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.

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

v.

STATE OF CALIFORNIA, ET AL.

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

REPLY BRIEF FOR THE PETITIONERS

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Respondents identify no compelling reason to reconsider this Court's prior determinations, implicitly made when granting and then maintaining a stay of the injunction below, that the questions presented here warrant the Court's review. Indeed, the importance of this Court's review has only grown over time. In the decisions below, a divided panel of the Ninth Circuit not only doubled down on the flawed reasoning of the earlier motions panel decision in *Sierra Club*, but then compounded that error in *California* by further failing to

faithfully apply the zone-of-interests requirement. And even setting aside the panel majority's errors with respect to whether respondents are proper plaintiffs, the decisions below warrant review because the panel majority erred in holding that the Acting Secretary of Defense acted unlawfully in transferring the funds at issue to respond to a request from the Department of Homeland Security (DHS) for counterdrug assistance at the southern border under 10 U.S.C. 284. Respondents' contrary view is at odds with the language and context of the transfer statute and is inconsistent with what respondents themselves acknowledge to be the "expert opinions" of the Government Accountability Office (GAO). Sierra Club Br. in Opp. 27 n.5 (quoting *Delta Data Sys. Corp.* v. *Webster*, 744 F.2d 197, 201 (D.C. Cir. 1984)) (brackets omitted); see Pet. 17. Respondents are also wrong to suggest that the questions presented are no longer significant now that many of the funds at issue have been expended. The construction financed by the funds at issue here remains ongoing; allowing the *Sierra Club* injunction to take effect would prevent the use of those funds to complete the projects. Further review is amply warranted.

A. The Decisions Below Are Incorrect

1. Respondents lack any cause of action to challenge the Acting Secretary's transfers

a. In *Sierra Club*, when this Court stayed the nationwide injunction, it explained that "[a]mong the reasons" was the government's showing that respondents in that case (collectively, Sierra Club) "have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005" of the Department of Defense Appropriations Act, 2019 (DoD Appropriations Act), Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat.

2999. 140 S. Ct. 1, 1. That observation remains sound. As Judge Collins explained in his dissenting opinion below, Sierra Club's "complaint alleges that the challenged transfers are not authorized by § 8005," so Section 8005 "is plainly the 'gravamen of the complaint,' and it therefore defines the applicable zone of interests." Pet. App. 55a-56a (quoting *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 886 (1990)). And Sierra Club's "asserted recreational, aesthetic, and environmental interests clearly lie outside the zone of interests protected by § 8005," which "does not mention" such interests or "require the Secretary to consider" them before transferring DoD appropriations. *Id.* at 60a.

Notably, Sierra Club makes no argument in this Court that its asserted recreational, aesthetic, and environmental interests in the public lands where construction is occurring are even arguably within the zone of interests protected by Section 8005. Nor could it plausibly do so. Section 8005 authorizes the Secretary of Defense to transfer funds among Department of Defense (DoD) appropriations accounts, to be used for specified purposes Congress has already authorized. See 132 Stat. 2999 (transferred funds are "to be merged with and to be available for the same purposes * * * as the appropriation or fund to which [they are] transferred"). Section 8005 thus plainly protects the intergovernmental interests of the Secretary and Congress in the appropriations process; it does not even arguably protect private interests in public lands that may be incidentally affected by statutorily authorized projects undertaken with the transferred funds—let alone the interests of private parties who, as here, have no role in or experience with interpreting or enforcing federal budgetary restrictions. See Pet. 19-22.

Sierra Club instead principally contends (Br. in Opp. 2) that it need not satisfy the zone-of-interests requirement for Section 8005 because Section 8005 allegedly arises only as a "defense" to Sierra Club's claims that the Acting Secretary violated the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, or acted *ultra vires* in transferring the funds at issue. That contention lacks merit for several independent reasons.

First, Sierra Club has no constitutional claim, only a statutory one. That is the lesson of this Court's decision in *Dalton* v. *Specter*, 511 U.S. 462 (1994), which instructed that claims alleging that a federal official has "exceeded his statutory authority are not 'constitutional' claims," *id.* at 473, and instead raise "only issues of statutory interpretation," *id.* at 474 n.6 (citation omitted). In attempting to distinguish *Dalton*, Sierra Club merely repeats (Br. in Opp. 18-19) the panel majority's observation that "a constitutional violation may occur when an officer violates an express prohibition of the Constitution," such as the Fourth Amendment. Pet. App. 23a. But the purported Appropriations Clause violation here is just a statutory claim "dressed up in constitutional garb." *Id.* at 65a (Collins, J., dissenting). Sierra Club cannot plead or prove a violation of the Appropriations Clause (or any *ultra vires* conduct) without showing that the challenged expenditures are not authorized "by Law," U.S. Const. Art. I, § 9, Cl. 7, and thus an essential ingredient of its claim is that the transfers at issue were not permissible under Section 8005. Cf. Sierra Club Br. in Opp. 21 ("constitutional" claim depends on "the absence of a valid statutory authorization"). Sierra Club's own discussion (*id.* at 25-31) of the merits vividly illustrates that point, as it turns entirely on Section 8005, not the Appropriations Clause.

Second, regardless, the Appropriations Clause does not itself confer any cause of action. Pet. 27. Sierra Club argues (Br. in Opp. 15-16) that this Court has long entertained suits for injunctive relief against allegedly unconstitutional conduct by public officials. But as the Court explained in *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), "[t]he ability to sue to enjoin unconstitutional actions by * * * federal officers is the creation of courts of equity." *Id.* at 327. The cause of action is not derived from the Constitution itself, which is why Congress may impose "express and implied statutory limitations." *Ibid.* Sierra Club errs in suggesting (Br. in Opp. 21 n.3) that the Appropriations Clause is distinguishable in this respect from the Supremacy Clause, which was at issue in *Armstrong*. The fact that a constitutional provision "protects individual liberty," *ibid.* (citation omitted), does not overcome the separation-of-powers concerns with judicially inferring a cause of action directly under the Constitution. Cf. *Hernandez* v. *Mesa*, 140 S. Ct. 735, 742-743 (2020).

Third, in any event, any implied equitable cause of action to enjoin allegedly unconstitutional or *ultra vires* conduct is subject to the zone-of-interests requirement, with Section 8005 supplying the relevant zone under the circumstances here. Pet. 28-29. The zone-of-interests requirement rests on a presumption that Congress does not intend the "absurd consequences" that might follow if any plaintiff who satisfies the bare minimum of Article III injury could sue to enforce federal law. *Thompson* v. *North Am. Stainless, LP*, 562 U.S. 170, 176 (2011). Those same absurd consequences would follow if a plaintiff contending that officials have exceeded the limitations of a federal statute could circumvent the zone-of-interests requirement simply by declining to

plead a claim under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and instead invoking Congress's grant of equity jurisdiction to the federal courts, see *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-319 (1999). If anything, this Court has indicated that, when the APA's "generous review" provisions do not apply, a *more* demanding inquiry is appropriate to ensure that Congress intended to allow the putative plaintiff to sue. *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987) (citation omitted); see Pet. 16, 28.

Sierra Club invokes (Br. in Opp. 2, 19-20) the D.C. Circuit's decision in *Haitian Refugee Center* v. *Gracey*, 809 F.2d 794 (1987), but mischaracterizes its reasoning. The court there did state, in dicta, that the interests of a litigant "injured by *ultra vires* action * * * normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest." *Id.* at 811 n.14. It went on to explain, though, that the relevant question in a suit—like this one—involving a statutory provision that "limit[s] the authority conferred" is whether "the litigant's interest may be said to fall within the zone protected by the limitation." *Ibid.*; see Pet. App. 75a n.17 (Collins, J., dissenting). Sierra Club's asserted aesthetic, recreational, and environmental interests are not even arguably within the zone of interests protected by Section 8005's limits on the Secretary's transfer authority.

Finally, Sierra Club errs in suggesting (Br. in Opp. 14-15) that its claim arises under the Consolidated Appropriations Act, 2019 (CAA), Pub. L. No. 116-6, 133 Stat. 13, which appropriated funds to DHS for the construction of fencing under DHS's own distinct statutory

authorities. See Pet. 10 (discussing the relevant title of the CAA). The panel majority did not endorse that argument, and for good reason. In addition to likewise failing to provide any private right of action for respondents, the CAA does not prohibit any spending that occurs in compliance with a transfer statute, such as Section 8005. See CAA § 739, 133 Stat. 197.

b. In the companion case, the panel majority erred in concluding that the sovereign and environmental interests asserted by California and New Mexico (collectively, the States) in their APA challenge are within the zone of interests protected by Section 8005—a provision that has nothing to do with such interests. See Pet. App. 138a-139a (Collins, J., dissenting) ("[T]he alleged environmental harms that the States assert here play no role in the analysis [of military priorities] that § 8005 requires the Secretary to conduct, and are not among the harms that § 8005's limitations seek to address or protect[.]"). The States nowhere defend the panel majority's misguided view (*id.* at 103a) that the zone-of-interests requirement should be relaxed in this context to compensate for limitations on congressional standing. Pet. 22-23. Nor do the States endorse the panel majority's view (Pet. App. 103a-105a) that the States are proper plaintiffs because of their supposedly "unique" interest in enforcing structural constitutional limitations, or because their interests are "congruent" with the interests of two congressional committees that disapproved of the transfers after the fact. Pet. 23-24. In short, the States do not meaningfully defend the reasoning of the decision below.

The States instead contend (Br. in Opp. 19-23) that they satisfy the zone-of-interests requirement when that requirement is applied by reference to the overall

statutory scheme, including the CAA. According to the States, Section 8005's proviso "protect[s] Congress's substantive spending choices," including its decision to appropriate funds to DHS in the CAA for fencing construction along the southern border only in Texas, not California and New Mexico. *Id.* at 21. The zone-of-interests requirement, however, must be applied "by reference to the particular provision of law upon which the plaintiff relies." *Bennett* v. *Spear*, 520 U.S. 154, 175-176 (1997). By the States' own account (*e.g.*, Br. in Opp. 2), no violation has occurred here unless the transfers were beyond the Acting Secretary's authority under Section 8005. To nonetheless define the relevant statutory provision for zone-of-interests purposes as "the CAA and other [spending] statutes" (*id.* at 22) would "deprive the zone-of-interests test of virtually all meaning." *Air Courier Conf. of Am.* v. *American Postal Workers Union*, 498 U.S. 517, 530 (1991).

Finally, the States are wrong (Br. in Opp. 23-24) to frame the question as whether Congress precluded judicial review. Recognizing that these particular litigants are not proper plaintiffs to sue to enjoin alleged violations of Section 8005 would not mean that such violations are categorically beyond review. Cf. *id.* at 16 n.8 (acknowledging that the government has not raised a zone-of-interests challenge in other litigation involving parties claiming an entitlement to the transferred funds); Pet. App. 289a (N.R. Smith, J., dissenting).

2. The Acting Secretary complied with Section 8005

The panel majority further erred in finding any violation on the merits. Pet. 29-32. The Acting Secretary appropriately determined that the transfers at issue here were "for higher priority items, based on unforeseen military requirements," and that "the item for

which funds are requested" had not been "denied" by Congress. DoD Appropriations Act § 8005, 132 Stat. 2999.

Respondents dwell on the term "denied." Sierra Club Br. in Opp. 26-28; States Br. in Opp. 29. But the critical term is "item." Respondents, like the panel majority, wrongly interpret the term "item" to refer to border-wall construction writ large. Pet. App. 116a-117a. Read in context, however, the limitation that appropriated funds may not be transferred for an "item * * * denied by the Congress," 132 Stat. 2999, refers to the particular budget items that DoD proposes during the budgeting process—as demonstrated by the earlier reference in the same proviso to "higher priority items," *ibid.*, which describes a specific project for which the transferred funds will be used, not a generalized goal. See Pet. App. 162a-163a (Collins, J., dissenting) ("[W]hen § 8005 requires a consideration of whether 'the item for which funds are requested has been denied by the Congress,' it is referring to whether Congress, *during DoD's appropriations process*, denied an 'item' that corresponds to the 'item for which funds are requested.'") (citation omitted); see also Pet. 30 (discussing GAO opinion confirming this interpretation).

Respondents likewise argue (*e.g.*, States Br. in Opp. 24-27) that DoD's need for additional funding to respond to DHS's request for counterdrug assistance under 10 U.S.C. 284 was not an "unforeseen military requirement[]." DoD Appropriations Act § 8005, 132 Stat. 2999. But DoD's need to respond to such a request was "unforeseen" at the relevant time—during DoD's budgeting process—because DHS had not yet made any specific request at that time, and DoD's authority to pro-

vide counterdrug support is contingent on such a request, see 10 U.S.C. 284(a). DHS made its request only months later, after protracted budget negotiations that could have obviated the need for additional DoD support. And while Sierra Club objects (Br. in Opp. 30) that the government's reading would permit "the Executive Branch [to] convert any action taken for the benefit of another agency into a 'military requirement' simply by having DoD take the action," it is *Congress* that authorized DoD to provide this form of military support to civilian agencies. In Section 284, Congress authorized DoD to use its military resources, including its expertise and funding, to assist in combatting the problem of drug smuggling. See, *e.g.*, 10 U.S.C. 284(b)(3), (5)-(6), and (10) (Supp. V 2018) (authorizing DoD to assist other federal agencies with transportation, training, communications monitoring, and aerial reconnaissance).

Respondents have abandoned any argument that Section 284(b)(7) does not authorize the construction activities at issue here. The transfers ordered by the Acting Secretary to fund that construction were also lawful.

B. The Questions Presented Warrant Review

This Court's prior orders in *Sierra Club* granting a stay in July 2019 and declining to lift the stay in July 2020 presumably reflected a determination that, at a minimum, the questions presented warrant review, as they manifestly do. See Pet. 16, 32. Respondents nowhere engage with this Court's stay orders. Respondents also do not dispute that the divided merits panel in *Sierra Club* employed essentially the same reasoning that this Court already found to be wanting in the earlier stay proceedings. Then as now, the panel majority concluded that either the zone-of-interests requirement does not apply at all to Sierra Club's claims, or that the

relevant zone of interests is set by the Appropriations Clause rather than Section 8005. Compare Pet. App. 33a (merits panel), with *id.* at 264a (motions panel). As explained above, that reasoning is deeply flawed and continues to warrant review.

Review is equally warranted in *California*. The panel majority's holding—that the States have a cause of action under the APA to challenge the Acting Secretary's Section 8005 transfers—is inconsistent with this Court's zone-of-interests precedent and, if allowed to stand, would invite future APA challenges to sensitive military judgments about the internal transfer of DoD appropriations. Moreover, the panel majority's holding in *California* was predicated in part on an ill-conceived effort to compensate for the limitations on congressional standing by "broadly" construing the "field of suitable challengers" who may assert a claim under the APA for a violation of Section 8005. Pet. App. 103a; see *id.* at 145a (Collins, J., dissenting).

Finally, the States argue (Br. in Opp. 15-16) that review is unwarranted because many of the funds at issue have already been expended. But construction of the projects financed by the funds at issue remains ongoing and would be disrupted if the *Sierra Club* injunction were to take effect. DoD recently estimated in other litigation that, as of August 14, 2020, more than 25% of the total contracted miles of fencing to be constructed using these funds had not yet been completed. See 19-cv-720 D. Ct. Doc. 99-7, at 1-2 (D.D.C. Aug. 14, 2020). The judgments below, and the underlying questions

presented, are of ongoing significance to the government's efforts to secure the southern border of the United States.[*]

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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SEPTEMBER 2020

[*] Moreover, Sierra Club has indicated elsewhere that it plans to seek additional sweeping and improper remedies, including the removal of already constructed fencing, if it prevails. See Adam Liptak, *Supreme Court Lets Trump Keep Building His Border Wall*, N.Y. Times, July 31, 2020, https://nyti.ms/3gljU4v (quoting Sierra Club's counsel as stating that it will "seek the removal of every mile of unlawful wall built").