No. 19-16102

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, ET AL.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
No. 4:19-cv-00892
The Honorable Haywood S. Gilliam, Jr., Judge

AMICUS BRIEF OF THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WISCONSIN IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTERESTS OF AMICI

The Amici States have a significant interest in the outcome of Defendants' emergency motion for a stay. As detailed in Amici States' June 6, 2019 letter to the Court, that interest is heightened by the unique posture of this case and the Amici States' status as parties to the district court proceeding and beneficiaries of the injunction issued by that court. The district court denied the Amici States' motion for injunctive relief because it had already "enjoined the relevant Defendants in the [*Sierra Club*] action from proceeding with . . . construction" in Plaintiff State New Mexico, and therefore "no irreparable harm [would] result from the denial (without prejudice) of the States' duplicative requested injunction." Exh. 1, Order Denying Prelim. Inj. 32, *California, et al. v. Trump, et al.*, Case No. 19-00872 (N.D. Cal.) ("*States* case") (ECF No. 165). Thus, the resolution of the pending motion will almost certainly impact the Amici States' case, both practically (because the State of New Mexico will be exposed to the harm in its preliminary injunction motion if the stay motion is granted) and as a precedential matter (because Defendants' arguments in support of their motion implicate the Amici States' claims).

ARGUMENT

The Amici States address three factors: 1) whether Defendants have made a strong showing that they are likely to succeed on the merits, 2) whether issuance of the stay will substantially injure the Amici States as a party "interested in the

proceeding," and 3) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Because the Amici States are governmental entities, factors 2 and 3 effectively merge and will be addressed together. All three factors weigh in favor of Plaintiffs-Appellees ("*Sierra Club* plaintiffs") and against Defendants-Appellants' ("Defendants") motion.

I. DEFENDANTS HAVE NOT MADE A STRONG SHOWING THAT THEY ARE LIKELY TO SUCCEED ON THE MERITS

A. The *Sierra Club* Plaintiffs Have a Valid Claim Challenging Defendants' Actions under § 8005

Defendants' argument that the transfers enjoined by the district court are not subject to challenge because there is no private cause of action under § 8005 of the Fiscal Year 2019 Department of Defense Appropriations Act, Mot. 8-11, fails for two reasons. First, as the district court correctly recognized, it ignores the well-established principle that an equitable ultra vires cause of action is available when the executive acts in excess of statutory authority. Order 28-31 (Dkt. No. 7-2)[1]; *see also Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). Second, that claim can be construed as an Administrative Procedure Act (APA) claim, 5 U.S.C. § 706(2)(C), as the *Sierra Club* plaintiffs stated to the district court in their pleadings and at the preliminary injunction hearing. *See* Exh. 2, Reply Br.

[1] Citations including "Dkt." refer to filings in the appellate docket.

3 n.1 (ECF No. 91)[2] (citing, inter alia, *Alto v. Black*, 738 F.3d 1111, 1117 (9th Cir. 2013); *Clouser v. Espy*, 42 F.3d 1522, 1533 (9th Cir. 1994)); Exh. 3, Hr'g Tr. 109:3-6.

B. The *Sierra Club* Plaintiffs' Claims Satisfy the Generous Zone of Interests Test

Defendants also erroneously argue that even if a cause of action existed under § 8005, the *Sierra Club* plaintiffs would not be able to sue to enforce § 8005 because they fall outside that provision's zone of interests. Mot. 10-13. This argument is premised on the mistaken view that the only action at issue here is "DoD's mere transfer of funds." Mot. 9. Leaving aside the question of whether such a transfer would be, standing on its own, final agency action for APA purposes (and the Amici States submit that it would),[3] Defendants improperly seek to split a single action into two parts for their litigation purposes. The *Sierra Club* plaintiffs' challenge is to Defendants' action transferring money under § 8005 to make funds available under 10 U.S.C. § 284. This is a single agency action to divert DOD funding and resources for the president's border wall, as Defendants'

[2] Citations including "ECF" refer to filings in the *Sierra Club* district court case, unless the citation refers to the *States* case.

[3] The § 8005 transfer would meet the final agency action requirement, as it "amounts to a definitive statement of the agency's position" as to the funds at issue, *Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006), and "legal consequences flow from [DOD's] decision" to make them available, *Multnomah Cty. v. Azar*, 340 F. Supp. 3d 1046, 1056 (D. Or. 2018).

own documents make clear. *See* Rapauno Decl. (Dkt. No. 7-3) Exh. D (DOD reprogramming treating use of § 8005 and § 284 as components of same action), Exh. C (DOD memorandum stating that § 284 "support will be funded through a transfer of $1B" under § 8005).

Defendants cannot evade judicial review by chopping what is, practically speaking, a single agency action into two parts and ignoring the second part. "The [agency's] challenged act must be examined as a whole, not in its pieces." *Inv. Co. Inst. v. FDIC*, 606 F. Supp. 683, 684 (D.D.C. 1985), *aff'd*, 815 F.2d 1540 (D.C. Cir. 1987). Further, Defendants' artificial separation of DOD's transfers under §§ 8005 and 284 fails to "adequately place § [8005] in the overall context . . . " of defense appropriations and spending law. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987) (examining the broad "statutory scheme" of federal banking law for zone of interests purposes).

Without this artificially narrow approach, Defendants' argument falls apart. Notably lacking from Defendants' motion is any challenge to the *Sierra Club* plaintiffs' ability to bring a claim alleging violations of § 284, including whether their challenge falls within *that* provision's zone of interests. This is not surprising, as it is evident that the *Sierra Club* plaintiffs have significant interests in preventing or minimizing the environmental impact of the "[c]onstruction of roads

and fences and installation of lighting" in which Defendants propose to engage under this statute.

In any event, the *Sierra Club* plaintiffs fall within § 8005's zone of interests even when these are viewed separately from § 284. As the Supreme Court has recognized, the zone of interests is a "generous" test, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014), that is "not meant to be especially demanding," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224-25 (2012). "[A]gency action [is] presumptively reviewable," and a party's interest need only be "*arguably* within the zone of interests to be protected or regulated by the statute." *Id.* (emphasis added). Indeed, courts "have always conspicuously included the word 'arguably' in the test to indicate that *the benefit of any doubt goes to the plaintiff*." *Id.* at 225 (emphasis added).[4]

The *Sierra Club* plaintiffs satisfy this test. Congress enacted § 8005 to "tighten congressional control of the re-programming process." Mot. 10 (citing H.R. Rep. No. 93-662, at 16-17 (1973)). It makes no difference that Congress

[4] Defendants half-heartedly argue that a heightened zone-of-interests standard "*might*" apply for non-APA cases. Mot. 10 (stating that "the Supreme Court has *suggested*" such a standard) (emphases added). However, as discussed above, the *Sierra Club* plaintiffs' claims can be construed as APA claims, depriving this weak argument of any force it might have.

failed to discuss the precise types of harm alleged by the *Sierra Club* plaintiffs in § 8005. As this Court has expressly recognized, "there need be no indication of congressional purpose to benefit the would-be plaintiff." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1200 (9th Cir. 2004) (internal quotation marks omitted). Because the *Sierra Club* plaintiffs' injuries are "causally related" to Defendants' attempt to skirt those restrictions, they fall within § 8005's zone of interests. *Port of Astoria, Or. v. Hodel*, 595 F.2d 467, 476 (9th Cir. 1979).

Defendants' position appears to be that *no party* could bring a claim to enforce § 8005; they complain that "[t]he court enjoined DoD at the behest of private parties who have no express cause of action to enforce this internal appropriations-transfer statute," Mot. 1, and that "there is no indication that Congress intended to authorize judicial enforcement of Section 8005 at all . . . ." Mot. 10.

Not only is this position constitutionally problematic,[5] it turns the legal standard on its head. This Court has held—without requiring any express cause of action or other indication that Congress intended to authorize judicial enforcement of a statute—that private parties may challenge executive spending under the

[5] *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (discussing "serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim") (internal punctuation omitted).

Appropriations Clause "when government acts in excess of its lawful powers." *United States v. McIntosh*, 833 F.3d 1163, 1174 (9th Cir. 2016) (collecting cases); *see also Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970) ("The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review"). Indeed, there is a "strong presumption favoring judicial review" of agency actions, which imposes a "heavy burden" upon assertions that agency actions are unreviewable. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). This presumption may be overcome only with "clear and convincing evidence" to preclude judicial review. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). Defendants do not—and cannot—present such evidence.

C. The *Sierra Club* Plaintiffs Have Shown a Likelihood of Success and Raised Serious Constitutional Questions

On the merits, the district court concluded that the *Sierra Club* and *State* plaintiffs were likely to succeed in showing that Defendants exceeded their authority under § 8005 and that Defendants' interpretation of § 8005 and § 284, at minimum, "raises serious constitutional questions" that the provisions should be construed to avoid. Order at 36-42; Exh. 1, *States* Order at 18-24. Defendants fail to offer any persuasive rebuttal to the district court's analysis of the provision, and they gloss over constitutional questions, asserting (with little analysis) that their

interpretation raises "no constitutional concerns." Mot. 17. That argument is mistaken.

One of the most serious separation of powers questions raised by Defendants' interpretation of § 8005 and §284 relates to violation of the Appropriations Clause. The Appropriations Clause is a

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

U.S. Dep't of the Navy v. Fed. Labor Relations Auth., 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.) (internal quotations omitted); *McIntosh*, 833 F.3d at 1175 ("The Appropriations Clause plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them.").

A valid appropriation must satisfy 31 U.S.C. § 1301, known as the "Purpose Statute," which "codified what was already required under the Appropriations Clause of the Constitution." Gov't Accountability Off. (GAO), *Principles of Federal Appropriations Law* 3-10 (4th ed. 2017)

https://www.gao.gov/assets/690/687162.pdf ("GAO Red Book").[6] To comply with § 1301(a), and hence the Appropriations Clause, agencies must follow the "necessary expense rule," which prohibits them from relying on a *general* appropriation for an expenditure when that expenditure falls *specifically* "within the scope of some other appropriation or statutory funding scheme." GAO Red Book 3-14-15, 3-16-17, 407-10. "Otherwise, an agency could evade or exceed congressionally established spending limits," *id.* at 3-408, which the Appropriations Clause forbids. *See Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990) (Appropriations Clause is violated if "the President or Executive Branch officials [who] were displeased with . . . restriction[s] . . . imposed by Congress" sought to "evade" those restrictions).

This "well-settled" restriction is supported by a "legion" of GAO decisions "from time immemorial." GAO Red Book 3-409. For example, one DOD subagency was prohibited from using a general appropriation for dredging where a *different* subagency of DOD had funds appropriated for that function. *Id.* at 3-408 to -09. And Congress's appropriation of $1 million expressly for Nevada for nuclear waste disposal activities "indicate[d] that is all Congress intended Nevada

[6] *See Dep't of the Navy*, 665 F.3d at 1349 (treating GAO's view of agency order's consistency with Appropriations Clause and § 1301(a) as "expert opinion") (quoting *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201 & n.1 (D.C. Cir. 1984) (Scalia, J.)).

to get [for that fiscal year]," and executive officials could not use a more general appropriation to fund such activities. *Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005).

This "general/specific" doctrine is not only a core tenet of appropriations law; it is a bedrock principle of statutory construction and separation of powers more generally. "[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and *more specifically* to the topic at hand." *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 133 (2000) (emphasis added); *Benda v. Grand Lodge of Int'l Assoc. of Machinists & Aerospace Workers*, 584 F.2d 308, 313 (9th Cir. 1978) ("[A]n expression of specific congressional intent should prevail over the conflicting general policy implications of a prior federal statute.").

As Justice Frankfurter reasoned in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the executive branch's exertion of general statutory authority where Congress has spoken specifically on a subject would also do violence to the Constitution's separation of powers:

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find that authority so explicitly withheld is not merely to disregard a particular instance the clear will of Congress. It is to disrespect the

> whole legislative process and the constitutional division of authority between President and Congress.

Id. at 609 (Frankfurter, J., concurring). Sections 284 and 8005 cannot be read so broadly as to run afoul of this constitutional principle. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001).

The application of these separation of powers and appropriations principles here is straightforward. Congress specifically appropriated $1.375 billion to fund a barrier for a specific and limited segment of the southwest border in Texas's Rio Grande Valley in the 2019 Consolidated Appropriations Act, Pub. L. No. 116-6, 133 Stat. 13, § 230 (2019). Defendants seek to supplement that appropriation by using funds that were more generally appropriated for "drug interdiction and counter-drug activities," FY 2019 Department of Defense Appropriations Act, Pub. L. No. 115, 245, 132 Stat. 2981, 2997 (2018), in order to fund additional portions of Defendants' border wall project that Congress chose not to fund in its specific appropriation. Because "a specific appropriation exists for a particular item"—i.e., the $1.375 billion for a border barrier in Texas—"then that appropriation must be used and it is improper to charge any other appropriation for that item." GAO Red Book 3-409.

Separation of powers and appropriations principles do not permit the executive branch to evade Congress's limitations on the amount, location, and manner in which a border barrier may be built, 2019 Consolidated Appropriations

Act, §§ 230-32, by redirecting different funds appropriated for more general purposes for construction that Congress declined to fund. *Cf. Gonzales v. Oregon*, 546 U.S. 243, 262 (2006) (rejecting argument that Congress would have "painstakingly described the Attorney General's limited authority to deregister a single physician" while granting "just by implication, authority to declare an entire class of activity outside 'the course of professional practice' . . . ."). Simply put, "[w]here Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized." *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

This is especially true where, as here, Congress considered and rejected a request for far greater funding. Order at 4-6, 38-39; Exh. 4, *States* case, RJN in Supp. of Mot. for Preliminary Inj. 117 (ECF No. 59-4) (Office of Management and Budget January 2019 letter requesting $5.7 billion for border barrier construction). In Defendants' view, because Congress did not "deny a DoD funding request for construction in these two project areas [at issue] under its counter-narcotics support line," Mot. 15, the executive branch could divert federal funds from other sources toward specific parts of the larger border wall project that Congress already rejected. Yet again, Defendants turn the analysis on its head here, contravening the heart of the Appropriations Clause. "If agents of the Executive were able, by their

unauthorized [actions], to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive." *Richmond*, 496 U.S. at 428.

To be sure, these constitutional limitations do not render DOD's § 284 authority toothless. If Congress had made no appropriation for barrier funding, and not rejected such an appropriation, then Defendants could have potentially invoked their § 284 authority. Further, if Congress had made clear in the appropriations bill its "intent to make a general appropriation available to supplement or increase a more specific appropriation, or to relieve [DOD] of the need to elect to use a single appropriation," GAO Red Book 3-411, DOD could also have invoked its § 284 authority. Congress chose not to do so here.

Separately, Defendants overlook that in the past, Congress has provided DOD with *specific* appropriations to provide support at the border. *See*, *e.g.*, Pub. L. No. 110-116, 121 Stat. 1295, 1299 (2007) (appropriating hundreds of millions of dollars to DOD for support DHS "including . . . installing fences and vehicle barriers"); Pub. L. No. 109-234, 120 Stat. 418, 480 (2006) (same); Pub. L. No. 101-511, 104 Stat. 1856, 1873 (1990) (appropriating $28 million for drug surveillance program at border). If Congress had intended to provide a specific appropriation to DOD to support DHS's border-barrier-construction activities

despite the existence of a specific appropriation for DHS for that very purpose, it knew how to do that, and it declined to do so for the 2019 fiscal year.

II. THE INTERESTS OF OTHER PARTIES AND THE PUBLIC INTEREST WEIGH AGAINST A STAY

Defendants argue the *Sierra Club* plaintiffs "will suffer little, if any, cognizable harm" from the issuance of a stay. Mot. 8. That is wrong. The district court correctly held that the injuries to the *Sierra Club* plaintiffs' members' "enjoyment of public land" constitute irreparable harm, Order 49 (citing *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)), and this Court has repeatedly held as much. *See, e.g., id.; Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 822 (9th Cir. 2018). Moreover, Defendants simply ignore that a stay of the injunction here will "substantially injure the other parties interested in the proceeding." *Nken*, 556 U.S. at 434. In particular, the Amici States will suffer substantial irreparable harm from a stay in several ways, harms that are also contrary to the public interest.

First, because the district court declined to grant a separate injunction to New Mexico because it had already granted the *Sierra Club* plaintiffs' injunction, a stay would cause substantial harm to the State of New Mexico's sovereign interest in enforcing its laws. Defendants have exercised their authority under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ["IIRIRA"], Pub. L. No. 104-208, § 102(a), 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1103 note)

to waive federal and state environmental laws that would ordinarily apply to the planned border-barrier construction. *See* Determination Pursuant to Section 102 of [IIRIRA], as Amended, 84 Fed. Reg. 17,186 (Apr. 24, 2019) ("N.M. IIRIRA waiver").[7] The unlawful diversion of funding under § 8005 and § 284 provides Defendants with the resources to effectuate the IIRIRA waiver to construct El Paso Project 1, and consequently renders New Mexico unable to enforce its duly enacted environmental laws. *See* N.M. IIRIRA waiver; Rapauno Decl., Ex. A at 8-9 (DHS description of El Paso Project 1 in memorandum to DOD) (Dkt. No. 7-3) ("DHS memo").

Specifically, the funding diversion and resulting construction will impede New Mexico's ability to implement its Wildlife Corridors Act, which aims to protect large mammals' habitat corridors from human-caused barriers such as roads and walls. 2019 N.M. Laws Ch. 97. Several of these corridors run through, or adjacent to, the El Paso Project 1 site. Pronghorn antelope, mule deer, mountain lions, and desert bighorn sheep are included within the definition of "large mammals" that are specifically protected under the Act. *Id.* El Paso Project 1 will

[7] While Amici States (and the *Sierra Club* plaintiffs) argued that DOD should not have been able to exercise a waiver here, the district court preliminarily ruled otherwise. *See* Order 47-48.

completely block habitat corridors for these species. Exh. 5, *States* case, Traphagen Decl. ¶¶ 17, 27-31 (ECF 59-2).

New Mexico has a compelling interest in enforcing those laws. *See Feldman v. Reagan*, 843 F.3d 366, 394 (9th Cir. 2016). More specifically, New Mexico has a clear sovereign interest in protecting wildlife within its borders, and in enforcing its laws to that end. *See Maine v. Taylor*, 477 U.S. 131, 151 (1986) (state has "broad regulatory authority to protect . . . its natural resources"); *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1013 (9th Cir. 1994) ("Clearly, the protection of wildlife is one of the state's most important interests"). These interests will be infringed if the stay is granted, preventing New Mexico from enforcing its laws. *Cf. New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (the "[public] interest is infringed by the very fact that the State is prevented from engaging in investigation and examination" pursuant to its own duly enacted state laws).

Second, a stay would harm species that New Mexico's laws were enacted to protect; many (such as the Mexican Wolf) are endangered under both New Mexico and federal endangered species acts. *See* N.M. Stat. Ann. § 17-2-41; Exh. 5, Traphagen Decl. ¶ 18. As noted above, the El Paso Project 1 border wall will bisect important wildlife habitats, impairing the Mexican Wolf and other endangered species' access to those habitats. *Id*. ¶¶ 14-24, 27. Endangered plant species would

also likely be harmed due to construction of El Paso Project 1, including two cactus species that are endangered under New Mexico law. N.M. Stat. Ann. § 75-6-1(A); Exh. 6, *States* case, Lasky Decl. ¶ 14 (ECF No. 59-2).

Although not the subject of this current stay motion, Defendants' proposed construction will also harm the State of California's sovereign and wildlife interests. After Amici States filed their preliminary injunction motion in the district court concerning El Paso Project 1, DOD announced a new project to "support" DHS with construction of 30-foot pedestrian fencing, roads, and lighting for the El Centro Project 1 in Imperial County, California. Exh. 7, *States* case, Second Rapauno Decl., Ex. A (ECF No. 143-1). Defendants have relied on essentially the same statutory authority to divert funding that they did with El Paso Project 1 in New Mexico, *see id.*, and similarly waived compliance with numerous federal and state environmental protection laws that would otherwise apply to the construction. Determination Pursuant to Section 102 of [IIRIRA], as Amended, 84 Fed. Reg. 21,801-03 (May 15, 2019) ("Cal. IIRIRA waiver").

But for the funding diversion, Defendants would not have the resources to effectuate the waiver to: (a) build El Centro Project 1 before a California agency certified Defendants' compliance with California's water quality standards, 33 U.S.C. § 1341(a)(1); (b) skirt California clean air measures, 42 U.S.C. § 7506(c)(1), 40 C.F.R. § 52.220(c)(345)(i)(E)(2); and (c) jeopardize the survival

of—or damage the habitat of—species that are endangered under both federal and California law, 16 U.S.C. § 1536(a)(2). For the reasons discussed above, Defendants' circumvention of California's comprehensive environmental protection legal framework causes irreparable harm to California's sovereignty.

New Mexico's (and, indirectly, California's) interests are currently protected by the preliminary injunction in the *Sierra Club* matter. However, if a stay is issued, DOD will quickly move to construct a border wall along New Mexico's southern border without complying with environmental laws; construction on California's southern border will follow shortly. *See* N.M. & Cal. IIRIRA waivers; DHS Memo 3, 8-9. Thus, a stay of the injunction will immediately subject New Mexico to these harms. And, as explained above, California will be subject to similar harms imminently. These harms are inimical to the public interest.

CONCLUSION

For the reasons stated above, Amici States request that this Court deny Defendants' emergency stay motion.

Dated: June 11, 2019

Respectfully submitted,

s/ James F. Zahradka II

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 27(d) and 32(c), and this Court's Order of June 5, 2019, because it uses a proportionately spaced Times New Roman font, has a typeface of 14 points, and contains 4,198 words.

Dated: June 11, 2019

s/ James F. Zahradka II
James F. Zahradka II

CERTIFICATE OF SERVICE

I certify that on June 11, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 11, 2019

s/ James F. Zahradka II
James F. Zahradka

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EXHIBIT 1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 19-cv-00872-HSG

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Re. Dkt. No. 59

On February 18, 2019, a coalition of sixteen states filed suit against Defendants Donald J. Trump, in his official capacity as President of the United States; the United States; the U.S. Department of Defense ("DoD"); Patrick M. Shanahan, in his official capacity as Acting Secretary of Defense; Mark T. Esper, in his official capacity as Secretary of the Army; Richard V. Spencer, in his official capacity as Secretary of the Navy; Heather Wilson, in her official capacity as Secretary of the Air Force; the U.S. Department of the Treasury; Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury; the U.S. Department of the Interior; David Bernhardt, in his official capacity as Secretary of the Interior[1]; the U.S. Department of Homeland Security ("DHS"); and Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security[2] (collectively, "Federal Defendants"). Dkt. No. 1. The next day, Sierra Club and Southern Border Communities Coalition (collectively, "Citizen Group Plaintiffs" or "Citizen Groups") brought a related suit against many, but not all, of the same Federal Defendants. *See* Complaint, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG, (N.D. Cal. Feb. 19,

[1] Secretary Bernhardt was named in his then-capacity as Acting Secretary, but was subsequently confirmed as Secretary by the U.S. Senate on April 11, 2019.

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

2019), ECF No. 1. Plaintiffs here filed an amended complaint on March 13, 2019, with the state coalition now constituting twenty states (collectively, "Plaintiff States" or "States"). *See* Dkt. No. 47 ("FAC").

Now pending before the Court is Plaintiffs' motion for a preliminary injunction, briefing for which is complete. *See* Dkt. Nos. 59 ("Mot."), 89 ("Opp."), 112 ("Reply"). The Court held a hearing on this motion on May 17, 2019. *See* Dkt. No. 159. In short, Plaintiffs seek to prevent executive officers from using redirected federal funds for the construction of a barrier on the U.S.-Mexico border.

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

Assessing whether Defendants' actions not only conform to the Framers' contemplated division of powers among co-equal branches of government but also comply with the mandates of Congress set forth in previously unconstrued statutes presents a Gordian knot of sorts. But the federal courts' duty is to decide cases and controversies, and "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule." *See Marbury v. Madison*, 1

Cranch 137, 177 (1803). Rather than cut the proverbial knot, however, the Court aims to untie it—no small task given the number of overlapping legal issues. And at this stage, the Court then must further decide whether Plaintiffs have met the standard for obtaining the extraordinary remedy of a preliminary injunction pending resolution of the case on the merits.

After carefully considering the parties' arguments, the Court **DENIES** Plaintiffs' motion.[3]

I. LEGAL STANDARD

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

II. ANALYSIS

In the pending motion, Plaintiffs seek to enjoin Defendants from using certain diverted federal funds and resources for border barrier construction. Specifically, Plaintiffs move to enjoin Defendants from: (1) invoking Section 8005's reprogramming authority to channel funds into DoD's drug interdiction fund, (2) invoking Section 284 to divert monies from DoD's drug

[3] The relevant background for this and the Citizen Groups' action is the same. The Court thus incorporates in full here the factual background and statutory framework as set forth in its preliminary injunction order in the Citizen Groups' action. *See* Order, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. May 24, 2019), ECF No. 144.

interdiction fund for border barrier construction on the southern border of New Mexico, (3) invoking Section 9705 to divert monies from the Treasury Forfeiture Fund for border barrier construction,[4] and (4) taking any further action related to border barrier construction until Defendants comply with NEPA.

Defendants oppose each basis for injunctive relief. Defendants further contend that (1) the Plaintiffs lack standing to bring their Sections 8005 and 9705 claims, and (2) the Court is not the proper venue to challenge border barrier construction in New Mexico. The Court addresses these threshold issues first before turning to Plaintiffs' individual bases for injunctive relief.

A. Article III Standing

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

"States are not normal litigants for the purposes of invoking federal jurisdiction," and are "entitled to special solicitude in [the] standing analysis." *Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007). For instance, states may sue to assert their "quasi-sovereign interest in the health and well-being—both physical and economic—of [their] residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). In that case, however, the "interest must be sufficiently concrete to create an actual controversy between the State and the defendant" such that the state is more than a nominal party. *Id.* at 602.

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[4] Only the State Plaintiffs challenge the diversion of funds under Section 9705.

1. New Mexico Has Standing for Its Section 8005 Claim.

Only New Mexico contends that it has standing to challenge Defendants' reprogramming of funds under Section 8005. *See* Reply at 2 (arguing that "Defendants' actions [under Section 8005] will cause concrete and particularized injuries-in-fact to New Mexico's environment and wildlife, giving New Mexico standing"). Defendants argue that New Mexico lacks standing to challenge Defendants' invocation of Section 8005 to reprogram funds into the drug interdiction fund, so that Defendants can then divert that money wholesale to border barrier construction using Section 284. *See* Opp. at 17–18.[5] Defendants do not dispute that New Mexico has standing to challenge the use of funds from the drug interdiction fund for border barrier construction under Section 284. Defendants nonetheless reason that harm from construction using drug interdiction funds under Section 284 does not establish standing to challenge Defendants' use of Section 8005 to supply those funds. *Id.* at 17. Defendants argue that standing requires that the plaintiff be the "object" of the challenged agency action, but that the Section 8005 augmentation of the drug interdiction fund and the use of that money for construction are "two distinct agency actions." *Id.* at 17–18 (citing *Lujan*, 504 U.S. at 562). According to Defendants, the "object" of the Section 8005 reprogramming was "simply mov[ing] funds among DoD's accounts." *Id.* (citing *Lujan*, 504 U.S. at 562).

Defendants' logic fails in all respects. As an initial matter, it is not credible to suggest that the "object" of the Section 8005 reprogramming is anything but border barrier construction, even if the reprogrammed funds make a pit stop in the drug interdiction fund. Since Defendants first announced that they would reprogram funds using Section 8005, they have uniformly described the object of that reprogramming as border barrier construction. *See* Dkt. No. 89-10 ("Rapuano Decl.") ¶ 5 (providing that "the Acting Secretary of Defense decided to use DoD's general transfer authority under section 8005 . . . to transfer funds between DoD appropriations to fund [border barrier construction in Arizona and New Mexico]"); *id.* Ex. D, at 1 (notifying Congress that the

[5] Defendants also argue New Mexico lacks standing because it falls outside Section 8005's "zone of interests." *See* Opp. at 18–19. Because the Court finds Defendants' "zone of interests" challenge derivative of Defendants' misunderstanding of *ultra vires* review, the Court addresses those matters together, below. *See infra* Section II.C.1.

"reprogramming action" under Section 8005 is for "construction of additional physical barriers and roads in the vicinity of the United States border").

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

No complicated causation inquiry is necessary here, as there are no independent absent actors. More important, if there were ever a case where standing exists even though the challenged government action is nominally directed to some different "object," this is it. Neither the parties nor the Court harbor any illusions that the point of reprogramming funds under Section 8005 is to use those funds for border barrier construction. And under Ninth Circuit law, there is no requirement that the challenged conduct be the last link in the causal chain. Rather, even if there is an intervening link between the Section 8005 reprogramming and the border barrier construction itself, any injury caused by the border barrier construction is nonetheless "fairly traceable" to the Section 8005 reprogramming under the circumstances. *See id.* The Court thus

cannot accept the Government's "two distinct actions" rationale as a basis for shielding Defendants' actions from review.

2. Plaintiffs Have Standing for Their Section 9705 Claim.

Defendants argue that no state has standing to challenge the Treasury's decision to allocate Treasury Forfeiture Fund ("TFF") money to border barrier construction because that decision "does not jeopardize the solvency of the TFF or negatively impact the States' receipt of future equitable sharing money." Opp. at 12. Defendants thus posit that "[t]he States have not established that the challenged action will cause them any injury." *Id.* at 14. As support, Defendants rely on the declaration of the Director of the Treasury's Executive Office for Asset Forfeiture ("TEOAF"), John M. Farley, who manages the TFF. Dkt. No. 89-9 ("Farley Decl.") ¶ 2. Mr. Farley assures that the Treasury has adequately accounted for mandatory and priority expenses in such a way that there is no risk to the TFF's solvency in general or to any equitable sharing payments specifically. *Id.* at 13–14. Defendants, however, do not address Plaintiffs' evidence to support standing, which includes recent statements from TEOAF that a "substantial drop in 'base' revenue," which "is relied upon to cover basic mandatory [TFF] costs . . . is especially troubling," even before the $601 million diversion. Dkt. No. 59-4 ("States RJN") Ex. 43, at 4[6]; Mot. at 12.

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

[6] The Court takes judicial notice of various documents, for reasons set forth in the Court's preliminary injunction order in the Citizen Groups' action. *See* Order, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. May 24, 2019), ECF No. 144, at 3 n.2; *see also* Request for Judicial Notice, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Apr. 4, 2019), ECF No. 36 ("Citizen Groups RJN").

Cty., 358 F.3d 626, 641 (9th Cir. 2004)).

At this stage, Plaintiff States have carried their burden to demonstrate that there is a "credible threat" that Defendants' diversion of TFF funds will have economic ramifications on the states. If the only information before the Court were bald allegations questioning the TFF's solvency and the States' prospects of future equitable sharing payments on the one hand, and Mr. Farley's declaration assuaging those concerns on the other, then whether Plaintiffs could demonstrate a "credible threat" would be a closer call. But that is not the case. Plaintiffs instead cite to recent statements by the Treasury characterizing "especially troubling" drops in revenue which call into question its ability to cover "basic mandatory [TFF] costs." *See* States RJN 43, at 4. The Court finds these statements demonstrate a "credible threat," such that Plaintiffs have satisfied the injury-in-fact requirement for Article III standing. *See Nat. Res. Def. Council*, 735 F.3d at 878.

B. Venue is Proper in This Court.

Because Defendants challenge Plaintiffs' standing as to all claims except New Mexico's Section 284 claim, Defendants assert that New Mexico is the only Plaintiff that can plausibly state an alleged injury and thus that venue is improper in the Northern District of California. Opp. at 30. But New Mexico's ability to seek relief in this Court relies on California having standing, which the parties do not dispute would render venue proper for all claims in this case. Because the Court finds that California has independent Article III standing, the Court finds venue is proper. *See* 28 U.S.C. § 1391(e)(1) (providing that venue is proper in actions against officers or employees of the United States where a "plaintiff resides if no real property is involved in the action").

C. Plaintiffs Have Not Shown They Are Entitled to a Preliminary Injunction.

Applying the *Winter* factors, the Court finds Plaintiffs are not entitled to a preliminary injunction at this time.

1. Likelihood of Success on the Merits

The crux of Plaintiffs' case is that Defendants' methods for funding border barrier construction are unlawful. And Plaintiffs package that core challenge in several ways. For

present purposes, Plaintiffs contend that Defendants' actions (1) are unconstitutional, (2) exceed Defendants' statutory authority—in other words, are *ultra vires*—(3) violate the APA because they are arbitrary and capricious, and (4) violate NEPA.

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

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

Rather than dispute these principles, Defendants contend that the challenged conduct complies with them. *See* Opp. at 26 ("The Government is not relying on independent Article II authority to undertake border construction; rather, the actions alleged are being undertaken

pursuant to express statutory authority."). Accordingly, one of the key issues in dispute is whether Congress in fact provided "express statutory authority" for Defendants' challenged actions.

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

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

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

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

Misunderstanding the presumptive availability of equitable relief to enforce federal law, Defendants contend that Plaintiffs may only challenge Defendants' conduct through the framework of the APA, and ignore Plaintiffs' *ultra vires* challenges entirely. *See* Opp. at 12

("Because Congress did not create a private right of action to enforce the statutes that form the basis of the States' challenge, their claims are governed by the [APA], 5 U.S.C. § *et seq*.") But as the Citizen Group Plaintiffs detail at length in their reply brief, *ultra vires* review exists outside of the APA framework. *See* Plaintiffs' Reply at 2–5, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. May 2, 2019), ECF No. 91 ("Citizen Groups Reply"); *see also* Dkt. No. 129 (Brief of *Amici Curiae* Federal Courts Scholars).[7]

Due to their mistaken framing of the scope of *ultra vires* review, Defendants also incorrectly posit that Plaintiffs must establish that they fall within the "zone of interests" of a particular statute to challenge actions taken by the government under that statute. *See* Opp. at 18–19. The "zone of interests" test, however, only relates to statutorily-created causes of action. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (explaining that "[t]he modern 'zone of interests' formulation . . . . applies to all statutorily created causes of action"). The test has no application in an *ultra vires* challenge, which operates outside of the APA framework. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) ("Appellants need not, however, show that their interests fall within the zones of interests of the constitutional and statutory powers invoked by the President in order to establish their standing to challenge the interdiction program as *ultra vires*."); *see also* 33 Charles Alan Wright et al., Federal Practice and Procedure § 8302 (2d ed. 2019) (explaining that the "zone of interests" test is to determine whether a plaintiff "seeks to protect interests that 'arguably' fall within the 'zone of interests' protected by that provision"). In other words, where a plaintiff seeks to vindicate a right protected by a statutory provision, the plaintiff must demonstrate that it arguably falls within the zone of interests Congress meant to protect by enacting that provision. But where a plaintiff seeks equitable relief against a defendant for exceeding its statutory authority, the zone-of-interests test

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

is inapposite. Any other interpretation would lead to absurd results. The very nature of an *ultra vires* action posits that an executive officer has gone beyond what the statute permits, and thus beyond what Congress contemplated. It would not make sense to demand that Plaintiffs—who otherwise have standing—establish that Congress contemplated that the statutes allegedly violated would protect Plaintiffs' interests. It is no surprise, then, that the Supreme Court's recent discussion of *ultra vires* review in *Armstrong* did not once reference this test.

In reviewing the lawfulness of Defendants' conduct, the Court thus begins each inquiry by determining whether the disputed action exceeds statutory authority. For unless an animating statute sanctions a challenged action, a court need not reach the second-level question of whether it would be unconstitutional for Congress to sanction such conduct. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (explaining the "well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case") (quoting *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)). This is not to say, however, that the yardstick of statutory authority overlooks constitutional concerns entirely. "The so-called canon of constitutional avoidance . . . counsel[s] that ambiguous statutory language be construed to avoid serious constitutional doubts." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). Nonetheless, a court presented with both *ultra vires* and constitutional claims should begin by determining whether the statutory authority supports the action challenged, and only reach the constitutional analysis if necessary.[8]

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[8] The Court finds it need not address Plaintiffs' claim that the use of the various reprogramming and diversion mechanisms is arbitrary and capricious under the APA. Plaintiffs' APA arguments are largely repackaged *ultra vires* claims. *See, e.g.*, Reply at 15 (arguing it is arbitrary and capricious to act in excess of statutory authority). To the extent Plaintiffs' APA claim is based on Defendants' alleged departure from internal procedure concerning Section 8005 reprogramming, the Court finds Plaintiffs' are unlikely to succeed on the merits of that argument. Among other reasons, this sort of DoD procedure does not appear to be the kind of "binding internal policy" that might demand an explanation if departed from. *Cf. Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003) (involving an agency's departure from a formally promulgated policy).

a. Sections 284 and 8005

At the President's direction, Defendants intend to divert $2.5 billion, $1 billion of which is the subject of the pending motion, to the DoD's drug interdiction fund for border barrier construction.[9] To do so, Defendants rely on Section 284(b)(7), which authorizes the Secretary of Defense to support other federal agencies for the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *See The Funds Available to Address the National Emergency at Our Border*, The White House, https://www.whitehouse.gov/briefings-statements/funds-available-address-national-emergency-border (Feb. 26, 2019). To satisfy the President's directive, Defendants intend to rely on their reprogramming authority under Section 8005, and plan to "augment" the drug interdiction fund with the entire $2.5 billion in funds that DoD will then use for the construction. *Id.*

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

[9] The Court here only considers the lawfulness of Defendants' March 25, 2019 invocation of Section 8005 to reprogram $1 billion, given the parties' agreement that this order need not address Defendants' recently announced intent to use Sections 8005, 9002, and 284 to fund border barrier construction in the El Centro Sector and Tucson Sector Projects. The parties reached this agreement after counsel for Defendants represented at the hearing on this motion that "no construction will start [with those funds] until at least 45 days from" the May 17, 2019 hearing date. *See* Dkt. No. 159 at 55:16–17. The parties confirmed that they would agree to a schedule to supplement the record, to permit the Court to review in a timely manner the lawfulness of the new reprogramming, under the framework set forth in this order. *Id.* at 59:14–60:2. The parties have since agreed on a schedule. *See* Dkt. No. 163.

for an item for which funds were requested but denied by Congress.

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

Plaintiffs argue that Defendants are transferring funds for a purpose previously denied by Congress. Mot. at 24. Defendants dispute, however, whether Congress's affirmative appropriation of funds in the CAA to DHS constitutes a "denial" of appropriations to DoD's "counter-drug activities in furtherance of DoD's mission under [Section] 284." Opp. at 19. In their view, "the item" for which funds are requested, for present purposes, is counterdrug activities under Section 284. *Id.* at 19–20. And Defendants maintain that "nothing in the DHS appropriations statute indicates that Congress 'denied' a request to fund DoD's statutorily authorized counterdrug activities, which expressly include fence construction." *Id.* In other words, even though DoD's counter-drug authority under Section 284 is merely a pass-through vessel for Defendants to funnel money to construct a border barrier that will be turned over to DHS, Citizen Groups RJN Ex. I, at 10, Defendants argue that the Court should only consider whether Congress denied funding to DoD.

Plaintiffs have shown a likelihood of success as to their argument that Congress previously denied "the item for which funds are requested," precluding the proposed transfer. On January 6, 2019, the President asked Congress for "$5.7 billion for construction of a steel barrier for the Southwest border," explaining that the request "would fund construction of a total of approximately 234 miles of new physical barrier." Citizen Groups RJN Ex. A, at 1. The request noted that "[a]ppropriations bills for fiscal year (FY) 2019 that have already been considered by the current and previous Congresses are inadequate to fully address these critical issues," to include the need for barrier construction funds. *Id.* The President's request did not specify the mechanics of how the $5.7 billion sought would be used for the proposed steel barrier construction. *Id.* Nonetheless, in the CAA passed by Congress and signed by the President, Congress appropriated only $1.375 billion for the construction of pedestrian fencing, of a specified type, in a specified sector, and appropriated no other funds for barrier construction. The Court agrees with Plaintiffs that they are likely to show that the proposed transfer is for an item for

which Congress denied funding, and that it thus runs afoul of the plain language of Section 8005 and 10 U.S.C. § 2214(b) ("Section 2214").[10]

As Defendants acknowledge, in interpreting a statute, the Court applies the principle that "the plain language of [the statute] should be enforced according to its terms, in light of its context." *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1210 (9th Cir. 2015). In its *amicus* brief, the House recounts legislative history that provides critical context for the Court's interpretative task. The House explains that the "denied by the Congress" restriction was imposed on DoD's transfer authority in 1974 to "tighten congressional control of the reprogramming process." Dkt. No. 73 ("House Br.") at 9 (citing H.R. Rep. No. 93-662, at 16 (1973)). The House committee report on the appropriations bill from that year explained that "[n]ot frequently, but on some occasions, the Department ha[d] requested that funds which have been specifically deleted in the legislative process be restored through the reprogramming process," and that "[t]he Committee believe[d] that to concur in such actions would place committees in the position of undoing the work of the Congress." H.R. Rep. No. 93-662, at 16. Significantly, the Committee stated that such a position would be "untenable." *Id.* Consistent with this purpose, Congress has described its intent that appropriations restrictions of this sort be "construed strictly" to "prevent the funding for programs which have been considered by Congress and for which funding has been denied." *See* H.R. Rep. No. 99-106, at 9 (1985) (discussing analogous appropriations restriction in Pub. L. No. 99-169, § 502(b), 99 Stat. 1005 (codified at 50 U.S.C. § 3094(b)).

The Court finds that the language and purpose of Section 8005 and Section 2214(b) likely preclude Defendants' attempt to transfer $1 billion from funds Congress previously appropriated for military personnel costs to the drug interdiction fund for the construction of a border barrier. Defendants argue that "Congress never denied DoD funding to undertake the [Section] 284 projects at issue," Opp. at 20, such that Section 8005 and Section 2214(b) are satisfied. But in the

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

Court's view, that reading of those sections is likely wrong, when the reality is that Congress was presented with—and declined to grant—a $5.7 billion request for border barrier construction. Border barrier construction, expressly, is the item Defendants now seek to fund via the Section 8005 transfer, and Congress denied the requested funds for that item. *See* 10 U.S.C. § 2214(b) (explaining that transfer authority "may not be used if *the item to which the funds would be transferred* is an item for which Congress has denied funds") (emphasis added). And Defendants point to nothing in the language or legislative history of the statutes in support of their assertion that only explicit congressional denial of funding for "[Section] 284 projects," or even DoD projects generally, would trigger Section 8005's limitation. Opp. at 20. It thus would be inconsistent with the purpose of these provisions, and would subvert "the difficult judgments reached by Congress," *McIntosh*, 833 F.3d at 1175, to allow Defendants to circumvent Congress's clear decision to deny the border barrier funding sought here when it appropriated a dramatically lower amount in the CAA. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring) ("It is quite impossible . . . when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.").

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

Plaintiffs next argue that any need for border barrier construction—to the extent there is a need—was long "foreseen." Mot. at 23. The Citizen Group Plaintiffs highlight that the President supported his fiscal year 2019 budget request for border barrier funding with a description that such a barrier "is critical to combating the scourge of drug addiction that leads to thousands of unnecessary deaths." Motion for Preliminary Injunction at 16, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Apr. 4, 2019) ("Citizen Groups Mot.") (quoting Citizen Groups RJN Ex. R, at 16).

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

counterdrug activities authority under Section 284. While not disputing that the President requested—and was denied—more-comprehensive funds for border barrier construction, Defendants instead note that "[t]he President's 2019 budget request did not propose additional funding for DoD's counter-drug activities under [Section] 284." Opp. at 20. Defendants then argue that because DHS only formally requested Section 284 support in February 2019, the need for Section 284 support only become foreseen in February 2019. *Id.*

Separate and apart from the Court's analysis above regarding whether Congress previously denied funding for the relevant item, Plaintiffs also have shown a likelihood of success as to their argument that Defendants fail to meet the "unforeseen military requirement" condition for the reprogramming of funds under Section 8005. As the House notes in its *amicus* brief, DoD has used this authority in the past to transfer funds based on unanticipated circumstances (such as hurricane and typhoon damage to military bases) justifying a departure from the scope of spending previously authorized by Congress. House Br. at 9 (citing Office of the Under Secretary of Defense (Comptroller), DoD Serial No. FY 04-37 PA, Reprogramming Action (Sept. 3, 2004)). Here, however, Defendants claim that what was "unforeseen" was "[t]he need for DoD to exercise its [Section] 284 authority to provide support for counter-drug activities," which "did not arise until February 2019, when DHS requested support from DoD to construct fencing in drug trafficking corridors." Opp. at 20.

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

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

Interpreting "unforeseen" to refer to the request for DoD assistance, as opposed to the underlying "requirement" at issue, also is not reasonable. By Defendants' logic, *every* request for Section 284 support would be for an "unforeseen military requirement," because only once the request was made would the "need to exercise authority" under the statute be foreseen. There is no logical reason to stretch the definition of "unforeseen military requirement" from requirements that the government as a whole plainly cannot predict (like the need to repair hurricane damage) to requirements that plainly *were* foreseen by the government as a whole (even if DoD did not realize that it would be asked to pay for them until after Congress declined to appropriate funds requested by another agency). Nothing presented by the Defendants suggests that its interpretation is what Congress had in mind when it imposed the "unforeseen" limitation, especially where, as here, multiple agencies are openly coordinating in an effort to build a project that Congress declined to fund. The Court thus finds it likely that Plaintiffs will succeed on this claim.[11]

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

The Court also finds it likely that Defendants' reading of these provisions, if accepted, would pose serious problems under the Constitution's separation of powers principles. Statutes must be interpreted to avoid a serious constitutional problem where another "construction of the statute is fairly possible by which the question may be avoided." *Zadvydas v. Davis*, 533 U.S. 678,

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

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

As Plaintiffs point out, the upshot of Defendants' argument is that the Acting Secretary of Defense is authorized to use Section 8005 to funnel an additional $1 billion to the Section 284 account for border barrier construction, notwithstanding that (1) Congress decided to appropriate only $1.375 billion for that purpose; (2) Congress's *total* fiscal year 2019 appropriation available under Section 284 for "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States" was $517 million, much of which already has been spent; and (3) Defendants have acknowledged that the Administration considered reprogramming funds for border barrier construction even before the President signed into law Congress's $1.375 billion appropriation. *See* Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, div. A, tit. VI, 132 Stat. 2981, 2997 (2018) (appropriating $881 million in funds "[f]or drug interdiction and counter-drug activities" in fiscal year 2019, $517 million of which is "for counter-narcotics support"); Dkt. No. 151 at 4 (indicating that Defendants have not used—and do not intend to use in the near future—any funds appropriated by Congress for counter-narcotics support for border barrier construction); Dkt. No. 89-12, at 14 (testimony of Defendant Shanahan before the House Armed Services Committee explaining that the Administration discussed unilateral reprogramming "prior to the declaration of a national emergency"). Put differently, according to Defendants, Section 8005 authorizes the Acting Secretary of Defense to essentially triple—or quintuple, when considering the recent additional $1.5 billion reprogramming—the amount Congress allocated to this account for these purposes, notwithstanding Congress's recent and clear actions in passing the CAA, and the relevant committees' express disapproval of the proposed reprogramming. *See* States RJN Ex. 35 ("The committee denies this request. The committee does

not approve the proposed use of [DoD] funds to construct additional physical barriers and roads or install lighting in the vicinity of the United States border."); *id.* Ex. 36 ("The Committee has received and reviewed the requested reprogramming action . . . . The Committee denies the request."). Moreover, Defendants' decision not to refer specifically to Section 284 in their $5.7 billion funding request deprived Congress of even the *opportunity* to reject or approve this funding item.[12]

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

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

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

While Defendants argue that the text and history of Section 284 suggest that their proposed transfer and use of the funds are within the scope of what Congress has permitted previously, Opp. at 21, that argument only highlights the serious constitutional questions that accepting their position would create. First, Defendants note that in the past DoD has completed what they characterize as "large-scale fencing projects" with Congress's approval. Opp. at 21 (citing H.R. Rep. No. 103-200, at 330–31 (1993)). But Congress's past approval of relatively small expenditures, that were well within the total amount allocated by Congress to DoD under Section 284's predecessor, speaks not at all to Defendants' current claim that the Acting Secretary has authority to redirect sums over a hundred orders of magnitude greater to that account in the face of Congress's appropriations judgment in the CAA. Similarly, whether or not Section 284 formally "limits" the Secretary to "small scale construction" (defined in Section 284(i)(3) as "construction at a cost not to exceed $750,000 for any project"), reading the statute to suggest that Congress requires reporting of tiny projects but nonetheless has delegated authority to DoD to conduct the massive funnel-and-spend project proposed here is implausible, and likely would raise serious questions as to the constitutionality of such an interpretation. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (noting that Congress "does not, one might say, hide elephants in mouseholes").

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

Finally, the Court has serious concerns with Defendants' theory of appropriations law, which presumes that the Executive Branch can exercise spending authority unless Congress explicitly restricts such authority by statute. Counsel for Defendants advanced this theory at the hearing on this motion, arguing that when Congress passed the recent DoD appropriations act containing Section 8005, it "could have" expressly "restrict[ed] that authority" to preclude reprogramming funds for border barrier construction. *See* Dkt. No. 159 at 76:16–77:3. According to Defendants: "If Congress had wanted to deny DOD this specific use of that [reprogramming] authority, that's something it needed to actually do in an explicit way in the appropriations process. And it didn't." *Id.* at 77:21–24. But it is not Congress's burden to prohibit the Executive from spending the Nation's funds: it is the Executive's burden to show that its desired use of those funds was "affirmatively approved by Congress." *See FLRA*, 665 F.3d at 1348 ("[A]ll uses of appropriated funds must be affirmatively approved by Congress," and "the mere absence of a prohibition is not sufficient."). To have this any other way would deprive Congress of its absolute control over the power of the purse, "one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several departments.'" *Id.* at 1346–47 (quoting The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961)).

To the extent Defendants believe the Ninth Circuit's decision in *McIntosh* suggests anything to the contrary, the Court disagrees. Defendants appeared to argue at the hearing on this motion that *McIntosh* stands for the principle that the Executive enjoys unfettered spending power

unless Congress crafts an appropriations rider cabining such authority. *See* Dkt. No. 159 at 75:5–10. As counsel for Defendants put it, "[Plaintiffs] want to say that something was denied by Congress if it wasn't funded by Congress. . . . But that is just not how these statutes are written and that's not how [*McIntosh*] tells us we interpret the appropriations statute." *Id.* at 75:13–20. But Defendants overlook that no party in *McIntosh* disputed that the government's use of funds was authorized but for the appropriations rider at issue in that case. *See* 833 F.3d at 1175 ("The parties dispute whether the government's spending money on their prosecutions violates [the appropriations rider]."). It is thus unremarkable that when faced with a dispute exclusively concerning whether the government's otherwise-authorized spending of money violated an appropriations rider, the Ninth Circuit held that "[i]t is a fundamental principle of appropriations law that we may only consider the text of an appropriations rider." *Id.* at 1178; *see also* Dkt. No. 159 at 75:5–10 (defense counsel relying on this language from *McIntosh*).

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

For all of these reasons, the Court finds that Plaintiffs have shown a likelihood of success as to their argument that the reprogramming of $1 billion under Section 8005 to the Section 284

account for border barrier construction is unlawful.[13]

b. Section 9705

At the President's direction, Defendants intend to divert $601 million from the Treasury Forfeiture Fund to DHS, to provide additional funding for border barrier construction. *See The Funds Available to Address the National Emergency at Our Border*, The White House, https://www.whitehouse.gov/briefings-statements/funds-available-address-national-emergency-border (Feb. 26, 2019). To do so, Defendants rely on 31 U.S.C. § 9705(g)(4)(B), which authorizes the Secretary of Treasury to transfer "unobligated balances . . . for obligation or expenditure in connection with the law enforcement activities of any Federal agency or of a Department of the Treasury law enforcement organization." Defendants intend to use the $601 million "in two allocations, $242 million available immediately and $359 million from future anticipated forfeitures." *Id.* Plaintiffs argue that Defendants' diversion of $601 million toward border barrier construction is not an expenditure for "law enforcement activities." Mot. at 25–26.[14]

As a threshold matter, Defendants contend that how the Treasury allocates funds is unreviewable because it is committed to the Treasury's discretion by law, as "the agency must be allowed to administer its statutory responsibilities" in ways "it sees as the most effective or desirable." Opp. at 14 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993)). They reason that as long as the Treasury "meet[s] permissible statutory objectives," the APA precludes judicial review of the allocation. *Id.* at 15 (quoting *Serrato v. Clark*, 486 F.3d 560, 568 (9th Cir. 2007)). And in

[13] Defendants have now acknowledged that all of the money they plan to spend on border barrier construction under Section 284 is money transferred into that account under Section 8005. *See* Dkt. No. 151 at 4. Given this acknowledgment, and the Court's finding that Plaintiffs are likely to show that the Section 8005 reprogramming is unlawful, the Court need not at this stage decide whether Defendants would have been permitted to use for border barrier construction any remaining funds that Congress appropriated to the Section 284 account for fiscal year 2019. The Court notes that the House confirmed in its own lawsuit that it "does not challenge the expenditure of any remaining appropriated funds under section 284 on the construction of a border wall." United States House of Representatives' Application for a Preliminary Injunction at 30, *U.S. House of Representatives v. Mnuchin*, No. 1:19-cv-00969 (TNM) (D.D.C. Apr. 23, 2019), ECF No. 17; *see also* House Br. at 11 (requesting preliminary injunction "prohibiting defendants from transferring and spending funds in excess of what Congress appropriated for counter-narcotics support under 10 U.S.C. § 284").

[14] Notably, the House does not challenge this expenditure in either its own lawsuit or in its *amicus* brief in this case. *See* Complaint, *U.S. House of Representatives v. Mnuchin*, No. 1:19-cv-00969 (TNM) (D.D.C. Apr. 5, 2019), ECF No. 1; House Br.

this instance—according to Defendants—the Acting Secretary of Defense has exercised his "wide discretion to use" unobligated balances "in connection with the law enforcement activities of any Federal agency." *Id.* "Thus, funding the construction of border barriers is consistent with the statutory purposes of the TFF, such that the allocation of funds for this purpose is unreviewable." *Id.*

The Court finds Defendants' reliance on *Lincoln* and *Serrato* unavailing, and finds that the transfer of funds under Section 9705 is reviewable. Under the APA, Congress may preclude review by statute where the administrative action is committed by law to an agency. *See* 5 U.S.C. § 701(a)(2). Judicial review of agency action, however, is presumptively available. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). And this presumption applies to judicial review of an agency's discretionary acts as well. *See* 5 U.S.C. § 706(2)(A) (permitting courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). That an agency enjoys discretion is thus only the beginning of the inquiry. Whether Section 701(a)(2) precludes review depends on whether the agency enjoys some special discretion.

Defendants maintain that such special discretion exists under *Lincoln* and *Serrato*. In *Lincoln*, the Supreme Court held that the Indian Health Service's decision to discontinue a pilot program called the Indian Children's Program and reallocate funds from a lump-sum appropriation was committed to agency discretion by law under Section 701(a)(2). 508 U.S. at 193. But the lump-sum nature of the appropriation at issue was critical to the *Lincoln* Court's conclusion. "After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way." *Id.* at 192. As the Supreme Court put it:

> [A]n agency's allocation of funds from a lump-sum appropriation requires a complicated balancing of a number of factors which are peculiarly within its expertise: whether its resources are best spent on one program or another; whether it is likely to succeed in fulfilling its statutory mandate; whether a particular program best fits the agency's overall policies; and, indeed, whether the agency has enough resources to fund a program at all.

Id. at 193 (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)) (internal quotation marks omitted). The Ninth Circuit applied *Lincoln* to another lump-sum appropriation in *Serrato*. *See* 486 F.3d at 567–69. And the Ninth Circuit there summarized the test established by *Lincoln*: "[A]s long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives, [Section] 701(a)(2) gives the courts no leave to intrude. [T]o [that] extent, the decision to allocate funds is committed to agency discretion by law." *Id.* at 568 (internal quotation marks omitted).

Defendants' diversion of $601 million from the TFF to fund border barrier construction fails the *Lincoln* unreviewability test in two respects. First, Congress's funding of the TFF arguably does not qualify as the sort of lump-sum appropriation present in *Lincoln* and *Serrato*. Rather, Section 9705 delineates a comprehensive list of payments for which the TFF "shall be available," thus specifying how TFF funds may be used. More important, Defendants' purported authority for diverting funds from the TFF itself establishes the limitation on discretion which Plaintiffs seek to vindicate here. Section 9705(g)(4)(B) limits transfers for use "in connection with [] law enforcement activities." And Plaintiffs maintain that Defendants have not met this limitation. *See* Mot. at 25–26. Thus, even accepting Defendants' argument that the APA precludes judicial review so long as the Treasury "meet[s] permissible statutory objectives," *see* Opp. at 14, judicial review is available because Plaintiffs maintain that the Treasury is transferring funds in a statutorily *impermissible* manner. *See Hawaii v. Trump*, 878 F.3d 662, 681 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018) (explaining that the "committed to 'agency discretion by law'" exception is "very narrow," and "does not apply where, as here, a court is tasked with reviewing whether an executive action has exceeded statutory authority").[15]

Although it finds that whether Defendants' conduct meets Section 9705's requirements is reviewable, the Court need not now address whether Plaintiffs are likely to succeed on the merits of their claim that the use of funds for border barrier construction is not "in connection with a law enforcement activity." For reasons discussed below, the Court finds that Plaintiffs have not met

[15] Defendants' position on the reviewability of Plaintiffs' challenge to the diversion of TFF funds is, in this sense, symptomatic of Defendants' general misunderstanding of *ultra vires* claims.

their independently necessary burden of showing a likelihood of irreparable harm as to the diversion of TFF funds so as to be entitled to a preliminary injunction.

c. NEPA

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

Defendants contend that such waivers preclude Plaintiffs from advancing a NEPA claim. Opp. at 25 (citing *In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1213, 1221 (9th Cir. 2019)). Plaintiffs respond that DHS's authority to waive NEPA requirements for construction under IIRIRA does not extend to construction undertaken by DoD under its own spending authority. Reply at 16–17. The Citizen Group Plaintiffs further contend that "Defendants' argument is incompatible with their own claim that they are not constructing the El Paso and Yuma sections of border wall under IIRIRA authority, but instead under the wholly separate DoD authority," and suggest that "Defendants cannot have it both ways." Citizen Groups Reply at 18–19.

Neither set of Plaintiffs appears to contest that the waivers, if applicable, would be dispositive of the NEPA claims. *See* Reply at 16 ("Plaintiffs do not dispute *DHS's* ability to waive NEPA compliance when constructing barriers pursuant to [IIRIRA], with funds specifically

appropriated by Congress to be used for that construction.") (emphasis in original); *see also In re Border Infrastructure Envtl. Litig.*, 915 F.3d at 1221 ("[A] valid waiver of the relevant environmental laws under section 102(c) is an affirmative defense to all the environmental claims [including NEPA claims]," and is "dispositive of [those] claims."). But Plaintiffs contend that "the DHS Secretary's waiver under IIRIRA does not waive *DOD's* obligations to comply with NEPA prior to proceeding with El Paso Project 1 under *DOD's* statutory authority, 10 U.S.C. § 284, and using *DOD's* appropriations," so that "DHS's waiver has no application to this project." Reply at 16 (emphasis in original); *see also* Citizen Groups Reply at 19 ("Defendants identify no statutory authority for a waiver for 'expeditious construction' under DOD's § 284 authority, and none exists.").

The Court finds that Plaintiffs are not likely to succeed on their NEPA argument because of the waivers issued by DHS. DoD's authority under Section 284 is derivative. Under the statute, DoD is limited to providing support (including construction support) to other agencies, and may invoke its authority only in response to a request from such an agency. *See* 10 U.S.C. § 284 ("The Secretary of Defense may provide support for the counterdrug activities . . . of any other department or agency of the Federal Government," including support for "[c]onstruction of roads and fences," if "such support is requested . . . by the official who has responsibility for the counterdrug activities."). Here, DHS has made such a request, invoking "its authority under Section 102 of IIRIRA to install additional physical barriers and roads" in designated areas, seeking support for its "ability to impede and deny illegal entry and drug smuggling activities." States RJN Ex. 33, at 1. DHS requested DoD's assistance "[t]o support DHS's action under Section 102." *Id.* at 2. Plaintiffs' argument would require the Court to find that even though it is undisputed that DHS could waive NEPA's requirements if it were paying for the projects out of its own budget, that waiver is inoperative when DoD provides support in response to a request from DHS. The Court finds it unlikely that Congress intended to impose different NEPA requirements on DoD when it acts in support of DHS's Section 102 authority in response to a direct request

under Section 284 than would apply to DHS itself.[16] *See Defs. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 121, 129 (D.D.C. 2007) (finding DHS's Section 102 waiver authority authorized the DHS Secretary to waive legal requirements where the U.S. Army Corps of Engineers, a federal agency within the DoD, was constructing border fencing "on behalf of DHS").[17]

2. Likelihood of Irreparable Injury

Plaintiffs advance two theories of irreparable harm: (1) New Mexico faces irreparable environmental harm from border barrier construction; and (2) all States face irreparable harm from the diversion of funds from the TFF. Mot. at 29–33. Defendants take issue with both theories. Opp. at 31–34.

a. New Mexico's Environmental Harm

New Mexico's asserted environmental harm stems largely from Defendants' alleged failure to comply with NEPA. *See* Mot. at 29 ("Thus, irreparable injury exists when the agency fails to consider the environmental concerns raised by NEPA such that governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment.") (internal quotation marks omitted). But for the reasons discussed above, the Court finds Plaintiffs are unlikely to succeed on the merits of their NEPA claim. Plaintiffs also allege, however, that beyond the procedural NEPA harm, Defendants' overall unlawful reprogramming and use of funds under Sections 8005 and 284 for border barrier construction "will cause irreparable injury to wildlife in the area and New Mexico as a whole." *Id.* at 30. And among other things, Defendants' proposed border barrier construction in the El Paso Sector Project 1 portion of New Mexico allegedly will (1) impede wildlife

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

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

connectivity of over 100 species of wildlife, including the Mexican gray wolf, mountain lion, bobcat, mule deer, and javelina; (2) generate "noise, deep holes for fence posts, vehicle traffic, lighting, and other [construction] disturbances," which will "kill, injure, or alter the behavior of" several species, including the Aplomado falcon and Gila monster; (3) limit New Mexico residents' recreational opportunities; and (4) harm New Mexico as a whole, as it is entrusted by its residents with a duty to protect natural resources for its residents' benefit. *Id.* at 30–31.

Defendants posit that Plaintiffs' "vague allegations," only supported by "declarations [that] are heavy on conjecture and light on detail" concerning harm to local species, are insufficient to satisfy Plaintiffs' burden of demonstrating a likelihood of irreparable injury. Opp. at 31–32. More to the point, Defendants maintain that New Mexico fails to meet its burden of showing that Defendants' plan "is likely to cause population-level harm," which Defendants claim requires proof of a "definitive threat" to the species as a whole, and "not mere speculation." *Id.* at 32 (quoting *Nat'l Wildlife Fed'n v. Burlington N.R.R.*, 23 F.3d 1508, 1512 n.8 (9th Cir. 1994) ("*Burlington*")). And as is relevant to the present discussion, Defendants highlight that any purported environmental harm does not warrant a preliminary injunction because population or species-level harm would not occur before a final disposition of the case on the merits. *Id.* at 34. Last, Defendants attack New Mexico's invocation of its residents' recreational interests as a possible irreparable harm, because states may not advance resident interests in *parens patriae* against the United States. *Id.* at 33 (citing *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178 (9th Cir. 2011)).

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

Contrary to Defendants' suggestion, the irreparable-injury inquiry does not require a showing of population-level harm or an extinction-level threat. In fact, none of Defendants' proffered cases establish this standard. *See N.M. Dep't of Game & Fish v. DOI*, 854 F.3d 1236, 1251 (10th Cir. 2017) (rejecting as insufficient evidence of irreparable harm a single declaration stating that the release of Mexican Wolves within a state "*has the potential* to affect predator-prey dynamics, and *may* affect other attributes of the ecosystem"); *Burlington*, 23 F.3d at 1511–12 (finding a district court did not clearly err in finding plaintiff failed to establish a likelihood of irreparable *future* injury based on *past* accidental injuries to protected grizzly bears); *Maughan v. Vilsack*, No. 4:14-cv-0007-EJL, 2014 WL 201702, at *6–7 (D. Idaho Jan. 17, 2014) (finding that growth in wolf population cut against plaintiffs' claim that a program authorizing wolf hunting would cause irreparable injury).[18] For example, Defendants offer *Burlington* for the principle that New Mexico here must establish that the challenged conduct constitutes a "definitive threat" to a "protected *species*." Opp. at 32 (citing 23 F.3d at 1512 n.8). But the *Burlington* court added an important qualifier: "We are not saying that a threat of extinction to the species is required before an injunction may issue under the ESA. This would be contrary to the spirit of the statute, whose goal of preserving threatened and endangered species can also be achieved through incremental steps." 23 F.3d at 1512 n.8. And *Burlington* cited favorably a case where "between three and nine grizzly bears would be killed" as meriting an injunction. *Id.* (citing *Fund for Animals, Inc. v. Turner*, No. 91-2201(MB), 1991 WL 206232 (D.D.C. Sept. 27, 1991)). Thus, while a showing of irreparable environmental injury to warrant injunctive relief may require evidence that the challenged action poses a threat of future demonstrable harm to a protected species, it does not require that the species is likely to be entirely wiped out.[19]

[18] Although the court in *Maughan* found a lack of irreparable injury because evidence showed the wolf species population was growing despite the challenged action, it nonetheless stated: "The evidence in the current record shows that the [challenged] program for hunting wolves will not result in the loss of the species as a whole." *See* 2014 WL 201702, at *7. Even if the *Maughan* court meant for this passing comment to serve as the standard for irreparable injury, no court has since endorsed this view. More important, that standard would be inconsistent with Ninth Circuit law, and thus the Court reads *Maughan* as standing for the narrow proposition that undisputed evidence of species growth in the face of a challenged action tilts against a finding of irreparable injury to that species from the challenged action.

[19] At the hearing on this motion, counsel for Defendants essentially acknowledged that this is the

However, whether or not New Mexico has proffered sufficient evidence to meet its burden of showing a likelihood of irreparable environmental harm from the use of reprogrammed and diverted funds under Sections 8005 and 284 for border barrier construction in the El Paso Sector Project 1 region, the contested use of such funds is no longer likely before resolution of the case on the merits. This is because the Court has enjoined the relevant Defendants in the Citizen Groups' action from proceeding with such construction. *See* Order at 55, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. May 24, 2019), ECF No. 144 (enjoining the use of reprogrammed funds for border barrier construction in El Paso Sector Project 1). Accordingly, no irreparable harm will result from the denial (without prejudice) of the States' duplicative requested injunction.

b. States' Harm from Diversion of TFF Funds

Plaintiffs' second theory of harm is that the diversion of TFF funds runs the risk of "depriv[ing] Plaintiff States of the same opportunity to receive TFF funds that they have enjoyed for years." Mot. at 31. Plaintiffs contend that a $601 million diversion "undermines the continued viability of TFF" moving forward and "jeopardizes the States' ability to collect their pending equitable share claims of millions of dollars that they are entitled to receive after dedicating time and resources to participating in joint law enforcement efforts." *Id.* at 32. In other words, Plaintiffs' alleged irreparable harms are that they (1) will not receive equitable share claims already owed, and (2) may not receive equitable share claims in the future.

Defendants respond to both irreparable injury bases with a declaration of the TEOAF Director, John M. Farley, who manages the TFF. *See* Farley Decl. ¶ 2. Mr. Farley acknowledges that equitable sharing payments to state and local enforcement agencies are "mandatory" TFF expenses. *Id.* ¶ 8. Mr. Farley explains, however, that "Strategic Support is an amount of unobligated funds at the end of the fiscal year, after accounting for equitable sharing and other mandatory expenses . . . [which] may be used in connection with the law enforcement activities of any Federal agency." *Id.* ¶ 4. He adds that TEOAF works with TFF member agencies "to track

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appropriate standard. Dkt. No. 159 at 104:4–6 ("And I don't want to overstate that because it's -- as my colleagues on the other side have pointed out, it's not extinction.")

anticipated and current forfeiture cases and liabilities that may be associated with such cases," which "enables the program to accurately estimate its revenue and liabilities." *Id.* ¶¶ 5, 9.[20] In this capacity, the "TFF has remained financially solvent and maintained adequate funds in its accounts to meet all of its expenses" since its inception in 1992. *Id.* ¶ 9.

Because Strategic Support funding at the end of any fiscal year has already taken account of current fiscal year mandatory expenses and anticipated liabilities for the following fiscal year, Mr. Farley provides that "the decision to make Strategic Support funding available in fiscal year 2019 will have no impact on the amount of money state and local entities receive through equitable sharing." *Id.* ¶¶ 13, 23. And the Treasury predicts that following the diversion of $601 million in strategic support payments to DHS, the "projected unobligated balance carry-over to fiscal year 2020 will be approximately $507 million." *Id.* ¶ 26.

Given Mr. Farley's representations, Defendants argue that there is no risk of irreparable harm to Plaintiffs from the diversion of TFF funds: "Because Treasury's Strategic Support payments to DHS do not pose any threat to the solvency of the TFF or diminish the equitable sharing payments to which the States may be entitled under [Section] 9705, the States have not established a likelihood of irreparable injury." Opp. at 31. Plaintiffs' substantive response to the Farley declaration is to characterize it as a "self-serving declaration" that must be disregarded. But Plaintiffs' support for this proposition—*Nigro v. Sears, Roebuck & Co.*—stands for the exact opposite proposition. *See* 784 F.3d 495, 497 (9th Cir. 2015) ("Although the source of the evidence may have some bearing on its credibility and on the weight it may be given by a trier of fact, the district court may not disregard a piece of evidence at the summary judgment stage solely based on its self-serving nature.").

At the hearing on this motion, Plaintiffs shifted their criticism of Mr. Farley to his TFF balance calculation. *See* Dkt. No. 138 at 45:12–47:1. Plaintiffs argued that Mr. Farley failed to consider contingent liabilities and noted that the TFF could theoretically be underwater based on such liabilities and other data contained in TEOAF's fiscal year 2020 budget. *See id.*; *see also*

[20] TEOAF also sets aside funding to cover future fiscal year expenses. *See* Farley Decl. ¶¶ 10–11 (explaining the process).

Dkt. No. 136 Ex. 55, at 6–7. It does not appear warranted, though, to discount the TFF balance calculation by the entire contingent liability entry, given that such liabilities "are significant because remission payments from multiple years are recorded and carried forward." *See* Dkt. No. 136 Ex. 55, at 6. Nothing indicates that the Treasury would pay out all contingent liabilities in the next fiscal year. And even accepting Plaintiffs' argument as true, they have not explained why the TFF's existence alone manifests an entitlement to future equitable sharing payments. Further, Plaintiffs fail to consider that the amount of potential future equitable sharing payments is tethered to future seizures or forfeitures for which a given state or local law enforcement agency participates in the seizure or forfeiture, and is capped by the value of the seized or forfeited property. *See* 31 U.S.C. § 9705(a)(1)(g), (b)(2), (h)(1)(B)(ii). Thus, to the extent a given law enforcement agency participates in future seizures or forfeitures, the TFF necessarily will have the funds to provide the mandatory equitable sharing payment.

Most important, Plaintiffs' ignore that the burden is theirs to demonstrate that irreparable injury is *likely* in the absence of an injunction. *Winter*, 555 U.S. at 22. "Speculative" or "possible" injury is not enough. *All. for the Wild Rockies*, 632 F.3d at 1131–36. Plaintiffs have not met their burden. Plaintiffs alleged there was some risk that Defendants' diversion of $601 million would undermine the continued viability of TFF and/or jeopardize their ability to collect "pending" equitable share claims. *See* Mot. at 31–32. Defendants responded with a sworn declaration demonstrating that no pending equitable share claims are at risk and that the TEOAF has taken account of future needs to prevent any threat to TFF's continued viability. The Court cannot ignore this declaration just because it makes it more difficult for Plaintiffs to meet their burden to demonstrate that irreparable injury is likely in the absence of an injunction. And the Court also cannot ignore that Plaintiffs failed to consider important relevant factors, such as the nature of equitable sharing payments. Thus, even though Plaintiffs have shown that they have standing as to this claim, they have not shown an entitlement to the "extraordinary" remedy of a preliminary injunction on this basis.[21]

[21] To the extent Plaintiffs rely on *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058–59 (9th Cir. 2009), for the principle that a "constitutional violation alone,

3. Balance of Equities and Public Interest

When the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). According to Defendants, these factors tilt in their favor, because their "weighty" interest in border security and immigration-law enforcement, as sanctioned by Congress, outweighs Plaintiffs' "speculative" injuries. Opp. at 34–35. The Ninth Circuit has recognized that "the public has a 'weighty' interest 'in efficient administration of the immigration laws at the border,'" and the Court does not minimize this interest. *See E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018) (quoting *Landon v. Plasencia*, 459 U.S. 21, 34 (1982)). On the other hand, "the public also has an interest in ensuring that statutes enacted by their representatives are not imperiled by executive fiat." *Id.* (internal quotation marks and brackets omitted). Because Plaintiffs have not shown a likelihood of irreparable harm as to the TFF diversion, and because the Court need not now reach that question with respect to the El Paso Sector project, this factor does not militate in favor of a preliminary injunction.[22]

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coupled with the damages incurred, can suffice to show irreparable harm," that principle does not alter the Court's conclusion. *See* Mot. at 31. Even under that theory of irreparable harm, Plaintiffs must demonstrate some likely harm resulting from the challenged action, and not simply a constitutional violation.

[22] The Court observes that, although Congress appropriated $1.571 billion for physical barriers and associated technology along the Southwest border for fiscal year 2018, counsel for the House has represented to the Court that the Administration has stated as recently as April 30, 2019 that CBP represents it has only constructed 1.7 miles of fencing with that funding. *See* Dkt. No. 161; *see also* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. F, tit. II, § 230(a) 132 Stat. 348 (2018). This representation tends to undermine Defendants' claim that irreparable harm will result if the funds at issue on this motion are not deployed immediately.

III. CONCLUSION

For the foregoing reasons, the Court **DENIES WITHOUT PREJUDICE** Plaintiffs' motion for a preliminary injunction. A case management conference is set for June 5, 2019 at 2:00 p.m. At the case management conference, the parties should be prepared to discuss a plan for expeditiously resolving this matter on the merits, whether through a bench trial, cross-motions for summary judgment, or other means. The parties must submit a joint case management statement by May 31, 2019.

IT IS SO ORDERED.

Dated: 5/24/2019

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California

EXHIBIT 2

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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; PATRICK M. SHANAHAN, Acting Secretary of Defense, in his official capacity; KIRSTJEN M. NIELSEN, Secretary of Homeland Security, in her official capacity; and STEVEN MNUCHIN, Secretary of the Treasury, in his official capacity,

Defendants.

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

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION

Date: May 17, 2019
Time: 10:00 AM
Judge: Honorable Haywood S. Gilliam, Jr.
Dept: Oakland
Date Filed: April 4, 2019
Trial Date: Not set

under well-established Ninth Circuit authority, and the balance of equities and the public interest both tip sharply in Plaintiffs' favor. The Court should grant Plaintiffs' motion.

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits of Their Claims.

A. Plaintiffs have properly sought review of Defendants' constitutional violations and *ultra vires* actions.

Defendants contend that Plaintiffs were required to bring their claims under the Administrative Procedure Act ("APA"), and that, if *ultra vires* review is available, Plaintiffs must meet a standard that is "one of the narrowest known to the law." Opp. 12–13 (quoting *Horizon Air Indus., Inc. v. Nat'l Mediation Bd.*, 232 F.3d 1126, 1131 (9th Cir. 2000) (quotation omitted)). Both premises mischaracterize the applicable law. First, the Ninth Circuit has never suggested that the APA is an exclusive remedy for unlawful government action. Second, Defendants improperly attempt to apply the narrow standard of review for claims governed by a statute that *precludes* judicial review here, where no such statutory preclusion exists.

1. Plaintiffs were not required to seek review of Defendants' wall-building scheme under the APA.

Plaintiffs seek to enjoin multiple Defendants from pursuing a multi-agency scheme to construct the contiguous border wall that President Trump has demanded and that Congress has refused to fund. In pursuit of this unconstitutional goal, the White House, the Department of Defense ("DOD"), and the Department of Homeland Security ("DHS") have each undertaken coordinated actions with the overarching and forbidden goal of usurping Congress's powers. The Ninth Circuit has never suggested that the APA divested courts of their equitable power to hear such claims.

In enacting the APA, Congress did not foreclose traditional equitable review of unlawful executive action. "The APA contains no express language suggesting that Congress intended it to displace constitutional claims for equitable relief." *Juliana v. United States*, 339 F. Supp. 3d 1062, 1084 (D. Or. 2018) (citing *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 & n.9 (9th Cir. 1989)). Nor is the APA the exclusive vehicle for nonconstitutional claims. *See Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017) (holding that *Presbyterian Church* is not limited to constitutional claims). It "makes little sense to hold that the APA waives

sovereign immunity for both APA and non-APA claims against federal agencies if the only viable claims are subject to the APA's judicial review provisions." *Juliana*, 339 F. Supp. 3d at 1083; *see* Br. of Federal Court Scholars 13–17.

Plaintiffs' "cause of action, which exists outside of the APA, allows courts to review *ultra vires* actions by the President that go beyond the scope of the President's statutory authority." *Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018). Courts regularly review, outside of the APA context, whether a particular executive action exceeded constitutional or statutory authority. *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187–88 (1993) (reviewing on the merits a challenge to an executive order issued pursuant to § 1182(f) of the Immigration and Nationality Act without reference to the APA); *Leedom v. Kyne*, 358 U.S. 184, 188–89 (1958) (permitting challenge to an Executive Order despite the lack of a final agency action under the APA); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327–28 (D.C. Cir. 1996) (judicial review of a Presidential action through a challenge brought against the Secretary of Labor). Plaintiffs have appropriately sought such review here.

Plaintiffs do not contend that any single agency action is causing their asserted injuries; instead "[t]hey seek review of *aggregate action* by *multiple agencies*, something the APA's judicial review provisions do not address." *Juliana*, 339 F. Supp. 3d at 1084. For example, Defendants' planned construction of walls in Arizona and New Mexico involves multiple coordinated DOD and DHS actions that Plaintiffs challenge as unlawful and unconstitutional. *See, e.g.*, Mot. 15–16 (DOD transfer of personnel funds to counterdrug account is unlawful); Mot. 16–20 (DOD transfer from counterdrug account to DHS to fund wall project is unlawful); Mot. 6–7 (DHS use of unappropriated funds to evade Congress's restriction on wall construction outside the Rio Grande Valley Sector is unlawful); Mot. 8–12 (combined scheme violates the Constitution). And Defendants cannot argue that a challenge to their announced use of § 2808 must be brought under the APA when they concede they have not completed final agency action on it. Opp. 21. Review of such claims is available outside of the APA. *See, e.g.*, *Navajo Nation*, 876 F.3d at1172 (noting that the "'final agency action' limitation applies only to APA claims").[1]

[1] Should the Court find that any of Plaintiffs' claims are more properly considered under the

2. The government mischaracterizes the scope and standard of *ultra vires* review.

The government claims that Plaintiffs must satisfy a "high standard" for challenging defendants' *ultra vires* action by showing the action "contravene[s] clear and mandatory statutory language." Opp. 12–13. As explained below, Plaintiffs would undeniably meet any such standard given the defendants' clear violation of §§ 8005, 284, 2808, and the CAA. *See* Section I.D, *infra*. But, in fact, no such high standard exists for Plaintiffs' claims. The government's citations are inapposite because in those cases a "statutory provision absolutely bars judicial review." *Staacke v. U.S. Sec'y of Labor*, 841 F.2d 278, 281 (9th Cir. 1988); *see Pac. Mar. Ass'n v. Nat'l Labor Relations Bd.*, 827 F.3d 1203, 1207 (9th Cir. 2016) (statute precluded judicial review of National Labor Relations Board decisions outside congressionally mandated framework); *Staacke*, 841 F.2d at 281 (statute's preclusion of judicial review "clear" and "unmistakable"). And far from being the rule for *ultra vires* review, the "narrowest known to the law" standard Defendants claim applies here is uniquely constrained to review of National Mediation Board decisions. As the Ninth Circuit has explained, that standard is more limited than ordinary *ultra vires* review and is "far more limited [even] than the review afforded to NLRB actions" because it is "directly tied to the [Mediation] Board's unique role in labor disputes." *Horizon*, 232 F.3d at 1131–32 (Congress gave the Board "discretion over, and the power to resolve finally, representation disputes," thus depriving federal courts of "jurisdiction over the merits of a representation dispute decided by the Board").

Supreme Court precedent provides no support for the notion that Defendants' proposed standard exists where, as here, Congress has neither precluded judicial review nor provided an alternative remedial scheme. *See, e.g.*, *Sale*, 509 U.S. at 158, 171–77 (applying ordinary canons of statutory construction to claim that return of noncitizens interdicted at sea exceeded authority);

APA, it has the power to treat them as APA claims without amendment of Plaintiffs' complaint. *See, e.g.*, *Alto v. Black*, 738 F.3d 1111, 1117 (9th Cir. 2013) (electing to consider two claims that were not "explicitly denominated as an APA claim" under the APA, 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.*, 478 U.S. 221, 228 & 230 n.4 (1986) (treating petition filed under the Mandamus Act to compel agency action as a claim for relief under the APA); *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.").

Dated: May 2, 2019

Respectfully submitted,

/s/ *Dror Ladin*_____

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EXHIBIT 3

Pages 1 - 112

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Haywood S. Gilliam, Jr., Judge

STATE OF CALIFORNIA, ET AL., Plaintiffs, VS. DONALD J. TRUMP, ET AL., Defendants.	)	**NO. CV 19-00872-HSG**
SIERRA CLUB, ET AL., Plaintiffs, VS. DONALD J. TRUMP, ET AL.,, Defendants.	)	**NO. CV 19-00892-HSG**

Oakland, California
Friday, May 17, 2019

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff States:

STATE OF CALIFORNIA
Department of Justice
Office of the Attorney General
455 Golden Gate Avenue - Suite 11000
San Francisco, CA 94102
BY: JANELLE SMITH, DEPUTY ATTORNEY GENERAL

Reported By: Pamela Batalo-Hebel, CSR No. 3593, RMR, FCRR
Official Reporter

the government is here saying, *We have a lot of really great arguments about how we could use 2808 constitutionally. We are not going to tell you what they are. We are not going to tell you where we are going to build it. Your Honor put in an order asking for the list of projects. That's still up for discussion, but we're working on good arguments.*

I think the idea here is, as we've shown and they haven't contested, the organizations are diverting resources. It's an ongoing harm. They are experiencing it right now. They don't have any assurance that they can stop working on the emergency until they have a court order stopping it, and so as I hear the government, they're not doing anything immediately on 2808 anyway. We would ask for a Court order blocking their use of 2808 at this time, given that they have not remotely justified it, despite announcing it. And if in the future they come up with a good loophole on how to use it, they could come and seek relief from the Court, and we would certainly be happy to brief whatever sections of land they think they can build on.

Then just finally on zone of interest, Your Honor, the government has suggested that 8005 is effectively unreviewable because it has to be thought of as creating a private cause of action which no one in this courtroom has said it does. And their violation of it can't be reviewed either by Congress or by the individuals affected by that transfer.

Respectfully, that can't be right. Congress did not,

through the APA, cut off review of unlawful government action that was traditionally available in equity. The Ninth Circuit has said that over and over and over. And so it's either reviewable in the APA, in which case, Your Honor, we would submit that our case can be considered as to that violation under the APA because we -- the zone of interest is not a particularly demanding test and surely our interest in preserving the decision that Congress denied funding for is not remotely or tangentially related to Congress' interest but is sufficient.

THE COURT: Here I can save time. I agree with your characterization of the law as to the availability of review in equity for executive action alleged to be beyond the scope of statutory or constitutional authority.

MR. LADIN: Thank you very much, Your Honor.

MR. SHERMAN: Thank you, Your Honor. I'll try my best to be brief.

First of all, I want to clear up a misconception that defendants have both about our Complaint and with our motion for preliminary injunction.

We do -- our third cause of action in our Complaint is an ultra vires cause of action. In our -- in our -- in our preliminary injunction motion, we talk about ultra vires as a -- as a separate cause of action, both in page 3, and we have a whole section that says, "Plaintiff States are likely to

succeed on their claims that defendants have acted ultra vires and in excess of their statutory authority."

We think that, as you just acknowledged, it's appropriate to look at it as courts do in equity under ultra vires. We also think that the zone-of-interest test is a very low bar. And even the case that defendants rely on, *Match-E-Be-Nash*, is --

THE COURT: I just don't think the zone-of-interest test applies.

MR. SHERMAN: Great. We can move from that.

I want to get to the statutory constitutional distinction because *Dalton* talked about a very discrete instance in which the claim was that the President was not following the statute. And while we do have causes of action that go to that, the States' causes of action are -- go much beyond that and they -- they assume that even if the defendants acted strictly in accordance with the statute, they're acting contrary to the Constitution.

And really from *City of New York* -- *City of New York* addresses this. This is on page 445 and 446. "The line-item veto act authorizes the President himself to effect the repeal of laws for his only policy reasons without observing the procedures set out in Article I, Section 7. The fact that Congress intended such a result is of no moment. Although Congress presumably anticipated the President might cancel some

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Monday, May 20, 2019

Pamela Batalo Hebel

Pamela Batalo Hebel, CSR No. 3593, RMR, FCRR
U.S. Court Reporter

EXHIBIT 4

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

January 6, 2019

The Honorable Richard Shelby
Chairman
Committee on Appropriations
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The President continues to stress the need to pass legislation that will both reopen the Federal Government and address the security and humanitarian crisis at our Nation's Southwest border. The Administration has previously transmitted budget proposals that would support his ongoing commitment to dramatically reduce the entry of illegal immigrants, criminals, and drugs; keep out terrorists, public safety threats, and those otherwise inadmissible under U.S. law; and ensure that those who do enter without legal permission can be promptly and safely returned home.

Appropriations bills for fiscal year (FY) 2019 that have already been considered by the current and previous Congresses are inadequate to fully address these critical issues. Any agreement for the current year should satisfy the following priorities:

- *Border Wall, Customs and Border Protection (CBP)*: The President requests $5.7 billion for construction of a steel barrier for the Southwest border. Central to any strategy to achieve operational control along the southern border is physical infrastructure to provide requisite impedance and denial. In short, a physical barrier—wall—creates an enduring capability that helps field personnel stop, slow down and/or contain illegal entries. In concert with the U.S. Army Corps of Engineers, CBP has increased its capacity to execute these funds. The Administration's full request would fund construction of a total of approximately 234 miles of new physical barrier and fully fund the top 10 priorities in CBP's Border Security Improvement Plan. **This would require an increase of $4.1 billion over the FY 2019 funding level in the Senate version of the bill.**
- *Immigration Judge Teams – Executive Office for Immigration Review (EOIR)*: The President requests at least $563 million for 75 additional Immigration Judges and support staff to reduce the backlog of pending immigration cases. The Administration appreciates that the Senate's FY 2019 bill provides this level of funding, and looks forward to working with the Congress on further increases in this area to facilitate an expansion of in-country processing of asylum claims.
- *Law Enforcement Personnel, Border Patrol Agent Hiring, CBP:* The President requests $211 million to hire 750 additional Border Patrol Agents in support of his promise to keep our borders safe and secure. While the Senate's FY 2019 bill supports some Border Patrol Agent hiring, fulfilling this request **requires an increase of $100 million over the FY 2019 funding level in the Senate version of the bill.**
- *Law Enforcement Personnel, Immigration and Customs Enforcement (ICE):* The President requests $571 million for 2,000 additional law enforcement personnel, as well as support staff, who enforce our U.S. immigration laws and help address gang violence, smuggling and trafficking, and the spread of drugs in our communities. **This would require an increase of $571 million over the FY 2019 funding level in the Senate version of the bill.**

- *Detention Beds, ICE:* The President requests $4.2 billion to support 52,000 detention beds. Given that in recent months, the number of people attempting to cross the border illegally has risen to 2,000 per day, providing additional resources for detention and transportation is essential. **This would require an increase of $798 million over the FY 2019 funding level in the Senate version of the bill.**
- *Humanitarian Needs:* **The President requests an additional $800 million to address urgent humanitarian needs.** This includes additional funding for enhanced medical support, transportation, consumable supplies appropriate for the population, and additional temporary facilities for processing and short-term custody of this vulnerable population, which are necessary to ensure the well-being of those taken into custody.
- *Counter-narcotics/weapons Technology:* Beyond these specific budgetary requests, the Administration looks forward to working with Congress to provide resources in other areas to address the unprecedented challenges we face along the Southwest border. Specifically, $675 million would provide Non-Intrusive Inspection (NII) technology at inbound lanes at U.S. Southwest Border Land Ports of Entry (LPOE) would allow CBP to deter and detect more contraband, including narcotics, weapons, and other materials that pose nuclear and radiological threats. **This would require an increase of $631 million over the FY 2019 funding level in the Senate version of the bill.**

In addition, to address the humanitarian crisis of unaccompanied alien children (UACs), Democrats have proposed in-country asylum processing for Central American Minors. This would require a statutory change, along with reallocation of State Department funds to establish in-country processing capacities at Northern Triangle consulates and embassies. Furthermore, for the new procedure to achieve the desired humanitarian result, a further corresponding statutory change would be required to ensure that those who circumvent the process and come to the United States without authorization can be promptly returned home. Without the latter change, in-country processing will not reduce the unauthorized flow or successfully mitigate the humanitarian crisis."

These upfront investments in physical barriers and technology, as well as legislation to close loopholes in our immigration system, will reduce illegal immigration, the flow of illicit drugs entering our country and reduce the long term costs for border and immigration enforcement activities.

The Administration looks forward to advancing these critical priorities as part of legislation to reopen the Government.

Sincerely,

Russell T. Vought
Acting Director

EXHIBIT 5

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; and STATE OF WISCONSIN; Plaintiffs, **v.**	4:19-cv-00872-HSG **DECLARATION OF MYLES B. TRAPHAGEN IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

DONALD J. TRUMP, in his official capacity as President of the United States of America; **UNITED STATES OF AMERICA; U.S. DEPARTMENT OF DEFENSE; PATRICK M. SHANAHAN**, in his official capacity as Acting Secretary of Defense; **MARK T. ESPER**, in his official capacity as Secretary of the Army; **RICHARD V. SPENCER**, in his official capacity as Secretary of the Navy; **HEATHER WILSON**, in her official capacity as Secretary of the Air Force; **U.S. DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN**, in his official capacity as Secretary of the Treasury; **U.S. DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT,** in his official capacity as Acting Secretary of the Interior; **U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN**, in her official capacity as Secretary of Homeland Security;

Defendants.

I, Myles B. Traphagen, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration. If called as a witness, I could and would testify competently to the matters set forth below.

2. I am the Borderlands Program Coordinator for Wildlands Network in Tucson, Arizona. I also serve as the Science Coordinator for the Malpai Borderlands Group based in Douglas, Arizona. I reside in Tucson, Arizona.

3. I hold a Bachelor of Arts Degree from the University of California Santa Cruz in Environmental Studies and a Master of Science Degree from the University of Arizona in Geographic Information Systems. The research I conducted for my Master's Degree, "Habitat connectivity for the white-sided jackrabbit (*Lepus callotis*) between the United States and Mexico: The border divides a species," used Landsat satellite imagery over a 30-year period from 1984 to 2014 to evaluate whether connectivity existed between the U.S. and Mexico populations of the white-sided jackrabbit.

4. Since 1996, I have conducted field surveys, inventories and research along the US and Mexico border region and in Mexico. From 1996 to 1998 I worked for the U.S. Fish and Wildlife Service ("Service" or "FWS") at San Bernardino National Wildlife Refuge in southeast Arizona conducting bird surveys, native fish surveys and recovery of Rio Yaqui fishes which reach their northernmost distribution in Cochise County of southeast Arizona.

5. From 1998 to 2008, I conducted research as a consultant for the U.S. Forest Service Rocky Mountain Research Station and Malpai Borderlands Group on the effects of fire, grazing and climate in the borderlands of southwest New Mexico and southeast Arizona. During this time period I also began researching the white-sided jackrabbit (*Lepus callotis gaillardi*), a State of New Mexico Threatened species that reaches its northern distribution in Hidalgo County, New Mexico, commonly referred to as the "Bootheel."

6. From 2000 to 2008, I worked for both Turner Enterprises and the Turner Endangered Species Fund in New Mexico inventorying vegetation, monitoring bison reintroduction, prairie dog reintroduction and rewilding the Bolson tortoise from Durango, Mexico. I have held permits from the New Mexico Department of Game and Fish to survey

mammals in the state.

7. From 2007 to 2014, I was a U.S. Bureau of Land Management ("BLM") Authorized Biologist and worked as a consultant on numerous renewable energy projects in California and Nevada surveying and translocating desert tortoise.

8. In 2010 and 2011, I conducted research for the New Mexico Department of Game and Fish to assess the population status of the white-sided jackrabbit in New Mexico. The results of this survey suggested that roadkill by the U.S. Customs and Border Patrol ("CBP" or "Border Patrol") was a significant factor leading to a threefold population decline in less than decade.

9. I have led botanical survey crews in California, Nevada, Arizona, Nebraska, South Dakota and New Mexico and have produced over 100 reports for agencies and private groups, and have written several publications, book chapters and maps concerning wildlife and plant species.

10. My current employment as Borderlands Program Coordinator with Wildlands Network involves researching and advocating for wildlife corridors and connectivity. This entails a significant amount of work in Mexico on projects such as trail camera trapping, mapping, and designing projects for mitigating road and highway impacts to wildlife and enhancing habitat connectivity.

11. As the Science Coordinator the Malpai Borderlands Group, I implement research and monitoring projects such as climate and weather monitoring and fire and grazing research. I also review and coordinate a large array of projects that relate directly to conservation projects in the borderlands of Arizona and New Mexico.

12. I have analyzed the border-infrastructure projects outlined in the February 25, 2019, memorandum regarding "Request for Assistance Pursuant to 10 U.S.C. § 284" that the U.S. Department of Homeland Security ("DHS") directed to the U.S. Department of Defense ("DOD"), in which DHS requests DOD's assistance in constructing pedestrian fencing along approximately 218 miles of the U.S.- Mexico border. DHS has identified eleven separate projects for border areas located in California, Arizona and New Mexico ("Section 284 Projects").

13. One of the Section 284 Projects, El Paso Project 1, is located in Doña Ana and

Luna Counties in New Mexico, and involves removing 46 miles of vehicle barrier fencing and replacing it with pedestrian fencing. El Paso Project 1 also includes construction of roads and installation of lighting.

14. In this declaration, I provide several examples specific to the El Paso Project 1 site, and to the border region more generally, to illustrate how the Section 284 Projects and El Paso Project 1 will cause irreparable harm to wildlife, including to endangered species like the Mexican Grey Wolf (*Canis lupus baileyi*).

15. The specific design of border walls and fences significantly affects how the walls/fences will impact wildlife movement. There are numerous types of fencing that fall into two categories according to what type of traffic they are intended to exclude or deter: vehicle and pedestrian. Within those two types there are many designs depending upon when they were built.

16. Vehicle Fencing: Made of either short steel bollards or "Normandy-style" steel crossbars, these are designed to deter "drive-thrus" of vehicles. They are the least detrimental to wildlife because they allow most animals to cross under or between them. However, they can be a formidable barrier for large animals like bison, Sonoran pronghorn or bighorn sheep. Pronghorn do not jump and can have difficulty passing beneath the vehicle fencing. The Janos-Hidalgo bison herd had roamed between southwest New Mexico and Chihuahua, Mexico for about 100 years, but their movements were inhibited when the Normandy-vehicle barrier was installed along the New Mexico-Mexico border. The herd has not been seen in several years.

17. Pedestrian fencing: This fencing is designed to deter and impede people, and therefore it is effective at impeding most animals from passing through. It ranges from 10 to 18 feet high, although 30-foot replacement fencing is currently planned for San Diego and some areas of Arizona. The style of pedestrian fencing that DHS currently favors is known as steel bollard. The most common type employed is 6 x 6 inch diameter square steel posts filled with concrete. The spacing between the steel posts is 4 inches. The height of the most recent border-wall-infrastructure projects is 18 feet, but some recent plans for replacement fencing call for 30-foot bollards. The bollard fencing recently installed in the twenty-mile section west of Santa Teresa, New Mexico, an area that is adjacent to and just east of the El Paso Project 1 site, is 18

feet high with 4-inch gaps. The details of these fencing designs are extremely important to understand in order to evaluate the effect they may have upon wildlife movement, migration and connectivity.

18. Mexican Gray Wolf (*Canis lupus baileyi*): The Mexican gray wolf is the rarest subspecies of gray wolf in North America. It was once common throughout the southwestern U.S., but was nearly eliminated from the wild by the 1970s. The Mexican gray wolf is listed as endangered under the Endangered Species Act ("ESA") (80 FR 2488). El Paso Project 1 will harm the Mexican gray wolf and significantly impact its recovery by dividing its habitat and impeding the wolf's movement.

19. For El Paso Project 1, the Trump administration plans to build an impermeable bollard steel wall, precluding all animals greater than 4" wide from passing through. This wall will prevent any connection between wolves from the U.S. and Mexico which is critical for the wolf's recovery. The Mexican Wolf Recovery Plan-First Revision, which is a wildlife plan the Service approved under the ESA to facilitate the wolf's revival, calls for a minimum of 320 wolves in the United States and 200 in Mexico to meet recovery goals. Ensuring that wolves can access their entire range in the U.S. and Mexico is important to the wolf's recovery because it allows for greater utilization of habitat and prey availability and will promote the establishment of meta-population connectivity.

20. Carroll et al (2014) state, "Restoring connectivity between fragmented populations is an important tool for alleviating genetic threats to endangered species. Yet recovery plans typically lack quantitative criteria for ensuring such population connectivity. We demonstrate how models that integrate habitat, genetic, and demographic data can be used to develop connectivity criteria for the endangered Mexican wolf (*Canis lupus baileyi*), which is currently being restored to the wild from a captive population descended from 7 founders. We used population viability analysis that incorporated pedigree data to evaluate the relation between connectivity and persistence for a restored Mexican wolf meta-population of 3 populations of equal size. Decreasing dispersal rates greatly increased extinction risk for small populations (<150-200), especially as dispersal rates dropped below 0.5 genetically effective migrants per

generation." Impeding connectivity between the U.S. and Mexican populations runs counter to published research that advises otherwise. An impenetrable border wall hamstrings binational efforts that have occurred for 30 years.

21. Under the ESA, critical habitat is sometimes designated for listed species. But for the Mexican Wolf, the Service instead re-introduced the species to Arizona and New Mexico as an ESA section 10(j) non-essential experimental population in order to allow for more flexibility in the recovery process within the 5,000 square-mile Mexican Wolf Experimental Population Area ("MWEPA"). On January 16, 2015, the Service revised the regulations for the non-essential experimental population of the Mexican wolf under section 10(j) to improve the population's ability to contribute to recovery (80 FR 2512). With the encouragement of Southwestern states including New Mexico, and based on the Service's collaborative relationship with Mexico, recovery planning was reinitiated in December 2015, focusing south of Interstate 40 in Arizona and New Mexico and into Mexico, which encompasses the historical range of the Mexican wolf.

22. Newly Published Taxonomic Status of the Mexican Gray Wolf: On March 28, 2019, the National Academies of Sciences, Engineering, and Medicine released their findings on *Evaluating the Taxonomic Status of the Mexican Gray Wolf and the Red Wolf.* The report concludes that the Mexican gray wolf is a valid taxonomic subspecies of the gray wolf. The Mexican gray wolf's size, morphology (physical characteristics such as head shape), and color distinguish it from other North American wolves. Genetic and genomic analyses confirm that the Mexican gray wolf is the most genetically distinct subspecies of gray wolf in North America. The Mexican gray wolf represents a smaller form of the gray wolf and inhabits a more arid ecosystem than the gray wolf. Furthermore, the current managed population of Mexican gray wolves are direct descendants of the last remaining wild Mexican gray wolves; the known history of current Mexican gray wolves suggests that there is continuity between them and the historic lineage. There is no evidence that the genome of the Mexican gray wolf includes DNA from domestic dogs. Preserving and maintaining Mexican wolf habitat in Mexico and the U.S. is critical to ensuring the survival of this unique and rare subspecies.

23. Long Distance International Wolf Dispersal, including in the El Paso Project 1

Site: Mexican gray wolf habitat exists on both sides of the U.S.-Mexico border, and wolves cross the border to access this habitat. In January of 2017, a GPS-collared male Mexican Gray Wolf (M1425), that was part of the U.S.-Mexico Bi-national Recovery Program in Mexico, crossed the border from Chihuahua and spent four days in the U.S. before returning to its original starting location in Mexico. While in the U.S., the wolf crossed the entire West Potrillo Mountains portion of the Organ Mountains-Desert Peaks National Monument in New Mexico, and associated wilderness areas and Areas of Critical Environmental Concern ("ACECs") in New Mexico. Additionally, it occupied both Zones 1 and 2 of the Mexican Wolf Experimental Population Area in New Mexico. The entire journey totaled 600 miles, of which 100 were in the U.S. (See Exhibit A attached to this declaration, which is a map I generated using GPS data to depict Wolf M1425's journey which also shows the El Paso Project 1 site).

24. The most important part of Wolf M1425's epic excursion, in regard to this case, is that it crossed the border at the proposed El Paso Project 1 site. Furthermore, it crossed back into Mexico through an unfenced section of the border at El Paso-Juarez. This location is a steep and rocky rugged mountain known as Mt. Cristo El Rey, and it has remained unfenced due to its topography. If El Paso Project 1 is completed, then the prospects of Mexican Gray Wolves dispersing and connecting to their northern counterparts will be next to zero, which will present significant obstacles to the long-term genetic fitness of the species at large and decrease the possibility that a healthy meta-population can grow (referenced above in paragraph 20 which describes the work of Carroll et al).

25. Additional Mexican Wolves Dispersing to the U.S. from Mexico: Wolf M1425 is not alone in making cross-border journeys between the U.S. and Mexico. In 2017, another Mexican gray wolf was documented crossing the U.S.-Mexico border. Like Wolf M1425, this second wolf also originated from Mexico and wore a GPS collar. This wolf, a female labeled F1530, was born in 2016 at a captive-wolf-breeding facility in Cananea, Mexico, and was released in October 2016 in Chihuahua, Mexico, approximately 90 to 100 miles south of the New Mexico border. The last collar radio transmission from Mexico was from February 14, 2017, 21 miles south of the New Mexico international border, as at that time the GPS collar became

inoperable. She was later observed in the U.S. in March, 2017, and was captured by the Interagency Wolf Field Team on March 26, 2017, near the Chiricahua Mountains in Cochise County, Arizona. She was then relocated to a wolf-breeding facility at the Sevilleta National Wildlife Refuge in New Mexico. This wolf likely crossed the border in the lower San Bernardino Valley near San Bernardino National Wildlife Refuge in Arizona. This stretch of border currently has a vehicle barrier, but under the proposed Tucson Project 3, one of the Section 284 Projects, steel bollard-pedestrian fencing will be installed, which will preclude any animals larger than four inches in width from crossing the border. The combined impact of the Section 284 Projects, especially in Arizona and New Mexico, will have devastating impacts on the connectivity between Mexican wolf habitat in the U.S. and Mexico and will harm the species' recovery.

26. Secondary effects of Border Patrol activities on wildlife: In addition to border barriers, the uncontrolled perennial presence of Border Patrol can severely impact animals. I recorded evidence of this harm to species in Hidalgo County, New Mexico in an area west of the El Paso Project 1 site. In that area Border Patrol vehicles outnumbered private vehicles 37 to 2 during a survey I conducted on Hidalgo County Road 1. Border Patrol vehicles result in roadkill deaths for numerous species such as the white-sided jackrabbit, which in the U.S. only occurs in Hidalgo County. A rise in the number of Border Patrol Agents in this same area (from 50 in 2000 to 300 in 2010), also led to more roadkill incidents due to increased vehicle use. I expect the same impacts will occur to species such as the Western Narrow-mouthed Toad (*Gastrophyrne olivacea*), a listed endangered species in New Mexico, that was documented by the New Mexico Game & Fish Department along Highway 9 in Luna County near the El Paso Project 1 site. The improved roads planned for El Paso Project 1 will allow Border Patrol vehicles to travel at faster speeds which will likely cause more roadkill to sensitive species like the Western Narrow-mouthed toad which often occupies low-lying depressions in the road that fill after warm-season monsoon rains that occur between June and September.

27. Wildlife Connectivity and Corridors: Wildlife connectivity and corridors should be considered when evaluating a project's environmental impacts, including under the National Environmental Policy Act ("NEPA"), because habitat connectivity is critical to many species'

survival. New Mexico recognizes the importance of wildlife connectivity, and on March 28, 2019, New Mexico's Governor signed the Wildlife Corridors Act into law. The Wildlife Corridors Act requires New Mexico state agencies to create a "wildlife corridors action plan" to protect species' habitat. Portions of El Paso Project 1 cross New Mexico State Trust Lands (as shown in Exhibit B to this declaration), and the planned pedestrian fencing disrupts habitat corridors in New Mexico—contrary to the Wildlife Corridors Act. Also, in my view the Mexican gray wolf is a "species of concern" under the Act due to wolf mortality from vehicles on New Mexico's roads, which include roads along the border that will be constructed as part of El Paso Project 1.

28. New Mexico's State Trust Lands in and around the El Paso Project 1 site, including within the Organ Mountains-Desert Peaks National Monument, the West Potrillo Mountains Wilderness Study Area, and the Alden Lava Flow Wilderness Study Area, form an important wildlife corridor for numerous species such as mule deer, javelina, pronghorn, bighorn sheep, mountain lion, bobcat, coyote, bats, quail and other small game like rabbits. This area is one of the largest undisturbed patches of Chihuahuan Desert grassland in the southwest and forms an important ecosystem and crucial habitat for rare birds such as the Aplomado falcon, which is present in both Luna and Doña Ana Counties, and Baird's sparrow.

29. Organ Mountains-Desert Peaks National Monument: The BLM currently manages all of the public lands within this new national monument for a range of multiple uses, including grazing, conservation of natural and archeological resources, and outdoor recreation activities such as hunting, hiking, biking, and camping. Statewide, BLM-New Mexico hosted 2.9 million visitors at 28 recreation sites in fiscal year 2013. Recreation on BLM-managed lands and waters in New Mexico supported more than 1,900 jobs and contributed more than $172 million to the state's economy in fiscal year 2012. The portions of this monument that would be impacted by a border wall include the Greater Potrillo Mountains and Alden Lava Wilderness Study Areas, which are both located approximately 30 miles southwest of Las Cruces. This monument and BLM Wilderness Study Areas lie only ¼ mile north of the proposed El Paso Project 1 site. Within this federally managed area there are 35 parcels of New Mexico State Trust Lands, which total

23,078 acres (See Exhibit B to this declaration).

30. New Mexico Game Management Unit 25: The large expanse of land ranging from the proposed El Paso Project 1 site on the border, north to Interstate 10 near Deming (33 miles north of the border), and east to Las Cruces, NM and the Texas border, constitutes a very large New Mexico Game and Fish Department Game Management Unit known as GMU-25. It is over 2 million acres in size, of which about 1.25 million of are federal and state public lands. GMU-25 contains 337 parcels of New Mexico State Trust Land totaling 268,821 acres. (See Exhibit B to this declaration). These State Trust Lands are a vital engine for the local economy. Important game animals like mule deer and pronghorn rely upon this vast landscape that is connected to an equally large unfragmented grassland in Mexico. Both countries act as sources and sinks for wildlife, largely as a function of the highly variable rainfall that serves as one of the primary drivers of local and regional animal distribution.

31. In a changing climate where drought has become a frequent occurrence in the Southwest, wildlife corridors are more important than ever for ensuring species' survival. In addition to the Mexican gray wolf discussed above, a perfect example in the region of interest to this case, which will be impacted by the Section 284 Projects, is the pronghorn antelope (*Antilocapra Americana*). The pronghorn relies upon "forbs" which are small annual plants that are dependent upon seasonal rainfall. The West Potrillo mountains region, which is located in Luna and Doña Ana Counties, along with the vast grasslands of Chihuahua to the south, is a large area that is needed to fulfill the requirements of a species in search of infrequent and highly variably distributed precipitation. In Mexico, the Chihuahuan subspecies of the American pronghorn (*Antilocapra americana mexicana*) is listed as endangered. For millennia this species has roamed the borderlands unimpeded by barriers. Major efforts are underway in Chihuahua to recover the species, and re-introductions have occurred in the past year not far to the south. The recovery of the Chihuahuan pronghorn in the region may be reliant upon its ability to be able to roam long distances across the grasslands in search of forage.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 4, 2019, at Tucson, Arizona.

Myles B. Traphagen

EXHIBIT 6

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SALLY MAGNANI
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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA; STATE OF COLORADO; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MARYLAND; COMMONWEALTH OF MASSACHUSETTS; ATTORNEY GENERAL DANA NESSEL ON BEHALF OF THE PEOPLE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; COMMONWEALTH OF VIRGINIA; and STATE OF WISCONSIN; Plaintiffs,	4:19-cv-00872-HSG **DECLARATION OF JESSE R. LASKY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

v.

DONALD J. TRUMP, in his official capacity as President of the United States of America; **UNITED STATES OF AMERICA; U.S. DEPARTMENT OF DEFENSE; PATRICK M. SHANAHAN**, in his official capacity as Acting Secretary of Defense; **MARK T. ESPER**, in his official capacity as Secretary of the Army; **RICHARD V. SPENCER**, in his official capacity as Secretary of the Navy; **HEATHER WILSON**, in her official capacity as Secretary of the Air Force; **U.S. DEPARTMENT OF THE TREASURY; STEVEN T. MNUCHIN**, in his official capacity as Secretary of the Treasury; **U.S. DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT,** in his official capacity as Acting Secretary of the Interior; **U.S. DEPARTMENT OF HOMELAND SECURITY; KIRSTJEN M. NIELSEN**, in her official capacity as Secretary of Homeland Security;

Defendants.

I, JESSE R. LASKY, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration. If called as a witness, I could and would testify competently to the matters set forth below.

2. I have been an Assistant Professor of Biology at Pennsylvania State University since 2015. I obtained an A.B. from Kenyon College and a Ph.D. from the University of Texas at Austin. I was subsequently an Earth Institute Fellow at Columbia University and was awarded the American Society of Naturalists Young Investigator Award in 2015. My scientific background is in spatial ecology and evolution, including biogeography, animal dispersal, and conservation biology. I have published over 40 peer reviewed papers, many in prestigious journals such as *Science* and *Proceedings of the National Academies of Sciences.* I have previously published peer-reviewed research in the journal *Diversity and Distributions* on the potential impacts to animal conservation of barriers along the USA-Mexico border[1].

3. Major construction projects, border infrastructure, and physical barriers pose a number of threats to wildlife. These threats range from short-term rapid destruction of animal habitat and populations to longer-term threats of extinction. My research in this field has been primarily focused on investigating the potential impacts of border barriers and associated infrastructure on wildlife.

4. In addressing Defendants' proposed "El Paso Project 1" border wall construction project ("Project"), I begin with a brief overview of the conceptual background for conservation implications of border barriers and associated infrastructure. I then discuss the consequential environmental impacts stemming from the proposed Project.

5. Immediate, short-term threats of border barrier construction come partly from their inevitable disturbance and destruction of natural habitats for wildlife. Much of the USA-Mexico border runs through wilderness and natural habitats for diverse wildlife, including the proposed Project region. To construct major barriers, such as a pedestrian fence, roads must be built and maintained, often across uneven terrain. As a result, wide swathes of natural vegetation and

[1] Jesse R. Lasky *et al.*, *Conservation biogeography of the US–Mexico border: a transcontinental risk assessment of barriers to animal dispersal*, 17 Diversity & Distributions 673, 687 (2011).

habitat for wildlife are destroyed. The rapid construction of roads over uneven terrain often results in dramatic erosion, destroying additional vegetation in a dry region with sensitive vegetation. Animal populations inhabiting these areas will be destroyed or displaced, either due to injury from construction equipment or the destruction of their habitat. The long-term presence of extensive bright lighting for border patrol and vegetation-free areas along border wall corridors will also drive away many species of animals from these areas.

6. Border barriers pose an additional immediate threat to populations of large animals that must move long distances to satisfy their needs for food, water, and mates, species which would have no ability to fit through small openings between bollards. If populations of these animals are blocked from foraging for food, water, and mates at the border, the result will likely be death, reduced fertility, and population decline. Examples of such species in the area of the proposed Project include Cougar, Bobcat, Mule and White-tailed Deer, Collared Peccary (Javelina), American Badger, and Gray Fox. Although these species are not in danger of global extinction, they play vital roles in their ecosystems. The addition of border barriers threatens their populations and hence ecosystems in the border region.

7. There are multiple species of large mammal in the region of the proposed Project whose populations are already officially threatened. Jaguar is considered Endangered by the US Fish and Wildlife Service. Jaguars were formerly widespread in the southwest US, but were extirpated by hunting. In recent decades, small numbers of individuals have dispersed north from breeding populations in northern Mexico. Some of these jaguars have recently reached mountains in southwestern New Mexico west of Luna county. If further long-term recolonization of jaguars continues, areas in Doña Ana and Luna counties include suitable habitat. Construction of the proposed Project would stop jaguar movement through the region, potentially limiting recolonization. The Mexican wolf is also considered Endangered by US FWS. It was once widely distributed across northwest Mexico and the southwest US. Today the species is limited to mountains straddling the Arizona-New Mexico borders with some recent small reintroductions in Mexico. Doña Ana and Luna counties as well as the locations across the border in Mexico contain suitable habitat for Mexican wolf. The long-term recolonization and repopulation of the region

would be limited by border barriers in the region.

8. Border barriers stop animal dispersal and thus also pose long term threats of extinction and population decline. There are two primary long-term threats of barriers. First, reduced dispersal prevents the recolonization of appropriate habitat following local population extinctions, which can lead to extinction of a whole metapopulation and the species. To explain: many species exist as metapopulations, which are collections of individual separate populations distributed across a landscape. These individual populations may disappear from time to time, perhaps due to a local disease epidemic or myriad other forces. But animal dispersal across a landscape allows these populations to be re-founded by individuals from surviving populations. If dispersal is prevented at the border, this process stops, and can lead the entire set of populations to go extinct over the long term. Second, preventing dispersal causes an erosion of genetic diversity within populations. If border barriers isolate animal populations on either side, the individual populations on a given side will lose genetic diversity over time. A loss of genetic diversity makes populations more vulnerable to extinction because it limits their ability to adapt to new diseases and changing environments, because deleterious mutations accumulate, and because inbreeding often reduces fitness.

9. The height of the proposed Project's wall and lighting pose major problems for the movement of birds and bats. Although these animals have the ability to fly over barriers, many small birds and bats avoid flying high in order to avoid predators (*e.g.* hawks and owls). The bollards of the proposed Project, at 30 feet high, would pose major barriers to many of these species. For example, researchers found that Ferruginous Pygmy-Owls (a transboundary species) in northern Sonora did not typically fly higher than 13 feet, and flights above vegetation were extremely rare[2]. Similarly, many birds and bats active at night avoid clearings with bright lights.

10. Species with small ranges are particularly vulnerable to extinction due to the various threats above. If animal movement is stopped by the border, then the species ranges will be effectively independent on either side, and the species' vulnerability to extinction will be

[2]Aaron D. Flesch *et al.*, *Potential Effects of the United States-Mexico Border Fence on Wildlife*, 24 Conservation Biology 171, 181 (2009).

determined by the size of the larger remaining sub-range (US or Mexican). I measured the larger portion of the species range for each amphibian, reptile, and non-volant mammal on either side of the border. The proposed Project intersects the range of 17 species whose largest remaining sub-range is less than 500,000 km^2, a relatively small size associated with greater risk of extinction. These species include three species whose largest remaining sub-range is less than 100,000 km^2, an even more threatening situation: Desert Pocket Gopher, New Mexico Whiptail, and Texas Lyre Snake.

11. There are a large number of species potentially impacted by these barriers. This region is one of the most biodiverse in the United States. This is particularly true of non-volant terrestrial vertebrate species such as amphibians, reptiles, and non-flying mammals that are most likely to be impacted by barriers to movement. Reptiles and mammal species of the borderlands in particular reach peak diversity in this region. I found that the new barriers of the proposed Project intersect the ranges of 53 non-volant mammal, 38 reptile, and 10 amphibian species.

12. The proposed Project runs directly through habitat and populations of Ornate Box Turtle and the Desert Pocket Gopher, both of which are considered Near Threatened by the International Union for Conservation of Nature ("IUCN"). Additionally, the project intersects the range of the Banner-tailed Kangaroo Rat, which is considered Near Threatened by the IUCN and individuals of which have been recently recorded in this region.

13. In Luna and Doña Ana counties, the locations of El Paso Project 1, there are 87 species of animals considered by the State of New Mexico to be Endangered, Endemic, Sensitive taxa, Species of Greatest Conservation Need, or Threatened. These designations signal that these species are potentially threatened by new major activities that destroy their habitat or limit their dispersal. Thus the proposed Project poses an important threat to these species.

14. There are at least two plant species, both cactus, considered by the State of New Mexico to be Endangered that are also found in the habitat surrounding El Paso Project 1: Nightblooming Cereus and Dune Pricklypear. This designation signals that these already imperiled species are severely threatened by habitat destruction and erosion that will be caused by border wall construction and associated activities.

15. In summary, the location of the proposed Project contains many species of wildlife potentially impacted by the Project. Many of these species are already under major threats of extinction and extirpation, thus the Project has the potential to do major damage to biodiversity and ecosystems in the region.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 4, 2019, at State College, Pennsylvania.

JESSE R. LASKY

EXHIBIT 7

SECOND DECLARATION OF KENNETH P. RAPUANO

I, KENNETH P. RAPUANO, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Assistant Secretary of Defense for Homeland Defense and Global Security (ASD(HD&GS)). Among other duties, which are generally reflected in Department of Defense (DoD) Directive 5111.13, I am responsible for developing, coordinating, and overseeing implementation of DoD policy for plans and activities related to defense support of civil authorities. On April 5, 2018, the Secretary of Defense designated the ASD(HD&GS) to manage the then-newly established DoD Border Security Support Cell. The DoD Border Security Support Cell is the focal point and integrator for all requests for assistance, taskings, and information related to DoD support pursuant to the President's April 4, 2018, memo, "Securing the Southern Border of the United States."

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

3. I previously executed a declaration dated April 25, 2019, that explained the status of DoD's support to the Department of Homeland Security (DHS) pursuant to 10 U.S.C. § 284 in response to a February 25, 2019, request from DHS for assistance in blocking up to 11 specific drug-smuggling corridors along certain portions of the southern border of the United States. The declaration explained that, on March 25, 2019, the Acting Secretary of Defense agreed to provide assistance to DHS to construct fencing to block drug-smuggling corridors in three project areas along of the southern border of the United States. The project areas are identified and described in my declaration as Yuma Sector Project 1, Yuma Sector Project 2, and El Paso Sector Project 1. The declaration explained that the Acting Secretary of Defense decided to use DoD's general transfer authority under section 8005 of the Department of Defense Appropriations Act, 2019, and section 1001 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 to transfer $1 billion between DoD appropriations to fund the approved projects.

4. My prior declaration also explained that the project identified as Yuma Sector Project 2 would be constructed pursuant to section 284 with money transferred pursuant under section 8005 of the Department of Defense Appropriations Act, 2019, and section 1001 of the John S. McCain National Defense Authorization Act for Fiscal Year. The U.S. Army Corps of Engineers has since decided not to fund or construct Yuma Project 2 under these authorities.

5. My prior declaration also explained that DoD was in the process of conducting a review of funding that might be available to support up to $1.5 billion of additional section 284 projects requested by DHS. My declaration stated that decisions regarding future transfer of funds and approval of additional DHS-requested projects under section 284 were expected in May 2019.

6. On May 9, 2019, the Acting Secretary of Defense approved four additional section 284 projects to block drug-smuggling corridors based on DHS's February 25, 2019, request. *See*

Exhibit A. One project is located in California (El Centro Project 1), and three projects are located in Arizona (Tucson Sector Projects 1, 2, and 3).

7. Also on May 9, 2019, the Acting Secretary of Defense decided to use DoD's general transfer authority under section 8005 of the Department of Defense Appropriations Act, 2019, and section 1001 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, as well as DoD's special transfer authority under section 9002 of the Department of Defense Appropriations Act, 2019, and section 1512 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, to transfer funds between DoD appropriations to fund the four newly approved projects. Specifically, he determined that the four projects will be funded through a transfer of $1.5 billion to the counter-narcotics support line of the Drug Interdiction and Counter-Drug Activities, Defense, account. *See* Exhibit B. Source accounts and explanations as to why the funds were available are described in more detail in Exhibit C.

8. On May 10, 2019, the Under Secretary of Defense (Comptroller)/Chief Financial Officer initiated the reprogramming to transfer funds pursuant to the above authorities. Congress was promptly notified of this transfer on May 10, 2019. *See* Exhibit C.

9. On May 10, 2019, the designated $1.5 billion was transferred from the Drug Interdiction and Counter-Drug Activities, Defense, account to the Operation and Maintenance, Army, account for use by the U.S. Army Corps of Engineers to undertake fence and road construction and lighting installation for the four projects approved on May 9, 2019.

10. The U.S. Army Corps of Engineers expects to award two contracts by May 16, 2019. One contract will be for Tucson Sector Projects 1, 2, and 3, approved on May 9, 2019. A second contract will be for El Centro Project 1 and Yuma Project 1, approved on May 9, 2019 and March 25, 2019, respectively.

11. The U.S. Army Corps of Engineers currently plans that construction of the four approved section 284 projects will begin no earlier than 45 days after the award of the contracts.

***

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 13, 2019

KENNETH P. RAPUANO

EXHIBIT A

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

5/9/19

MEMORANDUM FOR ACTING SECRETARY OF HOMELAND SECURITY

SUBJECT: Additional Support to the Department of Homeland Security

The Department of Defense appreciates that the Department of Homeland Security (DHS) confronts a continuing and worsening crisis at the southern border. As I indicated in my March 25, 2019 letter, in which I approved the undertaking of three projects to support to your Department's effort to secure the southern border by blocking drug-smuggling corridors along the border through the construction of roads and fences and the installation of lighting, the Department of Defense has continued to assess the availability of resources and other factors in order to determine how additional similar support can be provided to DHS.

10 U.S.C. § 284(b)(7) gives the Department of Defense the authority to construct roads and fences and to install lighting to block drug-smuggling corridors across international boundaries of the United States in support of counterdrug activities of Federal law enforcement agencies. For the following reasons, I have concluded that the support requested on February 25, 2019 satisfies the statutory requirements:

- DHS/Customs and Border Protection (CBP) is a Federal law enforcement agency;
- DHS has identified each project area as a drug-smuggling corridor; and
- The work requested by DHS to block these identified drug-smuggling corridors involves construction of fences (including linear ground detection systems), construction of roads, and installation of lighting (supported by grid power and including imbedded cameras).

Accordingly, at this time I have decided to undertake 4 additional projects, namely El Centro Sector Project 1, Tucson Sector Project 1, Tucson Sector Project 2, and Tucson Sector Project 3, by constructing 78.25 miles of 30-foot pedestrian fencing, constructing and improving roads, and installing lighting as described in the February 25, 2019 request.

As the proponent of the requested action, CBP will serve as the lead agency for environmental compliance and will be responsible for providing all necessary access to land. I request that DHS place the highest priority on completing these actions for the projects identified above. DHS will accept custody of the completed infrastructure, account for that infrastructure in its real property records, and operate and maintain the completed infrastructure.

The Commander, U.S. Army Corps of Engineers, is authorized to coordinate directly with DHS/CBP and immediately begin planning and executing up to $1.5B in support to DHS/CBP by undertaking the projects identified above.

Patrick M. Shanahan
Acting

cc:
Secretary of the Army
Chairman of the Joint Chiefs of Staff
Under Secretary of Defense for Policy
Under Secretary of Defense (Comptroller)/Chief Financial Officer
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant Secretary of Defense for Homeland Defense and Global Security
Assistant to the Secretary of Defense for Public Affairs
Commander, U.S. Army Corps of Engineers