Nos. 19-16102, 19-16300, 19-16299, 19-16336

In the United States Court of Appeals for the Ninth Circuit

SIERRA CLUB; SOUTHERN BORDER COMMUNITIES COALITION,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States, in his official capacity, et al.,
Defendants-Appellants.

STATE OF CALIFORNIA, et al.,
Plaintiffs-Appellees-Cross-Appellants,

v.

DONALD J. TRUMP, President of the United States, in his official capacity, et al.,
Defendants-Appellants-Cross-Appellees.

APPELLEES' ANSWERING BRIEF

On Appeal from the United States District Court
for the Northern District of California

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in Plaintiffs-Appellees.

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INTRODUCTION

Congress has considered, and rejected, the Executive Branch's plans to spend billions of dollars on construction of the specific barriers at issue in this appeal. Congress has weighed 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." No. 19-16102 (9th Cir. July 3, 2019), ECF No. 76 at 2 (Stay Op.).

The impasse between Congress and the administration over border 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 construction.

Defendants now ask this Court to allow them to spend billions of dollars that Congress denied, across more than a hundred miles of lands on which Congress refused to authorize construction. Defendants maintain 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 argue 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' primary argument is that no court may review the lawfulness of their conduct, based on their contention that Plaintiffs' claims, which are founded in equity and the Constitution, do not fall within the "zone of interests" of the statutes Defendants invoke in *defense* to those claims. But if the Appropriations Clause means anything, it means that no executive officer can spend funds that Congress has refused to authorize. As this Court established several years ago in a binding decision, persons who are injured by such expenditures may call upon the courts to protect them.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331, and entered final judgment under Federal Rule of Civil Procedure 54(b) on June 28, 2019. The government timely appealed on June 29, 2019. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the prior published decision in this case is binding law of the circuit.
2. Whether, as this Court's prior decision held, Plaintiffs have a cause of action to enjoin Defendants' violations of the Appropriations Clause.

3. Whether, as this Court's prior decision held, Plaintiffs have an equitable cause of action to enjoin Defendants' *ultra vires* actions.
4. Whether the district court's injunction may be upheld on the alternate grounds that Defendants are violating 10 U.S.C. § 284 and the National Environmental Policy Act.
5. Whether, as this Court's prior decision held, the district court did not abuse its discretion in issuing the injunction.

STATEMENT OF THE CASE

A. Factual Background

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." SER153. Throughout 2018, Congress rejected numerous bills that would have provided billions of dollars for wall construction. Stay Op. 6 (collecting failed legislation). Community and environmental organizations—including Plaintiffs—advocated with lawmakers to limit the scope and location of any construction. SER84, SER89.

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 (CBP)." Stay Op. 8.

On February 14, 2019, after extensive negotiations among the political branches, Congress denied the President's request, instead passing the CAA, Pub. Law No. 116-6, 133 Stat. 13 (2019). The CAA made available only $1.375 billion for wall construction, and restricted construction to eastern Texas. Stay Op. 9-10. 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." Stay Op. 10. 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." SER186. 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"). Stay Op. 11 (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," SER164, 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, ER196. 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, ER282, and an additional $1.5 billion transfer on May 9, 2019, ER169.

Because DoD's Section 284 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 2019 Department of Defense Appropriations Act, Pub. Law No. 115-245 (2019), to fill the account with funds appropriated for other purposes. The Acting Secretary of Defense ordered that funds appropriated for purposes ranging from military pay and pensions, ER290, modification of in-service missiles, ER179, and support for

U.S. allies in Afghanistan, ER181, 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." Stay Op. 15 n.6. 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." ER173.

Plaintiffs' members frequently use the lands on which Defendants seek to construct a massive, multibillion-dollar wall. *See, e.g.*, SER54. 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. SER60, SER65.

Many miles of the proposed construction will run along the Organ Pipe National Monument, replacing the short, wildlife-permeable vehicle barriers that currently exist there. 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." SER207. The current "barrier design allows water, and

animals, including the highly endangered Sonoran Pronghorn, to safely roam their natural ranges uninterrupted." SER207. Defendants' proposed new barrier is much higher, much denser, and would radically alter the status quo in these delicate lands. *See* ER64.

Although Congress in the CAA specifically refused to fund DHS construction "within certain wildlife refuges and parks," Stay Op. 10, DHS issued waivers purporting to waive all environmental restrictions on construction in these protected lands. ER60. Because Congress has refused to fund DHS's construction request, Defendants claim to act solely under separate DoD authority—even as they simultaneously claim an exception from environmental law applicable only to DHS construction.

B. Procedural History

Plaintiffs sued on February 19, 2019, the next business day after the President's announcement that he intended to construct the wall that Congress rejected. Plaintiffs sought injunctions against specific wall segments as Defendants made public their construction decisions. To enable expeditious and orderly review, Plaintiffs sought partial summary judgment and a permanent injunction on June 12.

On May 24, the district court entered a preliminary injunction barring Defendants' initial transfer of $1 billion to construct wall sections in Arizona and

New Mexico. The district court concluded that Defendants' plan was unlawful, because they had not identified any authority permitting construction in excess of what Congress had appropriated in the CAA. In particular, the district court found that the construction at issue was "denied by Congress" and was not "unforeseen," failing the requirements of the authority Defendants had invoked.

The district court 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." ER96. The court observed that Defendants' unreasonably 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. ER94-ER96, ER99-ER100; *see also* SER164 ("The President requests $5.7 billion for construction of a steel barrier for the Southwest border."). The district court further rejected Defendants' contention that the need for wall funds was "unforeseen" because the Executive Branch had repeatedly asserted that billions of dollars were needed for these same projects. ER96-ER99.

The district court also rejected Defendants' argument that Plaintiffs were required to satisfy a zone-of-interests test with respect to Defendants' actions

because 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." ER44.

The district court rejected Plaintiffs' environmental law claims, finding that—in spite of DoD's claims that it was exercising its own authority—DoD was acting entirely for DHS and therefore DHS's waiver applied. ER62.

On June 28, 2019, the district court issued a permanent injunction incorporating its prior reasoning on the merits. ER4-ER9.

Defendants sought an emergency stay of the district court's injunction. On July 3, 2019, a motions panel of this Court 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." Stay Op. 4.

This Court rejected Defendants' argument that their actions were unreviewable. It concluded that Plaintiffs could proceed under traditional equitable review of unlawful executive action, or under the Administrative Procedure Act

(APA)—and "[t]o the extent any zone of interests test were to apply to Plaintiffs' constitutional claims . . . it would be satisfied here." Stay Op. 4-5.

Finally, this Court rejected Defendants' arguments on the equities. The Court 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." Stay Op. 5; *see also* Stay Op. 73-75.

Judge Smith dissented, but did not conclude 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. Stay Op. Dissent 12-24.

In dissenting from the majority's refusal to grant a stay, Judge Smith also relied on his understanding 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." Stay Op. Dissent 26 & n.15.

On July 26, 2019, a majority of the Supreme Court issued a one-paragraph order staying the permanent injunction. The order contains the following explanation: "Among the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." Stay Order & Op. 1, No. 19A60 (S. Ct. July 26, 2019) ("SCt. Stay Order"). The only other statement on the merits in the Supreme Court's order is Justice Breyer's separate explanation that "This case raises novel and important questions about the ability of private parties to enforce Congress' appropriations power." SCt. Stay Order 1-2 (Breyer, J., concurring in part and dissenting in part).

SUMMARY OF ARGUMENT

The injunction should be affirmed. This Court's prior published decision is law of the circuit and binding on every issue it resolved. There is no support for Defendants' claim that this Court's precedential decision has been rendered nonbinding by the Supreme Court's grant of a stay. As numerous decisions confirm, Supreme Court stay orders do not purport to decide merits issues or to vacate circuit precedent. Decades of circuit law establish that the published motions panel decision continues to control this appeal.

Moreover, the motions panel's decision was correct on the merits and was compelled by earlier circuit precedents. In *United States v. McIntosh*, 833 F.3d

1163 (9th Cir. 2016), this Court held that a claim for injunctive relief is available under the Appropriations Clause for plaintiffs injured by governmental violations of a restriction contained in an appropriations act. That binding precedent establishes that Plaintiffs have a constitutional cause of action because Defendants are violating Congress's enacted appropriations decisions. Plaintiffs also have an *ultra vires* cause of action to enjoin Defendants' actions in excess of authority. And as the motions panel correctly found, Plaintiffs satisfy any relevant zone-of-interest requirement.

This Court may additionally affirm the district court on the alternate grounds that Defendants' actions are not authorized by 10 U.S.C. § 284, a statute on which they purport to rely, and violate the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-47 (1969).

Finally, the district court did not abuse its discretion in issuing the injunction. As this Court has already found, the record does not support Defendants' claims of harm, and instead establishes serious harms both to Plaintiffs and to the public interest.

ARGUMENT

I. The Motions Panel's Published Decision Controls This Appeal.

Defendants attempt to sidestep this Court's prior published decision by asserting that the Supreme Court has "abrogated" it, and "expressly and implicitly

rejected the panel majority's reasoning." OB 24. Defendants' claim contradicts both the text of the Supreme Court's order as well as this Court's (and other circuits') settled rules for determining whether published precedent remains binding in these circumstances.

A. The published motions panel decision remains binding law of the circuit.

Unlike the Supreme Court, the motions panel heard argument, ordered supplemental briefing, and wrote a 75-page reasoned decision. This Court's decision, by its own terms, decided numerous questions central to the merits of this dispute. The Court published its opinion, rendering it binding authority on panels in this Circuit.

Relying on Defendants' own claims of urgency, and unlike the Supreme Court in its subsequent order, the motions panel expressly decided the merits of the arguments Defendants raise here. All three judges acknowledged that they were "analyzing the merits at this stage," Stay Op. 31 & n.13, and the dissenting opinion expressly recognized that the motions panel was "potentially binding the merits panel." Stay Dissent 2 n.1. The majority explained that it reached the merits based on Defendants' assertions that the ordinary appellate process was too slow because "the Executive Branch will lose its ability to spend the reprogrammed money by the beginning of July, if not earlier." Stay Op. 31 n.13. Accordingly, under "the

unusual circumstances of this case," the Court addressed "the merits more fully than we otherwise might in response to a stay request." Stay Op. 30-31.

The Court took the step of publishing its stay decision, ensuring that it acts as precedent here. This Court has made clear that "a motions panel's published opinion binds future panels." *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015); *see id.* at 744, 747 (holding that published decision on emergency motion to stay injunction was binding); *see also In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) ("[A] published decision is final for such purposes as stare decisis, and full faith and credit, unless it is withdrawn by the court." (quotation marks omitted)). "Designating an opinion as binding circuit authority is a weighty decision," *Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001), and here the Court chose to take that step.

B. The Supreme Court did not "abrogate" this Court's published decision.

Defendants assert that the Supreme Court "abrogated" this Court's precedent. But by its own terms, the Supreme Court's order neither vacated this Court's decision nor purported to decide whether this Court was correct in holding that Plaintiffs have a cause of action. Unless and until the Supreme Court does so, this Court's prior decision on the merits remains binding.

Years of precedent confirm that Supreme Court stay orders do not decide the merits of disputes or overrule circuit court law. Lower courts therefore continue to

follow published circuit opinions on stay applications—even when the Supreme Court has subsequently granted a stay previously denied by a court of appeals. As the Sixth Circuit observed in *Dodds v. United States Department of Education*, a Supreme Court stay decision "does nothing more than show a possibility of relief," and thus cannot be read to decide the questions answered by appellate stay panels or to upset a circuit's "settled law." 845 F.3d 217, 221 (6th Cir. 2016) (per curiam). District courts around the country also understand that if the circuit court resolves an issue in a published decision, courts may not "ignore this binding precedent because the Supreme Court stayed the . . . Circuit's decision." *Doe v. Trump*, 284 F. Supp. 3d 1182, 1185 (W.D. Wash. 2018); *see also id.* (noting that "this court is not at liberty to simply ignore binding Ninth Circuit precedent based on Defendants' divination of what the Supreme Court was thinking when it issued the stay orders"); *Durham v. Prudential Ins. Co. of Am.*, 236 F. Supp. 3d 1140, 1147 (C.D. Cal. 2017) ("[I]t appears that a stay of proceedings pending Supreme Court review does not normally affect the precedential value of the circuit court's opinion."); *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 635 (M.D.N.C. 2016) ("[D]espite the stay and recall of the mandate, the Supreme Court did not vacate or reverse the Fourth Circuit's decision. Thus, while other courts may reach contrary decisions, at present [the stay panel's published decision] remains the law in this circuit." (citations omitted)).

Here, the Supreme Court was explicit that its stay decision was not a merits ruling and was limited to the preliminary showing required under the Supreme Court's stay standard. The Supreme Court emphasized that it was applying this lesser standard with this deliberate wording. *See* SCt. Stay Order 1 (explaining that "the Government has made a sufficient showing at this stage"). Under the Supreme Court's stay jurisprudence, a "sufficient showing" at the stay "stage" requires only a "fair prospect" that Defendants' arguments will ultimately be accepted by five justices. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Defendants' own briefs acknowledge that this is the standard the Court employs. *See* Defs.' Stay Appl. 21-22, No. 19A60 (S. Ct. July 12, 2019) (arguing that "if the Ninth Circuit affirms and this Court grants review, there is at least a 'fair prospect' that this Court will vacate the injunction"). The Supreme Court has thus routinely granted stays in cases where it ultimately decided not to vacate or reverse the underlying rulings. *See, e.g.*, *Herbert v. Kitchen*, 134 S. Ct. 893 (2014); *McQuigg v. Bostic*, 135 S. Ct. 314 (2014); *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014); *Buck v. Thaler*, 565 U.S. 1022 (2011); *Lovitt v. True*, 545 U.S. 1152 (2005); *Ibarra v. Duc Van Le*, 510 U.S. 1085 (1994).

In short, "[a]lthough a decision by the Court to grant a stay may take into account '[w]hether the applicant has a reasonable probability of prevailing on the

merits of the case,' it is not a merits decision." *Messer v. Kemp*, 831 F.2d 946, 957 (11th Cir. 1987) (citation omitted).

C. The Supreme Court's stay order did not impliedly overrule this Court's reasoning.

Because the Supreme Court did not purport to overrule or vacate this Court's earlier order, this Court's published stay opinion must be applied unless the Supreme Court's reasoning in its intervening order is "clearly inconsistent with the prior circuit precedent." *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (quotation marks and citations omitted). "This is a high standard," and it is not met here. *Id.* (quotation marks and citations omitted).

Under this Court's rules, which seek to "preserve the consistency of circuit law," a panel decision is impliedly overruled only if the Supreme Court's order "is clearly irreconcilable with our prior circuit authority." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). "For a three-judge panel to hold that an intervening Supreme Court decision has 'effectively overruled' circuit precedent, the intervening decision must do more than simply 'cast doubt' on our precedent." *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011). "Although we should consider the intervening authority's reasoning and analysis, as long as we can apply our prior circuit precedent without 'running afoul' of the intervening authority, we must do so." *Lair*, 697 F.3d at 1207 (quoting *United States v. Orm Hieng*, 679 F.3d 1131, 1140 (9th Cir. 2012)). "Nothing short of 'clear

irreconcilability' will do." *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1074 (9th Cir. 2018).

To determine whether a panel decision is "clearly inconsistent" with a subsequent Supreme Court decision, the court "focus[es] on the respective bases for those decisions to determine whether [the Supreme Court's] reasoning so undercuts the principles on which [the panel] relied that our prior decision cannot stand." *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 980 (9th Cir. 2013). Here, the panel set forth detailed reasoning supporting its conclusions that "Defendants' attempt to reprogram and spend these funds . . . violates the Appropriations Clause," Stay Op. 45, that "Plaintiffs have an avenue for seeking relief," Stay Op. 45, that the record does not support Defendants' claims of hardship, Stay Op. 70, and that Defendants' plans to circumvent Congress's funding decision are contrary to the public interest. Stay Op. 73-75.

Contrary to Defendants' unsupported claim, nowhere in the Supreme Court's order is there any discussion at all of the "panel majority's reasoning," much less an "express[] and implicit[]" overruling of that reasoning. OB 24. The Supreme Court did not *decide* any of the questions addressed by the motions panel, and its grant of a stay "does nothing more than show a possibility of relief." *Dodds*, 845 F.3d at 221. Nor did the Supreme Court elaborate a rule that "so undercuts" the stay panel's reasoning as to effectively overrule it. *Rodriguez*, 728 F.3d at 980.

Defendants maintain that the Supreme Court's order "strongly signaled" that Defendants' claims of unreviewable authority will ultimately prevail. OB 22. But a "signal" from the Supreme Court does not alter this Court's obligation to follow binding precedent. As this Court has repeatedly explained, "[i]t is not enough for there to be some tension between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to cast doubt on the prior circuit precedent." *Lair*, 697 F.3d at 1207 (quotation marks and citations omitted). Unless and until the Supreme Court or an en banc panel of this Court issues a decision incompatible with this Court's published reasoning, the motions panel's decision controls. *See, e.g.*, *Close*, 894 F.3d at 1074 (holding that previous panel's "reasoning would be suspect today, but it is not clearly irreconcilable with intervening higher authority," and "therefore controls our analysis"). Defendants' contrary position "is foreclosed by *Gammie* because of [the] motions panel decision." *Lair*, 798 F.3d at 747.

II. The Panel Correctly Held That Defendants' Unlawful Transfer Of Military Funds Is Subject To Judicial Review.

Defendants devote much of their Opening Brief to a broad claim that their actions are unreviewable. In their view, even though Congress denied the Executive Branch the billions of dollars it sought, no constitutional issue is raised by Defendants nonetheless funneling military funds to the border wall, and no

court can review in equity an executive officer's action so long as the officer invokes a statute—any statute—in defense of its actions. Defendants are wrong.

Plaintiffs sought an injunction because Defendants' plan to circumvent congressional appropriations decisions resulted in a judicially-redressable injury to Plaintiffs. As the motions panel recognized, "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." Stay Op. 33-34. 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).

Defendants' plan to spend money in the absence of Congress's valid appropriation—indeed, in a manner contrary to Congress's valid appropriation—is both an *ultra vires* executive action and a violation of the Appropriations Clause, and is actionable under the judiciary's traditional equitable powers as well as under the APA. "Defendants' defense to this claim is that, through Section 8005, Congress allowed Defendants to make this reallocation." Stay Op. 34. Both the district court and this Court 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 statute Defendants assert in defense of their actions. 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. 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.

A. 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.

Even if the motions panel's decision were not binding, under this Court's settled law Plaintiffs have a constitutional cause of action in equity under the Appropriations Clause because the Executive Branch seeks to spend funds that Congress has not appropriated. In *United States v. McIntosh*, this Court explained that when the government violates a restriction contained in an appropriations statute, it is "drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause." 833 F.3d 1163, 1175 (9th Cir. 2016). "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for . . . the courts to enforce them when enforcement is sought." *Id.* at 1172. While "novel and important questions about the ability of private parties to enforce Congress' appropriations power" may yet be undecided

by the Supreme Court, SCt. Stay Op. 1-2 (Breyer, J., concurring in part and dissenting in part), they have been settled in this circuit since 2016.

Where, as here, a litigant has Article III standing, it is circuit law that a constitutional cause of action will lie for the spending of funds in violation of an appropriations act. *See McIntosh*, 833 F.3d at 1174. *McIntosh* establishes that private plaintiffs can invoke the Appropriations Clause as the source of a constitutional cause of action, consistent with the numerous cases establishing that "private parties, rather than government departments, were able to rely on separation-of-powers principles in otherwise justiciable cases or controversies." *Id.* (collecting cases). This Court grounded this ruling in the principle that "separation-of-powers constraints in the Constitution serve to protect individual liberty, and a litigant in a proper case can invoke such constraints '[w]hen government acts in excess of its lawful powers.'" *Id.* at 1174 (quoting *Bond v. United States*, 564 U.S. 211 (2011)). *McIntosh* is clear: Plaintiffs have a constitutional cause of action if they have an Article III injury arising from Defendants' efforts to spend money in contravention of congressional will. *Id.*

Defendants attempt to evade *McIntosh* by declaring its constitutional holdings "dicta." OB 41. According to Defendants, the plaintiffs in *McIntosh* "fell squarely within the core of the statute's zone of interests," and this Court simply failed to take any notice of it in the opinion. OB 41. The pages of constitutional

discussion in *McIntosh* were, according to Defendants, entirely unnecessary and should be ignored. Defendants' unsupported assertion does nothing to erase this Court's reasoned discussion and conclusion in *McIntosh* that when the Executive Branch spends money in violation of an appropriations act, it is "violating the Appropriations Clause," which is "a separation-of-powers limitation that [litigants] can invoke" to enjoin the violation. *McIntosh*, 833 F.3d at 1175. As this Court held en banc in *United States v. Johnson*, "where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." 256 F.3d 895, 914 (9th Cir. 2001); *see also, e.g.*, *United States v. Tydingco*, 909 F.3d 297, 303 (9th Cir. 2018) (rejecting argument that panel's conclusion was "mere dictum" where "[t]he opinion considered the question at some length").[1]

Defendants argue that no constitutional action lies here, because their disregard of the restrictions in an appropriations act "must be understood as [a] statutory" violation with no constitutional implications. OB 38. Defendants maintain that the Supreme Court decided this question twenty-five years ago, in

[1] Defendants do not attempt to defend Judge Smith's dissenting argument that *McIntosh* is limited to a defense in criminal prosecutions, and inapplicable to affirmative injunctive claims. *Cf.* Stay Dissent 21. As the motions panel recognized, Stay Op. 48-49, *McIntosh* by its own terms addressed injunctions: "Appellants . . . can seek—and have sought—to enjoin [an agency] from *spending funds*" contrary to Congress's restrictions. *McIntosh*, 833 F.3d at 1172.

Dalton v. Spector, 511 U.S. 462 (1994). As described above, *McIntosh*, which postdates *Dalton* by two decades, squarely forecloses Defendants' argument in this circuit. *See Naruto v. Slater*, 888 F.3d 418, 425 n.7 (9th Cir. 2018) (subsequent panels "must faithfully apply" the law of the circuit, "even when the panel believes the precedent is unwise or incorrect" (quotation marks omitted)). But even if it were not foreclosed by binding circuit precedent, Defendants' argument fails on its own terms.

Defendants seek to contort *Dalton*'s general 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, if they simply invoke a statute in support of their spending action, no matter how inapplicable, an Appropriations Clause violation is transmuted into an unavailable statutory claim. But whatever *Dalton* stands for, nothing in that decision remotely bears on the availability or scope of an Appropriations Clause challenge. The mere fact that Congress's appropriations power is necessarily exercised through appropriations acts does not render an Appropriations Clause challenge an ordinary statutory claim dressed up in constitutional finery.

As the motions panel held, "[s]tatutory and constitutional claims are not mutually exclusive"—a conclusion supported by the language this Court used in

Dalton itself. Stay Op. 49. 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." Stay Op. 52. Here, because Section 8005 provides no authority, Defendants are "drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause." *McIntosh*, 833 F.3d at 1175.

But even if *Dalton* somehow rendered all Appropriations Clause claims unavailable so long as an executive official invokes a statute, *Dalton* still would not preclude review here. *Dalton* has no application to claims stemming from presidential actions that are "incompatible with the expressed or implied will of Congress," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring), nor to statutes that are unconstitutional if interpreted as the government contends. Indeed, review would be available under these circumstances even if Congress had expressly barred review. "Even where the statutory provision absolutely bars judicial review, however, there are two situations where review is nonetheless available: First, courts maintain jurisdiction to consider constitutional claims, and, second, jurisdiction exists where defendant is charged with violating a clear statutory mandate or prohibition." *Staacke v. U.S.*

Sec'y of Labor, 841 F.2d 278, 281 (9th Cir. 1988) (quotation marks and citations omitted). Both situations apply here.

First, 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 v. City of New York*, 524 U.S. 417, 444 & n.35 (1998). "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.

Second, Defendants have violated a clear statutory prohibition. 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* Stay Op. 5-9 (detailing Congress's specific and repeated consideration and rejection of legislation that would fund this construction). Congress denied the item at issue here, and prohibited in Section 8005 any transfer for an item it so denied. Review is available where, as here, an administration usurps congressional prerogatives. Because it is "quite clear that section 8005 does not authorize the reprogramming," Stay Op. 52 n.22, Defendants cannot invoke that authority as a bar against review.

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

There is nothing extraordinary about actions to enjoin *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). "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 asserts a statutory authority. In *Harmon*, for example, the Supreme 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 Supreme Court explained, the district court had the "power to construe the statutes involved to determine whether the respondent did exceed his powers." *Harmon*, 355 U.S. at 582. Similarly, in *Dames & Moore v. Regan*, the Supreme 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). Although 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,'" the Supreme Court did not require the identification of any private right of action under the claimed statutory authorities. *Id.* at 675; *see also, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187-88 (1993) (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 de 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)). Thus, 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 the Supreme 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, courts have permitted judicial review of *ultra vires* executive action without invoking a zone-of-interests test. Thus, in *Dames & Moore*, there was no requirement that the plaintiff somehow establish injuries lying within the zone of interests of the Hostage Act, which the executive invoked and which the Supreme Court held did not authorize the executive action. 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* Stay Op. 60 ("[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 any time 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.

Defendants argue that, notwithstanding hundreds of years of *ultra vires* review, all previous *ultra vires* decisions simply failed to recognize that "the equitable powers that the lower federal courts exercise are themselves conferred by statute," and are thus subject to the zone-of-interests limitations that apply to statutory claims. OB 32. But this argument proves far too much, as this Court explained: "Although Defendants are correct that Congress granted federal courts equity jurisdiction by statute, it a stretch to conclude that the traditional equitable cause of action to enjoin a constitutional violation was therefore created by statute. Indeed, the lower federal courts are created entirely by statute, but this does not mean that all constitutional claims filed in a federal district court are really statutory claims." Stay Op. 62-63 n.25 (citation omitted). Defendants' reliance on the restrictions applicable to private rights of actions for damages is equally unavailing. *See* OB 32-33 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017)). There is no question that courts' traditional equitable powers provide for relief in a far broader set of cases than are actionable in damages. *See Ziglar*, 137 S. Ct. at

1858 ("[I]f equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations."); *Gingery v. City of Glendale*, 831 F.3d 1222, 1233 (9th Cir. 2016) ("Unlike Section 1983, the availability of an equitable cause of action to enjoin purportedly unconstitutional conduct does not necessarily rely upon the fact that a particular constitutional provision confers an individual right on the plaintiff."); *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").

In short, 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. It would subvert the Supreme Court's canonical decision in *Youngstown* if the government could simply evade *ultra vires* review by cloaking a claim of unauthorized executive action in dubious statutory authority.[2]

[2] Defendants do not attempt to seriously defend the dissenting 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* Stay Op. Dissent 19-24. As this Court held, circuit precedent "clearly contemplates that claims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA." Stay Op. 56-57 (citing *Navajo Nation v. Dep't of Interior*, 876 F.3d 1144 (9th Cir. 2017), and *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989)). Other courts agree: "[E]nactment of the APA . . . does not repeal the review of *ultra vires* action recognized long before," *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (citation omitted). "It does not matter, therefore, whether traditional APA review is foreclosed, because

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

At the threshold, there is no cause for this Court to consider Defendants' argument that the zone-of-interests requirement applies to constitutional claims. Defendants make this argument for the first time on appeal, and have therefore waived it. *See Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1087 n.6 (9th Cir. 2003) ("[B]ecause the zone of interests test is merely prudential rather than constitutional it is waivable, and Defendants have waived it by not raising it below.").

Even if their argument were not waived, Defendants are wrong that Plaintiffs' constitutional claims should be subject to zone-of-interests limitations. Both the Supreme Court and this Court have only ever applied this limitation to constitutional claims under the dormant Commerce Clause, and this Court has followed Justice Scalia's view that the test is particularly applicable to this single type of constitutional claim. *See Individuals for Responsible Gov't, Inc. v. Washoe Cty. ex rel. Bd. of Cty. Comm'rs*, 110 F.3d 699, 703 (9th Cir. 1997) (noting zone-of-interests limit applies to constitutional claims "under the negative [dormant] commerce clause *in particular*" (emphasis added) (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting)). Indeed, the Supreme Court has

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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).

"recast the zone-of-interests inquiry as one of statutory interpretation," and has not applied the zone-of-interests test to any constitutional claim in decades. *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1120-21 (9th Cir. 2015) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127-28 (2014)). The Supreme Court made no mention of the test in its most recent examination of a dormant Commerce Clause challenge. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, No. 18-96 (U.S. June 26, 2019).[3]

In any event, 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." Stay Op. 67-68 (citing cases).

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, "Section 8005 would still prescribe the relevant zone of interests that plaintiffs must satisfy." OB 39. But Defendants cite no case holding

[3] The last reference to a zone of interests in the Supreme Court's constitutional jurisprudence is in Justice Scalia's dissent in *Wyoming v. Oklahoma*, where he predicted that if the majority's "rejection of the zone-of-interests test is applied logically, we can expect a sharp increase in all constitutional litigation." 502 U.S. at 473 (Scalia, J., dissenting). This view did not command a majority and the intervening decades have not borne out this prediction.

that the zone of interests of a constitutional claim should be determined by reference to a statute, particularly not one invoked in defense against a constitutional claim.[4]

Moreover, Defendants' effort to graft a statutory zone-of-interests test onto a constitutional or equitable cause of action should be rejected for the absurd—and dangerous—results it would produce. 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. *See* OB 40 (asserting that zone-of-interests test applies when statute is a "necessary ingredient" of constitutional claim). But the challengers, including "a farmers' cooperative consisting of about 30 potato growers in Idaho," 524 U.S. at 425, had interests that were plainly inconsistent

[4] Defendants wrongly claim that the D.C. Circuit in *Haitian Refugee Center* actually concluded that the ordinary zone-of-interests analysis applies to plaintiffs raising a claim that the government acted *ultra vires*. OB 40. The D.C. Circuit explicitly said the opposite. As both the stay panel and the D.C. Circuit held, the relevant zone-of-interests inquiry in an *ultra vires* case is not the inapplicable power invoked by the executive (here Section 8005), but instead the restriction on such lawless action (here the Appropriations Clause). *See Haitian Refugee Ctr.*, 809 F.2d at 811 n.14 ("[W]ere a case like *Youngstown* [] to arise today, the steel mill owners would not be required to show that their interests fell within the zone of interests of the President's war powers . . . . [I]t may be that the zone of interests requirement is satisfied because the litigant's challenge is best understood as a claim that *ultra vires* governmental action that injures him violates the due process clause.").

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)). If Defendants were correct, no individual harmed by the Line Item Veto Act would have been in a position to challenge its constitutionality.

Neither this Court nor the Supreme Court has ever applied a statutory zone-of-interest restriction to a constitutional claim. *Cf.* OB 26 (citing *Lexmark* and *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 178 (2011), both of which address statutory private rights 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. This Court correctly concluded that Plaintiffs could bring their claim under the APA, *see* Stay Op. 53-57, and, under the APA, a "suit should be allowed unless the statute evinces discernible congressional intent to *preclude* review." *White Stallion Energy Ctr., LLC v. E.P.A.*, 748 F.3d 1222, 1269 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part) (emphasis added). Defendants have not even attempted to show such a preclusive intent here.

Defendants fundamentally misunderstand the zone-of-interests test in arguing that Plaintiffs' claims are unreviewable because Section 8005 seeks to benefit Congress's control over appropriations rather than Plaintiffs, or because

Section 8005 does not mandate consideration of environmental harms. *Cf.* OB 29-30. 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' interests cannot meaningfully diverge from Congress's interests in enacting Section 8005. And like the statute in *Scheduled Airlines*, if private plaintiffs could not enforce Section 8005 it would be effectively unenforceable—defeating Congress's will.

Second, the Supreme Court has already rejected the crabbed zone-of-interests theory that Defendants advance here. In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, this Court considered a statute that "authorizes the acquisition of property 'for the purpose of providing land for Indians.'" 567 U.S. 209, 224 (2012) (citation omitted). The statute said nothing at all about construction, imposed no environmental or aesthetic restrictions, and was enacted entirely for the benefit of Indians. The Supreme Court nonetheless held

that the "environmental" and "aesthetic" interests of non-Indians lay within the statute's bounds. *Id.* at 227.

As the Supreme Court explained, it was of no moment that the plaintiff was "'not an Indian or tribal official seeking land' and does not 'claim an interest in advancing tribal development.'" *Id.* at 225 n.7 (citation omitted). Nor did it matter that the statute addressed only predicate land purchases, and said nothing at all about construction—much less imposed any aesthetic or environmental restrictions. 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 the ultimate use of the lands that the plaintiff objected to, as he claimed that 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). This connection was sufficient.

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 of Defense was required to consider that ultimate use—including through his finding that Congress had not denied funds for the border wall. ER286. 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 disallowing "construction within certain wildlife refuges and parks." Stay Op. 10. Defendants place significant weight on the fact that "Section 8005 does not regulate or limit DoD's use of public lands, nor does it require the Secretary to consider aesthetic, recreational, or environmental interests." OB 28. But this was precisely the case with respect to the statute at issue in *Match-E-Be-Nash-She-Wish*, and the Supreme Court nonetheless found the "environmental" and "aesthetic" interests sufficient. 567 U.S. at 227-28.

Plaintiffs' interests are directly affected by Defendants' efforts to circumvent congressional restrictions through implementation of Section 8005. Their "stake in opposing" 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.

D. Congress did not bar review.

At bottom, Defendants' argument is that Section 8005 affords the Executive Branch unreviewable authority to disregard Congress's enacted appropriations restrictions, to the tune of billions of dollars. *See* Hearing Tr. 98:04-05, *House v. Mnuchin*, No. 19-cv-969 (D.D.C. May 23, 2019), 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, courts may neither review nor enforce them. OB 29-30. Defendants are wrong.[5]

The Supreme Court has repeatedly held that 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). Defendants take that extreme position now, and simply assert, without elaboration, that "the presumption in favor of judicial review of agency action" has no application. OB 30.

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 Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting that if "Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear"). But even when only statutory violations are at issue, clear

[5] Defendants assert without elaboration that "[i]f Congress disagrees with a particular transfer . . . it has the necessary tools to address the problem itself." OB 29. But Defendants identify no congressional tool that can enforce the limitations enacted in Section 8005. They instead suggest that Congress could "enact[] new legislation." OB 29. There is no support for Defendants' theory that Congress must speak twice before its commands are enforced.

and convincing evidence of congressional intention to preclude review is still required. *See Bowen*, 476 U.S. at 680. Courts "ordinarily presume 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 that Congress intended the restrictions it imposed on transfers to be unenforceable.

III. The Panel Correctly Held That The Administration Could Not Lawfully Circumvent Congress By Transferring Military Funds To Build The Wall.

Defendants have acted to divert $2.5 billion from military accounts to wall construction, claiming that they may do so under transfer authorities that 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." Stay Op. 14 (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.

No court has endorsed Defendants' implausible interpretation of Section 8005. Nor has the Supreme Court suggested that Defendants have any chance of establishing that the transfers are lawful. Defendants have no authority to funnel billions of dollars in military funds to the wall.

A. 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. ER196.

Defendants maintain that Congress's refusal to fund any wall construction outside of Texas is irrelevant, pressing an unnaturally narrow reading of Section 8005's reference to an "item" that was "denied by the Congress." Defendants' theory is that "an 'item for which funds are requested'" refers to "a particular budget item" for Section 8005 purposes, so "Congress's decisions with respect to DHS's more general request for border-wall funding [are] irrelevant." Stay Op. 37. 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 this Court has 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. Stay Op. 37-38. 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." Stay Op. 37-38.

Defendants argue that both the district court and this Court erred in finding that the item that Congress denied was "a generic 'border wall,'" because Congress did not consider wall subsections funded "under DoD's counter-narcotics support line." OB 45. This defies logic and 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. And Congress's decision imposed substantive restrictions that Defendants ignore here, "including by not allowing construction within certain wildlife refuges and parks." Stay Op. 10.

As this Court found, Defendants' argument 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." Stay Op. 38. 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. *See* OB 45. As this Court explained, "[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." Stay Op. 38. And the plain text of Section 8005 speaks to an "item," not a "requesting agency."

Lacking any support in the statutory text, Defendants urge this Court to 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. OB 44. 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." ER47 (emphasis added). And in any event, courts do 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 this Court 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." Stay Op. 38-39.

Congress's decision could not have been more fully considered or deliberate. Earlier this year, this country endured the longest government shutdown in its 230-year 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," Stay Op. 39, 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." Stay Op. 39; *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (courts "are '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, J.))).

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

Defendants' action also fails to meet the requirement that wall construction be "unforeseen," which ordinarily applies to "unanticipated circumstances (such as hurricane and typhoon damage to military bases)." ER49. 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 for another year, until the moment DHS requested that DoD fund wall sections Congress had denied. OB 46.

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." SER153. As this Court held, "[t]he 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." Stay Op. 37; *see also* ER49 ("[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* SER156-SER157 (DoD withheld nearly $1 billion of fiscal year 2018 counterdrug funding until July 2018 for "Southwest Border construction"); SER161 (government counsel acknowledging that evidence "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 a 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 gaming the timing of the request. "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." ER54. This "heads-I-win-tails-you-lose" theory would upend the statute, and the constitutional requirement that Congress authorize spending.

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

Although the motions panel and district court did not need to reach Section 8005's requirement that the funds serve a "military" need, *see* ER50 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 counter-drug support pursuant to Section 284 only upon receiving a request from another agency." OB 46. And here, the record is clear that the project is undertaken entirely to serve DHS's requirements, not the military's needs. *See* ER282 (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).

IV. The Injunction May Be Upheld On Alternate Grounds.

This Court may also affirm the district court's injunction on the alternate grounds that Defendants' use of DoD funds to construct a border wall violates 10 U.S.C. § 284 and NEPA. *See Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 608 (9th Cir. 2000) (district court's grant of a permanent injunction may be affirmed on any ground supported by the record).

A. Plaintiffs are within the zone of interests of Section 284, and Defendants have violated the statute.

Although the district court found that it need not reach the question of whether Defendants' actions were authorized by Section 284, *see* ER6, it observed that Defendants' interpretation of 10 U.S.C. § 284 raised "serious constitutional questions." ER53. Defendants cannot use Section 284 to funnel $2.5 billion to DHS for a construction project that was denied by Congress. Section 284 permits the Secretary of Defense to provide law enforcement agencies with various forms of small-scale support, including the "construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. § 284(b)(7).

If Plaintiffs are required to satisfy a zone-of-interests test with respect to Section 284, they easily do so here, as *Match-E-Be-Nash-She-Wish* establishes. *See supra* pp. 36-38. If a plaintiff is within the zone of interests of a statute that was completely silent about land use because of asserted "economic, environmental,

and aesthetic harm" from eventual construction, Plaintiffs' asserted interests are certainly within the zone of interests of Section 284. Unlike the statute at issue in *Match-E-Be-Nash-She-Wish*, Section 284 explicitly addresses land use, referring to "[c]onstruction of roads and fences and installation of lighting." 10 U.S.C. § 284(b)(7). Moreover, the agency's Section 284 decision is even more closely tied to environmental interests than the land acquisition decision in *Match-E-Be-Nash-She-Wish*: in authorizing the Section 284 action, the Acting Secretary explicitly considered the environmental impact of the construction and determined a plan for "environmental compliance." ER282. The Supreme Court has held that decisions that "typically" involve consideration of a land's "eventual use" may be challenged by "neighbors to the use;" thus Plaintiffs are unquestionably proper challengers to construction decisions under Section 284, which *always* involves considerations of land use. *Match-E-Be-Nash-She-Wish*, 567 U.S. at 227-28.

Defendants' plan is not authorized by Section 284. Under Defendants' theory, 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 decision-making 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. "The sheer amount of failed legislation on this issue demonstrates the importance and divisiveness of the policies in play, reinforcing the Constitution's unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process." *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018) (quotation omitted). There is no indication in Section 284 that Congress granted DoD the prerogative to short-circuit the political process. *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 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." ER53.

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. The size of the projects Congress previously approved under this authority 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, at 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. ER53; *see also* ER99 (noting that $2.5 billion far exceeds Congress's "*total* fiscal year 2019 appropriation available under Section 284 . . . , much of which has already been spent").

But even if Section 284 permitted the Secretary of Defense to make decisions of "vast economic and political significance," *Util. Air Regulatory Grp.*, 573 U.S. at 324, DoD's proposed use of Section 284 must be interpreted alongside the more specific and recent judgment by Congress embodied in the CAA. "[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133. "This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." *Id.* at 143. Therefore, "a specific policy embodied in a later . . . statute should control [judicial] construction of the [earlier broad] statute, even though it ha[s] not been expressly amended." *Id.* (quotations and citations omitted). Through the CAA, Congress placed a specific policy limitation on the

scope and speed of border barrier construction, and Defendants' attempt to use Section 284 to evade these restrictions is unlawful.

In addition to violating the specific requirements of Section 284, Defendants run afoul of a core principle that prohibits Executive Branch agencies from mixing and matching funds from different accounts to exceed funding limits imposed by Congress. Courts have invalidated similar mix-and-match funding plans as an end-run around Congress's limits on appropriations. In *Nevada v. Department of Energy*, for example, the D.C. Circuit applied the rule that "specific appropriations preclude the use of general ones even when the two appropriations come from different accounts." 400 F.3d 9, 16 (D.C. Cir. 2005) (citing 4 Comp. Gen. 476 (1924)). The court rejected the use of funds from a general account to supplement a more specific and limited appropriation that Congress intended for the same purpose. *See id.* ("[T]he fact that Congress appropriated $1 million expressly for Nevada indicates that is all Congress intended Nevada to get in FY04 from whatever source."). Here, as in *Nevada*, Congress has allocated a specific amount of funding. The government cannot cobble together other, more general funds to increase funding levels for that same goal. Congress has authorized a maximum of $1.375 billion in Fiscal Year 2019 for border barrier construction, and Defendants may not transfer and spend funds above this limit.

B. Defendants' plan violates NEPA.

Defendants have not purported to comply with NEPA. Instead, they argued that the construction at issue here is exempt from NEPA because DHS had issued waivers pursuant to its authority under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. Law 104-208, Div. C. The district court erred in finding that the "pertinent waivers issued by DHS are dispositive" of Plaintiffs' NEPA claims, ER7, because Congress limited DHS's waiver authority to construction "under" IIRIRA and did not grant similar waiver authority for construction under Section 284.

DHS cannot waive NEPA's requirements when construction is undertaken under Section 284 authority. In its ruling, the district court relied upon determinations issued by the Secretary of Homeland Security purporting to waive various statutory requirements, including NEPA, pursuant to Section 102(c) of IIRIRA. ER60-ER61. Under IIRIRA, the Secretary of Homeland Security may "take such actions as may be necessary to install additional physical barriers and roads . . . in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." IIRIRA § 102(a). IIRIRA permits the Secretary of Homeland Security to waive compliance with NEPA only to the extent "necessary to ensure expeditious construction of the barriers and roads *under this section*"—that is, under Section 102 of IIRIRA. IIRIRA § 102(c)

(emphasis added). As such, DHS's waiver can only eliminate NEPA obligations if construction is "under" IIRIRA.

But of course, because Defendants are attempting to circumvent Congress's decision not to grant the President's request through DHS's budget, Defendants have invoked Section 284, rather than Section 102 of IIRIRA. Indeed, Defendants have repeatedly disclaimed any relationship between DHS construction authority under IIRIRA (which Congress chose not to fund), and the projects at issue here. *See, e.g.*, OB 1 ("DoD relied on longstanding statutory authority (10 U.S.C. § 284) to construct border barriers in support of counter-narcotics efforts"); OB 45 ("That DHS made a general request to Congress for funds to construct border barriers under its own statutory authority, and that Congress ultimately appropriated less funds than DHS requested, is irrelevant."). The very purpose of Defendants' invocation of Section 284 is to evade restrictions that the CAA places on wall construction funded by DHS appropriations. Thus, the DHS Secretary's authority to issue waivers under Section 102(c) of IIRIRA is inapplicable. There is no statutory authority for any waiver of NEPA for construction under Section 284.

In rejecting Plaintiffs' NEPA claim, the district court focused on the "derivative" nature of DoD's construction authority and failed to address the statutory limits on the waiver authority. ER61. Plaintiffs do not dispute that, *if* construction were taking place under IIRIRA, the DHS Secretary's Section 102(c)

waiver authority would cover construction undertaken by DoD. But Defendants cannot have it both ways: if, as they have asserted, construction is taking place under a wholly separate authority—Section 284, and not under IIRIRA—the Secretary of Homeland Security is not empowered to issue waivers extinguishing DoD's NEPA obligations. And if construction is taking place under DHS's IIRIRA authority, which Congress refused to fund, Defendants are violating the Appropriations Clause.

V. The Injunction Is Proper.

In challenging the injunction, Defendants repeat the same arguments already rejected by this Court. Defendants assert that the "injunction frustrates the government's ability to stop the flow of drugs across the border and harms the public's interest" and prevents Defendants from spending taxpayer funds on construction contracts signed during the pendency of this litigation. OB 49-52. Defendants also assert that any environmental harms are inconsequential because "proposed construction projects will not make any change to the existing land use within or near the project area." OB 51. Defendants' arguments are belied by the record and were correctly rejected by both the district court and the motions panel.

Congress recently considered, and rejected, the same argument Defendants make here: that a border wall is urgently needed to combat drugs. 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." SER153. After considering the executive's arguments throughout 2018 and early 2019, "Congress presumably decided such construction at this time was not in the public interest." Stay Op. 74-75.

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. By contrast, as this Court found, Defendants' submissions "have not actually spoken" to the critical question of "the impact of delaying the construction" on drug trafficking. Stay Op. 70. "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).

Defendants' own assessments undermine their claim that these barriers would significantly block "heroin and fentanyl" from "flowing into our Nation." No. 19-16102, ECF No. 7-1, Stay Mot. at 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." SER210. Only a "small percentage of all heroin seized by CBP along the land border was between Ports of Entry." SER210. Likewise, according to the Drug Enforcement Agency, fentanyl transiting the border is most commonly smuggled in "multi-kilogram loads" in vehicles crossing at legal ports of entry. SER211. In short, as this Court 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. Stay Op. 70.

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 the Supreme 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, the record establishes that "Defendants' proposed construction will lead to a substantial change in the environment," harming Plaintiffs. ER64. "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." ER64. This would work a substantial change from currently-existing conditions on these wildlife preserves and national monuments. 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." SER207. 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. As this Court observed, although "Defendants denigrate" Plaintiffs' interests, "[e]nvironmental injuries have been held sufficient in many cases to support injunctions blocking substantial government projects." Stay Op. 73.[6]

[6] Defendants materially misstate the record in asserting that Plaintiffs' interests are "less substantial" than the "observational and scientific interests" in *Winter*. OB 50. Numerous declarations establish that Plaintiffs' members conduct research and observation in the areas at issue. *See, e.g.*, SER27 (declarant supervises "several ongoing and long-term biology studies" in project area); SER49-50 (declarant published book on "natural history and social history" of project areas and conducted and published scientific and archaeological studies of area); SER66 (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"); SER16 (declarant uses camera system in project areas "to learn and share information about the wildlife that lives in these habitats").

This Court also did not err in finding that it would be inequitable to assign significant weight to unlawful financial obligations that Defendants undertook during the course of this litigation. Stay Op. 72. Congress has made it illegal to "involve [the 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, lifting the injunction so that Defendants may "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." Stay Op. 72. 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

This Court should affirm the injunction.

Dated: August 15, 2019

Respectfully submitted,

/s/ Dror Ladin

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STATEMENT OF RELATED CASES

Plaintiffs-Appellees know of no related cases, as defined by Ninth Circuit Rule 28-2.6, pending before this Court.

/s/Dror Ladin
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Dated: August 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2019, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

/s/ Dror Ladin
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Dated: August 15, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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