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

United States Court of Appeals
for the
Ninth Circuit

SIERRA CLUB, *et al.*,

Plaintiffs-Appellees,

– v. –

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,

Defendants-Appellants.

STATE OF CALIFORNIA, *et al.*,

Plaintiffs-Appellees/Cross-Appellants,

– v. –

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA (OAKLAND)
DISTRICT COURT CASE NOS. 4:19-CV-00892-HSG and 4:19-CV-00872-HSG

BRIEF FOR *AMICI CURIAE* EL PASO COUNTY, TEXAS; BORDER NETWORK FOR HUMAN RIGHTS; PROTECT DEMOCRACY and NISKANEN CENTER, IN SUPPORT OF PLAINTIFFS-APPELLEES AND PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

KRISTY PARKER
JUSTIN FLORENCE
DEANA K. EL-MALLAWANY
JESSICA MARSDEN
ERICA NEWLAND
CAMERON KISTLER
THE PROTECT DEMOCRACY PROJECT, INC.
2020 Pennsylvania Avenue, N.W., No. 163
Washington, DC 20006
(202) 579-4582

ANTON METLITSKY
EPHRAIM MCDOWELL
O'MELVENY & MYERS LLP
Seven Times Square
New York, New York 10036
(212) 326-2000

Attorneys for Amici Curiae

(For Further Appearances See Reverse Side of Cover)

DAVID BOOKBINDER
NISKANEN CENTER
820 First Street, N.E.
Washington, DC 20002
(202) 899-1161

LAURENCE H. TRIBE
Carl M. Loeb University Professor and
Professor of Constitutional Law
HARVARD LAW SCHOOL*
1575 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-1767

* *Affiliation Noted for Identification Purposes Only*

STUART GERSON
EPSTEIN BECKER GREEN
1227 25th Street, N.W.
Washington, DC 20037
(202) 861-4186

RICHARD MANCINO
SHAIMAA M. HUSSEIN
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, New York 10019
(212) 728-8000

CORPORATE DISCLOSURE STATEMENT

Amici are not required to file a corporate disclosure statement under Federal Rules of Appellate Procedure 29(a)(4)(A) and 26.1, because none is a non-governmental corporate party.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

Regulations

INTEREST OF *AMICI CURIAE*

Amici El Paso County, Texas and the Border Network for Human Rights (BNHR) are plaintiffs in a separate lawsuit challenging the legality of the Administration's border-wall construction that is currently pending before the U.S. Court of Appeals for the Fifth Circuit. *Amici* prevailed in the U.S. District Court for the Western District of Texas, as that court enjoined the Administration's $3.6 billion expenditure of 10 U.S.C. § 2808 funds on the border wall. The Fifth Circuit, however, has stayed the injunction pending appeal. *Amici* accordingly have a strong interest in the legality of the Administration's § 2808 expenditures.

Amici Protect Democracy and the Niskanen Center are bipartisan, nonprofit organizations dedicated to upholding the rule of law. They share an interest in enforcing the separation of powers and ensuring that the Executive Branch does not usurp congressional appropriations authority. Members of these organizations are also counsel in the Fifth Circuit case referenced above.[1]

INTRODUCTION

Recognizing that when "the decision to spend [is] determined by the Executive alone, … liberty is threatened," the Framers vested the power of the purse

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for amici certify that counsel for the parties have consented to the filing of this brief. Amici state that no party's counsel authored this brief in whole or in part, and that no person other than amici or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

exclusively in Congress. *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring). That power, embodied in the Appropriations Clause, gives rise to the following rule: an "expenditure of public funds" by the Executive Branch is "proper only when authorized by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

The district court faithfully applied these principles and enjoined the Administration's effort, under 10 U.S.C. § 2808, to spend $3.6 billion on border-wall construction. In so doing, the court correctly held that the Administration's plan is not authorized by § 2808's terms, because the border wall is neither a "military construction project" nor "necessary to support use of the armed forces." *California v. Trump*, 407 F. Supp. 3d 869, 891-899 (N.D. Cal. 2019).[2] Yet that plan is also unlawful for two additional reasons: it violates the 2019 Consolidated Appropriations Act (CAA), Pub. L. No. 116-6, 133 Stat. 13 (2019), and § 739 thereof. The U.S. District Court for the Western District of Texas held precisely that when enjoining the Administration's § 2808 expenditures in a case involving *amici*'s

[2] *Amici* disagree with the district court's holding that challenges to the President's emergency proclamation itself and/or whether that emergency "requires use of the armed forces" under § 2808 are unreviewable by courts. *See id.* at 890-91. That holding ignores that "purely legal question[s] of statutory interpretation" do not present nonjusticiable political questions, because "interpreting congressional legislation is a recurring and accepted task for the federal courts." *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986).

separate challenge to the Administration's border-wall construction. *See El Paso Cty. v. Trump*, 408 F. Supp. 3d 840, 857-60 (W.D. Tex. 2019) (granting summary judgment to *amici* El Paso County and BNHR); *El Paso Cty. v. Trump*, 407 F. Supp. 3d 655, 668 (W.D. Tex. 2019) (enjoining § 2808 expenditures).[3] These grounds provide additional reasons for affirmance here.

In the CAA, Congress carefully considered whether and to what extent to fund a border wall—a dispute over that question produced the Nation's longest-ever government shutdown—and decided to appropriate only $1.375 billion for wall construction. And to erase any doubt, Congress enacted a provision, § 739, specifically barring the Executive Branch from increasing funding for projects beyond the amounts appropriated. The Administration's attempt to circumvent these congressional judgments should be rejected.

ARGUMENT

I. IN THE CAA, CONGRESS DELIBERATELY DECIDED TO APPROPRIATE $1.375 BILLION—AND NO MORE—FOR A BORDER WALL

The CAA's history leaves no doubt that Congress appropriated only $1.375 billion of fiscal-year 2019 funds—and no more—for border-wall construction.

[3] The Fifth Circuit stayed the district court's injunction pending appeal in that case without expressing a view on the district court's merits holding. *See El Paso Cty. v. Trump*, No. 19-51144, Doc. 00515264406 (5th Cir. Jan. 8, 2020). The Administration's appeal is currently pending before the Fifth Circuit.

In February 2018, the President made his initial fiscal-year 2019 budget request, seeking "$1.6 billion to construct approximately 65 miles of border wall." *Sierra Club v. Trump*, 929 F.3d 670, 678 (9th Cir. 2019) (quoting Office of Mgmt. & Budget, Exec. Office of the President, *Budget of the U.S. Government, Fiscal Year 2019*, 58 (2018)). But mere weeks before fiscal-year 2018 appropriations were to expire, the President instead declared that he was seeking at least $5 billion and would be "proud to shut down the government for border security."[4] On December 22, 2018, the longest government shutdown in American history began.

About two weeks into the shutdown, the President sent a letter to the Senate Appropriations Committee "request[ing] $5.7 billion for construction of a steel barrier for the Southwest border." *Sierra Club*, 929 F.3d at 678 (quoting Letter from Russell T. Vought, Acting Dir. of the Office of Mgmt. & Budget, to Richard Shelby, Chairman of the Senate Comm. on Appropriations (Jan. 6, 2019)). He also announced that if the "negotiated process" did not yield sufficient border-wall funding, he could "call a national emergency and build [the wall] very quickly."[5]

---

[4] Aaron Blake, *Trump's Extraordinary Oval Office Squabble With Chuck Schumer and Nancy Pelosi, Annotated*, THE WASHINGTON POST (Dec. 11, 2018), https://www.washingtonpost.com/politics/2018/12/11/trumps-extraordinary-oval-office-squabble-with-chuck-schumer-nancy-pelosi-annotated/.

[5] *Remarks by President Trump After Meeting With Congressional Leadership on Border Security*, White House (Jan. 4, 2019),

On February 14, 2019, Congress passed the CAA. The CAA appropriates $1.375 billion to the Department of Homeland Security (DHS) "for the construction of primary pedestrian fencing … in the Rio Grande Valley Sector." 133 Stat. at 28, Title II, § 230(a)(1). And it establishes a process through which DHS must consult with Congress about whether more border-wall appropriations should be made in future years. *Id.* § 230(c).

The CAA also contains a provision—directly applicable to this case—precluding certain additional Executive Branch spending. Specifically, § 739 of Title VII, which applies "Government-Wide," states:

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

133 Stat. at 197. On February 15, 2019, the President signed the CAA into law.[6]

On that same day, the President invoked the National Emergencies Act (NEA), 50 U.S.C. § 1601 *et seq.*, to declare "[t]he current situation at the southern

---

https://www.whitehouse.gov/briefings-statements/remarks-president-trump-meeting-congressional-leadership-border-security/.

[6] Congress recently enacted the 2020 Consolidated Appropriations Act, Pub. L. No. 116-93, 133 Stat. 2317 (2019), which maintains the same level of border-wall funding ($1.375 billion) and contains a provision identical to § 739. *See id.* Title II, § 209(a)(1); Title VII, § 739.

border" a "national emergency." *Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States*, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019). The emergency Proclamation states "that this emergency requires the use of the Armed Forces" and "that the construction authority provided in section 2808 of title 10, United States Code, is invoked and made available, according to its terms, to the Secretary of Defense." *Id.* When announcing the Proclamation, the President observed that he "could do the wall over a longer period of time" and "didn't need to do this."[7] But, he said, "I'd rather do it much faster." *Id.*

After the President issued the Proclamation, the Administration announced a plan to fund and build the border wall. As relevant, that plan invokes 10 U.S.C. § 2808 as authority to spend $3.6 billion on the wall.[8] Section 2808 allows the Department of Defense (DoD) to "undertake military construction projects" in the event of a "national emergency" declared "in accordance with the [NEA]." On September 3, 2019, DoD determined to spend $3.6 billion of § 2808 funds on border-

[7] *Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border*, White House (Feb. 15, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border/.

[8] *Fact Sheets: President Donald J. Trump's Border Security Victory*, White House (Feb. 15, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/ ("White House Fact Sheet").

wall construction. Those funds had been originally intended for construction projects on American military bases throughout the world, including at Fort Bliss in El Paso County, Texas. Administration Br. 22 (noting that § 2808 funds being used were "appropriated for other projects").

II. THE ADMINISTRATION'S § 2808 EXPENDITURES VIOLATE THE CAA AND § 739 THEREOF

The foregoing history shows that Congress made a clear decision in the CAA to appropriate $1.375 billion—and no more—for border-wall construction, and to limit that construction to the Rio Grande Valley Sector. The Administration's current plan to spend $3.6 billion in additional funds on a wall outside the Rio Grande Valley Sector is plainly inconsistent with Congress's judgment in the CAA for two independent reasons. First, Congress's specific border-wall appropriations preclude the Administration's additional border-wall expenditures under settled appropriations-law principles. Second, CAA § 739 expressly precludes those expenditures. Because "the expenditure of public funds is proper only when authorized by Congress," the Administration's plan cannot be sustained. *MacCollom*, 426 U.S. at 321.

A. Congress's Specific Decision in the CAA Precludes the Administration From Relying on § 2808's General "Military Construction" Authority to Build a Border Wall

Settled appropriations-law principles preclude the Administration's § 2808 expenditures here. "Where Congress has addressed [a] subject" and "authorized

expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized." *Id.* at 321. And "[a]n appropriation for a specific purpose is exclusive of other appropriations in general terms which might be applicable in the absence of the specific appropriation." *Nevada v. DOE*, 400 F.3d 9, 16 (D.C. Cir. 2005). "[E]stablished from time immemorial," this rule applies "to appropriations bills the general principle of statutory construction" that "a more specific statute will be given precedence over a more general one." *Id.* at 16 (quoting *Busic v. United States*, 446 U.S. 398, 406 (1980)); *see Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992) ("specific provisions [in an appropriations act] qualify general ones" elsewhere); *Strawser v. Atkins*, 290 F.3d 720, 733 (4th Cir. 2002) (same).

The CAA appropriates $1.375 billion for construction of a border wall "in the Rio Grande Valley Sector." 133 Stat. at 28, Title II, § 230(a)(1). It also creates a scheme for consideration of future border-wall appropriations by directing DHS to submit construction proposals to congressional appropriations committees. *Id.* § 230(c); *see* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Title II, § 231(a)(2), (4) (2018). So, through the CAA, Congress appropriated a specific sum—$1.375 billion—for wall construction in a specific location—the Rio Grande Valley Sector—while adopting specific procedures to potentially enable future appropriations for wall construction in other locations.

The Administration is now spending $3.6 billion of appropriations for DoD "military construction projects," 10 U.S.C. § 2808, on immediate construction of a border wall outside the Rio Grande Valley Sector. But to the extent § 2808 allows border-wall spending at all, *but see* Appellees' Answering Br. 32-57, it does so only in general terms—by referencing "military construction projects." The CAA, by contrast, speaks *directly* to border-wall expenditures, permitting (again) only a $1.375 billion outlay for a wall in a particular sector, and prescribing a process for considering future wall spending. Under the specific vs. general principle, the Administration may not rely on its general § 2808 "military construction" authority to subvert Congress's specific border-wall construction plan in the CAA.

In previous filings, the Administration has suggested that its § 2808 expenditures are permissible so long as Congress has not explicitly barred them. *See El Paso Cty. v. Trump*, Case No. 19-51144, Doc. 00515238806, at 13-14 (5th Cir. Dec. 16, 2019). But Congress *has* explicitly barred them in CAA § 739, as explained below. And in any event, the Administration's suggestion flips black-letter appropriations-law principles on their head. "[A]ll uses of appropriated funds must be *affirmatively approved* by Congress; the mere absence of a prohibition is not sufficient." *Dep't of Navy v. FLRA*, 665 F.3d 1339, 1348 (D.C. Cir. 2012) (Kavanaugh, J.). Because Congress declined to "affirmatively approve[]" any border-wall spending beyond the $1.375 billion expressly authorized in the CAA,

the Administration's current plan violates that statute and, in turn, the Appropriations Clause.

B. In Addition, CAA § 739 Expressly Precludes Border-Wall Expenditures Beyond the § 1.375 Billion Authorized in the CAA

To "remove any doubt" about the Executive Branch's ability to spend beyond the CAA's limits, *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1074 (2018), Congress wrote CAA § 739. That provision applies "Government-Wide," and reads as follows:

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

133 Stat. at 197. As relevant, § 739 creates a rule and an exception. The rule is that "[n]one of the funds made available" in an "appropriations Act" "may be used to increase funding for a project" as "proposed in the President's budget request for a fiscal year." The exception permits such an increase only if it is "made pursuant to the reprogramming or transfer provisions" of an "appropriations Act."

1. The Administration's wall expenditures violate § 739's rule, because they (1) use funds "made available" in an "appropriations Act" (2) "to increase funding for a project" (3) that was "proposed in the President's budget request for a fiscal year."

First, the expenditures involve funds "made available" in an "appropriations Act." Specifically, the Administration is tapping appropriated military construction funds "made available" by the Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2019, Pub. L. No. 115-244, div. C, 132 Stat. 2946 (2018).

Second, the Administration is using these appropriations to "increase funding for a project"—namely, the border wall. The border wall is a "project" under that word's ordinary meaning, because it is "an undertaking requiring concerted effort." American Heritage Dictionary 1408 (5th ed. 2011).[9] Courts have repeatedly referred to similar major government construction plans as "projects."[10]

Third, the border wall project was "proposed in the President's budget request for a fiscal year." On January 6, 2019, the President formally requested $5.7 billion

[9] *See also* Merriam Webster Dictionary 575 (6th ed. 2016) ("a specific plan or design"); Oxford American Dictionary 558 (2011) ("piece of work, often involving many people, that is planned and organized carefully").

[10] *See, e.g.*, *Detroit Int'l Bridge Co. v. Gov't of Canada*, 883 F.3d 895, 901 (D.C. Cir. 2018) (referring to congressionally funded construction of a bridge as a "project"); *In re Aiken Cty.*, 725 F.3d 255, 259 (D.C. Cir. 2013) (referring to congressionally funded construction of a nuclear waste storage facility as a "project"); *United States v. 14.02 Acres of Land More or Less in Fresno Cty.*, 547 F.3d 943, 948 (9th Cir. 2008) (referring to construction of a transmission line as a "project"); *Env. Def. Fund, Inc. v. Alexander*, 614 F.2d 474, 476 (5th Cir. 1980) (referring to congressionally funded construction of a waterway as a "project").

"for construction of a steel barrier for the Southwest border." Letter from Russell T. Vought, Acting Dir. of the Office of Mgmt. & Budget, to Richard Shelby, Chairman of the Senate Comm. on Appropriations (Jan. 6, 2019). "The Administration's full request," the letter explains, "would fund construction of a total of approximately 234 miles of new physical barrier." *Id.* The "steel barrier for the Southwest border" referenced in the President's budget request is the same project that the Administration is now trying to "increase funding for" with § 2808 funds. That gambit thus flouts § 739's plain terms.

Seeking to escape those terms, the Administration has relied heavily on the Government Accountability Office's (GAO) definition of "program, project, or activity," i.e., an "[e]lement within a budget account." Government Accountability Office, *A Glossary of Terms Used in the Federal Budget Process* 80 (Sept. 2005).[11] According to the Administration, this definition compels the conclusion that § 739's use of "project" refers to a single agency's project—not a project that involves multiple agencies. And because the President's budget request sought a DHS appropriation for DHS to build the wall, the Administration reasons, it addressed a

[11] The Administration has not asked courts to defer to the GAO's construction under *Chevron v. NRDC*, 467 U.S. 837 (1984). Nor could they, because the GAO was not construing the "particular statutory provision" at issue here, Congress did not "delegate[] authority to" the GAO "generally to make rules carrying the force of law," and the GAO's *Glossary* was not "promulgated in the exercise of [any such] authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

different project than the one DoD is now undertaking with § 2808 funds. The Administration's argument is flawed for multiple reasons.

To start, even if the Administration were correct that § 739 restricts only funding increases within single agencies, its plan would still violate that provision. Recall that § 739 bars funding increases for projects "proposed in the President's budget request for *a* fiscal year"—that is, the provision applies to projects proposed by the President in any year at all, not only the year the funding increase is attempted. In the President's fiscal-year 2020 budget request, he sought $3.6 billion in wall funding for *DoD*.[12] Congress has not appropriated funds to fulfill that request, including in the recently passed 2020 Consolidated Appropriations Act. *See supra* at 5 n.6. And *DoD*—i.e., the *same agency* referenced in the President's 2020 budget request—is now increasing funding for the President's proposed project in the precise amount that the President requested and Congress denied. Section 739 squarely forbids that effort, even under the Administration's own reading of that provision.

[12] *President Donald J. Trump Is Promoting a Fiscally Responsible and Pro-American 2020 Budget*, White House (Mar. 11, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-promoting-fiscally-responsible-pro-american-2020-budget/ (seeking "$8.6 billion for the border wall, funded by Department of Defense (DOD) and Department of Homeland Security (DHS)").

Besides, the Administration's reading is incorrect: Section 739 broadly restricts project funding increases channeled through *any* agency—not just the agency for which the President requested funds. Congress placed § 739 in Title VII of the CAA under the heading of "General Provisions—Government-Wide … (Including Transfer of Funds)." Provisions in that Title therefore apply to fund transfers throughout the *whole Executive Branch*, not simply within particular agencies. And § 739's comprehensive sweep is further confirmed by its application to funds "in this *or any other* appropriations Act"—not funds in a specific account—and to "the President's" full "budget request"—not a request for a specific agency.

Indeed, Defendants' reading of "program, project, or activity" would effectively nullify § 739. Other statutory provisions already prohibit individual agencies from transferring money between their own accounts to supplement funding for preferred projects. *See* 31 U.S.C. § 1532 (funds may not "be withdrawn from one appropriation account and credited to another" unless "authorized by law"). Section 739 has meaning only if it preemptively restricts increased funding of projects that cut *across agencies*—like the border wall.

The Administration has also contended that the border wall is not the same "project" that was "proposed in the President's budget request," because a "project's" identity changes when its source of funding and primary supervisor change. On this view, border-wall construction undertaken by DHS with DHS funds

is a different "project" than border-wall construction undertaken by DoD with DoD funds, so § 739 does not apply.

The Administration is wrong again. To begin, the factual predicate on which the Administration's argument rests is not even accurate: the President's January 6, 2019 request did not envision DHS alone building the wall. That request expressly states that DHS would "execute these funds" "[i]n concert with the U.S. Army Corps of Engineers"—an agency within *DoD*. Letter from Russell T. Vought, Acting Dir. of the Office of Mgmt. & Budget, to Richard Shelby, Chairman of the Senate Comm. on Appropriations (Jan. 6, 2019). The President's request itself therefore presupposes a joint project by DHS and DoD.

Regardless, the Administration's reading of § 739 runs headlong into that provision's text and context. Start with text. Nothing in the ordinary meaning of "project"—again, "an undertaking requiring concerted effort," American Heritage Dictionary 1408 (5th ed. 2011)—depends on who is carrying out the undertaking, or how that undertaking is funded. To illustrate, suppose a County were building a bridge, and at the beginning of the process, it used one contractor whom it paid with County tax revenues, but then midway through the process, it hired another contractor whom it paid with federal grant money. No ordinary English speaker would say that the County had begun a brand new "project" when it hired the second contractor. To the contrary, the bridge project would remain the same "project"

throughout. So too here: the border wall is the same "project" that was "proposed in the President's budget request," even if DoD is building it with DoD appropriations, rather than DHS building it with DHS appropriations.

Section 739's context cements the point. As noted, Congress placed § 739 in Title VII of the CAA under the heading of "General Provisions—Government-Wide . . . (Including Transfer of Funds)." All provisions in that Title therefore apply *generally* to the *whole Executive Branch*. They are not aimed solely at a particular agency, or a particular funding account. The Administration's reading of § 739—which depends on the proposition that § 739 does not apply across agencies or accounts—is irreconcilable with this context.

Finally, the Administration's crabbed reading of "project" is belied by its own references to the border wall as a singular Executive Branch undertaking. The White House Fact Sheet issued in conjunction with the President's Proclamation states that the Administration has identified billions in DoD appropriations "that will be available to build *the border wall*." White House Fact Sheet at 3-4 (emphasis added). The President has issued an Executive Order stating that it is "the policy of *the executive branch*" to build "a physical wall on the southern border," defined as "a contiguous, physical wall, or other similarly secure, contiguous, and impassable physical barrier." E.O. 13767, 82 Fed. Reg. 8793, §§ 2(a), 3(e) (emphasis added). And the President's fiscal-year 2020 budget request sought "$8.6 billion for *the*

border wall, funded by Department of Defense and Department of Homeland Security." *See supra* at 13 n.12.

All of the Administration's own statements thus describe a coordinated Executive Branch effort, using various appropriations to various agencies, to build *the border wall*. It cannot now credibly argue that the border wall currently being built is somehow a novel, discrete project, totally separate from the border wall proposed in the President's budget requests. As this Court has aptly put the point, "statements made by and on behalf of the Administration outside the context of this litigation … suggest[] that the Administration's current litigation position is grounded not in the text of [the statute] but in a desire to avoid legal consequences." *City & Cty. of S.F. v. Trump*, 897 F.3d 1125, 1238 (9th Cir. 2018).

2. The Administration's wall-funding plan is not saved by § 739's exception for "change[s] . . . made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act." Under federal law, an "appropriations Act" is an Act whose title begins: "An Act making appropriations." See 2 U.S.C. § 622(5); 1 U.S.C. § 105. Section 2808—the provision the Administration is using to increase funding for the border-wall project—is not found in an "appropriations Act." It is part of the Military Construction Codification Act, Pub. L. No. 97-124, 96 Stat. 153, (1982), which says nothing about appropriations in its title, and makes no appropriations in its body.

C. The Presumption Against Implied Repeals Does Not Apply, and Is Overcome If It Does Apply

Revealing the weakness of its textual arguments, the Administration has placed great weight on the presumption against implied repeals. *See El Paso Cty. v. Trump*, No. 19-cv-00066, Doc. 95, at 54 (W.D. Tex. June 10, 2019). That presumption does not apply here. But even if it did, the CAA surmounts it.

1. The presumption against implied repeals has no application where a later statute "does not repeal the general operation" of an earlier statutory provision, but rather "create[s] a specific, discrete exception to that [provision]." *Strawser*, 290 F.3d at 733; *see Harris v. Owens*, 264 F.3d 1282, 1296 (10th Cir. 2001) ("The later statute simply addresses one particular application and carves out an exception. We see no repeal-by-implication problem."); *Greenless v. Almond*, 277 F.3d 601, 608-09 (1st Cir. 2002) ("The 'implied repeal' argument is an odd one because at issue is not whether Congress totally repealed [the earlier provision], but whether it intended to carve out [an exception] from the reach of that provision."). Instead, in that scenario, the specific vs. general canon (discussed above) takes priority. *Strawser*, 290 F.3d at 733.

The CAA "does not repeal the general operation" of § 2808. *Id.* After the CAA, DoD can still use § 2808 "to undertake military construction projects." 10 U.S.C. § 2808(a). Rather, the CAA merely "create[s] a specific, discrete exception" to § 2808, *Strawser*, 290 F.3d at 733: funds appropriated for § 2808 "military

construction" cannot be used to build the border wall that Congress directly addressed in the CAA. Instead of the presumption against implied repeals, the specific vs. general canon controls. And under that canon, the Administration's wall expenditures are unlawful. *See supra* at 7-10.

2. Even if the presumption against implied repeals applied, the result would not change. "Congress may amend substantive law in an appropriations statute, as long as it does so clearly." *Robertson*, 503 U.S. at 440; *see United States v. Will*, 449 U.S. 200, 222 (1980) (same). In the CAA, Congress clearly intended to preclude the Administration from spending more than $1.375 billion on a border wall. It specifically appropriated that precise amount for a wall in a designated border area, while establishing procedures for consideration of additional border-wall construction in future years. And it wrote § 739, which unambiguously bars the Administration from increasing funding for "projects" beyond the amount allocated in the CAA. By plainly restricting the Administration from relying on § 2808 to build a border wall, Congress has overcome the presumption against implied repeals to the extent it applies at all.

CONCLUSION

This Court should affirm the district court's holding that the Administration's § 2808 expenditures are unlawful. Those expenditures violate not only § 2808 itself, but also the CAA and § 739 thereof.

Dated: February 20, 2020

Respectfully submitted,

/s/ Anton Metlitsky
ANTON METLITSKY
EPHRAIM MCDOWELL
O'MELVENY & MYERS LLP
Seven Times Square
New York, NY 10036

KRISTY PARKER
JUSTIN FLORENCE
DEANA K. EL-MALLAWANY
JESSICA MARSDEN
ERICA NEWLAND
CAMERON KISTLER
THE PROTECT DEMOCRACY PROJECT, INC.
2020 Pennsylvania Avenue, N.W., No. 163
Washington, DC 20006

STUART GERSON
EPSTEIN BECKER GREEN
1227 25th Street, N.W.
Washington, DC 20037

RICHARD MANCINO
SHAIMAA M. HUSSEIN
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019

DAVID BOOKBINDER
NISKANEN CENTER
820 First Street, N.E.
Washington, DC 20002

LAURENCE H. TRIBE
Carl M. Loeb University Professor
and Professor of Constitutional Law

HARVARD LAW SCHOOL*
1575 Massachusetts Avenue
Cambridge, MA 02138

Affiliation Noted for Identification Purposes Only

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,562 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: February 20, 2020

Respectfully submitted,

/s/ Anton Metlitsky
ANTON METLITSKY
O'MELVENY & MYERS LLP
Seven Times Square
New York, NY 10036

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2020, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: February 20, 2020

Respectfully submitted,

/s/ Anton Metlitsky
ANTON METLITSKY
O'MELVENY & MYERS LLP
Seven Times Square
New York, NY 10036