

1 DROR LADIN*
 NOOR ZAFAR*
 2 JONATHAN HAFETZ*
 HINA SHAMSI*
 3 OMAR C. JADWAT*
 AMERICAN CIVIL LIBERTIES UNION FOUNDATION
 4 125 Broad Street, 18th Floor
 New York, NY 10004
 5 Tel: (212) 549-2660
 dladin@aclu.org
 6 nzafar@aclu.org
 jhafetz@aclu.org
 7 hshamsi@aclu.org
 ojadwat@aclu.org
 8 *Admitted pro hac vice

9 CECILLIA D. WANG (SBN 187782)
 AMERICAN CIVIL LIBERTIES UNION FOUNDATION
 10 39 Drumm Street
 San Francisco, CA 94111
 11 Tel: (415) 343-0770
 12 cwang@aclu.org

13 *Attorneys for Plaintiffs* (Additional counsel listed on following page)

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

17 SIERRA CLUB and SOUTHERN BORDER
 18 COMMUNITIES COALITION,

19 *Plaintiffs,*

20 v.

21 DONALD J. TRUMP, President of the United
 States, in his official capacity; MARK T. ESPER,
 22 Secretary of Defense, in his official capacity;
 KEVIN K MCALEENAN, Acting Secretary of
 23 Homeland Security, in his official capacity; and
 STEVEN MNUCHIN, Secretary of the Treasury,
 24 in his official capacity,

25 *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: Nov. 20, 2019
 Time: 10:00 AM
 Judge: Honorable Haywood S. Gilliam
 Dept: Oakland
 Date Filed: October 11, 2019

1 Additional counsel for Plaintiffs:

2 SANJAY NARAYAN (SBN 183227)**

3 GLORIA D. SMITH (SBN 200824)**

4 SIERRA CLUB ENVIRONMENTAL LAW
PROGRAM

5 2101 Webster Street, Suite 1300

6 Oakland, CA 94612

7 Tel: (415) 977-5772

8 sanjay.narayan@sierraclub.org

9 gloria.smith@sierraclub.org

10 **Counsel for Plaintiff SIERRA CLUB

11 MOLLIE M. LEE (SBN 251404)

12 AMERICAN CIVIL LIBERTIES UNION

13 FOUNDATION OF NORTHERN

14 CALIFORNIA, INC.

15 39 Drumm Street

16 San Francisco, CA 94111

17 Tel: (415) 621-2493

18 Fax: (415) 255-8437

19 mlee@aclunc.org

20 DAVID DONATTI*

21 ANDRE I. SEGURA (SBN 247681)

22 AMERICAN CIVIL LIBERTIES UNION

23 FOUNDATION OF TEXAS

24 P.O. Box 8306

25 Houston, TX 77288

26 Tel: (713) 325-7011

27 Fax: (713) 942-8966

28 ddonatti@aclutx.org

asegura@aclutx.org

*Admitted pro hac vice

TABLE OF CONTENTS

1

2 NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT 1

3 MEMORANDUM OF POINTS AND AUTHORITIES 1

4 INTRODUCTION 1

5 BACKGROUND 2

6 LEGAL STANDARD..... 6

7 ARGUMENT 6

8 I. Defendants’ diversion of funds violates the CAA 7

9 II. Section 2808 does not authorize Defendants to raid military construction projects

10 to fund a multibillion dollar civilian law enforcement wall that Congress refused

11 to fund..... 8

12 A. Congress’s decision to deny the President’s requested wall funding to DHS is

13 not an emergency requiring the use of the armed forces 9

14 B. A wall extending across the southern border does not constitute a “military

15 construction” project..... 11

16 C. A border wall intended to “reduce the challenges to CBP” fails Section

17 2808’s requirement that construction be necessary to support the use of the

18 armed forces..... 13

19 III. Defendants’ efforts to circumvent Congress’s appropriations restrictions are

20 unconstitutional and this Court should avoid the serious constitutional problems

21 Defendants’ efforts raise by invalidating them as ultra vires. 15

22 IV. Defendants are not free to disregard NEPA..... 18

23 V. Equitable review is proper and, in the alternative, APA review is available..... 21

24 A. The Ninth Circuit’s binding decision in *Sierra Club v. Trump* establishes that

25 Plaintiffs have a cause of action..... 21

26 B. Plaintiffs have an equitable claim under the Constitution 22

27 C. Plaintiffs satisfy any zone-of-interests requirements for an APA claim..... 23

28 VI. The Court should order injunctive and declaratory relief..... 25

A. The Court should enter a permanent injunction..... 25

1. Plaintiffs will suffer irreparable harm absent an injunction..... 25

a. Wall construction will cause irreparable injury to Plaintiffs’

members’ aesthetic and recreational interests..... 26

b. SBCC and its member organizations have suffered irreparable harm 28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

c. Defendants’ actions irreparably harm Plaintiffs’ constitutional interests..... 32

2. Plaintiffs do not have an adequate remedy at law..... 32

3. The balance of harms and public interest support a permanent injunction..... 33

B. The Court should declare unlawful Defendants’ proposed use of Section 2808 to construct a border wall that Congress rejected, as well as Defendants’ violation of NEPA..... 33

CONCLUSION..... 34

TABLE OF AUTHORITIES

Cases

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Aetna Life Ins. Co. v. Haworth,
300 U.S. 227 (1937)..... 34

All. for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 26, 33

Am. Trucking Ass’ns, Inc. v. City of Los Angeles,
559 F.3d 1046 (9th Cir. 2009) 32

Amoco Prod. Co. v. Vill. of Gambell,
480 U.S. 531 (1987)..... 32

Bond v. United States,
564 U.S. 211 (2011)..... 23

City & Cty. of San Francisco v. Trump,
897 F.3d 1225 (9th Cir. 2018) 17

City of Indianapolis v. Edmond,
531 U.S. 32 (2000)..... 10

Clinton v. City of New York,
524 U.S. 417 (1998)..... 17, 18

Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,
657 F.3d 936 (9th Cir. 2011) 31

Consejo de Desarrollo Economico de Mexicali, A.C. v. United States,
482 F.3d 1157 (9th Cir. 2007) 20, 21

Cottonwood Env’tl. Law Ctr. v. U.S. Forest Serv.,
789 F.3d 1075 (9th Cir. 2015) 25

Cty. of Santa Clara v. Trump,
250 F. Supp. 3d 497 (N.D. Cal. 2017) 32

Dalzin v. Belshe,
993 F. Supp. 732 (N.D. Cal. 1997)..... 6

Dep’t of Commerce v. New York,
139 S. Ct. 2551 (2019)..... 11

Dodds v. U.S. Dep’t of Educ.,
845 F.3d 217 (6th Cir. 2016) 22

Doe v. Trump,
284 F. Supp. 3d 1182 (W.D. Wash. 2018)..... 22

Drakes Bay Oyster Co. v. Jewell,
747 F.3d 1073 (9th Cir. 2014) 33

1 *Durham v. Prudential Ins. Co. of Am.*,
236 F. Supp. 3d 1140 (C.D. Cal. 2017) 22

2

3 *E. Bay Sanctuary v. Trump*,
909 F.3d 1219 (9th Cir. 2018) 33

4 *eBay Inc. v. MercExchange, L.L.C.*,
547 U.S. 388 (2006)..... 25

5

6 *F.D.A. v. Brown & Williamson Tobacco Corp.*,
529 U.S. 120 (2000)..... 15

7 *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*,
666 F.3d 1216 (9th Cir. 2012) 30

8

9 *Fair Hous. of Marin v. Combs*,
285 F.3d 899 (9th Cir. 2002) 31

10 *Feldman v. Bomar*,
518 F.3d 637 (9th Cir. 2008) 34

11

12 *Gartner v. United States*,
166 F.2d 728 (9th Cir. 1948) 7

13 *Gustafson v. Alloyd Co.*,
513 U.S. 561 (1995)..... 12

14

15 *Havens Realty Corp. v. Coleman*,
455 U.S. 363 (1982)..... 28

16 *Lair v. Bullock*,
798 F.3d 736 (9th Cir. 2015) 21

17

18 *Lands Council v. McNair*,
537 F.3d 981 (9th Cir. 2008) 32

19 *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*,
752 F.3d 755 (9th Cir. 2014) 32

20

21 *League of Women Voters v. Newby*,
838 F.3d 1 (D.C. Cir. 2016)..... 33

22 *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*,
567 U.S. 209 (2012)..... 24, 25

23

24 *McDonnell v. United States*,
136 S. Ct. 2355 (2016)..... 13

25 *Melendres v. Arpaio*,
695 F.3d 990 (9th Cir. 2012) 32, 33

26

27 *Nat’l Council of La Raza v. Cegavske*,
800 F.3d 1032 (9th Cir. 2015) 30

28

1 *No GWEN All. v. Aldridge*,
855 F.2d 1380 (9th Cir. 1988) 18

2

3 *Or. Nat. Res. Council v. Thomas*,
92 F.3d 792 (9th Cir. 1996) 19, 20, 21

4 *Ordlock v. Comm’r*,
533 F.3d 1136 (9th Cir. 2008) 19

5

6 *Patchak v. Salazar*,
632 F.3d 702 (D.C. Cir. 2011) 25

7 *Robertson v. Methow Valley Citizens Council*,
490 U.S. 332 (1989) 18

8

9 *Serv. Women’s Action Network v. Mattis*,
352 F. Supp. 3d 977 (N.D. Cal. 2018) 30

10 *Sierra Club v. Trump*,
929 F.3d 670 (9th Cir. 2019) 21, 22, 23, 33

11

12 *Sierra Club v. U.S. Forest Serv.*,
843 F.2d 1190 (9th Cir. 1988) 32

13 *Sierra Club v. U.S. Forest Serv.*,
93 F.3d 610 (9th Cir. 1996) 21

14

15 *Smith v. Pac. Props. & Dev. Corp.*,
358 F.3d 1097 (9th Cir. 2004) 30, 31

16 *Trump v. Sierra Club*,
No. 19A60 (S. Ct. July 26, 2019) 23

17

18 *United States v. MacCollom*,
426 U.S. 317 (1976) 8

19 *United States v. McIntosh*,
833 F.3d 1163 (9th Cir. 2016) 17, 22, 23

20

21 *United States v. Novak*,
476 F.3d 1041 (9th Cir. 2007) 19

22 *United States v. Stanchich*,
550 F.2d 1294 (2d Cir. 1977) 11

23

24 *Util. Air Regulatory Grp. v. E.P.A.*,
573 U.S. 302 (2014) 12, 15

25 *Valle del Sol Inc. v. Whiting*,
732 F.3d 1006 (9th Cir. 2013) 28

26

27 *Winter v. Nat. Res. Def. Council, Inc.*,
555 U.S. 7 (2008) 32

28

1 *Wright v. United States*,
 302 U.S. 583 (1938)..... 17

2

3 *Youngstown Sheet & Tube Co. v. Sawyer*,
 343 U.S. 579 (1952)..... 11, 18

4 *Zadvydas v. Davis*,
 533 U.S. 678 (2001)..... 16

5

6 **Statutes**

7 1 U.S.C. § 105..... 8

8 6 U.S.C. § 202..... 9, 11, 13

9 6 U.S.C. § 251..... 9, 11

10 8 U.S.C. § 1103..... 9, 10, 11, 14

11 10 U.S.C. § 275..... 10

12 10 U.S.C. § 2801..... 11, 12

13 10 U.S.C. § 2803..... 19

14 10 U.S.C. § 2808..... passim

15 10 U.S.C. § 2821..... 20

16 18 U.S.C. § 1385..... 10

17 28 U.S.C. § 2201..... 33

18 41 U.S.C. § 6303..... 20

19 42 U.S.C. § 4332..... 18

20 Consolidated Appropriations Act of 2019, Pub. Law No. 116-6, 133 Stat. 13 (2019)..... 1, 3, 7, 8

21 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No.
 22 104-208 (1996)..... 20

23

24 **Rules**

25 Fed. R. Civ. P. 54..... 6

26 Fed. R. Civ. P. 56..... 6

27

28

Other Authorities

1

2 H.J. Res. 46, 116th Cong. (2019)..... 4

3 Michael J. Vassalotti & Brendan W. McGarry, Cong. Research Serv., IN11017, *Military*

4 *Construction Funding in the Event of a National Emergency* (Jan. 11, 2019)..... 12, 13

5 Report Accompanying Military Construction Authorization Act, 1982, H. Rep. No. 97-44..... 19

6 S.J. Res. 54, 116th Cong. (2019) 4

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

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
5 America; Mark T. Esper, in his official capacity as Secretary of Defense; and Kevin K. McAleenan,
6 in his official capacity as Acting Secretary of Homeland Security (collectively, “Defendants”).

7 Plaintiffs respectfully move the Court to direct entry of final judgment in their favor (1)
8 declaring unlawful both Defendants’ actions to expend \$3.6 billion on a border wall in purported
9 reliance on 10 U.S.C. § 2808 and Defendants’ failure to comply with the National Environmental
10 Policy Act (“NEPA”) for this construction; (2) issuing a permanent injunction prohibiting
11 Defendants and all persons associated with them from engaging in border wall construction under
12 10 U.S.C. § 2808, and from proceeding with construction prior to complying with NEPA; and (3)
13 specifically enjoining the use of 10 U.S.C. § 2808 to construct the wall segments in the areas
14 Defendants have identified as Yuma 2, Yuma 10/27, Yuma 3, Yuma 6, San Diego 4, San Diego 11,
15 El Paso 2, El Centro 5, El Paso 8, El Centro 9, and Laredo 7. This motion is based on this Notice of
16 Motion and Motion, the accompanying supporting Memorandum of Points and Authorities; the
17 declarations and request for judicial notice, and the exhibits thereto; and any other written or oral
18 evidence or argument that may be presented at or before the time this motion is heard by the Court.

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **INTRODUCTION**

21 Congress has considered, and rejected, the executive branch’s plans to spend billions of
22 dollars on construction of the specific barriers at issue in this motion. Congress has weighed the
23 same justifications Defendants offer here—claims of a “long-standing” problem of “large-scale
24 unlawful migration through the southern border”—and has consistently refused to fund a
25 multibillion-dollar border wall as a policy response.

26 The impasse between Congress and the administration over border wall funding resulted in
27 the longest government shutdown in U.S. history. The shutdown was finally resolved after
28 Congress passed—and the President signed—the Consolidated Appropriations Act, which provided

1 a fraction of the wall funding that the executive branch requested, and imposed geographic and
2 other limitations on construction.

3 Defendants now claim the power to sidestep Congress’s enacted funding decisions, asserting
4 that 10 U.S.C. § 2808 (“Section 2808”) grants the executive branch essentially unlimited power to
5 restructure the nation’s priorities according to the executive branch’s policy preferences. But
6 Defendants’ efforts to spend billions that Congress denied them are contrary to both the
7 Constitution’s careful design and Congress’s explicit restrictions on the use of Section 2808. This
8 Court should bar Defendants’ attempt to undermine the Appropriations Clause and fundamental
9 separation-of-powers principles.

10 BACKGROUND

11 Since taking office, Defendant Trump has repeatedly sought appropriations to build a wall
12 on the border with Mexico. *See, e.g.*, Request for Judicial Notice (“RJN”) ¶ 1, Ex. 1 at 18
13 (requesting funding “to plan, design, and construct a physical wall along the southern border”).
14 Congress has exercised its appropriations judgment, including considering and rejecting several
15 bills that, if passed, would have appropriated billions of dollars for border barrier construction. RJN
16 ¶¶ 2–8, Exs. 2–8 (noticing proposed legislation and its disposition). In December 2018, Congress
17 and the President reached an impasse over border wall funding, during which the nation endured the
18 longest partial government shutdown in its history.

19 On January 6, 2019, the White House officially increased its request for border wall
20 construction in Fiscal Year 2019. By letter to the U.S. Senate Committee on Appropriations, the
21 Acting Director of the Office of Management and Budget requested “\$5.7 billion for construction
22 of a steel barrier for the Southwest border,” to “fund construction of a total of approximately 234
23 miles of new physical barrier.” *See* RJN ¶ 9, Ex. 9 at 1. As Congress negotiated toward
24 compromise, the White House repeatedly dismissed the appropriations process. Defendant Trump
25 threatened the wall would be built “one way or the other.” RJN ¶ 10, Ex. 10. Acting White House
26 Chief of Staff Mick Mulvaney echoed that the President “is going to build the wall . . . We’ll take
27 as much money as you can give us, and then we’ll go off and find the money someplace else
28 But this is going to get built, with or without Congress.” RJN ¶ 11 (video at 00:55–1:12). And on

1 February 12, with Congress about to exercise its judgment through an appropriations act, Defendant
 2 Trump told his Cabinet that “the wall is getting built;” Congress’s appropriation “doesn’t matter,”
 3 “[b]ecause we’re doing other things beyond what we’re talking about here.” RJN ¶ 12, Ex. 11 at 5.

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

13 None of the funds made available in this or any other appropriations
 14 Act may be used to increase, eliminate, or reduce funding for a
 15 program, project, or activity as proposed in the President’s budget
 16 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.

17 *Id.* § 739, 133 Stat. at 197.

18 Defendant Trump signed the CAA into law on February 15, 2019. The same day, he issued
 19 a proclamation “declar[ing] that a national emergency exists at the southern border of the United
 20 States.” RJN ¶ 13, Ex. 12 at 1. In describing the nature of the purported national emergency, the
 21 text of the Proclamation refers to a “long-standing” problem of “large-scale unlawful migration
 22 through the southern border” that has “worsened” in recent years due to “sharp increases in the
 23 number of family units entering and seeking entry to the United States and an inability to provide
 24 detention space” for them. *Id.* It further states that these family units “are often released into the
 25 country and are often difficult to remove from the United States because they fail to appear for

26
 27 ¹ 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 hearings, do not comply with orders of removal, or are otherwise difficult to locate.” *Id.*

2 Announcing the emergency proclamation from the Rose Garden, Defendant Trump stated
3 that he “went through Congress” but was “not happy” with the \$1.375 billion appropriated for a
4 border wall. RJN ¶ 14, Ex. 13 at 12. “I didn’t need to do this,” he explained. “But I’d rather do it
5 much faster . . . that’s all.” *Id.* at 12–13. Simultaneous to the emergency declaration, the White
6 House issued a “fact sheet” entitled “President Donald J. Trump’s Border Security Victory,” stating
7 that Defendants would divert up to \$3.6 billion from congressionally-approved military
8 construction projects “to build the border wall.” RJN ¶ 15, Ex. 14 at 1.

9 Testifying before Congress, DoD officials, including Acting Secretary of Defense Patrick
10 Shanahan and General Dunford, the Chairman of the Joint Chiefs of Staff, acknowledged that
11 although Defendants sought to divert military construction funding, the situation at the southern
12 border was “not a military threat.” RJN ¶ 16, Ex. 15 at 50–52. Admiral Mike Gilday, director of
13 operations for the Joint Staff testified that “[n]one of capabilities that we are provided are combat
14 capabilities, it’s not a war zone along the border.” RJN ¶ 17, Ex. 16 at 2–3.

15 For the first time in U.S. history, Congress disapproved the President’s declaration of an
16 emergency. On February 26, 2019, the House of Representatives overwhelmingly passed a
17 resolution pursuant to the National Emergencies Act to terminate the President’s declaration of
18 emergency. H.J. Res. 46, 116th Cong. (2019). In the Senate, a bipartisan majority likewise voted
19 59–41 to terminate the President’s declaration of emergency. On March 15, 2019, President Trump
20 vetoed the disapproval resolution. Six months later, on September 25, 2019, the Senate again
21 approved a bipartisan resolution to disapprove the emergency. S.J. Res. 54, 116th Cong. (2019). On
22 September 27, the House passed this resolution as well.

23 For nearly seven months after the White House announcement that an emergency existed
24 requiring the use of the armed forces, and that \$3.6 billion in military construction funds would be
25 diverted to the border wall, Defendants continued to maintain that DoD had made no decision to
26 spend a single dollar in military construction money on the border wall. Finally, on September 3,
27 2019, Defendant Esper announced that he had reached a decision: to support the use of the armed
28 forces, it was necessary to divert exactly \$3.6 billion from military construction projects to the

1 border wall. *See* Notice Of Decision By The Department Of Defense To Authorize Border Barrier
2 Projects Pursuant To 10 U.S.C. § 2808 (“Notice”), ECF No. 201 at 1.

3 That same day, DoD representatives explained that billions of dollars in construction
4 allegedly “necessary to support the use of the armed forces” would in fact benefit DHS: “this will
5 all go—funding will all go to adding significantly new capabilities to DHS’s ability to prevent
6 illegal entry.” RJN ¶ 18, Ex. 17 at 2, 5.

7 To fund the border wall, Defendants are stripping billions of dollars from military
8 construction projects that DoD previously told Congress were necessary to support servicemembers
9 and military missions. For example, Defendants have taken the funding that Congress allocated to
10 the Child Development Center at Joint Base Andrews, intended to replace a daycare facility for the
11 young children of servicemembers that reportedly suffers from “sewage backups, flooding, mold
12 and pests.” RJN ¶ 19, Ex. 18 at 1. Defendants aim to strip funding from dozens of congressionally-
13 approved projects to support military families and operations, including numerous schools, fire and
14 rescue stations, hazardous materials storage facilities, and a medical care center. Administrative
15 Record (“Admin. R.”), ECF No. 206-4 at 87–89.

16 As Defendant Trump confirmed on September 9, this diversion of funds is entirely a
17 response to Congress’s refusal to fund the President’s wall: “We’re taking money from all over
18 because, as you know, the Democrats don’t want us to build the wall.” RJN ¶ 20 (video at 00:17–
19 00:22). Ten days later, Defendant Trump again confirmed that Defendants’ use of Section 2808 was
20 the result of Congress’s refusal to accede to his funding request: “We wanted Congress to help us. It
21 would have made life very easy. And we still want them to get rid of loopholes, but we’ve done it a
22 different way. . . . We still want them to do it because it would be a little bit easier, but Congress
23 wouldn’t do it.” RJN ¶ 21, Ex. 19 at 11.

24 Although Congress had specifically exempted ecologically sensitive areas from wall
25 construction in the CAA, Defendant Esper claimed the authority to waive all environmental law
26 with respect to wall construction, as well as all other laws which “include, but [are] not limited to”
27 the National Historic Preservation Act and all military procurement law. Admin. R., ECF No. 206–
28 2 at 9. Defendants’ decision to dispense with the environmental protections that Congress enacted

1 exacerbates the threat posed by Defendants’ massive construction project. Plaintiffs’ members
2 include individuals who have treasured these unique borderlands for decades, who make their
3 homes in communities along the border, and who have worked for years to protect and conserve
4 these delicate landscapes.

5 LEGAL STANDARD

6 The Federal Rules of Civil Procedure provide for entry of partial summary judgment. “[T]he
7 court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties
8 only if the court expressly determines that there is no just reason for delay.” Fed. R. Civ. P. 54(b).
9 A party may move for summary judgment on any “claim or defense” or “part of [a] claim or
10 defense,” Fed. R. Civ. P. 56(a), and a district court should enter summary judgment where “there is
11 no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
12 law.” *Id.* This motion raises issues of statutory construction that present questions of law
13 appropriate for resolution through partial summary judgment. *See Dalzin v. Belshe*, 993 F. Supp.
14 732, 734 (N.D. Cal. 1997) (“It is axiomatic that questions of statutory interpretation are questions of
15 law.”).²

16 ARGUMENT

17 Defendants’ actions encroach on Congress’s exclusive power to appropriate funds as
18 enacted in the CAA. Defendants cannot use Section 2808 as an end-run around the appropriations
19 process, both because the border wall project is unauthorized by the plain language of Section 2808
20 and because Section 2808 cannot constitutionally permit the executive branch to set aside
21 Congress’s enacted appropriations decisions. In addition, because Section 2808 does not provide a
22 blanket exemption from environmental law, Defendants are not free to disregard the requirements
23 that Congress imposed on agency actions, like these, that are likely to have significant
24 environmental consequences.

25
26
27 ² Plaintiffs seek partial summary judgment on their claims involving military construction
28 funds because Defendants assert that they have made no final decision with respect to the use of
funds from the Treasury Forfeiture Fund.

1 **I. Defendants’ diversion of funds violates the CAA.**

2 Defendants’ actions to divert funds committed by Congress to other purposes for the
3 construction of the border wall directly violate the CAA. In enacting the CAA, Congress
4 specifically considered and rejected the administration’s plan to spend billions of taxpayer dollars
5 to quickly build a wall along the length of the Southwest border. Congress’s appropriations
6 judgment, as expressed in the bill that passed both chambers and was signed into law by Defendant
7 Trump, is that only \$1.375 billion should be used to construct border barriers, that such barriers
8 must be limited geographically to the Rio Grande Valley Sector, that certain sections must be
9 subject to consultation with local stakeholders, and that these new sections should be limited in
10 design to primary pedestrian fencing. Defendants’ actions to exceed these appropriations limitations
11 violate the CAA.

12 Through the CAA, Congress reached a directly contrary decision from Defendants on
13 several issues. First, Congress acted clearly to constrain the size and scope of the Defendants’ wall
14 project. The White House requested \$5.7 billion for 234 miles of wall in a letter dated January 6,
15 2019, but Congress decided on the far lower amount of \$1.375 billion. *See* RJN ¶ 9, Ex. 9 at 1. As
16 Defendant Trump conceded on the day he signed the CAA, when it came to the legislation the
17 “primary fight was on the wall,” and although the CAA gave the administration “so much money,
18 we don’t know what to do with it [t]he only place they don’t want to give as much money —
19 \$1,375,000,000” was for his wall. *Id.* ¶ 14, Ex. 13 at 8, 12. When it came to this disagreement,
20 “Congress, as holder of the purse strings, was free to deal with the subject on whatever basis it saw
21 fit.” *Gartner v. United States*, 166 F.2d 728, 729 (9th Cir. 1948). Although Defendant Trump
22 maintained that \$1.375 billion was insufficient for his plan, “beyond this Congress did not go, and
23 there can be no fair doubt that its restraint was deliberate and purposeful.” *Id.* at 730.

24 Second, Congress disagreed with Defendant Trump on the particulars of the border wall
25 funding by restricting the pace, location, permissible designs, and funding for border barrier
26 construction. *See* CAA, Division A §§ 230–32. “Where Congress has addressed the subject as it has
27 here, and authorized expenditures where a condition is met, the clear implication is that where the
28 condition is not met, the expenditure is not authorized.” *United States v. MacCollom*, 426 U.S. 317,

1 321 (1976). The executive branch cannot override Congress’s deliberate and specific plan for
2 funding border barriers.

3 Third, Congress ensured that Defendants could not unilaterally increase funding to projects
4 before Congress acts to approve such actions. The CAA prohibits the use of any appropriated funds
5 to “increase . . . funding for a program, project, or activity as proposed in the President’s budget
6 request for a fiscal year until such proposed change is subsequently enacted in an appropriation
7 Act” or authorized by provisions in other appropriations legislation. CAA, Division D § 739.
8 Defendants cannot dispute that the President has proposed an increase of funding for wall
9 construction by several billion dollars in his budget request for fiscal year 2020. *See* RJN ¶ 22, Ex.
10 20 at 50 (“Budget requests \$5 billion to construct approximately 200 miles of border wall along the
11 U.S. Southwest border.”); *id.* ¶ 23, Ex. 21 at 6–9 (requesting \$9.2 billion “to build border barriers,”
12 and “backfill funding reallocated in FY 2019 to build border barriers”). Defendant Trump’s sole
13 lawful option after signing the CAA into law was to make his appropriation request to Congress
14 another time, not to usurp Congress’s power of the purse and the legislative process by diverting
15 funds that were previously committed for other purposes.³

16 Defendants’ actions to evade Congress’s enacted decisions therefore directly interfere with a
17 primary function of appropriations legislation—to limit the size and scope of particular projects and
18 keep the executive branch accountable to the legislature through the mechanism of annual
19 budgeting.

20 **II. Section 2808 does not authorize Defendants to raid military construction**
21 **projects to fund a multibillion dollar civilian law enforcement wall that**
22 **Congress refused to fund.**

23 Defendants have invoked 10 U.S.C. § 2808 as the source of their authority to take money
24 away from appropriated military construction projects, but Congress expressly limited that statute
25 to undertakings that (1) respond to a national emergency “that requires use of the armed forces,”

26 ³ The only exception to the Section 739 prohibition on increases in funding is for increases
27 “made pursuant to the reprogramming or transfer provisions of this or any other appropriations
28 Act.” Section 2808 is not an appropriations act, therefore it cannot be used to increase border
barrier funding beyond the \$1.375 billion provided for in the CAA. *See* 1 U.S.C. § 105 (defining
appropriations acts).

1 and (2) are “military construction projects” that (3) “are necessary to support such use of the armed
2 forces.” 10 U.S.C. § 2808. Defendants’ actions to build the border wall fail all three statutory
3 requirements.

4 **A. Congress’s decision to deny the President’s requested wall funding to**
5 **DHS is not an emergency requiring the use of the armed forces.**

6 Congress expressly limited the executive branch’s power to defund approved military
7 construction projects and reallocate their appropriated funds to either a declared war or a national
8 emergency “that requires use of the armed forces.” 10 U.S.C. § 2808. Congress also expressly
9 assigned the tasks of border security and immigration enforcement to civilian agencies, rather than
10 the military. Because Defendants’ efforts to construct a border wall do not involve an emergency
11 requiring the use of the armed forces, Defendants cannot rely on Section 2808 to authorize their
12 plan to strip funding from approved military construction projects.

13 By its own terms, the Emergency Proclamation does not describe any emergency requiring
14 use of the armed forces. In describing the nature of the purported national emergency, the text of the
15 Proclamation refers to a “long-standing” problem of “large-scale unlawful migration through the
16 southern border” that has “worsened” in recent years due to “sharp increases in the number of
17 family units entering and seeking entry to the United States and an inability to provide detention
18 space” for them. RJN ¶ 13, Ex. 12 at 1. It further states that these family units “are often released
19 into the country and are often difficult to remove from the United States because they fail to appear
20 for hearings, do not comply with orders of removal, or are otherwise difficult to locate.” *Id.*

21 Taking the President’s words at face value, none of these conditions “requires use of the
22 armed forces.” Instead, Congress has made clear that response to any such condition is a core
23 function of the *civilian* components of the Department of Homeland Security. *See* 6 U.S.C. § 202
24 (assigning DHS responsibility for “[s]ecuring the borders” and “immigration enforcement
25 functions”); *id.* § 251 (assigning DHS responsibility for “Border Patrol,” “detention and removal,”
26 and “inspections”); 8 U.S.C. § 1103(a)(5) (Secretary of DHS has “duty to control and guard the
27 boundaries and borders of the United States against the illegal entry of aliens”). Congress has
28 specifically provided for a civilian, rather than military, response if “an actual or imminent mass

1 influx of aliens . . . near a land border[] presents urgent circumstances requiring an immediate
2 Federal response. . . .” 8 U.S.C. § 1103(a)(10). Should the Attorney General determine that such
3 “urgent circumstances” exist, the “immediate Federal response” Congress provided for is that the
4 Attorney General may authorize civilian “law enforcement officer[s]” to perform immigration
5 functions. *Id.* In the United States, border security tasks are reserved for civilian law enforcement—
6 not the armed forces. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000) (noting that
7 “Securing the border” is “of course, [a] law enforcement activit[y]”). This accords with Congress’s
8 longstanding design, which strictly distinguishes between the responsibilities of civilian law
9 enforcement agents and those of the military. Congress has specifically barred the armed forces
10 from “execut[ing] the laws,” 18 U.S.C. § 1385, or from participating in “search[es], seizure[s],
11 arrest[s], or other similar activit[ies].” 10 U.S.C. § 275.

12 Testimony by Department of Defense officials further dispels any claim that the unique
13 capabilities of the armed forces are required here. In DoD’s own words, the situation on the border
14 is “not a military threat” and “[n]one of capabilities that we are provided are combat capabilities,
15 it’s not a war zone along the border.” RJN ¶ 16, Ex. 15 at 50–52; RJN ¶ 17, Ex. 16 at 2–3.
16 Highlighting the complete inapplicability of Section 2808, not only is there no emergency requiring
17 the armed forces, the forces deployed to the border were not even required to be *armed*. As former
18 Secretary of Defense Mattis explained, his orders were that troops deployed to the border “will not
19 be armed, not with a firearm.” RJN ¶ 24, Ex. 22 at 2. The military’s official service awards likewise
20 recognize the simple fact that there is no border emergency requiring armed force: two months ago,
21 troops deployed to the border were announced to be eligible for a special “military award reserved
22 for troops who ‘encounter no foreign armed opposition or imminent hostile action.’” RJN ¶ 25, Ex.
23 23 at 1.

24 Congress’s decision to assign the task of border security to civilian law enforcement, like its
25 decision to limit appropriations for wall construction, cannot be undone by presidential fiat. Were it
26 otherwise, as Justice Jackson warned, a president could “vastly enlarge his mastery over the internal
27 affairs of the country” through “commitment of the Nation’s armed forces”—an outcome that could
28 not be “more sinister and alarming” in its departure from the core separation-of-powers principles

1 embodied in the Constitution. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 642 (1952)
2 (Jackson, J., concurring).

3 This is particularly so where the emergency allegedly requiring military force is “family
4 units entering and seeking entry to the United States.” RJN ¶ 13, Ex. 12 at 1. Both common sense
5 and congressional design make clear that unarmed parents and children seeking refuge do not
6 require a military response. *See, e.g.*, 6 U.S.C. § 202 (assigning DHS responsibility for “[s]ecuring
7 the borders” and “immigration enforcement functions”); *id.* § 251 (assigning DHS responsibility for
8 “Border Patrol,” “detention and removal,” and “inspections”); 8 U.S.C. § 1103(a)(5) (Secretary of
9 DHS has “duty to control and guard the boundaries and borders of the United States against . . .
10 illegal entry”).

11 In sum, the Court should give effect to the limits Congress enacted and reject Defendants’
12 patently pretextual claim that wall construction is being undertaken in response to an emergency
13 requiring the use of the armed forces. Even where review is “deferential,” courts “are ‘not required
14 to exhibit a naiveté from which ordinary citizens are free.’” *See Dep’t of Commerce v. New York*,
15 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir.
16 1977) (Friendly, J.)). Congress assigned to DHS, a civilian law enforcement agency, the
17 responsibility to secure the border and prevent unlawful entry. Congress limited border wall
18 construction in the CAA, using its budgetary control over DHS to control the size and scope of
19 Defendants’ wall-building project. And Congress specifically limited Section 2808’s use to
20 emergencies that *require* the use of the armed forces. Defendants are not free to disregard these
21 limits and use Section 2808 as freestanding authority to remake the federal budget to their liking.

22 **B. A wall extending across the southern border does not constitute a**
23 **“military construction” project.**

24 Defendants’ efforts to use Section 2808 to construct a border wall also fail because building
25 a wall across the border does not qualify as a “military construction” project. Congress limited
26 “military construction” for the purposes of Section 2808 to construction associated with a “military
27 installation” or “defense access road.” 10 U.S.C. § 2801(a). Congress defined “military
28 installation,” in turn, as a “base, camp, post, station, yard, center, or other activity under the

1 jurisdiction of the Secretary of a military department” *Id.* § 2801(c)(4). As this Court has
2 explained, “the term ‘other activity’ appears after a list of closely related types of discrete and
3 traditional military locations: ‘a base, camp, post, station, yard, [and] center.’ It is thus proper to
4 construe ‘other activity’ as referring to similar discrete and traditional military locations.” Order
5 Granting in Part and Denying in Part Plaintiffs’ Motion for Preliminary Injunction (“PI Order”),
6 ECF No. 144 at 45 (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)).

7 A 175-mile stretch of border bears no resemblance to any discrete and traditional military
8 location. With the exception of 33 miles along the Barry M. Goldwater Range, the lands Defendants
9 have targeted for construction are entirely unrelated to and disconnected from *any* military
10 locations, and were not even under the jurisdiction of the military at the time DoD decided to
11 construct a wall. Nor does a wall along the domestic border resemble any previous use of Section
12 2808. This authority has been used exclusively for overseas construction on military bases except
13 for a single project, shortly after the 9/11 attacks, to secure weapons of mass destruction held on
14 domestic Army facilities. *See* Michael J. Vassalotti & Brendan W. McGarry, Cong. Research Serv.,
15 IN11017, *Military Construction Funding in the Event of a National Emergency* (Jan. 11, 2019), at
16 2–3. Nor, finally, is there any similarity between the scope of the border wall construction and the
17 discrete projects previously authorized under Section 2808. The combined total dollar value of
18 every single previous project undertaken under Section 2808 in the past eighteen years is less than
19 half of what Defendants claim they may spend on the border wall here. *Id.* at 2. “When an agency
20 claims to discover in a long-extant statute an unheralded power to regulate a significant portion of
21 the American economy, we typically greet its announcement with a measure of skepticism.” *Util.*
22 *Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) (quotation marks and citation omitted).

23 Defendants appear to believe that all that is required to convert the border into a “military
24 installation” is an administrative transfer of jurisdiction to DoD. But as this Court has explained,
25 “[h]ad Congress intended for ‘other activity’ in Section 2801(c)(4) to be so broad as to transform
26 literally any activity conducted by a Secretary of a military department into a ‘military installation,’
27 there would have been no reason to include a list of specific, discrete military locations.” PI Order
28 45. By dispensing entirely with Congress’s decision to enact a list of discrete military locations,

1 such an unbounded definition of “military installation” would violate the “presumption that
2 statutory language is not superfluous.” *McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016)
3 (quotation marks and citation omitted). Nor would it accord with congressional design to allow a
4 paper land transfer to convert the border into a military installation. Congress assigned to the
5 Secretary of Homeland Security jurisdiction over “[s]ecuring the borders.” 6 U.S.C. § 202(2).
6 Defendants cannot simply wave a pen and convert hundreds of miles of land to a military
7 installation when convenient for the purposes of Section 2808. “[I]n context and with an eye toward
8 the overall statutory scheme, nothing demonstrates that Congress ever contemplated that ‘other
9 activity’ has such an unbounded reading that it would authorize Defendants to invoke Section 2808
10 to build a barrier on the southern border.” PI Order 46.

11 **C. A border wall intended to “reduce the challenges to CBP” fails Section**
12 **2808’s requirement that construction be necessary to support the use of**
13 **the armed forces.**

14 Defendants cannot divert billions of dollars in military construction funds to a permanent
15 border wall because Section 2808 is limited to construction “necessary to support” the “use of the
16 armed forces.” Construction projects that are “necessary to support” the armed forces are structures
17 that enable the military to conduct *military* operations. Accordingly, Section 2808 authority has
18 been used to build hangars, runways, logistics hubs, and facilities for storing ammunition and
19 weapons of mass destruction. *See Vassalotti & McGarry, Military Construction Funding in the*
20 *Event of a National Emergency*, at 2–3. Section 2808 does not, by its terms, provide freewheeling
21 authority to raid the military budget for the benefit of other agencies’ missions. Defendants cannot
22 defund congressionally–approved military construction projects to build a wall across the southern
23 border because such a wall is not necessary to enable any uniquely military mission, much less the
24 specific use of the military at the border.

25 As the administrative record confirms, to the extent the border wall would support the
26 operations of any agency, the beneficiary would be DHS and its subagency CBP—not the armed
27 forces. The purported benefit of the border wall is that it would “reduce the challenges to CBP,”
28 Admin. R., ECF No. 206-3 at 60–61, by working a “fundamental and enduring change to the
USBP’s operational capability.” Admin. R., ECF No. 206-4 at 106. At most, then, the record

1 establishes that a wall would support the operations of Border Patrol, rather than serving as a
2 necessary predicate to enable the emergency use of the armed forces. *Compare* Admin. R., ECF No.
3 206-2 at 6 (DoD claim that wall construction is “necessary to support the use of the armed forces”
4 because “construction of such physical barriers will deter illegal entry”) *with* 8 U.S.C. § 1103(a)(5)
5 (Secretary of DHS has “duty to control and guard the boundaries and borders of the United States
6 against . . . illegal entry”). DoD does not even expect to derive a benefit from wall construction on
7 the Barry M. Goldwater Range, which is the only military site involved in Defendants’ plan.
8 According to the administrative record, while construction “along the Barry M. Goldwater range”
9 might be expected to “limit potential impact to military training,” in fact “impact to military
10 training over the past five years has been negligible.” Admin. R., ECF No. 206-3 at 69. In short, as
11 DoD officials recently confirmed: “this will all go—funding will all go to adding significantly new
12 capabilities to DHS’s ability to prevent illegal entry.” RJN ¶ 18, Ex. 17.

13 The disconnect between a permanent border wall and the operational needs of the armed
14 forces is made even more stark by Defendants’ claim that the border wall would obviate, rather than
15 enable, the presence of the armed forces. According to Defendant Trump, “If we had a wall, we
16 don’t need the military because we’d have a wall.” RJN ¶ 14, Ex. 13 at 5. This position is
17 completely at odds with previous uses of Section 2808, where the armed forces were the entity that
18 would use the completed structures—be they airfields, barracks, or ammunition depots—to
19 accomplish uniquely military missions. By contrast, according to Defendant Trump, the armed
20 forces could not possibly make use of the wall because any military presence would end with the
21 wall’s completion. It cannot be that construction is “necessary to support” the “use” of the military
22 under Section 2808 while simultaneously rendering the use of the military unnecessary.

23 Moreover, Defendants’ claim that exactly \$3.6 billion in wall construction is “necessary” for
24 the use of the armed forces cannot be squared with the historical record. Defendant Trump ordered
25 that the military deploy to the border in October 2018. Although Congress had by that point
26 appropriated more than a billion dollars for border barrier construction, Defendants did not spend it,
27 representing as recently as April 30, 2019—months after the emergency proclamation—that they
28 had “only constructed 1.7 miles of fencing with that funding.” PI Order 54 n.22. Further

1 underscoring the lack of any necessity for wall construction, DoD waited nearly seven months after
2 the emergency proclamation to make any decision about whether to spend a single dollar of military
3 construction money on a wall. Even once a decision was made, DoD decided that in many areas
4 work would not even get underway before April 2020. Notice, ECF No. 201 at 4. These extreme
5 delays are entirely inconsistent with a claim that construction is “necessary” to enable emergency
6 military operations, demonstrating again the mismatch between Defendants’ massive public works
7 project and Congress’s limited grant of emergency military construction authority. It would be
8 absurd to read Section 2808’s emergency military construction authority to encompass years-long,
9 multibillion-dollar construction projects that have been the subject of years of congressional debate
10 and executive delay. *See Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. at 324 (“We expect Congress
11 to speak clearly if it wishes to assign to an agency decisions of vast economic and political
12 significance.” (quotation marks and citation omitted)).

13 Finally, DoD’s authority to undertake emergency military construction in support of urgent
14 military need cannot be read to extend to billions of dollars for border wall construction when
15 interpreted against the more specific and more recent judgment by Congress embodied in the CAA.
16 “[T]he meaning of one statute may be affected by other Acts, particularly where Congress has
17 spoken subsequently and more specifically to the topic at hand.” *F.D.A. v. Brown & Williamson*
18 *Tobacco Corp.*, 529 U.S. 120, 133 (2000). “This is particularly so where the scope of the earlier
19 statute is broad but the subsequent statutes more specifically address the topic at hand.” *Id.* at 143.
20 Therefore, “a specific policy embodied in a later . . . statute should control [judicial] construction of
21 the [earlier broad] statute, even though it ha[s] not been expressly amended.” *Id.* (quotations and
22 citations omitted). Here, the CAA’s specific policy limitation on border barrier construction must
23 control, and bar, Defendants’ attempt to use Section 2808 to evade Congress’s funding restrictions.

24 **III. Defendants’ efforts to circumvent Congress’s appropriations restrictions**
25 **are unconstitutional and this Court should avoid the serious constitutional**
26 **problems Defendants’ efforts raise by invalidating them as ultra vires.**

27 Defendants’ plan to construct a massive, multibillion-dollar wall that Congress considered
28 and rejected violates the Constitution’s Appropriations Clause, Presentment Clause, and the
separation of powers because it represents an effort “to circumvent Congress’s clear decision to

1 deny the border barrier funding sought here when it appropriated a dramatically lower amount in
2 the CAA.” PI Order 34. However, because Defendants’ plan is not authorized by the clear text of
3 Section 2808, the Court “need not reach the second-level question of whether it would be
4 unconstitutional for Congress to sanction such conduct.” PI Order 30. Even if there were any
5 ambiguity about the scope of Section 2808, the doctrine of constitutional avoidance requires an
6 interpretation of Section 2808 that avoids the serious constitutional problems Defendants’
7 interpretation of those statutes would raise. *See* PI Order 36–37 (“Statutes must be interpreted to
8 avoid a serious constitutional problem where another ‘construction of the statute is fairly possible
9 by which the question may be avoided.’” (quoting *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001))).

10 President Trump has acknowledged explicitly and repeatedly that his use of Section 2808 is
11 purely an effort to sidestep Congress’s considered decisionmaking in passing the CAA and his own
12 actions in signing the CAA into law. Congress and the president negotiated for months, explicitly
13 going back and forth on the proper funding level for any border wall construction. The President
14 simultaneously signed Congress’s appropriations judgment into law and announced that he would
15 ignore it by invoking Section 2808. He was explicit that that he “went through Congress . . . made a
16 deal,” and, that he “*didn’t need to do this*,” but was declaring an emergency because he would
17 “rather do it much faster.” RJN ¶ 14, Ex. 13 (emphasis added). Last month, just after DoD
18 announced that it would proceed with Defendant Trump’s military construction plan, Defendant
19 Trump again confirmed that Defendants were raiding the military budget because of a funding
20 disagreement with Congress: “We wanted Congress to help us. It would have made life very easy.
21 And we still want them to get rid of loopholes, but we’ve done it a different way. . . . We still want
22 them to do it because it would be a little bit easier, but Congress wouldn’t do it.” RJN ¶ 21, Ex. 19
23 at 11. Section 2808 cannot constitutionally provide the president with a power to unilaterally
24 override Congress’s appropriations judgment.

25 The Appropriations Clause provides Congress with “‘absolute’ control over federal
26 expenditures—even when that control may frustrate the desires of the executive branch regarding
27 initiatives it views as important.” PI Order 54. The Constitution delegates to Congress “exclusive”
28 power “not only to formulate legislative policies and mandate programs and projects, but also to

1 establish their relative priority for the Nation.” *United States v. McIntosh*, 833 F.3d 1163, 1172 (9th
2 Cir. 2016). Congress has exercised this judgment, and “repeatedly rejected legislation that would
3 have funded substantially broader border barrier construction . . . deciding in the end to appropriate
4 only \$1.375 billion.” PI Order 38–39 (citing *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225,
5 1234 (9th Cir. 2018) (“In fact, Congress has frequently considered and thus far rejected legislation
6 accomplishing the goals of the Executive Order. The sheer amount of failed legislation on this issue
7 demonstrates the importance and divisiveness of the policies in play, reinforcing the Constitution’s
8 ‘unmistakable expression of a determination that legislation by the national Congress be a step-by-
9 step, deliberate and deliberative process.’”). If Section 2808 permitted Defendants to circumvent
10 Congress’s appropriations judgment, “this reading of DoD’s authority under the statute would
11 render meaningless Congress’s constitutionally-mandated power to assess proposed spending, then
12 render its binding judgment as to the scope of permissible spending.” PI Order 38. Such an
13 interpretation of Section 2808 “would pose serious problems under the Appropriations Clause, by
14 ceding essentially boundless appropriations judgment to the executive agencies.” PI Order 40.

15 Likewise, a statute would run afoul of the Presentment Clause if it permitted the president to
16 sign an appropriation act and, “based on the same facts and circumstances that Congress
17 considered,” have the option of “rejecting the policy judgment made by Congress and relying on his
18 own policy judgment.” *Clinton v. City of New York*, 524 U.S. 417, 444 & n.35 (1998). “Where the
19 President does not approve a bill, the plan of the Constitution is to give to the Congress the
20 opportunity to consider his objections and to pass the bill despite his disapproval.” *Wright v. United*
21 *States*, 302 U.S. 583, 596 (1938). Instead of following this constitutional requirement, Defendant
22 Trump signed a bill to which he objected, and simultaneously announced that he would nonetheless
23 disregard the limitations Congress imposed in the CAA by increasing funds to his liking.

24 If Section 2808 enables a president to simply substitute his own judgment—whether under
25 claim of emergency or otherwise—for Congress’s simultaneous decision, it violates the
26 Presentment Clause, as the Supreme Court explained in *Clinton*: “Because the Line Item Veto Act
27 requires the President to act within five days, every exercise of the cancellation power will
28 necessarily be based on the same facts and circumstances that Congress considered, and therefore

1 constitute a rejection of the policy choice made by Congress.” 524 U.S. at 444 n.35. Congress has
2 no power to authorize “the President himself to effect the repeal of laws, for his own policy reasons,
3 without observing the procedures set out in Article I, § 7.” *Id.* at 445. “The Constitution is a
4 compact enduring for more than our time, and one Congress cannot yield up its own powers, much
5 less those of other Congresses to follow.” *Id.* at 452 (Kennedy, J., concurring).

6 Finally, Defendants’ efforts to circumvent congressional control of appropriations violate
7 the separation of powers. Defendants have invoked Section 2808 specifically to circumvent
8 Congress’s lawful exercise of its appropriations judgment. If Section 2808 indeed grants
9 Defendants the power to sidestep Congress, the statute would violate fundamental separation of
10 powers principles: “[T]he position that when Congress declines the Executive’s request to
11 appropriate funds, the Executive nonetheless may simply find a way to spend those funds ‘without
12 Congress’ does not square with fundamental separation of powers principles dating back to the
13 earliest days of our Republic.” PI Order 54–55; *see also Youngstown*, 343 U.S. at 609 (Frankfurter,
14 J., concurring) (“It is quite impossible . . . when Congress did specifically address itself to a
15 problem . . . to find secreted in the interstices of legislation the very grant of power which Congress
16 consciously withheld. To find authority so explicitly withheld is not merely to disregard in a
17 particular instance the clear will of Congress. It is to disrespect the whole legislative process and
18 the constitutional division of authority between President and Congress.”).

19 **IV. Defendants are not free to disregard NEPA.**

20 The National Environmental Policy Act (“NEPA”) compels federal agencies to assess the
21 environmental impact of agency actions that “significantly affect[] the quality of the human
22 environment.” 42 U.S.C. § 4332(C). NEPA does not establish substantive environmental standards,
23 and instead sets “action-forcing” procedures that compel agencies to take a “hard look” at
24 “environmental consequences.” *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332,
25 348–50 (1989). If agency action “might significantly affect environmental quality,” NEPA compels
26 preparation of what is known as an Environmental Impact Statement (“EIS”). *WildEarth Guardians*
27 *v. Provencio*, 923 F.3d 655, 669 (9th Cir. May 6, 2019). “There is no ‘national defense’ exception
28 to NEPA.” *No GWEN All. v. Aldridge*, 855 F.2d 1380, 1384 (9th Cir. 1988).

1 Although it plans to undertake a multibillion-dollar construction project on ecologically-
2 sensitive borderlands, DoD has not prepared and will not prepare an EIS. Instead, the Secretary of
3 Defense, after waiting seven months to act, has directed the Secretary of the Army to disregard
4 NEPA and commence construction “without regard to any other provision of law that could impede
5 such expeditious construction in response to the national emergency.” Admin. R., ECF 206-2, at 9.
6 Defendants specifically claim the right to disregard environmental laws, historic preservation laws,
7 and all restrictions and controls on bidding and procurement. *Id.*

8 Section 2808 does not provide such sweeping authority. The Ninth Circuit “ha[s] repeatedly
9 held that the phrase ‘notwithstanding any other law’ is not always construed literally.” *Or. Nat. Res.*
10 *Council v. Thomas*, 92 F.3d 792, 796 (9th Cir. 1996). Courts construe the reach of a given
11 “notwithstanding” clause by taking into account “the whole of the statutory context in which it
12 appears.” *United States v. Novak*, 476 F.3d 1041, 1046–47 (9th Cir. 2007) (citing *Or. Nat. Res.*
13 *Council*, 92 F.3d at 796). Such context defines the scope of the agency action that may be taken, as
14 well as the otherwise applicable laws that may be set aside.

15 Read in context, it is clear that Congress empowered DoD in Section 2808 to disregard only
16 the ordinarily applicable requirements that military construction projects be specifically authorized
17 by appropriations legislation. Title 10 generally, and Section 2808 specifically, are concerned with
18 the *authorization* of projects, either expressly by Congress or conditionally in the event of
19 contingencies or emergencies. Section 2808 “provide[s] a construction *authority* in the event of a
20 declaration of war or national emergency” in order to enable “restructuring construction priorities.”
21 Report Accompanying Military Construction Authorization Act, 1982, H. Rep. No. 97-44, at 72
22 (emphasis added). It is this authorization that Section 2808 contemplates should be made “without
23 regard to any other provision of law,” insofar as other provisions conflict with the Secretary’s
24 emergency authority to restructure construction priorities. *Cf. Ordlock v. Comm’r*, 533 F.3d 1136,
25 1141 (9th Cir. 2008) (“Thus, it appears that this decision is the ‘determination’ that the final
26 sentence of [26 U.S.C.] § 6015(a) contemplates should be made ‘without regard to community
27 property laws.’”). These provisions might otherwise limit, or altogether prohibit, such
28 reprioritization. *See, e.g.*, 10 U.S.C. § 2803 (authorizing the Secretary to carry out otherwise

1 unauthorized military construction projects vital to the national security, but limiting permissible
2 obligations to \$50,000,000); 10 U.S.C. § 2821 (prohibiting funds “for the construction, acquisition,
3 leasing, addition, extension, expansion, alteration, relocation, or operation and maintenance of
4 family housing . . . unless the appropriation of such funds has been authorized by law”); 41
5 U.S.C. § 6303 (prohibiting contracts “to make any public improvement” that are “made on terms
6 requiring the Federal Government to pay more than the amount specifically appropriated for the
7 activity covered by the contract”).

8 But neither NEPA’s objectives nor its requirements conflict with the reprioritization power
9 provided by Section 2808. And unlike other statutes that impliedly or explicitly waive NEPA’s
10 requirements, Section 2808 contains no language requiring that projects be undertaken “without
11 delay” or “expeditiously.” Congress knows how to fashion such waivers of environmental law, and
12 it did not do so in Section 2808. *Cf. Consejo de Desarrollo Economico de Mexicali, A.C. v. United*
13 *States*, 482 F.3d 1157, 1167 (9th Cir. 2007) (considering a provision authorizing the Interior
14 Secretary to, “[n]otwithstanding any other provision of law,” “without delay, carry out the All
15 American Canal Lining Project”); *Or. Nat. Res. Council*, 92 F.3d at 795 (considering a provision
16 that “[n]otwithstanding any other law . . . the Secretary concerned shall expeditiously prepare, offer,
17 and award timber sale contracts”). As the Ninth Circuit has explained, “when Congress has directed
18 *immediate* implementation ‘notwithstanding any other provision of law,’ we have construed the
19 legislation to exempt the affected project from the reach of environmental statutes which would
20 delay implementation.” *Consejo de Desarrollo Economico de Mexicali*, 482 F.3d at 1169 (emphasis
21 added and citation omitted). Congress did not grant such authority in Section 2808 because there is
22 no “express Congressional directive to proceed immediately or . . . ‘without delay.’” *Id.* Section
23 2808 is thus entirely unlike the Illegal Immigration Reform and Immigrant Responsibility Act of
24 1996, Pub. L. No. 104-208 (1996) (“IIRIRA”), which Defendants have invoked to waive
25 environmental requirements for several projects before this Court. *Cf. IIRIRA* § 102(c)(1)
26 (authorizing Secretary of Homeland Security “to waive all legal requirements . . . necessary to
27 ensure *expeditious* construction” of border barriers (emphasis added)).

28 Moreover, interpreting Section 2808 to contain a waiver of any law that clashes with the

1 implementation of Defendants’ construction plans would convert Section 2808 into a far more
2 broad-ranging executive authority than courts have ever recognized. In the past, statutes that were
3 held to authorize the executive branch to set aside environmental requirements had tightly-defined
4 geographic and temporal scopes. *See, e.g., Consejo de Desarrollo Economico de Mexicali*, 482 F.3d
5 at 1169 (addressing specific authorization for the All American Canal Lining Project); *Sierra Club*
6 *v. U.S. Forest Serv.*, 93 F.3d 610, 612 (9th Cir. 1996) (addressing salvage timber sales “in
7 preparation” during the date of enactment); *Or. Nat. Res. Council*, 92 F.3d at 794 (addressing
8 timber sales in “old growth and late successional forests from the Canadian border to northern
9 California”). By contrast, Section 2808 does not limit the type of works that might be undertaken,
10 or define a geographic scope. Defendants’ claimed authority to disregard any law that might
11 constrain any construction under Section 2808 would thus far exceed the delegation of IIRIRA’s
12 express waiver, empowering the Secretary of Defense to build almost anything, anywhere, while
13 disregarding virtually the entire U.S. code.

14 **V. Equitable review is proper and, in the alternative, APA review is available.**

15 **A. The Ninth Circuit’s binding decision in *Sierra Club v. Trump* establishes**
16 **that Plaintiffs have a cause of action.**

17 As this Court correctly held, and as the Ninth Circuit affirmed, “where a plaintiff seeks
18 equitable relief against a defendant for exceeding its statutory authority, the zone-of-interests test is
19 inapposite.” PI Order 30; *see also Sierra Club v. Trump*, 929 F.3d 670, 701 (9th Cir. 2019)
20 (“[W]here the very claim is that *no* statutory or constitutional provision authorized a particular
21 governmental action, it makes little sense to ask whether *any* statutory or constitutional provision
22 was written for the benefit of any particular plaintiffs.”). The Ninth Circuit’s publication of its
23 affirmance requires its treatment as binding precedent here. *See Lair v. Bullock*, 798 F.3d 736, 744,
24 747 (9th Cir. 2015) (holding that published decision on emergency motion to stay injunction was
25 binding).

26 The Supreme Court’s stay does not erase the binding effect of the Ninth Circuit’s published
27 decision, which therefore remains binding on this Court. As district courts in this circuit have
28 recognized, if the court of appeals resolves an issue in a published decision, courts within this

1 circuit may not “ignore this binding precedent because the Supreme Court stayed the Ninth
2 Circuit’s decision.” *Doe v. Trump*, 284 F. Supp. 3d 1182, 1185 (W.D. Wash. 2018); *see also id.*
3 (noting that “this court is not at liberty to simply ignore binding Ninth Circuit precedent based on
4 Defendants’ divination of what the Supreme Court was thinking when it issued the stay orders”);
5 *Durham v. Prudential Ins. Co. of Am.*, 236 F. Supp. 3d 1140, 1147 (C.D. Cal. 2017) (“[I]t appears
6 that a stay of proceedings pending Supreme Court review does not normally affect the precedential
7 value of the circuit court’s opinion.”). As the Sixth Circuit observed in *Dodds v. United States*
8 *Department of Education*, a Supreme Court stay decision “does nothing more than show a
9 possibility of relief,” and thus cannot be read to decide the questions answered by appellate stay
10 panels or to upset a circuit’s “settled law.” 845 F.3d 217, 221 (6th Cir. 2016) (per curiam).

11 Accordingly, for the reasons previously found by this Court and the Ninth Circuit,
12 Plaintiffs have a cause of action to review Defendants’ efforts to spend \$3.6 billion in military
13 construction funds on the border wall. “Defendants’ attempt to reprogram and spend these funds
14 therefore violates the Appropriations Clause and intrudes on Congress’s exclusive power of the
15 purse, for it would cause funds to be ‘drawn from the Treasury’ not ‘in Consequence of
16 Appropriations made by Law.’” *Sierra Club v. Trump*, 929 F.3d at 694. Such a claim is reviewable
17 as “an equitable action to enjoin unconstitutional official conduct,” or under the APA “as a
18 challenge to a final agency decision that is alleged to violate the Constitution, or both. Either way,
19 Plaintiffs have an avenue for seeking relief.” *Id.*

20 **B. Plaintiffs have an equitable claim under the Constitution.**

21 Even if the Ninth Circuit’s decision in *Sierra Club* were not binding on this Court, earlier
22 Ninth Circuit authority establishes that Plaintiffs have a constitutional cause of action in equity
23 under the Appropriations Clause. In *United States v. McIntosh*, the Ninth Circuit held that when the
24 government seeks to spend money in ways Congress has restricted, it is “drawing funds from the
25 Treasury without authorization by statute and thus violating the Appropriations Clause.” 833 F.3d
26 at 1175. “Once Congress, exercising its delegated powers, has decided the order of priorities in a
27 given area, it is for . . . the courts to enforce them when enforcement is sought.” *Id.* at 1172 (citation
28 omitted). Therefore, while “novel and important questions about the ability of private parties to

1 enforce Congress' appropriations power" may yet be undecided by the Supreme Court, Stay
2 Opinion at 1–2, *Trump v. Sierra Club*, No. 19A60 (S. Ct. July 26, 2019) (Breyer, J., concurring in
3 part and dissenting in part), they have been settled in this circuit since 2016.

4 Where, as here, a litigant has Article III standing, it is circuit law that an equitable cause of
5 action will lie for the spending of funds in violation of statute. *See McIntosh*, 833 F.3d at 1174.
6 *McIntosh* establishes that private plaintiffs can invoke the Appropriations Clause as the source of a
7 constitutional cause of action, consistent with the numerous cases establishing that “private parties,
8 rather than government departments, were able to rely on separation-of-powers principles in
9 otherwise justiciable cases or controversies,” *Id.* (collecting cases). The Ninth Circuit grounded this
10 ruling in the principle that “separation-of-powers constraints in the Constitution serve to protect
11 individual liberty, and a litigant in a proper case can invoke such constraints “[w]hen government
12 acts in excess of its lawful powers.” *Id.* at 1174 (quoting *Bond v. United States*, 564 U.S. 211, 217
13 (2011)). Because “individuals, too, are protected by the operations of separation of powers and
14 checks and balances,” it follows that “they are not disabled from relying on those principles in
15 otherwise justiciable cases and controversies.” *Bond*, 564 U.S. at 223. *McIntosh* is clear: the
16 Appropriations Clause “constitutes a separation-of-powers limitation” that private litigants can
17 invoke when the executive branch is “drawing funds from the Treasury without authorization by
18 statute and thus violating the Appropriations Clause.” 833 F.3d at 1175.

19 As explained above, Section 2808 does not authorize Defendants to spend taxpayer funds on
20 a border wall in excess of the limits Congress set in the CAA. Accordingly, Plaintiffs have a cause
21 of action to challenge Defendants' unauthorized spending in violation of the Appropriations Clause
22 and separation-of-powers constraints. To the extent any zone-of-interests tests applies to this cause
23 of action, Plaintiffs' “individual rights and interests resemble myriad interests that the Supreme
24 Court has concluded—either explicitly or tacitly—fall within any applicable zone of interests
25 encompassed by structural constitutional principles like separation of powers.” *Sierra Club v.*
26 *Trump*, 929 F.3d at 704 (collecting cases); *see also McIntosh*, 833 F.3d at 1174 (collecting cases).

27 **C. Plaintiffs satisfy any zone-of-interests requirements for an APA claim.**

28 Even if Plaintiffs were required to satisfy a further zone-of-interest test with respect to

1 Defendants' claimed Section 2808 authority, the test would pose no obstacle to the Court's review.
2 In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, the Supreme Court
3 considered a statute that "authorizes the acquisition of property 'for the purpose of providing land
4 for Indians.'" 567 U.S. 209, 224 (2012) (citation omitted). The statute said nothing at all about
5 construction, imposed no environmental or aesthetic restrictions, and was enacted entirely for the
6 benefit of Native Americans. The Supreme Court nonetheless held that the "environmental" and
7 "aesthetic" interests of non-Indians lay within the statute's bounds. *Id.* at 227–28. If a
8 nonbeneficiary plaintiff's asserted "economic, environmental, and aesthetic harm" from eventual
9 construction comes within the zone of interests of a statute that is completely silent about
10 construction, Plaintiffs' identical interests are certainly within the zone of interests of Section 2808,
11 a statute that explicitly concerns construction and requires consideration of land use.

12 The Supreme Court has already determined that claims arising from a nonbeneficiary's land
13 use lie within the zone of interests of statutes that even implicitly contemplate construction. As the
14 Supreme Court explained in *Match-E-Be-Nash-She-Wish*, it was of no moment that the plaintiff was
15 a nonbeneficiary who was "'not an Indian or tribal official seeking land' and does not 'claim an
16 interest in advancing tribal development.'" *Id.* at 225 n.7 (citation omitted). Nor did it matter that
17 the statute addressed only predicate land purchases, and said nothing at all about construction—
18 much less imposed any aesthetic or environmental restrictions. What mattered was that when the
19 agency used its statutory powers to acquire land, it acted "with at least one eye directed" toward
20 construction on the land it acquired. *Id.* at 226. And it was construction that the plaintiff objected to,
21 because he claimed it would cause "an irreversible change in the rural character of the area," and
22 cause "aesthetic, socioeconomic, and environmental problems." *Id.* at 213 (quotation marks
23 omitted). This connection was sufficient.

24 Under controlling Supreme Court law, therefore, Plaintiffs' identical interests are within the
25 zone of interests of Section 2808. Plaintiffs' claims are even stronger than those held sufficient in
26 *Match-E-Be-Nash-She-Wish*, because Section 2808 explicitly refers to construction (and not merely
27 land acquisition), and requires that the Secretary of Defense or Secretaries of the military
28 departments contemplate and approve specific construction projects before any decision under the

1 statute is reached. If a statute that is silent about construction, but “typically” involves consideration
 2 of a land’s “eventual use” may be challenged by “neighbors to the use,” Plaintiffs are
 3 unquestionably proper challengers to construction decisions under Section 2808, which *always*
 4 involves considerations of land use. *Match-E-Be-Nash-She-Wish*, 567 U.S. at 227–28.

5 The law is clear: where decisions under a statute are made with “an eye towards” the use of
 6 land, “neighbors to the use (like [Plaintiffs]) are reasonable—indeed, predictable—challengers of
 7 the Secretary’s decisions: Their interests, whether economic, environmental, or aesthetic, come
 8 within [the statute’s] regulatory ambit.” *Id.* Plaintiffs’ “stake in opposing” circumvention of
 9 Congress’s protection of the lands they treasure is “intense and obvious,” and easily passes the
 10 “zone-of-interests test[, which] weeds out litigants who lack a sufficient interest in the
 11 controversy.” *Patchak v. Salazar*, 632 F.3d 702, 707 (D.C. Cir. 2011), *aff’d sub nom. Match-E-Be-*
 12 *Nash-She-Wish*, 567 U.S. 209.

13 **VI. The Court should order injunctive and declaratory relief.**

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

15 A party seeking a permanent injunction must show that “(1) that it has suffered an
 16 irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to
 17 compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and
 18 defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved
 19 by a permanent injunction.” *Cottonwood Env’tl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088
 20 (9th Cir. 2015) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Plaintiffs
 21 have satisfied these requirements.

22 **1. Plaintiffs will suffer irreparable harm absent an injunction.**

23 As this Court found with respect to Defendants’ previous plans, Defendants’ proposed
 24 Section 2808 construction “will lead to a substantial change in the environment” that “cannot be
 25 remedied easily after the fact.” PI Order 50. Without an order permanently enjoining construction in
 26 the areas designated as Yuma 2, Yuma 10/27, Yuma 3, Yuma 6, San Diego 4, San Diego 11, El
 27 Paso 2, El Centro 5, El Paso 8, El Centro 9, and Laredo 7, Plaintiffs’ members will suffer
 28 irreparable harm to their recreational and aesthetic interests. In addition, absent a permanent

1 injunction, Plaintiff SBCC and its member organizations will suffer a frustration of their missions
2 and be forced to continue to divert resources in response to Defendants’ unlawful wall construction
3 plan. Finally, coupled with these other harms, Plaintiffs face irreparable harm from Defendants’
4 constitutional violations.

5 **a. Wall construction will cause irreparable injury to Plaintiffs’**
6 **members’ aesthetic and recreational interests.**

7 As this Court previously noted, “[i]t is well-established in the Ninth Circuit that an
8 organization can demonstrate irreparable harm by showing that the challenged action will injure its
9 members’ enjoyment of public land.” PI Order 49 (citing *All. for the Wild Rockies v. Cottrell*, 632
10 F.3d 1127, 1135 (9th Cir. 2011)). The wall construction at issue here will impede Plaintiffs’
11 members’ ability to enjoy, work, and recreate in the wilderness areas they have used for years along
12 the U.S.-Mexico border.

13 For example, Robert Ardivino regularly photographs, hikes, camps, and target shoots in
14 threatened areas within the proposed El Paso projects, and worries that instead of “open
15 landscapes” he has enjoyed for decades, he will see a “tall metal wall” when he “recreate[s] in the
16 sprawling vistas near Antelope Wells.” Ardivino Decl. ¶ 6. At night, rather than a “dark desert
17 wilderness,” he will be confronted by “an artificially lit militarized landscape.” *Id.* ¶ 7. Construction
18 in El Paso Project 2 will likewise “hamper [the] unobstructed views of the scenic vistas” that Dr.
19 Gary Roemer enjoys while riding his motorcycle along Highway 9 and will “create a barrier to
20 wildlife movement” that “could have numerous negative impacts on [...the] research” he is
21 conducting in the region. Roemer Decl. ¶¶ 15, 12, 13. Kevin Bixby also frequently recreates in the
22 Bootheel region of New Mexico, camping at Gray Ranch and hiking up Hatchet Peak to enjoy the
23 views of the surrounding habitats that the border wall “threaten[s] to destroy.” Third Bixby Decl.
24 ¶ 13. And Elizabeth Walsh, who enjoys “bird-watching and hiking around Antelope Wells,” Walsh
25 Decl. ¶ 7, fears based on her experience that “the adverse impact of wall construction in El Paso 2
26 will not just adversely impact my personal interests and ability to enjoy the wildlife in this area, but
27 also my interest in enjoying and recreating in a large geographic zone in the El Paso Sector that I
28 also routinely visit and intend to continue to visit in the future,” *id.* ¶ 10.

1 Similarly, construction of a “tall and intrusive pedestrian barrier” in Yuma Project 6 will
2 “fragment [the] vista” visible from just across the border in Los Algodones and prevent Orson
3 Bevins “from fully appreciating this area.” Bevins Decl. ¶ 7. It would also deter Nancy Meister’s
4 “ability to look at birds north” of Morelos Dam, Meister Decl. ¶ 15. An open water and marshy area
5 rich with a variety of birds, and attendant floodlights will “ruin” the “desert dark skies” that Albert
6 Del Val has treasured as a child. Del Val Decl. ¶ 6. A border wall will have “negative impacts” on
7 the unique “biodiversity that exists in [the Laredo 7] section of the Rio Grande Valley,” the use of
8 which is a “fundamental part of [Tom Miller’s] work and [] livelihood.” Miller Decl. ¶ 10.

9 Erecting pedestrian fencing in California pursuant to San Diego Projects 4 and 11 and El
10 Centro Projects 5 and 9 will harm the professional and aesthetic interests of Sierra Club members
11 who live and work in and around those areas. Daniel Watman has visited the border in the Otay
12 Mountain Wilderness more than forty times, and leads tours of the Wilderness, “one of the only
13 places along the border where there is complete tranquility.” Watman Decl. ¶¶ 7, 10. Construction
14 would destroy his use of these lands and “the purpose of the tours—to see nature continuing
15 unimpeded across the border—would be lost.” *Id.* ¶ 12. *See also* Wellhouse Decl. ¶ 5 (“enjoy[s]
16 visiting [San Diego Project 4 and 11] areas to birdwatch and study other plants and animals” and
17 worries that new construction will “significantly harm local species particularly low level flyers and
18 terrestrial species”); Ramirez Decl. ¶ 5 (“Construction along the border will make me less likely to
19 hike Mount Signal and enjoy outdoor recreational activities; and when I do undertake those
20 activities, my enjoyment of them will be irreparably diminished.”); Guerrero Decl. ¶ 6 (“Building a
21 primary and secondary wall within this desert wilderness would forever change my experience
22 visiting these places.”).

23 Gayle Hartmann and Bill Broyles have “decades of professional and personal experience
24 working on and recreating at the Goldwater Range and Cabeza Prieta,” Second Hartmann Decl. ¶ 7;
25 *see also* Broyles Decl. ¶ 4. Ms. Hartmann has “lived on the range to study the history and prehistory
26 of Tinajas Altas, a series of pools that provide one of the most important sources of water in the
27 region and are located on the Range a few miles north of the border,” and together with Mr. Broyles
28 co-authored a book on the subject. Hartmann Decl. ¶ 9. Ms. Hartmann and Mr. Broyles were

1 involved in the creation of a permit system for access to the Range, which is “not intended to limit
 2 public accessibility, but to educate potential users—helping inform people about cultural objects, as
 3 well as potential hazards like old pieces of weaponry.” *Id.* ¶ 12. Mr. Broyles has “camped in these
 4 areas” for nearly 50 years and collaborated with the military on preserving them. Broyles Decl.
 5 ¶ 12. Having used and helped protect these lands for decades, Ms. Hartmann explains that “[t]he
 6 proposed wall segments will be rather like having a 30-foot wall built through my living room.
 7 Southwestern Arizona and northern Mexico, together, are a cultural and historic universe; for me,
 8 the splendor of a 100-year, or 500-year or 1,000-year perspective, when people survived by moving
 9 from one water source to another, will be scarred by the wall.” Hartmann Decl. ¶ 15; *see also* Tuell
 10 Decl. ¶ 12 (construction will “diminish [her] ability to recreate and enjoy these natural spaces and
 11 prevent [her] from passing this tradition down through [her] son to [] future generations”).

12 The harms Plaintiffs will experience if construction proceeds are real, significant, and
 13 potentially irreversible. Just as this Court found with respect to wall construction Defendants
 14 proposed to undertake using Section 284, this proposed construction “constitutes a change in
 15 conditions” that will irreparably harm Plaintiffs’ members. PI Order 50. Plaintiffs’ injuries “are not
 16 speculative, and will be irreparable in the absence of an injunction.” PI Order 54.

17 **b. SBCC and its member organizations have suffered irreparable**
 18 **harm.**

19 Defendants’ actions have also “perceptibly impaired” Plaintiff SBCC’s and its member
 20 organization’s missions and caused “concrete and demonstrable injury to the organization[s]”
 21 activities.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). These injuries constitute
 22 irreparable harm because they include “ongoing harms to [their] organizational missions” and
 23 require the organizations to “divert resources” in response to Defendants’ unlawful conduct. *Valle*
 24 *del Sol Inc. v. Whiting*, 732 F.3d 1006, 1018, 1029 (9th Cir. 2013).

25 Since Defendant Trump declared a national emergency and announced plans to use Section
 26 2808 funding to build a border wall, Plaintiff SBCC and its member organizations have diverted
 27 staff time and resources to countering the negative impacts of the imminent construction and
 28 experienced a frustration of their missions. SBCC member organization Texas Civil Rights Project

1 (“TCRP”) has “divert[ed] scarce resources in protection of Texas landowners” who are at risk of
2 having their property condemned for border wall construction. Garza Decl. ¶ 10. TCRP has been
3 centrally involved in advising and representing impacted landowners facing condemnation as a
4 result of border wall construction for years, and is committed to “represent or secure representation
5 for every low income landowner threatened with condemnation.” *Id.* ¶ 15. Although TCRP is based
6 in the Rio Grande Valley, due to the “imminent land seizure and ‘military construction’ across 52
7 miles of borderlands in Laredo,” TCRP has had to expand its reach to Laredo—where it does not
8 have a physical presence and has never directly represented anyone because it is “prohibitive” to do
9 so. *Id.* ¶¶ 10, 12. The organization recently held an event in the area where it announced its
10 commitment to assist impacted landowners, and since then it has been fielding inquiries from
11 landowners in Laredo and “divert[ing] [] time away from [] other projects on issues impacting
12 border communities.” *Id.* ¶¶ 14, 16.

13 SBCC member organization Southwest Environmental Center (“SWEC”) focuses on hands-
14 on habitat restoration, public education, and advocacy. Third Bixby Decl. ¶¶ 4–8, 13. As a result of
15 Defendants’ actions, it has been forced to divert resources to monitoring construction, planning
16 border wall events, and focusing on defensive campaigns. *Id.* ¶¶ 12–16. This has forced it to devote
17 less time to its core restoration projects. *Id.* ¶ 16 (whereas Executive Director would normally
18 devote 20% of time to restoration work, he is now only able to devote 5%). “The lack of notice and
19 transparency surrounding the Administration’s plans for border wall construction using military
20 funds has frustrated SWEC’s ability to provide meaningful input about potential environmental and
21 ecological harms”—a key component of SWEC’s mission. *Id.* ¶ 13.

22 SBCC member American Friends Service Committee (AFSC) works with community
23 organizations and migrant communities in the San Diego area. Rios Decl. ¶ 5. “The communities
24 [AFSC] serve[s] on the border are deeply concerned about and affected by border wall
25 construction,” *id.* ¶ 7, and AFSC will be forced do divert resources to “physically monitor the
26 construction of border wall wherever it happens in San Diego and surrounding areas, including
27 Calexico.” *Id.* ¶ 9. AFSC will have to spread its small staff thin to cover Defendants’ construction
28

1 plans, which will substantially inhibit its ability to deliver know-your-rights trainings and
2 leadership development. *Id.* ¶¶ 12–13.

3 SBCC itself “has been forced to devote substantial staff time and resources to analyze,
4 mobilize, and respond to the harms a wall will cause along the southern border.” Third Gaubeca
5 Decl. ¶ 8. Its staff have been forced to spend time “mapping coordinates, and determining which
6 communities, habitats, and sacred and cultural sites will be threatened. [They] have engaged
7 organizations and individuals in or near affected areas, and supported their efforts to organize local
8 resistance.” *Id.* ¶ 11. SBCC has been forced to reduce the time devoted to “core projects” such as
9 Border Patrol accountability and community engagement on local health and education. *Id.* ¶ 12.

10 The injuries Plaintiffs have suffered are identical to those that the Ninth Circuit has found to
11 confer standing and constitute irreparable harm. “[T]he Ninth Circuit has specifically found that
12 diversion of resources for ‘outreach campaigns’ and educating the public establishes a diversion of
13 resources sufficient to establish organizational standing.” *Serv. Women’s Action Network v. Mattis*,
14 352 F. Supp. 3d 977, 985 (N.D. Cal. 2018) (citing *Nat’l Council of La Raza v. Cegavske*, 800 F.3d
15 1032, 1040 (9th Cir. 2015) and *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105–06 (9th
16 Cir. 2004)). SWEC and TCRP have “redirect[ed] [their] limited resources and limited staff hours to
17 answering questions” from members whose recreational interests are threatened by construction and
18 planned a community education event “in direct response to concerns” raised by members. *Id.* at
19 981 (quotation marks omitted); *see also* Third Bixby Decl. ¶ 14; Garza Decl. ¶¶ 11–13. SWEC has
20 also started a new education campaign that takes members to the border wall “in order to raise
21 awareness about the potential destruction it can cause to the surrounding environment and wildlife.”
22 Third Bixby Decl. ¶ 16; *see also Fair Hous. Council of San Fernando Valley v. Roommate.com,*
23 *LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (starting “new education and outreach campaigns
24 targeted at” the defendant’s discriminatory conduct constituted irreparable harm). As part of a new
25 campaign that SBCC started to push against the national emergency, it created toolkits, “created
26 and provided background and educational material”, and “wrote up action alerts.” Third Gaubeca
27 Decl. ¶ 9.

28 In addition, Plaintiffs have diverted resources to monitor and investigate Defendants’

1 conduct and counter its negative impacts. *See Smith*, 358 F.3d at 1105 (expending resources to
2 monitor the defendant’s conduct constitutes diversion of resources); *Fair Hous. of Marin v. Combs*,
3 285 F.3d 899, 905 (9th Cir. 2002) (finding diversion of resources for “investigating and other
4 efforts to counteract [defendant’s] discrimination”). This has resulted in a frustration of their
5 missions. SBCC’s mission to “improve quality of life in border communities” and push for
6 “accountability and transparency in the government policies and practices that impact” these
7 communities is frustrated by the construction of a wall—built without any public comment—that
8 will divide bi-national border communities and damage the natural habitats that they live, work, and
9 recreate in. Third Gaubeca Decl. ¶¶ 3, 4; *see also Comite de Jornaleros de Redondo Beach v. City*
10 *of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (ordinance preventing day laborers from
11 soliciting work frustrated organization’s mission “to strengthen and expand the work of local day
12 laborer organizing groups”). Resources that would “normally go towards [SWEC’s] longer term
13 restoration efforts” are “instead being channeled to immediate border wall advocacy” and efforts
14 “to stay on top of the Administration’s ever-changing plans for new wall construction.” Third
15 Bixby Decl. ¶¶ 12, 15.

16 In the absence of injunctive relief, Plaintiffs will be forced to continue diverting resources.
17 SBCC and its member organizations will continue fielding community inquiries about the proposed
18 construction and its impacts, offering legal representation or referrals for Laredo landowners facing
19 condemnation actions, and shifting resources away from their core mission in order to engage in
20 defensive border wall-related advocacy. Third Bixby Decl. ¶ 15; Garza Decl. ¶¶ 15–16; Third
21 Gaubeca Decl. ¶ 10. If construction using Section 2808 funds is permanently enjoined, Plaintiffs
22 can resume work that affirms their core organizational priorities. *See* Garza Decl. ¶ 16 (will no
23 longer be forced to expend resources trying to protect Laredo landowners from condemnation
24 actions); Third Gaubeca Decl. ¶ 12 (can focus on “affirmative work” “advocating for law
25 enforcement, health, education, and economic policies that [border] communities would benefit
26 from”). Permanent relief is appropriate. *Cf.* PI Order 52 (finding that preliminary relief was
27 inappropriate because “[w]ith or without an injunction, Plaintiffs will have to continue to litigate
28 this case and otherwise divert resources in the manner they have described until the case is

1 resolved”).

2 **c. Defendants’ actions irreparably harm Plaintiffs’ constitutional**
3 **interests.**

4 When coupled with the additional injuries Plaintiffs stand to suffer, “the deprivation of
5 constitutional rights unquestionably constitutes irreparable injury,” *Melendres v. Arpaio*, 695 F.3d
6 990, 1002 (9th Cir. 2012) (quotation marks omitted). This principle applies even where the
7 government’s constitutional violation is structural, rather than a deprivation of individual
8 constitutional rights. *See Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th
9 Cir. 2009) (finding with respect to Supremacy Clause that “constitutional violation alone, coupled
10 with the damages incurred, can suffice to show irreparable harm”); *Cty. of Santa Clara v. Trump*,
11 250 F. Supp. 3d 497, 538 (N.D. Cal. 2017) (rejecting distinction between violations of structural
12 and personal constitutional rights, and finding irreparable harm arising from separation of powers
13 and Spending Clause violations). Plaintiffs are experiencing and will continue to experience
14 irreparable harm stemming from Defendants’ usurpation of Congress’s authority.

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

16 No remedy at law can compensate Plaintiffs for the harm that wall construction imposes.
17 “[E]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and
18 is often permanent.” *Lands Council v. McNair*, 537 F.3d 981, 1004 (9th Cir. 2008) (en banc)
19 (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)), *abrogated in part on*
20 *other grounds by Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also League of*
21 *Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir.
22 2014) (noting that payment of money damages cannot remedy environmental injury stemming from
23 logging); *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988) (same). Once
24 Defendants commence construction—which includes preparatory activities such as installing
25 additional lighting, creating access roads, and moving heavy machinery on location—
26 environmental damage will have already occurred. This harm is irreversible, permanently altering
27 the surrounding environment and causing irreparable injury to Plaintiffs. No amount of after-the-
28 fact monetary damages can remedy this harm.

1 In addition, SBCC and its members face ongoing harm to their organizational missions,
 2 which cannot be remedied by damages. *See, e.g., League of Women Voters v. Newby*, 838 F.3d 1, 9
 3 (D.C. Cir. 2016) (obstacles that “make it more difficult for [organizations] to accomplish their
 4 primary mission” impose “irreparable harm”). And, when coupled with the additional injuries
 5 Plaintiffs stand to suffer, “the deprivation of constitutional rights unquestionably constitutes
 6 irreparable injury.” *Melendres*, 695 F.3d at 1002 (internal quotation marks omitted).

7 **3. The balance of harms and public interest support a permanent**
 8 **injunction.**

9 The public interest and balance of equities favor the entry of a permanent injunction. *See*
 10 *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (these two factors merge
 11 when the government is a party). Unless Defendants are permanently enjoined from wall
 12 construction, Plaintiffs will continue to face the prospect that the borderlands they treasure will be
 13 destroyed. *See All. for the Wild Rockies*, 632 F.3d at 1138 (there is a well-established “public
 14 interest in preserving nature and avoiding irreparable environmental injury”). The public also “has
 15 an interest in ensuring that statutes enacted by their representatives are not imperiled by executive
 16 fiat.” PI Order 54 (quoting *E. Bay Sanctuary v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018)).

17 As this Court has observed, “Congress considered all of Defendants’ proffered needs for
 18 border barrier construction, weighed the public interest in such construction against Defendants’
 19 request for taxpayer money, and struck what it considered to be the proper balance—in the public’s
 20 interest—by making available only \$1.375 billion in funding, which was for certain border barrier
 21 construction not at issue here.” Order, ECF No. 185 at 8. The public interest is “best served by
 22 respecting the Constitution’s assignment of the power of the purse to Congress, and by deferring to
 23 Congress’s understanding of the public interest as reflected in its repeated denial of more funding
 24 for border barrier construction.” *Sierra Club v. Trump*, 929 F.3d at 677.

25 **B. The Court should declare unlawful Defendants’ proposed use of**
 26 **Section 2808 to construct a border wall that Congress rejected, as well as**
 27 **Defendants’ violation of NEPA.**

28 This Court may issue declaratory relief “[i]n a case of actual controversy within its
 jurisdiction.” 28 U.S.C. § 2201(a); *see also Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–40

1 (1937). A “case or controversy exists justifying declaratory relief” because “the challenged
2 government activity is not contingent, has not evaporated or disappeared, and, by its continuing and
3 brooding presence, casts what may well be a substantial adverse effect on the interests of the
4 petitioning parties.” *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008). The Court should enter
5 Plaintiffs’ requested declaratory relief.

6 **CONCLUSION**

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

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Dated: October 11, 2019

Respectfully submitted,

2 /s/ Dror Ladin

3 Mollie M. Lee (SBN 251404)
4 American Civil Liberties Union Foundation
5 of Northern California, Inc.
6 39 Drumm Street
7 San Francisco, CA 94111
8 Tel: (415) 621-2493
9 Fax: (415) 255-8437
10 mlee@aclunc.org

Dror Ladin*
Noor Zafar*
Jonathan Hafetz*
Hina Shamsi*
Omar C. Jadwat*
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2660
Fax: (212) 549-2564
dladin@aclu.org
nzafar@aclu.org
jhafetz@aclu.org
hshamsi@aclu.org
ojadwat@aclu.org

11 David Donatti*
12 Andre I. Segura (SBN 247681)
13 American Civil Liberties Union Foundation
14 of Texas
15 P.O. Box 8306
16 Houston, TX 77288
17 Tel: (713) 325-7011
18 Fax: (713) 942-8966
19 ddonatti@aclutx.org
20 asegura@aclutx.org

Cecillia D. Wang (SBN 187782)
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
Fax: (415) 395-0950
cwang@aclu.org

21 Counsel for Plaintiffs

22 *Admitted pro hac vice
23 **Counsel for Plaintiff Sierra Club

Sanjay Narayan (SBN 183227)**
Gloria D. Smith (SBN 200824)**
Sierra Club Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA 94612
Tel: (415) 977-5772
sanjay.narayan@sierraclub.org
gloria.smith@sierraclub.org