No. 19-16102

In the United States Court of Appeals for the Ninth Circuit

SIERRA CLUB; SOUTHERN BORDER COMMUNITIES COALITION,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States, in his official capacity; PATRICK M. SHANAHAN, Acting Secretary of Defense, in his official capacity; KEVIN K. MCALEENAN, Acting Secretary of Homeland Security, in his official capacity; and STEVEN MNUCHIN, Secretary of the Treasury, in his official capacity,

Defendants-Appellants.

APPELLEES' SUPPLEMENTAL BRIEF IN OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

On Appeal from the United States District Court
for the Northern District of California
Case No. 4:19-cv-892-HSG

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INTRODUCTION

Defendants' arguments boil down to a simple claim: although Congress denied the Executive Branch the billions of dollars it sought for a border wall, no constitutional issue is raised by Defendants' funneling of military pay and pension funds to the wall, and no court can review that executive action. In support of this claim, Defendants submit that (1) twenty-five years ago, the Supreme Court quietly eliminated centuries of equitable review for any case where an executive official points to a statutory authority, no matter how inapplicable; (2) this Court did not mean what it said when it held in *United States v. McIntosh* that government violations of appropriations legislation give rise to a constitutional cause of action under the Appropriations Clause; and (3) the Administrative Procedures Act (APA) is both inapplicable here and also operates to bar any equitable claim for review. Defendants fundamentally misunderstand the law that applies to equitable and constitutional claims, and disregard decades of caselaw showing that Plaintiffs satisfy the APA's zone-of-interests test. Defendants fail to carry their heavy burden to establish that their unlawful actions here are unreviewable. They have not made a "strong showing" of success on the merits, and are not entitled to a stay. *Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017).

ARGUMENT

I. Plaintiffs May Seek Relief for Defendants' Violation of the Appropriations Clause.

A. Plaintiffs have an equitable claim to enjoin action in violation of the Constitution, regardless of whether Defendants invoke a statute as a source of authority.

As described in Plaintiffs' Opposition Brief and the amicus curiae brief of the Federal Courts scholars, Plaintiffs have an equitable cause of action to enjoin Defendants' actions in excess of constitutional authority. *See* Opp. 5-7; Fed. Courts Scholars Br. 3-7. "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015) (citing Jaffe & Henderson, Judicial Review and the Rule of Law: Historical Origins, 72 L.Q. Rev. 345 (1956)).

There is nothing extraordinary about equitable relief against ultra vires government conduct. "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958); *see also, e.g.*, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally"); *Gingery v. City of Glendale*, 831 F.3d 1222, 1233 (9th Cir.

2016) ("Unlike Section 1983, the availability of an equitable cause of action to enjoin purportedly unconstitutional conduct does not necessarily rely upon the fact that a particular constitutional provision confers an individual right on the plaintiff.").

Defendants are flatly wrong in arguing that an equitable claim evaporates when the executive branch claims a statutory authority. *See* Def. Supp. Br. 5-6. In *Harmon*, for example, the Court held that the district court erred when it dismissed a claim that the Secretary of the Army exceeded his statutory and constitutional authority. As the Court explained, the district court had the "power to construe the statutes involved to determine whether the respondent did exceed his powers." 355 U.S. at 582. If so, then "judicial relief from this illegality would be available." *Id.* Similarly, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the Supreme Court again addressed the merits of an action for an injunction based on a claim that officials "were beyond their statutory and constitutional powers." *Id.* at 667. Specifically, the Supreme Court considered the executive's claimed power to "suspend claims pending in American courts," when the President purported to act under authority of both the International Emergency Economic Powers Act and 22 U.S.C. § 1732, the so-called "Hostage Act." 453 U.S. at 675. The Court did not require the identification of any private right of action under the claimed statutory authorities, nor did the Court look to some other source for a cause of action. There

is nothing anomalous about such review: as the Court emphasized, its consideration and rejection of the President's claimed powers under the statutes was not an aberration, but rather "the view of all the courts which have considered the question." *Id.* at 675-76; *see also*, *e.g.*, *Hawaii v. Trump*, 878 F.3d 662, 682 (9th Cir. 2017) (courts may "review ultra vires actions by the President that go beyond the scope of the President's statutory authority"), *rev'd on other grounds*, 138 S. Ct. 2392 (2018).

Nowhere in *Dames & Moore* did the Court suggest that a challenger to an unlawful action under purported Hostage Act authority was required to satisfy a zone-of-interests test with respect to that inapplicable statute. Such a requirement, as the D.C. Circuit explained decades ago, would make little sense. "Otherwise, a meritorious litigant, injured by ultra vires action, would seldom have standing to sue since the litigant's interest normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987); *see also* Fed. Courts Scholars Br. 7-14.

Defendants wrongly suggest that *Dalton v. Spector*, 511 U.S. 462 (1994), worked a radical change in law by effectively ending ultra vires review. Def. Supp. Br. 6-8. *Dalton* by its own terms did not purport to overrule centuries of equitable review whenever the executive asserts it is acting under statutory authority, and

Defendants identify no decision in the twenty-five years since *Dalton* was decided that has remotely endorsed the government's theory here. Indeed, the Supreme Court's most recent decision on the availability of equitable review of unlawful executive actions does not even mention *Dalton*. *See Armstrong*, 135 S. Ct. 1378 (considering equitable review of action in violation of Medicaid Act). Instead, courts have emphasized that *Dalton* establishes a narrow rule, inapplicable here: "*Dalton*'s holding merely stands for the proposition that when a statute entrusts a discrete, specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1331 (D.C. Cir. 1996).

Because *Dalton* addressed a statute that *authorized* unfettered discretion by the President, the Court had no occasion there to consider statutes, such as Section 8005, that limit executive action. Defendants nonetheless seek to take *Dalton*'s limited statement that not "every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution," *Dalton*, 511 U.S. at 472, and convert it into a sweeping, inverse rule. According to Defendants, *whenever* the executive invokes a statute, no ultra vires or constitutional review is available. *See* Def. Supp. Br. 6-7. But no court interpreting *Dalton* has ever read it to hold as such. *See*, *e.g.*, *Mountain States*

Legal Found. v. Bush, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (distinguishing *Dalton* in reviewing a "statute [that] places discernable limits on the President's discretion," and finding ultra vires review available "to ensure that [the President's actions] are consistent with constitutional principles and that the President has not exceeded his statutory authority"); *Reich*, 74 F.3d at 1332 (holding ultra vires challenge to Executive Order was judicially reviewable and rejecting argument that President could "bypass scores of statutory limitations on government authority" "so long as the President claims that he is acting pursuant to the Procurement Act").

Under Defendants' extreme view, the government could *always* defeat review of ultra vires action simply by pointing to a statute, even if the executive branch action exceeds the plain boundaries set by that statute and baseline separation-of-powers principles. Indeed, if Defendants' radical reinterpretation of equitable actions were truly the law, *Youngstown* could have come out differently—rather than relying on a claim of unilateral executive power to act without authorization from or in defiance of Congress, as Defendants do here in all but name, President Truman would have simply pointed to one of the existing statutes allowing the president to take private property, and the Supreme Court would have declined any review of his ultra vires seizure of the Nation's steel

mills, no matter how tenuous or implausible that claimed statutory authority was. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-86 (1952).

In any event, *Dalton* certainly does not preclude courts from reviewing claims stemming from Presidential actions that are "incompatible with the express or implied will of Congress," *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), nor does it hold that a constitutional claim does not arise when the government is asserting powers based on a statute that *itself* is unconstitutional if it authorizes the challenged conduct, *Clinton v. City of New York*, 524 U.S. 417, 445-47 (1998). These two distinctions alone are sufficient to render *Dalton* inapposite here.

First, Defendants seek to accomplish through the transfer of funds wall construction that Congress considered and refused to fund. Specifically, Congress refused to fund new wall construction outside of Texas. "The sheer amount of failed legislation on this issue demonstrates the importance and divisiveness of the policies in play, reinforcing the Constitution's unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process." *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018) (quotation omitted). As Justice Frankfurter underscored in *Youngstown*:

> It is quite impossible . . . when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of

> power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

343 U.S. at 609 (Frankfurter, J., concurring); *see also* Order 38-39 (noting Congress "repeatedly rejected legislation that would have funded substantially broader barrier construction" before "deciding in the end to appropriate only $1.375 billion" for construction in Texas).

Second, if Defendants' actions are authorized by the statutes on which they rely, the statutes would violate the separation of powers and the Appropriations and Presentment Clauses. Unlike *Dalton*, where there was no argument that the statute as construed by the president violated the Constitution, Defendants' interpretations of Sections 8005 and 284 would usurp Congress's "exclusive" power "not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." *United States v. McIntosh*, 833 F.3d 1163, 1172 (9th Cir. 2016); *see also* Order 36-42. Likewise, if Section 8005 permitted the President to both sign the CAA and simultaneously "reject[ ] the policy judgment made by Congress and rely[ ] on his own policy judgment" by increasing funding for wall construction based "on the same conditions that Congress evaluated when it passed" the CAA, it would violate the Presentment Clause. *Clinton*, 524 U.S. at 443-44.

B. Plaintiffs have a direct cause of action under the Appropriations Clause.

i. This Court has already recognized a constitutional cause of action for executive spending in violation of appropriations legislation.

As this Court has recognized, in light of the unique congressional authority over spending, the government's violation of an appropriations statute gives rise to a constitutional cause of action. In *McIntosh*, this Court explained that when the government violates a restriction contained in appropriations statute, it is "drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause." 833 F.3d at 1175. "Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for . . . the courts to enforce them when enforcement is sought." *Id.*

Where, as here, a litigant has Article III standing, this Court has held that a constitutional cause of action will lie for the spending of funds in violation of an appropriations act. *See McIntosh*, 833 F.3d at 1174. As this Court explained, "the Appropriations Clause plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them." *Id.* at 1175. Consistent with the numerous cases establishing that "private parties, rather than government departments, were able to rely on separation-of-powers principles in otherwise justiciable cases or controversies," this Court held that private plaintiffs can invoke the Appropriations Clause as the

source of a constitutional cause of action. *Id.* at 1174 (collecting cases). This Court grounded its ruling in the principle that "separation-of-powers constraints in the Constitution serve to protect individual liberty, and a litigant in a proper case can invoke such constraints '[w]hen government acts in excess of its lawful powers.'" *Id.* at 1175 (quoting *Bond v. United States*, 564 U.S. 211 (2011)). *McIntosh* is clear: whether phrased as a cause of action for an Appropriations Clause violation or a violation of the separation of powers, Plaintiffs have a constitutional cause of action if they have an Article III injury arising from Defendants' efforts to spend money in contravention of congressional will.

In short, when the government violates the text of an appropriations restriction, the Appropriations "Clause constitutes a separation-of-powers limitation that [litigants] can invoke" to enjoin the constitutional violation. *McIntosh*, 833 F.3d at 1175. Defendants' assertion that an Appropriations Clause violation is merely an ordinary statutory claim dressed up in constitutional finery, Def. Supp. Br. 7-8, is wrong.

Contrary to Defendants' suggestion, Def. Supp. Br. 8, it is entirely unsurprising—and appropriate—that this Court did not discuss *Dalton* in *McIntosh*, because the difference in context between appropriations statutes and other legislation leads to a difference in their constitutional significance. Whatever *Dalton* stands for, nothing in the Supreme Court's decision in that case remotely

bears on the availability or scope of an Appropriations Clause challenge. While a claim concerning ordinary statutory authority might not always implicate separation of powers, when the government spends money in violation of an appropriations act, it is "drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause." *McIntosh*, 833 F.3d at 1175.[1]

As the district court correctly concluded, "the position that when Congress declines the Executive's request to appropriate funds, the Executive nonetheless may simply find a way to spend those funds 'without Congress' does not square with fundamental separation of powers principles dating back to the earliest days of our Republic." Order 54-55. These fundamental separation-of-powers principles do not disappear merely because an appropriations act is at issue, and Plaintiffs properly invoke them here.

[1] Defendants' reliance on *Harrington v. Schlesinger*, 528 F.2d 455, 457-58 (4th Cir. 1975), is misplaced. Def. Supp. Br. 6. *Harrington* concerned the distinct issue of taxpayer standing, which requires plaintiffs to demonstrate a nexus between their taxpayer status and the claimed constitutional violation. *Id.* at 457 (citing *Flast v. Cohen*, 392 U.S. 83 (1968)). In that unique context, Plaintiffs had to show that a challenged appropriation violated "the specific constitutional limits imposed on the exercise of that spending power." *Id.* at 458; *see Flast*, 392 U.S. at 84-85, 88 (taxpayer standing to challenge violation of the express prohibition of the Establishment and Free Exercise Clause). *Harrington* has no relevance where, as here, plaintiffs are not seeking standing based on their status as taxpayers and have demonstrated an independent basis of standing to challenge an Appropriations Clause violation. In any event, to the extent the Fourth Circuit's view is inconsistent with this Court's recent decision in *McIntosh*, this Court's law controls.

ii. No zone-of-interests limitation shields Defendants' violation of the Appropriations Clause from review.

At the threshold, there is no cause for this Court to consider Defendants' argument that the zone-of-interests requirement applies to constitutional claims. Defendants make this argument for the first time on appeal, and included no such argument in their preliminary injunction briefing in the district court. *See* Def. Opp. Br., No. 19-cv-00892-HSG (N.D. Cal.), ECF No. 64. Consequently, Defendants have waived this objection as to Plaintiffs' constitutional claims. *See Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1087 n.6 (9th Cir. 2003) ("[B]ecause the zone of interests test is merely prudential rather than constitutional it is waivable, and Defendants have waived it by not raising it below.").

Even if their argument were not waived, Defendants are wrong that Plaintiffs' constitutional claims should be subject to zone-of-interests limitations. Both the Supreme Court and this Court have only ever applied this limitation to constitutional claims under the dormant Commerce Clause, and this Court has followed Justice Scalia's view that the test is particularly applicable to this single type of constitutional claim. *See Individuals for Responsible Gov't, Inc. v. Washoe Cty. By & Through the Bd. of Cty. Comm'rs*, 110 F.3d 699, 703 (9th Cir. 1997) (noting zone-of-interests limit applies to constitutional claims "under the negative [dormant] commerce clause *in particular*" (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting) (emphasis added))). Indeed, in recent

decades the Supreme Court has "recast the zone-of-interests inquiry as one of statutory interpretation," and has not applied the zone-of-interests test to any constitutional claim in decades. *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1120-21 (9th Cir. 2015) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127-28 (2014)); *see* Fed. Ct. Scholars Br. 12-13. The Supreme Court made no mention of the test this week in its most recent examination of a dormant Commerce Clause challenge. *See Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, No. 18-96 (U.S. June 26, 2019).[2]

But this Court need not decide the exact parameters of the continuing application of a zone-of-interests analysis in constitutional cases because Plaintiffs would easily satisfy it. This test is not demanding. "The zone-of-interests test denies a right of review if the plaintiff's interests are marginally related to or inconsistent with the purposes implicit in the relevant constitutional provision." *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 932 (9th Cir. 2011) (quotation and alteration marks omitted). The Appropriations Clause has a "fundamental and comprehensive purpose . . . to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as

[2] The last reference to a zone of interests in the Supreme Court's constitutional jurisprudence is in Justice Scalia's dissent in *Wyoming v. Oklahoma*, where he predicted that if the majority's "rejection of the zone-of-interests test is applied logically, we can expect a sharp increase in all constitutional litigation." 502 U.S. at 473 (Scalia, J., dissenting).

to the common good and not according to the individual favor of Government agents." *McIntosh*, 833 F.3d at 1175 (quoting *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 427-28 (1990)).

If the zone-of-interests tests applies, "[t]he ultimate question, therefore, is whether [Plaintiff's] claims bear more than a marginal relationship to claims addressing" Defendants' efforts to spend money in contravention of the difficult judgments reached by Congress as to the common good. *Yakima Valley Mem'l Hosp.*, 654 F.3d at 932. "As the name implies, the zone of interests test turns on the *interest* sought to be protected, not the *harm* suffered by the plaintiff." *Id.* (quotation marks omitted). "Any alleged injury must somehow be tied to" an executive effort to spend money in contravention of Congressional judgment. *Id.* (quotation marks omitted). Plaintiffs' harms are clearly "tied to" an executive effort to spend money in circumvention of difficult Congressional judgments, which is the "*interest* sought to be protected." *Id.*; *see, e.g.*, Order 27 ("The crux of Plaintiffs' case is that Defendants' methods for funding border barrier construction are unlawful."); Order 1-2 ("In short, Plaintiffs seek to prevent executive officers from using redirected federal funds for the construction of a barrier on the U.S.-Mexico border."). Their interests are entirely congruent with the broad separation-of-powers interest articulated by Justice Kennedy: If "the decision to spend [is] determined by the Executive alone, without adequate control by the citizen's

Representatives in Congress, liberty is threatened. Money is the instrument of policy and policy affects the lives of citizens. The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints." *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring).

Rather than engage with the purpose of the Appropriations Clause, Defendants make the incredible assertion that the zone-of-interests with respect to Plaintiffs' constitutional claim is defined by the zone-of-interests of a *statute*. Def. Supp. Br. 11-12. Defendants do not cite a single case, in this circuit or any other, that has ever held that the zone of interests of a constitutional claim is determined by reference to a statute. Nor do Defendants address this Circuit's clear statement that, where it applies, "[t]he zone-of-interests test" turns on "the purposes implicit in the relevant *constitutional* provision." *Yakima Valley Mem'l Hosp.*, 654 F.3d at 932 (quotation omitted) (emphasis added).

In addition to its lack of any legal basis, Defendants' effort to graft a statutory zone-of-interests test on a constitutional cause of action should also be rejected for the absurd—and dangerous—results it would produce. Defendants' novel theory would insulate many unconstitutional statutes from review because those plaintiffs with the most concrete reason to bring a constitutional challenge would be least likely to find themselves within the zone-of-interests of the unconstitutional enactment. Under Defendant's logic, for example, in bringing a

Presentment Clause challenge to the president's exercise of authority under the Line Item Veto Act, the plaintiffs in *Clinton v. City of New York* should have been first required to demonstrate that they fit within the zone of interests of the Line Item Veto Act itself. But the challengers, "a farmers' cooperative consisting of about 30 potato growers in Idaho and an individual farmer who is a member and officer of the cooperative," 524 U.S. at 425, had interests that were plainly inconsistent with Congress's purposes in passing the Line Item Veto Act. That Act was enacted "for the purpose of 'ensur[ing] greater fiscal accountability in Washington,'" *id.* at 447 (quoting H.R. Rep. No. 104-491, at 15 (1996)). The potato growers sued because the President's cancellation of a tax benefit resulted in more money for the Treasury (as Congress intended), but imperiled a tax benefit the potato growers hoped to take advantage of. *Id.* at 426. Under Defendants' rule, the Court might never have decided the critical constitutional issue because no individual harmed by the unconstitutional Line Item Veto Act would plausibly have been in a position to challenge its constitutionality.

In short, *even if* the zone-of-interests test applies to Plaintiffs' constitutional challenges, it is plainly satisfied here.

C. The APA does not bar concurrent equitable and constitutional claims.

Defendants argue that the APA supersedes and is exclusive of any equitable or constitutional claims. Def. Supp. Br. 17-18. But the APA does not limit the availability of other forms of review.

As the Supreme Court confirmed just this week in *Kisor v. Wilkie*, the APA's judicial review provision "was understood when enacted to restate the present law as to the scope of judicial review" and the Supreme Court has "thus interpreted the APA not to significantly alter the common law of judicial review of agency action." No. 18-15, 2019 WL 2605554 (U.S. Jun. 26, 2019) (slip op.) (quotation and alteration marks omitted). By its own terms, the APA "do[es] not limit or repeal additional requirements imposed by statute or otherwise recognized by law." 5 U.S.C. § 559; *see* U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 139 (1947) (this provision was "intended simply to indicate that the act will be interpreted as supplementing constitutional and legal requirements imposed by existing law").

Thus, as Judge Silberman explained in the D.C. Circuit's decision in *Reich*, the "enactment of the APA . . . does not repeal the review of *ultra vires* action recognized long before," and "[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." 74 F.3d at 1328. Nor did *Dalton* purport to silently overrule this longstanding principle. Instead, it

"assume[d] for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA." *Dalton*, 511 U.S. at 474 (citing *Dames & Moore*, 453 U.S. at 667). Defendants have pointed to nothing in the APA that restricts the Court's traditional equitable powers. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

Nor, of course, can the APA be read to eliminate concurrent constitutional causes of action. In *Presbyterian Church (U.S.A.) v. United States*, this Court made clear that it need not determine whether "whether the alleged INS surveillance in this case constituted 'agency action'" for the purposes of an APA claim, because the plaintiffs had plead causes of action under the First and Fourth Amendments. 870 F.2d 518, 525 n.8 (9th Cir. 1989). Whether or not APA review was additionally available to the plaintiffs was irrelevant in determining the plaintiffs' entitlement to constitutional claims. Thus, in this case as well, the availability of an APA cause of action has no bearing on whether Plaintiffs have a cause of action under the Appropriations Clause. And as this Court established in *McIntosh*, Plaintiffs have such a constitutional claim. *See supra* Section I.B.

II. Plaintiffs Also Have a Meritorious APA Claim.

A. Defendants' final decision to spend unappropriated funds on the border wall is reviewable under the APA.

Defendants argue that the transfers from military pay and pension accounts to border wall construction under Section 8005 are not reviewable under 5 U.S.C. § 704 as either "final agency action" or as "preliminary, procedural, or intermediate agency action." *See* Def. Supp. Br. 14-15. This attempt to insulate the Section 8005 transfers from APA review fails on both fronts.

The Section 8005 transfers are final agency action under the APA because they "mark the 'consummation' of the agency's decisionmaking process," and are a means by which "'rights or obligations have been determined' or 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted). Defendants do not dispute that DoD has "consummate[ed]" the Section 8005 transfer. Nor can Defendants dispute that DoD's Section 8005 transfer has the direct legal consequence of procuring funds for border wall construction—funds that would otherwise have been unavailable, and construction that would otherwise be impossible. These consequences—both the transfer of funds into the counter-narcotics account, and the construction enabled thereby—are sufficient to render DoD's actions final for purposes of the APA. The agency has not left itself some "discretion over whether or not" the funds will be moved. *Int'l Bhd.of Teamsters v. U.S. Dep't of Transp.*, 861 F.3d 944, 952 (9th Cir. 2017). Rather,

DoD has "change[d] the legal situation," *id.*—it has transferred the money, and used it. *See Bennett*, 520 U.S. at 178 (actions that lack legal consequences are those that "serve 'more like a tentative recommendation than a final and binding determination" (citation omitted)).

Defendants seek to elide these consequences by suggesting that the transfer accomplished under Section 8005, taken alone, "has no legal consequences *for plaintiffs*." Def. Supp. Br. 14 (emphasis added). But the finality of an action does not depend upon its consequences *for plaintiffs*, and Defendants may not read an additional zone-of-interests requirement into the second *Bennett* factor. As the Supreme Court explained in *Bennett*, an agency action can be final if it affects the "regime to which *the action agency* is subject." *Bennett*, 520 U.S. at 178 (emphasis added). Defendants cannot reasonably dispute that DoD's actions under Section 8005 determined rights and obligations and had legal consequences for DoD. *Id.* (agency's action has legal consequences because it authorized agency "to take the endangered species if (but only if) it complies with the prescribed conditions"); *see also Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 319-320 (D.C. Cir. 2011) (action that withdraws discretion from agency's regional directors is final); *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1007 (D.C. Cir. 2014) (action that "provides firm guidance to [agency] officials about how to handle permitting decisions" is final). The Section 8005 transfers plainly have a legal

consequence: in the absence of those transfers, Defendants could not obligate the billion dollars for wall construction at issue here.[3]

Alternatively, even if there were any question about finality, the 8005 transfers could be reviewed as "preliminary, procedural, or intermediate agency action" in connection with review of final agency action under Section 284. *See* 5 U.S.C. § 704. Defendants contend that DoD's transfer of funds under Section 8005 was not "inherently bound up in" its use of those funds pursuant to Section 284—that the two actions were unrelated. Def. Supp. Br. 15. The record, Defendants' arguments to this Court, and common sense utterly belie that assertion. Defendants acknowledged *before* announcing DoD's Section 284 projects that such projects were not possible without transferring funds by Section 8005. *See, e.g.*, Rapuano Decl., ECF 7-1, Ex. 8-C, Memorandum from Elaine McCusker to Under Secretary of Defense (Comptroller); Admin. R., ECF 163-1, Memorandum from Patrick M. Shanahan to Under Secretary of Defense for Policy, dated March 8, 2019 (attached here) ("In order to support the DHS request for assistance, the

[3] In addition, the transfer has significant practical consequences. Courts "focus on both the practical and legal effects of the agency action, and define the finality requirement in a pragmatic and flexible manner." *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1163 (9th Cir. 2018) (quotation marks omitted). DoD's Section 8005 transfer is "a practical requirement," *id.*, for Defendants' border wall projects, and operations could not commence without it, *see* Order 16 ("[E]very dollar of Section 284 support to DHS and its enforcement agency, CBP, is attributable to reprogramming mechanisms."); *see generally Laub*, 342 F.3d at 1088-89 (action is sufficiently final for judicial review under APA where it will "influence subsequent . . . actions").

Department would need to transfer funding into the Drug Interdiction and Counter-Drug Activities, Defense appropriation, using the general transfer authority (GTA) provided for under Section 8005[.]"); Admin. R., ECF 163-1 at 2, Memorandum from Kenneth P. Rapuano to Acting Secretary of Defense, dated March 21, 2019 (attached here) ("To meet any level of the support requested by DHS, additional funds must be transferred . . . using DoD's general transfer authority (GTA), which is provided in Section 8005[.]") And, as discussed above, Section 8005 is itself inextricable from the purpose for which the funds will be used. *See also* Order 24 ("Since Defendants first announced that they would reprogram funds using Section 8005, they have uniformly described the object of that reprogramming as border barrier construction."). In short, Defendants' Section 8005 transfers are not beyond APA review.

B. The zone-of-interests test does not bar Plaintiffs' APA claim.

As Plaintiffs previously demonstrated, they are within the zone of interests of Section 8005. Opp. 9-13. The inquiry is "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) (citation omitted). Agency action is "presumptively reviewable," and a party's interest need only be "arguably within" a statute's zone of interests. *Id.* Congress's intent to exclude a category of plaintiffs

from judicial review must be "fairly discernible." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 401, 399 (1987).

Plaintiffs "were involved with Congress's funding decisions with respect to the border wall," Opp. 9, and now seek to enforce those decisions, including through the restrictions Congress imposed on reprogramming in contravention of Congressional funding denials. "[I]t is sufficient that the Organizations' asserted interests are consistent with and more than marginally related to the purposes of the [statute]." *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1244 (9th Cir. 2018); *see also Clarke*, 479 U.S. at 401 (zone-of-interests analysis must consider "overall context" and "overall purposes" of congressional action). Moreover, as Plaintiffs explained, because the Section 8005 decisions at issue here unquestionably involved the implementation of the transferred funds, Plaintiffs—as neighbors to that implementation—were within the zone of interests. *See* Opp. 11; *Patchak*, 567 U.S. 209 (as implementation of a land acquisition statute involved consideration of the land's eventual use, a plaintiff asserting "environmental' and "aesthetic harm" was within the zone of interests).

But even if Plaintiffs were not so directly involved in the denial of funds leading to Defendants' use of Section 8005, they would still be within the zone of interests as suitable challengers to Defendants' actions. The D.C. Circuit's decision in *Scheduled Airlines Traffic Offices, Inc. v. Dep't of Defense*, 87 F.3d 1356 (D.C.

Cir. 1996), illustrates the expansive zone of interests for claims arising under statutes protecting Congress's control over appropriations decisions. There, the court evaluated the zone-of-interests of a statute similarly aimed at tightening congressional control over executive spending. *Id.* at 1360. There was no indication that, in enacting the statute, Congress intended to benefit any third party, or indeed to "benefit anything other than the public fisc and Congress's appropriation power." *Id.* The D.C. Circuit nonetheless held that an individual seeking enforcement was within the very broad zone-of-interests because no claim could meaningfully diverge from Congress's interests in enacting the statute: "Either the funds at issue in this case are covered by the statute or they are not. There is no possible gradation in the statute's requirement. Because a statutory demarcation thus limits what [the plaintiff] can request, we run no risk that the outcome could in fact thwart the congressional goal." *Id.* at 1361 (quotation and alteration marks omitted).

Defendants suggest an inverse zone-of-inquiry rule: Section 8005 is effectively unreviewable and unenforceable. In the past, they claimed that "this is not a statute that anyone really has the authority to invoke." Hearing Tr. 98:04-05, *House v. Mnuchin*, No. 19-cv-969 (D.D.C. May 23, 2019). More recently, Defendants suggested that it would be "an exceedingly small number of people" who might theoretically be within Section 8005's zone of interests, perhaps limited

to a defense contractor entitled to funds that were nonetheless transferred. Oral Argument Recording at 10:57-11:20. Defendants do not explain why defense contractors' interests are more consistent with Congress's protection of its own appropriations powers that Plaintiffs' interests, nor do they identify how any defense contractor could possibly have an entitlement to funds transferred under Section 8005, as that Section provides no authority to transfer already-obligated funds. In any event, Defendants' theory is incompatible with the Supreme Court's "capacious view of the zone of interests requirement," which holds that a "suit should be allowed unless the statute evinces discernible congressional intent to preclude review." *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1269 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part) (discussing Supreme Court's expansive view of the zone-of-interests), *rev'd sub nom. Michigan v. EPA*, 135 S. Ct. 2699 (2015).

C. Defendants' legal arguments are not entitled to deference under the APA.

Review under the APA would not require the District Court to defer to Defendants' interpretation of Section 8005. Under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), deference is appropriate only where: (1) "Congress delegated authority to the agency generally to make rules carrying the force of law," and (2) "the agency interpretation claiming deference was

promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

Neither condition exists here. First, Congress did not provide DoD with "the authority to administer [appropriations restrictions] by issuing regulations with the force of law." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *see also Smith v. Berryhill*, 139 S. Ct. 1765, 1778 (2019) (holding that deference is inappropriate where statutory question is one that Congress is unlikely to have delegated to agency). And second, Defendants have provided their statutory interpretation only in the course of this litigation—not through the "exercise" of any rulemaking or formal authority, *Mead*, 533 U.S. at 227. An agency's litigating position merits, at most, "respect proportional to its 'power to persuade.'" *Id.* at 235.[4]

[4] Deference is inappropriate for a third, independent reason: *Chevron* is inapplicable to an agency's statutory interpretation, if the "proffered interpretation raises *serious* constitutional concerns"—as does Defendants' interpretation here. *Williams v. Babbitt*, 115 F.3d 657, 662-63 (9th Cir. 1997) ("[J]ust as we will not infer from an ambiguous statute that Congress meant to encroach on constitutional boundaries, we will not presume from ambiguous language that Congress intended to authorize an agency to do so."); *accord Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (The "canon of constitutional avoidance trumps *Chevron* deference."). "When agencies adopt a constitutionally troubling interpretation, . . . we can be confident that they not only lacked the expertise to evaluate the constitutional problems, but probably didn't consider them at all." *Williams*, 115 F.3d at 662.

What is left is then, at most, is *Skidmore* deference to an agency interpretation, which "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). And as the Supreme Court reminded the administration yesterday, "[e]ven where deference is required, this Court is 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Commerce v. New York*, No. 18-966, 2019 WL 2619473, at *28 (U.S. June 27, 2019) (slip op.) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, C.J.)).

Here, none of the factors enhances the persuasive power of the agency's position. The Acting Secretary's decision provides no evidence of thoroughness, no indication of its reasoning, and no consistency with decades of practice. *See* Rapuano Decl., ECF No. 7–3, Ex. C at 2 (conclusory statements that construction of wall segments was "an unforeseen military requirement not known at the time of the FY 2019 budget request," and had "not been denied by Congress"); Order 9-10, 37-38. Accordingly, there is no occasion for deference. *See, e.g.*, *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1211 (9th Cir. 2013) ("declin[ing] to grant deference" under *Skidmore* where there is "no analysis at all").

The government's elaborated interpretation of Section 8005, such as it is, is contained entirely in its briefing. This Court "do[es] not afford *Chevron* or *Skidmore* deference to litigation positions unmoored from any official agency interpretation because 'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'" *Alaska v. Fed. Subsistence Bd.*, 544 F.3d 1089, 1095 (9th Cir. 2008) (citation omitted). Lacking any claim to deference, Defendants' various arguments—that Congress intended the word "unforeseen" to cover Congress's own decision to deny funding to DHS, that Congress intended the words "item" and "denied" to be limited to requests for specific line items under identified statutory authorities, that subcomponents of an "item" are not "denied" when Congress refuses to fund a broader request that encompasses them—must stand or fall on their own merits. As Plaintiffs have shown, the district court was correct to reject them. Opp. 13-15.

Where, as here, an agency intends to spend a billion dollars on an undeniably controversial wall project, it must "offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better

than the explanation offered for the action taken in this case." *Dep't of Commerce v. New York*, No. 18-966, Slip Op. 28, 2019 WL 2619473, at *28.

III. Congress Has Not Prohibited Review.

At bottom, Defendants argue that, because they have invoked Section 8005, their actions are beyond the review of this or any court. But the Supreme Court has repeatedly held the when the government seeks to preclude review of a "substantial statutory and constitutional challenge[]" to executive decisionmaking, it is taking an "extreme position" requiring "a showing of clear and convincing evidence, to overcome the strong presumption that Congress did not mean to prohibit all judicial review of executive action." *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 680 (1986) (citations and quotation marks omitted). Defendants have not remotely made such a showing.

In light of this Court's unequivocal ruling in *McIntosh* that spending money in violation of an appropriations act restriction amounts to "violating the Appropriations Clause," 833 F.3d at 1175, Defendants' efforts to evade review are particularly disfavored. Defendants must carry a heavy burden to show that their violations of the restrictions in Section 8005 are beyond judicial review because the Supreme Court has emphasized that if "Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear" so as "to avoid the serious constitutional question that would arise if a federal statute were construed

to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (quotation marks omitted).

And even when only statutory violations are at issue, clear and convincing evidence of congressional intention to preclude review is required. *See Bowen*, 476 U.S. at 680. This is because courts "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Id.* at 681. Try as Defendants might to evade judicial scrutiny, their efforts to usurp congressional control over appropriations are the proper subject of this Court's review.

CONCLUSION

For the reasons stated in this brief and in Plaintiffs' Opposition, Defendants' Motion for a Stay should be denied.

Dated: June 28, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of 8,000 words because it contains 7,014 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Dror Ladin
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Dated: June 28, 2019

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2019, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

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