No. 19-16102

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, et al.,
Plaintiffs-Appellees,

v.

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

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

BRIEF OF FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN OPPOSITION TO DEFENDANTS' EMERGENCY MOTION FOR STAY PENDING APPEAL

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INTEREST OF AMICI CURIAE[1]

Amici curiae are a bipartisan group of more than 100 former Members of the House of Representatives, both Republicans and Democrats. *Amici* have served an aggregate of approximately 1,500 years in Congress, hail from 36 States, and include 21 former Members from the states of the Ninth Circuit. *Amici* disagree on many issues of policy and politics. Some *amici* believe that a wall along the Southern Border is in the national interest. Others do not. But all *amici* agree that the Executive Branch is undermining the separation of powers by proposing to spend tax dollars to build a border wall that Congress repeatedly and emphatically refused to fund.

Amici, as former members of Congress and as citizens of our Nation, have a strong interest in preventing Executive Branch overreach from degrading Congress's unique and important role in America's tripartite system of separated powers. All of the *amici* are

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4), undersigned counsel states that no party's counsel authored this brief in whole or in part. Nor did any party or party's counsel, or any other person other than *amici curiae*, contribute money that was intended to fund preparing or submitting this brief. All parties consented to the filing of this brief.

uniquely positioned to offer their perspective because they are former members of the Legislative Branch intimately familiar with the appropriations process. Each of them swore an oath to protect the Constitution; each has seen firsthand how the separation of powers safeguards the rights of the American people; and each firmly believes that defending Congress's power of the purse is essential to preserving democracy's promise that Americans' hard-earned tax dollars are spent in accordance with the will of the people.

A full listing of *amici* appears in the Appendix as Attachment A.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the district court recognized, this suit concerns the continued viability of the separation of powers—the foundation upon which "the whole American fabric has been erected," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)—as a limit on Executive authority. The Executive Branch plans, and has already begun, to take billions of dollars that Congress appropriated for other pressing national needs and spend it instead on a wall along the United States-Mexico border. It has done this despite repeated votes in both houses to refuse to fund construction of a border wall, and on the heels of a multi-month

government shutdown provoked, in part, by that very dispute. Now, more than four years after first arguing for a wall during the Presidential campaign, the President has determined that the situation at the border constitutes a national emergency justifying these extraordinary steps. Why? Because, as President Trump boasted: "I want to do it faster. I could do the wall over a longer period of time. *I didn't need to do this, but I'd rather do it much faster*…. I just want to get it done faster, that's all." Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. Times (Feb. 15, 2019), https://tinyurl.com/y4ngfkyz.

Rarely in our Nation's history has the Executive Branch launched such an assault on Congress's exclusive legislative powers. In the statement quoted above and many others like it, the President's essential rationalization for unilateral Executive Branch action is that Congress has refused to authorize his requested appropriation. This subversion of Article I has caused, and continues to cause, grave harm to the House as an institution.

The district court recognized as much when it enjoined the Executive's action. It understood that the case presented the critical

question of whether the Executive's actions "conform to the Framers' contemplated division of powers among co-equal branches of government." R.144 at 2. The court concluded that they do not. This Court should not undo the district court's careful resolution of the question. Stays are generally disfavored—particularly so when, as here, a stay would upset the status quo and could moot the plaintiffs' challenge. If this Court permits the Executive to build these portions of the wall and the District Court's injunction is affirmed on appeal, the Executive would have to tear down the portions it built during the stay. To warrant a stay, the government would need to make (1) "a strong showing that [it] is likely to succeed on the merits"; (2) that it "will be irreparably injured absent a stay"; (3) that "issuance of the stay will substantially injure the other parties interested in the proceeding"; and (4) that "the public interest lies" in a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

The government has shown none of the four factors. Beyond the government's likely failure on the merits, there is no emergency warranting a stay. If building these two parts of the wall are so vital to the nation's efforts to prevent drug trafficking—a problem that has

persisted for more than 50 years—the Executive can seek an appropriation from Congress. The Executive should not be empowered by this Court to spend taxpayer funds that have been denied to it by Congress. This Court should deny the defendants' motion.

ARGUMENT

I. THE GOVERNMENT IS NOT LIKELY TO SUCCEED ON THE MERITS

1. The district court correctly enjoined the defendants from using Sections 284 and 8005 to channel funds toward barrier construction on the ground that Congress "previously denied 'the item for which funds are requested.'" R.144 at 32. The President asked Congress to authorize and appropriate $5.7 billion to fulfill his campaign promise of a wall at the Southern Border, which he had assured the electorate Mexico (and not the American taxpayer) would fund. White House, *Remarks by President Trump on the Humanitarian Crisis on our Southern Border and the Shutdown* (Jan. 19, 2019), https://tinyurl.com/y7gdj6s8. Congress debated the President's proposal and, after weeks of negotiation, passed the 2019 Consolidated Appropriations Act allocating only $1.375 billion—not for a wall, but rather for "construction of primary pedestrian fencing, including levee

pedestrian fencing, in the Rio Grande Valley Sector" of the border. H.J. Res. 31 § 280(a)(1). Congress went out of its way to differentiate this fencing from a border wall, limiting the designs to ones already deployed, which did not use solid material like concrete. *Id.* § 230(b). The Congressional record precludes any doubt that Congress rejected the President's proposal.[2] If that disapproval were not sufficiently clear, a majority of both houses of Congress on March 14, 2019, passed a joint resolution to terminate the President's emergency declaration. *See* H.J. Res. 46. Congress's rejection alone forecloses the transfer of funds.

2. The district court was therefore exactly right that "Defendants' reading of these [statutory] provisions, if accepted, would pose serious problems under the Constitution's separation of powers principles." R.144 at 36. In particular, interpreting the statutes that the President invoked to allow the executive to freely channel funds in the face of congressional disapproval would squarely violate Congress's exclusive power over appropriations.

[2] Vice Chairman of the Senate Appropriations Committee Patrick Leahy: "The agreement does not fund President Trump's wasteful wall." 165 Cong. Rec. S1362 (daily ed. Feb 14, 2019).

The Appropriations Clause, Article I, section 9 of the Constitution, states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The words "No Money" and "in Consequence of Appropriations" are not ambiguous. This straightforward language "was intended as a restriction upon the disbursing authority of the Executive department." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937).

The Appropriations Clause "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990). Vesting Congress with the exclusive power to appropriate public funds was central to effectuate the Framers' intent that political compromises between competing and otherwise antagonistic groups be thrashed out in the legislative process. These structural elements of the Constitution, the Supreme Court has stated many times, are not simply matters of etiquette or architecture. They protect individual liberty—in this instance, by ensuring that only those representatives closest to the people can decide how to spend their

money. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010). The Framers understood that, if not for the Appropriations Clause, "the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure." 3 Joseph Story, *Commentaries on the Constitution* § 1342.

The Supreme Court has strictly enforced the Appropriations Clause. Nearly 170 years ago, the Court ruled that, "No officer, however high, *not even the President*, much less a Secretary of the Treasury or Treasurer, is empowered to pay debts of the United States generally, when presented to them … [in] the want of any appropriation by Congress to pay this claim." *Reeside v. Walker*, 52 U.S. 272, 291 (1850) (emphasis added). The Court emphasized that under Article 1, Section 9 of the Constitution, "no money can be taken or drawn from the Treasury except under an appropriation by Congress." *Id.* Indeed, the Court held, "[h]owever much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of anything not thus previously sanctioned. Any other course would give to the fiscal officers a *most dangerous discretion*." *Id.* (emphasis added); *see also Richmond*,

496 U.S. at 424 ("Our cases underscore the straightforward and explicit command of the Appropriations Clause. 'It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" (quoting *Cincinnati Soap*, 301 U.S. at 321)). Permitting the Executive, "on its own, [to] carve out an area of nonappropriated funding would create an Executive prerogative that offends the Appropriations Clause and affects the constitutional balance of powers." *Am. Fed'n of Gov't Emps., AFL-CIO, Local 1647 v. FLRA*, 388 F.3d 405, 414 (3d Cir. 2004).

Amici know firsthand the serious responsibilities that come with the power of the purse. In particular, they understand the gravity of denying an appropriation requested by the President. Withholding a requested appropriation renders the Executive Branch unable to complete projects for which it sought those funds. And while the President can veto appropriations bills and force Congress to return to the negotiating table, his power is only negative. The ultimate result of the negotiations still must be initiated and approved by Congress. Congress followed this procedure when it crafted the 2019

Appropriations Bill and presented it to the President. The Constitution gave the President two options: he could sign it or veto it.

The President, in effect, did both—he signed the bill and then reneged on the agreement his signature represented. By doing so, the President proposes to spend money in direct violation of the Appropriations Clause. The separation of powers is "violated when one branch assumes a function that more properly is entrusted to another." *INS v. Chadha*, 462 U.S. 919, 963 (1983). Courts have not hesitated to block executives from exercising legislative powers. *See, e.g.*, *Clinton*, 524 U.S. 417, 447 (1998) (Presentment Clause, Article I, § 7, forbade President from exercising "unilateral power to change the text of duly enacted statute"). The district court properly did the same, recognizing that, if the statutes cited by the President were read to authorize the President to spend unappropriated funds, they would be unconstitutional.[3]

[3] As *amici* argued below, because Congress considered and expressly rejected the President's border-wall proposal, and because no other statute authorizes the President's actions, those actions independently violate the separation of powers under the tripartite framework of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

3. What remains is the government's assertion that the plaintiffs are not within Section 8005's "zone of interests." The Government's argument is pure sleight of hand. In a parallel case over the President's misappropriation of funds brought by the House in the District of Columbia, the government has taken the position that Congress cannot sue the President for violating the Appropriations Clause. *U.S. House of Representatives v. Mnuchin*, No. 1:19-CV-00969 (TNM), 2019 WL 2343015, at *1 (D.D.C. June 3, 2019). Here, it argues that *only* Congress can sue the President. The sum of the government's positions is that no one should be able to sue—that Section 8005 is not judicially enforceable. Defs.' Mot. at 10. But the Legislative Branch's power of the purse is effective as a limitation on the unbounded power of the Executive only if that legislative power is enforceable through the courts. Policing the efforts of one branch to aggrandize its powers at the expense of other branches is one of the judiciary's critical functions. *See, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *Mistretta v. United States*, 488 U.S. 361 (1989); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986); *Bowsher v. Synar*, 478 U.S. 714 (1986).

Unless the courts remain available to stop violations of the Appropriations Clause, disputes over the lawfulness of Executive Branch violations would linger for years in the political process, where only blunt and imperfect tools are available to bring about compliance. To be sure, courts cannot be the arbiter of every constitutional disagreement between the political branches. But for violations like this one, that go to the very heart of Congress's exclusive powers and undermine its most important check on the Executive Branch, judicial review is necessary to safeguard the separation of powers.

* * * * *

Congress's power of the purse, like other aspects of the constitutionally enshrined separation of powers, was "not simply an abstract generalization in the minds of the Framers," but was expressly "woven into the document that they drafted in Philadelphia in the summer of 1787." *Chadha*, 462 U.S. at 946 (quoting *Buckley v. Valeo*, 424 U.S. 1, 124 (1976)) (internal quotation marks omitted)).

Because the constitutional structure helps safeguard individual liberty, the Judiciary has long played a critical role in preserving the structural compromises and choices embedded in the constitutional

text. As the Supreme Court has often explained, the "courts possess power to review either legislative or executive action that transgresses identifiable textual limits." *Nixon v. United States*, 506 U.S. 224, 238 (1993); *Powell v. McCormack*, 395 U.S. 486, 506 (1969).

The district court correctly concluded that the Executive Branch has circumvented the Constitution's clear limits on Executive Power and usurped Congress's exclusive power to appropriate money. The government will not likely succeed in overturning that conclusion.

II. THE OTHER FACTORS MILITATE STRONGLY AGAINST A STAY

None of the remaining factors support the defendants' stay request. These factors are: "(2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434.

The defendants seek a stay that would effectively rescind the district court's preliminary injunction and allow the Administration to proceed with the unlawful conduct that gave rise to this suit. The district court has already found that the resulting injury to plaintiffs would be irreparable. R.144 at 54. Against this backdrop, and in light of

the important statutory and constitutional issues presented by this case, the district court properly sought to preserve the status quo until the matter could be adjudicated on the merits, granting the plaintiffs' motion for preliminary injunction and denying the defendants' request for a stay pending appeal. *See id.*; R.152 at 2. Nothing in the defendants' stay motion suggests a different result.

First, the defendants have not shown irreparable harm. The defendants rely on three categories of alleged injury: the flow of drugs into the country through the Southern border; the lapse of funds that have not yet been obligated; and liabilities to existing contractors. None supports the issuance of a stay.

Even accepting the defendants' unsubstantiated claim that the injunction "will create irreparable harm with respect to the deadly drugs that flow into this country," Stay Mot. at 21—a bare allegation that falls far short of the defendants' burden—the alleged injury does not constitute irreparable harm. The defendants' theory would expand the category of irreparable harm to include virtually *any* instance in which an Administration tried and failed to convince Congress to adopt its proposed solution to an important public health or safety issue. The

problem of drug smuggling at the Southern border is not new. Quite the contrary, it is a longstanding, complex, and hotly debated public policy issue susceptible to many possible approaches. Here, the President sought an appropriation from Congress to fund one such approach—the construction of a border wall—but Congress denied those funds. Nothing prevents the President from seeking another appropriation once he has built a case capable of persuading a majority of Congress, either in the form of an emergency appropriation before the end of the fiscal year or a regular appropriation once the new fiscal year begins.[4]

Likewise, having decided to act without Congress in an area where congressional acquiescence is required, the defendants cannot complain that the lapse of funds at the end of the fiscal year—a standard feature of the appropriations process—will cause them irreparable injury. For the moment, at least, this harm is purely speculative. *See* Stay Mot. at 22 (explaining that this result would occur "should the district court's preliminary injunction continue into the coming months"). Moreover, in a case that the plaintiffs are likely to

[4] The new fiscal year begins on October 1, 2019, less than four months away.

win on the merits, it would be inequitable to allow the Administration to permanently alter the status quo before the merits can be decided. This is particularly true given that the President can seek an emergency appropriation from Congress to move forward with construction while the injunction is in place.

Finally, the defendants cannot establish irreparable harm based on liabilities to contractors. It is well established that monetary losses alone do not support a finding of irreparable harm. *See Rent-A-Center, Inc. v. Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). Because the defendants cannot prevail on any of their theories of irreparable harm, they are not entitled to an injunction even if they were likely to succeed on the merits.

Second, the issuance of a stay will substantially injure the other parties interested in the proceeding. As the district court correctly recognized, the denial of a preliminary injunction would irreparably harm the plaintiffs. R.144 at 54. Here, the effect of denying the preliminary injunction and the effect of issuing a stay are the same: both would allow the Administration to proceed with the construction of

an improperly funded border wall. This stay factor therefore strongly favors the plaintiffs.

Third, the public interest weighs against the issuance of a stay. The American public has few interests stronger than its liberty interest in ensuring that only those elected representatives closest to the people can decide how to spend their money. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010).

Here, the denial of a stay is necessary to preserve the status quo until the merits of the case can be decided. That status quo is the state of affairs that existed *before* the Administration sought to construct a border wall using funds that Congress had not appropriated for that purpose, and in fact had expressly denied. *See Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 369-70 (9th Cir. 2016) (declining to disturb injunction of a state statute pending appeal where the injunction would "preserve the *status quo* prior to the recent legislative action" and "restore[] the *status quo ante* to the disruption created by the Arizona legislature").

CONCLUSION

For the foregoing reasons and the reasons set forth in the plaintiffs' briefs, the Court should deny the defendants' motion for a stay pending appeal.

Dated: June 11, 2019

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of this Court's order dated June 7, 2019 because it is 3,351 words. This brief complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because it has been prepared in a proportionally spaced typeface using Word 14-point Century Schoolbook font.

/s/ *Douglas A. Winthrop*
Douglas A. Winthrop

CERTIFICATE OF SERVICE
Case No. No. 19-16102

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 11, 2019 for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

Dated: June 11, 2019.

/s/ *Douglas A. Winthrop*
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