No. 19-16102, 19-16300, 19-16299, 19-16336

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

RESPONSE/REPLY BRIEF FOR DEFENDANTS-APPELLANTS-CROSS-APPELLEES

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SUMMARY OF ARGUMENT

As the government's opening brief demonstrated, the district court committed fundamental errors in entering a permanent injunction prohibiting the Department of Defense (DoD) from constructing border barriers pursuant to 10 U.S.C. § 284 in support of the drug-interdiction efforts of the Department of Homeland Security (DHS). Plaintiffs assert injuries from border barrier construction that are solely aesthetic, recreational, and environmental in nature; they are entitled neither to sue nor to obtain injunctive relief on their claim, which at bottom is that DoD exceeded the limitations on its internal budgetary authority to transfer appropriated funds among otherwise-authorized projects under Section 8005 of its annual appropriations statute. Indeed, the government's arguments are so compelling that the Supreme Court granted a stay of the injunction, thereby allowing border barrier construction to occur while this appeal remains pending.

In their response briefs, plaintiffs Sierra Club and Southern Border Communities Coalition (the Organizations) and plaintiffs California and New Mexico (the States) fail to rehabilitate the injunction awarded to the Organizations, much less demonstrate that the district court abused its discretion in denying injunctive relief to the States. As a threshold matter, the Organizations are plainly incorrect that this Court's ability to conduct a plenary resolution of this important appeal is foreclosed by the interlocutory decision denying a stay entered by a motions panel after limited and expedited briefing, especially given that the Supreme Court's subsequent order

granting a stay necessarily rejects the motions panel's conclusion. And plaintiffs fare no better in defending the judgment below on the merits.

To begin, although plaintiffs emphasize the general availability of an implied cause of action in equity to challenge federal conduct in excess of authority, they fail to establish that they in particular are proper parties to bring such an action. Notably, they do not identify a single precedent allowing such an action where the putative plaintiff fell outside the zone of interests of the statutory or constitutional limitations on which the claim rested. And plaintiffs do not meaningfully dispute that they cannot satisfy the zone-of-interests requirement because their asserted harms are entirely unrelated to the asserted statutory and constitutional limitations on DoD's internal budget transfers.

In any event, plaintiffs' objections to DoD's transfer of funds are all meritless. Plaintiffs principally defend the district court's conclusion that, in transferring funds to support DHS's request for counter-drug support under Section 284, DoD exceeded its authority under Section 8005 on the grounds that Congress "denied" additional funding to DHS for border wall construction more generally, and that the need for such construction was not "unforeseen." But plaintiffs fail to refute the various textual and contextual indicia that Section 8005 is focused more narrowly on the particular "items" that DoD sought (or could seek) to include within its own budget. Congress's separate decisions concerning DHS's budget requests are irrelevant.

Plaintiffs also raise various alternative arguments that the district court did not adopt, but those are even more deficient. For example, Section 284 unambiguously authorizes DoD to build border barriers to support DHS's drug-interdiction efforts, and plaintiffs' proposed limitation on construction that is "too big" has no textual basis. Likewise, nothing in the Constitution remotely prohibits Congress from exercising its power over the purse by delegating to executive agencies limited authority to transfer legislatively appropriated funds among legislatively approved projects.

Finally, at a minimum, plaintiffs fail to demonstrate their entitlement to equitable relief. The Organizations' attempts to denigrate the harms to the government's counter-drug efforts, while exaggerating the intangible harms to themselves, do not undermine the government's showing that the district court abused its discretion in granting such an extraordinary injunction. And, *a fortiori*, the States cannot show that the district court abused its discretion in denying them injunctive relief. The district court was correct that the States lack irreparable harm warranting an injunction, both because the Organizations had obtained a duplicative injunction and because the States' environmental harms are speculative while their sovereign harms are not caused by DoD's challenged transfer of funds.

ARGUMENT

I. The Motions Panel's Superseded Decision Denying A Stay Does Not Bind The Merits Panel.

The Organizations contend (Br. 12-19) that this Court is foreclosed from considering the arguments raised in the government's opening brief because a motions panel published its decision denying the government's request for a stay pending appeal based on those same arguments, notwithstanding that the Supreme Court subsequently granted a stay. That contention makes neither legal nor practical sense. In granting the extraordinary relief of a stay pending appeal that allowed border barrier construction to begin, the Supreme Court necessarily concluded that the government had satisfied the standard to obtain a stay of the injunction. *Trump v. Sierra Club*, No. 19A60, ___ S. Ct. ___, 2019 WL3369425, at *1 (U.S. July 26, 2019) (SCt. Stay Order); *Nken v. Holder*, 556 U.S. 418, 434 (2009) (reciting stay standard). That decision is "clearly irreconcilable" with, and thus supersedes, the motions panel's contrary holding that the government had not satisfied the stay standard. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

The Organizations brush aside (Br. 15-16) the Supreme Court's order as "limited to the preliminary showing" that defendants had demonstrated a "fair prospect" of success. But the Supreme Court's conclusion that the government's appeal was sufficiently meritorious to warrant a stay necessarily rejects the motions panel's contrary conclusion. The motions panel addressed defendants' "*likelihood* of

success on the merits," Stay Op. 32 (formatting altered), and the Supreme Court's "fair prospect" standard did not require a *lesser* showing, *see Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (*Lair I*) (explaining that "courts routinely use different formulations to describe" the likelihood-of-success factor, including "fair prospect," but "[a]ll of these formulations indicate that, 'at a minimum,' a petitioner must show that there is a 'substantial case for relief on the merits'"). To the extent the motions panel suggested (Stay Op. 31) that it was evaluating the merits "more fully" than under the likelihood standard, it engaged in that unnecessary discussion because it feared the issues "may become moot." Such dicta should not control here, especially where the Supreme Court's stay has eliminated that concern. Indeed, if the motions panel thought it was conclusively resolving the underlying merits of the appeal, it would have affirmed the district court's entry of a permanent injunction, rather than merely denying a stay and allowing the parties to begin merits briefing—briefing that, under the Organizations' view, would be entirely pointless.

Moreover, even if the Supreme Court had not granted a stay, the motions panel's stay decision would not bind the merits panel. As this Court recently recognized, a motions panel's finding that appellants have not made an adequate showing of likelihood of success on the merits to obtain a stay "does not bind the merits panel in reviewing" the underlying injunction, "as that is not the standard the merits panel will apply." *East Bay Sanctuary Covenant v. Barr*, No. 19-16487, --- F.3d ---, 2019 WL 3850928, at *1 n.2 (9th Cir. Aug. 16, 2019); *see also Lair I*, 697 F.3d at 1203.

In addition, the entire purpose of a stay motion on an expedited timeline with limited briefing is to prevent irreparable harm *while the appeal is pending* in order to allow time for briefing and a merits decision in the ordinary course of the litigation. *Compare* Fed. R. App. P. 27(a) & 9th Cir. R. 27-3, *with* Fed. R. App. P. 32(a). The very nature of a motions panel's decision to grant or deny a stay pending appeal thus implies that the motions panel's analysis may be revisited after full merits briefing.

Lair v. Bullock, 798 F.3d 736 (9th Cir. 2015) (*Lair II*), does not compel a contrary conclusion. Although the Court in *Lair II* discussed the holding of an earlier motions panel in that case and stated that a "motions panel's published opinion binds future panels the same as does a merits panel's published opinion," the Court ultimately explained it did not need to rely on the motions panel's holding because other Ninth Circuit cases had "arrived at th[e] same conclusion." *Id.* at 747. The statement in *Lair II* was therefore dicta and should not be followed here. It would be ill-advised for this Court to hold that a motions panel's interlocutory ruling denying a stay pending appeal effectively resolves the appeal itself, *see East Bay*, 2019 WL 3850928, at *1 n.2, particularly where the Supreme Court has disagreed with the motions panel's decision and granted a stay "pending disposition of the Government's appeal," SCt. Stay Order 1.

II. Plaintiffs Are Not Proper Parties To Enforce Section 8005's Limitations, Which Govern DoD's Internal Transfer Of Funds.

As a threshold matter, plaintiffs repeatedly attack a straw man by asserting that the government argues that judicial review of a Section 8005 transfer is completely precluded or unavailable. *See, e.g.*, States Br. 35; Organizations Br. 39-40. Contrary to plaintiffs' assertions, the government is not arguing that courts are categorically barred from reviewing alleged constitutional claims resting on statutory violations in general, or an agency's internal transfers of funds absent statutory authority in particular. The government likewise is not arguing that there is never an equitable cause of action to bring such claims, or that no plaintiff could ever do so. *Cf.* Stay Op. Dissent 19 (N.R. Smith, J., dissenting) (concluding that Section 8005 at least "arguably protects," for example, "those who would have been entitled to the funds as originally appropriated").

Rather, the government argues that *these particular plaintiffs* are not proper parties to invoke any cause of action to challenge the government's expenditure of funds. Plaintiffs' claim that the government is acting ultra vires and in violation of the Appropriations Clause is necessarily predicated on their contention that the government has exceeded the limitations imposed by Section 8005, and yet their asserted aesthetic, recreational, and environmental injuries from the otherwise-authorized project to which the funds were transferred fall well outside the zone of interests protected by Section 8005's limitations. Indeed, the Supreme Court found

that the government was so likely to succeed on this argument that it granted the extraordinary relief of a stay allowing construction of border barriers to commence while the appeal is pending, and plaintiffs' arguments provide no basis for this Court to second-guess the Supreme Court's determination.

A. Plaintiffs Are Outside The Zone Of Interests Protected Or Regulated By Section 8005.

As set forth in the government's opening brief (at 26, 30-33), the zone-of-interests requirement is a general presumption limiting the plaintiffs who "may invoke [a] cause of action" that Congress has authorized, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-30 (2014), and reflects the fact that Congress typically does not intend the "absurd consequences" that could result from extending 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, 176-78 (2011). And as the government further demonstrated (Opening Br. 27-30), under any zone-of-interests standard, plaintiffs are not proper parties to enforce Section 8005's limitations: their aesthetic, recreational, and environmental injuries are entirely unrelated to the interests even arguably protected and regulated by Section 8005, a statute that governs DoD's internal transfer of funds between DoD appropriations accounts.

Although plaintiffs continue to call Section 8005 the government's "defense" to their ultra vires and Appropriations Clause claims, *see, e.g.* Organizations Br. 34, that

label cannot disguise the substance of the matter. Plaintiffs' claims necessarily rest on pleading and proving that DoD *lacked statutory authority* to transfer the funds *because the transfer violated* Section 8005's limitations. *See* Organizations Br. 40-47 (relying on Section 8005's limitations to allege DoD's transfer was unlawful); States Br. 13-19 (same).[1] And thus Section 8005 is "[t]he relevant statute" for zone-of-interests purposes, because it "is the statute whose violation is the gravamen of the complaint," *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 886 (1990), as confirmed "by reference to the particular provision of law upon which the plaintiff relies," *Bennett v. Spear*, 520 U.S. 154, 175-76 (1997).[2]

Plaintiffs make half-hearted efforts to show that their aesthetic, recreational, and environmental injuries fall within Section 8005's zone of interests—a conclusion reached by neither the district court nor the motions panel—but their arguments are unpersuasive. As they did in the Supreme Court, plaintiffs invoke (Organizations Br.

[1] Although Plaintiffs argue in passing that Section 8005 would itself be unconstitutional if construed as the government contends, those arguments are predicated on Plaintiffs' misunderstanding of Section 8005 and are meritless in any event. *See infra* at Part IV.B.

[2] It is therefore immaterial whether the States fall (Br. 34) within the zone of interests protected by the statutory limitations on waivers granted under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). That at most would support a claim challenging the IIRIRA waiver, not the transfers as exceeding Section 8005's limitations. *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 401 (1987), simply assessed the provision at issue "in the overall context of" the statutory scheme. That case does not support finding the zone of interests satisfied in a suit seeking to enforce one statutory provision merely because plaintiffs may fall within the zone of interests of a different statute.

36-38) the Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), but the statute at issue there authorized the Secretary of the Interior to acquire land, a decision "closely enough and often enough entwined with" the use of the land acquired that "neighbors to the use" were "reasonable—indeed, predictable—challengers of the Secretary's [land-acquisition] decisions." *Id.* at 224, 227. By contrast, Section 8005's limitations relate to Congress's regulation of DoD's budget, not DoD's substantive authority under Section 284 to construct border barriers in support of DHS's drug-interdiction efforts. DoD's transfer decisions are not "entwined" with the downstream collateral effects on private parties that may result from otherwise-authorized projects financed by transferred funds, and plaintiffs who assert aesthetic, recreational, or environmental injuries from those downstream collateral effects are not "predictable" challengers to DoD's internal transfers of funds. Unlike in *Patchak*, the problem goes well beyond the point that Section 8005's limitations were not intended "to benefit" plaintiffs; the more fundamental defect is that their collateral interests in construction on public land "are so marginally related" to Section 8005's regulation of internal DoD budget transfers among statutorily authorized projects that "it cannot reasonably be assumed that Congress intended to permit the suit." *See id.* at 225.

Plaintiffs contend that *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356 (D.C. Cir. 1996), demonstrates that the "zone of interests" standard "has been held to be extraordinarily broad" in the context of "statutes aimed at

tightening congressional control over executive spending." Organizations Br. 36; *see also* States Br. 32. But the D.C. Circuit "merely applied the same zone of interests test" that this Court applies in cases under the Administrative Procedure Act (APA), *see* Stay Op. Dissent 18 n.10 (N.R. Smith, J., dissenting). Where a statute regulated the circumstances in which government agencies needed to deposit money into the Treasury, the court held that the interests of a private party from whom those agencies extracted the money were "sufficiently congruent" to the Treasury's interests. *Scheduled Airlines*, 87 F.3d at 1359-60. That out-of-circuit case does not remotely support the expansive proposition that third parties with no interest in the actual funds at issue nevertheless fall within the zone of interests of a statute regulating an agency's internal budgeting merely because of alleged collateral effects from how the agency chooses to spend its funds on otherwise-authorized projects.

B. Plaintiffs Cannot Evade The Zone-Of-Interests Requirement By Asserting An Equitable Claim Against Ultra Vires Conduct.

Plaintiffs spill much ink emphasizing the undisputed point that a cause of action generally exists in equity to challenge ultra vires government conduct even where the dispute concerns the existence of statutory authority. *See* Organizations Br. 27-29; States Br. 26. But they fail to establish their disputed contention that such claims are somehow exempt from the zone-of-interests requirement. *See* Organizations Br. 29-31; States Br. 27-30.

Notably, they do not cite a single precedent in which a court has held that an equitable ultra vires claim could proceed notwithstanding that, as here, the plaintiff's asserted injuries were wholly unrelated to the interests protected by the limitations of the statute that defined the government authority at issue and provided the basis for the plaintiff's claim. Instead, plaintiffs merely cite cases in which courts did not expressly address the zone-of-interests requirement in the course of adjudicating claims to enjoin alleged ultra vires government action. But "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004). That is especially so because plaintiffs here generally do not even contend that the plaintiffs in those cases would have failed the zone-of-interests requirement, and they would not have. For example, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), a private company obviously satisfied the zone-of-interests requirement when alleging that the President had exceeded his authority under certain federal statutes in suspending *the company's own* monetary claims against Iran in federal court. *See id.* at 675-77. By contrast, plaintiffs' extraordinary theory here is that the ultra vires suit in *Dames & Moore* could have been brought, not just by the company itself, but also by any third party that could demonstrate that the President's suspension of Dames & Moore's monetary claims against Iran would somehow result in fairly traceable harm to the third party's aesthetic, recreational, or environmental interests. Contrary to plaintiffs' position, of course, such a suit never

would have been entertained, because the zone-of-interests requirement forecloses precisely that sort of "absurd consequence[]" of allowing suit by "any person injured in the Article III sense" from a statutory violation. *Thompson*, 562 U.S. at 176-77.

Plaintiffs' inability to cite any authority upholding ultra vires claims by plaintiffs who could not satisfy the zone-of-interests requirement is fatal to their claims. As the Organizations acknowledge (Br. 29), implied equitable claims are limited by "tradition[]." *Grupo Mexicano de Desarrolo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). The absence of any case allowing an ultra vires suit by a plaintiff outside the zone of interests of the statutory limitation on which the plaintiff's claim rests is thus powerful evidence that such claims are impermissible. *See id.* at 322 (holding that "Congress is in a much better position than [courts]" to authorize a "wrenching departure from past practice" with respect to "a type of relief that has never been available before"); *cf. Printz v. United States*, 521 U.S. 898, 905 (1997) (noting that if "earlier Congresses avoided use of" a "highly attractive" practice, "we would have reason to believe that the power was thought not to exist").[3]

[3] Although the Organizations observe (Br. 28-29) that equitable actions against ultra vires conduct by federal officials were traditionally available, that ignores *Grupo Mexicano*'s holding that an equitable remedy must be traditionally available in the *specific circumstances presented*. In that case, a tradition of creditors seeking to restrain dissipation of assets by debtors against whom they had already obtained a judgment did not extend to *pre-judgment* suits, and thus the Supreme Court held that that particular remedy was not available. *See* 527 U.S. at 319-22. Here, likewise, the "tradition[]" of ultra vires suits does not extend to allowing plaintiffs with *entirely unrelated injuries* to sue.

The absence of cases like this is also unsurprising. Implied equitable causes of action are available only "in some circumstances" constituting "a proper case," and "subject to express and implied statutory limitations." *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1384-85 (2015). The zone-of-interests requirement reflects common-law limitations on the types of plaintiffs who may sue. *Lexmark*, 572 U.S. at 130 n.5. The States attempt (Br. 27-29) to restrict the rationale for the zone-of-interests requirement to suits for damages, but as they immediately acknowledge (Br. 29), the zone-of-interests limitation also applies to claims for non-monetary relief under the APA. And contrary to the States' further suggestion (Br. 29) that such APA claims are subject to the zone-of-interests requirement only because the APA uniquely allows arbitrary-and-capricious review, the APA's zone-of-interests requirement equally applies to APA claims under 5 U.S.C. § 706(2) alleging that an agency acted "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." *See, e.g.*, *Northwest Requirements Util. v. FERC*, 798 F.3d 796, 804, 807-09 (9th Cir. 2015) (petitioners did not satisfy zone-of-interests requirement for claim that agency "exceeded its statutory authority"). The same result would plainly obtain if plaintiffs had raised only an implied equitable cause of action against ultra vires conduct. Indeed, in light of the APA's "generous review provisions" compared to the pre-APA scheme for judicial review of agency action, there is, if anything, a heightened zone-of-interests limitation on suits seeking to enforce federal statutory

limitations against federal agencies outside the APA's framework. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 394-95, 400 & n.16 (1987).

Relatedly, plaintiffs ignore the government's showing (Opening Br. 33-34) that it would turn the separation of powers on its head to allow plaintiffs outside the zone of interests of a statute's limitations nonetheless to enforce them through an equitable ultra vires claim. Congress both creates the statute's limitations and chooses whether or not to provide a cause of action, either expressly (through the APA or otherwise) or implicitly (through the grant of equity jurisdiction). It defies both law and logic to allow plaintiffs whom Congress did not authorize to invoke the APA's express cause of action nevertheless to invoke an equitable cause of action that Congress has only implicitly allowed. *See Lexmark*, 572 U.S. at 129 ("Congress is presumed to legislate against the background of the zone-of-interests limitation, which applies unless it is expressly negated." (quotation marks omitted)).

Conversely, the Organizations are fundamentally mistaken in suggesting (Br. 29-30, 34-35) that any statutory provision at issue in ultra vires claims is a grant of power to the government rather than a protection for plaintiffs, and thus applying the zone-of-interests requirement to ultra vires claims would "make little sense" and lead to "absurd—and dangerous—results." As the government explained (Opening Br. 40) when refuting plaintiffs' similar misreading of *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987), the statutory dispute in an ultra vires claim turns on the *limitations* of the statutory authorization for the government's actions, and thus

the proper inquiry in such cases focuses on whether plaintiffs fall within the zone of interests at least arguably "protected by the *limitation*[*s*]" on the "statutory powers invoked by the [defendant]." *Id.* (alterations in original). Plaintiffs offer no meaningful response other than to observe that Judge Bork was "speaking hypothetically," States Br.46 n.13, while ignoring that this is so because the discussion they invoked was dicta.

This misunderstanding likewise explains the Organizations' flawed suggestion (Br. 34-35) that *Clinton v. City of New York*, 524 U.S. 417 (1998), is an example of an ultra vires case where the plaintiffs could not have satisfied the zone-of-interests requirement if it applied. The plaintiffs there did not seek to enforce any limitations in the Line Item Veto Act—indeed it was "undisputed" that the President had "meticulously" followed "each of" the Act's "procedures." *Id.* at 436. Instead, the limitations plaintiffs sought to enforce came from the Presentment Clause, which they alleged prevented the President from unilaterally canceling the statutes at issue. *Id.* at 426-27. It thus would have been *inapposite* for the Supreme Court to analyze whether the plaintiffs in *City of New York* were proper parties to enforce the Line Item Veto Act's limitations; and it was *unnecessary* for the Court to expressly address whether they were proper parties to enforce the Presentment Clause's limitations, because they plainly were, as the intended beneficiaries of the cancelled spending legislation. *See id.* at 423-25. As discussed above, neither feature is present here: Plaintiffs' ultra vires claim rests on DoD's alleged lack of statutory authority under Section 8005, and

Section 8005's limitations on DoD's internal budget transfers among otherwise-authorized projects are entirely unrelated to asserted harms to Plaintiffs' aesthetic, recreational, and environmental interests from construction funded by the challenged transfer.

C. Plaintiffs' Invocation Of The Appropriations Clause Does Not Alter The Analysis.

1. As the government demonstrated (Opening Br. 35-41), the motions panel's characterization of plaintiffs' challenge as really raising an "Appropriations Clause" claim "is flatly contradicted" by *Dalton v. Specter*, 511 U.S. 462 (1994). *See* Stay Op. Dissent 5 (N.R. Smith, J., dissenting). Plaintiffs fail to rehabilitate that rationale.

The Organizations assert (Br. 24) that the government's reading of *Dalton* cannot be correct because it would create a "sweeping" rule whereby the government's express reliance on a statute for spending authority would "transmute[]" an alleged Appropriations Clause violation into an "ordinary statutory claim." But *Dalton* unambiguously adopted precisely that rule: "in cases in which the President concedes, either implicitly or explicitly, that the only source of his authority is statutory, no constitutional question whatever is raised," "only issues of statutory interpretation." 511 U.S. at 474 n.6 (quotation marks omitted).

If anything, plaintiffs' view would have the "sweeping" implication that every statutory-authority challenge to a tax assessment or agency regulation could be recharacterized as a "constitutional" claim, given the general absence of "any

background constitutional authority" for executive officials to take such actions without congressional authorization. *Compare* Opening Br. 37-38, *with* Stay Op. 51. Although the States try to avoid that slippery slope by observing that, compared to the Appropriations Clause, the Taxing Clause is not an "exclusive grant of power to Congress" and the limitations flowing from the Legislative Vesting Clause are less "specific" and "express," Br. 43-44, those purported distinctions are immaterial here. Such distinctions do not supply "background constitutional authority" for executive officials to assess taxes or promulgate regulations absent congressional authorization.

Nor does this Court's opinion in *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016), require treating the Appropriations Clause differently from all other constitutional provisions whose application turns on the existence of statutory authorization. Contrary to the Organizations' assertion (Br. 22), *McIntosh* does not constitute a binding holding that "private plaintiffs can invoke the Appropriations Clause as the source of a constitutional cause of action" any time the government has allegedly spent money in violation of a statute. After all, the Organizations do not dispute the government's showing (Opening Br. 41) that it was entirely irrelevant in *McIntosh* whether the criminal defendants' claims were characterized as "statutory" or "constitutional," because either way the challengers clearly fell within the zone of interests of an equitable cause of action alleging that the Department of Justice was violating an express statutory prohibition by spending funds *to prosecute them*. *See McIntosh*, 833 F.3d at 1172-73. Indeed, although this Court referred to an

"Appropriations Clause" violation, its merits analysis focused entirely on the operative statutory limitation. *See id.* at 1175-77 ("We focus, as we must, on the statutory text."). Nor did *McIntosh* even acknowledge, let alone distinguish, *Dalton*, and for this reason as well its dicta should not be read to create a sub silentio conflict with binding Supreme Court precedent.

The States similarly err (Br. 42-43) in invoking *United States Department of the Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1346-48 (D.C. Cir. 2012), to support their characterization of their claim as "constitutional." That case involved the "'necessary expense' doctrine," a doctrine developed by the Comptroller General "as a rule of construction for appropriations statutes." *Id.* at 1349. Thus, like this Court in *McIntosh*, the D.C. Circuit in *Department of the Navy* simply analyzed the relevant statute and did not rely on any independent constitutional principle about the Appropriations Clause. *See, e.g.*, *id.* at 1350 ("We agree with [the government's] interpretation of the statute."); *accord Harrington v. Schlesinger*, 528 F.2d 455, 457-58 (4th Cir. 1975) (recognizing that a dispute about whether a defendant has spent funds in excess of statutory authority turns solely on "the interpretation and application of congressional statutes under which the challenged expenditures either were or were not authorized," not on a "controversy about the reach or application of" the Appropriations Clause itself).

Finally, the Organizations' invocation (Br. 25-26) of *Staacke v. United States Secretary of Labor*, 841 F.2d 278, 281 (9th Cir. 1988), is even further afield. That case

concerned implied exceptions to express statutory preclusions of review. *See id.* Nothing in *Staacke* even remotely suggests that a plaintiff falling outside the zone of interests of the statutory limitations it seeks to enforce can nonetheless sue simply by either relabeling that statutory claim as a constitutional one or insisting the statutory violation is clear. *See id.*

2. As the government further explained (Opening Br. 39-40), even if plaintiffs' claims could be characterized as resting on the Appropriations Clause without contravening *Dalton*, plaintiffs nonetheless would need to fall within the zone of interests protected by Section 8005's limitations because their claim still rests on those limitations. Plaintiffs fail to refute this showing.

The Organizations' threshold assertion (Br. 32) that the government has somehow "waived" this argument is incorrect. The Organizations argued in district court and in opposing the government's stay motion in this Court that they did not need to satisfy the zone-of-interests requirement to enforce Section 8005's limitations because they had an "ultra vires" claim; alternatively, they argued that they fell within Section 8005's zone of interests. *See* FER13-16; Organizations' Opp'n. to Mot. for Stay 4-13 (June 11, 2019). The motions panel requested supplemental briefing on whether the claim to enforce Section 8005's limitations could be understood as an implied cause of action to enforce the Appropriations Clause, *see* Order (June 18, 2019), to which the government responded that it could not, but that the same zone-of-interests requirement would apply in any event, *see* Gov't Supp. Stay Br. 1-2 (June

27, 2019). The government thus in no way "waived" this argument by failing to first present it in district court, where plaintiffs themselves made different arguments about the nature of their claim and the relevant zone of interests. If anything, *plaintiffs* "waived" any argument that they can escape the zone-of-interests requirement by characterizing their claim as arising under the Appropriations Clause. Moreover, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Servs., Inc.*, 500 U.S. 90, 99 (1991). Here, the government plainly raised the issue that plaintiffs are not proper parties to challenge DoD's transfer of funds. This Court can and should consider that issue regardless of how plaintiffs' claim is framed.

The Organizations further err in arguing (Br. 32-33) that the zone-of-interests requirement does not apply to any (or almost any) constitutional claims. The Organizations acknowledge that both the Supreme Court and this Court have applied the requirement to claims under the so-called dormant Commerce Clause, but the Organizations fail to justify their suggestion that those particular structural constitutional claims are somehow sui generis. To the contrary, this Court has recognized that, under Supreme Court precedent, the zone-of-interests test not only "governs claims . . . under the negative [dormant] Commerce Clause in particular" but "under the Constitution in general." *Individuals for Responsible Gov't, Inc. v. Washoe*

County, 110 F.3d 699, 703 (9th Cir. 1997) (quotation marks omitted; brackets in original) (citing, indirectly, *Valley Forge Christian Coll. v. Americans United for Church & State, Inc.*, 454 U.S. 464, 475 (1982)).

The Organizations erroneously imply that such cases have been undermined by *Lexmark*'s clarification that the zone-of-interests inquiry concerns the scope of the cause of action rather than prudential standing, 572 U.S. at 127-28. *Lexmark* also reaffirms that Congress is presumed to legislate against the background of the zone-of-interests limitation. *Id.* at 129. There is no evident reason why that presumption should apply with any lesser force to the express and implied causes of action that Congress provides to assert structural constitutional claims in federal court. *Cf. id.* at 127 n.3 (suggesting that third-party standing requirements for claims asserting individual constitutional rights can likewise be framed as limits on the cause of action rather than prudential-standing rules). At a minimum, this Court remains bound by *Valley Forge*'s directly applicable rule that constitutional claims are subject to the zone-of-interests requirement, regardless of any tension with *Lexmark*'s subsequent recharacterization of the nature of that requirement, because this Court is barred from concluding that the Supreme Court's "more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

The States fare no better in arguing (Br. 47-48) that *Bond v. United States*, 564 U.S. 211 (2011), supports the proposition that it is at least sufficient that they purportedly fall within the zone of interests of the Appropriations Clause itself,

because it is a "structural" provision of the Constitution. The constitutional claim in *Bond* was not, as here, premised on the government's lack of statutory authority; the claim there was that Congress itself exceeded its enumerated powers in criminalizing Bond's conduct. *Id.* at 214. Nothing in *Bond* suggests that a plaintiff bringing a nominal "constitutional" claim that depends on a statutory violation need not fall within the zone-of-interests of the statutory limitations that form the basis of the claim.

Nor does *Bond* suggest that *any* Article III injury is a sufficient basis for a plaintiff to bring a structural constitutional claim. Although the criminal defendant in *Bond* undoubtedly satisfied the zone-of-interests requirement to argue that Congress had exceeded its enumerated powers in criminalizing *her own conduct*, that hardly suggests that a pre-enforcement claim likewise could have been brought by any third party that could demonstrate that another person's imminent prosecution and conviction would result in fairly traceable harm to the third party's aesthetic, recreational, or environmental interests. To the contrary, *Bond* itself emphasized that, in addition to Article III standing requirements, "[a]n individual who challenges federal action on [federalism] grounds" is also subject to "prudential rules[] applicable to all litigants and claims," *Bond*, 564 U.S. 225, and the zone-of-interests requirement, of course, was described as a "prudential" rule at the time.

Finally, the States' reliance (Br. 47) on *McIntosh* for this point fails for similar reasons. Again, *McIntosh* involved an appropriations rider which prohibited the

Department of Justice from spending money to "prevent such States from implementing their own State laws that *authorize* the use, distribution, possession, or cultivation of medical marijuana." 833 F.3d at 1169 (emphasis added). The defendants in *McIntosh*, indicted under federal criminal law for medical-marijuana-related offenses, asserted that the appropriations rider prohibited their prosecution. *Id.* at 1166-69. Contrary to the States' suggestion here, the criminal defendants in *McIntosh* were indisputably within the zone of interests of an appropriations rider that was alleged to prohibit federal impairment of state laws authorizing *their own conduct*. And the fact that such parties were allowed to sue does not suggest that plaintiffs seeking to vindicate entirely unrelated injuries also could have sued simply because the Appropriations Clause bars expenditures without Congressional authorization. For this reason and all the others discussed, the particular plaintiffs here "have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." SCt. Stay Order 1.

III. The Text And Context Of Section 8005 Confirm That DoD Had Statutory Authority To Transfer The Appropriated Funds.

As the government explained (Opening Br. 5-7), when Congress appropriated funds to DoD for FY2019, it authorized the Secretary of Defense to transfer some of those funds between DoD appropriations as the agency's needs changed over the fiscal year. *See* Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018) (Section 8005). The transfers at issue here

fall well within Section 8005's requirements, and plaintiffs fail to demonstrate otherwise.

A. An "Item" In Section 8005 Is An Item That DoD Is Authorized By Statute To Pay For, Rather Than A Broader Administration Goal Or Purpose.

The words Congress has enacted "must be read in their context and with a view to their place in the overall statutory scheme." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019). Section 8005 is a provision of DoD's Appropriations Act that governs internal transfers of funds within the FY2019 appropriation; in this context, the word "item" denotes items that have been funded, or could be funded, in DoD's budget. *See* Opening Br. 41-45.

Plaintiffs dismiss this interpretation as "not credible," States Br. 14-15, but they fail to come to grips with the actual text of Section 8005. The statute disallows transfers "unless for higher priority items . . . than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." Section 8005. To the extent DoD is using Section 8005 to transfer money "*for*" a "higher priority item[]," the referenced "item" must be a specific project or program *of DoD's*—Section 8005 permits DoD to transfer funds only between internal DoD accounts.

That the term "items" in the first clause of Section 8005's limitation refers to particular items within DoD's own budget and authority ("higher priority items") strongly suggests that the same term in the second clause—*i.e.*, an "item for which

funds are requested" but that "has been denied by the Congress"—likewise refers to a particular "item" within DoD's own authority and budget. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (explaining the "normal rule of statutory construction" "that identical words used in different parts of the same act are intended to have the same meaning" (quotation marks omitted)). Indeed, the phrase "item for which funds are requested" most naturally refers to an item within DoD's own budget, as it makes little sense to refer to anyone other than DoD "request[ing]" that funds be transferred.

The codified version of the transfer provision, 10 U.S.C. § 2214, bolsters this reading. Congress first codified the transfer provision in 1990, as part of a program to "codify certain provisions of law that are either permanent in nature, or have been including in defense appropriations Acts on a recurring basis." H.R. Rep. No. 101-665, 338 (1990).[4] Congress has nonetheless continued to include the transfer provision in DoD's annual appropriations acts, Section 8005 being only the most recent example.[5] Congress explained during the codification that "[a]lthough minor

[4] After Congress first enacted the transfer provision in 1974, it included the same language in subsequent appropriations acts. *See. e.g.,* Department of Defense Appropriations Act, 1984, Pub. L. No. 98-212, § 729, 97 Stat. 1421, 1444 (1983); Department of Defense Appropriations Act, 1975, Pub. L. No. 93-437, § 834, 88 Stat. 1212, 1231 (1974); Department of Defense Appropriations Act, 1974, Pub. L. No. 93-238, § 735, 87 Stat. 1026, 1044.

[5] *See, e.g.* Department of Defense Appropriations Act, 2015, Pub. L. No. 113-235, § 8005, 128 Stat. 2130, 2251 (2014); Department of Defense Appropriations Act, 2014, Pub. L. No. 113-76, § 8005, 128 Stat. 5, 103; Department of Defense

technical changes to the text of the provisions were sometimes necessary, there are no changes in the substance or effect of the provisions." *Id.* And Section 2214 is even clearer that "item" is used consistently in the provision: it states that DoD may not transfer appropriated funds except "for a higher priority item, based on unforeseen military requirements, than the items for which the funds were originally appropriated," and may not transfer funds at all "if the item to which the funds would be transferred is an item for which Congress has denied funds." 10 U.S.C. § 2214(b)(1), (2).

Thus, while Section 8005 uses the word "item" twice (disallowing transfer "unless for higher priority items . . . than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress"), Section 2214 uses "item" four times. By referring to "a higher priority item . . . than the items for which the funds were originally appropriated," Section 2214 explicitly cross-references the "items" for which funds in fact *were* appropriated, further clarifying that an "item" in this clause must be one for which DoD funds *could be* appropriated. 10 U.S.C. § 2214(b)(1), (2). Similarly, by repeating the word "item" in the phrase "if *the item* to which the funds would be transferred is *an item* for which Congress has denied funds," *id.*, (emphases added), Section 2214 again confirms that

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Appropriations Act, 2005, Pub. L. No. 108-287, § 8005, 118 Stat. 951, 969 (2004); Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8005, 109 Stat. 636, 652 (1995).

the "item for which Congress has denied funds" is an item that is or could be part of DoD's budget. *Id.* § 2214(b)(2). DoD can transfer funds only to items within its own budget, and Section 2214 clarifies that the "item" for which funding has been denied is the same "item." *Id.*

Plaintiffs' reading of "item" is itself not credible, as it would interpret "item" as referring broadly and colloquially to any potential policy goal across the federal government, unmoored to any particular agency or appropriations process. That interpretation makes little sense for a term that appears in DoD's annual appropriations statute, limits the circumstances under which DoD may transfer funds among otherwise-authorized projects, and was enacted in light of the historical experiences between Congress and DoD in the defense appropriations process. H.R. Rep. No. 93-662 at 16 (1973) (explaining that Congress was including Section 8005 because, on occasion, DoD had "requested that funds which have been *specifically deleted* in the legislative process be restored through the reprogramming process," but making clear this restriction would not "interfere with the basic requirements of the Department of Defense" (emphasis added)).

The States object that Section 8005 refers to the "item[s] . . . denied by the Congress," rather than "'*funding requests* denied by the Congress.'" Br. 15 (quoting Stay Op. 37). But considered in context, it is unsurprising that Section 8005 does not use that phrasing. Again, Section 8005 is a provision in DoD's fiscal year 2019 appropriations and is specific to the appropriations context; Congress did not need to

specifically use the term "*funding request* denied by the Congress." The provision's text and purpose show that Section 8005 is meant to prohibit DoD from transferring funds to an item it unsuccessfully requested funding for during the appropriations process, as plaintiffs themselves acknowledge. *See* States Br. 15; Organizations Br. 42. For similar reasons, the Organizations are incorrect (Br. 42) in drawing a negative inference from Congress's decision not to specifically include references "to an item's subcomponents, requesting agency, or specific budget line" in a transfer provision limited to the appropriations process between DoD and Congress.

Accordingly, the "item" at issue here is DoD's counter-drug support to DHS pursuant to DoD's explicit statutory authority in Section 284, and Congress in no way "denied" that "item." *See* Opening Br. 43-48. The Organizations erroneously contend (Br. 43) that "a general denial of something requested" necessarily includes "more specific or narrower forms of that request." But Congress's appropriation of a certain amount of border construction funds to DHS was not even a "general denial" *to DHS* and certainly did not encompass any denial of a request *by* DOD. DoD never made, and Congress never denied, any request for funds to support DHS's counter-drug activities pursuant to Section 284. Contrary to the Organizations' suggestion (Br. 44), this does not require the Court to "exhibit . . . naiveté" about broader political circumstances. It merely applies the plain terms in DoD's appropriations statute according to their plain meaning, the precise context in which they appear, and the particular purposes for which they were enacted.

B. DoD's Support For DHS Under Section 284 Was "Unforeseen" At The Time DoD's Budget Was Finalized.

As the government demonstrated (Opening Br. 45-47), DoD's need for funds to provide support to DHS pursuant to Section 284 was also "unforeseen" at the time DoD's budget was finalized, as Section 8005 requires. DoD cannot agree to provide support under Section 284 (or to identify appropriated funds for the work) until it has received such a request. *See* 10 U.S.C. § 284(a)(1). Congress did not enact DoD's appropriation for the 2019 fiscal year until September 2018. *See* 132 Stat. at 2981. At that time, negotiations were still ongoing for DHS's appropriation, which was not finalized until February 14, 2019, five months later. *See* Consolidated Appropriations Act of 2019, Pub. L. No. 116-6. It was not until February 25, 2019 that DHS first requested DoD's counter-drug support. ER187, ER271.

Plaintiffs' argument that Section 8005's "unforeseen" requirement was not satisfied once again rests upon the mistaken premise that the "item" or "requirement[]" to be funded is a border barrier generally, rather than DoD's need to provide support for counter-drug activities in response to specific requests from DHS under Section 284. *See* Organizations Br. 45; States Br. 16-17. Likewise, plaintiffs are incorrect that the existence of ongoing, general discussions about possible military support for DHS raised an inference that any or all of the specific Section 284 requests for support were foreseen. *See* Organizations Br. 46; States Br. 17. "[T]hinking about the possibility of 284 projects" (Organizations Br. 46) is not the

same as knowing what another agency will call upon DoD to do, or when support might be requested, or how much particular support activities will cost. Section 8005 limits DoD's ability to spend transferred funds on particular items, and the items at issue here did not come into being until DHS submitted its requests and DoD determined that it could, and would, provide support for particular projects consistently with Section 284. None of these specific requests were foreseen within the meaning of Section 8005, regardless of whether DoD could have expected that at some point it might be asked to provide some level of Section 284 support for counter-narcotics programs.

Plaintiffs suggest that the government's interpretation of Section 8005 would permit federal agencies to "game[]" the appropriations process. *See* Organizations Br. 46; States Br. 16. That makes neither legal nor practical sense. DoD is charged with the critical mission of safeguarding and defending the United States; in requesting funds for a given fiscal year, it must ensure it can support the Departments of the Army, Navy, and Air Force, procure and update weapons systems and other equipment, and provide for the needs of military personnel at home and overseas. *See generally* U.S. Code, Title X; *see also, e.g.*, H.R. Rep. No. 115-952 (2018) (conference report noting the House-, Senate-, and conference-committee determinations regarding DoD's thousands of requests for items to be funded in the appropriation for FY2019). There is no realistic scenario in which DoD would be encouraged by "the entire federal budgeting process" to *not* ask Congress for particular funds for

projects within its own authority so that it could later attempt to transfer funds between its own accounts to use for projects and activities Congress denied to some other agency. *See* States Br. 16.

To begin, if DoD intentionally withheld a specific request to Congress anticipating that Congress would later deny money to another agency and thus DoD could scheme to reprogram funds, Section 8005 would not permit the later transfer, because any transfer must be for "unforeseen" requirements. *See supra* at 30. Moreover, DoD would need explicit statutory authority to undertake any project. Although DoD has statutory authority to provide specified and enumerated assistance to some agencies under specific circumstances, as in Section 284, it is hardly plausible that DoD could or would risk the defense budget in order to undertake policies and projects across the federal government.

The suggestion that the timing of Section 284 requests could be manipulated is equally unrealistic. It would make little sense for an agency, knowing it has a specific Section 284 request that it wants funded in a given fiscal year, to wait until after DoD's budget is finalized in hopes that DoD would later use its transfer authority to finance the project. DoD's transfer authority is, of course, subject to restrictions, including that DoD have funds available for items with lower priority and that DoD has not exceeded the maximum transfer amount in a given year. If an agency wants a Section 284 project funded, "gaming" the appropriations process in the way plaintiffs suggest is hardly a sure-fire method to secure funds.

Plaintiffs also ignore Congress's role in the defense budget process. If, as they contend, DHS's requests for Section 284 support were foreseeable to DoD at the time of DoD's budget requests, then they were presumably foreseeable to Congress as well. If Congress anticipated that DoD might use its transfer authority to support DHS against Congress's wishes, then Congress had ample means to prevent DoD from doing so. Most obviously, it could have amended the transfer provision in DoD's FY2019 appropriation to bar DoD from funding border construction. Instead, Congress provided DoD with the transfer authority in Section 8005. Moreover, in the later Consolidated Appropriations Act that funded DHS and other agencies, Congress could have prohibited DHS from making Section 284 requests related to border construction, prohibited DoD (and every other agency, for that matter) from spending any money on border barrier projects other than the funds specifically appropriated to DHS, or amended Section 8005 to limit DoD's transfer authority. Congress did not do any of those things. Instead, its last word on the subject was to preserve agencies' existing authority to use "the reprogramming or transfer provisions of this or any other appropriations Act." Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. D, tit. VII, § 739, 133 Stat. 13, 82.

C. Counter-Narcotics Support Provided Under Section 284 Is A "Military Requirement."

Going beyond the district court and the motions panel, plaintiffs additionally contend that DoD's Section 284 support for DHS is not a "military requirement."

Here again, plaintiffs' arguments depend upon the mistaken premise that the "item" or "requirement" in question is border construction generally, rather than DoD's support under Section 284. *See* Organizations Br. 47; States Br. 17. The applicable "unforeseen military requirement" is DoD's counter-narcotics support under Section 284, and Congress itself has established that authority as a military requirement: Section 284 authorizes DoD to use its military resources, including its expertise and funding, to assist in combatting drug smuggling. *See, e.g.*, 10 U.S.C. § 284(b)(3), (5)-(6), (10) (Supp. V 2017) (authorizing DoD to assist other federal agencies with transportation, training, communications monitoring, and aerial reconnaissance). Plaintiffs thus ask this Court to second guess the judgment of Congress and DoD that the military may be, and here is, required to assist in combatting these problems.

Congress knew that it was directing military resources to assist in tackling the nation's drug problem. When enacting Section 284 itself, Congress expressed concern "about the threat posed by the production and trafficking of heroin, fentanyl (and precursor chemicals), and other illicit drugs," and directed DoD "to ensure appropriate resources are allocated to efforts to combat this threat." *See e.g.*, H.R. Rep. 114-840, at 1147 (2016). Moreover, military resources have for decades been committed to drug interdiction at the border, with Congress's authorization and approval. Congress has commended DoD specifically for its work in assisting with fencing at the border. *See* H.R. Rep. No. 103-200, at 330-31 (1993) (supporting "the reinforcement of approximately 13 miles of border fence along the 14-mile drug

smuggling corridor along the San Diego-Tijuana border area" is "precisely the kind of federal-local cooperative effort the Congress had in mind").[6]

In addition, Congress and DoD have for years understood that funds may be *transferred* within the Defense budget to support counter-narcotics operations and border protection. Congress in 2007, for example, approved a Section 8005 transfer of funds to DoD's Drug Interdiction and Counter-Drug Activities appropriation for an infrastructure project in Nicaragua to stem cocaine smuggling into the United States. *See* FER 1-6. And in 2006, Congress approved a Section 8005 transfer to address "National Guard Border Security Shortfalls," when the National Guard was deployed at the southern border for a particular operation. *See* FER 7-13. There is thus a sound historical basis for the understanding that counter-narcotics support and border reinforcement can be "unforeseen military requirements" to be funded though Section 8005 transfers; plaintiffs' view that DoD meets a military requirement only when it responds to a "military threat," *see* States Br. 17, is groundless.

The Organizations also contend (Br. 47) that Section 284 support cannot be a "military requirement" because "[i]f anything the military might do is deemed a military *requirement*, the statutory phrase imposes no restriction at all." But Congress

[6] *See also* Hearing Before the S. Comm. on Armed Servs. Subcomm. on Emerging Threats and Capabilities, 1999 WL 258030 (Apr. 27, 1999) (Testimony of Barry R. McCaffrey, Dir. Office of Nat'l Drug Control Policy) ("Without the critical foundation of DoD support, much of the nation's international drug control effort would not be possible.").

may clarify its intent through repetition, and that is all that occurs in Section 8005. The Supreme Court has recognized that "[s]ometimes the better overall reading of the statute contains some redundancy." *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019). Indeed, redundancies are "hardly unusual" in certain contexts, *Marx v. General Revenue Corp.*, 568 U.S. 371, 385 (2013), and often not significant. The Court attributes no significance to arguments based upon surplusage, for example, when the provisions or words of statutes simply overlap. *See*, *e.g.*, *Rimini,* 139 S. Ct. at 881; *Lorenzo v. Securities & Exch. Comm'n*, 139 S. Ct. 1094, 1102 (2019); *see also Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004) (The "preference" in statutory construction "for avoiding surplusage constructions is not absolute."); *Romo v. Barr*, No. 16-71559, 2019 WL 3808515, at *5 (9th Cir. Aug. 14, 2019) ("[W]hile redundancy and surplusage are not always desirable, they are not anoetic."). When the plain meaning of statutory text includes surplus terms, a court should not distort the text to avoid the surplusage but rather "prefer the plain meaning since that approach respects the words of Congress." *Lamie*, 540 U.S. at 536.

Congress in Section 8005 used the word "military" repeatedly. Nothing about that usage, however, suggests that the reiterations imply a new or different restriction upon DoD's ability to spend transferred funds. On the contrary, the entire section is by its terms limited to military spending. Section 8005 is the provision that generally authorizes DoD to make funds transfers, and authorizes the transfer of "funds made available in this Act to the Department of Defense *for military functions*." 132 Stat. at

2999 (emphasis added). Congress nonetheless repeats the qualifying word "military," confirming that the available funds exclude "military construction" funds, that transfers must support requests "based on unforeseen military requirements," and that "transfers among military personnel appropriations shall not be taken into account for purposes of the limitation on the amount of funds that may be transferred under this section." *Id.* These reiterations of "military" are clearly superfluous in the context of a statute that authorizes the repurposing of monies appropriated "for military functions." Thus, while it may not have been strictly necessary for Congress to specify that transferred funds must be used for "military" requirements, that does not imply that any inference should be drawn from Congress's decision to repeat the qualifying language. Here, DoD's Section 284 support is clearly a "military requirement" for purposes of Section 8005, and Congress's decision to reiterate that Section 8005 concerns "military" funding does not diminish that reality.

D. DoD Also Fully Complied With Section 9002.

Finally, the States alone briefly contend (Br. 18) that the Section 284 projects funded by a transfer under Section 9002—a separate transfer provision in DoD's FY2019 appropriations act, *see* 132 Stat. at 3042—violated a unique, additional requirement in that provision. In particular, they assert that Section 9002 authorizes transfers of funds only between appropriations made available in Title IX of the

appropriations act—the title dedicated to Overseas Contingency Operations—and, in their view, Section 284 support is not funded under Title IX. *See id.*

The States are factually incorrect. The record establishes unequivocally that the reprogramming in question transfers funds between appropriations made available under Title IX, as Section 9002 requires. *See, e.g.*, ER175 ("Part II of this reprogramming action transfers $681.535 million *between FY 2019 Title IX* Overseas Contingency Operations (OCO) Defense appropriations.") (emphasis added).[7] The district court was thus right to recognize that Section 8005 and Section 9002 apply in the same manner to the funds transfers at issue here. *See* ER4-ER5.

IV. Plaintiffs' Alternative Arguments For Affirmance Should Be Rejected.

Plaintiffs also seek to defend the permanent injunction on several distinct grounds that the district court itself did not rely on. Each of these alternative arguments is easily rejected.

[7] Congress, in Title IX of the Department of Defense Appropriations Act, 2019 appropriated $153 million for DoD's "Drug Interdiction and Counter-Drug Activities, Defense" appropriation, which funds Section 284 support obligations. *See* 132 Stat. at 3042. The transfer under Section 9002 transferred amounts from other Title IX appropriations into Title IX's appropriation for DoD's drug interdiction and counter-drug activities. The designation of all amounts appropriated in Title IX as "for Overseas Contingency Operations/Global War on Terrorism," does not mean that these funds can be made available only for overseas contingency operations, but merely raises caps on discretionary spending under Section 251(b)(2)(A)(ii) of the Balanced Budget and Emergency Deficit Control Act of 1985 (codified at 2 U.S.C. § 901(b)(2)).

A. Section 284 Explicitly Authorizes DoD's Construction.

Section 284 authorizes DoD to provide counter-drug support at the request of another agency like DHS, and this support expressly includes the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across" an international boundary. 10 U.S.C. § 284(a)(1)(A), (b)(7). The projects at issue here fall squarely within this authority.

Plaintiffs rely on a mistaken premise in objecting (Organizations Br. 49) that the government cannot identify "218 miles" of the border as a "drug smuggling corridor." The government instead has identified several drug smuggling corridors where improved barriers and other border infrastructure would help to block narcotics trafficking. The total length of those barriers adds up to 218 miles, but the separate projects are not part of a single "corridor." In any event, plaintiffs cite no standard or principle for defining a certain size or number of "drug smuggling corridor[s]," and plaintiffs cannot reasonably dispute that when DHS requested DoD's assistance it cited evidence of substantial drug trafficking between ports of entry in the Border Patrol Sectors where the project sectors are located and explained why the requested projects would help block drug smuggling. *See, e.g.*, ER128-ER127, ER271, ER274-ER275, ER278-ER279, ER282.

Plaintiffs' related argument that Section 284 somehow places limits on the scale or monetary amount of construction under the statute is similarly mistaken. Organizations Br. 50-51; States Br. 19. Although Section 284 provides that DoD's

border barrier construction must be in "support" of the requesting agencies' broader "counterdrug activities," nothing in Section 284 limits the size, scale, or budget of a construction support project authorized by the statute. *See, e.g.*, 10 U.S.C. § 284(b)-(c). Plaintiffs point to the requirement under Section 284(h) that the Secretary must give Congress 15 days' written notice before engaging in "small scale construction," which the statute defines as construction "not to exceed $750,000." *Id.* § 84(h)(1)(B), (i)(3). That notice requirement, of course, does not expressly prohibit larger construction, and it also provides no basis to infer that Congress intended to limit the support authorized under Section 284 to "small scale construction." Congress simply chose to require the Secretary to provide notice for smaller Section 284 projects but not for larger ones. Congress could reasonably have concluded, for example, that it would be unlikely to be made independently aware of small-scale construction projects, rendering a notice requirement uniquely necessary in that context. If Congress wished to limit DoD's support under Section 284 to that scale of construction, it "presumably would have done so expressly." *Russello v. United States*, 464 U.S. 16, 23 (1983).

Plaintiffs' argument also cannot be reconciled with Section 284's history. As the Organizations recognize (Br. 50-51), since Congress first provided Section 284's support authority, DoD has repeatedly used it, with Congress's explicit approval, to complete large-scale fencing projects along the southern border in support of DHS's counter-drug activities, *see* H.R. Rep. No. 103-200, at 330-31; H.R. Rep. No. 109-452

at 368 (2006). The Organizations assert (Br. 51-52) that those projects involved only "million[s]" of dollars, not $2.5 billion, but they cannot dispute that Congress approved of DoD's prior barrier construction under Section 284 in amounts substantially greater than the $750,000 limit they seek to infer from the congressional notification requirement. *See* 10 U.S.C. § 284(h)(1)(B), (i)(3).

Nor does the government's straightforward reading of Section 284 somehow "displace appropriations decision-making from Congress to the Secretary of Defense." Organizations Br. 49. Whether and how much Congress chooses to appropriate to DoD or DHS in a given fiscal year (and whether and under what circumstances Congress authorizes DoD to transfer funds between internal appropriations accounts) does not change the scope of DoD's underlying statutory authority set forth in the text of Section 284, which long predates the recent political controversy over border-barrier construction.

B. Plaintiffs' Constitutional Arguments Are Without Merit.

Plaintiffs argue that, if Section 8005 authorized DoD's transfer of funds, the statute itself would violate the Constitution. As a threshold matter, plaintiffs cannot satisfy the zone-of-interests requirement for these constitutional claims: just as their alleged aesthetic, recreational, and environmental injuries are entirely unrelated to Section 8005's limitations on DoD's internal budget transfers, those injuries are entirely unrelated to the asserted constitutional limitations on Congress's power to

authorize DoD's internal budget transfers. *Supra* at 8-11. In any event, these constitutional claims are entirely meritless.

1. Plaintiffs assert that Section 8005 violates the Presentment Clause because it allows DoD to "effectively amend" (States Br. 24), or "reject[] the limits Congress imposed" (Organizations Br. 26), in the Consolidated Appropriations Act of 2019, through which Congress appropriated only a certain amount of funds to DHS for border-barrier construction. But Section 8005 does not empower any executive official to amend or repeal any law, actually or effectively. Rather, the 2019 Act was enacted against the backdrop of the previously enacted Section 8005, which it left in place. DoD's ability to transfer appropriated funds among its own budget accounts in no way contradicts DHS's limited appropriation for border-barrier construction.

This case is thus not comparable to *Clinton v. City of New York*, where the Supreme Court held that the Presentment Clause was violated because the Line Item Veto Act purported to authorize the President to "cancel in whole" portions of enacted statutes and thereby deprive them of "legal force or effect." 524 U.S. at 435-37. Although *City of New York* expressed concern that the President was "rejecting the policy judgment made by Congress," *id.* at 444, that concern was necessarily limited to the context of a line-item veto in which the President unilaterally and expressly amended Acts of Congress. The Presentment Clause does not foreclose the Executive Branch from exercising its own independent policy judgment to "supplement" certain types of federal spending pursuant to an express congressional

"delegation" of authority to transfer appropriated funds. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (holding that the President has sweeping statutory authority to impose additional restrictions on the entry of aliens beyond those that Congress has seen fit to include).

2. Nor does Section 8005 violate the Appropriations Clause (States Br. 42), which simply requires that money drawn from the Treasury must be "in Consequence of Appropriations made by Law." U.S. Const., art. I, § 9, cl. 7. Accordingly, a federal statute authorizing an expenditure "by Law" by definition cannot violate the Appropriations Clause. Indeed, it is well established that Congress could have made the entire DoD budget a single lump-sum appropriation to be spent in the agency's unfettered discretion. *See* Opening Br. 47-48 (citing *Lincoln v. Vigil*, 508 U.S. 182 (1993)). Section 8005 cannot possibly violate the Appropriations Clause by providing DoD a more limited authority to transfer certain funds between DoD accounts.

Plaintiffs nevertheless broadly assert that federal agencies cannot "mix[] and match[] funds from different accounts to exceed funding limits imposed by Congress." Organizations Br. 53; *see also* States Br. 21-23. But the out-of-circuit case they cite, *Nevada v. Department of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005), stands for a much narrower, and inapposite, principle of statutory rather than constitutional interpretation: namely, that when a single federal agency is determining which of two appropriations *to that agency* should be used for a particular object or purpose, Congress presumptively intends the agency to use its specific appropriation rather

than its general appropriation. Here, DoD is using its own appropriated funds to support another agency pursuant to DoD's express statutory authority to provide such assistance. Plaintiffs cite no case from any court supporting the atextual proposition that a limitation in the appropriations statute of one agency (DHS) can limit a second agency (DoD) from using its own separate appropriations statute to support the first agency, let alone cause the second agency to somehow violate the Appropriations Clause.

3. Plaintiffs' allegation (States Br. 20) that Section 8005 violates the separation of powers fails for the same reasons. Nothing prevents Congress from exercising its power over the purse by delegating authority to an executive agency to transfer funds that Congress has appropriated among the projects that Congress has authorized.

C. The District Court Correctly Held That The Secretary Of Homeland Security's NEPA Waiver Was Effective.

The Organizations (but not the States) contend that DHS's waivers exempting the government from compliance with the National Environmental Policy Act (NEPA), are ineffective. Br. 54. The district court correctly rejected this argument. ER60-ER64.

Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) directs the Secretary of Homeland Security to "take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to

deter illegal crossings in areas of high illegal entry into the United States." Pub. L. No. 104-208, div. C, § 102, 110 Stat. 3009, 3009-555, § 102(a). As originally enacted in 1996, Section 102 authorized the Secretary to waive two specified environmental laws to the extent the Secretary "determines necessary to ensure expeditious construction of the barriers and roads under this section." *Id.*, 110 Stat. at 3009-554. But Congress became frustrated by "[c]ontinued delays caused by litigation" that were preventing the construction of border fencing projects, and it expanded the Secretary's waiver authority to include "other laws that might impede the expeditious construction of security infrastructure along the border." H.R. Rep. No. 109-72, at 171 (2005). Thus, in a provision of the REAL ID Act, *see* Pub. L. No. 109-13, div. B., § 102, 119 Stat. 231, 306 (2005), Congress amended Section 102(c) to authorize the Secretary, "[n]otwithstanding any other provision of law," to waive "*all* legal requirements" that the Secretary, in the Secretary's "sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." IIRIRA § 102(c)(1) (emphasis added).

Congress could hardly have been clearer in confirming that DHS has sweeping authority to waive laws that might impede the speedy construction of barriers at the border. Here, the Acting Secretary of Homeland Security has exercised his authority under Section 102(c)(1) to issue waivers, including waivers of NEPA, for the projects for which DoD has authorized Section 284 support. *See* 84 Fed. Reg. 21,798 (May 15, 2019); 84 Fed. Reg. 21,800 (May 15, 2019); 84 Fed. Reg. 17,187 (Apr. 24, 2019). This

Court has sustained the validity of earlier DHS waivers under Section 102. *See In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1213, 1225 (9th Cir. 2019) ("*Border Infrastructure*").

The Organizations contend (Br. 54) that the waivers here are ineffective because they must be limited to hastening the "construction of the barriers and roads *under this section*," *i.e.* Section 102 of IIRIRA, and thus cannot apply to "construction under Section 284." But Section 102(a) broadly authorizes the Secretary of Homeland Security to take "such actions as may be necessary to install additional physical barriers and roads . . . in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." IIRIRA § 102(a); *see also Border Infrastructure*, 915 F.3d at 1224 (upholding waiver for DHS barriers to restrict illegal entry of narcotics). The Acting Secretary of Homeland Security identified sectors with high levels of drug trafficking, listed specified border construction projects needed in those sectors, and requested DoD's assistance for the construction pursuant to Section 284—a statute that explicitly authorizes DoD to provide such support. *See, e.g.*, 84 Fed. Reg. at 21,799 ("DHS requested that the Department of Defense, pursuant to 10 U.S.C. 284(b)(7), assist by constructing fence, roads, and lighting within the Tucson Sector . . . . [T]he Department of Defense will provide such support.").

As the district court reasoned, the Organizations' position "would require the Court to find that even though it is undisputed that DHS could waive NEPA's

requirements if it were paying for the projects out of its own budget, that waiver is inoperative when DoD provides support in response to a request from DHS." ER62. And the district court correctly recognized the implausibility "that Congress intended to impose different NEPA requirements on DoD when it acts in support of DHS's Section 102 authority in response to a direct request under Section 284 than would apply to DHS itself." *Id.* The Acting Secretary's exercise of waiver authority under IIRIRA was valid, and there is nothing inconsistent about the two agencies' respective spheres of statutory authority.

V. The District Court Abused Its Discretion In Granting The Organizations Injunctive Relief.

The Organizations defend the district court's injunction (Br. 56-60) without addressing the Supreme Court's intervening grant of a stay pending appeal. In issuing the stay order, the Supreme Court necessarily determined that the balance of the equities tips in the government's favor. *See Nken*, 556 U.S. at 434 (stay factors include irreparable injury, the balance of hardships, and the public interest). That starkly underscores the government's arguments that the district court abused its discretion in granting the injunction. *See* Opening Br. 48-52.

Plaintiffs fail to meaningfully distinguish *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 23-31 (2008). The Organizations assert that "the government substantiated its claims" of harm in *Winter*, whereas they dispute that the construction here will impede drug trafficking. *See* Organizations Br. 57-58; *see also* States Br. 63-65.

But the district court notably made no finding about the government's drug-interdiction interests. ER68. And the record provides ample evidence of significant drug smuggling in the sectors at issue, including DHS's request for assistance to DoD, which specifically described the need for the particular construction projects here. *See, e.g.*, ER126-ER27, ER154, ER189, ER191-ER92, ER274-ER75, ER278-79. Plaintiffs may doubt the efficacy of the construction at stanching the flow of illegal drugs, but *Congress* has long recognized that border fencing is an important means to address cross-border drug trafficking: Congress in IIRIRA (and its amendments) directed DHS to expeditiously undertake construction to build barriers and roads at the border to prevent illegal entries, including the illegal entry of narcotics. *See* IIRIRA § 102(a); *Border Infrastructure*, 915 F.3d at 1224. And when Congress authorized DoD to provide support to the counter-drug activities of other agencies, it explicitly included the construction of fencing at international borders among the list of activities authorized for counter-drug support. 10 U.S.C. § 284(b)(7).

Plaintiffs are similarly mistaken to suggest that the government's harms here are less significant than the harms in *Winter* because "only a small percentage" of the drugs entering the United States enter the country between ports of entry, as opposed to at ports of entry. *See* States Br. 65; Organizations Br. 57-58. Even if *higher* rates of drug smuggling occur at points of entry than between points of entry, that in no way diminishes the importance of impeding drug smuggling, as Congress has explicitly authorized DHS and DoD to do. This Court has rejected similar arguments,

recognizing in the context of IIRIRA that whether a particular area has a "high" rate of illegal narcotics entry is not "a comparative determination" in reference to other sectors that might in fact have "high*er*" rates of illegal entry. *Border Infrastructure*, 915 F.3d at 1224.

The Organizations further assert (Br. 58) that the injunction in *Winter* disturbed, rather than preserved, the "status quo," but that was not a necessary element of the Court's equitable balancing. *Winter,* 555 U.S. at 21-22. Nor can *Winter* be distinguished (Organizations Br. 58) on the ground that the injunction enjoined the Navy's otherwise-lawful testing due to the government's mere failure to prepare an environmental impact statement. Similarly here, the district court never held that Section 284 did not authorize DoD's project; but its injunction halted DoD's otherwise-lawful construction under Section 284 based solely on its conclusion that Section 8005 barred DoD's earlier transfer of funds. And as the government already explained, *see* Opening Br. 52, the Organizations cannot brush aside the serious financial harms the injunction imposed on the government as "unlawful financial obligations" undertaken "during the course of this litigation," Organizations Br. 60. The mere threat of litigation or filing of a complaint cannot reasonably be treated as requiring a complete cessation of all contracting, especially given that "[a]n injunction is a matter of equitable discretion [that] does not follow from success on the merits as a matter of course," *see Winter*, 555 U.S. at 32.

Conversely, the Organizations fail to rebut the government's showing that the district court seriously misweighed the equities in enjoining DoD's construction on the basis of plaintiffs' asserted interests in fishing, hiking, and camping in the area. ER63. Indeed, the Organizations all but abandon those interests, instead contending that environmental harms are sufficient to justify injunctive relief, and that their members also engage in "research and observation in the areas at issue." Br. 59 n.6. The district court did not, of course, rely on either of those purported interests, but granted an injunction solely on the basis of plaintiffs' "aesthetic and recreational interests," which was an abuse of discretion, as the government has explained. ER64. In any event, these additional assertions would also be inadequate to warrant injunctive relief, as similar research and observational interests were not sufficient in *Winter*, and the district court here itself found the States' assertions of environmental injuries insufficient to warrant injunctive relief, *see infra* at Part VI.

VI. The District Court Did Not Abuse Its Discretion In Denying Injunctive Relief To The States.

The district court properly denied injunctive relief to the States, and they present no basis to conclude the district court abused its discretion.

A. As an initial matter, if this Court agrees with the government that the Organizations' injunction should be vacated, then the States are not entitled to an injunction either. The States are no different than the Organizations with respect to

the zone of interests or the merits. And the district court did not accept the States' flawed allegations of harm, as discussed below.

Moreover, if this Court affirms the Organizations' injunction, then the district court did not abuse its discretion in denying the States a duplicative injunction. Again, "[a]n injunction is a matter of equitable discretion [that] does not follow from success on the merits as a matter of course." *Winter*, 555 U.S. at 32. Here, the district court recognized that the States could make no showing of irreparable harm when the Organizations' injunction already prevented DoD from using funds transferred under Section 8005 to support DHS. *See* ER78, ER112. District courts in comparable circumstances have exercised their discretion to stay motions for preliminary injunctive relief because other courts had already enjoined the conduct, thereby eliminating any imminent threat of irreparable injury. *See, e.g.*, *Al-Mowafak v. Trump*, No. 17-cv-00557-WHO (N.D. Cal. Jan. 8, 2018); *Washington v. Trump*, No. C17-0141JLR, 2017 WL 1050354, at *4 (W.D. Wash. Mar. 17, 2017).

The States contend (Br. 49) that they "are no longer protected by the permanent injunction granted to the [Organizations]," but that point does not demonstrate their separate entitlement to injunctive relief. On the contrary, the Supreme Court's decision to stay the injunction granted to the Organizations would apply equally to any injunction in the States' favor.

B. In all events, the States' asserted harms are insufficient to justify an injunction.

1. The States' alleged irreparable injury from their inability as sovereigns to enforce their environmental laws (Br. 51-58) is traceable to the Acting Secretary of Homeland Security's issuance of waivers pursuant to IIRIRA. *See supra* at 44-47 (discussing and citing waivers); States Br. 51-56. And, as the States acknowledge, they do not challenge those waivers. *See* States Br. 58. Indeed, IIRIRA strictly limits challenges to the Secretary's waivers, allowing judicial review only of constitutional claims, with appeal only to the Supreme Court by writ of certiorari. *See* IIRIRA § 102(c). The States do not argue that DoD's mere transfer of funds would independently preclude enforcement of environmental laws. The States' inability to enforce their own laws is thus not fairly traceable to DoD's funds transfer. At a minimum, such an attenuated harm should not be treated as an irreparable injury warranting injunctive relief against DoD's funds transfer.[8]

2. The States fare no better with their fallback argument (Br. 58-60) that there will be concrete environmental harms within their jurisdictions. The district court did not abuse its discretion in finding the States' alleged environmental harms insufficient to warrant injunctive relief. ER76-ER77. Although the States contend (Br. 59) that "wildlife and plants will be irreparably harmed" by border barrier construction, the

[8] There is reason to doubt that the States could enforce their laws against federal construction activities on federal lands. Under the Supremacy Clause, the activities of federal agencies are free from regulation by the states, unless Congress directs otherwise. *See Columbia Basin Land Prot. Ass'n v. Schlesinger*, 643 F.2d 585, 603-04 (9th Cir. 1981) (citing *Hancock v. Train*, 426 U.S. 167, 178 (1976)).

record includes ample evidence supporting the district court's conclusions that the States' alleged harms were speculative and failed to demonstrate demonstrable species- or population-level harm, particularly in light of the government's regularly implemented "mitigation measures that successfully prevent such harm." ER76-ER78; *see, e.g.*, ER134-162; ER237-ER262.

The States nevertheless insist that harm would occur to the flat-tailed horned lizard because border barrier construction "will make it easier for [predators] to observe and capture the horned lizard." *See* States Br. 59-60. This *possibility* of harm to flat-tailed horned lizards because construction would make it *easier* for predators is insufficient to constitute irreparable injury, as the district court correctly recognized. ER77 n.10; *see also* ER77 (further recognizing that speculation that border barrier "*might* render Mexican wolves *more susceptible* to diseases falls far short of the necessary demonstrable evidence of harm to a protected species"). Evidence in the record established that the Fish and Wildlife Service had concluded that similar projects would have only "minor" effects on lizards. *See* ER259-ER260. Moreover, increased predation of a species of lizard would not alter the balance of the equities sufficiently to "justify a permanent injunction against the U.S. government" to stop counter-drug border barrier construction. ER77; *see supra* at Part V.

The States also assert (Br. 59) that the district court abused its discretion by taking the government's mitigation efforts into account. But the only case they cite in support is a district court decision concluding that in issuing a biological opinion

under the Endangered Species Act (ESA), an agency may not analyze a mitigation measure as part of the proposed action unless it is "specific and binding." *Pacificans for a Scenic Coast v. California Dep't of Transp.*, 204 F. Supp. 3d 1075, 1089 (N.D. Cal. 2016). Whether or not that is a correct statement of law under the ESA with respect to what an agency can consider when issuing a biological opinion, it is entirely irrelevant to what the *district court* has discretion to consider when determining whether plaintiffs are entitled to the extraordinary relief of an injunction against border barrier construction. And thus the court in no way abused its discretion in considering that factor among others in declining to award the States a duplicative injunction.

CONCLUSION

For the foregoing reasons, and those set forth in the government's opening brief, the judgment of the district court should be reversed, except that the denial of injunctive relief for the States should be affirmed.

Respectfully submitted,

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July 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 13,529 words.

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CERTIFICATE REGARDING ELECTRONIC FILING

I hereby certify that this brief is identical to the version submitted electronically.

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