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*.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et. al., Petitioners*,

v.

STATES OF CALIFORNIA AND NEW MEXICO, *Respondents*.

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

BRIEF IN OPPOSITION FOR THE STATE RESPONDENTS

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QUESTIONS PRESENTED

Congress and the President engaged in extended negotiations concerning the President's request for $5.7 billion to fund border-wall projects along the Nation's border with Mexico. After an impasse that resulted in the longest partial government shut-down in history, Congress passed and the President signed a bill providing funding to the Department of Homeland Security for border-wall construction only at a designated location in Texas, and in an amount ($1.375 billion) far less than what the President had requested. The same day that the President signed that legislation, however, he announced that he would spend far more than that amount to build barriers on other parts of the southern border, by transferring money from funds Congress appropriated for different purposes. In one such transfer, the Acting Secretary of Defense invoked 10 U.S.C. § 284 and transferred approximately $2.5 billion—which Congress had appropriated for Army personnel and other military purposes—to fund border-wall construction projects, including projects in California and New Mexico. The questions presented are:

1. Whether the States of California and New Mexico have a cognizable cause of action to challenge the transfer of funds for border-wall construction in their territory.

2. Whether the challenged transfers are unlawful.

PARTIES TO THE PROCEEDING

As petitioners informed the Court in their September 1, 2020 letter, the petition's description of the parties to the proceeding (Pet. II) is incorrect: the only respondents in the *California* case are the State of California and the State of New Mexico.

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INTRODUCTION

The "straightforward and explicit command" of the Appropriations Clause is "that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (internal quotation marks and citation omitted); *see* U.S. Const. art. I, § 9, cl. 7. The founders vested the appropriations power in the legislative branch because, "[i]f it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure." 3 Story, Commentaries on the Constitution of the United States § 1342 (1st ed. 1833).

In this case, the Executive disagreed with Congress's decisions about how much money to spend on the construction of barriers on the Nation's southern border. That disagreement was so severe that the elected branches shut down much of the federal government for more than a month in late 2018 and early 2019 while they debated the matter. They finally agreed to an appropriation—$1.375 billion for barrier construction in Texas—that was far more limited than what the President had requested. The same day that the President signed that appropriation into law, however, he unilaterally announced plans to finance up to $6.7 billion dollars of additional construction on other parts of the border by transferring funds that Congress had appropriated for different purposes.

Petitioners principally urge the Court to grant review on the basis of their underlying merits arguments. *See* Pet. 18-32. But the courts below correctly held that respondents are proper plaintiffs to challenge the $2.5 billion in transfers at issue in this case and that those transfers are unlawful. As relevant

here, the state respondents' claim under the Administrative Procedure Act satisfies the zone-of-interests test, which allows a suit to proceed except where there is a discernible congressional intent to preclude suit by the plaintiff class. There is no such intent here; to the contrary, the relevant statutes protect the interests of the States by requiring the Executive to adhere to Congress's decision not to appropriate funds for projects with harmful impacts in their territory. And the transfers exceeded the narrow transfer authority that Congress granted the Department of Defense in Section 8005 of the Department of Defense Appropriations Act of 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2981, 2999 (2018). First, the projects funded by the transfers were not "unforeseen military requirements," *id.*, because the purported need for border-barrier construction (and the Department of Homeland Security's desire for the military to financially support that construction) long predated passage of that Act. Second, the projects were items for which funds were "denied by the Congress," *id.*, when it repeatedly rejected the President's request for broader and more geographically dispersed funding of border barriers.

In any event, petitioners have not offered a persuasive reason for the Court to review those issues in this case. Petitioners do not identify any relevant conflict in the lower courts. Instead, they ground their request for review in terms of the practical significance of the case. *See* Pet. 17, 33-34. But while petitioners voice concern that the injunction entered by the district court below "interfere[s] with . . . the construction of fences on the southern border" (*id.* at 17), the injunction has been stayed for the last 13 months, petitioners have apparently been spending the funds at issue

during that period (*see id.* at 34), and they do not explain to what extent their concern remains a live one. And while petitioners assert that these issues will be of recurring significance because "[t]ransfer statutes like Section 8005 are commonplace," *id.* at 33, there is no indication that the Executive commonly violates other such statutes. To the extent that future litigation over prospective violations of similar transfer statutes leads to an actual conflict of authority, the Court can address that conflict after it arises.

Should the Court wish to review this case now, the state respondents are of course prepared to continue litigating it. The better course, however, would be for the Court to deny the petition and leave the court of appeals' judgments in place.

STATEMENT

A. Background

1. President Trump has long supported the construction of a wall on the Nation's southern border with Mexico. Pet. App. 3a. But "Congress has repeatedly declined to provide the amount of funding requested by the President" for that purpose. *Id.* at 81a. For fiscal year 2017, the President asked for almost $1 billion for border-wall construction.[1] Congress instead appropriated $341.2 million to replace 40 miles of existing fencing. Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, Div. F, Tit. VI, 131 Stat. 135,

[1] *See* Donald J. Trump, Letter to Speaker of House of Representatives (Mar. 16, 2017), https://bit.ly/31VpBBl, at 1 (attaching appropriations requests, including request to "fund efforts to plan, design, and construct a physical wall along the southern border"); *id.*, Attachment, at 3 (memorandum regarding appropriations requests, including "$999 million for planning, design and construction of the first installment of the border wall").

434 (2017). For fiscal year 2018, the President "requested $2.6 billion for border security, including 'funding to plan, design, and construct a physical wall along the southern border.'" Pet. App. 210a. Congress provided just $1.571 billion. *Id.*

Later in 2018, Congress considered several bills to appropriate billions of additional dollars for border barriers. Pet. App. 309a. Those bills did not pass. *Id.* And the additional spending proposed in those bills was not incorporated into any legislation that did pass, including the Department of Defense Appropriations Act of 2019, Pub. L. No. 115-245, Div. A, 132 Stat. 2981, 2982 (2018), which the President signed on September 28, 2018.

In December 2018, the President and Congress attempted to negotiate an appropriations bill to fund various other departments (including the Department of Homeland Security) for what remained of the fiscal year. Pet. App. 309a. The President initially requested $1.6 billion for 65 miles of border-barrier construction in Texas. *Id.* at 310a.[2] Congress did not pass any legislation funding that request. The President and his allies next requested funding in an even higher amount—$5.7 billion—to fund barrier projects in California and New Mexico, as well as Texas and Arizona.[3] Congress did not approve that request either, and the President announced he would not sign

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[2] *See* Office of Management & Budget, Fiscal Year 2019: An American Budget (Feb. 12, 2018), at 58, reproduced in D. Ct. Dkt. 112-1, Ex. 51; *see also id.* at 2. (Citations to "D. Ct. Dkt." are to the docket in *California v. Trump*, No. 19-cv-872 (N.D. Cal.).)

[3] *See* House Amendment to H.R. 695, 115th Cong., Div. A, § 141 (Dec. 20, 2018) (proposal to appropriate $5.7 billion for "U.S. Customs and Border Protection—Procurement, Construction, and

any bill that lacked such funding.[4] As a result of that impasse, and because the Constitution provides that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. Const. art. I, § 9, cl. 7, the government partially shut down.

During the shut-down, the Office of Management and Budget wrote to Congress, again requesting "'$5.7 billion for construction of a steel barrier for the Southwest border.'" Pet. App. 310a (quoting Jan. 6, 2019 letter from Acting Director of Office of Management and Budget). The request explained that this appropriation would "'fund construction of a total of approximately 234 miles of new physical barrier.'" *Id.* It also stated that the "'[a]ppropriations bills for fiscal year (FY) 2019 that have already been considered by the current and previous Congresses are inadequate to fully address these critical issues.'" *Id.* After the shut-down had lasted 35 days, Congress passed a stop-gap funding bill to reinstate existing levels of funding for three weeks. Pet. App. 213a. The President signed that bill on January 25. Pub. L. No. 116-5, 133 Stat. 10 (2019). The stop-gap bill continued funding

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Improvements"), reproduced in D. Ct. Dkt. 57-7, Ex. 24; Dep't of Homeland Security, Walls Work (Dec. 12, 2018), https://bit.ly/2ZgdixF (stating that "if funded at $5B in FY 2019," the Department would construct "border wall[s]" in its "highest priority" areas, including "El Centro Sector in California," "El Paso Sector in New Mexico," "Rio Grande Valley Sector in Texas," and three other sites in California, Texas, and Arizona), reproduced in D. Ct. Dkt. 57-7, Ex. 40.

[4] McClanahan & Murray, Congressional Research Service, Congressional Action on FY 2019 Appropriations Measures: 115th and 116th Congresses 7-8 (2019), https://bit.ly/2FkFV5H; Donald J. Trump, Twitter (Dec. 21, 2018), https://bit.ly/3gmkYo6 ("Shut-down today if Democrats do not vote for Border Security!").

through February 15 at the levels set in the previous Continuing Appropriations Act that had expired on December 7, 2018. *See id.* § 101(1), 133 Stat. at 10; Pub. L. No. 115-245, Div. C, § 105(3), 132 Stat. 2981, 3124 (2018).

2. On February 14, 2019, when the stop-gap funding was about to expire, Congress passed the Consolidated Appropriations Act of 2019 (CAA). Pub. L. No. 116-6, 133 Stat. 13 (2019). The CAA consolidated separate appropriations acts related to different federal agencies into one bill. Pet. App. 312a. One of those acts was the Department of Homeland Security Appropriations Act for Fiscal Year 2019. CAA, Div. A, 133 Stat. at 15.

In Section 230(a)(1) of Title II of that enactment, Congress addressed the issue that had led to the shutdown: funding for the construction of border barriers. It provided $1.375 billion "for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector" in Texas alone. CAA, Div. A, Tit. II, § 230(a)(1), 133 Stat. at 28. In the same section, Congress imposed certain procedural and substantive requirements related to the environmental impact of barrier construction and potential infringements on state and local government interests within the sector where the funded construction would take place. *See id.* §§ 230(b), 231, 133 Stat. at 28 (prohibiting construction within certain wildlife refuges and state and federal parks); *id.* § 232, 133 Stat. at 28-29 (requiring notice-and-comment procedures prior to the use of any funds for construction within certain city limits in the sector). The President signed the CAA into law the next day. Pet. App. 313a.

3. The same day that the President signed the CAA, he issued a proclamation "'declar[ing] that a national emergency exists at the southern border of the United States.'" Pet. App. 313a (quoting Proclamation No. 9844, 84 Fed. Reg. 4,949 (Feb. 15, 2019)). The proclamation stated that "'[t]he current situation at the southern border presents a border security and humanitarian crisis'"; the border was "'a major entry point for criminals, gang members, and illicit narcotics'"; and there was a "'longstanding'" problem of "'large-scale unlawful migration'" that had worsened "'in recent years.'" *Id.* at 313a-314a. "'Because of the gravity of the current emergency situation,'" the proclamation stated, "'it is necessary for the Armed Forces to provide additional support to address the crisis.'" *Id.* The President authorized the Department of Defense to use "'the construction authority provided in'" 10 U.S.C. § 2808 to provide such support. *Id.* at 314a. Section 2808 authorizes the Secretary of Defense, "[i]n the event of a declaration of war or [a Presidential declaration] of a national emergency . . . that requires use of the armed forces," to "undertake military construction projects . . . not otherwise authorized by law that are necessary to support such use of the armed forces." 10 U.S.C. § 2808(a).

A White House publication issued the same day as the presidential proclamation identified "'up to $8.1 billion that will be available to build the border wall.'" Pet. App. 315a. In addition to the $1.375 billion appropriated in the CAA, this figure included "'[u]p to $3.6 billion reallocated from Department of Defense military construction projects'" under 10 U.S.C. § 2808, and about $601 million from the Treasury Forfeiture Fund. *Id.* It also included "'[u]p to $2.5 billion [of] Department of Defense funds transferred'" for use under 10 U.S.C. § 284, which permits the Secretary of

Defense to provide support for the counter-drug activities of other federal departments and agencies. *Id.*

Ten days after the proclamation, the Department of Homeland Security invoked Section 284 and submitted a request to the Department of Defense for assistance "with the construction of fences[,] roads, and lighting" to block purported drug-smuggling corridors on the southern border. C.A. E.R. 272; *see* Pet. App. 317a. The Acting Secretary of Defense ultimately approved the request for assistance as to seven projects, including the El Paso Sector 1 project in New Mexico and the El Centro Sector 1 project in California that are at issue here. Pet. App. 83a. At the time, however, the Department of Defense had already spent or obligated most of the appropriation for Section 284 activities in the 2019 Defense Appropriations Act, for projects unrelated to border-barrier construction. The counter-narcotics support account contained less than 10 percent of the $2.5 billion that the seven border-barrier projects would cost. Pet. App. 5a.

To fill that gap, the Acting Secretary of Defense announced that he would transfer funds from other accounts into the Section 284 account, claiming authority to do so under Section 8005 of the 2019 Defense Appropriations Act. That provision allows the Secretary of Defense to transfer up to $4 billion

> of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction) between such appropriations or funds or any subdivision thereof . . . . *Provided*, That 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[.]

Pub. L. No. 115-245, Div. A, Tit. VIII, § 8005, 132 Stat. at 2999. A further provision, also referenced by the Acting Secretary, allows transfers of up to an additional $2 billion "between the appropriations or funds made available to the Department of Defense in this title . . . subject to the same terms and conditions as the authority provided in section 8005." *Id.* § 9002, 132 Stat. at 3042. Invoking these provisions, the Acting Secretary transferred $1 billion from Army personnel funds and "$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." Pet. App. 5a-6a.

Thereafter, the Acting Secretary of Homeland Security invoked authority under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended (IIRIRA), Pub. L. No. 104-208, Div. C, § 102(c), 110 Stat. 3009, 3009-555, to waive legal requirements that ordinarily would apply to the construction projects. *See* 84 Fed. Reg. 17,184 (Apr. 24, 2019); 84 Fed. Reg. 21,798 (May 15, 2019). As relevant here, with respect to the El Paso Sector project in New Mexico and the El Centro Sector project in California, he waived all "federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of" various statutes including the Clean Water Act, Clean Air Act, and Endangered Species Act. 84 Fed. Reg. at 17,185; 84 Fed. Reg. at 21,799. The Clean Air Act and Clean Water Act are cooperative federalism programs that typically require federal agencies to adhere to state regulatory

standards and processes. *See* 33 U.S.C. § 1323(a); 42 U.S.C. § 7506(c)(1). As a result of the waiver, however, the construction projects financed by the transfers would not feature such a state role.

B. Proceedings Below

1. California, New Mexico, and other States sued to challenge the transfers.[5] The complaint alleges, among other things, that the diversions of funds violated the Administrative Procedure Act and were *ultra vires*. C.A. E.R. 445-448. The case was assigned to the same district court judge as another lawsuit that was filed the next day by the Sierra Club and the Southern Border Communities Coalition, which is also the subject of this petition.

The state plaintiffs moved for a preliminary injunction to bar the transfer of funds for construction in New Mexico's El Paso Sector. *See* Pet. App. 87a. The district court held that the state plaintiffs had established standing, that they had stated a cause of action, and that their claims were likely to succeed. *Id.* at 391a-424a. But the court denied the state plaintiffs' request for provisional relief because the court was issuing an injunction in favor of the *Sierra Club* plaintiffs that, in its view, made any further injunction in the *California* case duplicative. Pet. App. 431a.

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[5] The first amended complaint includes 20 state plaintiffs. C.A. E.R. 374. As to all the challenged transfers, California and New Mexico based their claims on injuries they would suffer from border-wall construction in their territory. As to the challenges to the Section 2808 transfers, which are not at issue here, California and certain other state plaintiffs also based their claims on injuries they would suffer as a result of the diversion of money away from projects that Congress had intended to fund in their territory and for their benefit. *See infra* n.6.

The States of California and New Mexico (the States) then moved for partial summary judgment regarding the use, for the El Centro Sector and El Paso Sector projects, of money that petitioners had transferred under the purported authority of Sections 8005 and 9002. Pet. App. 192a. The court granted the motion in part and issued a declaration that petitioners' transfers of funds were unlawful. *Id.* at 195a. But the court again denied the States' request for injunctive relief, noting that it was issuing a permanent injunction against the same transfers in the parallel *Sierra Club* case. *Id.* at 200a. The court entered partial final judgments in both cases under Rule 54(b), allowing for an immediate appeal while other claims continued to be litigated. *See id.* at 8a-9a, 88a; *supra* n.5.[6]

2. While those appeals were pending, petitioners sought a stay of the permanent injunction in the *Sierra Club* case. That stay proceeding did not pertain to the *California* case. A motions panel of the Ninth Circuit denied the stay. Pet. App. 206a-273a; *see id.* at 274a-299a (dissent). Petitioners then applied for a stay from this Court. This Court granted the stay in July 2019, observing that petitioners had "made a sufficient showing at [that] stage" that the *Sierra Club* plaintiffs had "no cause of action to obtain review of the Acting Secretary's compliance with Section 8005."

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[6] As previously noted, other claims in the *California* and *Sierra Club* cases concerned petitioners' transfers under Section 2808. The district court eventually entered a separate judgment resolving those claims. It held that those transfers violated Section 2808, but again enjoined them only in the *Sierra Club* case. D. Ct. Dkt. 257, at 37, 46-47 (order in both cases). That judgment resolved all remaining claims in each case, and is the subject of separate appeals that have been briefed and argued, but not yet decided by the Ninth Circuit. *See* Ninth Cir. Nos. 19-17501, 19-17502, 20-15044.

140 S. Ct. 1 (2019). In July 2020, the *Sierra Club* plaintiffs filed a motion to lift that stay, which the Court denied.

3. The court of appeals affirmed the district court's partial final judgments. Pet. App. 1a-40a, 78a-119a.

a. In its *California* decision, the court of appeals first determined that California and New Mexico had Article III standing. Pet. App. 88a-99a. The States established that the challenged transfers caused them two types of injury. First, the construction projects financed by the transfers would injure them by harming specific endangered species in California and New Mexico. *Id.* at 90a-94a. Second, the States had "demonstrated that border wall construction injures their quasi-sovereign interests by preventing them from enforcing their environmental laws." *Id.* at 94a. Under federal law, activities on federal land within the States' boundaries are normally subject to state regulations that protect air quality, water quality, and endangered species. *Id.* at 94a-98a. By enabling the Department of Homeland Security to construct border barriers, however, the funding transfers allowed federal activity to occur without such state oversight and in violation of applicable state law, pursuant to the IIRIRA waivers that can apply to such construction. *Id.*; *see supra* pp. 9-10.

The court next considered whether the States could challenge the transfers under the APA. Pet. App. 100a-106a. It noted that APA plaintiffs must "establish that they fall within the zone of interests of the relevant statute." *Id.* at 100a. But this Court has "repeatedly emphasized that the zone of interests test is 'not "especially demanding"' in the APA context." *Id.* at 101a-102a (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014)).

The interests asserted by a plaintiff need only be "'arguably within the zone of interests to be protected or regulated by the statute,'" and "'the benefit of any doubt goes to the plaintiff.'" *Id.* at 100a, 102a (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224, 225 (2012)). Here, the States' interest in preserving congressional control over the relevant appropriations was congruent with Congress's purpose in enacting Section 8005. *Id.* at 103a. Moreover, the States' status as regular beneficiaries of proper Section 8005 transfers (for purposes such as disaster relief) made them "'reasonable' and 'predictable'" plaintiffs to challenge a violation of the statute. *Id.* at 106a (quoting *Patchak*, 567 U.S. at 227).[7]

On the merits, the court of appeals agreed with the district court that "Section 8005 did not authorize DoD's budgetary transfer to fund construction of the El Paso and El Centro Sectors." Pet. App. 106a. The court concluded that the $2.5 billion transfer at issue here violated Section 8005 in three respects. First, "the need for a border wall was not unforeseen." *Id.* at 107a. "[U]nforeseen" means "'not anticipated or expected.'" *Id.* at 108a. The problem of cross-border drug-smuggling that the transfers addressed, in contrast, was longstanding. *Id.* So was the current administration's position that the problem required substantial funding for border barrier construction, including possibly from the Department of Defense. *Id.* at 109a-110a. Second, the El Centro and El Paso construction projects were not "military requirement[s]." *Id.* at 112a. Instead of "'relating to soldiers,

[7] Because the States could advance an APA claim and because that claim was meritorious, the court of appeals did not address the States' alternative claims. Pet. App. 100a n.12.

arms, or war,'" both projects were to support a civilian agency in its civilian mission. *Id.* at 113a. And third, the transfer would fund something that had been "denied by the Congress." *Id.* at 116a. Congress "refused to appropriate the $5.7 billion requested by the White House in the CAA; instead Congress appropriated $1.375 billion, less than a quarter of the funds requested, for 'the construction of primary pedestrian fencing . . . in the Rio Grande Valley Sector.'" *Id.* at 116a-117a.

The court of appeals thus affirmed the district court's partial judgment declaring that the transfer to fund construction of the New Mexico and California projects was unlawful. Pet. App. 118a. In the same decision, the court concluded that the district court did not abuse its discretion by denying the States a permanent injunction in light of the injunctive relief it had granted in the *Sierra Club* case. *Id.* at 118a-119a. *But see id.* at 119a ("depending on further developments in these cases, the States are free to seek further remedies in the district court").

b. Judge Collins dissented. He agreed that the States had established Article III standing, Pet. App. 127a-131a, but concluded that they had not asserted a viable cause of action either under the APA, *id.* at 132a-145a, or with respect to their alternative claims, *id.* at 145a-156a. He also concluded that the States' claims would fail on the merits. *Id.* at 156a-173a.

c. In a separate opinion issued by the same panel on the same day, the court of appeals concluded that the *Sierra Club* plaintiffs had established standing and ruled in their favor on their *ultra vires* claims. Pet. App. 1a-34a. The court also affirmed the district court's grant of a permanent injunction in favor of the

Sierra Club plaintiffs. *Id.* at 34a-40a. Judge Collins again dissented. *Id.* at 40a-77a.

ARGUMENT

I. THE COURT SHOULD DENY REVIEW IN THIS CASE

Petitioners principally contend that review should be granted because "[t]he court of appeals erred in concluding that respondents are proper parties to challenge" the transfers (Pet. 16; *see id.* at 18-29) and "further erred in finding any violation of Section 8005" (*id.* at 17; *see id.* at 29-32). As explained in the next section, however, the decision below is correct in both respects. *See infra* pp. 17-30. In any event, under the particular circumstances here, the questions raised by petitioners do not warrant review in this case.

Petitioners have not identified any lower-court conflict on either question. Instead, petitioners ground their request for review in terms of the practical significance of the case. They contend that the injunction in *Sierra Club* will "interfer[e] with Executive Branch conduct that is of 'importance . . . to national security,'" by blocking "the transfer of military funds to assist in the construction of fences on the southern border to stanch the flow of illegal drugs." Pet. 17. But it is unclear to what extent that remains a live concern with respect to the funds that are subject to that injunction. The funds in question were appropriated in the 2019 Defense Appropriations Act, for the fiscal year that ended in September 2019. *Id.* at 4, 8. The injunction has been stayed since July 2019. *Id.* at 11. Petitioners do not say how much of the money has been spent in the intervening 13 months, but they acknowledge they have already used transferred funds to "undertake the construction of more than 100 miles of fencing (and associated roads and lighting)."

Id. at 34. And the best way for petitioners to address their practical concerns about the availability of funds going forward would be through the regular appropriations process—not through protracted litigation of a case concerning a diminishing tranche of funds.

Petitioners do not discuss how depletion of the transferred funds would affect the continuing importance of the particular judgments below or the Court's jurisdiction over this case. Nor do they address the possibility of changes in the spending priorities of the Executive Branch. But the realistic prospect of significant developments in one or more of those areas in the coming months, which could complicate review of the legal questions raised by the petition, counsels against further review of those questions in this case.

Petitioners also contend that the Court should grant this petition because "[t]ransfer statutes like Section 8005 are commonplace." Pet. 33. While this type of statute might be common, Executive violations of statutory transfer restrictions are rare—outside of petitioners' recent efforts to transfer funds for border-barrier construction.[8] And to the extent that viola-

[8] The petition does not mention that the Department of Defense also transferred funds appropriated for fiscal year 2020 to support border-barrier construction, by again invoking Section 284 in conjunction with Section 8005 (of the 2020 Defense Appropriations Act). A separate challenge to those transfers is currently being litigated in district court, and motions for summary judgment remain pending. *See California v. Trump*, No. 20-cv-1563 (N.D. Cal.). While some issues in that case overlap with issues in this one, the two cases are distinct in several respects. *See, e.g.*, *id.*, Dkt. 62 at 9 n.4 (federal defendants' concession that cer-

tions of other, similar transfer statutes occur in the future, they can be expected to generate litigation. If such litigation ever results in a conflict with the decision below, the Court can resolve the conflict at that time, with the benefit of further perspectives from additional lower courts addressing additional factual circumstances.

The States are, of course, prepared to continue litigating the questions raised by the petition if this Court prefers to address them now. But the better course would be for the Court to deny the petition, leave in place lower court judgments that are correct on the merits, and avoid embarking on plenary review of questions that could diminish in practical significance over the course of this Term. Allowing the *Sierra Club* injunction to go into effect may prevent some remaining construction from proceeding, *cf.* Pet. 17, 34, unless and until petitioners obtain legislation from Congress funding it. But any injury from that practical effect would be limited in nature and does not, by itself, warrant a grant of review in a case that does not implicate any conflict and is otherwise a problematic vehicle.

II. THE DECISION BELOW IS CORRECT

Petitioners argue that none of the respondents has a cause of action to obtain judicial review of the legality of the challenged transfers. Pet. 18-29. That argument is incorrect. As both courts below recognized,

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tain state plaintiffs fall within zone of interests in certain respects); *id.*, Dkt. 62 at 12 (federal defendants' argument that Congress "acquiesce[d]" in the Department's use of § 8005 by reauthorizing that section in the 2020 Defense Appropriations Act).

there are multiple viable claims here. And independent of whether particular private parties may pursue a cause of action, *cf.* 140 S. Ct. 1, at the very least California and New Mexico are entitled to a judicial determination of their claim under the Administrative Procedure Act that the transfers violated Section 8005. Petitioners' brief defense of the legality of the transfers (Pet. 29-32) is unpersuasive and fails to establish any compelling reason for review in this particular case.[9]

A. The States Have a Cognizable Cause of Action

The court of appeals correctly held that the States are proper parties to challenge the transfers under the Administrative Procedure Act. Pet. App. 100a-106a. The APA directs that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. To sue under that provision, the interests asserted by the plaintiff "must be 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012).

The zone-of-interests test is "'not meant to be especially demanding.'" *Patchak*, 567 U.S. at 225.

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[9] The States also advanced claims under the Constitution as well as an equitable cause of action to enjoin petitioners' *ultra vires* conduct. Pet. App. 86a. Those claims provide an independent basis for affirming the judgment below. Although the court of appeals did not address them in its *California* decision, in light of its holding that the States "prevail under the APA," *id.* at 100a n.12, it did address similar claims in its *Sierra Club* decision, and correctly held that they were meritorious. *Id.* at 40a.

"'[A]gency action [is] presumptively reviewable,'" and courts "have always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Id.* The test "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* Here, the States' interests are directly related to—and entirely consistent with—the interests protected by the statutory provisions in question.

1. Section 8005 provides a measure of flexibility to the Department of Defense, allowing the Secretary to redirect emergency funds to unanticipated requirements in certain limited circumstances. That transfer authority is subject to strict limitations, including the requirements that the need for which the money is redirected must have been "unforeseen" and that transfers may not be directed to an item for which funds have already "been denied by the Congress." Pub. L. No. 115-245, Div. A, Tit. VIII, § 8005, 132 Stat. at 2999. Congress imposed those restrictions to ensure that the Department would not abuse the transfer authority by circumventing substantive appropriations decisions that Congress had already made, or by sidestepping the process of asking Congress for appropriations in the first place. *See generally* Pet. App. 102a-103a. In the context of the 2019 Defense Appropriations Act and other appropriations legislation enacted during the same period, the restrictions help ensure compliance with Congress's decisions about funding and implementing border-wall construction projects—including its decision to deny funding for such projects in California and New Mexico. *See supra* pp. 4-6 & n.3; *see generally Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987) (the Court is "not limited to considering the

statute under which [the plaintiffs] sued, but may consider any provision that helps us to understand Congress' overall purposes").

The States' interests are thus closely aligned with the interests protected by the relevant statutes. Congress's decision to reject appropriations for border-wall construction projects in California and New Mexico protected those States from the environmental harms and loss of regulatory authority they would suffer if those projects moved forward. Section 8005 protects the same interests by preventing the Department from unilaterally circumventing Congress's funding decision. In challenging petitioners' transfer of billions of dollars for border-wall construction in California and New Mexico as invalid under Section 8005, the States are asserting interests that fall well within the relevant zone of interests. Indeed, under these circumstances, California and New Mexico are "predictable" challengers. *Patchak*, 567 U.S. at 227.

Moreover, this Court's zone-of-interests precedents do not require any "evidence of an intent to benefit the plaintiff class." *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1270 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev'd on other grounds sub nom. Michigan v. EPA*, 576 U.S. 743 (2015). They teach "that suit should be allowed unless there was a discernible congressional intent *to preclude suit* by the plaintiff class." *Id.*; *see, e.g.*, *Clarke*, 479 U.S. at 399 ("presumption in favor of judicial review of agency action" is "'overcome whenever the congressional intent to preclude judicial review is "fairly discernible in the statutory scheme"'"). Here, Congress did nothing to signal any intent to preclude the States from seeking judicial

review of executive actions that circumvented Congress's funding decisions in this manner, causing foreseeable harm to the States' air, water, and vulnerable species. *See* Pet. App. 90a-98a. At the very least, it is "'arguabl[e]'" that the States fall within the relevant zone of interest, which is all the test requires. *Patchak*, 567 U.S. at 224-225.

2. Petitioners assert that the States fail the zone-of-interests test because "Section 8005 protects the interests of DoD and Congress." Pet. 20. That misunderstands the nature of the test. True, Section 8005 grants the Department of Defense limited transfer authority while safeguarding Congress's institutional role as the ultimate authority on spending decisions. That does not mean, however, that the States' interests are unrelated to or inconsistent with that provision. *See Clarke*, 479 U.S. at 399. To the contrary: Section 8005 helps protect Congress's substantive spending choices.[10] And the substantive choice at issue here—Congress's denial of funding for border projects in California and New Mexico—protected the States from harms that would predictably be caused by barrier construction in their territory.

Like the dissenting judge below, petitioners also argue that the States' interests are insufficiently related to the purposes of Section 8005 because that provision does not require the Secretary of Defense to consider state environmental or sovereignty interests. *See* Pet. 19-20; Pet. App. 139a-140a (Collins, J., dissenting). But the zone-of-interests test does "not require any 'indication of congressional purpose to

[10] *Cf. Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990) (Appropriations Clause "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good").

benefit the would-be plaintiff.'" *Patchak*, 567 U.S. at 225. And the relevant zone of interests for any statute must be understood in the light of other "provision[s] that help[] us to understand Congress' overall purposes." *Clarke*, 479 U.S. at 401; *see id.* (considering "the overall context" of "the statute under which respondents sued").

Here, Section 8005 protects congressional funding decisions, as reflected in the CAA and other statutes, which in turn were often informed by consideration of environmental interests and federal-state comity concerns.[11] The overall context here also included Congress's awareness that the Department of Homeland Security had general authority to waive otherwise applicable federal and state environmental regulations for border-wall construction projects. *See supra* pp. 9-10; *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (presumption "that Congress is aware of existing law when it passes legislation"). The Department had invoked that authority repeatedly in 2017 and 2018, with respect to environmental laws of California, New Mexico, and Texas.[12] When Congress appropriated

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[11] For example, the CAA directly addressed the environmental and comity concerns certain to arise from any border-barrier construction project. *See* CAA, Div. A, Tit. II, § 231, 133 Stat. at 28 (directing that "[n]one of the funds made available by this Act or prior Acts are available for the construction of pedestrian fencing" in certain environmentally sensitive locations); *id.* § 232, 133 Stat. at 28-29 (requiring Department of Homeland Security to "confer" with local governments "and seek to reach mutual agreement" regarding design and alignment of barriers on lands within the purview of those governments).

[12] *See* Dep't of Homeland Security, Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 83 Fed. Reg. 51,472 (Oct.

limited funds to the Department for a Texas barrier project in the CAA, it imposed specific requirements to protect certain environmental and comity interests implicated by that construction. *See supra* p. 6. But it never had a similar opportunity to impose comparable requirements with respect to the additional projects in other States—for which it repeatedly denied funds—that were undertaken by the Department using funds transferred under the purported authority of Section 8005. The interests of the States in seeking to hold petitioners to the requirements of Section 8005 thus align with Congress's overall purposes in this area.

Finally, petitioners suggest that Congress could not have intended judicial enforcement of the limitations in Section 8005 because those limitations involve "judgments about national security that are uniquely within the Executive Branch's expertise." Pet. 21. Perhaps some of the prerequisites to a transfer under Section 8005 may be ill-suited to judicial determination, such as the decision to declare a national emergency or the relative "priority" of particular military requirements. Pub. L. No. 115-245, Div. A, Tit. VIII, § 8005, 132 Stat. at 2999. But that does not establish any "discernible congressional intent to preclude review" altogether. *White Stallion*, 748 F.3d at 1269 (Kavanaugh, J., concurring in part and dissenting in part). Petitioners do not suggest that the particular

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11, 2018) (IIRIRA waiver of federal, state, and other environmental laws for construction of barriers and roads at border in Hidalgo County, Texas); *see also* 83 Fed. Reg. 50,949 (Oct. 10, 2018) (same, in Cameron County, Texas); 83 Fed. Reg. 3,012 (Jan. 22, 2018) (same, near Santa Teresa Land Port, New Mexico); 82 Fed. Reg. 42,829 (Sept. 12, 2017) (same, near Calexico, California); 82 Fed. Reg. 35,984 (Aug. 2, 2017) (same, near San Diego, California).

requirements that the States seek to enforce here present questions unsuitable for judicial determination. *See* Pet. 21. And petitioners' disagreement with the decision below focuses on matters of statutory interpretation that the judiciary is well suited to resolve. *See id.* at 30-32; *infra* pp. 24-30.

B. The Transfers Were Unlawful

The court of appeals correctly held that the challenged transfers were unlawful. Pet. App. 106a-118a. Petitioners argue (Pet. 29-32) that Congress authorized the transfers in Section 8005. But Congress expressly forbade use of that transfer authority unless it was "based on unforeseen military requirements," and also prohibited such transfers "where the item for which funds are requested has been denied by the Congress." Pub. L. No. 115-245, Div. A, Tit. VIII, § 8005, 132 Stat. at 2999. As the lower courts recognized, the transfers here violated both requirements.

1. To begin with, the Department of Defense did not initiate these transfers to serve "unforeseen military requirement[s]." Pet. App. 107a. Indeed, the transfers did not support a "military requirement" at all. *Id.* at 112a. The stated purpose of the transfers was to support a civilian mission of the Department of Homeland Security: building a wall to block drug smuggling across the southern border. *See id.*

Even if that could be characterized as a "military requirement," it was hardly "unforeseen." A need "is unforeseen when it is 'not anticipated or expected.'" Pet. App. 108a. Here, nothing about the purported need to fund border-barrier construction was unanticipated or unexpected at the time Congress enacted Section 8005 in 2018. The President told Congress in his State of the Union Address in 2017 of his plan for

a "great wall along our southern border." C.A. S.E.R. 1276. Around the same time, the Secretary of Homeland Security stated that "[a] wall along the southern border is . . . a critical component of the President's overall border security strategy." Dep't of Homeland Sec., Implementing the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017), https://bit.ly/2YtXeIg. And the presidential proclamation ordering the Department of Defense to carry out the challenged transfers referenced conditions that long predated the enactment of Section 8005. *See* Pet. App. 313a-314a (referring to the "'long-standing'" problem of "'large-scale unlawful migration'" that had worsened "'in recent years'") (quoting Proclamation No. 9844, 84 Fed. Reg. 4,949 (Feb. 15, 2019)).

Petitioners nonetheless argue that the need to transfer funds for border-wall construction was "unforeseen" because the specific "request from DHS for assistance" had not yet been made at the time "DoD made its budget requests to Congress for the 2019 fiscal year." Pet. 31; *cf.* Pet. App. 171a (Collins, J., dissenting).[13] That interpretation ignores the text of Section 8005. The word "unforeseen" modifies "military requirements," not "budget requests." *See* Pet. App. 110a. The purported "military requirement"

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[13] Petitioners rely (Pet. 31-32) on a GAO letter concluding that the transfers did not violate Section 8005. *See* Department of Defense—Availability of Appropriations for Border Fence Construction, B-330862, 2019 WL 4200949, at *1 (Comp. Gen. Sept. 5, 2019). But that letter sheds little light on the meaning of Section 8005. In applying key statutory terms, it simply relies on the Department of Defense's internal policies. *See, e.g.*, *id.* at *7 ("Once DOD accepted DHS's request, the provision of support constituted a military requirement as defined in DOD's internal guidance.").

here—the "provision of support" for border-barrier construction on the southern border, Pet. 32—was well known by the time Congress enacted the 2019 Defense Appropriations Act.

Petitioners' contrary interpretation would open a multi-billion-dollar loophole in Section 8005. Section 284(a) authorizes the Department of Defense to "provide support for the counterdrug activities . . . of any other department or agency of the Federal Government[.]" 10 U.S.C. § 284(a). Petitioners' interpretation would allow the Department to transfer billions of dollars into its counter-narcotics account and use those funds to support *any* federal agency that requests counterdrug support. *Cf.* 10 U.S.C. § 284(a) (allowing Section 284(a) funds to be used to support "any State, local, tribal, or foreign law enforcement agency"). So long as the Executive Branch coordinates to make sure that the other agency's request comes to the Department after it sends "its budget requests to Congress" for the relevant fiscal year, Pet. 31, petitioners' interpretation would allow the Department to treat the request as "unforeseen." Petitioners identify no plausible reason why Congress would have granted the Executive free rein, over such an enormous amount of federal funding, with respect to matters that Congress routinely considers in its annual appropriations process. Congress "imposed [the] conditions" in Section 8005 "in order to 'tighten congressional control of the re-programming process,'" Pet. 21 (quoting H.R. Rep. No. 662, 93d Cong., 1st Sess. 16-17 (1973)) (emphasis omitted)—not to loosen it.

And even accepting that the relevant "requirement" was the "request from DHS for assistance," Pet. 31, the transfers here would still violate Section 8005 because the budget requests made by the Department

of Homeland Security were also "anticipated and expected," Pet. App. 111a. In January 2017, more than two years before the transfer at issue, the President instructed the Secretary of Homeland Security to "[i]dentify and, to the extent permitted by law, allocate *all sources of Federal funds* for the planning, designing, and constructing of a physical wall along the southern border." Exec. Order No. 13,767, § 4(b), 82 Fed. Reg. 8,793, 8,794 (Jan. 25, 2017) (emphasis added). Just over a year later, the President stated that "our Military is again rich" and the Nation should "[b]uild [the] WALL through [the] M[ilitary]." Donald J. Trump, Twitter (Mar. 25, 2018), https://bit.ly/2ENbJRa. A month after that, in April 2018, the President instructed the Secretary of Defense to "'support the Department of Homeland Security in securing the southern border.'" Pet. App. 111a.[14] And for most of fiscal year 2018, which ran through September 2018, the Department of Defense held back 84 percent of its Section 284 funds—totaling $947 million—precisely to save them "'for possible use in supporting Southwest Border construction.'" Pet. App. 111a; *see* C.A. S.E.R. 1206-1207. The specific February 2019 budget request that petitioners invoked to support these transfers may have occurred after passage of the 2019 Defense Appropriations Act, but the surrounding circumstances made that request entirely foreseeable—if not inevitable.

2. The challenged transfers also funded an "item" that had been "denied" by Congress. Pet. App. 116a. "An item of an appropriation bill" is "a specific appropriation of money." *Bengzon v. Sec'y of Justice of the*

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[14] *See also* C.A. E.R. 172 (Acting Secretary of Defense's 2019 memorandum relying on that instruction to justify the transfers challenged here).

Philippine Islands, 299 U.S. 410, 414 (1937). Here, the Executive Branch asked Congress to specifically appropriate $5.7 billion for border-wall construction projects in California and New Mexico as well as Texas and Arizona. *See supra* pp. 4-5 & n.3. But the legislation that Congress enacted and the President signed appropriated just a fraction of that amount, limited to border-wall projects in Texas. *Supra* p. 6. Indeed, Congress has never appropriated funds for the California and New Mexico projects at issue here—before or since—despite numerous opportunities to do so. Congress's repeated denial of "a specific appropriation of money," *Bengzon*, 299 U.S. at 414, for these projects "precludes the use of Section 8005's transfer authority," Pet. App. 117a.[15]

Petitioners argue that Congress has not previously "denied" this item because "DoD never requested appropriations for the item of providing this counterdrug assistance to DHS, and Congress never denied any request for that item of expenditure." Pet. 30. That again relies on an unduly narrow reading of the statutory text. Section 8005 of the 2019 Defense Appropriations Act refers to an "item . . . denied by the Congress"—not an item "requested by the Department of Defense and denied by the Congress," or an item "denied by the Congress in this Act." The President requested that Congress appropriate money for border-barrier construction on 234 miles of barriers along

[15] This conclusion does not amount to recognizing a "repeal[] by implication" of Section 8005. Amicus Br. of Rep. Barr 24. The CAA left Section 8005 intact; Congress's decisions in the CAA, however, foreclose petitioners from satisfying Section 8005's "denied" proviso with respect to the transfers at issue here.

the southwest border in four States, and Congress denied that request except as to specific projects in one State—Texas. Section 8005 thus bars the transfer.[16]

Invoking the legislative history of a predecessor statute, petitioners argue that Congress aimed "to ensure that DoD would not transfer funds for items in its budget that 'ha[d] been *specifically deleted* in the legislative process.'" Pet. 31. Petitioners misunderstand the House report they quote. The report referenced such behavior as a particularly egregious example of Executive Branch officials undermining the integrity of the appropriations process. *See* H.R. Rep. No. 662, 93d Cong., 1st Sess. 15-16 (1973) (House Report). But the transfer statute Congress enacted—which was "intended to tighten congressional control of the reprogramming process," *id.* at 16—also applies to other circumstances. Congress made sure of that by using the broad word "denied" rather than the narrower word "deleted." As the report explains, "[t]he provisions state that no reprogramming or transfer request may be made for an item which has been *denied by*

[16] Petitioners again rely (Pet. 30) on the GAO letter, which reasoned that the "denied" proviso was not implicated because Congress had not denied appropriations to the Department of Defense specifically "for its counter-drug activities . . . under section 284 to support" the Department of Homeland Security's border-construction activities. 2019 WL 4200949, at *8. That reasoning reverses the inferences that should be drawn from Congress's funding decision. A basic principle of appropriations law is that "'[a]n appropriation for a specific purpose is exclusive of other appropriations in general terms which might be applicable in the absence of the specific appropriation.'" *Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005). Here, Congress's appropriation of specific funds for the particular border-barrier construction in Texas prohibits the agencies from using other, general funds for similar projects in California and New Mexico.

Congress in the budgetary process." *Id.* (emphasis added).

Relatedly, petitioners contend that the term "item" refers only to specific requests in the Department of Defense's budget proposal to Congress. Pet. 30; *see also* Pet. App. 157a-163a (Collins, J., dissenting). But the term does not inherently carry the limited meaning that petitioners would give it. And the same legislative history that petitioners invoke indicates that Congress used the term "item"—in this very context—interchangeably with broader terms such as "projects" and "programs." *See* House Report at 16 (discussing the "limitation on the requesting of reprogramming funds for projects or items which are of a lower priority from programs of higher priority"). There can be no doubt that Congress denied funding for the projects at issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

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