No. 19-16102

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR *AMICUS CURIAE* SLSCO LTD. IN SUPPORT OF DEFENDANTS-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING APPEAL

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June 10, 2019

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* SLSCO Ltd. ("SLS") states that it is a nongovernmental limited partnership organized and existing under the laws of the State of Texas. SLS is not a subsidiary of any corporation, and no publicly traded corporation owns 10% or more of SLS's stock.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

SLSCO Ltd. ("SLS") has a direct interest in this matter because, ultimately, this action seeks to divest the U.S. Army Corps of Engineers ("Army Corps") of funding to carry out a procurement contract awarded to SLS for the construction of a barrier along a portion of the southwest border with Mexico. On April 9, 2019, the Army Corps awarded SLS a contract to perform the work that is the direct subject of Defendants' Emergency Motion Under Circuit Rule 27-3 for Stay Pending Appeal, ECF No. 7-1 ("Defendants' Motion for Stay"). SLS was also a party to a prior proceeding before the U.S. Court of Federal Claims involving this same work. In that case, the Court of Federal Claims denied injunctive relief and entered final judgment in favor of the Government and SLS. Or. for J. at 2, *Fisher Sand & Gravel Co. v. United States*, No. 19-cv-615C (Fed. Cl. May 21, 2019, reissued in public form May 29, 2019) (copy attached hereto as Exhibit 1).

SLS submits this *amicus* brief to provide the Court with additional facts regarding the federal government procurement action that is at the heart of this dispute and to alert this Court to a jurisdictional provision that grants the Court of

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), SLS states that no one, except for SLS and its counsel, authored this brief in whole or in part, or contributed money towards the preparation of this brief. Defendant-Appellants and Plaintiffs-Appellees have, through counsel, consented to the filing of this brief.

Federal Claims exclusive jurisdiction over this federal procurement matter and that ultimately divested the District Court of jurisdiction to enter its injunction.

ARGUMENT

As Defendants have explained, the District Court's preliminary injunction is fundamentally flawed. SLS strongly supports Defendants' motion for stay of that order pending appeal. But SLS respectfully submits that there is another, even more fundamental, reason why the District Court erred in granting a preliminary injunction: the District Court lacked subject matter jurisdiction to issue the injunction. *See Steel Co. v. Citizens for Better Environment*, 523 U.S. 83 (1998).

A. Procurement History And Prior Proceedings

On April 9, 2019, the Army Corps awarded a federal government contract to SLS to construct the forty-six miles of border fencing in New Mexico known as the El Paso Sector Project 1. On April 25, 2019, one of the disappointed bidders involved in the procurement, Fisher Sand & Gravel Co. ("Fisher"), filed a lawsuit at the Court of Federal Claims seeking, *inter alia*, to enjoin work on the El Paso Sector Project 1. After expedited briefing and oral argument, the Court of Federal Claims denied Fisher's request for injunctive relief and granted final judgment in favor of the Government and SLS. *See* Exhibit 1 at 2, 10.[2]

[2] On June 3, 2019, the U.S. District Court for the District of Columbia also issued an opinion explaining its decision denying an injunction in a separate case that would have also had the effect of enjoining work on the El Paso Sector Project 1.

The Opinion of the Court of Federal Claims was originally issued under seal on May 21, 2019. It is common for opinions by the Court of Federal Claims to be initially issued under seal to afford the parties an opportunity to propose the redaction of procurement-sensitive or other protected information. On May 29, 2019, the Court of Federal Claims Opinion was re-issued publicly after all parties advised the Court of Federal Claims that no redactions were necessary. *Id.* at 1 n.1.

In that decision regarding this procurement, the Court of Federal Claims referenced the government's identification of the need for the construction of border fencing through the President's February 15, 2019, "proclamation declaring a national emergency concerning the security of the southern border of the United States." *Id.* at 2. Moreover, the Court of Federal Claims specifically went through the steps taken by the government to identify funding and authority to support the procurement.[3] The Court of Federal Claims further explained: "[T]he Assistant Secretary of Defense for Homeland Defense and Global Security sought and received authority from the Acting Secretary of Defense to immediately shift funds

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Mem. Op., *United States House of Reps. v. Mnuchin*, No. 19-cv-0969 (D.D.C. June 3, 2019), ECF No. 54.

[3] The District Court similarly focused on these funding and authority provisions. *See* Order (ECF No. 144) at 9 ("To fund the Section 284 diversion, Defendant Shanahan simultaneously invoked Section 8005 of the most-recent DoD appropriations act to 'reprogram' $1 billion from Army personnel funds to the counter-narcotics support budget.") and 41-42 ("the Court finds that Plaintiffs have shown a likelihood of success as to their argument that the reprogramming of $1 billion under Section 8005 to the Section 284 account for border barrier construction is unlawful.").

for the implementation of Option One, which called for construction of fencing along … 46 miles near El Paso." *Id.* at 3.

On May 24, 2019, the U.S. District Court for the Northern District of California issued an injunction that is the subject of Defendants' Motion for Stay. While the Plaintiffs' complaint alleged violations of environmental laws, the District Court made clear that its preliminary injunction decision was not founded on the Plaintiffs' environmental allegations: "Plaintiffs are not likely to succeed on their [National Environmental Policy Act ("NEPA"), Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4370b)] argument because of the waivers issued by [the Department of Homeland Security]." Order at 47, *Sierra Club v. Trump*, No. 19-cv-0872 (N.D. Cal. May 24, 2019),ECF No. 144 ("Order"). Rather, the District Court based its decision on Plaintiffs' other claims, which were all related to the appropriation of funding for the contracts to construct the border barriers. *See, e.g.*, Order at 32 (finding likelihood of success regarding whether Congress denied funding), 41-42 (finding likelihood of success as to argument that reprogramming of funds is unlawful); 49-50 (finding irreparable harm regarding alleged violations of 10 U.S.C. § 284 and Section 8005).[4]

[4] With regard to their claims regarding 10 U.S.C. § 2808 and its limitation of construction authority to presidential declarations requiring the use of the armed forces, the District Court found "Plaintiffs have not yet met their burden of showing irreparable harm in the absence of a preliminary injunction." Order at 53.

Finding a likelihood that Plaintiffs would succeed on the appropriations law issues, the District Court enjoined the Secretaries of the Departments of Defense, Homeland Security and Treasury, and all persons acting under their direction, "from taking any action to construct a border barrier in the areas Defendants have identified as Yuma Sector Project 1 and **El Paso Sector Project 1** using funds reprogrammed by [the Department of Defense] under Section 8005 of the Department of Defense Appropriations Act, 2019." Order at 55, ECF No. 144 (emphasis added).[5] The District Court's injunction related to the same El Paso Sector Project 1 regarding which the Court of Federal Claims previously held should not be enjoined.

As a direct result of the District Court's injunction, the Army Corps issued a notice of suspension of work on the El Paso Sector Project 1 to SLS within hours of the District Court issuing its injunction. This notice stated:

> SLSCO, Ltd. is hereby directed to suspend all work pursuant to FAR Clause 52.242-14, SUSPENSION OF WORK (APR 1984), under Contract No. W912PP19C0018, Design-Build Construction Project for El Paso Sector FY18 Primary Pedestrian Wall Replacement. This suspension of work is issued as a result of the preliminary injunction from the U.S. District Court, Northern District of California notification on May 24, 2019 that all work shall be suspended.

[5] Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018) ("Section 8005").

May 24, 2019 Letter from L. Molina, Army Corps, to W. Sullivan, SLS (attached as Exhibit 2).

In addition, the Commanding Officer for Task Force Barrier, Army Corps, South Pacific Division, submitted a declaration explaining that, under the suspension of work order, SLS is required to incur substantial costs under its contract including costs to keep equipment ready at multiple locations, security costs to avoid equipment and materials from being stolen or vandalized, and labor costs during the period of contract suspension. *See* McFadden Decl. ¶¶ 12-13, ECF No. 7-6. The Army Corps estimates that SLS will have to incur $195,000 per day so long as the work under the El Paso Sector Project 1 Contract is suspended, and that the Army Corps will eventually have to reimburse SLS for these costs. Defendants' Motion for Stay at 22; McFadden Decl. ¶¶ 13-15.

B. The District Court Lacks Subject Matter Jurisdiction To Issue The Injunction

1. Jurisdiction Is A Threshold Issue Properly Before This Court

All federal courts have an independent obligation to assure subject matter jurisdiction exists, even if the parties themselves do not raise a jurisdictional objection. *Chavez v. JPMorgan Chase & Co.*, 888 F.3d 413, 415 (9th Cir. 2018) ("Although Chavez did not contest jurisdiction below, we have an independent obligation to ensure subject matter jurisdiction exists."). Federal District Courts are

courts of limited jurisdiction and only have the authority to hear cases (and take action) to the extent that they are granted that authority by the Constitution and Congress. *See Gunn v. Minton,* 568 U.S. 251, 256 (2013); *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994). Indeed, the presumption is that a federal district court does not have jurisdiction. *See Kokkonen,* 511 U.S. at 377; *United States v. Hill,* 694 F.2d 258, 260 (D.C. Cir. 1982).

"The requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (quoting *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). "[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Accordingly, because the District Court lacked subject matter jurisdiction to issue the injunction at issue (as explained below), this Court should address this issue now.

2. Congress Specifically Removed Federal District Court Jurisdiction Over "Any Alleged Violation Of Statute Or Regulation In Connection With A Procurement"

Prior to the Administrative Disputes Resolution Act of 1996, Pub. L. No. 104-320, § 12, 100 Stat. 3870, 3874–75 ("ADRA of 1996"), District Courts

shared jurisdiction with the Court of Federal Claims "to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract **or any alleged violation of statute or regulation in connection with a procurement** or a proposed procurement." 28 U.S.C. § 1491(b)(1) (emphasis added). In Section 12 of the ADRA of 1996, however, Congress provided that the concurrent District Court jurisdiction over such actions would expire on January 1, 2001. *See* ADRA of 1996 at § 12(d), 100 Stat. at 3874–75 ("SUNSET - The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001, unless extended by Congress."). Congress has not given 28 U.S.C. § 1491(b)(1) jurisdiction back to District Courts.

In *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071 (Fed. Cir. 2001), the U.S. Court of Appeals for the Federal Circuit explained that Congress terminated this district court jurisdiction to, among other things, "prevent forum shopping and to promote uniformity in government procurement award law." 264 F.3d at 1079. The Federal Circuit stated that it "is clear that Congress's intent in enacting the ADRA with the sunset provision was to vest a single judicial tribunal with exclusive jurisdiction to review government contract protest actions." *Id.*; *see*

also id. at 1080 ("[I]t is clear that the Court of Federal Claims is the only judicial forum to bring any governmental contract procurement protest.").

Thus, since January 1, 2001, the Court of Federal Claims has held exclusive jurisdiction over "any alleged violation of statute or regulation in connection with a procurement or proposed procurement." 28 U.S.C. § 1491(b)(1); *see also Emery*, 264 F.3d at 1080. District courts have routinely dismissed actions involving procurements since January 1, 2001 because of the sunset provision in the ADRA of 1996. *See, e.g.*, *Sigmatech, Inc. v. United States Dep't of Def.*, 365 F. Supp. 3d 1202, 1205 (N.D. Ala. 2019) (dismissing allegations related to a federal procurement because of the sunset provision in the ADRA of 1996); *Labat-Anderson, Inc. v. United States*, 346 F. Supp. 2d 145, 151 (D.D.C. 2004) (same).

3. The Exclusive Jurisdiction Of The Court Of Federal Claims Is Expansive

The statute, relevant regulations, and case law all support an expansive reading of § 1491(b)(1)'s grant of exclusive jurisdiction of the Court of Federal Claims over "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."

a. Both Statute And Regulation Broadly Define "Procurement"

Congress has defined the term "procurement" in an expansive manner. "[T]he term 'procurement' includes all stages of the process of acquiring property or

services, beginning with the process for determining a need for property or services and ending with contract completion and closeout." 41 U.S.C. § 111 (as incorporated by 10 U.S.C. § 2302(3)(A)); *see also Rothe Dev. v. United States Dep't of Def.*, 666 F.3d 336, 339 (5th Cir. 2011) (citing statutory definition of "procurement"); *Distrib. Sols., Inc. v. United States*, 539 F.3d 1340, 1345 (Fed. Cir. 2008) (same).

The Federal Acquisition Regulation similarly provides that a "procurement":

> begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

48 C.F.R. § 2.101 (defining "procurement" as an "acquisition" and providing the above definition for "acquisition").

b. Case Law Also Establishes Expansive Court Of Federal Claims Jurisdiction Under § 1491(b)(1)

In *RAMCOR Services Group, Inc. v. United States*, 185 F.3d 1286, 1289 (Fed. Cir. 1999), the U.S. Court of Appeals for the Federal Circuit explained that § 1491(b)(1) applies even beyond the definition of "procurement," because the "in connection with" language "does not require an objection to [an] actual contract procurement"; instead, "[a]s long as a statute has a connection to a procurement proposal, an alleged violation suffices to supply jurisdiction." Section 1491(b)(1)'s

"in connection with" language is "expansive" and "very sweeping in scope." *See, e.g.*, *Labat-Anderson, Inc.*, 346 F. Supp. 2d at 151. In particular, the D.C. District Court has explained that the scope of 28 U.S.C. § 1491(b)(1) is not limited to traditional bid protest jurisdiction: "[I]f Congress intended to confine the statute to bid protests, it could easily have stated so in the statute, instead of using the sweeping 'in connection with a procurement' language it employed." *Id.* at 153. In fact, the D.C. District Court explained in another case addressing this threshold issue that the jurisdictional language of § 1491: "covers even non-traditional disputes arising from the procurement process as long as the violation is 'in connection with a procurement or proposed procurement.'" *Validata Chem. Servs. v. United States Dep't of Energy*, 169 F. Supp. 3d 69, 78 (D.D.C. 2016) (quoting *Pub. Warehousing Co. K.S.C. v. Def. Supply Ctr.*, 489 F. Supp. 2d 30, 40 (D.D.C. 2007).[6]

[6] The D.C. District Court in *Validata* also explained that the exclusive jurisdiction of the Court of Federal Claims, when premised on the "in connection with a procurement" prong of § 1491(b)(1), is meant to apply broadly to cover all challenges relating to a federal procurement by any party. *See* 169 F.Supp. 3d at 79-82, 84-85 (explaining the intent of Congress in enacting ADRA of 1996 to create a single forum for uniformity and expertise in the development of procurement law regardless of whether the plaintiff is a disappointed bidder or any other party). In *City of Albuquerque v. United States Dep't of the Interior*, the Tenth Circuit concluded that the ADRA is limited to suits by "actual or potential bidder[s]." 379 F.3d 901, 911 (2004). As Judge Moss subsequently explained in *Validata*, however, if the "in connection with" language "were read to apply only to disappointed bidders, it is difficult to imagine what work the 'in connection with' clause would perform . . . ." 169 F3d at 82. Moreover, as Judge Moss further explained, this narrow interpretation of the Court of Federal Claims' jurisdiction is

c. Plaintiffs Cannot Create District Court Jurisdiction By Characterizing Their Claim As An Appropriations Challenge

Through the years, plaintiffs have tried to evade this grant of exclusive Court of Federal Claims jurisdiction by filing complaints in federal district courts that seek to characterize their actions as other than a challenge to the award or performance of a government contract. A body of law has developed against this practice. *See, e.g., Validata Chem. Servs.*, 169 F. Supp. 3d at 71, 89-91 (rejecting plaintiff's "attempt to reframe its claim against SBA-OHA as a constitutional due process challenge," holding the claim was "ultimately premised" on a violation of its rights "in connection with a procurement," and transferring the case to the Court of Federal Claims); *Labat-Anderson*, 346 F. Supp. 2d at 154 (dismissing for lack of jurisdiction a plaintiff's claims that, despite plaintiff's arguments to the contrary, were "in every relevant respect a challenge to the procurement process").

Specifically, the Court of Federal Claim's jurisdiction covers actions that include claims, like Plaintiffs' here, alleging that an agency's contract actions lack requisite funding. For instance, in *Sims v. United States*, 112 Fed. Cl. 808, 818-21 (2013), the Court of Federal Claims considered the plaintiffs' allegation that the government was "contracting in advance of funding availability or appropriations."

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inconsistent with the legislative history of the ADRA as well as other important factors. *See id.* at 82-85.

Similarly, in *Ultimate Concrete, LLC v. United States*, 127 Fed. Cl. 77, 84 (2016), the plaintiff contended that the awardee's proposal would result in a payment to the plaintiff in violation of the Anti-Deficiency Act, 31 U.S.C. § 3324.

4. The Preliminary Injunction Issued By The District Court Is Premised On An "Alleged Violation Of Statute Or Regulation In Connection With A Procurement"

The alleged violation of Section 8005 found by the District Court, *see* Order at 31-41, is "in connection with" a procurement for several independent reasons. First, the challenge was triggered by a procurement—the identification of the need for construction of the barrier at issue, arrangement of funding to meet that need, and procurement of services to construct that barrier. As the Court of Federal Claims analysis makes evident, *see* Exhibit 1 at 2-3, this procurement began with the identification of the need of the border fencing as set forth in the Presidential Proclamation. *See* Presidential Proclamation at 1. And as explained above: "The statute explicitly specifies that the stage where the process 'begin[s]' is the 'process for determining a need for property or services.'" *Fisher-Cal Indus. v. United States*, 747 F.3d 899, 902 (D.C. Cir. 2014).

Second, Section 8005 governs the funding available to the agency to carry out that procurement. The actions of DHS to request assistance and DOD to transfer funds to meet the need identified by the President under the authority of 10 U.S.C. § 284 and Section 8005 was a critical part of the procurement. *See, e.g.,* Notice of

Admin. R. Exhibit 1 at 5, *Sierra Club v. Trump*, No. 19-cv-0872 (N.D. Cal. June 7, 2019), ECF No. 163-1 ("Notice") (determining "that transferring $1B in funds for this support is in the national interest and that the other requirements of [Section 8005] … are met."), *id.* at 16 (DHS requesting DOD support under 10 U.S.C. § 284), and *id.* at 22-23 (identifying the need for the El Paso Project 1).[7]

Third, the District Court's injunction directly impeded that procurement. Indeed, within hours of the District Court's injunction, the Army Corps issued a suspension of work order under the El Paso Sector Project 1 Contract. *See* Exhibit 2. This suspension of work order removes any doubt that the alleged violation of appropriation statutes is "in connection with a procurement."

As the Federal Circuit has explained: "Where an agency's actions under a statute so clearly affect the award and performance of a contract, this court has little difficulty concluding that that statute has a 'connection with a procurement.'" *RAMCOR Servs. Grp., Inc.*, 185 F.3d at 1289 (citation omitted). Here, the District Court's injunction was based on the alleged violation of appropriation statutes closely associated with procurement actions, and the injunction resulted in an immediate stop work order on the procurement at issue here. The District Court therefore lacked jurisdiction to enter its injunction.

[7] This determination was subsequently modified to increase the proposed height of the fence for the El Paso Project 1. *See* Notice at 55-57, ECF No. 163-1.

CONCLUSION

The Court should vacate the District Court's injunction for lack of jurisdiction and, at a minimum, grant Defendants' motion for a stay pending appeal.

June 10, 2019

Respectfully submitted,

s/ Gregory G. Garre

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2019, I caused the foregoing Brief of *Amicus Curiae* SLSCO Ltd, in support of defendants-appellants' Emergency Motion Under Circuit Rule 27-3 for Stay Pending Appeal to be served by electronic means through the Court's CM/ECF system on counsel for all parties who are registered CM/ECF users.

s/ Gregory G. Garre
Gregory G. Garre

CERTIFICATE OF COMPLIANCE

Counsel for *amicus curiae* SLSCO Ltd. certifies:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5), Ninth Circuit Rules 32-1(a), and this Court's Order dated June 7, 2019, ECF No. 11, because this brief contains 3087 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font type.

Dated: June 10, 2019

s/ Gregory G. Garre
Gregory G. Garre

Attorney for Amicus Curiae

EXHIBIT 1

In the United States Court of Federal Claims

No. 19-615C
(Originally filed: May 21, 2019)
(Re-issued: May 29, 2019)[1]

* *

FISHER SAND & GRAVEL CO.,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

SLSCO LTD.,

Intervenor.

Post-award bid protest; CICA stay override; Urgent and compelling circumstances; Determination and finding; *Reilly* Factors; AFARS 5133.104(b)(a)(A); National emergency; National Security.

* *

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Anthony F. Schiaveti, Trial Attorney, United States Department of Justice, Civil Division, Commercial Litigation Branch, Washington, DC, with whom was *Douglas K. Mickle*, Assistant Director, for defendant. *David Cooper*, *Parag J. Rawal*, *Barbara Hebel*, *Katherine D. Denzel*, *Blake M. Hedgecock*, and *Alexandria Tramel*, U.S. Army Corps of Engineers, of counsel.

David R. Hazelton, Washington, DC, with whom were *Kyle R. Jefcoat*, *Dean W. Baxtresser*, and *Chase A. Chesser*, for intervenor.

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[1] This order was originally issued under seal to afford the parties an opportunity to propose redaction of protected information. The parties agreed that no redactions were necessary. One erratum has been corrected.

ORDER FOR JUDGMENT

BRUGGINK, *Judge.*

Plaintiff is a bidder on a solicitation by the Army Corps of Engineers ("COE") to contract for the construction of 46 miles of border fencing in New Mexico. Plaintiff did not receive the award; instead it was given to intervenor, SLSCO, on April 9, 2019. Plaintiff filed a timely protest at the Government Accountability Office ("GAO") on April 18, triggering the Competition in Contracting Act's ("CICA") automatic 100-day stay of contract performance. 31 U.S.C. § 3553(d)(3)(A) (2012). Pursuant to 31 U.S.C. § 3353(d)(3)(C) (2012), COE exercised its authority to override the stay and continue with contract performance. This is an action challenging that override decision. Pending are the parties' cross motions for judgment on the administrative record.[2] Oral argument was held on May 16, 2019. At the conclusion of oral argument, the court announced that it would deny plaintiff's motion for judgment on the administrative record and grant defendant's and intervenor's cross motions.

FACTUAL & PROCEDURAL BACKGROUND

On February 15, 2019, the President issued a proclamation declaring a national emergency concerning the security of the southern border of the United States. The proclamation recites that the "current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency." Administrative Record ("AR") at 14. The proclamation authorizes the use of armed forces to assist other elements of the government to secure the border. In an undated (but presumably executed in March 2019) Department of Homeland Security ("DHS") memo to the Department of Defense ("DOD"), DHS asked for assistance from the Army in constructing fencing in specific high-risk sectors of the border, all associated with intense drug smuggling activity. *See* 10 U.S.C. § 284 (2012) (authorizing DOD to provide "support for the counterdrug activity or

[2] Intervenor also filed a motion to dismiss for lack of standing. SLSCO notified the court that it withdrew that motion during oral argument, and we are satisfied that plaintiff has the requisite economic interest in the outcome of this proceeding to grant this court jurisdiction to hear the matter.

activities to counter transnational organized crime" to any other federal, state, local, tribal, or foreign law enforcement agency). The priority areas set out in the memo were Yuma and Tucson (in Arizona), El Centro (in California), and El Paso (in New Mexico).

In response, the Assistant Secretary of Defense for Homeland Defense and Global Security sought and received authority from the Acting Secretary of Defense to immediately shift funds for the implementation of Option One, which called for construction of fencing along 11 miles of the border near Yuma and 46 miles near El Paso. The COE was designated as the construction agent with a budget of up to $1 billion.

On April 4, 2019, relying on Federal Acquisition Regulation ("FAR") part 6.302.2, the COE Senior Contracting Official for the Fort Worth District announced an intent to use an "Undefinitized Contract Action" ("UCA") to contract for the construction of the El Paso portion of the fencing.[3] It would be a design and build contract. The effect was to limit dramatically competitive procedures by using less formal letter contracts instead of the more formal definitized contract process. Nevertheless, because COE had recently competed (July 2018, amended March 27, 2019) and put in place two prequalified contractor lists, consistently with CICA procedures and DFARS regulations, the COE had a list of potential building contractors to consult.[4] On March 28, 2019, COE sent all nine pre-qualified contractors a solicitation for the El Paso work in the form of 10 narrative questions and a contract line item number structure for the proposed contract. The questions were listed in descending order of importance. The solicitation stated that responses to the questions would be evaluated for "reasonableness, logic, and risk." AR at 68. COE promised to "select the most advantageous technical approach that meets its mission needs." *Id.*

Six of the prequalified companies responded to the solicitation. The agency performed an initial review of the offerors' responses to the solicitation's questions and ranked them according to its own view of the technical merits that those answers revealed. The Source Selection Authority ("SSA") decided that only two of the six, SLSCO and another

[3] A UCA, also known as a "letter contract," allows for award while specific terms and specifications are negotiated and memorialized in writing. *See* Defense Federal Acquisition Regulation Supplement ("DFARS") § 217.4.

[4] DFARS § 236.7272.

contractor, not plaintiff, were highly enough rated to be evaluated as prospects. The SSA selected SLSCO, the intervenor, as the most qualified and the only firm with which it would negotiate. Permission was sought, and granted on April 5, 2019, however, to proceed to make a commitment to SLSCO, even before concluding price negotiations, on a sole source basis. The Army issued a justification and approval ("J&A") for less than full and open competition on April 8, 2019, authorizing the COE to proceed with award to intervenor on a sole source basis. The J&A stated that no further time could be spent competing and negotiating the contract if the work was to begin this fiscal year and be completed within the 18-month delivery schedule anticipated by DHS and DOD. *See* AR at 36. A traditional, fully competed approach would take, in the Army's estimation in the J&A, nine to twelve months just to make an award. *Id.* In the face of a declared national emergency, that time could not be spent. *Id.*

Fisher became aware that SLSCO would be given the award on April 9, 2019, via a DOD press release. On April 18, 2019, Fisher filed its GAO protest, triggering the automatic stay. On April 24, the agency made a determination and finding ("D&F") that contract performance should continue notwithstanding the GAO protest. AR at 2-13. The D&F states that "urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the Protest" and cites 31 U.S.C. § 3553(d)(3)(C). AR at 11. It goes on to detail the government's view that the border crisis and cost in human capital outweighed, in the Army's view, the minimal effect to the protestor, which the D&F concludes has little chance of winning its protest at GAO. We will discuss the D&F more fully below.

Plaintiff filed its complaint here, challenging the D&F as arbitrary, capricious, and not in accordance with the law, on April 25, 2019. The court convened a status conference on April 29, whereupon a schedule was set for resolution of the merits on an expedited basis. Plaintiff thus forewent a request for preliminary relief. On May 3, 2019, however, plaintiff filed a motion requesting that the record be supplemented to include materials from the Army's consideration of Fisher's protest of the Yuma contract at GAO.

Unlike the El Paso project, the COE did not execute an override for the Yuma protest. Instead, on May 1, 2019, the agency confessed error in the way it had handled the solicitation and notified GAO that it was

terminating the awardee for convenience and resoliciting the work to include plaintiff as a qualified offeror. The GAO protest was dismissed as moot shortly thereafter. Plaintiff argued in its motion to supplement that the agency's decision to dismiss rather than override the stay in the Yuma protest ought to be considered here as evidence of the Army's irrationality in treating like circumstances differently, i.e., because the Army did not need an override for the Yuma protest, it did not need one for the El Paso work either. After receiving expedited responses from the two opposing parties, we denied plaintiff's motion by order on May 16, 2019, finding the circumstances of the two procurements different and thus concluding that the Yuma materials were not necessary for effective judicial review in this case. *Fisher Sand & Gravel Co. v. United States*, No. 19-615C, ECF No. 34 (Fed. Cl. May 13, 2019) (unpublished order denying motion to supplement the administrative record).

DISCUSSION AND CONCLUSION

The thrust of Fisher's challenge to the override is that defendant failed to meet the requirements of Army Federal Acquisition Regulation Supplement ("AFARS") 5133.104(b)(a)(A), which requires the Army to "clearly address" the following four factors in a D&F overriding a CICA stay on the basis of urgent and compelling circumstances:

> 1) Whether significant adverse consequences will necessarily occur if the stay is not overridden;
>
> 2) Whether reasonable alternatives to the override exist that would adequately address the circumstances presented;
>
> 3) How the potential costs of proceeding with the override, including costs associated with the potential that GAO might sustain the protest, compared to the benefits associated with the approach being considered for addressing the agency's needs; and
>
> 4) The impact of the override on competition and the integrity of the procurement system.

These factors are drawn directly from this court's opinion in *Reilly's Wholesale Produce v. Untied States*, 73 Fed. Cl. 705, 711 (2006) (surveying

CICA stay override cases).[5] Plaintiff alleges that the agency failed to adequately address any of the factors and, as to the fourth, failed to address it at all.[6] Our review, as in any bid protest, is one for rationality and illegality. 28 U.S.C. § 1491(b)(2) (2012).

The D&F is a 12-page document, which is supported by over 300 pages of enclosures. The enclosures include: the President's declaration of national emergency; DHS's request to DOD for help to combat drug smuggling at the border; DOD's and the Army's memoranda in response approving such help; El Paso project procurement documents; and the CO's analysis of 100-day construction delay costs.

The D&F itself begins with a background recital of the circumstances leading to its issue and the El Paso procurement's history. Section 4, Effect and Impact of Override, begins the required analysis. There, the agency states that proceeding with the override will allow SLSCO to begin construction this year. The "impact on contractors" is concluded to be "minimal" because there is no incumbent contract and because the Army views Fisher's likelihood of success at GAO to be low. AR 8. The next section of the D&F more fully considers the merits of plaintiff's protest at GAO and concludes, like the section before it, that plaintiff is unlikely to be successful at GAO, stating that most of its grounds for protest were late. AR

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[5] We note that the *Reilly* factors, although often relied on in the review of override decisions based on urgent and compelling circumstances, are not mandatory legal requirements in every instance. *See*, *e.g.*, *PMTech, Inc. v. United States*, 95 Fed. Cl. 330, 345 (2010) (noting that the standard of review is arbitrary and capricious, not whether the agency has ticked off the list of *Reilly* factors). As noted by plaintiff, however, the Army has purported to bind itself to those *Reilly* factors by incorporating them into its supplemental acquisition regulations. As stated later, we do not reach the issue of whether this AFARS provision is binding and enforceable by plaintiff because we find the D&F adequate regardless.

[6] Intervenor argues, *inter alia*, that the D&F should be considered as meeting the alternative standard for an override: "best interests of the United States," which do not implicate the *Reilly* factors. *See* 31 U.S.C. § 3553(d)(3)(C)(i)(I). We do not reach that question, however, because it is clear that the D&F is authorizing the stay on the basis of urgent and compelling circumstances.

8-10.

Section 7, Basis for the Override, cites the national emergency at the southern border as a "security and humanitarian crisis" threatening core national security interests. AR 11 (quoting the President's Declaration of National Emergency). Without the override, the Army believes that it is "highly unlikely" that construction would be undertaken this fiscal year, and thus the 18-month delivery schedule would be lost. *Id.* It goes on to explain that DOD's allocation of $1 billion for the border barrier project expires this fiscal year. Failure to timely use those funds would negatively impact border security and military operational readiness, warns the D&F. *Id.*

Section 8, Reasonable Alternatives, recites that the COE Fort Worth District Director of Contracting, "considered all forms of alternative contractual mechanisms to bridge the gap during the pendency of the Protest," but found that only the letter contract used here could meet the government's needs. *Id.* The Director also indicates in this section that a review of historical average timelines for negotiating and awarding contracts of this magnitude reveals that 9-12 months would be necessary, which is antithetical to the government's goals of beginning construction this year and finishing within 18 months. *Id.*

The next, and final, section considers the harm to the government without an override. The gist is that the government's ability to complete the work in the 18-month timeline is a significant risk to its mission to secure the border. The Army cites the need for physical barriers to stem the tide of narcotics and individuals trafficked over the border. The El Paso sector is cited as a particularly active area of smuggling across the border with "at least three transnational criminal organizations" operating in the sector. AR 12. Serious amounts of narcotics are listed as having been interdicted in this sector (15,000 lbs of marijuana, 342 lbs of cocaine, 40 lbs of heroin and 200 lbs of methamphetamines). *Id.* The delay imposed by the CICA stay would cost roughly $4 million to the government, but more significant than monetary losses, the D&F states that the risk to human lives and wellbeing presented by the unsecured border is "immeasurable." *Id.* Thus, "the cost to the United States should GAO sustain the Protest, however unlikely, cannot adequately or fully be measured in dollars and cents." *Id.*

The D&F goes on to explain that the UCA contracting mechanism

used for the El Paso project is such that "only 50% of the required funding can be obligated at time of contract award. The remaining 50% of the funding remains unobligated until a proposal is received from the contractor and the UCA can be definitized into a Firm Fixed Price contract action." *Id.* at 12-13. The import of which is that the first 100 days of performance are "critical to the success of the entire action" because the inability to definitize the contract by the end of the fiscal year would threaten the entire project due to the expiration of funds. *Id.* at 13.

We are satisfied that the D&F clearly lays out the agency's consideration of the significant adverse consequences for proceeding with the stay in place. Plaintiff argues that the adverse consequences to border security are only a potential and not a necessary result of the CICA stay.[7] This, Fisher argues, is insufficient to meet the test because the agency in the D&F has not demonstrated an "immediate threat to health, welfare, or safety." *AT&T Corp. v. United States*, 133 Fed. Cl. 550, 556 (2017). We disagree. The D&F explicitly cites large quantities of illicit narcotics that have passed through the border area implicated in this procurement. We will not second guess the executive's conclusion that this presents an urgent and compelling danger to the health and welfare of American citizens and residents.

We are also satisfied that the agency has clearly addressed whether there are reasonable alternatives to the override that would meet the government's needs. Given the timeline for this project and the specter of the funds for it expiring, we find the agency's conclusion rational, and we will, again, not substitute our own judgment for that of the executive.

As to the third factor, the potential cost of the override compared with proceeding without it, including the risk that GAO might sustain, we find that, although some of the analysis is misplaced, the agency has met this requirement in the D&F. The agency conducted a risk analysis of the delay

[7] Plaintiff also argues that the potential loss of funds cannot provide the basis for compelling circumstances because FAR part 6.301(c) instructs that failure to properly plan or the expiration of funding is not a justification for an agency proceeding without full and open competition. 48 C.F.R. § 6.301(c) (2018). We find this regulation inapposite as it is a limit on agency authority to employ non-competitive procedures to procure goods and services rather than the circumstances faced here, a stay override.

associated with the 100-day stay, finding that such a delay would cost approximately $4 million. This analysis, while cogent and relevant to the harm to the government posed by the stay, is not addressed to the cost to the government if GAO sustains the protest and the agency is forced to recompete the work. The Army did consider, however, the nonmonetary costs associated with a stay of performance (humanitarian and border security concerns) and found them too great to ignore. In the context of this procurement, we find this sufficient. The D&F's statement that the costs associated with these problems are not strictly measurable in extra taxpayer dollars should the agency be forced to recompete is rational.

The fourth factor, the impact on competition and the integrity of the procurement system, is largely missing from the government's calculus in the D&F. Plaintiff finds this *per se* objectionable and a violation of regulation that can only be remedied by enjoining or declaring insufficient the agency's D&F. Defendant and intervenor argue that the D&F as adequate in this regard or that the fourth factor is not determinative here because either the AFARS provision is not legally binding or because it is merely procedural in nature and thus does not afford plaintiff the right to substantive relief for a mere failure to follow it in a *pro forma* manner.

We note that that intervenor has argued that the AFARS' adoption of the *Reilly* factors is problematic because that provision is not the product of notice and comment rulemaking. Plaintiff argues that it need not be because it only supplements the already legally-promulgated provisions of the FAR. Intervenor rejoins that enforcing that provision strictly against the Army creates a substantive legal requirement, the same as the substantive provisions of the FAR. Ultimately, we do not reach the issue because it is unnecessary to our conclusion.

We find that the Army's consideration of the merits of Fisher's underlying GAO protest sufficient in these circumstances to meet the fourth *Reilly* prong and AFARS 5133.104. Under normal circumstances, the agency would be required to consider whether CICA or other legal requirements were being, in effect, thwarted by the issuance of an override. Here, however, where an agency is faced with a declared national emergency and has authorized use of non-competitive procurement procedures, the calculus necessarily shifts. The public's interest in a competitive procurement is balanced against the agency's need to address the national emergency. Congress has already made the determination that the

competitive procurement system is not overborne by the occasional need for expediency by excepting from CICA's competition requirements situations in which agencies face urgent and compelling circumstances, including overriding of the 100-day stay during a GAO protest.

Further, national security concerns must be considered by the court in any bid protest. 28 U.S.C. § 1491(b)(3) (2012). Here, they are particularly implicated by the President's declaration. The bona fides of the national emergency are assumed in this proceeding. As such, these concerns weigh heavily in favor of the government's conduct both on the merits of the protest and the balancing of harms when considering whether equitable relief is appropriate. As stated at the conclusion of oral argument, we find the declaration of a national emergency to be the anvil that falls on the scale of justice in favor of the government in these circumstances. It undergirds our consideration of the reasonableness of the Army's D&F and it suggests that relief would not be appropriate even if we found a legal infirmity in the override.

In sum, no relief can be granted. Plaintiff has not shown irrationality nor illegality in the agency's pursuit of an override nor has it established the requisite balancing of the equities in its favor to merit relief.[8] That is why we denied plaintiff's motion for judgment on the administrative record and granted the cross-motions of defendant and intervenor. Accordingly, the Clerk of Court is directed to enter judgment for defendant and to dismiss the complaint. No costs.

s/Eric G. Bruggink
Eric G. Bruggink
Senior Judge

[8] We agree with defendant that, whether declaratory or injunctive relief is the appropriate remedy, the court must consider the equities, including the balance of harms, when making such a determination. *See PGBA, LLC v. United States*, 389 F.3d 1219, 1228 (Fed. Cir. 2004) (citing *Samuels v. Mackell*, 401 U.S. 66, 71-72 (1971) (holding that, in the context of state prosecutions begun prior to the federal suit, where the declaratory relief would have the same effect as injunctive, the same equitable principles must be considered)). Here, they weigh in favor of the government due to the national security crisis laid out by the President.

EXHIBIT 2

REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
SOUTH PACIFIC DIVISION
3636 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85102-1939

Contracting Division

May 24, 2019

SLSCO, Ltd.
ATTN: William W. Sullivan, President
6702 Broadway Street
Galveston, Texas 77554

Dear Mr. Sullivan,

SLSCO, Ltd. is hereby directed to suspend all work pursuant to FAR Clause 52.242-14, SUSPENSION OF WORK (APR 1984), under Contract No. W912PP19C0018, Design-Build Construction Project for El Paso Sector FY18 Primary Pedestrian Wall Replacement. This suspension of work is issued as a result of the preliminary injunction from the U.S. District Court, Northern District of California notification on May 24, 2019 that all work shall be suspended.

Sincerely,

Leslie M. Molina

Leslie M. Molina
Contracting Officer

ACKNOWLEDGEMENT

To: US Army Corps of Engineers, Los Angeles District, Attn: Contracting Division, 3636 North Central Avenue, Phoenix, Arizona 85102

Suspension of Work notification was received on _____
(date)

SLSCO, Ltd.

BY_____

TITLE:_____

No. 19-16102

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

ADDENDUM TO BRIEF FOR *AMICUS CURIAE* SLSCO LTD. IN SUPPORT OF DEFENDANTS-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING APPEAL

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June 10, 2019

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

U.S. HOUSE OF REPRESENTATIVES, Plaintiff, v. **STEVEN T. MNUCHIN, in his official capacity as Secretary of the Department of the Treasury *et al.***, Defendants.	Case No. 1:19-cv-00969 (TNM)

MEMORANDUM OPINION

Few ideas are more central to the American political tradition than the doctrine of separation of powers. Our Founders emerged from the Revolution determined to establish a government incapable of repeating the tyranny from which the Thirteen Colonies escaped. They did so by splitting power across three branches of the federal government and by providing each the tools required to preserve control over its functions. The "great security against a gradual concentration of the several powers in the same department," James Madison explained, "consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." *The Federalist No. 51*.

This is a case about whether one chamber of Congress has the "constitutional means" to conscript the Judiciary in a political turf war with the President over the implementation of legislation. The U.S. House of Representatives seeks to enjoin the Secretaries and Departments of the Treasury, Defense, Homeland Security, and the Interior (collectively, the "Administration") from spending certain funds to build a wall along our southern border. The House argues that this expenditure would violate the Appropriations Clause of the Constitution

and usurp Congress's authority. This harm, the House suggests, constitutes an "institutional injury" supporting Article III standing.

The Administration disagrees. The Judiciary cannot reach the merits of this dispute, it contends, because the Constitution grants the House no standing to litigate these claims. The Administration is correct. The "complete independence" of the Judiciary is "peculiarly essential" under our Constitutional structure, and this independence requires that the courts "take no active resolution whatever" in political fights between the other branches. *See The Federalist No. 78* (Alexander Hamilton). And while the Constitution bestows upon Members of the House many powers, it does not grant them standing to hale the Executive Branch into court claiming a dilution of Congress's legislative authority. The Court therefore lacks jurisdiction to hear the House's claims and will deny its motion.

I.

The House and the President have been engaged in a protracted public fight over funding for the construction of a barrier along the border with Mexico. Following the longest partial shutdown of the Federal Government in history, Congress passed the Consolidated Appropriations Act of 2019 (the "CAA"), which provided $1.375 billion for new border fencing in the Rio Grande Valley. *See* Pub. L. No. 116-6 (2019). The President had sought much more. *See* Letter from Acting Dir., Office of Mgmt. & Budget to Senate Comm. On Appropriations (Jan. 6, 2019) (requesting "$5.7 billion for construction of a steel barrier for the Southwest border").[1]

[1] The Court takes judicial notice of the government documents cited in this Opinion as "sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. *See Cannon v. District of Columbia*, 717 F.3d 200, 205 n.2 (D.C. Cir. 2013).

On the same day he signed the CAA into law, President Donald Trump declared that "a national emergency exists at the southern border of the United States." Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) ("National Emergency Declaration"). The President determined that the "current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests." *Id*. He noted that the "southern border is a major entry point for criminals, gang members, and illicit narcotics" and that the problem of "large-scale unlawful migration" has "worsened in certain respects in recent years." *Id*. "Because of the gravity of the current emergency situation," he added, "it is necessary for the Armed Forces to provide additional support to address the crisis." *Id*.

Congress passed a joint resolution to void the President's National Emergency Declaration. *See* 165 Cong. Rec. S1882 (Mar. 14, 2019). Explaining the vote, Speaker Nancy Pelosi remarked that "[w]e would be delinquent in our duties as Members of Congress if we did not overturn what the President is proposing. He is asking each and every one of us to turn our backs on the oath of office that we took to the Constitution of the United States." *See* Speaker Pelosi's Floor Speech on Privileged Resolution, House of Representatives (Feb. 27, 2019).

The President vetoed the resolution. *See* Veto Message to the House of Representatives for H.J. Res. 46, White House (March 15, 2019). Some Members of the House tried unsuccessfully to override this veto. *See* 165 Cong. Rec. H2815 (Mar. 26, 2019). For the override to be operative, the Senate would have also had to vote to support it by a super-majority. It did not attempt to do so. So the "veto of the President was sustained and the joint resolution was rejected." *Id*. The House then filed this suit.

Upon a declaration of a national emergency "that requires the use of armed forces," the Secretary of Defense "may authorize the Secretaries of the military departments to 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). The White House explained that Section 2808 would be one of three sources of funding the Administration would use, on top of the $1.375 billion Congress appropriated through the CAA, to build the border wall. *See* President Donald J. Trump's Border Security Victory, White House (Feb. 15, 2019), ECF No. 36-7. It plans to use sequentially: (1) $601 million from the Treasury Forfeiture Fund; (2) up to $2.5 billion in funds transferred for "Support for Counterdrug Activities" under 10 U.S.C. § 284; and (3) up to $3.6 billion reallocated from Department of Defense military construction projects under Section 2808. *Id*.

The House does not challenge the President's declaration of an emergency under the National Emergencies Act. *See* Compl., ECF No. 1, at 39-43; Hr'g Tr. 81:23-25.[2] Nor does it contest the use of the Treasury Forfeiture Fund to build the wall. *See* Pl.'s Mot. for Prelim. Inj. ("Pl.'s Mot."), ECF No. 17, at 21. Instead, it argues that 10 U.S.C. §§ 284 and 2808 do not authorize the use of funds for building a border wall and that the Administration's planned spending therefore violates the Appropriations Clause of the Constitution and the Administrative Procedure Act (the "APA"). Compl. 39-42.

The Administration rejects the House's interpretation of the statutes. *See* Defs.' Opp. to Mot. for Prelim. Inj. ("Defs.' Opp."), ECF No. 36, at 57-64. But primarily, it contends that the House lacks standing to raise its arguments here. *Id*. at 28. There are "no Appropriations Clause principles at issue in this case," the Administration claims, precisely *because* the parties are contesting the meaning of bills that Congress has validly passed using its Appropriations power. *Id*. at 37. And quarrels over how to implement a law do not support legislative standing, as the

[2] All citations are to the page numbers generated by this Court's CM/ECF system.

"Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts." *Id*. at 36 (quoting *Bowsher v. Synar*, 478 U.S. 714, 722 (1986)).

The parties submitted thorough briefing on these issues, and the House's application for a preliminary injunction is now ripe. The Court also heard oral arguments from both sides and has reviewed the memoranda submitted by *amici curiae*.

II.

Before it may consider the merits of the House's motion, the Court must first confirm its jurisdiction over this case. Article III of the Constitution limits the jurisdiction of federal courts to "actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). One element of the "case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue." *Id*.

Article III's standing requirements are "built on separation-of-powers principles" and serve "to prevent the judicial process from being used to usurp the powers of the political branches." *Id*. Thus, "when reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional," the Court's standing inquiry must be "especially rigorous." *Id*. (quoting *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997)). The power of federal courts to hear cases "is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian Coll. v. Am. Utd. for Sep. of Church and State, Inc.*, 454 U.S. 464, 471 (1982).

As the plaintiff, the House "bear[s] the burden of establishing standing." *Commonwealth v. U.S. Dep't of Educ.*, 340 F. Supp. 3d 7, 12 (D.D.C. 2018). The Court "presumes that it lacks

jurisdiction unless the contrary appears affirmatively from the record." *Id*. (cleaned up). To establish standing, the House must allege an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper*, 568 U.S. at 409. For an injury to be legally cognizable, the dispute must be "traditionally thought to be capable of resolution through the judicial process." *Raines*, 521 U.S. at 819.

III.

The Administration concedes, and the Court agrees, that only the first prong of the standing analysis—injury that is concrete and particularized—is at issue here. *See* Defs.' Opp. at 28-43. Applying the "especially rigorous" analysis required, the Court finds that the House has failed to allege such an injury. So the Court must deny the House's motion.

A.

Two Supreme Court decisions—*Raines* and *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015)—guide the Court's inquiry. Neither directly addresses whether one House of Congress has standing to allege an institutional injury to the Appropriations power. Perhaps unsurprisingly, while the House urges the Court to conclude that this case is more like one (*Arizona State Legislature*), the Administration believes this case is more like the other (*Raines*).

In *Raines*, six federal legislators sued to contest the constitutionality of the Line Item Veto Act. *See* 521 U.S. at 813-14. The plaintiffs had voted against it. *Id*. at 814. They sued the Executive Branch, arguing that the Act "unconstitutionally expands the President's power," "divests the [legislators] of their constitutional role in the repeal of legislation," and "alters the constitutional balance of powers." *Id*. at 816. They claimed, in other words, that "the Act causes

a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally." *Id*. at 821.

The Supreme Court found that the legislators lacked standing. Beginning its analysis, it emphasized the "time-honored concern about keeping the Judiciary's power within its proper constitutional sphere." *Id*. at 820. That concern required it to "carefully inquire" about whether the legislators' "claimed injury is personal, particularized, concrete, and otherwise judicially cognizable." *Id*. The Court concluded that it was not. *Id*. at 830.

The legislators could not allege that "the Act will nullify their votes," the Court explained, because "[i]n the future, a majority of Senators and Congressmen can pass or reject appropriations bills; the Act has no effect on this process." *Id*. at 824. Their votes on the Act itself "were given full effect." *Id*. "They simply lost that vote." *Id*. It therefore held that "these individual members of Congress do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing." *Id*. at 830.

By contrast, in *Arizona State Legislature*, the Supreme Court held that a state legislature had standing to challenge the constitutionality of a proposition adopted by Arizona's voters by referendum. *See* 135 S. Ct. at 2659. Proposition 106 amended the Arizona Constitution to remove redistricting authority from the legislature and vest it in an independent commission. *Id*. at 2658. The legislature alleged that the Proposition violated its authority under the Elections Clause of the U.S. Constitution, which provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1.

The Court characterized the Arizona Legislature as "an institutional plaintiff asserting an institutional injury," that "commenced this action after authorizing votes in both of its

chambers." *Ariz. State Leg.*, 135 S. Ct. at 2664. It noted that Arizona's constitution prohibits the legislature from "adopt[ing] any measure that supersedes a [voter-initiated proposition]" unless the measure "furthers the purposes of the initiative." *Id*. This limitation, when combined with Proposition 106, would "completely nullify" any vote by the state's legislature, "now or in the future," that purported to adopt a redistricting plan. *Id*. at 2665. The Court thus concluded that the legislature had standing. *Id*.

B.

Read together, *Raines* and *Arizona State Legislature* create a spectrum of sorts. On one end, individual legislators lack standing to allege a generalized harm to Congress's Article I power. On the other end, both chambers of a state legislature do have standing to challenge a nullification of their legislative authority brought about through a referendum.

The House sees this case as largely indistinguishable from *Arizona State Legislature*. It alleges that the Administration's "usurpation" of the Appropriations power "inflicts a significant harm to the House as an institution." Pl.'s Mot. at 32. Permitting the Administration to "offend the Appropriations Clause" by spending funds in an unauthorized way would "affect the balance of powers in a manner that puts the House at a severe disadvantage within our system of government." *Id*. at 33. This form of institutional injury has, in the House's view, "consistently" been recognized as conferring standing upon institutional plaintiffs. *Id*.

But, as the Administration notes, the holding in *Arizona State Legislature* is narrower than the House suggests. *See* Defs.' Opp. at 40-41. The Supreme Court emphasized that its holding "does not touch or concern the question whether Congress has standing to bring a suit against the President." *Ariz. State Leg.*, 135 S. Ct. at 2665 n.12. It explained that there is "no federal analogue to Arizona's initiative power, and a suit between Congress and the President

would raise separation-of-powers concerns absent here." *Id*. The Administration also highlights that here, "[o]nly the House of Representatives has initiated this action." Defs.' Opp. at 41 n.7. The Arizona Legislature, however, filed its suit after authorizing votes in both of its chambers. *Id*. (citing *Ariz. State Leg.*, 135 S. Ct. at 2664).

For its part, the House questions the relevance of *Raines*. There, "only six Members of Congress" alleged a "wholly abstract and widely dispersed" injury. Pl.'s Reply in Supp. of Its Mot. for Prelim. Inj. ("Pl.'s Reply"), ECF No. 45 at 12. And both Houses of Congress "actively opposed" the lawsuit. *Id*. This is why, the House argues, *Arizona State Legislature* described *Raines* as "holding specifically and only that individual members of Congress lack Article III standing" to allege a nullification of their legislative power. *Id*. at 12-13 (quoting *Ariz. State Leg.*, 135 S. Ct. at 2664). *See also* Amicus Br. of Former General Counsels of the U.S. House of Reps. ("Former General Counsels' Amicus Br."), ECF No. 35 at 18 ("*Raines* and its progeny are simply inapplicable here, where the House not only has authorized the lawsuit but also itself appears as a litigant seeking to vindicate its institutional interests.").

This case falls somewhere in the middle of these two lodestars. Both therefore guide the Court's analysis. But, as explained below, the factors considered by the *Raines* Court are more relevant here. Application of these factors reveals that the House lacks standing to challenge the Administration's actions.

1.

Consider first historical practice and precedent. As the *Raines* Court explained, it is "evident from several episodes in our history that in analogous confrontations between one or

both Houses of Congress and the Executive Branch, no suit was brought on the basis of claimed injury to official authority or power." *Raines*, 521 U.S. at 826.[3]

For example, Congress passed the Tenure of Office Act over President Andrew Johnson's veto in 1867. *Id*. The Act provided that if an Executive Branch official's appointment required confirmation by the Senate, the President could not remove him without the Senate's consent. *Id*. Undeterred, President Johnson fired his Secretary of War. *Id*. A week later, the House impeached the President, but the Senate acquitted him. *Id*.

Arguably, either the President could have sued Congress over the constitutionality of the Act or Congress could have sued the President for violating it. Yet neither occurred. Had a federal court "entertained an action to adjudicate the constitutionality of the Tenure of Office Act immediately after its passage in 1867" it would have "been improperly and unnecessarily plunged into the bitter political battle being waged between the President and Congress." *Id*. at 827. So too here.

Similar episodes abound throughout our history. In 1933, President Franklin D. Roosevelt fired an official from his Senate-confirmed position at the Federal Trade Commission. The Federal Trade Commission Act permitted removal only for "inefficiency, neglect of duty, or malfeasance in office." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 619 (1935). The President removed the official without providing a reason. *Id*. The Senate likely had a "strong[] claim of diminution of" its Advice and Consent power. *Raines*, 521 U.S. at 826. Yet the Senate made no effort to challenge this action in court.

[3] *Arizona State Legislature* does not discuss the importance of historical practice in the context of legislative standing. That case, however, did not "touch or concern the question whether Congress has standing to bring a suit against the President," and it suggested that when this question arises, an "especially rigorous" standing analysis is required. 135 S. Ct. at 2665 n.12. This more exacting inquiry requires consideration of historical practice, as evidenced by the discussion in *Raines*.

In *INS v. Chadha*, 462 U.S. 919 (1983), a private plaintiff sought judicial review of his deportation order claiming the Immigration and Nationality Act's one-House veto was unconstitutional. Under a diminution of institutional power theory, the "Attorney General would have had standing to challenge the one-House veto provision because it rendered his authority provisional rather than final." *Raines*, 521 U.S. at 828. But the Executive brought no such suit.

And, applying the same line of reasoning, Congress could have challenged the validity of presidential pocket vetoes, first exercised by President Madison in 1812. But the pocket veto went unchallenged for over 100 years until President Coolidge pocketed a bill expanding Indian tribes' rights to damages for lost tribal lands and certain tribes sued. *See The Pocket Veto Case*, 279 U.S. 655, 673 (1929). *See also* Tara L. Grove *et al.*, *Congress's (Limited) Power to Represent Itself in Court*, 99 Cornell L. Rev. 571, 583-93 (2014) (discussing these and many other times when Congress declined to seek judicial intervention in the face of the Executive's non-defense of or alleged non-compliance with a federal law).

More still, the Administration notes that, "when Congress was concerned about unauthorized Executive Branch spending in the aftermath of World War I, it responded not by threatening litigation, but by creating the General Accounting Office . . . to provide independent oversight of the Executive Branch's use of appropriated funds." Defs.' Opp. at 38.

This history is persuasive. In the 230 years since the Constitution was ratified, the political branches have entered many rancorous fights over budgets and spending priorities. These fights have shut the Federal Government down 21 times since 1976, when Congress enacted the modern-day budget process. *See* Mihir Zaveri *et al.*, *The Government Shutdown was the Longest Ever. Here's the History.*, N.Y. Times (Jan. 25, 2019). Given these clashes, the paucity of lawsuits by Congress against the Executive would be remarkable if an alleged injury

to the Appropriations power conferred Article III standing upon the legislature. *See United States v. Windsor*, 570 U.S. 744, 790 (2013) (Scalia, J., dissenting) (remarking that the "famous, decades-long disputes between the President and Congress [discussed in *Raines*] . . . would surely have been promptly resolved by a Congress-vs.-the-President lawsuit if the impairment of a branch's powers alone conferred standing to commence litigation"). Indeed, no appellate court has ever adjudicated such a suit.

The House points to cases from this Circuit purportedly supporting the view that legislatures have standing to seek redress for this type of injury. Pl.'s Mot. at 33. Not so.

True, the D.C. Circuit has held that the "House as a whole has standing to assert its *investigatory* power." *United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976) (emphasis added). *See also Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008) (finding that the House has standing to assert investigatory and oversight authority); *Comm. on Oversight & Gov't Reform v. Holder*, 979 F. Supp. 2d 1 (D.D.C. 2013) (same). But whatever these cases may suggest about the House's ability to hale the Executive into court in the context of investigations, or the scope of this ability, they are of little use to the House here.

Indeed, using the Judiciary to vindicate the House's investigatory power is constitutionally distinct from seeking Article III standing for a supposed harm to Congress's Appropriations power. Unlike the Appropriations power, which requires bicameralism and presentment, the investigatory power is one of the few under the Constitution that *each* House of Congress may exercise individually. *See* U.S. Const. art. I, § 5 ("Each House may determine the Rules of its Proceedings"); *see also Congress's (Limited) Power to Represent Itself in Court*, 99 Cornell L. Rev. at 596-97 (noting that "the House and the Senate have long asserted the power to

conduct investigations and handle any litigation arising out of those investigations," while they have not historically brought suits to enforce federal statutes).

It is perhaps for this reason that the House's power to investigate has been enforced with periodic help from federal courts. In 1927, for instance, the Supreme Court observed that a "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927). Thirty years later, the Court affirmed that the power to investigate is "inherent in the legislative process" and is "broad." *Watkins v. United States*, 354 U.S. 178, 187 (1957). *See also Miers*, 558 F. Supp. 2d at 56 (noting that vindicating the House's investigatory power "involves a basic judicial task—subpoena enforcement—with which federal courts are very familiar").

And the House has, since the Founding era, exercised an independent power to conduct investigations and gather information. In 1792, it established a committee to examine General St. Clair's defeat at the Battle of the Wabash, a failed raid by the U.S. Army against Native Americans residing in the Northwest Territory. *See* 3 Annals of Cong. 494 (1792). Before complying with its requests for papers and records, President George Washington and his cabinet members, including Thomas Jefferson and Alexander Hamilton, concluded that "the House could conduct an inquest, institute inquiries, and call for papers." *Congress's (Limited) Power to Represent Itself in Court*, 99 Cornell L. Rev. at 598-99. This history of judicial and executive recognition of the House's investigatory power distinguishes it from the Appropriations power. Standing based on the Appropriations power would be a very different matter.[4]

[4] The Administration contends that the "scattered cases involving congressional subpoena enforcement are likewise incorrect and inconsistent with the Constitution's fundamental design, as well as irreconcilable with *Raines*." Defs.' Opp. at 42. But because the Court finds that the House's investigatory power is distinct from Congress's Appropriations power, it need not address this argument.

During oral argument, the House also suggested that *U.S. House of Representatives v. U.S. Department of Commerce*, 11 F. Supp. 2d 76 (D.D.C. 1998), provides an example of courts' willingness to recognize standing in similar contexts. Hr'g Tr. 6:12:23. Not so. There, the House had standing to argue that the Census Bureau's "statistical sampling will deprive Congress of information it is entitled to by statute (and the Constitution), and must have in order to perform its mandatory constitutional duty—the apportionment of Representatives among the states." *U.S. Dep't of Commerce*, 11 F. Supp. 2d at 85. In other words, the "inability to receive information which a person is entitled to by law" is "sufficiently concrete and particular to satisfy constitutional standing requirements." *Id*. This type of informational injury, which an individual can allege, is conceptually distinct from the "institutional" harm to an "institutional plaintiff" the House asks the Court to recognize here. More, informational injuries to Congress arise "primarily in subpoena enforcement cases," which hold that the legislature "has standing to assert its investigatory power." *Id*. at 86.[5]

This leaves the House with a single, non-precedential case in its support. In *U.S. House of Representatives v. Burwell*, the House alleged that the Executive Branch "spent billions of

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[5] The House relied on two other cases at the hearing to suggest that the Supreme Court is "perfectly comfortable" resolving claims of the type it raises. Hr'g Tr. 11:19-12:4. Neither case lends the House's position much support.

In the first, *Chadha*, the Court noted that, before Congress sought to intervene to defend its veto power, "there was adequate Art[icle] III adverseness even though the only parties were the INS and Chadha." 462 U.S. at 939. True, the Court suggested that "Congress is the proper party to defend the validity of a statute when an agency of government . . . agrees with plaintiffs that the statute is inapplicable or unconstitutional." *Id*. at 940. But this statement arose in the context of "prudential, as opposed to Art[icle] III, concerns" about hearing the merits of the parties' claims. *Id*.

In the second, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189 (2012), the Court held that the political question doctrine did not bar judicial review of a private plaintiff's claim against the Executive Branch. *Id*. at 191. Both *Chadha* and *Zivotofsky*, in other words, featured private plaintiffs seeking to vindicate their rights. And neither case held that one House of Congress has standing to allege harm to its Appropriations power.

unappropriated dollars to support the Patient Protection and Affordable Care Act." 130 F. Supp. 3d 53, 57 (D.D.C. 2015). This spending, the House alleged, "usurped its Article I legislative authority." *Id*. at 63.

The *Burwell* court held that the House had standing to sue on this "Non-Appropriation Theory," as it would "suffer a concrete, particularized injury if the Executive were able to draw funds from the Treasury without a valid appropriation." *Id*. at 74. The court distinguished "constitutional violations," which it found supported institutional standing, from "statutory violations," which it concluded did not. *Id*. Based on this dichotomy, it dismissed some claims but allowed others to proceed. *See id.*

This slender reed will not sustain the House's burden. As *Burwell* itself shows, it can be difficult to articulate a workable and consistent distinction between "constitutional" and "statutory" violations for legislative standing. There, Counts I and II of the House's complaint both alleged violations of constitutional provisions. Even so, the court dismissed Count II but permitted Count I to survive, because the former's allegations were "far more general" than the latter's. *Id*.

More, as *Burwell* notes, if "the invocation of Article I's general grant of legislative authority to Congress were enough to turn every instance of the Executive's statutory non-compliance into a constitutional violation, there would not be decades of precedent for the proposition that Congress lacks standing to affect the implementation of federal law." *Id*. (citing *Bowsher*, 478 U.S. at 722). But any claim about a violation of the Appropriation power would "inevitably involve some statutory analysis," as the Administration's "primary defense will be that an appropriation *has* been made, which will require reading the statute." *Id*. at 74 n.24 (emphasis in original).

Applying *Burwell* to the facts here would clash with binding precedent holding that Congress may not invoke the courts' jurisdiction to attack the execution of federal laws. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992) ("To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an individual right vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed,' Art. II, § 3."). The Court thus declines to do so.[6]

In short, like in *Raines*, the Court finds the lack of historical examples telling. The Executive and Legislative Branches have resolved their spending disputes without enlisting courts' aid. Until now. The House thus "lack[s] support from precedent," and "historical practice appears to cut against [it] as well." *Raines*, 521 U.S. at 826.

2.

The availability of institutional remedies also militates against finding that the House has standing. The notion that nullification of a legislature's power can support institutional standing, expressed in both *Raines* and *Arizona State Legislature*, comes from *Coleman v. Miller*, 307 U.S.

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[6] More still, even if the Court were to apply the *Burwell* approach, it is far from certain that the case would survive. Count III of the House's Complaint, for instance, alleges that the Administration's planned spending violates the APA. Compl. 42. This Count claims, in part, that the Administration's actions would be "'in excess of statutory, jurisdiction, authority, or limitations, or short of statutory right.'" *Id.* at 43 (quoting APA § 706(2)(C)). Whether the Administration has fallen afoul of this provision of the APA is a "statutory and not constitutional" question that concerns "the implementation, interpretation, or execution of federal statutory law." *Burwell*, 130 F. Supp. 3d at 74. The House would thus lack standing to allege this part of Count III, as it does not "seek redress for *constitutional* violations." *Id*. (emphasis in original). The remaining counts allege both statutory and constitutional allegations, not dissimilar to the count *Burwell* dismissed. *See* Compl. 39-42.

Additionally, *Burwell* emphasized that the Administration "conceded that there was no 2014 statute appropriating new money" for its planned expenditure. 130 F. Supp. 3d at 63. The Administration made no such concession about the lack of an applicable appropriations authority here. The lack of this concession complicates any effort to distinguish an alleged "constitutional" violation from a "statutory" one. Because the Court declines to apply *Burwell*, it need not resolve this issue.

433 (1939).[7] *Id*. There, the Kansas Legislature had rejected Congress's proposed Child Labor Amendment to the U.S. Constitution. *Coleman*, 307 U.S. at 435. Later, a state senator introduced a resolution to ratify the amendment. *Id*. at 435-36. The state senators' votes split evenly, so the lieutenant governor purported to cast a tie-breaking vote for the resolution. *Id*. at 436. The state's house of representatives then adopted the resolution. *Id*.

The senators who voted against, and three members of the state's house, sued in the Kansas Supreme Court to block the resolution from taking effect. *Id*. After the state's high court found that the lieutenant governor could legally cast the deciding vote, the legislators asked the U.S. Supreme Court to review and reverse the judgment. *Id*. at 437.

The Court held that the legislators had standing to challenge the state court's decision. It found that, assuming the truth of their allegations, their votes against ratifying the amendment had "been overridden and virtually held for naught." *Id*. at 438. Thus, because they had a "plain, direct and adequate interest in maintaining the effectiveness of their votes," the legislators fell "directly within the provisions of the statute governing [the Supreme Court's] appellate jurisdiction." *Id*. The plaintiffs in *Coleman*, in other words, had no other recourse but to turn to federal court.

So too in *Arizona State Legislature*. There, the Court found that the voter-adopted constitutional amendment "would completely nullify any vote by the Legislature, now or in the future." 135 S. Ct. at 2665 (cleaned up). Because of this, the Court concluded that judicial resolution of the legislature's claims was appropriate. *Id*. at 2665-66.

[7] The House does not rely on, or even cite, *Coleman* in its application for a preliminary injunction. *See generally* Pl.'s Mot. But the holding and reasoning in *Coleman* animates much of the analysis in *Arizona State Legislature* and thus merits brief discussion here.

Not so in *Raines*. There, the Court noted that dismissal "neither deprives Members of Congress an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act)." *Id*. at 829. It clarified that, "at most," *Coleman* means that "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue . . . on the ground that their votes have been completely nullified." *Id*. at 823. No such nullification, the Court held, had been alleged by the six legislators. *Id*. The Court thus concluded that there is "a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here." *Id*. at 826.

Again, *Raines* is the more salient precedent. The House urges that "Congress's authority under the [Appropriations] Clause is absolute for good reason." Pl.'s Mot. at 31. The Court agrees. It is no doubt true that Congress "should possess the power to decide how and when any money should be" spent by the Federal Government. *OPM v. Richmond*, 496 U.S. 414, 427 (1990). "If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure." *Id*.

But like the plaintiffs in *Raines*, the House retains the institutional tools necessary to remedy any harm caused to this power by the Administration's actions. Its Members can, with a two-thirds majority, override the President's veto of the resolution voiding the National Emergency Declaration. They did not. It can amend appropriations laws to expressly restrict the transfer or spending of funds for a border wall under Sections 284 and 2808. Indeed, it appears to be doing so. *See* ECF No. 36-9 at 3-4 (describing a proposed FY 2020 appropriation stating that "none of the funds appropriated in this or any other Act for a military construction project . .

. may be obligated, expended, or used to design, construct, or carry out a project to construct a wall, barrier, fence, or road along the Southern border of the United States"). And Congress "may always exercise its power to expand recoveries" for any private parties harmed by the Administration's actions. *OPM*, 496 U.S. at 428.

More still, the House can hold hearings on the Administration's spending decisions. As it has recently shown, the House is more than capable of investigating conduct by the Executive. *See, e.g.*, Alex Moe, *House Investigations of Trump and his Administration: The Full List*, NBC News (Mar. 27, 2019) (detailing "at least 50" ongoing House investigations into the President, federal agencies, and members of the Administration). And it has other tools it can use against Officers of the Executive Branch for perceived abuses of their authority.

The House believes it has exhausted the institutional remedies at its disposal. *See* Hr'g Tr. 14:19-15:6 (contending that "the House did exactly what the political weaponry tells it to do"). *See also* Former General Counsels' Amicus Br. at 22 ("Congress has used all of the political tools in its box"); *id.* at 23 (noting that "any new legislation here would require two-thirds majorit[ies] in both the House and Senate to overcome the President's veto, and so would be an exercise not only in redundancy but also futility"). But that the House majority may lack the votes to pass a resolution over the President's veto does not, by itself, confer standing on the legislators who would like to see the resolution enacted. To hold otherwise would likely place "the Constitution's entirely anticipated political arm wrestling into permanent judicial receivership[, which] does not do the system a favor." *Windsor*, 570 U.S. at 791 (Scalia, J., dissenting).

The availability of these institutional remedies shows that there is no "complete nullification" of the House's power. Considering the type of lawmaking at issue emphasizes this

point. As the D.C. Circuit has noted, the "key to understanding the [Supreme Court's] treatment of *Coleman* and its use of the word nullification is its implicit recognition that a ratification vote on a constitutional amendment is an unusual situation." *Campbell v. Clinton*, 203 F.3d 19, 22 (D.C. Cir. 2000). Once the amendment passed, "[i]t is not at all clear whether" the legislature "could have done anything to reverse that position." *Id*. at 22-23.[8]

The House does not allege that it is powerless to legislate in the future. Nor does it suggest that appropriations bills are unusual in the way the constitutional amendment in *Coleman* or the referendum in *Arizona State Legislature* might have been. Rather, it argues that the Administration's planned expenditures violate the Appropriations Clause because the Administration is interpreting Sections 284 and 2808 incorrectly. But like in *Raines*, the House "may repeal" or amend these laws or "exempt [future] appropriations" from the Administration's reach. *Raines*, 521 U.S. at 829. Thus, it has not alleged that the Administration's actions have nullified its legislative power. And it is therefore the political tools the Constitution provides,

[8] *Coleman* may in fact be best understood as a case about the Supreme Court's jurisdiction to review the decisions of state courts rather than to the ability of the Judiciary to hear suits between the co-equal political branches of the Federal Government. Recall that the plaintiffs first sued in state court before seeking to invoke the Supreme Court's appellate jurisdiction. *See Coleman*, 307 U.S. at 446. The Court did not suggest that the plaintiffs would have had jurisdiction to bring their claims directly to federal court. Indeed, as Justice Frankfurter observed, "[c]learly a Kansan legislator would have no standing had he brought suit in a federal court." *Id*. at 465 (Frankfurter, J., dissenting). No Justice disagreed with him.

When it issued, scholars and commentators viewed *Coleman* as part of a then-ongoing debate over the scope of the Court's ability to review the decisions on federal law made by state courts. *See, e.g.*, James Wm. Moore *et al.*, *The Supreme Court: 1938 Term II. Rule-Making, Jurisdiction and Administrative Review*, 26 Va. L. Rev. 679, 706-07 (1940) (suggesting that *Coleman* was "consistent with earlier cases" because it held that the legislators could "invoke the appellate jurisdiction of the Supreme Court, although they would not have had standing to sue initially in the federal courts"); *see also Raines*, 521 U.S. at 832 n.3 (Souter, J., concurring). That debate is over, and the "same standing requirements" now apply "both at trial and on appeal to any Article III court." Tara L. Grove, *Government Standing and the Fallacy of Institutional Injury*, forthcoming 167 U. Pa. L. Rev. __ at *40 (2019). The basis on which the *Coleman* legislators had standing then does not supply the House a basis for asserting standing today.

rather than the federal courts, to which the House must turn to combat the Administration's planned spending.[9]

3.

Lastly, *Raines* and *Arizona State Legislature* caution federal courts to consider the underlying separation-of-powers implications of finding standing when one political branch of the Federal Government sues another. *See Ariz. State Leg.*, 135 S. Ct. 2665 n.12; *Raines*, 521 U.S. at 820 ("the law of Art. III standing is built on a single idea—the separation of powers"). Respect for the doctrine of separation of powers "requires the Judicial Branch to exercise restraint in deciding constitutional issues by resolving those implicating the powers of the three branches of Government as a 'last resort.'" *Raines*, 521 U.S. at 833 (Souter, J., concurring).

Were it to rule on the merits of this case, the Court would not be deciding constitutional issues as a "last resort." *Id*. Instead, intervening in a contest between the House and the President over the border wall would entangle the Court "in a power contest nearly at the height of its political tension" and would "risk damaging the public confidence that is vital to the functioning of the Judicial Branch." *Id*.

As discussed above, Congress has several political arrows in its quiver to counter perceived threats to its sphere of power. These tools show that this lawsuit is not a last resort for the House. And this fact is also exemplified by the many other cases across the country challenging the Administration's planned construction of the border wall. *Cf. Raines*, 521 U.S.

[9] One other distinction between this case and *Arizona State Legislature* merits mention. Here, the House's claims are not being brought by both chambers of the legislature. While the House is correct that its allegations are less disparate and diluted than those brought by the *Raines* plaintiffs, these allegations are also less concrete and particularized than those brought by the united legislature in *Arizona State Legislature*.

at 534 (Souter, J., concurring) ("The virtue of waiting for a private suit is only confirmed by the certainty that another suit can come to us.").

In some of these lawsuits, including two before this Court, private plaintiffs have disputed the legality of the President's declaration of a national emergency and the Administration's ability to use Sections 284 and 2808 to build the wall. *See Ctr. for Biological Diversity v. Trump*, No. 19-cv-408 (D.D.C. 2019); *Rio Grande Int'l Study Ctr. v. Trump*, No. 19-cv-720 (D.D.C. 2019). The plaintiffs in both cases specifically allege that the Administration's planned expenditures violate the Appropriations Clause. *See, e.g.*, Compl., No. 19-cv-720, ECF No. 1 at 38; Compl., No. 19-cv-408, ECF No. 1 at 35-36. The House is free to seek leave to file briefs as *amicus curiae* in these suits.

In fact, it has done so in a related matter in the Northern District of California. *See* Br. of Amicus Curiae, *Sierra Club v. Trump* ("House *Sierra Club* Br."), No. 4:19-cv-892 (N.D. Cal. 2019), ECF No. 47. There, two citizens' groups sought a preliminary injunction against the Administration to prevent it from using the Sections 284 and 2808 funds to build the wall. *See Sierra Club v. Trump*, No. 4:19-cv-892, 2019 WL 2247689 (N.D. Cal. May 24, 2019). As *amicus curiae*, the House too, urged the court to enjoin the Administration, raising many of the contentions it did before this Court. *See* House *Sierra Club* Br. at 3-17. The *Sierra Club* court granted the citizens' groups a partial injunction and enjoined the Administration "from taking any action to construct a border barrier" along the southern border using Section 284 funds. *Sierra Club*, 2019 WL 2247689 at *30.

An old maxim in politics holds that, "Where you stand depends on where you sit." *See* Rufus E. Miles, Jr., *The Origin and Meaning of Miles' Law*, 38 Pub. Admin. Rev. 399 (1978). At law too, whether a plaintiff has standing often depends on where he sits. A seat in Congress

comes with many prerogatives, but legal standing to superintend the execution of laws is not among them.

As Chief Justice Marshall explained, the "province of the [C]ourt is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). The "irreplaceable value" of the Judiciary's power "lies in the protection it has afforded the constitutional rights and liberties of *individual citizens and minority groups* against oppressive or discriminatory government action." *Raines*, 521 U.S. at 829 (quoting *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring)) (emphasis added). It is "this role, not some amorphous, general supervision of the operations of government," that permits the "countermajoritarian implications" of judicial review to coexist with the "democratic principles upon which" the Founders built the Federal Government. *Id*. Mindful of these admonitions, the Court declines to take sides in this fight between the House and the President.[10]

[10] Based on the D.C. Circuit's reading of *Raines*, the Court includes this separation-of-powers discussion as a part of its standing analysis. *See Chenoweth v. Clinton,* 181 F.3d 112, 116 (D.C. Cir. 1999) (suggesting that *Raines* may "require us to merge our separation of powers and standing analyses"). Before *Raines*, the D.C. Circuit had upheld a district court's dismissal on equitable grounds of an inter-branch controversy that raised significant separation-of-powers concerns. *See Moore v. U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984).

The House urges the Court not to apply this "doctrine of equitable discretion," as it has rarely been used in recent years. Pl.'s Reply at 22. But the Circuit has not found that *Raines* formally overruled the *Moore* approach. *See Chenoweth*, 181 F.3d at 116 ("*Raines* notwithstanding, *Moore* . . . may remain good law, in part, but not in any way that is helpful to the plaintiff Representatives. Whatever *Moore* gives the Representatives under the rubric of standing, it takes away as a matter of equitable discretion."). Here, as in *Chenoweth*, the parties' dispute is "fully susceptible to political resolution" on either jurisdictional or prudential grounds. *Id*.

IV.

This case presents a close question about the appropriate role of the Judiciary in resolving disputes between the other two branches of the Federal Government. To be clear, the Court does not imply that Congress may never sue the Executive to protect its powers. But considering the House's burden to establish it has standing, the lack of any binding precedent showing that it does, and the teachings of *Raines* and *Arizona State Legislature*, the Court cannot assume jurisdiction to proceed to the merits. For these reasons, it will deny the House's motion. A separate Order accompanies this Opinion.

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Dated: June 3, 2019

TREVOR N. McFADDEN, U.S.D.J.