

No. 19-16102

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**DEFENDANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
FOR STAY PENDING APPEAL**

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPAN
JAMES M. BURNHAM
Deputy Assistant Attorneys General

H. THOMAS BYRON III
ANNE MURPHY
COURTNEY L. DIXON
*Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7243
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 353-8189*

CIRCUIT RULE 27-3 CERTIFICATE

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

(1) Telephone numbers, email addresses, and office addresses of the attorneys for the parties

Counsel for defendants:

H. Thomas Byron III (H.Thomas.Byron@usdoj.gov)
Anne Murphy (Anne.Murphy@usdoj.gov)
Courtney L. Dixon (Courtney.L.Dixon@usdoj.gov)
U.S. Department of Justice
950 Pennsylvania Avenue
Washington, DC 20530
Tel: 202-353-8189
Fax: 202-514-7964

Counsel for plaintiffs:

Dror Ladin (dladin@aclu.org)
Hina Shamsi, (Hshamsi@aclu.org)
Jonathan Hafetz, (Jhafetz@aclu.org)
Noor Zafar, (Nzafar@aclu.org)
Omar Jadwat, (Ojadwat@aclu.org)
ACLU Foundation
125 Broad Street, 18th Floor
New York, NY 10004
Tel: 212-549-2500

Christine Patricia Sun, (Csun@aclunc.org))
Mollie M. Lee, (Mlee@aclunc.org)
ACLU Foundation of Northern California, Inc.
39 Drumm Street
San Francisco, CA 94111
Tel: 415-621-2493

Cecilia D. Wang (Cwang@aclu.org)
ACLU Immigrants Right Project
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0775

Andre Ivan Segura, (Asegura@aclutx.org)
David A Donatti (Ddonatti@aclutx.org)
ACLU of Texas
P.O. Box 8306
Houston, TX
77288
Tel: (713) 325-7011

Gloria D. Smith (Gloria.Smith@sierraclub.org)
Sanjay Narayan (Sanjay.Narayan@sierraclub.org)
Sierra Club
2101 Webster St. Ste 1300
Oakland, CA 94612
Tel: (415) 977-5772

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

The district court enjoined defendants from completing two border barrier projects the Department of Defense (DoD) is constructing pursuant to its counter-drug support authority in 10 U.S.C. § 284 “using funds reprogrammed by DoD under Section 8005 of the Defense Appropriations Act, 2019.” Order 55. As set forth more fully in the motion below, the district court’s preliminary injunction imposes irreparable harm on the defendants and the general public because it prevents DoD from completing the two projects at issue, which are necessary to block identified drug-smuggling corridors identified by the Department of Homeland Security as among its highest priority projects. Unless stayed, the preliminary injunction threatens to permanently deprive

DoD of its ability to complete the two projects at issue because the injunction forbids DoD from spending approximately \$424 million it has transferred for construction of the projects but has not yet obligated via construction contracts. Unless those funds are obligated by September 30, 2019, the money will no longer remain available to DoD. The complex and time-consuming process to obligate the remaining money requires DoD to take multiple steps before the September 30 deadline. The contracts contemplate that those steps will take 100 days; DoD thus expects to begin that process by late June. Any delays beyond that point increase the risk that the process cannot be completed in the limited time available, and that the projects will be compromised or, if there is further delay, that the unobligated funds will no longer be available. A decision by June 17, 2019, would allow the parties time to seek emergency relief, if necessary, from the Supreme Court.

(3) When and how counsel for the other parties were notified and served with the motion

Government counsel notified plaintiffs' counsel by email on June 3, 2019 of the defendants' intent to file this motion. Service will be effected by electronic service through the CM/ECF system.

With the consent of plaintiffs, government counsel propose the following schedule for briefing this emergency motion, to allow time for a decision by this Court by June 17, 2019: Response to be filed by June 10, 2019; reply to be filed by June 13,

2019. Any amicus briefs supporting plaintiffs should be filed by the same date as the response is due.

(4) Submissions to the district court

The defendants requested a stay from the district court on May 29, 2019, which the district court denied on May 30, 2019.

/s/ Anne Murphy
ANNE MURPHY
Counsel for Defendants

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY OF ARGUMENT	1
BACKGROUND	3
ARGUMENT	7
I. The Government Has a Strong Likelihood of Prevailing on Appeal.....	8
A. Plaintiffs May Not Sue to Enforce the Requirements for Internal Transfers of Funds Under DoD’s Appropriations Statute.....	8
B. Section 8005 Authorized DoD’s Transfer of Funds.....	13
C. The District Court Abused its Discretion in Finding the Balance of Harms and Public Interest Justified an Injunction.....	18
II. The Equitable Balance of Harms Supports a Stay Pending Appeal.....	21
CONCLUSION.....	23
CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

Cases:	<u>Page(s)</u>
<i>Aircraft Serv. Int’l, Inc. v. International Bhd. of Teamsters</i> , 779 F.3d 1069 (9th Cir. 2015)	8
<i>Armstrong v. Exceptional Child Ctr., Inc.</i> , 135 S. Ct. 1378 (2015).....	9, 12
<i>Bennett v. Spear</i> , 520 U.S. 154 (1997).....	9, 11
<i>Boston Stock Exch. v. State Tax Comm’n.</i> , 429 U.S. 318 (1977).....	12
<i>City of Houston v. Department of Hous. & Urban Dev.</i> , 24 F.3d 1421 (D.C. Cir. 1994).....	21
<i>Clarke v. Securities Indus. Ass’n</i> , 479 U.S. 388 (1987).....	10
<i>East Bay Sanctuary Covenant v. Trump</i> , 909 F.3d 1219 (9th Cir. 2018)	20, 21
<i>Gringo Pass, Inc. v. Kiewit Sw. Co.</i> , No. 09-cv-251, 2012 WL 12905166 (D. Ariz. Jan. 11, 2012)	3
<i>Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.</i> , 527 U.S. 308 (1999).....	12, 13
<i>Individuals for Responsible Gov’t, Inc. v. Washoe County</i> , 110 F.3d 699 (9th Cir. 1997)	12
<i>Lexmark Int’l, Inc. v. Static Control Components, Inc.</i> , 572 U.S. 118 (2014).....	9, 10, 11, 13
<i>Lincoln v. Vigil</i> , 508 U.S. 182 (1993).....	17
<i>National Treasury Emps. Union v. Von Raab</i> , 489 U.S. 656 (1989).....	19

Nken v. Holder,
556 U.S. 418 (2009)..... 8

Ray Charles Found. v. Robinson,
795 F.3d 1109 (9th Cir. 2015) 10

Thompson v. North Am. Stainless, LP,
562 U.S. 170 (2011)..... 9, 12

United States v. Guzman-Padilla,
573 F.3d 865 (9th Cir. 2009) 19

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.,
454 U.S. 464 (1982)..... 12

Winter v. Natural Res. Def. Council, Inc.,
555 U.S. 7 (2008)8, 18, 19, 20

Ziglar v. Abbasi,
137 S. Ct. 1843 (2017)..... 13

Statutes:

Consolidated Appropriations Act of 2019, Pub. L. No. 116-6,
§ 230, 133 Stat. 13, 28.....6, 16, 18

Department Of Defense and Labor, Health And Human Services,
And Education Appropriations Act, 2019, And Continuing
Appropriations Act, 2019, Pub. L. No. 115-245,
132 Stat. 2981 (Sept. 28, 2018)5, 10, 16

Pub. L. No. 115-245,
§ 8005, 132 Stat. 2999 5, 10, 14

10 U.S.C. § 284..... 1,

10 U.S.C. § 284(a)..... 3

10 U.S.C. § 284(b)(7) 3

Legislative Materials:

H.R. Rep. No. 93-662 (1973) 10, 15

H.R. Rep. No. 103-200 (1993) 3
H.R. Rep. No. 115-952 (2018) 15

Other Authorities:

Declaring a National Emergency Concerning the Southern Border of the United States, Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019)..... 4
Veto Message for H.R.J. Res. 46, 116th Cong. (2019)..... 4
Remarks by President Trump in Briefing on Drug Trafficking on the Southern Border (Mar. 13, 2019), at <https://go.usa.gov/xmFYX> 4
Office of General Counsel, U.S. GAO, *Principles of Federal Appropriations Law*, (4th ed. 2016 rev.)..... 14

INTRODUCTION AND SUMMARY OF ARGUMENT

At the southern border, enormous quantities of illegal drugs, including deadly heroin and fentanyl, are flowing into our Nation. In response to this crisis, and pursuant to longstanding statutory authority (10 U.S.C. § 284), the Department of Homeland Security (DHS) asked the Department of Defense (DoD) to support its counter-narcotics operations by building barriers and roads and installing lights in two of the highest-priority drug-smuggling corridors between ports of entry. The district court enjoined DoD from providing DHS that critical support. Order 55 (ECF No. 144).

The district court's injunction is unprecedented and extraordinary. The court did not find that DoD lacked authority under Section 284 to support the counter-drug efforts of DHS. Rather, it rejected DoD's exercise of authority to transfer funds across internal budget accounts under Section 8005 of DoD's own appropriations statute. The court enjoined DoD at the behest of private parties who have no express cause of action to enforce this internal appropriations-transfer statute, and whose injury rests solely on the alleged effect that border fencing would have on their recreational or aesthetic interests in land within the drug-smuggling corridors. This Court should stay this remarkable injunction, which is fundamentally flawed on the merits and imposes serious irreparable harm on the government and the public.

Section 8005 governs DoD's internal budget and regulates the agency's relationship with Congress. It includes no cause of action for private enforcement. Even if there were an implied cause of action in equity for private enforcement of this internal

transfer provision for the Defense budget, the recreational and aesthetic injuries asserted by these plaintiffs fall well outside any zone of interests conceivably protected by Section 8005. The district court did not dispute any of this, and its holding that implied equitable claims are exempt from the zone-of-interests limitation is contrary to both binding precedent and the separation of powers.

In any event, Section 8005's requirements for transferring funds within DoD's accounts are plainly satisfied here. Section 8005 provides that a transfer for an "item" of funding must be "based on unforeseen military requirements" and cannot occur if "the item for which funds are requested has been denied by the Congress." The district court fundamentally misunderstood those requirements by focusing on whether the government could have foreseen the need for border barriers *generally*, and on whether Congress failed to fund some *other aspect* of the Executive Branch's request for funding to construct border barriers. The text and context of Section 8005 make clear that the statute refers to the *particular item* for which DoD seeks to transfer funds within its accounts after its budget has been finalized. Here, DHS requested DoD to provide counter-drug support; that February 2019 request was "unforeseen" when Congress authorized the Defense budget in September 2018, and Congress has never "denied" DoD funding for that item.

Finally, the court seriously mis-weighed the balance of harms. Plaintiffs' interests in hiking, birdwatching, and fishing—in two drug-smuggling corridors with deteriorating existing barriers—do not come close to outweighing the harm from

interfering with efforts to stop the flow of drugs entering the country. Moreover, the Executive Branch faces significant irreparable harm from the entry of this improper injunction. DoD's authority to spend the remaining \$424 million of unobligated funds for the projects is at risk of lapsing unless DoD can take steps to obligate the funds before the end of the fiscal year on September 30, a complex process that must start well in advance of that deadline. And DoD will incur unrecoverable expenses of over \$6 million monthly for suspending work on the projects if the injunction is not stayed. The wildly lopsided balance of equities here underscores the court's error in granting an injunction in the first place, and it confirms the need for this Court to stay the injunction pending appeal.

BACKGROUND

1. Congress has authorized DoD to “provide support for the counterdrug activities . . . of any other department or agency,” if “such support is requested.” 10 U.S.C. § 284(a). This support includes the “[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.” *Id.* § 284(a), (b)(7). Since the early 1990s, military personnel have helped to build and reinforce border barriers at the southwest border. *See* H.R. Rep. No. 103-200, at 330-31 (1993); *Gringo Pass, Inc. v. Kiewitt Sw. Co.*, No. 09-cv-251, 2012 WL 12905166, at *1 (D. Ariz. Jan. 11, 2012).

2. As the President recently explained, each year tens of thousands of pounds of illegal drugs are smuggled across the southern border, a “major entry point” for “illicit

narcotics.” Declaring a National Emergency Concerning the Southern Border of the United States, Proclamation No. 9844, 84 Fed. Reg. 4949, 4949 (Feb. 15, 2019); Veto Message for H.R.J. Res. 46, 116th Cong. (2019); *see also Remarks by President Trump in Briefing on Drug Trafficking on the Southern Border* (Mar. 13, 2019), at <https://go.usa.gov/xmFYX>.

On February 25, 2019, DHS requested DoD’s assistance in blocking “11 specific drug-smuggling corridors along portions of the southern border.” Rapuano Decl. (ECF No. 64-8), (attached) ¶ 3. The request sought “the replacement of existing vehicle barriers or dilapidated pedestrian fencing with new pedestrian fencing, the construction” and improvement of patrol roads, and “the installation of lighting.” *Id.* The Acting Secretary of Defense approved several projects, including the two at issue here: the Yuma Sector Project 1 and the El Paso Sector Project 1, the first and third highest priority counter-drug fencing projects for DHS due to the high rates of drug smuggling between ports of entry in those sectors. *Id.* ¶ 4; *see also id.*, Ex. A (DHS Request for Assistance), at 10 (setting forth sequencing of requested projects).

In the Yuma Sector, the United States Border Patrol had over 1,400 drug-related events between border crossings in Fiscal Year (FY) 2018, and seized over 8,000 pounds of marijuana, 78 pounds of cocaine, 102 pounds of heroin, 1,700 pounds of methamphetamine, and 6 pounds of fentanyl. DHS Request for Assistance, at 4; *see also* LeMaster Decl. (ECF No. 146-1) (attached) ¶ 5 (providing year-to-date FY2019 numbers). The Sinaloa Cartel, the most powerful drug cartel in the country, operates

in the area, and the Yuma Sector Project 1 area currently has ineffective vehicle barriers that must be replaced with new pedestrian fencing in order to counter the tactics of smugglers. DHS Request for Assistance, at 4 (explaining how “transnational criminal organizations” have “adapted their tactics” to evade existing barriers).

The El Paso Sector similarly experiences high rates of illegal drug activity. Border Patrol had over 700 drug-related events between border crossings in that sector, and seized over 15,000 pounds of marijuana, 342 pounds of cocaine, 40 pounds of heroin, and 200 pounds of methamphetamine. Rapuano Decl. 8; *see* LeMaster Decl. ¶ 4 (providing year-to-date FY2019 numbers). The El Paso Project will replace 46 miles of existing vehicle barriers that are no longer effective because of the changing tactics of transnational criminal organizations operating in the area. DHS Request for Assistance, at 9.

3. To complete these projects, DoD transferred \$1 billion to its counter-narcotics support appropriation from excess requirements in its Army personnel accounts. Rapuano Decl. ¶¶ 5-6. Section 8005 of the Department Of Defense and Labor, Health And Human Services, And Education Appropriations Act, 2019, And Continuing Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981, 2999 (Sept. 28, 2018) authorizes the Secretary of Defense to transfer up to \$4 billion from certain DoD funds provided “[t]hat such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which

originally appropriated and in no case where the item for which funds are requested has been denied by the Congress.”

4. Plaintiffs are environmental groups who allege that defendants failed to comply with the requirements of Section 8005 in transferring money to DoD’s counter-drug support fund. Plaintiffs sought a preliminary injunction, alleging that the intended construction would interrupt “their use and enjoyment of the areas” where the infrastructure projects would be built. Pls.’ Mot. for Prelim. Inj. (ECF No. 29) 5.

5. The district court partially granted the preliminary injunction. Although plaintiffs lacked any express cause of action to enforce Section 8005, the court reasoned it “ha[d] authority to review each of Plaintiffs’ challenges to executive action” pursuant to the court’s equitable power because “the Court has a duty to determine whether executive officers invoking statutory authority exceed their statutory powers.” Order 28. The court did not determine whether plaintiffs “fall within the ‘zone of interests’” protected by Section 8005 because it reasoned that the zone-of-interest requirement applies “to statutorily-created causes of action,” not equitable ones. Order 29.

The district court held that Section 8005 did not permit DoD to transfer the funds between its accounts. Because Congress had appropriated only \$1.375 billion to DHS for DHS to construct “primary pedestrian fencing . . . in the Rio Grande Valley Sector” of the Southern Border, Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 230, 133 Stat. 13, 28, the court reasoned Congress had thereby “denied fund[s]” to DoD to construct border infrastructure pursuant to DoD’s drug interdiction support

fund in Section 284. The court also concluded that DoD's construction under Section 284 was not an "unforeseen military requirement" because, even though DHS had not requested DoD's support under Section 284 until February 2019, the Administration had made other non-DoD funding requests for a border wall generally since early 2018. The court thus held that the "requirement[]" was "foreseen by the government as a whole," "even if DoD did not realize that it would be asked to pay" for counter-drug support at the time DoD's budgeting process was completed. Order 35-36.

The district court found plaintiffs had demonstrated irreparable injury "to their members' aesthetic and recreational interests in" the two project areas. Order 49. The court invoked declarations asserting that "border barrier construction will harm [the members'] ability to recreate in and otherwise enjoy public land along the border," such as interfering with the "ability to fish" and "hiking and camping interests." Order 49-50. Although the court recognized that "the public has a 'weighty' interest 'in efficient administration of the immigration laws at the border,'" it ignored the critical interest in enforcing the *drug* laws, and regardless, it found the balance of equities and public interest favored a preliminary injunction simply because "[p]laintiffs' injuries . . . are not speculative, and will be irreparable in the absence of an injunction." Order 54. The district court denied a stay pending appeal. Order Den. Stay 2 (ECF No. 152).

ARGUMENT

In deciding whether to stay an injunction pending appeal, this Court considers four factors: (1) the likelihood of success on the merits; (2) whether the applicant will

suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). This Court reviews the grant of a preliminary injunction for abuse of discretion, but legal conclusions are reviewed de novo. *Aircraft Serv. Int'l, Inc. v. International Bhd. of Teamsters*, 779 F.3d 1069, 1072 (9th Cir. 2015) (en banc). To obtain a preliminary injunction, plaintiffs were required to establish that they are “likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Here, a stay is manifestly warranted. The government has much more than a mere likelihood of success on the merits given the fundamental flaws in the district court’s legal analysis. And the lopsided balance of harms strongly tilts in the government’s favor, underscoring the court’s error in granting an injunction and confirming the need for a stay. Absent a stay, even if the injunction is ultimately vacated, the government will suffer substantial and irreparable injury, while plaintiffs will suffer little, if any, cognizable harm.

I. The Government Has a Strong Likelihood of Prevailing on Appeal

A. Plaintiffs May Not Sue to Enforce the Requirements for Internal Transfers of Funds Under DoD’s Appropriations Statute

The government is likely to succeed in demonstrating that plaintiffs cannot sue to enforce the limitations in Section 8005, a provision in DoD’s annual appropriations

statute that governs DoD's internal transfer of funds as part of Congress's regulation of DoD's budget. Section 8005 contains no express cause of action, and plaintiffs do not attempt to bring their suit under the Administrative Procedure Act (APA) (nor could they, because DoD's mere transfer of funds is not reviewable final agency action). Instead, the district court held that plaintiffs can enforce Section 8005 through an implied cause of action in equity. Order 30 n.14 (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015)).

Even if such an action were available, these plaintiffs fall outside the zone of interests protected by Section 8005 and thus cannot sue to enforce it. The "zone of interests" requirement limits the plaintiffs who "may invoke [a] cause of action" to enforce a particular statutory provision. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-30 (2014). The requirement recognizes that Congress does not necessarily intend to allow any person "who might technically be injured in an Article III sense" to sue based on a federal statutory violation. *Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 178 (2011). "Congress is presumed to 'legislat[e] against the background of' the zone-of-interests limitation," which excludes putative plaintiffs whose interests do not "fall within the zone of interests protected by the law invoked." *Lexmark*, 572 U.S. at 129 (alteration in original) (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)).

Although the zone-of-interest test under the APA’s “generous review provisions” bars suit only where a plaintiff’s interests are “marginally related to or inconsistent with” the statute it seeks to enforce, *Lexmark*, 572 U.S. at 130, “a heightened standard for the zone-of-interests test might apply in non-APA cases,” *Ray Charles Found. v. Robinson*, 795 F.3d 1109, 1121 (9th Cir. 2015). The Supreme Court has suggested that, where a plaintiff seeks to bring an implied cause of action in equity to enforce a statutory or constitutional provision, the zone-of-interests test requires that the provision be intended for the “*especial* benefit” of protecting the plaintiff at issue. *See Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 396, 400 & n. 16 (1987).

Here, under any standard, plaintiffs are not within the zone of interests of Section 8005. That statute regulates the relationship between Congress and the Executive by limiting when DoD may transfer appropriated funds between internal accounts. Nothing in Section 8005 suggests that Congress even arguably intended to allow persons alleging aesthetic or recreational harms to sue to enforce Section 8005’s terms, let alone that it specifically intended to protect such persons.

Indeed, there is no indication that Congress intended to authorize judicial enforcement of Section 8005 at all, as opposed to leaving any potential violations to its own oversight. Congress required DoD to provide notice to Congress when it exercises its transfer authority, *see* Pub. L. No. 115-245, § 8005, 132 Stat. at 2999, and Congress intended Section 8005 to “tighten *congressional* control of the re-programming process,” DoD Appropriation Bill, 1974, H. Rep. No. 93-662, at 16-17 (1973) (emphasis added).

To the extent Congress disagrees with DoD's transfer decisions, it has the necessary tools to address the problem, but Congress as a whole has failed to respond to DoD's notification through the appropriations process or otherwise.

The district court did not hold that plaintiffs were within the zone of interests of Section 8005. Rather, the court held that “the zone-of-interests test is inapposite” where plaintiffs seek “equitable relief” against defendants “for exceeding [their] statutory authority.” Order 30; *see also id.* (“It would not make sense to demand that [p]laintiffs . . . establish that Congress contemplated that the statutes allegedly violated would protect [p]laintiffs’ interests.”). To the contrary, it makes no sense to hold that the zone-of-interests requirement applies where Congress has provided a cause of action, but that, where Congress has not expressly authorized suit *at all*, any injured persons can sue, *even if* their interests are entirely unrelated to the interests protected by the statute. Indeed, that holding violates binding precedent and fundamental separation-of-powers principles.

The zone-of-interests requirement is a general presumption about Congress's intended limits on the scope of *all* causes of action, not just express causes of action under the APA or other statutes. *See Lexmark*, 572 U.S. at 129 (the zone-of-interests test “is a ‘requirement of general application’” (quoting *Bennett*, 520 U.S. at 163)). *Lexmark*'s reference to the requirement as applying to all “statutory” or “statutorily created” causes of action (*see id.*) encompasses equitable causes of action, which are inferred from Congress's statutory grant of equity jurisdiction and which enforce

statutes enacted against the backdrop of the zone-of-interests limitation, *see Armstrong*, 135 S. Ct. at 1384; *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). There is no basis to conclude that Congress intended to allow courts not only to infer an equitable cause of action but to do so for individuals outside the zone of interests of the statute being enforced, and such a rule would lead to “absurd consequences.” *Thompson*, 562 U.S. at 176-77 (identifying hypothetical persons with Article III injuries from statutory violations who plainly would be improper plaintiffs to enforce the statute); *see also Armstrong*, 135 S. Ct. at 1385 (“The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory [and constitutional] limitations.”).

The Supreme Court and this Court have made clear that the zone-of-interests requirement applies to implied equitable causes of action under the Constitution. *See, e.g., Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (“[T]he Court has required that the plaintiff’s complaint fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” (quotation omitted)); *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 320-21 n.3 (1977) (applying zone-of-interests requirement to plaintiffs seeking to enforce the dormant Commerce Clause); *Individuals for Responsible Gov’t, Inc. v. Washoe County*, 110 F.3d 699, 703 (9th Cir. 1997) (“[T]he zone of interest test also governs claims under the Constitution in general.” (quotation marks omitted)).

Fundamental separation-of-powers principles underscore why the zone-of-interests requirement applies to implied equitable claims. “[I]t is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action,” because “the Legislature is in the better position” to weigh the competing considerations involved. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856-57 (2017). And while courts may nevertheless wield “traditional equitable powers,” *id.* at 1856, “Congress is in a much better position than” courts “to design the appropriate remedy” when “depart[ing] from” “traditional equitable” practice, *Grupo Mexicano*, 527 U.S. at 322. Accordingly, courts’ limited authority to infer equitable claims cannot extend beyond the traditional presumption that Congress does not intend to allow plaintiffs outside the zone of interests of a statute to sue to enforce it. *See Lexmark*, 572 U.S. at 129.

In sum, the district court’s zone-of-interests holding cannot be reconciled with law or logic. The government is likely to prevail on appeal for that reason alone.

B. Section 8005 Authorized DoD’s Transfer of Funds

Even if plaintiffs could sue to enforce Section 8005, the government is likely to succeed in demonstrating that Section 8005 authorized DoD’s transfer of funds. Federal agencies are charged with administering massive and complex programs in evolving circumstances, and thus “have a legitimate need for a certain amount of flexibility to deviate from their budget estimates” in order to make funds available for agency priorities and changed circumstances. Office of General Counsel, U.S. GAO,

Principles of Federal Appropriations Law, vol. 1, ch. 2, part B at 2-38 (4th ed. 2016 rev.), <https://go.usa.gov/xmFRs>. One way Congress provides the necessary flexibility is to grant agencies the authority to allocate funds to a different program or purpose than originally budgeted, as it did for DoD in Section 8005.

When Congress appropriated funds to DoD for FY 2019, it expressly authorized the Secretary of Defense to transfer, “[u]pon determination . . . that such action is necessary in the national interest,” up to \$4 billion from certain “appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes . . . as the appropriation or fund to which transferred.” Pub. L. No. 115-245, § 8005, 132 Stat. at 2999. Congress provided that the transferred funds must be dedicated to “higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress.” *Id.*

The district court concluded that DoD had transferred funds for an “item” that was previously “denied” by Congress and that supported a military requirement that was not “unforeseen.” *See* Order 33-35. The court’s rationale was that, at the time of DoD’s appropriation, the Executive Branch’s *general desire* for border-wall funding was foreseen and Congress provided *DHS* only a limited amount of funding. *See id.* But that reasoning considers the appropriations process at far too high a level of generality. Section 8005 is a provision in the *DoD* appropriations statute, which grants DoD limited authorization to make internal transfers to fund *particular items* even after the

appropriations statute is enacted. Accordingly, the relevant question under Section 8005 is whether DoD's specific need in February 2019 to provide counter-drug support to DHS under Section 284 was "foreseen" at the time of the September 2018 appropriation, and whether Congress ever "denied" DoD funds to provide counter-drug support. The answer is plainly "no."

Under Section 8005, an "item for which funds are requested" is a particular budget item requiring additional funding beyond the amount in the Defense appropriation for the fiscal year. Congress first imposed the restriction on DoD's transfer authority for "denied" items in 1974, to ensure that DoD would not transfer funds for budget items that "ha[d] been *specifically deleted* in the legislative process." H.R. Rep. No. 93-662, at 16 (emphasis added). DoD during the budgeting process makes funding requests to Congress for budget line items, and Congress approves or disapproves these requests. *See, e.g.*, H. Rep. No. 115-952, at 452 (Sept. 13, 2018). At no point in the budgeting process here, however, did Congress deny a DoD funding request for construction in these two project areas under its counter-narcotics support line. Congress's decisions with respect to DHS's more general request for border-wall funding is irrelevant.

Similarly, the transfer of funds here is for an "unforeseen military requirement[]." An expenditure is "unforeseen" under Section 8005 if DoD was not aware of the specific need when it made its budgeting requests and Congress finalized the Defense appropriation. Congress enacted and the President signed DoD's FY 2019

appropriation on September 28, 2018. Pub. L. No. 115-245, 132 Stat. 2981. Not until February 2019 did DHS request DoD's assistance in blocking specific drug-smuggling corridors. *See* DHS Request for Assistance, at 1-2; Rapuano Decl. ¶ 3. DoD may undertake counter-drug support pursuant to Section 284 only upon receiving a request by another agency. The "need to provide support" to DHS for those proposed projects thus was "not known at the time of [DoD's] FY 2019 budget request" in 2018. *See* Rapuano Decl., Ex. C, at 1-2 (Memorandum from Acting Defense Secretary Patrick M. Shanahan). It is irrelevant that DHS's broader request for border-wall funding was foreseen at the time, especially since DHS's own appropriation was not finalized until February 2019. Pub. L. No. 116-6, 133 Stat. at 13.

The district court expressed concern that "*every* request for Section 284 support would be for an 'unforeseen military requirement.'" Order 36. But that misunderstands the budget process. An agency's request to DoD for counter-drug support will be "foreseen" for a given year's defense budget when it is received by DoD in time to include in the submission to Congress. Some such support requests will recur or will continue beyond a single fiscal year, and can therefore be included in the following year's budget. Here, however, at the time DoD's budget was finalized DoD could not have anticipated that DHS would request specific support for roads, fences, and lighting in these high-traffic drug corridors.

The district court's fundamental misunderstanding of the federal appropriations process is highlighted by its remarkable suggestion that the government's interpretation

of Section 8005 “likely would violate the Constitution’s separation of powers principles” by providing “unbounded authorization for Defendants to rewrite the federal budget.” Order 37. Congress has long provided agencies with “lump-sum appropriation[s],” and agencies’ delegated authority over “[t]he allocation of funds” is not only constitutional, but “committed to agency discretion by law” and “accordingly unreviewable.” *Lincoln v. Vigil*, 508 U.S. 182, 192-93 (1993). Given that Congress thus could have granted DoD unfettered discretion over its total budget, Section 8005’s limited grant of transfer authority within DoD’s reticulated budget, however broadly construed, poses no constitutional concerns.

The real separation-of-powers concern is the district court’s intrusion into the budgeting process. As discussed in the zone-of-interests context, the budgeting process is between the Legislative and Executive Branches—not the judiciary. Congress had (and retains) the political tools available to ensure that DoD could not transfer funds to complete Section 284 construction. Nevertheless, even when enacting DHS’s appropriation as late as February 2019, Congress explicitly recognized agencies’ continuing authority to make changes in their appropriations “pursuant to the reprogramming or transfer provisions of this or any other appropriations Act.” 2019 Consolidated Appropriations Act, Pub. L. No. 116-6, § 739, 133 Stat. at 197.

C. The District Court Abused its Discretion in Finding the Balance of Harms and Public Interest Justified an Injunction

The government also has a strong likelihood of demonstrating that the district court abused its discretion in failing to properly balance the equities and consider the public interest. “A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter*, 555 U.S. at 24. “In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Id.* (quotation marks omitted).

In *Winter*, the Supreme Court reversed a preliminary injunction prohibiting the Navy from using sonar technology in training exercises at sea, where plaintiffs claimed the sonar would injure them because they “observ[ed]” and “photograph[ed]” marine mammals in the area and “conduct[ed] scientific research.” 555 U.S. at 13-14, 25-26. In reversing, the Supreme Court explained that “the District Court and the Ninth Circuit significantly understated the burden the preliminary injunction would impose on the Navy’s ability to conduct realistic training exercises, and the injunction’s consequent adverse impact on the public interest in national defense,” which “plainly outweighed” the harms asserted by the plaintiffs. *Id.* at 24, 33. Here, the balance of equities likewise plainly bars a preliminary injunction.

As discussed, DHS identified the two barrier projects at issue because of the high rates of drug smuggling between ports of entry in the El Paso and Yuma Border Patrol Sectors. The record includes ample evidence of the problem of drug smuggling in these

corridors, and explains that existing vehicle barriers in the area have proved insufficient as transnational drug organizations have changed their tactics. *Supra* at 4-5. The district court's injunction frustrates the government's ability to stop the flow of drugs across the border and harms the public's interest. It is well established that the government has "compelling interests in safety and in the integrity of our borders." *National Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 (1989); accord *United States v. Guzman-Padilla*, 573 F.3d 865, 889 (9th Cir. 2009) (acknowledging the government's "strong interest[]" in "interdicting the flow of drugs" entering the country). As in *Winter*, a "proper consideration of these factors alone requires denial of the requested injunctive relief." 555 U.S. at 23.

Moreover, the harms to the government and the public interest are irreparable. Even if the government ultimately succeeds in this appeal, the passage of time will not only delay the construction of the drug-trafficking barriers; it also will threaten both to deprive DoD of its lawful authority to spend the funds at issue and to subject DoD to unrecoverable contract costs for the suspension of work. *Infra* Part II.

These grave harms "plainly outweigh[]" plaintiffs' aesthetic and recreational injuries, just as the harms from prohibiting the Navy's sonar testing did when balanced against the plaintiffs' observational and scientific interests in *Winter*, 555 U.S. at 26. Indeed, plaintiffs' interests here are even less substantial than those in *Winter*. Plaintiffs allege the construction at the border will harm their "ability to fish," "hik[e]," and "camp[]." Order 49-50. But the vast majority of construction in the project areas will

occur on a 60-foot strip of land that parallels the international border on areas that are already “heavily disturbed” and marked by barriers. *See* Enriquez Decl. (ECF No. 64-9) (attached) ¶ 63. The projects consist of replacing existing dilapidated vehicle barriers and pedestrian fencing in an area that “function[s] primarily as a law-enforcement zone,” and the proposed construction projects will not make any change to the existing land use within or near the project area. *Id.* ¶¶ 63-64.

The district court here failed to meaningfully weigh the equities. It acknowledged in passing that “the public has a ‘weighty’ interest ‘in efficient administration of the immigration laws at the border.’” Order 54 (quoting *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018)). But that entirely ignores the critical interest in drug interdiction. Moreover, while purporting not to “minimize” any law-enforcement interest, the court held that the equities supported the injunction based on nothing more than the public’s generalized interest “in ensuring that statutes . . . are not imperiled by executive fiat” and the plaintiffs’ modest recreational and aesthetic injuries, simply because it found those injuries “are not speculative” and “will be irreparable.” *Id.* That analysis contains no balancing at all, and it is irreconcilable with the reasoning and result of *Winter*.

Nor does *East Bay* support the injunction. It involved actions denying aliens the right to seek asylum if they did not enter through a port of entry, harming the asylum seekers themselves as well as the plaintiff organizations that received funding for serving them. 909 F.3d at 1237. Especially in light of *Winter*, the harms at issue in *East*

Bay are nothing like plaintiffs’ asserted injuries to “their ability to recreate in and otherwise enjoy public land” in a drug-trafficking corridor with existing border barriers. Order 49.

II. The Equitable Balance of Harms Supports a Stay Pending Appeal

As demonstrated, the district court’s injunction interferes with the government’s attempt to address the crisis on the border from the flow of narcotics in these two drug-trafficking corridors. A delay in the construction of border fencing pending appeal will create irreparable harm with respect to the deadly drugs that flow into this country in the interim. And DoD faces even more concrete irreparable injury if the injunction is not stayed pending appeal.

Most importantly, the injunction threatens to permanently deprive DoD of its authorization to use the funds at issue to complete the El Paso and Yuma projects, because the funding will likely lapse during the appeal’s pendency. The injunction forbids DoD from spending approximately \$424 million it has transferred for these projects but has not yet obligated via construction contracts. McFadden Decl. (ECF No. 146-2) (attached) ¶¶ 6-7. Should the government ultimately prevail on the merits, DoD would be entitled to spend those funds on Section 284 construction. But unless those funds are obligated by September 30, 2019, this money will no longer remain available to DoD. *Id.* ¶ 7; see *City of Houston v. Department of Hous. & Urban Dev.*, 24 F.3d 1421, 1424, 1426-27 (D.C. Cir. 1994) (recognizing the “well-settled matter of constitutional law that when an appropriation has lapsed . . . federal courts cannot order

the expenditure of funds that were covered by that appropriation”). And the complex and time-consuming process to obligate the remaining money requires DoD to take multiple steps before the September 30 deadline. McFadden Decl. ¶¶ 8-10. Thus, should the district court’s preliminary injunction continue into the coming months, the decision below will effectively operate as an improper final judgment. *Id.* ¶ 10.

In addition, DoD is incurring unrecoverable fees and penalties of hundreds of thousands of dollars to its contractors for each day that construction is suspended. That money cannot be spent for productive purposes, and will result in unsustainable costs for the government. McFadden Decl. ¶¶ 14–15 (estimating costs of \$195,000 per day for the El Paso Project 1, and \$20,000 per day for the Yuma Project 1).

The government and the public should not be forced to suffer these harms during the pendency of the appeal, especially given the weakness of plaintiffs’ alleged injuries and the strength of the government’s merits case.

CONCLUSION

The government respectfully requests that this Court enter a stay pending appeal of the district court's preliminary injunction.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

HASHIM M. MOOPAN
JAMES M. BURNHAM
Deputy Assistant Attorneys General

H. THOMAS BYRON III
/s/ Anne Murphy
ANNE MURPHY
COURTNEY L. DIXON
(202) 353-8189
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice, Room 7243
950 Pennsylvania Ave., NW
Washington, DC 20530

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitation of Fed. R. App. P. 27 and Ninth Circuit Rule 32-3 because it contains 5,578 words. This Motion 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 Garamond typeface.

/s/ Anne Murphy
Anne Murphy