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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATES OF CALIFORNIA AND NEW MEXICO,
Plaintiffs-Appellees-Cross-Appellants,

v.

DONALD J. TRUMP, ET AL.,
Defendants-Appellants-Cross-Appellees;

SIERRA CLUB, ET AL.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California, No. 4:19-cv-872
Hon. Haywood S. Gilliam, Jr., Judge

PRINCIPAL AND RESPONSE BRIEF OF THE STATES OF CALIFORNIA AND NEW MEXICO

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INTRODUCTION

The federal Defendants make remarkably little defense of their attempt to divert billions of dollars for border barrier construction that Congress refused to fund. As a motions panel of this Court correctly recognized, this diversion "violates the Appropriations Clause and intrudes on Congress's exclusive power of the purse," Stay Op. 45,[1] as well as exceeding Defendants' authority under the statutes invoked, *id.* at 34-39. Tellingly, the federal Defendants spend fewer than seven pages of their 53-page brief defending those acts on the merits.

Instead, Defendants argue that the plaintiffs are precluded from challenging their actions. These arguments fly in the face of established law concerning equitable *ultra vires* claims, the zone-of-interests test, and constitutional challenges to unlawful executive conduct. The Supreme Court's brief order granting Defendants' stay application does not undermine this authority. Defendants' attempt to immunize their unlawful transfer of funds should be rejected.

In addition, the States should be granted injunctive relief. The record demonstrates that the States would suffer irreparable injury absent an injunction, and that the balance of equities tips sharply in their favor. The district court's denial of the States' request for injunctive relief relied in part on its finding that the

[1] All citations to "Stay Op." are to the Order issued on July 3, 2019, in *Sierra Club et al. v. Donald J. Trump, et al.*, Case No. 19-16102, Dkt. No. 76.

States were protected by the injunction issued to the Sierra Club plaintiffs. That protection is now gone, and its absence puts the States' entitlement to injunctive relief squarely before this Court.

This Court should affirm the district court's order declaring that the transfers at issue are unlawful and reverse the denial of the States' request for an injunction.

JURISDICTIONAL STATEMENT

Under 28 U.S.C. § 1331, the district court has subject-matter jurisdiction over the States' challenge to Defendants' actions, which arises under the federal Constitution and federal laws. On June 28, 2019, the district court granted a declaratory judgment to the States in *California v. Trump*, 19-cv-00872 (N.D. Cal., filed Feb. 18, 2019), and denied the States injunctive relief. ER71. That same day, the district court entered final judgment and certified the judgment for immediate appeal under Federal Rules of Civil Procedure 54(b) and 58. SER1000.

Defendants noticed an appeal on June 29. ER360. The States timely noticed a conditional cross-appeal on July 8. ER354. The cross-appeal is no longer conditional in light of the stay imposed by the Supreme Court. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Defendants have exceeded their statutory authority, or, alternatively, violated the Constitution, by diverting $2.5 billion appropriated by Congress for other purposes toward construction of border barriers;
2. Whether the States may bring a claim that Defendants unlawfully diverted funds for construction of border barriers on the States' territory, infringing on the States' sovereign interests; and
3. Whether the district court erred in denying the States' request for injunctive relief.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

The separation of powers is one of the defining features of our Constitution, serving as a "structural protection[] against abuse of power." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986). These principles "were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps." *INS v. Chadha*, 462 U.S. 919, 957-58 (1983). Within this constitutional design, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). Where the executive branch "takes measures incompatible with the express or implied will of Congress, [its] power is at its lowest ebb, for then [it] can rely only upon [its] own

constitutional powers minus any constitutional powers of Congress over that matter." *Id.* at 637 (Jackson, J., concurring).

The Appropriations Clause secures Congress's control over federal spending with its "straightforward and explicit command" that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quoting U.S. Const. art. I, § 9, cl. 7). The Framers viewed this "power over the purse . . . as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people." The Federalist No. 58 (James Madison). If, contrary to this precept, "the decision to spend [is] determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened." *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring). As then-Judge Kavanaugh described it, the Appropriations Clause is a "bulwark of the Constitution's separation of powers . . . particularly important as a restraint on Executive Branch officers: If not for the Appropriations Clause, the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure." *U.S. Dep't of Navy v. Fed. Labor Rel. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (internal quotation marks omitted).

The "Purpose Statute," 31 U.S.C. § 1301, which was originally enacted in 1809, "codified what was already required under the Appropriations Clause of the Constitution." Gov't Accountability Office (GAO), Office of the General Counsel, Principles of Federal Appropriations Law 3-10 (4th Ed. 2017) ("GAO Red Book").[2] In that regard, section 1301(a) "reinforce[s] Congress's control over appropriated funds," *Dep't of Navy*, 665 F.3d at 1347, by requiring appropriations to be applied only "to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a). To comply with the Purpose Statute and Appropriations Clause, an agency must follow the "necessary expense rule." GAO Red Book at 3-14-15; *see also Dep't of Navy*, 665 F.3d at 1349 (characterizing GAO's assessment of the necessary expense rule as expert opinion). Among other requirements, the necessary expense rule prohibits an agency from relying on a *general* appropriation for an expenditure when that expenditure falls *specifically* "within the scope of some other appropriation or statutory funding scheme." GAO Red Book at 3-16-17, 3-407-10. "Otherwise, an agency could evade or exceed congressionally established spending limits," *id.* at 3-408, which the Constitution forbids. *See Richmond*, 496 U.S. at 428.

[2] The GAO Red Book is available on GAO's website at https://www.gao.gov/assets/690/687162.pdf.

II. FACTUAL BACKGROUND

A. The Dispute Between the President and Congress over Funding for a Border Wall

President Trump has advocated for the construction of a wall along the southern border of the United States for the past five years, starting in the early days of his candidacy. ER408-11; *see also* SER1254-94. Between 2017 and 2018, Congress rejected numerous bills proposing billions of dollars toward a border wall. *See* Stay Op. 5-7; *see also* SER1295-1321.

Starting at the end of 2018, President Trump and Congress engaged in a protracted public dispute over funding for a border wall, resulting in a 35-day partial government shutdown. *See* Stay Op. 7-8; *see also* SER1322-47. The Administration specifically demanded an appropriation of $5.7 billion to fund "approximately 234 miles of new physical barrier," Stay Op. 8; SER1348-50, while also claiming that they would secure the requested funds for a border wall "with or without Congress." ER47 n.16. During these negotiations, President Trump warned, "If we don't get a fair deal from Congress, the government will either shutdown on February 15, again, or I will use the powers afforded to me under the laws and the Constitution of the United States to address this emergency," *i.e.*, the Administration's demand for border wall funding. SER1351-55.

Congress rejected the Administration's $5.7 billion request. After weeks of negotiations, Congress passed the Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (2019) (2019 Consolidated Appropriations Act or CAA). In it, Congress granted only $1.375 billion to the U.S. Department of Homeland Security (DHS) for primary pedestrian border fencing, and only in the Rio Grande Valley Sector in Texas. *Id.* §§ 230-32, 133 Stat. at 28. Congress appropriated no other funding for barrier construction in fiscal year (FY) 2019.

B. Defendants' Actions to Divert Funding to Construct a Border Wall

On the same day that President Trump signed the CAA into law, the Administration announced it would divert $6.7 billion of other federal funds—several times the $1.375 billion appropriated by Congress—from other sources to construct border barriers, and that those barriers would be built in places not authorized by the CAA (including California and New Mexico). Stay Op. 11-12; SER1360-63.

Among the authorities invoked by Defendants is 10 U.S.C. § 284(b)(7), which authorizes the Secretary of Defense to use the U.S. Department of Defense (DoD) drug-interdiction account to support other federal agencies in the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." ER282-85. DoD also relied upon section 8005 of the FY 2019 DoD Appropriations Act, Pub. L. No. 115-245,

§ 8005, 132 Stat. 2981, 2999 (2018), to transfer funds into that DoD drug-interdiction account. *Id.*; *see also* SER1364-68. Section 8005 permits the transfer of DoD funds made available in the FY 2019 DoD Appropriations Act between appropriations "*[p]rovided*, that such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." DoD later invoked section 9002 of the FY 2019 DoD Appropriations Act to complete one of the transfers. Stay Op. 17; *see also* ER222. Section 9002 is subject to the same terms and conditions as section 8005. 132 Stat. at 3042. In addition, funds under section 9002 may only be transferred "between the appropriations or funds made available to [DOD] in this title," which pertains to Overseas Contingency Operations. *Id.*

Relying on section 8005, in response to a request made by DHS, DoD first transferred $1 billion from DoD's Military Personnel and Reserve account to the DoD drug-interdiction account. Stay Op. 13; *see also* ER282. DoD stated that these funds were for construction of 57 miles of border barriers, including 46 miles in El Paso Sector Project 1 in New Mexico. ER195, 282. Soon thereafter, also in response to a DHS request, DoD transferred another $818.5 million to the DoD drug-interdiction account under section 8005 and $681.5 million under a separate Overseas Contingency Operations transfer authority in section 9002 of the FY

2019 DoD Appropriations Act. Stay Op. 17; *see also* ER222. DoD stated that this $1.5 billion transfer was to construct 78.25 miles of border barriers, including 15 miles in El Centro Sector Project 1 (on the southern border of California). ER189, 222. Congress had not appropriated funding for border barriers in any of the locations slated for construction by DHS and DoD.

With respect to both transfers, the Acting Secretary of Defense asserted—without explanation—that the transfer of funds for these border barriers met the requirements of sections 8005 and 9002. ER225-28; 285-89. The relevant House committees disapproved of both transfers upon the Administration's notification, but the Administration proceeded with them anyway. Stay Op. 15-16; *see also* SER1379-82; SER1141-42.

DoD's Acting Secretary Shanahan informed DHS that Customs and Border Protection (CBP) would "serve as the lead agency for environmental compliance" and that DHS would accept and maintain all of the completed border barrier projects. SER1221; SER1224. Consistent with its practice with respect to all border barrier projects initiated since 2017 (and nearly all since 2008), DHS waived applicable state environmental laws, citing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 102(c), 110 Stat. 3009 (1996), for construction in the El Paso and El Centro Sectors. 84 Fed. Reg. 17,185-87 (Apr. 24, 2019); 84 Fed. Reg. 21,800-01 (May 15, 2019). DoD has

already awarded contracts to private companies for construction in both sectors. Stay Op. 16.

III. PROCEDURAL HISTORY

Immediately after President Trump announced his intent to divert funding, the States filed suit. ER506. The Sierra Club plaintiffs filed suit shortly thereafter. ER469. The States and the Sierra Club plaintiffs filed for preliminary relief to enjoin use of this funding towards construction of a border barrier in New Mexico's El Paso Sector. ER511. The district court concluded that the States had standing and their claims were likely to succeed, but denied preliminary relief. *See generally* ER81-116. The court reasoned, in part, that any injunction in favor of the States would be "duplicative" of the relief contemporaneously granted to the Sierra Club plaintiffs, and therefore the States would not suffer irreparable harm. ER112.

Shortly thereafter, the States moved for preliminary relief to enjoin funding for construction in California's El Centro sector. ER520-21. That motion was subsequently incorporated into the States' motion for partial summary judgment encompassing the El Centro and El Paso sector projects. ER522. On June 28, 2019, the district court granted, in part, the Sierra Club plaintiffs' motion for partial summary judgment, issuing declaratory relief and a permanent injunction. ER11. The district court also granted the States' motion for partial summary judgment,

issuing declaratory relief that Defendants' transfer of funds was unlawful, but again denied the States' request for injunctive relief. ER80.

Defendants appealed both judgments and sought a stay of the injunction pending appeal in this Court. After extensive briefing and oral argument, the motions panel denied the stay. The panel determined that "there is no statutory appropriation for the expenditures that are the subject of the injunction," and that the transfers violated the Appropriations Clause. Stay Op. 34. The motions panel also concluded that the Sierra Club plaintiffs had a cause of action, concluding: (a) that the plaintiffs had a claim in equity or under the APA, *id.* at 45-55; (b) the zone of interests does not apply, *id.* at 59-65; and (c) even if the test did apply, plaintiffs satisfied it, *id.* at 65-68. Finally, the panel conducted a thorough assessment of the balance of harms and "conclude[d] that the public interest weighs forcefully against issuing a stay." *Id.* at 68-75.

Defendants filed an emergency application for a stay with the Supreme Court. A divided Court granted a stay of the injunction in a one-paragraph order, stating only that "the Government has made a sufficient showing at this stage that the [Sierra Club] plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." Misc. Order, *Trump v. Sierra Club*, No. 19A60 (U.S. July 26, 2019) (S.Ct. Stay Order).

SUMMARY OF THE ARGUMENT

In attempting to build border walls in New Mexico and California, Defendants have diverted $2.5 billion that Congress appropriated for other purposes. That diversion exceeded Defendants' authority under sections 8005, 9002, and 284. Defendants' contrary interpretation of those provisions would violate the Constitution's separation of powers principles, including the Appropriations and Presentment Clauses, because, among other reasons, Defendants acted contrary to the express and implied will of Congress and usurped Congress's power of the purse.

Further, there is no evidence that Congress intended to bar the States' claims that Defendants unlawfully diverted funds for construction of border barriers, which would be required to overcome the presumption that the States have such a cause of action. The Supreme Court's brief, preliminary statement—in a case in which the States were not parties and their distinct interests were not directly before the Court—concerning the existence of a cause of action for the Sierra Club plaintiffs under section 8005 does not preclude the States from asserting their meritorious claims here. The States have three viable causes of action: (1) an equitable *ultra vires* claim, (2) an Administrative Procedure Act claim, and (3) constitutional claims. To the extent a zone-of-interests test applies to these claims (or applies at all), the States easily satisfy it.

Finally, the States are entitled to an injunction prohibiting Defendants from using the contested funds. There is a strong public interest in preventing violations of the fundamental restrictions imposed by the Constitution. In addition, Defendants' impending actions to build massive barriers on the States' borders, while waiving state-law provisions that would ordinarily apply even to federal construction, irreparably harm the States' sovereign interests in protecting their public heath, environment, natural resources, and wildlife.

ARGUMENT

I. THE COURT SHOULD UPHOLD THE DECLARATORY JUDGMENT IN THE STATES' FAVOR

A. Defendants Exceeded Their Statutory Authority

After an unusually "full[]" evaluation of the merits, Stay Op. 31, the motions panel determined that Defendants were unlikely to show that the proposed border barrier expenditures are authorized. Stay Op. 32-45. Defendants provide nothing to rebut this conclusion.

1. Defendants Exceeded Their Authority under Section 8005

For a transfer to be legal under section 8005, Defendants must show that it was: (1) not for an "item" for which Congress has denied funding, and (2) based on "unforeseen military requirements." FY 2019 DoD Appropriations Act § 8005; *see also* 10 U.S.C. § 2214(b) (imposing same conditions). Defendants have shown neither.

First, Defendants transferred money for an "item" for which Congress denied funding: border barrier construction. As the motions panel recognized, Congress considered and rejected the Administration's request for billions of dollars in border barrier funding, including its specific request for $5.7 billion in funding for FY 2019. Stay Op. 38-39. The dispute over border barrier funding "occupied center stage of the budgeting process for months, culminating in a prolonged government shutdown that both the Legislative and Executive Branches clearly understood as hinging on whether Congress would accede to the President's request for $5.7 billion to build a border barrier." Stay Op. 39. Ultimately Congress approved only $1.375 billion in border barrier funding, solely in Texas, and subject to specific conditions. CAA §§ 230-32. Thus, Congress plainly refused the Administration's request for greater border barrier funding. By using section 8005 to redirect DoD funds to barrier construction in locations not authorized by Congress, the Administration is violating the section's express prohibition against funding projects that Congress declined to fund.

Defendants claim they comply with section 8005 on the ground that under that section, the term "item" is implicitly limited to a "particular item for which DoD may request funding during a given fiscal year." Defs' Br. 44-45. Defendants do not—and cannot—seek deference for this interpretation. As the motions panel correctly determined, no deference—under *Chevron* or otherwise—is owed

because: (i) Congress did not "delegate to DoD the power to interpret section 8005"; and (ii) DoD "has not advanced its interpretation in a manner that would typically trigger review under *Chevron*." Stay Op. 41-42.[3]

Moreover, Defendants' interpretation is "not credible." Stay Op. 39. Defendants contend that section 8005 must be understood in the "context" of DoD's budgetary process, Defs' Br. 43, and note that section 8005's limitations were added in response to DoD attempts to reprogram funds "specifically deleted" in the legislative process, Defs. Br. 44 (citing H.R. Rep. No. 93-662, at 16 (1973)). But, as the motions panel recognized, section 8005's restrictions are not limited to items for which DoD unsuccessfully requested funding because the statute "refers to 'item[s] . . . denied by the Congress,' not to *funding requests* denied by the Congress." Stay Op. 37 (emphasis in original). And section 8005 contains no technical or defined terms compelling an interpretation that contradicts the "ordinary, contemporary, and common" meaning of such terms as "no case," "item," or "denied." *Id.* at 38 (quoting *United States v. Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998)). Thus, Defendants' interpretation has no textual basis.

[3] DoD also has no expertise to which this Court should defer as to the serious constitutional issues raised by DoD's interpretation of the statutes at issue here; that constitutional analysis is the province of the Court. *See Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997).

Defendants' interpretation also makes no sense. Under Defendants' interpretation, if Congress deleted a project during the DoD budgeting process, DoD would be restricted from transferring funds to that project. But if Congress unequivocally denied funding for a project throughout the entire federal budgeting process, DoD would be free to transfer funds to that project simply because the request was not included specifically in the DoD budget. Defendants offer no reason why Congress would have intended such a nonsensical result. Indeed, under Defendants' interpretation, section 8005 would create a "perverse" incentive for DoD to "declin[e] to present Congress with a particular line item to deny," and then "reprogram funds for a purpose that Congress refused to grant another agency elsewhere in the budgeting process." Stay Op. 38. Far from serving any plausible congressional purpose, such gamesmanship would undermine the exact "tighten[ed] congressional control of the reprogramming process" that section 8005 was intended to create. H.R. Rep. No. 93-662, at 16 (1973).

Second, the transfers at issue here are not for an "unforeseen" need. Defendants contend that this Court should look to whether DHS's request for DoD assistance—rather than the ostensible need for border barrier construction—was unforeseen. Defs' Br. 45-46. But in section 8005, the term "unforeseen" qualifies the phrase "military requirement," which (Defendants contend) is the construction of border barriers. Stay Op. 36-37. Defendants' suggestion that any need for border

barrier construction was "unforeseen" cannot be squared with "[t]he long history of the President's efforts to build a border barrier and of Congress's refusing to appropriate the funds he requested," including to stop the flow of drugs. *Id.* at 37; *see also* SER1254-94 (examples of President Trump's statements calling for a border wall).

In any event, "even the purported need for DoD to provide DHS with support for border security has . . . been long asserted." ER98. Nearly six months before enactment of the FY 2019 DoD Appropriations Act, President Trump directed DoD to provide support and resources to the southern border. SER1247, 1356-59. And in early 2018, DoD held back on using funds for counter-drug activity projects "primar[ily]" in anticipation "for possible use in supporting Southwest border construction" in FY 2018. SER1205-07. Given this record, Defendants' claim that their need for border barriers was "unforeseen" is not credible either. *See* Stay Op. 37.

Third, although the district court did not address whether barrier construction is a "military requirement," Defendants cannot satisfy that criterion either. Securing the border from *civilians* making unauthorized crossings is the responsibility of DHS, not DoD, *see* 6 U.S.C. § 211(c), and DoD has acknowledged that the situation at the border is not a "military threat." SER1383-95. Further, although Congress has authorized DoD to support construction of

border fencing under 10 U.S.C. § 284(b)(7), it has not *required* DoD to undertake this task. As Defendants acknowledge, DHS, not DoD, is the agency possessing the "experience and technical expertise" to construct border infrastructure. ER239, 279. Finally, the funds transferred by DoD are being used to fund contracts to *private* construction companies. ER300; SER1143-44. DHS could have just as easily contracted construction to private entities if Congress had appropriated the funds for it to do so. In short, the "military requirement" condition in section 8005 is not so elastic as to sustain the transfer of funds to a project where DoD does not possess unique military expertise.

2. Defendants Exceeded Their Authority under Section 9002

Defendants cannot rely on section 9002 to divert $681.5 million in DoD funding intended for overseas operations toward construction in the El Centro Sector. As the motions panel recognized, Stay Op. 17 n.7, section 9002 "is subject to the same terms and conditions as the authority provided in section 8005," 132 Stat. at 3042, which, as shown above, Defendants fail to satisfy.

Defendants also fail to satisfy section 9002's other requirements. Section 9002 lets DoD transfer funds only "*between* the appropriations or funds made available to the Department of Defense *in this title*"—namely, Title IX, the Overseas Contingency Operations title. 132 Stat. at 3042 (emphasis added). The proposed border barrier, however, is not an overseas contingency operation—the

El Centro Project 1 is entirely on U.S. territory—nor is it part of the "global war on terrorism," *see* SER1208-11 (setting forth the national security goals served by Overseas Contingency Operations).

3. Defendants Exceeded Their Authority under Section 284

Even if DoD could meet the criteria of sections 8005 and 9002, it lacks statutory authority under 10 U.S.C. § 284 to utilize billions of dollars in DoD funds and resources for border barrier construction projects. Section 284 only authorizes DoD "support" for the "[c]onstruction of roads and fences and installation of lighting." 10 U.S.C. 284(b). Such "support" is not limitless. Just as Congress did not authorize DoD resources to "primarily be used to fund the drug war," H.R. Rep. 101-665, at 203 (1990), Congress did not authorize DoD to "primarily" fund DHS's border wall project.

Further, in light of Section 284's reporting requirements, 10 U.S.C. § 284(h), (i)(3), the district court observed, "reading [section 284] to suggest that Congress requires reporting of tiny projects but nonetheless has delegated authority to DoD to conduct the massive funnel-and-spend project proposed here is implausible, and likely would raise serious questions as to the constitutionality of such an interpretation." ER101; *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (statutory construction "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").

B. Defendants' Actions Are Unconstitutional

Defendants' interpretation of sections 8005, 9002, and 284 must be rejected for another reason: if those sections were interpreted to allow Defendants' transfers, those statutes would be unconstitutional as applied. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (statutes must be interpreted to avoid serious constitutional problems when a construction avoiding the question is "fairly possible"). By permitting the executive branch to divert billions of dollars in funds toward a project that Congress refused to fund, those transfers would violate constitutional separation of powers principles, including those engrained in the Appropriations and Presentment Clauses. Separate and apart from whether Defendants exceeded their statutory authority, the Constitution does not permit such an outcome for three reasons.

First, Defendants violate separation of powers principles by seeking to spend federal funds toward a larger border wall project in the face of Congress's refusal to appropriate funding to that project. The undisputed facts here—(i) Congress's repeated rejection of border barrier funding from 2017-18, *e.g.*, Stay Op. 6-7; (ii) Congress's pointed refusal to appropriate $5.7 billion in requested border barrier funding resulting in a government shutdown exclusively over the border barrier

dispute, *id.* at 7-9; *and* (iii) Congress's limited $1.375 billion appropriation for particular border barriers in a specified area, CAA, §§ 230-32—demonstrate that Defendants' transfer of funding for construction in other geographic areas is "incompatible with the expressed or implied will of Congress." *Youngstown*, 343 U.S. at 637 (Jackson, J. concurring); *see also City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018) (upholding injunction on executive order to withhold funds from "sanctuary jurisdictions" where "Congress has frequently considered and thus far rejected legislation accomplishing the goals of the Executive Order").

Second, Defendants' transfers violate the Appropriations Clause, which states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. Const., art. I, § 9, cl. 7, and thus prohibits the executive branch from "evad[ing]" limitations on funding imposed by Congress. *Richmond*, 496 U.S. at 428. In particular, Defendants have violated the prohibition against use of a *general* appropriation for an expenditure that falls *specifically* "within the scope of some other appropriation or statutory funding scheme." GAO Red Book 3-17. This "well-settled" restriction is supported by a "legion" of GAO decisions "from time immemorial." GAO Red Book 3-409. For example, one DoD subagency was prohibited from using a general appropriation for dredging where a *different* sub-agency of DoD had funds appropriated for that function. *Id.* at 3-408

to -09. In another case, Congress's appropriation to Nevada of $1 million expressly for nuclear waste disposal activities "indicate[d] that is all Congress intended Nevada to get [for that fiscal year]," and executive officials could not use a more general appropriation to fund such activities. *Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005).

This "general/specific" doctrine is not only a core tenet of appropriations law, it is a bedrock principle of statutory construction and separation of powers. *See, e.g., Brown & Williamson Tobacco*, 529 U.S. at 133 ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and *more specifically* to the topic at hand") (emphasis added). As Justice Frankfurter reasoned in his concurring opinion in *Youngstown*:

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. 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).

The application of these principles here is straightforward. In the CAA, Congress specifically appropriated $1.375 billion to fund a barrier for a specific and limited segment of the southwest border in Texas. Defendants seek to

overcome the fiscal limitations of that appropriation by using the more general drug-interdiction appropriation, 132 Stat. at 2997, to fund a larger border wall project that Congress chose not to fund. Because "a specific appropriation exists for a particular item" that is subject to specific conditions—*i.e.*, the $1.375 billion for a border barrier in Texas—"that appropriation must be used and it is improper to charge any other appropriation for that item." GAO Red Book 3-409. Whether Congress explicitly prohibited the transfers, Defs' Br. 47, does not matter. *See Dep't of Navy*, 665 F.3d at 1348 ("[A]ll uses of appropriated funds must be affirmatively approved by Congress; the mere absence of a prohibition is not sufficient.").[4] Simply put, "[w]here 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).[5]

[4] Here, Congress did prevent the executive branch from using a provision such as 10 U.S.C. § 284 to "increase . . . funding for a program, project, or activity as proposed in the President's budget request for a fiscal year." CAA § 739.

[5] These constitutional limitations do not render DoD's section 284 authority meaningless. If Congress had not considered and rejected a request for an appropriation for border barriers, DoD could have potentially invoked its section 284 authority. Congress also could have expressed an "intent to make a general appropriation available to supplement or increase a more specific appropriation," GAO Red Book 3-411, or made a *specific* appropriation to DoD to provide support at the border, as it has done in the past, *see, e.g.*, Pub. L. No. 110-116, 121 Stat. 1295, 1299 (2007) (appropriating hundreds of millions of dollars to DoD for

Third, Defendants' transfers violate the Presentment Clause. U.S. Const., art. I, § 7, cl. 2. In *City of New York*, 524 U.S. 417 (1998), the Supreme Court concluded that the Line-Item Veto Act violated the Presentment Clause because it empowered the president to effectively modify appropriations passed by Congress without following the Constitution's "finely wrought" procedures. *Id.* at 445-46. Similarly, here, President Trump's unilateral increase of the $1.375 billion appropriation for limited barrier funding with billions of additional funds for use across the southern border without limitation "reject[s] the policy judgment made by Congress" and replaces it with the president's "own policy judgment" based "on the same conditions that Congress evaluated when it passed those statutes." *Id.* at 443-44. Whether Congress contemplated that the executive branch might use sections 8005, 9002, or 284 to divert funds for these border barriers is "of no moment," as Congress cannot authorize the executive branch to effectively amend appropriations "without observing the procedures set out in Article I, § 7" of the Constitution. *Id*. at 445-46.

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support DHS "including . . . installing fences and vehicle barriers"); Pub. L. No. 109-234, 120 Stat. 418, 480 (2006) (same); Pub. L. No. 101-511, 104 Stat. 1856, 1873 (1990) (appropriating $28 million for drug surveillance program at border). Congress declined to take any of those actions when appropriating funding for limited and specific barrier construction in FY 2019.

Defendants devote just one paragraph to these constitutional concerns, arguing that since "Congress . . . could have granted DoD unfettered discretion over its total budget," *Lincoln v. Vigil*, 508 U.S. 182 (1993), "[s]ection 8005, however broadly construed, poses no constitutional concerns." Defs' Br. 47-48. But *Lincoln* dealt with a lump-sum appropriation—something quite different than the highly restricted authority granted in section 8005. Stay Op. 50 n.19. Whether Congress could grant a lump-sum appropriation to the executive branch for border barriers (it did not) is irrelevant. Instead the issue is whether the executive branch under the Constitution can divert funding toward a border wall project where Congress only appropriated $1.375 billion for limited border barriers, and refused to fund anything more. For the reasons discussed above, the executive branch cannot. And, as *Lincoln* recognized, "in the absence of a clear expression of contrary congressional intent, . . . judicial review will be available for [these] colorable constitutional claims." 508 U.S. at 195.

C. Judicial Review Is Available

Defendants argue that the Supreme Court "made . . . clear" that plaintiffs lack a cause of action because they are "outside the zone of interests protected by the limitations in Section 8005." Defs' Br. 24. But the Supreme Court stated only that "the Government has made a sufficient showing at this stage that the [Sierra Club] plaintiffs have no cause of action to obtain review of the Acting Secretary's

compliance with Section 8005." S.Ct. Stay Op. 1. This brief statement was made at a preliminary stage in the context of a stay application, and thus is not binding on this Court. *See, e.g., Dodds v. U.S. Dep't of Educ.* 845 F.3d 217, 221 (6th Cir. 2016) (Supreme Court grant of stay "do[es] nothing more than show a possibility of relief" and party is still independently required to show likelihood of success on the merits). Further, it cannot be read to bar this action by the States, especially as the States were not plaintiffs in the case before the Supreme Court and assert interests distinct from the plaintiffs there. Indeed, the States have alleged at least three valid claims challenging Defendants' diversions, and, contrary to Defendants' assertions, the "zone-of-interests" test does not bar any of them.

1. The States Have an Ultra Vires Claim

This Court has recognized an equitable *ultra vires* cause of action, challenging executive acts in excess of statutory authority, including in the context of the Appropriations Clause. Stay Op. 45-49 (citing, inter alia, *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016)). Moreover, such claims are not subject to the zone-of-interests test.

Although neither resolved the issue, both the district court and the motions panel found it "doubtful" that the zone-of-interests test applies to an equitable cause of action. ER43-44, 91-92; Stay Op. 59-63. Other appellate court rulings

support the view that the zone-of-interests test is simply not applicable to *ultra vires* claims. *See Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) (Bork, J.); *Chiles v. Thornburgh*, 865 F.2d 1197, 1210 (11th Cir. 1989) (holding that local governmental entity did not have to satisfy zone-of-interests test based in part on *Haitian Refugee Ctr.*). In addition, despite the multiple rounds of briefing here, Defendants fail to cite a single case applying the zone-of-interests test to a solely equitable *ultra vires* cause of action.[6]

Defendants are also unable to offer any reason to extend the zone-of-interests cases to such claims. While the test has been applied to both damages claims and APA claims, the rationales for the test do not extend to *ultra vires* claims.

First, as Justice Scalia explained, the zone-of-interests test's "roots lie in the common-law rule that a plaintiff may not recover under the law of negligence for injuries caused by violation of a statute unless the statute" was "designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 n.5 (2014); *see also id.* at 126

[6] Citing *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 400 n. 16 (1987), Defendants assert there is a "heightened zone-of-interest requirement for actions in equity." Defs' Br. 26-27. The passage cited, however, concerned an earlier Supreme Court's decision, *see* 479 U.S. at n.16 (discussing *Cort v. Ash*, 422 U.S. 66, 78 (1975)), that considered whether to imply "a private cause of action for *damages*." *Cort*, 422 U.S. at 68 (emphasis added).

(noting that the test seeks to "ascertain, as a matter of statutory interpretation, the . . . class of persons who could maintain a private damages action under [a] legislatively conferred cause of action") (internal punctuation omitted). In the damages context, the zone-of-interests test ensures that plaintiffs cannot inappropriately invoke the negligence *per se* doctrine—which presumes responsibility and thus imposes an onerous form of strict liability for monetary damages. *See, e.g.*, *Casey v. Russell*, 188 Cal. Rptr. 18, 20 (Cal. Ct. App. 1982) ("a violation of the statute is presumed to be negligence").

This concern applies with especial force to damages claims against the government. As the Supreme Court recognized in one such case that Defendants (erroneously) cite to support their position that the Court should not allow an equitable cause of action here, *see* Defs' Br. 32-33, courts should tread cautiously when they are asked "to create and enforce a cause of action *for damages* against federal officials" because of the potentially far-reaching impacts of a damages remedy against the government. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) (emphasis added); *see also id.* at 1858 ("[T]he decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide"). "These and other considerations may make it less probable that Congress would want the Judiciary to entertain a damages suit in a given case" and therefore justify more stringent limitations when plaintiffs seek damages rather

than just injunctive relief, like the States here. *Id*. Equitable *ultra vires* actions raise neither concern. In such actions, only injunctive relief, not damages, is available, and therefore they do not impose the same potential burden on individual public employees or impact on government finances.

Second, although the APA only permits injunctive relief, application of the zone of interests to APA claims is justified by the APA's significantly broader scope of review. As the Supreme Court recently confirmed, the APA did not "significantly alter the common law of judicial review of agency action." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2419-20 (2019). Instead, it provided an alternative expanded form of statutory review. In addition to providing relief from agency actions that are "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(C), the APA authorizes courts to review whether agency action: (1) complied with procedural rulemaking requirements, 5 U.S.C. § 706(2)(D); and (2) was "arbitrary, capricious, [or] an abuse of discretion," *id.* § 706(2)(A). Under the arbitrary and capricious standard, courts consider the substantive basis for an agency decision, including whether "there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Neither type of review is available under an *ultra vires* cause of action, which is limited to enjoining officials' actions that exceed their authority. *See, e.g.*, *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 190 (D.C. Cir. 2006)

(noting "extremely limited scope" of nonstatutory review compared with APA review). It is reasonable to apply the zone of interests to APA claims to ensure that only parties whose interests are "arguably" congruent with those that Congress sought to further can invoke this expanded review unavailable in a traditional *ultra vires* claim.

2. The States Satisfy the Zone-of-Interests Test and Have a Cause of Action under the APA

The States easily satisfy the zone of interests test under the APA.[7] That test is "generous," *Lexmark*, 572 U.S. at 130, and "not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224-25 (2012). "[A]gency action [is] presumptively reviewable," and a party's interest need only be "*arguably* within the zone of interests to be protected or regulated by the statute." *Patchak*, 567 U.S. at 224-25 (emphasis added) (citation omitted). Indeed, courts "have always conspicuously included the word 'arguably' in the test to indicate that *the benefit of any doubt goes to the plaintiff*." *Id.* at 225 (emphasis added); *see also Hernandez-Avalos v. INS*, 50 F.3d 842, 846 (10th Cir. 1995) (requiring only "some non-trivial relation between the interests protected by the statute and the interest the plaintiff seeks to

[7] Defendants acknowledge that the APA is an appropriate vehicle for the claims at issue here, and do not argue that any threshold issues besides the zone-of-interests test preclude this Court's review. Defs' Br. 33.

vindicate"). This reflects the history and purpose of the test: "[A]t the time of its inception the zone-of-interests test was understood to be part of a broader trend toward *expanding* the class of persons able to bring suits under the APA challenging agency actions." *White Stallion Energy Ctr., LLC v. E.P.A.*, 748 F.3d 1222, 1268 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev'd on other grounds sub nom. Michigan v. E.P.A.*, 135 S. Ct. 2699 (2015).

The States satisfy this test with regard to the broad statutory scheme at issue here, which includes sections 8005 and 284, and IIRIRA. As Defendants acknowledge, Congress enacted section 8005 to "tighten congressional control of the re-programming process." Defs' Br. 29-30 (emphasis omitted) (quoting H.R. Rep. No. 93-662, at 16-17 (1973)). And while section 284 allows DoD to "support" DHS's drug interdiction efforts, as discussed *supra*, this support comes with distinct limitations. As the legislative history shows, DoD resources were not to "primarily be used to fund" counter-drug activities of other agencies, and DoD was only to "support . . . federal agencies with counter-drug responsibilities," not "fund the drug war for civilian law enforcement agencies," H.R. Rep. No. 101-665, at 203 (1990). DoD's effort to divert $2.5 billion to completely fund DHS's border barrier projects runs afoul of Congress's intent. Finally, IIRIRA provides Defendants with authority (which DHS purported to exercise here on DoD's

behalf) to waive all state environmental laws relating to the construction of border barriers, IIRIRA § 102(c)(1).

The States fall within the zone of interests of these statutes and their restrictions because the States seek to avoid harms that they would suffer if Defendants skirt the restrictions in sections 8005, 9002 and 284. For example, in *Scheduled Airlines Traffic Offices, Inc. v. Dep't of Def.*, 87 F.3d 1356 (D.C. Cir. 1996), the D.C. Circuit considered whether a travel agency could invoke a statute requiring federal agencies to deposit funds in the Treasury without deductions. The court held that, "although Congress did not expressly intend to benefit" the travel agency, in a statute designed to benefit "the public fisc and Congress's appropriation power," the travel agency was nonetheless was within the zone of interests as a "suitable challenger to enforce" the statute. *Id.* at 1360 (quoting *First Nat'l Bank & Tr. v. Nat'l Credit Union Admin.*, 988 F.2d 1272 (D.C. Cir. 1993)) (punctuation omitted). The travel agency's interests in preventing competitors from "benefitting from a [federal] agency's scheme to raise money at Treasury's expense," the court reasoned, were "sufficiently congruent" with those of Treasury that the travel agency was "not more likely to frustrate than to further statutory objectives." *Id.* (quoting *First Nat'l Bank & Tr.*, 988 F.2d at 1275) (punctuation omitted).

Similarly, here, the States' interest in preventing DoD from evading the limitations for sections 8005, 9002 and 284 is "sufficiently congruent" with Congress's interests in imposing those limitations. In particular, section 8005's "tighten[ed] congressional control of the re-programming process," H.R. Rep. No. 93-662, at 16-17 (1973), fortifies Appropriations Clause principles and "separation-of-powers constraints" that third parties may enforce. *See McIntosh*, 833 F.3d at 1174; *see also Scheduled Airlines*, 87 F.3d at 1359-60.

This congruency is made even clearer when the final piece of the statutory scheme—IIRIRA—is taken into account. A critical part of Defendants' "funnel-and-spend" plan is the IIRIRA waiver. As discussed further *infra*, Congress has subjected federal construction projects to state law in multiple respects.[8] But DHS invoked the IIRIRA waivers, ER108-09, allowing[9] DoD to ignore these state environmental laws when undertaking construction under section 284, which is made possible here only through the use of funds unlawfully transferred under sections 8005 and 9002.

[8] *See* 33 U.S.C. § 1341(a)(1) (state water quality certification required as part of federal permit); 42 U.S.C. § 7506(c)(1) (federal agencies' compliance with state air quality standards required).

[9] While the States disagree with the validity of the IIRIRA waivers, SER1239-40, the district court upheld them here. ER61-62.

Accordingly, as one of the statutory authorities invoked by Defendants, IIRIRA forms part of the "overall context" of defense appropriations and spending law for zone of interests purposes. *See Clarke*, 479 U.S. at 401 (1987) (for zone of interests purposes, the Court is "not limited to considering the statute under which [the parties] sued, but may consider any provision that helps us to understand Congress's overall purposes" of the statutory scheme); *see also* SER1370 (DHS's request for DoD support under section 284 was "[t]o support DHS's action under Section 102 of IIRIRA"). Congress has not expressed any indication through IIRIRA to bar the States from protecting their interests in ensuring that their state laws are not waived as a result of the unlawful diversion of federal funds (even assuming arguendo that the waivers themselves are valid). *See Kansas v. United States*, 249 F.3d 1213, 1223 (10th Cir. 2001) ("Surely Congress did not intend to render the State powerless to protect its sovereign interests in this situation."). And the States' assertion of those interests will not frustrate IIRIRA's objectives, which—despite the waiver provision—explicitly include taking into account states' interests in a number of respects. *See* IIRIRA § 102(b)(1)(C)(i).

Defendants assert that nothing in the text of section 8005 suggests Congress intended to permit the States to enforce section 8005's restrictions or "to protect interests akin to those raised by plaintiffs here." Defs' Br. 30. It is well-settled, however, that the zone-of-interests test does "not require any 'indication of

congressional purpose to benefit the would-be plaintiff.'" *Patchak*, 567 U.S. at 225 (quoting *Clarke*, 479 U.S. at 399-400). Moreover, in demanding a textually expressed intent to permit the States to enforce section 8005's restrictions, Defendants turn the zone-of-interests test on its head. Under the APA, there is a "strong presumption *favoring* judicial review" of agency actions, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015) (emphasis added), and therefore it has long been established that "[t]he mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970); *see also White Stallion*, 748 F.3d at 1269 (Kavanaugh, J., concurring in part and dissenting in part) (recognizing that under *Data Processing* and *Clarke*, "suits would be allowed unless a congressional intent to preclude review in suits by the plaintiffs was fairly discernible") (internal quotations omitted). Courts instead require "clear and convincing evidence" of congressional intent to preclude review. *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 671 (1986); *see also City of Sausalito v. O'Neill*, 386 F.3d 1186, 1201 (9th Cir. 2004) (holding APA claim available because "[t]here is no indication" that the statute "was intended by Congress to insulate from judicial review the actions of the agencies required to comply with the statute"). And especially clear evidence is needed to preclude the States' claims because it cannot be lightly presumed that Congress intended to

preclude States from enforcing state laws meant to prevent or ameliorate environmental harms. *See Kansas*, 249 F.3d at 1223.

Defendants do not point to anything in the text or legislative history of the statutes at issue that even hints at an intent to preclude courts from reviewing claims like those by the States here. Far from being "marginally related to or inconsistent with the purposes implicit in the statute," *Clarke*, 479 U.S. at 399, the States' interests are closely related to the statutory provisions they seek to enforce.

In fact, under Defendants' argument, *no party* can bring a judicial action to enforce section 8005,[10] and the only way Congress could enforce the section would be through "political tools," such as enacting new legislation, Defs' Br. 29—which, of course, can be used only *prospectively* and would be utterly ineffective against any past violations. Defendants do not even attempt to explain why Congress would prevent the States and other suitable challengers with "sufficiently congruent" interests to make them from enforcing the restrictions Congress itself imposed. Here again, Defendants' interpretation makes no sense.

[10] The only apparent exception to Defendants' absolute bar on such lawsuits would be a hypothetical party asserting "some private economic interests," Defs' Br. 30 (internal quotations omitted), but the lack of express congressional authorization for such a party to sue would, under Defendants' logic, prohibit them from suing as well.

3. Plaintiffs Have a Cause of Action for Their Constitutional Claims

Finally, the States have a cause of action that Defendants' transfers violate separation of powers principles, the Presentment Clause, and the Appropriations Clause. *See* Stay Op. 54-55 (citing *Webster v. Doe*, 486 U.S. 592, 602-604 (1988)); ER443-45 (constitutional claims in complaint); *see also* 5 U.S.C. § 706(2)(B) (cause of action where agency acts unconstitutionally).

a. *Dalton v. Specter* Does Not Preclude the States' Constitutional Claims

Defendants cite *Dalton v. Specter*, 511 U.S. 462 (1994), for the sweeping—and erroneous—proposition that so long as Defendants invoke a statute or an appropriation and argue that they allegedly have some authority to take a disputed action (no matter how dubious that authority may be), no plaintiff can raise a constitutional challenge to the action. *See* Defs' Br. 35-39. *Dalton* does not support such an expansive proposition.

Far from adopting a sweeping proposition, *Dalton* rejected one. The plaintiffs in *Dalton* challenged the President's decision to close the Philadelphia Naval Shipyard under a statute governing base closures because the Executive Branch did not comply with "procedural mandates specified by Congress." 511 U.S. at 464. The court of appeals did not hold that this decision, which was not reviewable under the APA, violated any specific restriction imposed by the

Constitution. Instead, the court asserted that the President must have "statutory authority 'for whatever action' he takes," and held that "whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." *Dalton*, 511 at 471 (discussing and quoting *Specter v. Garrett*, 995 F.2d 404, 409 (3d Cir. 1993)).

In rejecting this far-reaching proposition, the Supreme Court repeatedly stressed the narrowness of its holding. It began by observing that "[o]ur cases do not support the proposition that *every* action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution." *Id.* at 472 (initial emphasis added). It then noted that "we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority" and that prior decisions would not have distinguished between such claims "[i]f *all* executive actions in excess of statutory authority were *ipso facto* unconstitutional." *Id*. (emphasis added). It also reasoned that *Youngstown* "cannot be read for the proposition that an action taken by the President in excess of his statutory authority *necessarily* violates the Constitution." *Id.* at 473 (emphasis added); *see also id*. ("The decisions cited above establish that claims *simply* alleging that the President has exceeded his statutory authority are not 'constitutional' claims, subject to judicial review . . . .") (emphasis added). As the motions panel observed, "[t]here would

have been no reason for the Court to include the word 'necessarily'"—or the other caveats *Dalton* carefully repeated—"if [statutory and constitutional] claims were always mutually exclusive." Stay Op. 50.

The States' constitutional claims are easily distinguished. Unlike the plaintiffs in *Dalton*, the States did not premise their constitutional claims on the sweeping theory that the Acting Secretary violated the Constitution by exceeding his statutory authority. Instead, the States' constitutional claims concern express constitutional restrictions on the executive branch's power. One of those claims is based on the Appropriations Clause, which directs that "[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law." U.S. Const. art. I, § 9, cl. 7. This explicit prohibition "acts as a separate limit on the President's power," and therefore, provides a distinct cause of action. *In re Aiken Cty.*, 725 F.3d 255, 262 n.3 (D.C. Cir. 2013) (Kavanaugh, J., alternative holding). Another claim is based on the Presentment Clause, which mandates the procedures that legislative actions must follow, U.S. Const., art. I, § 7, cl. 2; *see City of New York*, 524 U.S. at 448-49. The States' final constitutional claim is based on separation of powers principles. Unlike the claim in *Dalton*, however, the constitutional claim here is based not on the executive branch exceeding the powers granted under a statute, 511 U.S. at 574, but rather on Defendants acting in a manner that violates

the express or implied will of Congress by diverting funds toward a border wall project that Congress explicitly refused to fund.

Nor do Defendants point to any court that has read *Dalton* to bar such claims. To the contrary, this Court has recognized that if an agency were spending money in violation of a statute, "it would be drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause." *McIntosh*, 833 F.3d at 1175. And the D.C. Circuit rejected the federal government's argument that *Dalton* precluded judicial review of plaintiffs' claim that the President's executive order violated the Constitution's non-delegation doctrine, although the government contended that the claim was premised merely on whether the President abused his discretion under a statute. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1326, 1331-32 (D.C. Cir. 1996). "[A]n independent claim of a President's violation of the Constitution," the court observed, "would certainly be reviewable." *Id.* at 1326.

Indeed, because the Appropriations Clause requires there be an "appropriation[] made *by law*," the question whether a given appropriation satisfies that clause will ordinarily turn on whether the executive branch is acting in accordance with statutory authority. Thus, nearly all Appropriations Clause cases would be solely statutory in nature if Defendants' view were correct that disputes over whether the agency can "spen[d] funds in excess of statutory authority" only

"presents a statutory claim, not a constitutional claim under the Appropriations Clause." Defs' Br. 37 (relying on *Harrington v. Schlesinger*, 528 F.2d 455, 457-58 (4th Cir. 1975)). But this cannot be correct, as it would relegate the Appropriations Clause, "a bulwark of the Constitution's separation of powers," *Dep't of the Navy*, 665 F.3d at 1347, into a largely unenforceable paper tiger. Nothing in *Dalton* supports eviscerating the Appropriations Clause in this manner.

Further, *Dalton* cannot reasonably be read to preclude the States from mounting an as-applied separation of powers challenge to Defendants' actions. Defendants acknowledge, as they must, that a constitutional claim is implicated if executive "officers rely on a statute that itself violates the Constitution." Defs' Br. 36; *see also City of New York*, 524 U.S. at 448-49. The States' constitutional claims as to Defendants' application of sections 8005, 9002, and 284 here should not be treated any differently. *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-259, 114 Stat. 656, *as recognized in Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (holding that the Religious Freedom Restoration Act as applied to the states "contradicts vital principles necessary to maintain separation of powers"); *United States* ex rel. *Schweizer v. Oce N.V.*, 677 F.3d 1228, 1235 (D.C. Cir. 2012) (treating facial separation of powers challenge "as if it were an as-applied challenge").

The States' as-applied challenge centers around whether the *Constitution* authorizes the executive branch to complete these transfers under the facts here. *See supra*. Contrary to Defendants' representation, the States' constitutional claims are not solely premised on whether the Acting Secretary "exceeded his statutory authority." *Compare* Defs' Br. 36-37 *with* SER 1002-03 & 1237-38. Nor do the States' constitutional claims depend on whether the executive branch satisfied certain procedural checkboxes in a statute, as was the case in *Dalton*, 511 U.S. at 474. Rather, the States contend that Defendants' unilateral transfers and expenditures pursuant to sections 8005, 9002, and 284 contradict Congress's explicit and specific funding determination on border barriers for FY 2019. Therefore, irrespective of whether Defendants "violated the terms of" sections 284, 8005, and 9002, *id.* at 474, their actions in repudiation of Congress's judgment here violate separation of powers principles and the Appropriations and Presentment Clauses. *See City of New York*, 524 U.S. at 443-44; *see also McIntosh*, 833 F.3d at 1175.

For example, the D.C. Circuit case *U.S. Dep't of Navy v. Fed. Labor Rel. Auth.* illustrates how the States' Appropriations Clause claim is tied to constitutional limitations—not those found in sections 8005, 9002, and 284. In that case, a D.C. Circuit panel led by then-Judge Kavanaugh considered whether the Department of Navy had authority to agree to provide employees with free bottled

water. The D.C. Circuit's decision turned not on an assessment of a particular appropriation, but "whether providing bottled water under these circumstances would violate federal appropriations law," including the Appropriations Clause, 31 U.S.C. § 1301 (the Purpose Statute), and the necessary expense rule. *Dep't of Navy*, 665 F.3d at 1346-48. Although "the relevant appropriations statute [did] not specifically prohibit the purchase of bottled water," the D.C. Circuit recognized that there was "no statutory language [that] explicitly authorizes the purchase of bottled water." *Id.* at 1348 (emphasis omitted). Similarly, the question presented by the States' Appropriations Clause claim is whether Defendants, without an explicit appropriation authorizing the construction of barriers in the El Paso and El Centro Sectors, may use a general appropriation under federal appropriations principles, including the same ones at issue in *Dep't of Navy*, to construct border barriers in those sectors even though Congress only explicitly authorized a far smaller amount for construction in a completely different sector. Thus, the States' constitutional claim is not premised solely on "an interpretation of the statutes," but also "presents [a] controversy about the reach or application of" the Appropriations Clause. *Harrington*, 528 F.2d at 458.

Recognizing these constitutional claims does not trigger the parade of horribles identified by Defendants. Defs' Br. 38. As the Fourth Circuit recently explained, a claim alleging a violation of the Taxing Clause, U.S. Const. art. I, sec.

8, cl. 1, does not invoke the same constitutional issues because, unlike the Appropriations Clause, the Taxing Clause "is not an exclusive grant of power to Congress." *Retfalvi v. United States*, 2019 WL 3137239, at *7, 930 F.3d 600 (4th Cir. 2019). And a claim that is based solely on the vesting of legislative power in Congress is, like the sweeping claim in *Dalton*, easily distinguished from the much narrower claims based upon the specific, express constitutional restrictions at issue here.

In contrast, Defendants' expansive reading of *Dalton* raises far more serious constitutional concerns. It would allow the executive branch to evade constitutional review simply by invoking a statute, regardless of whether the statute applies. This interpretation would also preclude plaintiffs from asserting as-applied constitutional challenges to agency actions, as the States do here. Such an outcome is contrary to bedrock principles of judicial review dating as far back as *Marbury v. Madison*, 5 U.S. 137, 180 (1803) ("[A] law repugnant to the constitution is void" and "must be discharged"). It would also implicate the "serious constitutional questions" arising if plaintiffs were "den[ied] any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603. The motions panel was correct: "It cannot be that simply by pointing to any statute, governmental defendants can foreclose a constitutional claim." Stay Op. 52.

b. The Zone-of-Interests Test Does Not Preclude the States' Constitutional Claims

Defendants claim that the States need to establish that they are within the zone of interests of the statutes Defendants invoke. Defs' Br. 39. This contention is immaterial because, as discussed *supra*, the States fall within the zone of interests of sections 8005 as well as sections 284 and 9002.[11] More importantly, this contention is wrong.

Defendants point to no case where a court has required a plaintiff to fall within the zone of interests of the underlying statute being challenged when bringing a challenge under separation of powers principles, the Appropriations Clause, or the Presentment Clause.[12] As this Court recognized in *McIntosh*, however, courts have routinely permitted third-party plaintiffs to rely on separation of powers principles without applying a zone-of-interests analysis. 833 F.3d at

[11] Defendants misinterpret the States' constitutional claims by contending that the States need to fall within *section 8005*'s zone of interests to bring such claims: as discussed *supra*, the States *do* "dispute that the obligation of funds properly transferred under Section 8005" as applied to the transfers here would be constitutional. *Compare* Defs' Br. 39 *with* SER1002-03 & 1237-38.

[12] Defendants cite to *Bennett v. Spear*, 520 U.S. 154 (1997), Defs' Br. 39, to support their argument that plaintiffs must show they are within the zone of interests of "the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175-76. But there was no constitutional claim in *Bennett*. Moreover, *Bennett* articulated an *expansive* view of the zone-of-interests test, making clear that plaintiffs did not need to seek to "vindicate the overall purpose" of the act in question in order to satisfy the "zone" test. *Id.*

1174 (identifying cases). For example, as the motions panel pointed out, in *City of New York*, the Court did not apply a zone-of-interests test to plaintiffs' Presentment Clause claim, Stay Op. 61, let alone analyze, as Defendants suggest here, whether plaintiffs satisfied the zone of interests of the Line-Item Veto Act, Defs' Br. 39.

The only court that has considered whether that test should apply in a case like this is the D.C. Circuit in *Haitian Refugee Center v. Gracey*. There, Judge Bork noted that the zone-of-interests test does not apply to constitutional separation of powers cases where there is a dispute over the executive branch's authority to take a certain action: "Appellants need not . . . show that their interests fall within the zones of interests of the constitutional and statutory powers invoked by the President in order to establish their standing to challenge the interdiction program as *ultra vires*." 809 F.2d at 811 n.14.[13] Otherwise, Judge Bork observed, litigants with meritorious *ultra vires* claims "would seldom have standing to sue since the litigants' interest normally will not fall within the zone of interests of the

[13] Defendants focus on Judge Bork's reference to a possible zone of interests test to determine whether a plaintiff's interests are "protected by the limitation" of the constitutional or statutory provision in question. Defs' Br. 40 (emphasis omitted). But Judge Bork, speaking hypothetically, only said that there "*may*" be certain constitutional or statutory provisions that are "intended to protect persons like the litigant" where the zone of interests test "*may*" apply. *Haitian Refugee Center*, 809 F.2d at 811 n.14 (emphasis added). As discussed here, the zone-of-interests test does not apply here, but even if it did, the States' interests fall within the zone of interests "protected by the limitation" of those constitutional principles.

very statutory or constitutional provision he claims does not authorize action concerning that interest." *Id.* The motions panel agreed, concluding that "where the very claim is that *no* statutory or constitutional provision authorized a particular governmental action, it makes little sense to ask whether *any* statutory or constitutional provision was written for the benefit of any particular plaintiffs." Stay Op. 60 (emphasis in original).

If the zone-of-interests test applies, the analysis should be based on the constitutional provision in question, as this Court made clear in *McIntosh*. It is not true, as Defendants claim, that *McIntosh* determined that the criminal defendants "fell squarely within the core of the statute's zone of interests." Defs' Br. 41. The appropriations rider in *McIntosh* was not explicitly directed at the criminal defendants' prosecution, but prohibited funding in a manner that would "prevent [certain] States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *McIntosh*, 833 F.3d at 1169 (quoting appropriations rider). Therefore, this Court did not look at whether Congress intended the statute in question to benefit the criminal defendant or even whether the defendant fell within the statute's zone of interests; instead, it looked at whether the criminal defendants may invoke the Appropriations Clause and concluded that they may. *Id.* at 1174-75; *see also* Stay Op. 66-67.

McIntosh followed the Supreme Court's decision in *Bond v. United States*, 564 U.S. 211 (2011) where the Court said that "if the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." *McIntosh*, 833 F.3d at 1174 (quoting *Bond*, 564 U.S. at 223). While neither *McIntosh* nor *Bond* specifically addressed the zone of interests, both cases support "the proposition that a plaintiff need only fall within the zone of interests protected by a 'structural provision' of the Constitution." Defs' Br. 40. The Supreme Court in *Bond* considered whether a criminal defendant could rely on a structural provision of the Constitution—there, the Tenth Amendment—to argue that the federal government could not interfere with local police powers by prosecuting a defendant under a statute enacted pursuant to an international treaty. It concluded that "[t]he structural principles secured by the separation of powers protect the individual as well." 564 U.S. at 222.

As Justice Kennedy explained in his concurring opinion in *City of New York*, "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers." 524 U.S. at 450. The Framers intended the separation of powers, along with federalism, "to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts." *Id.* Therefore, just as the states fall within the zone of interests of federalism

principles when a federal action interferes with their sovereignty, the States here are within the zone of interests of separation of powers and Appropriations Clause principles when constitutional violations harm the States' sovereignty.

II. THE COURT SHOULD GRANT THE STATES INJUNCTIVE RELIEF

This Court should reverse the district court's denial of injunctive relief to the States. The States are no longer protected by the permanent injunction granted to the Sierra Club plaintiffs, which formed a basis of the district court's denial of the States' request for an injunction. A plaintiff is entitled to a permanent injunction if it has "suffered an irreparable injury"; "remedies available at law . . . are inadequate"; "the balance of hardships between the plaintiff and defendant" supports an equitable remedy; and "the public interest would not be disserved." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).[14] Here, California and New Mexico meet those requirements.

A. Defendants' Actions Cause the States Irreparable Harm

California and New Mexico are faced with two sets of irreparable harms. First, by constructing the border barriers without complying with state environmental laws, Defendants will harm the States' sovereign interest in enforcing those laws. Second, Defendants' construction activities and border

[14] When the federal government is the opposing party, these last two factors for injunctive relief merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

barriers will irreparably injure wildlife and plants in the sensitive desert environments where the barriers are to be constructed.

1. Defendants' Actions Harm the States' Sovereign Interests

In light of the injunction issued in the *Sierra Club* action, the district court did not consider the harms to the States' sovereign interests, instead merely noting it was "unclear as a legal matter" whether the States were deprived of "their sovereign interests in enforcing state laws for purposes of an irreparable injury analysis, or [were] merely deprive[d] of their ability to bring suit to vindicate those interests." ER78. This Court reviews de novo the legal question whether harms to the States' sovereign interests constitute irreparable harm. *See United States v. Lang*, 149 F.3d 1044, 1046 (9th Cir. 1998). It should hold that Defendants' diversion of funds, border barrier construction, and IIRIRA waiver undermine California's and New Mexico's sovereign interests in enforcing state laws, and that these injuries to the States' "sovereign interests and public policies," which cannot be remedied by monetary damages, constitute irreparable harm justifying the imposition of injunctive relief. *Kansas*, 249 F.3d at 1227-28; *see also Brackeen v. Bernhardt*, No. 18-11479, 2019 WL 3759491, at *7 (5th Cir. Aug. 9, 2019) (holding that if federal authorities "promulgated a rule binding on states without the authority to do so, then State Plaintiffs have suffered a concrete injury to their sovereign interest").

a. Defendants' Actions Prevent California from Enforcing its Laws

California has many laws designed to protect the State's water and air quality; wildlife, land, and other environmental resources; and public health. *See*, *e.g.*, Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13000-16104; California Endangered Species Act, Cal. Fish and Game Code §§ 2050-2089.26. In addition, California agencies develop air quality, water quality, and wildlife resource management plans intended to accomplish California's environmental protection objectives, which apply to the border barriers at issue here, as required by federal law. Defendants' unlawful diversion of funds to construct El Centro Project 1 and invocation of IIRIRA waivers prevent California from exercising its sovereign right to enforce these laws.

(1) Water Quality Laws

Construction of El Centro Project 1 in Imperial County, California will disturb the soil in and near tributaries of the New River. SER1093-96. Ordinarily, before such dredge and fill activities can proceed, federal officials must obtain certification of compliance with California's water quality standards. Cal. Water Code § 13260 (imposing requirements on "persons" prior to discharging waste); *id.* § 13050(c) (defining "person" to include "the United States, to the extent authorized by federal law"); *see also* 33 U.S.C. § 1341(a)(1) (state water quality certification required as part of federal permit). Indeed, federal officials have

previously sought such certifications for construction projects in this area. SER1094-96; SER1145-55. Further, under the federal Clean Water Act, Defendants are required to adopt water-pollution-mitigation measures to obtain a permit and state certification from a California regional water board. 33 U.S.C. § 1341(a)(1). The conditions and mitigation measures imposed on projects during the permit and state certification process are a primary means by which California implements its water quality objectives and enforces its water quality laws. SER1093-98.

By issuing the IIRIRA waiver as part of this funding diversion and construction action, Defendants seek to bypass these requirements and undermine California's sovereign interests "in the conservation, control, and utilization of the water resources of the state" and in protecting "the quality of all the waters of the state . . . for use and enjoyment by the people of the state." Cal. Water Code § 13000. Defendants' actions are particularly injurious given that El Centro Project 1 "poses a high risk for storm water run-off impacting . . . water quality during the construction phase." SER1097.

(2) Air Quality Laws

Defendants also would ordinarily be required to ensure El Centro Project 1 conforms to California's air quality standards by complying with the federal Clean Air Act as set forth in California's State Implementation Plan (SIP). 42 U.S.C.

§ 7506(c)(1). The Clean Air Act prohibits federal agencies from engaging in, supporting, or financing any activity that does not conform to a SIP. 40 C.F.R. § 93.150(a). "Conformity" violations include "increas[ing] the frequency or severity of any existing violation of any standard in any area," or "delay[ing] timely attainment of any standard . . . in any area." 42 U.S.C. § 7506(c)(1)(B)(ii)-(iii). These safeguards prevent federal agencies from interfering with states' abilities to comply with the Clean Air Act, which "protect[s] and enhance[s] the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." *Id.* § 7401(b)(1).

But for the funding diversion and accompanying waiver, the local air district would enforce a rule (part of California's SIP) reducing the amount of fine particulate matter generated from Defendants' construction and earth-moving activities by requiring the development and implementation of a dust control plan. SER1157-61; 42 U.S.C. § 7506(c)(1); 40 C.F.R. § 52.220(c)(345)(i)(E)(2); 75 Fed. Reg. 39,366 (July 8, 2010). In addition to protecting Californians by supporting federal health standards, this rule mitigates blowing dust that can cause additional acute regional or local health problems. SER1163-65. Thus, by proceeding with the unlawfully funded construction without complying with California's laws, Defendants will impair California's sovereign interests in protecting not only its environment but also public health.

(3) Endangered Species Laws

Finally, but for Defendants' diversion of funds and the IIRIRA waiver, Defendants could not build El Centro Project 1 without ensuring the project "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2); SER1086. Compliance with this provision would protect species threatened, endangered, or of special concern under California law and allow California to continue implementing habitat conservation agreements with federal agencies that impose limitations on habitat-severing projects like El Centro Project 1. SER1087-88; SER1167-89. Defendants' attempted waiver of these protections undermines California's ability to enforce the California Endangered Species Act and "the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat." Cal. Fish & Game Code § 2052.

b. Defendants' Actions Prevent New Mexico from Enforcing its Laws

New Mexico also has enacted and enforces environmental laws to protect its air quality and wildlife. By using the disputed funds to construct El Paso Project 1 in Doña Ana and Luna Counties without complying with these laws, Defendants impair New Mexico's "protection of the state's beautiful and healthful

environment" which is "of fundamental importance to the public interest, health, safety and the general welfare." N.M. Const., art. XX, § 21.

(1) Air Quality Laws

The federal border-barrier-construction project would normally comply with a dust control plan that New Mexico adopted under the Clean Air Act. SER1191-1204; 40 C.F.R. § 51.930(b); N.M. Admin. Code §§ 20.2.23.108-113. The plan "limit[s] human-caused emissions of fugitive dust into the ambient air by ensuring that control measures are utilized to protect human health and welfare." N.M. Admin. Code § 20.2.23.6. Defendants' unlawful funds transfer and consequent IIRIRA waiver would thus impair New Mexico's ability to vindicate its sovereign interest in protecting human health and welfare.

(2) Wildlife Corridors and Endangered Species Laws

The funding diversion, IIRIRA waiver, and resulting construction also will impede New Mexico's ability to implement its Wildlife Corridors Act, which aims to protect large mammals' habitat corridors from human-caused barriers such as roads and walls, 2019 N.M. Laws Ch. 97, and requires New Mexico agencies to create a "wildlife corridors action plan" to protect species' habitat. SER1128-29. Several important wildlife corridors run through, or adjacent to, the El Paso Project 1 site. SER1135. Pronghorn antelope, mule deer, mountain lions, and bighorn sheep are all "large mammals" specifically protected under the Act. 2019 N.M.

Laws Ch. 97 § 2.B. El Paso Project 1 will completely block habitat corridors for these species and impair New Mexico's ability to protect these important corridors. SER1124, 1128-30, 1135.

Further, El Paso Project 1 will harm species that New Mexico's laws were enacted to protect; many (such as the Mexican Wolf) are endangered under both New Mexico and federal endangered species acts. *See* N.M. Stat. Ann. § 17-2-41; SER1125. The El Paso Project 1 border wall will bisect important wildlife habitats, impairing the access of the Mexican Wolf and other endangered species to those habitats. SER1124-29, 1133-35. Construction of El Paso Project 1 also would likely harm rare plants including two cactus species endangered under New Mexico law. *See* N.M. Stat. Ann. § 75-6-1(D); SER1107-08. Here again, absent an injunction, New Mexico's sovereign ability to enforce these laws and protect these interests would be impaired.

c. Defendants Irreparably Harm California's and New Mexico's Sovereign Interests by Preventing the States from Enforcing State Laws

As Defendants acknowledge, "there is 'irreparable harm' whenever a government cannot enforce its own laws." Defs' Br. 50 (citing *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers)). States possess undeniable sovereign interests in their "power to create and enforce a legal code," *Alfred L. Snapp & Son, Inc. v. Puerto Rico* ex rel. *Barez*, 458 U.S. 592, 601 (1982),

including codes protecting the natural resources and public health within their borders. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 151 (1986). Courts recognize that these sovereign interests are undermined where federal action impedes enforcement of state statutes. *See, e.g.*, *State of Alaska v. U.S. Dept. of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989) (holding states have sovereign interests in enforcing state consumer protection laws challenged by federal actions). And any time a state is prevented "from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury" separate from any injury to the persons or things those statutes are designed to protect. *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers).

The district court was incorrect to suggest that Defendants' actions merely prevent the States from "bring[ing] suit to vindicate [their sovereign] interests." ER78. Defendants are impeding the States' ability to enforce and effectuate duly enacted state environmental laws protecting the States, their residents, and their wildlife from Defendants' construction projects—which will result in 61 linear miles of permanent border wall, directly impacting over 440 acres of land.[15] DHS

[15] While Defendants contend "the vast majority of construction in the project areas will occur on a 60-foot strip of land," Defs' Br. 51, that strip spans 46 miles in New Mexico and 15 miles in California, totaling over 443 acres of land.

waived application of the laws described above under IIRIRA. But those waivers, the legality of which is not at issue here, deprive the States of their enforcement authority only if funding is lawfully available to build border projects. Thus, it is only because of the unlawful diversion of the funds challenged here that Defendants employed their waiver authority to override otherwise applicable state laws, sharply infringing on the States' sovereign interests and causing irreparable harm as a result.

2. Defendants' Actions Cause the States Irreparable Environmental Harm

Turning to the second form of harm the States suffer, the district court found the harms to the States' environments too speculative to warrant injunctive relief. For all but two species, the Peninsular bighorn sheep and the Mexican wolf, this conclusion was largely based on "Defendants[']present[ation of] evidence that relevant agencies regularly implement mitigation measures that successfully prevent such harm." ER77 n.9. However, Defendants' past implementation of mitigation measures for other construction projects is irrelevant to the irreparable harm analysis because, due to the IIRIRA waivers, no such mitigation measures are required for these projects.

Relying on purely voluntary mitigation measures that the federal government can choose to abandon is speculative and entirely different from mitigation required under state and federal law. Indeed, in the context of the Endangered

Species Act, courts prevent federal agencies from relying "on proposed mitigation measures 'absent specific and binding plans'" for those measures. *Pacificans for a Scenic Coast v. California Dep't of Transportation*, 204 F. Supp. 3d 1075, 1089 (N.D. Cal. 2016) (*citing Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008)). "Mitigation measures that are conceptual in nature only do not qualify." *Id.* (internal punctuation omitted). Thus, Defendants' contentions that "CBP will likely recommend mitigation measures to DoD that could reduce construction impacts in the area," SER1070, and "CBP implemented mitigation measures in prior projects to limit vegetation removal and curtail the spread of non-native species, and CBP expects to recommend the same measures for the projects here," SER1071, are beside the point; they are not sufficiently "specific and binding" to prevent harm to the States. The district court erred in finding otherwise.

It cannot be disputed that wildlife and plants will be irreparably harmed by the 16-to-30-foot-tall steel bollard walls and stadium lighting spread across 61 miles of California's and New Mexico's sensitive desert environments that Defendants plan to construct cannot be disputed. Even if the non-binding mitigation measures cited by the district court could prevent some of the irreparable harm facing the States, they do not purport to prevent all such harm to protected species such as the flat-tailed horned lizard (nor are the Defendants

prevented from abandoning those measures). For example, in California, "[b]y constructing a continuous fence . . . as well as numerous light poles, over the entire southern boundary of the Yuha Desert Management Area, [El Centro Project 1] will greatly increase the predation rate of lizards adjacent to the wall . . . ." SER1087. "The border wall will provide perching sites for loggerhead shrikes and American kestrels, two of the lizard's major predators, which will make it easier for them to observe and capture the horned lizard." SER1117. Defendants' proposed mitigation measures do not address this increased predation rate. SER1070.[16]

B. The Balance of Harms Favors Injunctive Relief

The motions panel denied Defendants' application to stay the Sierra Club plaintiffs' injunction without addressing any interests unique to the States. Stay Op. 69-75. The panel concluded, even without considering these unique state interests, that "the public interest weighs forcefully against issuing a stay." *Id*. at 73. The States' interests tip the balance even more sharply in favor of an injunction

[16] Further, the environmental assessment Defendants rely on to illustrate mitigation measures was for a much smaller project—a 1.6 mile-all-weather road near the U.S.-Mexico border. SER1072. Defendants do not explain how the measures outlined for that project, including a "monitor" who would physically "remove and relocate" lizards during construction and maintenance and "compensation acreage" for the loss of habitat resulting from the road, would be implemented for El Centro Project 1, a project involving 15 miles of border fencing that is nearly tenfold larger. SER1074-75.

and provide independent grounds for granting injunctive relief. Indeed, protecting state sovereignty is an especially important additional consideration, as "the Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992).

Defendants' side of the balance does not outweigh these harms to State interests and the public. Because, as shown above, Defendants have no statutory or constitutional authority to use the funds at issue for border barrier construction, they have no cognizable interest in using the funds for such purposes. Further, Defendants have not shown how border barriers will substantially advance their interests, but the planned construction will certainly harm the interests of the States and the public.

1. The Public Interest and the States' Harms Justify an Injunction

Most importantly, the balancing of the equities supports the grant of an injunction against Defendants because the challenged actions are contrary to the explicitly-expressed will of Congress, the branch of government most responsive to and reflective of the electorate's wishes. As the motions panel recognized, "[t]he public interest in ensuring protection of [the] separation of powers is foundational and requires little elaboration." Stay Op. 74. This cannot be served by allowing the executive branch to circumvent the limits of its constitutional authority. *Cf. Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (The federal

government "cannot suffer harm from an injunction that merely ends an unlawful practice."). Similarly, in denying the requested funding, "Congress presumably decided . . . construction [of the border wall] at this time is not in the public interest." Stay Op. 74-75; *see also id*. at 37-39. Conversely, as the motions panel correctly recognized, Stay Op. 72, the Court should not place significant weight on the financial harms Defendants assert because Congress has already spoken to this issue: the funds at issue were not appropriated for border barrier construction and Defendants have no legitimate interest in spending funds contrary to Congress's intent. Accordingly, the public interest strongly favors an injunction.

Further, guarding California's and New Mexico's sovereignty and their ability to enforce their environmental protection laws shields the public interest from the Defendants' unlawful and unconstitutional usurpation of state authority. *See New Motor Vehicle Bd.*, 434 U.S. at 1351 ("the public interest . . . is infringed by the very fact that the State is prevented from engaging in investigation and examination" pursuant to its own duly enacted state laws); *see also* Cal. Gov't Code § 12600 ("It is in the public interest to provide the people of the State of California . . . with adequate remedy to protect the natural resources of the state of California from pollution, impairment or destruction."); N.M. Const. art. XX § 21 ("The protection of the state's beautiful and healthful environment is . . . of fundamental importance to the public interest."). The strong public interest in

preserving the States' sovereignty against the federal government's unlawful funding diversions heavily favors an injunction. *See New York*, 505 U.S. at 162-63.

Separately, the Supreme Court has recognized that, because environmental and natural resource harms "can seldom be adequately remedied by money damages" and are often irreparable, "the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Consequently, protecting California's and New Mexico's interests in their environment and natural resources merits injunctive relief.

2. Defendants' Alleged Harms Are Unsubstantiated and Do Not Outweigh the Harms to the States and the Public

Like the motions panel, the States "do not question in the slightest the scourge that is illegal drug trafficking and the public interest in combatting it." Stay Op. 69. However, Defendants must offer more than mere assertions of harm; actual evidence is required. *E.g.*, *Hernandez v. Sessions*, 872 F. 3d 976, 996 (9th Cir. 2017) (balancing the harms to public interest requires consideration only of "consequences that are . . . supported by evidence"). If the record reflected that the construction of the border barriers would meaningfully further Defendants' drug-interdiction interests, the Court could consider them in its analysis. *See Winter v. NRDC*, 555 U.S. 7, 33 (2008). Here, however, Defendants' "evidence" does not support their assertions.

Defendants repeatedly recite statistics about the number of drug events and amount of drugs seized "between ports of entry" during FY 2018. *See* Defs' Br. 9-11 (citing ER274-79); ER124-27, 212-13. Understandably, the motions panel assumed that the Defendants' representations related to drug smuggling occurred "between border crossings." Stay Op. 69. While Defendants do not specifically define the term "between ports of entry," CBP's annual statistics report show that the data reflect sector-wide seizures, not just those that were smuggled between official border crossings.[17] In total, these patrol sectors cover 504,920 square miles, more than 15% of the total area of the continental United States.[18] Thus, when Defendants allege the occurrence of "over 4000 drug-related events between border crossings," Stay Op. 69 (punctuation omitted), they mean that the drug

[17] *See* United States Border Patrol FY 2018 Sector Profile, at 1 (showing that sector-total statistics for marijuana and cocaine seizures in FY 2018 match the amount the Defendants assert were seized "between ports of entry"), https://www.cbp.gov/sites/default/files/assets/documents/2019-May/Sector%20Profile%20FY18.pdf. These official U.S. Government documents and publicly available information on Government websites are subject to judicial notice in accordance with Federal Rules of Evidence, Rule 201. *See Kater v. Churchill Downs Inc.*, 886 F.3d 784, 788 n.3 (9th Cir. 2018); *see also* SER1017-20 (descriptions of El Paso and El Centro sectors including square miles in each).

[18] *See* Michael J. Fischer, Chief, U.S. Border Patrol, Holding the Line in the 21st Century, 10 (map showing areas covered by relevant border sectors cover *all* of New Mexico, Arizona, Nevada, and more than half of California); GAO, Border Patrol – Key Elements of New Strategic Plan Not Yet in Place to Inform Border Security Status and Needs, 6, 50-51 (2012) (documenting the square miles covered by each border patrol sector), https://www.gao.gov/assets/660/650730.pdf. These documents are also judicially noticeable for the reasons stated above.

events occurred across nearly all of the Southwest, with no particular nexus to any of the proposed border wall locations.

There is no evidence in the record that these drugs were smuggled across the border through the specific areas where the proposed projects are located. In fact, as the motions panel noted, Defendants have not disputed, at least with regards to heroin, that most drugs enter the United States at legal ports of entry, and that only a small percentage of drugs seized by CBP enters between these ports. Stay Op. 70-71. With respect to the much smaller percentage seized in locations other than the ports of entry, CBP's own public statements suggest that most occur at vehicle checkpoints located miles away from the border along highways that lead directly from the ports of entry and thus may involve drugs smuggled through those ports. SER1004-69. These evidentiary shortcomings undermine Defendants' asserted harm.

CONCLUSION

This Court should: (1) affirm the district court's declaratory judgment in the States' favor, (2) reverse the district court's denial of an injunction to the States, and (3) remand with instructions to issue an injunction prohibiting Defendants from taking any action to construct a border barrier in the areas Defendants have identified as El Paso Sector 1 and El Centro Sector using funds reprogrammed by DoD under sections 8005 and 9002 of the FY 2019 DoD Appropriations Act.

Dated: August 15, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

The States are not aware of any related cases, as defined by Ninth Circuit Rule 28-2.6, that are currently pending in this Court and are not already consolidated here.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 27(d), 28.1(e)(2)(A)(i), and 32(a), because it uses a proportionately spaced Times New Roman font, has a typeface of 14 points, and contains 15,197 words.

Dated: August 15, 2019

s/ James F. Zahradka II
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CERTIFICATE OF SERVICE

I certify that on August 15, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 15, 2019

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