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13
 14 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
 15 **SAN FRANCISCO-OAKLAND DIVISION**

16 SIERRA CLUB and SOUTHERN BORDER
 COMMUNITIES COALITION,

17 *Plaintiffs,*

18 v.

19 DONALD J. TRUMP, President of the United
 20 States, in his official capacity; PATRICK M.
 SHANAHAN, Acting Secretary of Defense, in his
 21 official capacity; KIRSTJEN M. NIELSEN,
 Secretary of Homeland Security, in her official
 22 capacity; and STEVEN MNUCHIN, Secretary of
 the Treasury, in his official capacity,

23 *Defendants.*

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

PLAINTIFFS' REPLY
MEMORANDUM IN SUPPORT OF
PRELIMINARY INJUNCTION

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

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TABLE OF CONTENTS

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

INTRODUCTION 1

ARGUMENT 2

 I. Plaintiffs Are Likely to Succeed on the Merits of Their Claims 2

 A. Plaintiffs have properly sought review of Defendants’ constitutional violations and *ultra vires* actions 2

 1. Plaintiffs were not required to seek review of Defendants’ wall-building scheme under the APA 2

 2. The government mischaracterizes the scope and standard of *ultra vires* review 4

 B. Plaintiffs have standing 5

 1. Plaintiffs have standing to challenge Defendants’ transfer of military personnel funds to build the wall in purported reliance on Section 8005 5

 2. Plaintiffs have standing to challenge Defendants’ unlawful use of 10 U.S.C. § 2808 7

 C. Defendants’ proposed construction of Sections 284, 2808, and 8005 violates the Constitution, or at least raises serious constitutional concerns 9

 D. Defendants’ statutory arguments are implausible and unavailing 11

 1. Section 8005 and 10 U.S.C. § 2214(b) 11

 2. Section 284 13

 3. Section 2808 15

 4. The Consolidated Appropriations Act (CAA) 17

 E. DHS cannot waive DOD’s obligation to comply with NEPA when DOD acts under Section 284 authority 18

 II. Plaintiffs Have Shown Irreparable Harm 19

 A. Plaintiffs have demonstrated irreparable harm to their members’ recreational and aesthetic interests 19

 B. Plaintiffs have established irreparable constitutional harm 21

 C. SBCC and its member organizations have demonstrated irreparable harm to their missions 21

 III. The Balance of Harms and Public Interest Overwhelmingly Favor Plaintiffs 24

1 IV. The Court Should Issue an Injunction Providing for Full Relief 24

2 CONCLUSION..... 25

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

TABLE OF AUTHORITIES

Cases

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

All. for Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011)..... 20

All. for Wild Rockies v. Marten,
253 F. Supp. 3d 1108 (D. Mont. 2017) 20

Alto v. Black,
738 F.3d 1111 (9th Cir. 2013)..... 4

Am. Int’l Grp., Inc. v. Islamic Republic of Iran,
657 F.2d 430 (D.C. Cir. 1981) 15

Bennett v. Spear,
520 U.S. 154 (1997) 6

Brown v. Valoff,
422 F.3d 926 (9th Cir. 2005)..... 8

Cal. Wilderness Coal. v. Dep’t of Energy,
631 F.3d 1072 (9th Cir. 2011)..... 18

Califano v. Yamasaki,
442 U.S. 682 (1979) 25

California v. Azar,
911 F.3d 558 (9th Cir. 2018)..... 25

Cent. Delta Water Agency v. United States,
306 F.3d 938 (9th Cir. 2002)..... 8

Chamber of Commerce v. Reich,
74 F.3d 1322 (D.C. Cir. 1996) 3, 10

Chas. T. Main Int’l, Inc. v. Khuzestan Water & Power Auth.,
651 F.2d 800 (1st Cir. 1981) 15

City & Cty. of San Francisco v. Trump,
897 F.3d 1225 (9th Cir. 2018)..... 8, 11

Clapper v. Amnesty Int’l USA,
568 U.S. 398 (2013) 8

Clark v. Martinez,
543 U.S. 371 (2005) 9

Clinton v. City of New York,
524 U.S. 417 (1998) 10

Clouser v. Espy,
42 F.3d 1522 (9th Cir. 1994)..... 4

1 *Ctr. for Biological Diversity v. Mattis*,
868 F.3d 803 (9th Cir. 2017)..... 16, 17

2

3 *Cty. of Santa Clara v. Trump*,
250 F. Supp. 3d 497 (N.D. Cal. 2017) 21

4 *Cty. of Santa Clara v. Trump*,
267 F. Supp. 3d 1201 (N.D. Cal. 2017)..... 8

5

6 *Dalton v. Specter*,
511 U.S. 462 (1994) 10

7 *Dames & Moore v. Regan*,
453 U.S. 654 (1981) 5, 15, 16

8

9 *E. Bay Sanctuary Covenant v. Trump*,
349 F. Supp. 3d 838 (N.D. Cal. 2018)..... 9

10 *E. Bay Sanctuary Covenant v. Trump*,
354 F. Supp. 3d 1094 (N.D. Cal. 2018)..... 25

11

12 *E. Bay Sanctuary Covenant v. Trump*,
909 F.3d 1219 (9th Cir. 2018)..... 21, 22, 25

13 *Elec. Data Sys. Corp. v. Soc. Sec. Org. of Iran*,
508 F. Supp. 1350 (N.D. Tex. 1981)..... 16

14

15 *F.D.A. v. Brown & Williamson Tobacco Corp.*,
529 U.S. 120 (2000) 14

16 *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*,
666 F.3d 1216 (9th Cir. 2012)..... 22

17

18 *Fair Hous. of Marin v. Combs*,
285 F.3d 899 (9th Cir. 2002)..... 23

19 *Haitian Refugee Ctr. v. Gracey*,
809 F.2d 794 (D.C. Cir. 1987) 6

20

21 *Hamdan v. Rumsfeld*,
548 U.S. 557 (2006) 16

22 *Harmon v. Brucker*,
355 U.S. 579 (1958) 5

23

24 *Havens Realty Corp. v. Coleman*,
455 U.S. 363 (1982) 22

25 *Hawaii v. Trump*,
878 F.3d 662 (9th Cir. 2017), *rev'd on other grounds*, 138 S. Ct. 2392 (2018)..... 3

26

27 *Hernandez v. Sessions*,
872 F.3d 976 (9th Cir. 2017)..... 24

28

1 *Horizon Air Indus., Inc. v. Nat’l Mediation Bd.*,
232 F.3d 1126 (9th Cir. 2000)..... 2, 4

2

3 *Idaho Conservation League v. Mumma*,
956 F.2d 1508 (9th Cir. 1992)..... 6

4 *Japan Whaling Ass’n. v. Am. Cetacean Soc.*,
478 U.S. 221 (1986) 4

5

6 *Juliana v. United States*,
339 F. Supp. 3d 1062 (D. Or. 2018)..... 2, 3

7 *Koohi v. United States*,
976 F.2d 1328 (9th Cir. 1992)..... 16

8

9 *Landwatch v. Connaughton*,
905 F. Supp. 2d 1192 (D. Or. 2012)..... 20

10 *Leedom v. Kyne*.
358 U.S. 184 (1958) 3

11

12 *Marschalk Co. v. Iran Nat’l Airlines Corp.*,
518 F. Supp. 69 (S.D.N.Y. 1981)..... 15

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

14

15 *Mendia v. Garcia*,
768 F.3d 1009 (9th Cir. 2014)..... 6

16 *Nat’l Council of La Raza v. Cegavske*,
800 F.3d 1032 (9th Cir. 2015)..... 22

17

18 *Navajo Nation v. Dep’t of the Interior*,
876 F.3d 1144 (9th Cir. 2017)..... 2, 3

19 *Nevada v. Dep’t of Energy*,
400 F.3d 9 (D.C. Cir. 2005) 15, 17

20

21 *Pac. Mar. Ass’n v. Nat’l Labor Relations Bd.*,
827 F.3d 1203 (9th Cir. 2016)..... 4

22 *Presbyterian Church (U.S.A.) v. United States*,
870 F.2d 518 (9th Cir. 1989)..... 2

23

24 *Sale v. Haitian Ctrs. Council, Inc.*,
509 U.S. 155 (1993) 3, 4

25 *Scott v. Rosenberg*,
702 F.2d 1263 (9th Cir. 1983)..... 6

26

27 *Serv. Women’s Action Network v. Mattis*,
352 F. Supp. 3d 977 (N.D. Cal. 2018)..... 22

28

1	<i>Sierra Club v. Watt</i> , 608 F. Supp. 305 (E.D. Cal. 1985).....	6
2		
3	<i>Skinner v. Switzer</i> , 562 U.S. 521 (2011)	4
4	<i>Smith v. Pac. Props. & Dev. Corp.</i> , 358 F.3d 1097 (9th Cir. 2004).....	22, 23
5		
6	<i>Staacke v. U.S. Sec’y of Labor</i> , 841 F.2d 278 (9th Cir. 1988).....	4
7	<i>Susan B. Anthony List v. Driehaus</i> , 134 S. Ct. 2334 (2014)	7
8		
9	<i>TVA v. Hill</i> , 437 U.S. 153 (1978)	24
10	<i>United States v. McIntosh</i> , 833 F.3d 1163 (9th Cir. 2016).....	10
11		
12	<i>United States v. Oakland Cannabis Buyers’ Coop.</i> , 532 U.S. 483 (2001)	24
13	<i>United States v. Spawr Optical Research, Inc.</i> , 685 F.2d 1076 (9th Cir. 1982).....	16, 17
14		
15	<i>Util. Air Regulatory Grp. v. E.P.A.</i> , 573 U.S. 302 (2014)	14
16	<i>Valle del Sol Inc. v. Whiting</i> , 732 F.3d 1006 (9th Cir. 2013).....	23
17		
18	<i>Virginian Ry. Co. v. Sys. Fed’n No. 40</i> , 300 U.S. 515 (1937)	24
19	<i>Washington v. Trump</i> , 847 F.3d 1151 (9th Cir. 2017).....	21
20		
21	<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952)	11
22	<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001)	9
23		
24		
25	Statutes	
26	10 U.S.C. § 284	passim
27	10 U.S.C § 2214	11, 12
28	10 U.S.C. § 2808	passim

1 2019 Department of Defense Appropriations Act, Pub. L. No. 115-145 passim

2 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L.
 3 No. 104-208, Div. C 18, 19

4 National Environmental Policy Act, 42 U.S.C. § 4332 18

5 **Other Authorities**

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 7 the Dep’t of Treasury, Office of Synthetic Fuels Projects, B-247644, 72 Comp. Gen. 164
 8 (Apr. 9, 1993) 14

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10 Remarks by President Trump on the National Security and Humanitarian Crisis on our
 Southern Border (Mar. 15, 2019) 8

11 *TRANSCRIPT: ABC News Anchor David Muir Interviews President Trump*, ABC News
 (Jan. 25, 2017) 17

12 Video interview of Kevin McAleenan, Acting Department of Homeland Security Secretary,
 13 Fox News (Apr. 23, 2019) 14

14
15
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19
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21
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INTRODUCTION

1
2 On February 15, 2019, having tried and failed to secure Congressional approval for his
3 border wall, the President announced that he would nonetheless construct it by diverting billions of
4 dollars that Congress had appropriated for the military. Defendants have proceeded according to this
5 unlawful and unconstitutional plan, and are preparing to begin construction as early as May 25.

6 In an effort to avoid this Court's scrutiny, Defendants urge a radical revision of standing law.
7 They maintain that their unlawful transfer of military pay and pension funds may not be challenged,
8 despite its undisputed causal link to Defendants' wall construction in Arizona and New Mexico. And
9 they speculate that the President's declaration of emergency might be an empty act, because
10 Defendants could abort their announced plan to divert \$3.6 billion in military construction funds—
11 even as they act to identify, by May 10, the construction projects they intend to sacrifice for the wall.
12 Neither argument undermines Plaintiffs' standing.

13 Defendants' arguments on the merits are equally flawed. They brush aside constitutional
14 concerns, urging the Court to disregard the unprecedented executive power grab at issue here and
15 ignoring the clear record of congressional refusal to fund the wall. They propose a series of
16 implausible statutory arguments, ranging from the incredible claim that Congress never "denied" the
17 President's wall request, to an equally unconvincing assertion that Congress quietly conferred on the
18 Secretary of Defense the power to unilaterally spend billions of dollars on a border wall that has
19 otherwise been the subject of reams of failed legislation and careful Congressional control. And
20 Defendants' argument that the border wall is a "military requirement" built under Department of
21 Defense ("DOD") authority (an effort to evade financial law), is belied by their simultaneous and
22 contradictory assertion that the very same sections of wall are a Department of Homeland Security
23 ("DHS") project under DHS authority (for purposes of circumventing environmental law). As to the
24 restrictions Congress imposed on the President's emergency power to divert military construction
25 funds, Defendants deem them nonjusticiable and unenforceable—contrary to settled caselaw.

26 Finally, Defendants' arguments on the preliminary injunction factors rest largely on
27 misstatements of both the record and relevant Ninth Circuit law. Plaintiffs face irreparable harm
28

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

3 ARGUMENT

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

5 A. Plaintiffs have properly sought review of Defendants' constitutional violations 6 and *ultra vires* actions.

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

15 1. Plaintiffs were not required to seek review of Defendants' wall-building 16 scheme under the APA.

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

23 In enacting the APA, Congress did not foreclose traditional equitable review of unlawful
24 executive action. "The APA contains no express language suggesting that Congress intended it to
25 displace constitutional claims for equitable relief." *Juliana v. United States*, 339 F. Supp. 3d 1062,
26 1084 (D. Or. 2018) (citing *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 & n.9
27 (9th Cir. 1989)). Nor is the APA the exclusive vehicle for nonconstitutional claims. *See Navajo*
28 *Nation v. Dep't of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017) (holding that *Presbyterian*
Church is not limited to constitutional claims). It "makes little sense to hold that the APA waives

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

4 Plaintiffs’ “cause of action, which exists outside of the APA, allows courts to review *ultra*
 5 *vires* actions by the President that go beyond the scope of the President’s statutory
 6 authority.” *Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017), *rev’d on other grounds*, 138 S. Ct.
 7 2392 (2018). Courts regularly review, outside of the APA context, whether a particular executive
 8 action exceeded constitutional or statutory authority. *See, e.g., Sale v. Haitian Ctrs. Council, Inc.*,
 9 509 U.S. 155, 187–88 (1993) (reviewing on the merits a challenge to an executive order issued
 10 pursuant to § 1182(f) of the Immigration and Nationality Act without reference to the APA); *Leedom*
 11 *v. Kyne*, 358 U.S. 184, 188–89 (1958) (permitting challenge to an Executive Order despite the lack
 12 of a final agency action under the APA); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327–28
 13 (D.C. Cir. 1996) (judicial review of a Presidential action through a challenge brought against the
 14 Secretary of Labor). Plaintiffs have appropriately sought such review here.

15 Plaintiffs do not contend that any single agency action is causing their asserted injuries;
 16 instead “[t]hey seek review of *aggregate action* by *multiple agencies*, something the APA’s judicial
 17 review provisions do not address.” *Juliana*, 339 F. Supp. 3d at 1084. For example, Defendants’
 18 planned construction of walls in Arizona and New Mexico involves multiple coordinated DOD and
 19 DHS actions that Plaintiffs challenge as unlawful and unconstitutional. *See, e.g.,* Mot. 15–16 (DOD
 20 transfer of personnel funds to counterdrug account is unlawful); Mot. 16–20 (DOD transfer from
 21 counterdrug account to DHS to fund wall project is unlawful); Mot. 6–7 (DHS use of unappropriated
 22 funds to evade Congress’s restriction on wall construction outside the Rio Grande Valley Sector is
 23 unlawful); Mot. 8–12 (combined scheme violates the Constitution). And Defendants cannot argue
 24 that a challenge to their announced use of § 2808 must be brought under the APA when they
 25 concede they have not completed final agency action on it. Opp. 21. Review of such claims is
 26 available outside of the APA. *See, e.g., Navajo Nation*, 876 F.3d at 1172 (noting that the “‘final
 27 agency action’ limitation applies only to APA claims”).¹

28 ¹ Should the Court find that any of Plaintiffs’ claims are more properly considered under the

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

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

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

23 APA, it has the power to treat them as APA claims without amendment of Plaintiffs’ complaint. *See,*
 24 *e.g., Alto v. Black*, 738 F.3d 1111, 1117 (9th Cir. 2013) (electing to consider two claims that were
 25 not “explicitly denominated as an APA claim” under the APA, as they were “fairly characterized as
 26 claims for judicial review of agency action under the APA”); *Clouser v. Espy*, 42 F.3d 1522, 1533
 27 (9th Cir. 1994) (“We shall therefore treat plaintiffs’ arguments as being asserted under the APA,
 28 although plaintiffs sometimes have not framed them this way in their pleadings.”); *Japan Whaling*
Ass’n v. Am. Cetacean Soc., 478 U.S. 221, 228 & 230 n.4 (1986) (treating petition filed under the
 Mandamus Act to compel agency action as a claim for relief under the APA); *see generally Skinner*
v. Switzer, 562 U.S. 521, 530 (2011) (“[A] complaint need not pin plaintiff’s claim for relief to a
 precise legal theory.”).

1 *Harmon v. Brucker*, 355 U.S. 579, 581–83 (1958) (reviewing claim that Army Secretary exceeded
2 statutory authority in ordering non-honorable discharges to inductees and applying ordinary canons
3 of statutory construction); *Dames & Moore v. Regan*, 453 U.S. 654, 669–88 (1981) (reviewing claim
4 that executive officials had exceeded their statutory authority and reaching conclusion based on text,
5 other legislation, and historical practice); *see also* Br. of Federal Courts Scholars 17–19.

6 In any event, in a challenge like this one, asserting that executive action is both *ultra vires*
7 and that the government’s claimed statutory authority raises serious constitutional problems, the
8 court must construe the statute to avoid those problems if possible. *See Harmon*, 355 U.S. at 581
9 (“In keeping with our duty to avoid deciding constitutional questions presented unless essential to
10 proper disposition of a case, we look first to the [challengers’] nonconstitutional claim that
11 [defendant] acted in excess of powers granted him by Congress.”); *see also* Section I.C, *infra*.
12 Defendants’ proposed “high standard” for all *ultra vires* action would improperly impose a barrier to
13 courts fulfilling this duty, improperly requiring unnecessary confrontation of constitutional
14 questions. While Plaintiffs would undeniably meet this “high standard” given that the President has
15 so clearly exceeded his statutory authority, this Court should reject Defendants’ misplaced attempt to
16 impose it in this case.

17 **B. Plaintiffs have standing.**

18 **1. Plaintiffs have standing to challenge Defendants’ transfer of military**
19 **personnel funds to build the wall in purported reliance on Section 8005.**

20 Defendants do not dispute that Plaintiffs have standing to challenge Defendants’ use of
21 Counterdrug Account funds to build sections of wall in Arizona and New Mexico under claimed
22 § 284 authority. Defendants nonetheless maintain that Plaintiffs may not challenge Defendants’
23 transfer of military pay and pension funds into the depleted Counterdrug Account. Opp. 13–14.
24 Defendants’ theory is that the direct cause of Plaintiffs’ harm is Defendants’ use of the transferred
25 funds to construct the President’s wall under § 284, and therefore the predicate unlawful transfer
26 under § 8005 is insulated from review. Defendants misunderstand the law of standing. There is no
27 requirement that Plaintiffs challenge only the final link in the chain that causes their injuries.

28 “Causation may be found even if there are multiple links in the chain connecting the

1 defendant's unlawful conduct to the plaintiff's injury, and there's no requirement that the defendant's
 2 conduct comprise the last link in the chain." *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014).
 3 "[I]f the complained of action is a 'but for' cause—a cause, even if not the only cause—it suffices
 4 for standing purposes." *Sierra Club v. Watt*, 608 F. Supp. 305, 316 (E.D. Cal. 1985) (citing *Scott v.*
 5 *Rosenberg*, 702 F.2d 1263, 1268 (9th Cir. 1983)). "The fact that the harm to the plaintiff may have
 6 resulted indirectly does not in itself preclude standing." *Mendia*, 768 F.3d at 1012 (quotation and
 7 alteration marks omitted). Defendants' claim to the contrary "wrongly equates injury 'fairly
 8 traceable' to the defendant with injury as to which the defendant's actions are the very last step in
 9 the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997).

10 Under well-established standing rules, Defendants' use of § 8005 is a "but for" cause of
 11 Plaintiffs' injuries, and Plaintiffs can challenge it. *See, e.g., Idaho Conservation League v. Mumma*,
 12 956 F.2d 1508, 1518 (9th Cir. 1992) (finding standing where "in the instant case the injury . . .
 13 would not have occurred but for the Secretary's decision"). Without transferring money in purported
 14 reliance on § 8005, Defendants would be unable to invoke § 284 in an effort to construct sections of
 15 wall in Arizona and New Mexico. Prior to constructing any sections of the wall using the
 16 Counterdrug Account, the government had already spent more than 90 percent of the funds
 17 appropriated for that account. *See* RJN ¶ 13, Ex. M at 1. And in any event, Congress appropriated
 18 less than \$1 billion for the § 284 account, while Defendants intend to funnel \$2.5 billion for the
 19 President's wall through that account. *Id.* In short, as Defendants concede, they used § 8005 to fill
 20 the § 284 account, specifically "to devote additional resources to border barrier construction." Opp.
 21 9. The § 8005 violation is thus a "but for" cause of Plaintiffs' injury: had Defendants not used
 22 § 8005 to fill the § 284 account, Defendants could not attempt to use § 284 to build the wall.²

23 ² Defendants' argument that Plaintiffs are outside the "zone of interests" of § 8005 is
 24 misplaced. Defendants confuse the requirements of APA review with those of *ultra vires* review.
 25 Plaintiffs' claim is that Defendants are spending military personnel funds on the border wall without
 26 any legal authority. They need not demonstrate that they fit within the zone of interests of § 8005
 27 merely because Defendants have invoked it. As the D.C. Circuit explained decades ago, such a
 28 requirement would make little sense. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14
 (D.C. Cir. 1987) ("Appellants need not, however, show that their interests fall within the zones of
 interests of the constitutional and statutory powers invoked by the President in order to establish
 their standing to challenge the interdiction program as *ultra vires*. Otherwise, a meritorious litigant,
 injured by *ultra vires* action, would seldom have standing to sue since the litigant's interest normally
 will not fall within the zone of interests of the very statutory or constitutional provision that he

1 **2. Plaintiffs have standing to challenge Defendants’ unlawful use of**
2 **10 U.S.C. § 2808.**

3 Defendants’ argument that SBCC and its members lack standing to challenge Defendants’
4 misuse of § 2808 boils down to the proposition that although the President has declared that an
5 urgent emergency *requires* the use of the armed forces to construct his border wall, the military
6 might nonetheless choose to ignore the President’s declaration and his subsequent veto. As
7 Defendants concede, however, Plaintiffs need not wait until the military starts pouring concrete; they
8 need only establish a “‘substantial risk’ that harm will occur.” Opp. 21 (quoting *Susan B. Anthony*
9 *List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014)). The record amply establishes such a risk. Moreover,
10 Defendants ignore that harm has already occurred to SBCC and its members, and that these harms
11 are ongoing. SBCC has standing to challenge Defendants’ announced plan to misuse § 2808.

12 Defendants have proceeded far along the path of diverting military construction funds
13 pursuant to § 2808; that they have not yet taken the final step does not render such a result remote or
14 tenuous. Defendants’ argument that SBCC’s claim is based on mere “speculation that DoD *may* use
15 § 2808 at some point in the future,” Opp. 21, cannot be squared with the record. Defendants concede
16 that on February 15, 2019, the President issued a Proclamation that declared a national emergency,
17 “determined that ‘this emergency requires use of the Armed Forces,’” and in order “to achieve [the
18 Proclamation’s] purpose,” provided Defendant Shanahan with “the authority under 10 U.S.C.
19 § 2808” to divert military construction funds. Opp. 6. That same day, the White House identified the
20 amount of funds they would use pursuant to § 2808: \$3.6 billion. Opp. 8. On March 12, the President
21 confirmed his plan to use § 2808 to divert \$3.6 billion in military construction funds to his wall by
22 submitting to Congress a budget request for \$3.6 billion to “backfill funding reallocated in FY 2019
23 to build border barriers.” RJN ¶ 14, Ex. N at 6–9. Defendants have never wavered from their
24 announced plan to use § 2808 and are proceeding apace: Defendant Shanahan has ordered DOD to
25 identify, by May 10, \$3.6 billion worth of military construction projects that should be sacrificed for
26 the border wall, as well as locations for construction. *See* Rapuano Decl. ¶¶ 14–15. When the court
27 considers “whether the threatened harm may result from a chain of contingencies, the possibility that
28 claims does not authorize action concerning that interest.”).

1 defendants may change their course of conduct is not the type of contingency” that can defeat
2 standing. *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002).

3 Defendants’ own statements belie any argument denying a “substantial risk” that they will
4 use § 2808 to construct the border wall. The Ninth Circuit recently rejected a similar government
5 argument that a challenged “Executive Order is all bluster and no bite, representing a perfectly
6 legitimate use of the presidential ‘bully pulpit,’ without any real meaning—‘gesture without motion,’
7 as T.S. Eliot put it.” *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1238 (9th Cir. 2018).
8 The court explained that consideration of “statements made by and on behalf of the Administration
9 outside the context of this litigation . . . suggests that the Administration’s current litigation position
10 is grounded not in the text of the Executive Order but in a desire to avoid legal consequences.” *Id.*
11 Here too, the overwhelming weight of the government’s statements make clear that Defendants
12 intend to use the national emergency declaration to build the wall faster than Congress will allow.
13 *See, e.g.*, RJN ¶ 5, Ex. E (President Trump’s statement on declaring a national emergency that he
14 “didn’t need to do this” but he’d rather build the wall “much faster”). Dispelling any doubt as to
15 whether the national emergency authority would be used for wall construction, on the occasion of
16 the President’s veto of the resolution to terminate the emergency declaration, Vice President Pence
17 announced that the President was “keeping [his] word by vetoing this legislation, by finding the
18 available resources to build the wall”³ The President confirmed that signing the veto was “a big
19 step. We’re building a lot of wall right now. It’s started [W]e have many miles under
20 construction right now, and we’re going to be signing contracts over the next couple of days for
21 literally hundreds of miles of wall.”⁴ Plaintiffs need not speculate that the emergency declaration
22 will be used for wall construction; they need only take Defendants at their word. *Cf. Clapper v.*
23 *Amnesty Int’l USA*, 568 U.S. 398, 410 (2013) (rejecting standing where Plaintiffs alleged “a highly
24 speculative fear” based on a “highly attenuated chain of possibilities”).

25 ³ Remarks by President Trump on the National Security and Humanitarian Crisis on our
26 Southern Border (Mar. 15, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border-2>. The Court may take
27 judicial notice of public statements by government officials. *See Cty. of Santa Clara v. Trump*, 267
28 F. Supp. 3d 1201, 1217, n.11 (N.D. Cal. 2017) (“government . . . statements of public record are appropriate for judicial notice”) (citing *Brown v. Valoff*, 422 F.3d 926, 933 n.9 (9th Cir. 2005)).

⁴ *Id.*

1 Finally, Defendants address only “allegations of future injury,” Opp. 21, and ignore entirely
2 that SBCC and its members have already suffered and continue to suffer ongoing harms. *See* Mot.
3 24–25 (describing ongoing harms to SBCC and its members Southwest Environmental Center and
4 Equal Voice Network); *see also* Section III.C., *infra*. This alone is sufficient to confer standing on
5 SBCC. *See E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 852 (N.D. Cal. 2018)
6 (rejecting argument that organizations’ fears were “speculative” or “self-inflicted” because “their
7 function is currently impaired by the Rule”). Defendants argue in passing that it is possible that
8 § 2808 funds will be used to build a wall in a location where Plaintiffs would not have a claim to a
9 cognizable injury. *See* Opp. 21. This argument is contrary to the record evidence, which establishes
10 that SBCC and its members span the entire Southwestern Border. *See* Gaubeca Decl. ¶ 3 (“SBCC’s
11 membership spans the borderlands from California to Texas.”); Bixby Decl. ¶ 3 (Southwest
12 Environmental Center “works statewide in New Mexico and our campaigns extend into Eastern
13 Arizona and West Texas”). Defendants’ plan to unlawfully construct \$3.6 billion worth of wall poses
14 a “substantial risk” of harming their interests.

15 **C. Defendants’ proposed construction of Sections 284, 2808, and 8005 violates the**
16 **Constitution, or at least raises serious constitutional concerns.**

17 Statutes must be interpreted to avoid a serious constitutional problem where another
18 “construction of the statute is fairly possible by which the question may be avoided.” *Zadvydas v.*
19 *Davis*, 533 U.S. 678, 689 (2001) (quotations and citations omitted). Constitutional avoidance is “thus
20 a means of giving effect to congressional intent,” as it is presumed that Congress did not intend to
21 create an alternative interpretation that would raise serious constitutional concerns, *Clark v.*
22 *Martinez*, 543 U.S. 371, 382 (2005), and courts “have read significant limitations into . . . statutes in
23 order to avoid their constitutional invalidation,” *Zadvydas*, 533 U.S. at 689 (citation omitted).
24 Defendants’ efforts to usurp Congress’s role trench on the Constitution’s Appropriations Clause,
25 Separation of Powers, and Presentment Clause. Mot. 8–12 (setting forth plaintiffs’ constitutional
26 claims). This Court can avoid addressing those serious constitutional problems by construing §§ 284,
27 2808, and 8005 to disallow building the President’s border wall. Such a construction would also
28 accord with the statutes’ plain meaning and with common sense.

1 Defendants mistakenly argue that Plaintiffs assert no constitutional violations separate from
2 Defendants' statutory violations. Opp. 27–28. As pled, Plaintiffs' Appropriations and Presentment
3 Clause claims are not merely assertions that Defendants violated the terms of the statutory authority
4 they invoke. Rather, Plaintiffs maintain that if §§ 284, 2808, and 8005 are interpreted to permit the
5 president to ignore Congress's appropriations judgments as enacted in the CAA, they would be
6 unconstitutional. *See* Mot. 13 n.6. The Constitution delegates to Congress "exclusive" power "not
7 only to formulate legislative policies and mandate program and projects, but also to establish their
8 relative priority for the Nation." *United States v. McIntosh*, 833 F.3d 1163, 1172 (9th Cir. 2016).
9 "The Constitution is a compact enduring for more than our time, and one Congress cannot yield up
10 its own powers, much less those of other Congresses to follow." *Clinton v. City of New York*, 524
11 U.S. 417, 452 (1998) (Kennedy, J., concurring). Likewise, a statute would run afoul of the
12 Presentment Clause if, as Defendants insist here, it permitted the president to sign an appropriations
13 act and, "based on the same facts and circumstances that Congress considered," have the option of
14 "rejecting the policy judgment made by Congress and relying on [its] own policy judgment." *Id.* at
15 444 & n.35. The government's unreasonable constructions of the statutes here would yield precisely
16 that prohibited result. Mot. 8–10, 12.

17 Defendants' reliance on *Dalton v. Specter*, 511 U.S. 462 (1994), is misplaced. In *Dalton*, the
18 Court considered whether the President had violated a statute that committed a decision entirely to
19 his discretion. *See id.* at 478 (Souter J., joined by Blackmun, Stevens, and Ginsburg JJ., concurring)
20 (statute "grants the President unfettered discretion to accept the Commission's base-closing report or
21 to reject it, for a good reason, a bad reason, or no reason"); *see generally Chamber of Commerce*, 74
22 F.3d at 1331 ("*Dalton's* holding merely stands for the proposition that when a statute entrusts a
23 discrete specific decision to the President and contains no limitations on the President's exercise of
24 that authority, judicial review of an abuse of discretion claim is not available."). The plaintiff in
25 *Dalton* "pleaded no constitutional claim against the President" and did not argue that the statute the
26 president invoked—if construed as the president argued—would violate the Constitution. 511 U.S. at
27 478 (Souter, J., joined by Blackmun, Stevens, and Ginsburg, JJ., concurring). Here, by contrast,
28 Plaintiffs assert violations of the Appropriations and Presentment Clauses, and their Separation of

1 Powers claim implicates an unconstitutional divestment of Congressional control over
2 appropriations. Thus, in *Dalton* there was no constitutional question for the Court to answer if the
3 statute was read to provide the government its claimed authority. That is not the situation here.

4 Defendants also deny any constitutional separation-of-powers implications because the
5 President is not purporting to exercise his inherent authority under Article II of the Constitution.
6 Opp. 27. But *Youngstown* specifically examined the question of statutory authority in its separation-
7 of-powers analysis. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–87 (1952).
8 Indeed, the parallels between this case and *Youngstown* are striking: in both cases the president
9 claims the very power Congress denied him. See *id.* at 639 (Jackson, J., concurring) (citing “three
10 statutory policies inconsistent with the [president’s] seizure”); *id.* at 602 (Frankfurter, J, concurring)
11 (analyzing statutory framework and concluding that “Congress has expressed its will to withhold this
12 power from the President as though it had said so in so many words”); see also *City & Cty. of San*
13 *Francisco*, 897 F.3d at 1234 (“Congress has frequently considered and thus far rejected legislation
14 accomplishing the goals” of the President’s unilateral action). If anything, Congress’s denial of the
15 power claimed by the President is even clearer here than in *Youngstown*. See Br. of Former Members
16 of Congress 14.

17 **D. Defendants’ statutory arguments are implausible and unavailing.**

18 **1. Section 8005 and 10 U.S.C. § 2214(b)**

19 Plaintiffs have shown that Defendants cannot funnel military pay and pension funds to the
20 Counterdrug Account for ultimate diversion to the President’s wall project. See Mot. 15–16.
21 Defendants make three implausible arguments in response: (1) Congress did not “deny funds” for the
22 wall project by refusing to give DHS the \$5 billion that the President demanded, (2) the wall project
23 is “an unforeseen military requirement” because DOD only discovered in February 2019 that it
24 would be called upon to transfer its own funds to DHS to replace those that Congress denied, and (3)
25 the wall project is inherently a “military requirement” because Congress authorized limited DOD
26 support construction under certain circumstances. Defendants’ implausible reading of the statute
27 contravenes its express language and legislative history, and should be rejected.

28 Defendants’ argument that Congress has not “denied” the government’s request to spend billions of

1 dollars on the President’s wall outside of the Rio Grande Valley contradicts the plain meaning of the
2 word “denied.” Defendants argue that when Congress denied funds to DHS for the wall project, it
3 was merely a “legislative judgment concerning the appropriation of funds for a different agency
4 under different statutory authorities.” Opp. 16. In other words, according to Defendants, Congress
5 was required to explicitly state that it was denying funds to DOD—not just to the President—and
6 that the wall restriction applied to “§ 284 projects” for the transfer bar to apply. *Id.* The plain
7 language of § 8005 and 10 U.S.C. § 2214(b) forecloses this argument. Neither includes any
8 limitation on the meaning of “denied” nor any reference to a requesting “agency” or “statutory
9 authorities.” Instead, Congress imposed the transfer restriction on any “item” it denied—in this case,
10 the President’s wall. *See* § 8005 (transfers may be used “in no case where the item for which funds
11 are requested has been denied by the Congress”); 10 U.S.C § 2214(b) (transfer may not be used for
12 “an item for which Congress has denied funds.”).

13 Whether constructed by DHS or by DOD, and whether for counterdrug or counter-migration
14 purposes, the wall is the same “item” Congress declined to fund. As the *amicus curiae* brief of the
15 House of Representatives explains, legislative history confirms that these restrictions are “to be
16 construed strictly to prevent the funding for programs which have been considered by Congress and
17 for which funding has been denied.” House Br. 10. (quotation marks and citation omitted). Congress
18 has denied funds for wall construction outside of the Rio Grande Valley, *see* Mot. 2–3, 6–8; House
19 Br. 4–87, and Defendants cannot rely on § 8005 to circumvent that judgment.

20 Defendants’ radically expansive gloss on the word “unforeseen” is similarly implausible.
21 Defendants do not even attempt an answer to Plaintiffs’ argument that wall construction under a
22 claim of counterdrug necessity cannot be “unforeseen” when the President specifically claimed to
23 Congress in his February 2018 budget proposal that “\$18 billion to fund the border wall” was
24 necessary because “a border wall is critical to combating the scourge of drug addiction.” RJN ¶ 18,
25 Ex. R at 16; Mot. 16. They instead argue that it was unforeseen that DOD would be charged with
26 wall construction until the moment DHS requested DOD money, a year later in February 2019, after
27 the President’s subsequent funding request was denied. Opp. 16–17. It is not plausible that Congress
28 intended its own decisions to deny funding to constitute “unforeseen” military requirements, or that

1 “unforeseen” means only that a specific agency did not know its own coffers might be raided for a
2 project that was described as “critical” for over a year. *See* House Br. 10.

3 Finally, Defendants maintain that wall construction is inherently a “military requirement”
4 because Congress authorized the military in some circumstances to provide support to law
5 enforcement for construction of barriers. Opp. 17 (citing § 284). Defendants’ argument proves too
6 much, conflating general authorization with *requirement*. If anything the military might do is
7 deemed a “military requirement,” the statutory phrase imposes no restriction at all. Such a reading
8 violates the “presumption that statutory language is not superfluous.” *McDonnell v. United States*,
9 136 S. Ct. 2355, 2369 (2016) (quotation marks omitted).

10 2. Section 284

11 Defendants’ arguments with respect to § 284 boil down to three main claims: (1) Congress
12 crafted § 284 as a broad statute authorizing the Secretary of Defense, in his sole discretion, to engage
13 in massive wall-building projects along the border; (2) the Court must look at the § 284 projects in
14 isolation and blind itself to their context; and (3) fiscal law restrictions have no application when
15 multiple agencies collaborate to evade funding restrictions. None has merit.

16 Defendants’ claim that the “text and history of § 284” supports Defendants’ plan to use the
17 statute to funnel \$2.5 billion of military funds to border wall construction is refuted by their own
18 authorities. Opp. 18. As Plaintiffs explained, it would be an absurd reading of § 284’s text to find
19 that Congress required detailed reporting of “small scale construction” under § 284 while
20 simultaneously delegating to the Secretary of Defense unbounded authority for massive,
21 controversial, multibillion dollar border wall construction. Mot. 17. The history Defendants cite
22 confirms how radically they propose to depart from the limited authority Congress provided in
23 § 284. Defendants cite Congress’s 2006 decision to recommend a “\$10 million increase” for fence
24 and road construction. Opp. 18; *see also* Opp. 8. (citing 2008 congressional recommendation for a
25 “\$5 million increase to DoD’s budget to continue construction”). That Defendants have already
26 funneled \$1 billion, 100 times that amount, and intend to spend an additional 150 times that amount
27 on wall construction demonstrates the implausibility of their interpretation. It is not reasonable to
28 read Congress’s endorsement of an expenditure that was 0.004% of what Defendants seek to spend

1 here as an unbounded authorization for Defendants to rewrite the federal budget. *See F.D.A. v.*
2 *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (interpretation of statutes “must be
3 guided to a degree by common sense as to the manner in which Congress is likely to delegate a
4 policy decision of such economic and political magnitude”); *Util. Air Regulatory Grp. v. E.P.A.*, 573
5 U.S. 302, 324 (2014) (“We expect Congress to speak clearly if it wishes to assign to an agency
6 decisions of vast economic and political significance.” (quotation marks omitted)).

7 Defendants cite no authority for their claim that the Court must ignore the context of their
8 wall-building project and focus only on individual § 284 projects in isolation. Opp. 19. Judicial
9 review here is not restricted to an administrative record, and in any event Defendants have been
10 perfectly clear that they are using § 284 as part of a single unitary project to build the President’s
11 wall. Responding to a recent question about how he could “combat” a “perception among some
12 Trump supporters that the wall is not being built” when he “can’t get Congress to appropriate any
13 additional money,” the Acting Secretary of Homeland Security declared that “with the expanded
14 support of additional DOD funding . . . we’re going to show a lot of progress this year.”⁵

15 Defendants’ appropriation law argument is equally unsupported and unconvincing.
16 Defendants propose that the principle that forbids the use of a general appropriation when Congress
17 has specifically appropriated funds for a given purpose applies only in “the circumstance of a *single*
18 agency determining which of two appropriations *to that agency*” should be used. Opp. 30.
19 Defendants do not cite any authority in support of this cramped reading of basic appropriations
20 principles. As the General Accountability Office (GAO) has explained, any agency effort to go
21 beyond a specific appropriation and seek additional money “from some other source would usurp
22 congressional prerogative and undercut the congressional power of the purse.” Availability of
23 Receipts from Synthetic Fuels Projects for Contract Admin. Expenses of the Dep’t of Treasury,
24 Office of Synthetic Fuels Projects, B-247644, 72 Comp. Gen. 164, 165 (Apr. 9, 1993). A rule that
25 restricted DHS to \$1.375 billion in DHS funds while allowing it to add unlimited billions from
26 general DOD accounts merely by requesting money from DOD would be contrary to the established

27 ⁵ Video interview of Kevin McAleenan, Acting Department of Homeland Security Secretary,
28 Fox News (Apr. 23, 2019), <https://video.foxnews.com/v/6029154226001/#sp=show-clips>.

1 principle that when Congress expressly appropriates a specific amount, that “indicates that is all
2 Congress intended” for a given project “to get in [a fiscal year] *from whatever source.*” *Nevada v.*
3 *Dep’t of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005) (emphasis added). *See* Mot. 19–20.

4 3. Section 2808

5 Defendants make no attempt to respond to the substance of Plaintiffs’ arguments that § 2808
6 does not authorize construction of the President’s wall. Although Plaintiffs need not satisfy
7 Defendants’ proposed “clear and mandatory” standard, *see* Section I.A.2, Defendants’ announced
8 plans to use § 2808 fail even that test because “Congress expressly limited that statute to
9 undertakings that (1) respond to a national emergency “that requires use of the armed forces,” and
10 (2) are “military construction projects” that “are necessary to support such use of the armed forces.”
11 Mot. 13 (quoting 10 U.S.C. § 2808). As Plaintiffs have shown, the President’s wall-building project
12 clearly violates those restrictions. Mot. 13–15; *see also* House Br. 11–17. Defendants’ only
13 argument in response is that these terms impose no limits at all, as they are either nonjusticiable or
14 nonbinding. Opp. 22–23. But Defendants are not free to disregard Congress’s statutory limitations,
15 nor is this Court barred from reviewing Defendants’ actions.

16 Contrary to Defendants’ claims, courts regularly review whether the government complies
17 with the requirements of emergency power statutes. In *Dames & Moore v. Regan*, for example, the
18 Supreme Court reviewed whether the International Emergency Economic Powers Act (“IEEPA”)
19 authorized the president to “suspend claims pending in American courts.” 453 U.S. at 675. The
20 Court rejected the government’s claims, finding that “[t]he terms of the IEEPA therefore do not
21 authorize the President” to take action under claimed emergency authority. *Id.* As the Court
22 emphasized, its review and rejection of the President’s compliance with the terms of the emergency
23 statute was not an aberration, but rather “the view of all the courts which have considered the
24 question.” *Id.* at 675–76 (citing *Chas. T. Main Int’l, Inc. v. Khuzestan Water & Power Auth.*, 651
25 F.2d 800, 809–814 (1st Cir. 1981); *Am. Int’l Grp., Inc. v. Islamic Republic of Iran*, 657 F.2d 430,
26 443, n.15 (D.C. Cir. 1981); *Marschalk Co. v. Iran Nat’l Airlines Corp.*, 518 F. Supp. 69, 79
27 (S.D.N.Y. 1981); *Elec. Data Sys. Corp. v. Soc. Sec. Org. of Iran*, 508 F. Supp. 1350, 1361 (N.D.
28

1 Tex. 1981)).⁶

2 Defendants likewise cannot insulate their wall-building scheme from review merely by
 3 dressing it up in military garb. “[T]he claim of military necessity will not, without more, shield
 4 governmental operations from judicial review.” *Koohi v. United States*, 976 F.2d 1328, 1331 (9th
 5 Cir. 1992). As the Ninth Circuit recently explained in another case where the government claimed
 6 unreviewable military authority to disregard statutory restrictions, “[w]e may consider national
 7 security concerns with due respect when the statute is used as a basis to request injunctive relief.
 8 This is not a grim future, and certainly no grimmer than one in which the executive branch can ask
 9 the court for leave to ignore acts of Congress.” *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803,
 10 826 (9th Cir. 2017); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (“[The president]
 11 may not disregard limitations that Congress has, in proper exercise of its own [military] powers,
 12 placed on his powers.”). Judicial review is appropriate here, where the President has proposed to use
 13 the military in peacetime, inside the United States, to build a wall that Congress refused to fund.

14 Defendants cannot claim “a history of congressional acquiescence in conduct of the sort
 15 engaged in by the President.” *Dames & Moore*, 453 U.S. at 678–79. As the President’s entire reason
 16 for using § 2808 is to subvert Congress, it is unsurprising that no history supports the President’s
 17 actions. *See* Opp. 10–11 (acknowledging that the only prior invocations of § 2808 were closely tied
 18 to the military’s exclusive role in responding to “the Government of Iraq’s invasion of Kuwait” and
 19 “the terrorist attacks against the United States on September 11, 2001”). No previous president has
 20 ever attempted to use § 2808 authority to acquire funding that Congress explicitly denied, and
 21 Congress has likewise never previously had occasion to pass a resolution disapproving of a declared
 22 emergency. *See* Brennan Center Br. 13–16; *cf. Dames & Moore*, 453 U.S. at 687–88 (noting that

23
 24 ⁶ The Ninth Circuit’s decision in *United States v. Spawr Optical Research, Inc.*, 685 F.2d
 25 1076 (9th Cir. 1982), is not to the contrary. There, the Ninth Circuit rejected as “essentially-political
 26 questions” only the question of whether *any* emergency existed, and what its duration should be.
 27 *Spawr*, 685 F.2d at 1081. Unlike § 2808, which limits the type of emergency (requiring the use of
 28 the armed forces), the statute at issue in *Spawr* “contained no standards by which to determine
 whether a national emergency existed or continued; in fact, Congress had delegated to the President
 the authority to define all of the terms in that subsection of the [statute] including ‘national
 emergency.’” *Id.* at 1080. And even under those circumstances, the court emphasized that “we are
 free to review whether the actions taken pursuant to a national emergency comport with the power
 delegated by Congress.” *Id.* at 1081.

1 “importantly, Congress has not disapproved of the action taken here” by “pass[ing] a resolution,
2 indicating its displeasure” or “in some way resisted the exercise of Presidential authority”); *United*
3 *States v. Spawr Optical Research, Inc.*, 685 F.2d 1076, 1081 (9th Cir. 1982) (“Congress not only
4 tolerated this practice, it expressed approval of the President’s reliance” on the statute).

5 As the U.S. House of Representatives explains in its *amicus* brief, Congress intended for §
6 2808 to constrain the President’s use of emergency powers. *See* House Br. 16–17. Judicial
7 enforcement of such constraints is central to Congress’s design. *See id.* If the premise that the armed
8 forces are necessary to stop “family units entering and seeking entry to the United States,” RJN ¶ 4,
9 Ex. D, is beyond review, and if the government may ignore Congress’s definition of “military
10 construction,” Congress’s careful limitations on § 2808 authority and the military’s role at the border
11 would be effectively nullified. Under Defendants’ logic, the President could deploy the military to
12 Chicago based solely on his claims that “Chicago is like a war zone,” and “I will send in what we
13 have to send in. Maybe they’re not gonna have to be so politically correct.”⁷ Similarly, the President
14 could, in his unreviewable discretion, order the diversion of military construction funds to build
15 facilities at Mar-A-Lago. The Court should not adopt a reading that permits such disregard for the
16 law. *See Ctr. for Biological Diversity*, 868 F.3d at 825 (military action could be enjoined because “to
17 abstain from giving effect to a federal statute is less respectful to Congress than reviewing the
18 executive’s compliance”).

19 4. The Consolidated Appropriations Act (CAA)

20 Defendants’ arguments with respect to the CAA suffer from two key flaws. First, Defendants
21 are dead wrong that “the grant of a specific appropriation cannot be read to restrict the use of other
22 appropriated funds for similar purposes pursuant to other statutory authority.” Opp. 24. The rule is
23 precisely the opposite: “specific appropriations preclude the use of general ones even when the two
24 appropriations come from different accounts.” *Nevada*, 400 F.3d at 16 (citing 4 Comp Gen. 476
25 (1924)); *see also* Mot. 19–20. This “rule has been well-established ‘from time immemorial,’” and
26 Congress has legislated against its backdrop for well over a century. GAO, Office of the General

27 ⁷ *TRANSCRIPT: ABC News Anchor David Muir Interviews President Trump*, ABC News
28 (Jan. 25, 2017), <https://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602>.

1 Counsel, Principles of Federal Appropriations Law (4th Ed. 2017), 3-409 (quoting 1 Comp. Dec.
2 126 (1894)). Defendants cannot wish away established restrictions away by pretending—in stark
3 opposition to government officials’ own statements and even to the evidence that Defendants
4 themselves have submitted in this case—that their massive wall project is a series of “similar” but
5 distinct projects existing in artificial isolation from one another. *See, e.g.*, Def. Exhibit 7 (President
6 Donald J. Trump’s Border Security Victory (Feb. 15, 2019)) (“[T]he Administration has so far
7 identified up to \$8.1 billion that will be available to build the border wall once a national emergency
8 is declared and additional funds have been reprogrammed.”).

9 Second, Defendants’ conclusory argument that “[a]ny funds utilized for border-barrier
10 construction pursuant to §§ 284 and 2808 will be used for the purpose for which they were
11 appropriated, not to increase funding for an item in the President’s 2020 budget request” should be
12 rejected. As the *amicus curiae* brief of Christopher Shays, et al. explains, Defendants’ efforts to
13 unilaterally fund the President’s wall through §§ 284 and 2808 are prohibited by § 739 of the CAA
14 because the billions Defendants seek to spend are “previously requested, but unenacted, increases in
15 funding for a program, project or activity.” Shays Br. 6, *see also* Shays Br. 4–7.

16 **E. DHS cannot waive DOD’s obligation to comply with NEPA when DOD acts**
17 **under Section 284 authority.**

18 The Department of Defense does not dispute that its actions have significant effects on the
19 environment, and that it has failed to prepare the impact statements required by the National
20 Environmental Policy Act (“NEPA”), 42 U.S.C. § 4332. *See Cal. Wilderness Coal. v. Dep’t of*
21 *Energy*, 631 F.3d 1072, 1101–02 (9th Cir. 2011) (NEPA requires preparation of environmental
22 assessment before agency undertakes action with foreseeable effects). Defendants contend only that
23 “the Secretary of Homeland Security waived NEPA’s requirements,” claiming a power that pertains
24 exclusively to construction under § 102 of the Illegal Immigration Reform and Immigrant
25 Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, Div. C. Defendants presume to extend
26 such waiver authority to the Department of Defense’s independent obligation to comply with NEPA.
27 Opp. 25. Defendants’ argument is incompatible with their own claim that they are not constructing
28 the El Paso and Yuma sections of border wall under IIRIRA authority, but instead under wholly

1 separate DOD authority.

2 Defendants cannot have it both ways. If, as they claim, the Yuma and El Paso Sector projects
 3 are not covered by “CBP’s mission under IIRIRA” but instead are “counter-drug activities in
 4 furtherance of DoD’s mission under § 284,” Opp. 16, any IIRIRA waiver is without effect. IIRIRA
 5 permits the Secretary of Homeland Security to waive compliance with NEPA only to the extent
 6 “necessary to ensure expeditious construction of the barriers and roads *under this section*,” that is,
 7 under § 102 of IIRIRA. IIRIRA § 102(c) (emphasis added). The section authorizes the DHS
 8 Secretary to install barriers and roads “to deter illegal crossings in areas of high illegal entry into the
 9 United States.” IIRIRA § 102(a). But as Defendants acknowledge, the CAA “places restrictions on
 10 border-barrier construction funded with DHS appropriations,” Opp. 23, and Defendants thus seek to
 11 evade those restrictions by arguing that the Yuma and El Paso Projects are undertaken under entirely
 12 separate authority—that provided by 10 U.S.C. § 284. *See, e.g.*, Opp. 26; Opp. 16 (characterizing
 13 projects as occurring “under § 284”). Defendants identify no statutory authority for a waiver for
 14 “expeditious construction” under DOD’s § 284 authority, and none exists.⁸

15 **II. Plaintiffs Have Shown Irreparable Harm.**

16 **A. Plaintiffs have demonstrated irreparable harm to their members’ recreational 17 and aesthetic interests.**

18 Defendants misstate Plaintiffs’ allegations of irreparable environmental harm and apply the
 19 incorrect standard to evaluate them. Plaintiffs have asserted injuries to their members’ aesthetic and
 20 recreational interests in borderlands threatened by wall construction. Mot. 23. But they have not, as
 21 Defendants argue, Opp. 29, alleged that these injuries stem from their interest in any given wildlife
 22 species. Cases turning on “species-level” harm are therefore inapposite. In addition, Defendants’
 23 efforts to undermine the declaration of Sierra Club member Albert Del Val are contradicted by their

24 ⁸ DOD may not simply transfer its § 284 project to DHS to evade NEPA. Congress
 25 foreclosed any such transfer of jurisdiction in the Department of Defense Appropriations Act, 2019,
 26 which mandates that “[n]one of the funds made available in this or any other Act may be used to pay
 27 the salary of any officer or employee of any agency funded by this Act who approves or implements
 28 the transfer of administrative responsibilities or budgetary resources of any program, project, or
 activity financed by this Act to the jurisdiction of another Federal agency not financed by this Act
 without the express authorization of Congress.” 2019 Department of Defense Appropriations Act
 § 8113, Pub. L. No. 115-145. Defendants have identified no such “express authorization.”

1 own declarant.

2 As Defendants acknowledge, a plaintiff organization can demonstrate irreparable
3 environmental harm by showing that a federal action will harm its members' use and enjoyment of
4 public lands. *See All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding
5 irreparable harm to recreational and aesthetic interests); *see also Landwatch v. Connaughton*, 905 F.
6 Supp. 2d 1192, 1197 (D. Or. 2012) (finding irreparable harm to plaintiffs who use project area for
7 "recreation such as hiking, camping, fishing, and photography, as well as watershed research,
8 education and observing wildlife"). Plaintiffs have done just that. They have alleged that
9 construction of a wall using § 284 funds will irreparably harm their ability to recreate in and enjoy
10 public lands along the border. *See Del Val Decl.* ¶¶ 7–8 (explaining that wall will impede his ability
11 to fish and detract from enjoyment of natural environment); *Bixby Decl.* ¶ 6 (alleging harm to
12 interest in hiking and camping); *Walsh Decl.* ¶¶ 8–9 (describing recreational interest in hiking and
13 bird-watching); *Munro Decl.* ¶ 11 (wall will diminish "happiness and sense of fulfillment" derived
14 from viewing "unique desert landscape").

15 Contrary to Defendants' claims, Plaintiffs have not relied on any interest tethered to
16 populations of specific animal species near the southern border. To the extent that Plaintiffs refer to
17 harms to wildlife, they do so in connection with their broader aesthetic, educational, and professional
18 interests. "[L]oss of biodiversity" will harm Dr. Walsh's "aesthetic enjoyment" of borderlands, and
19 the degradation of ephemeral wetlands will harm her educational and scientific interests in the
20 region. *See Walsh Decl.* ¶¶ 7, 10, 15. Similarly, Ms. Munro will be harmed "professionally,
21 aesthetically, and spiritually" from wall construction where she conducts her public education work.
22 *Munro Decl.* ¶¶ 6–11, 15. Such interests suffice to show irreparable harm. *See All. for Wild Rockies*
23 *v. Marten*, 253 F. Supp. 3d 1108, 1111 (D. Mont. 2017) (finding irreparable harm where project
24 threatened "recreational, scientific, spiritual, vocational and educational interests" in viewing and
25 utilizing "the area in its undisturbed state").

26 Defendants' own evidence belies their claim that "replacement of existing pedestrian border
27 infrastructure will not change conditions" in the land Sierra Club member Albert Del Val has loved
28 and used for fifty years. *Opp.* 30–31. Defendants intend to erect a "30-foot-tall" "bollard wall"

1 constructed of “steel-filled concrete,” “spaced approximately four inches apart,” accompanied by
 2 lighting, “imbedded cameras,” and a “linear ground detection system.” Enriquez Decl. ¶ 12. This is a
 3 massive departure from the current status quo of “vehicle fencing,” which typically “stands 4 to 6
 4 feet high.” Enriquez Decl. ¶ 12 & Exhibit C at 2-1. Defendants fail to raise any substantial challenge
 5 to Mr. Del Val’s concerns that an “ominous and oppressive” 30-foot wall would “detract from the
 6 natural environment [he] grew up with” and regularly enjoys, and that his use of the land will be
 7 “diminished by heightened security” and “artificial light pollution.” Del Val Decl. ¶¶ 7–10.

8 **B. Plaintiffs have established irreparable constitutional harm.**

9 Defendants argue that structural constitutional violations cannot cause irreparable harm, Opp.
 10 33, but “this distinction between personal and structural constitutional rights is not recognized in the
 11 Ninth Circuit.” *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 538 (N.D. Cal. 2017) (finding
 12 irreparable constitutional harm for claims including separation of powers). The cases cited by
 13 Defendants do not purport to establish a new rule. *See E. Bay Sanctuary Covenant v. Trump*, 909
 14 F.3d 1219, 1254 (9th Cir. 2018); *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017). In both
 15 cases the government claimed that a court order blocking executive branch action caused *the*
 16 *government* irreparable harm by eroding the separation of powers. In essence, the government
 17 argued that it was itself irreparably harmed any time it was enjoined by a court order. The Ninth
 18 Circuit handily rejected this argument: “To the extent that the Government claims that it has suffered
 19 an institutional injury by erosion of the separation of powers, that injury is not ‘irreparable.’ It may
 20 yet pursue and vindicate its interests in the full course of this litigation.” *Washington*, 847 F.3d at
 21 1168; *see also E. Bay Sanctuary Covenant*, 909 F.3d at 1254. These holdings were specific to the
 22 government’s interests and status as a litigant, and do not alter the general rule that a plaintiff is
 23 irreparably harmed when deprived of constitutional rights—including structural rights.

24 **C. SBCC and its member organizations have demonstrated irreparable harm**
 25 **to their missions.**

26 SBCC and its member organizations Equal Voice Network (EVN) and Southwest
 27 Environmental Center (SEC) have shown that responding to the emergency declaration and
 28 Defendants’ announced plan to use § 2808 to construct the President’s wall has put a “drain on

1 [their] resources” and “perceptibly impaired” their ability to carry out their missions. *Havens Realty*
 2 *Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Defendants’ only responses are that SBCC and its
 3 members (1) are “public advocacy groups” that cannot be injured by “focus[ing] organizational
 4 resources on advocacy”; and (2) Defendants’ announced plan to build the wall pursuant to the
 5 President’s emergency declaration cannot be a source of injury because Defendant Shanahan “has
 6 not yet decided to undertake or authorize any barrier construction projects under § 2808.” Opp. 33–
 7 34. Both of Defendants’ arguments fail.

8 As an initial matter, Defendants provide no support for their claim that SBCC’s members are
 9 “public advocacy groups.” Nor could they. Advocacy constitutes “only about 20%” of EVN’s
 10 activities, which largely consist of directly providing “organizing, training, and education” services
 11 to border communities. Supp. Decl. of Christina Patiño Houle ¶ 3. Similarly, public advocacy “is not
 12 primarily” the activity SEC engages in. Supp. Decl. of Kevin Bixby ¶ 5. Instead, SEC’s primary
 13 activities are “research and documentation, education, and on-the-ground restoration projects”
 14 towards its mission “to protect and restore wildlife and their habitats in the Southwest.” *Id.* ¶ 4.⁹

15 In any event, Plaintiffs’ harms are well within the heartland of organizational standing
 16 doctrine. Rather than merely shifting advocacy priorities, the organizations have diverted resources
 17 in ways that the Ninth Circuit has found to confer standing and constitute irreparable harm. “The
 18 Ninth Circuit has specifically found that diversion of resources for ‘outreach campaigns’ and
 19 educating the public establishes a diversion of resources sufficient to establish organizational
 20 standing.” *Serv. Women’s Action Network v. Mattis*, 352 F. Supp. 3d 977, 985 (N.D. Cal. 2018)
 21 (citing *Nat’l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) and *Smith v. Pac.*
 22 *Props. & Dev. Corp.*, 358 F.3d 1097, 1105–06 (9th Cir. 2004)); *see also Valle del Sol Inc. v.*

24 ⁹ Even if EVN and SEC *were* public advocacy groups, Defendants’ claim that such groups
 25 cannot suffer harm to their missions from diverting resources runs up against settled Ninth Circuit
 26 law. As the Ninth Circuit recently explained, the court has already recognized organizational
 27 standing based on “efforts by advocacy groups to show standing by pointing to the expenses of
 28 advocacy—the very mission of the group itself.” *E. Bay Sanctuary Covenant*, 909 F.3d at 1242
 (citing *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1226
 (9th Cir. 2012) (Ikuta, J., dissenting)). Defendants “are not free to ignore ‘the holdings of our prior
 cases’ or ‘their explications of the governing rules of law.’” *Id.* at 1243.

1 *Whiting*, 732 F.3d 1006, 1018 (9th Cir. 2013) (diverting resources to educational programs
2 addressing members’ concerns about new law constitutes irreparable harm). Much like plaintiffs in
3 *Valle del Sol*, SBCC and its member organizations have reallocated resources to conducting outreach
4 and educating members about the effects of the emergency declaration. *See* Gaubeca Decl. ¶¶ 7–8
5 (creating informational materials and media kits; training staff and partners); Houle Decl. ¶¶ 9–10
6 (answering calls; leading tours to border lands threatened with wall construction; tailoring
7 programming); Bixby Decl. ¶ 11 (responding to member inquiries; developing media kits).

8 Plaintiffs have also shown harm to their missions under Ninth Circuit law by diverting
9 resources to investigate and counteract Defendants’ conduct. *See, e.g., Fair Hous. of Marin v.*
10 *Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (finding standing for organization that diverted resources
11 to “investigating and other efforts to counteract [defendant’s] discrimination”); *Smith*, 358 F.3d at
12 1105 (monitoring defendant’s statutory violations and educating public about them constituted
13 diversion of resources injury). When construction plans were announced, SEC Executive Director
14 Kevin Bixby spent days discerning the coordinates and mapping out the exact locations where the
15 wall will be built. Bixby Decl. ¶ 10. Senior SBCC staff and members have spent the “majority” of
16 their time “analyzing and responding to the declaration,” Gaubeca Decl. ¶ 7, and EVN staff took
17 time away from other projects in order to “identify and resist” new construction and have been
18 “constantly monitoring, researching, and responding” to the declaration, Houle Decl. ¶¶ 8, 9.
19 Defendants’ actions have frustrated SBCC’s and its member organizations’ abilities to pursue their
20 core missions. *See* Gaubeca Decl. ¶ 10 (describing obstacles to pursuing “core projects” such as
21 “affirmative advocacy for Border Patrol accountability and immigration reform”); Bixby Decl. ¶¶ 3,
22 10–11 (SEC’s mission of “protection and restoration of native wildlife and their habitats in the
23 southwest” has been impaired); Houle Decl. ¶¶ 3–4, 8, 12 (core mission of working on behalf of
24 low-income communities has been hampered).

25 Defendants’ argument that Plaintiffs’ assertions of organizational harm somehow “elide[] the
26 distinction between the declaration and the use of § 284 or § 2808” is wrong. Plaintiffs’ declarations
27 make clear that the Proclamation and the impending emergency wall construction have forced them
28 to divert resources and frustrated their missions. *See* Gaubeca Decl. ¶¶ 7–8, 10; Houle Decl. ¶¶ 8–10,

1 12; Bixby Decl. ¶¶ 3, 10–11. Defendants’ reference to *Clapper* is also misplaced. Unlike the
2 plaintiffs in *Clapper*, SBCC and its member organizations are not responding to a “speculative
3 threat” but to imminent announced action by Defendants. *See supra* Section I.B.2. Plaintiffs have
4 suffered and will continue to suffer irreparable harm absent an injunction.

5 **III. The Balance of Harms and Public Interest Overwhelmingly Favor Plaintiffs.**

6 Harm to Plaintiffs if construction is not enjoined outweighs any harm an injunction may
7 cause Defendants. No harm can result from an order enjoining the government from violating the
8 Constitution, and an “injunction serves the interests of the general public” when it ensures that
9 government actions “comply with the Constitution.” *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th
10 Cir. 2017). Defendants have shown no immediate harm from maintaining the status quo, and they
11 would remain free to uphold the government’s interest in border security by enforcing federal
12 immigration laws in a lawful manner. Plaintiffs also agree with Defendants that, when fashioning
13 equitable relief, courts “cannot ignore the judgment of Congress, deliberately expressed in
14 legislation.” *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 551 (1937). But that only
15 strengthens the case for an injunction here: Congress has made it unequivocally clear that it does not
16 approve of the pace and manner of the wall construction Defendants are attempting. “Once
17 Congress, exercising its delegated powers, has decided the order of priorities in a given area, it
18 is . . . for the courts to enforce them when enforcement is sought.” *United States v. Oakland*
19 *Cannabis Buyers’ Coop.*, 532 U.S. 483, 497 (2001) (quoting *TVA v. Hill*, 437 U.S. 153, 194 (1978)).

20 **IV. The Court Should Issue an Injunction Providing for Full Relief.**

21 There is no reason to limit the scope of the injunction to the three wall segments in Yuma
22 Sector Projects 1 and 2 and El Paso Sector Project 1. Defendants’ argument to the contrary misstates
23 the facts and misapplies the law. First, Defendants misstate the facts in claiming that “Plaintiffs’
24 arguments regarding irreparable harm focus exclusively on the specific circumstances of the three
25 ongoing construction projects in Arizona and New Mexico.” Opp. 35. To the contrary, Plaintiffs’
26 opening brief identifies three categories of irreparable harm: 1) harm to Plaintiffs’ members who use
27 areas targeted for border wall construction, 2) harm to Plaintiffs from frustration of their missions,
28 and 3) constitutional harm. *See* Mot. 22–25. Only the first of these harms is tied to Defendants’ work

1 on specific projects, while the other harms result from Defendants' unlawful use of Department of
2 Defense funds for border wall construction more generally.

3 Second, Defendants misapprehend the law in relying on *California v. Azar*, 911 F.3d 558
4 (9th Cir. 2018), instead of *E. Bay Sanctuary Covenant*, 909 F.3d 1219. *Azar* considered a challenge
5 by four states to Affordable Care Act exemptions and held that, based on the record, an injunction
6 limited "to the plaintiff states would provide complete relief to them." 911 F.3d at 584. *Azar*
7 reaffirmed that a federal district court may grant nationwide relief when "necessary to provide
8 complete relief to the plaintiffs." *Id.* at 582 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702
9 (1979)). *East Bay Sanctuary Covenant* demonstrates the proper application of the "complete relief"
10 principle to cases, such as this, brought by organizational plaintiffs who are harmed by mission
11 frustration. There, the government made the same overbroad relief arguments against nationwide
12 injunctions that it makes here. 909 F.3d at 1255. The Ninth Circuit rejected these arguments, finding
13 that "the Government "fail[ed] to explain how the district court could have crafted a narrower
14 [remedy] that would have provided complete relief to the Organizations." *Id.* at 1256 (quotation
15 marks omitted). The district court subsequently issued a nationwide preliminary injunction, finding
16 that the plaintiff organizations' harms were "not limited to their ability to provide services to their
17 *current* clients, but extend to their ability to pursue their programs writ large . . ." *E. Bay Sanctuary*
18 *Covenant v. Trump*, 354 F. Supp. 3d 1094, 1121 (N.D. Cal. 2018) (emphasis in original).

19 Plaintiffs have members in every southern border state, and an injunction limited to three
20 specific projects would force Plaintiffs to continue diverting resources to address the detrimental
21 impact of a border wall at other sites along the border. To remedy this harm and provide complete
22 relief to plaintiffs, the court should issue an injunction barring the unlawful use of any DOD funds to
23 construct a border wall. Alternatively, the Court could fashion an injunction covering the four states
24 in which Plaintiff SBCC and its members operate: California, New Mexico, Arizona, and Texas.

25 CONCLUSION

26 For the reasons stated above, the Court should grant Plaintiffs a Preliminary Injunction.
27
28

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Respectfully submitted,

/s/ Dror Ladin

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