

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

**IN THE 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 U.S. District Court for the
Northern District of California

**BRIEF FOR AMICUS CURIAE U.S. HOUSE OF REPRESENTATIVES
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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INTEREST OF AMICUS CURIAE AND INTRODUCTION

The United States House of Representatives has a compelling interest in this case, which arises out of the Trump Administration’s violation of the bedrock constitutional principle that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const., Art. I, § 9, cl. 7. The Appropriations Clause vests Congress with “exclusive power over the federal purse,” and is “one of the most important authorities allocated to Congress in the Constitution[.]” *U.S. Dep’t of the Navy v. FLRA*, 665 F.3d 1339, 1346 (D.C. Cir. 2012). The House, moreover, has its own distinct interest in Congressional funding decisions because the federal purse has “*two strings*, one of which [is] in the hands of the H. of Reps,” and “[*b*]oth houses must concur in untying” them. 2 *The Records of the Federal Convention of 1787*, at 275 (M. Farrand ed., 1911) (James Wilson) (emphases added).¹

The district court correctly enjoined the Administration from spending billions of dollars in federal funds for the construction of a border wall that Congress unequivocally refused to appropriate for that purpose following the longest federal government shutdown in history. The Administration’s unprecedented actions thus directly implicate the House’s constitutional authority over Executive Branch spending, which the House exercised by agreeing to appropriate only \$1.375 billion

¹ All parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae and its counsel made a monetary contribution to its preparation or submission.

for the border wall—and nothing more. The Administration must not be permitted to circumvent this restriction and shield its unconstitutional border-wall spending by invoking inapplicable reprogramming statutes, as it did here to divert \$3.6 billion from military spending to border-wall construction under 10 U.S.C. § 2808. This Court should affirm.²

BACKGROUND

This dispute grew directly out of a pitched battle that President Trump and Congress waged in 2018-2019 over funding for a border wall. The President lost that battle, and yet he proceeded to spend money that Congress had refused to appropriate to construct a border wall. Multiple district courts have since enjoined this unconstitutional expenditure, including the district court in this case, but stays of those injunctions have permitted the Administration to continue to spend unappropriated funds on border-wall construction.

For fiscal year 2019, the President originally requested “\$1.6 billion to construct approximately 65 miles of border wall,”³ but within months of that initial request, he

² This brief focuses on the Appropriations Clause issues of greatest concern to the House and does not address all of the arguments raised on appeal.

³ Office of Mgmt. & Budget, *Fiscal Year 2019: Efficient, Effective, Accountable: An American Budget: Budget of the U.S. Government* 58 (2018), <https://perma.cc/MD3C-62YP>.

was “press[ing] Republicans to give him \$5 billion as a down payment on his wall.”⁴

Near the end of the 115th Congress, he and Congress faced an impasse on the issue.

In December 2018, President Trump held a televised meeting with then-House Minority Leader Nancy Pelosi and Senate Minority Leader Chuck Schumer to negotiate fiscal year 2019 appropriations for a border wall. During that meeting, the President reiterated his demand for \$5 billion for a border wall, warning that “[i]f we don’t get what we want one way or the other, whether it’s through you, through a military, through anything you want to call it, I will shut down the government.”⁵

Congress did not yield to that threat, and on December 21, 2018, the “longest partial government shutdown in the nation’s history” began. Appellants’ Excerpts of Record at ER5 (Jan. 24, 2020), ECF No. 31 (citations omitted). More than two weeks later, President Trump addressed the nation from the Oval Office, imploring Congress to “pass a bill that ends this crisis.”⁶ Congress still refused to appropriate the funds he sought for the border wall, and on January 25, 2019, President Trump

⁴ Rachael Bade, *Immigration Storm Bears Down on Republicans*, Politico (July 2, 2018), <https://perma.cc/D8LJ-DLTK>; *see also* Letter from Russell T. Vought, Acting Dir., Office of Mgmt. & Budget, to Sen. Richard Shelby, Chairman, U.S. Senate Comm. on Appropriations (Jan. 6, 2019), <https://perma.cc/98MY-3VXF> (requesting \$5.7 billion for a border wall).

⁵ Aaron Blake, *Trump’s Extraordinary Oval Office Squabble with Chuck Schumer and Nancy Pelosi, Annotated*, Wash. Post (Dec. 11, 2018), <https://perma.cc/2W9K-L2Z6>.

⁶ *Full Transcripts: Trump’s Speech on Immigration and the Democratic Response*, N.Y. Times (Jan. 8, 2019), <https://perma.cc/UJ6C-VZ37>.

signed a continuing resolution to fund the government through February 14, 2019.⁷ Over the next several weeks, a bipartisan conference committee negotiated a deal to fund the government.⁸ While those negotiations were underway, the Acting White House Chief of Staff declared that the border wall “is going to get built with or without Congress.”⁹

Ultimately, Congress passed the Consolidated Appropriations Act (CAA), 2019, Pub. L. No. 116-6, 133 Stat. 13, which appropriated only \$1.375 billion for construction of fencing in the Rio Grande Valley area of the border. *Id.* § 230, 133 Stat. at 28. On February 15, 2019, the President signed the CAA into law.¹⁰ That same day, however, he expressed dissatisfaction with the limited appropriation for border-wall construction and announced that his Administration would instead spend up to \$8.1 billion for that purpose. *See Fact Sheet: President Donald J. Trump’s Border Security Victory*, White House (Feb. 15, 2019) (*Fact Sheet*), <https://perma.cc/77SZ-GA4E>.

⁷ See Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, 133 Stat. 10.

⁸ Erica Werner et al., *Border Deal Nears Passage as Lawmakers Prepare for Votes, with Trump Expected to Sign*, Wash. Post (Feb. 14, 2019, 12:25 AM), <https://perma.cc/A8HE-ESHS>.

⁹ Andrew O’Reilly, *Mulvaney Says Border Wall Will Get Built, “With or Without” Funding from Congress*, Fox News (Feb. 10, 2019), <https://perma.cc/NGM3-2FML>.

¹⁰ See *Statement by the President*, White House (Feb. 15, 2019), <https://perma.cc/WNE6-C5ES>.

The White House stated that it would draw funding from three sources to supplement the amount appropriated by Congress, to “be used sequentially and as needed,” *id.*: (1) about \$601 million from the Treasury Forfeiture Fund, 31 U.S.C. § 9705; (2) up to \$2.5 billion under the Department of Defense (DOD) funds transferred for Support for Counterdrug Activities, 10 U.S.C. § 284; and, as relevant here, (3) up to \$3.6 billion reallocated from DOD military construction projects under the President’s national emergency declaration, 10 U.S.C. § 2808. *See Fact Sheet.*

Section 2808 provides that, “[i]n the event of a ... declaration by the President of a national emergency in accordance with the National Emergencies Act ... that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects ... not otherwise authorized by law that are necessary to support such use of the armed forces.” 10 U.S.C. § 2808(a). “Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction ... that have not been obligated.” *Id.*

As a predicate to asserting authority under Section 2808 to spend funds on border-wall construction, on February 15, 2019, President Trump declared a “national emergency” at the southern border pursuant to the National Emergencies Act, 50 U.S.C. §§ 1601 *et seq.* *See* Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019). “To provide additional authority to [DOD] to support the Federal Government’s response to the emergency,” President Trump declared that the “emergency requires

use of the Armed Forces and ... that the construction authority provided in [Section 2808] is invoked and made available, according to its terms, to the Secretary of Defense and, at the discretion of the Secretary of Defense, to the Secretaries of the military departments.” *Id.* at 4949.

The House is unaware of any other instance in American history where a President has declared a national emergency to obtain funding after having failed to win Congressional approval for an appropriation.¹¹ “And critically,” as the district court observed, “a president has never before invoked Section 2808 to secure funding for projects that Congress specifically declined to fund in its appropriations judgment. ... Yet here the president has been explicit in his intention to obtain funds for border barrier construction, with or without Congress.” ER4.

The President’s proclamation outlines the asserted basis for the national emergency declaration. It states that “[t]he southern border is a major entry point for criminals, gang members, and illicit narcotics.” 84 Fed. Reg. at 4949. The proclamation concedes that this “problem of large-scale unlawful migration ... is long-standing” but asserts that “the situation has worsened in certain respects in recent years” because there have been “sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space for many of these aliens while their removal proceedings are pending.” *Id.*

¹¹ See Charlie Savage, *Presidents Have Declared Dozens of Emergencies, but None Like Trump’s*, N.Y. Times (Feb. 15, 2019), <https://perma.cc/JG3X-J9YR>.

Prior to signing the proclamation, President Trump delivered remarks about his decision. *Remarks by President Trump on the National Security and Humanitarian Crisis on Our Southern Border*, White House (Feb. 15, 2019) (Feb. 15 Rose Garden Remarks), <https://perma.cc/5SE7-FS7F>. Among other things, President Trump said that Democrats had appropriated a “crazy” amount of money for border security—“so much money, we don’t know what to do with it.” *Id.* Democrats “didn’t even fight us on most of the stuff,” such as “[p]orts of entry.” *Id.* “The only place [Democrats] don’t want to give as much money [is the wall]—[\$1.375 billion],” which “[s]ounds like a lot, but it’s not so much.” *Id.* Later he remarked, “I went through Congress. I made a deal. I got almost \$1.4 billion when I wasn’t supposed to get one dollar—not one dollar. ‘He’s not going to get one dollar.’ Well, I got \$1.4 billion. But I’m not happy with it.” *Id.*

Reiterating that he was “successful” in getting Democrats to appropriate funding for the wall, President Trump explained why he nevertheless declared a national emergency: “So I did—I was successful, in that sense, but I want to do it faster. I could do the wall over a longer period of time. I didn’t need to do this. But I’d rather do it much faster. ... And I think that I just want to get it done faster, that’s all.” *Id.*

Congress swiftly rebuked President Trump’s decision to declare a national emergency at the southern border and spend in excess of what Congress had appropriated on the construction of a border wall. On February 26, 2019, the House

adopted House Joint Resolution 46, by a vote of 245 to 182, to terminate President Trump's national emergency declaration pursuant to section 202 of the National Emergencies Act, 50 U.S.C. § 1622. 165 Cong. Rec. H2217-18 (daily ed. Feb. 26, 2019). On March 14, 2019, the Senate passed the joint resolution by a vote of 59 to 41. 165 Cong. Rec. S1882 (daily ed. Mar. 14, 2019). The joint resolution was supported by numerous Republicans, including Senator Mitt Romney of Utah, who stated that his support for the resolution was “a vote for the Constitution and for the balance of powers that is at its core.”¹² President Trump vetoed the joint resolution on March 15, 2019.¹³

The Administration has since taken various steps to advance construction of the wall. *See* ER6-ER9. In September 2019, “the Secretary of Defense announced that he had decided to authorize eleven specific border barrier construction projects in California, Arizona, New Mexico and Texas, pursuant to Section 2808.” ER7; *see* ER99-ER100. To fund these eleven border-wall projects, the Administration announced its intention to divert funding that Congress had appropriated for 128 other projects. ER172. Sixty-four of those defunded military construction projects are located in the United States, and nineteen of them—totaling more than \$500 million—are located in eight of the plaintiff states. ER8.

¹² Marianne Levine, *Senate Deals Blow to Trump in Vote to Terminate Border Emergency*, Politico (Mar. 14, 2019), <https://perma.cc/Z2HX-7TZY>.

¹³ *Veto Message to the House of Representatives for H.J. Res. 46*, White House (March 15, 2019), <https://perma.cc/58P4-75AE>.

The Secretary of Defense stated that the eleven border-wall projects “are necessary to support the use of the armed forces in connection with the national emergency.” ER92. He asserted that the projects “will deter illegal entry, increase the vanishing time of those illegally crossing the border, and channel migrants to ports of entry.” *Id.* He stated that this would “reduce the demand for DoD personnel and assets at the locations where the barriers are constructed and allow the redeployment of DoD personnel and assets to other high-traffic areas on the border without barriers,” allowing “DoD to provide support to [the Department of Homeland Security (DHS)] more efficiently and effectively.” *Id.*

A number of plaintiffs, including plaintiffs here, sued to halt the Administration’s use of funds that Congress had not appropriated to construct a border wall. ER2, ER8. On cross-motions for partial summary judgment, the court below held that the Administration had circumvented Congress’s constitutional appropriations power and enjoined the Administration from invoking Section 2808 to use “military construction funds appropriated for other purposes to build a border wall.” ER48. The court rejected the Administration’s attempt to stretch the meaning of “military construction projects,” 10 U.S.C. § 2808(a), to include the nine border-wall projects being built on land that was not previously under military jurisdiction, holding that the Administration’s interpretation “disregard[s] the plain language of the statute,” ER24, would unlawfully grant the Executive Branch “essentially boundless

authority to reallocate military construction funds,” ER26, and “contravenes clear congressional intent to limit—not expand—executive emergency powers,” ER27.

With respect to the statutory requirement that the military construction projects be “necessary to support [the] use of the armed forces,” 10 U.S.C. § 2808(a), the court gave “due deference” to record materials submitted by the Administration, ER29, but, even so, could not “blind itself to the plain reality presented in this case: the border barrier projects [the Administration] now assert[s] are ‘necessary to support the use of the armed forces’ are the very same projects [the Administration] sought—and failed—to build under DHS’s civilian authority, because Congress would not appropriate the requested funds,” ER33. And while holding that whether the President’s “national emergency ... requires use of the armed forces,” 10 U.S.C. § 2808(a), presents “nonjusticiable political questions,” the court “acknowledge[d] the significant constitutional tension inherent in the President’s invocation of a national emergency ... for the avowed purpose of accessing money to fund projects that Congress expressly considered and declined to fund.” ER22.

The court stayed its permanent injunction pending any appeal, ER46, the Administration appealed, ER49-ER50, and certain plaintiffs cross-appealed, ER51-ER59.

SUMMARY OF THE ARGUMENT

In clear contravention of the Appropriations Clause, the Administration unilaterally overrode Congress’s rejection of President Trump’s demand for \$5 billion

for a border wall. Attempting to paper over its violation of the Constitution, the Administration has invoked inapposite authorities to divert funds appropriated for other purposes to spend on border-wall construction. As President Trump himself declared, “We’re taking money from all over because as you know the Democrats don’t want us to build the wall.”¹⁴

At issue here is the Administration’s reprogramming of \$3.6 billion from DOD military construction projects to border-wall construction under 10 U.S.C. § 2808. The district court correctly granted partial summary judgment in favor of plaintiffs. By its terms, Section 2808 authorizes the Secretary to reprogram military construction for specific reasons, and the Secretary’s reprogramming decision was not supported by such reasons here.

ARGUMENT

I. The Administration Has Violated the Appropriations Clause

The Administration’s spending of federal funds far in excess of those Congress appropriated to construct a border wall flouts Congress’s “exercise of its constitutionally-absolute power of the purse.” ER45. Summarizing the series of events that gave rise to this litigation, the district court explained that “Congress specifically declined to provide the funding sought by the Executive for the border barrier construction at issue in this case,” but the Administration decided to build the

¹⁴ The White House, *A Message from President Trump on the Border Wall*, YouTube (Sept. 9, 2019), <https://www.youtube.com/watch?v=0fEdhud7RJI>.

wall “by any means necessary.” ER45. That decision violates the Appropriations Clause, which dictates that the Executive Branch may spend funds for a particular purpose only if, and to the extent that, both Houses of Congress agree to appropriate funds for that purpose. U.S. Const., Art. I, § 9, cl. 7; *see, e.g., Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850) (“It is a well-known constitutional provision, that no money can be taken or drawn from the Treasury except under an appropriation by Congress.”). As the district court rightly concluded, the Administration’s actions “both disregard[] the clear will of Congress and disrespect[] the whole legislative process and the separation of powers enshrined in the Constitution.” ER45.

The Administration has invoked 10 U.S.C. § 2808 as a defense to plaintiffs’ constitutional claim—finding “secreted in the interstices of legislation the very grant of power which Congress consciously withheld,” ER45 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring))—but as further explained below, Section 2808 does not authorize spending in excess of what Congress appropriated. That is particularly so where, as here, Congress expressly denied additional expenditures for a particular purpose. As the district court correctly held, “by seeking funding through alternative channels,” the Administration “seek[s] to circumvent Congress’[s] appropriations power, and its judgment to provide the Administration with limited funds for specified and limited border barrier construction.” ER15-ER16. The Administration is thus “acting outside of any

statutory appropriation” and is “spending funds contrary to Congress’s appropriations decisions.” ER16 (quoting *Sierra Club v. Trump*, 929 F.3d 670, 689 (9th Cir. 2019)).

II. Section 2808 Does Not Allow the Administration to Spend More on a Border Wall Than Congress Appropriated

The district court correctly determined that Section 2808 provides no defense against the Administration’s Appropriations Clause violation. ER44. Section 2808(a) authorizes the Secretary of Defense to redirect unobligated military construction funds to other projects, subject to three limitations: (1) the funding must be spent on a “military construction project[],” (2) the project must be “necessary to support [the] use of the armed forces,” and (3) there must be a national emergency “that requires use of the armed forces.” 10 U.S.C. § 2808(a). The Administration must satisfy all three requirements before invoking Section 2808, but it cannot satisfy any.

A. A Border Wall Is Not a Military Construction Project

As the district court correctly held, *see* ER23-29, nine of the eleven border-wall projects at issue here are not “military construction projects” within the meaning of Section 2808. 10 U.S.C. § 2808(a). Congress has defined “military construction” as “any construction, development, conversion, or extension of any kind carried out with respect to a *military installation*.” *Id.* § 2801(a) (emphasis added); *see id.* § 2801(b) (“military construction project” includes “all military construction work ... necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility”). The Administration’s border-wall projects do not constitute

“military construction” because, with the exception of two projects on the Barry Goldwater Military Range, the border-wall projects are not being “carried out with respect to a military installation.”

Simply put, the southern border is not a militarized zone. Border security is a matter not for the armed forces but for domestic law enforcement—specifically, DHS, “the civilian agency that Congress has tasked with border security and immigration enforcement,” and its subagency, Customs and Border Patrol (CBP). ER21 (citing 6 U.S.C. §§ 202, 251; 8 U.S.C. §§ 1103(a)(5), (a)(10)).¹⁵ And “140 of the 175 total miles” of border wall at issue here, spanning “Arizona, California, New Mexico, and Texas,” are being constructed on “federal public domain or non-public land[] not previously under military jurisdiction.” ER26.

The Administration has attempted to dodge Section 2808’s limitations by assigning administrative jurisdiction over the land for these nine border-wall projects to a military installation, the U.S. Army Garrison Fort Bliss, “located several hundred miles away” near El Paso, Texas. ER26; *see* ER8-ER9. But even if these assignments were valid, the paper transfer of border lands to a wholly unconnected base does not

¹⁵ *See* ER125 (describing DHS’s mission as “gain[ing], maintain[ing], and expand[ing] operational control of the U.S. Border between ports of entry,” and characterizing border barriers as a “critical capabilit[y]” to achieve this mission); *Snapshot: A Summary of CBP Facts and Figures*, U.S. Customs & Border Protection (Dec. 2018) (CBP *Snapshot*), <https://perma.cc/H3JS-PH9C> (describing CBP’s mission as to “safeguard America’s borders”).

transform them into “military construction projects,” 10 U.S.C. § 2808(a), that are “carried out with respect to a military installation,” *id.* § 2801(a).

Congress has specified that a “military installation” means “a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department.” *Id.* § 2801(c)(4). As the district court observed, the Administration “do[es] not even attempt to explain how the proposed projects are similar in nature or scope to ‘a base, camp, post, station, yard, [or] center.’” ER25; *see Sierra Club v. Trump*, 379 F. Supp. 3d 883, 920 (N.D. Cal. 2019); *see also* ER24 n.10 (incorporating *Sierra Club*, 379 F. Supp. 3d at 920-21, by reference). The Administration notes that the statute “does not limit the *type* of base or other installation that qualifies for military construction purposes,” Br. for Defs.-Appellants at 38 (Jan. 24, 2020), ECF No. 30 (DOJ Br.) (emphasis added), but makes no effort to establish that the land at issue consists of a “base or other installation” in the first place.

Nor does the southern border fall within the statute’s “other activity” category. 10 U.S.C. § 2801(c)(4). The Administration argues that this category encompasses any “property that the military *might* need to use to conduct operations” and, further, “*any* land under military jurisdiction and subject to the military’s operational control.” DOJ Br. at 38 (emphases added). As the district court explained, under this interpretation, the Administration “would have the Court transform the definition of

‘military installation’ to include not just ‘other activity,’ but ‘*any* activity’ under military jurisdiction.” ER24. “That simply is not what the statute says.” *Id.*

“The term ‘other activity’ appears after a list of closely related types of discrete and traditional military locations: ‘a base, camp, post, station, yard, [and] center.’” *Sierra Club*, 379 F. Supp. 3d at 921. As the district court recognized, those terms “are not mere surplusage to ignore, but rather supply meaning and provide boundaries to the term ‘other activity.’” ER25; see *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (“[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” (quotation marks omitted)). “It is thus proper to construe ‘other activity’ as referring to similar discrete and traditional military locations.” *Sierra Club*, 379 F. Supp. 3d at 921. The U.S.-Mexico border plainly does not qualify, particularly given that there has never been a suggestion that troops are stationed on the land where the border-wall projects will be built or that such land is otherwise in use as a military post, station, yard, or center, or other similar *military* location.

Accepting the Administration’s argument that “military construction projects” should include land that DOD is acquiring for the first time for the purpose of constructing a border wall—which would be used by *DHS*, not the military—circumvents Section 2808’s prohibitions and does not represent a good-faith reading of the statute’s requirements. The House is aware of no prior use of Section 2808

funds for a construction project that will not be used by the military,¹⁶ and Section 2808 has never before been used “to fund projects for which Congress withheld appropriations,” as the district court found. ER28. Under the Administration’s view of the statute, “construction can be considered ‘carried out with respect to a military installation’ even if it is otherwise wholly unrelated to the installation’s functions, purpose, or even geography,” allowing the Administration to “redirect billions of dollars from projects to which Congress appropriated funds to projects of [their] own choosing, all without congressional approval (and in fact directly *contrary* to Congress’ decision not to fund these projects).” ER27. Congress did not grant the Administration such expansive authority under Section 2808.

Indeed, the Administration has previously invoked Section 8005 of the 2019 Department of Defense Appropriations Act as a source of authority to transfer DOD funds for other border-wall projects, *see* ER9; *Sierra Club*, 929 F.3d at 676, and that law *prohibits* transfers for purposes of “military construction,” *see* Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999. Thus, the Administration’s decision to transfer funds for border-wall construction under Section 8005 is, in essence, a representation that border-wall construction is *not* military construction. The Administration cannot have

¹⁶ Previous projects under Section 2808 have included the construction of barracks hangers and improvements to airfield runways. *See* Michael J. Vassalotti & Brendan W. McGarry, *Military Construction Funding in the Event of a National Emergency*, Cong. Research Serv., IN11017, at 2-3 (2019), <https://perma.cc/75UP-ANE3> (listing all military construction projects under Section 2808 between 2001 and 2014).

it both ways; the Administration represented that border-wall construction is not “military construction,” and thus cannot now use Section 2808 to transfer funds for that purpose.

B. A Border Wall Is Not Necessary to Support the Use of the Armed Forces

The Administration has also failed to show that any of the border-wall projects at issue here are “necessary to support ... the armed forces.” 10 U.S.C. § 2808(a). The district court correctly concluded that, “even crediting all facts in the administrative record, and giving due deference to the strategic and military determinations in it,” the Administration has not established that the border-wall projects meet this statutory requirement. ER29; *see* ER29-ER34.

As described above, it is the responsibility of DHS and CBP to ensure border security, not DOD. Over the past few years, the President has ordered a few thousand troops to assist DHS and CBP at the border, *see* ER125; as of August 2019, approximately 5,500 DOD personnel were supporting the DHS border mission, *see* ER84, ER128. As the administrative record demonstrates, however, such troops are limited to “support roles that relieve DHS personnel of non-law enforcement duties,” such as “logistics, planning, and intelligence analysis” and “monitoring and detection support” through “operating mobile surveillance camera[] units or providing aerial reconnaissance.” ER30 (citations omitted). These restrictions are consistent with the Posse Comitatus Act, 18 U.S.C. § 1385, which “codifie[s] a prohibition on the use of

the military in civilian law enforcement activities.” *United States v. Dreyer*, 804 F.3d 1266, 1272 (9th Cir. 2015).

DOD has asserted that a border wall is “necessary” to support the troops because it “will reduce the demand” for the troops at barrier locations, ER130, but this assertion falls far short of demonstrating that the border wall is “necessary” to support the use of the armed forces. As the district court explained, “[t]he administrative record ... illustrates that the border barrier construction projects are intended to benefit DHS and its subagencies,” and to allow *removal of troops from the border*, not to support any use of the military. ER30; *see* ER31 (“Section 2808 ... refers to construction that is necessary to support the use of the armed forces, not to construction that the armed forces will not use once constructed”).

The Administration continues to argue “that the assistance to DHS is merely a byproduct of helping DOD.” ER31; *see* DOJ Br. at 43. “Yet the administrative record suggests that the proposed projects may actually *reduce* DHS’s need for DoD support.” ER31. Thus, under the Administration’s theory, “any construction could be converted into military construction—and funded through Section 2808—simply by sending armed forces temporarily to provide logistical support to a civilian agency during construction.” ER31-ER32. But the Administration cannot escape the fact that policing of the border—and, by extension, the proposed border wall—is a law-enforcement, not a military, matter. The relationship between the wall and the “armed forces” is too attenuated to satisfy the statutory standard of necessity.

The Administration’s primary response is to contend that whether the border wall is “necessary to support ... the armed forces,” 10 U.S.C. § 2808(a), is committed to agency discretion by law and thus unreviewable. DOJ Br. at 40; *see id.* at 40-43. That occurs only in the “rare” instance “where there is truly no law to apply.” ER17 (some quotation marks omitted) (quoting *Perez v. Wolf*, 943 F.3d 853, 861 (2019)). By contrast, here, as the district court explained, Section 2808 provides meaningful standards for reviewing the Administration’s reprogramming of military construction funds for border-wall construction. *See* ER16-20. The Administration simply has not satisfied them.

C. There Is No National Emergency Requiring the Use of the Armed Forces

This Court should affirm upon concluding, as explained above and as the district court held, that a border wall is neither a military construction project nor necessary to support the use of the armed forces within the meaning of Section 2808—or for either of those reasons. This Court should also affirm because the national emergency the President declared does not “require[] use of the armed forces.” 10 U.S.C. § 2808(a).

In finding this claim nonjusticiable, the district court erroneously conflated two distinct questions: whether the President’s declaration of a national emergency is valid and whether the emergency the President declared permits the Administration to invoke Section 2808. *See* ER20-ER23. The former question is not at issue here. *See*

Sierra Club Appellees’ Answering Br. at 50 (Feb. 13, 2020), ECF No. 43. Pretextual as the President’s declaration appears, *see* ER21 (acknowledging “that both the timing and nature of the emergency raise obvious questions”), no party is asking this Court to “overrid[e]” the President’s “discretionary judgment as to what is and what is not an emergency,” ER22. Rather, only the latter question—whether the “emergency ... requires use of the armed forces,” 10 U.S.C. § 2808(a)—is presented, and it is a straightforward question of statutory interpretation that this Court can readily answer. The extraordinary facts here make quite clear that Section 2808’s prerequisite is not satisfied.

As detailed above, border security is a domestic law-enforcement matter and does not implicate the armed forces. The Administration has repeatedly acknowledged as much. It describes CBP as the “largest federal *law enforcement* agency in the United States.” *CBP Snapshot* (emphasis added). When the Administration transferred \$601 million from the Treasury Forfeiture Fund for border-wall construction, *see Fact Sheet*, ER310, the Administration confirmed that such construction is a law-enforcement matter because money from that Fund can be applied *only* to “law enforcement activities,” 31 U.S.C. § 9705(g)(4)(B). In addition, shortly before the national emergency proclamation, then-Acting Secretary of Defense Patrick Shanahan acknowledged that the situation at the border is “not a military

threat,”¹⁷ and another top-level defense official has testified that “[n]one of the capabilities that [the military is] providing [at the southern border] are combat capabilities.”¹⁸ Finally, as described above, under the Posse Comitatus Act the military is expressly prohibited from making “direct active use of Federal troops” to execute domestic law, necessarily limiting the armed forces to “support roles” in the border-wall projects, with the narrow benefit of “free[ing] up” CBP personnel. ER125; *see* ER215.

President Trump’s proclamation asserts that the situation at the border has “worsened” due to “sharp increases in the number of family units entering and seeking entry to the United States and an inability to provide detention space.” 84 Fed. Reg. at 4949. But this trend has long been apparent,¹⁹ and the repercussions, including humanitarian problems, are matters for domestic law enforcement, not the armed forces. There is no argument that the circumstances at the border require even the use of DOD *money* (as distinct from armed forces personnel): the President has stated that Congress appropriated for border security “so much money, we don’t know what to do with it.” Feb. 15 Rose Garden Remarks.

¹⁷ *Department of Defense Budget Posture: Hearing Before the S. Comm. on Armed Servs.*, 116th Cong. (2019) (statement of Patrick Shanahan, Acting Sec’y, Dep’t of Def.) (pre-published transcript available at <https://perma.cc/XX2K-J8AX>).

¹⁸ Heather Timmons, *The US Border Situation Isn’t a National Emergency, Pentagon Officials Tell Congress*, Quartz (Jan. 29, 2019), <https://perma.cc/S4V6-VZDG>.

¹⁹ *See, e.g., Southwest Border Migration FY2017*, U.S. Customs & Border Protection (Dec. 15, 2017), <https://perma.cc/8GW5-FD3K>.

Congress has chosen to allocate most of that money to border-security activities that do not include construction of a border wall. The Administration cannot plausibly claim that the armed forces are nevertheless “required” so that DHS can build a wall that Congress deemed unnecessary.

* * *

The Administration’s invocation of Section 2808 to spend unappropriated funds infringes on each chamber of Congress’s power over federal spending and defies statutory prohibitions. This Court should not “stretch the words” of Section 2808’s requirements “beyond their normal meaning,” *Schneider v. Smith*, 390 U.S. 17, 27 (1968), to give legal cover to the Administration’s transgression. Section 2808 is one of the scores of statutes that the President may invoke by declaring a national emergency under the National Emergencies Act, which, as the district court observed, was enacted “to *limit* the scope of [presidential] emergency powers.” ER28 (emphasis added); *see generally* ER27-28 (detailing the development and passage of the Act). The Act was “not intended to grant additional authority to the President” but instead to make clear that “[t]he President can only exercise those powers delegated to him in other statutes.” S. Rep. No. 94-1168, at 4 (1976); *accord* H. Rep. No. 94-238, at 5-6 (1975).

Section 2808 thus limits the circumstances and manner in which the President can exercise the transfer authority it provides. If courts fail to enforce these limits, the President’s emergency authority will, for all practical purposes, be unbounded.

That danger is particularly apparent here, where the Administration determined to build a border wall “with or without Congress,” ER4, and when Congress refused, turned to national emergency authorities that plainly do not encompass the Administration’s purpose—that, in other words, are “incongruent with what the record reveals about the [Administration’s] priorities.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019); *cf. id.* at 2576 (“Accepting contrived reasons would defeat the purpose of the enterprise.”).

Accepting the Administration’s interpretation of Section 2808 would transform the longest government shutdown in the nation’s history into mere political theater. The Administration would have known when 2019 DOD appropriations were passed on September 28, 2018, *see* Pub. L. No. 115-245, 132 Stat. 2981, that DOD could transfer billions of dollars in wall funding under the provisions it has now invoked. If, as the Administration claims, it possessed the authority after September 2018 to transfer these funds for border wall construction, it surely would not have precipitated the shutdown because Congress refused to appropriate the money it requested for that purpose. The Administration’s actions at the end of 2018 speak far louder than its arguments before this Court now.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court’s order granting plaintiffs’ motion for partial summary judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Cir. R. 32-1(a) because it contains 5,854 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2016 in 14-point Garamond type.

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CERTIFICATE OF SERVICE

I certify that on February 20, 2020, I filed the foregoing amicus brief via the CM/ECF system of the United States Court of Appeals for the Ninth Circuit, which I understand caused service on all registered parties.

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