No. 19-16102

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, et al.,
Plaintiffs-Appellees,
v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DEFENDANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING APPEAL

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CIRCUIT RULE 27-3 CERTIFICATE

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(2) Facts showing the existence and nature of the emergency

The district court enjoined defendants from completing two border barrier projects the Department of Defense (DoD) is constructing pursuant to its counter-drug support authority in 10 U.S.C. § 284 "using funds reprogrammed by DoD under Section 8005 of the Defense Appropriations Act, 2019." Order 55. As set forth more fully in the motion below, the district court's preliminary injunction imposes irreparable harm on the defendants and the general public because it prevents DoD from completing the two projects at issue, which are necessary to block identified drug-smuggling corridors identified by the Department of Homeland Security as among its highest priority projects. Unless stayed, the preliminary injunction threatens to permanently deprive

DoD of its ability to complete the two projects at issue because the injunction forbids DoD from spending approximately $424 million it has transferred for construction of the projects but has not yet obligated via construction contracts. Unless those funds are obligated by September 30, 2019, the money will no longer remain available to DoD. The complex and time-consuming process to obligate the remaining money requires DoD to take multiple steps before the September 30 deadline. The contracts contemplate that those steps will take 100 days; DoD thus expects to begin that process by late June. Any delays beyond that point increase the risk that the process cannot be completed in the limited time available, and that the projects will be compromised or, if there is further delay, that the unobligated funds will no longer be available. A decision by June 17, 2019, would allow the parties time to seek emergency relief, if necessary, from the Supreme Court.

(3) When and how counsel for the other parties were notified and served with the motion

Government counsel notified plaintiffs' counsel by email on June 3, 2019 of the defendants' intent to file this motion. Service will be effected by electronic service through the CM/ECF system.

With the consent of plaintiffs, government counsel propose the following schedule for briefing this emergency motion, to allow time for a decision by this Court by June 17, 2019: Response to be filed by June 10, 2019; reply to be filed by June 13,

2019. Any amicus briefs supporting plaintiffs should be filed by the same date as the response is due.

(4) Submissions to the district court

The defendants requested a stay from the district court on May 29, 2019, which the district court denied on May 30, 2019.

/s/ Anne Murphy
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Counsel for Defendants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Legislative Materials:

Other Authorities:

INTRODUCTION AND SUMMARY OF ARGUMENT

At the southern border, enormous quantities of illegal drugs, including deadly heroin and fentanyl, are flowing into our Nation. In response to this crisis, and pursuant to longstanding statutory authority (10 U.S.C. § 284), the Department of Homeland Security (DHS) asked the Department of Defense (DoD) to support its counter-narcotics operations by building barriers and roads and installing lights in two of the highest-priority drug-smuggling corridors between ports of entry. The district court enjoined DoD from providing DHS that critical support. Order 55 (ECF No. 144).

The district court's injunction is unprecedented and extraordinary. The court did not find that DoD lacked authority under Section 284 to support the counter-drug efforts of DHS. Rather, it rejected DoD's exercise of authority to transfer funds across internal budget accounts under Section 8005 of DoD's own appropriations statute. The court enjoined DoD at the behest of private parties who have no express cause of action to enforce this internal appropriations-transfer statute, and whose injury rests solely on the alleged effect that border fencing would have on their recreational or aesthetic interests in land within the drug-smuggling corridors. This Court should stay this remarkable injunction, which is fundamentally flawed on the merits and imposes serious irreparable harm on the government and the public.

Section 8005 governs DoD's internal budget and regulates the agency's relationship with Congress. It includes no cause of action for private enforcement. Even if there were an implied cause of action in equity for private enforcement of this internal

transfer provision for the Defense budget, the recreational and aesthetic injuries asserted by these plaintiffs fall well outside any zone of interests conceivably protected by Section 8005. The district court did not dispute any of this, and its holding that implied equitable claims are exempt from the zone-of-interests limitation is contrary to both binding precedent and the separation of powers.

In any event, Section 8005's requirements for transferring funds within DoD's accounts are plainly satisfied here. Section 8005 provides that a transfer for an "item" of funding must be "based on unforeseen military requirements" and cannot occur if "the item for which funds are requested has been denied by the Congress." The district court fundamentally misunderstood those requirements by focusing on whether the government could have foreseen the need for border barriers *generally*, and on whether Congress failed to fund some *other aspect* of the Executive Branch's request for funding to construct border barriers. The text and context of Section 8005 make clear that the statute refers to the *particular item* for which DoD seeks to transfer funds within its accounts after its budget has been finalized. Here, DHS requested DoD to provide counter-drug support; that February 2019 request was "unforeseen" when Congress authorized the Defense budget in September 2018, and Congress has never "denied" DoD funding for that item.

Finally, the court seriously mis-weighed the balance of harms. Plaintiffs' interests in hiking, birdwatching, and fishing—in two drug-smuggling corridors with deteriorating existing barriers—do not come close to outweighing the harm from

interfering with efforts to stop the flow of drugs entering the country. Moreover, the Executive Branch faces significant irreparable harm from the entry of this improper injunction. DoD's authority to spend the remaining $424 million of unobligated funds for the projects is at risk of lapsing unless DoD can take steps to obligate the funds before the end of the fiscal year on September 30, a complex process that must start well in advance of that deadline. And DoD will incur unrecoverable expenses of over $6 million monthly for suspending work on the projects if the injunction is not stayed. The wildly lopsided balance of equities here underscores the court's error in granting an injunction in the first place, and it confirms the need for this Court to stay the injunction pending appeal.

BACKGROUND

1. Congress has authorized DoD to "provide support for the counterdrug activities . . . of any other department or agency," if "such support is requested." 10 U.S.C. § 284(a). This support includes the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *Id.* § 284(a), (b)(7). Since the early 1990s, military personnel have helped to build and reinforce border barriers at the southwest border. *See* H.R. Rep. No. 103-200, at 330-31 (1993); *Gringo Pass, Inc. v. Kiewitt Sw. Co.*, No. 09-cv-251, 2012 WL 12905166, at *1 (D. Ariz. Jan. 11, 2012).

2. As the President recently explained, each year tens of thousands of pounds of illegal drugs are smuggled across the southern border, a "major entry point" for "illicit

narcotics." Declaring a National Emergency Concerning the Southern Border of the United States, Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019); Veto Message for H.R.J. Res. 46, 116th Cong. (2019); *see also Remarks by President Trump in Briefing on Drug Trafficking on the Southern Border* (Mar. 13, 2019), at https://go.usa.gov/xmFYX.

On February 25, 2019, DHS requested DoD's assistance in blocking "11 specific drug-smuggling corridors along portions of the southern border." Rapuano Decl. (ECF No. 64-8), (attached) ¶ 3. The request sought "the replacement of existing vehicle barriers or dilapidated pedestrian fencing with new pedestrian fencing, the construction" and improvement of patrol roads, and "the installation of lighting." *Id.* The Acting Secretary of Defense approved several projects, including the two at issue here: the Yuma Sector Project 1 and the El Paso Sector Project 1, the first and third highest priority counter-drug fencing projects for DHS due to the high rates of drug smuggling between ports of entry in those sectors. *Id.* ¶ 4; *see also id.*, Ex. A (DHS Request for Assistance), at 10 (setting forth sequencing of requested projects).

In the Yuma Sector, the United States Border Patrol had over 1,400 drug-related events between border crossings in Fiscal Year (FY) 2018, and seized over 8,000 pounds of marijuana, 78 pounds of cocaine, 102 pounds of heroin, 1,700 pounds of methamphetamine, and 6 pounds of fentanyl. DHS Request for Assistance, at 4; *see also* LeMaster Decl. (ECF No. 146-1) (attached) ¶ 5 (providing year-to-date FY2019 numbers). The Sinaloa Cartel, the most powerful drug cartel in the country, operates

in the area, and the Yuma Sector Project 1 area currently has ineffective vehicle barriers that must be replaced with new pedestrian fencing in order to counter the tactics of smugglers. DHS Request for Assistance, at 4 (explaining how "transnational criminal organizations" have "adapted their tactics" to evade existing barriers).

The El Paso Sector similarly experiences high rates of illegal drug activity. Border Patrol had over 700 drug-related events between border crossings in that sector, and seized over 15,000 pounds of marijuana, 342 pounds of cocaine, 40 pounds of heroin, and 200 pounds of methamphetamine. Rapuano Decl. 8; *see* LeMaster Decl. ¶ 4 (providing year-to-date FY2019 numbers). The El Paso Project will replace 46 miles of existing vehicle barriers that are no longer effective because of the changing tactics of transnational criminal organizations operating in the area. DHS Request for Assistance, at 9.

3. To complete these projects, DoD transferred $1 billion to its counter-narcotics support appropriation from excess requirements in its Army personnel accounts. Rapuano Decl.¶¶ 5-6. Section 8005 of the Department Of Defense and Labor, Health And Human Services, And Education Appropriations Act, 2019, And Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981, 2999 (Sept. 28, 2018) authorizes the Secretary of Defense to transfer up to $4 billion from certain DoD funds provided "[t]hat such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which

originally appropriated and in no case where the item for which funds are requested has been denied by the Congress."

4. Plaintiffs are environmental groups who allege that defendants failed to comply with the requirements of Section 8005 in transferring money to DoD's counter-drug support fund. Plaintiffs sought a preliminary injunction, alleging that the intended construction would interrupt "their use and enjoyment of the areas" where the infrastructure projects would be built. Pls.' Mot. for Prelim. Inj. (ECF No. 29) 5.

5. The district court partially granted the preliminary injunction. Although plaintiffs lacked any express cause of action to enforce Section 8005, the court reasoned it "ha[d] authority to review each of Plaintiffs' challenges to executive action" pursuant to the court's equitable power because "the Court has a duty to determine whether executive officers invoking statutory authority exceed their statutory powers." Order 28. The court did not determine whether plaintiffs "fall within the 'zone of interests'" protected by Section 8005 because it reasoned that the zone-of-interest requirement applies "to statutorily-created causes of action," not equitable ones. Order 29.

The district court held that Section 8005 did not permit DoD to transfer the funds between its accounts. Because Congress had appropriated only $1.375 billion to DHS for DHS to construct "primary pedestrian fencing . . . in the Rio Grande Valley Sector" of the Southern Border, Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 230, 133 Stat. 13, 28, the court reasoned Congress had thereby "denied fund[s]" to DoD to construct border infrastructure pursuant to DoD's drug interdiction support

fund in Section 284. The court also concluded that DoD's construction under Section 284 was not an "unforeseen military requirement" because, even though DHS had not requested DoD's support under Section 284 until February 2019, the Administration had made other non-DoD funding requests for a border wall generally since early 2018. The court thus held that the "requirement[]" was "foreseen by the government as a whole," "even if DoD did not realize that it would be asked to pay" for counter-drug support at the time DoD's budgeting process was completed. Order 35-36.

The district court found plaintiffs had demonstrated irreparable injury "to their members' aesthetic and recreational interests in" the two project areas. Order 49. The court invoked declarations asserting that "border barrier construction will harm [the members'] ability to recreate in and otherwise enjoy public land along the border," such as interfering with the "ability to fish" and "hiking and camping interests." Order 49-50. Although the court recognized that "the public has a 'weighty' interest 'in efficient administration of the immigration laws at the border,'" it ignored the critical interest in enforcing the *drug* laws, and regardless, it found the balance of equities and public interest favored a preliminary injunction simply because "[p]laintiffs' injuries . . . are not speculative, and will be irreparable in the absence of an injunction." Order 54. The district court denied a stay pending appeal. Order Den. Stay 2 (ECF No. 152).

ARGUMENT

In deciding whether to stay an injunction pending appeal, this Court considers four factors: (1) the likelihood of success on the merits; (2) whether the applicant will

suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). This Court reviews the grant of a preliminary injunction for abuse of discretion, but legal conclusions are reviewed de novo. *Aircraft Serv. Int'l, Inc. v. International Bhd. of Teamsters*, 779 F.3d 1069, 1072 (9th Cir. 2015) (en banc). To obtain a preliminary injunction, plaintiffs were required to establish that they are "likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Here, a stay is manifestly warranted. The government has much more than a mere likelihood of success on the merits given the fundamental flaws in the district court's legal analysis. And the lopsided balance of harms strongly tilts in the government's favor, underscoring the court's error in granting an injunction and confirming the need for a stay. Absent a stay, even if the injunction is ultimately vacated, the government will suffer substantial and irreparable injury, while plaintiffs will suffer little, if any, cognizable harm.

I. The Government Has a Strong Likelihood of Prevailing on Appeal

A. Plaintiffs May Not Sue to Enforce the Requirements for Internal Transfers of Funds Under DoD's Appropriations Statute

The government is likely to succeed in demonstrating that plaintiffs cannot sue to enforce the limitations in Section 8005, a provision in DoD's annual appropriations

statute that governs DoD's internal transfer of funds as part of Congress's regulation of DoD's budget. Section 8005 contains no express cause of action, and plaintiffs do not attempt to bring their suit under the Administrative Procedure Act (APA) (nor could they, because DoD's mere transfer of funds is not reviewable final agency action). Instead, the district court held that plaintiffs can enforce Section 8005 through an implied cause of action in equity. Order 30 n.14 (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015)).

Even if such an action were available, these plaintiffs fall outside the zone of interests protected by Section 8005 and thus cannot sue to enforce it. The "zone of interests" requirement limits the plaintiffs who "may invoke [a] cause of action" to enforce a particular statutory provision. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-30 (2014). The requirement recognizes that Congress does not necessarily intend to allow any person "who might technically be injured in an Article III sense" to sue based on a federal statutory violation. *Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 178 (2011). "Congress is presumed to 'legislat[e] against the background of' the zone-of-interests limitation," which excludes putative plaintiffs whose interests do not "fall within the zone of interests protected by the law invoked." *Lexmark*, 572 U.S. at 129 (alteration in original) (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)).

Although the zone-of-interest test under the APA's "generous review provisions" bars suit only where a plaintiff's interests are "marginally related to or inconsistent with" the statute it seeks to enforce, *Lexmark*, 572 U.S. at 130, "a heightened standard for the zone-of-interests test might apply in non-APA cases," *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1121 (9th Cir. 2015). The Supreme Court has suggested that, where a plaintiff seeks to bring an implied cause of action in equity to enforce a statutory or constitutional provision, the zone-of-interests test requires that the provision be intended for the "*especial* benefit" of protecting the plaintiff at issue. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396, 400 & n. 16 (1987).

Here, under any standard, plaintiffs are not within the zone of interests of Section 8005. That statute regulates the relationship between Congress and the Executive by limiting when DoD may transfer appropriated funds between internal accounts. Nothing in Section 8005 suggests that Congress even arguably intended to allow persons alleging aesthetic or recreational harms to sue to enforce Section 8005's terms, let alone that it specifically intended to protect such persons.

Indeed, there is no indication that Congress intended to authorize judicial enforcement of Section 8005 at all, as opposed to leaving any potential violations to its own oversight. Congress required DoD to provide notice to Congress when it exercises its transfer authority, *see* Pub. L. No. 115-245, § 8005, 132 Stat. at 2999, and Congress intended Section 8005 to "tighten *congressional* control of the re-programming process," DoD Appropriation Bill, 1974, H. Rep. No. 93-662, at 16-17 (1973) (emphasis added).

To the extent Congress disagrees with DoD's transfer decisions, it has the necessary tools to address the problem, but Congress as a whole has failed to respond to DoD's notification through the appropriations process or otherwise.

The district court did not hold that plaintiffs were within the zone of interests of Section 8005. Rather, the court held that "the zone-of-interests test is inapposite" where plaintiffs seek "equitable relief" against defendants "for exceeding [their] statutory authority." Order 30; *see also id.* ("It would not make sense to demand that [p]laintiffs . . . establish that Congress contemplated that the statutes allegedly violated would protect [p]laintiffs' interests."). To the contrary, it makes no sense to hold that the zone-of-interests requirement applies where Congress has provided a cause of action, but that, where Congress has not expressly authorized suit *at all*, any injured persons can sue, *even if* their interests are entirely unrelated to the interests protected by the statute. Indeed, that holding violates binding precedent and fundamental separation-of-powers principles.

The zone-of-interests requirement is a general presumption about Congress's intended limits on the scope of *all* causes of action, not just express causes of action under the APA or other statutes. *See Lexmark*, 572 U.S. at 129 (the zone-of-interests test "is a 'requirement of general application'" (quoting *Bennett*, 520 U.S. at 163)). *Lexmark*'s reference to the requirement as applying to all "statutory" or "statutorily created" causes of action (*see id.*) encompasses equitable causes of action, which are inferred from Congress's statutory grant of equity jurisdiction and which enforce

statutes enacted against the backdrop of the zone-of-interests limitation, *see Armstrong*, 135 S. Ct. at 1384; *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). There is no basis to conclude that Congress intended to allow courts not only to infer an equitable cause of action but to do so for individuals outside the zone of interests of the statute being enforced, and such a rule would lead to "absurd consequences." *Thompson*, 562 U.S. at 176-77 (identifying hypothetical persons with Article III injuries from statutory violations who plainly would be improper plaintiffs to enforce the statute); *see also Armstrong*, 135 S. Ct. at 1385 ("The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory [and constitutional] limitations.").

The Supreme Court and this Court have made clear that the zone-of-interests requirement applies to implied equitable causes of action under the Constitution. *See, e.g.*, *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) ("[T]he Court has required that the plaintiff's complaint fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (quotation omitted)); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320-21 n.3 (1977) (applying zone-of-interests requirement to plaintiffs seeking to enforce the dormant Commerce Clause); *Individuals for Responsible Gov't, Inc. v. Washoe County*, 110 F.3d 699, 703 (9th Cir. 1997) ("[T]he zone of interest test also governs claims under the Constitution in general." (quotation marks omitted)).

Fundamental separation-of-powers principles underscore why the zone-of-interests requirement applies to implied equitable claims. "[I]t is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action," because "the Legislature is in the better position" to weigh the competing considerations involved. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856-57 (2017). And while courts may nevertheless wield "traditional equitable powers," *id.* at 1856, "Congress is in a much better position than" courts "to design the appropriate remedy" when "depart[ing] from" "traditional equitable" practice, *Grupo Mexicano*, 527 U.S. at 322. Accordingly, courts' limited authority to infer equitable claims cannot extend beyond the traditional presumption that Congress does not intend to allow plaintiffs outside the zone of interests of a statute to sue to enforce it. *See Lexmark*, 572 U.S. at 129.

In sum, the district court's zone-of-interests holding cannot be reconciled with law or logic. The government is likely to prevail on appeal for that reason alone.

B. Section 8005 Authorized DoD's Transfer of Funds

Even if plaintiffs could sue to enforce Section 8005, the government is likely to succeed in demonstrating that Section 8005 authorized DoD's transfer of funds. Federal agencies are charged with administering massive and complex programs in evolving circumstances, and thus "have a legitimate need for a certain amount of flexibility to deviate from their budget estimates" in order to make funds available for agency priorities and changed circumstances. Office of General Counsel, U.S. GAO,

Principles of Federal Appropriations Law, vol. 1, ch. 2, part B at 2-38 (4th ed. 2016 rev.), https://go.usa.gov/xmFRs. One way Congress provides the necessary flexibility is to grant agencies the authority to allocate funds to a different program or purpose than originally budgeted, as it did for DoD in Section 8005.

When Congress appropriated funds to DoD for FY 2019, it expressly authorized the Secretary of Defense to transfer, "[u]pon determination . . . that such action is necessary in the national interest," up to $4 billion from certain "appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes . . . as the appropriation or fund to which transferred." Pub. L. No. 115-245, § 8005, 132 Stat. at 2999. Congress provided that the transferred funds must be dedicated to "higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." *Id.*

The district court concluded that DoD had transferred funds for an "item" that was previously "denied" by Congress and that supported a military requirement that was not "unforeseen." *See* Order 33-35. The court's rationale was that, at the time of DoD's appropriation, the Executive Branch's *general desire* for border-wall funding was foreseen and Congress provided *DHS* only a limited amount of funding. *See id.* But that reasoning considers the appropriations process at far too high a level of generality. Section 8005 is a provision in the *DoD* appropriations statute, which grants DoD limited authorization to make internal transfers to fund *particular items* even after the

appropriations statute is enacted. Accordingly, the relevant question under Section 8005 is whether DoD's specific need in February 2019 to provide counter-drug support to DHS under Section 284 was "foreseen" at the time of the September 2018 appropriation, and whether Congress ever "denied" DoD funds to provide counter-drug support. The answer is plainly "no."

Under Section 8005, an "item for which funds are requested" is a particular budget item requiring additional funding beyond the amount in the Defense appropriation for the fiscal year. Congress first imposed the restriction on DoD's transfer authority for "denied" items in 1974, to ensure that DoD would not transfer funds for budget items that "ha[d] been *specifically deleted* in the legislative process." H.R. Rep. No. 93-662, at 16 (emphasis added). DoD during the budgeting process makes funding requests to Congress for budget line items, and Congress approves or disapproves these requests. *See, e.g.*, H. Rep. No. 115-952, at 452 (Sept. 13, 2018). At no point in the budgeting process here, however, did Congress deny a DoD funding request for construction in these two project areas under its counter-narcotics support line. Congress's decisions with respect to DHS's more general request for border-wall funding is irrelevant.

Similarly, the transfer of funds here is for an "unforeseen military requirement[]." An expenditure is "unforeseen" under Section 8005 if DoD was not aware of the specific need when it made its budgeting requests and Congress finalized the Defense appropriation. Congress enacted and the President signed DoD's FY 2019

appropriation on September 28, 2018. Pub. L. No. 115-245, 132 Stat. 2981. Not until February 2019 did DHS request DoD's assistance in blocking specific drug-smuggling corridors. *See* DHS Request for Assistance, at 1-2; Rapuano Decl. ¶ 3. DoD may undertake counter-drug support pursuant to Section 284 only upon receiving a request by another agency. The "need to provide support" to DHS for those proposed projects thus was "not known at the time of [DoD's] FY 2019 budget request" in 2018. *See* Rapuano Decl., Ex. C, at 1-2 (Memorandum from Acting Defense Secretary Patrick M. Shanahan). It is irrelevant that DHS's broader request for border-wall funding was foreseen at the time, especially since DHS's own appropriation was not finalized until February 2019. Pub. L. No. 116-6, 133 Stat. at 13.

The district court expressed concern that "*every* request for Section 284 support would be for an 'unforeseen military requirement.'" Order 36. But that misunderstands the budget process. An agency's request to DoD for counter-drug support will be "foreseen" for a given year's defense budget when it is received by DoD in time to include in the submission to Congress. Some such support requests will recur or will continue beyond a single fiscal year, and can therefore be included in the following year's budget. Here, however, at the time DoD's budget was finalized DoD could not have anticipated that DHS would request specific support for roads, fences, and lighting in these high-traffic drug corridors.

The district court's fundamental misunderstanding of the federal appropriations process is highlighted by its remarkable suggestion that the government's interpretation

of Section 8005 "likely would violate the Constitution's separation of powers principles" by providing "unbounded authorization for Defendants to rewrite the federal budget." Order 37. Congress has long provided agencies with "lump-sum appropriation[s]," and agencies' delegated authority over "[t]he allocation of funds" is not only constitutional, but "committed to agency discretion by law" and "accordingly unreviewable." *Lincoln v. Vigil*, 508 U.S. 182, 192-93 (1993). Given that Congress thus could have granted DoD unfettered discretion over its total budget, Section 8005's limited grant of transfer authority within DoD's reticulated budget, however broadly construed, poses no constitutional concerns.

The real separation-of-powers concern is the district court's intrusion into the budgeting process. As discussed in the zone-of-interests context, the budgeting process is between the Legislative and Executive Branches—not the judiciary. Congress had (and retains) the political tools available to ensure that DoD could not transfer funds to complete Section 284 construction. Nevertheless, even when enacting DHS's appropriation as late as February 2019, Congress explicitly recognized agencies' continuing authority to make changes in their appropriations "pursuant to the reprogramming or transfer provisions of this or any other appropriations Act." 2019 Consolidated Appropriations Act, Pub. L. No. 116-6, § 739, 133 Stat. at 197.

C. The District Court Abused its Discretion in Finding the Balance of Harms and Public Interest Justified an Injunction

The government also has a strong likelihood of demonstrating that the district court abused its discretion in failing to properly balance the equities and consider the public interest. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24. "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* (quotation marks omitted).

In *Winter*, the Supreme Court reversed a preliminary injunction prohibiting the Navy from using sonar technology in training exercises at sea, where plaintiffs claimed the sonar would injure them because they "observ[ed]" and "photograph[ed]" marine mammals in the area and "conduct[ed] scientific research." 555 U.S. at 13-14, 25-26. In reversing, the Supreme Court explained that "the District Court and the Ninth Circuit significantly understated the burden the preliminary injunction would impose on the Navy's ability to conduct realistic training exercises, and the injunction's consequent adverse impact on the public interest in national defense," which "plainly outweighed" the harms asserted by the plaintiffs. *Id.* at 24, 33. Here, the balance of equities likewise plainly bars a preliminary injunction.

As discussed, DHS identified the two barrier projects at issue because of the high rates of drug smuggling between ports of entry in the El Paso and Yuma Border Patrol Sectors. The record includes ample evidence of the problem of drug smuggling in these

corridors, and explains that existing vehicle barriers in the area have proved insufficient as transnational drug organizations have changed their tactics. *Supra* at 4-5. The district court's injunction frustrates the government's ability to stop the flow of drugs across the border and harms the public's interest. It is well established that the government has "compelling interests in safety and in the integrity of our borders." *National Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 (1989); *accord United States v. Guzman-Padilla*, 573 F.3d 865, 889 (9th Cir. 2009) (acknowledging the government's "strong interest[]" in "interdicting the flow of drugs" entering the country). As in *Winter*, a "proper consideration of these factors alone requires denial of the requested injunctive relief." 555 U.S. at 23.

Moreover, the harms to the government and the public interest are irreparable. Even if the government ultimately succeeds in this appeal, the passage of time will not only delay the construction of the drug-trafficking barriers; it also will threaten both to deprive DoD of its lawful authority to spend the funds at issue and to subject DoD to unrecoverable contract costs for the suspension of work. *Infra* Part II.

These grave harms "plainly outweigh[]" plaintiffs' aesthetic and recreational injuries, just as the harms from prohibiting the Navy's sonar testing did when balanced against the plaintiffs' observational and scientific interests in *Winter*, 555 U.S. at 26. Indeed, plaintiffs' interests here are even less substantial than those in *Winter*. Plaintiffs allege the construction at the border will harm their "ability to fish," "hik[e]," and "camp[]." Order 49-50. But the vast majority of construction in the project areas will

occur on a 60-foot strip of land that parallels the international border on areas that are already "heavily disturbed" and marked by barriers. *See* Enriquez Decl. (ECF No. 64-9) (attached) ¶ 63. The projects consist of replacing existing dilapidated vehicle barriers and pedestrian fencing in an area that "function[s] primarily as a law-enforcement zone," and the proposed construction projects will not make any change to the existing land use within or near the project area. *Id.* ¶¶ 63-64.

The district court here failed to meaningfully weigh the equities. It acknowledged in passing that "the public has a 'weighty' interest 'in efficient administration of the immigration laws at the border.'" Order 54 (quoting *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018)). But that entirely ignores the critical interest in drug interdiction. Moreover, while purporting not to "minimize" any law-enforcement interest, the court held that the equities supported the injunction based on nothing more than the public's generalized interest "in ensuring that statutes . . . are not imperiled by executive fiat" and the plaintiffs' modest recreational and aesthetic injuries, simply because it found those injuries "are not speculative" and "will be irreparable." *Id.* That analysis contains no balancing at all, and it is irreconcilable with the reasoning and result of *Winter*.

Nor does *East Bay* support the injunction. It involved actions denying aliens the right to seek asylum if they did not enter through a port of entry, harming the asylum seekers themselves as well as the plaintiff organizations that received funding for serving them. 909 F.3d at 1237. Especially in light of *Winter*, the harms at issue in *East*

Bay are nothing like plaintiffs' asserted injuries to "their ability to recreate in and otherwise enjoy public land" in a drug-trafficking corridor with existing border barriers. Order 49.

II. The Equitable Balance of Harms Supports a Stay Pending Appeal

As demonstrated, the district court's injunction interferes with the government's attempt to address the crisis on the border from the flow of narcotics in these two drug-trafficking corridors. A delay in the construction of border fencing pending appeal will create irreparable harm with respect to the deadly drugs that flow into this country in the interim. And DoD faces even more concrete irreparable injury if the injunction is not stayed pending appeal.

Most importantly, the injunction threatens to permanently deprive DoD of its authorization to use the funds at issue to complete the El Paso and Yuma projects, because the funding will likely lapse during the appeal's pendency. The injunction forbids DoD from spending approximately $424 million it has transferred for these projects but has not yet obligated via construction contracts. McFadden Decl. (ECF No. 146-2) (attached) ¶¶ 6-7. Should the government ultimately prevail on the merits, DoD would be entitled to spend those funds on Section 284 construction. But unless those funds are obligated by September 30, 2019, this money will no longer remain available to DoD. *Id.* ¶ 7; *see City of Houston v. Department of Hous. & Urban Dev.*, 24 F.3d 1421, 1424, 1426-27 (D.C. Cir. 1994) (recognizing the "well-settled matter of constitutional law that when an appropriation has lapsed . . . federal courts cannot order

the expenditure of funds that were covered by that appropriation"). And the complex and time-consuming process to obligate the remaining money requires DoD to take multiple steps before the September 30 deadline. McFadden Decl. ¶¶ 8-10. Thus, should the district court's preliminary injunction continue into the coming months, the decision below will effectively operate as an improper final judgment. *Id.* ¶ 10.

In addition, DoD is incurring unrecoverable fees and penalties of hundreds of thousands of dollars to its contractors for each day that construction is suspended. That money cannot be spent for productive purposes, and will result in unsustainable costs for the government. McFadden Decl. ¶¶ 14–15 (estimating costs of $195,000 per day for the El Paso Project 1, and $20,000 per day for the Yuma Project 1).

The government and the public should not be forced to suffer these harms during the pendency of the appeal, especially given the weakness of plaintiffs' alleged injuries and the strength of the government's merits case.

CONCLUSION

The government respectfully requests that this Court enter a stay pending appeal of the district court's preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitation of Fed. R. App. P. 27 and Ninth Circuit Rule 32-3 because it contains 5,578 words. This Motion complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

/s/ Anne Murphy
Anne Murphy

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 19-cv-00892-HSG

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Re: Dkt. No. 29

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

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

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

Mexico border.

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

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

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

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I. FACTUAL BACKGROUND

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

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

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

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

The President and those in his administration stated on several occasions before, during, and after the shutdown that, although Congress should make the requisite funds available for border barrier construction, the President was willing to use a national emergency declaration and other reprogramming mechanisms as funding backstops. For example, during a December 11, 2018 meeting with congressional representatives, the President stated that "if we don't get what we want [for border barrier construction funding], one way or the other – whether it's through [Congress], through a military, through anything you want to call [sic] – I will shut down the government. Absolutely." States RJN Ex. 21. The White House initially requested only $1.6 billion for border barrier construction for the fiscal year 2019 budget, for sixty-five miles of border barrier construction "in south Texas." *See* Supplemental Request for Judicial Notice, *California v. Trump*, No. 4:19-cv-00872-HSG (N.D. Cal. Apr. 8, 2019), ECF No. 112-1, Ex. 51, at 58. However, the White House increased its request on January 6, 2019, when the Acting Director of the Office of Management and Budget transmitted a letter to the U.S. Senate Committee on Appropriations, "request[ing] $5.7 billion for construction of a steel barrier for the Southwest border," and explaining that the request "would fund construction of a total of approximately 234 miles of new physical barrier." *See* Dkt. No. 36 ("Citizen Groups RJN") Ex. A, at 1.[3] The increased request specified that "[a]ppropriations bills for fiscal year (FY) 2019 that have already been considered by the current and previous Congresses are inadequate to fully address these critical issues," including the need for border barrier construction funds. *Id.* Days later, the President explained: "If we declare a national emergency, we have a tremendous amount of funds

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

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

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

> The President is going to build a wall. You saw what the Vice-President said there, and that's our attitude at this point, which is: We'll take as much money as you can give us, and then we'll go off and find the money someplace else, legally, in order to secure that southern barrier. But this is going to get built, with or without Congress.

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

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

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

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

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

> None of the funds made 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.

Id. § 739, 133 Stat. at 197.

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

The proclamation itself provided:

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

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

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

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

- "Up to $3.6 billion reallocated from Department of Defense military construction projects under the President's declaration of a national emergency" (10 U.S.C. § 2808) ("Section 2808").

Id.

In declaring a national emergency, the President invoked his authority under the National Emergencies Act ("NEA"), Pub. L. 94–412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–1651). This appears to have been the first time in American history that a President declared a national emergency to secure funding previously withheld by Congress. As another historical first, Congress passed a joint resolution to terminate the President's declaration of a national emergency. *See* H.R.J. Res. 46, 116th Cong. (2019). The President vetoed Congress's joint resolution on March 15, 2019.[4] *See Veto Message to the House of Representatives for H.J. Res. 46*, The White House (Mar. 15, 2019), https://www.whitehouse.gov/briefings-statements/veto-message-house-representatives-h-j-res-46/. The House voted 248-181 to override the President's veto, which fell short of the required two-thirds majority. 165 Cong. Rec. 2,799, 2,814–15 (2019).

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

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

[4] As described below, the Congress that passed the NEA did not contemplate the possibility of a presidential veto.

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

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

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

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

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

On April 24, 2019, Defendant McAleenan, the Acting Secretary of Homeland Security, published in the Federal Register notices of determination concerning the "construction of barriers and roads in the vicinity of the international land border in Luna County, New Mexico and Doña Ana County, New Mexico," and "in Yuma County, Arizona"—in other words, areas encompassed by the El Paso Sector and Yuma Sector Projects. *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 17,185, 17,186 (Apr. 24, 2019); Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 84 Fed. Reg. 17,187 (Apr. 24, 2019). The Acting Secretary invoked his authority under Section 102(c) of the

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")[6] "to waive all legal requirements that [he], in [his] sole discretion, determine[d] necessary to ensure the expeditious construction of barriers and roads authorized by section 102 of IIRIRA." *See, e.g.*, 84 Fed. Reg. at 17,186. The waiver asserts that "areas in the vicinity of the United States border, located in [these regions], are areas of high illegal entry," for which "[t]here is presently an acute and immediate need to construct physical barriers and roads." *See id.* The designated "Project Areas" encompass all portions of New Mexico and Arizona for which Defendants presently intend to construct physical barriers. Finding this action "necessary," the Acting Secretary invoked Section 102(c) to waive "in their entirety" numerous federal laws—including the National Environmental Policy Act ("NEPA"), Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4370b)—"with respect to the construction of physical barriers and roads . . . in the project area[s]." *See id.*

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

The next day, Defendant Shanahan authorized an additional $1.5 billion in funding for border barrier construction, in further response to DHS's February 25, 2019 request for support

[6] Pub. L. No. 104–208, div. C, 110 Stat. 3009, 3009–554 (Sept. 30, 1996), as amended by the REAL ID Act of 2005, Pub. L. No. 109–13, div. B, 119 Stat. 231, 302, 306 (May 11, 2005), as amended by the Secure Fence Act of 2006, Pub. L. No. 109–367, § 3, 120 Stat. 2638, 2638–39 (Oct. 26, 2006), as amended by the Department of Homeland Security Appropriations Act, 2008, Pub. L. No. 110–161, div. E, tit. V, § 564, 121 Stat. 1844, 2090–91 (Dec. 26, 2007).

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

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

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

II. STATUTORY FRAMEWORK

A. The National Emergencies Act

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

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

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

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

> Mr. Conyers. . . . Mr. Chairman, my final participation in this debate revolves around the reason of this question: What happens if the President of the United States vetoes the congressional termination of the emergency power? Is that contemplatable within the purview of this legislation?
>
> . . .
>
> Mr. Flowers. Mr. Chairman, on the advice of counsel we have researched that thoroughly. A concurrent resolution would not require Presidential signature of acceptance. It would be an impossibility that it would be vetoed.
>
> Mr. Conyers. So there would be no way that the President could interfere with the Congress?
>
> Mr. Flowers. The gentleman is correct.

Id.

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

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

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

B. Section 284

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

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

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

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

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

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

C. Section 8005

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

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

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

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

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

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

D. Section 2808

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

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

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

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

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

E. Treasury Forfeiture Fund (Section 9705)

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

In late December 2018[11]—during the government shutdown and just before the

[11] The exact date of the request is unclear due to Defendants' inconsistent representations. *Compare* Flossman Second Decl. ¶ 9 (indicating the request was made on December 26, 2018),

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

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

F. National Environmental Policy Act

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

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

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

> be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."

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

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

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

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III. LEGAL STANDARD

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

IV. ANALYSIS

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

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

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

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

A. Article III Standing

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

1. Plaintiffs Have Standing for Their 8005 Claim.

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

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

[13] Defendants also argue Plaintiffs lack standing because they fall outside Section 8005's "zone of interests." *See* Opp. at 18–19. Because the Court finds Defendants' "zone of interests" challenge derivative of Defendants' misunderstanding of *ultra vires* review, the Court addresses those matters together, below. *See infra* Section IV.B.1.

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

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

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

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

2. Plaintiffs Have Standing for Their Section 2808 Claim.

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

> The Acting Secretary of Defense has not yet decided to undertake or authorize any barrier construction projects under section 2808. To inform the Acting Secretary's decision, on March 20, 2019, the Secretary of Homeland Security provided a prioritized list of proposed border-barrier-construction projects that DHS assesses would improve the efficiency and effectiveness of the armed forces supporting OHS in securing the southern border. On April 11, 2019, as a follow-up to the Chairman's preliminary assessment of February 10, 2019, the Acting Secretary instructed the Chairman of the Joint Chiefs of Staff to provide, by May 10, 2019, a detailed assessment of whether and how specific military construction projects could support the use of the armed forces in addressing the national emergency at the southern border.
>
> Also on April 11, 2019, the Acting Secretary instructed the DoD Comptroller, in consultation with the Secretaries of the military departments, the Chairman of the Joint Chiefs of Staff, the Under Secretary of Defense for Acquisition and Sustainment, the Under Secretary of Defense for Policy, and the heads of any other relevant DoD components to identify, by May 10, 2019, existing military construction projects of sufficient value to provide up to $3.6 billion of funding for his consideration.

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

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

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

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

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

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

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

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

1. Likelihood of Success on the Merits

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

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

"Federal statutes reinforce Congress's control over appropriated funds," and under federal law "appropriated funds may be applied only 'to the objects for which the appropriations were

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

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

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

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

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

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

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

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

Due to their mistaken framing of the scope of *ultra vires* review, Defendants also incorrectly posit that Plaintiffs must establish that they fall within the "zone of interests" of a particular statute to challenge actions taken by the government under that statute. *See* Opp. at 14–15. The "zone of interests" test, however, only relates to statutorily-created causes of action. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (explaining that "[t]he modern 'zone of interests' formulation . . . . applies to all statutorily created causes of action"). The test has no application in an *ultra vires* challenge, which operates outside of the

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

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

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

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

a. Sections 284 and 8005

At the President's direction, Defendants intend to divert $2.5 billion, $1 billion of which is the subject of the pending motion, to the DoD's drug interdiction fund for border barrier construction.[15] To do so, Defendants rely on Section 284(b)(7), which authorizes the Secretary of Defense to support other federal agencies for the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *See The Funds Available to Address the National Emergency at Our Border*, The White House, https://www.whitehouse.gov/briefings-statements/funds-available-address-national-emergency-border (Feb. 26, 2019). To satisfy the President's directive, Defendants intend to rely on their reprogramming authority under Section 8005, and plan to "augment" the drug interdiction fund with the entire $2.5 billion in funds that DoD will then use for the construction. *Id.*

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

[15] The Court here only considers the lawfulness of Defendants' March 25, 2019 invocation of Section 8005 to reprogram $1 billion, given the parties' agreement that this order need not address Defendants' recently announced intent to use Sections 8005, 9002, and 284 to fund border barrier construction in the El Centro Sector and Tucson Sector Projects. The parties reached this agreement after counsel for Defendants represented at the hearing on this motion that "no construction will start [with those funds] until at least 45 days from" the May 17, 2019 hearing date. *See* Dkt. No. 138 at 55:16–17. The parties confirmed that they would agree to a schedule to supplement the record, to permit the Court to review in a timely manner the lawfulness of the new reprogramming, under the framework set forth in this order. *Id.* at 59:14–60:2. The parties have since agreed on a schedule. *See* Dkt. No. 142.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in mouseholes").

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

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

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

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

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

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

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

b. Section 2808

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

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

[19] Defendants have now acknowledged that all of the money they plan to spend on border barrier construction under Section 284 is money transferred into that account under Section 8005. *See* Dkt. No. 131 at 4. Given this acknowledgment, and the Court's finding that Plaintiffs are likely to show that the Section 8005 reprogramming is unlawful, the Court need not at this stage decide whether Defendants would have been permitted to use for border barrier construction any remaining funds that Congress appropriated to the Section 284 account for fiscal year 2019. The Court notes that the House confirmed in its own lawsuit that it "does not challenge the expenditure of any remaining appropriated funds under section 284 on the construction of a border wall." United States House of Representatives' Application for a Preliminary Injunction at 30, *U.S. House of Representatives v. Mnuchin*, No. 1:19-cv-00969 (TNM) (D.D.C. Apr. 23, 2019), ECF No. 17; *see also* House Br. at 17 (requesting preliminary injunction "prohibiting defendants from transferring and spending funds in excess of what Congress appropriated for counter-narcotics support under 10 U.S.C. § 284").

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

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

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

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

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

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

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

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

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

The Court also finds relevant the *ejusdem generis* canon of statutory interpretation, which counsels that "[w]here 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." *Wash. State Dept. of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001)). At the hearing on this motion, Defendants argued that the term "other activity" "capture[s] everything under the jurisdiction of the secretary of a military department." Dkt. No. 138 at 92:9–13. The Court disagrees. Had 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. *See Yates v. United States*, 135 S. Ct. 1074, 1087 (2015) ("Had Congress intended 'tangible object' in § 1519 to be interpreted so generically as to capture physical objects as dissimilar as documents and fish, Congress would have had no reason to refer specifically to 'record' or 'document.' The Government's unbounded reading of 'tangible object' would render those words misleading surplusage."); *CSX Transp., Inc. v. Ala. Dept. of Revenue*, 562 U.S. 277, 295 ("We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless.").

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

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

c. NEPA

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

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

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

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

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

2. Likelihood of Irreparable Injury

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

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

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

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

a. Sections 8005 and 284

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

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

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

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

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

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

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b. Section 2808

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

To start, to the extent Plaintiffs rely on *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058–59 (9th Cir. 2009), for the principle that a constitutional violation alone suffices to show irreparable harm, the Court finds that principle unavailing. *See* Mot. at 25. Even under that theory of irreparable harm, Plaintiffs must demonstrate some likely irreparable harm in the absence of a preliminary injunction barring the challenged action, and not simply a constitutional violation. *See id.* (noting that the constitutional violation must be "coupled with the damages incurred," which in that case involved "a good deal of economic harm in the interim").

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

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

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

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

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

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

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

3. Balance of Equities and Public Interest

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

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

V. CONCLUSION

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

[22] The Court observes that, although Congress appropriated $1.571 billion for physical barriers and associated technology along the Southwest border for fiscal year 2018, counsel for the House has represented to the Court that the Administration has stated as recently as April 30, 2019 that CBP represents it has only constructed 1.7 miles of fencing with that funding. *See* Dkt. No. 139; *see also* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, div. F, tit. II, § 230(a) 132 Stat. 348 (2018). This representation tends to undermine Defendants' claim that irreparable harm will result if the funds at issue on this motion are not deployed immediately.

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

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

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

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

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

IT IS SO ORDERED.

Dated: 5/24/2019

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California

Exhibit 8

DECLARATION OF KENNETH P. RAPUANO

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

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

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

10 U.S.C. § 284

3. On February 25, 2019, the Department of Homeland Security (DHS) submitted a request to DoD for assistance in blocking up to 11 specific drug-smuggling corridors along certain portions of the southern border of the United States, pursuant to 10 U.S.C. § 284. The request sought assistance through the replacement of existing vehicle barricades or dilapidated pedestrian fencing with new pedestrian fencing, the construction of new patrol roads and the improvement of existing patrol roads, and the installation of lighting on Federal land. *See* Exhibit A.

4. On March 25, 2019, the Acting Secretary of Defense approved three projects to block drug-smuggling corridors based on this February 25, 2019, DHS request. *See* Exhibit B. Two projects are located in Arizona, and one project is located in New Mexico. The approved projects were identified as: Yuma Sector Project 1 (maximum of 5 miles/18-foot fence); Yuma Sector Project 2 (maximum of 6 miles/18-foot fence); and El Paso Sector Project 1 (maximum of 46 miles/18-foot fence).

5. Also on March 25, 2019, the Acting Secretary of Defense decided to use DoD's general transfer authority under section 8005 of the Department of Defense Appropriations Act, 2019, and section 1001 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 to transfer funds between DoD appropriations to fund the approved projects. Specifically, he determined that the above projects he approved for DHS will be funded through a transfer of $1 billion to the counter-narcotics support line of the Drug Interdiction and Counter-Drug Activities, Defense, account from fiscal year 2019 Army military personnel accounts that were excess to current military personnel requirements. *See* Exhibit C. Army personnel funds were available for transfer because expenditures for service member pay and compensation, retirement benefits, food, and moving expenses through the end of fiscal year 2019 will be lower than originally budgeted. Congress was notified of this transfer on March 25, 2019. *See* Exhibit D.

6. On March 26, 2019, the designated $1 billion was transferred from the Drug Interdiction and Counter-Drug Activities, Defense, account to the Operation and Maintenance, Army, account for use by the U.S. Army Corps of Engineers to undertake fence and road construction and lighting installation for the approved projects. Of the $1 billion, $2.5 million is for U.S. Army Corps of Engineers planning and surveys of the areas where border barriers will be constructed under section 284.

7. On March 29, 2019, DHS requested that DoD modify certain technical specifications for the three projects approved on March 25, 2019. Specifically, DHS requested that all fencing constructed by DoD include a 5-foot anti-climb steel plate and that DoD construct 30-foot fencing for Yuma Sector Project 1 and El Paso Sector Project 1. The fence for Yuma Sector Project 2 will remain 18 feet. *See* Exhibit E. The Acting Secretary of Defense approved this modification on April 9, 2019. *See* Exhibit F.

8. On April 9, 2019, DoD announced that the U.S. Army Corps of Engineers had awarded contracts to SLSCO Ltd. of Galveston, Texas ($789 million) to perform work in support of El Paso Sector Project 1, and to Barnard Construction Co. Inc. of Bozeman, Montana ($187 million), to perform work to support the Yuma Sector projects.

9. On April 12, 2019, DHS determined that it has sufficient appropriated funding to address approximately four (4) of the six (6) miles identified for Yuma Project 2. Based on the availability of this appropriated funding, DHS modified its request by removing 4 miles from the Yuma Project 2 requirements for DoD. *See* Exhibit G. On April 18, 2019, I approved this modification, which permitted funding additional miles of 30-foot bollard fencing, roads, and lighting in the El Paso Sector 1 project. *See* Exhibit H.

10. The U.S. Army Corps of Engineers currently plans that construction of the approved section 284 projects will begin no earlier than May 25, 2019.

11. As part of the DoD Comptroller's review of available funding, additional funds may be identified that are excess to need or are otherwise appropriate to use for additional section 284 projects. In that case, DoD could approve the transfer of up to an additional $1.5 billion to the counter-narcotics support line of the Drug Interdiction and Counter-Drug Activities, Defense, account. Decisions by the Acting Secretary of Defense regarding future transfer of funds and approval of additional DHS-requested projects under § 284 are expected in May 2019.

12. DoD will not use any DoD counter-narcotics funding for the drug-demand-reduction program, the National Guard counter-drug program, or the National Guard counter-drug schools program to provide support to DHS under 10 U.S.C. § 284(b)(7).

10 U.S.C. § 2808

13. On February 15, 2019, the President of the United States, in accordance with the National Emergencies Act, 50 U.S.C. §§ 1601-1651, declared that a national emergency exists at the southern border of the United States. In accordance with that declaration, the President invoked

10 U.S.C. § 12302 and made that statutory authority available, according to its terms, to the Secretaries of the military departments concerned, subject to the direction of the Secretary of Defense in the case of the Secretaries of the Army, Navy, and Air Force. To provide additional authority to DoD in support of the Federal Government's response to the national emergency at the southern border, the President also declared that this emergency requires use of the armed forces and, in accordance with section 301 of the National Emergencies Act (50 U.S.C. § 1631), that the construction authority provided in 10 U.S.C. § 2808 is made available, according to its terms, to the Secretary of Defense and, at the discretion of the Secretary of Defense, to the Secretaries of the military departments.

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

15. Also on April 11, 2019, the Acting Secretary instructed the DoD Comptroller, in consultation with the Secretaries of the military departments, the Chairman of the Joint Chiefs of Staff, the Under Secretary of Defense for Acquisition and Sustainment, the Under Secretary of Defense for Policy, and the heads of any other relevant DoD components to identify, by May 10, 2019, existing military construction projects of sufficient value to provide up to $3.6 billion of funding for his consideration. When evaluating the potential funding sources for potential section 2808 construction projects, the Comptroller was instructed not to consider family housing, barracks, or dormitory projects; projects that have already been awarded; or projects that have fiscal year 2019 award dates.

***

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

Executed on: April 25, 2019

KENNETH P. RAPUANO

EXHIBIT A

Executive Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

February 25, 2019

MEMORANDUM FOR: CAPT Hallock N. Mohler Jr.
Executive Secretary
Department of Defense (DoD)

FROM: Christina Bobb
Executive Secretary
Department of Homeland Security (DHS)

SUBJECT: Request for Assistance Pursuant to 10 U.S.C. § 284

I. Overview

As the government department tasked with border security, the Department of Homeland Security (DHS), through U.S. Customs and Border Protection (CBP), is requesting that the Department of Defense assist DHS in its efforts to secure the southern border. The Secretary has directed me to transmit this request for assistance to your attention. This memorandum supersedes the February 22, 2019 version.

In Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended (IIRIRA), 8 U.S.C. § 1103 note, Congress has directed DHS to construct border infrastructure in areas of high illegal entry to deter illegal crossing of both drugs and people into the United States. Pursuant to Section 102, DHS has identified the areas set forth in Section II below as areas of high illegal entry where CBP must take action (the Project Areas).

Within the Project Areas, DHS is experiencing large numbers of individuals and narcotics being smuggled into the country illegally. The Project Areas are also used by individuals, groups, and transnational criminal organizations as drug smuggling corridors. Mexican Cartels continue to remain dominant in these areas, influencing and controlling narcotics and human smuggling operations, within their respective strongholds.

DHS must use its authority under Section 102 of IIRIRA to install additional physical barriers and roads in the vicinity of the United States border in order to deter and prevent illegal crossings within the Project Areas. The construction of border infrastructure within the Project Areas will support DHS's ability to impede and deny illegal entry and drug smuggling activities within the Project Areas.

The Project Areas identified are adjacent to some of the most densely populated metropolitan areas of Mexico and are also home to some of the strongest and most violent drug cartels in the world. Deterring and preventing illegal cross-border activity will help stem the flow of illegal narcotics and entries in these areas. Similarly, the improved ability to impede, deny, and be mobile within the Project Areas creates a safer operational environment for law enforcement.

To support DHS's action under Section 102 of IIRIRA, DHS is requesting that DoD, pursuant to its authority under 10 U.S.C. § 284(b)(7), assist with the construction of fences roads, and lighting within the Project Areas to block drug-smuggling corridors across the international boundary between the United States and Mexico.

II. Capabilities Requested

Within the Project Areas there is existing vehicle fence and dilapidated pedestrian fencing. Vehicle fencing is intended to stop vehicles from illegally entering the United States, but can be climbed over or under by individuals. Pedestrian fencing is intended to prevent and deter individuals and vehicles from illegally crossing into the United States.

DHS requests that DoD assist in the execution of projects, within the Project Areas set forth below, to: (1) replace existing vehicle barriers or dilapidated pedestrian fencing with new pedestrian fencing; (2) construct roads; and (3) install lighting.

The new pedestrian fencing includes a Linear Ground Detection System, which is intended to, among other functions, alert Border Patrol agents when individuals attempt to damage, destroy or otherwise harm the barrier. The road construction includes the construction of new roads and the improvement of existing roads. The lighting that is requested has an imbedded camera that works in conjunction with the pedestrian fence. The lighting must be supported by grid power.

The segments of fence within the Project Areas identified below are situated on federal property. DHS will be responsible for securing, to the extent required, any other real estate interest or instrument that is required for project execution. In the event a real estate interest or instrument that is needed for project execution cannot be obtained for a segment of fence within a Project Area in a time frame that is within the requirements of this request for assistance, the segment may be withdrawn from this request. In addition, DHS will be responsible for any applicable environmental planning and compliance to include stakeholder outreach and consultation associated with the projects.

Project Areas:

II.A. El Centro Sector

Within the United States Border Patrol El Centro Sector (El Centro Sector) DHS is requesting that DoD assist by undertaking road construction, by replacing approximately 15 miles of existing vehicle barrier with new pedestrian fencing, and by installing lighting in the specific locations identified below.

The specific Project Area identified below is located in Imperial County, California and has been identified by the Office of National Drug Control Policy (ONDCP) as a High Intensity Drug Trafficking Area (HIDTA). Multiple local transnational criminal organizations known for smuggling drugs into Calexico from Mexico using a variety of tactics, techniques, procedures, and varying concealment methods operate in this area, including *Cartel De Jalisco Nueva Generacion* (CJNG) as well as remnants of the *Beltran Leyva* Organization and *La Familia Michoacana* organizations. CJNG, based in Jalisco, was previously a faction of the *Sinaloa* Cartel. CJNG broke away from the *Sinaloa* Cartel and has become an established Mexican Cartel. The Mexican government has declared CJNG as one of the most dangerous cartels in the country.

Due to the close proximity of urban areas on both sides of the border, the El Centro Sector suffers from some of the quickest vanishing times – that is, the time it takes to illegally cross into the United States and assimilate into local, legitimate traffic. These quick vanishing times enable the illegal activities of transnational criminal organizations, whether they are smuggling people or narcotics.

Border Patrol's own experience with apprehensions between border crossings bears this out. In fiscal year 2018, there were over 29,000 apprehensions of illegal entrants attempting to enter the United States between border crossings in the El Centro Sector. Also in fiscal year 2018, Border Patrol had approximately 200 separate drug-related events between border crossings in the El Centro Sector, through which it seized over 620 pounds of marijuana, over 165 pounds of cocaine, over 56 pounds of heroin, and over 1,600 pounds of methamphetamine.

The specific Project Area is as follows:

- *El Centro Project 1:*
    - The project begins approximately 10 miles west of the Calexico Port of Entry continuing west 15.25 miles in Imperial County.
    - Start coordinate: 32.63273, -115.922787; End coordinate: 32.652563, -115.662399

II.B. Yuma Sector

Within the United States Border Patrol Yuma Sector (Yuma Sector) DHS is requesting that DoD assist by undertaking road construction, by replacing approximately 36 miles of existing vehicle barrier and approximately 6 miles of dilapidated pedestrian fencing with new pedestrian fencing, and by installing lighting in the specific locations identified below. The specific areas identified below are located in Yuma County, Arizona.

Yuma County has been identified by the ONDCP as a HIDTA. Of particular note is the operation of the *Sinaloa* Cartel in this area. The *Sinaloa* Cartel continues to be the most powerful cartel in the country and controls illicit networks and operations in the United States. Despite the arrest of Joaquin "El Chapo" Guzman-Loera, its narcotics business has continued uninterrupted. As a result, there have been no significant changes within the *Sinaloa* Cartel's hierarchy, or any changes in the illicit operations conducted by the *Sinaloa* Cartel.

Border Patrol's own experience with apprehensions between border crossings bears this out. In fiscal year 2018, there were over 26,000 apprehensions of illegal entrants attempting to enter the United States between border crossings in the Yuma Sector. Also during fiscal year 2018, Border Patrol had over 1,400 separate drug-related events between border crossings in the Yuma Sector, through which it seized over 8,000 pounds of marijuana, over 78 pounds of cocaine, over 102 pounds of heroin, over 1,700 pounds of methamphetamine, and over 6 pounds of fentanyl.

The replacement of ineffective pedestrian fencing in this area is necessary because the older, wire mesh design is easily breached and has been damaged to the extent that it is ineffective. Additionally, this area is notorious for border violence and narcotics smuggling. Furthermore, while the deployment of vehicle barrier in the Yuma Sector initially curtailed the volume of illegal cross-border vehicular traffic, transnational criminal organizations quickly adapted their tactics switching to foot traffic, cutting the barrier, or simply driving over it to smuggle their illicit cargo into the United States. Thus, in order to respond to these changes in tactics, DHS now requires pedestrian fencing.

The specific Project Areas are as follows:

- *Yuma Project 1:*
    - The project begins approximately 1 mile southeast of the Andrade Port of Entry continuing along the Colorado River for approximately 5 miles in Yuma County.
    - Start coordinate: 32.704197, -114.726013; End coordinate: 32.642102, -114.764632)

- *Yuma Project 2:*
    - The project involves the replacement of two segments of primary pedestrian fencing in Yuma Sector for a total of approximately 6 miles. This includes approximately 2 miles of fencing along the Colorado River.
    - Start coordinate: 32.37755528, -114.4268201; End coordinate: 32.3579244, -114.3623999;
    - The project also includes replacement of primary pedestrian fencing approximately 17 miles east of the San Luis Port of Entry, on the Barry M Goldwater Range, continuing east for approximately 4 miles.
    - Start coordinate: 32.51419938, -114.8011175; End coordinate: 32.49350559, -114.8116619

- *Yuma Project 3:*
    - The project begins approximately 0.4 miles east of the Barry M. Goldwater Range continuing approximately 31 miles east through the Cabeza Prieta National Wildlife Refuge in Yuma County.
    - Start coordinate: 32.232935, -113.955211; End coordinate: 32.039033, -113.33411

III.C. Tucson Sector

Within the United States Border Patrol Tucson Sector (Tucson Sector) DHS is requesting that DoD assist by undertaking road construction, by replacing approximately 86 miles of existing vehicle barrier with new pedestrian fencing, and by installing lighting in the specific locations identified below. The specific areas identified below are located in Pima, Cochise, and Santa Cruz Counties, Arizona.

Pima, Cochise and Santa Cruz Counties have been identified by the ONDCP as a HIDTA. The *Sinaloa* Cartel relies on their local associates to coordinate, direct, and support the smuggling of illegal drugs and aliens from Mexico to the United States. Since Arizona is contiguous with the U.S.-Mexico International Boundary, the Tucson and Phoenix metropolitan areas are major trans-shipment and distribution points for contraband smuggling. Plaza bosses operate as a *Sinaloa* Cartel leader within their specific area of operation along the Sonora-Arizona corridor of the U.S.-Mexico International Boundary.

Border Patrol's own experience with apprehensions between border crossings bears this out. In fiscal year 2018, there were over 52,000 apprehensions of illegal entrants attempting enter the United States between the border crossings in the Tucson Sector. Also in fiscal year 2018 Border Patrol had over 1,900 separate drug-related events between border crossings in the Tucson Sector, through which it seized over 1,600 pounds of marijuana, over 52 pounds of cocaine, over 48 pounds of heroin, over 902 pounds of methamphetamine, and over 11 pounds of fentanyl.

In addition, the absence of adequate pedestrian fencing, either due to the presence of vehicle barrier only or ineffective pedestrian designs, in the Tucson sector continues to be particularly problematic as it pertains to the trafficking of illegal narcotics. Rival transnational criminal organizations frequently employ "rip crews" who leverage the remote desert environment and lack of infrastructure to steal one another's illicit cargo resulting in increased border violence.

The terrain also provides high ground to scouts seeking to protect and warn smuggling loads being passed through the area. Transnational criminal organizations have successfully utilized this advantage in furtherance of their illicit activity and for this reason the area is in need of an improved capability to impede and deny illegal crossings or people and narcotics. In addition, the area hosts a number of tourist attractions that allow illegal activity to blend into legitimate activity; avoiding detection and evading interdiction.

The specific Project Areas are as follows:

- *Tucson Project 1:*
  - The project includes replacement of two segments of vehicle barriers. The first segment begins approximately 2 miles west of the Lukeville Port of Entry continuing west approximately 30 miles.
  - Start coordinate: 32.038278, -113.331716; End coordinate: 31.890032, -112.850162
  - The second segment project begins approximately 3 miles east of the Lukeville Port of Entry and continues east approximately 8 miles in Pima County, Arizona.
  - Start coordinate: 31.8648, -112.76757; End coordinate: 31.823911, -112.634298

- *Tucson Project 2:*
  - The project includes approximately 5 miles of primary pedestrian fence replacement around the Lukeville Port of Entry extending from approximately 2 miles west of the port to approximately 3 miles east of the port.
  - Start coordinate: 31.88999921, -112.850162; End coordinate: 31.8648, -112.76757

- *Tucson Project 3*:
    - The project includes three segments of vehicle barrier replacement beginning approximately 18 miles west of the Naco Port of Entry and continuing to approximately 25 miles east of the Douglas Port of Entry (or approximately 5 miles west of the Arizona/New Mexico state line) for approximately 20 miles of non-contiguous vehicle barrier replacement in Cochise County, Arizona.
    - Start coordinate: 31.333754, -110.253863; End coordinate: 31.333767, -110.250286;
    - Start coordinate: 31.334154, -110.152548; End coordinate: 31.334137, -110.147464;
    - Start coordinate: 31.333995, -109.453305; End coordinate: 31.332759, -109.129344

- *Tucson Project 4:*
    - The project begins approximately 9 miles east of the Nogales Port of Entry and continues eastward for approximately 30 miles with approximately 26 miles of non-contiguous vehicle barrier replacement in Santa Cruz and Cochise Counties, Arizona.
    - Start coordinate: 31.333578, -110.79579; End coordinate: 31.333511, -110.775333;
    - start coordinate: 31.33328, -110.70545; End coordinate: 31.333602, -110.288665)
    - Note: An additional approximately 0.3 miles of new pedestrian fence could be built between the existing segmented vehicle barrier locations to fill existing gaps if appropriate real estate interest can be verified

- *Tucson Project 5:*
    - The project includes approximately 2 miles of vehicle barrier replacement beginning approximately 4.5 miles east of the Sasabe Port of Entry continuing east in six non-continuous segments for approximately 15 miles in Pima and Santa Cruz Counties, Arizona.
    - Start Coordinate: 31.460175, -111.473171; End Coordinate: 31.459673, -111.471584;
    - Start Coordinate: 31.453091, -111.450959; End Coordinate: 31.449633, -111.440132;
    - Start Coordinate: 31.440683, -111.412054; End Coordinate: 31.437351, -111.40168;
    - Start Coordinate: 31.423471, -111.358336; End Coordinate: 31.422541, -111.355444;
    - Start Coordinate: 31.42221, -111.354379; End Coordinate: 31.421321, -111.351608;

- Start Coordinate: 31.386813, -111.243966; End Coordinate: 31.385462, -111.239759)

II.D. El Paso Sector

Within the United States Border Patrol El Paso (El Paso Sector) DHS is requesting that DoD assist by undertaking road construction, by replacing approximately 70 miles of existing vehicle barrier with new pedestrian fencing, and by installing lighting in the specific locations identified below. The specific areas identified below are located in Luna, Hidalgo and Doña Ana Counties, New Mexico. Luna, Hidalgo and Doña Ana Counties have been identified by the ONDCP as a HIDTA.

There are three specific transnational criminal organizations of interest operating in the El Paso Sector - the *Sinaloa* Cartel as well as remnants of the *Juarez* Cartel and the *Beltran Leyva* Organization. In the El Paso Sector the *Sinaloa* Cartel employs a variety of tactics, techniques and procedures depending upon the terrain and environment to move drugs across the border. While the *Sinaloa* Cartel has a strong presence and control of territories at the flanks of the Sector, it does not have full control of the territory throughout the El Paso Sector. The *Juarez* Cartel, traditionally a major trafficker of marijuana and cocaine, has become an active member in opium cultivation and heroin production.

Border Patrol's own experience with apprehensions between border crossings bears this out. In fiscal year 2018, there were over 31,000 apprehensions of illegal entrants attempting to enter the United States between border crossings in the El Paso Sector. Also in fiscal year 2018, Border Patrol had over 700 separate drug-related events between border crossings in the El Paso Sector, through which it seized over 15,000 pounds of marijuana, over 342 pounds of cocaine, over 40 pounds of heroin, and over 200 pounds of methamphetamine.

Although the deployment of vehicle barrier in the El Paso Sector initially curtailed the volume of illegal cross-border vehicular traffic, transnational criminal organizations quickly adapted their tactics switching to foot traffic, cutting the barrier, or simply driving over it to smuggle their illicit cargo into the United States.

Thus, in order to respond to these changes in tactics, CBP now requires pedestrian fencing. Successfully impeding and denying illegal activities or transnational criminal organizations in this area is further complicated by the close proximity of New Mexico Highway 9 to the border. In some cases the highway is less than a half a mile, allowing illegal cross-border traffic to evade detection and apprehension and quickly vanish from the border area.

The specific Project Areas are as follows:

- *El Paso Project 1:*
  - The project includes 46 miles of vehicle barrier replacement beginning approximately 17.5 miles west of the Columbus Port of Entry continuing east in non-contiguous segments to approximately 35 miles east of the Columbus Port of Entry within the Luna and Doña Ana Counties, New Mexico.
  - Start Coordinate: 31.7837, -107.923151; End Coordinate: 31.783689, -107.679049;
  - Start Coordinate: 31.783672, -107.573919; End Coordinate: 31.783741, -107.038154

- *El Paso Project 2:*
  - The project includes 23.51 miles of Vehicle Barrier replacement in non-contiguous segments within Hidalgo and Luna Counties, New Mexico. The first segment begin approximately 5.1 miles east of the New Mexico/Arizona Border continuing east 4.55 miles.
  - Start Coordinate: 31.332323, -108.962631; End Coordinate: 31.332292, -108.885946;
  - The second segment begins approximately 3 miles west of the Antelope Wells Port of Entry to 3 miles east of the port of entry for 6.12 miles of Vehicle Barrier replacement.
  - Start Coordinate: 31.333368, -108.582412; End Coordinate: 31.333407, -108.47926;
  - The third segment begins approximately 20 miles west of the Columbus Port of Entry extending west 12.84 miles.
  - Start Coordinate: 31.783722, -108.182442; End Coordinate: 31.783708, -107.963193;

III. Technical Specifications

As set forth above, DHS requires road construction, installation of lighting, and the replacement of existing vehicle barrier or dilapidated pedestrian fencing with new pedestrian fencing within the Project Areas. DHS will provide DoD with more precise technical specifications as contract and project planning moves forward.

Given DHS's experience and technical expertise, DHS plans to coordinate closely with DoD throughout project planning and execution, to include review and approval of design specifications, barrier alignment and location, and other aspects of project planning and execution.

IV. Sequencing

The DHS request for assistance includes approximately 218 miles in which DHS requires road construction, the installation of lighting, and the replacement of existing vehicle fencing or dilapidated pedestrian fencing with new pedestrian fencing within the Project Areas. DHS requests that DoD's support under 10 U.S.C. § 284 address the requirements in order of priority as DoD resources allow. The DHS order of priority is as follows:

1. Yuma Sector Project 1
2. Yuma Sector Project 2
3. El Paso Sector Project 1
4. El Centro Sector Project 1
5. Tucson Sector Project 1
6. Tucson Sector Project 2
7. Tucson Sector Project 3
8. Tucson Sector Project 4
9. Yuma Sector Project 3
10. El Paso Sector Project 2
11. Tucson Sector Project 5

V. Funding

DHS requests that DoD provide the above-referenced border fences, roads, and lighting on a non-reimbursable basis as support to block drug smuggling corridors.

DHS will accept custody of the completed infrastructure and account for that infrastructure in its real property records.

DHS will operate and maintain the completed infrastructure.

VI. Conclusion

DHS requests DoD assistance under 10 U.S.C. § 284 to construct fences, roads, and to install lighting in order to block drug smuggling corridors in the Project Areas set forth above. The Projects Areas set forth above are also areas of high illegal entry under IIRIRA § 102(a), and the requested fences, roads, and lighting will assist in deterring illegal crossings in the Project Areas.

EXHIBIT B

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

MAR 25 2019

The Honorable Kirstjen Nielsen
Secretary of Homeland Security
Washington, DC 20528

Dear Madam Secretary:

Thank you for your February 25, 2019 request that the Department of Defense provide support to your Department's effort to secure the southern border by blocking up to 11 drug-smuggling corridors along the border through the construction of roads and fences and the installation of lighting.

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

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

Accordingly, at this time, I have decided to undertake Yuma Sector Projects 1 and 2 and El Paso Sector Project 1 by constructing 57 miles of 18-foot-high pedestrian fencing, constructing and improving roads, and installing lighting as described in your February 25, 2019 request.

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

The Commander, U.S. Army Corps of Engineers, is authorized to coordinate directly with DHS/CBP and immediately begin planning and executing up to $1B in support to DHS/CBP by undertaking the projects identified above.

Additional support may be available in the future, subject to the availability of funds and other factors.

Patrick M. Shanahan
Acting

EXHIBIT C

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

MAR 2 5 2019

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE (COMPTROLLER)/CHIEF FINANCIAL OFFICER

SUBJECT: Funding Construction in Support of the Department of Homeland Security Pursuant to 10 U.S.C. § 284

On February 25, 2019 the Secretary of Homeland Security requested that the DoD provide support to the Department of Homeland Security's (DHS) effort to secure the southern border by blocking up to 11 drug-smuggling corridors along the border through the construction of roads and fences and the installation of lighting. I have determined that the requirements of title 10, U.S.C., section 284, have been satisfied. Accordingly, I have approved DoD support for Yuma Sector Projects 1 and 2 and El Paso Sector Project 1 (DHS Priority Projects 1, 2, and 3) and have authorized up to $1B in funding for the construction of 18-foot high pedestrian fencing, the construction and improvement of roads, and the installation of lighting to block drug-smuggling corridors along the southern border.

I have also decided that the Department will reprogram funds to provide the support described above. This support will be funded through a transfer of $1B of FY 2019 Army military personnel appropriations into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation. I am advised that this amount is excess to the Army's current programmatic needs with respect to military personnel. You should undertake a reprogramming action to effectuate such transfer, as authorized by law.

The reprogramming action that I am directing satisfies the statutory requirements. I have determined that a transfer of funds and authorizations of appropriations for the construction of fences and roads and the installation of lighting to block drug-smuggling corridors is in the national interest. In an April 4, 2018 memorandum, "Securing the Southern Border of the United States," the President directed DoD to assist DHS in stopping the flow of illegal drugs into the United States. The reprogramming action is necessary to advance that goal. I have also determined that the other requirements of Section 8005 of the DoD Appropriations Act, 2019, and Section 1001 of the John S. McCain National Defense Authorization Act for FY 2019 are met as set forth below:

- The items to be funded (Yuma Sector Projects 1 and 2 and El Paso Sector Project 1) are a higher priority than the item for which funds and authority are transferred (excess Army military personnel funds) because Yuma Sector Projects 1 and 2 and El Paso Sector Project 1 are necessary in the national interest to prevent the flow of drugs into the United States and the Army military personnel funds are excess to need due to under-execution and lower-than-expected end-strength.

- Support to law enforcement under Section 284 for the construction of fences and roads and the installation of lighting to block drug-smuggling corridors is a military requirement assigned by statute. The need to provide support for Yuma Sector Projects 1

and 2 and El Paso Sector Project 1 was an unforeseen military requirement not known at the time of the FY 2019 budget request.

- Support under Section 284 for construction of roads and fences and the installation of lighting, including for Yuma Sector Projects 1 and 2 and El Paso Sector Project 1, has not been denied by Congress.

The funds that will be used for this project are excess to the need for which they were appropriated, and therefore, the use of such funds will not have a negative impact on joint force readiness. As such, I have determined that providing the requested support for Yuma Sector Projects 1 and 2 and El Paso Sector Project 1 will not adversely affect the military preparedness of the United States.

This $1B in funds will be allocated to the Department of the Army with instructions to allocate it further to the U.S. Army Corps of Engineers to undertake fence and road construction and lighting installation for the approved project.

No funds may be transferred or re-programmed from the drug-demand-reduction program, the National Guard counter-drug program, or the National Guard counter-drug schools program in order to fund subsection 284(b)(7) support to DHS.

You will comply with all statutory requirements, but will do so without regard to comity-based DoD policies that prescribe prior approval from congressional committees.

My point of contact is Kenneth Rapuano, Assistant Secretary of Defense for Homeland Defense and Global Security.

Patrick M. Shanahan
Acting

cc:
Secretary of the Army
Chairman of the Joint Chiefs of Staff
Under Secretary of Defense for Policy
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant to the Secretary of Defense for Public Affairs
Commander, U.S. Army Corps of Engineers

EXHIBIT D

OFFICE OF THE UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1100

COMPTROLLER
(Program/Budget)

MAR 25 2019

Mr. Mark Sandy
Deputy Associate Director,
National Security Division
Office of Management and Budget
Washington, DC 20503

Dear Mr. Sandy:

Enclosed is a Reprogramming Action for the Department's Support for the Department of Homeland Security (DHS) Counter-Drug Activity.

Pursuant to section 8005 of division A of Public Law 115-245, the Department of Defense (DoD) Appropriations Act, 2019; and section 1001 of Public Law 115-232, the John S, McCain National Defense Authorization Act for Fiscal Year (FY) 2019; as delegated, the Deputy Under Secretary of Defense (Comptroller) has determined that it is in the national interest to effect a transfer of funds between appropriations of the Department of Defense, as depicted on the enclosed reprogramming action.

Upon your approval, the reprogramming action will be forwarded to the congressional committees.

Sincerely,

Anne J. McAndrew
DoD Deputy Comptroller (Program/Budget)

Enclosure:
As stated

Under the authority vested in the Office of Management and Budget by section 8005 of division A of Public Law 115-245, the DoD Appropriations Act, 2019, the transfers in the enclosed reprogramming action for Support for the DHS Counter-Drug Activity are approved and can be transmitted to the congressional committees.

OMB Approval: _____ Date: 3/25/2019

Unclassified

REPROGRAMMING ACTION

Subject: Support for DHS Counter-Drug Activity Reprogramming Action	**DoD Serial Number:** FY 19-01 RA
Appropriation Title: Various Appropriations	**Includes Transfer?** Yes

Component Serial Number:	*(Amounts in Thousands of Dollars)*							
	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
Line Item	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
a	b	c	d	e	f	g	h	i

This reprogramming action is submitted because this action uses general transfer authority. This reprogramming action provides funding in support of higher priority items, based on unforeseen military requirements, than those for which originally appropriated; and is determined to be necessary in the national interest. It meets all administrative and legal requirements, and none of the items has previously been denied by the Congress.

This reprogramming action transfers $1,000.000 million from the Military Personnel, Army, 19/19, and Reserve Personnel, Army, 19/19, appropriations to the Drug Interdiction and Counter-Drug Activities, Defense, 19/19, appropriation. This reprogramming action uses $1,000.000 million of general transfer authority pursuant to section 8005 of division A of Public Law 115-245, the Department of Defense (DoD) Appropriations Act, 2019; and section 1001 of Public Law 115-232, the John S. McCain National Defense Authorization Act for Fiscal Year (FY) 2019.

FY 2019 REPROGRAMMING INCREASE:			**+1,000,000**	
Drug Interdiction and Counter-Drug Activities, Defense, 19/19			**+1,000,000**	
Budget Activity 01: Counter-Narcotics Support				
	238,306	238,306	**+1,000,000**	1,238,306

Explanation: Funds are required to provide support for counter-drug activities of the Department of Homeland Security (DHS). DHS has identified areas along the southern border of the United States that are being used by individuals, groups, and transnational criminal organizations as drug smuggling corridors, and determined that the construction of additional physical barriers and roads in the vicinity of the United States border is necessary in order to impede and deny drug smuggling activities. DHS requests DoD assistance in the execution of projects to replace existing vehicle barriers or dilapidated pedestrian fencing with new pedestrian fencing, construct roads, and install lighting. Title 10, U.S.Code, Section 284(b)(7) authorizes the DoD to support counterdrug activities of other Federal agencies through the construction of roads and fences, and the installation of lighting, to block drug smuggling corridors across international boundaries of the United States. Such support is funded using DoD's Drug Interdiction and Counter-Drug Activities appropriation. This is a base budget requirement.

Approved (Signature and Date)

Elaine McCusker 3/25/19

Subject: Support for DHS Counter-Drug Activity Reprogramming Action	DoD Serial Number: FY 19-01 RA
Appropriation Title: Various Appropriations	Includes Transfer? Yes

Component Serial Number:	*(Amounts in Thousands of Dollars)*							
	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
Line Item	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
a	b	c	d	e	f	g	h	i
FY 2019 REPROGRAMMING DECREASES:						**-1,000,000**		
Military Personnel, Army, 19/19						**-993,627**		
Budget Activity 01: Pay and Allowances of Officers								
		14,000,263		14,000,263		**-56,440**		13,943,823

Explanation: Funds are available due to lower than expected Thrift Savings Plan (TSP) automatic and matching contributions ($-38.9 million) and Continuation Pay (CP) ($-17.5 million) for military members enrolled in the new Blended Retirement System (BRS) as a result of fewer than planned opt-ins from the legacy retirement system. This is base budget funding.

Budget Activity 02: Pay and Allowances of Enlisted						
	27,151,209		27,151,209		**-754,212**	26,396,997

Explanation: Funds are available due to a 9,500 Soldier reduction to Army's overall end strength target (478,000 vice 487,500) as Army refocuses on smart, modest annual growth without compromising quality in a highly challenging recruiting and retention market. Funds are available from the following programs stemming from strength reductions and rate-driven adjustments observed in execution to date. This is base budget funding.

- $325.9 million in basic pay, primarily driven by the decrease in projected average strength
- $135.1 million in retired pay accrual, primarily driven by the decrease in projected average strength
- $15.9 million in clothing allowances, stemming from reduced requirements for non-accession related uniform purchases
- $13.3 million in incentive pays and family separation allowances, reflecting current base budget execution trends showing a shift toward higher Overseas Contingency Operations execution
- $141.3 million in separation payments, driven by nearly 10 thousand fewer projected separations than seen in fiscal year 2018, fewer Soldiers eligible for disability separation in the Integrated Disability Evaluation System, and fewer projected involuntary separations
- $29.0 million in social security tax employer contributions, primarily driven by the decrease in projected average strength
- $27.6 million in enlistment and reenlistment incentives, due to projections for fewer recruitment contracts with bonus options compared to prior year execution and a smaller than expected cohort eligible for reenlistment
- $66.1 million due to lower than expected Thrift Savings Plan (TSP) automatic and matching contributions ($-41.4 million) and Continuation Pay (CP) ($-24.7 million) for military members enrolled in the new Blended Retirement System (BRS) as a result of fewer than planned opt-ins from the legacy retirement system

Subject: Support for DHS Counter-Drug Activity Reprogramming Action	DoD Serial Number: FY 19-01 RA
Appropriation Title: Various Appropriations	Includes Transfer? Yes

Component Serial Number:	*(Amounts in Thousands of Dollars)*							
	Program Base Reflecting Congressional Action		Program Previously Approved by Sec Def		Reprogramming Action		Revised Program	
Line Item	Quantity	Amount	Quantity	Amount	Quantity	Amount	Quantity	Amount
a	b	c	d	e	f	g	h	i
Budget Activity 04: Subsistence of Enlisted Personnel		2,269,930		2,269,930		**-57,420**		2,212,510

Explanation: Funds are available due to a decrease in projected average enlisted strength, lower than budgeted rate increases (no inflation in 2019 vice 3.4% budgeted), and a slight increase in the amount of realized collections for members subsisting in Army dining facilities. This is base budget funding.

Budget Activity 05: Permanent Change of Station Travel		1,785,401		1,785,401		**-115,726**		1,669,675

Explanation: Funds are available due to lower than budgeted rates of execution that have been realized in recent move expenditures. This is base budget funding. Specifically:

- $36.9 million is available in accession moves
- $26.1 million is available in rotational moves
- $52.7 million is available in separation moves

Budget Activity 06: Other Military Personnel Costs		317,883		317,883		**-9,829**		308,054

Explanation: Funds are available due to a lower-than-projected number of former soldiers receiving unemployment compensation payments. This is base budget funding.

Reserve Personnel, Army, 19/19						**-6,373**		
Budget Activity 01: Reserve Component Training and Support		4,874,662		4,871,312		**-6,373**		4,864,939

Explanation: Funds are available due to lower than expected Thrift Savings Plan (TSP) automatic and matching contributions for military members enrolled in the new Blended Retirement System (BRS) as a result of fewer than planned opt-ins from the legacy retirement system. This is base budget funding.

Unclassified **REPROGRAMMING ACTION - INTERNAL REPROGRAMMING**

Subject: Drug Interdiction and Counter-Drug Activities, Defense	**DoD Serial Number:** FY 19-11 IR
Appropriation Title: Various Appropriations	**Includes Transfer?** Yes

Component Serial Number:	*(Amounts in Thousands of Dollars)*							
	Program Base Reflecting Congressional Action		**Program Previously Approved by Sec Def**		**Reprogramming Action**		**Revised Program**	
Line Item	**Quantity**	**Amount**	**Quantity**	**Amount**	**Quantity**	**Amount**	**Quantity**	**Amount**
a	b	c	d	e	f	g	h	i

This reprogramming action transfers $1,000.000 million from the Drug Interdiction and Counter-Drug Activities, Defense, 19/19, appropriation to Operation and Maintenance, Army, 19/19, appropriation for drug interdiction and counter-drug activities consistent with the provisions in division A of Title VI of Public Law 115-245, the Department of Defense (DoD) Appropriations Act, 2019.

Realignment of funds between Drug Interdiction projects may be accomplished only with the concurrence of the Office of the Deputy Assistant Secretary of Defense, Counternarcotics and Global Threats. No funds made available in this reprogramming action may be obligated for projects pursuant to sections 321, 322, or 333 of Title 10, United States Code. This prohibition will be noted on all Funding Authorization Documents.

FY 2019 REPROGRAMMING INCREASE:			**+1,000,000**	
Operation and Maintenance, Army, 19/19			**+1,000,000**	
Budget Activity 01: Operating Forces				
Counter-Narcotics Support	-	216,874	**+1,000,000**	1,216,874
FY 2019 REPROGRAMMING DECREASE:			**-1,000,000**	
Drug Interdiction and Counter-Drug Activities, Defense, 19/19			**-1,000,000**	
Budget Activity 01: Counter-Narcotics Support				
	1,238,306	1,238,306	**-1,000,000**	238,306

Explanation: Transfers funds from the Drug Interdiction and Counter-Drug Activities, Defense, 19/19, appropriation to Operation and Maintenance, Army, 19/19, appropriation to support the Department of Homeland Security (DHS) request for DoD to support drug interdiction and counter-drug activities through the construction of roads and fences, and the installation of lighting, to block drug smuggling corridors across international boundaries of the United States. This is a base budget requirement.

Approved (Signature and Date)

Elaine McCusker 3/25/19

DD 1415-3 ***UNCLASSIFIED***

EXHIBIT E

Executive Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

March 29, 2019

MEMORANDUM FOR: CAPT Hallock N. Mohler Jr.
Executive Secretary
Department of Defense

FROM: Christina Bobb
Executive Secretary
Department of Homeland Security

SUBJECT: Modification Request: Section 284 funding for Border Barrier Construction

REFERENCE: (a) February 25, 2019, DHS Request for Assistance Pursuant to 10 U.S.C. §284
(b) March 25, 2019, DoD Response to DHS Request for Assistance Pursuant to 10 U.S.C. §284

Overview

The Department of Homeland Security (DHS) thanks the Department of Defense for both the response and approval of the use of Section 284 funding for the construction of border fencing and roads and the installation of lighting as characterized in the Request for Assistance. The completion of these projects will assist CBP significantly in controlling the flow of migrants in between the Ports of Entry (POE) on the Southwest Border.

Clarifications

Prior to construction for border barrier projects, Customs and Border Protection (CBP) conducts an Alternatives Analysis (AA), which compares operational data against the known and tested impedance value of barrier and other related design attributes. The analysis examines key operational data points, including but not limited to:

- Vanishing time
- Response time
- Current staffing
- Presence and effectiveness of existing technology and infrastructure
- Subject matter expertise of agents intimately familiar with operations in these areas

Such analyses have often demonstrated that higher barriers and/or barriers augmented with anticlimb features significantly increase the amount of time that migrants require to reach a

vanishing point. A more robust barrier solution (i.e. 30 foot steel bollard vice 18 foot steel bollard and features), increases the vanishing time and provides USBP agents with a greater ability to with vice without anticlimb interdict migrants.

CBP undertook AAs for the proposed Section 284-funded projects; two of these AAs have been completed, with the following conclusions:

- Sector Yuma Project 2: Requirement for 18 foot steel bollard fencing with 5 foot anticlimb steel plate
- Sector El Paso Project 1: Requirement for 30 foot steel bollard fencing with 5 foot anticlimb steel plate

The AA for Sector Yuma Project 1, USBP's highest priority project, is still underway, with results expected the week of April 1st. Preliminary indications from the analysis, however, indicate 30 foot bollard with anticlimb features is the likely requirement. DHS will communicate to OSD the finalized requirements for Sector Yuma Project upon completion of the AA.

In light of the analyses summarized above, DHS requests that specifications for the Sector El Paso Project 1 be amended to 30ft bollard with anticlimb features, and that DoD be prepared to likewise amend the specifications for Sector Yuma Project 1. DHS also requests DoD directly follow the prioritization set forth in Reference (a) as closely as possible even if that means completing partial projects.

Please direct any questions to Ntina K. Cooper, Deputy Executive Director, Strategic Planning & Analysis, USBP, CBP (202) 344-1417.

EXHIBIT F

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

APR - 9 2019

MEMORANDUM FOR ACTING SECRETARY OF HOMELAND SECURITY

SUBJECT: Modification of Department of Defense Support to Block Drug-Smuggling Corridors

Thank you for your April 5, 2019 request that the Department of Defense provide modified specifications on projects approved for construction under 10 U.S.C. § 284 in order to support more effectively the Department of Homeland Security's efforts to secure the southern border.

10 U.S.C. § 284(b)(7) authorizes the Department of Defense to construct roads and fences, and to install lighting, to block drug-smuggling corridors across international boundaries of the United States in support of counter-narcotic activities of Federal law enforcement agencies. For the following reasons, I have concluded that this modified request continues to satisfy the statutory requirements:

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

Accordingly, I have approved construction of pedestrian fencing for Yuma Sector Projects 1 and El Paso Sector Project 1 with 30-foot steel bollard with anti-climb plate, and Yuma Sector Project 2, with 18-foot steel bollard with anti-climb plate, as requested in your April 5, 2019 request. Road construction and improvements, and lighting installation, will be included as described in your February 25, 2019 request.

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

I have authorized the Commander, U.S. Army Corps of Engineers, to coordinate directly with DHS/CBP and immediately begin planning and executing support to DHS/CBP by

undertaking the projects identified above in clearly defined segments to maximize the number of miles of barrier projects within the available funds (up to $1 billion).

Additional support may be provided in the future, subject to the availability of funds and other factors.

Patrick M. Shanahan
Acting

EXHIBIT G

Contracts for April 9, 2019

April 9, 2019
Contracts
Release No: CR-066-19

ARMY

SLSCO Ltd., Galveston, Texas, was awarded a $789,000,000 firm-fixed-price contract for border replacement wall construction. Nine bids were solicited with six bids received. Work will be performed in Santa Teresa, New Mexico, with an estimated completion date of Oct. 1, 2020. Fiscal 2019 operations and maintenance, Army funds in the amount of $388,999,999 were obligated at the time of the award. U.S. Army Corps of Engineers Albuquerque, New Mexico, is the contracting activity (W912PP-19-C-0018).

Barnard Construction Co. Inc., Bozeman, Montana, was awarded an $187,000,000 firm-fixed-price contract for design-bid-build construction project for primary pedestrian wall replacement. Four bids were solicited with three bids received. Work will be performed in Yuma, Arizona, with an estimated completion date of Sept. 30, 2020. Fiscal 2019 operations and maintenance, Army funds in the amount of $93,499,999 were obligated at the time of the award. U.S. Army Corps of Engineers, Los Angeles, California, is the contracting activity (W912PL-19-C-0013).

The Dutra Group, San Rafael, California, was awarded a $10,000,000 firm-fixed-price contract for rental of hopper dredge with attendant plant and operators for maintenance dredging in Alabama, Mississippi, and Florida. Bids were solicited via the internet with two received. Work locations and funding will be determined with each order, with an estimated completion date of June 9, 2020. U.S. Army Corps of Engineers, Mobile, Alabama, is the contracting activity (W91278-19-D-0019).

DEFENSE LOGISTICS AGENCY

Vital Images Inc., Minnetonka, Minnesota, has been awarded a maximum $100,000,000 firm-fixed-price, indefinite-delivery/indefinite-quantity contract for radiology and imaging systems, maintenance and training services. This is a five-year base contract with one five-year option. This was a competitive acquisition with 27 responses received. Location of performance is Minnesota, with an April 8, 2024, performance completion date. Using customers are Army, Navy, Air Force, Marine Corps and federal civilian agencies. Type of appropriation is fiscal 2019 through 2020 defense working capital funds. The contracting activity is the Defense Logistics Agency Troop Support, Philadelphia, Pennsylvania (SPE2D1-19-D-0012).

AAR Aircraft Services, Oklahoma City, Oklahoma, has been awarded a minimum $13,701,177 fixed-price with economic-price-adjustment contract for fuel. This was a competitive acquisition with 148 responses received. This is a 47-month base contract with a six-month option period. Location of performance is Oklahoma, with a March 31, 2023, performance completion date. Using customers are Army, Navy, Air Force, Marine Corps and federal civilian agencies. Type of appropriation is fiscal 2019 through fiscal 2023 defense working capital funds. The contracting activity is the Defense Logistics Agency Energy, Fort Belvoir, Virginia (SPE607-19-D-0061).

AIR FORCE

Pergravis LLC, Tampa, Florida, has been awarded an estimated $73,220,000 firm-fixed-price contract for power converting and continuation interfacing equipment emergency maintenance/preventative maintenance. This contract provides for support of 700 uninterruptable power supply systems across every Air Force major command. Work will be performed in various locations in the U.S. and overseas, and is expected to be complete by April 13, 2024. This contract is the result of a competitive acquisition and three offers were received. Fiscal 2019 other station funds in the amount of $137,440 are being obligated at

the time of award. Air Force Life Cycle Management Center, Hill Air Force Base, Utah, is the contracting activity (FA8217-19-D-0002).

Al Qabandi United Co. W.L.L., Kuwait City, Kuwait, is being awarded an estimated $30,000,000 firm-fixed-price contract for vehicle lease services. This contracts provides Ali Al Salem Air Base, Kuwait, and surrounding tenant units, with non-tactical vehicles for transportation purposes. Work will be performed at Ali Al Salem Air Base, Kuwait, and is expected to be complete by April 12, 2024. This award is the result of a competitive acquisition and 67 offers were received. Fiscal 2019 operations and maintenance funds in the amount of $16,000 are being obligated on a task order at the time of award. The 386th Expeditionary Contracting Squadron, Ali Al Salem AB, Kuwait, is the contracting activity (FA5703-19-D-0001).

Textron Aviation Defense LLC, Wichita, Kansas, has been awarded a $15,350,000 firm-fixed-price modification (P00007) to previously awarded contract FA8617-17-C-6225 for continued support for the completion of the reconstitution of 15 T-6A aircraft. This modification provides for a schedule extension to complete the reconstitution of 15 T-6A aircraft and procure cartridge actuated devices and propellant actuated devices. Work will be performed at Imam Ali Air Base, Iraq, and is expected to be complete by July 31, 2019. This modification involves 100 percent foreign military sales to Iraq, and brings the total cumulative face value of the contract to $35,338,422. Foreign military sales funds in the full amount are being obligated at the time of award. Air Force Life Cycle Management Center, Training Aircraft Division, Wright-Patterson Air Force Base, Ohio, is the contracting activity.

2101 LLC, doing business as Intercontinental Truck Body, Anaconda, Montana, has been awarded a $10,566,494 firm-fixed-price delivery order for tow tractors. This delivery order provides for the procurement of flight line tow tractors used to tow fighter aircraft, munition trailers and ground support equipment. Work will be performed in Anaconda, Montana, and is expected to be complete by Sept. 1, 2021. Fiscal 2018 and 2019 procurement funds in the full amount are being obligated at the time of award. Air Force Life Cycle Management Center, Robins Air Force Base, Georgia, is the contracting activity (FA8534-19-F-0017).

NAVY

Raytheon Intelligence, Information and Services, Indianapolis, Indiana, is awarded a $47,378,485 firm-fixed-price contract to procure 99 LAU-115 and 100 LAU-116 guided missile launchers for the Navy as well as 62 LAU-115 and 68 LAU-116 guided missile launchers for the government of Kuwait to enable F/A-18 aircraft to carry and launch AIM-120 and AIM-9X missiles. Work will be performed in Indianapolis, Indiana, and is expected to be completed in July 2022. Fiscal 2017 and 2018 aircraft procurement (Navy); and foreign military sales funds in the amount of $47,378,485 will be obligated at time of award, $17,285,182 of which will expire at the end of the current fiscal year. This contract was not competitively procured pursuant to Federal Acquisition Regulation 6.302-1. The Naval Air Systems Command, Patuxent River, Maryland, is the contracting activity (N00019-19-C-0056).

Raytheon Co., Portsmouth, Rhode Island, is awarded a $33,347,011 firm-fixed-priced, indefinite-delivery/indefinite supply quantity contract, for up to 28 electronic throttle control units and auxiliary components to support Naval Surface Warfare Center Philadelphia Division. This contract is for the purpose of supporting the Virginia class submarine program. The proposed contract is for procurement of replacement electronic throttle control unit (ETCU) hardware which is currently obsolete and can no longer be efficiently supported. The proposed contract includes the hardware fabrication for new construction platforms and all back-fit systems to mitigate parts obsolescence, update/maintain the ETCU technical data package, and design verification testing on limited production units for quality assurance. Work will be performed in Portsmouth, Rhode Island, and is expected to be completed by April 2024. Fiscal 2018 shipbuilding and conversion (Navy) funding in the amount of $9,165,306 will be obligated at time of award and will not expire at the end of the current fiscal year. This contract was solicited competitively via the Federal Business Opportunities website, with one offer received. The Naval Surface Warfare Center, Philadelphia Division, Philadelphia, Pennsylvania, is the contracting activity (N64498-19-D-4016).

Marshall Communications Corp.,* Ashburn, Virginia, is awarded $9,805,873 for firm-fixed-price delivery order N0042119F0555 against a previously issued NASA Solutions for Enterprise-wide procurements contract (NNG15SD82B). This order provides for information technology supplies and services in support of the Teamcenter Product Lifecycle Management configuration for the Commander, Fleet Readiness Centers business process, enabling digital data updates, sharing and visibility across all levels of aviation maintenance. Work will be performed at the Naval Air Station, Patuxent River, Maryland (70 percent); and the Fleet Readiness Center East, Cherry Point, North Carolina (30 percent), and is expected to be completed in April 2020. Fiscal 2019 research, development, test and evaluation (Navy); and Section 852 funds in the amount of $9,805,873 will be obligated at time of award, none of which will expire at the end of the current fiscal year. The Naval Air Warfare Center Aircraft Division, Patuxent River, Maryland, is the contracting activity.

Barnhart-Reese Construction, Inc.,* San Diego, California, is awarded $8,137,970 for firm-fixed-price task order N6247319F4452 under a previously awarded multiple award construction contract (N62473-17-D-4635) for construction of a full motion trainer facility at Marine Corps Base, Camp Pendleton. This project will construct a new 10,828 SF facility to centralize infrastructures, to consolidate all aspects of training in one physical location, to provide operational support for home ported detachments, virtual and hands-on maintenance training, operator training, and to support contingencies in accordance with combatant and commander tasking. The task order also contains two planned modifications, which if exercised would increase cumulative task order value to $8,171,720. Work will be performed in Oceanside, California, and is expected to be completed by October 2020. Fiscal 2019 military construction (Navy) contract funds in the amount of $8,137,970 are obligated on this award and will not expire at the end of the current fiscal year. Four proposals were received for this task order. Naval Facilities Engineering Command Southwest, San Diego, California, is the contracting activity.

BAE Systems Jacksonville Ship Repair, Jacksonville, Florida, is awarded an $8,123,072 cost-plus-award-fee modification to previously awarded contract N00024-16-C-2302 to exercise options for the USS Wichita (LCS 13) post-

shakedown availability (PSA). A PSA is accomplished within a period of approximately 10-16 weeks between the time of ship custody transfer to the Navy and the shipbuilding and conversion, Navy obligation work limiting date. The PSA encompasses all of the manpower, support services, material, non-standard equipment and associated technical data and documentation required to prepare for and accomplish the PSA. The work to be performed will include correction of government-responsible trial card deficiencies, new work identified between custody transfer and the time of PSA and incorporation of approved engineering changes that were not incorporated during the construction period which are not otherwise the building yard's responsibility under the ship construction contract. Work will be performed in Jacksonville, Florida, and is expected to be complete by March 2020. Fiscal 2019 shipbuilding and conversion (Navy) funding in the amount of $5,896,048; fiscal 2013 shipbuilding and conversion (Navy) funding in the amount of $1,482,102; and fiscal 2018 other procurement (Navy) funding in the amount of $293,384 will be obligated at time of award and will not expire at the end of the current fiscal year. The Naval Sea Systems Command, Washington, District of Columbia, is the contracting activity.

Huntington-Ingalls Industries - Ingalls Shipbuilding, Pascagoula, Mississippi, is awarded a $7,889,490 cost-plus-fixed-fee modification to previously awarded contract N00024-17-C-2473 to exercise an option for the accomplishment of emergent work as required, including management and labor efforts for the post-delivery planning yard services in support of the LHA-7 amphibious assault ship. Work will be performed in Pascagoula, Mississippi, and is expected to be completed December 2019. Fiscal 2019 shipbuilding and conversion (Navy) funding in the amount of $7,889,490 will be obligated at time of award and will not expire at the end of the current fiscal year. The Naval Sea Systems Command, Washington, District of Columbia, is the contracting activity.

MISSILE DEFENSE AGENCY

Lockheed Martin Rotary and Mission Systems, Moorestown, New Jersey, is awarded a $7,438,922 cost-plus-incentive-fee modification (P00322) to previously awarded contract HQ0276-10-C-0001. Under this modification, the contractor

will provide software maintenance support, identify, analyze, correct, test, and merge/rebase of the Common Source Library infrastructure and software discrepancies originating from heritage Aegis Ballistic Missile Defense Computer Programs. This modification increases the total cumulative face value of the contract from $2,973,087,008 to $2,980,525,930. Work will be performed in Moorestown, New Jersey, with an expected completion date of Oct. 31, 2019. Fiscal 2019 operations and maintenance funds in the amount of $1,045,902 will be obligated at the time of award. The Missile Defense Agency, Dahlgren, Virginia, is the contracting activity.

*Small business

EXHIBIT H

ASSISTANT SECRETARY OF DEFENSE
2600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-2600

HOMELAND DEFENSE &
GLOBAL SECURITY

APR 18 2019

MEMORANDUM FOR MILITARY ADVISOR, DEPARTMENT OF HOMELAND SECURITY

SUBJECT: Modification of DHS Request for Assistance Pursuant to 10 U.S.C. § 284

Thank you for your April 12, 2019, memorandum requesting that DoD de-scope approximately four (4) of the six (6) miles for Yuma Sector Project 2.

I have reviewed and approved your request, and will instruct the U.S. Army Corps of Engineers to take the necessary contracting action in response to your request. DoD will use those funds previously approved by the Acting Secretary of Defense that are no longer required for Yuma Sector Project 2 to fund additional miles of 30-foot bollard fencing, roads, and lighting in the El Paso Sector 1 project. As previously agreed, DHS retains the responsibility to address environmental compliance for all construction undertaken pursuant to 10 U.S.C. § 284 and to provide the necessary access to land (i.e., real estate rights).

I appreciate the opportunity to support the Department of Homeland Security's mission of securing and managing our Nation's southern border.

Kenneth P. Rapuano
Assistant Secretary of Defense
Homeland Defense & Global Security

EXHIBIT 1

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

SIERRA CLUB, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 4:19-cv-00892-HSG

DECLARATION OF MILLARD F. LEMASTER

I, Millard F. LeMaster, declare as follows:

1. I am the Deputy Chief, United States Border Patrol Strategic Planning and Analysis Directorate (SPAD), U.S. Customs and Border Protection (CBP), an agency of the Department of Homeland Security. I have held this position since February 2018. Over the course of my career I have served in multiple roles within the United States Border Patrol (USBP). I entered on duty with USBP in 2000. In that time I have served as a frontline Border Patrol Agent for five years, a Supervisory Border Patrol Agent for two different USBP Stations over the course of four years, and a second line supervisor in the field (Field Operations Supervisor, Watch Commander, and Deputy Patrol Agent In Charge) for two years until promotion to USBP Headquarters. Over the course of more

than five years at the headquarters level I have served as an Assistant Chief, Associate Chief, and finally as the Deputy Chief for SPAD.

2. In my current position I am personally aware of the fiscal year 2019 year-to-date drug apprehensions for the United States Border Patrol El Paso Sector (El Paso Sector) and the United States Border Patrol Yuma Sector (Yuma Sector).

3. The statements in this declaration are based on my personal knowledge and information that I have received in my official capacity.

4. Year-to-date in fiscal year 2019, there have been 314 drug events between border crossings in the El Paso Sector, through which USBP has seized over 9,500 pounds of marijuana, over 113 pounds of cocaine, over 139 ounces of heroin, over 228 pounds of methamphetamine, and over two pounds of fentanyl.

5. Year-to-date in fiscal year 2019, there have been 478 drug events between border crossings in the Yuma Sector, through which USBP has seized over 2,166 pounds of marijuana, .04 pounds of cocaine, over 160 ounces of heroin, over 664 pounds of methamphetamine, and over 36 pounds of fentanyl.

This declaration is made pursuant to 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct to the best of my current knowledge.

Executed on this 28th day of May, 2019.

Millard F. LeMaster
Deputy Chief
Strategic Planning and Analysis Directorate
United States Border Patrol

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

STATE OF CALIFORNIA, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	No. 4:19-cv-00872-HSG
SIERRA CLUB, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *et al.*, Defendants.	No. 4:19-cv-00892-HSG

DECLARATION OF PAUL ENRIQUEZ

I, Paul Enriquez, declare as follows:

1. I am the Acquisitions, Real Estate and Environmental Director for the Border Wall Program Management Office ("Wall PMO"), U.S. Border Patrol Program Management

Office Directorate, U.S. Customs and Border Protection ("CBP"), an agency of the Department of Homeland Security ("DHS"). I have held this position since August 6, 2018. From 2013 to August 2018, I was the Real Estate and Environmental Branch Chief for the Border Patrol and Air and Marine Program Management Office ("BPAM"), Facilities Management and Engineering, Office of Facilities and Asset Management ("OFAM"). From 2011 to 2013, I was employed as an Environmental Protection Specialist in the BPAM office. In that role, I performed environmental analyses for various border infrastructure projects. From 2008 to 2011, I was a contractor assigned to the BPAM office and provided environmental support on various border infrastructure projects. Based upon my current and past job duties, I am familiar with past and planned border infrastructure projects that have been executed in support of border security.

2. In my position I am personally aware of the border barrier projects that have been identified as "Yuma Projects 1 and 2 and El Paso Project 1," (collectively the "Yuma and El Paso Projects") which will be executed with the assistance of the Department of Defense ("DoD"). This declaration is based on my own personal knowledge and information made available to me in the course of my official duties.

BACKGROUND

3. The Secretary of DHS has determined that United States Border Patrol El Paso Sector (the "El Paso Sector") and the United States Border Patrol Yuma Sector (the "Yuma Sector") are areas of high illegal entry. Consequently Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended ("IIRIRA"), requires DHS to construct physical barriers and roads to deter and prevent illegal entry of people and drugs into the United States.

4. To support DHS's action under Section 102 of IIRIRA, the Secretary of DHS requested that the Secretary of Defense, pursuant to 10 U.S.C. § 284(b)(7), assist by constructing fences, roads, and lighting within the El Paso and Yuma Sectors. The Acting Secretary of Defense has concluded that the support requested satisfies the statutory requirements of 10 U.S.C. § 284(b)(7) and that DoD will provide such support for the Yuma and El Paso Projects.
5. CBP is the DHS component with primary responsibility for border security. Therefore, CBP constructs, operates, and maintains border infrastructure necessary to deter and prevent illegal entry on the southern border.
6. Within CBP, the Wall PMO has expertise in managing and executing border infrastructure projects. The Wall PMO is directly tasked with managing the schedule, finances, real estate acquisition, environmental planning—including compliance with the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA")—and construction of the border infrastructure system along the U.S. border. Given its expertise in managing border infrastructure projects, the Wall PMO, on behalf of CBP, is working in close coordination with DoD on the Yuma and El Paso Projects.
7. For the Yuma and El Paso Projects, the Wall PMO, on behalf of CBP will, among other things, review and approve technical specifications, review and approve barrier alignments and locations, and provide feedback and input on other aspects of project planning and execution. In addition, the Wall PMO, on behalf of CBP, is responsible for all environmental planning, including stakeholder outreach and consultation for the Yuma and El Paso Projects.

8. In my capacity as the Acquisitions, Real Estate and Environmental Director, I am responsible for overseeing all environmental planning and compliance activities as well as the real estate acquisition process for projects executed or overseen by the Border Wall PMO, including the Yuma and El Paso Projects.

9. DoD made contract awards for the Yuma and El Paso Projects on April 9, 2019. Environmental planning and consultation for the Yuma and El Paso Projects was initiated on April 8, 2019. The environmental planning and consultation that CBP has and will engage in for the Yuma and El Paso Projects are described in more detail in Paragraphs 19 through 33 below. On April 19, 2019, a protest was filed concerning the contracts for the Yuma and El Paso Projects. Construction on the Yuma and El Paso Projects was scheduled to begin in late-May; however, construction may be delayed due to the pending protests.

A. Yuma Project 1

10. Yuma Project 1 will be carried out under a waiver issued by the Secretary of DHS pursuant to Section 102(c) of IIRIRA that was published in the Federal Register on April 24, 2019, 84 Fed. Reg. 17187 (April 24, 2019) (the "Yuma Waiver").

11. The project area for Yuma Project 1 is in Yuma County, Arizona and is situated southeast of the Andrade Port of Entry along the United States border with Mexico. The project area is described in the Yuma Waiver as starting at the Morelos Dam and extending south and generally following the Colorado River for approximately five and one-half (5.5) miles (the "Yuma 1 Project Area"). Attached hereto as Exhibit A is a map depicting the Yuma 1 Project Area.

12. Within the Yuma 1 Project Area approximately five (5) miles of existing vehicle barrier will be replaced with new bollard wall that includes a linear ground detection system. The existing vehicle barrier no longer meets the United States Border Patrol's operational needs. The new bollard wall will be 30-feet tall. The bollards are steel-filled concrete that are approximately six inches in diameter and spaced approximately four inches apart. Yuma Project 1 will also include road improvement or construction and the installation of lighting that will be supported by grid power and includes imbedded cameras. All of the construction activity will occur on land that is owned and controlled by the United States.

B. <u>Yuma Project 2</u>

13. Yuma Project 2 will also be carried out under the Yuma Waiver.

14. The project area for Yuma Project 2 is in Yuma County, Arizona and is situated on the Barry M. Goldwater Range ("BMGR") along the United States and Mexico border. The project area is described in the Yuma Waiver as starting two and one-half (2.5) miles east of Border Monument 198 and extending east to Border Monument 197 (the "Yuma 2 Project Area"). Attached hereto as Exhibit A is a map depicting the Yuma 2 Project Area.

15. Within the Yuma 2 Project Area approximately one and one-half (1.5) miles of existing pedestrian barrier will be replaced with new bollard wall that includes a linear ground detection system. The existing pedestrian barrier is a steel mesh design that no longer meets Border Patrol's operational needs. The new bollard wall will be 18-feet tall. The bollards are steel-filled concrete that are approximately six inches in diameter and spaced approximately four inches apart. Yuma Project 2 will also include road improvement or construction and the installation of lighting that will be supported by grid power and

includes imbedded cameras. All of the construction activity will occur on land that is owned and controlled by the United States.

C. El Paso Project 1

16. El Paso Project 1 will be carried out under a waiver issued by the Secretary of DHS pursuant to Section 102(c) of IIRIRA that was published in the Federal Register on April 24, 2019, 84 Fed. Reg. 17185 (April 24, 2019) (the "El Paso Waiver").

17. The project area for El Paso Project 1 includes two segments along the United States border with Mexico in Luna County and Doña Ana County, New Mexico. The first segment is west of the Columbus Port of Entry and is described in the El Paso Waiver as starting at Border Monument 31 and extending east to Border Monument 23. The second segment is east of the Columbus Port of Entry and is described in the El Paso Waiver as starting approximately one (1) mile west of Border Monument 20 and extending east to Border Monument 9. Together these two segments represent the "El Paso 1 Project Area." Attached hereto as Exhibit B are maps depicting the El Paso 1 Project Area.

18. Within the El Paso 1 Project Area up to 46 miles of existing vehicle barrier will be replaced with new bollard wall that includes a linear ground detection system. The existing vehicle barrier no longer meets Border Patrol's operational needs. The new bollard wall will be 30-feet tall. The bollards are steel-filled concrete that are approximately six inches in diameter and spaced approximately four inches apart. El Paso Project 1 will also include road improvement or construction and the installation of lighting that will be supported by grid power and includes imbedded cameras. All of the construction activity will occur on land that is owned and controlled by the United States.

ENVIRONMENTAL PLANNING AND CONSULTATION FOR THE YUMA AND EL PASO PROJECTS

19. CBP has long had a border security presence in the Yuma 1 and 2 and El Paso 1 Project Areas (collectively, the "Project Areas") and their surrounding areas. Through the planning and development of past projects and activities, CBP has developed a deep understanding and awareness of the natural, biological, historic, and cultural resources in the Projects Areas.

20. To cite just a few examples of CBP's prior environmental analyses covering actions in and near the Project Areas, in 2008 CBP completed an Environmental Stewardship Plan ("ESP") covering the construction of approximately eight miles of border infrastructure within the Yuma 1 Project Area and its surrounding area. In 2013, CBP completed an Environmental Assessment ("EA") for the maintenance and repair of border infrastructure throughout the State of Arizona. The 2013 EA, the validity and sufficiency of which was never challenged in court, was the culmination of years of analysis and consultation with stakeholders concerning the potential environmental impacts from CBP's repair and maintenance of existing and proposed border infrastructure in Arizona, including infrastructure in the Yuma 1 and Yuma 2 Project Areas.

21. Similarly, in 2006 CBP completed a Programmatic Environmental Assessment of the construction, operation, and maintenance of border infrastructure within the El Paso Sector along the entire United States border in New Mexico, including the El Paso 1 Project Area. In 2008, CBP completed two separate ESPs covering the construction, operation, and maintenance of border infrastructure within the El Paso 1 Project Area and its surrounding area. In 2015, CBP completed an EA regarding the maintenance and repair of border infrastructure throughout the State of New Mexico, including the El Paso

1 Project Area. Like the 2013 EA regarding the maintenance and repair of border infrastructure throughout Arizona, the 2015 EA, the validity and sufficiency of which was never challenged in court, was the culmination of years of analysis and consultation with stakeholders concerning the potential impacts of CBP's repair and maintenance of existing and proposed border infrastructure in New Mexico, including infrastructure in the El Paso 1 Project Area.

22. More recently, in 2018, CBP undertook a project to replace approximately 20 miles of existing vehicle barrier with new bollard wall in a project area that is west of the Santa Teresa Port of Entry in Doña Ana County, New Mexico (the "Santa Teresa Project"). The project area for Santa Teresa Project abuts the segment of the El Paso 1 Project Area that is east of the Columbus Port of Entry. As part of the Santa Teresa Project, CBP prepared an ESP that examined the potential impacts of the Santa Teresa Project (the "Santa Teresa ESP"). A copy of the Santa Teresa ESP is attached hereto as Exhibit C.

23. As a part of its environmental planning process, including environmental planning for projects and activities in the Yuma and El Paso Sectors, CBP conducts biological, cultural, and other natural resource surveys, coordinates with stakeholders, and uses that information to assess environmental impacts.

24. CBP is drawing on its prior experience in the Project Areas as it assesses the potential environmental impacts for the Yuma and El Paso Projects.

25. In addition, CBP is presently engaged in new environmental planning and consultation that is specifically targeted to the Yuma and El Paso Projects.

26. On April 8, 2019, before the Yuma and El Paso Waivers were issued, to better understand the potential impacts of the Yuma and El Paso Projects, CBP sent consultation letters to a

number of stakeholders and potentially interested parties. The consultation letters include information about the Yuma and El Paso Projects and invite input from stakeholders regarding potential impacts. They also inform stakeholders that CBP will be accepting comments and input through May 8, 2019.

27. For the Yuma 1 and 2 Projects, CBP sent 108 separate consultation letters to a range of stakeholders and potentially interested parties, including, among others, the Department of Interior ("DOI"), the United States Fish and Wildlife Service ("USFWS"), the Bureau of Land Management ("BLM"), the United States Environmental Protection Agency ("USEPA"), the United States Section of the International Boundary and Water Commission ("USIBWC"), the Arizona State Historic Preservation Officer ("AZSHPO"), the Arizona Game and Fish Department, the Arizona Department of Environmental Quality, State and local officials, Native American Tribes, and numerous non-governmental organizations.

28. For El Paso Project 1, CBP sent 130 separate consultation letters to a range of stakeholders and potentially interested parties, including, among others, DOI, USFWS, BLM, USEPA, the New Mexico Historic Preservation Officer ("NMSHPO"), the New Mexico Environment Department, New Mexico Department of Game and Fish ("NMDGF"), State and local officials, Native American Tribes, and numerous non-governmental organizations.

29. Also on April 8, 2019, CBP posted notices on its website, CBP.gov, notifying the public of the Yuma and El Paso Projects and soliciting the public's input regarding potential impacts. The notices posted on CBP's website can be found at https://www.cbp.gov/document/environmental-assessments/yuma-county-border-

infrastructure-projects-april-2019 and https://www.cbp.gov/document/environmental-assessments/luna-and-do-ana-counties-border-infrastructure-projects-april. The notices included a link to the same consultation letters, including information about the Yuma and El Paso Projects, that was sent to every individual stakeholder or potentially interested party.

30. On April 16, 2019, and April 17, 2019, CBP conducted on-site meetings with representatives from DOI, USFWS, USEPA, Bureau of Reclamation, the Cocopah Tribe, and BLM. At the on-site meetings, the parties toured the Project Areas and discussed the Yuma and El Paso Projects and their potential impacts.

31. Within the next 20 days CBP will survey the Project Areas for biological, historical, and cultural resources, and jurisdictional "Waters of the United States." CBP will use the data and information obtained through those surveys, along with data and information drawn from past environmental surveys and planning that CBP has done in the Project Areas, to prepare biological and cultural resources reports.

32. All of the information and input CBP obtains through stakeholder consultations, the biological and cultural resources reports, and prior environmental planning will inform the project planning and execution of the Yuma and El Paso Projects.

33. Using the information it has compiled and feedback it has received, CBP will prepare an analysis of potential environmental impacts of the Yuma and El Paso Projects. CBP will use that analysis to identify construction Best Management Practices ("BMPs") or design modifications that will be presented to DoD for incorporation into project planning and execution in order to minimize or avoid potential impacts to the extent practicable. In addition, input from stakeholders and CBP's own analysis will be used to develop

mitigation measures, which may be implemented after construction to offset or minimize unavoidable impacts.

ALLEGED HARMS FROM THE YUMA AND EL PASO PROJECTS

34. As detailed in the Paragraphs 19 through 33, CBP has not yet completed the environmental planning and consultation process for the Yuma and El Paso Projects. Those processes are on-going. Nevertheless, based on these ongoing consultations, CBP's prior experience in the Project Areas, meetings with various resource experts, and my understanding of the Yuma and El Paso Projects, I find many of plaintiffs' claims concerning the alleged harms that will result from the Yuma and El Paso Projects to be overstated or misplaced.

A. Alleged Procedural Injuries

35. Plaintiffs have put forth concerns about possible procedural injuries, alleging that construction of the Yuma and El Paso Projects may occur without a review of impacts (Walsh Decl. ¶ 15) or that requiring a NEPA or ESA process for the Yuma and El Paso Projects will "surely redress" the alleged irreparable harms to federally-listed species and other resources that will purportedly result from the Yuma and El Paso Projects (Nagano Decl. ¶ 26).

36. As set forth above, however, CBP is engaging in environmental reviews of the Yuma and El Paso Projects that consider CBP's own data and information, new resource survey data, as well as the input provided by federal and state resource agencies, including USFWS, interest groups, and the public.

37. Through its consultation letters, CBP specifically sought input from numerous parties, including the Sierra Club, the Southern Border Communities Coalition, the Southwest

Environmental Center, and the ACLU. Therefore, a wide range of stakeholders or interested parties, including plaintiffs, will have the opportunity to raise concerns and provide input about the potential environmental impacts of the Yuma and El Paso Projects. CBP will consider that input as it plans for implementation of the Yuma and El Paso Projects.

38. In fact, CBP has a proven track record of responding to concerns or input provided to CBP as a part of its consultation processes. For example, in preparing the Santa Teresa ESP, CBP's Biological Resources Management Plan ("BRMP"), which informed the analysis in the Santa Teresa ESP, was revised to incorporate feedback CBP received from BLM, USFWS, and NMDGF, including incorporation of a discussion regarding proximity of the Santa Teresa project to a population of the Mexican wolf in the United States designated as a non-essential experimental population pursuant to Section 10(j) of ESA. CBP also held a teleconference with BLM to discuss the potential impacts of the Santa Teresa project on the cross-border migration of large mammals, and the BRMP was updated to reflect information received from BLM as a result of this discussion.

39. Similarly, as part of its planning process for border barrier construction in the Rio Grande Valley, Texas ("RGV"), CBP conferred with USFWS. Among other things, USFWS provided CBP with data related to wildlife migration corridors. CBP used that information to modify barrier design and alignment to minimize impacts to wildlife. For barrier construction in RGV, CBP is planning to include gates or gaps in the barrier in known migration corridors. CBP will also use a modified design for levee access ramps that will form a safe island for wildlife in the event of flooding.

40. To the extent that specific recommendations are made for barrier design, alignment modifications, or other measures that will minimize impacts to wildlife, wildlife migration, or other resources for the Yuma and El Paso Projects, CBP will similarly consider and, if feasible, recommend to DoD that those measures be incorporated into project planning and execution.

B. Alleged Environmental Harms

41. In addition to alleged procedural injuries, plaintiffs make a number of allegations regarding purported environmental harms that they assert will result from the Yuma and El Paso Projects, including impacts to federally-listed species, other wildlife, and plaintiffs' recreational or aesthetic interests. As detailed below, I find plaintiffs' claims to be exaggerated or misplaced.

1. Federally-Listed Species

42. Plaintiffs allege that the Yuma and El Paso Projects will have dire consequences for the endangered Northern jaguar. (Bixby Decl. ¶ 9.) For example, plaintiffs claim that a fixed border barrier has the potential to cause "irreparable harm for a jaguar isolated from a mate prior to insemination or a cub separated from its mother" (Hadley Decl. ¶ 13) and that construction of the Yuma and El Paso Projects "would stop jaguar movement through the region, potentially limiting recolonization" (Lasky Decl. ¶ 7).

43. USFWS defines critical habitat as those areas that contain the physical and biological features essential to the conservation of a species. 50 C.F.R. § 424.12(b). Critical habitat is generally limited to those areas that are either occupied by the species or those areas outside the geographic area occupied by the species that are essential to the conservation of the species. *Id.* The only designated critical habitat for jaguar within New Mexico is

found in Hidalgo County. *Final Rule, Designation of Critical Habitat for Jaguar*, 79 Fed. Reg. 12572 (March 5, 2014), available at https://www.federalregister.gov/documents/2014/03/05/2014-03485/endangered-and-threatened-wildlife-and-plants-designation-of-critical-habitat-for-jaguar. The El Paso 1 Project Area is well to the east of Hidalgo County in Luna and Doña Ana Counties. According to USFWS' critical habitat designation, there have only been seven individual jaguars detected in the United States since 1982, with all of them occurring in areas where critical habitat has been designated. *Id*. at 125851. Further, the most recent known breeding event in the United States, according to USFWS, was in 1910. *Id*. at 12586. Thus, plaintiffs' assertion that the Yuma and El Paso Projects will cause "irreparable harm for a jaguar isolated from a mate prior to insemination or a cub separated from its mother" is exaggerated. Similarly, the only designated critical habitat for jaguar within Arizona is found in Cochise, Pima, and Santa Cruz Counties. *Id*. at 12572. The Yuma 1 and 2 Project Areas are in Yuma County, well to the west of any designated critical habitat for jaguar in Arizona. In light of the above, the evidence does not support plaintiffs' suggestion or assertion that the Yuma and El Paso Projects will significantly harm the jaguar population or jaguar recovery in the United States.

44. Likewise, plaintiffs cite potential threats to the endangered Chiricahua leopard frog. (Hadley Decl. ¶ 24.) However, there is no designated habitat for Chiricahua leopard frog in Luna County or Doña Ana County, New Mexico where El Paso Project 1 will occur. *Final Rule, Listing and Designation of Critical Habitat for the Chiricahua Leopard Frog*, 77 Fed. Reg. 16324 (March 20, 2012), available at https://www.govinfo.gov/content/pkg/FR-2012-03-20/pdf/2012-5953.pdf. Nor is there

any critical habitat designated for Chiricahua leopard frog in Yuma County, Arizona where Yuma Projects 1 and 2 will occur. *Id.* Therefore, like their allegations concerning jaguar, plaintiffs' alleged harms concerning this species are misplaced. The evidence does not support plaintiffs' suggestion or assertion that the Yuma and El Paso Projects will significantly harm the Chiricahua leopard frog population or its recovery.

45. Plaintiffs express concern about the potential consequences for the white-sided jack rabbit. (Hadley Decl. ¶ 17.) Here again, however, this species only occurs in Hidalgo County, New Mexico. (Traphagen Decl. ¶ 26); *12-Month Finding on the Petition to List the White-Sided Jackrabbit as Threatened or Endangered*, 75 Fed. Reg. 53615, 53618 (September 1, 2010), available at https://www.govinfo.gov/content/pkg/FR-2010-09-01/pdf/2010-21774.pdf#page=1. As noted above, there will be no construction or other activities in Hidalgo County as a part of the Yuma and El Paso Projects. Therefore, the evidence does not support plaintiffs' suggestion or assertion that the Yuma and El Paso Projects will significantly harm the white-sided jack rabbit population or its recovery.

46. Similarly, plaintiffs raises concerns about impacts to ocelot (Bixby ¶ 9; Munro ¶ 7; Vasquez ¶ 12) and pronghorn, (Hadley Decl. ¶ 15; Traphagen Decl. ¶¶ 28, 30-31; Munro Decl. ¶ 7.) Within the United States, ocelot are only known to occur in south Texas and eastern Arizona, areas that will be unaffected by the Yuma and El Paso Projects. *See United States Fish and Wildlife Service, Species Profile for Ocelot*, available at https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=A084. As such, the evidence does not support plaintiffs' suggestion or assertion that the Yuma and El Paso Projects will significantly harm ocelot, the ocelot population, or its recovery. In my discussions with USFWS, I inquired about impacts to pronghorn and USFWS did not express

significant concerns about pronghorn being impacted by the Yuma or El Paso Projects. Thus, the Yuma and El Paso Projects will not significantly harm the pronghorn population or its recovery.

47. Plaintiffs further allege that El Paso Project 1 will adversely impact the endangered Mexican wolf and Aplomado falcon. (Nagano Decl. ¶ 12; Lasky Decl. ¶ 7.) USFWS has reintroduced both species in New Mexico as non-essential experimental populations pursuant to Section 10(j) of ESA, which means that USFWS has determined that the loss of these entire populations would not be "likely to appreciably reduce the likelihood of the survival of the species in the wild." 50 C.F.R. § 17.80(b).

48. Plaintiffs assert that construction activities associated with El Paso Project 1 present dire risks to both species. (Nagano Decl. ¶13.) Plaintiffs allege that construction activities will result in "injury, death, harm, and harassment" to the Mexican wolf and Aplomado falcon. (Nagano Decl. ¶ 13.) Plaintiffs claim that these harms will result from "linear vegetation clearing; road construction; grading and construction of equipment storage and parking areas; off road movement of vehicle[s] and equipment involved in construction; and poisoning from chemical applications (herbicides and pesticides)." (*Id.*) Plaintiffs further allege that these two species may be forced to abandon the El Paso 1 Project Area for essential behaviors such as feeding, resting, and mating and that there could be detrimental impacts caused by exotic species introduced by construction, which will eliminate food sources and habitat for rodents and other mammals utilized by the two species. (*Id.*)

49. Plaintiffs' claims regarding the potential impacts to the Mexican wolf and Aplomado falcon resulting from construction activities are overstated.

50. Plaintiffs' description of the actual construction activities is not accurate. The areas in and around the barrier footprint and construction staging areas are disturbed and largely devoid of vegetation. Therefore, there will be little to no vegetation clearing required for project execution. Further, there is already an existing border road that parallels the border within the El Paso 1 Project Area. Therefore, any new road construction or improvement will likely be within or adjacent to that existing road footprint. CBP also has construction BMPs, which it plans to present to DoD for consideration and incorporation into project execution, that are designed to address some of the very issues raised by plaintiffs. For example, as a part of the Santa Teresa Project, CBP implemented construction BMPs that included, among other things: (a) measures designed to prevent the entrapment of wildlife species; (b) anti-perch devices to discourage roosting by birds; (c) construction speed limits to minimize the risk of animal collisions; (d) backshields on lighting to minimize light pollution; (e) vehicle cleaning specifications to minimize the spread and establishment of invasive species; and (f) stringent requirements concerning the application of any herbicide or pesticide. Santa Teresa ESP at 4-5- 4-6. In addition, the Santa Teresa Project included species-specific BMPs. For example, to minimize impacts to Aplomado falcon, no construction was allowed to occur within two miles of active falcon nests, noise and light abatement measures were developed, and limits were placed on the removal of larger nests from other varieties of birds that could potentially be utilized by Aplomado falcon. *Id.* at 4-8.

51. USFWS has informed me that the potential impacts described by plaintiffs are unlikely to occur. USFWS informed me that the nearest known Aplomado falcon pair is located roughly seven miles from the El Paso 1 Project Area, in an area known as Simpson Draw

(the "Simpson Draw Pair"). After the Simpson Draw Pair, the nearest known pair are over 100 miles from the El Paso 1 Project Area. USFWS further stated that, while it would be possible for the Simpson Draw Pair to fly to the El Paso 1 Project Area, their risk of being killed, harmed, or harassed are at least as great on New Mexico Highway 9 and in the farm fields that are situated between Simpson Draw and the El Paso 1 Project Area. Relative to the El Paso 1 Project Area, New Mexico Highway 9 is closer to the area where the pair typically nest. Thus, USFWS stated, if the traffic and other activity from New Mexico Highway 9 has not caused the Simpson Draw Pair to abandon the site, it is unlikely that construction activities from El Paso Project 1 will. Further, USFWS has not expressed any concerns about potential construction impacts to Mexican wolf, and transient individual wolves are only rarely found in the El Paso Project Area.

52. This squares with CBP's prior analysis of construction impacts. As a part of the Santa Teresa Project, CBP concluded that construction activities did not pose a significant risk to either Mexican wolf or Aplomado falcon. Santa Teresa ESP at 3-24-3-25. The analysis in the Santa Teresa ESP was informed by input it received from USFWS and other resource agencies.

53. Regarding Mexican wolf, CBP concluded that Mexican wolf would not be impacted by construction activities because it is a mobile species and would leave the area if disturbed by such activities. *Id*. As to Aplomado falcon, CBP concluded that any impacts to Aplomado falcon from construction activities would be temporary and minor. *Id*. Given the similarity of the two projects and the input CBP has received from USFWS, I would expect that CBP will be able to reach similar conclusions concerning El Paso Project 1.

54. In addition to potential construction impacts, plaintiffs allege that the improved barrier that will be constructed as a part of El Paso Project 1 will have dire consequences for recovery of these species. (Bixby Decl. ¶ 9.) Plaintiffs allege that the project will negatively impact the long-term recolonization or repopulation of the Mexican wolf (Lasky Decl. ¶ 7; Nagano Decl. ¶ 15) because it will prevent connection between wolves in the United States and Mexico (Traphaegen Decl. ¶ 18). Plaintiffs allege that the lack of connectivity will either harm Mexican wolf recovery (Traphagen Decl. ¶ 25) or could actually "eliminate the possibility of recovery" (Nagano Decl. ¶ 15).

55. Despite plaintiffs' claims to the contrary, the evidence does not support plaintiffs' suggestion or assertion that the Yuma and El Paso Projects will significantly harm the population or recovery of either species. Regarding Mexican wolf, plaintiffs have overstated the potential harms. The recovery criteria for Mexican wolf specifically contemplates "two demographically and environmentally independent populations," one in the United States and one in Mexico, "such that negative events (e.g. diseases, severe weather, natural disasters) are unlikely to affect both populations simultaneously." *United States Fish and Wildlife Service, Mexican Wolf Recovery Plan, First Revision* (November 2017) at 24, available at https://www.fws.gov/southwest/es/mexicanwolf/pdf/2017MexicanWolfRecoveryPlanRevision1Final.pdf. According to USFWS, having two resilient populations provides for redundancy, which in turn provides security against extinction from catastrophic events that could impact a population. *Id.* Recovery criteria also call for achieving a specific genetic target to ensure genetic threats are adequately alleviated. *Id*. USFWS has recognized the benefits of connectivity (wolves naturally dispersing between populations)

to improve genetic diversity but has also stated, "[USFWS] do[es] not expect the level of dispersal predicted between any of the sites (particularly between the United States and northern Sierra Madre Occidental) to provide for adequate gene flow between populations to alleviate genetic threats or ensure *representation* of the captive population's gene diversity in both populations." *Id*. (emphasis in original). Therefore, USFWS crafted a recovery strategy for the Mexican wolf that relies on the initial release of wolves from captivity to the wild and the translocation of wolves between populations as a necessary form of management to alleviate genetic threats during the recovery process. *Id*. USFWS specifically stated that "connectivity or successful migrants are not required to achieve recovery" of the Mexican wolf. *Id.* at 15.

56. Similarly, regarding Aplomado Falcon, as noted above, USFWS has informed me that the nearest known Aplomado falcon pair is the Simpson Draw Pair, which is located roughly seven miles from the El Paso 1 Project Area. After the Simpson Draw Pair, the nearest known pair is over 100 miles from the El Paso 1 Project Area. USFWS has further informed me that, in the unlikely event that the Simpson Draw pair is killed or abandoned its nesting area due to El Paso Project 1, the impact to the subspecies survival and recovery would be negligible. According to USFWS, Aplomado falcon pairs likely number into the hundreds and are distributed among three populations and four countries. As such, the Simpson Draw pair likely account for less than 1% of Aplomado falcons. Therefore, even if the proposed construction resulted in the loss of one pair, it is not likely to significantly reduce the subspecies' survival or recovery probabilities.

57. In addition, it is unlikely that construction activities from El Paso Project 1 will have an appreciable impact on the availability of habitat for either species. USFWS has not

designated any critical habitat for the Aplomado falcon because there is "ample suitable habitat" to support falcons in Arizona and New Mexico. *Final Rule, Establishment of Experimental Population of Northern Aplomado Falcons in New Mexico and Arizona*, 71 Fed. Reg. 42298, 42305 (July 26, 2006), available at https://www.govinfo.gov/app/details/FR-2006-07-26/06-6486. Similarly, USFWS has not designated any critical habitat for Mexican wolf. USFWS has stated that there is a "large expanse of contiguous high-quality habitat" in central Arizona into west central New Mexico, as well as other patches of high-and-low quality habitat. *Mexican Wolf Recovery Plan,* at 11. Given the large amount of habitat that is already available to these species and in light of the fact that the El Paso 1 Project Area is already heavily disturbed, it is unlikely that the project will have a significant impact on the available habitat for either species.

2. Other Wildlife Species

58. In addition to federally-listed species, plaintiffs allege harms to state-listed species such as the Gila monster. (Nagano Decl. ¶¶ 20-25.) While plaintiffs acknowledge "the low number of observations and records of Gila monster west of El Paso and Las Cruces" where the El Paso 1 Project Areas is situated (Nagano Decl. ¶ 23), plaintiffs assert that it is "highly likely that this animal inhabits the area where the border wall is proposed." (Nagano Decl. ¶ 24.) Based on its purported presence in Luna and Doña Ana Counties, plaintiffs claim that the threats from the border barrier "come in the form of direct effects of wall construction such as their death and injury from construction operations, falling into trenches or other holes then dying of exposure or being buried alive; getting run over by vehicles associated with the project; collected by construction personnel; and indirect

effects in the form of the border wall blocking their movement patterns or reducing the size of an individual's home range and eliminating the available food or shelter resources." (Nagano Decl. ¶ 25.)

59. Here again, plaintiffs appear to have overstated the potential harms. First, plaintiffs' claim that Gila monsters are present within the El Paso 1 Project Area is highly speculative. The Recovery Plan for Gila monster states: "The Gila Monster reaches the eastern extent of its range in southwestern New Mexico, but the limits of its range are poorly understood. Its occurrence in Hidalgo and Grant Counties is well established, whereas origins of the small number of specimens and sight records from Luna and Doña Ana Counties have been questioned. The records from Kilborne Hole in Doña Ana County near Deming and Las Cruces are suspected to be released or escaped pets." *New Mexico Game and Fish, Gila Monster Recovery Plan* (April 5, 2017) at 6, available at http://www.wildlife.state.nm.us/download/conservation/species/amphibians-reptiles/Gila-Monster-Recovery-Plan.pdf. Second, even if it is accepted that Gila monsters occupy the El Paso 1 Project Area, as detailed above, CBP has construction BMPs, which will be presented to DoD for consideration and incorporation into project execution, that will address some of the issues raised by plaintiffs. These include measures designed to prevent the entrapment of wildlife species and construction speed limits to minimize the risk of animal collisions. Plaintiffs' assertion that the border barrier will block their movement patterns or reduce the size of an individual's home range and eliminating the available food or shelter resources is also speculative. The standard design of the planned bollard wall includes four-inch spacing between bollards thus allowing for the passage of Gila monsters through the barrier. In light of the above, the evidence does not

support plaintiffs' suggestion or assertion that the Yuma and El Paso Projects will significantly harm the viability of the Gila monster population.

60. Plaintiffs also overstate or exaggerate the risks to other wildlife species. For example, plaintiffs speculate that increased patrol activity will be detrimental to wildlife (Munro Decl. ¶ 9) or will present a specific risk of harm to species such as the Western Narrow-mounted toad (Traphagen Decl. ¶ 26). However, the Yuma and El Paso Projects are construction projects. Neither contemplates the hiring of additional Border Patrol agents and deploying those agents to patrol within the Project Areas.

61. Finally, plaintiffs put forth generalized fears that the Yuma and El Paso Projects will harm wildlife because they will bisect the habitat of larger species such as bobcats, mountain lions, mule deer, and badger (e.g., Munro Decl. ¶ 7; Bixby Decl. ¶ 8; Lasky Decl. ¶ 6) and smaller species such as lizards (Walsh Decl. ¶ 11), bats, birds, and snakes (Lasky Decl. ¶¶ 9-11). In at least one instance, plaintiffs go so far as to say that the Yuma and El Paso projects will result in "ecological devastation and likely regional extirpation of species." (Walsh Decl. ¶ 15.) Plaintiffs do not provide much in the way of support for these generalized fears. In addition, these assertions are directly at odds with CBP's prior analysis of similar projects, including the recent Santa Teresa Project. In the Santa Teresa ESP, which, as noted, examined the potential impacts of a project that is very similar to the Yuma and El Paso Projects, CBP concluded that the Santa Teresa Project would result only in minor adverse effects to wildlife. Santa Teresa ESP at 3-23. To this same end, in the Yuma 2 Project Area, the conversion from wire mesh fencing to bollard wall will have beneficial impacts for some smaller species, including the Flat-tailed horned lizard. For prior projects where CBP constructed mesh-style fencing, CBP

incorporated into the design small holes in the bottom of the fence that would allow for migration of smaller species such as Flat-tailed horned lizard. CBP incorporated these holes into the design upon the recommendation of USFWS and other resource agencies. The bollard wall will not require such holes because smaller species such as Flat-tailed horned lizard will be able to travel through the four-inch gaps between the bollards.

3. Recreational and Aesthetic Injuries

62. Plaintiffs also put forth a number of claims concerning purported recreational or aesthetic injuries. Plaintiffs allege that they enjoy recreational and aesthetic interests in the areas in and around the Project Areas. (*E.g.*, Bixby Decl. ¶ 6; Walsh Decl. ¶ 12.) These include hiking and camping in the desert scrubland and surrounding peaks or "sky islands" (Bixby Decl. ¶ 6), hunting and other hobbies (Trejo Decl. ¶¶ 6, 8; Vasquez Decl. ¶ 14), and fishing (Del Val Decl. ¶¶ 8-9). Plaintiffs assert not only that Yuma and El Paso Projects puts those interests at risk (Walsh Decl. ¶ 15) but that the consequences could be "devastating" (Bixby Decl. 12).

63. The evidence does not support plaintiffs' suggestions or assertions the Yuma and El Paso Projects will have significantly harm plaintiffs' recreational activities or aesthetic interests. The Yuma and El Paso Projects will not affect any change to the existing land use within the Project Areas. The Yuma and El Paso Projects will occur on federally-owned land that is directly adjacent to the border—the vast majority of the construction activity and the project footprints themselves will occur within a 60-foot strip of land that parallels the international border. These areas are heavily disturbed, include existing barriers and roads, and function primarily as a law enforcement zone. The Yuma 2

Project Area is on the BMGR, a military installation and active bombing range where unauthorized entry is prohibited. Given their current condition and use, I would be surprised to learn that any person has or would use the Project Areas for camping, hiking, hunting, or other recreational or aesthetic activities.

64. Further, the Yuma and El Paso Projects will not affect any change to the existing land uses in the areas that surround the Project Areas. Plaintiffs may continue to recreate in and enjoy the natural and undeveloped areas that surround the Project Areas. For example, because the barriers and roads that will be replaced or improved as a part of Yuma Project 1 are directly adjacent to the international border, plaintiffs will continue to be able to access and fish in the canals in and around Yuma, Arizona, including the West Main Canal. (Del Val Decl. ¶¶ 6-8.) Yuma Project 1 is located west of the canal and will not have any impact on the public's access to the canals. Similarly, El Paso Project 1 will not impact plaintiffs' ability to access, use, and enjoy the vast desert and mountains that surround the El Paso 1 Project Area. In fact, there are historical examples where CBP's construction of border barriers has resulted in increased public access and use in areas surrounding the border because barrier construction has reduced illegal traffic and, in turn, made such areas safer for access and use by the public.

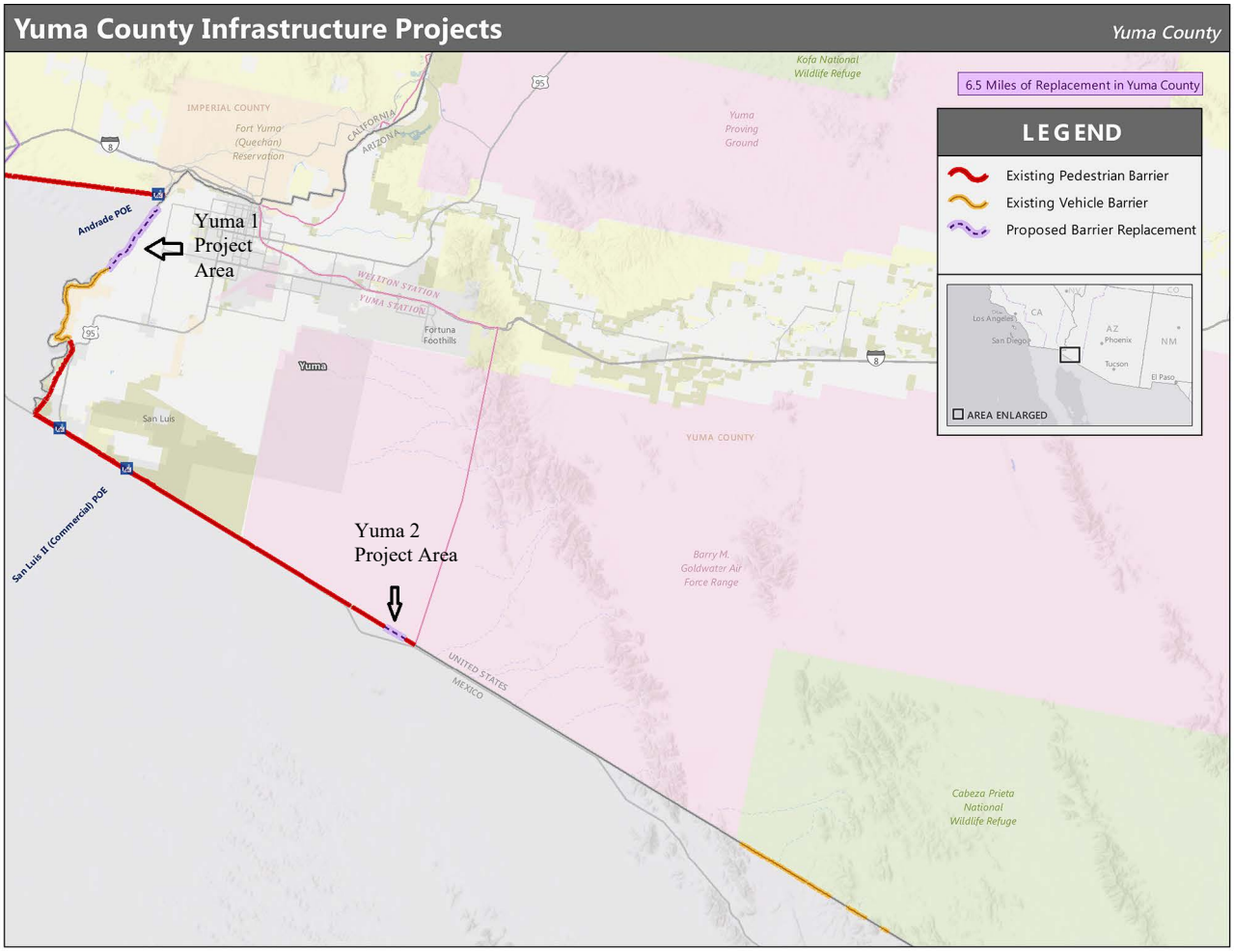
This declaration is made pursuant to 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct to the best of my current knowledge.

Executed on this 25 day of April, 2019.

Paul Enriquez
Acquisitions, Real Estate and Environmental Director
Border Wall Program Management Office
U.S. Border Patrol

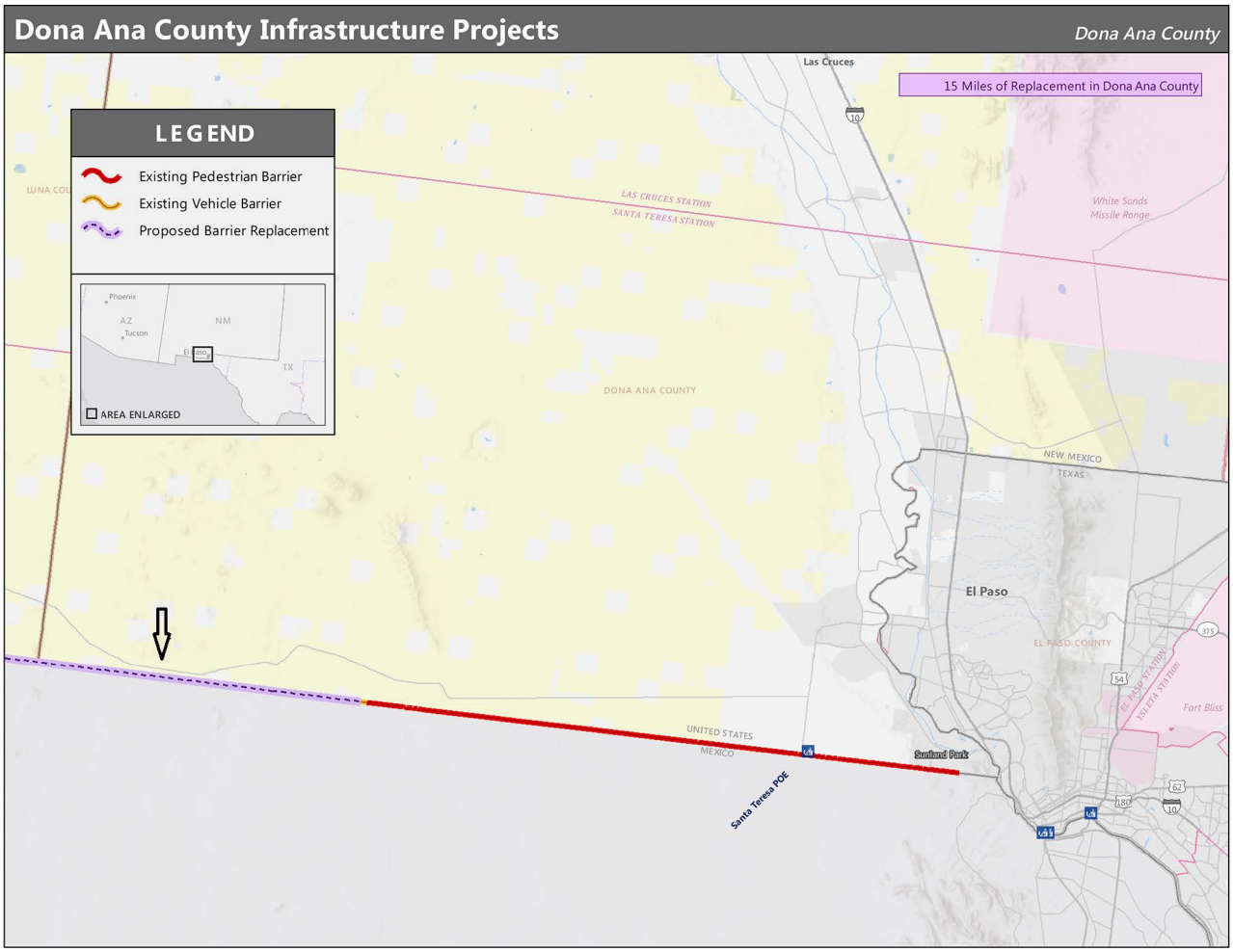
U.S. Customs and Border Protection

Exhibit A
Yuma 1 and 2 Project Areas



U.S. Customs and Border Protection

Exhibit B
El Paso 1 Project Area



U.S. Customs and Border Protection

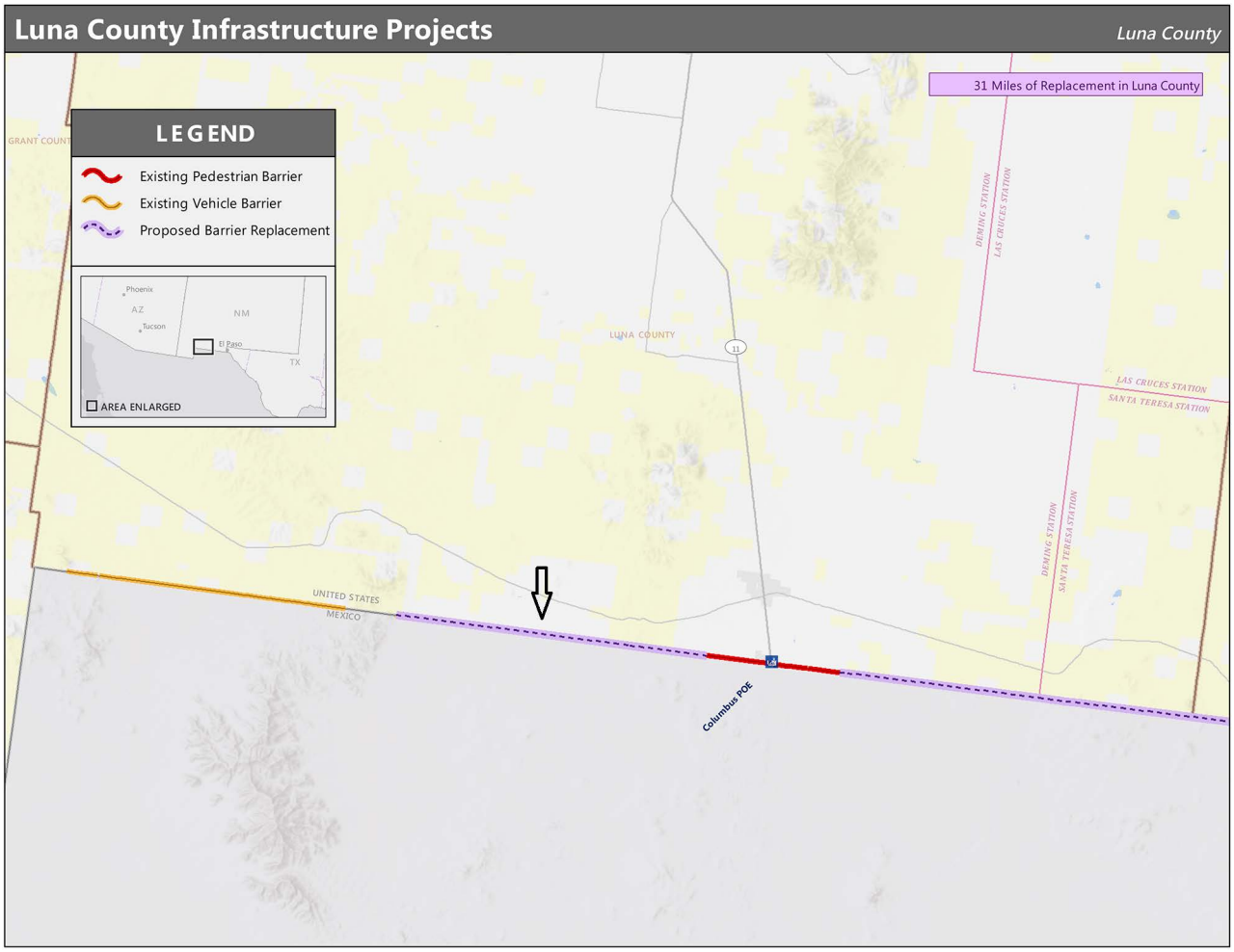


EXHIBIT 2

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

SIERRA CLUB, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 4:19-cv-00872-HSG

DECLARATION OF ERIC M. MCFADDEN

I, Eric M. McFadden, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

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

2. I am a Colonel in the United States Army and am currently the Commanding Officer for Task Force Barrier ("Task Force") with the U.S. Army Corps of Engineers ("Corps"), South Pacific Division. I am stationed in Phoenix, Arizona.

3. The Task Force's primary mission is to coordinate the construction of approved border barrier projects on the southern border of the United States.

4. In my capacity as the Commanding Officer of the Task Force, I have overall responsibility for, and authority over, the Task Force and its operations, consistent with relevant policy, regulations, and laws. In this respect, my responsibilities include providing oversight, direction, and management of all systems and personnel, including contracting officers, involved in executing the Task Force's mission.

5. In the course of my duties, I oversaw the award of contracts for El Paso Project 1, which involves the replacement of 46 miles of vehicle fence with pedestrian fencing in New Mexico ("El Paso 1"), and for Yuma Project 1, which involves the replacement of five miles of vehicle barrier fencing in the Yuma Sector ("Yuma 1"). I am currently overseeing the subsequent performance of work on these contracts. These awarded projects are collectively referred to as "Tranche 1."

6. Approximately $423,999,999 remains unobligated on the Tranche 1 projects and is expected to be needed to complete those projects: $388,999,999 unobligated for El Paso 1 and $35,000,000 unobligated for Yuma 1.

7. Amounts made available to the Corps to construct the Tranche 1 projects are from the fiscal year 2019 Operation and Maintenance, Army, appropriation. As provided in Section 8003 of the Department of Defense Appropriations Act, 2019, any unobligated amounts in the Operation and Maintenance, Army, appropriation, including the unobligated amounts described in paragraph six above, will no longer remain available for obligation after the fiscal year ends on September 30, 2019.

8. The contracting process necessary to completely obligate the full value of the contracts awarded for El Paso 1 and Yuma 1 (Tranche 1) is complex. These contracts are "undefinitized" contract actions, which is a type of contract for which the contract terms, specifications, or price are not agreed upon before performance begins, but which does establish an overall ceiling price pending definitization. "Definitization" occurs when the parties determine or agree on the contract terms, specifications, and price. *See* Defense Federal Acquisition Supplement ("DFARS") SUBPART 217.74 –UNDEFINITIZED CONTRACT ACTIONS (JUN 2018). The definitization process includes extensive negotiation, audits of contractor accounting systems, and review of proposals by the Defense Contract Audit Agency ("DCAA"), as well as legal review, all prior to the contracting officer reaching a fair and reasonable pricing determination to finalize the contract pricing.

9. The Corps is subject to statutory restrictions on undefinitized contract actions. Title 10 U.S.C. § 2326 restricts the Corps from obligating more than 50 percent of the contract's ceiling price upon award. If the contractor submits a qualifying proposal that contains sufficient information to enable the Corps to conduct a meaningful audit of the information contained in the proposal, the amount obligated may be increased to 75 percent of the negotiated overall ceiling price. Upon definitization, the Corps may obligate the remaining unobligated balance of the initial ceiling or such amounts as necessary to fully fund the contract's final negotiated price. If an agreement is not reached on contractual terms, specifications, and price within the time specified by the contract, the Corps may unilaterally definitize those terms.

10. The terms of the Tranche 1 contracts require definitization not later than 100 days from the date of contract award (the award dates are April 9 for El Paso 1 and May 15 for Yuma 1). If the Corps does not have sufficient time available prior to September 30, 2019, to definitize these contracts and thereby obligate the balance of the contract price, the remaining unobligated funds will become unavailable for obligation, as described in paragraph seven above. As a consequence, the Corps will be unable to complete the projects as planned, and the contracts will have to be significantly de-scoped or terminated.

11. On May 24, 2019, in compliance with the District Court's preliminary injunction, I directed the Task Force to cease all actions involved in constructing border barriers in the areas identified as El Paso 1 and Yuma 1 (Tranche 1). Accordingly, the contracting officers for the El Paso 1 and Yuma 1 contracts directed the respective contractors to suspend all work on those contracts

in the identified sectors, pursuant to Federal Acquisition Regulation ("FAR") Clause 52.242-14, SUSPENSION OF WORK (APR 1984).

12. As the Commander of the Task Force, I have been made aware by the contracting officers that suspending work on the above-named contracts in response to the preliminary injunction will cause significant immediate and irreparable harm to the government as described below.

13. Pursuant to FAR 52.242-14, the contractor is entitled to an adjustment for any increase in the cost of performance of the contract (excluding profit) necessarily caused by an unreasonable period of time during which the contract is suspended or delayed. The reasonableness of a suspension or delay is determined based upon the totality of the circumstances, including the duration of the delay. In this case, despite the suspension of work, the contractors will nevertheless continue to incur costs for every day that the contracts are suspended. The Corps estimates that these costs are likely to include significant costs for equipment the contractor must keep ready for use at multiple locations, costs for security to keep the equipment and materials from being stolen or vandalized, labor costs for the personnel managing the contract, labor costs for the personnel who have been trained and are dedicated to execute the tasks under the contract (workers whom the contractor would be reluctant to release due to the risk of not being able to rehire them), and potential costs associated with storing construction materials. Further, there will likely be increased market prices on labor, materials, and equipment (*i.e.*, steel and concrete). The Corps will be obligated to reimburse these additional costs, which would not have been incurred but for the Court's injunction. Moreover, the Corps will be obligated to reimburse these additional costs from funds that would otherwise be spent on actual barrier construction.

14. For El Paso 1, the costs expected to be incurred while the contract is suspended are currently estimated to be approximately $195,000 per day (approximately $5,460,000 per month).

15. For Yuma 1, the costs expected to be incurred while the contract is suspended are currently estimated to be approximately $20,000 per day (approximately $560,000 per month).

16. Additionally, both contractors have already incurred significant costs for their work on these projects. These are costs to the contractor that the government owes, but cannot pay because of the injunction, and they will result in additional costs to the government. The prompt payment interest penalty is 3.625 percent per annum, if the Corps does not pay invoices within 30 days of certification and submission. *See* FAR 52.232-27 PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (JAN 2017) (citing to 5 C.F.R. Part 1315).

17. For El Paso 1, the contractor has already incurred approximately $9,600,000 in material costs, $785,000 in labor costs, $250,000 in overhead, and $150,000 in travel. The total estimated incurred costs to date are $10,785,000. The estimated cost to the government for failure to timely pay any invoiced amounts for the above-related costs could reach approximately $390,956 per year.

18. For Yuma 1, the contractor has already incurred approximately $10,300,000 in material costs, $200,000 in labor costs, $50,000 in overhead, and $15,000 in travel. The total estimated

incurred costs to date are $10,565,000. The estimated cost to the government for failure to timely pay any invoiced amounts for the above-related costs could reach approximately $382,981 per year.

19. Therefore, if these contracts remain suspended, the government could incur estimated additional expenses of $6,020,000 monthly, plus any interest. These costs will quickly become unsustainable for the government, and if the contracts remain suspended for too long, the Corps will be forced to de-scope or terminate the contracts. Currently, the contracting officers estimate that if the contracts remain suspended for more than six months, the Corps will likely need to consider termination. The Corps estimates that the cost to terminate El Paso 1 will range between $71,600,000 and $101,600,000, and the cost to terminate Yuma 1 will range between $8,600,000 and $11,600,000.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 29th day of May, 2019.

MCFADDEN.ERIC.MICHAEL.1157309842 Digitally signed by MCFADDEN.ERIC.MICHAEL.1157309842 Date: 2019.05.29 05:58:38 -07'00'

Eric M. McFadden
Colonel, United States Army