Nos. 19-17501, 19-17502, 20-15044

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SIERRA CLUB, et al.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,
Defendants-Appellants.

STATE OF CALIFORNIA, et al.,
Plaintiffs-Appellees/Cross-Appellants,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,
Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of California

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

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SUMMARY OF ARGUMENT

As the government's opening brief demonstrated, the district court committed fundamental errors in entering a permanent injunction prohibiting the Department of Defense (DoD) from undertaking military construction projects under the authority expressly provided in 10 U.S.C. § 2808. Plaintiffs' interpretation of that statute is wrong on the merits, but more fundamentally, plaintiffs fail to show that they are proper parties to enforce Section 2808's limitations. The Sierra Club plaintiffs assert injuries from border-barrier construction that are solely aesthetic, recreational, and environmental in nature; the State plaintiffs additionally assert indirect financial injuries and abstract sovereign injuries. None of these claimed injuries entitle plaintiffs either to sue or to obtain injunctive relief on their claims that DoD improperly invoked express statutory authority to use military-construction funds for specific projects that the Secretary of Defense has determined are necessary to support the use of the armed forces in connection with the declaration of national emergency. For these reasons, plaintiffs have failed to rehabilitate the injunction awarded to the Sierra Club plaintiffs, much less demonstrate that the district court abused its discretion in denying injunctive relief to the State plaintiffs.

A. To begin, although plaintiffs emphasize the general availability of an implied cause of action in equity to challenge federal actions in excess of authority, they are not proper parties to bring such an action here. Notably, they do not identify a single precedent allowing such an action where the putative plaintiff fell outside the

zone of interests of the statutory or constitutional limitations on which the claim rested. And plaintiffs do not meaningfully dispute that they cannot satisfy the zone-of-interests requirement because their asserted harms are entirely unrelated to Section 2808's limitations, which are the essential element of virtually all of their claims. Plaintiffs' various arguments for why any person with Article III standing may sue to enforce the Appropriations Clause were made unsuccessfully to the Supreme Court in opposing a stay of the district court's earlier injunction against border-barrier construction under 10 U.S.C. § 284. *Trump v. Sierra Club*, 140 S. Ct. 1 (2019).

B. In any event, plaintiffs' objections to DoD's military-construction re-prioritization under Section 2808 are meritless. Plaintiffs attempt to defend the district court's conclusion that the military construction projects at issue here are neither construction with respect to a military installation nor necessary to support the use of the armed forces. But they cannot dispute that the challenged projects are taking place on land under the jurisdiction of a Secretary of a military department in general and assigned to two military bases in particular. The Secretary's determination—that these projects are necessary to support the use of the armed forces in connection with the national emergency declared by the President—was eminently reasonable given that the border-barrier construction has a force-multiplier effect that facilitates the military's assistance to other agencies in addressing the emergency. And neither plaintiffs nor the Court may second-guess the Secretary's military judgment in these circumstances.

Plaintiffs also raise various alternative arguments that the district court did not adopt, but those are likewise deficient. For example, plaintiffs contend that a statute (the Consolidated Appropriations Act 2019, or CAA) that appropriated funds to DHS, but not to DoD, implicitly prohibits DoD from invoking its longstanding military-construction authority under Section 2808. Nothing in the CAA supports plaintiffs' argument, and Congress has given no indication there or in any other statute that it sought to limit or curtail the authority it has long entrusted to DoD in times of national emergency. Likewise, nothing in the Constitution prohibits Congress from exercising its power of the purse by giving DoD the power to re-prioritize the use of military-construction funds, particularly when necessary to support the use of the armed forces in a national emergency.

C. Finally, and at a minimum, plaintiffs fail to demonstrate that equitable relief is justified here. Once again, plaintiffs all but ignore that the Supreme Court has already weighed the equities in the government's favor when staying the prior injunction against Section 284 construction. Plaintiffs also fail to undermine the significance of the government's, and the public's, interest in supporting the armed forces and in maintaining the security and integrity of the international border against a range of threats, including the smuggling of drugs and other contraband between ports of entry. And plaintiffs' exaggeration of the intangible and indirect harms to themselves does not undermine the government's showing that the district court abused its discretion in granting a permanent injunction against military construction

projects. *A fortiori*, the State plaintiffs cannot show that the district court abused its discretion in denying them injunctive relief. The district court was correct that they lack irreparable harm warranting an injunction, both because the Sierra Club plaintiffs had obtained a duplicative injunction and because the State plaintiffs' environmental harms are speculative while their sovereign and financial harms are insubstantial.

ARGUMENT

I. Plaintiffs Are Not Proper Parties To Enforce Section 2808's Limitations.

As our opening brief explained, plaintiffs are not entitled to bring suit to challenge alleged violations of Section 2808. In response, the Sierra Club plaintiffs principally argue (SC Br. 15-29) that there is no wholesale prohibition on judicial review of actions under Section 2808. But the government is not arguing that courts are categorically barred from reviewing alleged constitutional claims resting on statutory violations in general, or claims concerning an agency's use of funds absent statutory authority in particular. The government likewise is not arguing that there is never an equitable cause of action to bring such claims, or that no plaintiff could ever do so. *Cf. Sierra Club v. Trump*, 929 F.3d 670, 715 (9th Cir. 2019) (N.R. Smith, J., dissenting) (concluding that 10 U.S.C. § 8005 at least "arguably protects," for example, "those who would have been entitled to the funds as originally appropriated").

Rather, the government's argument is that *these particular plaintiffs* are not proper parties to invoke any cause of action to bring *these particular claims* against the

government's expenditure of funds. Plaintiffs' claims that the government is acting ultra vires and in violation of the Constitution are necessarily predicated on their contention that the government has exceeded the limitations imposed by Section 2808 (or that the statute is itself unconstitutional), and yet the asserted aesthetic, recreational, and environmental injuries from the military construction projects they challenge fall well outside the zone of interests of Section 2808's limitations.

Plaintiffs principally reprise the arguments that they need not satisfy the zone-of-interests requirement at all. But the Supreme Court rejected those arguments in granting a stay of the earlier injunction. Especially in light of the Supreme Court's stay, the prior stay panel's opinion—which the district court incorrectly relied on—is not controlling here. The Sierra Club plaintiffs are mistaken to suggest (SC Br. 15 & n.1) that the district court and this Court should disregard the Supreme Court's decision granting a stay. That decision is "clearly irreconcila[ble]" with, and thus supersedes, the motions panel's contrary holding that the government had not satisfied the stay standard. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). In any event, a stay panel's preliminary decision should not bind a later merits panel's determination. *See East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1028 n.2 (9th Cir. 2019).

A. Plaintiffs Are Outside The Zone Of Interests Protected Or Regulated By Section 2808.

As our opening brief showed (at 19-20, 25-29), the zone-of-interests requirement is a general presumption limiting the plaintiffs who "may invoke [a] cause of action" that Congress has authorized. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-30 (2014). This presumption reflects the fact that Congress typically does not intend the "absurd consequences" that could result from extending a cause of action to "plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated" to the legal provisions they seek to enforce. *Thompson v. North Am. Stainless, LP*, 562 U.S. 170, 176-78 (2011). And as we further explained (at 20-25, 31-35), plaintiffs are not proper parties to enforce Section 2808's limitations. Their alleged environmental, recreational, and aesthetic injuries are unrelated to, and indeed inconsistent with, the interests protected and regulated by Section 2808, a statute that governs the re-prioritization of military-construction funds in the event of a national emergency.

Plaintiffs make half-hearted efforts to show that their aesthetic, recreational, and environmental injuries fall within Section 2808's zone of interests (a conclusion the district court did not reach), but their arguments are unpersuasive. The Sierra Club plaintiffs' sole argument (SC Br. 23-26) is to cite *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), for the proposition that every statute contemplating land use is subject to a limitless zone of interests authorizing

suit by anyone who asserts any interest in the land, no matter who they are or how attenuated their link to the land or to the land use at issue. But the Supreme Court's decision in *Patchak* says nothing of the sort, and actually refutes the suggestion that plaintiffs' claims here fall within Section 2808's zone of interests.

Patchak was careful to identify the particular category of plaintiffs whose interests were sufficiently related to the context and purpose of the statute at issue to allow litigation to enforce the statute's provisions. The plaintiff in *Patchak* was a neighboring landowner whose own property would be damaged by the contemplated use of nearby land acquired for an Indian tribe to operate a casino. *See* 567 U.S. at 224 (describing plaintiff as "a nearby property owner"). Because the "context and purpose" of the Indian Reorganization Act served "to foster Indian tribes' economic development," it required the Secretary of the Interior to "take[] title to properties" on behalf of Indian tribes "with at least one eye directed toward how tribes will use those lands." *Id.* at 226. In light of that statutory purpose, the Court emphasized the governing regulatory regime that "require[d] the Secretary to consider . . . the 'potential conflicts of land use which may arise.'" *Id.* at 226 (quoting 25 C.F.R. § 151.10(f)). For that reason—the obligation of the government, before acquiring land to benefit Indian tribes, to consider potential conflicts that could result from the range of possible land uses—the Court concluded that "a neighboring landowner" was within the zone of interests "to bring suit to enforce the statute's limits." *Id.* at 227.

Unlike the plaintiff in *Patchak*, the Sierra Club plaintiffs are not neighboring landowners whose property might be affected by construction on a nearby federal military installation. Plaintiffs' interests are far more attenuated, and nothing in *Patchak* suggests that the Court would have permitted suit by an organization whose members merely wished to recreate or observe wildlife on what would become the Indian tribe's land. They would not be "reasonable" or "predictable" "challengers of the Secretary's [land-acquisition] decisions" merely because a nearby landowner was a proper plaintiff. *Patchak*, 567 U.S. at 227.

Moreover, the context and purposes of Section 2808 are far different from the Indian Reorganization Act. Instead of requiring the Secretary to consider whether to acquire land in light of the possible range of uses that a beneficiary might engage in—specifically including potential conflicts with nearby landowners—Section 2808 authorizes the military to acquire land in the context of reprioritizing funding for military construction to support the armed forces whose deployment is needed because of a national emergency, without regard to possible conflicts and even "without regard to any other provision of law" that might otherwise stand in the way of military construction in a national emergency. 10 U.S.C. § 2808(a). Nothing in that purpose would support suits by distant campers, fishers, and birdwatchers.

The Sierra Club plaintiffs thus cannot seriously contend that Congress even arguably intended Section 2808 to protect or regulate their aesthetic, recreational, or environmental interests. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 162 (1997) ("[A]

plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit."). Nothing in the text, context, or purpose of the statute supports that extraordinary notion.[1]

Unable to come within Section 2808's zone of interests, plaintiffs principally seek to evade the statute's zone-of-interests requirement by characterizing Section 2808 as the government's "defense" to their ultra vires and Appropriations Clause claims. *E.g.*, SC Br. 15-16. But that label cannot disguise the substance of plaintiffs' claims. No matter what cause of action plaintiffs invoke, their claims require them affirmatively to plead, and then to prove, that DoD lacked statutory authority to use appropriated but unobligated military-construction funds. Because the Appropriations Clause prohibits expenditures only where not "made by Law," U.S. Const. art. I, § 9, cl. 7, plaintiffs cannot prevail unless DoD's re-prioritization of funds violated Section 2808. *See* SC Br. 32-46 (relying on Section 2808's limitations to allege

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[1] The State plaintiffs argue (St. Br. 31-32) that they meet the zone-of-interests requirement because they may lose general tax revenues from deferred military construction projects. These financial harms are insubstantial, *infra* pp. 49, 53-54, and *a fortiori* cannot support a cognizable interest sufficient for these purposes. They are also even further afield of Section 2808's zone of interests than the interests asserted by the Sierra Club plaintiffs. Two States separately argue (St. Br. 33 n.11) that they maintain unspecified "significant interests" in "jurisdiction over" the land on which the challenged military construction projects are to be built. To the extent the States claim an interest in enforcing their environmental laws, *infra* p. 48, 50-53, such harms are indistinguishable from the environmental injuries that the Sierra Club plaintiffs assert.

DoD's transfer was unlawful); St. Br. 13-20 (same). Section 2808 is thus "[t]he relevant statute" for zone-of-interests purposes, because it "is the statute whose violation is the gravamen of the complaint," *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 886 (1990)—as confirmed "by reference to the particular provision of law upon which the plaintiff relies," *Bennett*, 520 U.S. at 175-76.[2]

Indeed, the Sierra Club plaintiffs implicitly acknowledge that their claims turn on "the letter of the difficult judgments reached by Congress as to the common good"—that is, the statutes they seek to enforce. SC Br. 22 (quoting *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016)). That belies any suggestion that their claim somehow asserts a pure constitutional or ultra vires cause of action, divorced altogether from the text, context, and purpose of Section 2808.

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

Plaintiffs emphasize the undisputed point that a cause of action generally exists in equity to challenge ultra vires government conduct. *See* SC Br. 16-21; St. Br. 29-30. But they do not, and cannot, support their disputed contention that such claims are

[2] Although Plaintiffs also argue that Section 2808 would itself be unconstitutional if construed as the government contends, those arguments appear to be predicated on Plaintiffs' misunderstanding of Section 2808 and are meritless in any event. *See infra* pp. 41-43.

somehow exempt from the zone-of-interests requirement. *See* SC Br. 19-20; St. Br. 29-30.[3]

Notably, plaintiffs cannot identify any controlling precedent holding that an equitable ultra vires claim could proceed notwithstanding that a plaintiff's asserted injuries were wholly unrelated to the interests protected by the limitations of the statute that defines the government authority at issue and provides the basis for the plaintiff's claims. Instead, plaintiffs merely cite cases in which courts did not expressly address the zone-of-interests requirement in the course of adjudicating claims to enjoin alleged ultra vires government action. But "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004). That is especially so because the plaintiffs in those cases would not have failed the zone-of-interests requirement. For example, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), it went without saying that a private company satisfied the zone-of-interests requirement when alleging that the President had exceeded his authority under certain federal statutes in suspending

[3] Contrary to the Sierra Club plaintiffs' contention (SC Br. 18), our opening brief (at 30) did not claim that an implied cause of action is necessarily improper; it argued instead that "this is not 'a proper case'" for one. They incorrectly suggest that *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) "rejected a similar argument," SC Br. 18, but the Court there merely observed that equitable relief for constitutional claims may be available "as a general matter." 561 U.S. at 491 n.2. It said nothing about whether such relief is available to plaintiffs like these who are not within the zone of interests of the provision invoked.

the company's own monetary claims against Iran in federal court. *Id.* at 675-77; *see Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987) (analyzing the zone-of-interests requirement in the context of "cases where the plaintiff is not itself the subject of the contested regulatory action"). By contrast, the extraordinary theory of plaintiffs here is that the ultra vires suit in *Dames & Moore* could have been brought, not just by the company itself, but also by any third party that could demonstrate that the President's suspension of Dames & Moore's monetary claims against Iran would somehow result in fairly traceable harm to the third party's aesthetic, recreational, or environmental interests. Contrary to plaintiffs' position, of course, such a suit never would have been entertained, because the zone-of-interests requirement forecloses precisely that sort of "absurd consequence[]" of allowing suit by "any person injured in the Article III sense" from a statutory or constitutional violation. *Thompson*, 562 U.S. at 176-77.

Plaintiffs' failure to cite any authority upholding ultra vires claims by plaintiffs who could not satisfy the zone-of-interests requirement is fatal to their claims. Implied equitable claims are limited by "tradition[]." *Grupo Mexicano de Desarrolo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999). The absence of any case allowing an ultra vires suit by a plaintiff outside the zone of interests of the statutory limitation on which the plaintiff's claim rests is thus powerful evidence that such claims are impermissible. *See id.* at 322 (holding that "Congress is in a much better position than [courts]" to authorize a "wrenching departure from past practice" with respect to "a type of relief that has never been available before"); *cf. Printz v. United*

States, 521 U.S. 898, 905 (1997) (noting that if "earlier Congresses avoided use of" a "highly attractive" practice, "we would have reason to believe that the power was thought not to exist").[4]

The absence of cases like this is also unsurprising. Implied equitable causes of action are available only "in some circumstances" constituting "a proper case," and "subject to express and implied statutory limitations." *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320, 326-27 (2015). The zone-of-interests requirement reflects common-law limitations on the types of plaintiffs who may sue. *Lexmark*, 572 U.S. at 130 n.5. The State plaintiffs attempt (St. Br. 30 n.9) to restrict the rationale for the zone-of-interests requirement to suits for damages, but the zone-of-interests limitation also indisputably applies to claims for non-monetary relief under the Administrative Procedure Act (APA). And the APA's zone-of-interests requirement equally applies to claims under 5 U.S.C. § 706(2) alleging that an agency acted "not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," or "in excess of statutory jurisdiction, authority, or limitations." *See, e.g.*, *Northwest Requirements Utils. v. FERC*, 798 F.3d 796, 804, 807-09 (9th Cir. 2015)

[4] Plaintiffs ignore *Grupo Mexicano*'s holding that an equitable remedy must be traditionally available in the *specific circumstances presented*. In that case, while there was a tradition of creditors seeking to restrain dissipation of assets by debtors against whom they had already obtained a judgment, that tradition did not extend to *pre-judgment* suits and thus the Supreme Court held that that particular remedy was not available. *See* 527 U.S. at 319-22. Here, likewise, the "tradition[]" of ultra vires suits does not extend to allowing plaintiffs with *entirely unrelated injuries* to sue. Rather, the traditional presumption is precisely the opposite.

(finding petitioners did not satisfy zone-of-interests requirement for claim that agency "exceeded its statutory authority in issuing" an order). Such cases would not and should not have come out any differently if those plaintiffs had abandoned reliance on the APA's express cause of action and tried to rest solely on an implied equitable cause of action against ultra vires conduct. Indeed, in light of the APA's "generous review provisions" compared to the pre-APA scheme for judicial review of agency action, there is, if anything, a heightened zone-of-interests limitation on suits seeking to enforce federal statutory or constitutional limitations against federal agencies outside of the APA's framework. *See Clarke*, 479 U.S. at 394-95, 400 & n.16.

Relatedly, plaintiffs fail to meaningfully respond to the government's point (at 27-29) that it would turn the separation of powers on its head to allow plaintiffs outside the zone of interests of a statute's limitations nonetheless to enforce those limitations through an equitable ultra vires claim. Congress is the entity that both creates the statute's limitations and chooses whether or not to provide a cause of action, either expressly (through the APA or otherwise) or implicitly (through the grant of equity jurisdiction). "It would be 'anomalous to impute a judicially implied cause of action beyond the bounds Congress has delineated for a comparable express cause of action.'" *Hernandez v. Mesa*, No. 17-1678, 2020 WL 889193, at *9 (U.S. Feb. 25, 2020) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 736 (1975)); *see Lexmark*, 572 U.S. at 129 ("Congress is presumed to legislate against the background

of the zone-of-interests limitation, which applies unless it is expressly negated." (quotation marks and alteration omitted)).[5]

Plaintiffs misread a footnote in *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987), to suggest that "imposing a statutory zone-of-interests requirement on *ultra vires* claims would make little sense." SC Br. 19. To the contrary, the statutory dispute in an ultra vires claim turns on the *limitations* of the statutory authorization for the government's actions, and thus the proper inquiry in such cases focuses on whether plaintiffs fall within the zone of interests at least arguably "protected by the *limitation*[*s*]" on the "statutory powers invoked by the [defendant]." *Haitian Refugee Ctr.*, 809 F.2d at 811 n.14 (emphasis added).

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

1. As explained in our opening brief (at 31-35), the district court erred in holding that the zone of interests for plaintiffs' claim is determined by the Appropriations Clause, rather than by Section 2808. The district court's characterization of plaintiffs' challenge as an "Appropriations Clause" claim, based on the motions panel's decision, "is flatly contradicted" by *Dalton v. Specter*, 511 U.S. 462

[5] The Sierra Club plaintiffs cite a sentence and footnote in a recent decision of this Court holding that the APA does not entirely displace implied equitable constitutional claims against federal agencies, *Juliana v. United States*, 947 F.3d 1159, 1167 n.5 (9th Cir. 2020); but that conclusion does not remotely suggest that plaintiffs can end-run the more general zone-of-interests requirement simply by invoking a court's equitable jurisdiction.

(1994). *See Sierra Club v. Trump*, 929 F.3d 670, 709 (N.R. Smith, J., dissenting). Plaintiffs fail to rehabilitate that rationale.

The Sierra Club plaintiffs assert (SC Br. 17) that *Dalton* does not support the government's "sweeping" claim that any invocation of a statutory source of authority by the President means that there is "no constitutional issue." But *Dalton* unambiguously adopted precisely that rule: "in cases in which the President concedes, either implicitly or explicitly, that the only source of his authority is statutory, no constitutional question whatever is raised," "only issues of statutory interpretation." 511 U.S. at 474 n.6 (quotation marks omitted).

If anything, as our opening brief explains (at 33), plaintiffs' view would have the "sweeping" implication that every challenge to a tax assessment or agency regulation could be recharacterized as a "constitutional" claim, given the general absence of any "background constitutional authority" for executive officials to take such actions without congressional authorization. The State plaintiffs respond that other constitutional provisions such as the Taxing Clause do not represent an "'exclusive grant of power to Congress,'" St. Br. 42 (quoting *Retfalvi v. United States*, 930 F.3d 600, 609 (4th Cir. 2019)), and the Legislative Vesting Clause is "not an affirmative prohibition," St. Br. 43. But none of that provides a principled basis for distinguishing the Appropriations Clause, as the Executive generally has no constitutional authority in any of these contexts to go beyond the scope of its statutory authority. Indeed, the nature and text of the Appropriations Clause confirm

that a claim invoking that provision will almost invariably turn on the specific provisions of a statute, unless—as *Dalton* explained, 511 U.S. at 473 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952))—the President were to rely solely on inherent Article II power. Because the Appropriations Clause prohibits expenditures only where not "made by Law," U.S. Const. art. I, § 9, cl. 7, the question in a challenge based on the Appropriations Clause will necessarily turn on whether the Executive has validly invoked statutory authority for the spending at issue.

This Court's opinion in *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016), demonstrates the point. Contrary to the Sierra Club plaintiffs' assertion (SC Br. 16), *McIntosh* does not stand for the proposition that private plaintiffs can invoke the Appropriations Clause as the sole source of authority under a constitutional cause of action, disregarding the zone of interests of the relevant statute. The criminal defendants in *McIntosh* relied on—and clearly fell within the zone of interests of—an express statutory provision that they contended prohibited the expenditure of funds *to prosecute them*. *See McIntosh*, 833 F.3d at 1172-73. Indeed, although this Court referred to an "Appropriations Clause" violation, its merits analysis focused entirely on the operative statutory limitation. *See id.* at 1175-77 ("We focus, as we must, on the statutory text."). Nor did *McIntosh* even acknowledge, let alone distinguish, *Dalton*; for this reason as well its dicta should not be read to create a sub silentio conflict with binding Supreme Court precedent.

The State plaintiffs similarly err (Br. 39-40) in invoking *United States Department of the Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1346-48 (D.C. Cir. 2012), to support their characterization of their claim as "constitutional." That case involved the "'necessary expense' doctrine," a doctrine developed by the Comptroller General "as a rule of construction for appropriations statutes." *Id.* at 1349. Thus, like this Court in *McIntosh*, the D.C. Circuit in *Department of the Navy* analyzed the relevant statute, rather than invoking any independent constitutional principle about the Appropriations Clause. *See, e.g.*, *id.* at 1350 ("We agree with [the government's] interpretation of the statute."); *accord Harrington v. Schlesinger*, 528 F.2d 455, 457-58 (4th Cir. 1975) (recognizing that a dispute about whether a defendant has spent funds in excess of statutory authority turns solely on "the interpretation and application of congressional statutes under which the challenged expenditures either were or were not authorized," not on a "controversy about the reach or application of" the Appropriations Clause itself).[6]

2. As the government further explained (at 34-35), even if plaintiffs' claims could be characterized as resting on the Appropriations Clause without contravening *Dalton*, plaintiffs nonetheless would need to fall within the zone of interests protected

[6] The State plaintiffs claim that *Department of the Navy* actually analyzed the Appropriations Clause because "the statute that [it] was analyzing—the Purpose Statute—simply codifies the Appropriations Clause's requirements." St. Br. 39 n.13. But the question here is not whether the Clause's substantive requirements apply by way of a statute; it is whether the claim arises under the statute allegedly violated (Section 2808) or directly under the Appropriations Clause.

by Section 2808's limitations because the claim still necessarily rests on those limitations. Plaintiffs fail to refute this showing as well.

Section 2808 is the "provision whose violation forms the legal basis for [the] complaint," which is the relevant provision when applying the zone-of-interests requirement. *Bennett*, 520 U.S. at 176 (quoting *Lujan*, 497 U.S. at 883). The State plaintiffs suggest (St. Br. 47 n.17) that the Court should disregard this principle because *Bennett* did not involve a constitutional claim. But *Bennett* merely illustrates how the zone-of-interests requirement applies, irrespective of the source of the claim. And we have already explained that the requirement applies equally to claims seeking to enforce constitutional as well as statutory limits.

The State plaintiffs argue that the zone-of-interests requirement applies to constitutional claims only under the so-called dormant Commerce Clause, but not under other constitutional provisions. St. Br. 46-48. But they offer no basis to conclude that those particular constitutional claims are somehow sui generis. To the contrary, this Court has recognized that, under Supreme Court precedent, the zone-of-interests test not only "governs claims . . . under the negative [dormant] Commerce Clause in particular" but "under the Constitution in general." *Individuals for Responsible Gov't, Inc. v. Washoe County*, 110 F.3d 699, 703 (9th Cir. 1997) (alteration in original) (quoting *Wyoming v. Oklahoma,* 502 U.S. 437, 469 (1992) (Scalia, J. dissenting), in turn citing *Valley Forge Christian Coll. v. Americans United for Church & State, Inc.*, 454 U.S. 464, 475 (1982)); *see Center for Reprod. Law & Policy v. Bush*, 304 F.3d

183, 186 (2d Cir. 2002) (Sotomayor, J.) (holding that the zone-of-interests requirement applies to claims under the Due Process Clause).

The State plaintiffs fare no better in arguing (St. Br. 49-50) that *Bond v. United States*, 564 U.S. 211 (2011), supports the proposition that it is at least sufficient that they purportedly fall within the zone of interests of the Appropriations Clause itself, because it is a "structural" provision of the Constitution. Unlike plaintiffs' claim here, the constitutional claim in *Bond* was not premised by necessity on the government's lack of statutory authority, but was instead that Congress had exceeded its enumerated powers in criminalizing Bond's conduct. *Id.* at 214. Thus, *Bond* did not hold and does not suggest that a plaintiff bringing a nominal "constitutional" claim—whose resolution turns entirely on a statutory violation—need not fall within the zone of interests protected by the statute that forms the basis of the claim.

Nor does *Bond* suggest that every Article III injury is a sufficient basis for a plaintiff to bring a structural constitutional claim. The criminal defendant in *Bond* undoubtedly satisfied the zone-of-interests requirement to argue that Congress had exceeded its enumerated powers in criminalizing *her own conduct*. That hardly proves that the same claim likewise could have been brought by anybody who could show that their aesthetic, recreational, or environmental interests would be harmed by a criminal defendant's imminent prosecution and conviction. To the contrary, *Bond* emphasized that "[a]n individual who challenges federal action on [federalism] grounds" is subject to "prudential rules[] applicable to all litigants and claims." 564

U.S. at 225. The zone-of-interests requirement, of course, was described as a "prudential" rule at the time. *Lexmark*, 572 U.S. at 125.

II. The Challenged Military Construction Projects Are Consistent With Section 2808.

Plaintiffs defend the district court's unduly narrow reading of Section 2808, arguing that the military construction projects at issue are neither construction with respect to a military installation nor necessary to support the use of the armed forces. SC Br. 32-46; St. Br. 15-20. But as the government explained in its opening brief (at 35-43), the eleven projects fall well within the plain text and historical context of those statutory requirements. Plaintiffs' attempts to impose additional constraints are inconsistent with the statute's language and purpose.

A. Each Project Is Being Carried Out With Respect To A Military Installation.

Section 2808 authorizes "military construction projects . . . that are necessary to support [the] use of the armed forces" in a national emergency. 10 U.S.C. § 2808(a). Military construction is defined as "any construction . . . of any kind carried out with respect to a military installation." *Id.* § 2801(a). The term "military installation" in turn is defined as "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." *Id.* § 2801(c)(4). As the government explained (at 36-40), nine projects will take place on land assigned to Fort Bliss, an Army Base under the jurisdiction of the Secretary of the Army that is

indisputably a "military installation"; the other two will occur at the Goldwater Range, as even the district court recognized was permissible.

Contrary to plaintiffs' characterization of the government's position (SC Br. 33, 34), the government does not contend that the entire "Southern border" is a military installation. Instead, each of the nine military construction projects at issue here is taking place on a specific tract of land that has been acquired by the military and is under the jurisdiction of the Secretary of the Army and assigned to Fort Bliss. Each project thus satisfies the definition of military construction because it entails construction with respect to particular land that qualifies as a military installation.

Plaintiffs argue that the land constituting a military installation must bear some resemblance "in nature or scope," ER25, to some paradigmatic "base, camp, post, station, yard, [or] center." SC Br. 34-36; St. Br. 15-16. But Fort Bliss unquestionably meets that standard. Because every challenged project is being built on land that is part of Fort Bliss, each project is "construction . . . carried out with respect to" Fort Bliss, which is a military installation. 10 U.S.C. § 2801. In arguing otherwise, plaintiffs insist that the terms "base, camp, post, station, yard, [or] center" must be defined restrictively. But because the plain meaning of those terms—which are examples of the many ways the military can exercise jurisdiction over land—is broad, Section 2801's definition of "military installation" clearly reaches the entire range of possible uses of land by the military.

Congress further confirmed the definition's broad reach by adding the expansive catch-all phrase "or other activity under the jurisdiction of the Secretary of a military department" to the list. *Id.* § 2801(c)(4). This residual category confirms that the statutory list was not intended to be restrictive, and that Congress instead sought to ensure that all activity under military jurisdiction is defined as a "military installation." The general canons of statutory interpretation that plaintiffs invoke, SC Br. 34-36; St. Br. 16, cannot alter the plain meaning of this particular text. And plaintiffs' interpretation would have untenable consequences if adopted. For example, DoD would no longer be able to use Section 2808 even for routine military construction projects—such as the construction of a radio tower to facilitate troop communication—on small, distant parcels of land.

Plaintiffs' interpretation also ignores the Supreme Court's recognition that the term "military installation" is generally "synonymous with the exercise of *military jurisdiction*." *United States v. Apel*, 571 U.S. 359, 368 (2014) (emphasis in original). When Congress intends to narrow the term's scope, it does so expressly. *E.g.*, 10 U.S.C. § 2687(g)(1) (defining, for the purpose of base closures and realignments, "military installation" to include "other activity under the jurisdiction of the Department of Defense" but clarifying that "[s]uch term does not include any facility used primarily for civil works" or similar activities); Pub. L. No. 114-287, § 3, 130 Stat. 1463, 1464 (2016) (defining military installation as "any fort, camp, post, naval training station, airfield proving ground, military supply depot, military school, or any *similar*

facility of the Department of Defense") (emphasis added). Significantly, Section 2801 includes no such limiting language.

The Sierra Club plaintiffs also argue that the term "military installation" should be limited by considering the installation's "'functions, purpose, [and] geography.'" SC Br. 36 (quoting ER27). These purported limits appear nowhere in the statutory text, and they make little sense in this context. Section 2808 allows DoD to acquire land for military use in the event of a national emergency, and to build military construction projects on that land that the Secretary deems necessary to support the use of the armed forces in connection with that emergency. Its purpose is to *expand* the military's ability to support DoD personnel in times of emergency, not to *contract* it. The Court should therefore decline plaintiffs' invitation to impose vague and arbitrary atextual constraints on the Secretary—whom Section 2808 empowers to determine which military construction projects to build, where those projects should be located, and what purposes those projects should serve.

Plaintiffs emphasize that some of the projects are assigned to Fort Bliss but are located in a different State. But many military installations are non-contiguous. ER69. The Assistant Secretary of the Army for Installations, Energy and Environment explained that "[t]here is no legal, regulatory, or policy requirement for geographically separate sites to be assigned to a 'nearby' military installation," or even "for all the sites or lands that comprise a given military installation to be located in the same State or within a certain distance of other sites associated with the military

installation." *Id.* The record in this case includes ample evidence of a wide range of military installations that are non-contiguous and, for some, in different States.[7]

Finally, the Sierra Club plaintiffs argue that the Secretary's determination "does not make sense," because the exercise of jurisdiction over the contested areas "would result in the military's abandonment" of them. SC Br. 37. But plaintiffs cite no record evidence supporting their assertion that, once the projects are completed, no military personnel will remain. Moreover, plaintiffs' argument merely restates their disagreement with the Secretary's military judgment that these projects are necessary to support DoD personnel deployed in connection with the national emergency because they create a force-multiplier effect. As explained below, plaintiffs' military judgment cannot substitute for the Secretary's.

In any event, plaintiffs' argument fails on its own terms. No one would doubt the permissibility of constructing a fence or setting out barbed wire around the perimeter of a military installation to prevent enemy forces from entering the base,

[7] "For example, Fort Campbell is located in both Kentucky and Tennessee; the Green River Test Complex site in Utah is part of White Sands Missile Range in New Mexico; the Special Forces site in Key West, Florida, is part of Fort Bragg, North Carolina; six different Navy Outlying Landing Field sites in Alabama are part of Naval Air Station Whiting Field, Florida; a new National Geospatial Intelligence Agency West Campus being constructed in Missouri is part of Scott Air Force Base, Illinois; the Pentagon Reservation includes the Pentagon building and Mark Center in Virginia as well as the Raven Rock Complex in Maryland and Pennsylvania; and among other Army examples, Fort Carson, Fort Belvoir, Fort Bliss, Joint Base Lewis McChord, Fort Benning, Fort Greely, and Fort Detrick all include various geographically separate sites." ER69.

even though such barriers allow troops to be redeployed elsewhere. The military often constructs projects that do not require an ongoing or permanent presence of service members. As noted, for example, the military might acquire land distant from an existing base in order to construct a remote radio antenna to facilitate communication. The fact that the antenna permits unattended operation is no reason to conclude that it is somehow not "with respect to" a military installation. Thus, at bottom, plaintiffs' disagreement is not about the presence or absence of military personnel but about the type of military construction project, and nothing in the statute supports the limitations plaintiffs seek to impose.

B. The Secretary Of Defense Exercised Appropriate Military Judgment In Determining That The Military Construction Projects Are Necessary To Support The Use Of The Armed Forces.

Plaintiffs argue that the eleven border-barrier projects are not "necessary to support [the] use of the armed forces" under 10 U.S.C. § 2808(a). SC Br. 38-46; St. Br. 18-20. But that argument relies on a narrow and unsupportable reading of the statutory language, as well as a fundamental misunderstanding of the courts' ability to review the Secretary's military-necessity determinations.

1. Plaintiffs rely heavily on the district court's rationales for rejecting the Secretary's determination that the projects are "necessary" to support the use of the armed forces: that the projects are for the benefit of DHS, not the armed forces, ER29-ER32, and that they are not "necessary" because their completion would

"obviat[e] the need" (ER31) for the armed forces, ER32-ER34. Those arguments are without merit, as explained in our opening brief (at 40-43). The Secretary explained at length why these eleven military construction projects meet the statutory standard and advance the mission of the armed forces. The "projects will deter illegal entry, increase the vanishing time of those illegally crossing the border, and channel migrants to ports of entry." ER92. Military troops have been deployed to these areas to support efforts by DHS to address those specific concerns. The construction of new or upgraded barriers in those locations will allow the military to support those efforts more efficiently.

Plaintiffs have no convincing response to the Secretary's reasoning. They emphasize, for example, that the military must cooperate with DHS to perform these duties. *E.g.*, ER92 ("[T]hese barriers will allow DoD to provide support to DHS more efficiently and effectively"). But that shared mission merely reflects the nature of the national emergency, which was declared precisely because DHS could not manage the southern border alone. And nothing about that mission is untoward. Congress has repeatedly authorized DoD to provide a wide range of support to DHS at the southern border. *E.g.*, 10 U.S.C. §§ 251-252, 271-284. And, as our opening brief (at 7) explained, military personnel have long supported civilian law-enforcement agency activities to secure the border, counter the spread of illegal drugs, and respond to transnational threats. *Hearing on Department of Defense's Support to the Southern Border Before the H. Armed Servs. Comm.*, 116th Cong. 1, 59-63 (2019) (Joint Statement of John

Rood and Vice Admiral Michael Gilday). Nothing in Section 2808—and nothing in any authority cited by plaintiffs or by the district court—remotely suggests that a military construction project ceases to be militarily necessary simply because its benefits are shared.

Plaintiffs also argue that a military construction project cannot be militarily necessary if it allows military forces to be redirected elsewhere. But as the Secretary has also explained, constructing a project at one point along the border may reduce the number of troops that must be deployed there, and allow them to be redeployed elsewhere to be used more effectively and efficiently. That is precisely what the Secretary meant by a "force multiplier": the challenged projects will help secure certain locations while allowing military forces to help DHS secure others, thus maximizing the use of those forces overall.

In short, plaintiffs have failed to undermine the Secretary's conclusion—based on an extensive internal deliberative process that included, among others, the Chairman of the Joint Chiefs of Staff—that each project is "necessary to support [the] use of the armed forces," as Section 2808 requires. ER92; *see generally* ER84-ER94, ER125-ER158; ER180-ER220.

2. The Secretary's determinations concerning the optimal deployment of forces reflect quintessential military judgments beyond the competence of the courts to second-guess. Plaintiffs nevertheless ask this Court to overstep the bounds of judicial power in the sensitive area of military administration by disregarding the

deference due to the Secretary's judgments. As explained in our opening brief (at 40), a determination whether a project is necessary to support the use of the armed forces is committed by law to the Secretary of Defense, not the courts. Plaintiffs' disagreement with the Secretary's judgment concerning military necessity is thus not a proper basis for the courts to superintend military decision-making.

Plaintiffs seek to diminish the significance of the Secretary's judgment that the military construction projects at issue are necessary to support the use of the armed forces in connection with the President's declaration of national emergency. *E.g.*, SC Br. 44 ("No part of this challenge involves 'deployment of troops and overall strategies of preparedness.'") (quoting *Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986)); St. Br. 18 ("the border barrier projects are . . . intended to support a civilian agency—DHS—rather than 'the armed forces'). Those descriptions mischaracterize the record. As explained, the Secretary here exercised his judgment about quintessential military matters: how the armed forces are to be deployed, and how best to use military resources efficiently. The Sierra Club plaintiffs suggest that the Court should exercise its equitable power to permit some military functions, such as serving meals and providing legal support in connection with the emergency conditions at the border, while prohibiting other functions, such as using military-construction resources to act as a force multiplier, allowing troops to be redeployed to use their skills where they are needed most. SC Br. 44. But those decisions are at the core of military decision-making, and are beyond the competence of the courts.

As the Supreme Court has held, "it is difficult to conceive of an area of governmental activity in which the courts have less competence" than "[t]he complex, subtle, and professional decisions as to the . . . control of a military force." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (referring to "a complicated balancing of a number of factors which are peculiarly within [the Secretary's] expertise"). Article III courts should not second-guess "determinations regarding . . . military value." *District No. 1, Pac. Coast Dist. v. Maritime Admin.*, 215 F.3d 37, 42 (D.C. Cir. 2000). At a minimum, courts must give "due deference to the strategic and military determinations" of the Secretary. ER29. *See*, *e.g.*, *Sebra*, 801 F.2d at 1142 ("Courts are properly wary of intruding upon that sphere of military decision-making" regarding "deployment of troops and overall strategies of preparedness").

Remarkably, the Sierra Club plaintiffs suggest that the Secretary's judgment is not entitled to deference because the decision was effectively made by the President. SC Br. 45-46. To begin, this ignores the "presumption of regularity [that] attaches to the actions of Government agencies." *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001). More fundamentally, it ignores that, as "Commander in Chief" of the armed forces, U.S. Const. art. II, § 2, the President himself would be entitled to military deference in any event. Indeed, the Supreme Court has even given military deference to Congress, when it excluded women from registration for selective service, notwithstanding the military's *contrary view* that registration of women could actually increase military flexibility. *See Rostker v. Goldberg*, 453 U.S. 57, 63 (1981).

The Sierra Club plaintiffs (SC Br. 43) point to *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), as an example of a case where courts found challenges to military matters justiciable. But whatever its merits, *Koohi* is inapposite even on its own terms, because it was an action for damages, which the court critically relied on in concluding the case was "particularly judicially manageable." *Id.* at 1332. There at least was no prospect there of a sweeping injunction that would prospectively constrain action by the military. Indeed, the Court emphasized that "the framing of injunctive relief," the type of relief at issue here, "may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches, [and] such suits are far more likely to implicate political questions." *Id.*

Plaintiffs cannot evade the limitations on judicial intrusion into military decision-making by characterizing the issues here as merely generic national-security or foreign-policy considerations, SC Br. 43.[8] The Secretary of Defense acted in response to the President's declaration of a national emergency, which identified specific grounds for concluding that the national emergency required use of the armed forces. *See*, *e.g.*, ER118 (noting that the southern border is a "major entry point for criminals, gang members, and illicit narcotics"). And the Secretary's response was

[8] The Sierra Club plaintiffs (SC Br. 43) discuss several cases upholding the principle that courts should defer to military and national-security concerns, while recognizing that there are limits to those principles of deference. But this case is well within those limits, as we have explained.

measured and appropriate. DoD did not assert jurisdiction over the entire southern border (*contra* SC Br. 33, 34); instead, the Secretary made specific determinations that these eleven projects, located in these specific areas, are necessary to support the use of the armed forces. Courts should not indulge plaintiffs' efforts to second-guess those specific military judgments concerning the need for particular military resources in particular locations.

3. The Sierra Club plaintiffs also contend that the national emergency here is not one requiring use of the armed forces. SC Br. 46-53. That argument is nonjusticiable, and in any event misunderstands both the nature of the President's declaration of a national emergency and the requirements of Section 2808.

The district court correctly held that a challenge to the President's declaration that the national emergency "requires use of the armed forces"—just like a challenge to "whether the national emergency truly exists"—is precluded as a "nonjusticiable political question[]." ER 22. The Sierra Club plaintiffs, however, suggest that the district court's holding was a "mistaken conflation" of the two contentions. SC Br. 50. But they do not seek a judgment directly invalidating the President's determination that the national emergency requires use of the armed forces. Nor can they do so, as that determination is an integral part of the declaration that a national emergency exists, and the description of the nature of that emergency. They offer no argument, let alone any authority, for the proposition that a court can strike down the

President's determination that the national emergency here is one that requires use of the armed forces.

Instead, plaintiffs suggest that the court should construe Section 2808 to provide an independent basis to second-guess the President's determination. But such a collateral attack on the President's declaration of a national emergency, and his judgment that the nature of that emergency requires use of the armed forces, is just as inappropriate as a direct challenge to the President's decision.

Plaintiffs' argument also misunderstands the statutory requirements in Section 2808. The statute does not require the Secretary of Defense—or anyone else—to determine whether the President was factually correct in declaring that the national emergency requires use of the armed forces, or to make a second, independent determination about the need for the use of the armed forces. Instead, Section 2808 authorizes the use of military-construction funds whenever there is a declaration "by the President" of such a "national emergency . . . that requires use of the armed forces." 10 U.S.C. § 2808(a). Here, there is no dispute that the President has issued a declaration that expressly satisfies that statutory predicate. That is the end of the inquiry. Plaintiffs simply misread the statute by suggesting that any additional constraint should be read into the statute's terms, especially in light of the nonjusticiability of a direct challenge to the President's declaration.

Moreover, the Sierra Club plaintiffs mischaracterize the nature of the national emergency. They contend that the President's emergency declaration here is flawed

because they say (SC Br. 46) that the declared emergency is merely about "the immigration of family units," and that civilian agencies are responsible to address immigration matters. In particular, they focus solely on what they describe as a "problem of 'large-scale unlawful migration through the southern border.'" SC Br. 47 (quoting ER118). But the actual terms of the President's declaration refute that selective quotation. *See*, *e.g.*, ER118 ("The southern border is a major entry point for criminals, gang members, and illicit narcotics."). The premise of plaintiffs' argument is simply incorrect, and the nature of the national emergency declared by the President is well within the scope of nonjusticiable military matters. But the Court need not reach that question because Section 2808 asks only whether there has been a declaration by the President of a national emergency requiring use of the armed forces; there can be no dispute here that the President has issued such a declaration, and it is not within the power of the federal courts to invalidate that declaration.

III. Plaintiffs' Alternative Arguments Should Be Rejected.

A. The Consolidated Appropriations Act Does Not Bar The Use Of Section 2808 To Fund The Challenged Projects.

The district court declined to adopt plaintiffs' argument that the Consolidated Appropriations Act barred the use of funds under Section 2808, holding instead that the use of unobligated military-construction funds for Section 2808 construction was proper if the requirements of Section 2808 were met: "The critical inquiry . . . is whether Section 2808 authorizes this reallocation." ER16. On appeal, both the Sierra

Club plaintiffs and the State plaintiffs resurrect their argument that the Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (CAA) bars such funding. SC Br. 30-32; St. Br. 20-21, 25-28. But nothing in that statute even addresses DoD's use of military-construction funds, let alone implicitly repeals the longstanding power conferred by Section 2808 in the event of national emergency.

1. Plaintiffs first argue that the CAA's appropriation of a specific amount of funds to DHS reflects an implied prohibition on the use of funding through Section 2808. SC Br. 30-31; St. Br. 26-27. They note that the Administration requested $5.7 billion for border-barrier construction but that "Congress decided on the far lower amount of $1.375 billion." SC Br. 30; *see* St. Br. 20, 26. But plaintiffs ignore the fact that those differing amounts of appropriations proposed and enacted in the CAA were specifically addressed to a funding request for DHS, not DoD, whose own appropriations (including appropriation of military-construction funds) had been completed long before the debate over the CAA.

Nothing in the CAA's text purports to prohibit agencies other than DHS from using their own appropriations to complete border construction projects pursuant to their own statutory grants of authority. The CAA appropriated a lump sum of money to an account within DHS's budget—the "Procurement, Construction, and Improvements" account for U.S. Customs and Border Protection—and specified that "[o]f the total amount available under" that specific account, $1.375 billion "is for the construction of primary fencing, including levee pedestrian fencing, in the Rio Grande

Valley Sector." CAA § 230(a)(1), 133 Stat. at 28. The CAA nowhere says that the appropriation to DHS prohibits other agencies from relying on separate statutory authority to expend their own appropriated funds on border-barrier construction. Nor would it make any sense to read such a sweeping prohibition into legislative silence in a statutory provision directed at DHS appropriations rather than those of other agencies.

When Congress sought to place restrictions on the construction of border barriers pursuant to other appropriations, it did so explicitly. In a separate section of the CAA, Congress provided that "[n]one of the funds made available by this Act *or prior Acts* are available for the construction of pedestrian fencing" within five specified areas of the border, including "the Santa Ana Wildlife Refuge," and "the National Butterfly Center." CAA, § 231, 133 Stat. at 28 (emphasis added). The government has not constructed any border barriers in the specified areas, under any statutory authority, including Section 2808. But nothing in the mere appropriation of a specific amount of funds to a specific DHS account precludes DoD from using its funds as authorized by existing statutes.

The State plaintiffs rely on the interpretive canon that the specific controls the general. St. Br. 21, 27-28. But while "[i]t is true that specific statutory language should control more general language when there is a conflict between the two," that interpretive canon does not apply where "there is no conflict." *National Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335-36 (2002); *International Ass'n of*

Machinists & Aerospace Workers, Lodge 751 v. Boeing Co., 833 F.2d 165, 169 (9th Cir. 1987) ("the maxim of statutory construction that a more recent specific statute prevails over an earlier and more general statute . . . only applies when there is an irreconcilable conflict between the statutes"). Indeed, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). There is no conflict between the CAA and Section 2808.

Plaintiffs' citation to *United States v. MacCollom*, 426 U.S. 317 (1976) (SC Br. 31; St. Br. 27), is inapt. There, the question was whether the judiciary could provide additional funding, beyond the appropriated amount, to pay for transcripts for habeas petitioners. Both the appropriation and the additional funds came from the same entity—the judiciary. Here, there is no conflict between Congress's appropriation to DHS for border-barrier construction pursuant to DHS's statutory authority, and DoD's use of its own military-construction appropriations to complete border-barrier construction under DoD's separate statutory authorities. And DoD's role is consistent with historical practice: Since the early 1990s, military personnel have provided assistance in building and reinforcing infrastructure at the southern 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).

Similarly, the issue in *Nevada v. Department of Energy*, 400 F.3d 9 (D.C. Cir. 2005), cited at St. Br. 26, arose when a single federal agency determined which of two

appropriations to that agency, "in the very same [appropriations] bill," should be used for a particular purpose. 400 F.3d at 16. In such a circumstance, Congress presumptively intends the agency to use its specific appropriation rather than its general appropriation. *See* U.S. Gov't Accountability Off., GAO-17-797SP, *Principles of Federal Appropriations Law*, p. S-407 (4th ed. 2017 Revision) ("[I]f an agency has a specific appropriation for a particular item, and also has a general appropriation broad enough to cover the same item, it does not have an option as to which to use. It must use the specific appropriation."). No authority supports the remarkable argument here that Congress's appropriation to one agency (DHS) implicitly precludes another agency (DoD) from using its separate appropriations and statutory authorities.

2. Plaintiffs also contend that Section 739 of the CAA bars the use of Section 2808 to fund military construction projects. SC Br. 31-32; St. Br. 20-21. But they misread Section 739, which states:

> None of the funds made available in this or any other appropriations Act may be used to increase, eliminate, or reduce funding for *a program, project, or activity* as proposed in the President's budget request for a fiscal year until such proposed change is subsequently enacted in an appropriation Act, or unless such change is made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act.

CAA § 739, 133 Stat. at 197 (emphasis added). Similar boilerplate language has been included in appropriations statutes since 2014. *See, e.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 743, 128 Stat. 5, 243 (2014); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 740, 128 Stat.

2130, 2390 (2014). There is nothing in that language to suggest that the provision could be read to implicitly repeal the longstanding and specific authority provided in Section 2808 concerning military construction in the event of a national emergency.

The phrase "program, project, or activity" in an appropriations statute has an established and specific meaning that has no bearing on Section 2808's distinct authority. The GAO has defined "program, project, or activity" as an "[e]lement within a budget account." U.S. Gov't Accountability Off., GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process* 80 (2005); *see* 31 U.S.C. § 1112 (requiring GAO to publish standard budget terms).[9]

An agency's budget is divided into several different appropriations accounts—for example, DHS's budget includes its "U.S. Customs and Border Protection--Procurement, Construction, and Improvements" account—under which an agency may fund numerous programs, projects, and activities that fit within that account. The CAA, like appropriations statutes generally, uses the phrase "programs, projects, and activities" in this specific manner: to refer to elements within an agency's budget accounts. *See, e.g.*, CAA § 101, 133 Stat. at 16 (directing DHS Chief Financial Officer to submit to the appropriations committees reports "that include[] total obligations of the Department for that month . . . at the appropriation and program, project, and

[9] The assertion by amici El Paso County, *et al.*, that "project" must be given what amici consider its "ordinary meaning," Amicus Br. 11, 15, ignores this specialized meaning in the appropriations context.

activity levels"); *see also* H.R. Rep. No. 116-9, at 503 (2019) ("remind[ing]" DHS, in the Conference Report accompanying the CAA, that DHS should "follow GAO's definition of 'program, project, or activity' as detailed in the GAO's A Glossary of Terms Used in the Federal Budget Process"). None of the Section 2808 construction projects increases funding for an element within any budget account of DoD, DHS, or any other agency. DoD has simply re-prioritized funds for some military construction projects using appropriated funds and independent statutory authority.

Plaintiffs argue that, because the challenged military construction projects are intended to help secure the Nation's southern border, the projects are improperly increasing funding to DHS. SC Br. 31-32; St. Br. 20-21. But the fact that a particular military construction project—constructed using previously appropriated military-construction funds—may serve purposes similar to those served by a different agency's "program, project, or activity" does not mean that DoD has increased the funds available for that other agency's "program, project, or activity," as that term of art is narrowly understood. Plaintiffs also contend that Section 2808 cannot satisfy the requirements of section 739 because Section 2808 is not an appropriations act. SC Br. 32; St. Br. 20-21. But that argument further underscores why Section 739 is inapplicable: Because Section 2808 is not an appropriations act, it is not affected by Section 739 to begin with. Section 2808 is a wholly independent source of authority for DoD to act.

B. Plaintiffs' Constitutional Arguments Are Without Merit.

Plaintiffs separately argue that, if Section 2808 authorizes DoD to reprioritize military-construction funds, Section 2808 is unconstitutional in several respects. SC Br. 53-57; St. Br. 21-28. As a threshold matter, plaintiffs cannot satisfy the zone-of-interests requirement for these constitutional claims. Just as their alleged aesthetic, recreational, and environmental injuries are entirely unrelated to Section 2808's requirements for military construction projects, those injuries are entirely unrelated to the asserted constitutional limitations on Congress's power to authorize DoD to use funds appropriated for military construction more flexibly in the event of a national emergency requiring use of the armed forces. In any event, plaintiffs' constitutional claims are meritless.

Plaintiffs principally assert that Section 2808 violates the Presentment Clause because it would allow the President to "effectively modify" (St. Br. 23), or "ignore the limits Congress placed" (SC Br. 29), in the CAA. But Section 2808 does not empower any executive official to amend or repeal any law, actually or effectively. Rather, the CAA was enacted against the backdrop of the previously enacted Section 2808, which the CAA left in place. DoD's ability to re-prioritize appropriated funds for military construction projects in no way amends or repeals DHS's limited appropriation for border-barrier construction.

This case is thus not comparable to *Clinton v. City of New York*, 524 U.S. 417 (1998), where the Supreme Court held that the Presentment Clause was violated

because the Line Item Veto Act purported to authorize the President to "cancel in whole" portions of enacted statutes and thereby deprive them of "legal force or effect." *Id.* at 435-37. Although *City of New York* expressed concern that the President was "rejecting the policy judgment made by Congress," *id.* at 444, that concern was necessarily limited to the context of a line-item veto in which the President unilaterally and expressly amended Acts of Congress. The Presentment Clause does not foreclose the Executive Branch from exercising independent authority to reprioritize certain types of federal spending pursuant to an express congressional grant of authority to do so. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018) (holding that the President has sweeping statutory authority to impose additional restrictions on the entry of aliens beyond those that Congress has seen fit to include).

Plaintiffs also argue that Section 2808 violates the Appropriations Clause (St. Br. 25-27). But that clause requires only that money drawn from the Treasury be "in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. A federal statute authorizing an expenditure "made by Law" cannot—by definition—violate the Appropriations Clause. It is well established that Congress could have made the entire DoD budget a single lump-sum appropriation to be spent in the agency's unfettered discretion. *See Lincoln v. Vigil*, 508 U.S. 182 (1993). Thus, Congress does not violate the Appropriations Clause by providing DoD more limited authority, under Section 2808, to use funds appropriated by law in service of a

congressionally authorized purpose. The State plaintiffs' contention (St. Br. 22) that Section 2808 would violate the separation of powers fails for the same reasons.

IV. The District Court Abused Its Discretion By Entering An Injunction For The Sierra Club Plaintiffs.

As our opening brief showed (at 43-47), the district court abused its discretion in granting a permanent injunction prohibiting military construction. The Sierra Club plaintiffs do not dispute that the government's interest and the public interest in protecting the integrity of the nation's border and in supporting the armed forces is compelling. And they cannot reasonably disagree that those interests are directly served by reducing international criminal activity in areas of known vulnerability between border crossings, and that enjoining construction activity therefore threatens public safety. Plaintiffs' asserted harms, by contrast, are less substantial.

The Supreme Court necessarily concluded as much when it stayed the district court's earlier injunction against border-barrier construction under Section 284. *Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019). That ruling was fundamentally premised on the Court's determination that the balance of harms and the public interest favored the stay pending appeal. *See Nken v. Holder*, 556 U.S. 418, 435-36 (2009). The Sierra Club plaintiffs object that the Supreme Court stay involved "very different argument[s] on the equities" because, in that case, funding for the Section 284 projects would have been lost without the stay. SC Br. at 58. But the Court did not limit its stay to address only that narrow concern. Justice Breyer's dissenting opinion

pointed out that the Court could have alleviated the harms from the imminent funding lapse by issuing a partial stay that would have allowed the government to finalize contracts, but proceed no further. *Trump v. Sierra Club*, 140 S. Ct. at 2. The majority did not take that course, but stayed the injunction in its entirety. And the same equities that the Court found persuasive in allowing border-barrier construction to proceed during the Section 284 litigation demonstrate why an injunction is inappropriate here.

Plaintiffs likewise have failed to distinguish *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 23-31 (2008), where the Supreme Court rejected an injunction predicated on a similarly lopsided equitable balance. Plaintiffs contend that the government in *Winter* submitted "specific" declarations from senior officials, SC Br. 60, while they say this record lacks comparable evidence of harm. But the administrative record is replete with evidence of specific harms at the high-priority sites where the eleven Section 2808 projects will strengthen border protections. *E.g.*, ER78-ER79, ER 126-ER130 ER151-ER153.[10] Plaintiffs also note that the training exercises at issue in *Winter* had continued for 40 years without environmental harm. SC Br. 60. But that was not the reason the Supreme Court vacated the injunction in

[10] Plaintiffs also take out of context DoD's determination that the risk to public safety at the border is not a "military threat," SC Br. at 60. That assessment is irrelevant: The question is not whether military construction is needed to address a military threat, but whether the military construction projects are deemed necessary to "support [the] use of the armed forces," and the Secretary has determined that they are. *See* ER 92.

that case. The Court instead vacated the injunction because the court of appeals had given insufficient weight to the government's interests. As the Court emphasized, a "proper consideration of" the "public interest" and "the Navy's interest in effective, realistic training" would "alone" have required denial of the injunction. *Winter*, 555 U.S. at 23.

Plaintiffs also try to distinguish *Winter* because the challengers there sought "compliance with" a statute's "procedural requirement," SC Br. at 60, and did not demand that the Navy "cease sonar training" altogether, St. Br. 66. But the nature of the *Winter* plaintiffs' claims was not decisive in the Supreme Court's balancing analysis. To the contrary, the Court faulted the court of appeals for "significantly understat[ing] the burden the preliminary injunction would impose" on Navy training. 555 U.S. at 24. That interference with military operations, and the injunction's "consequent adverse impact on the public interest," *id.*, were critical to the Court's holding that the court of appeals erred in issuing the injunction. Here too, the Sierra Club plaintiffs seek to halt critical military operations to further markedly less substantial recreational, aesthetic, and organizational interests. So here too, injunctive relief is contrary to the balance of equities and the public interest.

In any event, the district court abused its discretion by refusing altogether to engage in the required balancing. ER 44 ("Congress has already engaged in the difficult balancing of Defendants' proffered interests and the need for border barrier construction in passing the CAA."). Plaintiffs (SC Br. 59, St. Br. at 65) incorrectly

defend that conclusion. But nothing in the CAA addresses any of the relevant harms, let alone engages in the judicial balancing required to support a permanent injunction. And the statute cannot be construed to have contemplated the aesthetic, recreational, and environmental interests of the Sierra Club plaintiffs. Congress did not weigh in at all on the appropriate balancing of interests.[11]

Moreover, plaintiffs' argument improperly assumes that this Court will interpret the CAA as plaintiffs urge. But a party cannot show that the equities weigh in its favor by assuming that it will prevail on the merits. *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (rejecting equitable balancing arguments "premised on" a litigant's "view of the merits"); *cf.* St. Br. 65 (assuming conclusion of its own argument that the injunction would "prohibi[t] an unlawful act."). Rather, 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." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

Had the district court balanced the equities properly, the court could only have concluded that granting an injunction would harm the government far more than denying an injunction would harm plaintiffs. By its terms, the requested injunction prohibits the government from taking immediate action to support approximately

[11] Indeed, Congress's actions actually undermine the district court's injunction. Congress could have prohibited DoD from spending appropriated funds on border-barrier construction, or from invoking its authority under Section 2808, by enacting legislation to that effect. But Congress has not done so.

5,000 troops deployed to the border, and to protect public safety by acting against transnational criminal conduct in high-priority border areas where such conduct is prevalent. ER151-ER153. The Sierra Club plaintiffs, by contrast, have alleged only the very same recreational, aesthetic, and environmental interests that the Supreme Court found inadequate to support an injunction in connection with construction funded under Section 284.

V. The District Court Properly Denied Injunctive Relief To The State Plaintiffs.

The State plaintiffs in their cross-appeal fail to demonstrate that the district court abused its discretion in denying their request for an injunction.

A. As an initial matter, if this Court agrees with the government that the Sierra Club plaintiffs' injunction should be vacated, then the State plaintiffs are not entitled to an injunction either. As explained, the State plaintiffs—like the Sierra Club plaintiffs—cannot satisfy the zone-of-interests requirement, and have failed to demonstrate that the challenged military construction projects are unlawful.

Conversely, if this Court were to uphold the injunction granted to the Sierra Club plaintiffs, then the district court did not abuse its discretion in denying the State plaintiffs a duplicative injunction. "An injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). The State plaintiffs can make no showing of irreparable harm if an injunction entered for the Sierra Club plaintiffs already prevents

DoD from using Section 2808 to construct the challenged projects. District courts in comparable circumstances have exercised their discretion to stay motions for preliminary injunctive relief because other courts had already enjoined the conduct, removing any imminent threat of irreparable injury. *See*, *e.g.*, *Al-Mowafak v. Trump*, No.17-cv-00557-WHO (N.D. Cal. Jan. 8, 2018); *Washington v. Trump*, No. C17-0141JLR, 2017 WL 1050354, at *4 (W.D. Wash. Mar. 17, 2017).

B. In any event, the State plaintiffs' asserted harms are insufficient to support an injunction. They first contend that DoD's expenditure of funds under Section 2808 harms their sovereign interests because some States cannot enforce their environmental and public health laws against the federal government with respect to barrier construction. But the balance of harms here includes sovereign interests on both sides of the scale—and here, the supremacy of federal law further undermines the State plaintiffs' suggestion that their interest in enforcing state law outweighs the federal government's sovereign interests in securing the border and controlling the allocation of military resources.

The authorities cited by the State plaintiffs (St. Br. at 57) are inapposite because none involved a federal statute that expressly displaced state laws. In *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers), and *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers), States sought Supreme Court stays of judicial orders invalidating state law. And in *State of Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989), the court of

appeals held only that a State whose law had been preempted had standing to sue. The court did not hold that the State had suffered irreparable harm warranting injunctive relief.

The State plaintiffs are similarly incorrect to argue (St. Br. 67-68) that the Secretary of Defense's re-prioritization of military-construction funds will harm their financial interests. Section 2808 expressly authorizes the Secretary to do precisely what he did here: use unobligated military-construction funds for specific projects identified by the military leadership when a national emergency requires use of the armed forces.[12] And regardless, because Section 2808 only allows the expenditure of *unobligated* funds, there was no guarantee, and a State thus could have no expectation even apart from the national emergency, that any particular deferred military construction project would be completed by any specific time.[13]

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[12] The State plaintiffs also assert (St. Br. 67) that members of the military will be harmed by the Secretary's decision to defer other construction projects. But the Secretary of Defense has determined that support for the armed forces deployed to the border must take priority over those projects, and the Secretary, not individual States, is charged with the responsibility of superintending the needs of the military. *Cf. Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982) ("A State does not have standing as *parens patriae* to bring an action against the Federal Government."). States equally cannot assert harm to members of the military from military decisions made by the Secretary of Defense, and in any event, it would not be in the public interest for a court to second-guess that military judgment.

[13] Moreover, the State plaintiffs lack a cognizable interest in an uncertain loss of general tax revenues. *See infra* p. 53-54. They thus cannot rely on asserted harms to their financial interests.

C. Two State plaintiffs, California and New Mexico argue, in the alternative (St. Br. 53-61), that they will suffer environmental harms to air, water, and wildlife within their jurisdictions. The district court, in the earlier litigation over border-barrier construction under Sections 284 and 8005, correctly concluded that similar environmental injuries asserted by the State plaintiffs were inadequate to support a finding of irreparable harm warranting injunctive relief. *California v. Trump*, No. 19-cv-00872-HSG, 2019 WL 2715421, at *4 (N.D. Cal. June 28, 2019). The State plaintiffs' claims in this case are similarly flawed.

The State plaintiffs disregard the federal government's commitment to using Best Management Practices (BMPs), to protect air and water quality and to minimize the effects of construction on biological and cultural resources. FER6.[14] Those BMPs encompass measures such as dust-suppression and water-protection protocols, "identifying sensitive areas to be avoided" and "minimizing impacts to sensitive species." FER7, FER9-FER 10. The BMPs require surveys and flagging to protect the burrowing owl, *see* FER11-FER12, and protection, mitigation and compensation measures for the Flat-Tailed Horned Lizard, Sonoran desert tortoise, and other species. FER8, FER12. The State plaintiffs simply ignore the effects of these significant protective measures to minimize risks to air and water, and to reduce the possibility of injury to protected species.

[14] References to FER are to the government's Further Excerpts of Record.

The State plaintiffs allege no specific harms to air or water. And they do not dispute that their burden is to show likely harms to wildlife that would threaten "rare and special-status species" as a whole, St. Br. 58, rather than individual members of those species. A State's interest, after all, is in managing populations of wildlife, not individual specimens. The State plaintiffs must show a "definitive threat" of future harm "to protected species, not mere speculation." *National Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23 F.3d 1508, 1512 n.8 (9th Cir. 1994). Their evidence here falls far short.

At the outset, the State plaintiffs overlook the limited footprint of actual construction activity in each project area, which involves a construction area of only 60 or 150 feet along the border, depending on the fencing being installed. FER1. For the most part, existing roads can be used for construction traffic, minimizing any disturbance to wildlife. *See* FER2-FER6. The State plaintiffs fail to show any likelihood that construction will damage sensitive species. They have produced no evidence that the species they identify are likely to be present in the project areas at all during construction. A site inspection, for example, found no specimens of the Quino Checkerspot Butterfly within the area of San Diego Project 4. *See* SER1030; *cf.* St. Br. 58. And while the States assert a threat to "diapausing larvae" that might have burrowed into the ground during "dry conditions," St. Br. 59, the presence of such larvae anywhere near a construction zone is mere speculation.

The State plaintiffs' allegations concerning the Coastal California Gnatcatcher and the Western Burrowing Owl (St. Br. 59-60) are equally speculative. The record includes no evidence of gnatcatchers or burrowing owls within any project area. *Cf.* SER1031 (gnatcatcher "detected" two miles north of a project area); SER1033 (owl burrows found two years ago outside the same project area).[15] Nor is there evidence of vernal ponds in any area likely to be disturbed during construction. *Cf.* SER1035-SER1036 (describing ponds on private land, outside the project area, and not in the vicinity of any proposed construction). With no evidence of the presence of individual members of sensitive species, or the pools that contain them, within the project areas, the State plaintiffs cannot show likely harm to those species as a whole.

The evidence of harm to the white-sided jackrabbit and the jaguar in New Mexico (St. Br. 61-62) is also insufficient to support an injunction. The jackrabbit is not listed as threatened or endangered, no designated "critical habitat" is affected by the projects, and areas of connectivity to populations in Mexico will remain within the Animas Valley. FER13; *see also* FER12-FER13 (defining "critical habitat"). Similarly, the project areas are only "adjacent to" (St. Br. 62) habitat designated as critical for the jaguar. Only seven jaguars have been detected in the United States since 1982, making it extremely unlikely in any event that construction would harm this species. FER13.

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[15] References to SER are to the Supplemental Excerpts of Record filed by the State plaintiffs.

The district court previously rejected a similar effort by the State plaintiffs to rely on asserted environmental harms, *California v. Trump*, 2019 WL 2715421, at *4, and the court did not reach a different conclusion here. It would be especially inappropriate for this Court to hold that the State plaintiffs are entitled to an injunction on this theory, in the absence of any determination by the district court that the asserted environmental harms are substantial enough to support an injunction.

D. Finally, the State plaintiffs mistakenly assert (St. Br. 62-64) that they are irreparably harmed by the asserted indirect economic effects of the Secretary's decision to defer certain military construction projects within their borders to allow the border-barrier projects to proceed. Allegations of "loss of economic activity" and a resulting "effect on the tax revenues of state and local governments," St. Br. 63, are not enough to support Article III standing, let alone demonstrate the irreparable harm required for an injunction.

The Supreme Court has recognized a clear distinction between "a direct injury in the form of a loss of specific tax revenues," which could support standing, in contrast to the many decisions rejecting standing based on "actions taken by United States Government agencies [that] had injured a State's economy and thereby caused a decline in general tax revenues." *Wyoming v. Oklahoma*, 502 U.S. 437, 448 (1992). "[V]irtually all federal policies" have "unavoidable economic repercussions" on state tax revenues, *Pennsylvania v. Kleppe*, 533 F.2d 668, 672 (D.C. Cir. 1976), and a State

asserting only this type of generalized injury does not even have Article III standing to challenge the federal policy. *See id.*; *Arias v. DynCorp*, 752 F.3d 1011, 1015 (D.C. Cir. 2014) ("Lost tax revenue is generally not cognizable as an injury-in-fact for purposes of standing."); *Iowa v. Block*, 771 F.2d 347, 354 (8th Cir. 1985) (State lacked standing where allegations of lost revenue were "insufficiently proximate to" federal policy, "and the remedy to be offered by this action" would provide "an insufficient guarantee of solvency" for the State). *A fortiori*, that type of injury is insufficient to establish the more demanding requirement of irreparable harm required to support an injunction.

The State plaintiffs cite two cases to support their assertion of irreparable harm based on a loss of general tax revenue, but neither does so. *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1130 (11th Cir. 2005), a water-rights case, held that States had standing to challenge, in a literal sense, the "downstream" effects, St. Br. 64, of federal water policies. But the court of appeals then rejected the States' allegations of irreparable harm. *Alabama*, 424 F.3d at 1133-34. And the States in *California v. Azar*, 911 F.3d 558 (9th Cir. 2018), did not allege general loss of tax revenue, but specific increased costs to particular state programs. *See id.* at 573-74. The State plaintiffs here point to no such specific loss.

CONCLUSION

For these reasons, and for the reasons set forth in the government's opening brief, the relief in favor of plaintiffs should be reversed, and the denial of injunctive relief for the State plaintiffs should be affirmed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Circuit Rule 28.1-1(b) because it contains 13,981 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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