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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

STATE OF CALIFORNIA et al.; Plaintiffs, **v.** **DONALD J. TRUMP, in his official capacity as President of the United States of America et al.;** Defendants.	Case No. 4:19-cv-00872-HSG **PLAINTIFF STATES OF CALIFORNIA, COLORADO, HAWAII, MARYLAND, NEW MEXICO, NEW YORK, OREGON, VIRGINIA, AND WISCONSIN'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTION 2808 AND NEPA, AND OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** Date: November 20, 2019 Time: 10:00 am Judge: Honorable Haywood S. Gilliam, Jr. Trial Date: None Set Action Filed: February 18, 2019

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INTRODUCTION

Defendants' opposition and motion for partial summary judgment (Defs.' Brief) does nothing to alter this Court's earlier preliminary view that Defendants' contorted use of § 2808 is unlawful. The States are suitable, reasonable, and predictable challengers to Defendants' actions, and their interests are congruent with the provisions they seek to enforce. Further, in attempting to defend their latest diversion of funds for the border wall, Defendants are forced to adopt a sweeping and unprecedented interpretation of their authority under § 2808 that renders the statutory restrictions on that authority essentially meaningless. Abandoning their previous arguments on this point, Defendants now assert any site can be treated as a military installation under § 2808 so long as it is administratively assigned to an existing installation. Based on this logic, they argue that proposed border barriers in California and New Mexico qualify as construction related to a military installation because they have been assigned to a base in Texas hundreds of miles away. Defendants also contend that a project may be deemed to support the armed forces under § 2808 if it assists armed forces to support actions by a civilian agency, which allows them to use § 2808 to fund any activity to which they assign military forces, rendering this restriction meaningless as well. Far from reconciling these expansive interpretations with established principles of statutory interpretation, Defendants urge this Court to ignore such principles.

Defendants' other arguments concerning the merits are equally unpersuasive. Unable to dispute that they failed to consider public health and safety in diverting funds, Defendants ask this Court to rule that their diversion decisions are not subject to review under the Administrative Procedure Act (APA). In addition, they recycle their previous arguments that the States have no statutory or constitutional causes of action, which this Court correctly rejected.

Defendants' objections to a permanent injunction are unavailing as well. They fail to rebut the States' demonstration that they will suffer irreparable injury to their sovereign interests, natural resources, and tax revenues absent a permanent injunction. And in arguing that the balance of hardships and public interest weigh against injunctive relief, Defendants fail to address the public interest in such relief demonstrated as by the States and their *amicus curiae.* They ask

this Court to deny relief based on their interest in continuing to engage in unlawful and unconstitutional behavior.

This Court should grant the States' motion for partial summary judgment regarding § 2808 and the National Environmental Policy Act (NEPA) (States' Op. Brief), deny Defendants' motion, and enjoin Defendants from: (a) defunding military construction projects located within the States and constructing border barriers in California and New Mexico under § 2808; and (b) constructing border barrier projects under § 2808 and § 284 until Defendants have complied with NEPA.

LEGAL ARGUMENT

I. DEFENDANTS CANNOT PRECLUDE JUDICIAL REVIEW

A. The States Have *Ultra Vires* and APA Causes of Action

1. The Zone of Interests Test is Not Applicable to *Ultra Vires* Claims

The States have an *ultra vires* claim as Defendants do not dispute that the States have Article III standing and nothing more is required for such equitable claims. Moreover, this Court previously ruled the zone of interests test "has no application in an *ultra vires* challenge, which operates outside of the APA framework . . . ." Order re: Pls.' Partial Mot. for Summ. J. 4, *California v. Trump* (*California*) (June 28, 2019), No. 19-cv-872, ECF 185; *see also Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) ("Appellants need not, however, show that their interests fall within the zones of interests of the constitutional and statutory powers invoked by the President in order to establish their standing to challenge the interdiction program as *ultra vires*."). As this Court observed, where a party contends that an executive officer has exceeded the authority conferred by a statute, "[i]t would not make sense to demand that Plaintiffs—who otherwise have standing—establish that Congress contemplated that the statutes allegedly violated would protect Plaintiffs' interests." Order re Pls. Mot. for Prelim. Inj. 30, *Sierra Club v. Trump*, No. 19-cv-892 (May 24, 2019), ECF 144 (*Sierra Club* PI Order).

Although Defendants assert in a footnote this Court "erred" in making this ruling, they make no attempt to identify the supposed error. Defs.' Br. 10 n.3. They merely point to the Supreme Court's stay order regarding a different funding source in the Sierra Club's related case.

Id. Such a preliminary ruling, however, "does nothing more than show a possibility of relief," *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016), and far from determining that the zone of interests test applies to equitable *ultra vires* claims, the order at issue stated only that "the Government has made a sufficient showing at this stage that the [Sierra Club] plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." Order on Appl. for Stay, *Trump v. Sierra Club*, No. 19A60 (U.S. July 26, 2019) (emphasis added). The stay order provides no grounds for this Court to abandon its prior analysis.

2. Even if the Zone of Interests Test Applies, the States Fall Within the Zone of Interests of § 2808 and the National Emergencies Act

In any event, the States fall within the zone of interests of § 2808 and the National Emergencies Act (NEA) for purposes of their APA and, to the extent relevant, *ultra vires* claims.

The zone of interests test under the APA is "generous," *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (internal citation and quotation marks omitted), and "not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224-225 (2012) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987)). "The test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 225 (internal citation and quotation omitted). In fact, "at the time of its inception the zone of interests test was understood to be part of a broader trend toward *expanding* the class of persons able to bring suits under the APA challenging agency actions." *White Stallion Energy Ctr., LLC v. Envtl. Prot. Agency*, 748 F.3d 1222, 1268 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part) (emphasis in original), *rev'd on other grounds*, 135 S. Ct. 2699 (2015). Thus, the test is satisfied where plaintiffs are "reasonable—indeed predictable—challengers." *Patchak*, 567 U.S. at 227.

The States satisfy this test. In § 2808, Congress carefully restricted the Secretary of Defense's authority, allowing diversion of funds only to "military construction projects . . . that are necessary to support . . . use of the armed forces," and only in the event of war or a "declaration by the President of a national emergency in accordance with the [NEA]." 10 U.S.C.

§ 2808(a). Moreover, the NEA was enacted to preserve the normal balance of constitutional authority and rein in the president's emergency powers so that they would "be utilized only when emergencies actually exist." S. Rep. No. 94-1168, at 2 (1976); *see also Clarke*, 479 U.S. at 401 (in applying the zone of interests test, the Court is "not limited to considering the statute under which [the parties] sued, but may consider any provision that helps [the Court] to understand Congress' overall purposes" of the statutory scheme). The NEA's purposes and § 2808's requirement that diverted funds be used for "military construction" projects only (discussed below) prevent harms that stem from not following those limitations including: (a) defunding projects necessary to protect public health and safety within the States; (b) constructing border barriers within California and New Mexico; and (c) the unilateral creation of "military installations" within their boundaries. Congress could not have intended the zone of interest test to bar suits under § 2808 by such "reasonable—indeed predictable—challengers," *Patchak*, 567 U.S. at 227, because imposing such a narrow restriction would effectively prevent any third party from bringing suit under § 2808, and thus make the statute's limitations largely unenforceable. This would turn the "strong presumption favoring judicial review" on its head. *Mach Mining, LLC v. Equal Employ't Opportunity Comm'n*, 135 S. Ct. 1645, 1653 (2015).[1]

Indeed, Congress need not have intended § 2808 to benefit the States. In *Scheduled Airlines Traffic Offices, Inc. v. Dep't of Defense*, 87 F.3d 1356 (D.C. Cir. 1996), the D.C. Circuit held that although an appropriations statute was not intended to benefit third-party government contractors, a travel agency could invoke that statute to challenge an agency action because its interests, like the States' here, were "sufficiently congruent with those of the [Treasury's]" and were not "more likely to frustrate than to further . . . statutory objectives." *Id.* at 1360 (alterations in original) (quoting *First Nat'l Bank & Trust v. Nat'l Credit Union Admin.*, 988 F.2d 1272, 1275 (D.C. Cir.

[1] Defendants' zone of interest argument is even more remarkable when one considers that Defendants are now asserting they are unilaterally creating "military installations"—albeit installations that are somehow part of a military base in Texas—that are located within the jurisdictional boundaries of New Mexico and California. Defs.' Br. 12-13. The States maintain significant interests in these lands; as the Supreme Court has long held, states retain "power over . . . federal area[s] within [their] boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government." *Howard v. Comm'rs of Sinking Fund of the City of Louisville*, 344 U.S. 624, 627 (1953).

1993)). Nor does § 2808's "without regard to any other provision of law" clause make these interests any less relevant to a zone of interests analysis. *See* Defs.' Br. 11. It is well-settled that such clauses do not preclude judicial review of action taken under the statutes containing them—or, for that matter, under *other* laws. *See, e.g., Northwest Forest Res. Council v. Pilchuck Audubon Soc'y*, 97 F.3d 1161, 1167 (9th Cir. 1996) (holding that the language "notwithstanding any other . . . law" did not preclude application of other regulations) (internal citation and quotation marks omitted). Moreover, notably absent from Defendants' brief is any attempt to identify any other predictable challengers or to explain why Congress would have imposed careful restrictions on the authority granted under § 2808 without permitting any party to enforce those restrictions in court. Thus, even if the zone of interests test applied to the States' *ultra vires* claim (it does not), the States would still have *ultra vires* and APA causes of action.

B. The Zone of Interests Test Does Not Apply to the States' Separate Constitutional Claims

Defendants also assert that the States "cannot satisfy the zone-of-interests requirement for constitutional claims." Defs.' Br. 21. Courts, however, routinely permit plaintiffs to bring equitable constitutional claims without applying the zone of interests test. *See United States v. McIntosh*, 833 F.3d 1163, 1174 (9th Cir. 2016) (listing cases). And, as the Ninth Circuit motions panel highlighted in *Sierra Club v. Trump*, "[b]ecause the Constitution was not created by any act of Congress, it is hard to see how the zone of interests test would even apply" given the test's focus on *Congress' intent* as described in *Lexmark*. Order 62, *Sierra Club v. Trump*, No. 19-16102 and 19-16300 (9th Cir. July 3, 2019), ECF 76 (*Sierra Club* Stay Order) (relying on *Lexmark*, 572 U.S. at 127). Moreover, Defendants do not cite any cases that require plaintiffs to satisfy the zone of interests test for constitutional claims, and do not suggest any reason why that test should apply. *See* Defs.' Br. 21. To the extent Defendants suggest the States must fall within § 2808's zone of interest to bring constitutional claims, as shown above, they do so.

II. DEFENDANTS EXCEEDED THEIR AUTHORITY UNDER § 2808

A. Defendants Cannot Satisfy § 2808's Military Construction Requirement by Simply Declaring that Border Barrier Projects in California and New Mexico are Part of an Army Base in Texas

The States showed in their motion that the proposed border barrier projects fail to satisfy the definition of "military installation" in 10 U.S.C. § 2801(a), and therefore do not satisfy § 2808's military construction requirement. States' Op. Br. 8-12. In response, Defendants abandon their previous arguments on this point, and now advise this Court "not [to] revisit its earlier concern that canons of statutory construction 'likely preclude[] treating the southern border as an 'other activity'" constituting a military installation. Defs.' Br. 13. Defendants now argue that the project sites constitute military installations because the Secretary of the Army plans to assign them to a preexisting military installation, Fort Bliss. *Id.* at 12-13. This argument is patently absurd. Fort Bliss is located in Texas, over 100 miles from the project sites in New Mexico at issue and over 600 miles from the project sites in California. If Defendants can make this land part of a military installation simply by assigning it administratively to a military base, and then treat any construction project on that land as a military construction project under § 2808, *any* land *anywhere*, including national park land and private homes the federal government condemns through eminent domain, can be deemed a military installation. *See id.* at 8-9 (describing the steps the Defendants will take to acquire land for border barrier projects). Notably, Defendants' Administrative Record failed to mention that lands in California, Arizona, and New Mexico will become part of the Fort Bliss, Texas military installation – which shows Defendants have adopted a post-hoc rationalization for their untenable interpretation of § 2808. They do not even begin to explain how § 2808 can be construed to grant the Executive such a blank check.[2]

[2] Defendants cite to DoD's use of its § 2808 authority to build "a wide variety" of military construction projects over the past 18 years." Defs.' Br. 7. However, the Congressional Research Service Report they cite for this proposition shows the extreme nature of Defendants' new argument. The Report explains that "with the exception of one project dating from December 2011 related to security measures for weapons of mass destruction at sites in the continental United States, most of these projects took place at oversees locations." Michael J. Vassalotti & Brendan W. McGarry, Cong. Research Serv., IN11017, *Military Construction Funding in the Event of a National Emergency* (Jan. 11, 2019), at 2.

Defendants' interpretation violates fundamental canons of statutory interpretation. Courts must "give effect, if possible, to every clause and word of a statute" and should not interpret a statute to render any term "insignificant, if not wholly superfluous." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal citation and quotation marks omitted). Defendants' assertion that the Secretary of the Army can simply declare large swaths of California and New Mexico "part" of a military installation in Texas does just that by rendering the definition of "military installation" and the "military construction" requirement in § 2808 superfluous. In addition, by giving the Secretary the power to deem property hundreds of miles away from a military base to be part of that base, just to attempt to fit within the limitations of § 2808, Defendants' interpretation violates the rule that "statutory interpretations which would produce absurd results are to be avoided." *Ariz. State Bd. for Charter Schools v. U.S. Dept. of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006) (quoting *Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004)); *id.* at 1009 (holding that the natural reading of a statute prevailed when an alternative explanation would lead to "an unnecessarily expansive result").

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

Defendants also fail to show how their border barrier projects are needed "to support such use of the armed forces." 10 U.S.C. § 2808(a). Defendants urge this Court essentially to ignore the support requirement on the ground that "determination of what would constitute a project 'necessary' to support the use of the armed forces" is committed to agency discretion. Defs.' Br. 15. But the question before this Court is not whether border barriers are "necessary," but rather the legal question of which *agency* the border barriers are meant to "support." Defendants cannot satisfy § 2808's support requirement because the border barrier projects are, by Defendants' own admission, intended to support DHS—a civilian agency—not *the armed forces*. *See id*. at 2 (projects are meant to "enhance the ability of military forces to *support DHS* more effectively and efficiently"); *id.* at 17 ("[b]y serving as a force multiplier *for DHS*, the projects will *reduce DHS' reliance* on DoD. . . ."); and *id.* at 18 (projects "may ultimately reduce the demand for military support over time") (emphasis added).

Defendants assert that the border barrier projects are necessary to support military personnel because the barriers "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." Defs.' Br. 18. Defendants, however, do not dispute that "[s]ecuring the borders" and "[c]arrying out . . . immigration enforcement functions" are a civilian responsibility, which is assigned to DHS, not DoD. 6 U.S.C. § 202. Consequently, the border barriers at most will help DoD to support DHS, and if § 2808's support requirement can be satisfied by DoD supporting civilian agencies, then the support requirement will apply to any activity in which DoD is involved and become meaningless. Here again, Defendants' interpretation violates fundamental canons of statutory interpretation.

III. DEFENDANTS' ARBITRARY AND CAPRICIOUS ACTIONS VIOLATE THE APA

The administrative record fails to address the harms to public health and safety caused by the diversion of military construction funds for the border barriers. States' Op. Br. 13-14. When they originally requested military construction funds from Congress, Defendants provided specific evidence of the risks from exposure to hazardous and nuclear waste, as well as dangers to military security, absent sufficient funding. *Id.* Although Defendants deny acting arbitrarily and capriciously, notably absent from their brief is any contention that they considered public health and safety in diverting military construction funds to the border wall. *See* Defs. Brief 18-20. Failure to consider this "important aspect of the problem" and "relevant factor[]" is a violation of the APA. *Motor Vehicles Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983).

Unable to show that they considered this critical factor, Defendants are forced to take the extraordinary position that their decision to divert funding is entirely insulated from review because § 2808 "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." Defs.' Br. 18 (emphasis omitted). That is wrong. As a recent decision in this district recognized, even where the relevant statute imposes no limitations on what factors the agency could rely, the government acts arbitrarily and capriciously by failing to take "an impartial look at the balance

struck between the two sides of the scale." *State v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1112 (N.D. Cal 2017), *voluntarily dismissed*, 2018 WL 2735410 (9th Cir. 2018); *see also Koohi v. United States*, 976 F.2d 1328, 1131 (9th Cir. 1992) ("the claim of military necessity will not, without more, shield governmental operations from judicial review.").

Nor is Defendants' failure to consider the harms to public health and safety from cancelling military construction projects in the States excused by consideration of other factors. *See* Defs.' Br. 19. The other factors may be countervailing interests, but they do not make the public health and safety harms any less of an "important aspect of the problem" whose consideration the APA demands. The failure also is not cured by the fact that Defendants may ask Congress to replenish the funds. *See id.* If anything, that request shows the absurdity of Defendants' scheme: after Congress denied the President the funds he requested to build an expansive border wall, he cancelled other Congressionally-funded projects so that he could build that which Congress would not fund, and is now asking Congress to backfill the missing funding for these other projects apparently recognizing that his diversion harms congressional priorities.

Lastly, Defendants also violated the APA by relying on factors Congress did not intend Defendants to consider, *see State Farm*, 463 U.S. at 43, because, as described below, they have used § 2808 to divert funds toward a border wall project Congress repeatedly refused to fund.

IV. DEFENDANTS VIOLATED THE CONSTITUTION

A. Defendants' Invocation of § 2808 Does Not Immunize Their Constitutional Violations

Even if Defendants complied with § 2808 and the APA, their actions would still be unconstitutional.[3] In opposing the States' constitutional arguments, Defendants once again invoke *Dalton v. Specter*, 511 U.S. 462 (1994), claiming that the executive branch is immune from a separation of powers constitutional challenge so long as it invokes some statutory authority for its

[3] If § 2808 were interpreted to allow Defendants' diversion, that statute would be unconstitutional as applied. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (statutes must be interpreted to avoid serious constitutional problems when a construction avoiding the question is fairly possible).

conduct. *See* Defs' Br. 21. As the Ninth Circuit recognized, that is wrong. *Sierra Club* Stay Order 49-51.

Far from adopting the broad proposition asserted by Defendants, the *Dalton* Court rejected such a proposition and repeatedly stressed the narrowness of its holding. The plaintiffs in that case sought to challenge the president's selection of a shipyard under a statute requiring the closure and realignment of military installations. 511 U.S. at 464. Because the president's decision was not an agency action subject to challenge under the APA, *id.* at 468-71, the plaintiffs were forced to assert that the president's action was unconstitutional on the expansive theory that "whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." *Id.* at 471. The Supreme Court rejected this theory, first observing that "[o]ur cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution." *Id.* at 472. The Court then noted that "we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority" and that prior decisions would not have distinguished between such claims "[i]f *all* executive actions in excess of statutory authority were *ipso facto* unconstitutional." *Id.* (emphasis added). It also reasoned that *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) "cannot be read for the proposition that an action taken by the President in excess of his statutory authority *necessarily* violates the Constitution." *Id.* at 473 (emphasis added); *see also id.* ("The decisions cited above establish that claims *simply* alleging that the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review. . . .") (emphasis added). As the Ninth Circuit motions panel explained, *Dalton* does not support Defendants' position because "[t]here would have been no reason for the Court to include the word 'necessarily"—or the other caveats *Dalton* carefully repeated—"if [statutory and constitutional] claims were always mutually exclusive." *Sierra Club* Stay Order 50.

Moreover, the States' constitutional claims are easily distinguished from the claim in *Dalton*. The separation of powers claim in *Dalton* was based solely on the president's alleged violation of the base closure statute at issue there. *Dalton*, 511 U.S. at 474. There was no

contention that the president repudiated congressional intent by closing down a military base that Congress expressed it wanted to keep open. Nor could there have been, since the statute at issue in *Dalton* allowed Congress to reject the base closure before it took place. *See id.* at 465 (discussing The National Defense Authorization Act for Fiscal Year 1991, 104 Stat. 1485, 101 P.L. No. 510, §§ 2904(b) and 2908 (1991)). The same is not true here, as the States' claims concern the fundamental constitutional question of whether the executive branch may expend federal funds on a project toward which Congress plainly refused to appropriate funding. In addition, these claims are based in part on explicit prohibitions within the Constitution, such as the Appropriations Clause, which "acts as a separate limit on the President's power," *In re Aiken Cty.*, 725 F.3d 255, 262 n.3 (D.C. Cir. 2013) (Kavanaugh, J., alternate holding), and the Presentment Clause, which mandates the procedures that legislative actions must follow, U.S. Const., art. I, § 7, cl. 2; *Clinton v. City of New York*, 524 U.S. 417, 448-49 (1998). No similar constitutional questions were present in *Dalton*.

Further, *Dalton* cannot preclude the States from challenging the constitutionality of Defendants' actions under § 2808 as applied to the facts here. Defendants acknowledge, as they must, that a constitutional claim is implicated if executive "officers rely on a statute that itself violates the Constitution." Defs.' Br. 21; *see also City of New York*, 524 U.S. at 448-49 (holding the Line Item Veto Act violates the Presentment Clause). The States' constitutional challenge to Defendants' application of § 2808 here should not be treated any different. *See United States* ex rel. *Schweizer v. Océ N.V.*, 677 F.3d 1228, 1235 (D.C. Cir. 2012) (treating facial separation of powers challenge "as if it were an as-applied challenge").

Moreover, in *Chamber of Commerce v. Reich* the D.C. Circuit rejected the federal government's argument that *Dalton* precluded judicial review of the plaintiffs' claim that the president's executive order violated the Constitution's non-delegation doctrine, although the government contended that the claim was premised merely on whether the president abused his discretion under a statute. 74 F.3d 1322, 1326, 1331-32 (D.C. Cir. 1996). That is because, as the Court held, "an independent claim of a President's violation of the Constitution would certainly

be reviewable." *Id.* at 1326. For similar reasons, this Court should reject Defendants' reliance on *Dalton* here.[4]

B. Defendants Violated Separation of Powers Principles

Defendants' other constitutional arguments are equally unavailing. For example, they assert there is no separation of powers violation because they acted pursuant to authority granted by Congress, rather than the President's inherent authority. *See* Defs.' Br. 21-22. That is plainly wrong. The States do not dispute that, in the absence of specific congressional approval, § 2808 authorizes Defendants to divert federal funds toward emergency military construction projects under certain circumstances. But the Constitution prohibits Defendants from exercising this statutory authority in a manner that is "incompatible with the expressed or implied will of Congress." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). The undisputed facts here—(a) Congress's repeated rejection of border wall funding in 2017-18; (b) Congress's pointed refusal to appropriate $5.7 billion in requested border wall funding resulting in a government shutdown exclusively over the border wall; *and* (c) Congress's limited $1.375 billion appropriation for specified pedestrian fencing—demonstrate that Defendants' diversion of funds appropriated for specific military construction projects toward border barrier construction, not approved by Congress, is "incompatible with the expressed or implied will of Congress." *Id.*

Defendants deny that the limited $1.375 billion appropriation for the barriers in the Consolidated Appropriations Act, Pub. L. No. 116-6, § 230, 133 Stat. 13, 28 (2019) (CAA), implicitly prohibits use of additional federal funds appropriated for other purposes to construct border barriers. Defs.' Br. 21. But, as the Supreme Court has recognized, "Where Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized." *United States v. MacCollom*, 426 U.S. 317, 321 (1976). Here, Congress addressed the subject of barrier funding in the CAA and imposed limits on the amount of funding as well as where, when, and

[4] *Grupo Mexicano de Desarrollo SA v. All. Bond Fund, Inc.*¸ 527 U.S. 308 (1999), Defs.' Brief 12, is inapposite. *Grupo* did not involve any constitutional claims and addressed a very different question – namely, whether the Court had the equitable power to prohibit a holding company from disposing of its assets prior to a final judgment despite a general rule otherwise. *Id.* at 318-19. There is no such question about the Court's equitable power here.

how the barrier may be built. CAA, §§ 230-32. The limitations in the enacted statute—and the abundance of failed legislation, PI RJN, Exs. 14-20, ECF 59-4,, and the prolonged negotiations that produced the limited appropriation, *id.* Exs. 21-22, 24-25—express a clear congressional decision on border barrier funding, which the executive cannot unilaterally countermand. *See Youngstown*, 343 U.S. at 586 (amendment rejected by Congress informed holding that seizure of steel mills violated separation of powers); *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018) ("sheer amount of failed legislation" was evidence that the executive "attempted to coopt Congress's power to legislate" in violation of the separation of powers).[5]

As this Court has recognized, "it is not Congress's burden to prohibit the Executive from spending the Nation's funds: it is the Executive's burden to show that its desired use of those funds was affirmatively approved by Congress." *Sierra Club* PI Order 40 (internal quotation omitted). As such, under the Constitution, the implicit restriction on funding when Congress appropriates a limited amount of funds for a specific purpose prevents the executive branch from using different appropriations to circumvent congressional intent. *See Youngstown*, 343 U.S. at 609 (Frankfurter, J., concurring) ("It is one thing to draw an intention of Congress from general language . . . where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress withheld.").

Moreover, although an explicit prohibition was unnecessary, Congress expressly barred the executive branch from using a provision like § 2808 to "increase . . . funding for a program, project, or activity as proposed in the President's budget request for a fiscal year" unless made pursuant to a reprogramming or transfer provision. CAA § 739. However, Defendants do not—and cannot—contend that § 2808 is a reprogramming or transfer provision. Instead, referring to a

[5] Defendants' citations to *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012) and *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) are not on point. Defs.' Br. 21-22. *Salazar's* mention of "[a]n agency's discretion to spend appropriated funds is cabined only by the text of the appropriation," applies to the meaning of a particular appropriation rider, but is inapplicable to determining the significance of Congress's refusal to appropriate funds. *Salazar*, 567 U.S. at 200 (internal quotation omitted). And Plaintiffs assert not that the CAA "repeals" an agency's substantive obligations under any statute, *Tennessee Valley Auth.*, 437 U.S. at 190, but rather that the CAA imposes an implicit limit on spending for border barriers.

General Accountability Office (GAO) glossary, which defines "program, project, or activity" as an "[e]lement within a budget account," they contend that the border wall construction is not a program, project, activity. Defs.' Br. 23. But even that definition would disqualify the diversion here, since the diverted DoD funding is intended to supplement the programs, projects, and activities in DHS's budget accounts. *See, e.g.*, AR 9, 43, 53, 55-56, 120-21.[6]

Finally, Defendants' reliance on *Lincoln v. Vigil*, 508 U.S. 182 (1993) is misplaced. Defendants claim that under *Lincoln* their actions in diverting "military construction funds to emergency military construction projects do[] not pose constitutional concerns" because "Congress could have granted DoD unfettered discretion over its total budget." Defs.' Br. 22. *Lincoln*, however, involved a lump-sum appropriation which was essential to the Court's decision. 508 U.S. at 183, 192-93. Whether Congress could grant a lump-sum appropriation to the executive branch for border barriers is beside the point because it did not do so here; to the contrary, Congress imposed specific limitations on funding for border barriers. For all of these reasons, Defendants' diversion of funds under § 2808 violates separation of powers principles.

C. Defendants Violated the Appropriations Clause

Defendants do not dispute that the Appropriations Clause prohibits the executive branch from "evad[ing]" spending limitations set by Congress. States' Op. Br. 17 (citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990)). Instead, Defendants make the sweeping claim that any "action undertaken pursuant to a federal statute . . . cannot violate the Appropriations Clause." Defs.' Br. 23. That is not so. In *Nevada v. Dep't of Energy*, the D.C. Circuit held that it was unlawful for the executive branch to dedicate portions of a general $190 million appropriation for nuclear waste disposal activities to nuclear waste disposal activities in Nevada when Congress had appropriated only $1 million specifically for Nevada disposal activities in a different appropriation. 400 F.3d 9, 16-17 (D.C. Cir. 2005). If actions undertaken pursuant to a

[6] Although Defendants object that there is no cause of action to enforce the CAA, Defs.' Br. 23 n.5, as this Court already has recognized, the States can bring both *ultra vires* and APA claims in the absence of an express statutory claim. Moreover, any contention that this claim falls outside CAA § 739's zone of interest is barred by the Ninth Circuit's decision in *McIntosh*, which held that third parties may invoke separation of powers principles in disputes over an appropriation rider. 833 F.3d. at 1174.

federal statute could not violate the Appropriations Clause, the *Nevada* case would have come out differently. Here, just as in *Nevada*, the question presented by the States' Appropriations Clause claim is whether Defendants may use general appropriations to proceed with border barrier construction even though Congress explicitly authorized only a far smaller amount for construction in a completely different sector. The States' constitutional claim is not premised solely on "an interpretation of the statutes," but also "presents [a] controversy about the reach or application of" the Appropriations Clause, underscoring why *Dalton* does not preclude the States' Appropriations Clause claim. *Harrington v. Schlesinger*, 528 F.2d 455, 458 (4th Cir. 1975).

Defendants assert that congressional limitations in an appropriation for one agency cannot affect how another agency uses money for that same purpose. Defs.' Br. 23-24. But Defendants are unable to offer any case supporting this assertion, and they ignore that here, DoD is diverting money solely to support the activities of the agency whose appropriation Congress specifically limited. *See, e.g.*, AR 9, 43, 53, 55-56, 120-21. The recent GAO Opinion that Defendants cite, Defs.' Br. 24, does not support their position. Defs.' Br. Ex. 8 at 13 ("[A] more specific appropriation prevails over a general appropriation, *including where another agency has the more specific appropriation*.") (emphasis added). In any event, Defendants do not dispute that the GAO rendered this opinion without considering the arguments advanced by Plaintiffs and the courts. *Compare* States' Op. Br. 17 n.7, *with* Defs.' Br. 24. In addition, in the most analogous case, the GAO *prohibited* one DoD subagency from using a general appropriation to dredge a river where a *different* subagency of DoD had funds appropriated for dredging. GAO Opinion, B-139510 (May 13, 1959). This Court's prior observation was correct: the Appropriations Clause is not so feeble as to permit executive branch officials "displeased with a . . . restriction . . . imposed by Congress," *Richmond*, 496 U.S. at 428, to use DoD to "make a de facto appropriation to DHS, evading congressional control entirely." *Sierra Club* PI Order 40.

D. Defendants Violated the Presentment Clause

Notably absent from Defendants response to the States' demonstration that Defendants violated the Presentment Clause is any consideration of the similarities between the President's unilateral modification of Congress' $1.375 billion appropriation for barrier construction in the

CAA and the President's cancellation of select appropriations in *Clinton v. City of New York*. *See* Defs.' Br. 24. In *City of New York*, both houses of Congress passed appropriations bills, then the president signed those bills into law and simultaneously rejected two appropriations in those bills. 524 U.S. at 436. Here, in the face of a request for $5.7 billion in barrier funding, both houses of Congress passed the CAA with only $1.375 billion in barrier funding and only for the Rio Grande Valley; the president signed that bill into law and, simultaneously, added $6.7 billion from other sources to that appropriation without geographic limitation on where barriers may be built. *Sierra Club* PI Order 4-8. Like the line-item veto in *City of New York*, the President's unilateral actions here "reject[] the policy judgment made by Congress" and supplant it with the President's based "on the same conditions that Congress evaluated." 524 U.S. at 438, 443-44.

The federal government argued in *City of New York*, as it does here, that there is no Presentment Clause violation where the congressional enactments impacted by executive actions retain "real, legal budgetary effect." *Id.* at 440-41 (quoting Government's oral argument); Defs.' Br. 24 ("the CAA remains in effect"). *City of New York*, however, requires looking at the "legal *and practical* effect" of the President's actions. 524 U.S. at 438 (emphasis added). The augmentation of the $1.375 billion appropriation in the CAA with an additional $6.7 billion is "the functional equivalent" of an amendment of Congress's appropriation, which the Presentment Clause forbids. *Id.* at 441. Moreover, Defendants ignore that the disapproval process in the NEA is substantively similar to the disapproval process in the Line-Item Veto Act that the Supreme Court held to be unconstitutional. *Compare* 50 U.S.C. § 1622(a)(1), *with* 2 U.S.C. § 691b(a). This process does not simply allow the President to veto original legislative action, subject to override by a super-majority of Congress. Defs.' Br. 24. If Defendants' position were accepted, the NEA would allow the President to unilaterally divert funds, irrespective of Congress's refusal to appropriate funds for that purpose, and then require a two-thirds majority of Congress *to reclaim Congress's original appropriation that was previously passed into law*. This "authorize[s] the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature." *City of New York*, 524 U.S. at 448. That product is

"surely not a document that may 'become a law' pursuant to the procedures designed by the Framers of Article I, § 7 of the Constitution." *Id.* at 449.

V. DEFENDANTS VIOLATED NEPA

Defendants do not dispute that the border-barrier projects they are constructing are major federal actions that "significantly affect the quality of the human environment" to which NEPA would normally apply. Defs.' Br. 24-27; 42 U.S.C. § 4332(C); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-50 (1989). Instead, they assert that their actions on the California and New Mexico 2808 Projects are exempt from NEPA based on § 2808's "without regard to any other provision of law" clause. This argument fails because, as shown above, the proposed border-barriers are not authorized under § 2808. *See supra* at 6-8. For projects being constructed under § 284, Defendants rely on this Court's prior ruling. Defs.' Br. 24-25. As indicated in their motion, the States continue to contest that ruling. States' Op. Br. 19-21.

In addition, regardless of whether § 2808 applies, DOI was obligated to conduct an environmental review under NEPA before transferring property under its control to DoD. *See* States' Op. Br. 20-21. Defendants deny that this claim is properly before this Court because it was not mentioned in the First Amended Complaint. Defs.' Br. 26. But the allegations in the First Amended Complaint satisfy the general pleading requirements of the Federal Rules of Civil Procedure and provide Defendants with notice that their actions in facilitating border-barrier construction violate NEPA. Fed. R. Civ. P. Rule 8(a); ECF 47 ¶¶ 392-399. Defendants' authority for their argument, *Wasco Products, Inc. v. Southwall Techs., Inc.*, 435 F.3d 989 (9th Cir. 2006), is distinguishable because there, the issue was plaintiff's failure to plead fraudulent concealment with particularity under Federal Rule of Civil Procedure 9(b). *Id*. at 991-92 (holding plaintiff could not toll the statute of limitations based on its allegations of civil conspiracy, which it made for the first time in its response to a summary judgment motion). Further, DOI only recently transferred land to DoD for the § 2808 Projects so it was not possible for the States to include that particular allegation in the First Amended Complaint filed in March 2019. AR 3, 30-31. Nonetheless, the States alleged in that Defendants' actions to facilitate border barrier construction violate NEPA and named both DOI and DoD as Defendants. *See* ECF ¶¶ 206-206, 392-399.

Regarding the merits of the DOI NEPA claim, the limitations Defendants cite in the Federal Land Policy and Management Act (FLPMA) do not apply to the § 2808 Projects because under FLPMA an immediate withdrawal of land is only authorized when necessary "to preserve values that would otherwise be lost." 43 U.S.C. § 1714(e). Here, DOI is transferring land to DoD to construct border barriers that will actually harm the land and damage species' habitat rather than preserving them, *see generally* App'x of Decls. Re: Env. Harms ISO Pls' MSJ, *California* (ECF 220-1), and Defendants failed to produce sufficient evidence to rebut Plaintiffs' expert testimony.[7] Thus, Plaintiffs' evidence of the impacts that DOI's transfer will have on environmental resources is undisputed and the cases Defendants cite that authorize emergency withdrawals without NEPA compliance in some circumstances are not relevant to DOI's actions here. The Court should enter judgment for California and New Mexico on their NEPA claims.

VI. THE STATES ARE ENTITLED TO A PERMANENT INJUNCTION

This Court should grant a permanent injunction prohibiting Defendants from using § 2808 to defund military construction projects located within the States to construct border barrier projects in California and New Mexico, because the States meet all of the factors required for permanent injunctive relief. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).[8]

A. Defendants' Actions Irreparably Harm California and New Mexico

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

Defendants appear to concede that the California and New Mexico Projects will irreparably harm those States' sovereign interests in enforcing their laws if this Court agrees with the States

[7] Rather than produce evidence from declarants with expertise in endangered species, Defendants rely on a single declaration by Alex Beehler—an Assistant Secretary of the United States Army with no apparent expertise or independent knowledge relating to wildlife along the border—to address the impacts that the DOI's transfer will have on the environment. ECF 236-6. Assistant Secretary Beehler repeatedly refers to the purported statements by unnamed officials at the United States Fish and Wildlife Service and United States Army Corps of Engineers to support his conclusion that 11 border barrier projects will not have any negative impacts on the environment, largely based on mitigation measures he has been told may occur. *Id.* ¶¶ 33, 34, 38-65, 67-70. Assistant Secretary Beehler's opinions in this regard lack foundation, are speculative, and are inadmissible. *See, e.g.*, Fed. R. Evid. 602.

[8] California and New Mexico also request an injunction prohibiting Defendants from constructing border barrier projects in California and New Mexico under § 284 until Defendants comply with NEPA.

on their legal claims. Defendants offer no defense to California and New Mexico's position on this issue, but instead argue that in balancing the parties' harms related to injunctive relief, Defendants' interests prevail because § 2808 preempts the States' environmental laws. Defs.' Br. 33-35. But Defendants' argument misses the point here for two reasons.

First, practically, Defendants can only invoke authorities to override state laws if they have funds to undertake the construction at issue here. Therefore, Defendants' § 2808 diversion infringes upon the Plaintiff States' ability to implement their laws—which undeniably will cause them irreparable harm. *See Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001).

Second, even assuming *arguendo* that Defendants' broad reading of § 2808's "without regard to any other provision of law" clause is correct, there is no federal preemption because that clause does not conflict with the States' environmental laws. The key point here is that § 2808 does not authorize the 2808 California and New Mexico Projects and therefore, that clause does not apply. California and New Mexico are suffering irreparable harm to their sovereign interests because Defendants will not comply with these States' laws. States' Op. Br. 21-26; AR 4.

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

Defendants' arguments about the harms to the environment in California and New Mexico are lack merit. Defendants continue to incorrectly assert that population-level harm is required to establish irreparable harm to species. Defs.' Br. 28. But that is not the correct standard as this Court previously confirmed. ECF 165 at 31(*States* PI Order). Instead, the standard requires establishing that "the challenged action poses a threat of future demonstrable harm to a protected species." *Id.* at 31. California and New Mexico meet that standard here. States' Op. Br. 26-30.

Defendants also incorrectly argue that California's and New Mexico's harms are speculative. California and New Mexico have proffered undisputed evidence of concrete harms to protected species from the § 2808 projects that justify injunctive relief.[9] Starting with California,

[9] As noted above, the Beehler Declaration on which Defendants chiefly rely states opinions that lack foundation. It also contains numerous inaccuracies. For example, his assertion in paragraph 66 concerning the Vanderplank Declaration is not accurate as that declaration does not even address the Aplomado falcon – it is limited to rare and protected plant species.

Defendants claim that impacts to the federally endangered Quino Checkerspot Butterfly are speculative despite the fact that San Diego Project 4 cuts directly through the butterfly's critical habitat that the federal government designated under the Endangered Species Act to protect the species. 2808 Env. App'x Ex. 1 (Clark Decl. ¶ 13); Revised Designation of Critical Habitat for the Quino Checkerspot butterfly, 74 Fed. Reg. 28,801 (June 17, 2009). This designation was intended to preserve habitat "that is essential to the conservation of the species," 16 U.S.C. § 1533(a)(3)(C)(i), and here Defendants will be damaging that habitat for a species that lives only in a few locations in Riverside and San Diego Counties. Clark Decl. ¶¶ 15-17. Further, Quino Checkerspot Butterfly have been documented within the San Diego Project 4 project footprint. *Id.* ¶ 16. That Declarant Clark did not observe one during his site visit, *see* Defs.' Br. 28-29, is not conclusive evidence that the butterfly is absent. Nor is it evidence that Defendants' construction activities will not harm the butterfly and its habitat, particularly given that the Quino goes dormant and is often not visible. Clark Decl. ¶¶ 13-17. And Defendants do not identify any mitigation measures that would minimize impacts to this imperiled species. Beehler Decl. ¶ 70.

Defendants' responses concerning harms to the federally threatened Coastal California Gnatcatcher and the Western Burrowing Owl are also deficient. Defs.' Br. 29-30. Defendants acknowledge that San Diego Project 4 could harm these species and destroy their habitat. *Id*. While Defendants also claim that they may consider mitigation measures or "best management practices" to reduce impacts, these measures are entirely speculative because Defendants contend they can construct the California Projects without complying with any environmental or species-protection laws. AR 4; Defs.' Br. 25. These voluntary mitigation measures do not rebut California's evidence of species harm, particularly because they are limited to those "that could be undertaken without impeding expeditious construction of Section 2808 projects." Beehler Decl. ¶ 70; *see Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008) (rejecting mitigation measures as inadequate for protecting endangered fish species where there were no "specific and binding plans" for their implementation). Further, Defendants have not proposed any mitigation measures that—even if properly implemented—would avoid the harms outlined in the Clark Declaration. Clark Decl. ¶¶ 18-26.

As for vernal pool species, Defendants miss the point of California's harms argument. Defs.' Br. 30; Clark Decl. ¶¶ 27-33. While vernal pool species within the San Diego Project 4 site may be harmed, the focus of California's argument is that in order to access the project site, Defendants will necessarily need to use an unimproved dirt road that goes through vernal pool habitat where endangered species such as the San Diego Fairy Shrimp have been documented. Clark Decl. ¶¶ 30-31. Defendants will likely need to grade the road and remove vegetation to allow access for heavy equipment. Defendants do not contest this point and present no evidence to rebut Plaintiffs' argument that off-site construction to facilitate San Diego Project 4 will harm vernal pool species and destroy their habitat. Defs.' Br. 30; *see generally* Beehler Decl.

Concerning harms to the white-sided jackrabbit in New Mexico, Defendants' position appears to be that it is fine if the remaining U.S.-based population of this New Mexico-threatened species dies off as a result of El Paso Projects 2 and 8 since it "was never known to be abundant in the area." Defs.' Br. 31. Defendants fail to rebut the States' evidence that El Paso Project 8 will completely block the hares' migration corridor between the U.S. and Mexico, as identified by Declarant Traphagen, whom the U.S. Fish & Wildlife Service recognizes as an expert on this species. *Id.*; 2808 Env. App'x Ex. 5 (Traphagen Decl. ¶ 18, Ex. B); 12-Month Finding on a Petition to List the White-Sided Jackrabbit as Threatened or Endangered, 75 Fed. Reg. 53,618 (Sept. 1, 2010). Defendants also do not challenge that habitat connectivity between New Mexico and Mexico is critical for the hares' survival, and that the jackrabbit will most likely die off in the United States if El Paso Projects 2 and 8 proceed. Beehler Decl. ¶ 65 (stating "[t]he loss of these populations is not likely to result in a significant gap in the range of the taxon."). As for the jaguar, though much of its critical habitat is adjacent to the project sites, that species still faces harm because El Paso Projects 2 and 8 will block the eastern-most corridor of the jaguar's habitat between the U.S. and Mexico. Traphagen Decl. ¶ 21. Because New Mexico has demonstrated that El Paso Projects 2 and 8 pose a threat of "future demonstrable harm" to these protected species, *States* PI Order 31, this Court should issue an injunction to halt project construction.

3. The Cancellation of Military Construction Projects in Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin Causes those States Irreparable Financial Harm

Defendants argue that financial harms asserted by the States are "generalized complaints about harm to their local economies," and as such "are insufficient to establish standing, let alone irreparable injury warranting a permanent injunction." Defs.' Br. 3. However, Defendants mischaracterize the States' claims by conflating losses to the "States' local economies" with losses to the coffers of the *States themselves* in the form of "fewer taxes" collected. *Id.* at 32; *see also* States' Op. Br. 31 (noting that while the diverted construction would have brought $366 million in benefits to the States' economies, the *tax losses suffered by the States* would be $36 million). Although the $36 million decrease in tax revenues collected by Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin is a necessary result of the $366 million decline in local economic activity, these states seek redress only for the former, which is an injury directly impacting these states themselves.[10] That financial harm is clearly cognizable, despite Defendants' unsupported suggestion that only "direct recipients of the money for the deferred military construction projects" suffer economic harm. Defs.' Br. 32. Finally, Defendants are wrong to claim these are irrelevant because they are not "irreparable." *Id.* at 33. Defendants have repeatedly asserted their *own* financial harms as relevant, and precedent holds that economic harm can be irreparable when, as here, a party would not be able to recover monetary damages.

a. Lost Tax Revenue Is Cognizable Financial Harm

Defendants' implication that the States could only assert economic loss by showing they would be "direct recipients" of federal dollars is simply incorrect. Defs.' Br. 32. Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin can assert any "harm to [their] own economic interests," including lost opportunities for an economic "benefit." *City of Olmsted Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 268 (D.C. Cir. 2002); *City of New*

[10] It is for this reason that Defendants' discussion of *parens patriae* standing is irrelevant. Defs.' Br. 33 ("[T]o 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 [sic] fails."). While the States do not concede that Defendants' arguments regarding *parens patriae* claims are correct, they do not assert any financial harms on behalf of their residents here.

York, 524 U.S. at 431. The Ninth Circuit has recognized states' and municipalities' lost tax revenues as a result of federal actions as harm. *See, e.g.*, *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1194 (9th Cir. 2004) (recognizing financial harm from, *inter alia*, decreased tax revenue caused by federal plan to rehabilitate a former military base); *City of Oakland v. Lynch*, 798 F.3d 1159, 1164 (9th Cir. 2015) (recognizing "expected loss of tax revenue" as harm).

Defendants, who make no attempt to distinguish the binding circuit precedents of *Sausalito* and *Oakland*, instead object that only one case, *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), *cert. denied sub nom*, "even addresses" the Supreme Court's decision in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). Defs.' Br. 33. However, *Sausalito* and *Oakland* are entirely consistent with *Wyoming*, which explicitly holds that a state can suffer "direct injury in the form of a loss of specific tax revenues" traceable to federal action. 502 U.S. at 448-49. Furthermore, Defendants' argument that in *Wyoming* there was a "direct link between Oklahoma's law targeting coal usage and a specific stream of [Wyoming's] tax revenue based on coal extraction" is a distinction without a difference. Defs.' Br. 32. The "specific stream of tax revenue" that will be lost by the states here is no less "directly linked" to Defendants' actions than the predicted decline of coal purchases in *Wyoming*.

Defendants also do not dispute the methodology or conclusions of the States' expert on the economic tax benefits brought by military construction and projected lost tax revenue from the cancellation of military construction. Instead, citing out-of-circuit cases (two of which pre-date *Wyoming*'s recognition of lost tax revenue as cognizable harm), Defendants argue that this Court should ignore these harms because they constitute a "generalized grievance . . . distantly related to the wrong for which relief is sought." Defs.' Br. 32. But, those cases involved alleged harms that were far more generalized and speculative than those at issue here. *Iowa* ex rel. *Miller v. Block*, 771 F.2d 347, 353 (8th Cir. 1985) (state plaintiff claimed that "but for the Secretary's implementation of . . . disaster relief programs, agricultur[al] production [would] suffer . . . forcing unemployment up and state tax revenues down"); *Pennsylvania v. Kleppe*, 533 F.2d 668, 671-72 & n.14 (D.C. Cir. 1976) (state plaintiff claimed, solely during oral argument and in "sketchy and uncertain" terms, that federal assistance to rebuild hurricane-damaged businesses

was needed to avoid losing "tax revenues"); *Arias v. DynCorp*, 752 F.3d 1011, 1015 (D.C. Cir. 2014) (Ecuadorian provinces asserted that an herbicide-spraying operation caused a loss of tax revenues, but quantified claim solely by comparing current "annual budget deficits with their generally balanced budgets before the spraying began," and plaintiffs' "own expert noted that there [were] a number of economic and environmental factors that were responsible for the [recent] budget deficits, including . . . a volcanic eruption"). In contrast, the States' injuries here are not generalized or speculative. The lost tax revenues at issue are concrete and quantifiable, and will inexorably result from the loss of specific, identified construction projects within the States' borders. *See* Reaser Decl. ¶¶ 18-29.

b. Lost Tax Revenue Constitutes Irreparable Harm

Finally, Defendants are wrong to assert that "loss of tax revenue is not an irreparable injury." Defs.' Br. 31. Both before this Court and the Ninth Circuit, Defendants have repeatedly asserted their own economic harms as relevant to the balancing inquiry when considering injunctive relief. *See, e.g.*, Defs.' Notice of Mot. and Mot. for Partial Summ. J. and Opp'n, 24, *California* (June 19, 2019), ECF 182 (arguing against injunctive relief based on "significant costs" to Defendants, including "unrecoverable fees and penalties of hundreds of thousands of dollars"); Br. for Defs.-Appellants 51-52, *California v. Trump*, No. 19-16102 (9th Cir. 2019), ECF 85 (arguing that "unrecoverable fees and penalties" incurred by Defendants related to suspension of construction were "misweighed" among the relevant harms). More importantly, even though "[e]conomic harm is not normally considered irreparable[,] . . . such harm is irreparable [where] the states will not be able to recover monetary damages" to compensate for the harms alleged. *Azar*, 911 F.3d at 581. Because Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Virginia, and Wisconsin will not be able to recover tax benefits and revenues lost by the diversion of military construction projects, those harms should be considered by this Court as further justifying injunctive relief.

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

Defendants make no effort to meaningfully engage with the States' arguments regarding the balance of harms. Defendants entirely fail to address any harms to the public interest resulting from the cancellation of the military projects at issue as identified in the States' opening brief. *See* States' Op. Br. 13-14, 35, 2808 MSJ RJN Exs. 2-19 (cataloging severe harms to both the military and to the general public that Defendants themselves stated would result if the planned military construction projects were not undertaken). *Amicus curiae* Iraq and Afghanistan Veterans of America have further detailed harms to the "safety, quality of life, or work environment for military service members and their families" that would result from Defendants' diversions. Brief of Iraq and Afghanistan Veterans of America as *Amicus Curiae* in Supp. of Pls.' Mot. for Partial Summ. J. 4-8, *California*, (Oct. 22, 2019), ECF 232. Ignoring these interests, Defendants simply repeat their position that the Court should entirely defer to the President's determination that the armed forces "are required to confront this crisis" at the border. Defs.' Br. 34. However, Defendants' refusal to acknowledge these competing and compelling impacts to the public interest does not negate their existence.

Defendants similarly fail to address the harms their actions would cause to the States' sovereign interests. As explained above, Defendants cannot merely assert the supremacy of federal law here, where it is only Defendants' unlawful actions that lead to the curtailing of state sovereignty, in direct conflict with congressional intent. *See supra* at 19.

Finally, and most fundamentally, Defendants fail to explain how the public interest and the balance of hardship can favor their continued unlawful and unconstitutional diversion of funds. *See Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013).

CONCLUSION

For the reasons stated above, Plaintiffs ask that the Court grant their Motion for Partial Summary Judgment, order the States' requested injunctive and declaratory relief, and deny Defendants' Motion for Partial Summary Judgment.

Dated: November 1, 2019

Respectfully submitted,

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ATTESTATION OF SIGNATURES

I, Heather C. Leslie, hereby attest, pursuant to Local Civil Rule 5-1(i)(3) of the Northern District of California that concurrence in the filing of this document has been obtained from each signatory hereto.

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