No. 19-16102

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, et al.,
Plaintiffs-Appellees,
v.

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

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

DEFENDANTS' REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING APPEAL

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPPAN
JAMES M. BURNHAM
Deputy Assistant Attorneys General

H. THOMAS BYRON III
ANNE MURPHY
COURTNEY L. DIXON
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7243
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 353-8189

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INTRODUCTION

Plaintiffs' stay opposition fails to rehabilitate the district court's extraordinary injunction, which bars DoD from transferring funds across internal budget accounts to construct border barriers supporting DHS's counter-drug efforts in two of the highest-priority drug-smuggling corridors across the southern border, merely in order to prevent alleged harms to plaintiffs' recreational and aesthetic interests in the area. Indeed, plaintiffs manufacture alternate rationales in trying to justify the district court's decision, confirming that this Court should stay the deeply flawed and harmful injunction.

First, plaintiffs barely defend the district court's holding that the zone-of-interests requirement does not apply to implied causes of action in equity, which would perversely allow suit by plaintiffs whose interests are unrelated to the statute they seek to enforce only where Congress has declined to provide them with an express cause of action. Instead, plaintiffs primarily argue that they satisfy the zone-of-interests standard, but the district court did not adopt this argument and it is plainly wrong: plaintiffs' aesthetic and recreational interests are not even arguably protected by Section 8005's restrictions on DoD's ability to transfer funds across internal budget accounts.

Second, plaintiffs provide no meaningful response to the court's critical error in holding that Section 8005 barred the transfer. Plaintiffs continue to focus on border-wall funding generically, rather than on the specific "item" of funding at issue here—*i.e.*, funds for DoD to support DHS's request for counter-drug support under Section

284. Plaintiffs identify no basis in Section 8005's text or context for viewing the "item" of funding at such a high level of abstraction, and they do not dispute that the concrete "item" of Section 284 construction requested in February 2019 was neither "foreseen" by DoD when DoD's appropriation was enacted in September 2018 nor "denied" by Congress.

Third, plaintiffs never address the district court's failure to meaningfully balance the equities when it treated plaintiffs' alleged aesthetic and recreational harms as dispositive while misidentifying the government's interest as restricting illegal immigration rather than preventing drug trafficking. Plaintiffs' own post hoc weighing of the equities is especially improper because it denigrates the government's compelling interest in limiting the scourge of illegal narcotics while exaggerating their interests in activities like hiking and fishing.

Finally, plaintiffs fail to overcome the government's showing that the balance of equities grows particularly lopsided in the context of a stay. Delay of the preparatory steps that the government and its contractors must take in the short term risks irreparable financial and institutional harms to the government. Accordingly, this Court should grant a stay pending appeal.

ARGUMENT

I. The Government Has Demonstrated A Strong Likelihood-of-Success On The Merits.

A. Plaintiffs Lack A Cognizable Interest In Enforcing Section 8005's Restrictions On DoD's Internal Transfer of Funds.

The district court's holding that the zone-of-interests requirement does not apply to equitable causes of action is contrary to controlling precedent and common sense, and plaintiffs are outside the zone of interests protected by the limitations in Section 8005. Mot. 8-13. Plaintiffs' contrary arguments fail.

1. In less than two pages, plaintiffs half-heartedly defend the district court's holding that the zone-of-interests limitation does not apply to equitable causes of action, Opp'n 6-7, but they offer nothing to justify that untenable position.

Plaintiffs cite Supreme Court cases that addressed equitable causes of action without discussing the zone-of-interests requirement, which plaintiffs contend "suggests[] ultra vires review . . . does not typically involve such an inquiry." Opp'n 6. But the fact that it was not deemed necessary in certain equitable cases to discuss the zone-of-interests limitation does not mean that it is inapplicable in such cases. *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 937 (9th Cir. 2007) ("cases that do not actually analyze the issue we must now decide" are not binding precedent). Indeed, plaintiffs do not even claim those cases involved plaintiffs who actually fell *outside* the zone of interests of the provisions being invoked. As we explained (Mot. 12), it would turn the separation of powers on its head to conclude that persons with entirely unrelated

injuries can sue only where Congress has *declined* to provide an express cause of action; it is thus unsurprising that plaintiffs can identify no case endorsing such an "absurd consequence[]." *Cf. Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 176-77 (2011).

Plaintiffs misread the only case they cite as affirmatively rejecting the applicability of the zone-of-interests requirement to equitable ultra vires causes of action: *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987). The footnote plaintiffs cite simply clarified (in dicta) that, in cases challenging executive action as exceeding statutory authority, the relevant question is not whether the plaintiff is "within the zone of interests of the constitutional and statutory *powers* invoked by the [defendant]," but instead whether the plaintiff's "interest may be said to fall within the zone protected by the *limitation[s]*" on those powers. *Id.* (emphasis added). Thus, where a plaintiff alleges a defendant has exceeded statutory authority (due to an express limitation of authority or the mere absence of authority), the zone-of-interests requirement asks whether Congress's denial of authority was sufficiently related to protecting the particular type of plaintiff who has brought suit.

Finally, plaintiffs disregard the cases (Mot. 12) in which the Supreme Court and this Court have made clear that the zone-of-interests requirement applies to implied equitable causes of action, such as suits seeking injunctions under the Constitution, merely because they "predate" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Opp'n 7. But *Lexmark* did not silently abrogate such cases or otherwise narrow the zone-of-interests requirement. *Lexmark* simply clarified that the

zone-of-interests requirement is a merits inquiry— *i.e.*, whether Congress intended a particular plaintiff to be able to invoke "a cause of action"—not a question of "'prudential standing.'" 527 U.S. at 127-28. Indeed, *Lexmark* reaffirmed that the zone-of-interest requirement is a general presumption about Congress's intended limits on the scope of *all* causes of action, *id.* at 129, including equitable claims, which are inferred from Congress's statutory grant of equity jurisdiction and are "subject to express and implied statutory [and constitutional] limitations," *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015); *Grupo Mexicano Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999).[1]

2. Unable to defend the district court's proffered rationale, plaintiffs advance an alternative rationale that the court did not adopt—namely, that they fall within the zone of interests of Section 8005. But that too is wrong.

This Court need not decide plaintiffs' new (and incorrect) argument that they are subject only to the APA's relatively generous version of the zone-of-interests standard,

[1] Plaintiffs and amici misread *Grupo Mexicano* as supporting the district court's holding. Opp'n 7 n.1; Federal Courts Scholars Amicus Br. 9. *Grupo Mexicano* requires that a type of equitable remedy be traditionally available *in the specific circumstances presented*. In that case, although there was a tradition of creditors seeking to restrain dissipation of assets by debtors against whom they "had already obtained a judgment," there was not a tradition for pre-judgment suits and thus the Court held that remedy was not available. *See Grupo Mexicano*, 527 U.S. at 319-22. Here, likewise, while there is a tradition of ultra vires suits against federal officers by plaintiffs within the zone of interests of the restriction being invoked, there is no tradition of allowing plaintiffs with entirely unrelated Article III injuries to sue—indeed, the traditional presumption is precisely the opposite.

compare Opp'n 8, *with* Mot. 10, because the government has a strong likelihood of demonstrating that plaintiffs cannot satisfy even the APA standard. As the government established (Mot. 10-11), Section 8005 governs DoD's internal budgetary process; its transfer authorization provides DoD the necessary budgetary flexibility to move funds between internal accounts, and its transfer limitations "tighten *congressional* control of the re-programming process." Department of Defense Appropriation Bill, 1974, H.R. Rep. No. 93-662, at 16-17 (1973) (emphasis added). A private party's recreational or aesthetic harms from a project paid for with transferred funds are "so marginally related" to Section 8005's interests that the statute does not even "arguably" authorize enforcement suits by such persons under the APA or otherwise. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

Contrary to plaintiffs' arguments (Opp'n 10-11), *Patchak* does not support their position. That case involved an APA challenge to the Secretary of the Interior's statutory authority "to acquire property 'for the purpose of providing land for Indians.'" 567 U.S. at 211-12. The Supreme Court held that the plaintiff, a neighboring landowner "alleg[ing] economic, environmental, and aesthetic harms from the [tribe's planned] casino's operation," *id.* at 212., was within the zone of interests of the statute: it reasoned that the regulation of the *acquisition* of land was "closely enough and often enough entwined with" the *use* of the land being acquired that "neighbors to the use" were "reasonable—indeed, predictable—challengers of the Secretary's [land-acquisition] decisions." *Id.* at 227-28. By contrast, Section 8005's limitations on DoD's internal

budget transfers are in no way "entwined" with the collateral effects on private parties from the projects to which funds happen to be transferred. *Id.* And private parties alleging aesthetic or recreational harms from DoD's intended uses for its internally transferred funds are not "reasonable" or "predictable" challengers under Section 8005. *Id.* To the contrary, private enforcement of Section 8005 is unprecedented, and plaintiffs cite no authority in which private parties have ever brought suit to challenge any similar internal transfer of agency funds.

Finally, plaintiffs raise a red herring in asserting that the "strong presumption favoring judicial review," Opp'n 12, precludes the government from arguing that "appropriations limitations are unreviewable and unenforceable," Opp'n 4. Because these particular plaintiffs' aesthetic and recreational interests fall outside Section 8005's zone of interests under any applicable standard, this Court need not decide whether the statute's limitations may ever be subject to judicial review in an enforcement suit brought by some other hypothetical plaintiff.

B. Section 8005 Authorized DoD's Transfer Of Funds To Provide DHS Counter-Drug Support.

Under Section 8005, *if* the "item for which funds are requested" is DoD's construction of border barriers as counter-drug support for DHS under Section 284, then Congress did not "deny" that item, and the item was "unforeseen" at the time Congress appropriated funds for DoD in response to its budget request prepared earlier. Mot. 13-17. Plaintiffs do not dispute that conclusion. Rather, they only contest

the premise, adhering to the district court's remarkable view that the "item" for which DoD funds were transferred under Section 8005 is "the President's wall" in the abstract. Opp'n 14. That view misunderstands both the statutory language and the budget process.

The plain language of Section 8005 grants DoD authority to "transfer . . . funds . . . for military functions . . . between such appropriations or funds" that Congress has already allocated to DoD. Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018). Transferred funds are to be "merged with . . . the appropriation or fund to which transferred." *Id.* The statute thus authorizes DoD to move appropriations originally dedicated to one specified military purpose, and transfer them to funds dedicated to a different military purpose. Pursuant to that authority, DoD took surplus funds from a personnel account and transferred them to counter-narcotics support. Rapuano Decl. (ECF No. 64-8), ¶¶ 5-6.

Section 8005's command that DoD's "authority to transfer may not be used . . . where the item for which funds are requested has been denied by the Congress" thus has a particular meaning specific to the budget process. Pub. L. No. 115-245, § 8005, 132 Stat. at 2999. The provision was intended to ensure that DoD would not transfer funds for budget items that "ha[d] been *specifically deleted* in the legislative process." H.R. Rep. No. 93-662, at 16 (emphasis added). In the legislative budgeting process, Congress demonstrably and specifically approves, partially approves, or denies particular DoD funding requests. *See* H.R. Rep. No. 115-952 (2018) (conference report on DoD's FY

2019 appropriation). If DoD requests funding for an item and Congress denies it, the Conference Report will identify the denial. The use of DoD's counter-narcotics budget to support DHS was not an "item for which funds were requested" in DoD's budget request, let alone an item for which Congress "denied" funding in any appropriation.

Contrary to plaintiffs' contentions, this is not a dispute over the "interpretation of 'denied.'" Opp'n 14. The question is whether the "item for which funds [were] requested" under Section 8005 is specific (DoD's counter-narcotics support for DHS) or general ("the President's wall," Opp'n 13-14). Plaintiffs' reliance on budget requests for other agencies, "administration" funding requests, and overall funding for unspecified "projects," Opp'n 14, are irrelevant to the meaning of Section 8005. That particular statute is part of the legislation granting DoD's FY 2019 appropriation. It addresses only DoD's specific funding requests, and there was no request for the counter-narcotic funds at issue.

Similarly, the "item" at issue here—DoD's support for the projects requested by DHS under Section 284—was "unforeseen." At the time of DoD's appropriation in September 2018, DoD could not anticipate, based on the ongoing debate over DHS's separate request for appropriations to "build a border wall in these same lands" (Opp'n 15), that DHS would request specific Section 284 counter-narcotics support from DoD in February 2019. In these circumstances, it would not have been reasonable for DoD to make a specific budget request concerning the items at issue.

Congress of course could have prevented the administration from tapping other sources of funding for border construction. If DoD's transfer request had been foreseeable, as plaintiffs and the House of Representatives contend, *see* House Amicus Br. 13-14, then Congress could have prohibited DoD from making transfers to its Section 284 counter-narcotics support fund—Section 8005 is, after all, a provision in DoD's appropriation statute. Congress did not do so, and this Court should not accept plaintiffs' invitation to second-guess that decision. Congress also could have restricted transfers for border barrier funding in DHS's subsequent appropriation. Instead it expressly preserved agencies' authority to use "the reprogramming or transfer provisions of this or any other appropriations Act." Consolidated Appropriations Act 2019, Pub. L. No. 116-6, div. D, § 739, 133 Stat. 13, 197.

Finally, contrary to yet another alternate argument proposed by plaintiffs but not adopted by the district court (Opp'n 15-16), Section 284 support is undoubtedly a "military requirement." Congress enacted Section 284 precisely because it recognized the need for DoD to support civilian agencies by bringing military resources, both skills and funding, to bear upon the problem of drug smuggling.

C. The District Court Failed To Balance The Equities, Which Are Lopsided In The Government's Favor.

The district court abused its discretion by neglecting to properly balance the equities. Mot. 18-21. The court misidentified the government's interest as preventing illegal immigration rather than drug trafficking, and it treated plaintiffs' aesthetic and

recreational harms as sufficient to justify an injunction without any meaningful balancing. As in *Winter v. NRDC*, a "proper consideration" of the balance of harms, including significant national-security and law-enforcement interests, "requires denial of the requested injunctive relief." 555 U.S. 7, 23 (2008).

Ignoring this defect in the district court's merits analysis, plaintiffs provide their own view of the parties' respective harms for purposes of the stay. Opp'n 19-24. But that post hoc argument cannot justify the district court's injunction, as the court itself never actually exercised its discretion to balance the harms according to plaintiffs' new-found theory. And regardless, plaintiffs' suggested balance fails by its own terms. Although plaintiffs quibble about the relative amount and importance of drugs crossing between points of entry (Opp'n 21-23), the record includes ample evidence of drug trafficking in the smuggling corridors at issue (Mot. 4-5); plaintiffs cannot seriously deny the compelling public interest in preventing such drug trafficking, regardless of the precise amount and notwithstanding Congress's decision to provide DHS less than the full amount of border barrier funding it requested. And conversely, while plaintiffs assert generic "environmental harms," Opp'n 23, the district court correctly identified plaintiffs' asserted injuries to activities like hiking and camping as "aesthetic" and "recreational," rather than as specific harm to wildlife or plants, Order 49-50.[2]

[2] Unlike the cases plaintiffs cite, the district court did not rely on harms arising under environmental statutes. The States as amici point to environmental concerns raised in a companion case below concerning the El Paso project. States Amicus Br. 14-17. But the court did not resolve a dispute about the adequacy of the evidence there, and the

Accordingly, plaintiffs' efforts (Opp'n 23) to distinguish *Winter* are unpersuasive, because a significant basis for the reversal of the injunction there was a similarly lopsided balance of harms, including national-security concerns. 555 U.S. at 23-31. And while plaintiffs contend that the injunction in *Winter* disturbed rather than preserved the "status quo," that was not a necessary element of the Court's equitable balancing. *See id.* Indeed, where the equities are this lopsided, mandating preservation of the status quo for its own sake is decidedly inequitable.

II. The Equitable Balance Of Harms Supports A Stay Pending Appeal.

In addition to the balance of harms, a stay is warranted to prevent the irreparable harms resulting from the delay in construction and the risk that the appropriated funds would lapse. Mot. 21-22. Plaintiffs misunderstand or mischaracterize the nature of the irreparable injury to the government. Rather than simply seeking to "rush construction of a wall before their expedited appeal is heard," Opp'n 1; *see also*, *e.g.*, Opp'n 20, the government is in particular need of a stay to continue performing the complex and time-consuming process necessary before the end of the fiscal year to obligate the remaining funds. Contrary to plaintiffs' suggestion, this Court's expedited briefing schedule would not resolve the merits in time to complete that process. McFadden

States also raised no such claims concerning the Yuma project. Any claim of injury to Congress's authority under the Appropriations Clause, House Amicus Br. 5, is not judicially cognizable, as another district court recently held in denying an injunction sought by the House. *See U.S. House of Representatives v. Mnuchin*, No. 1:19-cv-00969 (TNM), 2019 WL 2343015 (D.D.C. June 3, 2019), *appeal docketed*, 19-5176 (D.C. Cir. June 14, 2019).

Decl. (ECF No. 146-2), ¶¶ 6-10 (noting process expected to require 100 days before September 30, a period that would begin on June 22). A stay would allow the government to complete that process while this appeal is briefed and argued.

Plaintiffs contend (Opp'n 1-2, 19-20) that the preliminary injunction will become moot in two weeks when the district court enters final judgment. But this Court will still need to address the merits questions presented in this case if the district court enters a permanent injunction. It would serve no purpose and impose real prejudice to deny a stay based on this quirk of timing, only for the Court to be presented with precisely the same issue in a materially identical stay motion in a few weeks, while the government continues to suffer harm in the interim. For that reason, the Court should assess the irreparable harm to the government during the time necessary to resolve the government's appeal, whether those harms flow from the preliminary injunction or from the likely imminent permanent injunction.

Plaintiffs are also mistaken to contend (Opp'n 21) that the irreparable harm of losing access to appropriated funds can be redressed by future appropriations in the following fiscal year. Absent a stay, even if the government ultimately prevails on the merits, this Court will be unable to redress the injury to DoD from the loss of the funds that Congress already appropriated. That irreparable harm is not eliminated by the speculative possibility that DoD may be able to obtain a new appropriation from Congress. Similarly, the government should not be forced to rely on the uncertain proposition (Opp'n 21; House Amicus Br. 9) that courts can equitably stay the statutory

lapse of appropriated funds—a proposition this Court has never sanctioned and that is an odd solution for plaintiffs and the House to propose while simultaneously seeking to enforce the constitutional restriction that money shall not be drawn from the Treasury without congressional appropriation.

Finally, plaintiffs improperly denigrate the government's irreparable injury from unrecoverable fees and penalties incurred due to the injunction. Opp'n 20-21. They suggest that the government should not have entered into the contracts in the shadow of this litigation. But under that inequitable theory, the government would be effectively required to act as if a preliminary injunction is in place even before a court rules; otherwise it will not be able to get a stay to protect it from unrecoverable costs incurred due to the later entry of an invalid injunction.

CONCLUSION

The government respectfully requests that this Court enter a stay pending appeal of the district court's preliminary injunction.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPPAN
JAMES M. BURNHAM
Deputy Assistant Attorneys General

H. THOMAS BYRON III
ANNE MURPHY
s/ *Courtney L. Dixon*
COURTNEY L. DIXON
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7243
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 353-8189

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Reply in support of Appellants' Motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 3,486 words. This Reply complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ *Courtney L. Dixon*
COURTNEY L. DIXON