No. 19-17501

In the United States Court of Appeals for the Ninth Circuit

SIERRA CLUB; SOUTHERN BORDER COMMUNITIES COALITION,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

APPELLEES' REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 TO LIFT STAY PENDING APPEAL

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

Dror Ladin
Noor Zafar
Jonathan Hafetz
Hina Shamsi
Omar C. Jadwat
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 549-2500

Cecillia D. Wang
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, CA 94111
Tel.: (415) 343-0770

Attorneys for Plaintiffs-Appellees
(Additional Counsel on Next Page)

Mollie M. Lee
American Civil Liberties Union
Foundation of Northern
California, Inc.
39 Drumm Street
San Francisco, CA 94111
Tel.: (415) 621-2493

David Donatti
Andre I. Segura
American Civil Liberties Union
Foundation of Texas
P.O. Box 8306
Houston, TX 77288
Tel.: (713) 325-7011

Attorneys for Plaintiffs-Appellees

Sanjay Narayan*
Gloria D. Smith*
Sierra Club Environmental Law
Program
2101 Webster Street, Suite 1300
Oakland, CA 94612
Tel.: (415) 977-5772

**Attorneys for Plaintiff-Appellee*
Sierra Club

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Defendants should not be permitted to short-circuit the ordinary appellate process and immediately erect a massive wall across nearly two hundred miles of lands on which Congress refused to authorize construction. Defendants' argument is that 10 U.S.C. § 2808 provides essentially unlimited and unreviewable authority to divert military construction funds to aggrandize civilian agencies. This sweeping claim of executive power is unprecedented, and conflicts with both statutory text and constitutional design. Defendants are not entitled to a stay pending appeal.[1]

ARGUMENT

Defendants do not even bother to defend the district court's stay order based on the district court's actual reasoning, which turned on "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 . . . ." Order 45. These factors bear no resemblance to the stay factors that Defendants themselves cite. *See* Opp'n 4-5 (listing traditional factors). The district court necessarily abused its discretion in granting a stay without finding that Defendants had satisfied the required factors. *See Just Film, Inc. v. Buono*, 847 F.3d 1108, 1115 (9th Cir. 2017) ("An abuse of

[1] Defendants state that "immediate resolution" of this motion is unnecessary because Defendants' pending Fifth Circuit stay motion "has not yet been fully briefed." Opp'n 2 n.1. That motion will be fully briefed by December 30. *See* Response, *El Paso County v. Trump*, No. 19-51144 (5th Cir. Dec. 23, 2019), ECF No. 00515247830; Fed. R. App. P. 27(a)(4) (reply due seven days after response).

discretion occurs when the district court, in making a discretionary ruling, relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them." (quotation omitted)); *see* Mot. 21-23.

Defendants attempt to rehabilitate the district court's stay order on alternate grounds, but fail for three reasons—each of which independently requires lifting the district court's stay. First, Defendants have made no showing of irreparable harm during the pendency of this appeal. Second, Defendants have not made the required strong showing of likelihood of success on the merits of their appeal. Finally, Defendants cannot rely on the Supreme Court's stay of a separate injunction—in an order that was silent as to both the public interest and balance of equities—to determine the public interest and balance of equities here.

I. Defendants Have Not Even Attempted to Show Irreparable Harm.

A showing of irreparable harm is one of "the most critical" factors required to justify a stay pending appeal. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Yet Defendants have not even attempted to meet this standard by identifying harms they would suffer during the pendency of this appeal.

Having delayed construction for more than ten months, Defendants offer no explanation, much less evidence, for their sudden urgency to build the wall while their appeal is pending. Instead, Defendants gesture only at generalized "high rates

of drug smuggling between ports of entry at the southern border, as well as recent increases in apprehensions following illegal crossings." Opp'n 6. This cannot carry Defendants' burden, because "Defendants have not actually spoken to the more relevant questions," namely: "what would be the impact of delaying the construction of those barriers" during the pendency of this appeal. *Sierra Club v. Trump*, 929 F.3d 670, 705 (9th Cir. 2019). As this Court concluded in denying Defendants' previous stay request based on a similarly threadbare record, "the evidence before us does not support a conclusion that enjoining the construction of the proposed barriers until this appeal is fully resolved will have a significant impact." *Id.*; *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("That the Government's asserted interests are important in the abstract does not mean, however, that [its proposed actions] will in fact advance those interests.").

Rather than present any evidence of injury from this injunction, Defendants rely entirely on the Supreme Court's grant of a stay with respect to the district court's earlier injunction relating to different sections of wall funded under separate claims of authority. But Defendants fail to address a critical distinction between the effects of the two injunctions: with respect to the previous injunction Defendants told the Supreme Court that the Department of Defense ("DoD") would permanently lose access to the funds if that injunction was not stayed pending appeal. *See* Defs.' Reply in Supp. of Stay Appl. 15, *Trump v. Sierra Club*,

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

II. Defendants Have Not Shown a Likelihood of Success on the Merits.

In addition to their failure to show irreparable harm, Defendants have also failed to make "the required 'strong showing' that they are likely to succeed on the merits" of the appeal. *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 (9th Cir. 2019) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Defendants' arguments boil down to a series of expansive and unprecedented claims that the district court correctly rejected. Defendants are unlikely to succeed in establishing that Section 2808 confers unreviewable authority to circumvent

Congress's appropriations decisions, that sections of border spread over more than 1,000 miles are part of a single military garrison in Texas, and that a wall aimed squarely at the mission of a civilian law enforcement agency is necessary to support the armed forces.

a. Defendants do not have unreviewable authority to remake the federal budget.

Defendants maintain that they have effectively unreviewable authority to usurp Congress's control over appropriations so long as they invoke Section 2808, because the zone-of-interests test bars any conceivable injured party from suing. Opp'n 10-15. Their arguments are contrary to settled law.

Defendants' argument that no equitable cause of action exists to enjoin executive usurpation of Congressional control over spending is foreclosed by this Court's binding precedent. This Court has held that expending funds in excess of statutory authority amounts to "violating the Appropriations Clause," which is "a separation-of-powers limitation that [litigants] can invoke" to equitably enjoin the violation. *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016); *see* Mot. 10-11. To the extent any zone-of-interests tests applies to constitutional violations (as opposed to statutory actions), it "denies a right of review if the plaintiff's interests are marginally related to or inconsistent with the purposes implicit in the relevant constitutional provision." *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 932 (9th Cir. 2011) (quotation and alteration marks

omitted). Plaintiffs' claims easily satisfy this inquiry. The Appropriations Clause has a "fundamental and comprehensive purpose": it "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *McIntosh*, 833 F.3d at 1175 (quoting *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427-28 (1990)). If the zone-of-interests tests applies, "[t]he ultimate question, therefore, is whether [Plaintiff's] claims bear more than a marginal relationship to claims addressing" Defendants' efforts to spend money in contravention of Congress's judgments as to the common good. *Yakima Valley Mem'l Hosp.*, 654 F.3d at 932 (quotation marks and citation omitted). They do.

Defendants assert that a *statutory* zone-of-interests nonetheless restricts claims founded on equity and the Constitution. Opp'n 13-14. But no case supports this premise, and Defendants do not cite a single decision by this Court or any other that applied a statutory zone-of-interests restriction to an equitable injunction enforcing a "separation-of-powers limitation." *McIntosh*, 833 F.3d at 1175.

At bottom, Defendants confuse private rights of action created by Congress to enforce statutory entitlements and equitable suits to enjoin executive officers from acting without authority or in violation of the Constitution. Mot. 10-12. "Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in

addition, who may enforce them and in what manner." *Davis v. Passman*, 442 U.S. 228, 241 (1979). By contrast, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015); *see* Amicus Br. of Fed. Courts Scholars, *Sierra Club*, No. 4:19-cv-00892-HSG (N.D. Cal. Sept. 3, 2019), ECF No. 245 at 11-21. While Congress can act to specifically displace equitable relief, Defendants do not contend that Congress has done so here. Accordingly, Section 2808 cannot restrict the availability of a separation-of-powers claim. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) ("[If] Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.").

In any event, even if a statutory zone-of-interests test applied, Defendants fail to distinguish the Supreme Court's instruction that environmental and aesthetic interests suffice whenever "issues of land use (arguably) fall within [a statute's] scope." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 n.7 (2012); Mot. 11-12. Defendants argue that Section 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." Opp'n 13. But the same was true with respect to the statute in *Match-E-*

Be-Nash-She-Wish, which did not even mention any type of construction—much less evince Congressional concern about possible downstream effects of construction on a third party's aesthetic, recreational, or environmental interests. Section 2808, which explicitly concerns construction decisions, is even more closely tethered to land use than the statute at issue in *Match-E-Be-Nash-She-Wish*, and Defendants' massive construction project is *a fortiori* subject to challenge.

b. Defendants cannot rely on Section 2808 to spend billions of dollars on a border wall that Congress refused to fund.

Defendants propose that Section 2808 provides authority to divert billions of dollars to aggrandize the approved budget and statutorily conferred powers of a civilian law enforcement agency, when Congress specifically refused to authorize such funding. This is a radical departure from previous uses of this power. "[A] president has never before invoked Section 2808 to secure funding for projects that Congress specifically declined to fund in its appropriations judgment." Order 3. "Of the military construction projects funded through Section 2808, only one was located in the United States, and that project related to securing facilities holding weapons of mass destruction shortly after the 9/11 attacks." Order 3. The combined total dollar value of every single previous project undertaken under Section 2808 in the past eighteen years is less than half of what Defendants claim they may spend on the border wall here. *See* Michael J. Vassalotti & Brendan W. McGarry, Cong. Research Serv., IN11017, *Military Construction Funding in the*

Event of a National Emergency (Jan. 11, 2019), at 2. Defendants' unprecedented claims are unlikely to succeed.[2]

Defendants offer no answer to the district court's statutory analysis of the limits Congress placed on "military construction" in 10 U.S.C. § 2801. Order 22-28; *see also* Order 23 n.10 (incorporating statutory analysis in Preliminary Injunction Order, *Sierra Club*, No. 19-cv-00892-HSG (May 24, 2019), ECF No. 144 at 44-45 ("PI Order") by reference). Defendants assert that they may satisfy this requirement by simply pointing to any parcel of land, anywhere in the world, and administratively assigning it to Fort Bliss in Texas. Opp'n 17-19. As the district court pointed out, Defendants' implausible interpretation would "provide the Executive Branch with unchecked power to transform the responsibilities assigned by law to a civilian agency into military ones by reclassifying large swaths of the southern border as 'military installations.'" Order 28. Myriad canons of statutory interpretation counsel against such an interpretation. Order 23-28 (plain language, presumption against surplusage); PI Order 44-46 (*noscitur a sociis* and *ejusdem generis*).

[2] Defendants make the puzzling claim that "plaintiffs assert that Congress implicitly repealed DoD's § 2808 authority" in the CAA. Opp'n 19. Plaintiffs nowhere make this assertion. In interpreting the scope of Section 2808, however, it is certainly relevant to consider whether the statute authorizes DoD to directly contravene Congress's enacted funding judgments.

As to Section 2808's requirement that construction must be "necessary to support [the] use of the armed forces," Defendants maintain that their assertion is unreviewable. Opp'n 19-20. As Plaintiffs have shown, however, Section 2808 does not fit within the rare exceptions to judicial review. Mot. 12-13; *see also Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992) ("[T]he claim of military necessity will not, without more, shield governmental operations from judicial review.").

Defendants' only remaining argument is that this Court must defer to DoD's decision to spend billions of dollars for the benefit of the Department of Homeland Security ("DHS"), in contravention of Congress's judgment. Opp'n 20-21. But the executive branch's decision to transfer military funding to an immigration enforcement mission that Congress assigned to a civilian agency is not a strategic judgment entitled to deference. And even where review is "deferential," courts "are not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quotation marks omitted). Defendants cannot cloak a de facto transfer of military construction money to DHS in claims of military necessity: "As DoD representatives have forthrightly explained, funding under Section 2808 would 'all go to adding significantly new capabilities to DHS's ability to prevent illegal entry.'" Order 30; *see* Mot. 16-17.

Section 2808 does not permit DoD to remake the federal budget and aggrandize DHS's border wall beyond that which Congress agreed to fund.[3]

III. The Balance of Equities and Public Interest Weigh Against a Stay of the Injunction.

Defendants largely rely on the Supreme Court's order staying the previous injunction relating to claimed Section 8005 authority, arguing that the Court silently predetermined the equitable balancing here. Opp'n 6-9. But, as described above, Defendants ignore the critical distinction between their claimed harms with respect to the previous injunction and the funds at issue here, which will not lapse during appeal. *See supra* Section I.

Defendants also point to *Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7 (2008), but that decision only underscores the weakness of their argument. There, the government substantiated its claims of national security harm with specific "declarations from some of the Navy's most senior officers, all of whom underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat." *Id.* at 24. The plaintiffs in *Winter* had shown no countervailing injury: at that point "training ha[d] been going on for

[3] Defendants misleadingly suggest that DoD determined that the "military significance of individuals and drugs crossing the border onto an active military training facility" justified wall construction the Goldwater Range. Opp 21. In fact, DoD found the opposite, concluding that there was "negligible" impact to military training from any border crossings on the Range. Mot. 17 n.2.

40 years with no documented episode of harm." *Id.* at 33. Nor was the broad injunction in *Winter* proper in light of the limited statutory violation that the plaintiffs there asserted: because there was no claim that the Navy "must cease sonar training, there [wa]s no basis for enjoining such training in a manner credibly alleged to pose a serious threat to national security." 555 U.S. at 32-33.

Here, by contrast, DoD officials have testified consistently that the situation on the border is "not a military threat," Pls.' RJN, *Sierra Club*, No. 19-cv-00892-HSG (Oct. 11, 2019), ECF No. 210-2, Ex. 15 at 50-52. And while Defendants' asserted military harms are insubstantial, the harms posed to Plaintiffs, the environment, and the public's interest in the separation of powers are extraordinary. Mot. 19-21. Finally, unlike in *Winter*, Plaintiffs' claim is that Defendants "must cease" the unlawful construction. Defendants should not be permitted to rush it through during the pendency of this appeal.

CONCLUSION

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

Dated: December 26, 2019

Respectfully submitted,

/s/ Dror Ladin

Dror Ladin
Noor Zafar
Jonathan Hafetz
Hina Shamsi
Omar C. Jadwat
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel.: (212) 549-2500
Fax: (212) 549-2564
dladin@aclu.org
nzafar@aclu.org
jhafetz@aclu.org
hshamsi@aclu.org
ojadwat@aclu.org

Cecillia D. Wang
American Civil Liberties Union Foundation
39 Drumm Street
San Francisco, CA 94111
Tel.: (415) 343-0770
Fax: (415) 395-0950
cwang@aclu.org

Attorneys for Plaintiffs-Appellees

Mollie M. Lee
American Civil Liberties Union Foundation of Northern California, Inc.
39 Drumm Street
San Francisco, CA 94111
Tel.: (415) 621-2493
Fax: (415) 255-8437
mlee@aclunc.org

David Donatti
Andre I. Segura
American Civil Liberties Union Foundation of Texas
P.O. Box 8306
Houston, TX 77288
Tel.: (713) 325-7011
Fax: (713) 942-8966
ddonatti@aclutx.org
asegura@aclutx.org

Sanjay Narayan*
Gloria D. Smith*
Sierra Club Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA 94612
Tel.: (415) 977-5772
sanjay.narayan@sierraclub.org
gloria.smith@sierraclub.org

**Attorneys for Plaintiff-Appellee Sierra Club*

CERTIFICATE OF SERVICE

I hereby certify that on December 26, 2019, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

/s/ Dror Ladin
Dror Ladin
Dated: December 26, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Circuit Rule 27-1(1)(d) and Circuit Rule 32-3 because it contains 2,799 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Dror Ladin
Dror Ladin
Dated: December 26, 2019