Nos. 19-17501, 19-17502, 20-15044

In the United States Court of Appeals for the Ninth Circuit

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

v.

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

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

v.

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

APPELLEES' ANSWERING BRIEF

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

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CORPORATE DISCLOSURE STATEMENT

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Defendants claim the unreviewable authority to divert $3.6 billion appropriated for servicemembers and their families to a border wall that Congress repeatedly refused to fund. The billions at issue here are in addition to $2.5 billion that Defendants diverted to the border wall under a separate claim of unreviewable authority, which is the subject of a pending appeal. *See* Nos. 19-16102; 19-16300; 19-16299; 19-16336.

According to Defendants, no constitutional issue is raised by their circumvention of Congress's appropriations decision, because they have invoked a statute, 10 U.S.C. § 2808. At the same time, Defendants urge the Court not to examine their compliance with the terms of Section 2808, because in their view the statute grants Defendants essentially limitless discretion to remake the federal budget.

Defendants' desire to avoid judicial scrutiny is understandable, as they barely gesture at satisfying Section 2808's statutory criteria. Defendants implausibly assert that migration of unarmed families requires an armed military response, that border sections spread over more than a thousand miles have suddenly become part of a military garrison in Texas, and that a wall aimed squarely at the capabilities of a civilian law enforcement agency in fact supports the use of troops.

The district court was correct to reject Defendants' unbounded claims of executive power. Section 2808 does not provide the executive branch with unreviewable authority to disregard Congress's enacted appropriations decisions. Nor did the district court abuse its discretion in enjoining Defendants from fundamentally undermining the constitutional separation of powers and irrevocably altering hundreds of miles of unique borderlands.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331, and entered final judgment under Federal Rule of Civil Procedure 54(b) on December 11, 2019. The government timely appealed on December 13, 2019. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether Defendants have unreviewable authority to circumvent Congress's funding decisions so long as they invoke a statute, 10 U.S.C. § 2808.
2. Whether Defendants may lawfully aggrandize border wall construction by $3.6 billion across 175 miles that Congress refused to fund.
3. Whether the district court properly exercised its discretion in deferring to Congress's assessment of the public interest in constructing a multibillion-dollar border wall, and in barring Defendants from spending billions of dollars that Congress refused to authorize.

ADDENDUM

10 U.S.C. §§ 2801 and 2808 are contained in the addendum of Appellants.

STATEMENT OF THE CASE

A. Factual Background

In December 2018, Congress and the President reached an impasse over wall funding, triggering a government shutdown. During the shutdown, the administration "request[ed] $5.7 billion for construction of a steel barrier for the Southwest border." SER218. The administration explained that the request was because "physical barrier—wall—creates an enduring capability that helps field personnel stop, slow down and/or contain illegal entries." SER218 Congress refused, and the shutdown became the longest in U.S. history.

As Congress negotiated toward a bipartisan compromise providing far less wall funding than requested, Defendant Trump and his staff repeatedly dismissed the appropriations process. "[T]he President has been explicit in his intention to obtain funds for border barrier construction, with or without Congress." ER4. On February 12, as congressional committees reached a bipartisan agreement, Defendant Trump told his Cabinet that Congress's funding decision would not constrain his wall project. "I can't say I'm thrilled. But the wall is getting built, regardless. It doesn't matter. Because we're doing other things beyond what we're talking about here." SER227.

On February 14, 2019, Congress passed the Consolidated Appropriations Act of 2019 ("CAA"), Pub. Law No. 116-6, 133 Stat. 13 (2019). The CAA made available $1.375 billion "for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector," and prohibited construction in specific ecologically sensitive lands within that sector. *Id.* §§ 230(a)(1), 133 Stat. at 28. And it further provided that:

> None of the funds made available in this or any other appropriations Act may be used to increase, eliminate, or reduce funding for a program, project, or activity as proposed in the President's budget request for a fiscal year until such proposed change is subsequently enacted in an appropriation Act, or unless such change is made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act.

Id. § 739, 133 Stat. at 197.

Defendant Trump signed the CAA into law on February 15, 2019. The same day, he issued a proclamation "declar[ing] that a national emergency exists at the southern border of the United States." ER118-119. In describing the nature of the purported national emergency, the text of the Proclamation refers to a "long-standing" problem of "large-scale unlawful migration through the southern border" that has "worsened" in recent years due to "sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space" for them. ER118.

"When announcing the proclamation, the President explained that he initially 'went through Congress' for the $1.375 billion in funding, but was 'not

happy with it.'" ER5. Defendant Trump "declared the national emergency one day after Congress passed the CAA, which limited appropriations for border barrier construction." ER22. "In announcing the national emergency declaration, the President explained, 'I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster. . . . And I think that I just want to get it done faster, that's all.'" ER22. "[Department of Defense ("DoD")] officials have forthrightly acknowledged that the border barrier projects are intended to fulfill the President's priorities." ER33 (citing testimony by former Acting U.S. Secretary of Defense Patrick M. Shanahan and current Secretary of Defense Mark Esper).

Simultaneous to the emergency declaration, the White House issued a "fact sheet" entitled "President Donald J. Trump's Border Security Victory," stating that Defendants would divert up to $3.6 billion from congressionally-approved military construction projects "to build the border wall." SER260-261. The fact sheet announced that in addition to these billions, Defendants would aggrandize the border wall project by an additional $2.5 billion from other military funds under claimed 10 U.S.C. § 284 authority, and $601 million from the Treasury Forfeiture Fund. SER260-261.

Testifying before Congress, DoD officials, including Acting Secretary of Defense Patrick Shanahan and General Dunford, the Chairman of the Joint Chiefs of Staff, acknowledged that although Defendants sought to divert military

construction funding, the situation at the southern border was "not a military threat." SER267. Admiral Mike Gilday, Director of Operations for the Joint Staff testified that "[n]one of capabilities that we are provided are combat capabilities, it's not a war zone along the border." SER271.

For the first time in U.S. history, Congress disapproved the declaration of an emergency. On February 26, 2019, the House of Representatives overwhelmingly passed a resolution pursuant to the National Emergencies Act to terminate the emergency declaration. H.R.J. Res. 46, 116th Cong. (2019). In the Senate, a bipartisan majority likewise voted 59-41 to terminate the emergency declaration. On March 15, 2019, President Trump vetoed the disapproval resolution. Six months later, on September 25, 2019, the Senate again approved a bipartisan resolution to disapprove the emergency. S.J. Res. 54, 116th Cong. (2019). On September 27, the House passed this resolution as well.

For nearly seven months after the White House announcement that an emergency existed requiring the use of the armed forces, and that $3.6 billion in military construction funds would be diverted to the border wall, Defendants continued to maintain that DoD had made no decision to spend a single dollar in military construction money on the border wall. Finally, on September 3, 2019, Defendant Esper announced that he had reached a decision: it was necessary to

divert exactly $3.6 billion from military construction projects to the border wall. ER7.

That same day, DoD representatives explained that billions of dollars in construction allegedly "necessary to support the use of the armed forces" would in fact benefit DHS: "this will all go—funding will all go to adding significantly new capabilities to DHS's ability to prevent illegal entry." SER279.

To fund the border wall, Defendants are stripping billions of dollars from military construction projects that DoD previously told Congress were necessary to support servicemembers and military missions. For example, Defendants have taken funding Congress allocated to "projects include rebuilding hazardous materials warehouses at Norfolk and the Pentagon; replacing a daycare facility for servicemembers' children at Joint Base Andrews, which reportedly suffers from 'sewage backups, flooding, mold and pests'; and improving security to comply with anti-terrorism and force protection standards at Kaneohe Bay." ER8. In total, Defendants aim to strip funding from dozens of congressionally-approved projects including schools, fire and rescue stations, hazardous materials storage facilities, and a medical care center. ER170-ER172.

As Defendant Trump confirmed on September 9, this diversion of funds is entirely a response to Congress's refusal to fund the President's wall: "We're taking money from all over because, as you know, the Democrats don't want us to

build the wall." White House, "A Message from President Trump on the Border Wall," https://www.youtube.com/watch?v=0fEdhud7RJI. Ten days later, Defendant Trump again confirmed that Defendants' use of Section 2808 was entirely the result of Congress's refusal to accede to his funding request: "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." SER291.

Although Congress had specifically exempted ecologically sensitive areas from wall construction in the CAA, Defendant Esper claimed the authority to waive all environmental law, as well as all other laws which "include, but [are] not limited to" the National Historic Preservation Act and all military procurement law. ER92. Defendants' decision to dispense with the environmental protections that Congress enacted exacerbates the threat posed by Defendants' massive construction project. Plaintiffs' members include individuals who have treasured these unique borderlands for decades, who make their homes in communities along the border, and who have worked for years to protect and conserve these delicate landscapes.

Defendants are presently rushing through construction that will radically alter hundreds of miles of landscape. The affected lands include the Diamond A

Ranch in New Mexico, which hosts more than 700 species of plants, hundreds of species of mammals, reptiles and amphibians, and birds, and is, according to the Nature Conservancy, "one of the most significant natural sites in the nation." SER3. Other threatened areas extend through California, Arizona, and Texas, and include the Barry M. Goldwater Range in Arizona, which, according to Defendants' own submission, "is nationally significant as a critical component in the largest remaining expanse of relatively unfragmented Sonoran Desert in the U.S." SER54. According to DoD, "the Sonoran Desert is now recognized as the most biologically diverse of the great North American deserts." SER71.

Contrary to Defendants' misleading and inaccurate claim that the hundreds of miles at issue here are "already heavily disturbed," Opening Brief ("OB") 13, the district court evaluated the evidence and concluded that "Defendants' proposal would significantly alter the existing landscape, and even the proposed changes to the existing infrastructure are substantial." ER39-40. The record includes stark evidence of this change, as Defendants' recent construction shows that existing fencing bears no resemblance to the wall Defendants plan to build. *See* SER12. A comparison between Plaintiffs' recent photographs and Defendants' own documentation of existing barriers likewise shows the enormous difference in scale. *Compare* SER6 *with* SER315.

B. Procedural History

Plaintiffs sued on February 19, 2019, challenging all construction in excess of that which Congress authorized in the CAA. Plaintiffs' members frequently use the lands threatened by construction. In addition, Plaintiff Southern Border Communities Coalition and its member organizations "work in and with border communities to protect and restore the environment," and to "promote the safety of border communities," and face irreparable harm to their ability to carry out their missions as a result of wall construction. ER43. Plaintiffs sought injunctions against specific wall segments as Defendants made public their construction decisions.

Defendants first attempted to use the $2.5 billion in additional funds under purported 10 U.S.C. § 284 ("Section 284") authority. As DoD's Section 284 account contained less than a tenth of the $2.5 billion it sought to funnel through the account, Defendants were forced to use section 8005 of the DoD Appropriations Act of 2019 ("Section 8005") and related provisions to divert billions to wall construction. 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. On June 28, 2019, the district court issued a permanent injunction incorporating its prior reasoning on the merits, and extending it to the full $2.5 billion in wall construction that Defendants announced

under claimed Section 8005 and Section 284 authority. Defendants sought an emergency stay of the district court's injunction. On July 3, 2019, a motions panel of this Court denied the stay motion in a published 2-1 opinion. *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019). On July 26, 2019, a majority of the Supreme Court issued a one-paragraph order staying the permanent injunction. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). That appeal remains pending before this Court. *See* Nos. 19-16102; 19-16300; 19-16299; 19-16336.

Plaintiffs sought the injunction at issue here on October 11, just over a month after Defendants announced the eleven Section 2808 projects. The district court granted Plaintiffs a permanent injunction on December 11, 2019.

The district court rejected Defendants' argument that their actions were beyond review. The district court followed this Court's published motions panel decision, determining that the Supreme Court's stay order was not clearly irreconcilable with this Court's published analysis. ER14. The district court rejected Defendants' contention that no constitutional issue was raised by their efforts to circumvent Congress. "[T]hat Defendants rely on Section 8005 (or here, Section 2808) as the basis for their efforts to reallocate funds for border barrier construction does not convert a constitutional claim into a statutory one." ER12. To the extent any zone of interests applied to such a constitutional claim, the district court explained that "the proper inquiry is whether Plaintiffs fall within the

zone of interests of the constitutional provision, and not the statute Defendants raise in defense." ER13. Finally, the district court found that "Section 2808 provides meaningful standards against which the Court may analyze Defendants' conduct under the statute." ER20.

On the merits, the district court found that Section 2808 provides no authority to aggrandize wall construction beyond that which Congress permitted in the CAA. "The diversion of funds from existing military construction projects is only authorized for (1) 'military construction projects' that are (2) 'necessary to support such use of the armed forces.'" ER18 (quoting Section 2808(a)). The court found that each of the wall sections at issue here fails one or both requirements.

First, with the exception of the wall sections on the Barry Goldwater Military Range, the district court found that none of the construction constitutes "military construction" as defined by statute. The court rejected Defendants' "expansive interpretation" as both implausible and contrary to the plain language of the statute. ER24.

Second, the district court found that, without exception, "Defendants have not established that the projects are necessary to support the use of the armed forces." ER29. 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 projects for the benefit of DHS, even when Congress specifically declined to give DHS itself the funds to build those projects." ER32.

The district court found that an injunction was merited. The record demonstrated that Plaintiffs face irreparable harm as "the funding and construction of these border barrier projects, if indeed barred by law, cannot be easily remedied after the fact." ER40. In addition, "Defendants' conduct has significantly altered 'business as usual' for the Plaintiff organizations, and will continue to do so without a permanent injunction." ER41. The district court concluded that the public interest was best served by deferring to Congress, which "has already engaged in the difficult balancing of Defendants' proffered interests and the need for border barrier construction in passing the CAA." ER44. The district court nonetheless stayed the injunction. ER46. Plaintiffs' motion to lift the stay is pending before this Court.

SUMMARY OF ARGUMENT

The injunction should be affirmed. Binding precedent establishes that Defendants' actions are not beyond this Court's review. Plaintiffs have a cause of action—whether constitutional, *ultra vires*, or under the Administrative Procedure Act (APA)—to seek redress of the injuries they face due to Defendants' unauthorized, multibillion-dollar wall construction. To the extent any zone-of-

interests test applies to Plaintiffs' claims, whether constitutional or statutory, Plaintiffs satisfy it.

On the merits, Defendants lack authority to circumvent Congress and aggrandize DHS's border wall project beyond that which Congress agreed to fund. The district court correctly rejected Defendants' limitless claim of executive branch power to construct massive civilian public works under Section 2808 authority. Defendants' theory of Section 2808 power contradicts the plain language of the statute, violates myriad canons of statutory interpretation, and would lead to absurd and unconstitutional results.

Finally, the district court did not abuse its discretion in issuing the injunction. No court has ever held that the executive branch should be permitted to violate the separation of powers based on its own assessment of desirable policy. The record establishes serious harms both to Plaintiffs and to the public interest, and the district court properly deferred to Congress's judgment as to whether billions of dollars in taxpayer funds should be spent on a border wall stretching across four states.

ARGUMENT

I. Defendants' Actions Are Reviewable.

A. Binding precedent establishes that Defendants' violation of the Appropriations Clause is subject to judicial review.

Defendants' primary argument is that their actions are unreviewable. In their view, even though Congress denied the executive branch the billions of dollars it sought, no constitutional issue is raised by Defendants nonetheless funneling billions to the border wall, and no court can review an executive officer's unconstitutional action so long as the officer invokes a statute—any statute—in defense. Defendants are wrong.

As an initial matter, as the district court correctly found, this Court's published motions panel decision was not abrogated or overruled by the Supreme Court's issuance of a temporary stay. ER13-14. The district court applied the "clear irreconcilability" standard this Court set forth in *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc), and found that it was required to follow published precedent and hold that Plaintiffs have a cause of action. ER14. Defendants ignore this Court's published authority, but they have no license to do so without meeting the *Miller v. Gammie* standard.[1]

[1] No exceptions grounded in "law of the case" could apply here. As this Court held en banc, "exceptions to the law of the case doctrine are not exceptions to [the] general 'law of the circuit' rule." *Gonzalez v. Arizona*, 677 F.3d 383,

But even if the prior published decision in this case could be somehow set aside, binding circuit precedent establishes that Plaintiffs have a cause of action to redress Defendants' violation of the Appropriations Clause. In *United States v. McIntosh*, this Court explained that when the government acts contrary to Congress's appropriations judgments, it is "drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause." 833 F.3d 1163, 1175 (9th Cir. 2016). Where, as here, a litigant has Article III standing, it is circuit law that a constitutional cause of action will lie for the spending of funds in violation of an appropriations act. *See McIntosh*, 833 F.3d at 1174.

Defendants argue that no constitutional claim is available because "the Appropriations Clause is implicated if and only if the Secretary of Defense has exceeded the authority conferred by Section 2808." OB 32. But this is a merits argument masquerading as a restriction on review. Defendants concede that the Appropriations Clause is implicated if, as the district court found, Section 2808 provides no authority to spend billions on the border wall. Defendants do not explain why they may simply assert, without challenge, that their actions are authorized by an inapplicable statute and thereby foreclose a constitutional claim that would otherwise lie. If Defendants' theory were correct, all the government needed to do to avoid review in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S.

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389 n.4 (9th Cir. 2012) (en banc) (overruling prior decisions to the extent they "suggested otherwise").

579 (1952), was to cloak its unauthorized executive action in dubious statutory authority. No case supports this proposition.

Defendants cite only *Dalton v. Specter*, 511 U.S. 462 (1994), in support of their sweeping claim that no constitutional issue exists so long as an executive official cites a statute. *OB 3*1. But no court has ever interpreted *Dalton* as Defendants urge. *See, e.g.*, *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1331 (D.C. Cir. 1996) ("*Dalton*'s holding merely stands for the proposition that when a statute entrusts a discrete, specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available."). And the law in this Circuit is clear that violation of an appropriations statute gives rise to a constitutional claim. *See McIntosh*, 833 F.3d at 1175 (the Appropriations Clause "constitutes a separation-of-powers limitation" that private litigants can invoke when the executive branch spends in excess of statutory authority). This Court grounded that rule in the well-established principle that "separation-of-powers constraints in the Constitution serve to protect individual liberty, and a litigant in a proper case can invoke such constraints '[w]hen government acts in excess of its lawful powers.'" *Id.* at 1174 (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)). Even if Defendants believe this Court erred in *McIntosh* when it held that the government's disregard of an appropriations limitation gave rise to a constitutional violation, subsequent

panels "must faithfully apply" the law of the circuit. *Naruto v. Slater*, 888 F.3d 418, 425 n.7 (9th Cir. 2018).

Defendants misunderstand the basic premise of an injunction against unconstitutional executive action, which they mistakenly claim is a new "'judge-made remedy' of an implied cause of action directly under the Constitution's Appropriations Clause." OB 30. The Supreme Court rejected a similar argument in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, where "[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). 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")). "If the Governmen's point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so." *Id.*

Defendants' theory likewise cannot be squared with the Supreme Court's own precedents reviewing claimed emergency powers. In *Dames & Moore v.*

Regan, the Supreme Court addressed the merits of an action for an injunction based on a claim that officials "were beyond their statutory and constitutional powers." 453 U.S. 654, 667 (1981). Although "the President purported to act under authority of both the [International Emergency Economic Powers Act ("IEEPA")] and 22 U.S.C. § 1732, the so-called 'Hostage Act,'" the Supreme Court did not require the identification of any private right of action under the claimed statutory authorities to determine whether Defendants acted *ultra vires*. *Id.* at 675. The plaintiff, a contractor who performed "site studies for a proposed nuclear power plant in Iran," could not possibly establish that it was within the zone of interests of the Hostage Act, which authorizes the President to use "such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release" of hostages. *Id.* at 664, 676.

If Defendants were correct, the Supreme Court in *Dames & Moore* could never have reached the question of whether the Hostage Act in fact provided any authority for the government's action. The Court was required instead to simply accept the government's "purported" authority, even though "neither the IEEPA nor the Hostage Act constitutes specific authorization of the President's action[.]" 453 U.S. at 677. But the Supreme Court has never endorsed Defendants' proposed restriction on review. As Judge Bork explained, imposing a statutory zone-of-interests requirement on *ultra vires* claims would make little sense. "Otherwise, a

meritorious litigant, injured by *ultra vires* action, would seldom have standing to sue since the litigant's interest normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987).

At bottom, Defendants, confuse private rights of action created by Congress to enforce statutory entitlements (as in *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011), and *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014)) with equitable suits to enjoin executive officers from acting without authority or in violation of the Constitution. "Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner." *Davis v. Passman*, 442 U.S. 228, 241 (1979). By contrast, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

Defendants' arguments against the Court's powers in equity are even more confused. They assert that "the courts' equitable powers are subject to 'express and implied statutory limitations.'" OB 28 (citing *Armstrong*, 575 U.S. at 327). True

enough, but entirely irrelevant. As this Court recently explained, *Armstrong* has no application to constitutional claims in equity because it did not "involve[] claims by the plaintiffs that the federal government was violating their constitutional rights." *Juliana v. United States*, No. 18-36082, 2020 WL 254149, at *4 n.5 (9th Cir. Jan. 17, 2020). Defendants' citation of *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856-57 (2017), concerning the availability of a private right of action in damages, is even further afield. OB 28. In that decision, the Supreme Court itself explained that remedies in equity were far broader than private rights of action. *See Ziglar*, 137 S. Ct. at 1858 ("[I]f equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations."); *see also, e.g.*, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally").

Finally, Defendants are mistaken in arguing that the APA provides an exclusive (yet unavailable) cause of action for claims against unconstitutional government conduct. OB 29-30. As this Court recently confirmed, "[n]othing in the APA evinces" an intent to foreclose constitutional claims. *Juliana*, 2020 WL 254149 at *4.

B. Plaintiffs satisfy any applicable zone of interests.

To the extent any zone-of-interests tests applies to constitutional violations (as opposed to statutory actions), it "denies a right of review if the plaintiff's interests are marginally related to or inconsistent with the purposes implicit in the relevant constitutional provision." *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 932 (9th Cir. 2011) (quotation and alteration marks omitted). Plaintiffs' claims easily satisfy this inquiry. The Appropriations Clause has a "fundamental and comprehensive purpose": it "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *McIntosh*, 833 F.3d at 1175 (quoting *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990)). If the zone-of-interests tests applies, "[t]he ultimate question, therefore, is whether [Plaintiff's] claims bear more than a marginal relationship to claims addressing" Defendants' efforts to spend money in contravention of Congress's judgments as to the common good. *Yakima Valley Mem'l Hosp.*, 654 F.3d at 932 (quotation omitted). They do.

Defendants assert that a *statutory* zone-of-interests nonetheless restricts claims founded on equity and the Constitution. OB 34-35. But no case supports this premise, and Defendants do not cite a single decision by this Court or any other that applied a statutory zone-of-interests restriction to an equitable injunction

enforcing a "separation-of-powers limitation." *McIntosh*, 833 F.3d at 1175. Defendants' novel statutory zone-of-interests for constitutional claims has no support, and clashes with their own quotation of *Bennett v. Spear*, 520 U.S. 154 (1997), which held that "the zone-of-interests requirement must be applied 'by reference to the particular provision of law upon which the plaintiff relies.'" OB 34 (quoting 520 U.S. at 176). Of course, it is not Plaintiffs that rely on Section 2808, which Plaintiffs contend has no application here. Instead, it is Defendants who argue that Section 2808—contrary to its text—authorizes the executive branch to substitute its own judgment for Congress's appropriations decisions. Plaintiffs' claims rely on Congress's decision, enacted in the CAA, to limit wall construction, *see* Section II.A, and on the well-established constitutional principle that this Court emphasized in *McIntosh*: "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for . . . the courts to enforce them when enforcement is sought." 833 F.3d at 1172 (citation omitted).

But even if a zone-of-interests test were to require consideration of Section 2808, Defendants fail to distinguish the Supreme Court's instruction that environmental and aesthetic interests suffice whenever "issues of land use (arguably) fall within [a statute's] scope." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 n.7 (2012). Section 2808—by contrast to Section 8005—explicitly concerns land use, and the Supreme Court has

already decided that if a statute even arguably concerns land use, "neighbors to the use" may sue, and their "interests, whether economic, environmental, or aesthetic, come within [the statute's] regulatory ambit." *Id.* at 227-28.

In *Match-E-Be-Nash-She-Wish*, the Supreme Court considered a statute that "authorizes the acquisition of property 'for the purpose of providing land for Indians.'" 567 U.S. at 224 (citation omitted). The statute imposed no environmental or aesthetic restrictions on eventual construction on acquired property, and was enacted entirely for the benefit of Native Americans. There was no discernible congressional intent to benefit third parties who *opposed* construction on aesthetic or environmental grounds. A neighbor who objected to the eventual construction of a casino in his community nonetheless brought suit, alleging that construction on land acquired under the statute would cause "an irreversible change in the rural character of the area," and result in "aesthetic, socioeconomic, and environmental problems." *Id.* at 213 (quotation omitted). The neighbor's objections had nothing to do with the purpose of the statute, which was to benefit Native Americans' economic development. The Supreme Court nonetheless explained that the neighbor could sue because, if a statute even arguably concerns land use, a neighbor's "interests, whether economic, environmental, or aesthetic, come within [the statute's] regulatory ambit." *Id.* at 227-28. Section 2808, which explicitly concerns construction decisions, is even

more closely tethered to land use than the statute at issue in *Match-E-Be-Nash-She-Wish*, and Defendants' massive construction project under purported Section 2808 authority is *a fortiori* subject to challenge

Defendants' objections misunderstand the zone-of-interests inquiry. They maintain that Plaintiffs' claims are barred because Section 2808's "requirements are not even arguably intended to protect parties who, like plaintiffs here, assert that particular Section 2808 projects would impair recreational, aesthetic, or environmental interests on the land where military construction is occurring." OB 21. But as the Supreme Court explained, this argument "is beside the point." *Match-E-Be-Nash-She-Wish*, 567 U.S. at 225 n.7. There is no requirement that a statute be "even arguably intended to protect" a plaintiff's interests: "The question is not whether [the statute] seeks to benefit [the plaintiff]; everyone can agree it does not. The question is instead . . . whether issues of land use (arguably) fall within [the statute's] scope—because if they do, a neighbor complaining about such use may sue to enforce the statute's limits." *Id.*; *see also Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987) ("The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.").

Try as they might, Defendants cannot evade the straightforward rule that the Supreme Court set out in *Match-E-Be-Nash-She-Wish*. Defendants argue that "by

contrast" to the statute at issue in that decision, Section 2808 imposes no requirement that the Secretary of Defense consider "the effect on any third party's aesthetic, recreational, or environmental interests." OB 23. But the same was true with respect to the statute in *Match-E-Be-Nash-She-Wish*, which did not even mention any type of construction—much less impose a statutory requirement that the Secretary of the Interior consider downstream effects of construction on third-party aesthetic, recreational, or environmental interests. And in any event, Defendants have conceded that environmental land use considerations are central to the implementation of Section 2808. Defendants' declarant states that "all Section 2808 projects" will include "on-site environmental monitors during construction," and every project will include an "Environmental Baseline Survey" to "identify, to the extent possible, potential impacts from construction activities and measures to avoid or minimize impacts to environmentally sensitive resources that could be undertaken without impeding expeditious construction of Section 2808 projects." SER22. This is unquestionably sufficient to bring land use interests within the statutory ambit under *Match-E-Be-Nash-She-Wish*, which teaches that a statute need not include explicit considerations of land use issues so long as the statute's "implementation encompasses these issues." 567 U.S. at 227.

Defendants' only remaining argument is that the broad "without regard to" clause in Section 2808 should be read to implicitly limit the availability of judicial

review. OB 23-24. Defendants do not cite any case interpreting a "without regard to" clause to limit the zone of interests, and their argument proves far too much. Defendants' theory is that because the "without regard to" clause might cover environmental statutes, interests that might be protected by these unnamed statutes are also barred from challenging violations of Section 2808. But the "without regard to" clause in Section 2808 is not limited to environmental statutes, and under Defendants' theory any interest protected by a statute covered by the "without regard to clause"—whether related to appropriations, military funding, or military construction—would be similarly barred. *See* ER92 (invoking clause to waive military procurement law).

C. Congress did not bar review.

Defendants get the law exactly backwards in asserting that their actions are unreviewable because Congress did not affirmatively "evince[] any desire" to "*permit* private plaintiffs to seek judicial enforcement of Section 2808's terms." OB 24 (emphasis added). As then-Judge Kavanaugh observed, under the Supreme 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." *White Stallion Energy Ctr., LLC v. E.P.A.*, 748 F.3d 1222, 1269 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part) (emphasis

added), *rev'd sub nom. Michigan v. E.P.A.*, 135 S. Ct. 2699 (2015). Defendants have shown no such congressional intent here.

The Supreme Court has repeatedly held that when the government seeks to preclude review of a "substantial statutory and constitutional challenge[]" to executive action, it is taking an "extreme position," requiring "a showing of clear and convincing evidence, to overcome the strong presumption that Congress did not mean to prohibit all judicial review of executive action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 680-81 (1986) (citations and quotation marks omitted). Defendants take that extreme position here, but fail to muster any evidence—much less clear and convincing evidence—in support of their argument.

Even when only statutory violations are at issue, clear and convincing evidence of congressional intention to preclude review is still required. *See Bowen*, 476 U.S. at 680. Courts "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Id.* at 681. And because the executive actions at issue here amount to a violation of the Appropriations Clause, Defendants' efforts to evade review are particularly disfavored. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting that if "Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear").

Defendants nonetheless maintain that so long as they invoke Section 2808, the only recourse is for the legislature to "enact new legislation prohibiting DoD from spending funds in a particular manner; reduce future appropriations to DoD; or restrict or even repeal DoD's Section 2808 authority." OB 24. This position does not even make sense on its own terms. Congress imposed specific restrictions on DoD's Section 2808 authority, which Defendants claim are unenforceable. Congress specifically rejected Defendants' request for a multibillion-dollar border wall and enacted an appropriations law that specified exactly how much money should be spent on a border wall. If Defendants are free to ignore the limits Congress placed on Section 2808 authority at this stage, there is no reason to expect that they would be bound to follow any new restrictions on DoD's Section 2808 authority. In any event, there is no support for Defendants' extreme view that Congress must speak twice before its commands are enforced. Defendants have not carried their "heavy burden" of showing that their multibillion-dollar scheme to usurp Congress's appropriations power is beyond judicial review.

II. Defendants Have No Authority To Circumvent Congress.

After diverting $2.5 billion from other military accounts to wall construction, Defendants now maintain that they may strip $3.6 billion from congressionally-approved military construction projects to build a wall for DHS. Defendants' argument is that Section 2808 provides unlimited authority to raid the

military construction budget for initiatives that Congress refused to fund. Defendants' claim runs contrary to the CAA, conflicts with Section 2808's plain language, and would raise serious constitutional questions. The district court was correct to reject it.

A. Congress used its exclusive control over appropriations to restrict wall construction.

In enacting the CAA, Congress specifically considered and rejected Defendants' planned wall. Congress's appropriations judgment, as expressed in the bill that passed both chambers and was signed into law by Defendant Trump, is that only $1.375 billion should be used to construct border barriers, and that such barriers must be limited geographically to the Rio Grande Valley Sector.

First, Congress acted clearly to constrain the scope of Defendants' wall project. The White House requested $5.7 billion for 234 miles of wall in a letter dated January 6, 2019, SER218, but Congress decided on the far lower amount of $1.375 billion. As Defendant Trump conceded on the day he signed the CAA, when it came to the legislation the "primary fight was on the wall," SER245, and although the CAA gave the administration "so much money, we don't know what to do with it . . . . [t]he only place they don't want to give as much money — $1,375,000,000" was for his wall, SER241. Second, Congress disagreed with Defendant Trump on the permissible location of border wall funding, providing

funds for construction only in the Rio Grande Valley Sector. *See* CAA, Division A §§ 230-32.

When it came to this disagreement, "Congress, as holder of the purse strings, was free to deal with the subject on whatever basis it saw fit." *Gartner v. United States*, 166 F.2d 728, 729 (9th Cir. 1948). Although Defendant Trump maintained that $1.375 billion was insufficient for his plan, "beyond this Congress did not go, and there can be no fair doubt that its restraint was deliberate and purposeful." *Id.* at 730. "Where Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized." *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

Congress ensured that Defendants could not unilaterally increase funding to projects before Congress acts to approve such actions. The CAA prohibits the use of any appropriated funds to "increase . . . funding for a program, project, or activity as proposed in the President's budget request for a fiscal year until such proposed change is subsequently enacted in an appropriation Act" or authorized by provisions in other appropriations legislation. CAA, Division D § 739. Defendants cannot dispute that the proposed budget requests for fiscal year 2020 seek to increase wall funding. *See* SER306 ("Budget requests $5 billion to construct approximately 200 miles of border wall along the U.S. Southwest border.");

SER309 (requesting $9.2 billion "to build border barriers," and "backfill funding reallocated in FY 2019 to build border barriers"). The only exception to the prohibition on increases in funding is for increases "made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act," and Section 2808 is not an appropriations act. CAA, Division D § 739. Defendant Trump's sole lawful option after signing the CAA was to make his appropriation request to Congress another time, not to usurp Congress's power of the purse and the legislative process by diverting funds that were previously committed for other purposes.

Defendants' actions directly interfere with a primary function of appropriations legislation—to limit the size and scope of particular projects and keep the executive branch accountable to the legislature through the mechanism of annual budgeting. To the extent any zone-of-interests requirement applies to consideration of the CAA, the CAA both explicitly concerns land use and takes into account environmental interests, as "Congress also imposed several limitations on the use of those funds, including by not allowing construction within certain wildlife refuges and parks." *Sierra Club v. Trump*, 929 F.3d at 679.

B. Section 2808 does not authorize Defendants to override Congress's funding decisions.

Defendants assert that Section 2808 provides authority to divert billions of military dollars to aggrandize a civilian law enforcement project, even when

Congress specifically refused to authorize such funding. This is a radical departure from previous uses of this power. "[A] president has never before invoked Section 2808 to secure funding for projects that Congress specifically declined to fund in its appropriations judgment." ER4. Moreover, the combined total dollar value of every previous Section 2808 project in the past eighteen years is less than half of what Defendants claim they may spend on the border wall here. *See* Michael J. Vassalotti & Brendan W. McGarry, Cong. Research Serv., IN11017, *Military Construction Funding in the Event of a National Emergency* (Jan. 11, 2019), at 2.

The district court was correct to reject Defendants' novel and sweeping claim of authority. *See Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [courts] typically greet its announcement with a measure of skepticism." (quotation omitted)). Defendants' interpretation of Section 2808 violates the plain text of the statute, and would at the very least raise serious constitutional questions.

i. The district court correctly found that the Southern border is not a "military installation."

With the exception of the wall sections on the Barry Goldwater Military Range, none of the construction constitutes "military construction" as defined by statute. Congress defined "military construction" as construction associated with a "military installation" or "defense access road." 10 U.S.C. § 2801(a). In turn,

Congress limited "military installation" for the purposes of Section 2808 to a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department . . . ." *Id.* § 2801(c)(4). Defendants maintain they can evade this requirement by simply assigning administrative jurisdiction of border sections sprawling across four states and more than a thousand miles to Fort Bliss in Texas. Defendants are wrong.

As the district court found, Defendants' "expansive interpretation" of "military installation" is untenable. ER24. Defendants' theory requires "disregard[ing] the plain language of the statute," ER24, because the wall project is entirely dissimilar "in nature or scope to 'a base, camp, post, station, yard, [or] center,'" ER25. The district court incorporated the statutory analysis from its previous preliminary injunction decision, *see* ER24 n.10, which found that "[a]pplying traditional tools of statutory construction, Section 2801 likely precludes treating the southern border as an 'other activity'" encompassed by Congress's definition of military construction. *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 920 (N.D. Cal. 2019).

The district court "relie[d] on the doctrine of *noscitur a sociis*, 'which is that a word is known by the company it keeps.'" *Id.* (quoting *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995)). Because "'other activity' appears after a list of closely related types of discrete and traditional military locations," it is properly

construed as "referring to similar discrete and traditional military locations. The Court does not readily see how the U.S.-Mexico border could fit this bill." *Id.* at 921. The district court also relied on the "*ejusdem generis* canon of statutory interpretation, which counsels that '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Id.* (quoting *Wash. State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)). As the district court explained, if "Congress intended for 'other activity' in Section 2801(c)(4) to be so broad as to transform literally any activity conducted by a Secretary of a military department into a 'military installation', there would have been no reason to include a list of specific, discrete military locations." *Id.*

Decades of caselaw support the district court's conclusion that "the terms 'base, camp, post, station, yard, [or] center' are not mere surplusage to ignore, but rather supply meaning and provide boundaries to the term 'other activity.'" ER25 (citing *McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016) (explaining that canons of construction are "wisely applied . . . to avoid the giving of unintended breadth to the Acts of Congress" (quotation omitted); *Yates v. United States*, 135 S. Ct. 1074, 1087 (2015) ("Had Congress intended 'tangible object' in § 1519 to be interpreted so generically as to capture physical objects as dissimilar as documents

and fish, Congress would have had no reason to refer specifically to 'record' or 'document.' The Government's unbounded reading of 'tangible object' would render those words misleading surplusage."); *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 295 (2011) ("We typically use ejusdem generis to ensure that a general word will not render specific words meaningless.")).

In addition to violating the plain meaning of "military installation," moreover, the district court was also correct to reject Defendants' interpretation in light of the absurd results it would produce. As the district court noted, "[w]hen asked during the hearing whether Defendants' reading of Section 2808 had a limiting principle, counsel could not articulate one." ER26. According to their theory, "provided Defendants complete the right paperwork," they may add any public or private land to a military installation, even if "wholly unrelated to the installation's functions, purpose, or even geography." ER27. This unbounded theory contrasts sharply with the military installations Defendants cite, such as the Special Forces aquatic training facility in Key West, Florida, which directly serves the Special Forces personnel stationed at Fort Bragg, North Carolina. OB 38.

In this appeal, Defendants are still unable to identify any limit on the power they claim. "Defendants' interpretation would grant them essentially boundless authority to reallocate military construction funds to build anything they want, anywhere they want, provided they first obtain jurisdiction over the land where the

construction will occur." ER26. This would lead to the absurd and unconstitutional result Defendants seek here, conferring on DoD the ability to "redirect billions of dollars from projects to which Congress appropriated funds to projects of Defendants' own choosing, all without congressional approval (and in fact directly *contrary* to Congress' decision not to fund these projects)." ER27.

Finally, Defendants' "military installation" theory does not make sense on its own terms. By Defendants' own account, DoD's exercise of jurisdiction over disparate sections of border would result in the military's abandonment of these sites. Defendants' plan is to shift any troops away from these newly materialized "military installations" and "redeploy" DoD personnel to "border areas that currently lack barriers"—in other words, to those areas of the border that Defendants claim are *not* under DoD jurisdiction. OB 41. It is counterintuitive, to say the least, for the definition of "military installation" to encompass specifically those sites along the border that the military intends not to use. *See Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004) ("[S]tatutory interpretations which would produce absurd results are to be avoided.").

Defendants offer no answer to the district court's statutory analysis. They do not attempt to explain why Congress specifically listed discrete military locations if a "military installation" actually encompasses "any land under military jurisdiction and subject to the military's operational control." OB 38. Nor do they

address the extensive Supreme Court authority on which the district court relied. ER25. Instead, Defendants invent a rationale that neither the district court nor Plaintiffs advanced. Defendants assert that the district court "agree[ed] with plaintiffs that a project is 'with respect to a military installation' only if it occurs at a place where the military has already been conducting certain unspecified activities for a lengthy (but unspecified) period of time." OB 37. But no part of the district court's decision or Plaintiffs' claims turns on this straw man argument.

As the district court summarized, "Put simply, the Court does not find that Section 2808 was intended to be used to resolve policy disputes with Congress or to provide the Executive Branch with unchecked power to transform the responsibilities assigned by law to a civilian agency into military ones by reclassifying large swaths of the southern border as 'military installations.'" ER29. Defendants have provided no reason to disturb this conclusion.

ii. A border wall built for the benefit of DHS is not "necessary to support" the armed forces.

The district court correctly rejected Defendants' claim that a border wall aimed squarely at DHS's capabilities and mission is "necessary to support" the "use of the armed forces." Construction projects that are "necessary to support" the armed forces are structures that enable the military to conduct military operations. Accordingly, Section 2808 authority has been used to build hangars, runways, logistics hubs, and facilities for storing ammunition. *See* Vassalotti & McGarry,

supra, at 2-3. The only domestic use of Section 2808 has been to secure weapons of mass destruction—unquestionably a task that Congress assigned to the military. Section 2808 does not, by contrast, provide freewheeling authority to raid the military construction budget for missions that Congress assigned to other agencies. The district court correctly "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 projects for the benefit of DHS, even when Congress specifically declined to give DHS itself the funds to build those projects." ER32.

As the district court found, nothing in the administrative record supports Defendants' claim that a DHS border wall is "necessary to support" the armed forces. To the extent they would support the operations of any agency, "the border barrier construction projects are intended to benefit DHS and its subagencies, including [Customs and Border Protection ("CBP")] and U.S. Border Patrol ("USBP")." ER30. The record is unambiguous: Defendants' wall construction is intended to "[i]mprove CBP's detection, identification, classification, and response capabilities,' '[r]educe . . . the time it takes for Border Patrol agents to apprehend illegal migrants,' 'reduce the challenges to CBP,' serve to channel illegal immigrants towards locations that are operationally advantageous to DHS,' 'reduce the enforcement footprint and compress USBP operations,' 'enable CBP agents to

focus less on the rugged terrain,'" and "give a distinct and enduring advantage to USBP." ER30-31 (citations to administrative record omitted).

As the record reflects, Defendants' justification for the border wall is based entirely on missions that Congress assigned to civilian law enforcement, not the armed forces. *Compare* ER130 (DoD claim that wall construction is "necessary to support the use of the armed forces" because "construction of such physical barriers will deter illegal entry") *with* 8 U.S.C. § 1103(a)(5) (Secretary of DHS has "duty to control and guard the boundaries and borders of the United States against . . . illegal entry"). The district court observed that "commission of these responsibilities to DHS is no secret: the entire reason for the longest shutdown of the Federal government in history was that the President sought over $5 billion in appropriations to DHS for these exact projects, and Congress exercised its constitutional prerogative to decline to authorize that spending." ER31. Defendants' wall construction scheme itself confirms that this is a law enforcement wall, not a "military support" wall, as Defendants additionally rely on the Treasury Forfeiture Fund, which can be applied only to "law enforcement activities." 31 U.S.C. § 9705(g)(4)(B).

Defendants' litigation position notwithstanding, the record reveals that DoD does not even expect to derive a military benefit from wall construction on the Barry M. Goldwater Range, which is the only military site involved in Defendants'

plan. Defendants misleadingly suggest that wall construction on the Range is supported by an assessment of "the military significance of individuals and drugs crossing the border onto an active military training facility." OB 42. In fact, Defendants' own records state that "impact to military training over the past five years has been negligible." ER152. There is not a shred of evidence in the administrative record that supports Defendants' claim before this Court that DoD is pursuing wall construction because of the "military significance" of "individuals and drugs." OB 42. Instead, "[a]s DoD representatives have forthrightly explained, funding under Section 2808 would 'all go to adding significantly new capabilities to DHS's ability to prevent illegal entry.'" ER31.

That a permanent border wall does not support military operations is further confirmed by Defendants' claim that the border wall would immediately obviate, rather than enable, the presence of the armed forces. *See* ER31-32. This position is completely at odds with previous uses of Section 2808, where the armed forces were the entity that would use the completed structures—be they airfields, barracks, or ammunition depots—to accomplish uniquely military missions. As the district court observed, "Defendants' argument proves too much," because "[u]nder their theory, any construction could be converted into military construction—and funded through Section 2808—simply by sending armed forces

temporarily to provide logistical support to a civilian agency during construction." ER31-32.

Lacking any support in the record, Defendants' primary contention is that this Court must defer absolutely whenever the executive branch invokes Section 2808. OB 40-43. But the decision to transfer military construction funds to a civilian immigration enforcement mission is not a strategic judgment entitled to deference.

It would not intrude on military judgments for the Court to decide whether Section 2808 authorizes a de facto DoD appropriation to DHS to aggrandize a civilian project that Congress refused to fund. In *Youngstown*, the Supreme Court rejected the government's reliance on "cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war," observing that "[e]ven though 'theater of war' be an expanding concept," lawmaking decisions are "a job for the Nation's lawmakers, not for its military authorities." 343 U.S. at 587. "Congress has the exclusive power to spend," and Defendants possess no unreviewable military authority to reallocate taxpayer funds for civilian law enforcement initiatives. *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1233 (9th Cir. 2018). Because this case is about transferring military funding to aggrandize DHS, cases involving deference to military discipline, training, or the relative military value of different naval bases are inapposite. *Cf. OB 4*0-42. Cases

involving ongoing judicial oversight of military activities are equally irrelevant. *See Gilligan v. Morgan*, 413 U.S. 1, 5 (1973) (distinguishing between "an action seeking a restraining order against some specified and imminently threatened unlawful action" and "a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard").

As was true in *Youngstown*, Defendants cannot rely on sweeping claims of military powers to shield their actions from review. *See also Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992) ("[T]he claim of military necessity will not, without more, shield governmental operations from judicial review."). "[F]rom the time of John Marshall to the present, the [Supreme] Court has decided many sensitive and controversial cases that had enormous national security or foreign policy ramifications." *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 n.3 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (collecting cases). The Supreme Court has repeatedly warned that "national-security concerns must not become a talisman used to ward off inconvenient claims—a 'label' used to 'cover a multitude of sins.'" *Ziglar*, 137 S. Ct. at 1862 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)). Here, "[t]his danger of abuse is even more heightened given the difficulty of defining the security interest in domestic cases." *Id.* (quotation omitted).

No part of this challenge involves "deployment of troops and overall strategies of preparedness." *Cf. Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986). Defendants themselves admit that they deployed thousands of troops to the border months before they invoked Section 2808. *See* OB9. Enforcement of Congress's restrictions in Section 2808 would not require second-guessing this or any other deployment decision. Defendants may thus continue to require servicemembers to spend months at the border, like the "100 DoD military personnel [deployed] to heat and distribute meals," ER219, but they may not use the presence of DoD personnel to spend billions on construction projects in the absence of Congressional authorization. Defendants may continue to detail DoD attorneys to serve immigration enforcement functions, ER216, but they could not use Section 2808 to construct new immigration courts that Congress refused to fund. Enforcement of these basic funding restrictions does not entangle the courts in subtle military decisions beyond judicial capacity. It just prohibits the President from using the military to spend money Congress specifically prohibited him from spending.

In any event, even where review is "deferential," courts "are not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quotation omitted). The district court was therefore not required to "blind itself to the plain reality presented in this case: the

border barrier projects Defendants now assert are 'necessary to support the use of the armed forces' are the very same projects Defendants sought—and failed—to build under DHS's civilian authority, because Congress would not appropriate the requested funds." ER33; *see generally Newman v. Apfel*, 223 F.3d 937, 943 (9th Cir. 2000) ("The fact that an agency has broad discretion in choosing whether to act does not establish that the agency may justify its choice on specious grounds. To concede otherwise would be to disregard entirely the value of political accountability, which itself is the very premise of administrative discretion in all its forms.").

While Defendants now argue that the military necessity of $3.6 billion worth of border wall construction is the result of complex and unreviewable strategic judgments, the inescapable reality is that the decision was made and publicized by the White House in February 2019. On the very same day the national emergency was declared, the White House announced that Defendants would use Section 2808 to make available $3.6 billion "to build the border wall." SER260-261. In March 2019, six months before the Secretary of Defense announced a decision, Defendant Trump confirmed his plan by submitting to Congress a military construction budget request for billions to "backfill funding reallocated in FY 2019 to build border barriers." SER309. Rather than identifying a military need for a border wall, "DoD officials have forthrightly acknowledged that the border barrier projects are

intended to fulfill the President's priorities." ER33. And rather than supporting the military, "DoD representatives have forthrightly explained [that] funding under Section 2808 would all go to adding significantly new capabilities to DHS's ability to prevent illegal entry." ER31 (quotation omitted).

In light of this "plain reality," ER33, it would be unreasonable to interpret Section 2808 to provide Defendants with authority to override Congress's decisions about multibillion-dollar, civilian public works that were the subject of enormous political debate. Interpretation of statutes "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *see also Util. Air Regulatory Grp.*, 573 U.S. at 324 ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." (quotation omitted)).

iii. Immigration of family units is not an emergency requiring the use of the armed forces.

Although the district court correctly found that Defendants could not use Section 2808 to circumvent Congress's funding decisions based on the reasons above, Defendants' reliance on Section 2808 also suffers from an additional flaw: the immigration of family units is not an emergency "that requires use of the armed forces." 10 U.S.C. § 2808(a). Congress expressly assigned the tasks of border

security and immigration enforcement to civilian agencies, not the armed forces. Because Defendants' efforts to construct a border wall do not involve an emergency requiring the use of the armed forces, Defendants cannot rely on Section 2808 to strip funding from approved military construction projects.

By its own terms, the Emergency Proclamation does not describe any emergency requiring use of the armed forces. In describing the nature of the purported national emergency, the text of the Proclamation refers to a "long-standing" problem of "large-scale unlawful migration through the southern border" that has "worsened" in recent years due to "sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space" for them. ER118. It further states that these family units "are often released into the country and are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate." ER118.

Taking the Proclamation at face value, none of these conditions "requires use of the armed forces" under the system that Congress enacted. Instead, Congress has made clear that response to any such condition is a core function of the *civilian* components of DHS. *See* 6 U.S.C. § 202 (assigning DHS responsibility for "[s]ecuring the borders" and "immigration enforcement functions"); 8 U.S.C.

§ 1103(a)(5) (Secretary of DHS has "duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens").

Congress has specifically provided for a civilian, rather than military, response if "an actual or imminent mass influx of aliens . . . near a land border[] presents urgent circumstances requiring an immediate Federal response . . . ." 8 U.S.C. § 1103(a)(10). Should the Attorney General determine that such "urgent circumstances" exist, the "immediate Federal response" Congress provided for is that the Attorney General may authorize civilian "law enforcement officer[s]" to perform immigration functions. *Id.* In the United States, border security tasks are reserved for civilian law enforcement—not the armed forces. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000) ("Securing the border" is "of course, [a] law enforcement activit[y.]"). This accords with Congress's longstanding design, which strictly distinguishes between the responsibilities of civilian law enforcement agents and those of the military. Congress has explicitly barred the armed forces from "execut[ing] the laws," 18 U.S.C. § 1385, or from participating in in "search[es], seizure[s], arrest[s], or other similar activit[ies]." 10 U.S.C. § 275.

DoD officials' testimony further dispels any claim that the unique capabilities of the armed forces are required here. *See* SER267 (situation on the border is "not a military threat"); SER271 ("None of the capabilities that we are

providing are combat capabilities"); SER271("it's not a war zone along the border"). The military's official service awards likewise recognize the simple fact that there is no border emergency requiring armed force: troops deployed to the border were announced to be eligible for a special "military award reserved for troops who 'encounter no foreign armed opposition or imminent hostile action.'" SER311.

DoD's assessment is unsurprising, because the emergency allegedly requiring military force is "family units entering and seeking entry to the United States." ER118. Both common sense and congressional design make clear that unarmed parents and children seeking refuge do not require a military response. *See, e.g.*, 6 U.S.C. § 202 (assigning DHS responsibility for "[s]ecuring the borders" and "immigration enforcement functions"); *id.* § 251 (assigning DHS responsibility for "Border Patrol," "detention and removal," and "inspections"); 8 U.S.C. § 1103(a)(5) (Secretary of DHS has "duty to control and guard the boundaries and borders of the United States against . . . illegal entry").

Although the district court "acknowledge[d] the significant constitutional tension inherent in the President's invocation of a national emergency under the NEA for the avowed purpose of accessing money to fund projects that Congress expressly considered and declined to fund," it found that Section 2808's limitation to emergencies requiring the use of the armed forces was unreviewable. ER22. The

district court erred in finding this statutory command to be an unreviewable political question.

The root of the district court's error is its mistaken conflation of two questions: (1) whether any emergency exists, and (2) whether, assuming an emergency exists, civilian immigration enforcement "requires the use of the armed forces" for the purposes of Section 2808. Plaintiffs are not asking this Court (and did not ask the district court) to rule on whether any emergency exists, nor do they seek an assessment of "the nature and validity of an emergency proclamation." ER22. Instead, Plaintiffs seek review of whether immigration enforcement—a civilian responsibility—fits within the statutory limitations of Section 2808. The district court's observation that "there is no precedent for a court overriding a President's discretionary judgment as to what is and is not an emergency" is therefore beside the point. ER22.

Because Congress has specifically limited the type of emergency qualifying for military construction funding under Section 2808, enforcement of those limits presents a justiciable question. *See Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 825 (9th Cir. 2017) (military could be enjoined because "to abstain from giving effect to a federal statute is less respectful to Congress than reviewing the executive's compliance"). This Court is qualified to answer whether Section 2808 authorizes the use of military construction funds for immigration enforcement in

light of the comprehensive statutory scheme that Congress established to address immigration. Plaintiffs are not asking the Court to substitute a "policy decision of the political branches with the courts' own unmoored determination of what United States policy . . . should be." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). Plaintiffs instead ask this Court to enforce legal prohibitions that Congress wrote into law by interpreting the statutes Congress enacted. This is a "familiar judicial exercise." *Id.* "To the extent a conflict arises from diverging intentions by the executive and Congress, [courts] are competent to police these kinds of disputes, even when they implicate foreign policy matters." *Ctr. for Biological Diversity*, 868 F.3d at 828.

Courts, including the Supreme Court, have not balked at reviewing executive claims of emergency authority. In *Dames & Moore*, for example, the Supreme Court reviewed whether an emergency statute authorized the president to "suspend claims pending in American courts." 453 U.S. at 675. The Court rejected the government's claims, finding that "[t]he terms of the [emergency statute] therefore do not authorize the President" to take such an action. *Id.* As the Court emphasized, its review and rejection of the president's compliance with the terms of the emergency statute was not an aberration, but rather "the view of all the courts which have considered the question." *Id.* at 675-76 (collecting cases). *United States v. Spawr Optical Research, Inc.*, 685 F.2d 1076 (9th Cir. 1982), is

not to the contrary. In *Spawr*, this Court declined to answer as "essentially-political questions" *only* the question of whether any emergency existed, and what its duration should be. *Id.* at 1081. Unlike Section 2808, which specifies and limits the type of emergency (i.e. one requiring the use of the armed forces), the statute at issue in *Spawr* "contained no standards" and "delegated to the President the authority to define all of the terms in that subsection of the [statute] including 'national emergency[.]'" *Id.* at 1080. Even then, this Court emphasized that "we are free to review whether the actions taken pursuant to a national emergency comport with the power delegated by Congress." *Id.* at 1081.

The question of whether a border wall aimed at civilian immigration enforcement fits within the confines of Section 2808 is particularly appropriate where, as here, "the question is whether Congress or the Executive is aggrandizing its power at the expense of another branch." *Zivotofsky*, 566 U.S. at 197 (quotation omitted). As this Court explained in another case where the government claimed unreviewable military authority to disregard statutory restrictions, "[w]e may consider national security concerns with due respect when the statute is used as a basis to request injunctive relief. This is not a grim future, and certainly no grimmer than one in which the executive branch can ask the court for leave to ignore acts of Congress." *Ctr. for Biological Diversity*, 868 F.3d at 826; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) ("[The president] may not

disregard limitations that Congress has, in proper exercise of its own [military] powers, placed on his powers.").

Congress's decision to assign the task of border security to civilian law enforcement, like its decision to limit appropriations for wall construction, cannot be undone by presidential fiat. Were it otherwise, as Justice Jackson warned, a president could "vastly enlarge his mastery over the internal affairs of the country" through "commitment of the Nation's armed forces"—an outcome that could not be "more sinister and alarming" in its departure from the core separation-of-powers principles embodied in the Constitution. *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring).

iv. Defendants' interpretation of Section 2808 raises serious constitutional questions.

Defendants' wall-funding scheme violates the plain text of Section 2808, as described above. But even if Section 2808 were ambiguous, the doctrine of constitutional avoidance requires that Section 2808 be interpreted to avoid the serious constitutional problems that would be raised if the statute authorized Defendants' actions. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). Defendants' plan to construct a multibillion-dollar wall that Congress considered and rejected represents an effort to "proceed with the construction by any means necessary, notwithstanding Congress' contrary exercise of its constitutionally-

absolute power of the purse." ER45. This plan violates the Appropriations Clause, the Presentment Clause, and core separation-of-powers principles.

Section 2808 cannot constitutionally authorize the president to unilaterally override Congress's appropriations judgment. Yet Defendant Trump has acknowledged explicitly and repeatedly that his use of Section 2808 is purely an effort to sidestep Congress's considered decisionmaking in passing the CAA and his own actions in signing the CAA into law. Congress and Defendant Trump negotiated for months, and as Defendant Trump conceded on the day he signed the CAA, "[t]he only place they don't want to give as much money — $1,375,000,000" was for his wall. SER241. Defendant Trump signed Congress's appropriations judgment into law and simultaneously announced that he would ignore it by invoking Section 2808. He was explicit that he "went through Congress," "made a deal," and that he "didn't need to do this," but was declaring an emergency because he would "rather do it much faster." SER245. Defendant Trump recently confirmed that Defendants were raiding the military budget because of a funding disagreement with Congress: "We wanted Congress to help us. It would have made life very easy. . . . We still want them to do it because it would be a little bit easier, but Congress wouldn't do it." SER291.

The Constitution delegates to Congress "exclusive" power "not only to formulate legislative policies and mandate programs and projects, but also to

establish their relative priority for the Nation." *McIntosh*, 833 F.3d at 1172. If Section 2808 were interpreted to "provide the Secretary of Defense with almost limitless authority to use billions of dollars of its appropriations to build projects for the benefit of DHS, even when Congress specifically declined to give DHS itself the funds to build those projects," ER32, it would violate the Appropriations Clause. "Congress, and not Defendants, holds the power of the purse." ER32.

Likewise, a statute would run afoul of the Presentment Clause if it permitted the president to sign an appropriations act and, "based on the same facts and circumstances that Congress considered," have the option of "rejecting the policy judgment made by Congress and relying on his own policy judgment." *Clinton v. City of New York*, 524 U.S. 417, 444 & n.35 (1998). "Where the President does not approve a bill, the plan of the Constitution is to give to the Congress the opportunity to consider his objections and to pass the bill despite his disapproval." *Wright v. United States*, 302 U.S. 583, 596 (1938). Instead of following this constitutional requirement, Defendant Trump signed a bill to which he objected, and simultaneously announced that he would disregard Congress's judgment by increasing funds to his liking.

If Section 2808 enables a president to simply substitute his own judgment—whether under claim of emergency or otherwise—for Congress's simultaneous decision, it violates the Presentment Clause, as the Supreme Court explained in

Clinton: "Because the Line Item Veto Act requires the President to act within five days, every exercise of the cancellation power will necessarily be based on the same facts and circumstances that Congress considered, and therefore constitute a rejection of the policy choice made by Congress." 524 U.S. at 444 n.35. Here, Defendant Trump purported to exercise Section 2808 power to increase wall funding the very same day he signed the CAA, based on his explicit rejection of Congress's judgment. This action cannot be squared with the Presentment Clause's requirements.

Finally, Defendants' efforts to circumvent congressional control of appropriations violate the separation of powers. As the district court observed, "the 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." *Sierra Club v. Trump*, 379 F. Supp. 3d at 927. As Justice Frankfurter observed in *Youngstown*, "It is quite impossible . . . when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole

legislative process and the constitutional division of authority between President and Congress." 343 U.S. at 609 (Frankfurter, J., concurring).

It would demean the legislative process and the separation of powers to embrace the fictions that Defendants press here. The wall Defendants are racing to construct on the border is not made up of alternating sections of "law enforcement counterdrug wall," "military support wall" and DHS-appropriated wall. Defendants have consistently requested funding for a single wall, and Congress has provided far less funding than Defendants have demanded. *See City & Cty. of San Francisco*, 897 F.3d at 1234 ("The sheer amount of failed legislation on this issue demonstrates the importance and divisiveness of the policies in play, reinforcing the Constitution's unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process." (quotation omitted)). Defendants have no constitutional authority to short-circuit the political process, and this Court should not bless the transparent pretext of Defendants' claim that sections of border wall have suddenly become separate military walls.

III. The Injunction Is Proper.

Defendants argue that the district court abused its discretion in enjoining their unlawful conduct for two reasons. First, in their view, the Supreme Court already silently decided the issue in their favor. OB 44. Second, Defendants argue

that the district court was required to permit Defendants to override Congress's assessment as to the need for a multibillion-dollar border wall, based on the very arguments that Congress rejected. Defendants' arguments are meritless.[2]

Defendants argue that the Supreme Court's stay of the Section 8005 injunction silently predetermined the equitable balancing here. OB 44. But, as Defendants concede in a footnote, OB 44 n.5, they presented the Supreme Court with a very different argument on the equities than is presented here. Defendants told the Supreme Court 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* 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 may believe that the Supreme Court would have permitted construction to commence whether or not Defendants had submitted voluminous argument and declarations related to funds imminently lapsing. But the Supreme Court said nothing at all on the subject, and mere speculation cannot carry

[2] Defendants do not challenge the district court's conclusion, ER37-43, that Plaintiffs have shown irreparable injury in the absence of an injunction. "When an appellant fails to clearly and distinctly raise an argument in its opening brief, this court considers the argument abandoned." *Ridgeway v. Walmart Inc.*, 946 F.3d 1066, 1076 (9th Cir. 2020).

Defendants' burden. In granting a temporary stay of a different injunction, the Supreme Court did not make a silent and permanent judgment on the equities here.

Defendants' remaining argument is that—even if they lack any statutory or constitutional authority to spend billions on a wall—it is an abuse of discretion for a court to order them to stop. In Defendants' view, Congress's absolute power of the purse should give way to Defendants' judgment that a wall is desirable to address "high rates of drug smuggling between ports of entry at the southern border, as well as recent increases in apprehensions following illegal crossings." OB 45. But, as the district court explained, "Congress has already engaged in the difficult balancing of Defendants' proffered interests and the need for border barrier construction in passing the CAA." ER44. Because "Defendants have not pointed to any factual developments that were not before Congress and that may have altered its judgment to appropriate just $1.375 billion in funding for limited border barrier construction," their request to proceed with unfunded construction is tantamount to a request to undermine the separation of powers. ER44. "Balancing the equities' when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. 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." *Youngstown*, 343 U.S. at 609-10 (Frankfurter, J., concurring).

Defendants point to *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), but that decision only underscores the weakness of their argument. There, the government substantiated its claims of national security harm with specific "declarations from some of the Navy's most senior officers, all of whom underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat." *Id.* at 24. Here, by contrast, DoD officials have testified consistently that the situation on the border is "not a military threat," SER267. And while *Winter* involved a 40-year status quo of training without documented environmental harm, the record here establishes that Defendants' multibillion-dollar construction project would "significantly alter the existing landscape." ER39-40; *see All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (there is a "well-established public interest in preserving nature and avoiding irreparable environmental injury" (quotation omitted)).

Most fundamentally, however, *Winter* is inapposite because it says nothing at all about the public interest in enforcing bedrock separation-of-powers principles. In *Winter*, the issue was not an underlying lack of executive authority, but compliance with a procedural requirement: "the ultimate legal claim [wa]s that the Navy must prepare an [Environmental Impact Statement], not that it must cease

sonar training." 555 U.S. at 32-33. Here, by contrast, Defendants lack any constitutional or statutory "mechanism by which they may override Congress' appropriations judgment." ER44. Defendants simply ignore this distinction, offering only the nonsensical assertion that their lack of any authority is "just a merits argument," and should be ignored when considering the public interest. OB 46. But because Defendants are acting without any constitutional or statutory authority, the relevant precedent is not *Winter*, but *Youngstown*. And the Supreme Court rejected far more substantial national security claims than Defendants' in upholding the injunction in *Youngstown*, observing that "[t]he Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times." 343 U.S. at 589.

While Defendants apparently do not believe the public interest is served by respecting the separation of powers, the Founders thought otherwise. "James Madison underscored the significance of that exclusive congressional power, stating, '[t]he power over the purse may [be] the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people.'" *City & Cty. of San Francisco*, 897 F.3d at 1231 (quoting The Federalist, No. 58). "Without it, Justice Story explained, 'the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure.'" *McIntosh*, 833 F.3d at 1175 (quoting 2 Joseph

Story, *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858)). The public interest compels an injunction against Defendants' actions because if "the decision to spend [is] determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened." *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring). The district court did not abuse its discretion in requiring Defendants to comply with the Constitution.[3]

CONCLUSION

This Court should affirm the injunction.

[3] Defendants argue in a footnote that the district court abused its discretion in granting declaratory relief because "the same equitable factors that militate against injunctive relief here equally cut against declaratory relief." OB 44 n.44. Defendants miss the point. The entire purpose of the Declaratory Judgment Act is "to make declaratory relief available in cases where an injunction would be inappropriate." *Steffel v. Thompson*, 415 U.S. 452, 471 (1974).

Dated: February 13, 2020

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs state that the following consolidated cases, which are pending in this Court, are related to the present appeal: *Sierra Club, et al. v. Donald Trump, et al.*, No. 19-16102; *Sierra Club, et al. v. Donald Trump*, *et al.*, No. 19-16300; *State of California, et al. v. Donald Trump, et al.*, No. 19-16299; *State of California, et al. v. Donald Trump, et al.*, No. 19-16336. All of these related appeals arise out of the same cases in district court as the present appeal.

/s/Dror Ladin
Dror Ladin
Dated: February 13, 2020

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2020, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

/s/ Dror Ladin
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Circuit Rule 32-1(a) because it contains 13,997 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 32(a) because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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