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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO-OAKLAND DIVISION

SIERRA CLUB and SOUTHERN BORDER COMMUNITIES COALITION,

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: Nov. 20, 2019
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Judge: Hon. Haywood S. Gilliam, Jr.
Dept: Oakland
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INTRODUCTION

Defendants claim the unreviewable authority to divert billions of dollars appropriated for servicemembers and their families to a border wall that Congress repeatedly refused to fund. According to Defendants, no constitutional issue is raised by their circumvention of Congress's appropriations decisionmaking, because they have invoked a statute, 10 U.S.C. § 2808. At the same time, Defendants urge the Court not to examine their compliance with the terms of Section 2808, because in their view the statute grants Defendants essentially limitless discretion to remake the federal budget. Defendants' desire to avoid judicial scrutiny is understandable, as they barely gesture at satisfying Section 2808's statutory criteria. Defendants implausibly assert that migration of unarmed families requires an armed military response, that sections of border spread over more than a thousand miles have suddenly become part of a military garrison in Texas, and that a wall aimed squarely at the capabilities of a civilian law enforcement agency in fact supports the use of troops. Defendants further maintain that Section 2808 overrides all environmental law and enacted appropriations legislation. Finally, in their efforts to avoid an injunction, Defendants misstate the record and disregard decades of law regarding the scope of environmental and organizational harms.

Defendants' arguments should be rejected. Defendants ask this Court to allow them to spend billions of dollars that Congress denied, across nearly two hundred miles of lands on which Congress refused to authorize construction. But if the Appropriations Clause means anything, it means that no executive officer can spend funds that Congress has refused to authorize. Persons who would be injured by such expenditures must be able to call upon the courts to protect them, and Defendants have shown no basis to preclude review.

ARGUMENT

I. Plaintiffs Have a Cause of Action.

A. Binding precedent establishes that Plaintiffs have an equitable cause of action.

Defendants assert that the Ninth Circuit's published decision finding the zone-of-interests test inapplicable is not binding because "the Supreme Court necessarily concluded that Defendants had satisfied the standard to obtain a stay," and this implicitly "supersedes" the Ninth Circuit

decision. Def. Mot. 10, ECF No. 236. Not so. District courts may not "ignore [] binding precedent because the Supreme Court stayed the Ninth Circuit's decision." *Doe v. Trump*, 284 F. Supp. 3d 1182, 1185 (W.D. Wash. 2018); *see also Durham v. Prudential Ins. Co.*, 236 F. Supp. 3d 1140, 1147 (C.D. Cal. 2017) ("[I]t appears that a stay of proceedings pending Supreme Court review does not normally affect the precedential value of the circuit court's opinion.").

The Ninth Circuit has instructed that to determine whether a panel decision is "fundamentally inconsistent" with a subsequent Supreme Court decision as to have been effectively superseded, courts "focus on the respective bases for those decisions to determine whether [the Supreme Court's] reasoning so undercuts the principles on which [the panel] relied that our prior decision cannot stand." *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 980 (9th Cir. 2013). Here, the panel set forth detailed reasoning supporting its conclusions that "Defendants' attempt to reprogram and spend these funds [] violates the Appropriations Clause," and that "Plaintiffs have an avenue for seeking relief." *Sierra Club v. Trump*, 929 F.3d 670, 694 (9th Cir. 2019). As the panel clearly stated, it reached the merits of these questions based on Defendants' assertions that the ordinary appellate process was too slow. *Id.* at 688 & n.13. By contrast, the Supreme Court did not *decide* any of the questions addressed by the motions panel, and its grant of a stay "does nothing more than show a possibility of relief." *Dodds v. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016). Nor did the Supreme Court elaborate any rule that "so undercuts" the stay panel's reasoning as to effectively overrule it. *Rodriguez*, 728 F.3d at 980.

Defendants maintain that the Supreme Court's order "sends a strong signal" that Defendants' claims of unreviewable Section 8005 authority will ultimately prevail. Def. Mot. 11. But a "signal" from the Supreme Court does not alter this Court's obligation to follow binding precedent. As the Ninth Circuit has repeatedly explained, "[i]t is not enough for there to be some tension between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to cast doubt on the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (quotation marks and citations omitted). Unless and until the Supreme Court or an en banc panel of the Ninth Circuit issues a decision incompatible with previous published reasoning, the motions panel's decision controls. *See, e.g.*, *Close v. Sotheby's, Inc.*, 894 F.3d 1061,

1074 (9th Cir. 2018) (holding that previous panel's "reasoning would be suspect today, but it is not clearly irreconcilable with intervening higher authority," and "therefore controls our analysis").

In any event, the Supreme Court's stay order cannot possibly be read to silently overrule the Ninth Circuit's binding decision in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), that individuals have an equitable cause of action under the Appropriations Clause to challenge government spending of funds in violation of statute. *See* Pl. Mot. 22–23, ECF No. 210. Defendants' only argument is that the numerous pages of constitutional analysis in *McIntosh* are "dicta," because—in their view—the Ninth Circuit did not actually find an "an independent Appropriations Clause violation." Def. Mot. 12. Defendants' unsupported assertion finds no support in the actual text of *McIntosh*. The Ninth Circuit considered the constitutional question at length and concluded that violations of spending statutes amount to "violating the Appropriations Clause," which is "a separation-of-powers limitation that [litigants] can invoke" to equitably enjoin the violation. *McIntosh*, 833 F.3d at 1175. Even if Defendants were correct that *McIntosh* could theoretically have been resolved as a purely statutory claim, this would not erase the pages of constitutional analysis in *McIntosh* or render them nonbinding on this Court. "[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc). Only "statements made in passing, without analysis, are not binding precedent." *In re Magnacom Wireless, LLC*, 503 F.3d 984, 993–94 (9th Cir. 2007); *see also, e.g.*, *United States v. Tydingco*, 909 F.3d 297, 303 (9th Cir. 2018) (panel's conclusion was not "mere dictum" where "[t]he opinion considered the question at some length").

B. Plaintiffs satisfy any applicable zone-of-interests test.

Plaintiffs have equitable claims to which no zone-of-interests tests apply. *See* Pl. Mot. 21–23. But even if the test applied, it "poses a low bar" and would not impede this Court's review. *See Cook v. Billington*, 737 F.3d 767, 771 (D.C. Cir. 2013) (Kavanaugh, J.). "The Supreme Court has emphasized that the zone of interests test, under the APA's 'generous review provisions,' 'is not meant to be especially demanding; in particular, there need be no indication of congressional

purpose to benefit the would-be plaintiff.'" *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 768 (9th Cir. 2018) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399–400 & n.16 (1987)). The Supreme Court has repeatedly emphasized that the zone-of-interests test must be applied with the presumption that agency action is reviewable and that "the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). Should the Court construe Plaintiffs' claims as arising under the Consolidated Appropriations Act of 2019 ("CAA"), Pub. Law No. 116-6, 133 Stat. 13 (2019), the Constitution, or Section 2808, Plaintiffs satisfy any relevant zone-of-interest requirement.[1]

First, Defendants' conclusory argument that Plaintiffs are outside the zone of interests of the CAA because that statute "regulates the relationship between Congress and the Executive Branch regarding federal spending" is wrong. The CAA explicitly takes into account environmental interests, as "Congress also imposed several limitations on the use of those funds, including by not allowing construction within certain wildlife refuges and parks." *Sierra Club v. Trump*, 929 F.3d at 679. "[I]t is sufficient that the Organizations' asserted interests are consistent with and more than marginally related to the purposes of" the CAA, which include—at the very least—an arguable purpose to limit wall construction and account for environmental interests. *E. Bay Sanctuary Covenant*, 932 F.3d at 768.

Defendants' arguments with respect to a constitutional zone-of-interests limitation are similarly conclusory and insubstantial. Defendants simply assert that "recreational, aesthetic, and resource injuries . . . do not fall within the asserted constitutional limitations on Congress's

[1] Defendants assert that dismissal is appropriate if Plaintiffs' claims should be considered under the Administrative Procedures Act rather than the Court's power in equity. Def. Mot. 12. But the proper course is instead to construe Plaintiffs' claims as arising under the APA. *See, e.g.*, *Alto v. Black*, 738 F.3d 1111, 1117 (9th Cir. 2013) (considering under APA claims not "explicitly denominated as an APA claim" as they were "fairly characterized as claims for judicial review of agency action under the APA"); *Clouser v. Espy*, 42 F.3d 1522, 1533 (9th Cir. 1994) ("We shall therefore treat plaintiffs' arguments as being asserted under the APA, although plaintiffs sometimes have not framed them this way in their pleadings."); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 228, 230 n.4 (1986) (treating Mandamus Act petition as APA claim); *see generally Skinner v. Switzer*, 562 U.S. 521, 530 (2011) ("[A] complaint need not pin plaintiff's claim for relief to a precise legal theory.").

power . . . .” Def. Mot. 25. Defendants do not explain this sweeping claim, which finds no support in either Supreme Court or Ninth Circuit precedent. Instead, Plaintiffs’ “interests resemble myriad interests that the Supreme Court has concluded—either explicitly or tacitly—fall within any applicable zone of interests encompassed by structural constitutional principles like separation of powers.” *Sierra Club v. Trump*, 929 F.3d at 704 (collecting cases); *see also McIntosh*, 833 F.3d at 1174 (collecting cases). Defendants’ attempt to impose cryptic limitations on the interests encompassed by structural constitutional protections cannot save their constitutional violations from judicial review. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (“If the Government’s point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so.”).

Finally, as to Section 2808, Defendants fail to distinguish the Supreme Court’s controlling decision that aesthetic and environmental interests are within the zone of interests of statutes that involve land use. Defendants maintain that “Section 2808 has nothing to do with environmental or recreational interests that [] construction might implicate and certainly does not evince congressional intent to protect such interests.” Def. Mot. 11. But that is equally true of the statute at issue in *Match-E-Be-Nash-She-Wish*, which imposed no environmental or aesthetic restrictions and evinced no congressional intent to protect such interests. 567 U.S. at 224–25; *see* Pl. Mot. 24–25. As the Supreme Court nonetheless explained, that the plaintiff “does not claim an interest in advancing tribal development is beside the point.” 567 U.S. at 225 n.7 (quotation marks and citations omitted). The only relevant question is “whether issues of land use (arguably) fall within [the statute’s] scope—because if they do, a neighbor complaining about such use may sue to enforce the statute’s limits.” *Id.* Because Section 2808 explicitly concerns issues of land use, Plaintiffs, as “neighbors to the use” may sue, and their “interests, whether economic, environmental, or aesthetic, come within [the statute’s] regulatory ambit.” *Id.* at 227–28.

Defendants’ final argument is to assert that the “notwithstanding” clause in Section 2808 should be read to implicitly limit the availability of judicial review. Def. Mot. 11. But Defendants do not cite any case interpreting such a clause to limit the zone of interests. Moreover, because

Defendants' position is, at bottom, that no one is within the zone of interests of Section 2808, "the agency bears a heavy burden in attempting to show that Congress prohibited all judicial review of the agency's compliance with a legislative mandate." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (quotation and alteration marks omitted). As then-Judge Kavanaugh observed, under the Supreme Court's "capacious view of the zone of interests requirement," a "suit should be allowed unless the statute evinces discernible congressional intent to preclude review." *White Stallion Energy Ctr., LLC v. E.P.A.*, 748 F.3d 1222, 1269 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev'd sub nom. Michigan v. E.P.A.*, 135 S. Ct. 2699 (2015). Defendants have shown no such congressional intent here.

C. This Court is competent to assess Defendants' invocation of Section 2808 to divert military funds for border wall construction.

Defendants assert that Congress's restriction of Section 2808 authority to emergencies that "require the use of the armed forces," and to construction "necessary to support" such use, should be effectively read out of the statute, because the terms impose no justiciable limitations. Def. Mot. 13–16, 19–20. But contrary to Defendants' sweeping claims of unreviewable authority, courts regularly review whether the government complies with the requirements of emergency power statutes. Nor do courts abdicate their judicial role whenever the executive makes a claim of military necessity. This Court is competent to construe the limitations that Congress imposed in Section 2808 and to decide whether the statute authorizes the executive branch to divert billions of dollars in military construction funds to a civilian law enforcement project.

Courts, including the Supreme Court, have not balked at reviewing executive claims of emergency authority. In *Dames & Moore v. Regan*, for example, the Supreme Court reviewed whether the International Emergency Economic Powers Act ("IEEPA") authorized the president to "suspend claims pending in American courts." 453 U.S. 654, 675 (1981). The Court rejected the government's claims, finding that "[t]he terms of the IEEPA therefore do not authorize the President" to take such an action under claimed emergency authority. *Id.* As the Court emphasized, its review and rejection of the president's compliance with the terms of the emergency statute was not an aberration, but rather "the view of all the courts which have considered the question." *Id.* at

675–76 (citing *Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 809–14 (1st Cir. 1981); *Am. Int'l Grp., Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 443, n.15 (D.C. Cir. 1981); *Marschalk Co. v. Iran Nat'l Airlines Corp.*, 518 F. Supp. 69, 79 (S.D.N.Y. 1981); *Elec. Data Sys. Corp. v. Soc. Sec. Org. of Iran*, 508 F. Supp. 1350, 1361 (N.D. Tex. 1981)).[2]

Defendants' claims of nonjusticiability are particularly inapt given their own assertion that "Plaintiffs' claims turn on the meaning and interpretation of § 2808." Def. Mot. 24. Statutory interpretation is a role uniquely assigned to the judiciary. Plaintiffs are not asking the Court to substitute a "policy decision of the political branches with the courts' own unmoored determination of what United States policy . . . should be." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). Plaintiffs instead ask this Court to enforce legal prohibitions that Congress wrote into law by interpreting the statutes Congress enacted. This is a "familiar judicial exercise." *Id.* "To the extent a conflict arises from diverging intentions by the executive and Congress, [courts] are competent to police these kinds of disputes, even when they implicate foreign policy matters." *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 828 (9th Cir. 2017).

Nor can Defendants insulate their wall-building scheme from review by dressing it up in military garb. "[T]he claim of military necessity will not, without more, shield governmental operations from judicial review." *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992). As such, "from the time of John Marshall to the present, the [Supreme] Court has decided many sensitive and controversial cases that had enormous national security or foreign policy implications." *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 n.3 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (collecting cases). The Supreme Court has repeatedly warned that "national-security concerns must not become a talisman used to ward off inconvenient

[2] The Ninth Circuit's decision in *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076 (9th Cir. 1982), is not to the contrary. There, the Ninth Circuit declined to answer as "essentially-political questions" *only* the question of whether any emergency existed, and what its duration should be. *Spawr*, 685 F.2d at 1081. Unlike Section 2808, which specifies and limits the type of emergency (*i.e.* one requiring the use of the armed forces), the statute at issue in *Spawr* "contained no standards" and "delegated to the President the authority to define all of the terms in that subsection of the [statute] including 'national emergency.'" *Id.* at 1080. And even under those circumstances, the court emphasized that "we are free to review whether the actions taken pursuant to a national emergency comport with the power delegated by Congress." *Id.* at 1081.

claims—a 'label' used to 'cover a multitude of sins.'" *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)). Here, "[t]his danger of abuse is even more heightened given the difficulty of defining the security interest in domestic cases." *Id.* (quotation marks and citation omitted). As the Ninth Circuit explained in another case where the government claimed unreviewable military authority to disregard statutory restrictions, "[w]e may consider national security concerns with due respect when the statute is used as a basis to request injunctive relief. This is not a grim future, and certainly no grimmer than one in which the executive branch can ask the court for leave to ignore acts of Congress." *Ctr. for Biological Diversity*, 868 F.3d at 826; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) ("[The president] may not disregard limitations that Congress has, in proper exercise of its own [military] powers, placed on his powers.").

In short, as then-Judge Kavanaugh wrote with respect to a government assertion of unreviewable military authority, "the political question doctrine does not apply in cases alleging statutory violations. If a court refused to give effect to a statute that regulated Executive conduct, it necessarily would be holding that Congress is unable to constrain Executive conduct in the challenged sphere of action." *El-Shifa Pharm. Indus.*, 607 F.3d at 857. It is not beyond judicial competence to construe the Congress's statutory term "requiring the use of the armed forces," and determine whether this requirement may be satisfied by tasks that Congress specifically assigned to civilian law enforcement. *See* Pl. Mot. 9–10. Nor would it intrude on military judgments for the Court to decide whether the term "necessary to support such use" of the armed forces is so capacious as to include multi-billion-dollar public works aimed squarely at increasing the capacity of a civilian agency. *See generally United States v. Munoz-Flores*, 495 U.S. 385, 396 (1990) (finding claims justiciable and observing that the judiciary is "capable of determining" terms such as "when congressional action is 'necessary and proper'"). And Defendants have themselves admitted that their "military" decisionmaking with respect to the border wall actually concerns DHS's mission, Congress's funding decisions with respect to DHS, and the executive branch's determination that the military construction budget should now be used to aggrandize DHS's capabilities in spite of Congress's decisions. *See* Pl. Mot. 4–5, 9–11, 13–16.

Defendants attempt to muddy the waters by suggesting that enforcement of Section 2808's restrictions boils down to judicial review of "the President's decision to deploy the armed forces to the southern border." Def. Mot. 13. But no part of this challenge concerns the deployment of troops. As Defendants themselves admit, Defendant Trump deployed thousands of troops to the border months before Defendants decided to invoke Section 2808 in response to Congressional funding decisions. *See* Def. Mot. 4. Enforcement of Congress's restrictions in Section 2808 would not require second-guessing this or any other deployment decision. Defendants may continue to require servicemembers to spend months at the border, performing "administrative, logistical" and other tasks, Def. Mot. 4, but they may not spend billions on wall construction in the absence of Congressional authorization. For example, Defendants may continue to detail DoD attorneys to serve immigration enforcement functions, *see* ECF No. 236-2 at 5, but they may not use Section to construct new immigration courts that Congress refused to fund. Defendants can continue to deploy "100 DoD military personnel to heat and distribute meals," ECF No. 236-2 at 8, but they may not divert military construction funds to build new kitchens for CBP. Enforcement of these basic funding restrictions does not entangle the courts in subtle military decisions beyond judicial capacity. It just prohibits the president from using the military to spend money Congress specifically prohibited him from spending.

Defendants finally assert that Congress entrusted Section 2808 decisionmaking entirely to Defendants' discretion because, in their view, it did not "impose any conditions or restrictions in § 2808" with respect to the president or provide a "meaningful standard by which the Court could review the Secretary of Defense's decision" that a border wall is necessary for the use of the armed forces. Def. Mot. 15–16, 19. But the discretionary exception to review is interpreted "quite narrowly," and is applicable only in "rare circumstances" to APA review of "agency decisions that courts have traditionally regarded as unreviewable, such as the allocation of funds from a lump-sum appropriation, or a decision not to reconsider a final action." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (quotation marks and citations omitted). Section 2808 does not resemble these rare instances where statutory language and structure bar review under the APA. *Cf. Webster v. Doe*, 486 U.S. 592, 600 (1988) (no review where statutory language "fairly

exudes deference" by permitting termination "whenever the Director 'shall deem such termination necessary or advisable'" and "not simply when the dismissal *is* necessary or advisable"). Defendants cite *Dalton v. Specter*, but the law there "grant[ed] the President unfettered discretion to accept the Commission's base-closing report or to reject it, for a good reason, a bad reason, or no reason." 511 U.S. 462, 478 (1994) (Souter, J. concurring). Section 2808 is not nearly so expansive, as Congress imposed several justiciable restrictions on the diversion of funds under the statute. Likewise, Defendants' reliance on the legislative history of the National Emergencies Act, Def. Mot. 16, which does not include any restrictions on the nature of emergencies under the statute, is misplaced. As the Brennan Center and Cato Institute amicus brief describes, "where statutes granting emergency powers do include criteria beyond the mere declaration of an emergency, [] legislative history underscores the importance of strictly interpreting and enforcing those limitations." ECF No. 219 at 15; *see also* Amicus Br. of U.S. House of Representatives 14, ECF No. 230. Finally, Defendants' citation to cases involving agency *inaction*, such as *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), are entirely inapposite to a case challenging agency action.

If Defendants' facially implausible claims that (1) armed forces are necessary to stop unarmed "family units entering and seeking entry to the United States," and (2) a border wall to benefit DHS is "necessary to support" the armed forces are both beyond review, Congress's careful limitations on Section 2808 authority and the DHS budget would be effectively nullified. Defendants could, in their sole discretion, divert military construction funds to any domestic context, under the unreviewable claim that military construction dollars could "free up" military resources that might otherwise be used to support civilian agencies. Under this logic, Defendant Trump could rely on his unreviewable determination that "Chicago is like a war zone" to divert military construction funds to build jails and police stations, or wall off entire neighborhoods—even if Congress specifically considered and rejected these proposals.[3] When the National Guard deploys to Florida in the wake of hurricanes, Defendants could divert military funds to build facilities at

[3] *TRANSCRIPT: ABC News Anchor David Muir Interviews President Trump*, ABC News (Jan. 25, 2017), https://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602.

Mar-A-Lago. The Court should not adopt a reading of Section 2808 authority that permits such disregard for the law. *See Ctr. for Biological Diversity*, 868 F.3d at 825 (military could be enjoined because "to abstain from giving effect to a federal statute is less respectful to Congress than reviewing the executive's compliance").[4]

II. Defendants' Scheme to Circumvent Congressional Control of Funding Is Unlawful.

A. Defendants are violating the CAA.

Through enacting the CAA, Congress limited the size, scope, and location of Defendants' wall project. *See* Pl. Mot. 7–8. As an initial matter, Plaintiffs agree with Defendants that there is no "statutory conflict" between the CAA and Section 2808, Def. Mot. 23, but that is because Section 2808 plainly provides no authority to fund a border wall in excess of what Congress provided for in the CAA. *See* Section II.B, *infra*. But even if Section 2808 did make available the use of general appropriations for a border wall, Defendants may not use funds from more general sources on the wall project because Congress has spoken specifically to this project in the CAA. In *Nevada v. Dep't of Energy*, the D.C. Circuit rejected the use of funds from a general account to buttress a more specific and limited appropriation that Congress intended for the same purpose. 400 F.3d 9, 16 (D.C. Cir. 2005) ("[T]he fact that Congress appropriated $1 million expressly for Nevada indicates that is all Congress intended Nevada to get in FY04 from whatever source."). Defendants' claim that the Section 2808 wall sections are not part of the CAA wall project, *e.g.* Def. Mot. 23–24, belies reality; there is no such thing as a separate "emergency military support wall." Instead, Defendants propose to unilaterally increase funding for "the border wall" beyond what Congress provided for in the CAA. *See, e.g.*, Plaintiffs' Request for Judicial Notice ¶ 15, Exh. 14, ECF No. 210-2 ("RJN") ("[T]he Administration has so far identified up to $8.1 billion that will be available

[4] Defendants also argue that Defendant Trump is not subject to injunction. Def. Mot. 14–15. But "the Supreme Court has never held that a court may *never* enjoin the President with regard to his official behavior." *Saget v. Trump*, 345 F. Supp. 3d 287, 297 (E.D.N.Y. 2018) (quotation marks omitted); *see also Nixon v. Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) ("There is not the slightest hint in any of the *Youngstown* opinions that the case would have been viewed differently if President Truman rather than Secretary Sawyer had been the named party."). The Court need not resolve this issue, however. An injunction against the remaining Defendants would provide Plaintiffs with relief.

to build the border wall once a national emergency is declared and additional funds have been reprogrammed.").[5]

Congress further protected its funding decision by specifically barring the use of any taxpayer funds to "increase" the amount allocated to any "program, project, or activity as proposed in the President's budget request" until Congress itself "subsequently enacted" such changes. CAA § 739. Defendant Trump proposed—and was denied—the multibillion-dollar wall projects at issue here; CAA Section 739 ensures that Congress's decision is respected. Defendants attempt to evade the plain meaning of "program, project, or activity" by asserting that the terms refer exclusively to elements within DHS's own budget accounts—and therefore the CAA does not bar an increase in wall funding so long as funds are not literally deposited in a DHS account prior to being spent on the border wall. Def. Mot. 24. This unnaturally constrained definition defies the plain language of the statute and would subvert Congress's ability to control the scope of projects through its funding decisions. The Court should reject it. *See El Paso Cty. v. Trump*, No. EP-19-CV-66-DB, 2019 WL 5092396, at *15 (W.D. Tex. Oct. 11, 2019) ("Construction of a wall along the southern border is a singular 'project' under that word's ordinary meaning.").

B. Defendants' actions are not authorized by Section 2808.

As Defendants' entire reason for invoking Section 2808 is to subvert Congress, it is unsurprising that they can muster no history or caselaw to support their actions. This Court has recognized that "[t]his appears to have been the first time in American history that a President declared a national emergency to secure funding previously withheld by Congress." Order Granting in Part and Denying in Part Plaintiffs' Motion for Preliminary Injunction ("PI Order"), ECF No. 144 at 8; *see also* Brennan Center & Cato Institute Br. 20–23. Congress has not acquiesced to this usurpation; instead it has twice passed bipartisan joint resolutions to disapprove of the emergency.

[5] Defendants' reliance on GAO Opinion B-330862 does not further their case. The GAO decision turns on its determination that Section 284 specifically provided DoD "authority to construct fences" along the border; no similar specific authority is provided by Section 2808. ECF No. 236-8 at 7. In any event, courts are unanimous that there is "no obligation to defer" to GAO assessments. *U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1349 (D.C. Cir. 2012) (quotation marks omitted) (Kavanaugh, J.).

Cf. Dames & Moore, 453 U.S. at 687–88 (noting that "importantly, Congress has not disapproved of the action taken here" by "pass[ing] a resolution, indicating its displeasure" or "in some way resisted the exercise of Presidential authority"); *Spawr*, 685 F.2d at 1081 ("Congress not only tolerated this practice, it expressed approval of the President's reliance" on the statute). Tellingly, over the many pages of briefing Defendants devote to Section 2808, Defendants never address the fundamental issue of whether Section 2808 authorizes the executive branch to override Congress. Instead, Defendants unconvincingly assert that (1) funding a border wall for DHS is the result of complex and unreviewable military judgments; (2) border wall sections stretching across four states are, in fact, part of a military garrison in Fort Bliss, Texas; and (3) a border wall aimed at increasing DHS's capabilities and reducing any purported need for DoD is necessary for use of the armed forces. Def. Mot. 15–23. None of Defendants' arguments is compelling.

First, as described above, Defendants cannot shelter behind claims of unreviewable military decisionmaking. *See* Section III, *supra*. Accordingly, this Court can and should determine that Congress's restriction of Section 2808 to emergencies that "require the use of the armed forces" is not void, but in fact limits the circumstances under which Defendants can divert funds that Congress appropriated for military construction. As Plaintiffs demonstrated, congressional design, DoD's own testimony, and basic common sense all confirm that "family units entering and seeking entry to the United States" do not require a uniquely military response. *See* Pl. Mot. 9–11.

Second, the Court should reject Defendants' absurd claim that they can simply "assign" an enormous swath of the southern border to Fort Bliss, a garrison in Texas, and thereby convert borderlands stretching across four states into a novel "military installation." Def. Mot. 16–19. Defendants offer no limiting principle for this theory, and do not even attempt to conform to this Court's holding that "military construction" is limited to "discrete and traditional military locations"—unlike the southern border. PI Order 45. Instead, Defendants simply assert that by dividing their $3.6 billion Section 2808 project into "11 discrete, specific project locations," the issue addressed by the Court's earlier statutory analysis "is not presented" here. Def. Mot. 17. Defendants miss the point. The Court's earlier conclusion rested on Defendants' announcement that Section 2808 would fund up to $3.6 billion of a proposed $8.1 billion wall on the border, *see* PI

Order 7–8, 42, which is exactly what Defendants now propose. Defendants have provided no reason for the Court to set aside its previous ruling that "in context and with an eye toward the overall statutory scheme, nothing demonstrates that Congress ever contemplated that 'other activity' has such an unbounded reading that it would authorize Defendants to invoke Section 2808 to build a barrier on the southern border." PI Order 46.

Nor does Defendants' "military installation" theory make any sense on its own terms. By Defendants' own account, DoD's exercise of jurisdiction over 11 sections of border spanning over a thousand disparate miles would result in the military's abandonment of these sites. Defendants' plan is to shift any troops away from these 11 newly materialized "military installations" and "redeploy[] DoD personnel and assets to other high-traffic areas on the border without barriers"—in other words, to those areas of the border that Defendants claim are not "military installations" and are not under DoD jurisdiction. Def. Mot. 22. It is counterintuitive, to say the least, for the definition of "military installation" to encompass specifically those sites along the border that the military intends not to use. *See Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004) ("[S]tatutory interpretations which would produce absurd results are to be avoided.").[6]

Finally, for all the deference Defendants claim is due to military decisionmaking, Congress did not authorize the Secretary of Defense to raid the military construction budget for the benefit of other agencies; construction must be "necessary to support" the use of armed forces. As the administrative record and DoD's own statements confirm, "this will all go—funding will all go to adding significantly new capabilities to DHS's ability to prevent illegal entry." RJN ¶ 18, Exh. 17; *see* Pl. Mot. 13–15. Defendants' argument is that none of this matters, because a border wall might "ultimately reduce [DHS's] demand for military support over time." Def. Mot. 22. But this argument clashes with both the plain language and logic of Section 2808. Section 2808 specifically refers to construction that is *necessary for the use* of the armed forces, not to construction that the armed forces will not be using. Moreover, Defendants' proposal would vastly increase the scope of

[6] *United States. v. Apel* does not support Defendants' theory, as that case involved only the question of whether military bases must be exclusively "withdrawn from public use" to qualify as installations, or whether a base remains a military installation if the public is permitted access to a portion of the base. 571 U.S. 359, 367 (2014).

Section 2808, converting it into essentially limitless authority for the Secretary of Defense to fund the capabilities of other agencies. As the Court correctly found with respect to Defendants' theory of Section 8005, "this reading of DoD's authority under the statute would render meaningless Congress's constitutionally-mandated power to assess proposed spending, then render its binding judgment as to the scope of permissible spending." PI Order 38 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (holding that the interpretation of statutes "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude")); *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." (quotation marks omitted)). "Under this interpretation, DoD could in essence make a de facto appropriation to DHS, evading congressional control entirely." PI Order 40. Defendants provide no convincing reason for the Court to adopt such a constitutionally problematic interpretation of Section 2808.

C. Defendants are violating the Constitution.

This Court has already explained that "the position that when Congress declines the Executive's request to appropriate funds, the Executive nonetheless may simply find a way to spend those funds 'without Congress' does not square with fundamental separation of powers principles dating back to the earliest days of our Republic." PI Order 54–55. Defendants nonetheless continue to insist that their actions to circumvent Congress have "no constitutional dimension." Def. Mot. 24. Defendants are wrong.

First, Defendants maintain that the Supreme Court held in *Dalton* that whenever an executive official points at a statutory authority—no matter how inapplicable—there can be no constitutional issue. Def. Mot. 25. But *Dalton* says no such thing. The Supreme Court's unremarkable statement that not "every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution," *Dalton*, 511 U.S. at 472, did not announce a sweeping, inverse rule that any action in excess of statutory authority cannot violate the Constitution. *See Sierra Club v. Trump*, 929 F.3d at 696 ("The Court did not say, however, that action in excess of statutory authority can never violate the Constitution or give rise

to a constitutional claim."). Although *Dalton* was decided decades ago, Defendants cite no decision embracing their implausible interpretation of this narrow decision. In any event, nothing in *Dalton* remotely bears on the availability or scope of an Appropriations Clause challenge in this circuit. As the court of appeals determined years after *Dalton* was decided, when the government spends money in violation of an appropriations act, it is effectively "drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause." *McIntosh*, 833 F.3d at 1175.[7]

Second, Defendants assert that because Congress may constitutionally distribute appropriations to agencies in lump-sum amounts, there can be no separation-of-powers issue if DoD decides to use its military construction budget to increase the funding for the border wall DHS requested. *See* Def. Mot. 25–26. But rather than merely delegating decisionmaking to an agency through a lump-sum appropriation, Congress in enacting the CAA exercised its own authority and restricted the wall project. If Section 2808 nonetheless permits DoD to "in essence make a de facto appropriation to DHS, evading congressional control entirely," this "would pose serious problems under the Appropriations Clause, by ceding essentially boundless appropriations judgment to the executive agencies." PI Order 40.

Finally, Defendants fail entirely to meaningfully address the Presentment Clause issue. Defendants assert that "the entire point of § 2808" is to permit the use of funds "outside of the normal, time-consuming congressional authorization and appropriations process." Def. Mot. 23. But here, Defendant Trump participated in the "normal, time-consuming congressional authorization and appropriations process"—indeed, his demands for wall funding extended that process through the longest partial government shutdown in American history. Having participated in the process the Constitution mandates, Defendant Trump signed Congress's judgment into law, and nonetheless declared the very same day that he would use Section 2808 to aggrandize the wall

[7] As the Ninth Circuit explained, Defendants' reliance on the Fourth Circuit's decision in *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975), is misplaced. *Harrington*, a taxpayer standing case, is "largely inapposite" and in any event supports the existence of a cause of action for "a clear violation of Congress's limits on expenditures." *Sierra Club v. Trump*, 929 F.3d at 697 n.20.

project by exactly $3.6 billion beyond what Congress decided. This violates the Presentment Clause. *See* Pl. Mot. 17–18. No statute can constitutionally authorize the president to enact an appropriations act and simultaneously set aside Congress's funding decision by "rejecting the policy judgment made by Congress and relying on his own policy judgment." *Clinton v. City of New York*, 524 U.S. 417, 444 & n.35 (1998).

D. Defendants are violating the National Environmental Policy Act.

Defendants acknowledge that statutory exemptions should not be read literally, and that their meaning is determined through statutory interpretation. Def. Mot. 26–27. Neither the history of Section 2808 nor its text suggests that DoD may waive NEPA, and Section 2808 does not include the terms that Congress ordinarily uses to waive the application of environmental law. Defendants nonetheless assert that Congress intended such a waiver, because Section 2808 "authority is available only in extraordinary situations such as time of war or national emergency that, by their very nature, require expedited military responses." Def. Mot. 27. But Defendants' assertion of Section 2808 authority in this very case cannot be squared with that theory. According to Defendants, Section 2808 authorizes the military to undertake peacetime construction projects that are planned to *begin* more than a full year after the need for such projects is announced. *See* Notice, ECF No. 201 (announcing border wall projects to begin in April 2020). If Section 2808 authorizes only construction so inherently expeditious that environmental law must not be complied with, then these border wall projects cannot be authorized by Section 2808. Conversely, if Section 2808 authorizes massive, years-long, multibillion-dollar domestic public works, then it would not make sense to infer that Congress intended to exempt such projects from all environmental, labor, and other laws. Congress knows how to waive environmental law. *See* Pl. Mot. 19–20. It did not do so here.

III. Plaintiffs Have Shown Irreparable Harm.

A. Construction of a 30-foot wall will significantly alter the landscape and irreparably harm Plaintiffs' members.

As Plaintiffs' declarations make clear, wall construction in the proposed sectors will significantly alter their overall enjoyment of borderlands that they frequently visit. This is sufficient

to establish irreparable harm. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Defendants' response distorts the record and misstates the law. Defendants cherry-pick misleading statements but fail to show that constructing a 30-foot wall will have no significant impact on the lands that Plaintiffs use and treasure. Second, Defendants ignore decades of settled law establishing that construction affecting the aesthetic enjoyment of lands constitutes irreparable harm.

The bulk of Defendants' argument is that a border wall cannot constitute an aesthetic harm because the border is "already heavily disturbed." Def. Mot. 28. As this Court previously found, this argument is fundamentally flawed because construction of a massive wall on the borderlands Plaintiffs use "will lead to a substantial change in the environment, the nature of which will harm [Plaintiffs'] members' aesthetic and recreational interests." PI Order 50. As before, Defendants propose to radically alter the landscape with the erection of a massive, 30-foot barrier. Stark evidence of this change is provided by recent documentation of Defendants' construction in Arizona and New Mexico. As the Arizona photographs showing fence replacement demonstrate, existing fencing bears no resemblance to the wall Defendants plan to build. *See* Supplemental Request for Judicial Notice ¶ 1, Exh. 1. A comparison between Kevin Bixby's recent photograph of New Mexico wall construction and Defendants' own documentation of vehicle barriers likewise shows the enormous difference in scale. *Compare* Fourth Bixby Decl., Exh. A, *with* Enriquez Decl., Exh. C, ECF No. 181-6 at 62. Defendants' admissions underscore the scope of the construction at issue here. Even secondary barrier projects will include a "30 ft. bollard barrier, with bollards at four-inch intervals" and require a "150-foot-wide construction area," whereas primary fencing will additionally be accompanied by "lighting . . . , fiber optic detection cable, and a patrol road." Beehler Decl. ¶¶ 4–5, ECF No. 236-6.

The statements that Defendants cherry-pick from Plaintiffs' declarations do nothing to undermine this conclusion. New primary pedestrian fencing and accompanying floodlights in Yuma 6 will "ruin" the "desert dark skies" Albert del Val has enjoyed his whole life, destroy the "native vegetation like the cottonwood and mesquite trees" that he finds so "beautiful," and "diminish[] the pleasures" he has experienced since he was a "child in this desert landscape." Del Val Decl. ¶¶ 6–7,

ECF No. 210-1 at 32. Far from suffering only a "subjective fear of being observed by CBP agents," Def. Mot. 28, Nancy Meister's ability to birdwatch north of the Morelos Dam will be concretely impaired by the "double wall that is contemplated, with a no-man's land in between," and the "loud construction noise and harsh lights . . . will scare birds away." Meister Decl. ¶¶ 15, 17, ECF No. 210-1 at 3–4. A new, "tall and intrusive" 30-foot barrier in Yuma 6 will "disrupt the desert views and inhibit [Orson Bevins] from fully appreciating this area." Bevins Decl. ¶ 7, ECF No. 210-1 at 13. Even if some lands near the San Diego 4 and 11 projects are "disturbed already," this is "relatively-short fencing with a small buffer zone" that allows wildlife and low-level flying species to pass. Second Wellhouse Decl. ¶ 6. Replacing it with a "thirty foot bollard wall" will "significantly worsen the impact" on the natural environment, and Ann Wellhouse's "enjoyment of the area would suffer as a result." *Id.* ¶¶ 7–8.

Defendants pick out isolated statements to argue that some of Plaintiffs' declarations "describe lands well outside of the construction footprint." Def. Mot. 30. But while certain declarations offer as context some discussion of the lands surrounding the proposed construction, these same declarations also point specifically at the direct harms from construction of the proposed projects. For example, new wall construction in El Centro 5 and 9 projects —which would be "within three miles of [Mount Signal's] base"—will make Carmina Ramirez "less likely to hike" the mountain "because the long-range views overlooking the valley would be of bulldozers and other machinery scarring the desert landscape." Second Ramirez Decl. ¶ 4. An additional, taller pedestrian fence would "further obstruct" her "views of the valley landscape and the mountains" and "detract from the overall beauty of the area." *Id.* ¶ 5. In arguing that Richard Guerrero hikes in areas not covered by the San Diego 4 Project, Defendants neglect to mention that he also "hike[s] in areas that are within the sightline of" planned construction, including lands to the Southwest of the Otay Open Space Preserve. Guerrero Decl. ¶ 5, ECF No. 210-1 at 49. In addition, Defendants confuse Daniel Watman's statements pertaining to his use of San Diego 4 Project and San Diego 11 Project lands. Construction in the latter sector "would seriously reduce the enjoyment [he] gets from the area, because seeing this large, out-of-place wall would mar [his] views of the beautiful mountain range on the American side." Watman Decl. ¶¶ 6–7, 12, 18, ECF No. 210-1 at 107–09.

Defendants' arguments regarding nonpublic land are misguided. As the Ninth Circuit has explained, "we have never required a plaintiff to show that he has a right of access to the site on which the challenged activity is occurring, or that he has an absolute right to enjoy the aesthetic or recreational activities that form the basis of his concrete interest. If an area can be observed and enjoyed from adjacent land, plaintiffs need not physically enter the affected area to establish an injury in fact." *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001). As Kevin Bixby explains, "[t]hat the land surrounding El Paso 8 is private reflects, rather than diminishes, [its] ecological significance,"—and he has "been invited to and spent time on the [Diamond A] Ranch," and fears that the "new 30 foot barriers will blight landscapes [he] cherish[es]." Fourth Bixby Decl. ¶¶ 6–7; *see also* Second Thompson Decl. ¶¶ 6–7 (even though most land along Laredo 7 is private, this is "not relevant" to Jerry Thompson's work because "[i]f the government builds [there, he] will likely be denied access to these historic sites" to which he has previously had access). Similarly, construction in the Goldwater Range "will be visible from miles away and block the view of scenery, wildlife, or persons beyond," "interfering" with Bill Broyles's "recreation and work" in the area. Third Broyles Decl. ¶¶ 8–9. "These impacts will be caused by every inch of new construction, whether on a publicly accessible portion of the Range and Refuge, or a portion that is currently closed to the public." *Id.* ¶ 9; *see also* Third Hartmann Decl. ¶ 7 ("no comparison" between 30-foot wall and existing barriers "which are approximately four feet tall[,] . . . allow passage of wildlife[,] . . . . do not obstruct views across the desert landscape[,] . . . . and blend more easily into the natural environment.").

Finally, Defendants claim that Sierra Club and SBCC members' injuries should be disregarded because they are simply expressing their "subjective opinion" that a border wall is "unsightly." Def. Mot. 31. While it is certainly true that "aesthetic perceptions are necessarily personal and subjective," it is equally true that these same subjective "aesthetic and recreational interests [] typically provide the basis for standing in environmental cases" in both the Ninth Circuit and the Supreme Court. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1150 (9th Cir. 2000). "As the Supreme Court has explained, "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society." *Id.* (quoting

Sierra Club v. Morton, 405 U.S. 727, 734 (1972)). Courts do not take the jaundiced view of these interests that Defendants urge. Instead, courts recognize that people establish meaningful injuries when they show "a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable—that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction—if the area in question remains or becomes environmentally degraded." *Id.* at 1149. Plaintiffs, many of whom have enjoyed these lands for decades, easily meet that standard.[8]

B. SBCC and its members have suffered organizational harm.

As Plaintiffs demonstrated, the harms to SBCC and its member organizations fall squarely within the heartland of organizational standing doctrine. *See* Pl. Mot. 28–31. Defendants' arguments in response fundamentally misunderstand the relevant law and misstate the facts. They claim that SBCC and its member organizations cannot show irreparable harm to their missions because they are "public advocacy groups" engaged in "First Amendment protected activity in support of their policy goals." Def. Mot. 31. They further argue that organizations can only be harmed if they are forced to undertake activities that are "different in kind" from their missions. Def. Mot. 32. Finally, Defendants misunderstand this Court's preliminary injunction decision that Plaintiffs' harms "will continue until this case's resolution," and argue that it means SBCC has shown no redressable harm at all. Def. Mot. 32. Defendants' arguments are meritless.

First, Defendants provide no support for their claim that SBCC and its member organizations are "public advocacy groups" asserting a "setback to [their] abstract social missions."

[8] The two unpublished cases Defendants cite are inapposite. *Gallatin Wildlife Association* found no irreparable harm where plaintiffs sought to enjoin a status quo of ongoing sheep grazing that had held for 150 years but "failed to demonstrate that allowing the domestic grazing to occur this year will cause any new harm to the landscape that has not already occurred in the past 150 years." *Gallatin Wildlife Ass'n v. U.S. Forest Serv.*, No. cv 15-27-BU-BMM, 2015 WL 4528611, at *4 (D. Mont. July 27, 2015). And in *Center for Biological Diversity v. Hays*, the key holding was not that the plaintiffs' aesthetic harms did not matter, but rather that plaintiffs did not and could not use the land at issue. No. 2:15-cv-01627-TLN-CMK, 2015 WL 5916739, at *10 (E.D. Cal. Oct. 8, 2015) ("Moreover, this situation is distinguishable from *Alliance for the Wild Rockies* because here the affected area cannot currently be used for recreational purposes because the snags have created dangerous conditions that preclude such use.").

Def. Mot. 31 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). Nor could they, as uncontested declarations make clear that the groups do much more than public advocacy. For example, Texas Civil Rights Project ("TCRP") represents individuals in immigration and condemnation proceedings. *See* Garza Decl. ¶¶ 4, 6–7, 13, ECF No. 210-1 at 36–38. Similarly, public advocacy "is not primarily" the activity the Southwest Environmental Center ("SWEC") engages in. Suppl. Bixby Decl. ¶ 4, ECF No. 91-2. Instead, SWEC's primary activities are "research and documentation, education, and on-the-ground restoration projects" towards its mission "to protect and restore wildlife and their habitats in the Southwest." *Id.* ¶¶ 4–5. Through its U.S./Mexico Border Program, American Friends Service Committee ("AFSC") "work[s] with migrant communities" to "address local issues" and, as part of this work, "regularly organize[s] community forums, host[s] rights trainings" and "help[s] people secure legal representation" and "navigate legal proceedings." Rios Decl. ¶¶ 5–6, ECF No. 210-1 at 75.[9]

Second, Defendants miss the mark in arguing that organizations that regularly engage in activities such as community outreach and securing representation for homeowners facing condemnation cannot be injured when Defendants force them to spend resources on similar activities with respect to unlawful Section 2808 projects. Def. Mot. 31–32. The Ninth Circuit rejected a similar argument in *National Council of La Raza v. Cegavske*, where it found organizational injury when an organization that "regularly has conducted and continues to conduct voter registration drives" was forced to expend additional resources on voter registration because the government was not complying with voter registration law. 800 F.3d 1032, 1036 (9th Cir. 2015). As the court explained, although the activity the plaintiffs were forced to divert resources to was a core aspect of their ordinary mission, "Plaintiffs have not alleged that they are simply going

[9] Even if SBCC and its members *were* public advocacy groups, Defendants' claim that such groups cannot suffer harm to their missions from diverting resources contradicts settled Ninth Circuit law. As the Ninth Circuit recently explained, the court has already recognized organizational standing based on "efforts by advocacy groups to show standing by pointing to the expenses of advocacy—the very mission of the group itself." *E. Bay Sanctuary Covenant*, 932 F.3d at 766 (citing *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1226 (9th Cir. 2012) (Ikuta, J., dissenting)). Defendants "are not free to ignore 'the holdings of [] prior cases' or 'their explications of the governing rules of law.'" *Id.*

about their 'business as usual,' unaffected by the State's conduct." *Id.* at 1040–41. Instead, those "[r]esources Plaintiffs put toward registering someone who would likely have been registered by the State, had it complied with the [National Voting Rights Act], are resources they would have spent on some other aspect of their organizational purpose—such as registering voters the [Act]'s provisions do not reach, increasing their voter education efforts, or any other activity that advances their goals." *Id.* at 1040; *see also Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012) (holding that organizations were injured by undertaking a campaign against discriminatory roommate advertising, even though their ordinary business includes investigating and raising awareness about housing discrimination); *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 902 (9th Cir. 2002) (nonprofit that ordinarily acts "to counteract and eliminate unlawful discriminatory housing practices, and provides outreach and education to the community regarding fair housing," suffered injury when a defendant's unlawful actions forced it to undertake exactly these activities). Defendants' claim that SBCC's "recent activities in response to § 2808 construction [are not] different in kind from its prior mission," Def. Mot. 32, is irrelevant; what matters is that Defendants' unlawful wall construction under Section 2808 is diverting resources that could be used elsewhere but for Defendants' actions.

Finally, Defendants misread the Court's prior holding. The Court denied Plaintiffs a preliminary injunction against the Section 2808 projects because it concluded that Plaintiffs' organizational harms would continue until the claims were fully resolved. PI Order 51–53. Plaintiffs now seek permanent relief, and have put forth evidence demonstrating that a permanent injunction would allow them to stop diverting resources to counter the harms of Section 2808 border wall construction and reallocate those resources to their core missions. *See* Rios Decl. ¶ 13, ECF No. 210-1 at 78 ("An order blocking these projects would alleviate our need to do monitoring work, and allow us to conduct trainings and engage with our communities as we currently do and intend to do."); Third Bixby Decl. ¶ 16, ECF No. 210-1 at 21 (whereas Executive Director "would normally spend about 20% of [his] time traveling and meeting with regional stakeholders about SWEC's wildlife restoration projects and campaigns, [he is] now devoting only 5% of [his] time to that work"); Garza Decl. ¶ 16, ECF No. 210-1 at 29 ("If a court blocks the undertaking, we no

longer will be forced to research the impacts of the emergency declaration on Laredo communities, to investigate on behalf of Laredo landowners threatened with condemnation, to travel to Laredo to do community outreach, education, or representation on this issue, or work to build a network of counsel capable of taking on condemnation actions at this time."); Third Gaubeca Decl. ¶ 12, ECF No. 210-1 at 45 (Executive Director has spent "more than 60 percent of [her] time . . . on border-wall related advocacy," instead of focusing on core initiatives "including Border Patrol accountability, community engagement on local health and education issues, and public education about immigration policies more broadly"). Far from "vague allegations," Def. Mot. 32, Plaintiffs have demonstrated concrete, irreparable harms to their respective missions, which will be remedied by a permanent injunction.

IV. The Balance of Equities Tips Sharply in Favor of an Injunction.

Defendants' chief argument on the equities is to urge the Court to blind itself to the basic facts of this case. They assert that "the government and public" have a "compelling interest" in Defendants' diversion of billions of dollars. But as this Court has already explained, "Congress considered all of Defendants' proffered needs for border barrier construction, weighed the public interest in such construction against Defendants' request for taxpayer money, and struck what it considered to be the proper balance—in the public's interest—by making available only $1.375 billion in funding, which was for certain border barrier construction not at issue here." Order Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment 8, ECF No. 185. Congress allocated the money at issue here to servicemembers and their families, and refused Defendant Trump's request to construct his wall on the lands that Plaintiffs use. The public interest would not be served by allowing Defendants to circumvent decisions constitutionally committed to the public's representatives. *See* Pl. Mot. 33.

Defendants point at *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), but that decision makes the weakness of their argument here even starker. There, the government substantiated its claims of national security harm with specific "declarations from some of the Navy's most senior officers, all of whom underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat." *Id.* at 24. The plaintiffs in *Winter* had

shown no countervailing injury: at that point "training ha[d] been going on for 40 years with no documented episode of harm." *Id.* at 33. Here, by contrast, DoD officials have testified consistently and repeatedly that the situation on the border is "not a military threat," RJN ¶ 16, Exh. 15. But while Defendants' asserted military harms are insubstantial, the harms posed to Plaintiffs, the environment, and the public are extraordinary. If "the decision to spend [is] determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened." *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring).

CONCLUSION

For the above reasons, Plaintiffs ask that the Court grant their Motion for Partial Summary Judgment, deny Defendants' Motion, and order declaratory and injunctive relief.

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Respectfully submitted,

/s/ *Dror Ladin*

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