No. 19-17501

In the United States Court of Appeals for the Ninth Circuit

SIERRA CLUB; SOUTHERN BORDER COMMUNITIES COALITION,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

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

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INTRODUCTION

No court has endorsed Defendants' assertion that 10 U.S.C. § 2808 provides essentially unlimited and unreviewable authority to divert military construction funds in contravention of Congress's appropriations decisions. This sweeping claim of executive power is unprecedented, and conflicts with both statutory text and constitutional design. Defendants' cursory arguments on the equities are even less substantial. They should not be permitted to short-circuit the expedited appeals process and rush a massive wall across nearly two hundred miles of lands on which Congress refused to authorize construction.

ARGUMENT

"The party seeking a stay—or continuation of a stay—bears the burden of showing his entitlement to a stay." *Latta v. Otter*, 771 F.3d 496, 498 (9th Cir. 2014. Defendants have failed to demonstrate that the extraordinary remedy of a stay is justified.

Defendants do not attempt to defend the stay based on the district court's actual reasoning, which turned on "the lengthy history of this action; the prior appellate record; and the pending appeal before the Ninth Circuit on the merits of Plaintiffs' Section 8005 claim . . . ." Order 45. The district court necessarily abused its discretion in granting a stay without finding that Defendants had satisfied the required factors. *See Just Film, Inc. v. Buono*, 847 F.3d 1108, 1115 (9th Cir. 2017)

("An abuse of discretion occurs when the district court, in making a discretionary ruling, relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them." (quotation omitted)); *see* Mot. 23-24.

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

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

A showing of irreparable harm is one of "the most critical" factors required to justify a stay pending appeal. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Yet Defendants' submission is silent on this critical point, and does not even attempt to identify harm they would suffer during the pendency of this expedited appeal. Having delayed construction for more than ten months, Defendants offer no explanation, much less evidence, for their sudden urgency to build the wall while their appeal is pending. *See* Mot. 20-21; *see generally Lydo Enters., Inc. v. City of*

Las Vegas, 745 F.2d 1211, 1213 (9th Cir. 1984) (unexplained delay demonstrates "lack of need for speedy action" (citation omitted)). Nor do Defendants contest that—unlike the Section 8005 injunction—here they face no risk of losing access to funds if they prevail on appeal. *See* Mot. 10-11.

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

In addition to their failure to show irreparable harm, Defendants have also failed to make "the required 'strong showing' that they are likely to succeed on the merits" of the appeal. *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 (9th Cir. 2019) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Defendants' arguments boil down to a series of expansive and unprecedented claims that the district court correctly rejected. Defendants are unlikely to prevail on their claims that (a) Section 2808 confers unreviewable authority to circumvent Congress's appropriations decisions, (b) sections of border spread over more than 1,000 miles are part of a single military garrison in Texas, and (c) a wall aimed squarely at the mission of a civilian law enforcement agency is necessary to support the armed forces.

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

Defendants maintain that they have effectively unreviewable authority to usurp Congress's control over appropriations so long as they invoke Section 2808,

because the zone-of-interests test bars any conceivable injured party from suing. Opp'n 10-15. Their arguments are contrary to settled law.

Defendants' argument that no equitable cause of action exists to enjoin executive usurpation of Congressional control over spending is foreclosed by this Court's binding precedent. This Court has held that expending funds in excess of statutory authority amounts to "violating the Appropriations Clause," which is "a separation-of-powers limitation that [litigants] can invoke" to equitably enjoin the violation. *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016); *see* Mot. 10-11.

To the extent any zone-of-interests tests applies to constitutional violations (as opposed to statutory actions), it "denies a right of review if the plaintiff's interests are marginally related to or inconsistent with the purposes implicit in the relevant constitutional provision." *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 932 (9th Cir. 2011) (quotation and alteration marks omitted). Plaintiffs' claims easily satisfy this inquiry. The Appropriations Clause has a "fundamental and comprehensive purpose": it "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *McIntosh*, 833 F.3d at 1175 (quoting *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427-28 (1990)). If the zone-of-interests tests applies, "[t]he ultimate

question, therefore, is whether [Plaintiff's] claims bear more than a marginal relationship to claims addressing" Defendants' efforts to spend money in contravention of Congress's judgments as to the common good. *Yakima Valley Mem'l Hosp.*, 654 F.3d at 932 (quotation omitted). They do.

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

At bottom, Defendants, confuse private rights of action created by Congress to enforce statutory entitlements (as in *Thompson v. North Am. Stainless, LP*, 562 U.S. 170 (2011) and *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014)) with equitable suits to enjoin executive officers from acting without authority or in violation of the Constitution. Mot. 10-12. "Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner." *Davis v. Passman*, 442 U.S. 228, 241 (1979). By contrast, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v.*

Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015); *see* Amicus Br. of Fed. Courts Scholars, *Sierra Club*, No. 4:19-cv-00892-HSG (N.D. Cal. Sept. 3, 2019), ECF No. 245 at 11-21. While Congress can act to specifically displace traditional equitable relief, Defendants do not contend that it has done so here.

In any event, even if a statutory zone-of-interests test applied, Defendants fail to distinguish the Supreme Court's instruction that environmental and aesthetic interests suffice whenever "issues of land use (arguably) fall within [a statute's] scope." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 n.7 (2012); Mot. 8-10. Defendants argue that Section 2808 "evinces no concern about the type of military construction the Secretary might authorize or its effect on any third party's aesthetic, recreational, or environmental interests." Opp'n 13. But the same was true with respect to the statute in *Match-E-Be-Nash-She-Wish*, which did not even mention any type of construction—much less show any concern for downstream effects of construction on third-party aesthetic, recreational, or environmental interests. As the Supreme Court explained, so long as a statute arguably addresses land use, "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.

b. The Southern border is not a "military installation" under 10 U.S.C. § 2801.

Defendants propose that Section 2808 provides authority to divert billions of dollars to aggrandize the budget and statutorily conferred powers of a civilian law enforcement agency, even when Congress specifically refused to authorize such funding. This is a radical departure from previous uses of this power. "[A] president has never before invoked Section 2808 to secure funding for projects that Congress specifically declined to fund in its appropriations judgment." Order 3. "Of the military construction projects funded through Section 2808, only one was located in the United States, and that project related to securing facilities holding weapons of mass destruction shortly after the 9/11 attacks." Order 3. The combined total dollar value of every previous Section 2808 project in the past eighteen years is less than half of what Defendants claim they may spend on the border wall here. *See* Michael J. Vassalotti & Brendan W. McGarry, Cong. Research Serv., IN11017, *Military Construction Funding in the Event of a National Emergency* (Jan. 11, 2019), at 2. Defendants' unprecedented claims are unlikely to succeed.

Defendants offer no answer to the district court's statutory analysis of the limits Congress placed on "military construction" in 10 U.S.C. § 2801. Mot. 16-18. Defendants simply assert that "military installation" is infinitely capacious, including any land, anywhere, that DoD "might need to use to conduct operations."

Opp'n 18. This staggeringly broad claim of agency power is not allayed by "statutory and regulatory requirements to acquire land and bring it under the jurisdiction of a military installation." Opp'n 18. According to Defendants, these requirements are entirely illusory: a simple stroke of a pen can convert all private land and protected wilderness areas along the Southern border to novel "military installations" that immediately become part of Fort Bliss. As the district court found, myriad canons of statutory interpretation counsel against such an unbounded interpretation. Mot. 16-18.[1]

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

[1] Defendants make the puzzling claim that "plaintiffs suggest that Congress implicitly repealed DoD's § 2808 authority" in the CAA. Opp'n 19. Plaintiffs make no such suggestion. In interpreting the scope of Section 2808, however, the district court appropriately considered whether the statute authorizes DoD to directly contravene Congress's enacted judgments about the proper scope of specific projects. *See 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)).

c. Defendants cannot aggrandize DHS's projects under a claim of military necessity.

Defendants' only remaining argument is that this Court must defer to DoD's decision to spend billions of dollars for the benefit of the Department of Homeland Security ("DHS"), in contravention of Congress's judgment. Opp'n 20-21. But the executive branch's decision to transfer military funding to a civilian immigration enforcement mission is not a strategic judgment entitled to deference. In *Youngstown*, the Supreme Court rejected the government's reliance on "cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war," observing that "[e]ven though 'theater of war' be an expanding concept," lawmaking decisions are "a job for the Nation's lawmakers, not for its military authorities." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). "Congress has the exclusive power to spend," and Defendants possess no unreviewable military authority to reallocate taxpayer funds for civilian law enforcement initiatives. *City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1233 (9th Cir. 2018).

Moreover, even where review is "deferential," courts "are not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quotation marks omitted). Defendants cannot cloak a de facto transfer of military construction money to DHS in claims of military necessity: "As DoD representatives have forthrightly explained,

funding under Section 2808 would 'all go to adding significantly new capabilities to DHS's ability to prevent illegal entry.'" Order 30; *see* Mot. 16-17. Section 2808 does not permit DoD to remake the federal budget and aggrandize DHS's border wall beyond that which Congress agreed to fund.[2]

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

Defendants argue that the Supreme Court's stay of the Section 8005 injunction silently predetermined the equitable balancing here. Opp'n 6-9. But Defendants ignore the critical distinction between their claimed harms with respect to the previous injunction and the funds at issue here, which will not lapse during appeal. *See* Mot. 20-21. Defendants may believe that the Supreme Court would have permitted construction to commence whether or not Defendants had submitted voluminous argument and declarations related to funds imminently lapsing. But the Supreme Court said nothing at all on the subject, and mere speculation cannot carry Defendants' burden.

Defendants also point to *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), but that decision only underscores the weakness of their argument. There, the government substantiated its claims of national security harm

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

with specific "declarations from some of the Navy's most senior officers, all of whom underscored the threat posed by enemy submarines and the need for extensive sonar training to counter this threat." *Id.* at 24. In addition, the injunction in *Winter* was improper in light of the limited statutory violation that the plaintiffs there asserted: because there was no claim that the Navy "must cease sonar training, there [wa]s no basis for enjoining such training in a manner credibly alleged to pose a serious threat to national security." 555 U.S. at 32-33. Finally, the plaintiffs in *Winter* had shown no countervailing injury: at that point "training ha[d] been going on for 40 years with no documented episode of harm." *Id.* at 33.

Here, by contrast, Defendants only gesture at generalized claims about drug smuggling and immigration, Opp'n 7, while DoD officials have testified consistently that the situation on the border is "not a military threat," Pls.' RJN, *Sierra Club*, No. 19-cv-00892-HSG (Oct. 11, 2019), ECF No. 210-2, Ex. 15 at 50-52. Moreover, unlike in *Winter*, Plaintiffs' claim is that Defendants "must cease" the unlawful construction because they have no authority to spend billions on the border wall. And while *Winter* involved a 40-year status quo of training without documented environmental harm, Defendants' multibillion-dollar construction project would radically alter the environment. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (there is a "well-established public

interest in preserving nature and avoiding irreparable environmental injury" (quotation omitted)).

Finally, Defendants fail entirely to account for the public interest in enforcing bedrock separation-of-powers principles that assign Congress the exclusive power to determine spending, a factor not present at all in *Winter*. Defendants cryptically assert that this is "a merits argument in the guise of an equitable argument," Opp'n 8, but do not explain why the Court should at this stage assume that Section 2808 authorizes Defendants to override Congress's decision that only $1.375 billion should be spent on the border wall. No court has found that Section 2808 provides Defendants such sweeping authority, and if Defendants lack it they are violating the Appropriations Clause.

The public interest does not support permitting Defendants to violate the Constitution while the appeal is pending. The Supreme Court rejected far more substantial national security claims in *Youngstown*, observing that "[t]he Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times." 343 U.S. at 589. Defendants should not be permitted to rush construction over Congress's contrary appropriations judgment.

CONCLUSION

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

Dated: January 17, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2020, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

/s/ Dror Ladin
Dror Ladin
Dated: January 17, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the type-volume limitation of Circuit Rule 27-1(1)(d) and Circuit Rule 32-3 because it contains 2,770 words. This brief complies with the typeface and the type style requirements of Fed. R. App. P. 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

/s/ Dror Ladin
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Dated: January 17, 2020