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

United States Court of Appeals for the Ninth Circuit

SIERRA CLUB, et al.,
Plaintiffs-Appellees,
v.

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

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

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

On appeal from the U.S. District Court for the Northern District of California, Nos. 4:19-CV-00892-HSG, 4:19-CV-00872-HSG, Hon. Haywood S. Gilliam, Jr.

BRIEF FOR AMICUS CURIAE U.S. HOUSE OF REPRESENTATIVES

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INTEREST OF AMICUS CURIAE AND INTRODUCTION

The U.S. House of Representatives has a compelling interest in this case, which arises out of the Administration's violation of the bedrock constitutional principle that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The Appropriations Clause vests Congress with "exclusive power over the federal purse," and is "one of the most important authorities allocated to Congress in the Constitution[]." *U.S. Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1346 (D.C. Cir. 2012). Moreover, the House has its own distinct interest in seeking to ensure Executive Branch compliance with Congressional funding decisions; as the Founders observed, the federal purse has "*two strings, one of which [is] in the hands of the H. of Reps*," and "*[b]oth houses* must concur in untying" them. 2 *The Records of the Federal Convention of 1787*, at 275 (M. Farrand ed., 1911) (James Wilson) (emphases added).[1]

The Administration claims that this case raises no constitutional issue, much less one involving a central component of our system of checks and balances. In its telling, the parties' dispute is nothing more than a disagreement over the meaning of an appropriations transfer law. But, as the Supreme Court recently observed, courts

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the House or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

"are 'not required to exhibit a naivete from which ordinary citizens are free.'" *Dep't of Commerce v. New York*, No. 18-966, slip op. at 28 (U.S. June 27, 2019).

This case involves a high-profile clash between the President, who has insisted on spending between $5 and $8 billion to build a southern border wall, and Congress, which refused to appropriate anything close to those sums. The President initially responded to that refusal by precipitating the longest Federal Government shutdown in history. Congress still refused to back down, appropriating only $1.375 billion for a southern border wall. Then, on the day he signed the relevant appropriations act into law, the President announced that his Administration would spend up to $8.1 billion on a border wall. The Department of Defense ("DOD") later invoked an appropriations transfer statute to achieve that goal.

The Administration thus refuses to acknowledge Congress's primacy over federal funds, and is brazenly spending more money than Congress appropriated for construction of a southern border wall, in clear violation of the Appropriations Clause. What is equally plain is that the Administration seeks judicial immunity for that violation. It suggests that "APA review is available for a proper plaintiff," Br. 21, but the arguments it advances here and in a separate suit brought by the House make clear that, on its view of the law, no such plaintiff exists. According to the Administration, (1) no private party falls within the "zone of interests" of the

appropriations statute it has invoked for its defense, and (2) the House, which is undeniably protected by that provision, lacks Article III standing.

At bottom, the Administration claims that, even when Congress makes absolutely clear that it is limiting funds, the Executive can defy that limit with impunity, as long as it asserts that there is some statutory basis for spending money Congress unequivocally refused to appropriate. Indeed, on the Administration's view, that pretextual claim is judicially incontestable: it converts constitutional challenges into statutory claims that no private party has a cognizable interest in prosecuting and that Congress lacks standing to pursue. If the Administration's arguments prevail, courts are powerless to adjudicate and enjoin a blatant violation of the Appropriations Clause, and Congress's critical "power of the purse" is reduced to a chimera. Congress, which has already made it a crime to spend money in excess of appropriations, must compel compliance by passing still more laws (by veto-proof majorities in both houses) or resort to impeachment.

This is not, and cannot be, the proper outcome under our system of checks and balances. Courts are empowered to enforce constitutional limits on the Executive Branch, particularly one of the most important checks the Founders adopted. And doing so in the unique circumstances presented here will not open the floodgates to non-statutory review of Executive action. By contrast, acceptance of the Administration's arguments would amount to a complete abdication of the "duty of

the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). For these and other reasons, which are explained more fully below, this Court should affirm the lower court's decision and injunction.

BACKGROUND

Contrary to the Administration's anodyne recitation of events, this dispute did not arise from a request for assistance that the Department of Homeland Security ("DHS") made to DOD in February 2019. It grew directly out of the pitched battle that the President and Congress waged over the subject of this litigation—funding for a border wall. Although the President originally requested "$1.6 billion to construct approximately 65 miles of border wall,"[2] by the middle of 2018 he was "press[ing] Republicans to give him $5 billion as a down payment on his wall."[3] Near the end of the 115th Congress, he and Congress faced an impasse on the issue.

In December 2018, President Trump held a televised meeting with then-Minority Leader of the House, Nancy Pelosi, and Senate Minority Leader, Chuck

[2] Office of Mgmt. & Budget, *Fiscal Year 2019: Efficient, Effective, Accountable: An American Budget: Budget of the U.S. Government* 58 (2018), http://tinyurl.com/WHFY19BudgetRequest.

[3] Rachael Bade, *Immigration Storm Bears Down on Republicans*, Politico (July 2, 2018, 5:05 AM), http://tinyurl.com/PoliticoImmigrationStorm; *see also* Letter from Russell T. Vought, Acting Dir., Office of Mgmt. & Budget, to Sen. Richard Shelby, Chairman, U.S. Senate Comm. on Appropriations (Jan. 6, 2019), http://tinyurl.com/ShelbyLettertoApprops (requesting $5.7 billion for a border wall).

Schumer, to negotiate fiscal year 2019 appropriations for a border wall.[4] During that meeting, the President reiterated his demand for $5 billion for a border wall. He also warned that "[i]f we don't get what we want one way or the other, whether it's through you, through a military, through anything you want to call it, I will shut down the government."[5]

Congress did not yield to that threat, and on December 21, 2018, the longest Federal Government shutdown in history began. More than two weeks later, President Trump addressed the nation from the Oval Office, imploring Congress to "do[] its job" and "pass a bill that ends this crisis."[6] Congress still refused to appropriate the funds he sought, and on January 25, 2019, President Trump signed a continuing resolution to fund the Government through February 14, 2019.[7] Over the next several weeks, a bipartisan conference committee negotiated a deal to fund the government. While those negotiations were underway, the Acting White House

[4] Aaron Blake, *Trump's Extraordinary Oval Office Squabble with Chuck Schumer and Nancy Pelosi, Annotated*, Wash. Post (Dec. 11, 2018), https://tinyurl.com/WaPoOvalOfficeSquabble.

[5] *Id.*

[6] *Full Transcripts: Trump's Speech on Immigration and the Democratic Response*, N.Y. Times (Jan. 8, 2019), http://tinyurl.com/TrumpNationalAddress (National Address Transcript).

[7] *See* Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, 133 Stat. 10.

Chief of Staff stated that the southern border wall "is going to get built, with or without Congress."[8]

Ultimately, Congress passed the Consolidated Appropriations Act, 2019, Pub L. No. 116-6, 133 Stat. 13 (the "CAA"), which appropriated only $1.375 billion for construction of fencing in the Rio Grande Valley area of the border. *Id.* § 230, 133 Stat. at 28. On February 15, 2019, President Trump signed the Act into law.[9] That same day, however, he expressed dissatisfaction with the appropriation for border wall construction and announced that his Administration would instead spend up to $8.1 billion for that purpose.[10] Ten days later, DHS requested DOD's assistance with the construction of fences, roads, and lighting along the southern border. ER272-73.

Although that request included statistics about the amounts of illegal drugs seized in these areas during fiscal year 2018, DHS did not assert or demonstrate that these amounts reflected an unforeseen increase in drug smuggling. *See* ER273-78. In fact, far greater amounts of illegal drugs enter the country through ports.[11] For

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[8] Fox News, *Mulvaney on chances of border deal, Democrats ramping up investigation of Trump admin*, YouTube (Feb. 10, 2019), https://youtu.be/l_Z0xx_zS0M.

[9] *See Statement by the President*, White House (Feb. 15, 2019), https://tinyurl.com/WHTrumpStatement.

[10] *See Fact Sheet: President Donald J. Trump's Border Security Victory*, White House (Feb. 15, 2019), http://tinyurl.com/WHBorderVictory.

[11] *See CBP Enforcement Statistics FY 2019*, U.S. Customs & Border Prot., https://tinyurl.com/CBPFY19Stats (last visited Aug. 16, 2019). Administration documents also reveal that (in addition to altering routes) smugglers evade border

these reasons, among others, Congress refused to appropriate the amount of money the Administration requested for wall construction.[12]

Over the next several months, DOD approved DHS's requests. DOD relied on its authority to "provide support for the counterdrug activities … of any other department or agency," if "such support is requested." 10 U.S.C. § 284(a). Such support can include the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors" at the borders. *Id.* § 284(b)(7). DOD also relied on Section 8005 of the 2019 Department of Defense Appropriations Act, which permits it to transfer up to $4 billion of funds available under that Act, provided certain conditions, or limitations, are met. *See* Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018).[13]

Plaintiffs challenged these actions as, *inter alia*, violations of the Appropriations Clause and *ultra vires*. *See, e.g.*, ER333-35, 345-47, 349-51; 444-46.

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walls using drones, tunnels, and other techniques. *Drug Smuggling at the Border*, Office of Intelligence, U.S. Customs & Border Prot. (Oct. 18, 2017), https://tinyurl.com/CBPDrugSmugglingPresentation.

[12] *See, e.g.*, Chairwoman Lowey Statement at House-Senate Conference Committee on Homeland Security (Jan. 30, 2019), https://appropriations.house.gov/news/press-releases/chairwoman-lowey-statement-at-house-senate-conference-committee-on-homeland (calling for enhancements for drug detection at ports and asserting "[s]mart border security is not overly reliant on physical barriers").

[13] DOD also invoked Section 9002, which provides authority to transfer another $2 billion, "subject to the same terms and conditions" as Section 8005. *Id.* § 9002, 132 Stat. at 3042. For simplicity, we simply refer to Section 8005.

The parties detail the lengthy procedural history of the cases, and the House will not repeat that discussion. Of relevance here, the motions panel concluded that plaintiffs had alleged constitutional violations, and that defendants' invocation of Section 8005 was a "defense to this claim." Order at 32, 34, No. 19-16102 (9th Cir. July 3, 2019), ECF No. 73 ("Stay Op."). It concluded that plaintiffs were entitled to pursue their claims either as an equitable action to enjoin unconstitutional conduct or under the Administrative Procedure Act ("APA"), *id.* at 45; that *Dalton v. Specter*, 511 U.S. 462 (1994), did not foreclose these remedies; and that the relevant "zone of interests," if one applies, is derived from the Appropriations Clause, not Section 8005. Stay Op. 45-53. As the House explains below, these core legal conclusions were correct and should be reaffirmed.

SUMMARY OF ARGUMENT

I. Plaintiffs have asserted valid causes of action for violations of the Appropriations Clause. Those constitutional claims require a showing that defendants are spending more money for a border wall than Congress appropriated in the CAA for that purpose. Section 8005 is not a "necessary ingredient" of plaintiffs' claims. Instead, it is the basis for the Administration's affirmative defense. That defense does not and cannot convert plaintiffs' constitutional challenges into claims for violation of a statute. Nothing in *Dalton v. Specter*, or the in Fourth

Circuit's decision in *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1975), remotely justifies a contrary conclusion.

For these same reasons, Section 8005 does not prescribe the relevant zone of interests for determining whether plaintiffs have prudential standing. As the D.C. Circuit long ago explained, plaintiffs challenging Executive Branch conduct as *ultra vires* need not show that their interests are protected by the constitutional or statutory authorities invoked *by defendants*. Such a requirement would often (and impermissibly) dictate the dismissal of meritorious claims, without any inquiry into the validity of the asserted defense. Nor is there any basis for imposing such a requirement in APA cases, where courts must consider whether plaintiffs are protected by the constitutional or statutory provision that provides the basis for their suit, not the basis for the defense to that suit. Here, plaintiffs fall within the zone of interests protected by the Appropriations Clause and/or the CAA, which provide the basis for their complaints.

II. On the merits, defendants' invocation of Section 8005 fails. The events surrounding enactment of the CAA make clear that Congress considered and denied funding in excess of $1.375 billion for the "item" for which DOD transferred funds, *i.e.*, the border wall projects. The Administration's contrary arguments rest on the implausible theory that, even though Congress refused—in the face of a government shutdown—to appropriate more funds for border wall construction, it did not "deny"

such funding within the meaning of Section 8005, because DOD's formal budget proposal did not include an explicit line item requesting funding for fencing, roads and lighting at the southern border for drug interdiction. This interpretation of Section 8005's "denied by Congress" limitation is flatly inconsistent with the statute's purpose.

DOD likewise cannot show that the transfer request was based on "unforeseen military requirements." Under the Administration's interpretation, this limitation simply requires that (1) one agency (here DHS) fails to anticipate that Congress will not appropriate the full amount the agency requests for drug interdiction efforts, and (2) DOD fails to foresee that the first agency will ask it to transfer funds in an effort to evade Congress's decision. This, too, is an entirely unreasonable interpretation that frustrates Section 8005's purposes and invites the Executive Branch to play a shell game in the budgeting process.

III. Finally, there is no basis for the Administration's extraordinary request that, even if it is found to be violating the Appropriations Clause, that ongoing violation should not be enjoined. The Administration cannot suffer any legally cognizable "harms" from complying with the Constitution. Moreover, its arguments to the contrary impermissibly ask the Court to accept its view that more money should be spent on a border wall to prevent drug smuggling and to reject Congress's

contrary view that the government's interest in preventing drug smuggling is better served by spending funds on other detection and interdiction efforts.

ARGUMENT

I. PLAINTIFFS HAVE ASSERTED VALID CAUSES OF ACTION FOR CONSTITUTIONAL VIOLATIONS.

The Administration devotes most of its brief to arguments that, if accepted, would prevent this Court from evaluating not only the merits of plaintiffs' Appropriations Clause and *ultra vires* claims, but also the Administration's claim that Section 8005 allows it to circumvent Congress's clear refusal to appropriate more than $1.375 billion for a border wall. The Administration argues that plaintiffs' claims are necessarily brought under Section 8005, and that they cannot pursue those claims because they fall outside the "zone of interests" protected by that statute. Br. 24-34. Alternatively, it claims that, even if plaintiffs' claims are constitutional in nature, Section 8005 still establishes the relevant zone of interests, and plaintiffs again fall outside of that zone. Both prongs of this "heads-we-win-tails-you-lose" argument are wrong.

A. Plaintiffs' Claims For Violation Of The Appropriations Clause Cannot Properly Be Treated As Statutory Claims.

Plaintiffs expressly pled claims under the Appropriations Clause. *See* ER333-35, 345-47, 349-51; 444-46. The Administration argues, however, that, "*because* the challenged agency action here depends on a statutory grant of authority, rather than

a constitutional one, [plaintiffs'] claims must be understood as statutory." Br. 38. This assertion is incorrect.

Plaintiffs' constitutional claims depend on a showing that (1) Congress unequivocally refused to appropriate more than $1.375 billion for a border wall, and (2) the Administration is spending more than that amount for that purpose. Section 8005 is not "a necessary ingredient of" their claims, *id.* at 40; it is the Administration's *affirmative defense*. That defense cannot change the nature of plaintiffs' claims—any more than a drug manufacturer's reliance on federal regulation of its drug's label could somehow convert a state tort claim into a "statutory claim" under the Federal Food, Drug and Cosmetic Act. *See Wyeth v. Levine*, 555 U.S. 555, 573 (2009) (fact that the Food and Drug Administration would not allow manufacturer to change drug label to warn of risk is a "defense" to a state tort claim); *see also Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 14 (1983) (no "arising under" jurisdiction even where federal defense is "anticipated in the plaintiff's complaint" and "is the only question truly at issue in the case").

Contrary to defendants' contention, *Dalton v. Specter* does not support their argument. There, the Court rejected "the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution" under separation-of-powers principles. 511

U.S. at 472. Instead, the Court stressed the distinction "between 'actions contrary to [a] constitutional prohibition,' and those 'merely said to be in excess of the authority delegated … by the Congress." *Id.* Because *Dalton* involved no claim that closure of a military base was "contrary to [a] constitutional prohibition," the claim there was necessarily statutory. *Id.* at 474.

Here, plaintiffs *have* asserted that Executive Branch officials are acting contrary to a constitutional prohibition—the Appropriations Clause's injunction that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Read in light of the events that preceded its enactment, the CAA clearly limited funding for construction of a border wall. An official who authorizes spending beyond that limit is not "merely" acting "in excess of the authority delegated" by the underlying appropriation. He or she is contravening a constitutional prohibition.

Nothing in *Dalton* allows courts to ignore the constitutional nature of the claims asserted here and to treat them as if they are only statutory in nature. And recognizing the constitutional nature of plaintiffs' claims will not open the floodgates and permit suits challenging all executive actions in excess of statutory authority as constitutional claims. Few if any such claims will involve executive

actions that also violate an express constitutional prohibition.[14] Fewer still will involve executive spending that contravenes a clear Congressional denial of funds.

The Fourth Circuit's decision in *Harrington v. Schlesinger* does not justify a contrary conclusion. That court held only that plaintiffs suing in their capacity as taxpayers or as individual members of Congress lacked standing to contest the Executive Branch's interpretation of an appropriations rider. 528 F.2d at 458-59. The court did not address whether the plaintiffs had a cause of action and, if so, whether and how the "zone-of-interest" analysis applied. And while the court suggested that the plaintiffs there presented no constitutional challenge, that *dicta* does not survive *Dalton*, which considers whether *conduct violates* a constitutional prohibition, not whether a court must decide "the reach or application of" a constitutional provision. *Id.* at 458. In all events, the Fourth Circuit went on to state that, "[i]f there were a clear and flagrant violation of congressional limitations upon expenditures," a court "might find its intervention appropriate" even at the behest of taxpayers. *Id.*

This case raises that exception. The Administration made clear its disdain for a congressional funding decision that it could not defeat politically; it openly announced its intent to defy that decision; and it has relied on a statutory transfer

[14] The Administration's examples, Br. 38, confirm this. Unlike the case with the spending power, the Constitution includes no *prohibition* on Executive Branch action that correlates directly to Congress's authority to impose taxes or enact laws.

authority as an after-the-fact justification for that defiance. Now it argues that its statutory *defense* (1) converts the plaintiffs' constitutional claims into statutory challenges; (2) dictates the relevant zone-of-interest test for determining who can bring those "statutory" challenges; and (3) effectively precludes suits by all private parties, since (according to the Administration) Section 8005 "exists to govern the relationship between Congress and DoD." *Defs.' Opp'n to Pls.' Mot. for Prelim. Inj.* at 13, *Sierra Club v. Trump*, No. 4:19-cv-00892 (N.D. Cal. Apr. 25, 2019), ECF No. 64. And, lest there be any doubt about whether any other plaintiff could bring such a challenge, the Administration has argued elsewhere that the House lacks standing to bring this challenge. *Defs.' Opp'n to Pl's. Mot. for Prelim. Inj.* at 16-41, *U.S. House of Representatives v. Mnuchin*, No. 1:19-cv-00969-TNM (D.D.C. May 8, 2019), ECF No. 36. None of the authorities the Administration cites remotely justifies the conclusion that the Executive Branch's mere invocation of a statutory defense to an Appropriations Clause claim precludes judicial review of that claim, including review of whether that defense has any merit.

B. Plaintiffs Are "Proper" Parties To Pursue The Claims They Have Asserted.

In its effort to foreclose judicial inquiry into the validity of its conduct, the Administration argues that, even if plaintiffs have a valid constitutional claim, Section 8005 "would still prescribe the relevant zone of interests." Br. 39. According to the Administration, "it is undoubtedly [s]ection 8005's limitations … that

plaintiffs invoke," and Section 8005 is the "provision whose violation forms the legal basis for [the] complaint." *Id.* These claims are wrong. To the extent any zone-of-interests test applies to plaintiffs' constitutional claim—an issue the House does not address—it must be derived from either the Appropriations Clause and/or the CAA. Plaintiffs are protected by both.

The "limitations" plaintiffs invoke and whose "violation" gives rise to their constitutional claims are found not in Section 8005, but in the CAA. Read in the context of the political battle that preceded its enactment, the CAA clearly did not provide federal funds for border wall construction beyond $1.375 billion. The requirements of Section 8005, by contrast, are not essential ingredients of plaintiffs' claim. They are limitations that the Administration must overcome to try to show that this provision somehow allows it to spend more money than Congress appropriated for border wall construction.

The D.C. Circuit, among others, has explained why it is improper to allow an Executive Branch official's defense to dictate the zone-of-interests inquiry. That court, speaking through Judge Bork, stated that plaintiffs

> need *not* … show that their interests fall within the zones of interests of the constitutional and statutory powers *invoked by the [defendants]*…. Otherwise, a meritorious litigant, injured by *ultra vires* action, would seldom have standing to sue since the litigant's interests normally will not fall within the zone of interest 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) (emphases added). *See also Chiles v. Thornburgh*, 865 F.2d 1197, 1211 (11th Cir. 1989) (same).

Contrary to the Administration's suggestion (and selective quotations), the D.C. Circuit did not "clarif[y]" that "the relevant question is whether the plaintiff's 'interest may be said to fall within the zone protected by the *limitation[s]*' on the 'statutory powers invoked by the [defendant].'" Br. 40 (quoting *Gracey*, 809 F.2d at 811 n.14). That "clarification" would have nullified the rule that plaintiffs "need not" fall within the zone of interests protected by the authority the defendant invokes. Instead, the court confirmed that rule by noting that, if the *Steel Seizure* case were 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 in order to establish their standing to challenge the seizure of their mills as beyond the scope of those powers." 809 F.2d at 811 n.14 (emphasis added) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). The court then observed that, "[i]t may be that a particular constitutional or statutory provision *was intended* to protect persons like the litigant [against the government] by limiting the authority conferred. *If so*, the litigant's interest may be said to fall within the zone protected by the limitation." *Id.* (emphases added). The possibility that a plaintiff falls within the zone of interests protected by the authority the defendant invokes was simply an adjunct

to the rule that plaintiffs need not make such a showing; it was not a nullification of that rule.

Nor should a different rule apply under the APA. In such suits, the zone of interests is determined by the "provision whose violation forms the legal basis for [the] complaint." *Bennett v. Spear*, 520 U.S. 154, 176 (1997) (emphasis omitted). Here, that provision is either the Appropriations Clause alone, or that Clause and the CAA, which embodied Congress's judgment about how much money could be spent on border wall construction. It makes no sense to require plaintiffs protected by these provisions to show that they also fall within the zone protected by the statutory provision invoked to defeat their claim. The Administration is entitled to defend its conduct; it is not entitled to have APA suits dismissed simply because its defense rests on constitutional or statutory provisions different from the ones that protect the plaintiffs and form the basis of their claims.

And plaintiffs here fall within the protection of both the Appropriations Clause and the CAA. Congress decided that the public interest would not be served by spending more than $1.375 billion on a southern border wall, and the Sierra Club and Southern Border Communities have shown that they are directly injured by the Administration's decision to defy Congress's judgment. These plaintiffs thus fall within the zone of interests protected by a constitutional prohibition that ensures that "the immediate representatives of the people," The Federalist No. 58, at 359

(Madison) (Clinton Rossiter ed., 1961), not executive officials, have exclusive control over federal spending.

They also fall within the zone of interests protected by Congress's decision not to fund the very construction activities that have harmed them. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225-27, (2012) (plaintiffs' economic, environmental, or aesthetic injuries arising from planned operation of a casino on nearby land fell within zone of interests protected by statute authorizing government to acquire property to provide land for Indians, because land acquisition decisions are often intertwined with considerations of land use, making "neighbors to the use … reasonable—indeed predictable—challengers of the [acquisition] decisions"). Indeed, the CAA embodies an explicit intent to protect against environmental harms; it provides that "[n]one of the funds made available by this Act or prior Acts are available for the construction of pedestrian fencing—(1) within the Santa Ana Wildlife Refuge; (2) within the Bentsen-Rio Grande Valley State Park; (3) within La Lomita Historical Park; (4) within the National Butterfly Center; or (5) within or east of the Vista del Mar Ranch tract of the Lower Rio Grande Valley National Wildlife Refuge." Pub L. No. 116-6, § 231, 133 Stat. at 28.

The Sierra Club and Southern Border Communities, therefore, are "proper plaintiffs" to bring constitutional challenges, under either the APA or an equitable

action, to enjoin the Administration's refusal to abide by the appropriations limit that Congress adopted.

II. SECTION 8005 DOES NOT ALLOW DEFENDANTS TO SPEND MORE ON A BORDER WALL THAN CONGRESS APPROPRIATED IN THE CONSOLIDATED APPROPRIATIONS ACT OF 2019.

Although unavailing, the Administration's efforts to preclude judicial review of its Section 8005 defense are understandable. A fundamental principle of appropriations law provides that "[a]n amount available under law may be withdrawn from one appropriation account and credited to another ... only when authorized by law." 31 U.S.C. § 1532. Section 8005 permits DOD to transfer up to $4 billion if it concludes that "such action is necessary in the national interest,"

> *Provided*, That such authority to transfer may not be used unless [1] for higher priority items, [2] based on unforeseen military requirements, than those for which originally appropriated and [3] in no case where the item for which funds are requested has been denied by the Congress ....

Pub. L. No. 115-245, § 8005, 132 Stat. at 2999. DOD's reliance on Section 8005 clearly founders on the second and third conditions of the "provided" clause.

A. Congress Denied Funds For The Item For Which DHS Requested Funding.

As the motions panel recognized, the events surrounding enactment of 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. Section 8005 does not permit the Administration to circumvent that denial. This restriction was added to "tighten congressional control of the reprogramming process." H.R. Rep. No. 93-662, at 16 (1973). It thus ensures that Section 8005 is not used to "undo[] the work of the Congress." *Id.* Consistent with that purpose, this provision, like other similar restrictions, is to be "construed strictly" to "prevent the funding for programs which have been considered by Congress and for which funding has been denied." *See* H.R. Rep. No. 99-106, at 9 (1985) (discussing analogous appropriations restriction in Pub. L. No. 99-169, § 502(b), 99 Stat. 1005 (codified at 50 U.S.C. § 3094(b))).

The Administration cannot dispute that Congress denied appropriations for the physical border wall that it is now seeking to construct. Nevertheless, it contends that "the term 'item for which funds are requested' in Section 8005 means a particular item for which DoD may request funding during a given fiscal year because it requires additional funding beyond the amount (if any) Congress appropriated to DoD for the fiscal year for that item." Br. 44-45. The Administration also claims that the relevant "item" cannot be "a generic 'border wall.'" *Id.* at 45.

As to the latter point, Acting Secretary Shanahan's memorandum directing the first transfer of funds states that the "items" at issue are the border wall projects. *See* ER285 (describing "[t]he items to be funded" as "Yuma Sector Projects 1 and 2 and El Paso Sector Project 1"). More fundamentally, the Administration's

interpretation converts a provision designed "to tighten congressional control of the reprogramming process," H.R. Rep. No. 93-662, at 16, into an invitation to the executive branch to engage in sleight-of-hand. As the motions panel explained, this interpretation "produce[s] the perverse result that DoD could, by declining to present Congress with a particular line item to deny, reprogram funds for a purpose that Congress refused to grant another agency elsewhere in the budgeting process." Stay Op. 38.

Indeed, the Administration's interpretation means that the shutdown of the federal government was only political theater: the Administration would have known when the DOD Appropriations Act was passed on September 28, 2018, *see* Pub. L. No. 115-245, 132 Stat. 2981, that DOD could transfer up to $6 billion for wall funding, since it had not asked for and been denied funding for the "item" of barrier construction under DOD's counter-narcotics support line. If, as the Administration now claims, it possessed the ability after September 2018 to transfer $6 billion for border wall funding, it surely would not have precipitated the longest government shutdown in history because Congress refused to appropriate $5.1 billion for that purpose. The Administration's actions at the end of last year speak far louder than its arguments before this Court now.

B. DHS Did Not Request Funding Based On Unforeseen Military Requirements.

The Administration's reliance on Section 8005 also fails because DHS's funding request was not "based on unforeseen military requirements." Congress included this limitation to confine DOD's transfer authority to situations where unanticipated circumstances justify a departure from Congress's previously authorized spending decisions. For example, DOD has used this authority to transfer funds to pay for unexpected hurricane damage to military bases.[15]

Here, the Administration does not claim that any unanticipated circumstances in the outside world required any unforeseen military actions, or triggered unforeseen military funding needs. The Administration instead reads the phrase "unforeseen *military* requirements" as, in effect, meaning a "transfer request from another agency that DOD did not foresee." *See* Br. 45-46 (DOD "was not aware at the time it made its budget requests to Congress that DHS would request support under Section 284"); *id.* at 46 (when "DoD's budget request was finalized, DoD could not have anticipated that DHS would request specific support"). Indeed, the Administration does not even claim that *DHS's request* was prompted by unforeseen real-world events. To the contrary, it has admitted that the "unforeseen" event was

[15] Office of the Under Sec'y of Def. (Comptroller), U.S. Dep't of Def., DoD Serial No. FY 04-37 PA, *Reprogramming Action–Prior Approval* (Sept. 3, 2004), http://tinyurl.com/DOD2004 ReprogrammingAction.

Congress's decision not to appropriate the amount the Administration sought for border wall construction.[16]

This is an untenable interpretation of the phrase "unforeseen military requirements" that clearly frustrates Congress's effort to limit DOD's transfer authority and once again invites gamesmanship. While the Administration focuses myopically on what "DOD" anticipated and foresaw, budgeting for the Executive Branch is done on a centralized basis. On the Administration's view, the President and the Office of Management and Budget can (1) decide that DHS should spend $5 billion on a border wall; (2) seek that level of funding from Congress; (3) shut the government down when that demand is not met; (4) agree to end the shutdown when Congress refuses to back down; and then (5) claim that, because *DOD* was ostensibly kept in the dark, DOD can provide the very funding Congress refused to appropriate because DOD did not "foresee" DHS's request until the moment it was made. Congress's denial of funding for a project cannot constitute the "unforeseen *military*

[16] Tr. of Proceedings at 80, *California v. Trump*, No. 4:19-cv-00872-HSG (N.D. Cal. May 17, 2019) ("The plan was to get a direct appropriation from Congress to do what the President wanted to do ... so DOD had no reason or occasion to be requesting a larger 284 appropriation."); Tr. of Proceedings at 94, *U.S. House of Representatives v. Mnuchin*, No. 1:19-cv-00969-TNM (D.D.C. May 23, 2019) ["*Mnuchin* Tr."] ("[N]obody foresaw ... that [Section 8005] ... would come into play" because "[e]veryone thought this would all happen in the DHS appropriations bill.").

requirement" that justifies a transfer under a statute designed to *limit* DOD's ability to reprogram federal funds.

In all events, even if the Administration's implausible interpretation were accepted, the Administration's claim is not factually supported. It has conceded that DOD considered using section 284 to support DHS's border barrier construction *in early 2018*.[17] Specifically, DOD withheld nearly $1 billion of fiscal year 2018 counter-drug funding until July 2018, because it was considering using that funding for "Southwest Border construction."[18]

In short, the Administration's transfer of $2.5 billion does not comply with two of Section 8005's strict limitations. It "therefore violates the Appropriations Clause and intrudes on Congress's exclusive power of the purse." Stay Op. 45.

III. THE DISTRICT COURT'S INJUNCTION SHOULD NOT BE REVERSED.

Because the Administration's actions are unconstitutional, they should be enjoined. Although federal courts are "not mechanically obligated to grant an injunction for every violation of law," *Winter v. NRDC*, 555 U.S. 7, 32 (2008), the Administration cites no authority for the proposition that courts have equitable

[17] *See Mnuchin* Tr. at 95 ("It is true that it was foreseeable in general that someone at some time might ask DoD to use its 284 authority to engage in border barrier construction.").

[18] Decl. of Paul Arcangeli ¶¶ 2-3, Attach. 1 to Mot. for Leave to File Suppl. Decl. Supp. Appl. for Prelim. Inj., *U.S. House of Representatives v. Mnuchin*, No. 1:19-cv-00969-TNM (D.D.C. May 15, 2019), ECF No. 44-1.

discretion to permit an ongoing violation of the Appropriations Clause because, in the view of executive officials, the "harms" of complying with funding limits outweigh the injuries that private parties suffer as a result of the violation. Indeed, because the Appropriations Clause is designed to be "the most *complete and effectual weapon* with which any constitution can arm the immediate representatives of the people," The Federalist No. 58, *supra*, at 359 (emphasis added), the costs of complying with congressional funding limits are not cognizable "harms" at all.

In advancing its claims of harms, moreover, the Administration is effectively asking the Court to ignore the policy judgment that underlies Congress's decision to limit funding for a border wall, and instead to substitute the Administration's contrary policy judgment—the very one Congress flatly rejected. No one denies that combatting illegal drugs is an important national objective. But in transferring funds to DHS, the Administration did not claim that the statistics it cited about illegal drug seizures reflected an unforeseen increase in drug smuggling at the border, or were even evidence that existing interdiction efforts were failing there. *See* Stay Op. 70. Most critically, the Administration did not and does not claim that Congress was unaware of this problem when it passed the CAA. Thus, while the Administration cites section 284(b)(7) as reflecting Congress's judgment "that the construction of fencing can meaningfully reduce drug smuggling across the southern border," Br. 52, it ignores Congress's more pertinent conclusion that only $1.375 billion should

be spent on a border wall, and that funds in excess of this amount would be better spent enhancing interdiction efforts at ports of entry. In light of Congress's plenary constitutional authority not only over federal spending, but also over immigration and federal drug policy, it would be particularly improper for a court to decline to enjoin a violation of the Appropriations Clause based on the Executive Branch's view that the policy judgments underlying a funding limit are wrong, and that the Administration's contrary view (which Congress rejected) should prevail.

The Administration also claims it will suffer irreparable harm because it "is incurring in unrecoverable fees and penalties each day that construction is suspended." Br. 52. But these injuries were self-inflicted, not "merely because an injunction had been requested," *id.*, but because the Administration chose to act at its own peril in spending money that it knew Congress had not appropriated for border wall construction. Stay Op. 72. And while the Administration refers to a lapse in appropriations that "would have" occurred "absent the Supreme Court's stay," Br. 50, that alleged harm has been eliminated, in light of the Supreme Court's stay and the fact that argument in this case will not occur until after the fiscal year ends.

While it overstates the harms it will suffer, the Administration dismisses plaintiffs' injuries as merely "aesthetic and recreational." *Id.* But this ignores the critical *structural* protection that the Appropriations Clause provides. The Appropriations Clause ensures that citizens will not suffer any harms—to their

environmental, economic, aesthetic, religious, or other interests—from federal activities that Congress has not funded.

In short, no balance of relevant interests can justify a decision to refrain from enjoining a clear and ongoing violation of the Appropriations Clause.

CONCLUSION

For the foregoing reasons, the House urges the Court to affirm the District Court's judgment and injunction.

Respectfully submitted,

/s/ Douglas N. Letter

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

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/s/ Douglas N. Letter
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I certify that I caused this document to be electronically filed with the Clerk of the Court using the appellate CM/ECF system on August 19, 2019. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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