IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB, *et al.*, Plaintiffs-Appellees, v. DONALD J. TRUMP, *et al.*, Defendants-Appellants.	No. 19-17501

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

Congress has given the Secretary of Defense the authority, in the event of a "declaration by the President of a national emergency . . . that requires the use of the armed forces," to "undertake military construction projects . . . not otherwise authorized by law" that are "necessary to support such use of the armed forces." 10 U.S.C. § 2808. The Secretary has determined that eleven border-barrier projects are necessary to support the use of the armed forces in connection with the President's declaration of a national emergency at the southern border. The district court entered a permanent injunction prohibiting the use of § 2808 military-construction funds for those projects, but stayed that injunction pending the government's appeal.

The district court's decision to grant a stay pending appeal was correct, and certainly not an abuse of discretion. The Supreme Court's stay of an injunction in a related appeal concerning border-barrier construction resolved the balance of equities in the government's favor, and raises substantial doubts about the legal basis for the injunction in this appeal. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (Mem.). Prior Supreme Court decisions such as *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), likewise make clear that plaintiffs' asserted harms to their aesthetic, recreational, and environmental interests are insubstantial in comparison to the government's interests. And the government is likely to prevail on the merits both because plaintiffs are not proper parties to raise § 2808 objections to the projects and

because the projects are entirely lawful in any event. Accordingly, this Court should deny plaintiffs' motion to lift the stay.[1]

STATEMENT

Plaintiffs Sierra Club and Southern Border Communities Coalition (SBCC) filed this action seeking to enjoin the government from constructing border barriers at several project locations.

The government previously appealed the district court's earlier decision in this case enjoining the use of funds transferred among internal Department of Defense (DoD) accounts, pursuant to §§ 8005 and 9002 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018), for border-barrier construction under 10 U.S.C. § 284. *Sierra Club v. Trump*, 9th Cir. No. 19-16102 (lead case). A divided panel of this Court denied the government's request for a stay, *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019), but the Supreme Court granted a stay pending appeal. The Supreme Court held that, "[a]mong the reasons" for 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

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[1] No emergency requires immediate resolution of plaintiffs' motion. Construction of the same § 2808 projects challenged here had already been enjoined by a different district court when the court issued the injunction and stay in this case. *El Paso County v. Trump*, No. EP-19-CV-66-DB (W.D. Tex. Dec. 10, 2019) (ECF No. 136). The government has sought a stay pending appeal in that case (5th Cir. No. 19-51144), but the stay motion in that case has not yet been fully briefed.

compliance with Section 8005." *Sierra Club*, 140 S. Ct. at 1. That appeal remains pending in this Court.

The decision at issue in this appeal involves the use of funds under a separate statutory provision, 10 U.S.C. § 2808. In that decision, the district court permanently enjoined the government's use of military-construction funds for eleven border-barrier projects, holding that 10 U.S.C. § 2808 did not authorize the use of those funds. The district court refused plaintiffs' invitation to invalidate the President's declaration of a national emergency, explaining that "whether the national emergency truly exists, and requires use of the armed forces, are nonjusticiable political questions." Order 21. But the district court held that plaintiffs had an equitable cause of action "to enjoin unconstitutional official conduct," *id.* at 11, and were within the zone of interests of the Appropriations Clause, *id.* at 11-14. The district court relied heavily on the opinion issued by the stay panel majority in the first appeal in addressing "the same arguments," *id.* at 11. The court then held that nine of the eleven border barrier projects were not being carried out with respect to a military installation, as § 2808 requires. *Id.* at 22-28.[2] The court further held that, in its view (and contrary to the assessment of the Secretary of Defense), none of the projects was "necessary" to support the use of the armed forces. *Id.* at 28-33.

[2] Plaintiffs do not dispute that the two project locations on the Goldwater Range comply with the statute's definition of a military installation.

In granting a permanent injunction, the district court concluded that Sierra Club members would suffer irreparable injury to their aesthetic and recreational interests from additional construction on the already heavily disturbed land. Order 37-39. The court also held 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. *Id.* at 39-42. The court further held that the balance of the harms and the public interest supported an injunction because the court concluded that Congress had already balanced the need for border-barrier construction through the appropriations process. *Id.* at 42-44.

The district court stayed its injunction pending appeal, recognizing that a stay was supported by several 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." Order 45. 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." *Id.*

ARGUMENT

The district court properly exercised its discretion to stay the permanent injunction pending appeal. In determining whether such a stay is warranted, courts consider (1) "whether the stay applicant has made a strong showing that he is likely to

succeed on the merits"; (2) "whether the applicant will be irreparably injured absent a stay"; (3) "whether issuance of a stay will substantially injure the other parties interested in the proceeding"; and (4) "the public interest." *Nken v. Holder*, 556 U.S. 418, 425-26 (2009). All four factors strongly support the stay here. The district court's entry of a stay is subject to deferential appellate review under the abuse-of-discretion standard. *Blue Cross & Blue Shield of Alabama v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 724 (9th Cir. 2007).

Plaintiffs have not demonstrated that the district court abused its discretion. To the contrary, the Supreme Court's stay decision in the related appeal reflects a determination that the balance of the harms and the public interest support a stay, and that balance is substantially identical here. Moreover, plaintiffs' arguments depend principally on the decision denying a stay issued by a panel of this Court in the earlier appeal. But the district court correctly recognized that the Supreme Court reached a different conclusion about those issues—and the Supreme Court's stay decision significantly undermines plaintiffs' reliance on this Court's earlier decision denying the same relief. In short, the district court's stay pending appeal was a proper exercise of that court's discretionary authority, and the stay should remain in place while this Court considers the merits of the government's appeal.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING A STAY PENDING APPEAL.

A. The Balance Of Equities Favors The Government.

As in the earlier, related appeal from the same case, the balance of the harms and the public interest strongly favor a stay pending appeal. The Supreme Court has already considered the aesthetic, recreational, and environmental interests advanced by the very same plaintiffs, and determined that the harm to the government from an injunction prohibiting border-barrier construction outweighs those interests. The district court correctly recognized the significance of the Supreme Court's stay decision in balancing the equities in this case. Indeed, given that the Supreme Court granted a stay in the prior appeal even where the district court and this Court had denied one, it follows *a fortiori* that the district court did not *abuse its discretion* in granting a stay here.

The district court's 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. ECF No. 236-9 at 3-4. The government's interests here are even stronger, where 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. ECF No. 206-2 at 9.

As in the earlier appeal, plaintiffs' asserted harms to their aesthetic, recreational, and environmental interests are, by comparison, insubstantial. The Supreme Court necessarily reached that conclusion in entering a stay pending appeal in the earlier appeal concerning border-barrier construction under § 8005. Such stays 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. *Nken*, 556 U.S. at 435-36; *cf. Winter*, 555 U.S. at 20 (holding that a preliminary injunction may issue only if the applicant satisfies all four factors). In opposing the government's stay application, plaintiffs advanced arguments no different from those they advance now—yet the Supreme Court entered a stay pending appeal nonetheless, demonstrating that plaintiffs' arguments are foreclosed here. *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).[3]

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[3] Amici States argue that a stay pending appeal would indirectly reduce their tax revenues, Amicus Br. 3-5, and impair their ability to enforce their environmental laws, Amicus Br. 5-7. But a speculative and indirect effect on tax revenue is not even sufficient to support standing, *see Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992), let alone establish irreparable harm. And the government's interest in supporting the use of the armed forces in connection with a national emergency plainly outweighs these asserted harms, *see Winter*, 555 U.S. at 26, as the Supreme Court held in granting a stay—over similar objections by States as amici—in the government's prior appeal.

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 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 the plaintiffs. *Id.* at 24, 33. Here, the balance of equities likewise bars injunctive relief and at a minimum supports the district court's exercise of discretion in granting a stay.

Plaintiffs contend that Congress has balanced the equities in declining to appropriate the funds at issue here. Mot. 19-20 (citing Consolidated Appropriations Act of 2019 (CAA), Pub. L. No. 116-6, div. A, 133 Stat. 13 (Feb. 15, 2019)). But that is just a merits argument in the guise of an equitable argument. And it 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 CAA

The States' asserted interest in enforcing their laws is even weaker here, in light of § 2808's "without regard to" clause. *Infra* at 13.

says nothing 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. Moreover, the mere grant of a discrete appropriation to one agency (DHS) does not implicitly prohibit another agency (DoD) from relying on its independent statutory authority to spend its own appropriated funds. *Infra* at 19.

Plaintiffs also contend (Mot. 20) that "the environmental effects of a multibillion-dollar construction project are effectively impossible to undo." But the Supreme Court granted a stay pending appeal in the prior appeal over similar objections from these same plaintiffs and a dissent. *See Trump v. Sierra Club*, 140 S. Ct. at 1-2 (Breyer, J., concurring in part and dissenting in part).

B. The Government Is Likely To Prevail On The Merits In this Appeal.

Given that the balance of equities cuts so strongly in the government's favor, the district court could not abuse its discretion in granting a stay unless the government were unable to demonstrate even a likelihood of success on the merits. *See Nken*, 556 U.S. at 434-35. The government, however, is very likely to succeed, especially given the Supreme Court's strong suggestion that these plaintiffs are not proper parties to sue.

1. Plaintiffs Are Not Proper Parties To Challenge The § 2808 Projects.

When the President declares a "national emergency . . . that requires use of the armed forces," Congress has authorized the Secretary of Defense to use funds "appropriated for military construction" to build "military construction projects" that the Secretary deems "necessary to support such use of the armed forces." 10 U.S.C. § 2808. Plaintiffs contend that § 2808 forbids DoD from expending previously appropriated funds on these military construction projects. But because plaintiffs fall well outside the zone of interests protected by § 2808, they cannot bring suit to enforce that statute.

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). Even under the "generous review provisions" of the Administrative Procedure Act (APA), 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) (quotation marks omitted); *see also id.* at 400 & n.16 (suggesting that, in implied causes of action outside the APA, there may be a heightened requirement for the plaintiff to show that the statutory provision sought to be enforced is intended for its "*especial* benefit"). The zone-of-interests requirement avoids the "absurd

consequences" that "would follow" if "any person injured in the Article III sense by a [statutory] violation could sue." *Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 176-77 (2011).

Congress enacted § 2808 to facilitate military construction in certain circumstances. The statute contains two substantive prerequisites: 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). Neither suggests any legislative purpose related to plaintiffs' aesthetic, recreational, and environmental interests. Similarly, 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 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, § 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.*; *see United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007) (en banc) ("statutory 'notwithstanding' clauses broadly sweep aside potentially conflicting laws"). Because plaintiffs' interests are unrelated to, and indeed inconsistent with, the purposes of

§ 2808, plaintiffs cannot satisfy the zone-of-interests requirement to enforce any statutory constraints in that provision. *See Clarke,* 479 U.S. at 399.[4]

In response, plaintiffs argue (Mot. 9-10) that the zone-of-interests requirement does not apply to constitutional claims. But that argument is foreclosed by binding precedent. As the Supreme Court has held, the zone-of-interests requirement is one "of general application." *Lexmark*, 572 U.S. at 129. And the requirement applies even when a plaintiff invokes a "constitutional guarantee." *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).[5]

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[4] For this reason, plaintiffs would not satisfy the zone-of-interests requirement even if this Court construes their claim as arising under the APA. *See* Mot. 12 n.1.

[5] *Lexmark*'s reference to "a legislatively conferred cause of action," 572 U.S. at 127, encompasses plaintiffs' invocation of an implied cause of action in equity, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326–27 (2015). 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), and thus subject to "express and implied statutory limitations," *Armstrong*, 575 U.S. at 327. Moreover, that equitable jurisdiction is constrained by historical "tradition[]," *Grupo Mexicano*, 527 U.S. at 319, and indeed the zone-of-interests requirement itself has common-law "roots," *Lexmark*, 572 U.S. at 130 n.5.

Plaintiffs also contend (Mot. 11-12) that their aesthetic, recreational, and environmental interests are protected by § 2808 merely because the statute addresses construction. But that argument misunderstands the holding of *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), which 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. By contrast, § 2808 evinces no concern about the type of military construction the Secretary might authorize or its effect on any third party's aesthetic, recreational, or environmental interests. Indeed, § 2808's "without regard to" 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 follows that plaintiffs are neither "reasonable" nor "predictable" challengers to the § 2808 projects at issue.

Nor is the relevant zone of interests measured by reference to the Constitution alone (Mot. 9). Plaintiffs' claim turns entirely on whether DoD's actions violated § 2808. Under plaintiffs' theory of liability, the Appropriations Clause is implicated if

and only if the Secretary of Defense has exceeded the authority conferred by § 2808. Plaintiffs' claim thus raises "no constitutional question whatever"; the "only issues" involve "statutory interpretation." *Dalton v. Specter*, 511 U.S. 462, 473-74 & n.6 (1994) (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). Accordingly, even assuming that plaintiffs have a cause of action outside the APA, the relevant zone of interests for plaintiffs' claim is established by § 2808, not by the Appropriations Clause—just as the relevant zone of interests for an APA claim is established by the substantive statute that was allegedly violated, not by the APA itself. *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 767-68 (9th Cir. 2018).

Plaintiffs cite (Mot. 9) this Court's decision denying the government a stay in the earlier appeal, *Sierra Club*, 929 F.3d at 704, to support their argument that they come within the zone of interests of the Appropriations Clause. But the district court correctly recognized that the Supreme Court's subsequent order granting the government a stay pending appeal rendered a stay of the injunction appropriate here too. Indeed, in the face of almost exactly the same arguments discussed above, the

Supreme Court expressly concluded that the government had "made a sufficient showing . . . that the plaintiffs have no cause of action to obtain review of [the government's] compliance with Section 8005." 140 S. Ct. at 1. Because that rationale applies equally to plaintiffs' claim that the government has violated § 2808, the district court did not abuse its discretion in granting a stay pending appeal.

2. The Challenged Projects Do Not Violate § 2808.

The government is also likely to prevail for the independent reason that the challenged projects comply with § 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. 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." *Id.* § 2801(c)(4).

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. The Secretary of Defense has concluded—after advice from the Chairman of the Joint Chiefs of Staff—that these eleven projects are necessary to

support the use of the armed forces deployed in connection with that national emergency. *See* ECF No. 206-2, at 1-7. And because each project will take place at a location "under the jurisdiction of the Secretary of a military department," 10 U.S.C. § 2801(c)(4), each qualifies as "construction, development, conversion, or extension of any kind carried out with respect to a military installation," *id.* § 2801(a). Two projects will be built on the Goldwater Range, an Air Force and Marine Corps bombing range, ECF No. 206-2, at 11; the remaining nine will be built on land assigned to Fort Bliss, an Army base. ECF No. 236-7 at 1. It was therefore lawful for the Secretary to undertake these projects under § 2808.

b. Plaintiffs do not challenge the district court's holding that the President's national-emergency declaration was lawful. They also do not contest that § 2808 permits construction of fencing and other barriers on a military installation.[6] Nor do they dispute that the projects will be built on land under the jurisdiction of the Secretary of a military department, or that the two projects on the Goldwater Range constitute "military construction" as defined in 10 U.S.C. § 2801(a).

Plaintiffs argue instead (Mot. 15) that nine of the challenged border-barrier projects (those outside the Goldwater Range) are not being "carried out with respect

[6] DoD has used its § 2808 authority to construct security fencing and protective barriers at domestic military installations. Cong. Research Serv., IN11017, Military Construction Funding in the Event of a National Emergency, 1-3 & tbl. 1 (updated Jan. 11, 2019), https://crsreports.congress.gov/product/pdf/IN/IN11017 (last visited Dec. 23, 2019); ECF No. 236-5 at 1-2.

to a military installation" because the land where the projects will be constructed is not a "discrete and traditional" military facility, Order 23 n.10, and because it is not "similar in nature or scope to 'a base, camp, post, station, yard, [or] center,'" Order 24. Plaintiffs apparently contend 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 again unspecified) period of time.

The text of § 2801(c)(4)'s definition of "military installation" forecloses plaintiffs' argument. First, the definition 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. ECF 249-1, at 3 (also listing other examples). Yet DoD has long administered Fort Bragg and the White Sands Missile Range as single "military installation[s]." *Id.*

Second, the definition of "military installation" also includes "other activity" under military "jurisdiction." 10 U.S.C. § 2801(c)(4); *see also United States v. Apel*, 571 U.S. 359, 368 (2014) (explaining that the statutory term "military installation" is generally "synonymous with the exercise of military jurisdiction"). 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—a conclusion 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."

Plaintiffs fail to address these statutory arguments. Nor do they contend that the Secretary of Defense acted improperly in acquiring the property at issue or assigning it to Fort Bliss. Instead, they suggest a parade of horribles in other circumstances, contending that DoD could invoke § 2808 "to build anything [it] want[s], anywhere [it] want[s], provided [it] first obtain[s] jurisdiction over the land where the construction will occur." Mot. 15 (quoting Order 25). But the record here demonstrates that DoD complies with a host of statutory and regulatory requirements to acquire land and bring it under the jurisdiction of a military installation. ECF No. 249-1, at 1-2. And DoD can undertake military construction under § 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. Moreover, the statute also 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). Plaintiffs do not dispute that the foregoing requirements have been satisfied here, and there is no basis for their atextual suggestion that § 2808 should be construed to impose additional restrictions on DoD.

Finally, plaintiffs assert (Mot. 15-16, 17) that Congress implicitly repealed DoD's § 2808 authority over these projects in the CAA. 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." 133 Stat. at 18, 28. The CAA also prohibited construction of border barriers at five locations not at issue here. *Id.* at 28. But the CAA nowhere provides that a discrete appropriation to DHS prohibits DoD from relying on DoD's separate and preexisting statutory authorities to spend its own previously appropriated funds on border barriers. Interpreting the CAA as impliedly repealing § 2808 would flout the principle that, "when 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." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

c. Plaintiffs separately argue (Mot. 16) 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." 10 U.S.C. § 2808(a). 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 particularly 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." *Marine Eng'rs' Beneficial Ass'n 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) ("courts 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 reducing demand for DoD personnel, and by allowing those personnel to be redeployed to high-traffic border areas that currently

lack barriers. ECF No. 206-2, at 9; *see generally* ECF No. 206-2, at 1-11; 42-54; ECF No. 206-3, at 1-19; ECF No. 206-4 at 1-2, 24-64. The Secretary made this finding after conducting an extensive internal deliberative process involving, among others, the Chairman of the Joint Chiefs of Staff. ECF No. 206-2, at 9. That military judgment warrants deference.

Despite acknowledging (Mot. 16) that the Secretary's "strategic and military determinations" are entitled to deference, plaintiffs ask this Court to reject the Secretary's military judgment. For example, plaintiffs contend (Mot. 17 n.2) that the projects on the Goldwater Range are not militarily necessary. But assessing the military significance of individuals and drugs crossing the border onto an active military training facility 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*, 555 U.S. at 33 (recognizing importance of military training).

The district court also mistakenly suggested that the challenged projects are unnecessary because, once the projects are completed, fewer troops may need to be deployed to the border. Order 30-31. But nothing in the statute precludes the Secretary of Defense from determining that construction of a barrier would serve as a force multiplier, allowing deployment of military personnel to other locations along the border where they are needed. Plaintiffs cannot reasonably dispute that, for

example, construction of fencing and other barriers around a 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, plaintiffs contend (Mot. 16) that the challenged projects are unnecessary to support the armed forces because they would benefit DHS as well. But no authority supports plaintiffs' atextual argument 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 § 2808 because it would also benefit a civilian agency.

CONCLUSION

The motion to lift the stay pending appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response complies with the requirements of Fed. R. App. P. 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that the foregoing response complies with the requirements of 9th Cir. R. 27-1(1)(d) and 9th Cir. R. 32-3 because it contains 5,517 words according to the count of Microsoft Word.

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