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14 **UNITED STATES DISTRICT COURT**  
 15 **NORTHERN DISTRICT OF CALIFORNIA**  
 16 **SAN FRANCISCO-OAKLAND DIVISION**

17 SIERRA CLUB and SOUTHERN BORDER  
 COMMUNITIES COALITION,

18 *Plaintiffs,*

19 v.

20 DONALD J. TRUMP, President of the United  
 21 States, in his official capacity; PATRICK M.  
 SHANAHAN, Acting Secretary of Defense, in his  
 22 official capacity; KEVIN K MCALEENAN,  
 Acting Secretary of Homeland Security, in his  
 23 official capacity; and STEVEN MNUCHIN,  
 Secretary of the Treasury, in his official capacity,

24 *Defendants.*

Case No.: 4:19-cv-00892-HSG

**PLAINTIFFS' NOTICE OF MOTION  
 AND MOTION FOR PARTIAL  
 SUMMARY JUDGMENT;  
 MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT  
 THEREOF**

Date:  
 Time:  
 Judge: Honorable Haywood S. Gilliam  
 Dept: Oakland  
 Date Filed: June 12, 2019  
 Trial Date: Not set

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1                   **NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT**

2                   PLEASE TAKE NOTICE that Plaintiffs Sierra Club and Southern Border Communities  
3 Coalition hereby move the Court pursuant to Federal Rule of Civil Procedure 56 for partial  
4 summary judgment against Defendants Donald J. Trump, President of the United States of America;  
5 Patrick M. Shanahan, in his official capacity as Acting Secretary of Defense; and Kevin K.  
6 McAleenan, in his official capacity as Acting Secretary of Homeland Security (collectively,  
7 “Defendants”). Plaintiffs respectfully request that this motion be decided without argument or, if the  
8 Court deems oral argument appropriate, that argument be scheduled prior to July 1, 2019.

9                   Plaintiffs respectfully move the Court to direct entry of final judgment in their favor 1)  
10 declaring unlawful Defendants’ transfer of Fiscal Year 2019 appropriated funds to the Department  
11 of Defense’s Section 284 account, the use of those funds for construction of a border wall, and  
12 Defendants’ failure to comply with NEPA for this construction; 2) issuing a permanent injunction  
13 prohibiting Defendants and all persons associated with them from transferring Fiscal Year 2019  
14 appropriated funds to the Section 284 account, using those funds to build a border wall, and  
15 proceeding with construction prior to complying with NEPA; and 3) specifically enjoining the use  
16 of 284 funds to construct the wall segments in the areas Defendants have identified as Yuma Sector  
17 Project 1, El Paso Sector Project 1, El Centro Project 1 and Tucson Sector Projects 1, 2 and 3. This  
18 motion is based on this Notice of Motion and Motion, the accompanying supporting Memorandum  
19 of Points and Authorities; the declarations and request for judicial notice, and the exhibits thereto;  
20 and any other written or oral evidence or argument that may be presented at or before the time this  
21 motion is heard by the Court.

22                   **MEMORANDUM OF POINTS AND AUTHORITIES**

23                   **INTRODUCTION**

24                   After repeatedly failing to obtain Congress’s approval for a “big, beautiful” wall along the  
25 U.S.-Mexico border, the President directed Defendants to raid military accounts and divert billions  
26 of dollars towards border wall construction. Defendants were poised to begin construction when this  
27 Court issued a preliminary injunction temporarily halting Defendants’ unlawful and  
28 unconstitutional plan. Plaintiffs now move for partial summary judgment on virtually identical “legal



1 questions regarding whether the proposed plan for funding border barrier construction exceeds the  
2 Executive Branch’s lawful authority.” Order Granting in Part and Denying in Part Plaintiffs’ Motion  
3 for Preliminary Injunction (“PI Order”) at 2. Plaintiffs seek to permanently enjoin Defendants from  
4 unlawfully funneling \$2.5 billion to build a wall that Congress explicitly refused to fund on scenic  
5 borderlands that they use and treasure.

6 As this Court has already held, on a nearly identical factual record, “Defendants’ actions  
7 exceed[] their statutory authority” and a contrary reading of the statutes Defendants rely on “would  
8 pose serious problems under the Constitution’s separation of powers principles.” PI Order 36, 55.  
9 Plaintiffs’ members will suffer “irreparable harm” to their “ability to recreate in and otherwise enjoy  
10 public land along the border” if Defendants are allowed to proceed with unauthorized construction.  
11 *Id.* at 49. Accordingly, Plaintiffs move for partial summary judgment and request that the Court  
12 make its preliminary injunction permanent.

### 13 BACKGROUND

14 The President announced his campaign on a platform to build a “great, great wall on our  
15 southern border,” Request for Judicial Notice (“RJN”) ¶ 1, Ex. 1 (June 16, 2015 Presidential  
16 Announcement Speech), and, since taking office, the President and Administration have repeatedly  
17 sought appropriations to build such a wall. *See, e.g.*, RJN ¶ 2, Ex. 2 at 18 (requesting funding “to  
18 plan, design, and construct a physical wall along the southern border”).

19 Congress has exercised its appropriations judgment, including considering and rejecting  
20 several bills that, if passed, would have appropriated billions of dollars for border barrier  
21 construction. RJN ¶¶ 3-9, Exs. 3-9 (noticing proposed legislation and its disposition).

22 The purported justifications for the Administration’s requests have sounded a consistent  
23 refrain: a wall is needed across the Southwest to combat migration and drug trafficking. In February  
24 2018, the White House submitted its Fiscal Year 2019 Budget Request seeking \$18 billion to fund a  
25 border wall on the basis that, “since most of the illegal drugs that enter the United States come  
26 through the Southwest border, a border wall is critical to combating the scourge of drug addiction  
27 that leads to thousands of unnecessary deaths.” RJN ¶ 10, Ex. 10 at 16.

28 Likewise the President has long expressed his wish that the Department of Defense (“DoD”)

1 participate in DHS’s counter-drug and migration activities on the border. On April 4, 2018,  
2 President Trump issued a Memorandum for the Secretary of Defense, the Attorney General, and the  
3 Secretary of Homeland Security claiming that “[t]he situation at the border has now reached a point  
4 of crisis,” and directing the Secretary of Defense “[to] support the Department of Homeland  
5 Security in securing the southern border and taking other necessary actions to stop the flow of  
6 deadly drugs and other contraband, gang members and other criminals, and illegal aliens into this  
7 country,” as well as to work with DHS “to determine what other resources and actions are necessary  
8 to protect our southern border, including . . . United States military resources.” Administrative  
9 Record (“Admin. R.”), ECF No. 163-1, at 26. DoD has been considering using Section 284 to  
10 support DHS since the beginning of 2018. *See* RJN ¶ 11, Ex. 11 (declaring that DoD recently  
11 informed the House Committee on Armed Services that its Comptroller had withheld nearly \$1  
12 billion of fiscal year 2018 counter-drug funding until July 2018 because DoD was considering using  
13 that funding for “Southwest Border construction.”); RJN ¶ 12, Ex. 12 at 95 (government counsel  
14 acknowledging that the Arcangeli declaration “suggest[s] that DoD was thinking about the  
15 possibility of 284 projects in the summer of ’18,” but arguing that it was only “foreseeable in  
16 general that someone at some time might ask DoD to use its 284 authority to engage in border  
17 barrier construction.”).

18 In December 2018, Congress and the President reached an impasse over border wall funding,  
19 during which the nation endured the longest partial government shutdown in its history.

20 On January 6, 2019, the White House officially increased its request for border wall  
21 construction in Fiscal Year 2019. By letter to the U.S. Senate Committee on Appropriations, Acting  
22 Director of the Office of Management and Budget requested “\$5.7 billion for construction of a steel  
23 barrier for the Southwest border,” to “fund construction of a total of approximately 234 miles of new  
24 physical barrier.” *See* RJN ¶ 13, Ex. 13 at 1. The letter asserted that “[a]ppropriations bills for fiscal  
25 year (FY) 2019 that have already been considered by the current and previous Congresses are  
26 inadequate” to address “critical issues” including the entry of drugs. *Id.*

27 As Congress negotiated toward compromise, the President and Administration repeatedly  
28 dismissed the appropriations process. The President threatened the wall would be built “one way or

1 the other.” RJN ¶ 14, Ex. 14. Acting White House Chief of Staff Mick Mulvaney echoed that the  
 2 President “is going to build a wall . . . We’ll take as much money as you can give us, and then we’ll  
 3 go off and find the money someplace else . . . . But this is going to get built, with or without  
 4 Congress.” RJN ¶ 15 (video at 00:55-1:12). And on February 12, with congressional compromise  
 5 imminent, the President told his Cabinet that “the wall is getting built;” Congress’s appropriation  
 6 “doesn’t matter,” “[b]ecause we’re doing other things beyond what we’re talking about here.” RJN ¶  
 7 16, Ex. 15 at 6.

8 On February 14, 2019, Congress passed the Consolidated Appropriations Act of 2019  
 9 (“CAA”), Pub. Law No. 116-6, 133 Stat. 13 (2019). The CAA made available \$1.375 billion “for  
 10 the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio  
 11 Grande Valley Sector.” *Id.* § 230(a)(1), 133 Stat. at 28. The CAA limited the use of these funds to  
 12 “operationally effective designs deployed as of the date of the Consolidated Appropriations Act,  
 13 2017,” and within the Rio Grande Valley Sector prohibited their use in several public and private  
 14 lands.<sup>1</sup> CAA §§ 230(b), 231, 133 Stat. at 28. It imposed notice and comment requirements prior to  
 15 the use of any funds for the construction of barriers within certain city limits. *Id.* § 232, 133 Stat. at  
 16 28-29. And it further provided that:

17 None of the funds made available in this or any other appropriations  
 18 Act may be used to increase, eliminate, or reduce funding for a  
 19 program, project, or activity as proposed in the President’s budget  
 20 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.

21 *Id.* § 739, 133 Stat. at 197.

22 President Trump signed the CAA into law on February 15, 2019. The same day, he issued a  
 23 proclamation “declar[ing] that a national emergency exists at the southern border of the United  
 24 States.” RJN ¶ 17, Ex. 16. Announcing the proclamation from the Rose Garden, the President stated  
 25 that he “went through Congress” but was “not happy” with the \$1.375 billion appropriated for a  
 26

27 <sup>1</sup> These are (1) the Santa Ana Wildlife Refuge, (2) the Bentsen-Rio Grande Valley State  
 28 Park, (3) La Lomita Historical Park, (4) the National Butterfly Center, and (5) within or east of the  
 Vista del Mar Ranch tract of the Lower Rio Grande Valley National Wildlife Refuge.

1 border wall. RJN ¶ 28, Ex. 26. “I didn’t need to do this,” he said. “But I’d rather do it much faster . . .  
2 . that’s all.” *Id.*

3 Simultaneous to the emergency declaration, the White House issued a “fact sheet[]”  
4 explaining that the Administration “has so far identified up to \$8.1 billion that will be available to  
5 build the border wall once a national emergency is declared and additional funds have been  
6 reprogrammed,” including “up to \$2.5 billion under the Department of Defense funds transferred for  
7 Support for Counterdrug Activities (Title 10 United States Code, section 284).” RJN ¶ 18, Ex. 17.

8 On March 6, 2019, then-Secretary of Homeland Security Kirstjen Nielsen testified before  
9 the House Homeland Security Committee that planning had begun in the previous months.  
10 RJN ¶ 19, at 1:08:30-1:09:00. While “[the President] hoped Congress would . . . [meet] his request  
11 to fund the resources that [CBP] has requested,” the Administration would proceed unilaterally. *Id.*  
12 at 28:00-28:30.

13 On February 25, eleven days after Congress refused to appropriate \$5.7 billion to construct  
14 “approximately 234 miles of new physical barrier,” DHS requested that DoD fund “approximately  
15 218 miles” of new walls. Admin. R., ECF No. 163-1, at 24. This request was “consistent with the  
16 President’s direction in his April 4, 2018, memorandum.” *Id.*

17 The DoD’s “Drug Interdiction and Counter-Drug Activities, Defense” appropriation  
18 (“counter-narcotics account”) did not contain sufficient funds for the transfer. As such, the DoD  
19 needed to transfer funds into the account to finance the requested projects. *See* Admin. R., ECF No.  
20 163-2, at 43 (“In order to support the DHS request for assistance, the Department would need to  
21 transfer funding into the Drug Interdiction and Counter-Drug Activities, Defense appropriation,  
22 using the general transfer authority provided for under Section 8005 of the DoD Appropriations Act,  
23 2019.”); *see also id.*, ECF No. 163-2, at 11 (“To meet any level of support requested by DHS,  
24 additional funds must be transferred into the ‘Drug Interdiction and Counter-Drug Activities,  
25 Defense’ appropriation.”).

26 DoD officials, including Defendant Shanahan, acknowledged that the situation at the  
27 southern border is “not a military threat.” RJN ¶ 20, Ex. 18 at 50-52.

28 Nonetheless, on March 25, 2019, Defendant Shanahan invoked Section 8005 and directed

1 the Under Secretary of Defense (Comptroller)/Chief Financial Officer to transfer \$1 billion from  
2 Army personnel funds to the counter-narcotics account. *See* Admin. R., ECF No. 163-1, at 10.  
3 Speaking to the House Armed Services Committee about the transfer, Defendant Shanahan stated  
4 that the Administration determined to unilaterally reprogram funds “prior to the declaration of a  
5 national emergency.” *See* RJN ¶ 21, Ex. 19 at 14.

6 The same day, Defendant Shanahan approved the diversion of funds from DoD’s counter-  
7 narcotics support budget for three “drug-smuggling corridors” in New Mexico and Arizona, known  
8 as El Paso Project 1 and Yuma Sector Projects 1 and 2. Admin. R., ECF No. 163-1, at 7. Pursuant to  
9 a Modification Request submitted April 5, 2019, Defendant Shanahan modified his prior approval  
10 of 18-foot pedestrian fencing to, at significantly greater cost, provide for “30-foot bollard fencing  
11 and a 5-foot anti-climb plate” within Yuma Sector Project 1 and El Paso Sector Project 1, and 18-  
12 foot bollard fencing with a 5-foot anti-climb plate in Yuma Sector Project 2. Admin. R., ECF No.  
13 163-2, at 8; *see also id.* No. 163-3, at 42 (detailing request for modification and stating that “DHS  
14 now requests that all fencing installed by DoD include a 5-foot anti-climb steel plate”). According  
15 to DHS, anti-climb fencing is necessary for stopping migration. DHS’s explanation for modification  
16 of counterdrug construction made no reference to any counterdrug mission. *See* Admin. R., ECF  
17 163-2, at 66-67.

18 Both the House Committee on Armed Services and the House Committee on Appropriations  
19 formally disapproved the DoD’s attempt to “reprogram” funds for purposes of constructing barriers  
20 on the southern border. *See* RJN ¶ 22, Ex. 20; *id.* ¶ 23, Ex. 21.

21 To attempt to expedite DoD’s construction in Arizona and New Mexico, Defendant  
22 McAleenan, as Acting Secretary of Homeland Security, published determinations pursuant to  
23 Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996  
24 (“IIRIRA”), Pub. Law 104-208 (1996), “waiv[ing] all legal requirements that [he], in [his] sole  
25 discretion, determine[d] necessary to ensure the expeditious construction of barriers and roads”  
26 where the El Paso Sector and Yuma Sector Projects were planned. *See* Determination Pursuant to  
27 Section 102 of IIRIRA, as Amended, 84 Fed. Reg. 17,185, 17,187 (Apr. 24, 2019).

28 “Yuma Project 1” consists of up to 5 miles of new 30-foot fencing in southern Arizona with

1 new roads and lighting that will disrupt the “beautiful landscape...on either side of the Colorado  
2 River.” Bevins Decl. ¶ 7. *See also* Admin. R., ECF No. 163-2, at 8, 13; Del Val Decl. ¶ 6  
3 (describing fishing in these lands for more than fifty years). “El Paso Project 1” is the erection of 46  
4 miles of 30-foot border wall, roads, and lighting in southern New Mexico. *See* Admin. R., ECF No.  
5 163-2, at 8, 13. This “rolling Chihuahuan desert scrubland, adjacent to several mountain ranges,  
6 with arroyos and diverse vegetation creating an undulating landscape,” is frequently visited by  
7 Plaintiffs’ members in their professional and personal capacities. Bixby Decl. ¶ 6; *see also* Munro  
8 Decl. ¶ 7; Walsh Decl. ¶ 7.

9 On May 8, 2019, Kenneth Rapuano, Assistant Secretary of Defense, requested “approval of  
10 a second tranche of assistance” to proceed with 78.25 miles of new construction, including “El  
11 Centro Sector Project 1,” consisting of 15.25 miles of 30-foot bollard wall in California, and Tucson  
12 Sector Projects 1, 2, and 3, which together consist of 63 miles of 30-foot bollard wall in Arizona.  
13 Admin. R., ECF No. 163-3, at 1-4.

14 Then next day, on May 9, 2019, Defendant Shanahan authorized an additional \$1.5 billion  
15 for DHS’s requested El Centro and Tucson Sector projects. *See* Admin. R., ECF No. 163-3, at 7.  
16 Defendant Shanahan further ordered that reprogramming should occur “without regard to comity-  
17 based policies that require prior approval from congressional committees.” *Id.*

18 As with the prior commitment, financing the new projects would require DoD to transfer  
19 funds into the counter-narcotics account. *See* Admin. R., ECF No. 163-3, at 1 (“To provide this  
20 support under Section 284, additional funds must be transferred into the ‘Drug Interdiction and  
21 Counter-Drug Activities, Defense’ appropriation,” including Section 8005 as well as “DoD’s special  
22 transfer authority (STA), which is provided in Section 9002 of the DoD Appropriations Act,  
23 2019.”). Defendant Shanahan accordingly invoked “base funds and funds designated for Overseas  
24 Contingency Operations,” including Section 8005 and “9002 of the DoD Appropriations Act, 2019,  
25 and section 1001 and 1512 of the John S. McCain National Defense Authorization Act for FY  
26 2019.” *See* Admin. R., 163-3, at 10-20.

27 On May 15, 2019, Defendant McAleenan issued waivers on lands encompassing the El  
28 Centro and Tucson Sector Projects. *See* Determination Pursuant to Section 102 of IIRIRA, as

1 Amended, 84 Fed. Reg. 21,798, 21,800 (May 15, 2019).

2 “El Centro Project 1” consists of “road construction,” replacement of 15 miles of existing  
3 vehicle barrier with 30-foot pedestrian fencing, and installment of lighting along California’s  
4 southern border. Admin. R., ECF No. 163-1, at 17. Plaintiffs and their members frequent this  
5 “culturally rich” land, which runs parallel to Highway 98, to witness “extraordinary beauty” of the  
6 desert habitat. *See* Evans Decl. ¶ 7; Armenta Decl. ¶ 6. Not only will natural environments on both  
7 sides of the border be disturbed, disruption of fragile desert crust may exacerbate air pollution and  
8 dust for communities where Plaintiffs’ members reside. Ramirez Decl. ¶ 8.

9 “Tucson Sector Projects 1, 2, and 3” consist of approximately 63 miles of “30-foot  
10 pedestrian fencing, constructing and improving roads, and installing lighting” in southern Arizona.  
11 Admin. R., ECF No. 163-3, at 22. These biodiverse lands are frequently visited by Plaintiffs’  
12 members for their unique beauty and archaeological, historic, and biological value, including at  
13 Organ Pipe National Monument, Coronado National Memorial, the Cabeza Prieta National Wildlife  
14 Refuge, the San Pedro River, and the San Bernardino National Wildlife Refuge. *See, e.g.*, Hartmann  
15 Decl.; Hudson Decl.; Dahl Decl.; Broyles Decl.; Gerrodette Decl.; Case Decl. These lands are also  
16 “ancestral territory and traditional homelands” of Amicus Tohono O’odham Nation, which would be  
17 “divide[d]” by proposed construction. ECF No. 159-1, at 7.

18 Many miles of the proposed construction run along the Organ Pipe National Monument, and  
19 replace the wildlife-permeable vehicle barriers that currently exist in the National Park. According  
20 to the Department of Interior, the current barrier “has not been breached, and monitoring has  
21 revealed a dramatic decline in illegal off-road vehicle activity.” RJN ¶ 24, Ex. 22. The current  
22 “barrier design allows water, and animals, including the highly endangered Sonoran Pronghorn, to  
23 safely roam their natural ranges uninterrupted.” *Id.* Defendants’ proposed new fence is much higher,  
24 much denser, and impermeable to most animals.

### 25 **LEGAL STANDARD**

26 The Federal Rules of Civil Procedure provide for entry of partial summary judgment. “[T]he  
27 court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties  
28 only if the court expressly determines that there is no just reason for delay.” Fed. R. Civ. P. 54(b). A

1 party may move for summary judgment on any “claim or defense” or “part of [a] claim or defense,”  
2 Fed. R. Civ. P. 56(a), and a district court should enter summary judgment where “there is no  
3 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”  
4 *Id.* This motion raises issues of statutory construction that present questions of law appropriate for  
5 resolution through partial summary judgment. *See Dalzin v. Belshe*, 993 F. Supp. 732, 734 (N.D.  
6 Cal. 1997) (“It is axiomatic that questions of statutory interpretation are questions of law.”)

## 7 ARGUMENT

8 Defendants’ reprogramming of DoD funds to construct a border wall is unlawful. Their  
9 actions are ultra vires because they exceed Defendants’ authority under the statutes they invoke as  
10 well as under the Constitution. In addition, Defendants’ actions violate NEPA. Plaintiffs have  
11 properly brought their claims in equity, but this Court may also consider them under the  
12 Administrative Procedure Act (“APA”).

### 13 I. Defendants’ diversion of funds is not authorized by the statutes on which they rely.

#### 14 A. Defendants lack authority to transfer funds into the Section 284 account because 15 the proposed border wall construction is an “item” for which Congress has 16 denied funding, is not “unforeseen,” and is not a “military requirement.”

16 Defendants rely on three reprogramming provisions to funnel DoD funds into the Section  
17 284 account for wall construction. *See* Admin. R., ECF No. 163-2, at 43-46; *id.* ECF No. 163-3 at  
18 10-20. These provisions have similar requirements, which Defendants do not satisfy. First, Section  
19 8005 of the 2019 Department of Defense Appropriations Act, Pub. Law No. 115-245 mandates that  
20 transfers between DoD funds “may only be used for (1) for higher priority items than those for  
21 which originally appropriated, and (2) based on unforeseen military requirements, but (3) in no case  
22 where the item for which funds are requested has been denied by the Congress.” PI Order 16 (citing  
23 Pub. Law No. 115-245 § 8005). Second, Section 9002 of the 2019 Department of Defense  
24 Appropriations Act, which governs the transfer of funds within DoD’s Overseas Contingency  
25 Operations appropriation, “is, at a minimum, subject to Section 8005’s limitations.” *Id.* at 12 n.7;  
26 Pub. Law No. 115-245 § 9002 (“the authority provided in this section ... is subject to the same terms  
27 and conditions as the authority provided in section 8005 of this Act”). Third and finally, Section  
28 1512 is subject to the restrictions contained in Section 1001 of the NDAA, *see* NDAA, Pub. Law



1 No. 115-232 § 1512(b), which in turn provides that transfer authorizations may only “may not be  
2 used to provide authority for an item that has been denied authorization by Congress,” NDAA §  
3 1001(b)(2). In addition, Section 1512 is subject to the general restrictions on transfer authorities  
4 imposed in 10 U.S.C. § 2214. *See* 10 U.S.C. § 2214(a) (section applies “[w]henver authority is  
5 provided in an appropriation Act to transfer amounts in working capital funds or to transfer amounts  
6 provided in appropriation Acts for military functions of the Department of Defense (other than  
7 military construction) between such funds or appropriations (or any subdivision thereof”). Section  
8 2214(b)(1) in turn restricts transfers “except to provide funds for a higher priority item, based on  
9 unforeseen military requirements, than the items for which the funds were originally appropriated.”

10 Each of Defendants’ planned wall sections rests on a violation of the requirement that DoD  
11 transfers may not be used for an item that has been denied by Congress. *See* PI Order 16 (“[E]very  
12 dollar of Section 284 support to DHS and its enforcement agency, CBP, is attributable to  
13 reprogramming mechanisms.”). “Congress has described its intent that appropriations restrictions of  
14 this sort be ‘construed strictly’ to ‘prevent the funding for programs which have been considered by  
15 Congress and for which funding has been denied.’” PI Order 33 (citing H.R. Rep. No. 99-106, at 9  
16 (1985) (discussing analogous appropriations restriction in Pub. Law No. 99-169, § 502(b), 99 Stat.  
17 1005 (codified at 50 U.S.C. § 3094(b))). The record leaves no ambiguity over whether wall sections  
18 outside of Texas are an item that Congress has “denied.” The protracted negotiations between the  
19 President and Congress, the President’s repeated assertions that the wall would get built “one way  
20 or the other,” and the fact that, ultimately, “Congress was presented with—and declined to grant—a  
21 \$5.7 billion request for border barrier construction,” make clear that “[b]order barrier construction,  
22 expressly, is the item Defendants now seek to fund via the Section 8005 transfer, and Congress  
23 denied the requested funds for that item.” PI Order 34. Congress’s decision to appropriate “only  
24 \$1.375 billion for construction of pedestrian fencing, of a specified type, in a specified sector”  
25 reflects its considered policy judgment to limit border wall construction. PI Order 32-33.

26 The reprogramming authorities that Defendants invoke are also subject to the condition that  
27 they be based on “unforeseen military requirements.” *See* Pub. Law No. 115-245 §§ 8005, 9002; 10  
28 U.S.C. § 2214(b)(1). Wall construction under a claim of counterdrug necessity is not “unforeseen”

1 as the President specifically claimed to Congress in his February 2018 budget proposal that “\$18  
2 billion to fund the border wall” was necessary because “a border wall is critical to combatting the  
3 scourge of drug addiction.” RJN ¶ 10, Ex. 10 at 16. *See also* PI Order 35 (“[T]hat the need for the  
4 requested border barrier construction funding was ‘unforeseen’ cannot logically be squared with the  
5 Administration’s multiple requests for funding for exactly that purpose dating back to at least early  
6 2018.”).

7       Moreover, while any interpretation of “‘unforeseen’ to refer to the request for DoD  
8 assistance, as opposed to the underlying ‘requirement’ at issue,” is “not reasonable,” even such an  
9 unreasonable interpretation would not render Defendants’ wall projects “unforeseen.” PI Order 36.  
10 As far back as April 2018, the White House directed DoD and DHS “to determine what other  
11 resources and actions are necessary to protect our southern border, including . . . United States  
12 military resources,” and to produce a report to the White House “detailing their findings and an  
13 action plan, including specific recommendations as to any other executive authorities that should be  
14 invoked to defend the border and security of the United States.” Admin. R., 163-1, at 27-28. The  
15 record likewise indicates that DoD was specifically considering the use of Section 284 to construct  
16 sections of border wall in the summer of 2018. *See* RJN ¶ 11, Ex. 11 (declaring that DoD recently  
17 informed the House Committee on Armed Services that its Comptroller had withheld nearly \$1  
18 billion of fiscal year 2018 counter-drug funding until July 2018 because DoD was considering using  
19 that funding for “Southwest Border construction.”); RJN ¶ 12, Ex. 12 at 95 (government counsel  
20 acknowledging that the Arcangeli declaration “suggest[s] that DoD was thinking about the  
21 possibility of 284 projects in the summer of ‘18,” but arguing that it was only “foreseeable in  
22 general that someone at some time might ask DoD to use its 284 authority to engage in border  
23 barrier construction”).

24       A different “interpretation likely would pose serious problems under the Appropriations  
25 Clause, by ceding essentially boundless appropriations judgment to the executive agencies.” PI  
26 Order 40. To construe “unforeseen” as Defendants transfer demands “would give the agency  
27 making a request for assistance under Section 284 complete control over whether that condition is  
28 met, simply by virtue of the timing of the request.” *Id.* DHS waited to see whether Congress would

1 grant a requested appropriation, and then turned to DoD when Congress declined. DoD did, and  
2 “could always characterize the resulting request as raising an ‘unforeseen’ requirement because it  
3 did not come earlier.” *Id.*

4 Finally, the building of a permanent border wall on behalf of DHS is not a “military  
5 requirement.” *See* Pub. Law No. 115-245 §§ 8005, 9002; 10 U.S.C. § 2214(b)(1); NDAA § 1512(b)  
6 (subject to restrictions in 10 U.S.C. § 2214). It is not a project to be carried out for any military or  
7 DoD purpose, but instead for DHS’s purposes, as Defendant Shanahan’s letter to Defendant Nielsen  
8 confirms. *See* Admin R., ECF No. 163-2, at 16-17 (“DHS will accept custody of the completed  
9 infrastructure, account for that infrastructure in its real property records, and operate and maintain  
10 the completed infrastructure.”). DoD officials, including Defendant Shanahan, have acknowledged  
11 that the situation at the southern border is “not a military threat.” RJN ¶ 20, Ex. 18 at 50-52.

12 Moreover, Congress has assigned to civilian law enforcement the responsibility for border  
13 security, including in any situation where “an actual or imminent mass influx of aliens . . . near a  
14 land border[] presents urgent circumstances requiring an immediate Federal response.” 8 U.S.C.  
15 § 1103(a)(10). Should the Attorney General determine that such “urgent circumstances” exist, the  
16 “immediate Federal response” Congress provided for is that the Attorney General may authorize  
17 civilian “law enforcement officer[s]” to perform immigration functions. *Id.*; *see also* 6 U.S.C. § 202  
18 (assigning DHS responsibility for “[s]ecuring the borders” and “immigration enforcement  
19 functions”); *id.* § 251 (assigning DHS responsibility for “Border Patrol,” “detention and removal,”  
20 and “inspections”); 8 U.S.C. § 1103(a)(5) (Secretary of DHS has “duty to control and guard the  
21 boundaries and borders of the United States against . . . illegal entry”). That Congress authorized the  
22 military in some circumstances, when it so appropriated, to provide support to law enforcement for  
23 construction of barriers does not convert support for civilian missions to a military *requirement*. If  
24 anything the military might do is deemed a “military requirement,” the statutory phrase imposes no  
25 restriction at all. Such a reading violates the “presumption that statutory language is not  
26 superfluous.” *McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016) (quotation marks omitted).

**B. Section 284 does not authorize Defendants to engage in a multibillion-dollar wall construction project.**

Defendants cannot use Section 284 to override Congress’s specific decision to limit the pace and manner of border wall construction. 10 U.S.C. § 284 authorizes the Secretary of Defense to provide other law enforcement agencies with small-scale support, including the “construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.” 10 U.S.C. § 284(b)(7).

A commonsense reading of the statute makes clear that Congress did not use Section 284 to authorize multibillion-dollar public works to be constructed at the sole discretion of the Secretary of Defense. For example, Subsection (h)(1)(B) requires the Secretary to give Congress 15 days’ written notice before providing certain forms of support, including “a description of any small scale construction project for which support is provided.” The statute defines “small scale construction” as “construction at a cost not to exceed \$750,000 for any project.” 10 U.S.C. § 284(i)(3). Congress would not have required a description of “any small scale construction” projects if it was, at the same time, authorizing massive, multibillion-dollar expenditures under this provision. “Whether or not Section 284 formally ‘limits’ the Secretary to ‘small scale construction’ . . . 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.” PI Order 39. Congress does not “hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns.*, 531 U.S. 457, 468 (2001).

Moreover, any general DoD authority to provide support to law enforcement agencies cannot be read to extend to billions of dollars for border barrier construction when interpreted against the more specific and more recent judgment by Congress embodied in the CAA. “[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.” *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). “This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.” *Id.* at 143. Therefore, “a specific policy embodied in a later . . . statute should control [judicial] construction of the [earlier

1 broad] statute, even though it ha[s] not been expressly amended.” *Id.* (quotations and citations  
2 omitted; brackets in original). Here, the CAA’s specific policy limitation on border barrier  
3 construction must control, and bar, Defendants’ attempt to use Section 284 to evade Congress’s  
4 funding restrictions.

5 The CAA further prohibits the use of any appropriated funds to “increase . . . funding for a  
6 program, project, or activity as proposed in the President’s budget request for a fiscal year until such  
7 proposed change is subsequently enacted in an appropriation Act” or authorized by provisions in  
8 other appropriations legislation. CAA, Division D § 739. The President has proposed an increase of  
9 funding for wall construction by several billion dollars in his budget request for fiscal year 2020.  
10 *See* RJN ¶ 26, Ex. 24 at 50 (“Budget requests \$5 billion to construct approximately 200 miles of  
11 border wall along the U.S. Southwest border.”); *id.* ¶ 27, Ex. 25 at 6–9 (requesting \$3.6 billion “to  
12 build border barriers,” and an additional \$3.6 billion to “backfill funding reallocated in FY 2019 to  
13 build border barriers”). 10 U.S.C. § 284 is not an appropriations act, and therefore cannot be  
14 used to increase border barrier funding beyond the \$1.375 billion provided for in the CAA. *See* 1  
15 U.S.C. § 105 (defining appropriations acts).

16 The history of Section 284 likewise shows that Defendants’ plan to use the statute to funnel  
17 \$2.5 billion of military funds to border wall construction exceeds any authority provided by Section  
18 284. For example, Congress’s 2006 decision to recommend a \$10 million increase for fence and  
19 road construction shows Congress contemplating a project amounting to 0.004% of Defendants’  
20 plan here. *See* H.R. Rep. No. 109-452, at 369 (2006). Interpretation of statutes “must be guided to a  
21 degree by common sense as to the manner in which Congress is likely to delegate a policy decision  
22 of such economic and political magnitude.” *Brown & Williamson Tobacco*, 529 U.S. at 133; *see*  
23 *also Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) (“We expect Congress to speak  
24 clearly if it wishes to assign to an agency decisions of vast economic and political significance.”  
25 (quotation marks omitted)).

26 In addition to violating the specific textual requirements of Section 284, Defendants violate  
27 general appropriation laws. Their transfer-and-spend plan violates the core principle that executive  
28 branch agencies may not mix and match funds from different accounts to exceed the funding limits

1 Congress imposed. Numerous “[f]ederal statutes reinforce Congress’s control over appropriated  
 2 funds.” *U.S. Dep’t of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir.  
 3 2012)(citing 31 U.S.C. § 1301 *et seq.*). These statutes include “Section 1301, known as the ‘Purpose  
 4 Statute,’ [which] provides that appropriated funds may be applied only ‘to the objects for which the  
 5 appropriations were made,’” and the Transfer Statute, Section 1532, which prohibits unauthorized  
 6 transfer of funds from one account to another. *Id. See also* 31 U.S.C. § 1532. The General  
 7 Accountability Office (“GAO”), which guides the executive branch’s use of appropriated funds by  
 8 providing expert interpretations of appropriations law, confirms these core principles.<sup>2</sup> Many of the  
 9 GAO’s rules protect a key function of congressional appropriations judgment: setting a “maximum  
 10 authorized program level” by specifically appropriating a finite set of funds for a particular project.  
 11 *SBA’s Imposition of Oversight Review Fees on PLP Lenders*, B-300248 (Comp. Gen. Jan. 15, 2004).

12 Courts have struck down similar mix-and-match funding plans as an end-run around  
 13 Congress’s limits on appropriations. In *Nevada v. Departmentt of Energy*, for example, the D.C.  
 14 Circuit applied the GAO’s rule that “specific appropriations preclude the use of general ones even  
 15 when the two appropriations come from different accounts.” 400 F.3d 9, 16 (D.C. Cir. 2005) (citing  
 16 4 Comp. Gen. 476 (1924)). The court rejected the use of funds from a general account to buttress a  
 17 more specific and limited appropriation that Congress intended for the same purpose. *Id.*; *see id.*  
 18 (“[T]he fact that Congress appropriated \$1 million expressly for Nevada indicates that is all  
 19 Congress intended Nevada to get in FY04 from whatever source.”). Here, as in *Nevada*, Congress  
 20 has allocated a specific amount of funding for an activity and the government cannot cobble  
 21 together other, more general sources of money to increase funding levels for that same goal.  
 22 Congress has set a maximum authorized program level for border barrier construction: \$1.375  
 23 billion in Fiscal Year 2019. Defendants may not transfer and spend funds above this limit. *See, e.g.*,  
 24 *Highland Falls- Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1171 (Fed. Cir.  
 25 1995) (government cannot “‘raid[]’ one appropriation account . . . to credit another”).

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26  
 27 <sup>2</sup> Courts frequently give “special weight to [GAO’s] opinions” due to its “accumulated  
 28 experience and expertise in the field of government appropriations.” *Nevada v. Dep’t of Energy*, 400  
 F.3d 9, 16 (D.C. Cir. 2005).

1       **II. Defendants’ efforts to circumvent Congress’s appropriations restrictions are**  
2       **unconstitutional and this Court should avoid the serious constitutional problems**  
3       **Defendants’ efforts raise by invalidating them as ultra vires.**

4       Defendants’ “massive funnel-and-spend project,” PI Order 39, violates the Constitution’s  
5       Appropriations Clause, Presentment Clause, and the separation of powers because it represents an  
6       effort “to circumvent Congress’s clear decision to deny the border barrier funding sought here when  
7       it appropriated a dramatically lower amount in the CAA.” PI Order 34. However, because each of  
8       Defendants’ challenged actions is unauthorized by the statutes on which they purport to rely, the  
9       Court “need not reach the second-level question of whether it would be unconstitutional for  
10       Congress to sanction such conduct.” PI Order 30. In addition to the clear statutory text, the doctrine  
11       of constitutional avoidance further supports an interpretation of the transfer statutes and Section 284  
12       that avoids the serious constitutional problems Defendants’ interpretation of those statutes would  
13       raise. PI Order 36-37 (“Statutes must be interpreted to avoid a serious constitutional problem where  
14       another ‘construction of the statute is fairly possible by which the question may be avoided.’”  
15       (quoting *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001))).

16       The Appropriations Clause provides Congress with “‘absolute’ control over federal  
17       expenditures—even when that control may frustrate the desires of the Executive Branch regarding  
18       initiatives it views as important.” PI Order 54. The Constitution delegates to Congress “exclusive”  
19       power “not only to formulate legislative policies and mandate program and projects, but also to  
20       establish their relative priority for the Nation.” *United States v. McIntosh*, 833 F.3d 1163, 1172 (9th  
21       Cir. 2016). As in *McIntosh*, Defendants’ efforts to spend money in violation of the restrictions  
22       imposed in the CAA amount to “drawing funds from the Treasury without authorization by statute  
23       and thus violating the Appropriations Clause.” *Id.* at 1175; *see also United States v. MacCollom*,  
24       426 U.S. 317, 321 (1976) (“The established rule is that the expenditure of public funds is proper  
25       only when authorized by Congress, not that public funds may be expended unless prohibited by  
26       Congress.”).

27       Likewise, a statute would run afoul of the Presentment Clause if it permitted the president to  
28       sign an appropriations act and, “based on the same facts and circumstances that Congress  
      considered,” have the option of “rejecting the policy judgment made by Congress and relying on

1 [its] own policy judgment.” *Clinton v. City of New York*, 524 U.S. 417, 444 & n.35 (1998). “Where  
2 the President does not approve a bill, the plan of the Constitution is to give to the Congress the  
3 opportunity to consider his objections and to pass the bill despite his disapproval.” *Wright v. United*  
4 *States*, 302 U.S. 583, 596 (1938). Instead of following this constitutional requirement, the President  
5 signed a bill to which he objected, and simultaneously announced that he would nonetheless  
6 disregard the limitations Congress imposed in the CAA by increasing funds to his liking. This  
7 violates the Presentment Clause. *See Clinton*, 524 U.S. at 445–47.

8 Finally, Defendants’ efforts to circumvent congressional control of appropriations violate the  
9 separation of powers. “[T]he position that when Congress declines the Executive’s request to  
10 appropriate funds, the Executive nonetheless may simply find a way to spend those funds ‘without  
11 Congress’ does not square with fundamental separation of powers principles dating back to the  
12 earliest days of our Republic.” PI Order 54-55. “Congress has repeatedly rejected legislation that  
13 would have funded substantially broader border barrier construction, as noted above, deciding in the  
14 end to appropriate only \$1.375 billion.” PI Order 38-39 (citing *City & Cty. of San Francisco v.*  
15 *Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018) (“In fact, Congress has frequently considered and thus  
16 far rejected legislation accomplishing the goals of the Executive Order. The sheer amount of failed  
17 legislation on this issue demonstrates the importance and divisiveness of the policies in play,  
18 reinforcing the Constitution’s ‘unmistakable expression of a determination that legislation by the  
19 national Congress be a step-by-step, deliberate and deliberative process.’”)); *see also Youngstown*  
20 *Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring) (“It is quite  
21 impossible . . . when Congress did specifically address itself to a problem . . . to find secreted in the  
22 interstices of legislation the very grant of power which Congress consciously withheld. To find  
23 authority so explicitly withheld is not merely to disregard in a particular instance the clear will of  
24 Congress. It is to disrespect the whole legislative process and the constitutional division of authority  
25 between President and Congress.”).

26 **III. Defendants’ final decision to construct a wall in the designated sectors violates NEPA.**

27 The National Environmental Policy Act (“NEPA”) demands that federal agencies prepare an  
28 Environmental Impact Statement before taking any action with significant environmental impacts.



1 42 U.S.C. § 4332. To comply with that mandate, NEPA’s implementing regulations require an  
 2 agency to complete at least an initial Environmental Assessment to determine whether a proposed  
 3 action will have such impacts. 40 C.F.R. 1501.4(b)-(c). DoD does not dispute that its actions have  
 4 significant effects on the environment, nor that it has failed to prepare an Assessment. Instead,  
 5 Defendants rely upon determinations issued by the Secretary of Homeland Security purporting to  
 6 waive various statutory requirements, including NEPA, pursuant to Section 102(c) of IIRIRA.

7 Section 102(c) allows DHS to waive compliance with laws to the extent “necessary to ensure  
 8 expeditious construction of the barriers and roads *under this section*”—that is, under Section 102 of  
 9 IIRIRA. IIRIRA § 102(c) (emphasis added). As such, DHS’s purported waiver can only eliminate  
 10 the Department of Defense’s NEPA obligations if the “expeditious construction” is “under” IIRIRA  
 11 authority. Defendants insist, however, that their projects are *not* being undertaken under DHS’s  
 12 IIRIRA authority; in an attempt to evade the restrictions of the CAA, they have characterized the  
 13 actions as occurring “under” Section 284. Defendants cannot have it both ways. If Defendants are  
 14 diverting funds toward border barrier construction that is derivative of DHS’s authorities, they have  
 15 violated statutory and constitutional law. *See supra* I and II. In the alternative—that is, if the  
 16 Department of Defense’s construction pursuant to Section 284 is not derivative of DHS’s Section  
 17 102(c) authority, Defendants have failed to satisfy their obligations under NEPA.<sup>3</sup>

18 **IV. Ultra vires review is proper and, in the alternative, APA review is available.**

19 A “court may grant injunctive relief against executive officers to enjoin both ultra vires  
 20 acts—that is, acts exceeding the officers’ purported statutory authority—and unconstitutional acts.”  
 21 PI Order 28. *See also Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949)  
 22 (“[W]here [an] officer’s powers are limited by statute, his actions beyond those limitations . . . are  
 23 ultra vires his authority and therefore may be made the object of specific relief.”). Plaintiffs’ “cause  
 24 of action, which exists outside of the APA, allows courts to review ultra vires actions by the  
 25 President that go beyond the scope of the President’s statutory authority.” *Hawaii v. Trump*, 878  
 26 F.3d 662, 682 (9th Cir. 2017), *rev’d on other grounds*, 138 S. Ct. 2392 (2018).

27 \_\_\_\_\_  
 28 <sup>3</sup> Plaintiffs acknowledge that the Court did not find they were likely to succeed on this  
 NEPA argument, but respectfully present it for the Court’s consideration on the merits.

1            “[W]here a plaintiff seeks equitable relief against a defendant for exceeding its statutory  
2 authority, the zone-of-interests test is inapposite.” PI Order 30; *see also Haitian Refugee Ctr. v.*  
3 *Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) (“Appellants need not, however, show that their  
4 interests fall within the zones of interests of the constitutional and statutory powers invoked by the  
5 President in order to establish their standing to challenge the interdiction program as ultra vires.”).  
6 Even if Plaintiffs were required to satisfy a further zone-of-interest test with respect to Defendants’  
7 claimed Section 8005 authority, the test would pose no obstacle to the Court’s review. “The test  
8 forecloses suit only when a plaintiff’s interests are so marginally related to or inconsistent with the  
9 purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to  
10 permit the suit.” *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S.  
11 209, 225 (2012) (quotations omitted). The inquiry is causal: zone-of-interests requires only that an  
12 injury “somehow be tied to” a violation of the underlying statutory or constitutional purpose.  
13 *Yakima Valley Mem’l Hosp. v. Wash. State Dep’t of Health*, 654 F.3d 919, 932 (9th Cir. 2011).

14            Here, Plaintiffs’ interest in avoiding circumvention of Congress’s decision to deny funds is  
15 entirely aligned with Section 8005’s purpose. Plaintiffs were involved with Congress’s funding  
16 decisions with respect to the border wall, and repeatedly advocated with lawmakers to limit the  
17 scope and location of any construction. *See Houle Decl.* ¶ 7; *Gaubeca Decl.* ¶ 5. They now seek to  
18 enforce the denial of funds that Congress enacted in the CAA. *See Clarke v. Sec. Indus. Ass’n.*, 479  
19 U.S. 388, 401 (1987) (zone-of-interests analysis “not limited to considering the statute under which  
20 respondents sued” but must consider “overall context” and “overall purposes” of congressional  
21 action). “[I]t is sufficient that the Organizations’ asserted interests are consistent with and more than  
22 marginally related to the purposes of the [statute].” *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d  
23 1219, 1244 (9th Cir. 2018). Plaintiffs’ “stake in opposing” the use of Section 8005 to circumvent  
24 Congress’s protection of the lands Plaintiffs treasure is “intense and obvious,” and easily passes the  
25 “zone-of-interests test[, which] weeds out litigants who lack a sufficient interest in the controversy.”  
26 *Patchak v. Salazar*, 632 F.3d 702, 707 (D.C. Cir. 2011), *aff’d sub nom. Match-E-Be-Nash-She-Wish*  
27 *Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209.

28            Finally, even if the Court ultimately views these claims as challenges arising under Section

1 8005, rather than nonstatutory ultra vires claims, it may treat them as APA claims. *See, e.g., Alto v.*  
 2 *Black*, 738 F.3d 1111, 1117 (9th Cir. 2013) (electing to consider under APA claims not “explicitly  
 3 denominated as an APA claim” as they were “fairly characterized as claims for judicial review of  
 4 agency action under the APA”); *Clouser v. Espy*, 42 F.3d 1522, 1533 (9th Cir. 1994) (“We shall  
 5 therefore treat plaintiffs’ arguments as being asserted under the APA, although plaintiffs sometimes  
 6 have not framed them this way in their pleadings.”). The transfers are final agency decisions  
 7 because “the initial agency decisionmaker arrived at a definitive position and put the decision into  
 8 effect,” *Oregon Nat. Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 984-85 (9th Cir. 2006)  
 9 (quotation omitted), leading directly to the challenged harms to Plaintiffs, PI Order 24-25.

10 **V. The Court should order injunctive and declaratory relief.**

11 **A. The Court should enter a permanent injunction.**

12 Less than one month ago, this Court issued a preliminary injunction finding that “Plaintiffs  
 13 are likely to show that Defendants’ actions exceeded their statutory authority, and that irreparable  
 14 harm will result from those actions.” PI Order 55. The material facts remain unchanged since then,  
 15 and the standard for a permanent injunction is “essentially the same,” except that a plaintiff must  
 16 show actual success on the merits instead of a likelihood of success. *Winter v. Nat. Res. Def.*  
 17 *Council, Inc.*, 555 U.S. 7, 32 (2008). More specifically, a party seeking a permanent injunction  
 18 must show that “(1) that it has suffered an irreparable injury; (2) that remedies available at law,  
 19 such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the  
 20 balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4)  
 21 that the public interest would not be disserved by a permanent injunction.” *Cottonwood Envtl. Law*  
 22 *Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088 (9th Cir. 2015) (quoting *eBay Inc. v. MercExchange,*  
 23 *L.L.C.*, 547 U.S. 388, 391 (2006)). Plaintiffs have satisfied these requirements.

24 **1. Plaintiffs will suffer irreparable harm absent a permanent injunction.**

25 The undisputed facts demonstrate that, without an order permanently enjoining construction  
 26 in the areas designated as El Paso Sector 1, Yuma Sector 1, El Centro, and Tucson Sector 1, 2, and  
 27 3, Plaintiffs’ members will suffer irreparable harm to their recreational and aesthetic interests.  
 28 Defendants’ proposed construction “will lead to a substantial change in the environment” that

1 “cannot be remedied easily after the fact.” PI Order 50.

2         The harm that border wall construction will inflict on Plaintiffs’ aesthetic and recreational  
3 interests constitutes irreparable injury sufficient to justify injunctive relief as a matter of law. “It is  
4 well-established in the Ninth Circuit that an organization can demonstrate irreparable harm by  
5 showing that the challenged action will injure its members’ enjoyment of public land.” PI Order 49  
6 (citing *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)). Plaintiffs’  
7 members have established in their uncontested declarations that construction in the designated areas  
8 will impede their ability to enjoy those lands. *See, e.g.*, Walsh Decl. ¶¶ 12, 15 (construction will  
9 “negatively impact [her] aesthetic enjoyment of borderlands wildlife” in El Paso Sector 1); Bixby  
10 Decl. ¶ 6 (describing harms to lands where he enjoys camping and hiking); Gerrodette Decl. ¶¶ 6, 8  
11 (“noise, dust, and unsightliness of [wall] construction zone” will deter her from hiking and  
12 observing wildlife in Tucson Sector 3); Hartmann Decl. ¶¶ 8, 9 (“proposed wall segments will  
13 fundamentally alter [her] experience of these lands”); Armenta Decl. ¶¶ 6-8 (proposed construction  
14 in El Centro Sector will destroy “unimpeded views, in all directions, [that] are centrally important to  
15 [his] enjoyment of this landscape”); Tuell Decl. ¶¶ 7, 10 (wall construction will impede camping,  
16 hiking, and wildlife observation experience); Ramirez Decl. ¶¶ 5, 8 (border wall will “irreparably  
17 diminish[]” enjoyment of recreational activities and “impact [her] ability to see the valley as a whole  
18 and recreate in the surrounding area”); Bevins Decl. ¶ 7 (“tall and intrusive pedestrian barrier would  
19 disrupt the desert views and inhibit [him] from fully appreciating this area”); and Ardovino Decl. ¶ 6  
20 (same).

21         Plaintiffs have “allege[d] recreational harms from not only the bollard wall construction but  
22 also the accompanying lighting, which does not currently exist” and would diminish the quality of  
23 Plaintiffs’ recreational activities. PI Order 50. *See also* Munro Decl. ¶¶ 9, 11 (“increased lighting  
24 and upkeep activities” will “diminish [the] happiness and sense of fulfillment [she] derive[s] from  
25 visiting these beautiful landscapes and viewing local species”); Del Val Decl. ¶¶ 9, 10 (construction  
26 will “create artificial light pollution interfering with the desert dark skies [he and his wife]  
27 treasure”); Broyles Decl. ¶¶ 8, 9 (enjoyment of areas will be “damaged by the incessant lighting  
28 associated with the wall and its construction” which will “disrupt night flights of migrating birds

1 and mar [his] and others’ view of the night skies”); Dahl Decl. ¶ 8 (increased lighting will “impede  
 2 the desert dark skies that are a hallmark of this landscape, and generally degrade [his] camping  
 3 experience”); Hudson Decl. ¶¶ 10, 11 (light pollution will “drastically impact [his] ability to  
 4 stargaze in this beautiful border region”); Case Decl. ¶¶ 10-12 (increased lighting is “an intrusive  
 5 nuisance and decreases [her] enjoyment of the area,” including ability to birdwatch); Evans Decl. ¶ 8  
 6 (lighting “detrimental to [his] ability to enjoy[] a dark sky full of stars” and nocturnal wildlife).

7 The harms Plaintiffs will experience if construction proceeds are real, significant, and  
 8 potentially irreversible. This proposed construction “constitutes a change in conditions” that will  
 9 irreparably harm Plaintiffs’ members. PI Order 50. Plaintiffs injuries are “are not speculative, and  
 10 will be irreparable in the absence of an injunction.” *Id.* at 54.

## 11 **2. Plaintiffs do not have an adequate remedy at law.**

12 No remedy at law can compensate Plaintiffs for the harm that wall construction imposes.  
 13 “Environmental injury, by its nature, can seldom be adequately remedied by money damages and is  
 14 often permanent.” *Lands Council v. McNair*, 537 F.3d 981, 1004 (9th Cir.2008) (en banc)  
 15 (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)), *abrogated in part on*  
 16 *other grounds by Winter*, 555 U.S. at 20; *see also League of Wilderness Defs./Blue Mountains*  
 17 *Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) (noting that payment  
 18 of money damages cannot remedy environmental injury stemming from logging); *Sierra Club v.*  
 19 *U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988) (same). Once Defendants commence  
 20 construction—which includes preparatory activities such as installing additional lighting, creating  
 21 access roads, and moving heavy machinery on location—environmental damage will have already  
 22 occurred. This harm is irreversible, permanently altering the surrounding environment and causing  
 23 irreparable injury to Plaintiffs. No amount of after-the-fact monetary damages can remedy this harm.

## 24 **3. The balance of harms and public interest support a permanent injunction.**

25 The public interest and balance of equities favor the entry of a permanent injunction. *See*  
 26 *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (these two factors merge  
 27 when the government is a party). Unless Defendants are permanently enjoined from wall  
 28 construction using funds reprogrammed to the Section 284 account, Plaintiffs will continue to face

1 the prospect that the borderlands they treasure will be irreversibly destroyed. *See All. for the Wild*  
2 *Rockies*, 632 F.3d at 1138 (there is a well-established “public interest in preserving nature and  
3 avoiding irreparable environmental injury” (quotations omitted)). The public also “has an interest in  
4 ensuring that statutes enacted by their representatives are not imperiled by executive fiat.” PI Order  
5 54 (quoting *E. Bay Sanctuary*, 909 F.3d at 1255). “Accordingly, this factor favors Plaintiffs” and  
6 counsels in favor of a permanent injunction. *Id.*

7 The public interest further supports a stay because the administration’s own expert  
8 assessment is that a border would do little to stanch the flow of heroin, fentanyl, and cocaine.  
9 According to the Drug Enforcement Agency, the “majority of the [heroin] flow is through [privately  
10 operated vehicles] entering the United States at legal ports of entry, followed by tractor-trailers,  
11 where the heroin is co-mingled with legal goods.” RJN ¶ 25, Ex. 23 at 19. Fentanyl transiting the  
12 Southern border is likewise most commonly smuggled in “multi-kilogram loads” in vehicles  
13 crossing at legal ports of entry. *Id.* at 33. And privately owned vehicles “remain the primary method  
14 used to smuggle cocaine across the [Southwest border]. Traffickers hide cocaine amongst legitimate  
15 cargo of commercial trucks or within secret compartments built within passenger vehicles.” *Id.* at 52.

16 **B. The court should declare unlawful Defendants’ proposed use of DoD transfer**  
17 **authorities and Section 284 to construct a border wall that Congress rejected, as**  
18 **well as their violation of NEPA.**

18 This Court may issue declaratory relief “[i]n a case of actual controversy within its  
19 jurisdiction.” 28 U.S.C. § 2201(a); *see also Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40  
20 (1937). Throughout the course of this litigation, Defendants have announced the use of new and  
21 different transfer authorities to move various funds into the Section 284 account for the purpose of  
22 wall construction. At the time Plaintiffs filed this lawsuit, Defendants had announced plans to  
23 transfer \$2.5 billion to wall construction through the use of Section 284. Defendants subsequently  
24 announced their first use of Section 8005 on March 25, 2019, and announced their first uses of  
25 “section 9002 of the Department of Defense Appropriations Act, 2019, and section 1512 of the John  
26 S. McCain National Defense Authorization Act for Fiscal Year 2019” on May 9, 2019. *See Admin.*  
27 *R.*, ECF 163-3, at 10-20; *see also id.*, 163-2, at 19-20. Defendants also announced a series of  
28 different Section 284 projects over the course of this litigation. They identified for the first time on

1 March 25, 2019, DoD’s intention to transfer funds for construction of the wall sections identified as  
2 El Paso Project 1 and Yuma Sector Projects 1 and 2. *See* Admin. R., 163-2, at 19-20. On May 9,  
3 Defendants announced that they intended to use Section 284 funds to construct wall in areas  
4 identified as El Centro Project 1 and Tucson Sector Projects 1, 2 and 3. *See* Admin. R., 163-3, at 7-8.

5 Accordingly, Plaintiffs request that the Court declare unlawful the use of any DoD authority  
6 to transfer funds for construction of border barriers, because construction of border barriers was  
7 denied by Congress and is not an unforeseen military requirement. The Court can make this  
8 declaration as to every DoD transfer authority, because restrictions in 10 U.S.C. § 2214 apply  
9 “[w]henever authority is provided in an appropriation Act to transfer amounts in working capital  
10 funds or to transfer amounts provided in appropriation Acts for military functions of the Department  
11 of Defense (other than military construction) between such funds or appropriations (or any  
12 subdivision thereof).” Section 2214(b) in turn restricts transfers “except to provide funds for a  
13 higher priority item, based on unforeseen military requirements, than the items for which the funds  
14 were originally appropriated” and bars any transfer “if the item to which the funds would be  
15 transferred is an item for which Congress has denied funds.” And it can make this declaration as to  
16 all sections of the border, because “Plaintiffs have demonstrated that their members span the entire  
17 U.S.-Mexico border.” PI Order 27. In addition, because Defendants have indicated through their  
18 consistent actions that they will not undertake NEPA reviews for border barrier construction,  
19 instead purporting to waive all environmental laws, Plaintiffs respectfully request that the Court  
20 enter a declaratory judgment on this claim as well.

21 A “case or controversy exists justifying declaratory relief” because “the challenged  
22 government activity is not contingent, has not evaporated or disappeared, and, by its continuing and  
23 brooding presence, casts what may well be a substantial adverse effect on the interests of the  
24 petitioning parties.” *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008) (internal quotation  
25 omitted). The Court should enter Plaintiffs’ requested declaratory relief.

## 26 CONCLUSION

27 For the reasons stated above, Plaintiffs ask that the Court grant their Motion for Partial  
28 Summary Judgment and order injunctive and declaratory relief.

1 Dated: June 12, 2019

Respectfully submitted,

2 /s/ Noor Zafar

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