IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

EL PASO COUNTY, TEXAS, and
BORDER NETWORK FOR HUMAN RIGHTS,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as President of the United States of America, *et al.*,

Defendants.

Civil Action No. 3:19-cv-66-DB

BRIEF OF FORMER REPUBLICAN MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Legislative History

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former Republican Members of Congress. As Republican Members of Congress, each started with one central understanding of their party's overarching commitment: to honor their pledge to protect and defend the Constitution of the United States. After each election, they renewed that pledge. It has always been a fundamental Republican principle that no matter how strong the policy preferences, no matter how deep the loyalties to presidents or party leaders, to remain a constitutional republic, all must respect the Constitution's separation of powers. *Amici* took an oath to put the country and its Constitution above everything, including party politics or loyalty to a president.

Amici are no longer Members of Congress, but that oath still resonates with them. They remain duty-bound to resist efforts to surrender Congress's powers to a president, no matter the political party. They come from diverse backgrounds and have varying views on whether a border barrier is necessary or appropriate. But they all agree on one thing: any funds for a border barrier must be appropriated by Congress, and here, Congress said no. Thus, they submit this brief supporting Plaintiffs' motion for summary judgment or, in the alternative, a preliminary injunction to defend the separation of powers and Congress's role in the constitutional system.

Steve Bartlett
U.S. House of Representatives (R-TX), 1983-1991

Charlie Bass
U.S. House of Representatives (R-NH), 1995–2007, and 2011-13

Jack Buechner
U.S. House of Representatives (R-MO), 1987-1991

Tom Coleman
U.S. House of Representatives (R-MO), 1976-1993

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission.

John Danforth
U.S. Senate (R-MO), 1977-1995

Mickey Edwards
U.S. House of Representatives (R-OK), 1977-1993

Rodney Frelinghuysen
U.S. House of Representatives (R-NJ), 1995-2019

Wayne Gilchrest
U.S. House of Representatives (R-MD), 1991-2009

Chuck Hagel
U.S. Senate (R-NE), 1997-2009
Secretary of Defense, 2013-2015

Gordon Humphrey
U.S. Senate (R-NH), 1979-1990

Bob Inglis
U.S. House of Representatives (R-SC), 1993-1999 and 2005-2011

James Kolbe
U.S. House of Representatives (R-AZ), 1985-2007

John LeBoutillier
U.S. House of Representatives (R-NY), 1981-1983

Connie Morella
U.S. House of Representatives (R-MD), 1987 to 2003

Claudine Schneider
U.S. House of Representatives (R-RI), 1981-1991

John J.H. Schwarz, MD
U.S. House of Representatives (R-MI), 2005-2007

Christopher Shays
U.S. House of Representatives (R-CT), 1987-2009

Peter Smith
U.S. House of Representatives (R-VT), 1989-1991

Alan Steelman
U.S. House of Representatives (R-TX), 1973-1977

ARGUMENT

The separation of powers is fundamental to our democracy. Each of the legislative, executive, and judicial branches plays a critical—but distinct—role. One way the Framers sought to enforce that separation is through the Appropriations Clause. The Constitution explicitly assigns Congress the exclusive power to appropriate funds. That authority is a critical check on the President's power, and Congress jealously guards it accordingly. Congress would not—and did not—cede that power to the President in the National Emergencies Act ("NEA").

The President's emergency declaration is an unconstitutional attempt to bypass the Appropriations Clause. Accepting the government's arguments would deprive Congress of its most basic constitutional duty. Plaintiffs' motion should be granted.

I. The Separation of Powers Is Fundamental to Our Democracy

The Framers considered "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands," to be "the very definition of tyranny." The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). To guard against such tyranny, they established a separation of powers—"giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." The Federalist No. 51, at 549 (James Madison) (J. Cooke ed., 1961). The Framers crafted "the interior structure of the government" to ensure that each of the branches would "be the means of keeping each other in their proper places." *Id.* As James Madison put it, "The constant aim [was] to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights." *Id.*

The separation of powers "was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of

1787." *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (per curiam). "Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). That influence reflects "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). Thus, the Supreme "Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies." *Buckley*, 424 U.S. at 123. The separation of powers "was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power." *Bowsher*, 478 U.S. at 722.

II. The Appropriations Clause Is a Critical Check on the President's Power

One way the Constitution effectuates the separation of powers is found in the Appropriations Clause. "The power of the purse, which the Framers vested in Congress, has long been recognized as 'the most important single curb in the Constitution on Presidential Power.'" S. Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition & H. Select Comm. to Investigate Covert Arms Transactions with Iran, Report of the Congressional Committees Investigating the Iran-Contra Affair, H.R. Rep. No. 433, S. Rep. No. 216, 100th Cong., 1st Sess. 411 (1987) (quoting E. Corwin, *The Constitution and What It Means Today* 101 (3rd ed. 1975)). "The appropriations clause was intended to give Congress *exclusive* control of funds spent by the Government, and to give the democratically elected representatives of the people an *absolute* check on Executive action requiring expenditure of funds." *Id*. at 412

(emphasis added). "The Framers viewed Congress' exclusive power of the purse as intrinsic to the system of checks and balances that is the genius of the United States Constitution." *Id.*

The Founders recognized the importance of maintaining appropriations power in Congress since the Constitutional Convention. Massachusetts's Elbridge Gerry explained that the House "was more immediately the representatives of the people, and it was a maxim that the people ought to hold the purse-strings." 1 Max Farrand & David Maydole Matteson, *The Records of the Federal Convention of 1787*, at 233 (1966).

James Madison described the Appropriations Clause "as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961).

Alexander Hamilton—who served as Secretary of the Treasury and therefore was responsible for effectuating Congress's appropriations—explained that the Constitution was designed to ensure "that the purpose, the limit, and the fund of every expenditure should be ascertained by a previous law. The public security is complete in this particular, if no money can be expended, but for an object, to an extent, and out of a fund, which the laws have prescribed." Alexander Hamilton, *Explanation* (Nov. 11, 1795), *reprinted in* 19 The Papers of Alexander Hamilton 400, 405 (H. Syrett ed. 1973).

And in 1801, Thomas Jefferson told Congress that "it would be prudent to multiply barriers against the dissipation of public money by appropriating specific sums to every specific purpose, susceptible of definition; by disallowing all application of money varying from the appropriation in object or transcending it in amount, … and thereby circumscribing discretionary

powers over money." First Annual Message of Thomas Jefferson to Congress (Dec. 8, 1801), *reprinted in* 1 Messages and Papers of the Presidents 326, 329 (J. Richardson ed. 1897).

Congress's appropriations power has never diminished in importance. Courts have long underscored Congress's exclusive power to appropriate funds. "The power of the purse was one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several departments.'" *U.S. Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1346 (D.C. Cir. 2012) (Kavanaugh, J.) (quoting The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961)). As such, "absolute control of money of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people." *Hart's Case*, 16 Ct. Cl. 459, 484 (1881), *aff'd*, 118 U.S. 62 (1886). "[N]o money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937). "The Appropriations Clause is thus a bulwark of the Constitution's separation of powers." *U.S. Dep't of the Navy*, 665 F.3d at 1347.

The Appropriations Clause was conceived of as a curb on the *President's* power in particular. It "is particularly important as a restraint on Executive Branch officers: If not for the Appropriations Clause, 'the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.'" *Id.* (quoting 3 Joseph Story, Commentaries on the Constitution of the United States § 1342, at 213-14 (1833)). The Clause "was intended as a restriction upon the disbursing authority of the Executive department." *Cincinnati Soap*, 301 U.S. at 321; *see Reeside v. Walker*, 52 U.S. 272, 291 (1851) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.").

This important power is not a mere formality. Congress solemnly exercises this power by passing annual appropriations bills. In those bills, Congress indicates both purposes for which appropriated funds *can* be used and purposes for which appropriated funds *cannot* be used. As relevant here, Congress explicitly appropriated funds for "the construction of primary pedestrian fencing" in "the Rio Grande Valley Sector." Pub. L. No. 116-6, § 230(a)(1) (2019). But it prohibited "funds made available by this Act or prior Acts" from being used "for the construction of pedestrian fencing" in any other sector of the border. *Id.* § 231. The President signed that bill—with those restrictions—into law.

III. Congress Did Not Give Away Its Critical Appropriations Power in the National Emergencies Act

Given the importance of Congress's power to control appropriations, Congress can and must jealously guard that power against attempted intrusions. Nothing in the NEA suggests that Congress intended to give the President unbounded power not only to spend money, but to spend it on projects that Congress considered and explicitly declined to fund.

In fact, in no sense was the NEA "intended to enlarge or add to Executive power." S. Rep. No. 94-1168 at 3 (1976). It was instead meant to end more than four decades' worth of emergency rule that placed extraordinary power at the President's disposal. When Congress passed the NEA in 1976, four emergency declarations—dating to President Roosevelt's 1933 declaration during the Great Depression—were still in effect. H. Rep. 94-238 at 2 (1975). The country had operated under "an emergency in one form or another for the last 43 years." *Id.* at 3.

These national emergencies concentrated extraordinary power in the Executive Branch. As Senator Mathias, one of the NEA's sponsors, explained on the Senate floor, "there were over 470 significant statutes on the books which are triggered by a state of national emergency." 122 Cong. Rec. S28225 (daily ed. Aug. 27, 1976). These statutes were largely "written by the

executive branch and sent to the Congress in a crisis atmosphere," where they often passed "without thorough consideration." *Id.* So many of these laws "gave virtually open ended authority to the executive branch." *Id.* What is more, under then-existing law, an emergency declaration would automatically trigger most of these laws "whether or not they [were] relevant to the emergency at hand." H. Rep. 94-238 at 7. In other words, "the President [could] exercise all these extraordinary powers, without so much as asking leave of the Congress." 122 Cong. Rec. S28226 (statement of Sen. Church). Together, these statutes "confer[red] on the President the power to rule the United States outside of normal constitutional processes." *Id.* at S28225 (statement of Sen. Mathias).

In passing the NEA, Congress intended not only to terminate the then-existing states of emergency but also to ensure that, "[i]n the future, every type and class of presidentially declared emergency will be subject to congressional control." *Id.* at S28227 (statement of Sen. Church). Among other things, Congress enacted 50 U.S.C. § 1631, providing, in part: "When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act." Accordingly, the President must specify by either declaration or executive order the statutory provisions "needed to deal with the emergency at hand," thus "put[ting] Congress and the public on notice as to precisely what laws are going to be used." H. Rep. 94-238 at 8. No longer can an emergency declaration trigger hundreds of sweeping presidential powers. The NEA also subjects all emergency declarations to Congressional oversight, including by authorizing Congress to immediately terminate an emergency by joint resolution, 50 U.S.C. § 1622(a)(2), requiring Congress to convene every six months to consider whether to terminate an emergency, *id.* § 1622(b), and

requiring the President to report to Congress the total expenditures attributable to the emergency, *id.* § 1641(c).

The NEA was thus meant to shift power from the President back to Congress, not the other way around. And, to state the obvious, the NEA does not empower the President to cause agencies to spend funds not appropriated by Congress simply because of a national emergency. Instead, it lets the President invoke and perpetuate national emergency powers only subject to congressional oversight and, even then, only by tapping specific statutory powers by declaration or executive order. Neither the NEA nor any emergency declaration can upend the bedrock principle giving Congress sole control over the country's purse strings.

IV. The Government's Reading of the Law Creates Constitutional Problems

If the President has the statutory power that he claims—through the NEA or otherwise—that power arguably is unconstitutional because it allows the President to end-run the constitutionally mandated lawmaking process. The President acted unilaterally to obtain border wall funds after Congress explicitly declined to appropriate those funds. The President presented his funding request to Congress, but Congress declined to appropriate the funds as requested—leading to the longest government shutdown in U.S. history and months of negotiation between Congress and the President. Congress ultimately passed, and the President signed, a compromise bill that provided some funds for a border barrier but denied the President the funds he now seeks to use. That is how the Constitution's bicameralism and presentment process is supposed to work. *See INS v. Chadha*, 462 U.S. 919 (1983).

The President's later emergency declaration can be interpreted only as a violation of that process. The enacted law not only withholds some of the requested funds but also prohibits use of the funds appropriated in that Act "or prior Acts" for fencing outside of the Rio Grande Valley

Sector. Pub. L. No. 116-6, § 231 (2019). The President's declaration effectively negates that proscription. "What has emerged … from the President's exercise of his [emergency powers]" is no longer "the product of the 'finely wrought' procedure that the Framers designed." *Clinton v. City of N.Y.*, 524 U.S. 417, 440 (1998). Instead, it amounts to a line-item veto (and an egregious one given that the President signed the bill into law with those restrictions). Worse, when Congress objected to the President's overreach by voting to terminate the emergency declaration, the President vetoed the resolution, thus approving of his own constitutional violation.[2] In so doing, the President end-ran the Constitution's bicameralism and presentment requirements. *See Chadha*, 462 U.S. 919.

"[I]f a serious doubt of constitutionality is raised, it is a cardinal principle that th[e] Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Because Defendants' reading of these statutes creates constitutional difficulties, the Court should reject it.

V. The Emergency Declaration Violates the Appropriations Clause

The President's actions are unprecedented. Not only did Congress not appropriate the funds the President now intends to use for his border wall, it *explicitly prohibited* funds from being used for that purpose. The President signed the appropriations bill containing that prohibition, yet that same day declared a "national emergency" purportedly allowing him to use funds for the very purpose Congress just prohibited. Never before has a President used the NEA to claim authority to appropriate funds that Congress expressly refused to appropriate. For good

[2] Congress never intended the President to have the power to veto disapproval resolutions under the NEA, but the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), mandates that result. Yet the very fact that the NEA's enacting Congress did not intend the President to have a veto is more evidence that the NEA is not the broad-based delegation of spending authority to the President that he claims it to be.

reason: such actions deprive Congress of its constitutional duty to appropriate all funds, thereby violating the Appropriations Clause.

This is not a matter of politics. The current issue—a wall on our southern border—has gone through the process put in place by the Constitution. It has been proposed by the President, it has been debated by Congress, and the people's representatives allocated funding at a level deemed appropriate by Congress. There are many Members of Congress who disagree with the final funding compromise reached by a bipartisan group of legislators. Some people, like the President, may think that an emergency declaration is an appropriate response. But the Constitution (and this Court's interpretation of it) remains the same no matter the party in power. Powers ceded to a President whose policies Congress supports may also be used by Presidents whose policies Congress abhors. That is all the more reason to believe that Congress did not, via the NEA, give away its appropriations powers, granting Presidents vast authority to repurpose funds for projects, even if those projects fly in the face of a painstakingly negotiated appropriations compromise between the President and Congress.

CONCLUSION

The Constitution entrusts Congress with the exclusive power to make appropriations. It is Congress's duty to guard that power from all threats, whether they come from the judiciary or the executive, from Republicans or Democrats. This is not a partisan issue. This is a separation-of-powers issue. If the President wants a wall, he must go through Congress. The Constitution that he (and *amici*) pledged to uphold and defend demands it.

Dated: May 16, 2019.

MCKOOL SMITH, P.C.

/s/ *Charles E. Fowler, Jr.*

Chelsea A. Priest (admission pending)
Texas State Bar No. 24102375
cpriest@McKoolSmith.com
MCKOOL SMITH, P.C.
300 Crescent Court Suite 1500
Dallas, TX 75201
Telephone: (214) 978-4000
Telecopier: (214) 978-4044

Charles E. Fowler, Jr.
Texas State Bar No. 24083014
cfowler@McKoolSmith.com
MCKOOL SMITH, P.C.
300 W. 6th Street, Suite 1700
Austin, TX 78701
Telephone: (512) 692-8722
Telecopier: (512) 692-8744

Attorneys for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served on all counsel of record via the Court's ECF system on May 16, 2019.

/s/ *Charles E. Fowler, Jr.*
Charles E. Fowler, Jr.