No. 19-16102, 19-16300, 19-16299, 19-16336

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.

STATE OF CALIFORNIA, et al.,
Plaintiffs-Appellees-Cross-Appellants,

v.

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

On Appeal from the United States District Court
for the Northern District of California

BRIEF FOR DEFENDANTS-APPELLANTS

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INTRODUCTION

This Court should reverse the extraordinary decisions below, which prohibit the Department of Defense (DoD) from constructing barriers in drug smuggling corridors along the southern border. In response to a request for assistance from the Department of Homeland Security (DHS), DoD relied on longstanding statutory authority (10 U.S.C. § 284) to construct border barriers in support of counter-narcotics efforts. The district court did not hold that Section 284 prohibits the construction at issue. Rather, it held that DoD exceeded the limitations on its authority to internally transfer appropriated funds among its own budget accounts under Section 8005 of its annual appropriations statute. Moreover, the court granted injunctive and declaratory relief on this basis to plaintiffs whom Congress has not authorized to sue to enforce Section 8005 and whose asserted injuries from the border barrier construction are primarily recreational and aesthetic. As confirmed by the Supreme Court's order staying the injunction, Misc. Order, *Trump v. Sierra Club*, No. 19A60 (U.S. July 26, 2019) (SCt. Stay Order), the district court's decisions are fundamentally flawed and must be reversed.

Foremost "[a]mong the reasons" for granting a stay, the Supreme Court emphasized that the Government had "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." SCt. Stay Order 1. In particular, regardless of whether their cause of action is expressly granted by the Administrative Procedure

Act (APA) or inferred from Congress's grant of equitable jurisdiction to federal courts, plaintiffs are not proper parties to enforce Section 8005 because they fall well outside its zone of interests. That statute governs DoD's internal reallocation of appropriated funds and has nothing to do with any effect that the funded and statutorily authorized project may have on recreational or aesthetic enjoyment of public lands. Nor can plaintiffs evade this conclusion by labeling their claims as enforcing the Appropriations Clause, rather than Section 8005. As Judge N.R. Smith explained in dissenting from a motions panel's decision to deny a stay, that approach would "turn[] every question of whether an executive officer exceeded a *statutory* grant of power into a *constitutional* issue," contrary to clear Supreme Court precedent. *See Sierra Club v. Trump*, No. 19-16102, Dkt. 76, 929 F.3d 670 (9th Cir. July 3, 2019) (N.R. Smith, J., dissenting) 1 (Stay Op. Dissent).

Moreover, DoD's transfer of funds was entirely consistent with Section 8005. Congress has explicitly granted DoD the authority to transfer funds among DoD's internal accounts to accommodate higher priority military requirements that are unforeseen and have not been denied by Congress. The counter-narcotics assistance projects at issue here were neither foreseen nor denied during the DoD budget process that occurred in 2018. Congress's later decision to grant only in part budget requests *by DHS* for general border wall funding did not alter *DoD's* authority to transfer appropriated funds to provide specific drug-interdiction assistance—authority

that must be understood in the particular context of the defense appropriation process.

Finally, the district court fundamentally misjudged the balance of harms. Plaintiffs' interests in hiking, birdwatching, and fishing—in several drug-smuggling corridors along the international border with deteriorating existing barriers—do not come close to outweighing the irreparable harm to the government and the public from interfering with efforts to stop the flow of drugs entering the country. The wildly lopsided balance of equities here is an independent basis to vacate the injunction.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 over plaintiffs' statutory and constitutional challenges to a transfer of funds among internal accounts for DoD. On June 28, 2019, the district court granted declaratory judgment and a permanent injunction for plaintiffs in *Sierra Club v. Trump*, No. 19-cv-00892 (N.D. Cal., filed Feb. 19, 2019) (Sierra Club case); granted declaratory judgment to plaintiffs in *California v. Trump,* 19-cv-00872 (N.D. Cal., filed Feb. 18, 2019)) (State case); and entered final judgment in both cases under Federal Rule of Civil Procedure 54(b). ER1, ER522. The government timely filed notices of appeal on June 29, 2019, ER117, ER360, and this Court granted a motion to consolidate the appeals. The State plaintiffs filed a cross-appeal. ER354. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether these plaintiffs can invoke a cause of action to enjoin DoD from allegedly exceeding the limitations of an internal DoD funds transfer provision based on asserted effects that using transferred funds for construction of border barriers will have on plaintiffs' aesthetic, recreational, and environmental interests.

2. Whether DoD's internal transfer of funds was authorized by Section 8005 of DoD's appropriations statute.

3. Whether the district court abused its discretion in granting a permanent injunction because the balance of equities and public interest tip sharply in the government's favor.

STATEMENT OF THE CASE

I. Statutory Background

This case involves the transfers of certain funds, appropriated to DoD for fiscal year 2019, between DoD accounts pursuant to DoD's explicit statutory authority under Section 8005 (and Section 9002) of the Department of Defense Appropriations Act, 2019 (DoD Appropriations Act), Pub. L. No. 115-245, div. A, tit. VIII, 132 Stat. 2981, 2999 (2018). The Acting Secretary of Defense invoked the transfer authority in response to a request from DHS, seeking DoD's assistance in combatting the flow of illegal narcotics across the southern border, which DoD may provide pursuant to its counter-drug support authority in 10 U.S.C. § 284.

A. Section 8005 of DoD's Appropriations Statute

DoD is charged with administering a vast and complex array of critical programs that are necessary to the defense and security of the United States. The defense budget that funds these programs is massive; Congress appropriated approximately $667 billion to fund DoD in 2019. *See* H.R. Rep. No. 115-952, at 515 (Sept. 13, 2018). Congress finalizes DoD's budget through a collaborative process between DoD and Congress; Congress also routinely provides DoD with necessary flexibility to transfer funds between its accounts to respond to changing circumstances.

1. DoD's Budgeting Process

During the budgeting process, DoD requests funding from Congress for each appropriation account by describing amounts needed to execute projects and programs; these requests are considered by committees in the House and Senate, which memorialize amounts the committees would provide for each budget activity comprised of related projects and programs. The amounts are then reconciled by conference committee, and the details are set forth in a conference report. *See generally* H.R. Rep. No. 115-952 (Sept. 13, 2018) (628-page conference report on DoD's appropriation for fiscal year 2019); *see, e.g.*, *id.* at 462 (setting forth amount DoD requested for specific budget activities within the "Military Personnel, Army" appropriation, the amounts that would be appropriated for each activity by the House and Senate, and a final amount determined by the conference committee).

In its annual Appropriations Act, Congress provides DoD the funds approved through this process. The total defense budget is divided into several different appropriation accounts—such as "Military Personnel, Army"—under which DoD may fund numerous programs and projects that fit within that account. *See* DoD Appropriations Act, 132 Stat. 2982; *see also* H.R. Rep. No. 93-662 at 1, 15 (1973) (explaining that DoD's appropriations are not "written on a line item basis").

2. DoD's Transfer Authority

DoD's budget projections are based upon predictions, which inevitably vary from the circumstances that actually confront DoD in any fiscal year. For example, DoD may request funds for anticipated contingencies that do not materialize, or may overestimate the costs of a particular program, resulting in a surplus in one part of the budget. *See, e.g.,* ER290-ER291 (identifying surplus funds in a personnel account resulting from "strength reductions," experience in actual program implementation, and "lower than budgeted rate increases."). Similarly, DoD might at any time face an unexpected circumstance for which funds were not budgeted, or which requires funding beyond budget estimates, resulting in a shortfall elsewhere.

a. In order to respond to these circumstances, Congress has long provided in DoD's annual appropriations statutes the authority for DoD to move "funds between appropriation[]" accounts as its needs and priorities change. U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law*, ch. 2, pt. B, § 7 at 5 (4th ed. Rev. 2016) (2016 WL 1275442) (defining transfer); *see also id.* (explaining the

"legitimate need for a certain amount of flexibility to deviate from [an agency's] budget estimates").

For fiscal year 2019, Congress once again included such a transfer provision in Section 8005 of DoD's Appropriations Act. Section 8005 authorizes the Secretary of Defense, "[u]pon determination . . . that such action is necessary in the national interest," to transfer up to $4 billion from certain "appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes . . . as the appropriation or fund to which transferred." *See* DoD Appropriations Act, § 8005, 132 Stat. 2999. Congress provided a separate and similar transfer authority in Section 9002, which permits the Secretary to "transfer up to $2,000,000,000 between the appropriations or funds made available" in Title IX of the DoD Appropriations Act. DoD Appropriations Act § 9002, 132 Stat. 3042. That authority is "in addition to any other transfer authority" but is "subject to the same terms and conditions as the authority provided in [S]ection 8005." *Id.*[1]

b. Since 1973, Congress has placed limitations on DoD's transfer authority. *See* H.R. Rep. No. 93-662, at 16. Congress observed in 1973 that "[n]ot frequently, but on some occasions," DoD "ha[d] requested that funds which ha[d] been specifically deleted in the legislative process be restored through the reprogramming

[1] For simplicity, because the transfer authorities at issue are all "subject to Section 8005's substantive requirements," ER5, this brief refers to these authorities collectively as Section 8005 unless otherwise specified, as the district court and motions panel also did, *id.*; Stay Op. 17 n.7.

process." *Id.* Moreover, DoD had, "on occasion, requested permission to reprogram" funds from high-priority projects into "programs which are of obviously lower priority according to military requirements." *Id.* Congress thus included, and has continued to include, limitations on DoD's transfer authority in order to "tighten congressional control of the reprogramming process." *Id.* Section 8005 of DoD's 2019 Appropriations Act provides, in particular, that funds may not be transferred under that provision "unless for higher priority items, based on unforeseen military requirements," and "in no case where the item for which funds are requested has been denied by the Congress." DoD Appropriations Act § 8005, 132 Stat. 2999.

B. 10 U.S.C. § 284

10 U.S.C. § 284 authorizes DoD to "provide support for the counterdrug activities . . . of any other department or agency," if "such support is requested." This support explicitly includes the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." *Id.* § 284(a), (b)(7).

Congress first provided DoD this authority in 1990, in the National Defense Authorization Act for Fiscal Year 1991. Pub. L. No. 101-510, § 1004, 104 Stat. 1485, 1629 (1990). Congress regularly renewed this provision, and specifically endorsed DoD's involvement in building barrier fences along the southern border. *See, e.g.*, H.R. Rep. No. 103-200, at 331 (1993) ("commend[ing]" DoD's efforts to support the reinforcement of "border fence along the 14-mile drug smuggling corridor along the

San Diego-Tijuana border area"); H.R. Rep. No. 110-652, 420 (2008) (describing border fencing as an "invaluable counter-narcotics resource"). Congress permanently codified this authority at 10 U.S.C. § 284 in 2016, directing DoD "to ensure appropriate resources are allocated to efforts to combat" the threat posed by illegal drug trafficking. H.R. Rep. No. 114-840, at 1147 (2016).

II. Factual Background

1. On February 25, 2019, DHS submitted a request to DoD for DoD's assistance, pursuant to 10 U.S.C. § 284, "with the construction of fences[,] roads, and lighting" within eleven specified project areas, "to block drug-smuggling corridors across the international boundary between the United States and Mexico." ER272-273; *see* ER274-ER279. The request sought the replacement of existing vehicle barriers or dilapidated pedestrian fencing with new pedestrian fencing, the construction of new and improvement of existing patrol roads, and the installation of lighting. ER272.

As relevant here, the Acting Secretary of Defense approved six projects, in two phases. First, in March 2019, the Acting Secretary of Defense approved DHS's request with respect to the "Yuma Sector Project[] 1" in Arizona and "El Paso Sector Project 1" in New Mexico. ER282. DHS had identified those projects as among its highest priorities, based on the volume of drug smuggling that occurs between ports of entry in those parts of the border. *See* ER274-ER275, ER278-ER279. As set forth in DHS's request for assistance, the United States Border Patrol had over 1,400

separate drug-related events between border crossings in the Yuma Sector in fiscal year 2018, through which Border Patrol "seized over 8,000 pounds of marijuana, over 78 pounds of cocaine, over 102 pounds of heroin, over 1,700 pounds of methamphetamine, and over 6 pounds of fentanyl." ER274. The Sinaloa Cartel, a powerful drug cartel, operates in the Yuma area. *Id.* The 5-mile area where the Yuma Sector Project 1 will be built currently has ineffective vehicle barriers that must be replaced with new pedestrian fencing in order to counter the current tactics of transnational criminal organizations operating in the Yuma Sector. *Id.* (explaining that "transnational criminal organizations" have "adapted their tactics" to evade existing barriers, such as by "switching to foot traffic, cutting the barrier, or simply driving over it to smuggle their illicit cargo into the United States").

The El Paso Sector similarly experienced high rates of illegal drug activity during Fiscal Year 2018. Border Patrol had over 700 separate drug-related events between border crossings in the El Paso Sector, through which it seized over 15,000 pounds of marijuana, over 342 pounds of cocaine, over 40 pounds of heroin, and over 200 pounds of methamphetamine. ER278. The El Paso Project will replace 46-miles of existing vehicle barriers that are no longer able to effectively stop illegal drugs from entering the United States because of the changing tactics of transnational criminal organizations operating in the area. *See* ER278-ER279.

Second, in May 2019, the Acting Secretary of Defense approved DHS's request for support under Section 284 with respect to four additional projects: "El Centro

Sector Project 1" in California and "Tuscon Sector Project[s]" 1, 2, and 3 in Arizona. *See* ER172. As with the prior projects, DHS had identified those areas as significant drug-smuggling corridors. *See* ER189, ER191-ER192. In the El Centro Sector in 2018, Border Patrol "seized over 620 pounds of marijuana, over 165 pounds of cocaine, over 56 pounds of heroin, and over 1,600 pounds of methamphetamine." ER154. In the Tucson Sector in 2018, Border Patrol seized over 134,000 pounds of marijuana, 62 pounds of cocaine, 91 pounds of heroin, over 902 pounds of methamphetamine, and over 11 pounds of fentanyl. ER191; ER126-ER127. The El Centro Sector Project 1 involves replacing approximately 15 miles of existing vehicle barriers with new pedestrian fencing, and Tucson Projects 1, 2, and 3 will collectively replace approximately 63 miles of existing vehicle barriers and outdated pedestrian barrier. ER164.

The construction activities for these projects will occupy a narrow, 60-foot strip of federal land directly adjacent to the international boundary line. *See* ER 137-ER139; ER240-ER242; ER260-ER261. That land is already heavily disturbed—both by existing border barriers and roads—and functions primarily as a law-enforcement corridor. *See* ER158-ER159; ER253; ER260-ER261.

2. To ensure adequate funds to complete these projects, the Acting Secretary of Defense invoked his authority under Section 8005 to transfer funds internally between DoD appropriation accounts. *See* ER285-ER286. Specifically, to fund the first set of projects, the Acting Secretary transferred $1 billion of excess funds from

the "Army military personnel appropriations" account into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriations account. ER285. The Acting Secretary determined this transfer satisfied the requirements of Section 8005 because "[t]he items to be funded (Yuma Sector Project[] 1 . . . and El Paso Sector Project 1) are a higher priority than the item for which funds and authority are transferred (excess Army military personnel funds) because [the projects] are necessary in the national interest to prevent the flow of drugs," and the "Army military personnel funds are excess to need due to under-execution and lower-than-expected end-strength." *Id.* The Acting Secretary further explained that DoD's "need to provide support for" the two projects under Section 284 was "not known at the time of" DoD's fiscal year 2019 budget request to Congress, and thus was an "unforeseen military requirement," and DoD's support under Section 284 for the two projects "has not been denied by Congress." ER285-ER286.[2]

To fund the second set of projects, the Acting Secretary transferred an additional $1.5 billion from various excess appropriations, invoking both Section 8005 and Section 9002 and making similar determinations that the criteria for transfer were satisfied. ER172-ER173.

[2] The Acting Secretary initially approved a second project in the Yuma sector, but the Army Corps of Engineers subsequently decided not to fund or construct that project pursuant to Section 8005 and Section 284. *See* ER219.

III. Prior Proceedings

1. The Sierra Club, a national environmental group, and the Southern Border Communities Coalition, an organization focused on border issues, brought suit against defendants seeking declaratory and injunctive relief from various actions the federal government has taken to construct physical barriers along the southern border, including DoD's construction pursuant to Section 284 and its transfer of funds under Sections 8005 and 9002. *See* ER317, ER319-ER320, ER336-ER337, ER350-ER351. Several States, including the State of California, filed a separate lawsuit seeking similar relief. *See generally* ER374.

Plaintiffs in both cases moved for preliminary injunctions. The Sierra Club plaintiffs alleged that the border-barrier projects would impair their members' "use and enjoyment of the areas" where the projects would occur. *See* Pls.' Notice Mot. & Mot. Prelim. Inj., *Sierra Club v. Trump*, No. 19-cv-892, Dkt. 29 (April 4, 2019) at 5. The State plaintiffs alleged that California and New Mexico were likely to suffer irreparable harm because construction of a border wall would "cause irreparable injury to wildlife in the area" because it would "permanently impede wildlife connectivity" necessary for "the survival of many species." *See* ER368, ER372.

2. The district court granted a preliminary injunction and a permanent injunction to the Sierra Club plaintiffs. *See* ER15-ER70 & ER2-ER12. The sole basis for the injunctions was the court's conclusion that Section 8005 did not authorize the internal transfer of funds made by the Acting Secretary of Defense. The court denied,

however, the States' motion for injunctive relief, finding plaintiffs' allegations of species-level harm to be inadequate, and determining that injunctive relief was unnecessary in any event in light of the injunction granted to the Sierra Club plaintiffs. *See* ER77-ER78.

a. In issuing a preliminary injunction to the Sierra Club plaintiffs, the district court determined that it "ha[d] authority to review each of Plaintiffs' challenges" pursuant to the court's equitable power to enjoin public officials from violating federal law, rather than under a specific grant of statutory authority, such as the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. ER42 (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015)). The court concluded that, in such an implied equitable action, plaintiffs need not demonstrate that their claims "fall within the 'zone of interests'" protected by Section 8005, because the court viewed that threshold requirement as applicable only "to statutorily-created causes of action," not equitable ones. ER43.

The district court held that Section 8005 did not permit DoD to transfer funds between its accounts for purposes of its Section 284 counter-drug assistance authority here. Because Congress had appropriated only $1.375 billion to DHS for DHS to construct "primary pedestrian fencing . . . in the Rio Grande Valley Sector" of the Southern Border, Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 230, 133 Stat. 13, 28, the district court reasoned Congress had thereby "denied fund[s]" to DoD to construct border infrastructure pursuant to DoD's drug interdiction support

fund in Section 284. *See* ER49. The court also reasoned that DoD's need to provide assistance to DHS was not "unforeseen" within the meaning of Section 8005, even though DHS had not requested DoD's support under Section 284 until February 2019, because the Administration had made non-DoD funding requests for a border wall generally since early 2018. ER49-ER50. The court thus held that the "requirement[]" was "foreseen by the government as a whole," "even if DoD did not realize that it would be asked to pay" for counter-drug support at the time DoD's budgeting process was completed. ER50.

The district court found the Sierra Club plaintiffs had demonstrated irreparable injury "to their members' aesthetic and recreational interests" in the two project areas. ER63. The court invoked declarations asserting that "border barrier construction will harm [the members'] ability to recreate in and otherwise enjoy public land along the border," such as interfering with the "ability to fish" and "hiking and camping interests." ER63-ER64. The court viewed those putative harms as outweighing the government's interests, which the court characterized as "border security and immigration-law enforcement," ER68, rather than drug interdiction. The court enjoined defendants from "taking any action to construct a border barrier . . . using funds reprogrammed by DoD under Section 8005" in the Yuma and El Paso project areas. ER69. The court later denied the government's request to stay the preliminary injunction pending appeal.

The district court denied a preliminary injunction to the State plaintiffs. *See* ER81. The court questioned whether the State plaintiffs had established a sufficient showing of environmental injury to warrant an injunction, but concluded in any event that an injunction was not necessary because the district court had granted the Sierra Club plaintiffs injunctive relief. *See* ER111-ER112.

b. The government moved in this Court for a stay of the district court's preliminary injunction granted to the Sierra Club plaintiffs. While that request was pending, the district court granted partial summary judgment to the Sierra Club plaintiffs and entered a permanent injunction covering the same projects as the first injunction, along with the later-approved projects in the El Centro Sector and Tucson Sectors 1-3. *See* ER2. The court "incorporate[d]" its prior reasoning on the zone of interests and Section 8005, and did not identify any new basis for the injunction. *See* ER5. The court concluded permanent injunctive relief was warranted and, as before, declined to stay its injunction pending appeal. ER11-ER12.

In the State case, the district court awarded declaratory relief that DoD's transfer of funds was unlawful, but it again declined to award injunctive relief. *See* ER71, ER80. The court found that New Mexico and California (the only states to assert environmental injury) had failed to establish that the intended border barrier construction projects would cause demonstrable harm to identified species. *See* ER76-ER77. The court further found an injunction was not warranted for the State

plaintiffs because it had granted a permanent injunction to the Sierra Club plaintiffs. ER78.

The government filed notices of appeal and moved to consolidate the new permanent-injunction appeal with the pending preliminary-injunction appeal, and to consolidate the Sierra Club case with the State case; that request was granted. The government requested that this Court stay the orders on the basis of the briefing and argument it had already received.

3. On July 3, 2019, a divided panel of this Court declined to enter a stay. *See Sierra Club v. Trump*, No. 19-16102, Dkt. 76, 929 F.3d 670 (9th Cir. July 3, 2019) (Stay Op.).

a. The motions panel majority, Judges Friedland and Clifton, agreed with the district court that plaintiffs need not demonstrate that their putative recreational and aesthetic interests fall within the zone of interests protected by Section 8005, although for different reasons than those given by the district court. The panel majority recognized that plaintiffs' challenge "turns on a question of statutory interpretation" concerning Section 8005. *See* Stay Op. 35. Nonetheless, the majority characterized plaintiffs' claims as "alleging a constitutional violation" on the theory that any use of DoD funds transferred improperly under Section 8005 would "cause funds to be 'drawn from the Treasury' not 'in Consequence of Appropriations made by Law,'" in violation of the Appropriations Clause. *Id.* at 4 (quoting U.S. Const., Art. I, § 9, cl. 7). The majority acknowledged the Supreme Court's admonition in *Dalton v. Specter*, 511

U.S. 462, 473 (1994), that "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims," but it distinguished *Dalton* as not addressing "the constitutional implications of violating statutes, such as section 8005, that authorize executive action contingent on satisfaction of certain requirements." Stay Op. 50.

From that premise, the majority reasoned that respondents "either have an equitable cause of action to enjoin a constitutional violation, or they can proceed on their constitutional claims under the [APA]." Stay Op. 4. After expressing skepticism whether the "zone of interests test applies" at all, the majority concluded that, "[t]o the extent" it does apply, "it requires [the court] to ask whether Plaintiffs fall within the zone of interests of the Appropriations Clause, not of section 8005." *Id.* at 65. The court found that test satisfied, reasoning that the Sierra Club plaintiffs' aesthetic and recreational interests are within the zone of interests protected by the Appropriations Clause based on plaintiffs' assertion that their interests will be impaired by "allegedly unconstitutional spending." *Id.* at 67.

The majority also agreed with the district court that Section 8005 likely did not permit the disputed transfers because they failed to meet the statutory requirement that the transfer must be for higher priority items based on "unforeseen military requirements" and must not have been for an "item" previously "denied by the Congress." Stay Op. 36. The majority assumed that DoD "could not have anticipated that DHS would request [the] specific support" for which the Acting Secretary of

Defense had transferred funds. *Id.* But the majority understood the relevant "'requirement'" at issue to be "a border wall," not DHS's specific request for counter-drug support. *Id.* at 37. The majority found it "not credible" that DoD failed to foresee during the budgeting process that it would need funds "to build a border barrier," given the President's protracted negotiations with Congress over that issue in the appropriations process with DHS. *Id.* The majority likewise concluded that Congress had "considered the 'item' at issue here"—in the majority's view, "a physical barrier along the entire southern border"—and had denied funds for that "item" beyond the specific amounts appropriated separately to DHS. *Id.* at 37-39.

Finally, the majority determined that "[t]he public interest and the balance of hardships do not support granting the motion to stay." Stay Op. 75. The majority "d[id] not question in the slightest the scourge that is illegal drug trafficking and the public interest in combatting it." *Id.* at 69. The majority questioned, however, whether "[i]f these specific leaks are plugged, will the drugs flow through somewhere else," and concluded that "the evidence . . . d[id] not support a conclusion that enjoining the construction of the proposed barriers" would "have a significant impact." *Id.* at 70. It further concluded that DoD had not alleged irreparable harms justifying a stay pending appeal because DoD's efforts "to spend this money is not consistent with Congress's power over the purse or with the tacit assessment by Congress that the spending would not be in the public interest." *Id.* at 72.

b. Judge N.R. Smith would have granted a stay pending appeal. In his view, the majority had "created a constitutional issue where none previously existed" and had embarked on "an unchartered and risky approach" that would "turn[] every question of whether an executive officer exceeded a *statutory* grant of power into a *constitutional* issue." Stay Op. Dissent 1. He explained that the Supreme Court's decision in *Dalton* "clarified the distinction between 'claims of constitutional violations and claims that an official has acted in excess of his statutory authority." *Id.* at 5. Judge Smith recognized that the plaintiffs' claim was fundamentally the latter: a challenge that "entirely rises or falls on whether the DoD complied with the limitations in § 8005." *Id.* at 6.

Judge Smith further explained that, "[w]hen their claim is properly viewed as alleging a statutory violation, plaintiffs have no mechanism to challenge [DoD's] actions." Stay Op. Dissent 4. Section 8005 itself does not, he observed, create any implied private cause of action. *Id.* And while the APA could be a "proper vehicle for challenging the DoD's § 8005 reprogramming," Judge Smith concluded that plaintiffs "are not a proper party to bring such a claim, as they fall outside § 8005's zone of interest." *Id.* at 12-13. *See also id.* at 17 ("The relevant zone of interests is not that of the APA itself, but rather the zone of interests to be protected or regulated by the statute that the plaintiff says was violated.") (brackets and citations omitted). In his view, "Section 8005 operates only to authorize the Secretary of Defense to transfer previously-appropriated funds between DoD accounts," and "[n]othing" in the statute

"requires that aesthetic, recreational, or environmental interests be considered before a transfer is made, nor does the statute even address such interests." *Id.* at 19-20. And because APA review is available for a proper plaintiff, Judge Smith would have held that the court "cannot save [plaintiffs'] claim by fashioning an 'equitable' work-around to assert a constitutional claim, as the majority has done." *Id.* at 19-20. That work-around, he explained, "distort[s] decades of administrative law practice" and will invite "future plaintiffs [to] simply challeng[e] any agency action 'equitably,' thereby avoiding the APA's limited judicial review." *Id.* at 23.

Judge Smith also disagreed with the majority's view of the balance of hardships. He reasoned that "drug trafficking along our southern border . . . threatens the safety and security of our nation and its citizens," and that the public interest favors permitting DoD to effectuate a policy it has determined to be "necessary to minimize that threat" while the appellate process plays out. Stay Op. Dissent 27.

4. The Supreme Court granted the Government's motion for a stay pending appeal. SCt. Stay Order. Rejecting the panel majority's reasoning, the Court explained that, "[a]mong the reasons" to grant the stay "is that 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." *Id.* at 1. The

Supreme Court granted a stay in full pending resolution of this appeal and any further review. *Id.*[3]

SUMMARY OF ARGUMENT

The district court's extraordinary orders must be reversed. The Supreme Court's order granting a stay pending appeal confirms that plaintiffs' claims are not viable.

Congress expressly authorized the Secretary of Defense to transfer funds among DoD's internal accounts to accommodate higher priorities that were unforeseen and not specifically denied during the budgeting process. As the Supreme Court strongly signaled in granting a stay allowing construction of the border barrier to resume, "the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *See* SCt. Stay Order 1.

Nothing in that statute suggests that Congress intended to allow suits claiming that the statute's conditions have been violated brought by persons who seek to vindicate recreational, aesthetic, or environmental interests allegedly affected by the statutorily authorized projects to which funds have been transferred. The plaintiffs' interests here are not even arguably within the zone of interests of the budgeting process addressed by Section 8005 and the overall appropriations statute it is part of. Plaintiffs cannot escape that conclusion merely by pointing to equity or the

[3] Justice Breyer would have granted a more limited stay. SCt. Stay Order 2. Justices Ginsburg, Sotomayor, and Kagan would have denied the stay. *Id.* at 1.

Constitution. Neither source of authority suggests that the zone-of-interests requirement is inapplicable to suits such as these. Moreover, plaintiffs cannot transform this statutory-interpretation dispute into a constitutional-authority claim, and attempting to do so does not alter the fundamental question: whether Congress intended plaintiffs like these to be able to seek judicial enforcement of the limitations in Section 8005.

In any event, DoD has complied with Section 8005's requirements. In holding otherwise, the district court simply misunderstood the meaning of the statutory terms. The six projects at issue here were neither denied by Congress nor foreseen at the time Congress enacted the DoD appropriations statute. Indeed, the budgeting process leading to that appropriations statute took place several months before DHS requested counter-narcotics support from DoD and identified the drug-smuggling corridors where that assistance was needed. The district court misread the specific statutory language addressing the DoD appropriations process and mistakenly held that those terms should be read to apply here to a separate proposal by another agency (DHS) concerning border-wall funding generally. That interpretation ignores the text and context of Section 8005, and should be rejected.

At a minimum, the district court abused its discretion in balancing the equities and the public interest to grant a permanent injunction. The Sierra Club plaintiffs' asserted recreational and aesthetic interests—their desire to prevent further alteration of drug-trafficking areas along a narrow strip of border land that is already home to

deteriorating barriers that smugglers have learned to overcome—pale in comparison to the interest of the government and the public in stemming the flow of deadly illegal drugs like heroin and fentanyl across the border.

STANDARD OF REVIEW

On appeal from a permanent injunction, this Court "review[s] the legal determination of whether the district court had the power to issue an injunction de novo, but review[s] the district court's exercise of that power for abuse of discretion." *Continental Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1102 (9th Cir. 1994).

ARGUMENT

This Court should reverse the district court's extraordinary injunction and declaratory judgment. The Court need not resolve the question whether the motions panel's stay decision would have bound the merits panel, because the motions panel's decision has been abrogated by the Supreme Court's order granting a stay, which expressly and implicitly rejected the panel majority's reasoning. *See* SCt. Stay Order 1 (explaining that the Government's showing that "plaintiffs have no cause of action" is "[a]mong the reasons" it was entitled to a stay).

I. Plaintiffs Are Not Proper Parties To Challenge DoD's Internal Transfer of Funds.

As a threshold matter, plaintiffs' claims fail because their alleged injuries are plainly outside the zone of interests protected by the limitations in Section 8005. The Supreme Court has already made this clear, specifically highlighting the government's

argument that "the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005" as a principal reason for staying the district court's injunction and allowing construction of the border barriers to resume. SCt. Stay Order 1.

None of the plaintiffs in these consolidated cases is within the zone of interests protected by Section 8005, which was enacted in DoD's annual appropriations statute and governs DoD's internal transfer of funds as part of Congress's regulation of DoD's budget. Indeed, neither the district court nor the motions panel majority held that plaintiffs satisfied the zone-of-interests requirement with respect to Section 8005. Instead, the district court held that plaintiffs could enforce Section 8005 through an implied cause of action in equity without satisfying any zone-of-interest requirement—a conclusion that is plainly contrary to decisions of the Supreme Court and this Court. The panel majority held that plaintiffs could bring this action for a different reason: it concluded that their claim was, in essence, a constitutional claim, and that the relevant zone of interests is determined by the Appropriations Clause rather than Section 8005 itself. But that holding also contravenes Supreme Court precedent, and risks turning every garden-variety statutory claim into a constitutional cause of action for which any private-party plaintiff with an Article III injury may bring suit, no matter how remote those injuries are from the interests protected by the statutory provision underlying the claim.

A. Plaintiffs' Aesthetic, Recreational, and Environmental Interests are Outside the Zone of Interests Protected by Section 8005.

The "zone-of-interests" requirement limits the plaintiffs who "may invoke [a] cause of action" to enforce a particular statutory provision. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-30 (2014). That limitation reflects the common-sense intuition that Congress does not intend to extend a cause of action to "plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions" they seek to enforce. *Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 178 (2011). "Congress is presumed to 'legislat[e] against the background of' the zone-of-interests limitation," which excludes putative plaintiffs whose interests do not "fall within the zone of interests protected by the law invoked." *Lexmark*, 572 U.S. at 129 (alteration in original) (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)).

When a plaintiff brings a cause of action under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, to challenge the government's compliance with another statute, the "interest he asserts must be 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012). Where a plaintiff seeks to bring an implied cause of action in equity to enforce a statutory or constitutional provision, the Supreme Court has suggested that a heightened zone-of-interest requirement applies, and the provision must be intended for the "*especial*

benefit" of protecting the plaintiff at issue. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396, 400 & n.16 (1987).

Under any standard, plaintiffs here are not proper parties to enforce the limitations in Section 8005. Section 8005 authorizes the Secretary of Defense to transfer up to $4 billion of certain funds between "appropriations or funds . . . to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which" the transfer is made, if the Secretary determines that the transfer "is necessary in the national interest." DoD Appropriations Act § 8005, 132 Stat. 2999. Section 8005 provides that the Secretary's transfer authority "may not be used unless for higher priority items, based on unforeseen military requirements, than those for which [the transferred funds were] originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." *Id.* It also requires the Secretary to "notify the Congress promptly of all transfers made pursuant to this authority or any other authority in this Act." *Id.*

Nothing in the text of Section 8005 suggests that Congress intended to permit enforcement of the statute's limitations by parties who, like the plaintiffs here, assert that a transfer would indirectly result in harm to their recreational, aesthetic, or environmental interests in public lands, based on how transferred funds are ultimately

spent.[4] The statute does not even "arguably" protect any of those interests. *Lexmark*, 572 U.S. at 130. Section 8005 does not regulate or limit DoD's use of public lands, nor does it require the Secretary to consider aesthetic, recreational, or environmental interests before transferring funds. To the contrary, it empowers the Secretary of Defense to transfer funds among appropriation accounts in order to fund any type of activities that Congress has statutorily authorized DoD to perform. Section 8005 requires the Secretary to notify only Congress when he or she exercises that authority. *See* DoD Appropriations Act § 8005, 132 Stat. 2999. And Congress conditioned the Secretary's transfer authority on judgments about DoD and national security affairs that are within the Secretary's expertise and that private parties and courts are ill-suited to second guess—*e.g.*, that the transfer is "necessary" for the "national interest" and for a "higher priority" item of defense spending. *Id.*; *see Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (cautioning that courts should be "reluctant to intrude upon the authority of the Executive in military and national security affairs").

Contrary to plaintiffs' suggestion in prior briefing, the Supreme Court's decision in *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

[4] Moreover, the district court found that the State plaintiffs' asserted environmental injuries were not sufficiently established even on their own terms. *See* ER76-78.

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. The Court reasoned that the regulation of the *acquisition* of land was "closely enough and often enough entwined with" the *use* of 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 collateral effects ultimately arising from the projects to which funds happen to be transferred. *Id.* And plaintiffs alleging aesthetic, recreational, or environmental harms from DoD's intended uses for its internally transferred funds are not "reasonable" or "predictable" challengers under Section 8005. *Id.* To the contrary, this type of private enforcement of Section 8005 is unprecedented, and plaintiffs cite no authority in which any plaintiffs have ever brought suit to challenge any similar internal transfer of agency funds.

If Congress disagrees with a particular transfer of which it is notified, it has the necessary political tools to address the problem itself, including by enacting new legislation to prohibit DoD from spending funds in a particular manner, reducing future appropriations to DoD, or restricting or eliminating entirely DoD's transfer authority. Indeed, Section 8005's legislative history confirms that the provision is principally a means of congressional oversight. When Congress first gave the Secretary of Defense this transfer authority, a committee report explained that

legislators imposed conditions on it to "tighten *congressional* control of the reprogramming process" in light of prior experiences with DoD in the budgeting process. H.R. Rep. No. 93-662 at 16-17 (emphasis added). There is no suggestion in the text or context of the statute that it was intended to permit plaintiffs to seek judicial enforcement to protect interests akin to those raised by plaintiffs here. Even assuming the limits on the Secretary's transfer authority might "arguably protect[]" some private "economic interests," *see* Stay Op. Dissent 19 (N.R. Smith, J., dissenting), plaintiffs do not assert any such interest. Accordingly, the motions panel majority erred, *see* Stay Op. 52, 55, in invoking the presumption in favor of judicial review of agency action. The relevant "presum[ption]," instead, is that plaintiffs who are outside the zone of interests of a provision may not sue to enforce it. *Lexmark*, 572 U.S. at 129.

B. The District Court Erred In Holding That The Zone-of-Interests Requirement Does Not Apply To Equitable Causes Of Action.

The district court did not hold that plaintiffs were within the zone of interests of Section 8005. Rather, the court held that "the zone-of-interests test is inapposite" where plaintiffs seek "equitable relief" against defendants "for exceeding [their] statutory authority." ER44. That holding is plainly incorrect.

1. The zone-of-interests requirement is a general presumption about Congress's intended limits on the scope of *all* causes of action, not just express causes of action under the APA or other statutes. *See Lexmark*, 572 U.S. at 129 (the zone-of-

interests test "is a 'requirement of general application'" (quoting *Bennett*, 520 U.S. at 163)). The Supreme Court and this Court have made clear that the zone-of-interests requirement applies to causes of action to enforce constitutional prohibitions. *See, e.g.*, *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) ("[T]he Court has required that the plaintiff's complaint fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (quotation marks omitted)); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320-21 n.3 (1977) (applying the zone-of-interests requirement to plaintiffs seeking to enforce the dormant Commerce Clause); *see also Individuals for Responsible Gov't, Inc. v. Washoe Cnty.*, 110 F.3d 699, 703 (9th Cir. 1997) ("[T]he zone of interests test also governs claims under the Constitution in general."(quotation marks omitted)).

Although the Supreme Court in *Lexmark* referred to the zone-of-interests requirement as applying to "statutory" or "statutorily created" causes of action, *Lexmark*, 572 U.S. at 129, the Court did not suggest—let alone hold—that the requirement does *not* apply to non-statutory causes of action. Accordingly, regardless of whatever "implication[s]" *Lexmark* might have for prior precedent applying the zone-of-interest requirement to non-statutory claims, this Court must "follow th[ose] case[s] which directly control[]" the outcome here, "leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). In any event, the reference in *Lexmark* to "statutorily created" causes of

action necessarily encompasses implied causes of action to enjoin statutory or constitutional violations. Those causes of action are "the creation of courts of equity," *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015), and are subject to "express and implied statutory limitations," *id.* at 1385. Moreover, the equitable powers that the lower federal courts exercise are themselves conferred by statute. *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (*Grupo Mexicano*) (citing the statutory grant of equity jurisdiction in the Judiciary Act of 1789). That equitable jurisdiction is constrained by historical "tradition[]," *id.* at 319, and indeed the zone-of-interests requirement itself has common-law "roots," *Lexmark*, 572 U.S. at 130 n.5. Neither plaintiffs nor the district court identified any case in which plaintiffs with injuries *unrelated* to a statute's zone of interests were allowed to bring suit merely by asserting an equitable ultra vires claim.

Fundamental separation-of-powers principles underscore why the zone-of-interests requirement applies to implied equitable causes of action. "[I]t is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action," because "the Legislature is in the better position" to weigh the competing considerations involved in creating private rights of action. *Abbasi*, 137 S. Ct. at 1856-57. And while courts may nevertheless wield "traditional equitable powers," *id.* at 1856, "Congress is in a much better position than" courts "to design the appropriate remedy" when "depart[ing] from" "traditional equitable practice," *Grupo Mexicano*, 527

U.S. at 322. There is thus no basis to conclude that Congress intended to allow courts not only to infer an equitable cause of action to enforce a statutory provision, but to do so for individuals outside the zone of interests of the statutory limitations being enforced. Indeed, such a rule would lead to "absurd consequences." *Thompson*, 562 U.S. at 176-77 (identifying hypothetical persons with Article III injuries from statutory violations who plainly would be improper plaintiffs to enforce the statute). Accordingly, courts' authority to infer equitable claims cannot extend beyond the traditional presumption that Congress does not intend to allow plaintiffs outside the zone of interests of a statute to sue to enforce it. *See Lexmark*, 527 U.S. at 129; *Armstrong*, 135 S. Ct. at 1384.

2. That plaintiffs' claim can (and should) be construed as an APA claim confirms the district court's error. *See* Stay Op. 53 ("Plaintiffs' claim is also cognizable under the APA."). The APA's cause of action expressly encompasses both statutory and constitutional challenges to agency action. 5 U.S.C. § 706(2)(B)(c) (providing that "reviewing court shall" "hold unlawful and set aside agency action . . . contrary to constitutional right" or "in excess of statutory jurisdiction, authority, or limitations."). This Court has held that "[t]he APA is the sole means for challenging the legality of federal agency action" when there is neither a private right of action nor a specialized provision for judicial review, and where the criteria for review under the APA are met. *See Hoefler v. Babbitt*, 139 F.3d 726, 728 (9th Cir. 1998); *see also Bennett*, 520 U.S. at 175 (the APA "applies universally 'except to the extent that—(1) statutes preclude judicial

review; or (2) agency action is committed to agency discretion by law"") (quoting 5 U.S.C. § 701(a)).

The zone-of-interests requirement indisputably applies to the APA cause of action. *Lexmark*, 527 U.S. at 129 (citing *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970)). Because, as discussed above, plaintiffs' alleged injuries fall entirely outside of the zone of interests of Section 8005, plaintiffs cannot meet the zone-of-interests requirement even under the "generous review" available in an APA case, *Lexmark*, 572 U.S. at 130; *see supra* 27-28. Plaintiffs cannot evade the limitations that Congress has placed on the APA cause of action by failing to cite that statute and instead invoking the courts' equitable jurisdiction. As explained, equitable causes of action are "subject to express and implied statutory limitations." *Armstrong*, 135 S. Ct. at 1385. It would turn the Constitution's separation of powers on its head for courts to allow a larger class of plaintiffs to sue an agency under an implied cause of action in equity than the class of plaintiffs Congress intended to allow to sue under the express cause of action that it created for such challenges. The district court's contrary holding cannot be reconciled with law or logic.

C. The Motions Panel Erred In Concluding That Plaintiffs Sufficiently Fell Within The Zone Of Interests Protected By The Appropriations Clause, Rather Than Section 8005.

Like the district court, the motions panel majority did not conclude that plaintiffs were within the zone of interests of Section 8005. Nor did the panel majority adopt the district court's flawed holding that the zone-of-interests

requirement does not apply at all to equitable causes of action (although the panel expressed skepticism that it did, *see* Stay Op. 63). Instead, the panel majority concluded that the Constitution's Appropriations Clause requires a less stringent zone-of-interests showing than Section 8005. In particular, the panel majority held that the government was unlikely to succeed on the merits because plaintiffs' challenge—whether characterized as a cause of action in equity or "under the APA"—is "at its core" a constitutional claim under the Appropriations Clause rather than a statutory claim under Section 8005, and thus, "[t]o the extent any zone of interests test applies," plaintiffs' asserted interests need only "fall within the zone of interests" of the former, not the latter. *See* Stay Op. 32, 65. That conclusion is flawed in multiple respects, as underscored by the Supreme Court's stay decision. *See* SCt. Stay Order 1.

1. To begin, the panel majority's attempt to recast plaintiffs' claims as constitutional, rather than statutory, is flatly contrary to the Supreme Court's decision in *Dalton v. Specter*, 511 U.S. 462 (1994). There, the plaintiffs "sought to enjoin the Secretary of Defense . . . from carrying out a decision by the President" to close a military facility under the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, div. B, tit. XXIX, pt. A, 104 Stat. 1485, 1808. *See Dalton*, 511 U.S. at 464. The court of appeals had permitted the suit to proceed on the assumption that the plaintiffs were effectively seeking "review [of] a presidential decision." *Id.* at 467. After the Supreme Court held that the President is not an "agency" for APA

purposes, *see id.* at 468 (discussing *Franklin v. Massachusetts*, 505 U.S. 788 (1992)), the court of appeals adhered to its decision on constitutional grounds. In particular, the court reasoned, based on *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), "that whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." *Dalton*, 511 U.S. at 471.

The Supreme Court unanimously rejected that logic, explaining that not "every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution." *Dalton*, 511 U.S. at 472. Instead, the Supreme Court has carefully "distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." *Id.* (collecting cases). The Constitution is implicated if executive officers rely on it as an independent source of authority to act, as in *Youngstown*, or if the officers rely on a statute that itself violates the Constitution. *See Dalton*, 511 U.S. at 473 & n.5. But claims alleging simply that an official has "exceeded his statutory authority are not 'constitutional' claims." *Id.* at 473.

Dalton's reasoning fully applies here. This dispute concerns "simply" whether the Acting Secretary "exceeded his statutory authority" in authorizing the disputed transfers under Section 8005, and "no constitutional question whatever is raised," "only issues of statutory interpretation." *Dalton*, 511 U.S. at 473-74 & n.6 (citations and quotation marks omitted). Indeed, throughout this lawsuit, plaintiffs have characterized their claim as alleging that the Acting Secretary had exceeded his

statutory authority, *see, e.g.*, Pl's Mot. for Partial Summ. J. 9, *Sierra Club v. Trump*, No. 4:19-cv-00892, ECF No. 168, (June 12, 2019), and the panel majority itself recognized that plaintiffs' claim "turns on a question of statutory interpretation," Stay Op. 35. Notably, the Fourth Circuit has held that a dispute about whether a defendant has spent funds in excess of statutory authority rather than in conceded absence of such authority presents a statutory claim, not a constitutional claim under the Appropriations Clause. *Harrington v. Schlesinger*, 528 F.2d 455, 457-58 (4th Cir. 1975). Such a claim "presents no controversy about the reach or application of" the Appropriations Clause itself, but rather turns solely on "the interpretation and application of congressional statutes under which the challenged expenditures either were or were not authorized." *Id.*

The panel majority attempted to distinguish *Dalton* on the ground that the decision did not address "the constitutional implications of violating statutes, such as section 8005, that authorize executive action contingent on satisfaction of certain requirements." Stay Op. 50. The majority failed to explain why that supposed distinction matters; regardless of the particular manner in which the statute at issue constrains the executive official's authority, the point remains that the question whether the official exceeded his authority under the statute is one of statutory interpretation rather than constitutional law. The panel majority also asserted that plaintiffs' claims do not allege merely a statutory violation because executive officials "lack any background constitutional authority to appropriate funds" in the absence of

statutory authority. *Id.* at 51. But that is precisely backwards: it is *because* the challenged agency action here depends on a statutory grant of authority, rather than a constitutional one, that respondents' claims must be understood as statutory.

Under the motions panel's reasoning, courts could "deem *unconstitutional* any reviewable executive actions . . . that exceed a *statutory* grant of authority." Stay Op. Dissent 10-11 (N.R. Smith, J., dissenting). For example, executive officials have no "background constitutional authority" to impose taxes other than pursuant to the exercise of Congress's power to "lay and collect Taxes," U.S. Const. art. I, § 8, cl. 1, yet claims that the IRS exceeded its asserted statutory authority in assessing taxes are obviously not constitutional claims. More generally, a party challenging any agency regulation could re-characterize the claim to be a violation of Article I's vesting of legislative power in Congress, U.S. Const. art. I, § 1, on the theory that executive agencies generally have no "background constitutional authority" to promulgate legislative rules other than to the extent permitted by statute. But that would have the radical effect of transforming every garden-variety *Chevron* challenge into a constitutional controversy, thereby "eviscerat[ing]" the "well established" "distinction between claims that an official exceeded his statutory authority, on the one hand, and claims that he acted in violation of the Constitution, on the other." *Dalton*, 511 U.S. at 474. And it would encourage plaintiffs to "challeng[e] any agency action 'equitably,' thereby avoiding the" circumscribed judicial-review standards of the APA and

upending "decades of administrative law practice." Stay Op. Dissent 23 (N.R. Smith, J., dissenting).

b. Moreover, even if plaintiffs' challenge could be viewed as resting in part on the Appropriations Clause, Section 8005 would still prescribe the relevant zone of interests that plaintiffs must satisfy because it is undoubtedly Section 8005's limitations—rather than any separate and independent constraint imposed by the Constitution—that plaintiffs invoke. The zone-of-interests requirement must be applied "by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175-176. The Appropriations Clause provides that appropriations must be "made by Law," U.S. Const., art. I, § 9, cl. 7, and plaintiffs do not dispute that the obligation of funds properly transferred under Section 8005 would satisfy that requirement. Plaintiffs contest only whether the transfer was proper. As the motions panel majority acknowledged, that "turns on a question of statutory interpretation" about the meaning of Section 8005, Stay Op. 35, which means that Section 8005 is the "provision whose violation forms the legal basis for [the] complaint." *Bennett*, 520 U.S. at 176 (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990)). Accordingly, the panel majority was wrong to suggest that compliance with Section 8005 is the government's "defense" to plaintiffs' Appropriations Clause "claim." Stay Op. 34. Plaintiffs cannot plead or prove a violation of the Appropriations Clause without showing that the challenged

expenditure is not authorized "by Law," and thus a necessary ingredient of their claim is that the transfers at issue were not permissible under Section 8005.

Indeed, that conclusion is supported by the out-of-circuit case erroneously invoked (Stay Op. 59) by plaintiffs and the panel majority, *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987). The D.C. Circuit there clarified (in dicta) that in cases, such as here, where the plaintiff challenges executive action as exceeding statutory authority, the relevant question is whether the plaintiff's "interest may be said to fall within the zone protected by the *limitation[s]*" on the "statutory powers invoked by the [defendant]." *Id.* (emphasis added). Here, DoD invoked Section 8005 to transfer the funds at issue, and plaintiffs allege that DoD exceeded its authority because Section 8005's limitations bar DoD's transfer; plaintiffs thus must fall within the zone of interests protected by the statutory limitations they rely on, which is a requirement that they cannot meet.

Significantly, neither plaintiffs nor the panel majority identified any case supporting the proposition that a plaintiff need only fall within the zone of interests protected by a "structural provision[]" of the Constitution, not the interests protected by the statutory limitations that are the necessary predicate for their allegation that the constitutional provision has been violated. *See* Stay Op. 65-66. The panel majority cited *Boston Stock Exchange*, *see id.*, but the Supreme Court in that case was considering the constitutionality of a New York State tax law under the so-called dormant aspect of the Commerce Clause, and thus looked to that constitutional provision itself for

the relevant zone of interests because that type of claim does not depend on any alleged violation of a statutory provision. *See Boston Stock Exch.*, 429 U.S. at 319, 320 n.3 Here, by contrast, the panel majority was not addressing the constitutionality of Section 8005 under the Appropriations Clause, and the Appropriations Clause, standing by itself, cannot establish plaintiffs' claim, which necessarily relies on showing that the government exceeded Section 8005's limitations. The panel majority also cited (Stay Op. 66) *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), but that case similarly does not support plaintiffs' claim. It involved a criminal defendant who argued that an appropriations rider explicitly prohibited funds from being spent on his prosecution. *Id.* at 1174. The defendant thus fell squarely within the core of the statute's zone of interests. And although dicta in that case referred to an "appropriations rider" violation, the Court's analysis focused entirely on the operative statutory limitation. *See id.* at 1172.

In sum, the panel majority's conclusion is unprecedented and untenable. Plaintiffs' claim should be rejected for failure to satisfy the zone-of-interests requirement, as the Supreme Court has strongly signaled.

II. Section 8005 Authorized DoD's Transfer.

Even if plaintiffs could sue to enforce Section 8005, that provision authorized DoD's transfer of funds. When Congress appropriated funds to DoD for fiscal year 2019, it expressly authorized the Secretary to transfer, "[u]pon determination . . . that such action is necessary in the national interest," up to $4 billion from certain

"appropriations or funds or any subdivision thereof," provided that the transfer is "for higher priority items, based on unforeseen military requirements," and that the "item for which funds are requested" was not previously "denied by the Congress." DoD Appropriations Act § 8005, 132 Stat. 2999. Congress provided a similar transfer authority under § 9002. *See* DoD Appropriations Act, § 9002, 132 Stat. 3042. Those provisions plainly authorize the Acting Secretary's action, and the contrary conclusion of the district court and the panel majority is inconsistent with the text and context of the provisions.

A. The Acting Secretary correctly found Section 8005's requirements satisfied in directing the transfers at issue here. The Acting Secretary concluded the transfers to provide DHS counter-drug support in constructing border barriers were for a "higher priority item" than the purposes for which the funds were originally appropriated, because the military personnel accounts and other DoD program funds from which the money was transferred were "excess to need due to" certain factors, including contract savings, unexpected strength reduction, and lower-than-expected funding requirements for a new retirement program. *See, e.g.*, ER285, ER288-ER292 (findings for transfers to fund El Paso and Yuma projects); *see also, e.g.*, ER172, ER174-ER182 (findings for transfers to fund El Centro and Tuscon projects). The Acting Secretary further found that the military requirements to be funded as a result of the transfer were "unforeseen" because "the need to provide support" for DHS's proposed projects "was not known at the time of [DoD's] FY 2019 budget request."

ER285-286 (findings for Yuma and El Paso projects); ER172-ER173 (similar finding for El Centro and Tucson projects). DoD's budget was finalized in September 2018, *see* DoD Appropriations Act, Pub. L. No. 115-245, 132 Stat. 2981, but DHS did not submit its request for DoD's assistance under Section 284 until February 2019, *see* ER271, several months later. Finally, the Acting Secretary found that the item for which the funds would be transferred—"[s]upport under Section 284 for construction of roads and fences and the installation of lighting" in the specific project areas requested by DoD—"has not been denied by Congress." ER173, ER286. These determinations are amply supported by the record.

B. The district court and motions panel majority concluded, however, that DoD transferred funds for an "item" that had been denied by Congress, and that the requirement was not "unforeseen," because the President and DHS had previously requested appropriations for a "border wall" that Congress had declined to provide in full when appropriating money to DHS in the 2018 Consolidated Appropriations Act, Pub. L. No. 115-141, div. F, tit. II, § 230(a), 132 Stat. 348, 616. This misunderstands the statutory text of Section 8005 and DoD's budget process.

Section 8005's reference to an "item for which funds are requested" cannot be understood at the level of generality used by the district court and panel majority. Section 8005 is a provision in DoD's annual appropriations statute, and must be understood in that context. *Home Depot U.S.A. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (explaining that the words of the statute "must be read in their context and with a

view to their place in the overall statutory scheme."). During the budgeting process, DoD requests funding from Congress for particular items, which may be as varied as personnel expenses, weapons systems, activities, or other programs, and Congress appropriates funds in light of those requests. *See, e.g.*, H.R. Rep. No. 115-952, at 452 (noting the House-, Senate-, and conference-committee determinations regarding DoD's requests for items to be funded by the appropriation for "Drug Interdiction and Counter-Drug Activities, Defense"). Section 8005 reflects Congress's understanding that, after this process between Congress and DoD is complete, DoD must nevertheless have "financial flexibility during a given year" to respond to changing circumstances after its budget has been finalized. *See* H.R. Rep. No. 93-662, at 17; *see also* U.S. Gov't Accountability Office, GAO 16-646SP, at 2-3B, *Transfer and Reprogramming*, Principles of Fed. Appropriations Law (4th ed. Mar. 2016) ("[A]gencies have a legitimate need for a certain amount of flexibility to deviate from their budget estimates.").

Congress first imposed limitations on DoD's transfer authority for "denied" "items" in 1974, to ensure that DoD would not transfer funds for items in its budget that "ha[d] been *specifically deleted* in the legislative process" between DoD and Congress, or "for projects or items which are of a lower priority from programs of higher priority which have been funded." H.R. Rep. No. 93-662, at 16 (emphasis added). Understood in this context, the term "item for which funds are requested" in Section 8005 means a particular item for which DoD may request funding during a

given fiscal year because it requires additional funding beyond the amount (if any) Congress appropriated to DoD for the fiscal year for that item. Indeed, § 8005 earlier refers to "higher priority items," which describes the specific project(s) for which the transferred funds will be used. The limiting language in Section 8005 ensures that the "item" cannot be something that DoD requested during the budget process that failed to win congressional approval and cannot be lower priority than what did obtain congressional approval.

Thus, contrary to the district court and panel majority's reasoning, the "item" Section 8005 refers to cannot be a generic "border wall," untethered to any particular DoD authority or spending program. It can only be an "item" for which DoD could request funding during the process of negotiating the defense budget. Here, as the Acting Secretary recognized, the relevant "item for which funds are requested" is DoD's counter-narcotics support to DHS under Section 284 pursuant to DHS's request. That "item" was not "denied by the Congress": at no point in the budgeting process did Congress deny a DoD funding request for border barrier construction under DoD's counter-narcotics support line. That DHS made a general request to Congress for funds to construct border barriers under its own statutory authority, and that Congress ultimately appropriated less funds than DHS requested, is irrelevant.

Similarly, the transfer of funds was for an "unforeseen military requirement[]" because, as the Acting Secretary determined, DoD was not aware at the time it made its budget requests to Congress that DHS would request support under Section 284

for the identified projects. Congress enacted and the President signed DoD's FY 2019 appropriation on September 28, 2018. DoD Appropriations Act, Pub. L. No. 115-245, 132 Stat. 2981. It was not until February 2019 that DHS requested DoD's assistance in blocking specific drug-smuggling corridors. *See* ER271. DoD may undertake counter-drug support pursuant to Section 284 only upon receiving a request by another agency. The "need to provide support" to DHS for those proposed projects thus was "not known at the time of [DoD's] FY 2019 budget request" in 2018. *See* ER286.

The district court expressed concern (shared by the panel majority) that, under defendants' reading, "*every* request for Section 284 support would be for an 'unforeseen military requirement.'" ER50. That is incorrect, as it ignores the realities of DoD's budgeting process. An agency's request to DoD for counter-drug support will be "foreseen" in a given year's defense budget when it is received by DoD in time to include in the submission to Congress. Some such support requests will recur or will continue beyond a single fiscal year, and can therefore be included in the following year's budget. Here, by contrast, at the time DoD's budget request was finalized, DoD could not have anticipated that DHS would request specific support for roads, fences, and lighting in the high-traffic drug corridors of these particular project areas. Moreover, DoD could not have foreseen that other appropriations in the DoD Appropriations Act would prove to be in excess of military requirements—

for example, because of lower than anticipated personnel spending levels—thus further affecting the agency's relative priorities in a given fiscal year.

Congress could of course prevent the Executive Branch from tapping other sources of funding for border construction. If DoD's transfer request had indeed been foreseeable, 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 appropriations statute, the same statute that appropriated the funds at issue here. Congress did not do so, and this Court should not accept plaintiffs' invitation to second-guess that decision. Congress could also 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, tit. VIII, § 739, 133 Stat. 13.

The district court's fundamental misunderstanding of the federal appropriations process is highlighted by its remarkable suggestion that the government's interpretation of Section 8005 "likely would violate the Constitution's separation of powers principles" by providing "unbounded authorization for Defendants to rewrite the federal budget." ER52. Congress has long provided agencies with "lump-sum appropriation[s]," and agencies' delegated authority over "[t]he allocation of [such] funds" is not only constitutional, but "committed to agency discretion by law" and "accordingly unreviewable." *Lincoln v. Vigil*, 508 U.S. 182, 192-

93 (1993). Given that Congress thus could have granted DoD unfettered discretion over its total budget, Section 8005, however broadly construed, poses no constitutional concerns.

In sum, DoD acted lawfully and reasonably under Section 8005. This Court should reject plaintiffs' extraordinary challenge to the validity of DoD's internal budget transfer.

III. The District Court Abused Its Discretion In Balancing The Equities And The Public Interest.

In all events, the district court committed a serious abuse of discretion in granting a permanent injunction to the Sierra Club plaintiffs. The court misidentified the government's asserted harms and failed to weigh the equities and properly consider the public interest.

"An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter v. NRDC*, 555 U.S. 7, 32 (2008). In order to be entitled to an injunction—whether preliminary or permanent—plaintiffs must demonstrate irreparable injury, and the court must weigh that injury against the harm to defendants in granting the injunction as well as the public interest. *Id.* (explaining that "the balance of equities and consideration of the public interest" "are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent").

In *Winter*, the Supreme Court reversed a preliminary injunction prohibiting the Navy from using sonar technology in training exercises at sea, where plaintiffs claimed the sonar would injure them because they "observ[ed]" and "photograph[ed]" marine mammals in the area and "conduct[ed] scientific research." 555 U.S. at 13-14, 25-26. In reversing, the Supreme Court explained that "the District Court and the Ninth Circuit significantly understated the burden the preliminary injunction would impose on the Navy's ability to conduct realistic training exercises, and the injunction's consequent adverse impact on the public interest in national defense," which "plainly outweighed" the harms asserted by the plaintiffs. *Id.* at 24, 33. And the Court explained that its "analysis of the proprietary of preliminary relief [wa]s applicable to any permanent injunction as well," which requires consideration of the same equitable factors. *Id.* at 33. Here, the balance of equities likewise plainly bars injunctive relief.

As discussed, DHS identified the barrier projects at issue because of the high rates of drug smuggling between ports of entry in those areas of the border. The record includes ample evidence of both the severity of the problem and the limited effectiveness of the existing barriers in those areas, which transnational criminal organizations have adjusted their tactics to evade. *See supra* 9-11. The district court's injunction frustrates the government's ability to stop the flow of drugs across the border and harms the public's interest. It is well established that the government has "compelling interests in safety and in the integrity of our borders." *National Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 (1989); *accord United States v. Guzman-*

Padilla, 573 F.3d 865, 889 (9th Cir. 2009) (acknowledging the government's "strong interest[]" in "interdicting the flow of drugs" entering the country). As in *Winter*, a "proper consideration of these factors alone requires denial of the requested injunctive relief." 555 U.S. at 23.

Moreover, the harms to the government and the public interest are not only substantial, but irreparable. To begin, DoD's counter-narcotics support efforts are authorized by statute, 10 U.S.C. § 284, and there is "irreparable harm" whenever a government cannot enforce its own laws. *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J.). More concretely, absent the Supreme Court's stay, even if the government succeeds in this appeal, the passage of time not only would have delayed the construction of the barriers to prevent drug-trafficking, but also would have threatened the scope and completion of those projects. That is so both because of the unrecoverable contract costs DoD has incurred for the suspension of work, and because the appropriated funds at issue would have expired unless they could be obligated before the end of the fiscal year. *See* ER123; ER131-ER132. The irreparable nature of the harm to the government and the public thus strengthened that side of the balance.

These harms "plainly outweigh[]" plaintiffs' aesthetic and recreational injuries, just as the harms from prohibiting the Navy's sonar testing did when balanced against the plaintiffs' observational and scientific interests in *Winter*, 555 U.S. at 26, 33. Indeed, plaintiffs' interests here are even less substantial than those in *Winter*. The

Sierra Club plaintiffs allege the construction at the border will harm their "ability to fish," "hik[e]," and "camp[]." ER63-ER64. But even assuming this is true, the vast majority of construction in the project areas will occur on a 60-foot strip of land that parallels the international border on areas that are already "heavily disturbed" and marked by barriers. *See* ER260-261. The projects consist of replacing existing dilapidated vehicle barriers and pedestrian fencing in an area that "function[s] primarily as a law-enforcement zone," and the proposed construction projects will not make any change to the existing land use within or near the project area. ER260.

The district court did not even consider the government's compelling interest in drug interdiction when framing its injunctions, characterizing the relevant interest instead as "border security and immigration-law enforcement." ER68. Moreover, while purporting not to "minimize" the government's law-enforcement interests, the court held that the equities supported the injunction based on nothing more than the public's generalized interest "in ensuring that statutes . . . are not imperiled by executive fiat" and the plaintiffs' modest recreational and aesthetic injuries, simply because it found that those injuries "are not speculative" and "will be irreparable." *Id.* That analysis contains no balancing at all, it is irreconcilable with the result and reasoning of *Winter*, and it is thus a manifest abuse of discretion.

The panel majority overlooked that problem in the district court's injunction, and similarly misweighed the relevant harms. The majority faulted the government for the absence of factual findings on "the impact of building the [proposed] barriers"

on drug flows, believing the record insufficient to conclude the proposed projects would serve the public interest: "If these specific leaks [in the border] are plugged, will the drugs flow through somewhere else?" Stay Op. 70. But no sound principle of equity requires such defeatism. Section 284(b)(7) reflects an evident judgment by Congress that the construction of fencing can meaningfully reduce drug smuggling across the southern border; DoD and DHS support that judgment, and made specific findings in the record that the identified projects at issue are in the public interest. The panel majority's speculation that fencing will be an imperfect solution does not justify setting aside those decisions.

The panel majority also wrongly disregarded the hundreds of thousands of dollars DoD is incurring in unrecoverable fees and penalties each day that construction is suspended, believing these to be "self-inflicted wounds" because "DoD knew this litigation was pending and that the district court had been asked to enter a preliminary injunction." Stay Op. 72. The panel majority did not cite any case supporting that proposition, and under that inequitable rule, the government would be effectively required to act as if a preliminary injunction was in place merely because an injunction had been requested.

In sum, even if this Court were to conclude that plaintiffs have a valid claim that DoD violated Section 8005, it should still vacate the district court's injunction as a remedial matter. In this case, given the lopsided balance of equities, it was an abuse of discretion to award the drastic remedy of a permanent injunction.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, appellants state that they know of no related case pending in this Court.

s/ Anne Murphy
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 13,037 words.

s/ Anne Murphy
Anne Murphy