No. 19A60

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

SIERRA CLUB, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR A STAY PENDING APPEAL 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

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The permanent injunction wrongly prohibits the Department of Defense (DoD), the Department of Homeland Security (DHS), and the Department of the Treasury from undertaking any border-wall construction using funds that the Acting Secretary of Defense lawfully transferred among DoD appropriations accounts pursuant to 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, and another provision incorporating Section 8005's limitations. Respondents' asserted recreational and aesthetic interests are not even arguably within the zone of interests protected by Section 8005, and they cannot avoid that conclusion by re-characterizing their statutory claims as either "ultra vires" or constitutional claims, especially in light of Dalton v.

Specter, 511 U.S. 462 (1994). Moreover, even if respondents were proper parties to enforce the conditions in Section 8005, they misread the statute. Section 8005 authorized these transfers for DoD to meet an unforeseen military requirement to support DHS -- an item of expenditure for DoD that, contrary to respondents' view, was not denied by Congress simply because Congress elsewhere appropriated less funding for DHS to construct a border wall than DHS had requested. The balance of equities also favors a stay, given the significant ongoing harm the injunction causes to the government's drug-interdiction efforts.

A. Likelihood Of Certiorari And Vacatur

Respondents do not dispute that, if the Ninth Circuit were to affirm the injunction, the questions presented in this case would warrant this Court's review. Stay Appl. 19-21. There is also at least a fair prospect that this Court would vacate the injunction.

1. Zone of Interests

a. Respondents' challenge is "fundamentally a dispute about whether the DoD erred in deciding that the pre-conditions of [Section] 8005 were met." Stay Appl. App. 81a (N.R. Smith, J., dissenting). Respondents must therefore demonstrate that their interests are "arguably within the zone of interests to be protected or regulated" by Section 8005. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224 (2012) (citation omitted); see Lujan v. National Wildlife Fed'n, 497 U.S.

871, 886 (1990) ("The relevant statute * * * is the statute whose violation is the gravamen of the complaint[.]").[1]

Respondents assert that they have an "interest in avoiding circumvention of Congress's decision to deny funds." Opp. 38. But that is a generalized grievance about an alleged violation of law that does not even constitute Article III injury. See Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018). It thus does not remotely satisfy the requirement that "the injury [the plaintiff] complains of (his aggrievement, or the adverse effect upon him)" must fall within the zone of interests, Lujan, 497 U.S. at 883 (citation omitted), such that it can "'reasonably be assumed that' Congress authorized that plaintiff to sue," Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 130 (2014) (citation omitted). The "aggrievement" and "adverse effect" (Lujan, 497 U.S. at 883) that respondents complain of here is an alleged injury to their enjoyment of public lands, and Section 8005 does not even arguably protect or regulate such interests.

Respondents' reliance (Opp. 38-40) on Patchak is thus misplaced. That case involved a challenge to the Secretary of the Interior's exercise of statutory authority "to acquire property 'for the purpose of providing land for Indians.'" 567 U.S. at 211-212 (citation omitted). This Court held that the "economic,

[1] The Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., would make no difference on this point. Contra Opp. 37-38. Section 8005 would still provide the relevant zone of interests. See Stay Appl. 23 & n.3.

environmental, and aesthetic" interests of the plaintiff, a neighboring landowner, were within the zone of interests of the land-acquisition statute, reasoning the acquisition of land was "closely enough and often enough entwined with" the use of the land being acquired that "neighbors to the use" were "reasonable -- indeed, predictable -- challengers." Id. at 224, 227.

By contrast, Section 8005's limitations on DoD's internal transfers of appropriated funds are in no way "entwined" with the downstream collateral effects on private parties that may result from the projects financed by transferred funds. And private parties alleging aesthetic or recreational harms from DoD's intended uses for transferred funds are not "reasonable" or "predictable" challengers. To the contrary, private enforcement of Section 8005 is unprecedented, and respondents cite no prior case in which private parties have ever brought suit to enjoin any similar internal transfer of funds.

Recognizing that respondents are not within the zone of interests arguably protected by Section 8005 is not tantamount to "a broad claim of unreviewable authority." Opp. 25. Indeed, respondents repeatedly conflate their own inability to enforce Section 8005 with precluding all judicial review of a Section 8005 transfer. See Opp. 3, 11, 40-42. These particular respondents are not proper plaintiffs, and the Court could reach that conclusion without needing to identify some other hypothetical

party whose interests might satisfy the zone-of-interests requirement. Cf. Stay Appl. App. 94a (N.R. Smith, J., dissenting) (noting that respondents do not claim they are "entitled to the funds as originally appropriated" or otherwise have any "economic interests" arguably protected by Section 8005).

b. The panel majority avoided the conclusion that respondents are not within the zone of interests protected by Section 8005 by re-characterizing their claims as sounding in the Appropriations Clause. Stay Appl. 25-26. That approach "is flatly contradicted by Dalton." Stay Appl. App. 80a (N.R. Smith, J., dissenting). Dalton explained that claims alleging that an official has "exceeded his statutory authority are not 'constitutional' claims," 511 U.S. at 473, and instead raise "only issues of statutory interpretation," id. at 474 n.6 (citation omitted). That principle directly controls this case.

Even if respondents' claims could be characterized as resting in part on the Appropriations Clause without contradicting Dalton, Section 8005 would still prescribe the relevant zone of interests, because their claims necessarily rest on an alleged violation of Section 8005. Stay Appl. 29-30. That reality is vividly illustrated by the fact that respondents' argument in this Court that the Acting Secretary acted unlawfully (Opp. 15-25) never once mentions the Appropriations Clause, and instead rests entirely on a dispute over statutory interpretation. Respondents are thus

wrong to suggest that compliance with Section 8005 is the government's "defense" to their Appropriations Clause "claim." Opp. 26-27. Respondents cannot plead or prove a violation of the Appropriations Clause without showing that the challenged expenditure is not authorized "by Law," U.S. Const. Art. I, § 9, Cl. 7, and thus a necessary ingredient of their claim is that the transfers at issue were not permissible under Section 8005.

Respondents argue (Opp. 32-33) that Dalton does not require characterizing their claims as exclusively statutory because "Congress exercises its exclusive appropriations power through legislation." But Congress exercises all its Article I lawmaking powers that way. The appropriations power is no different in that regard than, for example, the power to "lay and collect Taxes," U.S. Const. Art. I, § 8, Cl. 1, yet claims that the IRS exceeded its asserted statutory authority in assessing taxes are not constitutional claims, see Stay Appl. 28.

Respondents also argue (Opp. 33-34) that they need not satisfy the zone-of-interests requirement with respect to Section 8005 because they assert a separation-of-powers claim, as in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). But neither the court of appeals nor the district court based its decision on any such theory. See Stay Appl. App. 32a, 149a-150a. And that theory would not, in any event, suffice to distinguish Dalton, which explained that Youngstown involved constitutional rather than

statutory claims because the "only basis of authority asserted was the President's inherent constitutional power," Dalton, 511 U.S. at 473. Here, by contrast, the Acting Secretary of Defense did not assert that the Constitution provided a basis to transfer funds; the asserted basis for his action was Section 8005. Stay Appl. 27. For that reason, this case involves no grand constitutional question of whether the Executive may ever "spend moneys that Congress has not appropriated." Opp. 31-32.

Finally, respondents' suggestion (Opp. 34-35) that Section 8005 would be unconstitutional "as applied" if it authorized the transfers at issue is meritless. Congress often provides an agency with "lump-sum appropriation[s]" and the discretion to allocate those funds "to adapt to changing circumstances and meet [the agency's] statutory responsibilities in what it sees as the most effective or desirable way." Lincoln v. Vigil, 508 U.S. 182, 192 (1993). Given that Congress could have granted DoD unfettered discretion over how to spend its entire budget of appropriated funds, Section 8005's limited grant of authority to transfer certain funds from one appropriation account to another poses no constitutional concerns whatsoever.

c. Respondents alternatively contend (Opp. 27) that they need not satisfy the zone-of-interests requirement because they seek "equitable relief against ultra vires government conduct" and do not assert a statutory cause of action. See Opp. 27-31. But

even if respondents' claims were understood to sound in equity, respondents would still have to satisfy the same zone-of-interests requirement with respect to Section 8005.

This Court has explained that the "judge-made remedy" of a suit to enjoin unlawful executive action is "the creation of courts of equity" and is "subject to express and implied statutory limitations." Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1384-1385 (2015). One of those implied limitations is the requirement that the plaintiff's asserted interests fall within the zone of interests arguably protected by the provision whose alleged violation forms the basis for the plaintiff's claim -- as demonstrated by this Court's precedents recognizing that the zone-of-interests requirement applies to suits seeking to enjoin constitutional violations. See Stay Appl. 31.

That such claims seek equitable relief does not render them "[u]nlike a statutory cause of action" for these purposes. Opp. 28. The equitable powers of the lower federal courts are conferred by statute, see Stay Appl. 30-31, and thus the cause of action respondents seek to invoke is, at bottom, "legislatively conferred," Lexmark, 572 U.S. at 127. Moreover, the zone-of-interests requirement reflects a generalized historical presumption about Congress's intended limits on the scope of all causes of action. See id. at 130 & n.5. "Courts of equity can no

more disregard" that background presumption "than can courts of law." Armstrong, 135 S. Ct. at 1385 (citation omitted).

If the zone-of-interests requirement did not apply to equitable actions to enjoin alleged statutory violations, then any plaintiff "who might technically be injured in an Article III sense" could bring such a suit. Thompson v. North Am. Stainless, LP, 562 U.S. 170, 178 (2011). Indeed, respondents would effectively impute to Congress the intent to allow courts to fashion implied equitable causes of action for the very same plaintiffs -- those meeting the bare minimum of Article III injury but whose interests are unrelated to the statute at issue -- to whom Congress presumptively denies a cause of action when it creates express causes of action. Respondents offer no sound basis to embrace a rule that has such "absurd consequences," id. at 176, and that is so contrary to "separation-of-powers principles," Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017).

Respondents misread the only case they cite (Opp. 29) as affirmatively rejecting the applicability of the zone-of-interests requirement to equitable causes of action: Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987). The footnote respondents cite simply clarified (in dicta) that, in cases challenging executive action as exceeding statutory authority, the relevant question is not whether the plaintiff is "within the zones of interests of the constitutional and statutory powers invoked by

the [defendant]," but instead whether the plaintiff's "interest may be said to fall within the zone protected by the limitation[s]" invoked by the plaintiff. Ibid. (emphasis added).

Respondents also cite a number of decisions in which this Court did not discuss the zone-of-interests requirement in the course of addressing claims to enjoin alleged statutory or constitutional violations. Opp. 27-28, 36-37. 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) (citation omitted). And that is especially so here, where respondents do not even contend that the plaintiffs would have failed the zone-of-interests requirement in any of those cases, with the sole asserted exception of Clinton v. City of New York, 524 U.S. 417 (1998). Respondents' reliance on that case is misplaced. There, the plaintiffs alleged that the President had unlawfully cancelled statutes that would have financially benefited them. See id. at 426-427. To reprise the language from Haitian Refugee Center that respondents misread, the power invoked by the President was the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200, but the limitations the plaintiffs sought to enforce came from the President's violation of the Presentment Clause in cancelling the statutes at issue. See Stay Appl. 31 n.4.

2. Statutory Authority

a. The Acting Secretary appropriately determined, under Section 8005, that the transfers at issue here were "for higher priority items, based on unforeseen military requirements," and that "the item for which funds are requested" had not "been denied by the Congress." DoD Appropriations Act § 8005, 132 Stat. 2999. The panel majority wrongly read the terms "unforeseen military requirements" and "item" to encompass "border barrier funding" (Stay Appl. App. 36a) of any kind for any agency, rather than to refer to specific items in DoD's budget. See Stay Appl. 31-34.

Respondents merely repeat the same errors. Opp. 15-19. They observe (Opp. 17), for example, that the statute refers to an "item" without any "reference to an item's subcomponents, requesting agency, or specific budget line." But the words of the statute "must be read in their context and with a view to their place in the overall statutory scheme." Home Depot U. S. A., Inc. v. Jackson, 139 S. Ct. 1743, 1748 (2019) (citation omitted). Read in context, the limitation that appropriated funds may not be transferred for an "item * * * denied by the Congress," DoD Appropriations Act § 8005, 132 Stat. 2999, refers to the particular budget items that DoD proposes for congressional consideration -- as demonstrated by the earlier reference in the same proviso to "higher priority items," ibid., which describes a specific project for which the transferred funds will be used, not a generalized

goal. See Stay Appl. 32. As respondents do not dispute, DoD never proposed (and Congress never denied) any request by DoD for funds to support DHS's counterdrug activities pursuant to 10 U.S.C. 284. That is the proper "item" for these purposes.

Respondents suggest (Opp. 17) that reading the term "item" in Section 8005 of the DoD Appropriations Act to refer to the specific items that DoD asked Congress to fund would permit an end-run around "Congress's denial" of funding requests by other agencies or by the Administration as whole. But Congress was perfectly free to enact a broader restriction on the use of any appropriated funds for border-wall construction, had it wished to impose the limitation that respondents would now read into Section 8005 (and had the votes existed for imposing such a restriction). Moreover, at the time Congress enacted the DoD Appropriations Act in September 2018 (Stay Appl. 33), it had not yet made any final decisions on DHS's separate request for border-wall funding and thus could hardly be thought to have denied the item at issue here.

Respondents likewise argue (Opp. 19-21) that the need for border-wall funding was not an "unforeseen" military requirement. DoD Appropriations Act § 8005, 132 Stat. 2999. Again, the "requirement[]" at issue is not a border barrier generally, but rather DoD's need to provide support for counterdrug activities in response to a specific request from DHS under 10 U.S.C. 284 -- a request that post-dated both DoD's preparation of its budget

request for the 2019 fiscal year and Congress's consideration of that request. Stay Appl. 33-34. And even if DoD generally contemplated in 2018 that it might be asked to provide Section 284 support (Opp. 20-21), doing so was not a foreseeable requirement, given the fluidity of ongoing negotiations concerning DHS's separate budget requests for barrier construction.[2]

b. Respondents argue as a fallback position that the projects for which the Acting Secretary transferred funds are not authorized by Section 284. Opp. 22-25. Neither of the courts below found that the projects would violate Section 284. Stay Appl. 3. Section 284 authorizes DoD to provide support to other federal agencies for counterdrug activities in the form of 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) (Supp. V 2017). The statute does not impose any ceiling on the amount of funds that may be expended on such support, nor does it include any provisos comparable to the "denied by the Congress" limitation in Section

[2] Respondents briefly argue (Opp. 21-22) that affirmance would be appropriate on the alternative ground that DoD's support for the counterdrug activities of other federal agencies is not a "military requirement[]" under Section 8005. Congress disagreed. In Section 284, Congress authorized DoD to use its military resources, including its expertise and funding, to assist in combatting the problem of drug smuggling. See, e.g., 10 U.S.C. 284(b)(3), (5)-(6), and (10) (Supp. V 2017) (authorizing DoD to assist other federal agencies with transportation, training, communications monitoring, and aerial reconnaissance).

8005. Respondents identify no persuasive reason (Opp. 23-24) to read into the statute limitations Congress did not include.

B. Balance Of Equities

The balance of equities strongly favors a stay pending appeal and an immediate administrative stay. Stay Appl. 34-40. The injunction prevents DoD from using funds to provide one of the express forms of support permitted by Section 284 -- the construction of fences -- to assist DHS in combating the flow of illegal drugs between ports of entry at the southern border. Stay Appl. 34. Respondents argue (Opp. 48-49) that drug smuggling through ports of entry is a more significant problem. But Congress authorized DoD to "[c]onstruct[] * * * fences" to block "drug smuggling corridors," 10 U.S.C. 284(b)(7) (Supp. V 2017), and the injunction causes significant harm by preventing DoD from providing that support, even if the barriers would not stop all drug smuggling. The injunction also causes ongoing harm to the government and the public in the form of significant additional costs from delay. Stay Appl. 37-38. Respondents' assertion that those harms are self-inflicted (Opp. 50) fails to rebut the point that the mere threat of litigation cannot reasonably be treated as requiring a complete cessation of all contracting.

Respondents argue that there would be "no going back" (Opp. 46) if the injunction is stayed pending appeal. But respondents' asserted injuries to recreational and aesthetic interests in the

areas where construction will occur could be remedied at a later date, if respondents ultimately prevail. Stay Appl. 39. Respondents have never identified any independently cognizable injury that they or their members would suffer from the mere transfer of funds under Section 8005. And the record contradicts respondents' suggestions (Opp. 46) that the environment in the construction areas is so fragile that any disturbance from construction would be "practically impossible to undo." According to DHS, the "vast majority" of construction will occur "within a 60-foot strip of land" parallel to the border, which is already "heavily disturbed" and which contains "existing barriers and roads." Stay Appl. 38-39 (quoting DHS declaration).[3]

By contrast, declining to stay the injunction could well be tantamount to a decision on the merits in favor of respondents, at least in part. According to DoD, the funds at issue "will no longer remain available for obligation after the fiscal year ends on September 30, 2019." Stay Appl. 35-36 (quoting DoD declaration). Thus, if the government prevails on appeal and the injunction is vacated after September 30, the DoD Appropriations Act would not authorize DoD to obligate additional funds despite

[3] Respondents assert (Opp. 47 n.3) that they also have research interests, but the cited declarations refer to broad sectors of the border, not the specific areas in which construction will occur. In any event, the decisions below did not rest on any of those purported interests, or on the species-specific harms (Opp. 47) respondents now assert. Cf. D. Ct. Doc. 64-9, ¶¶ 41-61 (Apr. 25, 2019) (DHS declaration refuting alleged species harms).

its victory. The injunction thus threatens to operate, in effect, as a final judgment in respondents' favor. See id. at 37.

For that reason, respondents' observations about the pace of briefing in the court of appeals (Opp. 13, 42-43) are beside the point. Even on a highly expedited schedule, it is not realistic to expect a merits decision by September 30 from the Ninth Circuit, much less from this Court. The government therefore appropriately determined to seek a stay from this Court while continuing to litigate the merits of respondents' claims in the court of appeals on a reasonable, expedited schedule. The government also applied for the stay expeditiously, especially given that the Ninth Circuit issued a 75-page opinion (with a dissent) on the eve of July 4.

Finally, DoD has stated that the ordinary "contracting process necessary to completely obligate the full value" of these contracts is "complex." Stay Appl. 36 (quoting DoD declaration). Respondents fault the government for not oversimplifying those complexities (Opp. 44), but they do not controvert DoD's statement that "the government's interest in negotiating the best value for taxpayers and protecting the federal fisc would be best served by" adhering to the ordinary "definitization" process for these contracts. Stay Appl. 37 n.5 (quoting DoD declaration). That process takes time. DoD therefore respectfully requests a decision on this application by July 26, 2019, to maximize the time DoD has to finalize the contracts before September 30, 2019.

* * * * *

The injunction should be stayed pending appeal and, if necessary, pending 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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