No.

In the Supreme Court of the United States

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

v.

SIERRA CLUB, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

If the President declares "a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces," the Secretary of Defense has express statutory authority to "undertake military construction projects * * * not otherwise authorized by law that are necessary to support such use of the armed forces." 10 U.S.C. 2808(a). "Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated." *Ibid.* In 2019, following the President's declaration of a national emergency requiring the use of the armed forces at the southern border, the then-Secretary of Defense authorized 11 military construction projects involving border barriers pursuant to Section 2808. The questions presented are as follows:

1. Whether respondents have a cognizable cause of action to obtain review of the Secretary's compliance with Section 2808 in reprioritizing appropriated but unobligated funds for the military construction projects being authorized.

2. Whether the Secretary exceeded his statutory authority under Section 2808 in reprioritizing appropriated funds for the military construction projects being authorized.

PARTIES TO THE PROCEEDING

Petitioners are Donald J. Trump, in his official capacity as President of the United States; Steven T. Mnuchin, in his official capacity as Secretary of the Treasury; Christopher C. Miller, in his official capacity as Acting Secretary of Defense; David Bernhardt, in his official capacity as Secretary of the Interior; Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security; Ryan D. McCarthy, in his official capacity as Secretary of the Army; Kenneth J. Braithwaite, in his official capacity as Secretary of the Navy; Barbara M. Barrett, in her official capacity as Secretary of the Air Force; the United States; the Department of the Treasury; the Department of Defense; the Department of the Interior; and the Department of Homeland Security.[*]

Respondents are the Sierra Club; the Southern Border Communities Coalition; and the States of California, Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin.

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

RELATED PROCEEDINGS

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

Sierra Club v. *Trump*, No. 19-cv-892 (May 24, 2019) (preliminary injunction in Section 8005 litigation)

Sierra Club v. *Trump*, No. 19-cv-892 (June 28, 2019) (partial final judgment in Section 8005 litigation)

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

Sierra Club v. *Trump*, No. 19-cv-892 (Dec. 11, 2019) (partial final judgment in Section 2808 litigation)

California v. *Trump*, No. 19-cv-872 (Dec. 11, 2019) (same)

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

Sierra Club v. *Trump*, Nos. 19-16102 and 19-16300 (July 3, 2019) (denying stay pending appeal of Section 8005 injunction)

Sierra Club v. *Trump*, Nos. 19-16102 and 19-16300 (June 26, 2020) (affirming in Section 8005 appeal)

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

Sierra Club v. *Trump*, Nos. 19-17501, 19-17502, and 20-15044 (Oct. 9, 2020) (affirming in consolidated Section 2808 appeals)

Supreme Court of the United States:

Trump v. *Sierra Club*, No. 19A60 (July 26, 2019) (granting stay of Section 8005 injunction)

Trump v. *Sierra Club*, No. 20-138 (Oct. 19, 2020) (granting certiorari in Section 8005 litigation)

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of Donald J. Trump, President of the United States, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-103a) is reported at 977 F.3d 853. The order of the district court (App., *infra*, 104a-172a) is reported at 407 F. Supp. 3d 869. Additional related opinions and orders are described in the government's petition for a writ of certiorari in *Trump* v. *Sierra Club*, cert. granted, No. 20-138 (Oct. 19, 2020) (20-138 Pet.), and reproduced in the appendix to that petition.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2808 of Title 10 of the United States Code provides in pertinent part:

> In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces. Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.

10 U.S.C. 2808(a). Other pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. App., *infra*, 177a-191a.

STATEMENT

In February 2019, the President declared a national emergency requiring the use of the armed forces at the southern border. In the event of such a declaration, Congress has expressly authorized the Secretary of Defense to use previously appropriated but unobligated military construction funds to undertake military construction that is, in the Secretary's judgment, necessary to support the use of the armed forces in the emergency.

10 U.S.C. 2808(a). Here, the Secretary determined that 11 military construction projects—building barriers at the border with respect to military installations—are necessary to support the use of the armed forces in connection with the national emergency. The district court held that respondents have a cause of action to challenge the Secretary's Section 2808 determinations and that the projects the Secretary authorized are unlawful. The court permanently enjoined the government from "using military construction funds appropriated for other purposes" for the projects, but stayed the injunction pending appeal in deference to this Court's order staying the same district court's injunction in earlier related litigation. App., *infra*, 172a; see *Trump* v. *Sierra Club*, 140 S. Ct. 1 (2019), mot. to lift stay denied, 140 S. Ct. 2620 (2020). A divided panel of the court of appeals affirmed. App., *infra*, 1a-103a.

The same panel of the court of appeals had also previously affirmed the same district court's judgments in litigation between the same parties but concerning different construction projects, undertaken pursuant to 10 U.S.C. 284 using funds transferred under Section 8005 of the Department of Defense Appropriations Act, 2019 (DoD Appropriations Act), Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999. On October 19, 2020, this Court granted the government's petition for a writ of certiorari to review the judgments in those cases. *Trump* v. *Sierra Club*, No. 20-138. This petition seeks plenary review of the Ninth Circuit's follow-on judgment concerning the Section 2808 projects; in the alternative, the government respectfully requests that this petition be held pending the Court's disposition of the Section 8005 case and then disposed of as appropriate.

A. Statutory Background

Section 2808 authorizes the Secretary of Defense to reprioritize appropriated military construction funds that "have not been obligated," in order to undertake certain military construction projects that are "not otherwise authorized by law," when the President declares a "national emergency * * * that requires use of the armed forces." 10 U.S.C. 2808(a). Pursuant to such a declaration, the Secretary, "without regard to any other provision of law, may undertake military construction projects * * * that are necessary to support such use of the armed forces." *Ibid.*

As used here, the term "military construction" means "any construction, development, conversion, or extension of any kind carried out with respect to a military installation," as well as "any acquisition of land." 10 U.S.C. 2801(a). The term "military installation" means a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." 10 U.S.C. 2801(c)(4).

When the Secretary decides to undertake military construction under Section 2808, the statute requires the Secretary to "notify * * * the appropriate committees of Congress of the decision," and of "the estimated cost of the construction projects." 10 U.S.C. 2808(b).

B. The Challenged Projects

1. a. This case arises from actions taken by the Department of Homeland Security (DHS) and the Department of Defense (DoD) in the wake of the President's declaration of a national emergency on the southern border under the National Emergencies Act, 50 U.S.C. 1601 *et seq.* See 84 Fed. Reg. 4949 (Feb. 20, 2019). In that declaration, the President determined that "[t]he

current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests" of the United States. *Ibid.* The President explained that the border is "a major entry point for criminals, gang members, and illicit narcotics," and that the federal government continues to be unable to stem the tide of "large-scale unlawful migration" across the border. *Ibid.* The President had previously ordered DoD to support DHS in securing operational control of the southern border, including through the deployment of the National Guard. See Memorandum on Securing the Southern Border of the United States, 2018 Daily Comp. Pres. Doc. 2 (Apr. 4, 2018). In his February 2019 declaration, the President determined that "it is necessary for the Armed Forces to provide additional support to address the crisis," and he specifically made 10 U.S.C. 2808 available to allow the Secretary of Defense to undertake military construction as necessary to support the use of the armed forces in connection with the emergency. 84 Fed. Reg. at 4949; see 50 U.S.C. 1631.

The President's determination that the crisis at the southern border warranted using the armed forces and authorizing the Secretary of Defense to undertake military construction projects was in keeping with a substantial history of DoD assistance at the border, including through the construction of physical barriers. Congress has "long vested [DoD] with authority to construct fences" along the border. Gov't Accountability Office, *Department of Defense—Availability of Appropriations for Border Fence Construction*, B-330862, 2019 WL 4200949, at *13 (Comp. Gen. Sept. 15, 2019). For example, military personnel were integral to building the first modern border barrier near San Diego,

California, in the early 1990s. See H.R. Rep. No. 200, 103d Cong., 1st Sess. 330-331 (1993) (describing DoD's role).

Military personnel deployed to the southern border during the current emergency have performed a broad range of administrative, logistical, and operational tasks in support of DHS. Gov't C.A. E.R. 128-131. These activities include installing vehicle and pedestrian barriers; placing concertina wire along the border and at ports of entry; and operating aerial and mobile surveillance equipment to detect activity along the border. *Id.* at 212-213, 216-218. As of August 2019, DoD had approximately 5540 personnel supporting DHS's border-security mission. *Id.* at 125.

b. After the President's declaration, the government took a number of steps in sequence to address the emergency at the southern border through the construction of physical barriers.

First, the Secretary of the Treasury authorized the use of certain asset-forfeiture funds for border-barrier construction, pursuant to his authority to obligate such funds for "law enforcement activities." 31 U.S.C. 9705(g)(4)(B). Those actions are not at issue here.

Second, DHS submitted a request to DoD for DoD's assistance pursuant to 10 U.S.C. 284, which authorizes DoD to provide "support for the counterdrug activities" of other departments or agencies upon request. See 20-138 Pet. 6-7. Section 284 authorizes DoD to provide assistance in the form of "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. 284(b)(7). The then-Acting Secretary of Defense approved DHS's request with respect to several high-priority construction projects in

drug-smuggling corridors. 20-138 Pet. 7-8. To ensure adequate funds to complete the projects, he also invoked his authority under Section 8005 of the DoD Appropriations Act to transfer funds between DoD appropriations. *Ibid.* The Section 8005 transfers are the subject of the injunction that this Court stayed in *Sierra Club*, 140 S. Ct. at 1, and are at issue in the recently granted case, *Trump* v. *Sierra Club*, *supra* (No. 20-138).

Third, the then-Secretary of Defense authorized certain military construction projects under 10 U.S.C. 2808—the provision at issue here. Specifically, on September 3, 2019, the Secretary determined that undertaking 11 barrier-construction projects along the southern border was necessary to support the use of the armed forces in connection with the President's declaration of a national emergency. Gov't C.A. E.R. 89, 92-93. Based on the advice of the Chairman of the Joint Chiefs of Staff, see *id.* at 202-207—and after input from DHS, the U.S. Army Corps of Engineers, and the Department of the Interior—the Secretary determined that constructing barriers in the specified areas will "deter illegal entry, increase the vanishing time of those illegally crossing the border" (*i.e.*, the time that passes before a person who illegally crosses the border can no longer be apprehended), and "channel migrants to ports of entry," *id.* at 92. The Secretary further determined that the barriers will support the use of the armed forces by reducing "demand for DoD personnel and assets at the locations where the barriers are constructed and [will] allow the redeployment of DoD personnel and assets to other high-traffic areas on the border without barriers." *Ibid.* The Secretary accordingly found that the barriers will serve as "force multipliers" that will

enhance military capabilities and allow DoD to support DHS more efficiently and effectively. *Ibid.*

To fund the Section 2808 projects, the Secretary approved the use of up to $3.6 billion in previously appropriated but unobligated military construction funds. Gov't C.A. E.R. 93. The 11 projects, which involve 175 miles of border-barrier construction, include (1) two projects on the Barry M. Goldwater Range, a longstanding military installation in Arizona that is used for live-fire and weapons exercises by U.S. military pilots; (2) seven projects on federal land transferred to Army jurisdiction; and (3) two projects on non-public land, which has not yet been acquired. App., *infra*, 6a. The projects are located in Arizona, California, New Mexico, and Texas. *Ibid.*

C. Prior Proceedings

Respondents are two groups of plaintiffs that brought suit in the Northern District of California to challenge the government's construction of physical barriers along the southern border. The Sierra Club, a national environmental group, and the Southern Border Communities Coalition, an organization focused on border issues (collectively, Sierra Club), brought one of the suits; California and several other States brought the other. The district court addressed the plaintiffs' allegations on a rolling basis.

1. The Section 8005 litigation

The district court first addressed the Section 284 projects that were funded through transfers under Section 8005. In June 2019, the court granted Sierra Club's request for a permanent injunction barring use of the transferred funds for the Section 284 projects. See 20-

138 Pet. App. 174a-188a. The court reasoned that Sierra Club has an equitable cause of action to pursue its challenge, and therefore (in the court's view) need not satisfy the zone-of-interests requirement, and that the Acting Secretary exceeded his authority under Section 8005. See 20-138 Pet. 9-10. The court also entered a declaratory judgment in favor of California and New Mexico on essentially the same basis, while declining to grant a duplicative injunction. *Id.* at 13.

A divided panel of the court of appeals declined to stay the district court's Section 8005 injunction. 20-138 Pet. App. 206a-299a. The majority characterized Sierra Club's claims as "alleging a constitutional violation," *id.* at 234a, on the theory that any use of funds improperly transferred under Section 8005 would violate the Appropriations Clause, *id.* at 236a & n.16 (citing U.S. Const. Art. I, § 9, Cl. 7). The majority reasoned that "[t]o the extent" the zone-of-interests requirement applies to Sierra Club's claims, "it requires [the court] to ask whether [p]laintiffs fall within the zone of interests of the Appropriations Clause, not of [S]ection 8005," *id.* at 264a. The court then found that Sierra Club's claimed aesthetic and recreational interests were within the zone of interests protected by the Appropriations Clause. *Id.* at 266a-267a. The majority also agreed with the district court that Section 8005 likely did not permit the disputed transfers. *Id.* at 236a-237a. Judge N.R. Smith dissented. *Id.* at 274a-299a.

On July 26, 2019, this Court granted the government's application for a stay of the injunction pending appeal and, if necessary, certiorari. 140 S. Ct. at 1. The Court stated that "[a]mong the reasons" for granting the stay "is that the Government has made a sufficient showing at this stage that [Sierra Club has] no cause of

action to obtain review of the Acting Secretary's compliance with Section 8005." *Ibid.* Justice Breyer concurred in part and dissented in part, and Justices Ginsburg, Sotomayor, and Kagan dissented. *Id.* at 1-2.

A divided (and different) panel of the court of appeals later affirmed in the Section 8005 litigation, issuing two substantially similar opinions addressing Sierra Club's challenge and the parallel challenge by California and New Mexico. See 20-138 Pet. App. 1a-77a (*Sierra Club*); *id.* at 78a-173a (*California*). The panel majority concluded that Sierra Club "has both a constitutional and an *ultra vires* cause of action" to challenge the Section 8005 transfers, based on reasoning analogous to that in the motions panel's earlier opinion denying a stay. *Id.* at 19a. The majority also concluded that California and New Mexico have a cause of action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, after determining that those States' asserted environmental and sovereign interests are within the zone of interests protected by Section 8005. 20-138 Pet. App. 100a-106a. In both cases, the majority concluded that the challenged transfers did not comply with a proviso in Section 8005. See *id.* at 17a, 109a-117a. Judge Collins dissented in both cases. *Id.* at 40a-77a, 119a-173a.

On October 19, 2020, this Court granted the government's petition for a writ of certiorari to consider the Ninth Circuit's judgments in both of the parallel Section 8005 challenges. The questions presented are:

> 1. Whether [Sierra Club, California, and New Mexico] have a cognizable cause of action to obtain review of the Acting Secretary's compliance with Section 8005's proviso in transferring funds internally between DoD appropriations accounts.

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

20-138 Pet. I.

2. The Section 2808 litigation

a. On December 11, 2019, in a single opinion, the district court granted partial final judgment to Sierra Club and to California, Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Wisconsin, and Virginia (collectively, the States) in their parallel challenges to the Section 2808 projects. App., *infra*, 104a-172a; see *id.* at 105a n.1.

The district court first determined that respondents may "seek equitable relief through an implied cause of action under the Constitution" to challenge the Section 2808 projects. App., *infra*, 118a-119a. The court based that determination on the reasoning of the Ninth Circuit motions panel that had declined to stay the district court's earlier injunction—notwithstanding this Court's order granting a stay of the same injunction. See *id.* at 119a-123a. In particular, the district court reasoned that respondents' challenge "is 'fundamentally a constitutional' claim," premised on the allegation that expending funds for military construction in violation of Section 2808 would in turn violate the Appropriations Clause. *Id.* at 123a (citation omitted). And the court found that respondents' asserted "environmental, professional, aesthetic, and recreational interests" are within the zone of interests protected by the Appropriations Clause. *Id.* at 124a (citation omitted).

The district court then determined that the challenged projects violate Section 2808 because, in the court's view, nine of the projects are not being carried out with respect to a military installation, as Section

2808 requires. App., *infra*, 136a-144a.[1] The court also held that, contrary to the judgment of the Secretary of Defense, the projects are not "necessary" to support the use of the armed forces, as Section 2808 also requires. *Id.* at 145a-151a.

The district court granted Sierra Club's request for an injunction and permanently enjoined DoD and DHS from "using military construction funds appropriated for other purposes to build a border wall in the" specified project areas. App., *infra*, 172a. In deference to this Court's stay, however, the district court stayed its Section 2808 injunction pending appeal. *Ibid.*; see *id.* at 169a. The court denied the States' "duplicative request" for an injunction as "moot," *id.* at 157a, and entered partial final judgment under Federal Rule of Civil Procedure 54(b), see App., *infra*, 169a-171a.

b. The government appealed in both cases, and the States cross-appealed the denial of their request for an injunction. App., *infra*, 9a. The court of appeals consolidated the appeals for briefing and argument. 19-17501 C.A. Doc. 32, at 3 (Jan. 24, 2020). The court also denied Sierra Club's request to lift the stay of the Section 2808 injunction. App., *infra*, 175a-176a.

c. On October 9, 2020, a divided panel of the court of appeals—the same panel that had decided the earlier Section 8005 merits appeals—affirmed in the consolidated Section 2808 appeals. App., *infra*, 1a-64a. Judge Collins again dissented. See *id.* at 65a-103a.

The panel majority held that the States have a cause of action under the APA to challenge the Secretary's actions. App., *infra*, 34a. The majority recognized that

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[1] Respondents do not dispute that the two Section 2808 projects occurring on the Barry M. Goldwater Range are being carried out with respect to a military installation. See App., *infra*, 51a n.10.

"Section 2808 constitutes the relevant statute for the zone of interests test" for that APA claim. *Id.* at 35a. It concluded that the zone of interests protected by Section 2808 includes the States' asserted "economic interests" in the military construction projects from which the Secretary redirected money to fund the Section 2808 projects. *Id.* at 37a. The majority also understood this Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209 (2012), to establish that "neighbors" are generally within the zone of interests protected by a statute that "deals with land use"—a principle it took to support finding that at least California and New Mexico have a cause of action, as States neighboring the "border wall construction projects." App., *infra*, 38a. The majority also held that Sierra Club has a cause of action "under the Appropriations Clause," *ibid.*, and it reasoned that Sierra Club's asserted interests are within the zone of interests protected by the Appropriations Clause, "[t]o the extent" the zone-of-interests test applies, *id.* at 40a, because "Sierra Club is an organization within the United States that is protected by the Constitution," *id.* at 41a.

On the merits, the panel majority concluded that the Section 2808 projects were not "necessary to support" the "use of the armed forces," as the statute requires, because the projects were purportedly designed only to make it more "efficient" for the military to assist "DHS—a civilian law enforcement agency." App., *infra*, 46a-47a. The majority declined to defer to the Secretary of Defense's contrary judgment about military necessity, stating that the projects were not "actually necessary" even if they were "designed to improve effectiveness and efficiency." *Id.* at 48a. The majority also agreed with the district court's conclusion that nine

of the projects did not qualify as "military construction" under Section 2808 because they were not "carried out with respect to a military installation," as the statute requires. *Id.* at 49a (citation omitted). The majority recognized that the statute defines a "military installation" to include "a base, camp, post, station, yard, center, *or other activity under the jurisdiction of the Secretary of a military department*." *Ibid.* (quoting 10 U.S.C. 2801(a) and (c)(4)) (emphasis added). The government maintained that "the land on which the projects would be built has been brought under military jurisdiction and assigned to a military installation—Fort Bliss in El Paso, Texas." *Id.* at 50a. But the majority dismissed that assignment as merely an "administrative convenience," *id.* at 52a, insufficient to satisfy Section 2808. The majority further reasoned that the definition of "military installation" in Section 2801(c)(4) indicates that any "'other activity'" must be "similar to bases, camps, posts, stations, yards, or centers" in order to qualify as a military installation, *id.* at 54a-55a—a limitation the majority found not satisfied here, see *id.* at 55a-58a.

Judge Collins dissented. App., *infra*, 65a-103a. Like the majority, he would have held that respondents have a cause of action, although he would have located the cause of action for both Sierra Club and the States solely in the APA. *Id.* at 77a-84a. Unlike the majority, however, he would have held that respondents' "claims fail on the merits because DoD properly invoked § 2808 in undertaking these 11 projects." *Id.* at 84a. He explained that the projects will be carried out with respect to "'military installation[s]'" because they "involve an 'activity under the jurisdiction' of a military Secretary," *id.* at 89a (citation omitted), having been placed under

the jurisdiction of the Secretary of the Army as part of Fort Bliss. See *id.* at 89a-94a.

Judge Collins would have further held that "the Secretary properly determined that the construction projects here are 'necessary to support such use of the armed forces.'" App., *infra*, 97a (citation omitted). He explained that "necessary" as used in Section 2808 does not connote "absolutely needed" but rather "'important or strongly desired.'" *Id.* at 95a (quoting *Ayestas* v. *Davis*, 138 S. Ct. 1080, 1093 (2018)). And he found that standard "easily satisfied" because the President had declared a national emergency requiring the use of the armed forces to support DHS at the border and the Section 2808 projects will "permit 'DoD to provide support to DHS more efficiently and effectively,'" as the Secretary had determined. *Id.* at 97a.

d. In its opinion, the court of appeals stated that the district court's stay of its own injunction pending appeal "is terminated," and the court of appeals dismissed a renewed motion to lift the stay, filed by Sierra Club, as "moot." App., *infra*, 62a. Sierra Club subsequently moved to "clarify" that the court of appeals intended those directives to take effect before the issuance of the mandate. 19-17501 C.A. Doc. 112-1, at 1 (Oct. 15, 2020). The government opposed that motion and filed a cross-motion to stay issuance of the mandate pending the filing and disposition of a petition for a writ of certiorari, which the government committed to filing by November 18, 2020. 19-17501 C.A. Doc. 113-1, at 1 (Oct. 19, 2020). The government noted in its cross-motion that, pursuant to Federal Rule of Appellate Procedure 41(d)(2)(B)(ii), "such a stay [of the mandate] would then remain in effect until the Supreme Court's final disposition" of the petition. 19-17501 C.A. Doc. 113-1, at 15; see Fed. R.

App. P. 41(d)(2)(B) (providing that a stay pending certiorari may be extended beyond 90 days by giving notice to the circuit clerk of the filing of a petition, "in which case the stay continues until the Supreme Court's final disposition"). On October 26, 2020, the court of appeals denied Sierra Club's motion and granted the government's cross-motion to stay the mandate. App., *infra*, 173a-174a.

REASONS FOR GRANTING THE PETITION

Congress has empowered the Secretary of Defense, during a national emergency requiring the use of the armed forces, to authorize "military construction projects * * * not otherwise authorized by law," funded through reprioritization of amounts appropriated for military construction, if the Secretary determines that the projects "are necessary to support such use of the armed forces." 10 U.S.C. 2808(a). After the President declared a national emergency at the southern border requiring the use of the armed forces and made Section 2808 available, the Secretary determined that 11 military construction projects to build barriers at the border were necessary to support the use of the armed forces during the emergency. The court of appeals erred in holding that respondents have a cause of action to obtain judicial review of those national-security spending determinations and further erred in holding that the Secretary's determinations exceeded his authority under Section 2808.

The court of appeals' reasoning with respect to whether respondents have a cause of action paralleled the reasoning that the same panel employed in the prior proceedings involving Sierra Club, California, and New Mexico. The court concluded there that the plaintiffs have a cause of action to obtain judicial review of the

Secretary's transfers of funds between DoD appropriations accounts, pursuant to Section 8005 of the DoD Appropriations Act, to fund border-barrier construction projects undertaken in response to DHS's request for counterdrug assistance, see 10 U.S.C. 284(a) and (b)(7). This Court recently granted the government's petition for a writ of certiorari to review the court of appeals' judgments in those Section 8005 cases. *Trump* v. *Sierra Club*, No. 20-138 (Oct. 19, 2020). The same course is warranted here. At a minimum, the Court should hold this petition pending its disposition of the Section 8005 dispute, which is likely to shed significant light on whether respondents have a viable cause of action.

I. THE DECISION BELOW IS INCORRECT

A. Respondents Lack Any Cause Of Action To Obtain Judicial Review Of Whether The Secretary Exceeded His Authority Under Section 2808

Respondents are not proper parties to bring suit claiming that the Secretary exceeded his authority under Section 2808 in reprioritizing appropriated military construction funds for the military construction projects he authorized. Respondents cannot invoke any express or implied cause of action to do so because their asserted interests are not even arguably within the zone of interests protected by Section 2808. Section 2808 authorizes the Secretary of Defense, in the event of a presidential declaration of a national emergency requiring the use of the armed forces, to use unobligated military construction funds to "undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces." 10 U.S.C. 2808(a). The recreational, aesthetic, environmental, and sovereign interests that respondents assert are entirely outside the contemplation of Section 2808.

Nor can respondents avoid that conclusion by invoking the Appropriations Clause. Respondents have no constitutional claim distinct from their challenge to whether the Secretary exceeded the statutory authority conferred in Section 2808. In any event, the zone-of-interests requirement would apply no differently to an implied equitable cause of action asserting a violation of the Appropriations Clause premised on non-compliance with Section 2808.

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

Under this Court's interpretation of the APA's express cause of action, 5 U.S.C. 702, a plaintiff's asserted interest need only be "arguably within the zone of interests" of the provision to be enforced; suit is foreclosed only where the asserted interest is "marginally related to or inconsistent with the purposes implicit in the [provision]." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 224, 225 (2012) (citations omitted). But where a plaintiff asserts an implied cause of action in equity, see *Armstrong* v.

Exceptional Child Ctr., Inc., 575 U.S. 320, 327-328 (2015), this Court has suggested that a heightened zone-of-interests standard applies, requiring the plaintiff to be the intended beneficiary of the provision to be enforced. See *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987).

Here, under either the APA or an implied cause of action, respondents are not proper plaintiffs because their asserted interests are entirely unrelated to their claim that the Secretary's determination under Section 2808 violated the statute. Sierra Club has asserted that construction of fencing and roads on land under military jurisdiction along the southern border, using military construction funds made available under Section 2808, will impair its members' "environmental, aesthetic, and recreational interests" in the project areas. App., *infra*, 41a. The States have asserted that construction of the challenged military construction projects will harm the environment in California and New Mexico and will impair the States' "quasi-sovereign interests" in the enforcement of state law. *Id.* at 18a, 20a.

Nothing about Section 2808's text or context suggests that Congress even arguably intended to permit enforcement of the statute by parties who, like respondents here, assert that the challenged military construction projects would indirectly result in harm to their recreational, aesthetic, environmental, scientific, or quasi-sovereign interests. Section 2808 does not require the Secretary to consider those kinds of interests before using military construction funds. Indeed, it expressly empowers the Secretary to use these funds for specific types of military construction projects that are "not otherwise authorized by law" and to do so "without regard to any other provision of law." 10 U.S.C. 2808(a).

Moreover, Congress conditioned the Secretary's authority on judgments about national security that are uniquely within the Executive Branch's expertise and that courts and third parties are ill-suited to second guess—*e.g.*, that the projects "are necessary to support such use of the armed forces." *Ibid.*; see *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1861 (2017) (cautioning that courts should be "reluctant to intrude upon the authority of the Executive in military and national security affairs") (citation omitted).

Section 2808(b)'s congressional-notification requirement confirms that the statute is primarily, if not exclusively, intended to protect Congress's interests in the appropriations process. For example, if Congress disagrees with a particular use of funds under the statute after receiving notice of it, Congress may enact legislation to prohibit such a use, restrict funding for such projects in future appropriations acts, or modify DoD's authority under Section 2808.

Permitting any private party who meets the bare minimum of Article III injury to bring suit to challenge a project under Section 2808 could often be antithetical to the interests of Congress. Opportunistic litigation by private parties (or States) may frustrate the flexibility that Congress intended to confer in granting Section 2808 authority to the Secretary. Private enforcement of Section 2808 also runs the risk of excessive court-ordered remedies even for minor or technical violations—which Congress itself may well have viewed as inconsequential, or at least insufficient to warrant the wastefulness of bringing to a halt projects for which funds have already been expended.

2. The court of appeals erred in holding that the States satisfy the zone-of-interests requirement for

Section 2808. App., *infra*, 34a-38a. The States contend that they are within the zone of interests because the Secretary's invocation of Section 2808 has led to a diversion of funding from other projects in those States, and the panel majority concluded that the States are therefore "either the intended beneficiaries of [Section 2808], or at the very least, their interests are unlikely to frustrate the purpose of the statute." *Id.* at 37a. The panel majority also held that because Section 2808 involves land use, the States are "neighbors to the use," *id.* at 38a (citation omitted), who are within the zone of interests under *Patchak*, 567 U.S. at 227-228.

Both conclusions are mistaken. Section 2808 allows only the expenditure of *unobligated* funds—*i.e.*, funds for which no prior binding commitment existed. Moreover, even with respect to planned military construction projects for which funds had not yet been obligated, the States in which those projects would occur have no particular vested interest in the projects; the funds would not have gone to the States themselves. And nothing in the text or context of Section 2808 suggests that Congress intended to permit enforcement of the statute's limitations by States who assert that reprioritization of military construction funds under Section 2808 during a national emergency would, for example, indirectly diminish the States' tax revenue. Section 2808 gives the Secretary broad authority to authorize military construction projects when the Secretary determines that the projects will meet the needs of the armed forces, without regard to the effect on any third party's aesthetic, recreational, or environmental interests. Indeed, Section 2808(a)'s "without regard to" clause expressly authorizes DoD to bypass all other legal

requirements—including federal and state environmental statutes—that might otherwise limit DoD's exercise of its military construction authority.

The court of appeals' reliance on this Court's decision in *Patchak* was also misplaced. In *Patchak*, this Court was careful to identify the particular category of plaintiffs whose interests were sufficiently related to the context and purpose of the statute at issue to allow litigation to enforce the statute's provisions. The plaintiff there was "a nearby property owner" whose own property would be damaged by the contemplated use of nearby land acquired for an Indian tribe to operate a casino. *Patchak*, 567 U.S. at 224. Because the "context and purpose" of the relevant statute served "to foster Indian tribes' economic development," this Court concluded that the statute required the Secretary of the Interior to "take[] title to properties" on behalf of Indian tribes "with at least one eye directed toward how tribes will use those lands." *Id.* at 226. The Court also emphasized that the governing regulations "require[d] the Secretary to consider * * * the 'potential conflicts of land use which may arise.'" *Ibid.* (quoting 25 C.F.R. 151.10(f)). Only because the government was obligated, before acquiring land to benefit Indian tribes, to consider potential conflicts that could result from the range of possible land uses, did the Court conclude that "a neighboring landowner" was within the zone of interests "to bring suit to enforce the statute's limits." *Id.* at 227. Section 2808 imposes no similar constraints with respect to neighboring land owners.[2]

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[2] For similar reasons, Judge Collins erred in concluding, in his dissenting opinion, that the interests asserted by respondents are within the zone of interests protected by the limitations in Section 2808 that respondents allege were violated. Judge Collins observed

3. As for Sierra Club, neither the district court nor the court of appeals actually determined that its asserted recreational and aesthetic interests in the project areas are within the zone of interests protected by Section 2808. The lower courts instead reasoned that Sierra Club has a cause of action under the Appropriations Clause and need only come within the zone of interests protected by that Clause. See App., *infra*, 38a-41a, 123a-124a. That reasoning is fatally flawed.

a. Sierra Club does not and cannot allege any distinct constitutional violation in this case. The Appropriations Clause prohibits expenditures only if not "made by Law," U.S. Const. Art. I, § 9, Cl. 7, and thus the gravamen of its claim is necessarily that DoD exceeded the limits of Section 2808 in using previously appropriated but unobligated funds for the challenged military construction projects. That claim is nothing more than a statutory claim recast as a constitutional claim.

The panel majority's attempt to characterize Sierra Club's claim as sounding in the Constitution is contrary to this Court's decision in *Dalton* v. *Specter*, 511 U.S. 462 (1994). There, the plaintiffs "sought to enjoin the Secretary of Defense * * * from carrying out a decision by the President" to close a military facility pursuant to a federal statute. *Id.* at 464. The court of appeals had permitted the suit to proceed on the assumption that the plaintiffs were effectively seeking "review [of] a

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that, "[o]n its face, § 2808 authorizes the Secretary to undertake emergency military construction 'without regard to any other provision of law,'" including environmental laws, which he understood to mean that environmental interests are among the interests protected by Section 2808. App., *infra*, 82a. But the "without regard to" clause demonstrates quite the opposite: Congress expressly authorized the Secretary to act without regard to any state or private interest in the enforcement of environmental laws.

presidential decision." *Id.* at 467 (citation omitted). After this Court held that the President is not an "agency" for APA purposes, see *id.* at 468-469, the court of appeals adhered to its decision on constitutional grounds—reasoning, based on *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), "that whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." *Dalton*, 511 U.S. at 471.

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

The same reasoning fully applies here. This dispute concerns whether the Secretary "exceeded his statutory authority" in reprioritizing appropriated funds for the disputed construction projects authorized under Section 2808, and "no 'constitutional question whatever' is raised," "'only issues of statutory interpretation.'" *Dalton*, 511 U.S. at 473-474 & n.6 (citation omitted). The Secretary did not invoke the Constitution as a basis to transfer funds, and although Sierra Club has argued that the government's interpretation of Section 2808

would raise constitutional issues, it does not challenge the constitutionality of Section 2808.

The court of appeals did not discuss *Dalton* in the decision below. And the court erred in relying instead on this Court's decision in *Bond* v. *United States*, 564 U.S. 211 (2011), to support the notion that Sierra Club may assert a claim directly under the Appropriations Clause. See App., *infra*, 39a-40a. In *Bond*, the defendant in a criminal prosecution raised a separation-of-powers challenge to the prosecution. 564 U.S. at 222-224. The Court did not suggest that the defendant also had an affirmative cause of action to initiate a suit to challenge government action. Moreover, the Court emphasized that "[a]n individual who challenges federal action on [federalism] grounds" is subject to "prudential rules[] applicable to all litigants and claims." *Id.* at 225. At the time, the zone-of-interests was characterized as a "prudential standing rule," *Bennett* v. *Spear*, 520 U.S. 154, 161 (1997), and it remains a generally applicable limitation on the right to sue, *Lexmark*, 572 U.S. at 125.

On Sierra Club's own theory of the case, no violation of the Appropriations Clause has occurred *unless* the Secretary exceeded his authority under Section 2808. See App., *infra*, 40a-41a ("Because the diversion of funds was not authorized by the terms of Section 2808, it is unconstitutional."). As the panel majority noted, "[a]lthough the terms of Section 2808 are different from Section 8005, Section 2808's role here is analogous to the role of Section 8005 in the prior appeal." *Id.* at 39a. Thus, as in the Section 8005 litigation, *Dalton* is controlling on this issue. Sierra Club's claim is a statutory claim, not a constitutional claim.

b. In any event, the Appropriations Clause itself "certainly does not create a cause of action," *Armstrong*, 575 U.S. at 325, much less one that lacks a zone-of-interests requirement. Like the Supremacy Clause—the provision at issue in *Armstrong*—the Appropriations Clause "is silent regarding who may enforce [it] in court, and in what circumstances they may do so." *Ibid.* Rather than flowing from the Appropriations Clause itself, "[t]he ability to sue to enjoin unconstitutional actions by * * * federal officers is the creation of courts of equity." *Id.* at 327.

The panel majority was mistaken to suggest that the zone-of-interests requirement does not "appl[y] at all" to judicially implied causes of action. App., *infra*, 40a. To the contrary, the zone-of-interests requirement is "'of general application,'" reflecting a limitation on appropriate plaintiffs that "Congress is presumed" to intend in authorizing suit in federal court. *Lexmark*, 572 U.S. at 129 (quoting *Bennett*, 520 U.S. at 163). This Court's statement in *Lexmark* that the requirement applies to all "statutorily created" causes of action, *ibid.*, encompasses judicially implied equitable causes of action, because the equitable powers of federal district courts are themselves conferred by statute, see *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). *Lexmark* therefore did not silently abrogate this Court's precedents recognizing that the zone-of-interests requirement applies to equitable actions seeking to enjoin constitutional violations. See, *e.g.*, *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 469, 475 (1982) (Establishment Clause); *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977) (Dormant Commerce Clause).

Implied equitable suits are instead subject to "express and implied statutory limitations," *Armstrong*, 575 U.S. at 327, and the zone-of-interests requirement reflects Congress's presumed refusal to accept the "absurd consequences [that] would follow" "[i]f any person injured in the Article III sense by a [statutory or constitutional] violation could sue," even where the person's interests are entirely unrelated to the provision being enforced, *Thompson*, 562 U.S. at 176-177. Congress would be even less likely to accept such absurd results under its statutory grant of equity jurisdiction than under the APA. See *Hernandez* v. *Mesa*, 140 S. Ct. 735, 747 (2020) ("It would be 'anomalous to impute . . . a judicially implied cause of action beyond the bounds Congress has delineated for a comparable express cause of action.'") (brackets and citation omitted). If anything, this Court has indicated that, in light of the heightened separation-of-powers concerns with judicially implied causes of action, see *Abbasi*, 137 S. Ct. at 1855-1858, it would be appropriate to apply a more rigorous zone-of-interests standard requiring that the provision at issue be intended for the "*especial* benefit" of the plaintiff seeking to enforce it, *Clarke*, 479 U.S. at 400 n.16 (citation omitted); see *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283-285 (2002).

c. Finally, neither the Appropriations Clause nor an equitable "ultra vires" theory alters the conclusion that the focus of the zone-of-interests requirement is Section 2808. The zone-of-interests requirement must be applied "by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175-176. The Appropriations Clause provides that appropriations must be "made by Law," U.S. Const. Art.

I, § 9, Cl. 7, and respondents do not dispute that the obligation of funds properly used for military construction under Section 2808 would satisfy that requirement. Because a violation of Section 2808 is thus a necessary element of their claim, that is the "provision whose violation forms the legal basis for [the] complaint." *Bennett*, 520 U.S. at 176 (quoting *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990)) (emphasis omitted).

In concluding otherwise, the panel majority ruled that the constitutionality of the challenged executive action turns on whether the Secretary complied with Section 2808. App., *infra*, 40a-41a. But that is precisely the point: whether the Secretary's conduct was unlawful turns entirely on his compliance with Section 2808, not the Appropriations Clause. Sierra Club's (and the States') asserted interests must fall within the zone of interests protected by Section 2808 to maintain this suit. They do not.

B. The Secretary Fully Complied With Section 2808

In any event, the court of appeals erred in holding that the challenged construction violates Section 2808. In light of the President's declaration of a national emergency requiring the use of the armed forces at the southern border, Section 2808 authorizes the Secretary to use appropriated but unobligated military construction funds for the 11 projects at issue. Each project will take place with respect to a military installation, and the Secretary of Defense has concluded—after consultation with the Chairman of the Joint Chiefs of Staff—that these projects are necessary to support the use of the armed forces deployed in connection with the national emergency. The court of appeals erred in second-guessing those determinations.

1. The panel majority erred in concluding that the projects were not "military construction" under Section 2808 on the ground that they were not being "carried out with respect to a military installation." 10 U.S.C. 2801(a). That phrase "means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control." 10 U.S.C. 2801(c)(4). Two of the projects at issue here will be built on the Barry M. Goldwater Range, an Air Force and Marine Corps bombing range, that is indisputably a military installation. Gov't C.A. E.R. 94. The remaining projects will be built on land under the jurisdiction of the Secretary of the Army, assigned to and made a part of Fort Bliss, *id.* at 75, which is an existing military "base," 10 U.S.C. 2801(c)(4). Although the project areas are not contiguous to the existing lands that comprise Fort Bliss, military installations often include non-contiguous property. For example, the Special Forces site in Key West, Florida, is assigned to and therefore part of Fort Bragg, North Carolina, while the Green River Test Complex in Utah is assigned to and part of the White Sands Missile Range in New Mexico. Gov't C.A. E.R. 69 (listing additional examples). DoD has long administered Fort Bragg and the White Sands Missile Range as single "military installation[s]." *Ibid.*

The panel majority dismissed the military assignment of the project areas to Fort Bliss as a mere "administrative convenience" and stated that no "functional nexus" exists here to support the assignment. App., *infra*, 52a. But Section 2808 does not require any

"functional nexus," a term that appears nowhere in the statute. Moreover, even if the lands assigned to Fort Bliss were not part of a "base," the term "military installation" includes any "other activity under the jurisdiction of the Secretary of a military department." 10 U.S.C. 2801(c)(4). While the panel majority read the phrase "or other activity" to mean something that had to be *akin to* a base, camp, post, station, yard, or center, App., *infra*, 54a-55a, Judge Collins correctly pointed out that an "activity" simply refers to "places under military jurisdiction, because activities under military jurisdiction necessarily occur there," *id.* at 90a (dissenting opinion). As this Court explained in *United States* v. *Apel*, 571 U.S. 359 (2014), the statutory term "'military installation'" is generally "synonymous with the exercise of *military jurisdiction*," *id.* at 368 (citation omitted). The project areas are thus military installations as this Court has understood that term.

2. The panel majority also erred in concluding that the projects were not "necessary" to support the use of the armed forces for purposes of Section 2808. That conclusion was based on two mistaken rationales.

First, the panel majority reasoned that the projects are intended to support DHS, "a civilian agency," rather than the military. App., *infra*, 42a. That reasoning takes an unduly narrow view of the purpose of the projects. The military has long had a role in helping law enforcement agencies to secure the border. As Judge Collins observed in his dissenting opinion, "military support for DHS's mission *is* the relevant 'use of the armed forces' that has been declared by the President," and "the fact that the construction furthers *that* mission weighs decidedly in favor of finding that it is 'necessary to support such use of the armed forces.'" *Id.* at 98a

(quoting 10 U.S.C. 2808(a)). A federal court does not "get[] to substitute its own view of when the armed forces are needed in a national emergency for the view of the President as stated in [an] emergency declaration." *Ibid.*

Second, the panel majority reasoned that "necessary" means "'absolutely needed.'" App., *infra*, 43a (citation omitted). That too was error. The Secretary found that the projects are "force multipliers" that allow the armed forces to be used more efficiently, Gov't C.A. E.R. 92, and his finding satisfies the necessity requirement. As this Court explained in *Ayestas* v. *Davis*, 138 S. Ct. 1080 (2018), the term "'necessary'" need not mean "'essential,'" and "in ordinary speech, the term is often used more loosely to refer to something that is merely important or strongly desired." *Id.* at 1093; cf. *Commissioner* v. *Heininger*, 320 U.S. 467, 468, 471 (1943) (construing the statutory term "'necessary'" business expenses to include expenses that are "appropriate and helpful" to a business). And imposing a judicially enforceable strict necessity requirement in this context would be anomalous. The task of assessing how a particular military construction project will benefit military forces during an ongoing deployment is exactly the kind of judgment that the Secretary is uniquely equipped to make, and that courts have routinely refused to overrule. See App., *infra*, 98a (Collins, J., dissenting) (criticizing the panel majority's interpretation as "rest[ing] on the implicit view that *this court* gets to substitute its own view" of military necessity, and stating that "[n]othing in § 2808(a) assigns us that task").

At a minimum, the Secretary's assessment of military necessity is entitled to substantial deference. See App., *infra*, 96a (Collins, J., dissenting) (citing *Winter*

v. *Natural Res. Def. Council*, 555 U.S. 7, 24 (2008)). The Secretary of Defense determined that the military construction projects at issue here are important to support the use of the armed forces in connection with the national emergency, in which DoD is assisting DHS in securing the southern border. That is all the term "necessary" requires.

II. THE QUESTIONS PRESENTED WARRANT REVIEW

This case warrants further review for the same reasons that supported the Court's decision to grant review in the Section 8005 litigation. The decision below conflicts with relevant decisions of this Court. See Sup. Ct. R. 10(c). As in its earlier Section 8005 decisions, the panel majority in this case transformed Sierra Club's statutory claim into a constitutional violation, contrary to this Court's decision in *Dalton*. As Judge Collins put it in his dissent, "any such constitutional violations here can be said to have occurred *only if* the construction efforts violated the limitations set forth in § 2808." App., *infra*, 80a. Recognizing a cause of action under the Appropriations Clause itself would also be contrary to this Court's decision in *Armstrong*, which confirmed that implied suits to enjoin alleged constitutional violations by public officials are "the creation of courts of equity" and are therefore subject to "express and implied statutory limitations." 575 U.S. at 327. As to the States, nothing in this Court's precedents supports finding that a party who objects to the Secretary's reprioritizing of appropriated but unobligated military construction funds is within the zone of interests of the limits of the statute invoked by the Secretary to authorize his action.

In addition, the decision below, if allowed to stand, would frustrate the goals of both the President's declaration of a national emergency that requires the use of

the armed forces and also the reprioritization of military construction funds, which the Secretary determined were "necessary to support such use of the armed forces." 10 U.S.C. 2808(a). The Secretary found that these projects will act as "force multipliers" and will permit more efficient use of the armed forces. Gov't C.A. E.R. 92. Whether the Secretary exceeded his authority under Section 2808 when he authorized the projects at issue is a question of significant practical importance to the Executive Branch's authority to make decisions concerning military priorities. Accordingly, the petition for a writ of certiorari should be granted. At a minimum, given the overlapping issues presented here and in the Section 8005 litigation concerning whether the plaintiffs have a cognizable cause of action to challenge military spending, the Court should hold this petition for its decision in the Section 8005 case and then dispose of the petition as appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition should be held pending disposition of *Trump* v. *Sierra Club*, cert. granted, No. 20-138 (Oct. 19, 2020).

Respectfully submitted.

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NOVEMBER 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-17501
D.C. No. 4:19-cv-00892-HSG

SIERRA CLUB; SOUTHERN BORDER COMMUNITIES COALITION, PLAINTIFFS-APPELLEES

v.

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

No. 19-17502
D.C. No. 4:19-cv-00872-HSG

STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF HAWAII; STATE OF MARYLAND; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF OREGON; STATE OF WISCONSIN; COMMONWEALTH OF VIRGINIA, PLAINTIFFS-APPELLEES,

AND

STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF MAINE; STATE OF MINNESOTA; STATE OF NEW JERSEY; STATE OF NEVADA; STATE OF ILLINOIS; DANA NESSEL, ATTORNEY GENERAL, ON BEHALF OF THE PEOPLE OF MICHIGAN; STATE OF MASSACHUSETTS; STATE OF VERMONT; STATE OF RHODE ISLAND, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF DEFENSE; MARK T. ESPER, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF DEFENSE; RYAN D. MCCARTHY, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF THE ARMY; KENNETH J. BRAITHWAITE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NAVY; BARBARA M. BARRETT, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE AIR FORCE; UNITED STATES DEPARTMENT OF THE TREASURY; STEVEN TERNER MNUCHIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR; U.S. DEPARTMENT OF HOMELAND SECURITY; CHAD F. WOLF, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY OF HOMELAND SECURITY, DEFENDANTS-APPELLANTS

No. 20-15044
D.C. No. 4:19-cv-00872-HSG

STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF HAWAII; STATE OF MARYLAND; STATE OF NEW YORK; STATE OF NEW MEXICO; STATE OF OREGON; STATE OF COMMONWEALTH OF VIRGINIA; WISCONSIN, PLAINTIFFS-APPELLANTS,

AND

STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF MAINE; STATE OF MINNESOTA; STATE OF NEW JERSEY; STATE OF NEVADA; STATE OF ILLINOIS; DANA NESSEL, ATTORNEY GENERAL, ON BEHALF OF THE PEOPLE OF MICHIGAN; STATE OF MASSACHUSETTS; STATE OF VERMONT; STATE OF RHODE ISLAND, PLAINTIFFS

v.

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

[Filed: Oct. 9, 2020]

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

Before: THOMAS, Chief Judge, and WARDLAW and COLLINS, Circuit Judges

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

THOMAS, Chief Judge:

This appeal presents the question of whether the emergency military construction authority provided by 10 U.S.C. § 2808 ("Section 2808") authorized eleven border wall construction projects on the southern border of the United States. We conclude that it did not. We also consider whether the district court properly granted the Organizational Plaintiffs a permanent injunction and whether the district court improperly denied the State Plaintiffs' request for a separate permanent injunction. We affirm the decision of the district court on both counts.

I

Following the longest partial government shutdown in United States history, Congress passed the 2019 Consolidated Appropriations Act ("2019 CAA") on February 14, 2019. Pub. L. No. 116-6, div. A, 133 Stat. 13 (2019). Although the President requested $5.7 billion for border wall construction, the 2019 CAA made available only $1.375 billion "for the construction of primary pedestrian fencing . . . in the Rio Grande Valley Sector [in Texas]." On February 15, 2019 the President signed the 2019 CAA into law, but announced that he was "not happy" with the amount of border wall funding he had obtained. *Remarks by President Trump on the National Security and Humanitarian Crisis on Our Southern Border*, White House at 12 (Feb. 15, 2019), https://perma.cc/5SE7-FS7F ("*Rose Garden Remarks*").

On the same day, the President invoked his authority under the National Emergencies Act, 50 U.S.C. § 1601 *et seq.* (the "NEA") to declare that "a national emergency exists at the southern border of the United

States." *See Proclamation No. 9844*, 84 Fed. Reg. 4,949 (Feb. 15, 2019). The national emergency proclamation also "declare[d] that this emergency requires use of the Armed Forces," and made available "the construction authority provided in [Section 2808]." *Id.* The President explained that, even though he had obtained some border wall funding, he declared a national emergency because although he "could do the wall over a longer period of time" by going through Congress, he would "rather do it much faster." *Rose Garden Remarks* at 12.

Since February 2019, Congress has attempted to terminate the national emergency on two separate occasions. On March 14, 2019, Congress passed a joint resolution to terminate the emergency declaration, but it was vetoed the next day by the President, and Congress failed to override the Presidential veto. *See* H.R.J. Res. 46, 116th Cong. (2019); 165 Cong. Rec. H2799, H2814-15 (2019). On September 27, 2019, Congress passed a second joint resolution to terminate the emergency declaration, but once again, the President vetoed this resolution, and Congress failed to override the veto. *See* S.J. Res. 54, 116th Cong. (2019); 165 Cong. Rec. S5855, S5874-75 (2019).

Congress has an ongoing obligation to consider whether to terminate the emergency every six months, but the President renewed the declaration of a national emergency on February 13, 2020. *Message to Congress on the Continuation of the National Emergency with Respect to the Southern Border of the United States*, White House (Feb. 13, 2020).

Although the President's declaration of a national emergency was issued in February 2019, the administration did not announce that it had made a decision to divert the funds until September 3, 2019, when the Secretary of Defense announced that it was necessary to divert $3.6 billion from military construction projects to border wall construction projects.

The Secretary of Defense announced that the funds would be diverted to fund eleven specific border wall construction projects in California, Arizona, New Mexico, and Texas. Altogether, the projects include 175 miles of border wall. The projects fall into three basic categories: (1) two projects on the Barry M. Goldwater Range military installation in Arizona, (2) seven projects on federal public domain land that is under the jurisdiction of the Department of the Interior, and (3) two projects on non-public land that would need to be acquired through either purchase or condemnation before construction could begin. The first two projects would be built on the Goldwater Range, and "the remaining nine will be built on land assigned to Fort Bliss, an Army base," with its headquarters in El Paso, Texas.

On September 5, 2019, the Secretary of Defense identified which military construction projects the Department of Defense ("DoD") intended to defer in order to fund border wall construction. The Secretary authorized the diversion of funding from 128 military construction projects, 64 of which are located within the United States, and 17 of which are located within the territory of the Plaintiff States—California, Colorado, Hawai'i, Maryland, New Mexico, Oregon, Virginia, and Wisconsin

—totaling over $500 million in funds.[1] Pursuant to Section 2808, the Secretary authorized the Federal Defendants to proceed with construction without complying with environmental laws.

II

The Organizational Plaintiffs in this case, Sierra Club and the Southern Border Communities Coalition ("SBCC") (collectively, "Sierra Club") and the State Plaintiffs[2] filed separate suits challenging the Federal Defendants'[3] anticipated diversion of federal funds to fund border wall construction pursuant to various statutory authorities, including Section 2808. *See Sierra Club v. Trump*, No. 19-cv-00892-HSG; *California v. Trump*, No. 19-cv-00872-HSG.

In both cases, the parties first litigated the claims challenging the Federal Defendants' transfer of funds pursuant to Section 8005 and Section 9002 of the Department of Defense Appropriations Act of 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018) ("Section 8005")—the

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[1] Although there are 19 total defunded projects within the Plaintiff States, the States only assert harms from 17 of these projects.

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

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

claims that were the subject of the prior appeals considered by this panel. The parties agreed that while litigating the Section 8005 claims, they would stay the summary judgment briefing schedule as to the Section 2808 funds until the Acting Secretary of Defense and U.S. Customs and Border Protection ("CBP") reached a final decision to fund specific border wall projects using Section 2808. The Secretary of Defense reached this final decision on September 3, 2019, and the Federal Defendants filed a Notice of Decision in both cases pending before the district court.

Nine states, including California, Colorado, Hawai'i, Maryland, New Mexico, New York, Oregon, Wisconsin, and the Commonwealth of Virginia (collectively, the "States"), filed a motion for partial summary judgment on their Section 2808 claims on October 11, 2019 in *California v. Trump*. On the same day, Sierra Club filed a motion for partial summary judgment on its Section 2808 claims in *Sierra Club v. Trump*.

On December 11, 2019, in a single opinion addressing the claims of both State and Sierra Club Plaintiffs, the district court granted summary judgment and a declaratory judgment to the Plaintiffs on their Section 2808 claims with respect to the eleven border wall construction projects. It granted Sierra Club's request for a permanent injunction, enjoining "Defendants Mark T. Esper, in his official capacity as Secretary of Defense; and Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security" as well as "all persons acting under their direction" "from using military construction funds appropriated for other purposes to build a border wall" in the areas identified as "Yuma Project 2; Yuma Project 10/27; Yuma Project 3; Yuma Project 6;

San Diego Project 4; San Diego Project 11; El Paso Project 2; El Paso Project 8; Laredo Project 5; Laredo Project 7; El Centro Project 5; and El Centro Project 9." The district court denied the States' "duplicative request for a permanent injunction as moot." However, the district court *sua sponte* stayed the Sierra Club permanent injunction pending appeal pursuant to Fed. R. Civ. P. 62(c). It explained that "the Supreme Court's stay of this Court's prior injunction order appears to reflect the conclusion of a majority of that Court that the challenged construction should be permitted to proceed pending resolution of the merits." Therefore, the district court determined that "the lengthy history of this action; the prior appellate record; and the pending appeal before the Ninth Circuit on the merits of Plaintiffs' Section 8005 claim . . . warrant a stay." The district court properly considered the relevant factors and certified its order for immediate appeal pursuant to Fed. R. Civ. P. 54(b).

The Federal Defendants timely appealed the district court's grant of summary judgment and declaratory relief to Sierra Club and the States and the grant of a permanent injunction to Sierra Club. The States timely cross-appealed the district court's denial of their request for a permanent injunction.

III

We first provide a brief background of the statutory framework at issue: the National Emergencies Act. The NEA empowers the President to declare national emergencies. It states that "[w]ith respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary

power, the President is authorized to declare such a national emergency." 50 U.S.C. § 1621(a). The statute invoked by the Federal Defendants is one such Act of Congress that authorizes military construction in the event of a national emergency. 10 U.S.C. § 2808 provides that

> In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces.

Although the NEA empowers presidential action in national emergencies, it also empowers Congress to check that action. The NEA's legislative history makes clear that it was passed to "[e]nsure that the powers now in the hands of the Executive will be utilized only in time of genuine emergency and then only under safeguards providing for Congressional review," and that it "[was] not intended to enlarge or add to Executive power." *The National Emergencies Act (Public Law 94-412), Source Book: Legislative History, Text, and Other Documents* 50, 292 (1976) ("*NEA Source Book*"). Instead it was "an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes." *Id.* at 292.

As originally enacted, the NEA allowed Congress to terminate any national emergency declared by the President by concurrent resolution. *See* Pub. L. 94-412, 90 Stat. 1255, §202(a)(1) (1976) ("Any national emergency declared by the President in accordance with this title shall terminate if . . . Congress terminates the emergency by concurrent resolution."). However, the landmark Supreme Court decision, *INS v. Chadha*, 462 U.S. 919, 959 (1983), held that concurrent resolutions are unconstitutional, thus invalidating Congress's strongest check on the President's emergency powers. In response, Congress amended the NEA to allow for the termination of an emergency declaration if "there is enacted into law a joint resolution terminating the emergency." 10 U.S.C. § 1622(a)(1). *Chadha*, therefore, made it more difficult for Congress to check the President's use of emergency powers than originally intended.

Until now, *Chadha* had little impact because, prior to the President's declaration of a national emergency on the southern border, Congress had never once voted to terminate a declaration of a national emergency. Indeed, Section 2808 has only been invoked once to fund construction on American soil, and it has never been used to fund projects for which Congress withheld appropriations. Thus, this case operates against the background of the first serious clash between the political branches over the emergency powers since the passage of the NEA in 1976.[4]

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[4] The U.S. House of Representatives is also involved in this litigation as an amicus curiae supporting the Plaintiffs.

IV

We first consider whether Plaintiffs are the proper parties to challenge the Federal Defendants' actions. We conclude that Plaintiffs have Article III standing and a cause of action to challenge the border wall construction projects.

A

Although the Federal Defendants do not challenge either the States' or Sierra Club's Article III standing, we have "an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). In order to establish Article III standing, a plaintiff must have (1) suffered an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, and (3) likely to be redressed by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). When there are multiple plaintiffs, "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017). At summary judgment, a plaintiff cannot rest on mere allegations, but "must set forth by affidavit or other evidence specific facts." *Clapper v. Amnesty Int'l. USA*, 568 U.S. 398, 412 (2013) (internal quotations and citations omitted). However, these specific facts "for purposes of the summary judgment motion will be taken to be true." *Lujan*, 504 U.S. at 561.

1

The States put forth three different injuries in support of Article III standing. We conclude that border

wall construction will inflict environmental and quasi-sovereign injuries in fact upon California and New Mexico and economic injuries in fact upon the remaining states. We conclude that all nine states have standing.

a

California and New Mexico will suffer injuries similar to those asserted in the prior appeals. States are "entitled to special solicitude in our standing analysis." *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). As a quasi-sovereign, a state "has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). Thus, a state may sue to assert its "quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982). In addition, "[d]istinct from but related to the general well-being of its residents, the State has an interest in securing observance of the terms under which it participates in the federal system." *Id.* at 607-08.

California will suffer an injury in fact based on its environmental injuries. California asserts that it "has an interest in the natural resources of [its] State—such as wildlife, fish, and water—that are held in trust by the State for its residents and are protected by state and federal laws." If construction occurs, "dozens of sensitive plant and animal species that are listed as 'endangered,' 'threatened,' or 'rare' will be seriously at risk," and construction will "create environmental harm." For instance, the border wall construction projects will undermine the recovery of several federally listed en-

dangered species and California Species of Special Concern[5] and damage those species' habitats. San Diego Project 4 and 11 fall within the California Floristic Province, one of the world's biodiversity hotspots, which contains plants not found elsewhere in the United States, construction will likely have detrimental effects on the Quino Checkerspot Butterfly, the Coastal California Gnatcatcher, the Western Burrowing Owl, and vernal pool habitat and species, among other species.

California has adequately set forth facts and other evidence, which, taken as true, support these allegations for the purpose of Article III standing. It has demonstrated that border wall construction will injure its environmental interests.

The proposed construction areas for San Diego Projects 4 and 11 "would cut through designated critical habitat for the endangered Quino Checkerspot Butterfly," which has "been documented immediately adjacent to the border fence and on the surrounding slopes to the north, well within the proposed project area." The

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[5] A species of special concern is "a species, subspecies, or distinct population of an animal native to California that currently satisfies one or more of the following (but not necessarily mutually exclusive) criteria: is extirpated from the State . . . ; is listed as Federally-, but not State-, threatened or endangered; meets the State definition of threatened or endangered but has not formally been listed; is experiencing, or formerly experienced, serious (noncyclical) population declines or range retractions (not reversed) that, if continued or resumed, could qualify it for State threatened or endangered status; has naturally small populations exhibiting high susceptibility to risk from any factor(s), that if realized, could lead to declines that would qualify it for State threatened or endangered species." CAL. DEPT. OF FISH AND WILDLIFE, SPECIES OF SPECIAL CONCERN, https://wildlife.ca.gov/Conservation/SSC.

"proposed work, including resurfacing of the roadways where the butterfly and its host plants have been found, will crush and bury diapausing larvae and host plant seed bank in the area," causing "irreparable harm to the Quino Checkerspot Butterfly population and its critical habitat on Otay Mesa."

Gnatcatchers are found within the project area for San Diego Project 4, and construction activities "will result in significant displacement of California gnatcatchers into already diminished and limited habitat areas." Because the species is "restricted to coastal southern California in areas of open coastal sage scrub," and gnatcatcher "territories average approximately 9 acres," gnatcatchers affected by construction "will either be required to move or challenge adjacent pairs for their occupied territories," ultimately resulting in "a substantial reduction of the population in the area, and irreparable harm to the species and its habitat."

San Diego Project 4 would also harm the Western Burrowing Owl. The owl is "restricted to the western U.S. and northern Mexico," owls occur in the project area, and eastern Otay Mesa, where San Diego Project 4 is expected to occur, "is the last stronghold for the species in the County." The "loss of both occupied burrows and foraging habitat [where construction takes place] will only hasten [the owl's] decline." The owl will be further impacted because it is "especially sensitive to construction due to [its] unique behavior," and it is "easily flushed [from its burrows] by adjacent human disturbance or activities." "Repeated flushing during periods of incubation or while feeding chicks has extremely

negative effects, including cooling of eggs, reduced feeding of chicks, or increased exposure to predators, reducing the percentage of chicks surviving to adulthood."

San Diego Project 4 will also impact and harm delicate vernal-pool habitats, which are home to a number of endangered species, like the San Diego Fairy Shrimp. The landscape "leading to San Diego 4[] supports numerous vernal pools," and "[s]everal of these pools occur within and adjacent to dirt roads that will be utilized by heavy equipment, and where additional grading, vegetation clearing and filling may occur," which "would damage vernal pools and cause irreparable harm to the fairy shrimp and other vernal pool species."

New Mexico will also suffer an injury in fact based on its environmental injuries. If the New Mexico Projects are built, they will "impose environmental harm to the State" and the damage "would include the blocking of wildlife migration, flooding, and habitat loss." The New Mexico Projects will be built primarily in the "Bootheel" of New Mexico in the Animas and Playas Valleys, an area in southwestern New Mexico that is a "pinch point for ecological diversity, migration, and dispersal in the western North American continent." Border wall construction "for the New Mexico Projects will create fragmented habitat and block wildlife corridors for numerous protected species" such as the white-sided jackrabbit, a rare and threatened species under New Mexico law, and the jaguar, a federally endangered species.

New Mexico has also adequately set forth facts and other evidence, which, taken as true, support these allegations for the purpose of Article III standing. It has demonstrated that border wall construction will injure its environmental interests.

"Currently, the only area that the white-sided jackrabbit . . . inhabits in the United States is in the Animas and Playas Valleys, where the proposed El Paso 2 and 8 Projects are being constructed." The "species is already in distress and its numbers are falling due to habitat loss and roadkill incidents from U.S. Border Patrol vehicles which increased dramatically after Customs and Border Protection completed road improvements in 2008." The current population "is estimated to be 61 hares." The hares "cross back and forth" across the US-Mexico border "to avoid predators, and to access food, water and mates," but construction would block crossings because the border wall's "steel concrete-filled bollards [are] spaced four inches apart," and "jackrabbits cannot fit through the 4-inch gaps." El Paso Project 8 and the eastern portion of El Paso Project 2 block important habitat corridors for the hare, including "the sole route the hares can utilize to access habitat on both sides of the border because they cannot navigate the mountainous terrain that surrounds the Animas and Playas Valleys." Construction would therefore "cut off the last remaining population of the white-sided jackrabbit in the United States," and "[t]he outlook for the jackrabbit's survival in New Mexico and the United States [would be] dismal if El Paso 2 and 8 are built."

Likewise, "[c]onstruction of El Paso 2 and 8 will also harm the federally endangered jaguar . . . as both projects are immediately adjacent to the jaguar's critical habitat." Jaguars have been documented in the region, including on "lands that directly adjoin the location of El Paso 2 Project in the Animas Valley." "Habitat connectivity is critical to the jaguar's survival," because

"[t]he jaguar's survival depends on it being able to access habitat on both sides of the U.S.-Mexican border to access prey, mate and suitable habitat," but the "El Paso Projects impede the jaguar's recovery by blocking a key wildlife corridor."

In addition, California will suffer an injury in fact to its quasi-sovereign interests. California has alleged that it has "an interest in its exercise of sovereign power over individuals and entities within the State, including enforcement of its legal code." The Federal Defendants ordinarily would have to comply with various California laws designed to protect public health and the environment to proceed with construction, but Section 2808 authorizes construction "without regard to any other provision of law," and the Secretary of Defense has explicitly directed that the projects be undertaken "without regard to any other provision of law that could impede . . . expeditious construction." This impacts California's ability to enforce its state laws, including, among others, the Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13000-16104, the California Endangered Species Act, Cal. Fish and Game Code §§ 2050-2089.26, and California's state implementation program under the Clean Air Act, *see* 42 U.S.C. § 7506(c)(1). Thus, California will suffer an injury to its quasi-sovereign interest in enforcing its own laws, interfering with the terms under which it participates in the federal system.

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

Under California law, the California State Water Resources Control Board and nine regional boards establish water quality objectives and standards, and, for the California Projects, where the discharge of dredged or fill material into waters of the United States is expected to occur, a regional board must ordinarily certify compliance with water quality standards. The record indicates that El Centro Projects 5 and 9 and Yuma Project 6 are "to be constructed, at least in part, in areas under the jurisdiction of the Colorado River Basin Water Board." Therefore, absent the use of Section 2808 authority, these projects "could normally not proceed without a Section 404 dredge and fill permit issued by the United States Army Corp of Engineers, which would in turn compel a Section 401 water quality certification" by the Colorado River Basin Water Board. The record further indicates that, "[d]ue to their nature and location of construction, El Centro Projects 5 and 9, and Yuma Project 6 normally would also require enrollment in the State Water Board's statewide [National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities.]"

Additionally, but for the use of Section 2808, the Federal Defendants would be required to comply with the Endangered Species Act, which protects species threatened, endangered, or of special concern under California law and allows California to continue implementing habitat conservation agreements with federal agencies that impose limitations on habitat-severing projects like the border wall construction projects. The use of Section 2808 therefore undermines California's ability to enforce the California Endangered Species Act and the

"policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat." Cal. Fish & Game Code § 2052.

Likewise, the use of Section 2808 authority undermines California's enforcement of its air quality standards. In particular, the Clean Air Act prohibits any construction within California that does not conform to California's State Implementation Program ("SIP"). 40 C.F.R. § 93.150(a). Moreover, local air districts with jurisdiction over the California Project areas enforce rules to reduce the amount of fine particulate matter generated from construction projects by requiring those responsible to develop and implement a dust control plan. Although the Federal Defendants assert they "will implement control measures," implementing control measures is not the same as implementing a complete dust control plan, and there is no indication that the Federal Defendants intend to comply fully with California's air quality laws.

New Mexico will also suffer an injury in fact to its quasi-sovereign interests. The Federal Defendants would ordinarily have to comply with various New Mexico laws designed to protect public health and the environment. Such laws include the dust control plan New Mexico adopted under the Clean Air Act and its Wildlife Corridors Act, N.M. Stat. Ann. §§ 17-9-1-17-9-4. Thus, New Mexico too suffers an injury to its quasi-sovereign interest in enforcing its own laws, interfering with the terms under which it participates in the federal system.

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

Absent the use of Section 2808 authority, the Federal Defendants would normally be required to comply with New Mexico's fugitive dust control rule and the High Wind Fugitive Dust Mitigation Plan that New Mexico adopted under the Clean Air Act in order to construct El Paso Project 2. 40 C.F.R. § 51.930(b); *see* N.M. Admin. Code §§ 20.2.23.109-112 (mandating that "[n]o person . . . shall cause or allow visible emissions from fugitive dust sources that: . . . pose a threat to public health . . . interfere with public welfare, including animal or plant injury or damage, visibility or the reasonable use of property" and "[e]very person subject to this part shall utilize one or more dust control measures . . . as necessary to meet the requirements of [this section]"). Although the Federal Defendants assert that they plan to implement control measures, they have not indicated that they intend to be bound in any way by New Mexico's law.

Likewise, the Federal Defendants' use of Section 2808 authority impedes New Mexico's ability to implement its Wildlife Corridors Act, which aims to protect large mammals' habitat corridors from human-caused barriers such as roads and walls and requires New Mexico agencies to create wildlife corridors action plans to protect species' habitat. 2019 N.M. Laws Ch. 97. Several important wildlife corridors run through, or adjacent to, the New Mexico Projects in Hidalgo and Luna Counties. "El Paso Projects 2 and 8 will . . . block habitat corridors," in these counties for "wildlife species that currently cross back and forth over the border to access habitat, vegetation, water and other resources." "[P]articularly when viewed cumulatively with other recent border-barrier projects such as El Paso Project 1," the

loss of wildlife corridors will impede species' "access to resources necessary for their survival."

Moreover, the New Mexico Projects will harm species that New Mexico's laws were enacted to protect, such as the white-sided jackrabbit, as previously explained. The Projects will bisect important habitats, impairing the access of the Mexican wolf to those habitats. In sum, California and New Mexico have adequately shown one or more injuries in fact supported by facts and evidence.

Turning to the causation requirement, we conclude that California and New Mexico will suffer both environmental and sovereign injuries that are fairly traceable to the Federal Defendants' conduct. The declarations in support of the environmental harms clearly demonstrate how the proposed construction will harm species, and Section 2808 itself provides the authority for the Secretary of Defense to override state environmental laws.

It is also clear that a favorable judicial decision would redress California and New Mexico's asserted injuries. Without Section 2808 authorization, DoD has no authority to undertake border wall construction, and, if construction is prohibited, California and New Mexico will not suffer the alleged harms. We therefore conclude California and New Mexico have Article III standing to challenge the construction projects on their borders.

b

The remaining states assert theories of economic loss and the loss of tax revenues as the basis for standing. Economic loss and the loss of tax revenues can be sufficient to establish Article III injury in fact. *See, e.g.*,

Wyoming v. Oklahoma, 502 U.S. 437, 447 (1992) (holding that the loss of specific tax revenues conferred standing); *City of Oakland v. Lynch*, 798 F.3d 1159, 1163-64 (9th Cir. 2015) (recognizing that an expected loss of tax revenues constitutes a "constitutionally sufficient" injury for Article III standing); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1194, 1198-99 (9th Cir. 2004) (recognizing financial harm from decreased tax revenues as a cognizable injury). It may be appropriate to deny standing where a state claims only that "actions taken by United States Government agencies . . . injured a State's economy and thereby caused a decline in general tax revenues." *Wyoming v. Oklahoma*, 502 U.S. at 448 (citing *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 977 (1976), as an example). But where there is "some fairly direct link between the state's status as a collector and recipient of revenues and the legislative or administrative action being challenged," lost tax revenues can support Article III standing. *Kleppe*, 533 F.2d at 672.

The States have each individually alleged that the Section 2808 diversion of funds will result in economic losses, including lost tax revenues. The loss of tax revenues here is analogous to those in *Wyoming v. Oklahoma*. There, Wyoming challenged an Oklahoma law requiring Oklahoma utility companies using coal-fired generating plants to blend ten percent Oklahoma coal with their existing coal sources, which had been purchased almost entirely from Wyoming. *Id.* at 443, 445. Wyoming did not sell coal directly, but it imposed a severance tax on any person or company extracting coal from within its borders. *Id.* at 442. The Supreme Court agreed that Wyoming had standing because there was "a direct injury in the form of a loss of specific tax

revenues." *Id.* at 448, 451. Here, the States have alleged analogous, direct injuries in the form of lost tax revenues resulting from the cancellation of specific military construction projects.

Colorado has standing based on its economic injury and loss of tax revenues because it faces the defunding of a Space Control Facility at the Peterson Air Force Base resulting in an estimated loss of $1 million in state and local tax revenues.

Hawai'i has standing based on its economic injury and loss of tax revenues because it faces the defunding of two projects—a consolidated training facility at the Joint Base Pearl Harbor-Hickam and security improvements at the Marine Corps base at Kaneohe Bay—resulting in an estimated loss of $2.5 million in state and local tax revenues.

Maryland has standing based on its economic injury and loss of tax revenues because it faces the defunding of three projects—an expansion of cantonment area roads at Fort Meade, construction of a hazardous cargo loading and unloading pad and an explosive ordinance disposal training range at Joint Base Andrews, and construction of a child development center at Joint Base Andrews—resulting in an estimated loss of $5 million in state and local tax revenues.

New Mexico also has standing based on its economic injury and loss of tax revenues because it faces defunding of two projects—the construction of an air combat training facility for unmanned vehicles at Holloman Air Force Base and an Information Systems Facility at White Sands Missile Range—resulting in an estimated loss of $9 million in state and local tax revenues.

New York has standing based on its economic injury and loss of tax revenues because it faces the defunding of two projects—an Engineering Center and Parking Structure at the U.S. Military Academy at West Point—resulting in an estimated loss of $13 million in state and local tax revenues.

Oregon has standing based on its economic injury and loss of tax revenues because it faces the defunding of the construction of an indoor small arms training range at the Klamath Falls International Airport resulting in an estimated loss of $600,000 in state and local tax revenues.

Virginia has standing based on its economic injury and loss of tax revenues because it faces the defunding of four projects—the construction of a cyber operations facility at Joint Base Langley-Eustis, the replacement of two different Hazardous Materials Warehouses at Norfolk Naval Station in Norfolk and the Norfolk Naval Shipyard in Portsmouth, and the conversion and repair of a major Ships Maintenance Facility at the Naval Support Station in Portsmouth—resulting in an estimated loss of $5 million in state and local tax revenues.

Wisconsin has standing based on its economic injury and loss of tax revenues because it faces the defunding of the construction of an indoor small arms training range at Truax Field resulting in an estimated loss of $600,000 in state and local tax revenues.

The injuries are "fairly traceable" to the Federal Defendants' conduct. The States have illustrated that there is a "line of causation between the [Federal Defendants'] action and [their] harm" that is "more than attenuated." *Wash. Envtl. Council v. Bellon*, 732 F.3d

1131, 1141 (9th Cir. 2013) (citation omitted). The States have illustrated that the lost revenues stem from identifiable projects, directly linking the States' statuses as collectors and recipients of revenues to the challenged actions. Moreover, the States' expert calculated the estimated loss of tax revenues with the widely-used IMPLAN economic model that takes into account specific details about each defunded military construction project from the Federal Defendants' own information regarding each project. The expert's "analysis conservatively included only projects within the plaintiff states' boundaries because the diversion of those projects would have primary effects on the plaintiff states," and the analysis did not consider "the secondary effects of defendants' diversion of military construction projects located in other states and counties," thus ensuring that the calculated losses accounted for here are not too attenuated for purposes of Article III.

A favorable judicial decision barring Section 2808 construction would prevent the military construction funds at issue from being transferred from projects within the States to border wall construction projects, thereby preventing the alleged injuries. Therefore, the States' losses, as outlined here, satisfy the demands of Article III standing. We conclude that all nine states have standing to challenge the border wall construction projects.

2

Sierra Club and SBCC also have standing. An organization has standing to sue when "its members would otherwise have standing to sue in their own right," and when "the interests it seeks to protect are germane to

the organization's purpose." *United Food and Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). An organization may also have standing to sue on its own behalf when it suffers "both a diversion of its resources and a frustration of its mission." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (quoting *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)). The organization "must . . . show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *Id.*

Sierra Club has standing to sue on behalf of its members. It has alleged that the Federal Defendants' actions will cause particularized and concrete injuries to its members. Sierra Club has more than 400,000 members in California, over 9,700 of whom belong to its San Diego Chapter. Sierra Club's Grand Canyon Chapter, which covers the State of Arizona, has more than 16,000 members. Sierra Club's Rio Grande Chapter includes over 10,000 members in New Mexico and West Texas. Sierra Club's Lone Star Chapter, which covers the State of Texas, has over 26,100 members, more than 440 of whom live in the Lower Rio Grande Valley.

These members visit border areas such as: the Tijuana Estuary (California), the Otay Mountain Wilderness (California), the Jacumba Wilderness Area (California), the Sonoran Desert (Arizona), Cabeza Prieta National Wildlife Refuge (Arizona), the Chihuahan Desert (New Mexico), Santa Ana National Wildlife Refuge (Texas), the Lower Rio Grande Valley National Wildlife Refuge (Texas), Bentsen-Rio Grande Valley State Park

(Texas), La Lomita Historical Park (Texas), and the National Butterfly Center (Texas).

Sierra Club's members obtain recreational, professional, scientific, educational, and aesthetic benefits from their activities along the U.S.-Mexico border, and from the wildlife dependent upon the habitat in these areas. The construction of a border wall and related infrastructure will acutely injure these interests because the Department of Homeland Security ("DHS") is proceeding with border wall construction without ensuring compliance with any federal or state environmental regulations designed to protect these interests.

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

For instance, Sierra Club member Bill Broyles has a "substantial professional and personal connection to the lands identified for construction as projects Yuma 2 and 10/27 (on the Goldwater Range) and Yuma 3 (on Cabeza Prieta)." He has "written and edited several books and articles on Cabeza Prieta and the Goldwater Range," and he "also co-wrote and co-published a visitor's guide to the historic trail, El Camino del Diablo, that the proposed wall parallels and crosses, and that would be harmed by construction vehicle traffic." He participated in many meetings sponsored by the Range and Refuge concerning their management plans over the years. He believes that the "proposed wall is antithetical to [the] successful cooperative efforts of the Range and Refuge partners," and it would "desecrate" the historic El Camino del Diablo. He asserts that harm to wildlife species, "the incessant lighting associated with the wall and its construction," and the "attendant noise

and dust" of construction will harm his enjoyment of these areas.

Sierra Club member Orson Bevins lives near the U.S.-Mexico border and states that Yuma Sector Project 6 would "fragment" the vista he usually enjoys. He also states that the "tall and intrusive pedestrian barrier would disrupt the desert views and inhibit [him] from fully appreciating this area," and that a border wall "would greatly degrade [his] experience visiting and living in this area."

Richard Guerrero is a Sierra Club member who resides in San Diego, California, and he hikes the trails in and around the Otay Open Space Preserve "about once a month," and "often hike[s] in areas that are within the sightline of where [he] understand[s] the government plans to construct San Diego Project 4." The "wall would directly impact [his] ability to enjoy recreating in this area" by adding "a destructive human-created element to this otherwise peaceful open desert landscape."

Likewise, Sierra Club member Daniel Watman, who leads "border tours" through the Otay Mountain Wilderness, will be harmed by San Diego Project 4 and San Diego Project 11. If San Diego Project 4 is built, he will "no longer be able to lead [his] border tours because the purpose of the tours—to see nature continuing unimpeded across the border—would be lost." Moreover, he enjoys visiting the bi-national town of Tecate, and he believes "San Diego 11 project would seriously reduce the enjoyment [he] get[s] from the area, because seeing this large, out-of-place wall would mar [his] views of the beautiful mountain range on the American side" and "cause extensive and possibly irreparable damage to the native flora" in the area.

Sierra Club member Robert Ardovino "currently recreate[s] in what [he] understand[s] to be the El Paso Project 2 and 8 areas," and has "done so for several decades." He claims that construction will "drastically change [his] ability to appreciate [the] views" of the "sprawling vistas near Antelope Wells," because the lighting planned for the construction projects "would completely change the landscape," and the construction would harm the species he appreciates while camping, "permanently ruin[ing]" his "use and enjoyment of these areas."

Thomas Miller is a Sierra Club member who works at Laredo College conducting environmental research with students in the Rio Grande Valley, and he asserts that Laredo Project 7 will injure him "professionally, recreationally, and aesthetically." For the last 15 years, his "research has largely focused on the now endangered Texas Hornshell Mussel." He is "concerned that [Laredo Project 7] and its construction will destroy essential habitat for freshwater mussels and other species of plants and animals," because the "construction process and the existence of a wall would lead to river siltation when parts of the desert soil and rocks are displaced" and could potentially lead to "chemicals polluting the water sources" in the area. Likewise, Jerry Thompson, a Sierra Club member and Professor of History at Texas A&M International University, whose research focuses on "Texas history, border history, and the history of the American Civil War" asserts that Laredo Project 7 "would be extremely detrimental to [his] research and career as it would foreclose [his] ability to do site visits and visualize the area before writing about it." He has written numerous books about the Texas-Mexico border, has visited the Laredo 7 Project area around

twenty times in the course of his research, intends to return within the next few years to view the section of the Rio Grande where Laredo 7 project is slated for construction, and "plan[s] to continue to write about the Texas-Mexico border."

Carmina Ramirez is a Sierra Club member who "will be harmed culturally and aesthetically" if construction proceeds for El Centro Projects 5 and 9 because she has spent her entire life in the area surrounding the U.S.-Mexico Border, including the El Centro Sector, and she believes that border wall construction would "obstruct [the] view [of the Valley area]," "divide [her community]," "further militariz[e] the border," and "drastically impact [her] ability to enjoy the local natural environment." Construction will make her "less likely to hike Mount Signal and enjoy outdoor recreational activities; and when [she does] undertake those activities, [her] enjoyment of them will be irreparably diminished."

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

SBCC has also alleged facts that support its standing to sue on behalf of itself and its member organizations. SBCC alleged that, since the Federal Defendants proposed border wall construction, it has had to "mobilize[] its staff and its affiliates to monitor and respond to the

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

SBCC has adequately set forth facts and other evidence, which, taken as true, support these allegations for the purpose of Article III standing. SBCC Director Vicki Gaubeca has confirmed that the border wall construction projects have "caused [SBCC] to reduce the time that [it] devote[s] to [its] core projects," and "frustrated SBCC's mission of advancing the dignity and human rights of border communities." SBCC has "been forced to expend resources on countering the emergency instead of on [its] other initiatives, including Border Patrol accountability, community engagement on local health and education issues, and public education about immigration policies more broadly."

Moreover, Southwest Environmental Center ("SWEC"), an organization that forms part of the SBCC, has also been harmed by the proposed construction. SWEC was founded "to reverse the accelerating loss of plants and animals worldwide through protection and restoration of native wildlife and their habitats in the southwest," and it "has been actively involved in restoring riparian and aquatic habitats along the Rio Grande in southern New Mexico and west Texas. Border wall construction projects, however, have "required SWEC to shift its focus to more urgent, defensive campaigns,"

and "[s]taff time and resources that would normally go towards [its] longer-term restoration efforts to protect landscapes and wildlife species . . . are instead being channeled to immediate border wall advocacy." Without such defensive efforts, however, the wall will "cause[] irreversible damage to border lands that SWEC's members enjoy and cherish."

The Texas Civil Rights Project ("TCRP") is also a member organization of the SBCC and is comprised of separate programs, including a Racial and Economic Justice Program, a Voting Rights Program, and a Criminal Justice Reform Program. The "announcement of imminent land seizure and 'military construction' across 52 miles of borderlands in Laredo, Texas has caused and will continue to cause TCRP to divert scarce resources in protection of Texas landowners." TCRP has had to expand its operations into Laredo, Texas, even though Laredo is "a substantial distance from the nearest TCRP office" in Alamo, Texas, and it is "prohibitive to directly represent anyone in a region where [TCRP] do[es] not have a physical TCRP office." TCRP has had no choice but to take on this additional burden because declining to represent these landowners would undermine the organization's goal to fight for a "Texas where all communities thrive with dignity and justice and without fear."

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

Sierra Club and SBCC have also shown that such injuries are "fairly traceable to the challenged action[s] of

the [Federal Defendants], and not the result of the independent action of some third party not before the court." *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). Section 2808 is the statutory authorization for the construction, and it is therefore the direct cause of the alleged injury.

The injury to Sierra Club and SBCC is likely to be redressed by a favorable judicial decision. The Federal Defendants have no authority to undertake the border wall projects if the Court holds that Section 2808 does not authorize construction. Thus, Sierra Club and SBCC have established that they satisfy the demands of Article III standing to challenge the Federal Defendants' actions.

B

The Federal Defendants assert that the Plaintiffs do not have a cause of action. We hold that the States have a cause of action under the APA and Sierra Club has a constitutional cause of action.

1

The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Where a statute imposes obligations on a federal agency but the obligations do not "give rise to a 'private' right of action against the federal government[,] [a]n aggrieved party may pursue its remedy under the APA." *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005). The States must, however, establish that they fall within the zone of interests of the relevant statute to bring an APA

claim. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) ("This Court has long held that a person suing under the APA must satisfy not only Article III's standing requirements, but an additional test: The interest he asserts must be 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." (quoting *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970))).

Section 2808 does not confer a private right of action. Instead, like Section 8005, it delegates a narrow slice of Congress's power of the purse to DoD so that it can react quickly in the event of a declaration of war or a declaration of a national emergency. In doing so, the statute imposes certain obligations upon DoD—*i.e.*, DoD cannot invoke Section 2808 except for military construction that is necessary to support the use of the armed forces in the event of a declaration of a national emergency that requires the use of the armed forces. The States argue that DoD did not satisfy these obligations, and therefore, as aggrieved parties, they may pursue a remedy under the APA, so long as they fall within Section 2808's zone of interests.

As a threshold matter, Section 2808 constitutes the relevant statute for the zone of interests test. "Whether a plaintiff's interest is 'arguably . . . protected . . . by the statute' within the meaning of the zone-of-interests test is to be determined *not by reference to the overall purpose of the Act* in question . . . but by reference to the *particular provision of law* upon which the plaintiff relies." *Bennett*, 520 U.S. at 175-76 (emphasis added). Because the States invoke Section

2808's limitations in asserting their APA claim, this statute defines the relevant zone of interests.

The Supreme Court has clarified that, in the APA context, the zone of interests test does "not require any 'indication of congressional purpose to benefit the would-be plaintiff.'" *Patchak*, 567 U.S. at 225 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987)). Furthermore, the Court has repeatedly emphasized that the zone-of-interest test is "not 'especially demanding.'" *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (quoting *Patchak*, 567 U.S. at 225). Instead, for APA challenges, a plaintiff can satisfy the test in either one of two ways: (1) "if it is among those [who] Congress expressly or directly indicated were the intended beneficiaries of a statute," or (2) "if it is a suitable challenger to enforce the statute—that is, if its interests are sufficiently congruent with those of the intended beneficiaries that the litigants are not more likely to frustrate than to further . . . statutory objectives." *Scheduled Airlines Traffic Offices, Inc. v. Dep't of Def.*, 87 F.3d 1356, 1359 (D.C. Cir. 1996) (alterations in original) (citations omitted). "We apply the test in keeping with Congress's 'evident intent' . . . 'to make agency action presumptively reviewable,'" and note that "the benefit of any doubt goes to the plaintiff." *Patchak*, 567 U.S. at 225 (quoting *Clarke*, 479 U.S. at 399).

Section 2808's restrictions constrain DoD's ability to fund emergency military construction projects while deferring other military construction projects. The Federal Defendants concede as much, noting that the "limitations in the statute at most reflect constraints on the

decision to fund certain projects while deferring others."[6]

The States are suitable challengers to enforce Section 2808's limitations because they have asserted such economic interests here and thus they are either the intended beneficiaries of the statute, or at the very least, their interests are unlikely to frustrate the purpose of the statute. Absent the invocation of Section 2808, the States stood to benefit significantly from federal military construction funding. The Federal Defendants diverted funding from 17 separate military construction projects within the borders of the Plaintiff States, totaling over $493 million. According to the States' expert, the diversion of funds "would result in a total of $366 million in total lost business sales within the States for the next three calendar years, 2020-2022," even taking "into consideration the offsetting benefits to the States caused by the $1.0 billion of U.S. funds that would be spent in California and New Mexico to build the proposed border barriers."[7] Moreover, "the gross regional product (GRP) of the States would be reduced by

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[6] When considering the analogous role played by Section 8005, Judge N.R. Smith, in dissent, acknowledged that a plaintiff who suffered an economic injury as a result of a statutory diversion of funds would likely have a cause of action to challenge whether the diversion satisfied the terms of the statute. *See Sierra Club v. Trump*, 929 F.3d 670, 715 (9th Cir. 2019) (N.R. Smith, J., dissenting) ("This statute [Section 8005] arguably protects Congress and those who would have been entitled to the funds as originally appropriated; and as a budgetary statute regarding the transfer of funds among DoD accounts, it arguably protects economic interests.").

[7] Excluding California from this analysis, the expert estimates that total would be much greater: the total lost business sales within the remaining states would be $789 million.

$165 million as a result of this diversion of military funds," and the tax revenues for state and local governments would be reduced by over $36 million. Section 2808's restrictions ensure that, ordinarily, its authority cannot be used to divert funding for military construction projects unless the construction satisfies certain criteria. Therefore, the States fall within the statute's zone of interests and can enforce its criteria.

Moreover, *Patchak* establishes that when a statute deals with land use, the "neighbors to the use" may sue and their "interests, whether economic, environmental, or aesthetic, come within [the statute's] regulatory ambit." 567 U.S. at 227-28. Here, Section 2808 is a construction statute. It allows the Secretary of Defense to "undertake military construction projects," in "the event of a declaration of war or the declaration by the President of a national emergency." 10 U.S.C. § 2808. Construction of this sort naturally requires land use, and California and New Mexico, as border states immediately adjacent to the border wall construction projects, are quasi-sovereign neighbors to that use and plainly fall within its zone of interests.

Therefore, the States fall within Section 2808's zone of interests and they have a cause of action to challenge the construction.

2

The Supreme Court's decision in *Bond*, and our decisions in *McIntosh* and the prior *Sierra Club* appeal, provide ample support that Sierra Club has a cause of action under the Appropriations Clause to challenge the

Federal Defendants' use of Section 2808 for border wall construction.[8]

"[I]ndividuals, too, are protected by the operations of separation of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies." *Bond v. United States*, 564 U.S. 211, 223 (2011). "[B]oth federalism and separation-of-powers constraints in the Constitution serve to protect individual liberty, and a litigant in a proper case can invoke such constraints '[w]hen government acts in excess of its lawful powers.'" *United States v. McIntosh*, 833 F.3d 1163, 1174 (9th Cir. 2016) (discussing and quoting *Bond*, 564 U.S. at 222). "[The Appropriations Clause] constitutes a separation-of-powers limitation that [litigants] can invoke to challenge" actions that cause justiciable injuries. *Id.* at 1175.

Although the terms of Section 2808 are different from Section 8005, Section 2808's role here is analogous to the role of Section 8005 in the prior appeal: Section 2808 permits DoD to fund construction outside the normal appropriations process, if certain criteria are met, but it operates against the backdrop of the Appropriations Clause. Because, as explained below, we conclude that the Federal Defendants have not satisfied statute's criteria, any construction undertaken purportedly using its authority violates the explicit prohibition of the Appropriations Clause that "[n]o Money shall be

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[8] We address only whether Sierra Club has a constitutional cause of action because Sierra Club did not argue in any detail that it has a cause of action under the APA in its opening brief.

drawn from the Treasury, but in Consequence of Appropriations made by Law. . . . " U.S. Const. art.1, § 9, cl. 7. Sierra Club has invoked this prohibition.

If the zone of interests test applies at all here, the Appropriations Clause of the Constitution defines the zone of interests because it is the "particular provision of law upon which [Sierra Club] relies" in seeking relief. *Bennett*, 520 U.S. at 175-76. Section 2808 is relevant only because, to the extent it applies, it authorizes executive action that otherwise would be unconstitutional or *ultra vires*. That a statute is relevant does not transform a constitutional claim into a purely statutory one. Sierra Club's cause of action stems from the Federal Defendants' violation of the Appropriations Clause because Sierra Club seeks to enforce the Clause's express prohibition.

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

Applying that generous formulation of the test here, Sierra Club falls within the Appropriations Clause's zone of interests. Because the diversion of funds was

not authorized by the terms of Section 2808, it is unconstitutional. *See City and Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1233-34 (9th Cir. 2018) ("[W]hen it comes to spending, the President has none of 'his own constitutional powers' to 'rely' upon." (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). Sierra Club is an organization within the United States that is protected by the Constitution. The unconstitutional transfer of funds here infringed upon Sierra Club's members' liberty interests, harming their environmental, aesthetic, and recreational interests. Thus, Sierra Club falls within the Clause's zone of interests and has a cause of action to challenge the transfers.

V

Next, we consider whether the terms of Section 2808 authorize the challenged border wall construction projects. We conclude that the projects fail to satisfy two of the statutory requirements: they are neither necessary to support the use of the armed forces, nor are they military construction projects. Although the statute supplies other limitations, we do not address them because we conclude that these two limitations are more than sufficient to render the border wall construction projects unlawful.

A

Section 2808 allows the Secretary of Defense to undertake military construction projects in the event of a national emergency requiring the use of the armed forces, but the statute specifies that such projects must be "necessary to support such use of the armed forces." The district court's analysis is persuasive on this issue, and

we hold that border wall construction is not necessary to support the use of the armed forces with respect to the national emergency on the southern border. The Federal Defendants have not established that the projects are necessary to support the use of the armed forces because: (1) the administrative record shows that the border wall projects are intended to support and benefit DHS—a civilian agency—rather than the armed forces, and (2) the Federal Defendants have not established, or even alleged, that the projects are, in fact, *necessary* to support the use of the armed forces.

First, the record illustrates that the border wall projects are intended to benefit DHS and its subagencies, CBP and U.S. Border Patrol ("USBP"), not the armed forces. The record demonstrates that DoD primarily considered the many benefits to these civilian agencies in determining that physical barriers are necessary. DoD determined that physical barriers would "[i]mprove CBP's detection, identification, classification, and response capabilities," "[r]educe vulnerabilities in key border areas and the time it takes Border Patrol agents to apprehend illegal migrants," "improv[e] CBP force allocation," "reduce the challenges to CBP," "effectively reduce the enforcement footprint and compress USBP operations to the immediate border area," "serve to channel illegal immigrants towards locations that are operationally advantageous to DHS," "enable CBP agents to focus less on the rugged terrain," and "give a distinct and enduring advantage to USBP as a force multiplier."

To the extent DoD decision-makers believed that construction would benefit DoD at all, the record demonstrates that the construction is merely expected to help DoD *help* DHS. DoD determined that the barriers

would serve as "force multipliers," by allowing military personnel to cover other high-traffic border areas without existing barriers, a benefit plainly intended to assist DHS, which, by statute, is tasked with "[s]ecuring the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States." 6 U.S.C. § 202. Moreover, border wall construction would "enable more effective and efficient use of DoD personnel, which could ultimately reduce the demand for DoD support at the southern border over time." Thus, the record makes clear that the primary objective of border wall construction is to benefit a civilian agency, DHS, and that the construction strives to ultimately eliminate the need for DoD support to DHS altogether.

Second, the Federal Defendants have not even alleged, let alone established as a matter of fact, that the border wall construction projects are "necessary" under any ordinary understanding of the word. *See* MERRIAM-WEBSTER ONLINE DICTIONARY (defining "necessary" as "absolutely needed: required"); OXFORD ENGLISH DICTIONARY ONLINE (defining "necessary" as "[i]ndispensable, vital, essential"). In assessing the necessity of the border wall construction projects, the Federal Defendants concluded: "In short, these barriers will allow DoD to provide support to DHS more efficiently and effectively. In this respect the contemplated construction projects are force multipliers." Efficiency and efficacy are not synonymous with necessity.

The Federal Defendants contend that "Section 2808's reference to necessity does not entail the stringent level of indispensability," assumed by the district court, and

they request that the Court adopt a more relaxed definition of the term here. The Federal Defendants cite *United States v. Comstock*, 560 U.S. 126, 133-34 (2010), for the proposition that the word "necessary" "often means merely" "convenient, or useful," or "conducive." But *Comstock* provides little support for that proposition. The Court in *Comstock* considered what powers were entrusted to Congress by the Necessary and Proper Clause of the United States Constitution. Examining the import of the entire clause, the Court observed that "the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *Comstock*, 560 U.S. at 133-34 (quoting *M'Culloch v. Maryland*, 17 U.S. 316, 413, 418 (1819)). The Court noted that in the specific context of the Necessary and Proper Clause, "the word 'necessary' does not mean 'absolutely necessary.'" *Id.* at 134. Contrary to the Federal Defendants' assertion, however, the Court in *Comstock* did not set forth a universal definition of the word "necessary," but instead, one narrowly cabined to its constitutional context. The Federal Defendants provide no reason why we must apply the logic of the Court's approach in that specific context to the military construction authority at issue here.

The Federal Defendants also cite *Commissioner v. Heininger*, 320 U.S. 467, 471 (1943). In *Heininger*, the Court interpreted a Revenue Act provision allowing for the deduction of "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." *Id.* at 468 n.1. There, not only was the word "necessary" coupled with "ordinary," suggesting that a more relaxed definition of "necessary"

may be appropriate, but the Court was interpreting the language of a business expense tax deduction provision. Within that context, dealing with a statutory provision intended to foster business development and growth, it makes sense to interpret the term in a more relaxed fashion in furtherance of that purpose. Again, the Federal Defendants provide no explanation why *Heininger*'s logic applies to the very different statutory context at issue in this case.

"Necessary" as it appears in Section 2808 is best understood as retaining its plain meaning, which means, at the very least, "required," or "needed."[9] The fact that border wall construction might make DoD's support

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[9] *Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018) is not to the contrary. In *Ayestas*, the Supreme Court interpreted the use of the term "necessary" within the context of 18 U.S.C. § 3599, a statute that "authorizes federal courts to provide funding to a party who is facing the prospect of a death sentence and is 'financially unable to obtain adequate representation or . . . other *reasonably necessary* services.'" *Ayestas*, 138 S. Ct. at 1092 (emphasis added). The Court acknowledged that "necessary" may have one of two meanings: either "essential" or "something less than essential." *Id.* at 1093. It concluded that "necessary" carried the latter meaning in Section 3599 because it would "make[] little sense to refer to something as being 'reasonably essential.'" *Id.* In other words, the Court's interpretation hinged on the fact Section 3599 did not merely use the standalone term "necessary," but used the phrase "reasonably necessary." Thus, here, where "necessary" is a part of no such statutory phrase, it makes little sense to follow the Court's approach in *Ayestas*. Moreover, Section 3599's statutory context—the provision of funding to ensure the adequate defense of individuals facing the prospect of a death penalty—additionally supports the sensibility of a more flexible definition to serve that statutory purpose. That context is unrelated to emergency military construction authority, however, and so *Ayestas* does not alter our decision to adopt the plain meaning of "necessary" here.

more efficient and effective does not rise to the level of "required" or "needed"—and the Federal Defendants have failed to show that it does. That Congress declined to provide more substantial funding for border wall construction and voted twice to terminate the President's declaration of a national emergency underscores that the border wall is not, in fact, required or needed. Thus, the Federal Defendants fail to satisfy the statutory requirement that the construction projects be "necessary to support the use of such armed forces."

The remainder of the Federal Defendants' arguments do not compel an opposite conclusion. First, the Federal Defendants assert that the determination of whether military construction is necessary to support the use of the armed forces is "committed to the discretion of the Secretary of Defense by law." They argue that questions of military necessity turn on "a complicated balancing of a number of factors which are peculiarly within [the Secretary's] expertise" and that the Court should defer to such expertise. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

"[T]he claim of military necessity will not, without more, shield governmental operations from judicial review." *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992). A decision is generally committed to an agency decision by law only when a court would have "no meaningful standard against which to judge the agency's exercise of discretion." *Perez Perez v. Wolf*, 943 F.3d 853, 860 (9th Cir. 2019) (quoting *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 719 (9th Cir. 2011)).

As we have explained, the Federal Defendants have simply claimed "military necessity" without more, and

this alone cannot shield their actions from judicial review. Further, as we have noted, the judgment at issue here is not a military one. The border wall construction projects further the goals of DHS—a civilian law enforcement agency—and the determination that the projects are necessary, in any sense, is a law enforcement calculation, not a military one. Such determinations involve distinctly different calculations than those present in the military deference cases cited by the Federal Defendants, like *Gilligan v. Morgan*, which involved the ongoing judicial oversight of the Ohio National Guard. *See Gilligan v. Morgan*, 413 U.S. 1, 6 (1973) (considering whether the district court should "assume and exercise a continuing judicial surveillance over the Guard to assure compliance with whatever training and operations procedures may be approved by [the] court."). The determinations at issue here, while important, are lawmaking decisions that are "a job for the Nation's lawmakers, not for its military authorities." *Youngstown*, 343 U.S. at 587. Thus, the Federal Defendants cannot evade judicial review of these determinations by simply labeling them "military" ones.

What is more, nothing in the language of the statute suggests that this determination is committed to the discretion of the Secretary of Defense. Here, the phrase "that are necessary to support such use of the armed forces," provides standards against which to judge that exercise of discretion; as demonstrated above, the statutory language is susceptible to basic statutory interpretation. If Congress had committed these issues to the unfettered discretion of the Secretary, we would—of course—defer. But it did not, so it is our task to determine whether the Secretary has complied with the statutory requirements.

Further, judicial review of statutes conferring specific emergency powers to the President is critical because, as explained by the Senate Committee on Government Operations in passing the NEA, the NEA left "the definition of when a President is authorized to declare a national emergency . . . to the various statutes which give him extraordinary powers." *NEA Source Book* at 292. Therefore, the President's emergency authority is conferred only by statute. Were we to conclude that judicial review of such a statute was precluded, the President's emergency authority would be effectively unbounded, contravening the purpose of the NEA. Thus, the language of Section 2808 is not only susceptible to judicial review, but its statutory context requires it.

Alternatively, the Federal Defendants assert that "[e]ven if the Secretary's military-necessity determinations were reviewable, this Court . . . should defer to the Secretary's conclusion that the challenged projects are necessary to improve the effectiveness and efficiency of DoD personnel deployed to the border." But, as we have discussed, it does not follow from the idea that a project is designed to improve effectiveness and efficiency that a project is necessary in any ordinary sense. And absent from the record is any determination by the Secretary that the projects are actually necessary. Under these circumstances, deference, in the classic administrative law sense, is not appropriate.

In sum, based on the record, we conclude that the construction of the challenged border wall projects does not comply with the statutory requirements of Section 2808. Therefore, because the Federal Defendants' construction exceeds the authority provided by Section 2808 and

is unlawful, and we affirm the declaratory judgment of the district court.

B

Section 2808 permits the Secretary of Defense to "undertake military construction projects." Section 2801 defines the term "military construction" "as used in this chapter or any other provision of law" as "any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road." 10 U.S.C. § 2801(a). It further defines "military installation" as "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." *Id.* at § 2801(c)(4).

Because the border wall construction projects plainly qualify as "construction," the key inquiry here is whether they are being "carried out with respect to a military installation." "Interpretation of a statute must begin with the statute's language." *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257 (9th Cir. 1994) (citations omitted). "[S]tatutory language must always be read in its proper context," and courts must look to the "design of the statute as a whole and to its object and policy," *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1026 (9th Cir. 2013) (quotations omitted), for "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019).

The Federal Defendants make two separate arguments that border wall construction satisfies the requirements of Section 2808 based on one key fact: the land on which the projects would be built has been brought under military jurisdiction and assigned to a military installation—Fort Bliss in El Paso, Texas. First, the Federal Defendants argue that the individual border wall construction projects are actually one and the same as Fort Bliss because according to the Assistant Secretary of the Army, Alex A. Beehler, when a "site is assigned to a military installation for real property accountability purposes," it "is considered to be part of that installation, even if remotely located from the Army Garrison [of that installation]." Alternatively, they argue that because the projects have been brought under military jurisdiction, the construction projects are "other activity under the jurisdiction of the Secretary of a military department." 10 U.S.C. § 2801.

We must, then, determine (1) whether administratively assigning the projects to Fort Bliss renders them one and the same as Fort Bliss for purposes of the statute, and if not, (2) whether bringing land under military jurisdiction for real property accountability purposes renders the border wall "other activity under the jurisdiction of the Secretary of a military department."

We hold that, for purposes of the emergency construction authority provided by Section 2808, the border wall construction projects are distinct from Fort Bliss itself, and that the border wall construction projects at

issue here do not satisfy the meaning of "other activity."[10]

1

Although the border wall construction projects may be considered part of Fort Bliss for purposes of real property accounting, we find that a number of reasons support that the projects should not be considered a part of Fort Bliss for purposes of Section 2808.

First, we state the most obvious reason why the border wall construction projects need not be considered a part of Fort Bliss in this context. To begin, the projects are not physically connected to Fort Bliss—on their face, they are not "part" of that military installation. In fact, most projects are hundreds of miles away from Fort Bliss.

Moreover, the projects are not functionally part of Fort Bliss. The Federal Defendants cite no operational ties between the projects and any of the military activities conducted at Fort Bliss. This is contrary to other examples of sites which are geographically separate from the military installation to which they have been assigned. For example, the Federal Defendants highlight that the Green River Test Complex site in Utah is considered part of the White Sands Missile Range in New Mexico, even though the two are in different states and located hundreds of miles apart. But these sites

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[10] The Plaintiffs do not challenge that the projects on the Goldwater Range satisfy the definition of "military construction," and we do not consider this issue; therefore, our holding is limited only to the remaining nine construction projects. Our determination that the funding of the projects is not necessary to support the use of the armed forces is sufficient to hold all eleven projects unlawful.

share a close functional connection. Throughout the 1960s, the military tested Athena missiles by launching them from the Green River Test Complex to detonate on the White Sands Missile Range. No such functional nexus exists, or has even been alleged, here. Although a functional nexus may not be required for administrative assignment, it matters for purposes of Section 2808.

Additionally, the Federal Defendants cite no other purpose underlying the administrative assignment, besides pure administrative convenience, that compels the conclusion that the projects should be considered part of Fort Bliss for purposes of Section 2808. The Federal Defendants state that the projects were assigned to Fort Bliss "because it is the largest, most capable active Army installation in the vicinity of the southern border"; it "has a sizable existing installation management office"; it has "experience working with the U.S. Army Corps of Engineers on military construction projects"; "it is more efficient for command of all the real property associated with the projects undertaken pursuant to § 2808 to be vested in one Army installation"; and it has an "existing support relationship with the U.S. Border Patrol." While these are, of course, practical reasons for administratively assigning the land to Fort Bliss, they convey no underlying purpose more significant than administrative convenience. They signify no reason why the border wall construction projects must be considered part of Fort Bliss for any reason beyond administrative assignment.

Further, reading the words of Section 2808 "in their context and with a view to their place in the overall statutory scheme," it would make little sense to equate the

requirements of Section 2808 with the administrative assignment process in order to conclude that the projects are a part of Fort Bliss. *Home Depot U.S.A., Inc.*, 139 S. Ct. at 1748. The text of Section 2808 supplies boundaries for the authority provided—such as, that construction be conducted with respect to a military installation, meaning a base, camp, station, yard, center, or other activity under military jurisdiction. By contrast, there appear to be no boundaries whatsoever restricting when the government can administratively assign a geographically distant site to a military installation. The Federal Defendants even specify that "[t]here is no legal, regulatory, or policy requirement [that] geographically separate sites . . . be assigned to a 'nearby' military installation," nor a requirement that the "sites or lands that comprise a given military installation . . . be located in the same State or within a certain distance of other sites associated with the military installation." And a site may exist as "land only, where there are no facilities present," "facility or facilities only, where the underlying land is neither owned nor controlled by the government," or "land and facilities thereon." To construe the limited text of Section 2808 to incorporate a wholly unlimited process would be contrary to its structure and context.

Moreover, to construe the statute so broadly would also be contrary to the purpose of the statutory scheme of which Section 2808 is a part—the NEA. *See Brooks v. Donovan*, 699 F.2d 1010, 1011 (9th Cir. 1983) (rejecting a literal interpretation that "would thwart the purpose of the over-all statutory scheme or lead to an absurd result" (quotations and citations omitted)); *see generally NEA Source Book* at 50. Because "[t]he National Emergencies Act is not intended to enlarge or add

to Executive power," it would make little sense to interpret the constrained definition of "military installation" supplied by Section 2808 to encompass a process with no limitations whatsoever. *NEA Source Book* at 292. This would undoubtedly have the effect of enlarging the President's emergency powers because it would allow a less stringent Executive Branch administrative process to circumvent the limits of the statutory authority. This would allow the Executive Branch to undertake any construction project it wants by merely assigning any piece of land to a military installation, thus permitting more construction than authorized by the statute and granting the President more emergency authority.

2

The Federal Defendants' second argument fails for similar reasons. To hold that the border wall construction projects constitute "other activity" under military jurisdiction would transform the definition of "military installation" to include not just "other activity," but "any activity" under military jurisdiction, contradicting the text of the statute. The terms "base, camp, post, station, yard, [or] center" supply meaning and provide boundaries to the term "other activity," and they are not mere surplusage. *See Yates v. United States*, 135 S. Ct. 1074, 1087 (2015) ("Had Congress intended 'tangible object' in § 1519 to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to 'record' or 'document.' The Government's unbounded reading of 'tangible object' would render those words misleading surplusage."). The Federal Defendants do not explain how the border wall construction projects are similar to bases, camps, posts, stations,

yards, or centers, and we find that they are not. The failure to illustrate a connection between the border wall projects and the other statutory examples is sufficient to reject this argument because we avoid construing statutes to allow one general word to render specific words meaningless. *See CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 295 (2011) ("We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless.").

The Federal Defendants cite *United States v. Apel*, 571 U.S. 359, 368 (2014) to support their position, but this case has limited applicability here, and does not support that "other activities" under military jurisdiction means "any activity" under military jurisdiction. There, the Supreme Court analyzed a different statute, which imposed a criminal fine on anyone who reentered a "military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation" after being removed from such a location. *See* 18 U.S.C. § 1382. The Federal Defendants argue that *Apel* supports their position because in interpreting the definition of "military installation," the Court explained that "'military duty' and 'military protection' are synonymous with the exercise of *military jurisdiction*," and it cited 10 U.S.C. § 2801 as an example of a statute defining "military installation" as a "base . . . or other activity under the jurisdiction of the Secretary of a military department." *Apel*, 571 U.S. at 368. But this point does not go to the key issue here—Plaintiffs do not contest that the sites are under military jurisdiction, but rather, whether they fall within the parameters of "other activity" under military jurisdiction, as limited by the other examples provided. In any event, *Apel* did not analyze Section 2801 itself. The context of a criminal trespass statute, is, of course,

different than the context of emergency construction authority, and because "[s]tatutory language must always be read in its proper context," it is not clear why *Apel*'s definition should apply here. *UMG Recordings, Inc.*, 718 F.3d at 1026.

If anything, *Apel* provides support for our reasoning with respect to the Federal Defendants' first argument. *Apel* undermines the notion that the use, possession, or control of land—such as through the process of administrative assignment—is central to the inquiry of what constitutes a military installation. *Apel*, 571 U.S. at 368. Instead, *Apel* emphasizes that in determining what constitutes a military installation, an area's connection to military functions plays a significant role. *Apel* cites *United States v. Phisterer*, 94 U.S. 219, 222 (1877), explaining that "there we interpreted 'military station' to mean 'a place where troops are assembled, where military stores, animate or inanimate, are kept or distributed, where military duty is performed or military protection afforded,—where something, in short, more or less closely connected with arms or war is kept or is to be done,'" which it reasoned, if anything, "confirms our conclusion that § 1382 does not require exclusive use, possession, or control." *Id.* (internal quotations and citations omitted). Thus, *Apel* provides little assistance to the Federal Defendants, and if anything, bolsters the Plaintiffs' interpretation of the statute.

Second, as the district court explained, the Federal Defendants' interpretation of "other activities" would grant them "essentially boundless authority to reallocate military construction funds to build anything they want, anywhere they want, provided they first obtain ju-

risdiction over the land where the construction will occur." These arguments are closely related to those outlined in the previous section, and as explained there, no restrictions constrain when land can be brought under military jurisdiction. *See* Section V.B.1. Although the Federal Defendants assert that "the government does not contend that the entire 'Southern border' is a military installation," the Federal Defendants cite no limit to their interpretation that would prevent them from making it one. This means that, if we were to adopt their interpretation of "other activity," and, as the district court explained, "provided [they] complete the right paperwork," the Federal Defendants would be free to divert billions of dollars from projects funded by congressional appropriations to projects of their own choosing. As demonstrated by this case, this would allow the Federal Defendants to redirect funds at will without regard for the normal appropriations process. Ordinarily, we reject interpretations with "unnecessarily expansive result[s], absent more explicit guidance or indication from Congress," and instead, adopt more "rational" or "natural" readings. *Ariz. State Bd. for Charter Sch. v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1008-09 (9th Cir. 2006). For this reason, where there is no guidance or indication from Congress that such an expansive interpretation is favored, and particularly where doing so would produce a result contrary to the express will of Congress, it is untenable for us to adopt such an interpretation.

Finally, to interpret "other activities" so broadly would run afoul of the constitutional separation of powers, which provide Congress with exclusive control over appropriations, and of the NEA, which was passed to

"[e]nsure that the powers now in the hands of the Executive will be utilized only in time of genuine emergency and then only under safeguards providing for Congressional review." *NEA Source Book* at 50. Particularly in the context of this case, where Congress declined to fund the very projects at issue and attempted to terminate the declaration of a national emergency (twice), we cannot interpret the statute to give the Executive Branch unfettered discretion to divert funds to any land it deems under military jurisdiction.[11] "Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress," and "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." *Youngstown*, 343 U.S. at 635, 637 (Jackson, J., concurring). Here, though imperfectly, Congress has made clear that it does not support extensive border wall construction. The Federal Defendants' actions to the contrary are incompatible with this position, and therefore, the existing statutory authority provided by Section 2808 must be construed narrowly.[12] We cannot, and do not, accept the Federal Defendants' boundless interpretation of what constitutes a "military installation."

Therefore, we conclude that Section 2808 does not authorize the eleven border wall construction projects.

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[11] We do not express a view with respect to whether this is a "real" national emergency, but instead, we merely construe the statute narrowly in light of Congress's determinations on the matter.

[12] *See* Kristen Eichensehr, *The* Youngstown Canon: *Vetoed Bills and the Separation of Powers*, 70 DUKE L.J. __ (forthcoming 2021), available at SSRN: https://ssrn.com/abstract=3680748.

VI

The district court held that Sierra Club was entitled to a permanent injunction enjoining the Federal Defendants "from using military construction funds appropriated for other purposes to build a border wall in the" project areas challenged in this appeal. We review a district court's grant of injunctive relief for abuse of discretion. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

A permanent injunction is appropriate when: (1) a plaintiff will "suffer[] an irreparable injury" absent injunction, (2) available remedies at law are "inadequate,"[13] (3) the "balance of hardships" between the parties supports an equitable remedy, and (4) the public interest is "not disserved." *Id.* When the government is party to a case, the balance of equities and public interest factors merge. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

The district court properly considered each of these elements. It held that Sierra Club suffered irreparable injury because the Federal Defendants' conduct "will impede [Sierra Club's members'] ability to enjoy, work, and [re]create in the wilderness areas they have used for years along the U.S.-Mexico border," and that the organizations themselves had suffered irreparable harm as a result of the Federal Defendants' conduct, because they "have spent resources creating new education, outreach, and monitoring programs related to the construction projects, rather than on other activities related to their respective missions." In part, because

[13] The parties do not contest this element, and we do not address it here.

the Federal Defendants "have not pointed to any factual developments that were not before Congress and that may have altered its judgment" to appropriate border wall funding, the district court took the position that the public interest was best served by "ensuring that the statutes enacted by . . . representatives are not imperiled by executive fiat," "by respecting the Constitution's assignment of the power of the purse to Congress," and "by deferring to Congress's understanding of the public interest as reflected in its repeated denial of more funding for border barrier construction." The district court's analysis is reasonable and does not indicate that it abused its discretion.

The Federal Defendants' arguments to the contrary are unavailing. They contend that the district court abused its discretion because, in staying the permanent injunction with respect to the Section 8005 case, the Supreme Court "necessarily determined that the harm to the federal government from an injunction prohibiting border-barrier construction outweighs those interests." The Federal Defendants do not expand upon this point, and the Supreme Court's stay order does not address the appropriateness of injunctive relief. If anything, the order alludes only to the merits of Sierra Club's cause of action arguments; it contains nowhere a suggestion that the district court abused its discretion in balancing the equities and weighing the public interest. *See Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.) (stating only that "[a]mong the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005."). We cannot read into the order more than its text supports.

The Federal Defendants, as they did in the prior appeal, also argue that *Winter v. NRDC, Inc.*, 555 U.S. 7, 32 (2008), requires that the balance of the equities favors the government when the public interest in national defense is weighed against a plaintiff's ecological, scientific, and recreational interests. Their argument is not compelling here for the same reasons it was not there. *See Sierra Club v. Trump*, 963 F.3d 874, 895-97 (9th Cir. 2020), *petition for cert. filed*, (U.S. Aug. 7, 2020) (No. 20-138). Even if the government has a "compelling interest[] in safety and in the integrity of [its] borders," *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 (1989), "it cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (citing *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983) ("[T]he INS cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations.")). The fact an important interest is at stake does not permit the government to use unlawful means to further that end. This is evidenced by the *Winter* injunction which enjoined conduct otherwise permitted by law. *Winter*, 555 U.S. at 18-19.

Winter is further distinguishable because the public interest there balanced "mission-critical," *id.* at 14, technology used for the Pacific Fleet's "top warfighting priority," *id.* at 12, against possible "harm to an unknown number of marine mammals," *id.* at 26. By contrast, the Federal Defendants here have cited no such critical interest at stake, and the permanent environmental and economic harms to the Plaintiffs are far more serious and far less speculative than those alleged in *Winter*.

Finally, the Federal Defendants challenge the district court's reasoning that "by enacting the Consolidated Appropriations Act, *Congress* had already balanced the equities in plaintiffs' favor" because "the CAA did *not* prohibit DoD from relying on separate and preexisting statutory authorities to spend its own previously appropriated funds on border barriers." This argument is unavailing because the budgetary standoff, government shutdown, and the resulting 2019 CAA clearly indicate that Congress determined that the interests of the entire country did not favor funding more expansive border wall construction. While this determination might be broader than the balance of equities between the parties here, it certainly incorporates them, and the district court did not abuse its discretion by giving weight to Congress's judgment in its own analysis.

We therefore affirm the permanent injunction granted to Sierra Club. Given that we have resolved the merits of this appeal, the district court's stay pending appeal is terminated, and we dismiss Sierra Club's emergency motion to lift the stay pending appeal as moot.

VII

The district court denied the States' request for a separate permanent injunction enjoining the Federal Defendants' use of Section 2808 for border wall construction as duplicative and moot. This Court reviews a district court's denial of injunctive relief for an abuse of discretion. *eBay Inc.*, 547 U.S. at 391. "An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Rabkin v. Or. Health Sci. Univ.*, 350 F.3d 967, 977 (9th Cir. 2003) (citations and quotations omitted).

The district court did not abuse its discretion. It held that "[b]ecause . . . the Court finds that Sierra Club Plaintiffs have established that a permanent injunction is warranted as to all eleven proposed projects, the Court denies State Plaintiffs' duplicative request for a permanent injunction as moot." Injunctive relief is an equitable remedy, and "an award of an injunction is something that a plaintiff is generally not entitled to as a matter of right." 42 Am. Jur. 2d *Injunctions* § 14 (2020). "Even if facts justifying an injunction . . . have been proven, a court must still exercise its discretion to decide whether to grant an injunction." *Id.* Here the district court did not abuse this discretion because it granted Sierra Club a permanent injunction enjoining the construction of the same border wall projects challenged by the States. Although it subsequently stayed that injunction, it did so because of a Supreme Court stay imposed in a prior appeal which was based on, conceivably, a similar legal issue. Therefore, though we might weigh the considerations present in this case differently, we hold that the district court did not abuse its discretion in denying the States injunctive relief.

VIII

Although we recognize that in times of national emergency we generally owe great deference to the decisions of the Executive, the particular circumstances of this case require us to take seriously the limitations of the text of Section 2808 and to hold the Executive to them. The "power to legislate for emergencies belongs in the hands of Congress." *Youngstown*, 343 U.S. at 654 (Jackson, J., concurring). We cannot "keep power in the hands of Congress if it is not wise and timely in meeting

its problems," *id.*, but where, as here, Congress has clung to this power with both hands—by withholding funding for border wall construction at great effort and cost and by attempting to terminate the existence of a national emergency on the southern border on two separate occasions, with a majority vote by both houses—we can neither pry it from Congress's grasp. For all "its defects, delays and inconveniences," it remains critical in all areas, but particularly with respect to the emergency powers, that "the Executive be under the law, and that the law be made by parliamentary deliberations." *Id.* at 655. We reject Justice Jackson's contention that "[s]uch institutions may be destined to pass away," *id.*, particularly given the actions of Congress as relate to this case. We agree, however, that it must always be "the duty of the Court to be last, not first, to give them up." *Id.*

We affirm the judgment of the district court. We hold that the States and Sierra Club both have Article III standing and a cause of action to challenge the Federal Defendants' border wall construction projects, that Section 2808 did not authorize the challenged construction, and that the district court did not abuse its discretion in either granting a permanent injunction to Sierra Club or in denying a separate permanent injunction to the States.[14]

AFFIRMED.

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[14] Because we conclude that the projects are unlawful because they are not authorized by Section 2808, we do not reach Plaintiffs' arguments with respect to Section 739 of the 2019 CAA.

COLLINS, Circuit Judge, dissenting:

We once again consider challenges to the Department of Defense's construction of border barriers and related infrastructure along our southern border. *See Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020); *California v. Trump*, 963 F.3d 926 (9th Cir. 2020). In this second round of appeals from the same underlying lawsuits, the Government appeals the district court's grant of declaratory and permanent injunctive relief barring the use of "military construction funds appropriated for other purposes to build a border wall" in 11 specified project areas. Two distinct groups of litigants constitute the Plaintiffs in these appeals (collectively, "Plaintiffs"): (1) the Sierra Club and the Southern Border Communities Coalition ("SBCC") (collectively, the "Organizations") and (2) nine states led by California and New Mexico (collectively, the "States").[1] In the partial judgments under review, the district court granted summary judgment and declaratory relief to the Plaintiffs, concluding that the emergency military construction authority granted by 10 U.S.C. § 2808 did not authorize the challenged use of funds. However, the district court granted permanent injunctive relief only to the Organizations and denied the States' request for such relief.

The majority concludes that both the Organizations and the States have Article III standing; that the States have a cause of action to challenge the construction projects under the Administrative Procedure Act ("APA") and that the Organizations have a cause of action under

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[1] The nine States are California, New Mexico, Colorado, Hawaii, Maryland, New York, Oregon, Virginia, and Wisconsin. California and New Mexico had likewise taken the lead in the prior appeals.

the Appropriations Clause of the Constitution; that the construction projects are unlawful; and that the district court properly determined that the Organizations are entitled to declaratory and injunctive relief while the States are entitled to only declaratory relief. I agree that at least the Sierra Club, California, and New Mexico have established Article III standing, and I conclude that they have a cause of action to challenge the construction projects under the APA. But in my view the construction projects are lawful. Accordingly, I would reverse the district court's partial judgments and remand for entry of partial summary judgment in favor of the Defendants. I respectfully dissent.

I

Although these appeals arise from the same underlying lawsuits as the prior appeals, the particular dispute at issue here involves a different statutory framework and a distinct procedural history. Before turning to the merits, I will briefly review both that framework and that history.

A

Under the National Emergencies Act, 50 U.S.C. § 1601 *et seq*., the President may formally declare a "national emergency," thereby triggering the potential exercise of emergency powers set forth in various other statutes. *See* 50 U.S.C. § 1621(a). Among those emergency powers is the authority to "undertake military construction projects," but that authority may be invoked only if the President specifically declares a national emergency "that requires use of the armed forces." 10 U.S.C. § 2808(a). On February 15, 2019, the President did just that, "declar[ing] that a national emergency exists at the

southern border of the United States" and "that this emergency requires use of the Armed Forces." *See* Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 20, 2019). As the President's Proclamation explained, the Department of Defense ("DoD") was already providing "support and resources" to the Department of Homeland Security ("DHS") "at the southern border," and "additional support," including military personnel and logistical support, was necessary "to address the crisis." *Id.*

In light of this declaration, the Secretary of Defense was authorized to "undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). On September 3, 2019, the Secretary of Defense issued a memorandum expressly invoking that authority in deciding to undertake 11 specified "border barrier military construction projects." "Based on analysis and advice from the Chairman of the Joint Chiefs of Staff and input from the Commander, U.S. Army Corps of Engineers, the Department of Homeland Security (DHS), and the Department of the Interior," the Secretary determined that these "11 military construction projects along the international border with Mexico, with an estimated total cost of $3.6 billion, are necessary to support the use of the armed forces in connection with the national emergency." The Secretary stated that, because "[t]hese projects will deter illegal entry, increase the vanishing time of those illegally crossing the border, and channel migrants to ports of entry," the projects would support the use of the armed forces by "reduc[ing] the demand for DoD personnel and assets at the locations where the barriers are constructed and allow[ing] the redeployment of DoD personnel and assets to other high-traffic areas on the border without

barriers." "In this respect," the Secretary explained, "the contemplated construction projects are force multipliers."

Section 2808 further provides that the Secretary may undertake emergency military construction projects "without regard to any other provision of law." 10 U.S.C. § 2808(a). Accordingly, the Secretary's memorandum included the additional directive that the Acting Secretary of the Army was to "expeditiously" undertake the 11 projects "without regard to any other provision of law that could impede such expeditious construction in response to the national emergency," including "the National Environmental Policy Act, the Endangered Species Act, . . . [and] the Clean Water Act."

The 11 projects authorized by the Secretary contemplated a total of 175 miles of border-barrier construction. They include two projects on the Barry M. Goldwater Range (a military installation in Arizona), seven projects on federal public-domain land, and two projects on non-public land that would need to be acquired through either purchase or condemnation. Because the latter nine projects, unlike the first two, were to be on land that was not then within any military installation, the Secretary's memorandum ordered the Department of the Army to "add such land to the Department of the Army's real property inventory, either as a new installation or as part of an existing military installation." The Army subsequently designated the land for the latter nine projects as under the jurisdiction of the U.S. Army Garrison Fort Bliss, which is in Texas.

Section 2808(a) further provides that emergency military construction "may be undertaken only within the total amount of funds that have been appropriated for

military construction, including funds appropriated for family housing, that have not been obligated." 10 U.S.C. § 2808(a). Moreover, when the emergency military construction authority is invoked, the Secretary must notify the appropriate congressional committees of "the decision and of the estimated cost of the construction projects." *Id.* § 2808(b). In providing that notice, the Secretary stated that the "estimated total cost" of the 11 projects was $3.6 billion. The Secretary further stated that the necessary funds would be obtained by deferring "military construction projects that are not scheduled for award until fiscal year 2020 or later," and that the first $1.8 billion of funding would come from the deferral of certain projects "outside of the United States." Only after that would funds be obtained by deferring other construction projects within the United States. In an additional memorandum to other DoD officials, the Secretary identified the 128 specific projects that were slated to be deferred. Forty-three of those projects were located in U.S. States, 21 in U.S. territories, and 64 were overseas. Of the 43 deferred projects in U.S. States, 19 of them were located in the nine States that are parties to this appeal.[2]

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[2] On April 29, 2020, Defendants "provided[d] notice [to the district court] of recent changes to the funding sources for the eleven border barrier military construction projects the Secretary of Defense decided to undertake on September 3, 2019, pursuant to 10 U.S.C. § 2808." Specifically, on April 27, 2020, the Secretary of Defense authorized adjustments to the funding of the projects. Twenty-two projects located in U.S. States were removed from the deferred projects list, and substitute funds were to be drawn from other sources. In light of these funding changes, DoD is no longer deferring projects in Colorado, Hawaii, and New York.

B

After the President's emergency declaration, but before DoD formally invoked its emergency military construction authority, the Organizations filed an action in the district court against the Acting Defense Secretary, DoD, and a variety of other federal officers and agencies. In their March 18, 2019 First Amended Complaint, they sought to challenge, *inter alia*, any projects undertaken by the Secretary under § 2808. California and New Mexico, joined by several other States, filed a similar action, and their March 13, 2019 First Amended Complaint also sought to challenge any such projects. The Plaintiffs' respective complaints also separately challenged certain *other* border-barrier projects undertaken with funds derived from DoD's transfers of funds pursuant to §§ 8005 and 9002 of the Department of Defense Appropriations Act, 2019 ("DoD Appropriations Act"), Pub. L. No. 115-245, Div. A, 132 Stat. 2981, 2999, 3042 (2018). The litigation of those distinct challenges proceeded (resulting in the opinions we issued in the prior appeals), but the parties agreed to stay the summary judgment briefing schedule as to any claims involving § 2808 until the Secretary of Defense made a final decision as to the use of § 2808 to undertake military construction projects.

After the Secretary of Defense reached that final decision on September 3, 2019, as explained above, the parties filed cross-motions for summary judgment. On October 11, 2019, the Organizations moved for partial summary judgment on the ground that DoD's invocation of § 2808 was unlawful, and the Organizations requested declaratory relief and a permanent injunction against

the use of § 2808 to carry out the 11 construction projects. The States filed a comparable summary judgment motion that same day. Although that motion sought injunctive and declaratory relief against any deferral of funding for projects in the nine States, it only sought direct relief against the border-wall construction itself with respect to the subset of seven construction projects that were to be undertaken in California and New Mexico. Defendants filed cross-motions for summary judgment on the legality of DoD's construction efforts under § 2808 with respect to the corresponding projects at issue in each case.

On December 11, 2019, the district court granted partial summary judgment and declaratory relief to both the Organizations and the States, concluding that DoD's construction efforts under § 2808 were unlawful. The court granted permanent injunctive relief to the Organizations against all 11 projects, and in light of this grant of injunctive relief, it denied the States' "duplicative request for a permanent injunction as moot." The district court denied Defendants' cross-motions for summary judgment in both cases. The district court stated, however, that it construed "the Supreme Court's stay of this Court's prior injunction order"—which was the subject of the prior appeals—as "reflect[ing] the conclusion of a majority of that Court that the challenged construction should be permitted to proceed pending resolution of the merits," and the district court therefore *sua sponte* stayed the permanent injunction pending appeal pursuant to Federal Rule of Civil Procedure 62(c). Invoking its authority under Federal Rule of Civil Procedure 54(b), the district court entered partial judgments in favor of both the Organizations and the States.

II

The Government has not contested the Article III standing of the Plaintiffs in its merits briefs on appeal, but as the majority notes, "we have 'an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties.'" *See* Maj. Opin. at 14 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)). As "an indispensable part of the plaintiff's case, each element" of Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife* (*Lujan v. Defenders*), 504 U.S. 555, 561 (1992). Thus, although well-pleaded allegations are enough at the motion-to-dismiss stage, they are insufficient to establish standing at the summary-judgment stage. *Id.* "In response to a summary judgment motion, . . . the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Id.* (simplified). In reviewing standing *sua sponte* in the context of cross-motions for summary judgment, it is appropriate to apply the more lenient standard that takes the plaintiffs' evidence as true and then asks whether a reasonable trier of fact could find Article III standing. *Lujan v. Defenders*, 504 U.S. at 563 (applying this standard in evaluating whether Government's cross-motion for summary judgment should have been granted); *see also California v. Trump*, 963 F.3d at 954 (Collins, J., dissenting).

In their briefs below concerning the parties' cross-motions, the Plaintiffs asserted a variety of theories as to why they have standing. The Sierra Club and SBCC each asserted that Defendants' allegedly unlawful conduct would cause harm to their members' recreational, aesthetic, and environmental interests. California and New Mexico asserted that Defendants' allegedly unlawful construction activities within their borders would cause both harm to the States' sovereign interests in enforcing their environmental laws as well as actual environmental harm to animals and plants within the States. And all the States, except California, asserted that Defendants' deferral of funding for military construction projects located in those States would cause financial harm to the States in the form of a loss of economic activity and tax revenues. Accepting the Plaintiffs' evidence as true, and drawing all reasonable inferences in their favor, a reasonable trier of fact could conclude that at least the Sierra Club has standing in the Organizations' suit and that at least California and New Mexico have standing in the States' suit.[3]

A

The Sierra Club has presented sufficient evidence to demonstrate that it has associational standing under *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333 (1977). Under the *Hunt* test, an association has standing if "(a) its members would otherwise have

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[3] None of the Plaintiffs addressed Article III standing when they moved for partial summary judgment, nor did the district court address Article III standing in its ruling. However, Plaintiffs' evidentiary showing of injury in support of a permanent injunction provides a sufficient basis for evaluating their Article III standing. *See California v. Trump*, 963 F.3d at 954 n.4 (Collins, J., dissenting).

standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343. The Sierra Club has presented sufficient evidence as to each of these three requirements.

To establish that its members would suffer irreparable harm absent a permanent injunction, the Sierra Club presented declarations from members who regularly visit each of the 11 respective project areas. These members described how the construction and the resulting border barriers would interfere with their enjoyment of the surrounding landscape and would impede their ability to camp, to hike, to hunt, to monitor wildlife, and to participate in other related activities near the project sites. These injuries to the members' recreational, aesthetic, and environmental interests are sufficient to constitute an injury in fact for Article III purposes. *See Lujan v. Defenders*, 504 U.S. at 562-63 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."). Moreover, these injuries are fairly traceable to the construction, and an injunction blocking military construction funds appropriated for other purposes from being used to build border barriers in the 11 project areas would redress those injuries by effectively stopping the construction. *See id.* at 560-61. This evidence is therefore sufficient to establish that these members would have Article III standing to sue in their own right.

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

Because the Sierra Club satisfies the applicable standing requirements as to all of the challenged projects in its partial summary judgment motion, we may proceed to the merits of the Organizations' motion without having to address the standing of SBCC. *See Secretary of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984) ("Since the State of California clearly does have standing, we need not address the standing of the other [plaintiffs], whose position here is identical to the State's."). And given my view that those legal challenges fail, I perceive no obstacle to entering judgment against both the Sierra Club *and* SBCC without determining whether SBCC has standing. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98-100 (1998).

B

In my view, California and New Mexico have presented sufficient evidence to demonstrate that they have standing based on their inability to enforce their environmental laws.[4]

The Secretary of Defense has directed DoD to undertake the 11 border barrier projects "without regard to

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[4] I express no view as to whether the majority is correct in concluding that California and New Mexico have standing based on the theory that the construction will cause actual environmental harm to species within those States. *See* Maj. Opin. at 15-21.

any other provision of law that could impede such expeditious construction in response to the national emergency," and "[s]uch laws include, but are not limited to, the National Environmental Policy Act, the Endangered Species Act, . . . [and] the Clean Water Act." Because the Clean Water Act would otherwise require compliance with certain state water pollution requirements, *see*, *e.g.*, 33 U.S.C. §§ 1323(a), 1341(a), setting aside the Clean Water Act prevents California from enforcing state water quality standards. Similarly, because the Clean Air Act would otherwise require compliance with certain state air pollution requirements, *see*, *e.g.*, 42 U.S.C. §§ 7418(a), 7506(c)(1), setting aside the Clean Air Act likewise prevents California and New Mexico from enforcing certain state air quality standards. Because § 2808 *itself* gives the Secretary the simultaneous authority to undertake emergency military construction projects *and* to do so "without regard to any other provision of law," this asserted injury to California and New Mexico's sovereign interests is fairly traceable to DoD's invocation of § 2808, and an injunction aimed at the use of military construction funds appropriated for other purposes to build border barriers under § 2808 in the 11 project areas would redress this injury. *Cf. California v. Trump*, 963 F.3d at 960 (Collins, J., dissenting) (where preemption of state environmental laws was due to a *different* statute than the one authorizing the transfer of appropriated funds, an injunction aimed at the transfers would not undo the preemption of state law and would not redress the associated injury to the States' sovereign interests).

Because California and New Mexico satisfy the applicable standing requirements as to all seven of the chal-

lenged projects in their partial summary judgment motion, we are free to proceed to the merits of the States' motion without having to address the standing of the other States. *See Secretary of the Interior v. California*, 464 U.S. at 319 n.3. And given my view that those legal challenges fail, I perceive no obstacle to entering judgment against California, New Mexico, *and* the remaining States without determining whether the remaining States have standing. *See Steel Co.*, 523 U.S. at 98-100.[5]

III

Our next task is to determine whether the Plaintiffs have asserted a viable cause of action that properly brings the lawfulness of the construction projects before us. *See Air Courier Conf. v. American Postal Workers Union AFL-CIO*, 498 U.S. 517, 530-31 (1991). The majority holds that the States have a valid cause of action under the APA to challenge DoD's construction efforts and that the Organizations have a constitutional cause of action under the Appropriations Clause. *See* Maj. Opin. at 41, 46-47. Because I conclude that the Organizations and States have a cause of action under the APA to challenge the various projects they challenge here, there is no need in this case to address whether any of

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[5] I therefore also have no occasion to address whether the majority is correct in concluding that the remaining States may assert Article III standing based on the theory that, due to the deferral of particular military construction projects within their borders, those States have assertedly suffered a loss of economic activity and tax revenues. *See* Maj. Opin. at 27-32.

them would also have a cause of action under the Constitution or under an equitable "ultra vires" theory.[6] So long as they have at least one viable cause of action, the merits of whether DoD's construction projects are lawful are properly before us. *See Air Courier Conf.*, 498 U.S. at 530-31. And because the success of these other asserted causes of action ultimately turns on whether DoD's construction efforts are lawful, and because I also conclude that those efforts *are* lawful, any consideration of whether these other causes of action actually exist would make no difference here.

In authorizing suit by any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. § 702, the APA incorporates the familiar zone-of-interests test, which reflects a background principle of law that always "applies unless it is expressly negated," *Bennett v. Spear*, 520 U.S. 154, 163 (1997); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014).[7] That test

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[6] Although the Organizations invoke the APA only as a fallback to their preferred non-statutory claims, I think it is appropriate to first consider whether they have a *statutory* cause of action under the APA. *Cf. Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326-27 (D.C. Cir. 1996) (suggesting that, if a plaintiff relies on both the APA and non-statutory-review claims, the APA claim should be considered first); *see also California v. Trump*, 963 F.3d at 956 (Collins, J., dissenting).

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

requires a plaintiff to "establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. NWF*, 497 U.S. at 883 (quoting *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396-97 (1987)). This test "is not meant to be especially demanding." *Clarke*, 479 U.S. at 399. Because the APA was intended to confer "generous review" of agency action, the zone-of-interests test is more flexibly applied under that statute than elsewhere, and it requires only a showing that the plaintiff is "*arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 156 (1970) (emphasis added); *see also Bennett*, 520 U.S. at 163 ("what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the generous review provisions of the APA may not do so for other purposes") (simplified). Because an APA plaintiff need only show that its interests are "arguably" within the relevant zone of interests, "the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). In my view, the Plaintiffs have made a sufficient showing to satisfy this generous zone-of-interests test.

In applying this test, we must first identify the "statutory provision whose violation forms the legal basis for [the] complaint" or the "gravamen of the complaint." *Lujan v. NWF*, 497 U.S. at 883, 886; *see also Air Courier Conf.*, 498 U.S. at 529. That question is easy here.

The Organizations' complaint alleges that "[t]he President's Proclamation does not meet the conditions required for invocation of 10 U.S.C. § 2808 because it does not identify an emergency requiring use of the armed forces"; that "[t]he President's Proclamation additionally does not meet the conditions required for invocation of 10 U.S.C. § 2808 because construction of a border wall is not a military construction project supporting the armed forces"; and that therefore, "Defendants are acting ultra vires in seeking to divert funding or resources pursuant to . . . 10 U.S.C. § 2808 for failure to meet the criteria required under th[at] statute[]." The States' complaint alleges that "Defendants have acted ultra vires in seeking to divert funding pursuant to 10 U.S.C. section 2808 for failure to meet the criteria required under that statute" and that "construction of the border wall: (a) is not a 'military construction project'; (b) does not 'require[] use of the armed forces'; and (c) is not 'necessary to support such use of the armed forces.'"[8] Section 2808 is plainly the "gravamen of the complaint," and it therefore defines the applicable zone of interests. *Lujan v. NWF*, 497 U.S. at 886.

Although both the Organizations and the States also invoke the Appropriations Clause and the constitutional separation of powers in contending that Defendants' actions are unlawful, any such constitutional violations here can be said to have occurred *only if* the construction efforts violated the limitations set forth in § 2808:

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[8] While their complaints mention the President's proclamation, neither the Organizations nor the States seek to overturn the proclamation or assess its validity. They only challenge whether the declared national emergency satisfies the qualifications in § 2808.

if Congress authorized DoD to undertake the construction projects, and to fund those projects using unobligated funds that were appropriated for other purposes, then that money has been spent "in Consequence of Appropriations made by Law," U.S. CONST. art. I, § 9, cl. 7, and the Executive has not otherwise transgressed the separation of powers.[9] *All* of Plaintiffs' theories for challenging the construction projects—whether styled as constitutional claims or as statutory claims—thus rise or fall based on whether DoD has transgressed the limitations set forth in § 2808. As a result, § 2808 is obviously the "statute whose violation is the gravamen of the complaint." *Lujan v. NWF*, 497 U.S. at 886. To maintain a claim under the APA, therefore, the Plaintiffs must establish that they are within the zone of interests of § 2808. On this point, the majority and I are in apparent agreement. *See* Maj. Opin. at 43.[10]

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[9] Plaintiffs also contend that § 2808 *itself* violates the Appropriations Clause and the constitutional separation of powers, but for reasons that I explained in rejecting the analogous argument made in the prior appeals, any such contention is wholly frivolous. *See California v. Trump*, 963 F.3d at 963 (Collins, J., dissenting).

[10] Plaintiffs also assert that DoD's ability to spend the funds at issue under § 2808 is displaced by § 739 of Division D of the Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13, 197 (2019). I do not separately consider the zone-of-interests test with respect to § 739 because (1) I see no reason why a plaintiff within the zone of interests of § 2808 would not be an appropriate plaintiff to make that additional argument against the lawfulness of DoD's invocation of § 2808, and (2) for reasons I shall explain, I agree that the Sierra Club, California, and New Mexico satisfy the zone-of-interests test with respect to § 2808. In any event, I conclude that Plaintiffs' contentions based on § 739 lack merit. *See infra* at 41-43.

Having identified the relevant statute, our next task is to "discern the interests arguably to be protected by the statutory provision at issue" and then to "inquire whether the plaintiff's interests affected by the agency action in question are among them." *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998) (simplified). Although I concluded in the prior appeals that the Plaintiffs were *not* within the zone of interests of the particular appropriations-statute at issue there, § 2808 differs from that statute in a critical respect that warrants a different conclusion here.

In the prior appeals, the transfer of appropriated funds occurred pursuant to "§ 8005" of the relevant annual appropriations law. In concluding that the Plaintiffs did not fall within the zone of interests of that provision, I noted that § 8005 did not "mention environmental interests"; that it did not "require the Secretary to consider such interests"; that environmental harms were "not among the harms that § 8005's limitations seek to address or protect"; and that § 8005 did "not itself mention or contemplate the displacement of state [environmental] laws." *See California v. Trump*, 963 F.3d at 959-60 (Collins, J., dissenting); *see also id.* at 960 (noting that any injury to the States' sovereign interests in enforcing their environmental laws was the result of a "separate determination" under "a completely separate statute"). Here, the opposite is true. On its face, § 2808 authorizes the Secretary to undertake emergency military construction "without regard to any other provision of law," and although environmental laws are not specifically mentioned, they are one of the most familiar potential obstacles to carrying out construction projects, and such laws are thus within the contemplation

of this language. Because an invocation of § 2808 thus *itself* sets aside the environmental laws that protect the interests asserted by the Plaintiffs here, the *limitations* in § 2808 on the exercise of that authority arguably protect the Organizations' environmental interests and the States' sovereign interests in enforcing their environmental laws. Because the Plaintiffs' asserted harms are thus "among the harms that [§ 2808's] limitations seek to address or protect," and § 2808 "itself . . . contemplate[s] the displacement of state [environmental] laws," Plaintiffs are within the zone of interests of § 2808. *California v. Trump*, 963 F.3d at 959-60 (Collins, J., dissenting).

The Supreme Court's decision in *Patchak* confirms the correctness of this conclusion. In *Patchak*, the Secretary of the Interior had been granted statutory authority to "acquire property 'for the purpose of providing land for Indians.'" 567 U.S. at 211 (quoting 25 U.S.C. § 465). The plaintiff lived near land that the Secretary had acquired in trust for a tribe seeking to open a casino, and the plaintiff claimed that he would suffer "economic, environmental, and aesthetic harms from the casino's operation." *Id.* at 211-12. In addressing whether the plaintiff's asserted harms fell within the statute's zone of interests, the Court emphasized that "[t]he question is not whether § 465 seeks to benefit Patchak; everyone can agree it does not." *Id.* at 225 n.7. "The question is instead . . . whether *issues of land use* (arguably) fall within § 465's scope—because if they do, a neighbor complaining about such use may sue to enforce the statute's limits." *Id.* (emphasis added). The Court answered that question in the affirmative, because the land-acquisition decisions contemplated by the statute were "closely enough and

often enough entwined with considerations of land use" to make any difference between the two "immaterial." *Id.* at 227. A similar logic applies here. As is confirmed by the Secretary's memorandum simultaneously invoking § 2808 and waiving environmental laws under that statute, environmental considerations are entwined with military construction under § 2808 "from start to finish," *id.*, and are plainly within the "scope" of that provision, *id.* at 225 n.7. Because the Sierra Club's environmental interests, and California's and New Mexico's sovereign interests, are affected by the waiver of environmental laws occasioned by the invocation of § 2808, those Plaintiffs are arguably within § 2808's zone of interests and "may sue" under the APA "to enforce the statute's limits." *Id.*[11]

IV

Although the Sierra Club, California, and New Mexico have a cause of action under the APA, I conclude that their claims fail on the merits because DoD properly invoked § 2808 in undertaking these 11 projects.

Section 2808(a) provides:

> In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any

[11] Because this narrower ground provides an adequate basis for concluding that California and New Mexico have a cause of action under the APA, I express no view as to whether the majority is correct in its broader theory that any State that "stood to benefit significantly from federal military construction funding" falls within the zone of interests of § 2808. *See* Maj. Opin. at 45.

> other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces. Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.

10 U.S.C. § 2808(a). "Military construction" is defined by the statute as "any construction, development, conversion, or extension of any kind carried out with respect to a *military installation*," as well as "any acquisition of land or construction of a defense access road." *Id.* § 2801(a) (emphasis added). A "military installation," in turn, is defined as "a base, camp, post, station, yard, center, or *other activity under the jurisdiction of the Secretary of a military department*." *Id.* § 2801(c)(4) (emphasis added).

Under the plain language of these provisions, three requirements must be satisfied in order for DoD's construction activities to comply with § 2808. First, the President must have declared that there exists a national emergency that requires use of the armed forces. Second, the 11 border barrier construction projects must qualify as "military construction" projects within the meaning of the statute. And third, the projects must be "necessary to support [the] use of the armed forces." Here, all three requirements are satisfied.

A

Section 2808 authorizes the undertaking of military construction projects "[i]n the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act ["NEA"] (50 U.S.C. 1601 et seq.) that requires use of the armed forces." 10 U.S.C. § 2808(a). In my view, this requirement for invoking § 2808 is satisfied here.

The President has issued Proclamation 9844 expressly invoking § 201 of the NEA, which is the provision of the NEA that authorizes the President to declare a national emergency that would, in turn, authorize the invocation of emergency powers set forth in other statutes. 50 U.S.C. § 1621(a). Specifically, Proclamation 9844 expressly declares that "[t]he current situation at the southern border . . . constitutes a national emergency," and it briefly explains the basis for the President's determination. 84 Fed. Reg. at 4949. And in accordance with § 301 of the NEA, which requires the President to personally specify which emergency powers have been invoked, the Proclamation further determines "that this emergency requires use of the Armed Forces and . . . that the construction authority provided in section 2808 of title 10, United States Code, is invoked and made available." *Id.* There has thus been an express "declaration by the President of a national emergency in accordance with the [NEA] that requires use of the armed forces," 10 U.S.C. § 2808(a), and this element of § 2808 is therefore satisfied here.

The States do not contest this element, but the Organizations do, at least in part. The Organizations do not dispute that the President has properly declared a

national emergency,[12] and they acknowledge that the President has expressly declared that this emergency requires use of the armed forces. They contend, however, that the national emergency does not *actually* require use of the armed forces and that § 2808 therefore may not be invoked. This argument fails.

The relevant language of § 2808 states that, "[i]n the event of . . . the declaration by the President of a national emergency in accordance with the [NEA] that requires use of the armed forces," the Secretary of Defense may undertake appropriate military construction. 10 U.S.C. § 2808(a). At the outset, it is important to note that the quoted statutory requirement is *not* satisfied unless (at a minimum) the President declares, not just a "national emergency," but specifically a "national emergency . . . that requires use of the armed forces." No party disputes this point, but in any event, it is the grammatically preferable reading of the statutory text. Because the phrase "that requires use of the armed forces" clearly modifies "national emergency"—which is the immediate object of the "declaration"—the most natural reading of the language is that the President must *declare* a "national emergency . . . that requires use of the armed forces." It seems highly unlikely that, in using this phrasing, Congress intended for the President merely to declare an "emergency" and

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[12] We therefore have no occasion in this case to address the issues raised by certain *amici curiae* as to whether the President was correct in concluding that the situation at the southern border properly qualifies as a "national emergency." We likewise are not presented with any issue concerning the availability of any other emergency authority under any other statute, nor do we have before us any possible constitutional limitations on the use of any such other authorities.

then to have some unspecified person *separately* determine that the emergency is one "that requires use of the armed forces." Indeed, given that the "Secretary of Defense" is expressly the one to whom § 2808 grants the emergency construction authority, one would have expected that, if someone other than the President was intended to make this determination, it would necessarily be the Secretary of Defense—in which case one would have expected to see such a specification included in the later language in § 2808 about the authority of the "Secretary of Defense."

But once it is recognized that the President's "declaration" must itself include the determination that the emergency "requires use of the armed forces," the Organizations' statutory argument collapses. By its terms, this statute is triggered, not by the *existence* of the specified kind of "national emergency," but by the "*event of a declaration*" of such an emergency. 10 U.S.C. § 2808(a) (emphasis added). If (as I have explained) the requirement that the emergency must be one "that requires use of the armed forces" pertains to the "declaration" itself, then that phrase merely describes the *content* of the required "declaration" and does not supply a freestanding requirement to be examined *separately* from that declaration. As a result, the statute does not require a separate inquiry into whether the findings made by the President in the required declaration are substantively valid; it merely requires a "declaration" meeting the statutory requisites. Those are that the declaration be made "by the President"; that it be made "in accordance with the [NEA]"; and that it declare a "national emergency" and declare that the emergency "requires use of the armed forces." 10 U.S.C. § 2808(a). All three requirements have been met here, as explained earlier.

This portion of the statute requires nothing more, and so this initial element of § 2808 is satisfied.

B

To qualify as "military construction" that is authorized under the emergency authority granted in § 2808(a), the construction generally must be carried out "with respect to a military installation." 10 U.S.C. § 2801(a).[13] Section 2801(c)(4) defines the term "military installation" to "mean[] a base, camp, post, station, yard, center, or *other activity under the jurisdiction of the Secretary of a military department*." *Id.* (emphasis added). Accordingly, so long as the border-barrier construction occurs with respect to one of these enumerated items, that construction qualifies as "military construction." Plaintiffs do not dispute that the two projects that are taking place within the Barry M. Goldwater Range are being carried out with respect to a "military installation," *see* Maj. Opin. at 61 n.10, and so the only question here is whether the other nine projects also fit the definition of "military construction." Because those nine construction projects involve an "activity under the jurisdiction" of a military Secretary, they constitute "military construction" within the plain meaning of the statute.

By its terms, the statute authorizes any construction project "of any kind" that is "carried out with respect to" an "*activity* under the jurisdiction of the Secretary of a military department." 10 U.S.C. § 2801(a), (c)(4)

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[13] One exception, which is relevant to certain of DoD's actions here, is that "military construction" also "includes . . . any acquisition of land" by DoD, without any further statutory limitation. 10 U.S.C. § 2801(a).

(emphasis added). An "activity" is a "specified pursuit in which a person partakes," *see Activity*, AMERICAN HERITAGE DICTIONARY (5th ed. 2018), or in which a group of persons participates, *see Activity*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The collective acts of one person or of two or more people engaged in a common enterprise."); *see also Activity*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY ("WEBSTER'S THIRD") ("an occupation, pursuit, or recreation in which a person is active"). Although "activity under the jurisdiction" of a military department thus broadly denotes any specific *task* of those departments, and does not itself denote a *place*, the term embraces places under military jurisdiction, because activities under military jurisdiction necessarily occur there. As the Supreme Court has explained, a "place . . . where military duty is performed" is "synonymous with the exercise of *military jurisdiction*," and that "is precisely how the term 'military installation' is used" in § 2801(c)(4). *United States v. Apel*, 571 U.S. 359, 368 (2014). Accordingly, land that is under military jurisdiction counts as a "military installation." And, as the majority notes, "Plaintiffs do not contest that the sites are under military jurisdiction." *See* Maj. Opin. at 67. Indeed, the point is incontestable, because the land involving the nine relevant construction projects has been lawfully assigned to the jurisdiction of U.S. Army Garrison Fort Bliss, an Army base. This element of § 2808 is therefore also satisfied.

The majority nonetheless rejects this reading as contrary to *ejusdem generis*, "the statutory canon that where general words follow specific words in a statutory enumeration, the general words are construed to embrace

only objects similar in nature to those objects enumerated by the preceding specific words," *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (simplified). *See* Maj. Opin. at 65-66. According to the majority, the nine project areas at issue here are insufficiently similar to the enumerated items—*i.e.*, a "base, camp, post, station, yard, or center"—to be properly included within the final generic phrase, "other activity under the jurisdiction" of a military department. *Id.* at 66. For several reasons, this argument fails.

As an initial matter, the majority overlooks the fact that *ejusdem generis* "does not control . . . when the whole context dictates a different conclusion." *Norfolk & W. Ry. Co. v. American Train Dispatchers Ass'n,* 499 U.S. 117, 129 (1991). Here, the generic term used—"other activity"—is notably dissimilar from each of the terms which precedes it, thereby precluding any effort to invoke *ejusdem generis* to narrow it. If the statute had referred to any "base, camp, post, station, yard, center, or other *place* under the jurisdiction" of the military, the majority's argument might have had some superficial force—although it still would be wrong for the additional reasons I will describe momentarily. But the generic term "activity" refers to *actions*, not places, and is simply not within the same class as the enumerated items. This shift unmistakably denotes an intention to go *beyond* the ordinary, established military facilities that are enumerated and to allow construction in support of *whatever activities* the military needs to conduct to address the national emergency. Ironically, consideration of this canon thus points towards an even *broader* reading of the generic term than the Government urges here. And Plaintiffs would plainly lose under that broader view, because it is simply indisputable

that the construction projects here are all "carried out with respect to" an "*activity* under the jurisdiction" of a military department. 10 U.S.C. § 2801(a), (c)(4) (emphasis added).

In any event, the majority's application of *ejusdem generis* fails for the additional reason that it overlooks the fact that the statute *itself* tells us what the unifying characteristic of the enumerated items is—namely, they are all places "*under the jurisdiction of the Secretary of a military department*." 10 U.S.C. § 2801(c)(4) (emphasis added). Where, as here, the generic term explicitly defines the common feature, it would "not give the words a faithful interpretation if we confined them more narrowly than the class of which they are a part." *Cleveland v. United States*, 329 U.S. 14, 18 (1946) (rejecting invocation of *ejusdem generis* to narrow the scope of the generic term "any other immoral purpose" in the Mann Act, so that it would only apply to sex trafficking and not to polygamy). The statute thus requires nothing more than that the place be "under the jurisdiction" of a military department, and all agree that that requirement is satisfied here.

The majority contends that this reading of the text cannot be correct because the resulting flexibility in emergency construction authority would be, in the majority's view, unreasonably broad and "would run afoul of the constitutional separation of powers." *See* Maj. Opin. at 70. Both contentions are wrong.

As to the first, the majority overlooks the fact that the exact same grant of construction authority at issue here applies, not just in the event of a "declaration . . . of a national emergency," but also "[i]n the event of a *declaration of war*." 10 U.S.C. § 2808(a) (emphasis

added). It is hardly surprising that Congress has granted extremely broad emergency authority to "redirect [construction] funds at will without regard for the normal appropriations process" in the event of a formal declaration of war. *See* Maj. Opin. at 69. Given that the statute grants, in a single clause, the very same wartime authority in the event of a declaration of a national emergency, we lack any textual basis whatsoever for imposing artificial limits on the breadth of that authority. The majority obviously thinks that it was unwise for the Executive to have such an "unnecessarily expansive" construction authority in the event of a national emergency, *see id.* (citation omitted), but that is unmistakably what Congress said in § 2808(a). The majority vaguely hints that it does not think that the current situation constitutes a *real* "national emergency" that would warrant such broad authority. *See id.* at 70 (noting that the NEA should "be utilized only in time of genuine emergency" (citation omitted)). But no party here contends that the President's declaration of a national emergency was not "in accordance with the [NEA]," as required by § 2808(a), and so that issue is not before us. *See supra* note 12.

The majority is also wrong in contending that Congress's grant of such flexibility raises separation-of-powers concerns. The majority argues that allowing this much flexibility over how to spend funds appropriated for military construction would infringe on Congress's "exclusive control over appropriations." *See* Maj. Opin. at 70. The suggestion is, as I have previously explained, "'wholly insubstantial and frivolous,'" *see California v. Trump*, 963 F.3d at 963 (Collins, J., dissenting) (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)), given that the Constitution indisputably allows

Congress to make a "'*lump-sum* appropriation'" that leaves the exact "'allocation of funds'" to the discretion of the Executive, *id.* (quoting *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993)) (emphasis added). The emergency construction authority granted by § 2808 is not meaningfully distinguishable, for constitutional purposes, from a lump-sum appropriation for military construction. The majority states that there is nonetheless an appropriations-power concern here because Congress has made clear its opposition to these specific projects, "though imperfectly," by "declin[ing] to fund the very projects at issue" in DHS's appropriations statute and by "attempt[ing] to terminate the declaration of a national emergency (twice)." *See* Maj. Opin. at 70. But Congress has not *enacted* any relevant limitation, and under *INS v. Chadha*, 462 U.S. 919 (1983), we have no business undertaking to give legal effect to our own perceptions of the "big-picture 'denial' [of funding] that we think is implicit in the 'real-world events in the months and years leading up to the 2019 appropriations bills.'" *California v. Trump*, 963 F.3d at 972 (Collins, J., dissenting) (citation omitted).

Because the 11 border barrier construction projects here are all taking place with respect to land that is under the jurisdiction of the Secretary of a military department, they are taking place with respect to a military installation. This requirement of § 2808 is thus also satisfied.

C

The final requirement of § 2808 is that the military construction projects undertaken by the Secretary of Defense must be "necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). In determining

that this requirement was satisfied with respect to the 11 border barrier construction projects at issue here, the Secretary of Defense explained his reasoning as follows:

> These projects will deter illegal entry, increase the vanishing time of those illegally crossing the border, and channel migrants to ports of entry. They will reduce the demand for DoD personnel and assets at the locations where the barriers are constructed and allow the redeployment of DoD personnel and assets to other high-traffic areas on the border without barriers. In short, these barriers will allow DoD to provide support to DHS more efficiently and effectively. In this respect, the contemplated construction projects are force multipliers.

This determination is more than sufficient to satisfy this final requirement of § 2808.

The Government contends that the Secretary's determination is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and is therefore unreviewable under the APA. In my view, it is not necessary to decide that issue, because even assuming *arguendo* that this APA exception is inapplicable, the Secretary's determination is well within the bounds of § 2808. By requiring that the construction be "necessary" to the contemplated use of the armed forces, § 2808 does not limit the Secretary to only those projects that are, as the majority contends, "absolutely needed" or "required." *See* Maj. Opin. at 52 (citation omitted). As the Supreme Court has explained, the term "necessary" does not always denote "essential," because "*in ordinary speech*, the term is often used more loosely to refer to something that is merely important or strongly desired." *Ayestas*

v. Davis, 138 S. Ct. 1080, 1093 (2018) (emphasis added); *see also id.* ("necessary" may "import that which is only convenient, useful, appropriate, suitable, proper, or conducive to the end sought" (citation omitted)). By confirming that this broader meaning of "necessary" is consistent with how the word is used in "ordinary speech," *see id.*, *Ayestas* puts the lie to the majority's untenable contention that this broader meaning is not consistent with "*any* ordinary understanding of the word," *see* Maj. Opin. at 52 (emphasis added), and is instead a peculiarity of the caselaw concerning the Constitution's Necessary and Proper Clause, *id.* at 52-54.[14] Indeed, the majority acknowledges that "necessary" has the same general meaning as "required," and I have already explained why that latter term likewise "includes 'something that is wanted or needed' or 'something called for or demanded.'" *California v. Trump*, 963 F.3d at 974 (Collins, J., dissenting) (quoting *Requirement*, WEBSTER'S THIRD). We should be loathe to reject this familiar and more flexible use of the term, especially given that we are construing the scope of the emergency authority that is available to be exercised during the course of a "war" or "national emergency." *Cf. Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008) ("great deference" is generally given to the military's judgment of the importance of a military interest).

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[14] The majority attempts to distinguish *Ayestas* on the ground that the relevant statutory phrase there was "reasonably necessary" and not just "necessary." *See* Maj. Opin. at 55 n.9. This effort fails, because, in the course of construing the statutory language at issue in *Ayestas*, the Supreme Court first addressed the use of the word "necessary"—by itself—in "ordinary speech," and it is *that* explication that refutes the majority's flawed analysis. *See* 138 S. Ct. at 1093.

With this understanding of "necessary" in mind, I think it is clear that the Secretary properly determined that the construction projects here are "necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). By referring to "*such* use of the armed forces," the statute refers back to the "use of the armed forces" that the President has determined is "require[d]" by the "national emergency" that he has declared. *Id.* (emphasis added). In Proclamation 9844, the President noted that DoD had been "provid[ing] support and resources to the Department of Homeland Security at the southern border," and he determined that it is "necessary for the Armed Forces to provide additional support to address the crisis" at the southern border. 84 Fed. Reg. at 4949. This determination does not entail an entirely novel use of the armed forces, because Congress has repeatedly recognized a support role for DoD at the border. *See*, *e.g.*, 10 U.S.C. §§ 251-252, 271-284. Because the "use of the armed forces" that has been declared necessary by the President is thus the *provision of support to DHS* in securing the border, the only question before us is whether the Secretary properly determined that the 11 construction projects are "necessary to support *such* use of the armed forces." 10 U.S.C. § 2808(a) (emphasis added). That standard is easily satisfied, because the construction projects, by "allow[ing] the redeployment of DoD personnel and assets to *other* high-traffic areas on the border without barriers," will permit "DoD to provide support to DHS more efficiently and effectively." By allowing DoD to help cover a wider area with fewer personnel, the "contemplated construction projects are force multipliers."

The majority wrongly ignores the statutory language focusing on whether the construction projects are necessary to support "such use of the armed forces," 10 U.S.C. § 2808(a)—*viz.*, the use of the armed forces to "provide support and resources to the Department of Homeland Security at the southern border." 84 Fed. Reg. at 4949. As a result, the majority gets things exactly backwards when it says that the construction does not support such use of the armed forces here *because* it will "support and benefit DHS." *See* Maj. Opin. at 50-52. Given that, under the terms of the statute, military support for DHS's mission *is* the relevant "use of the armed forces" that has been declared by the President, the fact that the construction furthers *that* mission weighs decidedly in favor of finding that it is "necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). The majority's contrary conclusion rests on the implicit view that *this court* gets to substitute its own view of when the armed forces are needed in a national emergency for the view of the President as stated in the emergency declaration. Nothing in § 2808(a) assigns us that task. *See supra* at 26-27. As relevant here, § 2808 merely instructs us to consider whether the Secretary properly determined that these projects are "necessary" to support the President's *declared* use of the armed forces.

* * *

Because all of the requirements of § 2808(a) have been met, the 11 military construction projects at issue here were authorized by that section. Plaintiffs' claims resting on a contrary view fail on the merits.

V

Plaintiffs' final argument on the merits is that, even if the construction was otherwise authorized under § 2808, DoD's power to invoke that authority was effectively disabled by § 739 of the Financial Services and General Government Appropriations Act, 2019, which is Division D of the Consolidated Appropriations Act, 2019. This argument is unavailing.

Section 739 provides, in its entirety, as follows:

> 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, 133 Stat. 13, 197 (2019). Plaintiffs' argument is that DoD's invocation of emergency military construction authority alters funding levels from what was proposed in the budget or enacted in the 2019 appropriations statutes, and that § 2808 cannot be used to justify that alteration because it is not a provision of an "appropriations Act." *Id.* Therefore, according to Plaintiffs, § 739 bars any use under § 2808 of any "funds made available" in *any* appropriations act. This argument lacks merit, because it fails to construe the language of § 739 in light of the appropriations context against which its terms must be understood. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743,

1748 (2019) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (simplified).

As I have previously explained, the terms of an appropriations-law restriction "can only be understood against the backdrop of th[e] [appropriations] process" and must take account of any settled meanings attached to the particular terms used as well as any established understanding surrounding the budgetary practices being referenced. *California v. Trump*, 963 F.3d at 968 (Collins, J., dissenting). Here, the relevant language of § 739 refers to action to "[1] increase, eliminate, or reduce funding [2] for a program, project, or activity," and both portions of this phrase align with familiar concepts in the budgetary process.

Specifically, the phrase "program, project, or activity" ("PPA") is a phrase of art that refers to an "element within a budget account." *See* U.S. GOV'T ACCOUNTABILITY OFF. ("GAO"), GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process* 80 (2005) ("*Glossary*"); *see generally* 31 U.S.C. § 1112 (requiring GAO to "establish, maintain, and publish standard terms and classifications for fiscal, budget, and program information of the Government"). "For annually appropriated accounts, the Office of Management and Budget (OMB) and agencies identify PPAs by reference to committee reports and budget justifications." *Glossary*, *supra*, at 80. Similarly, an action to "increase, eliminate, or reduce" funding for a PPA corresponds to the familiar budgetary concepts of a reprogramming or transfer of funds. The GAO defines a "reprogramming" as "[s]hifting funds *within* an appropriation or

fund account to use them for purposes other than those contemplated at the time of appropriation; it is the shifting of funds from one object class to another within an appropriation or from one program activity to another." *Id.* at 85 (emphasis added). A transfer, by contrast, is defined as a "[s]hifting of all or part of the budget authority in one appropriation or fund account to another." *Id.* at 95; *see also California v. Trump*, 963 F.3d at 969 (Collins J., dissenting). Viewed against this backdrop, § 739's reference to action that would "increase, eliminate, or reduce funding for a program, project, or activity" clearly refers to the sort of change in funding that would require the agency to undertake a formal reprogramming or transfer. That reading of the phrase is further confirmed by the remainder of § 739, which states that such action may not be undertaken "unless such change is made pursuant to the *reprogramming or transfer provisions* of this or any other appropriations Act." *See* 133 Stat. at 197 (emphasis added).

This understanding of § 739 confirms that it does not apply to an invocation of emergency military construction authority under § 2808. Under longstanding DoD budgetary guidelines, an allocation of funds under the emergency military construction authority in § 2808 is *not* considered to be a "reprogramming" or "transfer" because such allocations take place outside of "the normal planning, programming, and budgeting process." *See* Department of Defense Directive 4270.5, ¶ 4.1 (February 12, 2005); *see also id.* at ¶ 4.2 ("Reprogramming is not necessary for projects under Sections 2804 and 2808[.]"). Congress is presumably well aware of this settled understanding as to how an allocation of funds under § 2808 is considered for budgetary purposes. *See Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *see also*

Bragdon v. Abbott, 524 U.S. 624, 631, 645 (1998); *see generally* U.S. GOV'T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (4th ed. 2016 rev.), pt. B, § 7, 2016 WL 1275442, at *6-7 (whether a reprogramming has occurred would be evaluated in light of the relevant budgetary documents and understandings). Indeed, Directive 4270.5 is prominently cross-referenced in the discussion of § 2808 authority contained in DoD's governing "Financial Management Regulation," *see* DoD Financial Management Regulation 7000.14-R, Vol. 3, Chap. 17 at 17-17 (2019), and Congress is obviously familiar with that important document, which it has even expressly cited in the 2019 military construction appropriations law, *see* Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2019, Pub. L. No. 115-244, Div. C, § 123, 132 Stat. 2897, 2953 (2018). Section 739's reference to the sort of actions that would trigger a reprogramming or transfer thus does not include an allocation of funding under the emergency military construction authority granted in § 2808.

Any doubt on this score is confirmed by the doctrine disfavoring repeals by implication, which "'applies with full vigor when . . . the subsequent legislation is an *appropriations* measure.'" *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) (quoting *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 785 (D.C. Cir. 1971)); *see also Rostker v. Goldberg*, 453 U.S. 57, 74-75 (1981) (noting the "sound principle[] that appropriations legislation should not be considered as modifying substantive legislation."). Section 2808 allows the Secretary of Defense to "undertake military construction projects" notwithstanding "any other provision of law." It would be remarkable to conclude that

this emergency authority—a critical power that allows our nation and military to respond quickly in times of war or national emergency—was impliedly (if not accidentally) disabled in a later appropriations bill that makes no reference to § 2808 or to emergency powers. This canon further confirms what the budgetary context already makes clear, which is that § 739 poses no bar to DoD's use of § 2808.

VI

Based on the foregoing, I conclude that at least the Sierra Club, California, and New Mexico have Article III standing. They have a cause of action under the APA to challenge these § 2808 military construction projects, but their claims fail on the merits as a matter of law because the projects comply with the limitations in § 2808 and because § 739 is inapplicable here. I therefore would reverse the district court's partial grant of summary judgment to the Organizations and to the States and would remand with instructions to grant Defendants' motions for summary judgment on this set of claims.[15] I respectfully dissent.

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[15] In light of my resolution of the merits, I would not terminate the district court's stay pending appeal, and I would deny the Organizations' emergency motion to lift the stay.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 19-cv-00872-HSG
Re: Dkt. Nos. 220, 236

STATE OF CALIFORNIA, ET AL., PLAINTIFFS

v.

DONALD J. TRUMP, ET AL, DEFENDANTS

Case No. 19-cv-00892-HSG
Re: Dkt. Nos. 210, 236

SIERRA CLUB, ET AL., PLAINTIFFS

v.

DONALD J. TRUMP, ET AL., DEFENDANTS

Filed: Dec. 11, 2019

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Pending before the Court are cross-motions for partial summary judgment in two related cases, *State of California v. Trump*, No. 19-cv-00872-HSG, and *Sierra*

Club v. Trump, No. 19-cv-00892-HSG.[1] Plaintiffs in both cases challenge Defendants' proposed reallocation of $3.6 billion in military construction funds under 10 U.S.C. § 2808 ("Section 2808") to build a wall along the southern border of the United States. Section 2808 is just one of several alternative sources of funding that Defendants identified for border construction after Congress appropriated only $1.375 billion for that purpose in the Consolidated Appropriations Act of 2019 ("CAA"), far less than the $5.7 billion the President ultimately requested. *Compare California*, 19-cv-00872-HSG, Dkt. No. 59-4, Ex. 25, *with* CAA, Pub. L. No. 116-6, 133 Stat. 13 (2019). Plaintiffs assert that Defendants' reliance on Section 2808—like Defendants' other alternative funding plans—improperly circumvents the CAA and Congress' appropriations power under the Constitution.[2] Plaintiffs therefore seek declaratory

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[1] Plaintiffs in *State of California v. Trump* are a coalition of nine states, including California, Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Wisconsin, and the Commonwealth of Virginia ("State Plaintiffs"). Plaintiffs in *Sierra Club v. Trump* include the Sierra Club and the Southern Border Communities Coalition ("Sierra Club Plaintiffs"). Because Plaintiffs' motions for summary judgment overlap considerably, the Court refers collectively to both State and Sierra Club Plaintiffs in this order as "Plaintiffs," unless otherwise specified. Defendants in both cases include President Donald J. Trump and certain of his cabinet members, in their official government capacities. The Court refers to them collectively as "Defendants" in this order to avoid confusion in light of the apparent conflict between the Executive and Legislative branches of the government in these cases.

[2] The Appropriations Clause of the Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art I., § 9, cl. 7.

and injunctive relief, prohibiting Defendants from using funds under Section 2808 to build border barriers.

As the Court has previously explained, these two cases are not about—and the Court offers no opinion regarding —whether the challenged border barrier construction plan is sound policy. *See City and County of San Francisco v. United States Citizenship and Immigration Services*, No. 19-17213, (9th Cir. Dec. 5, 2019), Dkt. No. 27 at 2-3 (Bybee, J., concurring) (explaining that "even as we are embroiled in these controversies, no one should mistake our judgments for our policy preferences," and that "our thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the National Government's policy" (quotation omitted)); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (indicating that the Supreme Court "express[ed] no view on the soundness of the policy" at issue there); *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092, 1102 (S.D. Cal. 2018) (noting that the court "cannot and does not consider whether underlying decisions to construct the border barriers are politically wise or prudent").[3] Neither does

[3] There also appears to be no dispute between the Executive and Congress that at least some border barrier construction is warranted, as Congress has historically appropriated funds for this purpose. For fiscal year 2018, for example, Congress appropriated $1.571 billion for physical barriers and associated technology along the southwest border. *See California*, No. 19-cv-00872-HSG, Dkt. No. 161; *see also* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. F, tit. II, § 230(a) 132 Stat. 348 (2018). And even for fiscal year 2019, the Administration initially requested $1.6 billion for border barrier construction, *see California*, No. 19-cv-00872-HSG, Dkt. No. 112-1, Ex. 51 at 58, and Congress appropriated $1.375 billion, *see* CAA, 133 Stat. 13.

the Court here address any of the other sources of funding that Defendants have identified to pay for the border barrier construction. Rather, the issues currently before the Court are narrow: whether Defendants' proposed plan for funding border barrier construction under Section 2808 (1) exceeds the Executive Branch's statutory and constitutional authority; (2) is arbitrary and capricious under the Administrative Procedures Act, 5 U.S.C. §§ 551 *et seq.*, ("APA"); and (3) violates the National Environmental Policy Act ("NEPA").

Nevertheless, the Court assesses these issues against a complicated and unprecedented backdrop. As an initial matter, presidents have only invoked Section 2808 twice since it was enacted in 1982. *See* Michael J. Vassalotti & Brendan W. McGarry, *Military Construction Funding in the Event of a National Emergency*, Cong. Research Serv., IN11017 (Jan. 11, 2019) at 2-3; Jennifer K. Elsea, Edward C. Lieu, & Jay B. Sykes, *Can the Department of Defense Build the Border Wall*, Cong. Research Serv., LSB10242 (Feb. 18, 2019) at 3-4. Of the military construction projects funded through Section 2808, only one was located in the United States, and that project related to securing facilities holding weapons of mass destruction shortly after the 9/11 attacks. *See, e.g.*, Vassalotti, at 1-3; *see also Sierra Club*, 19-cv-00892-HSG, Dkt. No. 236-5, Ex. 5. And critically, a president has never before invoked Section 2808 to secure funding for projects that Congress specifically declined to fund in its appropriations judgment. *Id.* Yet here the President has been explicit in his intention to obtain funds for border barrier construction, with or without Congress. *See, e.g.*, *California*, 19-cv-00872-HSG, Dkt. No. 59-4, Exs. 13, 21; *Sierra Club*, 19-cv-00892-HSG, Dkt. No. 36-3, Ex. C. Accordingly, the President

invoked Section 2808 the day after Congress passed the CAA, which provided limited funding for, and contained restrictions regarding funding for, border barrier construction. *See* CAA, § 230(a)(1), 133 Stat. at 28.

The Court heard argument on these motions on November 20, 2019. *See California*, 19-cv-00872-HSG, Dkt. No. 250; *Sierra Club*, 19-cv-00892-HSG, Dkt. No. 248. After carefully considering the parties' arguments, the Court **GRANTS IN PART** Sierra Club Plaintiffs' partial motion for summary judgment; **GRANTS IN PART** State Plaintiffs' partial motion for summary judgment; and **DENIES** Defendants' motions.

I. BACKGROUND

A. Factual Background

The Court has detailed the lengthy history of these cases in its prior orders, and incorporates the factual background in full. *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 144. The Court also briefly summarizes and notes subsequent factual developments as relevant to this order.

i. Emergency Declaration

Following the longest partial government shutdown in the nation's history, Congress passed the CAA on February 14, 2019, making available $1.375 billion "for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector." *See* CAA, § 230(a)(1), 133 Stat. at 28. On February 15, 2019, the President signed the CAA into law. *See generally id.* That same day, the President invoked his authority under the National Emergencies Act ("NEA"), Pub. L. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601-51), and declared

that "a national emergency exists at the southern border of the United States." *See* Proclamation No. 9844, 84 Fed. Reg. 4,949 (Feb. 15, 2019) ("Proclamation No. 9844"). The proclamation further "declar[ed] that this emergency requires use of the Armed Forces," and made available "the construction authority provided in [S]ection 2808." *Id.* When announcing the proclamation, the President explained that he initially "went through Congress" for the $1.375 billion in funding, but was "not happy with it." *See California*, No. 19-cv-00872-HSG, Dkt. No. 59-4, Ex. 50.

Since that time, Congress has sought to terminate the national emergency on two separate occasions. On March 14, 2019, Congress passed a joint resolution to terminate the emergency declaration. *See* H.R.J. Res. 46, 116th Cong. (2019). On March 15, 2019, the President vetoed the joint resolution. *See Veto Message to the House of Representatives for H.J. Res. 46*, The White House (Mar. 15, 2019), https://www.whitehouse.gov/briefings-statements/veto-message-house-reprsentatives-h-j-res-46/. Congress failed to override the President's veto. *See* 165 Cong. Rec. H2799, H2814-15 (2019). On September 27, 2019, Congress passed a second joint resolution to terminate the emergency declaration. *See* S.J. Res. 54, 116th Cong. (2019). And on October 15, 2019, the President vetoed the second joint resolution. *See S.J. Res. 54 Veto Message*, The White House (Oct. 15, 2019), https://www.whitehouse.gov/presidential-actions/s-j-res-54-veto-message/ ("S.J. Res. 54 Veto Message"). Again, Congress failed to override the veto. *See* S.J. Res. 54, 116 Cong. (2019). Congress has an ongoing obligation to consider whether to termi-

nate the emergency every six months, but the President's declaration of a national emergency remains in effect.[4] *See* 50 U.S.C. § 1622(a)-(b).

ii. Military Construction Funds and Diverted Projects

On February 11, 2019, prior to the President's proclamation and invocation of Section 2808, the Chairman of the Joint Chiefs of Staff submitted a preliminary assessment to the Acting Secretary of Defense regarding whether and how military construction projects could support the use of the armed forces in addressing a national emergency at the southern border. *See California*, No. 19-cv-00872-HSG, Dkt. No. 212 ("Administrative Record" or "AR")[5] at 119-124. The memorandum explained that the Department of Homeland Security

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[4] Under the NEA as initially drafted in 1976, the national emergency would have ended once Congress passed the first joint resolution. The NEA did not require a presidential signature on the joint resolution, nor was it subject to a presidential veto, until the Supreme Court ruled in *INS v. Chadha* that the president must have the power to approve or veto such congressional acts. *See* 462 U.S. 919, 944-58 (1983).

[5] The parties do not oppose the Court's consideration of the administrative record, *see California*, No. 19-cv-00872-HSG, Dkt. Nos. 212-2, 212-3, 212-4, or the Plaintiffs' request to take judicial notice of various documents. The Court finds it may take judicial notice of documents from the administrative record and Plaintiffs' requests that are cited in this order, all of which are: (1) statements of government officials or entities that are not subject to reasonable dispute; or (2) other public records and government documents available on reliable internet sources, such as government websites. *See DeHoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 763 n.5 (9th Cir. 2018) (taking "judicial notice of government documents, court filings, press releases, and undisputed matters of public record").

("DHS") identified specific geographic areas in which border barriers could allow Department of Defense ("DoD") personnel and resources "to be employed more efficiently" and "reduce DHS requirements for DoD support." *Id.* However, although the President authorized use of military construction funds under Section 2808 in his February 15 proclamation, Defendants did not exercise this authority for several months.

Instead, in the intervening months, the Chairman of the Joint Chiefs of Staff submitted a supplemental assessment on May 6, 2019, regarding military construction projects at the southern border. *See* AR at 59-70. In the updated memorandum, the Chairman again concluded that such construction "can reasonably be expected to support the use of the armed forces by enabling more efficient use of DoD personnel, and may ultimately reduce the demand for military support over time." *See id.* at 60. The Chairman explained that although "any border barrier construction supports the use of the armed forces on the border to some extent," the Joint Chiefs prioritized fifteen projects, totaling $3.6 billion. *See id.* at 63. On May 15, 2019, Defendants informed the Court that the Under Secretary of Defense had identified existing military construction project funding to divert for border barrier construction pursuant to Section 2808, but that the Acting Secretary of Defense had "not yet decided to undertake or authorize any barrier construction projects under § 2808." *See California*, 19-cv-00872-HSG, Dkt. No. 151 at 3.

Then on September 3, 2019, the Secretary of Defense announced that he had decided to authorize eleven specific border barrier construction projects in California, Arizona, New Mexico, and Texas, pursuant to Section

2808. *See California*, 19-cv-00872-HSG, Dkt. Nos. 206, 206-1, Ex. 1. In doing so, he reiterated that these projects "will reduce the demand for DoD personnel and assets to other high-traffic areas on the border without barriers." *See id.*, Dkt. No. 206-1, Ex. 1. He concluded that "[i]n short, these barriers will allow DoD to provide support to DHS more efficiently and effectively." *Id.*

Collectively, the eleven projects total $3.6 billion and include 175 miles of border barrier construction across four states. *Id.* These projects fall into three categories:

- Two projects on the Barry M. Goldwater Range military installation in Arizona;
- Seven projects on federal public domain land that is under the jurisdiction of the Department of the Interior; and
- Two projects on non-public land that would need to be acquired through either purchase or condemnation before construction could begin.

See id., Dkt. Nos. 206 at 2-4, 206-1, Ex. 1. The Secretary of Defense authorized the Secretary of the Army "to expeditiously undertake the eleven border barrier military construction projects," including taking the necessary steps to acquire the public domain and non-public land as part of "the Army's real property inventory, either as a new military installation or as part of an existing military installation." *See id.*, Dkt. No. 206-1, Ex. 1 at 1; *see also* AR at 3-6, 9-10, 30-31. That same day, in a briefing on the use of Section 2808, DoD representatives explained that the $3.6 billion would "all go to adding significantly new capabilities to DHS's ability to

prevent illegal entry." *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 210-2, Ex. 17 at 5.

Two days later, on September 5, 2019, the Secretary of Defense identified which military construction projects DoD intended to defer in order to fund the border barrier construction projects. *See California*, 19-cv-00872-HSG, Dkt. Nos. 207, 207-1, Ex. 1. In total, the Secretary of Defense authorized diverting funding from 128 military construction projects, domestically and abroad. *See id.*, Dkt. No. 207-1, Ex. 1. Sixty-four of the defunded military construction projects are located within the United States; and nineteen projects, totaling over $500 million, are within Plaintiff States California, Colorado, Hawaii, Maryland, New Mexico, Oregon, Virginia, and Wisconsin. *See id.*; *see also id.*, No. 19-cv-00872-HSG, Dkt. No. 220-5, Exs. 2-19.

The Secretary of Defense explained that he sought to identify projects for defunding and deferral based on the projects' timing, and thus the 128 projects "are not scheduled for award until fiscal year 2020 or later." *See* AR at 13. Doing so, he stated, would "provide [DoD] time to work with [Congress] to determine opportunities to restore funds for these important military construction projects. . . . " *California*, 19-cv-00872-HSG, Dkt. No. 206-2, Ex. 2 at 2; *cf.* S. 1790, 116th Cong. § 2906 ("Replenishment of Certain Military Construction[] Funds"). The deferred projects include rebuilding hazardous materials warehouses at Norfolk and the Pentagon; replacing a daycare facility for servicemembers' children at Joint Base Andrews, which reportedly suffers from "sewage backups, flooding, mold and pests"; and improving security to comply with anti-terrorism and force protection standards at Kaneohe Bay. *See*

Sierra Club, No. 19-cv-00892-HSG, Dkt. No. 202-1, Ex. 1; *id.*, Dkt. No. 210-2, Ex. 18; *see also California*, No. 19-cv-00872-HSG, Dkt. No. 232 (Brief of *Amici Curiae* Iraq and Afghanistan Veterans of America) ("IAVA Brief").

In accordance with the Secretary of Defense's directive, the Secretary of the Army has taken steps over the past few months to obtain administrative jurisdiction over some of the land for the border barrier construction projects. On October 7, 2019, the Secretary of the Interior announced the transfer of approximately 560 acres of federal lands to the Department of the Army for a period of three years for border barrier construction in Arizona, California, and New Mexico. *See California*, No. 19-cv-00872-HSG, Dkt. No. 220-5, Ex. 1. Additionally, on October 8, 2019, the Secretary of the Army issued General Order No. 2019-36, which automatically assigns all land transferred to the Army for Section 2808 border barrier construction projects to the U.S. Army Garrison Fort Bliss, Texas, irrespective of the location of the land. *See id.*, Dkt. No. 236-7, Ex. 7.

During the hearing on the motions for partial summary judgment, Defendants' counsel also represented to the Court that there have been two contracts awarded related to the border barrier construction projects. *See California*, No. 19-cv-00872-HSG, Dkt. No. 254 at 81:2-24. The first contract relates to the projects on the Barry M. Goldwater Range, in Arizona: that contract was awarded on November 6, 2019, and ground disturbing activity was anticipated to start no earlier than November 27, 2019. *Id.* The second contract relates to a project in San Diego County, California: that contract was awarded on November 19, 2019, and ground

disturbing activity was anticipated to start no earlier than December 9, 2019. *Id.*

B. Procedural History

Following the passage of the CAA and the President's national emergency declaration in February 2019, the State and Sierra Club Plaintiffs filed suit challenging Defendants' anticipated diversion of federal funds for border barrier construction pursuant to several statutory provisions. These include reallocating funds from the Treasury Forfeiture Fund; DoD's Appropriations Act of 2019 under Section 8005 and 10 U.S.C. § 284; and DoD appropriations for military construction projects under Section 2808. *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 36-7, Ex. G at 2-4; *see also id.*, Dkt. No. 64-8, ¶¶ 5-6.

The Court first preliminarily enjoined Defendants' use of funds for two border barrier construction projects in New Mexico and Arizona under Section 8005. *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 144. The Court reasoned that Plaintiffs were likely to show that (1) the language and purpose of Section 8005 precluded Defendants' transfer and use of funds for construction of border barriers because Congress had already explicitly denied those requested funds; (2) the need for such funds was not unforeseen as the Administration had requested such funding as early as 2018; and (3) Defendants' proposal likely would violate the Constitution's separation of powers principles to the extent it bypassed Congress' appropriations authority. *Id.* At the time, Sierra Club Plaintiffs also sought a preliminary injunction to preclude Defendants' proposed use of Section 2808. *See id.*, Dkt. No. 29 at 13-15, 23-25. However,

the Court found that Plaintiffs could not show irreparable harm as needed to warrant an injunction because as of May 2019, Defendants had not yet made a final decision as to whether to use Section 2808 funds. *Id.*, Dkt. No. 144 at 51-53.

The Court subsequently affirmed its ruling on Defendants' use of Section 8005, granting in part the motions for partial summary judgment filed by California, New Mexico, and the Sierra Club Plaintiffs, and denying Defendants' motions for partial summary judgment. *See California*, No. 19-cv-00872-HSG, Dkt. No. 185; *Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 185. The Court entered a permanent injunction, prohibiting Defendants from taking any action to construct a border barrier in the six sectors that Defendants identified in New Mexico, Arizona, and California, using funds reprogrammed by DoD under Section 8005. *Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 185 at 10.

Following the Court's summary judgment orders, Defendants filed an emergency application with the Ninth Circuit for a stay of the injunction. On July 3, 2019, the Ninth Circuit motions panel denied the stay application, finding that Defendants' border barrier construction was not authorized by any statutory appropriation, such that the proposed reprogramming and use of these funds violated the Appropriations Clause. *See Sierra Club v. Trump*, 929 F.3d 670, 676-77 (9th Cir. 2019). The motions panel further held—over Defendants' objection—that Plaintiffs have an equitable cause of action to challenge Defendants' funding proposal as unconstitutional, and that Plaintiffs satisfied any "zone of interests" test that may apply to their claim. *See id.* at 694-704; *see also* Section III.A below.

On July 26, 2019, the Supreme Court stayed the permanent injunction pending resolution of the government's appeal before the Ninth Circuit and any subsequent writ of certiorari. *See Trump v. Sierra Club*, 140 S. Ct. 1 (2019). In the one-paragraph decision, the Supreme Court stated that "the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Id.* The Supreme Court, however, provided no further explication of its reasoning, and the appeal before the Ninth Circuit regarding Section 8005 remains pending.

In the interim, the parties agreed to stay the summary judgment briefing schedule as to Section 2808 and the Treasury Forfeiture Fund until the Acting Secretary of Defense and U.S. Customs and Border Protection ("CBP"), respectively, reached a final decision to fund specific barrier construction projects under these provisions. *See California*, No. 19-cv-00872-HSG, Dkt. Nos. 199, 200; *Sierra Club*, No. 19-cv-00892-HSG, Dkt. Nos. 191, 197. Because the Secretary of Defense has since announced his authorization for border barrier construction projects pursuant to Section 2808, as detailed in Section I.A.ii above, the parties now move for partial summary judgment as to this proposal.

II. LEGAL STANDARD

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

III. DISCUSSION

A. Plaintiffs' Cause of Action

As a threshold matter, Defendants contend that Plaintiffs lack a cause of action through which they may challenge the proposed use of military construction funds under Section 2808.

They argue that Plaintiffs may not seek equitable relief through an implied cause of action under the Consti-

tution, and that Plaintiffs fall outside the zone of interests protected by Section 2808 and the CAA. As Defendants acknowledge, they raised the same arguments before this Court and the Ninth Circuit motions panel in the context of Plaintiffs' challenge to funding a border wall using Section 8005. In response, the Ninth Circuit engaged in a detailed discussion—and rejection—of each point, concluding that "Plaintiffs have an avenue for seeking relief." *See Sierra Club*, 929 F.3d at 694-704; *see also Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 245 (Brief of *Amici Curiae* Federal Courts Scholars).

First, the Ninth Circuit held that Plaintiffs could challenge the reprogramming of funds under Section 8005 "through an equitable action to enjoin unconstitutional official conduct." *Sierra Club*, 929 F.3d at 694. Plaintiffs' argument there, as here, is that Defendants' attempt to reprogram funds for border barrier construction violates the Appropriations Clause, and thus separation of powers principles, because "Defendants lack any background constitutional authority to appropriate funds." *See id.* at 696. The Ninth Circuit confirmed that such a claim is "fundamentally a constitutional one," and "Plaintiffs may seek equitable relief to remedy an alleged constitutional violation." *Id.* at 695-97. That Defendants rely on Section 8005 (or here, Section 2808) as the basis for their efforts to reallocate funds for border barrier construction does not convert a constitutional claim into a statutory one. *See id.* at 697 ("It cannot be that simply by pointing to any statute, governmental defendants can foreclose a constitutional claim.").

Second, the Ninth Circuit expressed "doubt[] that any zone of interests test applies to Plaintiffs' equitable

cause of action to enjoin a violation of the Appropriations Clause." *Id.* at 700. A zone of interests test is used "to 'determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim.'" *Id.* (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014)). The test "ask[s] whether the plaintiff's 'interests fall within the zone of interests protected by the law invoked.'" *Id.* (quoting *Lexmark*, 572 U.S. at 129). The Ninth Circuit highlighted the problems with applying a zone of interests test to Plaintiffs' constitutional claim: "[W]here the very claim is that no statutory or constitutional provision authorized a particular governmental action, it makes little sense to ask whether any statutory or constitutional provision was written for the benefit of any particular plaintiffs." *Id.* at 701 (emphasis omitted). Moreover, "[b]ecause the Constitution was not created by any act of Congress, it is hard to see how the zone of interests test would even apply." *Id.* at 702. Thus, the Court concluded that "it is likely sufficient here that Plaintiffs would be concretely injured by the alleged Appropriations Clause violation, and that no zone of interests test applies to their claim." *Id.* at 701.

Third, even if a zone of interests test *did* apply to such a constitutional claim, the Ninth Circuit explained that the proper inquiry is whether Plaintiffs fall within the zone of interests of the constitutional provision, and not the statute Defendants raise in defense. *Id.* at 703-04. The Court explained that "individuals, too, are protected by the operations of separation of powers and checks and balances," and thus, Plaintiffs' contention "that their rights or liberties were infringed by a violation of the Appropriations Clause . . . falls within

any zone of interests required to enforce that clause's provisions." *Id.* at 704 (quotation omitted).

i. *Miller v. Gammie*

Defendants urge the Court to disregard the Ninth Circuit's reasoning in light of the Supreme Court's opinion staying the permanent injunction as to Section 8005. *See Trump*, 140 S. Ct. at 1. Defendants argue that the "Supreme Court decision sends a strong signal" that they ultimately will prevail on the claim that their exercise of authority under Section 8005 may not be challenged by these Plaintiffs. *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 236 at 11. This claimed "strong signal" is based on a sentence in the Supreme Court's stay order stating that "the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *See Trump*, 140 S. Ct. at 1.[6] However, notwithstanding Defendants' characterization of this "signal," the Court may not so readily disregard the Ninth Circuit's opinion. The Ninth Circuit has cautioned that only in cases of

[6] The October 15, 2019, veto message went further, claiming that the proclamation itself "has withstood judicial challenge in the Supreme Court." *See* S.J. Res. 54 Veto Message. This is inaccurate: the injunction that was the subject of the stay involved a funding source that did not depend on the emergency declaration, and the validity of the proclamation has never been addressed by the Ninth Circuit or the Supreme Court. *See Sierra Club*, 929 F.3d at 686 (explaining that the Ninth Circuit's opinion "does not address any sources of funds Defendants might use to build a border barrier except those reprogrammed under section 8005"), 679, & n.1 (explaining that DoD's proposed use of funds reprogrammed under Section 8005 to provide support for other agencies under section 284 "does not require the declaration of a national emergency").

"clear irreconcilability" can district courts "consider themselves bound by the intervening higher authority and reject the prior opinion of [the Ninth Circuit] as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc). "This is a high standard," which "requires [the district court] to look at more than the surface conclusions of the competing authority." *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013) (quotation omitted).

At this stage, the Court can only speculate regarding the reasoning underlying the stay, including what it means for how the Supreme Court may ultimately assess the merits of these two cases.[7] As Justice Breyer explained, "[t]his case raises novel and important questions about the ability of private parties to enforce Congress' appropriations power." *Trump*, 140 S. Ct. 1 (Breyer, J., concurring in part and dissenting in part). Because the Supreme Court opinion does not address these questions directly, the Court cannot find that it is "clearly irreconcilable with the reasoning or theory" in the Ninth Circuit panel opinion. *See Miller*, 335 F.3d at 899; *accord Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1074 (9th Cir. 2018) (holding that even where a prior panel opinion's "reasoning would be suspect today, [] it is not clearly irreconcilable with intervening higher authority"); *Doe v. Trump*, 284 F. Supp. 3d 1182, 1184-85

[7] During oral argument on the motions, counsel for Defendants also acknowledged that he did not know the precise grounds on which the Supreme Court stayed the permanent injunction. Counsel opined that the majority could have "meant there is not a cause of action period, or there's not a cause of action for these plaintiffs because of the zone of interests test" applicable to their claim. *See California*, No. 19-cv-00872-HSG, Dkt. No. 254 at 53:17-20.

(W.D. Wash. 2018) ("[T]his court is not at liberty to simply ignore binding Ninth Circuit precedent based on Defendants' divination of what the Supreme Court was thinking when it issued the stay orders. . . . "). The Ninth Circuit's opinion in *Sierra Club v. Trump* therefore controls this Court's analysis.

ii. Zone of Interests

Following the Ninth Circuit's reasoning, as it must, the Court finds that Plaintiffs may challenge Defendants' funding for border barrier construction under Section 2808. As with their challenge to Defendants' use of funds under Section 8005, Plaintiffs' claim that Defendants' use of military construction authority under Section 2808 violates the Appropriations Clause is "fundamentally a constitutional" claim. *See Sierra Club*, 929 F.3d at 696-97. And to the extent Plaintiffs must fall within the zone of interests of the Appropriations Clause to assert this claim, *see id.* at 703-04, the Court finds this "low bar" easily satisfied here. *See Cook v. Billington*, 737 F.3d 767, 771 (D.C. Cir. 2013) (Kavanaugh, J.) ("A plaintiff with Article III standing satisfies the requirement unless his interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." (quotation omitted)).

The Court first looks to the fundamental interests protected by the Appropriations Clause, and observes that the importance of those interests cannot be overstated. The Appropriations Clause "is particularly important as a restraint on Executive Branch officers: If not for the Appropriations Clause, the Executive would possess an unbounded power over the public purse of

the nation; and might apply all its monied resources at his pleasure." *U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.) (quotation omitted). As such, members of the public, and not just Congress, have an interest in ensuring that the Constitution's checks on executive power are upheld. As the Ninth Circuit noted, "[t]he Appropriations Clause is a vital instrument of separation of powers, which has as its aim the protection of individual rights and liberties—not merely separation for separation's sake." *Sierra Club*, 929 F.3d at 704. Both State and Sierra Club Plaintiffs assert that if Defendants proceed with their proposed spending plan in contravention of Congress' appropriations judgment, they will suffer injury to their "environmental, professional, aesthetic, and recreational interests." *Id.* In short, the Court finds that Plaintiffs have a cause of action to challenge Defendants' invocation of Section 2808 as unconstitutional, and proceeds to analyze this claim below.

B. Section 2808

The Ninth Circuit's opinion in *Sierra Club v. Trump* further guides the Court's analysis of Plaintiffs' constitutional claim. *See Sierra Club*, 929 F.3d at 689-92. Plaintiffs' claim—and the legal theory undergirding both cases—is that Defendants seek to circumvent Congress' appropriations power, and its judgment to provide the Administration with limited funds for specified and limited border barrier construction, by seeking funding through alternative channels. Defendants' counsel characterized the Administration's approach as "a full-court press," meaning they are using any means that they contend are available to them to fund a border wall. *See California*, No. 19-cv-00872-HSG, Dkt. No. 254 at 73:5-19.

Although Plaintiffs appear to challenge all funding for border barrier construction outside of the CAA, for purposes of this order, Defendants contend that in Section 2808, Congress allowed Defendants to make this reallocation from existing military construction projects to the border barrier construction. Because Congress only exercises its appropriations power through statutes, the Ninth Circuit accordingly focused its analysis on the text and purpose of Defendants' asserted defense. *Sierra Club*, 929 F.3d at 689-92. The critical inquiry, therefore, is whether Section 2808 authorizes this reallocation. If it does not, "then Defendants are acting outside of any statutory appropriation and are therefore spending funds contrary to Congress's appropriations decisions." *Id.* at 689. The Court therefore analyzes whether Defendants' conduct falls within the statutory authority provided by Section 2808.

Under Section 2808, the Secretary of Defense may use funds previously appropriated for other projects in limited circumstances where three factors are satisfied: (1) there is a national emergency that requires use of the armed forces, and (2) "military construction projects" are (3) "necessary to support such use of the armed forces." *See* 10 U.S.C. § 2808(a). Plaintiffs challenge all three conditions, arguing that Defendants fail to satisfy any of them.

i. Justiciability

As a threshold matter, Defendants assert that the Court may not assess whether they have satisfied the statute's requirements, because their decision to undertake military construction pursuant to Section 2808 was entirely committed to agency discretion. *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 236 at 15-16, 19-

20. Defendants reason that there is no meaningful standard against which the Court can determine whether the President or Secretary of Defense exceeded the authority granted by Congress by declaring a national emergency that required use of the armed forces; authorizing use of Section 2808; or undertaking military construction projects under Section 2808. *Id.* In short, Defendants contend that the President and Secretary of Defense have unreviewable discretion, under both the NEA and Section 2808, to determine whether an emergency exists that meets the statutory criteria. Plaintiffs indicated during oral argument that they are not challenging the President's emergency declaration per se, but rather whether it meets the statutory criteria for an emergency under Section 2808. *See California*, No. 19-cv-00872-HSG, Dkt. No. 254 at 12:6-16:12. The Court addresses that narrow challenge as part of its statutory analysis in Section III.B.ii. Here, however, the Court cabins its analysis to Defendants' argument that their invocation of Section 2808 itself is committed to agency discretion by law, and as such, is nonjusticiable. *See* 5 U.S.C. § 701(a)(2). The Court disagrees that its ability to review Defendants' conduct is so circumscribed.

As the Ninth Circuit has repeatedly held, "[t]he default rule is that agency actions are reviewable under federal question jurisdiction, pursuant to 28 U.S.C. § 1331 . . . even if no statute specifically authorizes judicial review." *See Perez v. Wolf*, No. 18-35123, 2019 WL 6224421, at *5 (9th Cir. Nov. 11, 2019) (quoting *ANA Int'l, Inc. v. Way*, 393 F.3d 886, 890 (9th Cir. 2004)). A decision is generally committed to agency discretion by law, and thus not subject to judicial review, when a court would have "no meaningful standard against which to

judge the agency's exercise of discretion." *Id.* at *5 (quotation omitted). This is rare. "Only where there is truly 'no law to apply' ha[s] [the Ninth Circuit] found an absence of meaningful standards of review." *Id.* at *6 (quoting *Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 688 (9th Cir. 2003)). Courts must assess "the language of the statute and whether the general purposes of the statute would be endangered by judicial review.'" *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1068 (9th Cir. 2015) (quotation omitted).

Engaging in this exercise, the Ninth Circuit recently explained that "courts routinely treat discretion-laden standards as providing 'law to apply.'" *Perez*, 2019 WL 6224421, at *8-*9 (collecting cases). In *Perez v. Wolf*, the Ninth Circuit held that U-Visa determinations made by the United States Citizenship and Immigration Service ("USCIS") are subject to judicial review because the statutory framework provides a meaningful standard against which to assess the agency's exercise of discretion. *Id.* at 15-16. The statutory provision requires that a U-Visa applicant:

> (1) has suffered "substantial physical or mental abuse" as a result of having been a victim of qualifying criminal activity; (2) "possesses information" about qualifying criminal activity; and (3) "has been helpful, is being helpful, or is likely to be helpful" to an authority "investigating or prosecuting" qualifying criminal activity.

Id. at *8 (citing 8 U.S.C. § 1101(a)(15)(U)(i)). Although terms such as "substantial" and "helpful" contain an element of subjectivity, the Ninth Circuit nevertheless found that they constituted "law to apply." *Id.*

The Court finds that Section 2808 likewise provides "meaningful standards" for reviewing Defendants' compliance with its conditions. The diversion of funds from existing military construction projects is only authorized for (1) "military construction projects" that are (2) "necessary to support such use of the armed forces." *See* 10 U.S.C. § 2808(a). Congress defined military construction as "any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road." *Id.* § 2801(a). And Congress defined "military installation," in turn, as "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control." *Id.* § 2801(c)(4). Section 2808 therefore establishes statutory standards that constrain its use. And applying these standards to determine "whether the reprogramming of funds is consistent with the Appropriations Clause and [Section 2808] . . . is a familiar judicial exercise." *See Sierra Club*, 929 F.3d at 687 (quotation omitted).

That the statute conditions authorization on the existence of a national emergency and the use of the armed forces does not, on its own, convert the legal exercise of statutory interpretation into a purely political one. The Ninth Circuit's opinion in *United States v. Spawr Optical Research, Inc.*, is illustrative. In *Spawr*, President Gerald Ford relied on the continued existence of

two national emergencies to forbid the shipment of certain strategic items to foreign countries under the Trading with the Enemy Act ("TWEA"). 685 F.2d 1076, 1079-80 (9th Cir. 1982). During a national emergency, TWEA empowered the president to "regulate, . . . prevent or prohibit . . . any exportation of . . . or transactions involving[] any property in which any foreign country . . . has any interest." 50 U.S.C. § 4305(b)(1)(B). The Ninth Circuit distinguished between "the essentially political questions surrounding the declaration or continuance of a national emergency," on the one hand, and the legal question of "whether the actions taken pursuant to a national emergency comport with the power delegated by Congress," on the other. *See Spawr*, 685 F.2d at 1080-81. The Ninth Circuit held that courts "are free to review" whether the Executive Branch has legal authority to act, and went on to determine whether the regulations at issue were rationally related to the emergencies. *See id.* at 1081 (concluding that "President Ford's effort to limit the exportation of strategic items clearly had a rational relationship to the prevention of aggression and armed conflict").

The Court fully appreciates that "[n]ational-security policy is the prerogative of the Congress and President," and that their military judgments are due deference. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017); *see also Rostker v. Goldberg*, 453 U.S. 57, 66 (1981) (acknowledging "a healthy deference to legislative and executive judgments in the area of military affairs"). But "the judiciary appropriately exercises its constitutional function where the question is whether Congress or the Executive is aggrandizing its power at the expense of

another branch." *Sierra Club*, 929 F.3d at 687 (quotation omitted). As the Ninth Circuit explained, "'courts cannot avoid their responsibility merely because the issues have political implications.'" *Id.* (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)). The Court accordingly may, and must, determine whether Defendants have exceeded the limits set by Congress regarding spending under Section 2808, while affording both branches due deference. As summarized by the Ninth Circuit in another case in which the Executive Branch invoked national security concerns in support of its nonjusticiability argument:

> To declare that courts cannot even look to a statute passed by Congress to fulfill international obligations turns on its head the role of the courts and our core respect for a co-equal political branch, Congress. Interpreting and applying [the statute at issue] does not prevent the military from planning and building bases. It requires only that the executive take into account certain procedural obligations, required by Congress, before it takes steps forward. The courts may then look to whether the executive complied with its obligations. We may consider national security concerns with due respect when the statute is used as a basis to request injunctive relief. This is not a grim future, and certainly no grimmer than one in which the executive branch can ask the court for leave to ignore acts of Congress.

Ctr. for Biological Diversity v. Mattis, 868 F.3d 803, 825-26 (9th Cir. 2017).

ii. Statutory Interpretation

Having found that Section 2808 provides meaningful standards against which the Court may analyze Defendants' conduct under the statute, the Court reviews their compliance with those standards. The Court provided its initial impression as to Defendants' compliance with Section 2808 in its preliminary injunction order in *Sierra Club v. Trump*. *See Sierra Club*, 19-cv-00892-HSG, Dkt. No. 144 at 42-46. At the time, the Court expressed reservations that "border barrier construction could reasonably constitute a 'military construction project' such that Defendants' invocation of Section 2808 would be lawful," and also raised concerns that Defendants' interpretation of Section 2808 would cede unbounded authority to Defendants to redirect military construction funds. *See id.* at 42-43. Now that Defendants have specified how they intend to use Section 2808, the Court confirms its preliminary analysis, finding that the eleven border barrier projects are not "military construction projects" that are "necessary to support such use of the armed forces." *See* 10 U.S.C. § 2808(a).

a. Emergency Requiring Use of the Armed Forces

Sierra Club Plaintiffs alone challenge the President's February 15 declaration of a national emergency to the extent that the President simultaneously concluded that this emergency required use of the armed forces.[8] *See*

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[8] State Plaintiffs, on the other hand, explicitly note that for purposes of their motion for partial summary judgment they are not challenging the President's declaration of a national emergency. *See California*, No. 19-cv-00872-HSG, Dkt. No. 220 at 8.

Sierra Club, No. 19-cv-00892-HSG, Dkt. No. 210 at 9-11. Sierra Club Plaintiffs couch this as a statutory condition, and thus as a matter of statutory interpretation under Section 2808 rather than one of policy or politics. The Court is not persuaded.

Sierra Club Plaintiffs assert that there is no true emergency at the southern border, and that even if there were, DHS, not DoD, has jurisdiction over protecting the nation's borders. In support of their challenge, Sierra Club Plaintiffs point to the text of the proclamation itself, which states in relevant part:

> [R]ecent 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 . . . [T]he 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. Plaintiffs contend that "unarmed parents and children seeking refuge do not require a military response." *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 210 at 11. Plaintiffs also point to comments made by DoD officials outside the proclamation that the situation at the border is "not a military threat." *See, e.g.*, *id.*, Dkt. No. 210-2, Ex. 15 at 50-52 (Acting U.S. Secretary of Defense Shanahan and General Joseph Dunford concurring that the "situation on the southern border" is a "security challenge" and "not a military threat"); Ex. 16 at 2 (Admiral Michael M. Gilday, Operations Director of the Joint Staff, stating that "[n]one of

the capabilities that we are providing are combat capabilities" and "[i]t's not a war zone along the border"). Rather, in Plaintiffs' view, Defendants are using DoD's temporary and limited support of DHS—the civilian agency that Congress has tasked with border security and immigration enforcement—to justify funding the border barriers that DHS has sought to build. *See, e.g.*, 6 U.S.C. §§ 202, 251; 8 U.S.C. §§ 1103(a)(5), (a)(10).

At bottom, Plaintiffs' theory is premised on the idea that the proclamation was designed solely to avoid Congress' appropriations judgment and that the emergency is a convenient pretext. The Court acknowledges that both the timing and nature of the emergency raise obvious questions. The Administration repeatedly and unsuccessfully sought appropriations from Congress for border barrier construction. When Congress and the President could not agree on such funding, the President suggested his willingness to declare a national emergency if Congress refused to appropriate the money he requested. *See, e.g.*, *California*, 19-cv-00872-HSG, Dkt. No. 59-4, Ex. 21. When asked about his threshold for declaring an emergency, the President stated, "[m]y threshold will be if I can't make a deal with people that are unreasonable." *See* George Sargent, *Trump: I have the 'absolute right' to declare a national emergency if democrats defy me*, Wash. Post (Jan. 9, 2019), https://tinyurl.com/y5f5eqwg. And the President then declared the national emergency one day after Congress passed the CAA, which limited appropriations for border barrier construction. *See* Proclamation No. 9844. In announcing the national emergency declaration, the President explained, "I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster. . . . And I think that I just want

to get it done faster, that's all." *See California*, No. 19-cv-00872-HSG, Dkt. No. 59-4, Ex. 50.

All this said, there is no precedent for a court overriding a President's discretionary judgment as to what is and is not an emergency. That one of the conditions to invoke Section 2808 is that the emergency require use of the armed forces does not alter the nature of the inquiry. Sierra Club Plaintiffs are still asking the Court to evaluate the "policy choice[] and value determination[]" underlying the President's emergency proclamation. *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986). Plaintiffs have not cited, and the Court has not found, any case in which a court has assessed the nature and validity of an emergency proclamation. *Cf. California*, No. 19-cv-00872-HSG, Dkt. No. 254 at 12:6-16:12. To the contrary, as discussed in Section III.B.i above, the Ninth Circuit has characterized "the declaration or continuance of a national emergency" as an "essentially political question[]." *Spawr*, 685 F.2d at 1080-81. The Court accordingly finds that whether the national emergency truly exists, and requires use of the armed forces, are nonjusticiable political questions.

The Court nevertheless acknowledges the significant constitutional tension inherent in the President's invocation of a national emergency under the NEA for the avowed purpose of accessing money to fund projects that Congress expressly considered and declined to fund. It is apparent that at the time Congress enacted the NEA it did not envision the statute would (or even could) be used to circumvent the will of Congress. As the Court previously explained, Congress initially reserved the right to terminate a national emergency with

a simple majority and without the opportunity for a presidential veto. *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 144 at 13-14, & n.8; *see also id.*, Dkt. No. 219 at 10-15 (Brief of *Amici Curiae* Brennan Center for Justice and the Cato Institute) ("Brennan Center Brief"). Thus, prior to the Supreme Court's opinion in *INS v. Chadha*, it would have been impossible for the President to use the NEA to somehow bypass the will of a congressional majority. *See* 462 U.S. at 944-58; *see also Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 219 (Brennan Center Brief) at 15 ("The notion that Congress intended the NEA as an affirmative delegation of unlimited discretion to the president—one that would allow the president to circumvent the will of Congress on specific policy proposals—is contradicted by this and every other aspect of the legislative history.").

Still, Congress is not without recourse. Under the NEA, "[a]ny national emergency declared by the President in accordance with this subchapter shall terminate if . . . there is enacted into law a joint resolution terminating the emergency." 50 U.S.C. § 1622(a)(1). Moreover, the NEA not only allows, but in fact obligates, Congress to "consider a vote on a joint resolution to determine whether that emergency shall be terminated" every six months. *See id.* § 1622(b). Congress thus has the authority to monitor and if needed, reverse, the President's determination that circumstances at the southern border constitute a national emergency. That Congress has so far been unable to override the President's veto with a two-thirds majority vote does not somehow transform this fundamentally political question into a legal one. Because the national emergency remains in effect, the Court may not opine as to whether the President properly invoked the NEA by declaring a

national emergency requiring the use of the armed forces at the southern border.

b. Military Construction Project

Next, the parties disagree as to whether the border barrier construction projects constitute "military construction projects" for purposes of Section 2808.[9] As noted above, Congress defined the term "military construction" to "include[] any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road. . . . " 10 U.S.C. § 2801(a). Because it is apparent that border barrier construction constitutes "construction," the critical question before the Court is whether the eleven proposed projects are being "carried out with respect to a military installation." *Id.*; *see also id.* § 2801(b) ("A military construction project includes all military construction work . . . necessary to produce a complete and useable facility or a complete and usable improvement to an existing facility.").

A "military installation," in turn, "means a base, camp, post, station, yard, center, or other activity under

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[9] During the hearing, Sierra Club Plaintiffs explained that they are not challenging whether the two projects on the Barry M. Goldwater Range, an existing military installation, constitute military construction for purposes of Section 2808. *See California*, No. 19-cv-00872-HSG, Dkt. No. 254 at 85:12-19. Defendants have identified these two projects as Yuma Project 2 and Yuma Project 10/27. But Plaintiffs still challenge whether any of the eleven projects are necessary to support use of the armed forces. *See* Section III.B.ii.c.

the jurisdiction of the Secretary of a military department. . . . " *Id.* § 2801(c)(4). Defendants do not attempt to characterize the projects as either a "base, camp, post, station, yard, [or] center." *See id.* § 2801(c)(4). Instead, they reason that the 175 miles of proposed border barrier construction fall within the "other activity" definition because DoD has obtained—or will obtain—administrative jurisdiction over the land for these projects and assign it to Fort Bliss in Texas. *See California*, No. 19-cv-00872-HSG, Dkt. No. 236-7, Ex. 7 (General Order No. 2019-36). By obtaining administrative jurisdiction over the land in this way, they conclude, all eleven projects will be part of an existing military installation. *Id.* In other words, Defendants contend that "military installation" is "inclusive of [any] activities under the jurisdiction of the Secretary of a military department." *See id.*, Dkt. No. 236 at 13. The Court finds several flaws with this expansive interpretation.

First, Defendants' interpretation requires the Court to disregard the plain language of the statute. Defendants would have the Court transform the definition of "military installation" to include not just "other activity," but "*any* activity" under military jurisdiction. That simply is not what the statute says.[10] As the Supreme

[10] In its opposition to Sierra Club Plaintiffs' motion for a preliminary injunction as to Section 2808, *see Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 64 at 21-23, Defendants initially posited that the as-yet unidentified border barrier projects would fall within the "other activity" category. Applying traditional tools of statutory construction, the Court explained that "a base, camp, post, station, yard, [and] center" are all discrete and traditional military locations, and

Court has noted, when interpreting a statute, context matters. *See, e.g.*, *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016) ("[W]e look to the context in which the words appear."); *see also ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1210 (9th Cir. 2015) ("[T]he plain language of a statute should be enforced according to its terms, in light of its context."). And here, as the Court cautioned before, the terms "base, camp, post, station, yard, [or] center" are not mere surplusage to ignore, but rather supply meaning and provide boundaries to the term "other activity." *See, e.g.*, *McDonnell*, 136 S. Ct. at 2369 (explaining that canons of construction are "wisely applied . . . to avoid the giving of unintended breadth to the Acts of Congress" (quotation omitted)); *Yates v. United States*, 135 S. Ct. 1074, 1087 (2015) ("Had Congress intended 'tangible object' in § 1519 to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to 'record' or 'document.' The Government's unbounded reading of 'tangible object' would render those words misleading surplusage."); *CSX Transp., Inc. v. Ala. Dept. of Revenue*, 562 U.S. 277, 295 ("We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless."). Defendants do not even attempt to explain how the proposed projects are similar in nature or scope to "a base, camp, post, station, yard, [or] center," 10 U.S.C. § 2801(c)(4), and the Court finds that they are not.

"other activity" must refer to similar locations. The Court incorporates that reasoning again here, in all respects. *See id.*, Dkt. No. 144 at 44-45.

Rather than engaging with the text of the statute, Defendants rely heavily on the Supreme Court's decision in *United States v. Apel*, 571 U.S. 359, 368 (2014). There, the Supreme Court noted that "'military duty' and 'military protection' are synonymous with the exercise of military jurisdiction," and that the term "'military installation' is used [that way] elsewhere in federal law." *Id.* (emphasis omitted). The Supreme Court, however, was not analyzing the definition of military installations under Section 2808 or 10 U.S.C. § 2801(c)(4). The case involved an entirely different statute under Title 18, which imposed a criminal fine on anyone who reentered a "military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation" after being removed. *See* 18 U.S.C. § 1342. The question before the Court in *Apel* was whether a public easement on an Air Force base was still considered part of the military installation. The Court rejected "[t]he use-it-or-lose-it rule" that § 1342 only applied where the military had exclusive use, possession, or control over the property in question. *Apel*, 571 U.S. at 372. In doing so, the Court cited the language of 10 U.S.C. § 2801(c)(4), but did not engage in any analysis of its possible limitations. *See id.* at 368. Indeed, to the extent *Apel* provides any insight for the interpretation of Section 2808, it is simply that statutes must be read in context, and with an eye toward common sense. *Id.* at 369-72.

Defendants also suggest that Congress intended "military installation" in Section 2808 to be read broadly because elsewhere it defined the term differently. Under 10 U.S.C. § 2687(g)(1), for example, Congress defined "military installation" in the context of base clo-

sures to "mean[] a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense," but excluded "any facility used primarily for civil works, rivers and harbors projects, or flood control projects." *Id.* The Court acknowledges that Congress may provide different definitions in different statutes, but this does not open the door to a limitless definition of military installation in Section 2808. Again, part of the inquiry is context and congressional intent, but Defendants do not engage with either.

Second, Defendants' interpretation would grant them essentially boundless authority to reallocate military construction funds to build anything they want, anywhere they want, provided they first obtain jurisdiction over the land where the construction will occur. Although Defendants attempt to reassure the Court that they "are *not* arguing that the entire southern U.S. border" constitutes a military installation for purposes of Section 2808, *see California*, No. 19-cv-00872-HSG, Dkt. No. 236 at 13, there is nothing in their interpretation to preclude them from doing so. When asked during the hearing whether Defendants' reading of Section 2808 had a limiting principle, counsel could not articulate one. *See id.*, Dkt. No. 254 at 62:21-64:3.

The scale of what is possible under this reading is immense. The eleven projects at issue in the instant motions are illustrative. Defendants acknowledge that nine of the proposed projects are on federal public domain or non-public land, not previously under military jurisdiction. *See id.*, Dkt. Nos. 206 at 2-4, 206-1, Ex. 1. These nine projects, which cover 140 of the 175 total miles of border barrier construction at issue, are located

on land spanning several hundred miles in Arizona, California, New Mexico, and Texas. But Fort Bliss, the military installation to which Defendants will administratively assign the land, is located near El Paso, Texas. Defendants suggest that projects located several hundred miles away from Fort Bliss are nevertheless "carried out with respect to [that] military installation," provided Defendants complete the right paperwork. *See* 10 U.S.C. § 2801(a).[11] Under this interpretation, construction can be considered "carried out with respect to a military installation" even if it is otherwise wholly unrelated to the installation's functions, purpose, or even geography. Indeed, Defendants do not offer any substantive connection between the proposed construction here and Fort Bliss. Instead they acknowledge that the construction sites are assigned administratively to Fort Bliss "for real property accountability purposes." *See California*, No. 19-cv-00872-HSG, Dkt. No. 251 at 4;

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[11] The Court notes that in an August 21, 2019, "Action Memo," the Assistant Secretary of Defense, Homeland Defense and Global Security said that in order for border barrier projects to constitute military construction projects, a military department would need to report the land in its inventory "either as its own installation or as part of an existing, *nearby* military installation." AR at 3 (emphasis added). Defendants now contend that this common-sense "nearby" condition is not actually a formal requirement of the statute. *See California*, No. 19-cv-00872-HSG, Dkt. No. 251 at 3-4. Even if that is technically true, the Court finds it plain that Defendants' characterization of the breadth of the asserted power to cobble together far-flung parcels as part of one "military installation" goes far beyond any historical example they cite. *See id.*, Dkt. No. 249 at 7-8 (citing auxiliary landing field located 40 miles away from main military installation as an example of a "geographically separated location[] . . . part of, but physically separate from" that installation).

see id., Dkt. No. 251-1 at ¶¶ 7-11. They further state that "Fort Bliss is the largest, most capable Active Army installation in the vicinity of the southern border." *Id.* The Court is not persuaded that Congress intended "military construction" to have no stronger connection to a military installation than Defendants' own administrative convenience. If this were true, Defendants could redirect billions of dollars from projects to which Congress appropriated funds to projects of Defendants' own choosing, all without congressional approval (and in fact directly *contrary* to Congress' decision not to fund these projects). Elevating form over substance in this way risks "the Executive [] aggrandizing its power at the expense of [Congress]." *Sierra Club*, 929 F.3d at 687 (quotation omitted).

Third, Defendants' interpretation contravenes clear congressional intent to limit—not expand—executive emergency powers. The NEA was passed in 1976 as a reform measure, following concern about the duration of the national emergencies that presidents had declared historically, and the scope of their related emergency powers. *See* L. Elaine Halchin, *National Emergency Powers*, Cong. Research Serv., 98-505 (Aug. 5, 2019). For example, an emergency declaration that was issued at the start of the Korean War in 1950 was still being used decades later with respect to the Vietnam War. *Id.* at 7. In 1973, there were four national emergencies still in effect from 1933, 1950, 1970, and 1971. *See id.* The Senate, therefore, created a special committee, known as the Special Committee on National Emergencies and Delegated Emergency Powers, to evaluate this issue. *See id.* at 7-8. Through its work, the Committee identified 470 provisions of federal law that granted the president extensive emergency powers. *See id.* at 8.

The Committee developed legislation—the NEA—to limit the scope of such emergency powers. In support of the NEA, the Committee explained the need to place limits on the presidential use of emergency powers:

> Right now, hundreds of emergency statutes confer enough authority on the President to rule the country without reference to normal constitutional process. Revelations of how power has been abused by high government officials must give rise to concern about the potential exercise, unchecked by the Congress or the American people, of this extraordinary power. The National Emergencies Act would end this threat and [e]nsure that the powers now in the hands of the Executive will be utilized only in time of genuine emergency and then only under safeguards providing for Congressional review.

See Sierra Club, No. 19-cv-00892-HSG, Dkt. No. 219 (Brennan Center Brief) at 12-13 (quoting *The National Emergencies Act (Public Law 94-412), Source Book: Legislative History, Text, and Other Documents* (1976) ("*NEA Source Book*"). In its report, the Committee noted that "[t]he National Emergencies Act is not intended to enlarge or add to Executive power. Rather the statute is an effort by the Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes." *Id.* at 14 (quoting *NEA Source Book*).

In keeping with this narrower view of executive emergency powers, Section 2808 has rarely been used, and never to fund projects for which Congress withheld appropriations. Rather, Section 2808 has been used to build projects like aircraft hangars, barracks, airfield runways, detention facilities, logistics hubs, and waste

water treatment plants. *See* Vassalotti, at 2-3. Defendants' invocation of Section 2808 for border barrier construction, in conflict with Congress' judgment on those projects, is simply unprecedented, contrary to the Administration's claims.[12] This, on its own, is enough to warrant close scrutiny: "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quotation omitted). Put simply, the Court does not find that Section 2808 was intended to be used to resolve policy disputes with Congress or to provide the Executive Branch with unchecked power to transform the responsibilities assigned by law to a civilian agency into military ones by reclassifying large swaths of the southern border as "military installations." Such an interpretation defies both the text and spirit of the statute. The Court, therefore, finds that the border barrier construction projects, with the exception of the two projects on the Barry M. Goldwater range, are not "carried out with respect to a military installation" within the meaning of Section 2808.

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[12] *Compare* S.J. Res. 54 Veto Message ("Proclamation 9844 was neither a new nor novel application of executive authority. Rather it is the sixtieth Presidential invocation of the [NEA]. It relies upon the same statutory authority used by both of the previous two Presidents to undertake more than 18 different military construction projects from 2001 through 2013."), *with Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 219 (Brennan Center Brief) at 20 ("Perhaps most significantly, in none of these cases did presidents invoke emergency powers to take action after Congress had explicitly considered and rejected legislation to authorize such action.").

c. Necessary to Support Use of the Armed Forces

Even assuming the border barrier construction could somehow be considered military construction for purposes of Section 2808, the parties also disagree as to whether the proposed projects are necessary to support the use of the armed forces. Defendants rely on a lengthy administrative record, which, they say, explains why the projects are necessary to provide such support. But even crediting all facts in the administrative record, and giving due deference to the strategic and military determinations in it, the Court finds that Defendants have not established that the projects are necessary to support the use of the armed forces.

The problem is twofold. Inherent in Defendants' argument and the administrative record is that the proposed border barrier projects are intended to support and benefit DHS, a civilian agency, rather than the armed forces. And although the administrative record explains why such border barrier projects may be beneficial to DHS's mission, Defendants have not established that they are in fact *necessary to support the use of the armed forces*—which is the statutory limitation set by Congress. The Court discusses each issue in turn.

On April 4, 2018, the President directed the Secretary of Defense to support DHS "in securing the southern border and taking other necessary actions" due to "[t]he crisis at our southern border." *See California*, 19-cv-00872-HSG, Dkt. No. 59-4, Ex. 27. The President further empowered the Secretary of Defense to "request use of National Guard personnel to assist" as needed. *Id.* As of August 13, 2019, DoD had approximately 5,500 personnel supporting DHS in its "border

security mission." *See* AR at 1, 45. DoD personnel are generally serving in "support roles that relieve DHS personnel of non-law enforcement duties," such as "logistics, planning, and intelligence analysis" and "monitoring and detection support" through "operating mobile surveillance cameras units or providing aerial reconnaissance." *Id.* at 42. DHS stated that the proposed border barrier projects that DHS recommended to DoD would "give a distinct and enduring advantage to [U.S. Border Patrol] as a force multiplier," and would "likely reduce DHS's reliance on DoD for force protection, surveillance support, engineering support, air support, logistical support, and strategic communications assistance." *Id.* at 43 (quotation omitted). In sum, the Chairman of the Joint Chiefs of Staff and DHS summarized that the projects would "allow DoD to provide support to DHS more efficiently and effectively." *See id.* at 48; *see also id.* at 59-71.

The administrative record therefore illustrates that the border barrier construction projects are intended to benefit DHS and its subagencies, including CBP and U.S. Border Patrol ("USBP"). The record explains that physical barriers, such as those proposed, may "[i]mprove CBP's detection, identification, classification, and response capabilities," AR at 4; "[r]educe vulnerabilities in key border areas and the time it takes for Border Patrol agents to apprehend illegal migrants," *id.*; "reduce the challenges to CBP," *id.* at 61; "serve to channel illegal immigrants towards locations that are operationally advantageous to DHS," *id.*; "reduce the enforcement footprint and compress USBP operations," *id.* at 43; "enable CBP agents to focus less on the rugged terrain," *id.* at 69; and as noted above, "give a distinct and enduring advantage to USBP as a force multiplier,"

id. at 43; *see also id.* at 121-24. As DoD representatives have forthrightly explained, funding under Section 2808 would "all go to adding significantly new capabilities to DHS's ability to prevent illegal entry." *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 210-2, Ex. 17 at 5.

That the border barrier projects would benefit DHS is unsurprising, as Congress empowered that agency to "[s]ecur[e] the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States." 6 U.S.C. § 202; *see also* 8 U.S.C. §§ 1103(a)(5) (charging the Secretary of Homeland Security with "the power and duty to control and guard the boundaries and borders of the United States"). But this is a *civilian* agency, and not part of the armed forces. The commission of these responsibilities to DHS is no secret: the entire reason for the longest shutdown of the Federal government in history was that the President sought over $5 billion in appropriations to *DHS* for these exact projects, and Congress exercised its constitutional prerogative to decline to authorize that spending. Put another way, the entire dispute in this case arises from the Executive's efforts to find other ways to help DHS do what Congress directly said it would not authorize when it rejected the Executive's DHS budget request.

Defendants suggest that the assistance to DHS is merely a byproduct of helping DoD. *See, e.g.*, *California*, No. 19-cv-00872-HSG, Dkt. No. 249 at 10. Yet the administrative record suggests that the proposed projects may actually *reduce* DHS's need for DoD support. *See, e.g.*, AR at 4 (noting that the projects "could ulti-

mately reduce the demand for DoD support at the southern border over time"). As the President put it, "[i]f we had a wall, we don't need the military because we'd have a wall." *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 210-2, Ex. 13 at 5. Defendants do not explain how the projects are necessary to support the use of the armed forces while simultaneously obviating the need for those forces. This appears to defy the purpose of Section 2808, which specifically refers to construction that is necessary to support the use of the armed forces, not to construction that the armed forces will not use once constructed. Again, Defendants' argument proves too much. Under their theory, any construction could be converted into military construction—and funded through Section 2808—simply by sending armed forces temporarily to provide logistical support to a civilian agency during construction. But Congress, and not Defendants, holds the power of the purse. The Court declines to interpret Section 2808 to provide the Secretary of Defense with almost limitless authority to use billions of dollars of its appropriations to build projects for the benefit of DHS, even when Congress specifically declined to give DHS itself the funds to build those projects. *See, e.g.*, *Util. Air Regulatory Grp.*, 573 U.S. at 324 ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." (quotation omitted)).

The administrative record also fails to establish that the border barrier construction projects are "*necessary* to support [] use of the armed forces." *See* 10 U.S.C. § 2808(a) (emphasis added). The Oxford English Dictionary defines "necessary" as "[i]ndispensable, vital, essential." *See Necessary*, OXFORD ENGLISH DICTION-

ARY ONLINE (last visited Nov. 20, 2019); *accord* MERRIAM-WEBSTER ONLINE DICTIONARY (defining "necessary" as "absolutely needed: required") (last visited Nov. 20, 2019). Yet Defendants simply contend that the projects will "allow DoD to provide support to DHS more efficiently and effectively." *See* AR at 48. Even accepting this conclusion as true, promoting efficiency and efficacy is not tantamount to necessity, given the nature of the construction at issue. And the Court declines Defendants' invitation to blur this distinction. There is simply nothing in the record before the Court indicating that the eleven border barrier projects—however helpful—are necessary to support the use of the armed forces.

The Court does not lightly reach the conclusion that the record does not support Defendants' claim of necessity here. The undersigned deeply respects the work of the United States armed forces, and understands and is grateful for the innumerable sacrifices made by military women and men, and their families, in service of our country. *See California*, No. 19-cv-00872-HSG, Dkt. No. 232 (IAVA Brief) at 9 ("Service members are used to discomfort. They signed up to endure hardships so that the rest of American society could live freely and comfortably. . . . But they should never be asked to work in unnecessarily unsafe or harmful conditions, or to wait even longer for basic facilities that are already long overdue."). And the Court has no doubt that Congress shares this respect and gratitude. Were this case about constructing hangars for storage of aircraft used in "aerial reconnaissance," or building a control center for "operating mobile surveillance camera units," AR at 42, the circumstances likely would be very different.

But the Court cannot blind itself to the plain reality presented in this case: the border barrier projects Defendants now assert are "necessary to support the use of the armed forces" are the very same projects Defendants sought—and failed—to build under DHS's civilian authority, because Congress would not appropriate the requested funds. Even where review is "deferential," courts "are 'not required to exhibit a naiveté from which ordinary citizens are free.'" *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)); *see also Karnoski v. Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019) ("Of course, deference does not mean abdication.") (quotation omitted). DoD officials have forthrightly acknowledged that the border barrier projects are intended to fulfill the President's priorities. During a congressional hearing on the reprogramming of funds for border barrier construction, Acting U.S. Secretary of Defense Shanahan explained that "given a legal order from the commander in chief, we are executing on that order." *See* John Wagner, Paul Sonne, and Dan Lamothe, *Pentagon announces $1 billion transfer for border barriers, angering Democrats*, Wash. Post (March 26, 2019), https://tinyurl.com/y2njmvsk. Similarly, when asked during the hearing about prioritizing the border wall over military readiness and modernization, U.S. Army Secretary Esper said "I'm saying that the Department of Defense made decisions based on what the president set as priorities, and we are following through. We are executing." *Id.*

The parties do not suggest that additional factfinding would buttress or clarify the rationale or need for the projects. The Court therefore finds that the projects are not necessary to support the use of the armed forces.

As the Supreme Court has explained, "[r]egardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quotation omitted). Accordingly, taking into account the totality of the record, the Court finds that Defendants have not satisfied the mandatory conditions set by Congress in Section 2808, and that they thus are not authorized to redirect military construction funds to the eleven border barrier projects they have identified.

C. APA

State Plaintiffs further contend that Defendants' conduct is reviewable as unlawful under the APA. Plaintiffs first suggest that by failing to comply with the statutory conditions in Section 2808, Defendants have acted "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *See* 5 U.S.C. § 706(2)(C). Such arguments, however, collapse into the same analysis of Section 2808 that the Court detailed in Section III.B above. *See Sierra Club*, 929 at 689-92. The Ninth Circuit acknowledged when analyzing Section 8005 that "Plaintiffs either have an equitable cause of action to enjoin a constitutional violation, or they can proceed on their constitutional claims under the Administrative Procedure Act, or both." *Id.* at 676-77. However, the analysis—whether under the Constitution or the APA—remains the same. *Id.*[13]

[13] Although Sierra Club Plaintiffs do not raise an independent claim under the APA, they note, as the Ninth Circuit has recognized,

State Plaintiffs also make a second and distinct claim that Defendants have violated the APA's prohibition on arbitrary and capricious agency action. *See California*, No. 19-cv-00872-HSG, Dkt. No. 220 at 13-15. Plaintiffs argue that in identifying and reallocating funds from 128 existing military construction projects, Defendants did not "address any of the harms to public health and safety" that would result from defunding those projects. *Id.* at 13. The Court finds this argument meritless. "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Rather, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* (quotation omitted). Here, the administrative record provides such an explanation, indicating that Defendants identified projects for defunding to "provide [DoD] time to work with [Congress] to determine opportunities to restore funds for these important military construction projects. . . . " *California*, No. 19-cv-00872-HSG, Dkt. No. 206-2, Ex. 2 at 2. For the same reasons discussed above, it is not the Court's task to decide whether it finds the substance of Defendants' rationale for defunding or delaying these

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that the Court may consider their claim challenging the use of military construction funds either as an equitable action to enjoin unconstitutional conduct or under the APA as final agency action that violates the Constitution. *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 210 at 21-22 (citing *Sierra Club*, 929 at 676-77).

projects persuasive or wise, and State Plaintiffs' disagreement with that rationale does not make the decision arbitrary and capricious.

D. National Environmental Policy Act

Plaintiffs also seek a declaratory judgment deeming unlawful Defendants' failure to comply with NEPA before undertaking the proposed military construction projects under Section 2808.[14] NEPA is intended "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. Under NEPA, federal agencies must assess the environmental impact

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[14] State Plaintiffs also attempt to expand their NEPA cause of action to include the land transfer from the Department of the Interior for the proposed border barrier construction projects, but their complaint does not assert such a claim. *See California*, No. 19-cv-00872-HSG, Dkt. No. 47 at ¶¶ 392-99. Rather, their NEPA claim explicitly states that "Defendant DHS is in violation of NEPA and the APA because it failed to prepare an [Environmental Impact Statement] concerning border wall development projects that will have adverse effects on the environment. . . . " *Id.* at ¶ 397. Even reading the complaint liberally, the operative complaint does not "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *See Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006) (holding district court did not err in finding plaintiff failed to provide adequate notice of her claims where she presented specific factual grounds for those claims for first time on summary judgment) (quotation omitted). The Court may not now grant summary judgment as to a claim that State Plaintiffs never asserted until their motion for summary judgment, when they never sought leave to amend the complaint. *See Wasco Prod., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) ("Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings." (quotation omitted)).

of agency actions that "significantly affect[ ] the quality of the human environment." *Id.* § 4332(C). Where an agency's project "might significantly affect environmental quality," NEPA compels preparation of an Environmental Impact Statement ("EIS"). *See WildEarth Guardians v. Provencio*, 923 F.3d 655, 669 (9th Cir. 2019). Plaintiffs contend that Defendants were required to prepare an EIS for the proposed border barrier construction projects, but failed to do so here.

In response, Defendants point to the language of Section 2808, which by its terms, authorizes "the Secretary of Defense, without regard to any other provision of law, [to] undertake military construction projects. . . . " 10 U.S.C. § 2808. The Secretary of Defense mirrored this language in directing the Secretary of the Army "to expeditiously undertake the eleven border barrier military construction projects," and "to do so without regard to any other provision of law that may impede the expeditious construction of such projects in response to the national emergency." *See California*, No. 19-cv-00872-HSG, Dkt. No. 206-1, Ex. 1 at 1. The Court finds that the language in Section 2808 is clear on its face, and permits the Secretary of Defense, if properly acting within his authority under Section 2808, to undertake military construction projects without regard to NEPA.

Plaintiffs attempt to restrict this "notwithstanding" language by divorcing Defendants' ability to re-prioritize military construction projects from their ability to actually construct those projects. Plaintiffs urge that only the former power to "restructur[e] construction priorities" may be undertaken "without regard to any other provision of law." *See, e.g.*, *Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 210 at 19-20. The Court

finds no evidence for this reading, as the statute permits the Secretary to "undertake military construction projects," not just to prioritize them.

Plaintiffs next contend that the Court should still read the "notwithstanding" language narrowly because had Congress intended to waive NEPA's requirements, the statute would have included language that the projects be undertaken "without delay" or "expeditiously." *Id.* at 20. However, there are no magic words constraining Congress' ability to empower Defendants to proceed without consideration of NEPA or other laws. Rather, the Court must "tak[e] into account the whole of the statutory context in which [the notwithstanding clause] appears." *See United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007). Here, Plaintiffs' argument is belied by the statutory prerequisite that there be a declaration of war or a national emergency before Section 2808 may be used for military construction. Such a condition, by its nature, normally would require speed. The Court finds it unreasonable to conclude that in the face of war or a national emergency, Congress would require Defendants to engage in the time-intensive EIS process prior to undertaking projects "necessary to support [] use of the armed forces." *See* 10 U.S.C. § 2808. Plaintiffs' concern that Section 2808 would "empower[] the Secretary of Defense to build almost anything, anywhere," *see Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 210 at 21, ignores the conditions discussed in Section III.B.ii above. Section 2808 has limits. It may only be invoked in the event of war or a national emergency, and the Secretary of Defense still must establish that the proposal is a military construction project necessary to support the use of the armed forces.

This does not, however, end the inquiry. To be sure, had Defendants acted within their authority under Section 2808 in proposing the eleven border barrier construction projects, the Court finds that their conduct likely would not violate NEPA. But the Court has already found that Defendants have not properly invoked Section 2808, so that the "without regard to any other provision of law" language is not triggered. Put another way, the question of whether Defendants are required to comply with NEPA with respect to the eleven projects is derivative of the parties' Section 2808 arguments. The Court does not understand Defendants to suggest that any authority other than Section 2808 excuses them from complying with NEPA as to these projects. The Court thus need not reach whether a proper invocation of Section 2808 could theoretically still require compliance with NEPA under different circumstances.[15]

E. Injunctive Relief

Having found that Defendants' intended use of military construction funds under Section 2808 is unlawful, the Court next considers Plaintiffs' request for injunctive relief. It is a well-established principle of equity that a permanent injunction is appropriate when: (1) a plaintiff will "suffer[ ] an irreparable injury" absent an

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[15] State Plaintiffs appear to seek reconsideration of the Court's prior order regarding whether Defendants violated NEPA for purposes of Section 8005 and 10 U.S.C. § 284. *See California*, No. 19-cv-00872-HSG, Dkt. No. 220, at 5, 19-20, & n.3. State Plaintiffs acknowledge that they do so to preserve this issue for appeal. *Id.* at 5, n.3. The Court declines to reconsider its prior order given Plaintiffs have failed to provide any new law or factual evidence warranting further analysis.

injunction; (2) available remedies at law are "inadequate;" (3) the "balance of hardships" between the parties supports an equitable remedy; and (4) the public interest is "not disserved." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Defendants do not challenge whether the available remedies at law are inadequate. *See, e.g.*, *Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 236 at 28-34. The Court thus addresses the remaining factors.

i. Irreparable Injury

The State Plaintiffs identify several theories of irreparable injury that will occur in the absence of an injunction, including environmental and financial harm, as well as harm to their ability to enforce state laws concerning the protection of environmental and natural resources. The Sierra Club Plaintiffs, in turn, identify aesthetic and recreational harm, as well as organizational harm to their missions in diverting resources to respond to Defendants' proposed projects. The Court recognizes that these injuries are distinct, and first addresses the Sierra Club Plaintiffs' alleged injuries. Because, as explained more fully below, the Court finds that Sierra Club Plaintiffs have established that a permanent injunction is warranted as to all eleven proposed projects, the Court denies State Plaintiffs' duplicative request for a permanent injunction as moot.

a. Aesthetic and Recreational Harm

Sierra Club Plaintiffs contend that absent a permanent injunction Defendants' conduct will irreparably harm their members' aesthetic and recreational interests as the construction "will impede [their] ability to enjoy, work, and create in the wilderness areas they

have used for years along the U.S.-Mexico border." *See Sierra Club*, 19-cv-00892-HSG, Dkt. No. 210 at 26. As this Court has previously noted, "it is well-established in the Ninth Circuit that an organization can demonstrate irreparable harm by showing that the challenged action will injure its members' enjoyment of public land. *See id.*, Dkt. No. 144 at 49 (citing *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)). And here, Plaintiffs provide declarations from their members detailing how Defendants' eleven proposed border barrier construction projects will harm their ability to recreate in and otherwise enjoy public land along the border. *See, e.g.*, *id.*, Dkt. No. 210-1, Exs. 1-19.

In response, Defendants attempt to minimize Plaintiffs' injuries by arguing that many of the challenged construction projects are surrounded by private land or are in areas previously disturbed by at least some border barrier construction. *See id.*, Dkt. Nos. 236 at 28-31, 236-6, Ex. 6. Defendants further suggest that any access limitations imposed by the new construction would be de minimis, especially as to the two projects on the Barry M. Goldwater Range, where only a third of the miles scheduled for construction are accessible to the public. *See id.*, Dkt. No. 236 at 30. Defendants conclude that Plaintiffs' asserted harm is thus little more than their subjective opinion about whether a border wall would be unsightly. *Id.* The Court is not persuaded.

As an initial matter, the Ninth Circuit has "never required a plaintiff to show that he has a right of access to the site on which the challenged activity is occurring, or that he has an absolute right to enjoy the aesthetic or recreational activities that form the basis of his concrete

interest." *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001). In *Cantrell*, for example, the Ninth Circuit credited birdwatchers' allegations that they would suffer harm from the defendant's construction, which would hinder them from viewing birds and nests on a naval station from publicly accessible locations. Such an approach is sensible as "an area can be observed and enjoyed from adjacent land," such that plaintiffs may still suffer injury to their aesthetic and recreational interests even when not physically *on* the affected land. *See id.* Here too, Plaintiffs have explained that the proposed projects may be seen from miles away, and affect their recreational and aesthetic interests, even when they are not standing directly on the areas proposed for construction. *See, e.g.*, *Sierra Club*, 19-cv-00892-HSG, Dkt. No. 210-1, Ex. 4; *id.*, Ex. 9.

Defendants' reliance on *Center for Food Safety v. Vilsack* does not undermine the significance of Plaintiffs' injury. Defendants point to a sentence in a footnote that states "a plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of irreparable harm necessary to obtain it." 636 F.3d 1166, 1171, n.6 (9th Cir. 2011). This point is true as far as it goes, but the plaintiffs in *Vilsack* had only raised possible concerns about genetic contamination, not a likelihood of injury. *Id.* at 1173. In *Vilsack*, the plaintiffs suggested that the defendants' genetically modified sugar beets could cross-pollinate with their crops, causing injury. *See id.* at 1172. The Ninth Circuit explained that the undisputed evidence, however, indicated that the defendants' plants were "biologically incapable of flowering or cross-pollinating" in a way that could affect the plaintiffs' plants. *Id.* at 1173. Because the alleged harm was a biological impossibility, the Ninth Circuit found

that there was no likelihood of irreparable injury warranting an injunction.

Here, in contrast, Plaintiffs have detailed the harm that would result if the border barrier construction projects continue. Defendants' argument in response is that the land for the challenged projects "is already heavily disturbed with border infrastructure" as much of the land occupies existing "law enforcement corridors." *Sierra Club*, 19-cv-00892-HSG, Dkt. No. 236 at 28. But as the Court has previously explained, Defendants' proposal would significantly alter the existing landscape, and even the proposed changes to the existing infrastructure are substantial. *See id.*, Dkt. No. 144 at 50.

The Court is also not persuaded that the preexistence of some construction means Plaintiffs here cannot suffer an injury from additional construction. Defendants do not cite a case that warrants such a sweeping limitation. In *Gallatin Wildlife Association v. U.S. Forest Services*, the plaintiffs sought to enjoin sheep grazing that had occurred for the past 150 years. *See* No. cv 15-27-BU-BMM, 2015 WL 4528611, at *4 (D. Mont. July 27, 2015). The court found that the plaintiffs had "failed to demonstrate that allowing the domestic grazing to occur this year will cause any new harm to the landscape that has not already occurred in the past 150 years." *Id.* That the sheep had grazed in the area before was not itself decisive; instead, the court considered the nature and scale of their continued and additive effect on the land at issue. And in *Center for Biological Diversity v. Hays*, the court found that the plaintiffs had not established irreparable injury where the land at issue could not be used for recreational purposes at all due to the scale of

preexisting dead trees that threatened the safety of visitors. No. 2:15-cv-01627-TLN-CMK, 2015 WL 5916739, at *1, *10 (E.D. Cal. Oct. 8, 2015). The plaintiff's interest in studying these trees was thus irrelevant as he could not access them regardless of the defendant's conduct. *Id.*

In sum, the Court finds that the funding and construction of these border barrier projects, if indeed barred by law, cannot be easily remedied after the fact. To the contrary, as the Ninth Circuit has acknowledged, "[t]he harm here, as with many instances of this kind of harm, is irreparable for the purposes of the preliminary injunction analysis." *See League of Wilderness Defenders/ Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014). Accordingly, the Court finds that Sierra Club Plaintiffs have established irreparable injury to their aesthetic and recreational interests in the absence of a permanent injunction.

b. Organizational Harm

Sierra Club Plaintiffs further contend that Defendants' conduct has irreparably harmed the missions and activities of the Southern Border Communities Coalition ("SBCC") and its member organizations, which include the Texas Civil Rights Project ("TCRP"), Southwest Environmental Center ("SWEC"), and American Friends Service Committee ("AFSC"). Each has had to divert resources to combat the impact of the proposed construction.

The Supreme Court has recognized that an organization may suffer harm if the challenged conduct frustrates its activities and drains its resources. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377-79

(1982). In *Havens Reality*, a nonprofit corporation challenged the defendants' alleged "racial steering" practices, in which real estate brokers encouraged racial segregation by directing members of racial or ethnic groups to buildings or neighborhoods occupied primarily by members of the same race of ethnic group. *Id.* at 367, & n.1. The organization's "purpose was to make equal opportunity in housing a reality. . . . " *Id.* at 368 (quotation omitted). The Supreme Court explained that the organization's need to divert resources "to identify and counteract" the defendants' discriminatory practices "constitute[d] far more than simply a setback to the organization's abstract social interests" in equal access to housing. *See id.* at 379-80. Similarly, in *National Council of La Raza v. Cegavske*, the Ninth Circuit further recognized that an organization may establish concrete harm if the defendant's conduct changes "business as usual" for the organization, such that resources spent to counter a defendant's conduct "would have [been] spent on some other aspect of their organizational purpose . . . or any other activity that advances their goals." 800 F.3d 1032, 1040 (9th Cir. 2015) (quotation omitted). In *Cegavske*, the Ninth Circuit acknowledged that had the state complied with the National Voter Registration Act, the organization could have spent its resources elsewhere, such as increasing its voter education efforts, rather than on voter registration drives in communities where the defendant should have offered voter registration opportunities. *Id.*; *accord Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012).

That is precisely what Plaintiffs have established here, as Defendants' conduct has significantly altered

"business as usual" for the Plaintiff organizations, and will continue to do so without a permanent injunction:

- SBCC's "principal goals are to protect human rights, dignity, and safety" in the border regions of the United States. *Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 210-1, Ex. 7 at 41-46. SBCC has spent considerable time and resources advocating against appropriations for border barrier construction and in urging Congress to terminate the national emergency. As a result, SBCC has diverted time and resources away from its "other initiatives, including Border Patrol accountability, community engagement on local health and education issues, and public education about immigration policies more broadly." *Id.* at 45.
- TCRP has diverted resources to protect Texas landowners in Laredo who are at risk of having their non-public property condemned for the border barrier construction projects, *id.*, Ex. 6 at 35-39. They have staged events to educate communities about these projects and their rights, are working to create a network of advocates for this work. Because of this work, TCRP has had to divert time and resources away from their other projects to protect border communities outside of Laredo.
- SWEC's mission is to "reverse the accelerating loss of plants and animals worldwide through protection and restoration of native wildlife and their habitats in the southwest." *Id.*, Ex. 3 at 16-17. Though based in New Mexico, its restoration and education work extends into Eastern Arizona and

West Texas. However, in light of the proposed border barrier projects, SWEC has significantly reduced its restoration work to divert resources to monitor construction and educate members and the public about the proposed construction and its likely impact.

- AFSC works with migrant communities in San Diego and El Centro to document abuses by law enforcement and collaborate with community groups to address local issues. *Id.*, Ex. 13 at 74-75. However, if the border barrier projects in these areas proceed, they will have to decrease the time and resources they spend on their other services, including know-your-rights trainings and leadership development courses, so they can monitor the construction and provide outreach resources to the affected communities.

Defendants counter that Plaintiffs' missions as public advocacy groups have not been injured, and more critically still, that Plaintiffs have not established any nexus between their injury and Defendants' conduct. Defendants first contend that the organizations may continue their advocacy work in the face of the border barrier projects, but as the Ninth Circuit recognized in *Cegavske*, it is enough that these organizations "would have spent [resources] on some other aspect of their organizational purpose . . . or any other activity that advances their goals," in the absence of the border barrier construction projects. *See* 800 F.3d at 1040. Here, the Plaintiff organizations have spent resources creating new education, outreach, and monitoring programs related to the construction projects, rather than on other activities related to their respective missions.

Defendants' suggestion that there is no nexus between Plaintiffs' harm and Defendants' conduct is similarly unavailing. The organizations work in and with border communities to protect and restore the environment, as is the case with SWEC, and promote the safety of border communities, as is the case with SBCC, TCRP, and AFSC. But because the organizations believe the border barrier projects impede these respective missions, they have altered "business as usual" to combat these projects and educate others about them. Defendants' blanket conclusion that the border barrier construction projects "in no way impede or disrupt their day-to-day activities," *Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 247 at 24, simply is not supported by the record. The Court finds that Sierra Club Plaintiffs have thus established irreparable injury to their organizational missions in the absence of a permanent injunction.

i. Balance of Equities and Public Interest

The parties all acknowledge that when the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). And in these cases, the parties' asserted injuries collapse into the equities they assert.

According to Defendants, these factors tilt in their favor, because they have "compelling interests in safety and in the integrity of our borders," and "in ensuring that [the country's] military forces are properly supported and have the necessary resources to ensure mission success." *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. No. 236 at 33. As the Court has previously acknowledged, "the public has a 'weighty' interest 'in efficient

administration of the immigration laws at the border.'" *See E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 779 (9th Cir. 2018) (quoting *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)).

Yet Defendants' argument again fails to recognize that Congress has already engaged in the difficult balancing of Defendants' proffered interests and the need for border barrier construction in passing the CAA. *See* CAA, § 230(a)(1), 133 Stat. 13. Defendants have not pointed to any factual developments that were not before Congress and that may have altered its judgment to appropriate just $1.375 billion in funding for limited border barrier construction. The Court appreciates the complexity of the policy judgments at hand, and further understands that Defendants may strongly disagree with Congress' determination. But the Court has found that Defendants do not have the statutory authority under Section 2808 to redirect military construction funds for the planned border barrier construction. And as such, Defendants have not identified a mechanism by which they may override Congress' appropriations judgment. As the Court explained in its orders related to Section 8005, "Defendants' position on these factors boils down to an argument that the Court should not enjoin conduct found to be unlawful because the ends justify the means. No case supports this principle." *See Sierra Club*, 19-cv-00892-HSG, Dkt. No. 185 at 8. The Court finds that "the public [] has an interest in ensuring that statutes enacted by their representatives are not imperiled by executive fiat," *E. Bay Sanctuary Covenant*, 932 F3d at 779, and that these constitutional separation of powers principles outweigh Defendants' concerns about the efficiency of DHS. Accordingly, the Court follows the Ninth Circuit's reasoning that the

public interest "is best served by respecting the Constitution's assignment of the power of the purse to Congress, and by deferring to Congress's understanding of the public interest as reflected in its repeated denial of more funding for border barrier construction." *Sierra Club*, 929 F.3d at 677.

In his concurrence in the landmark 1952 case of *Youngstown Sheet and Tube Co. v. Sawyer*, which addressed the scope of executive power during a time of war on the Korean Peninsula, Justice Frankfurter articulated a principle that remains as important today as it was then:

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure [of steel mills by the President], to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

343 U.S. 579, 610 (Frankfurter, J., concurring).

After a lengthy legislative process, Congress specifically declined to provide the funding sought by the Executive for the border barrier construction at issue in this case. The Executive has made plain its determination to nonetheless proceed with the construction by any

means necessary, notwithstanding Congress' contrary exercise of its constitutionally-absolute power of the purse. As Justice Frankfurter explained long ago, that position both disregards the clear will of Congress and disrespects the whole legislative process and the separation of powers enshrined in the Constitution. Because the Court finds Defendants' proposed use of funds under Section 2808 unlawful, the Court finds that the balance of hardships and public interest favor Plaintiffs, and counsel in favor of a permanent injunction.[16]

IV. STAY PENDING APPEAL

Federal Rule of Civil Procedure 62(c) authorizes a district court to stay enforcement of a permanent injunction pending appeal. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation omitted). Rather, the decision to grant or deny a stay is committed to the district court's discretion. *Id.* In determining whether to issue a stay, a court examines several factors including: (1) whether the applicant has made a strong showing that he is likely to succeed on the merits of the appeal; (2) whether the applicant will be irreparably injured absent a stay; (3) whether a stay will substantially injure the non-moving party; and (4) where the public

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[16] The Court further notes that on December 10, 2019, the United States District Court for the Western District of Texas also entered an order permanently enjoining "agency head Defendants Mark T. Esper, Chad F. Wilf, Todd, T. Semonite, David Bernhardt, and Steven T. Mnuchin . . . from using § 2808 funds beyond the $1.375 billion in the 2019 Consolidated Appropriations Act for border wall construction." *See El Paso County v. Trump*, No. 3:19-cv-0066-DB (W.D. Tex.), Dkt. No. 136 at 21.

interest lies. *See Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011).

Although the Court has considered similar factors as part of its permanent injunction analysis above, the Supreme Court's stay of this Court's prior injunction order appears to reflect the conclusion of a majority of that Court that the challenged construction should be permitted to proceed pending resolution of the merits. Accordingly, the Court finds in its discretion that the lengthy history of this action; the prior appellate record; and the pending appeal before the Ninth Circuit on the merits of Plaintiffs' Section 8005 claim, which will address several of the threshold legal and factual issues raised in this order, warrant a stay of the permanent injunction pending appeal. Plaintiffs may, of course, petition the Ninth Circuit to lift this stay.

V. CERTIFICATION FOR APPEAL

Given the parties' express request to certify for appeal the Court's prior orders regarding Section 8005, the Court also considers whether certification is appropriate here. Appellate courts generally only have jurisdiction to hear appeals from final orders. *See* 28 U.S.C. § 1291. Federal Rule of Civil Procedure 54(b) allows for a narrow exception to this final judgment rule, permitting courts to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Entry of judgment under Rule 54(b) thus requires: (1) a final judgment; and (2) a determination that there is no just reason for delay of entry. *See Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 574 (9th Cir. 2018) (quoting *Curtiss-Wright Corp. v.*

Gen. Elec. Co., 446 U.S. 1, 7-8 (1980)). The Court finds both requirements satisfied here.

A. Finality of Judgment

A final judgment is "a decision upon a cognizable claim for relief" that is "an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Curtiss-Wright Corp.*, 446 U.S. at 7. The Court finds this requirement satisfied because the Court's award of partial summary judgment in this order is "an ultimate disposition" of Plaintiffs' claims related to Defendants' purported reliance on Section 2808 for border barrier construction.

B. No Just Reason for Delay

As the Ninth Circuit has explained, "[j]udgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties." *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). Accordingly, an explanation of findings "should include a determination whether, upon any review of the judgment entered under the rule, the appellate court will be required to address legal or factual issues that are similar to those contained in the claims still pending before the trial court." *Id.* at 965. "The greater the overlap the greater the chance that [the Court of Appeals] will have to revisit the same facts—spun only slightly differently—in a successive appeal." *Wood v. GCC Bend, LLC*, 422 F.3d 873, 882

(9th Cir. 2005). "[P]lainly, sound judicial administration does not require that Rule 54(b) requests be granted routinely." *Id.* at 879 (quotation omitted).

As with its partial summary judgment order related to Section 8005, the Court finds there is no just reason for delay under the circumstances. Whether Defendants' actions comport with the statutory requirements of Section 2808 and whether Defendants' actions comport with the remaining statutory requirements related to the outstanding claims are distinct inquiries, largely based on distinct law. The Court therefore finds that "sound judicial administration" is best served by the Court certifying this judgment for appeal, in light of the undisputedly significant interests at stake in this case. *See Wood*, 422 F.3d at 879.

VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' motions for partial summary judgment and **DENIES** Defendants' motions for partial summary judgment. Specifically, the Court **GRANTS** Plaintiffs' request for declaratory judgment that Defendants' intended use of military construction funds under Section 2808 for the eleven border barrier construction projects that the Secretary of Defense identified as Yuma Project 2; Yuma Project 10/27; Yuma Project 3; Yuma Project 6; San Diego Project 4; San Diego Project 11; El Paso Project 2; El Paso Project 8; Laredo Project 5; Laredo Project 7; El Centro Project 5; and El Centro Project 9, is unlawful. *See Sierra Club*, No. 19-cv-00892-HSG, Dkt. Nos. 201, 201-1, & Ex. 1. The Court **DENIES** Plaintiffs' request for declaratory judgment and injunctive relief concerning Defend-

ants' (1) invocation of Section 2808 beyond these projects; (2) reliance on Section 2808 to excuse them from complying with NEPA as to the eleven proposed projects; and (3)decision to defer outstanding military construction projects.

The terms of the permanent injunction are as follows: Defendants Mark T. Esper, in his official capacity as Secretary of Defense; and Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security (collectively, "Defendants"), and all persons acting under their direction, are permanently enjoined from using military construction funds appropriated for other purposes to build a border wall in the areas Defendants have identified as Yuma Project 2; Yuma Project 10/27; Yuma Project 3; Yuma Project 6; San Diego Project 4; San Diego Project 11; El Paso Project 2; El Paso Project 8; Laredo Project 5; Laredo Project 7; El Centro Project 5; and El Centro Project 9. Nevertheless, as discussed in Section IV above, the Court exercises its discretion to **STAY** the permanent injunction pending appeal.

The Clerk is directed to enter final judgment in favor of Plaintiffs and against Defendants with respect to Defendants' purported reliance on Section 2808 to fund border barrier construction. This judgment will be certified for immediate appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: 12/11/2019

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

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND

No. 19-17501

SIERRA CLUB; SOUTHERN BORDER COMMUNITIES COALITION, PLAINTIFFS-APPELLEES

v.

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

No. 19-17502

STATE OF CALIFORNIA; ET AL., PLAINTIFFS-APPELLEES

v.

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

No. 20-15044
D.C. No. 4:19-cv-00872-HSG

STATE OF CALIFORNIA; ET AL., PLAINTIFFS-APPELLANTS

AND

STATE OF CONNECTICUT; ET AL., PLAINTIFFS

v.

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

[Filed: Oct. 26, 2020]

ORDER

Before: THOMAS, Chief Judge, and WARDLAW and COLLINS, Circuit Judges.

Appellees' emergency motion for clarification (Dkt. No. 112) is denied, without prejudice. Appellants' cross-motion for a stay of the mandate (Dkt. No. 113) is granted and the issuance of the mandate is stayed until November 18, 2020.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND

No. 19-17501

SIERRA CLUB; SOUTHERN BORDER COMMUNITIES COALITION, PLAINTIFFS-APPELLEES

v.

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

[Filed: Dec. 30, 2019]

ORDER

Before: THOMAS, Chief Judge, and WARDLAW and COLLINS, Circuit Judges.

Plaintiffs Sierra Club and Southern Border Communities Coalition have filed an emergency motion to lift the district court's stay of its injunction pending appeal. The district court injunction permanently enjoined spending funds under 10 U.S.C. § 2808 for eleven specified border barrier construction projects, but the district court stayed the injunction pending appeal. Defendants oppose the motion to lift the stay.

We deny the request to lift the stay, without prejudice. The district court in the Western District of Texas has issued a substantially similar injunction precluding

using § 2808 funds beyond what Congress has otherwise appropriated for border wall construction. *See El Paso Cty v. Trump*, No. EP-19-CV-66-DB (W.D. Tex. Dec. 10, 2019). In addition, the Supreme Court has already stayed an injunction previously granted by the district court in this case. *See Trump v. Sierra Club*, 140 S. Ct. 1 (2019). As the district court concluded, "the Supreme Court's stay of this Court's prior injunction order appears to reflect the conclusion of a majority of that Court that the challenged construction should be permitted to proceed pending resolution of the merits." *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Dec. 11, 2019). Given the existence of a spending injunction and the Supreme Court's stay order, we decline to reverse the district court's grant of a stay pending appeal at this time, without prejudice to renewal or reconsideration pending further developments. In doing so, we express no view as to the merits of the case.

APPENDIX E

1. U.S. Const. Art. I, § 9, Cl. 7 provides:

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

2 10 U.S.C. 284 provides:

Support for counterdrug activities and activities to counter transnational organized crime

(a) SUPPORT TO OTHER AGENCIES.—The Secretary of Defense may provide support for the counterdrug activities or activities to counter transnational organized crime of any other department or agency of the Federal Government or of any State, local, tribal, or foreign law enforcement agency for any of the purposes set forth in subsection (b) or (c), as applicable, if—

(1) in the case of support described in subsection (b), such support is requested—

(A) by the official who has responsibility for the counterdrug activities or activities to counter transnational organized crime of the department or agency of the Federal Government, in the case of support for other departments or agencies of the Federal Government; or

(B) by the appropriate official of a State, local, or tribal government, in the case of support

for State, local, or tribal law enforcement agencies; or

(2) in the case of support described in subsection (c), such support is requested by an appropriate official of a department or agency of the Federal Government, in coordination with the Secretary of State, that has counterdrug responsibilities or responsibilities for countering transnational organized crime.

(b) TYPES OF SUPPORT FOR AGENCIES OF UNITED STATES.—The purposes for which the Secretary may provide support under subsection (a) for other departments or agencies of the Federal Government or a State, local, or tribal law enforcement agencies, are the following:

(1) The maintenance and repair of equipment that has been made available to any department or agency of the Federal Government or to any State, local, or tribal government by the Department of Defense for the purposes of—

(A) preserving the potential future utility of such equipment for the Department of Defense; and

(B) upgrading such equipment to ensure compatibility of that equipment with other equipment used by the Department.

(2) The maintenance, repair, or upgrading of equipment (including computer software), other than equipment referred to in paragraph (1) for the purpose of—

(A) ensuring that the equipment being maintained or repaired is compatible with equipment used by the Department of Defense; and

(B) upgrading such equipment to ensure the compatibility of that equipment with equipment used by the Department.

(3) The transportation of personnel of the United States and foreign countries (including per diem expenses associated with such transportation), and the transportation of supplies and equipment, for the purpose of facilitating counterdrug activities or activities to counter transnational organized crime within or outside the United States.

(4) The establishment (including an unspecified minor military construction project) and operation of bases of operations or training facilities for the purpose of facilitating counterdrug activities or activities to counter transnational organized crime of the Department of Defense or any Federal, State, local, or tribal law enforcement agency within or outside the United States.

(5) Counterdrug or counter-transnational organized crime related training of law enforcement personnel of the Federal Government, of State, local, and tribal governments, including associated support expenses for trainees and the provision of materials necessary to carry out such training.

(6) The detection, monitoring, and communication of the movement of—

(A) air and sea traffic within 25 miles of and outside the geographic boundaries of the United States; and

(B) surface traffic outside the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside of the boundary.

(7) Construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.

(8) Establishment of command, control, communications, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

(9) The provision of linguist and intelligence analysis services.

(10) Aerial and ground reconnaissance.

(c) TYPES OF SUPPORT FOR FOREIGN LAW ENFORCEMENT AGENCIES.—

(1) PURPOSES.—The purposes for which the Secretary may provide support under subsection (a) for foreign law enforcement agencies are the following:

(A) The transportation of personnel of the United States and foreign countries (including per diem expenses associated with such transportation), and the transportation of supplies and equipment, for the purpose of facilitating counterdrug activities or activities to counter transnational organized crime within or outside the United States.

(B) The establishment (including small scale construction) and operation of bases of operations or training facilities for the purpose of facilitating

counterdrug activities or activities to counter transnational organized crime of a foreign law enforcement agency outside the United States.

(C) The detection, monitoring, and communication of the movement of—

(i) air and sea traffic within 25 miles of and outside the geographic boundaries of the United States; and

(ii) surface traffic outside the geographic boundaries of the United States.

(D) Establishment of command, control, communications, and computer networks for improved integration of United States Federal and foreign law enforcement entities and United States Armed Forces.

(E) The provision of linguist and intelligence analysis services.

(F) Aerial and ground reconnaissance.

(2) COORDINATION WITH SECRETARY OF STATE.—In providing support for a purpose described in this subsection, the Secretary shall coordinate with the Secretary of State.

(d) CONTRACT AUTHORITY.—In carrying out subsection (a), the Secretary may acquire services or equipment by contract for support provided under that subsection if the Department of Defense would normally acquire such services or equipment by contract for the purpose of conducting a similar activity for the Department.

(e) LIMITED WAIVER OF PROHIBITION.—Notwithstanding section 276[1] of this title, the Secretary may provide support pursuant to subsection (a) in any case in which the Secretary determines that the provision of such support would adversely affect the military preparedness of the United States in the short term if the Secretary determines that the importance of providing such support outweighs such short-term adverse effect.

(f) CONDUCT OF TRAINING OR OPERATION TO AID CIVILIAN AGENCIES.—In providing support pursuant to subsection (a), the Secretary may plan and execute otherwise valid military training or operations (including training exercises undertaken pursuant to section 1206(a) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189; 103 Stat. 1564)) for the purpose of aiding civilian law enforcement agencies.

(g) RELATIONSHIP TO OTHER SUPPORT AUTHORITIES.—

(1) ADDITIONAL AUTHORITY.—The authority provided in this section for the support of counterdrug activities or activities to counter transnational organized crime by the Department of Defense is in addition to, and except as provided in paragraph (2), not subject to the other requirements of this chapter.

(2) EXCEPTION.—Support under this section shall be subject to the provisions of section 275[1] and, except as provided in subsection (e), section 276[1] of this title.

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[1] See References in Text note below.

(h) CONGRESSIONAL NOTIFICATION.—

(1) IN GENERAL.—Not less than 15 days before providing support for an activity under subsection (a), the Secretary of Defense shall submit to the appropriate committees of Congress a written and electronic notice of the following:

(A) In the case of support for a purpose described in subsection (c)—

(i) the country the capacity of which will be built or enabled through the provision of such support;

(ii) the budget, implementation timeline with milestones, anticipated delivery schedule for support, and completion date for the purpose or project for which support is provided;

(iii) the source and planned expenditure of funds provided for the project or purpose;

(iv) a description of the arrangements, if any, for the sustainment of the project or purpose and the source of funds to support sustainment of the capabilities and performance outcomes achieved using such support, if applicable;

(v) a description of the objectives for the project or purpose and evaluation framework to be used to develop capability and performance metrics associated with operational outcomes for the recipient;

(vi) information, including the amount, type, and purpose, about the support provided

the country during the three fiscal years preceding the fiscal year for which the support covered by the notice is provided under this section under—

(I) this section;

(II) section 23 of the Arms Export Control Act (22 U.S.C. 2763);

(III) peacekeeping operations;

(IV) the International Narcotics Control and Law Enforcement program under section 481 of the Foreign Assistance Act of 1961 (22 U.S.C. 2291);

(V) Nonproliferation, Anti-Terrorism, Demining, and Related Programs;

(VI) counterdrug activities authorized by section 1033 of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105-85); or

(VII) any other significant program, account, or activity for the provision of security assistance that the Secretary of Defense and the Secretary of State consider appropriate;

(vii) an evaluation of the capacity of the recipient country to absorb the support provided; and

(viii) an evaluation of the manner in which the project or purpose for which the support is

provided fits into the theater security cooperation strategy of the applicable geographic combatant command.

(B) In the case of support for a purpose described in subsection (b) or (c), a description of any small scale construction project for which support is provided.

(2) COORDINATION WITH SECRETARY OF STATE.—In providing notice under this subsection for a purpose described in subsection (c), the Secretary of Defense shall coordinate with the Secretary of State.

(i) DEFINITIONS.—In this section:

(1) The term "appropriate committees of Congress" means—

(A) the Committee on Armed Services, the Committee on Appropriations, and the Committee on Foreign Affairs of the House of Representatives; and

(B) the Committee on Armed Services, the Committee on Appropriations, and the Committee on Foreign Relations of the Senate.

(2) The term "Indian tribe" means a Federally recognized Indian tribe.

(3) The term "small scale construction" means construction at a cost not to exceed $750,000 for any project.

(4) The term "tribal government" means the governing body of an Indian tribe, the status of whose land is "Indian country" as defined in section

1151 of title 18 or held in trust by the United States for the benefit of the Indian tribe.

(5) The term "tribal law enforcement agency" means the law enforcement agency of a tribal government.

(6) The term "transnational organized crime" means self-perpetuating associations of individuals who operate transnationally for the purpose of obtaining power, influence, monetary, or commercial gains, wholly or in part by illegal means, while protecting their activities through a pattern of corruption or violence or through a transnational organization structure and the exploitation of transnational commerce or communication mechanisms.

3. 10 U.S.C. 2801 provides:

Scope of chapter; definitions

(a) The term "military construction" as used in this chapter or any other provision of law includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road (as described in section 210 of title 23).

(b) A military construction project includes all military construction work, or any contribution authorized by this chapter, necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility (or to produce such portion of a complete and usable facility or improvement as is specifically authorized by law).

(c) In this chapter and chapter 173 of this title:

(1) The term "appropriate committees of Congress" means the congressional defense committees and, with respect to any project to be carried out by, or for the use of, an intelligence component of the Department of Defense, the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(2) The term "facility" means a building, structure, or other improvement to real property.

(3) The term "life-cycle cost-effective", with respect to a project, product, or measure, means that the sum of the present values of investment costs, capital costs, installation costs, energy costs, operating costs, maintenance costs, and replacement costs, as estimated for the lifetime of the project, product, or measure, does not exceed the base case (current or standard) for the practice, product, or measure.

(4) The term "military installation" means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control.

(5) The term "Secretary concerned" includes the Secretary of Defense with respect to matters concerning the Defense Agencies.

(d) This chapter (other than sections 2830, 2835, and 2836 of this chapter) does not apply to the Coast Guard or to civil works projects of the Army Corps of Engineers.

4. 10 U.S.C. 2808 provides:

Construction authority in the event of a declaration of war or national emergency

(a) In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces. Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.

(b) When a decision is made to undertake military construction projects authorized by this section, the Secretary of Defense shall notify, in an electronic medium pursuant to section 480 of this title, the appropriate committees of Congress of the decision and of the estimated cost of the construction projects, including the cost of any real estate action pertaining to those construction projects.

(c) The authority described in subsection (a) shall terminate with respect to any war or national emergency at the end of the war or national emergency.

5. 50 U.S.C. 1621 provides:

Declaration of national emergency by President; publication in Federal Register; effect on other laws; superseding legislation

(a) With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register.

(b) Any provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect (1) only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and (2) only in accordance with this chapter. No law enacted after September 14, 1976, shall supersede this subchapter unless it does so in specific terms, referring to this subchapter, and declaring that the new law supersedes the provisions of this subchapter.

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

DIVISION A—DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2019

* * * * *

Tit. VIII
GENERAL PROVISIONS

* * * * *

SEC. 8005. Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed $4,000,000,000 of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction) between such appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred: *Provided*, That such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress: *Provided further*, That the Secretary of Defense shall notify the Congress promptly of all transfers made pursuant to this authority or any other authority in this *Act: Provided further*, That no part of the funds in this Act shall be available to prepare or present a request to the Committees on Appropriations for

reprogramming of funds, unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which reprogramming is requested has been denied by the Congress: *Provided further*, That a request for multiple reprogrammings of funds using authority provided in this section shall be made prior to June 30, 2019: *Provided further*, That transfers among military personnel appropriations shall not be taken into account for purposes of the limitation on the amount of funds that may be transferred under this section.