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

16 SIERRA CLUB and SOUTHERN BORDER
 17 COMMUNITIES COALITION,

18 *Plaintiffs,*

19 v.

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

23 *Defendants.*

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

**PLAINTIFFS' NOTICE OF MOTION
 AND MOTION FOR PRELIMINARY
 INJUNCTION; MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT THEREOF**

Date: May 9, 2019
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 Judge: Honorable Haywood S. Gilliam
 Dept: Oakland
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1 **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

2 PLEASE TAKE NOTICE that Plaintiffs Sierra Club and Southern Border Communities
3 Coalition hereby move the Court pursuant to Federal Rule of Civil Procedure 65 for a preliminary
4 injunction against Defendants Donald J. Trump, President of the United States of America; Patrick
5 M. Shanahan, in his official capacity as Acting Secretary of Defense; and Kirstjen M. Nielsen, in her
6 official capacity as Secretary of the United States Department of Homeland Security (collectively,
7 “Defendants”). Plaintiffs request that this motion be heard on May 9, 2019, at 2:00 PM before the
8 Honorable Haywood S. Gilliam in Courtroom 2 of the United States District Court for the Northern
9 District of California, 1301 Clay Street, Oakland, CA, 94612.

10 Plaintiffs respectfully move the Court to enter a nationwide preliminary injunction
11 prohibiting Defendants and all persons associated with them from taking action to build a border
12 wall using funds or resources from the Defense Department; and specifically enjoining construction
13 of the wall segments in the areas Defendants have identified as “Yuma Sector Projects 1 and 2 and
14 El Paso Sector Project 1.” This motion is based on this Notice of Motion and Motion, the
15 accompanying supporting Memorandum of Points and Authorities, and any other written or oral
16 evidence or argument that may be presented at or before the time this motion is heard by the Court.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **INTRODUCTION**

19 Plaintiffs Sierra Club and Southern Border Communities Coalition seek a preliminary
20 injunction to halt the irreversible damage threatened by the President’s unilateral pursuit of a border
21 wall that Congress has refused to fund. The President has repeatedly sought billions of taxpayer
22 dollars to construct hundreds of miles of barriers along the border. Congress has repeatedly denied
23 the President this authority, most recently through an appropriations act that imposed substantial
24 restrictions on the scope, location and timing of border wall construction. The President has
25 nonetheless announced his intention to disregard Congress’s considered judgment, including by
26 declaring a national emergency and instructing the Secretaries of Defense, Treasury, and Homeland
27 Security to fund and build a wall in excess of Congress’s appropriations. In recent weeks,
28 Defendants Shanahan and Nielsen have taken concrete steps to proceed with imminent and

1 unauthorized wall construction in areas that Plaintiffs’ members use and treasure. These actions
2 include the unlawful transfer of hundreds of millions of dollars that Congress appropriated for
3 military pay and pensions.

4 Neither a declaration of emergency nor the statutes that Defendants have invoked permit the
5 President to disregard Congress’s enacted appropriations legislation. Nor have Defendants even
6 attempted to comply with the environmental protections Congress required in the National
7 Environmental Policy Act. An injunction is necessary to prevent Defendants’ disregard for the
8 statutes enacted by a coordinate branch of government, and their attempt to usurp its powers.

9 **FACTS**

10 **I. Congress has reviewed and rejected President Trump’s requested appropriations for wall construction.**

11 Since taking office in 2017, President Trump and his administration have repeatedly sought
12 appropriations to fund construction of a border wall. *See* Pls.’ Am. Compl. ¶¶ 27–29, ECF No. 26.
13 Congress has reviewed, responded to, and rejected these requests. *See id.* ¶¶ 28–30.

14 On January 6, 2019, during what would become the longest partial government shutdown in
15 American history to date, the Acting Director of the Office of Management and Budget
16 communicated to congressional Committees on Appropriation that “[t]he President requests \$5.7
17 billion for construction of a steel barrier for the Southwest border,” which would “fund construction
18 of a total of approximately 234 miles of new physical barrier and fully fund the top 10 priorities in
19 CBP’s Border Security Improvement Plan.” Request for Judicial Notice (“RJN”) ¶ 1, Ex. A at 1.
20 After the shutdown ended, a bipartisan committee of negotiators from the House and Senate began
21 work on a compromise appropriations bill that would include some funding for border security.
22 President Trump publicly expressed his skepticism that negotiations would be fruitful, declaring that
23 the negotiators were “[w]asting their time” and that he would “get [the wall] built one way or the
24 other.” *Id.* ¶¶ 2, 3, Exs. B, C. The House and Senate nonetheless negotiated a bipartisan agreement,
25 and on February 14, 2019, Congress passed the Consolidated Appropriations Act of 2019 (“CAA”).

26 The CAA accorded \$1.375 billion for the construction of a border wall, a fraction of the \$5.7
27 billion that the President requested. It geographically restricted the funding to Border Patrol’s Rio
28 Grande Valley Sector, which consists entirely of lands in Texas and is the eastern-most Sector in a

1 state with five Border-Patrol Sectors. And the CAA expressly protected areas that the administration
 2 had claimed to be priorities, Pub. Law No. 116-6, Division A § 231,¹ and imposed consultation and
 3 approval requirements before initiating construction in cities situated along the border, *id.* §§ 231–2.²

4 **II. President Trump has acted to circumvent Congress’s enacted decisions.**

5 On February 15, 2019, President Trump virtually simultaneously signed the appropriations
 6 bill and declared a national emergency. *See* RJN ¶ 4, Ex. D. In announcing his declaration of
 7 national emergency, President Trump acknowledged that he “went through Congress . . . made a
 8 deal,” and, though he “didn’t need to do this, . . . [he]’d rather do it much faster.” *Id.* ¶ 5, Ex. E.
 9 Although he signed the CAA into law, President Trump stated that he was “not happy” with
 10 Congress’s compromise deal and would use “other methods” to finance a wall without explicit
 11 approval from Congress. *Id.* ¶ 5,6, Exs. E, F. The \$1.375 billion appropriated from Congress, said
 12 the President, is “not so much” for a border wall. *Id.* ¶ 5, Ex. E. Accordingly, the President
 13 announced he would circumvent the CAA’s limit through the use of “other methods” to “get[] close
 14 to \$8 billion [and] . . . build a lot of wall.” *Id.*

15 In a contemporaneous “fact sheet” entitled “President Donald J. Trump’s Border Security
 16 Victory,” the White House identified approximately \$8.1 billion to be diverted to build a border wall
 17 from funds Congress appropriated for other purposes. *See* RJN ¶ 7, Ex. G. These included \$3.6
 18 billion to be reallocated from Department of Defense military construction projects in purported
 19 reliance on emergency military construction authority set out in 10 U.S.C. § 2808, \$2.5 billion to be
 20 diverted from Department of Defense funds in purported reliance on authority for the military to
 21 support for counterdrug activities under 10 U.S.C. § 284, and \$601 million to be reallocated from the
 22 Treasure Forfeiture Fund. *Id.*

23 Congress swiftly rebuked the President’s diversion of funds. On February 26, 2019, the

24
 25 ¹ Congress prohibited the use of any appropriated funds to construct a barrier “(1) within the
 26 Santa Ana Wildlife Refuge; (2) within the Bentsen-Rio Grande Valley State Park; (3) within La
 Lomita Historical Park; (4) within the National Butterfly Center; or (5) within or east of the Vista del
 Mar Ranch tract of the Lower Rio Grande Valley National Wildlife Refuge.”

27 ² Congress forbade the use of appropriated funds for construction within the city limits of
 28 Roma, Texas; Rio Grande City, Texas; Escobares, Texas; La Grulla, Texas; and within Salineño,
 Texas, until local elected officials and the public have had an opportunity to comment.

1 House of Representatives overwhelmingly passed an unprecedented resolution pursuant to the
2 National Emergencies Act to terminate the President’s declaration of emergency. H.J. Res. 46, 116th
3 Cong. (2019). The Senate followed shortly thereafter, with a bipartisan majority passing the
4 disapproval resolution 59-41 to terminate the President’s declaration of emergency. On March 15,
5 2019, President Trump vetoed the disapproval resolution.

6 **III. Defendants have begun diverting funds to build President Trump’s border wall.**

7 Defendants quickly initiated the process of diverting funds to build President Trump’s border
8 wall. On February 15, 2019, the Department of Treasury notified Congress that it would transfer
9 \$242 million from the Treasury Forfeiture Fund to the Department of Homeland Security (“DHS”)
10 to support law enforcement border security efforts conducted by CBP. *See* RJN ¶ 8, Ex. H. On
11 February 25, 2019, DHS officially requested that the Department of Defense (“DOD”) supply it with
12 military funds to construct approximately 200 miles of barriers along the border, in areas located
13 outside of the Rio Grande Valley. *Id.* ¶ 9, Ex. I. On March 8, 2019, President Trump wrote on
14 Twitter: “The Wall is being built and is well under construction. Big impact will be made. Many
15 additional contracts are close to being signed. Far ahead of schedule despite all of the Democrat
16 Obstruction and Fake News!” *Id.* ¶ 10, Ex. J. The next day, the President wrote that “Major sections
17 of Wall are being built” and that “MUCH MORE” would “follow shortly.” *Id.* ¶¶ 11, 12 Exs. K, L.

18 By March 11, 2019, Defendants informed members of Congress that they were preparing a
19 transfer of funds into the Drug Interdiction and Counter-Narcotics Activities account for diversion to
20 border barrier construction. *See* RJN ¶ 13, Ex. M at 1. This was necessary because DOD had already
21 spent more than 90 percent of the \$881.5 million appropriated for that account in fiscal year 2019,
22 while the administration had announced its intention to funnel \$2.5 billion to the wall through the
23 account. *Id.* On March 12, the President confirmed his plan to divert \$3.6 billion in military
24 construction funds to his wall by submitting to Congress a budget request for \$3.6 billion to “backfill
25 funding reallocated in FY 2019 to build border barriers *Id.* ¶ 14, Ex. N at 6-9.

26 On March 25, 2019, the Department of Defense confirmed the transfer of \$1 billion from
27 previously appropriated Military Personnel accounts—including military pay and pension funds—to
28 the depleted Drug Interdiction and Counter-Drug Activities account for further diversion to DHS

1 wall construction. RJN ¶ 21, Ex. U That same day, Defendant Shanahan confirmed in a letter to
2 Defendant Nielsen that he “ha[d] decided to undertake Yuma Sector Projects 1 and 2 and El Paso
3 Sector Project 1 by constructing 57 miles of 18-foot-high pedestrian fencing.” *Id.* ¶ 15, Ex. O. Yuma
4 Projects 1 and 2 provide for the construction of 11 miles of new or replacement border walls near
5 Yuma, Arizona, and along the Colorado River; El Paso Project 1 entails the construction of 46 miles
6 of new or replacement border walls in southern New Mexico. *Id.* ¶ 16, Ex. P. By the letter, Acting
7 Secretary Shanahan authorized the Commander of the U.S. Army Corps of Engineers to “coordinate
8 directly with DHS/CBP and immediately begin planning and executing up to \$1B in support of
9 DHS/CBP.” *Id.* ¶ 15, Ex. O. The letter stated that “DHS will accept custody of the completed
10 infrastructure, account for that infrastructure in its real property records, and operate and maintain
11 the completed infrastructure.” *Id.* According to a spokesperson for the Army Corps of Engineers,
12 contracts for construction in these areas will be sent to builders in April. *See id.* ¶ 16, Ex. P.
13 Construction could begin in May 2019. *Id.*

14 **IV. Plaintiffs have been harmed and face imminent injuries.**

15 President Trump’s decision to disregard the limitations Congress imposed on wall
16 construction “shattered the security [Plaintiffs] obtained through the democratic appropriations
17 process.” Declaration of Vicki Gaubeca ¶ 6. As a result, SBCC and its member organizations have
18 been forced to set aside their existing priorities and respond to the new threat the President’s wall
19 poses to their communities and the unique environment they treasure. *See* Gaubeca Decl. ¶¶ 7–8, 10;
20 Declaration of Christina Patiño Houle. ¶¶ 8–12; Declaration of Kevin Bixby ¶¶ 10-11.

21 Plaintiffs also face imminent harm to their use and enjoyment of the areas Defendants have
22 slated for wall construction in May. These borderlands are biologically diverse areas known for their
23 outstanding hiking, wildlife viewing, and wilderness values. *See* Bixby Decl. ¶ 6. They are
24 ecologically sensitive and home to a wide variety of wildlife, including endangered species. *Id.* ¶ 9.
25 Border infrastructure construction would disrupt these ecosystems and cause irreversible damage.
26 *See* Declaration of Elizabeth J. Walsh. ¶¶ 10-13; Houle Decl. ¶ 6.

LEGAL STANDARD

1
2 On a motion for a preliminary injunction, a plaintiff “must establish that he is likely to
3 succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
4 that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Saravia*
5 *for A.H. v. Sessions*, 905 F.3d 1137, 1142 (9th Cir. 2018). A preliminary injunction may issue where
6 “serious questions going to the merits [are] raised and the balance of hardships tips sharply in
7 [plaintiff’s] favor.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)
8 (citation and quotation marks omitted).

ARGUMENT

I. Plaintiffs Are Likely To Succeed On The Merits Of Their Claims.

9
10
11 Because the Defendants’ actions encroach on Congress’s exclusive power to appropriate
12 funds as enacted in the Consolidated Appropriations Act of 2019, Pub. Law No. 116-6 (“CAA”),
13 Plaintiffs are likely to succeed on the merits of their claims. Defendants’ refusal to abide by the
14 restrictions Congress imposed on wall construction violates the CAA and the Constitution, and is
15 contrary to the statutes Defendants purport to rely on. Neither the President’s declaration of an
16 emergency nor his invocation of a statute regarding military support for law enforcement agencies
17 permits him to disregard Congress’s enacted appropriations decisions.

A. Defendants’ diversion of funds violates the CAA.

18
19 Defendants’ actions to divert funds committed to other purposes for the construction of the
20 border wall directly violates the CAA. In enacting the CAA, Congress specifically considered and
21 rejected the administration’s plan to spend billions of taxpayer dollars to quickly build a wall along
22 the length of the Southwest Border. Congress’s appropriations judgment, as expressed in the bill that
23 passed both chambers and was signed into law by the President, is that only \$1.375 billion should be
24 used in this fiscal year to construct border barriers, that such barriers must be limited geographically
25 to the Rio Grande Valley Sector, that certain sections be subject to consultation with local
26 stakeholders, and that these new sections should be limited in design to pedestrian fencing.
27 Defendants’ actions to exceed these appropriations limitations violate the CAA.

28 Through the CAA, Congress reached a directly contrary decision from the President on

1 several issues. First, Congress acted clearly to constrain the size and scope of the President’s wall
2 project for the present fiscal year. The White House requested \$5.7 billion for 234 miles of wall in a
3 letter dated January 6, 2019, but Congress decided on the far lower amount of \$1.375 billion. *See*
4 RJN ¶ 1, Ex. A at 1. As the President conceded on the day he signed the CAA, when it came to the
5 legislation the “primary fight was on the wall,” and although the CAA gave the administration “so
6 much money, we don’t know what to do with it . . . [t]he only place they don’t want to give as
7 much money — \$1,375,000,000” was for his wall. *Id.* ¶ 5, Ex. E. When it came to this disagreement,
8 “Congress, as holder of the purse strings, was free to deal with the subject on whatever basis it saw
9 fit.” *Gartner v. United States*, 166 F.2d 728, 729 (9th Cir. 1948). Although the President maintained
10 that \$1.375 billion was insufficient for his plan, “beyond this Congress did not go, and there can be
11 no fair doubt that its restraint was deliberate and purposeful.” *Id.* at 730.

12 Second, Congress disagreed with the President on the particulars of the border wall funding
13 by restricting the pace, location, permissible designs, and funding for border barrier construction.
14 *See* CAA, Division A §§ 230–32. “Where Congress has addressed the subject as it has here, and
15 authorized expenditures where a condition is met, the clear implication is that where the condition is
16 not met, the expenditure is not authorized.” *United States v. MacCollom*, 426 U.S. 317, 321 (1976).
17 The President cannot override Congress’s deliberate and specific plan for funding border barriers.

18 Third, Congress ensured that the President could not unilaterally increase funding to projects
19 before Congress acts to approve such actions. The CAA prohibits the use of any appropriated funds
20 to “increase . . . funding for a program, project, or activity as proposed in the President’s budget
21 request for a fiscal year until such proposed change is subsequently enacted in an appropriation Act”
22 or authorized by provisions in other appropriations legislation. CAA, Division D § 739. Defendants
23 cannot dispute that the President has proposed an increase of funding for wall construction by
24 several billion dollars in his budget request for fiscal year 2020. *See* RJN ¶ 17, Ex. Q at 50 (“Budget
25 requests \$5 billion to construct approximately 200 miles of border wall along the U.S. Southwest
26 border.”); *id.* ¶ 14, Ex. N at 6–9 (requesting \$3.6 billion “to build border barriers,” and an additional
27 \$3.6 billion to “backfill funding reallocated in FY 2019 to build border barriers”). President Trump’s
28 sole lawful option after signing the CAA into law was to make his appropriation request to Congress

1 another time, not to usurp Congress’s power of the purse and the legislative process by diverting
2 funds that were previously committed for other purposes.³

3 Defendants’ actions to evade Congress’s enacted decisions therefore directly interfere with a
4 primary function of appropriations legislation—to limit the size and scope of particular projects and
5 keep the executive branch accountable to the legislature through the mechanism of annual budgeting.
6 Congress often makes use of appropriations law to “give a particular agency, program, or function
7 its spending cap and thus constrain what that agency, program, or function may do in the relevant
8 year(s). . . . Such appropriations are an integral part of our constitutional checks and balances,
9 insofar as they tie the Executive Branch to the Legislative Branch via purse strings.” *U.S. House of*
10 *Representatives v. Burwell*, 185 F. Supp. 3d 165, 169–70 (D.D.C. 2016).

11 **B. Defendants’ efforts to usurp Congress’s role are unconstitutional.**

12 **1. Defendants’ actions violate the Appropriations Clause.**

13 In the CAA, Congress provided that only \$1.375 billion may be spent on border wall
14 construction, and that such construction is restricted to the Rio Grande Valley. That decision is
15 reserved exclusively for Congress in the Constitution’s Appropriations Clause, which unequivocally
16 provides: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made
17 by Law” U.S. Const. art. I, § 9, cl. 7; *see also City & Cty. of San Francisco v. Trump*, 897 F.3d
18 1225, 1231 (9th Cir. 2018) (“The United States Constitution exclusively grants the power of the
19 purse to Congress, not the President.”). “James Madison underscored the significance of that
20 exclusive congressional power, stating, ‘[t]he power over the purse may [be] the most complete and
21 effectual weapon with which any constitution can arm the immediate representatives of the people.’”
22 *Id.* at 1231 (quoting *The Federalist* No. 58) (James Madison)). “The Clause has a ‘fundamental and
23 comprehensive purpose . . . to assure that public funds will be spent according to the letter of the
24 difficult judgments reached by Congress as to the common good and not according to the individual
25

26 ³ The only exception to the Section 739 prohibition on increases in funding is for increases
27 “made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act.”
28 Neither 10 U.S.C. § 2808 nor 10 U.S.C. § 284 is an appropriations act, therefore neither can be used
to increase border barrier funding beyond the \$1.375 billion provided for in the CAA. *See* 1 U.S.C.
§ 105 (defining appropriations acts).

1 favor of Government agents.” *Id.* at 1174–75 (quoting *Office of Pers. Mgmt. v. Richmond*, 496 U.S.
2 414, 427–8 (1990) (alterations in original)).

3 Courts have an essential role to play in protecting litigants from government efforts to evade
4 the restrictions Congress imposes through its appropriations judgments. In *United States v.*
5 *McIntosh*, for example, the Ninth Circuit emphasized that the government could not disregard
6 Congress’s enactment of an appropriations law that “specifically restricts DOJ from spending money
7 to pursue certain activities.” 833 F.3d 1163, 1172 (9th Cir. 2016). The court observed that “it is
8 emphatically . . . the exclusive province of the Congress not only to formulate legislative policies
9 and mandate programs and projects, but also to establish their relative priority for the Nation. Once
10 Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for
11 . . . the courts to enforce them when enforcement is sought.” *Id.* (quoting *Tenn. Valley Auth. v. Hill*,
12 437 U.S. 153, 194 (1978)).

13 As in *McIntosh*, Defendants’ efforts to spend money in violation of the restrictions imposed
14 in the CAA amount to “drawing funds from the Treasury without authorization by statute and thus
15 violating the Appropriations Clause.” *Id.* at 1175. The violation—and Defendants’ disdain for the
16 considered decision of a coordinate branch of government—is all the more clear in light of
17 Defendants’ public statements acknowledging their disagreement with Congress’s appropriations
18 judgment. On the morning that President Trump signed the CAA and declared an emergency, he
19 acknowledged that Congress’s judgment was that “they don’t want to give as much money —
20 \$1,375,000,000” for his wall. RJN ¶ 5, Ex. E. Nonetheless, President Trump declared his intention to
21 use up to \$8 billion because “I think that I just want to get it done faster, that’s all.” *Id.* He explained
22 that “I could do the wall over a longer period of time. I didn’t need to do this. But I’d rather do it
23 much faster.” *Id.* President Trump’s words tracked the White House’s previous statements, including
24 his January 10, 2019 statement that “if we don’t make a deal, I would say it would be very surprising
25 to me that I would not declare a national emergency and just fund it through the various
26 mechanisms,” and Acting White House Chief of Staff Mick Mulvaney’s statement that “[w]e’ll take
27 as much money as [Congress] can give us and then we’ll go off and find the money someplace else
28 . . . but [the wall] is going to get built with or without Congress.” *Id.* ¶ 20, Ex. T (video at 00:55–

1 01:12). “[T]he Administration’s public statements are indicative of both the object of and policy
 2 supporting” the President’s effort to override Congress’s appropriations decision. *San Francisco*,
 3 897 F.3d at 1243. Defendants’ efforts to build the wall “with or without Congress” violate the
 4 Appropriations Clause. *See MacCollom*, 426 U.S. at 321 (“The established rule is that the
 5 expenditure of public funds is proper only when authorized by Congress, not that public funds may
 6 be expended unless prohibited by Congress.”).⁴

7 **2. Defendants’ actions violate the Separation of Powers.**

8 Because Congress has clearly expressed its will that border barrier construction be limited to
 9 \$1.375 billion in the Rio Grande Valley, the Constitution’s separation of powers forbids Defendants’
 10 actions. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (Jackson, J.,
 11 concurring); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (even in war, a president “may not
 12 disregard limitations that Congress has, in proper exercise of its own [] powers, placed on his
 13 powers” (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring))). If there were any doubt
 14 about whether Congress approved of President Trump’s effort to claim additional funds, Congress
 15 explicitly rejected the President’s invocation of emergency powers to build the wall through the
 16 unprecedented passage of a disapproval resolution, which was vetoed by the President on March 15,
 17 2019. *See* H.J. Res. 46. “It is quite impossible . . . when Congress did specifically address itself to a
 18 problem,” as Congress has unmistakably done here, “to find secreted in the interstices of legislation
 19 the very grant of power which Congress consciously withheld.” *Youngstown*, 343 U.S. at 609
 20 (Frankfurter, J., concurring).

21 As the Ninth Circuit recently instructed, “Justice Jackson’s *Youngstown* concurrence
 22 provides the operative test in this context: When the President takes measures incompatible with the
 23 expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon
 24 his own constitutional powers minus any constitutional powers of Congress over the matter.” *San*
 25 *Francisco*, 897 F.3d at 1233–34 (citing *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring)).

26 ⁴ Defendants’ Appropriations Clause violation is not lessened by their attempt to draw on
 27 unobligated funds remaining in accounts that Congress chose to fund for other purposes. “However
 28 much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of
 any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most
 dangerous discretion.” *Reeside v. Walker*, 52 U.S. 272, 291 (1850).

1 Justice Jackson’s canonical separation-of-powers opinion has particular force in the appropriations
 2 context. The Appropriations Clause “is a bulwark of the Constitution’s separation of powers,” one
 3 that “is particularly important as a restraint on Executive Branch officers: If not for the
 4 Appropriations Clause, “the executive would possess an unbounded power over the public purse of
 5 the nation; and might apply all its monied resources at his pleasure.” *U.S. Dep’t of Navy v. Fed.*
 6 *Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (quoting 3 Joseph Story,
 7 Commentaries on the Constitution of the United States § 1342, at 213–14 (1833)). If “the decision to
 8 spend [is] determined by the Executive alone, without adequate control by the citizen’s
 9 Representatives in Congress, liberty is threatened.” *Clinton v. City of New York*, 524 U.S. 417, 451
 10 (1998) (Kennedy, J., concurring)).

11 “To . . . maintain the separation of powers, the carefully defined limits on the power of each
 12 Branch must not be eroded.” *I.N.S. v. Chadha*, 462 U.S. 919, 957–58 (1983). Here, “Congress has
 13 frequently considered and thus far rejected legislation accomplishing the goals” of the President’s
 14 unilateral funding diversion. *San Francisco*, 897 F.3d at 1234.⁵ “The sheer amount of failed
 15 legislation on this issue demonstrates the importance and divisiveness of the policies in play,
 16 reinforcing the Constitution’s ‘unmistakable expression of a determination that legislation by the
 17 national Congress be a step-by-step, deliberate and deliberative process.’” *Id.* (quoting *Chadha*, 462
 18 U.S. at 959).

19 In short, through the CAA and other legislation, Congress “expressed its will to withhold this

20 ⁵ The current Congress rejected the administration’s January 6, 2019 request for \$5.7 billion
 21 in wall funding, while the 115th Congress rejected the Department of Defense Appropriations Act of
 22 2018, H.R. 695, 115th Cong. (2018) (\$5.7 billion for CBP construction; passed by the House but not
 23 the Senate); the WALL Act of 2018, S. 3713, 115th Cong. (2018) (\$25 billion appropriation for
 24 border wall; no committee action); the 50 Votes for the Wall Act, H.R. 7073, 115th Cong. (2018)
 25 (\$25 billion appropriation for funding for border wall; no committee action), the Build the Wall,
 26 Enforce the Law Act of 2018, H.R. 7059, 115th Cong. (2018) (\$16.6 billion appropriation for border
 27 wall; no committee action); the Fund and Complete the Border Wall Act, H.R. 6657, 115th Cong.
 28 (2018) (authorization of funding for border wall; no committee action); American Border Act, H.R.
 6415, 115th Cong. (2018) (\$16.6 billion appropriation for border wall; no committee action); Border
 Security and Immigration Reform Act of 2018, H.R. 6136, 115th Cong. (2018) (\$16.6 billion
 appropriation for border wall; voted down by House 301 to 121); Securing America’s Future Act of
 2018, H.R. 4760, 115th Cong. (2018) (construction of border wall; voted down by House 231 to
 193); Border Security and Deferred Action Recipient Relief Act, S. 2199, 115th Cong. (2017) (\$38.2
 million for planning for border wall construction; no action in Senate); Make America Secure
 Appropriations Act, H.R. 3219, 115th Cong. (2017) (\$38.2 million appropriation for border wall;
 passed by House, no action by Senate).

1 power from the President as though it had said so in so many words,” *Youngstown*, 343 U.S. at 602
2 (Frankfurter, J., concurring). “[B]ecause Congress has the exclusive power to spend,” and because
3 Congress has refused to grant the President the authority to spend more than \$1.375 billion on the
4 wall—as well as restricted construction to the Rio Grande Valley—“the President’s ‘power is at its
5 lowest ebb.’” *San Francisco*, 897 F.3d at 1234 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J.,
6 concurring)). The President, accordingly, is entirely without authority to spend additional taxpayer
7 money on the wall or to construct any portion of it outside of Texas. *Id.* at 1233–34. (“[W]hen it
8 comes to spending, the President has none of ‘his own constitutional powers’ to ‘rely’ upon.”
9 (citation omitted)). The President’s continuing attempt to circumvent the legislative process and
10 spend this additional taxpayer money flouts the Constitution’s separation-of-powers.

11 **3. Defendants’ actions violate the Presentment Clause.**

12 Defendants’ actions also violate the Presentment Clause, Article I, Section 7, Clause 2, which
13 provides the President with only two options when Congress passes an appropriations act: he must
14 sign it, or return it with his objections so that Congress may consider them. “Where the President
15 does not approve a bill, the plan of the Constitution is to give to the Congress the opportunity to
16 consider his objections and to pass the bill despite his disapproval.” *Wright v. United States*, 302
17 U.S. 583, 596 (1938). “There is no provision in the Constitution that authorizes the President to
18 enact, to amend, or to repeal statutes.” *Clinton*, 524 U.S. at 438. This restriction dates back to the
19 founding: “Our first President understood the text of the Presentment Clause as requiring that he
20 either approve all the parts of a Bill, or reject it in toto.” *Id.* at 440 (quotation omitted).

21 Instead of following this mandatory requirement, the President signed a bill to which he
22 objected, and simultaneously announced that he would nonetheless disregard the limitations
23 Congress imposed in the CAA by increasing funds to his liking. Because the President has purported
24 to modify or repeal the appropriations bill passed by Congress, his actions violate the Presentment
25 Clause. *See id.* at 445–47 (the President may not “effect the repeal of laws, for his own policy
26 reasons, without observing the procedures set out in Article I, § 7,” nor may the President claim “the
27 unilateral power to change the text of duly enacted statute”).

28 **C. Defendants’ diversion of funds is not authorized by the statutes on which they purport to rely.**

1 To avoid Congress’s funding restrictions on border barrier construction, Defendants seek to
 2 divert billions of dollars that Congress appropriated for military construction, pensions, and pay. In
 3 support of this extraordinary action, Defendants muster three inapplicable statutes in an effort to
 4 cobble together the massive wall project that Congress denied them. But neither the emergency
 5 military construction authority set forth in 10 U.S.C. § 2808, the restricted transfer authority
 6 provided in the 2019 Department of Defense Appropriations Act, nor the authorization for military
 7 support for counterdrug activities in 10 U.S.C. § 284 authorizes construction of the President’s wall.⁶

8 **1. Defendants cannot use emergency military construction funds to
 9 construct President Trump’s border wall.**

10 The President has invoked 10 U.S.C. § 2808 as the source of his authority to take money
 11 away from appropriated military construction projects, but Congress expressly limited that statute to
 12 undertakings that (1) respond to a national emergency “that requires use of the armed forces,” and
 13 (2) are “military construction projects” that “are necessary to support such use of the armed forces.”
 14 10 U.S.C. § 2808. Defendants’ actions to build the President’s border wall fail both requirements.

15 By its own terms, the President’s Emergency Proclamation fails to identify an emergency
 16 requiring use of the armed forces. In describing the nature of the purported national emergency, the
 17 text of the Proclamation refers to a “long-standing” problem of “large-scale unlawful migration
 18 through the southern border” that has “worsened” in recent years due to “sharp increases in the
 19 number of family units entering and seeking entry to the United States and an inability to provide
 20 detention space” for them. RJN ¶ 4, Ex. D. It further states that these family units “are often released
 21 into the country and are often difficult to remove from the United States because they fail to appear
 22 for hearings, do not comply with orders of removal, or are otherwise difficult to locate.” *Id.*

23 Even if true, none of these emergency conditions inherently “requires use of the armed
 24 forces.” Instead, Congress has made clear that response to any such condition is a core function of
 25 the *civilian* components of the Department of Homeland Security. *See* 6 U.S.C. § 202 (assigning

26 ⁶ For the reasons stated in Section I.B, any statute that provided the President with authority
 27 to set aside Congress’s enacted appropriations decisions would be unconstitutional. “The
 28 Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own
 powers, much less those of other Congresses to follow.” *Clinton*, 524 U.S. at 452 (Kennedy, J.,
 concurring).

1 DHS responsibility for “[s]ecuring the borders” and “immigration enforcement functions”); *id.* § 251
2 (assigning DHS responsibility for “Border Patrol,” “detention and removal,” and “inspections”); 8
3 U.S.C. § 1103(a)(5) (Secretary of DHS has “duty to control and guard the boundaries and borders of
4 the United States against the illegal entry of aliens”). Congress has specifically provided for a
5 civilian, rather than military response if “an actual or imminent mass influx of aliens . . . near a land
6 border[] presents urgent circumstances requiring an immediate Federal response. . . .” 8 U.S.C. §
7 1103(a)(10). Should the Attorney General determine that such “urgent circumstances” exist, the
8 “immediate Federal response” Congress provided for is that the Attorney General may authorize
9 civilian “law enforcement officer[s]” to perform immigration functions. *Id.* In the United States,
10 these tasks are reserved for civilian law enforcement—not the armed forces. *See City of Indianapolis*
11 *v. Edmond*, 531 U.S. 32, 42 (2000) (“Securing the border and apprehending drunk drivers are, of
12 course, law enforcement activities . . .”). Congressional testimony by Defendant Shanahan and
13 General Dunford, the Chairman of the Joint Chiefs of Staff, further confirms that the situation on the
14 border is “not a military threat.” RJN ¶ 19, Ex. S at 50–52.

15 Defendants’ efforts to use Section 2808 to construct a border wall also fail because
16 construction of a border wall is not a military construction project. Congress limited “military
17 construction” for the purposes of Section 2808 to construction associated with a “military
18 installation” or “defense access road.” 10 U.S.C. § 2801(a). Congress defined “military installation,”
19 in turn, as a “base, camp, post, station, yard, center, or other activity under the jurisdiction of the
20 Secretary of a military department . . .” 10 U.S.C. § 2801(c)(4). Plainly, the hundreds of miles
21 along the Mexico border on which Defendants are determined to construct a wall do not constitute a
22 military “base, camp, post, station, yard, [or] center” or “defense access road.” Nor is securing the
23 border region an “activity under the jurisdiction of the Secretary of a military department.” Instead,
24 Congress assigned to the Secretary of Homeland Security jurisdiction over “[s]ecuring the borders.”
25 6 U.S.C. § 202. Defendants themselves acknowledge that DHS is “the government department
26 tasked with border security.” RJN ¶ 9, Ex. I at 1.

27 Finally, the border wall project cannot qualify for diversion of funds under 10 U.S.C. § 2808
28 because it is not “necessary to support” the “use of the armed forces.” Construction projects that are

1 “necessary to support” the armed forces are structures that enable the military to conduct required
2 operations. For example, Section 2808 authority has been used to build military hangars and
3 runways, logistics hubs, and facilities for storing ammunition. *See* Michael J. Vassalotti & Brendan
4 W. McGarry, Cong. Research Serv., IN11017, Military Construction Funding in the Event of a
5 National Emergency (Jan. 11, 2019). Because the military is not charged with border security, the
6 armed forces would not be supported in conducting operations by a permanent border wall; at most
7 such a barrier would support DHS. President Trump confirmed this basic flaw on the very same day
8 he proclaimed the emergency, declaring that his border wall would obviate, rather than support, the
9 presence of the armed forces: “If we had a wall, we don’t need the military because we’d have a
10 wall.” RJN ¶ 5, Ex. E. Under the President’s logic, the armed forces could not possibly make use of
11 the wall because their presence would end with the wall’s completion.

12 **2. Defendants cannot divert military pay and pension funds to the Counter-
13 Drug account to fund President Trump’s wall.**

14 Defendants have stated that they will divert \$2.5 billion to border wall construction from
15 Department of Defense funds through the Drug Interdiction and Counter-Drug Activities account.
16 There is a significant obstacle to the President’s scheme, however, as the Counter-Drug Activities
17 account contains substantially less money than this sum. Accordingly, Defendants have announced
18 that they will rely on the limited transfer authority provided by Section 8005 of the 2019 Department
19 of Defense Appropriations Act, Pub. Law No. 115-245, to funnel \$1 billion in military pay and
20 pension funds into the Counter-Drug Activities account. *See* RJN ¶ 21, Ex. U (purporting to
21 authorize transfer of funds to Counter-Drug account for further transfer to DHS for “construction of
22 additional physical barriers” along the border). This transfer is an essential step in Defendants’
23 efforts to evade Congress’s restrictions on border barrier construction, and violates both Congress’s
24 specific restrictions on military funds transfers as well as basic principles of fiscal law.

25 Defendants’ transfer of military pay and pension funds for diversion to border barrier
26 construction violates the restrictions Congress imposed for military funds transfers in Section 8005
27 and 10 U.S.C § 2214(b). Both of these statutes ensure that the Secretary of Defense cannot use
28 transfers as an end run around Congress’s role in determining funding levels. By its plain language,
Section 8005 mandates that transfers between funds “may not be used unless for higher priority

1 items, based on unforeseen military requirements, than those for which originally appropriated and
 2 *in no case where the item for which funds are requested has been denied by the Congress*”
 3 (emphasis added). In 10 U.S.C § 2214(b), Congress likewise limited the transfer of Department of
 4 Defense funds, other than military construction funds, to circumstances where the transfer will
 5 “provide funds for a higher priority item, based on unforeseen military requirements, than the items
 6 for which the funds were originally appropriated;” *and* are not for “*an item for which Congress has*
 7 *denied funds*” (emphasis added). Defendants’ reliance on these statutes violates these restrictions.

8 First, as set forth in Section I.A above, Congress has in fact “denied funds” for the purposes
 9 the President desires here. Defendant Shanahan is therefore barred from transferring money into the
 10 Counter-Drug account to fund construction of barriers beyond these restrictions. *See* Pub. Law No.
 11 115-245 § 8005 (prohibiting transfers when “item for which funds are requested has been denied by
 12 the Congress”); 10 U.S.C § 2214(b) (same).

13 Second, the asserted purpose of constructing a border barrier “to impede and deny drug
 14 smuggling activities,” is not “unforeseen.” Indeed, the President specifically supported his Fiscal
 15 Year 2019 budget request for \$18 billion to fund the border wall with a statement that “since most of
 16 the illegal drugs that enter the United States come through the Southwest border, a border wall is
 17 critical to combating the scourge of drug addiction that leads to thousands of unnecessary deaths.”
 18 RJN ¶ 18, Ex. R at 16. Congress disagrees. This longstanding disagreement is not “unforeseen.”

19 Third, the building of a permanent border wall on behalf of DHS is not a “military
 20 requirement.” It is not a project to be carried out for any military or Defense Department purpose,
 21 but instead for DHS’s purposes, as Defendant Shanahan’s letter to Defendant Nielsen confirms. *See*
 22 RJN ¶ 15, Ex. O at 1 (“DHS will accept custody of the completed infrastructure, account for that
 23 infrastructure in its real property records, and operate and maintain the completed infrastructure.”);
 24 *see also* Section I.C.1, *supra* (Congress assigned “securing the border” to law enforcement).

25 **3. Defendants cannot use DOD’s authorization to provide support to law
 26 enforcement to build President Trump’s wall.**

27 In enacting 10 U.S.C. § 284, Congress authorized the Secretary of Defense to provide various
 28 forms of small-scale support to other law enforcement agencies, generally on a reimbursable basis.
See 10 U.S.C. §§ 277, 284. One such form of support is the “construction of roads and fences and

1 installation of lighting to block drug smuggling corridors across international boundaries of the
2 United States.” 10 U.S.C. § 284(b)(7).

3 Section 284(b)(7) is not a broad delegation to the Secretary of Defense of power to override
4 Congress’s specific decisions about funding of the border wall. *See F.D.A. v. Brown & Williamson*
5 *Tobacco Corp.*, 529 U.S. 120, 133 (2000) (interpretation of statutes “must be guided to a degree by
6 common sense as to the manner in which Congress is likely to delegate a policy decision of such
7 economic and political magnitude”). Other sections of the statute reinforce this commonsense
8 reading. For example, Subsection (h)(1)(B) requires the Defense Secretary to give Congress 15 days’
9 written notice before providing such support, including “a description of any small scale
10 construction project for which support is provided.” The statute defines “small scale construction” as
11 “construction at a cost not to exceed \$750,000 for any project.” 10 U.S.C. § 284(i)(3). Congress
12 would not have required a description of “any small scale construction” projects if it was, at the
13 same time, authorizing massive, multibillion-dollar expenditures under this provision. Congress does
14 not “hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns.*, 531 U.S. 457, 468 (2001).
15 Moreover, any general DOD authority to provide support to law enforcement agencies cannot be
16 read to extend to billions of dollars for border barrier construction when interpreted against the more
17 specific and more recent judgment by Congress embodied in the CAA. “[T]he meaning of one
18 statute may be affected by other Acts, particularly where Congress has spoken subsequently and
19 more specifically to the topic at hand.” *Brown & Williamson Tobacco*, 529 U.S. at 133. “This is
20 particularly so where the scope of the earlier statute is broad but the subsequent statutes more
21 specifically address the topic at hand.” *Id.* at 143. Therefore, “a specific policy embodied in a later . . .
22 . . . statute should control [judicial] construction of the [earlier broad] statute, even though it ha[s] not
23 been expressly amended.” *Id.* (quotations and citations omitted; brackets in original). Here, the
24 CAA’s specific policy limitation on border barrier construction must control, and bar, Defendants’
25 attempt to use Section 284 to evade Congress’s funding restrictions.

26 Even if these sorts of expenditures were within the general ambit of Section 284, however,
27 another provision prohibits the particular actions Defendants plan to undertake. Within the same
28 Chapter addressing “Military Support for Civilian Law Enforcement Agencies,” Congress has

1 enacted restrictions precisely to prevent the shifting of Defense Department funds to other purposes
2 without reimbursement or benefit to the Defense Department, so that the Secretary of Defense may
3 not disregard the balance that Congress struck as to the money needed for national defense. Thus,
4 section 277 provides: “to the extent otherwise required by section 1535 of title 31 (popularly known
5 as the ‘Economy Act’) or other applicable law, the Secretary of Defense *shall require* a civilian law
6 enforcement agency to which support is provided under this chapter to reimburse the Department of
7 Defense for that support” (emphasis added).

8 Because the very purpose of Defendants’ actions is to exceed the amount Congress
9 appropriated for DHS to construct border barriers, Defendant Shanahan cannot comply with
10 Congress’s requirement that he seek reimbursement. Reflecting Congress’s appropriation decision,
11 DHS lacks any funds to reimburse DOD for the planned wall construction in Arizona and New
12 Mexico. DHS has accordingly requested support on a “non-reimbursable basis.” RJN ¶ 9, Ex. I at 10.
13 But Congress permitted the Secretary of Defense to waive reimbursement under 10 U.S.C. § 277(c)
14 only if the support is either “(1) provided in the normal course of military training or operations; or
15 (2) results in a benefit to the element of the Department of Defense or personnel of the National
16 Guard providing the support that is substantially equivalent to that which would otherwise be
17 obtained from military operations or training.” Plainly neither of these conditions holds.

18 In addition, Section 284 authorizes only limited construction “to block drug smuggling
19 corridors,” rather than permitting DOD to take part in a massive, multibillion dollar effort to block
20 the U.S.–Mexico border generally. 10 U.S.C. §284(b)(7). Defendants cannot dispute that Section
21 284 is being used as a tool to create a contiguous border wall, not to address specific corridors. For
22 example, On March 6, 2019, Defendant Nielsen testified before the House of Representatives’
23 Homeland Security Committee that the border wall that was discussed in the previous months would
24 involve constructing a “little more than 700” miles of barriers. RJN ¶ 23 at 01:08:30–01:09:00. On
25 March 8, 2019, Defendant Trump wrote on Twitter: “The Wall is being built and is well under
26 construction. Big impact will be made. Many additional contracts are close to being signed.” *Id.*
27 ¶ 10, Ex. J. On March 9, 2019, Defendant Trump wrote on Twitter that “Major sections of Wall are
28 being built” and that “MUCH MORE” would “follow shortly.” *Id.* ¶¶ 11, 12, Exs. K, L. These

1 statements all reflect the simple truth that Defendants’ efforts to funnel military pension funds to the
2 wall are part of a project aimed at subverting Congress’s appropriations decisions.

3 In addition to violating the specific textual requirements section 284, Defendants’ transfer-
4 and-spend plan violates the core principle that executive branch agencies may not mix and match
5 funds from different accounts to exceed the funding limits Congress imposed. Numerous “[f]ederal
6 statutes reinforce Congress’s control over appropriated funds.” *U.S. Dep’t of Navy*, 665 F.3d at 1347
7 (citing 31 U.S.C. § 1301 *et seq.*). These statutes include “Section 1301, known as the ‘Purpose
8 Statute,’ [which] provides that appropriated funds may be applied only ‘to the objects for which the
9 appropriations were made,’” and the Transfer Statute, Section 1532, which prohibits unauthorized
10 transfer of funds from one account to another. *See* 31 U.S.C. § 1532.

11 The General Accountability Office (“GAO”), which guides the executive branch’s use of
12 appropriated funds by providing expert interpretations of appropriations law, confirms these core
13 principles.⁷ Many of the GAO’s rules protect a key function of congressional appropriations
14 judgment: setting a “maximum authorized program level” by specifically appropriating a finite set of
15 funds for a particular project. *SBA’s Imposition of Oversight Review Fees on PLP Lenders*, B-
16 300248 (Comp. Gen. Jan. 15, 2004). “Allowing an agency to exceed this level with funds derived
17 from some other source would usurp congressional prerogative and undercut the congressional
18 power of the purse.” *Availability of Receipts from Synthetic Fuels Projects for Contract Admin.*
19 *Expenses of the Dep’t of Treasury, Office of Synthetic Fuels Projects*, B-247644, 72 Comp. Gen.
20 164, 165 (Apr. 9, 1993).

21 Courts have struck down similar mix-and-match funding plans as an end-run around
22 Congress’s limits on appropriations. In *Nevada v. Dep’t of Energy*, for example, the D.C. Circuit
23 applied the GAO’s rule that “specific appropriations preclude the use of general ones even when the
24 two appropriations come from different accounts.” 400 F.3d 9, 16 (D.C. Cir. 2005) (citing 4 Comp.

25 ⁷ Courts frequently give “special weight to [GAO’s] opinions” due to its “accumulated
26 experience and expertise in the field of government appropriations.” *Nevada v. Dep’t of Energy*, 400
27 F.3d 9, 16 (D.C. Cir. 2005); *see also Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201 (D.C. Cir.
28 1984) (court “regard[s] the assessment of the GAO as an expert opinion, which [courts] should
prudently consider”); *UAW v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (noting that GAO’s
“accumulated experience and expertise” in the field of government appropriations give special
weight to its opinions (quotation marks omitted)).

1 Gen. 476 (1924)). Observing that the GAO rule “seems exactly right,” the court rejected the use of
 2 funds from a general account to buttress a more specific and limited appropriation that Congress
 3 intended for the same purpose. *Id.*; *see id.* (“[T]he fact that Congress appropriated \$1 million
 4 expressly for Nevada indicates that is all Congress intended Nevada to get in FY04 from whatever
 5 source.”).

6 Here, as in *Nevada v. Department of Energy*, Congress has allocated a specific amount of
 7 funding for an activity and the government cannot cobble together other, more general sources of
 8 money to increase funding levels for that same goal. Congress has set a maximum authorized
 9 program level for border barrier construction: \$1.375 billion in Fiscal Year 2019. Defendants’
 10 actions to transfer and spend funds above this limit are unlawful. *See, e.g., Multnomah Cty. v. Azar*,
 11 340 F. Supp. 3d 1046, 1068 (D. Or. 2018) (finding violation of the Purpose Statute); *Highland Falls-*
 12 *Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1171 (Fed. Cir. 1995)
 13 (government cannot “‘raid[]’ one appropriation account . . . to credit another”).

14 **D. Defendants’ final decision to construct a wall in Yuma Sector Projects 1 and 2
 and El Paso Sector Project 1 violates NEPA.**

15 Construction of a border wall will significantly impact the surrounding environment and
 16 triggers the requirements of the National Environmental Policy Act (NEPA). Border infrastructure
 17 will fragment the biologically diverse ecosystems along the El Paso and Yuma Sectors and bisect the
 18 natural habitats of wildlife species, threatening them with regional extirpation. *See Walsh Decl.* ¶¶
 19 10-11, 13; *Bixby Decl.* ¶ 9 (fragmentation of wildlife populations will make them more vulnerable to
 20 disease and loss of genetic variability). Even preparatory construction activities involving heavy
 21 machinery, such as road construction, installation of light fixtures, and removal of vegetation, cause
 22 significant environmental degradation and adversely impact wildlife populations. *See Walsh Decl.* ¶
 23 12; *Munro Decl.* ¶ 9; *see also Env’tl. Def. Fund, Inc. v. Corps of Eng’rs of U.S. Army*, 331 F. Supp.
 24 925, 927 (D.D.C. 1971) (preliminarily enjoining government from awarding contracts for public
 25 works project because their execution would involve clearing, grubbing, excavation, and other
 26 actions). Defendants’ failure to make any public assessment of the impact of border wall
 27 construction violates the most basic requirement of NEPA.

28 NEPA mandates that a public review of a project’s potential environmental impacts occur at

1 the “earliest possible time” in the planning process. *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir.
2 2000) (citation omitted); 40 C.F.R. § 1501.2; *see also Andrus v. Sierra Club*, 442 U.S. 347, 351 n.3
3 (1979) (requiring environmental review at the “go-no go” stage). This promotes NEPA’s two
4 primary goals. First, it ensures that federal agencies take a “hard look” at the environmental
5 consequences of their actions. *Metcalf*, 214 F.3d at 1141. Through this review, NEPA ensures
6 agencies make informed decisions before taking action. *See Marsh v. Or. Nat. Res. Council*, 490
7 U.S. 360, 371 (1989) (“By so focusing agency attention, NEPA ensures that the agency will not act
8 on incomplete information, only to regret its decision after it is too late to correct.” (citation
9 omitted)). Second, it provides a mechanism for the public to learn about and comment on the
10 impacts of a proposed action. *Id.*

11 NEPA is triggered when federal agencies undertake actions “significantly affecting the
12 quality of the human environment.” 42 U.S.C. § 4332(2)(C). It mandates preparation of an
13 Environmental Impact Statement (EIS) when there are substantial questions about whether a project
14 “may” harm the environment. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239
15 (9th Cir. 2005) (emphasis in original). “[T]his is a low standard.” *Cal. Wilderness Coal. v. U.S.*
16 *Dep’t of Energy*, 631 F.3d 1072, 1097 (9th Cir. 2011) (citation omitted). “A plaintiff need not show
17 that significant effects will in fact occur. It is enough for the plaintiff to raise substantial questions
18 whether a project may have a significant effect on the environment.” *WildEarth Guardians v.*
19 *Provencio*, 918 F.3d 620, 633 (9th Cir. 2019) (quotation marks and citations omitted). Where an EIS
20 is not categorically required, federal agencies must prepare an Environmental Assessment (EA) to
21 determine the extent of the environmental impacts and whether an EIS is needed. *See Ocean*
22 *Advocates v. U.S. Army Corps of Engr’s*, 402 F.3d 846, 864 (9th Cir. 2005); *see also* 40 C.F.R. §§
23 1501.3, 1501.4(c). If the project will have only an insignificant effect, agencies issue a finding of no
24 significant impact. *See* 40 C.F.R. § 1501.4(e). As part of their NEPA assessment, agencies must
25 consider reasonable alternatives to the proposed action, including a “no action” option. *See* 42
26 U.S.C. § 4332(2)(E); *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988).

27 Defendants’ actions violate NEPA because DHS and DOD have conducted *no* public
28 assessment whatsoever of the environmental effects of their decision to begin construction in

1 Arizona and New Mexico next month, despite advancing their specific construction plans. DOD and
 2 DHS have issued notices stating exactly where border infrastructure will be built, and DOD has
 3 transferred money to fund it. *See* RJN ¶ 15, 21 Exs. O, U. Teams of experts and engineers are
 4 surveying sites. *Id.* ¶ 16, Ex. P. Yet, DOD and DHS have not engaged in interagency consultations,
 5 invited public comment, prepared an EIS or an EA, or issued a finding of no significant impact.
 6 Their failure to do so violates NEPA. *Cf. In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1213,
 7 1219, 1225–26 (9th Cir. 2019) (not reaching NEPA challenge to border wall construction because
 8 project was “still in the preliminary planning stage” and no final agency action had been taken).

9 **II. Plaintiffs are suffering irreparable harm and will suffer further harm in the absence
 10 of a preliminary injunction.**

11 Plaintiffs have suffered and will suffer irreparable harm if a border wall is constructed
 12 pursuant to the President’s emergency declaration. As a result of the declaration, Sierra Club and
 13 SBCC have been forced to continuously divert resources and efforts away from other core
 14 organizational priorities. In addition, Plaintiffs’ members who live, work, or recreate in the specified
 15 Yuma and El Paso sectors will suffer irreparable harm to their interests as a result of Defendants’
 16 construction of 18-foot-high barriers across the land they treasure. Finally, the emergency
 17 declaration causes constitutional injury to Plaintiffs by usurping Congress’s appropriations authority
 18 and violating the Constitution’s separation of powers.

19 **A. Sierra Club and SBCC members face irreparable harm if construction proceeds
 20 in Yuma Sector Projects 1 and 2 and El Paso Sector Project 1.**

21 Construction of a border wall in Yuma Sector Projects 1 and 2 and El Paso Sector Project 1
 22 will have devastating effects on the environment and cause irreparable harm to Plaintiffs’ members
 23 who reside or recreate in these areas. *See All. for the Wild Rockies*, 632 F.3d at 1135
 24 (“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is
 25 often permanent or at least of long duration, *i.e.*, irreparable.”) (quotation marks and citation
 26 omitted). A plaintiffs who can establish that a project will “harm [their] members’ ability to ‘view,
 27 experience, and utilize’ . . . areas in their undisturbed state” has demonstrated a likelihood of
 28 irreparable harm. *Id. See also Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 886 F.3d 803,
 822 (9th Cir. 2018) (finding irreparable harm to plaintiffs’ aesthetic and recreational pursuits
 stemming from irreparable harm to endangered species). A plaintiff can also establish irreparable

1 harm if construction proceeds prior to NEPA compliance. *See High Sierra Hikers Ass’n v.*
2 *Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004) (“In the NEPA context, irreparable injury flows from
3 the failure to evaluate the environmental impact of a major federal action.” (citation omitted)).
4 Plaintiffs Sierra Club and SBCC face irreparable harm for these reasons.

5 Wall construction will diminish Plaintiffs’ members’ recreational, aesthetic, and professional
6 interests in the wilderness areas along the U.S.–Mexico border. For example, Albert Del Val has
7 been fishing striped bass in the canals along the border in Yuma, Arizona for more than fifty years.
8 *See Del Val Decl.* ¶¶ 6. He fears that installation of an 18-foot-high border wall in this area will cut
9 off his access to the canals and detract from the natural environment that he has cherished since he
10 was a young boy. *Id.* ¶¶ 6, 7, 9-10. Sierra Club member Elizabeth Walsh routinely visits the El Paso
11 Sector 1 area for hiking and birdwatching. *See Walsh Decl.* ¶ 8. As part of her professional and
12 academic work, Dr. Walsh supervises several ongoing and long-term biology studies in the area with
13 graduate students. *Id.* ¶ 7. Construction of a border wall will not only impede her aesthetic
14 enjoyment of the borderlands, but will also negatively impact her ability to continue the scientific
15 studies she has been conducting for years. *Id.* ¶¶ 10-11, 15. *See also Munro Decl.* ¶ 7–9.

16 The agencies’ failure to comply with NEPA also increases the risk of irreparable harm. A
17 preliminary injunction is appropriate where a Plaintiff can show that irreparable harm is likely to
18 flow from a procedural violation of an environmental statute. *See W. Watersheds Project v.*
19 *Kraayenbrink*, 632 F.3d 472, 492–93 (9th Cir. 2011) (finding irreparable harm for procedural
20 violation of NEPA); *see also Cottonwood Env’tl. Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091
21 (9th Cir. 2015) (procedural violation supports injunctive relief). By neglecting to even consider the
22 environmental harms of construction, as they are required to under NEPA, Defendants threaten
23 irreparable harm to Plaintiffs. *See, e.g., Bixby Decl.* ¶¶ 6–7, 9; *Walsh Decl.* ¶ 15; *Del Val Decl.* ¶¶
24 8–10. For SBCC community members who live along the border, Defendants’ failure to adhere to
25 NEPA is especially harmful because a wall and its underground foundation can increase lands’
26 susceptibility to flooding and cause the displacement of entire communities. *See Houle Decl.* ¶¶ 4, 6.

27 **B. Plaintiffs face irreparable harm from frustration of their missions.**

28 Plaintiffs will suffer irreparable harm unless the President’s plan to use military funds under

1 10 U.S.C. sections 2808 and 284 is enjoined, because they are forced to continue to divert
2 organizational resources to address the detrimental impact of a border wall. Such injuries are
3 sufficient to demonstrate a likelihood of irreparable harm and justify preliminary injunctive relief.
4 *See, e.g., Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (plaintiffs who have
5 shown “ongoing harms to their organizational missions . . . have established a likelihood of
6 irreparable harm”); *E. Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1116 (N.D. Cal.
7 2018); *League of Women Voters v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016) (obstacles that “make it
8 more difficult for [organizations] to accomplish their primary mission” impose “irreparable harm”).

9 Plaintiff SBCC has expended significant staff time and resources to monitor and respond to
10 the diversion of funds and threatened construction caused by the emergency declaration. Since the
11 President declared a national emergency, several senior SBCC staff have devoted a “majority” of
12 their time to analyzing and responding to it. *See* Gaubeca Decl. ¶ 7 (emphasis in original). They have
13 fielded inquiries from members, journalists, and elected officials; created new educational materials,
14 media toolkits, and multimedia content; and hosted trainings for staff and partners, all in order to
15 respond to the national emergency declaration. *Id.* ¶¶ 8-9. Prioritizing these activities has taken time
16 away from and frustrated SBCC’s core organizational mission of advocating for Border Patrol
17 accountability and immigration reform, through activities such as policy initiatives that increase law-
18 enforcement accountability. *Id.* ¶ 10. SBCC member organizations Southwest Environmental Center
19 (SEC) and Equal Voice Network (EVN) have similarly diverted scarce organizational resources to
20 address the emergency declaration. *See* Houle Decl. ¶¶ 8-10 (organizing site-specific protests,
21 educating community members, providing group tours to border areas affected by “emergency,”
22 mapping out anticipated construction areas, creating new media campaign); Bixby Decl. ¶¶ 10-11
23 (identifying timing and location of construction, responding to stakeholder concerns, designing
24 media kits about impact of construction). Responding to the emergency declaration has frustrated the
25 core missions of both organizations, causing them irreparable harm. *See* Houle Decl. ¶¶ 4-5
26 (organization developed “additional arm” to deal with emergency, detracting from core
27 organizational priorities such as “Jobs and Economic Security,” “Education,” “Housing,” and
28 “Healthcare”); Bixby Decl. ¶¶ 3, 10-11 (core mission of “protection and restoration of native

1 wildlife and their habitats in the southwest” is frustrated). Plaintiffs are suffering present, ongoing,
2 and concrete harms and will continue to do so absent judicial intervention.

3 **C. Defendants’ constitutional violations impose irreparable harm.**

4 “[T]he deprivation of constitutional rights unquestionably constitutes irreparable injury.”
5 *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks omitted). This
6 principle applies even where the government’s constitutional violation is structural, rather than a
7 deprivation of individual constitutional rights. *See Am. Trucking Assn’s. v. City of Los Angeles*, 559
8 F.3d 1046, 1058 (9th Cir. 2009) (finding with respect to Supremacy Clause that “constitutional
9 violation alone, coupled with the damages incurred, can suffice to show irreparable harm”); *Cty. of*
10 *Santa Clara v. Trump*, 250 F. Supp. 3d 497, 538 (N.D. Cal. 2017) (rejecting distinction between
11 violations of structural and personal constitutional rights, and finding irreparable harm arising from
12 Separation of Powers and Spending Clause violations). Plaintiffs are experiencing and will continue
13 to experience irreparable harm stemming from the President’s usurpation of Congressional authority.
14 Defendants efforts to construct a border wall at a speed and manner not authorized by Congress
15 through the unlawful diversion of military funds to construct walls in Arizona and New Mexico
16 directly impairs Sierra Club members’ and SBCC members’ ability to enjoy protected parks and
17 wildlife areas. This harm is irreparable.

18 **III. The Balance of Equities and Public Interest Favor a Preliminary Injunction.**

19 The balance of the equities and public interest support issuance of injunctive relief. In cases
20 against the government, the government’s interest and public interest factors “merge.” *Nken v.*
21 *Holder*, 556 U.S. 418, 435 (2009). Here, the public “has an interest in ensuring that ‘statutes enacted
22 by [their] representatives’ are not imperiled by executive fiat. *E. Bay Sanctuary Covenant v. Trump*,
23 909 F.3d 1219, 1255 (9th Cir. 2018) (quoting *Maryland v. King*, 567 U.S. 1301, 1301 (2012)
24 (Roberts, C.J., in chambers)). In addition, there is a “well-established public interest in preserving
25 nature and avoiding irreparable environmental injury.” *All. for the Wild Rockies*, 632 F.3d at 1138
26 (citation omitted); *see also Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007).

27 **CONCLUSION**

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

1 Dated: April 4, 2019

Respectfully submitted,

2 /s/ Dror Ladin

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