No. 20A-__

In the
Supreme Court of the United States

SIERRA CLUB, ET AL.,

Applicants,

v.

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

Respondents,

APPLICANTS' MOTION TO LIFT STAY

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PARTIES TO THE PROCEEDING

The applicants (plaintiffs-appellees below) are the Sierra Club and the Southern Border Communities Coalition.

The respondents (defendants-appellants below) are Donald J. Trump, in his official capacity as President of the United States; Mark T. Esper, in his official capacity as Secretary of Defense; Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security; and Steven T. Mnuchin, in his official capacity as Secretary of the Treasury.*

RELATED PROCEEDINGS

United States Supreme Court:

Trump v. Sierra Club, No. 19A60 (July 26, 2019)

United States Court of Appeals (9th Cir.):

Sierra Club v. Trump, Nos. 19-16102 and 19-16300 (June 26, 2020)

United States District Court (N.D. Cal.):

Sierra Club v. Trump, No. 19-cv-892 (June 28, 2019)

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* The complaint named as official-capacity defendants then-Acting Secretary of Defense Patrick M. Shanahan and then-Secretary of Homeland Security Kirstjen M. Nielsen. Secretary Esper and Acting Secretary Wolf were substituted as defendants pursuant to Federal Rule of Civil Procedure 25(d).

CORPORATE DISCLOSURE STATEMENT

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

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

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

INTRODUCTION

This case concerns whether Plaintiffs-Applicants ("Plaintiffs"), whose members own nearby property, and fish, hike, study, and otherwise use and enjoy a protected landscape, have any recourse when the executive branch causes them irreparable harm by directly contravening Congress's considered decision to limit spending on border wall construction. Every court to address the question has concluded that the wall construction is illegal. A year ago, at an early stage of this litigation and the disputed construction, this Court granted an emergency stay of an injunction against the construction. Since then, intervening events have made clear that should that stay remain in effect, it will not preserve the status quo, but hand Defendants-Respondents ("Defendants") a complete victory despite having lost in every court.

When this Court granted its initial stay, it presumably assumed that it was merely granting interim relief, not deciding the merits in the guise of stay. That is no longer the case. At the same time, a series of intervening decisions, from the court below and several other courts, have strengthened Plaintiffs' claims that Defendants' actions are both unlawful and subject to judicial redress.

Defendants have spent the past year rushing construction of a border wall that Congress denied and that multiple courts have all found unlawful. The court of appeals has now affirmed the injunction that this Court stayed, but the government has 150 days to seek certiorari. At this juncture, the Court's stay, far from preserving the status quo, will permit Defendants to complete their project and threatens to

deprive Plaintiffs of a remedy. The Court should therefore lift the stay so that it may consider any certiorari petition in the ordinary course.

STATEMENT OF THE CASE

A. Underlying Facts

The President sought, and Congress denied, funding to construct a wall across the lands that Plaintiffs' members live near, use, protect, and treasure. After Congress "repeatedly declined to provide the amount of funding requested by the President," the "President announced that he would not sign any legislation that did not allocate substantial funds to border wall construction." App. 10a.

The President's public challenge triggered "the longest partial government shutdown in United States history." App. 10a. During the shutdown, the White House "requested $5.7 billion to fund the construction of approximately 234 miles of new physical barrier." App. 10a. "After 35 days, the government shutdown ended without an agreement to provide increased border wall funding in the amount requested by the President." App. 10a. Congress denied the President's request on February 14, 2019, instead passing the Consolidated Appropriations Act of 2019 ("CAA"), Pub. L. No. 116-6, div. A, 133 Stat. 13 (2019). The CAA made available only $1.375 billion for wall construction, and restricted construction to eastern Texas, in the United States Border Patrol's Rio Grande Valley Sector. 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 above and beyond Congress's appropriation. This sum included "$2.5 billion of Department of Defense ('DoD') funds that could be transferred to provide support for counterdrug activities of other federal government agencies under 10 U.S.C. § 284 ('Section 284')," App. 11a, a statute providing for "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). In addition, the White House announced that "up to $3.6 billion" of military construction funds would be diverted under 10 U.S.C. § 2808 ("Section 2808"). App. 206a.

Ten days later—less than two weeks after Congress denied the executive branch's request to construct approximately 234 miles of new physical barrier 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. App. 12a. In the following months DoD approved $2.5 billion in Section 284 expenditures for DHS construction, as specified in the February 15 White House announcement. App. 12a.

None of the Section 284 construction was paid for by funds that Congress had appropriated for DoD's Section 284 account, and the construction projects chosen by the executive branch directly contravened the limitations Congress placed on border wall construction. At the time Defendants embarked on their plan to circumvent Congress, the Section 284 account contained "less than one tenth of the $2.5 billion needed to complete those projects." App. 12a. So DoD invoked Section 8005 and Section 9002 of the Department of Defense Appropriations Act of 2019, Pub. L. No.

115-245, 132 Stat. 2981 (2018) ("Section 8005") to transfer "$1 billion from Army personnel funds" and an additional "1.5 billion from 'various excess appropriations,' which contained funds originally appropriated for purposes such as modification of in-service missiles and support for U.S. allies in Afghanistan." App. 12a–13a. These transfer authorities are explicitly limited by Congress and "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." App.13a–14a.

B. Proceedings Prior to this Court's Grant of a Stay

Plaintiffs sued on February 19, 2019, one business day after the president's announcement that he intended to construct the wall that Congress rejected. Plaintiffs' members live near and use the lands on which Defendants seek to construct a massive, multibillion-dollar wall. This unique landscape is renowned for its beauty and archaeological, historic, and biological value, and includes protected public lands, including Organ Pipe National Monument, Coronado National Memorial, the Cabeza Prieta National Wildlife Refuge, and the San Bernardino National Wildlife Refuge.

Beginning on April 4, 2019, as Defendants made public their construction decisions, Plaintiffs sought injunctions against specific wall segments. To enable expeditious and orderly review and disposition of this action, Plaintiffs sought partial summary judgment and a permanent injunction on June 12, 2019.

On May 24, 2019, the district court entered a preliminary injunction barring Defendants' initial transfer of $1 billion to construct wall sections in Arizona and New

Mexico. The district court concluded that Defendants' plan was unlawful, because they had not identified any statutory authority that permitted them to spend funds on wall construction in excess of what Congress had appropriated in the CAA. In particular, the district court found that the wall construction at issue here was "denied by Congress" and was not "unforeseen," thus failing the requirements of the authority Defendants had invoked, Section 8005 of the DoD Appropriations Act. App. 229a–234a.

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." App. 232a. The court observed that Defendants' reading of "denied," which would apply only to specific rejections of budget-line requests, would defeat the entire purpose of the limitation because Defendants could simply (as they did here) request items without reference to specific budget lines or subcomponents. App. 230a–231a, 235a–236a; *see also* Office of Management & Budget Letter 1, Dist. Ct. ECF No. 168-2, Ex. 13 (RJN) ("The President requests $5.7 billion for construction of a steel barrier for the Southwest border.").

The district court likewise rejected Defendants' contention that the need for wall funds was "unforeseen." For more than a year before the transfers, the Executive Branch requested, and Congress considered, the allocation of billions of dollars to build a border wall in these same lands. App. 233a–234a.

The district court also noted that Defendants' position raised serious constitutional concerns under the Appropriations Clause and the separation of powers: "[T]he position that when Congress declines the Executive's request to appropriate funds, the Executive nonetheless may simply find a way to spend those funds 'without Congress' does not square with fundamental separation of powers principles dating back to the earliest days of our Republic." App. 252a–253a.

The district court rejected Defendants' argument that Plaintiffs were required to satisfy a zone-of-interests test with respect to Section 8005. It held that Plaintiffs did not "seek[] to vindicate a right protected by a statutory provision," but instead sought "equitable relief against a defendant for exceeding its statutory authority." App. 228a.

On June 28, 2019, the district court issued a permanent injunction incorporating its prior reasoning on the merits. On the equities of the injunction, the district court "note[d] that Congress considered all of Defendants' proffered needs for border barrier construction, weighed the public interest in such construction against Defendants' request for taxpayer money, and struck what it considered to be the proper balance—in the public's interest—by making available only $1.375 billion in funding, which was for certain border barrier construction not at issue here." App. 195a.

Defendants sought an emergency stay of the district court's preliminary injunction. On July 3, 2019, the court of appeals denied the stay motion in a published 2-1 opinion. Judges Clifton and Friedland, writing for the court, held that "[b]ecause

section 8005 did not authorize DoD to reprogram the funds—and Defendants do not and cannot argue that any other statutory or constitutional provision authorized the reprogramming—the use of those funds violates the constitutional requirement that the Executive Branch not spend money absent an appropriation from Congress." *Sierra Club v. Trump*, 929 F.3d 670, 676 (9th Cir. 2019).

Judge Smith dissented, concluding that Plaintiffs could not bring an Administrative Procedure Act claim, and that the APA foreclosed the judiciary's power in equity to enjoin the Executive Branch actions here. *Id.* at 713–717 (Smith, J., dissenting). In dissenting from the majority's refusal to grant a stay, Judge Smith also reasoned (more than a year ago) 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." *Id.* at 718 & n.15.

On July 12, 2019, Defendants filed a stay application with this Court. The Court granted the stay on July 26, 2019. App. 185a. The Court explained that "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." App. 185a.

C. Proceedings Since this Court's Stay

Judicial decisions in this case and several related cases have issued since the Court's stay. All agree that the government's actions are subject to review; and each one that reached the merits ruled that the government's actions are unlawful.

On June 26, 2020, a separate court of appeals panel affirmed the district court's injunction on the merits in a comprehensive decision. Writing for the court of appeals, Chief Judge Thomas found that Congress did not appropriate funds for border wall construction, and that Defendants could not rely on Section 8005 to make up the shortfall by transferring billions from the military budget to DHS's unfunded wall projects. The court of appeals set forth its reasoning that Section 8005 was inapplicable to the border wall expenditures in an opinion filed the same day in the companion case, *State of California, et al. v. Trump, et al.*, Nos. 19-16299 & 19-16336, (9th Cir. June 26, 2020), App. 119a.

The court of appeals agreed with the district court that border wall construction was not "unforeseen." App. 119a–124a. It pointed out that Defendants' position—that a Section 284 request is foreseen only at the moment it is received by DoD—"would swallow the rule and undermine Congress's constitutional appropriations power," and would be "inconsistent with the purpose of Section 8005: to 'tighten congressional control of the reprogramming process.'" App. 122a (quoting H.R. Rep. No. 93-662, at 16 (1973)). Moreover, the historical record demonstrated that DoD did, in fact, anticipate just such a request for Section 284 funds. App. 122a–123a.

In addition, the court of appeals found that construction of border wall sections aimed at a civilian law enforcement agency's counterdrug mission is not a "military requirement," and Congress limited the use of Section 8005 to such requirements. App. 124a–128a. "To conclude that supporting projects unconnected to any military

purpose or installation satisfies the meaning of 'military requirement' would effectively write the term out of Section 8005." App. 128a.

The court of appeals also agreed with the district court that "Congress's broad and resounding denial resulting in a 35-day partial government shutdown must constitute a previous denial for purposes of Section 8005." App. 129a. The court "decline[d] to impose upon Congress an obligation to deny every possible source of funding when it refuses to fund a particular project," observing that "surely when Congress withheld additional funding for the border wall, it intended to withhold additional funding for the wall, regardless of its source." App. 129a.

Because Section 8005 was inapplicable, and "the Executive Branch lacked independent constitutional authority to authorize the transfer of funds," the court of appeals concluded that Defendants' plan to transfer $2.5 billion in taxpayer funds to border wall construction was unlawful. App. 25a.

The court of appeals determined that Sierra Club, whose members are injured by Defendants' efforts to evade Congress's appropriations decisions, "has both a constitutional and an *ultra vires* cause of action." App. 25a. The court of appeals held that "because the Federal Defendants not only exceeded their delegated authority, but also violated an express constitutional prohibition designed to protect individual liberties,"—the Appropriations Clause— "Sierra Club has a constitutional cause of action here." App. 31a. This conclusion flowed from this Court's guidance that "certain structural provisions give rise to causes of action." App. 26a.

The court further held that an equitable *ultra vires* cause of action was available, in line with a long tradition of such equitable review. App. 31a–36a. The court observed that "[e]quitable actions to enjoin *ultra vires* official conduct do not depend upon the availability of a statutory cause of action; instead, they seek a 'judge-made remedy' for injuries stemming from unauthorized government conduct, and they rest on the historic availability of equitable review." App. 32a (quoting *Armstrong v. Exceptional Child Ctr., Inc.*), 575 U.S. 320, 327 (2015)). Relying on decades of decisions from the D.C. Circuit and this Court, the court found that "[s]uch causes of action have been traditionally available in American courts." App. 32a (citing *Dart v. United States*, 848 F.2d 217, 223 (D.C. Cir. 1988) ("When Congress limits its delegation of power, courts infer (unless the statute clearly directs otherwise) that Congress expects this limitation to be judicially enforced.")). Following the D.C. Circuit, the court rejected the arguments that the APA displaced traditional equitable review, and that Plaintiffs were required to satisfy the zone of interests of Section 8005 in challenging wall construction that Congress refused to fund. App. 36a–40a.

Finally, the court of appeals found that the district court did not abuse its discretion in granting an injunction against Defendants' construction. It rejected Defendants' argument "that Sierra Club will not be irreparably harmed because its members have plenty of other space to enjoy." App. 41a. And it found that the balance of equities and public interest favored enforcement of Congress's "calculated choice to fund only one segment of border barrier." App. 42a. "No matter how great the

collateral benefits of building a border wall may be, the transfer of funds for construction remains unlawful." App. 42a. Moreover, unlike in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 32 (2008), Defendants failed to produce any evidence of the benefits of border wall construction. App. 44a. "The Executive Branch's failure to show, in concrete terms, that the public interest favors a border wall is particularly significant given that Congress determined fencing to be a lower budgetary priority and the Department of Justice's own data points to a contrary conclusion." App. 44a–45a.

In dissent, Judge Collins "agreed that at least the Sierra Club has established Article III standing," but "conclude[d] that the transfers were lawful" and that Plaintiffs "lack[ed] any cause of action" to challenge them. App. 47a.

Several related district court decisions have also issued since the stay order. The decisions concern numerous aspects of Defendants' wall-building plan, including the additional diversion of $3.6 billion in military construction funds under claimed Section 2808 authority that Defendants undertook after the stay order. Three of the four decisions reached the merits and found that aggrandizing wall construction with billions of military dollars is unlawful; the fourth denied a motion to dismiss and found that an *ultra vires* claim was available to challenge wall construction under claimed Section 8005 authority.

On October 11, 2019, in a case brought by El Paso County and a community organization in the Western District of Texas, Senior Judge Briones found that Defendants' efforts to spend billions of military dollars on wall construction violates

Congress's decision to limit the scope and location of wall construction in enacting the CAA. *See El Paso County v. Trump*, 408 F. Supp. 3d 840, 857 (W.D. Tex. 2019). The court noted its agreement with the district court in this matter that "when a plaintiff seeks equitable relief against a defendant for exceeding its statutory authority, the zone-of-interests test is inapposite." *Id.* at 856 n.1 (citing *Sierra Club v. Trump*, 379 F.Supp.3d 883, 910 (N.D. Cal. 2019)). Due to this Court's stay order, the district court found claims regarding Section 284 "unviable" and limited its holding to Section 2808. *Id.* at 846. In a subsequent order the court therefore enjoined the use of military construction funds under § 2808 but declined to "issue an injunction regarding the § 284 projects that would effectively override the Supreme Court's order." *El Paso County, Texas v. Trump*, 407 F. Supp. 3d 655, 661 (W.D. Tex. 2019). The Fifth Circuit stayed the injunction, explaining that "among other reasons" there was a "substantial likelihood that Appellees lack Article III standing." *El Paso Cty. v. Trump*, No. 19-51144, 2020 U.S. App. LEXIS 567 (5th Cir. Jan. 8, 2020).[2]

On December 11, 2019, the district court in this action entered a permanent injunction against Defendants' construction of 175 miles of additional border wall sections through diversion of $3.6 billion in military construction funds. The district court "decline[d] to interpret Section 2808 to provide the Secretary of Defense with almost limitless authority to use billions of dollars of its appropriations to build

[2] This concern is irrelevant here: as the court of appeals noted, "[t]he Federal Defendants do not challenge Sierra Club's Article III standing in these appeals," App. 17a n.9, and the dissent agreed that Plaintiffs here have standing, App. 47a.

projects for the benefit of DHS, even when Congress specifically declined to give DHS itself the funds to build those projects." *California v. Trump*, 407 F. Supp. 3d 869, 897 (N.D. Cal. 2019) (citing *Util. Air Regulatory Grp.*, 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 district court stayed the injunction pending appeal, noting that "the Supreme Court's stay of this Court's prior injunction order appears to reflect the conclusion of a majority of that Court that the challenged construction should be permitted to proceed pending resolution of the merits." *Id.* at 907.

On February 27, 2020, in a case brought by the State of Washington in the Western District of Washington, Judge Rothstein found that Defendants did not have authority to use Section 2808 to aggrandize border wall funding beyond the $1.375 billion that Congress appropriated for that purpose. *See State v. Trump*, --- F.Supp.3d ---, No. 2:19-CV-01502-BJR, 2020 WL 949934 (W.D. Wash. Feb. 27, 2020). The court found that Congress "saw fit to limit funding for border barrier construction to $1.37 billion all in accordance with its exclusive spending power," and that the CAA "explicitly prohibits the Trump Administration from circumventing Congress, and instead requires that any increased funding for the border wall come through an appropriations act. *Id.* at *8–10. The court observed that "Congress repeatedly and deliberately declined to appropriate the full funds the President requested for a border wall along the southern border of the United States," and cautioned that, "[a]s Justice Field wrote more than a century ago, a court cannot shut its 'eyes to matters

of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men.'" *Id.* at *13 (quoting *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879)).

Finally, on April 2, 2020, Judge McFadden of the district court for the District of Columbia refused to dismiss *ultra vires* claims brought by environmental plaintiffs who "plausibly allege[d] that Defendants used § 8005 to fund border wall construction and that Congress denied funds for this border wall project." *Ctr. for Biological Diversity v. Trump*, –- F.Supp.3d ---, No. 1:19-CV-00408 (TNM), 2020 WL 1643657, at *26 (D.D.C. Apr. 2, 2020). Although the court sustained the *ultra vires* cause of action, it found that a constitutional cause of action was unavailable. *See id.* at *28.

D. Factual developments since the Court's stay

In the year that this Court's stay has been in place, Plaintiffs have sought at every turn to expedite the litigation. Meanwhile, the Defendants have sought to expedite construction of the wall. At the same time, in response to the COVID-19 pandemic, this Court has extended the time for filing a petition for certiorari to 150 days. As a result, the Defendants now concede that they will be able to build the entirety of the wall in dispute *before* they have to file a petition for certiorari.

Due to the ongoing COVID-19 pandemic, this Court extended the deadline to file petitions for writs of certiorari to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing. *See* Order of March 19, 2020. The earliest a petition for certiorari would therefore be due is November 23, 2020. Even if Plaintiffs waive their brief in opposition, the petition could not be

conferenced before December 4, 2020. Should Defendants file a petition for rehearing in the court of appeals, the current deadline extension means that their petition for certiorari need not be filed in time for any conference this year.

In the time that has elapsed since the Court stayed the injunction a year ago, Defendants have already *completed* several of the projects enjoined as unlawful by the District Court—El Centro 1 and Yuma 1 & 2. *See* Border Wall System, U.S. Customs and Border Protection, https://www.cbp.gov/border-security/along-us-borders/border-wall-system. As to the remaining projects, according to CBP, Defendants have completed just under 2/3 of the Tucson Border Wall System Project, and will complete the project by the end of 2020. *See Border-Wall Project Could Block San Pedro River*, Public News Service (July 8, 2020), https://www.publicnewsservice.org/2020-07-08/environment/border-wall-project-could-block-san-pedro-river/a70787-1. On July 15, CBP's Public Lands Liaison informed the Sierra Club that Defendants had completed more than half of the El Paso 1 project, and that it would be complete by the end of 2020. In short, if the stay remains in place, Defendants will complete the entire wall before they even need to file a petition for certiorari with this Court.

These projects have already had significant consequences for both the natural landscape as well as archaeological and tribal sites, and will cause additional destruction unless the stay is lifted. The National Park Service warned that border wall construction at Organ Pipe Cactus National Monument, a UNESCO biosphere reserve in Arizona's Sonoran Desert, could damage or destroy 22 archaeological sites.

Border Fence Construction Could Destroy Archaeological Sites, National Park Service Finds, Wash. Post (Sept. 17, 2019), https://wapo.st/39eD5dr. Defendants have already blasted through parts of Monument Hill, which includes a burial site for the Tohono O'odham Nation, a resting place for primarily Apache warriors. *Sacred Native American Burial Sites are Being Blown Up for Trump's Border Wall, Lawmaker Says*, Wash. Post (Feb. 9, 2020), https://wapo.st/30y6efV. Elsewhere, Defendants have begun construction across Arizona's San Pedro River, the last free-flowing stream in the Sonoran Desert, *Border-Wall Project Could Block San Pedro River*, Public News Service (July 8, 2020), https://www.publicnewsservice.org/2020-07-08/environment/border-wall-project-could-block-san-pedro-river/a70787-1.

ARGUMENT

The Court should vacate its order staying the injunction because intervening events have made clear that unless the stay is lifted, Defendants will complete the wall that is the subject of this litigation before their petition for certiorari is due. Accordingly, Defendants will effectively prevail on the merits, even though *every court* to assess the legality of Defendants' actions has found them unauthorized. A stay should preserve the status quo, not grant the losing party a complete victory without appeal.

Plaintiffs have done everything in their power to enable expeditious review, including seeking speedy entry of partial summary judgment and securing an expedited briefing and argument schedule from the court of appeals. They have succeeded before the lower courts, including two separate appellate panels. But the

combination of this Court's extended filing deadlines and Defendants' rush to complete the wall now threatens to deny the possibility of redress for Plaintiffs' claims. Defendants plan to complete the wall before they would have to seek certiorari. At that point, they need not even file a petition for certiorari, as they will have effectively prevailed. Should the stay remain in place, it therefore will "be tantamount to a decision on the merits in favor of the applicants." *Nat'l Socialist Party of Am. v. Village of Skokie*, 434 U.S. 1327, 1328 (1977) (Stevens, J., in chambers). That is manifestly *not* the purpose of a stay.

At the same time, numerous intervening decisions lend substantial new support to the district court's injunction. These decisions confirm both that Defendants' plan to spend billions of military dollars on a border wall is unlawful, and that a cause of action exists for Plaintiffs to seek redress for their injuries. Under these extraordinary circumstances, the Court should lift its stay.

I. IF THE STAY CONTINUES, DEFENDANTS WILL COMPLETE THEIR UNLAWFUL PROJECT WHILE EVADING THIS COURT'S REVIEW.

At this point, leaving the stay in place will not preserve the status quo; to the contrary, Defendants will prevail on the merits without ever getting a single court to rule in their favor. At the same time, their actions will inflict irreparable injury on the Plaintiffs, and irreversible damage to the lands in question. *Cf. San Diegans For Mt. Soledad Nat. War Mem'l v. Paulson*, 548 U.S. 1301, 1303 (2006) (Kennedy, J., in chambers) (granting stay to "preserv[e] the status quo," because "[c]ompared to the irreparable harm of altering the memorial and removing the cross, the harm in a brief delay pending the Court of Appeals' expedited consideration of the case seems

slight"). A stay should be just that: a stay. Not a victory for the party that has *lost* before every court that has adjudicated the wall's legality.

This Court's extension of filing deadlines in response to the COVID-19 pandemic means that Defendants need not file a petition for certiorari in time for the Court's consideration in 2020. At the same time, exploiting the stay, Defendants have expedited wall construction. In the words of Acting CBP Commissioner Mark Morgan, "This pandemic has not slowed the construction of the border wall system. In fact, we're increasing the pace of construction." *Border Wall Construction Has Sped Up Amid Coronavirus Crisis, CBP Chief Says*, Fox News (May 14, 2020), https://www.foxnews.com/politics/border-wall-construction-has-sped-up-amid-coronavirus. As a result, by Defendants' own estimates, every wall section at issue in the injunction will be complete by the end of 2020.

Although some of Plaintiffs' injuries can be reversed by taking down the unlawful construction, much of the damage Defendants are inflicting on the borderlands will be beyond repair. In their rush to construct the border wall, Defendants are destroying protected saguaro cacti that can take 100 years to reach maturity, and "according to tribal leaders of the Tohono O'odham Nation who live on both sides of the border, [are] blasting ancient burial sites and siphoning an aquifer that feeds a desert oasis where human beings have slaked their thirst for 16,000 years." Tribal Nation Condemns 'Desecration' to Build Border Wall, N.Y. Times (Feb. 26, 2020), https://nyti.ms/32zcqHb. Defendants have dispensed with protections used in the past, rendering their actions even more destructive and irreparable:

> During construction of a section of border wall in 2008, the Bush administration trucked in water for construction use instead of extracting water from the aquifer feeding the Quitobaquito spring.
> . . .
> Now workers at the site are pumping water from the aquifer beneath Quitobaquito to mix cement and to water down dirt roads around construction sites. That could endanger not just the spring's existence but species in its waters such as the Quitobaquito pupfish and Sonoyta mud turtle, according to the National Park Service.

Id. Defendants' destructive approach to the wall project shifts the equities towards reinstating the district court's injunction, because when environmental injury is "sufficiently likely, . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987).

At the same time, Defendants' asserted justification for a stay has substantially weakened. One of their chief arguments in applying for the stay was that DoD would permanently lose access to the funds at issue in the Section 8005 injunction if that injunction was not stayed pending appeal. *See, e.g.*, Defs.' Reply in Supp. of Stay Appl. 15, *Trump v. Sierra Club*, No. 19A60 (S. Ct. July 22, 2019) (asserting that "declining to stay the injunction could well be tantamount to a decision on the merits in favor of respondents, at least in part" because DoD would be unable to obligate the challenged funds even if it prevailed). Defendants have now obligated 100% of the $2.5 billion at stake in this appeal; lifting the stay would not bar the obligation of funds, but would prevent Defendants from completing construction, and inflicting permanent and irreversible damage, before the Court has an opportunity to consider the merits of the case.

As to the remaining equities Defendants raised in their application, those have proven insubstantial. As the court of appeals found, "[t]he Executive Branch's failure to show, in concrete terms, that the public interest favors a border wall is particularly significant given that Congress determined fencing to be a lower budgetary priority and the Department of Justice's own data points to a contrary conclusion." App. 44a–45a. Since this Court's grant of a stay, multiple courts have now found that Defendants are acting in circumvention of Congress's funding decisions—*and not a single court has ruled otherwise*. As the court of appeals recognized, the public interest therefore favors enforcement of Congress's "calculated choice to fund only one segment of border barrier." App. 42a; *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609–10 (Frankfurter, J., concurring) ("When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion.").

Most important, neither the public interest nor the balance of equities support allowing Defendants to achieve full relief on the merits by leaving an emergency stay in place for more than a year, while expediting their construction to complete the wall before this Court can consider its legality. What the Court initially entered as interim relief to permit considered review, will now accomplish the opposite. It threatens to both operate as "justice on the fly" and to convert any subsequent proceeding on certiorari into "what may be an 'idle ceremony.'" *Nken v. Holder*, 556 U.S. 418, 427

(2009) (quoting *Scripps–Howard Radio, Inc. v. FCC*, 316 U.S. 4, 10 (1942)). The stay should therefore be lifted.

II. EVERY COURT TO CONSIDER THE QUESTION HAS FOUND THAT DEFENDANTS' PLAN TO CIRCUMVENT CONGRESS IS UNLAWFUL, AND THAT JUDICIAL REVIEW IS AVAILABLE.

In the time since the Court granted Defendants' stay application, several courts have considered the legality of wall construction in excess of the $1.375 billion that Congress provided for in the CAA, and the viability of a cause of action to challenge it. *Every one* has come to the conclusion that Defendants are acting without any authority to spend billions of taxpayer dollars on a border wall, and that an equitable cause of action is available to address Defendants' lawless action.

A. Plaintiffs Have a Cause of Action.

The court of appeals correctly found that Plaintiffs can proceed in equity to seek relief from *ultra vires* and unconstitutional actions by executive officers. "Where, as here, Congress could not more clearly and emphatically have withheld the authority exercised by DoD, with full consciousness of what it was doing and in the light of much recent history, and Sierra Club satisfies the rigors of Article III standing, our obligation to hear and decide this case is virtually unflagging." App. 26a (quoting *Youngstown*, 343 U.S. at 602 (Frankfurter, J. concurring) and *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (citations, quotations, and alteration marks omitted)). In addition to the recent court of appeals ruling, several intervening decisions since this Court's stay order confirm that Plaintiffs may call on the courts for protection from Defendants' *ultra vires* attempts to circumvent Congress.

As a recent Seventh Circuit decision makes clear, separation-of-powers concerns rooted in congressional control over spending do not dissipate whenever the executive branch invokes an inapplicable statutory authority. In *City of Chicago v. Barr*, that court rejected the executive branch's broad claims of statutory spending authority, which fell "far astray from the language, context and structure of the statute itself," and "would raise potential constitutional and statutory concerns." 961 F.3d 882, 906 (7th Cir. 2020). Writing for the court, Judge Rovner concluded that "[r]ather than an exercise of authority granted to it by the legislature," the challenged actions were "an executive usurpation of the power of the purse." *Id.* at 931. Altering the label did not alter the substance of the interest at stake: "Whether deemed a statutory or a constitutional violation, the executive's usurpation of the legislature's power of the purse implicates an interest that is fundamental to our government and essential to the protection against tyranny." *Id.* at 919. Thus, even though the executive branch invoked a statute as justification for its actions, the court concluded that "the Attorney General exceeded the authority delegated by Congress" and this decision "violated the constitutional principle of separation of power." *Id.* at 931. This accords with the conclusion of the court of appeals that Plaintiffs have a cause of action because "the Federal Defendants not only exceeded their delegated authority, but also violated an express constitutional prohibition designed to protect individual liberties[.]" App. 31a.

This Court also recently reaffirmed that parties who can trace their injuries to a separation of powers violation are entitled to call on the courts for protection. As

the Court reiterated, "we have found it sufficient that the challenger 'sustain[s] injury' from an executive act that allegedly exceeds the official's authority." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7, 2020 WL 3492641, at *8 (U.S. June 29, 2020) (quoting *Bowsher v. Synar*, 478 U.S. 714, 721 (1986)). The Court's decision confirms its prior determination in *Free Enterprise Fund v. Public Company Accounting Oversight Board* that such claims are viable. In that case, "[t]he Government assert[ed] that 'petitioners have not pointed to any case in which this Court has recognized an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of powers principles.'" 561 U.S. 477, 491 n.2 (2010) (quoting Brief for United States at 22, *Free Enter. Fund*, 561 U.S. 477 (2010) (No. 08–861)). But, as the Court observed, private plaintiffs are entitled to such "relief as a general matter[.]" *Id.* (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution")); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015) ("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."); *accord* App. 29a ("Where plaintiffs, like Sierra Club, establish that they satisfy the requirements of Article III standing, they may invoke separation-of-powers constraints, like the Appropriations Clause, to challenge agency spending in excess of its delegated authority.")

Recent decisions from the district courts likewise recognize the viability of an *ultra vires* claim to challenge border wall construction, and confirm Judge Bork's observation that it does not make sense to ask whether a plaintiff is within the zone of interests of a statute claimed to be inapplicable. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) ("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."); *accord* App. 38a n.14 ("[T]he relevant limitation here is not the inapplicable statutory power invoked by the Executive—Section 8005—but instead the restriction on unlawful action—the Appropriations Clause."). As a court in the District of Columbia reasoned:

> If the Government were to use a Medicare statute, for example, to justify building the border wall on someone's property, it would make little sense to require that person to show that he was a Medicare beneficiary or provider to argue that the Medicare statute did not permit border barrier construction.

Ctr. for Biological Diversity, 2020 WL 1643657, at *25. Additional intervening district court decisions in Washington and Texas are in agreement. *See State v. Trump*, 2020 WL 949934, at *15 ("The Court concludes that the zone-of-interests test does not apply to Plaintiff's challenge to Defendants' reliance on § 2808."); *El Paso County*, 408 F. Supp. 3d at 856 n. 1 (agreeing that "the zone-of-interests test is inapposite" to *ultra vires* claims). These decisions all accord with longstanding D.C. Circuit recognition of the ongoing viability of *ultra vires* review. As Judge Silberman explained for that

court, the "enactment of the APA . . . does not repeal the review of *ultra vires* action recognized long before," and "[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (citation omitted).

But even if this Court were to hold for the first time that a statutory zone of interests limited the availability of an *ultra vires* or separation-of-powers challenge, the court of appeals decision in the companion case demonstrates that Plaintiffs—whose interests range from nearby property ownership to aesthetic and environmental interests in using the land—are at least arguably within that zone. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) ("[W]e have always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff."). In the companion case, the court of appeals joined the D.C. Circuit in recognizing the expansive scope of congressional interest in enforcing statutes aimed at tightening congressional control over executive spending: "The field of suitable challengers must be construed broadly in this context because, although Section 8005's obligations were intended to protect Congress, restrictions on congressional standing make it difficult for Congress to enforce these obligations itself." App. 115a; *accord 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 and alteration

marks omitted)). Like the landowner in *Match-E-Be-Nash-She-Wish*, therefore, landowners and other users of land are suitable challengers to enforce limits on predicate administrative steps that lead directly to the alteration of land. Plaintiffs' "stake in opposing" the circumvention of Congress's protection of the lands they treasure is "intense and obvious," and 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.

This Court has never before held that individuals facing injury due to unauthorized and unconstitutional government action should be shut out of court in the absence of Congress's clear displacement of courts' traditional equitable powers. Plaintiffs' members own neighboring property. They fish, hike, study, use, and conserve the lands threatened by construction. They all face injuries traceable to Defendants' disregard for Congress's control over appropriations. Defendants' position is that effectively no injured party can challenge their diversion of billions of dollars that Congress appropriated for other purposes, no matter how clearly unauthorized. But in the absence of any indication that Congress intended to prohibit judicial examination of the executive action here, Defendants' efforts to circumvent congressional control over appropriations are the proper subject of this Court's review. *See Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) ("Congress rarely intends to prevent courts from enforcing its directives to federal agencies."); *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222, 1269 (2014) (Kavanaugh, J., concurring

in part and dissenting in part) (observing that under this Court's "capacious view of the zone of interests requirement," a "suit should be allowed unless the statute evinces discernible congressional intent to preclude review").

B. Defendants have no authority to reconfigure the nation's budget to circumvent Congress's power of the purse.

As every court to examine the question has found, no authority permits Defendants to funnel billions of dollars to a wall that Congress refused to fund. Section 8005, by its terms, cannot be used to aggrandize the funding for "items" that have been "denied by the Congress." And as the lower courts recognized, Congress denied the President's request to fund any wall construction outside of Texas, and did not authorize the spending of billions of taxpayer dollars on the wall sections at issue here. The court of appeals therefore correctly held that "Congress's broad and resounding denial resulting in a 35-day partial government shutdown must constitute a previous denial for purposes of Section 8005." App. 129a; *see also* App. 232a ("The reality is that Congress was presented with—and declined to grant—a $5.7 billion request for border barrier construction."); *Sierra Club v. Trump*, 929 F.3d at 691 ("Construing 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.").

The longest partial government shutdown in U.S. history ended with Congress's decision, "in a transparent process subject to great public scrutiny," to

deny the administration's request to construct hundreds of miles of wall outside of Texas. *Sierra Club*, 929 F.3d at 692. "To call that anything but a 'denial' is not credible." *Id.* The President has himself confirmed what the record makes obvious: Congress refused to fund the very wall construction that Defendants are nonetheless pursuing. As the President conceded on September 18, 2019, the diversion of military funds was entirely occasioned by Congress's refusal to accede to his funding demands: "We wanted Congress to help us. It would have made life very easy. And we still want them to get rid of loopholes, but we've done it a different way. . . We still want them to do it because it would be a little bit easier, but Congress wouldn't do it." Remarks by President Trump During Visit to the Border Wall, White House, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-visit-border-wall-san-diego-ca/ (Sept. 18, 2019).

Faced with this record, "to hold that Congress did not previously deny the Executive Branch's request for funding to construct a border wall would be to 'find secreted in the interstices of legislation the very grant of power which Congress consciously withheld.'" App. 129a (quoting *Youngstown*, 343 U.S. at 609 (Frankfurter, J., concurring)); *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) ("[T]his Court is 'not required to exhibit a naiveté from which ordinary citizens are free.'" (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, C.J.))). In short: "'No' means no." App. 129a.

But even if Congress's denial was insufficiently clear, Defendants additionally lack authority because border wall construction is not an "unforeseen" military need,

as Section 8005 requires. The court of appeals correctly rejected Defendants' argument that "unforeseen" should be equated with "unknown," because "'Congress' choice of words is presumed to be deliberate' and deserving of judicial respect.'" App. 123a (quoting *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018)). In line with its ordinary meaning, the "unforeseen" requirement has been met in the past by "unanticipated circumstances (such as hurricane and typhoon damage to military bases) justifying a departure from the scope of spending previously authorized by Congress." App. 233a. As the court of appeals found, such circumstances are a far cry from the years-long border wall project Defendants repeatedly requested funding for and are now pursuing over Congress's objection. Neither the "longstanding problem" of drug smuggling "nor the President's purported solution"—a border wall—"was unanticipated or unexpected here." App. 120a.

The record establishes that the asserted concern about drugs was not "unforeseen." In February 2018, the President specifically claimed to Congress in his budget proposal that "$18 billion to fund the border wall" was necessary because "a border wall is critical to combating the scourge of drug addiction." Fiscal Year 2019 Budget Request 16, Dist. Ct. ECF No. 168-2, Ex. 10 (RJN); *see also* App. 233a ("[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."). And 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 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. App. 122a–123a.

Moreover, it is implausible that Congress intended its own denial of the president's funding request to constitute "unforeseen" circumstances. If that were the case, as the district court observed, agencies could evade any strictures Congress imposed on their funding simply by virtue of 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." App. 238a. This "heads-I-win-tails-you-lose" theory would upend the statute and the constitutional requirement that Congress authorize spending. Defendants' position—that a Section 284 request is foreseen only at the moment it is received by DoD—"would swallow the rule and undermine Congress's constitutional appropriations power," and is "inconsistent with the purpose of Section 8005: to 'tighten congressional control of the reprogramming process.'" App. 122a (quoting H.R. Rep. No. 93-662, at 16 (1973)).

Finally, the court of appeals correctly determined that 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. There is no dispute that the construction of barriers at issue here is a civilian project, and that DoD is here providing support to the civilian law-

enforcement agency. The court explained that "a request for this support without connection to any military function fails to rise to the level of a military requirement for purposes of Section 8005." App. 127a. "To conclude that supporting projects unconnected to any military purpose or installation satisfies the meaning of 'military requirement' would effectively write the term out of Section 8005." App. 128a. If the executive branch can convert any action taken for the benefit of another agency into a "military requirement" simply by having DoD take the action, the statutory phrase would impose 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).

In sum, the court of appeals' decision, issued subsequent to this Court's stay, is plainly correct that Section 8005 does not provide an end run around Congress's judgment. Congress considered and rejected Defendants' request for border wall funding. 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 . . . ." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427–28 (1990). A multibillion-dollar raid on DoD's budget is no substitute for the appropriations process. Defendants lack any authority for their actions.

CONCLUSION

The stay should be lifted.

Respectfully submitted,

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