 25. Even under that theory of irreparable harm, Plaintiffs must demonstrate some likely irreparable harm in the absence of a preliminary injunction barring the challenged action, and not simply a constitutional violation. *See id.* (noting that the constitutional violation must be "coupled with the damages incurred," which in that case involved "a good deal of economic harm in the interim").

Plaintiffs primary alternative theory of irreparable injury is that Defendants' invocation of and use of funds under Section 2808 for border barrier construction has

harmed and continues to harm Plaintiff SBCC and its member organizations' ability to carry out their missions. *See* Mot. at 23-25. To this end, Plaintiffs describe that "several senior SBCC staff have devoted a '*majority*' of their time to analyzing and responding to" Defendants' invocation of Sections 2808 and 284. *Id.* at 24. Defendants acts purportedly have forced SBCC to "field[] inquiries from members, journalists and elected officials; create[] new educational materials, media toolkits and multimedia content; and host[] trainings for staff and partners." *Id.* Tending to these activities has frustrated SBCC and its member organizations' ability to focus on their "core missions." *Id.* In Plaintiffs' view, "[s]uch injuries are sufficient to demonstrate a likelihood of irreparable harm and justify preliminary injunctive relief." *Id.*

But Plaintiffs conflate the type of harm to organizational mission that gives rise to Article III standing and the type of harm necessary for a preliminary injunction. There is no dispute that the "perceptibl[e] impair[ment]" of an organization's ability to carry out its mission that results in a "drain on the organization's resources" is enough for Article III standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). But to warrant a preliminary injunction, Plaintiffs must do more than just assert irreparable harm. *Winter* commands that plaintiffs seeking a preliminary injunction establish that they are "likely to suffer irreparable harm *in the absence of preliminary relief*." 555 U.S. at 20 (emphasis added). Plaintiffs ignore the "in the absence of preliminary relief" component, but *Winter* is not complicated on this point. Under *Winter*, Plaintiffs must demonstrate that preliminary injunctive relief will prevent some irreparable injury that is likely to occur before the

Court has time to decide the case on the merits. In other words, Plaintiffs must present some persuasive counterfactual analysis showing a likelihood that irreparable harm would occur absent an injunction, but would not occur if an injunction is granted. But as it stands, nothing indicates that Plaintiffs' proffered "diversion" of funds or resources would change at all if the Court were to issue an injunction. With or without an injunction, Plaintiffs will have to continue to litigate this case and otherwise divert resources in the manner they have described until the case is resolved.

All three cases on which Plaintiffs rely to support their mission-frustration theory support the Court's conclusion. First, in *Valle de Sol Inc. v. Whiting*, plaintiffs faced a "credible threat of prosecution" under an allegedly unconstitutional statute, where the resulting injury could not be remedied by monetary damages. 732 F.3d 1006, 1029 (9th Cir. 2013). But that is the quintessential sort of irreparable harm warranting an injunction. *See Ex parte Young*, 209 U.S. 123, 155-56 (1908) ("The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."). Next, in *East Bay Sanctuary Covenant v. Trump*, the plaintiff organizations sufficiently demonstrated that they faced a substantial loss of funding in the absence of an injunction. 354 F. Supp. 3d 1094, 1116 (N.D. Cal. 2018); *see also Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 537 (N.D.

Cal. 2017) ("Without clarification regarding the Order's scope or legality, the Counties will be obligated to take steps to mitigate the risk of losing millions of dollars in federal funding, which will include placing funds in reserve and making cuts to services."). Finally, in *League of Women Voters v. Newby*, plaintiffs demonstrated that their mission interest in registering voters faced likely irreparable injury absent a preliminary injunction because registration deadlines would pass before resolution of the case on the merits. 838 F.3d 1, 9 (D.C. Cir. 2016) ("Because, as a result of the Newby Decisions, those new obstacles unquestionably make it more difficult for the Leagues to accomplish their primary mission of registering voters, they provide injury for purposes both of standing and irreparable harm. And that harm is irreparable because after the registration deadlines for the November election pass, there can be no do over and no redress.") (internal quotation marks and citations omitted).

In all three cases, a counterfactual existed which demonstrated the need for a preliminary injunction. In *Valle*, injunctive relief meant the difference between prosecution under an unconstitutional statute or not. In *East Bay Sanctuary Covenant* and *County of Santa Clara*, injunctive relief meant the difference between organizations losing substantial funding or not. In *League of Women Voters*, injunctive relief meant the difference between registering voters for an election in keeping with organizations' mission interests or not. Here, however, Plaintiffs present no evidence that injunctive relief will make any difference to the purported harm to their mission interests, which will continue until this case's resolution. Plaintiffs thus have not carried their burden to show that the "extraordinary remedy" of a

preliminary injunction is warranted in this regard. *See Winter*, 555 U.S. at 20.

Although the Court finds that Plaintiffs have not yet met their burden of showing irreparable harm in the absence of a preliminary injunction, the Court fully expects that if and when Defendants identify border barrier construction locations where Section 2808 funds will be used, Plaintiffs will have the opportunity to submit materials in support of their irreparable harm claim. The Court takes Defendants at their word that they "will inform the Court" immediately once a decision is made to use Section 2808 to fund border barrier construction. *See* Dkt. No. 131 at 3.

**3. Balance of Equities and Public Interest**

When the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). According to Defendants, these factors tilt in their favor, because their "weighty" interest in border security and immigration-law enforcement, as sanctioned by Congress, outweighs Plaintiffs' "speculative" injuries. Opp. at 34-35. The Ninth Circuit has recognized that "the public has a 'weighty' interest 'in efficient administration of the immigration laws at the border,'" and the Court does not minimize this interest. *See E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018) (quoting *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)). On the other hand, "the public also has an interest in ensuring that statutes enacted by their representatives are not imperiled by executive fiat." *Id.* (internal quotation marks and brackets omitted). And the Court has found

above that Plaintiffs' injuries as to El Paso Sector Project 1 and Yuma Sector Project 1 are not speculative, and will be irreparable in the absence of an injunction. Accordingly, this factor favors Plaintiffs, and counsels in favor of a preliminary injunction, to preserve the status quo until the merits of the case can be promptly resolved.[22]

## V. CONCLUSION

Congress's "absolute" control over federal expenditures —even when that control may frustrate the desires of the Executive Branch regarding initiatives it views as important—is not a bug in our constitutional system. It is a feature of that system, and an essential one. *See FLRA*, 665 F.3d at 1346-47 ("The power over the purse was one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several departments.'") (quoting The Federalist No. 51, at 320 (James Madison)). The Appropriations Clause is "a bulwark of the Constitution's separation of powers among the three branches of the National Government," and is "particularly important as a restraint on Executive Branch officers." *Id.* at

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[22] The Court observes that, although Congress appropriated $1.571 billion for physical barriers and associated technology along the Southwest border for fiscal year 2018, counsel for the House has represented to the Court that the Administration has stated as recently as April 30, 2019 that CBP represents it has only constructed 1.7 miles of fencing with that funding. *See* Dkt. No. 139; *see also* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. F, tit. II, § 230(a) 132 Stat. 348 (2018). This representation tends to undermine Defendants' claim that irreparable harm will result if the funds at issue on this motion are not deployed immediately.

1347. In short, the position that when Congress declines the Executive's request to appropriate funds, the Executive nonetheless may simply find a way to spend those funds "without Congress" does not square with fundamental separation of powers principles dating back to the earliest days of our Republic. *See City & Cty of San Francisco*, 897 F.3d at 1232 ("[I]f the decision to spend is determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened.") (internal quotation marks and brackets omitted) (quoting *Clinton*, 524 U.S. at 451) (Kennedy, J., concurring). Justice Frankfurter wrote in 1952 that "[i]t is not a pleasant judicial duty to find that the President has exceeded his powers," *Youngstown*, 343 U.S. at 614 (Frankfurter, J., concurring), and that remains no less true today. But "if there is a separation-of-powers concern here, it is between the President and Congress, a boundary that [courts] are sometimes called upon to enforce." *E. Bay Sanctuary Covenant*, 909 F.3d at 1250; *see also Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 825-26 (9th Cir. 2017) ("To declare that courts cannot even look to a statute passed by Congress to fulfill international obligations turns on its head the role of the courts and our core respect for a co-equal political branch, Congress."). Because the Court has found that Plaintiffs are likely to show that Defendants' actions exceeded their statutory authority, and that irreparable harm will result from those actions, a preliminary injunction must issue pending a resolution of the merits of the case.

For the foregoing reasons, the Court hereby **GRANTS IN PART** and **DENIES IN PART WITHOUT PREJUDICE** Plaintiffs' motion for a preliminary injunction.

The terms of the injunction are as follows[23]: Defendants Patrick M. Shanahan, in his official capacity as Acting Secretary of Defense, Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security, Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury, and all persons acting under their direction, are enjoined from taking any action to construct a border barrier in the areas Defendants have identified as Yuma Sector Project 1 and El Paso Sector Project 1 using funds reprogrammed by DoD under Section 8005 of the Department of Defense Appropriations Act, 2019.

A case management conference is set for June 5, 2019 at 2:00 p.m. At the case management conference, the parties should be prepared to discuss a plan for expeditiously resolving this matter on the merits, whether through a bench trial, cross-motions for summary judgment, or other means. The parties must submit a joint case management statement by May 31, 2019.

**IT IS SO ORDERED.**

Dated: 5/24/2019

/s/ HAYWOOD S. GILLIAM, JR.
HAYWOOD S. GILLIAM, JR.
United States District Judge

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[23] The Court finds that an injunction against the President personally is not warranted here. *See Cty. of Santa Clara*, 250 F. Supp. 3d at 549-40.

**APPENDIX J**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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Case No. 19-cv-00872-HSG

STATE OF CALIFORNIA, ET AL., PLAINTIFFS

*v.*

DONALD J. TRUMP, ET AL., DEFENDANTS

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Filed: May 24, 2019

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**ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**
**Re: Dkt. No. 59**

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On February 18, 2019, a coalition of sixteen states filed suit against Defendants Donald J. Trump, in his official capacity as President of the United States; the United States; the U.S. Department of Defense ("DoD"); Patrick M. Shanahan, in his official capacity as Acting Secretary of Defense; Mark T. Esper, in his official capacity as Secretary of the Army; Richard V. Spencer, in his official capacity as Secretary of the Navy; Heather Wilson, in her official capacity as Secretary of the Air Force; the U.S. Department of the Treasury; Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury; the U.S. Department of the

Interior; David Bernhardt, in his official capacity as Secretary of the Interior[1]; the U.S. Department of Homeland Security ("DHS"); and Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security[2] (collectively, "Federal Defendants"). Dkt. No. 1. The next day, Sierra Club and Southern Border Communities Coalition (collectively, "Citizen Group Plaintiffs" or "Citizen Groups") brought a related suit against many, but not all, of the same Federal Defendants. *See* Complaint, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG, (N.D. Cal. Feb. 19, 2019), ECF No. 1. Plaintiffs here filed an amended complaint on March 13, 2019, with the state coalition now constituting twenty states (collectively, "Plaintiff States" or "States"). *See* Dkt. No. 47 ("FAC").

Now pending before the Court is Plaintiffs' motion for a preliminary injunction, briefing for which is complete. *See* Dkt. Nos. 59 ("Mot."), 89 ("Opp."), 112 ("Reply"). The Court held a hearing on this motion on May 17, 2019. *See* Dkt. No. 159. In short, Plaintiffs seek to prevent executive officers from using redirected federal funds for the construction of a barrier on the U.S.-Mexico border.

It is important at the outset for the Court to make clear what this case is, and is not, about. The case is not about whether the challenged border barrier construction plan is wise or unwise. It is not about whether the plan is the right or wrong policy response to existing

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[1] Secretary Bernhardt was named in his then-capacity as Acting Secretary, but was subsequently confirmed as Secretary by the U.S. Senate on April 11, 2019.

[2] Acting Secretary McAleenan is automatically substituted for former Secretary Kirstjen M. Nielsen. *See* Fed. R. Civ. P. 25(d).

conditions at the southern border of the United States. These policy questions are the subject of extensive, and often intense, differences of opinion, and this Court cannot and does not express any view as to them. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (indicating that the Supreme Court "express[ed] no view on the soundness of the policy" at issue there); *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092, 1102 (S.D. Cal. 2018) (noting that the court "cannot and does not consider whether underlying decisions to construct the border barriers are politically wise or prudent"). Instead, this case presents strictly legal questions regarding whether the proposed plan for funding border barrier construction exceeds the Executive Branch's lawful authority under the Constitution and a number of statutes duly enacted by Congress. *See In re Aiken Cty.*, 725 F.3d 255, 257 (D.C. Cir. 2013) ("The underlying policy debate is not our concern. . . . Our more modest task is to ensure, in justiciable cases, that agencies comply with the law as it has been set by Congress.").

Assessing whether Defendants' actions not only conform to the Framers' contemplated division of powers among co-equal branches of government but also comply with the mandates of Congress set forth in previously unconstrued statutes presents a Gordian knot of sorts. But the federal courts' duty is to decide cases and controversies, and "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule." *See Marbury v. Madison*, 1 Cranch 137, 177 (1803). Rather than cut the proverbial knot, however, the Court aims to untie it—no small task given the number of overlapping legal issues. And at this stage, the Court then must further decide whether Plaintiffs have met the standard for obtaining the extraordinary remedy of a

preliminary injunction pending resolution of the case on the merits.

After carefully considering the parties' arguments, the Court **DENIES** Plaintiffs' motion.[3]

## I. LEGAL STANDARD

A preliminary injunction is a matter of equitable discretion and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking preliminary injunctive relief must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Id.* at 20. Alternatively, an injunction may issue where "the likelihood of success is such that serious questions going to the merits were raised and the balance of hardships tips sharply in [the plaintiff's] favor," provided that the plaintiff can also demonstrate the other two *Winter* factors. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011) (citation and internal quotation marks omitted). Under either standard, Plaintiffs bear the burden of making a clear showing that they are entitled to this extraordinary remedy. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). The most important *Winter* factor is likelihood of success on the merits.

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[3] The relevant background for this and the Citizen Groups' action is the same. The Court thus incorporates in full here the factual background and statutory framework as set forth in its preliminary injunction order in the Citizen Groups' action. *See* Order, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. May 24, 2019), ECF No. 144.

*See Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017).

## II. ANALYSIS

In the pending motion, Plaintiffs seek to enjoin Defendants from using certain diverted federal funds and resources for border barrier construction. Specifically, Plaintiffs move to enjoin Defendants from: (1) invoking Section 8005's reprogramming authority to channel funds into DoD's drug interdiction fund, (2) invoking Section 284 to divert monies from DoD's drug interdiction fund for border barrier construction on the southern border of New Mexico, (3) invoking Section 9705 to divert monies from the Treasury Forfeiture Fund for border barrier construction,[4] and (4) taking any further action related to border barrier construction until Defendants comply with NEPA.

Defendants oppose each basis for injunctive relief. Defendants further contend that (1) the Plaintiffs lack standing to bring their Sections 8005 and 9705 claims, and (2) the Court is not the proper venue to challenge border barrier construction in New Mexico. The Court addresses these threshold issues first before turning to Plaintiffs' individual bases for injunctive relief.

### A. Article III Standing

A plaintiff seeking relief in federal court bears the burden of establishing "the irreducible constitutional minimum" of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). First, the plaintiff must have

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[4] Only the State Plaintiffs challenge the diversion of funds under Section 9705.

"suffered an injury in fact." *Id.* This requires "an invasion of a legally protected interest" that is concrete, particularized, and actual or imminent, rather than conjectural or hypothetical. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). Second, the plaintiff's injury must be "fairly traceable to the challenged conduct of the defendant." *Spokeo*, 136 S. Ct. at 1547. Third, the injury must be "likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan*, 504 U.S. at 560-61).

"States are not normal litigants for the purposes of invoking federal jurisdiction," and are "entitled to special solicitude in [the] standing analysis." *Massachusetts v. EPA*, 549 U.S. 497, 518-20 (2007). For instance, states may sue to assert their "quasi-sovereign interest in the health and well-being—both physical and economic—of [their] residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). In that case, however, the "interest must be sufficiently concrete to create an actual controversy between the State and the defendant" such that the state is more than a nominal party. *Id.* at 602.

**1. New Mexico Has Standing for Its Section 8005 Claim.**

Only New Mexico contends that it has standing to challenge Defendants' reprogramming of funds under Section 8005. *See* Reply at 2 (arguing that "Defendants' actions [under Section 8005] will cause concrete and particularized injuries-in-fact to New Mexico's environment and wildlife, giving New Mexico standing"). Defendants argue that New Mexico lacks standing to challenge Defendants' invocation of Section 8005 to repro-

gram funds into the drug interdiction fund, so that Defendants can then divert that money wholesale to border barrier construction using Section 284. *See* Opp. at 17-18.[5] Defendants do not dispute that New Mexico has standing to challenge the use of funds from the drug interdiction fund for border barrier construction under Section 284. Defendants nonetheless reason that harm from construction using drug interdiction funds under Section 284 does not establish standing to challenge Defendants' use of Section 8005 to supply those funds. *Id.* at 17. Defendants argue that standing requires that the plaintiff be the "object" of the challenged agency action, but that the Section 8005 augmentation of the drug interdiction fund and the use of that money for construction are "two distinct agency actions." *Id.* at 17-18 (citing *Lujan*, 504 U.S. at 562). According to Defendants, the "object" of the Section 8005 reprogramming was "simply mov[ing] funds among DoD's accounts." *Id.* (citing *Lujan*, 504 U.S. at 562).

Defendants' logic fails in all respects. As an initial matter, it is not credible to suggest that the "object" of the Section 8005 reprogramming is anything but border barrier construction, even if the reprogrammed funds make a pit stop in the drug interdiction fund. Since Defendants first announced that they would reprogram funds using Section 8005, they have uniformly described

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[5] Defendants also argue New Mexico lacks standing because it falls outside Section 8005's "zone of interests." *See* Opp. at 18-19. Because the Court finds Defendants' "zone of interests" challenge derivative of Defendants' misunderstanding of *ultra vires* review, the Court addresses those matters together, below. *See infra* Section II.C.1.

the object of that reprogramming as border barrier construction. *See* Dkt. No. 89-10 ("Rapuano Decl.") ¶ 5 (providing that "the Acting Secretary of Defense decided to use DoD's general transfer authority under section 8005 . . to transfer funds between DoD appropriations to fund [border barrier construction in Arizona and New Mexico]"); *id.* Ex. D, at 1 (notifying Congress that the "reprogramming action" under Section 8005 is for "construction of additional physical barriers and roads in the vicinity of the United States border").

Nor does *Lujan* impose Defendants' proffered strict "object" test. The *Lujan* Court explained that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." 504 U.S. at 562 (internal quotation marks omitted). And the Supreme Court was concerned in particular with "causation and redressability," which are complicated inquiries when a plaintiff's standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Id.* (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (Kennedy, J.)). As concerns causation, the Ninth Circuit recently explained that Article III standing only demands a showing that the plaintiff's injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). "Causation may be found even if there are multiple links in the chain connecting the defendant's unlawful conduct to the plaintiff's injury, and there's no

requirement that the defendant's conduct comprise the last link in the chain. As we've said before, what matters is not the length of the chain of causation, but rather the plausibility of the links that comprise the chain." *Id.* (internal quotation marks and citations omitted).

No complicated causation inquiry is necessary here, as there are no independent absent actors. More important, if there were ever a case where standing exists even though the challenged government action is nominally directed to some different "object," this is it. Neither the parties nor the Court harbor any illusions that the point of reprogramming funds under Section 8005 is to use those funds for border barrier construction. And under Ninth Circuit law, there is no requirement that the challenged conduct be the last link in the causal chain. Rather, even if there is an intervening link between the Section 8005 reprogramming and the border barrier construction itself, any injury caused by the border barrier construction is nonetheless "fairly traceable" to the Section 8005 reprogramming under the circumstances. *See id.* The Court thus cannot accept the Government's "two distinct actions" rationale as a basis for shielding Defendants' actions from review.

**2. Plaintiffs Have Standing for Their Section 9705 Claim.**

Defendants argue that no state has standing to challenge the Treasury's decision to allocate Treasury Forfeiture Fund ("TFF") money to border barrier construction because that decision "does not jeopardize the solvency of the TFF or negatively impact the States' receipt of future equitable sharing money." Opp. at 12. Defendants thus posit that "[t]he States have not estab-

lished that the challenged action will cause them any injury." *Id.* at 14. As support, Defendants rely on the declaration of the Director of the Treasury's Executive Office for Asset Forfeiture ("TEOAF"), John M. Farley, who manages the TFF. Dkt. No. 89-9 ("Farley Decl.") ¶ 2. Mr. Farley assures that the Treasury has adequately accounted for mandatory and priority expenses in such a way that there is no risk to the TFF's solvency in general or to any equitable sharing payments specifically. *Id.* at 13-14. Defendants, however, do not address Plaintiffs' evidence to support standing, which includes recent statements from TEOAF that a "substantial drop in 'base' revenue," which "is relied upon to cover basic mandatory [TFF] costs . . . is especially troubling," even before the $601 million diversion. Dkt. No. 59-4 ("States RJN") Ex. 43, at 4[6]; Mot. at 12.

Defendants ask too much of Plaintiffs. A plaintiff need not present undisputable proof of a future harm. The injury-in-fact requirement instead permits standing when a risk of future injury is "at least *imminent*." *See Lujan*, 504 U.S. at 564 n.2. And while courts must ensure that the "actual or imminent" measure of harm is not "stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes," *see id.*, the Ninth Circuit has consistently held that a "'credible threat' that a probabilistic harm will materialize" is enough, *see Nat. Res. Def. Council v.*

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[6] The Court takes judicial notice of various documents, for reasons set forth in the Court's preliminary injunction order in the Citizen Groups' action. *See* Order, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. May 24, 2019), ECF No. 144, at 3 n.2; *see also* Request for Judicial Notice, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Apr. 4, 2019), ECF No. 36 ("Citizen Groups RJN").

*EPA*, 735 F.3d 873, 878 (9th Cir. 2013) (quoting *Covington v. Jefferson Cty.*, 358 F.3d 626, 641 (9th Cir. 2004)).

At this stage, Plaintiff States have carried their burden to demonstrate that there is a "credible threat" that Defendants' diversion of TFF funds will have economic ramifications on the states. If the only information before the Court were bald allegations questioning the TFF's solvency and the States' prospects of future equitable sharing payments on the one hand, and Mr. Farley's declaration assuaging those concerns on the other, then whether Plaintiffs could demonstrate a "credible threat" would be a closer call. But that is not the case. Plaintiffs instead cite to recent statements by the Treasury characterizing "especially troubling" drops in revenue which call into question its ability to cover "basic mandatory [TFF] costs." *See* States RJN 43, at 4. The Court finds these statements demonstrate a "credible threat," such that Plaintiffs have satisfied the injury-in-fact requirement for Article III standing. *See Nat. Res. Def. Council*, 735 F.3d at 878.

**B. Venue is Proper in This Court.**

Because Defendants challenge Plaintiffs' standing as to all claims except New Mexico's Section 284 claim, Defendants assert that New Mexico is the only Plaintiff that can plausibly state an alleged injury and thus that venue is improper in the Northern District of California. Opp. at 30. But New Mexico's ability to seek relief in this Court relies on California having standing, which the parties do not dispute would render venue proper for all claims in this case. Because the Court finds that California has independent Article III standing, the Court finds venue is proper. *See* 28 U.S.C. § 1391(e)(1)

(providing that venue is proper in actions against officers or employees of the United States where a "plaintiff resides if no real property is involved in the action").

### C. Plaintiffs Have Not Shown They Are Entitled to a Preliminary Injunction.

Applying the *Winter* factors, the Court finds Plaintiffs are not entitled to a preliminary injunction at this time.

#### 1. Likelihood of Success on the Merits

The crux of Plaintiffs' case is that Defendants' methods for funding border barrier construction are unlawful. And Plaintiffs package that core challenge in several ways. For present purposes, Plaintiffs contend that Defendants' actions (1) are unconstitutional, (2) exceed Defendants' statutory authority—in other words, are *ultra vires*—(3) violate the APA because they are arbitrary and capricious, and (4) violate NEPA.

The Court begins with a discussion of the law governing the appropriation of federal funds. Under the Appropriations Clause of the Constitution, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. "The Clause's words convey a 'straightforward and explicit command': No money 'can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1346 (D.C. Cir. 2012) (quoting *OPM v. Richmond*, 496 U.S. 414, 424 (1990)). "The Clause has a 'fundamental and comprehensive purpose . . . to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to

the common good and not according to the individual favor of Government agents.'" *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) (quoting *Richmond*, 496 U.S. at 427-28). It "protects Congress's exclusive power over the federal purse," and "prevents Executive Branch officers from even inadvertently obligating the Government to pay money without statutory authority." *FLRA*, 665 F.3d at 1346-47 (internal quotation marks and citations omitted).

"Federal statutes reinforce Congress's control over appropriated funds," and under federal law "appropriated funds may be applied only 'to the objects for which the appropriations were made.'" *Id.* at 1347 (quoting 31 U.S.C. § 1301(a)). Moreover, "[a]n amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law." 31 U.S.C. § 1532. "[A]ll uses of appropriated funds must be affirmatively approved by Congress," and "the mere absence of a prohibition is not sufficient." *FLRA*, 665 F.3d at 1348. In summary, "Congress's control over federal expenditures is 'absolute.'" *Id.* (quoting *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 185 (D.C. Cir. 1992)).

Rather than dispute these principles, Defendants contend that the challenged conduct complies with them. *See* Opp. at 26 ("The Government is not relying on independent Article II authority to undertake border construction; rather, the actions alleged are being undertaken pursuant to express statutory authority."). Accordingly, one of the key issues in dispute is whether Congress in fact provided "express statutory authority" for Defendants' challenged actions.

Turning to Plaintiffs' claims, it is necessary as a preliminary matter to outline the measure and lens of reviewability the Court applies in assessing such broad challenges to actions by executive officers. As a first principle, the Court finds that it has authority to review each of Plaintiffs' challenges to executive action. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 1 Cranch at 177. In determining what the law is, the Court has a duty to determine whether executive officers invoking statutory authority exceed their statutory power. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). And even where executive officers act in conformance with statutory authority, the Court has an independent duty to determine whether authority conferred by act of the legislature nevertheless runs afoul of the Constitution. *See Clinton v. City of New York*, 524 U.S. 417, 448 (1998).

Once a case or controversy is properly before a court, in most instances that court may grant injunctive relief against executive officers to enjoin both *ultra vires* acts —that is, acts exceeding the officers' purported statutory authority—and unconstitutional acts. The Supreme Court recently reaffirmed this broad equitable power:

> It is true enough that we have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law. But that has been true not only with respect to violations of federal law by state officials, but also with respect to violations of federal law by federal officials. . . . What our cases demonstrate is that, in a proper case, relief may

> be given in a court of equity . . . to prevent an injurious act by a public officer.
>
> The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.

*Armstrong*, 135 S. Ct. at 1384 (internal quotation marks and citations omitted).

Misunderstanding the presumptive availability of equitable relief to enforce federal law, Defendants contend that Plaintiffs may only challenge Defendants' conduct through the framework of the APA, and ignore Plaintiffs' *ultra vires* challenges entirely. *See* Opp. at 12 ("Because Congress did not create a private right of action to enforce the statutes that form the basis of the States' challenge, their claims are governed by the [APA], 5 U.S.C. § *et seq*.") But as the Citizen Group Plaintiffs detail at length in their reply brief, *ultra vires* review exists outside of the APA framework. *See* Plaintiffs' Reply at 2-5, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. May 2, 2019), ECF No. 91 ("Citizen Groups Reply"); *see also* Dkt. No. 129 (Brief of *Amici Curiae* Federal Courts Scholars).[7]

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[7] Congress may displace federal courts' equitable power to enjoin unlawful executive action, but a precluding statute must at least display an "intent to foreclose" injunctive relief. *Armstrong*, 135 S. Ct. at 1385. Courts have found such implied foreclosure where (1) the statute provides an express administrative remedy, and (2) the statute is otherwise judicially unadministrable in nature. *Id.* at 1385-86. No party contends that the statutes at issue in this case either expressly foreclose equitable relief or provide an express administrative remedy, which might warrant a finding of implied foreclosure of equitable relief.

Due to their mistaken framing of the scope of *ultra vires* review, Defendants also incorrectly posit that Plaintiffs must establish that they fall within the "zone of interests" of a particular statute to challenge actions taken by the government under that statute. *See* Opp. at 18-19. The "zone of interests" test, however, only relates to statutorily-created causes of action. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (explaining that "[t]he modern 'zone of interests' formulation. . . . applies to all statutorily created causes of action"). The test has no application in an *ultra vires* challenge, which operates outside of the APA framework. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) ("Appellants need not, however, show that their interests fall within the zones of interests of the constitutional and statutory powers invoked by the President in order to establish their standing to challenge the interdiction program as *ultra vires*."); *see also* 33 Charles Alan Wright et al., Federal Practice and Procedure § 8302 (2d ed. 2019) (explaining that the "zone of interests" test is to determine whether a plaintiff "seeks to protect interests that 'arguably' fall within the 'zone of interests' protected by that provision"). In other words, where a plaintiff seeks to vindicate a right protected by a statutory provision, the plaintiff must demonstrate that it arguably falls within the zone of interests Congress meant to protect by enacting that provision. But where a plaintiff seeks equitable relief against a defendant for exceeding its statutory authority, the zone-of-interests test is inapposite. Any other interpretation would lead to absurd results. The very nature of an *ultra vires* action posits that an executive officer has gone beyond what the statute permits, and

thus beyond what Congress contemplated. It would not make sense to demand that Plaintiffs—who otherwise have standing—establish that Congress contemplated that the statutes allegedly violated would protect Plaintiffs' interests. It is no surprise, then, that the Supreme Court's recent discussion of *ultra vires* review in *Armstrong* did not once reference this test.

In reviewing the lawfulness of Defendants' conduct, the Court thus begins each inquiry by determining whether the disputed action exceeds statutory authority. For unless an animating statute sanctions a challenged action, a court need not reach the second-level question of whether it would be unconstitutional for Congress to sanction such conduct. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (explaining the "well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case") (quoting *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)). This is not to say, however, that the yardstick of statutory authority overlooks constitutional concerns entirely. "The so-called canon of constitutional avoidance . . . counsel[s] that ambiguous statutory language be construed to avoid serious constitutional doubts." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). Nonetheless, a court presented with both *ultra vires* and constitutional claims should begin by determining whether

the statutory authority supports the action challenged, and only reach the constitutional analysis if necessary.[8]

**a. Sections 284 and 8005**

At the President's direction, Defendants intend to divert $2.5 billion, $1 billion of which is the subject of the pending motion, to the DoD's drug interdiction fund for border barrier construction.[9] To do so, Defendants

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[8] The Court finds it need not address Plaintiffs' claim that the use of the various reprogramming and diversion mechanisms is arbitrary and capricious under the APA. Plaintiffs' APA arguments are largely repackaged *ultra vires* claims. *See, e.g.*, Reply at 15 (arguing it is arbitrary and capricious to act in excess of statutory authority). To the extent Plaintiffs' APA claim is based on Defendants' alleged departure from internal procedure concerning Section 8005 reprogramming, the Court finds Plaintiffs' are unlikely to succeed on the merits of that argument. Among other reasons, this sort of DoD procedure does not appear to be the kind of "binding internal policy" that might demand an explanation if departed from. *Cf. Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003) (involving an agency's departure from a formally promulgated policy).

[9] The Court here only considers the lawfulness of Defendants' March 25, 2019 invocation of Section 8005 to reprogram $1 billion, given the parties' agreement that this order need not address Defendants' recently announced intent to use Sections 8005, 9002, and 284 to fund border barrier construction in the El Centro Sector and Tucson Sector Projects. The parties reached this agreement after counsel for Defendants represented at the hearing on this motion that "no construction will start [with those funds] until at least 45 days from" the May 17, 2019 hearing date. *See* Dkt. No. 159 at 55:16-17. The parties confirmed that they would agree to a schedule to supplement the record, to permit the Court to review in a timely manner the lawfulness of the new reprogramming, under the framework set forth in this order. *Id.* at 59:14-60:2. The parties have since agreed on a schedule. *See* Dkt. No. 163.

rely on Section 284(b)(7), which authorizes the Secretary of Defense to support other federal agencies for the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *See The Funds Available to Address the National Emergency at Our Border*, The White House, https://www.whitehouse.gov/briefings-statements/funds-available-address-national-emergency-border (Feb. 26, 2019). To satisfy the President's directive, Defendants intend to rely on their reprogramming authority under Section 8005, and plan to "augment" the drug interdiction fund with the entire $2.5 billion in funds that DoD will then use for the construction. *Id.*

Plaintiffs challenge both the augmentation of the drug interdiction fund through Section 8005 and the use of funds from the drug interdiction fund under Section 284. Turning first to the augmentation of funds, Section 8005 authorizes the reprogramming of up to $4 billion "of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense." The transfer must be (1) either (a) DoD working capital funds or (b) "funds made available in this Act to the [DoD] for military functions (except military construction)," (2) first determined by the Secretary of Defense as necessary in the national interest, (3) for higher priority items than those for which originally appropriated, (4) based on unforeseen (5) military requirements, and (6) in no case where the item for which funds are requested has been denied by Congress. Plaintiffs argue that Defendants' actions fail the last three requirements. The Court first considers whether the reprogramming Defendants propose here is for

an item for which funds were requested but denied by Congress.

**i. Plaintiffs are Likely to Show That the Item for Which Funds Are Requested Has Been Denied by Congress.**

Plaintiffs argue that Defendants are transferring funds for a purpose previously denied by Congress. Mot. at 24. Defendants dispute, however, whether Congress's affirmative appropriation of funds in the CAA to DHS constitutes a "denial" of appropriations to DoD's "counter-drug activities in furtherance of DoD's mission under [Section] 284." Opp. at 19. In their view, "the item" for which funds are requested, for present purposes, is counterdrug activities under Section 284. *Id.* at 19-20. And Defendants maintain that "nothing in the DHS appropriations statute indicates that Congress 'denied' a request to fund DoD's statutorily authorized counterdrug activities, which expressly include fence construction." *Id.* In other words, even though DoD's counter-drug authority under Section 284 is merely a pass-through vessel for Defendants to funnel money to construct a border barrier that will be turned over to DHS, Citizen Groups RJN Ex. I, at 10, Defendants argue that the Court should only consider whether Congress denied funding to DoD.

Plaintiffs have shown a likelihood of success as to their argument that Congress previously denied "the item for which funds are requested," precluding the proposed transfer. On January 6, 2019, the President asked Congress for "$5.7 billion for construction of a steel barrier for the Southwest border," explaining that the request "would fund construction of a total of approximately 234 miles of new physical barrier." Citizen

Groups RJN Ex. A, at 1. The request noted that "[a]ppropriations bills for fiscal year (FY) 2019 that have already been considered by the current and previous Congresses are inadequate to fully address these critical issues," to include the need for barrier construction funds. *Id.* The President's request did not specify the mechanics of how the $5.7 billion sought would be used for the proposed steel barrier construction. *Id.* Nonetheless, in the CAA passed by Congress and signed by the President, Congress appropriated only $1.375 billion for the construction of pedestrian fencing, of a specified type, in a specified sector, and appropriated no other funds for barrier construction. The Court agrees with Plaintiffs that they are likely to show that the proposed transfer is for an item for which Congress denied funding, and that it thus runs afoul of the plain language of Section 8005 and 10 U.S.C. § 2214(b) ("Section 2214").[10]

As Defendants acknowledge, in interpreting a statute, the Court applies the principle that "the plain language of [the statute] should be enforced according to its terms, in light of its context." *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1210 (9th Cir. 2015). In its *amicus* brief, the House recounts legislative history that provides critical context for the Court's interpretative task. The House explains that the "denied by the Congress" restriction was imposed on DoD's transfer authority in 1974 to "tighten congressional control of

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[10] *See* Fox News, *Mick Mulvaney on chances of border deal, Democrats ramping up investigation of Trump admin*, YouTube (Feb. 10, 2019), https://www.youtube.com/watch?v=l_Z0xx_zS0M (statement by Acting White House Chief of Staff that "[w]e'll take as much money as you can give us, and then we'll go off and find the money someplace else, legally, in order to secure that southern barrier. But this is going to get built, with or without Congress.").

the reprogramming process." Dkt. No. 73 ("House Br.") at 9 (citing H.R. Rep. No. 93-662, at 16 (1973)). The House committee report on the appropriations bill from that year explained that "[n]ot frequently, but on some occasions, the Department ha[d] requested that funds which have been specifically deleted in the legislative process be restored through the reprogramming process," and that "[t]he Committee believe[d] that to concur in such actions would place committees in the position of undoing the work of the Congress." H.R. Rep. No. 93-662, at 16. Significantly, the Committee stated that such a position would be "untenable." *Id.* Consistent with this purpose, Congress has described its intent that appropriations restrictions of this sort be "construed strictly" to "prevent the funding for programs which have been considered by Congress and for which funding has been denied." *See* H.R. Rep. No. 99-106, at 9 (1985) (discussing analogous appropriations restriction in Pub. L. No. 99-169, § 502(b), 99 Stat. 1005 (codified at 50 U.S.C. § 3094(b)).

The Court finds that the language and purpose of Section 8005 and Section 2214(b) likely preclude Defendants' attempt to transfer $1 billion from funds Congress previously appropriated for military personnel costs to the drug interdiction fund for the construction of a border barrier. Defendants argue that "Congress never denied DoD funding to undertake the [Section] 284 projects at issue," Opp. at 20, such that Section 8005 and Section 2214(b) are satisfied. But in the Court's view, that reading of those sections is likely wrong, when the reality is that Congress was presented with—and declined to grant—a $5.7 billion request for border barrier construction. Border barrier construction, expressly, is the item Defendants now seek to fund via the

Section 8005 transfer, and Congress denied the requested funds for that item. *See* 10 U.S.C. § 2214(b) (explaining that transfer authority "may not be used if *the item to which the funds would be transferred* is an item for which Congress has denied funds") (emphasis added). And Defendants point to nothing in the language or legislative history of the statutes in support of their assertion that only explicit congressional denial of funding for "[Section] 284 projects," or even DoD projects generally, would trigger Section 8005's limitation. Opp. at 20. It thus would be inconsistent with the purpose of these provisions, and would subvert "the difficult judgments reached by Congress," *McIntosh*, 833 F.3d at 1175, to allow Defendants to circumvent Congress's clear decision to deny the border barrier funding sought here when it appropriated a dramatically lower amount in the CAA. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring) ("It is quite impossible . . . when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.").

**ii. Plaintiffs are Likely to Show That the Transfer is Not Based on "Unforeseen Military Requirements."**

Plaintiffs next argue that any need for border barrier construction—to the extent there is a need—was long "foreseen." Mot. at 23. The Citizen Group Plaintiffs

highlight that the President supported his fiscal year 2019 budget request for border barrier funding with a description that such a barrier "is critical to combating the scourge of drug addiction that leads to thousands of unnecessary deaths." Motion for Preliminary Injunction at 16, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Apr. 4, 2019) ("Citizen Groups Mot.") (quoting Citizen Groups RJN Ex. R, at 16).

In response, Defendants again seek to minimize the pass-through nature of DoD's counterdrug activities authority under Section 284. While not disputing that the President requested—and was denied—more-comprehensive funds for border barrier construction, Defendants instead note that "[t]he President's 2019 budget request did not propose additional funding for DoD's counter-drug activities under [Section] 284." Opp. at 20. Defendants then argue that because DHS only formally requested Section 284 support in February 2019, the need for Section 284 support only become foreseen in February 2019. *Id.*

Separate and apart from the Court's analysis above regarding whether Congress previously denied funding for the relevant item, Plaintiffs also have shown a likelihood of success as to their argument that Defendants fail to meet the "unforeseen military requirement" condition for the reprogramming of funds under Section 8005. As the House notes in its *amicus* brief, DoD has used this authority in the past to transfer funds based on unanticipated circumstances (such as hurricane and typhoon damage to military bases) justifying a departure from the scope of spending previously authorized by Congress. House Br. at 9 (citing Office of the Under Secretary of Defense (Comptroller), DoD Serial No. FY

04-37 PA, Reprogramming Action (Sept. 3, 2004)). Here, however, Defendants claim that what was "unforeseen" was "[t]he need for DoD to exercise its [Section] 284 authority to provide support for counter-drug activities," which "did not arise until February 2019, when DHS requested support from DoD to construct fencing in drug trafficking corridors." Opp. at 20.

Defendants' argument that the need for the requested border barrier construction funding was "unforeseen" cannot logically be squared with the Administration's multiple requests for funding for exactly that purpose dating back to at least early 2018. *See* Citizen Groups Ex. R (February 2018 White House Budget Request describing "the Administration's proposal for $18 billion to fund the border wall"); *see also* States RJN Exs. 14-20 (failed bills); *id.* Ex. 21 (December 11, 2018 transcript from a meeting with members of Congress, where the President stated that "if we don't get what we want [for border barrier construction funding], one way or the other—whether it's through you, through a military, through anything you want to call [sic]—I will shut down the government"); Dkt. No. 89-12, at 14 (testimony of Defendant Shanahan before the House Armed Services Committee explaining that the Administration discussed unilateral reprogramming "prior to the declaration of a national emergency"). Further, even the purported need for DoD to provide DHS with support for border security has similarly been long asserted. *See* States RJN Ex. 27 (April 4, 2018 presidential memorandum directing the Secretary of Defense to support DHS "in securing the southern border and taking other necessary actions" due to "[t]he crisis at our southern border"). Defendants' suggestion that by not specifically seeking border barrier funding under Section 284 by name, the

Administration can later contend that as far as DoD is concerned, need for such funding is "unforeseen," is not likely to withstand scrutiny.

Interpreting "unforeseen" to refer to the request for DoD assistance, as opposed to the underlying "requirement" at issue, also is not reasonable. By Defendants' logic, *every* request for Section 284 support would be for an "unforeseen military requirement," because only once the request was made would the "need to exercise authority" under the statute be foreseen. There is no logical reason to stretch the definition of "unforeseen military requirement" from requirements that the government as a whole plainly cannot predict (like the need to repair hurricane damage) to requirements that plainly *were* foreseen by the government as a whole (even if DoD did not realize that it would be asked to pay for them until after Congress declined to appropriate funds requested by another agency). Nothing presented by the Defendants suggests that its interpretation is what Congress had in mind when it imposed the "unforeseen" limitation, especially where, as here, multiple agencies are openly coordinating in an effort to build a project that Congress declined to fund. The Court thus finds it likely that Plaintiffs will succeed on this claim.[11]

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[11] Because the Court has found that Plaintiffs are likely to succeed on their argument that the reprogramming violates the two Section 8005 conditions discussed above, it need not reach at this stage their argument that the border barrier project is not a "military requirement" at all.

**iii. Accepting Defendants' Proposed Interpretation of Section 8005's Requirements Would Likely Raise Serious Constitutional Questions.**

The Court also finds it likely that Defendants' reading of these provisions, if accepted, would pose serious problems under the Constitution's separation of powers principles. Statutes must be interpreted to avoid a serious constitutional problem where another "construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (internal quotation marks and citations omitted). Constitutional avoidance is "thus a means of giving effect to congressional intent," as it is presumed that Congress did not intend to create an alternative interpretation that would raise serious constitutional concerns. *Clark v. Martinez*, 543 U.S. 371, 382 (2005). Courts thus "have read significant limitations into . . . statutes in order to avoid their constitutional invalidation." *Zadvydas*, 533 U.S. at 689 (citation omitted).

As Plaintiffs point out, the upshot of Defendants' argument is that the Acting Secretary of Defense is authorized to use Section 8005 to funnel an additional $1 billion to the Section 284 account for border barrier construction, notwithstanding that (1) Congress decided to appropriate only $1.375 billion for that purpose; (2) Congress's *total* fiscal year 2019 appropriation available under Section 284 for "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States" was $517 million, much of which already has been spent; and (3) Defendants have acknowledged that the Administration considered reprogramming funds

for border barrier construction even before the President signed into law Congress's $1.375 billion appropriation. *See* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, div. A, tit. VI, 132 Stat. 2981, 2997 (2018) (appropriating $881 million in funds "[f]or drug interdiction and counter-drug activities" in fiscal year 2019, $517 million of which is "for counter-narcotics support"); Dkt. No. 151 at 4 (indicating that Defendants have not used—and do not intend to use in the near future—any funds appropriated by Congress for counter-narcotics support for border barrier construction); Dkt. No. 89-12, at 14 (testimony of Defendant Shanahan before the House Armed Services Committee explaining that the Administration discussed unilateral reprogramming "prior to the declaration of a national emergency"). Put differently, according to Defendants, Section 8005 authorizes the Acting Secretary of Defense to essentially triple—or quintuple, when considering the recent additional $1.5 billion reprogramming —the amount Congress allocated to this account for these purposes, notwithstanding Congress's recent and clear actions in passing the CAA, and the relevant committees' express disapproval of the proposed reprogramming. *See* States RJN Ex. 35 ("The committee denies this request. The committee does not approve the proposed use of [DoD] funds to construct additional physical barriers and roads or install lighting in the vicinity of the United States border."); *id.* Ex. 36 ("The Committee has received and reviewed the requested reprogramming action. . . . The Committee denies the request."). Moreover, Defendants' decision not to refer specifically to Section 284 in their $5.7 billion funding

request deprived Congress of even the *opportunity* to reject or approve this funding item.[12]

The Court agrees with the Citizen Group Plaintiffs that reading Section 8005 to permit this massive redirection of funds under these circumstances likely would amount to an "unbounded authorization for Defendants to rewrite the federal budget," Citizen Groups Reply at 14, and finds that Defendants' reading likely would violate the Constitution's separation of powers principles. Defendants contend that because Congress did not reject (and, indeed, never had the opportunity to reject) a specific request for an appropriation to the Section 284 drug interdiction fund, DoD can use Section 8005 to route anywhere up to the $4 billion cap set by that statute, to be spent for the benefit of DHS via Section 284. But this reading of DoD's authority under the statute would render meaningless Congress's constitutionally-mandated power to assess proposed spending, then render its binding judgment as to the scope of permissible spending. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (holding that the interpretation of statutes "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and

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[12] Defendants do not convincingly explain why the amount now sought to be transferred under Section 8005 could not have been sought directly from Congress as part of the fiscal year 2019 appropriation to the DoD Section 284 account to cover requests for counterdrug support, given that the President has consistently maintained since before taking office that border barrier funding is necessary. If the answer is that the Administration expected, or hoped, that Congress would appropriate the funds to DHS directly, that highlights rather than mitigates the present problem with Defendants' position.

political magnitude"); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.") (internal quotation marks omitted). This is especially true given that Congress has repeatedly rejected legislation that would have funded substantially broader border barrier construction, as noted above, deciding in the end to appropriate only $1.375 billion. *See City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018) ("In fact, Congress has frequently considered and thus far rejected legislation accomplishing the goals of the Executive Order. The sheer amount of failed legislation on this issue demonstrates the importance and divisiveness of the policies in play, reinforcing the Constitution's 'unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.'") (citing *Chadha*, 462 U.S. at 959). In short, the Constitution gives Congress the exclusive power "not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation," *McIntosh*, 833 F.3d at 1172, and "Congress cannot yield up its own powers" in this regard, *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring). Defendants' interpretation of Section 8005 is inconsistent with these principles.

While Defendants argue that the text and history of Section 284 suggest that their proposed transfer and use of the funds are within the scope of what Congress has permitted previously, Opp. at 21, that argument only highlights the serious constitutional questions that accepting their position would create. First, Defendants note that in the past DoD has completed what they characterize

as "large-scale fencing projects" with Congress's approval. Opp. at 21 (citing H.R. Rep. No. 103-200, at 330-31 (1993)). But Congress's past approval of relatively small expenditures, that were well within the total amount allocated by Congress to DoD under Section 284's predecessor, speaks not at all to Defendants' current claim that the Acting Secretary has authority to redirect sums over a hundred orders of magnitude greater to that account in the face of Congress's appropriations judgment in the CAA. Similarly, whether or not Section 284 formally "limits" the Secretary to "small scale construction" (defined in Section 284(i)(3) as "construction at a cost not to exceed $750,000 for any project"), reading the statute to suggest that Congress requires reporting of tiny projects but nonetheless has delegated authority to DoD to conduct the massive funnel-and-spend project proposed here is implausible, and likely would raise serious questions as to the constitutionality of such an interpretation. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (noting that Congress "does not, one might say, hide elephants in mouseholes").

Similarly, if "unforeseen" has the meaning that Defendants claim, Section 8005 would give the agency making a request for assistance under Section 284 complete control over whether that condition is met, simply by virtue of the timing of the request. As here, DHS could wait and see whether Congress granted a requested appropriation, then turn to DoD if Congress declined, and DoD could always characterize the resulting request as raising an "unforeseen" requirement because it did not come earlier. Under this interpretation, DoD could in essence make a de facto appropriation to DHS, evading congressional control entirely. The Court finds that this interpretation likely would pose serious problems

under the Appropriations Clause, by ceding essentially boundless appropriations judgment to the executive agencies.

Finally, the Court has serious concerns with Defendants' theory of appropriations law, which presumes that the Executive Branch can exercise spending authority unless Congress explicitly restricts such authority by statute. Counsel for Defendants advanced this theory at the hearing on this motion, arguing that when Congress passed the recent DoD appropriations act containing Section 8005, it "could have" expressly "restrict[ed] that authority" to preclude reprogramming funds for border barrier construction. *See* Dkt. No. 159 at 76:16-77:3. According to Defendants: "If Congress had wanted to deny DOD this specific use of that [reprogramming] authority, that's something it needed to actually do in an explicit way in the appropriations process. And it didn't." *Id.* at 77:21-24. But it is not Congress's burden to prohibit the Executive from spending the Nation's funds: it is the Executive's burden to show that its desired use of those funds was "affirmatively approved by Congress." *See FLRA*, 665 F.3d at 1348 ("[A]ll uses of appropriated funds must be affirmatively approved by Congress," and "the mere absence of a prohibition is not sufficient."). To have this any other way would deprive Congress of its absolute control over the power of the purse, "one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several departments.'" *Id.* at 1346-47 (quoting The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961)).

To the extent Defendants believe the Ninth Circuit's decision in *McIntosh* suggests anything to the contrary,

the Court disagrees. Defendants appeared to argue at the hearing on this motion that *McIntosh* stands for the principle that the Executive enjoys unfettered spending power unless Congress crafts an appropriations rider cabining such authority. *See* Dkt. No. 159 at 75:5-10. As counsel for Defendants put it, "[Plaintiffs] want to say that something was denied by Congress if it wasn't funded by Congress. . . . But that is just not how these statutes are written and that's not how [*McIntosh*] tells us we interpret the appropriations statute." *Id.* at 75:13-20. But Defendants overlook that no party in *McIntosh* disputed that the government's use of funds was authorized but for the appropriations rider at issue in that case. *See* 833 F.3d at 1175 ("The parties dispute whether the government's spending money on their prosecutions violates [the appropriations rider]."). It is thus unremarkable that when faced with a dispute exclusively concerning whether the government's otherwise-authorized spending of money violated an appropriations rider, the Ninth Circuit held that "[i]t is a fundamental principle of appropriations law that we may only consider the text of an appropriations rider." *Id.* at 1178; *see also* Dkt. No. 159 at 75:5-10 (defense counsel relying on this language from *McIntosh*).

Unlike in *McIntosh*, where the sole dispute concerned the scope of an external limitation on an otherwise-authorized spending of money, the present dispute concerns the scope of limitations within Section 8005 itself on the authorization of reprogramming funds. Whether Congress gives authority in the first place is not the same issue as whether Congress later restricts that authority. And it cannot be the case that Congress must draft an appropriations rider to breathe life into the internal limitations in Section 8005 establishing that the

Executive may only reprogram money based on unforeseen military requirements, and may not do so where the item for which funds are requested has been denied by Congress. To adopt Defendants' position would read out these limitations entirely, which the Court cannot do. *See Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 740 (2017) ("Whenever possible, however, we should favor an interpretation that gives meaning to each statutory provision."). To give meaning to—and thus to construe the scope of—these internal limitations is wholly consistent with *McIntosh*, which explained that the Executive's authority to spend is at all times limited "by the text of the appropriation." 833 F.3d at 1178 (internal quotation marks omitted).

For all of these reasons, the Court finds that Plaintiffs have shown a likelihood of success as to their argument that the reprogramming of $1 billion under Section 8005 to the Section 284 account for border barrier construction is unlawful.[13]

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[13] Defendants have now acknowledged that all of the money they plan to spend on border barrier construction under Section 284 is money transferred into that account under Section 8005. *See* Dkt. No. 151 at 4. Given this acknowledgment, and the Court's finding that Plaintiffs are likely to show that the Section 8005 reprogramming is unlawful, the Court need not at this stage decide whether Defendants would have been permitted to use for border barrier construction any remaining funds that Congress appropriated to the Section 284 account for fiscal year 2019. The Court notes that the House confirmed in its own lawsuit that it "does not challenge the expenditure of any remaining appropriated funds under section 284 on the construction of a border wall." United States House of Representatives' Application for a Preliminary Injunction at 30, *U.S. House of Representatives v. Mnuchin*, No. 1:19-cv-00969 (TNM)

**b. Section 9705**

At the President's direction, Defendants intend to divert $601 million from the Treasury Forfeiture Fund to DHS, to provide additional funding for border barrier construction. *See The Funds Available to Address the National Emergency at Our Border*, The White House, https://www.whitehouse.gov/briefings-statements/funds-available-address-national-emergency-border (Feb. 26, 2019). To do so, Defendants rely on 31 U.S.C. § 9705(g)(4)(B), which authorizes the Secretary of Treasury to transfer "unobligated balances . . . for obligation or expenditure in connection with the law enforcement activities of any Federal agency or of a Department of the Treasury law enforcement organization." Defendants intend to use the $601 million "in two allocations, $242 million available immediately and $359 million from future anticipated forfeitures." *Id.* Plaintiffs argue that Defendants' diversion of $601 million toward border barrier construction is not an expenditure for "law enforcement activities." Mot. at 25-26.[14]

As a threshold matter, Defendants contend that how the Treasury allocates funds is unreviewable because it is committed to the Treasury's discretion by law, as "the agency must be allowed to administer its statutory responsibilities" in ways "it sees as the most effective or

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(D.D.C. Apr. 23, 2019), ECF No. 17; *see also* House Br. at 11 (requesting preliminary injunction "prohibiting defendants from transferring and spending funds in excess of what Congress appropriated for counter-narcotics support under 10 U.S.C. § 284").

[14] Notably, the House does not challenge this expenditure in either its own lawsuit or in its *amicus* brief in this case. *See* Complaint, *U.S. House of Representatives v. Mnuchin*, No. 1:19-cv-00969 (TNM) (D.D.C. Apr. 5, 2019), ECF No. 1; House Br.

desirable." Opp. at 14 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993)). They reason that as long as the Treasury "meet[s] permissible statutory objectives," the APA precludes judicial review of the allocation. *Id.* at 15 (quoting *Serrato v. Clark*, 486 F.3d 560, 568 (9th Cir. 2007)). And in this instance—according to Defendants—the Acting Secretary of Defense has exercised his "wide discretion to use" unobligated balances "in connection with the law enforcement activities of any Federal agency." *Id.* "Thus, funding the construction of border barriers is consistent with the statutory purposes of the TFF, such that the allocation of funds for this purpose is unreviewable." *Id.*

The Court finds Defendants' reliance on *Lincoln* and *Serrato* unavailing, and finds that the transfer of funds under Section 9705 is reviewable. Under the APA, Congress may preclude review by statute where the administrative action is committed by law to an agency. *See* 5 U.S.C. § 701(a)(2). Judicial review of agency action, however, is presumptively available. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). And this presumption applies to judicial review of an agency's discretionary acts as well. *See* 5 U.S.C. § 706(2)(A) (permitting courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). That an agency enjoys discretion is thus only the beginning of the inquiry. Whether Section 701(a)(2) precludes review depends on whether the agency enjoys some special discretion.

Defendants maintain that such special discretion exists under *Lincoln* and *Serrato*. In *Lincoln*, the Supreme Court held that the Indian Health Service's decision to discontinue a pilot program called the Indian Children's Program and reallocate funds from a lump-sum appropriation was committed to agency discretion by law under Section 701(a)(2). 508 U.S. at 193. But the lump-sum nature of the appropriation at issue was critical to the *Lincoln* Court's conclusion. "After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way." *Id.* at 192. As the Supreme Court put it:

> [A]n agency's allocation of funds from a lump-sum appropriation requires a complicated balancing of a number of factors which are peculiarly within its expertise: whether its resources are best spent on one program or another; whether it is likely to succeed in fulfilling its statutory mandate; whether a particular program best fits the agency's overall policies; and, indeed, whether the agency has enough resources to fund a program at all.

*Id.* at 193 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)) (internal quotation marks omitted). The Ninth Circuit applied *Lincoln* to another lump-sum appropriation in *Serrato*. *See* 486 F.3d at 567-69. And the Ninth Circuit there summarized the test established by *Lincoln*: "[A]s long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives, [Section] 701(a)(2) gives the courts no leave to intrude. [T]o [that] extent, the decision to allocate

funds is committed to agency discretion by law." *Id.* at 568 (internal quotation marks omitted).

Defendants' diversion of $601 million from the TFF to fund border barrier construction fails the *Lincoln* unreviewability test in two respects. First, Congress's funding of the TFF arguably does not qualify as the sort of lump-sum appropriation present in *Lincoln* and *Serrato*. Rather, Section 9705 delineates a comprehensive list of payments for which the TFF "shall be available," thus specifying how TFF funds may be used. More important, Defendants' purported authority for diverting funds from the TFF itself establishes the limitation on discretion which Plaintiffs seek to vindicate here. Section 9705(g)(4)(B) limits transfers for use "in connection with [] law enforcement activities." And Plaintiffs maintain that Defendants have not met this limitation. *See* Mot. at 25-26. Thus, even accepting Defendants' argument that the APA precludes judicial review so long as the Treasury "meet[s] permissible statutory objectives," *see* Opp. at 14, judicial review is available because Plaintiffs maintain that the Treasury is transferring funds in a statutorily *impermissible* manner. *See Hawaii v. Trump*, 878 F.3d 662, 681 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018) (explaining that the "committed to 'agency discretion by law'" exception is "very narrow," and "does not apply where, as here, a court is tasked with reviewing whether an executive action has exceeded statutory authority").[15]

Although it finds that whether Defendants' conduct meets Section 9705's requirements is reviewable, the

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[15] Defendants' position on the reviewability of Plaintiffs' challenge to the diversion of TFF funds is, in this sense, symptomatic of Defendants' general misunderstanding of *ultra vires* claims.

Court need not now address whether Plaintiffs are likely to succeed on the merits of their claim that the use of funds for border barrier construction is not "in connection with a law enforcement activity." For reasons discussed below, the Court finds that Plaintiffs have not met their independently necessary burden of showing a likelihood of irreparable harm as to the diversion of TFF funds so as to be entitled to a preliminary injunction.

**c. NEPA**

After Plaintiffs filed the instant motion—and one day before Defendants filed their opposition—the Acting Secretary of Homeland Security invoked his authority under Section 102(c) of IIRIRA to waive any NEPA requirements for construction in the El Paso and Yuma sectors. *See* Opp. at 24-26; *see also* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 17185-01 (Apr. 24, 2019); REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 231, 306 (May 11, 2005) (amending Section 102(c) to reflect that the Secretary "ha[s] the authority to waive all legal requirements" that, in the "Secretary's sole discretion," are "necessary to ensure expeditious construction" of barriers and roads). The Acting Secretary later waived NEPA requirements for the El Centro Sector and Tucson Sector Projects as well, on the same basis. *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,798 (May 15, 2019); Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,800 (May 15, 2019).

Defendants contend that such waivers preclude Plaintiffs from advancing a NEPA claim. Opp. at 25 (citing *In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1213, 1221 (9th Cir. 2019)). Plaintiffs respond that DHS's authority to waive NEPA requirements for construction under IIRIRA does not extend to construction undertaken by DoD under its own spending authority. Reply at 16-17. The Citizen Group Plaintiffs further contend that "Defendants' argument is incompatible with their own claim that they are not constructing the El Paso and Yuma sections of border wall under IIRIRA authority, but instead under the wholly separate DoD authority," and suggest that "Defendants cannot have it both ways." Citizen Groups Reply at 18-19.

Neither set of Plaintiffs appears to contest that the waivers, if applicable, would be dispositive of the NEPA claims. *See* Reply at 16 ("Plaintiffs do not dispute *DHS's* ability to waive NEPA compliance when constructing barriers pursuant to [IIRIRA], with funds specifically appropriated by Congress to be used for that construction.") (emphasis in original); *see also In re Border Infrastructure Envtl. Litig.*, 915 F.3d at 1221 ("[A] valid waiver of the relevant environmental laws under section 102(c) is an affirmative defense to all the environmental claims [including NEPA claims]," and is "dispositive of [those] claims."). But Plaintiffs contend that "the DHS Secretary's waiver under IIRIRA does not waive *DOD's* obligations to comply with NEPA prior to proceeding with El Paso Project 1 under *DOD's* statutory authority, 10 U.S.C. § 284, and using *DOD's* appropriations," so that "DHS's waiver has no application to this project." Reply at 16 (emphasis in original); *see also* Citizen Groups Reply at 19 ("Defendants identify no statutory

authority for a waiver for 'expeditious construction' under DOD's § 284 authority, and none exists.").

The Court finds that Plaintiffs are not likely to succeed on their NEPA argument because of the waivers issued by DHS. DoD's authority under Section 284 is derivative. Under the statute, DoD is limited to providing support (including construction support) to other agencies, and may invoke its authority only in response to a request from such an agency. *See* 10 U.S.C. § 284 ("The Secretary of Defense may provide support for the counterdrug activities . . . of any other department or agency of the Federal Government," including support for "[c]onstruction of roads and fences," if "such support is requested . . . by the official who has responsibility for the counterdrug activities."). Here, DHS has made such a request, invoking "its authority under Section 102 of IIRIRA to install additional physical barriers and roads" in designated areas, seeking support for its "ability to impede and deny illegal entry and drug smuggling activities." States RJN Ex. 33, at 1. DHS requested DoD's assistance "[t]o support DHS's action under Section 102." *Id.* at 2. Plaintiffs' argument would require the Court to find that even though it is undisputed that DHS could waive NEPA's requirements if it were paying for the projects out of its own budget, that waiver is inoperative when DoD provides support in response to a request from DHS. The Court finds it unlikely that Congress intended to impose different NEPA requirements on DoD when it acts in support of DHS's Section 102 authority in response to a direct request under Section 284 than would apply to DHS

itself.[16] *See Defs. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 121, 129 (D.D.C. 2007) (finding DHS's Section 102 waiver authority authorized the DHS Secretary to waive legal requirements where the U.S. Army Corps of Engineers, a federal agency within the DoD, was constructing border fencing "on behalf of DHS").[17]

### 2. Likelihood of Irreparable Injury

Plaintiffs advance two theories of irreparable harm: (1) New Mexico faces irreparable environmental harm from border barrier construction; and (2) all States face irreparable harm from the diversion of funds from the TFF. Mot. at 29-33. Defendants take issue with both theories. Opp. at 31-34.

#### a. New Mexico's Environmental Harm

New Mexico's asserted environmental harm stems largely from Defendants' alleged failure to comply with NEPA. *See* Mot. at 29 ("Thus, irreparable injury exists when the agency fails to consider the environmental

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[16] Plaintiffs argue that "[i]n another context, Congress explicitly allows the DOD Secretary to request 'the head of another agency responsible for the administration of navigation or vessel-inspection laws to waive compliance with those laws to the extent the Secretary considers necessary.'" Reply at 17 (citing 46 U.S.C. 501(a)). The Court finds this statute to be irrelevant to the issue here. In this case, DoD is acting solely in response to DHS's request for support under Section 102; DHS has undisputed authority to issue waivers under that section; and it would not make sense to make NEPA compliance a condition of DoD's derivative support notwithstanding DHS's waiver.

[17] To the extent Plaintiffs' argument is that Defendants "cannot have it both ways," the Court agrees, to the extent it found a likelihood of success as to Plaintiffs' Section 8005 argument, as discussed in Section II.C.1.a, above.

concerns raised by NEPA such that governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment.") (internal quotation marks omitted). But for the reasons discussed above, the Court finds Plaintiffs are unlikely to succeed on the merits of their NEPA claim. Plaintiffs also allege, however, that beyond the procedural NEPA harm, Defendants' overall unlawful reprogramming and use of funds under Sections 8005 and 284 for border barrier construction "will cause irreparable injury to wildlife in the area and New Mexico as a whole." *Id.* at 30. And among other things, Defendants' proposed border barrier construction in the El Paso Sector Project 1 portion of New Mexico allegedly will (1) impede wildlife connectivity of over 100 species of wildlife, including the Mexican gray wolf, mountain lion, bobcat, mule deer, and javelina; (2) generate "noise, deep holes for fence posts, vehicle traffic, lighting, and other [construction] disturbances," which will "kill, injure, or alter the behavior of" several species, including the Aplomado falcon and Gila monster; (3) limit New Mexico residents' recreational opportunities; and (4) harm New Mexico as a whole, as it is entrusted by its residents with a duty to protect natural resources for its residents' benefit. *Id.* at 30-31.

Defendants posit that Plaintiffs' "vague allegations," only supported by "declarations [that] are heavy on conjecture and light on detail" concerning harm to local species, are insufficient to satisfy Plaintiffs' burden of demonstrating a likelihood of irreparable injury. Opp. at 31-32. More to the point, Defendants maintain that New Mexico fails to meet its burden of showing that Defendants' plan "is likely to cause population-level harm,"

which Defendants claim requires proof of a "definitive threat" to the species as a whole, and "not mere speculation." *Id.* at 32 (quoting *Nat'l Wildlife Fed'n v. Burlington N.R.R.*, 23 F.3d 1508, 1512 n.8 (9th Cir. 1994) ("*Burlington*")). And as is relevant to the present discussion, Defendants highlight that any purported environmental harm does not warrant a preliminary injunction because population or species-level harm would not occur before a final disposition of the case on the merits. *Id.* at 34. Last, Defendants attack New Mexico's invocation of its residents' recreational interests as a possible irreparable harm, because states may not advance resident interests in *parens patriae* against the United States. *Id.* at 33 (citing *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011)).

As the Ninth Circuit has explained, "it would be incorrect to hold that all potential environmental injury warrants an injunction." *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014). "Environmental injury," however, "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 545 (1987). Plaintiffs must nonetheless demonstrate that irreparable injury "is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. Mere "possibility" of irreparable harm does not merit a preliminary injunction. *Id.*

Contrary to Defendants' suggestion, the irreparable-injury inquiry does not require a showing of population-level harm or an extinction-level threat. In fact, none of Defendants' proffered cases establish this standard. *See N.M. Dep't of Game & Fish v. DOI*, 854 F.3d 1236,

1251 (10th Cir. 2017) (rejecting as insufficient evidence of irreparable harm a single declaration stating that the release of Mexican Wolves within a state "*has the potential* to affect predator-prey dynamics, and *may* affect other attributes of the ecosystem"); *Burlington*, 23 F.3d at 1511-12 (finding a district court did not clearly err in finding plaintiff failed to establish a likelihood of irreparable *future* injury based on *past* accidental injuries to protected grizzly bears); *Maughan v. Vilsack*, No. 4:14-cv-0007-EJL, 2014 WL 201702, at *6-7 (D. Idaho Jan. 17, 2014) (finding that growth in wolf population cut against plaintiffs' claim that a program authorizing wolf hunting would cause irreparable injury).[18] For example, Defendants offer *Burlington* for the principle that New Mexico here must establish that the challenged conduct constitutes a "definitive threat" to a "protected *species*." Opp. at 32 (citing 23 F.3d at 1512 n.8). But the *Burlington* court added an important qualifier: "We are not saying that a threat of extinction to the species is required before an injunction may issue under the ESA. This would be contrary to the spirit of the statute, whose goal of preserving threatened and endangered species

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[18] Although the court in *Maughan* found a lack of irreparable injury because evidence showed the wolf species population was growing despite the challenged action, it nonetheless stated: "The evidence in the current record shows that the [challenged] program for hunting wolves will not result in the loss of the species as a whole." *See* 2014 WL 201702, at *7. Even if the *Maughan* court meant for this passing comment to serve as the standard for irreparable injury, no court has since endorsed this view. More important, that standard would be inconsistent with Ninth Circuit law, and thus the Court reads *Maughan* as standing for the narrow proposition that undisputed evidence of species growth in the face of a challenged action tilts against a finding of irreparable injury to that species from the challenged action.

can also be achieved through incremental steps." 23 F.3d at 1512 n.8. And *Burlington* cited favorably a case where "between three and nine grizzly bears would be killed" as meriting an injunction. *Id.* (citing *Fund for Animals, Inc. v. Turner*, No. 91-2201(MB), 1991 WL 206232 (D.D.C. Sept. 27, 1991)). Thus, while a showing of irreparable environmental injury to warrant injunctive relief may require evidence that the challenged action poses a threat of future demonstrable harm to a protected species, it does not require that the species is likely to be entirely wiped out.[19]

However, whether or not New Mexico has proffered sufficient evidence to meet its burden of showing a likelihood of irreparable environmental harm from the use of reprogrammed and diverted funds under Sections 8005 and 284 for border barrier construction in the El Paso Sector Project 1 region, the contested use of such funds is no longer likely before resolution of the case on the merits. This is because the Court has enjoined the relevant Defendants in the Citizen Groups' action from proceeding with such construction. *See* Order at 55, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. May 24, 2019), ECF No. 144 (enjoining the use of reprogrammed funds for border barrier construction in El Paso Sector Project 1). Accordingly, no irreparable harm will result from the denial (without prejudice) of the States' duplicative requested injunction.

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[19] At the hearing on this motion, counsel for Defendants essentially acknowledged that this is the appropriate standard. Dkt. No. 159 at 104:4-6 ("And I don't want to overstate that because it's —as my colleagues on the other side have pointed out, it's not extinction.")

**b. States' Harm from Diversion of TFF Funds**

Plaintiffs' second theory of harm is that the diversion of TFF funds runs the risk of "depriv[ing] Plaintiff States of the same opportunity to receive TFF funds that they have enjoyed for years." Mot. at 31. Plaintiffs contend that a $601 million diversion "undermines the continued viability of TFF" moving forward and "jeopardizes the States' ability to collect their pending equitable share claims of millions of dollars that they are entitled to receive after dedicating time and resources to participating in joint law enforcement efforts." *Id.* at 32. In other words, Plaintiffs' alleged irreparable harms are that they (1) will not receive equitable share claims already owed, and (2) may not receive equitable share claims in the future.

Defendants respond to both irreparable injury bases with a declaration of the TEOAF Director, John M. Farley, who manages the TFF. *See* Farley Decl. ¶ 2. Mr. Farley acknowledges that equitable sharing payments to state and local enforcement agencies are "mandatory" TFF expenses. *Id.* ¶ 8. Mr. Farley explains, however, that "Strategic Support is an amount of unobligated funds at the end of the fiscal year, after accounting for equitable sharing and other mandatory expenses . . . [which] may be used in connection with the law enforcement activities of any Federal agency." *Id.* ¶ 4. He adds that TEOAF works with TFF member agencies "to track anticipated and current forfeiture cases and liabilities that may be associated with such cases," which "enables the program to accurately estimate its revenue

and liabilities." *Id.* ¶¶ 5, 9.[20] In this capacity, the "TFF has remained financially solvent and maintained adequate funds in its accounts to meet all of its expenses" since its inception in 1992. *Id.* ¶ 9.

Because Strategic Support funding at the end of any fiscal year has already taken account of current fiscal year mandatory expenses and anticipated liabilities for the following fiscal year, Mr. Farley provides that "the decision to make Strategic Support funding available in fiscal year 2019 will have no impact on the amount of money state and local entities receive through equitable sharing." *Id.* ¶¶ 13, 23. And the Treasury predicts that following the diversion of $601 million in strategic support payments to DHS, the "projected unobligated balance carry-over to fiscal year 2020 will be approximately $507 million." *Id.* ¶ 26.

Given Mr. Farley's representations, Defendants argue that there is no risk of irreparable harm to Plaintiffs from the diversion of TFF funds: "Because Treasury's Strategic Support payments to DHS do not pose any threat to the solvency of the TFF or diminish the equitable sharing payments to which the States may be entitled under [Section] 9705, the States have not established a likelihood of irreparable injury." Opp. at 31. Plaintiffs' substantive response to the Farley declaration is to characterize it as a "self-serving declaration" that must be disregarded. But Plaintiffs' support for this proposition—*Nigro v. Sears, Roebuck & Co.*—stands for the exact opposite proposition. *See* 784 F.3d 495, 497 (9th Cir. 2015) ("Although the source of the evidence may have some bearing on its credibility and on the

[20] TEOAF also sets aside funding to cover future fiscal year expenses. *See* Farley Decl. ¶¶ 10-11 (explaining the process).

weight it may be given by a trier of fact, the district court may not disregard a piece of evidence at the summary judgment stage solely based on its self-serving nature.").

At the hearing on this motion, Plaintiffs shifted their criticism of Mr. Farley to his TFF balance calculation. *See* Dkt. No. 138 at 45:12-47:1. Plaintiffs argued that Mr. Farley failed to consider contingent liabilities and noted that the TFF could theoretically be underwater based on such liabilities and other data contained in TEOAF's fiscal year 2020 budget. *See id.*; *see also* Dkt. No. 136 Ex. 55, at 6-7. It does not appear warranted, though, to discount the TFF balance calculation by the entire contingent liability entry, given that such liabilities "are significant because remission payments from multiple years are recorded and carried forward." *See* Dkt. No. 136 Ex. 55, at 6. Nothing indicates that the Treasury would pay out all contingent liabilities in the next fiscal year. And even accepting Plaintiffs' argument as true, they have not explained why the TFF's existence alone manifests an entitlement to future equitable sharing payments. Further, Plaintiffs fail to consider that the amount of potential future equitable sharing payments is tethered to future seizures or forfeitures for which a given state or local law enforcement agency participates in the seizure or forfeiture, and is capped by the value of the seized or forfeited property. *See* 31 U.S.C. § 9705(a)(1)(g), (b)(2), (h)(1)(B)(ii). Thus, to the extent a given law enforcement agency participates in future seizures or forfeitures, the TFF necessarily will have the funds to provide the mandatory equitable sharing payment.

Most important, Plaintiffs' ignore that the burden is theirs to demonstrate that irreparable injury is *likely* in the absence of an injunction. *Winter*, 555 U.S. at 22. "Speculative" or "possible" injury is not enough. *All. for the Wild Rockies*, 632 F.3d at 1131-36. Plaintiffs have not met their burden. Plaintiffs alleged there was some risk that Defendants' diversion of $601 million would undermine the continued viability of TFF and/or jeopardize their ability to collect "pending" equitable share claims. *See* Mot. at 31-32. Defendants responded with a sworn declaration demonstrating that no pending equitable share claims are at risk and that the TEOAF has taken account of future needs to prevent any threat to TFF's continued viability. The Court cannot ignore this declaration just because it makes it more difficult for Plaintiffs to meet their burden to demonstrate that irreparable injury is likely in the absence of an injunction. And the Court also cannot ignore that Plaintiffs failed to consider important relevant factors, such as the nature of equitable sharing payments. Thus, even though Plaintiffs have shown that they have standing as to this claim, they have not shown an entitlement to the "extraordinary" remedy of a preliminary injunction on this basis.[21]

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[21] To the extent Plaintiffs rely on *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058-59 (9th Cir. 2009), for the principle that a "constitutional violation alone, coupled with the damages incurred, can suffice to show irreparable harm," that principle does not alter the Court's conclusion. *See* Mot. at 31. Even under that theory of irreparable harm, Plaintiffs must demonstrate some likely harm resulting from the challenged action, and not simply a constitutional violation.

### 3. Balance of Equities and Public Interest

When the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). According to Defendants, these factors tilt in their favor, because their "weighty" interest in border security and immigration-law enforcement, as sanctioned by Congress, outweighs Plaintiffs' "speculative" injuries. Opp. at 34-35. The Ninth Circuit has recognized that "the public has a 'weighty' interest 'in efficient administration of the immigration laws at the border,'" and the Court does not minimize this interest. *See E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018) (quoting *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)). On the other hand, "the public also has an interest in ensuring that statutes enacted by their representatives are not imperiled by executive fiat." *Id.* (internal quotation marks and brackets omitted). Because Plaintiffs have not shown a likelihood of irreparable harm as to the TFF diversion, and because the Court need not now reach that question with respect to the El Paso Sector project, this factor does not militate in favor of a preliminary injunction.[22]

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[22] The Court observes that, although Congress appropriated $1.571 billion for physical barriers and associated technology along the Southwest border for fiscal year 2018, counsel for the House has represented to the Court that the Administration has stated as recently as April 30, 2019 that CBP represents it has only constructed 1.7 miles of fencing with that funding. *See* Dkt. No. 161; *see also* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. F, tit. II, § 230(a) 132 Stat. 348 (2018). This representation tends to undermine Defendants' claim that irreparable harm

## III. CONCLUSION

For the foregoing reasons, the Court **DENIES WITHOUT PREJUDICE** Plaintiffs' motion for a preliminary injunction. A case management conference is set for June 5, 2019 at 2:00 p.m. At the case management conference, the parties should be prepared to discuss a plan for expeditiously resolving this matter on the merits, whether through a bench trial, cross-motions for summary judgment, or other means. The parties must submit a joint case management statement by May 31, 2019.

**IT IS SO ORDERED.**

Dated: 5/24/2019

/s/ HAYWOOD S. GILLIAM, JR.
HAYWOOD S. GILLIAM, JR.
United States District Judge

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will result if the funds at issue on this motion are not deployed immediately.

## APPENDIX K

1. U.S. Const. Art. I, § 9, Cl. 7 provides:

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

2 10 U.S.C. 284 provides:

**Support for counterdrug activities and activities to counter transnational organized crime**

(a) SUPPORT TO OTHER AGENCIES.—The Secretary of Defense may provide support for the counterdrug activities or activities to counter transnational organized crime of any other department or agency of the Federal Government or of any State, local, tribal, or foreign law enforcement agency for any of the purposes set forth in subsection (b) or (c), as applicable, if—

(1) in the case of support described in subsection (b), such support is requested—

(A) by the official who has responsibility for the counterdrug activities or activities to counter transnational organized crime of the department or agency of the Federal Government, in the case of support for other departments or agencies of the Federal Government; or

(B) by the appropriate official of a State, local, or tribal government, in the case of support

for State, local, or tribal law enforcement agencies; or

(2) in the case of support described in subsection (c), such support is requested by an appropriate official of a department or agency of the Federal Government, in coordination with the Secretary of State, that has counterdrug responsibilities or responsibilities for countering transnational organized crime.

(b) TYPES OF SUPPORT FOR AGENCIES OF UNITED STATES.—The purposes for which the Secretary may provide support under subsection (a) for other departments or agencies of the Federal Government or a State, local, or tribal law enforcement agencies, are the following:

(1) The maintenance and repair of equipment that has been made available to any department or agency of the Federal Government or to any State, local, or tribal government by the Department of Defense for the purposes of—

(A) preserving the potential future utility of such equipment for the Department of Defense; and

(B) upgrading such equipment to ensure compatibility of that equipment with other equipment used by the Department.

(2) The maintenance, repair, or upgrading of equipment (including computer software), other than equipment referred to in paragraph (1) for the purpose of—

(A) ensuring that the equipment being maintained or repaired is compatible with equipment used by the Department of Defense; and

(B) upgrading such equipment to ensure the compatibility of that equipment with equipment used by the Department.

(3) The transportation of personnel of the United States and foreign countries (including per diem expenses associated with such transportation), and the transportation of supplies and equipment, for the purpose of facilitating counterdrug activities or activities to counter transnational organized crime within or outside the United States.

(4) The establishment (including an unspecified minor military construction project) and operation of bases of operations or training facilities for the purpose of facilitating counterdrug activities or activities to counter transnational organized crime of the Department of Defense or any Federal, State, local, or tribal law enforcement agency within or outside the United States.

(5) Counterdrug or counter-transnational organized crime related training of law enforcement personnel of the Federal Government, of State, local, and tribal governments, including associated support expenses for trainees and the provision of materials necessary to carry out such training.

(6) The detection, monitoring, and communication of the movement of—

(A) air and sea traffic within 25 miles of and outside the geographic boundaries of the United States; and

(B) surface traffic outside the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside of the boundary.

(7) Construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.

(8) Establishment of command, control, communications, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

(9) The provision of linguist and intelligence analysis services.

(10) Aerial and ground reconnaissance.

(c) TYPES OF SUPPORT FOR FOREIGN LAW ENFORCEMENT AGENCIES.—

(1) PURPOSES.—The purposes for which the Secretary may provide support under subsection (a) for foreign law enforcement agencies are the following:

(A) The transportation of personnel of the United States and foreign countries (including per diem expenses associated with such transportation), and the transportation of supplies and equipment, for the purpose of facilitating counterdrug activities or activities to counter transnational organized crime within or outside the United States.

(B) The establishment (including small scale construction) and operation of bases of operations or training facilities for the purpose of facilitating

counterdrug activities or activities to counter transnational organized crime of a foreign law enforcement agency outside the United States.

(C) The detection, monitoring, and communication of the movement of—

(i) air and sea traffic within 25 miles of and outside the geographic boundaries of the United States; and

(ii) surface traffic outside the geographic boundaries of the United States.

(D) Establishment of command, control, communications, and computer networks for improved integration of United States Federal and foreign law enforcement entities and United States Armed Forces.

(E) The provision of linguist and intelligence analysis services.

(F) Aerial and ground reconnaissance.

(2) COORDINATION WITH SECRETARY OF STATE.—In providing support for a purpose described in this subsection, the Secretary shall coordinate with the Secretary of State.

(d) CONTRACT AUTHORITY.—In carrying out subsection (a), the Secretary may acquire services or equipment by contract for support provided under that subsection if the Department of Defense would normally acquire such services or equipment by contract for the purpose of conducting a similar activity for the Department.

(e) LIMITED WAIVER OF PROHIBITION.—Notwithstanding section 276[1] of this title, the Secretary may provide support pursuant to subsection (a) in any case in which the Secretary determines that the provision of such support would adversely affect the military preparedness of the United States in the short term if the Secretary determines that the importance of providing such support outweighs such short-term adverse effect.

(f) CONDUCT OF TRAINING OR OPERATION TO AID CIVILIAN AGENCIES.—In providing support pursuant to subsection (a), the Secretary may plan and execute otherwise valid military training or operations (including training exercises undertaken pursuant to section 1206(a) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189; 103 Stat. 1564)) for the purpose of aiding civilian law enforcement agencies.

(g) RELATIONSHIP TO OTHER SUPPORT AUTHORITIES.—

(1) ADDITIONAL AUTHORITY.—The authority provided in this section for the support of counterdrug activities or activities to counter transnational organized crime by the Department of Defense is in addition to, and except as provided in paragraph (2), not subject to the other requirements of this chapter.

(2) EXCEPTION.—Support under this section shall be subject to the provisions of section 275[1] and, except as provided in subsection (e), section 276[1] of this title.

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[1] See References in Text note below.

(h) CONGRESSIONAL NOTIFICATION.—

(1) IN GENERAL.—Not less than 15 days before providing support for an activity under subsection (a), the Secretary of Defense shall submit to the appropriate committees of Congress a written and electronic notice of the following:

(A) In the case of support for a purpose described in subsection (c)—

(i) the country the capacity of which will be built or enabled through the provision of such support;

(ii) the budget, implementation timeline with milestones, anticipated delivery schedule for support, and completion date for the purpose or project for which support is provided;

(iii) the source and planned expenditure of funds provided for the project or purpose;

(iv) a description of the arrangements, if any, for the sustainment of the project or purpose and the source of funds to support sustainment of the capabilities and performance outcomes achieved using such support, if applicable;

(v) a description of the objectives for the project or purpose and evaluation framework to be used to develop capability and performance metrics associated with operational outcomes for the recipient;

(vi) information, including the amount, type, and purpose, about the support provided

the country during the three fiscal years preceding the fiscal year for which the support covered by the notice is provided under this section under—

(I) this section;

(II) section 23 of the Arms Export Control Act (22 U.S.C. 2763);

(III) peacekeeping operations;

(IV) the International Narcotics Control and Law Enforcement program under section 481 of the Foreign Assistance Act of 1961 (22 U.S.C. 2291);

(V) Nonproliferation, Anti-Terrorism, Demining, and Related Programs;

(VI) counterdrug activities authorized by section 1033 of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105-85); or

(VII) any other significant program, account, or activity for the provision of security assistance that the Secretary of Defense and the Secretary of State consider appropriate;

(vii) an evaluation of the capacity of the recipient country to absorb the support provided; and

(viii) an evaluation of the manner in which the project or purpose for which the support is

provided fits into the theater security cooperation strategy of the applicable geographic combatant command.

(B) In the case of support for a purpose described in subsection (b) or (c), a description of any small scale construction project for which support is provided.

(2) COORDINATION WITH SECRETARY OF STATE.—In providing notice under this subsection for a purpose described in subsection (c), the Secretary of Defense shall coordinate with the Secretary of State.

(i) DEFINITIONS.—In this section:

(1) The term "appropriate committees of Congress" means—

(A) the Committee on Armed Services, the Committee on Appropriations, and the Committee on Foreign Affairs of the House of Representatives; and

(B) the Committee on Armed Services, the Committee on Appropriations, and the Committee on Foreign Relations of the Senate.

(2) The term "Indian tribe" means a Federally recognized Indian tribe.

(3) The term "small scale construction" means construction at a cost not to exceed $750,000 for any project.

(4) The term "tribal government" means the governing body of an Indian tribe, the status of whose land is "Indian country" as defined in section

1151 of title 18 or held in trust by the United States for the benefit of the Indian tribe.

(5) The term "tribal law enforcement agency" means the law enforcement agency of a tribal government.

(6) The term "transnational organized crime" means self-perpetuating associations of individuals who operate transnationally for the purpose of obtaining power, influence, monetary, or commercial gains, wholly or in part by illegal means, while protecting their activities through a pattern of corruption or violence or through a transnational organization structure and the exploitation of transnational commerce or communication mechanisms.

3. Section 8005 of Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999, provides:

**DIVISION A—DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2019**

* * * * *

Tit. VIII
GENERAL PROVISIONS

* * * * *

SEC. 8005. Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed

$4,000,000,000 of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction) between such appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred: *Provided*, That such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress: *Provided further*, That the Secretary of Defense shall notify the Congress promptly of all transfers made pursuant to this authority or any other authority in this *Act:* *Provided further*, That no part of the funds in this Act shall be available to prepare or present a request to the Committees on Appropriations for reprogramming of funds, unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which reprogramming is requested has been denied by the Congress: *Provided further*, That a request for multiple reprogrammings of funds using authority provided in this section shall be made prior to June 30, 2019: *Provided further*, That transfers among military personnel appropriations shall not be taken into account for purposes of the limitation on the amount of funds that may be transferred under this section.

4. Section 9002 of Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. IX, 132 Stat. 3042, provides:

**DIVISION A—DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2019**

* * * * *

TITLE IX

OVERSEAS CONTINGENCY OPERATIONS

MILITARY PERSONNEL

* * * * *

SEC. 9002. Upon the determination of the Secretary of Defense that such action is necessary in the national interest, the Secretary may, with the approval of the Office of Management and Budget, transfer up to $2,000,000,000 between the appropriations or funds made available to the Department of Defense in this title: *Provided*, That the Secretary shall notify the Congress promptly of each transfer made pursuant to the authority in this section: *Provided further*, That the authority provided in this section is in addition to any other transfer authority available to the Department of Defense and is subject to the same terms and conditions as the authority provided in section 8005 of this Act.