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SIERRA CLUB V. TRUMP, CALIFORNIA V. TRUMP: BORDER WALL FUNDING KNOCKED DOWN

*Edward A. Fitzgerald**

*After Congress refused to fund the border wall, President Trump declared a national emergency. This allowed him to reprogram funds from other accounts to provide funding for border wall construction. The Ninth Circuit in *Sierra Club v. Trump* and *California v. Trump* held that the reprogramming of funds pursuant to sections 8005 and 2808 violated the statutes and posed constitutional problems. However, the Supreme Court issued a stay, which allowed construction to continue. This article analyzes and asserts that the Ninth Circuit decisions were correct. Events at the end of Trump administration are reviewed. After taking office, President Biden cancelled the national emergency and stopped most of the funding for the border wall. President Biden supports the establishment of a virtual border wall. Events during the Biden administration are examined.*

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* Edward A. Fitzgerald is a professor of Political Science at Wright State University. He received his Ph.D. at Boston University in 1983, M.A. at Northeastern University in 1976, J.D. at Boston College Law School in 1974, B.A. at Holy Cross College in 1971.

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I. Introduction

Construction of the wall along the U.S.-Mexico border has been an environmental disaster. The Center for Biodiversity (CBD) points out that 93 threatened, endangered, and candidate species are impacted by wall construction and related infrastructure changes, including jaguars and Mexican wolves. Wall construction degrades and destroys critical habitats within 50 miles of the border. The wall impedes wildlife migration, which prevents genetic diversity.¹ Questionable Department of Homeland Security (DHS) waivers pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) have negated federal and state laws that protect the environment and undermined state authority to manage their lands.²

President Trump relied on dubious methods to fund his wall. After Congress refused funding for his wall, President Trump shut the federal government down. When Congress continued to balk, President Trump declared a national emergency and invoked various statutory powers, which allowed the Department of Defense (DOD) to reprogram and transfer funds to the DHS to build the wall.

The reprogramming generated litigation by environmental groups and several states. The DOD reprogrammed 2.5 billion dollars pursuant to section 8005³ into counter drug activities under

¹ Greenwald et al., Ctr. for Biological Diversity, *A Wall in the Wild: The Disastrous Impacts of Trump's Border Wall on Wildlife* 1 (2017),

https://www.biologicaldiversity.org/programs/international/borderlands_and_boundary_waters/pdfs/A_Wall_in_the_Wild.pdf.

² Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1997) (codified as amended at 8 U.S.C. § 1103 note). Section 102(c)(1) states: "Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determine legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section... Any such decision by the Secretary shall be effective upon being published in the Federal Register."; See also Edward A. Fitzgerald, *San Diego Border Infrastructure Environmental Litigation: Return of the Walking Dead*, 50 ENVTL. L. 151 (2020).

³ Department of Defense Appropriations Act of 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018) (hereinafter "Section 8005"). Section 8005 authorizes the Secretary of Defense (SOD) with the approval of the

section 284.⁴ The U.S. District Court for the Northern District of California⁵ and Ninth Circuit in *Sierra Club v. Trump* held the DOD's reprogramming violated section 8005 and posed constitutional problems.⁶ The U.S. District Court for the Northern District of California⁷ and Ninth Circuit in *California v. Trump* also held that the DOD's reprogramming violated section 8005.⁸ Both Ninth Circuit decisions precluded the Trump administration from spending these funds on his border wall. Nevertheless, the Supreme Court stayed the Ninth Circuit decisions, which allowed the Trump administration to proceed with the construction of his border wall.⁹

The DOD also re-appropriated 3.6 billion dollars in military construction funds to build the wall pursuant to section 2808.¹⁰ The U.S. District Court for the Northern District of California in

Office of Management and Budget (OMB) to “transfer not to exceed [\$4 billion] of working capital funds of the Department of Defense (DOD) or funds made available in [2019 appropriation act] for military functions (except military construction.)” Funds may only be transferred “for higher priority items, based on unforeseen military requirements, than those for which originally appropriated,” and may not be transferred “where the item for which the funds are requested have been denied by Congress.” Section 8005 requires the DOD to “promptly notify Congress of such transfers made pursuant to this authority.”

⁴ 10 U.S.C. § 284. Section 284 authorizes the SOD to “to provide support for the counterdrug activities or activities to counter transnational organized crime of any other department or agency of the Federal Government or of any State, local, tribal, or foreign law enforcement agency.” DOD may provide support only after it has been “requested” by the appropriate official from government agency or department, and then only for “the purposes set forth in section 284. Purposes include “the maintenance and repair” of certain equipment, the “training of law enforcement personnel” related to “counter drug and or counter transnational organized crime,” and “aerial and ground reconnaissance.” DOD is also authorized to provide support for the “construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the U.S.” To ensure expeditious action, 284 is not subject to requirements that govern DOD other authorizations to support civilian law enforcement. Section 284 also provides for congressional oversight of DOD support activities. At least 15 days prior to providing support, the SOD must submit “a description of any small-scale construction project for which support is provided” to the appropriate congressional committees, the House and Senate Armed Services and Appropriation Committees. A “small scale construction project” is defined as encompassing projects that cost no more than \$750,000. There is no reporting required for projects exceeding \$750,000.

⁵ *Sierra Club v. Trump*, 379 F. Supp. 3d 883 (N.D. Cal. 2019).

⁶ *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019).

⁷ *State of California v. Donald J. Trump*, Order Granting in Part and Denying in Part Plaintiffs’ Motion for Partial Summary Judgment, Denying Defendants’ Motion for Partial Summary Judgment, and Certifying Judgment for Appeal, Case No. 19-cv-00872-HSG, Dkts. Nos. 176, 182, U.S. District Court for Northern District of California, June 28, 2019 (slip opinion) [hereinafter 2019 Order].

⁸ *California v. Trump*, 963 F.3d 926 (9th Cir. 2020), *cert. granted sub nom.* *Trump v. Sierra Club*, 141 S. Ct. 618 (2020).

⁹ Adam Liptak, *Supreme Court Lets Trump Keep Building His Border Wall*, N.Y. TIMES (Jul. 31, 2020, updated Sept. 9, 2020), <https://www.nytimes.com/2020/07/31/us/supreme-court-trump-border-wall.html>.

¹⁰ Bobby Allyn, *Appeals Court Allows Trump To Divert \$3.6 Billion In Military Funds for Border Wall* (Jan. 9 2020), <https://www.npr.org/2020/01/09/794969121/appeals-court-allows-trump-to-divert-3-6-billion-in-military-funds-for-border-wa>; 10 U.S.C. § 2808. §2808 states: “In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and 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.” Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family holdings, that have not been obligated. Military construction “includes any construction, development, conversion, or extension of any kind carried out with respect to military installations, whether to satisfy temporary or permanent requirements, or any acquisition of land... Congress defined “military installation” to mean “a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of military department or, in the case of an activity in foreign country, under the operational control of Secretary of military department or SOD, without regard to duration of operational control.

California v. Trump¹¹ and the Ninth Circuit in *Sierra Club v. Trump* held that section 2808 did not authorize the transfer of funds.¹² However, the Supreme Court placed a stay on the Ninth Circuit decision.¹³ The Supreme Court agreed to review the Ninth Circuit decision, but cancelled the arguments at the request of the Biden administration.¹⁴

The Biden administration opposes Trump's border wall. After taking office, President Biden ended the National Emergency declaration and put a 60-day halt on border wall construction.¹⁵ President Biden cancelled several border wall contracts and requested Congress to terminate prior funding for the border wall.¹⁶ Republicans are pursuing efforts to restore border wall funding.¹⁷ Remediation efforts are underway on the border to stop further environmental damage.¹⁸ Texas has begun the construction of the Texas-Mexico border wall.¹⁹ Nevertheless, President Biden supports the creation of the virtual border wall.²⁰

This article reviews the facts and earlier decisions leading up to the litigation. It analyzes and points out that the Ninth Circuit decisions were correct. It examines activities at the end of the Trump administration regarding border wall funding, the boondoggle at the border regarding wall construction, and the creation of a virtual border wall. Finally, it examines events during the Biden administration.

II. Border Wall Funding

President Trump initially sought funding for his border wall through the normal appropriation process. The President requested billions of dollars to construct his border wall in

¹¹ California v. Trump, 407 F. Supp. 3d 869 (N.D. Cal. 2019).

¹² Sierra Club v. Trump, 977 F.3d 853 (9th Cir. 2020), cert. granted, judgment vacated sub nom. Biden v. Sierra Club, 142 S. Ct. 56 (2021). The vote was 2 to 1, Judge Thomas and Judge Wardlaw voting to affirm, Judge Collins dissenting. The Ninth Circuit upheld the district court decision in California v. Trump, 379 F. Supp. 3d 928, 937 (N.D. Cal. 2019), aff'd, 963 F.3d at 950.

¹³ 2019 Order, supra note 7.

¹⁴ Pete Williams, *Supreme Court Cancels Arguments on Trump's Border Wall, 'Remain in Mexico' Policy*, NBC NEWS (Feb. 3, 2021), <https://www.nbcnews.com/politics/supreme-court/supreme-court-cancels-arguments-trump-s-border-wall-remain-mexico-n1256593>.

¹⁵ María Méndez, *What Will Happen To The Border Wall After Biden's 60-day Review?*, Tex. Pub. Radio (Feb. 3, 2021), <https://www.tpr.org/border-immigration/2021-02-03/what-will-happen-to-the-border-wall-after-bidens-60-day-pause-runs-out>.

¹⁶ Caroline Downey, *Biden Administration Cancels Remaining Contracts for Border Wall* (Oct. 9, 2021), https://www.yahoo.com/video/biden-administration-cancels-remaining-contracts-181209186.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAANKYjZSNqHWKiXCx9BbIgcU5KND6Jlf5qvAR_Wtf-2fcM3DPaWokUxC-jh1fxy7AZDwI4xcJruBL3GAXQitoXz5odsQDWA1qdsV2YEa3dehUKJ3oXskc145oLU0mBbMHb7CCcfdGtTbuHmWSh1w0NjtMOeokMtzd83C1RhoaxQc.

¹⁷ Priscilla Alvarez, *Biden administration canceling more wall contracts* (Oct. 8, 2021), <https://www.cnn.com/2021/10/08/politics/border-wall-contracts-canceled-biden-administration/index.html>.

¹⁸ Mary B. Powers, *Feds to Repair Damage From Halted Border Wall Work in Texas, California*, ENR (May 5, 2021), <https://www.enr.com/articles/51704-feds-to-repair-damage-from-halted-border-wall-work-in-texas-california> (it also addressed dangerous soil erosion caused by improper compaction of soil and construction material along 14-mile segment in San Diego).

¹⁹ Kaylee Olivas, *Phase one of Governor Abbot's border construction plan begins*, KVEO-TV (Dec. 31, 2021), <https://www.valleycentral.com/news/local-news/phase-one-of-governor-greg-abbotts-border-construction-plan-begins/>.

²⁰ Candice Bernd, *Biden is rejecting Trump's border wall-but favors his own tech wall*, Truthout (Feb 2, 2021), <https://truthout.org/articles/biden-is-rejecting-trumps-border-wall-but-proposing-his-own-virtual-wall/>.billio

FY 2017.²¹ Congress appropriated 341.2 million dollars to replace 40 miles of existing fencing.²² Contracts for various border wall prototypes were offered.²³

President Trump asked for 2.6 billion dollars for his wall in FY 2018.²⁴ Congress appropriated 1.571 billion dollars for border security technology and fencing in designated locations.²⁵ Customs and Border Patrol (CBP) received 251 million dollars for “14 miles of secondary fencing, all of which provides for cross-barrier visual situational awareness, along the southwest border in the San Diego sector.” El Centro sector barriers were funded from the 445 million dollars authorized for “replacement of existing border fence along the southwest border.”²⁶ However, Congress again restricted the funding to “operationally effective designs deployed as of the date of the Consolidated Appropriations Act of 2017, such as currently deployed steel bollard designs, that prioritize agent safety.”²⁷ None of the funding could be used to construct any of President Trump’s border wall prototypes.²⁸

Construction of replacement fencing in the San Diego sector began in June 2018.²⁹ The existing 14 mile, eight to ten foot high barrier built from scrap metal was replaced by an 18- to 30-foot-high bollard style wall topped with anti-climbing plates at a projected cost of 147 million dollars.³⁰ Construction of the two miles of replacement fencing in El Centro sector was completed in October 2018.³¹

Funding for the border wall remained contentious. President Trump initially requested 1.6 billion dollars for his border wall in the proposed FY 2019 budget, but increased his request to five billion dollars.³² House Republicans approved five billion dollars in funding for border security.³³ The Senate only offered 1.6 billion dollars for border wall construction.³⁴ Congress passed and President Trump signed a short-term spending bill in September 2018, which did not

²¹ Norman Merchant, *As Trump seeks billions for wall, US still paying for fence*, ASSOC. PRESS, May 12, 2017.

²² Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135, 434 (2017).

²³ Ron Nixon, *New Contracts for Border Wall Prototypes*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/us/politics/border-wall-prototype-contracts.html>.

²⁴ The Trump Administration FY 2018 Budget: Funding for a Massive Deportation Machine, AILA Doc. No. 17060906 (June 9, 2017).

²⁵ Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 616 (2018).

²⁶ GEN. ACCT. OFF., *SOUTHWEST BORDER SECURITY: CBP IS EVALUATING DESIGNS AND LOCATIONS FOR BORDER BARRIERS BUT IS PROCEEDING WITHOUT KEY INFORMATION* 11 (Aug. 2018), <https://www.gao.gov/assets/gao-18-614.pdf>.

²⁷ Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 617 (2018).

²⁸ Michael Smolens, *Trump’s Push for Border Wall May Cast Shadow on Election*, SAN DIEGO UNION TRIB. (Aug. 15, 2018), <https://www.sandiegouniontribune.com/news/columnists/michael-smolens/sd-me-smolens-border-wall-20180809-story.html>.

²⁹ *Border Wall Construction Project Starts in San Diego Sector*, U.S. CUSTOMS AND BORDER PATROL (June 6, 2018) (“Under this president’s leadership, we have a renewed commitment to secure our border . . . The new primary wall project represents an important milestone in our work to secure the international border.”), <https://www.cbp.gov/newsroom/local-media-release/border-wall-construction-project-starts-san-diego-sector/>.

³⁰ *Id.*

³¹ Danny Freeman and R. Stickney, *Renovation Complete on Tallest Portion of Border Fence in Southwest U.S.*, NBC SAN DIEGO, (Oct. 26, 2018), <https://www.nbcsandiego.com/news/local/dhs-el-centro-border-fence-san-diego-mexico/169686/>.

³² Kevin Diaz, *Trump’s Border Wall Boast Runs Into Budget Maw*, SAN ANTONIO EXPRESS-NEWS, (Aug. 30, 2018), <https://www.expressnews.com/news/local/article/Trump-s-border-wall-boast-runs-into-budget-maw-13192298.php>.

³³ Erica Werner, *House Eyes \$5 Billion for Border Wall, Setting Up Showdown with Senate*, WASH. POST (Jul. 18, 2018), <https://www.texastribune.org/2018/07/18/house-eyes-5-billion-border-wall-setting-showdown-senate/>.

³⁴ *Id.*

include any funding for his wall.³⁵ Subsequently, House majority leader Kevin McCarthy (R. Cal.) introduced legislation that included 23 billion dollars to complete President Trump's border wall.³⁶ However, Congress agreed to postpone any consideration of border wall funding until after the November mid-term elections.³⁷

Congress passed a bipartisan continuing resolution in December 2018, which kept the remaining federal agencies funded through 2019, but included no funding for the border wall.³⁸ After criticism from conservative commentators, President Trump refused to sign the bill and executed a partial shutdown of the federal government.³⁹ President Trump demanded 5.7 billion dollars for 234 miles of new steel slat fencing in sections of the border, which was projected to cost 24.4 million dollars per mile.⁴⁰ During the shut-down, the President announced that if negotiations regarding the border wall were not successful, he would "call a national emergency and build [the wall] very quickly."⁴¹ He asserted that he had "[an] absolute right to do [a] national emergency if [he] wanted," and the "threshold" would be no "deal with people [in Congress] that are unreasonable."⁴²

Democrats took control of the House of Representatives in 2019.⁴³ After the 45-day partial shutdown of the federal government was temporarily halted, a bipartisan committee was created to reach a compromise.⁴⁴ The January 2019 compromise provided 1.375 billion dollars for 55 miles of border fencing in the Rio Grande Valley in Texas.⁴⁵ Funding was limited to pedestrian fencing "operationally effective designs deployed as of the date of the Consolidated Appropriations Act, 2017...such as currently deployed steel bollard designs."⁴⁶ Construction was prohibited in certain areas.⁴⁷ Limitations on certain executive spending were also established.⁴⁸

President Trump signed the agreement, but issued a proclamation "declaring that a national emergency exists on [the] southern border."⁴⁹ The national emergency declaration was designed to get around congressional spending restrictions and transfer military funds to pay for his border

³⁵ Committee for Responsible Federal Budget, *Appropriation Watch: FY 2019* (Sept. 28, 2018).

³⁶ Dean DeChiaro, *McCarthy Bill Would Fund Border Wall, Boost Speaker Bid*, ROLL CALL (Oct. 15, 2018), <https://rollcall.com/2018/10/15/mccarthy-bill-would-fund-border-wall-boost-speaker-bid/>.

³⁷ *Id.*

³⁸ John Burnett, *Border Patrol Makes its Case for an Expanded 'Border Barrier'*, NPR (Jan. 11, 2019), <https://www.npr.org/2019/01/11/684037990/border-patrol-makes-its-case-for-an-expanded-border-barrier>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Brief for Plaintiff-Appellees Cross-Appellants at 7–8, *El Paso County v. Trump*, 982 F.3d 332, 335 (5th Cir. 2020), *cert. denied sub nom.* *El Paso County v. Biden*, 141 S. Ct. 2885 (2021), *reh'g denied*, 142 S. Ct. 51 (2021), 2020 WL 1666978.

⁴² *Id.*

⁴³ Elliot Spagat and Colleen Long, *Immigration Spending Pact Has More Than a Border Wall*, ASSOCIATED PRESS (Feb. 14, 2019), <https://apnews.com/article/immigration-donald-trump-us-news-ap-top-news-az-state-wire-18b632a262634e31918344f2c74a8e32>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Consolidated Appropriations Act 2019, Pub. L. No. 116-6, 133 Stat. 13, 28 (2019).

⁴⁷ *Id.* No funds were available for construction within the Santa Ana Wildlife Refuge, Bentsen-Rio Grande Valley State Park, La Lomita Historical Park, National Butterfly Center, or within or east of the Vista del Mar Ranch tract of the Lower Rio Grande National Wildlife Refuge.

⁴⁸ *Id.* at 197.

⁴⁹ Plaintiffs' Motion for Partial Summary Judgment at 3, *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 895 (N.D. Cal. 2019), *aff'd*, 963 F.3d 874 (9th Cir. 2020), *vacated and remanded sub nom.* *Biden v. Sierra Club*, 142 S. Ct. 46 (2021).

wall.⁵⁰ President Trump stated that “he went through Congress,” but was “not happy” with the 1.375 billion dollars appropriated for his wall. He explained “I didn’t need to do this. But I’d rather do it much faster...that’s all.”⁵¹

On February 15, 2019, President Trump announced that he planned to divert 6.1 billion dollars in federal funds for border wall construction.⁵² The administration identified three funding sources: 3.6 billion dollars from military construction projects; 2.5 billion dollars from other military accounts; and the remaining 601 million dollars from the Treasury Forfeiture Fund.⁵³

After ten days, the Department of Homeland Security (DHS) asked the Department of Defense (DOD) to fund approximately 218 miles of new wall in Customs and Border Patrol (CBP) priority areas.⁵⁴ The Secretary of Defense (SOD) in March approved the reprogramming of one billion dollars from its general funds pursuant to section 8005 to counter drug activities under section 284 for the New Mexico–El Paso sector project one and the Arizona-Yuma projects section one and two.⁵⁵

The DOD previously had a ‘gentlemen’s agreement’ with Congress to seek approval from the relevant committees before reprogramming funds, rather than informing them after the decision had been finalized.⁵⁶ In this case, the SOD ordered the reprogramming “without regard to comity-based policies that require prior approval from congressional committees.”⁵⁷ Acting SOD Shanahan testified that the administration was willing to bear any potential adverse reactions from Congress.⁵⁸ The same day both the House Armed Service and Appropriation Committees voted to disapprove the transfer.⁵⁹

The House and Senate passed resolutions opposing the national emergency declaration.⁶⁰ President Trump vetoed the joint resolution.⁶¹ The House failed to override President Trump’s veto.⁶² President Trump stated that the “situation on our border cannot be described as anything other than a national emergency and our Armed Forces are need to help confront it.”⁶³

⁵⁰ Peter Baker, Emily Cochrane, and Maggie Haberman, *As Congress Passes Spending Bill, Trump Plans National Emergency to Build Border Wall*, N.Y. TIMES (Feb. 14, 2019), <https://www.nytimes.com/2019/02/14/us/politics/trump-national-emergency-border.html>.

⁵¹ *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 894 (N.D. Cal. 2019), *aff’d*, 963 F.3d 874 (9th Cir. 2020), *vacated and remanded sub nom. Biden v. Sierra Club*, 142 S. Ct. 46 (2021).

⁵² *Id.* at 895.

⁵³ *Id.*

⁵⁴ *Id.* at 896.

⁵⁵ *Id.*

⁵⁶ *Sierra Club v. Trump*, 963 F.3d 874, 882 (9th Cir. 2020), *cert. granted*, 141 S. Ct. 618 (2020), *vacated and remanded sub nom. Biden v. Sierra Club*, 142 S. Ct. 46 (2021).

⁵⁷ *Id.*

⁵⁸ *Sierra Club*, 379 F. Supp. 3d at 896–897.

⁵⁹ *Id.*

⁶⁰ Lolita C. Baldor and Robert Burns, *Lawmakers Denounce Plan to Divert Military Money for Wall*, ASSOCIATED PRESS (Mar. 26, 2019), <https://apnews.com/article/north-america-donald-trump-ap-top-news-adam-smith-politics-a25e1aa8e1a94979ad7706b1a0e94d61>; Alan Fram, *Trump Border Emergency Survives as House Veto Override Fails*, ASSOCIATED PRESS (Mar. 26, 2019), <https://apnews.com/article/north-america-donald-trump-ap-top-news-az-state-wire-ca-state-wire-056c0ce531a34b999a6a50179e2265ad>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Veto Message on H.J. Res. 46, H.R. DOC. NO. 116-22, at 2 (2019), <https://www.govinfo.gov/content/pkg/CDOC-116hdoc22/pdf/CDOC-116hdoc22.pdf>.

Acting Secretary of Homeland Security (SHS) McAleenan, relying on his authority under 102(c) of IIRIRA, waived numerous environmental laws that would obstruct projects in the El Paso and Yuma sectors in April of 2019.⁶⁴

In May 2019, Acting SOD Shanahan authorized the transfer of additional 1.5 billion dollars for border barrier construction into counter-drug activities under section 284 for four projects: El Centro California Sector Project One and Arizona-Tucson Sector Projects One through Three.⁶⁵ The Secretary again relied on section 8005, as well as the “special transfer authority under section 9002 of the 2019 Defense Department Appropriation Act and section 1512 of John McCain National Defense Authorization Act of 2019.”⁶⁶ Section 9002 is subject to the same constraints as section 8005.⁶⁷ Acting DHS Secretary McAleenan waived NEPA requirements for the four projects.⁶⁸ This was the 12th time the Trump administration utilized waivers under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁶⁹

The legality of the SHS’s waiver authority was the focus of earlier litigation.⁷⁰ The Ninth Circuit in *In Re Border Infrastructure* Litigation upheld the validity of the SHS’s waivers of numerous laws for border wall construction in the San Diego and El Centro Sectors.⁷¹ The court’s decision was dubious because the waivers were ultra vires.⁷² The Secretary’s authority under section 102(c) was limited to border fencing authorized in section 102(b), which was completed in 2013.⁷³ Furthermore, the unbridled discretion granted to the Secretary under section 102(c) violated the non-delegation doctrine.⁷⁴

⁶⁴ *Sierra Club v. Trump*, 379 F. Supp. 3d at 897. Representative Grijalva stated: “the Trump administration consistently stoops to new lows when it comes to building the President’s vanity wall—even if it endangers the public health of our communities and the environment we call home . . . The president is sending a clear message to border residents: his political agenda is more important than their homes, health, and livelihoods.” Keerthi Vedantam, *Critics Blast DHS Environmental Waivers That Clear Way for Border Wall*, CRONKITE NEWS (Apr. 24, 2019), <https://cronkitenews.azpbs.org/2019/04/24/critics-blast-dhs-environmental-waivers-that-clear-way-for-border-wall/>.

⁶⁵ *Sierra Club*, 379 F. Supp. 3d, at 898.

⁶⁶ *State of California v. Donald J. Trump*, Order Granting in Part and Denying in Part Plaintiffs’ Motion for Partial Summary Judgment, Denying Defendants’ Motion for Partial Summary Judgment, and Certifying Judgment for Appeal, Case No. 19-cv-00872-HSG, Dkts. Nos. 176, 182, U.S. District Court for Northern District of California, June 28, 2019 (slip opinion).

⁶⁷ Section 9002 authorizes SOD to “transfer up to [\$2 billion] between the appropriations or funds made available to DOD in this title.” This act is “in addition to any other transfer authority available to DOD” including section 8005—and is also “subject to same terms and conditions as the authority provided in section 8005.” SOD must inform Congress of these transfers.

⁶⁸ 84 Fed. Reg. 21,798 (May 15, 2019) waivers for the Tucson projects and 84 Fed. Reg. 21,800 waivers for El Centro project.; Paul Ingram, *BP Plans 63 Miles of New Border Wall, Up to 30 Ft. High, in 3 Protected AZ Wilderness Areas*, TUCSON SENTINEL (May 7th, 2019), https://www.tucsonsentinel.com/local/report/050719_organ_pipe_border/bp-plans-63-miles-new-border-wall-up-30-ft-high-3-protected-az-wilderness-areas/.

⁶⁹ Press Release, Center for Biological Diversity, *Trump Administration Waives Laws to Build 100 Miles of Border Wall Across Arizona National Monument, Wildlife Refuges* (May 14, 2019), <https://biologicaldiversity.org/w/news/press-releases/trump-administration-waives-laws-to-build-100-miles-border-wall-across-arizona-national-monument-and-refuges-2019-05-14/#:~:text=The%20three%20waivers%20sweep%20aside,El%20Centro%20and%20San%20Diego.>

⁷⁰ *In re Border Infrastructure* Env’tl. Litig., 915 F.3d 1213, 1226 (9th Cir. 2019); The Ninth Circuit upheld the federal district court decision.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Fitzgerald, *supra* note 2, at 153.

⁷⁴ *Id.* at 182–91.

Sierra Club and Southern Border Communities Coalition (SBCC) brought suits,⁷⁵ alleging violations of the 2019 Consolidated Appropriation Act (CAA), the Appropriations Clause, Presentment Clause, NEPA, and asserted the SOD action was ultra vires.⁷⁶ On May 24, 2019, the U.S. District Court for the Northern District of California granted a preliminary injunction, halting the February transfer of one billion dollars for the New Mexico and Arizona projects.⁷⁷ The lawsuit preceded the May transfer of 1.5 billion dollars. Later in June, the district court applied the same reasoning and concluded the 1.5 billion dollar transfer was also not authorized by 8005 or 9002.⁷⁸

The court held the plaintiffs had standing.⁷⁹ The plaintiffs were likely to succeed on the merits of the case because the federal government action was ultra vires.⁸⁰ The administration's action had not complied with section 8005 because (1) the items for which funds were requested were denied by Congress; (2) the transfer was not based on "unforeseen military requirements; (3) accepting the government's proposed interpretation of section 8005 would raise serious constitutional questions.⁸¹ However, the court held that the plaintiffs were unlikely to succeed on their NEPA claims.⁸² The court also rejected the plaintiff's assertion that the SHS's (SHS) waiver authority under section 102(c) only extended to DHS funded projects. The court held the SHS waiver authority was derivative, so could be used for DOD funded projects that were designed to accomplish DHS goals.⁸³

Another suit brought by California and New Mexico⁸⁴ challenged the transfer of 1.5 billion dollars to fund four border projects: one in the El Centro sector in California, and three in the Tucson sector in Arizona.⁸⁵ California argued that the El Centro barrier construction threatened various animal and plant species.⁸⁶ Construction would potentially hinder migration of Peninsular

⁷⁵ There was also a companion suit brought by ACLU and Southern Border Communities Coalition (SBCC). Miranda Green, *Environmental Groups Launch Lawsuit Against Trump's Border Emergency Declaration*, HILL (Feb. 18, 2019), <https://thehill.com/policy/energy-environment/430455-environment-groups-launch-lawsuit-against-trumps-border-wall>.

⁷⁶ *Sierra Club v. Trump*, 379 F. Supp. 3d 883 (N.D. Cal. 2019).

⁷⁷ *Id.* at 928.

⁷⁸ *Sierra Club v. Trump*, No. 19-CV-00892-HSG, 2019 WL 2715422, at *4 (N.D. Cal. June 28, 2019).

⁷⁹ *Id.* at 10-14. Subsequently, the Democratic members of the U.S. House of Representatives brought suit in the U.S. District Court for the District of Columbia, challenging the President's authority to reprogram funds. Judge Trevor N. McFadden held the House lacked standing to bring the suit. He stated: "Congress has several political arrows in its quiver to counter perceived threats to its sphere of power," including legislation "to expressly restrict the transfer or spending of funds for a border wall." Adam Liptak, *Supreme Court Lets Trump Proceed on Border Wall*, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/us/politics/supreme-court-border-wall-trump.html>; Gregg Re, *Judge Tosses House Dems' Lawsuit Over Trump's Use of Emergency Military Funds for Border Wall*, FOX NEWS (June 3, 2019), <https://www.foxnews.com/politics/judge-house-dems-lawsuit-trump-emergency-military-funds-border-wall>.

⁸⁰ *Sierra Club v. Trump*, 379 F. Supp. 3d at 908-19.

⁸¹ *Sierra Club*, 379 F. Supp. 3d at 921-22.

⁸² *Id.* at 222-24.

⁸³ *Id.* at 922-23.

⁸⁴ Jaqueline Thomsen, *California, New Mexico Ask Judge to Block Trump from Using Military Funds for Border Wall*, HILL (June 13, 2019), <https://thehill.com/regulation/court-battles/448399-california-new-mexico-ask-judge-to-block-trump-from-using-military>.

⁸⁵ State of California v. Donald J. Trump, Order Granting in Part and Denying in Part Plaintiffs' Motion for Partial Summary Judgment, Denying Defendants' Motion for Partial Summary Judgment, and Certifying Judgment for Appeal, Case No. 19-cv-00872-HSG, Dkts. Nos. 176, 182, U.S. District Court for Northern District of California, June 28, 2019 (slip opinion).

⁸⁶ *Id.* at 6-7.

bighorn sheep across the southern border and pregnant ewes might be scared away by construction activities.⁸⁷ The court rejected the claims, holding that the state's line of causation did not pose the requisite "threat of future demonstrable harm to a protected species."⁸⁸ California only demonstrated that Peninsular bighorn sheep crossed the southern border west of project area," and that the pregnant ewe population may seek a critical area "adjacent" to project site.⁸⁹ California did not allege that protected species cross the southern border where challenged construction would occur.⁹⁰ Furthermore, California's allegation that pregnant ewes may be adversely affected does not explain why temporary construction would pose a threat of demonstrable harm to the species.⁹¹

The court also determined that New Mexico failed to show irreparable injury.⁹² New Mexico asserted that barrier construction will harm the Mexican wolf by preventing genetic exchange between wolves in the U.S. and Mexico.⁹³ The court doubted that New Mexico's interest in the international travel by a few animals could ever justify a permanent injunction against the federal government.⁹⁴ Furthermore, New Mexico only identified two instances of Mexican wolves crossing the border, one of which returned to Mexico, and neither had bred with wolves in the U.S.⁹⁵ New Mexico's speculation that the border barrier might prevent inbreeding, which might hamper genetic diversity, and might make Mexican wolves more susceptible to disease, was not sufficient evidence of irreparable harm to the species.⁹⁶

California and New Mexico also alleged irreparable injury arguing that the SHS's waiver interfered with the states' ability to enforce their laws protecting the environment and natural resources.⁹⁷ The court held that it is legally unclear whether waiver violates the states "sovereign interest in enforcing state laws" or "merely deprives the states of the ability to sue to vindicate those interests."⁹⁸ However, any harm to the states sovereign interests did not have to be addressed because the court had earlier enjoined wall construction.⁹⁹

In June 2019, the U.S. District Court for the Northern District of California granted California's request for a declaratory judgment, denying the federal government the ability to reprogram funds for the designated projects. The court reaffirmed its earlier decision and held the funds reprogrammed under sections 8005 and 9002 for designated projects were unlawful.¹⁰⁰

The federal government petitioned the Ninth Circuit to grant a stay of the district court injunction granted in the Sierra Club and SBCC case.¹⁰¹ The Ninth Circuit in July rejected the

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 7.

⁹⁷ *Id.* at 7–8.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Criteria for stay are the following: 1) whether the stay applicant has made a strong showing that he is likely to succeed on the merit; 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) wherein lies the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

federal government's request by a vote of 2-1.¹⁰² The court held that the federal government was unlikely to succeed on the merits of the case.¹⁰³ The transfer of funds did not meet the requirements of section 8005.¹⁰⁴ Furthermore, the Trump administration's action violated congressional authority over appropriations.¹⁰⁵

The federal government appealed to the U.S. Supreme Court.¹⁰⁶ On July 26, the Supreme Court reversed the lower courts and granted the stay of the district court's preliminary injunction.¹⁰⁷ The stay remains in effect "pending disposition of the Government's appeal in U.S. Court of Appeals for the Ninth Circuit and disposition of the government's petition for a writ of certiorari if such a writ is timely sought."¹⁰⁸ The Court questioned the plaintiff's standing, stating: "the government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005."¹⁰⁹

Justices Ginsburg, Sotomayor, and Kagan voted to deny the petition. Justice Breyer argued for a partial stay that would allow the government to finalize the contracts, but not begin construction.¹¹⁰ The Court's decision allowed the federal government to spend 2.5 billion dollars for the construction of bollard fencing on 130 miles along the U.S. Mexican border in Arizona, California, and New Mexico.¹¹¹

Professor Vladeck commented that the decision demonstrated a dubious trend on the part of the Court to grant stays in cases requested by the Solicitor General that favored the government's position.¹¹² Presidents George H.W. Bush and Barack Obama only sought eight stays from the Supreme Court.¹¹³ Conversely, the Trump administration asked for 20 stays and has prevailed in most instances.¹¹⁴ The Supreme Court seems to be encouraging lower courts to accept the federal government's arguments.¹¹⁵ The lack of standing is often cited as the basis for awarding many stays.¹¹⁶ Professor Vladeck argues that the Court is operating under the "presumption of

¹⁰² *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019).

¹⁰³ *Id.* at 689–707.

¹⁰⁴ *Id.* at 690–92.

¹⁰⁵ *Id.* at 688–89.

¹⁰⁶ Josh Gerstein, *Justice Dept. Asks Supreme Court to Lift Border Wall Ruling*, POLITICO (July 12, 2019), <https://www.politico.com/story/2019/07/12/supreme-court-trump-border-wall-1415651>. Sierra Club noted that "the courts have twice ruled against Trump request to stay this important court order stopping construction of his ruinous wall. Now he is asking the Supreme Court to step in and save his wall, but we will continue to vehemently fight these tactics."

¹⁰⁷ *Trump v. Sierra Club*, 140 S. Ct. 1 (2019).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Curt Prendergast, *Supreme Court Opens Door to \$1 billion for wall on Arizona-Mexico Border*, ARIZ. DAILY STAR (Jul. 27, 2019), https://tucson.com/news/local/supreme-court-opens-door-to-1-billion-for-wall-on-arizona-mexico-border/article_d0931fd2-979b-54c6-b408-0d45bd411449.html; Liptak, *supra* note 79.

¹¹² Steve Vladeck, *Academic Highlight: The Quiet Doctrinal Shift (Likely) Behind the Border-wall Stay*, SCOTUSBLOG (July 27, 2019), <https://www.scotusblog.com/2019/07/academic-highlight-the-quiet-doctrinal-shift-likely-behind-the-border-wall-stay/>. *see also* Steve Vladeck, *Power Versus Discretion: Extraordinary Relief and the Supreme Court*, SCOTUSBLOG (Dec. 12, 2018) <https://www.scotusblog.com/2018/12/power-versus-discretion-extraordinary-relief-and-the-supreme-court/>; Linda Greenhouse, *On the Border Wall, the Supreme Court Caves to Trump*, N.Y. TIMES, (Aug. 1, 2019) <https://www.nytimes.com/2019/08/01/opinion/trump-supreme-court-border-wall.html>.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

constitutionality,” which assumes that the government is acting in accordance with the law and places the burden of proof on the plaintiff to counter this assumption.¹¹⁷ Justices seem to be responding on how they will rule on the case when it reaches the court, rather than the merits of granting the stay.¹¹⁸ This is causing confusion and undermining the legitimacy of the Court.¹¹⁹

Justice Sotomayor, dissenting in an unrelated case, also criticized the Court’s willingness to grant the Solicitor General’s requests for stays of lower court decisions that were decided against the federal government.¹²⁰

In September 2019, the House again voted 236-174 to end the President’s emergency declaration.¹²¹ Speaker Pelosi stated: “The administration’s decision also dishonors the Congress by negating its most fundamental principle: the separation of powers. It’s an assault on our power of the purse.”¹²² However, the Senate vote, 54-41, was not sufficient to override the President’s veto, so the national emergency declaration continued.¹²³

III. Sierra Club v. Trump — Section 8005

The federal government requested a stay of the district court decision.¹²⁴ The federal government argued that the case revolved around a question of statutory interpretation of Section 8005.¹²⁵ The case should have been resolved under the Administrative Procedures Act (APA),¹²⁶ which requires the plaintiff to demonstrate that she will (1) suffer an injury in fact and (2) that the injury falls within the zone of interests to be protected by the statute.¹²⁷ The federal government asserted that the plaintiff’s injuries fell outside the zone of interests that are protected in Section 8005.¹²⁸

The Ninth Circuit refused to grant the stay.¹²⁹ The court held the DOD’s reprogramming of funds did not meet the requirements of section 8005 and violated the Constitution.¹³⁰ The court determined that the “plaintiffs either have an equitable cause of action to enjoin a constitutional violation, or they can proceed on their constitutional claim under the Administrative Procedures Act.”¹³¹

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3, 4–6 (2019); Ian Millhiser, *Justice Sotomayor Warns the Supreme Court is Doing “Extraordinary” Favors for Trump*, VOX (September 12, 2019), <https://www.vox.com/2019/9/12/20862320/sotomayor-supreme-court-favors-trump>.

¹²¹ Emily Cochrane, *House Again Rejects Trump’s Border Emergency*, N.Y. TIMES (Sept. 27, 2019).

¹²² *Id.*

¹²³ Emily Cochrane, *Senate Again Rejects Trump’s Border Emergency, but Falls Short of a Veto-Proof Majority*, N.Y. TIMES (Sept. 25, 2019).

¹²⁴ *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019).

¹²⁵ Brief for Defendants-Appellants at 1-2, 30-41, *Sierra Club v. Trump, California v. Trump*, No. 19-16102, 19-16300, 19-16299, 19-16336 (9th Cir. Jul. 31, 2020) [hereinafter Appellants’ Brief].

¹²⁶ The court reviews an agency’s determination to ensure that it is not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

¹²⁷ *Assoc. Data Processing Services Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970).

¹²⁸ Cochrane, *supra* note 123.

¹²⁹ *Sierra Club*, 929 F.3d at 707.

¹³⁰ *Id.* at 676.

¹³¹ *Id.*

A. Equitable Relief

A statutory cause of action is not needed to obtain equitable relief for unauthorized Executive conduct.¹³² The Supreme Court consistently employs equity to review Executive actions without addressing the statutory cause of action.¹³³ The Supreme Court has granted equitable relief for Executive action that is ultra vires in many cases.¹³⁴ The Court has stated that “when an Executive acts ultra vires, courts are normally available to reestablish the limits on his authority.”¹³⁵

The Supreme Court has also held that equitable relief is available in constitutional challenges to Executive action. This has occurred both before¹³⁶ and after the enactment of the APA.¹³⁷ The Supreme Court in *Free Enterprise Fund v. Public Co. Accounting Oversight Board* rejected the argument that a challenge to “government action under the appointment clause or separation of power principles” should be treated “differently than every other constitutional claim” for which “equitable relief has long been recognized as the proper means for preventing entities from unconstitutionally.”¹³⁸

Equitable actions addressing ultra vires and unconstitutional claims are not premised on a statutory right or existence of a statutory cause of action, so the zone of interest test does not apply.¹³⁹ Instead, plaintiffs can seek judicial redress for injuries caused by unauthorized government conduct.¹⁴⁰ The zone of interest test only governs statutorily created causes of action and confines the right to sue.¹⁴¹ The zone of interest test does not extend to persons whose interests are unrelated to any statutory violations.¹⁴² For example, the Supreme Court in *Armstrong v. Exceptional Child Center* concluded that the Medicaid Act “displaced the equitable relief traditionally available to enforce federal law,” but reiterated that “in a proper case, relief may be given in a court of equity. . . to prevent injuries act of a public official.” “Relief can be granted . . .to prevent an injurious act of public official.”¹⁴³

Judge Bork of the D.C. Circuit perceptively noted that “a litigant’s interest normally will not fall within the zone of interest of the very statutory or constitutional provision that he claims does not authorize action concerning that interest.”¹⁴⁴ Consequently, plaintiffs alleging ultra vires action “need not show that their interests fall within zone of interest of the constitutional and statutory powers invoked by the president.”¹⁴⁵

¹³² Brief of Amici Curiae Federal Courts Scholars in Support of Respondents at 13-14, *Trump v. Sierra Club*, No. 20-138 (Jan. 19, 2021) [hereinafter, Brief Constitutional Scholars].

¹³³ *Id.*

¹³⁴ *Id.* at 9-10.

¹³⁵ *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (citing *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988).

¹³⁶ Brief Constitutional Scholars, *supra* note 132, at 12 (citing *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 583 (1952)).

¹³⁷ *Id.* at 12 (citing *Dames Moore v. Regan*, 453 U.S. 654, 667 (1981)).

¹³⁸ *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010).

¹³⁹ Brief Constitutional Scholars, *supra* note 132, at 12-17.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Brief Constitutional Scholars, *supra* note 132, at 12-17.

¹⁴³ *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 328-29 (2015).

¹⁴⁴ *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811, n.14 (D.C. Cir. 1987).

¹⁴⁵ *Id.*

The APA does not preclude equitable challenges to ultra vires or unconstitutional government action. Congress acknowledged the persistence of the court's ultra vires authority after the enactment of the Administrative Procedures Act (APA).¹⁴⁶ The 1947 Attorney General Manual referred to the APA as "a general restatement of principles of judicial review embodied in many statutes and judicial decisions."¹⁴⁷ The Senate Committee report on the APA declared that "it has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified."¹⁴⁸

The Supreme Court has adopted this position.¹⁴⁹ The Court in *Franklin v. Massachusetts* examined the constitutionality of a reapportionment plan of the Massachusetts House of Representatives.¹⁵⁰ The Court refused to review the plan under the APA because it was not a final agency action. However, the Court did rule on the plan's constitutionality.¹⁵¹ The Court stated "although reapportionment is not subject to review under APA, that does not dispose of appellees constitutional claims."¹⁵² The Court went on to decide the case on its merits, demonstrating that "judicially implied injunctive relief remains available."¹⁵³

Federal courts have not viewed the APA as precluding other causes of action.¹⁵⁴ The Ninth Circuit declared that precedent "clearly contemplates that claims challenging agency actions-particularly constitutional claims-may exist wholly apart from the APA."¹⁵⁵ Scholars also agree that the APA "does not exclude other forms of judicial review."¹⁵⁶

B. Ultra Vires

The Supreme Court has recognized its authority to declare an administrative action ultra vires. The Court in *Larsen v. Domestic & Foreign Commerce Corp.* stated:

Where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without

¹⁴⁶ U.S. Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 93 (1949); see Brief Constitutional Scholars, *supra* note 132, at 15-16.

¹⁴⁷ *Id.*

¹⁴⁸ S. Rep. No. 79-752, at 26 (1945), *quoted in* *Dart v. U.S.*, 848 F.2d 217, 224 (D.C. Cir. 1988).

¹⁴⁹ *Leedom v. Kyne*, 358 U.S. 184, 190 (1958).

¹⁵⁰ See *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

¹⁵¹ *Id.* at 801.

¹⁵² *Id.*

¹⁵³ John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 51-53 (2013).

¹⁵⁴ *Chamber of Com. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996); *Aid Ass'n for Lutherans v. U.S. Postal Serv.* 321 F.3d 1166, 1172 (D.C. Cir. 2003).

¹⁵⁵ *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019) (citing *Navajo Nation v. Dept. of Interior*, 876 F.3d 1144 (9th Cir. 2017) and *Presbyterian Church (U.S.A.) v. U.S.*, 870 F.2d 518 (9th Cir. 1989)).

¹⁵⁶ Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612 (1997). Professor Siegel stated: "There is in fact general judicial and scholarly agreement that non-statutory review was never eliminated and may still be used today. It may be used in cases where the APA fails to provide a plaintiff with a remedy." *Id.* at 1669-70.

impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore sufficient.¹⁵⁷

Several scholars critically noted that the Court has recognized ultra vires authority as the distinction between “errors in the exercise of delegated powers” and “acts in excess of delegated powers.”¹⁵⁸

1. Rejected Item

Section 8005 prohibits spending on an item that was rejected by Congress.¹⁵⁹ The Government argued that Congress only limited the DHS funding to 1.375 billion dollars for Rio Grande Valley border fencing and therefore, DOD funding for the border wall was not prohibited.¹⁶⁰ The Ninth Circuit properly rejected this argument and held that Congress specifically denied funding for the border wall. It did not matter which agency requested the funding for the wall. Congress specifically refused to fund this item.¹⁶¹ The Ninth Circuit noted that this was “creative repackaging... But putting a gift in different wrapping paper does not change the gift.”¹⁶²

The Ninth Circuit decision is consistent with text. Statutory interpretation begins with the text. Statutory interpretation must be “compatible with the plain text” and the “ordinary, contemporary, and common” meaning of words Congress chooses.¹⁶³ The text of appropriation bills must be read strictly.¹⁶⁴

Section 230 of the Consolidated Appropriation Act of 2019 states the DHS “shall only” spend 1.375 billion dollars on Rio Grande Valley border fencing.¹⁶⁵ Congress was very specific about border fence funding. Congress restricted the pace, location, permissible designs, and funding for border barrier construction.¹⁶⁶ When Congress appropriates money for a specific project “that is all Congress intended” for that project “to get in (fy) from whatever source.”¹⁶⁷ Congress is not required to designate prohibited spending.¹⁶⁸ The burden is on the Executive to demonstrate that its spending was authorized by Congress. The Executive can't override Congress's deliberate and specific plan for funding border barriers. Otherwise, budgetary authority would be transferred to the Executive.¹⁶⁹

The Ninth Circuit decision was consistent with the specific/general canon of statutory interpretation, which states that “an appropriation for a specific purpose is exclusive of other

¹⁵⁷ *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689–90 (1949).

¹⁵⁸ Larry Alexander and Evan Tsen Lee, *Is there Such a Thing as Extraconstitutional: The Puzzling Case of Dalton v. Specter*, 27 ARIZ. ST. L. J. 845, 861 (1995).

¹⁵⁹ *Sierra Club v. Trump*, 929 F.3d 670, 690–91 (9th Cir. 2019).

¹⁶⁰ Appellants' Brief, *supra* note 125, at 41–48.

¹⁶¹ *Sierra Club v. Trump*, 929 F.3d 670, 690–91 (9th Cir. 2019).

¹⁶² *Id.* at 691.

¹⁶³ *Id.*

¹⁶⁴ *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 913 (N.D. Cal. 2019).

¹⁶⁵ *U.S. v. MacCollom*, 426 U.S. 317, 321 (1976) (“Where Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized.”).

¹⁶⁶ Consolidated Appropriations Act 2019, Pub. L. No. 116-6, 133 Stat. 13, 28 (2019).

¹⁶⁷ *MacCollom*, 426 U.S. at 321.

¹⁶⁸ *Sierra Club v. Trump*, 379 F. Supp. 3d at 909-19.

¹⁶⁹ Richard D. Rosen, *Funding Non-Traditional Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MILITARY L. REV. 1, 111–14 (1998).

appropriations in general terms which might be applicable in the absence of the specific appropriation.”¹⁷⁰ The D.C. Circuit held that a “specific appropriation precludes use of general ones even when the two appropriations come from different accounts.”¹⁷¹ The court found that an appropriation expressly for repairing jails in Alaska, made from funds comprised of ‘fines, forfeitures, and judgement,” precluded the financing of repairs to an Alaska jail with funds appropriated from the Treasury for the more general purpose of “repairs, betterments, and improvement of U.S. jails.”¹⁷²

Congress specifically granted 1.375 billion dollars for border fencing, which precluded any other federal spending for border wall construction.¹⁷³ Congress considered the President’s request for 5.7 billion dollars for his wall, but denied the wall funding. This led to a 45-day shut-down of the federal government.¹⁷⁴ Rejected proposals are important indicators of congressional intent. They demonstrate that Congress considered the proposal, but refused to accept it.¹⁷⁵

The Ninth Circuit decision was consistent with legislative intent and purposes. Section 8005 was enacted in 1974. The House Committee report noted that DOD should spend its appropriated funds for their designated purposes.¹⁷⁶ Otherwise, Congress will have to take restrictive action. Nevertheless, the committee recognized that changing circumstances might require DOD to reprogram funds for other purposes.¹⁷⁷ DOD was provided with flexibility to reprogram funds with the concurrence of four committees, Senate and House Committees on Interior and Insular Affairs and Appropriations.¹⁷⁸

The committee specifically noted that Section 8005 was not designed to expand DOD authority, but “to tighten congressional control over the reprogramming process.”¹⁷⁹ The committee stressed that “no reprogram or transfer request may be made for an item which has been denied by Congress in the budget process.”¹⁸⁰ In the past, DOD had made requests to reprogram funds for items “specifically deleted in the legislative process.”¹⁸¹ The committee criticized this practice as “an untenable position and notifies the DOD that henceforth no such requests will be entertained.”¹⁸²

The Trump administration specifically refused to bring its request for reprogramming before the relevant committees.¹⁸³ When informed of this refusal, Acting SHS declared that the administration was willing to bear any risk from its defiance.¹⁸⁴

¹⁷⁰ Nevada v. Department of Energy, 400 F.3d 9, 16 (D.C. Cir. 2005). See also GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 13–197 (Sept. 2008).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Consolidated Appropriations Act 2019, Pub. L. No. 116-6, 133 Stat. 13, 28 (2019).

¹⁷⁴ Sierra Club v. Trump, 379 F. Supp. 3d at 893-895.

¹⁷⁵ William N. Eskridge, *New Textualism*, 37 UCLA L. REV. 621, 636–40 (1990).

¹⁷⁶ H.R. Rep. 93-662 at 16 (1973).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Sierra Club v. Trump, 379 F. Supp. 3d 883, 896–97 (N.D. Cal. 2019).

¹⁸⁴ *Id.*

2. Unforeseen

Section 8005 only allows for the transfer of funds needed for unforeseen military activities.¹⁸⁵ The Government claimed that the wall was needed to counter illegal drug activities, which was not foreseen when DOD made its budget request in February 2018.¹⁸⁶ The need for DOD border wall funding was not contemplated until the DHS budget request in 2019 was denied.¹⁸⁷ The Ninth Circuit correctly rejected the government's assertion. The Court noted that "the long history of Presidents efforts to build the border barrier and of Congress's refusing to appropriate the funds he requested makes it implausible that this need was unforeseen."¹⁸⁸

Wall construction to stop drug trafficking was not unforeseen. DOD considered using Section 284 funds for wall funding in its February 2018 budget request. President Trump asked for \$1.8 billion for the wall to "combat the scourge of drug addiction."¹⁸⁹ DOD withheld one billion dollars of FY 2018 counter drug funding until July 2018 for Southwest border wall construction.¹⁹⁰ Congress did not intend its funding decisions to constitute unforeseen circumstances.¹⁹¹ The government was gaming the system through the timing of its budget requests. DHS requested funding for the wall, which Congress denied. The government then simply turned to DOD, claiming DOD's reprogramming of funds was unforeseen. This is "heads-I-win, tails-you-lose."¹⁹²

The Government asserted that DOD was provided with lump sum funding to be used for other purposes.¹⁹³ DOD has discretion on how to spend these funds.¹⁹⁴ Attorney General William Barr stated that Congress "ultimately only has the power to provide a lump sum" for the constitutional activities of the president. Furthermore, Congress is unable to "use the appropriation power to control Presidential power that is beyond its direct control."¹⁹⁵

The Ninth Circuit properly rejected this claim.¹⁹⁶ Section 8005 does not allow DOD to spend funds on items denied by Congress, such as the border wall.¹⁹⁷ Section 8005 does not involve lump sum expenditures, whose allocation is committed to agency discretion.¹⁹⁸ Instead, section 8005 poses restrictions on what and for what purposes the DOD must use reprogrammed funds.¹⁹⁹ Congress appropriated 1.375 billion dollars to DHS for Rio Grande Valley border fencing, which precluded any other wall funding by any other agency.²⁰⁰

¹⁸⁵ *Id.* at 915-22.

¹⁸⁶ Appellants' Brief, *supra* note 125, at 41-48.

¹⁸⁷ *Id.*

¹⁸⁸ *Sierra Club v. Trump*, 929 F.3d 670, 690 (9th Cir. 2019).

¹⁸⁹ Appellees' Answering Brief at 46, *Sierra Club v. Trump, California v. Trump*, No. 19-16102, 19-16300, 19-16299, 19-16336 (9th Cir. Aug. 15, 2019) [hereinafter, Appellees' Brief].

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Appellants' Brief, *supra* note 125, at 46-48 (citing *Lincoln v. Vigil* 508 U.S. 182, 192-93 (1993)).

¹⁹⁴ *Id.* (citing *Vigil*, 508 U.S. at 193).

¹⁹⁵ William C. Banks & Peter Raven-Hansen, *National Security Law and Power of the Purse* 144 (1994).

¹⁹⁶ *Sierra Club v. Trump*, 929 F.3d 670, 696 n.19 (9th Cir. 2019).

¹⁹⁷ *Id.* at 690-91.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Consolidated Appropriations Act 2019, Pub. L. No. 116-6, 133 Stat. 13, 28 (2019).

3. Military Requirement

Section 8005 limits funding solely to meet military requirements. The government claimed the reprogramming of funds is necessary to meet military requirements.²⁰¹ The Ninth Circuit properly rejected the government's assertion and held the DOD reprogramming of funds and transfer to DHS for border wall construction did not serve a military purpose.²⁰² It was solely designed to meet the civilian goals to stop illegal immigration and drug interdiction.²⁰³ Furthermore, if the wall was considered military construction, section 8005 explicitly prohibits the transfer of funds for military construction.²⁰⁴

DOD's actions were unprecedented. Section 284 is limited to small-scale projects, costing less than 750,000 dollars.²⁰⁵ DOD transferred 2.5 billion dollars of counter drug funds to DHS. Such large expenditures were not contemplated under Section 284.²⁰⁶ Furthermore, DOD is required to consult with Congress for such small transfers. Section 284 (h)(1)(b) requires DOD to give Congress a 15-day written notice before providing certain forms of support for small scale construction, not exceeding 750,000 dollars.²⁰⁷ The government's assertion that consultation with Congress is only applicable for smaller projects, not for larger projects like the border wall, is counterintuitive.²⁰⁸ The district court stated, "reading a statute to suggest that Congress requires reporting of tiny projects but nonetheless has delegated authority to DOD to conduct the massive funnel and spend project proposed here is implausible, and likely would raise serious questions as to the constitutionality of such an interpretation."²⁰⁹

C. Chevron Deference

Federal courts, when interpreting statutory ambiguity, employ the *Chevron* two-step. The court first examines the text and legislative history of the statute to determine "whether Congress has directly spoken to the precise question at issue."²¹⁰ If not, the court moves to the second step and to determine "whether the agency's answer is based on a permissible construction of the statute."²¹¹ The court must defer to "a reasonable interpretation made by the administrator of the agency."²¹² However, before *Chevron* is even invoked, the court must conduct the threshold "step zero" inquiry, to ask whether Congress delegated such power to the executive agency and was the agency's action performed in furtherance of this authority.²¹³ If not, the court only grants agency deference to the extent that the agency's reasoning is persuasive."²¹⁴

²⁰¹ Response/Reply Brief for Defendants-Appellants-Cross-Appellees (Appellants Reply Brief) at 33–37, *Sierra Club v. Trump*, *California v. Trump*, Nos. 19-16102, 19-16300, 19-16299, 19-16336 (9th Cir Aug. 19, 2019).

²⁰² *California v. Trump*, 963 F.3d 926, 934 (9th Cir. 2020).

²⁰³ *Id.* at 934.

²⁰⁴ *Id.*

²⁰⁵ Appellees' Brief, *supra* note 189, at 50–53.

²⁰⁶ *Id.*

²⁰⁷ 10 U.S.C. § 284(i)(3).

²⁰⁸ Appellees' Brief, *supra* note 189, at 50–53.

²⁰⁹ *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 912 (N.D. Cal. 2019).

²¹⁰ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Sierra Club v. Trump*, 929 F.3d 670, 692–94 (9th Cir. 2019) (citing *U.S. v. Mead Corp.*, 533 U.S. 218, 226–27 (2001)); see Cass Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).

²¹⁴ *Sierra Club*, 929 F.3d at 692 (citing *Mead Corp.*, 533 U.S. at 234).

Chevron step zero provides support for the Court's "major question doctrine," which refuses to grant *Chevron* deference to agency decisions involving questions of major political or economic significance.²¹⁵ *Chevron* deference is not granted in such cases for several reasons: (1) there is no indication Congress intended to delegate such power to the agency, (2) the agency lacks technical expertise over issues of major economic and political significance, or (3) only decisions preferably made by political accountable actors support deference.²¹⁶ Instead, judges are instructed to review the statute *de novo* and not accord agency deference.²¹⁷

Justice Kavanaugh has gone even further with his "major rules doctrine," which denies even *de novo* review.²¹⁸ Justice Kavanaugh would declare agency rules of major economic or political significance unlawful unless Congress has clearly authorized the agency action.²¹⁹ Major policy changes must be explicit.²²⁰ Agency decisions with major economic or political implications are presumptively unlawful, absent a clear statement.²²¹

Other Circuits have adopted the clear statement principle. For example, Chief Judge Gregory in *International Refugee Assistance Project v. Trump*, stated:

The clear statement rule guards against unnecessary erosion of separation of powers and political accountability by insisting that the legislature directly confront the benefits and implications of these decisions. Here the power claimed by the government, even if not exercised to its full extent, is at least as broad as it was in cases where courts have applied the major question canon...the President does not, within the confines of the Constitution, decide major questions that are within the legislature's function.²²²

The Ninth Circuit refused to grant *Chevron* deference to DOD's interpretation of Section 8005 because Congress did not delegate such lawmaking authority to the DOD.²²³ The Ninth Circuit found the issues presented were not within DOD's expertise and were contrary to the legislative history, which indicates Section 8005 is designed to constrain DOD authority.²²⁴ DOD's interpretation was not the product of "careful consideration...over a long period of time" or other formal rulemaking, but appears to be litigation inspired position.²²⁵ DOD's decision lacked thoroughness, and its reasoning was weak and inconsistent with prior pronouncements.²²⁶ Furthermore, DOD's interpretation was not based on "expertise that might inspire deference."²²⁷

²¹⁵ Michael Sebring, *Major Rules Doctrine*, Georgetown L. Libr., Sept. 12, 2018, at 2.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 422 (D.C. Cir. 2017).

²¹⁹ Sebring, *supra* note 215, at 2; *see also* Michael Sebring, *The Major Rules Doctrine: How Justice Brett Kavanaugh's Novel Doctrine Can Bridge the Gap Between the Chevron and Nondelegation Doctrines*, 12 N.Y. UNIV. J. OF L. AND LIBERTY 188 (2018).

²²⁰ *Id.*

²²¹ *Id.*

²²² Sebring, *supra* note 215, at 2 (citing *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 274 (4th Cir. 2017), as amended (Feb. 28, 2018)).

²²³ *Sierra Club v. Trump*, 929 F.3d 670, 692–94 (9th Cir. 2019).

²²⁴ *Id.*

²²⁵ *Id.* at 693 (citing *Barnhart v. Walton*, 535 U.S. 212, 222 (2002)). The Ninth Circuit noted that the agency's "litigation position is not entitled to *Chevron* deference." *Sierra Club*, 929 F.3d at 693; *see also* U.S. v. Mead Corp., 533 U.S. 218, 227 (2001).

²²⁶ *Sierra Club*, 929 F.3d at 692–94 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

²²⁷ *Id.* (citing *Gonzalez v. Oregon*, 546 U.S. 243, 253–54 (2006)).

The Ninth Circuit properly followed the Court's major question doctrine. The Ninth Circuit noted that "the sheer amount of failed legislation on this issue demonstrates the importance and divisiveness of the policies at play, reinforcing the Constitution's unmistakable expression of a determination that legislation by the national Congress must be a step by step, deliberative process."²²⁸ Congress did not grant the DOD authority to frustrate the political process.²²⁹ The Supreme Court stated, "we expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."²³⁰ Border wall funding was expressly denied by Congress and inconsistent with the purpose of Section 8005 to curtail DOD's reprogramming discretion.²³¹

D. Constitution

The Constitution separates power between the three branches of government: Congress, which legislates, the Executive, which implements, and the Judiciary, which adjudicates. The Constitution is based on a system of checks and balances and a division of power between the federal and state governments.²³² The separation of powers secures the horizontal balance between Congress and the Executive, and the vertical balance between each branch and the citizens, who have vital interest in regularity of exercise of government power.²³³ The separation of powers is intended "to diffuse power the better to secure liberty."²³⁴ Federal courts ensure that no branch intrudes on the power of another branch.

1. Appropriation Clause

The Appropriation Clause states: "No money shall be drawn from Treasury, but in consequence of appropriation made by law."²³⁵ All payments from the Treasury must be authorized by statute.²³⁶ This clear unambiguous language was intended "as a restriction upon the disbursing authority of the Executive department."²³⁷

The Appropriation Clause plays a critical role in the Constitution's separation of powers and checks and balances. The Appropriation Clause "assures that public funds will be spent according to letter of different judgments reached by Congress as to common good and not according to the individual favor of government agents."²³⁸ The Framers intended Congress to be the forum for fashioning compromises that resolve interest group conflicts.²³⁹ Congressional control over appropriations protects individual liberty by guaranteeing that duly elected officials

²²⁸ *City of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018).

²²⁹ Appellees' Brief, *supra* note 189, at 49.

²³⁰ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

²³¹ *Sierra Club*, 929 F.3d at 691-92.

²³² *All. for the Wild Rockies v. Salazar*, 800 F. Supp. 2d 1123, 1127 (D. Mont. 2011) (citing *Wayman v. Southard*, 23 U.S. 1 (1835) (discussing the roles of each branch of federal government); *see also* Linda D. Jellum, *Which Is to Be the Master, the Judiciary or the Legislature? When Statutory Directives Violate the Separation of Powers*, 56 UCLA L. REV. 837, 854-78 (2009) (analyzing separation of powers).

²³³ *Clinton v. New York*, 524 U.S. 417, 452 (1998).

²³⁴ *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

²³⁵ U.S. Const., Art. I, § 19, cl. 7.

²³⁶ *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990).

²³⁷ *Cincinnati Soap Co. v. U.S.*, 301 U.S. 308, 321 (1937).

²³⁸ *Richmond*, 496 U.S. at 427-28.

²³⁹ *Id.*

decide how to spend funds.²⁴⁰ Otherwise “the Executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.”²⁴¹

The Supreme Court has vigorously enforced the Appropriation Clause. The Supreme Court ruled that, “no officer, however high, not even the President...is empowered to pay debts of U.S. generally, when presented to them...in the want of any appropriation by Congress to pay this claim.”²⁴² The Court stressed that “no money can be taken or drawn from Treasury except under an appropriation by Congress.”²⁴³ The Court noted that “however 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.”²⁴⁴ Permitting the Executive “on its own, to carve out an area of non-appropriated funding would create an Executive prerogative that offends the Appropriation Clause and affects the Constitution’s balance of powers.”²⁴⁵ Justice Jackson noted that “Congress alone controls the raising of revenues and their appropriations and may determine in what manner and by what means they shall be spent for military and naval procurement.”²⁴⁶

Justice Kavanaugh recognized the importance of the Appropriation Clause, stating: “[t]he Appropriation Clause is thus a bulwark of the Constitution’s separation among the three branches of National Government.”²⁴⁷ It is particularly important as a restraint on Executive Branch officers: if not for the Appropriation 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.”²⁴⁸

Justice Kavanaugh noted that federal statutes reinforce congressional control over appropriated funds.²⁴⁹ The Miscellaneous Receipt Act requires that all funds received by the federal government generally must be deposited in the U.S. Treasury.²⁵⁰ The Purpose Act provides that appropriated funds may be applied only “to the objects for which the appropriations were made.”²⁵¹ The Anti-Deficiency Act does not allow government officials to “make or authorize an

²⁴⁰ U.S. v. McIntosh, 833 F.3d 1163, 1175 (9th Cir. 2016).

²⁴¹ *Id.* Joseph Story in his *Commentaries on the Constitution of the U.S.* 486 (Carolina Academic Press 1987) noted that the appropriation power was given to Congress to check Executive expenditures and to “secure regularity, punctuality, and fidelity, in the disbursement of public money.” *Id.* To preclude granting the President “unbounded power over the public purse of the nation,” Congress was designated as “the guardian of the national treasure” granting it “the power to decide, how and when any money should be applied.” *Id.* The power over appropriations serves as “a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation.” *Id.* James Madison described the “power over the purse” as “the most complete and effectual weapon with which any constitution can arm the immediate rep of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.” Federalist No. 58, *cited in* CONGRESSIONAL RESEARCH SERVICE, LEGAL AUTHORITY TO REPURPOSE FUNDS FOR BORDER BARRIER CONSTRUCTION 1 (Dec. 2019).

²⁴² *Reeside v. Walker*, 52 U.S. 272, 291 (1850).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *American Fed’n of Gov’t Emps., AFL-CIO, Local 1647 v. FLRA*, 388 F.3d 405, 414 (3d Cir. 2004).

²⁴⁶ *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637 (1952).

²⁴⁷ *Dept. of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1346–47 (D.C. Cir. 2012).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ 31 U.S.C. § 3302.

²⁵¹ *Id.*, 31 USC § 1301(a); GAO, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, 4-6 to 4-7 (Sept. 2008) (notes that the Purpose Act “prohibits charging authorized items to the wrong appropriation” or “unauthorized items to any appropriation,” because “anything less would render congressional control [of appropriations] largely meaningless.”); *see Zachary Price, Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 368 n.30 (2018).

expenditure or obligation exceeding an amount available in an appropriation” or to involve the Federal government “in a contract or obligation for payment of money before an appropriation is made unless authorized by law.²⁵² A government official who knowingly and willfully violates section 1341(a) is subject to criminal penalties, including imprisonment.”²⁵³ Furthermore, “Congress’s control over federal expenditures is ‘absolute.’ The Clause does not permit an agency... to authorize the expenditure of funds beyond what Congress has approved.”²⁵⁴

Scholars have argued that the Appropriation Clause grants exclusive power to Congress. The president does not possess any inherent spending authority.²⁵⁵ Professor Stith asserts: “Agencies and officials of the federal government may not spend monies from any source, private or public, without legislative permission to do so.”²⁵⁶ She declared: “Spending in the absence of appropriations is *ultra vires*.”²⁵⁷ On the other hand, Professor Sidak posits that the Appropriations Clause is merely a “tool for fiscal accountability,” and, as such, more a “limitation on the legislative power” than on the executive branch.²⁵⁸ He argues: “Article II is an authorization by law...by which the President may encumber the Treasury for the minimum amount reasonably necessary for him to perform his constitutional duties and exercise his constitutional prerogatives.”²⁵⁹ Presidential spending is necessary and proper for the president to exercise his constitutional duties.²⁶⁰ Professors Banks and Raven-Hansen, refuting Professor Sidak, point out that spending authority is granted to the Congress under Article I of the Constitution.²⁶¹ The necessary and proper clause is an exclusive grant of power to Congress.²⁶² Executive practice and Supreme Court decisions recognize that spending authority lies with Congress.²⁶³ Furthermore, Professor Sidak’s argument grants unlimited power to the president.²⁶⁴

The district court invoked the Constitutional Avoidance Doctrine to support its reading of Section 8005.²⁶⁵ Under this doctrine, when there are two possible interpretations of a statute, one of which would raise serious constitutional concerns, the court should adopt the interpretation that avoids the constitutional difficulties.²⁶⁶ The district court concluded that the administration’s interpretation of Section 8005 would “pose serious problems under the Constitution’s separation of power principles because it would allow the executive branch to “render meaningless

²⁵² 31 U.S.C. § 1341-42. The U.S. Justice Department’s Office of Legal Counsel has characterized the Anti-Deficiency Act as “one of several means by which Congress has sought to enforce” conditions of Appropriations Clause. *Applicability of the Anti-Deficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation*, 25 Op. O.L.C. 33 (2001); *see also* Price, *supra* note 251.

²⁵³ *Id.*

²⁵⁴ *Fed. Lab. Rels. Auth.*, 665 F.3d at 1348.

²⁵⁵ WILLIAM C. BANKS AND PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE, 166-68 (1994). *See also* Price, *supra* note 251, at 379-82.

²⁵⁶ Kate Stith, Congress Power of the Purse, 87 YALE L. J. 1343, 1357 (1988).

²⁵⁷ *Id.* at 1351.

²⁵⁸ Gregory Sidak, *The President’s Power of the Purse*, 1989 DUKE L. J. 1162, 1166 (1989).

²⁵⁹ *Id.* at 1242-43.

²⁶⁰ *Id.* at 1186-87.

²⁶¹ William C. Banks and Peter Raven-Hansen, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE, 166-68 (1994).

²⁶² *Id.* at 167.

²⁶³ *Id.*

²⁶⁴ *Id.* at 168; *see also* Price, *supra* note 251.

²⁶⁵ *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 915-17 (N.D. Cal. 2019).

²⁶⁶ *Id.*

Congress’s constitutionally mandated power” to control federal expenditures “by ceding essentially boundless appropriations judgement to the executive agencies.”²⁶⁷

The Ninth Circuit correctly held that DOD’s transfer of funds under Section 8005 violated the Appropriation Clause.²⁶⁸ DOD reprogrammed funds under Section 8005 to fund the border wall, which was specifically denied by Congress.²⁶⁹ President Trump violated the separation of powers by usurping Congress’ exclusive power over appropriations.²⁷⁰ The Ninth Circuit noted that “any exercise of a power granted by the Constitution to one of the other branches of government is limited by a valid reservation of Congress’ control over funds in the Treasury.”²⁷¹

The government asserted that the case was based on statutory compliance, so there was no constitutional claim.²⁷² The government invoked the Court’s decision in *Dalton v. Specter*,²⁷³ alleging that statutory violations cannot be transformed into constitutional violations.²⁷⁴ Plaintiffs in *Dalton* sought to enjoin the Secretary of Defense from carrying out decisions by the Executive to close military facilities under the Defense Base Closure and Realignment Act.²⁷⁵ The Third Circuit permitted suit because the plaintiffs were seeking “review of Executive decision.”²⁷⁶ The Third Circuit stated: “Whenever the president acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine.”²⁷⁷ The Supreme Court rejected this and held that every action of the President beyond his statutory authority is not “a violation of Constitution.”²⁷⁸ Statutory and constitutional violations must be distinguished.²⁷⁹ The Constitution only comes into play when the Executive is acting under inherent authority or when the statute violates the Constitution.²⁸⁰ Claims that executive officials act beyond their statutory authority are not constitutional violations.²⁸¹

The Ninth Circuit correctly rejected the government’s argument because *Dalton* did not deal with a constitutional violation.²⁸² *Dalton* simply holds that every statutory violation is not a violation of separation of powers.²⁸³ Just because appropriations are enacted by statute does not mean every Appropriation Clause challenge is solely statutory.²⁸⁴ *Dalton* referred to a procedural violation of a particular statute, which granted the President unlimited discretion.²⁸⁵ The Supreme Court simply held that plaintiffs can’t attempt to resurrect an unenforceable statute by claiming a constitutional violation of separation of powers.²⁸⁶ Judicial review of Executive acts taken under

²⁶⁷ *Id.*

²⁶⁸ *Sierra Club v. Trump*, 929 F.3d 670, 689-90 (9th Cir. 2019).

²⁶⁹ *Id.* at 675-76.

²⁷⁰ *Id.* at 707.

²⁷¹ *Id.* at 694.

²⁷² Appellants’ Brief, *supra* note 125, at 35-38.

²⁷³ *Dalton v. Specter*, 511 U.S. 463, 473 (1994).

²⁷⁴ Appellants’ Brief, *supra* note 125, at 17-18, 35-36, 38.

²⁷⁵ *See Dalton*, 511 U.S. at 464.

²⁷⁶ *Id.* at 467.

²⁷⁷ *Id.* at 471, (citing *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 572 (1952)).

²⁷⁸ *Id.* at 473.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 473 n.5.

²⁸¹ *Id.*

²⁸² *Sierra Club v. Trump*, 963 F.3d 874, 889-90 (9th Cir. 2020).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

statutory authority that violate the separation of powers is not precluded.²⁸⁷ The government’s attempt to preclude judicial review of Executive action by sheltering it in cloak of unreviewable statutory authority seeks to make Congress and courts minions of the Executive.²⁸⁸

Other circuits have recognized the limited scope of *Dalton*. The D.C. Circuit held: “*Dalton*’s holding merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and contains no limitations on the President’s exercise of that authority, judicial review of an abuse of discretion claim is not available.”²⁸⁹

The Ninth Circuit in *U.S. v. McIntosh* recognized that a statutory violation can give rise to a constitutional claim.²⁹⁰ Congress passed an appropriation rider that prohibited the Department of Justice (DOJ) from pursuing criminal actions pursuant to Controlled Substances Act against the defendants, who were acting under state law regarding marijuana possession.²⁹¹ The court explained: “Congress has enacted an appropriations rider that specifically restricts DOJ from spending money to pursue certain activities” and in so doing has acted within its “exclusive province.”²⁹² Once Congress has acted, “it is for... the courts to enforce” its decisions.²⁹³ The court noted that “a court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation.”²⁹⁴ The court found that such prosecutions violated the Appropriation Clause because it was “drawing funds from the Treasury without authorization by statute.”²⁹⁵ Congress has the exclusive authority to formulate policy and establish priorities.²⁹⁶ Furthermore, when the government exceeds its power, “private parties, rather than government departments, were able to rely on separation-of-powers principles in otherwise justiciable cases or controversies.”²⁹⁷ The court noted that the “separation of powers can serve to safeguard individual liberty.”²⁹⁸

2. Bicameralism and Presentment Clause

President Trump’s action violates bicameralism and the Presentment Clause. Legislation must pass both houses of Congress and be presented to the President for his signature or veto. Congress can override the veto with 2/3 majority vote.²⁹⁹ The Court in *Clinton v. New York* declared line-item veto unconstitutional, noting: “Where the President does not approve a bill, the plan of the Constitution is to give to the Congress the opportunity to consider his objections and

²⁸⁷ *Id.*

²⁸⁸ Brief of Amici Curiae 75 Religious Organizations in Support of Plaintiffs at 17-18; *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020).

²⁸⁹ Chamber of Com. of *U.S. v. Reich*, 74 F.3d 1322, 1331 (D.C. Cir. 1996).

²⁹⁰ *U.S. v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). *McIntosh* post-dates *Dalton* by two decades and forecloses the government’s argument. Appellees’ Brief, *supra* note 189, at 24 (citing *Naruto v. Slater*, 888 F.3d 418, 425 n.7 (9th Cir. 2018)).

²⁹¹ Pub. Law 91-513, 84 Stat. 1236, 21 U.S.C. ch.13, section 801 *et seq.*; *McIntosh*, 833 F.3d at 1168.

²⁹² *McIntosh*, 833 F.3d at 1172.

²⁹³ *Id.* at 1172 (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978)).

²⁹⁴ *Id.* (citing *United States v. Oakland Cannabis Buyers Co-op.*, 532 U.S. 483, 497 (2001)).

²⁹⁵ *Id.* at 1175.

²⁹⁶ *Id.* at 1174.

²⁹⁷ *Id.*

²⁹⁸ *Id.* (citing *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559-60 (2014)).

²⁹⁹ *City of New York v. Clinton*, 985 F. Supp. 168, 178-79 (D.D.C. 1998).

to pass the bill despite his disapproval.”³⁰⁰ The Constitution does not “authoriz[e] the President to enact, to amend, or to repeal statutes.”³⁰¹

Congress only allocated 1.37 billion dollars for specific border fencing in the Consolidated Appropriations Act (CAA) of 2019.³⁰² President Trump signed the bill, then declared a national emergency.³⁰³ This allowed President Trump to reprogram funds to build his wall, which had been specifically rejected by Congress.³⁰⁴ President Trump violated the separation of powers by altering CAA 2019 without following the proper procedures.³⁰⁵ President Trump’s alteration of the CAA 2019 constituted a violation of the Presentment Clause.³⁰⁶ The Supreme Court in *Clinton* explained “because line-item veto requires the President to act within 5 days, every exercise of the cancellation power will necessarily be based on the same facts and circumstances that Congress considered, and therefore constitute a rejection of the policy choice made by Congress.”³⁰⁷ Congress has no power to authorize “the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I Section, § 7.”³⁰⁸

The Court declared that nothing in the Constitution gives the President unilateral power to change a statute.³⁰⁹ The President is not allowed “to create a statute whose text was not voted on by either House of Congress or presented to the President for signature.”³¹⁰ Justice Kennedy noted: “The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow.”³¹¹ Any change in the law is left up to Congress.³¹²

³⁰⁰ *Clinton v. City of New York*, 524 U.S. 417, 438 (1998).

³⁰¹ *Id.*

³⁰² Spagat, *supra* note 43.

³⁰³ Consolidated Appropriations Act 2019, Pub. L. No. 116-6, 133 Stat. 13, 28 (2019).

³⁰⁴ *Id.*

³⁰⁵ Plaintiffs’ Notice of Motion and Motion for Partial Summary Judgment; Memorandum of Points and Authorities in Support Thereof, *Sierra Club v. Trump*, Case 4:19-cv-00892-HSG, 17-18 (Nov. 11, 2019).

³⁰⁶ *Id.*

³⁰⁷ *Clinton v. City of New York*, 524 U.S. 417, 444 n.35 (1998).

³⁰⁸ *Id.* at 445.

³⁰⁹ *Id.* at 447.

³¹⁰ *Id.* at 448.

³¹¹ *Id.* at 452 (Kennedy, J., concurring)

³¹² *Id.*

IV. California v. Trump — Section 8005

The Ninth Circuit, in the companion case *California v. Trump*, held that the Trump Administration’s action pursuant to Section 8005 violated the APA.³¹³ To establish standing under the APA, the plaintiffs must first show they have suffered an injury in fact.³¹⁴ The Ninth Circuit held that California and New Mexico suffered harm to their environment and wildlife and to their quasi-sovereign interests in state land management.³¹⁵ Second, the plaintiffs must show that their injuries were caused by the defendant.³¹⁶ The transfer of funds pursuant to Section 8005 resulted in harm to the plaintiffs. Third, the plaintiffs must show that the court is capable of providing redress for their injuries.³¹⁷ The court could halt the reprogramming of funds towards border wall construction. Finally, the plaintiffs must show that their injuries fall within the zone of interests protected by the statute.³¹⁸ The Ninth Circuit held that plaintiffs’ injuries fell within the zone of interests because they were suitable challengers, whose interests systematically aligned with and were congruent with those of Congress.³¹⁹

A. Injury in Fact

The Ninth Circuit correctly held California and New Mexico demonstrated specific harm to their environment and wildlife.³²⁰ The El Centro Border Sector One in California contains the Jacumba wilderness area, which is home to many endangered species and plants.³²¹ Peninsular desert bighorn sheep graze on both sides of border.³²² Construction and road building will affect their behavior.³²³ The border wall will prohibit movement into their cross-border habitat, which will harm their genetic diversity.³²⁴

The Jacumba Wilderness is also the home of the flat-tailed horned lizard.³²⁵ Clearing the land for the wall will destroy flat-tailed horned lizard habitat and increase their mortality through bird predation.³²⁶ The wall will terminate any linkages between lizards in U.S. and Mexico.³²⁷

³¹³ *California v. Trump*, 963 F.3d 926 (9th Cir. 2020).

³¹⁴ *Id.* at 935–36.

³¹⁵ California and New Mexico were joined in the suit by Colorado, Connecticut, Delaware, Hawaii, Maine, Minnesota, New Jersey, Nevada, New York, Oregon, Illinois, Maryland, Michigan, Wisconsin, Massachusetts, Vermont, Rhode Island, and Virginia. *Id.* at 935 n. 7.

³¹⁶ *Id.* at 935–36.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* at 941.

³²⁰ *Id.* at 936–40.

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

The wall construction will harm endangered and threatened species in the El Paso Sector.³²⁸ The Chihuahuan desert is bisected by the New Mexico-Mexico border.³²⁹ Construction in this biologically diverse region will have negative impact on the Mexican wolf.³³⁰ The wall will decrease Mexican wolf habitat and interfere with cross border migration, which is necessary to maintain the species genetic diversity.³³¹ This will frustrate the federal government's ongoing 20-year program to remove the Mexican wolf from ESA protection.³³²

Wall construction will also jeopardize jaguar recovery.³³³ Jaguars in Mexico have migrated to New Mexico west of Luna County.³³⁴ Construction in El Paso Sector One will stop their movement through the region and limit their recolonization.³³⁵

The wall will also hamper the states' ability to enforce their laws.³³⁶ The wall will interfere with the states' quasi-sovereign interest relating to preservation of wildlife on the border and environmental management on state land, as well as their participation in federal statutory programs.³³⁷ California demonstrated that wall construction will interfere with its enforcement of the Clean Water Act and Clean Air Act requirements in the El Centro sector.³³⁸ Federal waivers preclude any state consultation regarding endangered and threatened species and the El Centro sector.³³⁹ The wall also interferes with New Mexico Wildlife Corridors Act, which "requires New Mexico state agencies to create a 'wildlife corridor action plan' to protect species' habitat."³⁴⁰ New Mexico state trust lands in and around El Paso are important wildlife corridors for "mule deer, javelina, pronghorn, bighorn sheep, mountain lions, bobcats, coyote, bats, quail, and other small game like rabbits."³⁴¹

The Ninth Circuit found that the States' injuries were caused by federal action.³⁴² The Section 8005 transfers are the last step in the chain of causation.³⁴³ There would be no waiver of federal and state laws in the absence of the transfer of funds to build the wall.³⁴⁴ The Ninth Circuit held its ruling will redress the states' injuries.³⁴⁵

³²⁸ *Id.* at 937–38.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² See Edward A. Fitzgerald, *The Lobo Limps on from Limbo: A History, Summary, and Outlook for Mexican Wolf Recovery in the American Southwest*, 29 COLO NAT. RES. ENERGY & ENV'T L. REV. 223 (2018).

³³³ *California v. Trump*, 936 F.3d at 938.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.* at 938–39.

³³⁸ *Id.*

³³⁹ *Id.* at 939–40

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 940.

B. Zone of Interests

The major question presented was whether the states' injuries fell within the zone of interest of Section 8005, and therefore provide the states with a cause of action.³⁴⁶ The zone of interest test does not require any indication of congressional intent to benefit a would-be plaintiff.³⁴⁷ Plaintiffs can satisfy the test, which is “not ‘especially demanding,’”³⁴⁸ in several ways: First, plaintiffs, who are the intended beneficiaries of the statute, clearly fall within the zone of interests.³⁴⁹ Second plaintiffs, who are suitable challengers, are able to enforce the statute because their interests are sufficiently congruent with those of the intended beneficiaries.³⁵⁰ Suitable challengers fall within the zone of interests as long as the suit will not frustrate the statutory objectives.³⁵¹ Only those plaintiffs, whose “interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.”³⁵² Congress intended that agency action is presumptively reviewable and “the benefit of any doubt goes to plaintiff.”³⁵³

The Ninth Circuit properly held that the states fall within the zone of interests.³⁵⁴ Section 8005 was designed to “tighten congressional control of the reprogramming process.”³⁵⁵ Congress is the direct beneficiary of Section 8005, but was precluded from bringing suit due to restrictive standing rules.³⁵⁶ The states are “suitable challengers because their interests are congruent with those of Congress and are not ‘inconsistent with the purposes implicit in the statute.’”³⁵⁷

The dissent argued that the States cannot be congressional surrogates, but must assert that their specific injuries fall within the zone of interest of Section 8005.³⁵⁸ The states cannot just assert their interests are congruent with those of the Congress.³⁵⁹ The state's environmental interests are not even marginally related to the zone of interests of Section 8005, which deals exclusively with military requirements.³⁶⁰ However, the dissent's view of the zone of interest test is too constrained. The Supreme Court has recognized that the zone of interest test is very broad, not narrow.³⁶¹

When the Supreme Court established the standing rules for the APA, it noted that this was part of a “trend...toward enlargement of the class of the people who may protest administrative

³⁴⁶ *Id.* at 941.

³⁴⁷ *Id.*

³⁴⁸ *Id.* (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014)).

³⁴⁹ *Id.* at 941–42.

³⁵⁰ *Id.*

³⁵¹ *Id.* at 942 (citing *Scheduled Airlines Traffic Offs., Inc. v. Dep't of Def.*, 87 F.3d 1356, 1359 (D.C. Cir. 1996)).

³⁵² *Id.* at 941–42 (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012)).

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.* at 942 (citing H.R. Rep. No. 93-662 at 16 (1973)).

³⁵⁶ *Id.* (citing *House of Representatives v. Mnuchin*, 379 F. Supp. 3d 8, 11 (D.D.C. 2019)). This decision was reversed by the D.C. Circuit. *See U.S. House of Representatives v. Mnuchin*, 976 F.3d 1 (D.C. Cir. 2020). Certiorari was granted and the judgment vacated and remanded to the district court in October 2021 with instructions to dismiss the case as moot. *Yellen v. U.S. House of Representatives*, 142 S. Ct. 332 (2021).

³⁵⁷ *California*, 936 F.3d .at 942-44 (citing *Scheduled Airlines*, 87 F.3d at 1359 and *Patchak*, 567 U.S. at 225).

³⁵⁸ *Id.* at 938, 958-62 (Collins, J., dissenting).

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 962.

³⁶¹ *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 397-400 (1987).

actions.”³⁶² The Supreme Court refused to take an overly-restrictive view of “the generous review provisions” of the APA, which should be construed “not grudgingly but as serving a broadly remedial purpose.”³⁶³

The Supreme Court recognized the expansive scope of the zone of interest test in *Clarke v. Securities Ind. Association*.³⁶⁴ The Comptroller General granted banks the ability to provide brokerage services at in- and out-of- state locations.³⁶⁵ However, the National Bank Act (NBA) limits the activities of banks to their home state associations³⁶⁶ “[T]rade association representing security brokers, underwriters, and investment bankers” brought suit, alleging the out-of-state brokerage offices exceeded the geographical restrictions of the NBA.³⁶⁷

The Court held the zone of interests test is a guide for deciding whether Congress intended agency decisions to be reviewable by particular plaintiffs.³⁶⁸ If the plaintiffs are not the direct party of regulation, plaintiffs can’t sue if their interests are so marginally related to or inconsistent with the purposes implicit in the statute; therefore it cannot be reasoned that Congress intended to permit the suit.³⁶⁹ The test is not particularly demanding; there does not need to be any indication of congressional purpose to benefit the would-be plaintiff.³⁷⁰ The test is designed to determine whether Congress intended “to make agency action presumptively reviewable.”³⁷¹ The Court was principally concerned that plaintiffs would be “a reliable private attorney general to litigate the issues of the public interest in the present case.”³⁷² Plaintiffs fell within the zone of interests because they have a plausible relationship to the policies underlying the NBA with regard to Congress keeping national banks from gaining a monopoly over credit and money through unlimited branches.³⁷³

The D.C. Circuit invoked suitable challenger standing in *Hazardous Waste Treatment Council v. EPA*.³⁷⁴ The court stated “in the absence of apparent congressional intent to benefit, however, there may still be standing if some factor--some indicator that the plaintiff is a peculiarly suitable challenger of administrative neglect--supports an inference that Congress would have intended eligibility.”³⁷⁵ The court, citing the earlier *Haitian Refugee Center v. Gracey*,³⁷⁶ stated that “the initial inquiry is whether ‘from the face of the statute’ the interest was arguably intended to be protected or regulated, but that clear evidence in the legislative history of intent to afford or deny standing may rebut the initial answer.”³⁷⁷

Judge Kavanaugh argued that *Hazardous Waste Treatment Council* was incorrectly decided because it required competitors to provide “in the absence of either some explicit evidence of an intent to benefit such firms, or some reason to believe that such firms would be unusually

³⁶² *Ass’n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 154 (1970).

³⁶³ *Id.* at 156.

³⁶⁴ *See Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388 (1987).

³⁶⁵ *Id.* at 388.

³⁶⁶ *Id.* at 391.

³⁶⁷ *Id.* at 392.

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 399.

³⁷⁰ *Id.* at 399–400.

³⁷¹ *Id.* at 399.

³⁷² *Id.* at 397 n.12.

³⁷³ *Id.* at 389.

³⁷⁴ *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277 (D.C. Cir. 1988).

³⁷⁵ *Id.* at 288.

³⁷⁶ *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 812–13 (D.C. Cir. 1987).

³⁷⁷ *Hazardous Waste Treatment Council*, 861 F.2d at 283.

suitable champions of Congress's ultimate goals."³⁷⁸ This was contrary to earlier Supreme Court decisions, which had specifically stated that "there does not need to be evidence of an intent to benefit the plaintiff class."³⁷⁹ Furthermore, "suit should be allowed unless there was discernible congressional intent to preclude suit by the plaintiff class."³⁸⁰

The D.C. Circuit operationalized the suitable challenger standard in *Hazardous Waste Treatment Council v. Thomas*.³⁸¹ The court noted that a non-beneficiary can establish standing if they show "less than a...congressional intent to benefit but more than a 'marginal relationship' to the statutory purpose."³⁸² Once accomplished, "they may be regarded as a 'suitable challenger' of agency action, and as such, have standing under the zone of interests test."³⁸³ The suitable challenger's interests must coincide "systematically, not fortuitously," with interest of the intended beneficiaries.³⁸⁴ The court held HWTC was not a suitable challenger because its interests did not systematically coincide with the interests Congress wanted to protect.³⁸⁵ HWTC economic interests were more "likely to frustrate than to further statutory objectives."³⁸⁶

The D.C. Circuit granted standing for a suitable challenger in *First National Bank (FNB) v. NCUA*.³⁸⁷ The court noted: "Litigants can qualify as 'protected' by a statute if they are intended beneficiaries of the legislation or are nevertheless what we have termed suitable challengers; that is, if their interests are sufficiently congruent with those of the intended beneficiaries that the litigants are not more likely to frustrate than to further the statutory objective."³⁸⁸ The D.C. Circuit noted that prudential standing was granted in *Clarke* because "the potentially limitless incentives of competitors were channeled by the terms of the statute into suits of a limited nature brought to enforce the statutory demarcation...."³⁸⁹

The D.C. Circuit further extended suitable challenger standing in *Schedules Airlines Traffic Offices Inc. (SATO) v. Department of Defense*.³⁹⁰ Congress enacted the Miscellaneous Receipt Act (MRA) because some executive officials failed to deposit the entire amount of government funds they received into the Treasury.³⁹¹ Instead, they deducted their expenses before making their deposit.³⁹² Congress wanted to ensure that such expenses resulted from proper appropriations, rather than depending on the whims of executive officials. Congress sought to account for and control such expenses.³⁹³

SATO was not a government agency or the U.S. Treasury, so it was not the intended beneficiary of the MRA.³⁹⁴ Nevertheless, the court held that SATO had standing as a "suitable

³⁷⁸ *Id.*

³⁷⁹ *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222, 1269 (D.C. Cir. 2014) (Kavanaugh, J., dissenting in part).

³⁸⁰ *Id.*

³⁸¹ *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918 (D.C. Cir. 1989).

³⁸² *Id.* at 922 (citing *Hazardous Waste Treatment Council II*, 861 F.2d at 283).

³⁸³ *Id.* at 922–23.

³⁸⁴ *Id.* at 924.

³⁸⁵ *Id.* at 922.

³⁸⁶ *Id.* at 922 (citing *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 397 n.12 (1987)).

³⁸⁷ *First Nat. Bank & Trust Co. v. Nat. Credit Union Admin.*, 988 F.2d 1272 (D.C. Cir. 1992).

³⁸⁸ *Id.* (citing *HWTC IV*, 885 F.2d 918, 923–24 (D.C. Cir. 1989) and *Clarke*, 479 U.S. at 397 n.12).

³⁸⁹ *First Nat. Bank & Trust Co.*, 988 F.2d at 1278.

³⁹⁰ *Scheduled Airlines Traffic Offs., Inc. v. Dep't of Def.*, 87 F.3d 1356 (D.C. Cir. 1996).

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.*

challenger.”³⁹⁵ The court, reiterating *Clarke*, noted that the zone of interest “test is not meant to be especially demanding,” a would-be plaintiff is outside statute zone of interest only “if the Plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.”³⁹⁶ The court held that SATO interests “are thus sufficiently congruent with those of the Treasury’s that SATO is not more likely to frustrate than to further...statutory objectives.”³⁹⁷

The Supreme Court, reiterating *Clarke*, noted that the zone of interest test was broad in *National Credit Union Association v. First National Bank*.³⁹⁸ The Court declared that the proper inquiry is simply “whether the interest sought to be protected by the complainant is arguably within the zone of interest to be protected...by the statute.”³⁹⁹ The Court should not focus on whether Congress, in enacting the statutory provision, specifically intended to benefit the plaintiffs.⁴⁰⁰ Instead, the Court must first discern the interest “arguably...to be protected” by the statute, then “inquire whether the plaintiff’s interests affected by the agency action in question are among them.”⁴⁰¹

The Supreme Court again recognized the broad scope of the zone of interest test in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*.⁴⁰² The Indian Reorganization Act allowed the government to purchase land for Native Americans, who intended to build a casino.⁴⁰³ The federal statute was not concerned with the use of land or any adverse environmental impacts from construction.⁴⁰⁴ Surrounding land-owners challenged the action, asserting environmental and aesthetic harm.⁴⁰⁵ The Supreme Court held the agency action, the purchase of land, did not exist in vacuum, so the ultimate use of the land had to be considered. Adjoining land-owners, who alleged environmental and aesthetic harm, fell within the zone of interests of federal statute.⁴⁰⁶

The Court stated prudential standing “is not meant to be especially demanding. We apply the test in keeping with Congress’s ‘evident intent’ when enacting the APA ‘to make agency action presumptively reviewable.’”⁴⁰⁷ The Court does not require any “indication of congressional purpose to benefit the would-be plaintiff.”⁴⁰⁸ The word “arguably” has always been conspicuously included in the test to indicate that the benefit of any doubt goes to the plaintiff.⁴⁰⁹ Suit is only foreclosed when a plaintiff’s “interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.”⁴¹⁰

Judge Kavanaugh commented that the *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* case reinforces the Court’s broad view of the zone of interest test, which presents a very

³⁹⁵ *Id.* (citing *Clarke*, 479 U.S. at 399).

³⁹⁶ *Id.* (citing *First Nat’l Bank & Trust*, 988 F.2d at 1275).

³⁹⁷ *Id.* at 1360-61.

³⁹⁸ *Nat’l Credit Union Admin. v. First Nat’l Bank*, 522 U.S. 479, 488–92 (1998).

³⁹⁹ *Id.* at 492 (citing *Ass’n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970)).

⁴⁰⁰ *Id.* at 492.

⁴⁰¹ *Id.* at 492.

⁴⁰² *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

⁴⁰³ 25 U.S.C. § 465.

⁴⁰⁴ *Patchak*, 567 U.S. at 225.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.* (citing *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987)).

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

low bar.⁴¹¹ The Court noted that the plaintiffs need not be among the class that Congress intended to benefit in the statute at hand.⁴¹² The Court also recognized that a wide variety of interests, including economic interests related to an agency's allegedly unlawful action with respect to someone else, fall within the zone of interests.⁴¹³ Justice Kavanaugh stressed the *Match-Be* case should put an end to the D.C. Circuit's crabbed approach to zone of interests, which is inconsistent with Supreme Court precedents.⁴¹⁴

The Supreme Court highlighted the broad scope of the zone of interest test in *Lexmark v. Static Controls*.⁴¹⁵ The Court continued to acknowledge that the zone of interest test was not particularly demanding.⁴¹⁶ Suit is only denied when "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that" Congress granted the plaintiff the right to sue.⁴¹⁷ This lenient approach reinforces the goal of the APA, which permits suit for violations of various statutes "that do not themselves include causes of action for judicial review."⁴¹⁸

Furthermore, the Court stressed that "a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute."⁴¹⁹ The central concern is "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits."⁴²⁰ Suits are only barred when the "alleged harm that is 'too remote' from the defendant's unlawful conduct."⁴²¹ This ordinarily occurs when "the harm is purely derivative of 'misfortunes visited upon a third person by the defendant's acts.'"⁴²²

Judge Kavanaugh noted that *Lexmark* presented a "lenient approach" to the zone of interest test. *Lexmark* provides "an appropriate means of preserving the flexibility of the APA's omnibus judicial review provision, which permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial-review."⁴²³

The Ninth Circuit correctly determined that California and New Mexico are suitable challengers.⁴²⁴ The Court has adopted a broad view of the zone of interests to be protected.⁴²⁵ Plaintiffs have standing if they have a plausible relation with underlying policies of the statute. The test is not demanding.⁴²⁶ There is no need to show Congress intended that the would-be plaintiff was the intended beneficiary of the statute.⁴²⁷ Plaintiffs are only outside the zone of

⁴¹¹ *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222, 1272 (D.C. Cir. 2014) (Kavanaugh, J., dissenting in part).

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.* at 1272-73.

⁴¹⁵ *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014).

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 130 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012)).

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 132.

⁴²⁰ *Id.*

⁴²¹ *Id.* at 133.

⁴²² *Id.*

⁴²³ *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222, 1272 (D.C. Cir. 2014) (Kavanaugh, J., dissenting in part).

⁴²⁴ *California v. Trump*, 963 F.3d at 942-44.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

interests if their interests are so marginally related to purposes of the statute that it can't be assumed Congress intended to allow suit.⁴²⁸ The States meet this test.⁴²⁹

California and New Mexico suffered injuries that were proximately caused by DOD's violation of Section 8005. The states interests are "systematically congruent" and "systematically aligned" with Congress' explicit purpose to "tighten congressional control of (DOD) reprogramming process."⁴³⁰ Section 8005 was designed to reinforce the structure of the Constitution, particularly congressional control over appropriations. Section 8005 prevents the DOD from reprogramming funds in opposition to congressional will. California and New Mexico have more than a plausible relation with underlying policy of Section 8005. The States acting as private Attorney Generals furthered the goal of Congress to prevent President Trump from spending funds on his border wall.

V. *Sierra Club v. Trump* — Section 2808

Section 2808 allows the President, after the declaration of a national emergency, to authorize military construction projects not otherwise authorized by law.⁴³¹ DOD compliance with Section 2808 was raised by the District Court in the earlier *Sierra Club v. Trump* case, but the court did not rule on the issue because the DOD had not identified the specific border projects to be funded.⁴³² Subsequently, DOD authorized 11 border projects covering 175 miles in California, Arizona, New Mexico, and Texas that would be funded pursuant to Section 2808.⁴³³ Two of the projects would occur in Barry Goldwater Range in Arizona, seven on Department of Interior lands, and two on condemned land.⁴³⁴ The Secretary of Interior transferred 560 acres of public lands to the Department of Army, which in turn, was transferred to Fort Bliss in Texas.⁴³⁵ The DOD reprogrammed 3.6 billion dollars in military construction funds, taken from 128 military construction projects, to fund portions of the border wall.⁴³⁶ DOD awarded two contracts for wall construction in the Barry Goldwater Range and San Diego region in October and November 2019.⁴³⁷

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d at 922, 924.

⁴³¹ Section 2808 states: "In the event of declaration of war or the declaration by the Presidents of national emergency in accordance with National Emergencies Act that requires use of armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and 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." Such projects "may be undertaken only within the total amount of funds that have been appropriated for military construction, excluding funds appropriated for family housing, that remain unobligated." 10 U.S.C. § 2808. Military construction "includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land...." Congress defined "military installation" to mean "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in foreign country, under the operational control of Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control." 10 U.S.C. § 2801.

⁴³² *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 902 (N.D. Cal. 2019).

⁴³³ *California v. Trump*, 407 F. Supp. 3d 869, 880 (N.D. Cal. 2019).

⁴³⁴ *Id.* at 880–81.

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *California v. Trump*, 407 F. Supp. 3d 869, 880–82 (N.D. Cal. 2019).

President Trump stated the diversion of funds was instigated by Congress' refusal to fund the wall.⁴³⁸ President Trump stated: "We're taking the money from all over because, as you know, the Democrats don't want us to build the wall."⁴³⁹ President Trump later reaffirmed his views, stating: "We wanted Congress to help us. It would have made life very easy. And we still want them to get rid of loopholes, but we've done it a different way.... We still want them to do it because it would be a little bit easier, but Congress wouldn't do it."⁴⁴⁰

California brought suit challenging the national emergency declaration and asserting the wall cannot be classified as military construction under Section 2808.⁴⁴¹ Sierra Club and Southern Border Communities Coalition brought a similar suit.⁴⁴² The government claimed the wall is a military installation under the jurisdiction of Fort Bliss and can be funded as "other acts" under Section 2808.⁴⁴³

Furthermore, plaintiffs cannot seek equitable relief through an implied cause of action under the Constitution or statute.⁴⁴⁴ The government again repeated that this is an issue of statutory compliance, which should be governed pursuant to the APA.⁴⁴⁵ Plaintiffs lacked standing because they do not fall within the zone of interests of Section 2808.⁴⁴⁶ The government relied, in part, on the Supreme Court's stay, which questioned the plaintiff's standing.⁴⁴⁷

The U.S. District Court for the District of Northern California, consolidating both cases, held that plaintiffs have standing to enjoin unconstitutional official conduct.⁴⁴⁸ Equitable relief is available to halt constitutional violations, so the zone of interest test is not applicable to these claims.⁴⁴⁹ There is no conflict with the Supreme Court's stay. The district court could only speculate why the Supreme Court granted the stay, but it must follow the Ninth Circuit decisions.⁴⁵⁰ Furthermore, the district court rejected the government's assertion that Section 2808 judgments are committed to military discretion and are not subject to judicial review.⁴⁵¹ DOD actions can be reviewed to determine if they "fall within the statutory authority provided by Section 2808."⁴⁵²

The federal district court, following the Ninth Circuit, refused to review the President's declaration of a national emergency.⁴⁵³ The court held that this was a nonjusticiable political

⁴³⁸ Plaintiffs Notice of Motion and Motion for Partial Summary Judgment: Memorandum of Points and Authorities in Support Thereof, *Sierra Club v. Trump* 2–5 (Nov. 20, 2019) [hereinafter, Plaintiff Memo].

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ California was part of a nine-state coalition that included Colorado, Hawaii, Maryland, New Mexico, New York, Oregon, Wisconsin, and Virginia. *California v. Trump*, 407 F. Supp. 3d at 877 n.1.

⁴⁴² *Id.*

⁴⁴³ Defendants Notice of Motion and Motion for Partial Summary Judgment Regarding the Border Barrier Projects Undertaken Pursuant to 10 U.S.C. § 2808; Memorandum of Points and Authorities in Support Thereof and in Opposition to Plaintiffs Motion for Partial Summary Judgment, *Sierra Club v. Trump* 16–26 (November 20, 2019) [hereinafter Defendant Memo].

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *California v. Trump*, 407 F. Supp. 3d 869, 885 (N.D. Cal. 2019).

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.* at 888.

⁴⁵² *Id.*

⁴⁵³ *Id.* at 891.

question.⁴⁵⁴ Initially, a national emergency could be ended by a joint resolution, which was not subject to presidential veto. However, the legislative veto ended with *Immigration and Naturalization Service v. Chadha*.⁴⁵⁵ National emergencies now can be ended by majority vote in both houses of Congress, which is subject to a presidential veto.⁴⁵⁶ Congress twice voted to end the national emergency, but President Trump vetoed both resolutions.⁴⁵⁷ Congress could not muster the two-thirds vote to overrule the presidential veto.⁴⁵⁸

The Ninth Circuit in *Sierra Club v. Trump* properly upheld the district court decision.⁴⁵⁹ The federal government abandoned its challenge to the appellants standing in the Ninth Circuit.⁴⁶⁰ Nevertheless, the Ninth Circuit found that the states had standing under the APA,⁴⁶¹ and environmental groups had standing to assert the violation of the Appropriation Clause.⁴⁶² The Ninth Circuit determined that the federal government's reprogramming of military construction funds violated Section 2808.⁴⁶³ The permanent injunction issued by the district court in 2019 was reinstated.⁴⁶⁴

A. Standing

To establish Article III standing, the plaintiff must show that she: (1) has suffered injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant; and (3) that the injury is likely to be redressed by a favorable judicial decision.⁴⁶⁵ An organization has standing to sue for the benefit of its members when “its members would otherwise have standing to sue in their own right,” and when “the interests it seeks to protect are germane to the organization’s purpose.”⁴⁶⁶ An organization has standing on its own behalf when it suffers “both a diversion of its resources and a frustration of its mission.”⁴⁶⁷ The organization must “show that it would have suffered some other injury if it had not diverted resources to counteract the problem.”⁴⁶⁸

Standing is not based on a strict objective test. The Supreme Court has noted that a plaintiff, who is not the direct object of government action, can still sue, but must establish causation through linkages.⁴⁶⁹ It is not the length of attenuation, but its plausibility.⁴⁷⁰

⁴⁵⁴ *Id.*

⁴⁵⁵ *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

⁴⁵⁶ *California v. Trump*, 407 F. Supp. 3d at 891.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *Sierra Club v. Trump*, 977 F.3d 853 (9th Cir. 2020), *cert. granted, judgment vacated sub nom. Biden v. Sierra Club*, 142 S. Ct. 56 (2021). The vote was 2 to 1, Judge Thomas and Judge Wardlaw voting to affirm, Judge Collins dissenting. The Ninth Circuit upheld the district court decision in *California v. Trump*, 379 F. Supp. 3d 928, 937 (N.D. Cal. 2019), *aff'd*, 963 F.3d 926 (9th Cir. 2020).

⁴⁶⁰ *Id.* at 865.

⁴⁶¹ *Id.* at 865–72.

⁴⁶² *Id.* at 872–76.

⁴⁶³ *Id.* at 889.

⁴⁶⁴ *Id.* at 890.

⁴⁶⁵ *Id.* at 883 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

⁴⁶⁶ *Id.* (citing *United Food and Com. Workers Union Local 751 v. Brown Grp. Inc.*, 517 U.S. 544, 553 (1996)).

⁴⁶⁷ *Id.* at 884 (citing *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010)).

⁴⁶⁸ *Id.*

⁴⁶⁹ *Lujan*, 504 U.S. at 562; *U.S. v. Students Challenging Regul. Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

⁴⁷⁰ *Lujan*, 504 U.S. at 562.

Sierra Club demonstrated that its members would suffer harm to their aesthetic and recreational interests. SBCC demonstrated harm to the organization's ability to carry out its missions. The plaintiff's injuries were caused by government's action-the reprogramming of funds to allow border wall construction. The court could provide redress by halting the transfer of funds to construct the wall.⁴⁷¹

B. Use of Armed Forces

Section 2808 allows the DOD to transfer military construction funds to activities that require the use of armed forces.⁴⁷² The government argued that the specific border projects are necessary to support the DOD.⁴⁷³ This decision, which involves balancing competing factors, is left up to military discretion.⁴⁷⁴ Since there are no judicially manageable standards, it is not reviewable by the court.⁴⁷⁵ Even if it is reviewable, the court must accord substantial deference to the military's decision.⁴⁷⁶

The Ninth Circuit rejected DOD's claim that the wall was necessary to support the armed forces.⁴⁷⁷ The court held that "necessity" in Section 2808 means "required" or "needed. The wall was neither "required" or "needed" by the military.⁴⁷⁸ There was no evidence that the 11 border projects will help the military, but would only allow the DOD to support the DHS, CBP, and USBP.⁴⁷⁹ The DOD asserted the proposed border projects would serve as "force multipliers," which would assist DHS and "could ultimately reduce the demand for DOD support at the southern border over time."⁴⁸⁰ Nevertheless, the court concluded that "the recover makes clear that the primary objective of border wall construction is to benefit a civilian agency, DHS..."⁴⁸¹

The Ninth Circuit rejected DOD's claim that the reprogramming of funds was subject to military discretion, and was immune from judicial review or should be accorded great deference.⁴⁸² The district court noted that even deferential review does not require the court "to exhibit a naivete from which ordinary citizens are free."⁴⁸³ The Ninth Circuit pointed out that military necessity is not a shield from judicial review.⁴⁸⁴ Furthermore, the court stressed that the President's action under NEA is not unbounded, but is still subject to statutory limitations.⁴⁸⁵

The Ninth Circuit's decision was correct. There was no emergency at the border that required the use of the armed forces. DOD officials, including Acting Secretary of Defense Patrick Shanahan and the Chair of Joint Chiefs of Staff General Dunford, acknowledged that the situation at the southern border was "not a military threat." Admiral Mike Gilday, Director of Operations

⁴⁷¹ *Sierra Club*, 977 F.3d at 886.

⁴⁷² *California v. Trump*, 407 F. Supp. 3d 869, 880 (N.D. Cal. 2019).

⁴⁷³ Defendant Memo, *supra* note 443, at 15–16.

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.*

⁴⁷⁷ *Sierra Club*, 977 F.3d at 879–83.

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.* at 880.

⁴⁸¹ *Id.*

⁴⁸² *Id.* at 882–83.

⁴⁸³ *California v. Trump*, 407 F. Supp. 3d at 898, citing *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019).

⁴⁸⁴ *Sierra Club*, 977 F.3d at 881–83.

⁴⁸⁵ *Id.* at 882–83.

for the Joint Staff Chiefs of Staff, testified that “none of the capabilities that we are providing are combat capabilities, it’s not a war zone along the border.”⁴⁸⁶

President Trump’s national emergency proclamation referred to the “long standing” problem of illegal immigration through the southern border.⁴⁸⁷ This problem has been exacerbated in recent years because of the “sharp increases in number of family units entering and seeking entry to the United States and an inability to provide detention space” for them.⁴⁸⁸ Furthermore, family units that are released into the country “are often difficult to remove from the United States because they fail to appear for hearings, do not comply with orders of removal, or are otherwise difficult to locate.”⁴⁸⁹ None of these conditions required the use of the military.

C. Military Installations

Section 2808 defines a military installation as “a base, camp, post, station, yard, center, or other activity under the jurisdiction of Secretary of military department.”⁴⁹⁰ The government asserted that the border wall is a military installation because it falls under the jurisdiction of Fort Bliss.⁴⁹¹ The Assistant SOD declared that in order to qualify as a military construction project, the military department needs to report the land in its inventory “either as its own installation or part of an existing, nearby military installation.”⁴⁹² Military installation is “synonymous with the exercise of military jurisdiction.”⁴⁹³ Section 2808 allows the DOD to undertake military projects, including land acquisition, “without regard to any other provision of law.”⁴⁹⁴ This clause provides “a sweeping dispensation from all legal constraints” and indicates “Congress intended military agencies to enjoy unfettered discretion.”⁴⁹⁵ Furthermore, the DOD is not claiming jurisdiction over the entire southern border as “other activity,” just 11 discrete specific projects.⁴⁹⁶

The Ninth Circuit properly held the DOD did not have unlimited authority to reallocate military construction funds to any activity by declaring military jurisdiction over the area. There must be a “functional nexus” between the activity, the wall, and the military installation.⁴⁹⁷ The expansion of Fort Bliss jurisdiction over the land does not make the projects military installations.⁴⁹⁸ There is no connection between the border wall and Fort Bliss, except administrative convenience.⁴⁹⁹

DOD claimed that projects were assigned to Fort Bliss “because it is the largest, most capable active Army installation in the vicinity of the southern border”; it has “experience with the U.S. Army Corps of Engineers on military construction projects”; “it is more efficient for

⁴⁸⁶ Plaintiff Memo, *supra* note 438, at 2.

⁴⁸⁷ Defendant Memo, *supra* note 443, at 5 (quoting President Donald J. Trump).

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at 5 (quoting President Donald J. Trump).

⁴⁹⁰ California v. Trump, 407 F. Supp. 3d 869 (N.D. Cal. 2019).

⁴⁹¹ Defendant Memo, *supra* note 443, at 17–19.

⁴⁹² Trump, 407 F. Supp. 3d at 894 n.11 (quoting statement of Assistant Sec’y of Def., Homeland Def. & Global Sec. in audio record).

⁴⁹³ U.S. v. Apel, 571 U.S. 359, 368 (2014).

⁴⁹⁴ Defendant Memo, *supra* note 443, at 18 (citing Am. Fed’n of Gvt’t Emps., Local 3295 v. Fed. Lab. Rels., Auth., 46 F.3d 73, 76 (D.C. Cir. 1995)).

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.* at 17.

⁴⁹⁷ Sierra Club, 977 F.3d at 882–84.

⁴⁹⁸ *Id.* at 884–85.

⁴⁹⁹ *Id.*

command of all the real property associated with the projects undertaken pursuant to Section 2808 to be vested in one Army installation”; and it has an “existing support relationship with the U.S. Border Patrol.”⁵⁰⁰ These practical concerns are evidence of administrative convenience, but are not part of Section 2808.⁵⁰¹

Military construction is limited to specifically defined military installations, which earlier had been defined as types of “discrete and traditional military locations.”⁵⁰² The division of the 11 projects in this case was just a litigation tactic. The Trump administration was seeking to construct a border wall across much of the Southwest. These 11 sections of border wall are just part of the single border wall project, so they are not discrete and traditional military locations.

The government alleged that since Congress never defined “other activities,” the term should be defined broadly to include the border wall.⁵⁰³ The Ninth Circuit correctly held that the 11 border wall projects cannot be considered as “other activities.”⁵⁰⁴ The term “other activity” does not mean “any activity.” Words in the statute must be interpreted within their context.⁵⁰⁵ If Congress wanted “any activity” to be included under Section 2808, it could have so stated. Congress had specific tangible items in mind, which did not include the border wall.⁵⁰⁶

The Ninth Circuit decision was consistent with two canons of statutory interpretation. The principle of *ejusdem generis* posits that general words, such as “other activity,” cannot render specific words (articulated items) meaningless. Furthermore, the principle of *noscitur a sociis* holds that the interpretation of a general term (other activities) must be similar to the more specific terms in the series.⁵⁰⁷ The border wall is not similar to the other enumerated items in Section 2808.

Furthermore, DOD conceded the border wall was not a military installation because in the earlier cases DOD employed Section 8005 to transfer funds into counter-drug activities under Section 284.⁵⁰⁸ Section 8005 only allows DOD to transfer money for military functions other than military construction.⁵⁰⁹ By employing Section 8005 to transfer funds into Section 284, DOD admitted that the border wall is not military construction.⁵¹⁰ The DOD’s change in its position must be viewed with skepticism.⁵¹¹

D. Scope of Section 2808

The Ninth Circuit properly interpreted Section 2808, which limits DOD authority. The court’s interpretation of Section 2808 “must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.*

⁵⁰² *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 921 (N.D. Cal. 2019).

⁵⁰³ Defendant Memo, *supra* note 443, at 18.

⁵⁰⁴ *Sierra Club*, 977 F.3d at 882–85.

⁵⁰⁵ Supreme Court declared that “we look to the context in which the words appear.” *McDonnell v. U.S.*, 579 U.S. 550, 568 (2016). The Ninth Circuit stated: “the plain language of a statute should be enforced according to its terms, in light of its context.” *ASARCO LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1210 (9th Cir. 2015).

⁵⁰⁶ *Sierra Club*, 977 F.3d at 885–886.

⁵⁰⁷ WILLIAM N. ESKRIDGE, PHILLIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* app. at 20 (3d ed. 2001).

⁵⁰⁸ Appellees’ Brief, *supra* note 189, at 47.

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

⁵¹¹ *Pauley v. Beth Energy Mines, Inc.*, 501 U.S. 680, 698 (1991) (“The case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.”).

magnitude.”⁵¹² Congress did not grant the DOD authority to build the border wall by reallocating military construction funds during peacetime. The Supreme Court noted: “Congress. . . does not. . . hide elephants in mouseholes.”⁵¹³ The Court requires “Congress to speak clearly if it wishes to assign to an agency decision of vast economic and political significance.”⁵¹⁴ Congress considered border wall funding and only granted the administration 1.375 billion dollars.⁵¹⁵ Section 2808 does not grant the DOD discretion to fund the border wall in direct contravention of Congress.⁵¹⁶

The scope of presidential power claimed by President Trump under Section 2808 and NEA was unprecedented. Section 2808 had only been invoked twice: once by President George H.W. Bush for the invasion of Kuwait and another time by President George W. Bush post 9/11.⁵¹⁷ Section 2808 has been used for overseas construction of “projects like aircraft hangers, barracks, airfield runways, detention facilities, logistics hubs and wastewater treatment plants.”⁵¹⁸ The combined value of past expenditures under Section 2808 over the past 18 years is less than half the cost of the wall.⁵¹⁹ Most importantly, Section 2808 has never been used to fund projects for which Congress withheld appropriations.⁵²⁰ The claim of exceptional power that is based on an old statute must be viewed with suspicion.⁵²¹ The Supreme Court noted: “When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism.”⁵²²

The Ninth Circuit was wary of the broad power asserted by the government pursuant to Section 2808.⁵²³ The court noted that the DOD can claim jurisdiction over the entire 175 mile border and transfer funds to its favored projects regardless of congressional preferences.⁵²⁴ The district court in *Sierra Club v. Trump* earlier rejected the government’s argument that Congress granted the DOD “boundless authority to reallocate military construction funds to build anything [it] wants, anywhere [it] wants, provided that [it] first obtain jurisdiction over the land where construction will occur.”⁵²⁵

Furthermore, the government’s assertion of broad power pursuant to Section 2808 violates the separation of power by interfering with congressional authority under the Appropriation Clause. Section 2808 is part of a larger statutory scheme that is linked to NEA, which was not designed to expand, but to limit executive emergency power.⁵²⁶ The Special Committee on

⁵¹² *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 133 (2000).

⁵¹³ *Whitman v. American Trucking Assoc., Inc.* 531 U.S. 457, 468 (2001).

⁵¹⁴ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

⁵¹⁵ Burnett, *supra* note 38.

⁵¹⁶ Brief in Opposition, *Biden v. Sierra Club*, No. 20-685 (U.S. 2021).

⁵¹⁷ *California v. Trump*, 407 F. Supp. 3d 869, 895 (N.D. Cal. 2019).

⁵¹⁸ *Id.*

⁵¹⁹ Compare *California v. Trump* 2808-2019 at 73 (Collins, J., dissenting) (stating total cost of wall is \$3.6 billion) with MICHAEL J. VASSALOTTI & BRENDAN W. MCGARRY, CONG. RSCH. SERV., *MILITARY CONSTRUCTION FUNDING IN THE EVENT OF A NATIONAL EMERGENCY* 2–3 (2019) (showing list of expenditures under Section 2808 from 2001 to 2014, which equal \$1.4 billion).

⁵²⁰ *Trump*, 407 F. Supp. 3d at 895.

⁵²¹ *Id.*

⁵²² *Util. Air Regul. Grp. v. EPA*, 523 U.S. 302, 324 (2014).

⁵²³ *Sierra Club v. Trump*, 977 F. 3d 853, 884–85 (9th Cir. 2020).

⁵²⁴ *Id.*

⁵²⁵ *Trump*, 407 F. Supp. 3d at 893.

⁵²⁶ *Id.* at 895 (quoting S. Comm. on Gov’t Operations and the Spec. Comm. on Nat’l Emergencies and Delegated Emergency Powers, *The National Emergencies Act (Public Law 94-412)*, *Source Book: Legislative History, Text, and Other Documents* at 50 (1976)) (“Right now, hundreds of emergency statutes confer enough authority on the President to rule the country without reference to normal constitutional process. Revelations of how power has been

National Emergencies report on NEA stated: “The NEA is not intended to enlarge or add to Executive power. Rather the statute is an effort by Congress to establish clear procedures and safeguards for the exercise by the President of emergency powers conferred upon him by other statutes.”⁵²⁷ Section 2808 cannot be interpreted to permit the president to circumvent statutory authority.⁵²⁸

E. Section 739

The federal government’s transfer of funds under Section 2808 violated the Consolidated Appropriation Act of 2019 (CAA 2019). Section 739 of the CAA 2019 declares:

None of the funds made available in this or any other appropriation Act may be used to increase. . . funding for a program, project, or activity as proposed in the President’s budget request for the fiscal year until such proposed change is subsequently enacted in an appropriation Act, or unless such change is made pursuant to the reprogramming or transfer provision of this or any other appropriation act.⁵²⁹

Section 739 applies when the executive branch proposes to use appropriated funds to increase funding requested in the president’s fiscal year budget, but Congress has not enacted.⁵³⁰ The legislative history of Section 739 is illuminating. Representative Culberson (R-TX), the lead proponent of Section 739, wanted to maintain funding for the space program, which was being curtailed by the Obama administration.⁵³¹ House Republicans in 2014 added a provision to the appropriation bill that constrained President Obama’s budgetary powers.⁵³² The language prohibited President Obama from taking steps to “eliminate or reduce the funding for any program, project, or activity as proposed in the President’s budget request” until it has cleared Congress.⁵³³ In 2015, Republicans added the word “increase” alongside the words “eliminate or reduce” funding.⁵³⁴ The legislative history demonstrates “what goes around, comes around.”⁵³⁵

The Ninth Circuit did not address the constraints in Section 739,⁵³⁶ but other courts dealing with border wall funding have addressed the issue. In *El Paso v. Trump*, Judge Briones held the

abused by high government officials must give rise to concern about the potential exercise, unchecked by the Congress or the American people, of this extraordinary power. The [NEA] would end this threat and ensure that the powers now in the hands of the Executive will be utilized only in time of genuine emergency and then only under safeguards providing for Congressional review.”)

⁵²⁷ *Id.* (quoting same).

⁵²⁸ *Sierra Club*, 977 F.3d at 887–88.

⁵²⁹ Consolidated Appropriations Act 2019, Pub. L. No. 116-6, 113 Stat. 97 (2019).

⁵³⁰ *El Paso Cnty. v. Trump*, 408 F. Supp. 3d 840, 856 (W.D. Tex. 2019).

⁵³¹ David Rogers, *Judge stymies Trump border wall by invoking GOP law targeting Obama*, Politico (Dec. 14, 2019, 6:39 AM), <https://www.politico.com/news/2019/12/14/judge-trump-border-wall-obama-084540>.

⁵³² *Id.*

⁵³³ *Id.*

⁵³⁴ *Id.*

⁵³⁵ *Id.*

⁵³⁶ *Sierra Club v. Trump*, 977 F.3d 853, 907–09 (9th Cir. 2020) (Collins, J., dissenting) (arguing that section 739 applies only to items in the specific appropriation bill, which does not include Section 2808 because it is invoked pursuant to the NEA).

President's reprogramming of funds violated Section 739 of CAA.⁵³⁷ Judge Briones found Section 2808 was funded by congressional appropriations.⁵³⁸ Section 2808 funds were being used to increase funding for the wall, which was a project proposed in the President's budget, but rejected by Congress.⁵³⁹ Section 2808 funds were not being reprogrammed through an appropriation act, which begins with "an act to make appropriations," but were part of Military Codification Construction Act of 1982.⁵⁴⁰ In *Washington v. Trump*, Judge Rothstein reached a similar conclusion stating, the "Defendants' attempt to procure additional funds for the border barrier projects outside the appropriations framework violates section 739 of the CAA."⁵⁴¹ In *Center for Biodiversity v. Trump*, Judge McFadden held that the plaintiffs have "stated a claim under the APA for a violation of CAA section 739."⁵⁴²

VI. Developments at the end of the Trump Administration

A. FY 2020/2021 Appropriations

The Trump Administration requested five billion dollars for border wall construction for FY 2020.⁵⁴³ Both parties reached a budget deal in July 2019 that avoided all controversial issues. Subsequently, the House Appropriations Committee refused to provide any funding for border wall construction and voted to restrict the reprogramming of military funds for border wall construction. The Senate Appropriations Committee voted to provide five billion dollars for border wall funding and rejected any effort to stop reprogramming.⁵⁴⁴ The Senate committee argued that the effort to stop reprogramming violated the July agreement.⁵⁴⁵ The Senate backed off when the Democrats threatened to filibuster DOD funding.⁵⁴⁶ Congress agreed to a temporary continuing

⁵³⁷ *El Paso Cnty. v. Trump*, 408 F. Supp. 3d 840, 858 (W.D. Tex. 2019); see also *CBD v. Trump*, Case No. 1:19-cv-00408 (TNM), *Rio Grande Int. Study Ctr. v. Trump*, Case No. 1:19-cv-00720 (TNM) at 41-45 (April 2, 2020).

⁵³⁸ *Id.* at 858.

⁵³⁹ *Id.*

⁵⁴⁰ *Id.* The Fifth Circuit Court of Appeals issued a stay of the district court decision in *El Paso Cnty. v. Trump*, No. 19-51144, 2020 U.S. App. LEXIS 567, at *2 (5th Cir. Jan. 8, 2020) (Higginson, J., dissenting) ("The district court's analysis is comprehensive and probing, granting parsed relief enjoining the Department of Defense from using funds under 10 U.S.C. § 2808 while simultaneously deciding to enjoin the use of border-construction funds under 10 U.S.C. § 284. That ruling implicates several weighty issues that animate my desire to expedite.").

⁵⁴¹ *Washington v. Trump*, 441 F. Supp. 3d 1101, 1116 (W.D. Wash. 2020).

⁵⁴² *Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 46 (D.D.C. 2020).

⁵⁴³ Andrew Taylor, Associated Press, *Democrats Block Pentagon Bill Amid Border Wall Battle*, NBC Southern California, <http://www.nbclosangeles.com>.

⁵⁴⁴ *Id.* Andrew Taylor, *Trump's Senate Republican allies give OK to \$5B wall request*, ASSOCIATED PRESS (Sept. 24, 2019), <https://apnews.com/article/35e9556a3648462bbcae1ccfdc1a028b>; Andrew Taylor, ASSOCIATED PRESS, *Abortion, border wall put major spending bills into disarray*, INSIDER (Sept. 11, 2019, 9:19 PM), <https://www.insider.com/abortion-border-wall-put-major-spending-bills-into-disarray-2019-9>.

⁵⁴⁵ Andrew Taylor, Associated Press, *Democrats Block Pentagon Bill Amid Border Wall Battle*, NBC Southern Cal., <http://www.nbclosangeles.com>; Andrew Taylor, Associated Press, *GOP sides with Trump on wall; Dems threaten filibuster*, CHICAGO TRIB., https://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=353692c6-4e8c-4923-8a1e-c76dbe77fd75 (last visited Feb. 20, 2022); J. Edward Moreno, Tex. Tribune, *Another Budget Fight Looms this Month in Congress Centering on Border Wall Funding*, GOV'T EXEC. (Sept. 16, 2019), <https://www.govexec.com/oversight/2019/09/another-budget-fight-looms-month-congress-centering-border-wall-funding/159891/>.

⁵⁴⁶ Andrew Taylor, *Trump's Senate Republican allies give OK to \$5B wall request*, ASSOCIATED PRESS (Sept. 24, 2019), <https://apnews.com/article/35e9556a3648462bbcae1ccfdc1a028b>.

resolution, which maintained 2019 funding levels.⁵⁴⁷ In December 2019, the House and Senate reached a compromise in the FY 2020 DHS Appropriation Act that provided 1.375 billion dollars for “construction of barrier system along the southwest border.”⁵⁴⁸ Barrier design restrictions are the same as in prior years,⁵⁴⁹ but there is a new exception for designs that help “mitigate community or environmental impacts.”⁵⁵⁰ There are no restrictions on the reprogramming of funds.⁵⁵¹

The Military Construction Appropriation Act (MILCON), which is separate from DOD appropriations, was signed the same day.⁵⁵² The Administration requested to direct 7.2 billion dollars in MILCON emergency to border wall construction, including 3.6 billion dollars for new border walls in FY 2020 and 3.6 billion dollars to replenish, or backfill, funding reallocated from MILCON funds for border wall construction in FY 2019.⁵⁵³ Congress provided no money for border wall construction or backfills in the 2020 Further Consolidated Appropriations Act.⁵⁵⁴ Congress has requested that the Pentagon restore the military construction funds that were diverted to wall construction.⁵⁵⁵

Despite court decisions rejecting the DOD reprogramming of FY 2019 funds, the Trump Administration planned to reprogram 7.2 billion dollars of FY 2020 DOD appropriated funds using the same mechanisms as the FY 2019 transfers.⁵⁵⁶ In February 2020, the Trump Administration announced that it was planning to construct 31 segments of wall totaling 177 miles by reprogramming military construction funds pursuant to Section 2808.⁵⁵⁷ The 31 segments will be

⁵⁴⁷ Emily Cochrane, *Congress Gives Final Approval to Spending Measure That Would Stave Off Shutdown*, N.Y. TIMES (Sept. 26, 2019), <https://www.nytimes.com/2019/09/26/us/politics/congress-spending-shutdown.html>.

⁵⁴⁸ WILLIAM L. PAINTER & AUDREY SINGER, CONG. RSCH. SVS., DHS BORDER BARRIER FUNDING, 13 (2020).

⁵⁴⁹ *Id.*; Department of Homeland Security Appropriations Act, Pub. L. No. 116-93, Div. D. § 209, 133 Stat. 2511-12 (2019). Border wall construction was limited in the 2020 CAA. No federal funds were provided for construction within 1) Santa Ana NWR; 2) Bentsen-Rio Grande Valley State Park; 3) La Lomita Historical Park; 4) National Butterfly Center; 5) east of the Vista del Mar Ranch tract of the Lower Rio Grande Valley NWR; or 6) historic cemeteries. Sections 739 and 8005 are still applicable. § 210, 133 Stat. at 2512.

⁵⁵⁰ Department of Homeland Security Appropriations Act § 209(b)(1)(B), 133 Stat. at 2512.

⁵⁵¹ Associated Press, *Spending deal to provide \$1.4 billion for Trump border wall, while Democrats get expanded Head Start, other programs*, MARKET WATCH (Dec. 13, 2019, 3:32 PM), <https://www.marketwatch.com/story/spending-deal-to-provide-14-billion-for-trumps-border-wall-while-democrats-get-expanded-head-start-other-programs-2019-12-13>.

⁵⁵² Complaint for Declaratory and Injunctive Relief at 10, *Ctr. for Biological Diversity v. Esper*, No. 1:20-cv-01230 (D.D.C. filed May 12, 2020). MILCON allows the various military Secretaries “to plan, program design, and build the runways, piers, warehouses, barracks, schools, hospitals, child development centers, and other facilities needed to support U.S. military forces at home and abroad.” *Id.*

⁵⁵³ *Id.*

⁵⁵⁴ *Id.*

⁵⁵⁵ *Congress Asks Pentagon to Restore Military Base Construction Funds from Border Wall*, MILITARY.COM <http://www.military.com/daily-news/2021/01/27> (Jan. 27, 2021). Of \$3.6 billion pulled for the border wall, \$922 million was spent. The remaining \$2.67 billion has not yet been designated or unspent.

⁵⁵⁶ Complaint for Declaratory and Injunctive Relief at 13-14, *Ctr. for Biological Diversity v. Esper*, No. 1:20-cv-01230 (D.D.C. filed May 12, 2020).

⁵⁵⁷ Determination Pursuant to Section 102 of Immigration Reform and Immigrant Responsibility Act of 1996, as amended, 85 Fed. Reg. 14,958, 14,680 (Dep’t Homeland Sec. Mar. 16, 2020). Rep. Grijalva, chair of H.R. Nat. Res. Comm. has accused the Trump administration of abusing its authority to waive environmental laws to permit border wall construction. Paul Ingram, *Spurred by Grijalva, federal watchdog to review Trump’s border wall construction*, TUCSON SENTINEL (Jun. 9, 2021, 10:33 AM), https://www.tucson sentinel.com/local/report/060921_gao_border_wall/spurred-by-grijalva-federal-watchdog-review-trumps-border-wall-construction/. Previously, the waiver authority under the RIDA had only been invoked 7 times, but during the Trump administration it was invoked 29 times. See generally Edward A. Fitzgerald, *San Diego Border Infrastructure Environmental Litigation: Return of the Walking Dead*, 50 ENVTL. L. 151 (2020). Once the

undertaken on 13 border wall projects within the Del Rio, El Centro, El Paso, San Diego, Tucson, and Yuma sectors.⁵⁵⁸ The DHS in March 2020 issued six waivers to expedite the 31 projects.⁵⁵⁹ Chad Wolf, the Acting SHS, stated: “We hope that will accelerate some of the construction that’s going along the southern border.”⁵⁶⁰

The Sierra Club and SBCC again sued, asserting that the projects will have significant adverse environmental impacts.⁵⁶¹ The groups pointed out that there are 700 miles of border barriers currently in existence, and any additional construction will have severe cumulative and irreversible impacts on wildlife populations.⁵⁶² Nineteen states have also sued,⁵⁶³ challenging the reprogramming of 3.6 billion dollars from the Pentagon to the wall. The states allege that diverting billions of dollars from defense programs in their states, including the National Guard, will cause damage to their economies, harm their proprietary interests, and violate the Appropriation Clause.⁵⁶⁴

Congress appropriated 1.375 billion dollars for a “barrier system” in the FY 2021 budget.⁵⁶⁵ The language specifically did not refer to a wall, so the Biden administration has discretion.⁵⁶⁶ The funds can be used to implement technology, construct roads and lighting, and replace older fencing along the border.⁵⁶⁷

By the end of President Trump’s term, 438 miles of border wall had been constructed, comprising 365 miles of primary and secondary fencing replacements, 40 miles of new primary

waiver authority is invoked, the CBP is required to prepare Environmental Stewardship Plans (ESP) and during construction “assign environmental monitors to ensure implementation of any mitigation measures in the ESP and report on any deviations.” Letter from Rep. Grijalva to Gene Dodaro, Comp. Gen. (May 10, 2021). Among the two dozen environmental reviews conducted during the Trump administration, CBP found “no significant impact” to the environment. Nevertheless, responsible stakeholders have reported “irreparable harm to natural and cultural resources on the border.” Representative Grijalva has asked the GAO to examine this issue. Ingram, *supra* note 557.⁵⁵⁸ *Id.*

⁵⁵⁹ Elliot Spagat, *Homeland Security waives contracting laws for wall*, ASSOCIATED PRESS (Feb. 18, 2020), <https://apnews.com/article/elections-az-state-wire-tx-state-wire-nm-state-wire-new-mexico-1689fa48a2e177d1f397b95ff0cb97db>.

⁵⁶⁰ *Id.*

⁵⁶¹ Mary B. Powers, *States Sue to Block Trump on New \$3.8B Border Wall Fund Shift*, ENG’G NEWS REP. (Mar. 8, 2020), <https://www.enr.com/articles/48842-states-sue-to-block-trump-on-new-38b-border-wall-fund-shift>; Press Release, Ctr. Biological Diversity, *Lawsuit Challenges Trump Administration’s \$7.2 Billion Transfer for Wall Construction.*, (May 12, 2020), <https://biologicaldiversity.org/w/news/press-releases/lawsuit-challenges-trump-administrations-72-billion-transfer-for-border-wall-construction-2020-05-12/>.

⁵⁶² *Id.*

⁵⁶³ *Id.* The states are California, Colorado, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Wisconsin.

⁵⁶⁴ Connor O’Brien, *19 states sue Trump administration over border wall money shift*, POLITICO (Mar. 3, 2020, 5:36 PM), <https://www.politico.com/news/2020/03/03/states-sue-trump-administration-border-wall-119806>.

⁵⁶⁵ Sandra Sanchez, *Biden can redirect new border wall funding lawmakers say they OK’d to avert shutdown*, Border Report (Jan. 4, 2021, 7:02 PM), <https://www.borderreport.com/hot-topics/the-border-wall/biden-can-redirect-new-border-wall-funding-lawmakers-say-they-okd-to-avert-shutdown/>.

⁵⁶⁶ *Id.*

⁵⁶⁷ *Id.*; ‘Monumental’: 450 miles of border wall completed, funding for hundreds more secured, acting CBP head says, Border Report (Jan. 5, 2021, 6:28 PM), <https://www.borderreport.com/hot-topics/the-border-wall/monumental-450-miles-of-border-wall-completed-funding-for-hundreds-more-secured-acting-cbp-head-says/>.

wall, and 33 miles of new secondary wall.⁵⁶⁸ The border wall is 40 miles longer than it was when President Trump took office.⁵⁶⁹

B. Boondoggle at the Border

President Trump initially projected that his wall would cost between eight billion and 12 billion dollars.⁵⁷⁰ From 2016 to 2019, the administration awarded 40 contracts worth at least \$10 billion to 15 companies for 500 miles of fencing, roads, lights, and infrastructure.⁵⁷¹ In addition, there have been over 200 contract modifications, which have cost 2.9 billion dollars.⁵⁷² These cost increases have gone to a few companies with no bid contracts. President Trump's border wall has cost five times more per mile than the border barriers constructed during the Bush and Obama administrations.⁵⁷³

President Trump's supporters have profited from border wall construction.⁵⁷⁴ Fisher Sand and Gravel (FSG) wanted to participate in wall construction, so FSG President, Tommy Fisher, went on Fox News touting his support for building the wall.⁵⁷⁵ FSG spent 145,000 dollars on lobbyists and contributed to Arizona congressional campaigns.⁵⁷⁶ Tommy Fisher contributed 5,400 dollars to McSally's (R-AZ) 2018 Senate campaign, which she lost.⁵⁷⁷ He also contributed 4,200 dollars to Representative Lesko (R-AZ) and 2,700 dollars each to Representative Biggs (R-AZ) and Representative Schwiekert (R-AZ) campaigns.⁵⁷⁸ Senator Cramer (R-ND), who vigorously promoted FSG, received 24,000 dollars for his campaigns.⁵⁷⁹ The White House placed FSG on the preferred contractor list even though FSG had no experience in wall construction.⁵⁸⁰

⁵⁶⁸ Robert Farley, *Trump's Border Wall: Where Does It Stand?*, FACT CHECK (Feb. 16, 2021), <https://www.factcheck.org/2020/12/trumps-border-wall-where-does-it-stand/>. CBP says it has funding to construct another 241 miles of wall. Over the last 3 months 31 miles of new wall have been built. *Id.*

⁵⁶⁹ *Id.*

⁵⁷⁰ Perla Trevizo & Jeremy Schwartz, *Federal records show the price tag of Trump's border wall is ballooning*, TEX. TRIBUNE (Oct. 27, 2020, 12:00 PM), <https://www.texastribune.org/2020/10/27/border-wall-texas-cost-rising-trump/>.

⁵⁷¹ *Id.*

⁵⁷² *Id.*

⁵⁷³ *Id.* CBP declared that the costs are not comparable because it "is constructing a border wall system which includes a combination of various types of infrastructure, such as an internally hardened steel bollard barrier 18 [feet] to 30 [feet] high, new and improved all- weather roads, lighting, enforcement cameras and other related technology to create a complete enforcement zone. This is very different than the barriers we constructed in 2007-2009 where it was just the 18 [feet] steel bollard barriers in some locations and vehicle barriers in others." *Id.*

⁵⁷⁴ Curt Prendergast, *\$1.28 billion wall project on Arizona border goes to firm favored by Trump*, ARIZ. DAILY STAR (May 20, 2020), https://tucson.com/news/local/1-28-billion-wall-project-on-arizona-border-goes-to-firm-favored-by-trump/article_ad3b3de1-ccb-d-5771-951c-49e09c720ec0.html.

⁵⁷⁵ *Id.*

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.*; Jim Small, *Owner of border wall construction firm gave to McSally, other AZ Republicans in 2018*, ARIZ. MIRROR (Dec. 13, 2019, 12:12 PM), <https://www.azmirror.com/2019/12/13/mcsally-border-wall-construction-firm-2018-campaign-contributions/>.

⁵⁷⁸ *Id.*

⁵⁷⁹ Jeremy Schwartz & Perla Trevizo, *He built a privately funded wall. It's already at risk of falling down if not fixed*, TEX. TRIBUNE (July 2, 2020, 5:00 AM), <https://www.texastribune.org/2020/07/02/texas-border-wall-private/>.

⁵⁸⁰ *Id.*

FSG had a dubious record.⁵⁸¹ Critics pointed out that FSG pled guilty to tax fraud in 2009 and was fined 150,000 dollars for not complying with mitigation regulations at three facilities in 2013.⁵⁸² FSG paid one million dollars in fines for air quality violations and 2.1 million dollars in federal tax and environmental penalties from its asphalt plant in 2017.⁵⁸³

FSG's first effort to build a wall on private land occurred in Sunland Park, New Mexico.⁵⁸⁴ The wall was funded by We Build the Wall (WBW), whose members included Steve Bannon, Kris Kobach, Eric Prince, Curt Shelling, and former Representative Tancredo.⁵⁸⁵ WBW provided six million dollars for the construction of the private wall.⁵⁸⁶ Local officials denied construction permits because the proposed wall did not meet the city code.⁵⁸⁷ After a nasty counter-offense, which involved death threats to the mayor, the city relented and allowed construction to proceed.⁵⁸⁸

FSG built a second wall on private property owned by Neuhaus & Sons in the Rio Grande Valley (RGV) in Texas.⁵⁸⁹ WBW provided 25 million dollars in funding.⁵⁹⁰ The National Butterfly Center (NBC) sued in state court, alleging that constructing a wall in the floodplain would redirect surface water during flooding events.⁵⁹¹ This alteration of up and downstream flows, along with the accompanying debris, would cause permanent damage to its property.⁵⁹² In December 2019, a Texas district court judge issued a temporary restraining order halting WBW construction.⁵⁹³

The NBC case was removed to federal court after the federal government filed suit on behalf of the International Boundary and Water Commission (IBWC), alleging that continued construction could "cause a shift of the Rio Grande River channel and, therefore, cause a shift of

⁵⁸¹ Daniel Van Schooten, *Bad Actors Among Border Wall Contractors*, PROJECT GOV'T OVERSIGHT (Apr. 17, 2018), <https://www.pogo.org/analysis/2018/04/bad-actors-among-border-wall-contractors/>.

⁵⁸² Morgan Loew, *CBS 5 Investigates looks at winners, losers with President Trump's border wall*, AZFAMILY.COM (Jan. 9, 2020), https://www.azfamily.com/news/investigations/cbs_5_investigates/cbs-5-investigates-looks-at-winners-losers-with-president-trumps-border-wall/article_4ced6932-334c-11ea-8045-df02b73f9a1f.amp.html.

⁵⁸³ *Id.* see also Priscilla Alvarez, Clare Foran & Ryan Browne, *Company touted by Trump to build the wall has history of fines, violations*, CNNPOLITICS (May 31, 2019, 1:24 AM), <https://www.cnn.com/2019/05/31/politics/finer-sand-and-gravel-legal-history-border-wall/index.html>.

⁵⁸⁴ Simon Romero, *Border Wall on Private Land in New Mexico Fuels Backlash*, N.Y. TIMES (May 28, 2019), <https://www.nytimes.com/2019/05/28/us/border-wall-private-new-mexico.html>.

⁵⁸⁵ *Id.*

⁵⁸⁶ *Id.*

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.*

⁵⁸⁹ Jose De Leon III, *Trial dates set in private wall lawsuits*, PROGRESS TIMES (Sept. 12, 2020), <https://www.progresstimes.net/2020/09/18/trial-dates-set-in-private-border-wall-lawsuit/>. FSG entered into a lease/purchase agreement with Neuhaus & Sons for a strip of land 15 feet landward from the riverbank. In 2019, the Hidalgo County Appraisal District classified the 638-acre property as agricultural land, which was appraised at \$277,047. The district in 2020 reclassified Neuhaus land as commercial property. The resulting improvements due to the wall were valued at \$16 million per mile. The land is now appraised at \$20.3 million. The taxes due on the property are \$435,000. Monitor, September 12, 2020.

⁵⁹⁰ Private group must stop building border wall in South Texas, judge says in temporary order, Texas Tribune (December 4, 2019), <http://www.texastrbune.org/2019/04>.

⁵⁹¹ National Butterfly Center Obtains Temporary Restraining Order Against Brian Kolfage and We Build the Wall, NAT'L BUTTERFLY CTR. (Dec. 4, 2019), <https://www.nationalbutterflycenter.org/nbc-multi-media/in-the-news/286-national-butterfly-center-obtains-temporary-restraining-order-against-brian-kolfage-and-we-build-the-wall>.

⁵⁹² *Id.*

⁵⁹³ Michael Benitt, *Texas Judge Orders Trump's Supporters to Stop Building the Border Wall*, Latin Post (Dec. 9, 2019, 11:57 AM), <https://www.latinpost.com/articles/142887/20191209/texas-judge-orders-trumps-supporters-not-to-build-private-border-wall.htm>.

the international boundary line.”⁵⁹⁴ This would violate the treaty, which stipulates that both American and Mexican IBWC counterparts must analyze hydraulic models before any riverside construction can occur.⁵⁹⁵ FSG failed to provide a detailed report regarding the hydraulic impact of the proposed bollard structure on the riverbank.⁵⁹⁶ Judge Vasquez in the United States District Court for the District of South Texas stopped construction.⁵⁹⁷ Again, there was a nasty counter-offensive by WBW.⁵⁹⁸ Judge Crane in the United States District Court for the District of South Texas eventually decided that construction would not pose any problems, so construction was allowed to move forward.⁵⁹⁹

FSG efforts attracted President Trump’s attention.⁶⁰⁰ FSG was awarded a 400 million dollar contract to construct 31 miles of wall in Arizona in December 2019.⁶⁰¹ President Trump’s involvement, however, raised concerns regarding improper influence.⁶⁰² This precipitated an investigation by the Inspector General.⁶⁰³ The House Homeland Security Committee also became concerned.⁶⁰⁴ The House Committee Chair, Representative Bennie Thompson (D-MS), stated: “Given the President’s multiple endorsements of this company and the amount of taxpayer money at stake, I remain concerned about the possibility of inappropriate influence on the Army Corps contracting decision.”⁶⁰⁵ There was also speculation in the press that Senator Cramer was holding up confirmation of a White House official until the FSG received the contract.⁶⁰⁶ Nevertheless, Arizona state officials enthusiastically supported the construction of the border wall.⁶⁰⁷

In February 2020, DHS waived 11 contracting laws, which included open bidding and permitting losing bidders to appeal, for projects in six border areas: San Diego and El Centro in California; Yuma and Tucson in Arizona; and El Paso and Del Rio in Texas.⁶⁰⁸ Contracts for the

⁵⁹⁴ Nina Lakhani, *Private border wall construction continues despite court order*, THE GUARDIAN (Dec. 7, 2019, 2:15 AM), <https://www.theguardian.com/us-news/2019/dec/06/private-border-wall-construction-continues-despite-court-order>.

⁵⁹⁵ *Id.*; Convention between United States and Mexico, Water Boundary, March 1, 1889, Treaty Series 241, Washington Government Printing Office 1914.

⁵⁹⁶ *Id.*

⁵⁹⁷ Benitt, *supra* note 593.

⁵⁹⁸ Schwartz & Trevizo, *supra* note 579.

⁵⁹⁹ Geneva Sands, *Federal judge allows private border wall construction to move ahead*, CNN (Jan. 9, 2020, 9:25 PM).

⁶⁰⁰ Prendergast, *supra* note 574.

⁶⁰¹ Zolan Kanno-Youngs, *Pentagon Investigator to Examine Border Wall Contract Awarded to G.O.P. Donor*, N.Y. TIMES (Dec. 12, 2019), <https://www.nytimes.com/2019/12/12/us/politics/trump-border-wall-investigation.html>.

⁶⁰² *Id.*

⁶⁰³ *Id.*

⁶⁰⁴ Anthony Capaccio, *Pentagon Delays Answers on Border Wall Contract, Watchdog Says*, BLOOMBERG (Dec. 4, 2020, 12:00 AM), <https://www.bloomberg.com/news/articles/2020-12-04/pentagon-delays-answers-on-border-wall-contract-watchdog-says>. In December 2020, the Acting Pentagon Inspector General reported that Department of Defense attorneys, alleging executive privilege, were “slow walking an 11-month-old request to turn over executive branch emails on the \$400 million border wall contract awarded to [FSG].” This has hampered his oversight work. Representative Thompson stated, “It seems clear that the Trump administration is dragging its feet in cooperating with the investigation into Fisher border wall contract, which has already gone on for a year.” *Id.*

⁶⁰⁵ *Id.*

⁶⁰⁶ Zolan Kenno-Young, *Pentagon Investigator to Examine Border Wall Contract Awarded to G.O.P. donor*, N.Y. TIMES, Dec. 12, 2019.

⁶⁰⁷ Steven Hsieh, *Arizona Republicans Push Bill Permitting Private Border Wall Construction*, PHOENIX NEW TIMES (Jan. 3, 2020, 1:21 PM), <https://www.phoenixnewtimes.com/news/border-wall-arizona-immigration-republicans-bill-permits-construction-11419861>.

⁶⁰⁸ Spagat, *supra* note 559.

construction of 177 miles of border wall in these areas were limited to 12 firms, including FSG.⁶⁰⁹ The Project on Government Oversight (POGO) noted that waiving the law for contractors that provide the government with certified cost data (e.g. labor or parts) could lead to grossly inflated prices. POGO stated: “It’s equivalent to buying a car without seeing a sticker price. This could be a recipe for shoddy work and paying a much higher price than they should.”⁶¹⁰ Representative Thompson declared that “cronies are likely to be the beneficiaries.”⁶¹¹ He stated: “President Trump broke his promise to make Mexico pay for the wall. Now he’s not only sticking the American people with the bill, but also waiving procurement laws meant to protect taxpayers from government waste, fraud, and abuse.”⁶¹²

Problems continued to plague the private border wall in RGV, reawakening the earlier conflict. Erosion at the base of the wall threatens the wall’s integrity. IBWC found FSG’s three-mile fence, which was just 35 feet from the Rio Grande River, could worsen flooding by trapping debris and change the course of the river. IBWC asked FSG to make changes in the project.⁶¹³

FSG countered that IBWC was using a faulty hydraulic computer model and was misstating the potential of major flooding.⁶¹⁴ After minor changes, the IBWC withdrew its objections.⁶¹⁵ Critics argued that IBWC caved, noting that IBWC Commissioner Harkins had contributed to President Trump’s campaign during the negotiations.⁶¹⁶ Representative Castro (D-TX) stated: “It’s clear that no degree of adjustments to the wall will work. This unnecessary wall must be taken down.”⁶¹⁷

While the criticism and investigation of FSG was underway, FSG was awarded a 1.3 billion dollar contract to construct 42 miles of wall in March 2020.⁶¹⁸ The proposed wall will traverse the mountainous region of Arizona from Nogales to the eastern border of the Tohono O’odham Nation.⁶¹⁹ The average cost for the project is 30 million dollars per mile, which is much higher than the average cost of 20 million dollar per mile in the rest of Arizona.⁶²⁰ The Army Corps justified the increased cost because of the unique nature of the project. Representative Thompson raised questions about the contract, stating: “If the administration cared about anything besides political optics and maximizing miles of fence in the run up to the election, they wouldn’t have

⁶⁰⁹ *Id.*

⁶¹⁰ *Id.*

⁶¹¹ Ryan Summers, ‘Insecurity’: How Trump Administration is Placing Border Wall Speed before the Law, PROJECT GOV’T OVERSIGHT (Jun. 5, 2020), <https://www.pogo.org/analysis/2020/06/insecurity-how-the-trump-administration-is-placing-border-wall-speed-before-the-law/>.

⁶¹² *Id.*

⁶¹³ Noman Merchant, *Agency finds private border wall violates Rio Grande treaty*, ASSOCIATED PRESS (May 6, 2020), <https://apnews.com/article/5f62e012bcd0f8f87bd86232fa38fc2>.

⁶¹⁴ Sandra Sanchez, *Private border wall builder says south Texas structure doesn’t violate international treaty*, BORDER REPORT (May 7, 2020, 5:58 PM), <https://www.borderreport.com/hot-topics/the-border-wall/private-border-wall-builder-says-south-texas-structure-does-not-violates-international-treaty/> (quoting FSG CEO Tommy Fisher) (“They’re talking about one little area of 3-mile fence project that handles less than 3% of total volume of water. It’s such a non-issue but we want to respect the agency and we want to make them comfortable in the end that we did things right.”).

⁶¹⁵ Jeremy Schwartz & Paula Trevizo, *He built a privately funded wall. It’s already at risk of falling down if not fixed*, TEX. TRIBUNE (July 2, 2020, 5:00 AM), <https://www.texastribune.org/2020/07/02/texas-border-wall-private/>.

⁶¹⁶ *Id.*

⁶¹⁷ *Id.*

⁶¹⁸ Prendergast, *supra* note 574.

⁶¹⁹ *Id.*

⁶²⁰ *Id.*

awarded this contract.”⁶²¹ Representative Thompson asked the Department of Defense to investigate the awarding of the contract.⁶²² In addition, FSG received a 7.6 million dollar contract to build 800 feet of wall near Yuma⁶²³ and a 283 million dollar contract for 27 miles of wall in Laredo, Texas.⁶²⁴

FSG private border wall in the RGV continues to be criticized. Federal officials in Texas are conducting an engineering inspection of the wall. Portions of wall are showing signs of erosion, possibly causing the wall to fall into the river. U.S. Attorney, Ryan Patrick, characterizing the work as slapdash, noted that the FSG “didn’t do any engineering beyond a PowerPoint slide.”⁶²⁵ FSG countered that the erosion is just cosmetic and “everything is in great shape.”⁶²⁶ President Trump, evidencing a change in attitude, tweeted that he “disagreed with doing this very small section of wall, in a tricky area.” [The project] “was only done to make me look bad.”⁶²⁷

Four officials of We Build the Wall (WBW), including President Kolfage, Bannon, Bartolato, and Shea, have been indicted for conspiracy to commit mail fraud and conspiracy to commit money laundering.⁶²⁸ WBW raised 25 million dollars to build the private border wall. President Kolfage declared he would not take a salary and all the funds raised would be used to build the wall. After questions were raised, Florida’s Department of Agriculture opened a case in May 2019, which was later referred to the FBI. The investigations showed that the defendant’s used fake invoices and sham vendor arrangements to siphon off funds to pay private expenses.⁶²⁹ Steve Bannon, who is accused of diverting one million dollars, in part, to pay President Kolfage’s salary, stated: “This entire fiasco is to stop people who want to build the wall.”⁶³⁰ President Trump’s press secretary commented: “President Trump has no involvement in this project and felt it was only being done in order to showboat, and perhaps raise funds.”⁶³¹ President Trump, distancing himself from Bannon, stated, “I haven’t been dealing with him for a very long period

⁶²¹ Molly Hennessy-Fiske, *Trump accelerates border wall construction ahead of election, despite pandemic*, L.A. TIMES (Jun. 30, 2020, 4:00 AM), <https://www.latimes.com/world-nation/story/2020-06-30/trump-accelerates-border-wall-construction-ahead-of-election-despite-pandemic>.

⁶²² James MacPherson, *Audit: North Dakota firm was properly awarded wall contract*, ASSOCIATED PRESS (Nov. 16, 2021), <https://apnews.com/article/business-north-dakota-dickinson-bennie-thompson-us-army-6193a3fd6067c42e3a78ead3312423f4>.

⁶²³ Curt Prendergast, *\$1.28 billion wall project on Arizona border goes to firm favored by Trump*, TUCSON.COM (May 20, 2020), https://tucson.com/news/local/1-28-billion-wall-project-on-arizona-border-goes-to-firm-favored-by-trump/article_ad3b3de1-ccb3d-5771-951c-49e09c720ec0.html.

⁶²⁴ Sandra Sanchez, *2 new border wall contracts, valued at half a billion dollars issued for Laredo, Texas*, BORDER REPORT (October 8, 2020), <https://www.borderreport.com/hot-topics/the-border-wall/2-new-border-wall-contracts-valued-at-half-a-billion-dollars-issued-for-laredo-texas/>.

⁶²⁵ Curt Prendergast, *Contractor building \$1.3 billion border wall in southern Arizona is accused of shoddy work in Texas*, TUCSON.COM (last updated Dec. 21, 2020), https://tucson.com/news/local/contractor-building-1-3b-border-wall-in-southern-arizona-is-accused-of-shoddy-work-in/article_13f72412-f0aa-5313-985c-a8e2ee8b142f.html.

⁶²⁶ *Id.*

⁶²⁷ *Id.*

⁶²⁸ Larry Neumeister et al., *Ex-white house advisor Steve Bannon pleads not guilty in border wall scheme*, ABC NEWS (Aug. 20, 2020), <https://abcnews.go.com/Politics/wireStory/white-house-adviser-steve-bannon-arrested-fraud-scam-72494472>.

⁶²⁹ Zolan Kanno-Youngs et al., *How Bannon and His Indicted Business Partners Cashed In on Trump*, N.Y. TIMES (Aug. 20, 2020), <https://www.nytimes.com/2020/08/20/us/politics/bannon-we-build-the-wall.html>.

⁶³⁰ Alan Feuer et al., *Steve Is Charged with Fraud in We Build the Wall Campaign*, N.Y. TIMES (Aug. 21, 2020), <https://www.nytimes.com/2020/08/20/nyregion/steve-bannon-arrested-indicted.html>.

⁶³¹ Megan Roos, *Trump distances from Bannon after arrest over border wall fund raising fraud: showboating*, NEWSWEEK (August 20, 2020), <https://www.newsweek.com/trump-distances-bannon-after-arrest-over-border-wall-fundraising-fraud-showboat-1526509>.

of time.”⁶³² However, on his final day in office President Trump issued a pardon to Steve Bannon.⁶³³

The NBC⁶³⁴ and the IBWC suits have been joined and will be argued in November 2020.⁶³⁵ Tommy Fisher called the private Rio Grande fence the “Lamborghini” of border walls.⁶³⁶ Alex Mayer, a professor of civil engineering at University of Texas at El Paso, stated: “It’s not a Lamborghini, it’s a \$500 used car.”⁶³⁷ Several recent reports on behalf of the NBC have concluded that a private Texas border wall is likely to fall.⁶³⁸ Mark Thompkins, an environmental engineer, concluded that the private border wall will fall into the Rio Grande River and FSG can do nothing to stop it. FSG maintenance plan is “haphazard and unprofessional” and demonstrates a “complete lack of understanding of professional standards for safe and effective construction and maintenance of infrastructure in large, dynamic floodways like the Rio Grande.”⁶³⁹ The Millennium Engineers Group declared: “the geography of the wall’s construction location in comparison to the river bend is not a favorable location for long-term performance.”⁶⁴⁰

FSG is not the only company under suspicion. BFBC was awarded a 569 million dollar contract to construct 17 miles of border wall in California. Senator Warren (D-MA) and Representative Thompson asked the DOD Inspector General to examine the contract to insure that

⁶³² Feuer et al., *supra* note 630.

⁶³³ Benjamin Weiser, *Trump Pardon of Biden Could Raise Risk for 3 Co-Defendants*, N.Y. TIMES (Jan. 26, 2012), <https://www.nytimes.com/2021/01/26/nyregion/steve-bannon-pardon-trump.html>; Robert Hart, *Reports: Manhattan DA Weighs Prosecuting Steven Bannon For Border Wall Fraud After Trump’s Last-Minute Pardon In Federal Case*, FORBES (Feb. 3, 2021), <https://www.forbes.com/sites/roberthart/2021/02/03/reports-manhattan-da-weighs-prosecuting-steve-bannon-for-border-wall-fraud-after-trumps-last-minute-pardon-in-federal-case/?sh=9d9c8b6df44c>.

⁶³⁴ Sanford Nowlin, *South Texas’ National Butterfly Center wins court victory over Trump administration’s border wall*, SAN ANTONIO CURRENT (Oct. 14, 2020), <https://www.sacurrent.com/sanantonio/south-texas-national-butterfly-center-wins-court-victory-over-trump-administrations-border-wall/Content?oid=24678062> (The NBC also brought suit against the federal government, alleging construction of the border wall violated federal environmental law and its constitutional rights. The D.C. District Court dismissed the case. The D.C. Circuit, however, reversed and remanded the case. The court held that CBP used portions of NBC without authorization and damaged the property. The federal government violated the Due Process Clause of the Fifth Amendment “because the government has not established that its statutory authority to enter private property to patrol the border licenses all of the alleged intrusions at the Center.”).

⁶³⁵ Jose De Leon III, *Trial dates set in private border wall*, PROGRESS TIMES, (September 18, 2020), <https://www.progresstimes.net/2020/09/18/trial-dates-set-in-private-border-wall-lawsuit/>; Sandra Sanchez, *Private border wall hearing Thursday, first since We Build The Wall indictments*, BORDER REPORT (last updated Sept. 24, 2020), <https://www.borderreport.com/hot-topics/the-border-wall/private-border-wall-hearing-thursday-first-since-we-build-the-wall-indictments/>; Simon van Zuylen-Wood, *The Guy Who Spent \$30 Million Building Trump’s Wall Is Looking for Buyers*, BLOOMBERG NEWS (July 22, 2021), <https://www.bloomberg.com/news/features/2021-07-22/trump-border-wall-builder-tommy-fisher-is-looking-for-a-buyer>.

⁶³⁶ Jeremy Schwartz & Perla Trevizo, *Privately built border wall will fail, engineering report says*, THE TEXAS TRIBUNE (Sept. 2, 2020), <https://www.texastribune.org/2020/09/02/texas-private-border-wall-study>.

⁶³⁷ *Id.*

⁶³⁸ *Id.*; Kim Slowey, *Engineer finds a portion of Texas border wall at risk of failing*, CONSTRUCTION DIVE (Sept. 11, 2020), <https://www.constructiondive.com/news/engineer-finds-a-portion-of-texas-border-wall-at-risk-of-failing/585054/>; Jill Ament & Caroline Covington, *Private Border Wall In South Texas Could Topple In A Flood, According to Engineering Report*, TEX. STANDARD (Sept. 4, 2020), <https://www.texasstandard.org/stories/private-border-wall-in-south-texas-could-topple-in-a-flood-according-to-engineering-report/>.

⁶³⁹ *Id.*

⁶⁴⁰ *Id.*

the government is not being overcharged.⁶⁴¹ Democrats want a “thorough review of circumstances surrounding the award...because [they] have numerous questions about whether federal procurement law may have been subverted in order to reward a political ally of the administration.”⁶⁴² Senator Reed (D-RI) noted that the BFBC no-bid contract raises “troubling questions ... the contracting process should be merit-based and free from political influence and corruption.”⁶⁴³

South West Valley Contractors was awarded several border wall construction contracts: a 1.3 billion dollar contract in 2019 to build 63 miles of border wall in Cochise County, New Mexico, which includes Organ Pipe National Monument and Cabeza Prieta National Wildlife Refuge; a 524 million dollar contract in March 2020 to build an additional 24 miles of border wall in Cochise County;⁶⁴⁴ and a 201 million dollar contract for a 13 miles of border wall in Laredo, Texas.⁶⁴⁵ South West Valley Contractors is facing three OSHA violations related to the excavation safety rules.⁶⁴⁶ Its parent company, Kiewit, was also awarded a 42.8 million dollar contract to construct parts of the border wall in Texas. Kiewit, has been designated as one of the top 32 environmental polluters in the nation.⁶⁴⁷ Since 2000, Kiewit has paid over five million dollars in penalties.⁶⁴⁸

C. Virtual Wall

CBP fixation on a physical wall has been criticized. The DHS Inspector General report in July 2020 concluded that CBP “has not fully demonstrated that it possesses the acquisition capability to potentially spend billions of dollars to execute a large-scale acquisition to secure the southern border.” Furthermore, “any future initiative may take longer than planned, cost more than expected and deliver less capability than envisioned to secure the southern border.” DHS is not exempt from “following congressional requirements and established acquisition practices to safeguard taxpayer dollars from fraud, waste, and abuse.”⁶⁴⁹ CBP’s own internal analysis determined that domain awareness technology and boots on the ground would be more effective in certain border regions.⁶⁵⁰ CBP responded that it was just following President Trump’s order to build the wall.⁶⁵¹

⁶⁴¹ J. Edward Moreno, *Top Democrats Call on Pentagon to Review Border Wall Contract*, THE HILL (Apr. 24, 2020), <https://thehill.com/policy/defense/494526-top-democrats-pentagon-review-trump-border-wall-contract>.

⁶⁴² *Id.*

⁶⁴³ *Id.*

⁶⁴⁴ *Largest Yet: \$1.3 Billion Contract for Border Wall*, VOA (May 20, 2020), https://www.voanews.com/a/usa_largest-yet-13-billion-contract-border-wall-awarded/6189642.html.

⁶⁴⁵ Sanchez, *supra* note 565.

⁶⁴⁶ Perla Trevizo & Jeremy Schwartz, *Records show Trump’s border wall is costing taxpayers billions more than initial contracts*, THE TEX. TRIBUNE (Oct. 27, 2020), <https://www.texastribune.org/2020/10/27/border-wall-texas-cost-rising-trump/>.

⁶⁴⁷ Brenda Norrell, *Arizona border wall contractors parent company is among world’s most polluting companies*, INDYBAY (Jan. 10, 2020), <https://www.indybay.org/newsitems/2020/01/10/18829609.php>.

⁶⁴⁸ Trevizo & Schwartz, *supra* note 646.

⁶⁴⁹ U.S. DEP’T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., *CBP Has Not Demonstrated Acquisition Capabilities Needed to Secure the Southern Border*, OIB-20-52, at 15 (July 14, 2020), <https://www.oig.dhs.gov/sites/default/files/assets/2020-07/OIG-20-52-Jul20.pdf>.

⁶⁵⁰ John Burnett, *Border Patrol Faulted for Favoring Steel and Concrete Wall Over High-Tech Solutions*, NPR (Aug. 10, 2020), <https://www.npr.org/2020/08/10/900241592/border-patrol-faulted-for-favoring-steel-and-concrete-wall-over-high-tech-soluti>.

⁶⁵¹ *Id.*

There is bipartisan support for the construction of a virtual border wall. Earlier attempts to install a virtual fence proved unsuccessful,⁶⁵² but recent efforts employing newer technology have shown promise.⁶⁵³ Congress has authorized DHS to construct a virtual wall in three locations in south Texas: Bentsen-Rio Grande Valley State Park, La Lomita Chapel, and the National Butterfly Center.⁶⁵⁴

Additional efforts are underway in Congress.⁶⁵⁵ The Southwest Border Security Technology Improvement Act of 2020 requires DHS to assess technology needs along the border. DHS will be required to examine emerging technologies, including manned and unmanned aerial systems, tower-based surveillance technology, and tunnel detection devices. DHS will have to consider the impact of public health emergencies, like COVID-19, on border security. DHS will be required to identify areas where improvements can be made and develop a border plan to implement the relevant technology.⁶⁵⁶ The bill cleared the Senate Homeland Security and Government Affairs Committees. An identical bill was introduced in the House by Representative Torres Small (D-NM) and Representative Crenshaw (R-TX).⁶⁵⁷

The Trump administration hired Anduril Industries to construct solar-powered mobile surveillance towers with cameras and thermal imaging to detect moving objects, which can distinguish humans and wildlife with 97 percent accuracy.⁶⁵⁸ Anduril has developed “ghost drones,” which will enhance its surveillance capabilities. Anduril plans to construct 200 towers by 2022 in an ongoing relationship with CBP.⁶⁵⁹ Anduril will also work with Google and Plantir to further improve its border security system.⁶⁶⁰ President Trump stated that Anduril’s virtual wall system is a “technology so essential it will be a dedicated item in the homeland security budget,” reportedly worth “several hundred million dollars.”⁶⁶¹

⁶⁵² Obama Administration Ends High-Tech Border Fence, CBS NEWS (Jan. 14, 2011), <https://www.cbsnews.com/news/obama-administration-ends-high-tech-border-fence/>.

⁶⁵³ Cade Metz, *Parts of a ‘Virtual’ Border Wall, Built With the Tech Behind Driverless Cars*, N.Y. TIMES (Sept. 18, 2018), <https://www.nytimes.com/2018/09/18/technology/trump-border-wall-lidar.html>; Kristina Davis, *US starts small with ‘smart walls’ to protect the Mexican border*, DAILY REPUBLIC (Mar. 25, 2019), <https://www.dailyrepublic.com/all-dr-news/wires/state-nation-world/us-starts-small-with-smart-walls-to-protect-mexican-border/>; Austin Bundy, *A virtual wall may be the solution to protect wildlife at the border*, CRONKITE NEWS (Apr. 26, 2019), <https://cronkitenews.azpbs.org/2019/04/26/us-mexico-border-lidar/>.

⁶⁵⁴ Sandra Sanchez, *‘Virtual wall’ to be built at 3 protected locations in south Texas, congressman say*, BORDER REPORT (May 27, 2020), <https://www.borderreport.com/hot-topics/the-border-wall/virtual-wall-to-be-built-at-3-protected-locations-in-south-texas-congressman-says/>.

⁶⁵⁵ Victoria Harker, *Bill seeks to expanded border technology to safeguard national security*, AZ BIG MEDIA (Aug. 17, 2020), <https://azbigmedia.com/business/bill-seeks-expanded-border-technology-to-safeguard-national-security/>.

⁶⁵⁶ *Id.*

⁶⁵⁷ *Id.*

⁶⁵⁸ Nick Miroff, *Trump administration hires tech firm to build a virtual border wall, an idea Democrats praised*, WASH. POST (July 2, 2020), https://www.washingtonpost.com/immigration/trump-virtual-border-wall/2020/07/02/7b380490-b0ac-11ea-a567-6172530208bd_story.html.

⁶⁵⁹ Taylor Hatmaker, *Anduril launches a smarter drone and picks up more money to build a virtual border wall*, TECHCRUNCH (Sept. 10, 2020), <https://techcrunch.com/2020/09/10/anduril-cbp-ghost-2020/>.

⁶⁶⁰ Lee Fang & Sam Biddle, *Google AI tech Will Be Used for Virtual Border Wall, CBP Contract Shows*, INTERCEPT (Oct. 21, 2020), <https://theintercept.com/2020/10/21/google-cbp-border-contract-anduril/>.

⁶⁶¹ *Id.*

VII. Biden Administration

While a candidate, President Biden, declared that border wall construction will stop.⁶⁶² The border wall will not be disbanded, but he will pursue efforts to construct a high-tech virtual wall to provide border security.⁶⁶³ Border wall construction continued to proceed at a rapid pace in the waning days of the Trump administration.⁶⁶⁴ On his first day in office, President Biden signed an Executive Order to end the Trump emergency at the border, halted construction of the border wall for 60 days, and ordered a review of the funding appropriated and redirected for the wall.⁶⁶⁵ President Biden withdrew the Trump administration's appeal to the Supreme Court challenging the Ninth Circuit decisions regarding border wall funding. President Biden stated: "it shall be the policy of my administration that no more American taxpayer dollars be diverted to construct a border wall."⁶⁶⁶

A. Contract Cancellation

President Biden plans to cancel all border wall contracts, but it will be difficult.⁶⁶⁷ Project on Government Oversight noted: "while ending construction is easy to say, it might not be so easy, because he'll have to consider phase of construction, gaps in wall that could be exploited and termination costs of existing contracts, which can come with a high price tag for taxpayers."⁶⁶⁸ Of the 46 projects contracted by the Corps utilizing 2808 DOD and 284 DHS funds, 37 projects are ongoing, eight completed, and one suspended pending resolution of protest.⁶⁶⁹ Nevertheless, the Corps of Engineers estimated that the termination of the border wall contracts will save the government 2.6 billion dollars.⁶⁷⁰

⁶⁶² Schwartz & Trevizo, *supra* note 579 (POGO warned that "while ending construction is easy to say, it might not be easy, because he'll have to consider the phase of construction, gaps in the wall that could be exploited and the termination costs for existing contracts, which can come with the high price tag for taxpayers. President Trump might have boxed in Biden, requiring completion of certain portions of the wall whether he likes it or not." Records show Trump's border wall is costing taxpayers billions more than initial contracts, Texas Tribune (October 27, 2020). However, there will also be great savings). Josh Dawsey & Nick Miroff, *Biden's order to halt border wall project would save \$2.6 billion, Pentagon estimates show*, WASH. POST, (Dec. 16, 2020), https://www.washingtonpost.com/immigration/stopping-border-wall-save-billions/2020/12/16/fa096958-3fd1-11eb-a402-fba110db3b42_story.html.

⁶⁶³ Alfredo Corchado, *Biden says border wall construction will stop if he's elected president*, DALLAS MORNING NEWS (Aug. 5, 2020), <https://www.dallasnews.com/news/politics/2020/08/05/biden-says-border-wall-construction-will-stop-if-hes-elected-president/>.

⁶⁶⁴ Sandra Sanchez, *Border wall construction forging ahead with Biden months away from taking office*, BORDER REPORT (Nov. 23, 2020), <https://www.borderreport.com/hot-topics/the-border-wall/border-wall-construction-forging-ahead-with-biden-months-away-from-taking-office/>.

⁶⁶⁵ Proclamation No. 10142, 86 Fed. Reg. 7225 (Jan. 20, 2021).

⁶⁶⁶ Pete Williams, *Supreme Court cancels arguments on Trump's border wall, remain in Mexico policy*, NBC NEWS, (Feb. 3, 2021), <https://www.nbcnews.com/politics/supreme-court/supreme-court-cancels-arguments-trump-s-border-wall-remain-mexico-n1256593>.

⁶⁶⁷ Geneva Sands & Priscilla Alvarez, *Biden's desire to stop border wall construction could be costly and arduous*, CNN (Dec. 5, 2020), <https://www.cnn.com/2020/12/05/politics/biden-border-wall/index.html>; See generally CONG. RSCH SERV., TERMINATING CONTRACTS FOR THE GOVERNMENT'S CONVENIENCE: ANSWERS TO FREQUENTLY ASKED QUESTIONS (Feb. 3, 2015), <https://sgp.fas.org/crs/misc/R43055.pdf>.

⁶⁶⁸ Walter Pincus, *A Border Wall Mess*, THE CIPHER BRIEF (Dec. 1, 2020), https://www.thecipherbrief.com/column_article/a-border-wall-mess.

⁶⁶⁹ Sands & Alvarez, *supra* note 667.

⁶⁷⁰ Dawsey & Miroff, *supra* note 662.

President Biden cancelled border wall projects paid for with diverted military construction funds pursuant to section 2808.⁶⁷¹ In July 2021, the Biden Administration cancelled two border contracts in the Laredo section that covered approximately 31 miles.⁶⁷² In October, DHS announced it was planning to cancel all the border wall contracts in south Texas. CBP announced it “intends to engage in environmental planning concerning these barrier projects, including taking certain actions consistent with the NEPA and other statutes.”⁶⁷³

President Biden has asked Congress to cancel all prior year funding for the border wall.⁶⁷⁴ The Consolidated Appropriations Act of 2020 appropriated 1.375 billion dollars for “construction of barrier system along the southwest border.” The Act specified that the designated amount “shall only be available for border barrier systems.” Similarly, the FY 2021 DHS Appropriations Act provided the same amount of funds, so 2.8 billion dollars remains available for border barrier construction.⁶⁷⁵ If these contracts are not cancelled, DHS will be required to use the funds consistent with their appropriated purpose.⁶⁷⁶

B. Republican Opposition

House Republicans introduced the Finish the Wall Act, which requires border wall construction to begin 24 hours after passage of the Act. DHS must spend funds “appropriated or obligated to border wall system since 2017,” and submit an implementing plan to Congress with benchmarks for “physical barriers, tech, roads and lighting.”⁶⁷⁷

Republicans oppose Biden’s freeze on border wall funds.⁶⁷⁸ Missouri Attorney General Eric Schmitt and Texas Attorney General Ken Paxton have brought suit, seeking to compel the Biden Administration to spend the 2.8 billion dollars that Congress appropriated for the border

⁶⁷¹ Nick Miroff, *Biden cancels border wall projects Trump paid for with diverted military funds*, WASH. POST (Apr. 30, 2021), https://www.washingtonpost.com/national/border-wall-cancelled/2021/04/30/98575af0-a9ec-11eb-b166-174b63ea6007_story.html; Benjamin Siegel & Cecilia Vega, *Biden administration to return billions in border wall funding Trump diverted from Pentagon*, ABC NEWS (Apr. 30, 2021), <https://abcnews.go.com/Politics/biden-administration-return-billions-border-wall-funding-trump/story?id=77423458>.

⁶⁷² Priscilla Alvarez, *Biden administration canceling more border wall contracts*, CNN (Oct. 18, 2021), <https://www.cnn.com/2021/10/08/politics/border-wall-contacts-cancelled-biden-administration/index.html>.

⁶⁷³ Fernie Ortiz, *DHS to terminate all border wall contracts in South Texas*, BORDER REPORT (Oct. 18, 2021), <https://www.borderreport.com/hot-topics/the-border-wall/dhs-to-terminate-all-border-wall-contracts-in-south-texas/>.

⁶⁷⁴ *Id.*

⁶⁷⁵ Zoe Brown, *Missouri AG files suit to require Biden Administration to build border wall*, KCTV5 (Oct. 21, 2021), https://www.kctv5.com/news/local_news/missouri-ag-files-suit-to-require-biden-administration-to-build-border-wall/article_d1ef5602-32b6-11ec-b6d1-47fb86b7f06b.html.

⁶⁷⁶ *Id.*

⁶⁷⁷ *US Republican table Finish the Wall Act to address “Biden’s border crisis,”* GCR (Apr. 28, 2021), <https://www.globalconstructionreview.com/us-republicans-table-finish-wall-act-address-biden/>.

⁶⁷⁸ Dennis Rombo, *Mitt Romney, GOP senators say Biden’s freeze on border wall funds violates federal law*, DESERET NEWS (Mar. 17, 2021), <https://www.deseret.com/utah/2021/3/17/22336867/mitt-romney-gop-senators-president-joe-biden-freeze-border-wall-funds-violate-federal-law>; *see also* Anthony Warren, *Wicker, Hyde-Smith join in letter claiming Biden wall proclamation illegal*, WLBT3 (March 18, 2021), <https://www.wlbt.com/2021/03/18/wicker-hyde-smith-join-letter-claiming-biden-border-wall-proclamation-illegal/> (the Republican letter referring to the 2018 and 2019 appropriations asserts, “the Constitution specifically vests Congress with the power of purse. The President is not vested with power to ignore or amend a duly enacted law. Instead, he must faithfully execute the law as Congress enacts it.”).

wall.⁶⁷⁹ The suit alleges that the administration lacks any constitutional or statutory authority to stop the funding for the border wall.⁶⁸⁰ They have filed a motion for a preliminary injunction to “immediately resume the building of the southern border wall.”⁶⁸¹

Arizona Attorney General Mark Brnovich has brought suit, alleging that the federal government violated NEPA by failing to discuss the environmental impacts for not completing the border wall.⁶⁸² The suit claims that stopping border wall construction increases illegal immigration, which causes present and future harm to the environment.⁶⁸³ CBD characterized the suit as “political grandstanding and an insult to border communities, wildlife, and wild lands.”⁶⁸⁴ If the Attorney General really “cared about the environment he would’ve sued the Trump Administration for ignoring environmental laws and tried to stop these destructive walls from being built.”⁶⁸⁵

Republican senators on the Government Operations and Border Management Subcommittee of the Homeland Security and Government Affairs Committee issued a report that found the government is paying border wall contractors 3.3 million dollars per day not to build the border wall. This has cost the government at least two billion dollars to date.⁶⁸⁶

Five republican senators have threatened to “withhold support of any negotiated FY 2022 omnibus funding agreement that fails to appropriately fund our nation’s border security.”⁶⁸⁷ Nevertheless, senate democrats have outlined spending plans to rescind past border wall funds, which will be used for border security technology. Senator Murphy (D. Conn.) stated that “if Republicans want to shut down the government over the border wall, that’s their choice. But we got elected based on our promise to be more thoughtful about border security, and I feel we have to make good on that promise.”⁶⁸⁸

⁶⁷⁹ Brown, *supra* note 675 (the Consolidated Appropriations Act of 2020 appropriated \$1.375b for “construction of barrier system along the southwest border.” The Act specified that the designated amount “shall only be available for border barrier systems.” Similarly, the FY 2021 DHS Appropriations Act provided same amount of funds, so \$3.6 billion is available for border wall construction.).

⁶⁸⁰ Uriell J. Garcia, *Texas Attorney General Ken Paxton sues Biden Administration in bid to force construction of U.S.-Mexico border wall*, THE TEXAS TRIBUNE (Oct. 21, 2021), <https://www.texastribune.org/2021/10/21/texas-paxton-border-wall-lawsuit-biden/>.

⁶⁸¹ Craig Huber, *Texas AG Paxton calls on court to force Biden to restart border wall construction*, SPECTRUM NEWS (Dec. 22, 2021), <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2021/12/22/texas-ag-ken-paxton-calls-on-court-to-force-biden-to-restart-border-wall-construction->.

⁶⁸² Steve Nielson, *Arizona Attorney General sues feds for stopping wall construction*, FOX10 PHOENIX (Apr. 12, 2021), <https://www.fox10phoenix.com/news/arizona-attorney-general-sues-feds>.

⁶⁸³ Ryan J. Farrick, *Attorney General Mark Brnovich made the dubious claim that Arizona’s natural landscapes will suffer without a better border wall*, LEGALREADER.COM (Apr. 21, 2021), <https://www.legalreader.com/arizona-attorney-general-sues-biden-administration-border-wall/>.

⁶⁸⁴ *Id.*

⁶⁸⁵ *Arizona Attorney General Sues Over Biden Border Policies*, U.S. NEWS (Apr. 12, 2021), <https://www.usnews.com/news/best-states/arizona/articles/2021-04-12/arizona-attorney-general-sues-over-bidens-border-policies>.

⁶⁸⁶ Adam Shaw, *Senate GOP report finds Biden administration spending \$2 billion to suspend border wall construction*, FOXNEWS (July 24, 2021), <https://www.foxnews.com/politics/senate-gop-report-biden-administration-2b-suspend-wall-construction>.

⁶⁸⁷ Adam Shaw & Key Laco, *GOP senators threaten to withhold support from spending bill over lack of border wall funding*, FOX NEWS (Nov. 13, 2021), <https://www.foxnews.com/politics/gop-senators-threaten-withhold-support-spending-bill-border-wall-funding>.

⁶⁸⁸ Aris Folley, *Republicans struggle to save funding for Trump’s border wall*, THE HILL (Nov. 27, 2021), <https://thehill.com/policy/finance/budget/583073-republicans-struggle-to-save-funding-for-trumps-border-wall>.

C. Remediation

Construction of the border wall has caused immense environmental destruction, which requires mitigation. Conservation groups want 58 of the 226 miles of new fencing removed and the land restored, particularly on lands containing wildlife corridors that impede wildlife migration.⁶⁸⁹ Former Secretaries of the Interior Bruce Babbitt and Sally Jewell, support this effort, noting “a new approach is desperately needed, one that restores degraded lands and waters.”⁶⁹⁰ In addition, Representative Grijalva, chair of House Natural Resources Committee, has asked the General Accounting Office to review the impacts on natural and cultural resources resulting from border wall construction during the Trump administration.⁶⁹¹

Border wall construction damaged the levees in southern Texas and Arizona.⁶⁹² Texas Senators implored the Biden administration to fix the levees to prevent flooding in the Rio Grande Valley.⁶⁹³ Border wall funds are being spent to repair breaches in 13-mile section of Rio Grande Valley⁶⁹⁴ and close gaps in Trump’s border wall.⁶⁹⁵ Federal government claims these efforts do not expand the border wall. Conservation groups disagree, declaring that the Administration “is just using this as a loophole, to start construction so that those contractors get the full payout for finishing out the contract” signed during the Trump administration.⁶⁹⁶ Conservation groups have brought suit alleging that these federal efforts violate environmental laws.⁶⁹⁷

⁶⁸⁹ Mandy Loader, *Wildlife rights coalition asks Biden to remove miles of Arizona’s border wall*, TUCSON.COM (Mar. 1, 2021), https://tucson.com/news/local/wildlife-rights-coalition-asks-biden-to-remove-miles-of-arizonas-border-wall/article_7e6b61de-838f-56a3-b74e-ff6057fc2ea6.html.

⁶⁹⁰ Erin Stone, et al., *Trump’s border wall scarred sacred lands, displaced wildlife and drained water. Can it be taken down?*, AZCENTRAL (updated Apr. 20, 2021), <https://www.azcentral.com/in-depth/news/local/arizona-environment/2021/04/15/arizona-mexico-border-calls-removing-wall-and-repairing-environmental-impacts/4589493001/>.

⁶⁹¹ Letter from Representative Grijalva to Gene Dodaro, Comptroller of the U.S. (May 10, 2021). *Spurred by Grijalva, fed watchdog to review Trump border wall construction*, TUCSON SENTINEL (June 9, 2021).

⁶⁹² Elliot Spagat, *Homeland Security to repair damage created by border wall*, PBS NEWSHOUR (April 30, 2021), <https://www.pbs.org/newshour/nation/homeland-security-to-repair-damage-created-by-border-wall>.

⁶⁹³ Moly Taft, *Trump’s Unfinished Border Wall Could Worsen Texas Flooding*, GIZMODO (Apr. 26, 2021), <https://gizmodo.com/trump-s-unfinished-border-wall-could-worsen-texas-flood-1846731979>; Sandra Sanchez, *Cruz joins call for Biden to fix breaches in border levee*, BORDER REPORT (Apr. 21, 2021), <https://www.borderreport.com/hot-topics/the-border-wall/cruz-joins-call-for-biden-to-fix-breaches-in-border-levee-before-hurricane-season-in-south-texas/>.

⁶⁹⁴ Mary B. Powers, *Feds to Repair Damage From Halted Border Wall Work in Texas, California*, ENR (May 5, 2021), <https://www.enr.com/articles/51704-feds-to-repair-damage-from-halted-border-wall-work-in-texas-california> (it also addressed dangerous soil erosion caused by improper compaction of soil and construction material along 14-mile segment in San Diego).

⁶⁹⁵ Tyler Olson, *Biden DHS to close Trump border wall gaps, dispose of unused materials*, FOX NEWS (Dec. 21, 2021), <https://www.foxnews.com/politics/homeland-security-border-wall-close-gaps>.

⁶⁹⁶ Uriell J. Garcia, *Federal government calls it a levee. South Texas immigration advocates and environmentalist see a border wall*, TEXAS TRIBUNE (Sept. 3, 2021), <https://www.texastribune.org/2021/09/03/texas-border-wall-levee/>; John Burnett, *Biden promised to halt building Trump’s border wall - but new construction has begun*, NPR (Oct. 5, 2021), <https://www.npr.org/2021/10/05/1043458068/biden-promised-to-halt-building-trumps-border-wall-but-new-construction-has-begu>; Clara Migoya, *Feds OK work to close border wall ‘gaps’ in Arizona as environmentalist raise concerns*, AZCENTRAL (Dec. 30, 2021), <https://www.azcentral.com/story/news/politics/border-issues/2021/12/30/feds-ok-closing-arizona-border-wall-gaps-upgrading-flood-prevention/8988357002/>.

⁶⁹⁷ Fernie Ortiz, *Conservation group to sue DHS, CBP alleging failure to protect ocelots when building border levees*, Border Report (Dec. 23, 2021), <https://www.borderreport.com/hot-topics/the-border-wall/conservation-group-to-sue-dhs-cbp-alleging-failure-to-protect-ocelots-when-building-border-levees/>.

D. Texas Border Wall

Texas lawmakers decided to complete Trump's border wall utilizing state funds to improve border security.⁶⁹⁸ The Texas legislature considered HB 2862, which would create "border security enhancement fund" to pay for projects on the border.⁶⁹⁹ Governor Abbott declared a disaster in 34 counties based on illegal immigration in order to reallocate 250 million dollars of legislative appropriated funds toward border wall construction.⁷⁰⁰ Private donations for the construction of the Texas border wall soared to 54 million dollars, but almost all of the funds came from one billionaire, Tim Mellon.⁷⁰¹ Governor Abbot signed a bill allocating 1.88 billion dollars for border security, 750 million dollars will be used to build border barriers.⁷⁰²

The Texas Facilities Commission, which approves state contracts, authorized an 11 million dollar contract with several corporations to manage border wall budgets, dedicate state land for wall construction, and find willing private landowners to facilitate construction.⁷⁰³ Most of the border land in Texas is owned by private persons, unlike the borderlands in California, Arizona, and New Mexico, which are federal land. Many Texas landowners have granted the state permission to put border fencing on their property.⁷⁰⁴

The Texas Facilities Commission is considering five firms to construct Governor Abbott's border wall.⁷⁰⁵ Several of the five firms have already completed federal border wall contracts, but have experienced some difficulties.⁷⁰⁶ Construction of the Texas border wall has already begun. The wall only stretches 800 feet, but is expected to expand 1.3 miles and be part of the eight-mile border wall in Starr County.⁷⁰⁷

⁶⁹⁸ Hayden Sparks, *Texas Lawmakers Introduce Bill to Finish Trump's Border Wall Using State Funds*, THE TEXAN (Mar. 4, 2021), <https://thetexan.news/texas-lawmaker-introduces-bill-to-finish-trumps-border-wall-using-state-funds/>; Edgar Sandoval & Zolan Kanno-Youngs, *Texas Says It Will Build Border Wall with Mexico*, N.Y. TIMES (June 12, 2021), <https://www.nytimes.com/2021/06/10/us/texas-border-wall.html>.

⁶⁹⁹ Kim Slowey, *Texas bill would continue border wall construction in the state*, CONSTRUCTION DIVE (Mar. 9, 2021), <https://www.constructiondive.com/news/texas-bill-would-continue-border-wall-construction-in-the-state/596259/>.

⁷⁰⁰ James Barragan & Cassandra Pollock, *Gov. Greg Abbott using disaster declaration to help fund border wall*, TEXAS TRIBUNE (July 23, 2021), <https://www.texastribune.org/2021/06/23/texas-greg-abbott-border-wall/>.

⁷⁰¹ James Barragán & Carla Astudillo, *Texas has raised \$54 million in private donations for its border wall plan. Almost all came from this one billionaire*, CLICK2HOUSTON.COM (Oct. 6, 2021), <https://www.click2houston.com/news/texas/2021/10/06/texas-has-raised-54-million-in-private-donations-for-its-border-wall-plan-almost-all-of-it-came-from-this-one-billionaire/>.

⁷⁰² J.D. Miles, *Governor Abbott approves nearly \$2 billion for border security while in Fort Worth*, CBS NEWS (Sept. 17, 2021), <https://www.cbsnews.com/dfw/news/gov-greg-abbott-signs-texas-border-security-bill-law-fort-worth/>.

⁷⁰³ Uriel J. Garcia, *State agency awards \$11 million contract to oversee construction of Gov. Abbott's Texas-Mexico border wall*, TEX. TRIBUNE (Sept. 16, 2021), <https://www.texastribune.org/2021/09/16/texas-mexico-border-wall-contract/>.

⁷⁰⁴ Scott D. Jones, *123 Texas landowners allow state to put border fencing on their property*, NEWS MAX (Sept. 16, 2021), <https://www.newsmax.com/newsfront/borderwall-texasimmigration-eminentdomain/2021/09/16/id/1036767/>.

⁷⁰⁵ Uriell J. Garcia, *Five firms being considered for design and construction of Texas/Mexico border wall that Governor Abbott promised*, TEX. TRIBUNE (Oct. 26, 2021), <https://www.texastribune.org/2021/10/26/texas-mexico-border-wall-contract-greg-abbott/>.

⁷⁰⁶ *Id.* (the four firms with prior experience are Fisher Sand and Gravel, Southwest Valley Constructors, BFBC, and SLSCO. Posillico Civil had been shortlisted, but never received a contract).

⁷⁰⁷ Kaylee Olivas, *Phase one of Governor Abbot's border construction plan begins*, KVEO-TV (Dec. 31, 2021), <https://www.valleycentral.com/news/local-news/phase-one-of-governor-greg-abbotts-border-construction-plan-begins/>.

E. Virtual Wall

President Biden supports the creation of a virtual border wall powered by biometric data, artificial intelligence, facial recognition, aerial drones, infrared cameras, motion sensors and radar.⁷⁰⁸ The U.S. Citizenship Act 2021 provides funding to the DHS to develop and implement a plan to deploy technology to “expedite screening” and “enhance the ability to process asylum seekers.”⁷⁰⁹ Congress appropriated 2.8 billion dollars for a “barrier system” on the border in the FY 2020 and FY 2021 budgets. The language in these bills did not specifically refer to a border wall, so the Biden administration has discretion to use these funds to create a virtual border wall.⁷¹⁰

VIII. Conclusion

President Trump’s invocation of the national emergency at the border was unprecedented. It was the first-time a national emergency has been declared to circumvent congressional spending restrictions.⁷¹¹ President Trump even openly acknowledged that there was no national emergency at the border.⁷¹²

President Trump’s misuse of national emergency authority poses a threat to the Constitution. Danial Ziblatt and Steven Levitsky, authors of “How Democracies Die,” warned: “National emergencies can threaten the constitutional balance even under democratically minded presidents like Abraham Lincoln and Franklin Roosevelt. But they can be fatal under would-be autocrats... Crises present such great opportunities for concentrating power that would-be autocrats often manufacture them... [T]hese developments should set off alarm bells. Our president is behaving like an autocrat.”⁷¹³

The national emergency declaration allowed the President to invoke latent statutory powers, which were challenged. The Ninth Circuit in *Sierra Club v. Trump* held that the DOD reprogramming of funds pursuant to section 8005 was ultra vires and unconstitutional. The Ninth Circuit in *California v. Trump* held that DOD reprogramming under section 8005 violated the APA and was ultra vires.

The Supreme Court, however, refused to lift the stay granted the initial injunction issued by the district court in June 2019. This has allowed the reprogramming of funds to continue and border wall construction to proceed. The Court’s decision is evidence of a dubious trend on the part of the Court to grant stays in cases requested by the Solicitor General that favor the government’s position.

The Ninth Circuit in *California v. Trump* determined that the reprogramming of military construction funds pursuant to section 2808 to build his wall violated the APA and was ultra vires and unconstitutional.

⁷⁰⁸ Candice Bernd, *Biden is rejecting Trump’s border wall-but favors his own tech wall*, TRUTHOUT (Feb 2, 2021), <https://truthout.org/articles/biden-is-rejecting-trumps-border-wall-but-proposing-his-own-virtual-wall/>.

⁷⁰⁹ *Id.*

⁷¹⁰ Sandra Sanchez, *Biden can redirect new border wall funding lawmakers say they OK’d to avert shutdown*, BORDER REPORT (Jan. 15, 2021), <https://www.borderreport.com/hot-topics/the-border-wall/biden-can-redirect-new-border-wall-funding-lawmakers-say-they-okd-to-avert-shutdown/>.

⁷¹¹ Spagat, *supra* note 43.

⁷¹² *Id.*

⁷¹³ Steve Levitsky & Daniel Ziblatt, *Why Autocrats Love Emergencies*, N.Y. TIMES (Jan. 12, 2020), <https://www.nytimes.com/2019/01/12/opinion/sunday/trump-national-emergency-wall.html>.

The construction of the border wall has had a devastating environmental impact on the border lands. It has destroyed wildlife habitat, jeopardizing the existence of many endangered and threatened species. It has also undermined the role of the states in the federal system by precluding their ability to manage their land and protect their environment.

President Trump's effort to fund his border wall has stretched the parameters of the Constitution, which rests on principles of separation of powers and checks and balances. Congress has exclusive control over appropriations. No money can be spent without congressional authorization. Congress denied funding for his wall. President Trump's subversion of congressional will has undermined the Constitution's separation of powers and checks and balances.

The Supreme Court has warned about the Executive's usurpation of power. Justice Jackson declared: "When a president takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."⁷¹⁴

Justice Kennedy noted that the concentration of power in hands of a single branch is a threat to liberty.⁷¹⁵ Liberty demands limits on the ability of one branch to influence basic political decisions.⁷¹⁶ Political branches can't be allowed to reallocate their own authority. The constitutional structure requires stability which transcends convenience of moment. Liberty is always at stake when one or more branches seek to transgress the separation of powers.⁷¹⁷

President Trump's reprogramming of funds has also exceeded his statutory authority. Justice Frankfurter declared: "It is quite impossible...Congress did specifically address itself to a problem...to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the Constitution's division of authority between president and Congress."⁷¹⁸ President Trump's action undermines the ability of Congress to legislate. Public choice theory posits that legislation reflects deals struck between legislators and interest groups.⁷¹⁹ Congress provided spending for specific military projects in the 2019 CAA. These projects were negotiated by congresspersons to benefit their constituencies and would occur in states, which expected to reap the resulting economic benefits. President Trump's reprogramming undermined these provisions and will make it more difficult to achieve legislative bargains in the future when faced with the threat of capricious executive action.

Most of the federal courts dealing with border wall funding have ruled against President Trump's actions. In *U.S. House of Representatives v. Steven T. Mnuchin*, Judge McFadden held that the House of Representatives lacked standing to challenge the reprogramming of appropriated

⁷¹⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952).

⁷¹⁵ *Clinton v. City of New York*, 524 U.S. 417 (1998).

⁷¹⁶ *Id.* at 451.

⁷¹⁷ *Id.* at 452.

⁷¹⁸ *Youngstown Sheet & Tube Co.*, 343 U.S. at 609.

⁷¹⁹ DANIEL A. FARBER AND PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (Univ. of Chicago 1991).

funds.⁷²⁰ On rehearing en banc, the D.C. Circuit by a vote of 7-2 held the separation of powers did not bar House Democrats from challenging the Trump administration's action.⁷²¹ Subsequently, the D.C. Circuit by a unanimous 3-0 vote reversed the district court and held that the House has standing to challenge the Trump administration's reprogramming of funds.⁷²² Judge Sentelle wrote: "the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys. The Executive Branch has, in a word, snatched the House's key out of its hands. That is the injury over which the House is suing."⁷²³ The Trump administration's action essentially "cuts the House out of the appropriation process., rendering for naught its vote withholding the Executive's desired border wall funding and carefully calibrating what type of border security investments could be made."⁷²⁴ The court stressed that "expenditures made without the House's approval---or worse, as alleged here, in the face of its specific disapproval---cause a concrete and particularized constitutional injury that the House experiences, and can seek redress for, independently."⁷²⁵ Furthermore, the failure to acknowledge such an "injury in fact would fundamentally alter the separation of powers by allowing the Executive Branch to spend any funds the Senate is on board with, even if the House withheld its authorizations."⁷²⁶ Subsequently, the Supreme Court vacated the decision, declaring the case moot.⁷²⁷

In another case, *CBD v. Trump*, Judge McFadden held the plaintiffs have standing to challenge DOD's reprogramming for being ultra vires pursuant to sections 8005, 284, 2808 and for violating section 739.⁷²⁸

The U.S. District for the Western District of Washington in *Washington v. Trump* held that DOD's reprogramming of 89 million dollars in military construction funds pursuant to section 2808 violated section 739 of the CAA of 2019 and exceeded the mandate of section 2808.⁷²⁹

The U.S. District Court for the Western District of Texas in *El Paso County v. Trump* held the DOD reprogramming of funds pursuant to section 2808 violated section 739 of CAA of

⁷²⁰ Brief for the Brennan Ctr. For Just., as Amicus Curiae in Support of Plaintiff's Motion for a Preliminary Injunction, *U.S. House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 1228477 (D.C. Cir. Mar. 13, 2020); Ross Todd, Judge: House lacks standing to sue Trump over border wall funding, *THE NATIONAL LAW JOURNAL* (June 3, 2019), <https://www.law.com/nationallawjournal/2019/06/03/judge-house-lacks-standing-to-sue-trump-administration-over-border-wall-funding/>.

⁷²¹ *U.S. House of Representatives v. Steven Mnuchin, On Rehearing En Banc*, No. 19-5176 (August 7, 2020); John Krugel, *House Democrats can sue Trump over U.S. Mexican wall funding, court rules*, *THE HILL* (August 7, 2020).

⁷²² *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1 (D.C. Cir. 2020), *cert. granted, vacated sub nom.*

⁷²³ *Id.* at 20.

⁷²⁴ *Id.* at 21.

⁷²⁵ *Id.* at 23.

⁷²⁶ *Id.* at 23.

⁷²⁷ Todd Ruger, *Showdown over border wall spending reaches Supreme Court*, *ROLL CALL* (June 15, 2021) <https://rollcall.com/2021/06/15/showdown-over-border-wall-spending-reaches-supreme-court/>; Todd Ruger, *Supreme Court ends legal clash over border wall spending*, *ROLL CALL* (Oct. 12, 2021), <https://rollcall.com/2021/10/12/supreme-court-ends-legal-clash-over-border-wall-spending/>.

⁷²⁸ *Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11 (D.D.C. 2020); Josh Gerstein, *Judge rebuffs Trump administration over border wall funding*, *Politico* (Apr. 3, 2020), <https://www.politico.com/news/2020/04/03/judge-trump-border-wall-funding-162721>.

⁷²⁹ *Washington v. Trump*, 441 F. Supp. 3d 1101 (W.D. Wash. 2020); Gene Johnson, *Far from US-Mexico border, Seattle judge weighs wall funding*, *KOMO* (Jan. 23, 2020), <https://komonews.com/news/local/far-from-us-mexico-border-seattle-judge-weighs-wall-funding>.

2019.⁷³⁰ The Fifth Circuit, following the Supreme Court's lead, issued a stay.⁷³¹ The federal government argued its appeal of the district court decision before the Fifth Circuit.⁷³²

Despite these court decisions, President Trumps again planned to reprogram FY 2020 appropriations pursuant sections 8005, 284, and 2808. Suits challenging the reprogramming have been filed by the same parties involved in the earlier decisions. At the same time, the awarding of border wall contracts has been criticized and is under congressional investigation.

The Supreme Court decided to review the Ninth Circuit case,⁷³³ but the earlier stay granted by the Supreme Court continued to permit the environmental destruction of the border lands. Justice Breyer warned by the time the Court decides the case, much of the environmental damage will already be done because much of the wall will already have been built. However, on February 3, 2021, the Court canceled arguments on Trump's border wall after Acting Solicitor General, Elizabeth Prelogar, asked the Court to take the case off the calendar and "hold further proceedings in abeyance."⁷³⁴

President Joe Biden stopped construction of the border wall and canceled several border wall contracts. He asked Congress to cancel the previously authorized funding for the border wall. Nevertheless, Republicans are pursuing various efforts to restore border wall funding. Remediation efforts are underway to prevent further environmental harm at the border. Texas has begun construction on the Texas-Mexico border wall.

President Biden supports the construction of a virtual border wall driven by technology.⁷³⁵ Congress has authorized construction of a small portion of the virtual wall on part of the border in Mission, Texas. Congress is also considering a bill that provides for the greater use of technology at the border. The virtual wall is the proper way to provide border security because it will do minimal harm to the environment and wildlife.⁷³⁶ Then California Attorney General Xavier Becerra astutely noted that "a medieval wall along the U.S.-Mexico border simply does not belong in the 21st century."⁷³⁷

⁷³⁰ El Paso Cnty. v. Trump, 408 F. Supp. 3d 840 (W.D. Tex. 2019).

⁷³¹ El Paso Cnty. Tex. v. Trump, 982 F.3d 332 (5th Cir. 2020); Lauren Lanty, *Trump praises court decision that military funds can be used for border wall*, ABC NEWS (Jan. 9, 2020), <https://abcnews.go.com/Politics/trump-praises-appeals-court-decision-military-funds-border/story?id=68168127>.

⁷³² Fernie Ortiz, *El Paso suffers when Fort Bliss money is taken for border wall, lawyer argues in federal court*, BORDER REPORT (Sept. 3, 2020), <https://www.borderreport.com/hot-topics/the-border-wall/el-paso-suffers-when-fort-bliss-money-is-taken-for-border-wall-lawyer-argues-in-federal-court/>.

⁷³³ El Paso County has filed a petition for a Writ of Certiorari Before Judgement to ensure a full discussion of the issues in the cases. Petition for a Writ of Certiorari Before Judgment, *El Paso v. Trump* (September 2, 2020). El Paso County asserts that issues presented in the federal district court are pertinent to the resolution of the same concerns before the Court. *Id.* at 13-15. El Paso County concurs with Ninth Circuit decisions regarding section 8005, but argues that the Ninth Circuit did not address the violations of the specific/general canon and section 739. *Id.* at 16-19. Furthermore, if there is any doubt regarding California and Sierra Club standing, El Paso County's distinct economic and budgetary interests fall squarely within the zone of of interests of section 8005. *Id.* at 20-23. Even Judge Collins, dissenting in the Ninth Circuit cases, acknowledged that section 8005 "arguably protects economic interests." *California*, 963 F.3d at 962. *Sierra Club*, 929 F.3d at 715. Recognizing El Paso's standing will ensure that the Court can rule on the merits of the section 8005 issue. *Id.* at 23.

⁷³⁴ Williams, *supra* note 666.

⁷³⁵ Bernd, *supra* note 708 (groups concerned with privacy are critical of the close relationship of the Biden administration and the tech industry. Biden is rejecting Trumps border wall-but favors his own tech wall).

⁷³⁶ Metz, *supra* note 653 (Representative Hurd (R-TX) noted that "the only way to have operational control of the border... is through technology.").

⁷³⁷ Kristin Davis, *San Diego judge rules border wall projects can proceed*, SAN DIEGO UNION-TRIBUNE (Feb. 27, 2018).