No. 19-16102

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

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

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

This Court directed the parties to provide supplemental briefing addressing two questions:

> (1) whether Plaintiffs have an equitable or constitutional cause of action for violation of the Appropriations Clause, and how *Dalton v. Specter*, 511 U.S. 462 (1994), bears on this question; and (2) whether Plaintiffs' cause of action should be treated as an APA claim, and, if so, whether it succeeds. The parties should also address whether the answer to question 2 affects the answer to question 1.

As to the first question, the substance of plaintiffs' claim is that the Department of Defense (DoD) lacked authority to transfer the funds at issue; that claim on these facts necessarily seeks to enforce a statutory rather than constitutional limitation. The claim cannot properly be characterized as raising only a constitutional violation of the Appropriations Clause, without regard to whether DoD committed a statutory violation of Section 8005 of the 2019 Defense Appropriation Act, because Section 8005 is the very authority the agency invoked for the funds transfer. The Appropriations Clause prohibits expenditures of funds only absent congressional authorization; thus, whether or not Section 8005 authorized the funds transfer here is a necessary element of plaintiffs' affirmative claim, not a mere defense to that claim. Indeed, in *Dalton v. Specter*, 511 U.S. 462 (1994), the Supreme Court drew a clear distinction between constitutional claims that the Executive Branch acted in "the conceded *absence* of *any* statutory authority" and statutory claims that the Executive Branch "acted in excess of such authority." *Id.* at 473. The Court squarely held that "claims simply alleging that the

President [or another executive officer] has exceeded his statutory authority are not 'constitutional' claims." *Id.* Otherwise, a plaintiff could simply recharacterize any claim that an agency action exceeds statutory authority to be a constitutional claim: a routine statutory challenge to a regulation could be transformed into a claim that the agency exercised legislative power in violation of Article I's Vesting Clause, and that the agency's invocation of a statutory delegation of authority is simply a "defense" to that constitutional "claim." *Cf. Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-44 (1984). In all events, controlling precedent compels the conclusion that the zone-of-interests requirement fully applies even to implied causes of action to enforce constitutional provisions. That is especially true here given how artificial it would be to recharacterize plaintiffs' statutory claim under Section 8005 as a constitutional claim under the Appropriations Clause.

As to the second question, the APA cannot save plaintiffs' claim and, if anything, APA analysis underscores why the claim fails. To begin, the APA is not applicable here because the mere internal transfer of funds under Section 8005 is neither reviewable final agency action in itself, nor properly part of any review of the distinct final agency action approving the Section 284 projects to which the funds would be transferred. More fundamentally, even assuming the APA were applicable because its final-agency-action condition could be met, plaintiffs indisputably must satisfy the zone-of-interests requirement under the APA, which they plainly cannot do. The fact that plaintiffs cannot satisfy the APA's zone-of-interests requirement forecloses any attempt to

invoke an equitable or constitutional cause of action to end-run the limits Congress has imposed in the APA. Thus, the answer to the second question does affect the answer to the first question: Because plaintiffs fail to satisfy the zone-of-interests requirement under the APA, they cannot rely on any implied cause of action, even if one were available, to avoid the APA's requirements.

In sum, as detailed further below, this Court should hold that the government is likely to succeed on its argument that plaintiffs cannot sue to enforce Section 8005's limitations. For this reason and the others previously briefed, this Court should stay the district court's injunction.

ARGUMENT

As the government previously explained, plaintiffs cannot sue to enforce Section 8005's limitations because they fall well outside the zone of interests of that statutory provision: plaintiffs' aesthetic and recreational interests in opposing border barrier construction under Section 284's counter-drug support provisions are entirely unrelated to the Section 8005 restrictions they invoke, in which Congress specified DoD's authority to internally transfer its statutorily appropriated funds among statutorily authorized projects. *See* Mot. 8-13, Reply 3-7. Plaintiffs cannot evade that limitation by characterizing their claim as an equitable or constitutional cause of action for violation of the Appropriations Clause, both because their claim is statutory rather than constitutional in nature and because the zone-of-interests requirement would equally bar their claim regardless. Nor can the APA solve plaintiffs' problem, both because it

is unavailable here and because their inability to satisfy the zone-of-interests requirement is fatal to any express APA claim and preclusive of any implied claim. In short, regardless of how plaintiffs try to characterize the legal provision they rely on and the cause of action they invoke to enforce it, their suit must fail because they are not proper parties to invoke the Section 8005 limitations accompanying DoD's appropriation from Congress.

I. Plaintiffs Do Not Have An Equitable or Constitutional Cause of Action for Violation of The Appropriations Clause.

A. Plaintiffs' Claim Is Necessarily Statutory, Not Constitutional.

The Appropriations Clause provides that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. "[I]n other words, the payment of money from the Treasury must be authorized by a statute," and thus a necessary predicate of an Appropriations Clause violation is the absence of statutory authority. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990). Accordingly, the existence and scope of statutory appropriations are central to the text and purpose of the Appropriations Clause, and claims concerning authority to disburse federal funds necessarily turn on the text of the governing appropriations statutes.

Here, as plaintiffs acknowledge, *see* First Am. Compl. ¶¶ 106-09, 166, 187-189 (Dkt. No. 26), DoD expressly invoked specific statutory authority in Section 8005 of the 2019 Defense Appropriation Act to transfer congressionally appropriated funds

across internal DoD accounts to complete congressionally authorized construction projects. DoD has not invoked any inherent Executive authority to spend money or complete construction, and this case thus does not turn on any dispute about constitutional authorities. All parties agree that an expenditure must be statutorily authorized; the only question is whether the applicable statutes authorized the expenditures at issue here.

Plaintiffs' claim cannot be characterized as a claim seeking to enforce only the Appropriations Clause, with Section 8005 serving merely as a defense to liability raised by the government. To the contrary, defendants' alleged statutory violation is an essential element of any purported Appropriations Clause "claim," because there is no Appropriations Clause violation if the relevant expenditure was "authorized by a statute." *Richmond*, 496 U.S. at 424. Put differently, plaintiffs obviously could not have pleaded an Appropriations Clause "claim" by simply objecting to defendants' transfer of funds while saying nothing in the complaint about whether defendants had statutory authority. Absent plaintiffs' allegation that neither Section 8005 nor any other statute "authorized" defendants' transfer of funds, *see* Pl. Mot. for Prelim. Inj. 11-12 (Dkt. No. 29); First Am. Compl. ¶¶ 106-09, 166, 187-189, plaintiffs' Appropriations Clause claim with respect to DoD's transfer would fail as a matter of law. Accordingly, the existence or absence of statutory authority under Section 8005 is no mere "defense" left to the government's discretion whether to raise, but rather a necessary ingredient for plaintiffs to affirmatively establish their claim for relief.

Notably, the Fourth Circuit has squarely held that a dispute about whether a defendant has spent funds in excess of statutory authority rather than in conceded absence of such authority presents a statutory claim rather than a constitutional claim under the Appropriations Clause. *Harrington v. Schlesinger*, 528 F.2d 455, 457-58 (4th Cir. 1975). Such a claim "presents no controversy about the reach or application of" the Appropriations Clause itself, but rather turns solely on "the interpretation and application of congressional statutes under which the challenged expenditures either were or were not authorized." *Id.*

Plaintiffs' challenge also cannot be understood as an Appropriations Clause "claim," with a statutory "defense" raised by the government, because that characterization would permit any garden-variety statutory-authority claim to be relabeled a "constitutional" claim. The Supreme Court has rejected that very reasoning: "Our cases do not support the proposition that 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 v. Specter*, 511 U.S. 462, 472 (1994); *see also id.* ("[W]e have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority."). Although *Dalton* involved a challenge to the Executive's exercise of authority under a statute restricting military base closings rather than military spending, its reasoning fully applies in the Appropriations Clause context: where the dispute is "simply" whether an executive branch official "has exceeded his statutory authority," "no constitutional question whatever is raised," "only

issues of statutory interpretation." 511 U.S. at 473 & n.6 (quotation marks omitted). *Dalton* thus makes clear that a plaintiff cannot simply recharacterize a claim that an agency action exceeds statutory authority—such as a routine challenge to a regulation—as a claim that the agency is violating Article I's vesting of legislative power in Congress, U.S. Const. art. I, § 1, and that the agency's reliance on a statute purportedly delegating authority for the regulation is merely a flawed statutory "defense" to that constitutional "claim." That semantic sleight-of-hand would have the radical effect of transforming every *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.

For this reason, plaintiffs' contention that DoD "violate[d] the restrictions Congress imposed . . . in Section 8005" and spent money absent congressional authorization, Pl. Mot. for Prelim. Inj. 15-16, is necessarily a statutory claim. *See Dalton*, 511 U.S. at 472-74. In fact, because the Appropriations Clause by its terms refers to "Appropriations made by Law," claims related to the appropriations power will almost always be based on a statutory-authority dispute. As *Dalton* explained, a claim of constitutional dimension would arise only in a rare case like *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), "involv[ing] the conceded *absence* of *any* statutory authority" and the assertion instead of "inherent constitutional power as the Executive." *Dalton*, 511 U.S. at 473. Unsurprisingly, plaintiffs have not cited (and

defendants are not aware of) any case in which a purely constitutional dispute over the appropriations power was at issue.

This Court's decision in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), demonstrates the point. Although dicta in that case referred to an "Appropriations Clause" violation, *id.* at 1174, the Court's analysis focused entirely on the operative statutory limitation, which was set forth in an appropriations rider. *See id.* at 1172 ("Congress has enacted an appropriations rider that specifically restricts DOJ from spending money to pursue certain activities"); *id.* at 1175 ("We focus, as we must, on the statutory text."). Likewise, the Court's invocation of the "separation of powers," *id.* at 1175, did not necessarily mean that the alleged violation of the appropriations rider was constitutional rather than statutory in nature, and the characterization was not dispositive or even relevant to either the merits question presented or the Article III standing analysis in which the language appeared. Especially given that *McIntosh* did not even acknowledge, let alone distinguish, *Dalton*, its dicta should not be read as creating a sub silentio conflict with binding Supreme Court precedent.

B. The Zone-Of-Interests Requirement Applies To Constitutional Claims.

Even assuming plaintiffs' claim could be construed as an implied cause of action to enforce the Appropriations Clause rather than Section 8005, their claim would still fail under the zone-of-interests requirement. The Supreme Court has "made clear" that the zone-of-interests limitation is a "requirement of general application" that "applies

to all statutorily created causes of action." *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). It reflects the common-sense presumption 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. *See Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 178 (2011); *see also Lexmark*, 572 U.S. at 130. The Supreme Court has long recognized that the same presumption applies to causes of action to enforce constitutional prohibitions. *See, e.g.*, *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) ("[T]he Court has required that the plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute *or constitutional guarantee* in question.'" (quoting *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (emphasis added)); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320-21 n.3 (1977) (applying zone-of-interests test to Dormant Commerce Clause challenge).[1]

The Supreme Court in *Lexmark* did not overrule its prior cases including constitutional claims within the zone-of-interests requirement. Although *Lexmark* held that the requirement presumptively applies to all "statutory" or "statutorily created"

[1] *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), did not abandon the zone-of-interests requirement for the constitutional claim there. Instead, the Court held that it did not need to address whether "the scope of plaintiffs' Establishment Clause rights" included "a legally protected interest in the admission of particular foreign nationals," because the government's argument on that issue "concern[ed] the merits" rather than Article III standing, and there was no Establishment Clause violation at all. *See id.* at 2416.

causes of action, 572 U.S. at 129, it did not even suggest, let alone hold, that the requirement does *not* apply to non-statutory causes of action, much less to any constitutional claims regardless of whether the cause of action is expressly authorized by statute (such as the APA) or implicitly authorized under the statutory grant of equitable jurisdiction or the Constitution itself. Accordingly, regardless of whatever "implication[s]" *Lexmark* might have for prior precedent applying the zone-of-interests test to constitutional claims, the Supreme Court has repeatedly admonished that "the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

Moreover, *Lexmark* is entirely consistent with the Court's prior precedent concerning constitutional claims. *Lexmark*'s reference to "statutory" or "statutorily created" causes of action necessarily encompasses equitable causes of action as well, which are inferred from Congress's statutory grant of equity jurisdiction in the Judiciary Act of 1789, *see Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999), and are "subject to express and implied statutory limitations," *see Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015). Indeed, the Supreme Court has made clear that, if anything, the zone-of-interests test likely applies with particular rigor to implied equitable causes of action. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 396, 400 & n.16 (1987). And it would likely violate "separation-of-powers principles" for federal courts to hold that an action may be "implied to enforce the

Constitution itself" *without* Congress either having authorized courts to exercise "traditional equitable powers" or otherwise given its imprimatur to such actions. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017). Even assuming that an implied cause of action directly under the Constitution could somehow exist wholly apart from Congress, there is no reason to think that the Framers of the Constitution were any more inclined to authorize the "absurd consequences" of allowing any plaintiff with an Article III injury to sue to enforce a constitutional provision without regard to whether their interests were related to the provision invoked. *See Thompson*, 562 U.S. at 176-77; *see also Lexmark*, 572 U.S. at 130 n.5 (recognizing that the "roots" of the zone-of-interests test "lie in [a similar] common-law rule").

Importantly, these reasons why the zone-of-interests requirement applies to constitutional claims carry particular weight for plaintiffs' purported Appropriations Clause claim. Even assuming that the challenge to DoD's transfer of funds may somehow be characterized as constitutional rather than statutory in nature, that claim still necessarily rests on the premise that, as discussed above, DoD lacked statutory authority in general and exceeded its statutory authority under Section 8005 in particular. It thus would make little sense to allow plaintiffs' artificial invocation of the Appropriations Clause to justify end-running the zone-of-interests limitations on enforcing Section 8005 directly. Relatedly, plaintiffs also cannot undermine the zone-of-interests requirement by looking to the interests generally protected by the Appropriations Clause, rather than the interests specifically protected by Section 8005.

Regardless of whether the cause of action exists under the APA, a separate statutory provision, or in equity, coverage within the zone of interests "is to be determined … by reference to the particular provision of law upon which the plaintiff relies." *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997); *see also id.* at 176 ("the specific provision which they alleged had been violated"). The Appropriations Clause alone does not resolve the dispute in this case; plaintiffs' allegations that DoD violated Section 8005 form the core of the dispute.

In sum, any Appropriations Clause violation is necessarily predicated on a Section 8005 violation, and thus parties whose interests do not make them proper plaintiffs to sue to enforce Section 8005 are likewise not proper plaintiffs to sue to enforce the Appropriations Clause based on the alleged Section 8005 violation. Although the analysis might well be different in a hypothetical scenario where DoD had acted in the conceded absence of any statutory appropriation to construct border barriers, the sole basis for the actual Appropriations Clause claim alleged in this case is that DoD exceeded the limits on its authority to internally transfer statutorily appropriated funds among statutorily authorized projects. And whatever the precise scope of the zone of interests for *that* violation, plaintiffs' aesthetic and recreational interests in land that happens to be where transferred funds are used to construct border barriers falls well short. Accordingly, this defect alone is sufficient reason to reject plaintiffs' claims and to stay the district court's injunction.

II. The APA Cannot Save Plaintiffs' Claim.

Although this Court has inquired about the relevance of the APA, plaintiffs themselves did not present an APA claim to the district court. Rather, plaintiffs argued that the zone-of-interests requirement applicable to APA claims does not apply to a claim seeking ultra vires review. Plaintiffs thus do not and cannot deny that they can bring suit under the APA only if they suffer the "type of injury . . . within the 'zone of interests' protected by" the legal provision the agency is alleged to have violated. *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 n.4 (1986); *see also Lexmark*, 572 U.S. at 129 (noting that the zone-of-interests standard originated as "a limitation on the cause of action for judicial review conferred by the Administrative Procedure Act"). If plaintiffs had expressly brought an APA claim, they would have been unable to argue that the zone-of-interests requirement has no application to this case.

Indeed, the APA provides no help to plaintiffs. At the outset, plaintiffs' challenge to the transfer of funds under Section 8005 does not satisfy the "final agency action" condition on the availability of the APA cause of action. More importantly, even if they could satisfy the final agency action requirement, plaintiffs do not fall within any zone of interests arguably protected by Section 8005. That failure is fatal to their APA claim, and it likewise demonstrates why they cannot evade the APA's requirements merely by disclaiming the applicability of that statutory framework.

A. DoD's Internal Transfer Of Funds Is Not Final Agency Action Reviewable Under The APA.

The APA creates a cause of action for judicial review of "final agency action" at the behest of a person alleging to be "adversely affected or aggrieved" by that action. 5 U.S.C. §§ 702, 704. Final agency action both "mark[s] the 'consummation' of the agency's decisionmaking process," and, more significantly here, is an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (citations omitted). This Court has held that a final agency decision may have "the status of law or comparable legal force, and . . . immediate compliance with its terms is expected." *Oregon Nat. Desert Ass'n v. United States Forest Serv.*, 465 F.3d 977, 987 (9th Cir. 2006).

As a threshold matter, DoD's internal transfer of funds across the agency's own accounts under Section 8005 is not final agency action that can be reviewed under the APA. The funds transfer has no legal consequences for plaintiffs; it merely moves appropriated funds from one part of DoD's budget to another. DoD's transfer of funds imposes no obligations and confers no rights upon plaintiffs.

Because plaintiffs' claimed injuries arise not from the transfer of funds alone but instead from the construction of border barriers, plaintiffs have suggested that the funds transfer could be characterized as a "preliminary, procedural or intermediate" step that would be subject to APA review of any final agency action by DoD under Section 284. 5 U.S.C. § 704. Although a closer question, that argument misunderstands

DoD's separate and distinct authority under the two statutory schemes. The funds transfer was neither categorically necessary to, nor inherently bound up in, DoD's approval of DHS's counter-drug support request.

To be sure, the transfer was ancillary to DoD's decision to authorize counter-drug support for DHS under Section 284, as DoD needed to identify some source of funding before the counter-drug projects could proceed to construction of the barriers, roadways, and lighting to be installed in the drug-smuggling corridors. But the fact that the two decisions were both necessary to construction does not make each one separately a final agency action. The record makes clear that the basis for DoD's decision to authorize assistance to DHS was the Acting Secretary's determination that the criteria set forth in Section 284 for providing counter-drug support were satisfied. *See* Rapuano Dec. Exh. B. The basis for the transfer of funds, by contrast, was the Acting Secretary's determination that the internal funds transfer complied with Section 8005. *See* Rapuano Dec. Exh. C. The two actions were distinct, not merely sequential stages of a single proceeding before the agency. *Cf. Burns v. Director, Office of Workers' Comp. Programs*, 41 F.3d 1555, 1561-62 (D.C. Cir. 1994) (judicial review of final decision of Benefits Review Board denying workers' compensation claim encompassed prior Board rulings remanding the same claims).

B. The APA's Zone-Of-Interests Requirement Is Fatal To Plaintiffs' Claims.

Even if the final agency action requirement were satisfied and thus the APA cause of action were available here, these plaintiffs cannot invoke it. The zone-of-interests requirement indisputably applies to the APA cause of action, *supra* at 13, and the APA's cause of action expressly encompasses both statutory and constitutional challenges to agency action. 5 U.S.C. § 706(2)(B) (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").

As we have explained, plaintiffs plainly cannot satisfy the zone-of-interests requirement because their aesthetic and recreational injuries are entirely unrelated to the interests protected by Section 8005's limitations. *Supra* at 12; Mot. 10-11. Thus, plaintiffs cannot satisfy the zone-of-interests requirement even under the APA's "generous review provisions," *Lexmark*, 572 U.S. at 130, underscoring why plaintiffs similarly cannot succeed on any implied cause of action that may be available. This Court has held that "[t]he APA is the sole means for challenging the legality of federal agency action" when there is neither a private right of action nor a specialized provision for judicial review, and where the criteria for review under the APA are met. *See Hoefler v. Babbitt*, 139 F.3d 726, 728 (9th Cir. 1998); *see also Bennett*, 520 U.S. at 175 (the APA "applies universally 'except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law'") (quoting 5 U.S.C.

§ 701(a)); *Japan Whaling*, 478 U.S. at 230 n.4 (explaining that the APA provides a cause of action whenever the criteria for APA review are satisfied). Section 8005 does not provide an explicit cause of action, nor is there any specialized mechanism for judicial review of plaintiffs' claims outside the APA. Thus, if the final agency action condition is satisfied and so the APA cause of action is otherwise available, plaintiffs cannot avoid the zone-of-interests requirement merely by recasting their claim in equity.

Accordingly, a challenge to final agency action can—and should—be reviewed under the APA even when the plaintiff has not explicitly labeled the claim as one arising under the APA. For example, in a case challenging decisions of the Forest Service that prevented plaintiffs from reaching their mining claims using motorized vehicles, plaintiffs expressly identified only some of their claims as APA claims and described other claims in other terms. *Clouser v. Espy*, 42 F.3d 1522, 1527 (9th Cir. 1994). But this Court concluded that "plaintiffs' other arguments against the challenged actions—that they were taken without statutory authority, or that they violate statutory standards—should also be regarded and treated as claims under the APA." *Id.* at 1528 n.5 (unless Congress has provided an alternative avenue of review, "review under a framework statute such as the APA is the sole means for testing the legality" of final agency action); *see also Alto v. Black*, 738 F.3d 1111, 1117 (9th Cir. 2013) (because all of plaintiffs' claims "involve challenges to the propriety of the BIA's decision," all "may therefore be fairly characterized as claims for judicial review of agency action under the APA," although only one was "explicitly denominated as an APA claim in the complaint").

Consequently, to the extent the APA cause of action is applicable, plaintiffs cannot evade the limitations that Congress has placed on that cause of action simply by failing to cite the APA and instead invoking equity jurisdiction. As previously noted, equitable causes of action are "subject to express and implied statutory limitations." *Armstrong*, 135 S. Ct. at 1385. Similarly, even assuming that there is an implied cause of action directly under the Constitution apart from equity, such causes of action should not be inferred where Congress has created an "exclusive statutory alternative remedy," even if that remedial scheme "do[es] not provide complete relief for the plaintiff." *See Schweiker v. Chilicky*, 487 U.S. 412, 421, 423 (1988). In short, whether construed as an APA claim or as an implied cause of action in equity or under the Constitution, plaintiffs' claim fails.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the type-volume limitation of 8,000 words because it contains 4,516 words. The foregoing complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ *Courtney L. Dixon*
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