APPENDIX

FOR PUBLICATION

FILED

JUL 3 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

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

Order by Judges Clifton and Friedland

Dissent by Judge N.R. Smith

CLIFTON and FRIEDLAND, Circuit Judges:

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

[1] When federal officials are parties to litigation, we usually refer to them collectively as "the Government." That terminology seems inapt in this proceeding given that the question before us is whether the Executive Branch of the federal government is attempting to exercise authority that is allocated by the Constitution to the Legislative Branch of the federal government, and whether the Executive Branch is doing so without authorization from the Legislative Branch.

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

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

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

---

And the House of Representatives, which is part of the Legislative Branch, has filed an amicus brief opposing the Executive Branch's position. To avoid confusion, we therefore refer to the President and the cabinet members sued here collectively as "Defendants."

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

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

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

We conclude, first, that Defendants are not likely to succeed on the merits of their appeal. The Appropriations Clause of the Constitution provides that "No

Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art I., § 9, cl. 7. Defendants assert that, through section 8005, Congress authorized DoD to reprogram the funds at issue. We agree with Plaintiffs, however, that the requirements of section 8005 have not been met. Specifically, the need for which the funds were reprogrammed was not "unforeseen," and it was an item for which funds were previously "denied by the Congress." Defendants do not argue that their contrary interpretation of section 8005 is entitled to any form of administrative deference, and we hold that no such deference would be appropriate in any event.

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

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

were to apply to Plaintiffs' constitutional claims, we hold that it would be satisfied here.

Considering the remaining factors relevant to Defendants' request for a stay—the degree of hardship that may result from a stay or its denial, and the public interest at stake—we are not persuaded that a stay should be entered. There is a strong likelihood that Plaintiffs will prevail in this litigation, and Defendants have a correspondingly low likelihood of success on appeal. As for the public interest, we conclude that it is best served by respecting the Constitution's assignment of the power of the purse to Congress, and by deferring to Congress's understanding of the public interest as reflected in its repeated denial of more funding for border barrier construction. We therefore hold that a stay of the district court's order granting Plaintiffs an injunction is not warranted.

I. Factual & Procedural Background

President Trump has made numerous requests to Congress for funding for construction of a barrier on the U.S.-Mexico border. In his proposed budget for Fiscal Year 2018, for example, the President requested $2.6 billion for border security, including "funding to plan, design, and construct a physical wall along the southern border." Office of Mgmt. & Budget, Exec. Office of the President, *Budget of the United States Government, Fiscal Year 2018*, at 18 (2017). Congress partially obliged, allocating in the 2018 Consolidated Appropriations Act $1.571

billion for border fencing, "border barrier planning and design," and the "acquisition and deployment of border security technology." Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. F, tit. II, § 230(a), 132 Stat. 348, 616 (2018). Throughout 2018, House and Senate lawmakers introduced numerous bills that would have authorized or appropriated additional billions for border barrier construction. Specifically, Congress considered and rejected the Securing America's Future Act of 2018, H.R. 4760, 115th Cong. § 1111 (2018) (instructing the Secretary of Homeland Security to take necessary actions to build a physical barrier on the southern border); the Border Security and Immigration Reform Act of 2018, H.R. 6136, 115th Cong. § 5101 (2018) (appropriating $16.625 billion for a border wall); the American Border Act, H.R. 6415, 115th Cong. § 4101 (2018) (same); the Fund and Complete the Border Wall Act, H.R. 6657, 115th Cong. § 2 (2018) (creating a "Secure the Southern Border Fund" for appropriations for border barrier construction); the Build the Wall, Enforce the Law Act of 2018, H.R. 7059, 115th Cong. § 9 (2018) (again, appropriating $16.625 billion for a "border wall system"); the 50 Votes for the Wall Act, H.R. 7073, 115th Cong. § 2 (2018) (establishing a "Border Wall and Security Trust Fund" of up to $25 billion to "construct a wall (including physical barriers and associated detection technology, roads, and lighting)" along the U.S.-Mexico border); and the WALL Act of 2018, S. 3713, 115th Cong. § 2 (2018)

(appropriating $25 billion for the construction of a border wall). Lawmakers spent countless hours considering these various proposals, but none ultimately passed.

The situation reached an impasse in December 2018. During negotiations with Congress over an appropriations bill to fund various parts of the federal government for the remainder of the fiscal year, the President announced his unequivocal position that "any measure that funds the government must include border security." C-SPAN, *Farm Bill Signing* (Dec. 20, 2018), https://www.c-span.org/video/?456189-1/president-government-funding-bill-include-money-border-wall. He declared that he would not sign any funding bill that did not allocate substantial funding for a physical barrier on the U.S.-Mexico border. Erica Werner et al., *Trump Says He Won't Sign Senate Deal to Avert Shutdown, Demands Funds for Border Security*, Wash. Post (Dec. 21, 2018), https://wapo.st/2EIpkHu?tid=ss_tw&utm_term=.6e7c259f6857 ("Werner et al."). The President also stated that he was willing to declare a national emergency and use other mechanisms to get the money he desired if Congress refused to allocate it. *Remarks by President Trump in Meeting with Senate Minority Leader Chuck Schumer and House Speaker-Designate Nancy Pelosi*, The White House (Dec. 11, 2018, 11:40 A.M.), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-senate-minority-leader-chuck-schumer-house-speaker-designate-nancy-pelosi/. On December 20, 2018, the House of Representatives

passed a continuing resolution that allocated $5.7 billion in border barrier funding. H.R. 695, 115th Cong. § 141 (2018) ("[T]here is appropriated for 'U.S. Customs and Border Protection—Procurement, Construction, and Improvements' $5,710,357,000 for fiscal year 2019."). But the Senate rejected the bill. The President could not reach an agreement with lawmakers on whether the spending bill would include border barrier funding, triggering what would become the nation's longest partial government shutdown. Werner et al., *supra*; Mihir Zaveri et al., *The Government Shutdown Was the Longest Ever. Here's the History.*, N.Y. Times (Jan. 25, 2019), https://nyti.ms/2RATHG9.

On January 6, 2019, during the shutdown, the President "request[ed] $5.7 billion for construction of a steel barrier for the Southwest border" in a letter to the Senate Committee on Appropriations, explaining that the request "would fund construction of a total of approximately 234 miles of new physical barrier," including in the top ten priority areas in the Border Security Improvement Plan created by Customs and Border Protection ("CBP"). Letter from Russell T. Vought, Acting Dir. of the Office of Mgmt. and Budget, to Richard Shelby, Chairman of the Senate Comm. on Appropriations (Jan. 6, 2019). This represented a $4.1 billion increase over the President's February 2018 request for $1.6 billion for the Fiscal Year 2019 budget, which had been for the construction of "65 miles

of border wall in south Texas." Office of Mgmt. & Budget, Exec. Office of the President, *Budget of the U.S. Government, Fiscal Year 2019*, 58 (2018).

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

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

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

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

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

An accompanying White House Fact Sheet explained that the President was "using his legal authority to take Executive action to secure additional resources" to build a border barrier. *President Donald J. Trump's Border Security Victory*, The White House (Feb. 15, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/. It continued: "Including funding in Homeland Security appropriations, the Administration has so far identified up to $8.1 billion that will be available to build the border wall once a national emergency is declared and additional funds have been reprogrammed." *Id.* The fact sheet specifically identified three funding sources: (1) "[a]bout $601 million from the Treasury Forfeiture Fund," 31 U.S.C. § 9705(a); (2) "[u]p to $2.5 billion under the Department of Defense [reprogrammed] funds transferred [to DHS] for Support for Counterdrug Activities" pursuant to 10 U.S.C. § 284 ("section 284");[2] and (3) "[u]p to $3.6 billion reallocated from [DoD] military construction projects under the President's

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

declaration of a national emergency" pursuant to 10 U.S.C. § 2808 ("section 2808"), which provides that the Secretary of Defense may authorize military construction projects whenever the President declares a national emergency that requires use of the armed forces. *Id.*

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

Almost immediately, executive branch agencies began to use the funds identified in Proclamation 9844 for border barrier construction. The same day the President issued the proclamation, the Department of the Treasury approved DHS's December 2018 request to use treasury forfeiture funds to enhance border security infrastructure, providing up to $601 million in funding.[3] Letter from

[3] The three funding sources the White House had identified were to "be used sequentially and as needed." *President Donald J. Trump's Border Security Victory*, The White House (Feb. 15, 2019). In other words, the government first began spending the treasury forfeiture funds, followed by DoD funding

David F. Eisner, Assistant Sec'y for Mgmt., U.S. Dep't of the Treasury, to the House and Senate Appropriations Comms.' Subcomms. on Fin. Servs. & Gen. Gov't (Feb. 15, 2019). Then, on February 25, DHS submitted a request to DoD for assistance, pursuant to section 284, with construction of fences, roads, and lighting within eleven drug-smuggling corridors identified by DHS along the border. Memorandum re: Request for Assistance Pursuant to 10 U.S.C. § 284 from Christina Bobb, Exec. Sec'y, DHS, to Capt. Hallock N. Mohler, Jr., Exec. Sec'y, DoD, (Feb. 25, 2019). In response to that request, on March 25, the Acting Secretary of Defense, Patrick Shanahan, approved the transfer of up to $1 billion in funds from DoD to DHS for the three highest priority drug-smuggling corridors: the Yuma Sector Project 1 and Yuma Sector Project 2 in Arizona, and the El Paso Sector Project 1 in New Mexico.[4] Letter from Patrick M. Shanahan, Acting Sec'y of Def., DoD, to Kirstjen Nielsen, Sec'y of Homeland Sec., DHS (Mar. 25, 2019).

To fund the approved projects, Shanahan invoked section 8005 of the Department of Defense Appropriations Act of 2019 and section 1001 of the John S. McCain National Defense Authorization Act ("NDAA") for Fiscal Year 2019 to "reprogram" approximately $1 billion from Army personnel funds to the

---

reprogrammed under section 8005 and transferred to DHS pursuant to section 284, and finally military construction funds reallocated under section 2808.

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

counter-narcotics support budget, which Shanahan asserted then made those funds available for transfer to DHS pursuant to section 284. Section 8005 authorizes the Secretary of Defense to transfer up to $4 billion "of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction)." The Secretary must first determine that "such action is necessary in the national interest" and obtain approval from the White House Office of Management and Budget. Section 8005 further provides that the authority to transfer may only be used "for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress."[5] It also imposes a "prompt[]" congressional notification requirement for all transfers made under its authority. Reprogramming of funds under section 8005 does not require the declaration of a national emergency.

A memo from Shanahan asserted that the statutory requirements for reprogramming under section 8005 had been met: that the items to be funded were a higher priority than the Army personnel funds; that the need to provide support for the Yuma and El Paso Projects was "an unforeseen military requirement not

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

known at the time of the FY 2019 budget request"; and that support for construction of the border barrier in these areas "ha[d] not been denied by Congress." Memorandum re: Funding Construction in Support of the Department of Homeland Security Pursuant to 10 U.S.C. § 284 from Patrick M. Shanahan, Acting Sec'y of Def., DoD, to Under Sec'y of Def. (Comptroller)/Chief Fin. Officer (Mar. 25, 2019). Specifically, DoD concluded that "Army personnel funds were available for transfer because expenditures for service member pay and compensation, retirements benefits, food, and moving expenses through the end of fiscal year 2019 [would] be lower than originally budgeted." As required by section 8005, Shanahan also formally notified Congress of the reprogramming authorization, explaining that the reprogrammed funds were "required" so that DoD could provide DHS the support it requested under section 284.[6]

The next day, both the House Committee on Armed Services and the House Committee on Appropriations formally disapproved of DoD's section 8005 reprogramming. The Armed Services Committee wrote in a letter to DoD that it "denie[d] this [reprogramming] request," and that the committee "[did] not approve the proposed use of Department of Defense funds to construct additional

[6] DoD had previously adhered to a "gentlemen's agreement" with Congress where it sought approval from the relevant committees *before* reprogramming funds, rather than simply notifying them after the decision had been finalized. House Armed Services Committee Holds Hearing on Fiscal 2020 Defense Authorization, CQ Cong. Transcripts (Mar. 26, 2019).

physical barriers and roads or install lighting in the vicinity of the United States border." Letter from Adam Smith, Chairman of the U.S. House of Representatives Comm. on Armed Servs., to David L. Norquist, Under Sec'y of Def., Comptroller, and Chief Fin. Officer (Mar. 26, 2019). The Appropriations committee similarly denied the reprogramming request. Letter from Peter J. Visclosky, Chairman of the Def. Subcomm. of the U.S. House of Representatives Comm. on Appropriations (Mar. 26, 2019).

Officials at DoD and DHS pressed forward with reprogramming-enabled border barrier construction plans. In early April, DoD awarded contracts for work in the Yuma and El Paso Project areas, and the agencies began environmental planning and consultation. *Contracts for Apr. 9, 2019*, U.S. Dep't of Def. (Apr. 9, 2019), https://dod.defense.gov/News/Contracts/Contract-View/Article/1809986/.

Meanwhile, Shanahan reported on May 8 that DoD and DHS had secured funding for DHS to build about 256 miles of border barrier using both treasury forfeiture funds and reprogrammed monies. *Acting Defense Secretary Shanahan Testimony on Fiscal Year 2020 Budget Request* (C-SPAN May 8, 2019), https://www.c-span.org/video/?460437-1/acting-defensesecretary-shanahan-testifies-2020-budget-request. DoD also reported selecting twelve companies to compete for up to $5 billion worth of border barrier construction contracts. *Contracts for May 8, 2019*, U.S. Dep't of Def. (May 8, 2019),

https://dod.defense.gov/News/Contracts/Contract-View/Article/1842189/. On May 9, Shanahan invoked section 8005 and section 1001 of the NDAA again—along with related reprogramming provisions, section 9002 of the Department of Defense Appropriations Act of 2019 and section 1512 of the NDAA[7]—to authorize an additional $1.5 billion in reprogramming to fund four more projects. Memorandum re: Additional Support to the Dep't of Homeland Security from Patrick M. Shanahan, Acting Sec'y of Def., DoD (May 9, 2019). The new projects, El Centro Project 1 and Tucson Sector Projects 1, 2, and 3, are located in California and Arizona. Around the same time, the President indicated that he expected to approve additional projects using funds authorized by the national emergency declaration pursuant to section 2808, although no concrete action has

[7] Section 9002 of the Department of Defense Appropriations Act of 2019 authorizes the Secretary of Defense to transfer up to $2 billion between the appropriations or funds made available to DoD if he determines "that such action is necessary in the national interest" and obtains approval from the Office of Management and Budget. Pub. L. No. 115-245, § 9002, 132 Stat 2981, 3042 (2018). Section 9002 "is subject to the same terms and conditions as the authority provided in section 8005." *Id.* Section 1512 of the NDAA likewise provides a special transfer authority for up to $3.5 billion upon determination that it is "necessary in the national interest," and, under section 1001 of the NDAA, is subject to identical terms and conditions as 8005. Pub. L. No. 115-232, § 1512, 132 Stat. 1636, 2096 (2018). Because it is uncontested that all of these reprogramming provisions are subject to section 8005's requirements, we refer to these requirements collectively by reference to section 8005. *See* Order Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment, *Sierra Club v. Trump*, No. 19-cv-00892-HSG, 2019 WL 2715422, at *2 (N.D. Cal. June 28, 2019).

been taken in that regard. *See* White House Memorandum on Sequencing of Border Barrier Construction Authorities (Mar. 4, 2019).

On February 19, 2019, the Sierra Club and Southern Border Communities Coalition filed a lawsuit against Donald J. Trump, in his official capacity as President of the United States; Patrick M. Shanahan, in his official capacity as Acting Secretary of Defense; Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security; and Steven Mnuchin, in his official capacity as Secretary of the Treasury (collectively, "Defendants," *see supra* n.1).[8] This lawsuit followed closely on the heels of a related action brought by a coalition of states against the same group of Defendants and others.

Plaintiffs are two nonprofit organizations who sued on behalf of themselves and their members. The Sierra Club is dedicated to enjoyment of the outdoors and environmental protection, and it engages in advocacy and public education on issues such as habitat destruction, land use, and the human and environmental impact of construction projects, including the proposed construction of the border barrier. SBCC is a program of Alliance San Diego that brings together organizations from California, Arizona, New Mexico, and Texas to promote

[8] The current Acting Secretary of Defense, Mark Esper, has been automatically substituted for Shanahan. The current Acting Secretary of Homeland Security, Kevin K. McAleenan, has been automatically substituted for Nielsen.

policies aimed at improving the quality of life in border communities, including border enforcement and immigration reform policies.

Plaintiffs' operative Complaint alleges that Defendants exceeded the scope of their constitutional and statutory authority by spending money in excess of what Congress allocated for border security; that Defendants' actions violated separation of powers principles as well as the Appropriations Clause and Presentment Clause of the Constitution; and that Defendants failed to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. Plaintiffs also allege that Defendants are acting *ultra vires* (without authority) in seeking to divert funding without statutory authority to do so.

Plaintiffs allege that Defendants' use of the reprogrammed funds would injure their members because the noise of construction, additional personnel, visual blight, and negative ecological effects that would accompany a border barrier and its construction would detract from their ability to hike, fish, enjoy the desert landscapes, and observe and study a diverse range of wildlife in areas near the U.S.-Mexico border. Plaintiffs also allege that they participated in the legislative process by "devot[ing] substantial staff and other resources towards legislative advocacy leading up to the appropriations bill passed by Congress in February 2019, specifically directed towards securing Congress's denial of substantial funding to the border wall." The Complaint requests declaratory and permanent

injunctive relief to prevent construction of the border barrier using the funding at issue in the lawsuit.

On April 4, Plaintiffs filed a motion for a preliminary injunction, asking the district court to enter a "preliminary injunction prohibiting Defendants and all persons associated with them from taking action to build a border wall using funds or resources from the Defense Department; and specifically enjoining construction of the wall segments in the . . . 'Yuma Sector Projects 1 and 2 and El Paso Sector Project 1 [areas].'" In particular, Plaintiffs moved to enjoin Defendants from using DoD's reprogramming authority in section 8005 to transfer funds from Army personnel into the counterdrug appropriations line, from subsequently using section 284 to divert those funds from DoD's counterdrug appropriations line to be used by DHS for border barrier construction, from invoking section 2808 to divert funds appropriated to military construction projects, and from taking any further action before complying with NEPA's procedural requirements. Plaintiffs argued that a preliminary injunction was necessary because Defendants had already diverted funds, and that Plaintiffs would be irreparably harmed if Defendants proceeded with their threatened construction during the pendency of the district court proceedings. After receiving briefing from both sides, the district court held a multiple-hour hearing on May 17, 2019.

On May 24, the district court issued an order granting the motion in part and denying it in part. *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG, 2019 WL 2247689 (N.D. Cal. May 24, 2019). After concluding that Plaintiffs had standing to bring their challenge, the district court held that Plaintiffs were entitled to a preliminary injunction with respect to the section 8005 reprogramming authority because they would likely succeed in arguing that Defendants acted *ultra vires*, they had demonstrated that they would be irreparably harmed, and the balance of equities weighed in their favor. *Id.* at *13-23, *27-28, *29. The court declined to rule on Plaintiffs' likelihood of success on their section 2808 arguments, however, because Defendants had not yet disclosed a plan for diverting funds under that authority. *Id.* at *25, *28-29. Finally, the court concluded that Plaintiffs were unlikely to succeed on their NEPA argument. *Id.* at *26. It accordingly granted the following preliminary injunction:

> Defendants Patrick M. Shanahan, in his official capacity as Acting Secretary of Defense, Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security, Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury, and all persons acting under their direction, are enjoined from taking any action to construct a border barrier in the areas Defendants have identified as Yuma Sector Project 1 and El Paso Sector Project 1 using funds reprogrammed by DoD under Section 8005 of the Department of Defense Appropriations Act, 2019.

Id. at 30.[9]

Defendants filed a motion in the district court to stay the preliminary injunction pending appeal. The district court denied that motion, concluding that Defendants were unlikely to prevail on the merits and that the "request to proceed immediately with the enjoined construction would not preserve the status quo" but rather would "effectively moot [Plaintiffs'] claims." *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG, 2019 WL 2305341, at *1 (N.D. Cal. May 30, 2019).

On June 3, 2019, Defendants filed an emergency motion with this court requesting a stay pending appeal. Defendants implored our court to act as quickly as possible because they were incurring daily fees and penalties from contractors due to the suspension of construction and because, if the injunction remained in place, Defendants would need to begin the process of reprogramming the funds again by the end of June or else face the risk of being deprived of the use of those funds entirely.[10]

---

[9] The district court simultaneously denied the motion for a preliminary injunction in the related case brought by states, explaining that there was no likelihood of irreparable injury once it had granted the injunction in the *Sierra Club* case. *See State v. Trump*, No. 4:19-cv-00872-HSG, 2019 WL 2247814, at *17 (N.D. Cal. May 24, 2019).

[10] We note that Defendants did not file any motion to expedite the appeal itself, and as explained below, actually filed a motion to delay the expedited briefing schedule our court had issued for the preliminary injunction appeal, asking us to let the parties wait until *after* further anticipated decisions in the district court and our court's decision on their stay motion to propose a new briefing schedule that could govern "any" full appeal.

Initial briefing on the stay motion was completed on June 14, and we heard oral argument on June 20. On June 24, we requested supplemental briefing from the parties on issues that arose during oral argument but that had not been briefed. That briefing was completed on June 28.

Meanwhile, proceedings continued in the district court. On May 29, Plaintiffs filed a motion for a supplemental preliminary injunction to block the additional planned construction in California and Arizona using funds reprogrammed under sections 8005 and 9002 of the Department of Defense Appropriations Act of 2019, as well as section 1512 of the 2019 NDAA. Plaintiffs acknowledged that the motion "present[ed] virtually identical legal questions regarding whether the proposed plan for funding border barrier construction exceeds the Executive Branch's lawful authority" to the ones that the court had decided in its May 24 order granting in part Plaintiffs' motion for a preliminary injunction. On June 12, 2019, Plaintiffs moved for partial summary judgment, seeking a permanent injunction based on the same arguments made in their initial and supplemental motions for a preliminary injunction. Defendants cross-moved for summary judgment, resting on the same arguments they had made against the preliminary injunction. Briefing on those motions was completed on June 24.

On June 28, the district court issued an order granting in part and denying in part Plaintiffs' motion for partial summary judgment, and denying Defendants'

cross-motion for partial summary judgment. *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG, 2019 WL 2715422 (N.D. Cal. June 28, 2019). In that order, the court issued a permanent injunction prohibiting Defendants from using reprogrammed funds to construct a border barrier in the El Paso and Yuma Sectors (the subject of the initial preliminary injunction) as well as the more recently-announced El Centro and Tucson Sector areas (the subject of the motion for a supplemental preliminary injunction).[11] *Id.* at *6. The district court concluded that Plaintiffs' legal challenge was meritorious, that Plaintiffs had shown that they would suffer irreparable harm absent a permanent injunction, and that the balance of hardships and the public interest supported a permanent injunction. *Id.* at *4-5. The court heeded Defendants' request to certify the judgment for immediate

[11] The terms of the permanent injunction are identical to those of the preliminary injunction, but it also covers funds reprogrammed under sections 8005 and 9002 for construction in the El Centro and Tucson sectors. In full, the permanent injunction states:

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

Sierra Club, 2019 WL 2715422, at *6.

appeal, *see* Fed. R. Civ. P. 54(b), and it denied Defendants' request to stay the injunction pending appeal. *Id.* at *5-6.

Defendants filed an immediate notice of appeal from that decision. At Defendants' request, we consolidated their new appeal with the pending appeal of the preliminary injunction. Defendants now seek a stay of the permanent injunction pending appeal, resting on the same arguments they made about the preliminary injunction because the underlying legal questions are identical.

II. Issues Not Before the Court

Before turning to the merits, we highlight what is not at issue in this appeal. First, Defendants at oral argument acknowledged that they are "not challenging [Article III] standing for purposes of the stay motion." Thus, Defendants do not dispute that Plaintiffs have suffered an "actual or imminent," "concrete and particularized," "injury in fact" that is "fairly traceable" to Defendants' actions and that will "likely" be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotation marks and alterations omitted); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). We have satisfied ourselves that Defendants' assessment is correct. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (discussing a court's *sua sponte* obligation to assure itself that it has jurisdiction before proceeding to the merits). Plaintiffs have alleged enough to satisfy the requirements for standing

under Article III at this stage of the litigation. *Id.* at 181-83 (holding that the plaintiffs' injuries from environmental harm were sufficient for standing).

Second, although Defendants may have access to other funding sources to build a border barrier, the only source at issue in this stay motion is section 8005 reprogramming.[12] The district court's preliminary injunction order discussed various other potential sources, including the Treasury Forfeiture Fund and money reallocated after a national emergency declaration for "military construction projects" under section 2808. *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG, 2019 WL 2247689, at *11 (N.D. Cal. May 24, 2019). The injunction, however, only concerns section 8005 reprogramming for border barrier construction in Yuma Sector Project 1, El Paso Sector 1, El Centro Sector 1, and Tucson Sectors 1-3. We have not been asked to expand the scope of the injunction, and the parties have not addressed in this stay motion any non-section 8005 funding sources. Accordingly, our decision does not address any sources of funds Defendants might use to build a border barrier except those reprogrammed under section 8005.

Third, as the district court observed in the preliminary injunction order,

> The case is not about whether the challenged border barrier construction plan is wise or unwise. It is not

[12] As noted above, the parties do not contest that the related reprogramming provisions—section 9002 of the Department of Defense Appropriations Act of 2019 and section 1512 of the NDAA—are subject to section 8005's requirements. We accordingly refer to these requirements collectively by reference to section 8005.

> about whether the plan is the right or wrong policy response to existing conditions at the southern border of the United States. These policy questions are the subject of extensive, and often intense, differences of opinion, and this Court cannot and does not express any view as to them.

Sierra Club, 2019 WL 2247689, at *1. Our consideration is limited to legal questions regarding the authority of the Executive Branch under the Constitution and under statutes enacted into law by Congress.

III. Justiciability

Defendants have not argued that jurisdiction over this action is lacking. Nor have they asserted that Plaintiffs' challenge to the section 8005 reprogramming presents a nonjusticiable "political question." They have contended, however, that "[t]he real separation-of-powers concern is the district court's intrusion into the budgeting process," which "is between the Legislative and Executive Branches—not the judiciary." We consider, therefore, whether it is appropriate for the courts to entertain Plaintiffs' action in the first place. We conclude that it is.

"Cases" and "controversies" that contain "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *Baker v. Carr*, 369 U.S. 186, 217 (1962), or "revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch," *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986), present a "narrow exception" to our responsibility to

decide cases properly before us, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012).

Nowhere does the Constitution grant Congress the exclusive ability to determine whether the Executive Branch has violated the Appropriations Clause. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990). Nor does the Constitution leave the Executive Branch to police itself. Rather, the judiciary "appropriately exercises" its constitutional function "where the question is whether Congress or the Executive is 'aggrandizing its power at the expense of another branch.'" *Zivotofsky*, 566 U.S. at 197 (quoting *Freytag v. Comm'r,* 501 U.S. 868, 878 (1991)).

The current action does not ask us to decide whether the projects for which Defendants seek to reprogram funds are worthy or whether, as a policy judgment, funds should be spent on them. Instead, we are asked whether the reprogramming of funds is consistent with the Appropriations Clause and section 8005. That "is a familiar judicial exercise." *Id*. at 196.

Chief Justice Marshall's answer to "whether the legality of an act of the head of a department be examinable in a court of justice" or "only politically examinable" remains the same: "[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, . . . the individual who considers himself injured, has a right to resort to the laws of his country for a

remedy." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803). Pursuant to its exclusive power of appropriation, Congress imposed on the Executive Branch a duty—contained in section 8005—not to transfer funds unless certain circumstances were present. As discussed above, *see supra* Section II, Defendants have not disputed that Plaintiffs have sufficiently alleged injuries that satisfy Article III's standing requirement to enable them to pursue this action. Although "our decision may have significant political overtones," *Japan Whaling Ass'n*, 478 U.S. at 230, "courts cannot avoid their responsibility merely 'because the issues have political implications,'" *Zivotofsky*, 566 U.S. at 196 (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)). In sum, it is appropriate for this action to proceed in federal court.

IV. Stay Standards

We decide whether to issue a stay by considering four factors, reiterated by the Supreme Court in *Nken v. Holder*, 556 U.S. 418 (2009):

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two factors "are the most critical," and we only reach the last two "[o]nce an applicant satisfies the first two factors." *Id.* at 434-35.

The requirement that an applicant for a stay make a "strong showing" may be explained at least in part by the fact that "[a] stay is not a matter of right, even if irreparable injury might otherwise result." *Id.* at 433 (quoting *Virginian Ry. Co. v. United States,* 272 U.S. 658, 672 (1926)). Indeed, "[a] stay is an intrusion into the ordinary processes of administration and judicial review." *Id.* at 427 (quotation marks omitted). Issuing a stay is therefore "an exercise of judicial discretion" not to be issued "reflexively," but rather based on the circumstances of the particular case. *Id.* at 427, 433. "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. at 433-34. Here, Defendants carry those burdens because it is Defendants who have sought a stay.

That being said, the unusual circumstances of this case complicate our typically restrained approach to assessing the merits in this procedural posture. When deciding whether to issue a stay, we usually speak about the merits in probabilistic "likelihood" terms, in part because we recognize that the "ordinary processes of administration and judicial review" best ensure "careful review and a meaningful decision." *Id.* at 427 (quotation marks omitted). Particularly given a recent increase in emergency petitions asking for injunctive relief or stays of injunctive relief, we think it is especially important for courts to strive to follow the traditional process of judicial review. Otherwise, we are forced to decide "justice on the fly." *Id.*

Here, however, both sides contend that we must evaluate the merits of this case now to preserve their interests—both agree that there is no time for the "ordinary" course of appellate review.[13] As Defendants represented in their briefing and again at oral argument, if the injunction remains in place, DoD's authority to spend the remaining challenged funds on border barrier construction, or to redirect them for other purposes, will lapse. At the same time, as the district court noted, allowing Defendants to move forward with spending the funds will allow construction to begin, causing immediate, and likely irreparable, harm to Plaintiffs. *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG, 2019 WL 2247689, at *27-28 (N.D. Cal. May 24, 2019). In either scenario, many of the issues in this case may become moot or largely moot before fuller litigation of the appeal can be completed. Accordingly, we proceed to evaluate the merits more fully than we otherwise might in response to a stay request.[14]

---

[13] The dissent suggests that we should not be analyzing the merits at this stage because there will be a fuller appeal later. Dissent at 2 n.1. That argument depends on disbelieving Defendants' assertions that the Executive Branch will lose its ability to spend the reprogrammed money by the beginning of July, if not earlier. To the extent Defendants' representations about their imminent injury are not credible, Defendants certainly do not deserve the equitable relief of a stay.

[14] In an appeal from a district court's grant of a permanent injunction, we may "affirm the district court on any ground supported by the record." *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 608 (9th Cir. 2000) (quoting *Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc.*, 810 F.2d 869, 874 (9th Cir. 1987)). Evaluating whether Defendants have a likelihood of

V. Likelihood of Success on the Merits

In their operative Complaint, Plaintiffs framed their claim in various ways. Plaintiffs asserted constitutional claims based on violations of separation of powers principles, the Appropriations Clause, and the Presentment Clause; a claim that Defendants acted *ultra vires*; and a statutory claim under the Consolidated Appropriations Act of 2019.[15] Because we conclude that Plaintiffs' claim is, at its core, one alleging a constitutional violation, we focus on that issue. More than one legal doctrine offers Plaintiffs a cause of action to raise that claim, and Plaintiffs' success under each depends on whether Defendants' actions indeed violate the Constitution.

A. Plaintiffs' Constitutional Claim

The Constitution's Appropriations Clause provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. In addition to safeguarding "the public treasure, the common fund of all," and providing "a most useful and salutary check upon . . . corrupt influence and public peculation," it ensures that the "the executive [does not] possess an unbounded power over the public purse of the nation." 3 Joseph

---

success on appeal therefore requires assessing whether there are clear grounds for affirmance supported by the record.

[15] Plaintiffs also separately asserted a NEPA claim. The parties have not made any arguments about the NEPA claim in these stay proceedings, so we do not address it.

Story, *Commentaries on the Constitution of the United States* § 1342 (Boston, Hilliard, Gray & Co. ed. 1833).

This approach to the power of the purse comported with the Founders' "declared purpose of separating and dividing the powers of government," namely "to 'diffus[e] power the better to secure liberty.'" *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (alteration in original) (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring)); *see also INS v. Chadha*, 462 U.S. 919, 949-50 (1983) (collecting sources and explaining the Founders' belief in "the need to divide and disperse power in order to protect liberty"). In response to critiques that his proposed Constitution would dangerously concentrate power in a single central government, James Madison argued that the risk of abuse of such power was low because "the sword and purse are not to be given to the same member" of the government. 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 393 (Jonathan Elliot ed., 2d ed. 1836). Instead, Madison explained that "[t]he purse is in the hands of the representatives of the people," who "have the appropriation of all moneys." *Id.*

Plaintiffs' principal legal theory is that Defendants seek to spend funds for a different purpose than that for which Congress appropriated them, thereby

violating the Appropriations Clause.[16] Defendants' defense to this claim is that, through section 8005, Congress allowed Defendants to make this reallocation. If Defendants were correct that section 8005 allowed this spending reallocation, Plaintiffs' claim would fail, because the spending would be consistent with Congress's appropriation legislation. If section 8005 does not authorize the reallocation, however, then Defendants are acting outside of any statutory appropriation and are therefore spending funds contrary to Congress's appropriations decisions. We believe Plaintiffs are correct that there is no statutory appropriation for the expenditures that are the subject of the injunction. Reprogramming and spending those funds therefore violates the Appropriations Clause.

1. Section 8005's Meaning

Defendants argue that they are likely to prevail on appeal because Congress has authorized DoD to reprogram funds, the planned use of funds is consistent with that reprogramming authorization, and this spending is therefore authorized by an appropriation from Congress as the Appropriations Clause requires. We disagree.

[16] Throughout this litigation, Plaintiffs' claim has been framed in various ways. The lack of compliance with section 8005 has sometimes been labeled *ultra vires* as outside statutory authority or as outside the President's Article II powers, and spending without an appropriation has been described as a violation of the Appropriations Clause. However their claim is labeled, Plaintiffs' theory is ultimately the same.

DoD's proposed expenditures are not authorized by the applicable reprogramming statute. They therefore are not "in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7.

At bottom, this constitutional issue turns on a question of statutory interpretation. Section 8005 of the Department of Defense Appropriations Act of 2019 provides that the Secretary of Defense may reprogram funds for certain military functions other than those for which they were initially appropriated, but it limits the Secretary's ability to do so to a narrow set of circumstances. Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018).[17] Transferred funds must address

[17] Section 8005 provides, in relevant part:

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

"higher priority items, based on unforeseen military requirements, than those for which originally appropriated." *Id.* And "in no case" may the Secretary use the funds "where the item for which reprogramming is requested has been denied by the Congress." *Id.* We conclude, as Plaintiffs argue, that those requirements are not satisfied.

i. "Unforeseen"

Plaintiffs argue that the President's repeated and unsuccessful requests for more border barrier funding make the request here obviously not unforeseen. Defendants assert in response, without citation, that "[a]n expenditure is 'unforeseen' . . . if DoD was not aware of the specific need when it made its budgeting requests." Defendants contend that DoD could not have foreseen the "need to provide support" to DHS for border barrier construction in the relevant sectors when it made its budget requests for 2019, before DHS's own budget was even finalized.

Defendants mistakenly focus on the assertion that DoD "could not have anticipated that DHS would request specific support for roads, fences, and lighting." Even assuming that is true, the fact remains that DHS came to DoD for funds because Congress refused to grant DHS itself those funds. And when

---

> no case where the item for which reprogramming is requested has been denied by the Congress.

properly viewed as applying to the broader "requirement" of a border wall, not to DHS's specific need to turn to an entity other than Congress for funds, it is not credible that DoD did not foresee this requirement. The long history of the President's efforts to build a border barrier and of Congress's refusing to appropriate the funds he requested makes it implausible that this need was unforeseen.

ii. "Denied by the Congress"

Even if there could be doubt about how to interpret "unforeseen," it is clear that Congress denied this request. Because each of section 8005's conditions must be satisfied for DoD's reprogramming and spending to be constitutionally permissible, this conclusion alone undermines Defendants' likelihood of success on the merits on appeal.

Defendants urge that "an 'item for which funds are requested'" refers to "a *particular* budget item" for section 8005 purposes, so "Congress's decisions with respect to DHS's more general request for border-wall funding [are] irrelevant." But this interpretation, which would require that a specific funding request be explicitly rejected by Congress, is not compatible with the plain text of section 8005. First, the statute refers to "item[s] . . . denied by the Congress," not to *funding requests* denied by the Congress, suggesting that the inquiry centers on what DoD wishes to spend the funds on, not on the form in which Congress

considered whether to permit such spending. Second, Defendants give the term "denied" a meaning other than its "ordinary, contemporary, and common" one. *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998). In common usage, a general denial of something requested can, and in this case does, encompass more specific or narrower forms of that request. To illustrate, if someone offered a new job asks her potential future employer for a larger compensation package than was included in the job offer and the request is denied, she has been denied a five percent higher salary even if her request did not specifically ask for that amount.

As the district court noted, Defendants' reading of section 8005 also would produce the perverse result that DoD could, by declining to present Congress with a particular line item to deny, reprogram funds for a purpose that Congress refused to grant another agency elsewhere in the budgeting process.[18] In other words, it would simply invite creative repackaging. But putting a gift in different wrapping paper does not change the gift. Identifying the request to Congress as having come previously from DHS instead of from DoD does not change what funding was requested for: a wall along the southern border.

Construing section 8005 with an eye towards the ordinary and common-sense meaning of "denied," real-world events in the months and years

[18] That result would hardly comport with Congress's stated desire in drafting the language currently in section 8005 "to tighten congressional control of the reprogramming process." H.R. Rep. No. 93-662, at 16 (1973).

leading up to the 2019 appropriations bills leave no doubt that Congress considered and denied appropriations for the border barrier construction projects that DoD now seeks to finance using its section 8005 authority. Long before the emergency declaration and DoD's reprogramming at issue here, the President made plain his desire to construct a border barrier, requesting $5.7 billion from Congress to do so. Throughout 2018, Congress considered multiple bills that would have supported construction of such a barrier; it passed none of them. *See supra* Section I.

That DoD never specifically requested from Congress the specific sums at issue here for the specific purpose of counterdrug funding at the southern border (and that Congress therefore never had cause to deny that specific request) is of no moment. The amount to be appropriated for a border barrier occupied center stage of the budgeting process for months, culminating in a prolonged government shutdown that both the Legislative and Executive Branches clearly understood as hinging on whether Congress would accede to the President's request for $5.7 billion to build a border barrier.

In sum, Congress considered the "item" at issue here—a physical barrier along the entire southern border, including in the Yuma, El Paso, Tucson, and El Centro sectors—and decided in a transparent process subject to great public scrutiny to appropriate less than the total amount the President had sought for that item. To call that anything but a "denial" is not credible.

2. Defendants' Interpretation and Agency Deference

Defendants did not argue in their briefing to the district court, their stay motion, or their supplemental briefing that their contrary interpretation of section 8005 is entitled to agency deference. Even setting aside whether Defendants' failure to raise such an argument may operate as a waiver or forfeiture, we conclude that their position is unworthy of deference when evaluated under traditional standards for reviewing agency action.

Under the two-step framework articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a reviewing court will often defer to an agency's interpretation of an ambiguous statute administered by the agency. *Id.* at 843. To determine whether the *Chevron* framework governs at all, however, there is a threshold "step zero" inquiry in which we ask whether "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and [whether] the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). "Delegation of such authority may be shown in a variety of ways, [such] as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." *Id.* at 227. And to evaluate whether the agency exercised its authority, we look to "the interpretive method used and the nature of

the question at issue," considerations that may include "the interstitial nature of the legal question, the related expertise of the [a]gency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the [a]gency has given the question over a long period of time." *Barnhart v. Walton*, 535 U.S. 212, 222 (2002). If we determine that (1) Congress did not intend to delegate interpretive authority to the agency, or (2) that the agency did not take the challenged action in exercise of that authority, we defer to the agency only to the extent that the agency's reasoning is persuasive. *Mead*, 533 U.S. at 234 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

Under this framework, DoD's current interpretation of section 8005 is not entitled to deference. First, it does not appear that Congress intended to delegate to DoD the power to interpret section 8005. DoD's authorizing and appropriating statutes do not contain an explicit grant of rulemaking power to the agency. Section 8005 could suggest a potential congressional intent to delegate to DoD the authority to interpret the phrase "higher priority items, based on unforeseen military requirements," because these are subjects about which DoD has expertise. But the same is not true of the "denied by the Congress" limitation, given that DoD has no clear expertise in assessing what "denied by the Congress" might mean. Moreover, as discussed above, Congress's intent in inserting the "denied by the

Congress" limitation in the first place was to tighten the fiscal reins and retain congressional control over the appropriations process. *See supra* n.18.

Second, the agency has not advanced its interpretation in a manner that would typically trigger review under *Chevron*. There is no question that DoD did not conduct notice-and-comment rulemaking or other formalized procedures in interpreting section 8005. *See Mead*, 533 U.S. at 230 ("[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication."). Nor were there any other features in DoD's interpretive process here that might otherwise justify *Chevron* deference. *See Barnhart*, 535 U.S. at 222. There is no indication that DoD's decision was the product of "careful consideration . . . over a long period of time" or any other procedural rigor that would more closely approximate a formal rulemaking. *Id.* On the contrary, DoD's interpretation appears to have emerged in a matter of weeks. And to the extent that DoD has mustered further support for its interpretation during this litigation, that litigating position is not entitled to *Chevron* deference. *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 830 (9th Cir. 2012) (en banc) ("Without a basis in agency regulations or other binding agency interpretations, there is usually no justification for attributing to an agency litigating position 'the force of law.'" (quoting *Mead*, 533 U.S. at 227)).

Accordingly, we conclude that *Chevron* deference to DoD's interpretation of section 8005 is not warranted.

An agency action not entitled to *Chevron* deference may nevertheless carry persuasive weight based on the factors that the Supreme Court enumerated in *Skidmore*, 323 U.S. at 140. *See Mead*, 533 U.S. at 234-35. Under *Skidmore*, we look to "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." 323 U.S. at 140.

DoD's interpretation of section 8005 does not warrant deference under *Skidmore*'s standards either. The two documents in the record that appear to contain DoD's analysis of the section 8005 requirements—the official reprogramming action and a related memorandum to DoD's comptroller—are entirely conclusory. The reprogramming action merely parrots the statute without analysis:

> This reprogramming action provides funding in support of higher priority items, based on unforeseen military requirements, than those for which originally appropriated; and is determined to be necessary in the national interest. It meets all administrative and legal requirements, and none of the items has previously been denied by the Congress.

The memorandum contains little more, stating that "[t]he need to provide support . . . was . . . not known at the time of the [Fiscal Year] 2019 budget request" and that Congress had not denied funding for the items. The Supreme

Court has found unpersuasive under *Skidmore* agency determinations containing far more reasoning than that which we confront here. *See Gonzales v. Oregon,* 546 U.S. 243, 253-54 (2006) (rejecting as unpersuasive under *Skidmore* an interpretive rule announced by the Attorney General that "[i]ncorporat[ed] the legal analysis of a memorandum he had solicited from his Office of Legal Counsel"); *Christensen v. Harris County*, 529 U.S. 576, 581, 587 (2000) (rejecting as unpersuasive under *Skidmore* an interpretation in an opinion letter containing brief textual analysis and citation to operative regulations).

Defendants' interpretation also fails to rest on the sort of expertise that might inspire deference. *See Gonzales,* 546 U.S. at 269 ("[*Skidmore*] deference here is tempered by the Attorney General's lack of expertise in this area."); *cf. Kisor v. Wilkie*, No. 18-15, 2019 WL 2605554, at *9 (U.S. June 26, 2019) (explaining that when an agency interprets its own regulation, its "interpretation must in some way implicate its substantive expertise" to be entitled to deference); *compare Mead*, 533 U.S. at 235 ("There is room at least to raise a *Skidmore* claim here, where . . . [the agency] can bring the benefit of specialized experience to bear on the subtle questions in this case.").

* * *

Without section 8005's statutory authorization to reprogram funds for section 284 security measures, no congressional action permits Defendants to use

those funds to construct border barriers. "The President's power . . . must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to [act] as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied." *Youngstown*, 343 U.S. at 585. Defendants' attempt to reprogram and spend these funds therefore violates the Appropriations Clause and intrudes on Congress's exclusive power of the purse, for it would cause funds to be "drawn from the Treasury" not "in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7.

B. Whether Plaintiffs Have a Cause of Action

Defendants argue that none of the foregoing analysis matters because Plaintiffs lack a cause of action to challenge the reprogramming of funds at issue here. We disagree. Plaintiffs may bring their challenge through an equitable action to enjoin unconstitutional official conduct, or under the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, as a challenge to a final agency decision that is alleged to violate the Constitution, or both. Either way, Plaintiffs have an avenue for seeking relief.

1. Equitable Cause of Action

The Supreme Court has "long held that federal courts may in some circumstances grant injunctive relief against" federal officials violating federal

law. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) ("[I]njunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally."). "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 135 S. Ct. at 1384; *see also Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999) ("[T]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief . . . depend on traditional principles of equity jurisdiction." (quoting 11A Charles Alan Wright et al., Federal Practice and Procedure § 2941, at 31 (2d ed. 1995)).

In *Youngstown*, for example, the Supreme Court heard a challenge to a wartime presidential order directing the Secretary of Commerce to seize and operate a majority of the nation's steel mills. 343 U.S. at 582. Acting pursuant to the presidential order, the Secretary of Commerce issued possessory orders that required the seized companies to operate according to the Secretary's direction. *Id.* at 583. The plaintiff steel mill owners challenged the order as amounting to lawmaking, a function that "the Constitution has expressly confided to the Congress and not to the President." *Id.* at 582. The President contended that his order was "necessary to avert a national catastrophe." *Id.* In addressing the

dispute, the Court held that there was no statute that authorized the order, and that "[t]he order [could not] properly be sustained as an exercise of the President's military power," or any other constitutional grant of power to the President. *Id.* at 587. The Court therefore held that "th[e] seizure order [could not] stand." *Id.* at 589.

More recently, in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), the Supreme Court heard a challenge to a presidential proclamation restricting the entry of certain foreign nationals into the United States on the ground that it violated the Establishment Clause of the First Amendment. *Id.* at 2403. Plaintiffs were individuals who alleged that they were injured by being separated from relatives barred from entering the country. *Id.* at 2416. Without discussing whether a cause of action existed to challenge the alleged constitutional violation, the Court reached the merits of the plaintiffs' Establishment Clause claim. *See id.* at 2416-17. The government had contended that the plaintiffs' claims were not justiciable because the Establishment Clause did not give them a legally protected interest in the admission of particular foreign nationals, but the Court rejected this argument and proceeded to evaluate the merits of the plaintiffs' claim. *Id.* at 2416. *Trump v. Hawaii* and *Youngstown* therefore support the conclusion that Plaintiffs may seek equitable relief to remedy an alleged constitutional violation.

Consistent with these cases, our court allowed an equitable action to enforce the Appropriations Clause in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). In *McIntosh*, appellants were criminal defendants who had been federally indicted on marijuana-related offenses. *Id.* at 1168-69. They sought to enjoin their prosecutions, claiming that a congressional appropriations rider prohibited the Department of Justice ("DOJ") from spending money on their prosecutions because their marijuana-related activities were licensed under state law. *Id.* at 1169, 1177. We held that the defendant-appellants could properly "enjoin their prosecutions on the grounds that [DOJ] [was] prohibited from spending funds to prosecute them" if they could demonstrate that their conduct was authorized by state law and thus fell within what the appropriations rider was enacted to protect. *Id.* at 1169, 1174. As we explained: "Congress has enacted an appropriations rider that specifically restricts DOJ from spending money to pursue certain activities," and it had acted within its "'exclusive province'" in doing so. *Id.* at 1172 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978)). Once Congress has so acted, "it is for . . . the courts to enforce" its decisions. *Id.* (quoting *Tenn. Valley Auth.*, 437 U.S. at 194). Contrary to the dissent's characterization, we did not in *McIntosh* treat the alleged constitutional violation only "as a *defense* for criminal defendants." Dissent at 21. Instead we held that "Appellants . . . can seek—and

have sought—to enjoin [an agency] from *spending funds*" contrary to Congress's restrictions. *McIntosh*, 833 F.3d at 1172.

Relying on *Dalton v. Specter*, 511 U.S. 462 (1994), Defendants argue that there cannot be a constitutional cause of action here. *Dalton* involved a challenge to the President's discretionary decision to agree to a specific military base closure included in a base closure package proposed by an independent commission pursuant to the Defense Base Closure and Realignment Act of 1990 ("DBCRA"). *Id.* at 464-66. The Supreme Court held that the plaintiff's statutory challenge to the President's decision failed because the statute gave the President unfettered discretion. *Id.* at 474-76. The Court then also rejected the argument that because the President had allegedly violated the statute, he had acted unconstitutionally. *Id.* at 472-74. In explanation, the Court stated that "every action by the President, or by another executive official, in excess of his statutory authority is [not] *ipso facto* in violation of the Constitution." *Id.* at 472. The Court did not say, however, that action in excess of statutory authority can *never* violate the Constitution or give rise to a constitutional claim. Statutory and constitutional claims are not mutually exclusive. Indeed, the Court went on in *Dalton* to state that *Youngstown* "cannot be read for the proposition that an action taken by the President in excess of his statutory authority *necessarily* violates the Constitution." *Id*. at 473 (emphasis

added). There would have been no reason for the Court to include the word "necessarily" if the two claims were always mutually exclusive.

In *Dalton*, the President's authority was put at issue because of the contention that he had violated requirements set by DBCRA. It was only because Congress had enacted a statutory process for closing bases that the Court considered whether it could review the President's compliance with DBCRA and ultimately concluded that it could not because the statute gave the President unreviewable discretion. *Id.* at 474-76. It was in that context that the Court explained that an allegation that the President had not complied with the statute would not necessarily become a constitutional claim through an *ultra vires* theory. *Id.* at 472-73. Because DBCRA authorized unfettered discretion by the President to either approve or disapprove the package of base closures as a whole, the Court had no occasion to consider the constitutional implications of violating statutes, such as section 8005, that authorize executive action contingent on satisfaction of certain requirements.[19] Here, unlike in *Dalton*, Plaintiffs' claim is not one "*simply* alleging that the President has exceeded his statutory authority." *Id.* at 473

[19] The dissent notes that when Congress appropriates funds in lump-sum amounts, and leaves it to the unfettered discretion of the agency to re-allocate funds, no judicial review is available. Dissent at 8 (citing *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993)). That principle has no bearing here. Section 8005 does not involve a lump sum whose allocation is committed to the agency's discretion, but instead imposes restrictions on when and for what purposes the agency may use reprogrammed funds.

(emphasis added). Rather, Plaintiffs claim that to the extent Defendants did not have statutory authority to reprogram the funds, they acted in violation of constitutional separation of powers principles because Defendants lack any background constitutional authority to appropriate funds—making Plaintiffs' claim fundamentally a constitutional one.[20] *Dalton* therefore does not foreclose Plaintiffs' constitutional claim here.[21]

---

[20] Defendants rely on *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975), in which the Fourth Circuit held that the claims of several individual taxpayers who alleged that the government was spending money in violation of two statutes did not satisfy the test for taxpayer standing enunciated in *Flast v. Cohen*, 392 U.S. 83 (1968), because they "present[ed] no constitutional challenge to any congressional appropriation," *Harrington*, 528 F.2d at 457. *Harrington* is largely inapposite, because Plaintiffs do not rely on taxpayer standing here. The court in *Harrington* noted, however, that "[i]f there were a clear and flagrant violation of congressional limitations upon expenditures, a court in a taxpayer suit might find its intervention appropriate." *Id.* at 458. Thus, if *Harrington* has any persuasive value here, we think it is in suggesting that Plaintiffs *do* have a cause of action because, as we have discussed, there has been a clear violation of Congress' limits on expenditures.

[21] The dissent suggests that *Train v. City of New York*, 420 U.S. 35 (1975), supports the proposition that a claim attacking the Executive Branch's reading of an appropriations statute sounds only in that statute and not in the Constitution. Dissent at 8-9. But the plaintiffs in *Train* argued not that the Executive Branch was spending money that Congress had never appropriated, rather that the Executive Branch was *refusing* to allot money Congress had specifically *instructed* it to spend. 420 U.S. at 42. There was thus no constitutional claim at issue in *Train*, and if there had been, it would have had nothing to do with the prohibitions on unauthorized spending imposed by the Appropriations Clause. The Supreme Court in *Train* considered only the statutory question whether an Executive Branch agency had failed to comply with a specific statutory mandate because that was the only issue in that case, not because the existence of a statute had any bearing on constitutional reviewability.

Defendants also cannot be right in their apparent contention that as long as an official identifies some statutory authorization for his actions, doing so makes any challenge to those actions statutory and precludes constitutional review. It cannot be that simply by pointing to any statute, governmental defendants can foreclose a constitutional claim. At the risk of sounding tautological, only if the statute *actually* permits the action can it *even possibly* give authority for that action.[22] For the reasons explained above, section 8005 does not permit the action here.

Congress may, of course, limit a court's equitable power to enjoin acts violating federal law. *See Armstrong*, 135 S. Ct. at 1385 (explaining that an equitable remedy is not available where Congress has demonstrated an "intent to foreclose" that form of relief, as where a statutory provision (1) expressly provided a method of enforcing a substantive right, or (2) lacked a judicially administrable standard (quoting *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002))). But Defendants do not argue that Congress has demonstrated any

[22] Although in *Youngstown* the President *conceded* that no statute authorized his actions, and relied only on his Article II powers, 343 U.S. at 587, we do not see how Defendants' willingness or unwillingness to concede that a particular statute does not authorize their actions should affect whether Plaintiffs in this case have a cause of action—particularly when, as we have discussed, we think it quite clear that section 8005 does not authorize the reprogramming. Thus, we do not think that the concession in *Youngstown* was determinative, or that the lack of a concession is determinative here.

such intent to limit equitable remedies here, and we have identified no statute that does so. Indeed, to foreclose a remedy for a constitutional violation, Congress must demonstrate its intent by "clear and convincing evidence." *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975) (quoting *Johnson v. Robinson*, 415 U.S. 361, 373 (1974)); *see also City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 183 (1997) ("[J]udicial review of [federal] administrative action is the rule, and nonreviewability an exception which must be demonstrated." (alterations in original) (quoting *Barlow v. Collins*, 397 U.S. 159, 166 (1970)).

2. Administrative Procedure Act Cause of Action

Plaintiffs' claim is also cognizable under the APA. The APA provides for judicial review of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Here, Plaintiffs have a cause of action under the APA as long as there has been final agency action, and as long as Congress has not limited review of such actions through other statutes or committed them to agency discretion. Neither of these bars to APA relief is present here. *See* 5 U.S.C. §§ 701(a), 704, 706; *Bennett v. Spear*, 520 U.S. 154, 175 (1997).

The APA mandates that a court "shall . . . hold unlawful and set aside agency action . . . found to be . . . contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). Plaintiffs' challenge is to a final agency

action and alleges that the action violates the Appropriations Clause, so it falls within the APA's scope.[23]

Although section 701(a)(2) of the APA "preclude[s] judicial review of certain categories of administrative decisions," this case does not involve such an "administrative decision traditionally regarded as committed to agency discretion." *Lincoln v. Vigil*, 508 U.S. 182, 191-92 (1993). In their emergency stay motion and related supplemental briefing, Defendants do not argue that DoD's actions were committed to "agency discretion by law," so as to preclude review under the APA. We agree with Defendants' implicit concession that this is not a case involving a "statute . . . drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

Any constitutional challenge that Plaintiffs may advance under the APA would exist regardless of whether they could also assert an APA claim that DoD's

[23] Defendants argue that DoD's reprogramming action is not a final agency action in part because it "imposes no obligations and confers no rights upon plaintiffs." **Exec. Tan Br. at 14.** But the question we must ask in determining finality is whether the agency action imposes obligations on the agency, not whether it imposes obligations on Plaintiffs. *See Bennett*, 520 U.S. at 177 (holding that the challenged agency actions were final because they "alter[ed] the legal regime *to which the action agency* [wa]s subject" (emphasis added)). Here, as we have discussed, the reprogramming action purports to affect DoD's legal right to use particular funds to build a border barrier instead of the purpose for which they were originally appropriated.

application of section 8005 was "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C); *see Webster v. Doe*, 486 U.S. 592, 602-04 (1988) (holding that a plaintiff may raise under the APA a constitutional challenge to agency action even where the plaintiff lacks an avenue under the APA to argue that the same agency action is invalid for statutory or procedural reasons). If "Congress intends to preclude judicial review of constitutional claims[,] its intent to do so must be clear." *Webster*, 487 U.S. at 603. Congress has not done so here.

3. Survival of at Least One Cause of Action

The dissent argues that Plaintiffs' claim is necessarily one encompassed by the APA, and that the availability of an APA cause of action precludes Plaintiffs' equitable claim. We do not think that the APA forecloses Plaintiffs' equitable claim. And even if it did, then for the reasons we have discussed, Plaintiffs would have an APA claim. Either way, it cannot be that both an equitable claim and an APA claim foreclose the other, leaving Plaintiffs with no recourse.

It is true that the APA is the general mechanism by which to challenge final agency action. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (noting the "basic presumption of judicial review [created by the APA] for one 'suffering legal wrong because of agency action'" (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)). But this does not mean the APA

forecloses other causes of action. In *Navajo Nation v. Department of the Interior*, 876 F.3d 1144 (9th Cir. 2017), we explained that "a court is foreclosed by [APA section] 704 from entertaining claims *brought under the APA* seeking review of non-final agency action (and not otherwise permitted by law)," but that this final agency action limitation does not apply "to other types of claims (like . . . constitutional claims)." *Id.* at 1170.

Likewise, in *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989), we allowed constitutional claims to proceed without even deciding whether an APA cause of action was available. There, plaintiff churches brought claims for injunctive relief against the United States, DOJ, and the Immigration and Naturalization Service ("INS") and certain INS officials, alleging violations of their First and Fourth Amendment rights by INS agents' surreptitious recording of their church services. *Id.* at 520. The district court dismissed the plaintiffs' claims as, in relevant part, barred by sovereign immunity. *Id.* at 521. We reversed, holding that APA section 702 waived the government defendants' sovereign immunity for claims seeking non-monetary relief. *Id.* at 523-24. We further explained that this waiver of sovereign immunity was not limited to suits involving an "agency action" as defined under the APA. *Id.* at 525. We therefore did not reach the question whether the actions challenged in that case were ones for which the APA would provide a cause of action. *Id.* at 525 n.8. Rather, we remanded for

further analysis of standing and mootness, and, if the district court determined it had jurisdiction, for evaluation of the plaintiffs' constitutional claims. *Id.* at 529. *Navajo Nation* and *Presbyterian Church* clearly contemplate that claims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA.

In fact, the APA provides for judicial review only of "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Here, no statute expressly makes Plaintiffs' claims reviewable, but, as we have explained, Plaintiffs do have an adequate remedy in a court: an equitable cause of action for injunctive relief. If either form of their claim precludes the other, it would therefore seem that their equitable claim to enjoin unconstitutional action would preclude their APA claim to enjoin unconstitutional action. But even if it is the other way around, these causes of action cannot possibly be the legal equivalent of baking soda and vinegar—when they come in contact, there is no reason to believe they both go up in smoke.

C. Zone of Interests

Defendants argue that even if a cause of action generally exists to challenge the reprogramming, Plaintiffs must satisfy a "zone of interests" test to establish that *they*, specifically, have a cause of action for the constitutional violation they allege here. Defendants argue that this test would apply to Plaintiffs' claim

whether characterized as an equitable cause of action to enjoin a constitutional violation or as an APA claim. We are doubtful that a zone of interests test applies to Plaintiffs' equitable cause of action. Although we recognize that the APA generally does carry a zone of interests test, there is some lack of clarity with respect to what that might look like in a constitutional context. We need not resolve these ambiguities in the case law, however, because we believe Plaintiffs fall within any zone of interests test that may apply.

1. Applicability of a Zone of Interests Test

Courts apply the zone of interests test to "determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 (2014). To determine whether a plaintiff satisfies this test we ask whether the plaintiff's "interests fall within the zone of interests protected by the law invoked." *Id.* at 129 (quotation marks omitted). In answering this question, we recognize that "the breadth of the [applicable] zone of interests varies according to the provisions of law at issue." *Id.* at 130 (quoting *Bennett*, 520 U.S. at 163).

The zone of interests test derives from the Supreme Court's decision in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), where the Court articulated a limit on causes of action conferred by the

APA. But the Court clarified in *Lexmark* that the test "applies to *all* statutorily created causes of action . . . and that Congress is presumed to 'legislate against the background of' the zone-of-interests limitation, 'which applies unless it is expressly negated.'" *Lexmark*, 572 U.S. at 129 (emphasis added) (quoting *Bennett*, 520 U.S. at 163).[24]

We are doubtful that any zone of interests test applies to Plaintiffs' equitable cause of action to enjoin a violation of the Appropriations Clause, particularly after *Lexmark*.

As an initial matter, we are skeptical that there could be a zone of interests requirement for a claim alleging that official action was taken in the absence of all authority, like that which Plaintiffs assert here. The D.C. Circuit's decision in *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987), explains why it does not make sense to treat such claims as carrying a zone of interests requirement. There, the court heard a challenge to a government program for

[24] Many pre-*Lexmark* cases refer to the zone of interests test—and the broader question whether a particular plaintiff has a cause of action—as a part of the standing inquiry (and, more specifically, as a component of "prudential standing"). *See Lexmark*, 572 U.S. at 126-27. In *Lexmark*, however, the Court clarified that the zone of interests test does not go to a plaintiff's standing but rather to whether the plaintiff has a cause of action. *Id.* at 127, 128 n.4. The Court suggested that holding otherwise would be "in some tension with [the Court's] recent affirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'" *Id.* at 126 (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013).

intercepting ships carrying undocumented immigrants, in which the plaintiffs argued that the program exceeded authority granted by statute or the Constitution. *Id.* at 797-98. The court ultimately held that the plaintiffs lacked standing. *Id.* at 800-01. But, citing *Youngstown* in its discussion, the D.C. Circuit noted that the plaintiffs were not required to "show that their interests [fell] within the zones of interests of the constitutional and statutory powers invoked by the President in order to . . . challenge the . . . program as *ultra vires*." *Id.* at 811 n.14. "Otherwise," the court explained, "a meritorious litigant, injured by *ultra vires* action, would seldom have standing to sue since the litigant's interest normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest." *Id.* In other words, where the very claim is that *no* statutory or constitutional provision authorized a particular governmental action, it makes little sense to ask whether *any* statutory or constitutional provision was written for the benefit of any particular plaintiffs.

Consistent with this logic, *Youngstown* did not apply a zone of interests test. Although we acknowledge that *Youngstown* was decided before the Supreme Court had formally articulated a zone of interests test, *Youngstown* did not address any similar concept, either. Rather, the Court held that the President had unlawfully intruded on the lawmaking function reserved to Congress without ever discussing

whether the plaintiffs, steel mill owners whose property was ordered to be seized, were the intended beneficiaries of the structural provisions in Article II.

Similarly, in *Clinton v. City of New York*, 524 U.S. 417 (1998), which addressed a Presentment Clause challenge, the Supreme Court said nothing about a zone of interests requirement. In that case, two sets of plaintiffs challenged the constitutionality of the Line Item Veto Act, which allowed the President to veto only particular provisions in enacted laws, rather than the entire law. *Id.* at 420-21. One set of plaintiffs consisted of the City of New York, a hospital and two hospital associations, and unions representing hospital employees. *Id.* at 425. Another consisted of a cooperative of Idaho potato growers, and an individual potato farmer. *Id.* All the plaintiffs alleged that they were injured by the President's cancellation of particular line items in the budget that would have inured to their financial benefit. *Id.* at 421. The Supreme Court held that the Act violated the structural protections provided by the Presentment Clause, without asking whether the plaintiffs fell within any zone of interests of that clause. *Id.* at 436-48.

The Appropriations Clause likewise operates as a structural protection built into our constitutional system. Just as the Court in *Clinton* treated as sufficient that the plaintiffs were concretely injured as a result of the alleged Presentment Clause violation, we believe it is likely sufficient here that Plaintiffs would be concretely

injured by the alleged Appropriations Clause violation, and that no zone of interests test applies to their claim.

Even if a zone of interests test may have been applied to some cases considering constitutional claims like Plaintiffs' prior to *Lexmark*, we think that *Lexmark* has called into question its continuing applicability to constitutional claims. *Lexmark* focuses on *Congress's intent* in creating statutory causes of action, casting doubt on Defendants' argument that a zone of interests test has any role to play here, where Plaintiffs' theory derives from the Constitution. The Court in *Lexmark* described the purpose of the zone of interests test as being to discern whether a statutory cause of action exists—specifically, "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." 572 U.S. at 127. Because the Constitution was not created by any act of Congress, it is hard to see how the zone of interests test would even apply.[25]

[25] Defendants argue that an equitable cause of action to enjoin a constitutional violation is, at its root, a creation of statute, and is therefore encompassed within *Lexmark*'s references to causes of action created by statute. Although Defendants are correct that Congress granted federal courts equity jurisdiction by statute, *see Grupo Mexicano*, 527 U.S. at 318 ("The Judiciary Act of 1789 conferred on the federal courts jurisdiction over all suits . . . in equity." (quotation marks omitted)); *see also* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."), we think it a stretch to conclude that the traditional equitable cause of action to enjoin a constitutional violation was therefore *created by statute*. Indeed, the lower federal courts are created entirely by statute, *see* An Act to Establish the Judicial Courts of the United States §§ 2-6, 1 Stat. 73 (1789),

Indeed, in its recent decision in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, No. 18-96, 2019 WL 2605555 (U.S. June 26, 2019), in which the plaintiffs alleged a violation of the dormant Commerce Clause, the Supreme Court did not even mention the zone of interests test. Given that the Court did apply a zone of interests test in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), a pre-*Lexmark* dormant Commerce Clause case, *Tennessee Wine* supports the idea that *Lexmark* has changed the landscape. *See* 429 U.S. at 602 n.3.

For all of these reasons, we doubt that any zone of interests test applies to Plaintiffs' equitable cause of action.

We recognize that the Supreme Court has consistently applied a zone of interests test to causes of action arising under the APA. When the Court has applied the zone of interests test in APA actions, however, it has analyzed the zone of interests of the statute the agency is alleged to have violated, not any zone of interests of the APA itself. In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), for example, the Court examined an APA action alleging that the government had exceeded its statutory authority to take title

---

but this does not mean that all constitutional claims filed in a federal district court are really statutory claims. *See, e.g.*, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (recognizing "a cause of action under the Fourth Amendment" for damages).

to a piece of property "for the purpose of providing land for Indians." *Id.* at 211 (quoting the Indian Reorganization Act, 25 U.S.C. § 465 (2012) (current version at 25 U.S.C. § 5108)). It concluded that the plaintiff, who lived near land that had been acquired by the Secretary of the Interior for an Indian tribe seeking to open a casino, was "arguably within the zone of interests to be protected or regulated by" the Indian Reorganization Act, which "authorize[d] the acquisition of property 'for the purpose of providing land for Indians.'" *Id.* at 211-12, 224-26 (first quoting *Ass'n of Data Processing Serv. Orgs.*, 397 U.S. at 153, then quoting 25 U.S.C. § 465 (2012) (current version at 25 U.S.C. § 5108)). In so doing, it departed from the reasoning of the district court, which had concluded that the plaintiff fell outside the Act's zone of interests because he was "not an Indian, nor [did] he purport to seek to protect or vindicate the interests of any Indians or Indian tribes." *Patchak v. Salazar*, 646 F. Supp. 2d 72, 77 (D.D.C. 2009). And in *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517 (1991), the Court asked whether postal workers bringing a claim under the APA were within the zone of interests protected by the Private Express Statutes on which their claims depended.[26]

[26] In *Bennett*, the Court noted that because the zone of interests test "varies according to the provisions of law at issue, . . . what comes within the zone of interests of a statute for purposes of obtaining judicial review . . . under the 'generous review provisions' of the APA may not do so for other purposes." 520

Here, rather than looking at a statute underlying an APA action to determine the relevant zone of interests, we would need to look at the Appropriations Clause. Because, as we have discussed, we are doubtful that any zone of interests test applies to claims seeking to enjoin a violation of the Appropriations Clause, we think it is possible that the present type of APA claim is distinct from typical APA claims and that there is no zone of interests requirement here. We need not decide that question, however, because we believe that, even if a zone of interests test applied here, it would be satisfied.

2. Whether Any Zone of Interests Test Is Satisfied

Defendants argue that Plaintiffs cannot satisfy the zone of interests test because their claims fall outside the zone of interests of section 8005. Although Plaintiffs' Complaint did assert a claim under section 8005, it also asserted constitutional claims, including a claim for a violation of the Appropriations Clause. To the extent any zone of interests test applies to that constitutional claim (whether brought in equity or under the APA), it requires us to ask whether Plaintiffs fall within the zone of interests of the Appropriations Clause, not of section 8005. And when the Supreme Court has applied a zone of interests test to

---

U.S. at 163 (quoting *Clark v. Sec. Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987)). We read this not to suggest that a particular zone of interests test applies to *all* APA actions, but that when analyzing whether a plaintiff falls within the zone of interests of a particular statute, courts should be particularly lenient if a violation of that statute is being asserted through an APA claim.

claims about structural provisions of the Constitution, it has applied a very lenient version of that test.

For example, in *Boston Stock Exchange*, the Court held that plaintiff businesses that alleged financial injury from a state tax that discriminated against out-of-state businesses fell within the zone of interests of the implied dormant Commerce Clause, which functions as a limit on a state's power relative to that of Congress to regulate interstate commerce. 429 U.S. at 320 n.3. Although the suit was not brought by Congress seeking to protect its Commerce Clause authority, or even by another state alleging harm from the defendant state's tax law, the Court held that the plaintiffs were permitted to assert that the state defendant had acted in a manner that infringed on Congress's constitutional authority. *Id.*

More recently, in *McIntosh*, we allowed criminal defendants charged with marijuana-related offenses to seek an injunction prohibiting DOJ from spending funds in violation of the Appropriations Clause. 833 F.3d at 1168, 1172. We explained: "When Congress has . . . expressly prohibit[ed] DOJ from spending funds on certain actions, federal criminal defendants may seek to enjoin the expenditure of those funds, and we may exercise jurisdiction over a district court's direct denial of a request for such injunctive relief." *Id.* at 1172-73. To the extent we implicitly applied a zone of interests test to the criminal defendants, it was not a restrictive one—indeed, our primary concern was to confirm that the defendants

had standing to challenge the Appropriations Clause violation (and we concluded they did). *Id.* at 1173-74.

Accordingly, if Plaintiffs must fall within a zone of interests served by the constitutional provision they seek to vindicate, we are persuaded that they do. The Appropriations Clause is a vital instrument of separation of powers, which has as its aim the protection of individual rights and liberties—not merely separation for separation's sake. *See supra* section V.A. As Justice Kennedy put it in *Clinton*:

> [I]f a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened. . . . The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints.

524 U.S. at 451 (Kennedy, J., concurring). Because "individuals, too, are protected by the operations of separation of powers and checks and balances," it follows that "they are not disabled from relying on those principles in otherwise justiciable cases and controversies." *Bond v. United States*, 564 U.S. 211, 223 (2011).

Plaintiffs assert that if Defendants' allegedly unconstitutional spending proceeds, they will suffer injuries to their environmental, professional, aesthetic, and recreational interests. Those individual rights and interests resemble myriad interests that the Supreme Court has concluded—either explicitly or tacitly—fall within any applicable zone of interests encompassed by structural constitutional

principles like separation of powers. *See, e.g.*, *Chadha*, 462 U.S. at 935-36, 951-52 (allowing a plaintiff with an interest in avoiding deportation to bring a constitutional claim based on bicameralism and presentment requirements); *Bos. Stock Exch.*, 429 U.S. at 602 n.3 (allowing a plaintiff stock exchange with an interest in avoiding a state tax to bring a claim enforcing Congress's dominion over the regulation of interstate commerce). Plaintiffs' claim that their rights or liberties were infringed by a violation of the Appropriations Clause therefore falls within any zone of interests required to enforce that clause's provisions.

VI. The Remaining Stay Factors

Our focus to this point has been on the first of the four factors to be considered in deciding a motion to stay, "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009). The second factor, "whether the applicant will be irreparably injured absent a stay," was identified in *Nken* together with the first factor as "the most critical." *Id*.

The Supreme Court observed in *Nken* that the third and fourth factors—whether issuance of a stay will substantially injure other parties and where the public interest lies—"merge when the Government is the opposing party." *Id.* at 435. That case involved an application for a stay of removal by a noncitizen who was facing deportation. The motion before us presents a variant on that situation.

Here, it is Defendants who seek a stay, so the question whether Defendants will be irreparably injured absent a stay may, in practical terms, merge with consideration of the public interest.

Public interest is a concept to be considered broadly. The Court noted in *Nken*, for example, that there is a public interest in "preventing aliens from being wrongfully removed," but also that there is "always a public interest in prompt execution of removal orders." *Id*. at 436.

Defendants have discussed these three remaining factors together in terms of the "equitable balance of harms." There is logic in that, so we will do the same, considering the respective impacts on Defendants, Plaintiffs and others interested in the proceedings, and the general public.

The primary harm cited by Defendants if a stay is not granted is that a "delay in the construction of border fencing pending appeal will create irreparable harm" because "deadly drugs [will] flow into this country in the interim." They argue that CBP has recorded over 4,000 "drug-related events" between border crossings in the El Paso, El Centro, Tucson, and Yuma Sectors in Fiscal Year 2018 and cites CBP's seizure of thousands of pounds of marijuana and lesser amounts of other illegal substances, including cocaine, heroin, methamphetamine, and fentanyl.

We do not question in the slightest the scourge that is illegal drug trafficking and the public interest in combatting it. Our circuit includes several border states,

and our courts deal with no small number of cases involving illegal drugs crossing those states' borders.

Defendants have not actually spoken to the more relevant questions, however. What will be the impact of building the barriers they propose? Even more to the point, what would be the impact of delaying the construction of those barriers? If these specific leaks are plugged, will the drugs flow through somewhere else? We do not know, but the evidence before us does not support a conclusion that enjoining the construction of the proposed barriers until this appeal is fully resolved will have a significant impact.

To begin with, the statistics cited by Defendants describe drug trafficking that CBP has detected with existing barriers and law enforcement efforts. They do not tell us how much gets through undetected or what additional amounts would be stopped by the proposed barriers.

As Plaintiffs point out, according to the Drug Enforcement Administration's most recent assessment, the "majority of the [heroin] flow is through [privately operated vehicles] entering the United States at legal ports of entry, followed by tractor-trailers, where the heroin is co-mingled with legal goods." Drug Enforcement Admin., *2018 National Drug Threat Assessment* 19 (2018), https://www.dea.gov/sites/default/files/2018-11/DIR-032-18%202018%20NDTA%20final%20low%20resolution.pdf. Only "a small

percentage of all heroin seized by [CBP] along the land border was between Ports of Entry." *Id*. Fentanyl transiting the southern border is likewise most commonly smuggled in "multi-kilogram loads" in vehicles crossing at legal ports of entry. *Id*. at 33. Defendants have not disputed these assessments.

That does not lead to a conclusion that leaks should not be plugged. It does suggest, however, that Defendants' claim that failing to stay the injunction pending appeal will cause significant irreparable harm is supported by much less than meets the eye. Congress could have appropriated funds to construct these barriers if it concluded that the expenditure was in the public interest, but it did not.

For similar reasons, we are unmoved by Defendants' contention that "the injunction threatens to permanently deprive DoD of its authorization to use the funds at issue to complete" the selected projects, including "approximately $1.1 billion it has transferred for these projects but has not yet obligated via construction contracts," because "the funding will likely lapse during the appeal's pendency." A lapse in funding does not mean that the money will disappear from the Treasury. The country will still have that money. It could be spent in the future, including through appropriations enacted by Congress for the next fiscal year. The lapse simply means that Defendants' effort to justify spending those funds based on the appropriations act for the current fiscal year and the authority to reprogram funds under section 8005 may be thwarted.

Defendants' identification of this lapse as a factor that should tip the balance of harms in their favor actually serves instead to illustrate the underlying weakness in their position. Defendants' rush to spend this money is necessarily driven by their understanding that Congress did not appropriate requested funding for these purposes in the current budget and their expectation that Congress will not authorize that spending in the next fiscal year, either. The effort by Defendants to spend this money is not consistent with Congress's power over the purse or with the tacit assessment by Congress that the spending would not be in the public interest.

Finally, Defendants maintain that a stay is necessary because DoD "is incurring unrecoverable fees and penalties of hundreds of thousands of dollars to its contractors for each day that construction is suspended." But that liability resulted from Defendants' own decisions about how to proceed in the face of litigation. Plaintiffs filed their motion for a preliminary injunction on April 4, 2019, and a hearing was held on May 17. When DoD awarded contracts on April 9 for El Paso Project Sector 1, and May 15 for Yuma Project Sector 1 and Tucson Project Sectors 1-3, DoD knew this litigation was pending and that the district court had been asked to enter a preliminary injunction. Placing significant weight on financial obligations that Defendants knowingly undertook would, in effect, reward them for self-inflicted wounds.

Moving to the impacts on the Plaintiffs, Defendants denigrate those impacts as limited to "aesthetic and recreational injuries." As noted above, *see supra* Section II, Defendants have elected not to dispute that Plaintiffs' interests are sufficiently substantial to support Article III standing. Environmental injuries have been held sufficient in many cases to support injunctions blocking substantial government projects. The Supreme Court has observed that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

As to the public interest, we conclude that the public interest weighs forcefully against issuing a stay. The Constitution assigns to Congress the power of the purse. Under the Appropriations Clause, it is Congress that is to make decisions regarding how to spend taxpayer dollars. As we have explained, *see supra* Section V.C.2., the Appropriations Clause serves as a check by requiring that "not a dollar of [money in the Treasury] can be used in the payment of any thing not thus previously sanctioned" by Congress," as "[a]ny other course would give to the fiscal officers a most dangerous discretion." *Reeside v. Walker*, 52 U.S.

272, 291 (1850). In the words of then-Judge Kavanaugh, the Appropriations Clause is

> a bulwark of the Constitution's separation of powers among the three branches of the National Government. It is particularly important as a restraint on Executive Branch officers: If not for the Appropriations Clause, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.

U.S. Dep't of Navy v. Fed. Labor Relations Auth., 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.) (quotation marks omitted). The Clause prevents the Executive Branch from "even inadvertently obligating the Government to pay money without statutory authority." *Id.* The public interest in ensuring protection of this separation of powers is foundational and requires little elaboration. *See supra* Section V.A.

Similarly, when Congress chooses how to address a problem, "[i]t is quite impossible . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld," as doing so is "not merely to disregard in a particular instance the clear will of Congress," but "to disrespect the whole legislative process and the constitutional division of authority between President and Congress." *Youngstown*, 343 U.S. at 609 (1952) (Frankfurter, J., concurring). Congress did not appropriate money to build the border barriers Defendants seek to build here. Congress presumably decided such construction at

this time was not in the public interest. *See id.*; *supra* Section V.A.1.ii. It is not for us to reach a different conclusion.

The public interest and the balance of hardships do not support granting the motion to stay.

VII. Conclusion

In his concurrence in *Youngstown*, Justice Jackson made eloquent comments that seem equally apt today:

> The essence of our free Government is "leave to live by no man's leave, underneath the law"—to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible. The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. . . . With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.
>
> Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

343 U.S. at 654-55 (Jackson, J., concurring).

Heeding Justice Jackson's words, we deny Defendants' motion for a stay.

Sierra Club v. Trump, Case Nos. 19-16102, 19-16300

N.R. SMITH, Circuit Judge, dissenting:

The majority here takes an uncharted and risky approach—turning every question of whether an executive officer exceeded a *statutory* grant of power into a *constitutional* issue. This approach is in contradiction to the most fundamental concepts of judicial review. The majority has created a constitutional issue where none previously existed. *See Dalton v. Specter*, 511 U.S. 462, 472–74 (1994). We have no right to expand the Judiciary's role in this manner and, as explained in greater detail below, the majority's approach has been expressly rejected by the Supreme Court.

Turning to the merits of the case before us, we are asked solely whether we should stay a permanent injunction prohibiting Defendants from transferring certain funds within the budget of the Department of Defense (DoD) to support counterdrug activities, while the parties await a final ruling on the merits of the permanent injunction order. We are not, as the majority claims, "evaluat[ing] the merits more fully that we otherwise might." Maj. Op. at 31. In fact, the parties have expressly informed the court that they will be presenting an expedited briefing schedule for the merits panel by July 8, 2019, Dkt. No. 65 at 4—four days after the

parties anticipate a decision from the current panel.[1] Because Defendants have satisfied their burden to obtain the requested relief when Plaintiffs' claim is properly cast as a statutory issue, the majority should grant Defendants' motion to stay the permanent injunction until the matter is finally determined on appeal.

In deciding whether to stay an injunction pending appeal, we must consider: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies," *Nken*, 556 U.S. at 434 (citation omitted). "[H]arm to the opposing party and weighing the public interest . . . merge when the Government" is one of the parties. *Id.* at 435. Although "[t]he first two factors . . . are the most critical," *id.* at 434, we must "give serious consideration to the public interest factor," *Nat. Res. Def. Council, Inc. v. Winter,*

[1]The majority ignores this declaration. Maj. Op. at 31. The parties have asked us to expedite our decision, but they have not asked us to make a merits decision in contravention of traditional procedure. *Nken v. Holder*, 556 U.S. 418, 427 (2009) (recognizing that the "ordinary processes of administration and judicial review" best ensure "careful review and a meaningful decision" (citation omitted)). Whether an issue may become moot during the course of an appeal does not change the scope of our review for a motion to stay. Even though the parties rely on their previous briefs for purposes of this motion, they do not suggest that they do not have additional arguments for the merits of appeal. We should not be deciding the merits of these issues (potentially binding the merits panel).

502 F.3d 859, 863 (9th Cir. 2007). In any event, the decision to grant or deny a stay is discretionary. *Nken*, 556 U.S. at 433–34. Here, each factor favors issuing a stay.[2]

I. Defendants are Likely to Succeed on the Merits

The district court granted a permanent injunction in Plaintiffs' favor based on a purported statutory claim under the DoD Appropriations Act for Fiscal Year 2019, Pub. L. No. 115-245, §§ 8005, 9002, 132 Stat. 2981, 2999. *See* Permanent Injunction Order at 3–4, 6–8. The district court analyzed only whether Defendants exceeded their statutory authority under § 8005, without discussing whether they also separately violated any constitutional provision. *See generally id.*

[2]Whether Defendants are likely to succeed on the merits of this appeal ultimately turns on whether the district court abused its discretion in issuing the permanent injunction. *See La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 879 (9th Cir. 2014). Thus, even though this is only a motion to stay, we review the district court's grant of a permanent injunction for abuse of discretion, and we review its legal conclusions de novo. *Aircraft Serv. Int'l, Inc. v. Int'l Bhd. of Teamsters*, 779 F.3d 1069, 1072 (9th Cir. 2015) (en banc). "It is an abuse of discretion to apply the wrong legal standard." *United States v. Emmett*, 749 F.3d 817, 819 (9th Cir. 2014). As explained in greater detail below, the district court abused its discretion here by failing to analyze Plaintiffs' claim under the Administrative Procedure Act. *See, e.g.*, Permanent Injunction Order at 4 ("[T]he Court continues to find that the [zone of interests] test has no application in an *ultra vires* challenge, which operates outside of the APA framework."). The majority does not defend the district court's decision, but rules in Plaintiffs' favor under a completely different—yet equally faulty—legal theory.

Nevertheless, the majority views Plaintiffs' claim as, "at its core, one alleging a constitutional violation." Maj. Op. at 32. As discussed below, viewing Plaintiffs' claim as alleging a statutory violation is the proper approach. *Dalton*, 511 U.S. at 472–74.

When their claim is properly viewed as alleging a statutory violation, Plaintiffs have no mechanism to challenge Defendants' actions. Plaintiffs have neither an implied statutory cause of action under § 8005, nor an equitable cause of action. *See generally Dalton*, 511 U.S. at 472–76. Nor do Plaintiffs have a cause of action to challenge the DoD's § 8005 reprogramming under the Administrative Procedure Act (APA), as they fall outside of the zone of interests for such a claim. Consequently, Defendants have made a strong showing that they are likely to succeed on the merits of their appeal.

1. Plaintiffs Claim Is Properly Viewed as Alleging a Statutory Violation

Because we are allowed to affirm the permanent injunction "on any ground supported by the record," *Sony Comput. Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 608 (9th Cir. 2000) (citation omitted), the majority denies Defendants' motion for a stay by re-characterizing Plaintiffs' claim as a constitutional violation—despite the contrary ground relied on by the district court in its

decision[3]—which the majority now analyzes on the fly.

The majority's primary mistake is drawing no distinction between a claim that an agency is violating a statute and a claim that an agency is violating the Constitution:

> If section 8005 does not authorize the reallocation, however, then Defendants are acting outside of any statutory appropriation and are therefore spending funds contrary to Congress's appropriations decisions. . . . The lack of compliance with section 8005 has sometimes been labeled *ultra vires* as outside statutory authority or as outside the President's Article II powers, and spending without an appropriation has been described as a violation of the Appropriations Clause. However their claim is labeled, Plaintiffs' theory is ultimately the same.

Maj. Op. at 34 & n.16. This approach is flatly contradicted by *Dalton* and related cases, which clarified the distinction between "claims of constitutional violations and claims that an official has acted in excess of his statutory authority" and declared that "[o]ur cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is

---

[3]The district court construed Plaintiffs' claim as an *ultra vires* action to enforce § 8005. Permanent Injunction Order at 4. It determined that principles of constitutional avoidance required it to first analyze whether § 8005 supported the reprogramming, and reach the constitutional analysis only if necessary. *Sierra Club v. Trump*, No. 19-CV-00892-HSG, 2019 WL 2247689, *18 (N.D. Cal. March 24, 2019); Permanent Injunction Order at 5 ("[N]o new factual or legal arguments persuade the Court that its analysis in the preliminary injunction order was wrong."). Thus, the court never conducted a constitutional analysis of this question.

ipso facto in violation of the Constitution." *Dalton*, 511 U.S. at 472.

Indeed, recasting Plaintiffs' challenge—fundamentally a dispute about whether the DoD erred in deciding that the pre-conditions of § 8005 were met—as a constitutional claim against the DoD for violating the Appropriations Clause contradicts several lines of caselaw.

First, *Dalton* clarifies that cases such as *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) involve constitutional violations, because "[t]he only basis of authority asserted was the [executive's] inherent constitutional power." *Dalton*, 511 U.S. at 473. In those instances, "the case necessarily turned on whether *the Constitution* authorized the [executive's] actions," only "[b]ecause no statutory authority was claimed." *Id.* (emphasis added).

This is not that type of case. As noted by the majority, Plaintiffs' claim entirely rises or falls on whether the DoD complied with the limitations in § 8005. Maj. Op. at 34 ("If Defendants were correct that section 8005 allowed this spending reallocation, Plaintiffs' claim would fail, because the spending would be consistent with Congress's appropriation legislation. If section 8005 does not authorize the reallocation, however, then Defendants are acting outside of any statutory appropriation and are therefore spending funds contrary to Congress's appropriations decisions."). The DoD offers no other source of authority *besides* a

statute. Accordingly, this case "concern[s] *only* issues of statutory interpretation" and "*no constitutional question whatever is raised*." *Dalton*, 511 U.S. at 474 n.6 (emphasis added) (citation and internal quotation marks omitted).

Second, applying *Dalton* to the Appropriations Clause context requires us to reject the majority's logic, which relies on the assumption that every violation of an appropriations statute is *necessarily* a constitutional violation. In *Dalton*, Congress granted the President discretion to take certain actions, and the plaintiffs asserted that he had exceeded that authority. *Id.* at 474. The plaintiffs further claimed that, *because* the President had exceeded his statutory authority, he had also violated the Constitution. *Id.* That is precisely the majority's approach in this case. *See* Maj. Op. at 51 ("Plaintiffs claim that to the extent Defendants did not have statutory authority to reprogram the funds, they acted in violation of constitutional separation of powers principles because Defendants lack any background constitutional authority to appropriate funds."). The Supreme Court rejected this type of constitutional claim, flatly reminding us that "[t]he distinction between claims that an official exceeded his statutory authority, on the one hand, and claims that he acted in violation of the Constitution, on the other, is too well established to permit this sort of evisceration." *Dalton*, 511 U.S. at 474.

Finally, the distinction between an Appropriations Clause violation and a

non-constitutional "exceeding statutory authority" claim turns on the degree of discretion Congress has provided to the agency or President in appropriating funds. On the one hand, if Congress has entirely withdrawn agency discretion over the who, what, when, where, and why of agency spending, an Appropriations Clause violation may lie. *See, e.g.*, *United States v. McIntosh*, 833 F.3d 1163, 1172, 1175 (9th Cir. 2016). On the other hand, if Congress has merely appropriated a lump-sum amount and leaves it to the agency to re-allocate funds toward a particular statutory purpose, Congress has provided such discretion to the agency that, not only could there be no *constitutional* violation, a challenger does not even have a viable "exceeding statutory authority" claim.[4] *See Lincoln v. Vigil*, 508 U.S. 182, 193 (1993). Section 8005, which appropriates funds to the DoD and makes allocating those funds incumbent on the Secretary's determination of the "national interest" and other factors, falls somewhere in the middle. Unlike the appropriations language in *McIntosh*, which we observed "*specifically* restricts [the Department of Justice (DOJ)] from spending money to pursue certain activities," 833 F.3d at 1172 (emphasis added), or the non-discretionary "not to exceed" and "shall be allotted" language in *Train v. City of New York*, 420 U.S. 35, 42 (1975),

[4]The statutory claims in *Dalton* ultimately failed on this basis. *See Dalton*, 511 U.S. at 474–76.

§ 8005 provides some discretion over the who, what, when, where, and why of agency spending. Yet, unlike the virtually unfettered discretion of the agency to re-allocate funds towards particular statutory purposes in *Lincoln*, 508 U.S. at 192–93, § 8005 constrains the discretion and the DoD is "not free simply to disregard *statutory* responsibilities." *Id.* at 193 (emphasis added). Accordingly, the DoD's reprogramming of funds is a judicially reviewable statutory claim. The majority overlooks these points.

In attempting to distinguish *Dalton*, the majority misstates the chronology of the Supreme Court's decision, claiming that "[t]he Supreme Court held that the plaintiff's statutory challenge to the President's decision failed because the statute gave the President unfettered discretion . . . [and] then also rejected the argument that because the President had allegedly violated the statute, he had acted unconstitutionally." Maj. Op. at 49. However, the Supreme Court declared *first* that there was no constitutional issue, *Dalton*, 511 U.S. at 472–74, and only thereafter determined that the plaintiffs' statutory claim failed based on the President's unfettered discretion, *id.* at 474–76. Consequently, the Court's conclusion that "no constitutional question whatever is raised" did not stem from its later conclusion that the President had, in fact, acted within his statutory authority in that case. *Id.* at 474 n.6; *see also id.* at 476–77 ("In sum . . . [t]he claim that the President exceeded

his authority under the 1990 Act *is not a constitutional claim, but a statutory one*. Where a statute, such as the 1990 Act, commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available." (emphasis added)).

The majority also attempts to distinguish *Dalton* on the grounds that it "did not say . . . that action in excess of statutory authority can *never* violate the Constitution or give rise to a constitutional claim." Maj. Op. at 49. Albeit true that claims alleging statutory violations and those alleging constitutional violations are not mutually exclusive, *Dalton* expressly discussed when the two may be asserted together—by pointing to cases where the constitutionality of the authorizing statute itself is called into question. *Dalton*, 511 U.S. at 473 n.5; *see, e.g.*, *Chamber of Commerce of United States v. Reich*, 74 F.3d 1322, 1325 (D.C. Cir. 1996) (determining that a claim raised a constitutional violation, because it alleged that the relevant statutory authority itself was "an unconstitutional delegation" of Congressional power). But Plaintiffs have not alleged that § 8005 is itself unconstitutional.

The majority's approach would turn our current system of administrative review on its head, directing courts in this circuit to deem *unconstitutional* any reviewable executive actions (i.e., any actions that are not entirely within the

actor's discretion) that exceed a *statutory* grant of authority. Such an approach directly contradicts the Supreme Court's declaration that "[o]ur cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution."[5] *Dalton*, 511 U.S. at 472. For those reasons, the majority's approach is flawed; no claim of a constitutional violation exists in this case.

2. Plaintiffs have no Implied Statutory Claim

Whether Plaintiffs have an implied statutory cause of action under § 8005 turns on "whether Congress intended to create a private cause of action." *Karahalios v. Nat'l Fed'n of Fed. Emps., Local 1263*, 489 U.S. 527, 532 (1989) (citation and internal quotation marks omitted).

Here, "[t]here is no express suggestion" that Congress intended a direct judicial remedy for a § 8005 violation, and "neither the language nor the structure of the Act shows any congressional intent to provide a private cause of action to" judicially enforce such a violation. *Id.* at 532–33. Likewise, "[n]othing in the

[5]The majority's approach is also directly contradicted by the D.C. Circuit. In *Mountain States Legal Foundation v. Bush*, our sister circuit determined that "[n]o constitutional . . . claim is before us, as the President exercised his delegated powers *under the Antiquities Act*," precisely because "that statute includes intelligible principles to guide the President's actions." 306 F.3d 1132, 1137 (D.C. Cir. 2002) (emphasis added).

legislative history of [§ 8005] has been called to our attention indicating that Congress contemplated direct judicial enforcement." *Id.* at 533.

Furthermore, § 8005 is directed not at private parties or individuals, but at the Secretary of Defense; creates no apparent individual rights, much less an individual remedy; and "lacks the sort of rights-creating language needed to imply a private right of action." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387 (2015).

3. Plaintiffs have no APA Claim

With *Dalton* limiting our ability to construe Plaintiffs' claim as alleging a constitutional violation, and with no implied statutory cause of action to challenge the agency's action as a violation of § 8005, Plaintiffs are left with challenging the DoD's reprogramming under the APA as an "abuse of discretion," "not in accordance with law," or "in excess of statutory jurisdiction." *See* 5 U.S.C. § 706(2)(A), (C). *See Clouser v. Espy*, 42 F.3d 1522, 1527 n.5 (9th Cir. 1994) (construing a plaintiff's challenge to Forest Service rulings "as issued without statutory authority" to be "a claim challenging agency action 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right' under 5 U.S.C. § 706(2)(C)"). However, although the APA is the proper vehicle for challenging the DoD's § 8005 reprogramming, Plaintiffs are not a proper party to bring such a

claim, as they fall outside § 8005's zone of interests. The majority errs by fashioning an equitable claim to bypass the APA's limitations.

a. The APA is the Proper Vehicle for Challenging the DoD's Action

Where a statute imposes obligations on a federal agency but "does not give rise to a 'private' right of action against the federal government[,] [a]n aggrieved party may pursue its remedy under the APA." *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1096–99 (9th Cir. 2005) (explaining how a federal action is nearly always reviewable under the APA for conformity with statutory obligations even absent a "private right of action"). In other words, the APA opens the door for judicial review provided: (1) the agency's action is "final," 5 U.S.C. § 704; (2) the statute imposing obligations on the federal agency does not "preclude judicial review," *id.* § 701(a)(1); and (3) the agency action is not "committed to agency discretion by law," *id.* § 701(a)(2). *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). Each element is satisfied here.

First, the agency's action satisfies the test for "final agency action" for purposes of 5 U.S.C. § 704. The finality of an agency's action turns on whether the decision represents the "consummation of the agency's decisionmaking process" and whether it determines rights or obligations, or from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citation omitted). After

approving the Department of Homeland Security's (DHS) request for support under 10 U.S.C. § 284, the Secretary of Defense concluded support could be funded through the reprogramming of funds under § 8005. The Secretary found the § 8005 criteria were met. Following the necessary procedures, the DoD transferred the funds to the Drug Interdiction and Counter-Drug Activities, Defense, appropriation account. Because the DoD committed those funds for § 284(b)(7) support, "legal consequences [began to] flow." *See Bennett*, 520 U.S. at 178 (citation omitted). Indeed, Defendants acknowledge that the § 8005 transfer was necessary for authorizing support under § 284 and constructing the wall.

Second, as explained above, § 8005 does not "preclude judicial review." *See* 5 U.S.C. § 701(a)(1). Further, neither party presented "clear and convincing evidence" that § 8005 precludes APA's default remedy. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

Finally, the DoD's reprogramming of funds under § 8005 is not "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Defendants do not argue to the contrary, nor would such an argument succeed. The APA embodies a broad presumption of judicial review of agency action. *Abbott Labs.*, 387 U.S. at 140–41. Out of concern that "legal lapses and violations occur, and especially so when they

have no consequence," *Weyerhaeuser Co.*, 139 S. Ct. at 370 (quoting *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1652–53 (2015)), the Supreme Court "read[s] the [phrase 'committed to agency discretion'] quite narrowly, restricting it to 'those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Id.* (quoting *Lincoln*, 508 U.S. at 191).

The appropriation scheme governing § 8005 allows the DoD to reprogram funds provided the transferred funds address "higher priority items, based on unforeseen military requirements, than those for which originally appropriated."[6] § 8005. And "in no case" may the Secretary use the funds "where the item for which reprogramming is requested has been denied by the Congress." *Id.* Thus, we do not confront one of those rare circumstances where a court would have no meaningful standard for judging the agency's exercise of discretion. *See Weyerhaeuser*, 139 S. Ct. at 371–72 (citing *Lincoln*, 508 U.S. at 191); *accord Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). For example, whether the "item" to be funded by the reprogrammed funds was "denied" by Congress turns on a meaningful question of statutory interpretation—i.e., what

[6] Section 9002 is subject to these same limitations.

does "item" and "denied" mean?[7] This court is generally required to provide some deference to such an interpretation, depending on the circumstance, *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944),[8] but the phrase undoubtedly places a judicially reviewable constraint on the DoD's actions.

b. Plaintiffs are Not the Proper Party to Bring an APA Claim

However, to bring a valid APA claim, Plaintiffs must establish that they "fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (citation omitted). They have failed to do so.[9]

---

[7]Unlike in *Lincoln*, the appropriation scheme governing Plaintiffs' claims does not involve a lump-sum appropriation designed with merely a general, overarching goal and no specific strings attached to the money. 508 U.S. at 189–92.

[8]In determining whether Defendants violated § 8005, we should defer to the DoD's interpretation under *Skidmore*. *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 487 (2004). *Skidmore* deference operates like a sliding scale, meaning the degree of deference we give the agency's interpretation of a statute "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. We also consider whether the agency has changed its position or whether its interpretation "was framed for the specific purpose of aiding a party in this litigation." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 400 (2008).

[9]Because the majority concludes Plaintiffs' APA claim is constitutional, we (continued...)

The zone of interests test requires a court to determine whether, "in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987). "[T]he relevant zone of interests is not that of the APA itself, but rather the zone of interests to be protected or regulated by the statute that the plaintiff says was violated." *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1244 (9th Cir. 2018) (alteration omitted) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012)). "[W]e first discern the interests arguably to be protected by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them." *Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 492 (1998) (alteration and internal quotation marks omitted).

Although, "in the APA context, . . . the test is not 'especially demanding,'" *Lexmark*, 572 U.S. at 130, it "is not toothless," *Nw. Requirements Utils. v. FERC*,

---

[9](...continued)
disagree as to what zone of interests applies. However, as a statutory claim, Plaintiffs must fall within the zone of interests of § 8005. They have failed to do so. Because this claim should not be viewed as a constitutional claim under the Appropriations Clause, it is not necessary to decide whether Plaintiffs could (or would need to) fall within that zone of interests.

798 F.3d 796, 808 (9th Cir. 2015). "In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke*, 479 U.S. at 399. Even under this generous standard, we have found certain APA claims fail the zone of interests test.[10] *See, e.g.*, *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005) ("[P]urely economic interests do not fall within [the National Environmental Policy Act's (NEPA)] zone of interests" because "the zone of interests that NEPA protects [is] environmental."); *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1166–67 (9th Cir. 2018) (recognizing that the plaintiff's environmental interests fell outside the Mining Act's zone of interests, but within the Federal Land Policy and Management Act's zone of interests); *Nw. Requirements Util*s., 798 F.3d at 809 (determining zone of interests test not satisfied where the plaintiffs' goals were likely to frustrate rather than further statutory objectives).

---

[10]Plaintiffs cite the D.C. Circuit's decision in *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356 (D.C. Cir. 1996) as "illustrat[ing] the expansive zone of interests for claims arising under statutes protecting Congress's control over appropriations decisions." However, that case merely applied the same zone of interests test that we do here to determine that the plaintiff's economic interests were "sufficiently congruent" with the statute and fell within the zone of interests. *Id.* at 1360.

Here, Plaintiffs' interests fall outside § 8005's zone of interests. Section 8005 operates only to authorize the Secretary of Defense to transfer previously-appropriated funds between DoD accounts, based upon certain conditions and circumstances. This statute arguably protects Congress and those who would have been entitled to the funds as originally appropriated; and as a budgetary statute regarding the transfer of funds among DoD accounts, it arguably protects economic interests. Plaintiffs have not asserted that they would have been entitled to the funds but for the transfer, nor have they raised any other economic interests. Rather, they assert aesthetic, recreational, and generalized environmental interests that will be affected, not by the transfer of funds, but by the building of the border wall. Nothing in § 8005 requires that aesthetic, recreational, or environmental interests be considered before a transfer is made, nor does the statute even address such interests. At best, Plaintiffs' interests are only "marginally related to . . . the purposes implicit in the statute [such] that it cannot reasonably be assumed that Congress intended to permit the suit," *Clarke*, 479 U.S. at 399, and they fall outside § 8005's zone of interests. Thus, Plaintiffs may not bring this APA claim, because their interests are not protected by the relevant statute.

c. The Existence of an APA Claim Also Precludes an Equitable Constitutional Claim

Even though *these* Plaintiffs lack a cause of action under the APA, this court

cannot save their claim by fashioning an "equitable" work-around to assert a constitutional claim, as the majority has done. Even if we ignored the discretion § 8005 provides to the DoD and thus could reframe Plaintiffs' claim as a constitutional one, the APA's "scope of review" provision would cover it. Those provisions provide that a reviewing court shall:

> [H]old unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) *contrary to constitutional right, power, privilege, or immunity*;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]

5 U.S.C. § 706(2) (emphasis added). Where courts can review an agency action under the APA to ensure the agency has not abused its discretion, violated the Constitution, or otherwise operated outside its authority, we have no business devising additional "equitable" causes of action. Here, an avenue for challenging the DoD's reprogramming action exists under the APA—just not for these Plaintiffs. Thus, there is no reason to resort to the extraordinary step of implying an equitable cause of action for these Plaintiffs.

As the majority recognizes, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity." *See Armstrong*, 135 S. Ct. at 1384–85. However, this "judge-made remedy" does not

provide courts the unfettered power to enjoin executive action; our power "is subject to express and implied statutory limitations." *Id.* at 1385. The majority ignores this limitation, relying on inapposite cases to conclude that a federal court's "equity" jurisdiction allows any would-be plaintiff to avoid proceeding under the APA. Maj. Op. at 46–47. That the Supreme Court considered challenges to a *president*'s action in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) and *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) lends the majority no support; the APA does not apply to the President, *see Dalton*, 511 U.S. at 468, so *no plaintiff* would have an APA claim in those cases. Yet this case is about an *agency* action, and therefore the APA applies. Moreover, *McIntosh* arose in a very different context; our court did not "allow[] an equitable action to enforce the Appropriations Clause," Maj. Op. at 48, we considered the Appropriations Clause as a *defense* for criminal defendants indicted for federal marijuana offenses, *McIntosh*, 833 F.3d at 1168 ("We are asked to decide whether criminal defendants may avoid prosecution for various federal marijuana offenses on the basis of a congressional appropriations rider that prohibits the United States Department of Justice from spending funds to prevent states' implementation of their own medical marijuana laws."). Allowing defendants to invoke constitutional principles as a defense is common, *see, e.g.*, *Bond v. United States*, 564 U.S. 211, 225–26 (2011),

and distinguishable from the affirmative enforcement that the majority provides here.[11]

The majority's reliance on *Armstrong* highlights its fundamental misunderstanding of cases involving a court's equitable power to enjoin acts violating federal law. Maj. Op. at 52–53. Congress has not *displaced* the possibility of judge-made equitable remedies against federal agencies through the APA, *see Armstrong*, 135 S. Ct. at 1385, it *codified* judicial review of agency action.[12] *Cf. W. Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1123 (9th Cir. 2009) ("The fact that APA's procedures are available where no other adequate alternative remedy exists further indicates Congress's intent that courts should not devise

---

[11]The majority misunderstands my point about the distinguishing features of *McIntosh*. Maj. Op. at 48. The question facing the *McIntosh* court was whether criminal defendants could halt their prosecutions by attacking how the DOJ was funding the prosecutions. 833 F.3d at 1172–73. All of the defendants "filed motions to dismiss or to enjoin on the basis of the rider." *Id.* at 1170. In granting relief, the court stated that it "need not decide in the first instance exactly how the district courts should resolve claims that the DOJ is spending money to prosecute a defendant in violation of an appropriations rider. We therefore take no view on the precise relief required and leave that issue to the district courts in the first instance." *Id.* at 1172 n.2. As such, *McIntosh* simply did not address or contemplate an injunction to enjoin spending funds parallel to the pending criminal proceedings.

[12]Without supporting authority, the majority even suggests that the availability of an equitable cause of action would *preclude* an APA claim under the APA provision providing for judicial review when "there is no other adequate remedy in a court." Maj. Op. at 57 (quoting 5 U.S.C. § 704).

additional, judicially crafted default remedies."); *San Carlos Apache Tribe*, 417 F.3d at 1096–97 ("[C]reating a direct private action against the federal government makes little sense in light of the administrative review scheme set out in the APA.").[13]

The majority's failure to channel Plaintiffs' claims through the APA's framework for challenging agency action will inevitably lead to peculiar results. What prevents future plaintiffs from simply challenging any agency action "equitably," thereby avoiding the APA's limited judicial review under the "arbitrary and capricious" standard, so that a court may substitute its own judgment for that of the agency? *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The majority offers no reason to distort decades of administrative law practice to recognize Plaintiffs' "equitable" action when the APA provides for review of the

[13]The majority's reliance on *Navajo Nation v. Department of the Interior*, 876 F.3d 1144 (9th Cir. 2017) and *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989) is misplaced. *Presbyterian Church* reserved the determination of whether there was "agency action" within the meaning of the APA, 870 F.2d at 525 n.8, meaning there was no "alternative" APA claim. *Navajo Nation* addressed the limits of the APA's waiver of sovereign immunity, but offered no guidance about the propriety of bringing parallel claims espousing the same theory under two different causes of action (under the APA and "equitably"). 876 F.3d at 1171–72. Thus, neither case stands for the proposition that, where (as here) an agency action *is* reviewable under the APA, Plaintiffs may bring a parallel "equitable" claim.

DoD's reprogramming actions.

Although it may seem unjust that Plaintiffs have no viable recourse for their asserted injuries, "[t]he judicial power of the United States conferred by Article III of the Constitution is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute." *Dalton*, 511 U.S. at 477. Plaintiffs' relief has been permissibly foreclosed here, and Defendants have accordingly demonstrated a strong likelihood of success on the merits of their appeal.

II. The Other Relevant Factors Also Favor a Stay

To reemphasize, the issue before us is a motion to stay the district court's injunction under Federal Rule of Appellate Procedure 8. We are limited to decide only whether a stay should be granted until the appeal on the merits is final. Although "[a] stay is not a matter of right, even if irreparable injury might otherwise result," it is "an exercise of judicial discretion, and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken*, 556 U.S. at 433 (citations, alteration, and quotation marks omitted). Here, the circumstances of this case merit our discretionary relief pending appeal.

Even if Defendants had failed to show a strong likelihood of success on the merits, they "may be entitled to prevail if [they] can demonstrate a 'substantial case

on the merits' and the second and fourth factors [irreparable injury and public interest] militate in [their] favor." *Winter,* 502 F.3d at 863. Because Plaintiffs have no viable claim for relief, Defendants have more than demonstrated a substantial case on the merits.[14] Therefore, our panel must "give serious consideration" to the second and fourth factors. *Id.*

As to irreparable harm, Defendants argue that without a stay they will be prevented from ever using the enjoined funds to complete the identified projects addressed by the permanent injunction. Defendants are likely correct. The funding for those projects will lapse on September 30th, and even if Defendants prevail in this court's final ruling, we could not order or permit Defendants to spend funds granted in a lapsed appropriation. *See, e.g.*, *City of Houston v. Dep't of Hous. & Urban Dev*., 24 F.3d 1421, 1424, 1426–27 (D.C. Cir. 1994). No one appears to dispute that this will likely be the practical consequence if a stay is denied.

---

[14]As to the discretionary standard of review, the district court did not apply the second and fourth factors (for the short period of time for which this appeal would be pending) to the request for the permanent injunction. Thus, its factual findings are not clear as to the motion before us. It did have the occasion to apply these two factors in its analysis of the stay of the preliminary injunction. However, in its analysis of that stay, it chose to ignore these factors, concluding that, "[b]ecause the Court finds that Defendants have not met their burden to make a strong showing that they are likely to succeed on the merits of their appeal, the Court need not further address the other *Nken* factors." *Sierra Club v. Trump*, No. 19-CV-00892-HSG, 2019 WL 2305341, at *2 n.2 (N.D. Cal. May 30, 2019). This conclusion was an abuse of discretion. *See Winter*, 502 F.3d at 862.

Congress may opt to appropriate new funds for these projects in the future, but that possibility is irrelevant. Simply, the permanent injunction will certainly render Defendants unable to use the funds at issue here under § 284(b)(7). Thus, there is a "possibility that . . . corrective relief will [not] be available at a later date, in the ordinary course of litigation." *See Sampson v. Murray*, 415 U.S. 61, 90 (1974). Therefore, Defendants have demonstrated that they will be irreparably injured if a stay is not issued. *See id.*

As to the public interest, Defendants argue that their interests in preventing drug trafficking easily outweigh Plaintiffs' aesthetic, recreational, and generalized environmental injuries. In the narrow context of this stay motion, Defendants are correct. Even though environmental injuries may be significant in the long term, the injunction will only be stayed for a short period.[15] If the DoD is precluded from obligating these funds in the 2019 fiscal year, it must forgo providing support under § 284(b)(7). Defendants have adequately demonstrated that the public interest weighs in their favor for supporting § 284(b)(7) for at least three reasons.[16]

---

[15]As previously noted, the parties have suggested that an expedited briefing schedule will be requested. Given the need for a timely resolution of this case, this case should be resolved shortly.

[16]Whether the district court appropriately balanced these interests when it issued the permanent injunction is not before us. Our inquiry is limited to the motion to stay, and the final determination on the balance on interests is one that

(continued...)

First, no one disputes that Defendants have broad authority to carry out a variety of actions aimed at disrupting the cross-border flow of narcotics in the affected areas. *Cf. United States v. Guzman-Padilla*, 573 F.3d 865, 889 (9th Cir. 2009). Nor does anyone dispute that Defendants are authorized by statute to construct fencing and other barriers for that purpose in the areas at issue in this lawsuit. *See* 10 U.S.C. § 284(b)(7). Nor even does anyone seriously dispute the DoD's determination that drug trafficking along our southern border (including in the project areas at issue here) threatens the safety and security of our nation and its citizens. *See Winter*, 502 F.3d at 862 ("We customarily give considerable deference to the Executive Branch's judgment regarding foreign policy and national defense." (citing *Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988))); *see also Franklin*, 505 U.S. at 818. Given this significant national security interest, the public would benefit more from a stay that—while this appeal is pending—permits Defendants to effect the policies that it has determined are necessary to minimize that threat, than it would from a decision that hampers Defendants' ability to combat this threat throughout the present appellate process.[17]

---

[16](...continued)
the merits panel will ultimately decide.

[17]The record does not reflect that Congress "denied" funding under § 284. The funds at issue here will be used solely to "provide support for the counterdrug
(continued...)

Second, if the injunction is allowed to remain in effect, it will, for reasons outlined above, potentially cause irreparable harm to Defendants. On the other hand, the irreparable harm to Plaintiffs during this relatively short period (if a stay is granted) is less clear. Defendants have represented to this court that the projects at issue are needed to protect national security and must go forward even if there is a possibility that a merits panel may eventually order them to remove whatever was constructed while a stay was in place. This is not the sort of determination that courts will ordinarily second guess. *See Winter*, 502 F.3d at 862; *Franklin*, 505 U.S. at 818 (recognizing "the principle of judicial deference that pervades the area of national security"); *see also Munaf v. Geren*, 553 U.S. 674, 689 (2008) ("We therefore approach these questions cognizant that 'courts traditionally have been

---

[17](...continued)
activities." § 284. The fact that there were numerous discussions surrounding the building of a wall, during the budgetary negotiations and the shut down of the government, does not alter what Congress set forth in its appropriations bill for the DoD. *See Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 200 (2012) ("An agency's discretion to spend appropriated funds is cabined only by the 'text of the appropriation,' not by Congress' expectations of how the funds will be spent, as might be reflected by legislative history." (citation omitted)). Nowhere in the DoD Appropriations Act are there limitations on its ability to act under § 284. Moreover, the transfer of funds stays within the DoD's allotted appropriations and does not increase the appropriations of the DHS. Even if we should look to all appropriation acts, the only limitations placed on the DHS "for the construction of pedestrian fencing" were for geographic areas and "funds made available by this Act or prior Acts." *See* Pub. L. No. 116-6, § 231, 133 Stat. 13, 28. *see also id.* § 232.

reluctant to intrude upon the authority of the Executive in military and national security affairs.'" (quoting *Egan*, 484 U.S. at 530)). It is difficult to determine that Plaintiffs' inability to recreate in and otherwise enjoy this public land would outweigh the claimed national interests during the limited period of time the requested stay would be in place—especially considering Plaintiffs do not have a viable cause of action to challenge Defendants' actions under § 8005.

Third, the district court's reasoning that the public interest does not favor Defendants, because the public has a generalized interest in ensuring that the Executive acts within the limits imposed by statute and by the Constitution, simply begs the question. If a court accepts the premise that Defendants exceeded statutory or constitutional limitations on its authority, then the public has an interest in seeing that the Executive Branch is "reined in." However, if Defendants show that they did not exceed those bounds, then the public interest articulated by Plaintiffs and the district court has no merit. Moreover, when considering whether to grant a stay, the public interest factor cannot rise or fall on how the appeal is ultimately resolved on its merits. That analysis would collapse the public interest factor into the first element of the four-part test.

In conclusion, because Defendants have more than demonstrated a substantial case on the merits, and because the second and fourth factors "militate

in [their] favor," we should exercise our discretion and issue a stay pending the appeal of the district court's permanent injunction. *See Winter*, 502 F.3d at 863. It makes little sense to tie Defendants' hands while the appellate process plays out, especially given Plaintiffs' lack of a viable claim and given the national security considerations present in this case.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 19-cv-00892-HSG

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT, CERTIFYING JUDGMENT FOR APPEAL, AND DENYING REQUEST TO STAY

Re: Dkt. Nos. 168, 181

Pending before the Court are cross-motions for partial summary judgment filed by Plaintiffs Sierra Club and Southern Border Communities Coalition, and Defendants Donald J. Trump, in his official capacity as President of the United States; Mark T. Esper, in his official capacity as Acting Secretary of Defense[1]; Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security[2]; and Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury, briefing for which is complete. Dkt. Nos. 168 ("Pls.' Mot."), 181 ("Defs.' Mot."), 192 ("Pls.' Reply"). The only issue presently before the Court concerns Defendants' intended reprogramming of funds under Sections 8005 and 9002 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018), and subsequent use of such funds under 10 U.S.C. § 284 ("Section 284") for border barrier construction.[3]

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

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

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

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

I. LEGAL STANDARD

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

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

II. DISCUSSION

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

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

permanent injunction prohibiting Defendants from so funding border barrier construction "prior to complying with NEPA"; and (3) enjoin such unlawful use of funds generally. Pls.' Mot. at 1. Defendants' motion seeks a final determination that their intended use of funds under Sections 8005, 9002, and 284 for border barrier construction is lawful. Defs.' Mot. at 2. Defendants also request that the Court certify this judgment for appeal under Rule 54(b). *Id.* at 24–25.

A. Declaratory Relief

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

1. Sections 8005, 9002, and 284

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

The Court previously only considered Defendants' reprogramming and subsequent use of funds for border barrier construction for El Paso Sector Project 1 and Yuma Sector Project 1. It did not consider Defendants' more-recently announced reprogramming and subsequent diversion of funds for border barrier construction for the El Centro Sector Project and Tucson Sector Projects 1–3, pending further development of the record as to those projects. *See id.* at 12. To fund these projects, Defendants again invoked Section 8005, as well as DoD's "special transfer

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

authority under section 9002 of the Department of Defense Appropriations Act, 2019, and section 1512 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019." *See* Dkt. No. 118-1 ("Rapuano Second Decl.") ¶ 7. Defendants' Section 9002 authority, however, is subject to Section 8005's limitations. *See* Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, § 9002, 132 Stat. 2981, 3042 (2018) (providing that "the authority provided in this section is in addition to any other transfer authority available to the Department of Defense and is subject to the same terms and conditions as the authority provided in section 8005 of this Act"); *see also* Defs.' Mot. at 10 n.4 (acknowledging that Section 9002 is subject to Section 8005's requirements). Because Defendants agree that all such authority is subject to Section 8005's substantive requirements, the Court refers to these requirements collectively by reference to Section 8005.

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

Defendants also continue to assert that DoD did not transfer funds for an item previously denied by Congress and that the transfer was for an "unforeseen" requirement. *Compare* Opp. at 11–13, *with* Dkt. No. 64 at 16–18. But Defendants again present no new evidence or argument for why the Court should depart from its prior decision, and it will not. The Court thus stands by its prior finding that Defendants' proposed interpretation of the statute is unreasonable, and agrees with Plaintiffs that Defendants' intended reprogramming of funds under Section 8005—and

necessarily under Section 9002 as well—to the Section 284 account for border barrier construction is unlawful. *See* PI Order at 31–42. Because no new factual or legal arguments persuade the Court that its analysis in the preliminary injunction order was wrong, Plaintiffs' likelihood of success on the merits has ripened into actual success. The Court accordingly **GRANTS** Plaintiffs' request for declaratory judgment that such use of funds reprogrammed under Sections 8005 and 9002 for El Paso Sector Project 1, Yuma Sector Project 1, El Centro Sector Project, and Tucson Sector Projects 1–3 is unlawful.[6]

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

2. NEPA

Separate and apart from whether Defendants' invocations of Sections 8005, 9002, and 284 to fund border barrier construction conform with respective statutory requirements, Plaintiffs seek a declaratory judgment deeming unlawful Defendants' failure to comply with NEPA before pursuing such construction. *See, e.g.*, Pls.' Mot. at 24. Plaintiffs acknowledge that they present

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

identical arguments previously raised and rejected by the Court in its preliminary injunction order. *See id.* at 18 n.3. Presented with no new evidence or argument that was not already considered in the Court's preliminary injunction order, the Court continues to find that the pertinent waivers issued by DHS are dispositive of the NEPA claims, for the reasons detailed in the Court's previous order. *See* PI Order at 46–48.

B. INJUNCTIVE RELIEF

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

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

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

(Hudson Decl.) ¶¶ 10–11; *id.* Ex. 11 (Dahl Decl.) ¶ 8; *id.* Ex. 13 (Gerrodette Decl.) ¶¶ 6, 8; *id.* Ex. 14 (Case Decl.) ¶¶ 10–12; *id.* Ex. 17 (Tuell Decl.) ¶¶ 7, 10; Ex. 18 (Ardovino Decl.) ¶ 6).

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

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

The parties agree that the Court should consider the balance of the equities and public interest factors together, because the government is a party to the case. *See* Pls.' Mot. at 22; Defs.' Mot. at 23–24; *see also Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). As they did at the preliminary injunction stage, Defendants here contend that these factors tilt in their favor because the Government has a strong interest in border security. Defs.' Br. at 23. Defendants also contend that an injunction would "permanently deprive DoD of its authorization to use the funds at issue to complete the projects, because the funding will lapse at the end of the fiscal year" and that DoD will "incur unrecoverable fees and penalties" while construction is suspended. *Id.* at 23–24.

As the Court explained in its preliminary injunction order, the Ninth Circuit has recognized that "the public has a 'weighty' interest 'in efficient administration of the immigration laws at the

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

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

C. Certification for Appeal

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

1. Finality of Judgment

A final judgment is "a decision upon a cognizable claim for relief" that is "an ultimate

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

2. No Just Reason for Delay

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

The Court finds there is no just reason for delay under the circumstances. In their motion, Defendants contend that "[t]he legal and factual issues do not 'intersect and overlap' with the outstanding claims in this case, which focus on separate statutory authorities, and final judgment on these claims will not result in piecemeal appeals on the same sets of facts." Defs.' Mot. at 25. The Court agrees. Whether Defendants' actions comport with the statutory requirements of Sections 8005 and 9002 and whether Defendants' actions comport with the remaining statutory requirements related to outstanding claims are distinct inquiries, largely based on distinct law. The Court also recognizes that Defendants' appeal of the Court's preliminary injunction order is currently pending before the Court of Appeals, which recently issued an order holding the briefing on that appeal in abeyance pending this order. *See Sierra Club v. Trump*, No. 19-16102 (9th Cir.

2019), ECF Nos. 65–66. This suggests to the Court that the Court of Appeals agrees that "sound judicial administration" is best served by the Court certifying this judgment for appeal, in light of the undisputedly significant interests at stake in this case. *See Wood*, 422 F.3d at 879.

III. CONCLUSION

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

The terms of the permanent injunction are as follows[7]: Defendants Mark T. Esper, in his official capacity as Acting Secretary of Defense, Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security, Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury, and all persons acting under their direction, are enjoined from taking any action to construct a border barrier in the areas Defendants have identified as El Paso Sector 1, Yuma Sector 1, El Centro Sector, and Tucson Sectors 1–3 using funds reprogrammed by DoD under Sections 8005 and 9002 of the Department of Defense Appropriations Act, 2019.

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

//

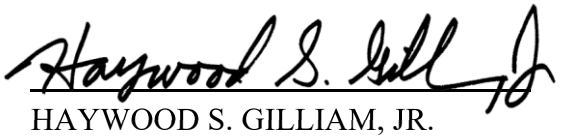
//

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

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

IT IS SO ORDERED.

Dated: 6/28/2019



HAYWOOD S. GILLIAM, JR.
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 19-cv-00892-HSG

JUDGMENT

On June 28, 2019, the Court granted in part and denied in part Plaintiffs' motion for partial summary judgment. Pursuant to Federal Rule of Civil Procedure 58, the Court hereby ENTERS partial judgment in favor of Plaintiffs and against Defendants on the grounds stated in the Court's order. *See* Dkt. No. 185. As discussed in that order, the Court certifies this judgment for immediate appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: 6/28/2019

Haywood S. Gilliam, Jr.

HAYWOOD S. GILLIAM, JR.
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 19-cv-00892-HSG

ORDER DENYING MOTION TO STAY PRELIMINARY INJUNCTION

Re: Dkt. Nos. 146, 147

Pending before the Court is Defendants' Motion to Stay Preliminary Injunction Pending Appeal. *See* Dkt. No. 146 ("Mot."). Defendants seek a stay of the Court's May 24, 2019 preliminary injunction order pending the outcome of their recently filed appeal to the United States Court of Appeals for the Ninth Circuit. *See* Dkt. No. 144 ("Order"). The Order enjoined Defendants from "taking any action to construct a border barrier in the areas Defendants have identified as Yuma Sector Project 1 and El Paso Sector Project 1 using funds reprogrammed by DoD under Section 8005 of the Department of Defense Appropriations Act, 2019." *Id.* at 55.[1]

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotation marks omitted). Instead, it is "an exercise of judicial discretion," and "the propriety of its issue is dependent upon the circumstances of the particular case." *Id.* (internal quotation and alteration marks omitted). The party seeking a stay bears the burden of justifying the exercise of that discretion. *Id.* at 433–34.

[1] Reasonably, Defendants "request that the Court rule on this motion expeditiously," without a response from Plaintiffs, and without oral argument, so that Defendants may promptly seek relief in the Ninth Circuit if the Court denies the motion to stay. Mot. at 1. The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. *See* Civil L.R. 7-1(b). The Court further finds that no response from Plaintiffs is necessary.

Whether to grant a stay pending appeal involves a similar inquiry as whether to issue a preliminary injunction. *Tribal Vill. of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988). Courts consider four familiar factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434 (noting overlap with *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008)). The first two factors "are the most critical." *Id.*

The Court will not stay its preliminary injunction order pending Defendants' appeal. The Court does not find that Defendants are likely to prevail on the merits of their appeal. In granting the preliminary injunction, the Court rejected all of the arguments Defendants now advance regarding their intended use of funds reprogrammed by DoD under Section 8005, and found that Plaintiffs, not Defendants, were likely to succeed on the merits of their respective arguments. The Court incorporates that reasoning here. Moreover, Defendants' request to proceed immediately with the enjoined construction would not preserve the status quo pending resolution of the merits of Plaintiffs' claims, and would instead effectively moot those claims. Finally, the Court continues to see no reason that the merits of this case cannot be resolved expeditiously, enabling the parties to litigate a final judgment on appeal, rather than a preliminary injunction.

For these reasons, the Court **DENIES** Defendants' Motion to Stay.[2] Defendants' Motion to Shorten Time is **TERMINATED AS MOOT**. *See* Dkt. No. 147.

IT IS SO ORDERED.

Dated: 5/30/2019

Haywood S. Gilliam, Jr.

HAYWOOD S. GILLIAM, JR.
United States District Judge

[2] Because the Court finds that Defendants have not met their burden to make a strong showing that they are likely to succeed on the merits of their appeal, the Court need not further address the other *Nken* factors.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 19-cv-00892-HSG

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Re: Dkt. No. 29

On February 19, 2019, Sierra Club and Southern Border Communities Coalition ("SBCC") (collectively, "Citizen Group Plaintiffs" or "Citizen Groups") filed suit against Defendants Donald J. Trump, in his official capacity as President of the United States; Patrick M. Shanahan, in his official capacity as Acting Secretary of Defense; Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security[1]; and Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury (collectively, "Federal Defendants"). Dkt. No. 1. This action followed a related suit brought by a coalition of states (collectively, "Plaintiff States" or "States") against the same—and more—Federal Defendants. *See* Complaint, *California v. Trump*, No. 4:19-cv-00872-HSG (N.D. Cal. Feb. 18, 2019), ECF No. 1. Plaintiffs here filed an amended complaint on March 18, 2019. Dkt. No. 26 ("FAC").

Now pending before the Court is Plaintiffs' motion for a preliminary injunction, briefing for which is complete. *See* Dkt. Nos. 29 ("Mot."), 64 ("Opp."), 91 ("Reply"). The Court held a hearing on this motion on May 17, 2019. *See* Dkt. No. 138. In short, Plaintiffs seek to prevent executive officers from using redirected federal funds for the construction of a barrier on the U.S.-

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

Mexico border.

It is important at the outset for the Court to make clear what this case is, and is not, about. The case is not about whether the challenged border barrier construction plan is wise or unwise. It is not about whether the plan is the right or wrong policy response to existing conditions at the southern border of the United States. These policy questions are the subject of extensive, and often intense, differences of opinion, and this Court cannot and does not express any view as to them. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (indicating that the Supreme Court "express[ed] no view on the soundness of the policy" at issue there); *In re Border Infrastructure Envtl. Litig.*, 284 F. Supp. 3d 1092, 1102 (S.D. Cal. 2018) (noting that the court "cannot and does not consider whether underlying decisions to construct the border barriers are politically wise or prudent"). Instead, this case presents strictly legal questions regarding whether the proposed plan for funding border barrier construction exceeds the Executive Branch's lawful authority under the Constitution and a number of statutes duly enacted by Congress. *See In re Aiken Cty.*, 725 F.3d 255, 257 (D.C. Cir. 2013) ("The underlying policy debate is not our concern. . . . Our more modest task is to ensure, in justiciable cases, that agencies comply with the law as it has been set by Congress.").

Assessing whether Defendants' actions not only conform to the Framers' contemplated division of powers among co-equal branches of government but also comply with the mandates of Congress set forth in previously unconstrued statutes presents a Gordian knot of sorts. But the federal courts' duty is to decide cases and controversies, and "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule." *See Marbury v. Madison*, 1 Cranch 137, 177 (1803). Rather than cut the proverbial knot, however, the Court aims to untie it—no small task given the number of overlapping legal issues. And at this stage, the Court then must further decide whether Plaintiffs have met the standard for obtaining the extraordinary remedy of a preliminary injunction pending resolution of the case on the merits.

After carefully considering the parties' arguments, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' motion.

//

I. FACTUAL BACKGROUND

The President has long voiced support for a physical barrier between the United States and Mexico. *See, e.g.*, Request for Judicial Notice, *California v. Trump*, No. 4:19-cv-00872-HSG (N.D. Cal. Apr. 8, 2019), ECF No. 59-4 ("States RJN") Ex. 3 (June 16, 2016 Presidential Announcement Speech) ("I would build a great wall, and nobody builds walls better than me, believe me, and I'll build them very inexpensively, I will build a great, great wall on our southern border. And I will have Mexico pay for that wall.").[2] Upon taking office in 2017, the President's administration repeatedly sought appropriations from Congress for border barrier construction. *See, e.g.*, *Budget of the U.S. Government: A New Foundation for American Greatness: Fiscal Year 2018*, Office of Mgmt. & Budget 18 (2017), https://www.whitehouse.gov/wp-content/uploads/2017/11/budget.pdf (requesting "$2.6 billion in high-priority tactical infrastructure and border security technology, including funding to plan, design, and construct a physical wall along the southern border"). Congress provided some funding, including $1.571 billion for fiscal year 2018. *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. F, tit. II, § 230(a) 132 Stat. 348 (2018). And Congress considered several bills that, if passed, would have authorized or otherwise appropriated billions of dollars more for border barrier construction. *See* States RJN Exs. 14–20. None passed.

In December 2018—as Congress and the President were negotiating an appropriations bill to fund various federal departments for what remained of the fiscal year—the President announced that he would not sign any funding legislation that lacked substantial funds for border barrier construction. *Farm Bill Signing*, C-SPAN (Dec. 20, 2018), https://www.c-

[2] Defendants do not oppose the Plaintiff States' request to take judicial notice of various documents. The Court finds it may take judicial notice of documents from Plaintiff States' request that are cited in this order, all of which are: (1) statements of government officials or entities that are not subject to reasonable dispute; (2) bills considered by Congress or other legislative history; or (3) other public records and government documents available on reliable internet sources, such as government websites. *See DeHoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 763 n.5 (9th Cir. 2018) (taking "judicial notice of government documents, court filings, press releases, and undisputed matters of public record"); *Hawaii v. Trump*, 859 F.3d 741, 773 n.14 (9th Cir. 2017) (taking judicial notice of President's tweets), *vacated on other grounds*, 138 S. Ct. 377 (2017); *Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) ("Legislative history is properly a subject of judicial notice.").

span.org/video/?456189-1/president-government-funding-bill-include-money-border-wall ("I've made my position very clear. Any measure that funds the government must include border security. . . . Walls work whether we like it or not. They work better than anything."). Congress did not pass a bill with the President's desired border barrier funding and, due to this impasse, the United States entered into the nation's longest partial government shutdown.

The President and those in his administration stated on several occasions before, during, and after the shutdown that, although Congress should make the requisite funds available for border barrier construction, the President was willing to use a national emergency declaration and other reprogramming mechanisms as funding backstops. For example, during a December 11, 2018 meeting with congressional representatives, the President stated that "if we don't get what we want [for border barrier construction funding], one way or the other – whether it's through [Congress], through a military, through anything you want to call [sic] – I will shut down the government. Absolutely." States RJN Ex. 21. The White House initially requested only $1.6 billion for border barrier construction for the fiscal year 2019 budget, for sixty-five miles of border barrier construction "in south Texas." *See* Supplemental Request for Judicial Notice, *California v. Trump*, No. 4:19-cv-00872-HSG (N.D. Cal. Apr. 8, 2019), ECF No. 112-1, Ex. 51, at 58. However, the White House increased its request on January 6, 2019, when the Acting Director of the Office of Management and Budget transmitted a letter to the U.S. Senate Committee on Appropriations, "request[ing] $5.7 billion for construction of a steel barrier for the Southwest border," and explaining that the request "would fund construction of a total of approximately 234 miles of new physical barrier." *See* Dkt. No. 36 ("Citizen Groups RJN") Ex. A, at 1.[3] The increased request specified that "[a]ppropriations bills for fiscal year (FY) 2019 that have already been considered by the current and previous Congresses are inadequate to fully address these critical issues," including the need for border barrier construction funds. *Id.* Days later, the President explained: "If we declare a national emergency, we have a tremendous amount of funds

[3] The Court takes judicial notice of documents submitted by the Citizen Group Plaintiffs, consideration of which Defendants do not oppose, and the accuracy of the contents of which similarly "cannot be questioned." *See* discussion *supra* note 2.

– tremendous – if we want to do that, if we want to go that route. Again, there is no reason why we can't come to a deal. . . . [Congress] could stop this problem in 15 minutes if they wanted to." States RJN Ex. 13.

After the government shutdown ended, the President and others in his administration reaffirmed their intent to fund a border barrier, with or without Congress's blessing. On February 9, 2019, the President explained that even if Congress provided less than the requested funding for a border barrier, the barrier "[would] get built one way or the other!" Citizen Groups RJN Ex. C. The next day, the Acting White House Chief of Staff explained that the Administration intended to accept whatever funding Congress would offer and then use other measures to reach the President's desired funding level for border barrier construction:

> The President is going to build a wall. You saw what the Vice-President said there, and that's our attitude at this point, which is: We'll take as much money as you can give us, and then we'll go off and find the money someplace else, legally, in order to secure that southern barrier. But this is going to get built, with or without Congress.

See Fox News, *Mick Mulvaney on chances of border deal, Democrats ramping up investigation of Trump admin*, YouTube (Feb. 10, 2019), https://www.youtube.com/watch?v=l_Z0xx_zS0M. He went on to detail that the Administration was prepared to both reprogram money and declare a national emergency to unlock funds:

> There are other funds of money that are available to [the President] through what we call reprogramming. There is money that he can get at and is legally allowed to spend, and I think it -- needs to be said again and again that all of this is going to be legal. There are statutes on the books as to how any President can do this. . . . There are certain funds of money that he can get to without declaring a national emergency and other funds that he can only get to after declaring a national emergency.

Id. All told, the "whole pot" of such funds was "well north of $5.7 billion." *Id.* And with respect to a national emergency declaration in particular, the Acting White House Chief of Staff explained: "The President doesn't want to do it. . . . He would prefer legislation because that's the right way to go, and it's the proper way to spend money in this country." *Id.*

On February 14, 2019, Congress passed the Consolidated Appropriations Act of 2019

("CAA"), Pub. L. No. 116-6, 133 Stat. 13 (2019). The CAA consolidated separate appropriations acts related to different federal agencies into one bill, including for present purposes the DHS Appropriations Act for Fiscal Year 2019. *See id.*, div. A. The CAA made available $1.375 billion—less than one quarter of the $5.7 billion sought by the President—"for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector." *Id.* § 230(a)(1), 133 Stat. at 28. Congress limited the use of these funds both as to the type of pedestrian fencing—only "operationally effective designs deployed as of the date of the Consolidated Appropriations Act, 2017 . . . such as currently deployed steel bollard designs"—and geographically—no funds were available for construction within (1) the Santa Ana Wildlife Refuge, (2) the Bentsen-Rio Grande Valley State Park, (3) La Lomita Historical park, (4) the National Butterfly Center, or (5) within or east of the Vista del Mar Ranch tract of the Lower Rio Grande Valley National Wildlife Refuge. *Id.* §§ 230(b), 231, 133 Stat. at 28. The CAA further imposed notice and comment requirements prior to the use of any funds for the construction of barriers within certain city limits. *Id.* § 232, 133 Stat. at 28–29. Section 739 of the CAA provided:

> None of the funds made available in this or any other appropriations Act may be used to increase, eliminate, or reduce funding for a program, project, or activity as proposed in the President's budget request for a fiscal year until such proposed change is subsequently enacted in an appropriation Act, or unless such change is made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act.

Id. § 739, 133 Stat. at 197.

On February 15, 2019, the President not only signed the CAA into law but also issued a proclamation "declar[ing] that a national emergency exists at the southern border of the United States." Proclamation No. 9844, 84 Fed. Reg. 4,949 (Feb. 15, 2019). In announcing the national emergency declaration, the President declared that although he "went through Congress" for the $1.375 billion in funding, he was "not happy with it." States RJN Ex. 50. The President added: "I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster. . . . And I think that I just want to get it done faster, that's all." *Id.*

The proclamation itself provided:

> The current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency. The southern border is a major entry point for criminals, gang members, and illicit narcotics. The problem of large-scale unlawful migration through the southern border is long-standing, and despite the executive branch's exercise of existing statutory authorities, the situation has worsened in certain respects in recent years. In particular, recent years have seen sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending. If not detained, such aliens are often released into the country and are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate. In response to the directive in my April 4, 2018, memorandum and subsequent requests for support by the Secretary of Homeland Security, the Department of Defense has provided support and resources to the Department of Homeland Security at the southern border. Because of the gravity of the current emergency situation, it is necessary for the Armed Forces to provide additional support to address the crisis.

Proclamation No. 9844, 84 Fed. Reg. 4,949. The proclamation then invoked and made available to relevant Department of Defense ("DoD") personnel two statutory authorities. First, the proclamation made available the authority to "order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve . . . to active duty for not more than 24 consecutive months," under 10 U.S.C. § 12302. *Id.* Second, the proclamation made available "the construction authority provided in [10 U.S.C. § 2808]." *Id.* As is necessary to invoke Section 2808, the proclamation "declar[ed] that this emergency requires use of the Armed Forces." *Id.*; *see also* 10 U.S.C. § 2808(a) (limiting construction authority to presidential declarations "that require[] use of the armed forces").

As additional information regarding the national emergency declaration, the White House simultaneously issued a "fact sheet[]," which explained that "the Administration [had] so far identified up to $8.1 billion that will be available to build the border wall once a national emergency is declared." Citizen Groups RJN Ex. G. The White House specifically identified three funding sources, purportedly to be used sequentially:

- "About $601 million from the Treasury Forfeiture Fund" ("TFF");
- "Up to $2.5 billion under the Department of Defense funds transferred for Support for Counterdrug Activities" (10 U.S.C. § 284) ("Section 284"); and

- "Up to $3.6 billion reallocated from Department of Defense military construction projects under the President's declaration of a national emergency" (10 U.S.C. § 2808) ("Section 2808").

Id.

In declaring a national emergency, the President invoked his authority under the National Emergencies Act ("NEA"), Pub. L. 94–412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–1651). This appears to have been the first time in American history that a President declared a national emergency to secure funding previously withheld by Congress. As another historical first, Congress passed a joint resolution to terminate the President's declaration of a national emergency. *See* H.R.J. Res. 46, 116th Cong. (2019). The President vetoed Congress's joint resolution on March 15, 2019.[4] *See Veto Message to the House of Representatives for H.J. Res. 46*, The White House (Mar. 15, 2019), https://www.whitehouse.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/. The House voted 248-181 to override the President's veto, which fell short of the required two-thirds majority. 165 Cong. Rec. 2,799, 2,814–15 (2019).

Following the President's national emergency declaration, executive officers reaffirmed what the President and his administration had been saying for months: the Administration was content to first request border barrier construction funding from Congress, and then augment whatever they received with funds from alternative sources. Then-Secretary of Homeland Security Nielsen described this mindset on March 6, 2019, while testifying before the House Homeland Security Committee: "[The President] hoped Congress would act, that it didn't have to come to issuing an emergency declaration, if Congress had met his request to fund the resources that [U.S. Customs and Border Protection ("CBP")] has requested." *3/6/2019 Nielsen Testimony*, C-SPAN (Mar. 6, 2019), https://www.c-span.org/video/?c4787939/362019-nielsen-testimony.

Since the national emergency declaration, Defendants have taken significant steps toward using the funds at issue in this motion for border barrier construction. On February 15, 2019, the

[4] As described below, the Congress that passed the NEA did not contemplate the possibility of a presidential veto.

Treasury approved a request from the Department of Homeland Security ("DHS") to make available up to $601 million from the Treasury Forfeiture Fund, which Defendants "intend[] to obligate . . . before the end of Fiscal Year 2019." *See* Case No. 4:19-cv-00872-HSG, ECF No. 89-8 ("Flossman Second Decl.") ¶¶ 9, 11. On February 25, 2019, DHS submitted a request to DoD for assistance blocking drug-smuggling corridors under Section 284. *See* Dkt. No. 64-8 ("Rapuano Decl.") ¶ 3; States RJN Ex. 33. And on March 25, 2019, in response to DHS's request, the Acting Secretary of Defense—Defendant Shanahan—approved the diversion of funds from DoD's counter-narcotics support budget for three "drug-smuggling corridors" identified by DHS: one located in New Mexico—El Paso Project 1—and two located in Arizona—Yuma Sector Projects 1–2.[5] Rapuano Decl. ¶¶ 4, 7–9. Construction related to these projects may begin as soon as May 25, 2019. *See id.* ¶ 10 (providing that construction "will begin no earlier than May 25, 2019").

To fund the Section 284 diversion, Defendant Shanahan simultaneously invoked Section 8005 of the most-recent DoD appropriations act to "reprogram" $1 billion from Army personnel funds to the counter-narcotics support budget. *See id.* ¶ 5; States RJN Ex. 34; *see also* Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018). Defendant Shanahan also formally notified Congress of the authorization, explaining that reprogrammed funds under Section 8005 were "required" so that DoD could provide DHS the support it requested under Section 284. States RJN Ex. 32, at 1; *see also id.* Ex. 33, at 2 (DHS's February 25, 2019 request for support under Section 284).

The next day, Defendant Shanahan appeared before the House Armed Services Committee to testify in support of the President's budget request for fiscal year 2020. *See* Case No. 4:19-cv-00872-HSG, ECF No. 89-12. The Committee Chairman asked Defendant Shanahan why DoD did not first seek approval from relevant congressional committees before reprogramming funds under Section 8005, as would have been consistent with a "gentlemen's agreement[]" between Congress

[5] Defendants have since elected not to fund or construct Yuma Project 2 using funds reprogrammed or diverted under Sections 8005 or 284. *See* Dkt. No. 118-1 ("Rapuano Second Decl.") ¶ 4.

and the Executive. *Id.* at 13 ("But one of the sort of gentlemen's agreements about [giving reprogramming authority for up to $4 billion last year] was if you reprogram money, you will not do it without first getting the approval of all for [sic] relevant committees . . . . For the first time since we've [given such reprogramming authority] . . . . you are not asking for our permission."). The Chairman noted that "the result of" ignoring the gentlemen's agreement likely would be Congress declining to provide such broad reprogramming authority in the future. *Id.* Defendant Shanahan conceded that "discretionary reprogramming" was "traditionally done in coordination" with Congress, but explained that the Administration discussed unilateral reprogramming "prior to the declaration of a national emergency," recognized "the significant downsides of the [sic] losing what amounts to a privilege," and nonetheless decided to move forward with unilaterally reprogramming funds despite that risk. *Id.* at 14. The same day as the hearing, both the House Committee on Armed Services and the House Committee on Appropriations formally disapproved of the Section 8005 reprogramming. *See* States RJN Ex. 35 ("The committee denies this request. The committee does not approve the proposed use of [DoD] funds to construct additional physical barriers and roads or install lighting in the vicinity of the United States border."); *id.* Ex. 36 ("The Committee has received and reviewed the requested reprogramming action . . . . The Committee denies the request.").

On April 24, 2019, Defendant McAleenan, the Acting Secretary of Homeland Security, published in the Federal Register notices of determination concerning the "construction of barriers and roads in the vicinity of the international land border in Luna County, New Mexico and Doña Ana County, New Mexico," and "in Yuma County, Arizona"—in other words, areas encompassed by the El Paso Sector and Yuma Sector Projects. *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 17,185, 17,186 (Apr. 24, 2019); Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 17,187 (Apr. 24, 2019). The Acting Secretary invoked his authority under Section 102(c) of the

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")[6] "to waive all legal requirements that [he], in [his] sole discretion, determine[d] necessary to ensure the expeditious construction of barriers and roads authorized by section 102 of IIRIRA." *See, e.g.*, 84 Fed. Reg. at 17,186. The waiver asserts that "areas in the vicinity of the United States border, located in [these regions], are areas of high illegal entry," for which "[t]here is presently an acute and immediate need to construct physical barriers and roads." *See id.* The designated "Project Areas" encompass all portions of New Mexico and Arizona for which Defendants presently intend to construct physical barriers. Finding this action "necessary," the Acting Secretary invoked Section 102(c) to waive "in their entirety" numerous federal laws—including the National Environmental Policy Act ("NEPA"), Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4370b)—"with respect to the construction of physical barriers and roads . . . in the project area[s]." *See id.*

On May 8, 2019, Defendant Shanahan, appearing before the Senate Defense Appropriations Subcommittee, testified: "We now have on contract sufficient funds to build about 256 miles of barrier," explaining that this funding derived in part from "treasury forfeiture funds, as well as reprogramming." *Acting Defense Secretary Shanahan Testifies on 2020 Budget Request*, C-SPAN (May 8, 2019), https://www.c-span.org/video/?460437-1/acting-defense-secretary-shanahan-testifies-2020-budget-request. Defendant Shanahan estimated that "sixty-three new miles will come online" from these contracts in the next six months, or "half a mile a day." *Id.* The same day, DoD reported selecting twelve companies to compete for up to $5 billion worth of border barrier construction contracts. Contracts for May 8, 2019, U.S. Dep't of Def. (May 8, 2019), https://dod.defense.gov/News/Contracts/Contract-View/Article/1842189/.

The next day, Defendant Shanahan authorized an additional $1.5 billion in funding for border barrier construction, in further response to DHS's February 25, 2019 request for support

[6] Pub. L. No. 104–208, div. C, 110 Stat. 3009, 3009–554 (Sept. 30, 1996), as amended by the REAL ID Act of 2005, Pub. L. No. 109–13, div. B, 119 Stat. 231, 302, 306 (May 11, 2005), as amended by the Secure Fence Act of 2006, Pub. L. No. 109–367, § 3, 120 Stat. 2638, 2638–39 (Oct. 26, 2006), as amended by the Department of Homeland Security Appropriations Act, 2008, Pub. L. No. 110–161, div. E, tit. V, § 564, 121 Stat. 1844, 2090–91 (Dec. 26, 2007).

under Section 284, for four projects: one located in California—El Centro Project 1—and three located in Arizona—Tucson Sector Projects 1–3. *See* Rapuano Second Decl. ¶ 6; *see also* Rapuano Decl. Ex. A, at 3, 6–7 (describing project locations). To fund these projects, Defendant Shanahan again invoked Section 8005, "as well as DoD's special transfer authority under section 9002 of the Department of Defense Appropriations Act, 2019, and section 1512 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019."[7] Rapuano Second Decl. ¶ 7. Defendants anticipate that construction will begin with these funds as early as July 2019. *Id.* ¶¶ 10–11 (noting Defendants' expectation of awarding contracts by May 16, 2019, forty-five days after which construction may begin). And on May 15, 2019, Defendant McAleenan issued NEPA waivers for the El Centro Sector and Tucson Sector Projects. *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,798 (May 15, 2019) (waiving NEPA requirements for Tucson Sector Projects); Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,800 (May 15, 2019) (waiving NEPA requirements for El Centro Sector Project).

At the hearing on this motion, the parties agreed that the Court need not yet address the lawfulness of Defendants' newly announced reprogramming and subsequent diversion of funds for border barrier construction in the El Centro Sector and Tucson Sector Projects, pending further development of the record as to those projects.

//

//

//

//

[7] Defendants' Section 9002 authority is, at a minimum, subject to Section 8005's limitations. *See* Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, § 9002, 132 Stat. 2981, 3042 (2018) (providing that "the authority provided in this section is in addition to any other transfer authority available to the Department of Defense and is subject to the same terms and conditions as the authority provided in section 8005 of this Act"); *see also* Dkt. No. 131, at 4 (acknowledging that Section 9002 "incorporates the requirements of [Section] 8005 by reference").

II. STATUTORY FRAMEWORK

A. The National Emergencies Act

In 1976, Congress enacted the National Emergencies Act "to insure that the exercise of national emergency authority is responsible, appropriate, and timely." Comm. on Gov't Operations & the Special Comm. on Nat'l Emergencies & Delegated Emergency Powers, 94th Cong., 2d Sess., The National Emergencies Act (Public Law 94–412) Source Book: Legislative History, Texts, and Other Documents, at 1 (1976) ("NEA Source Book"). The NEA rescinded several existing national emergencies, repealed many statutes, and created procedural guidelines for congressional oversight over future presidents' declarations of national emergencies.

The NEA first permits that after "specifically declar[ing] a national emergency," the president may exercise emergency powers authorized by Congress in other federal statutes. 50 U.S.C. § 1621. To exercise any statutory emergency power, the president must first specify the power or authority under which the president or other officers will act, "either in the declaration of a national emergency, or by one or more contemporaneous or subsequent Executive orders published in the Federal Register and transmitted to the Congress." *Id.* § 1631.

Section 1622 then establishes a procedure for Congress to terminate any declared national emergency through a joint resolution.[8] As initially drafted, Congress meant for the joint resolution to terminate the declared national emergency by itself—the NEA did not require a presidential signature on the joint resolution, nor was it subject to a presidential veto. In part because Congress had power under the NEA to terminate national emergencies with a simple majority in both houses, Congress neither defined the term "national emergency," nor "ma[de] any attempt to define when a declaration of national emergency is proper." NEA Source Book at 9, 278–92. In rejecting a proposed amendment to the NEA that would have "spelled out" for the executive what may constitute a national emergency, the House of Representatives observed the "impossibility" of future presidents vetoing any joint resolution. *Id.* at 279–80. House members there observed:

[8] The initial version of the NEA referred to a "concurrent resolution." That language was changed to "joint resolution" in 1985. *See* Foreign Relations Authorization Act, "22 USC 2651 note" Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 801(1)(A), 99 Stat. 405, 448 (1985). For simplicity's sake, the Court only uses the term "joint resolution," as the statute now reads.

> Mr. Conyers. . . . Mr. Chairman, my final participation in this debate revolves around the reason of this question: What happens if the President of the United States vetoes the congressional termination of the emergency power? Is that contemplatable within the purview of this legislation?
>
> . . .
>
> Mr. Flowers. Mr. Chairman, on the advice of counsel we have researched that thoroughly. A concurrent resolution would not require Presidential signature of acceptance. It would be an impossibility that it would be vetoed.
>
> Mr. Conyers. So there would be no way that the President could interfere with the Congress?
>
> Mr. Flowers. The gentleman is correct.

Id.

Congress's unilateral power under the NEA to terminate national emergency declarations ended in 1983, when the Supreme Court in *INS v. Chadha* ruled that the president must have power to approve or veto congressional acts, such as a terminating joint resolution under the NEA. *See* 462 U.S. 919 (1983). Two years later, Congress amended the NEA to reflect that the joint resolution must be "enacted into law" to terminate an emergency, thereby rendering the NEA *Chadha*-compliant. *See* Pub. L. No. 99-93, § 801(1)(A), 99 Stat. 405, 448 (1985).

By some estimates, there are 123 statutory powers available to a president who declares a national emergency. *See A Guide to Emergency Powers and Their Use*, Brennan Ctr. for Justice (2019), www.brennancenter.org/sites/default/files/legislation/Emergency%20Powers_Printv2.pdf. And in the more than forty years since Congress enacted the NEA, presidents have declared almost sixty national emergencies. *See Declared National Emergencies Under the National Emergencies Act, 1978-2018*, Brennan Ctr. for Justice (2019), www.brennancenter.org/sites/default/files/analysis/NEA%20Declarations.pdf.

Until now, Congress had never invoked its emergency termination powers.

B. Section 284

Under Section 284, "[t]he Secretary of Defense may provide support for the counterdrug activities . . . of any other department or agency of the Federal Government" if "such support is requested . . . by the official who has responsibility for [such] counterdrug activities." 10 U.S.C.

§ 284(a), (a)(1)(A). Section 284 defines permissible "[t]ypes of support" under the statute, including support for "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *Id.* § 284(b)(7). The statute also mandates congressional notification before the Secretary of Defense provides certain—but not all—types of support. *Id.* § 284(h). For one, Section 284 requires the Secretary of Defense to submit to the appropriate congressional committee "a description of any small scale construction project for which support is provided." *Id.* § 284(h)(1)(B). Section 284 defines "small scale construction" as "construction at a cost not to exceed $750,000 for any project." *Id.* § 284(i)(3).

Congress first provided DoD with authority to support such counterdrug activities in 1991, in what is commonly referred to as "Section 1004." *See* National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1004, 104 Stat. 1485, 1629–30 (1990). The initial iteration of Section 1004 made available $50 million in funds for fiscal year 1991 alone, and contained no congressional notification requirement or per-project cap on the provision of support. *Id.* § 1004(g), 104 Stat. at 1630. Congress subsequently renewed Section 1004 on a regular basis.[9] Congress ultimately codified Section 1004 at 10 U.S.C. § 284 in 2016. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1011(a)(1), 130 Stat. 2000, 2381 (2016), *renumbered § 284 by id.* § 1241(a)(2), 130 Stat. at 2497.

[9] Congress extended the provision of funds under Section 1004 on eight occasions, the last of which provided funds through fiscal year 2017. *See* National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 1088(a), 105 Stat. 1290, 1484 (1991) (extending funding through fiscal year 1993); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1121, 107 Stat. 1547, 1753–54 (1993) (extending funding through fiscal year 1995); National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 1011, 108 Stat. 2663, 2836–37 (1994) (extending funding through fiscal year 1999); Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1021, 112 Stat. 1920, 2120 (1998) (extending funding through fiscal year 2002); National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 1021, 115 Stat. 1012, 1212–15 (2001) (extending funding through fiscal year 2006); John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1021, 120 Stat. 2083, 2382 (2006) (extending funding through fiscal year 2011); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1005, 125 Stat. 1298, 1556–57 (2011) (extending funding through fiscal year 2014); Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1012, 128 Stat. 3292, 3483–84 (2014) (extending funding through fiscal year 2017).

In fiscal year 2019, Congress appropriated $881 million in funds to DoD "[f]or drug interdiction and counter-drug activities," $517 million of which was "for counter-narcotics support." *See* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, div. A, tit. VI, 132 Stat. 2981, 2997 (2018). All funds DoD now purports to make available for support to DHS under Section 284 come from the counter-narcotics support line of appropriation, out of what is known as the "drug interdiction fund." Rapuano Decl. ¶ 5, Ex. D. But when Secretary Shanahan first authorized support to DHS under Section 284 on March 25, 2019, the counter-narcotics support line only contained $238,306,000 in unobligated funds. *See* Dkt. No. 131 at 4 (citing Rapuano Decl. ¶ 5, Ex. D, at 2). Therefore, although DoD seeks to make available $2.5 billion in support to DHS "under Section 284," Defendants have not used—and do not intend to use in the near future—any of the counter-narcotics support funds appropriated by Congress in fiscal year 2019 for border barrier construction. *Id.* (noting that all $2.5 billion in border barrier construction support to DHS under Section 284 is attributable to Section 8005 and 9002 reprogramming). In other words, every dollar of Section 284 support to DHS and its enforcement agency, CBP, is attributable to reprogramming mechanisms.

DoD's provision of support under Section 284 does not require a national emergency declaration.

C. Section 8005

"An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law." 31 U.S.C. § 1532. Section 8005 of the fiscal year 2019 Department of Defense Appropriations Act authorizes the Secretary of Defense to transfer up to $4 billion "of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction)." § 8005, 132 Stat. at 2999. The Secretary must first determine that "such action is necessary in the national interest." *Id.* Section 8005 further provides that such authority to transfer may only be used (1) for higher priority items than those for which originally appropriated, and (2) based on unforeseen military requirements, but (3) in no case where the item

for which funds are requested has been denied by the Congress.[10] *Id.*

DoD's Section 8005 transfer authority has existed in largely the same form since at least fiscal year 1974. *See* Department of Defense Appropriation Act, 1974, Pub. L. No. 93-238, § 735, 87 Stat. 1026, 1044 (1974). That year, Congress added the "denied by Congress" provision "to tighten congressional control of the reprogramming process," and in response to incidents where "[DoD] [had] requested that funds which have been specifically deleted in the legislative process be restored through the reprogramming process." H.R. Rep. No. 93-662, at 16 (1973). The House Committee on Appropriations "believ[ed] that to concur in such actions would place committees in the position of undoing the work of the Congress," and that "henceforth no such requests will be entertained." *Id.*

On February 25, 2019, DHS submitted a request to DoD for assistance blocking drug-smuggling corridors under Section 284. *See* Rapuano Decl. ¶ 3; States RJN Ex. 33. And on March 25, 2019, DoD invoked Section 8005 to transfer $1 billion from funds Congress previously appropriated for military personnel costs to the drug interdiction fund, which DoD then intends to use to provide DHS's requested "assistance" by constructing border barriers using its Section 284 authority. *See* Rapuano Decl. ¶ 5, Ex. D. Despite the recent dispute between the President and Congress over funding for border barrier construction, and although the President had directed DoD nearly a year prior to support DHS "in securing the southern border and taking other necessary actions," including the provision of "military personnel," Federal Defendants purported to invoke Section 8005 "based on unforeseen military requirements." *Id.*; *see also* States RJN Ex. 27 (April 4, 2018 presidential memorandum). On May 9, 2019, Defendants invoked Section 8005 and a related reprogramming provision to authorize the transfer of an additional $1.5 billion in funding into the drug interdiction fund, which then is slated to be used under Section 284 for border barrier construction. *See* Rapuano Second Decl. ¶¶ 6–7, Ex. C.

The reprogramming of funds under Section 8005 does not require a national emergency declaration.

[10] 10 U.S.C. § 2214(b) contains identical transfer authority.

D. Section 2808

Under Section 2808, the Secretary of Defense "may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law." 10 U.S.C. § 2808(a). Section 2808 requires that the President first declare a national emergency under the NEA "that requires use of the armed forces." *Id.* And the Secretary of Defense must use the funds for "military construction projects . . . that are necessary to support such use of the armed forces." *Id.*

Congress defined the term "military construction" as it is used in Section 2808 to "include[] any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road (as described in section 210 of title 23)." 10 U.S.C. § 2801(a). And Congress defined the term "military installation" to "mean[] a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control." *Id.* § 2801(c)(4).

Presidents have twice invoked Section 2808's military construction authority. In 1990, President George H.W. Bush authorized emergency construction authority "to deal with the threat to the national security and foreign policy of the United States caused by the invasion of Kuwait by Iraq." Exec. Order No. 12,734, 55 Fed. Reg, 48,099 (Nov. 14, 1990). President George W. Bush later authorized emergency construction authority in the aftermath of the September 11, 2001 terrorist attacks. Exec. Order. No. 13,235, 66 Fed. Reg. 58,343 (Nov. 16, 2001). To date, DoD has only once used its Section 2808 military construction authority domestically, when it authorized $35 million in funds to secure weapons of mass destruction in five states. *See* Michael J. Vassalotti, Brendan W. McGarry, *Military Construction Funding in the Event of a National Emergency*, Cong. Research Serv. 2 & tbl. 1 (January 11, 2019).

According to Defendants, the Acting Secretary of Defense "has not yet decided to undertake or authorize any barrier construction projects under section 2808." Rapuano Decl. ¶ 14.

DoD undertook an internal review process, to identify "existing military construction projects of sufficient value to provide up to $3.6 billion of funding." *Id.* ¶ 15. The review process identified such funding for border barrier construction, but the Acting Secretary nevertheless "has taken no action on this information and has not yet decided to undertake or authorize any barrier construction projects under section 2808." *See* Dkt. No. 131-2 ("Rapuano Third Decl.") ¶ 6. Defendants have represented that they "will inform the Court" once a decision is made to use Section 2808 to fund border barrier construction. *See* Dkt. No. 131 at 3.

E. Treasury Forfeiture Fund (Section 9705)

Through 31 U.S.C. § 9705, Congress established in the Treasury of the United States a separate fund known as the "Department of the Treasury Forfeiture Fund." 31 U.S.C. § 9705(a). Funds are generally available to the Secretary of the Treasury "with respect to seizures and forfeitures made pursuant to [applicable] law," and for certain "law enforcement purposes." *Id.* State and local law enforcement agencies that participate in the seizure or forfeiture of property may receive "[e]quitable sharing payments." *Id.* § 9705(a)(1)(G). Section 9705(a)(1)(G) details three statutory avenues for the provision of such equitable sharing payments: "Equitable sharing payments made to other Federal agencies, State and local law enforcement agencies, and foreign countries pursuant to section 616(c) of the Tariff Act of 1930 (19 U.S.C. 1616a(c)), section 981 of title 18, or subsection (h) of this section, and all costs related thereto." Equitable sharing payments are statutorily capped, however, by the value of seized property. 31 U.S.C. § 9705(b)(2). After the TFF has accounted for not only the current fiscal year's mandatory expenses—which include equitable sharing payments—but also set aside adequate funds for the following fiscal year's mandatory expenses, unobligated balances are available to the Secretary of the Treasury, to be used "in connection with the law enforcement activities of any Federal agency." 31 U.S.C. § 9705(g)(4)(B). This is commonly referred to as "Strategic Support." *See* Case No. 4:19-cv-00872-HSG, ECF No. 89-9 ("Farley Decl.") ¶ 11.

In late December 2018[11]—during the government shutdown and just before the

[11] The exact date of the request is unclear due to Defendants' inconsistent representations. *Compare* Flossman Second Decl. ¶ 9 (indicating the request was made on December 26, 2018),

Administration sought $5.7 billion from Congress to fund border barrier construction—DHS requested $681 million in Strategic Support funding "for border security." *Id.* ¶ 24; *see also* States RJN Ex. 25 (January 6, 2019 request for $5.7 billion in funding for border barrier construction). The Treasury ultimately determined that it could make available to CBP, DHS's enforcement agency, up to $601 million from the TFF, in two tranches. Farley Decl. ¶¶ 24–25; Opp. at 9. The first tranche—$242 million—was made available for obligation on March 14, 2019. *See* Opp. at 9. Save for a small portion "for program support on the TFF funded projects," CBP intends to obligate the first tranche "on an Interagency Agreement (IAA) with the U.S. Army Corps of Engineers . . . by June 2019." Dkt. No. 131-1 ("Flossman Third Decl.") ¶ 4. Defendants represent that "CBP intends to obligate all available TFF funds before the end of Fiscal Year 2019 or, if not, before the end of the 2019 calendar year." Flossman Second Decl. ¶ 11. The second tranche—$359 million—"is expected to be made available for obligation at a later date upon Treasury's receipt of additional anticipated forfeitures." *See* Opp. at 9. CBP intends to use funds from the TFF "exclusively for projects in the Rio Grande Valley Sector," in Texas. *See* Flossman Third Decl. ¶ 5.

The Secretary of Treasury's use of funds in the TFF for Strategic Support does not require a national emergency declaration.

F. National Environmental Policy Act

NEPA establishes a "national policy which will encourage productive and enjoyable harmony between man and his environment[,] to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. To this end, NEPA compels federal agencies to assess the environmental impact of agency actions that "significantly affect[ ] the quality of the human environment." *Id.* § 4332(C). NEPA

> serves two fundamental objectives. First, it "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." And, second, it requires "that the relevant information will

with Farley Decl. ¶ 24 (indicating the request was made on December 29, 2018).

> be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."

WildEarth Guardians v. Provencio, No. 17-17373, 2019 WL 1983455, at *7 (9th Cir. May 6, 2019) (quoting *WildEarth Guardians v. Mont. Snowmobile Ass'n*, 790 F.3d 920, 924 (9th Cir. 2015)). NEPA does not establish substantive environmental standards; rather, it sets "action-forcing" procedures that compel agencies to take a "hard look" at environmental consequences. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348–50 (1989). "NEPA's purpose is to ensure that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'" *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989)). And the Ninth Circuit commands that courts "strictly interpret" NEPA's procedural requirements "to the fullest extent possible," as consistent with NEPA's policies. *Churchill Cty. v. Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001) (quoting *Lathan v. Brinegar*, 506 F.2d 677, 687 (9th Cir. 1974) (en banc)). "[G]rudging, pro forma compliance will not do." *Id.* (quoting *Lathan*, 506 F.2d at 693).

Where an agency's project "*might* significantly affect environmental quality," NEPA compels preparation of what is known as an Environmental Impact Statement ("EIS"). *Provencio*, 2019 WL 1983455, at *7 (emphasis added). To prevail on a claim that an agency violated its duty to prepare an EIS, a plaintiff need only raise "substantial questions whether a project may have a significant [environmental] effect." *Id.* (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)). An action's "significance" depends on "both context and intensity." 40 C.F.R. § 1508.27; *see also id.* § 1508.27(b) (setting forth ten factors to "consider[] in evaluating intensity"). Even where a project does not require an EIS, agencies generally must prepare an Environmental Assessment ("EA") which, in part, serves to "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." *See* 40 C.F.R. § 1508.9(a)(1).

"[A]gency action taken without observance of the procedure required by law will be set aside." *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

//

III. LEGAL STANDARD

A preliminary injunction is a matter of equitable discretion and is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking preliminary injunctive relief must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Id.* at 20. Alternatively, an injunction may issue where "the likelihood of success is such that serious questions going to the merits were raised and the balance of hardships tips sharply in [the plaintiff's] favor," provided that the plaintiff can also demonstrate the other two *Winter* factors. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011) (citation and internal quotation marks omitted). Under either standard, Plaintiffs bear the burden of making a clear showing that they are entitled to this extraordinary remedy. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). The most important *Winter* factor is likelihood of success on the merits. *See Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017).

IV. ANALYSIS

In the pending motion, Plaintiffs seek to enjoin Defendants from using certain diverted federal funds and resources for border barrier construction. Specifically, Plaintiffs move to enjoin Defendants from (1) invoking Section 8005's reprogramming authority to channel funds into DoD's drug interdiction fund, (2) invoking Section 284 to divert monies from DoD's drug interdiction fund for border barrier construction on the southern border of Arizona and New Mexico, (3) invoking Section 2808 to divert monies from appropriated DoD military construction projects for border barrier construction,[12] and (4) taking any further action related to border barrier construction until Defendants comply with NEPA.

Defendants oppose each basis for injunctive relief. Defendants further contend that the Plaintiffs lack standing to bring their Sections 8005 and 2808 claims. The Court addresses these

[12] Only the Citizen Group Plaintiffs challenge the diversion of funds under Section 2808.

threshold issues first before turning to Plaintiffs' individual bases for injunctive relief.

A. Article III Standing

A plaintiff seeking relief in federal court bears the burden of establishing "the irreducible constitutional minimum" of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). First, the plaintiff must have "suffered an injury in fact." *Id.* This requires "an invasion of a legally protected interest" that is concrete, particularized, and actual or imminent, rather than conjectural or hypothetical. *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). Second, the plaintiff's injury must be "fairly traceable to the challenged conduct of the defendant." *Spokeo*, 136 S. Ct. at 1547. Third, the injury must be "likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan*, 504 U.S. at 560–61).

1. Plaintiffs Have Standing for Their 8005 Claim.

Defendants argue that Plaintiffs lack standing to challenge Defendants' invocation of Section 8005 to reprogram funds into the drug interdiction fund, so that Defendants can then divert that money wholesale to border barrier construction using Section 284. *See* Opp. at 14.[13] Defendants do not dispute that Plaintiffs have standing to challenge the use of funds from the drug interdiction fund for border barrier construction under Section 284. Defendants nonetheless reason that harm from construction using drug interdiction funds under Section 284 does not establish standing to challenge Defendants' use of Section 8005 to supply those funds. *Id.* Defendants argue that standing requires that the plaintiff be the "object" of the challenged agency action, but that the Section 8005 augmentation of the drug interdiction fund and the use of that money for construction are two distinct agency actions. *Id.* (citing *Lujan*, 504 U.S. at 562). According to Defendants, the "object" of the Section 8005 reprogramming was "simply mov[ing] funds among DoD's accounts." *Id.* (citing *Lujan*, 504 U.S. at 562).

Defendants' logic fails in all respects. As an initial matter, it is not credible to suggest that

[13] Defendants also argue Plaintiffs lack standing because they fall outside Section 8005's "zone of interests." *See* Opp. at 18–19. Because the Court finds Defendants' "zone of interests" challenge derivative of Defendants' misunderstanding of *ultra vires* review, the Court addresses those matters together, below. *See infra* Section IV.B.1.

the "object" of the Section 8005 reprogramming is anything but border barrier construction, even if the reprogrammed funds make a pit stop in the drug interdiction fund. Since Defendants first announced that they would reprogram funds using Section 8005, they have uniformly described the object of that reprogramming as border barrier construction. *See* Rapuano Decl. ¶ 5 (providing that "the Acting Secretary of Defense decided to use DoD's general transfer authority under section 8005 . . . to transfer funds between DoD appropriations to fund [border barrier construction in Arizona and New Mexico]"); *id.* Ex. D, at 1 (notifying Congress that the "reprogramming action" under Section 8005 is for "construction of additional physical barriers and roads in the vicinity of the United States border").

Nor does *Lujan* impose Defendants' proffered strict "object" test. The *Lujan* Court explained that "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." 504 U.S. at 562 (internal quotation marks omitted). And the Supreme Court was concerned in particular with "causation and redressability," which are complicated inquiries when a plaintiff's standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Id.* (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (Kennedy, J.)). As concerns causation, the Ninth Circuit recently explained that Article III standing only demands a showing that the plaintiff's injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 167 (1997)). "Causation may be found even if there are multiple links in the chain connecting the defendant's unlawful conduct to the plaintiff's injury, and there's no requirement that the defendant's conduct comprise the last link in the chain. As we've said before, what matters is not the length of the chain of causation, but rather the plausibility of the links that comprise the chain." *Id.* (internal quotation marks and citations omitted).

No complicated causation inquiry is necessary here, as there are no independent absent actors. More important, if there were ever a case where standing exists even though the

challenged government action is nominally directed to some different "object," this is it. Neither the parties nor the Court harbor any illusions that the point of reprogramming funds under Section 8005 is to use those funds for border barrier construction. And under Ninth Circuit law, there is no requirement that the challenged conduct be the last link in the causal chain. Rather, even if there is an intervening link between the Section 8005 reprogramming and the border barrier construction itself, any injury caused by the border barrier construction is nonetheless "fairly traceable" to the Section 8005 reprogramming under the circumstances. *See id.* The Court thus cannot accept the Government's "two distinct actions" rationale as a basis for shielding Defendants' actions from review.

2. Plaintiffs Have Standing for Their Section 2808 Claim.

Defendants argue that Plaintiffs lack standing to challenge Defendants' diversion of funds under Section 2808 "because the Acting Secretary of Defense has not yet decided to undertake or authorize any barrier construction projects under [Section] 2808." Opp. at 21. Defendants describe the status of the Section 2808 diversion as follows:

> The Acting Secretary of Defense has not yet decided to undertake or authorize any barrier construction projects under section 2808. To inform the Acting Secretary's decision, on March 20, 2019, the Secretary of Homeland Security provided a prioritized list of proposed border-barrier-construction projects that DHS assesses would improve the efficiency and effectiveness of the armed forces supporting OHS in securing the southern border. On April 11, 2019, as a follow-up to the Chairman's preliminary assessment of February 10, 2019, the Acting Secretary instructed the Chairman of the Joint Chiefs of Staff to provide, by May 10, 2019, a detailed assessment of whether and how specific military construction projects could support the use of the armed forces in addressing the national emergency at the southern border.
>
> Also on April 11, 2019, the Acting Secretary instructed the DoD Comptroller, in consultation with the Secretaries of the military departments, the Chairman of the Joint Chiefs of Staff, the Under Secretary of Defense for Acquisition and Sustainment, the Under Secretary of Defense for Policy, and the heads of any other relevant DoD components to identify, by May 10, 2019, existing military construction projects of sufficient value to provide up to $3.6 billion of funding for his consideration.

Rapuano Decl. ¶¶ 14–15. According to Defendants, absent some express decision to authorize or undertake a particular project, Plaintiffs' injury is speculative: "It is entirely possible that no

barrier projects will be constructed pursuant to [Section] 2808, and that, if they are, they will be [sic] built in any location where Plaintiffs would have a claim to a cognizable injury." Opp. at 21.

Defendants ask too much of Plaintiffs. A plaintiff need not present undisputable proof of a future harm. The injury-in-fact requirement instead permits standing when a risk of future injury is "at least *imminent*." *See Lujan*, 504 U.S. at 564 n.2. And while courts must ensure that the "actual or imminent" measure of harm is not "stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes," *see id.*, the Ninth Circuit has consistently held that a "'credible threat' that a probabilistic harm will materialize" is enough, *see Nat. Res. Def. Council v. EPA*, 735 F.3d 873, 878 (9th Cir. 2013) (quoting *Covington v. Jefferson Cty.*, 358 F.3d 626, 641 (9th Cir. 2004)).

At this stage, Plaintiffs have carried their burden to demonstrate that there is a "credible threat" that Defendants will divert funds under Section 2808 for border barrier construction in a location where Plaintiffs would have a claim to a cognizable injury. As detailed in Defendants' supporting declaration, a decision on the use of Section 2808 to authorize border barrier construction is forthcoming, as the DoD has now received necessary information which it intends to use to make decisions. *See* Rapuano Third Decl. ¶ 6. Further, the Court cannot ignore that the President invoked Section 2808 to enable the diversion of funds for border barrier construction. *See* Citizen Groups RJN Ex. D. The White House in fact provided in February 2019 that funds under Section 2808 "will be available." *Id.* Ex. G. There is thus no speculation necessary for the Court to find that Defendants will continue with their current course of conduct and exercise their authority under Section 2808 in the manner directed by the President. *See Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002) ("Although [*Nelsen v. King County*, 895 F.2d 1248, 1251–52 (9th Cir. 1990)] certainly requires us to consider all the circumstances related to a threatened future harm, including whether the threatened harm may result from a chain of contingencies, the possibility that defendants may change their course of conduct is not the type of contingency to which we referred in *Nelsen*.").

Finally, as to Defendants' claim that they might use Section 2808 funds in a location where Plaintiffs would not have a claim to a cognizable injury, it is highly unlikely that this would be the

case, as Plaintiffs have demonstrated that their members span the entire U.S.-Mexico border. *See, e.g.*, Dkt. No. 32 ¶ 3 ("SBCC's membership spans the borderlands from California to Texas.").

B. Plaintiffs Have Shown They Are Entitled to a Preliminary Injunction.

Applying the *Winter* factors, the Court finds Plaintiffs are entitled to a preliminary injunction as to Defendants' use of Section 8005's reprogramming authority to channel funds into the drug interdiction fund so that those funds may be ultimately used for border barrier construction in El Paso Sector Project 1 and Yuma Sector Project 1.

1. Likelihood of Success on the Merits

The crux of Plaintiffs' case is that Defendants' methods for funding border barrier construction are unlawful. And Plaintiffs package that core challenge in several ways. For present purposes, Plaintiffs contend that Defendants' actions (1) violate Congress's most-recent appropriations legislation, (2) are unconstitutional, (3) exceed Defendants' statutory authority—in other words, are *ultra vires*—and (4) violate NEPA.

The Court begins with a discussion of the law governing the appropriation of federal funds. Under the Appropriations Clause of the Constitution, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. "The Clause's words convey a 'straightforward and explicit command': No money 'can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1346 (D.C. Cir. 2012) (quoting *OPM v. Richmond*, 496 U.S. 414, 424 (1990)). "The Clause has a 'fundamental and comprehensive purpose . . . to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents.'" *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) (quoting *Richmond*, 496 U.S. at 427–28). It "protects Congress's exclusive power over the federal purse," and "prevents Executive Branch officers from even inadvertently obligating the Government to pay money without statutory authority." *FLRA*, 665 F.3d at 1346–47 (internal quotation marks and citations omitted).

"Federal statutes reinforce Congress's control over appropriated funds," and under federal law "appropriated funds may be applied only 'to the objects for which the appropriations were

made.'" *Id.* at 1347 (quoting 31 U.S.C. § 1301(a)). Moreover, "[a]n amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law." 31 U.S.C. § 1532. "[A]ll uses of appropriated funds must be affirmatively approved by Congress," and "the mere absence of a prohibition is not sufficient." *FLRA*, 665 F.3d at 1348. In summary, "Congress's control over federal expenditures is 'absolute.'" *Id.* (quoting *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 185 (D.C. Cir. 1992)).

Rather than dispute these principles, Defendants contend that the challenged conduct complies with them. *See* Opp. at 26 ("The Government is not relying on independent Article II authority to undertake border construction; rather, the actions alleged are being undertaken pursuant to express statutory authority."). Accordingly, one of the key issues in dispute is whether Congress in fact provided "express statutory authority" for Defendants' challenged actions.

Turning to Plaintiffs' claims, it is necessary as a preliminary matter to outline the measure and lens of reviewability the Court applies in assessing such broad challenges to actions by executive officers. As a first principle, the Court finds that it has authority to review each of Plaintiffs' challenges to executive action. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 1 Cranch at 177. In determining what the law is, the Court has a duty to determine whether executive officers invoking statutory authority exceed their statutory power. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). And even where executive officers act in conformance with statutory authority, the Court has an independent duty to determine whether authority conferred by act of the legislature nevertheless runs afoul of the Constitution. *See Clinton v. City of New York*, 524 U.S. 417, 448 (1998).

Once a case or controversy is properly before a court, in most instances that court may grant injunctive relief against executive officers to enjoin both *ultra vires* acts—that is, acts exceeding the officers' purported statutory authority—and unconstitutional acts. The Supreme Court recently reaffirmed this core equitable power:

> It is true enough that we have long held that federal courts may in

> some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law. But that has been true not only with respect to violations of federal law by state officials, but also with respect to violations of federal law by federal officials. . . . What our cases demonstrate is that, in a proper case, relief may be given in a court of equity . . . to prevent an injurious act by a public officer.
>
> The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England.

Armstrong, 135 S. Ct. at 1384 (internal quotation marks and citations omitted).

Misunderstanding the presumptive availability of equitable relief to enforce federal law, Defendants contend that Plaintiffs fail to identify a statutory private right of action, that Plaintiffs must challenge Defendants' conduct through the framework of the APA, and that to the extent *ultra vires* review is available, "Plaintiffs [must] show that the challenged action 'contravene[s] clear and mandatory statutory language.'" *See* Opp. at 12–13. But as Plaintiffs detail at length in their reply brief, *ultra vires* review exists outside of the APA framework, and Defendants' heightened standard for *ultra vires* review only applies where Congress has foreclosed judicial review, which is not the case here. *See* Reply at 2–5; *see also* Dkt. No. 107 (Brief of *Amici Curiae* Federal Courts Scholars).[14]

Due to their mistaken framing of the scope of *ultra vires* review, Defendants also incorrectly posit that Plaintiffs must establish that they fall within the "zone of interests" of a particular statute to challenge actions taken by the government under that statute. *See* Opp. at 14–15. The "zone of interests" test, however, only relates to statutorily-created causes of action. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (explaining that "[t]he modern 'zone of interests' formulation . . . . applies to all statutorily created causes of action"). The test has no application in an *ultra vires* challenge, which operates outside of the

[14] Congress may displace federal courts' equitable power to enjoin unlawful executive action, but a precluding statute must at least display an "intent to foreclose" injunctive relief. *Armstrong*, 135 S. Ct. at 1385. Courts have found such implied foreclosure where (1) the statute provides an express administrative remedy, and (2) the statute is otherwise judicially unadministrable in nature. *Id.* at 1385–86. No party contends that the statutes at issue in this case either expressly foreclose equitable relief or provide an express administrative remedy, which might warrant a finding of implied foreclosure of equitable relief.

APA framework. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) ("Appellants need not, however, show that their interests fall within the zones of interests of the constitutional and statutory powers invoked by the President in order to establish their standing to challenge the interdiction program as *ultra vires*."); *see also* 33 Charles Alan Wright et al., Federal Practice and Procedure § 8302 (2d ed. 2019) (explaining that the "zone of interests" test is to determine whether a plaintiff "seeks to protect interests that 'arguably' fall within the 'zone of interests' protected by that provision"). In other words, where a plaintiff seeks to vindicate a right protected by a statutory provision, the plaintiff must demonstrate that it arguably falls within the zone of interests Congress meant to protect by enacting that provision. But where a plaintiff seeks equitable relief against a defendant for exceeding its statutory authority, the zone-of-interests test is inapposite. Any other interpretation would lead to absurd results. The very nature of an *ultra vires* action posits that an executive officer has gone beyond what the statute permits, and thus beyond what Congress contemplated. It would not make sense to demand that Plaintiffs—who otherwise have standing—establish that Congress contemplated that the statutes allegedly violated would protect Plaintiffs' interests. It is no surprise, then, that the Supreme Court's recent discussion of *ultra vires* review in *Armstrong* did not once reference this test.

In reviewing the lawfulness of Defendants' conduct, the Court thus begins each inquiry by determining whether the disputed action exceeds statutory authority. For unless an animating statute sanctions a challenged action, a court need not reach the second-level question of whether it would be unconstitutional for Congress to sanction such conduct. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (explaining the "well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case") (quoting *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)). This is not to say, however, that the yardstick of statutory authority overlooks constitutional concerns entirely. "The so-called canon of constitutional avoidance . . . counsel[s] that ambiguous statutory language be construed to avoid serious constitutional doubts." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). Nonetheless, a court presented with both *ultra vires* and constitutional claims

should begin by determining whether the statutory authority supports the action challenged, and only reach the constitutional analysis if necessary.

a. Sections 284 and 8005

At the President's direction, Defendants intend to divert $2.5 billion, $1 billion of which is the subject of the pending motion, to the DoD's drug interdiction fund for border barrier construction.[15] To do so, Defendants rely on Section 284(b)(7), which authorizes the Secretary of Defense to support other federal agencies for the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *See The Funds Available to Address the National Emergency at Our Border*, The White House, https://www.whitehouse.gov/briefings-statements/funds-available-address-national-emergency-border (Feb. 26, 2019). To satisfy the President's directive, Defendants intend to rely on their reprogramming authority under Section 8005, and plan to "augment" the drug interdiction fund with the entire $2.5 billion in funds that DoD will then use for the construction. *Id.*

Plaintiffs challenge both the augmentation of the drug interdiction fund through Section 8005 and the use of funds from the drug interdiction fund under Section 284. Turning first to the augmentation of funds, Section 8005 authorizes the reprogramming of up to $4 billion "of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense." The transfer must be (1) either (a) DoD working capital funds or (b) "funds made available in this Act to the [DoD] for military functions (except military construction)," (2) first determined by the Secretary of Defense as necessary in the national interest, (3) for higher priority items than those for which originally appropriated, (4) based on unforeseen (5) military requirements, and (6) in no case where the item for which funds are

[15] The Court here only considers the lawfulness of Defendants' March 25, 2019 invocation of Section 8005 to reprogram $1 billion, given the parties' agreement that this order need not address Defendants' recently announced intent to use Sections 8005, 9002, and 284 to fund border barrier construction in the El Centro Sector and Tucson Sector Projects. The parties reached this agreement after counsel for Defendants represented at the hearing on this motion that "no construction will start [with those funds] until at least 45 days from" the May 17, 2019 hearing date. *See* Dkt. No. 138 at 55:16–17. The parties confirmed that they would agree to a schedule to supplement the record, to permit the Court to review in a timely manner the lawfulness of the new reprogramming, under the framework set forth in this order. *Id.* at 59:14–60:2. The parties have since agreed on a schedule. *See* Dkt. No. 142.

requested has been denied by Congress. Plaintiffs argue that Defendants' actions fail the last three requirements. The Court first considers whether the reprogramming Defendants propose here is for an item for which funds were requested but denied by Congress.

i. Plaintiffs are Likely to Show That the Item for Which Funds Are Requested Has Been Denied by Congress.

Plaintiffs argue that Defendants are transferring funds for a purpose previously denied by Congress. Mot. at 16. Defendants dispute, however, whether Congress's affirmative appropriation of funds in the CAA to DHS constitutes a "denial" of appropriations to DoD's "counter-drug activities in furtherance of DoD's mission under [Section] 284." Opp. at 16. In their view, "the item" for which funds are requested, for present purposes, is counterdrug activities under Section 284. *Id.* And Defendants maintain that "nothing in the DHS appropriations statute indicates that Congress 'denied' a request to fund DoD's statutorily authorized counter-drug activities, which expressly include fence construction." *Id.* In other words, even though DoD's counterdrug authority under Section 284 is merely a pass-through vessel for Defendants to funnel money to construct a border barrier that will be turned over to DHS, Citizen Groups RJN Ex. I, at 10, Defendants argue that the Court should only consider whether Congress denied funding to DoD.

Plaintiffs have shown a likelihood of success as to their argument that Congress previously denied "the item for which funds are requested," precluding the proposed transfer. On January 6, 2019, the President asked Congress for "$5.7 billion for construction of a steel barrier for the Southwest border," explaining that the request "would fund construction of a total of approximately 234 miles of new physical barrier." Citizen Groups RJN Ex. A, at 1. The request noted that "[a]ppropriations bills for fiscal year (FY) 2019 that have already been considered by the current and previous Congresses are inadequate to fully address these critical issues," to include the need for barrier construction funds. *Id.* The President's request did not specify the mechanics of how the $5.7 billion sought would be used for the proposed steel barrier construction. *Id.* Nonetheless, in the CAA passed by Congress and signed by the President, Congress appropriated only $1.375 billion for the construction of pedestrian fencing, of a specified

type, in a specified sector, and appropriated no other funds for barrier construction. The Court agrees with Plaintiffs that they are likely to show that the proposed transfer is for an item for which Congress denied funding, and that it thus runs afoul of the plain language of Section 8005 and 10 U.S.C. § 2214(b) ("Section 2214").[16]

As Defendants acknowledge, in interpreting a statute, the Court applies the principle that "the plain language of [the statute] should be enforced according to its terms, in light of its context." *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1210 (9th Cir. 2015). In its *amicus* brief, the House recounts legislative history that provides critical context for the Court's interpretative task. The House explains that the "denied by the Congress" restriction was imposed on DoD's transfer authority in 1974 to "tighten congressional control of the reprogramming process." Dkt. No. 47 ("House Br.") at 10 (citing H.R. Rep. No. 93-662, at 16 (1973)). The House committee report on the appropriations bill from that year explained that "[n]ot frequently, but on some occasions, the Department ha[d] requested that funds which have been specifically deleted in the legislative process be restored through the reprogramming process," and that "[t]he Committee believe[d] that to concur in such actions would place committees in the position of undoing the work of the Congress." H.R. Rep. No. 93-662, at 16. Significantly, the Committee stated that such a position would be "untenable." *Id.* Consistent with this purpose, Congress has described its intent that appropriations restrictions of this sort be "construed strictly" to "prevent the funding for programs which have been considered by Congress and for which funding has been denied." *See* H.R. Rep. No. 99-106, at 9 (1985) (discussing analogous appropriations restriction in Pub. L. No. 99-169, § 502(b), 99 Stat. 1005 (codified at 50 U.S.C. § 3094(b)).

The Court finds that the language and purpose of Section 8005 and Section 2214(b) likely preclude Defendants' attempt to transfer $1 billion from funds Congress previously appropriated for military personnel costs to the drug interdiction fund for the construction of a border barrier.

[16] *See* Fox News, *Mick Mulvaney on chances of border deal, Democrats ramping up investigation of Trump admin*, YouTube (Feb. 10, 2019), https://www.youtube.com/watch?v=l_Z0xx_zS0M (statement by Acting White House Chief of Staff that "[w]e'll take as much money as you can give us, and then we'll go off and find the money someplace else, legally, in order to secure that southern barrier. But this is going to get built, with or without Congress.").

Defendants argue that "Congress never denied DoD funding to undertake the [Section] 284 projects at issue," Opp. at 16, such that Section 8005 and Section 2214(b) are satisfied. But in the Court's view, that reading of those sections is likely wrong, when the reality is that Congress was presented with—and declined to grant—a $5.7 billion request for border barrier construction. Border barrier construction, expressly, is the item Defendants now seek to fund via the Section 8005 transfer, and Congress denied the requested funds for that item. *See* 10 U.S.C. § 2214(b) (explaining that transfer authority "may not be used if *the item to which the funds would be transferred* is an item for which Congress has denied funds") (emphasis added). And Defendants point to nothing in the language or legislative history of the statutes in support of their assertion that only explicit congressional denial of funding for "[Section] 284 projects," or even DoD projects generally, would trigger Section 8005's limitation. Opp. at 16. It thus would be inconsistent with the purpose of these provisions, and would subvert "the difficult judgments reached by Congress," *McIntosh*, 833 F.3d at 1175, to allow Defendants to circumvent Congress's clear decision to deny the border barrier funding sought here when it appropriated a dramatically lower amount in the CAA. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring) ("It is quite impossible . . . when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.").

ii. Plaintiffs are Likely to Show That the Transfer is Not Based on "Unforeseen Military Requirements."

Plaintiffs next argue that any need for border barrier construction—to the extent there is a need—was long "foreseen," noting that the President supported his fiscal year 2019 budget request for border barrier funding with a description that such a barrier "is critical to combating the scourge of drug addiction that leads to thousands of unnecessary deaths." Mot. at 16 (quoting Citizen Groups RJN Ex. R, at 16).

In response, Defendants again seek to minimize the pass-through nature of DoD's counter-

drug activities authority under Section 284. While not disputing that the President requested—and was denied—more-comprehensive funds for border barrier construction, Defendants instead note that "[t]he President's 2019 budget request did not propose additional funding for DoD's counterdrug activities under [Section] 284." Opp. at 16. Defendants then argue that because DHS only formally requested Section 284 support in February 2019, the need for Section 284 support only become foreseen in February 2019. *Id.* at 16–17.

Separate and apart from the Court's analysis above regarding whether Congress previously denied funding for the relevant item, Plaintiffs also have shown a likelihood of success as to their argument that Defendants fail to meet the "unforeseen military requirement" condition for the reprogramming of funds under Section 8005. As the House notes in its *amicus* brief, DoD has used this authority in the past to transfer funds based on unanticipated circumstances (such as hurricane and typhoon damage to military bases) justifying a departure from the scope of spending previously authorized by Congress. House Br. at 10 (citing Office of the Under Secretary of Defense (Comptroller), DoD Serial No. FY 04-37 PA, Reprogramming Action (Sept. 3, 2004)). Here, however, Defendants claim that what was "unforeseen" was "[t]he need for DoD to exercise its [Section] 284 authority to provide support for counter-drug activities," which "did not arise until February 2019, when DHS requested support from DoD to construct fencing in drug trafficking corridors." Opp. at 16.

Defendants' argument that the need for the requested border barrier construction funding was "unforeseen" cannot logically be squared with the Administration's multiple requests for funding for exactly that purpose dating back to at least early 2018. *See* Citizen Groups Ex. R (February 2018 White House Budget Request describing "the Administration's proposal for $18 billion to fund the border wall"); *see also* States RJN Exs. 14–20 (failed bills); *id.* Ex. 21 (December 11, 2018 transcript from a meeting with members of Congress, where the President stated that "if we don't get what we want [for border barrier construction funding], one way or the other – whether it's through you, through a military, through anything you want to call [sic] – I will shut down the government"); Case No. 4:19-cv-00872-HSG, ECF No. 89-12, at 14 (testimony of Defendant Shanahan before the House Armed Services Committee explaining that the

Administration discussed unilateral reprogramming "prior to the declaration of a national emergency"). Further, even the purported need for DoD to provide DHS with support for border security has similarly been long asserted. *See* States RJN Ex. 27 (April 4, 2018 presidential memorandum directing the Secretary of Defense to support DHS "in securing the southern border and taking other necessary actions" due to "[t]he crisis at our southern border"). Defendants' suggestion that by not specifically seeking border barrier funding under Section 284 by name, the Administration can later contend that as far as DoD is concerned, the need for such funding is "unforeseen," is not likely to withstand scrutiny.

Interpreting "unforeseen" to refer to the request for DoD assistance, as opposed to the underlying "requirement" at issue, also is not reasonable. By Defendants' logic, *every* request for Section 284 support would be for an "unforeseen military requirement," because only once the request was made would the "need to exercise authority" under the statute be foreseen. There is no logical reason to stretch the definition of "unforeseen military requirement" from requirements that the government as a whole plainly cannot predict (like the need to repair hurricane damage) to requirements that plainly *were* foreseen by the government as a whole (even if DoD did not realize that it would be asked to pay for them until after Congress declined to appropriate funds requested by another agency). Nothing presented by the Defendants suggests that its interpretation is what Congress had in mind when it imposed the "unforeseen" limitation, especially where, as here, multiple agencies are openly coordinating in an effort to build a project that Congress declined to fund. The Court thus finds it likely that Plaintiffs will succeed on this claim.[17]

iii. Accepting Defendants' Proposed Interpretation of Section 8005's Requirements Would Likely Raise Serious Constitutional Questions.

The Court also finds it likely that Defendants' reading of these provisions, if accepted, would pose serious problems under the Constitution's separation of powers principles. Statutes must be interpreted to avoid a serious constitutional problem where another "construction of the

[17] Because the Court has found that Plaintiffs are likely to succeed on their argument that the reprogramming violates the two Section 8005 conditions discussed above, it need not reach at this stage their argument that the border barrier project is not a "military requirement" at all.

statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (internal quotation marks and citations omitted). Constitutional avoidance is "thus a means of giving effect to congressional intent," as it is presumed that Congress did not intend to create an alternative interpretation that would raise serious constitutional concerns. *Clark v. Martinez*, 543 U.S. 371, 382 (2005). Courts thus "have read significant limitations into . . . statutes in order to avoid their constitutional invalidation." *Zadvydas*, 533 U.S. at 689 (citation omitted).

As Plaintiffs point out, the upshot of Defendants' argument is that the Acting Secretary of Defense is authorized to use Section 8005 to funnel an additional $1 billion to the Section 284 account for border barrier construction, notwithstanding that (1) Congress decided to appropriate only $1.375 billion for that purpose; (2) Congress's *total* fiscal year 2019 appropriation available under Section 284 for "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States" was $517 million, much of which already has been spent; and (3) Defendants have acknowledged that the Administration considered reprogramming funds for border barrier construction even before the President signed into law Congress's $1.375 billion appropriation. *See* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, div. A, tit. VI, 132 Stat. 2981, 2997 (2018) (appropriating $881 million in funds "[f]or drug interdiction and counter-drug activities" in fiscal year 2019, $517 million of which is "for counter-narcotics support"); Dkt. No. 131 at 4 (indicating that Defendants have not used—and do not intend to use in the near future—any funds appropriated by Congress for counter-narcotics support for border barrier construction); Case No. 4:19-cv-00872-HSG, ECF No. 89-12, at 14 (testimony of Defendant Shanahan before the House Armed Services Committee explaining that the Administration discussed unilateral reprogramming "prior to the declaration of a national emergency"). Put differently, according to Defendants, Section 8005 authorizes the Acting Secretary of Defense to essentially triple—or quintuple, when considering the recent additional $1.5 billion reprogramming—the amount Congress allocated to this account for these purposes, notwithstanding Congress's recent and clear actions in passing the CAA, and the relevant

committees' express disapproval of the proposed reprogramming. *See* States RJN Ex. 35 ("The committee denies this request. The committee does not approve the proposed use of [DoD] funds to construct additional physical barriers and roads or install lighting in the vicinity of the United States border."); *id.* Ex. 36 ("The Committee has received and reviewed the requested reprogramming action . . . . The Committee denies the request."). Moreover, Defendants' decision not to refer specifically to Section 284 in their $5.7 billion funding request deprived Congress of even the *opportunity* to reject or approve this funding item.[18]

The Court agrees with Plaintiffs that reading Section 8005 to permit this massive redirection of funds under these circumstances likely would amount to an "unbounded authorization for Defendants to rewrite the federal budget," Reply at 14, and finds that Defendants' reading likely would violate the Constitution's separation of powers principles. Defendants contend that because Congress did not reject (and, indeed, never had the opportunity to reject) a specific request for an appropriation to the Section 284 drug interdiction fund, DoD can use Section 8005 to route anywhere up to the $4 billion cap set by that statute, to be spent for the benefit of DHS via Section 284. But this reading of DoD's authority under the statute would render meaningless Congress's constitutionally-mandated power to assess proposed spending, then render its binding judgment as to the scope of permissible spending. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (holding that the interpretation of statutes "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude"); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.") (internal quotation marks omitted). This is especially true given that Congress has repeatedly rejected legislation that would

[18] Defendants do not convincingly explain why the amount now sought to be transferred under Section 8005 could not have been sought directly from Congress as part of the fiscal year 2019 appropriation to the DoD Section 284 account to cover requests for counterdrug support, given that the President has consistently maintained since before taking office that border barrier funding is necessary. If the answer is that the Administration expected, or hoped, that Congress would appropriate the funds to DHS directly, that highlights rather than mitigates the present problem with Defendants' position.

have funded substantially broader border barrier construction, as noted above, deciding in the end to appropriate only $1.375 billion. *See City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018) ("In fact, Congress has frequently considered and thus far rejected legislation accomplishing the goals of the Executive Order. The sheer amount of failed legislation on this issue demonstrates the importance and divisiveness of the policies in play, reinforcing the Constitution's 'unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.'") (citing *Chadha*, 462 U.S. at 959). In short, the Constitution gives Congress the exclusive power "not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation," *McIntosh*, 833 F.3d at 1172, and "Congress cannot yield up its own powers" in this regard, *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring). Defendants' interpretation of Section 8005 is inconsistent with these principles.

While Defendants argue that the text and history of Section 284 suggest that their proposed transfer and use of the funds are within the scope of what Congress has permitted previously, Opp. at 18, that argument only highlights the serious constitutional questions that accepting their position would create. First, Defendants note that in the past DoD has completed what they characterize as "large-scale fencing projects" with Congress's approval. Opp. at 18 (citing H.R. Rep. No. 103-200, at 330–31 (1993)). But Congress's past approval of relatively small expenditures, that were well within the total amount allocated by Congress to DoD under Section 284's predecessor, speaks not at all to Defendants' current claim that the Acting Secretary has authority to redirect sums over a hundred orders of magnitude greater to that account in the face of Congress's appropriations judgment in the CAA. Similarly, whether or not Section 284 formally "limits" the Secretary to "small scale construction" (defined in Section 284(i)(3) as "construction at a cost not to exceed $750,000 for any project"), reading the statute to suggest that Congress requires reporting of tiny projects but nonetheless has delegated authority to DoD to conduct the massive funnel-and-spend project proposed here is implausible, and likely would raise serious questions as to the constitutionality of such an interpretation. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (noting that Congress "does not, one might say, hide elephants

in mouseholes").

Similarly, if "unforeseen" has the meaning that Defendants claim, Section 8005 would give the agency making a request for assistance under Section 284 complete control over whether that condition is met, simply by virtue of the timing of the request. As here, DHS could wait and see whether Congress granted a requested appropriation, then turn to DoD if Congress declined, and DoD could always characterize the resulting request as raising an "unforeseen" requirement because it did not come earlier. Under this interpretation, DoD could in essence make a de facto appropriation to DHS, evading congressional control entirely. The Court finds that this interpretation likely would pose serious problems under the Appropriations Clause, by ceding essentially boundless appropriations judgment to the executive agencies.

Finally, the Court has serious concerns with Defendants' theory of appropriations law, which presumes that the Executive Branch can exercise spending authority unless Congress explicitly restricts such authority by statute. Counsel for Defendants advanced this theory at the hearing on this motion, arguing that when Congress passed the recent DoD appropriations act containing Section 8005, it "could have" expressly "restrict[ed] that authority" to preclude reprogramming funds for border barrier construction. *See* Dkt. No. 138 at 76:16–77:3. According to Defendants: "If Congress had wanted to deny DOD this specific use of that [reprogramming] authority, that's something it needed to actually do in an explicit way in the appropriations process. And it didn't." *Id.* at 77:21–24. But it is not Congress's burden to prohibit the Executive from spending the Nation's funds: it is the Executive's burden to show that its desired use of those funds was "affirmatively approved by Congress." *See FLRA*, 665 F.3d at 1348 ("[A]ll uses of appropriated funds must be affirmatively approved by Congress," and "the mere absence of a prohibition is not sufficient."). To have this any other way would deprive Congress of its absolute control over the power of the purse, "one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several departments.'" *Id.* at 1346–47 (quoting The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961)).

To the extent Defendants believe the Ninth Circuit's decision in *McIntosh* suggests anything to the contrary, the Court disagrees. Defendants appeared to argue at the hearing on this

motion that *McIntosh* stands for the principle that the Executive enjoys unfettered spending power unless Congress crafts an appropriations rider cabining such authority. *See* Dkt. No. 138 at 75:5–10. As counsel for Defendants put it, "[Plaintiffs] want to say that something was denied by Congress if it wasn't funded by Congress. . . . But that is just not how these statutes are written and that's not how [*McIntosh*] tells us we interpret the appropriations statute." *Id.* at 75:13–20. But Defendants overlook that no party in *McIntosh* disputed that the government's use of funds was authorized but for the appropriations rider at issue in that case. *See* 833 F.3d at 1175 ("The parties dispute whether the government's spending money on their prosecutions violates [the appropriations rider]."). It is thus unremarkable that when faced with a dispute exclusively concerning whether the government's otherwise-authorized spending of money violated an appropriations rider, the Ninth Circuit held that "[i]t is a fundamental principle of appropriations law that we may only consider the text of an appropriations rider." *Id.* at 1178; *see also* Dkt. No. 138 at 75:5–10 (defense counsel relying on this language from *McIntosh*).

Unlike in *McIntosh*, where the sole dispute concerned the scope of an external limitation on an otherwise-authorized spending of money, the present dispute concerns the scope of limitations within Section 8005 itself on the authorization of reprogramming funds. Whether Congress gives authority in the first place is not the same issue as whether Congress later restricts that authority. And it cannot be the case that Congress must draft an appropriations rider to breathe life into the internal limitations in Section 8005 establishing that the Executive may only reprogram money based on unforeseen military requirements, and may not do so where the item for which funds are requested has been denied by Congress. To adopt Defendants' position would read out these limitations entirely, which the Court cannot do. *See Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 740 (2017) ("Whenever possible, however, we should favor an interpretation that gives meaning to each statutory provision."). To give meaning to—and thus to construe the scope of—these internal limitations is wholly consistent with *McIntosh*, which explained that the Executive's authority to spend is at all times limited "by the text of the appropriation." 833 F.3d at 1178 (internal quotation marks omitted).

For all of these reasons, the Court finds that Plaintiffs have shown a likelihood of success

as to their argument that the reprogramming of $1 billion under Section 8005 to the Section 284 account for border barrier construction is unlawful.[19]

b. Section 2808

At the President's direction, the DoD intends to use up to $3.6 billion in military construction funding to facilitate border barrier construction. Defendants rely on Section 2808, under which the Secretary of Defense may "undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law." 10 U.S.C. § 2808(a). As is relevant here, Section 2808 requires that (1) the President first declare a national emergency in accordance with the NEA that "requires use of the armed forces," (2) the use of funds be for "military construction projects," and (3) the military construction projects be "necessary to support such use of the armed forces." *Id.* Plaintiffs contend that Defendants' plan to use Section 2808 to build a barrier on the U.S.-Mexico border fails all three requirements.

Under the circumstances, it is unclear how border barrier construction could reasonably constitute a "military construction project" such that Defendants' invocation of Section 2808 would be lawful. Section 2808 authorizes the Secretary of Defense to "undertake military construction projects." And Congress defined the term "military construction," as it is used in Section 2808, to "include[] any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road." 10 U.S.C.

[19] Defendants have now acknowledged that all of the money they plan to spend on border barrier construction under Section 284 is money transferred into that account under Section 8005. *See* Dkt. No. 131 at 4. Given this acknowledgment, and the Court's finding that Plaintiffs are likely to show that the Section 8005 reprogramming is unlawful, the Court need not at this stage decide whether Defendants would have been permitted to use for border barrier construction any remaining funds that Congress appropriated to the Section 284 account for fiscal year 2019. The Court notes that the House confirmed in its own lawsuit that it "does not challenge the expenditure of any remaining appropriated funds under section 284 on the construction of a border wall." United States House of Representatives' Application for a Preliminary Injunction at 30, *U.S. House of Representatives v. Mnuchin*, No. 1:19-cv-00969 (TNM) (D.D.C. Apr. 23, 2019), ECF No. 17; *see also* House Br. at 17 (requesting preliminary injunction "prohibiting defendants from transferring and spending funds in excess of what Congress appropriated for counter-narcotics support under 10 U.S.C. § 284").

§ 2801(a). Congress in turn defined the term "military installation" to "mean[] a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control." *Id.* § 2801(c)(4).

Plaintiffs reason that border barrier construction does not constitute construction "carried out with respect to a military installation," because (1) the U.S.-Mexico border is not a military "base, camp, post, station, yard, center" or "defense access road;" and (2) securing the border is not an "activity under the jurisdiction of the Secretary of a military department." Mot. at 14. Instead, Congress assigned responsibility for "[s]ecuring the borders" to DHS. *See* 6 U.S.C. § 202. Defendants respond that although the statute defines both "military construction" and its nested term, "military installation," "[b]road terms defining military construction as 'includ[ing]' (but not limited to, *see* 10 U.S.C. § 101(f)(4)) construction with respect to a military installation, and defining military installation to include non-specified 'other activity,' are not the kind of clear and mandatory statutory language that is a necessary predicate to an ultra vires claim." Opp. at 23.

Defendants' arguments prove too much. As explained above, Defendants misunderstand the standard for *ultra vires* review. More to the merits, the plain language of the relevant statutory definitions does not demonstrate the sort of unbounded authority that Defendants suggest. Turning first to the statutory definition of "military construction," that it uses the word "includes" when it provides that military construction "includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation" is irrelevant. No one disputes that border barrier construction constitutes "construction." What matters is that Section 2801(a) limits such construction—however broad that term might be—to construction related to a military installation. In other words, the critical language of Section 2801(a) is not the word "includes," it is the condition "with respect to a military installation."

Turning next to the statutory definition of "military installation," Section 2801(c)(4) provides in relevant part that it "means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." And Defendants make no

attempt to characterize the U.S.-Mexico border or a border barrier as a "base, camp, post, station, yard, [or] center." Nor could they. Defendants instead contend that border barrier construction is authorized under the catch-all term "other activity." *See* Dkt. No. 138 at 92:9–93:22.

In interpreting Section 2801 to determine whether Defendants' plan to construct a barrier on the U.S.-Mexico border falls within the "other activity" category, the Court applies "traditional tools of statutory construction." *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257 (9th Cir. 1994), *amended on denial of reh'g by* 99 F.3d 321 (9th Cir. 1996). The Court "begin[s] with the statute's language, which is conclusive unless literally applying the statute's text demonstrably contradicts Congress's intent." *Chemehuevi Indian Tribe v. Newsom*, 919 F.3d 1148, 1151 (9th Cir. 2019). "When deciding whether the language is plain, courts must read the words in their context and with a view to their place in the overall statutory scheme." *Id.* (quoting *Rainero v. Archon Corp.*, 844 F.3d 832, 837 (9th Cir. 2016) (internal quotation marks and alterations omitted)).

Applying traditional tools of statutory construction, Section 2801 likely precludes treating the southern border as an "other activity." Defendants on this point fail to appreciate that the words immediately preceding "or other activity" in Section 2801(c)(4)— "a base, camp, post, station, yard, [and] center"—provide contextual limits on the catch-all term. The Court thus relies on the doctrine of *noscitur a sociis*, "which is that a word is known by the company it keeps." *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995). Courts apply this rule "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth to the Acts of Congress.'" *Id.* (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). The Supreme Court has relied on this canon of statutory interpretation many times when construing detailed statutory lists followed by catch-all-type terms. Most recently, in *Epic Systems Corp. v. Lewis*, the Court limited the term "other concerted activities" in Section 7 of the National Labor Relations Act to refer to "things employees 'just do' for themselves in the course of exercising their right to free association in the workplace," rather than any concerted activity whatsoever—including class and collective actions—because the term appeared at the end of a detailed list of specific activities, none of which "speak[] to the procedures judges or

arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum." 138 S. Ct. 1612, 1625 (2018). Before that, in *Gustafson*, the Supreme Court construed the word "communication" as used in Section 2(10) of the Securities Act of 1933 to "refer[] to a public communication" and not any communication whatsoever, because the word followed a list of other terms—"prospectus, notice, circular, advertisement, [and] letter"—in consideration of which "it [was] apparent that the list refers to documents of wide dissemination." 513 U.S. at 575.

Noscitur a sociis applies with equal force in the present circumstance. The term "other activity" appears after a list of closely related types of discrete and traditional military locations: "a base, camp, post, station, yard, [and] center." It is thus proper to construe "other activity" as referring to similar discrete and traditional military locations. The Court does not readily see how the U.S.-Mexico border could fit this bill.

The Court also finds relevant the *ejusdem generis* canon of statutory interpretation, which counsels that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dept. of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001)). At the hearing on this motion, Defendants argued that the term "other activity" "capture[s] everything under the jurisdiction of the secretary of a military department." Dkt. No. 138 at 92:9–13. The Court disagrees. Had Congress intended for "other activity" in Section 2801(c)(4) to be so broad as to transform literally any activity conducted by a Secretary of a military department into a "military installation", there would have been no reason to include a list of specific, discrete military locations. *See Yates v. United States*, 135 S. Ct. 1074, 1087 (2015) ("Had Congress intended 'tangible object' in § 1519 to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to 'record' or 'document.' The Government's unbounded reading of 'tangible object' would render those words misleading surplusage."); *CSX Transp., Inc. v. Ala. Dept. of Revenue*, 562 U.S. 277, 295 ("We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless.").

To be clear, "other activity" is not an empty term. Congress undoubtedly contemplated that military installations would encompass more than just "a base, camp, post, station, yard, [or] center." But the Court need not stake out the term's outer limits here. All that matters for present purposes is that, in context and with an eye toward the overall statutory scheme, nothing demonstrates that Congress ever contemplated that "other activity" has such an unbounded reading that it would authorize Defendants to invoke Section 2808 to build a barrier on the southern border.

Despite its concerns with Defendants' arguments on this point, the Court need not now address whether Plaintiffs are likely to succeed on the merits of their claim that Defendants' ultimate plan to divert funds under Section 2808 is *ultra vires*. That is because, as discussed below, Plaintiffs have not met their independently necessary burden of showing a likelihood of irreparable harm from the use of funds under Section 2808 for construction at as-yet-unspecified locations so as to be entitled to a preliminary injunction.

c. NEPA

After Plaintiffs filed the instant motion—and one day before Defendants filed their opposition—the Acting Secretary of Homeland Security invoked his authority under Section 102(c) of IIRIRA to waive any NEPA requirements for construction in the El Paso and Yuma sectors. *See* Opp. at 25–26; *see also* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 17185-01 (Apr. 24, 2019); REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 231, 306 (May 11, 2005) (amending Section 102(c) to reflect that the Secretary "ha[s] the authority to waive all legal requirements" that, in the "Secretary's sole discretion," are "necessary to ensure expeditious construction" of barriers and roads). The Acting Secretary later waived NEPA requirements for the El Centro and Tucson Sectors Projects as well, on the same basis. *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,798 (May 15, 2019); Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,800 (May 15, 2019).

Defendants contend that such waivers preclude Plaintiffs from advancing a NEPA claim. Opp. at 26 (citing *In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1213, 1221 (9th Cir. 2019)). Plaintiffs respond that DHS's authority to waive NEPA requirements for construction under IIRIRA does not extend to construction undertaken by DoD under its own spending authority. Reply at 18–19. Plaintiffs further contend that "Defendants' argument is incompatible with their own claim that they are not constructing the El Paso and Yuma sections of border wall under IIRIRA authority, but instead under the wholly separate DoD authority," and suggest that "Defendants cannot have it both ways." Reply at 18–19.

Neither set of Plaintiffs appears to contest that the waivers, if applicable, would be dispositive of the NEPA claims. *See, e.g.*, Plaintiff States' Reply at 16, *California v. Trump*, No. 4:19-cv-00872-HSG (N.D. Cal. May 2, 2019), ECF No. 112 ("States Reply") ("Plaintiffs do not dispute *DHS's* ability to waive NEPA compliance when constructing barriers pursuant to [IIRIRA], with funds specifically appropriated by Congress to be used for that construction.") (emphasis in original); *see also In re Border Infrastructure Envtl. Litig.*, 915 F.3d at 1221 ("[A] valid waiver of the relevant environmental laws under section 102(c) is an affirmative defense to all the environmental claims [including NEPA claims]," and is "dispositive of [those] claims."). But Plaintiffs contend that "the DHS Secretary's waiver under IIRIRA does not waive *DOD's* obligations to comply with NEPA prior to proceeding with El Paso Project 1 under *DOD's* statutory authority, 10 U.S.C. § 284, and using *DOD's* appropriations," so that "DHS's waiver has no application to this project." States Reply at 16 (emphasis added); *see also* Reply at 19 ("Defendants identify no statutory authority for a waiver for 'expeditious construction' under DOD's § 284 authority, and none exists.").

The Court finds that Plaintiffs are not likely to succeed on their NEPA argument because of the waivers issued by DHS. DoD's authority under Section 284 is derivative. Under the statute, DoD is limited to providing support (including construction support) to other agencies, and may invoke its authority only in response to a request from such an agency. *See* 10 U.S.C. § 284 ("The Secretary of Defense may provide support for the counterdrug activities . . . of any other department or agency of the Federal Government," including support for "[c]onstruction of roads

and fences," if "such support is requested . . . by the official who has responsibility for the counterdrug activities."). Here, DHS has made such a request, invoking "its authority under Section 102 of IIRIRA to install additional physical barriers and roads" in designated areas, seeking support for its "ability to impede and deny illegal entry and drug smuggling activities." Citizen Groups RJN Ex. I, at 1. DHS requested DoD's assistance "[t]o support DHS's action under Section 102." *Id.* at 2. Plaintiffs' argument would require the Court to find that even though it is undisputed that DHS could waive NEPA's requirements if it were paying for the projects out of its own budget, that waiver is inoperative when DoD provides support in response to a request from DHS. The Court finds it unlikely that Congress intended to impose different NEPA requirements on DoD when it acts in support of DHS's Section 102 authority in response to a direct request under Section 284 than would apply to DHS itself.[20] *See Defs. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 121, 129 (D.D.C. 2007) (finding DHS's Section 102 waiver authority authorized the DHS Secretary to waive legal requirements where the U.S. Army Corps of Engineers, a federal agency within the DoD, was constructing border fencing "on behalf of DHS").[21]

2. Likelihood of Irreparable Injury

Plaintiffs advance three theories of irreparable harm: (1) harm to their members' aesthetic and recreational interests in areas threatened by border barrier construction; (2) constitutional harm; and (3) harm to Plaintiff SBCC and its member organizations' ability to carry out their missions. Mot. at 22–25; Reply at 19–24. Critical to this analysis is that while Defendants have committed to fund border barrier construction in the El Paso Sector 1 and Yuma Sector 1 projects

[20] Plaintiff States argue that "[i]n another context, Congress explicitly allows the DOD Secretary to request 'the head of another agency responsible for the administration of navigation or vessel-inspection laws to waive compliance with those laws to the extent the Secretary considers necessary.'" States Reply at 17 (citing 46 U.S.C. § 501(a)). The Court finds this statute to be irrelevant to the issue here. In this case, DoD is acting solely in response to DHS's request for support under Section 102; DHS has undisputed authority to issue waivers under that section; and it would not make sense to make NEPA compliance a condition of DoD's derivative support notwithstanding DHS's waiver.

[21] To the extent Plaintiffs' argument is that the government "cannot have it both ways," the Court agrees, to the extent it found a likelihood of success as to Plaintiffs' Section 8005 argument, as discussed in Section IV.B.1.a, above.

using funds reprogrammed and subsequently used under Sections 8005 and 284, Defendants have not committed to fund any border barrier construction using Section 2808. Because of this distinction, the Court addresses the two categories separately.

a. Sections 8005 and 284

The Court finds that Plaintiffs have demonstrated a likelihood of irreparable harm to their members' aesthetic and recreational interests in the areas known as El Paso Sector Project 1 and Yuma Sector Project 1.

As the Ninth Circuit has explained, "it would be incorrect to hold that all potential environmental injury warrants an injunction." *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014). "Environmental injury," however, "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 545 (1987). Plaintiffs must nonetheless demonstrate that irreparable injury "is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. Mere "possibility" of irreparable harm does not merit a preliminary injunction. *Id.* But it is well-established in the Ninth Circuit that an organization can demonstrate irreparable harm by showing that the challenged action will injure its members' enjoyment of public land. *See All. for Wild Rockies*, 632 F.3d at 1135.

Turning to Plaintiffs' aesthetic and recreational interests, Plaintiffs provide declarations from several members, detailing how Defendants' proposed use of funds reprogrammed under Section 8005 and then used under Section 284 for border barrier construction will harm their ability to recreate in and otherwise enjoy public land along the border. *See* Dkt. No. 30 ("Del Val Decl.") ¶¶ 7–9 (alleging harm from border barrier construction and the accompanying lighting in the Yuma Sector Project 1 to declarant's "ability to fish" and general enjoyment of natural environment); Dkt. No. 31 ("Munro Decl.") ¶ 11 (alleging harm from border barrier construction in El Paso Sector Project 1 to declarant's "happiness and sense of fulfillment," which she "derive[s] from visiting these beautiful landscapes"); Dkt. No. 34 ("Bixby Decl.") ¶¶ 6, 12 (alleging harm from border barrier construction in El Paso Sector Project 1 to declarant's hiking

and camping interests); Dkt. No. 35 ("Walsh Decl.") ¶¶ 8–12 (alleging harm from border barrier construction in El Paso Sector Project 1 to declarant's recreational interests, including "bird watching and hiking").

Defendants argue that Plaintiffs' alleged recreational harms are insufficient for two reasons. First, Defendants argue that Plaintiffs have not demonstrated "that any species-level impacts are likely as a result of border wall construction." *See* Opp. at 29. But Defendants here misunderstand Plaintiffs' theory. Plaintiffs' declarants nowhere state that their recreational interest is merely the enjoyment of a particular species. Defendants' second argument is that their planned "replacement of existing pedestrian border infrastructure . . . will not change conditions where Mr. Del Val fishes." *Id.* at 30–31. But Defendants here understate the effects of what they now characterize as mere "replacement of existing pedestrian border infrastructure." By Defendants' own description, they intend to replace four-to-six-foot vehicle barriers in the Yuma Sector Project 1 area with a thirty-foot "bollard wall," where "[t]he bollards are steel-filled concrete that are approximately six inches in diameter and spaced approximately four inches apart" and accompanied by lighting. *See* Dkt. No. 64-9 ("Enriquez Decl.") ¶ 12 & Ex. C, at 2-1. Even if the characteristics of the wall were unchanged—which is not the case—Mr. Del Val alleges recreational harms from not only the bollard wall construction but also the accompanying lighting, which does not currently exist. *See* Del Val Decl. ¶ 9. Because the Court finds that Defendants' proposed construction in Yuma Sector Project 1 constitutes a change in conditions for Mr. Del Val, it rejects Defendants' second challenge to Plaintiffs' alleged recreational harms.

Plaintiffs have shown that Defendants' proposed construction will lead to a substantial change in the environment, the nature of which will harm their members' aesthetic and recreational interests. The funding of border barrier construction, if indeed barred by law, cannot be remedied easily after the fact, and yet Defendants intend to commence construction immediately and complete it expeditiously. Thus, "[t]he harm here, as with many instances of this kind of harm, is irreparable for the purposes of the preliminary injunction analysis." *See League of Wilderness Defenders/Blue Mountains Biodiversity Project*, 752 F.3d at 764.

//

b. Section 2808

Because Defendants have not disclosed a plan for diverting funds under Section 2808 for border barrier construction, the Court cannot now determine a likelihood of harm to Plaintiffs' members' aesthetic and recreational interests. The Court thus turns to Plaintiffs' other theories of irreparable injury.

To start, to the extent Plaintiffs rely on *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058–59 (9th Cir. 2009), for the principle that a constitutional violation alone suffices to show irreparable harm, the Court finds that principle unavailing. *See* Mot. at 25. Even under that theory of irreparable harm, Plaintiffs must demonstrate some likely irreparable harm in the absence of a preliminary injunction barring the challenged action, and not simply a constitutional violation. *See id.* (noting that the constitutional violation must be "coupled with the damages incurred," which in that case involved "a good deal of economic harm in the interim").

Plaintiffs primary alternative theory of irreparable injury is that Defendants' invocation of and use of funds under Section 2808 for border barrier construction has harmed and continues to harm Plaintiff SBCC and its member organizations' ability to carry out their missions. *See* Mot. at 23–25. To this end, Plaintiffs describe that "several senior SBCC staff have devoted a '*majority*' of their time to analyzing and responding to" Defendants' invocation of Sections 2808 and 284. *Id.* at 24. Defendants acts purportedly have forced SBCC to "field[] inquiries from members, journalists and elected officials; create[] new educational materials, media toolkits and multimedia content; and host[] trainings for staff and partners." *Id.* Tending to these activities has frustrated SBCC and its member organizations' ability to focus on their "core missions." *Id.* In Plaintiffs' view, "[s]uch injuries are sufficient to demonstrate a likelihood of irreparable harm and justify preliminary injunctive relief." *Id.*

But Plaintiffs conflate the type of harm to organizational mission that gives rise to Article III standing and the type of harm necessary for a preliminary injunction. There is no dispute that the "perceptibl[e] impair[ment]" of an organization's ability to carry out its mission that results in a "drain on the organization's resources" is enough for Article III standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). But to warrant a preliminary injunction, Plaintiffs

must do more than just assert irreparable harm. *Winter* commands that plaintiffs seeking a preliminary injunction establish that they are "likely to suffer irreparable harm *in the absence of preliminary relief*." 555 U.S. at 20 (emphasis added). Plaintiffs ignore the "in the absence of preliminary relief" component, but *Winter* is not complicated on this point. Under *Winter*, Plaintiffs must demonstrate that preliminary injunctive relief will prevent some irreparable injury that is likely to occur before the Court has time to decide the case on the merits. In other words, Plaintiffs must present some persuasive counterfactual analysis showing a likelihood that irreparable harm would occur absent an injunction, but would not occur if an injunction is granted. But as it stands, nothing indicates that Plaintiffs' proffered "diversion" of funds or resources would change at all if the Court were to issue an injunction. With or without an injunction, Plaintiffs will have to continue to litigate this case and otherwise divert resources in the manner they have described until the case is resolved.

All three cases on which Plaintiffs rely to support their mission-frustration theory support the Court's conclusion. First, in *Valle de Sol Inc. v. Whiting*, plaintiffs faced a "credible threat of prosecution" under an allegedly unconstitutional statute, where the resulting injury could not be remedied by monetary damages. 732 F.3d 1006, 1029 (9th Cir. 2013). But that is the quintessential sort of irreparable harm warranting an injunction. *See Ex parte Young*, 209 U.S. 123, 155–56 (1908) ("The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."). Next, in *East Bay Sanctuary Covenant v. Trump*, the plaintiff organizations sufficiently demonstrated that they faced a substantial loss of funding in the absence of an injunction. 354 F. Supp. 3d 1094, 1116 (N.D. Cal. 2018); *see also Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 537 (N.D. Cal. 2017) ("Without clarification regarding the Order's scope or legality, the Counties will be obligated to take steps to mitigate the risk of losing millions of dollars in federal funding, which will include placing funds in reserve and making cuts to

services."). Finally, in *League of Women Voters v. Newby*, plaintiffs demonstrated that their mission interest in registering voters faced likely irreparable injury absent a preliminary injunction because registration deadlines would pass before resolution of the case on the merits. 838 F.3d 1, 9 (D.C. Cir. 2016) ("Because, as a result of the Newby Decisions, those new obstacles unquestionably make it more difficult for the Leagues to accomplish their primary mission of registering voters, they provide injury for purposes both of standing and irreparable harm. And that harm is irreparable because after the registration deadlines for the November election pass, there can be no do over and no redress.") (internal quotation marks and citations omitted).

In all three cases, a counterfactual existed which demonstrated the need for a preliminary injunction. In *Valle*, injunctive relief meant the difference between prosecution under an unconstitutional statute or not. In *East Bay Sanctuary Covenant* and *County of Santa Clara*, injunctive relief meant the difference between organizations losing substantial funding or not. In *League of Women Voters*, injunctive relief meant the difference between registering voters for an election in keeping with organizations' mission interests or not. Here, however, Plaintiffs present no evidence that injunctive relief will make any difference to the purported harm to their mission interests, which will continue until this case's resolution. Plaintiffs thus have not carried their burden to show that the "extraordinary remedy" of a preliminary injunction is warranted in this regard. *See Winter*, 555 U.S. at 20.

Although the Court finds that Plaintiffs have not yet met their burden of showing irreparable harm in the absence of a preliminary injunction, the Court fully expects that if and when Defendants identify border barrier construction locations where Section 2808 funds will be used, Plaintiffs will have the opportunity to submit materials in support of their irreparable harm claim. The Court takes Defendants at their word that they "will inform the Court" immediately once a decision is made to use Section 2808 to fund border barrier construction. *See* Dkt. No. 131 at 3.

3. Balance of Equities and Public Interest

When the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747

F.3d 1073, 1092 (9th Cir. 2014). According to Defendants, these factors tilt in their favor, because their "weighty" interest in border security and immigration-law enforcement, as sanctioned by Congress, outweighs Plaintiffs' "speculative" injuries. Opp. at 34–35. The Ninth Circuit has recognized that "the public has a 'weighty' interest 'in efficient administration of the immigration laws at the border,'" and the Court does not minimize this interest. *See E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018) (quoting *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)). On the other hand, "the public also has an interest in ensuring that statutes enacted by their representatives are not imperiled by executive fiat." *Id.* (internal quotation marks and brackets omitted). And the Court has found above that Plaintiffs' injuries as to El Paso Sector Project 1 and Yuma Sector Project 1 are not speculative, and will be irreparable in the absence of an injunction. Accordingly, this factor favors Plaintiffs, and counsels in favor of a preliminary injunction, to preserve the status quo until the merits of the case can be promptly resolved.[22]

V. CONCLUSION

Congress's "absolute" control over federal expenditures—even when that control may frustrate the desires of the Executive Branch regarding initiatives it views as important—is not a bug in our constitutional system. It is a feature of that system, and an essential one. *See FLRA*, 665 F.3d at 1346–47 ("The power over the purse was one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several departments.'") (quoting The Federalist No. 51, at 320 (James Madison)). The Appropriations Clause is "a bulwark of the Constitution's separation of powers among the three branches of the National Government," and is "particularly important as a restraint on Executive Branch officers." *Id.* at 1347. In short, the position that when Congress declines the Executive's request to

[22] The Court observes that, although Congress appropriated $1.571 billion for physical barriers and associated technology along the Southwest border for fiscal year 2018, counsel for the House has represented to the Court that the Administration has stated as recently as April 30, 2019 that CBP represents it has only constructed 1.7 miles of fencing with that funding. *See* Dkt. No. 139; *see also* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. F, tit. II, § 230(a) 132 Stat. 348 (2018). This representation tends to undermine Defendants' claim that irreparable harm will result if the funds at issue on this motion are not deployed immediately.

appropriate funds, the Executive nonetheless may simply find a way to spend those funds "without Congress" does not square with fundamental separation of powers principles dating back to the earliest days of our Republic. *See City & Cty of San Francisco*, 897 F.3d at 1232 ("[I]f the decision to spend is determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened.") (internal quotation marks and brackets omitted) (quoting *Clinton*, 524 U.S. at 451) (Kennedy, J., concurring). Justice Frankfurter wrote in 1952 that "[i]t is not a pleasant judicial duty to find that the President has exceeded his powers," *Youngstown*, 343 U.S. at 614 (Frankfurter, J., concurring), and that remains no less true today. But "if there is a separation-of-powers concern here, it is between the President and Congress, a boundary that [courts] are sometimes called upon to enforce." *E. Bay Sanctuary Covenant*, 909 F.3d at 1250; *see also Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 825–26 (9th Cir. 2017) ("To declare that courts cannot even look to a statute passed by Congress to fulfill international obligations turns on its head the role of the courts and our core respect for a co-equal political branch, Congress."). Because the Court has found that Plaintiffs are likely to show that Defendants' actions exceeded their statutory authority, and that irreparable harm will result from those actions, a preliminary injunction must issue pending a resolution of the merits of the case.

For the foregoing reasons, the Court hereby **GRANTS IN PART** and **DENIES IN PART WITHOUT PREJUDICE** Plaintiffs' motion for a preliminary injunction. The terms of the injunction are as follows[23]: Defendants Patrick M. Shanahan, in his official capacity as Acting Secretary of Defense, Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security, Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury, and all persons acting under their direction, are enjoined from taking any action to construct a border barrier in the areas Defendants have identified as Yuma Sector Project 1 and El Paso Sector Project 1 using funds reprogrammed by DoD under Section 8005 of the Department of Defense Appropriations Act, 2019.

A case management conference is set for June 5, 2019 at 2:00 p.m. At the case

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

management conference, the parties should be prepared to discuss a plan for expeditiously resolving this matter on the merits, whether through a bench trial, cross-motions for summary judgment, or other means. The parties must submit a joint case management statement by May 31, 2019.

IT IS SO ORDERED.

Dated: 5/24/2019

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California

No. 19A-_____

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

SIERRA CLUB, ET AL.

DECLARATION OF JILL E. STIGLICH
IN SUPPORT OF APPLICATION FOR A STAY PENDING APPEAL
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT AND PENDING
FURTHER PROCEEDINGS IN THIS COURT
AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

I, JILL E. STIGLICH, hereby declare and state as follows:

1. This declaration is based on my own personal knowledge and information made available to me in the course of my official duties.

2. I am the Director of Contracting for the United States Army Corps of Engineers (Corps), and have recently been designated as the "Head of the Contracting Activity" (HCA) for the Corps by the Senior Procurement Executive for the Department of the Army.

3. In my capacity as the Director of Contracting and HCA for the Corps, I am responsible for oversight and direction of all of the Corps' contracting activities, including the contracting activities of Task Force Barrier ("Task Force").

4. I have reviewed the previous declarations of Colonel (COL) Eric M. McFadden, who is the Commanding Officer of the Task Force, which were filed in connection with the subject litigation.

5. I am familiar with the factual information set forth in COL McFadden's declarations, including the mission of the Task Force and its contracting activities to date.

6. As explained in the declarations of COL McFadden, 10 U.S.C. § 2326(b) prohibits the Corps from obligating the full value of the "undefinitized" contracts for the Tranche 1 (El Paso 1 and Yuma 1) projects and the Tranche 2 (El Centro 1 and Tucson 1, 2, 3) projects until the definitization process is complete. This requirement generally cannot be waived; however, 10 U.S.C. § 2326(b)(4)(A) authorizes a limited waiver with respect to the contracts if the Secretary of the Army determines that a waiver is necessary to support "[a] contingency operation." As defined in 10 U.S.C. § 101(a)(13)(B), a contingency operation includes a military operation that results in the mobilization to active duty of members of the uniformed services under specified provisions of law, including 10 U.S.C. § 12302, during a national emergency declared by the President.

7. On July 11, 2019, I received information that the Commandant of the U.S. Coast Guard, under authority delegated by the Acting Secretary of Homeland Security, had authorized the involuntary mobilization of certain members of the Reserve Component of the U.S. Coast Guard pursuant to 10 U.S.C. § 12302. In my view, this mobilization may allow the Secretary of the Army to waive the restrictions in 10 U.S.C. § 2326(b) on obligating the full value of the contracts for the Tranche 1 and Tranche 2 projects if the government's request for a stay of the injunction is granted.

8. The Corps estimates that it would take approximately 30 to 45 days to complete the necessary preparatory work and to conclude discussions with the contractors to obligate the full value of the contracts for the Tranche 1 and Tranche 2 projects in the event a decision were made to waive the requirements of 10 U.S.C. § 2326(b) based on the Coast Guard mobilization under 10 U.S.C. § 12302.

9. Given the existing injunction, and as of the date of this declaration, I have made no decision to request that the Secretary of Army invoke the waiver authority in 10 U.S.C. § 2326(b)(4)(A) and the Secretary of the Army had made no decision to invoke this waiver authority, nor has any authoritative determination been made that the statutory requirements for invoking such authority have been satisfied. Nevertheless, because of the Coast Guard mobilization, in my view, the Army's authority to waive the requirements of 10 U.S.C. § 2326(b) is now potentially available.

10. Notwithstanding the potential availability of this waiver authority, the government's interest in negotiating the best value for taxpayers and protecting the federal fisc would be best served by adhering to the definitization requirements set forth in 10 U.S.C. § 2326(b). For this reason, the Corps would prefer not having to resort to the waiver authority in 10 U.S.C. § 2326(b)(4)(A) if the injunction is stayed.

I declare under penalty of perjury that to the best of my current knowledge the foregoing is true and correct. Executed on July 12, 2019.

Jill E. Stiglich
Director of Contracting and
Head of the Contracting Activity
United States Army
Corps of Engineers