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 Motion to Lift Stay Pending the Filing of a Petition for a Writ of Certiorari with This Court

MOTION FOR LEAVE TO FILE IN COMPLIANCE WITH RULE 33.2, MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF, AND BRIEF OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF MOTION TO LIFT STAY

DOUGLAS N. LETTER
General Counsel
Counsel of Record
TODD B. TATELMAN
MEGAN BARBERO
JOSEPHINE MORSE
ADAM A. GROGG

Office of General Counsel
U.S. House of Representatives
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

CARTER G. PHILLIPS
VIRGINIA A. SEITZ
JOSEPH R. GUERRA
CHRISTOPHER A. EISWERTH

Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

July 24, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

MOTION FOR LEAVE TO FILE IN COMPLIANCE WITH RULE 33.2 v

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF vii

BRIEF OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF MOTION TO LIFT STAY 1

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 2

ARGUMENT 6

I. The Balance Of Equities Weighs Against Continuation Of The Court's Stay .. 7

II. The Ninth Circuit's Decision Demonstrates That The Administration Has Failed To Raise Issues That Justify Continuation Of The Stay 12

A. Plaintiffs Have Asserted Valid Non-Statutory Causes Of Action 12

B. The Ninth Circuit Correctly Rejected The Administration's Claim That Its Spending Was Permitted Under The Transfer Statutes It Invoked As Its Defense 20

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Armstrong v. Exceptional Child Center, Inc.,
575 U.S. 320 (2015) 16, 17

Bennett v. Spear,
520 U.S. 154 (1997) 18

Bond v. United States,
564 U.S. 211 (2011) 10, 16

Chamber of Commerce v. Reich,
74 F.3d 1322 (D.C. Cir. 1996) 17, 18

Clinton v. City of New York,
524 U.S. 417 (1998) 10

Dalton v. Specter,
511 U.S. 462 (1994) 5, 17

Dart v. United States,
848 F.2d 217, 223 (D.C. Cir. 1988).......... 18

Grupo Mexicano de Desarolla S.A. v. All. Bond Fund, Inc.,
527 U.S. 308 (1999) 17

Harrington v. Bush,
553 F.2d 190 (D.C. Cir. 1977) 9

Haitian Refugee Ctr. v. Gracey,
809 F.2d 794 (D.C. Cir. 1987) 18

Ind. State Police Pension Tr. v. Chrysler LLC,
556 U.S. 960 (2009) (per curiam) 6

King v. Smith,
88 S. Ct. 842 (1968) 7

Lexmark Int'l, Inc. v. Static Control Components, Inc.,
572 U.S. 118 (2014) 18

McNabb v. United States,
318 U.S. 332 (1943) 10

Sierra Club v. Trump,
929 F.3d 670 (9th Cir. 2019) 9, 11

Sierra Club v. Trump,
No. 19-892, 2019 WL 2715422 (N.D. Cal. June 28, 2019) 3

Trump v. Int'l Refugee Assistance Project,
137 S. Ct. 2080 (2017) 3, 6

Trump v. Sierra Club,
140 S. Ct. 1 (2019) (mem.) .... v, 3

Univ. of Tex. v. Camenisch,
451 U.S. 390 (1981) 4

U.S. Dep't of the Navy v. FLRA,
665 F.3d 1339 (D.C. Cir. 2012) 1, 9, 10

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 15

Constitution

U.S. Const. art. I, § 9, cl. 7 1

Statutes

10 U.S.C. § 284 .... vi, 4, 15

10 U.S.C. § 2801 .... 21, 22

31 U.S.C. § 1341 .... 9, 15

Consolidated Appropriations Act, 2019. Pub L. No. 116-6,
133 Stat. 13 (2019) 14, 15

Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245,
132 Stat. 2981 .... 4, 20

Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5,
133 Stat. 10 (2019) 14

Further Additional Continuing Appropriations Act, 2019, H.R. 695, 115th
Cong. (2018) 14

Legislative Authorities

165 Cong. Rec. S1362 (daily ed. Feb 14, 2019) 11

Other

Aaron Blake, *Trump's Extraordinary Oval Office Squabble with Chuck Schumer and Nancy Pelosi, Annotated*, Wash. Post (Dec. 11, 2018), https://perma.cc/2W9K-L2Z6 13

Andrew O'Reilly, *Mulvaney Says Border Wall Will Get Built, 'With or Without' Funding from Congress*, Fox News (Feb. 10, 2019), https://perma.cc/97EA-VXKH 2, 8, 15

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), https://perma.cc/5AY6-T93X 14

CBP Enforcement Statistics Fiscal Year 2020, U.S. Customs & Border Protection, https://perma.cc/H37J-RTK5 (last visited July 23, 2020) 11

David J. Barron, *Waging War: The Clash Between Presidents and Congress 1776 to ISIS* (2016) 8

Jacob Pramuk, *Trump Signs Bill to Temporarily Reopen Government After Longest Shutdown in History*, CNBC (Jan. 25, 2019, 9:58 PM), https://perma.cc/N2ZM-ANA2 14

Kevin Liptak, *Flight Delays Pile Pressure on Trump Amid Shutdown*, CNN (Jan. 25, 2019, 12:17 PM), https://perma.cc/VM4H-VRAA 14

Message to Congress in Special Session (July 4, 1861), *in* Abraham Lincoln, *Speeches and Writings 1859-1865* (Don E. Fehrenbacher ed. 1989) 8

Military, Merriam-Webster Online Dictionary (2020) 21

Office of Intelligence, U.S. Customs & Border Protection, *Drug Smuggling at the Border* (2017), https://perma.cc/529N-BB2J 11

Remarks by President Trump on the National Security and Humanitarian Crisis on Our Southern Border, White House (Feb. 15, 2019), https://perma.cc/VH6F-JU4C 6, 11, 15

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

Statement by the President, White House (Feb. 15, 2019), https://perma.cc/7QVG-GPE8 15

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 Motion to Lift Stay Pending the Filing of a
Petition for a Writ of Certiorari with This Court

MOTION FOR LEAVE TO FILE IN COMPLIANCE WITH RULE 33.2

The U.S. House of Representatives moves for leave to file the attached *amicus curiae* brief on 8.5" x 11" paper in accordance with Rule 33.2. This format is consistent with the Court's April 15, 2020 order allowing similar filings on 8.5" x 11" paper instead of in booklet form, and it accords with the form in which plaintiffs' motion to lift this Court's July 26, 2019 stay was filed. The House seeks this relief in light of the timing constraints—on July 23, 2020, the Court called for a response to the motion by July 29—and complications arising from the COVID-19 pandemic.

Respectfully submitted,

Douglas N. Letter
General Counsel
Counsel of Record
Todd B. Tatelman
Megan Barbero
Josephine Morse
Adam A. Grogg

Office of General Counsel
U.S. House of Representatives
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

Carter G. Phillips
Virginia A. Seitz
Joseph R. Guerra
Christopher A. Eiswerth

Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

July 24, 2020

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 Motion to Lift Stay Pending the Filing of a
Petition for a Writ of Certiorari with This Court

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The U.S. House of Representatives moves for leave to file the accompanying brief in support of plaintiffs' motion to lift this Court's July 26, 2019 stay of the injunction issued by the U.S. District Court for the Northern District of California in this case. The House has participated as *amicus curiae* at every stage in this litigation. The House filed briefs and presented argument in the district court and the court of appeals and filed an *amicus curiae* brief supporting plaintiffs in their opposition to the original stay application in this Court.

In June 2019, the district court enjoined the Trump Administration's construction of a wall along the southern border of the United States in the absence of a valid Congressional appropriation. After this Court stayed that injunction, *see Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.), the district court granted plaintiffs summary judgment, rejecting the Administration's argument that it had

the authority to use funds transferred from the Department of Defense budget to the Department of Homeland Security to build barriers to counter drug-smuggling activities under 10 U.S.C. § 284. The court entered a permanent injunction, subject to this Court's 2019 stay. On June 26, 2020, the Ninth Circuit affirmed the district court's judgment on the merits, again subject to this Court's 2019 stay. Plaintiffs now seek to lift this Court's 2019 stay to ensure that the Administration cannot complete its unauthorized construction activities before this Court can act on the petition for a writ of certiorari that the Administration is expected to file.

The House has a strong interest in supporting that relief. Under the Appropriations Clause, Congress has the exclusive power to determine the purposes for which federal funds are spent, and the amount to be spent on such purposes. The House thus has a compelling interest in ensuring that border wall construction that two levels of the federal judiciary have declared to be unconstitutional does not continue while the Administration prepares and this Court considers a request to review those rulings.

Respectfully submitted,

Douglas N. Letter
General Counsel
Counsel of Record
Todd B. Tatelman
Megan Barbero
Josephine Morse
Adam A. Grogg

Office of General Counsel
U.S. House of Representatives
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

Carter G. Phillips
Virginia A. Seitz
Joseph R. Guerra
Christopher A. Eiswerth

Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

July 24, 2020

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 Motion to Lift Stay Pending the Filing of a
Petition for a Writ of Certiorari with This Court

BRIEF OF THE U.S. HOUSE OF REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF MOTION TO LIFT STAY

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). As a matter of constitutional design, moreover, each chamber of Congress can

[1] Pursuant to Supreme Court Rule 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.

exercise a structural veto over spending. Thus, the House has a compelling interest in this case in protecting its constitutional authority.

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 has refused to accept this limitation on its authority, as clearly demonstrated by then-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, the Administration cannot construct an immense wall along our border without funds appropriated by Congress for that purpose. The House, accordingly, has a substantial interest in the merits of this case and in having the stay lifted to halt this ongoing violation of the Appropriations Clause.

INTRODUCTION

This case involves the Administration's use of billions of dollars in federal funds to construct a wall along the southern border of the United States despite Congress's unequivocal 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

---

[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) (*Mulvaney Says Border Wall Will Get Built*), https://perma.cc/97EA-VXKH.

Congress did not appropriate for that purpose. The district court enjoined that effort. *See Sierra Club v. Trump*, No. 19-892, 2019 WL 2715422 (N.D. Cal. June 28, 2019). However, in July 2019, this Court stayed that injunction, stating that, among other reasons, "the Government ha[d] made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review" of the Administration's decision. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.). Plaintiffs now ask this Court to lift that stay in light of both the Ninth Circuit's decision—which held that plaintiffs have a cause of action and that the Administration's spending is unconstitutional and *ultra vires*, App. at 23a-25a—and the significantly changed circumstances since this Court entered its stay. Plaintiffs' request should be granted.

A stay "balance[s] the equities as the litigation moves forward" and does not "conclusively determine the rights of the parties." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). When the Court entered its stay over a year ago, there was no reason to believe that the Administration would be able to complete those portions of the border wall that plaintiffs were challenging before this Court could assess the legality of that construction. Plaintiffs were seeking expedited review, and the portions of the border wall that they were challenging remained incomplete.[4]

[4] The Ninth Circuit concluded (unanimously) that plaintiffs have standing to challenge construction of the border wall in certain areas, or "sectors," based on injuries that construction in those areas has on their members' recreational, scientific, and aesthetic interests. App. at 18a-23a; 55a-57a. The Administration has funded wall construction in these sectors by transferring funds under the

The House understands, and plaintiffs report, however, that Executive Branch officials now expect to complete construction of these portions of the wall by the end of 2020. Motion to Lift Stay at 18 (Motion). Because, under the current COVID-19 guidelines, the Administration's petition for a writ of certiorari to review the Ninth Circuit's ruling is not due until late November 2020, this construction could be complete before this Court has a chance to decide whether *to review* the Ninth Circuit's ruling. Thus, this Court's stay is no longer operating to preserve the status quo pending this Court's review; it is allowing the Administration to complete construction that two courts have concluded is illegal.

Although this Court previously concluded that the Administration had made a substantial showing that plaintiffs do not have a cause of action, that conclusion was not "tantamount to [a] decision[] on the underlying merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981). The Ninth Circuit's thorough analysis and rejection of that claim demonstrates that the Administration's argument is not so substantial that it should be allowed to remain in place while the Administration aggressively finishes the very border wall construction that plaintiffs have successfully challenged as illegal. In concluding that plaintiffs could bring a claim under the Appropriations Clause, the Ninth Circuit followed this Court's precedents recognizing that the Constitution's structural protections, such as separation-of-powers principles and federalism, also protect individual liberty and thus can

---

Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018) (Section 8005), ostensibly to support counterdrug activities under 10 U.S.C. § 284.

provide the basis for cognizable constitutional claims brought by individuals. The Ninth Circuit correctly concluded that the Appropriations Clause is just such a structural protection. The Ninth Circuit also correctly concluded that plaintiffs had alleged a traditional equitable cause of action to enjoin unconstitutional and other *ultra vires* action by Executive Branch officials. This Court has long recognized the propriety of such suits, as have other courts.

The Ninth Circuit also correctly rejected the Administration's challenges to these causes of action. This Court's decision in *Dalton v. Specter*, 511 U.S. 462 (1994), did not address, much less foreclose, non-statutory review of a claim that an Executive Branch official's conduct violated an explicit constitutional prohibition. Enactment of the Administrative Procedure Act (APA) did not displace this traditional judicial remedy, nor does it require that plaintiffs' claims be treated as though they were brought under that statute. And, because plaintiffs' claims are not statutory in nature, no "zone of interest" analysis applies to those claims. Finally, the lower courts' rejection of the Administration's statutory *defenses* to plaintiffs' claims—*i.e.*, the Administration's assertion that certain statutes permitted it to take funds appropriated for Department of Defense (DoD) and use them instead for border wall construction—is plainly correct and not independently worthy of further review.

Together, the passage of time, the Administration's determined push to finish wall construction, and the Ninth Circuit's decision fundamentally alter the balance of equities. The Administration's unprecedented spending of billions of dollars in

violation of the Appropriations Clause imposes substantial irreparable harms on plaintiffs, on other parties (including the House of Representatives), and on the public. Unless this Court lifts the stay, the Administration is on course to complete the entire unauthorized border wall construction enjoined by the district court before this Court can act on a petition to review the Ninth Circuit's rulings. By contrast, the Administration would suffer no remotely comparable harms if the stay is lifted. Indeed, President Trump long ago acknowledged that the Administration "didn't need to do this" because it could "do the wall over a longer period of time."[5]

ARGUMENT

A stay is "an exercise of judicial discretion," *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (per curiam), and thus is "often dependent as much on the equities of a given case as the substance of the legal issues it presents," *Int'l Refugee Assistance Project*, 137 S. Ct. at 2087. Here, changed circumstances have significantly altered the balance of equities and demonstrate that the stay is irreparably harming plaintiffs' and the public's interests. Far from preserving the status quo, the stay is enabling the Administration to spend billions of dollars in its unprecedented defiance of a Congressional spending limit.

At the same time, the Ninth Circuit's decision makes clear that the Administration's stay application was predicated on an incorrect characterization of plaintiffs' claims. Those claims are not statutory in nature, and the theories the

[5] *Remarks by President Trump on the National Security and Humanitarian Crisis on Our Southern Border*, White House (Feb. 15, 2019) (Feb. 15 Rose Garden Remarks), https://perma.cc/VH6F-JU4C.

Administration advanced in its stay application do not foreclose recognition of the non-statutory claims plaintiffs actually raised. Moreover, the Ninth Circuit properly rejected the Administration's *statutory defense* to plaintiffs' claims. The Ninth Circuit's decision thus demonstrates that the issues the Administration has raised are not so substantial that a stay should remain in place. *Cf. King v. Smith*, 88 S. Ct. 842, 843 (1968) (Black, J., in chambers) (lifting stay in light of amendment to relevant law).

I. The Balance Of Equities Weighs Against Continuation Of The Court's Stay

When it initially sought the stay from this Court, the Administration argued that the funds it was using to build the wall could not be obligated after September 30, 2019, and that, as a practical matter, it needed relief from the injunction even sooner given the complexities of government contracting. Application for a Stay Pending Appeal at 35-36 (DOJ Application). It also argued that these funds were needed to stop the flow of illegal drugs into the country and that the harms the injunction would visit on those efforts greatly outweighed the recreational and aesthetic interests underlying plaintiffs' standing. *Id.* at 34, 38.

The balance of equities has now shifted from those the Court confronted last year. The Administration has already completed several portions of the wall that were subject to the district court's injunction; it has also completed two-thirds of another of these sections. Motion at 18. And plaintiffs and the House further understand that the Administration expects by year's end to complete all segments that plaintiffs have successfully challenged. *See id.*

At the same time, under the current COVID-19 guidelines, the Administration's petition for a writ of certiorari to review the Ninth Circuit's ruling is not due until late November. *See* Order, 589 U.S. — (Mar. 19, 2020). Thus, the wall segments at issue could be complete before the Court can even decide whether to review the Ninth Circuit's ruling.

The Administration's unprecedented conduct makes reconsideration of the stay by this Court particularly imperative. In its litigation with the House and with plaintiffs in this case, the Administration has repeatedly argued that the novelty of the suits is evidence of their invalidity. But the suits that plaintiffs and the House have brought are novel precisely because the conduct they challenge—this Administration's brazen defiance of clear Congressional funding limits—is unprecedented. When the Civil War broke out during a lengthy Congressional recess, President Lincoln unilaterally expanded the military, *see* David J. Barron, *Waging War: The Clash Between Presidents and Congress 1776 to ISIS* 133-36 (2016), but he promptly acknowledged the dubious constitutionality of the steps he had taken and sought Congressional ratification once Congress reconvened, *see* *Message to Congress in Special Session* (July 4, 1861), *in* Abraham Lincoln, *Speeches and Writings 1859-1865*, at 246, 254 (Don E. Fehrenbacher ed. 1989). In stark contrast, this Administration responded to Congress's refusal to appropriate more than $1.375 billion for border wall construction by announcing that it would build the wall "without Congress."[6]

[6] *Mulvaney Says Border Wall Will Get Built*, https://perma.cc/97EA-VXKH.

Now that two levels of the federal judiciary have condemned its actions as unlawful, the Administration should not be allowed to continue building a border wall in areas where Congress did not authorize such construction. The harms of such construction outweigh any asserted harm to the Administration pending review in this Court.

a. First, in its application for a stay, the Administration incorrectly suggested that the only harm that would occur if the Court granted a stay would be "aesthetic and recreational injuries" to plaintiffs. DOJ Application at 38. Those injuries are real. *See* Motion at 21-22; App. at 18a-22a; 55a-57a. But these injuries are not the only ones weighing in the balance of harms.

The House's Appropriations Clause interests have also been, and will continue to be, injured if the stay is not lifted. Indeed, the Appropriations Clause "prevents Executive Branch officers from even inadvertently obligating the Government to pay money without statutory authority." *FLRA*, 665 F.3d at 1347;[7] *accord Sierra Club v. Trump*, 929 F.3d 670, 707 (9th Cir. 2019); *see* App. to DOJ Application at 72a (the Administration's urgency simply "is not consistent with Congress's power over the purse").

---

[7] Congress has made it illegal to "involve [the U.S. 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).

The injury to Congress's Appropriations Clause authority 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). The public interest in ensuring protection of separation of powers and our constitutional structure strongly supports lifting the stay. *See FLRA*, 665 F.3d at 1347; *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring) ("The individual loses liberty in a real sense if [appropriations are] not subject to traditional constitutional constraints."); *Bond v. United States*, 564 U.S. 211, 222 (2011) ("An individual has a direct interest in objecting to laws that upset the constitutional balance.").

b. In contrast, the Administration suffers no harm from being required to cease unconstitutional spending. "Congress made a calculated choice to fund only one segment of border barrier." App. at 42a. The Administration argued that it would suffer harm if it could not build the other segments that Congress chose *not* to fund. But this was an improper request that this Court give weight to a policy judgment that, under our Constitution, the Executive Branch has no authority to make in the first place. That same policy judgment cannot justify continuation of the stay.

Indeed, the Administration claimed that "[t]he injunction frustrates the government's ability to stop the flow of drugs across the border." DOJ Application at 34. But the Administration has acknowledged that the overwhelming majority of

drugs are smuggled *at ports of entry*, not between.[8] Administration documents also reveal that (in addition to altering their routes) smugglers evade border walls by using drones, tunnels, and other techniques.[9] The Ninth Circuit found that the Administration "ha[d] failed to demonstrate that construction of the border wall would serve" its asserted purpose of stopping drug smuggling. App. at 44a; *see also id.* (this failure is "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"). It was for these reasons, among others, that Congress refused to fund "President Trump's wasteful wall."[10] And any urgency associated with this interest is undermined by the President's own statement that the Administration "didn't need to do this" because it could "do the wall over a longer period of time."[11]

In its stay application, the Administration also claimed that, "if the injunction remains in place, it [might] foreclose DoD's ability to obligate the funds" before its appropriations expire. DOJ Application at 36. Of course, DoD by now has already obligated funds in violation of the Appropriations Clause. Moreover, "[a] lapse in funding does not mean that the money will disappear from the Treasury." *Sierra Club*, 929 F.3d at 706. Rather, "[t]he country will still have that money" and "[i]t could be spent in the future" subject to Congressional appropriations. *Id.*

---

[8] *See CBP Enforcement Statistics Fiscal Year 2020*, U.S. Customs & Border Protection, https://perma.cc/H37J-RTK5 (last visited July 23, 2020).

[9] Office of Intelligence, U.S. Customs & Border Protection, *Drug Smuggling at the Border* 17 (2017), https://perma.cc/529N-BB2J.

[10] 165 Cong. Rec. S1362 (daily ed. Feb. 14, 2019) (statement of Sen. Leahy).

[11] Feb. 15 Rose Garden Remarks, https://perma.cc/VH6F-JU4C.

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.

II. The Ninth Circuit's Decision Demonstrates That The Administration Has Failed To Raise Issues That Justify Continuation Of The Stay

A. Plaintiffs Have Asserted Valid Non-Statutory Causes Of Action

When it sought a stay from this Court last year, the Administration argued that a Ninth Circuit panel had ruled that plaintiffs could "pursue a constitutional claim for a violation of the Appropriations Clause, *premised entirely* on the allegation that the Acting Secretary of Defense violated Section 8005 of the DoD Appropriations Act by transferring excess funds to the appropriation used to fund DoD's provision of counterdrug support activities under 10 U.S.C. 284." DOJ Application at 20 (emphasis added). Based on that characterization, the Administration argued that this Court's decision in *Dalton* foreclosed review of claims that Executive Branch officials have exceeded their statutory authority, and that plaintiffs' claims fell outside the zone of interests protected by Section 8005. *Id.* at 20-31.

The Administration's characterization of plaintiffs' claim, however, was too narrow. As the Ninth Circuit's recent decision (by a different panel) recognizes, plaintiffs asserted claims under the Appropriations Clause and the doctrine of non-statutory review of *ultra vires* action. Those claims were premised on Congress's unequivocal and highly public refusal to appropriate more than $1.375 billion for border wall construction, and the Administration's equally unequivocal and open

defiance of that limit. While the Administration's *defense* to plaintiffs' non-statutory claims was "premised entirely" on Section 8005, the Ninth Circuit correctly refused to allow that defense to dictate the nature of plaintiffs' claims, and to subject those claims to inapplicable limits.

a. The background of the dispute between the President and Congress makes clear that plaintiffs have asserted a constitutional claim: Congress rejected President Trump's demand for over $5 billion for a border wall, and the Administration's expenditures of more money than Congress appropriated violates the Appropriations Clause.

Near the end of the 115th Congress, the President and Congress 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 Charles Schumer to negotiate fiscal year 2019 appropriations for a border wall.[12] 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."[13]

Two days before funding for nine federal departments expired, the Senate passed a continuing resolution to fund the government temporarily, and it did not

[12] Aaron Blake, *Trump's Extraordinary Oval Office Squabble with Chuck Schumer and Nancy Pelosi, Annotated*, Wash. Post (Dec. 11, 2018), https://perma.cc/2W9K-L2Z6.

[13] *Id.*

include funding for a border wall.[14] 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."[15] 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.[16]

Appropriations for a substantial portion of the federal government expired on December 21, 2018, beginning the longest federal government shutdown in history. On January 25, 2019, after it became apparent that the government's closure was causing serious disruption throughout the Nation, President Trump signed a continuing resolution to fund the government through February 14, 2019.[17] Over the next several weeks, a bipartisan conference committee negotiated a deal to fund the government.[18] Consistent with that deal, Congress passed the Consolidated Appropriations Act, 2019. Pub L. No. 116-6, 133 Stat. 13 (2019). The Act appropriated $1.375 billion for construction of fencing in the Rio Grande Valley area

---

[14] *See* Further Additional Continuing Appropriations Act, 2019, H.R. 695, 115th Cong. § 101(1) (as passed by Senate with amendment, Dec. 19, 2018).

[15] *See id.* § 141 (as passed by House with amendment, Dec. 20, 2018).

[16] *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), https://perma.cc/5AY6-T93X.

[17] *See* Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, 133 Stat. 10 (2019); Kevin Liptak, *Flight Delays Pile Pressure on Trump Amid Shutdown*, CNN (Jan. 25, 2019, 12:17 PM), https://perma.cc/VM4H-VRAA.

[18] *See* Jacob Pramuk, *Trump Signs Bill to Temporarily Reopen Government After Longest Shutdown in History*, CNBC (Jan. 25, 2019, 9:58 PM), https://perma.cc/N2ZM-ANA2.

of the border. *Id.* § 230, 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.[19] Yet, that same day, he 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.[20] To use the words of Mr. Mulvaney, the Administration decided to build the wall "without Congress."[21]

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 later claimed to 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). Because it is illegal to spend federal funds without a valid appropriation, *see* 31 U.S.C. § 1341(a)(1), Administration officials purported to rely on Section 8005 to transfer funds appropriated to DoD for 10 U.S.C. § 284 counterdrug activities, and then began spending those funds on border wall construction. Plaintiffs challenged these expenditures as, *inter alia*, violations of the

---

[19] *See Statement by the President*, White House (Feb. 15, 2019), https://perma.cc/7QVG-GPE8.

[20] *See Fact Sheet: President Donald J. Trump's Border Security Victory*, White House (Feb. 15, 2019), https://perma.cc/77SZ-GA4E; Feb. 15 Rose Garden Remarks, https://perma.cc/VH6F-JU4C.

[21] *Mulvaney Says Border Wall Will Get Built*, https://perma.cc/97EA-VXKH.

Appropriations Clause itself. The Ninth Circuit agreed that plaintiffs could assert a claim under that constitutional provision.

Relying on several of this Court's precedents, including, primarily, *Bond v. United States*, 564 U.S. 211 (2011), the Ninth Circuit held that certain structural protections of the Constitution—such as separation-of-powers principles and federalism—protect not only the interests of other political bodies in our constitutional scheme (such as other branches of the federal government or state governments), but more broadly, the liberty of private citizens and entities. App. at 26a-28a. The Ninth Circuit ruled that the Appropriations Clause was such a structural protection, and that private parties such as plaintiffs could invoke those protections as a basis for asserting claims in federal court. *Id.* at 28a-29a. Congress had chosen to order the priorities for border security and, in doing so, declined to appropriate more than $1.375 billion for border wall construction. It was the duty of the courts to enforce the priorities Congress had established, and the court was obligated to do so at the behest of the plaintiffs, who had suffered Article III injuries as a result of the Administration's failure to abide by those priorities. *Id.* at 29a.

The Ninth Circuit properly concluded, moreover, that this Court's decisions in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), and *Dalton* do not foreclose recognition of a claim under the Appropriations Clause. *Armstrong* rejected a private cause of action under the Supremacy Clause. Unlike the Appropriations Clause, the Supremacy Clause "only declares a truth, which flows immediately and necessarily from the institution of a Federal Government"; it does

not limit the power of a branch of that government, and thereby protect individual liberty, as the Appropriations Clause does. App. at 31a (quoting *Armstrong*, 575 U.S. at 325); *see also Armstrong*, 575 U.S. at 327 ("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.").

In *Dalton*, 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); *id.* at 472. But, as the Ninth Circuit explained, *Dalton* recognized that courts can hear claims when Executive Branch officials violate express constitutional prohibitions. App. at 30a. And plaintiffs alleged just such a claim here, by challenging the Administration's expenditures as a violation of the Appropriation Clause's express prohibition on spending in excess of appropriations. *Id.*

b. The Ninth Circuit also correctly recognized that plaintiffs had properly asserted an equitable *ultra vires* cause of action, or a claim for non-statutory review. It explained that this Court has recognized that courts of equity have traditionally granted relief to enjoin unconstitutional or otherwise *ultra vires* conduct by federal and state officials. *Id.* at 31a-32a (citing *Armstrong*, 575 U.S. at 327, and *Grupo Mexicano de Desarolla S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999)). And the D.C. Circuit has likewise recognized such non-statutory bases for judicial review of Executive Branch conduct. *Id.* at 33a-34a (citing *Chamber of Commerce v. Reich*,

74 F.3d 1322, 1325-27 (D.C. Cir. 1996), and *Dart v. United States*, 848 F.2d 217, 223-34 (D.C. Cir. 1988)). As the Ninth Circuit explained, the relief plaintiffs sought was clearly consistent with traditional equitable principles. *Id.* at 33a; *see also id.* at 35a-36a.

The Ninth Circuit also properly rejected the arguments the Administration advanced in an effort to defeat non-statutory review here. Trying to turn its unprecedented conduct into an asset, the Administration argued that courts of equity have not granted relief in the *specific circumstances* presented by this case. The Ninth Circuit noted, however, that this Court's cases do not announce or support such a limitation and, in all events, plaintiffs' claims closely paralleled the claims asserted and the relief granted by this Court in *Youngstown*. *Id.* at 35a-36a.

The Ninth Circuit further rejected the Administration's contention that plaintiffs' claims could only be brought under the APA. Neither Ninth Circuit precedent nor the decision in *Bennett v. Spear*, 520 U.S. 154 (1997), supported that claim. The latter case did not involve any claimed violation of the Constitution, and held only that the private cause of action under the Endangered Species Act did not displace the availability of an APA cause of action—not that the APA was the exclusive remedy for challenging government action. App. at 36a-37a.

Finally, the Ninth Circuit correctly dismissed the theory that plaintiffs could not sue because they fall outside the "zone of interests" protected by the transfer statutes the Administration had invoked as its statutory defense. This Court made clear in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129

(2014), that the zone-of-interests test applies only to statutory causes of action, and plaintiffs have not predicated their cause of action on any statute, *see* App. at 37a. Moreover, as Judge Bork explained in *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987), it makes no sense to consider whether plaintiffs challenging governmental action as *ultra vires* fall within the zone of interests protected by the statute that officials invoke as a *defense* to such claims. In that circumstance, the plaintiffs are not claiming the benefit of a statute (as they do when invoking one as their cause of action); they are instead forced to deny that a statute invoked by the government authorizes the conduct they are challenging. *See* App. at 37a-39a.

In all events, the Ninth Circuit explained that, if any zone-of-interest test applies, it must be the interests protected by the Appropriations Clause itself. Given the breadth of the test—whether a plaintiff is *arguably* within the relevant zone of interests—plaintiffs here readily satisfy the test. As a structural protection of the Constitution, the Appropriations Clause protects the individual liberty of all citizens injured by the unlawful expenditure of federal funds, and the plaintiffs had clearly established that they were suffering cognizable harms from construction of the border wall. *Id.* at 39a-40a.

* * *

In short, the Ninth Circuit broke no new ground in recognizing that plaintiffs had properly alleged claims under the Appropriations Clause and the equitable cause of action to challenge *ultra vires* conduct. The Ninth Circuit's decision follows

from the precedents of this Court, and those of the D.C. Circuit. The Ninth Circuit's conclusion that plaintiffs had properly invoked these causes of action thus does not present substantial issues justifying continuation of a stay that is allowing the Administration to continue to fund a border wall "without Congress."

B. The Ninth Circuit Correctly Rejected The Administration's Claim That Its Spending Was Permitted Under The Transfer Statutes It Invoked As Its Defense

The Ninth Circuit also correctly concluded that Section 8005 of the DoD Appropriations Act does not authorize the transfer of funds from DoD to construct a border wall.[22] That ruling likewise raises no substantial issues justifying continuation of the current stay.

In pertinent part, Section 8005 provides that

> [u]pon 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 (2018).[23] The Ninth Circuit ruled that the need for a border wall was not unforeseen, that the funds were not being

---

[22] The Ninth Circuit rendered these rulings in a companion case, *California v. Trump.*, Nos. 19-16299, 19-16366 (9th Cir. June 26, 2020), and incorporated those rulings by reference in its decision in this case. *See* App. at 23a-24a. The citations that follow are to the *California* decision.

[23] The Administration also invoked Section 9002. It is "subject to the same terms and conditions as the authority provided in Section 8005." Pub. L. No. 115-245, § 9002, 132 Stat. at 3042.

used for military requirements, and that Congress had, in fact, denied use of the funds for border wall construction.

The problem of drugs being smuggled across the southern border was not "unforeseen." It was instead well-understood. Indeed, as the Ninth Circuit explained: "Nothing prevented Congress from funding solutions to this problem through the ordinary appropriations process—Congress simply chose not to fund" the solution the Administration wanted. App. at 121a. Recognizing this, the Administration argued that the request that the Department of Homeland Security (DHS) submitted to DoD asking for a transfer of money was not "foreseen" at the time that DoD submitted its budget requests to Congress.

The Ninth Circuit properly rejected this theory. Section 8005 authorizes transfers to address unforeseen "military *requirements*," not unforeseen budgetary requests. *Id.* at 122a. And DHS's budgetary request *was* foreseen, as contemporaneous documents and statements made clear. *Id.* at 122a-23a.

The Ninth Circuit also properly rejected the Administration's claim that its spending was related to "military requirements." The word "military" means "'of or relating to soldiers, arms, or war.'" *Id.* at 124a (quoting *Military*, Merriam-Webster Online Dictionary (2020)). The administrative record made clear, however, that the transferred funds were being used to support DHS—a civilian agency entirely separate from the military. *Id.* at 125a.

Nor could the transfers be justified on the theory that they were being used for a "military installation" within the meaning of 10 U.S.C. § 2801. That term is

defined as a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." *Id.* § 2801(c)(4). None of the construction projects qualifies under this definition. App. at 126a-27a. And while Section 284 itself is entitled "Military Support for Civilian Law Enforcement Agencies," Section 8005 requires that transferred funds be used for a "military requirement," which is plainly different than "military support" for civilian activities. *Id.* at 127a.

Finally, the Ninth Circuit correctly concluded that Congress had "denied" use of the funds for border wall construction. The court rejected the Administration's claim that, by using the word "item," Section 8005 required Congress to deny a specific budgetary line item request to use DoD funds for border wall construction. *Id.* at 129a. Congress had responded to the Administration's funding request for border wall construction with a "broad and resounding denial resulting in a 35-day partial government shutdown." *Id.* That broad denial made clear that Congress intended to deny funding for such construction regardless of its source.

CONCLUSION

The Court should grant the motion to lift the stay pending the Administration's filing of a petition for certiorari.

Respectfully submitted,

Douglas N. Letter
General Counsel
Counsel of Record
Todd B. Tatelman
Megan Barbero
Josephine Morse
Adam A. Grogg

Office of General Counsel
U.S. House of Representatives
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700
douglas.letter@mail.house.gov

Carter G. Phillips
Virginia A. Seitz
Joseph R. Guerra
Christopher A. Eiswerth

Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

July 24, 2020