No. 19-17501

In the United States Court of Appeals for the Ninth Circuit

SIERRA CLUB; SOUTHERN BORDER COMMUNITIES COALITION,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States, in his official capacity; MARK T. ESPER, Acting Secretary of Defense, in his official capacity; CHAD F. WOLF, Acting Secretary of Homeland Security, in his official capacity; and STEVEN MNUCHIN, Secretary of the Treasury, in his official capacity,

Defendants-Appellants.

APPELLEES' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 TO LIFT STAY PENDING APPEAL

Relief requested by January 24, 2020

On Appeal from the United States District Court
for the Northern District of California
Case No. 4:19-cv-892-HSG

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CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

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(2) Facts showing the existence and nature of the emergency.

This motion concerns the imminent construction of a massive, multibillion-dollar project that would radically alter delicate and unique lands across the border. Plaintiffs request that this Court lift the district court's stay by January 24, 2020, to provide Plaintiffs protection against this unlawful construction, which, the district court found, would cause irreparable harm and "cannot be easily remedied after the fact." Order Granting in Part and Denying in Part Pls.' Mots. for Partial Summ. J.

and Denying Defs.' Mots. for Partial Summ. J. ("Order") 38-39, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Dec. 11, 2019), ECF No. 258 (attached as Exhibit 1).

During the November 20, 2019 hearing before the district court, Defendants disclosed that two border wall contracts had already been awarded. Order 8. "According to Defendants, the timetable for "substantial construction" to begin on the challenged projects is "40 days after contract award." DoD Notice of Decision to Authorize Border Barrier Projects Pursuant to 10 U.S.C. § 2808, at 3, 4, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Sept. 3, 2019), ECF No. 201 (attached as Exhibit 2). Substantial construction on the projects at issue here could begin imminently in San Diego, California and on the Barry M. Goldwater Range in Arizona, which, as Defendants' submissions to the district court acknowledge, "is nationally significant as a critical component in the largest remaining expanse of relatively unfragmented Sonoran Desert in the U.S." *See* Integrated Natural Resources Management Plan, Barry M. Goldwater Range, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Dec. 11, 2019), ECF No. 236-6 at 66.

While an injunction entered by a district court in the Western District of Texas previously blocked the construction at issue here, on the evening of January 8, 2020, the Fifth Circuit stayed that injunction. *See* Order, *El Paso Cty. v. Trump*,

No. 19-51144 (5th Cir. Jan. 8, 2020), ECF No. 00515264406 (attached as Exhibit 3).

As was true with respect to similar construction projects that are the subject of a separate appeal in this case, "allowing Defendants to move forward with spending the funds will allow construction to begin, causing immediate, and likely irreparable, harm to Plaintiffs." *Sierra Club v. Trump*, 929 F.3d 670, 688 (9th Cir. 2019). Lifting the stay on or before January 24, 2020, would minimize this harm.

(3) Explanation of timeliness, contact with and service on other parties' counsel, contact with the Court's emergency motions unit, and proposed schedule.

On the evening of January 8, 2020, shortly after the Fifth Circuit stayed the Texas injunction, counsel for Plaintiffs informed counsel for Defendants that Plaintiffs would file this motion. On the morning of January 9, Plaintiffs' counsel contacted the Court's emergency motions unit by telephone to advise that Plaintiffs would file this motion. Defendants' counsel will be served electronically by the CM/ECF system.

With the consent of Defendants and in light of the fact that the parties have recently briefed the merits of a substantially similar motion to this Court, Plaintiffs propose the following schedule to allow time for a decision by this Court by January 24, 2020: Response to be filed by January 15; Reply to be filed by January 17.

(4) Futility of relief before the district court.

The district court ordered that the injunction be stayed on December 11, 2019. The district court's order explains that the court has considered whether to impose a stay pending appeal and found that a stay pending appeal is appropriate. The district court expressly instructed that Plaintiffs may seek any relief from this Court: "Plaintiffs may, of course, petition the Ninth Circuit to lift this stay." Order 45. The only relief available in the district court would be for Plaintiffs to file a futile motion for reconsideration and to disregard the district court's order that motions to lift the stay should be directed at this Court. Accordingly, Plaintiffs seek relief through this motion.

/s/ Dror Ladin
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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in Plaintiffs-Appellees.

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INTRODUCTION AND SUMMARY OF ARGUMENT

On December 30, 2019, this Court denied Plaintiffs' previous motion to lift the stay, in light of "the existence of a spending injunction and the Supreme Court's stay order, . . . without prejudice to renewal or reconsideration pending further developments." ECF No. 12 at 2. On January 8, 2020, the Fifth Circuit stayed the injunction that previously protected Plaintiffs' interests. Order at 2, *El Paso Cty. v. Trump*, No. 19-51144 (5th Cir. Jan. 8, 2020), ECF No. 00515264406 (attached as Exhibit 3). In light of the Fifth Circuit's order, Plaintiffs are in urgent need of relief and renew their request to lift the stay.

Congress has considered, and rejected, the executive branch's plans to spend billions of dollars on construction of the specific barriers at issue in this appeal. Defendants claim the power to sidestep Congress's enacted funding decisions, asserting that 10 U.S.C. § 2808 ("Section 2808") grants the executive branch essentially unlimited power to restructure the nation's priorities according to the executive branch's policy preferences. But Defendants' efforts to spend billions that Congress denied them are contrary to both the Constitution's careful design and Congress's explicit restrictions on the use of Section 2808.

The district court correctly concluded that Defendants have no power to evade Congress's enacted funding decisions, and their attempt to circumvent Congress is not beyond review. In addition, as the district court found, the

equitable factors favor a permanent injunction of Defendants' unlawful construction plans: the record demonstrates that Plaintiffs will suffer irreparable harm, and the balance of equities and public interest support respecting Congress's judgment and exclusive control over the proper funding levels for any border wall construction.

The district court nonetheless stayed its own injunction pending appeal, threatening the very result the court's permanent injunction is meant to guard against. The stay should be lifted for three reasons. First, the district court did not make the critical findings that could justify a stay: that Defendants had a likelihood of success on appeal and that Defendants face irreparable harm. Defendants have established neither of these essential factors, and the district court erred in granting a stay in their absence.

Second, in light of the district court's correct conclusion that the balance of equities and public interest weigh against permitting Defendants to proceed with the unlawful construction at issue here, it would be inequitable to allow Defendants to undertake construction while this appeal is pending.

Finally, the district court abused its discretion in imposing a stay in the absence of Defendants' having satisfied the stay factors.

BACKGROUND

This appeal arises from Defendants' efforts to evade Congress's enacted appropriations judgment through diversion of $3.6 billion dollars to wall construction. The funds at issue here come from military construction projects that the Department of Defense ("DoD") previously told Congress were necessary to support servicemembers and military missions. Defendants intend to strip funding from these projects to build 175 miles of border walls across four states.

Congress has repeatedly refused to fund the construction at issue here. Throughout 2018, Congress considered the White House's repeated requests for wall funds and rejected numerous bills that would have provided billions of dollars for wall construction. *See Sierra Club v. Trump*, 929 F.3d 670, 677 (9th Cir. 2019) (collecting failed legislation). After Congress "consistently refused to pass any measures that met the President's desired funding level" for border wall construction, the political branches reached "a standoff that led to a 35-day partial government shutdown." *Id.* at 675-76.

"Following the longest partial government shutdown in the nation's history, Congress passed the [Consolidated Appropriations Act of 2019, Pub. Law No. 116-6, 133 Stat. 13 (2019) ("CAA")] CAA on February 14, 2019, making available $1.375 billion 'for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector.'" Order Granting in Part and

Denying in Part Pls.' Mots. for Partial Summ. J. and Denying Defs.' Mots. for Partial Summ. J. ("Order") 4, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Dec. 11, 2019), ECF No. 258 (attached as Exhibit 1) (citing CAA § 230(a)(1), 133 Stat. at 28). The next day, "[t]he President signed the budget legislation that ended the shutdown, but he then declared a national emergency and pursued other means to get additional funding for border barrier construction beyond what Congress had appropriated." *Sierra Club v. Trump*, 929 F.3d at 676. That same day, the White House issued a fact sheet entitled "President Donald J. Trump's Border Security Victory," identifying sources of funding that Defendants would divert to exceed the $1.375 billion Congress had allocated. Among those sources was "[u]p to $3.6 billion reallocated from [DoD] military construction projects under the President's declaration of a national emergency" pursuant to Section 2808. *Id.* at 679.

As Defendant Trump has repeatedly confirmed, Defendants are attempting to use Section 2808 to directly override Congress's refusal to accede to his funding request. "When announcing the proclamation, the President explained that he initially 'went through Congress' for the $1.375 billion in funding, but was 'not happy with it.'" Order 4. Defendant Trump "declared the national emergency one day after Congress passed the CAA, which limited appropriations for border barrier construction." Order 21. "In announcing the national emergency

declaration, the President explained, 'I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster. . . . And I think that I just want to get it done faster, that's all.'" Order 21. "DoD officials have forthrightly acknowledged that the border barrier projects are intended to fulfill the President's priorities." Order 32.

Plaintiffs sued on February 19, 2019, challenging all construction in excess of that which Congress authorized in the CAA. Plaintiffs' members frequently use the lands on which Defendants seek to construct a massive, multibillion-dollar wall. In addition, Plaintiff Southern Border Communities Coalition and its member organizations "work in and with border communities to protect and restore the environment," and to "promote the safety of border communities," and face irreparable harm to their ability to carry out their missions as a result of wall construction. Order 42.

Defendants first attempted to use the $2.5 billion in additional funds under purported 10 U.S.C. § 284 ("Section 284") authority. As DoD's Section 284 account contained less than a tenth of the $2.5 billion it sought to funnel through the account, Defendants were forced to use section 8005 of the DoD Appropriations Act of 2019 ("Section 8005") and related provisions to divert billions from military pension and other funds to wall construction. On June 28, 2019, the district court permanently enjoined construction of border barriers using

military funds that Defendants sought to divert through Section 284, finding that Defendants had no authority under Section 8005 to divert military funds to the border wall. *See Sierra Club v. Trump*, No. 4:19-cv-00892-HSG, 2019 WL 2715422 (N.D. Cal. June 28, 2019).

On July 3, 2019, a motions panel of this Court denied an emergency stay of the injunction, finding that "the use of those funds violates the constitutional requirement that the Executive Branch not spend money absent an appropriation from Congress." *Sierra Club v. Trump*, 929 F.3d at 676. On July 26, 2019, a majority of the Supreme Court issued a one-paragraph order staying the permanent injunction. The order contains the following explanation: "Among the reasons 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." *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). The related appeal is pending before this Court. *See* Docket Nos. 19-16102, 19-16300, 19-16299, 19-16336.

For nearly seven months after the announcement that an emergency existed requiring the use of the armed forces, and that $3.6 billion in military construction funds would be diverted to the border wall, Defendants continued to maintain that DoD had made no decision to spend a single dollar in military construction money. "Then on September 3, 2019, the Secretary of Defense announced that he had

decided to authorize eleven specific border barrier construction projects in California, Arizona, New Mexico, and Texas, pursuant to Section 2808." Order 6. "Collectively, the eleven projects total $3.6 billion and include 175 miles of border barrier construction across four states." Order 6. To fund this construction, Defendants are stripping funds from projects that Congress authorized, including "rebuilding hazardous materials warehouses at Norfolk and the Pentagon; replacing a daycare facility for servicemembers' children at Joint Base Andrews, which reportedly suffers from 'sewage backups, flooding, mold and pests'; and improving security to comply with anti-terrorism and force protection standards at Kaneohe Bay." Order 7.

Plaintiffs sought the injunction at issue here on October 11, just over a month after Defendants announced the eleven Section 2808 projects. During the November 20 hearing before the district court, Defendants represented that two contracts had already been awarded with the funds at issue here. Order 8. According to Defendants, the timetable for "substantial construction" to begin on the challenged projects is "40 days after contract award." DoD Notice of Decision to Authorize Border Barrier Projects Pursuant to 10 U.S.C. § 2808 at 3, 4, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Sept. 3, 2019), ECF No. 201 (attached as Exhibit 2). The district court granted Plaintiffs a permanent injunction on December 11, 2019.

On December 16, 2019, Plaintiffs filed an emergency motion to lift the district court's stay of the injunction. ECF No. 2-1. On December 30, 2019, this Court denied without prejudice Plaintiffs' motion to lift the stay. ECF No. 12 at 2.

On January 8, 2020, the Fifth Circuit issued a 2-1 decision staying the spending injunction that previously protected Plaintiffs' interests. The majority reasoned that a stay was justified "for, among other reasons, the substantial likelihood that Appellees lack Article III standing." Exhibit 3 at 2. Unlike the plaintiffs in the *El Paso County* litigation, Defendants do not contend that Plaintiffs lack Article III standing in this case.

ARGUMENT

I. The Supreme Court's Section 8005 Stay Does Not Justify the District Court's Stay of the Section 2808 Injunction.

A. The only factor identified by the Supreme Court as justifying a stay is inapplicable with respect to the Section 2808 injunction.

The only explanation in the Supreme Court's stay order concerns whether Plaintiffs have a "cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). That concern is inapplicable here. Section 2808—by contrast to Section 8005—explicitly concerns land use, and the Supreme Court has already decided that if a statute even arguably concerns land use, "neighbors to the use" may sue, and their "interests, whether economic, environmental, or aesthetic, come within [the

statute's] regulatory ambit." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 227-28 (2012).

In *Match-E-Be-Nash-She-Wish*, the Supreme Court considered a statute that "authorizes the acquisition of property 'for the purpose of providing land for Indians.'" 567 U.S. at 224 (citation omitted). The statute imposed no environmental or aesthetic restrictions on eventual construction on acquired property, and was enacted entirely for the benefit of Native Americans. The Supreme Court nonetheless determined that a neighbor who had no interest in tribal development or land acquisition was within the statute's zone of interests, because the neighbor objected that construction on land acquired under the statute would cause "an irreversible change in the rural character of the area," and result in "aesthetic, socioeconomic, and environmental problems." *Id.* at 213 (quotation marks omitted).

According to the Supreme Court, the only relevant question is "whether issues of land use (arguably) fall within [the statute's] scope—because if they do, a neighbor complaining about such use may sue to enforce the statute's limits." *Id.* at 225 n.7. The statute in *Match-E-Be-Nash-She-Wish* did not even mention any type of construction—much less evince Congressional concern about possible downstream effects of eventual construction on a third party's aesthetic, recreational, or environmental interests. Nonetheless, third parties objecting to and

injured by the effects of construction were appropriate challengers. Section 2808, which explicitly concerns construction decisions, is even more closely tethered to land use than the statute at issue in *Match-E-Be-Nash-She-Wish*, and Defendants' massive construction project under purported Section 2808 authority is *a fortiori* subject to challenge.

B. Defendants' equitable arguments for a stay are far weaker than those considered by the Supreme Court.

Defendants told the Supreme Court that the Department of Defense ("DoD") would permanently lose access to the funds at issue in the Section 8005 injunction if that injunction was not stayed pending appeal. *See* Defs.' Reply in Supp. of Stay Appl. 15, *Trump v. Sierra Club*, No. 19A60 (S. Ct. July 22, 2019) (asserting that Defendants face irreparable harm "if the government prevails on appeal and the injunction is vacated after September 30," because DoD would be unable to obligate the challenged funds); *see also Sierra Club v. Trump*, 929 F.3d at 688 ("Defendants represented in their briefing and again at oral argument, if the injunction remains in place, DoD's authority to spend the remaining challenged funds on border barrier construction, or to redirect them for other purposes, will lapse."). Defendants make no such claims with respect to the Section 2808 injunction currently at issue, and the record could not support such a claim. Defendants cannot rely on a different stay of a different injunction to bridge this gap. *See Leiva-Perez v. Holder*, 640 F.3d 962, 969 (9th Cir. 2011) (noting that the

Supreme Court has "emphasized the individualized nature of the irreparable harm inquiry").

II. The Stay Should Be Lifted Because Defendants Have No Likelihood of Success on the Merits and Have Not Established That the Injunction Will Cause Them Irreparable Harm.

Defendants cannot make a strong showing that they are likely to succeed on the merits of any appeal, nor demonstrate any irreparable injury if the injunction remains in effect during this appeal. In the absence of these "most critical factors," a stay is clearly unwarranted, and the Court need not examine the remaining factors. *See Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (citation omitted). The district court erred in imposing a stay without determining that Defendants satisfied these requirements. *See City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, No. 19-17213, 2019 WL 6726131, at *11 (9th Cir. Dec. 5, 2019) (noting with respect to a showing of likelihood of success that "the Supreme Court has made clear that satisfaction of this factor is the irreducible minimum requirement to granting any equitable and extraordinary relief").

A. Defendants' plan to circumvent Congress's appropriations power is not beyond review.

The district court correctly rejected Defendants' claim of unreviewable authority to divert billions of dollars appropriated for servicemembers and their families to a border wall that Congress repeatedly refused to fund. Defendants argued that no constitutional issue was raised by their circumvention of Congress's

appropriations decisionmaking, because they invoked a statute, Section 2808. At the same time, Defendants urged the district court not to examine their compliance with the terms of Section 2808, because in their view the statute grants them essentially limitless discretion to remake the federal budget. Defendants' claims of unreviewable authority are unlikely to succeed on appeal.

This Court has already determined that Plaintiffs have an equitable cause of action to seek review of their fundamentally constitutional claims that Defendants' actions usurp Congress's control over appropriations. Order 11 (citing *Sierra Club v. Trump*, 929 F.3d at 695-97). Even if a zone-of-interests requirement applied to such claims, Plaintiffs' "interests resemble myriad interests that the Supreme Court has concluded—either explicitly or tacitly—fall within any applicable zone of interests encompassed by structural constitutional principles like separation of powers." *Sierra Club v. Trump*, 929 F.3d at 704 (collecting cases); *see generally Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) ("If the Government's point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so."). The district court correctly found that this Court's decision was neither overruled nor clearly irreconcilable with the Supreme Court's stay decision, and therefore controls. *See* Order 12-13.

Even if the prior published motions panel decision were not binding, under this Court's settled law Plaintiffs have a constitutional cause of action in equity under the Appropriations Clause because the executive branch seeks to spend funds that Congress has not appropriated. *See United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). In *McIntosh*, this Court considered the constitutional question at length and concluded that expending funds in excess of statutory authority amounts to "violating the Appropriations Clause," which is "a separation-of-powers limitation that [litigants] can invoke" to equitably enjoin the violation. *McIntosh*, 833 F.3d at 1175. Even if *McIntosh* could theoretically have been resolved as a purely statutory claim, this would not erase the pages of constitutional analysis in *McIntosh* or render them nonbinding on this Court. "[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc).

In any event, even if Plaintiffs' claims were construed as strictly statutory claims requiring satisfaction of a zone-of-interests test with respect to Defendants'

claimed Section 2808 authority, the test would pose no obstacle to the Court's review. *See* Section I.A, *supra*.[1]

Finally, the district court was correct to find that "Section 2808 provides meaningful standards against which the Court may analyze Defendants' conduct under the statute." Order 19. Defendants are unlikely to prevail in their arguments that courts are not competent to construe the limitations that Congress imposed in Section 2808. Order 15-17. Section 2808 does not resemble these rare instances where statutory language and structure bar review under the APA. *Cf. Webster v. Doe*, 486 U.S. 592, 600 (1988) (no review where statutory language "fairly exudes deference" by permitting termination "whenever the Director 'shall deem such termination necessary or advisable'" and "not simply when the dismissal *is* necessary or advisable"); *see generally Perez v. Wolf*, No. 18-35123, 2019 WL 6224421, at *5-*7 (9th Cir. Nov. 22, 2019) (discussing rarity of unreviewable statutes); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986)

[1] Should the Court determine that Plaintiffs' claims are statutory claims arising under Section 2808, it may treat them as APA claims. *See, e.g.*, *Alto v. Black*, 738 F.3d 1111, 1117 (9th Cir. 2013) (considering under APA claims not "explicitly denominated as an APA claim" because they were "fairly characterized as claims for judicial review of agency action under the APA"); *Clouser v. Espy*, 42 F.3d 1522, 1533 (9th Cir. 1994) ("We shall therefore treat plaintiffs' arguments as being asserted under the APA, although plaintiffs sometimes have not framed them this way in their pleadings."); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 228, 230 n.4 (1986) (treating Mandamus Act petition as APA claim); *see generally Skinner v. Switzer*, 562 U.S. 521, 530 (2011) ("[A] complaint need not pin plaintiff's claim for relief to a precise legal theory.").

(Courts "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.").

Nor does this case resemble the exception to justiciability posed by granular, ongoing judicial supervision over military activities. *See Gilligan v. Morgan*, 413 U.S. 1, 5 (1973) (distinguishing "an action seeking a restraining order against some specified and imminently threatened unlawful action" from "a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard"). Instead, as the district court properly concluded, "The Court accordingly may, and must, determine whether Defendants have exceeded the limits set by Congress regarding spending under Section 2808, while affording both branches due deference." Order 18; *see also Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 826 (9th Cir. 2017) ("We may consider national security concerns with due respect when the statute is used as a basis to request injunctive relief. This is not a grim future, and certainly no grimmer than one in which the executive branch can ask the court for leave to ignore acts of Congress.").

B. Defendants' plan to funnel $3.6 billion in military construction funds to construction of a border wall is unlawful.

Defendants' theory is that Section 2808 provides essentially unlimited authority to raid appropriated military construction funds for policy initiatives that Congress refused to fund. The district court correctly rejected this interpretation,

which is not supported by the plain text of the statute and would raise grave constitutional questions. Section 2808 does not permit Defendants to sidestep the appropriations process, regardless of their dissatisfaction with its outcome.

The district court correctly found that Section 2808 provides no authority to aggrandize wall construction beyond that which Congress permitted in the CAA. "The diversion of funds from existing military construction projects is only authorized for (1) 'military construction projects' that are (2) 'necessary to support such use of the armed forces.'" Order 17 (quoting Section 2808). Each of the wall sections at issue here fails one or both requirements.

First, with the exception of the wall sections on the Barry Goldwater Military Range, none of the construction constitutes "military construction" as defined by statute. Congress defined "military construction" as construction associated with a "military installation" or "defense access road." 10 U.S.C. § 2801(a). In turn, Congress limited "military installation" for the purposes of Section 2808 to a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department . . . ." *Id.* § 2801(c)(4). Defendants maintain they can evade this requirement by simply assigning administrative jurisdiction of border sections sprawling across four states and more than a thousand miles to Fort Bliss in Texas. Defendants are wrong.

As the district court found, Defendants' "expansive interpretation" of "military installation" is untenable. Order 23. Defendants' theory requires "disregard[ing] the plain language of the statute," Order 23, because the massive wall projects are entirely dissimilar "in nature or scope to 'a base, camp, post, station, yard, [or] center.'" Order 24. The district court incorporated the statutory analysis from its previous preliminary injunction decision, *see* Order 23 n.10, which found that "[a]pplying traditional tools of statutory construction, Section 2801 likely precludes treating the southern border as an 'other activity'" encompassed by Congress's definition of military construction. *Sierra Club v. Trump*, 379 F. Supp. 3d 883, 920 (N.D. Cal. 2019). The district court "relie[d] on the doctrine of *noscitur a sociis*, 'which is that a word is known by the company it keeps.'" *Id.* (quoting *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995)). Because "'other activity' appears after a list of closely related types of discrete and traditional military locations," it is properly construed as "referring to similar discrete and traditional military locations. The Court does not readily see how the U.S.-Mexico border could fit this bill." *Id.* at 921. The district court also relied on the "*ejusdem generis* canon of statutory interpretation, which counsels that '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Id.* (quoting *Wash. State*

Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384 (2003)). As the district court explained, if "Congress intended for 'other activity' in Section 2801(c)(4) to be so broad as to transform literally any activity conducted by a Secretary of a military department into a 'military installation', there would have been no reason to include a list of specific, discrete military locations." *Id.*

Moreover, "Defendants' interpretation would grant them essentially boundless authority to reallocate military construction funds to build anything they want, anywhere they want, provided they first obtain jurisdiction over the land where the construction will occur." Order 25. This would lead to the absurd and unconstitutional result Defendants seek here, conferring on DoD the ability to "redirect billions of dollars from projects to which Congress appropriated funds to projects of Defendants' own choosing, all without congressional approval (and in fact directly *contrary* to Congress' decision not to fund these projects)." Order 26. Finally, Defendants' theory "defies both the text and spirit of" Congress's emergency powers legislation, by claiming "unchecked power to transform the responsibilities assigned by law to a civilian agency into military ones by reclassifying large swaths of the southern border as 'military installations.'" Order 28.

Second, each of the projects fails the requirements of Section 2808 because, "even crediting all facts in the administrative record, and giving due deference to the strategic and military determinations in it . . . . Defendants have not established that the projects are necessary to support the use of the armed forces." Order 28. As the administrative record confirms, to the extent the border wall would support the operations of any agency, the beneficiary would be the civilian Department of Homeland Security ("DHS")—not the armed forces. *See* Order 29-30. "As DoD representatives have forthrightly explained, funding under Section 2808 would 'all go to adding significantly new capabilities to DHS's ability to prevent illegal entry.'" Order 30. The district court correctly "decline[d] to interpret Section 2808 to provide the Secretary of Defense with almost limitless authority to use billions of dollars of its appropriations to build projects for the benefit of DHS, even when Congress specifically declined to give DHS itself the funds to build those projects." Order 31 (citing *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." (quotation omitted))).[2]

[2] The administrative record established that DoD does not even expect to derive a benefit from wall construction on the Barry M. Goldwater Range, which is the only military site involved in Defendants' plan. While construction of a border wall "along the Barry M. Goldwater range" might be expected to "limit potential impact to military training" caused by migration, DoD's records show that "impact to military training over the past five years has been negligible." Admin. R., Ex. 3, at 69, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Sept. 16, 2019),

At bottom, "the plain reality presented in this case" is that "the border barrier projects Defendants now assert are 'necessary to support the use of the armed forces' are the very same projects Defendants sought—and failed—to build under DHS's civilian authority, because Congress would not appropriate the requested funds." Order 32; *see generally City & Cty. of San Francisco v. Trump*, 897 F.3d at 1234 ("In fact, Congress has frequently considered and thus far rejected legislation accomplishing the goals of the Executive Order. The sheer amount of failed legislation on this issue demonstrates the importance and divisiveness of the policies in play, reinforcing the Constitution's 'unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.'"). Moreover, "[t]here is simply nothing in the record before the Court indicating that the eleven border barrier projects—however helpful—are necessary to support the use of the armed forces." Order 31. In light of the "plain reality" reflected in the record, Defendants do not have a strong likelihood of success on appeal.

C. Defendants will not be irreparably harmed by the district court's injunction.

The district court did not find that Defendants would be irreparably harmed during the appeal in the absence of a stay, and the record could not support such a

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ECF No. 206-3. According to Defendants' own assessment, even for construction on the Goldwater range, any benefit would be to CBP's civilian border enforcement mission.

finding. Instead, the record demonstrates that Defendants have not moved with any urgency to proceed with the construction at issue here. DoD waited nearly seven months after the emergency proclamation to make any decision about whether to spend a single dollar of military construction money on a wall. Having decided to construct a border wall, the earliest "substantial construction" that DoD intended to undertake was on December 16, 2019—more than ten months after the White House announced its intention to spend $3.6 billion in military construction funds on the wall through invocation of Section 2808. *See* Exhibit 2 (describing earliest substantial construction as occurring 40 days after contract award). Defendants' lengthy delay is incompatible with any claim of an urgent need to proceed with construction during the pendency of this appeal.

In addition to Defendants' nearly year-long delay in beginning construction, any claim of irreparable harm is further undermined by the fact that they face no loss of access to military construction funds if they do prevail on appeal. Unlike the funds at issue in the prior *Sierra Club* injunction, which the Supreme Court stayed, none of the funds here would revert to the treasury during the pendency of this appeal. *See* Section I.B, *supra*.

III. The Stay Should Be Lifted Because the Equities and Public Interest Weigh Against Allowing Defendants to Circumvent Congress's Decisions.

In the words of Justice Frankfurter, "'[b]alancing the equities' when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable discretion." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609-10 (1952) (Frankfurter, J., concurring). Here, as the district court found, "Congress has already engaged in the difficult balancing of Defendants' proffered interests and the need for border barrier construction in passing the CAA. Defendants have not pointed to any factual developments that were not before Congress and that may have altered its judgment to appropriate just $1.375 billion in funding for limited border barrier construction." Order 43 (citation omitted).

Allowing Defendants to usurp Congress's role is contrary to the public interest. "The Executive has made plain its determination to nonetheless proceed with the construction by any means necessary, notwithstanding Congress' contrary exercise of its constitutionally-absolute power of the purse." Order 44. But if "the decision to spend [is] determined by the Executive alone, without adequate control

by the citizen's Representatives in Congress, liberty is threatened." *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring).

Moreover, because the environmental effects of a multibillion-dollar construction project are effectively impossible to undo, the balance of harms favors an injunction. "[T]he funding and construction of these border barrier projects, if indeed barred by law, cannot be easily remedied after the fact." Order 39. The lands protected by the injunction are unique and treasured by Plaintiffs' members. The record "detail[s] how Defendants' eleven proposed border barrier construction projects will harm [Plaintiffs' members'] ability to recreate in and otherwise enjoy public land along the border." Order 37. While Defendants have repeatedly attempted to the minimize these harms, the district court recognized that "Defendants' proposal would significantly alter the existing landscape, and even the proposed changes to the existing infrastructure are substantial." Order 38-39.

IV. The District Court Abused Its Discretion in Imposing a Stay.

Although the district court cited the stay factors set forth by this Court in *Leiva-Perez*, 640 F.3d at 964, the district court's reasoning appears to disregard those factors entirely. Order 44-45. The district court instead reasoned that "the Supreme Court's stay of this Court's prior injunction order appears to reflect the conclusion of a majority of that Court that the challenged construction should be permitted to proceed pending resolution of the merits." Order 45. The district court

concluded that "the lengthy history of this action; the prior appellate record; and the pending appeal before the Ninth Circuit on the merits of Plaintiffs' Section 8005 claim, which will address several of the threshold legal and factual issues raised in this order, warrant a stay of the permanent injunction pending appeal." Order 45. The district court abused its discretion in departing from the required stay factors.

First, as the district court itself recognized, the Supreme Court's stay of a separate injunction sheds little light on the issues here. *See* Order 13 ("At this stage, the Court can only speculate regarding the reasoning underlying the stay, including what it means for how the Supreme Court may ultimately assess the merits of these two cases."). The existence of that stay does not justify a stay here. *See* Section I, *supra*.

Second, the district court's unexplained invocation of "the lengthy history of this action," the "appellate record," and the existence of a pending related appeal cannot justify a stay. This action's history is hardly lengthy: Plaintiffs sued on February 19, 2019, and sought the injunction at issue here just over a month after Defendants announced the Section 2808 projects. Nor does the pendency of a related appeal support a stay for the duration of *this* appeal. The district court cited no precedent, and Plaintiffs are aware of none, that would justify a stay based on these factors.

CONCLUSION

This Court should lift the district court's stay of the permanent injunction.

Dated: January 9, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2020, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

/s/ Dror Ladin
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Dated: January 9, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Circuit Rule 27-1(1)(d) and Circuit Rule 32-3 because it contains 5,583 words. This brief 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 Times New Roman typeface.

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