No. 20-685

IN THE

Supreme Court of the United States

JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

—v.—

SIERRA CLUB, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether environmental interests are within the zone of interests of a statute that directly addresses land use, affects the application of environmental protections, and is intertwined with environmental considerations from start to finish.

2. Whether 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.

3. Whether the court of appeals correctly held that the Petitioners may not divert $3.6 billion from military construction projects to aggrandize a civilian law enforcement wall that Congress refused to fund.

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.

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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 harmed by the Executive Branch's unauthorized construction of a border wall. 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.

The Executive Branch diverted $3.6 billion that Congress appropriated for servicemembers and their families to instead build a border wall that Congress repeatedly refused to fund. This transfer of military construction funds was in addition to $2.5 billion diverted from other military accounts to the border under a separate claim of statutory authority and addressed in a separate petition, *Biden v. Sierra Club*, No. 20-138 (cert. granted Oct. 19, 2020, vacated and remanded July 2, 2021). Notwithstanding Congress's refusal to authorize this spending, the government maintained that an emergency military construction statute, 10 U.S.C. § 2808 ("Section 2808") authorizes an unlimited transfer of military construction funds to civilian priorities, waives all otherwise applicable environmental protections, and is effectively unreviewable. None of the judges below agreed with the sweeping claim of unreviewable authority, and the majority agreed that Section 2808 did not authorize the diversion of military funds to build border wall sections spread over more than a thousand miles.

Since the time the government filed its petition, it has conceded in a related case that the issues presented here no longer merit this Court's review at this time, and has repudiated the claims of military necessity it previously pressed. For this reason alone, the petition should be denied. Nor is there any basis in equity or this Court's precedents for granting the petition only to vacate the decision below, where there are no valid grounds to grant review and the case is not moot. Finally, the court of appeals decision was grounded in statutory text and this Court's precedents, involves a statutory authority that the government no longer invokes, addresses a context that shows no indication of arising again, was correct on the merits, and does not merit review.

STATEMENT OF THE CASE

A. Underlying Facts

Throughout 2018, President Trump sought, and Congress denied, funding to construct a wall along the U.S.-Mexico border, across the lands that Plaintiffs' members live near, use, protect, and treasure. In December 2018, this dispute 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." 20-138 Pet. 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 White House announced that simultaneously with the signing of the CAA the President would "take Executive action" to secure additional funds far beyond what Congress appropriated, and that he had "so far" identified up to $8.1 billion for wall construction. 20-138 Pet. App. 4a. This "Executive action" to override Congress's appropriations judgment included the President's declaration of a national emergency and intention to divert up to $3.6 billion from congressionally-approved military construction projects "to build the border wall." *Id.* at 215a.

The same day, the President held a press conference to explain his signing of the CAA and simultaneous declaration of a national emergency. "In announcing the national emergency declaration, the President stated that although he 'went through Congress' for the $1.375 billion in funding, he was 'not happy with it.'" 20-138 Pet. App. 313a. "The President added: 'I could do the wall over a longer period of time. I didn't need to do this. But I'd rather do it much faster. . . . And I think that I just want to get it done faster, that's all.'" *Id.*

For the first time in U.S. history, Congress disapproved the declaration of an emergency.

Bipartisan majorities of both houses twice voted to terminate the emergency declaration; the President vetoed both resolutions. *See* H.R.J. Res. 46, 116th Cong. (2019); 165 Cong. Rec. H2799, H2814-15 (2019); See S.J. Res. 54, 116th Cong. (2019); 165 Cong. Rec. S5855, S5874-75 (2019).

"[A]lthough the President authorized use of military construction funds under Section 2808 in his February 15 proclamation, Defendants did not exercise this authority for several months." Pet. App. 111a. During that time, DoD determined which funds would be stripped from military construction projects that it had previously told Congress were necessary to support servicemembers and military missions and used instead to pay for a civilian border wall.

On September 5, 2019, the Secretary of Defense authorized the diversion of $3.6 billion from funding Congress allocated to "projects includ[ing] rebuilding hazardous materials warehouses at Norfolk and the Pentagon; replacing a daycare facility for servicemembers' children at Joint Base Andrews, which reportedly suffers from 'sewage backups, flooding, mold and pests'; and improving security to comply with anti-terrorism and force protection standards at Kaneohe Bay." Pet. App. 113a–114a.

Congress specifically exempted ecologically sensitive areas from wall construction in the CAA and has enacted numerous statutes that act to protect borderlands from construction, such as the National Monuments Act. Nevertheless, the Secretary of Defense announced that invocation of Section 2808 waived all environmental law that otherwise applied to border wall construction. *See* Pet. App. 75a–76a.

Plaintiffs' members own nearby property and regularly use the lands on which border wall construction occurred in contravention of Congress's refusal to appropriate funds for the project. In addition, Plaintiff SBCC and its member organizations have themselves been directly injured by Defendants' actions. For example, the Texas Civil Rights Project, a member organization of SBCC, has been forced to divert resources to Laredo, Texas to aid Texas landowners threatened by land seizure. Defendants' "announcement of imminent land seizure and 'military construction' across 52 miles of borderlands in Laredo, Texas has caused . . . TCRP to divert scarce resources in protection of Texas landowners." Pet. App. 33a. "TCRP has had to expand its operations into Laredo, Texas, even though Laredo is 'a substantial distance from the nearest TCRP office' in Alamo, Texas, and it is 'prohibitive to directly represent anyone in a region where [TCRP] do[es] not have a physical TCRP office.'" *Id.*

On January 20, 2021, President Biden issued a Proclamation terminating "the national emergency declared by Proclamation 9844, and continued on February 13, 2020 (85 Fed. Reg. 8715), and January 15, 2021," and directing that "the authorities invoked in that proclamation will no longer be used to construct a wall at the southern border." 86 Fed. Reg. 7225 (cleaned up).

On June 11, 2021, the government announced that there would be no further wall construction on the projects that had relied on diverted DoD funds. The government noted that the construction projects had "diverted critical resources away from military training facilities and schools, and caused serious risks to life, safety, and the environment." *Department*

of Defense and Department of Homeland Security Plans for Border Wall Funds (June 11, 2021), https://www.whitehouse.gov/omb/briefing-room/2021/06/11/fact-sheet-department-of-defense-and-department-of-homeland-security-plans-for-border-wall-funds/ ("Fact Sheet"). The government further observed that "[b]uilding a massive wall that spans the entire southern border and costs American taxpayers billions of dollars is not a serious policy solution or responsible use of Federal funds." *Id.*

As the government acknowledged, the challenged wall projects "redirected billions of dollars Congress provided for supporting American military personnel and their families and for investing in military installation infrastructure and vehicles, aircraft, and ships." *Id.* Under the new policy, "no more money will be diverted for the purposes of building a border wall, and DOD has started cancelling all border barrier projects using the diverted funds." *Id.* Instead, DoD will return unspent funds to "on-base schools, hangars, housing, and essential operational and training facilities." *Id.*

B. 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.

1. Defendants' initial diversion of $2.5 billion of military funds

Defendants first diverted $2.5 billion from other military accounts, citing 10 U.S.C. § 284 ("Section 284") as its purported authority. As DoD's Section 284 account contained less than a tenth of the $2.5 billion it sought to funnel through the account, Defendants also invoked section 8005 of the DoD Appropriations Act of 2019 ("Section 8005") and related provisions to divert billions to wall construction. 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. On June 28, 2019, the district court issued a permanent injunction that extended to the full $2.5 billion in wall construction that Defendants had announced.

Defendants sought an emergency stay of the district court's injunction. On July 3, 2019, the court of appeals denied the stay motion in a published 2-1 opinion. On July 26, 2019, this Court issued a one-paragraph order staying the permanent injunction. *Trump v. Sierra Club,* 140 S. Ct. 1 (2019). 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. 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.*

On October 19, 2020, this Court granted the government's petition for certiorari to consider the court of appeals decision. After the Biden administration took office and suspended wall construction, this Court on July 2, 2021, granted the government's motion to vacate and remand in light of the changed circumstances.

2. Defendants' diversion of $3.6 billion from military construction funds

Plaintiffs sought the injunction at issue here on October 11, 2019, just over a month after Defendants announced eleven wall construction projects ostensibly under the authority of Section 2808. The district court granted a permanent injunction on December 11, 2019, but stayed the injunction, stating that that "the Supreme Court's stay of this Court's prior injunction order appears to reflect the conclusion of a majority of that Court that the challenged construction should be permitted to proceed pending resolution of the merits." Pet. App. 169a.

On October 9, 2020, the court of appeals affirmed the district court's permanent injunction in a 2–1 decision. All three judges agreed that Plaintiffs had a cause of action to challenge the government's reliance on Section 2808 to construct a wall that injured its members' property and use of public lands. The majority found a cause of action available under the Constitution, Pet. App. 40a–41a, while Judge Collins found a cause of action available under the

Administrative Procedures Act (APA), 5 U.S.C. 701 *et seq.*, *id.* at 79a–84a (Collins, J., dissenting).

Distinguishing Section 2808 from Section 8005, Judge Collins concluded that "§ 2808 differs from that statute in a critical respect that warrants a different conclusion here." Pet App. 82a (Collins, J., dissenting). In particular, he found that plaintiffs' claims fell squarely within the zone of interests of the statute at issue, and therefore supported a cause of action under the APA. According to Judge Collins, as Section 2808 contemplates the waiver of laws impeding construction, and environmental laws "are one of the most familiar potential obstacles to carrying out construction projects . . . such laws are thus within the contemplation of this language." *Id.* at 82a–83a. "Because an invocation of § 2808 thus *itself* sets aside the environmental laws that protect the interests asserted by the Plaintiffs here, the limitations in § 2808 on the exercise of that authority arguably protect the Organizations' environmental interests . . . ." *Id.* at 83a. "As is confirmed by the Secretary's memorandum simultaneously invoking § 2808 and waiving environmental laws under that statute, environmental considerations are entwined with military construction under § 2808 'from start to finish' and are plainly within the 'scope' of that provision." *Id.* at 84a (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 n.7, 227 (2012)).

On the merits, Chief Judge Thomas wrote for the court of appeals that Congress had not appropriated funds for this particular border wall construction, and that Defendants could not rely on Section 2808 to make up the shortfall by transferring billions from military construction projects to

unfunded wall projects. The court of appeals found Section 2808 inapplicable because the border wall construction projects do not satisfy at least two of the statute's requirements: "they are neither necessary to support the use of the armed forces, nor are they military construction projects." Pet. App. 41a.

As to the first requirement, the court of appeals explained that "(1) the administrative record shows that the border wall projects are intended to support and benefit DHS—a civilian agency—rather than the armed forces, and (2) the Federal Defendants have not established, or even alleged, that the projects are, in fact, *necessary* to support the use of the armed forces." Pet. App. 42a.

The court of appeals found that the record clearly showed that the border wall was intended to support civilian law enforcement. The court's conclusion that a border wall supports civilian law enforcement—rather than the use of the armed forces—followed from Congressional design: it is "DHS, which, by statute, is tasked with '[s]ecuring the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States.'" Pet. App. 43a (quoting 6 U.S.C. § 202).

The court of appeals next interpreted "necessary" according to its plain meaning of "required" or "needed." Pet. App. 45a. It observed that "absent from the record is any determination by the Secretary that the projects are actually necessary." Pet. App. 48a.

The court of appeals rejected Defendants' claim that any necessity determination was committed to the Secretary of Defense's unreviewable discretion.

First, "[t]he border wall construction projects further the goals of DHS—a civilian law enforcement agency—and the determination that the projects are necessary, in any sense, is a law enforcement calculation, not a military one." Pet. App. 47a. Moreover, "[t]he determinations at issue here, while important, are lawmaking decisions that are 'a job for the Nation's lawmakers, not for its military authorities.'" *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).

The court of appeals also determined that 9 of the 11 border wall projects failed the statute's requirement that it be used only for "military construction."[1]

The government had offered two alternative arguments why the civilian border wall projects constituted military construction: either "administratively assigning the projects to Fort Bliss renders them one and the same as Fort Bliss for purposes of the statute," or "bringing land under military jurisdiction for real property accountability purposes renders the border wall 'other activity under the jurisdiction of the Secretary of a military department.'" Pet. App. 50a (quoting 10 U.S.C. § 2801). The court of appeals rejected both arguments.

First, although the government had "assigned" the wall projects to Fort Bliss, "most projects are hundreds of miles away from Fort Bliss"; the government did not even allege any "operational ties between the projects and any of the military activities conducted at Fort Bliss," and could "cite no other

[1] Plaintiffs did not dispute that the two projects on the Goldwater Range constituted "military construction" under the statutory definition. Pet. App. 51a n.10.

purpose underlying the administrative assignment, besides pure administrative convenience, that compels the conclusion that the projects should be considered part of Fort Bliss for purposes of Section 2808." Pet. App. 51a–52a. The court of appeals rejected the government's claim of "a wholly unlimited process," where military construction funds could be used anywhere, for any purpose, so long as there was an administrative assignment of a parcel of land to some distant and unrelated military installation. Pet. App. 53a–54a.

Next, relying on this Court's decision in *Yates v. United States*, 135 S. Ct. 1074, 1087 (2015), the court of appeals declined to adopt the government's unbounded interpretation of the phrase "other activity," because it reduced the specific terms that Congress supplied to cabin that definition, "base, camp, post, station, yard, [or] center" to mere surplusage and would "allow one general word to render specific words meaningless." Pet. App. 54a–55a. The Court explained that "where there is no guidance or indication from Congress that such an expansive interpretation is favored, and particularly where doing so would produce a result contrary to the express will of Congress, it is untenable for us to adopt such an interpretation." Pet. App. 57a.

Judge Collins dissented. Although he agreed with the majority that Respondents have a cause of action, he concluded that "DoD properly invoked § 2808 in undertaking these 11 projects." Pet. App. 84a.

REASONS TO DENY THE PETITION

Since the time the government filed its petition, it has conceded in a related case that the issues presented here do not merit the Court's review at this time, and has repudiated the claims of military necessity it made in support of this petition. For this reason alone, the petition should be denied. There is no other justification for granting the petition, and this Court has never before granted a petition when the underlying case is not moot, when there is no indication that the courts below were unaware of a material fact or law that would undermine a premise on which their judgments rested, and when the petitioner itself has abandoned the positions advanced in its petition. In any event, the lower court's decision was correct and does not justify plenary review.

I. THE GOVERNMENT HAS CONCEDED THAT THE ISSUES IN THIS CASE DO NOT MERIT THE COURT'S PLENARY REVIEW AT THIS TIME.

In its Petition, the government argued that review was warranted "for the same reasons that supported the Court's decision to grant review in the Section 8005 litigation," and because the court of appeals decision "would frustrate the goals of both the President's declaration of a national emergency that requires the use of the armed forces and also the reprioritization of military construction funds, which the Secretary determined were 'necessary to support such use of the armed forces.'" Pet. 32–33 (quoting 10 U.S.C. § 2808(a)). The government has now repudiated both rationales.

In the Section 8005 litigation, the government represented on June 11, 2021 that the court of appeals decision no longer "warrant[s] this Court's plenary review at this time in light of the greatly changed circumstances." No. 20-138 Mot. to Vacate and Remand 11. The government had initially argued that "transfer of military funds to assist in the construction of fences on the southern border to stanch the flow of illegal drugs" was of national importance, and that the lower court decision "interfere[s] with Executive Branch conduct that is of importance to national security." No. 20-138 Pet. at 17 (quotation and alteration marks omitted). But on June 11, 2021, the government reversed course, conceding that wall construction using diverted military funds is "not a serious policy solution or responsible use of Federal funds," deprives the military of "critical resources," and does not effectively further the interdiction of contraband. Fact Sheet. The government announced that it would not construct any additional wall using funds diverted from military accounts. The Court on July 2, 2021, granted the government's motion, vacated the lower court decision, and remanded the litigation.

The government has similarly abandoned any claim that certiorari is necessary to avoid frustration of any ongoing or future effort to divert DoD's military construction funds to unfunded border wall projects. On January 20, 2021, the President declared: "I have determined that the declaration of a national emergency at our southern border in Proclamation 9844 of February 15, 2019 (Declaring a National Emergency Concerning the Southern Border of the

United States), was unwarranted." 86 Fed. Reg. 7225. As the President explained, "building a massive wall that spans the entire southern border is not a serious policy solution. It is a waste of money that diverts attention from genuine threats to our homeland security." *Id.* On June 11, the government further acknowledged that rather than supporting the armed forces, siphoning money from military construction projects "[s]hortchanged the Military," by "redirect[ing] billions of dollars Congress provided for supporting American military personnel and their families and for investing in military installation infrastructure and vehicles, aircraft, and ships." Fact Sheet. Rather than seeking to use the funds at issue here on border wall construction, DoD will return unspent funds to "on-base schools, hangars, housing, and essential operational and training facilities." *Id.* There is thus no cause for the Court to review the lower court decision.

In the prior border wall case, the Court had granted certiorari, and concluded that given changed circumstances, remand with an order to vacate the lower court decision was warranted. Here, by contrast, the Court has not granted certiorari. As the government has abandoned the very arguments upon which it initially sought certiorari, the proper course here is simply to deny the petition.

II. THERE IS NO BASIS IN PRECEDENT OR EQUITY TO GRANT THE PETITION FOR THE PURPOSE OF VACATUR.

Given the government's abandonment of the grounds for its petition, it is not appropriate to grant the petition and remand to the court below with directions to vacate the decision. To do so would be

entirely unprecedented. Moreover, to the extent the government believes changed circumstances might warrant relief from the injunction, Federal Rule of Civil Procedure 60(b) offers the proper recourse.

This Court has instructed that granting certiorari to vacate a non-moot case may be appropriate "[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). But that standard is not met here. The threshold requirement is a "reasonable probability" that a changed circumstance undermines a premise on which the decision below rests, so that the lower court should be given an opportunity to reconsider the challenged holding. There is no intervening factor that suggests the lower court overlooked a material fact or law and might decide the case differently.

Nothing in the government's January 20, 2021, decision to terminate the declared emergency or its June 11 announcement would "reveal a reasonable probability" that the court of appeals would now reject some premise it relied upon in deciding the government's appeal. The lower court's conclusion that the government lacked authority to spend $3.6 billion in military construction funds to construct specific wall sections does not even arguably turn on whether the government would ultimately complete each challenged project, or later abandon course. That the government has now repudiated its earlier claim

of emergency and its prior diversion of military funds cannot plausibly buttress the legality of its earlier actions.

Granting certiorari under these circumstances would be unprecedented. Plaintiffs are not aware of a single case—and the government has so far identified none—in which this Court has granted certiorari of a non-moot, non-certworthy petition in the absence of either a confession of error or a finding that the lower court may not have considered facts or law that could plausibly alter the lower court's analysis. This Court's prior GVR decisions based on changed circumstances make this requirement plain. In *N.L.R.B. v. Federal Motor Truck Co.*, 325 U.S. 838 (1945) (per curiam), *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 325 U.S. 838 (1945) (per curiam), and *N.L.R.B. v. E.C. Atkins & Co.*, 325 U.S. 838 (1945) (per curiam), the courts of appeals had considered National Labor Review Board orders authorizing the unionization of militarized employees during wartime. In deciding the cases, the courts of appeals were unaware that the employees at issue had recently been demilitarized. Lacking that essential context, the Sixth Circuit in the *Federal Motor Truck* and *Jones & Laughlin Steel* cases had rejected the NLRB's unionization orders, ruling that "the Board's fatal error" was disregarding the militarized guards' "paramount duty as militarized police of the United States Government." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 331 U.S. 416, 420 (1947) (describing vacated Sixth Circuit holding). The Seventh Circuit had reached a similar conclusion, holding that militarized guards could not join a union because "[n]othing should be permitted which will interfere in any degree or to any extent with the obligation which these guards have with the military."

N.L.R.B. v. E.C. Atkins & Co., 147 F.2d 730, 742 (7th Cir. 1945), *vacated,* 325 U.S. 838 (1945). In its petitions for certiorari, the NLRB informed the Court that the lower court decisions did not account for the fact that the employees had been demilitarized.

In all the *NLRB* cases, the lower court was unaware of a material fact that might have affected the decisions. That the employees no longer owed any duty to the military presented a clear "intervening development[]" that revealed "a reasonable probability that the decision below rest[ed] upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence*, 516 U.S. at 167. This Court accordingly granted the petitions, vacated the decisions below, and remanded to permit the lower courts to consider in the first instance the effect of any demilitarization of employees on the NLRB's orders. *See Federal Motor Truck Co.*, 325 U.S. at 838; *accord Jones & Laughlin Steel Corp.*, 325 U.S. at 838; *E.C. Atkins & Co.*, 325 U.S. at 838–39.

Here, by contrast, the court of appeals' legal analysis did not rest on the status of spending or construction. Nor does the government's decision to terminate the emergency and return some of the disputed funds plausibly undermine any premise on which the lower court relied to determine that the diversion and construction were unlawful and subject to judicial review.

The Court's vacatur of *Biden v. Sierra Club*, No. 20-138, is not to the contrary. The Court did not grant certiorari in that case when it was concededly unworthy of plenary review. To the contrary, the Court granted certiorari in October 2020 and set the

case for argument.[2] Here, by contrast, given the government's concessions, it is plain that the decision below is not worthy of plenary review.

Finally, there is no equitable reason to grant certiorari for the purpose of vacatur, particularly where the government has recourse, through a Rule 60(b) motion in the district court, should it believe changed circumstances warrant relief from the injunction. The Court has instructed that "[j]udicial efficiency and finality are important values, and our GVR power should not be exercised for mere convenience." *Stutson v. United States*, 516 U.S. 193, 197 (1996) (quotation marks and citation omitted). To the extent that the Court may "suspect that a lower court has erred and wish to correct its error, [it] should grant certiorari and decide the issue [itself] in accordance with the traditional exercise of [its] appellate jurisdiction." *Youngblood v. W. Virginia*, 547 U.S. 867, 874 (2006) (Scalia, J. dissenting). But vacating without a finding of error so that the lower courts can consider again the same questions and the

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[2] In *Kiyemba v. Obama*, 559 U.S. 131 (2010) (per curiam), similarly, the Court granted certiorari while the case still presented an important issue worthy of plenary review: "whether a federal court exercising habeas jurisdiction has the power to order the release of prisoners held at Guantanamo Bay" where "release into the continental United States is the only possible effective remedy." *Id.* (quotation marks omitted); *see also Kiyemba v. Obama*, 563 U.S. 954 (2011) (Breyer, J., Statement respecting denial of the petition for writ of certiorari) (The "Court initially granted certiorari to resolve the important question whether a district court may order the release of an unlawfully held prisoner into the United States *where no other remedy is available*."). The Court vacated and remanded the case when the question on which it had already granted review was no longer at issue due to the intervening availability of alternate relief.

same record would amount to "a tutelary remand, as to a schoolboy made to do his homework again." *Id.* (quotation marks and citation omitted); *see also Andrus v. Texas*, 140 S. Ct. 1875, 1888 (2020) (Alito, J., dissenting) (rejecting "tutelary remand" as "a misuse of our supervisory authority").

Moreover, in the Section 8005 case, the government predicted that a flood of litigation over transfer statutes might result from recognizing the availability of an equitable cause of action, because of agencies' frequent use of "commonplace" transfer statutes. No. 20-138 Pet. 33–34. But here, the government has made no similar claim, nor could it; there is no "commonplace" use of Section 2808 and there are no similar emergency construction statutes. The statute has only rarely been invoked in the decades since it was enacted, and never for a domestic project that Congress considered and refused to fund. *See* Michael J. Vassalotti & Brendan W. McGarry, Cong. Rsch. Serv., IN11017, Military Construction Funding in the Event of a National Emergency (2019). And in any event, while the Court has expressed doubt that Plaintiffs have a "cause of action to obtain review of the Acting Secretary's compliance with Section 8005," *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.), Judge Collins noted, in agreeing with the majority on the existence of a cause of action, that Section 2808 "differs from [Section 8005] in a critical respect that warrants a different conclusion here," Pet App. 82a (Collins, J., dissenting). *See* Section III, *infra*.

The decision below does not impede any government function or threaten a flood of litigation, and there is no plausible reason that the government's decision to end construction would lead the lower

courts to decide the cause of action or legality of construction differently. To the extent changed circumstances warrant relief from judgment, the government can pursue that below. There is no basis this Court's precedents or in equity to grant certiorari in this case for the purpose of vacatur.

III. THE COURT OF APPEALS DECISION WAS CORRECT.

The court of appeals was correct both that Plaintiffs have a cause of action and that the diversion of funds was unauthorized.

First, the conclusion that people who own nearby property and regularly use the lands affected by construction may sue over wrongful invocation of a statute addressing land use follows from straightforward application of this Court's precedents. As Judge Collins observed, this case is on all fours with the Court's decision that a cause of action was available in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012): "As is confirmed by the Secretary's memorandum simultaneously invoking § 2808 and waiving environmental laws under that statute, environmental considerations are entwined with military construction under § 2808 'from start to finish,' and are plainly within the 'scope' of that provision." Pet. App. 84a (quoting *Patchak*, 567 U.S. at 225 n.7, 227). In addition, the court of appeals was correct that a constitutional cause of action is available to challenge the Executive Branch's attempt to usurp Congress's spending power. *See, e.g.*, *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2020) ("[W]henever a separation-of-powers violation occurs, any aggrieved party with standing may file a constitutional

challenge."). Whether under the statute or the Constitution, Plaintiffs have a cause of action to challenge unlawful construction that injures their members' properties and their use of public land.

Second, the court of appeals was correct on the merits that the border wall projects fail the requirements of Section 2808, because they are neither "necessary to support the use of the armed forces, nor are they military construction projects." Pet. App. 41a.

As to the first requirement, the court of appeals correctly observed that the "the administrative record shows that the border wall projects are intended to support and benefit DHS—a civilian agency—rather than the armed forces." Pet. App. 42a. Indeed, the government now concedes that diverting military construction funds to the border wall in fact "[s]hortchanged the Military," stripping it of much-needed funding that "Congress provided for supporting American military personnel and their families and for investing in military installation infrastructure." Fact Sheet; *see also* 6 U.S.C. § 202 (assigning Secretary of DHS, a civilian law enforcement agency, with responsibility for "[s]ecuring the borders, territorial waters, ports, terminals, waterways, and air, land, and sea transportation systems of the United States").

And the court of appeals correctly determined that 9 of the 11 border wall projects failed Section 2808's "military construction" requirement as well. The term "military construction" is defined by statute as "any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or

permanent requirements, or any acquisition of land or construction of a defense access road." 10 U.S.C. § 2801(a). In turn, a "military installation" is defined as "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department." *Id.* at § 2801(c)(4). While the government maintained that border wall parcels spread over four states and a thousand miles fell under "other activity," the court of appeals correctly rejected the government's efforts to read out of the statute the limits Congress had imposed on the use of military construction funds.

The lower court's conclusion that "military installation" did not encompass civilian border wall sections with no military function; that were intended for a civilian law enforcement mission; and were unconnected to the operations of any military base, camp, post, station, yard or center followed directly from the Court's guidance. The court of appeals relied specifically on *Yates v. United States*, 135 S. Ct. 1074, 1087 (2015), in finding that "other activity" should not be read to swallow the specific terms that Congress supplied to cabin that definition, "base, camp, post, station, yard, [or] center." Pet. App. 54a; *see also id.* at 55a (citing *CSX Transp., Inc. v. Ala. Dep't of Revenue*, 562 U.S. 277, 295 (2011) ("We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless.")).

The court of appeals was also correct to reject the government's argument that mere assignment of border wall sections sprawled across four states to Fort Bliss in Texas automatically converted a civilian border wall to a military installation. The government did not allege any "operational ties between the projects and any of the military activities conducted at

Fort Bliss," and could "cite no other purpose underlying the administrative assignment, besides pure administrative convenience." Pet. App. 51a–52a. The court of appeals did not err in rejecting the government's efforts to enlarge Section 2808 far beyond the statute's ordinary meaning and scope: "To construe the limited text of Section 2808 to incorporate a wholly unlimited process would be contrary to its structure and context." *Id.* at 53a.

As the court of appeals concluded:

> The "power to legislate for emergencies belongs in the hands of Congress." *Youngstown* [*Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 637 (Jackson, J., concurring)]. We cannot "keep power in the hands of Congress if it is not wise and timely in meeting its problems," *id.*, but where, as here, Congress has clung to this power with both hands—by withholding funding for border wall construction at great effort and cost and by attempting to terminate the existence of a national emergency on the southern border on two separate occasions, with a majority vote by both houses—we can neither pry it from Congress's grasp. For all "its defects, delays and inconveniences," it remains critical in all areas, but particularly with respect to the emergency powers, that "the Executive be under the law, and that the law be made by parliamentary deliberations." *Id.* at 655. We reject Justice Jackson's contention that "[s]uch institutions may be destined to pass away," *id.*, particularly given the actions of Congress as relate to this case. We agree, however, that it must always be "the duty of the Court to be last, not first, to give them up." *Id.*

Pet. App. 63a–64a.

Plaintiffs have both "Article III standing and a cause of action to challenge the Federal Defendants' border wall construction projects," and "Section 2808 did not authorize the challenged construction." Pet. App. 64a. This conclusion is grounded in the Court's precedents, statutory text, Congress's expressed judgements, and the administrative record. The court of appeals was correct.

CONCLUSION

The petition should be denied.

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