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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. 4:20-cv-01563-HSG

PLAINTIFF STATES OF CALIFORNIA, CONNECTICUT, MASSACHUSETTS, MICHIGAN, NEW JERSEY, NEW MEXICO, VIRGINIA, AND WISCONSIN'S NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING SECTIONS 284, 8005, AND 9002; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Judge: Hon. Haywood S. Gilliam, Jr.
Trial Date: None Set

Action Filed: March 3, 2020

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NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

PLEASE TAKE NOTICE that Plaintiff States of California, Connecticut, Massachusetts, Michigan, New Jersey, New Mexico, Virginia, and Wisconsin (the States) hereby move this Court under Federal Rule of Civil Procedure 56 for partial summary judgment. The States respectfully request that the Court enter judgment in their favor because the undisputed evidence establishes that the diversion of $3.8 billion in federal funds under §§ 8005 and 9002 of the Fiscal Year (FY) 2020 Department of Defense Appropriations Act (FY 2020 DoD Appropriations Act), Pub. L. No. 116-93, 133 Stat. 2317, 2335, 2376 (2019) and 10 U.S.C. § 284 for the construction of barriers on the border between the United States and Mexico: (1) is *ultra vires*; (2) violates the U.S. Constitution's separation of powers principles, including the Appropriations and Presentment Clauses; and (3) violates the Administrative Procedure Act (APA). The States are entitled to declaratory and injunctive relief prohibiting Defendants from utilizing these provisions to: (1) construct border barriers in California and New Mexico; and (2) take $2 billion of the total diverted for border barrier construction away from appropriations directly benefiting the States.

This motion is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities; the accompanying declarations and Request for Judicial Notice; all briefs and evidence submitted in *California v. Trump*, No. 19-cv-872-HSG (*California I*) and *California v. Trump*, Ninth Cir. Nos. 19-16299, 19-16336, 19-17502, 20-15044; this Court's rulings in *California I* and *Sierra Club v. Trump,* No. 19-cv-892-HSG (*Sierra Club I,* with *California I*, the FY 2019 litigation); and any other evidence or arguments as may be presented. Consistent with this Court's March 6, 2020 Order, ECF No. 21, to support this motion the States incorporate by reference all arguments made in prior briefing and their prior requests for judicial notice, which this Court has granted. Order Den. Pls.' Mot for Prelim. Inj. 7 n.6, *California I* (May 24, 2019), ECF No. 165 (*California* PI Order).

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

For the second consecutive year, the Trump Administration has defied the will of Congress by redirecting billions of dollars appropriated by Congress for unrelated Department of Defense

(DoD) projects toward building a wall on the United States-Mexico border. In a series of orders last year, this Court and the Ninth Circuit held last year's diversions unlawful.[1] This year, Defendants have redirected another $3.8 billion that Congress appropriated to DoD for other purposes toward construction of border barriers (FY 2020 Reprogramming Action), citing much of the same statutory authority as last year—§§ 8005 and 9002 of the FY 2020 DoD Appropriations Act and 10 U.S.C. § 284. Like last year's diversion, this diversion is illegal and unconstitutional. It violates the requirements of §§ 8005, 9002, and 284, the statutes under which Defendants purport to act. It separately violates the APA's prohibition on arbitrary and capricious action. And Defendants again violate the Constitution's separation of powers principles by repudiating Congress's judgment *not* to appropriate billions of dollars for border barriers.

By any measure, these violations are subject to challenge by the States. The FY 2020 Reprogramming Action harms the States in additional, new ways from the FY 2019 action—satisfying even the most restrictive view of the zone of interests test. First, Defendants divert $890 million allocated for the benefit of the States' National Guard units for equipment critical to their mission to support state authorities in natural disasters and other emergencies such as the current COVID-19 crisis. Second, Defendants redirect $1.1 billion of DoD funds that were intended to purchase land vehicles and aircraft parts manufactured in Wisconsin and Connecticut, directly injuring these States' economies and reducing their tax revenues. In addition to these new types of harm, Defendants are also causing environmental damage to California and New Mexico and sovereign harm to these States from undermining enforcement of laws designed to protect their environments and natural resources, as they did last year. The States, therefore, plainly have a cause of action to contest Defendants' illegal and unconstitutional action.

This action should be enjoined now. The States and the public will be irreparably harmed if the States are deprived of equipment vital to protecting their residents and natural resources, and

[1] Order re: Pls.' Mot for Prelim. Inj., *Sierra Club I* (May 24, 2019), ECF No. 144 (*Sierra Club* PI Order); Order re: Pls.' Mot. for Partial Summ. J., *California I* (June 28, 2019), ECF No. 185 (*California* FY 2019 284 MSJ Order); Order re: Pls.' Mot. for Partial Summ. J., *Sierra Club I* (June 28, 2019), ECF No. 185 (*Sierra Club* FY 2019 284 MSJ Order); Order re: Mots. for Partial Summ. J., *California* (Dec. 11, 2019), ECF No. 257 (FY 2019 2808 MSJ Order); *see also Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019).

an injunction would serve the public interest in enforcing statutory and constitutional restrictions on the Executive Branch. Defendants are currently obligating the diverted funds, increasing the possibility that there will soon be no funds left to remedy the States' injuries, and are immediately proceeding with construction.[2] The States thus respectfully urge this Court to enjoin the identified diversions and construction projects, and request that the Court order so by May 13, 2020.

BACKGROUND

I. DEFENDANTS' DIVERSIONS OF APPROPRIATED FUNDS TOWARD BORDER BARRIERS

As this Court has recounted, President Trump has repeatedly requested billions of dollars of funding for a border wall, and Congress has considered numerous bills that would have authorized or appropriated such funds—all of which failed. *Sierra Club* PI Order 3; Compl. ¶ 202 & n.54, ECF No. 1; Req. for Jud. Notice. in Supp. of Pls.' Mot. for Prelim. Inj., Exs. 3-20, *California I* (Apr. 8, 2019), ECF No. 59-4 (PI RJN). In FY 2019, President Trump and Congress engaged in a protracted and public dispute over border barrier funding, which resulted in a 35-day partial government shutdown. *Sierra Club* PI Order 3-5; PI RJN Exs. 21-26. In the end, instead of the $5.7 billion the President had requested, PI RJN Ex. 25, Congress appropriated only $1.375 billion subject to specific limitations. Pub. L. No. 116-6, 133 Stat. 13, §§ 230-32 (2019). Hours after signing that appropriation into law, President Trump declared that the situation at the border "constitutes a national emergency" and that it was "necessary for the Armed Forces to provide additional support to address the crisis." 84 Fed. Reg. 4949 (Feb. 15, 2019) (Emergency Declaration).[3] In connection with that declaration, the President announced the redirection of $6.7 billion of federal funds to construct a border wall, far more than the $1.375 billion that Congress had appropriated for limited border barrier fencing. *Sierra Club* PI Order 6-8; PI RJN Ex. 28.

These events were repeated this year. In his FY 2020 budget, the President requested an additional "$5 billion to construct approximately 200 miles of border wall along the U.S. Southwest border." Req. for Jud. Notice in Supp. of Mot. for Partial Summ. J. (FY 2020 MSJ

[2] Nina Lakhani, *Construction of US-Mexico border wall proceeds despite coronavirus pandemic*, The Guardian (Mar. 22, 2020), https://tinyurl.com/u9bquxk.

[3] A majority of both houses of Congress twice passed resolutions terminating the Emergency Declaration. S.J. Res. 54, 116th Cong. (2019); H.J. Res. 46, 116th Cong. (2019). The President vetoed both, and Congress could not reach the necessary two-thirds majority to override the veto.

RJN) Ex. 1. Congress rejected this request. Instead, on December 19, 2019, Congress passed the Consolidated Appropriations Act, 2020, which again made a limited $1.375 billion appropriation "for the construction of barrier system [sic] along the southwest border," and imposed specific limitations on the type of fencing. Pub. L. No. 116-93, 133 Stat. 2317, § 209 (2020) (CAA). President Trump signed the CAA into law the next day.

On February 13, 2020, the President announced the continuation of the national emergency, 85 Fed. Reg. 8715 (Feb. 13, 2020), and that same day, DoD announced the transfer of $3.831 billion appropriated by Congress for other purposes in the FY 2020 DoD Appropriations Act into DoD's drug-interdiction account for border barrier construction under 10 U.S.C. § 284(b)(7). Admin. Rec. (AR) 1-7, 17-21, ECF No. 32-1. Much as in FY 2019, DoD relied on its general transfer authority under § 8005 to transfer $2.2 billion, and its transfer authority for Overseas Contingency Operations under § 9002 to transfer the remaining $1.6 billion. *Id.* at 17; *compare* AR 1-7, 17-21 *with* Admin. Rec. Pt. 1 at 1-8, 34-37, *California I* (June 7, 2019), ECF No. 173-1 & Admin. Rec. Pt. 3 at 1-20, *California I* (June 7, 2019), ECF No. 173-3.

Like the analogous FY 2019 provisions, §§ 8005 and 9002 of the FY 2020 DoD Appropriations Act authorize the DoD Secretary to transfer funds from appropriations within the FY 2020 DoD Appropriations Act to "higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." 133 Stat. at 2335, § 8005; *id.* at 2377, § 9002 (authorizing transfers "subject to the same terms and conditions as the authority provided in section 8005 of this Act"). Under § 284(b)(7), the DoD Secretary is authorized to support to other federal agencies in the "[c]onstruction of roads fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States."

II. THE HARMS CAUSED BY THE FY 2020 REPROGRAMMING ACTION

A. The FY 2020 Reprogramming Action Deprives the National Guard of $890 Million in Vital Equipment Needed for Domestic Operations

The diverted funds were appropriated by Congress to procure equipment for the Army, Navy, Air Force, National Guard, and Reserves. AR 17-21. Relevant here, the FY 2020

Reprogramming Action diverts the entire $1.3 billion that Congress appropriated for the National Guard and Reserve Equipment Account (NGREA) in the FY 2020 DoD Appropriations Act, 133 Stat. at 2375-76, including $790 million allocated for the fifty states' Army and Air National Guard units, AR 21. Congress specifically intended that these funds be set aside for the National Guard. H.R. Rep. No. 116-84, at 368 (2019) (also attached as FY 2020 MSJ RJN Ex. 2).[4]

Defendants' diversion from NGREA diminishes the equipment available for the States' National Guard units and undercuts their ability to meet the States' critical domestic needs. As set out in the U.S. Constitution, art. I, § 8, cl. 16, the States' National Guards fulfill dual purposes: they are a federal reserve military force when called upon by the President, and—as demonstrated by current circumstances—provide vital support to state authorities during domestic emergencies. *See* App'x of Decls. re Nat'l Guard Harms (NG App'x) Exs. 1 (Spano Decl. ¶¶ 5-10), 2 (Mercer Decl. ¶¶ 7-10), 3 (Piterski Decl. ¶¶ 5, 7-8), 4 (Hinman Decl. ¶¶ 4, 8-10), 5 (Cognitore Decl. ¶¶ 6-7), 6 (Ross Decl. ¶¶ 6-7), 7 (Magurn Decl. ¶¶ 12-13). Right now, the States' National Guards are undertaking critical missions to help protect their residents—and all Americans—from the spread of COVID-19. To name just a few examples, the States' National Guard units are constructing temporary hospitals and testing centers; transporting and delivering ventilators, test kits, personal protective equipment, and other medical supplies; and providing logistical and medical assistance and coordination. *Id.* Exs. 1 (Spano Decl. ¶ 9), 2 (Mercer Decl. ¶ 10), 3 (Piterski Decl. ¶¶ 9, 16), 4 (Hinman Decl. ¶¶ 9-10, 25), 5 (Cognitore Decl. ¶ 6), 6 (Ross Decl. ¶¶ 6-7).

In FY 2019 alone, National Guard forces were called up by their states 235 times, responding to 63 natural disasters, including hurricanes or tropical storms, floods, winter storms, and fires. FY 2020 MSJ RJN Ex. 3 at 21; *see also* FY 2020 MSJ RJN Ex. 4 at 2 (DoD general describing National Guard's provision of "recovery and support to all those affected by Hurricane Dorian"). These support and protection missions are not possible without proper equipment, as DoD acknowledges: "In order to be ready and available to respond to domestic emergencies, it is

[4] While the FY 2020 Reprogramming Action identifies $790 million for this purpose, AR 21, the relevant House report discusses slightly less—$750 million total, with $375 million each for the Army and Air National Guard, H.R. Rep. No. 116-84, at 368—comprising 95 percent of this amount. For simplicity's sake, this brief refers to the $790 million figure.

key the [Army National Guard units] receive the most modern and available equipment." FY 2020 MSJ RJN Exs. 5 at 2-9, 6 ("The [Army National Guard] is seeking to acquire dual-use equipment that enables both our federal combat mission and state domestic operations mission.").

Since 1981, NGREA has been a vital source of funding to provide equipment to the States' National Guard units to fulfill their domestic missions. Congress created NGREA in response to the "tremendous shortage of equipment available to the Army Guard and Reserve." H.R. Rep. No. 97-333, at 38 (1981) (also attached as FY 2020 MSJ RJN Ex. 7). The States' National Guards annually request and receive dual-use equipment funded by NGREA from DoD, enabling them to provide public safety support to civil authorities in times of emergency and mission-ready forces to the federal government in times of conflict. *See* NG App'x Exs. 1 (Spano Decl. ¶¶ 11-12), 2 (Mercer Decl. ¶¶ 11-12), 3 (Piterski Decl. ¶ 9), 4 (Hinman Decl. ¶¶ 11-12), 5 (Cognitore Decl. ¶¶ 9, 12), 6 (Ross Decl. ¶ 8), 7 (Magurn Decl. ¶¶ 15-17); *see also* H.R. Rep. No. 116-84, at 368 (NGREA "funding will allow the National Guard . . . to procure high priority equipment used by these components for both their military missions and missions in support of State governors."); FY 2020 MSJ RJN Ex. 5 at B-3 ("The vast majority of [National Guard] equipment is available for state governors to use to save lives and property when not supporting federal missions.").

The States' National Guards have historically received millions of dollars' worth of such essential dual-use equipment from NGREA. *See, e.g.*, NG App'x Exs. 1 (Spano Decl. ¶¶ 15-16), 2 (Mercer Decl. ¶ 13), 4 (Hinman Decl. ¶ 14), 5 (Cognitore Decl. ¶ 14). For example, NGREA has funded equipment for critical domestic uses in California, including supplying and equipping airplanes, helicopters, and drones to fight wildfires; adding sensors on helicopters to locate people lost in the wilderness; and establishing operations centers, which were deployed to address the devastating Camp Fire in 2018. *Id.* Ex. 1 (Spano Decl. ¶¶ 14-18). The Virginia National Guard has received through NGREA hardware and software to protect the State's infrastructure from cyber-attacks, as well as fire-fighting trucks and other emergency equipment. *Id.* Ex. 2 (Mercer Decl. ¶ 13). The Wisconsin National Guard has likewise received vital dual-use equipment through NGREA, including equipment that has been utilized to respond to the current COVID-19 outbreak. *Id.* Ex. 4 (Hinman Decl., ¶¶ 14, 26); *see also id.* Ex. 3 (Piterski Decl. ¶ 9 (the New

Jersey National Guard has used equipment in response to disaster and public health responses)).

For FY 2020, the individual States submitted requests for tens of millions of dollars' worth of critical dual-use equipment that would ordinarily be funded through NGREA. For instance, the California National Guard's $35 million request sought equipment to enhance airborne firefighting capabilities to better respond to and contain destructive wildfires in the State, and lifesaving Aeromedical Evacuation In-Flight Equipment Kits that are needed to transport critically ill patients in widespread medical emergencies. *Id.* Ex. 1 (Spano Decl. ¶¶ 19-27). The Virginia National Guard requested communications systems and helicopter upgrades totaling millions of dollars. *Id.* Ex. 2 (Mercer Decl. ¶ 14); *see also id.* Exs. 3 (Piterski Decl. ¶ 14 (New Jersey: $13 million)), 4 (Hinman Decl. ¶ 21 (Wisconsin: $7.2 million)), 5 (Cognitore Decl. ¶ 15 (Michigan: $31.2 million)), 6 (Ross Decl. ¶ 12 (Connecticut: $8.79 million)), 7 (Magurn Decl. ¶ 18 (Massachusetts: $2.9 million)). The States' National Guards report not receiving any of the requested equipment for FY 2020. *Id.* Exs. 1 (Spano Decl. ¶ 21), 2 (Mercer Decl. ¶ 14), 3 (Piterski Decl. ¶ 14), 4 (Hinman Decl. ¶ 21)).

The diversion from NGREA in the FY 2020 Reprogramming Action makes it less likely that the States will receive the requested equipment to meet their needs, particularly considering the equipment shortages that predated the diversion. While the FY 2020 Reprogramming Action points to a $1.6 billion unobligated balance in NGREA, AR 21, DoD documents show that the states' National Guards have a $19.5 billion equipment shortage. FY 2020 MSJ RJN Ex. 5 at 1-18 to -19. In fact, Congress intended its FY 2020 funding for NGREA to "meet urgent equipment needs in the coming fiscal year." H.R. Rep. No. 116-84, at 368.

Apart from the diversion from NGREA, the FY 2020 Reprogramming Action also redirects $100 million that Congress appropriated for modernization of National Guard HMMWV (Humvee) vehicles (Humvee Modernization Program). AR 18; *see also* 133 Stat. at 2327 (appropriating funds for "modification of vehicles, including tactical . . . vehicles"); H.R. Rep. No. 116-84, at 145 (including $100 million for "ARNG HMMWV Modernization Program"). According to DoD, the modernization is necessary to "enable the [Army National Guard] to sustain the [Humvee] fleet in the interim as a critical . . . transportation asset during domestic

operations." FY 2020 MSJ RJN Ex. 5 at 2-14; *see also* H.R. Rep. No. 116-84, at 154 (describing the program as "a low-risk, highly effective, and cost efficient model"). This defunding will harm the Virginia National Guard, NG App'x Ex. 2 (Mercer Decl. ¶ 16), and the Wisconsin National Guard's Humvee fleet that "includes 314 vehicles that are the oldest type of Humvees with the greatest urgency for replacement," *id.* Ex 4 (Hinman Decl. ¶ 23).

B. The Diversion of $1.1 billion from Equipment Manufactured in Two Plaintiff States Damages Their Economies and Reduces Tax Revenues

Separately, the diversion of $1.1 billion in other funds for military procurement projects will reduce taxable economic activity within Wisconsin and Connecticut, causing quantifiable harms to those states' fiscs. First, the diversion of $101 million intended for Heavy Expanded Mobility Tactical Truck (HEMTT) procurement and $650 million intended for Landing Helicopter Assault (LHA) Replacement Ship procurement, AR 18-19, will reduce economic activity in Wisconsin, where the Oshkosh Corporation would have constructed the HEMTT vehicles and the Fairbanks Morse Corporation would have constructed the engines for the LHA Replacement Ships, Decl. of Alison Lynn Reaser (Reaser Decl.) ¶ 27. Second, the diversion of $379 million from the Joint Strike Fighter Standard Take-off and Vertical Landing (JSF STOVL) and the F-35 Advance Procurement projects for the Navy and Air Force, AR 18-19, will reduce economic activity in Connecticut, where Pratt & Whitney would have produced the engines for four of these planes totaling $80 million, Reaser Decl. ¶ 26. The net loss of specific state and local tax revenue for those States from the lost economic activity totals $8 million. *Id.* ¶¶ 26-27.

To summarize, the following appropriations diverted by the FY 2020 Reprogramming Action harm the States' National Guard units and financial interests:

Diverted Appropriation	States Affected	Type of Injury Asserted	Amount Diverted
Miscellaneous Equipment, Army National Guard	California, Connecticut, Massachusetts, Michigan, New Jersey, Virginia, Wisconsin	National Guard Injury	$395,000,000
Miscellaneous Equipment, Air National Guard	California, Connecticut, Massachusetts, Michigan, New Jersey, Virginia, Wisconsin	National Guard Injury	$395,000,000

Diverted Appropriation	States Affected	Type of Injury Asserted	Amount Diverted
Army National Guard HMMWV (Humvee) Modernization	Wisconsin, Virginia	National Guard Injury	$100,000,000
F-35 Advance Procurement	Connecticut	Financial Injury	$156,000,000
JSF STOVL	Connecticut	Financial Injury	$223,000,000
Hvy Expanded Mobile Tactical Truck Ext Serv.	Wisconsin	Financial Injury	$101,000,000
LHA Replacement	Wisconsin	Financial Injury	$650,000,000
Total			**$2.02 billion**

C. Defendants' Proposed Construction of Border Barrier Projects in California and New Mexico and Waiver of Those States' Laws

The second part of Defendants' "funnel-and-spend project," *Sierra Club* PI Order 39, is the proposed construction of border barrier projects. On January 14, 2020, the Department of Homeland Security (DHS) requested that DoD construct 38 segments of border barriers covering 270.6 miles. AR 1. DoD approved the construction of 31 of the 38 segments covering 177 miles. *Id.* at 6. Ten segments are located in California and New Mexico. AR 11; Notice Regarding Authorization of Additional Border Barrier Projects Pursuant to 10 U.S.C. § 284, *California* (N.D. Cal. Feb. 13, 2020), ECF 165. As described in the table below, those 10 projects (FY 2020 Projects) cover 41.5 total miles. *Id.*

Project Name	Location	Segment
El Centro A (seg. 1)	Imperial Co., CA	10.2 miles
El Paso B (seg. 6)	Luna Co., NM	2.4 miles
El Paso C (seg. 1)	Luna Co., NM	3 miles
El Paso C (seg. 2)	Doña Ana Co., NM	7 miles
Yuma B (seg. 1)	Imperial Co., CA (Quechan Res.)	0.3 miles
Yuma B (seg. 2)	Imperial Co., CA (Quechan Res.)	0.3 miles
San Diego A (seg. 1)	San Diego Co., CA	13.7 miles
San Diego A (seg. 2)	San Diego Co., CA	2 miles
San Diego A (seg. 3)	San Diego Co., CA	2 miles
El Paso D (seg. 4)	Doña Ana Co., NM	0.6 miles
Totals		**41.5 miles**

Construction of at least some of these projects may already be occurring. DoD anticipated that it would fully obligate funds and proceed with construction for some projects—specifically,

those where only a modification to an existing contract (as opposed to a new contract) was needed—as early as March 15, 2020. Notice Re: Authorization of Additional Border Barrier Projects Pursuant to 10 U.S.C. § 284 at 1-2, *California I* (Feb. 13, 2020), ECF No. 271 (2020 Notice). Defendants have already modified two construction contracts, obligating a total of $536.6 million. FY 2020 MSJ RJN Exs. 8-9. For projects requiring new contracts, DoD anticipated that it would fully obligate funds as early as April 7, and could "begin ground-disturbing activities as early as five days after task order award and substantial construction as early as ten days after task order award." 2020 Notice at 3. Defendants intend to fully obligate funds for all FY 2020 Projects by no later than September 30, 2020. Decl. of Jill E. Stiglich (Stiglich Decl.) ¶ 4, *California I* (Feb. 13, 2020), ECF No. 271-2.

The Army identified DHS as responsible for providing environmental waivers for each project under Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. AR 56. On March 16, 2020, DHS did so, waiving the application of various environmental laws—including all state "laws, regulations, and legal requirements of, deriving from, or related to the subject of" federal environmental statutes—to the FY 2020 Projects. 85 Fed. Reg. 14965 (Mar. 16, 2020); 85 Fed. Reg. 14963 (Mar. 16, 2020); 85 Fed. Reg. 14958 (Mar. 16, 2020).

III. RELEVANT PROCEDURAL HISTORY

In February 2019, the States and the Sierra Club plaintiffs filed lawsuits challenging Defendants' original $6.7 billion diversion toward border barrier construction. Compl., *California I* (Feb. 18, 2019), ECF No. 1; Compl., *Sierra Club I* (Feb. 19, 2019), ECF No. 1. This Court first preliminarily enjoined Defendants' use of funds transferred via § 8005 of the FY 2019 DoD Appropriations Act towards construction of border barriers, finding the State and Sierra Club plaintiffs demonstrated a likelihood of success that Defendants acted *ultra vires*. *Sierra Club* PI Order 32-36, 55; *California* PI Order 14-18. This Court reached the same conclusion in granting California's and New Mexico's and the Sierra Club plaintiffs' motions for partial summary judgment declaring Defendants' use of transferred funds under §§ 8005 and 9002 to be unlawful, and granting the Sierra Club plaintiffs' request for a permanent injunction. *Sierra Club* FY 2019 284 MSJ Order; *California* FY 2019 284 MSJ Order.

Defendants' merits appeal from this Court's grant of partial summary judgment to the State and Sierra Club plaintiffs is now under submission with the Ninth Circuit. Before merits briefing, Defendants had sought a stay from the Ninth Circuit. The Ninth Circuit motions panel denied the stay application, addressing the merits at length and agreeing with this Court's conclusion that Defendants' transfers were unlawful. *Sierra Club*, 929 F.3d at 689-92, 707. The Supreme Court stayed the injunction in a one-paragraph order stating only that "the Government has made a sufficient showing at this stage that the [Sierra Club] plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (Mem.) (Stay Order). The order did not address the lawfulness of Defendants' actions. Since the States were not parties to that case, the Court also did not address the States' injuries or whether they had a cause of action.

This Court also granted nine States' and the Sierra Club plaintiffs' motions for partial summary judgment declaring Defendants' use of a different statutory provision, 10 U.S.C. § 2808, to divert DoD funds toward border barrier construction unlawful, and issued a permanent injunction to the Sierra Club plaintiffs. FY 2019 2808 MSJ Order 46-47. This Court stayed the injunction pending appeal. *Id.* at 45. The Ninth Circuit is currently considering Defendants' appeal of that order and the Sierra Club plaintiffs' request to lift the stay.

Also before the Ninth Circuit is the States' cross-appeal of this Court's denial of the States' requests for injunctive relief as "duplicative" of the injunctive relief granted to the Sierra Club plaintiffs. FY 2019 2808 Order 37; *California I* FY 2019 284 MSJ Order 8; Notice of Cross-Appeal, *California I* (Jan. 7, 2020), ECF No. 262; Notice of Cross-Appeal, *California I* (July 8, 2019), ECF No. 191.

ARGUMENT

I. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Declaratory relief is appropriate to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28

U.S.C. § 2201(a). A plaintiff is entitled to a permanent injunction if it has "suffered an irreparable injury," "remedies available at law are inadequate," "the balance of hardships between the plaintiff and defendant" supports an injunction, and "the public interest would not be disserved." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). The last two factors merge when the federal government is the opposing party. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

II. THE STATES HAVE A CAUSE OF ACTION

The States' direct interest in the $890 million diverted from equipment for their National Guards—a type of interest not addressed in the FY 2019 litigation—satisfies any conceivable zone of interests test, even assuming it applies.[5] While "there need be no indication of congressional purpose to benefit the would-be-plaintiff" to satisfy the zone of interests test, *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1200 (9th Cir. 2004) (citation omitted), such a congressional purpose is plainly present here. As discussed above, the States' National Guards fulfill vital, life-saving state functions when they are not federalized by the President. *See supra* pp. 4-8. Congress specifically intended its NGREA appropriation to benefit the States for this purpose by "allow[ing] the National Guard . . . to procure high priority equipment used by these components for both their military missions *and missions in support of state governors*." H.R. Rep. No. 116-84 at 368 (2019) (emphasis added). Congress also intended to specifically benefit the States' National Guards in its $100 million appropriation for the Humvee Modernization Program that Defendants also de-funded. *Id.* at 145. By authorizing transfers "between . . . appropriations" within the FY 2020 DoD Appropriations Act, the zone of interests around §§ 8005 and 9002 encompasses, at a minimum, the interests of parties like the States that are directly harmed by the loss of diverted appropriations that Congress intended for their benefit.

[5] As discussed in prior briefing, California and New Mexico have a cause of action to challenge Defendants' diversion under §§ 8005, 9002, and 284 based on the injury caused to those States' sovereign interests in their environment, natural resources, and enforcement of state laws. *E.g.*, Reply in Supp. of Mot. for Summ. J. 12-13, *California I* (June 24, 2019), ECF No. 183 (FY 2019 284 MSJ Reply). As this Court and the Ninth Circuit have concluded, the zone of interests test does not apply to the States' *ultra vires* and constitutional claims. *Sierra Club*, 929 F.3d at 700-703; *California* PI Order 10-12. Even if the zone of interests test did apply, California and New Mexico satisfy it with respect to these injuries. *E.g.*, FY 2019 284 MSJ Reply 1-4.

Indeed, this point should not be disputed. As Defendants acknowledged in a related case, a party can sue under § 8005 if that party would have benefitted from "projects that had been set out that were being taken away." Oral Arg. at 39:30, *House of Reps. v. Mnuchin*, No. 19-5176 (D.C. Cir. Feb. 18, 2020).[6] That is the kind of injury the States face here. Thus, the States' challenge to the diversion of $790 million for NGREA and $100 million for the Humvee Modernization Program that Congress explicitly intended for their benefit in the FY 2020 DoD Appropriations Act satisfies even the most restrictive view of the zone of interests inquiry. *Cf. Sierra Club*, 929 F.3d at 715 (Smith, J., dissenting) (stating that § 8005 "protects . . . *those who would have been entitled to the funds as originally appropriated*") (emphasis added).

Connecticut and Wisconsin also fall within § 8005's zone of interest for another reason: they are separately harmed by the loss of specific tax revenue from the diversion of $1.1 billion appropriated for the purchase of land vehicles and helicopters and airplane components from manufacturers in those States. Reaser Decl. ¶¶ 17, 26-27. For this reason as well, both Connecticut and Wisconsin are within the zone of interests of the original appropriation and § 8005 to enforce Appropriations Clause principles and separation-of-powers constraints in order to prevent these harms. *See United States v. McIntosh*, 833 F.3d 1163, 1174 (9th Cir. 2016); *see also Scheduled Airlines Traffic Offices, Inc. v. Dep't of Def.*, 87 F.3d 1356, 1359-60 (D.C. Cir. 1996). There is no "fairly discernible" congressional intent within the text or legislative history of the appropriations acts or the transfer statutes to support precluding plaintiffs from asserting such economic injuries caused by an unlawful diversion. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987) (citation omitted). To the contrary, the States' interest in preserving Congress's original appropriation is closely aligned with Congress's express intent in § 8005 to "tighten congressional control of the reprogramming process," H.R. Rep. No. 93-662, at 16-17 (1973).

In sum, all of the States' interests are highly "congruent" with Congress's intent. *Scheduled Airlines*, 87 F.3d at 1360 (citation omitted). The States' new injuries make clear that they are "suitable challenger[s] to [enforce] the statute[s]," *First Nat'l Bank & Tr. Co. v. Nat'l Credit Union Admin.*, 988 F.2d 1272, 1275 (D.C. Cir. 1993) (citation omitted), under any standard, and

[6] A recording of the proceedings is available at https://tinyurl.com/t5ftt3g.

easily satisfy the "generous" zone of interests test, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (citation omitted).

III. THE FY 2020 REPROGRAMMING ACTION IS UNLAWFUL AND UNCONSTITUTIONAL

A. The FY 2020 Reprogramming Action Is *Ultra Vires* and Exceeds Defendants' Authority under §§ 8005, 9002, and 284 (Counts 3 and 4)

Last year, this Court held that Defendants failed to satisfy the requirements for transferring DoD funds under §§ 8005 and 9002 because the border barriers for which those funds were transferred were not an "unforeseeable" military requirement and were items for which Congress had denied funding. *California* FY 2019 284 MSJ Order 3-5. The Ninth Circuit motions panel reached the same conclusion. *Sierra Club*, 929 F.3d at 690-92.

This Court should rule the FY 2020 Reprogramming Action unlawful for similar reasons. The border barriers are clearly items that were denied by Congress, as Congress has continued to deny the Trump Administration's requests to appropriate billions of dollars toward border barriers. *See* PI RJN Exs. 14-26; FY 2020 MSJ RJN Ex. 1; CAA, § 209. And Defendants' claim that the need for DoD support for border barriers was "unforeseeable" is even weaker now under the FY 2020 Reprogramming Action than it was under the FY 2019 transfers. Although DoD asserts that the need for its support on border barrier construction was unforeseeable on March 11, 2019 when it made its FY 2020 budget request, AR 14, that contention cannot be credibly squared with the facts. By that time, the President had already issued an Emergency Declaration expressing the purported need "for the Armed Forces to provide additional support to address the crisis" at the border, 84 Fed. Reg. 4949 (Feb. 15, 2019), after Congress had refused to appropriate $5.7 billion requested by the President for border barrier construction, *see supra* pp. 3-4. Thus, when the President's FY 2020 proposed budget a month later, *dated the same day as the DoD budget request*, asked for "$5 billion to construct approximately 200 miles of border wall along the U.S. Southwest border," FY 2020 MSJ RJN Ex 1, it was plainly foreseeable that Congress would deny that request, and Defendants would again need to rely on DoD funds and resources to

satisfy the Trump Administration's request for border barriers. Consequently, it is now even more clear that DoD exceeded its statutory authority under §§ 8005 and 9002.[7]

DoD also lacks authorization under § 284(b)(7). *See California* FY 2019 284 MSJ at 13; *see also* 10 U.S.C. § 284(h), (i)(3) (requiring notice to Congress for "small scale construction" projects "not to exceed $750,000"). As this Court observed in the FY 2019 litigation when considering the use of $1 billion to fund border barriers to ostensibly block just three "drug smuggling corridors," "reading [§ 284] to suggest that Congress requires reporting of tiny projects but nonetheless has delegated authority to DoD to conduct that massive funnel-and-spend project proposed here is implausible, and likely would raise serious questions as to the constitutionality of such an interpretation." *Sierra Club* PI Order 39. This is especially true for the FY 2020 Reprogramming Action, where Defendants plan to use even more DoD funds, *$3.8 billion,* to construct even more barriers, *31 projects covering 177 miles,* than it did last year without DHS contributing any funding at all for these FY 2020 Projects. AR 6.

B. The FY 2020 Reprogramming Action Violates the Separation of Powers and the Appropriations and Presentment Clauses (Counts 1, 2, and 3)

This Court should further declare Defendants' FY 2020 Reprogramming Action unconstitutional because it violates fundamental separation of powers principles and the Appropriations and Presentment Clauses for the same reasons as the FY 2019 transfers. *See California* FY 2019 284 MSJ 13-17. By diverting billions of dollars toward border barriers in the face of repeated congressional refusal, Defendants "reject[ed] the policy judgment made by Congress," *Clinton v. City of New York*, 524 U.S. 417, 444 (1998), and acted contrary to the "expressed or implied will of Congress," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), in violation of separation of powers principles and the Presentment Clause. Defendants have also violated the Appropriations Clause by "evad[ing]" the spending limitations set by Congress, *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428

[7] As the States previously argued, Defendants also fail to satisfy the criteria of §§ 8005 and 9002 because border barrier construction is not a "military requirement." *See, e.g.*, Pls.' Mot. for Partial Summ. J. 11-12, *California* (June 12, 2019), ECF No. 176 (*California* FY 2019 284 MSJ).

(1990), by using a general appropriation to fund border barriers where Congress enacted a more limited $1.375 billion specific appropriation, *Nevada v. DOE*, 400 F.3d 9, 16 (D.C. Cir. 2005).

C. The FY 2020 Reprogramming Action Is Arbitrary and Capricious in Violation of the APA (Count 5)

DoD has also violated the APA's prohibition on arbitrary and capricious agency action. 5 U.S.C. § 706(2)(A).[8] For an agency's action to pass muster, it "must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). An agency acts in an arbitrary and capricious manner if it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Id.* at 43. Here, Defendants have violated all three principles.

First, they have given no meaningful consideration to the harm that the diversions will cause to the National Guard. The record shows that DoD officials were aware of potential impacts of the diversions to the National Guard, but did not consider those impacts when making their decision. In a memorandum directed to Defendant Esper, Chair of the Joint Chiefs of Staff General Mark A. Milley states that the diverted funds "likely would be used to address other unfunded DoD *requirements* . . . including unfunded National Guard *requirements*" if they were not diverted for border barrier construction; the "Action Memo" that Defendant Esper signed cites this statement. AR 4, 65 (emphasis added). Despite this, nothing in the record indicates that Defendants considered the impacts of failing to meet these requirements.[9] This deficiency is particularly stark now when the National Guard needs resources to respond to domestic emergencies such as the COVID-19 pandemic. *See* FY 2020 MSJ RJN Ex. 10 at 13 (DoD official testifying that due to diversions "over the next three years [the National Guard] will be less

[8] For the reasons just explained, *supra* pp. 14-15, Defendants' actions also violate the APA because they are "contrary to constitutional right, power, privilege, or immunity" and in excess of statutory authority. 5 U.S.C. §§ 706(2)(B)-(C); Compl. ¶¶ 315-19 (Count 4).

[9] DoD's assessment regarding Humvees in particular—dismissing it as an unneeded "old platform not needed for the army"—appears to focus only on the active-duty military. AR 63. But the FY 2020 Reprogramming Action refers to a congressional appropriation for Humvee modernization funds intended to meet the National Guard's equipment needs, not the active-duty Army's. *Id.* at 18; *see also* H.R. Rep. No. 116-84, at 145. The record does not show that Defendants analyzed the former at all.

equipped to do our domestic operations missions than we otherwise would have been," including purchasing "personal protective equipment that . . . might [be] used for a COVID-19 response").

Second, Defendants acted contrary to the evidence before them by claiming in the Action Memo that the NGREA funds being diverted "are early to current programmatic need" (in other words, that DoD did not yet need the funds for their intended purpose), AR 21, when the record indicates the opposite is true. *See State Farm*, 463 U.S. at 43. As discussed above, in the same Action Memo, DoD acknowledged that other unfunded military (including National Guard) requirements would go unaddressed due to the diversions. *Id.* at 4. DoD's other documents corroborate that the Army National Guard faces a $14 billion equipment shortage and the Air National Guard has a shortage of over $5.5 billion. FY 2020 MSJ RJN Ex. 5 at 1-18 to -19. By failing to "articulate a rational connection between the data before it and its conclusion" when the data "point[s] in the opposite direction," DoD acted arbitrarily and capriciously. *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1030 (9th Cir. 2011).

Third, DoD "relied on factors which Congress has not intended it to consider," *State Farm*, 463 U.S. at 43, by diverting an additional $3.8 billion in federal funds toward a border barrier when Congress rejected any such appropriation beyond $1.375 billion. *Supra* pp. 3-4. What is more, the FY 2020 Reprogramming Action diverts funds that Congress specifically intended for equipment for the states' National Guard units, H.R. Rep. No. 116-84, at 145, 368, toward a border wall project that Congress rejected.[10] Such agency actions taken "contrary to plain congressional intent" are arbitrary and capricious. *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1277 (9th Cir. 2020).

IV. THE STATES ARE ENTITLED TO INJUNCTIVE RELIEF

A. The States Suffer Irreparable Injury

Each of the States suffers from at least one of four distinct forms of irreparable injury: (1) injury to the domestic functions of their National Guard units; (2) economic injury through the loss of tax revenue; (3) injury to their ability to enforce state environmental laws; and (4)

[10] DoD's failure to take Congress's will into account when diverting the funds is also evident from its dismissive statements that NGREA funding is an "Unrequested Annual Add," implying that DoD only regards items that it requests as important, not those added by Congress. AR 63.

environmental injury from proposed construction.

1. The Diversions from NGREA and the Humvee Modernization Program Injure the States' National Guard Units

Defendants' FY 2020 Reprogramming Action causes new irreparable injuries to the States that did not exist for the FY 2019 transfers. As discussed *supra* pp. 4-8, the States' National Guards have a direct interest in the appropriations for NGREA ($790 million) and the Humvee Modernization Program ($100 million)—$890 million total—that Defendants have diverted. Defendants have hollowed out these FY 2020 appropriations, diminishing the funds available for the States to obtain the dual-use equipment needed for their National Guard units. Reducing the States' ability to obtain this dual-purpose equipment irreparably harms critical state interests, including their ability to protect their natural resources, *see Massachusetts v. EPA,* 549 U.S. 497, 518-20 (2007), and their residents' "health and well-being—both physical and economic," *California v. HHS*, 281 F. Supp. 3d 806, 821 (N.D. Cal. 2017) (internal quotations omitted); *see also Washington v. Trump*, No. 19-cv-1502, 2020 WL 949934, at *8, 17 (W.D. Wash. Feb. 27, 2020) (in context of FY 2019 border wall funding diversion, state suffered irreparable harm from loss of federal project to ensure nuclear weapons' security); *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 582 (E.D. Pa. 2017) (finding irreparable harm from federal policy inflicting "significant harm to the [state]'s interest in protecting the health, safety, and well-being of its citizens").

For example, the C130J-related equipment sought by California in FY 2020 "would have greatly enhanced the California Air National Guard's airborne firefighting capabilities within California." NG App'x Ex. 1 (Spano Decl. ¶¶ 22-23). Medical equipment sought by the California National Guard would have allowed "quick and efficient emergency care to mitigate human suffering," and "significantly improve patients' chances of survival" during disaster relief operations. *Id.* Ex. 1 (Spano Decl. ¶¶ 24, 26). In Virginia, failure to receive requested emergency communications equipment and helicopter upgrades would "diminish the [Virginia National Guard]'s ability to provide public safety support effectively and efficiently to civil authorities in times of emergencies." *Id.* Ex. 2 (Mercer Decl. ¶¶ 14-15). The Wisconsin National Guard would lose equipment to construct bridges, detect weapons of mass destruction, conduct rescue

operations, and suppress fires. *See id.* Ex. 4 (Hinman Decl. ¶ 27). This impairment of the States' ability to maintain properly equipped National Guards to prevent environmental damage and loss of life unquestionably irreparably harms them. *See, e.g.*, *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) (federal injury to a state's "sovereign interests" is irreparable).

Defendants' denial of equipment also strains the States' National Guard units' resources, irreparably harming the States' proprietary interests. *Alfred L. Snapp & Son, Inc. v. Puerto Rico* ex rel. *Barez,* 458 U.S. 592, 601 (1982); *see Texas v. United States*, 809 F.3d 134, 186 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (drain on state's resources caused by federal program enabling certain immigrants to obtain drivers' licenses constituted irreparable harm). The loss of equipment through NGREA and the Humvee Modernization Program means that the States would have to use their own funds and National Guard resources to fill the needed gaps in equipment to effectively provide support for civil authorities. *See* NG App'x Exs. 3 (Piterski Decl. ¶ 17), 4 (Hinman Decl. ¶¶ 27, 29), 6 (Ross Decl. ¶ 13); *see also* Cal. Mil. & Vet. Code, § 410 (requiring California to provide National Guard "the supplies and equipment, not supplied by the United States, necessary for the proper performance of functions authorized or prescribed by the laws and regulations of the State and the United States"). As a result, the States' National Guards face a Hobson's choice: not procure the equipment needed to adequately perform their domestic missions, or procure the equipment using state funds, further straining National Guard resources that are already stretched thin in response to the current COVID-19 pandemic. *See Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1057-58 (9th Cir. 2009) (subjecting a party to a Hobson's choice—when it is harmed no matter what choice it makes—qualifies as an irreparable injury).

These injuries are not theoretical. The alleged $1.6 billion unobligated balance in NGREA, AR 21, is far from sufficient to meet the over $19 billion in unmet equipment needs of the states' National Guards that DoD itself has documented. FY 2020 MSJ RJN Ex. 5 at 1-18 to -19. This reality is manifested by the States' National Guards not receiving the equipment that they requested through NGREA for FY 2020. *See* NG App'x Exs. 1 (Spano Decl. ¶ 21), 2 (Mercer Decl. ¶ 14), 3 (Piterski Decl. ¶ 14), 4 (Hinman Decl. ¶ 21). The reduced availability of funds for

equipment to the States, along with the increased competition for equipment among the states that is generated by the diminished pool of available funds, is irreparable harm on its own. *See, e.g., Apple Computer, Inc. v. Formula Int'l, Inc.*, 725 F.2d 521, 526 (9th Cir. 1984) (an injury to a party's "competitive position" is an irreparable injury); *see also Nat'l Ass'n of Neighborhood Health Centers, Inc. v. Mathews*, 551 F.2d 321, 329 (D.C. Cir. 1976) (a plaintiff is "directly" injured by "the sharp curtailment of their opportunities for funding").

2. Connecticut and Wisconsin Suffer Economic Injuries Due to the Loss of Tax Revenue from Land Vehicles and Aircraft Components Manufactured in Those States

The FY 2020 Reprogramming Action also inflicts cognizable irreparable economic harms on Connecticut and Wisconsin for the same reasons as the FY 2019 2808 transfers. Mot. for Summ. J. 30-32, *California I* (Oct. 11, 2019), ECF No. 220 (*California* FY 2019 2808 MSJ). Defendants intend to divert all funding approved and allocated by Congress to manufacture four types of military aircraft and land vehicles totaling $1.1 billion within the borders of those two States. AR 17-20; Reaser Decl. ¶ 17. Those projects would have brought $445 million in business sales to the economies of Connecticut and Wisconsin. Reaser Decl. ¶¶ 26-27. This loss of economic activity—including lost sales for contractors and subcontractors for the projects, various firms in the supply chains, and companies selling goods and services to individuals hired to work directly on the projects or at some point in the supply chain—will substantially, directly, and irreparably harm those two States by reducing their state and local tax revenues (including taxes on personal income, retail sales, corporate profits, and other sources) by $8 million. *Id.*

The unrecoverable loss of those specific tax revenues is a substantial harm that merits injunctive relief. *See California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (economic harm is "irreparable [where] the states will not be able to recover monetary damages" as compensation). Recently, a federal district court found that the State of Washington suffered irreparable harm to justify an injunction due to the loss of tax revenue resulting from the diversion of funds from a military construction project in the state toward border barriers. *Washington*, 2020 WL 949934, at *17. For the same reasons, this Court should remedy the irreparable injury to Connecticut and Wisconsin by enjoining the diversion of funds for these projects.

3. Defendants' Diversion and Resulting Construction Impair California's and New Mexico's Ability to Enforce Their Legal Codes

Defendants' diversion of funds toward border barrier construction, and their accompanying use of waivers to disregard California and New Mexico's environmental laws—laws that Congress specifically decreed would otherwise apply to federal construction projects like the border barriers—undermine those States' sovereign interests in enforcing their state laws, causing irreparable injury. *See Kansas*, 249 F.3d at 1227-28; *see also California* FY 2019 284 MSJ 19-21. Many of the laws and regulations aimed at minimizing public health risks and environmental damage that would normally have applied to the FY 2019 border barrier projects also would apply to the FY 2020 Projects. *See, e.g., California* FY 2019 284 MSJ 5-9; FY 2019 284 MSJ RJN Exs. 4, 5, 7; MSJ Env. App'x Exs. 2 (Dunn Decl. ¶ 17), 3 (Gibson Decl. ¶ 20). An injunction against construction is necessary to prevent Defendants from hindering California and New Mexico's enforcement of those laws.

4. California and New Mexico Will Suffer Environmental Injuries Due to the FY 2020 Reprogramming Action and Resulting Construction

The FY 2020 Projects will also irreparably harm protected wildlife and other natural resources within California and New Mexico. The FY 2020 Projects pose a threat of demonstrable harm to numerous rare and special-status species that warrants issuance of injunctive relief. *See California* PI Order at 31; *Nat'l Wildlife Fed'n v. Burlington N. R.R.*, 23 F.3d 1508,1512 n. 8 (9th Cir. 1994) ("[w]e are not saying that a threat of extinction to the species is required before an injunction may issue"); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 818-19 (9th Cir. 2018) (holding "extinction-level threat" not required to show irreparable harm to protected species).

Multiple FY 2020 Projects run through important federally designated critical habitat for protected species. In California, El Centro Project A will be built through the critical habitat of the federally threatened Peninsular bighorn sheep. App'x of Decls. re Env. Harms (Env. App'x) Ex. 1 (Clark Decl. ¶ 12). This habitat is the only connection between populations of the sheep in the United States and Mexico, and the border barriers will sever this genetic and demographic

connectivity between populations. *Id.* The border barriers will cut sheep off from critical lamb-rearing habitat and summer water sources. *Id.* San Diego Project A will, moreover, cut through the breeding grounds in the critical habitat of the federally endangered arroyo toad. *Id.* ¶ 17.

In New Mexico, the El Paso Projects will add to the harms already caused by the FY 2019 border-barriers and will completely block wildlife corridors and species' habitat along an approximately 100-mile stretch of New Mexico's border with Mexico. *Id.* Ex. 4 (Traphagen Decl. ¶¶ 22-25). Numerous wildlife species including the federally endangered Mexican Wolf, and the pronghorn antelope, bighorn sheep, and mountain lions (protected under New Mexico's Wildlife Corridors Act), depend on access to habitat, food, water and mates on both sides of the U.S.-Mexico border. *Id.* The El Paso Projects destroy the habitat connectivity that is critical to these species' survival. *Id.*

Multiple FY 2020 Projects will also require vegetation clearing that will destroy protected plant life. San Diego Project A and El Centro Project A alone will "most likely cause irreparable and irreversible impacts to at least 57 plant species of conservation concern including 32 that are rare, threatened, or endangered in California." *Id.* Ex. 5 (Vanderplank Decl. ¶ 6).

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

The harms to the public from these diversions are even more pressing than the FY 2019 diversions,[11] because Defendants' actions deprive the States' National Guards of the opportunity to obtain vital equipment to prepare and maintain readiness to respond to emergencies like natural disasters and the current COVID-19 pandemic. *Supra* pp. 4-8, 18-20. In addition, the financial impact suffered by all nineteen plaintiff states weigh in favor of an injunction. Defendants' actions will cause nearly $65 million in lost income, $92 million in lost gross regional product, and a decline of $396 million in business sales within all of the plaintiff states, *even when offsetting* the economic benefits that would result from the border barrier construction occurring in California and New Mexico. Reaser Decl. ¶¶ 29-30. The cumulative harm to the States far

[11] Defendants' unlawful diversions in FY 2020 cause harms to the States' financial, sovereign, and environmental interests, as well as damage to the public interest, similar to their FY 2019 diversions. *California* FY 2019 284 MSJ 24-25; *California* FY 2019 2808 MSJ 32-34.

outweighs any burden the Defendants might suffer as result of an injunction. For that matter, Defendants can assert no legitimate interest in engaging in an unconstitutional or unlawful activity. *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013).

Further, Congress's decision to limit appropriations for border fencing to $1.375 billion in FY 2020, rejecting the Administration's request for billions more, *see supra* pp. 3-4, demonstrates that the professed public interest in border barrier construction is lacking. This Court already found that the public interest disfavored border barrier construction for that reason in the FY 2019 litigation. *E.g. Sierra Club* 284 MSJ Order 7-8; *Sierra Club* PI Order 53-55. This Court should continue to defer to Congress's determination on what expenditures best serve the public interest. *See TVA v. Hill*, 437 U.S. 153, 194 (1978) (it is the "exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation").

C. The States Are Entitled to Their Own Injunction Separate from Any Injunction Issued to the Sierra Club

Since the States have satisfied the requisite criteria for obtaining a permanent injunction, this Court should issue a separate injunction to the States based on their distinct legal claims and harms. Notwithstanding this Court's prior decisions in the FY 2019 litigation, the States' request for injunctive relief is not "duplicative" or "moot[ed]" by the issuance of an injunction to the Sierra Club plaintiffs. FY 2019 2808 Order 36-37; *California* FY 2019 284 MSJ Order 8.

In this case, the States are suffering additional harms not present in the FY 2019 litigation and distinct from those of the Sierra Club plaintiffs. The States will suffer irreparable harm to their sovereign, proprietary, and economic interests, including their ability to maintain a fully equipped National Guard. *Supra* pp. 17-22. Thus, their claims will be subject to a qualitatively different zone of interests analysis. *Supra* pp. 12-14. The States also suffer an injury stemming from the actual diversion of funds, not just an injury arising from construction, which further distinguishes the States' interests from the Sierra Club plaintiffs. *Supra* pp. 18-20. Finally, if the Court were to stay an injunction to the Sierra Club plaintiffs based on the Supreme Court's Stay Order as it did in the FY 2019 litigation (which the States believe would be improper here), FY

2019 2808 MSJ Order 45, the States would not be protected by that injunction. For all of these reasons, there is a "reasonable expectation" that an injunction issued to the States would likely serve an "effective purpose," even if the Court also grants the Sierra Club plaintiffs' request for relief. *California v. HHS*, 941 F.3d 410, 423 (9th Cir. 2019); *Nat'l Wildlife Fed'n v. Burford*, 677 F. Supp. 1445, 1452-53 (D. Mont. 1985) (injunctive relief claim remains "live controversy," despite overlap with relief sought in another case, because relief would be granted for "different reasons" and "effective purpose could still be served by issuing the . . . injunctive relief sought").

V. THE INJUNCTION SHOULD NOT BE STAYED PENDING APPEAL

The States recognize that the Supreme Court stayed this Court's injunction in the FY 2019 litigation, which this Court granted to the Sierra Club plaintiffs after finding Defendants' transfers under § 8005 unlawful. The States also recognize that this Court took that Supreme Court stay into account when it stayed the injunction that it granted to the Sierra Club plaintiffs after finding Defendants' transfers under a different statutory authority unlawful. FY 2019 2808 MSJ Order 45. Nonetheless, a stay of any injunction granted to the States here would not be appropriate.

First, the Supreme Court's order addressed only the Sierra Club plaintiffs' cause of action and interests. The States are different parties with distinct interests in preventing harms to their sovereignty, environment, residents, fiscs, and National Guards. The States' injuries this year are compounded by the fact that funds are being taken away from appropriations that would have provided the States' National Guards with equipment that is critical to the States' ability to respond to natural disasters and other emergencies, like the current COVID-19 pandemic. *Supra* pp. 4-8, 18-20. The Supreme Court's Stay Order, which does not reflect any consideration of those interests and injuries, does not preclude injunctive relief for the States.

Second, the injury to the States' National Guard units' access to vital equipment for which funding was appropriated by Congress in the FY 2020 DoD Appropriations Act is one that neither the States nor the Sierra Club plaintiffs asserted in the FY 2019 litigation, and one that satisfies even the most restrictive zone of interests analysis. *Supra* pp. 12-14. The Supreme Court's statement 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," Stay Order, cannot encompass the States' cause of action to protect appropriations in the FY 2020 DoD Appropriations Act that uncontrovertibly and explicitly benefit the States. *Supra* pp. 4-8, 12-13. Nor could it mean that the States do not have a cause of action to prevent the financial injuries that result from the diversion, *supra* pp. 8-9, 13, an injury that was not asserted by the Sierra Club plaintiffs, and thus, was not considered by the Supreme Court.

Third, even if the States ultimately prevail on appeal, without an immediate injunction, there is a substantial risk that the funds diverted from Congress's appropriations will be gone once Defendants obligate them toward border barrier construction. Defendants have already obligated $528 million, FY 2020 MSJ RJN Exs. 8-9, and intend to fully obligate all of the diverted funds by September 30, 2020. Stiglich Decl. ¶¶ 4-5. Defendants' intent to quickly obligate funds is further evidenced by their refusal to stipulate to not obligate even a portion of the diverted $3.8 billion in which the States have a direct interest until this Court decides this motion. Decl. of Lee Sherman ¶ 3 & Ex. A.[12] Once those funds have been obligated for border barrier construction, the States may have no adequate remedy to obtain relief, subjecting them to additional irreparable injury. *See City of Houston v. HUD*, 24 F.3d 1421, 1428 (D.C. Cir. 1994); *see also Ariz. Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) ("Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award for damages."). While an injunction would preserve the status quo pending any appeals, a stay would upend the status quo, contrary to what a stay is supposed to achieve. *See Nken*, 556 U.S. at 429 ("A stay simply suspends judicial alteration of the status quo. . . .") (quotations and alterations omitted).

CONCLUSION

For the foregoing reasons, the States request that this Court grant their motion in full.

[12] On March 26, Defendants suggested an extension to the briefing schedule to align the schedule in this case to the *Sierra Club* case. Decl. of Lee Sherman, Ex. A. The States responded that an extension was acceptable if Defendants stipulated that they would not obligate the diverted funds in which the States have a direct interest until this Court reaches a final judgment. *Id.* Defendants declined that proposal, and stated their intent to litigate the two cases on separate schedules. *Id.*

Dated: March 30, 2020

Respectfully submitted,

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ATTESTATION OF SIGNATURES

I, Lee I. Sherman, 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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