JAMES M. BURNHAM
Deputy Assistant Attorney General
ALEXANDER K. HAAS
Director, Federal Programs Branch
ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch
ANDREW I. WARDEN (IN #23840-49)
Senior Trial Counsel
KATHRYN C. DAVIS
MICHAEL J. GERARDI
LESLIE COOPER VIGEN
RACHAEL WESTMORELAND
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, D.C. 20530
Tel.: (202) 616-5084
Fax: (202) 616-8470
Attorneys for Defendants

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

SIERRA CLUB, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 4:19-cv-00892-HSG

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Hearing Date: November 20, 2019
Time: 10 a.m.
Place: Oakland Courthouse
Courtroom 2, 4th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

UNITED STATES CONSTITUTION

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTRODUCTION

DoD's use of 10 U.S.C. § 2808 to undertake eleven border barrier military construction projects along the U.S.-Mexico border is lawful. *See generally* Defs.' Mot. (ECF No. 236). The projects comply with § 2808's statutory requirements and do not violate any other statutory or constitutional provision. There is thus no basis to enjoin them.

Plaintiffs' disagree, but fail to establish any basis for the sweeping declaratory and injunctive relief they seek. At the outset, Plaintiffs lack a cause of action to enforce § 2808, the Consolidated Appropriations Act, 2019 (CAA), Pub. L. No. 116-6, 133 Stat. 13 (2019), and the constitutional provisions they invoke because they fall outside the zone of interests protected by those provisions. Plaintiffs' recreational, aesthetic, and organizational interests are entirely unrelated to the emergency military construction and appropriations interests protected by § 2808 and the CAA, and there is no basis to conclude that Congress intended for these sorts of Plaintiffs to invoke those provisions.

Plaintiffs also ask this Court to be the first ever to second-guess a Presidential national emergency declaration. Plaintiffs offer no legal support for the Court to take that unprecedented step and, indeed, none exists. The President's decision to declare a national emergency along the southern border that requires the use of the armed forces presents a nonjusticiable political question; the Supreme Court has barred judicial review of statutorily-authorized discretionary Presidential judgments, and Plaintiffs lack a cause of action to challenge the President's decision.

Plaintiffs' challenge to DoD's use of its § 2808 authority fares no better. The locations of the discrete border barrier projects at issue here fall within the definition of "military installation" not only because they are part of Fort Bliss, but also because they fall within the broad scope of the phrase "other activity under the jurisdiction of the Secretary of a military department." 10 U.S.C. § 2808(c)(4). Additionally, the Secretary of Defense's determination, supported by the detailed administrative record, that the projects are necessary to support the use of armed forces is committed to his discretion or, at most, is subject to review under a highly deferential standard. Under either approach, there is no basis for the Court to substitute its judgment for that of the Secretary on this military matter.

Plaintiffs also have not established that the § 2808 projects violate any other statutory or constitutional provision. The CAA provided funding for agencies other than DoD, and it is not an

implied prohibition on DoD's ability to utilize its own separate statutory authority for border barrier funding and construction. And by undertaking these projects, DoD is not adding funds to an appropriation account of the Department of Homeland Security (DHS) in contravention of § 739 of the CAA. Additionally, Plaintiffs cannot sidestep the fact that § 2808 authorizes military construction "without regard to any other provision of law" and their claims under the National Environmental Policy Act (NEPA) fail. Nor can Plaintiffs re-cast their statutory claims in constitutional terms. This case raises purely statutory issues and Plaintiffs' effort to recast their statutory claims as ones arising under the Appropriations Clause, Presentment Clause, and separation of powers lacks merit.

Finally, Plaintiffs have failed to demonstrate their entitlement to a permanent injunction stopping the funding and construction of all § 2808 projects. Plaintiffs have not established an irreparable injury necessary to support the sweeping injunction they seek and the balance of equities tips sharply in favor of Defendants. Defendants' significant interest in supporting the armed forces and enhancing border security far outweighs Plaintiffs' recreational and aesthetic interests in the narrow strip of land along the international border with Mexico, as well as their organizational interests.

For these reasons, as explained further below, the Court should grant summary judgment in favor of Defendants on all claims related to the funding and construction of the § 2808 border barrier projects.

ARGUMENT

I. Plaintiffs Lack a Cause of Action to Obtain Review of Defendants' Compliance with § 2808, the CAA, or the Constitution.

A. The Zone-of-Interests Requirement Applies to Implied Equitable Actions as well as Causes of Action Under the Constitution.

The zone-of-interests requirement is a general presumption about Congress's intended limits on the scope of *all* causes of action, not just express causes of action under the Administrative Procedure Act (APA) or other statutes. As the Supreme Court has made clear, the zone-of-interests test "is a 'requirement of general application.'" *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)). The zone-of-interests

test thus applies to claims brought under the APA and the Constitution. *See, e.g.*, *Lexmark*, 572 U.S. at 192 (the zone of interests is "a limitation on the cause of action for judicial review conferred by" the APA); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) ("[T]he Court has required that the plaintiff's complaint fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (quotation marks omitted)); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320-21 n.3 (1977) (applying the zone-of-interests requirement to plaintiffs seeking to enforce the dormant Commerce Clause); *Individuals for Responsible Gov't, Inc. v. Washoe Cnty.*, 110 F.3d 699, 703 (9th Cir. 1997) (stating that although the zone-of-interests test is applied "most frequently in suits brought under the Administrative Procedure Act," it "also governs claims under the Constitution in general.").

With respect to Plaintiffs' purported implied *ultra vires* claims for alleged statutory violations, Defendants recognize that this Court previously concluded that the zone-of-interests test does not apply to these sorts of actions outside the APA framework. *See Sierra Club v. Trump*, 379 F. Supp. 3d 883, 910 (N.D. Cal. 2019). Defendants respectfully disagree with the Court's conclusion and have explained the reasons why that conclusion is inconsistent with established doctrine on the zone of interests. *See* Defs.' Mot. at 9–12. The Supreme Court has stated that the zone-of-interests "limitation *always* applies and is never negated." *Lexmark*, 572 U.S. at 129 (emphasis in original). There is also no basis to conclude that Congress intended to allow courts to infer an equitable cause of action for individuals outside the zone of interests of the statute being enforced. Such a rule would lead to "absurd consequences." *Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 178 (2011) (identifying hypothetical persons with Article III injuries from statutory violations who plainly would be improper plaintiffs to enforce the statute).

Plaintiffs argue that this Court is bound by the decision in *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019), regarding the cause of action analysis, *see* Pls.' Opp'n at 1–3 (ECF No. 239), but that interlocutory decision denying a stay entered by a motions panel after limited and expedited briefing does not control the outcome of this case, particularly because the Supreme Court's subsequent order granting a stay necessarily rejected the motions panel's cause of action analysis. *See Trump v. Sierra Club*, 2019 WL 3369425 (U.S. July 26, 2019). The district court cases Plaintiffs cite for the proposition

that this Court is bound by the motions panel's decision—notwithstanding an intervening stay order from the Supreme Court—involved situations where the Supreme Court "gave no reason for its stay orders" and the district courts could not "discern the Supreme Court's rationale." *Doe v. Trump*, 284 F. Supp. 3d 1182, 1185 (W.D. Wash. 2018); *see Durham v. Prudential Ins. Co. of Am.*, 236 F. Supp. 3d 1140, 1147 (C.D. Cal. 2017). Here, by contrast, the Government was entitled to a stay because, "[a]mong other reasons," it had sufficiently shown that "the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Sierra Club*, 2019 WL 3369425 at *1. The Supreme Court's decision to stay an injunction is guided by the same factors that inform the issuance of a preliminary injunction. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). Thus, when the Supreme Court stayed this Court's injunction, it necessarily found that Defendants were likely to succeed on the merits of the claim that Plaintiffs "have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Sierra Club*, 2019 WL 3369425 at *1. That rationale is equally applicable to Plaintiffs' § 2808 and CAA claims because neither of those statutes provide a cause of action, and Plaintiffs do not fall within either provision's zone of interests. The motions panel's decision is thus "clearly irreconcilable with the reasoning" of the Supreme Court's order regarding Plaintiffs' implied equitable cause of action. *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013). As the Supreme Court has made clear, "a statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked." *Lexmark Int'l*, 572 U.S. at 129.

Plaintiffs also contend that the Supreme Court's order does not undermine the decision in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), which they argue establishes "that individuals have an equitable cause of action under the Appropriations Clause." *See* Pls.' Opp'n at 3. But *Mcintosh* does not stand for that expansive proposition, as it did not address the zone-of-interests requirement or causes of action.[1] Rather, the justiciability portion of the decision focused solely on Article III

[1] Plaintiffs also offer no response to Defendants' argument that they lack a cause of action because this is not "a proper case" for the "judge-made remedy" of an implied cause of action under the Appropriations Clause. *See* Defs.' Mot. at 12 (citing *Armstrong v, Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *Grupo Mexicano De Desarrollo SA v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999)).

standing of a criminal defendant to bring a constitutional challenge to his prosecution. *Id.* at 1173–74. And cases that do not discuss the zone-of-interests requirement in the course of addressing claims to enjoin alleged statutory or constitutional violations have no force because "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (citation omitted).

B. Plaintiffs Cannot Satisfy the Zone-of-Interests Requirement.

Plaintiffs cannot satisfy the zone-of-interests requirement for § 2808, the CAA, or the Constitution because their recreational, aesthetic, and organizational interests are entirely unrelated to the interests protected by those provisions. *See* Pls.' Opp'n at 3–5.

Plaintiffs contend that they fall within the zone of interests protected by the CAA because it "takes into account environmental interests[.]" *See id.* at 4. But Plaintiffs are not seeking to enforce the limitations in § 231 of the CAA that prohibits border barrier construction in five designated areas in the Rio Grande Valley border patrol sector in Texas. *See* Pub. L. No. 116-6, § 231. None of the projects at issue in this case are being built in the Rio Grande Valley. Instead, Plaintiffs are seeking to protect their purported interests in border barrier projects constructed in other areas of the country under § 2808, a separate statutory authority that is funded by a different appropriation. *See* Pub. L. No. 115-244, div. C, tit. I (Sept. 21, 2018) (DoD's military construction appropriation). Because the zone-of-interests requirement must be applied "by reference to the particular provision of law upon which the plaintiff relies," *Bennett*, 520 U.S. at 175–76, the limitations in § 231 are irrelevant to Plaintiffs' claims here. Plaintiffs' CAA claims are premised on violations of §§ 230 and 739, *see* Pls.' Opp'n, 11–12, but Plaintiffs make no effort to explain how they fall within the zone of interests of those appropriations provisions, which govern the Executive Branch's relationship with Congress regarding federal spending and are not part of the U.S. Code.

Nor are Plaintiffs' asserted interests within the zone of interests that § 2808 protects. *See Association of Data Processing Services Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). In authorizing military construction projects during a time of war or national emergency "without regard to any other provision of law," 10 U.S.C. § 2808(a), it is not plausible that Congress even considered individuals

who recreate on project land used for those construction projects or the organizational interests of those groups who advocate against the projects, let alone that it actually sought to protect those far-flung interests when it enacted § 2808. Plaintiffs are thus far more attenuated from the limitations in § 2808 than was the nearby landowner who fell within the zone of interests protected by the land acquisition statute at issue in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225–26 (2012). Plaintiffs thus have not established the necessary relationship between the "interests to be protected or regulated" by § 2808 and their interests in this lawsuit. *Bennett,* 520 U.S. at 175.

Plaintiffs also mistakenly contend that they fall within the zone of interests protected by the Appropriations Clause and separation of powers. *See* Pls.' Opp'n at 4–5. But Plaintiffs' attempt to recast their statutory claims as sounding in the Constitution is contrary to *Dalton v. Specter*, 511 U.S. 462, 472–73 (1994). And in any event, the question here is whether DoD's actions complied with § 2808; that provision, not the Constitution, provides the framework for the zone-of-interests inquiry. *See Bennett*, 520 U.S. at 175-176. The fact that the purported constitutional claim here is premised on DoD's lack of statutory authority distinguishes it from cases cited in the decision of the motions panel that Plaintiffs invoke. *See Sierra Club*, 929 F.3d at 704 (citing *Bos. Stock Exch.*, 429 U.S. at 602 n.3; *INS v. Chadha*, 462 U.S. 919, 943 (1983)). Even assuming Plaintiffs' claims could be deemed to rest in part on the Constitution, they have not established that separation of powers, Presentment Clause, and Appropriations Clause protect the recreational, aesthetic, and organizational mission interests they are asserting.

II. The President's Decision to Declare a National Emergency that Requires the Use of the Armed Forces is Nonjusticiable.

Plaintiffs' challenge to the President's decision to declare a national emergency that requires the use of the armed forces is unreviewable because (1) the President's decision presents a nonjusticiable political question; (2) Plaintiffs cannot challenge a statutorily-authorized discretionary judgment of the President; and (3) Plaintiffs lack a cause of action to challenge the President's decision. *See* Defs.' Mot. at 12–16; Presidential Proclamation on Declaring a Nat'l Emergency Concerning the S. Border of the United States, 84 Fed. Reg. 4949 (Feb. 15, 2019) (Proclamation).

Plaintiffs contend that courts have previously reviewed executive claims of emergency authority, *see* Pls.' Mot. at 6–7, but they identify no case in which a court has ever reviewed the merits of a President's decision to declare a national emergency. To the contrary, courts that have considered the issue have uniformly concluded that a Presidential declaration of a national emergency is a nonjusticiable political question.[2] *See United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076, 1081 (9th Cir. 1982) ("courts have not normally reviewed the essentially political questions surrounding the declaration or continuance of a national emergency" and "we will not address these essentially-political questions"); Defs.' Mot. at 13. Plaintiffs primarily rely on *Dames & Moore v. Reagan*, 453 U.S. 654 (1981), but that case did not involve a challenge to President Carter's decision to declare a national emergency declaration in response to the 1979 Iran hostage crisis. *See id.* at 672. Rather, the passage and cases Plaintiffs rely upon from *Dames & Moore* addressed the separate "question of the President's authority to suspend claims pending in American courts" under International Emergency Economic

[2] *See also United States v. Amirnazmi*, 645 F.3d 564, 581 (3d Cir. 2011) ("[F]ederal courts have historically declined to review the essentially political questions surrounding the declaration or continuance of a national emergency."); *Soudavar v. Bush*, 46 F. App'x 731 (5th Cir. 2002) (per curiam) (affirming district court decision dismissing a challenge to executive orders imposing national emergency sanctions on Iran as involving a "nonjusticiable political question"); *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 573 (Cust. & Pat. App. 1975) (courts will not "review the judgment of a President that a national emergency exists"); *Chichakli v. Szubin*, 2007 WL 9711515, at *4 (N.D. Tex. June 4, 2007) (holding that a challenge to President Bush's declaration of a national emergency with respect to Liberia "presents a nonjusticiable political question"), *aff'd in part, vacated in part*, 546 F.3d 315 (5th Cir. 2008); *Beacon Prods. Corp. v. Reagan*, 633 F. Supp. 1191, 1194–95 (D. Mass. 1986) (whether national emergency existed with respect to Nicaragua presents a non-justiciable political question); *Sardino v. Fed. Reserve Bank of N.Y.*, 361 F.2d 106, 109 (2d Cir. 1966) (concluding that President Truman's national emergency declaration concerning the situation in Korea is not justiciable and "courts will not review a determination so peculiarly within the province of the chief executive"); *Veterans & Reservists for Peace in Vietnam v. Regional Comm'r of Customs, Region II*, 459 F.2d 676, 679 (3d Cir. 1972) ("a President's declaration of national emergency is unreviewable"); *Santiago v. Rumsfeld*, 2004 WL 3008724, at *3 (D. Or. Dec. 29, 2004) (holding that plaintiffs challenge to "whether the national emergency declared by the President continues to apply to Afghanistan" has "raised an essentially political issue" and "[c]ourts should refrain from ruling on such issues"), *aff'd* 403 F.3d 702 (9th Cir. 2005 and 407 F.3d 1018 (9th Cir. 2005); *United States v. Groos*, 616 F. Supp. 2d 777, 788-89 (N.D. Ill. 2008) ("The court cannot question the President's political decision" to declare a national emergency regarding "unrestricted access of foreign parties to U.S. goods and technology"); *Chang v. United States*, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988) ("to the extent that the plaintiffs' inquiry into the 'true facts' of the Libyan crisis would seek to examine the President's motives and justifications for declaring a national emergency, such an inquiry would likely present a nonjusticiable political question").

Powers Act (IEEPA). Although exercise of authority under IIEEPA requires a declaration of a national emergency, *see* 50 U.S.C. 1701(a), nothing in *Dames & Moore* contradicts the many decisions holding that national emergency declarations are nonjusticiable.

Plaintiffs also contend that the political question doctrine is inapplicable because they have alleged statutory violations of § 2808. *See* Pls.' Opp'n at 7. But many of the cases in which courts have concluded that national emergency declarations are nonjusticiable political questions arose in the context of alleged statutory violations, such as challenges to the President's statutory authority under the Trading with the Enemy Act (TWEA), Pub. L. No. 65–91, § 5, 40 Stat. 411, 415 (1917), which granted the President authority to regulate international trade during a declared national emergency, and IEEPA, which empowers the President to deploy economic sanctions and other measures upon the declaration of a national emergency, 50 U.S.C. §§ 1701–02. *See Amirnazmi*, 645 F.3d at 572 (noting IEEPA and TWEA require "the declaration of a national emergency under the National Emergencies Act"); *supra* at n.2. Accordingly, the President's determination of a national emergency that requires the use of the armed forces does not become justiciable simply because § 2808, like TWEA and IEEPA, is premised on a national emergency declaration in accordance with the National Emergencies Act, or a particular type of national emergency. *See* 50 U.S.C. 1701(a) (IIEPA requires the President to declare a national emergency "with respect to" "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States").

Moreover, "a statute providing for judicial review does not override Article III's requirement that federal courts refrain from deciding political questions." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843 (D.C. Cir. 2010) (en banc); *see Tiffany v. United States*, 931 F.2d 271, 275–76 (4th Cir. 1991).[3] Statutory challenges to Executive Branch conduct thus routinely present nonjusticiable political questions. *See, e.g., Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (declining to construe statute to require judicial review of foreign policy decisions); *Ali Jaber v. United*

[3] Plaintiffs cite to then-Judge Kavanaugh's concurring opinion in *El Shifa* to support their position that the political question doctrine cannot apply to alleged statutory violations, *see* Pls.' Opp'n at 8, but that view was not accepted by the *en banc* majority, as noted above. *See El Shifa*, 607 F.3d at 843.

States, 155 F. Supp. 3d 70, 80 (D.D.C. 2016) (applying political question doctrine to the Torture Victim Protection Act and the Alien Tort Statute); *Alaska v. Kerry*, 972 F. Supp. 2d 1111, 1127–231 (D. Alaska 2013) (holding that statutory challenge to implementation of anti-pollution treaty is nonjusticiable political question).

Nor can Plaintiffs evade the political question doctrine by characterizing their claim as a statutory one. *El Shifa*, 607 F.3d at 842–43. Regardless of how their claim is styled, Plaintiffs' fundamental claim is that the President erroneously determined that the situation at the southern border constitutes a national emergency that requires the use of the armed forces; that is so, they say, because there is no need for a military response to a civilian issue. *See* Pls.' Opp'n at 13. But resolving that question would require the Court to second-guess policy determinations about immigration enforcement, border security, use of military resources, and public safety committed to the political branches—all without any manageable standards for dictating the circumstances under which a President may declare a national emergency, or assessing whether the crisis at the southern border satisfies whatever newly-created criteria the Court imposes. The political question doctrine prohibits the Court from such free-wheeling, second-guessing of the President's policy determination based on the Court's "unmoored determination of what United States policy . . . should be." *Zivotofsky ex rel. Zivotofsky v. Clinton,* 566 U.S. 189, 196 (2012).

The military character of the decision by the President as Commander-in-Chief that the crisis at the southern border requires the capabilities of the armed forces further underscores that the Court cannot review this determination. *See* Defs.' Mot. at 13–14. Plaintiffs ask this Court to pass judgment on the President's quintessential military judgment about whether the armed forces are required to address a national emergency. Plaintiffs cannot evade that reality by claiming that "no part of this challenge concerns the deployment of troops." *See* Pls.' Opp'n at 9. To rule for Plaintiffs, the Court would have to determine that the armed forces were not, in fact, required to respond to the crisis at the border—a policy decision that goes to the core of the President's constitutional control over military personnel and resources. No court has ever conducted that sort of judicial second-guessing over such a military decision and none of the cases Plaintiffs cite come close to endorsing it. *See* Pls.' Opp'n at 7–8.

In addition to posing a quintessential political question, Plaintiffs' challenge to the President's Proclamation also fails for the separate reason that it seeks review of a statutorily-authorized discretionary judgment of the President. *See* Defs.' Mot. at 15–16; *Dalton,* 511 U.S. at 474. Section 2808 commits to the President's discretion the decision to declare a national emergency that requires the use of the armed forces. Plaintiffs' claim thus "concerns not a want of Presidential power, but a mere excess or abuse of discretion in exerting a power given." *See Dalton*, 511 U.S. at 474 (quoting *Dakota Central Telephone Co. v. South Dakota ex rel. Payne*, 250 U.S. 163, 184 (1919)). There is no dispute that Congress has authorized the President to declare a national emergency that requires the use of the armed forces. Rather, Plaintiffs' argument is that—contrary to the President's determination—this statutory grant of power does not extend to the specific factual circumstances at the border. That claim is "simply alleging that the President has exceeded his statutory authority," which is not subject to judicial review. *Dalton*, 511 U.S. at 473. As the Supreme Court has made clear, "[w]here a statute . . . commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available." *Dalton*, 511 U.S. at 477. Contrary to Plaintiffs' argument, *see* Pls.' Mot. at 10, § 2808 qualifies as such a statute, particularly given that the President's decision arose in the military context in relation to the declaration of a national emergency, which are both areas traditionally outside the purview of the judiciary. *See Dakota Central Telephone Co.*, 250 U.S. at 183–184 (holding that courts could not review the President's decision to take control of telephone lines where statute authorized such Presidential action when "necessary for the national security or defense").

Finally, Plaintiffs do not respond to Defendants' argument that they lack a cause of action to challenge the President's Proclamation, either under the APA or via a non-statutory cause of action. *See* Defs.' Mot. at 14–15. Plaintiffs concede that there is no need for an *injunction* against the President in this case, *see* Pls.' Opp'n at 11 n.4, but that speaks only to the remedy the Court may order at the conclusion of this litigation, not whether Plaintiffs have a *cause of action* against the President in the first place. As Defendants have explained, they do not. *See* Defs.' Mot. at 14–15.

III. The Border Barrier Projects Are Military Construction Projects.

As for the border barrier projects themselves, Defendants have satisfied the statutory requirement that they constitute "military construction" because the projects are undertaken "with

respect to a military installation." 10 U.S.C. § 2801(a); *see* Defs.' Mot. at 16–19. Plaintiffs in their opposition ignore the majority of the Defendants' arguments. In particular, they offer no meaningful rebuttal to Defendants' argument that the term "other activity" within the definition of a military installation should be construed broadly and includes locations "under the jurisdiction of a Secretary of a military department" in addition to those types of locations specifically listed in the statute. *See* Defs.' Mot. at 13–14 (quoting 10 U.S.C. § 2801(c)(4)). Additionally, construction of the § 2808 border barrier projects is plainly an "activity" under any definition of that term,[4] and there is no dispute that this activity is "under the jurisdiction" of the Secretary of the Army. *See* Administrative Record re: § 2808 (AR) at 9–10 (ECF No. 206).

Instead, Plaintiffs take issue with the Secretary of the Army's decision to assign all land necessary for the § 2808 projects to be part of the Fort Bliss military installation upon transfer of administrative jurisdiction over those sites to the Army.[5] *See* Pls.' Opp'n at 13–14. Plaintiffs claim it is "absurd" for the Secretary to assign these parcels to Fort Bliss. *See id.* at 13. But Plaintiffs cannot point to any authority for their assertion that the Secretary's decision about what lands under his jurisdiction will become part of an existing military installation is somehow restricted by the proximity of the land to that military installation—or indeed, by anything else. To the contrary, Army regulations specifically contemplate the assignment of lands "under the control of the Department of the Army, at which functions of the Department of the Army are carried on" as "subinstallation[s]," which are "attached to installations for command and administrative purposes, *although they are located separately*." 32 C.F.R. § 552.31(c) (emphasis added); *see also id.* at 552.31(b) ("[T]he term 'installation' will include installations, subinstallations, and *separate locations housing an activity*." (emphasis added)). In practice, military departments often designate geographically separated locations as part of, but physically

[4] *See Yeskey v. Com. of Pa. Dep't of Corr.*, 118 F.3d 168, 170 (3d Cir. 1997), *aff'd sub nom. Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998) ("the ordinary meaning[] of 'activity' . . . includes the 'duties or function' of 'an organizational unit for performing a specific function.' (quoting *Webster's Third New International Dictionary* 22 (1986)); *Black's Law Dictionary* (8th ed. 2004) (defining "activity" as "[t]he collective acts of one person or of two or more people engaged in a common enterprise").

[5] Plaintiffs do not dispute that the two projects on the Goldwater Range, an existing military installation, are being undertaken "with respect to a military installation." *See* Defs.' Mot. at 16. Nor do they challenge DoD's authority to acquire land necessary for § 2808 projects. *See id.* at 18–19.

separate from, the main military installation. *See, e.g.*, Navy Auxiliary Landing Field Orange Grove (auxiliary landing field located 40 miles away from the main military installation in Kingsville, TX) (Exhibit 1). Accordingly, there no basis for the Court to second-guess the Secretary of the Army's decision to designate land under its jurisdiction and control to a particular military installation, or conclude that such land is not part of the military installation to which it is assigned.

Moreover, Plaintiffs are incorrect to the extent they argue that the Secretary of the Army's decision to assign the § 2808 project locations to the Fort Bliss military installation constitutes an end-run around either the "military construction" requirement of § 2808 or that provision's definition of "military installation." *See* Pls.' Opp'n at 13. To the contrary, these discrete project locations fall squarely within the definition of "military installation" not only because they have been assigned to Fort Bliss, but also because they fall within the broad scope of an "other activity under the jurisdiction of the Secretary of a military department." 10 U.S.C. § 2808(c)(4). Nor are Plaintiffs correct insofar as they suggest that this Court has already decided that border barrier construction can never constitute an "other activity." *See* Pls.' Opp'n at 13–14. Although the Court posited that "other activity" should be understood as referring to "discrete and traditional military locations," it also noted that "'other activity' is not an empty term" and that it "encompass[es] more than just 'a base, camp, post, yard, [or[center.'" *See Sierra Club*, 379 F. Supp. 3d at 921. Along these lines, the Supreme Court has endorsed a broad reading of the term "military installation," observing that federal law treats it as "synonymous with the exercise of *military jurisdiction*." *United States v. Apel*, 571 U.S. 359, 368 (2014) (emphasis in original). Although Congress could have limited the reach of the term "military installation" here, by replacing "other activity" with "any similar military facility," as it has in other statutes, it chose not to here. *See* Defs.' Mot. at 18.

The breadth of the term "military installation" is further confirmed by the second clause of the definition, which states that a military installation also includes "an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control." 10 U.S.C. § 2801(c)(4). This repeated use of the term "activity" in the same definition reinforces the understanding of the term "military installation," whether foreign or domestic, to cover any land on which DoD is exercising jurisdictional

control for an official purpose. The presumption of consistent usage controls, *see Midbrook Flowerbulbs Holland B.V. v. Holland Am. Bulb Farms, Inc.*, 874 F.3d 604, 615 n.11 (9th Cir. 2017), and the term "activity" must be given its ordinary meaning throughout § 2808. Thus, the locations on which the 11 specific border barrier projects at issue will be constructed constitute an "other activity under the jurisdiction of the Secretary of a military department," and the barrier construction associated with them is being undertaken "with respect to a military installation," thereby falling within the definition of "military construction" as required by § 2808. *See* Defs.' Mot. at 12–13 (quoting 10 U.S.C. §§ 2801(a) & (c)(4)).

Finally, Plaintiffs have not factual basis for their argument that the § 2808 project locations designated by the Secretary of Defense cannot constitute military installations because DoD plans to "abandon" them. *See* Pls.' Opp'n at 14. The Secretary's determination that border barrier projects will reduce the demand for DoD personnel at the project locations and permit redeployment of DoD personnel and assets does not mean that DoD will have no presence on or near the sites while DoD continues to support DHS at the border. *See* AR at 9. Plaintiffs' argument is thus based on an unsupported factual inference and should be discounted.

IV. The Border Barrier Projects are Necessary to Support the Use of the Armed Forces.

As explained in Defendants' motion, the administrative record supports the Secretary of Defense's determination that the § 2808 border barrier projects are necessary to support the use of the armed forces in connection with the national emergency at the southern border. *See* Defs.' Mot. at 15–18. The Secretary's decision is committed to agency discretion by law or, at most, subject to highly deferential review based on the well-established authority requiring judicial deference to military judgments. *See id.* Plaintiffs' contrary arguments lack merit. *See* Pls.' Mot. at 9–10, 14–15

Plaintiffs contend that the prohibition of judicial review for actions "committed to agency discretion" should be construed narrowly, *see* Pls.' Opp'n at 9–10, but the prohibition is appropriate here in light of the military nature of the Secretary's decision and the lack of statutory criteria guiding his determination. The Secretary's decision necessarily depends upon "a complicated balancing of a number of factors which are particularly within [his] expertise" and is thus committed to his discretion.

Heckler v. Chaney, 470 U.S. 821, 831 (1985). The determination regarding what is necessary to support the use of the armed forces is an inherent military judgment and the type of "agency decision[] that courts have traditionally regarded as unreviewable." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018). In *National Federation of Federal Employees v. United States*, for example, the D.C. Circuit held that DoD's closing of certain military bases and reassigning of troops was committed to agency discretion even though DoD's statutory authority to close bases contained a set of criteria for making those decisions. 905 F.2d 400, 405–06 (D.C. Cir. 1990). The court reasoned that judicial review of the closings and reassignments "would necessarily involve second-guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure." *Id.* at 406. The court explained that "the federal judiciary is ill-equipped to conduct reviews of the nation's military policy" and that "[s]uch decisions are better left to those more expert in issues of defense." *Id.* Similarly, here, there are no "judicially manageable standards" for judging how and when the Secretary of Defense should exercise his discretion to undertake military construction projects necessary to support the use of the armed forces. *Heckler,* 470 U.S. at 830; *see Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 41–42 (D.C. Cir. 2000) (holding that "determinations regarding [] military value" were committed to agency discretion by law).

Even if the Secretary's decision were reviewable, Plaintiffs do not contest that the Court should defer to the Secretary's military judgment. *See* Defs.' Mot. at 20. As the administrative record sets forth in detail, the § 2808 projects at issue support the use of the armed forces by improving the effectiveness and efficiency of DoD personnel deployed to the border. *See id.* at 21–23; AR at 1–11; 42–75; 97–137. The projects will reduce demand for DoD personnel and assets at the locations where the barriers are constructed and will allow the redeployment of DoD personnel and assets to other high-traffic areas on the border that lack barriers. *See id.* at 9. In reaching this considered military judgment, the Secretary undertook a robust internal deliberative process, seeking analysis and advice from the Chairman of the Joint Chiefs of Staff, and input from others, and made a decision that warrants deferential review. *See Gilligan v. Morgan,* 413 U.S. 1, 10 (1973) ("it is difficult to conceive of an area of governmental activity in which the courts have less competence" than "[t]he complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force").

Accordingly, the Court should not disturb the Secretary's determination.

Plaintiffs, however, contend that the projects are not authorized under § 2808 because the projects also assist DHS in its border security mission. *See* Pls.' Opp'n at 14–15. But Plaintiffs never explain why military construction projects that provide benefits to both DoD and DHS are somehow thereby rendered unlawful. The text of § 2808 certainly does not support that assertion, as it does not require that military construction projects solely benefit the armed forces to the exclusion of other federal agencies or allied partners. The fact that the projects are *both* necessary to support the armed forces *and* also assist DHS in its efforts to secure the border thus does not violate § 2808.

Plaintiffs also argue that § 2808 would become a "limitless authority" if the support requirement could be satisfied by DoD "fund[ing] the capabilities of other agencies." *See* Pls.' Opp'n at 8. But Defendants are not arguing that DoD's support to DHS or another federal agency, standing alone, is sufficient to support the use of the armed forces. To the contrary, military construction projects undertaken pursuant to § 2808 must support the use of the *armed forces*. In other words, there must be a nexus between the military construction and the support such construction provides to the armed forces in the context of the national emergency for which they are deployed. As explained above, that requirement is satisfied here, while any additional benefits the construction projects provide to DHS in its mission does not render them unlawful under § 2808 or unnecessary to support the use of the armed forces. Plaintiffs' far-fetched hypotheticals that DoD will become an omnibus domestic construction agency are thus not in any way presented here. *See id.* at 9.

V. The CAA Does Not Prohibit DoD From Undertaking Border Barrier Projects Pursuant to § 2808.

Contrary to Plaintiffs' argument, *see* Pls.' Opp'n at 11–12, the DHS appropriations act did not preclude DoD from using its separate statutory authorities and separate appropriations to engage in border barrier construction. *See* Defs.' Mot. at 23–24. Plaintiffs contend that the CAA "plainly provides no authority to fund a border wall in excess of what Congress provided in the CAA," *see* Pls. Opp'n at 11, but nothing in the text of either the CAA or § 2808 supports that interpretation. In appropriating funds to DHS for border barrier construction, *see* CAA § 230, Congress did not modify any other law or impose a general appropriations restriction that would span the entire U.S. Code and

prevent the President from invoking other statutory authorities or appropriations to engage in military construction. Congress also expressly preserved agencies' authority to repurpose appropriated funds pursuant to "the reprogramming or transfer provisions of this or any other appropriations Act." CAA § 739. The CAA does not, for example, preclude use of § 2808 and, in fact, does not discuss military construction at all—a significant omission given that Congress could have imposed a rider prohibiting all other barrier construction, as it has done in the past, including via similar riders elsewhere in the CAA. *See, e.g.*, CAA § 206 ("Notwithstanding any other provision of law, none of the funds provided in this or any other Act . . . ."); *id.* § 231 ("None of the funds made available by this Act or prior Acts are available for the construction of pedestrian fencing" in certain specifically-enumerated locations). The absence of such provisions in the text of the law precludes any inference that Congress disabled DoD from relying on other available authorities or appropriations. *See, e.g.*, *Robertson v. Seattle Audubon Society,* 503 U.S. 429, 440 (1992) ("repeals by implication are especially disfavored in the appropriations context").

Plaintiffs argue that DoD cannot use a general appropriation for an expenditure where Congress has provided a more specific appropriation to a different agency. *See* Pls.' Mot. at 11. But the case they cite, *Nevada v. Department of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005), stands for a much narrower, and inapposite, principle: namely, that when a single federal agency is determining which of two appropriations *to that agency* should be used for a particular object or purpose, Congress presumptively intends the agency to use its specific appropriation rather than its general appropriation. Here, DoD is using its own appropriated funds for the § 2808 projects and Plaintiffs cite no case for the proposition that an appropriation of funds to one agency (here, to DHS in the CAA) can limit a second agency (DoD) from using its own separate appropriations. Moreover, applying that principle across multiple agencies undertaking related (but distinct) activities funded by their own separate appropriations would lead to absurd results. For example, it is routine for multiple agencies to spend their own separate appropriations in furtherance of an overall government policy, and in no way are such expenditures adding to another agency's appropriation. For example, multiple agencies receive appropriations from Congress to fight illegal drug trafficking, but it cannot possibly be the case that Congress's appropriation of funds to DoD for counter-narcotics activities precludes the Drug

Enforcement Administration, Department of Health and Human Services, or the Department of State from utilizing their own separate appropriations and authorities in support of similar activities (or vice-versa). Accepting Plaintiffs' argument would result in a radical transformation of appropriations law and there is no legal and historical support for such an extreme step.

Additionally, there is no merit for Plaintiffs' argument that the § 2808 border barrier projects violate § 739 of the CAA.[6] *See* Pls.' Opp'n at 12. DoD is not transferring funds to a "program, project, or activity" within one of DHS's budget accounts, as that specific term is used in the appropriations context. *See* Defs.' Mot. at 24; *King v. St. Vincent's Hosp.,* 502 U.S. 215, 221 (1991) ("the meaning of statutory language, plain or not, depends on context"). Plaintiffs contend that this understanding of § 739 is "unnaturally constrained[,]", but offer no legal support for their view that the term "program, project, or activity" refers to the "border wall" generally. The term has an established meaning in the appropriations context and refers to a *particular item* funded in an agency's budget account as set forth in an appropriations act. *See* 2 U.S.C. § 906(k)(2) (defining "programs, projects, and activities" for purposes of budget sequestration by reference to "a budget account . . . as delineated in the appropriation Act or accompanying report for the relevant fiscal year covering that account"); *United States v. Burgess*, 1987 WL 39092, at *17 n.16 (N.D. Ill. Dec. 1, 1987) (defining the term by reference to the "most specific level of budget items" listed in an appropriations act and committee reports). Accordingly, there is no violation of § 739 because DoD's use of § 2808 is not increasing "funding for a program, project, or activity" in the CAA.

VI. DoD's Use of § 2808 Does Not Violate the Constitution.

DoD has not violated the Constitution by utilizing the military construction funding and statutory authorization that Congress provided in § 2808, and Plaintiffs' claims are statutory ones. *See Dalton*, 511 U.S. at 472; *see* Defs.' Mot. 24-26.

Plaintiffs' attempt to distinguish *Dalton* is unavailing. *See* Pls.' Opp'n at 9–11. Plaintiffs accuse Defendants of reading *Dalton* to create a rule "that any action in excess of statutory authority cannot violate the Constitution." Pls.' Opp'n. at 15. But *Dalton* by its terms applies to all "constitutional"

[6] Not even the House of Representatives endorses Plaintiffs' § 739 argument. *See* ECF No. 230.

claims that the "President has exceeded his statutory authority." 511 U.S. at 473–74, 477. Where, as here, the "constitutional" claim is indistinguishable from the statutory claim, *Dalton* holds that there is simply no constitutional claim for the courts to address. Plaintiffs never distinguish the circumstances here from those at issue in *Dalton*. Like *Dalton*, this case raises "only issues of statutory interpretation" and presents "no constitutional question whatever[.]" *Dalton*, 511 U.S. at 473–74 & n.6.

Plaintiffs nevertheless claim that, despite acting pursuant to statutory authority granted by Congress in § 2808, Defendants have violated separation-of-powers principles, the Appropriations Clause, and the Presentment Clause. Each of these assertions fails.

Plaintiffs hardly address Defendants' refutation of their separation-of-powers and Appropriations Clause claims. And too the extent they do, Plaintiffs misapprehend the facts. DoD is not adding to the funds Congress appropriated to DHS for border barrier construction. *See* Pls.' Opp'n at 16. Rather, DoD is expending military construction funds that Congress appropriated to DoD on construction authorized and carried out by DoD, pursuant to a statute authorizing the Secretary of Defense take the actins he is taking. That use of preexisting statutory authority and separate appropriations in no way violates separation-of-powers principles, nor does the use of § 2808 permit Defendants to rewrite the federal budget.[7] *See* Defs.' Mot. at 25. And as explained above, DoD's use of § 2808 does not conflict with the CAA. Because such statutorily-authorized expenditures by one agency are not de facto appropriations to another agency, Plaintiffs' separation-of-powers and Appropriations Clause arguments fail.

DoD's use of § 2808 also does not violate the Presentment Clause. As Defendants have pointed out, § 2808 does not empower any executive official to amend or repeal any law and is in no way comparable to *Clinton v. City of New York*, 524 U.S. 417 (1998). *See* Defs.' Mot. at 26. The CAA remains in effect, and the Presentment Clause does not prevent DoD from acting pursuant to other statutes to fund additional border barrier construction. Plaintiffs are also incorrect insofar as they

[7] Plaintiffs misunderstand Defendants' citation to *Lincoln v. Vigil*, 508 U.S. 182 (1993), in its opening brief. Defendants merely observed that Congress's decision to permit DoD to redirect military construction funds where certain criteria are met does not pose constitutional concerns because Congress could have permissibly given DoD broader authority to control its own budget. *See* Defs.' Mot. at 25.

claim that the President, in declaring a national emergency, somehow modified the CAA after its passage. *See* Pls.' Opp'n at 16–17. Instead, the President invoked separate statutes, each of which—including § 2808—could be utilized only where their specified criteria were met, and only by the individuals authorized to act pursuant to those statutes. *See, e.g.*, 10 U.S.C. § 2808(a) (empowering the Secretary of Defense to act in certain circumstances). The invocation of duly enacted statutes in accordance with their statutory criteria does not somehow modify the CAA, or violate the Presentment Clause.

VII. Plaintiffs' NEPA Claim Lacks Merit.

Contrary to Plaintiffs' argument, *see* Pls.' Opp'n at 17, § 2808's broad "without regard to" clause sweeps aside all statutory and regulatory provisions, such as NEPA, that might otherwise constrain or impede the activities authorized by § 2808, including construction and acquisitions of land. Plaintiffs claim that the text and history of § 2808 do not support that interpretation, but they provide no evidence that Congress, in authorizing military construction during a time of war or national emergency, intended for DoD to undertake the lengthy process to comply with NEPA in contravention of an express directive that such construction could be undertaken "without regard to any other provision of law." Based on an agency-wide study completed in 2018, federal agencies averaged 4.5 years to complete the environmental impact statement process required by NEPA. *See* Environmental Impact Statement Timelines (2010-2017) (Exhibit 2). Congress plainly did not intend for § 2808 projects to remain on hold for such a lengthy period during a time of war or national emergency while the NEPA process runs its course. Plaintiffs' interpretation would thus conflict with the central purpose of § 2808, namely to provide DoD with flexibility to engage in emergency military construction. *See* H.R. Rep. No. 97-44, at 72 (1981) (§ 2808 provides "authority to immediately restructure construction priorities").

Plaintiffs argue that "Congress knows how to waive environmental laws," Pls.' Opp'n at 17, but the fact that § 2808 includes a categorical waiver—rather than one that specifically refers to NEPA or other environmental laws—cannot support Plaintiffs given that the phrase "any other provision of law" plainly includes environmental laws. *See In re Partida*, 862 F.3d 909, 912 (9th Cir. 2017) (rejecting narrow construction of "[n]otwithstanding any other Federal law" clause because "the plain language"

of the statute "makes clear" that the government can take action, "despite any federal laws to the contrary."); *Nat'l Coal. to Save Our Mall v. Norton*, 161 F. Supp. 2d 14 (D.D.C. 2001) (applying "notwithstanding" clause to override NEPA), *aff'd*, 269 F.3d 1092 (D.C. Cir. 2001). Moreover, Congress enacted § 2808 over a decade *after* it enacted NEPA, and that timing provides stronger support that Congress intended to override requirements in pre-existing statutes like NEPA that would impede DoD's § 2808 authority. *See In re Partida*, 862 F.3d at 912.

VIII. The Court Should Not Issue A Permanent Injunction.

An injunction is an "extraordinary and drastic remedy" that is "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008). It "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Plaintiffs cannot meet this demanding standard because they cannot establish an irreparable injury absent their requested in junction, and the balance of equities tips sharply in Defendants' favor given the compelling need to support the armed forces and enhance border security.

A. Plaintiffs Have Not Established Irreparable Injury to Their Recreational and Aesthetics Interests.

Plaintiffs' recreational and aesthetic harms are insufficient to establish irreparable injury. *See* Defs.' Mot. at 28–31. In response, Plaintiffs cite two Ninth Circuit cases that they argue support a finding of irreparable harm sufficient to warrant injunctive relief based on allegations of a subjective loss of aesthetic enjoyment. Pls.' Opp'n 20-21 (citing *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001); *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1150 (9th Cir. 2000)). But in fact, both cases are addressing only *standing* for environmental plaintiffs in light of the Supreme Court's standing decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). Neither say anything about irreparable harm. *See Cantrell*, 241 F.3d at 680-82 (holding that allegation that naval station would disrupt birdwatching was sufficient injury-in-fact for standing in NEPA challenge); *Ecological Rights Found.*, 230 F.3d at 1148-50 (discussing recreational or aesthetic injury standing post-*Laidlaw*). Plaintiffs conflate standing with their burden to show a "certain and great" irreparable harm justifying this Court's exercise of its equitable powers. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (citations omitted). The burdens are not, of

course, the same, or else every plaintiff with the minimal harm needed to supply standing would *per se* establish the irreparable injury needed for injunctive relief. *Center for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011) ("a plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of irreparable harm necessary to obtain it.").

Other courts in this circuit, when faced with similar claims, have rejected injunctions as inappropriate, and Plaintiffs' attempts to distinguish those authorities (in a footnote) are unavailing. In *Gallatin Wildlife Association*, the plaintiffs, relying on *Cottrell*, argued that they faced a threat of irreparable harm from a grazing permit because of "the unsightly appearance of the sheep, the loud and threatening sheep dogs, and the fact that the presence of domestic sheep impacts the declarants' ability to view wildlife in the area." *Gallatin Wildlife Ass'n v. U.S. Forest Serv.*, No., 2018 WL 1796216, at *5 (D. Mt. April 16, 2018). The court found those arguments insufficient to demonstrate irreparable harm because the plaintiffs would not lose access to the area and because the area was already disturbed by previous grazing. *Id.* In *Center for Biological Diversity v. Hays*, the plaintiffs argued that post-fire salvage logging would hurt the declarants "research, recreational, and aesthetic interests." No. 2:15-cv-01627-TLN-CMK, 2015 WL 5916739, at *10 (E.D. Cal. Oct. 8, 2015). The court found those allegations insufficient to warrant injunctive relief because an "aesthetic opinion that post-fire logging is 'ugly' does not establish likely irreparable harm," because the declarant had not explained why he could not "conduct his studies in other areas where logging will not be commenced," and because "the affected area cannot currently be used for recreational purposes." *Id.*

As in *Gallatin Wildlife Association*, the construction footprint for the challenged projects here is already heavily disturbed—the area primarily functions as a law enforcement corridor, *see* Beehler Decl. ¶¶ 8, 10, 13, 16, 19, 21, 23, 25, 27, 28, 29—and Plaintiffs will not lose access to any of the areas on which they currently recreate. And as in *Center for Biological Diversity v. Hays*, Plaintiffs' subjective, aesthetic opinion that border infrastructure is ugly does not establish the irreparable harm necessary for injunctive relief, especially where Plaintiffs are not losing access to any public lands and the project locations already function as a law enforcement zone. In sum, Plaintiffs' subjective opinions about

the relative aesthetic qualities of different types of border security infrastructure do not establish an irreparable harm.[8]

In addition to failing to demonstrate irreparable harm from the border security facilities themselves, several Plaintiffs allege harms from temporary construction impacts, which are fleeting and thus do not warrant permanent injunctive relief. For example, Plaintiffs direct the Court to the Meister Declaration, where Ms. Meister alleges that she fears construction "will scare away the birds from the area while construction is occurring." Meister Decl., ECF No. 210-1 at 61 ¶¶ 17-18. This statement is conclusory; no evidence is presented in support of her fears that construction will drive away the birds she enjoys observing at the international border with Mexico. But more fundamentally, Plaintiffs do not explain how temporary construction impacts are of "a permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). The same shortcoming infects the Second Ramirez Declaration, where Ms. Ramirez now alleges that her enjoyment of hiking Mount Signal in Mexico will be harmed because "the long-range views overlooking the valley would be of bulldozers and other machinery scarring the desert landscape." Second Ramirez Decl., ECF No. 239-2 at 26 ¶ 4. Once again, temporary construction impacts are just that—temporary. No permanent injunctive relief is warranted on the basis of those harms.

Plaintiffs' recreational and aesthetic harm allegations thus fall short of meeting their burden to demonstrate an irreparable injury necessitating injunctive relief.

B. Plaintiffs' Organizational Missions Are Not Irreparably Harmed by § 2808 Military Construction.

Defendants also have explained why the organizational harms asserted by Plaintiffs in this case are not a sufficient basis for an injunction. *See* Defs.' Mot. at 31–32. Plaintiffs' response brief attempts to rehabilitate their organizational harm claims, Pls.' Opp'n 21–24, but fails to draw a logical connection between these harms and § 2808 construction. As such, they do not amount to the sort

[8] Plaintiffs' failure to establish irreparable harm is even starker when weighed against the substantial benefits to the armed forces and border security afforded by the § 2808 projects. *See Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 31-32 (2008) (reversing preliminary injunction where strong national security interests outweighed environmental interests, and cautioning that "[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." (citation omitted)).

of irreparable harm necessary to warrant an injunction.

Plaintiffs begin by asserting that they "do much more than public advocacy"; they also "represent[] individuals in immigration and condemnation proceedings," "organize[] community forums," and "host[] rights trainings," among other things. *See* Pls.' Opp'n at 22. They also emphasize that their new declarations establish "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." *Id.* at 23–24. Many of these activities, like "monitoring" and reporting on activities at the border to their members and the public, "meeting with regional stakeholders," and "research" on "the impacts of the emergency declaration" on border communities, are simply "advocacy" by another name. *Id.* at 22–24 (quotation marks omitted). But the categorization of these activities sidesteps the fundamental problem with Plaintiffs' organizational harm allegations: they cannot explain how any of these activities are impeded or affected by the national emergency declaration or § 2808 construction.[9] The Proclamation does not prevent or limit anyone from undertaking any of these activities.

The absence of any nexus between Plaintiffs' alleged organizational harms and Defendants' conduct is what distinguishes this case from previous decisions applying *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), that Plaintiffs rely upon, including *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018), and *National Council of La Raza v. Cegavske*, 800 F.3d 1032 (9th Cir. 2015). In *Sanctuary Covenant*, the plaintiffs were "various organizations representing applicants and potential applicants for asylum" who challenged a government rule limiting asylum applicants to those who properly presented themselves for inspection at a port of entry to the United States. 932 F.3d at 755. The Ninth Circuit agreed that "enforcement of the [r]ule has frustrated the[] mission of providing legal aid to" individuals who would otherwise be eligible to apply for asylum, and that the rule required

[9] The closest Plaintiffs come is to allege that remediation and education projects conducted by the Southwest Environmental Center ("SWEC") would be disrupted by construction, but the only education and remediation projects they describe in their supplemental declaration occurred many miles north of the international border near Las Cruces, New Mexico, and Plaintiffs fail to explain how these activities would be impeded by § 2808 construction. Supp. Decl. of Kevin Bixby ¶ 6 (educational tour of Organ Mountains), ECF No. 91-2; *id.* ¶ 9 (conservation work at Mesilla Valley Bosque State Park).

diversion of resources from other initiatives these organizations would otherwise pursue. *Id.* at 766. Likewise, the plaintiffs in *La Raza* had the organizational mission of "encourag[ing] participation in federal and state elections by traditionally underrepresented groups." 800 F.3d at 1036 (quotation marks omitted). The Ninth Circuit agreed that Nevada's alleged violations of Section 7 of the National Voter Rights Act harmed the plaintiffs because the violations required the plaintiffs to spend time and resources registering voters who would have been registered but for Nevada's failure to follow the law. *Id.* at 1039–41.

The same holds true for the housing discrimination cases Plaintiffs rely upon. Since *Havens Realty*, which was itself a housing discrimination case, courts have agreed that housing organizations suffer a cognizable injury when they expend resources to investigate and combat forms of discrimination that impede their mission of promoting equal housing opportunity. *Fair Hous. Council of San Fernando Valley v. Roommate.com*, 666 F.3d 1216, 1219 (9th Cir. 2012) (plaintiffs investigated defendant's alleged violations of the law and "started new education and outreach campaigns targeted at discriminatory roommate advertising"); *Fair Hous. Of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (finding that plaintiff's "resources were diverted to investigating and other efforts to counteract Combs' discrimination above and beyond litigation").

The common theme across all of these cases is the presence of a plausible nexus between the defendant's conduct (*e.g.*, alleged housing discrimination) and the organization's activities (*e.g.*, combatting housing discrimination) that differentiates a "concrete and demonstrable injury to the organization's activities" from a mere "setback to the organization's abstract social interests." *Havens Realty*, 455 U.S. at 379. Not one of these cases supports Plaintiffs' assertions that they are harmed by actions that in no way impede or disrupt their day-to-day activities. Plaintiffs' argument would sanction equitable relief for any group that chooses to change its messaging or allocation of resources in reaction to the announcement of a new government policy, even if the policy imposes no interference or restrictions whatsoever on the activities the group is currently conducting.

C. The Balance of Equities and Public Interest Weigh Against Injunctive Relief.

Finally, the Court should not enter a permanent injunction in this case because the balance of equities and public interest weigh decidedly in Defendants' favor. *See* Defs.' Mot. at 33–34; *Winter*, 555 U.S. at 26–30. Plaintiffs do not dispute that the Government and the public have a significant interest in ensuring that military forces are well-supported during deployments and have the necessary resources to ensure mission success. Nor do they challenge that the Government and the public have a "compelling interest[]" in the "safety and in the integrity of our borders." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989). These interests "plainly outweigh[]" Plaintiffs' asserted aesthetic, recreational, and organizational interests, and Plaintiffs make no effort to contend otherwise. *See Winter*, 555 U.S. at 26; *see also* Pls.' Opp'n at 24.

Instead, Plaintiffs fall back on their merits arguments that DoD's use of § 2808 harms the public interest by infringing on the Congress' power of the purse, *see* Pls.' Opp'n at 24, but as explained above, DoD's use of § 2808 is lawful and does not violate any other statutory or constitutional provision. Plaintiffs' attempt to bootstrap their merits arguments into the balance of equities should be rejected.

Plaintiffs also fail to meaningfully distinguish *Winter*. *See id.* at 24–25. The balance of equities here is just as lopsided as in *Winter*. Contrary to Plaintiffs' argument, the need for border barriers to support the use of the armed forces along the southern border is well-supported by the administrative record, similar to the declarations the Navy submitted in *Winter* to justify the need for sonar training. Further, Plaintiffs' desire to recreate on a narrow strip of land that parallels the international border, much of which is already heavily disturbed or marked by existing barriers, is far less substantial than the scientific interests asserted by the plaintiffs in *Winter*. Accordingly, Plaintiffs have not made the necessary "clear showing" to warrant permanent injunctive relief. *Winter*, 555 U.S. at 22.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion for partial summary judgment, deny Plaintiffs' motion for partial summary judgment, and enter final judgment for Defendants on all claims related to the funding and construction of the § 2808 projects.

DATE: November 8, 2019

Respectfully submitted,

JAMES M. BURNHAM
Deputy Assistant Attorney General

ALEXANDER K. HAAS
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

/s/ *Andrew I. Warden*
ANDREW I. WARDEN
Senior Trial Counsel (IN Bar No. 23840-49)

KATHRYN C. DAVIS
RACHAEL L. WESTMORELAND
MICHAEL J. GERARDI
LESLIE COOPER VIGEN
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, D.C. 20530
Tel.: (202) 616-5084
Fax: (202) 616-8470

JEFFREY BOSSERT CLARK
Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division

/s/ *Tyler M. Alexander*
TYLER M. ALEXANDER
(CA Bar No. 313188)
Natural Resources Section
Trial Attorney
PO Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0238
Fax: (202) 305-0506
tyler.alexander@usdoj.gov