No. 19A60

In the

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,

Applicants,

v.

SIERRA CLUB, ET AL.,

Respondents,

RESPONDENT'S OPPOSITION TO APPLICATION FOR STAY

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CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, respondents make the following disclosures:

1) Respondents Sierra Club and Southern Border Communities Coalition do not have parent corporations.

2) No publicly held company owns ten percent or more of the stock of any respondent.

INTRODUCTION

Defendants ask this Court, without full briefing and argument and despite their own significant delay, to allow them to circumvent Congress and immediately begin constructing a massive, $2.5 billion wall project through lands including Organ Pipe National Monument, Coronado National Memorial, the Cabeza Prieta National Wildlife Refuge, and the San Bernardino National Wildlife Refuge. A stay would dramatically upend the status quo, irrevocably injure delicate public lands, and permit Defendants to irretrievably commit taxpayer funds in contravention of Congress's considered spending judgment. Defendants have failed to meet the standard for such an extraordinary disruption of the appellate process.

For several years Congress has considered, and rejected, the administration's plans to spend billions of dollars on the construction of barriers along the border with Mexico. Congress has considered the same justifications Defendants offer here—an asserted need to address drug trafficking—and has "consistently refused to pass any measures that met the President's desired funding level." App. 2a. The impasse between Congress and the administration over wall funding resulted in the longest government shutdown in U.S. history. The shutdown was finally resolved after Congress passed—and the president signed—the Consolidated Appropriations Act (CAA), which provided a fraction of the wall funding that the Executive Branch requested, and imposed geographic and other limitations on wall construction.

Defendants now ask this Court to allow them to swiftly spend billions of dollars that Congress denied, across more than a hundred miles of lands on which

Congress refused to authorize construction. Defendants' argument is that the shutdown was essentially a charade, because the entire sum of wall money they sought through the appropriations process was already available for wall construction and remains so—regardless of Congress's rejection of the president's request. Defendants maintain that they can funnel this money to the Department of Homeland Security (DHS) from various military accounts and achieve the same result Congress refused to authorize.

Defendants have not met their heavy burden of showing that this Court will grant certiorari and reverse. Defendants' actions are unauthorized by the plain language of the statutes they invoke, and raise serious constitutional concerns in light of Congress's exclusive control over the public fisc. Defendants' primary argument is that no court may review the lawfulness of their conduct, based on their contention that Plaintiffs' claims, founded in equity and the Constitution, do not fall within the zone of interests of the statutes Defendants invoke in defense to those claims. That theory essentially seeks unreviewable authority to expend funds that Congress has specifically declined to appropriate, even where that expenditure causes direct and concrete injury to citizens. But if the Appropriations Clause means anything, it means that no executive officer can spend funds that Congress has refused to authorize. Persons who would be injured by such expenditures must be able to call upon the courts to protect them, and Defendants have shown no basis to preclude review.

Moreover, if a stay is granted and wall construction begins, there will be no turning back. By essentially handing Defendants an irrevocable victory, a stay would accomplish the opposite of a stay's proper purpose: providing interim relief to allow for considered review. *See Nken v. Holder*, 556 U.S. 418, 427 (2009) (explaining that one purpose of the stay mechanism is to avoid "justice on the fly"); *Nat'l Socialist Party of Am. v. Village of Skokie*, 434 U.S. 1327, 1328 (1977) (Stevens, J., in chambers) (denying application for stay that "would be tantamount to a decision on the merits in favor of the applicants"). If Defendants obligate taxpayer funds and commence construction, the status quo would be radically altered, and Plaintiffs will suffer irreparable harm. By contrast, Defendants' claims of harm are speculative and undermined by both their own delay and the administration's own expert assessments.

Congress has repeatedly refused to provide billions of dollars for construction of walls in the lands at issue here, "in a transparent process subject to great public scrutiny." App. 39a. Insofar as Defendants believe they have the authority to spend those funds unilaterally, that question should be decided in the normal course. It should not be mooted by issuance of a stay.

STATEMENT OF THE CASE

1. Congress has repeatedly refused to fund the construction at issue here. In February 2018, the White House submitted its Fiscal Year 2019 Budget Request seeking $18 billion to fund a border wall, claiming that, "since most of the illegal drugs that enter the United States come through the Southwest border, a border

wall is critical to combating the scourge of drug addiction that leads to thousands of unnecessary deaths." Fiscal Year 2019 Budget Request, Dist. Ct. ECF No. 168-2 ¶ 10, Ex. 10 (RJN). Throughout 2018, Congress rejected numerous bills that would have provided billions of dollars for wall construction. *See* App. 6a (collecting failed legislation). Community and environmental organizations—including Plaintiffs—advocated with lawmakers to limit the scope and location of any construction. *See* Dist. Ct. ECF Nos. 32 ¶ 5 (Gaubeca Decl.), 33 ¶ 7 (Houle Decl.).

In December 2018, Congress and the president reached an impasse over wall funding that triggered the longest government shutdown in U.S. history. During the shutdown, the administration "request[ed] $5.7 billion for construction of a steel barrier for the Southwest border" to construct "a total of approximately 234 miles of new physical barrier," which included "the top ten priority areas in the Border Security Improvement Plan created by Customs and Border Protection." App. 8a (quoting Letter from Russell T. Vought, Acting Dir. of the Office of Mgmt. and Budget, to Richard Shelby, Chairman of the Senate Comm. on Appropriations (Jan. 6, 2019)).

On February 14, after extensive negotiations among the political branches, Congress denied the president's request, instead passing the Consolidated Appropriations Act (CAA). The CAA made available only $1.375 billion for wall construction, and restricted construction to eastern Texas. Even within that area, Congress "also imposed several limitations on the use of those funds, including by not allowing construction within certain wildlife refuges and parks." App. 10a

(citing Consolidated Appropriations Act of 2019, Pub. Law No. 116-6 d. § 231, 133 Stat. 13, 28 (2019)). On February 15, the president signed the CAA into law.

On the same day that Congress's funding decision became law, the White House announced that the administration would act unilaterally to spend billions of dollars beyond what Congress had appropriated for wall construction. The White House identified approximately $6 billion in military funds that it claimed "will be available to build the border wall once a national emergency is declared and additional funds have been reprogrammed." App. 11a (quoting *President Donald J. Trump's Border Security Victory*, The White House (Feb. 15, 2019)). This sum included "[u]p to $2.5 billion under the Department of Defense [reprogrammed] funds transferred [to DHS] for Support for Counterdrug Activities" pursuant to 10 U.S.C. § 284 ("Section 284")." App. 11a (alterations in original).

Ten days later—less than two weeks after Congress denied the president's request to construct "approximately 234 miles of new physical barrier," App. 8a, in areas identified as the top Customs and Border Protection (CBP) priorities—DHS formally requested that the Department of Defense (DoD) fund "approximately 218 miles" of new walls in CBP priority areas, DHS Request Mem. at 1, 10, Dist. Ct. ECF No. 64-8, ¶ 3, Ex. A (Rapuano Decl.). In the following months DoD approved $2.5 billion in Section 284 transfers to DHS: The Acting Secretary of Defense authorized an initial billion-dollar transfer to DHS on March 25, 2019, and an additional $1.5 billion transfer on May 9, 2019.

Because DoD's Section 284 counter-narcotics account contained less than a tenth of the $2.5 billion the administration had announced it would transfer through the account to DHS, Defendants determined that they would use Sections 8005 and 9002 of the DoD Appropriations Act to fill the account with funds originally appropriated for other purposes. The Acting Secretary of Defense ordered that funds appropriated for purposes ranging from military pay and pension, Dist. Ct. ECF No. 163-1 at 36 (Admin. R.), modification of in-service missiles, Dist. Ct. ECF No. 163-3 at 17 (Admin. R.), and support for U.S. allies in the Afghanistan Security Forces, Dist. Ct. ECF No. 163-3 at 19–20 (Admin. R.), be channeled to the Section 284 account for transfer to DHS's wall construction.

Until the transfers at issue here, "DoD had previously adhered to a 'gentlemen's agreement' with Congress where it sought approval from the relevant committees *before* reprogramming funds, rather than simply notifying them after the decision had been finalized." App. 15a n.6 (quoting House Armed Services Committee Holds Hearing on Fiscal 2020 Defense Authorization, CQ Cong. Transcripts (Mar. 26, 2019)). For these wall transfers, the Acting Secretary of Defense ordered that reprogramming should occur "without regard to comity-based policies that require prior approval from congressional committees." DoD Transfer Mem., Admin. R., ECF No. 163-3 at 11.

2. Plaintiffs sued on February 19, the next business day after the president's announcement that he intended to construct the wall that Congress rejected. Plaintiffs' members frequently use the lands on which Defendants seek to

construct a massive, multibillion-dollar wall. These lands are renowned for their beauty and archaeological, historic, and biological value, and include protected public lands such as Organ Pipe National Monument, Coronado National Memorial, the Cabeza Prieta National Wildlife Refuge, and the San Bernardino National Wildlife Refuge.

Many miles of the proposed construction run along the Organ Pipe National Monument, and replace the short, wildlife-permeable vehicle barriers that currently exist in the national monument. According to the Department of Interior, the current barrier "has not been breached, and monitoring has revealed a dramatic decline in illegal off-road vehicle activity." International Border Vehicle Barrier, Dist. Ct. ECF No. 168-2 ¶ 22, Ex. 22 (RJN). The current "barrier design allows water, and animals, including the highly endangered Sonoran Pronghorn, to safely roam their natural ranges uninterrupted." *Id.* Defendants' proposed new barrier is much higher, much denser, and would radically alter the status quo in these delicate lands. *See* App. 169a (quoting government declarant's description of "a thirty-foot 'bollard wall,' where '[t]he bollards are steel-filled concrete that are approximately six inches in diameter and spaced approximately four inches apart' and accompanied by lighting").

Beginning on April 4, Plaintiffs sought injunctions against specific wall segments as Defendants made public their construction decisions. To enable expeditious and orderly review and disposition of this action, Plaintiffs sought partial summary judgment and a permanent injunction on June 12.

3. On May 24, 2019, the district court entered a preliminary injunction barring Defendants' initial transfer of $1 billion to construct wall sections in Arizona and New Mexico. The court noted that "this case presents strictly legal questions regarding whether the proposed plan for funding border barrier construction exceeds the Executive Branch's lawful authority under the Constitution and a number of statutes duly enacted by Congress." App. 121a. The district court concluded that Defendants' plan was unlawful, because they had not identified any statutory authority that permitted them to spend funds on wall construction in excess of what Congress had appropriated in the CAA. In particular, the district court found that the wall construction at issue here was "denied by Congress" and was not "unforeseen," failing the requirements of the authority Defendants had invoked, Section 8005 of the DoD Appropriations Act.

The district court first rejected Defendants' argument that Congress had never "denied" the wall construction projects, finding that "the reality is that Congress was presented with—and declined to grant—a $5.7 billion request for border barrier construction." App. 153a. The court observed that Defendants' crabbed reading of "denied," which would apply only to specific rejections of budget-line requests, would defeat the entire purpose of the limitation because Defendants could simply (as they did here) request items without reference to specific budget lines or subcomponents. App. 151a–153a, 156a–157a; *see also* OMB Letter at 1, Dist. Ct. ECF No. 168-2 ¶ 13, Ex. 13 (RJN) ("The President requests $5.7 billion for construction of a steel barrier for the Southwest border.").

The district court likewise rejected Defendants' contention that the need for wall funds was "unforeseen." For more than a year before the transfers, the Executive Branch requested, and Congress considered, the allocation of billions of dollars to build a border wall in these same lands. App. 154a–155a.

In addition to violating the plain language of Section 8005, the district court noted that Defendants' position raised serious constitutional concerns: "In short, the position that when Congress declines the Executive's request to appropriate funds, the Executive nonetheless may simply find a way to spend those funds 'without Congress' does not square with fundamental separation of powers principles dating back to the earliest days of our Republic." App. 173a–174a.

The district court also rejected Defendants' argument that Plaintiffs were required to satisfy a zone-of-interests test with respect to Section 8005. It held that Plaintiffs did not "seek[] to vindicate a right protected by a statutory provision," but instead sought "equitable relief against a defendant for exceeding its statutory authority." App. 149a.

The district court declined to stay the injunction pending appeal, noting that "Defendants' request to proceed immediately with the enjoined construction would not preserve the status quo pending resolution of the merits of Plaintiffs' claims, and would instead effectively moot those claims." App. 119a.

On June 28, 2019, the district court issued a permanent injunction incorporating its prior reasoning on the merits. On the equities of the injunction, the district court "note[d] that Congress considered all of Defendants' proffered

needs for border barrier construction, weighed the public interest in such construction against Defendants' request for taxpayer money, and struck what it considered to be the proper balance—in the public's interest—by making available only $1.375 billion in funding, which was for certain border barrier construction not at issue here." App. 113a.

4. Defendants sought an emergency stay of the district court's preliminary injunction. They asserted to the court of appeals that the contracts the Executive Branch had signed with construction vendors required that the government begin the "complex and time-consuming process" of obligating taxpayer funds "by late June," as the "contracts contemplate that those steps will take 100 days" and funding would lapse on September 30. Stay Mot. at 3, Ct. App. Case No. 19-16102, ECF No. 7-1.

On July 3, 2019, the court of appeals denied the stay motion in a published 2-1 opinion. Judges Clifton and Friedland, writing for the court, held that "[b]ecause section 8005 did not authorize DoD to reprogram the funds—and Defendants do not and cannot argue that any other statutory or constitutional provision authorized the reprogramming—the use of those funds violates the constitutional requirement that the Executive Branch not spend money absent an appropriation from Congress." App. 4a.

The court of appeals rejected Defendants' argument that their actions were essentially unreviewable. It concluded that Plaintiffs could proceed under traditional equitable review of unlawful executive action, or under the

Administrative Procedure Act—and "[t]o the extent any zone of interests test were to apply to Plaintiffs' constitutional claims . . . it would be satisfied here." App. 4a–5a.

Finally, the court of appeals rejected Defendants' arguments on the equities. It observed that the record evidence "does not support a conclusion that enjoining the construction of the proposed barriers until this appeal is fully resolved will have a significant impact" on the flow of drugs. App. 70a. The court of appeals was also unconvinced that the public interest would be furthered by enabling Defendants' "rush to spend this money," App. 72a, as the funds at issue here do not disappear if they are not spent during the course of the injunction. And the court of appeals found Plaintiffs' injuries consequential, as "[e]nvironmental injuries have been held sufficient in many cases to support injunctions blocking substantial government projects." App. 73a. The court of appeals concluded that the public interest "is best served by respecting the Constitution's assignment of the power of the purse to Congress, and by deferring to Congress's understanding of the public interest as reflected in its repeated denial of more funding for border barrier construction." App. 5a; *see also* App. 73a–75a.

Judge Smith dissented, but no judge found that Defendants' efforts to spend $2.5 billion on wall construction were lawful. Instead, the dissent disagreed with the majority's conclusion that the executive actions were properly subject to judicial challenge, opining both that Plaintiffs could not bring an APA claim, and that the

APA itself foreclosed the judiciary's power to equitably enjoin the Executive Branch actions here. App. 91a–99a.

In dissenting from the majority's refusal to grant a stay, Judge Smith also relied on his understanding "that an expedited briefing schedule will be requested," reasoning that "the injunction will only be stayed for a short period," thus minimizing, "[i]n the narrow context of this stay motion," environmental injuries that might otherwise "be significant in the long term." App. 101a & n.15.

5. Rather than seek expedited disposition of their appeal, Defendants "filed a motion to delay the expedited briefing schedule," and further requested that the court of appeals "wait until *after* further anticipated decisions in the district court and our court's decision on their stay motion to propose a new briefing schedule that could govern 'any' full appeal." App. 22a n.10.

On July 8, five days after the court of appeals denied the stay application, the Defendants proposed a briefing schedule to the court of appeals that would result in the completion of briefing in October—after, Defendants contend, the funds at issue here must be spent. Defs.' Mot. to Consolidate & Establish Schedule at 4, Ct. App. Case No. 19-16300, ECF No. 7.

On July 12, nine days after the stay denial, Defendants filed the instant stay application with this Court, which includes the request for "an immediate administrative stay of the injunction pending the Court's consideration of this application." Stay App. 1.

On July 15, the court of appeals granted Defendants' requested briefing schedule on the merits. As Defendants further requested, the underlying appeal in this matter was consolidated with a cross-appeal by state plaintiffs who had not received an injunction. In accordance with Defendants' requested schedule, their final brief is due September 20, with the states' reply in the consolidated cross-appeal due October 11.

ARGUMENT

Defendants bear a "heavy burden" to justify the "extraordinary" relief of a stay. *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, J., in chambers). They must establish "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

"Because this matter is pending before the Court of Appeals, and because the Court of Appeals denied [its] motion for a stay, [the administration] has an especially heavy burden." *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers); *see also Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (an "applicant seeking an overriding stay from this Court bears 'an especially heavy burden'"). Such stays are "rare and exceptional," granted only "upon the weightiest

considerations." *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring in denial of stay application) (voting to deny stay despite view that lower court decisions were "inconsistent" with Supreme Court precedent). Because the stay requested here would upend the status quo and effectively resolve the merits, a stay is especially unwarranted. *Nat'l Socialist Party*, 434 U.S. at 1328 (Stevens, J., in chambers) (denying application for a stay that "would be tantamount to a decision on the merits in favor of the applicants").

I. THE COURT IS UNLIKELY TO GRANT CERTIORARI AND REVERSE.

As the court of appeals recognized, Defendants lack authority to spend taxpayer funds on a wall that Congress considered and denied. The judiciary's power and responsibility to review Executive Branch actions is likewise clear and grounded in this Court's precedents. Because likelihood of success on the merits is "critical," *Nken*, 556 U.S. at 434, the Court may reject the stay application on this basis alone.

A. The Administration's Plan to Circumvent Congress is Unlawful.

Defendants have acted to divert $2.5 billion from military accounts to wall construction, claiming that they may do so under transfer authorities that Congress has provided may be used only for the purpose of "unforeseen military requirements," and that "in no case [may be used] where the item for which funds are requested has been denied by the Congress." App. 14a (quoting Section 8005). These express prohibitions are found in the very transfer authorities Defendants

invoke, and are also codified at 10 U.S.C. § 2214. Defendants have no authority to funnel billions of dollars in military funds to the wall.

1. Congress has denied the request to construct a border wall outside of Texas.

Defendants' planned wall construction has been denied by Congress. The president requested $5.7 billion to fund construction of "approximately 234 miles of new physical barrier" across the southern border in areas his administration identified as CBP priorities. On February 14, 2019, Congress denied that request, appropriating instead only a fraction of the money and explicitly limiting construction to eastern Texas. Eleven days later, DHS requested that DoD transfer billions to DHS for it to construct "approximately 218 miles" of barriers in CBP's priority areas outside of Texas. DHS Request Mem. at 1, 10, Dist. Ct. ECF No. 64-8 ¶ 3, Ex. A (Rapuano Decl.).

Defendants maintain that Congress's refusal to fund any wall construction outside of Texas is irrelevant for the purposes of Section 8005, pressing an unnaturally narrow reading of Section 8005's reference to an "item" that was "denied by the Congress." According to the Defendants, the statute's bar on circumvention of congressional funding decisions has no application in any case except where "a particular budget line-item" was specifically requested by DoD, and deleted by Congress. Stay App. 32–33. Defendants argue that unless the government makes a request to Congress in this particular format, DoD is free to transfer billions to fund projects that Congress specifically considered and rejected.

As the court of appeals held, Defendants' interpretation "is not compatible with the plain text of section 8005" and does not comport with the ordinary meaning of the words Congress chose. App. 37a–38a. The statute's plain language refers to an "item" that "Congress denied," and includes no reference to an item's subcomponents, requesting agency, or specific budget line. The statute "refers to 'item[s] . . . denied by the Congress,' not to *funding requests* denied by the Congress, suggesting that the inquiry centers on what DoD wishes to spend the funds on, not on the form in which Congress considered whether to permit such spending." App. 37a–38a.

Defendants also argue that the courts below erred in finding that the "relevant item" that Congress denied was "a border wall writ large." Stay App. 32 (quotation marks omitted). This defies common sense, since Congress considered the president's request and granted only part of it, specifically denying construction in areas where Defendants now desire to build. Defendants' argument thus violates the precept that "[i]n common usage, a general denial of something requested can, and in this case does, encompass more specific or narrower forms of that request." App. 38a. Nor can Defendants evade the force of Congress's denial by arguing that they requested funds as part of the DHS budget rather than as part of the DoD budget. As the court of appeals properly held, "[i]dentifying the request to Congress as having come previously from DHS instead of from DoD does not change what funding was requested for: a wall along the southern border." App. 38a. And the plain text of Section 8005 speaks to an "item," not a "requesting agency."

Lacking any support in the statutory text, Defendants urge that this Court infer from a single sentence in the legislative history (of an earlier statute) a far narrower statutory purpose: to bar only items that "ha[d] been specifically deleted" from a DoD budget-line request. Stay App. 33 (quoting H.R. Rep. No. 93-662, at 16). But if anything, legislative history cuts against Defendants' theory: as the district court noted, "Congress has described its intent that appropriations restrictions of this sort be 'construed strictly' to 'prevent the funding for *programs* which have been considered by Congress and for which funding has been denied." App. 152a (emphasis added). And in any event, this Court does not allow scraps of legislative history "to 'muddy' the meaning of 'clear statutory language.'" *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (citation omitted).

The presumption is that "the legislative purpose is expressed by the ordinary meaning of the words used." *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019) (citation omitted). Therefore, as the court of appeals correctly concluded, "[c]onstruing section 8005 with an eye towards the ordinary and common-sense meaning of 'denied,' real-world events in the months and years leading up to the 2019 appropriations bills leave no doubt that Congress considered and denied appropriations for the border barrier construction projects that DoD now seeks to finance using its section 8005 authority." App. 38a–39a. The district court similarly concluded that "the reality is that Congress was presented with—and declined to grant—a $5.7 billion request for border barrier construction. Border barrier

construction, expressly, is the item Defendants now seek to fund via the Section 8005 transfer, and Congress denied the requested funds for that item." App. 153a.

This was a deliberate decision by Congress. Less than six months ago, this country endured the longest government shutdown in its history due to Congress's refusal to appropriate funds for the wall construction at issue here. The shutdown ended with Congress's decision "in a transparent process subject to great public scrutiny," App. 39a, to deny the administration's request to construct hundreds of miles of wall outside of Texas. "To call that anything but a 'denial' is not credible." App. 39a; *see also Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2575 (2019) ("[T]his Court is 'not required to exhibit a naiveté from which ordinary citizens are free." (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, C.J.))).

2. Defendants' planned wall construction is not an "unforeseen" need.

Defendants' action also fails to meet the requirement in Section 8005 that wall construction be "unforeseen." This requirement has been met in the past by "unanticipated circumstances (such as hurricane and typhoon damage to military bases) justifying a departure from the scope of spending previously authorized by Congress." App. 154a. Defendants maintain that their asserted need to construct a border barrier to stop the flow of drugs was "unforeseen" when DoD made its budget request in February 2018, and remained unforeseen until February 2019, when DHS requested that DoD fund wall sections that Congress had denied that same month. Stay App. 33.

But wall construction under a claim of counterdrug necessity was plainly not "unforeseen" in February 2018. That month, the president specifically claimed to Congress in his budget proposal that "$18 billion to fund the border wall" was necessary because "a border wall is critical to combating the scourge of drug addiction." Fiscal Year 2019 Budget Request at 16, Dist. Ct. ECF No. 168-2 ¶ 10, Ex. 10 (RJN). As the court of appeals held, "when properly viewed as applying to the broader 'requirement' of a border wall, not to DHS's specific need to turn to an entity other than Congress for funds, it is not credible that DoD did not foresee this requirement." App. 36a–37a. "The long history of the President's efforts to build a border barrier and of Congress's refusing to appropriate the funds he requested makes it implausible that this need was unforeseen." App. 37a; *see also* App. 154a ("[T]hat the need for the requested border barrier construction funding was 'unforeseen' cannot logically be squared with the Administration's multiple requests for funding for exactly that purpose dating back to at least early 2018.").

Even if "unforeseen" could be interpreted as referring only to DoD's participation in the wall project, rather than to the general "requirement" of a wall to combat drugs, the administration's arguments are still belied by the record: DoD was specifically considering the use of Section 284 to construct sections of a border wall long before the actions at issue here. *See* Arcangeli Decl. ¶ 3, Dist. Ct. ECF No. 168-2 ¶ 11, Ex. 11 (RJN) (declaring that DoD recently informed the House Committee on Armed Services that its Comptroller had withheld nearly $1 billion of fiscal year 2018 counterdrug funding until July 2018 because DoD was considering

using that funding for "Southwest Border construction."); Hearing Tr. at 95, Dist. Ct. ECF No. 168-2 ¶ 12, Ex. 12 (RJN) (government counsel acknowledging that the Arcangeli declaration "suggest[s] that DoD was thinking about the possibility of 284 projects in the summer of '18," but arguing that it was only "foreseeable in general that someone at some time might ask DoD to use its 284 authority to engage in border barrier construction").

Finally, it is implausible that Congress intended its own funding decisions (namely, the denial of the president's larger funding request) to constitute "unforeseen" circumstances. If that were the case, as the district court observed, agencies could easily evade the strictures Congress imposed on their funding simply by virtue of the timing of the request. *See* App. 159a. "As here, DHS could wait and see whether Congress granted a requested appropriation, then turn to DoD if Congress declined, and DoD could always characterize the resulting request as raising an 'unforeseen' requirement because it did not come earlier." App. 159a. This "heads-I-win-tails-you-lose" theory would upend the statute and the constitutional requirement that Congress authorize spending.

3. Transferring funds to a civilian law enforcement agency is not a "military requirement."

Although the courts below did not need to reach Section 8005's requirement that the funds serve a "military" need, *see* App. 155a n.17, the transfers fail this test as well. Transferring funds to DHS so that it may build a permanent border wall that Congress refused to fund is not a "military requirement." As Defendants concede, rather than responding to any military purpose, "DoD may undertake

counterdrug support pursuant to Section 284 only upon receiving a request from another agency." Stay App. 33. And here, the record is clear that the project is undertaken entirely to serve DHS's requirements, not the military's needs. *See* DoD Approval, Dist. Ct. ECF No. 64-8, Ex. B (Rapuano Decl.) (CBP is "the proponent of the requested action," "DHS will accept custody" of the wall, "operate and maintain" it, and "account for that infrastructure in its real property records"); *see also* 6 U.S.C. § 202 (assigning DHS responsibility for "[s]ecuring the borders"). DoD's authority to provide limited support to civilian agencies, when Congress so appropriates, does not convert a civilian law enforcement request into a "military requirement" justifying a Section 8005 transfer. If anything the military might do is deemed a "military requirement," the statutory phrase imposes no restriction at all. Such a reading violates the "presumption that statutory language is not superfluous." *McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016) (quotation marks and citation omitted).

4. Section 284 does not authorize Defendants' planned construction.

As the courts below found, the absence of authority under Section 8005 to transfer the funds is sufficient to bar Defendants' actions. But those actions are also not authorized by Section 284. Defendants misleadingly state that "[n]o court has found that the proposed projects are in any respect inconsistent with Section 284," but that is only because it was unnecessary to reach the question. Stay App. 3. In fact, the district court raised serious concerns about the use of Section 284 to funnel $2.5 billion to DHS for wall construction, and reserved judgment on the question

only because the administration's violation of Section 8005 was itself sufficient to support an injunction. App. 161a n.1. The court of appeals likewise had no cause to decide whether Section 284 authorized the construction of a $2.5 billion wall, because it found that Section 8005 did not authorize the predicate transfers and, "[w]ithout section 8005's statutory authorization to reprogram funds for section 284 security measures, no congressional action permits Defendants to use those funds to construct border barriers." App. 44a–45a.

Under Defendants' interpretation of Section 284, DHS can request 234 miles of border wall ostensibly to counter drug smuggling, and, when Congress denies that request, DHS can simply reclassify 218 miles as an enormous "drug smuggling corridor," and thereby displace appropriations decisionmaking from Congress to the Secretary of Defense. It is implausible that Congress quietly granted the Secretary of Defense such unbounded authority through Section 284. Interpretation of statutes "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude." *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). In determining the proper scope and location for wall construction, Congress engaged in a drawn-out and deliberative political process, involving consideration of constituents' (including Plaintiffs') advocacy. There is no indication in Section 284 that Congress granted DoD the prerogative to reconsider that significant decision. *See Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) ("We expect

Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." (quotation marks omitted)).

The structure and context of Section 284 reinforce the commonsense interpretation that Congress did not authorize multibillion-dollar public works to be constructed at the sole discretion of the Secretary of Defense. For example, Subsection (h)(1)(B) requires the Secretary to give Congress 15 days' written notice before providing certain forms of support, including "a description of any small scale construction project for which support is provided." The statute defines "small scale construction" as "construction at a cost not to exceed $750,000 for any project." 10 U.S.C. § 284(i)(3). Congress would not have required a description of "any small scale construction" projects if it were, at the same time, authorizing unspecified, massive, multibillion-dollar expenditures under this provision. As the district court observed, "reading the statute to suggest that Congress requires reporting of tiny projects but nonetheless has delegated authority to DoD to conduct the massive funnel-and-spend project proposed here is implausible, and likely would raise serious questions as to the constitutionality of such an interpretation." App. 158a.

Finally, the historical use of Section 284 confirms that the administration's plan to use the statute to funnel $2.5 billion of military funds to border wall construction exceeds any authority Congress provided in that statute. Defendants cite legislative history in support of their claim that DoD has used this authority for decades. Stay App. 7 (citing H.R. Rep. No. 200, 103d Cong., 1st Sess. 330-331 (1993)). But the size of the projects Congress previously approved under this

authority only demonstrates how far Defendants propose to depart from the statute's reasonable contours. For example, Congress's 2006 decision to recommend a $10 million increase to Section 284 funding for fence and road construction, which Defendants cited below, amounted to 1/250th (0.4%) of the administration's plan here. *See* H.R. Rep. No. 109-452, at 369 (2006). Similarly, in 2008, Congress contemplated a $5 million increase, or 1/500th (0.2%) of what Defendants seek to transfer here. *See* H.R. Rep. No. 110-652, 420 (2008). As the district court observed, "Congress's past approval of relatively small expenditures, that were well within the total amount allocated by Congress to DoD under Section 284's predecessor, speaks not at all to Defendants' current claim that the Acting Secretary has authority to redirect" enormous sums to that account. App. 158a.

B. The Administration's Actions Are Not Beyond Judicial Review.

Defendants devote much of their stay application to a broad claim of unreviewable authority. In their view, even if Congress denied the Executive Branch the billions of dollars it sought, no constitutional issue is raised by Defendants nonetheless funneling military funds to the wall, and no court can review in equity an executive officer's action so long as the officer invokes a statute. Defendants' position is that once they invoke Section 8005 all inquiry must end, and no court may review whether Congress did, or did not, appropriate the funds in question. Defendants are wrong.

Plaintiffs sought an injunction because Defendants' plan to circumvent congressional appropriations decisions exceeded their authority and resulted in a

judicially-redressable injury to Plaintiffs. "Plaintiffs' principal legal theory is that Defendants seek to spend funds for a different purpose than that for which Congress appropriated them, thereby violating the Appropriations Clause." App. 33a–34a. As this Court has described, the "fundamental and comprehensive purpose" of the Appropriations Clause "is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427–28 (1990).

> In the words of then-Judge Kavanaugh, the Appropriations Clause is "a bulwark of the Constitution's separation of powers among the three branches of the National Government. It is particularly important as a restraint on Executive Branch officers: If not for the Appropriations Clause, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure." *U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.) (quotation marks omitted).

App. 74a.

Defendants' plan to spend money in the absence of a valid appropriation is both an *ultra vires* executive action and a violation of the Appropriations Clause. "Defendants' defense to this claim is that, through Section 8005, Congress allowed Defendants to make this reallocation." App. 34a. Both courts below correctly held that Plaintiffs need not show that Congress created a right of action under, or that they fall within the zone of interests of, Section 8005, the defense the administration asserts. Plaintiffs do not seek to enforce a right created by Section 8005, and therefore Defendants' contentions that they do not fall within that

statute's zone of interests are fundamentally misguided. Instead, Plaintiffs properly sought an injunction against *ultra vires* executive action that would directly injure their protected interests, on the claim that Defendants had no authority under any statute or the Constitution to act as they did. But even if Plaintiffs had to show that their claims are within the zone-of-interests of a *defense* to their claim of *ultra vires* action, Plaintiffs satisfy that test.

1. Plaintiffs have an *ultra vires* cause of action, and therefore need not satisfy a zone-of-interests test.

There is nothing extraordinary about equitable relief against *ultra vires* government conduct. "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *Harmon v. Brucker*, 355 U.S. 579, 581–82 (1958); *see also, e.g.*, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally"). "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) (citing Jaffe & Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. Rev. 345 (1956)).

There is no support for Defendants' theory that an equitable claim evaporates when the Executive Branch claims a statutory authority. In *Harmon*, for example, this Court held that the district court erred when it dismissed a claim that the Secretary of the Army exceeded his statutory and constitutional authority. As the

Court explained, the district court had the "power to construe the statutes involved to determine whether the respondent did exceed his powers." 355 U.S. at 582. If so, then "judicial relief from this illegality would be available." *Id.* Similarly, in *Dames & Moore v. Regan*, this Court again addressed the merits of an action for an injunction based on a claim that officials "were beyond their statutory and constitutional powers." 453 U.S. 654, 667 (1981). Specifically, the Court considered the executive's claimed power to "suspend claims pending in American courts," when the president "purported to act under authority of both the [International Emergency Economic Powers Act] and 22 U.S.C. § 1732, the so-called 'Hostage Act.'" *Id.* at 675. The Court did not require the identification of any private right of action under the claimed statutory authorities, nor did the Court look to some other source for a cause of action; it was sufficient that plaintiffs would be injured by conduct they asserted was unauthorized. *See also, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187–88 (1993) (challenge to executive order issued under asserted statutory authority); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) ("[W]here [an] officer's powers are limited by statute, his actions beyond those limitations . . . are ultra vires his authority and therefore may be made the object of specific relief.").

Unlike a statutory cause of action, "[t]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief . . . depend on traditional principles of equity jurisdiction." *Grupo Mexicano v. Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999) (quoting 11A

Charles Alan Wright et al., Federal Practice and Procedure § 2941, at 31 (2d ed. 1995)). In cases like this one, the question is simply "whether the relief [Plaintiffs] requested . . . was traditionally accorded by courts of equity." *Id.* at 319. And as this Court recently confirmed in *Armstrong*, "equitable relief . . . is traditionally available to enforce federal law" through injunctions against unlawful executive action. *Armstrong*, 135 S. Ct. at 1385–86.

For two centuries, this Court has permitted judicial review of *ultra vires* executive action without invoking a zone-of-interests test. Thus, nowhere in *Dames & Moore* did this Court suggest that a challenger to an unlawful action under purported Hostage Act authority was required to satisfy a zone-of-interests test with respect to that inapplicable statute. As Judge Bork explained decades ago, such a requirement would make little sense. "Otherwise, a meritorious litigant, injured by *ultra vires* action, would seldom have standing to sue since the litigant's interest normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987); *see also* App. 60a ("[W]here the very claim is that no statutory or constitutional provision authorized a particular governmental action, it makes little sense to ask whether any statutory or constitutional provision was written for the benefit of any particular plaintiffs."). In short, an *ultra vires* claim is not defeated anytime an executive officer makes a claim of statutory authority—however misplaced—and then argues that the challenger is not within the statute's zone of interests.

Notably, Defendants do not attempt to seriously defend the dissent's argument that the APA provides an exclusive yet unavailable cause of action for review of the executive action here, while simultaneously barring any claim in equity. *See* App. 94a–99a (N.R. Smith, J., dissenting). Defendants instead relegate to a footnote the conclusory claim that "availability of an express cause of action under the APA precludes judicial resort to any implied equitable cause of action," without suggesting that such an APA cause of action is available here. Stay App. 23 n.3. Contrary to the dissent's view that the APA's zone-of-interest test serves to limit the type of Plaintiffs who might have otherwise sought equitable injunctions, "at the time of its inception, the zone-of-interests test was understood to be part of a broader trend toward expanding the class of persons able to bring suits under the APA challenging agency actions." *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1268 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev'd sub nom. Michigan v. E.P.A.*, 135 S. Ct. 2699 (2015).

As this Court recently confirmed in *Kisor v. Wilkie*, the APA's judicial review provision "was understood when enacted to restate the present law as to the scope of judicial review" and the Supreme Court has "thus interpreted the APA not to significantly alter the common law of judicial review of agency action." 139 S. Ct. 2400, 2419–20 (2019) (quotation and alteration marks omitted). Thus, as Judge Silberman explained, the "enactment of the APA . . . does not repeal the review of *ultra vires* action recognized long before," and "[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." *Chamber of*

Commerce v. Reich, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (citation omitted); *see generally Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."). "It does not matter, therefore, whether traditional APA review is foreclosed, because judicial review is favored when an agency is charged with acting beyond its authority." *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1172 (D.C. Cir. 2003) (quotation omitted); *see* App. 57a. The existence of an APA cause of action, or lack thereof, does not affect the availability of *ultra vires* review.

Defendants wrongly suggest that *Dalton v. Specter*, 511 U.S. 462 (1994), worked a radical change in law by effectively ending *ultra vires* review, or at least requiring a zone-of-interests test whenever an executive official claims a statutory authority. Defendants identify no decision endorsing that view in the 25 years since *Dalton*, and there is none. To the contrary, as Judge Silberman emphasized, *Dalton* established a narrow rule, inapplicable here: "*Dalton*'s holding merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available." *Reich*, 74 F.3d at 1331.

2. Plaintiffs have a constitutional cause of action under the Appropriations Clause, and therefore need not fall within the zone of interests of the statutes the government asserts in defense.

Plaintiffs also have a constitutional cause of action under the Appropriations Clause, because the president seeks to spend moneys that Congress has not

appropriated. *See United States v. MacCollom*, 426 U.S. 317, 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."). Defendants seek to contort *Dalton*'s limited statement that not "every action by the President, or by another executive official, in excess of his statutory authority is ipso facto in violation of the Constitution," 511 U.S. at 472, into a sweeping, inverse rule. Under the Defendants' view, the moment they invoke an appropriations statute, no matter how inapplicable, an Appropriations Clause violation is transmuted into an unavailable statutory claim.

But as the court of appeals held, "[s]tatutory and constitutional claims are not mutually exclusive"—a conclusion supported by the language this Court used in *Dalton* itself. *See* App. 49a–50a. Thus, "[i]t cannot be that simply by pointing to any statute, governmental defendants can foreclose a constitutional claim. At the risk of sounding tautological, only if the statute actually permits the action can it even possibly give authority for that action." App. 52a. In this case in particular, where it is "quite clear that section 8005 does not authorize the reprogramming," App. 52a n.22, Defendants cannot bar Plaintiffs' claims by asserting that Section 8005 authorizes their actions, and then arguing that Plaintiffs are outside that statute's zone of interests. Indeed, it would subvert this Court's canonical decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), if the government could simply evade *ultra vires* review by cloaking a claim of unauthorized executive

action in dubious statutory authority. Nothing in *Dalton* suggests such a sea change in the longstanding practice of equitable review.

Moreover, whatever the scope of *Dalton*'s holding with respect to areas in which the executive and legislature share overlapping power, it cannot be read to foreclose all constitutional claims under the Appropriations Clause. While a claim concerning ordinary statutory authority might not always implicate separation of powers, the Constitution expressly and unambiguously establishes that Congress exercises its exclusive appropriations power through legislation: "Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute." *Richmond*, 496 U.S. at 424. The fact that Congress's appropriations power is exercised through statutory enactments does not mean that a challenge under the Appropriations Clause is merely an ordinary statutory claim dressed up in constitutional finery. *Dalton* does not hold that the Executive Branch's unilateral action in disregard of congressional instructions, in an area entrusted to Congress by the Constitution, creates no constitutional violation.

In any event, *Dalton* does not preclude courts from reviewing claims stemming from presidential actions that are "incompatible with the expressed or implied will of Congress," *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), nor does it hold that a constitutional claim does not arise when the government asserts powers under a statute that would be unconstitutional if interpreted as the

government contends. Either of these two distinctions alone is sufficient to render *Dalton* inapposite here.[1]

First, as noted above, Congress specifically refused to fund new wall construction outside of Texas. As Justice Frankfurter underscored in *Youngstown*:

> It is quite impossible . . . when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

343 U.S. at 609 (Frankfurter, J., concurring); *see also* App. 5a–9a (detailing Congress's specific and repeated consideration and rejection of legislation that would fund the construction at issue here). *Dalton* does not foreclose review where, as here, an administration usurps Congressional prerogatives.

Second, if Defendants' proffered interpretations of Sections 8005 and 284 were correct, those statutes would be unconstitutional as applied. As the district court explained, if Section 8005 authorizes the Secretary of Defense to present DHS with billions of dollars that Congress explicitly withheld from the administration's wall project, this would likely "amount to an 'unbounded authorization for Defendants to rewrite the federal budget,'" and thereby "violate the Constitution's

[1] Although Defendants state that Plaintiffs "do not allege that Section 8005 violates any provision of the Constitution," Stay App. 27–28, Plaintiffs have, in fact, repeatedly argued that if Defendants' actions were actually authorized by the statutes on which they rely, the statutes would violate the separation of powers and the Appropriations and Presentment Clauses. *See, e.g.*, Pls.' Suppl. Br. at 8, Ct. App. Case No. 19-16102, ECF No. 71-1; App. 155a–161a (construing Section 8005 to avoid constitutional questions).

separation of powers principles." App. 157a (quotation omitted). "The 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 v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

Likewise, it would violate the Presentment Clause if the president could sign the CAA and simultaneously, on the same day, "based on the same facts and circumstances that Congress considered," have the option of "rejecting the policy judgment made by Congress and relying on his own policy judgment." *Clinton*, 524 U.S. at 444 & n.35. "Where the president does not approve a bill, the plan of the Constitution is to give to the Congress the opportunity to consider his objections and to pass the bill despite his disapproval." *Wright v. United States*, 302 U.S. 583, 596 (1938). Instead of following this constitutional requirement, the president signed a bill to which he objected, and simultaneously rejected the limits Congress imposed by increasing wall spending, including through funneling exactly $2.5 billion through Section 284. If Section 8005 enabled this executive action, it would violate the Presentment Clause. *See Clinton*, 524 U.S. at 445–47.

3. The zone-of-interests test does not bar review.

Even if a zone-of-interests test applied to constitutional claims, Plaintiffs' "individual rights and interests resemble myriad interests that the Supreme Court has concluded—either explicitly or tacitly—fall within any applicable zone of interests encompassed by structural constitutional principles like separation of powers." App. 67a–68a. Defendants do not contest that Plaintiffs fit within the zone

of interests protected by the Appropriations Clause itself, but argue that even with respect to a constitutional claim, Plaintiffs' "asserted interests must fall within the zone of interests protected by Section 8005 to maintain this suit." Stay App. 30. But Defendants cite no case holding that the zone of interests of a constitutional claim should be determined by reference to a statute.

Moreover, Defendants' effort to graft a statutory zone-of-interests test on a constitutional or equitable cause of action should be rejected for the absurd—and dangerous—results it would produce. Defendants' novel theory would insulate many unconstitutional statutes from review because plaintiffs with the most concrete reason to bring a constitutional challenge would be least likely to find themselves within the zone-of-interests of the unconstitutional enactment. Under Defendants' logic, for example, in bringing a Presentment Clause challenge to the president's exercise of authority under the Line Item Veto Act, the plaintiffs in *Clinton v. City of New York* should have been first required to demonstrate that they fit within the zone of interests of the Line Item Veto Act itself. Defendants assert that these plaintiffs "would have easily satisfied" the zone-of-interests test. Stay App. 31 n.4. But the challengers, "a farmers' cooperative consisting of about 30 potato growers in Idaho and an individual farmer who is a member and officer of the cooperative," 524 U.S. at 425, had interests that were plainly inconsistent with Congress's purposes in passing the Line Item Veto Act. That Act was enacted "for the purpose of 'ensur[ing] greater fiscal accountability in Washington,'" *id.* at 447 (quoting H.R. Rep. No. 104-491, at 15 (1996)). The potato growers sued because the president's

cancellation of a tax benefit resulted in more money for the Treasury (as Congress intended), but less money for the potato growers, by imperiling a tax benefit they hoped to take advantage of. *Id.* at 426. Under Defendants' rule, the potato growers could not have been in the zone of interests for the Line Item Veto Act itself—thereby lacking any ability to challenge "a necessary element of their claim." Stay App. 29. The Court thus could never have decided the constitutional issue, because no individual harmed by the Line Item Veto Act would have been in a position to challenge its constitutionality.

As described above, Plaintiffs' claims do not derive from a "legislatively conferred cause of action," and thus no zone-of-interests test applies. *Cf.* Stay App. 23 (quoting *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302–1303 (2017) (addressing legislatively conferred private right of action)). But even if Plaintiffs were required to satisfy a zone-of-interest test with respect to Defendants' claimed Section 8005 authority, this would pose no obstacle to the Court's review. The court of appeals correctly concluded that Plaintiffs could bring their claim under the APA, *see* App. 53a–57a, and, under the APA, "[t]he test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quotations omitted). As then-Judge Kavanaugh observed, under this Court's "capacious view of the zone of interests requirement," a "suit should be allowed unless the statute evinces discernible congressional intent

to *preclude* review." *White Stallion Energy Ctr.*, 748 F.3d at 1269 (Kavanaugh, J., concurring in part and dissenting in part) (emphasis added). The administration has not even attempted to show such a preclusive intent here.

It does not matter that Section 8005 was enacted to benefit Congress's control over appropriations rather than Plaintiffs, or that Section 8005 does not mandate consideration of environmental harms. *Cf.* Stay App. 25. First, where Congress enacts statutes aimed at tightening congressional control over executive spending, the zone of interests has been held to be extraordinarily broad, because a plaintiff's claim cannot meaningfully diverge from Congress's interests in enacting the statute. *See Scheduled Airlines Traffic Offices, Inc. v. Dep't of Def.*, 87 F.3d 1356, 1360–61 (D.C. Cir. 1996) (holding that statute that did not seek to "benefit anything other than the public fisc and Congress's appropriation power" was enforceable by private plaintiff because "we run no risk that the outcome could in fact thwart the congressional goal" (citation omitted)). Here too, Plaintiffs' interest in avoiding circumvention of Congress's decision to deny funds is entirely aligned with Section 8005's purpose.

Second, this Court has already rejected the crabbed view of the zone of interests that Defendants advance here. In *Match-E-Be-Nash-She-Wish*, this Court held that a neighboring property owner asserting "environmental" and "aesthetic" interests could bring suit under a statute that "authorizes the acquisition of property 'for the purpose of providing land for Indians.'" 567 U.S. at 224 (citation omitted). That the plaintiff was "not an Indian or tribal official seeking land" and

did not "claim an interest in advancing tribal development . . . is beside the point." *Id.* at 225 n.7 (citation omitted). What mattered was that when the agency used its statutory powers, it did "not do so in a vacuum," but rather acted "with at least one eye directed" toward the ultimate use of the land it acquired. *Id.* at 226. And it was precisely the ultimate use of the lands that the plaintiff objected to, as he claimed that casino construction would cause "an irreversible change in the rural character of the area," and cause "aesthetic, socioeconomic, and environmental problems." *Id.* at 213 (quotation marks omitted). The "statute's implementation centrally depends on the projected use of a given property," bringing objectors to the use within the zone of interests. *Id.* at 226–27.

Here too, Section 8005's "implementation centrally depends on the projected use" of the transferred funds, *see id.* at 226-27, and the Acting Secretary was required to consider that ultimate use, including through his finding that Congress had not denied funds for the border wall. *See* DoD Transfer Mem. 1–2, Dist. Ct. ECF No. 64-8 ¶ 5, Ex. C (Rapuano Decl.). And when Congress enacted its own decisions with respect to the border wall, including denying construction outside of Texas, it explicitly considered community and environmental interests in the lands, including by disallowed "construction within certain wildlife refuges and parks." App. 10a (citing CAA, d. § 231, 133 Stat. at 28). Plaintiffs, whose interests are directly affected by Defendants' efforts to circumvent that restriction through implementation of Section 8005, "are reasonable—indeed, predictable—challengers of the Secretary's decisions." *Match-E-Be-Nash-She-Wish*, 567 U.S. at 227–28. Their

"stake in opposing" the circumvention of Congress's protection of the lands they treasure is "intense and obvious," and easily passes the "zone-of-interests test[, which] weeds out litigants who lack a sufficient interest in the controversy." *Patchak v. Salazar*, 632 F.3d 702, 707 (D.C. Cir. 2011), *aff'd sub nom. Match-E-Be-Nash-She-Wish*, 567 U.S. 209.

4. Congress did not bar review.

At bottom, Defendants' claim is that Section 8005 affords the Executive Branch unreviewable authority to disregard Congress's enacted appropriations restrictions, to the tune of billions of dollars, and that no one may challenge its actions, no matter how injured. *See* Hearing Tr. 98:04–05, *House v. Mnuchin*, No. 19-cv-969 (D.D.C. May 23, 2019), Ct. App. Case No. 19-16102, ECF No. 39-5 (claiming that Section 8005 is judicially unenforceable because "this is not a statute that anyone really has the authority to invoke"). According to Defendants, to the extent the limitations Congress imposed on Section 8005 transfers are binding at all, they are only for Congress to address—courts may neither review nor enforce them. Stay App. 25. Defendants' claim is unlikely to succeed.[2]

[2] Defendants assert without elaboration that "[i]f Congress disagrees with a particular transfer under Section 8005, it has the necessary tools to address the problem itself." Stay App. 25. But the only uniquely congressional tools contemplated by the statute are its notification requirement, coupled with an unwritten "gentlemen's agreement" not to transfer funds in the face of congressional disapproval. *See* App. 15a. Here, the Executive Branch has simply dispensed with seeking advance approval. *See* App. 15a. And although the relevant congressional committees have explicitly disapproved the transfers at issue here, the administration has chosen to ignore those disapprovals. *See* App. 15a–16a.

This Court has repeatedly held the when the government seeks to preclude review of a "substantial statutory and constitutional challenge[]" to executive action, it is taking an "extreme position," requiring "a showing of clear and convincing evidence, to overcome the strong presumption that Congress did not mean to prohibit all judicial review of executive action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 680–81 (1986) (citations and quotation marks omitted).

Because the executive actions at issue here amount to a violation of the Constitution's Appropriations Clause, Defendants' efforts to evade review are particularly disfavored. *See* App. 51a (holding that "Plaintiffs' claim [is] fundamentally a constitutional one"). Defendants must carry a heavy burden to show that their actions to spend money in excess of what the Constitution authorizes are beyond judicial review: If "Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear . . . ." *Webster v. Doe*, 486 U.S. 592, 603 (1988).

Even when only statutory violations are at issue, clear and convincing evidence of congressional intention to preclude review is required. *See Bowen*, 476 U.S. at 680. This Court "ordinarily presume[s] that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Id.* at 681. "Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). Accordingly, "the agency

bears a heavy burden in attempting to show that Congress prohibited all judicial review of the agency's compliance with a legislative mandate." *Id.* (quotation and alteration marks omitted).

Defendants have not carried this "heavy burden." There is no indication in either Section 8005 or 10 U.S.C. § 2214 that Congress intended the restrictions it imposed on transfers to be unenforceable. Nor do "the statutes at issue in this case either expressly foreclose equitable relief or provide an express administrative remedy, which might warrant a finding of implied foreclosure of equitable relief." App. 148a n.14. In the absence of any indication that Congress intended to prohibit judicial examination of the executive action here, Defendants' efforts to circumvent congressional control over appropriations are the proper subject of this Court's review.

II. DEFENDANTS HAVE NOT SHOWN IRREPARABLE INJURY.

Defendants have sought to delay both the orderly disposition of their underlying appeal and the obligation of funds for wall construction, substantially undermining their claims of urgent and irreparable injury. As the court of appeals observed, rather than seek expedited disposition, Defendants "filed a motion to delay the expedited briefing schedule" that the court of appeals had set for the preliminary injunction appeal, and requested that the court of appeals "wait until after further anticipated decisions in the district court and our court's decision on their stay motion to propose a new briefing schedule that could govern 'any' full appeal." App. 22a n.10. Defendants then asked the court of appeals to further delay

the underlying appeal by consolidating briefing with a related cross-appeal by several states of a decision that imposed no injunction. Defs.' Mot., Ct. App. Case No. 19-16300, ECF No. 4. On July 8, five days after the court of appeals denied their stay application, Defendants proposed an appellate briefing schedule that would result in the completion of briefing on October 11—almost two weeks after, according to the administration, the funds at issue here must be spent. Defs.' Mot. to Consolidate & Establish Schedule at 4, Ct. App. Case No. 19-16300, ECF No. 7.

Defendants' sudden urgency to build the wall while their appeal is pending also represents an abrupt shift from their previous course of conduct, further undermining their claim of irreparable harm. As the district court noted, "although Congress appropriated $1.571 billion for physical barriers and associated technology along the Southwest border for fiscal year 2018," the record shows "as recently as April 30, 2019 that CBP represents it has only constructed 1.7 miles of fencing with that funding. . . . This representation tends to undermine Defendants' claim that irreparable harm will result if the funds at issue on this motion are not deployed immediately." App. 173a n.22. And although Defendants announced on February 15 that up to $2.5 billion in Section 284 military funds "will be available to build the border wall once a national emergency is declared and additional funds have been reprogrammed," App. 11a, they waited nearly three months, until May 9, to undertake the full $2.5 billion in Section 8005 transfers at issue here.

Moreover, because Defendants "ha[ve] not been particularly expeditious in seeking a stay," their own conduct "blunt[s] [their] claim of urgency and counsels

against the grant of a stay." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317–18 (1983) (Blackmun, J., in chambers). Defendants waited until July 12, nine days after the court of appeals denied their application for a stay, to file the instant application, even though they had already fully briefed the issue in the lower courts. This is inconsistent with a claim of urgency.

Finally, Defendants' shifting and murky set of purported contractual deadlines further weakening their claims of irreparable injury. In the court of appeals, Defendants claimed that they would need to begin the "complex and time-consuming process" of obligating taxpayer funds "by late June," as their "contracts contemplate that those steps will take 100 days" and funding would lapse on September 30. Defendants no longer claim a "late June" deadline, instead requesting a decision "by July 26." Stay App. 5. At the same time, Defendants now acknowledge that even the new July 26 deadline may be unnecessary in light of their ability to use a waiver authority. *See* Stay App. 36–37 & n.5; Stiglich Decl. ¶ 7. But rather than definitely apprising this Court of whether, in fact, the administration has the power to waive a purported deadline, "it has made no 'authoritative determination * * * that the statutory requirements for' a waiver have been satisfied, 'and the Secretary of the Army ha[s] made no decision to invoke this waiver authority' if it is available." Stay App. 37 n.5 (quoting Stiglich Decl. ¶ 9). If Defendants have not even taken steps within their own power to expedite matters, they have not shown the need for this Court's extraordinary intervention. And in any event, decisions have "repeatedly reaffirmed the power of the courts to

order that funds be held available beyond their statutory lapse date if equity so requires." *Connecticut v. Schweiker*, 684 F.2d 979, 997 (D.C. Cir. 1982) (quotation marks omitted).

III. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST TIP SHARPLY AGAINST ISSUANCE OF A STAY.

Congress recently considered, and rejected, the same argument Defendants make here: that a border wall is urgently needed to combat drugs. If Defendants were nonetheless permitted to obligate taxpayer funds and commence construction, the status quo would be radically and irrevocably altered, and Plaintiffs would suffer irreparable harm. For these reasons as well, Defendants' stay application should be denied.

The president specifically supported his Fiscal Year 2019 budget request with the claim that a border barrier "is critical to combating the scourge of drug addiction that leads to thousands of unnecessary deaths." App. 153a (quotation omitted). After considering the executive's arguments throughout 2018 and early 2019, Congress decided that they do not justify urgent expenditure of billions of taxpayer dollars on wall construction in Arizona, California, and New Mexico.

Defendants now request that this Court override the balance struck by Congress in February, so that they may construct a permanent wall this summer—before Congress has a chance to consider and pass another budget. As the court of appeals observed, Defendants' "rush to spend this money is necessarily driven by their understanding that Congress did not appropriate requested funding for these purposes in the current budget and their expectation that Congress will not

authorize that spending in the next fiscal year, either." App. 72a. Having weighed the same justifications Defendants put to this Court, "Congress presumably decided such construction at this time was not in the public interest." App. 74a–75a.

If Defendants are nonetheless permitted to spend taxpayer funds, there is no going back: "once the relevant funds have been obligated, a court cannot reach them in order to award relief." *City of Houston v. Dep't of Housing & Urban Dev.*, 24 F.3d 1421, 1426 (D.C. Cir. 1994). And because the environmental effects of a billion-dollar construction project are practicably impossible to undo, the balance of harms further weighs against Defendants' stay application. This Court has determined that when environmental injury is "sufficiently likely, . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). As the district court found, "Defendants' request to proceed immediately with the enjoined construction would not preserve the status quo pending resolution of the merits of Plaintiffs' claims, and would instead effectively moot those claims." App. 119a. Where, as here, staying the lower court's ruling "would be tantamount to a decision on the merits in favor of the applicants," the application should be denied. *Nat'l Socialist Party*, 434 U.S. at 1328; *see also, e.g.*, *Cousins v. Wigoda*, 409 U.S. 1201, 1206 (1972).

Defendants attempt to obscure the significant harms at issue here, asserting that the land is already disturbed. Stay App. 38–39. But Defendants in fact propose to substantially alter a protected landscape: "By Defendants' own description, they intend to replace four-to-six-foot vehicle barriers . . . with a thirty-foot 'bollard wall,'

where '[t]he bollards are steel-filled concrete that are approximately six inches in diameter and spaced approximately four inches apart' and accompanied by lighting." App. 169a. This would work a substantial change from currently-existing conditions on the wildlife preserves and national monuments that are threatened with construction. For example, according to the Department of Interior, the current vehicle barrier design in Organ Pipe National Monument "allows water, and animals, including the highly endangered Sonoran Pronghorn, to safely roam their natural ranges uninterrupted." International Border Vehicle Barrier, Dist. Ct. ECF No. 168-2 ¶ 22, Ex. 22 (RJN). Defendants' proposed construction—30-foot barriers with anti-climb plates, lighting, and roads—will completely alter this status quo, substantially changing the landscape in the Monument and throughout the more than one-hundred miles of construction. *See, e.g.,* Hudson Decl. ¶ 6, Dist. Ct. ECF No. 168-1, Ex. 10 ("Access to the Cabeza Prieta Wildlife Refuge, near the border, is along the El Camino del Diablo. Its proximity to the border makes hiking right to the current barrier possible. On foot you feel extremely connected with nature and I can hardly imagine the juxtaposition of this high border wall with the desert landscape.").[3]

[3] Defendants materially misstate the record in asserting that Plaintiffs "do not claim to have conducted any research or other productive activity in the specific areas at issue." Stay App. 40. Numerous declarations establish that Plaintiffs' members conduct research and related productive activities in the areas at issue. *See, e.g.*, Walsh Decl. ¶ 7, Dist. Ct. ECF No. 35 (declarant supervises "several ongoing and long-term biology studies . . . on the aquatic diversity of ephemeral wetlands" and studies "habitat fragmentation and population trends of several indigenous lizard species"); Hartmann Decl. ¶¶ 3–5, Dist. Ct. ECF No. 168-1, Ex. 9 (declarant published book on "natural history and social history" of lands covered by

Defendants' reliance on *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), is misplaced. There, the government substantiated its claims of national security harm with specific "declarations from some of the Navy's most senior officers, all of whom underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat." *Id.* at 24. Here, by contrast, Defendants' submissions "have not actually spoken" to the critical question of "the impact of delaying the construction" on drug trafficking. App. 70a. "That the Government's asserted interests are important in the abstract does not mean, however, that [its proposed actions] will in fact advance those interests." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994).

The administration's own assessments undermine their claim that a stay here is urgently needed so as to significantly block "deadly heroin and fentanyl" from "flowing into our Nation." Ct. of Appeals Stay Mot. at 1, Case No. 19-16102, ECF No. 7-1. According to the Drug Enforcement Agency's most recent assessment, the "majority of the [heroin] flow is through [privately operated vehicles] entering the United States at legal ports of entry, followed by tractor-trailers, where the heroin is co-mingled with legal goods." National Drug Threat Assessment at 19, Dist. Ct. ECF No. 168-2 ¶ 23, Ex. 23 (RJN). Only a "small percentage of all heroin

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Tucson Sector 1 and 2 projects, and conducted scientific and archaeological studies in the area culminating in further books and scientific publications); Broyles Decl. ¶¶ 5, 6, Dist. Ct. ECF No. 168-1, Ex. 12 (declarants' use of lands include "several thousand hours counting desert bighorn, surveying desert waterholes, measuring rainfall" and "writ[ing] and edit[ing] books and articles on the area"); Bixby Decl. ¶ 8, Dist. Ct. ECF No. 34 (declarant uses camera system in areas covered by El Paso Project 1 "to learn and share information about the wildlife that lives in these habitats").

seized by CBP along the land border was between Ports of Entry." *Id.* Likewise, according to the Drug Enforcement Agency, fentanyl transiting the Southern border is most commonly smuggled in "multi-kilogram loads" in vehicles crossing at legal ports of entry. *Id.* at 33. In short, as the court of appeals concluded, "the evidence before us does not support a conclusion that enjoining the construction of the proposed barriers until this appeal is fully resolved will have a significant impact" on drug trafficking. App. 70a.

An even more critical distinction between this case and *Winter* is that in *Winter* the challenged injunction was both unrelated to the merits and upended the status quo. As this Court explained, because there was no claim that the Navy "must cease sonar training, there [wa]s no basis for enjoining such training in a manner credibly alleged to pose a serious threat to national security." 555 U.S. at 32–33. Moreover, the injunction in *Winter* drastically altered the status quo: at that point "training ha[d] been going on for 40 years with no documented episode of harm." *Id.* at 33. Here, by contrast, the status quo would be radically and irrevocably altered if Defendants were permitted to construct a multibillion-dollar wall across delicate national parks.

Finally, it would be inequitable to assign significant weight to any new and unlawful financial obligations that Defendants took on through contracts they signed during the course of litigation over this motion. Stay App. 37–38. As the court of appeals observed, "[w]hen DoD awarded contracts on April 9 for El Paso Project Sector 1, and May 15 for Yuma Project Sector 1 and Tucson Project Sectors

1-3, DoD knew this litigation was pending and that the district court had been asked to enter a preliminary injunction. Placing significant weight on financial obligations that Defendants knowingly undertook would, in effect, reward them for self-inflicted wounds." App. 72a. Moreover, Congress has made it illegal to "involve [the United States Government] in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). "If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive." *Richmond*, 496 U.S. at 428.

In short, issuance of a stay that would permit Defendants to immediately "spend this money is not consistent with Congress's power over the purse or with the tacit assessment by Congress that the spending would not be in the public interest." App. 72a. And if "the decision to spend [is] determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened.'" *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring)).

CONCLUSION

The administration's application for a stay should be denied.

Respectfully Submitted,

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