No. 19A60

In the

Supreme Court of the United States

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

v.

SIERRA CLUB, ET AL., RESPONDENTS.

ON APPLICATION FOR STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNOPPOSED MOTION FOR LEAVE TO FILE AND BRIEF OF THE U.S. HOUSE OF REPRESENTATIVES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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CONSENT MOTION FOR LEAVE TO FILE BRIEF IN SUPPORT OF RESPONDENTS

The U.S. House of Representatives moves for leave to file the accompanying brief in support of respondents' opposition to the Solicitor General's Application for a Stay Pending Appeal to the United States Court of Appeals for the Ninth Circuit of the injunction issued by the United States District Court for the Northern District of California. This order enjoins the Trump Administration's construction of a wall along the southern border of the United States in the absence of a valid Congressional appropriation. Counsel for the parties consent to the filing of this brief.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

This case arises out of the Administration's disregard for 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 it 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). Thus, the House has a compelling interest in this case.

This power over the purse is an essential element of the checks and balances built into our Constitution—even the monarchs of England learned long ago that they could not spend funds over the opposition of Parliament.[2] Yet, the Administration refuses to accept this limitation on its authority, as clearly demonstrated by Acting White House Chief of Staff Mick Mulvaney's statement that President Trump's border wall "is going to get built with or without Congress."[3] Under our Constitutional scheme, an immense wall along our border simply cannot be constructed without funds appropriated by Congress for that purpose.

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[1] Pursuant to Sup. Ct. R. 37.6, the House states that 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.

[2] *See* Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 Mil. L. Rev. 1, 33-49 (1998).

[3] Andrew O'Reilly, *Mulvaney Says Border Wall Will Get Built, 'With or Without' Funding from Congress*, Fox News (Feb. 10, 2019), https://tinyurl.com/MulvaneyFoxNewsSunday.

INTRODUCTION

This case involves the Administration's attempt to use billions of dollars in federal funds to construct a wall along the southern border of the United States despite Congress's refusal to appropriate such funding—a refusal it adhered to through a government shutdown precipitated by this very issue. In the face of that refusal, the Administration chose to defy Congress's judgment and spend money Congress did not appropriate. The district court appropriately enjoined that effort, and the court of appeals correctly rejected the Administration's request for a stay pending appeal. This Court should also deny the Administration's request for a stay.

To justify the extraordinary remedy of a stay pending appeal, the Administration must demonstrate that this Court would likely grant certiorari to review a decision affirming the injunction entered below; that a majority of the Court would likely vote to set aside such a decision; and that the injury asserted by the Administration outweighs the harm to other parties and the public. The Administration has not made these showings.

With respect to the first two, merits-based factors, the Administration misstates the nature of the claims asserted in this lawsuit and the law governing those claims. Through a hard-fought political battle, Congress unmistakably refused to appropriate funding for the construction of a border wall in the amounts that the Administration sought, and the Administration is

violating the Appropriations Clause by nevertheless spending money Congress refused to provide.

The Administration has invoked a statutory transfer authority as a "defense to this claim." App. 34a. But that defense cannot obscure the constitutional nature of respondents' challenge, and this Court's decision in *Dalton v. Specter*, 511 U.S. 462 (1994), does not foreclose non-statutory review of that challenge. Moreover, the Administration's zone-of-interests argument is merely another effort to evade judicial review as it would preclude anyone from challenging the Executive Branch's violations of the Appropriations Clause. And insofar as the Administration seeks review with respect to its statutory defense, the lower courts' statutory interpretation is plainly correct and not independently worthy of review. For all of these reasons, the Administration cannot show that, if the court of appeals upholds the injunction below, this Court is likely to grant review and reverse.

With respect to the third, equity-based factor, the Administration ignores the harms to other parties (such as the House of Representatives) and the public that will result if the Administration is allowed to spend billions of dollars on a border wall even though Congress denied such an appropriation. The Administration has been clear about the reason it seeks a stay: Absent an injunction, it intends to quickly obligate and expend funds on border wall construction while its appeal is pending. Indeed, but for the preliminary injunction, the Administration has stated that it would begin building the border wall within a matter of days at the rate of half a mile per day. Once those funds are obligated and spent, they cannot be

clawed back, and the harm to Congress's Appropriations Clause interests, the Constitution, and the Nation cannot be remedied.

By contrast, there is no substantial irreparable injury to the United States if the district court's injunction remains in effect. Among other reasons, if federal funds are not spent during this fiscal year, they are not lost; they return to the federal treasury and can be appropriated for use next year, if Congress believes that they should be spent on border wall construction. Indeed, President Trump publicly acknowledged that the Administration "didn't need to do this" because it could "do the wall over a longer period of time."[4]

ARGUMENT

A stay is "an exercise of judicial discretion, and the 'party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.'" *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (per curiam). Because "[a] stay is an 'intrusion into the ordinary processes of administration and judicial review,'" *Nken v. Holder*, 556 U.S. 418, 427 (2009), "the applicant bears a heavy burden." *Philip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010) (Scalia, J., in chambers). The Administration has not satisfied its burden of justifying a stay pending appeal here.

1. The Administration claims that this Court will grant certiorari and reverse, *Ind. State Police*

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[4] *Remarks by President Trump on the National Security and Humanitarian Crisis on Our Southern Border*, White House (Feb. 15, 2019, 10:39 AM), http://tinyurl.com/TrumpRoseGarden Remarks [hereinafter Feb. 15 Rose Garden Remarks].

Pension Tr., 556 U.S. at 960, on three distinct issues. Its showings as to all three are insufficient.

a. The Administration argues that respondents have raised no constitutional claims, but rather only statutory claims, and that this Court's decision in *Dalton* forecloses non-statutory review for claims based on the meaning of a statute. Application at 20. Both predicates to this "showing" are wrong.

i) The background of the dispute between the President and Congress makes clear that respondents have asserted a constitutional claim: Congress clearly rejected President Trump's request for over $5 billion for a border wall, and the Administration's effort to spend more money than Congress appropriated violates the Appropriations Clause.

For fiscal year 2019, the Administration officially requested from Congress "$1.6 billion to construct approximately 65 miles of border wall."[5] The initial Senate appropriations bill for DHS included $1.6 billion for approximately 65 miles of border fencing. *See* S. 3109, 115th Cong., tit. 2 (as reported by S. Comm. on Appropriations, June 21, 2018). Around July 2018,

[5] 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.

however, President Trump informally "pressed Republicans to give him $5 billion as a down payment on his wall."[6]

Near the end of the 115th Congress, Congress and the President reached an impasse on appropriations for a border wall. President Trump held a televised meeting with Speaker of the House (then-Minority Leader) Nancy Pelosi and Senate Minority Leader Chuck Schumer to negotiate fiscal year 2019 appropriations for a border wall.[7] At that meeting, President Trump reiterated his demand for $5 billion for a border wall and 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, I will shut down the government, absolutely."[8]

Two days before funding for nine federal departments expired, the Senate passed a continuing resolution to fund the Government temporarily, and it did

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[6] 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 Senator Richard Shelby, Chairman, U.S. Senate Comm. on Appropriations (Jan. 6, 2019), http://tinyurl.com/ShelbyLettertoApprops (requesting $5.7 billion for a border wall). The process for submitting and amending appropriations requests to Congress is subject to well-established guidelines and procedures that were not followed here. *See generally* Office of Mgmt. & Budget, Circular No. A-11, *Preparation, Submission, and Execution of the Budget* (June 2019), https://tinyurl.com/OMBCircularA11.

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

[8] *Ibid.*

not include funding for a border wall.[9] The next day, the House approved a short-term funding bill appropriating $5.7 billion for "U.S. Customs and Border Protection—Procurement, Construction, and Improvements."[10] However, because "Democrats w[ere] not . . . willing to support $5 billion in wall funding," the Senate never considered the House's version of the legislation.[11]

Appropriations for a substantial portion of the Federal Government expired on December 21, 2018, *see* Pub. L. No. 115-298 (2018) (to be printed at 132 Stat. 4382), beginning the longest Federal Government shutdown in history. On January 2, 2019, Speaker Pelosi stated that the incoming House would provide "nothing for the wall."[12] In response, President Trump addressed the nation from the Oval Office, imploring Congress to "do[] its job" and "pass a bill that ends this crisis."[13]

On January 25, 2019, after it became apparent that the Government's closure was causing serious disruption throughout the Nation, President Trump

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[9] *See* Further Additional Continuing Appropriations Act, 2019, H.R. 695, 115th Cong. § 101(1) (Dec. 19, 2018).

[10] *See* Further Additional Continuing Appropriations Act, 2019, H.R. 695, 115th Cong. § 141 (Dec. 20, 2018).

[11] *See* Bo Erickson et al., *House Passes Spending Bill with $5 Billion Border Wall Funding, Increasing Likelihood of Shutdown*, CBS News (Dec. 20, 2018, 9:00 PM), http://tinyurl.com/CBSHousePassesBill.

[12] Tal Axelrod, *Pelosi on Negotiations with Trump: 'Nothing for the Wall,'* Hill (Jan. 2, 2019, 5:48 PM), http://tinyurl.com/HillNothingForWall.

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

signed a continuing resolution to fund the Government through February 14, 2019.[14] Over the next several weeks, a bipartisan conference committee negotiated a deal to fund the Government.[15] Consistent with that deal, Congress passed the Consolidated Appropriations Act, 2019. Pub L. No. 116-6 (2019) (to be printed at 133 Stat. 13). The Act appropriated $1.375 billion for construction of fencing in the Rio Grande Valley area of the border. *Id.* § 230 (to be printed at 133 Stat. at 28). No other funding was designated for the construction of a border wall.

On February 15, 2019, President Trump signed the Act into law.[16] Yet, that same day, President Trump expressed his dissatisfaction with the amount that Congress had appropriated and announced that his Administration would instead spend up to $8.1 billion on construction of a border wall.[17] To use the

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[14] *See* Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, 133 Stat. 10; Kevin Liptak, *Flight Delays Pile Pressure on Trump Amid Shutdown*, CNN (Jan. 25, 2019, 12:17 PM), http://tinyurl.com/CNNFlightDelays.

[15] *See* Jacob Pramuk, *Trump Signs Bill to Temporarily Reopen Government After Longest Shutdown in History*, CNBC (Jan. 25, 2019, 9:58 PM), https://tinyurl.com/CNBCTrumpSignsBill.

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

[17] *See Fact Sheet: President Donald J. Trump's Border Security Victory*, White House (Feb. 15, 2019), http://tinyurl.com/WHBorderVictory [hereinafter Border Victory Fact Sheet]; Feb. 15 Rose Garden Remarks, *supra* note 4.

words of Mr. Mulvaney, the Administration decided to build the wall "without Congress."[18]

This is directly contrary to the Appropriations Clause, which dictates that the Administration may spend funds to build a border wall only if Congress authorizes those funds to be spent for that purpose. Congress appropriated only $1.375 billion for the construction of a border wall. Thus, the Administration may constitutionally spend only that amount on such construction. *See, e.g.*, *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1851) ("It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress."). The court of appeals therefore correctly held that respondents had properly alleged a violation of the Appropriations Clause. App. 44a-45a.

ii) The Administration claims that respondents have not alleged an Appropriations Clause violation because its expenditures are in fact authorized by certain appropriations provisions. Application at 20. But government officials who spend money in excess of appropriated amounts *must always* claim that they are relying on some statutory authority: without such a defense, the constitutional violation is uncontested. The assertion of such a defense, however, does not mean that the challenger is not raising a constitutional claim for violation of the Appropriations Clause. The Administration's contrary argument

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[18] Andrew O'Reilly, *Mulvaney Says Border Wall Will Get Built, 'With or Without' Funding from Congress*, Fox News (Feb. 10, 2019), https://tinyurl.com/MulvaneyFoxNewsSunday.

would mean that it could never violate the Appropriations Clause so long as it contends—however incorrectly or pretextually—that an appropriation exists.

Nothing in *Dalton* dictates otherwise. There, the Court rejected the open-ended theory that "*whenever* the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." 511 U.S. at 471 (emphasis added). Here, the claim is not merely that Administration officials have taken actions beyond those Congress authorized. It is that they have taken actions in the face of clear Congressional *refusal* to authorize those actions—a refusal, moreover, that pertains to the use of federal funds, where Congress's constitutional power is exclusive. Recognizing a non-statutory basis for review of claims challenging such actions is entirely consistent with *Dalton*, and will not open the courthouse doors to all claims in which Executive Branch officials are alleged to have exceeded a grant of authority.[19]

b. Having precipitated the longest government shutdown in history because Congress would not appropriate the amount of funds it wanted for a border wall, the Administration now incorrectly claims to

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[19] Even assuming that this dispute is merely statutory, *Dalton* does not announce a broad rule of unreviewability. The statute at issue in *Dalton* "d[id] not *at all limit* the President's discretion" and instead allowed him to approve or disapprove certain recommendations "for *whatever reason he sees fit*." *Id.* at 476 (emphases added). Here, as discussed below, Section 8005 is narrowly drawn, with strict limitations. *See Chamber of Commerce v. Reich*, 74 F.3d 1322, 1331 (D.C. Cir. 1996) (*Dalton* "merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available").

have found "secreted in the interstices of legislation the very grant of power which Congress consciously withheld." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring). The Administration argues (Application at 31-34) that the court of appeals incorrectly rejected its assertion of inapposite appropriations authorities in an attempt to excuse its constitutional violation. But the Court is unlikely to grant certiorari and reverse on this basis.

As relevant here, the Administration asserts authority to spend $2.5 billion of Department of Defense (DOD) funds under 10 U.S.C. § 284, which authorizes DOD to, *inter alia*, construct fences to block drug smuggling corridors along the border in support of the Department of Homeland Security (DHS). Most of the fiscal year 2019 funding that Congress appropriated for the military's counter-drug activities, including DOD's activities under Section 284, has already been used. The Administration therefore plans to transfer into the military's counter-drug fund $2.5 billion that Congress appropriated for other purposes.

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. The Administration claims that Sec-

tions 8005 and 9002 of the 2019 Department of Defense Appropriations Act, Pub. L. No. 115-245, 132 Stat. 2981, authorize its transfers here.

In pertinent part, Section 8005 provides that:

> Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may . . . transfer not to exceed $4,000,000,000 of . . . funds made available in this Act . . . *Provided*, That such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress . . . .

Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999. Section 9002 provides an additional authority to transfer up to $2 billion between certain accounts, and it is "subject to the same terms and conditions as the authority provided in section 8005." *Id.* § 9002, 132 Stat. at 3042.

The meaning of these provisions is not worthy of review. The Administration identifies no other cases interpreting these provisions, let alone a division among the circuits about their meaning. Regardless, review is unwarranted because the lower courts' interpretation is plainly correct. As relevant here, two limitations in Section 8005 preclude the Administration from transferring funds to construct the border wall sought by President Trump.

First, Section 8005 does not authorize the transfer of funds in cases "where the item for which funds are

requested has been denied by the Congress." This restriction was added in fiscal year 1974, to "tighten congressional control of the reprogramming process." H.R. Rep. No. 93-662, at 16 (1973). The House committee report explained that DOD had sometimes "requested that funds which have been specifically deleted in the legislative process be restored through the reprogramming process," and that "[t]he Committee believe[d] that to concur in such actions would place committees in the position of undoing the work of the Congress." *Id.*

Indeed, of considerable significance here, the Committee stated that such a position would be "untenable." *Id.* Consistent with its purpose, this sort of appropriations restriction is intended 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))).

As the court of appeals explained, the "real-world events in the months and years leading up to the 2019 appropriations bills leave no doubt that Congress considered and denied appropriations for the border barrier construction projects that DoD now seeks to finance using its section 8005 authority." App. 38a-39a. Indeed, the Administration has unequivocally stated in court that *the reason DOD is constructing a border*

*wall for DHS is because Congress denied "a direct appropriation" to DH*S.[20] Section 8005 emphatically does not permit the Administration to circumvent that denial.

Significantly, the Administration does not dispute that Congress denied appropriations for the physical border wall that it is now seeking to construct. *See* Application at 32. Instead, it contends that "Section 8005's reference to an 'item for which funds are requested' means a particular budget line-item requiring additional funding beyond the amount in the DoD appropriation for the fiscal year." *Ibid.* The Administration offers no support for this position. The text of the statute does not say this. And Acting Secretary Shanahan's memorandum directing the first transfer states that the "items" at issue are the border wall projects. *See* Decl. of Kenneth P. Rapuano, Ex. C (Memorandum from Patrick M. Shanahan, Acting Sec'y of Def., U.S. Dep't of Def. (Mar. 25, 2019)), *Sierra Club v. Trump*, No. 19-16102 (9th Cir. June 3, 2019),

[20] 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) [hereinafter *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.").

ECF No. 7-3 [hereinafter Shanahan Memo] (describing "[t]he items to be funded" as "Yuma Sector Projects 1 and 2 and El Paso Sector Project 1").[21]

The Administration argues that the border wall projects at issue are different from those Congress denied because they are funded by DOD, not DHS. Application at 33. But this "does not change what funding was requested for: a wall along the southern border." App. 38a. There is no relevant distinction between DHS's construction of a border wall directly and DOD's construction of a border wall for DHS that undermines Congress's assessment that *DHS does not need a $5 billion border wall*.

Contrary to the Administration's present claim that the projects are completely distinct, the Administration has touted DOD's efforts as part of its singular "Border Security Victory" in fulfillment of the Administration's overall goal to construct a wall along the southern border.[22] And the Administration is relying on DHS's National Environmental Policy Act (NEPA) waivers in order to construct the projects, the validity of which depends on the projects being constructed pursuant to DHS's authority under Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, tit. I, § 102(a), 110 Stat. 3009 (codified at 8 U.S.C. § 1103 note). *See Defs.' Opp'n to Pls.' Mot. for Prelim.*

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[21] The Administration criticizes the court of appeals for construing the relevant "item" to be "'a border wall' writ large." Application at 32 (quoting App. 37a). But the court of appeals considered the "item" to be "the border barrier construction projects that DoD now seeks to finance using its section 8005 authority," App. 39a—*exactly as Acting Secretary Shanahan described*.

[22] *See* Border Victory Fact Sheet, *supra* note 17.

Inj. at 25-26, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Apr. 25, 209), ECF No. 64; App. 166a-167a. The Administration cannot plausibly contend that DOD's construction of a border wall is indistinguishable from DHS's construction of a border wall for purposes of NEPA, but entirely distinct for purposes of Section 8005.[23]

Second, Section 8005 authorizes only transfers "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.[24]

In this case, "the President's repeated and unsuccessful requests for more border barrier funding make the request here obviously not unforeseen." App. 36a. The Administration's alleged need to build a border wall was clearly foreseen—Congress simply disagreed

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[23] Even under the Administration's interpretation of the "denied by the Congress" limitation, their Section 8005 transfers still fail. While DOD requested $547 million for the military's counter-narcotics support activities, Congress specifically rejected $30 million of this request as "[e]xcess to need" and instead appropriated only $517 million. H.R. Rep. No. 115-952, at 452 (2018).

[24] 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/DOD2004ReprogrammingAction.

that $5 billion for a border wall was necessary and proper.

The Administration concedes that DHS's purported need for a border wall was foreseen, but argues that DOD's "'need to provide support' to DHS for these projects was 'not known at the time of [DoD's] FY 2019 budget request" because DHS did not request support from DOD until February 2019. Application at 33 (alteration in original) (quoting Shanahan Memo). But "DHS came to DoD for funds because Congress refused to grant DHS itself those funds." App. 36a. If the Administration's argument were accepted, Congress's denial of funding for a project could constitute the unforeseen circumstance that justifies a transfer to fund that project. This situation, however, is precisely what Congress designed the limitations in Section 8005 to prevent.

Moreover, the Administration's claim (Application at 33) that DOD cannot foresee a need for counter-drug support until it actually receives a request from an agency is implausible. The Administration has in fact conceded in court that DOD considered using Section 284 to support DHS's border barrier construction *in early 2018*.[25] Specifically, DOD's Comptroller withheld nearly $1 billion of fiscal year 2018 counter-drug

[25] *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.").

funding until July 2018, because DOD was considering using that funding for "Southwest Border construction."[26]

Because the Administration's transfer of $2.5 billion does not comply with Section 8005's strict limitations, "no congressional action permits Defendants to use those funds to construct border barriers." App. 44a-45a. The Administration's transfer, obligation, and expenditure of the funds at issue here "therefore violates the Appropriations Clause and intrudes on Congress's exclusive power of the purse." *Ibid.*

c. Finally, the Administration has failed to show that its zone-of-interests argument is worthy of review or likely to lead to reversal. In fact, the Administration's zone-of-interests claim is, in reality, an argument that *no one* can challenge the conduct at issue here. That claim fails for several reasons.

First, as explained above, respondents have asserted a constitutional claim. *See supra* p. 5. Although the Administration argues abstractly that a zone-of-interest analysis should apply to constitutional claims, it never states what test applies to claims under the Appropriations Clause. Instead, the Administration claims that Section 8005 still prescribes the relevant zone of interests test because "a violation of Section 8005's limitations is . . . a necessary element of their claim." Application at 29. But, as discussed, it is the Administration's *defense* to that claim that

[26] 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.

turns on the meaning of Section 8005—and that defense cannot establish who is protected by, and entitled to enforce, the Appropriations Clause.

Second, the Administration's zone-of-interests argument proves too much. The Administration identifies *no* parties whose interests would be "protected by Section 8005" and who could therefore enforce that statute's limitations. Indeed, it has separately argued that the House lacks standing to bring suit notwithstanding its assertion that Section 8005 is a "provision that 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-HSG (N.D. Cal. Apr. 25, 2019), ECF No. 64.

The Administration's attempt to insulate its conduct from judicial review cannot be reconciled with "the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). Indeed, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

The Administration claims that "[t]o the extent that Section 8005 expressly contemplates any form of enforcement, it is congressional oversight." Application at 25. According to the Administration, "[i]f Congress disagrees with a particular transfer under Section 8005, it has the necessary tools to address the problem itself." *Ibid.* Again, this is not a zone-of-interests argument, but a claim for barring all judicial review. And the alternative to such review is illusory. The Administration has failed to identify *any* action

that Congress can take that would prevent the expenditure of the $2.5 billion at issue here.

It is no answer to say that Congress could pass legislation invalidating the use of the funds, given that this case arises from the Administration's violation of Congress's appropriations legislation. The Appropriations Clause can hardly serve as "a bulwark of the Constitution's separation of powers," *FLRA*, 665 F.3d at 1347, if the Administration can disregard Congress's appropriations decisions unless there exist veto-proof majorities in both chambers.

To the contrary, "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion) (citing *Reeside*, 52 U.S. (11 How.) 272). It is not incumbent upon Congress to pass additional legislation disapproving what the Constitution already forbids. The Appropriations Clause instead puts the burden on the Administration to show Congressional authorization for its transfer, obligation, and expenditure of the $2.5 billion at issue on a border wall—a burden that the court of appeals correctly determined that the Administration has not and cannot satisfy.

2. The balance of the equities also weighs strongly against a stay because the injury asserted by the Administration does not surpass the harm to other parties or to the public that will result absent an injunction. *See Ind. State Police Pension Tr.*, 556 U.S. at 960.

a. The Administration incorrectly suggests that the only harm that would occur if the Court grants a

stay would be "aesthetic and recreational injuries" to respondents. Application at 38. Congress's Appropriations Clause interests have already been injured, and will continue to be injured, if a stay is granted.

A stay would not preserve the status quo, but rather prejudice the outcome of this appeal. Absent the district court's injunction, the Administration stresses that it will expeditiously obligate and expend the transferred funds. *See* Application at 5 (explaining that "DoD has to finalize contracts before September 30, 2019"); App. 130a (noting that the Administration intends to build the border wall at the rate of half a mile per day).

The Appropriations Clause, however, "prevents Executive Branch officers from even inadvertently obligating the Government to pay money without statutory authority." *FLRA*, 665 F.3d at 1347.[27] Once DOD obligates and spends these funds, there will be no way to get them back, and the constitutional injury will be irreparable. As the district court explained, "[t]he funding of border barrier construction, if indeed barred by law, cannot be remedied easily after the

[27] Congress has made it illegal to "involve [the United States Government] in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). This provision is among the "various statutory provisions" that reflect "[t]he Congressionally chosen method of implementing" the Appropriations Clause. *Harrington v. Bush*, 553 F.2d 190, 194-95 (D.C. Cir. 1977); *see also City of Houston v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1426 (D.C. Cir. 1994) (explaining that "once the relevant funds have been obligated, a court cannot reach them in order to award relief").

fact, and yet [the Administration] intend[s] to commence construction immediately and complete it expeditiously." App. 169a.

The court of appeals correctly explained that the Administration's "rush to spend this money is necessarily driven by their understanding that Congress did not appropriate requested funding for these purposes in the current budget and their expectation that Congress will not authorize that spending in the next fiscal year, either." App. 72a. This effort, it concluded, simply "is not consistent with Congress's power over the purse." *Ibid.*

The injury to Congress's Appropriations Clause interests harms not only the House, but also the public. "The Appropriations Clause is . . . a bulwark of the Constitution's separation of powers," *FLRA*, 665 F.3d at 1347, and "[t]he history of liberty has largely been the history of observance of [such] procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943). As the court of appeals summarized, "[t]he public interest in ensuring protection of this separation of powers is foundational and requires little elaboration." App. 74a.

b. The constitutional damage that has occurred and will occur if a stay is granted outweighs any asserted harm to the Administration pending appeal.

The Administration claims that "[t]he injunction frustrates the government's ability to stop the flow of drugs across the border." Application at 34. However, the Administration acknowledges that the overwhelming majority of drugs are smuggled *at* ports of

entry, not between.[28] Administration documents also reveal that (in addition to altering their routes) smugglers evade border walls by using drones, tunnels, and other techniques.[29] For these reasons, among others, Congress refused to fund "President Trump's wasteful wall."[30] In other words, "Congress could have appropriated funds to construct these barriers if it concluded that the expenditure was in the public interest, but it did not." App. 71a.

The court of appeals therefore correctly determined that "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 smuggling. App. 70a. The Administration criticizes this conclusion, stating that "[n]o sound principle of equity requires such defeatism." Application at 35. As the stay applicant, however, the burden is on the Administration to show that it will be irreparably harmed absent a stay. There is nothing "defeatist" about pointing out that the Administration has failed to satisfy its burden.

Moreover, the Administration has other tools at its disposal to secure the border. For example, it could spend the funds that Congress appropriated and deemed sufficient for the construction of a border

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[28] *See CBP Enforcement Statistics FY 2019*, U.S. Customs & Border Prot., https://tinyurl.com/CBPFY19Stats (last visited July 17, 2019).

[29] *Drug Smuggling at the Border*, Office of Intelligence, U.S. Customs & Border Prot., https://tinyurl.com/CBPDrug SmugglingPresentation (last visited July 17, 2019).

[30] 165 Cong. Rec. S1362 (daily ed. Feb 14, 2019) (statement of Sen. Leahy).

fence. Yet the Administration has apparently completed only 1.7 of the 95 miles of border fencing Congress approved and appropriated funds for in fiscal year 2018.[31] And President Trump has also publicly conceded that the Administration "didn't need to do this" because it could "do the wall over a longer period of time."[32]

The Administration claims that, "if the injunction remains in place, it [might] foreclose DoD's ability to obligate the funds" before its appropriations expire. Application at 36. But, as the court of appeals explained, "[a] lapse in funding does not mean that the money will disappear from the Treasury." App. 71a. Rather, "[t]he country will still have that money" and "[i]t could be spent in the future" subject to Congressional appropriations. *Ibid.* Accordingly, the Administration will have the funds it seeks if Congress—the *only* body that can decide how federal funds should be spent—decides that public money should be spent as the Administration wishes.

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[31] *See* Letter from U.S. House of Representatives, *California v. Trump*, No. 4:19-cv-00872-HSG (N.D. Cal. May 21, 2019), ECF No. 161.

[32] Feb. 15 Rose Garden Remarks, *supra* note 4.

CONCLUSION

The Court should deny the Administration's motion for a stay pending appeal.

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