JAMES M. BURNHAM
Deputy Assistant Attorney General
ALEXANDER K. HAAS
Director, Federal Programs Branch
ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch
ANDREW I. WARDEN (IN #23840-49)
Senior Trial Counsel
KATHRYN C. DAVIS
MICHAEL J. GERARDI
LESLIE COOPER VIGEN
RACHAEL WESTMORELAND
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, D.C. 20530
Tel.: (202) 616-5084
Fax: (202) 616-8470
Attorneys for Defendants

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

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING BORDER BARRIER PROJECTS UNDERTAKEN PURSUANT TO 10 U.S.C. § 2808; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Hearing Date: November 20, 2019
Time: 10 a.m.
Place: Oakland Courthouse
Courtroom 2, 4th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

UNITED STATES CONSTITUTION

OTHER AUTHORITIES

NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

PLEASE TAKE NOTICE that Defendants hereby move the Court pursuant to Federal Rules of Civil Procedure 54(b) and 56 for partial summary judgment with respect to the funding and construction of the border barrier projects undertaken pursuant to 10 U.S.C. § 2808. The motion is based on the following Memorandum of Points and Authorities in support of Defendants' motion and in opposition to Plaintiffs' motion for partial summary judgment, as well as all previous filings in this action, including the certified administrative record (ECF No. 212) and Defendants' opposition to Plaintiffs' motion for preliminary injunction (ECF No. 89).

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

On February 15, 2019, the President issued a proclamation declaring that a national emergency exists at the southern border. *See* Presidential Proclamation on Declaring a Nat'l Emergency Concerning the S. Border of the United States, 84 Fed. Reg. 4949 (Feb. 15, 2019) (Proclamation). Because the southern border is "a major entry point for criminals, gang members, and illicit narcotics" as well as "large-scale unlawful migration," the President determined that "[t]he current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency." *Id.* Given the "gravity of the current emergency situation," the President also determined that "this emergency requires use of the Armed Forces" and "it is necessary for the Armed Forces to provide additional support to address the crisis." *Id.*

To respond to the national emergency, the President's Proclamation invoked and made available to the Department of Defense (DoD) the statutory authority conferred in 10 U.S.C. § 2808, which authorizes DoD to spend unobligated military construction funds to undertake military construction projects necessary to support the use of the armed forces in response to a national emergency that requires the use of the armed forces. DoD has been building barriers along the southern border since the 1990s, and several thousand military personnel are currently deployed to the southern border to provide a wide range of assistance to the Department of Homeland Security (DHS) in its border security mission. To provide additional support for these military forces, the

Secretary of Defense undertook an extensive multi-agency deliberative process that culminated in his decision on September 3, 2019, to undertake eleven border barrier military construction projects in California, Arizona, New Mexico, and Texas pursuant to § 2808 as necessary to support the use of the armed forces in connection with the national emergency.

Plaintiffs here, a collection of 20 States, raise various statutory and constitutional challenges to the Secretary's decision, but none of them has merit. As a threshold matter, the States claims fail because their alleged injuries fall outside the zone of interests protected by the limitations in § 2808 as well as the Consolidated Appropriations Act, 2019 (CAA), Pub. L. No. 116-6, 133 Stat. 13 (2019). Further, the States lack an implied cause of action in equity to enforce the Appropriations Clause.

Even assuming the States have a cause of action, the Secretary of Defense's decision to undertake the projects was lawful and consistent with the requirements of § 2808. The projects all constitute "military construction" undertaken "with respect to a military installation." *See* 10 U.S.C. § 2801. Congress defined these terms broadly and the border barrier projects here easily fall within those statutory definitions. The Secretary also properly determined that the projects are necessary to support the use of the armed forces in connection with the national emergency at the southern border because the projects will, among other things, enhance the ability of military forces to support DHS more effectively and efficiently. The Secretary's military judgment with respect to the allocation of resources to support the armed forces is committed to his discretion by law or, at most, is subject to review under a highly deferential standard given the long line of authority requiring judicial deference to military judgments. Further, there is no merit to the States' argument that the Secretary acted arbitrarily and capriciously in violation of the Administrative Procedure Act (APA) by funding the projects using money from unobligated military construction projects, as § 2808 requires.

The Court should also reject the States' argument that the use of § 2808 violates other statutory and constitutional provisions. DoD's use of its independent statutory authority pursuant to § 2808 does not violate any provision of the CAA. Additionally, the States' claim against DoD under the National Environmental Policy Act (NEPA) fails because § 2808 authorizes military construction "without regard to any other provision of law" and thus sweeps aside statutes like NEPA that would impede the activities authorized by § 2808. The States' NEPA claim against the Department of the

Interior (DoI) fares no better as it is procedurally improper and, in any event, fails on the merits given the mandatory nature of the emergency land transfer authority under Federal Land Policy and Management Act (FLPMA). Further, the States' purported constitutional claims under the Appropriations Clause, Presentment Clause, and separation of powers are nothing more than dressed-up allegations of statutory violations and otherwise fail on the merits.

The States' request for a permanent injunction should also be denied because the States have not carried their burden to establish an irreparable injury. The States are not injured by their inability to enforce state laws in contravention of § 2808; they have not carried their burden to establish that the § 2808 projects will irreparably injure wildlife; and their generalized complaints about harm to their local economies are insufficient to establish standing, let alone irreparable injury warranting a permanent injunction. Moreover, the balance of equities tips sharply in favor of the Government given the compelling interests in supporting military forces and in protecting the safety and integrity of the Nation's borders, as compared to the States' environmental and fiscal interests.

For these reasons, as explained below, the Court should deny the States' motion for partial summary judgment, grant Defendants' motion for partial summary judgment, and enter final judgment for Defendants on all claims related to the funding and construction of § 2808 border barrier projects.

BACKGROUND

I. DoD's Support for DHS' Efforts to Secure the Southern Border

On January 25, 2017, the President issued an Executive Order stating that it is the policy of the Executive Branch to "secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism." *See* Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017). On April 4, 2018, the President issued a memorandum to the Secretary of Defense, Secretary of Homeland Security, and the Attorney General titled, "Securing the Southern Border of the United States." Presidential Memorandum, 2018 WL 1633761 (Apr. 4, 2018). The President stated that "[t]he security of the United States is imperiled by a drastic surge of illegal activity on the southern border" and pointed to an "anticipated rapid rise in illegal crossings," as well as "[t]he

combination of illegal drugs, dangerous gang activity, and extensive illegal immigration." *Id.* The President determined the situation at the border had "reached a point of crisis" that "once again calls for the National Guard to help secure our border and protect our homeland." *Id.* To address this crisis, the President directed the Secretary of Defense to support DHS in securing the border, including through the use of the National Guard. *Id.*

The President's directive for the military to assist with DHS' border security efforts builds on a decades-long practice of DoD providing support to civilian law-enforcement activities at the border. Congress has authorized the military to provide a wide range of support to DHS at the southern border. *See, e.g.*, 10 U.S.C. §§ 251–52, 271–84. And since the early 1990s, military personnel have provided extensive assistance to civilian law-enforcement agency activities to secure the border, counter the spread of illegal drugs, and respond to transnational threats. *See* H. Armed Servs. Comm. Hr'g on S. Border Defense Support (Jan. 29, 2019) (Joint Statement of John Rood, Under Secretary of Defense for Policy, and Vice Admiral Michael Gilday, Director of Operations for the Joint Chiefs of Staff) (Exhibit 1). Indeed, for decades, U.S. military forces have played an active role in barrier construction and reinforcement on the border. *See, e.g.*, H.R. Rep. No. 103-200, at 330-31, 1993 WL 298896 (1993) (commending DoD for its role in constructing the San Diego primary fence); Hr'g Before the S. Comm. on Armed Servs. Subcomm. on Emerging Threats and Capabilities, 1999 WL 258030 (Apr. 27, 1999) (military personnel constructed over 65 miles of barrier fencing); Joint Statement of Rood and Gilday (National Guard built over 100 miles of barriers).

Since the President issued his April 2018 memorandum, military personnel deployed to the southern border have performed a broad range of administrative, logistical, and operational tasks in support of DHS' border security mission. *See* Administrative Record re: § 2808 (AR) at 45 (ECF No. 212); H. Comm. Homeland Security Hr'g on DoD's Deployment to the U.S. Mexico Border (June 20, 2019) (Statement of Robert G. Salesses, Deputy Assistant Secretary of Defense) (Exhibit 2); *see id.* (Statement of Carla Provost, Chief, U.S. Border Patrol) (Exhibit 3). These activities include installing vehicle and pedestrian barriers; emplacing concertina wire along the border and at ports of entry; and operating aerial and mobile surveillance equipment to detect activity along the border. *See id.*

II. The President's Proclamation Declaring a National Emergency at the Southern Border

On February 15, 2019, the President declared that "a national emergency exists at the southern border of the United States." *See* Proclamation. The President determined that "[t]he current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency." *Id.* The President explained:

> 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.

Id. "Because of the gravity of the current emergency situation," the President determined that "this emergency requires use of the Armed Forces" and "it is necessary for the Armed Forces to provide additional support to address the crisis." *Id.*

On March 15, 2019, the President vetoed a joint resolution passed by Congress that would have terminated the national emergency declaration. *See* Veto Message for H.R.J. Res. 46, 2019 WL 1219481 (Mar. 15, 2019). The President relied upon statistics published by U.S. Customs and Border Protection (CBP) as well congressional testimony by the Secretary of Homeland Security to reaffirm that a national emergency exists along the southern border. *See id.* The President highlighted, among other things, (1) a recent increase in the number of apprehensions along the southern border; (2) CBP's seizure of hundreds of thousands of pounds of illegal drugs; and (3) arrests of aliens previously charged with or convicted of crimes. *See id.* The President concluded that the "situation on our border cannot be described as anything other than a national emergency, and our Armed Forces are needed to help confront it." *Id.*

On October 15, 2019, the President vetoed a second joint resolution that sought to terminate

the national emergency declaration. *See* S.J. Res. 54 Veto Message (Exhibit 4).[1] The President again reaffirmed that there is a national emergency requiring the use of the armed forces at the southern border. *See id.* The President stated that the "ongoing crisis at the southern border threatens core national security interests" and termination of the national emergency would "impair the Government's capacity to secure the Nation's southern borders against unlawful entry and to curb the trafficking and smuggling that fuels the present humanitarian crisis." *Id.*

III. 10 U.S.C. § 2808

The President's Proclamation made available to the Secretary of Defense the military construction authority provided by 10 U.S.C. § 2808. *See* Proclamation. 10 U.S.C. § 2808(a) provides:

> In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 *et seq.*) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces. Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.

The term "military construction" as used in § 2808 "includes 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 . . . ." 10 U.S.C. § 2801(a). 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 invoked the military construction authority under § 2808 on two prior occasions. First, President George H.W. Bush authorized the use of § 2808 in 1990 following the Government of Iraq's invasion of Kuwait. *See* Exec. Order No. 12734, 55 Fed. Reg. 48099 (Nov. 14,

[1] Congress failed to override the President's vetoes. *See* Summary, H.R.J. Res. 46, 116th Cong., www.congress.gov/bill/116thcongress/house-joint-resolution/46; Summary S.J. Res. 54, www.congress.gov/bill/116th-congress/senate-joint-resolution/54.

1990). Second, President George W. Bush invoked § 2808 in response to the terrorist attacks against the United States on September 11, 2001. *See* Exec. Order No. 13295, 66 Fed. Reg. 58343 (Nov. 16, 2001). The national emergency addressing the September 11 attacks remains in effect today, *see* 84 Fed. Reg. 48545 (Sept. 12, 2019), and DoD has used its § 2808 authority to build a wide variety of military construction projects over the past 18 years, including security fencing and protective barriers at domestic military installations. *See* Cong. Research Serv., Military Construction Funding in the Event of a National Emergency at 1–3 & tbl. 1 (updated Jan. 11, 2019); *see* Memorandum for the Secretary of the Army (Dec. 4, 2001) (Exhibit 5).

IV. The Secretary of Defense's Authorization to Undertake 11 Border Barrier Military Construction Projects Pursuant to § 2808

On September 3, 2019, pursuant to § 2808, the Secretary of Defense determined that 11 border barrier projects along the international border with Mexico are necessary to support the use of the armed forces in connection with the President's declaration of a national emergency. *See* AR at 1–33. Based on analysis from the Chairman of the Joint Chiefs of Staff, among others, the Secretary concluded the projects will deter illegal entry, increase the vanishing time of those illegally crossing the border (*i.e.*, the time that passes before a subject who illegally crosses the border can no longer be identified), and channel migrants to ports of entry. *Id.* at 9. Further, the projects will support the use of the armed forces by reducing demand for DoD personnel and assets at the locations where the barriers are constructed and allow redeployment of DoD personnel and assets to other high-traffic areas on the border without barriers. *Id.* Consequently, the barriers serve as force multipliers enhancing military capabilities and allow DoD to support DHS more efficiently and effectively. *Id.*

As relevant to this case, the States seek an injunction prohibiting the construction of five projects in California and two in New Mexico:

1. **San Diego 4:** 1.5 miles of new primary pedestrian fence system and 2 miles of new secondary pedestrian fence system in San Diego County, CA (3.5 miles);

2. **San Diego 11:** New secondary pedestrian fence system in San Diego County, CA (3 miles);

3. **El Paso 2:** Replace vehicle barriers with new pedestrian fencing in non-contiguous segments in Hidalgo and Luna Counties, NM (23.1 miles);

4. **El Paso 8:** Replace vehicle barriers with 6 miles of new primary pedestrian fence system and 6 miles of new secondary pedestrian fence system in Hidalgo County, NM (12 miles);

5. **El Centro 9:** New secondary pedestrian fence system in Imperial County, CA (12 miles);

6. **El Centro 5:** New secondary pedestrian fence system in Imperial County, CA (1 mile);

7. **Yuma 6:** 1 mile of new primary pedestrian fence system and 2 miles of new secondary pedestrian fence system.[2]

See AR at 11; States' Mot. at 1; Declaration of Alex Beehler, Asst. Sec. of the Army for Installations, Energy, and Environment, ¶¶ 3–32 (describing project areas and attaching maps.) (Exhibit 6).

To fund these projects, the Secretary approved the use of up to $3.6 billion in unobligated military construction funds. *See id.* at 82–89. The Secretary directed that, initially, only funds associated with projects located outside the United States will be provided to the Department of the Army. *See id.* at 82. Deferred military construction projects outside the United States account for $1.8 billion of the required funds. *See id.* The remaining $1.8 billion associated with deferred projects located in the United States (including U.S. territories) will be made available to the Secretary of the Army when needed for obligation. *See id.* The States seek to enjoin the use of funds associated with 17 deferred projects in their States. *See* States' Mot. at 2 & n.2; AR at 87–89.

The Secretary identified three different types of land on which the projects would be built and authorized the Secretary of the Army to take steps to acquire and add that land to the Army's real property inventory, either as a new military installation or as part of an existing military installation. *See id.* at 3, 6, 9–10, 30–31. First, several projects will be located in whole or in part on Federal land not subject to the Federal Property and Administrative Services Act (Property Act), 40 U.S.C. § 101 *et. seq.*, and that can be transferred under the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.*; Declaration of Brigadier General Glenn Goddard ¶ 10 (ECF No. 206-3). The Secretary authorized and directed the Secretary of the Army to request that DoI transfer Federal lands subject to the FLPMA required for the projects to the Army. *See* AR at 9–10, 30–31. On September 18, 2019, DoI announced transfers of the public lands for five projects in this category. *See* Public Land Order Nos. 7883–87, 84 Fed. Reg. 50063–65 (Sept. 24, 2019) (San Diego 4, El Paso 2 & 8, and

[2] The Yuma 6 project has construction in Arizona and California. The portion in California at issue here is 0.2 miles of primary barrier and 1.5 miles of secondary barrier. *See* Beehler Decl. ¶ 18.

Yuma 3 & 6). Second, for Federal land governed by the Property Act, the Secretary of Defense directed that the relevant Federal land holding agency, through the General Services Administration (GSA), transfer administrative jurisdiction over lands in the project areas to the Army expeditiously and without charge. *See* AR at 9–10, 30–31. Third, with respect to any non-Federal land, the United States intends to acquire that land through negotiated purchases or condemnation. *See id.* at 3; Goddard Decl. ¶¶ 9, 10.c. On October 8, 2019, the Secretary of the Army assigned all land necessary for the § 2808 projects to the U.S. Army Garrison Fort Bliss, Texas, making those lands, upon transfer of administrative jurisdiction to the Army, part of the Fort Bliss military installation. *See* General Order No. 2019-36, Assignment of Southwest Border Sites (Exhibit 7).

LEGAL STANDARD

Federal Rule of Civil Procedure 56(a) provides that a party may move for summary judgment on some or all of the claims or defenses presented in a case. Summary judgment is appropriate when, viewing the evidence and drawing all reasonable inferences most favorably to the nonmoving party, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Where the parties file cross-motions for partial summary judgment, "the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determine that there is no just reason for delay." *See* Fed. R. Civ. P. 54(b).

ARGUMENT

I. Plaintiffs Are Outside The Zone Of Interests Protected By § 2808 and the CAA.

The States' claims fail because their alleged injuries fall outside the zone of interests protected by the limitations in § 2808 and the CAA.

The "zone-of-interests" requirement limits the types of 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). That limitation reflects the reality that Congress generally does not intend to provide a cause of action to "plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions" they seek to enforce. *Thompson v. North Am. Stainless*, LP, 562 U.S. 170, 178 (2011). "Congress is presumed to legislate 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.

When a plaintiff brings a cause of action under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, to challenge the government's compliance with another statute, the "interest he asserts must be arguably within the zone of interests to be protected or regulated by the statute that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). Where a plaintiff invokes an implied cause of action in equity, the Supreme Court has suggested that a heightened zone-of-interest requirement applies, and the provision must be intended for the "*especial* benefit" of the plaintiff. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396, 400 & n.16 (1987). Thus, regardless of whether the States' cause of action in this case is considered under the APA or as an implied equitable action, the zone-of-interests requirement applies. *See, e.g., Lexmark Int'l, Inc.,* 572 U.S. at 129; *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320–21 & n.3 (1977); *Individuals for Responsible Gov't, Inc. v. Washoe Cnty.*, 110 F.3d 699, 703 (9th Cir. 1997).

Indeed, the absence of a cause of action was among the reasons the Supreme Court stayed the injunction issued by this Court against the border barrier projects funded by transfers pursuant to § 8005 of the DoD Appropriations Act, 2019. *See Trump v. Sierra Club*, --- S. Ct. ----, 2019 WL 3369425 (U.S. July 26, 2019) ("Among the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005.").[3]

[3] Defendants acknowledge that this Court previously concluded that the zone-of-interests test does not apply in an *ultra vires* challenge outside of the APA framework. *See California v. Trump*, 379 F. Supp. 3d 928, 943 (N.D. Cal. 2019). Defendants respectfully submit that the Court erred for the reasons explained above. Moreover, in granting the extraordinary relief of a stay of the Court's injunction pending appeal, the Supreme Court necessarily concluded that Defendants had satisfied the standard to obtain a stay of the injunction, including a likelihood of success on the merits related to the absence of a cause of action. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (reciting stay standard). That decision is "clearly irreconcilable" with, and thus supersedes, the Court of Appeals' motions panel's contrary holding that the government had not satisfied the stay standard. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *see Sierra Club v. Trump*, 929 F.3d 670, 700–04 (9th Cir. 2019). Because the Supreme Court's decision sends a strong signal that the analysis of the cause of action and zone of interests by this Court and the Ninth Circuit motions panel was incorrect, Defendants respectfully submit that the Court should not follow that analysis here.

The States lack a cause of action to enforce the limitations in § 2808 because their sovereign, environmental, and fiscal interests fall outside its zone of interests. Section 2808 provides that in the event the President declares a national emergency that requires the use of the armed forces, DoD may undertake military construction projects, "without regard to any other provision of law," that are "necessary to support such use of the armed forces." Nothing in the text of § 2808 suggests that Congress intended to permit enforcement of the statute's limitations by parties who, like the States here, assert that a military construction project would indirectly diminish their tax revenue and harm their environmental interests. Section 2808 authorizes DoD to undertake military construction projects "without regard to any other provision of law" and reflects Congress' decision to give DoD significant flexibility to engage in construction projects necessary to support the use of the armed forces. Section 2808 has nothing to do with environmental or economic interests that such construction might implicate and certainly does not evince congressional intent to protect such interests. Indeed, the text of the statute—specifically its "without regard to any other provision of law" clause—authorizes DoD to bypass the extrinsic statutory and regulatory requirements that would otherwise limit DoD from exercising its military construction authority effectively and expeditiously. *See Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) (approving lower courts' statements that a notwithstanding clause "supersede[s] all other laws" and that a "clearer statement is difficult to imagine"). And given the language in § 2808 that contrary laws must give way to facilitate military construction—making clear that the statute not only does not protect the States' asserted interests but applies notwithstanding other provisions that might do so—it would be especially odd to allow suit by "plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated" to the limitations in § 2808. *Thompson,* 562 U.S. at 176–78.

The States also fall outside the zone of interests protected by the CAA. *See* States' Mot. at 15–16. Like § 8005, the CAA regulates the relationship between Congress and the Executive Branch regarding federal spending. Thus, the "interests protected by the" statute are completely unrelated to the interests the States seek to vindicate in this case. *See Lexmark*, 527 U.S. at 131.

II. Plaintiffs Lack an Implied Equitable Cause of Action Under the Constitution.

In addition, the States lack a cause of action because this is not "a proper case" for the "judge-

made remedy" of an implied cause of action under the Appropriations Clause. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *Grupo Mexicano De Desarrollo SA v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). As explained below, *see infra* at 20–24, this case raises purely statutory, not constitutional issues, and the States identify no history or tradition of courts of equity inferring an analogous equitable cause of action directly under the Appropriations Clause in such circumstances. *See Grupo Mexicano*, 527 U.S. at 319 (1999).

III. The § 2808 Border Barriers Are Military Construction Projects.

Assuming the Court reaches the merits of the States' claim, the Secretary's actions are plainly lawful. Section 2808(a) authorizes the Secretary of Defense to "undertake military construction projects" and there is no dispute that the planned border barriers constitute "construction" being undertaken by DoD. *See Sierra Club v. Trump*, 379 F. Supp. 3d 883, 920 (N.D. Cal. 2019). Accordingly, the projects fall within the definition of "military construction" so long as they are undertaken "with respect to a military installation." 10 U.S.C. § 2801(a).

The locations of the planned border barrier projects fall within the broad definition of "military installation," which includes "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department[.]" *Id.* § 2801(c)(4). Two of the projects are on the Goldwater Range, an existing military installation. *See* AR at 11 (Yuma 2 & Yuma 10/27). With respect to the remaining project areas, DoD has the authority to obtain administrative jurisdiction over the requisite land and either convert that land into a new military installation or add it to an existing military installation in accordance with DoD's regulations governing property acquisition. *See* DoD Instruction 4165.14, *Real Property Inventory and Forecasting*; DoD Instruction 4165.71, *Real Property Acquisition*. As explained above, the Secretary of Defense has directed the Secretary of the Army to acquire administrative jurisdiction of real property from other Federal agencies and acquire the non-Federal real property necessary to undertake the § 2808 projects. *See supra* at 8. And the Secretary of the Army has determined that the sites designated for the § 2808 border barrier military construction projects will be part of the Fort Bliss military installation upon transfer of administrative jurisdiction of those sites to the Department of the Army. *See* Exhibit 7. There is thus no merit to the States' argument that the projects are not "military construction." All

of the planned construction will be undertaken "with respect to a military installation": either the Goldwater Range or Fort Bliss. These are clearly existing military installations, (*i.e.*, a "base, camp, post, station, yard, center, homeport facility"), and any land assigned to Fort Bliss by the Secretary of the Army where § 2808 activity would occur would also be an "activity under the jurisdiction of the Secretary of a military department." 10 U.S.C. § 2801(c)(4).

Defendants are *not* arguing that the entire southern U.S. border falls within the scope of an "other activity" constituting a military installation. Thus, the Court need not revisit its earlier concern that canons of statutory construction "likely preclude[] treating the southern border as an 'other activity.'" *Sierra Club*, 379 F. Supp. 3d at 920. That issue is not presented because the Secretary of Defense has selected 11 discrete, specific project locations on which to construct border barrier projects. *See* AR at 11. Certain of these project locations are already within preexisting military installations, and a lawful process is underway for DoD to obtain administrative jurisdiction over the remaining project locations and assign land to be part of the preexisting Fort Bliss military installation. The border barrier construction DoD will undertake pursuant to § 2808 thus falls within the broad statutory definition of a "military installation." 10 U.S.C. § 2801(c)(4).

To be sure, the Court has observed that the term "other activity" should be construed as referring to "discrete and traditional military locations" similar to "a base, camp, post, station, yard, [and] center." *Sierra Club*, 379 F. Supp. 3d at 921. But, as explained, the § 2808 project locations are discrete and specific. And the Court also recognized that "'other activity' is not an empty term," and that "Congress undoubtedly contemplated that military installations would encompass more than just 'a base, camp, post, station, yard, [or] center.'" *Id.* Congress's choice to include an unqualified, all-encompassing term like "or other activity" indicates its intent to make the term "military installation" inclusive of activities under the jurisdiction of the Secretary of a military department *in addition to* those facilities specifically listed in the statute. 10 U.S.C. § 2801(c)(4). Indeed, the Supreme Court has noted, with specific reference to the statute defining the terms in § 2808, that federal law treats the term "military installation" as "synonymous with the exercise of *military jurisdiction*," *United States v. Apel*, 571 U.S. 359, 368 (2014)—an exercise of jurisdiction that is present for all the projects here. If Congress had wished to limit the definition of "military installation" here, it could have done so, as it has in

other statutes that define the term more narrowly in different contexts. *See* 10 U.S.C. § 2687(g)(1) (defining, for the purpose of base closures and realignments, "military installation" to include "other activity under the jurisdiction of the Department of Defense" but clarifying that "[s]uch term does not include any facility used primarily for civil works" or similar activities); Pub. L. No. 114-287, § 3, 130 Stat. 1463 (2016) (defining military installation as "any fort, camp, post, naval training station, airfield proving ground, military supply depot, military school, or any similar facility of the Department of Defense."). There is simply no basis to conclude that the § 2808 projects do no fall within the broad term "other activity under the jurisdiction of the Secretary of a military department."

Nor is there any question that DoD has the authority to acquire land necessary for § 2808 projects, given that § 2808 expressly authorizes "military construction," including "any acquisition of land." 10 U.S.C. § 2801(a). Section 2808 further authorizes the Secretary of Defense to undertake military construction projects (including land acquisitions) "without regard to any other provision of law." This broad language—a variant of a *non obstante* or "notwithstanding" clause—sweeps aside all statutory and regulatory provisions that might otherwise constrain the authority provided by § 2808. *See Am. Fed'n of Gov't Emps., Local 3295 v. Fed. Labor Relations Auth.*, 46 F.3d 73, 76 (D.C. Cir. 1995). The clause thus provides "a sweeping dispensation from all legal constraints," and "indicate[s] that Congress intended agencies to enjoy 'unfettered discretion.'" *Id.* at 76; *see United States v. Novak*, 476 F.3d 1041, 1046–47 (9th Cir. 2007) (en banc) ("The Supreme Court has indicated as a general proposition that statutory 'notwithstanding' clauses broadly sweep aside potentially conflicting laws."). Accordingly, land acquisition authorized by § 2808 need not comply with otherwise-applicable statutory restrictions.

In addition, for land currently controlled by other federal agencies, Congress has authorized land transfers between federal agencies, although such transfers are not subject to statutory constraints because of § 2808's *non obstante* clause. FLPMA authorizes the Secretary of the Interior to make "withdrawals" of land, 43 U.S.C. § 1714(a), including the "transfer[of] jurisdiction over an area of Federal land . . . from one department, bureau or agency to another department, bureau or agency," *id.* § 1702(j). Further, the Property Act, 40 U.S.C. §§ 101 *et seq.*, authorizes GSA to transfer excess real property between agencies. *See id.* § 521. Finally, for any non-federal land, the federal government

may use its power of eminent domain to acquire property for military installations. *See, e.g.*, *United States v. 32.42 Acres of Land, More or Less, Located in San Diego Cty.,* 683 F.3d 1030, 1038 (9th Cir. 2012).

IV. The Border Barrier Projects are Necessary to Support the Use of the Armed Forces.

Section 2808 also requires that the military construction projects must be "necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). That requirement is satisfied here.

As a threshold matter, the Secretary's decision to undertake military construction under § 2808 is not subject to judicial review because it is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2).[4] A decision is generally committed to agency discretion by law "when a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Id.* Here, there is no meaningful standard by which the Court could review the Secretary of Defense's decision that the border barrier projects "are necessary to support such use of the armed forces." 10 U.S.C. § 2808. That is a military judgment committed to the Secretary, and the statute does not specify any criteria the Secretary must consider in making his determination. Nor does it include any specific prohibitions or judicially manageable standards limiting the Secretary's determination of what would constitute a project "necessary" to support the use of the armed forces. *See NFFE v. United States*, 905 F.2d 400, 405–06 (D.C. Cir. 1990) (concluding that decisions about closure of military bases were committed to agency discretion by law because "the federal judiciary is ill-equipped to conduct reviews of the nation's military policy").

Even if the Secretary's judgment is reviewable, it is entitled to substantial deference from this Court. *See, e.g., Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (military officials are owed "great deference" by courts faced with requests to enjoin military action); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (Courts must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."); *Rostker v. Goldberg*,

[4] The principle of committing decisions to agency discretion applies whether the States' claims are brought under the APA or as a non-statutory challenge to agency action. *See* Kenneth Culp Davis, Administrative Law §§ 28:1, 5, 15 (1984) (summarizing pre-APA law on unreviewable agency action).

453 U.S. 57, 66 (1981) (Courts must give "a healthy deference to legislative and executive judgments in the area of military affairs."); *Pruitt v. Cheney*, 963 F.2d 1160, 1166 (9th Cir. 1991) ("We readily acknowledge, as we must, that military decisions by the Army are not lightly to be overruled by the judiciary."). Indeed, the Supreme Court has traditionally been reluctant to intervene in the conduct of military affairs. *See, e.g., Winter.*, 555 U.S. at 24–27; *North Dakota v. United States*, 495 U.S. 423, 443 (1990); *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983); *Gilligan*, 413 U.S. at 10; *Orloff v. Willoughby*, 345 U.S. 83, 93–94 (1953); *see also Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986) ("Courts are properly wary of intruding upon that sphere of military decision-making" regarding "deployment of troops and overall strategies of preparedness"). This reluctance rests on separation-of-powers concerns as well as the principle that judges "are not given the task of running the Army," *Orloff,* 345 U.S. at 93, and are "ill-equipped" to determine the impact of judicial intrusion on military decision making, *Chappell*, 462 U.S. at 305. For these reasons, the Supreme Court has instructed courts to defer to "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force." *Gilligan*, 413 U.S. at 10; *see Karnoski v. Trump*, 926 F.3d 1180, 1207 (9th Cir. 2019) (granting writ of mandamus where the court failed to apply "the appropriate deference due to a proffered military decision").

Applying this highly deferential standard of review, the administrative record amply supports the Secretary's military judgment that the projects are necessary to support the use of the armed forces in connection with the national emergency at the southern border. *See* AR at 1–11; 42–75; 97–137. In reaching this decision, the Secretary undertook a thorough and deliberate process of study and review that is the hallmark of judicial deference to military decisions. *See, e.g., Goldman*, 475 U.S. at 508–09; *Rostker*, 453 U.S. at 71–72; *Karnoski*, 926 F.3d at 1202. The Secretary requested and received information from DHS concerning which border barrier projects DHS considers to be most effective in improving the effectiveness and efficiency of DoD personnel supporting CBP at the southern border. *See* AR 50–57, 91. DHS explained that the proposed border barrier construction would fundamentally change the dynamic at the border, would give a distinct and enduring advantage to the Border Patrol as a force multiplier, and would provide agents with capabilities to respond more quickly to illicit activities. *Id.* at 56–57. As such, the projects would improve the effectiveness and efficiency

of DoD personnel by allowing them to shift away from providing support to frequent, low risk border incursions and instead concentrate on monitoring, tracking, and responding to a smaller, more focused set of higher risk activities at the border. *Id.* at 57. By serving as a force multiplier for DHS, the projects will reduce DHS' reliance on DoD for force protection, surveillance support, engineering support, and air support, and thus allow DoD to focus its efforts on a smaller, more focused area. *Id.*

In addition, the Secretary received two separate reports from the Chairman of the Joint Chiefs of Staff providing his views on whether and how border barrier projects would support the use of the armed forces deployed to the border to support DHS. The Chairman provided a preliminary assessment in February 2019, *see* AR at 119–24. That assessment concluded, among other things, that constructing physical barriers in areas where military personnel are deployed could allow those forces to be re-prioritized to other missions in support of DHS thereby enabling a more efficient use of DoD personnel. *See id.* at 122–24. After receiving DHS' recommendation, the Secretary requested that the Chairman provide an updated and expanded report assessing a variety of factors analyzing how border barriers could support the use of the armed forces. *See id.* at 97–98.

The Chairman's final report, based on consultations with multiple DoD and DHS components, identified four key factors upon which to assess whether the projects were necessary to support the use of the armed forces at the southern border: 1) DHS' prioritization of the projects; 2) current migrant flows measured by apprehensions per month; 3) current troop dispositions and support missions by CBP sector; and 4) the type of land upon which the proposed projects were to be undertaken. *See id.* at 61–62. The Chairman then conducted a detailed analysis of these factors for each border patrol sector where proposed construction would take place. *See id.* 63–70. The Chairman analyzed, among other things, the type of proposed border barrier construction, the location and mileage of each project, the number of DoD personnel deployed to each sector and the support activities they provide to DHS, and the impact the barriers are expected to have on denying illegal entry, channeling migrants to ports of entry, and increasing vanishing times along the southern border. *See id.* For example, the Chairman concluded that barriers will reduce the areas where migrants can cross easily, thereby reducing the need for DoD personnel to operate mobile surveillance camera as well as conduct monitoring and detection operations between ports of entry. *See id.* at 68–70. In the

end, the Chairman developed a prioritized list of border barrier projects and concluded that the projects are necessary to support the use of the armed forces because they support those forces by enabling more efficient use of DoD personnel, and may ultimately reduce the demand for military support over time. *Id.* at 64. Contrary to States' argument, *see* States' Mot. at 12-13, the record explains how the projects are necessary to support military personnel, separate and apart from any benefit the projects provide to DHS.

Relying on the Chairman's analysis and advice, as well as input from the U.S. Army Corps of Engineers, DHS, and DoI, the Secretary of Defense determined that the border barrier projects discussed above are necessary to support the use of the armed forces in connection with the national emergency. *See* AR at 1–11; 42–48 (Secretary's determination and summary of analysis regarding necessity of border barriers). The Secretary concluded that the border barrier projects will deter illegal entry, increase the vanishing time of those illegally crossing the border, and channel migrants to ports of entry. *See id.* at 9. Thus, he determined, the projects will reduce the demand for DoD personnel and assets at the locations where the barriers are constructed and allow the redeployment of DoD personnel and assets to other high-traffic areas on the border without barriers. *See id.* Given the extensive record supporting the Secretary's decision, the Court should defer to his military judgment that the barriers are necessary to support the use of military forces. *See, e.g., Gilligan*, 413 U.S. at 10.

V. DoD's Use of § 2808 Authority Was Not Arbitrary and Capricious.

The Secretary's decision to undertake construction pursuant to § 2808 amply meets the APA's deferential arbitrary and capricious standard. The States' claim that DoD acted arbitrarily and capriciously by "fail[ing] to consider all factors relevant" to its § 2008 decision—specifically, the alleged "harms to public health and safety arising from [] defunding . . . military construction projects" in order to undertake the § 2808 projects—is without merit. States' Mot. at 13.

Section 2808 expressly authorizes the Secretary to fund construction authorized under that section with "funds that have been appropriated for military construction . . . that have not been obligated." *See* 10 U.S.C. § 2808 (a). The statute does not identify *any* factors that the Secretary must consider in determining which military construction projects should be deferred in order to fund § 2808 projects. *See* H.R. Rep. 97-612 at 20 (June 17, 1982) ("The *only restriction* in [§ 2808(a)] is that

the total cost of all projects undertaken must be within the unobligated amount of funds previously appropriated for military construction and military family housing.") (emphasis added). Rather, it leaves such judgments to the Secretary's broad discretion. *See NFFE*, 905 F.2d at 405–06.

Here, the record reflects that DoD exercised that discretion with the stated objective of *minimizing* the effects of deferring existing military construction. Indeed, the Secretary directed the Comptroller, through close consultation with DoD Components, to identify for deferral only "military construction projects that are not scheduled for award until fiscal year 2020 or later[,]" AR at 13, "the deferral of which would have a minimal effect on Component readiness[,]" *id.* at 5, and would be consistent with the National Defense Strategy, *id.* at 94. And per the Secretary's instructions, the Comptroller prioritized deferrals "such that, initially, only [$1.8 billion of] funds associated with deferred military construction projects outside of the United States will be made available[.]" *Id.* at 13. The remaining funds associated with deferred domestic projects—like the projects the States identify—will be made available as necessary once overseas funds are exhausted. *Id.* at 14. As the Secretary explained, one purpose of "prioritizing funds in this manner is to provide [DoD] time to work with [Congress] to determine opportunities to restore funds for these important military construction projects[.]" *Id.*; *see* S. 1790, 116th Cong. § 2906 (bill to replenish deferred funds). Thus, the Secretary cannot fairly be said to have inadequately weighed the potential impacts of deferring existing military construction projects or to have insufficiently explained the rationale for selecting which projects to defer, particularly given the "healthy deference" due military judgments. *Rostker*, 453 U.S. at 66; *see Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Inc. Co.*, 463 U.S. 29, 43 (1983) (agency must "examine the relevant data and articulate a satisfactory explanation for its action"); *Crickon v. Thomas*, 579 F.3d 978, 982 (9th Cir. 2009) (APA review is "highly deferential").

Because § 2808 does not identify factors DoD must consider in determining which military construction projects to defer in order to fund § 2808 construction, this case is distinguishable from the cases on which the States rely. *See* States Mot. at 14 (citing *State Farm*, 463 U.S. at 33 (statute directing the Secretary of Transportation to consider "relevant available motor vehicle safety data" in issuing motor vehicle safety standards that were "reasonable, practicable, and appropriate") (quoting 15 U.S.C. § 1392(f)(1), (3), (4) (repealed 1994)), and *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d

1015, 1024 (9th Cir. 2011) (regulation requiring the Secretary of the Interior, when delisting an endangered species, to determine that five particular factors would not threaten or endanger the species) (citing 50 C.F.R. § 424.11(d)). The States are likewise incorrect that in utilizing its § 2808 authority DoD allegedly considered factors Congress did not intend it to consider. *See* States' Mot. at 14-15. This argument relies on the erroneous contention that Congress's fiscal year 2019 appropriation for border barrier construction to DHS limits DoD's ability to use other available statutory authorities—like § 2808—for separate barrier construction. It does not. *See infra* at 21–24; *see also Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1558 (D.C. Cir. 1984); *Building & Const. Trades Dep't., AFL-CIO v. Martin*, 961 F.2d 269, 273–74 (D.C. Cir. 1992).

Even where a statute sets forth specific factors for an agency to consider, if Congress "did not assign the specific weight the [agency] should accord each of these factors, the [agency] is free to exercise [its] discretion in this area." *New York v. Reilly*, 969 F.2d 1147, 1150 (D.C. Cir. 1992); *Brady v. FERC*, 416 F.3d 1, 6 (D.C. Cir. 2005); *see also Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 611 (1950) (where statutorily mandated "consideration[s]" are not "mechanical or self-defining standards," they indicate Congress's recognition that they involve "wide areas of judgment and therefore of discretion"). Here, no statute dictates the factors for DoD to consider in determining which yet-to-be awarded military construction projects to defer in order to fund § 2808 construction. On the contrary, the Secretary's use of his § 2808 authority is committed to his discretion precisely because (among other things) matters of military policy—including assessments of "military value"—are "better left to those more expert in issues of defense." *NFFE*, 905 F.2d at 406; *see Dist. No. 1, Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 41–42 (D.C. Cir. 2000).

Accordingly, Congress has not instructed DoD to give the considerations urged by the States any particular weight—or, indeed, any weight at all. That any specific factors related to the projects identified by the States did not receive conclusive weight in the final calculus, as the States contend they should have, is therefore no reason to disturb DoD's decision. *See, e.g.*, *Reilly*, 969 F.2d at 1150. The States have shown no "clear error" in DoD's exercise of its discretionary judgment under § 2808 and thus their APA claim must fail. *See State Farm*, 463 U.S. at 43.

VI. DoD's Use of § 2808 Does Not Violate the Constitution.

DoD's use of § 2808 is not unconstitutional. The States' claims turn on the meaning and interpretation of § 2808—a purely statutory dispute with no constitutional dimension.

At the outset, the States' lack a cause of action and cannot satisfy the zone-of-interests requirement for constitutional claims under the separation of powers, Appropriations Clause, and Presentment Clause. Just as their alleged sovereign, economic, and environmental injuries are entirely unrelated to the limitation in § 2808 and the CAA, those injuries also do not fall within the asserted constitutional limitations on Congress's power to authorize emergency military construction.

In any event, the Supreme Court unanimously rejected the States' constitutional argument in *Dalton v. Spector*, 511 U.S. 462 (1994), explaining that not "every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution." 511 U.S. at 472. The Supreme Court carefully "distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." *Id.* (collecting cases). The Constitution is implicated if executive officers rely on it as an independent source of authority to act—which is not the case here—or if the officers rely on a statute that itself violates the Constitution. *Id.* at 473 & n.5. But claims alleging that an official has "exceeded his statutory authority are not 'constitutional' claims." *Id.* at 473. *Dalton*'s reasoning applies here and refutes the States' argument that they have a constitutional claim or cause of action. This case concerns "simply" whether the Secretary has "exceeded his statutory authority" in authorizing the § 2808 projects; "no constitutional question whatever is raised[,]" "only issues of statutory interpretation." *Id.* at 473-74 & n.6.

In advancing a constitutional claim based on the separation of powers, the States make precisely the argument the Supreme Court rejected in *Dalton.* Their claim hinges on the allegation that DoD acted contrary to the will of Congress because it allegedly took actions contrary to *statutory* limitations in the CAA. *See* States' Mot. at 15–16. In any event, the fact that the CAA appropriates funds to *DHS* for certain border-barrier construction, *see* Pub. L. No. 116-6, § 230(a), does not mean that Congress impliedly prohibited *DoD* from using its permanent statutory authority to use its funding for different border barrier projects in response to a national emergency. *See Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 200 (2012) ("An agency's discretion to spend appropriated funds is cabined only

by the text of the appropriation."); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) ("doctrine disfavoring repeals by implication applies with full vigor . . . when the subsequent legislation is an appropriations measure"). Indeed, the entire point of § 2808 is to provide DoD with the flexibility to undertake military construction projects and use military construction funds during a national emergency outside of the normal, time-consuming congressional authorization and appropriations process. *See* H.R. Rep. No. 97-44, at 72 (1981) (§ 2808 provides "authority to immediately restructure construction priorities"). The States try to create a statutory conflict between the CAA and § 2808 where none exists, and in doing so violate the principle that where two statutes "are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *See J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143–44 (2001). Because Congress has statutorily authorized the conduct at issue, there can be no concerns that DoD is usurping "Congress's constitutionally-mandated power" to asses and determine "permissible spending." *California v. Trump*, 379 F. Supp. 3d 928, 949 (N.D. Cal. 2019).

Nor does DoD's use of § 2808 "violate the Constitution's separation of powers principles" by providing "unbounded authorization for Defendants to rewrite the federal budget." *Id.* Congress has long provided agencies with "lump-sum appropriation[s]," and agencies' delegated authority over "[t]he allocation of [such] 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 could have granted DoD unfettered discretion over its total budget, Congress' decision to provide DoD with a more limited authority to reallocate unobligated military construction funds to emergency military construction projects does not pose constitutional concerns.

The States also claim a separation of powers violation based on the assertion that use of § 2808 is prohibited by § 739 of the CAA. *See* States' Mot. at 16. Section 739 states, "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." Pub. L. No. 116-6, div. D, § 739. The States' argument rests upon a faulty

premise: that barrier construction undertaken pursuant to separate funding and statutory authority under § 2808 is somehow adding money to DHS' appropriation in the CAA. *See id.* § 230. It is not. There is no violation of § 739 because DoD is not adding additional money to a "program, project, or activity" within one of DHS' budget accounts, as that term is understood in the appropriations context. *See* Government Accountability Office (GAO), *A Glossary of Terms Used in the Federal Budget Process* 80 (Sept. 2005) (defining "program, project, or activity" as an "[e]lement within a budget account"); *see* 31 U.S.C. § 1112 (GAO is statutorily required to publish and maintain standard terms related to the federal budget process). The fact that § 2808 provides DoD with independent authority to construct border barriers does not transform DoD's use of *its* military construction authorities into an excess infusion of money to an entirely separate *DHS* appropriation.[5]

The States' Appropriations Clause claim also fails. The Appropriations Clause simply requires that money drawn from the Treasury must be "in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl. 7. Accordingly, action undertaken pursuant to a federal statute like § 2808 that authorizes an expenditure "by Law" cannot violate the Appropriations Clause. *See Harrington v. Schlesinger*, 528 F.2d 455, 457–58 (4th Cir. 1975) (statutory funding disputes turn solely on "the interpretation and application of congressional statutes under which the challenged expenditures either were or were not authorized," not on a "controversy about the reach or application of" the Appropriations Clause). The States nonetheless argue that DoD cannot use a general appropriation for an expenditure where Congress has provided a more specific appropriation for the same expenditure. *See* States' Mot. at 17. But the case they cite, *Nevada v. Department of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005), stands for a much narrower, and inapposite, principle of statutory rather than constitutional interpretation: namely, that when a single federal agency is determining which of two appropriations *to that agency* should be used for a particular object or purpose, Congress presumptively intends the agency to use its specific appropriation rather than its general appropriation. Here, DoD is using its own appropriated funds for the § 2808 projects and the States cite no case for the proposition that an appropriation of funds to one agency (here, to DHS in the CAA) can limit a

[5] For these reasons, as well as the absence of a cause of action to enforce the CAA, the Court should not follow the decision in *El Paso Cty. v. Trump*, No. EP-19-CV-66-DB, 2019 WL 5092396 (W.D. Tex. Oct. 11, 2019), that use § 2808 violates the CAA.

second agency (DoD) from using its own separate appropriations, let alone violate the Appropriations Clause. Indeed, the GAO—the independent, nonpartisan arm of Congress charged with auditing Executive spending— recently concluded that DoD did not violate the general-specific appropriation principle in using §§ 8005 and 284 for border barrier construction even though Congress had appropriated funds to DHS for such construction in the CAA. *See* GAO Opinion B-330862 at 13–15 (Sept. 5, 2019) (Exhibit 8) (citing prior GAO opinions). The same reasoning applies equally to DoD's use of § 2808 and provides further support to deny the States' Appropriations Clause claim.

Additionally, the States assert that § 2808 violates the Presentment Clause because it allows DoD to "effectively amend" the appropriations Congress provided in CAA without following the procedures in Article I, § 7. *See* States' Mot. at 17–18. But § 2808 does not empower any executive official to amend or repeal any law, actually or effectively, and is in no way comparable to *Clinton v. City of New York*, 524 U.S. 417 (1998), which held the Line Item Veto Act unconstitutional because it purported to authorize the President to "cancel in whole" portions of enacted statutes. *Id.* at 435–37. The CAA remains in effect, and the Presentment Clause does not prevent DoD from acting pursuant to other duly enacted statutes to fund additional border barrier construction. The Court should also reject the States' argument that the structure of the National Emergencies Act (NEA) violates the Presentment Clause. *See* States' Mot. at 19. The NEA was amended in 1985, following with *INS v. Chadha*, 462 U.S. 919, 95 (1983), precisely to avoid any Presentment Clause problem and currently authorizes Congress to terminate a national emergency upon enactment of a joint resolution enacted pursuant to Art. I., § 7, cl. 2. *See* 50 U.S.C. § 1622. The fact that legislative action must be presented to the President, and, if he disapproves, to be repassed by two-thirds of the Senate and House is a hallmark of our constitutional system, not a violation of it.

VII. NEPA Does Not Apply to the § 284 or § 2808 Border Barrier Projects.

The Court should reject the States' arguments that Defendants violated NEPA by failing to conduct environmental reviews of the § 284 and § 2808 border barrier projects. First, as this Court previously held, the States' NEPA claim against the § 284 projects fails because the Secretary of Homeland Security has waived NEPA's application pursuant to § 102 of the Illegal Immigration Reform and Immigrant Responsibility Act. *See* Determinations Pursuant to IIRIRA, 84 Fed. Reg.

17185-87 (Apr. 24, 2019); 21798-801 (May 15, 2019). The Court rejected the States' NEPA argument in its preliminary injunction opinion in this case, *see California*, 379 F. Supp. 3d at 953–55, and reaffirmed that same decision in issuing final judgment in the *Sierra Club* case. *See Sierra Club v. Trump*, No. 19-CV-892-HSG, 2019 WL 2715422, at *3 (N.D. Cal. June 28, 2019). The States do not present any new arguments here to warrant a different conclusion.

Second, the States' NEPA claims against the § 2808 projects should be dismissed because § 2808 authorizes the Secretary of Defense to undertake emergency military construction projects "without regard to any other provision of law." As noted above, this broad language sweeps aside all statutory and regulatory provisions, such as NEPA, that might otherwise constrain or impede the activities authorized by § 2808, including construction and acquisitions of land. *See Cisneros*, 508 U.S. at 18; *Novak*, 476 F.3d at 1046.

To be sure, *non-obstante* clauses are "not always construed literally" and courts often assess the scope of the clauses "by taking into account the whole of the statutory context." *Id.* at 1046. Here, however, the statutory context supports interpreting § 2808's "without regard to" clause as broadly as it is written. Section 2808 applies only "[i]n the event of a declaration of war or the declaration by the President of a national emergency," and Congress drafted the statute to give DoD great flexibility during such times to engage in emergency construction projects necessary to support the use of the armed forces. *See* H.R. Rep. No. 97-44, at 72 (1981). There is no evidence to suggest Congress intended for DoD to engage in the potentially lengthy process of complying with environmental statutes such as NEPA prior to engaging in military construction during a time of war or national emergency. Moreover, Congress omitted from § 2808 other types of restrictions it has imposed for other emergency military construction authorities. *See* 10 U.S.C. § 2803 (authorizing military construction in a broader range of emergencies but without a *non-obstante* clause and imposing a report-and-wait requirement before construction can proceed). Indeed, Congress knows how to limit the scope of "without regard to" clauses when it wants to do so. *Compare* 12 U.S.C. § 1702 (Secretary of Housing and Urban Development authorized to take action "without regard to any other provisions of law governing the expenditure of public funds"). Had Congress wanted to limit the scope of the clause in § 2808 solely to enable DoD to disregard appropriations laws, it could have said so expressly.

See 50 U.S.C. § 3038(c) ("without regard to the provisions of law or regulation relating to the expenditure of Government funds"). Congress did not restrict the clause to a particular subject matter, thus laws such as NEPA that would impede § 2808 construction must give way. *See Nat'l Coal. to Save Our Mall v. Norton*, 161 F. Supp. 2d 14, 21 (D.D.C.), *aff'd* 269 F.3d 1092 (D.C. Cir. 2001).

Third, the States incorrectly argue that DoI should have complied with NEPA before transferring land to DoD for the § 2808 projects. *See* States' Mot. at 20–21. The States cannot assert this claim because their complaint does not raise a NEPA claim against DoI related to the transfer of land. *See* Amended Complaint ¶¶ 392–99 (NEPA claims against only DHS for barrier construction). The States cannot move for summary judgment on a claim that they did not plead in the complaint. *See, e.g., Wasco Prods., Inc. v. Southwall Techs., Inc.,* 435 F.3d 989, 992 (9th Cir. 2006). Moreover, § 2808's "without regard to" clause would apply to DoI's transfer of land, as NEPA compliance would impose a legal restriction upon DoI's transfers of land that indirectly burdens DoD's use of § 2808.

In any event, NEPA does not apply to the DoI's land transfer because the transfer was made pursuant to the non-discretionary emergency withdrawal authority under FLPMA. *See* 43 U.S.C. § 1714(e); *see* Public Land Order Nos. 7883–87, 84 Fed. Reg. 50063–65 (Sept. 24, 2019). FLPMA defines a "withdrawal" to mean, among other things, "transferring jurisdiction over an area of Federal land, other than 'property' governed by the [Property Act] from one department, bureau or agency, to another department, bureau, or agency." 43 U.S.C. § 1702(j). FLPMA further requires that the Secretary of the Interior "*shall immediately* make a withdrawal" of land when he determines "that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost[.]" 43 U.S.C. § 1714(e) (emphasis added); 43 C.F.R. § 2310.5. Because of the emergency nature of the land withdrawal at issue here—and because it is mandatory under FLPMA that the Secretary make such a withdrawal immediately—compliance with NEPA is not required. *State of Alaska v. Carter*, 462 F. Supp. 1155, 1160-61 (D. Alaska 1978) (holding that an emergency withdrawal does not require compliance with NEPA because such compliance would conflict with FLPMA's command that withdrawals be made "immediately"); *see Flint Ridge Dev. Co. v. Scenic Rivers Assoc.*, 426 U.S. 776, 788 (1976) (holding that NEPA compliance is not required where a statute provided the agency only 30 days to act); *Westlands Water Dist. v. Nat. Res. Def. Council*, 43 F.3d 457, 460 (9th Cir.

1994) ("An irreconcilable conflict is created if a statute mandates a fixed time period for implementation and this time period is too short to allow the agency to comply with NEPA."). Here, "Congress did not give the Secretary discretion over when he may carry out his duties," *Westlands Water Dist.*, 43 F.3d at 460, and "imposed an unyielding statutory deadline for agency action." *Jamul Action Comm. v. Chaudhuri*, 837 F.3d 958, 964 (9th Cir. 2016). Accordingly, there is "clear and unavoidable conflict" between NEPA and FLPMA's emergency withdrawal requirement, thus "NEPA must give way." *Flint Ridge*, 426 U.S. at 788.

VIII. The States Have Not Met The Requirements For A Permanent Injunction.

The Court should deny the States' request for a permanent injunction. *See* States' Mot. at 1. "[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, LLC.*, 547 U.S. 388, 391 (2006). Even if the States were to prevail on the merits of their claims, permanent "injunctive relief is not automatic, and there is no rule requiring automatic issuance of a blanket injunction when a violation is found." *See N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007). A permanent "injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter,* 555 U.S. at 32.

A. The States Have Not Established an Irreparable Injury.

1. The States Have Not Established Irreparable Injury to the Environment.

California and New Mexico allege that the construction of the border wall projects in the States will harm their interests in wildlife management. Specifically, California argues that the extremely limited construction from the San Diego 4, San Diego 11, and Yuma 6 projects will threaten the Quino Checkerspot Butterfly, Coastal California Gnatcatcher, Western Burrowing owl, various vernal pool species, "rare plants" including the Tecate Cypress, Yuma Ridgeway's Rail, Southwestern Willow Flycatcher, Western Yellow-billed Cuckoo, Flat-tailed Horned Lizard, and the Sonoran Mud Turtle. States Mot. at 27–29. Notably, California submits no evidence of environmental harm for El

Centro 5 and 9. New Mexico argues that construction of El Paso 2 and El Paso 8 will fragment habitat and block wildlife corridors for the White-sided Jackrabbit and Northern Jaguar. *Id.* at 29–30. The States' arguments lack merit; California and New Mexico's speculative fears about construction impacts and cross-border migration do not satisfy their burden to show population-level impacts are likely absent an injunction. The States' environmental allegations fail to demonstrate the requisite likely irreparable harm for permanent injunctive relief. *See generally* Beehler Decl.

At the preliminary injunction stage for the § 284 challenge, this Court held that "the irreparable-injury requirement does not require a showing of population-level harm or an extinction-level threat." *California*, 379 F. Supp. 3d at 956. To be clear, it has never been the United States' position that a showing of an extinction-level threat is required. *See id.* at 967 n.19. But because the States' interest is not in individual animals—and rather in managing a species (or distinct populations of a species) within their borders—the States must show species or population level harm of a "permanent or at least of long duration, *i.e.*, irreparable." *AMOCO Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987); *see also New Mexico Dept. of Game & Fish v. U.S. Dept. of Interior*, 854 F.3d 1236, 1253 (10th Cir. 2017) (holding that New Mexico had failed to establish irreparable harm to "the State's ungulate herds, as opposed to individual members of those herds"). The States may meet this burden only through showing a "definitive threat" of future harm "to protected species, not mere speculation." *Nat'l Wildlife Fed'n v. Burlington N.R.R.*, 23 F.3d 1508, 1512 n.8 (9th Cir. 1994). By attempting to prove up population-level harms, the States impliedly agree to this standard. *See, e.g.*, ECF No. 220-1 at 5 ¶ 17 (alleging "irreparable harm to the Quino Checkerspot Butterfly population"); *id.* at 6 ¶ 20 (alleging a "substantial reduction of the population [of the Coastal California Gnatcatcher] in the area, and irreparable harm to the species and its habitat").

But the States' efforts fall short. For example, California—through the Clark Declaration—alleges that the Quino Checkerspot Butterfly "has been documented to occur within the [San Diego 4] project area," and speculates that the individual diapausing larvae could be taken during construction before stating in conclusory fashion that the theoretical death of any larvae in the construction footprint "will cause irreparable harm to the Quino Checkerspot Butterfly population." *Id.* at 9-10 ¶¶ 15-17. This cannot carry the States' burden. Despite having been on a field visit of the

area, *id.* at 9 ¶ 14, Mr. Clark does not allege to have even seen any Quino Checkerspot Butterfly in the project area, but instead only posits that they could be present. *Id.* at 10 ¶ 17. While Mr. Clark argues that "a lack of sightings in any given year does not necessarily mean that the species is not present," *id.* at 10 ¶ 15, the conclusion that "the species is present" in the narrow construction footprint plainly does not follow. *Id.* at 10 ¶ 17. Further, even assuming *arguendo* that the butterfly is present, Mr. Clark offers no support for his conclusion that the possible take of any larvae from construction impacts would cause irreparable harm to the population. *See id.*

The same is true of California's allegations regarding the Coastal California Gnatcatcher. Unlike the Quino Checkerspot Butterfly, Mr. Clark alleges to have actually "detected" a gnatcatcher—two miles northwest of the project area. *Id.* at 11 ¶ 19.[6] Mr. Clark theorizes that construction of the border wall "will destroy essential habitat for numerous gnatcatcher pairs" and that associated road construction will expand the construction impacts beyond the narrow law enforcement corridor. *Id.* at 11 ¶ 20. This is inaccurate. DoD is including construction Best Management Practices ("BMPs") from prior CBP work in the area as well as other measures to minimize environmental impacts associated with construction. Beehler Decl. ¶¶ 33–58. The Court previously credited similar mitigation measures in finding that the States' had not established irreparable injury for the § 284 projects. *See California v. Trump*, 2019 WL 2715421, at *4 & n.9 (N.D. Cal. June 28, 2019). The Corps is also utilizing Environmental Support Teams, who meet with other resource agencies to develop additional mitigation measures including avoiding—to the extent possible—impacts to sensitive areas or species. Beehler Decl. ¶¶ 36–39. Further, the San Diego 4 area already has existing patrol roads, *id.* at ¶ 10, and construction will utilize established roads to the maximum extent practicable. *Id.* at ¶ 34. And even if some gnatcatcher habitat is lost due to unavoidable construction impacts, Mr. Clark offers no support for his conclusion that population-level impacts will result. ECF No. 220-1 at 11 ¶ 20.

[6] The United States Fish and Wildlife Service has not conducted surveys to assess whether the Quino Checkerspot Butterfly or Coastal California Gnatcatcher are actually present in the San Diego 4 project area. California does not appear to have done so either. Instead, California speculates the two species are present based on habitat designations and a single site visit that did not reveal a single member of either species in the construction area. That any members of these species are even present in the small construction footprint for San Diego 4 is entirely speculation.

California's allegations regarding the Western Burrowing Owl fare no better. Mr. Clark points to owl burrows found over two years ago in areas west of San Diego 4 and implies that burrowing owls may be present in the project area. *Id.* at 13 ¶ 24. He then concludes that border wall construction will flush burrowing owls and that construction would otherwise "hasten the decline of this last breeding population in coastal southern California." *Id.* at 8 ¶ 6. There is no evidence before this Court that there are any burrowing owls in the San Diego 4 project area. But if there are, the Corps has special mitigations in place to avoid harming burrowing owls, including surveys to locate any burrows thirty days before construction begins, 250-foot buffer zones around active burrows that can be avoided, and special protocols before collapsing any occupied burrows designed to protect eggs and young owls. Beehler Decl. ¶ 62. Further, even if some owls are displaced or taken due to construction impacts, Mr. Clark's conclusion that this will "hasten the decline" of the owl is conclusory and unsupported.

California's remaining wildlife harm allegations are weaker still. Mr. Clark alleges that "several recent biological surveys on private properties have found . . . vernal pools and numerous rare and endangered species with them." ECF No. 220-1 at 15 ¶ 32. But construction in San Diego 4 is taking place on federal land adjacent to the border, and despite a site visit, Mr. Clark cannot even allege any vernal pools are within the San Diego 4 construction footprint. As to San Diego 11, Mr. Clark presents a list of "California State Species of Special Concern" he alleges could be present in the project area, but offers no evidence that they are present in the construction footprint nor how any incidental take would harm California's interest in managing a population. *Id.* at 16-17 ¶ 34. The same is true of California's allegations regarding Yuma 6. *Id.* at 18-19 ¶¶ 35-36. California's wildlife harms fall far short of demonstrating an irreparable harm warranting an injunction.

New Mexico argues that some species, including the Northern Jaguar and the White-sided Jackrabbit, will be harmed through a loss of connectivity to Mexico due to border wall construction in El Paso 2 and 8. *See* States' Mot. at 30. As the States concede, border wall construction is only taking place in areas "adjacent" to jaguar critical habitat. *Id.* The United States Fish and Wildlife Service ("USFWS") has only detected seven jaguars in the United States since 1982, all occurring within designated critical habitat, which for the jaguar serves as a migration corridor into Northern

Mexico. Beehler Decl. ¶ 64. El Paso 2 and 8 will thus not disrupt the jaguar's migration corridor into Mexico, as shown by New Mexico's own exhibits, because construction will not occur in the critical habitat migration corridors. *See* ECF 220-1 at 106, 108 (showing critical habitat abutting unfenced portions of the border).

The White-sided Jackrabbit is not listed under the Endangered Species Act, and USFWS has not conducted surveys to determine whether the species is present in the El Paso 2 and 8 project areas. Assuming *arguendo* that they are, Declarant Traphagen alleges that the population has already been injured by CBP patrol activity and will be further harmed by a loss of connectivity to Mexico. *Id.* at 75-76 ¶ 19. USFWS has rejected New Mexico's argument that vehicle strikes associated with CBP enforcement has caused the jackrabbit to decline. Beehler Decl. ¶ 65. Border wall construction at El Paso 2 and 8 will not extend—nor cut off connectivity with Mexico—across the entire Animas Valley and, in any event, USFWS has also determined that jackrabbit populations in the United States are "peripheral populations occurring in an area where the species was never known to be abundant" and not significant to the species. *Id.* New Mexico has not shown that their interests in the jackrabbit will be irreparably harmed by construction in El Paso 2 and 8.

Finally, both California and New Mexico allege that border wall construction could impact the states' air quality, and California alleges that border wall construction could impact the state's water quality. States' Mot. at 22-25. To the extent this Court considers these allegations as environmental injuries, neither warrant injunctive relief. As to air quality, the Corps will implement control measures—including watering unearthed soil—to minimize fugitive dust leaving the work site during construction. Beehler Decl. ¶ 55. Post construction, the Corps will implement erosion protection measures to prevent any long-term increase in particulate matter. *Id.* As to California's water quality concerns, the Corps has measures in place to prevent erosion and sedimentation during construction, as well as long-term erosion controls post-construction. *Id.* at ¶¶ 56–57. The States have not shown that they are entitled to injunctive relief on the basis of their alleged environmental harms.

2. Loss of Tax Revenue is Not An Irreparable Injury.

Third, eight States (Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin) argue that deferral of 17 military construction projects in those States will harm their

local economies. *See* States' Mot. at 30–32. But this theory of alleged harm is insufficient to confer standing, let alone irreparable injury sufficient to warrant a permanent injunction. The States do not claim that they would be the direct recipients of the money for the deferred military construction projects. Instead, the States' theory is that third party contractors who would receive the money will now pay fewer taxes and not spend the money in ways that would enhance the States' local economies. But "virtually all federal policies" will have "unavoidable economic repercussions" on state tax revenues, and accordingly, complaints about such losses typically amount to "the sort of generalized grievance about the conduct of government, so distantly related to the wrong for which relief is sought, as not to be cognizable for purposes of standing." *Pennsylvania v. Kleppe*, 533 F.2d 668, 672 (D.C. Cir. 1976); *see Iowa ex rel. Miller v. Block*, 771 F.2d 347, 353 (8th Cir. 1985) (holding that there was an insufficiently direct link between reduced tax revenue and federal disaster relief decisions to support standing); *Arias v. DynCorp*, 752 F.3d 1011, 1015 (D.C. Cir. 2014) (holding that loss of tax revenue from anti-drug herbicide-spraying operation resulting in damage to local crops local crops property was insufficient to establish standing).

In *Wyoming v. Oklahoma*, the Supreme Court recognized standing to challenge "a direct injury in the form of a loss of specific tax revenues," but distinguished cases where "actions taken by United States Government agencies [have injured their] econom[ies] and thereby caused a decline in general tax revenues." 502 U.S. 437, 448 (1992) (discussing *Kleppe* and *Miller*). In reaching that conclusion, the Supreme Court emphasized that States must establish a direct link between the tax at issue and the administrative action being challenged to meet the requirements for Article III standing. *Wyoming* concerned a law enacted by Oklahoma that required Oklahoma utility companies to use a certain percentage of Oklahoma coal. See 502 U.S. at 443–44. Prior to the law's enactment, Oklahoma utility companies used nearly 100% Wyoming coal, for which Wyoming charged a specific severance tax for extracting coal from the state. *Id.* at 445. After the law's enactment, Oklahoma businesses purchased less Wyoming coal, reducing Wyoming's severance tax revenues accordingly. *Id.* at 446–48. The Supreme Court held that the direct link between Oklahoma's law targeting coal usage and a specific stream of tax revenue based on coal extraction was sufficient to support Wyoming's standing to sue. *Id.* at 447. The direct causal connection that the Supreme Court found critical to standing in *Wyoming*

is not present in this case, as the States merely assert a general allegation that they will lose anticipated revenue because of "lost sales for contractors and subcontractors for the projects" and "various firms in the supply chains." States' Mot. at 32; *see People ex rel. Hartigan v. Cheney*, 726 F. Supp. 219, 223–28 (C.D. Ill. 1989) (State of Illinois lacks standing to challenge closure of military base based on theory that closure would reduce tax revenue and harm the State's economy)

None of the cases cited by the States support their expansive theory of irreparable injury. *See id.* at 31–32. Only one of the cases cited by the States even addresses *Wyoming—California v. Azar*, 911 F.3d 558, 574 (9th Cir. 2018)—and that case merely noted that the statute at issue differed from the tax in *Wyoming* because it was not tied to the legislative decisions of other states. And to the extent the States' theory is that they effectively have *parens patriae* standing on behalf of contractors who would otherwise be direct recipients of the funds, that they fails. States cannot stand as *parens patriae* in claims against the federal government to protect the future taxable income that construction companies might receive if awarded contracts for the deferred projects. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,* 458 U.S. 592, 610 n.16 (1982).

Moreover, the States do not present any evidence from any State official explaining how the States will be irreparably injured by the alleged loss of tax revenue. "[E]conomic harm generally does not constitute irreparable injury[.]" *See, e.g., Calvillo Manriquez v. Devos*, 345 F. Supp. 3d 1077, 1107 (N.D. Cal. 2018). Beyond the mere loss of expected tax revenue, there nothing is in the record explaining how the State' sovereign interests will be irreparably injured by the loss of this money. *See generally* Declaration of Alison Reaser (ECF No. 221). The States cannot establish irreparable harm by merely asserting that they will not receive future anticipated tax revenue from contractors who would have successfully bid on the deferred projects.

B. The Balance of Equities and Public Interest Weigh Against Injunctive Relief.

The balance of equities and public interest also weigh decidedly in Defendants' favor. *See Nken v. Holder,* 556 U.S. 418, 435 (2009) (holding that these factors merge when the government is a party). The President has declared a national emergency because of the large number of aliens attempting to cross the border and the huge quantities of illegal drugs that continue to be smuggled across the border each year. *See* Proclamation; Veto Messages; *see also* Third Declaration of Millard

LeMaster (Exhibit 9) (summarize drug and crossing statistics in Fiscal Year 2019). As the Supreme Court has recognized, the Government has "compelling interests in safety and in the integrity of our borders." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989). The President has also determined that the unique skills and resources of the armed forces are required to confront this crisis. *See* Proclamation; Veto Messages. Further, the Secretary of Defense has concluded that the § 2808 border barrier projects are necessary to support the use of the armed forces in the context of their support to DHS at the southern border. The Government and the public thus have a compelling interest in ensuring that its military forces are properly supported during active deployments and have the necessary resources to ensure mission success. *See Goldman*, 475 U.S. at 507 (Courts must "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."); *Winter*, 555 U.S. at 25 (military training and readiness are of the "utmost importance to the Navy and the Nation").

These interests "plainly outweigh[]" the States' asserted 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, 33. Indeed, the States' interests here are even less substantial than those in *Winter*. As explained above, have not carried their burden to establish that the § 2808 project will irreparably injure wildlife and their generalized complaints about harm to their local economies are insufficient to establish standing, let alone irreparable harm.

The States also contend that an injunction must issue to protect their sovereign interest in enforcing their environmental laws. *See* States' Mot. at 21–26. But the possibility that a challenged action may impair a State's ability to enforce state law is not alone sufficient to justify injunctive relief, particularly when the requested injunction would impair the federal government's own sovereign interest in supporting its armed forces pursuant to a federal statute. In enacting that statute, Congress made a policy judgment that emergency military construction should take precedence over any laws that would hinder such construction. And "when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause." *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976); *see also Idaho Bldg. & Const. Trades Council, AFL-CIO v. Wasden*, 834 F. Supp. 2d 1091, 1102 (D. Idaho 2011) (denying injunction because "the State and its officials do not have an interest in enforcing

a state law that is likely preempted by federal law"); *Nat'l City Bank of Indiana v. Turnbaugh*, 367 F. Supp. 2d 805, 822 (D. Md. 2005) ("Once it is determined that the state laws are preempted by federal law, the harm the state may suffer if its laws are not enforced becomes irrelevant"). And to the extent the States' invocation of their sovereign interests turns on the environmental harms they allege, those harms are themselves outweighed, as explained above.

The States' argument that the Government will not be harmed by an injunction is similarly misplaced. The States contend that amount of time that elapsed between the President's proclamation and the Secretary of Defense's decision to authorize specific border barrier projects pursuant to § 2808 undermines the need for action. *See* States' Mot. at 33. But there is no statutory obligation for the Secretary to act at all, let alone act within a certain period of time—indeed, past Secretaries have invoked § 2808 to authorize military construction projects years after a declared national emergency. *See supra* at 6–7. The Secretary has broad discretion to address and decide when, where, and how funds should be spent under this authority. Here, there is no basis to enjoin the § 2808 projects simply because the Secretary undertook a deliberate process to reach his decision. The States also argue that walls have not been historically effective at stopping unlawful entry, *see* States' Mot. at 34, but they provide no support for that assertion and the record establishes that barriers have proven extremely effective at stopping drugs and migrants from entering the country. *See* AR at 50–57.

Given the lopsided balance of equities, it would be an abuse of discretion to award the "extraordinary remedy" of a permanent injunction when the States have not made a "clear showing" that they are entitled to such relief. *Winter,* 555 U.S. at 22.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion for partial summary judgment, deny the States' motion for partial summary judgment, and enter final judgment for Defendants on all claims related to the funding and construction of the § 2808 projects. A proposed order is attached.

DATE: October 25, 2019

Respectfully submitted,

JAMES M. BURNHAM
Deputy Assistant Attorney General

JOHN G. GRIFFITHS
Director, Federal Programs Branch

ANTHONY J. COPPOLINO
Deputy Director, Federal Programs Branch

/s/ *Andrew I. Warden*
ANDREW I. WARDEN
Senior Trial Counsel (IN Bar No. 23840-49)

KATHRYN C. DAVIS
RACHAEL L. WESTMORELAND
MICHAEL J. GERARDI
LESLIE COOPER VIGEN
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, D.C. 20530
Tel.: (202) 616-5084
Fax: (202) 616-8470

JEFFREY BOSSERT CLARK
Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division

/s/ *Tyler M. Alexander*
TYLER M. ALEXANDER
(CA Bar No. 313188)
Natural Resources Section
Trial Attorney
PO Box 7611
Washington, DC 20044-7611
Tel: (202) 305-0238
Fax: (202) 305-0506
tyler.alexander@usdoj.gov