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

Relief requested by December 30, 2019

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

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CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies that the following is the information required by Circuit Rule 27-3:

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(2) Facts showing the existence and nature of the emergency.

This motion concerns the imminent construction of a massive, multibillion-dollar project that would radically alter delicate and unique lands across the border. The district court found that Plaintiffs will suffer irreparable harm from the unlawful construction and permanently enjoined it, but stayed its own injunction. Plaintiffs request that this Court lift the district court's stay by December 30, 2019, to provide Plaintiffs protection against the construction here, which, the district court found, "cannot be easily remedied after the fact." Order Granting in Part and Denying in Part Pls.' Mots. for Partial Summ. J. and Denying Defs.' Mots. for

Partial Summ. J. ("Order") 38–39, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Dec. 11, 2019), ECF No. 258 (attached as Exhibit 1).

During the November 20 hearing before the district court, Defendants disclosed that two border wall contracts had already been awarded. Order 8. "The first contract relates to the projects on the Barry M. Goldwater Range, in Arizona: that contract was awarded on November 6, 2019," and the "second contract relates to a project in San Diego County, California: that contract was awarded on November 19, 2019." Order 8. According to Defendants, the timetable for "substantial construction" to begin on the challenged projects is "40 days after contract award." DoD Notice of Decision to Authorize Border Barrier Projects Pursuant to 10 U.S.C. § 2808, at 3, 4, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Sept. 3, 2019), ECF No. 201 (attached as Exhibit 2).

While a district court in the Western District of Texas enjoined construction on December 10, 2019, *see El Paso Cty. v. Trump*, No. 3:19-cv-0066-DB (W.D. Tex. Dec. 10, 2019), ECF No. 136, Defendants are seeking an emergency stay of that injunction. At the moment any stay is granted in the *El Paso County* litigation, substantial construction on the projects at issue here could begin on the Barry M. Goldwater Range in Arizona, which, as Defendants' submissions to the district court acknowledge, "is nationally significant as a critical component in the largest remaining expanse of relatively unfragmented Sonoran Desert in the U.S." *See*

Integrated Natural Resources Management Plan, Barry M. Goldwater Range, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Dec. 11, 2019), ECF No. 236-6 at 66. Further substantial construction could begin after December 29, 2019, in San Diego, California.

As was true with respect to similar construction projects that are the subject of a separate appeal in this case, "allowing Defendants to move forward with spending the funds will allow construction to begin, causing immediate, and likely irreparable, harm to Plaintiffs." *Sierra Club v. Trump*, 929 F.3d 670, 688 (9th Cir. 2019). Lifting the stay on or before December 30, 2019, would prevent construction in San Diego and minimize harm from the Arizona construction.

(3) Explanation of timeliness, contact with and service on other parties' counsel, contact with the Court's emergency motions unit, and proposed schedule.

Counsel for Plaintiffs contacted counsel for Defendants on December 12, 2019, the next day after the district court's stay order, to inquire whether Defendants intended to file a notice of appeal of the permanent injunction and to advise Defendants of Plaintiffs' intent to file this motion. Because Defendants required additional time to determine whether and when they would appeal, the parties agreed to speak again the next day. On December 13, 2019, Defendants' counsel informed Plaintiffs that Defendants would file a notice of appeal, and that Defendants would seek an emergency stay of the *El Paso County v. Trump*

injunction. After speaking with Defendants' counsel, Plaintiffs' counsel contacted the Court's emergency motions unit by telephone on December 13, 2019, to advise that Plaintiffs would file the motion on the next business day, December 16, 2019. Defendants' counsel will be served electronically by the CM/ECF system.

With the consent of Defendants, Plaintiffs propose the following schedule for briefing this emergency motion to allow time for a decision by this Court by December 30, 2019: Response to be filed by December 23; Reply to be filed by December 26, 2019.

(4) Futility of relief before the district court.

The district court ordered that the injunction be stayed on December 11, 2019. The district court's order explains that the court has considered whether to impose a stay pending appeal and found that a stay pending appeal is appropriate. The district court expressly instructed that Plaintiffs may seek any relief from this Court: "Plaintiffs may, of course, petition the Ninth Circuit to lift this stay." Order 45. The only relief available in the district court would be for Plaintiffs to file a futile motion for reconsideration and to disregard the district court's order that motions to lift the stay should be directed at this Court. Accordingly, Plaintiffs seek relief through this motion.

/s/ Dror Ladin
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Counsel for Plaintiffs-Appellees

CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in Plaintiffs-Appellees.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Congress has considered, and rejected, the executive branch's plans to spend billions of dollars on construction of the specific barriers at issue in this appeal. The impasse between Congress and the administration over border wall funding resulted in the longest government shutdown in U.S. history. The shutdown was finally resolved after Congress passed—and the President signed—the Consolidated Appropriations Act of 2019, Pub. Law No. 116-6, 133 Stat. 13 (2019) ("CAA"), which provided a fraction of the wall funding that the executive branch requested, and imposed geographic and other limitations on construction.

Defendants claim the power to sidestep Congress's enacted funding decisions, asserting that 10 U.S.C. § 2808 ("Section 2808") grants the executive branch essentially unlimited power to restructure the nation's priorities according to the executive branch's policy preferences. But Defendants' efforts to spend billions that Congress denied them are contrary to both the Constitution's careful design and Congress's explicit restrictions on the use of Section 2808.

The district court correctly concluded that Defendants have no power to evade Congress's enacted funding decisions, and their attempt to circumvent Congress is not beyond review. In addition, as the district court found, the equitable factors favor a permanent injunction of Defendants' unlawful construction plans: the record demonstrates that Plaintiffs will suffer irreparable

harm, and the balance of equities and public interest support respecting Congress's judgment and exclusive control over the proper funding levels for any border wall construction.

The district court nonetheless stayed its own injunction pending appeal, threatening the very result the court's permanent injunction is meant to guard against. The stay should be lifted for three reasons. First, the district court did not make the critical findings that could justify a stay: that Defendants had a likelihood of success on appeal and that Defendants face irreparable harm. Defendants have established neither of these essential factors, and the district court erred in granting a stay in their absence.

Second, in light of the district court's correct conclusion that the balance of equities and public interest weigh against permitting Defendants to proceed with the unlawful construction at issue here, it would be inequitable to allow Defendants to undertake construction while this appeal is pending.

Finally, the district court abused its discretion in imposing a stay based on the related injunction appeal pending before this Court. As the district court acknowledged, the Supreme Court's stay of the related injunction does not control the injunction at issue here. And the pendency of a related appeal before this Court does not support issuance of a stay in the absence of Defendants' having satisfied the stay factors.

BACKGROUND

This appeal arises from Defendants' efforts to evade Congress's enacted appropriations judgment through diversion of $3.6 billion dollars to wall construction. The funds at issue here come from military construction projects that the Department of Defense ("DoD") previously told Congress were necessary to support servicemembers and military missions. Defendants intend to strip funding from these projects to build 175 miles of border walls across four states.

Congress has repeatedly refused to fund the construction at issue here. Throughout 2018, Congress considered the White House's repeated requests for wall funds and rejected numerous bills that would have provided billions of dollars for wall construction. *See Sierra Club v. Trump*, 929 F.3d 670, 677 (9th Cir. 2019) (collecting failed legislation). After Congress "consistently refused to pass any measures that met the President's desired funding level" for border wall construction, the political branches reached "a standoff that led to a 35-day partial government shutdown." *Id.* at 675–76.

"Following the longest partial government shutdown in the nation's history, Congress passed the CAA on February 14, 2019, making available $1.375 billion 'for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector.'" Order Granting in Part and Denying in Part Pls.' Mots. for Partial Summ. J. and Denying Defs.' Mots. for Partial Summ.

J. ("Order") 4, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Dec. 11, 2019), ECF No. 258 (attached as Exhibit 1) (citing CAA § 230(a)(1), 133 Stat. at 28). The next day, "[t]he President signed the budget legislation that ended the shutdown, but he then declared a national emergency and pursued other means to get additional funding for border barrier construction beyond what Congress had appropriated." *Sierra Club v. Trump*, 929 F.3d at 676. That same day, the White House issued a fact sheet entitled "President Donald J. Trump's Border Security Victory" that specifically identified three sources of funding that Defendants would divert to border wall construction in excess of the $1.375 billion Congress had allocated:

> (1) "[a]bout $601 million from the Treasury Forfeiture Fund," 31 U.S.C. § 9705(a); (2) "[u]p to $2.5 billion under the Department of Defense [reprogrammed] funds transferred [to DHS] for Support for Counterdrug Activities" pursuant to 10 U.S.C. § 284; and (3) "[u]p to $3.6 billion reallocated from [DoD] military construction projects under the President's declaration of a national emergency" pursuant to 10 U.S.C. § 2808, which provides that the Secretary of Defense may authorize military construction projects whenever the President declares a national emergency that requires use of the armed forces.

Id. at 679.

As Defendant Trump has repeatedly confirmed, Defendants are attempting to use Section 2808 to directly override Congress's refusal to accede to his funding request. "When announcing the proclamation, the President explained that he initially 'went through Congress' for the $1.375 billion in funding, but was 'not

happy with it.'" Order 4. Defendant Trump "declared the national emergency one day after Congress passed the CAA, which limited appropriations for border barrier construction." Order 21. "In announcing the national emergency declaration, the President explained, 'I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster. . . . And I think that I just want to get it done faster, that's all.'" Order 21. "DoD officials have forthrightly acknowledged that the border barrier projects are intended to fulfill the President's priorities." Order 32.

Plaintiffs sued on February 19, 2019, challenging all construction in excess of that which Congress authorized in the CAA. Plaintiffs' members frequently use the lands on which Defendants seek to construct a massive, multibillion-dollar wall. In addition, Plaintiff Southern Border Communities Coalition and its member organizations "work in and with border communities to protect and restore the environment," and to "promote the safety of border communities," and face irreparable harm to their ability to carry out their missions as a result of wall construction. Order 42.

Because Defendants first attempted to use the $2.5 billion in additional funds under purported 10 U.S.C. § 284("Section 284") authority, Plaintiffs initially sought a permanent injunction against that construction. As DoD's Section 284 account contained less than a tenth of the $2.5 billion the administration announced

it would funnel through the account, Defendants were forced to use section 8005 of the DoD Appropriations Act of 2019 ("Section 8005") and related provisions to attempt to move $2.5 billion from military pension and other funds to border wall construction. On June 28, 2019, the district court permanently enjoined construction of border barriers using the $2.5 billion in military funds that Defendants sought to divert through 10 U.S.C. § 284, finding that Defendants had no authority under Section 8005 to divert military funds to the border wall. *See Sierra Club v. Trump*, No. 4:19-cv-00892-HSG, 2019 WL 2715422 (N.D. Cal. June 28, 2019).

On July 3, 2019, a motions panel of this Court denied an emergency stay of the injunction, finding that "the use of those funds violates the constitutional requirement that the Executive Branch not spend money absent an appropriation from Congress." *Sierra Club v. Trump*, 929 F.3d at 676. On July 26, 2019, a majority of the Supreme Court issued a one-paragraph order staying the permanent injunction. The order contains the following explanation: "Among the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). The related appeal is pending before this Court. *See* Docket Nos. 19-16102, 19-16300, 19-16299, 19-16336.

Plaintiffs sought the injunction at issue here on October 11, just over a month after Defendants announced the eleven Section 2808 projects. For nearly seven months after the declaration that an emergency existed requiring the use of the armed forces, and the White House announcement that $3.6 billion in military construction funds would be diverted to the border wall, Defendants continued to maintain that DoD had made no decision to spend a single dollar in military construction money on the border wall. "Then on September 3, 2019, the Secretary of Defense announced that he had decided to authorize eleven specific border barrier construction projects in California, Arizona, New Mexico, and Texas, pursuant to Section 2808." Order 6. "Collectively, the eleven projects total $3.6 billion and include 175 miles of border barrier construction across four states." Order 6. To fund this construction, Defendants are stripping funds from projects that Congress authorized, including "rebuilding hazardous materials warehouses at Norfolk and the Pentagon; replacing a daycare facility for servicemembers' children at Joint Base Andrews, which reportedly suffers from 'sewage backups, flooding, mold and pests'; and improving security to comply with anti-terrorism and force protection standards at Kaneohe Bay." Order 7.

During the November 20 hearing before the district court, Defendants "represented to the Court that there have been two contracts awarded related to the border barrier construction projects." Order 8. "The first contract relates to the

projects on the Barry M. Goldwater Range, in Arizona: that contract was awarded on November 6, 2019," and the "second contract relates to a project in San Diego County, California: that contract was awarded on November 19, 2019." Order 8. According to Defendants, the timetable for "substantial construction" to begin on the challenged projects is "40 days after contract award." DoD Notice of Decision to Authorize Border Barrier Projects Pursuant to 10 U.S.C. § 2808 at 3, 4, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Sept. 3, 2019), ECF No. 201 (attached as Exhibit 2).

ARGUMENT

I. The Stay Should Be Lifted Because Defendants Have No Likelihood of Success on the Merits and Have Not Established That the Injunction Will Cause Them Irreparable Harm.

Defendants cannot make a strong showing that they are likely to succeed on the merits of any appeal, nor demonstrate any irreparable injury if the injunction remains in effect during this appeal. In the absence of these "most critical factors," a stay is clearly unwarranted, and the Court need not examine the remaining factors. *See Washington v. Trump*, 847 F.3d 1151, 1164 (9th Cir. 2017) (citation omitted). The district court erred in imposing a stay without determining that Defendants satisfied these requirements. *See City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs.*, No. 19-17213, 2019 WL 6726131, at *11 (9th Cir. Dec. 5, 2019) (noting with respect to a showing of likelihood of success that

"the Supreme Court has made clear that satisfaction of this factor is the irreducible minimum requirement to granting any equitable and extraordinary relief").

a. Defendants' plan to circumvent Congress's appropriations power is not beyond review.

The district court correctly rejected Defendants' claim of unreviewable authority to divert billions of dollars appropriated for servicemembers and their families to a border wall that Congress repeatedly refused to fund. Defendants argued that no constitutional issue was raised by their circumvention of Congress's appropriations decisionmaking, because they invoked a statute, 10 U.S.C. § 2808. At the same time, Defendants urged the district court not to examine their compliance with the terms of Section 2808, because in their view the statute grants them essentially limitless discretion to remake the federal budget. Defendants' claims of unreviewable authority are unlikely to succeed on appeal.

This Court has already determined that Plaintiffs have an equitable cause of action to seek review of their fundamentally constitutional claims that Defendants' actions usurp Congress's control over appropriations. Order 11 (citing *Sierra Club v. Trump*, 929 F.3d at 695–97). Even if a zone-of-interests requirement applied to such claims, Plaintiffs' "interests resemble myriad interests that the Supreme Court has concluded—either explicitly or tacitly—fall within any applicable zone of interests encompassed by structural constitutional principles like separation of powers." *Sierra Club v. Trump*, 929 F.3d at 704 (collecting cases); *see generally*

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 491 n.2 (2010) ("If the Government's point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so."). The district court correctly found that this Court's decision was neither overruled nor clearly irreconcilable with the Supreme Court's stay decision, and therefore controls. *See* Order 12–13.

Even if the prior published motions panel decision were not binding, under this Court's settled law Plaintiffs have a constitutional cause of action in equity under the Appropriations Clause because the executive branch seeks to spend funds that Congress has not appropriated. *See United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). In *McIntosh*, this Court considered the constitutional question at length and concluded 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. *McIntosh*, 833 F.3d at 1175. Even if *McIntosh* could theoretically have been resolved as a purely statutory claim, this would not erase the pages of constitutional analysis in *McIntosh* or render them nonbinding on this Court. "[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling

becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc). Only "statements made in passing, without analysis, are not binding precedent." *In re Magnacom Wireless, LLC*, 503 F.3d 984, 993–94 (9th Cir. 2007).

In any event, even if Plaintiffs' claims were construed as strictly statutory claims requiring satisfaction of a zone-of-interests test with respect to Defendants' claimed Section 2808 authority, the test would pose no obstacle to the Court's review. The Supreme Court has already decided in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), that aesthetic and environmental interests are within the zone of interests of statutes that typically involve construction on land. In *Match-E-Be-Nash-She-Wish*, the Supreme Court considered a statute that "authorizes the acquisition of property 'for the purpose of providing land for Indians.'" 567 U.S. at 224 (citation omitted). The statute imposed no environmental or aesthetic restrictions on eventual construction on acquired property, and was enacted entirely for the benefit of Native Americans. The Supreme Court nonetheless determined that a neighbor who had no interest in tribal development or land acquisition was within the statute's zone of interests, because the neighbor objected that construction on land acquired under the statute would cause "an irreversible change in the rural character of the area," and result in

"aesthetic, socioeconomic, and environmental problems." *Id.* at 213 (quotation marks omitted).

According to the Supreme Court, the only relevant question is "whether issues of land use (arguably) fall within [the statute's] scope—because if they do, a neighbor complaining about such use may sue to enforce the statute's limits." *Id.* at 225 n.7. As Section 2808 explicitly concerns land use, Plaintiffs, as "neighbors to the use" may sue, and their "interests, whether economic, environmental, or aesthetic, come within [the statute's] regulatory ambit." *Id.* at 227–28.[1]

Finally, the district court was correct to find that "Section 2808 provides meaningful standards against which the Court may analyze Defendants' conduct under the statute." Order 19. Defendants are unlikely to prevail in their arguments that courts are not competent to construe the limitations that Congress imposed in Section 2808. Order 15–17. Section 2808 does not resemble these rare instances where statutory language and structure bar review under the APA. *Cf. Webster v.*

[1] Should the Court determine that Plaintiffs' claims are statutory claims arising under Section 2808, it may treat them as APA claims. *See, e.g.*, *Alto v. Black*, 738 F.3d 1111, 1117 (9th Cir. 2013) (considering under APA claims not "explicitly denominated as an APA claim" because they were "fairly characterized as claims for judicial review of agency action under the APA"); *Clouser v. Espy*, 42 F.3d 1522, 1533 (9th Cir. 1994) ("We shall therefore treat plaintiffs' arguments as being asserted under the APA, although plaintiffs sometimes have not framed them this way in their pleadings."); *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 228, 230 n.4 (1986) (treating Mandamus Act petition as APA claim); *see generally Skinner v. Switzer*, 562 U.S. 521, 530 (2011) ("[A] complaint need not pin plaintiff's claim for relief to a precise legal theory.").

Doe, 486 U.S. 592, 600 (1988) (no review where statutory language "fairly exudes deference" by permitting termination "whenever the Director 'shall deem such termination necessary or advisable'" and "not simply when the dismissal *is* necessary or advisable"); *see generally Perez v. Wolf*, No. 18-35123, 2019 WL 6224421, at *5–*7 (9th Cir. Nov. 11, 2019) (discussing rarity of unreviewable statutes); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986) (Courts "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.").

Nor does this case resemble the exception to justiciability posed by granular, ongoing judicial supervision over military activities. *See Gilligan v. Morgan*, 413 U.S. 1, 5 (1973) (distinguishing "an action seeking a restraining order against some specified and imminently threatened unlawful action" from "a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard"). Instead, as the district court properly concluded, "The Court accordingly may, and must, determine whether Defendants have exceeded the limits set by Congress regarding spending under Section 2808, while affording both branches due deference." Order 18; *see also Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 826 (9th Cir. 2017) ("We may consider national security concerns with due respect when the statute is used as a basis to request injunctive

relief. This is not a grim future, and certainly no grimmer than one in which the executive branch can ask the court for leave to ignore acts of Congress.").

b. Defendants' plan to funnel $3.6 billion in military construction funds to construction of a border wall is unlawful.

Defendants' theory is that Section 2808 provides essentially unlimited authority to raid appropriated military construction funds for policy initiatives that Congress refused to fund. The district court correctly rejected this interpretation, which is not supported by the plain text of the statute and would raise grave constitutional questions. Section 2808 does not permit Defendants to sidestep the appropriations process, regardless of their dissatisfaction with its outcome.

The district court correctly found that Section 2808 provides no authority for Defendants to divert $3.6 billion in military construction funds to a border wall, and that Defendants cannot use the statute to aggrandize wall construction beyond that which Congress permitted in the CAA. "The diversion of funds from existing military construction projects is only authorized for (1) 'military construction projects' that are (2) 'necessary to support such use of the armed forces.'" Order 17 (quoting 10 U.S.C. § 2808(a)). Each of the wall sections at issue here fails one or both requirements.

First, with the exception of the wall sections on the Barry Goldwater Military Range, none of the wall construction here constitutes "military construction" as defined by statute. Congress defined "military construction" as

construction associated with a "military installation" or "defense access road." 10 U.S.C. § 2801(a). In turn, Congress limited "military installation" for the purposes of Section 2808 to a "base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department . . . ." *Id.* § 2801(c)(4). Defendants maintain they can evade this requirement by simply assigning administrative jurisdiction of border sections sprawling across four states and more than a thousand miles to Fort Bliss in Texas. Defendants are wrong.

As the district court found, Defendants' "expansive interpretation" of "military installation" is untenable. Order 23. Defendants' theory requires "disregard[ing] the plain language of the statute," Order 23, because "Defendants do not even attempt to explain how the proposed projects are similar in nature or scope to 'a base, camp, post, station, yard, [or] center,' and the Court finds that they are not." Order 24 (quoting 10 U.S.C. § 2801(c)(4)). Moreover, "Defendants' interpretation would grant them essentially boundless authority to reallocate military construction funds to build anything they want, anywhere they want, provided they first obtain jurisdiction over the land where the construction will occur." Order 25. This would lead to the absurd and unconstitutional result Defendants seek here, conferring on DoD the ability to "redirect billions of dollars from projects to which Congress appropriated funds to projects of Defendants' own choosing, all without congressional approval (and in fact directly *contrary* to

Congress' decision not to fund these projects)." Order 26. Finally, Defendants' theory "defies both the text and spirit of" Congress's emergency powers legislation, by claiming "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.

Second, each of the projects fails the requirements of Section 2808 because, "even crediting all facts in the administrative record, and giving due deference to the strategic and military determinations in it . . . . Defendants have not established that the projects are necessary to support the use of the armed forces." Order 28. As the administrative record confirms, to the extent the border wall would support the operations of any agency, the beneficiary would be the civilian Department of Homeland Security ("DHS")—not the armed forces. *See* Order 29–30. "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. The district court correctly "decline[d] to interpret Section 2808 to provide the Secretary of Defense with almost limitless authority to use billions of dollars of its appropriations to build projects for the benefit of DHS, even when Congress specifically declined to give DHS itself the funds to build those projects." Order 31 (citing *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 324

(2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." (quotation omitted))).[2]

At bottom, "the plain reality presented in this case" is that "the border barrier projects Defendants now assert are 'necessary to support the use of the armed forces' are the very same projects Defendants sought—and failed—to build under DHS's civilian authority, because Congress would not appropriate the requested funds." Order 32; *see generally City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018) ("In fact, Congress has frequently considered and thus far rejected legislation accomplishing the goals of the Executive Order. The sheer amount of failed legislation on this issue demonstrates the importance and divisiveness of the policies in play, reinforcing the Constitution's 'unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.'")). Moreover, "[t]here is simply nothing in the record before the Court indicating that the eleven border barrier projects—however helpful—are necessary to support the use of the

[2] The administrative record established that DoD does not even expect to derive a benefit from wall construction on the Barry M. Goldwater Range, which is the only military site involved in Defendants' plan. While construction of a border wall "along the Barry M. Goldwater range" might be expected to "limit potential impact to military training" caused by migration, DoD's records show that "impact to military training over the past five years has been negligible." Admin. R., Ex. 3, at 69, *Sierra Club v. Trump*, No. 4:19-cv-00892-HSG (N.D. Cal. Sept. 16, 2019), ECF No. 206-3.

armed forces." Order 31. In light of the "plain reality" reflected in the record, Defendants do not have a strong likelihood of success on appeal.

c. Defendants will not be irreparably harmed by the district court's injunction.

The district court did not find that Defendants would be irreparably harmed during the appeal in the absence of a stay, and the record could not support such a finding. Instead, the record demonstrates that Defendants have not moved with any urgency to proceed with the construction at issue here. DoD waited nearly seven months after the emergency proclamation to make any decision about whether to spend a single dollar of military construction money on a wall. Having decided to construct a border wall, the earliest "substantial construction" that DoD intends to undertake is on December 16, 2019—more than ten months after the White House announced its intention to spend $3.6 billion in military construction funds on the wall through invocation of Section 2808. *See* Exhibit 2 (describing earliest substantial construction as occurring 40 days after contract award). Defendants' lengthy delay is incompatible with any claim of an urgent need to proceed with construction during the pendency of this appeal.

In addition to Defendants' nearly year-long delay in beginning construction, any claim of irreparable harm further undermined by the fact that they face no loss of access to military construction funds if they do prevail on appeal. Unlike the funds at issue in the prior *Sierra Club* injunction, which the Supreme Court stayed,

none of the funds here would revert to the treasury during the pendency of this appeal. *Cf. Sierra Club v. Trump*, 929 F.3d at 706 (discussing "Defendants' contention with respect to the previous injunction that 'the injunction threatens to permanently deprive DoD of its authorization to use the funds at issue to complete' the selected projects, including 'approximately $1.1 billion it has transferred for these projects but has not yet obligated via construction contracts,' because 'the funding will likely lapse during the appeal's pendency'").

II. The Stay Should Be Lifted Because the Equities and Public Interest Weigh Against Allowing Defendants to Circumvent Congress's Decisions.

When injunctions protect Congress's appropriations decisions, "the public interest weighs forcefully against issuing a stay." *Sierra Club v. Trump*, 929 F.3d at 706. As this Court explained in rejecting a similar stay, "Congress did not appropriate money to build the border barriers Defendants seek to build here. Congress presumably decided such construction at this time was not in the public interest. It is not for us to reach a different conclusion." *Id.* at 707 (citations omitted). In the words of Justice Frankfurter, "'[b]alancing the equities' when considering whether an injunction should issue, is lawyers' jargon for choosing between conflicting public interests. When Congress itself has struck the balance, has defined the weight to be given the competing interests, a court of equity is not justified in ignoring that pronouncement under the guise of exercising equitable

discretion." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609–10 (1952) (Frankfurter, J., concurring).

Here, as the district court found, "Congress has already engaged in the difficult balancing of Defendants' proffered interests and the need for border barrier construction in passing the CAA. Defendants have not pointed to any factual developments that were not before Congress and that may have altered its judgment to appropriate just $1.375 billion in funding for limited border barrier construction." Order 43 (citation omitted). "After a lengthy legislative process, Congress specifically declined to provide the funding sought by the Executive for the border barrier construction at issue in this case. The Executive has made plain its determination to nonetheless proceed with the construction by any means necessary, notwithstanding Congress' contrary exercise of its constitutionally-absolute power of the purse." Order 44. Allowing Defendants to usurp Congress's role is contrary to the public interest. *See Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring)) (If "the decision to spend [is] determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened.").

Moreover, because the environmental effects of a multibillion-dollar construction project are effectively impossible to undo, the balance of harms favors an injunction. "[T]he funding and construction of these border barrier projects, if

indeed barred by law, cannot be easily remedied after the fact." Order 39. The lands protected by the injunction are unique and treasured by Plaintiffs' members. The record "detail[s] how Defendants' eleven proposed border barrier construction projects will harm [Plaintiffs' members'] ability to recreate in and otherwise enjoy public land along the border." Order 37. While Defendants have repeatedly attempted to the minimize these harms, the district court recognized that "Defendants' proposal would significantly alter the existing landscape, and even the proposed changes to the existing infrastructure are substantial." Order 38–39.

III. The District Court Abused Its Discretion in Imposing a Stay.

Although the district court cited the stay factors set forth by this Court in *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011), the district court's reasoning appears to disregard those factors entirely. Order 44–45. The district court instead reasoned that "the Supreme Court's stay of this Court's prior injunction order appears to reflect the conclusion of a majority of that Court that the challenged construction should be permitted to proceed pending resolution of the merits." Order 45. The district court concluded that "the lengthy history of this action; the prior appellate record; and the pending appeal before the Ninth Circuit on the merits of Plaintiffs' Section 8005 claim, which will address several of the threshold legal and factual issues raised in this order, warrant a stay of the

permanent injunction pending appeal." Order 45. The district court abused its discretion in departing from the required stay factors.

First, as the district court itself recognized, the Supreme Court's stay of a separate injunction sheds little light on the issues here. *See* Order 13 ("At this stage, the Court can only speculate regarding the reasoning underlying the stay, including what it means for how the Supreme Court may ultimately assess the merits of these two cases."). The only explanation in the Supreme Court's stay order concerns whether Plaintiffs have a "cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Trump v. Sierra Club*, 140 S. Ct. 1 (2019). That concern is inapplicable here, because Section 2808—by contrast to Section 8005—explicitly concerns land use, and the Supreme Court has already decided that Plaintiffs, as "neighbors to the use" may sue, and their "interests, whether economic, environmental, or aesthetic, come within [the statute's] regulatory ambit." *Match-E-Be-Nash-She-Wish*, 567 U.S. at 227–28. The Supreme Court's imposition of a stay of a different injunction on wholly separate grounds cannot compel a stay here.

Second, the district court's unexplained invocation of "the lengthy history of this action," the "appellate record," and the existence of a pending related appeal cannot justify a stay. The district court's reasoning is not clear, but this action's history is hardly lengthy: Plaintiffs sued on February 19, 2019, and sought the

injunction at issue here on October 11, just over a month after Defendants announced the eleven enjoined Section 2808 projects. Nor does the pendency of a related appeal support a stay for the duration of this appeal. Regardless of whether resolution of the related appeal would "address several of the threshold legal and factual issues" at issue here, the stay of *this* injunction would persist until this new appeal is resolved. The district court cited no precedent, and Plaintiffs are aware of none, that would justify a stay based on these factors.

CONCLUSION

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

Dated: December 16, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 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
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Dated: December 16, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27 because it contains 5,351 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.

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