Nos. 19-17501, 19-17502, 20-15044

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATES OF CALIFORNIA, ET AL.,
Plaintiffs-Appellees-Cross-Appellants,

v.

DONALD J. TRUMP, ET AL.,
Defendants-Appellants-Cross-Appellees;

SIERRA CLUB, ET AL.,
Plaintiffs-Appellees,

v.

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

On Appeal from the United States District Court for the Northern District of California, Nos. 4:19-cv-872 and 4:19-cv-892
Hon. Haywood S. Gilliam, Jr., Judge

PRINCIPAL AND RESPONSE BRIEF OF THE STATES OF CALIFORNIA, COLORADO, HAWAII, MARYLAND, NEW MEXICO, NEW YORK, OREGON, VIRGINIA, AND WISCONSIN

Xavier Becerra
Attorney General of California
Robert W. Byrne
Michael L. Newman
Senior Assistant Attorneys General
Harrison M. Pollack
Acting Senior Assistant Atty. General
Joshua A. Klein
Deputy Solicitor General
Michael P. Cayaban
Christine Chuang
Edward H. Ochoa
Supervising Deputy Attorneys General

Brian J. Bilford
Sparsh S. Khandeshi
Lee I. Sherman
Janelle M. Smith
James F. Zahradka II
Heather C. Leslie (SBN 305095)
Deputy Attorneys General
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street, Suite 125
Sacramento, CA 94244-2550
(916) 210-7832
Heather.Leslie@doj.ca.gov
Attorneys for the State of California

(*Additional counsel listed on signature page*)

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INTRODUCTION

Congress considered the President's request for billions of dollars for the Department of Homeland Security (DHS) to build a wall across hundreds of miles of the southern border in California, New Mexico, Arizona, and Texas, and denied it. Instead, Congress passed—and the President signed into law—a much smaller appropriation for a border barrier explicitly limited to one sector in Texas. That statute became binding law under the procedures of Article I's Presentment Clause, and Article II gave the President no choice but to faithfully execute it. That is precisely how the legislative and appropriations process is meant to work under the Constitution.

However, the very day he signed the appropriations bill, the President announced that he would obtain the money Congress denied through the appropriations process by diverting $6.7 billion that Congress had directed towards other priorities. At issue here is $3.6 billion of these diverted funds that were appropriated for particular military construction projects that Congress had deemed were in the public interest. That diversion violated the separation of powers, and the resulting expenditures violate the Appropriations Clause's command that "[n]o Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law."

Defendants attempt to justify this diversion using 10 U.S.C. § 2808 (Section 2808), which allows the Department of Defense (DoD) to fund military construction projects, subject to certain limitations, once a national emergency is declared. However, the border barriers are neither "military construction projects" nor "necessary to support [the] use of the armed forces" as Section 2808 requires. And if Section 2808 did purport to authorize the transfers, it would, as applied here, violate multiple constitutional doctrines.

Although Defendants attempt to insulate their actions from judicial review, none of their objections bear scrutiny. As precedent establishes, the States need not show that Section 2808 was intended to benefit them in particular under a zone-of-interests test—and if there were such a requirement, the States could easily satisfy it. The States are suitable, reasonable, and predictable challengers to Defendants' actions, and their financial, sovereign, and other interests are congruent with the constitutional and statutory provisions they seek to enforce. Nor is the States' action barred by the Supreme Court's order staying a prior injunction in a related case. That order addressed only the *Sierra Club* plaintiffs' cause of action under 10 U.S.C. § 284 and their asserted interests. The States here are different parties with distinct interests, suing under a different statutory authority. In short, to the extent the zone-of-interests test applies at all, it does not prohibit this Court from halting Defendants' unconstitutional actions.

Finally, although Defendants repeatedly conflate the States' interests with the environmental, recreational, and aesthetic harms asserted by the *Sierra Club* plaintiffs, this characterization ignores the States' unique sovereign and financial interests that will be irreparably injured absent an injunction. And the States' request for an injunction is not duplicative at this juncture, when Defendants are currently harming the States both by constructing border barrier projects within two of the States and by redirecting funds that were congressionally appropriated for military projects within nine of the States.

This Court should affirm the district court's order declaring that the transfers under Section 2808 are unlawful, and reverse the district court's denial of the States' request for an injunction.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the States' federal claims under 28 U.S.C. § 1331. On December 11, 2019, the district court granted a declaratory judgment to the States, denied the States injunctive relief, entered final judgment, and expressly determined that there is no just reason for delay under Federal Rules of Civil Procedure 54(b) and 58. ER1, 47-48. Defendants timely noticed an appeal on December 13, 2019, ER51-52, and the States timely noticed their cross-appeal on January 7, 2020, ER53-59; *see* Fed. R. App. P. 4(a)(1)(B), (a)(3). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether Defendants exceeded their statutory authority, and violated the Constitution, by diverting $3.6 billion appropriated by Congress for other purposes toward construction of border barriers that Congress had refused to fund.

2. Whether Defendants' actions are insulated from judicial review.

3. Whether the district court, having found the States' claims meritorious, erred in nevertheless denying the States' request for injunctive relief.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Dispute Between the President and Congress over Funding a Border Wall

Since taking office, President Trump has pressed for the construction of a wall along the southern border of the United States. ER301-306; *see also* SER1377-1417. Between 2017 and 2018, Congress rejected numerous bills that proposed spending billions of dollars toward the border wall that President Trump sought. *See Sierra Club v. Trump*, 929 F.3d 670, 677 (9th Cir. 2019); *see also* SER1418-1444.

Starting in late 2018, President Trump and Congress engaged in a protracted public dispute over funding for a border wall, resulting in a 35-day partial government shutdown. *See* SER1445-1470. The Administration requested that

Congress appropriate $5.7 billion to fund "approximately 234 miles of new physical barrier." SER1471-1473.

After weeks of negotiations, Congress passed the Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (2019) (CAA). In it, Congress rejected the Administration's $5.7 billion request. Instead, Congress granted only $1.375 billion to the U.S. Department of Homeland Security (DHS), specifying that those funds were to *only* be used for "primary pedestrian fencing," "in the Rio Grande Valley Sector" in Texas. *Id.* § 230, 133 Stat. at 28. President Trump signed the bill, and it became law on February 15, 2019.

B. Defendants' Diversion of Funding from Congressionally Chosen Projects to the Border Wall Construction that Congress Chose Not to Fund

The same day that President Trump signed the CAA into law, the Administration announced it would divert $6.7 billion of funds from other purposes and devote those funds instead to constructing border barriers not authorized by the CAA (including in California and New Mexico). SER1474-1477.

In implementing that goal, Defendants first announced that border wall construction would receive $2.5 billion in diverted funds under the purported authority of 10 U.S.C. § 284, ostensibly to prevent drug smuggling. These transfers are the subject of separate appeals, in Nos. 19-16299, 19-16336, 19-16102, and 19-

16300.[1] As relevant in this appeal, the Administration later announced that, under the purported authority of Section 2808, it would divert a further $3.6 billion from congressionally specified military construction projects to build 11 border barrier projects. $1.8 billion of that would come from 64 domestic military construction projects Congress funded, including 17 projects located in the Plaintiff States. SER1256-1260. As shown in the chart below, the cost of those 17 defunded projects totals nearly $500,000,000. *Id.*[2]

Defunded Military Construction Projects in Plaintiff States' Jurisdiction

State	Location Title	Line Item Title	Amount
California	Channel Islands ANGS	Construct C-130J Flight Simulator Facility	$8,000,000
Colorado	Peterson AFB	Space Control Facility	$8,000,000
Hawaii	Joint Base Pearl Harbor-Hickam	Consolidated Training Facility	$5,500,000
	Kaneohe Bay	Security Improvements Mokapu Gate	$26,492,000
Maryland	Fort Meade	Cantonment Area Roads	$16,500,000
	Joint Base Andrews	PAR Relocate Haz Cargo Pad and EOD Range	$37,000,000
		Child Development Center	$13,000,000
New Mexico	Holloman AFB	MQ-9 FTU Ops Facility	$85,000,000
	White Sands	Information Systems Facility	$40,000,000
New York	U.S. Military	Engineering Center	$95,000,000

[1] Defendants are also reprogramming $601 million from the Treasury Forfeiture Fund. That reprogramming was not at issue in the prior appeals and is not at issue here.

[2] As discussed below, there are 19 defunded projects in total within the Plaintiff States, but the States only assert harms, either financially or to the public interest, from 17 of these projects.

	Academy	Parking Structure	$65,000,000
Oregon	Klamath Falls IAP	Construct Indoor Range	$8,000,000
Virginia	Joint Base Langley-Eustis	Construct Cyber Ops Facility	$10,000,000
	Norfolk	Replace Hazardous Materials Warehouse	$18,500,000
	Portsmouth	Replace Hazardous Materials Warehouse	$22,500,000
		Ships Maintenance Facility	$26,120,000
Wisconsin	Truax Field	Construct Small Arms Range	$8,000,000
Total			**$492,612,000**

Instead of completing these projects as Congress intended, Defendants will use the diverted funding to build five border barrier segments in California (San Diego Project 4, San Diego Project 11, El Centro Project 5, El Centro Project 9, and Yuma Project 6[3] [California Projects]) totaling approximately 20 miles. ER94. Defendants will also use those funds to build two border barrier projects in New Mexico (El Paso Project 2 and El Paso Project 8 [New Mexico Projects]), totaling 35.51 miles. *Id.* Moreover, the Secretary has instructed Defendants to proceed with construction without complying with ordinarily applicable environmental laws. ER92.[4]

[3] Yuma Project 6 is located partially in California and partially in Arizona.

[4] The Secretary relies on the text of Section 2808 to circumvent any otherwise applicable environmental laws, stating, "I therefore authorize and direct the Acting Secretary of the Army to expeditiously undertake the eleven border barrier military projects specified in the attachment, and, as authorized by section 2808, to do so without regard to any other provision of law… ." *Id.*

II. PROCEDURAL HISTORY

A. Challenges to the Executive's Prior Diversions

The States filed suit on February 18, 2019, to challenge the Administration's diversion of federal funds for border barrier construction. ER408. The *Sierra Club* plaintiffs sued shortly thereafter. ER363. The States and the *Sierra Club* plaintiffs requested a preliminary injunction against the Executive's diversion of funds under 10 U.S.C. § 284 and sections 8005 and 9002 of the FY 2019 Dept. of Defense (DoD) Appropriations Act, Pub. L. No. 115-245, §§ 8005, 9002, 132 Stat. 2981, 299 (2018), towards construction of a border barrier in New Mexico in the El Paso Sector. ER365, 413. The district court concluded that the States and the *Sierra Club* plaintiffs had standing and that their claims were likely to succeed. Although the court granted injunctive relief to the *Sierra Club* plaintiffs, it denied such relief to the States. Part of the court's reasoning was that any injunction in favor of the States would be "duplicative" given the injunctive relief contemporaneously granted the *Sierra Club* plaintiffs. SER1358.

Shortly thereafter, the States moved for preliminary relief to enjoin funding for construction in California's El Centro Sector. ER422. That motion was subsequently incorporated into the States' motion for partial summary judgment encompassing the El Centro and El Paso Sector projects. ER423. These motions were brought solely on behalf of the two states impacted by the § 284 construction

projects, California and New Mexico. *Id.* The district court granted, in part, the *Sierra Club* plaintiffs' motion for partial summary judgment, issuing declaratory relief and a permanent injunction. SER1266-1267. The court also granted, in part, the States' motion for partial summary judgment, issuing declaratory relief that Defendants' transfer of funds was unlawful, but again denying the States' request for injunctive relief on the ground that the *Sierra Club* injunction made any additional relief unnecessary. *Id*.

Defendants appealed both judgments and sought a stay of the *Sierra Club* preliminary injunction pending appeal. After briefing and oral argument, a motions panel of this Court denied the stay. The panel's opinion determined that "there is no statutory appropriation for the expenditures that are the subject of the injunction," and that the transfers violated the Appropriations Clause. *Sierra Club*, 929 F.3d at 689. The opinion also concluded that the *Sierra Club* plaintiffs had a cause of action, because: (a) the plaintiffs had a claim in equity or under the APA, *id.* at 694-699; (b) the zone-of-interests test does not apply, *id.* at 700-703; and (c) even if the test did apply, plaintiffs satisfied it, *id.* at 703-704. Finally, based on a thorough assessment of the balance of harms, the court "conclude[d] that the public interest weighs forcefully against issuing a stay." *Id.* at 704-707.

Defendants filed an emergency application for a stay with the Supreme Court. Although California and New Mexico filed an amicus brief in support of the

Sierra Club plaintiffs, the States were not parties to the Supreme Court proceeding which concerned only the status of the *Sierra Club* injunction. The Court granted a stay of the injunction in a one-paragraph order, stating only that "the Government has made a sufficient showing at this stage that the [*Sierra Club*] plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Trump v. Sierra Club*, 140 S.Ct. 1 (Mem.) (2019).

B. Challenges to the Section 2808 Diversion

On October 10, 2019, the States and *Sierra Club* plaintiffs filed motions for partial summary judgment seeking declaratory relief and injunctive relief against DoD's separate diversion of funds under Section 2808. *States'* case, ECF No. 220; *Sierra Club* case, ECF No. 210. Unlike the States' earlier preliminary injunction motion regarding other diversions, which focused on the interests of two border states, the States' motion for summary judgment relating to Section 2808 was brought on behalf of nine States.

On December 11, the district court issued an opinion, granting injunctive and declaratory relief to the *Sierra Club* plaintiffs, while granting only declaratory relief to the States. ER38, 47-48. The court ruled that, to the extent the plaintiffs were required to meet any zone-of-interests requirement, that bar was "easily satisfied." ER15. The court also held that plaintiffs' Section 2808 claims were justiciable, and that Defendants' attempt to reallocate funds to border wall

construction was not authorized by Section 2808 because that construction neither constituted "military construction projects" nor was "necessary to support [] use of the armed forces." ER16-34. The court nevertheless denied the States' request for injunctive relief, reasoning that such relief was "duplicative" and "moot" in light of the injunction already granted to the *Sierra Club* plaintiffs. ER38. As a result, the court never evaluated or addressed the distinct harms to state sovereignty and state finances alleged by the States. This appeal followed.

SUMMARY OF THE ARGUMENT

Defendants have begun building a wall along the Southern Border despite Congress's refusal to authorize and fund such a project. In order to fund construction of the border wall Congress denied, Defendants have diverted $3.6 billion that Congress *did* appropriate for vital military construction projects. That diversion exceeds Defendants' limited authority to reallocate funds under Section 2808, because the diverted funds are not being used for "military construction" as defined by statute, and because the construction is intended to benefit a civilian agency rather than the "armed forces." The diversion also violates the Constitution. Congress passed, and the President signed into law, particular appropriations. To immediately disregard that law's commands, without even an arguable change of circumstances, violates not only general separation-of-powers principles but also the Appropriations and Presentment Clauses.

The States have three viable causes of action challenging Defendants' actions: (1) an equitable *ultra vires* claim, (2) an Administrative Procedure Act (APA) claim, and (3) constitutional claims. Defendants cannot insulate their actions from judicial review by invoking the zone-of-interests test, which only applies to the States' APA claim. In any event, the States' financial interests in the defunded military construction projects are encompassed by the zone of interests of Section 2808 and the National Emergencies Act; further, the States are well within the zone of interest of the relevant constitutional provisions.

Finally, if this Court accepts that the Defendants are acting illegally, then there is no basis on which to deny the States an injunction. There is a strong public interest in preventing violations of the Constitution's separation-of-powers restrictions. Defendants have begun to build border barriers without following the state laws that ordinarily apply to federal construction, which will irreparably harm California's and New Mexico's sovereign interests in enforcing their own state laws. Further, Defendants' diversion of funds will cause financial harm to Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin—and will result in the cancellation of projects that directly benefit the public in the plaintiff States, such as building safe storage facilities for hazardous waste in Virginia and flight simulators to help California flight crews train to fight wildfires.

ARGUMENT

I. THE COURT SHOULD UPHOLD THE DECLARATORY JUDGMENT IN THE STATES' FAVOR

A. Defendants Exceeded Their Authority under Section 2808

Defendants exceeded their authority under Section 2808 by diverting funds to build border barriers. This conclusion is the same whether their actions are reviewed as *ultra vires* under the common law or under the framework of the Administrative Procedure Act, which requires a court to "hold unlawful and set aside agency action … in excess of statutory jurisdiction." 5 U.S.C. § 706(2).

1. The President's Emergency Powers Do Not Negate Section 2808's Requirements

The States do not challenge the legality of the President's emergency declaration.[5] Instead, the States challenge Defendants' exercise of statutory authority that they claim is available as a result of that declaration. Such a claim is justiciable. *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076, 1081 (9th Cir. 1982) (Courts are "free to review whether the actions taken pursuant to a national emergency comport with the power delegated by Congress.").

The National Emergencies Act (NEA) allows the President, after declaring a national emergency, to utilize emergency powers *only* as authorized by Congress

[5] Defendants' brief misattributes a claim that "there is no true emergency at the southern border" to the States. Defs.' Br. 14; ER21.

in other federal statutes. *See* 50 U.S.C. § 1621. Intending to rein in presidential powers, Congress designed the NEA to ensure that the president's "extraordinary" emergency powers would "be utilized only when emergencies actually exist." S. Rep. No. 94-1168, at 2 (1976). Senator Frank Church, who led the development of the NEA, testified before the Senate Committee of Government Operations "that the President should not be allowed to invoke emergency authorities … for frivolous or partisan matters, nor for that matter in cases where important but not 'essential' problems are at stake." *National Emergencies Act: Hearing on H.R. 3884 Before the S. Comm. of Governmental Operations*, 94th Cong. 7 (1976). Senator Church continued that "[t]he Committee intentionally chose language which would make clear that the authority of the Act was to be reserved for matters that are 'essential' to the protection of the Constitution and the people." *Id.*

When such a national emergency has been declared, the NEA does not confer any emergency powers on its own. Instead, it allows the president to utilize only emergency powers specified by other "Acts of Congress." 50 U.S.C. § 1621(a). One such act is Section 2808, which provides:

> in the event of … the declaration by the President of a national emergency in accordance with the [NEA] that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake *military construction projects*, not otherwise authorized by law that are *necessary to support such use of the armed forces.*

10 U.S.C. § 2808(a) (emphases added).

Defendants' actions here exceed the statutory authority to undertake "military construction" that is "necessary to support such use of the armed forces." *Id.*

2. Section 2808 Is Not Satisfied by Simply Declaring that Border Barrier Projects in California and New Mexico Are Part of an Army Base in Texas

Defendants' proposed border barrier projects in California and New Mexico are not "military construction projects" as required by Section 2808. *Id.* "'[M]ilitary construction'" is defined as "any construction, development, conversion, or extension of any kind carried out *with respect to a military installation*." 10 U.S.C. § 2801(a) (emphasis added). In turn, a "'military installation'" is defined as a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." *Id.* § 2801(c)(4). The proposed barrier projects do not satisfy these definitions.

Defendants have never suggested that the border barrier projects are a base, camp, post, station, yard, or center. Instead, in response to the *Sierra Club* motion for a preliminary injunction regarding Section 2808, Defendants originally argued that the border barrier projects fell within the "other activity" definition of "military installation." SER1361-1362. But the district court held that "[h]ad Congress intended for 'other activity' in Section 2801(c)(4) to be so broad as to

transform literally any activity conducted by a Secretary of a military department into a 'military installation', there would have been no reason to include a list of specific, discrete military locations" like base, camp, post, station, yard, or center. SER1362. The court explained Defendants' argument violated the statutory interpretation principles of "*noscitur a sociis*" ("'a word is known by the company it keeps'") and "*ejusdem generis*" ("'where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'"). SER1361-1362.

Defendants do not challenge this analysis. Instead, Defendants shifted to theory based on a later document "assign[ing]" the proposed projects to U.S. Army Garrison Fort Bliss, Texas. ER75. Based on that assignment, Defendants continue to argue that these projects are "military construction projects" because they will "take place on land 'under the jurisdiction of the Secretary of a military department.'" Defs.' Br. 36 (citing 10 U.S.C. § 2801(c)(4)). But Fort Bliss is located in Texas, over 100 miles from the project sites in New Mexico and over 600 miles from the project sites in California. If Defendants can make this land part of a military installation by assigning it administratively to a military base, and then treat any construction project on that land as a military construction project under Section 2808, then *any* land *anywhere* can be deemed a military installation.

That could include land that Congress has dedicated to other uses (such as national parks) and private land that the Defendants decide to condemn and forcibly acquire through eminent domain. *See* ER123 (describing the steps the Defendants will take to acquire land for border barrier projects).

As the district court properly held, Defendants' interpretation violates the plain language of the statute. Defendants' interpretation would "transform the definition of 'military installation' to include not just 'other activity,' but '*any* activity' under military jurisdiction." ER24 (emphasis in original). It would render superfluous most of the words Congress specified when it defined a military installation as a "base, camp, post, station, yard, center, or other activity." 10 U.S.C. § 2801(c)(4); *see Duncan v. Walker*, 533 U.S. 167, 174 (2001) (courts must "give effect, if possible, to every clause and word of a statute" and should not interpret a statute to render any term "insignificant, if not wholly superfluous" (internal citation and quotation marks omitted)). It would undermine the NEA's goal of constraining the President's emergency power to congressionally specified limits. *See Ariz. State Bd. for Charter Schools v. U.S. Dep't. of Educ.*, 464 F.3d 1003, 1009 (9th Cir. 2006) (holding that the natural reading of a statute prevailed when an alternative explanation would lead to "an unnecessarily expansive result"). And Defendants' interpretation of Section 2808 would result in vast presidential encroachment on Congress's Article I authority, allowing

congressional decisions made through constitutionally specified processes to be supplanted by evasive technicalities and absurd declarations. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005) (canon of constitutional avoidance is a "tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts").

3. Defendants' Border Barrier Projects Are Not "Necessary to Support" the "Use of the Armed Forces"

The diversions also do not satisfy Section 2808's requirement that military construction projects be "necessary to support" the "use of the armed forces." 10 U.S.C. § 2808(a). Defendants erroneously claim that interpretation of the "necessary to support" the "use of the armed forces" clause in Section 2808 is "committed to the discretion of the Secretary of Defense." Defs.' Br. 40. Their argument narrowly focuses on the word "necessary" and postulates that questions of military necessity should not be second-guessed. *Id.* But the States are not asking this Court to second-guess a determination of military necessity. The question of law before this Court is not whether border barriers are "necessary," but rather which *agency* the border barriers are designed to "support."

Defendants cannot satisfy Section 2808's "support" requirement because the border barrier projects are, by Defendants' own admission, *see, e.g.*, ER84, intended to support a civilian agency—DHS—rather than "the armed forces." 10

U.S.C. § 2808(a). DHS is charged with "[s]ecuring the borders" and "[c]arrying out … immigration enforcement functions." 6 U.S.C. § 202. Defendants originally requested that Congress fund DHS to build these border barrier projects. SER1418-1444. Only after Congress denied that request did Defendants newly characterize border wall construction as serving a military function. And even then, as Defendants' own documents establish, the purported military function is simply to provide support to DHS. *See e.g.* ER84 ("[T]he President directed the Secretary of Defense to support the [DHS]"); ER87 ("reduce the demand for DoD support"); ER99 ("these barriers will allow DoD to provide support to DHS more efficiently and effectively"); ER118 ("requests for support by the Secretary of Homeland Security"); ER138-39 ("border barrier projects that DHS recommends that DoD undertake").

This problem is not solved by Defendants' explanation that border barriers will allow the military to devote fewer resources to its support of the civilian agency. As the district court rightly reasoned, under Defendants' theory, "any construction could be converted into military construction—and funded through Section 2808—simply by sending armed forces temporarily to provide logistical support to a civilian agency during construction." ER31-32. Once again, Defendants' interpretation violates a fundamental principle of statutory interpretation: it would render the requirement that military construction be

necessary to support the use of the armed forces "insignificant, if not wholly superfluous." *Duncan*, 533 U.S. at 174.

B. The Transfers Are Also Prohibited by Section 739 of the CAA

Defendants' use of Section 2808 to divert funds toward border barriers is also barred by an appropriations rider added by Congress in the CAA itself that the President agreed to when he signed that Act into law. Under Section 739 of the Act:

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

CAA, § 739. Section 739 prohibits the diversion here because even if Section 2808 were a reprogramming or transfer provision, it is not a provision in the CAA or any other *appropriations* Act. The Trump Administration initially requested $1.6 billion in border barrier funding in its FY 2019 budget, SER1465, then modified that request to seek $5.7 billion instead, SER1471-1473. Congress chose to fund only $1.375 billion in the CAA, yet the Executive seeks to "increase … funding for [the border barrier] program, project, or activity as proposed in the President's budget request" through the "use[]" of *other* funds. CAA, § 739. The mechanism by which he seeks to do so is neither the CAA itself ("this Act") nor "any other

appropriations Act." Rather, it is Section 2808, which provides Defendants, at most, with general authority to undertake military construction projects. When a "general permission or prohibition is contradicted by a specific prohibition or permission" as exists in Section 739, "the specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). Therefore, Section 739 controls to bar the diversions under Section 2808.

C. The Diversions Would Violate the Constitution

Defendants are incorrect that "this case raises purely statutory, not constitutional issues." Defs.' Br. 30. The constitutional problems with Defendants' diversions of funds under Section 2808 do not depend on whether these transfers fall within the terms of Section 2808. Even if Section 2808 were somehow interpreted to allow Defendants' diversions contrary to expressed congressional intent, that statute would necessarily be unconstitutional as applied to Defendants' actions here. The presumption that Congress would not have intended such an unconstitutional result is, of course, one more reason to conclude that Defendants' actions are statutorily unauthorized. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (statutes must be interpreted to avoid serious constitutional problems when a construction avoiding the question is "fairly possible"). But an as-applied

constitutional claim would succeed here even if the Court rejected the States' statutory argument, for three reasons.

First, Defendants are violating separation of powers principles by diverting billions of dollars appropriated for other purposes toward the construction of border barriers that Congress expressly considered and declined to fund. *See* Section I, *supra* (noting Congressional rejection of administration request, and enactment of far smaller funding with significant restrictions). This is not a case where Defendants are acting in the absence of congressional decisionmaking. Instead, Defendants' expenditures are "incompatible with the expressed or implied will of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *see also City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018) (upholding injunction on executive order to withhold funds from "sanctuary jurisdictions" where "Congress has frequently considered and thus far rejected legislation accomplishing the goals of the Executive Order"). Defendants notably do not (and could not) advance any argument that their challenged actions are consistent with Congressional intent. It is the "duty of the Court" to prevent this outcome. *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring).

Second, Defendants' diversions violate the Presentment Clause. U.S. Const., art. I, § 7, cl. 2. The Presentment Clause sets "finely wrought" procedures for

enacting legislation. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983). The President is not empowered to effectively "enact …, amend, or … repeal statutes." *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). Instead, the President must veto acts of which he does not approve, and negotiate for the passage of acts he will sign. The designated procedures, and the balance of powers that they protect, cannot be legislated away through statutory attempts to establish alternative mechanisms. *Id.* at 438-40. In *City of New York*, for instance, Congress's Line-Item Veto Act purported to authorize the President to cancel appropriations after they were enacted into law; nevertheless, the Court held that act violated the Presentment Clause because it empowered the President to effectively modify the appropriations determinations made by Congress. *Id.* at 445-46. Congress could not empower the President to "reject the policy judgment made by Congress" and replace it with the President's "own policy judgment" based "on the same conditions that Congress evaluated when it passed those statutes." *Id.* at 443-44. The same is true here. As in *City of New York*, the Executive's unilateral increase of the $1.375 billion appropriation for barrier funding in a limited area with billions of additional funds for use across the entire southern border has the "practical effect" of modifying the appropriation passed by Congress. *Id.* at 438. By doing so, Defendants are "creat[ing] a different law—one whose text was not

voted on by either House of Congress or presented to the President for signature." *Id*. at 448.

This results in a redistribution of power that is fundamentally at odds with constitutional design. Under the Presentment Clause, the President negotiates with Congress to get the funding he desires—and if Congress does not comply, he may veto the entire appropriations bill. Then, Congress could either pass the bill over his veto (if two-thirds of each House agrees), or continue negotiations with the Executive. Here, however, Congress appropriated only a fraction of the funds that the President requested for border barrier projects. Rather than veto the bill and conduct further negotiation as the Constitution dictates, the President signed it—then negated the congressional decision and replaced it with his own. He did so even though the timing of his actions makes clear that there is no remotely plausible defense that new conditions arose that Congress had not considered in making its decisions. Although the NEA would allow Congress to pass a resolution terminating the national emergency, that resolution could itself be vetoed by the President, with two-thirds of each House required to override the veto. 50 U.S.C. § 1622(a)(1). The end result of the President's course of action is to effectively give the President what he wants, *without* negotiation, even if only one-third plus one of the members of one congressional chamber supports him. That is a far cry from the balance of powers that the Constitution commands.

The Line-Item Veto Act at issue in *City of New York* contained a similar procedure. It allowed the President to alter the effect of an enacted law. Congress could have prevented the presidential decision from taking effect only through enacting a "disapproval bill," which required either the President's approval or a two-thirds vote of each house to override the President's veto. 524 U.S. at 436-37. When the President applied this law, the Court held that the resulting changes in federal expenditures violated the Constitution. The same is true here.

Third, Defendants' transfers violate the Appropriations Clause, which commands that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl. 7. The Appropriations Clause prohibits the Executive Branch from "evad[ing]" limitations on funding imposed by Congress. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990).[6] To comply with the limits in the Appropriations Clause, an agency must follow the "necessary expense rule," *GAO Red Book* at 3-14-15, which forbids, among other things, an agency from relying on a *general*

[6] In addition to the Appropriations Clause itself, the "Purpose Statute," 31 U.S.C. § 1301, "reinforce[s] Congress's control over appropriated funds," *Dep't of the Navy v. Nat'l Labor Relations Bd.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012), by requiring appropriations to be applied only "to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a); Gov't Accountability Off. (GAO), Off. of the Gen'l Counsel, *Principles of Federal Appropriations Law* 3-10 (4th Ed. 2017) (*GAO Red Book*) (section 1301 "codified what was already required under the Appropriations Clause of the Constitution").

appropriation for an expenditure when that expenditure falls *specifically* "within the scope of some other appropriation or statutory funding scheme." *GAO Red Book* at 3-16-17, 3-407-10. The "general/specific" doctrine is not only a core tenet of appropriations law; it is a bedrock principle of statutory construction and separation of powers. *See, e.g., Food & Drug Admin. v. Brown & Williamson Tobacco*, 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and *more specifically* to the topic at hand") (emphasis added).

The application of these principles here is straightforward. In the CAA, Congress specifically appropriated $1.375 billion to fund a barrier for a specific and limited segment of the southwest border in Texas "indicat[ing] that is all Congress intended" to provide to the Administration for border barrier funding for FY 2019. *Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005). Even if Section 2808 authorized funds for border barrier construction (which it did not), it is a more general authorization that cannot be used to evade the limits of a specific appropriation under the circumstances here. The President signed the specific appropriation (the CAA) into law one day, only to turn around—literally, the very same day—and invoke a general statute (Section 2808) to add to that appropriation, repudiating Congress's policy judgment under unchanged conditions. *Cf. City of New York*, 524 U.S. at 443-44 (finding unconstitutional "the

exercise of the cancellation power within five days after the enactment of the Balanced Budget and Tax Reform Acts," which "necessarily was based on the same conditions that Congress evaluated when it passed those statutes.").

Congress did not need to explicitly prohibit the transfers, *see* Defs.' Br. 24-25 n.3, in order for them to be unauthorized. *See Dep't of the Navy*, 665 F.3d at 1348 ("[A]ll uses of appropriated funds must be affirmatively approved by Congress; the mere absence of a prohibition is not sufficient.").[7] "Where Congress has addressed the subject as it has here, and authorized expenditures where a condition is met"—here, for limited border barrier construction in the Rio Grande Valley— "the clear implication is that where the condition is not met, the expenditure is not authorized." *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

Defendants argue that under *Morton v. Mancari*, 417 U.S. 535, 551 (1974), DoD can complete the transfers because "[t]he CAA did not prohibit DoD from relying on separate and preexisting statutory authorities to spend its own previously appropriated funds on border barriers." Defs.' Br. 47 (emphasis omitted). But *Morton* actually *supports* the States' constitutional arguments, as the

[7] Although unnecessary, as discussed *supra* at Section I.B, Congress did prevent the Executive Branch from using a provision such as Section 2808 to "increase… funding for a program, project, or activity as proposed in the President's budget request for a fiscal year … ." CAA, § 739.

Court there held that a general statute could not negate Congress's intent in a more specific statute. In *Morton*, the Court held that the Equal Employment Opportunity Act—a statute of "general application" without any reference to Indian hiring preferences—did not implicitly repeal "specific" statutory provisions that adopted preferences for Indian hires "absent a clearly expressed congressional intention to the contrary." *Id.* at 550-51. Here, like in *Morton*, there is "ample independent evidence that the legislative intent" was not to authorize funds for border barriers beyond those specifically appropriated by Congress for FY 2019. *Id.* at 550. As the Court concluded in *Morton*, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.* at 550-51. As such, a general provision, like Section 2808, cannot "control or nullif[y]" the implicit limitations contained in Congress's specific appropriation in the CAA by authorizing the transfer of billions of additional dollars for border barriers beyond what Congress decided to appropriate.

II. JUDICIAL REVIEW IS AVAILABLE

Defendants spend little of their brief actually defending the constitutionality of their actions. Defs.' Br. 35-43. Instead, they concentrate on insulating their actions from judicial review by arguing that the plaintiffs have no cause of action and fall outside the applicable statutes' zones of interest. *Id.* at 18-35. These arguments repeatedly focus on the *Sierra Club* plaintiffs' "aesthetic, recreational,

and environmental interests," Defs.' Br. 1-4, 12, 15-16, 18-19, 21-24, 44-45, 47, while ignoring the States' additional and distinct interests in preventing financial and sovereign harms. Under the proper legal standard, and considering the full range of the States' interests, Defendants' efforts to avoid judicial review must fail.

A. The States Have a Cause of Action for Their *Ultra Vires* Claim

The States have an *ultra vires* claim, as Defendants do not dispute that the States have Article III standing and nothing more is required for such equitable claims.[8] Although it did not resolve the issue, the motions panel found it "doubtful" that the zone-of-interests test even applies to an equitable cause of action. *Sierra Club*, 929 F.3d at 700. Other appellate court rulings support the view that the zone-of-interests test is simply not applicable to *ultra vires* claims. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) (Bork, J.) (explaining that the zone-of-interests test should not apply to *ultra vires* claims because "the litigant's interest normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest"); *Chiles v. Thornburgh*, 865 F.2d 1197, 1210-11 (11th Cir. 1989) (holding that local governmental entity did not have to satisfy

[8] Although Defendants' urge this Court to view the Plaintiffs' claims as APA claims only, the APA did "not repeal the review of *ultra vires* actions." *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988).

zone-of-interests test, based in part on *Haitian Refugee Ctr*.). Despite the multiple rounds of briefing addressing this issue, Defendants fail to cite a single case applying the zone-of-interests test to a solely equitable *ultra vires* cause of action.[9]

B. The States Have an APA Cause of Action and Satisfy the APA's Zone-of-Interests Test

The States easily satisfy the zone-of-interests test under the APA.[10] That test is "generous." *Lexmark Int'l, Inc. v. Static Control Components*, 572 U.S. 118, 130 (2014). It is "not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224-25 (2012). "The test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 225 (internal citation and quotation omitted). "[A]gency action [is] presumptively reviewable," and a party's

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[9] Defendants cite *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987), to assert that "a plaintiff may be required to prove that the statutory provision sought to be enforced is intended for plaintiff's '*especial* benefit.'" Defs.' Br. 20 (emphasis in original). The passage cited, however, concerned an earlier Supreme Court decision, *see* 479 U.S. at 400 n.16 (discussing *Cort v. Ash*, 422 U.S. 66, 78 (1975)), that considered whether to imply "a private cause of action for *damages*." *Cort*, 422 U.S. at 68 (emphasis added). As *Clarke* notes, the zone-of-interests test "is not a test of universal application." 479 U.S. at 400 n.16. There is no reason to think that the Court's hesitancy to recognize private damages claims would extend to claims for purely injunctive relief, particularly when brought by a State.

[10] Defendants acknowledge that the APA is an appropriate vehicle for the claims at issue here, Defs.' Br. 29, and do not argue that any threshold issues besides the zone-of-interests test preclude this Court's review.

interest need only be "*arguably* within the zone of interests to be protected or regulated by the statute." *Id.* (emphasis added) (citation omitted). Indeed, courts "have always conspicuously included the word 'arguably' in the test to indicate that *the benefit of any doubt goes to the plaintiff*." *Id.* at 225 (emphasis added); *see also Hernandez-Avalos v. Immigration & Naturalization Serv.*, 50 F.3d 842, 846 (10th Cir. 1995) (requiring only "some non-trivial relation between the interests protected by the statute and the interest the plaintiff seeks to vindicate"). This reflects the history and purpose of the test: "at the time of its inception the zone-of-interests test was understood to be part of a broader trend toward *expanding* the class of persons able to bring suits under the APA challenging agency actions." *White Stallion Energy Ctr., LLC v. E.P.A.*, 748 F.3d 1222, 1268 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev'd on other grounds sub nom. Michigan v. E.P.A.*, 135 S. Ct. 2699 (2015).

The States satisfy this test. In Section 2808, Congress carefully restricted the Secretary of Defense's authority, allowing diversion of funds only to "military construction projects … that are necessary to support … use of the armed forces," and only in the event of war or a "declaration by the President of a national emergency in accordance with the [NEA]." 10 U.S.C. § 2808(a). The economic harms to Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin that will result from cancelled military construction projects in

those states, *see infra* (Section III.A.3), are the kind of "economic" interests that even Defendants admit are governed by Section 2808. *See* Defs.' Br. 22 (citing *Sierra Club v. Trump*, 929 F.3d 670, 715 (9th Cir. 2019) (N.R. Smith, J., dissenting)).

Moreover, the NEA was enacted to preserve the normal balance of constitutional authority and rein in the president's emergency powers. S. Rep. No. 94-1168, at 2 (1976); *see also Clarke*, 479 U.S. at 401 (in applying the zone-of-interests test, the Court is "not limited to considering the statute under which [the parties] sued, but may consider any provision that helps [the Court] to understand Congress's overall purposes" of the statutory scheme). In seeking to prevent improper use of executive power under Section 2808 and the NEA, the States are furthering Congress's intent in enacting such statutes, and are certainly not acting "inconsistent with the purposes implicit in the statute [such] that it cannot reasonably be assumed that Congress intended to permit the suit." *Patchak*, 567 U.S. at 225.

Congress could not have intended the zone-of-interests test to bar suits under Section 2808 by such "reasonable—indeed predictable—challengers," *Patchak*, 567 U.S. at 227, because imposing such a narrow restriction would effectively prevent any third party from bringing suit under Section 2808, making the statute's limitations largely unenforceable. This would turn the "strong presumption

favoring judicial review" on its head. *Mach Mining, LLC v. Equal Employ't Opportunity Comm'n*, 575 U.S. 480, 489 (2015).[11]

Indeed, the States satisfy the zone-of-interests test even if Congress had not specifically intended Section 2808 to benefit the States. In *Scheduled Airlines Traffic Offices, Inc. v. Dep't of Defense*, 87 F.3d 1356 (D.C. Cir. 1996), the D.C. Circuit held that although an appropriations statute was not intended to benefit third-party government contractors, a travel agency could invoke that statute to challenge an agency action if it was a "suitable challenger"—i.e., that its interests, like the States' here in enforcing the limitations of Section 2808 and Congress's underlying intent behind the NEA, were "sufficiently congruent with those of the [federal agency]" and were not "more likely to frustrate than to further … statutory objectives." *Id.* at 1360 (alterations in original) (quoting *First Nat'l Bank & Trust*

[11] Defendants' argument that the States are not proper parties to enforce Section 2808's restrictions is even more remarkable when one considers that Defendants purport to be transferring authority over the land within the jurisdictional boundaries of New Mexico and California to a military base in Texas to comply with Section 2808's restriction on "military construction" and allow them to construct miles of border barriers. Defs.' Br. 12-13. The States maintain significant interests in these federal lands; as the Supreme Court has long held, "[a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory …." *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976). California and New Mexico have neither consented nor completely ceded jurisdiction over these lands to the federal government. The States are therefore surely appropriate challengers to Defendants' use of the funds at issue here to construct the border barriers on the new "military installations" within their territory that Defendants claim to have created.

v. Nat'l Credit Union Admin., 988 F.2d 1272, 1275 (D.C. Cir. 1993)). And contrary to Defendants' assertions, Section 2808's provision allowing military construction "without regard to any other provision of law" does not make these interests any less relevant to a zone-of-interests analysis. It is well-settled that such clauses do not preclude judicial review of action taken under the statutes containing them—or, for that matter, under *other* laws. *See, e.g.*, *Northwest Forest Res. Council v. Pilchuck Audubon Soc'y*, 97 F.3d 1161, 1167 (9th Cir. 1996) (holding that the language "notwithstanding any other… law" did not preclude application of other regulations) (internal citation and quotation marks omitted). Moreover, notably absent from Defendants' brief is any attempt to explain why Congress would have imposed careful restrictions on the authority granted under Section 2808 without permitting any party to enforce those restrictions in court.[12]

C. Plaintiffs Have a Cause of Action for Their Constitutional Claims

In addition to the above *ultra vires* and APA causes of action, the States have a cause of action under the Constitution. That cause of action is barred neither under the Supreme Court's *Dalton* ruling nor under the zone-of-interests test.

[12] As previously discussed, such an interpretation also goes against the prohibition in Section 739 of the CAA on increasing funding for a program as proposed in the President's budget. Far from frustrating the purpose of Section 739, Plaintiffs are furthering Congress's express goal of ensuring proposed programs are funded as Congress intended.

1. *Dalton v. Specter* Does Not Preclude the States' Constitutional Claims

Defendants cite *Dalton v. Specter*, 511 U.S. 462 (1994), for the sweeping proposition that if a plaintiff makes a constitutional challenge to an action by the federal government which also implicates a failure to follow statutory requirements, the constitutional challenge is barred. *See* Defs.' Br. 31-34. *Dalton* does not support their argument.

A brief summary of *Dalton*'s circumstances and holding clarifies why it lacks purchase here. The plaintiffs in *Dalton* challenged the President's decision to close the Philadelphia Naval Shipyard under a statute governing base closures, arguing that the Executive Branch did not comply with "procedural mandates specified by Congress." 511 U.S. at 464. The court of appeals did not hold that this decision violated any specific restriction imposed by the Constitution. Instead, the court of appeals asserted that the President must have "statutory authority 'for whatever action' he takes," and issued a broad holding that "*whenever* the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." *Id.* at 471 (discussing and quoting *Specter v. Garrett*, 995 F.2d 404, 409 (3d Cir. 1993)) (emphasis added).

The Supreme Court properly rejected this far-reaching proposition and carefully explained how narrow its own holding was. *Dalton*, 511 U.S. at 472 ("Our cases do not support the proposition that *every* action by the President, or by

another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution.") (emphasis added). The Court noted that "we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority," and that prior decisions would not have distinguished between such claims "[i]f *all* executive actions in excess of statutory authority were *ipso facto* unconstitutional … ." *Id*. (emphasis added). The Court also reasoned that *Youngstown* "cannot be read for the proposition that an action taken by the President in excess of his statutory authority *necessarily* violates the Constitution." *Id.* at 473 (emphasis added); *see also id*. ("The decisions cited above establish that claims *simply* alleging that the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review ….") (emphasis added).

The Court's statements make clear that its holding in *Dalton* set forth a limited principle, namely that executive action in excess of statutory authority does not *automatically* constitute a constitutional violation. It would be perverse to construe this holding as immunizing all allegedly unconstitutional executive actions where the Executive invokes some statutory authority. As the motions panel observed, "[t]here would have been no reason for the Court to include the word 'necessarily'"—or the other caveats *Dalton* carefully repeated—"if [statutory

and constitutional] claims were always mutually exclusive." *Sierra Club v. Trump*, 929 F.3d 670, 696.

Fundamentally, *Dalton* is a poor fit here because even if the statutory limitations in Section 2808 did not exist, the States' constitutional claims would be exactly the same. In contrast, if the base closure statute at issue in *Dalton* had not existed, plaintiffs' constitutional challenge would have evaporated because it was entirely based on the Executive Branch exceeding the powers granted in the base closure statute, without reference to independent constitutional constraints. 511 U.S. at 474. With this basic distinction in mind, it is clear that nothing in *Dalton* precludes the States' constitutional challenges to Defendants' actions.

a. The States' Appropriations Clause Challenge is Not Barred by *Dalton*

As to the Appropriations Clause, Defendants are incorrect that *Dalton* precludes Plaintiffs' claims on this basis here, *see* Defs.' Br. 32, for two reasons. *First*, the Appropriations Clause's command that "[n]o money shall be drawn from the Treasury but in consequence of appropriations made by law," U.S. Const. art. I, § 9, cl. 7, serves as a "separate limit on the President's power," in addition to any statutory restrictions that Congress may have imposed. *In re Aiken Cty.*, 725 F.3d 255, 262 n.3 (D.C. Cir. 2013) (Kavanaugh, J., alternative holding). Because the Appropriations Clause requires an "appropriation[] made by law," the question of whether an executive action like the diversions here satisfies that Clause will

ordinarily turn on whether that action accords with statutory authority. *See, e.g.*, *U.S. v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016) (recognizing that if agency were spending money in violation of statute, "it would be drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause."). In Defendants' view, the claim in *McIntosh*—and, indeed, nearly all Appropriations Clause claims—would be solely statutory in nature, because, they argue, disputes over whether "'challenged expenditures either were or were not authorized' do not present a 'controversy about the reach or application of' the Appropriations Clause." Defs.' Br. 32-33 (relying on *Harrington v. Schlesinger*, 528 F.2d 455, 457-58 (4th Cir. 1975)).

This cannot be correct. It would relegate the Appropriations Clause, "a bulwark of the Constitution's separation of powers," *Department of the Navy*, 665 F.3d at 1347, into a largely unenforceable paper tiger, leaving no recourse for parties harmed by such Executive actions in the absence of a specific statutory cause of action. Nothing in *Dalton* supports eviscerating the Appropriations Clause in this manner. *See also Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326, 1331-32 (D.C. Cir. 1996) (rejecting argument that *Dalton* precluded judicial review of claims that executive order violated non-delegation doctrine, stating that "an independent claim of a President's violation of the Constitution would certainly be reviewable.").

Second, even if the criteria of Section 2808 were met, the States' Appropriations Clause claim still has force, as it does not depend solely on whether Defendants' action complies with such statutory criteria. Rather, like the D.C. Circuit's decision in *Department of the Navy*, the States' allegations here concern the reach of the Appropriations Clause itself. In *Department of the Navy*, a panel led by then-Judge Kavanaugh considered whether the agency had authority to agree to provide employees with free bottled water. 665 F.3d at 1342. The court's decision turned not on an assessment of a particular appropriation—there was no dispute that the relevant statutes neither "specifically prohibit[ed]" nor "explicitly authorize[d] the purchase of bottled water," *id.* at 1348 (emphasis omitted)—but on "whether providing bottled water under these circumstances would violate federal appropriations law," including the Appropriations Clause; the "Purpose Statute," (31 U.S.C. § 1301) a "core tenet of appropriations law," (*Department of the Navy*, 665 F.3d at 1348); and the necessary expense rule. *Id.* at 1346-49.[13]

[13] In prior briefing, Defendants have argued that *Department of the Navy* "simply analyzed the relevant statute and did not rely on any independent constitutional principle about the Appropriations Clause." Response/Reply Brief for Defendants-Appellants-Cross-Appellees at 19, *Sierra Club et al. v. Trump et al.*, No. 19-16102 (9th Cir. 2019), ECF No. 155. This ignores the fact that, as discussed above, the statute that the D.C. Circuit was analyzing—the Purpose Statute—simply codifies the Appropriations Clause's requirements. *Department of the Navy*, 665 F.3d at 1348. Thus, the analysis of the Purpose Statute is identical to the Appropriations Clause analysis, unlike Section 2808 which imposes additional statutory limitations.

Similarly, the question presented by the States' Appropriations Clause claim is whether Defendants—without an explicit appropriation authorizing the construction of barriers in the El Centro, El Paso, San Diego, and Yuma Sectors—may use a general appropriation to construct border barriers in those sectors even though Congress specifically appropriated only a far smaller amount for construction in a completely different sector. The answer to this question does not depend on the interpretation of Section 2808 or the existence of a specific prohibition on the use of Section 2808 to fund border barriers. Instead, it involves federal appropriations principles, including the same ones at issue in *Department of the Navy*. *See* 665 F.3d at 1346. Thus, the States' constitutional claim is not premised solely on "an interpretation of [Section 2808]," but also "presents [a] controversy about the reach or application of" the Appropriations Clause. *Harrington*, 528 F.2d at 458.

b. The States' Separation of Powers Challenge is Not Barred by *Dalton*

In addition, Defendants' actions violate separation of powers principles, again regardless of whether Section 2808's statutory criteria were met. As discussed above, there is robust, uncontested evidence in this case of Congress's intent to deny funding for border barriers beyond what it appropriated in the CAA. In *Dalton*, all that was at issue were procedural "check-the-boxes" allegations that federal officials had not followed statutory requirements relating to transmittal of

information and public hearings. 511 U.S. at 467. There was no evidence that, for example, the President had closed down a particular base despite Congress resoundingly expressing its intent not to close down that base. Here, the States allege serious substantive violations, namely that the Executive Branch is spending funds to build border barriers despite Congress clearly and repeatedly refusing to appropriate funds for that purpose. This repudiation of Congress's judgment violates separation of powers principles regardless of whether Defendants "violated the terms of" Section 2808. *Id.* at 474; *see City of New York*, 524 U.S. at 443-44 ("rejecting the policy judgment made by Congress … fail[s] to satisfy Article I, § 7"); *see also McIntosh*, 833 F.3d at 1175 (Appropriations Clause is meant to "assure that public funds will be spent according to the letter of the difficult judgments reached by Congress … .").

c. The States' Presentment Clause Challenge is Not Barred by *Dalton*

Third, the States' allegations also implicate the reach of the Presentment Clause, which bars the President from going outside the detailed procedures of Article I, Section 7 of the Constitution to effectively "create a different law" than that passed by Congress. *City of New York*, 524 U.S. at 442, 448-49. These allegations raise the question of whether the President may—immediately after signing a congressionally approved appropriation into law—unilaterally modify that appropriation. Just as the Supreme Court considered the constitutionality of

such an action in *City of New York*, which was decided four years after *Dalton*, judicial review is available for the Court to review the constitutionality of the President's analogous action in this case.

d. Defendants' Hypotheticals About Unrelated Constitutional Provisions are Unrealistic and Irrelevant

Recognizing the States' constitutional claims does not trigger the parade of horribles identified by Defendants. Defs.' Br. 33-34. Both of the constitutional provisions Defendants point to are readily distinguishable from the provisions at issue here. First, as the Fourth Circuit recently explained, the Taxing Clause, U.S. Const. art. I, sec. 8, cl. 1, "is not an exclusive grant of power to Congress," while "only Congress can authorize federal expenditures." *Retfalvi v. United States*, 930 F.3d 600, 609 (4th Cir. 2019). Therefore, the court held, there is no constitutional prohibition on the Executive exercising some taxation power without assent from both houses of Congress. *See id.* at 608-10. Given this, a taxpayer's claim that the IRS exceeded its statutory authority would generally involve "an interpretation of the [IRS's organic] statute[]," and would not be a claim going to the "reach or application" of the Taxing Clause. *Harrington*, 528 F.2d at 458.[14] In contrast, the

[14] As *Retfalvi* implies, claims that the Executive has not merely exceeded its statutory authority, but is acting contrary to express constitutional limits—e.g., if the President were to "tax by executive order"—could create issues of a constitutional dimension. *Id.* at 609 (citing *Youngstown*, 343 U.S. at 585, 643

Constitution endows Congress with the "exclusive" power of appropriations. *Sierra Club*, 929 F.3d at 687 (quoting *McIntosh*, 833 F.3d at 1172); *see* U.S. Const., art. I, § 9 ("No money shall be drawn from the treasury, but in consequence of appropriations made by law ….").

Defendants' arguments relating to the Vesting Clause are no more tenable. Defs.' Br. 33-34. Unlike the Appropriations Clause, the Vesting Clause is not an affirmative prohibition on action by the Executive Branch. *Compare* U.S. Const., art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States") *with* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"). Thus, "every garden-variety *Chevron* challenge" will not be transmuted into a constitutional challenge, Defs.' Br. 34, since plaintiffs will lack a colorable argument that the Vesting Clause provided a limit for the Executive to violate.

Turning back to the core issues in this case, a final flaw in Defendants' argument about *Dalton*'s applicability is that it would have the extreme effect of wiping out the ability of plaintiffs to bring as-applied challenges like the one the States bring here. Defendants acknowledge that a constitutional claim is implicated if executive "officers rely on a statute that itself violates the Constitution." Defs.'

(Douglass and Jackson, JJ., concurring)). Such claims—analogous to the States' here—are (it is to be hoped) rare, and would not present a "floodgates" problem.

Br. 32; *see also City of New York*, 524 U.S. at 448-49. The States argue exactly that with respect to Defendants' claimed application of Section 2808 here. This Court is empowered to adjudicate such claims, and the fact that this is an as-applied rather than facial challenge does not make the States' claim non-justiciable. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), *superseded by statute, as recognized in Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (holding that the Religious Freedom Restoration Act *as applied* to states "contradicts vital principles necessary to maintain separation of powers"); *United States* ex rel. *Schweizer v. Oce N.V.*, 677 F.3d 1228, 1235 (D.C. Cir. 2012) (treating facial separation of powers challenge "as if it were an as-applied challenge"). If Defendants are permitted to rely on Section 2808 to overrule explicit congressional intent on the decision to appropriate only limited funds for border construction, then Section 2808 is unconstitutional as applied here. Section I.C., *supra. Dalton* certainly cannot prevent the States from bringing an as-applied challenge on these grounds; otherwise such a constitutional challenge could never be brought.

In sum, Defendants' expansive reading of *Dalton* raises far more serious constitutional concerns than the hypothetical problems with unrelated constitutional provisions that Defendants posit. That reading would preclude plaintiffs from asserting as-applied constitutional challenges to agency actions

based on statutory authority, as the States do here, and it would prevent plaintiffs from enforcing explicit prohibitions on executive action found in the Constitution itself. Such an outcome is contrary to bedrock principles of judicial review dating as far back as *Marbury v. Madison*, 5 U.S. 137, 180 (1803) ("[A] law repugnant to the constitution is void" and "must be discharged."). It would also "deny [plaintiffs] any judicial forum for a colorable constitutional claim," raising "serious constitutional question[s]." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (internal quotation marks omitted). The motions panel was correct: "It cannot be that simply by pointing to any statute, governmental defendants can foreclose a constitutional claim." *Sierra Club*, 929 F.3d at 697.

2. The Zone-of-Interests Test Does Not Preclude the States' Constitutional Claims

Defendants claim that the States need to establish that they are within the zone of interests of the statute that Defendants invoke to justify their diversions of funds (here, Section 2808), rather than the zone of interests of the constitutional provisions being violated. Defs.' Br. 31-34. As discussed above, the States do fall within the zone of interests of Section 2808, and would satisfy this test if it were appropriate here. But Defendants' contention is also wrong on its own terms.

First, the zone-of-interests test does not even apply to the types of constitutional claims at issue here. As Justice Scalia wrote for the Court in *Lexmark*, that test prevents plaintiffs from bringing suit only if their "interests are

so marginally related to or inconsistent with the purposes implicit in the *statute* that it cannot reasonably be assumed that *Congress* authorized that plaintiff to sue." *Lexmark*, 572 U.S. at 130 (quoting *Patchak*, 567 U.S. at 225) (internal quotation marks omitted) (emphases added); *see also Clarke*, 479 U.S. at 399 ("The essential inquiry is whether *Congress* intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law") (internal punctuation omitted) (emphases added). Under that reasoning, it is difficult to see how the test would apply to the States' claims based on structural protections in the Constitution.

The only constitutional provision to which courts have applied the zone-of-interests test with any regularity is the dormant Commerce Clause, the provision at issue in both of the cases cited in Defendants' brief. Defs.' Br. 27 (citing *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977); *Individuals for Responsible Gov't, Inc. v. Washoe County*, 110 F.3d 699 (9th Cir. 1997)).[15] Indeed, before Lexmark, the Supreme Court last discussed this point more than 30 years earlier in its decision in *Boston Stock Exchange*, and even then, the zone-of-

[15] The brief statement in the *Valley Forge* case cited by Defendants is dicta. The Court did not even address whether the plaintiffs there met the zone-of-interests test, holding that they lacked Article III standing. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474–82 (1982).

interests test was mentioned in a single sentence in a footnote. *Boston Stock Exch.*, 429 U.S. at 321 n.3.[16]

Defendants point to no case where a court has required a plaintiff to fall within the zone of interests of a statute when bringing a challenge under separation of powers principles, the Appropriations Clause, or the Presentment Clause.[17] To the contrary, courts have routinely permitted third-party plaintiffs to rely on separation of powers principles without applying *any* zone of interests analysis, as this Court recognized in *McIntosh*. 833 F.3d at 1174 (identifying cases, including, inter alia, *Youngstown*, *Chadha*, and *Bond v. United States*, 564 U.S. 211 (2011)). For example, as the motions panel pointed out, the *City of New York* Court did not apply a zone-of-interests test to plaintiffs' Presentment Clause claim, let alone

[16] Moreover, *Boston Stock Exchange*'s continued vitality on this point is dubious, given the Supreme Court's recent *Tennessee Wine* decision. As the motions panel noted, in that case—the only post-*Lexmark* Supreme Court decision on the Dormant Commerce Clause—the Court did not even mention the zone-of-interests test. *Sierra Club*, 929 F.3d at 702 (citing *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019)).

[17] Defendants cite to *Bennett v. Spear*, 520 U.S. 154 (1997) to support their argument that plaintiffs must show they are within the zone-of-interests of "the provision whose violation forms the legal basis for [the] complaint." Defs.' Br. 35 (quoting *Bennett*, 520 U.S. at 176). But there was no constitutional claim in *Bennett*. Here, by contrast, the States' constitutional claims are central to their complaint; indeed, the first two causes of action are constitutional claims. ER336-338. Moreover, *Bennett* articulated an *expansive* view of the zone-of-interests test, making clear that plaintiffs did not need to seek to "vindicate the overall purpose" of the act in question in order to satisfy the test. *Bennett*, 520 U.S. at 176.

analyze whether plaintiffs satisfied the zone of interests of the Line-Item Veto Act. *Sierra Club*, 929 F.3d at 701. And Justice Kennedy, writing for the *Bond* Court, noted that Chadha's challenge to the legislative veto was sustained even though that procedure's direct impact was on the Executive Branch. *Bond*, 564 U.S. at 222-23 (citing *Chadha*, 462 U.S. at 919). Not only the Executive Branch, but individuals like Chadha and other stakeholders in our democracy are also "protected by the operations of separation of powers and checks and balances; and … not disabled from relying on those principles in otherwise justiciable cases and controversies." *Bond*, 564 U.S. at 223.

Second, even assuming that a zone-of-interests test applies here, the analysis should be based on the constitutional provision in question. Contrary to Defendants' assertion, *McIntosh* did not focus "exclusively on the statutory text of the appropriations rider." *See* Defs.' Br. at 32 (citing *McIntosh*, 833 F.3d at 1175-77). Instead, *McIntosh* contains an extensive Appropriations Clause analysis immediately preceding the section of the opinion that Defendants cite in their brief. *See id.* at 1174-75. That constitutional discussion, not the discussion of the rider which follows, is the basis for the court's conclusion that the plaintiff there could bring suit: "separation-of-powers constraints in the Constitution serve to protect individual liberty, and a litigant in a proper case can invoke such constraints when

government acts in excess of its lawful powers." *Id.* at 1174 (quoting *Bond*, 564 U.S. at 220-24) (internal punctuation omitted).[18]

McIntosh followed the Supreme Court's decision in *Bond*, which mandates that the zone-of-interests test is not appropriate here. The *Bond* Court considered whether a criminal defendant could rely on a structural provision of the Constitution—there, the Tenth Amendment—to argue that the federal government could not interfere with local police powers by prosecuting a defendant under a statute enacted pursuant to an international treaty. 564 U.S. at 214. It concluded that "[t]he structural principles secured by the separation of powers protect the individual as well." *Id.* at 222.

Critically, *Bond* made clear that a zone-of-interests test or other "prudential" (as the zone-of-interests test was characterized at that time) doctrines should not prevent litigants with Article III standing from bringing suit. *Id.* at 225-26 (citing

[18] Defendants also argue that the States "have identified no separate and independent constraint imposed by the Appropriations Clause as a reason to invalidate DoD's use of Section 2808." Defs.' Br. 35. But the States asserted exactly such claims in their complaint and have consistently done so throughout this litigation. *See* ER337-338. Indeed, these are the very "provision[s] of law upon which [the States] rel[y]" for their substantive claims. *Bennett*, 520 U.S. at 175-76. Thus, Defendants' analogy to this Court's discussion in *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742 (9th Cir. 2018) (Defs.' Br. 35) is inapposite because that case only stands for the well-established principle that the APA—as the procedural vehicle for plaintiffs' claims—does not form the relevant zone of interests.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)). "[I]f the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." *Id*. at 223; *see McIntosh*, 833 F.3d at 1174 (same).

In short, the States are appropriate parties to seek redress for the constitutional violations at issue here. As Justice Kennedy explained in his concurring opinion in *City of New York*, "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers." 524 U.S. at 450. The Framers intended the separation of powers, along with federalism, "to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts." *Id.* Every stakeholder in our democracy has a stake in these principles, and therefore no one is barred from bringing suit to enforce them if that party meets Article III's "irreducible" standing requirements. *Lujan*, 504 U.S. at 560. The States are no different, and are proper parties to bring separation of powers and Appropriations Clause challenges to Defendants' actions that injure the States.

III. THE COURT SHOULD REVERSE THE DENIAL OF INJUNCTIVE RELIEF

The district court denied injunctive relief to the States on the ground that their interests were fully protected by the separate grant of injunctive relief to the *Sierra Club* plaintiffs. ER38. But the States are entitled to injunctive relief because

they have "suffered an irreparable injury" for which "remedies available at law … are inadequate," where "the balance of hardships" between the States and Defendants supports an equitable remedy, and "the public interest would not be disserved." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).[19] Relief to the States is not duplicative. The States continue to suffer irreparable harm because the district court stayed the injunctive relief it issued to the *Sierra Club* plaintiffs. ER45-46. Moreover, the Supreme Court's stay order in the prior *Sierra Club* proceeding, on which the district court relied in staying the *Sierra Club* injunction, does not address the States and their distinct interests and harms. ER46. Therefore, this Court should remand the case to the district court with instructions to issue the States' requested injunctive relief.

A. Defendants' Actions Irreparably Harm the States

California and New Mexico suffer two kinds of irreparable harms from the border barriers built under Section 2808. First, by constructing the border barriers without complying with state environmental laws, Defendants are harming the States' sovereign interests. Second, Defendants' construction activities and border barriers will irreparably injure wildlife and plants in sensitive desert environments.

[19] When the federal government is the opposing party, these last two factors for injunctive relief merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

New Mexico, Colorado, Hawaii, Maryland, New York, Oregon, Virginia, and Wisconsin also face irreparable harm because Defendants' unlawful diversion of funds from military construction projects has deprived those States of valuable financial benefits, including tax revenue.

1. Defendants' Actions Irreparably Harm California's and New Mexico's Sovereign Interests in Enforcing Their State Laws

This Court reviews de novo the legal question of whether harms to the States' sovereign interests constitute irreparable harm. *See United States v. Lang*, 149 F.3d 1044, 1046 (9th Cir. 1998). Here, Defendants' illegally funded border barrier construction is inflicting irreparable injuries on the States. As is further described below, Defendants would normally have to comply with various state laws designed to protect public health and the environment. However, Defendants contend that Section 2808 authorizes construction of the California and New Mexico Projects "without regard to any other provision of law" and have indicated that they will not comply with the States' environmental laws. ER92. Defendants' diversion of funds and construction of the California and New Mexico Projects under Section 2808 therefore undermines California's and New Mexico's sovereign interests in enforcing their laws. Those injuries cannot be remedied by monetary damages. *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001) (holding State of Kansas demonstrated irreparable harm sufficient to support

injunction where it challenged a federal agency action that would have limited the state's sovereign interest in enforcing its gaming laws within its borders).

a. Defendants' Actions Prevent California from Enforcing Its Laws

California has many laws designed to protect the State's environmental resources and public health. *See, e.g.*, Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13000-16104; California Endangered Species Act, Cal. Fish and Game Code §§ 2050-2089.26. State and local management plans intended to accomplish the goals of such laws would normally apply to the border barriers at issue here, as required by federal law.

(1) Water Quality Laws

Construction of the California Projects will involve dredge and fill activities that could impair water quality in violation of federal and state law. Ordinarily, before such dredge and fill activities can proceed, federal officials must obtain certification of compliance with California's water quality standards. Cal. Water Code § 13260 (imposing requirements on "persons" prior to discharging waste); *id.* § 13050(c) (defining "person" to include "the United States, to the extent authorized by federal law"); *see also* 33 U.S.C. § 1341(a)(1) (requiring *state* water quality certification as part of *federal* permit). Federal officials have previously sought such certifications for construction projects in the project areas as required by federal and state law. SER1058; SER1068. Under the federal Clean Water Act,

Defendants must adopt water-pollution-mitigation measures to obtain a state permit certification from a California regional water board. 33 U.S.C. § 1341(a)(1); SER1056-1058, 1061, 1067-1068, 1070-1071. The conditions and mitigation measures imposed during the state permit and certification process are a primary means by which California implements its water quality objectives and enforces its water quality laws. *Id.*

(2) Air Quality Laws

Defendants also would ordinarily be required to ensure the California Projects conform to California's air quality standards by complying with the federal Clean Air Act as set forth in California's State Implementation Plan (SIP). 42 U.S.C. § 7506(c)(1). The Clean Air Act prohibits federal agencies from engaging in, supporting, or financing any activity that does not conform to a SIP. *Id.*; 40 C.F.R. § 93.150(a). These safeguards prevent federal agencies from interfering with states' ability to comply with the Clean Air Act. 42 U.S.C. § 7506(c)(1); 40 C.F.R 93.150(a).

The local air districts with jurisdiction over the California Project areas would normally enforce rules to reduce the amount of fine particulate matter generated from Defendants' construction activities by requiring Defendants to develop and implement a dust control plan. SER1284-1289, 1223-1227; 42 U.S.C. §§ 7418(a); 7506(c)(1); 40 C.F.R. § 52.220(c)(345)(i)(E)(2); 75 Fed. Reg. 39,366

(July 8, 2010). These rules mitigate blowing dust that can cause additional acute regional or local health problems. SER1290-1293.

(3) Endangered Species Laws

Finally, but for Defendants' refusal to comply with environmental laws, Defendants could not build the California Projects without ensuring they "[are] not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2). Compliance with this provision would protect species and allow California to continue implementing habitat conservation agreements with federal agencies that impose limitations on habitat-severing projects like the California Projects. SER1294-1317, 1032, 1036-1039.

b. Defendants' Actions Prevent New Mexico from Enforcing Its Laws

New Mexico also has enacted and enforces environmental laws to protect its air quality and wildlife. By using the disputed funds to construct the New Mexico Projects without complying with these laws, Defendants impair New Mexico's "protection of the state's beautiful and healthful environment," which is "of fundamental importance to the public interest, health, safety and the general welfare." N.M. Const., art. XX, § 21.

(1) Air Quality Laws

El Paso Project 2, a portion of which falls within Luna County, would normally be subject to a dust control plan that New Mexico adopted under the Clean Air Act. SER1318-1356; 40 C.F.R. § 51.930(b); N.M. Admin. Code §§ 20.2.23.108-113. The plan "limit[s] human-caused emissions of fugitive dust into the ambient air by ensuring that control measures are utilized to protect human health and welfare." N.M. Admin. Code § 20.2.23.6.

(2) Wildlife Corridors and Endangered Species Laws

Defendants' refusal to comply with environmental laws and resulting construction also impedes New Mexico's ability to implement its Wildlife Corridors Act, which aims to protect large mammals' habitat corridors from human-caused barriers such as roads and walls, N.M. Stat. Ann. §§ 17-9-1-17-9-4. Several important wildlife corridors run through, or adjacent to, the New Mexico Projects including in Hidalgo and Luna Counties. SER1095, 1097. Defendants' border barriers will block corridors for pronghorn antelope, mule deer, mountain lions, and bighorn sheep, impairing New Mexico's ability to protect these species. SER1097.

c. Defendants Irreparably Harm California's and New Mexico's Sovereign Interests by Preventing Them from Enforcing State Laws

There is irreparable harm whenever a government cannot enforce its own laws. *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers). States possess undeniable sovereign interests in their "power to create and enforce a legal code," *Alfred L. Snapp & Son, Inc. v. Puerto Rico* ex rel. *Barez*, 458 U.S. 592, 601 (1982), including codes protecting the natural resources and public health within their borders. *See Maine v. Taylor*, 477 U.S. 131, 151 (1986) (the State "retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources."). These sovereign interests are undermined where federal action impedes enforcement of state statutes. *See, e.g.*, *State of Alaska v. U.S. Dept. of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989) (holding states have sovereign interests in enforcing state consumer protection laws impeded by federal actions). And any time a state is prevented "from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury" separate from any injury to the persons or things those statutes are designed to protect. *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

2. Defendants' Actions Irreparably Harm California's and New Mexico's Environment, Wildlife, and Natural Resources

The district court also declined to address the irreparable harm to protected wildlife and other natural resources within California and New Mexico from the California and New Mexico Projects. ER37-38. The Projects pose a threat of demonstrable harm to numerous rare and special-status species that warrants issuance of injunctive relief. *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508, 1512 n. 8 (9th Cir. 1994) ("We are not saying that a threat of extinction to the species is required before an injunction may issue… ."); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 818-19 (9th Cir. 2018) (holding "extinction-level threat" not required to show irreparable harm to protected species).

a. Harms from the California Projects

The California Projects will undermine the recovery of several federally listed endangered species and California Species of Special Concern, as well as damage those species' habitat. Both San Diego Project 4 and Project 11 fall within the California Floristic Province, one of the world's biodiversity hotspots that contains many plants not found elsewhere in the United States. SER1113.

The federally endangered Quino Checkerspot Butterfly has been documented to occur in and immediately adjacent to the San Diego Project 4 area,

and lives only in a few locations in Riverside and San Diego counties. SER1029-1030. The butterfly relies on the dwarf plantain—its host plant—for survival. *Id.* If dry conditions occur and this plant is not available, the butterfly larvae enter a biological stasis or "diapause" phase where they bury themselves in leaf litter—sometimes for years—until suitable conditions arrive again. *Id*. Construction of San Diego Project 4, including road improvements, will irreparably harm the Quino Checkerspot Butterfly population and its critical habitat in Otay Mesa by crushing and burying diapausing larvae, removing the butterfly's host plant, and destroying the plant's seed bank in the project area. *Id.*

San Diego Project 4 will also irreparably harm the federally threatened Coastal California Gnatcatcher, a federally threatened bird species, and its habitat. SER1030-1031. California Gnatcatchers have been documented within the project footprint, and likely remain there as it is a suitable habitat for the species. *Id.* San Diego Project 4 will destroy essential habitat for numerous Gnatcatcher pairs due to the vegetation clearance required to construct the proposed border barriers and roads. *Id.*

San Diego Project 4 will also harm the Western Burrowing Owl, which the U.S. Fish and Wildlife Service has designated as a Bird of Conservation Concern. SER1031-1033. The owl is also a Species of Special Concern under California law, and habitat loss and modification is a key threat to the species' survival. *Id*.

Recent surveys show that burrowing owls are present in and around the project site and that the area is the last stronghold for the owl in San Diego County. *Id.* This species lives underground in burrows. *Id.* Project construction with its extensive vegetation clearing, trenching and roadwork will destroy owl habitat and possibly kill owls directly, or expose them to increased mortality by flushing them from their burrows where they face increased predation as they search for new burrows. *Id.*

Additional impacts from San Diego Project 4 include harms to vernal-pool habitat and species, many of which (such as the San Diego Fairy Shrimp) are endangered. SER1034-1036, 1069-1070. Project construction involves roadwork that will likely fill the pools, and will irreparably harm vernal-pool species. SER1034-1036. Rare plants such as the Tecate Cypress are at risk as well, and will likely be killed during construction. SER1118-1120.

Finally, San Diego Project 11 and Yuma Project 6 will harm numerous wildlife species that are protected under both federal and state law including the federally endangered Quino Checkerspot Butterfly, Yuma Ridgeway's Rail, Southwestern Willow Flycatcher, and Western Yellow-billed Cuckoo, and California Species of Special Concern such as the Flat-tailed Horned Lizard and Sonoran mud turtle. SER1036-1040.

b. Harms from the New Mexico Projects

The New Mexico Projects will be built primarily in the "Bootheel" of New Mexico in the Animas and Playas Valleys. SER1078-1079. This area in Southwestern New Mexico is a "pinch point for ecological diversity, migration, and dispersal in the western North American continent." SER1093. The 35 miles of bollard-style pedestrian fencing planned for the New Mexico Projects will create fragmented habitat and block wildlife corridors for numerous protected species such as the white-sided jackrabbit and the jaguar. SER1078-1080, 1094-1097; ER94.

For example, the Animas Valley is home to an estimated 61 white-sided jackrabbits, a rare and threatened species under New Mexico law. SER1094. Because the jackrabbit's United States habitat is limited to the Animas Valley, the species' survival in the United States depends upon its ability to access habitat and other white-sided jackrabbits in Mexico. SER1094-1096. It is already in decline due in part to actions by Border Patrol (including roadkill incidents and the introduction of exotic grasses), and the population will decrease even further due to El Paso Projects 2 and 8 since they will block the jackrabbits' only route to habitat in Mexico. *Id.* Given the pressures already affecting the species, if the New

Mexico Projects are constructed the white-sided jackrabbit's prospects for survival in the United States are "dismal." SER1095.

The New Mexico Projects will also bisect the intracontinental corridor for the jaguar, a rare species that is federally endangered. SER1096-1097. The New Mexico Projects will create an impenetrable barrier adjacent to the designated Critical Habitat for this endangered species. SER1096. Jaguars have been documented in the United States on conservation lands that directly adjoin the location of El Paso Project 2 in the Animas Valley. *Id.*; SER1098-1101, 1106-1107. These border barriers will "almost certainly … significantly contribute to the elimination of this imperiled species in the United States." SER1080.

3. The Cancellation of Military Construction Projects in Other Plaintiff States Causes Irreparable Financial Harm in those States

Defendants' actions also cause irreparable financial harm to the States of Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin, harms that are unique to the States and are currently materializing in light of the district court's stay of the *Sierra Club* injunction. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Develop. Corp.*, 429 U.S. 252 (1977) (private developer of low-income housing demonstrated economic injury in challenge to ordinance banning low-income housing); *Texas v. United States*, 809 F.3d 134, 152-53 (5th Cir. 2015) (recognizing financial harms to states by federal

actions that cause "a major effect on the states' fiscs" and harms to state sovereignty by "federal interference with the enforcement of state law").

Defendants intend to divert all funding from 17 separate military construction projects within the borders of the States, totaling $493 million in funds approved and allocated by Congress. SER1256-1258. That construction would have brought $366 million in direct and inter-state benefits to the economies of Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin *even when offsetting* the economic benefits that would result from the border barrier construction occurring within the boundaries of New Mexico. SER1006.

This loss of economic activity will have a substantial, direct effect on the tax revenues of state and local governments of Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin, irreparably harming them. *See, e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 447 (1992) (Wyoming suffered direct injury from the loss of specific tax revenues); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1194 (9th Cir. 2004) (recognizing financial harm from, *inter alia*, decreased tax revenue caused by federal plan to develop and rehabilitate a former military base "due to impaired vehicular movement and commerce," even where harm could not be quantified); *City of Oakland v. Lynch*, 798 F.3d 1159, 1164 (9th

Cir. 2015) (recognizing that "[a]n expected loss of tax revenue" constituted a harm).

Specifically, Defendants' actions will reduce the tax revenues of these states and their municipalities (including taxes on personal income, retail sales, corporate profits, and other sources) by over $36 million. SER1007. These are direct, quantifiable, and inevitable harms. By diverting funds from military construction projects within those States' borders, Defendants will cause lost sales for contractors and subcontractors for the projects, various firms in the supply chains, and companies selling goods and services to individuals hired to work directly on the projects or at some point in the supply chain. SER1006. All that lost business activity would create tax revenues for the states that can be quantifiably calculated now. SER1006-1007. Such financial effects of federal actions constitute cognizable harms that will go unremedied without an injunction. *See Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1130 (11th Cir. 2005) (downstream environmental and economic effects of federal policies are cognizable harms); *see also California v. Azar*, 911 F.3d 558, 572 (9th Cir. 2018) (finding that the plaintiff states "need not have already suffered economic harm" and that there "is also no requirement that the economic harm be of a certain magnitude").

B. The Balance of Hardships and Public Interest Favor Granting the States a Permanent Injunction

The public interest and the balance of equities favor enjoining Defendants' construction of a border wall using funds diverted from military construction projects that Congress and the DOD recognized were important to protect public health and safety.

First, as the district court and Ninth Circuit held, "the public interest 'is best served by respecting the Constitution's assignment of the power of the purse to Congress, and by deferring to Congress's understanding of the public interest as reflected in its repeated denial of more funding for border barrier construction.'" ER44 (quoting *Sierra Club*, 929 F.3d at 677). "Congress has already engaged in the difficult balancing of Defendants' proffered interest and the need for border barrier construction in passing the CAA." ER44.

Second, the Defendants can suffer no harm from an injunction that prohibits an unlawful act. *See e.g.*, *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). The district court held that "the balance of hardships and public interest favor Plaintiffs" "because the court [found] Defendants' proposed use of funds under Section 2808 unlawful." ER45. Defendants' reliance on the Supreme Court's balancing of the equities and denial of injunctive relief in *Winter* to argue otherwise is misplaced. Defs' Br. 45-46. That decision is distinguishable because the "ultimate legal claim" under the National Environmental Policy Act (NEPA)

was "that the Navy must prepare an EIS, not that it must cease sonar training." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 32 (2008). Because NEPA "does not mandate particular results," but "imposes only procedural requirements," the district court in *Winter* could afford complete relief to plaintiffs' procedural claim without enjoining the underlying activity—which the plaintiffs were not arguing was illegal. *Id.* at 23. Here, in contrast, the only relief that can effectively remedy the harm caused to the States by the Executive Branch's violation of law is a permanent injunction preventing the Executive Branch applicants from diverting funds and undertaking construction. *Compare Amoco Production Co. v. Gambell*, 480 U.S. 531, 544 (1987) (considering the federal government's interest in leasing public land when the challenged conduct was the federal government failure to comply with a procedural requirement), *with Rodriguez*, 715 F.3d at 1127 (refusing to consider the federal government's interest in indefinitely detaining foreign nationals without a hearing because that conduct was deemed unlawful).

Third, the harms to California's and New Mexico's sovereignty and environments that would result if Defendants are not enjoined further tip the balance of equities in favor of granting the States an injunction. *See New Motor Vehicle Bd.*, 434 U.S. at 1351 ("the public interest … is infringed by the very fact that the State is prevented from" implementing its own duly enacted laws); *E. Bay*

Sanctuary Covenant v. Trump, 932 F.3d 742, 779 (9th Cir. 2018) ("the public also has an interest in ensuring that statutes enacted by their representatives are not imperiled by executive fiat") (internal citations omitted); *Amoco Prod. Co.*, 480 U.S. at 545 (because environmental and natural resources harms "can seldom be adequately remedied by money damages" and are often irreparable, "the balance of harms will usually favor the issuance of an injunction to protect the environment").

Fourth, unlike in appeals regarding prior diversions, this Court must now take into account that Defendants' administrative cancellation of the military construction projects that Congress decided to fund will reduce tax revenues by $36 million in Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin, and will reduce direct and inter-state economic activity by $789 million. SER1006. Further, the cancellation of the projects will have a detrimental impact on public safety. DoD itself has detailed the extensive public health and safety harms that would arise if these military projects did not move forward, such as woefully inadequate security at military bases, improperly contained hazardous materials, and a lack of enhanced aerial firefighter training. SER1156-1222, 1129, 1131-1133. Cancelling such projects will place service members and the nearby public at significant risk. Based on these factors, the balance of equities and the public interest favor an injunction against Defendants'

unlawful diversion of congressionally appropriated funds and the construction of a border wall using those funds.

CONCLUSION

This Court should: (1) affirm the district court's declaratory judgment in the States' favor; (2) reverse the district court's denial of an injunction to the States; and (3) remand with instructions to issue an injunction prohibiting Defendants from defunding military construction projects located within the States and constructing border barrier projects in California and New Mexico under Section 2808.

Dated: February 13, 2020

Respectfully submitted,

s/ Heather C. Leslie

Xavier Becerra
Attorney General of California
Robert W. Byrne
Michael L. Newman
Senior Assistant Attorneys General
Harrison M. Pollack
Acting Senior Assistant Attorney General
Joshua A. Klein
Deputy Solicitor General
Michael P. Cayaban
Christine Chuang
Edward H. Ochoa
Supervising Deputy Attorneys General
Brian J. Bilford
Sparsh S. Khandeshi
Lee I. Sherman
Janelle M. Smith
James F. Zahradka II
Heather C. Leslie (SBN 305095)
Deputy Attorneys General
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 210-7832
Heather.Leslie@doj.ca.gov
Attorneys for the State of California

PHILIP J. WEISER
Attorney General of Colorado
ERIC R. OLSON
Solicitor General
Attorneys for Plaintiff State of Colorado

CLARE E. CONNORS
Attorney General of Hawaii
ROBERT T. NAKATSUJI
First Deputy Solicitor General
Attorneys for Plaintiff State of Hawaii

BRIAN E. FROSH
Attorney General of Maryland
JEFFREY P. DUNLAP
Assistant Attorney General
Attorneys for Plaintiff State of Maryland

HECTOR BALDERAS
Attorney General of New Mexico
TANIA MAESTAS
Chief Deputy Attorney General
NICHOLAS M. SYDOW
Civil Appellate Chief
JENNIE LUSK
Civil Rights Bureau Chief
Attorneys for Plaintiff State of New Mexico

LETITIA JAMES
Attorney General of New York
MATTHEW COLANGELO
Chief Counsel for Federal Initiatives
STEVEN C. WU
Deputy Solicitor General
ERIC R. HAREN
Special Counsel
GAVIN MCCABE
Special Assistant Attorney General
AMANDA MEYER
Assistant Attorney General
Attorneys for Plaintiff State of New York

ELLEN ROSENBLUM
Attorney General of Oregon
BENJAMIN GUTMAN
Solicitor General
J. NICOLE DEFEVER
Senior Assistant Attorney General
Attorneys for Plaintiff State of Oregon

MARK R. HERRING
Attorney General of Virginia
TOBY J. HEYTENS
Solicitor General, Counsel of Record
MICHELLE S. KALLEN
MARTINE E. CICCONI
Deputy Solicitors General
JESSICA M. SAMUELS
Assistant Solicitor General
ZACHARY R. GLUBIAK
Attorney
Attorneys for Plaintiff Commonwealth of Virginia

JOSHUA L. KAUL
Attorney General of Wisconsin
GABE JOHNSON-KARP
Assistant Attorney General
Attorneys for Plaintiff State of Wisconsin

STATEMENT OF RELATED CASES

The States are not aware of any related cases, as defined by Ninth Circuit Rule 28-2.6, that are currently pending in this Court, are not already consolidated here, and are not already identified in Defendants-Appellants' Brief.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of 9th Circuit Rule 28.1-1(c) and Federal Rules of Appellate Procedure 27(d) and 32(a), because it uses a proportionately spaced Times New Roman font, has a typeface of 14 points, and contains 15,609 words.

Dated: February 13, 2020

s/ Heather C. Leslie
Heather C. Leslie