No. 19A-_____

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
APPLICANTS

v.

SIERRA CLUB, ET AL.

APPLICATION FOR A STAY PENDING APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND PENDING FURTHER PROCEEDINGS IN THIS COURT AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

PARTIES TO THE PROCEEDING

The applicants (defendants-appellants below) are Donald J. Trump, in his official capacity as President of the United States; Mark T. Esper, in his official capacity as Acting Secretary of Defense; Kevin K. McAleenan, in his official capacity as Acting Secretary of Homeland Security; and Steven T. Mnuchin, in his official capacity as Secretary of the Treasury.*

The respondents (plaintiffs-appellees below) are the Sierra Club and the Southern Border Communities Coalition.

RELATED PROCEEDINGS

United States Court of Appeals (9th Cir.):

Sierra Club v. Trump, Nos. 19-16102 and 19-16300 (July 3, 2019)

United States District Court (N.D. Cal.):

Sierra Club v. Trump, No. 19-cv-892 (June 28, 2019)

* The complaint named as official-capacity defendants then-Acting Secretary of Defense Patrick M. Shanahan and then-Secretary of Homeland Security Kirstjen M. Nielsen. Acting Secretary Esper and Acting Secretary McAleenan were substituted as defendants in the district court pursuant to Federal Rule of Civil Procedure 25(d). See App., infra, 18a, 106a nn.1-2.

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_____

Pursuant to Rule 23 of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of applicants President Donald J. Trump et al., respectfully applies for a stay of the injunction issued by the United States District Court for the Northern District of California, pending the consideration and disposition of the government's appeal from that injunction to the United States Court of Appeals for the Ninth Circuit and, if necessary, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. In addition, the Solicitor General respectfully requests an immediate administrative stay of the injunction pending the Court's consideration of this application.

The district court enjoined the Department of Defense (DoD) from undertaking any border-wall construction using approximately $2.5 billion that the Acting Secretary of Defense transferred, pursuant to express statutory authority, from other appropriation accounts into the appropriation account that DoD uses to fund its counternarcotic efforts, and a divided panel of the court of appeals declined to stay the injunction pending appeal. The sole basis for the injunction -- that the Acting Secretary exceeded his statutory authority in transferring the funds -- rests on a misreading of the statutory text. Moreover, the injunction was entered at the behest of private parties whose asserted recreational and aesthetic interests in the enjoyment of public lands do not fall within the zone of interests protected by the transfer statute, and who are thus not, in any event, proper plaintiffs to sue to enforce the conditions in that statute. Accordingly, this Court should stay the injunction.

The Acting Secretary transferred the funds at issue in response to a request from the Department of Homeland Security (DHS) for assistance in combatting the enormous flow of illegal narcotics across the southern border. The transferred funds will be used to construct more than a hundred miles of fencing in areas of the border. Under 10 U.S.C. 284, DoD may provide support to other federal agencies for "counterdrug activities" upon request.[1]

[1] All citations to Section 284 in this application refer to the version codified as 10 U.S.C. 284 (Supp. V 2017).

In particular, the statute specifies that DoD may provide support for the "[c]onstruction of roads and fences * * * to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. 284(b)(7). The specific projects at issue here would be undertaken in areas of the border that DHS has identified as high priorities for drug-interdiction efforts, and in which DHS has seized thousands of pounds of illegal drugs in recent years. No court has found that the proposed projects are in any respect inconsistent with Section 284.

As noted, the injunction instead rests entirely on the premises that (1) the Acting Secretary exceeded his statutory authority in internally transferring funds to provide the support that DHS had requested, and (2) respondents -- private parties who assert that the proposed construction will impair their aesthetic and recreational enjoyment of public lands -- are proper parties to enforce the conditions on the Secretary's transfer authority. Both premises are demonstrably incorrect.

The relevant statute authorizes the Secretary to transfer certain funds, but only to address "unforeseen" requirements, and only for items of expenditure not previously "denied by the Congress." App., infra, 14a (citation omitted). The courts below concluded that Congress had "denied" this "item" in the relevant sense (and that the requirement at issue was not "unforeseen") based on Congress's decision to appropriate only $1.375 billion to

DHS in 2019 for pedestrian fencing in a different sector of the border, after protracted public negotiations. But the statutory text, context, and history make clear that the "unforeseen" and "denied by the Congress" provisos refer to specific budget items DoD proposes during the appropriations process. Those terms do not refer to a "border wall" writ large.

In any event, respondents are not proper plaintiffs to challenge the Acting Secretary's exercise of his statutory authority to transfer appropriated funds. Respondents' asserted recreational and aesthetic interests -- in drug-smuggling corridors that already contain dilapidated vehicle and pedestrian barriers -- are entirely unrelated to the interests protected by the transfer statute, which governs DoD's internal reallocation of appropriated funds and says nothing at all about recreational or aesthetic enjoyment of public lands. To avoid that conclusion, the panel majority in the court of appeals devoted the bulk of its opinion to attempting to recast respondents' claims -- which allege in substance that the Acting Secretary exceeded his statutory authority to transfer funds -- as constitutional claims, for which (the majority reasoned) respondents need only fall within the zone of interests protected by the Appropriations Clause, U.S. Const., Art. I, § 9, Cl. 7, rather than the statute. That reasoning is flatly inconsistent with this Court's decision in Dalton v. Specter, 511 U.S. 462 (1994). The majority's approach also

threatens to "turn[] every question of whether an executive officer exceeded a statutory grant of power into a constitutional issue." App., infra, 76a (N.R. Smith, J., dissenting).

At a minimum, the lopsided balance of the equities favors staying the injunction pending appeal. Respondents' interests in hiking, birdwatching, and fishing in designated drug-smuggling corridors do not outweigh the harm to the public from halting the government's efforts to construct barriers to stanch the flow of illegal narcotics across the southern border.

According to DoD, under current law the funds at issue "will no longer remain available for obligation after the fiscal year ends on September 30, 2019." D. Ct. Doc. 146-2, ¶ 7 (May 29, 2019) (First McFadden Decl.). DoD has further stated that the ordinary "contracting process necessary to completely obligate the full value of the contracts" for these projects "is complex." Id. ¶ 8; see id. ¶¶ 8-9 (describing the contracting process). DoD has thus stated that if it does not have "sufficient time available prior to September 30" to fully obligate the funds, "the remaining unobligated funds will become unavailable," and DoD "will be unable to complete the projects as planned." Id. ¶ 10; see p. 36 n.5, infra (noting that DoD may have authority to waive otherwise applicable requirements). Therefore, DoD respectfully requests a decision on this application by July 26, 2019, to maximize the time DoD has to finalize contracts before September 30, 2019.

STATEMENT

1. This case arises from actions taken by DHS and DoD in the wake of the President's declaration of a national emergency on the southern border under the National Emergencies Act, 50 U.S.C. 1601 et seq. See 84 Fed. Reg. 4949 (Feb. 20, 2019). In his proclamation determining that "[t]he current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests" of the United States, the President explained that the border is "a major entry point" for "illicit narcotics." Ibid.; see also Memorandum on Securing the Southern Border of the United States, 2018 Daily Comp. Pres. Doc. 2 (Apr. 4, 2018) (directing DoD to "support [DHS] in securing the southern border and taking other necessary actions to stop the flow of deadly drugs"). Hundreds of thousands of pounds of illegal narcotics are smuggled into the United States from Mexico each year -- primarily by transnational criminal organizations, such as Mexican cartels. See, e.g., Office of Nat'l Drug Control Policy, National Southwest Border Counternarcotics Strategy 2-6 (May 2016), https://go.usa.gov/xyBZp.

On February 25, 2019, DHS submitted a request to DoD for DoD's assistance, pursuant to 10 U.S.C. 284, "with the construction of fences[,] roads, and lighting" within 11 specified project areas, "to block drug-smuggling corridors across the international

boundary between the United States and Mexico." D. Ct. Doc. 64-8, Ex. A, at 2 (Apr. 25, 2019) (DHS Request); see id. at 3-9.

Under Section 284(a), the "Secretary of Defense may provide support for the counterdrug activities * * * of any other department or agency of the Federal Government," if "such support is requested * * * by the official who has responsibility for the counterdrug activities." 10 U.S.C. 284(a)(1)(A). Section 284(b) identifies the support DoD may provide. As relevant here, DoD may assist in the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. 284(b)(7). For decades, DoD personnel have helped to build and reinforce border barriers on the southern border pursuant to this authority and its predecessors. See, e.g., H.R. Rep. No. 200, 103d Cong., 1st Sess. 330-331 (1993).

On March 25, 2019, the Acting Secretary of Defense approved DHS's request with respect to three projects, including two at issue here: "Yuma Sector Project 1" in Arizona and "El Paso Sector Project 1" in New Mexico. App., infra, 13a; see D. Ct. Doc. 64-8, Ex. B, at 1 (DoD Approval). DHS had identified those projects as among its highest priorities, based on the volume of drug smuggling that occurs between ports of entry in those parts of the border. See DHS Request 4-5, 8-9. In the Yuma Sector, for example, DHS seized over 8000 pounds of marijuana, 1700 pounds of

methamphetamine, 102 pounds of heroin, and 78 pounds of cocaine in enforcement actions in fiscal year (FY) 2018. Id. at 4; cf. D. Ct. Doc. 146-1, ¶ 5 (May 29, 2019) (LeMaster Decl.) (comparable numbers for FY 2019 to date). The El Paso Sector is likewise plagued by high rates of drug trafficking, and Mexican cartels operate in both areas. See DHS Request 8 (more than 300 pounds of cocaine and 200 pounds of methamphetamine seized in FY 2018); cf. LeMaster Decl. ¶ 4 (more than 200 pounds of methamphetamine seized in FY 2019). The Acting Secretary ultimately approved up to $1 billion of DoD assistance, including assistance to replace ineffective existing barriers in the Yuma and El Paso Sectors with 30-foot-high fencing, as DHS had requested. App., infra, 13a; see D. Ct. Doc. 64-8, Exs. E-F (revised barrier specifications).

To ensure adequate funds to complete the projects, the Acting Secretary of Defense invoked his authority under Section 8005 of the Department of Defense Appropriations Act, 2019 (DoD Appropriations Act), Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999, to transfer funds internally between DoD appropriations. App., infra, 13a-14a; see D. Ct. Doc. 64-8, Ex. C, at 1-2 (DoD Transfer Mem.). Section 8005 provides that, "[u]pon determination by the Secretary of Defense that such action is necessary in the national interest," the Secretary may "transfer not to exceed $4,000,000,000 of * * * funds made available in this Act to [DoD] for military functions (except military

construction) between such appropriations or funds or any subdivision thereof, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred." DoD Appropriations Act § 8005, 132 Stat. 2999. Here, the Acting Secretary initially transferred $1 billion in excess funds from Army personnel appropriations accounts into the appropriation for DoD's drug-interdiction and counterdrug support activities, including DoD's provision of support to other federal agencies under 10 U.S.C. 284. See DoD Transfer Mem. 1; D. Ct. Doc. 64-8, ¶ 5 (Rapuano Decl.).

Section 8005 contains a proviso stating that funds may not be transferred under that provision "unless for higher priority items, based on unforeseen military requirements," and "in no case where the item for which funds are requested has been denied by the Congress." DoD Appropriations Act § 8005, 132 Stat. 2999. The Acting Secretary of Defense determined that those limitations were satisfied here, explaining that DoD's need to provide this counterdrug assistance to DHS pursuant to DHS's February 2019 request was "unforeseen" at the time of DoD's earlier budget request and that Congress had never denied any request for funding for DoD to provide this assistance. DoD Transfer Mem. 1-2.

On May 9, 2019, the Acting Secretary of Defense approved DHS's request for support under Section 284 with respect to four additional projects: "El Centro Project 1" in California and

"Tucson Sector Project[s]" 1, 2, and 3 in Arizona. D. Ct. Doc. 118-1, Ex. A, at 1 (May 13, 2019). As with the prior projects, DHS had identified those areas as significant drug-smuggling corridors, and the Acting Secretary authorized DoD to provide up to $1.5 billion in support to DHS for 30-foot-high fencing as well as roads and lighting. Ibid.; see DHS Request 3, 5-7. To fund this support, the Acting Secretary transferred an additional $1.5 billion from various excess appropriations, invoking both Section 8005 and Section 9002 of the DoD Appropriations Act. App., infra, 17a. Section 9002 permits the Secretary to "transfer up to $2,000,000,000 between the appropriations or funds made available" in Title IX of the DoD Appropriations Act. DoD Appropriations Act § 9002, 132 Stat. 3042. That authority is "in addition to any other transfer authority" but is "subject to the same terms and conditions as the authority provided in [S]ection 8005." Ibid.

2. Respondents -- the Sierra Club, a national environmental group, and the Southern Border Communities Coalition, an advocacy organization focused on border issues -- brought this action in the Northern District of California on February 19, 2019, seeking declaratory and injunctive relief from actions the United States has taken to construct physical barriers along the southern border, including the actions described above. Am. Compl. ¶¶ 11, 16, 104-108, 185-189; see App., infra, 18a. On April 4, 2019, respondents moved for a preliminary injunction, alleging that the intended

construction would impair their members' "use and enjoyment of the areas" where the projects would occur. D. Ct. Doc. 29, at 5.

3. The district court issued a preliminary injunction on May 24, 2019 (App., infra, 120a-175a), and a permanent injunction on June 28, 2019 (id. at 106a-116a). The sole basis for both injunctions was the court's conclusion that Section 8005 did not authorize the internal transfers made by the Acting Secretary of Defense to fund the disputed projects.

a. In issuing its first injunction, the district court determined that it "ha[d] authority to review each of [respondents'] challenges" pursuant to the court's equitable power to enjoin public officials from violating federal law, rather than under a specific grant of statutory authority, such as the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq. App., infra, 147a (citing Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015)). The court concluded, on that basis, that respondents need not demonstrate that their claims "fall within the 'zone of interests'" protected by Section 8005, because the court viewed that threshold requirement as applicable only "to statutorily-created causes of action." Id. at 148a.

The district court also found that respondents were likely to show that Section 8005 did not permit DoD to transfer the funds at issue. The court reasoned that Congress had "denied" funds for the projects within the meaning of Section 8005's proviso, see

p. 9, supra, when Congress appropriated only $1.375 billion to DHS in February 2019 for the construction of fencing in the Rio Grande Valley. App., infra, 152a-153a; see Department of Homeland Security Appropriations Act, 2019, Pub. L. No. 116-6, Div. A, Tit. II, § 230, 133 Stat. 28. The court also reasoned that DoD's need to provide assistance to DHS was not "'unforeseen'" (as required for a Section 8005 transfer) because, even though DHS had not requested DoD's support under Section 284 until February 2019, the "government as a whole" had made other funding requests for border-wall construction since early 2018. App., infra, 155a.

Finally, the district court concluded that respondents had demonstrated irreparable injury "to their members' aesthetic and recreational interests" in the areas where construction would occur. App., infra, 168a. The court viewed those putative harms as outweighing the government's interests, which the court characterized as "border security and immigration-law enforcement," id. at 173a, rather than drug interdiction.

The district court enjoined DoD, DHS, and the Department of the Treasury from "taking any action to construct a border barrier * * * using funds reprogrammed by DoD under Section 8005," App., infra, 174a, in the two project areas -- Yuma Sector Project 1 and El Paso Sector Project 1 -- first approved by the Acting Secretary. The court later denied the government's request to stay the preliminary injunction pending appeal. Id. at 118a-119a.

b. On June 28, 2019, the district court issued a permanent injunction covering the same projects as the first injunction, along with the later-approved projects in the El Centro and Tucson Sectors. App., infra, 115a. The court "incorporate[d]" its prior reasoning on the zone of interests and Section 8005, and it did not identify any new basis for the injunction. Id. at 109a.[2] The court also concluded that permanent injunctive relief was warranted. Id. at 111a-113a. As before, the court declined to stay the injunction pending appeal. Id. at 107a.

4. On May 29, 2019, applicants noticed an appeal from the preliminary injunction. D. Ct. Doc. 145. On June 3, 2019, applicants filed an emergency motion in the Ninth Circuit for a stay of the injunction pending appeal. App., infra, 22a.

Although applicants did not request an administrative stay, they requested that the court of appeals issue a decision on the stay request by June 17, 2019. Gov't C.A. Emergency Stay Mot., Circuit Rule 27-3 Certificate 3. DoD had explained that the funds at issue "will no longer remain available for obligation after the fiscal year ends on September 30, 2019." First McFadden Decl. ¶ 7; see DoD Appropriations Act § 8003, 132 Stat. 2998 ("No part of any appropriation contained in this Act shall remain available

[2] The Acting Secretary had invoked Section 8005 and Section 9002 of the DoD Appropriations Act to transfer funds for the El Centro and Tucson projects. App., infra, 108a-109a. As the district court explained, however, Section 9002 "is subject to Section 8005's substantive requirements," and the court treated the two as interchangeable for these purposes. Id. at 109a.

for obligation beyond the current fiscal year, unless expressly so provided."). DoD had also explained that the "complex" contracting process for these projects requires sufficient time to complete before funds may be fully obligated. First McFadden Decl. ¶ 8.

After briefing and oral argument in the court of appeals, the district court issued its permanent injunction. Applicants immediately noticed an appeal, moved to consolidate the new permanent-injunction appeal with the pending preliminary-injunction appeal, and requested that the court of appeals stay the permanent injunction on the basis of the briefing and argument it had already received. See App., infra, 25a. The court of appeals granted the motion to consolidate the two appeals. Ibid.

5. On July 3, 2019, a divided panel of the court of appeals declined to stay the permanent injunction. App., infra, 1a-75a.

a. The majority agreed with the district court that respondents need not demonstrate that their putative recreational and aesthetic interests fall within the zone of interests protected by Section 8005, although for different reasons. App., infra, 58a-68a. The majority recognized that respondents' challenge "turns on a question of statutory interpretation" concerning Section 8005. Id. at 35a. Nonetheless, the majority characterized respondents' claims as "alleging a constitutional violation," id. at 32a, on the theory that any use of DoD funds transferred improperly under Section 8005 would "cause funds to be 'drawn from

the Treasury' not 'in Consequence of Appropriations made by Law,'" in violation of the Appropriations Clause, id. at 45a (quoting U.S. Const., Art. I, § 9, Cl. 7). The majority acknowledged this Court's admonishment in Dalton v. Specter, 511 U.S. 462 (1994), that "claims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims," id. at 473, but it distinguished Dalton and related cases as not addressing "the constitutional implications of violating statutes, such as [S]ection 8005, that authorize executive action contingent on satisfaction of certain requirements," App., infra, 50a.

From that premise, the majority reasoned that respondents "either have an equitable cause of action to enjoin a constitutional violation, or they can proceed on their constitutional claims under the [APA]." App., infra, 4a; see id. at 45a-55a. After questioning whether the "zone of interests test applies" at all, id. at 63a, the majority concluded that, "[t]o the extent" the test applies to respondents' claims, "it requires [the court] to ask whether [respondents] fall within the zone of interests of the Appropriations Clause, not of [S]ection 8005," id. at 65a. The court found that test satisfied, reasoning that respondents' claimed aesthetic and recreational interests are within the zone of interests protected by the Appropriations Clause, based on nothing more than respondents' assertion that

those interests will be impaired by the "allegedly unconstitutional spending." Id. at 66a, 67a.

The majority also agreed with the district court that Section 8005 likely did not permit the disputed transfers, based on the same two conditions -- i.e., that the transfer must be for higher priority items based on "unforeseen military requirements" and must not be for an "item" previously "denied by the Congress," DoD Appropriations Act § 8005, 132 Stat. 2999. See App., infra, 36a-39a. The majority assumed that DoD "could not have anticipated that DHS would request [the] specific support" for which the Acting Secretary of Defense had transferred funds. Id. at 36a. But the majority understood the "'requirement'" at issue under Section 8005 to be "a border wall," not DHS's specific request for support, and the majority found it "not credible" that DoD failed to foresee during the budgeting process that it would need funds "to build a border barrier," given the President's protracted negotiations with Congress over that issue. Id. at 37a. The majority likewise concluded that Congress had "considered the 'item' at issue here" -- in the majority's view, "a physical barrier along the entire southern border" -- and had denied funds for that "item" beyond the specific amounts appropriated separately to DHS. Id. at 39a.

Finally, the majority determined that "[t]he public interest and the balance of hardships do not support granting the motion to stay." App., infra, 75a.

b. Judge N.R. Smith would have granted a stay pending appeal. App., infra, 76a-105a. In his view, the majority had "created a constitutional issue where none previously existed" and had embarked on "an uncharted and risky approach" that would "turn[] every question of whether an executive officer exceeded a statutory grant of power into a constitutional issue." Id. at 76a. As he explained, this Court's decision in Dalton "clarified the distinction between 'claims of constitutional violations and claims that an official has acted in excess of his statutory authority,'" id. at 80a (quoting Dalton, 511 U.S. at 472), and respondents' claim is fundamentally the latter -- a challenge that "entirely rises or falls on whether the DoD complied with the limitations in [Section] 8005," id. at 81a; see id. at 86a ("[N]o claim of a constitutional violation exists in this case.").

Judge Smith further explained that, "[w]hen their claim is properly viewed as alleging a statutory violation, [respondents] have no mechanism to challenge [DoD's] actions." App., infra, 79a. Section 8005 itself does not, he observed, create any implied private cause of action. Id. at 86a-87a. And while the APA could be a "proper vehicle for challenging the DoD's [Section] 8005 reprogramming," Judge Smith concluded that respondents "are not a proper party to bring such a claim, as they fall outside [Section] 8005's zone of interests." Id. at 87a-88a; see id. at 92a ("The relevant zone of interests is not that of the APA itself, but

rather the zone of interests to be protected or regulated by the statute that the plaintiff says was violated.") (brackets and citations omitted). In his view, "Section 8005 operates only to authorize the Secretary of Defense to transfer previously-appropriated funds between DoD accounts," and "[n]othing" in the statute "requires that aesthetic, recreational, or environmental interests be considered before a transfer is made, nor does the statute even address such interests." Id. at 94a. And because APA review is available for a proper plaintiff, Judge Smith would have held that the court "cannot save [respondents'] claim by fashioning an 'equitable' work-around to assert a constitutional claim, as the majority has done." Id. at 95a; see id. at 94a-99a. That work-around, he explained, "distort[s] decades of administrative law practice" and will invite "future plaintiffs [to] simply challeng[e] any agency action 'equitably,' thereby avoiding the APA's limited judicial review." Id. at 98a.

Judge Smith also disagreed with the majority's view of the balance of hardships. App., infra, 99a-105a. He reasoned that "drug trafficking along our southern border * * * threatens the safety and security of our nation and its citizens," and that the public interest favors permitting DoD to effectuate a policy it has determined to be "necessary to minimize that threat" while the appellate process plays out. Id. at 102a; see id. at 105a.

ARGUMENT

Under Rule 23 of this Court and the All Writs Act, 28 U.S.C. 1651, a single Justice or the Court may stay a district-court order pending appeal to a court of appeals. See, e.g., Trump v. International Refugee Assistance Project, 137 S. Ct. 2080, 2083 (2017) (per curiam); West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016). "In considering stay applications on matters pending before the Court of Appeals, a Circuit Justice" considers three questions: first, the Justice must "try to predict whether four Justices would vote to grant certiorari" if the court below ultimately rules against the applicant; second, the Justice must "try to predict whether the Court would then set the order aside"; and third, the Justice must "balance the so-called stay equities," San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers) (citation and internal quotation marks omitted), by determining "whether the injury asserted by the applicant outweighs the harm to other parties or to the public," Lucas v. Townsend, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); see Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (stay factors). All those factors counsel strongly in favor of a stay here. An interim administrative stay is also warranted while this application is pending.

1. If the Ninth Circuit affirms the injunction, this Court is likely to grant review. As Judge Smith explained in his

dissenting opinion, the decision below "is flatly contradicted" by this Court's decision in Dalton v. Specter, 511 U.S. 462 (1994). App., infra, 80a. The panel majority concluded that respondents may pursue a constitutional claim for a violation of the Appropriations Clause, premised entirely on the allegation that the Acting Secretary of Defense violated Section 8005 of the DoD Appropriations Act by transferring excess funds to the appropriation used to fund DoD's provision of counterdrug support activities under 10 U.S.C. 284. See, e.g., App., infra, 35a. But Dalton teaches that "claims that an official exceeded his statutory authority" are not constitutional claims. 511 U.S. at 474; see pp. 26-29, infra (discussing Dalton). Review would thus be warranted to correct the Ninth Circuit's failure to adhere faithfully to this Court's precedent.

Review would also be warranted given the significance of the questions presented. Transfer statutes like Section 8005 are commonplace. See, e.g., Michelle D. Christensen, Cong. Research Serv., Transfer and Reprogramming of Appropriations 3-4 (June 2013); U.S. Gov't Accountability Office, Principles of Federal Appropriations Law 2-39 to 2-40 (4th ed. 2016) (GAO Redbook). They reflect Congress's longstanding judgment that the Executive Branch must have some flexibility to redirect appropriations during "the lengthy and overlapping cycles of the budget process," GAO Redbook 2-44 (citation omitted), in light of unforeseen events or changed

priorities. If a private party could sue to enjoin the exercise of such a transfer provision without demonstrating that the party falls within the zone of interests protected by the statute, the courthouse doors would be open to a wide variety of challenges that Congress never contemplated and that the APA does not permit. More broadly, the decision below threatens to "turn our current system of administrative review on its head" by transforming garden-variety statutory challenges into constitutional claims. App., infra, 85a (N.R. Smith, J., dissenting).

Finally, the practical significance of the decision below for the government's drug-interdiction efforts would weigh strongly in favor of further review. See App., infra, 105a (N.R. Smith, J., dissenting). The decision prevents DoD from taking steps to support DHS that the Acting Secretary of Defense determined to be "necessary in the national interest," DoD Appropriations Act § 8005, 132 Stat. 2999, to stanch the flow of illegal drugs across the southern border. The support DoD seeks to provide, pursuant to its express authority in 10 U.S.C. 284(b)(7), would permit the construction of more than 100 miles of pedestrian fencing in areas identified by DHS as drug-smuggling corridors, where DHS has seized thousands of pounds of heroin, cocaine, and methamphetamine between ports of entry in recent years. See DHS Request 3-9.

2. A stay is also warranted because, if the Ninth Circuit affirms and this Court grants review, there is at least a "fair

prospect" that this Court will vacate the injunction. Lucas, 486 U.S. at 1304 (Kennedy, J., in chambers). Respondents are not within the zone of interests protected by Section 8005. Neither the panel majority nor the district court disputed that point, and the "work-around[s]" they devised for respondents to circumvent that fatal defect do not withstand scrutiny. App., infra, 95a (N.R. Smith, J., dissenting). Moreover, the transfers authorized by the Acting Secretary of Defense plainly satisfied Section 8005. DHS's request to DoD for support under 10 U.S.C. 284 was "unforeseen" at the time of DoD's budget requests, and Congress never previously "denied" funding for that particular "item" of expenditure. DoD Appropriations Act § 8005, 132 Stat. 2999. The panel majority erred in reading those terms in the DoD transfer statute to encompass "border barrier funding" (App., infra, 36a) generally, rather than to refer to specific items in DoD's budget.

a. This Court "presume[s] that a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 129 (2014) (citation omitted). That limitation reflects the common-sense intuition that Congress does not intend to extend a cause of action to "plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory

prohibitions" they seek to enforce. Thompson v. North Am. Stainless, LP, 562 U.S. 170, 178 (2011).

To apply this requirement, the Court uses "traditional tools of statutory interpretation" to discern "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." Bank of Am. Corp. v. City of Miami, 137 S. Ct. 1296, 1302-1303 (2017) (quoting Lexmark, 572 U.S. at 127). If the plaintiff invokes the APA to challenge compliance with another statute, the "interest he asserts must be 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224 (2012) (citation omitted).[3]

The government is likely to succeed in demonstrating that respondents are not within the zone of interests protected by Section 8005. Section 8005 authorizes the Secretary of Defense to "transfer not to exceed $4,000,000,000" of certain funds between "appropriations or funds * * * to be merged with and to be available for the same purposes, and for the same time period, as

[3] Respondents did not plead an APA claim, but the panel majority nonetheless construed their complaint as raising a claim "cognizable under the APA" as an alternative to an equitable claim to enjoin a violation of federal law. App., infra, 53a. Those claims are not permissible alternatives. The availability of an express cause of action under the APA precludes judicial resort to any implied equitable cause of action. See id. at 93a-99a (N.R. Smith, J., dissenting); Gov't C.A. Supp. Br. 16-18. Regardless, for reasons discussed below, see pp. 29-30, infra, Section 8005 provides the relevant zone of interests for respondents' claims, however characterized.

the appropriation or fund to which" the transfer is made, if the Secretary determines that the transfer "is necessary in the national interest." DoD Appropriations Act § 8005, 132 Stat. 2999. The statute provides that the Secretary's transfer authority "may not be used unless for higher priority items, based on unforeseen military requirements, than those for which [the transferred funds were] originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." Ibid. It also requires the Secretary to "notify the Congress promptly of all transfers made pursuant to this authority or any other authority in this Act." Ibid.

Nothing in the text of Section 8005 suggests that Congress intended to permit enforcement of the statute's limitations by plaintiffs, like respondents, who assert that a transfer would indirectly result in harm to their recreational or aesthetic interests in public lands. The statute does not even "arguably" protect those interests. Lexmark, 572 U.S. at 130 (citation omitted). It does not require the Secretary to consider aesthetic or recreational interests before transferring funds, nor does it regulate or limit DoD's use of public lands or DoD's authority to undertake any construction. Instead, it empowers the Secretary of Defense to transfer funds from one appropriation enacted by Congress to another such appropriation, to be used for the purposes Congress authorized in that appropriation -- including, as here,

providing counterdrug support to DHS. Even if the limits on the Secretary's transfer authority might arguably protect some private "economic interests," respondents assert no such interests here. App., infra, 94a (N.R. Smith, J., dissenting). And the Secretary's authority is conditioned on judgments that courts are ill-suited to second-guess -- for example, that the transfer is "necessary" for the "national interest," and that it is for a "higher priority" item of defense spending. DoD Appropriations Act § 8005, 132 Stat. 2999; see Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017) (cautioning that courts should be "reluctant to intrude upon the authority of the Executive in military and national security affairs") (citation omitted).

To the extent that Section 8005 expressly contemplates any form of enforcement, it is congressional oversight -- hence the requirement that the Secretary notify Congress of any transfer. The legislative history confirms as much. When Congress first gave the Secretary of Defense this transfer authority, a committee report explained that legislators imposed conditions on it to "tighten congressional control of the reprogramming process." H.R. Rep. No. 662, 93d Cong., 1st Sess. 16 (1973) (emphasis added). If Congress disagrees with a particular transfer under Section 8005, it has the necessary tools to address the problem itself.

b. The panel majority disputed none of this. It concluded, instead, that respondents' challenge "at its core" is

constitutional, not statutory, and that, "[t]o the extent any zone of interests test applies," respondents' asserted interests need only "fall within the zone of interests of the Appropriations Clause." App., infra, 32a, 65a. That conclusion is flawed in multiple respects.

The majority's attempt to recast respondents' claims as sounding in the Constitution is flatly contrary to this Court's decision in Dalton. There, the plaintiffs "sought to enjoin the Secretary of Defense * * * from carrying out a decision by the President" to close a military facility under the Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Div. B, Tit. XXIX, Pt. A, 104 Stat. 1808. Dalton, 511 U.S. at 464. The court of appeals had permitted the suit to proceed on the assumption that the plaintiffs were effectively seeking "review [of] a presidential decision." Id. at 467 (citation omitted). After this Court held that the President is not an "agency" for APA purposes, see id. at 468 (discussing Franklin v. Massachusetts, 505 U.S. 788 (1992)), the court of appeals adhered to its decision on constitutional grounds. In particular, the court reasoned, based on Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), "that whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." Dalton, 511 U.S. at 471.

This Court unanimously rejected that logic, explaining that not "every action by the President, or by another executive official, in excess of his statutory authority is ipso facto in violation of the Constitution." Dalton, 511 U.S. at 472. Instead, this Court has carefully "distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." Ibid. (collecting cases). The Constitution is implicated if executive officers rely on it as an independent source of authority to act, as in Youngstown, supra, or if the officers rely on a statute that itself violates the Constitution. See Dalton, 511 U.S. at 473 & n.5. But claims alleging simply that an official has "exceeded his statutory authority are not 'constitutional' claims." Id. at 473.

Although Dalton involved a challenge to the Executive's exercise of statutory authority to close military bases rather than to transfer military funds, its reasoning fully applies here. This dispute concerns "simply" whether the Acting Secretary "exceeded his statutory authority" in authorizing the disputed transfers under Section 8005, and "no constitutional question whatever is raised," "only issues of statutory interpretation." Dalton, 511 U.S. at 473-474 & n.6 (citations and internal quotation marks omitted). The Acting Secretary did not invoke the Constitution as a basis to transfer funds, and respondents do not allege that Section 8005 violates any provision of the

Constitution. Thus, "no claim of a constitutional violation exists in this case." App., infra, 86a (N.R. Smith, J., dissenting).

The panel majority attempted to distinguish Dalton on the ground that the decision did not address "the constitutional implications of violating statutes, such as [S]ection 8005, that authorize executive action contingent on satisfaction of certain requirements." App., infra, 50a. The majority failed to explain why that supposed distinction matters; at all events, the question is whether the executive official's actions complied with the statute. The majority also asserted that respondents' claims do not allege merely a statutory violation because executive officials "lack any background constitutional authority to appropriate funds" in the absence of statutory authority. Id. at 51a. But that is precisely backwards. It is because the challenged agency action here depends on a statutory grant of authority, rather than a constitutional one, that respondents' claims must be construed as statutory under Dalton.

The majority's approach threatens to upend judicial review in the Ninth Circuit, inviting courts "to deem unconstitutional any reviewable executive actions * * * that exceed a statutory grant of authority." App., infra, 85a-86a (N.R. Smith, J., dissenting). For example, the majority identified no reason that its decision would not apply equally to a plaintiff challenging the collection of federal tax. Executive officials "lack any background

constitutional authority," id. at 51a, to impose taxes in the absence of statutory authority, and yet a challenge to statutory tax liability is not "ipso facto" a constitutional claim, Dalton, 511 U.S. at 472. By the same logic, any party challenging an agency regulation could re-characterize its claim as sounding in the Constitution, on the theory that executive agencies generally "lack any background constitutional authority" to promulgate legislative rules and instead may do so only to the extent permitted by statute. That cannot be correct.

Moreover, even if respondents' challenge could be viewed as resting in part on the Appropriations Clause, Section 8005 would still prescribe the relevant zone of interests that respondents must satisfy. The zone-of-interests requirement must be applied "by reference to the particular provision of law upon which the plaintiff relies." Bennett v. Spear, 520 U.S. 154, 175-176 (1997). The Appropriations Clause provides that appropriations must be "made by Law," U.S. Const., Art. I, § 9, Cl. 7, and respondents do not dispute that the obligation of funds properly transferred under Section 8005 would satisfy that requirement. Respondents contest only whether the transfer was proper; their "constitutional" claim, as the panel majority acknowledged, "turns on a question of statutory interpretation." App., infra, 35a. Because a violation of Section 8005's limitations is thus a necessary element of their claim, Section 8005, not the Appropriations Clause, is the

"provision whose violation forms the legal basis for [the] complaint," Bennett, 520 U.S. at 176 (quoting Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883 (1990)) (emphasis omitted), and respondents' asserted interests must fall within the zone of interests protected by Section 8005 to maintain this suit. Respondents fail that requirement.

The panel majority was also wrong to suggest that the zone-of-interests requirement does not apply at all to "constitutional claims" or to an "equitable cause of action." App., infra, 62a-63a; cf. id. at 148a-149a (district court's similar reasoning). The zone-of-interests requirement is "of general application," Lexmark, 572 U.S. at 129 (quoting Bennett, 520 U.S. at 163), to all causes of action authorized by Congress. It reflects a general presumption about which plaintiffs Congress intended to allow to bring suit in federal court. This Court's statement in Lexmark that the requirement applies to all "statutorily created" causes of action, ibid., encompasses implied causes of action to enjoin constitutional or statutory violations. Those causes of action are "the creation of courts of equity," Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384 (2015), and are subject to "express and implied statutory limitations," id. at 1385. And the equitable powers that the lower federal courts exercise are themselves conferred by statute. See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999) (citing

the statutory grant of equity jurisdiction). Lexmark therefore did not silently abrogate this Court's precedents recognizing that the zone-of-interests requirement applies to equitable actions seeking to enjoin constitutional violations. See, e.g., Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 469, 475 (1982) (Establishment Clause); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 320 n.3 (1977) (Dormant Commerce Clause).[4]

In sum, respondents are not within the zone of interests protected by Section 8005. The panel majority's effort to avoid that conclusion is inconsistent with Dalton, wrong in principle, and unlikely to survive this Court's review.

c. This Court is also likely to vacate the injunction for the independent reason that the Acting Secretary of Defense complied with Section 8005. When Congress appropriated funds to DoD for FY 2019, it expressly authorized the Secretary of Defense to transfer some of those funds under Section 8005, provided that the transfer is "for higher priority items, based on unforeseen military requirements," and that the "item for which funds are

[4] The decisions cited by the panel majority are not to the contrary. App., infra, 60a-61a (discussing Youngstown, supra, and Clinton v. City of New York, 524 U.S. 417 (1998)). Neither case addressed the zone-of-interests requirement, and the plaintiffs in those cases would have easily satisfied the requirement had it been disputed. In City of New York, for example, the plaintiffs challenged the President's purported cancellation of statutes conferring financial benefits for which the plaintiffs were eligible. See 524 U.S. at 426-427.

requested" was not previously "denied by the Congress." DoD Appropriations Act § 8005, 132 Stat. 2999. The transfers at issue here did not transgress those bounds.

The panel majority's contrary view rests on a misreading of the statutory text. The majority, echoing the district court, concluded that DoD had transferred funds for an "item" that had been denied by Congress and that the transfer was for a "requirement" DoD should have foreseen, because the President and other agencies had previously requested border-wall appropriations that Congress had declined to provide in full. App., infra, 37a. The majority thus construed the relevant "'item'" and "'requirement'" to be "a border wall" writ large. Ibid. But the text does not have such a broad sweep.

Read in context, Section 8005's reference to an "item for which funds are requested" means a particular budget line-item requiring additional funding beyond the amount in the DoD appropriation for the fiscal year. During the budgeting process, DoD requests funding from Congress for budget line-items, and Congress appropriates funds in light of those requests. See, e.g., H.R. Rep. No. 952, 115th Cong., 2d Sess. 452 (2018) (noting the House-, Senate-, and conference-committee determinations regarding DoD's requests for items to be funded by the appropriation for "Drug Interdiction and Counter-Drug Activities, Defense"). The proviso in Section 8005 operates only to prevent DoD from using

its general authority to transfer or reprogram funds to circumvent those congressional choices, by shifting funds to pay for budget items that "ha[d] been specifically deleted in the legislative process." H.R. Rep. No. 662, at 16. The proviso does not forbid DoD from transferring funds for a different "item" that a different agency asked different congressional committees to fund. And it is undisputed that Congress never denied any request by DoD for appropriations to fund construction under Section 284 in these (or any other) project areas.

The Acting Secretary also reasonably determined that the transfers were for "higher priority items, based on unforeseen military requirements," DoD Appropriations Act § 8005, 132 Stat. 2999. DoD Transfer Mem. 1-2. As he explained, DoD's "need to provide support" to DHS for these projects was "not known at the time of [DoD's] FY 2019 budget request." Ibid. The FY 2019 budget was submitted to Congress in February 2018, see D. Ct. Doc. 36, ¶ 18 (Apr. 4, 2019), and Congress enacted the DoD Appropriations Act in September 2018, 132 Stat. 2981. DHS did not request support from DoD under Section 284 until February 2019, App., infra, 13a, and DoD may undertake counterdrug support pursuant to Section 284 only upon receiving a request from another agency. Moreover, DoD could not have foreseen that other appropriations in the DoD Appropriations Act would prove to be in excess of military requirements -- for example, because of lower than anticipated

personnel spending levels -- thus further affecting the agency's relative priorities. See DoD Transfer Mem. 1-2.

3. The balance of equities tips decidedly in favor of a stay pending appeal. See App., infra, 87a-105a (N.R. Smith, J., dissenting). The Court should also grant an administrative stay pending the disposition of this application.

a. The harm to the government and the public from enjoining DoD's use of the transferred funds during litigation is significant. The injunction frustrates the government's ability to stop the flow of drugs across the border in known drug-smuggling corridors. DHS identified the project areas at issue because of the high rates of drug smuggling between ports of entry in those areas of the border. The record includes ample evidence of both the severity of the problem and the limited effectiveness of the existing barriers in the areas, which transnational criminal organizations have adjusted their tactics to evade. See pp. 7-10, supra. The public would therefore benefit from a stay during litigation, to "permit[] [the government] to effect the policies it has determined are necessary." App., infra, 102a (N.R. Smith, J., dissenting); cf. National Treasury Emps. Union v. Von Raab, 489 U.S. 656, 672 (1989) (recognizing the government's "compelling interests in safety and in the integrity of our borders").

The district court did not even consider the government's compelling interest in drug interdiction when framing its

injunctions, characterizing the relevant interest instead as "border security and immigration-law enforcement." App., infra, 173a; see id. at 112a. The court's failure to afford "[a] proper consideration" to the public interest, Winter v. NRDC, Inc., 555 U.S. 7, 23 (2008), and its "cursory" balancing of the equities, id. at 26, were among the government's main claims of error in seeking a stay in the court of appeals. Gov't C.A. Emergency Stay Mot. 18-21. The panel majority overlooked that problem and, indeed, faulted the government for the absence of factual findings on "the impact of building the [proposed] barriers" on drug flows. App., infra, 70a. In the majority's view, the record was insufficient to conclude that the proposed projects would serve the public interest: "If these specific leaks [in the border] are plugged, will the drugs flow through somewhere else?" Ibid.

No sound principle of equity requires such defeatism. Section 284(b)(7) reflects an evident judgment by Congress that the construction of fencing can meaningfully reduce drug smuggling across the southern border, DoD and DHS support that judgment and have determined that these specific projects are in the public interest, and the panel majority's speculation that the fencing will be an imperfect solution does not counsel against a stay.

The government also stands to suffer additional harm from the injunction during the appeal. According to DoD, the funds at issue "will no longer remain available for obligation after the fiscal

year ends on September 30, 2019." First McFadden Decl. ¶ 7; see D. Ct. Doc. 181-13, ¶ 7 (June 19, 2019) (Second McFadden Decl.); see also DoD Appropriations Act § 8003, 132 Stat. 2998 ("No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year, unless expressly so provided."). DoD has further stated that the ordinary "contracting process necessary to completely obligate the full value" of these contracts is "complex," explaining that the "contracts are 'undefinitized' contract actions, which is a type of contract for which the contract terms, specifications, or price are not agreed upon before performance begins." First McFadden Decl. ¶ 8; see Second McFadden Decl. ¶ 8; cf. 48 C.F.R. 217.7400 et seq. DoD has also explained that the "definitiziation process includes extensive negotiation," "audits," and internal review, although DoD may "unilaterally definitize" terms in some circumstances. First McFadden Decl. ¶¶ 8-9. The agency has stated that if it "does not have sufficient time available prior to September 30, 2019, to definitize these contracts and thereby obligate the balance of the contract price, the remaining unobligated funds will become unavailable," and DoD "will be unable to complete the projects as planned." Id. ¶ 10. Thus, if the injunction remains in place, it may foreclose DoD's ability to obligate the funds; if so, it may effectively operate as a final judgment.[5]

[5] According to DoD, a recent decision by the U.S. Coast Guard to "authorize[] the involuntary mobilization of certain

The panel majority's observation (App., infra, 71a-72a) that Congress could appropriate funds in the future for these projects is a non sequitur. Courts could not grant that relief and thus could not undo the harm from the injunction if the government prevails, even if Congress could do so. See, e.g., City of Houston v. Department of Hous. & Urban Dev., 24 F.3d 1421, 1424, 1426-1427 (D.C. Cir. 1994) (recognizing the "well-settled matter of constitutional law that when an appropriation has lapsed * * * federal courts cannot order the expenditure of funds that were covered by that appropriation").

Finally, DoD anticipates that it "will be obligated to reimburse" its contractors for the additional expenses they are incurring, such as the cost of storing and securing equipment, "which would not have been incurred but for the [district court's]

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members of [its] Reserve Component" may have altered DoD's authority to waive the requirement that the contracts be definitized before funds may be fully obligated -- which, in turn, would reduce the amount of time necessary to fully obligate funds for these projects. App., infra, 178a, ¶ 7 (Stiglich Decl.); see id. ¶¶ 6-8; cf. 10 U.S.C. 2326(b)(4)(A). DoD states, however, that it has made no "authoritative determination * * * that the statutory requirements for" a waiver have been satisfied, "and the Secretary of the Army ha[s] made no decision to invoke this waiver authority" if it is available. Stiglich Decl. ¶ 9. DoD has also stated that, "[n]otwithstanding the potential availability of this waiver authority, the government's interest in negotiating the best value for taxpayers and protecting the federal fisc would be best served by adhering to the definitization requirements" in Section 2326(b), id. ¶ 10, which will require substantial time to complete. Accordingly, notwithstanding the possibility of a waiver, DoD respectfully requests a decision on this application by July 26, 2019, to ensure that it has sufficient time to finalize the contracts before September 30, 2019.

injunction." First McFadden Decl. ¶ 13. DoD estimates that those additional costs will exceed $490,000 per day for all the projects combined. See id. ¶¶ 14-15; Second McFadden Decl. ¶¶ 14-15. In that respect, too, the injunction does not merely preserve the status quo, but rather inflicts significant ongoing harm on the government and the public. The panel majority wrongly dismissed this harm as "self-inflicted," App., infra, 72a, because DoD entered into the contracts in the face of litigation. By that logic, DoD would have been required to treat the mere filing of a complaint as an injunction, unilaterally ceasing to enter into contracts -- in contravention of this Court's repeated admonition that a "preliminary injunction is an extraordinary remedy never awarded as of right," Winter, 555 U.S. at 24.

b. These harms plainly outweigh whatever aesthetic and recreational injuries respondents and their members may incur if the Acting Secretary's transfers are allowed to take effect "during the limited period of time the requested stay would be in place." App., infra, 104a (N.R. Smith, J., dissenting). Respondents allege that the construction at the border will harm their "'ability to fish,'" "hik[e]," and "camp[]." Id. at 168a-169a (citation omitted) (district court's order granting preliminary injunction). According to DHS, however, "the vast majority of the construction activity and the project footprints themselves will occur within a 60-foot strip of land that parallels the international border,"

in areas that are already "heavily disturbed" and that "include existing barriers and roads." D. Ct. Doc. 64-9, ¶ 63 (Apr. 25, 2019) (First Enriquez Decl.) (discussing Yuma and El Paso projects); see D. Ct. Doc. 181-7, ¶¶ 10-16 (June 19, 2019) (Second Enriquez Decl.) (discussing El Centro and Tucson projects). DHS reports that the projects consist of replacing existing barriers in areas that "function primarily as * * * law enforcement zone[s]," and that the projects will not make "any change to the existing land uses in the areas." First Enriquez Decl. ¶¶ 63-64; see id. ¶¶ 12, 15, 18; see also Second Enriquez Decl. ¶ 10. And, in any event, respondents' interests can be largely protected if they ultimately prevail -- for example, by the removal of any barriers found to be unlawful. See App., infra, 103a (N.R. Smith, J., dissenting). Respondents' asserted interest in undisturbed fishing and birdwatching in the law-enforcement zone adjacent to the border does not justify bringing the entire contracting process to a halt, let alone immediately while an appeal is pending.

Respondents' alleged harms are even less substantial than the whale-watching interests this Court found insufficient to justify a preliminary injunction in Winter, supra. There, the Court reversed a preliminary injunction prohibiting the Navy from using sonar technology in training exercises at sea, where the plaintiffs claimed the sonar would injure them because they "observ[ed]" and "photograph[ed]" marine mammals in the area and "conduct[ed]

scientific research." 555 U.S. at 25-26. While acknowledging the "seriousness" of the plaintiffs' interests, id. at 26, the Court nonetheless vacated the injunction, explaining that "the District Court and the Ninth Circuit significantly understated the burden the preliminary injunction would impose on the Navy's ability to conduct realistic training exercises, and the injunction's consequent adverse impact on the public interest in national defense," id. at 24; see id. at 33.

Here, respondents do not claim to have conducted any research or other productive activity in the specific areas at issue. Their sole asserted interests are recreational and aesthetic, and those interests are substantially outweighed by the harm to the government and the public from the injunction.

CONCLUSION

The injunction should be stayed pending appeal and, if the Ninth Circuit affirms the injunction, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. The injunction should also be administratively stayed during the pendency of this application.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

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