APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EL PASO COUNTY, TEXAS and BORDER NETWORK FOR HUMAN RIGHTS,	§	
Plaintiffs,	§	
v.	§	**EP-19-CV-66-DB**
DONALD J. TRUMP*, in his official capacity as President of the United States of America*, et al.,	§	
Defendants.	§	

MEMORANDUM OPINION

On this day, the Court considered Plaintiffs El Paso County, Texas, ("El Paso County") and Border Network for Human Right's ("BNHR") (collectively, "Plaintiffs") "Motion for Summary Judgment or, in the alternative, a Preliminary Injunction" ("Motion"), filed in the above-captioned case on April 25, 2019. On June 10, 2019, Defendants Donald J. Trump, Patrick M. Shanahan, Kirstjen M. Nielsen, David Bernhardt, Steven T. Mnuchin, William Barr, John F. Bash, and Todd T. Semonite (collectively, "Defendants") filed their "Memorandum in Support of the Government's Cross-Motion to Dismiss or for Summary Judgment, and Opposition to Plaintiffs' Motion for Summary Judgment and a Preliminary Injunction" ("Cross-Motion"). On July 10, 2019,

Plaintiffs filed a Reply. The Defendants filed their Reply on July 31, 2019. The Court held a hearing on the Motion and Cross-Motion on August 29, 2019.

On September 10, 2019, Plaintiffs filed their "Supplemental Brief in Light of Notice of Decision by the Department of Defense to Authorize Border Barrier Projects Pursuant to 10 U.S.C. § 2808." On September 20, 2019, Defendants filed their "Supplemental Brief Addressing Border Barrier Construction Pursuant to 10 U.S.C. § 2808." On September 24, 2019, Plaintiffs filed their Reply. After due consideration, the Court is of the opinion that the

Plaintiffs' Motion shall be granted.

BACKGROUND

This case presents questions regarding whether the proposed plan for funding border barrier construction exceeds the Executive Branch's lawful authority under the Consolidated Appropriations Act ("CAA"), the Appropriations Clause of the Constitution, the Military Construction Act 10 U.S.C. § 2808 ("2808"), the Funding for Counterdrug Activities 10 U.S.C. § 284 ("284"), and the National Emergency Act ("NEA").

In 2017, President Trump requested $999 million in congressional appropriations for "the first installment of the border wall." Budget Request, Pl.'s Mot. 5, ECF No. 55-6. A Republican-controlled Congress instead provided the Department of Homeland Security ("DHS") with $341.2 million "to replace approximately 40 miles of existing primary pedestrian and vehicle border fencing along the

southwest border." CAA, Pub. L. No. 115-31, 131 Stat. 135, 434 (2017). In 2018, President Trump requested $1.6 billion in congressional appropriations for 74 miles of new or replacement border wall. FY 2018 Budget in Brief, Pl.'s Mot. 3, ECF No. 55-7. In response, Congress appropriated $1.571 billion for new border security technology and new and replacement fencing in specified areas on the southern border. CAA, Pub. L. No. 115-141 (2018) (to be printed at 132 Stat. 348, 616).

In January 2019, President Trump formally requested $5.7 billion for fiscal year 2019 "for construction of a steel barrier for the Southwest border." Letter to Appropriations Chairman 1, ECF No. 55-28. On February 14, 2019, Congress passed the 2019 CAA. Pub. L. No. 116-6 (2019) (to be printed at 133 Stat. 13). The CAA provides $1.375 billion for "the construction of primary pedestrian fencing" in "the Rio Grande Valley Sector." CAA § 230(a)(1). And it states that none of the funds appropriated by the Act can be used "for the construction of pedestrian fencing" in any other areas of the border. *Id.* § 231. A component of the CAA, § 739 of the Financial Services and General Government Appropriations Act, states:

> 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.

Pub. L. No. 116-6, div. D, § 739. On February 15, 2019, President Trump signed the CAA into law.

Also on February 15, 2019, the President issued a proclamation declaring that a national emergency exists at the southern border. *See* Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States, 2019 WL 643819, at *1 (Feb. 15, 2019) ("Proclamation").

The proclamation itself states:

> 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 largescale 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.

In addition to declaring a national emergency, the President announced a plan, to be carried out by Defendant Acting Secretaries of Defense and Homeland Security, to use funds that Congress appropriated for other purposes to build a border wall. Most relevant, President Trump directed those Acting Secretaries to use: (1) $2.5 billion of the Department of Defense ("DOD") funds appropriated for Support for Counterdrug Activities under § 284; and (2) $3.6 billion of DOD funds appropriated for "military construction projects" under § 2808. President Donald J. Trump's Border Security Victory, White House Fact Sheet (Feb. 15, 2019) ("Fact Sheet"), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/.

On September 3, 2019, Defendants gave the Court notice that the DOD has made a final determination to build eleven border wall projects using

$3.6 billion in military construction funds under 10 U.S.C. § 2808. Notice of DOD Decision, ECF No. 112. And on September 5, 2019, Defendants gave notice identifying the military construction projects that Congress had already appropriated money for that will now lose funding in order to build those eleven wall projects. Supplemental Notice of DOD Decision, ECF No. 114. Most relevant for this case: the DOD will divert $20 million away from a planned military construction project at Fort Bliss in El Paso County, and one of the new wall projects will take place in southern New Mexico, in El Paso County's close vicinity. 2808 Deferrals in United States Territories 2, ECF No. 114-1.

LEGAL STANDARDS

The parties have filed cross-motions for summary judgment. Rule 56 of the Federal Rules of Civil Procedure mandates entry of summary judgment "if the 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); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Curtis v. Anthony,* 710 F.3d 587, 594 (5th Cir. 2013). Defendants agree with Plaintiffs that this case presents questions of law for the Court to resolve that do not require further factual development through discovery. In these circumstances, the Court should enter either summary judgment for Defendants based on the parties' moving papers or dismiss the First Amended Complaint under Federal Rule of Civil Procedure 12.

Furthermore, the Court must dismiss a case under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction if it lacks the statutory or constitutional power to adjudicate the case. *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). The party asserting subject-matter jurisdiction has the burden of proving it exists by a preponderance of the evidence. *See New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 327 (5th Cir. 2008).

To survive a motion to dismiss under Civil Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcrofi v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). A complaint that "tenders naked assertions devoid of further factual enhancement" is insufficient. *Id.* (internal citation and alteration omitted). At the summary-judgment stage, plaintiffs "must 'set forth' by affidavit or other evidence 'specific facts" to establish their standing. *Lujan v. Def of Wildlife*, 504 U.S. 555, 561 (1992) (quoting Fed. R. Civ. P. 56(e)). When evaluating plaintiffs' standing, courts must "take as true" the factual evidence plaintiffs submit. *McCardell v. Dep't of Hous. & Urban Dev.*, 794 F.3d 510, 520 (5th Cir. 2015); *see Lujan*, 504 U.S. at 561.

Finally, Plaintiffs have requested a preliminary injunction, which 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.

ANALYSIS

Plaintiffs make several claims in their Amended Complaint and seek summary judgment, as well as permanent declaratory and injunctive relief, because the President's Proclamation is unlawful. Considering the Supreme Court's recent decision in *Donald J. Trump, President of the United Sates, et al. v. Sierra Club, et al.*, the Court will not further address either parties' arguments regarding the statutory authority of DOD Secretary Shanahan to spend under § 8005. *See* No. 19A60, 2019 WL 3369425, at*l (2019). The Supreme Court granted a stay in Defendants' favor and reasoned "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 [§] 8005." *Id.* The DOD Appropriations Act, § 8005, authorizes the Secretary of the Department of Defense to transfer the $2.5 billion for § 284 Support for Counterdrug Activities. Thus, the Court finds Plaintiffs' argument that the DOD Secretary exceeded his statutory authority under § 284 unviable. In addition, the Court will not address the Plaintiffs' arguments regarding the Treasury Forfeiture Funds, as Plaintiffs abandoned these claims at oral argument. Hr'g Tr. 67-68, ECF No. 115.

Apart from the aforementioned § 284 and Treasury Forfeiture Funds arguments, Plaintiffs argue that the Proclamation exceeded the President's authority under the National Emergency Act ("NEA"). Mot. 19, ECF No. 54. Alternatively, according to Plaintiffs, the NEA is unconstitutional if it authorizes the President's Proclamation because it runs afoul of the nondelegation doctrine and the Take Care Clause of the Constitution. *Id.* at 26. Next, the Plaintiffs assert that Defendants' use of the funds to build a border wall violates the CAA, the Appropriations Clause of the Constitution, and the Administrative Procedure Act ("APA"). *Id.* at 33, 45-46.

Defendants counter that all Plaintiffs' claims fail because Congress intended to preclude judicial review of national emergency declarations, that the challenge presents a nonjusticiable political question, and that Plaintiffs cannot obtain equitable relief against the President. Cross-Mot. 20 and 23, ECF No. 95. Regarding Plaintiffs' alternative argument, Defendants argue that the nondelegation challenge to the NEA is meritless. *Id.* at 30. According to Defendants, Plaintiffs' claims based on the APA are unsuccessful because they have not satisfied the APA's requirements for review of agency action and they fail on the merits. *Id.* at 44 and 49. Finally, Defendants argue that Plaintiffs fail to state a claim under the CAA because nothing in the CAA modifies or disables the use of the permanent statutes at issue in this case. *Id.* at 54.

Prior to the Court's discussion of the merits of these claims and counterclaims, the Court will address standing. Plaintiffs claim they have standing because El Paso County is the "object" of the Defendants' Proclamation to build a border wall in the community. Mot. 10, ECF No. 54. Furthermore, El Paso County has suffered reputational and economic injuries. *Id.* at 11-13. For its part, BNHR asserts organizational standing. *Id.* at 14.

Defendants counter, first, that Plaintiffs cannot challenge either the Proclamation or § 284 because the alleged reputational harm is not an injury in fact, it is not fairly traceable to the Defendants' action, it is too speculative, and it is not redressable by a favorable outcome. Cross-Mot. 35-39, ECF No. 95. Second, according to Defendants, the pecuniary injuries are not sufficiently concrete or imminent, and even if they were, they are not traceable to the Proclamation and subsequent actions. *Id.* at 40. Third, Plaintiffs' cannot establish standing to sue under § 2808. *Id.* at 34.

Finally, Defendants argue that BNHR lacks standing because there is no nexus between the organizational activities and the Defendants' conduct, rather BNHR relies on an "abstract social interest." *Id.* at 41-42. According to Defendants, not only is "stigmatization" not a cognizable injury for Article III standing, but other alleged harm to the quality of life of BNHR members is not sufficiently concrete or imminent. *Id.* at 43. As discussed below, the Court finds that the Plaintiffs do have standing and are entitled to summary judgment based on their CAA claim.

I. PLAINTIFFS HAVE STANDING.

To establish Article III standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000).

At the summary judgment stage, plaintiffs "must 'set forth' by affidavit or other evidence 'specific facts" to establish their standing. *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e)). When evaluating plaintiffs' standing, courts must "take as true" the factual evidence that plaintiffs submit. *McCardell*, 794 F.3d at 520; *see Lujan*, 504 U.S. at 561. Thus, El Paso County has standing, and BNHR has standing both as an organization and because its members have suffered a concrete injury.

1. El Paso County Has Standing.

El Paso County has standing to sue Defendants because they are the "object" of the border wall construction, and they have suffered concrete reputational and economic injury. Although either reputational or economic injury alone would suffice to justify El Paso County's day in federal court, the Court will address the viability of each in turn.

a. <u>El Paso County Is the Object of the Proclamation to Build a Border Wall</u>.

When a plaintiff "challeng[es] the legality of government action," the "nature and extent of facts that must be averred" to establish standing "depends considerably upon whether the plaintiff is [itself] an object of the action" at issue. *Lujan*, 504 U.S. at 561-62. If it is, "there is ordinarily little question that the action. . . has caused [it] injury, and that a judgment preventing. . . the action will redress [that injury]." *Id.*; *see Duarte ex rel. Duarte v. City of Lewisville*, 759 F.3d 514, 518 (5th Cir. 2014) ("It follows from Lujan that if a plaintiff is an object of a government regulation, then that plaintiff ordinarily has standing to challenge that regulation.")

The Supreme Court in Lujan held the plaintiffs lacked standing to challenge the Secretary of the Interior's refusal to extend Endangered Species Act protections to animals abroad. *Lujan*, 504 U.S. at 562. The Supreme Court dismissed the case because the individual plaintiffs expressed mere "some day intentions" and failed to produce evidence on summary judgment of "concrete plans" to visit the endangered animals abroad. *Id.* at 564-65 (internal quotation marks omitted). In contrast, the Fifth Circuit held that a plaintiff, a registered child sex offender, was the target of a local ordinance restricting where registered child sex offenders could live. *Duarte*, 759 F.3d at 518. There the plaintiff submitted evidence that, taken in the light most favorable to him, established that he had "concrete plans" to eventually reside in areas impacted by the local ordinance, unlike the plaintiffs in *Lujan*. *Id.*

The President's Proclamation is aimed at building a border wall along the southern border between

El Paso County and Mexico. Thus, unlike the plaintiffs in *Lujan* who had only intentions of visiting a targeted area without any concrete plans, El Paso County is the "object" or target of the government action. Even more clearly than the plaintiff in *Duarte*, who merely had concrete plans to eventually reside in an impacted area, El Paso County itself is the impacted area of the government's action. The Court agrees with the Plaintiffs that because El Paso County is the object of the Proclamation, it has standing to bring this challenge.

b. El Paso County's Reputation Has Been Injured.

Specifically, El Paso County has shown an injury to its reputation and has had to take affirmative steps to avoid harm. According to El Paso County Judge Samaniego ("Judge Samaniego"), El Paso County takes pride in its "reputation as a safe place to live, work, and visit," and as a vibrant "bilingual, bi-national, multicultural" community. Samaniego Decl. ¶¶ 3-4, ECF No. 55-26. But Defendants' actions have "falsely told the world the exact opposite:" "that El Paso County and the Southern border are crime-ridden and dangerous, that [its] immigrant community comprises criminals and drug traffickers. . ., that [its] proximity to Mexico is an existential threat, and that [it] can be rescued only through the blight of massive wall construction and militarization." *Id.* ¶ 8; see also *id.* ¶ 10 ("I have already heard personally from people who have a false impression that El Paso County is a dangerous place and who do not want to come here [because of the President's Proclamation]."). And according to

Chief Administrator of El Paso County Keller ("Ms. Keller"), Defendants' actions amount to a message "transmitted all over the world" that "all of [the County's] strengths are actually weaknesses" and that the County is "so endangered by immigrants and [its] closeness to Mexico that [it] need[s] a wall to protect [it]." Keller Decl. ¶ 6, ECF No. 55-25. Because of Defendants' actions, Ms. Keller now must "not only promot[e] El Paso's image, but actively defend[] it." *Id.* As Judge Samaniego explained, "every meeting anyone promoting El Paso has now must include extra efforts to persuade people that El Paso County is a good place to invest in and visit." Samaniego Decl. ¶ 11, ECF No. 55-25.

El Paso County asserts that they have standing because "injury to reputation can constitute a cognizable injury sufficient for Article III standing." *Foretich v. United States,* 351 F.3d 1198, 1211 (D.C. Cir. 2003); *see Walker v. City of Mesquite,* 129 F.3d 831, 832-33 (5th Cir. 1997). "[W]here reputational injury derives directly from an unexpired and unretracted government action, that injury satisfies the requirements of Article III standing to challenge that action." *Foretich,* 351 F.3d at 1213. Even "the need to take . . . affirmative steps to avoid the risk of harm to [one's] reputation constitutes a cognizable injury." *Meese v. Keene,* 481 U.S. 465, 475 (1987); *see also Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 154 (2010) (finding standing based on plaintiffs' need "to take certain measures to minimize the likelihood" of harm).

In *Meese*, for instance, the Supreme Court held that a plaintiff had standing, based on reputational

injury, to challenge a federal law classifying films he wished to show as "political propaganda." *Id.* at 472-77. By forcing the plaintiff to "choose between exhibiting the films and incurring the risk that public perception of this [legal] scheme will harm [his] reputation," the law inflicted concrete injury. *Id.* at 477. And in *NCAA v. Governor of New Jersey*, which the Fifth Circuit has favorably cited for its standing analysis (*see Texas v. United States*, 809 F.3d 134, 156 (5th Cir. 2015)), the court held that sports leagues had standing, based on reputational injury, to challenge a state law legalizing sports gambling. 730 F.3d 208, 220 (3d Cir. 2013), *rev'd on other grounds sub nom.*, 138 S. Ct. 1461 (2018). The leagues had shown cognizable reputational injury because "they are harmed by their unwanted association with an activity they (and large portions of the public) disapprove of—gambling." *Id.*

However, "[s]tanding is not available to just any resident of a jurisdiction to challenge a government message without a corresponding action about a particular belief." *Barber v. Bryant*, 860 F.3d 345, 355 (5th Cir. 2017) (rejecting "purported stigmatic injury"); *see also Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 284 (5th Cir. 1996) ("[N]o parent ought to be allowed to sue over a school policy with which he disagrees unless the policy has demonstrably injured him or his child."); *Chaplaincy of Full Gospel Churches v. US. Navy (In re Navy Chaplaincy)*, 534 F.3d 756, 764-65 (D.C. Cir. 2008) (Kavanaugh, J.) (allowing standing based on offense to a government message would "eviscerate well-settled standing limitations"). And to assert standing,

more is required than alleging a "possible future injury." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Finally, the Court cannot indulge "speculation about 'the unfettered choices made by independent actors not before the court" that cannot support standing. *Id.* at 410, 414 n. 5 (quoting *Lujan*, 504 U.S. at 562).

The Court agrees with Plaintiffs that the Proclamation and subsequent government actions of obtaining funding from various sources to build a border wall between El Paso County and Mexico incurs the risk of harm to El Paso County's reputation. Like the leagues in *NCAA*, El Paso County has shown cognizable reputational injury on the ground that "they are harmed by their unwanted association with an activity they (and large portions of the public) disapprove of—" the construction of a border wall through executive action. 730 F.3d at 220.

Defendants' attempt to distinguish *Meese and NCAA* which each involved "self-effectuating" statutes from the current case, which involves the Proclamation as a catalyst for the statutory authority that appropriates the construction funds, is unpersuasive. Even though the Proclamation is not self-effectuating, it directly authorizes actions under other statutes that give rise to an injury in fact. Like *Foretich*, reputational injury derives from an unexpired and unretracted government action and El Paso County's "need to take. . . affirmative steps to avoid the risk of harm to [its] reputation constitutes a cognizable injury." 351 F.3d at 1213.

Furthermore, combined with the above-reasoned conclusion that El Paso County is the "object" of the government action, it is not speculative that El Paso has suffered an injury in fact to its reputation that is traceable to the Proclamation. *See supra* 9. El Paso County submitted affidavit testimony from Ms. Keller and Judge Samaniego who testified to taking affirmative steps to avoid the risk of harm to El Paso County's reputation. *See supra* 10-11.

Unlike *Clapper* with its "highly attenuated chain of possibilities" involving five increasingly—speculative logical leaps between the government action under the Foreign Intelligence Surveillance Act and the fear that their communication with foreign contacts would be intercepted in the future, El Paso County's injury is far more direct. *Clapper*, 568 U.S. at 408. El Paso County is not indulging in speculation about the unfettered choices of unknown investors or tourists, rather El Paso County's reputation has been injured because, as in *Meese*, the risk of harm to public perception is enough to constitute a concrete injury.

Finally, the Court disagrees with the Defendants' argument that El Paso County's reputational injury is self-inflicted. *See* Resp. 38, ECF No. 95 (citing *Clapper*, 568 U.S. at 408; *Zimmerman v. City of Austin*, 881 F.3d 378, 389 (5th Cir. 2018); *Assoc. for Retarded Citizens of Dallas v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Rd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994)). Again unlike *Clapper* where the standing inquiry was particularly rigorous because the court was asked to find the ac-

tions of the other branches of government unconstitutional, here the Court will not reach the constitutionality of the NEA nor whether use of the funds to build a border wall violates the Appropriations Clause.

Second, the Fifth Circuit in *Association for Retarded Citizens of Dallas* held that redirection of an organization's "resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." 19 F.3d at 244. Here Defendants have not submitted any argument or evidence regarding El Paso County's redirection of resources to litigation or legal counseling expenses. *See generally* Def.'s Cross-Mot., ECF No. 95. Finally, unlike the plaintiff in *Zimmerman* whose desire to solicit funds did not establish an intent to accept funds above the proscribed limit in the challenged law, El Paso County has made concrete plans with objective evidence demonstrating an investment of time and resources to combat the Proclamation. 881 F.3d at 3 89-90; *see, e.g.,* Keller Decl. ¶¶ 9-11, ECF No. 55-25; Samaniego Decl. ¶¶ 11-12, ECF No. 55-26 ("I have spent approximately 30% of my time [as County Judge] . . . to defending El Paso's reputation."). El Paso County's reputational injury—though alone enough for standing—is also intimately tied to "a direct pecuniary injury that generally is sufficient to establish injury-in-fact" to be addressed in the next section. *K.P. v. LeBlanc*, 627 F.3d 115, 122 (5th Cir. 2010) (quotations omitted).

c. El Paso County Has Suffered Economic Harm.

Any drop in the $4 million tax revenue El Paso County earns from tourism "would significantly damage the county's financial health." Samaniego Decl. ¶ 5, ECF No. 55-26). Ms. Keller explained, "[t]here is nothing more detrimental to a drive to bring in tourists than the perception that a community is chaotic and dangerous and that the tourists[']access to historical and scenic destinations will be impeded by construction." Keller Decl. ¶ 8, ECF No. 55-25; *see also* Samaniego Decl. ¶ 6, ECF No. 55-26 ("[T]he President's Proclamation declaring an emergency at the Southern border is a serious threat to both tourism and economic development because of the false and negative impression of El Paso that it creates."). Judge Samaniego likewise emphasized that recent meetings with "local business leaders" have indicated that Defendants' actions are "generating fears of potential investors that the community will be mired in a long-term state of chaos that includes. . . violent crime, the blight of construction, and impediments to crossing back and forth across the border." Samaniego Decl. ¶ 11, ECF No. 55-26.

When a plaintiff suffers "a direct pecuniary injury" that, too, is generally "sufficient to establish injury-in-fact." *K.P. LeBlanc*, 627 F.3d 115, 122 (5th Cir. 2010); *see also Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) ("economic injury is a quintessential injury upon which to base standing"). For example, a municipality's "diminish[ed] . . . tax base" constitutes injury in fact. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S.

91, 110-11 (1979). That is equally true where the economic injury stems from the "loss of a non-illusory opportunity" to obtain "a benefit." *Ecosystem Investment Partners v. Crosby Dredging, L.L.C.*, 729 F. App'x 287, 292 (5th Cir. 2018); *see also Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) (finding standing where challenged action deprived party of "a chance to obtain a settlement that respected [its] priority" in bankruptcy).

Even if we were to view Judge Samaniego and Ms. Keller's current fears of construction and chaos as unpersuasive, more economic harm is "certainly impending" and may constitute an injury in fact despite having "not yet materialized." *SBA v. Driehaus*, 573 U.S. 149, 158 (2014) (quotations omitted); *LeBlanc*, 627 F.3d at 122. The longer the President's Proclamation remains in effect, the more El Paso County's reputation will be tarnished in the eyes of tourists and developers, and the more hours El Paso County officials will have to devote to combating negative messaging, as opposed to "meeting directly with business leaders to bring business to El Paso." Samaniego Decl. ¶ 12, ECF No. 55-26.

Moreover, Defendants will divert $20 million away from a planned military construction project at Fort Bliss in El Paso County, and one of the new wall projects will take place in southern New Mexico, in El Paso County's close vicinity. Supplemental Notice of DOD Decision 3, ECF No. 114. "Fort Bliss is the lifeblood of the El Paso economy," contributing billions of dollars and creating thousands of jobs. Samaniego Decl. ¶ 15, ECF. No. 55-26. Losing funds that had been appropriated for use at Fort

Bliss "creates the imminent prospect of economic harm to El Paso County." *Id.* ¶ 16. That loss of funds also represents a missed opportunity to "obtain a benefit," which can also suffice to show injury in fact. *N.E. Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

d. Causation and Redressability Have Been Shown.

While Defendants admit that negative impressions of the southern border or El Paso County are associated with the Proclamation, they argue that El Paso County cannot demonstrate causation. Cross-Mot. 39, ECF No. 95. Nor can El Paso County show how a favorable decision will redress its injury of lost business and tourism. *Id.*

However, the causation element is satisfied because the County's reputational and economic injuries are "fairly traceable" to Defendants' actions. *Bennett v. Spear*, 520 U.S. 154, 167 (1997). The President's Proclamation expressly declares a "national emergency" on the "southern border"—including El Paso County—based on its status as a "major entry point for criminals, gang members, and illicit narcotics." Proclamation 1, ECF 55-14. And Defendants' desired deployment of the military to build a border wall reinforces El Paso County's image as dangerous and uninviting, while threatening to increase noise and congestion in the area. *Id.*; *see also To Secure the Border and Make America Safe Again, We Need to Deploy the National Guard*, Department of Homeland Security (Apr. 4, 2018),

https://www.dhs.gov/news/2018/04/04/secure-border-and-make-america-safe-again-we-need-deploy-national-guard.

As El Paso County officials explained, these precise actions bear a "causal connection" to the County's reputational and economic injuries described above. *Driehaus*, 573 U.S. at 158; *see* Keller Decl. ¶ 6 ("The President's Proclamation. . . is an official government statement that damages El Paso County's ability to compete for business investment and tourism."), ¶ 10 ("Because of the President's Proclamation, we are now in the process of strategizing how to combat a falsely negative image."), ¶¶ 12-13 (impending wall construction will create a "massive construction zone," deterring "tourism and business development"), ECF No. 55-25; Samaniego Dec. ¶ 10 ("The President's Proclamation has falsely told the world the exact opposite of who we are and what we promote"), ¶ 16 (diversion of funds from Fort Bliss "creates the imminent prospect of economic harm"), ECF No. 55-26.

Finally, where, as here, a plaintiff challenges government action, "[c]ausation and redressability typically overlap as two sides of a causation coin." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 n.1 (D.C. Cir. 2017). "After all, if a government action causes an injury, enjoining the action usually will redress that injury." *Id.* That is true here. As to El Paso County's reputational injuries, enjoining Defendants' actions will allow El Paso County officials to refocus their resources on improving tourism and commerce, not defending El Paso County against Defendants' attacks. *See Foretich*, 351 F.3d at 1214

(invalidating government action from which "reputational injury. . . derives" "provide[s] meaningful relief"). And as to El Paso County's pecuniary injuries, enjoining Defendants' actions will help restore El Paso County's image in the eyes of tourists and investors and forestall disruptive border wall construction. Accordingly, El Paso County has standing to bring its claims.

2. BNHR Has Standing.

BNHR is a community organization headquartered in El Paso, Texas. Decl. of Fernando Garcia ("Garcia Decl.") ¶¶ 2-3, ECF No. 55-27. It consists of about 5,000 members who live and work in west Texas, metropolitan El Paso, and southern New Mexico. *Id.* at ¶ 4. BNHR's mission is to "organize border communities through human rights education" and "mobilize [its] members to advocate for positive change in policies" affecting "the immigrant community." *Id.* at ¶ 3. To fulfill that mission, BNHR "educate[s] [its] own members about their rights" and "train[s] them to educate and organize other members of the immigrant community." *Id.* It also works to forge bonds between its members and the area's law-enforcement officials. *Id.* at ¶ 10. BNHR claims that the Proclamation has impaired its organization's mission and caused it to expend an additional $23,956 to combat the unlawful conduct. *Id.* at ¶¶ 16, 21; *see also id.* at ¶¶ 13, 37, ECF No. 55-27 (explaining that BNHR has "divert[ed] resources" away from its core mission toward "counsel[ing] members who are fearful," "organizing [its]

community in opposition to the President's declaration," and "opposing the illegal [border wall] construction.").

In addition to draining and diverting resources, BNHR had to cancel the signature event, "Hugs Not Walls," for one of its "major initiatives" to build trust between the immigrant community and law enforcement. *Id.* at ¶ 32. Defendants argue that there is an insufficient nexus between BNHR's organizational activities and the Proclamation because the Proclamation does not actually inhibit BNHR from carrying out its organizational mission, neither by imposing barriers nor by neglecting a legal duty. Cross-Mot. 40, ECF No. 95.

"An organization has standing to sue on its own behalf if it meets the same standing test that applies to individuals." *Fowler*, 178 F.3d at 356. In *Havens Really Corp. v. Coleman*, the Supreme Court held a "housing counseling service" whose organizational mission included "the investigation and referral of complaints concerning housing discrimination" met that test, enabling it to challenge defendants' "racial steering practices." 455 U.S. 363, 379 (1982). Havens Realty Corporation sent testers to an apartment complex in order to determine whether it practiced unlawful "racial steering," and subsequently sued to challenge the practice it discovered. *Id.* at 363. The Supreme Court found sufficient the organization's allegation that it "had to devote significant resources to identify and counteract" defendants' unlawful practices. *Id.* If defendants' "practices have perceptibly impaired [the or-

ganization's] ability to provide" its services, the Supreme Court explained, "there can be no question that the organization has suffered injury in fact." *Id.* "Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Id.*

Applying *Havens Realty*, the Fifth Circuit has announced the following rule: "an organization has standing to sue on its own behalf where it devotes resources to counteract a defendant's allegedly unlawful practices." *Fowler*, 178 F.3d at 360; *see also Scott v. Schedler*, 771 F.3d 831, 837 (5th Cir. 2014). In *Scott*, the Fifth Circuit held that the Louisiana NAACP had standing to challenge Louisiana's alleged failure to comply with the National Voter Registration Act. 771 F.3d at 837. Because one NAACP member "devoted resources to counter[acting] [the State's] allegedly unlawful practices" by conducting "voter-registration drives," the NAACP "suffered injury in fact." *Id.*

In a similar vein, the Fifth Circuit held in *OCA-Greater Houston v. Texas* that an advocacy organization had standing to challenge a Texas law restricting the "interpretation assistance that English-limited voters may receive." 867 F.3d 604, 606 and 612 (5th Cir. 2017). The plaintiffs expended resources to educate members about the restrictions so they could rely on the interpreter of their choice at the polls. *Id.* at 612. Because the organization "went out of its way to counteract the effect of

Texas's allegedly unlawful" restriction—for instance, by "educat[ing] voters" about it—the organization had suffered cognizable injury, even if that "injury was not large." *Id.*

However, absent such a direct impairment on its mission caused by the challenged action, standing does not exist whenever a public interest organization decides to spend money opposing a governmental policy of concern or the organization suffered a "setback to [its] abstract social interests." *Id.* (citing *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (explaining that "a mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself . . .") (internal quotations omitted)).

The Fifth Circuit rejected a claim of organizational standing in *NAACP v. City of Kyle*, 626 F.3d 233 (5th Cir. 2010). There the plaintiff tried to ground standing to challenge revised housing ordinances in a study it had commissioned regarding the impact of the revisions, as well as lobbying efforts designed to persuade the defendant municipality not to implement the revised ordinances, but did not explain how those efforts "differ from the HBA's routine lobbying activities," or "identif[y] any specific projects that the HBA had to put on hold or otherwise curtail in order to respond to the revised ordinances." *Id.* at 238. The *Kyle* court also reaffirmed that "redirect[ing] . . . resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." *Id.* (quoting *La. ACORN*

Fair Hous. v. LeBlanc, 211 F.3d 298, 305 (5th Cir. 2000).

Here BNHR has explained how its current expenditures differ from its routine activities and, unlike the plaintiff in *Kyle*, it has not merely redirected resources to litigation and legal counseling in response to the Proclamation. In normal circumstances, BNHR dedicates its resources to "its core mission" of human rights education and "promoting immigration reform." Garcia Decl. ¶ 13, ECF No. 55-27. Because of Defendants' emergency declaration and attendant transfer of funds to build a wall, however, BNHR has had to "divert resources" away from that core mission, and toward "counsel[ing] community members who are fearful," "organizing [its] community in opposition to the President's declaration," and "opposing the illegal [border wall] construction." *Id.* at ¶¶ 13, 37.

In addition, BNHR has held and scheduled Proclamation-related weekend events that it would not otherwise hold and has increased the frequency of its "Know Your Rights" presentations approximately five-fold. *Id.* at ¶¶ 14-15. It has also hired another policy consultant (costing $14,400) to deal with its increased advocacy workload in light of the Proclamation, and has sent delegations to discuss the Proclamation's effects with congressional members in Washington, D.C. *Id.* at ¶¶ 16, 19. In short, as the organization's Executive Director stated in his declaration, the Proclamation and Defendants' subsequent actions have "required BNHR to expend significant resources that could have, and would have, gone elsewhere," leading to a total of $23,956

in additional organizational expenses. *Id.* at ¶¶ 16, 21.

Like the organizational plaintiffs in *Havens Really, OCA-Greater Houston,* and *Scott*, BNHR has standing to challenge Defendants' actions. As shown, BNHR has gone "out of its way to counteract" those actions by diverting resources from its traditional activities toward "counsel[ing]" and "organizing" community members in relation to the national emergency and border wall. *OCA-Greater Houston*, 867 F.3d at 612; Garcia Decl. ¶¶ 13, 37, ECF No. 55-27. And Defendants' actions have inflicted "demonstrable injury to the organization's activities" because those actions have forced BNHR to cancel initiatives, like the "Hugs Not Walls" campaign signature event, it would otherwise spearhead. *Havens Realty*, 455 U.S. at 379; Garcia Decl. ¶ 32, ECF No. 55-27.

All BNHR's organizational injuries, moreover, have a "causal nexus" to Defendants' actions, and would be redressed if this Court were to enjoin those actions. *See Scott*, 771 F.3d at 838-39. Defendants raise the same arguments regarding causation and redressability as brought up against El Paso County, but BNHR similarly will be able to refocus their resources on their core mission after summary judgment and injunction in their favor. *See supra* 18. Thus, BNHR has standing and this case will not be dismissed for lack of subject matter jurisdiction.

3. Plaintiffs Have Standing to Sue Under § 2808.

Finally, Defendants initially argued that Plaintiffs lacked standing to challenge §2808 construction because the border barrier construction projects funded under § 2808 had not been decided. Rapuano Decl. ¶¶ 5-7, ECF No. 95-7. At the time of Defendants' Cross-Motion the process was still ongoing as to which specific military construction projects would be authorized. *Id.* But on September 5, 2019, Defendants gave notice that the DOD had made the final determination to divert $20 million away from planned construction on "Defense Access Roads" at Fort Bliss, to be used on building a wall under § 2808. Supplemental Notice of DOD Decision 2, ECF No. 114.

A federal district court recently rejected Defendant's same argument in *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 907-08 (N.D. Cal. 2019) (reversed on other grounds). A "future" pecuniary injury may suffice so long as there is a "substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Furthermore, though standing may rest not rest on the independent actions of third parties, it may rest on "injury produced by determinative or coercive effect upon the action of someone else." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (finding standing to challenge an agency's biological opinion that "ha[d] a powerful coercive effect on the agency action. . . though the action agency was technically free to disregard the Biological Opinion... [all were] keenly aware of the

virtually determinative effect of its biological opinions.")

Especially considering the most recent developments, the Court agrees with the Plaintiffs that they have standing to challenge Defendants' use of § 2808 funds. Plaintiffs have demonstrated a "substantial risk" that Defendants will rely on § 2808 to fund a border wall. Reply 11-12, ECF No. 101 (quoting *Driehaus*, 573 U.S. at 158). The Proclamation expressly "invoke[s]" and "ma[kes] available" "the construction authority provided in [§] 2808 of title 10." Proclamation 1, ECF No. 55-14. And the same day the President issued his Proclamation, the White House identified the amount of § 2808 funds "that will be available to build the border wall:" $3.6 billion. Facts Sheet 4, ECF No. 95-5. There is a substantial risk that the Acting Defense Secretary will follow the President's directive to use § 2808 funds to build a border wall, rather than disregard it. *See Bennett*, 520 U.S. at 169. The fact that the Acting Secretary is "technically free to disregard the" Proclamation is irrelevant in light of its "virtually determinative effect" on his actions. *Bennett*, 520 U.S. at 170.

The Government's position is made more implausible by the fact that the DOD has taken significant steps toward building the border wall using § 2808 funds—namely identifying the deferred projects that will serve as sources of the funding. *See supra* 22. That diversion of funds substantiates the County's "direct pecuniary injury" that suffices for Article III standing. *LeBlanc*, 627 F.3d at 122. After all, it takes funds from the "lifeblood of the El Paso

economy," and it eliminates jobs that new construction at Fort Bliss would have created. *See* Samaniego Decl. ¶¶ 14-16, ECF No. 55-26. Such "economic injur[ies] [are] quintessential injur[ies] upon which to base standing." *Texas Democratic Party*, 459 F.3d at 586. There is a more than substantial risk that the DOD will use § 2808 funds on a border wall, at Fort Bliss's expense. Having established that Plaintiffs have standing to challenge Defendants' actions, the Court turns to the merits.

II. THE PRESIDENT'S PROCLAMATION IS UNLAWFUL.

The Proclamation is unlawful because the funding plan violates the CAA generally and specifically violates § 739. Because this disposes of the case, the Court will not address the other merits arguments raised, including the constitutionality of the Proclamation and the NEA, nor the Appropriations Clause and Administrative Procedures Act claims.[1] Following Rule 56 of the Federal Rules of Civil Procedure, this Court will enter summary judgment because "the movant [has shown] [ ]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); *see Celotex*, 477 U.S. at 322-23; *Curtis*, 710

[1] Defendants do not repeat their arguments that Plaintiffs do not fall within the zone of interests of the CAA, and even if they did the Court agrees with the U.S. District Court for the Northern District of California, which reasoned that when a plaintiff seeks equitable relief against a defendant for exceeding its statutory authority, the zone-of-interests test is inapposite. *Sierra Club*, 379 F. Supp. 3d at 910.

F.3d at 594. Defendants agree with Plaintiffs that this case presents legal questions for the Court to resolve without the need for further factual development.

Finally, Plaintiffs have requested a preliminary injunction, which 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). Defendants have countered that Plaintiffs cannot obtain equitable relief against the President. Cross-Mot. 20 and 23, ECF No. 95. The Court has requested additional briefing on this issue arid will reserve judgment in this regard for a later date.

1. Defendants' Use of Funds to Build a Border Wall Violates the Consolidated Appropriations Act.

To resolve this case, the Court turns to one of the three golden rules of statutory construction "established from time immemorial" that "a more specific statute will be given precedence over a more general one." *Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005) (quoting 1 Comp. Dec. 126, 127 (1894) and *Busic v. United States*, 446 U.S. 398, 406 (1980)). This rule "appli[es] to appropriations bills." *See id.* Thus, "[a]n appropriation for a specific purpose is exclusive of other appropriations in general terms which might be applicable in the absence of the specific appropriation." *Id.* (quoting 4 Comp. Gen. 476, 476 (1924)). Applying this rule, the D.C.

Circuit has held, for instance, that Congress's specific appropriation of $1 million to Nevada for conducting "scientific oversight responsibilities" precluded a more general $190 million appropriation for "nuclear waste disposal activities" from being directed to Nevada. *Id.*

Like the specific appropriation in Nevada, the CAA specifically appropriates $1.375 billion for border-wall expenditures and requires those expenditures to be made on "construction. . . in the Rio Grande Valley Sector" alone. CAA §§ 230, 231. Defendants' funding plan, by contrast, will transfer $6.1 billion of funds appropriated for other more general purposes-military construction, under § 2808, and counterdrug activities, under § 284. Their plan therefore flouts the cardinal principle that a specific statute controls a general one and violates the CAA. *See Nevada*, 400 F.3d at 16; *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

Defendants counter by pointing out that the CAA does not modify any of the statutes at issue here and, therefore, Congress did not intend to disable the use of other available funding authorities. See Cross-Mot. 54, ECF No. 95. The DOD Secretary may exercise his discretion to spend because he is only cabined by the text of the appropriation. *Id.* (citing *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 200 (2012) (quotation omitted). In absence of CAA provisions that specifically alter the meaning or availability of "permanent statutes" like § 284 and § 2808, it cannot be inferred that Congress meant to restrict the use of other appropriated funds for similar purposes. *Id.* at 54-55 (citing *Tennessee Valley*

Auth. v. Hill, 437 U.S. 153, 190 (1978) ("doctrine disfavoring repeals by implication applies with full vigor when the subsequent legislation is an appropriations measure")); *see also Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1558 (D.C. Cir. 1984) ("[W]hen appropriations measures arguably conflict with the underlying authorizing legislation, their effect must be construed narrowly.")

However, Defendants' reliance on *Salazar v. Ramah Navajo Chapter* is misplaced. At issue in that case is whether the Government must pay the full amount of contract support costs when Congress appropriates enough funds to pay in full any individual contractor's contract support costs, but not enough funds to cover the aggregate amount due every contractor. *Salazar*, 567 U.S. at 185. Consistent with longstanding principles of government contracting law, the Supreme Court held that the Government must pay each tribe's contract support costs in full. *Id.* Defendants rely on dicta in this case: "[in the absence of contrary language, the grant of a specific appropriation cannot be read to restrict the use of other appropriated funds for similar purposes pursuant to other statutory authority." Cross-Mot. 54-55 (citing *Salazar*, 567 U.S. at 200), ECF No. 95.

But in *Salazar* the Supreme Court reasoned that because Congress merely appropriated a lump-sum amount (for tribes to pay contract support costs) without a statutory restriction on what could be done with those funds, a clear inference arose that Congress did not intend to impose legally binding restrictions. 567 U.S. at 200 (citing *Lincoln v. Vigil*,

508 U.S. 182, 192). The Supreme Court *cites Lincoln v. Vigil*, which underscores the conclusion that "[t]he allocation of funds from a lumpsum appropriation is {an] administrative decision...committed to agency discretion. 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. . . the most effective. . . way." *Vigil*, 508 U.S. at 192. However, the CAA is not a lump sum appropriation without restrictions, and Defendants do not profess it to be such. *See* CAA § 230. The CAA provides $ 1.375 billion for "the construction of primary pedestrian fencing" in "the Rio Grande Valley Sector." CAA § 230(a)(1). And it states that none of the funds appropriated by the Act can be used "for the construction of pedestrian fencing" in any of the five other areas of the border. *Id.* § 231.

Moreover, in Salazar and Lincoln, the Supreme Court makes much of the fact that the "indicia in committee reports and other legislative history as to how funds should or are expected to be spent do not establish any legal requirements on the agency." 567 U.S. at 200 (quoting 508 U.S. at 192). Here we have far more than "indicia" or legislative history establishing Congressional expectations as to how the funds are spent: the plain text of the CAA restricts the amount and location of funding for border barrier construction. *See* CAA § 230(a)(1), 231.

Defendants reliance on *Tennessee Valley Authority v. Hill* is similarly inapposite. 437 U.S. 153, 190 (1978) ("doctrine disfavoring repeals by implication Cir. 1984)). However, the CAA does not conflict with

any underlying authorizing legislation, rather the Proclamation's use of other legislation to commit additional funds to border barrier construction conflicts with the CAA. *Compare* CAA § 230 *with* § 284, 2808. *Donovan* relies on *Tennessee Valley Authority,* which is inapplicable as described above. *See supra* 26.

Donovan also relies on *U.S. v. Langston,* which is illustrative of the problem with Defendants' argument in general: Congress did not need to be prescient and specifically "alter" or repeal § 284 and § 2808 in order to limit border barrier funding to the amount appropriated in the CAA. *See* 734 F.2d at 1558 (citing 118 U.S. 389 (1886)). In *Langston*, the salary of the minister to Haiti was originally fixed at the sum of $7,500. 118 U.S. at 394. Then subsequent acts appropriated $5,000 for his benefit, but did not contain any language to the effect that such sum shall be "in full compensation" for those years, nor was there in either of the subsequent acts an appropriation of money "for additional pay," from which it might be inferred that Congress intended to repeal the act fixing his annual salary at $7,500. *Id*. Repeals by implication are not favored, and the Supreme Court—in 1886—was able to look to several precedents establishing this rule specifically in the context of appropriations for public officials' salaries. *Id*. at 392-93 (citing *U.S. v. Fisher*, 109 U.S. 143, 146 (1883); *U.S. v. Mitchell*, 109 U.S. 146, 149 (1883)). In contrast, this case presents an unprecedented issue, albeit with a familiar solution that the *Langston* opinion recommends: the congressional language in the CAA itself reveals Congress's intent

to limit the border barrier funding. *See id*. and CAA § 739. And nowhere is this made more apparent than in § 739 of the CAA detailed below.

2. In Addition, the Proclamation Violates § 739.

CAA § 739 expressly forbids Defendants' funding plan. § 739 states:

> None of the funds made available in this or any other appropriations Act may be used to increase. . . 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.

§ 739 creates a general rule and an exception. The general rule is that "[n]one of the funds made available" in an "appropriations Act" (including the CAA) "may be used to increase funding for a program, project, or activity" that was "proposed in the President's budget request for a fiscal year." CAA § 739. The exception is that appropriations may be used to increase such funding if that use is authorized by "the reprogramming or transfer provisions" of an "appropriations Act."

§ 739 prohibits Defendants' plan to fund the border wall because the plan is barred by that provision's general rule and the plan does not fall within its exception. Defendants' plan is barred by § 739's general rule, because it (1) seeks to use funds "made

available in" an "appropriations Act"; (2) "to increase funding for a program, project, or activity"; (3) that was "proposed in the President's budget request for a fiscal year."

First, Defendants' plan seeks to use funds "made available in" an "appropriations Act." CAA § 739. It taps appropriated military construction funds under § 2808 and counterdrug support funds under § 284. As the White House has acknowledged, all funds have been "appropriated by Congress." Fact Sheet, https://www.whitehouse.gov/briefingsstatements/president-donald-jtrumps-border-security-victory/. The Military Construction Appropriation Acts dating back to 1982 "made available" the § 2808 military construction funds. *See, e.g.,* Pub. L. No. 97-106, 95 Stat. 1503; *see also* § 2808(a) (military construction projects "may be undertaken only within the total amount of funds that have been appropriated for military construction"). And the DOD Appropriations Act "made available" the § 284 counterdrug support funds. *See* Pub. L. No. 115-245 (2019). So while § 2808 and § 284 themselves are not appropriations act, which is why they do not fall within the § 739 exception (detailed below, *infra* 31), they were "made available" by an appropriation act.

Second, Defendants' plan also seeks to use these appropriations to "increase funding for a program, project, or activity." CAA § 739. Construction of a wall along the southern border is a singular "project" under that word's ordinary meaning. *See* Merriam Webster's Dictionary 932 (11th ed. 2003) (defining "project" as "a specific plan or design") In-

deed, the Executive Branch has consistently referred to the wall in this manner. In the first days of his administration, the President signed an executive order stating that it is "the policy of the executive branch" to construct "a physical wall on the southern border," defined as "a contiguous, physical wall, or other similarly secure, contiguous, and impassable physical barrier." 82 Fed. Reg. 8793-94, ECF No. 55-5, (2017). Likewise, on the day of the President's Proclamation, a White House fact sheet announced that the Executive Branch would use over $6 billion in additional funds to "build the border wall." Fact Sheet, https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/.

Third, funding for the border wall was "proposed in the President's budget request for a fiscal year." CAA § 739. On January 6, 2019, President Trump formally requested $5.7 billion for fiscal year 2019 "for construction of a steel barrier for the Southwest border." Letter to Appropriations Chairman 1, ECF No. 55-28. And he was denied, which led to the longest government shutdown in our country's history. *See* Pl.'s Mot. 4-5, ECF No. 54; *see also Sierra Club*, 379 F.Supp.3d at 892.

Next, Defendants' funding plan is not saved by § 739's exception: the funding increases it proposes are not "change[s] . . . made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act." Under federal law, an "appropriations Act" is an Act whose title begins: "An Act making appropriations." 2 U.S.C. § 622(5); 1 U.S.C.

§ 105. Neither § 2808 nor § 284 begins with this language. § 2808 is a provision of the Military Construction Codification Act, Pub. L. No. 97-124, 96 Stat. 153 (1982), which says nothing about appropriations in its title, nor makes any appropriations in its body. And § 284 is a provision of the National Defense Authorization Act, Pub. L. No. 114-328, 130 Stat. 2000, 2381, 2497 (2016), which by title and substance is not an "appropriations Act." *Cf* Pub. L. No. 115-31, 131 Stat. 135, 229 (2017) (separate statute appropriating DOD funds). The Proclamation violates § 739 of the CAA.

CONCLUSION

El Paso County and Border Network for Human Rights have standing to sue Defendants. Because the Proclamation seeks additional funds for border barrier funding in violation of the CAA generally and § 739 of the CAA specifically, it is unlawful. There is no genuine dispute as to any material fact, so Plaintiffs are entitled to judgment as a matter of law.

IT IS HEREBY ORDERED that Plaintiffs El Paso County, Texas, and Border Network for Human Right's "Motion for Summary Judgment or, in the alternative, a Preliminary Injunction" is **GRANTED**.

IT IS FURTHER ORDERED that Defendants Donald J. Trump, Patrick M. Shanahan, Kirstjen M. Nielsen, David Bernhardt, Steven T. Mnuchin, William Barr, John F. Bash, and Todd T. Semonite's "Cross—Motion to Dismiss or for Summary Judg-

ment, and Opposition to Plaintiffs' Motion for Summary Judgment and a Preliminary Injunction" **IS DENIED**.

IT IS FINALLY ORDERED that Plaintiffs El Paso County, Texas, and Border Network for Human Right shall **FILE A PROPOSED PRELIMINARY INJUNCTION** specifying the scope of said injunction **WITHIN TEN DAYS OF THIS MEMORANDUM OPINION** and then Defendants Donald J. Trump, Patrick M. Shanahan, Kirstjen M. Nielsen, David Bernhardt, Steven T. Mnuchin, William Barr, John F. Bash, and Todd T. Semonite will be given an opportunity to **RESPOND WITHIN FIVE DAYS**.

SIGNED this 11th day of **October 2019**.

/s/
THE HONORABLE DAVID BRIONES
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EL PASO COUNTY, TEXAS and BORDER NETWORK FOR HUMAN RIGHTS,	§	
Plaintiffs,	§	**EP-19-CV-66-DB**
v.	§	
DONALD J. TRUMP*, in his official capacity as President of the United States of America*, et al.,	§	
Defendants.	§	

MEMORANDUM OPINION

On October 11, 2019, the Court issued a Memorandum Opinion granting Plaintiffs El Paso County, Texas, ("El Paso County") and Border Network for Human Rights's ("BNHR") (collectively, "Plaintiffs") "Motion for Summary Judgment or, in the alternative, a Preliminary Injunction" ("Motion for Summary Judgment") and denying Defendants[1] Donald J. Trump, Mark T. Esper, Chad F. Wolf, David Bernhardt, Steven T. Mnuchin, William Barr, John F. Bash, and Todd T. Semonite's (collectively, "Defendants") "Cross-Motion to Dismiss or for Summary

[1] In suits against a public officer in an official capacity who cease to hold office while the action is pending, the officer's successor is automatically substituted as a party. Fed. R. Civ. P. 25(d).

Judgment, and Opposition to Plaintiffs' Motion for Summary Judgment and a Preliminary Injunction." Mem. Op., ECF No. 129. Therein, the Court ordered Plaintiffs to file a proposed preliminary injunction specifying the scope of said injunction and Defendants were given an opportunity to respond. *Id.* at 33.

On this day, the Court considered Plaintiffs' "Supplemental Brief Addressing Scope of Remedy" ("Plaintiffs' Supplemental Brief") filed in the above-captioned case on October 21, 2019. ECF No. 130. The Plaintiffs were granted leave to file an Amended Proposed Order on October 24, 2019. ECF No. 132. On October 28, 2019, Defendants filed their "Supplemental Brief Addressing Scope of Remedy" ("Defendants' Supplemental Brief"). ECF No. 134. After due consideration, the Court is of the opinion that a declaratory judgment and permanent injunction shall be granted in Plaintiffs' favor.

BACKGROUND

On October 11, 2019, this Court held that Plaintiffs had standing to sue Defendants. Mem. Op. 32, ECF No. 129. Further, it held that because the Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States ("the Proclamation") seeks additional funds for border barrier funding in violation of the 2019 Consolidated Appropriations Act ("CAA") generally and § 739 of the CAA specifically, it is unlawful. *Id.*

In its opinion, the Court requested that Plaintiffs "file a proposed preliminary injunction specifying the scope of said injunction." *Id.* at 33. In Plaintiffs' Supplemental Brief, Plaintiffs ask the Court to:

> (1) issue a declaratory judgment that the Proclamation is unlawful to the extent it authorizes border wall construction using funds appropriated by the CAA for "military construction" under 10 U.S.C. § 2808, and that Defendants' use of funds appropriated by the CAA for "military construction" under 10 U.S.C. § 2808 and "support for counterdrug activities" under 10 U.S.C. § 284 funds on building a border wall is unlawful; and
> (2) permanently enjoin Defendants Esper, [Wolf], Semonite, Bernhardt, and Mnuchin ("the agency head Defendants") from using funds appropriated by the CAA for "military construction" under § 2808 and "support for counterdrug activities" under § 284 on building a border wall.

Pls.' Supp. Br. 5-6, ECF No. 130.

Defendants counter in their Supplemental Brief that the Court should decline to enter an injunction and should exclude the Proclamation from the Court's declaratory relief. Defs.' Supp. Br. 1, 2-3, ECF No. 134. Alternatively, if the Court did enter any injunctive relief, Defendants argue that it should enter an administrative stay pending appeal. *Id.* at 13-14. The Court disagrees with Defendants and will not stay its decision to permanently enjoin their use of § 2808 funds for border barrier funding, though it will not extend this injunction to § 284 funds.

LEGAL STANDARDS

To obtain any injunction, a plaintiff must show:

> (1) that [they have] suffered an irreparable injury;
> (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
> (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and
> (4) that the public interest would not be disserved by a permanent injunction.

Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 156-58 (2010); *see also, e.g., eBay Inc. v. MercExchange, LLC,* 547 U.S. 388, 391 (2006), and *Winter*[2] *v. Nat. Res. Def Council,* 555 U.S. 7, 32-33 (2008). "[I]njunctive relief is a drastic remedy, not to be applied as a matter of course." *O'Donnell v. Harris Cty.,* 892 F.3d 147, 155 (5th Cir. 2018) (quoting *Marshall v. Goodyear Tire & Rubber Co.,* 554 F.2d 730, 733 (5th Cir. 1977)) (internal quotations omitted).

Injunctive relief never "follow[s] from success on the merits as a matter of course," *Winter,* 555 U.S. at 32, and, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklemburg Bd. of Ed.,* 402 U.S. 1, 16 (1971). As such, an injunction "should be no more burdensome to the defendant than necessary to provide complete relief." *Califano v. Yamasaki,* 442 U.S. 682, 702 (1979); *see also John Doe #1 v. Veneman,* 380 F.3d

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[2] Throughout this opinion, the Court refers to those four factors as the "*Winter*" or "permanent injunction" factors for sake of brevity.

807, 818 (5th Cir. 2004) ("The district court must narrowly tailor an injunction to remedy the specific action which gives rise to the order.").

Furthermore, "[t]he existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." Fed. R. Civ. P. 57. A declaratory judgment is appropriate when it will "terminate the controversy" giving rise to the proceeding. Fed. R. Civ. P. 57 advisory committee's 1937 note. It is within the discretion of a trial court to grant declaratory relief on motion of party. *Delno v. Market St. R. Co.,* 124 F.2d 965, 967 (9th Cir. 1942) (citing § 6 of the Uniform Declaratory Judgment Act).

ANALYSIS

To begin, Plaintiffs argue that the Court should issue a declaratory judgment that the Proclamation's invocation of § 2808 and the Defendants' use of §§ 2808 and 284 funds on the border wall are unlawful. Pls.' Supp. Br. 2, ECF No. 130. This declaratory judgment and the permanent injunction would only need to issue against the agency head Defendants, rather than the President himself. *Id.* at 2 n.1.

Next, Plaintiffs assert that a permanent, rather than preliminary, injunction should issue to stop the agency head Defendants from using these funds for border wall construction because the Court's grant of Plaintiffs' Motion for Summary Judgment was a final judgment ending the litigation on the merits. *Id.* at 3. Finally, Plaintiffs go through the permanent injunction factors and describe how they meet each. *Id.* at 4-7.

In response, Defendants call Plaintiffs' requested injunction overbroad and unjustified because Plaintiffs have failed to demonstrate irreparable injury and the Government's compelling interests in constructing border barriers outweigh the Plaintiffs' interests. Defs.' Supp. Br. 1, ECF No. 134. And Defendants claim that Plaintiffs' proposed injunction conflicts with the Supreme Court's recent order staying an injunction that the District Court for the Northern District of California entered. *Id.* at 1-2 (citing *Trump v. Sierra Club*, 140 S. Ct. 1 (2019)). Finally, Defendants argue that the Proclamation should be excluded from the Court's declaratory judgment as there is no basis for such extraordinary relief that would necessarily run against President Trump in his official capacity. *Id.* at 2-3.

Because both sides and the Court agree that any declaratory judgment shall not run against the President, the Court does not address the merits of this argument. Instead, the Court discusses the merits of a declaratory judgment against the agency head Defendants. Then, because the Court's injunction § 2808 funds does not conflict with Supreme Court precedent, the Court weighs the permanent injunction factors to conclude that a permanent injunction shall be granted in Plaintiffs' favor, though more narrowly tailored than the injunction they propose on both §§ 284 and 2808 funds.

I. A Declaratory Judgment Shall Enter Against the Agency Head Defendants.

Plaintiffs highlight that this Court expressly held

that "[t]he Proclamation is unlawful" and "the funding plan violates the CAA generally and specifically violates § 739." Pls.' Supp. Br. 2, ECF No. 130 (quoting Mem. Op. 24, ECF No. 129) (internal quotations omitted). In accordance with that holding, Plaintiffs argue that this Court should issue a declaratory judgment that the Proclamation is unlawful to the extent it authorizes border wall construction using funds that the CAA appropriated for "military construction" under § 2808. *Id.* (citing 28 U.S.C. § 2201(a) (court "may declare the rights and other legal relations of any interested party seeking such declaration"); ECF No. 52, at 47 (Plaintiffs seeking declaratory relief)). And, according to Plaintiffs, the declaratory judgment should state that the agency head Defendants' use of CAA funds appropriated for "military construction" under § 2808, and "support for counterdrug activities" under § 284 on building a border wall is unlawful. **Id.**

Defendants counter that "such an order would not be appropriate in light of the Court's merits determination, which did not conclude the Proclamation was unlawful." Defs.' Supp. Mot. 13, ECF No. 134. Defendants highlight that this Court's Memorandum Opinion only concluded that the use of § 2808 was inconsistent with the CAA. *Id.* Thus, according to Defendant, no declaratory judgment .should issue against the Proclamation. *Id.*

A declaratory judgment is appropriate here because it will "terminate the controversy" giving rise to the proceeding. *See* Fed. R. Civ. P. 57 advisory committee's 1937 note. Contrary to Defendants' argument, the conclusion in the Memorandum Opinion reads: "[b]ecause the Proclamation seeks additional

funds for border barrier funding in violation of the CAA generally and § 739 of the CAA specifically, it is unlawful. There is no genuine dispute as to any material fact, so Plaintiffs are entitled to judgment as a matter of law." Mem. Op. 32, ECF No. 129. It is within this Court's discretion to grant declaratory relief on Plaintiffs' motion. *See Delno,* 124 F.2d at 967 (citing § 6 of the Uniform Declaratory Judgment Act). Thus, a declaratory judgment shall be granted in Plaintiffs' favor against the agency head Defendants' attempt to use CAA funds appropriated for "military construction" under § 2808 for border wall construction above and beyond the lawfully appropriated $1.375 billion. CAA §§ 230, 231. However, it will not extend to the CAA funds appropriated for "support for counterdrug activities" under § 284, explained further below.

II. The Court's Decision to Enjoin Does Not Conflict with Supreme Court Precedent.

Defendants point out that the Supreme Court has already stayed an injunction issued by another district court prohibiting the DOD from proceeding with the § 284 border barrier projects. Defs.' Supp. Br. 7, ECF No. 134 (citing *Sierra Club,* 140 S. Ct. 1). In issuing that stay, the Supreme Court determined that the balance of the equities tipped in the Government's favor. *Id.* (citing *Nken v. Holder,* 556 U.S. 418, 434 (2009) (explaining that stay factors include irreparable injury, the balance of hardships, and the public interest)); *Sierra Club,* 140 S. Ct. at 1. Consequently, the Defendants argue that there is no basis for this Court to issue an injunction regarding the § 284 projects that would effectively override the Supreme

Court's order. Defs.' Supp. Br. 7, ECF No. 134. And this Court agrees.

As acknowledged in this Court's Memorandum Opinion, the Supreme Court granted a stay in Defendants' favor, reasoning "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 [§] 8005." *Sierra Club,* 140 S. Ct. at 1. Because DOD Appropriations Act, § 8005, authorizes the Secretary of the Department of Defense to transfer the $2.5 billion for § 284 Support for Counterdrug Activities, this Court found Plaintiffs' argument that the DOD Secretary exceeded his statutory authority under § 284 unviable. Mem. Op. 6, ECF No. 129. However, this conclusion and the Supreme Court's decision do not mandate that this Court is prohibited from enjoining the use of § 2808 funds to augment border wall funding in violation of the CAA. *See id.*

III. The *Winter* Factors Tip in Favor of Plaintiffs, so a Permanent Injunction Shall Issue Against Defendants.

Plaintiffs ask the Court to issue a permanent injunction against the agency head Defendants from using § 2808 funds on a border wall, while Defendants claim that Plaintiffs are not entitled to such relief because they cannot demonstrate irreparable injury, and the balance of the equities and public interest weigh against injunctive relief. Pls.' Supp. Br. i, ECF No. 130; Defs.' Supp. Br. 4, 6, ECF No. 134.

Because Plaintiffs satisfy the four *Winter* factors, the Court disagrees with the Defendants and issues a

permanent injunction against the agency head Defendants' use of additional § 2808 funds to fund border barrier construction. After addressing the first *Winter* factor, irreparable injury, the Court will tum to the third and fourth factors, the balance of the equities and public interest, respectively. Because Defendants do not address the second *Winter* factor—that remedies available at law, such as monetary damages, are inadequate to compensate for the injury—the Court will agree with Plaintiffs' argument that "[m]oney damages cannot substitute for injunctive relief in this case" without further discussion. Pls.' Supp. Br. 4, ECF No. 130 (citing *Paulsson Geophysical Servs., Inc. v. Sigmar,* 529 F.3d 303, 313 (5th Cir. 2008)).

1. Plaintiffs Have Suffered Irreparable Injury.

Plaintiffs claim irreparable injury citing this Court's conclusion that Plaintiffs have standing due to their reputational, economic, and organizational injuries. *Id.* at 8 (citing Mem. Op. 9-22, ECF No. 129). Further, according to the Plaintiffs, "[t]hose injuries are irreparable absent an injunction: the County's reputational and economic harm will persist as long as Defendants are allowed to carry out their plan to build a wall; and BNHR will continue to divert resources to counteract Defendants' unlawful actions as long as those actions remain in effect." *Id.*

First, Defendants attack the viability of reputational harm as the basis for an injunction. Defs.' Supp. Br. 4, ECF No. 134. Second, Defendants argue that Plaintiffs' economic injury is indirect and, thus, cannot form the basis for an injunction. *Id.* at 4-5. Finally,

according to Defendants, BNHR's reallocation of resources also does not justify an injunction. *Id.* at 5-6.

i. Plaintiffs have shown more than reputational harm, which alone supports an injunction.

As an initial matter, Defendants assert that Plaintiffs have not submitted any evidence to establish that they are injured by specific § 2808 projects that the Department of Defense ("the DOD") plans to undertake, as all of Plaintiffs' declarations pre-date the Secretary of Defense's decision. *Id.* at 4. This Court rejected this same argument in its Memorandum Opinion as it related to standing because there is more than a substantial risk that the DOD will use § 2808 funds on a border wall, at Fort Bliss's expense. Mem. Op. 24, ECF No. 129.

However, Defendants argue. that standing is a separate and independent inquiry than evaluating irreparable harm for an injunction, which requires separate and convincing proof. Defs.' Supp. Br. 4, ECF No. 134 (citing *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983); *O'Shea v. Littleton,* 414 U.S. 488, 499 (1974); *White v. Carlucci,* 862 F.2d 1209, 1212 (5th Cir. 1989)). All the cases that Defendants cite for this proposition are inapposite in this context as they involve distinguishable fact patterns and do not illustrate how the concrete injury facet of the standing inquiry is insufficient to satisfy the irreparable harm requirement for equitable relief

First, *Carlucci,* involves an employment dispute wherein respondent claimed Title VII plaintiffs did not need to establish irreparable harm at all and the Fifth Circuit merely held that irreparable harm was

a requirement for an injunction to issue, not that concrete injury is insufficient to meet the test. 862 F.2d at 1212. In *Littleton,* the Supreme Court distinguished between the case or controversy requirement of standing and the irreparable injury *Winter* factor-again distinct from the assertion Defendants make that the concrete injury requirement of standing is insufficient to establish irreparable injury. 414 U.S. at 499. Moreover, *Littleton* involved the particularly fraught area of criminal prosecution and enjoining state actors that enveloped distinct federalism issues, not relevant to this case. *Id.* Likewise, in *Lyons,* the Supreme Court distinguished between the case or controversy requirement and irreparable injury; it did not hold that concrete injury may never suffice to show irreparable harm. 461 U.S. at 103. Distinguishing between the case or controversy requirement and irreparable harm does not necessarily imply, as Defendants argue, that showing concrete injury is insufficient to show irreparable harm.

Furthermore, even if concrete injury did not suffice on its own, *Carlucci* illustrates that irreparable injury is intimately linked with the second *Winter* factor. 862 F.2d at 1212. The. Supreme Court emphasized in *Carlucci* that the injuries all could be made whole by money damages or other relief, thus were not irreparable. *Id.* In contrast, the Plaintiffs here will not be made whole with traditional remedies at law—and Defendants do not contest this. *See supra* 8.

Next, Defendants cite *Sampson v. Murray* in which "the Supreme Court recognized that reputational harm 'falls far short of the type of irreparable injury which is a necessary predicate to the issuance'

of an injunction." *Id.* (quoting 415 U.S. 61, 91-92 (1974)). Thus, according to Defendants, El Paso County's reputational injury from the President's proclamation itself cannot serve as the basis for injunctive relief against construction pursuant to statutory authorities dependent on that proclamation. *Id.*

However, the Court disagrees with Defendants' analysis of *Sampson* v. *Murray* for two reasons. First, *Sampson* dealt with a distinguishable factual situation involving a respondent who was a probationary worker alleging humiliation and reputational harm after being discharged without additional procedural safeguards. 415 U.S. at 91. The Supreme Court highlighted that it was not the discharge itself that was the harm, but "only that she was entitled to additional procedural safeguards in effectuating the discharge." *Id.* The Court concluded "that no significant loss of reputation would be inflicted by procedural irregularities in effectuating respondent's discharge, and that whatever damage might occur would be fully corrected by an administrative determination requiring the agency to conform to the applicable regulations." *Id.*

Second, while the Court concluded that even assuming reputational damage did occur, it would not suffice for irreparable injury, the Court added a footnote:

> We recognize that cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee; may so far depart from the normal situation that irreparable injury might be

> found. Such extraordinary cases are hard to define in advance of their occurrence. We have held that an insufficiency of savings or difficulties in immediately obtaining other employment—external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself—will not support a finding of irreparable injury, however severely they may affect a particular individual. But we do not wish to be understood as foreclosing relief in the genuinely extraordinary situation. Use of the court's injunctive power, however, when discharge of probationary employees is an issue, should be reserved for that situation rather than employed in the routine case.

Id. at 92, n.68 (citing *Wettre* v. *Hague,* 74 F. Supp. 396 (Mass. 1947); vacated and remanded on other grounds, 168 F.2d 825 (1st Cir. 1948)).

Therefore, this Court refuses to extend the conclusion in *Sampson* to this case, especially when the Supreme Court was careful to confine its conclusions to the facts of that case and specifically left open the possibility of irreparable injury in other employment situations with a "result[ing] effect on the employee['s]" reputation that warrants an injunction. *See id.* Far from foreclosing injunctive relief from all entities suffering reputational harm, the Supreme Court carefully left open the possibility. *See id.*

Moreover, here El Paso County's reputational harm is distinguishable in important ways from *Sampson*. To begin, El Paso County is far from a mere

probationary worker entitled to less procedural safeguards than a permanent employee. *Id.* at 81. El Paso County and BNHR are central stakeholders. *See* Mem. Op. 9, ECF No. 129. Indeed, this Court concluded that El Paso County is the object of the Proclamation, entitled to protection from Defendants' statutory violations. *Id.* And unlike the Supreme Court in *Sampson,* this Court cannot summarily conclude "that no significant loss of reputation would be inflicted by procedural irregularities in effectuating respondent's discharge, and that whatever damage might occur would be fully corrected by an administrative determination requiring the agency to conform to the applicable regulations." 415 U.S. at 91. This Court has already concluded that Plaintiffs' reputational harm is significant. *See* Mem. Op. at 10-14. ECF No. 129. Finally, unlike the plaintiff in *Sampson* who had other recourse through the administrative agency, Defendants do not contest the second *Winter* factor that no other adequate remedies at law can compensate Plaintiffs' injury. *See generally* Defs.' Supp. Br., ECF No. 134. While the reputational harm alone is enough to satisfy the irreparable injury requirement, Plaintiffs also have demonstrated economic harm.

ii. Plaintiffs economic harm is irreparable absent an injunction.

Defendants next argue that El Paso County's purported loss of tax revenue from the deferral of the roads project at Fort Bliss also cannot support a finding of irreparable injury because it is a generalized grievance insufficient to support standing. *Id.* at 4 (citing *Iowa ex rel. Miller v. Block,* 771 F.2d 347, 353

(8th Cir. 1985)). Defendants claim that any decision to the contrary would conflict with *Wyoming v. Oklahoma,* where the Supreme Court recognized standing to challenge "a direct injury in the form of a loss of specific tax revenues," but distinguished cases where "actions taken by United States Government agencies [have injured their] econom[ies] and thereby caused a decline in general tax revenues." *Id.* at 4-5 (quoting 502 U.S. 437, 448 (1992)) (internal quotations omitted). In reaching that conclusion, the Supreme Court emphasized that States must establish a direct link between the tax at issue and the administrative action being challenged to meet the requirements for Article III standing. *Id.* at 5 (citing *Wyoming,* 502 U.S. at 448).

Defendants argue that the direct causal connection that the Supreme Court found critical to the finding of an injury in *Wyoming* is not present in this case, as El Paso merely asserts generalized allegations of harm resulting from reduced tourism and business development, as well as the deferral of the roads project at Fort Bliss. *Id.* at 5. Defendants point to the affidavit of Judge Samaniego, who is responsible for the County's tax rate and budget, in which only the threat of generalized "economic harm" is raised. *Id.* (citing Decl. of Judge Samaniego ¶¶ 2, 16 ECF No. 55-26). Defendants conclude that this is fatal to Plaintiffs' claims and to their request for equitable relief. *Id.*

This Court has already rejected this argument because the diversion of resources from Fort Bliss can hardly be described as generalized—it is directly tied to the unlawful deferral of resources to border wall funding in violation of the CAA. Mem. Op. 4, ECF No.

129. Far from a general decline in tax revenue, Defendants will divert $20 million away from a planned military construction project at Fort Bliss in El Paso County. Supp. Notice of the DOD Decision 3, ECF No. 114. "Fort Bliss is the lifeblood of the El Paso economy," contributing billions of dollars and creating thousands of jobs. Samaniego Decl. ¶ 15, ECF. No. 55-26. Losing funds that had been appropriated for use at Fort Bliss "creates the imminent prospect of economic harm to El Paso County." *Id.* ¶ 16. That loss of funds also represents a missed opportunity to "obtain a benefit," which can also suffice to show injury in fact. *N.E. Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Defendants recognize the legitimacy of this economic harm when they contest the breadth of the Plaintiffs' proposed injunction, but are forced to admit that "the absolute most Plaintiffs are entitled to is an injunction prohibiting DOD from using the $20 million in military construction funds initially associated with Fort Bliss." Defs. Supp. Br. 12-13. And in addition to the economic and reputational harm of El Paso County, BNHR has also suffered irreparable harm.

iii. BNHR's organizational harm is irreparable absent an injunction.

Defendants claim that BNHR's diversion-of-resources theory fails to carry BNHR's burden to show irreparable injury in the absence of its requested injunction. Defs.' Supp. Br. 5-6, ECF No. 134. In Defendants' retelling, BNHR has not established that its reallocation of resources has imposed concrete irreparable harm beyond simply undertaking a different form of border policy advocacy. *Id.*

This too the Court has already addressed to the contrary in its Memorandum Opinion and does so again here because BNHR has established irreparable injury. Mem. Op. 18-22, ECF No. 129. More than being forced to undertake a different form of border policy advocacy, BNHR's resources have been drained and diverted, as illustrated by the cancelation of a signature event and additional expenditures to counteract Defendants' unlawful actions that differ from its routine expenses. *Id.* at 18, 21. Because BNHR and El Paso County have satisfied the first and second *Winter* factors, irreparable harm that cannot be treated with traditional remedies at law, the Court will address the remaining factors.

2. The Balance of Equities and Public Interest Weigh in Favor of Injunctive Relief.

Where, as here, the Government is a party to the case, the third and fourth permanent injunction factors merge: the balance of the equities and public interest. *See Nken v. Holder,* 556 U.S. 418, 435 (2009).

Plaintiffs reiterate the irreparable injury facts described above, which would cause severe hardship absent an injunction and tips the balance of the equities in their favor. *See* Pls.' Supp. Br. 8, ECF No. 1 30. Plaintiffs further argue that Defendants have no legitimate interest in taking actions that violate the CAA, or in spending funds that Congress appropriated for purposes other than a border wall. *Id.* And while the importance of border security should not be minimized, according to Plaintiffs, that concern cannot override the public's interest in the Executive Branch complying with the law. *Id.* That is especially

so when Congress—the People's representatives—determined that securing the border required only $1.375 billion, not $6.1 billion, to be spent on a wall. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 655 (1952)).

Defendants argue to the contrary that these factors tip in their favor because the Supreme Court has recognized that the Government has "compelling interests in safety and in the integrity of our borders." Defs.' Supp. Br. 6, ECF No. 134 (citing *Nat'l Treasury Emps. Union v. Von Raab,* 489 U.S. 656, 672 (1989))." Defendants address § 284 and § 2808 projects separately.

i. § 284 construction shall not be enjoined.

Because the Court agrees with the Supreme Court, as stated above, an injunction on the use of § 284 funds will not issue. *See supra 7.* However, Defendants largely repeat their arguments for why equity and public interest weigh against a permanent injunction on both § 284 and § 2808 funding for border wall construction. Defs.' Supp. Br. 8, ECF No. 134. Thus, the Court will address Defendants' arguments as they pertain to § 2808.

ii. § 2808 construction shall be enjoined.

Defendants argue that enjoining § 2808 projects would prohibit the Government from taking critical steps needed to prevent the continuing surge of illegal drugs from entering the country through the southern border. Defs.' Supp. Br. 6, 7-9, ECF No. 134 (citing *United States v. Guzman-Padilla,* 573 F.3d 865, 889 (9th Cir. 2009) (Government has a "strong interest

[ ]" in "interdicting the flow of drugs" entering the United States)). Defendants explain that these undisputed harms "plainly outweigh[ ]" Plaintiffs' asserted injuries arising from construction with § 2808 funds. *Id.* (citing *Winter,* 555 U.S. at 26, 33). And according to Defendants, Plaintiffs' asserted reputational, economic, and organizational harms, which arise principally from the Proclamation's message, have essentially no connection to the legal violation of the CAA that the Court identified. *Id.* Given that, and in light of Defendant's self-proclaimed "weighty and undisputed interest in undertaking projects to assist with drug interdiction at the southern border, it would be an abuse of discretion for this Court to award the 'extraordinary remedy' of a permanent injunction on § [2808 construction to provide Plaintiffs relief from the specific violation the Court identified." *Id.* at 7 (citing *Winter,* 555 U.S. at 22).

Defendant's first citation to *Von Raab, see supra* 15, is unpersuasive in this context because while the Supreme Court did hold that the Government has "compelling interests in safety and in the integrity of our borders[,]" it did so in contrast to the less compelling privacy expectations of an armed customs officer who had to submit to urine analysis. 489 U.S. at 672. Likewise, *Guzman-Padilla* does not counsel a ruling in Defendants' favor as it was similarly decided within a distinct Fourth Amendment context. 573 F.3d at 889 (9th Cir. 2009).

Drawing upon *Guzman-Padilla* for support, Defendants overstate this Court's permanent injunction as aimed at all § 284 projects—and impliedly § 2808 projects. *See* Defs.' Supp. Br. 6, 8, ECF No. 134. Far

from enjoining all § 2808 projects, this Court only enjoins the use of funds to increase funding in contravention of the fixed amount prescribed in the CAA. *See infra* 20. Defendants are not prohibited from taking steps to prevent illegal drugs from entering the country through the southern border, but they are prohibited from violating the CAA. *Id.*

Next, Defendants liken Plaintiffs to the unsuccessful plaintiffs in *Winter* whose interests in whale watching trips, observing marine mammals underwater, and conducting scientific research on marine mammals was outweighed by both the Navy's interest and the public interest in sonar training exercises. 555 U.S. at 26. An injunction on these unique training exercises would force the Navy to deploy unprepared antisubmarine forces and, thus, jeopardize the safety of the entire feet. *Id.* The Supreme Court was careful to limit its holding because "[o]f course, military interests do not always trump other considerations, and we have not held that they do." *Id.*

Far from enjoining a unique or sole source of funding, which would make this case more analogous to *Winter,* this injunction merely stops the unlawful augment of the funds that were already appropriated for border wall funding. *See* Mem. Op. 32, ECF No. 129. Finally, granting a preliminary injunction would not "disserve the public interest." PLs.' Mot. Summ. J. 50, ECF No. 54 (quoting *Planned Parenthood of Gulf Coast Inc. v. Gee,* 862 F.3d 445, 479 (5th Cir. 2017). To the contrary, because Defendants' actions are unlawful and the people's representatives—Congress—

declined to augment the border wall budget as Defendants attempt, the public interest would be served by halting them. *Id.*

Finally, Defendants argue that both the Government and the public have a compelling interest in ensuring that its military forces are properly supported with necessary resources for successful missions. Defs.' Supp. Br. 7, ECF No. 134. Defendants cite *Goldman v. Weinberger* for the proposition that courts must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." 475 U.S. 503, 507 (1986). However, the Supreme Court was careful in that case to limit its holding to the particular military context where First Amendment rights are necessarily circumscribed. *Id.* So when it held that the Air Force did not have to make an exception to its dress code for religious apparel, it did so with great deference to military judgment. *Id.* at 509. This context is distinct from the present case and so is the level of deference required. *See id.* at 507. Thus, Plaintiffs satisfy all four *Winter* factors and a permanent injunction shall issue in their favor.

For the same reasons, Defendants do not have compelling reasons justifying an administrative stay of this decision as they have requested, though they are free to pursue a stay pending appeal before the Fifth Circuit. Defs.' Supp. Mot. 13-14, ECF No. 134; ***see*** Fed. R. App. P. 8.

3. A Permanent Injunction, Rather than Preliminary Injunction, Is Appropriate Here.

The Court granted Plaintiffs' Motion for Summary

Judgment, which is a final judgment that "ends the litigation on the merits." *McLaughlin v. Mississippi Power Co.,* 376 F.3d 344, 350 (5th Cir. 2004). When a court grants a plaintiff summary judgment, a permanent-rather than preliminary-injunction should issue. *See, e.g. , Dep't of Texas, Veterans of Foreign Wars v. Texas Lottery Comm'n,* 760 F.3d 427, 441 (5th Cir. 2014) (en banc) (affirming summary judgment and permanent injunction); *Vais Arms, Inc. v. Vais,* 383 F.3d 287, 296 (5th Cir. 2004) (same); *Sierra Club v. Trump,* 2019 WL 2715422, at *6 (N.D. Cal. June 28, 2019) (granting summary judgment and permanently enjoining border wall construction under § 8005). After all, there is no need to determine whether the plaintiff is "likely to succeed on the merits" (as a court does in a preliminary-injunction posture, *see Pendergest-Holt v. Certain Underwriters at Lloyd's of London,* 600 F.3d 562, 568-69 (5th Cir. 2010)) once the court determines that the plaintiff has succeeded on the merits. Because this Court granted Plaintiffs' summary judgment and because Plaintiffs have met all four *Winter* factors,. a permanent injunction is the proper form of equitable relief.

IV. The Permanent Injunction on the Use of § 2808 Funds Beyond the $1.375 Billion in the CAA Is Not Overbroad.

Defendants make much of the difference between the Plaintiffs' original and amended proposed injunction order, calling the latter especially overbroad. Defs.' Supp. Br. 9-10. The relevant portion of Plaintiffs' original Proposed Order reads: the Defendants "are enjoined from border wall construction using funds **appropriated by the 2019 Consolidated**

Appropriations Act for 'military construction' under 10 U.S.C. § 2808, and 'support for counterdrug activities' under 10 U.S.C. § 284." Proposed Order 2, ECF No. 130-1 (emphasis added). The Plaintiffs' Amended Proposed Order reads: the Defendants "are enjoined from border wall construction using funds appropriated for 'military construction' under 10 U.S.C. § 2808, and 'support for counterdrug activities' under 10 U.S.C. § 284." Amended Proposed Order 2, ECF No. 131-1. The bold language has been taken out and, according to Defendants, this shows that Plaintiffs are aware that an injunction is inappropriate because no "funds appropriated by the 2019 [CAA]" are being used to carry out the disputed construction. Defs.' Supp. Br. 9 (citing Mem. Op. 30-31, ECF No. 129). Defendants go on to reargue the merits of the CAA's prohibition on additional funding for border wall construction, limiting that prohibition to only other provisions within the CAA itself. *Id.* The Court disagreed in its Memorandum Opinion and continues to uphold the "general principle of statutory interpretation" that "a more specific statute will be given precedence over a more general one," which necessitates an injunction against the unlawful augment of funds for border wall construction. Mem. Op. 25, ECF No. 129 (quoting *Nevada v. Dep't of Energy,* 400 F.3d 9, 16 (D.C. Cir. 2005)) (internal quotations omitted).

CONCLUSION

After succeeding on the merits of their claim at summary judgment, Plaintiffs are entitled to a declaratory judgment against the agency head Defendants' unlawful attempt to augment the CAA funds with § 2808 funds above the appropriated $1.375 billion. Far

from conflicting with the Supreme Court's decision in *Sierra Club,* this Court's decision is not based on whether the DOD Secretary exceeded his statutory authority under § 284 and, indeed, the Court deemed Plaintiffs' argument relying on this line of reasoning invalid. Because Plaintiffs have demonstrated irreparable harm, an inability of traditional remedies at law to rectify that harm, and the balance of the equities and public interest weigh in their favor, they are entitled to a permanent injunction against Defendants' use of § 2808 funds for border barrier construction.

IT IS HEREBY ORDERED that a **DECLARATORY JUDGMENT ISSUE** declaring the Proclamation 9844 of February 15, 2019, 84 Fed. Reg. 4949, **UNLAWFUL** to the extent it authorizes agency head Defendants Mark T. Esper, Chad F. Wolf, Todd T. Semonite, David Bernhardt, and Steven T. Mnuchin to use § 2808 funds beyond the $1.375 billion in the 2019 Consolidated Appropriations Act for border wall construction.

IT IS FINALLY ORDERED that agency head Defendants Mark T. Esper, Chad F. Wolf, Todd T. Semonite, David Bernhardt, and Steven T. Mnuchin are **PERMANENTLY ENJOINED** from using § 2808 funds beyond the $1.375 billion in the 2019 Consolidated Appropriations Act for border wall construction.

SIGNED this 10th day of **December 2019.**

/s/
THE HONORABLE DAVID BRIONES
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-51144

EL PASO COUNTY, BORDER NETWORK FOR HUMAN RIGHTS,

Plaintiffs - Appellees Cross-Appellants

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, In his official capacity; MARK ESPER, SECRETARY, DEPARTMENT OF DEFENSE, In his official capacity; CHAD F. WOLF, ACTING SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY, In his official capacity; DAVID BERNHARDT, SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, In his official capacity; STEVEN T. MNUCHIN, SECRETARY, U.S. DEPARTMENT OF TREASURY, In his official capacity; TODD T. SEMONITE, In his official capacity as Commanding General United States Army Corps of Engineers,

Defendants - Appellants Cross-Appellees

Appeals from the United States District Court
for the Western District of Texas

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

The application for a stay of the district court's injunction pending appeal is GRANTED. The Supreme Court recently stayed a similar injunction from our sister circuit. *See Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.); *accord Sierra Club v. Trump*, No. 19-17501, slip. op. (9th Cir. Dec. 30, 2019). The Government is entitled to the same relief here for, among other reasons, the substantial likelihood that Appellees lack Article III standing.

IT IS FURTHER ORDERED that Appellees' motion to expedite appeal is DENIED.

IT IS FURTHER ORDERED that Appellees' motion for oral argument to be scheduled no later than March 2020 is DENIED.

IT IS FURTHER ORDERED that the unopposed motion for leave to file Amicus Curiae brief of United States Representative Andy Barr in support of Appellants' motion for stay pending appeal of order granting injunction is GRANTED.

IT IS FURTHER ORDERED that the unopposed motion for leave to file Amicus Curiae brief of Government Oversight, Incorporated, Christopher Shays, Christine Todd Whitman, John Bellinger III, Samuel Witten, Stanley Twardy, and Richard Bernstein in opposition to Appellants' motion for stay pending appeal of order granting injunction is GRANTED.

STEPHEN A. HIGGINSON, Circuit Judge, dissenting:

Although I agree with my colleagues that this matter presents "a substantial case on the merits" and involves a "serious legal question," *Ruiz v. Estelle*, 666

F.2d 854, 856 (5th Cir. 1982) (citation omitted), I am unable to agree, without focused panel deliberation and discussion—possibly aided by dialogue with counsel—that the government presently has shown either a likelihood of success on the merits or irreparable harm in the absence of a stay, *Nken v. Holder*, 556 U.S. 418, 434 (5th Cir. 2009). Therefore, I dissent.

Regardless, I would expedite merits assessment by our court. The district court's analysis is comprehensive and probing, granting parsed relief enjoining the Department of Defense from using funds under 10 U.S.C. § 2808 while simultaneously declining to enjoin the use of border-construction funds under 10 U.S.C. § 284. *El Paso County v. Trump*, 407 F Supp. 3d 655 (W.D. Tex. 2019). That ruling implicates several weighty issues that animate my desire to expedite. These include threshold jurisdictional issues of county and organizational standing; merits issues implicating Executive military authority and Congress's prohibitory Spending Clause authority; the Ninth Circuit's recent denial of a motion to lift a stay of a "substantially similar injunction," *Sierra Club v. Trump*, No. 19-17501, slip. op. (9th Cir. Dec. 30, 2019); and the Supreme Court's stay of a related but distinct injunction in *Trump v. Sierra Club*, 140 S. Ct. 1 (July 26, 2019) (mem.). Amici have already entered the case, demonstrating the importance of the issues. This constellation of sensitive and complex legal questions, all in the context of a nationwide injunction, warrant expediting the appeal for prompt consideration of the merits.

APPENDIX D

RELEVANT STATUTORY PROVISIONS

Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. A, § 230.

SEC. 230. (a) Of the total amount made available under "U.S. Customs and Border Protection—Procurement, Construction, and Improvements", $2,370,222,000 shall be available only as follows:

(1) $1,375,000,000 is for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector;

(2) $725,000,000 is for the acquisition and deployment of border security technologies and trade and travel assets and infrastructure, to include $570,000,000 for non-intrusive inspection equipment at ports of entry; and

(3) $270,222,000 is for construction and facility improvements, to include $222,000,000 for humanitarian needs, $14,775,000 for Office of Field Operations facilities, and $33,447,000 for Border Patrol station facility improvements.

(b) The amounts designated in subsection (a)(1) shall only be available for operationally effective designs deployed as of the date of the Consolidated Appropriations Act, 2017 (Public Law 115– 31), such as currently deployed steel bollard designs, that prioritize agent safety.

(c) Not later than 180 days after the date of the enactment of this Act, the Secretary of Homeland

Security shall submit to the Committee on Appropriations of the Senate, the Committee on Appropriations of the House of Representatives, and the Comptroller General of the United States an updated risk-based plan for improving security along the borders of the United States that includes the elements required under subsection (a) of section 231 of division F of the Consolidated Appropriations Act, 2018 (Public Law 115–141), which shall be evaluated in accordance with subsection (b) of such section.

Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. D, § 739.

SEC. 739. 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.

Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, div. A, § 8005.

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.