Nos. 19-17501, 19-17502, 20-15044

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

The President has declared a national emergency at the southern border requiring the use of the armed forces, and the Secretary of Defense has determined that eleven military construction projects—building border barriers with respect to military installations—are necessary to support the use of the armed forces in connection with that national emergency. In those circumstances, Congress has expressly authorized the Secretary in 10 U.S.C. § 2808 to use previously appropriated military-construction funds for such projects.

Although the district court here properly recognized that it could not review the President's declaration of a national emergency, it nevertheless issued a permanent injunction and declaratory judgment second-guessing the Secretary of Defense's exercise of military judgment under Section 2808. The district court's previous permanent injunction in this case, barring the Secretary of Defense from transferring funds under Section 8005 of an appropriations act for the Department of Defense (DoD) to support the Department of Homeland Security (DHS) in its counter-narcotics efforts, *see* 10 U.S.C. § 284, was stayed pending appeal by the Supreme Court. The permanent injunction at issue here is equally flawed.

First, plaintiffs are not within the zone of interests of Section 2808 based on their claimed injuries to aesthetic, recreational, and environmental interests. That statute was enacted solely to meet the specific needs of the military when there is a declaration of national emergency requiring use of the armed forces, and the Secretary

of Defense determines that particular military construction projects are necessary to support the use of the armed forces in connection with that emergency. The statute's language and context offer no suggestion that Congress even arguably intended to allow lawsuits by private parties or States who invoke the statute to vindicate aesthetic, recreational, or environmental interests allegedly affected by the Secretary of Defense's exercise of emergency construction authority. Indeed, the Supreme Court's stay pending appeal in plaintiffs' challenge to the transfer of funds under DoD's Section 8005 authority similarly focused on these very plaintiffs' lack of a cause of action. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (Mem.). Moreover, the Court's decision forecloses the attempt by the district court here to evade or weaken the zone-of-interests requirement by recharacterizing plaintiffs' statutory arguments as an implied constitutional claim in equity to enforce the Appropriations Clause.

Second, in any event, Section 2808 authorizes the military construction projects at issue here. The statute provides that, when the President declares a "national emergency . . . that requires use of the armed forces, the Secretary of Defense . . . may undertake military construction projects . . . that are necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). The President has declared a national emergency requiring use of the armed forces, and the Secretary of Defense has concluded that the eleven challenged projects are military construction projects necessary to support the use of the armed forces deployed in connection with that national emergency. Each project qualifies as construction "with respect to a military

installation," 10 U.S.C. § 2801(a), because each will take place at a location "under the jurisdiction of the Secretary of a military department," *id.* § 2801(c)(4). Two of the projects will be built on the Goldwater Range, which is an Air Force and Marine Corps bombing range, and the other nine will be built on land assigned to Fort Bliss, an Army base. The district court committed serious error in second-guessing the Secretary's determinations under Section 2808.

Finally, at a minimum, the district court abused its discretion in balancing the equities here. The government has compelling interests in border security, drug interdiction, and preventing cross-border criminal activity, which far outweigh the alleged harms to plaintiffs' aesthetic, recreational, and environmental concerns. The district court's error is confirmed by the Supreme Court's grant of a stay in the earlier appeal, and by ample precedent.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 over both the Sierra Club plaintiffs' and the State plaintiffs' challenges to the Department of Defense's construction of border-barrier projects under 10 U.S.C. § 2808. On December 11, 2019, the district court granted the Sierra Club plaintiffs, but not the State plaintiffs, a permanent injunction barring the federal defendants from using Section 2808 funding to build border barriers at the relevant locations; however, the court stayed the injunction pending appeal. ER2-ER48. The district court entered a declaratory judgment the same day, ER47, and also entered judgment pursuant to Rule 54(b) of

the Federal Rules of Civil Procedure, ER48. The federal defendants filed timely notices of appeal in the two cases on December 13, 2019. ER49, ER51. The State plaintiffs filed a notice of cross-appeal on January 7, 2020. ER53. This Court has jurisdiction over the appeals under 28 U.S.C. 1291.[1]

STATEMENT OF THE ISSUES

1. Whether these plaintiffs can invoke a cause of action to enjoin DoD from using military-construction funds to construct border barriers necessary to support the use of the armed forces following a presidential declaration of a national emergency, based on the asserted effects that those military construction projects will have on plaintiffs' aesthetic, recreational, and environmental interests.

2. Whether DoD was authorized by 10 U.S.C. § 2808 to use military-construction funds for these projects.

3. Whether the district court abused its discretion in granting a permanent injunction because the balance of equities and public interest strongly favors the government.

PERTINENT STATUTES

Pertinent statutes are reproduced in the addendum to this brief.

[1] The government has moved to consolidate all three appeals.

STATEMENT OF THE CASE

A. Statutory Background

The statute at issue here, 10 U.S.C. § 2808, authorizes the Secretary of Defense to undertake certain military construction projects when the President declares a "national emergency . . . that requires use of the armed forces." In that circumstance, the Secretary, "without regard to any other provision of law, may undertake military construction projects . . . that are necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). The term "military construction" means "any construction, development, conversion, or extension of any kind carried out with respect to a military installation," as well as "any acquisition of land." *Id.* § 2801(a). The term "military installation" means a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control." *Id.* § 2801(c)(4). The statute requires the Secretary to "notify . . . the appropriate committees of Congress of the decision" to undertake military construction projects under that authority, and of "the estimated cost of the construction projects." *Id.* § 2808(b).

Congress funds DoD through different appropriations acts. In September 2018, Congress enacted the Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2019, Pub. L. No. 115-244, div. C, 132 Stat. 2946

(2018) (MILCON Appropriations Act), as well as the Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, Pub. L. No. 115-245, div. A, 132 Stat. 2981 (2018) (DoD Appropriations Act). Section 8005 of the DoD Appropriations Act 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. *Id.* § 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.* For simplicity, this brief refers to these authorities as Section 8005.

Several months later, in February 2019, Congress enacted the Department of Homeland Security Appropriations Act, 2019, which is found in Division A of the Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (2019) (CAA). There, Congress appropriated $1,375,000,000 to the Department of Homeland Security (not DoD) "for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector." CAA § 230(a)(1), 133 Stat. at 28. None of those funds could be used to construct

pedestrian fencing in five specific locations: "(1) within the Santa Ana Wildlife Refuge; (2) within the Bentsen-Rio Grande Valley State Park; (3) within La Lomita Historical park; (4) within the National Butterfly Center; or (5) within or east of the Vista del Mar Ranch tract of the Lower Rio Grande Valley National Wildlife Refuge." CAA, § 231, 133 Stat. at 28.

B. Factual Background

Congress has long authorized the military to provide a wide range of support to DHS at the southern border. *See*, *e.g.*, 10 U.S.C. § 284; *see generally* 10 U.S.C. §§ 271-274. Since the early 1990s, military personnel have supported civilian law-enforcement agency activities to secure the border, counter the spread of illegal drugs, and respond to transnational threats. *See Hearing on Department of Defense's Support to the Southern Border Before the H. Armed Servs. Comm.*, 116th Cong. 1 (2019) [hereinafter *Hearing*] (Joint Statement of John Rood and Vice Admiral Michael Gilday) (Ex. 1). For decades, U.S. military forces have played an active role in barrier construction and reinforcement on the southern border. Military personnel were critical to construction of the first modern border barrier near San Diego, California, in the early 1990s, as well as other border-fence projects. *See* H.R. Rep. No. 103-200, at 330-31, 1993 WL 298896 (1993) (commending DoD for its role in construction of the San Diego primary fence); *International Narcotics Trafficking: Hearing on the Department of Defense's Role in U.S. Drug Control Policy Before the S. Comm. on Armed Servs. Subcomm. on Emerging Threats and Capabilities*, 106th Cong. (1999) (Test. of Barry R. McCaffrey)

(military personnel "constructed over 55 miles of barrier fencing"). In 2006, the National Guard improved southern border security infrastructure by "building more than 38 miles of fence, 96 miles of vehicle barrier, and more than 19 miles of new all-weather road," and by performing road repairs exceeding 700 miles. *See Hearing* 1. And during the last administration, the U.S. Army Corps of Engineers assisted DHS by providing planning, engineering, and barrier construction support. *See*, *e.g.*, *Gringo Pass, Inc. v. Kiewit Sw. Co.*, No. CV-09-251-TUC-DCB, 2012 WL 12905166, at *1 (D. Ariz. Jan. 11, 2012).

On February 15, 2019, the President declared that "a national emergency exists at the southern border of the United States." *Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States*, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019) (Proclamation No. 9844). The President explained that "[t]he southern border is a major entry point for criminals, gang members, and illicit narcotics," adding that "[b]ecause of the gravity of the current emergency situation, . . . this emergency requires use of the Armed Forces" and "it is necessary for the Armed Forces to provide additional support to address the crisis." *Id.* This Proclamation made available to the Secretary of Defense the military-construction authority set forth in 10 U.S.C. § 2808.

The Proclamation built upon the President's previous direction to the Secretary of Defense to support DHS in securing the border, including through the use of the National Guard. *See* Presidential Memorandum, *Securing the Southern Border of the United*

States 1, 2018 WL 1633761 (Apr. 4, 2018) (assigning "a mission to the Secretary of Defense to support the operations of [DHS] in securing our southern border . . . and to take other necessary steps to stop the flow of deadly drugs and other contraband, gang members and other criminals, and illegal aliens into the country" and directing the Secretary to "use all available authorities as appropriate . . . to fulfill this mission"). It also built upon the authority conferred upon the Secretary by Congress to transfer appropriated funds between accounts to use as needs and priorities change. Office of the Gen. Counsel, U.S. Gov't Accountability Office, *Principles of Federal Appropriations Law*, 2-38 (4th ed. Rev. 2016), https://go.usa.gov/xdgrb (defining transfer); *see id.* (explaining the "legitimate need for a certain amount of flexibility to deviate from [an agency's] budget estimates").

Since the President issued his April 2018 memorandum, military personnel deployed to the southern border have performed a broad range of administrative, logistical, and operational tasks in support of DHS's border security mission. ER128-ER131. These activities include installing vehicle and pedestrian barriers; emplacing concertina wire along the border and at ports of entry; and operating aerial and mobile surveillance equipment to detect activity along the border. ER212-ER213, ER216-ER218.

The Secretary of Defense has exercised his authority under Section 2808, determining that eleven border-barrier projects along the Mexican border are necessary to support the use of the armed forces in connection with the President's

declaration of a national emergency. Based on an extensive administrative record, including analysis and advice from the Chairman of the Joint Chiefs of Staff, *see* ER202-ER207, and input from DHS, the Commander of the U.S. Army Corps of Engineers, and the Department of the Interior, the Secretary concluded the projects will "deter illegal entry, increase the vanishing time of those illegally crossing the border" (that is, the time that passes before a subject who illegally crosses the border can no longer be apprehended), and "channel migrants to ports of entry." ER92. Further, the Secretary concluded that the barriers will support the use of the armed forces by reducing "demand for DoD personnel and assets at the locations where the barriers are constructed, and by allowing redeployment of DoD personnel and assets to other high-traffic areas on the border without barriers." *Id.* Consequently, the barriers serve as "force multipliers" that enhance military capabilities and allow DoD to support DHS more efficiently and effectively. *Id.*

To fund these projects, the Secretary approved the use of up to $3.6 billion in unobligated military-construction funds. ER93. The eleven projects, which involve 175 miles of border-barrier construction, include (1) two projects on the Barry M. Goldwater Range, a longstanding military installation in Arizona that is used for live-fire and weapons exercises by U.S. military pilots; (2) seven projects on federal land transferred to DoD jurisdiction; and (3) two projects on non-public land, which has not yet been acquired. ER7.

C. 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 federal government officials, including the Secretary of Defense, seeking declaratory and injunctive relief in order to stop the government from constructing physical barriers along the southern border. *See* ER227-ER266. The Sierra Club plaintiffs' lawsuit included challenges not only to DoD's construction pursuant to 10 U.S.C. § 2808 (the statute at issue in these appeals), but also to DoD's construction pursuant to a statute authorizing DoD to "provide support for the counterdrug activities . . . of any other department or agency" if "such support is requested," 10 U.S.C. § 284, using funds transferred among DoD internal accounts under a provision of DoD's appropriations statute, Section 8005. Several States filed a separate lawsuit seeking similar relief based on similar legal theories. *See generally* ER267-ER348.

In earlier orders, the district court enjoined DoD's use of Section 284 funds, transferred using Section 8005 authority, for border-barrier construction. *Sierra Club v. Trump*, 379 F. Supp. 3d 883 (N.D. Cal. 2019) (permanent injunction). A divided panel of this Court denied the government's request for a stay pending appeal, *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019), but the Supreme Court granted the stay. The Supreme Court held that, "[a]mong the reasons" for granting the stay, "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, 1 (2019) (Mem.). The appeals concerning the Section 284 construction remain pending in this Court.

2. These appeals concern the district court's decision enjoining Section 2808 construction. As relevant here, plaintiffs seek to stop DoD from constructing the eleven challenged border-barrier projects under Section 2808. To support their request for a permanent injunction, the Sierra Club plaintiffs contended that the challenged projects would impair their members' "aesthetic and recreational interests" in "enjoy[ing], work[ing], and recreat[ing]" in the areas where the projects are to be built. ECF No. 210, at 35. The State plaintiffs contended that the challenged projects would impair their interest in enforcing their environmental laws and would reduce their tax revenues. *California v. Trump*, ECF No. 220, at 30-41. These are the same interests that the Sierra Club and the State plaintiffs asserted in seeking the injunction against Section 284 construction that the Supreme Court stayed. *See Sierra Club v. Trump*, 379 F. Supp.3d at 923. Both the Sierra Club and State plaintiffs also sought a declaratory judgment that the challenged projects are unlawful. The parties cross-moved for summary judgment.

The district court granted the plaintiffs' summary-judgment motions in part. The court granted a permanent injunction to the Sierra Club plaintiffs, holding that Section 2808 does not authorize the government's use of military-construction funds for the eleven challenged border-barrier projects.

The district court first held that all plaintiffs had an equitable cause of action "to enjoin unconstitutional official conduct," ER12 (quotation marks omitted), and were within the zone of interests of the Appropriations Clause, ER12-ER15. To reach that conclusion, the court relied heavily on the opinion issued by the stay panel majority in the earlier Section 284 appeal that addressed "the same arguments," ER12, notwithstanding the Supreme Court's contrary conclusion in granting the stay, *Trump v. Sierra Club*, 140 S. Ct. at 1.

The district court next held that the challenged projects were unlawful under Section 2808. The court relied solely on two grounds: (1) that nine of the eleven border-barrier projects were not being carried out with respect to a military installation, as Section 2808 requires, ER23-ER29; and (2) that, contrary to the expert judgment of the Secretary of Defense, none of the projects was "necessary" to support the use of the armed forces, as Section 2808 also requires, ER29-ER34.

The district court then addressed the equitable factors governing issuance of a permanent injunction. The court concluded that the Sierra Club's members would suffer irreparable injury to their aesthetic and recreational interests from additional construction on already heavily disturbed land, ER38-ER40, and that SBCC and its member organizations had suffered harm because the court concluded they had to divert resources to oppose the proposed border-barrier construction. ER40-ER43. In the court's view, the balance of the harms and the public interest supported an injunction because Congress had already balanced the need for border-barrier

construction through the appropriations process. ER43-ER45. The court so held despite the fact that the same harms, the same balancing of interests, and the same purported congressional balancing were before the Supreme Court when it stayed the district court's injunction of the Section 284 projects.

The district court denied the State plaintiffs' "duplicative request" for identical injunctive relief as "moot" in light of the Sierra Club plaintiffs' injunction, ER38, but it granted both the State plaintiffs and the Sierra Club plaintiffs a declaratory judgment, ER47-ER48. Finally, the court denied plaintiffs' request for declaratory and injunctive relief on their other claims, including on the State plaintiffs' claim that "there is no true emergency at the southern border." ER21. As to that claim, the court held that the questions "whether the national emergency truly exists, and requires use of the armed forces, are nonjusticiable political questions." ER22.

3. The district court *sua sponte* stayed the permanent injunction pending appeal. The court held that such a stay was appropriate for a variety of factors, including "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." ER46. The court also recognized 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." ER46.

The Sierra Club plaintiffs filed an emergency motion in this Court to lift the district court's stay of its injunction pending appeal. This Court denied the motion without prejudice, in part because "the Supreme Court has already stayed an injunction previously granted by the district court in this case," but also in part because a nationwide injunction against the Section 2808 construction had been entered in a parallel suit in the U.S. District Court for the Western District of Texas. Order, Dec. 30, 2019, at 2. The Fifth Circuit subsequently stayed that injunction, *see* Order, *El Paso County v. Trump*, No. 19-51144 (5th Cir. Jan. 8, 2020), and plaintiffs here have renewed their motion for this Court to lift the stay, which remains pending.

SUMMARY OF ARGUMENT

The district court's extraordinary orders must be reversed. For many of the same reasons underlying the Supreme Court's stay of the prior injunction against DoD's border-barrier construction pursuant to 10 U.S.C. § 284, plaintiffs' claims against DoD's border-barrier construction pursuant to 10 U.S.C § 2808 are not viable.

Plaintiffs are not within the zone of interests to invoke a cause of action to enforce Section 2808's requirements based on asserted injuries to their aesthetic, recreational, and environmental interests. Congress enacted that statute to meet the needs of the military in narrow circumstances where there is a declaration of national emergency requiring use of the armed forces, and the Secretary of Defense determines that particular military construction projects are necessary to support the use of the armed forces in connection with that emergency. The specific requirements in the

statute reflect a legislative judgment about when and how military-construction funds can be used in those circumstances. Thus, Congress required that the use of funds appropriated for certain military construction projects should only be used for other military construction projects, as defined in the statute, when the Secretary of Defense determines that those projects are necessary to support the use of the armed forces in connection with the national emergency. There is no suggestion in the statute's language or context that Congress even arguably intended to allow lawsuits of this nature brought by private parties or States who seek to vindicate aesthetic, recreational, or environmental interests allegedly affected by the Secretary of Defense's exercise of emergency construction authority.

Indeed, the Supreme Court, in granting a stay pending appeal in these same plaintiffs' challenge to the transfer of funds under DoD's Section 8005 authority, specifically emphasized plaintiffs' lack of a cause of action. *Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019) (Mem.). And that decision further confirms that plaintiffs cannot evade or weaken the zone-of-interests requirement by invoking an equitable cause of action instead of a claim under the Administrative Procedure Act (APA), or by recharacterizing their statutory arguments under Section 2808 as a constitutional claim under the Appropriations Clause. They made similar arguments opposing the stay before the Supreme Court, which nevertheless reached the conclusion that the zone-of-interests requirement likely applies and denies them a cause of action.

In any event, Section 2808 authorizes the military construction projects at issue here. The statute provides that, when the President declares a "national emergency . . . that requires use of the armed forces, the Secretary of Defense . . . may undertake military construction projects . . . that are necessary to support such use of the armed forces." 10 U.S.C. § 2808. The President has in fact declared a national emergency requiring use of the armed forces, and the Secretary of Defense has affirmatively concluded—after consulting with the Chairman of the Joint Chiefs of Staff—that the eleven challenged projects are necessary to support the use of the armed forces deployed in connection with that national emergency. Each project meets the statutory definition of construction "with respect to a military installation," 10 U.S.C. § 2801(a), inasmuch as each will take place at a location "under the jurisdiction of the Secretary of a military department," *id.* § 2801(c)(4). Specifically, two projects will be built on the Goldwater Range, an Air Force and Marine Corps bombing range, and nine projects will be built on land assigned to Fort Bliss, which is an Army base. Although the district court properly recognized that it could not second-guess the President's national-emergency determination, it fundamentally erred in nevertheless enjoining the Section 2808 construction by second-guessing the Secretary's military judgment concerning the needs of the armed forces.

At a minimum, the district court abused its discretion in balancing the equities when granting a permanent injunction. The government's compelling interests in border security, and its specific interests in drug interdiction and the prohibition of

other cross-border criminal activity, far outweigh the asserted harms to plaintiffs' aesthetic, recreational, and environmental concerns. Again, the Supreme Court's grant of a stay in the earlier appeal in this case, and ample precedent, confirm that the district court erred.

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Protect Our Communities Found. v. LaCounte*, 939 F.3d 1029, 1034 (9th Cir. 2019). 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

I. Plaintiffs Are Not Proper Parties To Challenge DoD's Military Construction Projects Under Section 2808.

Plaintiffs' claims fail at the threshold because their alleged injuries fall outside the zone of interests protected by the limitations on the statutory authority granted to DoD by 10 U.S.C. § 2808. Section 2808 provides that, when the President declares a "national emergency . . . that requires use of the armed forces," the Secretary of Defense may use funds "appropriated for military construction" to undertake "military construction projects" that the Secretary deems "necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). As detailed below, none of the

plaintiffs in these consolidated cases is within the zone of interests protected by Section 2808. And indeed, the district court did not hold that plaintiffs satisfied the zone-of-interests requirement with respect to Section 2808.

Instead, the district court held that plaintiffs could enforce Section 2808 through an implied cause of action in equity to enforce the Appropriations Clause of the Constitution, and that plaintiffs fall within the zone of interests protected by that clause. But the Supreme Court rejected identical reasoning when it stayed the district court's previous injunction of border-barrier construction projects funded under Sections 8005 and 284 because, among other reasons, "plaintiffs have no cause of action to obtain review" of those projects' legality. And more generally, the district court's reasoning 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' Alleged Environmental, Recreational, and Aesthetic Injuries Fall Outside the Zone of Interests Protected by Section 2808.

The zone-of-interests requirement limits who "may invoke [a] cause of action" to enforce a given statute. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014). This requirement 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); *see id.* at 176-77 (describing the "absurd consequences" that "would follow" if any person with an Article III injury could sue). "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)).

Even under the "generous review provisions" of the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, a plaintiff whose interests are "so marginally related to or inconsistent with the purposes implicit in the [allegedly violated] statute" cannot sue to enforce that statute because "it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 395, 399 (1987). 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 requirement may apply. *Id.* at 400 & n.16 (explaining that, in such circumstances, a plaintiff may be required to prove that the statutory provision sought to be enforced is intended for plaintiff's "'*especial*' benefit") (emphasis in original).

Under any standard, neither the Sierra Club plaintiffs nor the State plaintiffs are proper parties to enforce the terms of Section 2808. Congress enacted Section 2808 to facilitate "military construction" in the event of a declaration of war or national

emergency requiring the use of the armed forces, and a determination that, in the judgment of the Secretary of Defense, the construction is "necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). Plaintiffs contend that some of the projects at issue here do not satisfy the statute's definition of "military construction" because the sites purportedly are not military installations, and that the construction is not actually a military necessity. But the scope of the statute and its purpose—facilitating military construction in the event of war or national emergency—demonstrate that those requirements are not even arguably intended to protect parties who, like plaintiffs here, assert that particular Section 2808 projects would impair recreational, aesthetic, or environmental interests on the land where military construction is occurring.

The statute's definition of military construction, 10 U.S.C. § 2801(a), with its focus on the broad needs of the military, suggests that private or state parties' aesthetic, recreational, or environmental interests in military installations are not sufficient to permit plaintiffs to seek to enforce the statute. Underscoring the broad discretion vested in the Secretary, Section 2808 provides that the military construction it authorizes can be undertaken "without regard to any other provision of law"—including federal and state laws vindicating the kinds of interests that plaintiffs have invoked. *Id.* § 2808(a); *see United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007) (en banc) ("statutory 'notwithstanding' clauses broadly sweep aside potentially conflicting laws").

And Congress deferred to the Secretary's judgment to identify the "military construction projects . . . that are necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). Based on that judgment, Section 2808 permits the use of unobligated military-construction funds appropriated for other projects instead to be used for projects that are "not otherwise authorized by law." *Id.* The statute is thus analogous to the authority in Section 8005 of the DoD Appropriations Act, in that it provides the Secretary with flexibility to reprioritize the use of DoD's budgetary resources. The Secretary's exercise of military and policy judgment under such statutes does not even arguably implicate plaintiffs' concerns about their aesthetic, recreational, or environmental interests. To the extent that the limitations in Section 2808 govern the re-prioritization of military-construction funds in the event of a national emergency, the limitations in the statute at most reflect constraints on the decision to fund certain projects while deferring others. *Sierra Club v. Trump*, 929 F.3d 670, 715 (9th Cir. 2019) (N.R. Smith, J., dissenting) ("This statute [Section 8005] arguably protects Congress and those who would have been entitled to the funds as originally appropriated; and as a budgetary statute regarding the transfer of funds among DoD accounts, it arguably protects economic interests.").

In short, plaintiffs' interests are unrelated to, and indeed inconsistent with, the purposes of Section 2808. Accordingly, none of these plaintiffs can satisfy the zone-

of-interests requirement to enforce any statutory constraints in that provision. *See Clarke,* 479 U.S. at 399.[2]

Contrary to plaintiffs' suggestion in prior briefing, the Supreme Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), does not support their zone-of-interests argument. *Patchak* concerned a statute whose "context and purpose" served "to foster Indian tribes' economic development," and authorized the Secretary of the Interior to "take[] title to properties" on behalf of Indian tribes "with at least one eye directed toward how tribes will use those lands." *Id.* at 226. The Court held that, because of that statutory purpose, the Secretary "typically acquire[s] land with its eventual use in mind [and] after assessing potential conflicts that use might create," and therefore "neighbors to the use . . . are reasonable—indeed, predictable—challengers of the Secretary's decisions." *Id.* at 227.

Here, by contrast, Section 2808 gives the Secretary broad authority to authorize military construction projects, without regard to the kind or context of that construction, when the Secretary determines that the project will meet the needs of the armed forces, without regard to the effect on any third party's aesthetic, recreational, or environmental interests. Indeed, Section 2808's "without regard to"

[2] For the same reasons, none of the plaintiffs in these cases would satisfy the zone-of-interests requirement even if their claims were construed as arising under the APA.

clause expressly authorizes DoD to bypass all other legal requirements—including federal and state environmental statutes—that might otherwise limit DoD's exercise of its military-construction authority. It therefore follows that plaintiffs alleging aesthetic, recreational, or environmental harms from DoD's Section 2808 projects are not "reasonable" or "predictable" challengers under Section 2808.

The structure of Section 2808 further underscores this point. No Section 2808 project may proceed unless the Secretary of Defense "notif[ies] . . . the appropriate committees of Congress of the decision and of the estimated cost of the construction project[], including the cost of any real estate action pertaining to th[at] construction project[]." 10 U.S.C. § 2808(b). This notice provision allows Congress to deploy its legislative authority to address the use of military-construction funds for Section 2808 projects if it disagrees with the Secretary's judgment. Congress could, for example, enact new legislation prohibiting DoD from spending funds in a particular manner; reduce future appropriations to DoD; or restrict or even repeal DoD's Section 2808 authority. But nothing in the notice provision—and indeed nothing in the entirety of Section 2808—evinces any desire by Congress to permit private plaintiffs to seek judicial enforcement of Section 2808's terms.[3]

[3] Congress recently passed—and the President signed into law—the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019); the Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, 133 Stat. 2317 (2019) (which includes the Department of Defense Appropriations Act, 2020, and the Department of Homeland Security Appropriations Act, 2020); and the

The Supreme Court's decision granting the government a stay pending the earlier Section 8005 appeal reflects the judgment that these plaintiffs are not within the zone of interests of the statute at issue in that case, and thus that they are not proper parties to seek to enforce that statute. For similar reasons, these same plaintiffs are not within the zone of interests to challenge the Secretary's statutory authority to invoke Section 2808's emergency authority to fund some military construction projects while deferring others. In both instances, plaintiffs raise interests entirely unrelated to the budgetary and military purposes underlying the statutes at issue. *See Sierra Club*, 929 F.3d at 715 (N.R. Smith, J., dissenting).

B. The District Court's Contrary Conclusions Lack Merit.

The district court did not hold that plaintiffs were within the zone of interests of Section 2808. The court instead construed plaintiffs' claim—that the challenged projects violate the terms of Section 2808—as "fundamentally a constitutional claim" sounding in the Appropriations Clause, ER15 (quotation marks omitted), and

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Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 133 Stat. 2354 (2019) (which includes the Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2020). None of these statutes contains any provision restricting DoD's Section 2808 authority. The House of Representatives passed several proposals that would have restricted border-barrier construction efforts. *See, e.g.*, H.R. 2968, 116th Cong. § 8127 (2019) ("None of the funds appropriated or otherwise made available by this Act or any prior appropriations Acts may be used to construct a wall, fence, border barriers, or border security infrastructure along the southern land border of the United States."). But none of these proposed restrictions was enacted into law, which further underscores the impropriety of reading such a restriction into Section 2808.

expressed "doubt[]" that the zone-of-interests requirement applies to constitutional claims at all, ER12 (quoting *Sierra Club*, 929 F.3d at 700). The court then held, in the alternative, that plaintiffs were proper parties to challenge DoD's Section 2808 decisions because their alleged injuries fall within the zone of interests protected by the Appropriations Clause. ER15. The court's reasoning fails at every step.

1. At the outset, the district court's analysis is flatly contrary to the Supreme Court's order granting a stay of the earlier injunction against Section 284 construction. To hold that plaintiffs fell within the zone of interests protected by Section 2808, the district court relied entirely on the reasoning of the stay panel's previous decision (in the Section 8005 context) denying the government's motion for a stay pending appeal. ER14 ("The Ninth Circuit's opinion in [previous stay proceedings] therefore controls this Court's analysis."). But the Supreme Court rejected the stay panel's reasoning when it held that the government had made a sufficient showing that "plaintiffs have no cause of action to obtain review of [DoD's] compliance with" the statutes at issue there. *Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019) (Mem.). The Supreme Court's ruling forecloses any argument that the zone-of-interests requirement does not apply to equitable lawsuits to enforce the Appropriations Clause, and any argument that plaintiffs' interests satisfy the zone of interests protected by that Clause. As we demonstrate below, the Supreme Court's rejection of those arguments follows from well-established law.

2. Binding precedent forecloses the district court's suggestion that the zone-of-interests requirement does not apply to implied equitable causes of action to enforce constitutional provisions. As the Supreme Court has held, the zone-of-interests requirement is one "of general application," reflecting a 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. *Lexmark*, 572 U.S. at 129 (quoting *Bennett*, 520 U.S. at 163) (quotation marks omitted). Accordingly, both the Supreme Court and this Court have made clear that the requirement applies even to causes of action to enforce "constitutional guarantee[s]." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982); *see 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); *Individuals for Responsible Gov't, Inc. v. Washoe County*, 110 F.3d 699, 703 (9th Cir. 1997) (holding that the zone-of-interest requirement "governs claims under the Constitution in general") (quotation marks omitted).

In concluding otherwise, the district court reprised (ER11-ER12) the stay panel's misinterpretation of *Lexmark*'s reference to "a legislatively conferred cause of action" when describing the scope of the zone-of-interests requirement. 572 U.S. at 127. *Lexmark*'s reference encompasses a cause of action implied under equity, *see Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-27 (2015), because the courts' equitable powers are themselves conferred by statute, *Grupo Mexicano de Desarrollo S.A.*

v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999). Indeed, the courts' equitable powers are subject to "express and implied statutory limitations," *Armstrong*, 575 U.S. at 327, and constrained by historical "tradition[]," *Grupo Mexicano*, 527 U.S. at 319, which includes the common-law "roots" of the zone-of-interests requirement itself, *Lexmark*, 572 U.S. at 130 n.5. Thus, *Lexmark*'s references to "legislatively" or "statutorily created" causes of action do not suggest—let alone hold—that the zone-of-interests requirement does not apply to causes of action implied under equity. And regardless of whatever "implication[s]" *Lexmark* may have for prior precedent applying the zone-of-interests requirement to such 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).

That is especially warranted here because fundamental constitutional principles underscore that the zone-of-interests requirement applies even 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. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856-57 (2017). Although courts possess "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 relief,"

Grupo Mexicano, 527 U.S. at 322. It would thus be remarkable to conclude—as the district court did—that, by enacting an appropriations statute with certain limitations, Congress intended *not only* to allow courts to infer an equitable cause of action to enforce those limitations, *but also* to allow enforcement even by private individuals who would not fall within the zone of interests protected by that statute. Embracing 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*, 572 U.S. at 129; *Armstrong*, 575 U.S. at 326-27.

That plaintiffs' claim can (and should) be construed as an APA claim, *see* ER34 n.13, confirms the district court's error. The APA's cause of action expressly encompasses both statutory and constitutional challenges to agency action. *See* 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. *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)). And the zone-of-interests requirement indisputably applies to the APA cause of action. *Lexmark*, 572 U.S. at 129 (citing *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970)).

As we have explained, *supra* pp. 18-25, plaintiffs' alleged injuries fall outside the zone of interests of Section 2808. Plaintiffs therefore cannot satisfy the zone-of-interests requirement even under the "generous review" available in an APA case. *Lexmark*, 572 U.S. at 130 (quotation marks omitted). Yet under the district court's reasoning, plaintiffs would be able to evade the limitations Congress placed on the APA cause of action by failing to cite that statute and by instead invoking the courts' equitable jurisdiction. 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 Congress created for such challenges. The district court's contrary holding cannot be reconciled with law or logic.

In all events, plaintiffs do not have a cause of action outside the APA because this is not "a proper case" for the "judge-made remedy" of an implied cause of action directly under the Constitution's Appropriations Clause. *See Armstrong*, 575 U.S. at 326-27 (quotation marks omitted); *Grupo Mexicano*, 527 U.S. at 319. As discussed below, *infra* pp. 31-35, this case raises purely statutory, not constitutional, issues. And

plaintiffs identify no history or tradition of courts of equity inferring an analogous equitable cause of action directly under the Appropriations Clause in such circumstances.

3. The district court committed an equally fundamental error by holding, ER14-ER15, that the zone of interests for plaintiffs' claim is established not by the statutory text of 10 U.S.C. § 2808 but by the Appropriations Clause of the Constitution. That holding is flawed in both premise and conclusion.

First, the district court's premise that plaintiffs' claim rests not on Section 2808 but on the Appropriations Clause is foreclosed by *Dalton v. Specter*, 511 U.S. 462 (1994). In *Dalton*, 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. *Dalton*, 511 U.S. at 464. The court of appeals initially allowed the suit to proceed on the assumption that the plaintiffs were effectively seeking "review [of] a presidential decision." *Id.* at 467 (quotation marks omitted). 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 (like this one) alleging simply that an official has "exceeded his statutory authority are not 'constitutional' claims." *Id.* at 473.

Dalton's reasoning fully applies here. Plaintiffs' claim turns entirely on whether DoD's decision to construct eleven border-barrier projects pursuant to 10 U.S.C. § 2808 is consistent with that statute's restrictions on the use of military-construction funds. Under plaintiffs' theory of liability, the Appropriations Clause is implicated if and only if the Secretary of Defense has exceeded the authority conferred by Section 2808. Plaintiffs' claim thus raises "no constitutional question whatever"; the "only issues" involve "statutory interpretation." *Dalton*, 511 U.S. at 473-74 & n.6 (quotation marks omitted); *see United States v. McIntosh*, 833 F.3d 1163, 1175-77 (9th Cir. 2016) (analyzing Appropriations Clause claim by "focus[ing], as we must," exclusively "on the statutory text" of the appropriations rider that the government allegedly violated); *Harrington v. Schlesinger*, 528 F.2d 455, 457-58 (4th Cir. 1975) (disputes about "the

interpretation and application of congressional statutes under which the challenged expenditures either were or were not authorized" do not present a "controversy about the reach or application of" the Appropriations Clause).

The district court did not attempt to reconcile its conclusion with *Dalton*'s holding. The court instead cited the stay panel's decision granting plaintiffs a stay pending appeal in the prior litigation, which 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." *Sierra Club*, 929 F.3d at 696. But that is a distinction without a difference. Regardless of the particular manner in which a statute constrains an executive official's authority, a claim that an official exceeded his authority under the statute is one of statutory interpretation rather than separate constitutional mandate.

Under the motions panel's reasoning, courts could "deem *unconstitutional* any reviewable executive actions . . . that exceed a *statutory* grant of authority." *Sierra Club*, 929 F.3d at 712 (N.R. Smith, J., dissenting) (emphasis in original). 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." *Sierra Club*, 929 F.3d at 717 (N.R. Smith, J., dissenting).

Second, even accepting the premise that plaintiffs' claim could be viewed as resting on the Appropriations Clause, the district court's conclusion does not follow, because the relevant zone of interests would still be prescribed by Section 2808. 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 previously appropriated military-construction funds properly subject to Section 2808 in the event of a declaration of national emergency would satisfy that constitutional requirement. Plaintiffs contest only whether the terms of Section 2808's statutory limitations permit the use of military-construction funds here, not whether the Constitution permits Congress to authorize the Executive to use military-construction funds in particular

ways in the event of such an emergency. As the district court acknowledged, the "critical inquiry" for these purposes is "whether Section 2808 authorizes" DoD to construct the border-barrier projects at issue. ER16.

It thus follows that Section 2808 is the "provision whose violation forms the legal basis for [the] complaint," which is the relevant provision when applying the zone-of-interests requirement. *Bennett*, 520 U.S. at 176 (quoting *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990)) (emphasis and quotation marks omitted). Indeed, plaintiffs have identified no separate and independent constraint imposed by the Appropriations Clause as a reason to invalidate DoD's use of Section 2808. And the zone-of-interests requirement must be applied "by reference to the particular provision of law upon which the plaintiff relies," *id.* at 175-76—just as the relevant zone of interests for an APA claim is established by the substantive statute that was allegedly violated, and not by the APA itself, *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 767-68 (9th Cir. 2018).

For these reasons, plaintiffs' claim should be rejected for failure to satisfy the zone-of-interests requirement, as the Supreme Court has strongly signaled.

II. 10 U.S.C. § 2808 Authorizes The Challenged Military Construction Projects.

Even if plaintiffs could invoke a cause of action to enforce Section 2808, the permanent injunction should be reversed for the independent reason that the

challenged projects are fully consistent with the statutory requirements of Section 2808.

A. Section 2808 provides that, when the President declares a "national emergency . . . that requires use of the armed forces, the Secretary of Defense . . . may undertake military construction projects . . . that are necessary to support such use of the armed forces." 10 U.S.C. § 2808(a). The eleven military construction projects at issue here satisfy these statutory requirements. The President has declared a national emergency requiring use of the armed forces, and the Secretary of Defense has concluded—after consultation with the Chairman of the Joint Chiefs of Staff—that these eleven projects are military construction projects necessary to support the use of the armed forces deployed in connection with that national emergency. *See* ER84-ER90. The definition of military construction projects is satisfied, because each project is "construction, development, conversion, or extension of any kind carried out with respect to a military installation," 10 U.S.C. § 2801(a), given that each will take place on land "under the jurisdiction of the Secretary of a military department," *id.* § 2801(c)(4). In particular, two projects will be built on the Goldwater Range, an Air Force and Marine Corps bombing range, ER94; the remaining nine will be built on land assigned to Fort Bliss, an Army base. ER75. It was therefore lawful for the Secretary to undertake these projects under Section 2808.

The district court did not dispute the lawfulness of the President's national-emergency declaration under the National Emergencies Act, 50 U.S.C. § 1601 *et seq.*,

and "there is no precedent for a court overriding a President's discretionary judgment as to what is and is not an emergency." ER22. The district court also did not dispute that military-construction funds may be used to construct fencing and other barriers on a military installation, which DoD has previously done. *See* Congressional Research Service, *Military Construction Funding in the Event of a National Emergency*, 1-3 & tbl. 1 (updated Jan. 11, 2019), https://go.usa.gov/xdgby; ER72-ER73. Nor did the district court dispute that the challenged Section 2808 projects will be built on land under the jurisdiction of the Secretary of a military department, and that the two projects on the Goldwater Range constitute "military construction" as defined in 10 U.S.C. § 2801(a). *See* ER23 n.9. The district court nevertheless enjoined the Section 2808 projects for two reasons. As discussed below, both theories are fundamentally flawed.

B. The district court's primary theory was that nine of the challenged projects—those outside the Goldwater Range—are not being "carried out with respect to a military installation" because the land where the projects will be constructed is not a "discrete and traditional" military facility, ER24 & n.10, and because it is not "similar in nature or scope to 'a base, camp, post, station, yard, [or] center,'" ER25. In agreeing with plaintiffs that a project is "with respect to a military installation" only if it occurs at a place where the military has already been conducting certain unspecified activities for a lengthy (but unspecified) period of time, the district court erred.

First, the statutory definition of "military installation" includes every "base, camp, post, station, yard, [or] center," 10 U.S.C. § 2801(c)(4). It does not limit the type of base or other installation that qualifies for military construction purposes. Nor does it require that any base or land assigned to a base have been under military jurisdiction for any length of time. And longstanding military practice confirms that many military installations include noncontiguous property, including geographically distant sites, that DoD has determined, for a variety of reasons, to subject to centralized administrative control and jurisdiction. For example, the Special Forces site in Key West, Florida, is under the jurisdiction of Fort Bragg, North Carolina, while the Green River Test Complex in Utah is under the jurisdiction of the White Sands Missile Range in New Mexico. ER69 (also listing other examples). Yet DoD has long administered Fort Bragg and the White Sands Missile Range as single "military installation[s]." ER69.

Second, the definition of "military installation" also includes "other activity" under military "jurisdiction." 10 U.S.C. § 2801(c)(4). This broad residual category covers the wide range of locations and types of property that the military might need to use to conduct operations. Its meaning likewise includes any land under military jurisdiction and subject to the military's operational control. This conclusion is underscored by the very next clause of § 2801(c)(4), which describes "activity" overseas in terms of what is "under the [military's] operational control," *id.*, as well as by the Supreme Court's recognition that the statutory term "military installation" is

generally "synonymous with the exercise of military jurisdiction," *United States v. Apel*, 571 U.S. 359, 368 (2014).

There is no dispute that DoD lawfully acquired the property at issue and lawfully assigned that property to the jurisdiction of Fort Bliss. And the district court's concern that the government's "interpretation would grant [it] essentially boundless authority to reallocate military-construction funds to build anything [it] want[s], anywhere [it] want[s], provided [it] first obtain[s] jurisdiction over the land where the construction will occur," ER26, is misplaced. The administrative record demonstrates that DoD complies with a host of statutory and regulatory requirements before it can acquire land and bring that land under the jurisdiction of a military installation. ER67-ER68. Furthermore, DoD can undertake military construction under Section 2808 only in the event of a declaration of war or national emergency that requires use of the armed forces, and even then only if the Secretary concludes that such construction is necessary to support the use of the armed forces. Finally, the statute requires the Secretary to notify "the appropriate committees of Congress of the decision and of the estimated cost" of any such project before beginning military construction, 10 U.S.C. § 2808(b). DoD satisfied all of these requirements here. The district court's apparent belief that Section 2808's requirements are insufficient is no basis for adopting an interpretation of "military installation" in Section 2801—a term applicable not merely to Section 2808 but to other DoD

authorities—that imposes additional restrictions on DoD not present in the statutory text.

The district court also declined to follow the plain meaning of Section 2801's definition of "military installation" because, in the court's view, Congress's decision to enact the National Emergencies Act requires courts to construe all emergency-powers-related statutes narrowly. ER27-29. But nothing in that statute purports to restrict DoD's Section 2808 authority. And there is no basis to interpret a statute that is "not intended to enlarge or add to Executive power," ER28, to *contract* Executive power despite plain language to the contrary.

C. The district court alternatively held that, even if the challenged projects satisfy the definition of "military construction," none of them is "necessary to support [the] use of the armed forces" within the meaning of 10 U.S.C. § 2808(a). *See* ER29-ER34. That determination, however, is committed to the discretion of the Secretary of Defense by law. Questions of military necessity turn on "a complicated balancing of a number of factors which are peculiarly within [the Secretary's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *accord Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence" than "[t]he complex, subtle, and professional decisions as to the . . . control of a military force."). Accordingly, Article III courts should not second-guess "determinations regarding . . . military value." *District No. 1, Pac. Coast Dist. v. Maritime Admin.*, 215 F.3d 37, 42 (D.C. Cir. 2000).

Even if the Secretary's military-necessity determinations were reviewable, this Court at a minimum should defer to the Secretary's conclusion that the challenged projects are necessary to improve the effectiveness and efficiency of DoD personnel deployed to the border. *See*, *e.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("[C]ourts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest"); *Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986) ("Courts are properly wary of intruding upon that sphere of military decision-making" regarding "deployment of troops and overall strategies of preparedness"). The Secretary specifically found that each project will serve as a "force multiplier[]" by allowing DoD personnel to be redeployed to high-traffic border areas that currently lack barriers. ER92; *see generally* ER84-ER94, ER125-ER158; ER180-ER220. The Secretary made this finding after conducting an extensive internal deliberative process involving, among others, the Chairman of the Joint Chiefs of Staff. ER92. That military judgment warrants deference.

Despite acknowledging that the Secretary's "strategic and military determinations" under the statute are entitled to deference, ER30, the district court rejected the Secretary's military judgment. The court concluded that a border barrier was not necessary to prevent drug trafficking and other incursions onto the Goldwater Range, a test site for live weapons training. But Section 2808's reference to necessity does not entail the stringent level of indispensability, ER32, that the district court assumed. *Cf. United States v. Comstock*, 560 U.S. 126, 133-34 (2010)

(emphasizing that the word "necessary" does not typically mean "absolutely necessary," and often means merely "convenient," "useful," or "conducive") (quotation marks omitted); *Commissioner v. Heininger*, 320 U.S. 467, 471 (1943) (holding that the statutory term "necessary business expenses" covers expenses "appropriate and helpful to a business"). In any event, the task of assessing the military significance of individuals and drugs crossing the border onto an active military training facility or any other military installation is exactly the kind of judgment that the Secretary is uniquely equipped to make, and that courts have routinely refused to overrule. *Cf. Goldman*, 475 U.S. at 509-10 (deferring to Air Force uniform regulations prohibiting wearing of yarmulke); *Sebra*, 801 F.2d at 1142 (deferring to National Guard personnel-transfer decision); *see also Winter v. National Res. Def. Council, Inc.*, 555 U.S. 7, 33 (2008) (recognizing importance of military training).

The district court mistakenly concluded that the challenged projects are unnecessary because, once the projects are completed, fewer troops may need to be deployed to the border. ER31-ER32. But nothing in the statute precludes the Secretary of Defense from determining that construction of a barrier would serve as a force multiplier, allowing more efficient deployment of military personnel to locations along the border where they are needed. Plaintiffs presumably would not dispute that construction of fencing and other barriers around a military base in an overseas conflict zone could free up troops who would otherwise be needed to guard the perimeter, thereby allowing them to use their skills for other activities, such as

defeating an enemy force. The argument that this rationale is somehow inapplicable to the Goldwater Range or to Fort Bliss thus boils down to the argument either that those locations are not "military installations" or that the Secretary's reasoning was incorrect. Those arguments lack merit for the reasons given above.

Finally, the district court placed considerable weight on the idea that the challenged projects would benefit DHS as well the military. ER29-ER30. The court believed that such a benefit legally forecloses the possibility that the projects are necessary to support the armed forces. But no authority supports the court's atextual belief that, even when the Secretary has determined that a military construction project is "necessary to support [the] use of the armed forces," that project cannot be built under Section 2808 because it would also benefit a civilian agency.

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

In all events, the district court committed a serious abuse of discretion in granting a permanent injunction to the Sierra Club plaintiffs. "An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 32. An injunction—whether preliminary or permanent—can issue only if plaintiffs demonstrate irreparable injury, and only if that injury outweighs the harm to defendants, as well as to the public interest, in granting the injunction. *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"). And here, the balance of equities and public interest cut decisively in favor of the federal government and against injunctive relief.[4]

Indeed, when it stayed the district court's earlier injunction against the Section 284 construction, the Supreme Court considered the same aesthetic, recreational, and environmental interests advanced by these very plaintiffs, and it necessarily determined that the harm to the federal government from an injunction prohibiting border-barrier construction outweighs those interests. *See Trump v. Sierra Club*, 140 S. Ct. at 1 ("*Among the reasons* [for the stay] is that the Government has made a sufficient showing . . . that the plaintiffs have no cause of action.") (emphasis added); *Nken v. Holder*, 556 U.S. 418, 435-36 (2009) (stay of injunction pending appeal may issue only if the applicant satisfies all four stay factors, including that the balance of the harms and the public interest favors a stay). Although the district court itself correctly recognized the significance of the Supreme Court's decision in staying the Section 2808 injunction, it abused its discretion by overlooking that the Supreme Court's equitable balancing strongly weighed against entry of that injunction in the first place.[5]

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[4] Declaratory relief is also available only in the district court's discretion. *See, e.g.*, *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287-88 (1995). The same equitable factors that militate against injunctive relief here equally cut against declaratory relief. *See Samuels v. Mackell*, 401 U.S. 66, 69 (1971).

[5] The government in the Section 8005 appeal explained that a stay was particularly appropriate there for the additional reason that the unobligated funds at issue in that case would have expired at the end of the fiscal year. That said, the Supreme Court majority specifically rejected the dissent's proposal to limit the stay to prevent the expiration of funding, instead granting the broad stay requested by the

Even apart from the Supreme Court's stay decision, the district court's abuse of discretion is manifest. The injunction directly interferes with the government's ability to advance its "compelling interests in safety and in the integrity of our borders." *National Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 (1989). The record includes ample evidence of the high rates of drug smuggling between ports of entry at the southern border, as well as recent increases in apprehensions following illegal crossings. ER78-ER79. And the Secretary of Defense has concluded, based on advice from the Chairman of the Joint Chiefs of Staff, that the challenged military construction projects are necessary to support the use of the armed forces deployed in conjunction with a national emergency. ER92. By comparison, plaintiffs' asserted harms to their aesthetic, recreational, and environmental interests are insubstantial.

The Supreme Court similarly recognized the lopsided balance of equities in *Winter*, where plaintiffs raising similar interests sought to interfere with military training operations. 555 U.S. at 32-33 (reversing preliminary injunction that restricted Navy sonar-training exercises where plaintiffs claimed injury because they observed and photographed marine mammals and conducted scientific research). The Court held in *Winter* that "the District Court and the Ninth Circuit [had] significantly understated the burden the preliminary injunction would impose on the Navy's ability

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government permitting construction to continue pending the appeal. *Compare Trump v. Sierra Club*, 140 S. Ct. at 1, *with id.* at 1-2 (Breyer, J., concurring in part and dissenting in part from grant of stay).

to conduct realistic training exercises, and the injunction's consequent adverse impact on the public interest in national defense," which "plainly outweighed" the "ecological, scientific, and recreational interests in marine mammals" asserted by plaintiffs. *Id.* at 24, 33. Here, the balance of equities likewise bars injunctive relief.

Yet the district court in this case declined to engage in any balancing analysis at all. The court instead held that, whatever the benefits to the public of border-barrier construction, the balance of equities could not weigh in the government's favor due to the court's finding "that Defendants do not have the statutory authority under Section 2808" to construct the challenged projects. ER44. But that is just a merits argument, and no substitute for the balance of the equities and the public interest required before entering an injunction. Moreover, the district court's conclusion is contrary to *Winter*'s reasoning that the balance of equities cut in the government's favor even if the government had violated the statute at issue there. 555 U.S. at 32-33.

The district court also held that, by enacting the Consolidated Appropriations Act, *Congress* had already balanced the equities in plaintiffs' favor. ER44 (citing CAA § 230(a)(1)). That holding is again contrary to the Supreme Court's prior stay decision. There as here, plaintiffs sought to enjoin DoD's construction of border barriers pursuant to an appropriations statute independent of the CAA. Under the district court's view, the CAA would have predetermined the outcome of any balancing implicating the construction of *those* border barriers as well. Yet the Supreme Court stayed the court's injunctions pending appeal—a stay that, as noted,

could issue only if the balance of harms and the public interest favor allowing the government's border-barrier construction projects to proceed.

In any event, the district court's reasoning cannot be sustained even on its own terms. The CAA appropriated a lump sum to an account within the budget of the Department of Homeland Security (DHS), and specified that "[o]f the total amount made available under" that account, $1.375 billion "is for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector." CAA § 230(a)(1), 133 Stat. at 18, 28. The CAA also prohibited construction of border barriers at five locations not at issue here. CAA § 231, 133 Stat. at 28. The CAA did *not* prohibit DoD from relying on separate and preexisting statutory authorities to spend its own previously appropriated funds on border barriers. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") Still less did the CAA express any opinion whatsoever about the equitable balance between the government's interests in securing the border and the particular harms asserted by these plaintiffs to their aesthetic, recreational, and environmental interests. By nevertheless holding that the CAA preordains any equitable balancing arising from any challenge to any border-barrier construction—even military construction projects undertaken by DoD—the district court committed a clear abuse of discretion.

CONCLUSION

For these 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 the following consolidated cases, which are pending in this Court, are related to the present appeal: *Sierra Club, et al. v. Donald Trump, et al.*, No. 19-16102; *Sierra Club, et al. v. Donald Trump, et al.*, No. 19-16300; *State of California, et al. v. Donald Trump, et al.*, No. 19-16299; *State of California, et al. v. Donald Trump, et al.*, No. 19-16336. All of these related appeals arise out of the same cases in district court as the present appeal.

In those appeals, this Court denied the defendants' motion for a stay pending appeal in a published opinion, *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019), but the Supreme Court granted a stay pending appeal. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (Mem.). The consolidated appeals have been argued and are awaiting decision by this Court.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,876 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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ADDENDUM

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10 U.S.C. § 2801

§ 2801. Scope of chapter; definitions

(a) The term "military construction" as used in this chapter or any other provision of law includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road (as described in section 210 of title 23).

(b) A military construction project includes all military construction work, or any contribution authorized by this chapter, necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility (or to produce such portion of a complete and usable facility or improvement as is specifically authorized by law).

(c) In this chapter and chapter 173 of this title:

(1) The term "appropriate committees of Congress" means the congressional defense committees and, with respect to any project to be carried out by, or for the use of, an intelligence component of the Department of Defense, the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(2) The term "facility" means a building, structure, or other improvement to real property.

(3) The term "life-cycle cost-effective", with respect to a project, product, or measure, means that the sum of the present values of investment costs, capital costs, installation costs, energy costs, operating costs, maintenance costs, and replacement costs, as estimated for the lifetime of the project, product, or measure, does not exceed the base case (current or standard) for the practice, product, or measure.

(4) The term "military installation" means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control.

(5) The term "Secretary concerned" includes the Secretary of Defense with respect to matters concerning the Defense Agencies.

10 U.S.C. § 2808

§ 2808. Construction authority in the event of a declaration of war or national emergency

(a) In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act (50 U.S.C. 1601 et seq.) that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces. Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.

(b) When a decision is made to undertake military construction projects authorized by this section, the Secretary of Defense shall notify, in an electronic medium pursuant to section 480 of this title, the appropriate committees of Congress of the decision and of the estimated cost of the construction projects, including the cost of any real estate action pertaining to those construction projects.

(c) The authority described in subsection (a) shall terminate with respect to any war or national emergency at the end of the war or national emergency.