

No. 19-16102, -16300, -16299, -16336

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

SIERRA CLUB, et al.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,
Defendants-Appellants.

STATE OF CALIFORNIA, et al.,
Plaintiffs-Appellees-Cross-Appellants,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,
Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of California

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JOSEPH H. HUNT
Assistant Attorney General
HASHIM M. MOOPAN
JAMES M. BURNHAM
Deputy Assistant Attorneys General
H. THOMAS BYRON III
ANNE MURPHY
COURTNEY L. DIXON
Attorneys, Appellate Staff
Civil Division, Room 7243
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-8189

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, et al.,
Plaintiffs,
v.
DONALD J. TRUMP, et al.,
Defendants.


Case No. [19-cv-00892-HSG](#)

JUDGMENT

On June 28, 2019, the Court granted in part and denied in part Plaintiffs’ motion for partial summary judgment. Pursuant to Federal Rule of Civil Procedure 58, the Court hereby ENTERS partial judgment in favor of Plaintiffs and against Defendants on the grounds stated in the Court’s order. *See* Dkt. No. 185. As discussed in that order, the Court certifies this judgment for immediate appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: 6/28/2019


HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, et al.,
Plaintiffs,
v.
DONALD J. TRUMP, et al.,
Defendants.

Case No. [19-cv-00892-HSG](#)

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT, CERTIFYING JUDGMENT FOR APPEAL, AND DENYING REQUEST TO STAY

Re: Dkt. Nos. 168, 181

Pending before the Court are cross-motions for partial summary judgment filed by Plaintiffs Sierra Club and Southern Border Communities Coalition, and Defendants Donald J. Trump, in his official capacity as President of the United States; Mark T. Esper, in his official capacity as Acting Secretary of Defense¹; Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security²; and Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury, briefing for which is complete. Dkt. Nos. 168 (“Pls.’ Mot.”), 181 (“Def.’ Mot.”), 192 (“Pls.’ Reply”). The only issue presently before the Court concerns Defendants’ intended reprogramming of funds under Sections 8005 and 9002 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018), and subsequent use of such funds under 10 U.S.C. § 284 (“Section 284”) for border barrier construction.³

¹ Acting Secretary Esper is automatically substituted for former Acting Secretary Patrick M. Shanahan. *See* Fed. R. Civ. P. 25(d).

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

³ The relevant background for this motion is essentially unchanged since the Court’s preliminary injunction order. The Court thus incorporates in full here the factual background and statutory framework as set forth in that order. *See* Dkt. No. 144.

1 After carefully considering the parties' arguments, the Court **GRANTS IN PART** and
2 **DENIES IN PART** Plaintiffs' motion, and **DENIES** Defendants' motion.⁴ The Court also
3 certifies this judgment for immediate appeal pursuant to Rule 54(b) of the Federal Rules of Civil
4 Procedure. Last, the Court **DENIES** Defendants' request for a stay of any injunction pending
5 appeal.

6 **I. LEGAL STANDARD**

7 Summary judgment is proper when a "movant shows that there is no genuine dispute as to
8 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).
9 A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson*
10 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And a dispute is "genuine" if there is evidence
11 in the record sufficient for a reasonable trier of fact to decide in favor of the nonmoving party. *Id.*
12 But in deciding if a dispute is genuine, the court must view the inferences reasonably drawn from
13 the materials in the record in the light most favorable to the nonmoving party, *Matsushita Elec.*
14 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986), and "may not weigh the evidence
15 or make credibility determinations," *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997),
16 *overruled on other grounds by Shakur v. Schriro*, 514 F.3d 878, 884–85 (9th Cir. 2008). If a court
17 finds that there is no genuine dispute of material fact as to only a single claim or defense or as to
18 part of a claim or defense, it may enter partial summary judgment. Fed. R. Civ. P. 56(a).

19 The parties agree that the issue presently before the Court is properly resolved on their
20 cross-motions for partial summary judgment. Pls.' Mot. at 8–9; Defs.' Mot. at 9.

21 **II. DISCUSSION**

22 In their motion, Plaintiffs request that the Court (1) enter final judgment in their favor
23 "declaring unlawful Defendants' transfer of Fiscal Year 2019 appropriated funds to the
24 Department of Defense's ["DoD's"] Section 284 account, the use of those funds for construction
25 of a border wall, and Defendants' failure to comply with NEPA for this construction"; (2) issue a
26

27 ⁴ In light of the extended oral argument regarding these issues at the preliminary injunction
28 hearing, *see* Dkt. No. 138, the Court finds these matters appropriate for disposition without oral
argument and the matters are deemed submitted, *see* Civil L.R. 7-1(b).

1 permanent injunction prohibiting Defendants from so funding border barrier construction “prior to
 2 complying with NEPA”; and (3) enjoin such unlawful use of funds generally. Pls.’ Mot. at 1.
 3 Defendants’ motion seeks a final determination that their intended use of funds under Sections
 4 8005, 9002, and 284 for border barrier construction is lawful. Defs.’ Mot. at 2. Defendants also
 5 request that the Court certify this judgment for appeal under Rule 54(b). *Id.* at 24–25.

6 **A. Declaratory Relief**

7 Plaintiffs seek a declaratory judgment finding unlawful Defendants’ (1) reprogramming of
 8 funds under Sections 8005 and 9002, (2) use of those funds for border barrier construction under
 9 Section 284, and (3) failure to comply with NEPA before pursuing any such construction. *See*
 10 Pls.’ Mot. at 1.

11 **1. Sections 8005, 9002, and 284**

12 Starting with Section 8005, the Court previously held that Plaintiffs were likely to succeed
 13 on their arguments that Defendants’ intended reprogramming of funds under Section 8005 to the
 14 Section 284 account to fund border barrier construction in El Paso Sector 1 and Yuma Sector 1 is
 15 unlawful. In particular, the Court found that Plaintiffs were likely to show that (1) the item for
 16 which funds are requested has been denied by Congress; (2) the transfer is not based on
 17 “unforeseen military requirements”; and (3) accepting Defendants’ proposed interpretation of
 18 Section 8005’s requirements would raise serious constitutional questions.⁵ Dkt. No. 144 (“PI
 19 Order”) at 31–42.

20 The Court previously only considered Defendants’ reprogramming and subsequent use of
 21 funds for border barrier construction for El Paso Sector Project 1 and Yuma Sector Project 1. It
 22 did not consider Defendants’ more-recently announced reprogramming and subsequent diversion
 23 of funds for border barrier construction for the El Centro Sector Project and Tucson Sector
 24 Projects 1–3, pending further development of the record as to those projects. *See id.* at 12. To
 25 fund these projects, Defendants again invoked Section 8005, as well as DoD’s “special transfer

26 _____
 27 ⁵ The Court did not consider whether Defendants’ reprogramming of funds was for a “higher
 28 priority item”—an independently necessary requirement under Section 8005—because
 Defendants’ planned use of such reprogrammed funds failed multiple other Section 8005
 requirements. The Court similarly does not consider the “higher priority item” requirement here.

1 authority under section 9002 of the Department of Defense Appropriations Act, 2019, and section
2 1512 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019.” See Dkt.
3 No. 118-1 (“Rapuano Second Decl.”) ¶ 7. Defendants’ Section 9002 authority, however, is
4 subject to Section 8005’s limitations. See Department of Defense Appropriations Act, 2019, Pub.
5 L. No. 115-245, § 9002, 132 Stat. 2981, 3042 (2018) (providing that “the authority provided in
6 this section is in addition to any other transfer authority available to the Department of Defense
7 and is subject to the same terms and conditions as the authority provided in section 8005 of this
8 Act”); see also Defs.’ Mot. at 10 n.4 (acknowledging that Section 9002 is subject to Section
9 8005’s requirements). Because Defendants agree that all such authority is subject to Section
10 8005’s substantive requirements, the Court refers to these requirements collectively by reference
11 to Section 8005.

12 In their pending motion, “Defendants acknowledge that the Court previously rejected
13 [their] arguments about the proper interpretation of § 8005 in its [preliminary injunction] order.”
14 Defs.’ Mot. at 10. Defendants contend that the Court’s findings were wrong for two reasons: (1)
15 “Plaintiffs fall outside the zone of interests of § 8005 and thus cannot sue to enforce it”; and (2)
16 “DoD has satisfied the requirements set forth in § 8005.” *Id.* at 10–13. But Defendants here offer
17 no evidence or argument that was not already considered in the Court’s preliminary injunction
18 order. For example, Defendants continue to argue that under *Lexmark International, Inc. v. Static*
19 *Control Components, Inc.*, 572 U.S. 118 (2014), the zone-of-interests test applies to Plaintiffs’
20 claims. Compare Opp. at 10, with Dkt. No. 64 at 14–15. And the Court continues to find that the
21 test has no application in an *ultra vires* challenge, which operates outside of the APA framework,
22 and the Court incorporates here its prior reasoning on this point. PI Order at 29–30.

23 Defendants also continue to assert that DoD did not transfer funds for an item previously
24 denied by Congress and that the transfer was for an “unforeseen” requirement. Compare Opp. at
25 11–13, with Dkt. No. 64 at 16–18. But Defendants again present no new evidence or argument for
26 why the Court should depart from its prior decision, and it will not. The Court thus stands by its
27 prior finding that Defendants’ proposed interpretation of the statute is unreasonable, and agrees
28 with Plaintiffs that Defendants’ intended reprogramming of funds under Section 8005—and

1 necessarily under Section 9002 as well—to the Section 284 account for border barrier construction
2 is unlawful. *See* PI Order at 31–42. Because no new factual or legal arguments persuade the
3 Court that its analysis in the preliminary injunction order was wrong, Plaintiffs’ likelihood of
4 success on the merits has ripened into actual success. The Court accordingly **GRANTS** Plaintiffs’
5 request for declaratory judgment that such use of funds reprogrammed under Sections 8005 and
6 9002 for El Paso Sector Project 1, Yuma Sector Project 1, El Centro Sector Project, and Tucson
7 Sector Projects 1–3 is unlawful.⁶

8 Turning to Section 284, the Court finds that it need not determine whether Plaintiffs are
9 entitled to declaratory judgment that Defendants’ invocation of Section 284 is also unlawful.
10 When a party requests declaratory judgment, “the question in each case is whether the facts
11 alleged, under all the circumstances, show that there is a substantial controversy, between parties
12 having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a
13 declaratory judgment.” *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Having
14 determined that Defendants’ proposed reprogramming of funds under Sections 8005 and 9002 is
15 unlawful, no immediate adverse legal interests warrant a declaratory judgment concerning Section
16 284. Defendants acknowledge that all of the money they plan to spend on border barrier
17 construction under Section 284 is money transferred into the relevant account under Sections 8005
18 and 9002. *See* Dkt. No. 131 at 4. Given this acknowledgment, the Court’s ruling as to Sections
19 8005 and 9002 obviates the need to independently assess the lawfulness of Defendants’ invocation
20 of Section 284.

21 2. NEPA

22 Separate and apart from whether Defendants’ invocations of Sections 8005, 9002, and 284
23 to fund border barrier construction conform with respective statutory requirements, Plaintiffs seek
24 a declaratory judgment deeming unlawful Defendants’ failure to comply with NEPA before
25 pursuing such construction. *See, e.g.*, Pls.’ Mot. at 24. Plaintiffs acknowledge that they present

26
27 ⁶ Plaintiffs’ motion seeks a broader declaratory judgment that any use of reprogrammed funds for
28 border barrier construction, even outside of these particular sectors, is unlawful. *See* Mot. at 23–
24. Given that Defendants have not yet authorized any border barrier construction outside of the
contested sectors, the Court declines to issue such a declaratory judgment.

1 identical arguments previously raised and rejected by the Court in its preliminary injunction order.
 2 *See id.* at 18 n.3. Presented with no new evidence or argument that was not already considered in
 3 the Court’s preliminary injunction order, the Court continues to find that the pertinent waivers
 4 issued by DHS are dispositive of the NEPA claims, for the reasons detailed in the Court’s previous
 5 order. *See* PI Order at 46–48.

6 **B. INJUNCTIVE RELIEF**

7 It is a well-established principle of equity that a permanent injunction is appropriate when:
 8 (1) a plaintiff will “suffer[] an irreparable injury” absent an injunction; (2) available remedies at
 9 law are “inadequate;” (3) the “balance of hardships” between the parties supports an equitable
 10 remedy; and (4) the public interest is “not disserved.” *eBay Inc. v. MercExchange, LLC*, 547 U.S.
 11 388, 391 (2006). Defendants do not dispute that available remedies at law are inadequate. The
 12 Court thus only considers the remaining factors.

13 **1. Plaintiffs Have Shown They Will Suffer Irreparable Harm Absent a**
 14 **Permanent Injunction.**

15 Plaintiffs contend that absent an order permanently enjoining the contemplated border
 16 barrier construction in the areas designated El Paso Sector 1, Yuma Sector 1, El Centro Sector,
 17 and Tucson Sectors 1–3, its members “will suffer irreparable harm to their recreational and
 18 aesthetic interests.” Mot. at 20–22. The Court agrees and finds that Plaintiffs have shown that
 19 they will suffer irreparable harm to their members’ aesthetic and recreational interests in the
 20 identified areas absent injunctive relief. As the Court previously noted, it is well-established in the
 21 Ninth Circuit that an organization can demonstrate irreparable harm by showing that the
 22 challenged action will injure its members’ enjoyment of public land. *See* PI Order at 49. And
 23 Plaintiffs here provide declarations from their members detailing how Defendants’ proposed use
 24 of funds reprogrammed under Sections 8005 and 9002 will harm their ability to recreate in and
 25 otherwise enjoy public land along the border. *See* Pls.’ Mot. at 21–22 (citing Dkt. No. 168-1 Ex. 1
 26 (Bevins Decl.) ¶ 7; *id.* Ex. 2 (Del Val Decl.) ¶¶ 9–10; *id.* Ex. 3 (Bixby Decl.) ¶ 6; *id.* Ex. 4 (Munro
 27 Decl.) ¶¶ 9, 11; *id.* Ex. 5 (Walsh Decl.) ¶¶ 12, 15; *id.* Ex. 6 (Evans Decl.) ¶ 8; *id.* Ex. 7 (Armenta
 28 Decl.) ¶¶ 6–8; *id.* Ex. 8 (Ramirez Decl.) ¶¶ 5, 8; *id.* Ex. 9 (Hartmann Decl.) ¶¶ 8, 9; *id.* Ex. 10

1 (Hudson Decl.) ¶¶ 10–11; *id.* Ex. 11 (Dahl Decl.) ¶ 8; *id.* Ex. 13 (Gerrodette Decl.) ¶¶ 6, 8; *id.* Ex.
2 14 (Case Decl.) ¶¶ 10–12; *id.* Ex. 17 (Tuell Decl.) ¶¶ 7, 10; Ex. 18 (Ardovino Decl.) ¶ 6).

3 Defendants do not contest the truthfulness of Plaintiffs’ declarants’ assertions that the
4 challenged border barrier construction will harm their recreational interests. Defendants instead
5 contend that Plaintiffs’ alleged recreational harms are insufficient because even with the proposed
6 border barrier construction, Plaintiffs’ members have plenty of other space to enjoy. *See* Defs.’
7 Mot. at 21–22. In their words, border barrier construction “will not impact land uses in the
8 thousands of acres surrounding the limited project areas, where the forms of recreation Plaintiffs
9 enjoy will remain possible.” *Id.* at 22. Defendants’ argument—unsupported by any case law—
10 proves too much. *See All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)
11 (holding this argument’s “logical extension is that a plaintiff can never suffer irreparable injury
12 resulting from environmental harm in [one] area as long as there are other areas [] that are not
13 harmed”). Given that Plaintiffs’ declarants’ characterization of the harm they will suffer is
14 undisputed as a factual matter, the result under Ninth Circuit law is that Plaintiffs have shown they
15 will suffer irreparable harm absent a permanent injunction.

16 **2. Balance of Hardships and Public Interest Support a Permanent** 17 **Injunction**

18 The parties agree that the Court should consider the balance of the equities and public
19 interest factors together, because the government is a party to the case. *See* Pls.’ Mot. at 22; Defs.’
20 Mot. at 23–24; *see also Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). As
21 they did at the preliminary injunction stage, Defendants here contend that these factors tilt in their
22 favor because the Government has a strong interest in border security. Defs.’ Br. at 23.
23 Defendants also contend that an injunction would “permanently deprive DoD of its authorization
24 to use the funds at issue to complete the projects, because the funding will lapse at the end of the
25 fiscal year” and that DoD will “incur unrecoverable fees and penalties” while construction is
26 suspended. *Id.* at 23–24.

27 As the Court explained in its preliminary injunction order, the Ninth Circuit has recognized
28 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)). But “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). And the Court notes that Congress considered all of Defendants’ proffered needs for border barrier construction, weighed the public interest in such construction against Defendants’ request for taxpayer money, and struck what it considered to be the proper balance—in the public’s interest—by making available only \$1.375 billion in funding, which was for certain border barrier construction not at issue here. *See Consolidated Appropriations Act of 2019*, Pub. L. No. 116-6, § 230(a)(1), 133 Stat. 13, 28 (2019). Most important, Defendants overlook that these factors are informed by the Court’s finding that Defendants do not have the purported statutory authority to reprogram and use funds for the planned border barrier construction. Absent such authority, Defendants’ position on these factors boils down to an argument that the Court should not enjoin conduct found to be unlawful because the ends justify the means. No case supports this principle.

Because the Court finds Defendants’ proposed use of funds reprogrammed under Sections 8005 and 9002 unlawful, the Court finds that the balance of hardships and public interest favors Plaintiffs, and counsels in favor of a permanent injunction.

C. Certification for Appeal

Finally, Defendants request that the Court certify this judgment for appeal under Rule 54(b). Appellate courts generally only have jurisdiction to hear appeals from final orders. *See* 28 U.S.C. § 1291. Rule 54(b) allows for a narrow exception to this final judgment rule, permitting courts to “direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.” Entry of judgment under Rule 54(b) thus requires: (1) a final judgment; and (2) a determination that there is no just reason for delay of entry. *See Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 574 (9th Cir. 2018) (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7–8 (1980)).

1. Finality of Judgment

A final judgment is “a decision upon a cognizable claim for relief” that is “an ultimate

1 disposition of an individual claim entered in the course of a multiple claims action.” *Curtiss-*
2 *Wright Corp.*, 446 U.S. at 7 (citing *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956)). The
3 Court finds this requirement satisfied because the Court’s award of partial summary judgment in
4 this order is “an ultimate disposition” of Plaintiffs’ claims related to Defendants’ purported
5 reliance on Sections 8005, 9002, and 284 for border barrier construction.

6 2. No Just Reason for Delay

7 As the Ninth Circuit has explained, “[j]udgments under Rule 54(b) must be reserved for
8 the unusual case in which the costs and risks of multiplying the number of proceedings and of
9 overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early
10 and separate judgment as to some claims or parties.” *Morrison-Knudsen Co. v. Archer*, 655 F.2d
11 962, 965 (9th Cir. 1981). Accordingly, an explanation of findings “should include a determination
12 whether, upon any review of the judgment entered under the rule, the appellate court will be
13 required to address legal or factual issues that are similar to those contained in the claims still
14 pending before the trial court.” *Id.* at 965. “The greater the overlap the greater the chance that
15 [the Court of Appeals] will have to revisit the same facts—spun only slightly differently—in a
16 successive appeal.” *Wood v. GCC Bend, LLC*, 422 F.3d 873, 882 (9th Cir. 2005). “[P]lainly,
17 sound judicial administration does not require that Rule 54(b) requests be granted routinely.” *Id.*
18 at 879 (internal quotation marks omitted).

19 The Court finds there is no just reason for delay under the circumstances. In their motion,
20 Defendants contend that “[t]he legal and factual issues do not ‘intersect and overlap’ with the
21 outstanding claims in this case, which focus on separate statutory authorities, and final judgment
22 on these claims will not result in piecemeal appeals on the same sets of facts.” Defs.’ Mot. at 25.
23 The Court agrees. Whether Defendants’ actions comport with the statutory requirements of
24 Sections 8005 and 9002 and whether Defendants’ actions comport with the remaining statutory
25 requirements related to outstanding claims are distinct inquiries, largely based on distinct law.
26 The Court also recognizes that Defendants’ appeal of the Court’s preliminary injunction order is
27 currently pending before the Court of Appeals, which recently issued an order holding the briefing
28 on that appeal in abeyance pending this order. *See Sierra Club v. Trump*, No. 19-16102 (9th Cir.

United States District Court
Northern District of California

1 2019), ECF Nos. 65–66. This suggests to the Court that the Court of Appeals agrees that “sound
2 judicial administration” is best served by the Court certifying this judgment for appeal, in light of
3 the undisputedly significant interests at stake in this case. *See Wood*, 422 F.3d at 879.

4 **III. CONCLUSION**

5 For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART**
6 Plaintiffs’ motion for partial summary judgment and **DENIES** Defendants’ motion for partial
7 summary judgment. Specifically, the Court **GRANTS** Plaintiffs’ request for declaratory judgment
8 that Defendants’ intended use of funds reprogrammed under Sections 8005 and 9002 of the
9 Department of Defense Appropriations Act, 2019, for border barrier construction in El Paso Sector
10 1, Yuma Sector 1, El Centro Sector, and Tucson Sectors 1–3, is unlawful. The Court **DENIES**
11 Plaintiffs’ request for declaratory judgment concerning Defendants’ (1) invocation of Sections
12 8005 and 9002 beyond these sectors, (2) invocation of Section 284, and (3) compliance with
13 NEPA.

14 The terms of the permanent injunction are as follows⁷: Defendants Mark T. Esper, in his
15 official capacity as Acting Secretary of Defense, Kevin K. McAleenan, in his official capacity as
16 Acting Secretary of Homeland Security, Steven T. Mnuchin, in his official capacity as Secretary
17 of the Department of the Treasury, and all persons acting under their direction, are enjoined from
18 taking any action to construct a border barrier in the areas Defendants have identified as El Paso
19 Sector 1, Yuma Sector 1, El Centro Sector, and Tucson Sectors 1–3 using funds reprogrammed by
20 DoD under Sections 8005 and 9002 of the Department of Defense Appropriations Act, 2019.

21 The Clerk is directed to enter final judgment in favor of Plaintiffs and against Defendants
22 with respect to Defendants’ purported reliance on Sections 8005, 9002, and 284 to fund border
23 barrier construction. This judgment will be certified for immediate appeal pursuant to Rule 54(b)
24 of the Federal Rules of Civil Procedure.

25 //
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27 _____
28 ⁷ The Court finds that an injunction against the President personally is not warranted here. *See*
Cty. of Santa Clara, 250 F. Supp. 3d at 549–40.

1 Last, for these reasons and those set out in the Court’s May 30, 2019 order, the Court
2 declines Defendants’ request to stay the injunction pending appeal. See Dkt. No. 152.

3 **IT IS SO ORDERED.**

4 Dated: 6/28/2019



HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, et al.,
Plaintiffs,
v.
DONALD J. TRUMP, et al.,
Defendants.

Case No. [19-cv-00892-HSG](#)

**ORDER DENYING MOTION TO STAY
PRELIMINARY INJUNCTION**

Re: Dkt. Nos. 146, 147

Pending before the Court is Defendants’ Motion to Stay Preliminary Injunction Pending Appeal. *See* Dkt. No. 146 (“Mot.”). Defendants seek a stay of the Court’s May 24, 2019 preliminary injunction order pending the outcome of their recently filed appeal to the United States Court of Appeals for the Ninth Circuit. *See* Dkt. No. 144 (“Order”). The Order enjoined Defendants from “taking any action to construct a border barrier in the areas Defendants have identified as Yuma Sector Project 1 and El Paso Sector Project 1 using funds reprogrammed by DoD under Section 8005 of the Department of Defense Appropriations Act, 2019.” *Id.* at 55.¹

“A stay is not a matter of right, even if irreparable injury might otherwise result.” *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotation marks omitted). Instead, it is “an exercise of judicial discretion,” and “the propriety of its issue is dependent upon the circumstances of the particular case.” *Id.* (internal quotation and alteration marks omitted). The party seeking a stay bears the burden of justifying the exercise of that discretion. *Id.* at 433–34.

¹ Reasonably, Defendants “request that the Court rule on this motion expeditiously,” without a response from Plaintiffs, and without oral argument, so that Defendants may promptly seek relief in the Ninth Circuit if the Court denies the motion to stay. Mot. at 1. The Court finds this matter appropriate for disposition without oral argument and the matter is deemed submitted. *See* Civil L.R. 7-1(b). The Court further finds that no response from Plaintiffs is necessary.

United States District Court
Northern District of California


1 Whether to grant a stay pending appeal involves a similar inquiry as whether to issue a
2 preliminary injunction. *Tribal Vill. of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988). Courts
3 consider four familiar factors: “(1) whether the stay applicant has made a strong showing that he
4 is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a
5 stay; (3) whether issuance of the stay will substantially injure the other parties interested in the
6 proceeding; and (4) where the public interest lies.” *Nken*, 556 U.S. at 434 (noting overlap with
7 *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008)). The first two factors “are
8 the most critical.” *Id.*

9 The Court will not stay its preliminary injunction order pending Defendants’ appeal. The
10 Court does not find that Defendants are likely to prevail on the merits of their appeal. In granting
11 the preliminary injunction, the Court rejected all of the arguments Defendants now advance
12 regarding their intended use of funds reprogrammed by DoD under Section 8005, and found that
13 Plaintiffs, not Defendants, were likely to succeed on the merits of their respective arguments. The
14 Court incorporates that reasoning here. Moreover, Defendants’ request to proceed immediately
15 with the enjoined construction would not preserve the status quo pending resolution of the merits
16 of Plaintiffs’ claims, and would instead effectively moot those claims. Finally, the Court
17 continues to see no reason that the merits of this case cannot be resolved expeditiously, enabling
18 the parties to litigate a final judgment on appeal, rather than a preliminary injunction.

19 For these reasons, the Court **DENIES** Defendants’ Motion to Stay.² Defendants’ Motion
20 to Shorten Time is **TERMINATED AS MOOT**. *See* Dkt. No. 147.

21 **IT IS SO ORDERED.**

22 Dated: 5/30/2019

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24 
25 HAYWOOD S. GILLIAM, JR.
26 United States District Judge

27 _____
28 ² Because the Court finds that Defendants have not met their burden to make a strong showing that they are likely to succeed on the merits of their appeal, the Court need not further address the other *Nken* factors.

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, et al.,
Plaintiffs,
v.
DONALD J. TRUMP, et al.,
Defendants.

Case No. [19-cv-00892-HSG](#)

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS’
MOTION FOR PRELIMINARY
INJUNCTION**

Re: Dkt. No. 29

On February 19, 2019, Sierra Club and Southern Border Communities Coalition (“SBCC”) (collectively, “Citizen Group Plaintiffs” or “Citizen Groups”) filed suit against Defendants Donald J. Trump, in his official capacity as President of the United States; Patrick M. Shanahan, in his official capacity as Acting Secretary of Defense; Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security¹; and Steven T. Mnuchin, in his official capacity as Secretary of the Department of the Treasury (collectively, “Federal Defendants”). Dkt. No. 1. This action followed a related suit brought by a coalition of states (collectively, “Plaintiff States” or “States”) against the same—and more—Federal Defendants. *See* Complaint, *California v. Trump*, No. 4:19-cv-00872-HSG (N.D. Cal. Feb. 18, 2019), ECF No. 1. Plaintiffs here filed an amended complaint on March 18, 2019. Dkt. No. 26 (“FAC”).

Now pending before the Court is Plaintiffs’ motion for a preliminary injunction, briefing for which is complete. *See* Dkt. Nos. 29 (“Mot.”), 64 (“Opp.”), 91 (“Reply”). The Court held a hearing on this motion on May 17, 2019. *See* Dkt. No. 138. In short, Plaintiffs seek to prevent executive officers from using redirected federal funds for the construction of a barrier on the U.S.-

¹ Acting Secretary McAleenan is automatically substituted for former Secretary Kirstjen M. Nielsen. *See* Fed. R. Civ. P. 25(d).

1 Mexico border.

2 It is important at the outset for the Court to make clear what this case is, and is not, about.
3 The case is not about whether the challenged border barrier construction plan is wise or unwise. It
4 is not about whether the plan is the right or wrong policy response to existing conditions at the
5 southern border of the United States. These policy questions are the subject of extensive, and
6 often intense, differences of opinion, and this Court cannot and does not express any view as to
7 them. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (indicating that the Supreme Court
8 “express[ed] no view on the soundness of the policy” at issue there); *In re Border Infrastructure*
9 *Envtl. Litig.*, 284 F. Supp. 3d 1092, 1102 (S.D. Cal. 2018) (noting that the court “cannot and does
10 not consider whether underlying decisions to construct the border barriers are politically wise or
11 prudent”). Instead, this case presents strictly legal questions regarding whether the proposed plan
12 for funding border barrier construction exceeds the Executive Branch’s lawful authority under the
13 Constitution and a number of statutes duly enacted by Congress. *See In re Aiken Cty.*, 725 F.3d
14 255, 257 (D.C. Cir. 2013) (“The underlying policy debate is not our concern. . . . Our more
15 modest task is to ensure, in justiciable cases, that agencies comply with the law as it has been set
16 by Congress.”).

17 Assessing whether Defendants’ actions not only conform to the Framers’ contemplated
18 division of powers among co-equal branches of government but also comply with the mandates of
19 Congress set forth in previously unconstrued statutes presents a Gordian knot of sorts. But the
20 federal courts’ duty is to decide cases and controversies, and “[t]hose who apply the rule to
21 particular cases, must of necessity expound and interpret that rule.” *See Marbury v. Madison*, 1
22 Cranch 137, 177 (1803). Rather than cut the proverbial knot, however, the Court aims to untie
23 it—no small task given the number of overlapping legal issues. And at this stage, the Court then
24 must further decide whether Plaintiffs have met the standard for obtaining the extraordinary
25 remedy of a preliminary injunction pending resolution of the case on the merits.

26 After carefully considering the parties’ arguments, the Court **GRANTS IN PART** and
27 **DENIES IN PART** Plaintiffs’ motion.

28 //

1 **I. FACTUAL BACKGROUND**

2 The President has long voiced support for a physical barrier between the United States and
3 Mexico. *See, e.g.*, Request for Judicial Notice, *California v. Trump*, No. 4:19-cv-00872-HSG
4 (N.D. Cal. Apr. 8, 2019), ECF No. 59-4 (“States RJN”) Ex. 3 (June 16, 2016 Presidential
5 Announcement Speech) (“I would build a great wall, and nobody builds walls better than me,
6 believe me, and I’ll build them very inexpensively, I will build a great, great wall on our southern
7 border. And I will have Mexico pay for that wall.”).² Upon taking office in 2017, the President’s
8 administration repeatedly sought appropriations from Congress for border barrier construction.
9 *See, e.g.*, *Budget of the U.S. Government: A New Foundation for American Greatness: Fiscal Year*
10 *2018*, Office of Mgmt. & Budget 18 (2017), [https://www.whitehouse.gov/wp-](https://www.whitehouse.gov/wp-content/uploads/2017/11/budget.pdf)
11 [content/uploads/2017/11/budget.pdf](https://www.whitehouse.gov/wp-content/uploads/2017/11/budget.pdf) (requesting “\$2.6 billion in high-priority tactical
12 infrastructure and border security technology, including funding to plan, design, and construct a
13 physical wall along the southern border”). Congress provided some funding, including \$1.571
14 billion for fiscal year 2018. *See Consolidated Appropriations Act, 2018*, Pub. L. No. 115-141, div.
15 F, tit. II, § 230(a) 132 Stat. 348 (2018). And Congress considered several bills that, if passed,
16 would have authorized or otherwise appropriated billions of dollars more for border barrier
17 construction. *See States RJN Exs. 14–20*. None passed.

18 In December 2018—as Congress and the President were negotiating an appropriations bill
19 to fund various federal departments for what remained of the fiscal year—the President announced
20 that he would not sign any funding legislation that lacked substantial funds for border barrier
21 construction. *Farm Bill Signing*, C-SPAN (Dec. 20, 2018), <https://www.c->

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24 ² Defendants do not oppose the Plaintiff States’ request to take judicial notice of various
25 documents. The Court finds it may take judicial notice of documents from Plaintiff States’ request
26 that are cited in this order, all of which are: (1) statements of government officials or entities that
27 are not subject to reasonable dispute; (2) bills considered by Congress or other legislative history;
28 or (3) other public records and government documents available on reliable internet sources, such
as government websites. *See DeHoog v. Anheuser-Busch InBev SA/NV*, 899 F.3d 758, 763 n.5
(9th Cir. 2018) (taking “judicial notice of government documents, court filings, press releases, and
undisputed matters of public record”); *Hawaii v. Trump*, 859 F.3d 741, 773 n.14 (9th Cir. 2017)
(taking judicial notice of President’s tweets), *vacated on other grounds*, 138 S. Ct. 377 (2017);
Anderson v. Holder, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) (“Legislative history is properly a
subject of judicial notice.”).

1 span.org/video/?456189-1/president-government-funding-bill-include-money-border-wall (“I’ve
2 made my position very clear. Any measure that funds the government must include border
3 security. . . . Walls work whether we like it or not. They work better than anything.”). Congress
4 did not pass a bill with the President’s desired border barrier funding and, due to this impasse, the
5 United States entered into the nation’s longest partial government shutdown.

6 The President and those in his administration stated on several occasions before, during,
7 and after the shutdown that, although Congress should make the requisite funds available for
8 border barrier construction, the President was willing to use a national emergency declaration and
9 other reprogramming mechanisms as funding backstops. For example, during a December 11,
10 2018 meeting with congressional representatives, the President stated that “if we don’t get what
11 we want [for border barrier construction funding], one way or the other – whether it’s through
12 [Congress], through a military, through anything you want to call [sic] – I will shut down the
13 government. Absolutely.” States RJN Ex. 21. The White House initially requested only \$1.6
14 billion for border barrier construction for the fiscal year 2019 budget, for sixty-five miles of border
15 barrier construction “in south Texas.” See Supplemental Request for Judicial Notice, *California v.*
16 *Trump*, No. 4:19-cv-00872-HSG (N.D. Cal. Apr. 8, 2019), ECF No. 112-1, Ex. 51, at 58.
17 However, the White House increased its request on January 6, 2019, when the Acting Director of
18 the Office of Management and Budget transmitted a letter to the U.S. Senate Committee on
19 Appropriations, “request[ing] \$5.7 billion for construction of a steel barrier for the Southwest
20 border,” and explaining that the request “would fund construction of a total of approximately 234
21 miles of new physical barrier.” See Dkt. No. 36 (“Citizen Groups RJN”) Ex. A, at 1.³ The
22 increased request specified that “[a]ppropriations bills for fiscal year (FY) 2019 that have already
23 been considered by the current and previous Congresses are inadequate to fully address these
24 critical issues,” including the need for border barrier construction funds. *Id.* Days later, the
25 President explained: “If we declare a national emergency, we have a tremendous amount of funds
26

27
28 ³ The Court takes judicial notice of documents submitted by the Citizen Group Plaintiffs,
consideration of which Defendants do not oppose, and the accuracy of the contents of which
similarly “cannot be questioned.” See discussion *supra* note 2.

1 – tremendous – if we want to do that, if we want to go that route. Again, there is no reason why
2 we can’t come to a deal. . . . [Congress] could stop this problem in 15 minutes if they wanted to.”
3 States RJN Ex. 13.

4 After the government shutdown ended, the President and others in his administration
5 reaffirmed their intent to fund a border barrier, with or without Congress’s blessing. On February
6 9, 2019, the President explained that even if Congress provided less than the requested funding for
7 a border barrier, the barrier “[would] get built one way or the other!” Citizen Groups RJN Ex. C.
8 The next day, the Acting White House Chief of Staff explained that the Administration intended to
9 accept whatever funding Congress would offer and then use other measures to reach the
10 President’s desired funding level for border barrier construction:

11 The President is going to build a wall. You saw what the Vice-
12 President said there, and that’s our attitude at this point, which is:
13 We’ll take as much money as you can give us, and then we’ll go off
14 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.

15 *See* Fox News, *Mick Mulvaney on chances of border deal, Democrats ramping up investigation of*
16 *Trump admin*, YouTube (Feb. 10, 2019), https://www.youtube.com/watch?v=l_Z0xx_zS0M. He
17 went on to detail that the Administration was prepared to both reprogram money and declare a
18 national emergency to unlock funds:

19 There are other funds of money that are available to [the President]
20 through what we call reprogramming. There is money that he can get
21 at and is legally allowed to spend, and I think it -- needs to be said
22 again and again that all of this is going to be legal. There are statutes
23 on the books as to how any President can do this. . . . There are certain
funds of money that he can get to without declaring a national
emergency and other funds that he can only get to after declaring a
national emergency.

24 *Id.* All told, the “whole pot” of such funds was “well north of \$5.7 billion.” *Id.* And with respect
25 to a national emergency declaration in particular, the Acting White House Chief of Staff
26 explained: “The President doesn’t want to do it. . . . He would prefer legislation because that’s
27 the right way to go, and it’s the proper way to spend money in this country.” *Id.*

28 On February 14, 2019, Congress passed the Consolidated Appropriations Act of 2019

1 (“CAA”), Pub. L. No. 116-6, 133 Stat. 13 (2019). The CAA consolidated separate appropriations
 2 acts related to different federal agencies into one bill, including for present purposes the DHS
 3 Appropriations Act for Fiscal Year 2019. *See id.*, div. A. The CAA made available \$1.375
 4 billion—less than one quarter of the \$5.7 billion sought by the President—“for the construction of
 5 primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector.”
 6 *Id.* § 230(a)(1), 133 Stat. at 28. Congress limited the use of these funds both as to the type of
 7 pedestrian fencing—only “operationally effective designs deployed as of the date of the
 8 Consolidated Appropriations Act, 2017 . . . such as currently deployed steel bollard designs”—and
 9 geographically—no funds were available for construction within (1) the Santa Ana Wildlife
 10 Refuge, (2) the Bentsen-Rio Grande Valley State Park, (3) La Lomita Historical park, (4) the
 11 National Butterfly Center, or (5) within or east of the Vista del Mar Ranch tract of the Lower Rio
 12 Grande Valley National Wildlife Refuge. *Id.* §§ 230(b), 231, 133 Stat. at 28. The CAA further
 13 imposed notice and comment requirements prior to the use of any funds for the construction of
 14 barriers within certain city limits. *Id.* § 232, 133 Stat. at 28–29. Section 739 of the CAA
 15 provided:

16 None of the funds made available in this or any other appropriations
 17 Act may be used to increase, eliminate, or reduce funding for a
 18 program, project, or activity as proposed in the President’s budget
 19 request for a fiscal year until such proposed change is subsequently
 20 enacted in an appropriation Act, or unless such change is made
 21 pursuant to the reprogramming or transfer provisions of this or any
 22 other appropriations Act.

23 *Id.* § 739, 133 Stat. at 197.

24 On February 15, 2019, the President not only signed the CAA into law but also issued a
 25 proclamation “declar[ing] that a national emergency exists at the southern border of the United
 26 States.” Proclamation No. 9844, 84 Fed. Reg. 4,949 (Feb. 15, 2019). In announcing the national
 27 emergency declaration, the President declared that although he “went through Congress” for the
 28 \$1.375 billion in funding, he was “not happy with it.” States RJN Ex. 50. The President added: “I
 could do the wall over a longer period of time. I didn’t need to do this. But I’d rather do it much
 faster. . . . And I think that I just want to get it done faster, that’s all.” *Id.*

The proclamation itself provided:

1 The current situation at the southern border presents a border security
2 and humanitarian crisis that threatens core national security interests
3 and constitutes a national emergency. The southern border is a major
4 entry point for criminals, gang members, and illicit narcotics. The
5 problem of large-scale unlawful migration through the southern
6 border is long-standing, and despite the executive branch’s exercise
7 of existing statutory authorities, the situation has worsened in certain
8 respects in recent years. In particular, recent years have seen sharp
9 increases in the number of family units entering and seeking entry to
10 the United States and an inability to provide detention space for many
11 of these aliens while their removal proceedings are pending. If not
12 detained, such aliens are often released into the country and are often
13 difficult to remove from the United States because they fail to appear
14 for hearings, do not comply with orders of removal, or are otherwise
15 difficult to locate. In response to the directive in my April 4, 2018,
16 memorandum and subsequent requests for support by the Secretary of
17 Homeland Security, the Department of Defense has provided support
18 and resources to the Department of Homeland Security at the southern
19 border. Because of the gravity of the current emergency situation, it
20 is necessary for the Armed Forces to provide additional support to
21 address the crisis.

12 Proclamation No. 9844, 84 Fed. Reg. 4,949. The proclamation then invoked and made available
13 to relevant Department of Defense (“DoD”) personnel two statutory authorities. First, the
14 proclamation made available the authority to “order any unit, and any member not assigned to a
15 unit organized to serve as a unit, in the Ready Reserve . . . to active duty for not more than 24
16 consecutive months,” under 10 U.S.C. § 12302. *Id.* Second, the proclamation made available “the
17 construction authority provided in [10 U.S.C. § 2808].” *Id.* As is necessary to invoke Section
18 2808, the proclamation “declar[ed] that this emergency requires use of the Armed Forces.” *Id.*;
19 *see also* 10 U.S.C. § 2808(a) (limiting construction authority to presidential declarations “that
20 require[] use of the armed forces”).

21 As additional information regarding the national emergency declaration, the White House
22 simultaneously issued a “fact sheet[],” which explained that “the Administration [had] so far
23 identified up to \$8.1 billion that will be available to build the border wall once a national
24 emergency is declared.” Citizen Groups RJN Ex. G. The White House specifically identified
25 three funding sources, purportedly to be used sequentially:

- 26 • “About \$601 million from the Treasury Forfeiture Fund” (“TFF”);
- 27 • “Up to \$2.5 billion under the Department of Defense funds transferred for Support for
28 Counterdrug Activities” (10 U.S.C. § 284) (“Section 284”); and

- 1 • “Up to \$3.6 billion reallocated from Department of Defense military construction
2 projects under the President’s declaration of a national emergency” (10 U.S.C. § 2808)
3 (“Section 2808”).

4 *Id.*

5 In declaring a national emergency, the President invoked his authority under the National
6 Emergencies Act (“NEA”), Pub. L. 94–412, 90 Stat. 1255 (1976) (codified as amended at 50
7 U.S.C. §§ 1601–1651). This appears to have been the first time in American history that a
8 President declared a national emergency to secure funding previously withheld by Congress. As
9 another historical first, Congress passed a joint resolution to terminate the President’s declaration
10 of a national emergency. *See* H.R.J. Res. 46, 116th Cong. (2019). The President vetoed
11 Congress’s joint resolution on March 15, 2019.⁴ *See Veto Message to the House of*
12 *Representatives for H.J. Res. 46*, The White House (Mar. 15, 2019),
13 <https://www.whitehouse.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/>.
14 The House voted 248-181 to override the President’s veto, which fell short of the required two-
15 thirds majority. 165 Cong. Rec. 2,799, 2,814–15 (2019).

16 Following the President’s national emergency declaration, executive officers reaffirmed
17 what the President and his administration had been saying for months: the Administration was
18 content to first request border barrier construction funding from Congress, and then augment
19 whatever they received with funds from alternative sources. Then-Secretary of Homeland
20 Security Nielsen described this mindset on March 6, 2019, while testifying before the House
21 Homeland Security Committee: “[The President] hoped Congress would act, that it didn’t have to
22 come to issuing an emergency declaration, if Congress had met his request to fund the resources
23 that [U.S. Customs and Border Protection (“CBP”)] has requested.” *3/6/2019 Nielsen Testimony*,
24 C-SPAN (Mar. 6, 2019), <https://www.c-span.org/video/?c4787939/362019-nielsen-testimony>.

25 Since the national emergency declaration, Defendants have taken significant steps toward
26 using the funds at issue in this motion for border barrier construction. On February 15, 2019, the

27 _____
28 ⁴ As described below, the Congress that passed the NEA did not contemplate the possibility of a
presidential veto.

1 Treasury approved a request from the Department of Homeland Security (“DHS”) to make
 2 available up to \$601 million from the Treasury Forfeiture Fund, which Defendants “intend[] to
 3 obligate . . . before the end of Fiscal Year 2019.” *See* Case No. 4:19-cv-00872-HSG, ECF No. 89-
 4 8 (“Flossman Second Decl.”) ¶¶ 9, 11. On February 25, 2019, DHS submitted a request to DoD
 5 for assistance blocking drug-smuggling corridors under Section 284. *See* Dkt. No. 64-8
 6 (“Rapuano Decl.”) ¶ 3; States RJN Ex. 33. And on March 25, 2019, in response to DHS’s request,
 7 the Acting Secretary of Defense—Defendant Shanahan—approved the diversion of funds from
 8 DoD’s counter-narcotics support budget for three “drug-smuggling corridors” identified by DHS:
 9 one located in New Mexico—El Paso Project 1—and two located in Arizona—Yuma Sector
 10 Projects 1–2.⁵ Rapuano Decl. ¶¶ 4, 7–9. Construction related to these projects may begin as soon
 11 as May 25, 2019. *See id.* ¶ 10 (providing that construction “will begin no earlier than May 25,
 12 2019”).

13 To fund the Section 284 diversion, Defendant Shanahan simultaneously invoked Section
 14 8005 of the most-recent DoD appropriations act to “reprogram” \$1 billion from Army personnel
 15 funds to the counter-narcotics support budget. *See id.* ¶ 5; States RJN Ex. 34; *see also* Department
 16 of Defense Appropriations Act, 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018).
 17 Defendant Shanahan also formally notified Congress of the authorization, explaining that
 18 reprogrammed funds under Section 8005 were “required” so that DoD could provide DHS the
 19 support it requested under Section 284. States RJN Ex. 32, at 1; *see also id.* Ex. 33, at 2 (DHS’s
 20 February 25, 2019 request for support under Section 284).

21 The next day, Defendant Shanahan appeared before the House Armed Services Committee
 22 to testify in support of the President’s budget request for fiscal year 2020. *See* Case No. 4:19-cv-
 23 00872-HSG, ECF No. 89-12. The Committee Chairman asked Defendant Shanahan why DoD did
 24 not first seek approval from relevant congressional committees before reprogramming funds under
 25 Section 8005, as would have been consistent with a “gentlemen’s agreement[]” between Congress
 26

27 _____
 28 ⁵ Defendants have since elected not to fund or construct Yuma Project 2 using funds
 reprogrammed or diverted under Sections 8005 or 284. *See* Dkt. No. 118-1 (“Rapuano Second
 Decl.”) ¶ 4.

1 and the Executive. *Id.* at 13 (“But one of the sort of gentlemen’s agreements about [giving
2 reprogramming authority for up to \$4 billion last year] was if you reprogram money, you will not
3 do it without first getting the approval of all for [sic] relevant committees For the first time
4 since we’ve [given such reprogramming authority] you are not asking for our permission.”).
5 The Chairman noted that “the result of” ignoring the gentlemen’s agreement likely would be
6 Congress declining to provide such broad reprogramming authority in the future. *Id.* Defendant
7 Shanahan conceded that “discretionary reprogramming” was “traditionally done in coordination”
8 with Congress, but explained that the Administration discussed unilateral reprogramming “prior to
9 the declaration of a national emergency,” recognized “the significant downsides of the [sic] losing
10 what amounts to a privilege,” and nonetheless decided to move forward with unilaterally
11 reprogramming funds despite that risk. *Id.* at 14. The same day as the hearing, both the House
12 Committee on Armed Services and the House Committee on Appropriations formally disapproved
13 of the Section 8005 reprogramming. *See* States RJN Ex. 35 (“The committee denies this request.
14 The committee does not approve the proposed use of [DoD] funds to construct additional physical
15 barriers and roads or install lighting in the vicinity of the United States border.”); *id.* Ex. 36 (“The
16 Committee has received and reviewed the requested reprogramming action The Committee
17 denies the request.”).

18 On April 24, 2019, Defendant McAleenan, the Acting Secretary of Homeland Security,
19 published in the Federal Register notices of determination concerning the “construction of barriers
20 and roads in the vicinity of the international land border in Luna County, New Mexico and Doña
21 Ana County, New Mexico,” and “in Yuma County, Arizona”—in other words, areas encompassed
22 by the El Paso Sector and Yuma Sector Projects. *See* Determination Pursuant to Section 102 of
23 the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed.
24 Reg. 17,185, 17,186 (Apr. 24, 2019); Determination Pursuant to Section 102 of the Illegal
25 Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg.
26 17,187 (Apr. 24, 2019). The Acting Secretary invoked his authority under Section 102(c) of the
27
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1 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”)⁶ “to waive all
2 legal requirements that [he], in [his] sole discretion, determine[d] necessary to ensure the
3 expeditious construction of barriers and roads authorized by section 102 of IIRIRA.” *See, e.g.*, 84
4 Fed. Reg. at 17,186. The waiver asserts that “areas in the vicinity of the United States border,
5 located in [these regions], are areas of high illegal entry,” for which “[t]here is presently an acute
6 and immediate need to construct physical barriers and roads.” *See id.* The designated “Project
7 Areas” encompass all portions of New Mexico and Arizona for which Defendants presently intend
8 to construct physical barriers. Finding this action “necessary,” the Acting Secretary invoked
9 Section 102(c) to waive “in their entirety” numerous federal laws—including the National
10 Environmental Policy Act (“NEPA”), Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as
11 amended at 42 U.S.C. §§ 4321–4370b)—“with respect to the construction of physical barriers and
12 roads . . . in the project area[s].” *See id.*

13 On May 8, 2019, Defendant Shanahan, appearing before the Senate Defense
14 Appropriations Subcommittee, testified: “We now have on contract sufficient funds to build about
15 256 miles of barrier,” explaining that this funding derived in part from “treasury forfeiture funds,
16 as well as reprogramming.” *Acting Defense Secretary Shanahan Testifies on 2020 Budget*
17 *Request*, C-SPAN (May 8, 2019), [https://www.c-span.org/video/?460437-1/acting-defense-](https://www.c-span.org/video/?460437-1/acting-defense-secretary-shanahan-testifies-2020-budget-request)
18 [secretary-shanahan-testifies-2020-budget-request](https://www.c-span.org/video/?460437-1/acting-defense-secretary-shanahan-testifies-2020-budget-request). Defendant Shanahan estimated that “sixty-three
19 new miles will come online” from these contracts in the next six months, or “half a mile a day.”
20 *Id.* The same day, DoD reported selecting twelve companies to compete for up to \$5 billion worth
21 of border barrier construction contracts. Contracts for May 8, 2019, U.S. Dep’t of Def. (May 8,
22 2019), <https://dod.defense.gov/News/Contracts/Contract-View/Article/1842189/>.

23 The next day, Defendant Shanahan authorized an additional \$1.5 billion in funding for
24 border barrier construction, in further response to DHS’s February 25, 2019 request for support
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26 _____
27 ⁶ Pub. L. No. 104–208, div. C, 110 Stat. 3009, 3009–554 (Sept. 30, 1996), as amended by the
28 REAL ID Act of 2005, Pub. L. No. 109–13, div. B, 119 Stat. 231, 302, 306 (May 11, 2005), as
amended by the Secure Fence Act of 2006, Pub. L. No. 109–367, § 3, 120 Stat. 2638, 2638–39
(Oct. 26, 2006), as amended by the Department of Homeland Security Appropriations Act, 2008,
Pub. L. No. 110–161, div. E, tit. V, § 564, 121 Stat. 1844, 2090–91 (Dec. 26, 2007).

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1 under Section 284, for four projects: one located in California—El Centro Project 1—and three
 2 located in Arizona—Tucson Sector Projects 1–3. *See* Rapuano Second Decl. ¶ 6; *see also*
 3 Rapuano Decl. Ex. A, at 3, 6–7 (describing project locations). To fund these projects, Defendant
 4 Shanahan again invoked Section 8005, “as well as DoD’s special transfer authority under section
 5 9002 of the Department of Defense Appropriations Act, 2019, and section 1512 of the John S.
 6 McCain National Defense Authorization Act for Fiscal Year 2019.”⁷ Rapuano Second Decl. ¶ 7.
 7 Defendants anticipate that construction will begin with these funds as early as July 2019. *Id.*
 8 ¶¶ 10–11 (noting Defendants’ expectation of awarding contracts by May 16, 2019, forty-five days
 9 after which construction may begin). And on May 15, 2019, Defendant McAleenan issued NEPA
 10 waivers for the El Centro Sector and Tucson Sector Projects. *See* Determination Pursuant to
 11 Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as
 12 Amended, 84 Fed. Reg. 21,798 (May 15, 2019) (waiving NEPA requirements for Tucson Sector
 13 Projects); Determination Pursuant to Section 102 of the Illegal Immigration Reform and
 14 Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,800 (May 15, 2019)
 15 (waiving NEPA requirements for El Centro Sector Project).

16 At the hearing on this motion, the parties agreed that the Court need not yet address the
 17 lawfulness of Defendants’ newly announced reprogramming and subsequent diversion of funds for
 18 border barrier construction in the El Centro Sector and Tucson Sector Projects, pending further
 19 development of the record as to those projects.

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25 ⁷ Defendants’ Section 9002 authority is, at a minimum, subject to Section 8005’s limitations. *See*
 26 Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, § 9002, 132 Stat. 2981,
 27 3042 (2018) (providing that “the authority provided in this section is in addition to any other
 28 transfer authority available to the Department of Defense and is subject to the same terms and
 conditions as the authority provided in section 8005 of this Act”); *see also* Dkt. No. 131, at 4
 (acknowledging that Section 9002 “incorporates the requirements of [Section] 8005 by
 reference”).

1 **II. STATUTORY FRAMEWORK**

2 **A. The National Emergencies Act**

3 In 1976, Congress enacted the National Emergencies Act “to insure that the exercise of
4 national emergency authority is responsible, appropriate, and timely.” Comm. on Gov’t
5 Operations & the Special Comm. on Nat’l Emergencies & Delegated Emergency Powers, 94th
6 Cong., 2d Sess., *The National Emergencies Act (Public Law 94–412) Source Book: Legislative
7 History, Texts, and Other Documents*, at 1 (1976) (“NEA Source Book”). The NEA rescinded
8 several existing national emergencies, repealed many statutes, and created procedural guidelines
9 for congressional oversight over future presidents’ declarations of national emergencies.

10 The NEA first permits that after “specifically declar[ing] a national emergency,” the
11 president may exercise emergency powers authorized by Congress in other federal statutes. 50
12 U.S.C. § 1621. To exercise any statutory emergency power, the president must first specify the
13 power or authority under which the president or other officers will act, “either in the declaration of
14 a national emergency, or by one or more contemporaneous or subsequent Executive orders
15 published in the Federal Register and transmitted to the Congress.” *Id.* § 1631.

16 Section 1622 then establishes a procedure for Congress to terminate any declared national
17 emergency through a joint resolution.⁸ As initially drafted, Congress meant for the joint resolution
18 to terminate the declared national emergency by itself—the NEA did not require a presidential
19 signature on the joint resolution, nor was it subject to a presidential veto. In part because
20 Congress had power under the NEA to terminate national emergencies with a simple majority in
21 both houses, Congress neither defined the term “national emergency,” nor “ma[de] any attempt to
22 define when a declaration of national emergency is proper.” NEA Source Book at 9, 278–92. In
23 rejecting a proposed amendment to the NEA that would have “spelled out” for the executive what
24 may constitute a national emergency, the House of Representatives observed the “impossibility”
25 of future presidents vetoing any joint resolution. *Id.* at 279–80. House members there observed:

26 _____
27 ⁸ The initial version of the NEA referred to a “concurrent resolution.” That language was changed
28 to “joint resolution” in 1985. *See* Foreign Relations Authorization Act, “22 USC 2651 note”
Fiscal Years 1986 and 1987, Pub. L. No. 99-93, § 801(1)(A), 99 Stat. 405, 448 (1985). For
simplicity’s sake, the Court only uses the term “joint resolution,” as the statute now reads.

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Mr. Conyers. . . . Mr. Chairman, my final participation in this debate revolves around the reason of this question: What happens if the President of the United States vetoes the congressional termination of the emergency power? Is that contemplatable within the purview of this legislation?

...

Mr. Flowers. Mr. Chairman, on the advice of counsel we have researched that thoroughly. A concurrent resolution would not require Presidential signature of acceptance. It would be an impossibility that it would be vetoed.

Mr. Conyers. So there would be no way that the President could interfere with the Congress?

Mr. Flowers. The gentleman is correct.

Id.

Congress’s unilateral power under the NEA to terminate national emergency declarations ended in 1983, when the Supreme Court in *INS v. Chadha* ruled that the president must have power to approve or veto congressional acts, such as a terminating joint resolution under the NEA. *See* 462 U.S. 919 (1983). Two years later, Congress amended the NEA to reflect that the joint resolution must be “enacted into law” to terminate an emergency, thereby rendering the NEA *Chadha*-compliant. *See* Pub. L. No. 99-93, § 801(1)(A), 99 Stat. 405, 448 (1985).

By some estimates, there are 123 statutory powers available to a president who declares a national emergency. *See A Guide to Emergency Powers and Their Use*, Brennan Ctr. for Justice (2019), www.brennancenter.org/sites/default/files/legislation/Emergency%20Powers_Printv2.pdf. And in the more than forty years since Congress enacted the NEA, presidents have declared almost sixty national emergencies. *See Declared National Emergencies Under the National Emergencies Act, 1978-2018*, Brennan Ctr. for Justice (2019), www.brennancenter.org/sites/default/files/analysis/NEA%20Declarations.pdf.

Until now, Congress had never invoked its emergency termination powers.

B. Section 284

Under Section 284, “[t]he Secretary of Defense may provide support for the counterdrug activities . . . of any other department or agency of the Federal Government” if “such support is requested . . . by the official who has responsibility for [such] counterdrug activities.” 10 U.S.C.

1 § 284(a), (a)(1)(A). Section 284 defines permissible “[t]ypes of support” under the statute,
 2 including support for “[c]onstruction of roads and fences and installation of lighting to block drug
 3 smuggling corridors across international boundaries of the United States.” *Id.* § 284(b)(7). The
 4 statute also mandates congressional notification before the Secretary of Defense provides
 5 certain—but not all—types of support. *Id.* § 284(h). For one, Section 284 requires the Secretary
 6 of Defense to submit to the appropriate congressional committee “a description of any small scale
 7 construction project for which support is provided.” *Id.* § 284(h)(1)(B). Section 284 defines
 8 “small scale construction” as “construction at a cost not to exceed \$750,000 for any project.” *Id.*
 9 § 284(i)(3).

10 Congress first provided DoD with authority to support such counterdrug activities in 1991,
 11 in what is commonly referred to as “Section 1004.” *See* National Defense Authorization Act for
 12 Fiscal Year 1991, Pub. L. No. 101-510, § 1004, 104 Stat. 1485, 1629–30 (1990). The initial
 13 iteration of Section 1004 made available \$50 million in funds for fiscal year 1991 alone, and
 14 contained no congressional notification requirement or per-project cap on the provision of support.
 15 *Id.* § 1004(g), 104 Stat. at 1630. Congress subsequently renewed Section 1004 on a regular basis.⁹
 16 Congress ultimately codified Section 1004 at 10 U.S.C. § 284 in 2016. *See* National Defense
 17 Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1011(a)(1), 130 Stat. 2000, 2381
 18 (2016), *renumbered* § 284 by *id.* § 1241(a)(2), 130 Stat. at 2497.

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 21 ⁹ Congress extended the provision of funds under Section 1004 on eight occasions, the last of
 22 which provided funds through fiscal year 2017. *See* National Defense Authorization Act for
 23 Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 1088(a), 105 Stat. 1290, 1484 (1991)
 24 (extending funding through fiscal year 1993); National Defense Authorization Act for Fiscal Year
 25 1994, Pub. L. No. 103-160, § 1121, 107 Stat. 1547, 1753–54 (1993) (extending funding through
 26 fiscal year 1995); National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337,
 27 § 1011, 108 Stat. 2663, 2836–37 (1994) (extending funding through fiscal year 1999); Strom
 28 Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261,
 § 1021, 112 Stat. 1920, 2120 (1998) (extending funding through fiscal year 2002); National
 Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 1021, 115 Stat. 1012,
 1212–15 (2001) (extending funding through fiscal year 2006); John Warner National Defense
 Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1021, 120 Stat. 2083, 2382 (2006)
 (extending funding through fiscal year 2011); National Defense Authorization Act for Fiscal Year
 2012, Pub. L. No. 112-81, § 1005, 125 Stat. 1298, 1556–57 (2011) (extending funding through
 fiscal year 2014); Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act
 for Fiscal Year 2015, Pub. L. No. 113-291, § 1012, 128 Stat. 3292, 3483–84 (2014) (extending
 funding through fiscal year 2017).

1 In fiscal year 2019, Congress appropriated \$881 million in funds to DoD “[f]or drug
2 interdiction and counter-drug activities,” \$517 million of which was “for counter-narcotics
3 support.” *See* Department of Defense and Labor, Health and Human Services, and Education
4 Appropriations Act, 2019, Pub. L. No. 115-245, div. A, tit. VI, 132 Stat. 2981, 2997 (2018). All
5 funds DoD now purports to make available for support to DHS under Section 284 come from the
6 counter-narcotics support line of appropriation, out of what is known as the “drug interdiction
7 fund.” Rapuano Decl. ¶ 5, Ex. D. But when Secretary Shanahan first authorized support to DHS
8 under Section 284 on March 25, 2019, the counter-narcotics support line only contained
9 \$238,306,000 in unobligated funds. *See* Dkt. No. 131 at 4 (citing Rapuano Decl. ¶ 5, Ex. D, at 2).
10 Therefore, although DoD seeks to make available \$2.5 billion in support to DHS “under Section
11 284,” Defendants have not used—and do not intend to use in the near future—any of the counter-
12 narcotics support funds appropriated by Congress in fiscal year 2019 for border barrier
13 construction. *Id.* (noting that all \$2.5 billion in border barrier construction support to DHS under
14 Section 284 is attributable to Section 8005 and 9002 reprogramming). In other words, every
15 dollar of Section 284 support to DHS and its enforcement agency, CBP, is attributable to
16 reprogramming mechanisms.

17 DoD’s provision of support under Section 284 does not require a national emergency
18 declaration.

19 C. Section 8005

20 “An amount available under law may be withdrawn from one appropriation account and
21 credited to another or to a working fund only when authorized by law.” 31 U.S.C. § 1532.
22 Section 8005 of the fiscal year 2019 Department of Defense Appropriations Act authorizes the
23 Secretary of Defense to transfer up to \$4 billion “of working capital funds of the Department of
24 Defense or funds made available in this Act to the Department of Defense for military functions
25 (except military construction).” § 8005, 132 Stat. at 2999. The Secretary must first determine that
26 “such action is necessary in the national interest.” *Id.* Section 8005 further provides that such
27 authority to transfer may only be used (1) for higher priority items than those for which originally
28 appropriated, and (2) based on unforeseen military requirements, but (3) in no case where the item

1 for which funds are requested has been denied by the Congress.¹⁰ *Id.*

2 DoD's Section 8005 transfer authority has existed in largely the same form since at least
3 fiscal year 1974. *See* Department of Defense Appropriation Act, 1974, Pub. L. No. 93-238, § 735,
4 87 Stat. 1026, 1044 (1974). That year, Congress added the "denied by Congress" provision "to
5 tighten congressional control of the reprogramming process," and in response to incidents where
6 "[DoD] [had] requested that funds which have been specifically deleted in the legislative process
7 be restored through the reprogramming process." H.R. Rep. No. 93-662, at 16 (1973). The House
8 Committee on Appropriations "believ[ed] that to concur in such actions would place committees
9 in the position of undoing the work of the Congress," and that "henceforth no such requests will
10 be entertained." *Id.*

11 On February 25, 2019, DHS submitted a request to DoD for assistance blocking drug-
12 smuggling corridors under Section 284. *See* Rapuano Decl. ¶ 3; States RJN Ex. 33. And on
13 March 25, 2019, DoD invoked Section 8005 to transfer \$1 billion from funds Congress previously
14 appropriated for military personnel costs to the drug interdiction fund, which DoD then intends to
15 use to provide DHS's requested "assistance" by constructing border barriers using its Section 284
16 authority. *See* Rapuano Decl. ¶ 5, Ex. D. Despite the recent dispute between the President and
17 Congress over funding for border barrier construction, and although the President had directed
18 DoD nearly a year prior to support DHS "in securing the southern border and taking other
19 necessary actions," including the provision of "military personnel," Federal Defendants purported
20 to invoke Section 8005 "based on unforeseen military requirements." *Id.*; *see also* States RJN Ex.
21 27 (April 4, 2018 presidential memorandum). On May 9, 2019, Defendants invoked Section 8005
22 and a related reprogramming provision to authorize the transfer of an additional \$1.5 billion in
23 funding into the drug interdiction fund, which then is slated to be used under Section 284 for
24 border barrier construction. *See* Rapuano Second Decl. ¶¶ 6–7, Ex. C.

25 The reprogramming of funds under Section 8005 does not require a national emergency
26 declaration.

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¹⁰ 10 U.S.C. § 2214(b) contains identical transfer authority.

D. Section 2808

Under Section 2808, the Secretary of Defense “may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law.” 10 U.S.C. § 2808(a). Section 2808 requires that the President first declare a national emergency under the NEA “that requires use of the armed forces.” *Id.* And the Secretary of Defense must use the funds for “military construction projects . . . that are necessary to support such use of the armed forces.” *Id.*

Congress defined the term “military construction” as it is used in Section 2808 to “include[] any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road (as described in section 210 of title 23).” 10 U.S.C. § 2801(a). And Congress defined the term “military installation” to “mean[] a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control.” *Id.* § 2801(c)(4).

Presidents have twice invoked Section 2808’s military construction authority. In 1990, President George H.W. Bush authorized emergency construction authority “to deal with the threat to the national security and foreign policy of the United States caused by the invasion of Kuwait by Iraq.” Exec. Order No. 12,734, 55 Fed. Reg. 48,099 (Nov. 14, 1990). President George W. Bush later authorized emergency construction authority in the aftermath of the September 11, 2001 terrorist attacks. Exec. Order. No. 13,235, 66 Fed. Reg. 58,343 (Nov. 16, 2001). To date, DoD has only once used its Section 2808 military construction authority domestically, when it authorized \$35 million in funds to secure weapons of mass destruction in five states. *See* Michael J. Vassalotti, Brendan W. McGarry, *Military Construction Funding in the Event of a National Emergency*, Cong. Research Serv. 2 & tbl. 1 (January 11, 2019).

According to Defendants, the Acting Secretary of Defense “has not yet decided to undertake or authorize any barrier construction projects under section 2808.” Rapuano Decl. ¶ 14.

1 DoD undertook an internal review process, to identify “existing military construction projects of
2 sufficient value to provide up to \$3.6 billion of funding.” *Id.* ¶ 15. The review process identified
3 such funding for border barrier construction, but the Acting Secretary nevertheless “has taken no
4 action on this information and has not yet decided to undertake or authorize any barrier
5 construction projects under section 2808.” *See* Dkt. No. 131-2 (“Rapuano Third Decl.”) ¶ 6.
6 Defendants have represented that they “will inform the Court” once a decision is made to use
7 Section 2808 to fund border barrier construction. *See* Dkt. No. 131 at 3.

8 **E. Treasury Forfeiture Fund (Section 9705)**

9 Through 31 U.S.C. § 9705, Congress established in the Treasury of the United States a
10 separate fund known as the “Department of the Treasury Forfeiture Fund.” 31 U.S.C. § 9705(a).
11 Funds are generally available to the Secretary of the Treasury “with respect to seizures and
12 forfeitures made pursuant to [applicable] law,” and for certain “law enforcement purposes.” *Id.*
13 State and local law enforcement agencies that participate in the seizure or forfeiture of property
14 may receive “[e]quitable sharing payments.” *Id.* § 9705(a)(1)(G). Section 9705(a)(1)(G) details
15 three statutory avenues for the provision of such equitable sharing payments: “Equitable sharing
16 payments made to other Federal agencies, State and local law enforcement agencies, and foreign
17 countries pursuant to section 616(c) of the Tariff Act of 1930 (19 U.S.C. 1616a(c)), section 981 of
18 title 18, or subsection (h) of this section, and all costs related thereto.” Equitable sharing
19 payments are statutorily capped, however, by the value of seized property. 31 U.S.C.
20 § 9705(b)(2). After the TFF has accounted for not only the current fiscal year’s mandatory
21 expenses—which include equitable sharing payments—but also set aside adequate funds for the
22 following fiscal year’s mandatory expenses, unobligated balances are available to the Secretary of
23 the Treasury, to be used “in connection with the law enforcement activities of any Federal
24 agency.” 31 U.S.C. § 9705(g)(4)(B). This is commonly referred to as “Strategic Support.” *See*
25 Case No. 4:19-cv-00872-HSG, ECF No. 89-9 (“Farley Decl.”) ¶ 11.

26 In late December 2018¹¹—during the government shutdown and just before the
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28 ¹¹ The exact date of the request is unclear due to Defendants’ inconsistent representations.
Compare Flossman Second Decl. ¶ 9 (indicating the request was made on December 26, 2018),

1 Administration sought \$5.7 billion from Congress to fund border barrier construction—DHS
 2 requested \$681 million in Strategic Support funding “for border security.” *Id.* ¶ 24; *see also* States
 3 RJN Ex. 25 (January 6, 2019 request for \$5.7 billion in funding for border barrier construction).
 4 The Treasury ultimately determined that it could make available to CBP, DHS’s enforcement
 5 agency, up to \$601 million from the TFF, in two tranches. Farley Decl. ¶¶ 24–25; Opp. at 9. The
 6 first tranche—\$242 million—was made available for obligation on March 14, 2019. *See* Opp. at
 7 9. Save for a small portion “for program support on the TFF funded projects,” CBP intends to
 8 obligate the first tranche “on an Interagency Agreement (IAA) with the U.S. Army Corps of
 9 Engineers . . . by June 2019.” Dkt. No. 131-1 (“Flossman Third Decl.”) ¶ 4. Defendants represent
 10 that “CBP intends to obligate all available TFF funds before the end of Fiscal Year 2019 or, if not,
 11 before the end of the 2019 calendar year.” Flossman Second Decl. ¶ 11. The second tranche—
 12 \$359 million—“is expected to be made available for obligation at a later date upon Treasury’s
 13 receipt of additional anticipated forfeitures.” *See* Opp. at 9. CBP intends to use funds from the
 14 TFF “exclusively for projects in the Rio Grande Valley Sector,” in Texas. *See* Flossman Third
 15 Decl. ¶ 5.

16 The Secretary of Treasury’s use of funds in the TFF for Strategic Support does not require
 17 a national emergency declaration.

18 **F. National Environmental Policy Act**

19 NEPA establishes a “national policy which will encourage productive and enjoyable
 20 harmony between man and his environment[,] to promote efforts which will prevent or eliminate
 21 damage to the environment and biosphere and stimulate the health and welfare of man.” 42
 22 U.S.C. § 4321. To this end, NEPA compels federal agencies to assess the environmental impact
 23 of agency actions that “significantly affect[] the quality of the human environment.” *Id.*
 24 § 4332(C). NEPA

25 serves two fundamental objectives. First, it “ensures that the agency,
 26 in reaching its decision, will have available, and will carefully
 27 consider, detailed information concerning significant environmental
 impacts.” And, second, it requires “that the relevant information will

28 *with* Farley Decl. ¶ 24 (indicating the request was made on December 29, 2018).

1 be made available to the larger audience that may also play a role in
2 both the decisionmaking process and the implementation of that
3 decision.”

3 *WildEarth Guardians v. Provencio*, No. 17-17373, 2019 WL 1983455, at *7 (9th Cir. May 6,
4 2019) (quoting *WildEarth Guardians v. Mont. Snowmobile Ass’n*, 790 F.3d 920, 924 (9th Cir.
5 2015)). NEPA does not establish substantive environmental standards; rather, it sets “action-
6 forcing” procedures that compel agencies to take a “hard look” at environmental consequences.
7 *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348–50 (1989). “NEPA’s
8 purpose is to ensure that ‘the agency will not act on incomplete information, only to regret its
9 decision after it is too late to correct.’” *Friends of the Clearwater v. Dombek*, 222 F.3d 552, 557
10 (9th Cir. 2000) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989)). And the
11 Ninth Circuit commands that courts “strictly interpret” NEPA’s procedural requirements “to the
12 fullest extent possible,” as consistent with NEPA’s policies. *Churchill Cty. v. Norton*, 276 F.3d
13 1060, 1072 (9th Cir. 2001) (quoting *Lathan v. Brinegar*, 506 F.2d 677, 687 (9th Cir. 1974) (en
14 banc)). “[G]rudging, pro forma compliance will not do.” *Id.* (quoting *Lathan*, 506 F.2d at 693).

15 Where an agency’s project “*might* significantly affect environmental quality,” NEPA
16 compels preparation of what is known as an Environmental Impact Statement (“EIS”). *Provencio*,
17 2019 WL 1983455, at *7 (emphasis added). To prevail on a claim that an agency violated its duty
18 to prepare an EIS, a plaintiff need only raise “substantial questions whether a project may have a
19 significant [environmental] effect.” *Id.* (quoting *Blue Mountains Biodiversity Project v.*
20 *Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)). An action’s “significance” depends on “both
21 context and intensity.” 40 C.F.R. § 1508.27; *see also id.* § 1508.27(b) (setting forth ten factors to
22 “consider[] in evaluating intensity”). Even where a project does not require an EIS, agencies
23 generally must prepare an Environmental Assessment (“EA”) which, in part, serves to “[b]riefly
24 provide sufficient evidence and analysis for determining whether to prepare an environmental
25 impact statement or a finding of no significant impact.” *See* 40 C.F.R. § 1508.9(a)(1).

26 “[A]gency action taken without observance of the procedure required by law will be set
27 aside.” *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

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1 **III. LEGAL STANDARD**

2 A preliminary injunction is a matter of equitable discretion and is “an extraordinary
3 remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”
4 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). “A plaintiff seeking preliminary
5 injunctive relief must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer
6 irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor,
7 and that an injunction is in the public interest.” *Id.* at 20. Alternatively, an injunction may issue
8 where “the likelihood of success is such that serious questions going to the merits were raised and
9 the balance of hardships tips sharply in [the plaintiff’s] favor,” provided that the plaintiff can also
10 demonstrate the other two *Winter* factors. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
11 1131–32 (9th Cir. 2011) (citation and internal quotation marks omitted). Under either standard,
12 Plaintiffs bear the burden of making a clear showing that they are entitled to this extraordinary
13 remedy. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). The most important
14 *Winter* factor is likelihood of success on the merits. *See Disney Enters., Inc. v. VidAngel, Inc.*, 869
15 F.3d 848, 856 (9th Cir. 2017).

16 **IV. ANALYSIS**

17 In the pending motion, Plaintiffs seek to enjoin Defendants from using certain diverted
18 federal funds and resources for border barrier construction. Specifically, Plaintiffs move to enjoin
19 Defendants from (1) invoking Section 8005’s reprogramming authority to channel funds into
20 DoD’s drug interdiction fund, (2) invoking Section 284 to divert monies from DoD’s drug
21 interdiction fund for border barrier construction on the southern border of Arizona and New
22 Mexico, (3) invoking Section 2808 to divert monies from appropriated DoD military construction
23 projects for border barrier construction,¹² and (4) taking any further action related to border barrier
24 construction until Defendants comply with NEPA.

25 Defendants oppose each basis for injunctive relief. Defendants further contend that the
26 Plaintiffs lack standing to bring their Sections 8005 and 2808 claims. The Court addresses these
27

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¹² Only the Citizen Group Plaintiffs challenge the diversion of funds under Section 2808.

1 threshold issues first before turning to Plaintiffs’ individual bases for injunctive relief.

2 **A. Article III Standing**

3 A plaintiff seeking relief in federal court bears the burden of establishing “the irreducible
4 constitutional minimum” of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)
5 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). First, the plaintiff must have
6 “suffered an injury in fact.” *Id.* This requires “an invasion of a legally protected interest” that is
7 concrete, particularized, and actual or imminent, rather than conjectural or hypothetical. *Lujan*,
8 504 U.S. at 560 (internal quotation marks omitted). Second, the plaintiff’s injury must be “fairly
9 traceable to the challenged conduct of the defendant.” *Spokeo*, 136 S. Ct. at 1547. Third, the
10 injury must be “likely to be redressed by a favorable judicial decision.” *Id.* (citing *Lujan*, 504 U.S.
11 at 560–61).

12 **1. Plaintiffs Have Standing for Their 8005 Claim.**

13 Defendants argue that Plaintiffs lack standing to challenge Defendants’ invocation of
14 Section 8005 to reprogram funds into the drug interdiction fund, so that Defendants can then
15 divert that money wholesale to border barrier construction using Section 284. *See Opp.* at 14.¹³
16 Defendants do not dispute that Plaintiffs have standing to challenge the use of funds from the drug
17 interdiction fund for border barrier construction under Section 284. Defendants nonetheless
18 reason that harm from construction using drug interdiction funds under Section 284 does not
19 establish standing to challenge Defendants’ use of Section 8005 to supply those funds. *Id.*
20 Defendants argue that standing requires that the plaintiff be the “object” of the challenged agency
21 action, but that the Section 8005 augmentation of the drug interdiction fund and the use of that
22 money for construction are two distinct agency actions. *Id.* (citing *Lujan*, 504 U.S. at 562).
23 According to Defendants, the “object” of the Section 8005 reprogramming was “simply mov[ing]
24 funds among DoD’s accounts.” *Id.* (citing *Lujan*, 504 U.S. at 562).

25 Defendants’ logic fails in all respects. As an initial matter, it is not credible to suggest that

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27 ¹³ Defendants also argue Plaintiffs lack standing because they fall outside Section 8005’s “zone of
28 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 IV.B.1.

1 the “object” of the Section 8005 reprogramming is anything but border barrier construction, even
2 if the reprogrammed funds make a pit stop in the drug interdiction fund. Since Defendants first
3 announced that they would reprogram funds using Section 8005, they have uniformly described
4 the object of that reprogramming as border barrier construction. *See* Rapuano Decl. ¶ 5 (providing
5 that “the Acting Secretary of Defense decided to use DoD’s general transfer authority under
6 section 8005 . . . to transfer funds between DoD appropriations to fund [border barrier
7 construction in Arizona and New Mexico]”); *id.* Ex. D, at 1 (notifying Congress that the
8 “reprogramming action” under Section 8005 is for “construction of additional physical barriers
9 and roads in the vicinity of the United States border”).

10 Nor does *Lujan* impose Defendants’ proffered strict “object” test. The *Lujan* Court
11 explained that “when the plaintiff is not himself the object of the government action or inaction he
12 challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.”
13 504 U.S. at 562 (internal quotation marks omitted). And the Supreme Court was concerned in
14 particular with “causation and redressability,” which are complicated inquiries when a plaintiff’s
15 standing “depends on the unfettered choices made by independent actors not before the courts and
16 whose exercise of broad and legitimate discretion the courts cannot presume either to control or to
17 predict.” *Id.* (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (Kennedy, J.)). As
18 concerns causation, the Ninth Circuit recently explained that Article III standing only demands a
19 showing that the plaintiff’s injury is “fairly traceable to the challenged action of the defendant, and
20 not the result of the independent action of some third party not before the court.” *Mendia v.*
21 *Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 167
22 (1997)). “Causation may be found even if there are multiple links in the chain connecting the
23 defendant’s unlawful conduct to the plaintiff’s injury, and there’s no requirement that the
24 defendant’s conduct comprise the last link in the chain. As we’ve said before, what matters is not
25 the length of the chain of causation, but rather the plausibility of the links that comprise the
26 chain.” *Id.* (internal quotation marks and citations omitted).

27 No complicated causation inquiry is necessary here, as there are no independent absent
28 actors. More important, if there were ever a case where standing exists even though the

1 challenged government action is nominally directed to some different “object,” this is it. Neither
 2 the parties nor the Court harbor any illusions that the point of reprogramming funds under Section
 3 8005 is to use those funds for border barrier construction. And under Ninth Circuit law, there is
 4 no requirement that the challenged conduct be the last link in the causal chain. Rather, even if
 5 there is an intervening link between the Section 8005 reprogramming and the border barrier
 6 construction itself, any injury caused by the border barrier construction is nonetheless “fairly
 7 traceable” to the Section 8005 reprogramming under the circumstances. *See id.* The Court thus
 8 cannot accept the Government’s “two distinct actions” rationale as a basis for shielding
 9 Defendants’ actions from review.

10 **2. Plaintiffs Have Standing for Their Section 2808 Claim.**

11 Defendants argue that Plaintiffs lack standing to challenge Defendants’ diversion of funds
 12 under Section 2808 “because the Acting Secretary of Defense has not yet decided to undertake or
 13 authorize any barrier construction projects under [Section] 2808.” *Opp.* at 21. Defendants
 14 describe the status of the Section 2808 diversion as follows:

15 The Acting Secretary of Defense has not yet decided to undertake or
 16 authorize any barrier construction projects under section 2808. To
 17 inform the Acting Secretary’s decision, on March 20, 2019, the
 18 Secretary of Homeland Security provided a prioritized list of
 19 proposed border-barrier-construction projects that DHS assesses
 20 would improve the efficiency and effectiveness of the armed forces
 21 supporting OHS in securing the southern border. On April 11, 2019,
 as a follow-up to the Chairman’s preliminary assessment of February
 10, 2019, the Acting Secretary instructed the Chairman of the Joint
 Chiefs of Staff to provide, by May 10, 2019, a detailed assessment of
 whether and how specific military construction projects could support
 the use of the armed forces in addressing the national emergency at
 the southern border.

22 Also on April 11, 2019, the Acting Secretary instructed the DoD
 23 Comptroller, in consultation with the Secretaries of the military
 24 departments, the Chairman of the Joint Chiefs of Staff, the Under
 25 Secretary of Defense for Acquisition and Sustainment, the Under
 26 Secretary of Defense for Policy, and the heads of any other relevant
 DoD components to identify, by May 10, 2019, existing military
 construction projects of sufficient value to provide up to \$3.6 billion
 of funding for his consideration.

27 Rapuano Decl. ¶¶ 14–15. According to Defendants, absent some express decision to authorize or
 28 undertake a particular project, Plaintiffs’ injury is speculative: “It is entirely possible that no

1 barrier projects will be constructed pursuant to [Section] 2808, and that, if they are, they will be
2 [sic] built in any location where Plaintiffs would have a claim to a cognizable injury.” Opp. at 21.

3 Defendants ask too much of Plaintiffs. A plaintiff need not present undisputable proof of a
4 future harm. The injury-in-fact requirement instead permits standing when a risk of future injury
5 is “at least *imminent*.” See *Lujan*, 504 U.S. at 564 n.2. And while courts must ensure that the
6 “actual or imminent” measure of harm is not “stretched beyond its purpose, which is to ensure that
7 the alleged injury is not too speculative for Article III purposes,” see *id.*, the Ninth Circuit has
8 consistently held that a “‘credible threat’ that a probabilistic harm will materialize” is enough, see
9 *Nat. Res. Def. Council v. EPA*, 735 F.3d 873, 878 (9th Cir. 2013) (quoting *Covington v. Jefferson*
10 *Cty.*, 358 F.3d 626, 641 (9th Cir. 2004)).

11 At this stage, Plaintiffs have carried their burden to demonstrate that there is a “credible
12 threat” that Defendants will divert funds under Section 2808 for border barrier construction in a
13 location where Plaintiffs would have a claim to a cognizable injury. As detailed in Defendants’
14 supporting declaration, a decision on the use of Section 2808 to authorize border barrier
15 construction is forthcoming, as the DoD has now received necessary information which it intends
16 to use to make decisions. See Rapuano Third Decl. ¶ 6. Further, the Court cannot ignore that the
17 President invoked Section 2808 to enable the diversion of funds for border barrier construction.
18 See Citizen Groups RJN Ex. D. The White House in fact provided in February 2019 that funds
19 under Section 2808 “will be available.” *Id.* Ex. G. There is thus no speculation necessary for the
20 Court to find that Defendants will continue with their current course of conduct and exercise their
21 authority under Section 2808 in the manner directed by the President. See *Cent. Delta Water*
22 *Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002) (“Although [*Nelsen v. King County*,
23 895 F.2d 1248, 1251–52 (9th Cir. 1990)] certainly requires us to consider all the circumstances
24 related to a threatened future harm, including whether the threatened harm may result from a chain
25 of contingencies, the possibility that defendants may change their course of conduct is not the type
26 of contingency to which we referred in *Nelsen*.”).

27 Finally, as to Defendants’ claim that they might use Section 2808 funds in a location where
28 Plaintiffs would not have a claim to a cognizable injury, it is highly unlikely that this would be the

1 case, as Plaintiffs have demonstrated that their members span the entire U.S.-Mexico border. *See*,
 2 *e.g.*, Dkt. No. 32 ¶ 3 (“SBCC’s membership spans the borderlands from California to Texas.”).

3 **B. Plaintiffs Have Shown They Are Entitled to a Preliminary Injunction.**

4 Applying the *Winter* factors, the Court finds Plaintiffs are entitled to a preliminary
 5 injunction as to Defendants’ use of Section 8005’s reprogramming authority to channel funds into
 6 the drug interdiction fund so that those funds may be ultimately used for border barrier
 7 construction in El Paso Sector Project 1 and Yuma Sector Project 1.

8 **1. Likelihood of Success on the Merits**

9 The crux of Plaintiffs’ case is that Defendants’ methods for funding border barrier
 10 construction are unlawful. And Plaintiffs package that core challenge in several ways. For
 11 present purposes, Plaintiffs contend that Defendants’ actions (1) violate Congress’s most-recent
 12 appropriations legislation, (2) are unconstitutional, (3) exceed Defendants’ statutory authority—in
 13 other words, are *ultra vires*—and (4) violate NEPA.

14 The Court begins with a discussion of the law governing the appropriation of federal funds.
 15 Under the Appropriations Clause of the Constitution, “No Money shall be drawn from the
 16 Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. art. I, § 9, cl. 7.
 17 “The Clause’s words convey a ‘straightforward and explicit command’: No money ‘can be paid
 18 out of the Treasury unless it has been appropriated by an act of Congress.’” *U.S. Dep’t of Navy v.*
 19 *FLRA*, 665 F.3d 1339, 1346 (D.C. Cir. 2012) (quoting *OPM v. Richmond*, 496 U.S. 414, 424
 20 (1990)). “The Clause has a ‘fundamental and comprehensive purpose . . . to assure that public
 21 funds will be spent according to the letter of the difficult judgments reached by Congress as to the
 22 common good and not according to the individual favor of Government agents.’” *United States v.*
 23 *McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) (quoting *Richmond*, 496 U.S. at 427–28). It
 24 “protects Congress’s exclusive power over the federal purse,” and “prevents Executive Branch
 25 officers from even inadvertently obligating the Government to pay money without statutory
 26 authority.” *FLRA*, 665 F.3d at 1346–47 (internal quotation marks and citations omitted).

27 “Federal statutes reinforce Congress’s control over appropriated funds,” and under federal
 28 law “appropriated funds may be applied only ‘to the objects for which the appropriations were

1 made.” *Id.* at 1347 (quoting 31 U.S.C. § 1301(a)). Moreover, “[a]n amount available under law
2 may be withdrawn from one appropriation account and credited to another or to a working fund
3 only when authorized by law.” 31 U.S.C. § 1532. “[A]ll uses of appropriated funds must be
4 affirmatively approved by Congress,” and “the mere absence of a prohibition is not sufficient.”
5 *FLRA*, 665 F.3d at 1348. In summary, “Congress’s control over federal expenditures is
6 ‘absolute.’” *Id.* (quoting *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 185 (D.C. Cir.
7 1992)).

8 Rather than dispute these principles, Defendants contend that the challenged conduct
9 complies with them. *See Opp.* at 26 (“The Government is not relying on independent Article II
10 authority to undertake border construction; rather, the actions alleged are being undertaken
11 pursuant to express statutory authority.”). Accordingly, one of the key issues in dispute is whether
12 Congress in fact provided “express statutory authority” for Defendants’ challenged actions.

13 Turning to Plaintiffs’ claims, it is necessary as a preliminary matter to outline the measure
14 and lens of reviewability the Court applies in assessing such broad challenges to actions by
15 executive officers. As a first principle, the Court finds that it has authority to review each of
16 Plaintiffs’ challenges to executive action. “It is emphatically the province and duty of the judicial
17 department to say what the law is.” *Marbury*, 1 Cranch at 177. In determining what the law is,
18 the Court has a duty to determine whether executive officers invoking statutory authority exceed
19 their statutory power. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384
20 (2015). And even where executive officers act in conformance with statutory authority, the Court
21 has an independent duty to determine whether authority conferred by act of the legislature
22 nevertheless runs afoul of the Constitution. *See Clinton v. City of New York*, 524 U.S. 417, 448
23 (1998).

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

28 It is true enough that we have long held that federal courts may in

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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 fail to identify a statutory private right of action, that Plaintiffs must challenge Defendants’ conduct through the framework of the APA, and that to the extent *ultra vires* review is available, “Plaintiffs [must] show that the challenged action ‘contravene[s] clear and mandatory statutory language.’” *See Opp.* at 12–13. But as Plaintiffs detail at length in their reply brief, *ultra vires* review exists outside of the APA framework, and Defendants’ heightened standard for *ultra vires* review only applies where Congress has foreclosed judicial review, which is not the case here. *See Reply* at 2–5; *see also* Dkt. No. 107 (Brief of *Amici Curiae* Federal Courts Scholars).¹⁴

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 14–15. 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

¹⁴ 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.

1 APA framework. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987)
2 (“Appellants need not, however, show that their interests fall within the zones of interests of the
3 constitutional and statutory powers invoked by the President in order to establish their standing to
4 challenge the interdiction program as *ultra vires*.”); *see also* 33 Charles Alan Wright et al., Federal
5 Practice and Procedure § 8302 (2d ed. 2019) (explaining that the “zone of interests” test is to
6 determine whether a plaintiff “seeks to protect interests that ‘arguably’ fall within the ‘zone of
7 interests’ protected by that provision”). In other words, where a plaintiff seeks to vindicate a right
8 protected by a statutory provision, the plaintiff must demonstrate that it arguably falls within the
9 zone of interests Congress meant to protect by enacting that provision. But where a plaintiff seeks
10 equitable relief against a defendant for exceeding its statutory authority, the zone-of-interests test
11 is inapposite. Any other interpretation would lead to absurd results. The very nature of an *ultra*
12 *vires* action posits that an executive officer has gone beyond what the statute permits, and thus
13 beyond what Congress contemplated. It would not make sense to demand that Plaintiffs—who
14 otherwise have standing—establish that Congress contemplated that the statutes allegedly violated
15 would protect Plaintiffs’ interests. It is no surprise, then, that the Supreme Court’s recent
16 discussion of *ultra vires* review in *Armstrong* did not once reference this test.

17 In reviewing the lawfulness of Defendants’ conduct, the Court thus begins each inquiry by
18 determining whether the disputed action exceeds statutory authority. For unless an animating
19 statute sanctions a challenged action, a court need not reach the second-level question of whether
20 it would be unconstitutional for Congress to sanction such conduct. *See Nw. Austin Mun. Util.*
21 *Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (explaining the “well-established principle
22 governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide
23 a constitutional question if there is some other ground upon which to dispose of the case”)
24 (quoting *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)). This is not to say,
25 however, that the yardstick of statutory authority overlooks constitutional concerns entirely. “The
26 so-called canon of constitutional avoidance . . . counsel[s] that ambiguous statutory language be
27 construed to avoid serious constitutional doubts.” *FCC v. Fox Television Stations, Inc.*, 556 U.S.
28 502, 516 (2009). Nonetheless, a court presented with both *ultra vires* and constitutional claims

1 should begin by determining whether the statutory authority supports the action challenged, and
2 only reach the constitutional analysis if necessary.

3 **a. Sections 284 and 8005**

4 At the President’s direction, Defendants intend to divert \$2.5 billion, \$1 billion of which is
5 the subject of the pending motion, to the DoD’s drug interdiction fund for border barrier
6 construction.¹⁵ To do so, Defendants rely on Section 284(b)(7), which authorizes the Secretary of
7 Defense to support other federal agencies for the “[c]onstruction of roads and fences and
8 installation of lighting to block drug smuggling corridors across international boundaries of the
9 United States.” *See The Funds Available to Address the National Emergency at Our Border*, The
10 White House, [https://www.whitehouse.gov/briefings-statements/funds-available-address-national-](https://www.whitehouse.gov/briefings-statements/funds-available-address-national-emergency-border)
11 [emergency-border](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
12 on their reprogramming authority under Section 8005, and plan to “augment” the drug interdiction
13 fund with the entire \$2.5 billion in funds that DoD will then use for the construction. *Id.*

14 Plaintiffs challenge both the augmentation of the drug interdiction fund through Section
15 8005 and the use of funds from the drug interdiction fund under Section 284. Turning first to the
16 augmentation of funds, Section 8005 authorizes the reprogramming of up to \$4 billion “of
17 working capital funds of the Department of Defense or funds made available in this Act to the
18 Department of Defense.” The transfer must be (1) either (a) DoD working capital funds or (b)
19 “funds made available in this Act to the [DoD] for military functions (except military
20 construction),” (2) first determined by the Secretary of Defense as necessary in the national
21 interest, (3) for higher priority items than those for which originally appropriated, (4) based on
22 unforeseen (5) military requirements, and (6) in no case where the item for which funds are

23 _____
24 ¹⁵ The Court here only considers the lawfulness of Defendants’ March 25, 2019 invocation of
25 Section 8005 to reprogram \$1 billion, given the parties’ agreement that this order need not address
26 Defendants’ recently announced intent to use Sections 8005, 9002, and 284 to fund border barrier
27 construction in the El Centro Sector and Tucson Sector Projects. The parties reached this
28 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. 138 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. 142.

1 requested has been denied by Congress. Plaintiffs argue that Defendants’ actions fail the last three
2 requirements. The Court first considers whether the reprogramming Defendants propose here is
3 for an item for which funds were requested but denied by Congress.

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

6 Plaintiffs argue that Defendants are transferring funds for a purpose previously denied by
7 Congress. Mot. at 16. Defendants dispute, however, whether Congress’s affirmative
8 appropriation of funds in the CAA to DHS constitutes a “denial” of appropriations to DoD’s
9 “counter-drug activities in furtherance of DoD’s mission under [Section] 284.” Opp. at 16. In
10 their view, “the item” for which funds are requested, for present purposes, is counterdrug activities
11 under Section 284. *Id.* And Defendants maintain that “nothing in the DHS appropriations statute
12 indicates that Congress ‘denied’ a request to fund DoD’s statutorily authorized counter-drug
13 activities, which expressly include fence construction.” *Id.* In other words, even though DoD’s
14 counterdrug authority under Section 284 is merely a pass-through vessel for Defendants to funnel
15 money to construct a border barrier that will be turned over to DHS, Citizen Groups RJN Ex. I, at
16 10, Defendants argue that the Court should only consider whether Congress denied funding to
17 DoD.

18 Plaintiffs have shown a likelihood of success as to their argument that Congress previously
19 denied “the item for which funds are requested,” precluding the proposed transfer. On January 6,
20 2019, the President asked Congress for “\$5.7 billion for construction of a steel barrier for the
21 Southwest border,” explaining that the request “would fund construction of a total of
22 approximately 234 miles of new physical barrier.” Citizen Groups RJN Ex. A, at 1. The request
23 noted that “[a]ppropriations bills for fiscal year (FY) 2019 that have already been considered by
24 the current and previous Congresses are inadequate to fully address these critical issues,” to
25 include the need for barrier construction funds. *Id.* The President’s request did not specify the
26 mechanics of how the \$5.7 billion sought would be used for the proposed steel barrier
27 construction. *Id.* Nonetheless, in the CAA passed by Congress and signed by the President,
28 Congress appropriated only \$1.375 billion for the construction of pedestrian fencing, of a specified

1 type, in a specified sector, and appropriated no other funds for barrier construction. The Court
2 agrees with Plaintiffs that they are likely to show that the proposed transfer is for an item for
3 which Congress denied funding, and that it thus runs afoul of the plain language of Section 8005
4 and 10 U.S.C. § 2214(b) (“Section 2214”).¹⁶

5 As Defendants acknowledge, in interpreting a statute, the Court applies the principle that
6 “the plain language of [the statute] should be enforced according to its terms, in light of its
7 context.” *ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1210 (9th Cir. 2015). In its
8 *amicus* brief, the House recounts legislative history that provides critical context for the Court’s
9 interpretative task. The House explains that the “denied by the Congress” restriction was imposed
10 on DoD’s transfer authority in 1974 to “tighten congressional control of the reprogramming
11 process.” Dkt. No. 47 (“House Br.”) at 10 (citing H.R. Rep. No. 93-662, at 16 (1973)). The
12 House committee report on the appropriations bill from that year explained that “[n]ot frequently,
13 but on some occasions, the Department ha[d] requested that funds which have been specifically
14 deleted in the legislative process be restored through the reprogramming process,” and that “[t]he
15 Committee believe[d] that to concur in such actions would place committees in the position of
16 undoing the work of the Congress.” H.R. Rep. No. 93-662, at 16. Significantly, the Committee
17 stated that such a position would be “untenable.” *Id.* Consistent with this purpose, Congress has
18 described its intent that appropriations restrictions of this sort be “construed strictly” to “prevent
19 the funding for programs which have been considered by Congress and for which funding has
20 been denied.” *See* H.R. Rep. No. 99-106, at 9 (1985) (discussing analogous appropriations
21 restriction in Pub. L. No. 99-169, § 502(b), 99 Stat. 1005 (codified at 50 U.S.C. § 3094(b)).

22 The Court finds that the language and purpose of Section 8005 and Section 2214(b) likely
23 preclude Defendants’ attempt to transfer \$1 billion from funds Congress previously appropriated
24 for military personnel costs to the drug interdiction fund for the construction of a border barrier.

26 ¹⁶ *See* Fox News, *Mick Mulvaney on chances of border deal, Democrats ramping up investigation*
27 *of Trump admin*, YouTube (Feb. 10, 2019), https://www.youtube.com/watch?v=l_Z0xx_zS0M
28 (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.”).

1 Defendants argue that “Congress never denied DoD funding to undertake the [Section] 284
2 projects at issue,” Opp. at 16, such that Section 8005 and Section 2214(b) are satisfied. But in the
3 Court’s view, that reading of those sections is likely wrong, when the reality is that Congress was
4 presented with—and declined to grant—a \$5.7 billion request for border barrier construction.
5 Border barrier construction, expressly, is the item Defendants now seek to fund via the Section
6 8005 transfer, and Congress denied the requested funds for that item. *See* 10 U.S.C. § 2214(b)
7 (explaining that transfer authority “may not be used if *the item to which the funds would be*
8 *transferred* is an item for which Congress has denied funds”) (emphasis added). And Defendants
9 point to nothing in the language or legislative history of the statutes in support of their assertion
10 that only explicit congressional denial of funding for “[Section] 284 projects,” or even DoD
11 projects generally, would trigger Section 8005’s limitation. Opp. at 16. It thus would be
12 inconsistent with the purpose of these provisions, and would subvert “the difficult judgments
13 reached by Congress,” *McIntosh*, 833 F.3d at 1175, to allow Defendants to circumvent Congress’s
14 clear decision to deny the border barrier funding sought here when it appropriated a dramatically
15 lower amount in the CAA. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609
16 (1952) (Frankfurter, J., concurring) (“It is quite impossible . . . when Congress did specifically
17 address itself to a problem . . . to find secreted in the interstices of legislation the very grant of
18 power which Congress consciously withheld. To find authority so explicitly withheld is not
19 merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole
20 legislative process and the constitutional division of authority between President and Congress.”).

21 **ii. Plaintiffs are Likely to Show That the Transfer is Not**
22 **Based on “Unforeseen Military Requirements.”**

23 Plaintiffs next argue that any need for border barrier construction—to the extent there is a
24 need—was long “foreseen,” noting that the President supported his fiscal year 2019 budget
25 request for border barrier funding with a description that such a barrier “is critical to combating
26 the scourge of drug addiction that leads to thousands of unnecessary deaths.” Mot. at 16 (quoting
27 Citizen Groups RJN Ex. R, at 16).

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

1 drug activities authority under Section 284. While not disputing that the President requested—and
2 was denied—more-comprehensive funds for border barrier construction, Defendants instead note
3 that “[t]he President’s 2019 budget request did not propose additional funding for DoD’s
4 counterdrug activities under [Section] 284.” Opp. at 16. Defendants then argue that because DHS
5 only formally requested Section 284 support in February 2019, the need for Section 284 support
6 only become foreseen in February 2019. *Id.* at 16–17.

7 Separate and apart from the Court’s analysis above regarding whether Congress previously
8 denied funding for the relevant item, Plaintiffs also have shown a likelihood of success as to their
9 argument that Defendants fail to meet the “unforeseen military requirement” condition for the
10 reprogramming of funds under Section 8005. As the House notes in its *amicus* brief, DoD has
11 used this authority in the past to transfer funds based on unanticipated circumstances (such as
12 hurricane and typhoon damage to military bases) justifying a departure from the scope of spending
13 previously authorized by Congress. House Br. at 10 (citing Office of the Under Secretary of
14 Defense (Comptroller), DoD Serial No. FY 04-37 PA, Reprogramming Action (Sept. 3, 2004)).
15 Here, however, Defendants claim that what was “unforeseen” was “[t]he need for DoD to exercise
16 its [Section] 284 authority to provide support for counter-drug activities,” which “did not arise
17 until February 2019, when DHS requested support from DoD to construct fencing in drug
18 trafficking corridors.” Opp. at 16.

19 Defendants’ argument that the need for the requested border barrier construction funding
20 was “unforeseen” cannot logically be squared with the Administration’s multiple requests for
21 funding for exactly that purpose dating back to at least early 2018. *See* Citizen Groups Ex. R
22 (February 2018 White House Budget Request describing “the Administration’s proposal for \$18
23 billion to fund the border wall”); *see also* States RJN Exs. 14–20 (failed bills); *id.* Ex. 21
24 (December 11, 2018 transcript from a meeting with members of Congress, where the President
25 stated that “if we don’t get what we want [for border barrier construction funding], one way or the
26 other – whether it’s through you, through a military, through anything you want to call [sic] – I
27 will shut down the government”); Case No. 4:19-cv-00872-HSG, ECF No. 89-12, at 14 (testimony
28 of Defendant Shanahan before the House Armed Services Committee explaining that the

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

9 Interpreting “unforeseen” to refer to the request for DoD assistance, as opposed to the
10 underlying “requirement” at issue, also is not reasonable. By Defendants’ logic, *every* request for
11 Section 284 support would be for an “unforeseen military requirement,” because only once the
12 request was made would the “need to exercise authority” under the statute be foreseen. There is
13 no logical reason to stretch the definition of “unforeseen military requirement” from requirements
14 that the government as a whole plainly cannot predict (like the need to repair hurricane damage) to
15 requirements that plainly *were* foreseen by the government as a whole (even if DoD did not realize
16 that it would be asked to pay for them until after Congress declined to appropriate funds requested
17 by another agency). Nothing presented by the Defendants suggests that its interpretation is what
18 Congress had in mind when it imposed the “unforeseen” limitation, especially where, as here,
19 multiple agencies are openly coordinating in an effort to build a project that Congress declined to
20 fund. The Court thus finds it likely that Plaintiffs will succeed on this claim.¹⁷

21 **iii. Accepting Defendants’ Proposed Interpretation of**
22 **Section 8005’s Requirements Would Likely Raise Serious**
23 **Constitutional Questions.**

24 The Court also finds it likely that Defendants’ reading of these provisions, if accepted,
25 would pose serious problems under the Constitution’s separation of powers principles. Statutes
26 must be interpreted to avoid a serious constitutional problem where another “construction of the

27 _____
28 ¹⁷ 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.

1 statute is fairly possible by which the question may be avoided.” *Zadvydas v. Davis*, 533 U.S. 678,
2 689 (2001) (internal quotation marks and citations omitted). Constitutional avoidance is “thus a
3 means of giving effect to congressional intent,” as it is presumed that Congress did not intend to
4 create an alternative interpretation that would raise serious constitutional concerns. *Clark v.*
5 *Martinez*, 543 U.S. 371, 382 (2005). Courts thus “have read significant limitations into . . .
6 statutes in order to avoid their constitutional invalidation.” *Zadvydas*, 533 U.S. at 689 (citation
7 omitted).

8 As Plaintiffs point out, the upshot of Defendants’ argument is that the Acting Secretary of
9 Defense is authorized to use Section 8005 to funnel an additional \$1 billion to the Section 284
10 account for border barrier construction, notwithstanding that (1) Congress decided to appropriate
11 only \$1.375 billion for that purpose; (2) Congress’s *total* fiscal year 2019 appropriation available
12 under Section 284 for “[c]onstruction of roads and fences and installation of lighting to block drug
13 smuggling corridors across international boundaries of the United States” was \$517 million, much
14 of which already has been spent; and (3) Defendants have acknowledged that the Administration
15 considered reprogramming funds for border barrier construction even before the President signed
16 into law Congress’s \$1.375 billion appropriation. *See* Department of Defense and Labor, Health
17 and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, div. A, tit.
18 VI, 132 Stat. 2981, 2997 (2018) (appropriating \$881 million in funds “[f]or drug interdiction and
19 counter-drug activities” in fiscal year 2019, \$517 million of which is “for counter-narcotics
20 support”); Dkt. No. 131 at 4 (indicating that Defendants have not used—and do not intend to use
21 in the near future—any funds appropriated by Congress for counter-narcotics support for border
22 barrier construction); Case No. 4:19-cv-00872-HSG, ECF No. 89-12, at 14 (testimony of
23 Defendant Shanahan before the House Armed Services Committee explaining that the
24 Administration discussed unilateral reprogramming “prior to the declaration of a national
25 emergency”). Put differently, according to Defendants, Section 8005 authorizes the Acting
26 Secretary of Defense to essentially triple—or quintuple, when considering the recent additional
27 \$1.5 billion reprogramming—the amount Congress allocated to this account for these purposes,
28 notwithstanding Congress’s recent and clear actions in passing the CAA, and the relevant

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1 committees’ express disapproval of the proposed reprogramming. *See* States RJN Ex. 35 (“The
2 committee denies this request. The committee does not approve the proposed use of [DoD] funds
3 to construct additional physical barriers and roads or install lighting in the vicinity of the United
4 States border.”); *id.* Ex. 36 (“The Committee has received and reviewed the requested
5 reprogramming action The Committee denies the request.”). Moreover, Defendants’
6 decision not to refer specifically to Section 284 in their \$5.7 billion funding request deprived
7 Congress of even the *opportunity* to reject or approve this funding item.¹⁸

8 The Court agrees with Plaintiffs that reading Section 8005 to permit this massive
9 redirection of funds under these circumstances likely would amount to an “unbounded
10 authorization for Defendants to rewrite the federal budget,” Reply at 14, and finds that
11 Defendants’ reading likely would violate the Constitution’s separation of powers principles.
12 Defendants contend that because Congress did not reject (and, indeed, never had the opportunity
13 to reject) a specific request for an appropriation to the Section 284 drug interdiction fund, DoD
14 can use Section 8005 to route anywhere up to the \$4 billion cap set by that statute, to be spent for
15 the benefit of DHS via Section 284. But this reading of DoD’s authority under the statute would
16 render meaningless Congress’s constitutionally-mandated power to assess proposed spending,
17 then render its binding judgment as to the scope of permissible spending. *See FDA v. Brown &*
18 *Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (holding that the interpretation of statutes
19 “must be guided to a degree by common sense as to the manner in which Congress is likely to
20 delegate a policy decision of such economic and political magnitude”); *Util. Air Regulatory Grp.*
21 *v. EPA*, 573 U.S. 302, 324 (2014) (“We expect Congress to speak clearly if it wishes to assign to
22 an agency decisions of vast economic and political significance.”) (internal quotation marks
23 omitted). This is especially true given that Congress has repeatedly rejected legislation that would
24

25 ¹⁸ Defendants do not convincingly explain why the amount now sought to be transferred under
26 Section 8005 could not have been sought directly from Congress as part of the fiscal year 2019
27 appropriation to the DoD Section 284 account to cover requests for counterdrug support, given
28 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.

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

13 While Defendants argue that the text and history of Section 284 suggest that their proposed
14 transfer and use of the funds are within the scope of what Congress has permitted previously, Opp.
15 at 18, that argument only highlights the serious constitutional questions that accepting their
16 position would create. First, Defendants note that in the past DoD has completed what they
17 characterize as “large-scale fencing projects” with Congress’s approval. Opp. at 18 (citing H.R.
18 Rep. No. 103-200, at 330–31 (1993)). But Congress’s past approval of relatively small
19 expenditures, that were well within the total amount allocated by Congress to DoD under Section
20 284’s predecessor, speaks not at all to Defendants’ current claim that the Acting Secretary has
21 authority to redirect sums over a hundred orders of magnitude greater to that account in the face of
22 Congress’s appropriations judgment in the CAA. Similarly, whether or not Section 284 formally
23 “limits” the Secretary to “small scale construction” (defined in Section 284(i)(3) as “construction
24 at a cost not to exceed \$750,000 for any project”), reading the statute to suggest that Congress
25 requires reporting of tiny projects but nonetheless has delegated authority to DoD to conduct the
26 massive funnel-and-spend project proposed here is implausible, and likely would raise serious
27 questions as to the constitutionality of such an interpretation. *See Whitman v. Am. Trucking*
28 *Ass’ns*, 531 U.S. 457, 468 (2001) (noting that Congress “does not, one might say, hide elephants

1 in mouseholes”).

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

11 Finally, the Court has serious concerns with Defendants’ theory of appropriations law,
12 which presumes that the Executive Branch can exercise spending authority unless Congress
13 explicitly restricts such authority by statute. Counsel for Defendants advanced this theory at the
14 hearing on this motion, arguing that when Congress passed the recent DoD appropriations act
15 containing Section 8005, it “could have” expressly “restrict[ed] that authority” to preclude
16 reprogramming funds for border barrier construction. *See* Dkt. No. 138 at 76:16–77:3. According
17 to Defendants: “If Congress had wanted to deny DOD this specific use of that [reprogramming]
18 authority, that’s something it needed to actually do in an explicit way in the appropriations
19 process. And it didn’t.” *Id.* at 77:21–24. But it is not Congress’s burden to prohibit the Executive
20 from spending the Nation’s funds: it is the Executive’s burden to show that its desired use of those
21 funds was “affirmatively approved by Congress.” *See FLRA*, 665 F.3d at 1348 (“[A]ll uses of
22 appropriated funds must be affirmatively approved by Congress,” and “the mere absence of a
23 prohibition is not sufficient.”). To have this any other way would deprive Congress of its absolute
24 control over the power of the purse, “one of the most important authorities allocated to Congress
25 in the Constitution’s ‘necessary partition of power among the several departments.’” *Id.* at 1346–
26 47 (quoting *The Federalist* No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961)).

27 To the extent Defendants believe the Ninth Circuit’s decision in *McIntosh* suggests
28 anything to the contrary, the Court disagrees. Defendants appeared to argue at the hearing on this

1 motion that *McIntosh* stands for the principle that the Executive enjoys unfettered spending power
2 unless Congress crafts an appropriations rider cabining such authority. *See* Dkt. No. 138 at 75:5–
3 10. As counsel for Defendants put it, “[Plaintiffs] want to say that something was denied by
4 Congress if it wasn’t funded by Congress. . . . But that is just not how these statutes are written
5 and that’s not how [*McIntosh*] tells us we interpret the appropriations statute.” *Id.* at 75:13–20.
6 But Defendants overlook that no party in *McIntosh* disputed that the government’s use of funds
7 was authorized but for the appropriations rider at issue in that case. *See* 833 F.3d at 1175 (“The
8 parties dispute whether the government’s spending money on their prosecutions violates [the
9 appropriations rider].”). It is thus unremarkable that when faced with a dispute exclusively
10 concerning whether the government’s otherwise-authorized spending of money violated an
11 appropriations rider, the Ninth Circuit held that “[i]t is a fundamental principle of appropriations
12 law that we may only consider the text of an appropriations rider.” *Id.* at 1178; *see also* Dkt. No.
13 138 at 75:5–10 (defense counsel relying on this language from *McIntosh*).

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

28 For all of these reasons, the Court finds that Plaintiffs have shown a likelihood of success

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1 as to their argument that the reprogramming of \$1 billion under Section 8005 to the Section 284
2 account for border barrier construction is unlawful.¹⁹

3 **b. Section 2808**

4 At the President’s direction, the DoD intends to use up to \$3.6 billion in military
5 construction funding to facilitate border barrier construction. Defendants rely on Section 2808,
6 under which the Secretary of Defense may “undertake military construction projects, and may
7 authorize the Secretaries of the military departments to undertake military construction projects,
8 not otherwise authorized by law.” 10 U.S.C. § 2808(a). As is relevant here, Section 2808 requires
9 that (1) the President first declare a national emergency in accordance with the NEA that “requires
10 use of the armed forces,” (2) the use of funds be for “military construction projects,” and (3) the
11 military construction projects be “necessary to support such use of the armed forces.” *Id.*
12 Plaintiffs contend that Defendants’ plan to use Section 2808 to build a barrier on the U.S.-Mexico
13 border fails all three requirements.

14 Under the circumstances, it is unclear how border barrier construction could reasonably
15 constitute a “military construction project” such that Defendants’ invocation of Section 2808
16 would be lawful. Section 2808 authorizes the Secretary of Defense to “undertake military
17 construction projects.” And Congress defined the term “military construction,” as it is used in
18 Section 2808, to “include[] any construction, development, conversion, or extension of any kind
19 carried out with respect to a military installation, whether to satisfy temporary or permanent
20 requirements, or any acquisition of land or construction of a defense access road.” 10 U.S.C.

21
22 _____
23 ¹⁹ Defendants have now acknowledged that all of the money they plan to spend on border barrier
24 construction under Section 284 is money transferred into that account under Section 8005. *See*
25 *Dkt. No. 131 at 4*. Given this acknowledgment, and the Court’s finding that Plaintiffs are likely to
26 show that the Section 8005 reprogramming is unlawful, the Court need not at this stage decide
27 whether Defendants would have been permitted to use for border barrier construction any
28 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 17 (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”).

1 § 2801(a). Congress in turn defined the term “military installation” to “mean[] a base, camp, post,
2 station, yard, center, or other activity under the jurisdiction of the Secretary of a military
3 department or, in the case of an activity in a foreign country, under the operational control of the
4 Secretary of a military department or the Secretary of Defense, without regard to the duration of
5 operational control.” *Id.* § 2801(c)(4).

6 Plaintiffs reason that border barrier construction does not constitute construction “carried
7 out with respect to a military installation,” because (1) the U.S.-Mexico border is not a military
8 “base, camp, post, station, yard, center” or “defense access road;” and (2) securing the border is
9 not an “activity under the jurisdiction of the Secretary of a military department.” *Mot.* at 14.
10 Instead, Congress assigned responsibility for “[s]ecuring the borders” to DHS. *See* 6 U.S.C.
11 § 202. Defendants respond that although the statute defines both “military construction” and its
12 nested term, “military installation,” “[b]road terms defining military construction as ‘includ[ing]’
13 (but not limited to, *see* 10 U.S.C. § 101(f)(4)) construction with respect to a military installation,
14 and defining military installation to include non-specified ‘other activity,’ are not the kind of clear
15 and mandatory statutory language that is a necessary predicate to an *ultra vires* claim.” *Opp.* at 23.

16 Defendants’ arguments prove too much. As explained above, Defendants misunderstand
17 the standard for *ultra vires* review. More to the merits, the plain language of the relevant statutory
18 definitions does not demonstrate the sort of unbounded authority that Defendants suggest.
19 Turning first to the statutory definition of “military construction,” that it uses the word “includes”
20 when it provides that military construction “includes any construction, development, conversion,
21 or extension of any kind carried out with respect to a military installation” is irrelevant. No one
22 disputes that border barrier construction constitutes “construction.” What matters is that Section
23 2801(a) limits such construction—however broad that term might be—to construction related to a
24 military installation. In other words, the critical language of Section 2801(a) is not the word
25 “includes,” it is the condition “with respect to a military installation.”

26 Turning next to the statutory definition of “military installation,” Section 2801(c)(4)
27 provides in relevant part that it “means a base, camp, post, station, yard, center, or other activity
28 under the jurisdiction of the Secretary of a military department.” And Defendants make no

1 attempt to characterize the U.S.-Mexico border or a border barrier as a “base, camp, post, station,
2 yard, [or] center.” Nor could they. Defendants instead contend that border barrier construction is
3 authorized under the catch-all term “other activity.” *See* Dkt. No. 138 at 92:9–93:22.

4 In interpreting Section 2801 to determine whether Defendants’ plan to construct a barrier
5 on the U.S.-Mexico border falls within the “other activity” category, the Court applies “traditional
6 tools of statutory construction.” *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d
7 1250, 1257 (9th Cir. 1994), *amended on denial of reh’g* by 99 F.3d 321 (9th Cir. 1996). The Court
8 “begin[s] with the statute’s language, which is conclusive unless literally applying the statute’s
9 text demonstrably contradicts Congress’s intent.” *Chemehuevi Indian Tribe v. Newsom*, 919 F.3d
10 1148, 1151 (9th Cir. 2019). “When deciding whether the language is plain, courts must read the
11 words in their context and with a view to their place in the overall statutory scheme.” *Id.* (quoting
12 *Rainero v. Archon Corp.*, 844 F.3d 832, 837 (9th Cir. 2016) (internal quotation marks and
13 alterations omitted)).

14 Applying traditional tools of statutory construction, Section 2801 likely precludes treating
15 the southern border as an “other activity.” Defendants on this point fail to appreciate that the
16 words immediately preceding “or other activity” in Section 2801(c)(4)— “a base, camp, post,
17 station, yard, [and] center”—provide contextual limits on the catch-all term. The Court thus relies
18 on the doctrine of *noscitur a sociis*, “which is that a word is known by the company it keeps.”
19 *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995). Courts apply this rule “to avoid ascribing
20 to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving
21 ‘unintended breadth to the Acts of Congress.’” *Id.* (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S.
22 303, 307 (1961)). The Supreme Court has relied on this canon of statutory interpretation many
23 times when construing detailed statutory lists followed by catch-all-type terms. Most recently, in
24 *Epic Systems Corp. v. Lewis*, the Court limited the term “other concerted activities” in Section 7 of
25 the National Labor Relations Act to refer to “things employees ‘just do’ for themselves in the
26 course of exercising their right to free association in the workplace,” rather than any concerted
27 activity whatsoever—including class and collective actions—because the term appeared at the end
28 of a detailed list of specific activities, none of which “speak[] to the procedures judges or

1 arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral
2 forum.” 138 S. Ct. 1612, 1625 (2018). Before that, in *Gustafson*, the Supreme Court construed
3 the word “communication” as used in Section 2(10) of the Securities Act of 1933 to “refer[] to a
4 public communication” and not any communication whatsoever, because the word followed a list
5 of other terms—“prospectus, notice, circular, advertisement, [and] letter”—in consideration of
6 which “it [was] apparent that the list refers to documents of wide dissemination.” 513 U.S. at 575.

7 *Noscitur a sociis* applies with equal force in the present circumstance. The term “other
8 activity” appears after a list of closely related types of discrete and traditional military locations:
9 “a base, camp, post, station, yard, [and] center.” It is thus proper to construe “other activity” as
10 referring to similar discrete and traditional military locations. The Court does not readily see how
11 the U.S.-Mexico border could fit this bill.

12 The Court also finds relevant the *eiusdem generis* canon of statutory interpretation, which
13 counsels that “[w]here general words follow specific words in a statutory enumeration, the general
14 words are construed to embrace only objects similar in nature to those objects enumerated by the
15 preceding specific words.” *Wash. State Dept. of Social & Health Servs. v. Guardianship Estate of*
16 *Keffeler*, 537 U.S. 371, 384 (2003) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–
17 15 (2001)). At the hearing on this motion, Defendants argued that the term “other activity”
18 “capture[s] everything under the jurisdiction of the secretary of a military department.” Dkt. No.
19 138 at 92:9–13. The Court disagrees. Had Congress intended for “other activity” in Section
20 2801(c)(4) to be so broad as to transform literally any activity conducted by a Secretary of a
21 military department into a “military installation”, there would have been no reason to include a list
22 of specific, discrete military locations. *See Yates v. United States*, 135 S. Ct. 1074, 1087 (2015)
23 (“Had Congress intended ‘tangible object’ in § 1519 to be interpreted so generically as to capture
24 physical objects as dissimilar as documents and fish, Congress would have had no reason to refer
25 specifically to ‘record’ or ‘document.’ The Government’s unbounded reading of ‘tangible object’
26 would render those words misleading surplusage.”); *CSX Transp., Inc. v. Ala. Dept. of Revenue*,
27 562 U.S. 277, 295 (“We typically use *eiusdem generis* to ensure that a general word will not
28 render specific words meaningless.”).

1 To be clear, “other activity” is not an empty term. Congress undoubtedly contemplated
2 that military installations would encompass more than just “a base, camp, post, station, yard, [or]
3 center.” But the Court need not stake out the term’s outer limits here. All that matters for present
4 purposes is that, in context and with an eye toward the overall statutory scheme, nothing
5 demonstrates that Congress ever contemplated that “other activity” has such an unbounded reading
6 that it would authorize Defendants to invoke Section 2808 to build a barrier on the southern
7 border.

8 Despite its concerns with Defendants’ arguments on this point, the Court need not now
9 address whether Plaintiffs are likely to succeed on the merits of their claim that Defendants’
10 ultimate plan to divert funds under Section 2808 is *ultra vires*. That is because, as discussed
11 below, Plaintiffs have not met their independently necessary burden of showing a likelihood of
12 irreparable harm from the use of funds under Section 2808 for construction at as-yet-unspecified
13 locations so as to be entitled to a preliminary injunction.

14 **c. NEPA**

15 After Plaintiffs filed the instant motion—and one day before Defendants filed their
16 opposition—the Acting Secretary of Homeland Security invoked his authority under Section
17 102(c) of IIRIRA to waive any NEPA requirements for construction in the El Paso and Yuma
18 sectors. *See* Opp. at 25–26; *see also* Determination Pursuant to Section 102 of the Illegal
19 Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg.
20 17185-01 (Apr. 24, 2019); REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 231, 306
21 (May 11, 2005) (amending Section 102(c) to reflect that the Secretary “ha[s] the authority to
22 waive all legal requirements” that, in the “Secretary’s sole discretion,” are “necessary to ensure
23 expeditious construction” of barriers and roads). The Acting Secretary later waived NEPA
24 requirements for the El Centro and Tucson Sectors Projects as well, on the same basis. *See*
25 Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant
26 Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,798 (May 15, 2019); Determination
27 Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of
28 1996, as Amended, 84 Fed. Reg. 21,800 (May 15, 2019).

1 Defendants contend that such waivers preclude Plaintiffs from advancing a NEPA claim.
2 Opp. at 26 (citing *In re Border Infrastructure Env'tl. Litig.*, 915 F.3d 1213, 1221 (9th Cir. 2019)).
3 Plaintiffs respond that DHS's authority to waive NEPA requirements for construction under
4 IIRIRA does not extend to construction undertaken by DoD under its own spending authority.
5 Reply at 18–19. Plaintiffs further contend that “Defendants’ argument is incompatible with their
6 own claim that they are not constructing the El Paso and Yuma sections of border wall under
7 IIRIRA authority, but instead under the wholly separate DoD authority,” and suggest that
8 “Defendants cannot have it both ways.” Reply at 18–19.

9 Neither set of Plaintiffs appears to contest that the waivers, if applicable, would be
10 dispositive of the NEPA claims. *See, e.g.*, Plaintiff States’ Reply at 16, *California v. Trump*, No.
11 4:19-cv-00872-HSG (N.D. Cal. May 2, 2019), ECF No. 112 (“States Reply”) (“Plaintiffs do not
12 dispute *DHS’s* ability to waive NEPA compliance when constructing barriers pursuant to
13 [IIRIRA], with funds specifically appropriated by Congress to be used for that construction.”)
14 (emphasis in original); *see also In re Border Infrastructure Env'tl. Litig.*, 915 F.3d at 1221 (“[A]
15 valid waiver of the relevant environmental laws under section 102(c) is an affirmative defense to
16 all the environmental claims [including NEPA claims],” and is “dispositive of [those] claims.”).
17 But Plaintiffs contend that “the DHS Secretary’s waiver under IIRIRA does not waive *DOD’s*
18 obligations to comply with NEPA prior to proceeding with El Paso Project 1 under *DOD’s*
19 statutory authority, 10 U.S.C. § 284, and using *DOD’s* appropriations,” so that “DHS’s waiver has
20 no application to this project.” States Reply at 16 (emphasis added); *see also* Reply at 19
21 (“Defendants identify no statutory authority for a waiver for ‘expeditious construction’ under
22 *DOD’s* § 284 authority, and none exists.”).

23 The Court finds that Plaintiffs are not likely to succeed on their NEPA argument because
24 of the waivers issued by DHS. DoD’s authority under Section 284 is derivative. Under the
25 statute, DoD is limited to providing support (including construction support) to other agencies, and
26 may invoke its authority only in response to a request from such an agency. *See* 10 U.S.C. § 284
27 (“The Secretary of Defense may provide support for the counterdrug activities . . . of any other
28 department or agency of the Federal Government,” including support for “[c]onstruction of roads

1 and fences,” if “such support is requested . . . by the official who has responsibility for the
2 counterdrug activities.”). Here, DHS has made such a request, invoking “its authority under
3 Section 102 of IIRIRA to install additional physical barriers and roads” in designated areas,
4 seeking support for its “ability to impede and deny illegal entry and drug smuggling activities.”
5 Citizen Groups RJN Ex. I, at 1. DHS requested DoD’s assistance “[t]o support DHS’s action
6 under Section 102.” *Id.* at 2. Plaintiffs’ argument would require the Court to find that even
7 though it is undisputed that DHS could waive NEPA’s requirements if it were paying for the
8 projects out of its own budget, that waiver is inoperative when DoD provides support in response
9 to a request from DHS. The Court finds it unlikely that Congress intended to impose different
10 NEPA requirements on DoD when it acts in support of DHS’s Section 102 authority in response to
11 a direct request under Section 284 than would apply to DHS itself.²⁰ *See Defs. of Wildlife v.*
12 *Chertoff*, 527 F. Supp. 2d 119, 121, 129 (D.D.C. 2007) (finding DHS’s Section 102 waiver
13 authority authorized the DHS Secretary to waive legal requirements where the U.S. Army Corps
14 of Engineers, a federal agency within the DoD, was constructing border fencing “on behalf of
15 DHS”).²¹

16 2. Likelihood of Irreparable Injury

17 Plaintiffs advance three theories of irreparable harm: (1) harm to their members’ aesthetic
18 and recreational interests in areas threatened by border barrier construction; (2) constitutional
19 harm; and (3) harm to Plaintiff SBCC and its member organizations’ ability to carry out their
20 missions. Mot. at 22–25; Reply at 19–24. Critical to this analysis is that while Defendants have
21 committed to fund border barrier construction in the El Paso Sector 1 and Yuma Sector 1 projects
22

23 ²⁰ Plaintiff States argue that “[i]n another context, Congress explicitly allows the DOD Secretary
24 to request ‘the head of another agency responsible for the administration of navigation or vessel-
25 inspection laws to waive compliance with those laws to the extent the Secretary considers
26 necessary.’” States Reply at 17 (citing 46 U.S.C. § 501(a)). The Court finds this statute to be
27 irrelevant to the issue here. In this case, DoD is acting solely in response to DHS’s request for
28 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.

²¹ To the extent Plaintiffs’ argument is that the government “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 IV.B.1.a, above.

1 using funds reprogrammed and subsequently used under Sections 8005 and 284, Defendants have
2 not committed to fund any border barrier construction using Section 2808. Because of this
3 distinction, the Court addresses the two categories separately.

4 **a. Sections 8005 and 284**

5 The Court finds that Plaintiffs have demonstrated a likelihood of irreparable harm to their
6 members' aesthetic and recreational interests in the areas known as El Paso Sector Project 1 and
7 Yuma Sector Project 1.

8 As the Ninth Circuit has explained, "it would be incorrect to hold that all potential
9 environmental injury warrants an injunction." *League of Wilderness Defs./Blue Mountains*
10 *Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014). "Environmental injury,"
11 however, "by its nature, can seldom be adequately remedied by money damages and is often
12 permanent or at least of long duration, *i.e.*, irreparable." *Amoco Prod. Co. v. Vill. of Gambell,*
13 *Alaska*, 480 U.S. 531, 545 (1987). Plaintiffs must nonetheless demonstrate that irreparable injury
14 "is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22. Mere "possibility" of
15 irreparable harm does not merit a preliminary injunction. *Id.* But it is well-established in the
16 Ninth Circuit that an organization can demonstrate irreparable harm by showing that the
17 challenged action will injure its members' enjoyment of public land. *See All. for Wild Rockies*,
18 632 F.3d at 1135.

19 Turning to Plaintiffs' aesthetic and recreational interests, Plaintiffs provide declarations
20 from several members, detailing how Defendants' proposed use of funds reprogrammed under
21 Section 8005 and then used under Section 284 for border barrier construction will harm their
22 ability to recreate in and otherwise enjoy public land along the border. *See* Dkt. No. 30 ("Del Val
23 Decl.") ¶¶ 7–9 (alleging harm from border barrier construction and the accompanying lighting in
24 the Yuma Sector Project 1 to declarant's "ability to fish" and general enjoyment of natural
25 environment); Dkt. No. 31 ("Munro Decl.") ¶ 11 (alleging harm from border barrier construction
26 in El Paso Sector Project 1 to declarant's "happiness and sense of fulfillment," which she
27 "derive[s] from visiting these beautiful landscapes"); Dkt. No. 34 ("Bixby Decl.") ¶¶ 6, 12
28 (alleging harm from border barrier construction in El Paso Sector Project 1 to declarant's hiking

1 and camping interests); Dkt. No. 35 (“Walsh Decl.”) ¶¶ 8–12 (alleging harm from border barrier
2 construction in El Paso Sector Project 1 to declarant’s recreational interests, including “bird
3 watching and hiking”).

4 Defendants argue that Plaintiffs’ alleged recreational harms are insufficient for two
5 reasons. First, Defendants argue that Plaintiffs have not demonstrated “that any species-level
6 impacts are likely as a result of border wall construction.” *See* Opp. at 29. But Defendants here
7 misunderstand Plaintiffs’ theory. Plaintiffs’ declarants nowhere state that their recreational
8 interest is merely the enjoyment of a particular species. Defendants’ second argument is that their
9 planned “replacement of existing pedestrian border infrastructure . . . will not change conditions
10 where Mr. Del Val fishes.” *Id.* at 30–31. But Defendants here understate the effects of what they
11 now characterize as mere “replacement of existing pedestrian border infrastructure.” By
12 Defendants’ own description, they intend to replace four-to-six-foot vehicle barriers in the Yuma
13 Sector Project 1 area with a thirty-foot “bollard wall,” where “[t]he bollards are steel-filled
14 concrete that are approximately six inches in diameter and spaced approximately four inches
15 apart” and accompanied by lighting. *See* Dkt. No. 64-9 (“Enriquez Decl.”) ¶ 12 & Ex. C, at 2-1.
16 Even if the characteristics of the wall were unchanged—which is not the case—Mr. Del Val
17 alleges recreational harms from not only the bollard wall construction but also the accompanying
18 lighting, which does not currently exist. *See* Del Val Decl. ¶ 9. Because the Court finds that
19 Defendants’ proposed construction in Yuma Sector Project 1 constitutes a change in conditions for
20 Mr. Del Val, it rejects Defendants’ second challenge to Plaintiffs’ alleged recreational harms.

21 Plaintiffs have shown that Defendants’ proposed construction will lead to a substantial
22 change in the environment, the nature of which will harm their members’ aesthetic and
23 recreational interests. The funding of border barrier construction, if indeed barred by law, cannot
24 be remedied easily after the fact, and yet Defendants intend to commence construction
25 immediately and complete it expeditiously. Thus, “[t]he harm here, as with many instances of this
26 kind of harm, is irreparable for the purposes of the preliminary injunction analysis.” *See League*
27 *of Wilderness Defenders/Blue Mountains Biodiversity Project*, 752 F.3d at 764.

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United States District Court
Northern District of California

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b. Section 2808

Because Defendants have not disclosed a plan for diverting funds under Section 2808 for border barrier construction, the Court cannot now determine a likelihood of harm to Plaintiffs’ members’ aesthetic and recreational interests. The Court thus turns to Plaintiffs’ other theories of irreparable injury.

To start, 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 suffices to show irreparable harm, the Court finds that principle unavailing. *See* Mot. at 25. Even under that theory of irreparable harm, Plaintiffs must demonstrate some likely irreparable harm in the absence of a preliminary injunction barring the challenged action, and not simply a constitutional violation. *See id.* (noting that the constitutional violation must be “coupled with the damages incurred,” which in that case involved “a good deal of economic harm in the interim”).

Plaintiffs primary alternative theory of irreparable injury is that Defendants’ invocation of and use of funds under Section 2808 for border barrier construction has harmed and continues to harm Plaintiff SBCC and its member organizations’ ability to carry out their missions. *See* Mot. at 23–25. To this end, Plaintiffs describe that “several senior SBCC staff have devoted a ‘majority’ of their time to analyzing and responding to” Defendants’ invocation of Sections 2808 and 284. *Id.* at 24. Defendants acts purportedly have forced SBCC to “field[] inquiries from members, journalists and elected officials; create[] new educational materials, media toolkits and multimedia content; and host[] trainings for staff and partners.” *Id.* Tending to these activities has frustrated SBCC and its member organizations’ ability to focus on their “core missions.” *Id.* In Plaintiffs’ view, “[s]uch injuries are sufficient to demonstrate a likelihood of irreparable harm and justify preliminary injunctive relief.” *Id.*

But Plaintiffs conflate the type of harm to organizational mission that gives rise to Article III standing and the type of harm necessary for a preliminary injunction. There is no dispute that the “perceptibl[e] impair[ment]” of an organization’s ability to carry out its mission that results in a “drain on the organization’s resources” is enough for Article III standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). But to warrant a preliminary injunction, Plaintiffs

1 must do more than just assert irreparable harm. *Winter* commands that plaintiffs seeking a
2 preliminary injunction establish that they are “likely to suffer irreparable harm *in the absence of*
3 *preliminary relief.*” 555 U.S. at 20 (emphasis added). Plaintiffs ignore the “in the absence of
4 preliminary relief” component, but *Winter* is not complicated on this point. Under *Winter*,
5 Plaintiffs must demonstrate that preliminary injunctive relief will prevent some irreparable injury
6 that is likely to occur before the Court has time to decide the case on the merits. In other words,
7 Plaintiffs must present some persuasive counterfactual analysis showing a likelihood that
8 irreparable harm would occur absent an injunction, but would not occur if an injunction is granted.
9 But as it stands, nothing indicates that Plaintiffs’ proffered “diversion” of funds or resources
10 would change at all if the Court were to issue an injunction. With or without an injunction,
11 Plaintiffs will have to continue to litigate this case and otherwise divert resources in the manner
12 they have described until the case is resolved.

13 All three cases on which Plaintiffs rely to support their mission-frustration theory support
14 the Court’s conclusion. First, in *Valle de Sol Inc. v. Whiting*, plaintiffs faced a “credible threat of
15 prosecution” under an allegedly unconstitutional statute, where the resulting injury could not be
16 remedied by monetary damages. 732 F.3d 1006, 1029 (9th Cir. 2013). But that is the
17 quintessential sort of irreparable harm warranting an injunction. *See Ex parte Young*, 209 U.S.
18 123, 155–56 (1908) (“The various authorities we have referred to furnish ample justification for
19 the assertion that individuals who, as officers of the state, are clothed with some duty in regard to
20 the enforcement of the laws of the state, and who threaten and are about to commence
21 proceedings, either of a civil or criminal nature, to enforce against parties affected an
22 unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of
23 equity from such action.”). Next, in *East Bay Sanctuary Covenant v. Trump*, the plaintiff
24 organizations sufficiently demonstrated that they faced a substantial loss of funding in the absence
25 of an injunction. 354 F. Supp. 3d 1094, 1116 (N.D. Cal. 2018); *see also Cty. of Santa Clara v.*
26 *Trump*, 250 F. Supp. 3d 497, 537 (N.D. Cal. 2017) (“Without clarification regarding the Order’s
27 scope or legality, the Counties will be obligated to take steps to mitigate the risk of losing millions
28 of dollars in federal funding, which will include placing funds in reserve and making cuts to

1 services.”). Finally, in *League of Women Voters v. Newby*, plaintiffs demonstrated that their
2 mission interest in registering voters faced likely irreparable injury absent a preliminary injunction
3 because registration deadlines would pass before resolution of the case on the merits. 838 F.3d 1,
4 9 (D.C. Cir. 2016) (“Because, as a result of the Newby Decisions, those new obstacles
5 unquestionably make it more difficult for the Leagues to accomplish their primary mission of
6 registering voters, they provide injury for purposes both of standing and irreparable harm. And
7 that harm is irreparable because after the registration deadlines for the November election pass,
8 there can be no do over and no redress.”) (internal quotation marks and citations omitted).

9 In all three cases, a counterfactual existed which demonstrated the need for a preliminary
10 injunction. In *Valle*, injunctive relief meant the difference between prosecution under an
11 unconstitutional statute or not. In *East Bay Sanctuary Covenant* and *County of Santa Clara*,
12 injunctive relief meant the difference between organizations losing substantial funding or not. In
13 *League of Women Voters*, injunctive relief meant the difference between registering voters for an
14 election in keeping with organizations’ mission interests or not. Here, however, Plaintiffs present
15 no evidence that injunctive relief will make any difference to the purported harm to their mission
16 interests, which will continue until this case’s resolution. Plaintiffs thus have not carried their
17 burden to show that the “extraordinary remedy” of a preliminary injunction is warranted in this
18 regard. *See Winter*, 555 U.S. at 20.

19 Although the Court finds that Plaintiffs have not yet met their burden of showing
20 irreparable harm in the absence of a preliminary injunction, the Court fully expects that if and
21 when Defendants identify border barrier construction locations where Section 2808 funds will be
22 used, Plaintiffs will have the opportunity to submit materials in support of their irreparable harm
23 claim. The Court takes Defendants at their word that they “will inform the Court” immediately
24 once a decision is made to use Section 2808 to fund border barrier construction. *See* Dkt. No. 131
25 at 3.

26 3. Balance of Equities and Public Interest

27 When the government is a party to a case in which a preliminary injunction is sought, the
28 balance of the equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747

1 F.3d 1073, 1092 (9th Cir. 2014). According to Defendants, these factors tilt in their favor,
 2 because their “weighty” interest in border security and immigration-law enforcement, as
 3 sanctioned by Congress, outweighs Plaintiffs’ “speculative” injuries. Opp. at 34–35. The Ninth
 4 Circuit has recognized that “the public has a ‘weighty’ interest ‘in efficient administration of the
 5 immigration laws at the border,’” and the Court does not minimize this interest. *See E. Bay*
 6 *Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018) (quoting *Landon v. Plasencia*,
 7 459 U.S. 21, 34 (1982)). On the other hand, “the public also has an interest in ensuring that
 8 statutes enacted by their representatives are not imperiled by executive fiat.” *Id.* (internal
 9 quotation marks and brackets omitted). And the Court has found above that Plaintiffs’ injuries as
 10 to El Paso Sector Project 1 and Yuma Sector Project 1 are not speculative, and will be irreparable
 11 in the absence of an injunction. Accordingly, this factor favors Plaintiffs, and counsels in favor of
 12 a preliminary injunction, to preserve the status quo until the merits of the case can be promptly
 13 resolved.²²

14 V. CONCLUSION

15 Congress’s “absolute” control over federal expenditures—even when that control may
 16 frustrate the desires of the Executive Branch regarding initiatives it views as important—is not a
 17 bug in our constitutional system. It is a feature of that system, and an essential one. *See FLRA*,
 18 665 F.3d at 1346–47 (“The power over the purse was one of the most important authorities
 19 allocated to Congress in the Constitution’s ‘necessary partition of power among the several
 20 departments.’”) (quoting *The Federalist* No. 51, at 320 (James Madison)). The Appropriations
 21 Clause is “a bulwark of the Constitution’s separation of powers among the three branches of the
 22 National Government,” and is “particularly important as a restraint on Executive Branch officers.”
 23 *Id.* at 1347. In short, the position that when Congress declines the Executive’s request to
 24

25 _____
 26 ²² The Court observes that, although Congress appropriated \$1.571 billion for physical barriers
 27 and associated technology along the Southwest border for fiscal year 2018, counsel for the House
 28 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. 139;
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.

United States District Court
Northern District of California

1 appropriate funds, the Executive nonetheless may simply find a way to spend those funds “without
 2 Congress” does not square with fundamental separation of powers principles dating back to the
 3 earliest days of our Republic. *See City & Cty of San Francisco*, 897 F.3d at 1232 (“[I]f the
 4 decision to spend is determined by the Executive alone, without adequate control by the citizen’s
 5 Representatives in Congress, liberty is threatened.”) (internal quotation marks and brackets
 6 omitted) (quoting *Clinton*, 524 U.S. at 451) (Kennedy, J., concurring). Justice Frankfurter wrote
 7 in 1952 that “[i]t is not a pleasant judicial duty to find that the President has exceeded his powers,”
 8 *Youngstown*, 343 U.S. at 614 (Frankfurter, J., concurring), and that remains no less true today.
 9 But “if there is a separation-of-powers concern here, it is between the President and Congress, a
 10 boundary that [courts] are sometimes called upon to enforce.” *E. Bay Sanctuary Covenant*, 909
 11 F.3d at 1250; *see also Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 825–26 (9th Cir.
 12 2017) (“To declare that courts cannot even look to a statute passed by Congress to fulfill
 13 international obligations turns on its head the role of the courts and our core respect for a co-equal
 14 political branch, Congress.”). Because the Court has found that Plaintiffs are likely to show that
 15 Defendants’ actions exceeded their statutory authority, and that irreparable harm will result from
 16 those actions, a preliminary injunction must issue pending a resolution of the merits of the case.

17 For the foregoing reasons, the Court hereby **GRANTS IN PART** and **DENIES IN PART**
 18 **WITHOUT PREJUDICE** Plaintiffs’ motion for a preliminary injunction. The terms of the
 19 injunction are as follows²³: Defendants Patrick M. Shanahan, in his official capacity as Acting
 20 Secretary of Defense, Kevin K. McAleenan, in his official capacity as Acting Secretary of
 21 Homeland Security, Steven T. Mnuchin, in his official capacity as Secretary of the Department of
 22 the Treasury, and all persons acting under their direction, are enjoined from taking any action to
 23 construct a border barrier in the areas Defendants have identified as Yuma Sector Project 1 and El
 24 Paso Sector Project 1 using funds reprogrammed by DoD under Section 8005 of the Department
 25 of Defense Appropriations Act, 2019.


26 A case management conference is set for June 5, 2019 at 2:00 p.m. At the case

27 _____
 28 ²³ The Court finds that an injunction against the President personally is not warranted here. *See*
Cty. of Santa Clara, 250 F. Supp. 3d at 549–40.

1 management conference, the parties should be prepared to discuss a plan for expeditiously
2 resolving this matter on the merits, whether through a bench trial, cross-motions for summary
3 judgment, or other means. The parties must submit a joint case management statement by May
4 31, 2019.

5 **IT IS SO ORDERED.**

6 Dated: 5/24/2019

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9 HAYWOOD S. GILLIAM, JR.
10 United States District Judge

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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 GRANTING IN PART AND DENYING IN PART PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING DEFENDANTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT, AND CERTIFYING JUDGMENT FOR APPEAL

Re: Dkt. Nos. 176, 182

Pending before the Court are cross-motions for partial summary judgment filed by Plaintiff States California and New Mexico, and Defendants Donald J. Trump, in his official capacity as President of the United States; the U.S. Department of Defense (“DoD”); Mark T. Esper, in his official capacity as Acting Secretary of Defense¹; Ryan D. McCarthy, in his official capacity as Acting Secretary of the Army²; 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 Interior³; the U.S. Department of Homeland Security (“DHS”); and Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security,⁴ briefing for which

¹ Acting Secretary Esper is automatically substituted for former Acting Secretary Patrick M. Shanahan. *See* Fed. R. Civ. P. 25(d).
² Acting Secretary McCarthy is automatically substituted for former Secretary Esper. *See* Fed. R. Civ. P. 25(d).
³ 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.
⁴ Acting Secretary McAleenan is automatically substituted for former Secretary Kirstjen M. Nielsen. *See* Fed. R. Civ. P. 25(d).

1 is complete. Dkt. Nos. 176 (“Pls.’ Mot.”), 182 (“Defes.’ Mot.”), 183 (“Pls.’ Reply”). The only
 2 issue presently before the Court concerns Defendants’ intended reprogramming of funds under
 3 Sections 8005 and 9002 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-
 4 245, 132 Stat. 2981 (2018), and subsequent use of such funds under 10 U.S.C. § 284 (“Section
 5 284”) for border barrier construction.⁵

6 After carefully considering the parties’ arguments, the Court **GRANTS IN PART** and
 7 **DENIES IN PART** Plaintiffs’ motion, and **DENIES** Defendants’ motion.⁶ The Court also
 8 certifies this judgment for immediate appeal pursuant to Rule 54(b) of the Federal Rules of Civil
 9 Procedure.

10 I. LEGAL STANDARD

11 Summary judgment is proper when a “movant shows that there is no genuine dispute as to
 12 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).
 13 A fact is “material” if it “might affect the outcome of the suit under the governing law.” *Anderson*
 14 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And a dispute is “genuine” if there is evidence
 15 in the record sufficient for a reasonable trier of fact to decide in favor of the nonmoving party. *Id.*
 16 But in deciding if a dispute is genuine, the court must view the inferences reasonably drawn from
 17 the materials in the record in the light most favorable to the nonmoving party, *Matsushita Elec.*
 18 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986), and “may not weigh the evidence
 19 or make credibility determinations,” *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997),
 20 *overruled on other grounds by Shakur v. Schriro*, 514 F.3d 878, 884–85 (9th Cir. 2008). If a court
 21 finds that there is no genuine dispute of material fact as to only a single claim or defense or as to
 22 part of a claim or defense, it may enter partial summary judgment. Fed. R. Civ. P. 56(a).

23 The parties agree that the issue presently before the Court is properly resolved on their
 24

25 ⁵ The relevant background for this motion is essentially unchanged since the Court’s preliminary
 26 injunction orders in this and the related case, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG
 27 (N.D. Cal.). The Court thus incorporates in full here the factual background and statutory
 28 framework as set forth in the preliminary injunction order in the related case. *See Order, Sierra*
Club v. Trump, No. 4:19-cv-00892-HSG (N.D. Cal. May 24, 2019), ECF No. 144.

⁶ In light of the extended oral argument regarding these issues at the preliminary injunction
 hearing, *see* Dkt. No. 159, the Court finds these matters appropriate for disposition without oral
 argument and the matters are deemed submitted, *see* Civil L.R. 7-1(b).

1 cross-motions for partial summary judgment. Pls.’ Mot. at 9; Defs.’ Mot. at 9.

2 **II. DISCUSSION**

3 In their motion, Plaintiffs request that the Court (1) enter final judgment in their favor
4 declaring unlawful Defendants’ transfer of Fiscal Year 2019 appropriated funds to the DoD’s
5 Section 284 account and those funds’ subsequent use for border barrier construction; and (2)
6 enjoin such unlawful use of funds. Pls.’ Mot. at 1. Defendants’ motion seeks a final
7 determination that their intended use of funds under Sections 8005, 9002, and 284 for border
8 barrier construction is lawful. Defs.’ Mot. at 2. Defendants also request that the Court certify this
9 judgment for appeal under Rule 54(b). *Id.* at 24–25.

10 **A. Declaratory Relief**

11 Plaintiffs seek a declaratory judgment finding unlawful Defendants’ (1) reprogramming of
12 funds under Sections 8005 and 9002, and (2) use of those funds for border barrier construction
13 under Section 284. *See* Pls.’ Mot. at 1. Plaintiffs contend that Defendants’ actions “(1) are ultra
14 vires; (2) violate the United States Constitution’s separation of powers principles, including the
15 Appropriations and Presentment Clauses; and (3) violate the Administrative Procedure Act
16 (APA).” *Id.*

17 Starting with Section 8005, the Court previously held that Plaintiffs were likely to succeed
18 on their arguments that Defendants’ intended reprogramming of funds under Section 8005 to the
19 Section 284 account to fund border barrier construction in El Paso Sector 1 is unlawful. In
20 particular, the Court found that Plaintiffs were likely to show that (1) the item for which funds are
21 requested has been denied by Congress; (2) the transfer is not based on “unforeseen military
22 requirements”; and (3) accepting Defendants’ proposed interpretation of Section 8005’s
23 requirements would raise serious constitutional questions.⁷ Dkt. No. 165 (“PI Order”) at 13–24.

24 The Court previously only considered Defendants’ reprogramming and subsequent use of
25 funds for border barrier construction for El Paso Sector Project 1. It did not consider Defendants’

26 _____
27 ⁷ The Court did not consider whether Defendants’ reprogramming of funds was for a “higher
28 priority item”—an independently necessary requirement under Section 8005—because
Defendants’ planned use of such reprogrammed funds failed multiple other Section 8005
requirements. The Court similarly does not consider the “higher priority item” requirement here.

1 more-recently announced reprogramming and subsequent diversion of funds for border barrier
2 construction for the El Centro Sector Project, pending further development of the record as to this
3 project. *See id.* at 13 n.9. To fund this project, Defendants again invoked Section 8005, as well as
4 DoD’s “special transfer authority under section 9002 of the Department of Defense Appropriations
5 Act, 2019, and section 1512 of the John S. McCain National Defense Authorization Act for Fiscal
6 Year 2019.” *See* Dkt. No. 118-1 (“Rapuano Second Decl.”) ¶ 7. Defendants’ Section 9002
7 authority, however, is subject to Section 8005’s limitations. *See* Department of Defense
8 Appropriations Act, 2019, Pub. L. No. 115-245, § 9002, 132 Stat. 2981, 3042 (2018) (providing
9 that “the authority provided in this section is in addition to any other transfer authority available to
10 the Department of Defense and is subject to the same terms and conditions as the authority
11 provided in section 8005 of this Act”); *see also* Defs.’ Mot. at 9 n.3 (acknowledging that Section
12 9002 is subject to Section 8005’s requirements). Because Defendants agree that all such authority
13 is subject to Section 8005’s substantive requirements, the Court refers to these requirements
14 collectively by reference to Section 8005.

15 In their pending motion, “Defendants acknowledge that the Court previously rejected
16 [their] arguments about the proper interpretation of § 8005 in its [preliminary injunction order].”
17 Defs.’ Mot. at 9. Defendants contend that the Court’s findings were wrong for two reasons: (1)
18 “Plaintiffs fall outside the zone of interests of § 8005 and thus cannot sue to enforce it”; and (2)
19 “DoD has satisfied the requirements set forth in § 8005.” *Id.* at 9–12. But Defendants here offer
20 no evidence or argument that was not already considered in the Court’s preliminary injunction
21 order. For example, Defendants continue to argue that under *Lexmark International, Inc. v. Static*
22 *Control Components, Inc.*, 572 U.S. 118 (2014), the zone-of-interests test applies to Plaintiffs’
23 claims. *Compare* Opp. at 9–10, with Dkt. No. 89 at 18–19. And the Court continues to find that
24 the test has no application in an *ultra vires* challenge, which operates outside of the APA
25 framework, and the Court incorporates here its prior reasoning on this point. PI Order at 11–12.

26 Defendants also continue to assert that DoD did not transfer funds for an item previously
27 denied by Congress and that the transfer was for an “unforeseen” requirement. *Compare* Opp. at
28 10–11, with Dkt. No. 89 at 19–20. But Defendants again present no new evidence or argument for

1 why the Court should depart from its prior decision, and it will not. The Court thus stands by its
 2 prior finding that Defendants’ proposed interpretation of the statute is unreasonable, and agrees
 3 with Plaintiffs that Defendants’ intended reprogramming of funds under Section 8005—and
 4 necessarily under Section 9002 as well—to the Section 284 account for border barrier construction
 5 is unlawful. *See* PI Order at 13–24. Because no new factual or legal arguments persuade the
 6 Court that its analysis in the preliminary injunction order was wrong, Plaintiffs’ likelihood of
 7 success on the merits has ripened into actual success. The Court accordingly **GRANTS** Plaintiffs’
 8 request for declaratory judgment that such use of funds reprogrammed under Sections 8005 and
 9 9002 for El Paso Sector Project 1 and El Centro Sector Project is unlawful.⁸

10 Turning to Section 284, the Court finds that it need not determine whether Plaintiffs are
 11 entitled to declaratory judgment that Defendants’ invocation of Section 284 is also unlawful.
 12 When a party requests declaratory judgment, “the question in each case is whether the facts
 13 alleged, under all the circumstances, show that there is a substantial controversy, between parties
 14 having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a
 15 declaratory judgment.” *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Having
 16 determined that Defendants’ proposed reprogramming of funds under Sections 8005 and 9002 is
 17 unlawful, no immediate adverse legal interests warrant a declaratory judgment concerning Section
 18 284. Defendants acknowledge that all of the money they plan to spend on border barrier
 19 construction under Section 284 is money transferred into the relevant account under Sections 8005
 20 and 9002. *See* Dkt. No. 151 at 4. Given this acknowledgment, the Court’s ruling as to Sections
 21 8005 and 9002 obviates the need to independently assess the lawfulness of Defendants’ invocation
 22 of Section 284.

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26 ⁸ Plaintiffs’ motion seeks a declaratory judgment that any use of reprogrammed funds for border
 27 barrier construction is unlawful as (1) *ultra vires*; (2) unconstitutional, and (3) in violation of the
 28 APA. Given that the Court determines Defendants’ use of such funds is *ultra vires*, which
 resolves Plaintiffs’ claim concerning such use of funds, the Court declines to issue a broader
 declaratory judgment.

1 **B. INJUNCTIVE RELIEF**

2 It is a well-established principle of equity that a permanent injunction is appropriate when:
3 (1) a plaintiff will “suffer[] an irreparable injury” absent an injunction; (2) available remedies at
4 law are “inadequate;” (3) the “balance of hardships” between the parties supports an equitable
5 remedy; and (4) the public interest is “not disserved.” *eBay Inc. v. MercExchange, LLC*, 547 U.S.
6 388, 391 (2006). Defendants do not dispute that available remedies at law are inadequate. The
7 Court thus need only consider the remaining factors. But because the Court finds that Plaintiffs
8 have not established irreparable injury—an independently necessary burden for Plaintiffs—the
9 Court does not consider the balance of hardships and public interest factors.

10 Plaintiffs present two theories of irreparable injury: (1) that California and New Mexico
11 will be irreparably harmed by their inability to enforce state laws concerning the protection of
12 environmental and natural resources; and (2) that border barrier construction will harm California
13 and New Mexico’s animals and plants. *See* Pls.’ Mot. at 19–24.

14 The Court begins with Plaintiffs’ second theory. With respect to the El Centro Sector
15 Project, California contends that border barrier construction will threaten various animal and plant
16 species. Pls.’ Mot. at 21–22. Of particular concern to California is that construction in this sector
17 potentially could hinder the migration of Peninsular bighorn sheep across the southern border and
18 that pregnant ewes might be scared away by construction activities. *Id.* But Plaintiffs’ supporting
19 declarations do not indicate that Defendants’ challenged action poses the requisite “threat of future
20 demonstrable harm to a protected species.” *See* PI Order at 31. To start, Plaintiffs only contend
21 that Peninsular bighorn sheep have crossed the southern border “west of the project area,” and that
22 pregnant ewe populations may seek a critical area “adjacent” to the project site. Pls’ Mot. at 21–
23 22. In other words, Plaintiffs do not even allege that the protected species crosses the southern
24 border where the challenged construction would occur. Finally, as to the potential disturbance
25 caused by construction activities, Plaintiffs only allege that pregnant ewes may be “adversely
26 affected.” *Id.* But reference to a tenuous adverse effect is insufficient to explain why temporary
27 construction would pose a threat of demonstrable harm to the species. All told, California has
28 failed to carry its burden of presenting evidence that the challenged action would pose a threat of

1 future demonstrable harm to the Peninsular bighorn sheep.⁹

2 New Mexico similarly fails to prove a threat of future demonstrable harm. With respect to
3 the El Paso Sector Project, New Mexico primarily contends that construction might hamper
4 repopulation efforts of the Mexican wolf because genetic interchange benefits the species. *See*
5 Pls.' Mot. at 23–24. As an initial matter, the Court has some doubt that New Mexico's purported
6 interest in the international travels of a few animals between its state and another sovereign nation
7 could ever justify a permanent injunction against the U.S. government. But even setting that
8 aside, New Mexico only identifies two instances of Mexican wolves crossing the border, one of
9 which returned to Mexico, and neither of which Plaintiffs contend are known to have bred with
10 Mexican wolves on the other side of the border. *Id.* at 23. New Mexico's speculation that a
11 border barrier *might* prevent interbreeding, which *might* hamper genetic diversity, which *might*
12 render Mexican wolves *more susceptible* to diseases falls far short of the necessary demonstrable
13 evidence of harm to a protected species, and thus does not entitle New Mexico to a permanent
14 injunction.¹⁰

15 Turning to Plaintiffs' first theory, the crux of the parties' dispute concerns whether
16 Defendants' issuance of IIRIRA waivers related to the challenged border barrier construction
17 projects nullifies the States' interest in enforcing their laws concerning the protection of the
18 environment. Defendants contend that California and New Mexico cannot establish irreparable
19 injury to their enforcement of state laws because the IIRIRA waivers set aside all such legal
20 requirements, such that California and New Mexico lack a legal interest capable of being
21 irreparably harmed. *See* Defs.' Mot. at 19–20; *see also* Determination Pursuant to Section 102 of
22 the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed.
23 Reg. 17,185-01 (Apr. 24, 2019) (waiving state laws related to the El Paso Sector Project);
24

25 _____
26 ⁹ California's other purported harms to its wildlife are similarly unavailing. It is not enough, for
27 example, for California to argue that construction could possibly disrupt plant life or harm Flat-
28 tailed horned lizards and burrowing owls, especially when Defendants present evidence that
relevant agencies regularly implement mitigation measures that successfully prevent such harm.
See Defs.' Mot. at 21–22.

¹⁰ New Mexico's purported harm to other wildlife from construction activity fails for the same
reasons that California's similar allegations fail. *See supra* note 9.

1 Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant
2 Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,800 (May 15, 2019) (waiving state laws
3 related to the El Centro Sector Project); REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119
4 Stat. 231, 306 (May 11, 2005) (amending Section 102(c) to reflect that the Secretary “ha[s] the
5 authority to waive all legal requirements” that, in the “Secretary’s sole discretion,” are “necessary
6 to ensure expeditious construction” of barriers and roads). Plaintiffs counter that the waivers’
7 effectiveness depends on Defendants first having authority to use funds in a certain manner. *See*
8 *Pls.’ Reply* at 12–13. As Plaintiffs put it, “without the funds to proceed with construction, [an]
9 IIRIRA waiver is meaningless.” *Id.* at 12.

10 Whether the relevant waivers deprive states of their sovereign interests in enforcing state
11 laws for purposes of an irreparable injury analysis, or merely deprive states of their ability to bring
12 suit to vindicate those interests, is unclear as a legal matter. The Court need not resolve this issue,
13 however, because whether or not the border barrier construction at issue in this order could harm
14 California and New Mexico’s sovereign interests, the contested use of funds for such construction
15 will not occur in the absence of injunctive relief. This is because the Court has permanently
16 enjoined the relevant Defendants in the related action from proceeding with such construction.
17 *See Order* at 10, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. June 28, 2019), ECF
18 No. 185 (permanently enjoining the use of reprogrammed funds for border barrier construction for
19 El Paso Sector Project 1 and the El Centro Sector Project). Accordingly, no irreparable harm to
20 California and New Mexico will result from the denial (without prejudice) of their duplicative
21 requested injunction.

22 C. Certification for Appeal

23 Finally, Defendants request that the Court certify this judgment for appeal under Rule
24 54(b). Appellate courts generally only have jurisdiction to hear appeals from final orders. *See* 28
25 U.S.C. § 1291. Rule 54(b) allows for a narrow exception to this final judgment rule, permitting
26 courts to “direct entry of a final judgment as to one or more, but fewer than all, claims or parties
27 only if the court expressly determines that there is no just reason for delay.” Entry of judgment
28 under Rule 54(b) thus requires: (1) a final judgment; and (2) a determination that there is no just

1 reason for delay of entry. *See Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565, 574 (9th Cir.
2 2018) (quoting *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7–8 (1980)).

3 1. Finality of Judgment

4 A final judgment is “a decision upon a cognizable claim for relief” that is “an ultimate
5 disposition of an individual claim entered in the course of a multiple claims action.” *Curtiss-*
6 *Wright Corp.*, 446 U.S. at 7 (citing *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956)). The
7 Court finds this requirement satisfied because the Court’s award of partial summary judgment in
8 this order is “an ultimate disposition” of Plaintiffs’ claims related to Defendants’ purported
9 reliance on Sections 8005, 9002, and 284 for border barrier construction.

10 2. No Just Reason for Delay

11 As the Ninth Circuit has explained, “[j]udgments under Rule 54(b) must be reserved for
12 the unusual case in which the costs and risks of multiplying the number of proceedings and of
13 overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early
14 and separate judgment as to some claims or parties.” *Morrison-Knudsen Co. v. Archer*, 655 F.2d
15 962, 965 (9th Cir. 1981). Accordingly, an explanation of findings “should include a determination
16 whether, upon any review of the judgment entered under the rule, the appellate court will be
17 required to address legal or factual issues that are similar to those contained in the claims still
18 pending before the trial court.” *Id.* at 965. “The greater the overlap the greater the chance that
19 [the Court of Appeals] will have to revisit the same facts—spun only slightly differently—in a
20 successive appeal.” *Wood v. GCC Bend, LLC*, 422 F.3d 873, 882 (9th Cir. 2005). “[P]lainly,
21 sound judicial administration does not require that Rule 54(b) requests be granted routinely.” *Id.*
22 at 879 (internal quotation marks omitted).

23 The Court finds there is no just reason for delay under the circumstances. In their motion,
24 Defendants contend that “[t]he legal and factual issues do not ‘intersect and overlap’ with the
25 outstanding claims in this case, which focus on separate statutory authorities, and final judgment
26 on these claims will not result in piecemeal appeals on the same sets of facts.” Defs.’ Mot. at 25.
27 The Court agrees. Whether Defendants’ actions comport with the statutory requirements of
28 Sections 8005 and 9002 and whether Defendants’ actions comport with the remaining statutory

United States District Court
Northern District of California

1 requirements related to outstanding claims are distinct inquiries, largely based on distinct law.
2 The Court also recognizes that Defendants’ appeal of the Court’s preliminary injunction order in
3 the related case, *Sierra Club v. Trump*, is currently pending before the Court of Appeals, which
4 recently issued an order holding the briefing on that appeal in abeyance pending partial summary
5 judgment orders. *See Sierra Club v. Trump*, No. 19-16102 (9th Cir. 2019), ECF Nos. 65–66. This
6 suggests to the Court that the Court of Appeals agrees that “sound judicial administration” is best
7 served by the Court certifying this judgment for appeal, in light of the undisputedly significant
8 interests at stake in this case. *See Wood*, 422 F.3d at 879.


9 **III. CONCLUSION**

10 For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART**
11 Plaintiffs’ motion for partial summary judgment and **DENIES** Defendants’ motion for partial
12 summary judgment. Specifically, the Court **GRANTS** Plaintiffs’ request for declaratory judgment
13 that Defendants’ intended use of funds reprogrammed under Sections 8005 and 9002 of the
14 Department of Defense Appropriations Act, 2019, for border barrier construction in El Paso Sector
15 1 and El Centro Sector is unlawful. The Court **DENIES** Plaintiffs’ requests for (1) any broader
16 declaratory judgment, and (2) a permanent injunction.

17 The Clerk is directed to enter final judgment in favor of Plaintiffs and against Defendants
18 with respect to Defendants’ purported reliance on Sections 8005, 9002, and 284 to fund border
19 barrier construction. This judgment will be certified for immediate appeal pursuant to Rule 54(b)
20 of the Federal Rules of Civil Procedure.

21 **IT IS SO ORDERED.**

22 Dated: 6/28/2019

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25 HAYWOOD S. GILLIAM, JR.
26 United States District Judge
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United States District Court
Northern District of California

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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 Interior¹; the U.S. Department of Homeland Security (“DHS”); and Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security² (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).

1 2019), ECF No. 1. Plaintiffs here filed an amended complaint on March 13, 2019, with the state
2 coalition now constituting twenty states (collectively, “Plaintiff States” or “States”). *See* Dkt. No.
3 47 (“FAC”).

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

9 It is important at the outset for the Court to make clear what this case is, and is not, about.
10 The case is not about whether the challenged border barrier construction plan is wise or unwise. It
11 is not about whether the plan is the right or wrong policy response to existing conditions at the
12 southern border of the United States. These policy questions are the subject of extensive, and
13 often intense, differences of opinion, and this Court cannot and does not express any view as to
14 them. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (indicating that the Supreme Court
15 “express[ed] no view on the soundness of the policy” at issue there); *In re Border Infrastructure*
16 *Envtl. Litig.*, 284 F. Supp. 3d 1092, 1102 (S.D. Cal. 2018) (noting that the court “cannot and does
17 not consider whether underlying decisions to construct the border barriers are politically wise or
18 prudent”). Instead, this case presents strictly legal questions regarding whether the proposed plan
19 for funding border barrier construction exceeds the Executive Branch’s lawful authority under the
20 Constitution and a number of statutes duly enacted by Congress. *See In re Aiken Cty.*, 725 F.3d
21 255, 257 (D.C. Cir. 2013) (“The underlying policy debate is not our concern. . . . Our more
22 modest task is to ensure, in justiciable cases, that agencies comply with the law as it has been set
23 by Congress.”).

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

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

5 After carefully considering the parties’ arguments, the Court **DENIES** Plaintiffs’ motion.³

6 **I. LEGAL STANDARD**

7 A preliminary injunction is a matter of equitable discretion and is “an extraordinary
8 remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”
9 *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). “A plaintiff seeking preliminary
10 injunctive relief must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer
11 irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor,
12 and that an injunction is in the public interest.” *Id.* at 20. Alternatively, an injunction may issue
13 where “the likelihood of success is such that serious questions going to the merits were raised and
14 the balance of hardships tips sharply in [the plaintiff’s] favor,” provided that the plaintiff can also
15 demonstrate the other two *Winter* factors. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
16 1131–32 (9th Cir. 2011) (citation and internal quotation marks omitted). Under either standard,
17 Plaintiffs bear the burden of making a clear showing that they are entitled to this extraordinary
18 remedy. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). The most important
19 *Winter* factor is likelihood of success on the merits. *See Disney Enters., Inc. v. VidAngel, Inc.*, 869
20 F.3d 848, 856 (9th Cir. 2017).

21 **II. ANALYSIS**

22 In the pending motion, Plaintiffs seek to enjoin Defendants from using certain diverted
23 federal funds and resources for border barrier construction. Specifically, Plaintiffs move to enjoin
24 Defendants from: (1) invoking Section 8005’s reprogramming authority to channel funds into
25 DoD’s drug interdiction fund, (2) invoking Section 284 to divert monies from DoD’s drug
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27 ³ The relevant background for this and the Citizen Groups’ action is the same. The Court thus
28 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.

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

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

9 **A. Article III Standing**

10 A plaintiff seeking relief in federal court bears the burden of establishing “the irreducible
11 constitutional minimum” of standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)
12 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). First, the plaintiff must have
13 “suffered an injury in fact.” *Id.* This requires “an invasion of a legally protected interest” that is
14 concrete, particularized, and actual or imminent, rather than conjectural or hypothetical. *Lujan*,
15 504 U.S. at 560 (internal quotation marks omitted). Second, the plaintiff’s injury must be “fairly
16 traceable to the challenged conduct of the defendant.” *Spokeo*, 136 S. Ct. at 1547. Third, the
17 injury must be “likely to be redressed by a favorable judicial decision.” *Id.* (citing *Lujan*, 504 U.S.
18 at 560–61).

19 “States are not normal litigants for the purposes of invoking federal jurisdiction,” and are
20 “entitled to special solicitude in [the] standing analysis.” *Massachusetts v. EPA*, 549 U.S. 497,
21 518–20 (2007). For instance, states may sue to assert their “quasi-sovereign interest in the health
22 and well-being—both physical and economic—of [their] residents in general.” *Alfred L. Snapp &*
23 *Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). In that case, however, the “interest must be
24 sufficiently concrete to create an actual controversy between the State and the defendant” such that
25 the state is more than a nominal party. *Id.* at 602.

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

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

2 Only New Mexico contends that it has standing to challenge Defendants’ reprogramming
3 of funds under Section 8005. *See* Reply at 2 (arguing that “Defendants’ actions [under Section
4 8005] will cause concrete and particularized injuries-in-fact to New Mexico’s environment and
5 wildlife, giving New Mexico standing”). Defendants argue that New Mexico lacks standing to
6 challenge Defendants’ invocation of Section 8005 to reprogram funds into the drug interdiction
7 fund, so that Defendants can then divert that money wholesale to border barrier construction using
8 Section 284. *See* Opp. at 17–18.⁵ Defendants do not dispute that New Mexico has standing to
9 challenge the use of funds from the drug interdiction fund for border barrier construction under
10 Section 284. Defendants nonetheless reason that harm from construction using drug interdiction
11 funds under Section 284 does not establish standing to challenge Defendants’ use of Section 8005
12 to supply those funds. *Id.* at 17. Defendants argue that standing requires that the plaintiff be the
13 “object” of the challenged agency action, but that the Section 8005 augmentation of the drug
14 interdiction fund and the use of that money for construction are “two distinct agency actions.” *Id.*
15 at 17–18 (citing *Lujan*, 504 U.S. at 562). According to Defendants, the “object” of the Section
16 8005 reprogramming was “simply mov[ing] funds among DoD’s accounts.” *Id.* (citing *Lujan*, 504
17 U.S. at 562).

18 Defendants’ logic fails in all respects. As an initial matter, it is not credible to suggest that
19 the “object” of the Section 8005 reprogramming is anything but border barrier construction, even
20 if the reprogrammed funds make a pit stop in the drug interdiction fund. Since Defendants first
21 announced that they would reprogram funds using Section 8005, they have uniformly described
22 the object of that reprogramming as border barrier construction. *See* Dkt. No. 89-10 (“Rapuno
23 Decl.”) ¶ 5 (providing that “the Acting Secretary of Defense decided to use DoD’s general transfer
24 authority under section 8005 . . . to transfer funds between DoD appropriations to fund [border
25 barrier construction in Arizona and New Mexico]”); *id.* Ex. D, at 1 (notifying Congress that the
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27 ⁵ Defendants also argue New Mexico lacks standing because it falls outside Section 8005’s “zone
28 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.

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

3 Nor does *Lujan* impose Defendants’ proffered strict “object” test. The *Lujan* Court
4 explained that “when the plaintiff is not himself the object of the government action or inaction he
5 challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish.”
6 504 U.S. at 562 (internal quotation marks omitted). And the Supreme Court was concerned in
7 particular with “causation and redressability,” which are complicated inquiries when a plaintiff’s
8 standing “depends on the unfettered choices made by independent actors not before the courts and
9 whose exercise of broad and legitimate discretion the courts cannot presume either to control or to
10 predict.” *Id.* (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (Kennedy, J.)). As
11 concerns causation, the Ninth Circuit recently explained that Article III standing only demands a
12 showing that the plaintiff’s injury is “fairly traceable to the challenged action of the defendant, and
13 not the result of the independent action of some third party not before the court.” *Mendia v.*
14 *Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 167
15 (1997)). “Causation may be found even if there are multiple links in the chain connecting the
16 defendant’s unlawful conduct to the plaintiff’s injury, and there’s no requirement that the
17 defendant’s conduct comprise the last link in the chain. As we’ve said before, what matters is not
18 the length of the chain of causation, but rather the plausibility of the links that comprise the
19 chain.” *Id.* (internal quotation marks and citations omitted).

20 No complicated causation inquiry is necessary here, as there are no independent absent
21 actors. More important, if there were ever a case where standing exists even though the
22 challenged government action is nominally directed to some different “object,” this is it. Neither
23 the parties nor the Court harbor any illusions that the point of reprogramming funds under Section
24 8005 is to use those funds for border barrier construction. And under Ninth Circuit law, there is
25 no requirement that the challenged conduct be the last link in the causal chain. Rather, even if
26 there is an intervening link between the Section 8005 reprogramming and the border barrier
27 construction itself, any injury caused by the border barrier construction is nonetheless “fairly
28 traceable” to the Section 8005 reprogramming under the circumstances. *See id.* The Court thus

1 cannot accept the Government’s “two distinct actions” rationale as a basis for shielding
2 Defendants’ actions from review.

3 **2. Plaintiffs Have Standing for Their Section 9705 Claim.**

4 Defendants argue that no state has standing to challenge the Treasury’s decision to allocate
5 Treasury Forfeiture Fund (“TFF”) money to border barrier construction because that decision
6 “does not jeopardize the solvency of the TFF or negatively impact the States’ receipt of future
7 equitable sharing money.” Opp. at 12. Defendants thus posit that “[t]he States have not
8 established that the challenged action will cause them any injury.” *Id.* at 14. As support,
9 Defendants rely on the declaration of the Director of the Treasury’s Executive Office for Asset
10 Forfeiture (“TEOAF”), John M. Farley, who manages the TFF. Dkt. No. 89-9 (“Farley Decl.”)
11 ¶ 2. Mr. Farley assures that the Treasury has adequately accounted for mandatory and priority
12 expenses in such a way that there is no risk to the TFF’s solvency in general or to any equitable
13 sharing payments specifically. *Id.* at 13–14. Defendants, however, do not address Plaintiffs’
14 evidence to support standing, which includes recent statements from TEOAF that a “substantial
15 drop in ‘base’ revenue,” which “is relied upon to cover basic mandatory [TFF] costs . . . is
16 especially troubling,” even before the \$601 million diversion. Dkt. No. 59-4 (“States RJN”) Ex.
17 43, at 4⁶; Mot. at 12.

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

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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”).

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

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

13 **B. Venue is Proper in This Court.**

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

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

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

26 **1. Likelihood of Success on the Merits**

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

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

4 The Court begins with a discussion of the law governing the appropriation of federal funds.
5 Under the Appropriations Clause of the Constitution, “No Money shall be drawn from the
6 Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. art. I, § 9, cl. 7.
7 “The Clause’s words convey a ‘straightforward and explicit command’: No money ‘can be paid
8 out of the Treasury unless it has been appropriated by an act of Congress.’” *U.S. Dep’t of Navy v.*
9 *FLRA*, 665 F.3d 1339, 1346 (D.C. Cir. 2012) (quoting *OPM v. Richmond*, 496 U.S. 414, 424
10 (1990)). “The Clause has a ‘fundamental and comprehensive purpose . . . to assure that public
11 funds will be spent according to the letter of the difficult judgments reached by Congress as to the
12 common good and not according to the individual favor of Government agents.’” *United States v.*
13 *McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) (quoting *Richmond*, 496 U.S. at 427–28). It
14 “protects Congress’s exclusive power over the federal purse,” and “prevents Executive Branch
15 officers from even inadvertently obligating the Government to pay money without statutory
16 authority.” *FLRA*, 665 F.3d at 1346–47 (internal quotation marks and citations omitted).

17 “Federal statutes reinforce Congress’s control over appropriated funds,” and under federal
18 law “appropriated funds may be applied only ‘to the objects for which the appropriations were
19 made.’” *Id.* at 1347 (quoting 31 U.S.C. § 1301(a)). Moreover, “[a]n amount available under law
20 may be withdrawn from one appropriation account and credited to another or to a working fund
21 only when authorized by law.” 31 U.S.C. § 1532. “[A]ll uses of appropriated funds must be
22 affirmatively approved by Congress,” and “the mere absence of a prohibition is not sufficient.”
23 *FLRA*, 665 F.3d at 1348. In summary, “Congress’s control over federal expenditures is
24 ‘absolute.’” *Id.* (quoting *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 185 (D.C. Cir.
25 1992)).

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

1 pursuant to express statutory authority.”). Accordingly, one of the key issues in dispute is whether
2 Congress in fact provided “express statutory authority” for Defendants’ challenged actions.

3 Turning to Plaintiffs’ claims, it is necessary as a preliminary matter to outline the measure
4 and lens of reviewability the Court applies in assessing such broad challenges to actions by
5 executive officers. As a first principle, the Court finds that it has authority to review each of
6 Plaintiffs’ challenges to executive action. “It is emphatically the province and duty of the judicial
7 department to say what the law is.” *Marbury*, 1 Cranch at 177. In determining what the law is,
8 the Court has a duty to determine whether executive officers invoking statutory authority exceed
9 their statutory power. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384
10 (2015). And even where executive officers act in conformance with statutory authority, the Court
11 has an independent duty to determine whether authority conferred by act of the legislature
12 nevertheless runs afoul of the Constitution. *See Clinton v. City of New York*, 524 U.S. 417, 448
13 (1998).

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

18 It is true enough that we have long held that federal courts may in
19 some circumstances grant injunctive relief against state officers who
20 are violating, or planning to violate, federal law. But that has been
21 true not only with respect to violations of federal law by state
22 officials, but also with respect to violations of federal law by federal
23 officials. . . . What our cases demonstrate is that, in a proper case,
24 relief may be given in a court of equity . . . to prevent an injurious act
25 by a public officer.

26 The ability to sue to enjoin unconstitutional actions by state and
27 federal officers is the creation of courts of equity, and reflects a long
28 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

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

7 Due to their mistaken framing of the scope of *ultra vires* review, Defendants also
8 incorrectly posit that Plaintiffs must establish that they fall within the “zone of interests” of a
9 particular statute to challenge actions taken by the government under that statute. *See* Opp. at 18–
10 19. The “zone of interests” test, however, only relates to statutorily-created causes of action. *See*
11 *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (explaining that
12 “[t]he modern ‘zone of interests’ formulation . . . applies to all statutorily created causes of
13 action”). The test has no application in an *ultra vires* challenge, which operates outside of the
14 APA framework. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987)
15 (“Appellants need not, however, show that their interests fall within the zones of interests of the
16 constitutional and statutory powers invoked by the President in order to establish their standing to
17 challenge the interdiction program as *ultra vires.*”); *see also* 33 Charles Alan Wright et al., *Federal*
18 *Practice and Procedure* § 8302 (2d ed. 2019) (explaining that the “zone of interests” test is to
19 determine whether a plaintiff “seeks to protect interests that ‘arguably’ fall within the ‘zone of
20 interests’ protected by that provision”). In other words, where a plaintiff seeks to vindicate a right
21 protected by a statutory provision, the plaintiff must demonstrate that it arguably falls within the
22 zone of interests Congress meant to protect by enacting that provision. But where a plaintiff seeks
23 equitable relief against a defendant for exceeding its statutory authority, the zone-of-interests test
24

25 ⁷ Congress may displace federal courts’ equitable power to enjoin unlawful executive action, but a
26 precluding statute must at least display an “intent to foreclose” injunctive relief. *Armstrong*, 135
27 S. Ct. at 1385. Courts have found such implied foreclosure where (1) the statute provides an
28 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.

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

7 In reviewing the lawfulness of Defendants’ conduct, the Court thus begins each inquiry by
8 determining whether the disputed action exceeds statutory authority. For unless an animating
9 statute sanctions a challenged action, a court need not reach the second-level question of whether
10 it would be unconstitutional for Congress to sanction such conduct. *See Nw. Austin Mun. Util.*
11 *Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (explaining the “well-established principle
12 governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide
13 a constitutional question if there is some other ground upon which to dispose of the case”)
14 (quoting *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)). This is not to say,
15 however, that the yardstick of statutory authority overlooks constitutional concerns entirely. “The
16 so-called canon of constitutional avoidance . . . counsel[s] that ambiguous statutory language be
17 construed to avoid serious constitutional doubts.” *FCC v. Fox Television Stations, Inc.*, 556 U.S.
18 502, 516 (2009). Nonetheless, a court presented with both *ultra vires* and constitutional claims
19 should begin by determining whether the statutory authority supports the action challenged, and
20 only reach the constitutional analysis if necessary.⁸

21 //
22 //

23 _____
24 ⁸ The Court finds it need not address Plaintiffs’ claim that the use of the various reprogramming
25 and diversion mechanisms is arbitrary and capricious under the APA. Plaintiffs’ APA arguments
26 are largely repackaged *ultra vires* claims. *See, e.g.*, Reply at 15 (arguing it is arbitrary and
27 capricious to act in excess of statutory authority). To the extent Plaintiffs’ APA claim is based on
28 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).

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

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

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

16 Plaintiffs have shown a likelihood of success as to their argument that Congress previously
17 denied “the item for which funds are requested,” precluding the proposed transfer. On January 6,
18 2019, the President asked Congress for “\$5.7 billion for construction of a steel barrier for the
19 Southwest border,” explaining that the request “would fund construction of a total of
20 approximately 234 miles of new physical barrier.” Citizen Groups RJN Ex. A, at 1. The request
21 noted that “[a]ppropriations bills for fiscal year (FY) 2019 that have already been considered by
22 the current and previous Congresses are inadequate to fully address these critical issues,” to
23 include the need for barrier construction funds. *Id.* The President’s request did not specify the
24 mechanics of how the \$5.7 billion sought would be used for the proposed steel barrier
25 construction. *Id.* Nonetheless, in the CAA passed by Congress and signed by the President,
26 Congress appropriated only \$1.375 billion for the construction of pedestrian fencing, of a specified
27 type, in a specified sector, and appropriated no other funds for barrier construction. The Court
28 agrees with Plaintiffs that they are likely to show that the proposed transfer is for an item for

1 which Congress denied funding, and that it thus runs afoul of the plain language of Section 8005
2 and 10 U.S.C. § 2214(b) (“Section 2214”).¹⁰

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

20 The Court finds that the language and purpose of Section 8005 and Section 2214(b) likely
21 preclude Defendants’ attempt to transfer \$1 billion from funds Congress previously appropriated
22 for military personnel costs to the drug interdiction fund for the construction of a border barrier.
23 Defendants argue that “Congress never denied DoD funding to undertake the [Section] 284
24 projects at issue,” Opp. at 20, such that Section 8005 and Section 2214(b) are satisfied. But in the
25

26 ¹⁰ *See* Fox News, *Mick Mulvaney on chances of border deal, Democrats ramping up investigation*
27 *of Trump admin*, YouTube (Feb. 10, 2019), https://www.youtube.com/watch?v=l_Z0xx_zS0M
28 (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.”).

1 Court’s view, that reading of those sections is likely wrong, when the reality is that Congress was
 2 presented with—and declined to grant—a \$5.7 billion request for border barrier construction.
 3 Border barrier construction, expressly, is the item Defendants now seek to fund via the Section
 4 8005 transfer, and Congress denied the requested funds for that item. *See* 10 U.S.C. § 2214(b)
 5 (explaining that transfer authority “may not be used if *the item to which the funds would be*
 6 *transferred* is an item for which Congress has denied funds”) (emphasis added). And Defendants
 7 point to nothing in the language or legislative history of the statutes in support of their assertion
 8 that only explicit congressional denial of funding for “[Section] 284 projects,” or even DoD
 9 projects generally, would trigger Section 8005’s limitation. *Opp.* at 20. It thus would be
 10 inconsistent with the purpose of these provisions, and would subvert “the difficult judgments
 11 reached by Congress,” *McIntosh*, 833 F.3d at 1175, to allow Defendants to circumvent Congress’s
 12 clear decision to deny the border barrier funding sought here when it appropriated a dramatically
 13 lower amount in the CAA. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609
 14 (1952) (Frankfurter, J., concurring) (“It is quite impossible . . . when Congress did specifically
 15 address itself to a problem . . . to find secreted in the interstices of legislation the very grant of
 16 power which Congress consciously withheld. To find authority so explicitly withheld is not
 17 merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole
 18 legislative process and the constitutional division of authority between President and Congress.”).

19 **ii. Plaintiffs are Likely to Show That the Transfer is Not**
 20 **Based on “Unforeseen Military Requirements.”**

21 Plaintiffs next argue that any need for border barrier construction—to the extent there is a
 22 need—was long “foreseen.” *Mot.* at 23. The Citizen Group Plaintiffs highlight that the President
 23 supported his fiscal year 2019 budget request for border barrier funding with a description that
 24 such a barrier “is critical to combating the scourge of drug addiction that leads to thousands of
 25 unnecessary deaths.” Motion for Preliminary Injunction at 16, *Sierra Club v. Trump*, No. 4:19-cv-
 26 00892-HSG (N.D. Cal. Apr. 4, 2019) (“Citizen Groups Mot.”) (quoting Citizen Groups RJN Ex.
 27 R, at 16).

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

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

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

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

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

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

20 **iii. Accepting Defendants’ Proposed Interpretation of**
 21 **Section 8005’s Requirements Would Likely Raise Serious**
 22 **Constitutional Questions.**

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

27 _____
 28 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.

1 689 (2001) (internal quotation marks and citations omitted). Constitutional avoidance is “thus a
2 means of giving effect to congressional intent,” as it is presumed that Congress did not intend to
3 create an alternative interpretation that would raise serious constitutional concerns. *Clark v.*
4 *Martinez*, 543 U.S. 371, 382 (2005). Courts thus “have read significant limitations into . . .
5 statutes in order to avoid their constitutional invalidation.” *Zadvydas*, 533 U.S. at 689 (citation
6 omitted).

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

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

7 The Court agrees with the Citizen Group Plaintiffs that reading Section 8005 to permit this
8 massive redirection of funds under these circumstances likely would amount to an “unbounded
9 authorization for Defendants to rewrite the federal budget,” Citizen Groups Reply at 14, and finds
10 that Defendants’ reading likely would violate the Constitution’s separation of powers principles.
11 Defendants contend that because Congress did not reject (and, indeed, never had the opportunity
12 to reject) a specific request for an appropriation to the Section 284 drug interdiction fund, DoD
13 can use Section 8005 to route anywhere up to the \$4 billion cap set by that statute, to be spent for
14 the benefit of DHS via Section 284. But this reading of DoD’s authority under the statute would
15 render meaningless Congress’s constitutionally-mandated power to assess proposed spending,
16 then render its binding judgment as to the scope of permissible spending. *See FDA v. Brown &*
17 *Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (holding that the interpretation of statutes
18 “must be guided to a degree by common sense as to the manner in which Congress is likely to
19 delegate a policy decision of such economic and political magnitude”); *Util. Air Regulatory Grp.*
20 *v. EPA*, 573 U.S. 302, 324 (2014) (“We expect Congress to speak clearly if it wishes to assign to
21 an agency decisions of vast economic and political significance.”) (internal quotation marks
22 omitted). This is especially true given that Congress has repeatedly rejected legislation that would
23 have funded substantially broader border barrier construction, as noted above, deciding in the end
24

25 _____
26 ¹² Defendants do not convincingly explain why the amount now sought to be transferred under
27 Section 8005 could not have been sought directly from Congress as part of the fiscal year 2019
28 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.

1 to appropriate only \$1.375 billion. *See City & Cty. of San Francisco v. Trump*, 897 F.3d 1225,
2 1234 (9th Cir. 2018) (“In fact, Congress has frequently considered and thus far rejected legislation
3 accomplishing the goals of the Executive Order. The sheer amount of failed legislation on this
4 issue demonstrates the importance and divisiveness of the policies in play, reinforcing the
5 Constitution’s ‘unmistakable expression of a determination that legislation by the national
6 Congress be a step-by-step, deliberate and deliberative process.’”) (citing *Chadha*, 462 U.S. at
7 959). In short, the Constitution gives Congress the exclusive power “not only to formulate
8 legislative policies and mandate programs and projects, but also to establish their relative priority
9 for the Nation,” *McIntosh*, 833 F.3d at 1172, and “Congress cannot yield up its own powers” in
10 this regard, *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring). Defendants’ interpretation of
11 Section 8005 is inconsistent with these principles.

12 While Defendants argue that the text and history of Section 284 suggest that their proposed
13 transfer and use of the funds are within the scope of what Congress has permitted previously, *Opp.*
14 at 21, that argument only highlights the serious constitutional questions that accepting their
15 position would create. First, Defendants note that in the past DoD has completed what they
16 characterize as “large-scale fencing projects” with Congress’s approval. *Opp.* at 21 (citing H.R.
17 Rep. No. 103-200, at 330–31 (1993)). But Congress’s past approval of relatively small
18 expenditures, that were well within the total amount allocated by Congress to DoD under Section
19 284’s predecessor, speaks not at all to Defendants’ current claim that the Acting Secretary has
20 authority to redirect sums over a hundred orders of magnitude greater to that account in the face of
21 Congress’s appropriations judgment in the CAA. Similarly, whether or not Section 284 formally
22 “limits” the Secretary to “small scale construction” (defined in Section 284(i)(3) as “construction
23 at a cost not to exceed \$750,000 for any project”), reading the statute to suggest that Congress
24 requires reporting of tiny projects but nonetheless has delegated authority to DoD to conduct the
25 massive funnel-and-spend project proposed here is implausible, and likely would raise serious
26 questions as to the constitutionality of such an interpretation. *See Whitman v. Am. Trucking*
27 *Ass’ns*, 531 U.S. 457, 468 (2001) (noting that Congress “does not, one might say, hide elephants
28 in mouseholes”).

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

10 Finally, the Court has serious concerns with Defendants’ theory of appropriations law,
11 which presumes that the Executive Branch can exercise spending authority unless Congress
12 explicitly restricts such authority by statute. Counsel for Defendants advanced this theory at the
13 hearing on this motion, arguing that when Congress passed the recent DoD appropriations act
14 containing Section 8005, it “could have” expressly “restrict[ed] that authority” to preclude
15 reprogramming funds for border barrier construction. *See* Dkt. No. 159 at 76:16–77:3. According
16 to Defendants: “If Congress had wanted to deny DOD this specific use of that [reprogramming]
17 authority, that’s something it needed to actually do in an explicit way in the appropriations
18 process. And it didn’t.” *Id.* at 77:21–24. But it is not Congress’s burden to prohibit the Executive
19 from spending the Nation’s funds: it is the Executive’s burden to show that its desired use of those
20 funds was “affirmatively approved by Congress.” *See FLRA*, 665 F.3d at 1348 (“[A]ll uses of
21 appropriated funds must be affirmatively approved by Congress,” and “the mere absence of a
22 prohibition is not sufficient.”). To have this any other way would deprive Congress of its absolute
23 control over the power of the purse, “one of the most important authorities allocated to Congress
24 in the Constitution’s ‘necessary partition of power among the several departments.’” *Id.* at 1346–
25 47 (quoting *The Federalist* No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961)).

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

1 unless Congress crafts an appropriations rider cabining such authority. *See* Dkt. No. 159 at 75:5–
2 10. As counsel for Defendants put it, “[Plaintiffs] want to say that something was denied by
3 Congress if it wasn’t funded by Congress. . . . But that is just not how these statutes are written
4 and that’s not how [*McIntosh*] tells us we interpret the appropriations statute.” *Id.* at 75:13–20.
5 But Defendants overlook that no party in *McIntosh* disputed that the government’s use of funds
6 was authorized but for the appropriations rider at issue in that case. *See* 833 F.3d at 1175 (“The
7 parties dispute whether the government’s spending money on their prosecutions violates [the
8 appropriations rider].”). It is thus unremarkable that when faced with a dispute exclusively
9 concerning whether the government’s otherwise-authorized spending of money violated an
10 appropriations rider, the Ninth Circuit held that “[i]t is a fundamental principle of appropriations
11 law that we may only consider the text of an appropriations rider.” *Id.* at 1178; *see also* Dkt. No.
12 159 at 75:5–10 (defense counsel relying on this language from *McIntosh*).

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

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

1 account for border barrier construction is unlawful.¹³

2 **b. Section 9705**

3 At the President’s direction, Defendants intend to divert \$601 million from the Treasury
 4 Forfeiture Fund to DHS, to provide additional funding for border barrier construction. *See The*
 5 *Funds Available to Address the National Emergency at Our Border*, The White House,
 6 [https://www.whitehouse.gov/briefings-statements/funds-available-address-national-emergency-](https://www.whitehouse.gov/briefings-statements/funds-available-address-national-emergency-border)
 7 border (Feb. 26, 2019). To do so, Defendants rely on 31 U.S.C. § 9705(g)(4)(B), which authorizes
 8 the Secretary of Treasury to transfer “unobligated balances . . . for obligation or expenditure in
 9 connection with the law enforcement activities of any Federal agency or of a Department of the
 10 Treasury law enforcement organization.” Defendants intend to use the \$601 million “in two
 11 allocations, \$242 million available immediately and \$359 million from future anticipated
 12 forfeitures.” *Id.* Plaintiffs argue that Defendants’ diversion of \$601 million toward border barrier
 13 construction is not an expenditure for “law enforcement activities.” Mot. at 25–26.¹⁴

14 As a threshold matter, Defendants contend that how the Treasury allocates funds is
 15 unreviewable because it is committed to the Treasury’s discretion by law, as “the agency must be
 16 allowed to administer its statutory responsibilities” in ways “it sees as the most effective or
 17 desirable.” Opp. at 14 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993)). They reason that as
 18 long as the Treasury “meet[s] permissible statutory objectives,” the APA precludes judicial review
 19 of the allocation. *Id.* at 15 (quoting *Serrato v. Clark*, 486 F.3d 560, 568 (9th Cir. 2007)). And in
 20

21 ¹³ Defendants have now acknowledged that all of the money they plan to spend on border barrier
 22 construction under Section 284 is money transferred into that account under Section 8005. *See*
 23 Dkt. No. 151 at 4. Given this acknowledgment, and the Court’s finding that Plaintiffs are likely to
 24 show that the Section 8005 reprogramming is unlawful, the Court need not at this stage decide
 25 whether Defendants would have been permitted to use for border barrier construction any
 26 remaining funds that Congress appropriated to the Section 284 account for fiscal year 2019. The
 27 Court notes that the House confirmed in its own lawsuit that it “does not challenge the expenditure
 28 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.

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

6 The Court finds Defendants’ reliance on *Lincoln* and *Serrato* unavailing, and finds that the
7 transfer of funds under Section 9705 is reviewable. Under the APA, Congress may preclude
8 review by statute where the administrative action is committed by law to an agency. *See* 5 U.S.C.
9 § 701(a)(2). Judicial review of agency action, however, is presumptively available. *See Abbott*
10 *Labs. v. Gardner*, 387 U.S. 136, 141 (1967), *abrogated on other grounds by Califano v. Sanders*,
11 430 U.S. 99 (1977). And this presumption applies to judicial review of an agency’s discretionary
12 acts as well. *See* 5 U.S.C. § 706(2)(A) (permitting courts to “hold unlawful and set aside agency
13 action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or
14 otherwise not in accordance with law”). That an agency enjoys discretion is thus only the
15 beginning of the inquiry. Whether Section 701(a)(2) precludes review depends on whether the
16 agency enjoys some special discretion.

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

25 [A]n agency’s allocation of funds from a lump-sum appropriation
26 requires a complicated balancing of a number of factors which are
27 peculiarly within its expertise: whether its resources are best spent on
28 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.

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

8 Defendants’ diversion of \$601 million from the TFF to fund border barrier construction
9 fails the *Lincoln* unreviewability test in two respects. First, Congress’s funding of the TFF
10 arguably does not qualify as the sort of lump-sum appropriation present in *Lincoln* and *Serrato*.
11 Rather, Section 9705 delineates a comprehensive list of payments for which the TFF “shall be
12 available,” thus specifying how TFF funds may be used. More important, Defendants’ purported
13 authority for diverting funds from the TFF itself establishes the limitation on discretion which
14 Plaintiffs seek to vindicate here. Section 9705(g)(4)(B) limits transfers for use “in connection
15 with [] law enforcement activities.” And Plaintiffs maintain that Defendants have not met this
16 limitation. *See* Mot. at 25–26. Thus, even accepting Defendants’ argument that the APA
17 precludes judicial review so long as the Treasury “meet[s] permissible statutory objectives,” *see*
18 Opp. at 14, judicial review is available because Plaintiffs maintain that the Treasury is transferring
19 funds in a statutorily *impermissible* manner. *See Hawaii v. Trump*, 878 F.3d 662, 681 (9th Cir.
20 2017), *rev’d on other grounds*, 138 S. Ct. 2392 (2018) (explaining that the “committed to ‘agency
21 discretion by law’” exception is “very narrow,” and “does not apply where, as here, a court is
22 tasked with reviewing whether an executive action has exceeded statutory authority”).¹⁵

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

27 _____
28 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.

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

3 **c. NEPA**

4 After Plaintiffs filed the instant motion—and one day before Defendants filed their
5 opposition—the Acting Secretary of Homeland Security invoked his authority under Section
6 102(c) of IIRIRA to waive any NEPA requirements for construction in the El Paso and Yuma
7 sectors. *See* Opp. at 24–26; *see also* Determination Pursuant to Section 102 of the Illegal
8 Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg.
9 17185-01 (Apr. 24, 2019); REAL ID Act of 2005, Pub. L. No. 109-13, § 102, 119 Stat. 231, 306
10 (May 11, 2005) (amending Section 102(c) to reflect that the Secretary “ha[s] the authority to
11 waive all legal requirements” that, in the “Secretary’s sole discretion,” are “necessary to ensure
12 expeditious construction” of barriers and roads). The Acting Secretary later waived NEPA
13 requirements for the El Centro Sector and Tucson Sector Projects as well, on the same basis. *See*
14 Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant
15 Responsibility Act of 1996, as Amended, 84 Fed. Reg. 21,798 (May 15, 2019); Determination
16 Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of
17 1996, as Amended, 84 Fed. Reg. 21,800 (May 15, 2019).

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

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

1 appropriated by Congress to be used for that construction.”) (emphasis in original); *see also In re*
2 *Border Infrastructure Envtl. Litig.*, 915 F.3d at 1221 (“[A] valid waiver of the relevant
3 environmental laws under section 102(c) is an affirmative defense to all the environmental claims
4 [including NEPA claims],” and is “dispositive of [those] claims.”). But Plaintiffs contend that
5 “the DHS Secretary’s waiver under IIRIRA does not waive *DOD*’s obligations to comply with
6 NEPA prior to proceeding with El Paso Project 1 under *DOD*’s statutory authority, 10 U.S.C.
7 § 284, and using *DOD*’s appropriations,” so that “DHS’s waiver has no application to this
8 project.” Reply at 16 (emphasis in original); *see also* Citizen Groups Reply at 19 (“Defendants
9 identify no statutory authority for a waiver for ‘expeditious construction’ under *DOD*’s § 284
10 authority, and none exists.”).

11 The Court finds that Plaintiffs are not likely to succeed on their NEPA argument because
12 of the waivers issued by DHS. DoD’s authority under Section 284 is derivative. Under the
13 statute, DoD is limited to providing support (including construction support) to other agencies, and
14 may invoke its authority only in response to a request from such an agency. *See* 10 U.S.C. § 284
15 (“The Secretary of Defense may provide support for the counterdrug activities . . . of any other
16 department or agency of the Federal Government,” including support for “[c]onstruction of roads
17 and fences,” if “such support is requested . . . by the official who has responsibility for the
18 counterdrug activities.”). Here, DHS has made such a request, invoking “its authority under
19 Section 102 of IIRIRA to install additional physical barriers and roads” in designated areas,
20 seeking support for its “ability to impede and deny illegal entry and drug smuggling activities.”
21 States RJN Ex. 33, at 1. DHS requested DoD’s assistance “[t]o support DHS’s action under
22 Section 102.” *Id.* at 2. Plaintiffs’ argument would require the Court to find that even though it is
23 undisputed that DHS could waive NEPA’s requirements if it were paying for the projects out of its
24 own budget, that waiver is inoperative when DoD provides support in response to a request from
25 DHS. The Court finds it unlikely that Congress intended to impose different NEPA requirements
26 on DoD when it acts in support of DHS’s Section 102 authority in response to a direct request
27
28

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

5 **2. Likelihood of Irreparable Injury**

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

10 **a. New Mexico’s Environmental Harm**

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

23 ¹⁶ Plaintiffs argue that “[i]n another context, Congress explicitly allows the DOD Secretary to
 24 request ‘the head of another agency responsible for the administration of navigation or vessel-
 25 inspection laws to waive compliance with those laws to the extent the Secretary considers
 26 necessary.’” Reply at 17 (citing 46 U.S.C. 501(a)). The Court finds this statute to be irrelevant to
 27 the issue here. In this case, DoD is acting solely in response to DHS’s request for support under
 28 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.

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

7 Defendants posit that Plaintiffs’ “vague allegations,” only supported by “declarations [that]
8 are heavy on conjecture and light on detail” concerning harm to local species, are insufficient to
9 satisfy Plaintiffs’ burden of demonstrating a likelihood of irreparable injury. *Opp.* at 31–32.

10 More to the point, Defendants maintain that New Mexico fails to meet its burden of showing that
11 Defendants’ plan “is likely to cause population-level harm,” which Defendants claim requires
12 proof of a “definitive threat” to the species as a whole, and “not mere speculation.” *Id.* at 32
13 (quoting *Nat’l Wildlife Fed’n v. Burlington N.R.R.*, 23 F.3d 1508, 1512 n.8 (9th Cir. 1994)
14 (“*Burlington*”). And as is relevant to the present discussion, Defendants highlight that any
15 purported environmental harm does not warrant a preliminary injunction because population or
16 species-level harm would not occur before a final disposition of the case on the merits. *Id.* at 34.
17 Last, Defendants attack New Mexico’s invocation of its residents’ recreational interests as a
18 possible irreparable harm, because states may not advance resident interests in *parens patriae*
19 against the United States. *Id.* at 33 (citing *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1178
20 (9th Cir. 2011)).

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

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

23

24 ¹⁸ Although the court in *Maughan* found a lack of irreparable injury because evidence showed the
25 wolf species population was growing despite the challenged action, it nonetheless stated: “The
26 evidence in the current record shows that the [challenged] program for hunting wolves will not
27 result in the loss of the species as a whole.” *See* 2014 WL 201702, at *7. Even if the *Maughan*
28 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

1 anticipated and current forfeiture cases and liabilities that may be associated with such cases,”
2 which “enables the program to accurately estimate its revenue and liabilities.” *Id.* ¶¶ 5, 9.²⁰ In
3 this capacity, the “TFF has remained financially solvent and maintained adequate funds in its
4 accounts to meet all of its expenses” since its inception in 1992. *Id.* ¶ 9.

5 Because Strategic Support funding at the end of any fiscal year has already taken account
6 of current fiscal year mandatory expenses and anticipated liabilities for the following fiscal year,
7 Mr. Farley provides that “the decision to make Strategic Support funding available in fiscal year
8 2019 will have no impact on the amount of money state and local entities receive through
9 equitable sharing.” *Id.* ¶¶ 13, 23. And the Treasury predicts that following the diversion of \$601
10 million in strategic support payments to DHS, the “projected unobligated balance carry-over to
11 fiscal year 2020 will be approximately \$507 million.” *Id.* ¶ 26.

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

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

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

1 Dkt. No. 136 Ex. 55, at 6–7. It does not appear warranted, though, to discount the TFF balance
 2 calculation by the entire contingent liability entry, given that such liabilities “are significant
 3 because remission payments from multiple years are recorded and carried forward.” *See* Dkt. No.
 4 136 Ex. 55, at 6. Nothing indicates that the Treasury would pay out all contingent liabilities in the
 5 next fiscal year. And even accepting Plaintiffs’ argument as true, they have not explained why the
 6 TFF’s existence alone manifests an entitlement to future equitable sharing payments. Further,
 7 Plaintiffs fail to consider that the amount of potential future equitable sharing payments is tethered
 8 to future seizures or forfeitures for which a given state or local law enforcement agency
 9 participates in the seizure or forfeiture, and is capped by the value of the seized or forfeited
 10 property. *See* 31 U.S.C. § 9705(a)(1)(g), (b)(2), (h)(1)(B)(ii). Thus, to the extent a given law
 11 enforcement agency participates in future seizures or forfeitures, the TFF necessarily will have the
 12 funds to provide the mandatory equitable sharing payment.

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

27 _____
 28 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,

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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.

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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