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, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

In Section 8005 of the Department of Defense Appropriations Act of 2019, Congress authorized the Secretary of Defense to transfer certain appropriated funds between Department of Defense (DoD) appropriations accounts "[u]pon determination by the Secretary . . . that such action is necessary in the national interest." Section 8005 contains a proviso stating "[t]hat such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." *Id.* In 2019, the acting secretary of defense transferred approximately $2.5 billion pursuant to § 8005 and another similar provision to make funds available for DoD to respond to a request from the Department of Homeland Security for counterdrug assistance under 10 U.S.C. § 284, including in the form of construction of fences along the southern border.

The questions presented are as follows:

1. Whether respondents have a cognizable cause of action to obtain review of the acting secretary's compliance with § 8005's proviso in transferring funds internally between DoD appropriations accounts.

2. Whether the acting secretary exceeded his statutory authority under § 8005 in making the transfers at issue.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because judicial review of administrative action is a crucial bulwark for liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

"This case," Justice Breyer observed, "raises novel and important questions about the ability of private parties to enforce Congress' appropriations power." *Trump v. Sierra Club*, 140 S. Ct. 1, 1 (2019) (Breyer, J., concurring in part and dissenting in part from grant of stay). In addressing these critical questions, the government points to *Dalton v. Specter*, 511 U.S. 462 (1994), which—according to the government—stands for the sweeping proposition that constitutional claims are nonjusticiable whenever they implicate statutory violations. *See* Pet. Br. at 21 ("Under the reasoning of this Court's decision in [*Dalton*], respondents' claims are statutory, not constitutional.");

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. Further, no party's counsel authored this brief in any part and *amicus* alone funded its preparation and submission.

see also Sierra Club v. Trump, 963 F.3d 874, 889 (9th Cir. 2020) (summarizing the government's belief that *Dalton* "means that when there is a claim that an Executive Branch official acted in excess of his statutory authority, there is no constitutional violation").

Contrary to the government's arguments, however, *Dalton* adds nothing to the resolution of this case's "novel and important questions" regarding constitutional causes of action. Lower courts have always interpreted *Dalton* to preclude judicial review in a narrow class of cases: challenges to the president's exercise of unfettered statutory discretion. *See, e.g.*, *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1359–60 (Fed. Cir. 2006) (en banc) (applying *Dalton* preclusion to claims against president's statutory powers to regulate foreign commerce); *Mt. States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (finding *Dalton* to be "inapposite" when the enabling act "places discernable limits on the president's discretion"). It follows that *Dalton* has no bearing here, a case involving *ultra vires* and constitutional claims against an agency rather than the president (even though his name is in the case caption).

The government seeks to expand *Dalton* beyond its four corners and thereby transform its holding into a presumption against judicial review of administrative action. "If [the government's] expansive theory of *Dalton* were correct," respondents rightly have argued, then "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" due to prevailing justiciability

doctrines. Opp. Br. to Cert. Pet. at 19. The government's "expansive theory" would obviate the respondent's claim under the Appropriations Clause; more generally, it would deny access to courts for a much broader class of claims than those at issue in *Dalton*.

In rejecting the government's overbroad interpretation of *Dalton*, the Ninth Circuit distinguished that case from this one. *See Sierra Club*, 963 F.3d at 889–90. This brief supplements the lower court's reasoning with further reasons why the Court should reject the government's self-serving gloss on its precedent.

ARGUMENT: *DALTON V. SPECTER* IS INAPPOSITE TO THIS CASE

The government claims that *Dalton* "fully applies" to the controversy at hand, Pet. Br. at 32, but this is fully wrong. *Dalton* is fully inapposite.

Crucially, *Dalton* involved judicial review of *presidential* action, an executive order to shut down a naval base. *See* 511 U.S. at 465 (describing president's statutory powers). Here, by contrast, respondents argue that an agency—the Defense Department—performed an end-run around Congress. Not all defendants are created equal, and this Court exercises much greater restraint in reviewing presidential action, "[o]ut of respect for the separation of powers and the unique constitutional position of the President." *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992). When an agency, and not the president, is the defendant, then the "default presumption of the availability of review for challenges to whether a government official has legal authorization remains a core element

of our commitment to a federal government of limited powers." Kevin Stack, *The President's Statutory Powers*, 62 Vand. L. Rev. 1171, 1201 (2009); *see also Ethyl Corp. v. EPA*, 541 F.2d 1, 68 (D.C. Cir. 1976) (en banc) (Leventhal, J., concurring) ("Congress has been willing to delegate its legislative powers broadly—and the courts have upheld such delegations—because there is court review to assure that the agency exercises the delegated power within statutory limits."). The Court should resist the government's attempt to extend *Dalton*'s presumption of preclusion beyond rare controversies involving judicial review of the president.

Further distinguishing *Dalton*, the statutory regime there conferred unfettered discretion on the president and thus made judicial review a practical impossibility. *See* 511 U.S. at 476 ("The 1990 Act does not at all limit the President's discretion in approving or disapproving the Commission's recommendations."). Absent any textual limits whatsoever, there were no judicially manageable standards to facilitate review. Here, in stark contrast to *Dalton*, respondents alleged that the Defense Department contravened explicit constitutional and statutory constraints under the Appropriations Clause and the Consolidated Appropriations Act of 2019, respectively. The Court has interpreted the Appropriations Clause to require that "the payment of money from the Treasury must be authorized by a statute," *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990), and respondents argue that the border wall funding is not "authorized by a statute" because it contravenes clear textual limits.

Unlike respondents, the *Dalton* plaintiffs failed to allege any constitutional violation at all. Instead, the

Court in *Dalton* took issue with the lower court's unprompted contention that "whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." 511 U.S. at 471. The amorphous (and *sua sponte*) constitutional questions at issue in *Dalton* make for an apples-to-oranges comparison with the respondents' specific legal claims here.

Finally, this case and *Dalton* are distinguishable by virtue of their divergent backgrounds. When it comes to a viable constitutional cause of action, this Court "refuse[s] to turn a blind eye to the context in which this policy arose." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *see also Dept. of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) ("Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision."). Here, the government nakedly defied Congress's exclusive and plenary power of the purse. The Court is under no duty to remain willfully ignorant of the fact that the executive branch announced it would shuffle appropriations to pay for a border wall only one day after the president signed a spending bill whose high-profile deliberations had centered squarely on the availability of such funds. *See California v. Trump*, 963 F.3d 926, 932–34 (9th Cir. 2020) (recounting legislative and administrative histories of funds that are disputed in this case). *Dalton*, in contrast, involved no such controversy. To the contrary, Congress lent its tacit approval to the presidential action. *See* 511 U.S.

at 466 (noting that a resolution disapproving the president's decision was roundly rejected by Congress).

Perhaps unsure in its legal reasoning, the government resorts to policy arguments in support of its expansive gloss on *Dalton*. Thus it warns of "[o]pportunistic litigation" limiting the Defense Department's "flexibility" if the Court does not read *Dalton* to preclude the respondents' constitutional claims. Pet. Br. at 26. Such fears are unfounded. Were the Court to reject the government's position, subsequent suits would be as rare as the circumstances of this case. That is, such litigation would occur only as often as the Defense Department abused its delegated authority to spend billions of dollars on a policy rejected by Congress.

CONCLUSION

Because *ultra vires* agency action must be subject to judicial review, the Court should affirm the lower court.

Respectfully submitted,

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