No. 20-138

IN THE

Supreme Court of the United States

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

Petitioners,

—v.—

SIERRA CLUB and SOUTHERN BORDER COMMUNITIES COALITION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

Sanjay Narayan
Gloria D. Smith
SIERRA CLUB ENVIRONMENTAL LAW PROGRAM
2101 Webster Street, Suite 1300
Oakland, CA 94612

Vasudha Talla
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111

David Donatti
Andre I. Segura
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS
P.O. Box 8306
Houston, TX 77288

Dror Ladin
Counsel of Record
Noor Zafar
Hina Shamsi
Omar C. Jadwat
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
dladin@aclu.org

Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

Attorneys for Respondents

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that private parties may seek an injunction in equity or under the Constitution when they face imminent, redressable injury from Executive Branch actions that are not authorized by statute and violate the Appropriations Clause.

2. Whether Executive Branch officials may defeat Plaintiffs-Respondents' challenge to an unconstitutional and *ultra vires* expenditure of funds, on the ground that Plaintiffs-Respondents have no cause of action under a statute that Defendants claim authorizes the expenditure—even though Plaintiffs did not assert a claim under that statute and are directly harmed by the officials' diversion of funds for border wall construction.

3. Whether the court of appeals correctly held that the Defendants-Petitioners may not divert $2.5 billion through Defense Department accounts for the purpose of widespread wall construction across the length of the U.S.-Mexico border, in contravention of Congress's decision to appropriate only $1.375 billion for more limited wall construction projects limited to the Border Patrol's Rio Grande Valley sector.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Plaintiffs-Respondents make the following disclosures:

1) Respondents Sierra Club and Southern Border Communities Coalition do not have parent corporations.

2) No publicly held company owns ten percent or more of the stock of any respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION & STATUTES

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs-Respondents—the Sierra Club and Southern Border Communities Coalition ("Plaintiffs")—are organizations whose members own nearby property and live in, study, conserve, fish, hike, and otherwise use and enjoy lands that are now being harmed by the Defendants-Petitioners' ("Defendants'") unauthorized construction of a border wall. Congress rejected the administration's request for $5.7 billion to construct the wall, and instead allocated only $1.375 billion for construction limited to south Texas. In diverting funds not authorized for this use, Executive Branch officials contravened Congress's deliberate decision to limit wall construction to a defined geographic area, and to subject such construction to certain constraints including local government input.

There is no dispute that Plaintiffs and their members are directly harmed by the Defendants' border wall construction. The court of appeals held that because that construction harms Plaintiffs and violates the Appropriations Clause and the Consolidated Appropriations Act of 2019 ("CAA"), Plaintiffs are entitled to an injunction. That decision is plainly correct.

Defendants argue that this Court should grant review, maintaining that the court of appeals erred in two respects: by recognizing a cause of action, and by concluding that Defendants' spending was unauthorized. The court of appeals was correct on both counts.

First, the court of appeals was correct in recognizing Plaintiffs' right to equitable relief. Where, as here, the government engages in conduct that

harms an individual and is beyond Executive Branch authority, the courts have long recognized a right in equity to enjoin the action as *ultra vires*. Here, moreover, the spending violates the Appropriations Clause, which requires that Congress approve spending and protects individuals from harm inflicted by unauthorized executive expenditures.

Defendants argue that because they have invoked another statute in *defending* against Plaintiffs' constitutional and *ultra vires* claims—Section 8005 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999 ("Section 8005")—the case must be dismissed because *that statute* does not confer a right of action. But as Judge Robert Bork explained decades ago in rejecting a similar defense couched in "zone of interest" terms, that argument makes no sense: "[A] meritorious litigant, injured by *ultra vires* action, would seldom have standing to sue since the litigant's interest normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987). The same reasoning holds here. Whether Section 8005 provides a cause of action is irrelevant. Plaintiffs have a right of action in equity to bar violations of the Appropriations Clause and the CAA that harm them personally.

The court of appeals was also correct on the merits. It could not be plainer that Congress rejected President Trump's funding request for the wall construction in dispute here. The President himself conceded that Congress turned him down. Defendants seek to circumvent that denial by invoking Section

8005, an inapposite statute authorizing spending for "unforeseen military needs." But the court of appeals correctly held, as has every court that has considered this question, that Section 8005 by its terms does not apply, and cannot be warped to authorize implicitly what Congress plainly rejected.

STATEMENT OF THE CASE

A. The Spending Power

The Constitution vests the federal government's spending power in Congress through the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7, which "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (quotation marks and citation omitted). Congress's exclusive spending power "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *Id.* at 427–28.

B. Underlying Facts

Throughout 2018, the President sought, and Congress denied, funding to construct a wall across the lands that Plaintiffs' members live and own property near, use, protect, and treasure. Numerous individuals and organizations—including Plaintiffs—participated in the political process by advocating with Congress to limit the scope and location of any construction so as to avoid harm to neighboring landowners, the environment, and the communities who live along the border. *See* Dist. Ct. ECF Nos. 32 ¶ 5 (Gaubeca Decl.), 33 ¶ 7 (Houle Decl.).

In December 2018, this dispute between Congress and the President led to the longest government shutdown in U.S. history. During the shutdown, "the White House requested $5.7 billion to fund the construction of approximately 234 miles of new physical barrier." App. 3a. Congress denied that request on February 14, 2019, instead passing the Consolidated Appropriations Act of 2019, Pub. L. No. 116-6, Div. A, 133 Stat. 13 (2019). The CAA made available only $1.375 billion for wall construction, and restricted construction to south Texas, in the U.S. Border Patrol's Rio Grande Valley Sector. CAA § 230(a)(1). Even within that limited area, Congress barred all construction within specified ecologically sensitive sites in the Rio Grande Valley Sector and imposed notice and comment requirements on wall construction within certain city limits to enable local community input. CAA §§ 231–232, 133 Stat. at 28–29.

On February 15, the President signed the CAA into law. But rather than abide by the deal he struck with Congress to limit wall construction to $1.375 billion in south Texas, the President simultaneously announced with the signing of the CAA that he would "take Executive action" to secure additional funds over and above what Congress appropriated, and that he had "so far" identified up to $8.1 billion for wall construction. App. 4a. This included "$2.5 billion of Department of Defense ('DoD') funds that could be transferred to provide support for counterdrug activities of other federal government agencies under 10 U.S.C. § 284 ('Section 284')," App. 4a.

Ten days later—less than two weeks after Congress specifically denied the Executive Branch's request to construct approximately 234 miles of new

physical barrier in areas identified as the top Customs and Border Protection ("CBP") priorities—DHS followed through on the February 15 White House announcement and formally requested that the Department of Defense ("DoD") fund "approximately 218 miles" of new walls in CBP priority areas. App. 5a. In the following months DoD approved exactly $2.5 billion in Section 284 expenditures for DHS construction, as specified in the February 15 White House announcement. App. 5a.

Prior to the Defendants' decision to bypass Congress's appropriations act, DoD's Section 284 account did not even contain sufficient funds to cover the $2.5 billion expenditure. It held "less than one tenth of the $2.5 billion needed to complete those projects." App. 5a. So DoD had to invoke Sections 8005 and 9002 of the Department of Defense Appropriations Act of 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018) ("Section 8005") to transfer funds appropriated for other military purposes into the Section 284 account: "$1 billion from Army personnel funds" and an additional "$1.5 billion from 'various excess appropriations,' which contained funds originally appropriated for purposes such as modification of in-service missiles and support for U.S. allies in Afghanistan." App. 5a–6a. These transfer authorities are explicitly limited by Congress and "may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." App.6a–7a (quoting Section 8005).

Plaintiffs' members own nearby property and regularly use the lands on which Defendants are now

constructing a massive, multibillion-dollar wall, in direct contravention of Congress's refusal to appropriate funds for the project. These unique border landscapes are renowned for their beauty and archaeological, historic, and biological value. Although the budgetary compromise that emerged from the government shutdown limited wall construction to the U.S. Border Patrol's Rio Grande Valley Sector, carved out ecologically sensitive sites from construction, and set up a public notice-and-comment requirement prior to construction within cities, Defendants have bypassed Congress's deliberate choices by using the $2.5 billion diverted from military purposes.

The wall construction at issue here stretches across three states and includes protected public lands, including Organ Pipe National Monument, Coronado National Memorial, the Cabeza Prieta National Wildlife Refuge, and the San Bernardino National Wildlife Refuge. In constructing the wall, Defendants are destroying protected saguaro cacti that can take 100 years to reach maturity, blasting ancient burial sites, and siphoning a 16,000 year-old desert aquifer sacred to the Tohono O'odham Nation. Br. for Tohono O'odham Nation as Amicus Curiae Supporting Plaintiffs-Appellees, *Sierra Club et al. v. Trump et al.*, 963 F.3d 874 (9th Cir. 2019) (Nos. 19-16102, 19-16300, 19-16299, 19-16336).

Defendants have dispensed with environmental protections used in the past, prompting warnings from the National Park Service that depleting the aquifer for construction—abandoning the Bush administration's practice of trucking in water—has endangered its existence and further threatens two endangered species. *See Tribal*

Nation Condemns 'Desecration' to Build Border Wall, N.Y. Times (Feb. 26, 2020), https://nyti.ms/32zcqHb. The National Park Service similarly cautioned that border wall construction at Organ Pipe Cactus National Monument, a UNESCO biosphere reserve in Arizona's Sonoran Desert, could damage or destroy 22 archaeological sites. *Border Fence Construction Could Destroy Archaeological Sites, National Park Service Finds*, Wash. Post (Sept. 17, 2019), https://wapo.st/39eD5dr. Defendants have also blasted through parts of Monument Hill, which includes a burial site for the Tohono O'odham Nation, a resting place primarily for Apache warriors. *Sacred Native American Burial Sites are Being Blown Up for Trump's Border Wall, Lawmaker Says*, Wash. Post (Feb. 9, 2020), https://wapo.st/30y6efV.

C. Prior Proceedings

Plaintiffs brought this suit on February 19, 2019, in response to the President's announcement that he intended to unilaterally divert funds to construct the very wall that Congress rejected. Beginning on April 4, 2019, as Defendants made public their construction decisions, Plaintiffs sought injunctions against specific wall segments. To enable expeditious and orderly review and disposition of this action, Plaintiffs sought partial summary judgment and a permanent injunction on June 12, 2019.

On May 24, 2019, the district court entered a preliminary injunction barring Defendants' initial transfer of $1 billion to construct wall sections in Arizona and New Mexico. The district court concluded that Defendants' plan was unlawful, because the wall construction projects were specifically "denied by Congress" and therefore not an "unforeseen" need, and

thus failed to meet the requirements of the authority Defendants had invoked, Section 8005 of the DoD Appropriations Act. App. 350a–357a. The district court also noted that Defendants' position raised serious constitutional concerns under the Appropriations Clause and the separation of powers.

On June 28, 2019, the district court issued a permanent injunction incorporating its prior reasoning on the merits. App. 187a–88a.

Defendants sought an emergency stay of the district court's preliminary injunction. On July 3, 2019, the court of appeals denied the stay motion in a published 2-1 opinion. Judges Clifton and Friedland, writing for the court, held that "[b]ecause section 8005 did not authorize DoD to reprogram the funds—and Defendants do not and cannot argue that any other statutory or constitutional provision authorized the reprogramming—the use of those funds violates the constitutional requirement that the Executive Branch not spend money absent an appropriation from Congress." App. 209a.

On July 12, 2019, Defendants filed a stay application with this Court. The Court granted the stay on July 26, 2019. 140 S. Ct. at 1. The Court explained: "Among the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Id.* Justice Breyer concurred in part and dissented in part, while Justices Ginsburg, Sotomayor, and Kagan would have denied the stay. *Id.*

On June 26, 2020, a different panel of the court of appeals affirmed the district court's permanent injunction. Writing for the court, Chief Judge Thomas

found that Congress did not appropriate funds for border wall construction, and that Defendants could not rely on Section 8005 to make up the shortfall by transferring billions from military budget lines to DHS's unfunded wall projects. The court of appeals set forth its reasoning that Section 8005 was inapplicable to the border wall expenditures in an opinion filed the same day in the companion case, *State of California v. Trump*, 963 F.3d 926 (9th Cir. 2020), App. 78a.

The court of appeals agreed with the district court that border wall construction was not "unforeseen" as required under the DoD transfer statute Defendants relied upon. App. 107a–112a. It pointed out that Defendants' position—that a Section 284 request is foreseen only at the moment it is received by DoD—"would swallow the rule and undermine Congress's constitutional appropriations power," and would be "inconsistent with the purpose of Section 8005: to 'tighten congressional control of the reprogramming process.'" App. 110a (quoting H.R. Rep. No. 93-662, at 16 (1973)). Moreover, the historical record demonstrated that DoD did, in fact, anticipate just such a request for Section 284 funds. App. 111a.

In addition, the court of appeals held that construction of border wall sections in support of a civilian law enforcement agency's counterdrug mission is not a "military requirement," which Section 8005 demands. App. 112a–116a. "To conclude that supporting projects unconnected to any military purpose or installation satisfies the meaning of 'military requirement' would effectively write the term out of Section 8005." App. 116a.

The court of appeals also agreed with the district court that "Congress's broad and resounding denial resulting in a 35-day partial government shutdown must constitute a previous denial for purposes of Section 8005." App. 117a. The court "decline[d] to impose upon Congress an obligation to deny every possible source of funding when it refuses to fund a particular project," observing that "surely when Congress withheld additional funding for the border wall, it intended to withhold additional funding for the wall, regardless of its source." App. 117a.

Because Section 8005 was inapplicable, and "the Executive Branch lacked independent constitutional authority to authorize the transfer of funds," the court of appeals concluded that Defendants' plan to divert $2.5 billion in funds appropriated for military purposes to border wall construction was unlawful. App. 18a.

The court of appeals determined that Sierra Club, whose members are injured by Defendants' efforts to evade Congress's appropriations decisions, "has both a constitutional and an *ultra vires* cause of action." App. 19a. The court of appeals held that "because the Federal Defendants not only exceeded their delegated authority, but also violated an express constitutional prohibition designed to protect individual liberties"—the Appropriations Clause—"Sierra Club has a constitutional cause of action here." App. 25a. This conclusion flowed from this Court's guidance that "certain structural provisions give rise to causes of action." App. 20a (citing *Nat. Labor Relations. Bd. v. Noel Canning*, 573 U.S. 513, 556-57 (2014); *Bond v. United States*, 564 U.S. 211, 225-26 (2011); *Clinton v. City of New York*, 524 U.S. 417, 434-36 (1998); *INS v. Chadha*, 462 U.S. 919, 943-44 (1983);

United States v. McIntosh, 833 F.3d 1163, 1174-75 (9th Cir. 2016)).

The court further held that "[e]quitable actions to enjoin *ultra vires* official conduct do not depend upon the availability of a statutory cause of action; instead, they seek a 'judge-made remedy' for injuries stemming from unauthorized government conduct, and they rest on the historic availability of equitable review." App. 25a (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015)). Relying on decades of decisions from the D.C. Circuit as well as this Court, the court found that "[s]uch causes of action have been traditionally available in American courts." App. 26a (citing *Dart v. United States*, 848 F.2d 217, 223 (D.C. Cir. 1988) ("When Congress limits its delegation of power, courts infer (unless the statute clearly directs otherwise) that Congress expects this limitation to be judicially enforced."). Following the D.C. Circuit's precedents, the Ninth Circuit rejected Defendants' arguments that the Administrative Procedure Act displaced traditional equitable review and that Plaintiffs were required to show that they fell within a zone of interests protected by Section 8005. App. 30a–34a.

Finally, the court of appeals found that the district court did not abuse its discretion in granting an injunction against Defendants' wall construction. It rejected Defendants' argument "that Sierra Club will not be irreparably harmed because its members have plenty of other space to enjoy." App. 35a. And it found that the balance of equities and public interest favored enforcement of Congress's "calculated choice to fund only one segment of border barrier." App. 36a.

In dissent, Judge Collins "agreed that at least the Sierra Club has established Article III standing," but "conclude[d] that the transfers were lawful" and that Plaintiffs "lack[ed] any cause of action" to challenge them. App. 41a.

On July 31, 2020, this Court denied Plaintiffs' motion to lift the stay the Court had previously imposed. *See* Order, *Trump v. Sierra Club*, No. 19A60 (July 31, 2020). Justices Breyer, Ginsburg, Sotomayor, and Kagan would have granted the motion. *Id.*

REASONS TO DENY THE PETITION

Defendants' chief argument is that this Court should grant certiorari because their invocation of Section 8005 effectively precludes judicial review of their expenditure of billions of dollars on wall construction Congress refused to authorize—even if their actions indisputably harm plaintiffs and are not authorized by Section 8005 or any other act of Congress. *See* Pet. 16. But the court of appeals' rejection of this contention is correct. Indeed, no court has agreed with this sweeping argument, which would radically constrict the judiciary's traditional equitable powers; allow the Executive Branch to avoid review of *any* spending it undertakes, even when it is in direct contradiction to Congress's appropriations acts; and threaten individual property and liberty interests from unauthorized intrusion. Contrary to Defendants' claims, the Ninth Circuit faithfully applied this Court's precedents in recognizing the availability of a cause of action to seek equitable relief against Defendants' usurpation of Congress's powers to Plaintiffs' direct detriment. The decision below creates no circuit split, as the Ninth Circuit followed the D.C.

Circuit's lead in recognizing the availability of an equitable cause of action when the Executive Branch engages in unauthorized conduct that directly harms individuals' interests.

The court of appeals' determination on the merits that Defendants' actions are unlawful is also correct. Defendants' theory that Section 8005 authorizes them to finance civilian law enforcement activities by diverting billions of dollars through various military accounts, to spend funds Congress specifically denied them in an appropriations act, directly contradicts the text of Section 8005. And the court of appeals correctly found that Defendants' factual assertion that the diversion of military funds meets the statute's requirement of an unforeseen military emergency is not supported by the ample evidentiary record demonstrating that the border wall project was in no sense unforeseen.

Defendants' remaining arguments for review lack merit. Contrary to Defendants' claims, *see* Pet. 33-34, the Ninth Circuit's decision—which applies longstanding D.C. Circuit caselaw—does not open the floodgates to litigation over funds transfers, any more than the prior D.C. Circuit cases have. And the court of appeals correctly rejected the Defendants' vague assertions of "national security" concerns, *see* Pet. 34, because the record demonstrates that the Executive Branch presented those assertions to Congress, and Congress rejected them. If Defendants believe Congress appropriated too little money, their recourse is to make a new budget request to Congress, not to seek review of a court of appeals decision that correctly applies this Court's precedents, is consistent with other circuits' precedents, and presents no other issue worthy of certiorari.

I. THE COURT OF APPEALS' DECISION WAS CORRECT.

A. Plaintiffs Have a Cause of Action.

The court of appeals correctly applied precedents of this Court and other circuits to hold that Plaintiffs can proceed in equity to enjoin unconstitutional and *ultra vires* executive actions that directly injured them. As the court of appeals stated:

> [W]here, as here, Congress could not more clearly and emphatically have withheld [the] authority exercised by DoD, with full consciousness of what it was doing and in the light of much recent history, and Sierra Club satisfies the rigors of Article III standing, our obligation to hear and decide this case is virtually unflagging.

App. 19a (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 602 (1952) (Frankfurter, J., concurring) and *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (internal quotation marks omitted)).

As the court of appeals correctly recognized, Plaintiffs' claims arise from Defendants' efforts to circumvent congressional control over appropriations. Plaintiffs' claims are founded on the Constitution's vesting of the appropriations power in Congress, and the lack of any valid statutory authorization for Defendants to transfer military funds as an end-run around the CAA. Defendants' petition mis-characterizes Plaintiffs' claims as a mere statutory dispute about the scope of the Section 8005 transfer authority that Defendants assert. But Plaintiffs' claims arise under the Appropriations Clause and the

CAA, the spending bill that denied the funds that Defendants seek to spend.[1] "The CAA appropriated only $1.375 billion of the $5.7 billion the President had sought in border barrier funding"; limited construction to "the Rio Grande Valley Sector" in Texas; and, even within that sector, "imposed several limitations on the use of those funds, including by not allowing construction within certain wildlife refuges and parks." App. 213a–214a (quoting Consolidated Appropriations Act of 2019, Pub. L. No. 116-6, Div. A, §§ 230(a)(1), 231, 133 Stat. 13 (2019)). Although the government's Petition does not once mention the CAA, that act expresses Congress' judgment as to the permissible size and scope of a taxpayer-funded wall. It is Defendants' disregard of Congress's judgment that forms the basis for this lawsuit. Thus, the court of appeals correctly analyzed whether the Executive Branch could create an end-run around Congress's deliberate decision to exercise its constitutionally conferred power to appropriate funds only for a far more limited scope of border wall construction, to which the President acquiesced when he signed the CAA.

In holding that the Plaintiffs have a cause of action to challenge the Defendants' actions, the court

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[1] When Plaintiffs initially filed suit on February 19, 2019, Defendants had not even invoked Section 8005. The February 15, 2019 White House announcement revealed Defendants' plan to aggrandize wall construction by several billion dollars beyond what Congress appropriated, including $2.5 billion in "support for counterdrug activities." App. 4a. But the Executive Branch did not suggest that it would funnel billions of dollars into the Section 284 drug enforcement account. Plaintiffs' claim was then— and remains now—that Defendants had no authority to aggrandize wall construction because Congress had specifically denied the Executive Branch's request for those funds.

of appeals correctly applied this Court's precedents that "[g]enerally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." App. 26a (quoting *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958)). This Court has long reviewed such claims in a wide variety of cases. *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 165-66 (1993); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902).

Defendants maintain that equitable relief to preserve the guarantees of the Constitution's structural provisions is disfavored. Not so. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, "[t]he Government assert[ed] that 'petitioners have not pointed to any case in which this Court has recognized an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles.'" 561 U.S. 477, 491 n.2 (2010) (quoting Br. for United States at 22, *Free Enter. Fund*, 561 U.S. 477 (2010) (No. 08–861)). But, as the Court observed, private plaintiffs are entitled to such "relief *as a general matter*." *Id.* (emphasis added); *see also Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.").

The court of appeals' decision is also consistent with a long line of D.C. Circuit precedents recognizing causes of action to challenge *ultra vires* conduct by

Executive Branch agencies that harm individuals.[2] App. 27a–28a (citing *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322, 1325-26 (D.C. Cir. 1996) and *Dart v. United States*, 848 F.2d 217, 223–34 (D.C. Cir. 1988)). As the D.C. Circuit summarized, "[w]hen Congress limits its delegation of power, courts infer (unless the statute clearly directs otherwise) that Congress expects this limitation to be judicially enforced." *Dart*, 848 F.2d at 223. In particular, "*[j]udicial review is favored when an agency is charged with acting beyond its authority*." *Id.* at 221 (emphasis added). It makes no sense to require a statutory cause of action for such a claim, which asserts the *absence* of statutory authority. Rather, relief is grounded in the courts' equitable powers: "The responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction." *Chamber of Commerce*, 74 F.3d at 1327; *see also Stark v. Wickard*, 321 U.S. 288, 309-10 (1944); *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1172 (D.C. Cir. 2003) ("It does

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[2] Defendants do not identify any conflict between circuits on this point. To the contrary, the court of appeals' decision is consistent with its sister circuits' decisions in analogous cases. *See, e.g.*, *City of Chicago v. Barr*, 961 F.3d 882, 906, 919, 931 (7th Cir. 2020) (rejecting Executive Branch's broad claims of statutory spending authority and holding that "[w]hether deemed a statutory or a constitutional violation, the executive's usurpation of the legislature's power of the purse implicates an interest that is fundamental to our government and essential to the protection against tyranny"); *State of New York v. Dep't of Justice*, 951 F.3d 84, 101 (2d Cir. 2020) ("When the challenged action is not only unauthorized but also intrusive on power constitutionally committed to a coordinate branch, the action may violate the Constitution, specifically, its mandate for the separation of legislative from executive powers.").

not matter, therefore, whether traditional APA review is foreclosed, because 'judicial review is favored when an agency is charged with acting beyond its authority.'") (quoting *Dart*, 848 F.2d at 221).

The D.C. Circuit has consistently rejected the position Defendants advance here, which "would permit the President to bypass scores of statutory limitations on governmental authority" so long as the President maintains he is acting under some other unreviewable statute. *Chamber of Commerce*, 74 F.3d at 1332. Defendants' fear that recognition of an equitable claim here would open the door to "even . . . minor or technical violations" (Pet. 22), is entirely misplaced since the D.C. Circuit caselaw acknowledges that *ultra vires* review is of "extremely limited scope," and curbs only "'patent violation[s] of agency authority.'" *Am. Clinical Lab. Ass'n v. Azar,* 931 F.3d 1195, 1208-09 (D.C. Cir. 2019) (quoting *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 190 (D.C. Cir. 2006); *Indep. Cosmetic Mfrs. & Distribs. v. Dep't of Health, Educ. & Welfare*, 574 F.2d 553, 555 (D.C. Cir 1978)). And contrary to Defendants' assertions, *see* Pet. 16, the court of appeals' decision is fully consistent with this Court's decisions in *Dalton v. Specter*, 511 U.S. 462 (1994), and *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320 (2015).

First, contrary to Defendants' implication, Plaintiffs' constitutional claim under the Appropriations Clause is not a "garden-variety claim[] that an official acted in excess of his delegated statutory authority." Pet. 33. As the court of appeals correctly noted, "*Dalton* suggests that some actions in excess of statutory authority may be constitutional violations, while others may not. Specifically, *Dalton* suggests that a constitutional violation may occur

when an officer violates an express prohibition of the Constitution." App. 23a (citing *Dalton*, 511 U.S. at 472). The Appropriations Clause contains such a constitutional prohibition, declaring that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ." App. 23a (quoting U.S. Const. art. 1, § 9, cl. 7). The "fundamental and comprehensive purpose" of the Appropriations Clause "is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good," and Defendants' efforts to circumvent those judgments violate the Constitution. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 427-28 (1990).

Defendants seek to contort *Dalton*'s observation 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," 511 U.S. at 472, into a sweeping, inverse rule that the Executive Branch can never be challenged in court when it acts in excess of its authority and inflicts harm on individuals. Under the Defendants' view, if they simply invoke a statute in support of their spending action, whether or not it supports the expenditure, an Appropriations Clause violation is transmuted into an unavailable statutory claim. But neither this Court nor any other has read *Dalton* as Defendants do.

If Defendants' expansive theory of *Dalton* were correct, the Executive Branch could always evade review of unconstitutional and *ultra vires* conduct simply by asserting a statutory authorization and arguing that the plaintiffs do not have a right of action under that statute. Such a rule, as Judge Bork recognized decades ago, would be nonsensical: "[A] meritorious litigant, injured by *ultra vires* action,

would seldom have standing to sue since the litigant's interest normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987)); *see also Ctr. for Biological Diversity v. Trump*, No. 19-CV-00408, 2020 WL 1643657, at *25 (D.D.C. Apr. 2, 2020). Judge Bork further explained that "were a case like [*Youngstown*] to arise today, the steel mill owners would not be required to show that their interests fell within the zone of interests of the President's war powers in order to establish their standing to challenge the seizure of their mills as beyond the scope of those powers." *Haitian Refugee Ctr.*, 809 F.2d at 811 n.14. Under Defendants' view, however, had President Truman invoked some statute in support of the seizures that did not itself afford the mill owners a cause of action, they would have been precluded from challenging the seizure.

The court of appeals' decision is also consistent with this Court's decision in *Armstrong*, which confirmed, rather than undermined, the continued viability of equitable relief against unconstitutional executive action. As this Court explained, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 575 U.S. at 327 (citing Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. Rev. 345 (1956)). Unlike a statutory cause of action, "[t]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief . . .

depend on traditional principles of equity jurisdiction." *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318-19 (1999) (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2941, at 31 (2d ed. 1995)). Thus, in cases like this one, the question is simply "whether the relief [Plaintiffs] requested . . . was traditionally accorded by courts of equity." *Id.* at 319. And as *Armstrong* reaffirmed, "equitable relief . . . is traditionally available to enforce federal law" through injunctions against unlawful executive action. *Armstrong*, 575 U.S. at 329.

Defendants rely on *Armstrong*'s statement that "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations," 575 U.S. at 327. Pet. 33. But as set forth above, there is no such statutory limitation in this case. *Armstrong* requires a clear showing of congressional "intent to foreclose" equitable relief, 575 U.S. at 328 (citation omitted), and the only statute Defendants point to, Section 8005, is both inapposite and evidences no such intent. Defendants ignore the fundamental nature of Plaintiffs' constitutional claim—that Executive Branch officials have done an end-run around Congress's express denial of their appropriations request for a civilian law enforcement purpose, through a transfer of funds that were appropriated for other, military purposes, and in the absence of a valid statutory authorization for that transfer.[3]

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[3] *Armstrong*'s conclusion that plaintiffs there did not have a cause of action under the Supremacy Clause, 575 U.S at 325–27, is distinguishable. As the court of appeals rightly recognized, the Appropriations Clause "protects individual liberty." App. 24a. As Justice Kennedy observed, when "the decision to spend [is]

Even accepting for purposes of argument Defendants' contention that Section 8005 is "primarily if not exclusively intended to protect Congress's interests in the appropriations process" (Pet. 21), it does not follow that Congress intended to place all executive actions taken under an *assertion* of Section 8005 authority beyond judicial review, even where those actions are contrary to the Appropriations Clause and another statute, the CAA. Plaintiffs participated in the public process envisioned by the Framers in the Appropriations Clause; Plaintiffs advocated for limits on border wall construction to protect their property interests and ability to use and enjoy public lands that would be destroyed under Defendants' plans. And Plaintiffs prevailed in that political process when Congress largely denied the President's request, authorized only limited wall construction, and took care to provide for environmental protections and additional local consultation in those areas. Defendants assert that private actions "could often be antithetical to the interests of Congress" (Pet. 21) but they fail to demonstrate how, on this record, this private action contravenes congressional intent, when Plaintiffs seek redress for the injuries they have suffered by

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determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened." *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring). "The individual loses liberty in a real sense" in the absence of congressional control over the purse. *Id.* "If not for the Appropriations Clause, 'the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.'" *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.) (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213–14 (1833)).

Defendants' flouting of Congress's intent as expressed by its deliberate appropriations decision in the CAA.[4]

Defendants fail to carry the heavy burden this Court has required when the government takes the "extreme position" of seeking to preclude review of a "substantial statutory and constitutional challenge[]" to executive action. *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 680-81 (1986). They have failed to make "a showing of clear and convincing evidence, to overcome the strong presumption that Congress did not mean to prohibit all judicial review of executive action." *Id.* (citations and internal quotation marks omitted). This is the test even when only statutory violations are at issue. *See id.* at 680. Courts "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Id.* at 681; *see also Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015). And because Plaintiffs raise

[4] Defendants' argument that their invocation of Section 8005 as a defense to this lawsuit somehow precludes "[p]rivate enforcement" (Pet. 22) is especially troubling in light of their contention in a separate case that Congress also cannot enforce the limits it imposed on border wall funding. In a brief filed in April, Defendants asserted that Congress cannot seek judicial review of the limits on Section 8005 because "spending that allegedly exceeds statutory appropriations" does not inflict on the legislative branch "a concrete and traditional injury-in-fact, but rather [constitutes] on[ly] a generalized grievance about Executive noncompliance with the law, or at most an abstract dilution of legislative power." Suppl. Resp. Br. for Appellees on Reh'g En Banc, *U.S. House of Representatives v. Mnuchin*, No. 19-5176, 2020 WL 1902327 (D.C. Cir. April 16, 2020), at 14. It is hard to understand why Congress would have implicitly precluded "private enforcement" if Congress itself has no role in enforcing Section 8005's limitations.

constitutional claims, Defendants' efforts to evade review are particularly disfavored. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting that if "Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear") (citing *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974)). There is no indication, much less clear and convincing evidence, that Congress intended to preclude a right of action where, as here, the Executive Branch takes unauthorized action that inflicts direct cognizable harm on Plaintiffs.

Under the circumstances and on the factual record in this case, the court of appeals correctly held that "it is entirely sensible to give a clause that restricts the power of the federal government as a whole a reading that safeguards individual liberty" through equitable suits by individuals facing concrete, traceable, and redressable harms from executive action. App. 25a. There is nothing anomalous or disfavored about such actions. *See, e.g.*, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) (injunctive relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally"); *United States v. Stanley*, 483 U.S. 669, 683 (1987) (distinguishing *Bivens* claim from "redress designed to halt or prevent [a] constitutional violation," which is a "traditional form[] of relief") (citation omitted).

* * *

Defendants' position is that no one can challenge their diversion of billions of dollars that Congress appropriated for other purposes, and their use of those funds for a project Congress specifically rejected. But the court of appeals was correct in ruling

that in the absence of any indication that Congress intended to prohibit judicial examination of the executive action here, Defendants' infliction of concrete harm on Plaintiffs, in violation of the Appropriations Clause and the CAA, affords a cause of action in equity.

B. Defendants Have No Authority To Aggrandize Wall Construction By Billions Of Dollars That Congress Refused To Provide For That Purpose.

The district court was also correct on the merits. In fact, every court to examine the question has found that Defendants had no authority to divert billions of dollars to wall construction projects that Congress refused to fund. Section 8005 by its terms cannot be used to fund "item[s]" that have been "denied by the Congress." 132 Stat. at 2999. As the court of appeals recognized, Congress in the CAA funded only specific projects in southeastern Texas subject to additional environmental and public-engagement restrictions, and specifically considered and disallowed spending billions of taxpayer dollars on the wall sections at issue here. The court of appeals therefore correctly held that "Congress's broad and resounding denial resulting in a 35-day partial government shutdown must constitute a previous denial for purposes of Section 8005." App. 117a; *see also* App. 240a ("Construing section 8005 with an eye towards the ordinary and common-sense meaning of 'denied,' real-world events in the months and years leading up to the 2019 appropriations bills leave no doubt that Congress considered and denied appropriations for the border barrier construction projects that DoD now seeks to finance using its

section 8005 authority."); App. 353a ("[T]he reality is that Congress was presented with—and declined to grant—a $5.7 billion request for border barrier construction.").

Defendants' unnatural reading of "denied," which would apply only to specific rejections of budget-line requests, would defeat the purpose of Section 8005's limitation because Defendants could simply (as they did here) request items without reference to specific budget lines or subcomponents. *See* App. 212a (quoting official request for "$5.7 billion for construction of a steel barrier for the Southwest border" to "fund construction of a total of approximately 234 miles of new physical barrier"). According to Defendants, so long as they do not request that a project be funded from a specific budget line, the action is not "previously denied" for purposes of Section 8005. If that were the rule, Executive Branch officials could always subvert Section 8005 simply by making budget requests without specifying a funding agency or budget line. They would require Congress not only to reject a requested budget item but to specify that the Executive also cannot divert funds appropriated for other purposes to fund the rejected item. Not surprisingly, no court has adopted Defendants' interpretation. Such a reading is incompatible with the plain text of the statute, which "refers to 'item[s] . . . denied by the Congress,' not to *funding requests* denied by the Congress." App. 230a (alterations in original). Defendants' asserted interpretation is contrary to the ordinary meaning of "denied," because "a general denial of something

requested can, and in this case does, encompass more specific or narrower forms of that request." *Id.*[5]

The longest partial government shutdown in U.S. history ended with Congress's decision, "in a transparent process subject to great public scrutiny," to deny the administration's request to construct a barrier along the entire southern border including the areas at issue here. App. 241a. "To call that anything but a 'denial' is not credible." *Id.* The President has himself confirmed that Congress denied his request: "We wanted Congress to help us. It would have made life very easy. And we still want them to get rid of loopholes, but we've done it a different way. . . . We still want them to do it because it would be a little bit easier, but Congress wouldn't do it." Remarks by President Trump During Visit to the Border Wall (Sept. 18, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-visit-border-wall-san-diego-ca/.

Faced with this record, "to hold that Congress did not previously deny the Executive Branch's request for funding to construct a border wall would be to 'find secreted in the interstices of legislation the very grant of power which Congress consciously withheld.'" App. 117a (quoting *Youngstown*, 343 U.S.

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[5] Against the weight of judicial opinion, Defendants offer an opinion of the Governmental Accountability Office (GAO). Pet. 17 (citing *Department of Defense—Availability of Appropriations for Border Fence Construction*, B-330862, 2019 WL 4200949, at *1 (Comp. Gen. Sept. 5, 2019)). But as then-Judge Scalia wrote, GAO assessments are "expert opinion[s]" which courts "should prudently consider but to which [they] have no obligation to defer. . . . [I]t is the court that has the last word and it should not shrink from exercising its power." *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201–02 (D.C. Cir. 1984) (quotation and alteration marks omitted).

at 609 (Frankfurter, J., concurring)). As a district court in another case observed, "Congress repeatedly and deliberately declined to appropriate the full funds the President requested for a border wall along the southern border of the United States," and "[a]s Justice Field wrote more than a century ago, a court cannot shut its 'eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men.'" *Washington v. Trump*, 441 F. Supp. 3d 1101, 1121 (W.D. Wash. Feb. 27, 2020) (quoting *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879)). "[T]his Court is 'not required to exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, C.J.)). The President has already admitted that "Congress wouldn't do it." Remarks by President Trump During Visit to the Border Wall (Sept. 18, 2019), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-visit-border-wall-san-diego-ca/. This should end the matter: "'No' means no." App. 117a.

Even if Congress's denial were not so clear, Defendants would still lack authority for the independent reason that border wall construction is not an "unforeseen" military requirement, as Section 8005 demands. First, the court of appeals correctly rejected Defendants' argument that "unforeseen" should be equated with "unknown," because "'Congress' choice of words is presumed to be deliberate' and deserving of judicial respect.'" App. 112a (quoting *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018)). In line with its ordinary meaning,

the "unforeseen" requirement has been met in the past by "unanticipated circumstances (such as hurricane and typhoon damage to military bases) justifying a departure from the scope of spending previously authorized by Congress." App. 355a.

Here, by contrast, the purported necessity for the border wall was anything but an "unforeseen military requirement." The fact that Congress denied the funding does not make the Executive's asserted need for the wall "unforeseen." The Executive Branch was fully aware of its protracted dispute with Congress over the border wall proposal. Moreover, the asserted purpose of drug interdiction was also not "unforeseen": As early as February 2018, the President specifically claimed in his budget proposal to Congress that "$18 billion to fund the border wall" was necessary because "a border wall is critical to combating the scourge of drug addiction." Fiscal Year 2019 Budget Request 16, Dist. Ct. ECF No. 168-2, Ex. 10 (RJN); *see also* App. 355a ("Defendants' argument that the need for the requested border barrier construction funding was 'unforeseen' cannot logically be squared with the Administration's multiple requests for funding for exactly that purpose dating back to at least early 2018."). And "[n]early six months before the enactment of the 2019 DoD Appropriations Act," the President instructed the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security that "[t]he Secretary of Defense shall support the Department of Homeland Security in securing the southern border and taking other necessary actions to stop the flow of deadly drugs and other contraband . . . into this country." App. 111a (ellipsis in original). Both the President's asserted need for the border wall and the DHS request to DoD

to build that wall "were anticipated and expected" and neither was "'unforeseen' within the meaning of Section 8005." App. 112a.

Finally, the court of appeals correctly determined that the border wall project—which Defendants concede is a civilian law enforcement activity—does not qualify as a "military requirement" justifying a Section 8005 transfer. This requirement is not eliminated by DoD's limited authority under Section 284 to provide support to civilian agencies when Congress makes an appropriation for that purpose. The court explained that "a request for this support [for DHS's border wall for counternarcotics purposes] without connection to any military function fails to rise to the level of a military requirement for purposes of Section 8005." App. 116a. If the Executive Branch can convert any action taken for the benefit of another agency into a "military requirement" simply by having DoD take the action, the statutory phrase would impose no restriction at all and contravene the canon that no term of a statute should be rendered superfluous. *See, e.g.*, *McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016).

Congress understandably limited the use of Section 8005 to *military* requirements rather than support to civilian agencies. There is no indication that Congress intended through Section 284 to override that purpose and permit military budget lines (here, for in-service missiles and support for allied troops in Afghanistan, App. 5a–6a) to be ransacked for the benefit of other agencies' civilian missions *when Congress specifically denied funds to those agencies*. When Congress wishes to fund military support for civilian priorities, it does so by appropriating money into support accounts, such as

the Section 284 account. But Congress made no such appropriation for border wall construction, and Section 8005 does not provide a vehicle for overriding Congress's judgment. "To conclude that supporting projects unconnected to any military purpose or installation satisfies the meaning of 'military requirement' would effectively write the term out of Section 8005." App. 128a.

In sum, the court of appeals was plainly correct that the diversion of funds violated the Appropriations Clause and the CAA, and that Section 8005 does not authorize what Congress denied. Accordingly, the Court need not exercise review.

II. DEFENDANTS' OTHER ARGUMENTS DO NOT WARRANT REVIEW.

Defendants argue that this Court's intervention is warranted for two other, equally invalid reasons: a concern that a flood of litigation over transfer statutes will follow the court of appeals decision, and a claim that the injunction interferes with the Executive Branch's preferred counterdrug policy. Pet. 33–34.

1. There is no reason to expect a flood of litigation in response to the court of appeals' holding that Plaintiffs need not fall within a zone of interests created by Section 8005 in order to maintain their equitable causes of action alleging that Defendants' actions are unconstitutional and *ultra vires*. The D.C. Circuit has for decades recognized such *ultra vires* claims without requiring plaintiffs to fit within the zone of interests of a statute that defendants assert in defense but that plaintiffs maintain is inapplicable, without provoking any such flood. Where the

Executive Branch admits that Congress rejected its request after a protracted and public debate, and then attempts an end-run around Congress's decision anyway, an action should lie under longstanding precedents of this Court and the courts of appeals. Moreover, this Court has never declined review of a constitutional violation on a zone-of-interests basis. The court of appeals decision does nothing to disturb this settled status quo.

2. Defendants' cursory and unilateral assertion of necessity to build the wall—contrary to Congress's deliberate judgment after a contested appropriations process—cannot render this case worthy of certiorari. In any event, Defendants' unsupported claim that a wall is necessary is belied by the government's own data, which "points to a contrary conclusion." App. 39a & n.16; App. 269a. More fundamentally, Defendants already made the case to Congress that a wall was necessary to "to stanch the flow of illegal drugs," Pet. 17, and Congress exercised its exclusive power to deny that funding. Defendants may try again in their budget proposal to Congress for the next fiscal year, but they have offered no valid reason for this Court to disturb the court of appeals' decision vindicating the Constitution's placement of that decision in Congress's hands.

CONCLUSION

The petition should be denied.

Respectfully submitted,

Dror Ladin
Counsel of Record
Noor Zafar
Hina Shamsi
Omar C. Jadwat
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Sanjay Narayan
Gloria D. Smith
SIERRA CLUB ENVIRONMENTAL LAW PROGRAM
2101 Webster Street, Suite 1300
Oakland, CA 94612

Vasudha Talla
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111

Cecillia D. Wang
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111

David Donatti
Andre I. Segura
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS
P.O. Box 8306
Houston, TX 77288

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005

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