No. 20-138

IN THE

# Supreme Court of the United States

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

*Petitioners*,

—v.—

SIERRA CLUB and SOUTHERN BORDER COMMUNITIES COALITION,

*Respondents.*

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

## BRIEF FOR RESPONDENTS


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## QUESTIONS PRESENTED

After a lengthy budgetary standoff resulting in the longest government shutdown in U.S. history, Congress rejected the President's request for $5.7 billion to construct a border wall, and instead authorized only $1.375 billion for construction limited to south Texas. On the same day the President signed Congress's decision into law, he announced that he would nonetheless divert billions of dollars from various military accounts to build the wall beyond Congress's authorization. Plaintiffs-Respondents are organizations whose members own neighboring properties and use the lands affected by the multibillion-dollar construction project. The questions presented are:

1. Whether private parties have a cause of action when they face imminent, redressable injury from Executive Branch actions that violate the Appropriations Clause.

2. Whether executive officers violated the Appropriations Clause by spending $2.5 billion on wall construction that Congress refused to authorize.

## 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

Congress exercised its exclusive power of the purse to reject the administration's request for $5.7 billion to construct a wall across the US–Mexico border, and instead allocated only $1.375 billion for construction limited to south Texas. Executive Branch officials nonetheless acted to contravene Congress's deliberate decision to authorize funds for wall construction only for a defined geographic area, and to subject such construction to consultative and environmental constraints. Defendants-Petitioners ("Defendants") argue that their diversion of billions of taxpayer dollars to a massive, unauthorized infrastructure project may not be challenged by any injured party. The court of appeals correctly rejected that extreme view of unchecked power.

There is no dispute that Plaintiffs-Respondents' ("Plaintiffs") members are directly harmed by Defendants' border wall construction. Plaintiffs Sierra Club and Southern Border Communities Coalition are organizations whose members own nearby property and live in, study, conserve, fish, hike, and otherwise use protected lands on which Defendants are constructing an unauthorized border wall that interferes directly with their interests. Because that construction harms Plaintiffs and violates the Appropriations Clause, Plaintiffs are entitled to an injunction.

Plaintiffs have a cause of action under well-established principles of equity, and the Administrative Procedures Act ("APA"). When government officials act without authority and harm individuals, courts have long recognized a right in equity to enjoin the action as *ultra vires*, particularly

when the actions violate an express constitutional provision, as they did here. Congress provided an additional basis for judicial relief under the APA against agency actions that exceed constitutional and statutory authority, as Defendants' actions here do.

Defendants argue that actions seeking equitable relief against constitutional violations are barred if Plaintiffs do not fall within the "zone of interests" of the statute Defendants invoke in *defending* against Plaintiffs' claims—Section 8005 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999 ("Section 8005"). But a plaintiff's right to proceed does not turn on the statute defendants choose to raise as a defense. This Court has never imposed such a counterintuitive zone-of-interests test on constitutional or equitable claims, and Defendants provide no reason for doing so here.

The court of appeals was also correct on the merits. Congress unequivocally rejected President Trump's funding request for the wall construction in dispute. The President himself conceded that Congress turned him down. Defendants seek to circumvent that denial by invoking Section 8005, an inapposite statute authorizing spending for "unforeseen military requirements." But the court of appeals correctly held, as has every court that has considered this question, that Section 8005 by its terms does not apply, and therefore does not authorize what Congress deliberately rejected.

# STATEMENT OF THE CASE

## A. The Spending Power

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

"The separation between the Executive and the ability to appropriate funds was frequently cited during the founding era as the premier check on the President's power." *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1, 8–9 (D.C. Cir. 2020). The Constitution's reservation of appropriations power to Congress reflects the Framers' use of separation of powers to safeguard individual liberty, and was consistent with their view that the branch of government closest to the people should possess the power of the purse. *See The Federalist* No. 58 at 394 (James Madison) (Jacob E. Cooke ed., 1961) ("Th[e] power over the purse may in fact be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people . . . .").

### B. Underlying Facts

1. *Congress considers and rejects the President's proposal for a multibillion-dollar border wall.*

In February 2018, the Executive Branch submitted its Fiscal Year 2019 Budget Request, which proposed "$18 billion to fund the border wall," with an initial "invest[ment] of $1.6 billion." J.A. 128. The Request justified the border wall as a counternarcotics measure, asserting that "a border wall is critical to combating the scourge of drug addiction" because "[t]he border wall would stop smugglers in their tracks." *Id.*

Throughout 2018, Congress considered the President's proposal for a multibillion-dollar wall, ultimately rejecting "numerous bills that would have authorized or appropriated additional billions for border barrier construction." Pet. App. 210a–211a (listing proposed legislation). Numerous individuals and organizations—including Plaintiffs—participated in the political process by advocating with Congress to limit the scope and location of any construction, to avoid harm to neighboring landowners, the environment, and border communities. *See* Dist. Ct. ECF Nos. 32 ¶ 5 (Gaubeca Decl.), 33 ¶ 7 (Houle Decl.). Members of Congress from the potentially affected communities unanimously opposed the proposal. *See Every Congressperson Along Southern Border Opposes Border Wall Funding*, CBS News (Jan. 8, 2019), https://www.cbsnews.com/news/trumps-border-wall-every-congressperson-along-southern-border-opposes-border-wall-funding-2019-1-8. "Lawmakers spent countless hours considering these various [wall-funding] proposals, but none ultimately passed." Pet. App. 211a.

By December 2018, the disagreement between Congress and the President led to a 35-day partial government shutdown, as Congress "consistently refused to pass any measures that met the President's desired funding level." *Id.* at 207a. While the political branches negotiated a resolution to the border wall funding dispute, the United States endured the longest partial government shutdown in its history.

On January 6, 2019, the President supplemented his border wall proposal with a formal request for $5.7 billion in border wall construction funds. A letter from the Acting Director of the Office of Management and Budget to the U.S. Senate Committee on Appropriations stated: "The President requests $5.7 billion for construction of a steel barrier for the Southwest border." J.A. 131–32. The letter explained that "a physical barrier—wall" would aid field personnel, and that CBP would "execute these funds" with the assistance of "the U.S. Army Corps of Engineers." J.A. 132. Because the Senate had previously approved only $1.6 billion in wall funding, the letter recognized that the President's request "**would require an increase of $4.1 billion over the FY 2019 funding level in the Senate version of the bill.**" J.A. 132 (emphasis in original).

On February 14, 2019, Congress rejected the President's request, and instead *reduced* wall funding below the Senate's earlier bill, which had authorized $1.6 billion in wall construction. After lengthy negotiations, Congress passed the Consolidated Appropriations Act of 2019 ("CAA"), 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 the limited area Congress agreed to fund, Congress barred all construction within specified ecologically sensitive sites and imposed notice-and-comment requirements on wall construction within certain city limits to enable local community input. CAA §§ 231–32, 133 Stat. at 28–29.

The President conceded the next day that Congress had rejected his request for billions in wall funds. During a press conference, President Trump stated that he "went through Congress" and "made a deal," but that he was "not happy with it." J.A. 142. Rather than the $5.7 billion he requested, the President acknowledged, "I got almost $1.4 billion." J.A. 142. Although Congress provided "billions and billions of dollars for other things—port of entries . . . drug equipment," J.A. 142, Congress refused to provide the requested wall funds. Trump acknowledged that this was a deliberate and unambiguous decision: "the primary fight was on the wall," and "on the wall, they skimped." J.A. 143.

The President nonetheless signed the CAA into law on February 15, 2019.

2. *The Executive Branch announces that it will unilaterally increase border wall funding.*

Rather than abide by the deal the President struck with Congress, and signed into law, the White House announced that President Trump would "take Executive action to secure additional resources" for border wall construction beyond what Congress appropriated for that purpose. J.A. 138. In a fact sheet titled "President Donald J. Trump's Border Security Victory," the White House stated that "the Administration has so far identified up to $8.1 billion

that will be available to build the border wall once a national emergency is declared and additional funds have been reprogrammed." J.A. 138. On top of the $1.375 billion that Congress had agreed to spend on a border wall in Texas, this amount included "$2.5 billion under the Department of Defense funds transferred for Support for Counterdrug Activities (Title 10 United States Code, section 284)" and "$3.6 billion reallocated from Department of Defense military construction projects under the President's declaration of a national emergency (Title 10 United States Code, section 2808)." J.A. 138.

The President declared a national emergency the same day that he signed the CAA, proclaiming a "longstanding" problem of "large-scale unlawful migration through the southern border" that has "worsened" in recent years. Declaring a National Emergency Concerning the Southern Border of the United States, Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019). The President explained that unilateral actions, including the declaration of a national emergency, would permit him to exceed the terms of the deal he made with Congress and build the border wall at his desired pace: "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." J.A. 143.

3. *Defendants divert billions of dollars from the military to wall sections that Congress refused to fund.*

Ten days later—less than two weeks after Congress denied the President's request to construct approximately 234 miles of new physical barrier in areas identified as the top Customs and Border Protection ("CBP") priorities—DHS requested that

the Department of Defense ("DoD") fund "approximately 218 miles" of new walls in those areas. Pet. App. 5a. DoD approved exactly $2.5 billion in Section 284 expenditures for DHS construction, as specified in the February 15 White House announcement. *Id.*

Prior to the Defendants' decision to bypass Congress's appropriations decision, DoD's Section 284 contained "less than one tenth of the $2.5 billion needed to complete those projects." Pet. App. 5a. So DoD invoked Sections 8005 and 9002 of the Department of Defense Appropriations Act of 2019, Pub. L. No. 115-245, 132 Stat. 2981 (2018),[1] to transfer funds appropriated for other military purposes into the Section 284 account: "$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. These transfer authorities "may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." *Id.* at 6a–7a (quoting Section 8005).

As to the $3.6 billion in military construction funds that the White House announced would be diverted under claimed national emergency powers, Defendants took no action for nearly seven months. In the meantime, for the first time in U.S. history,

[1] Section 9002 is "subject to the same terms and conditions" as Section 8005 and Petitioners' brief refers to the transfer authorities collectively as "Section 8005." Pet. Br. 9 n.1. This brief follows the same convention.

bipartisan majorities of both houses voted to terminate a President's emergency declaration. *See* H.R.J. Res. 46, 116th Cong. (2019); 165 Cong. Rec. H2799, H2814–15 (2019). The President vetoed this effort.

Finally, on September 3, 2019, the Secretary of Defense announced that it was necessary to divert exactly $3.6 billion from military construction projects to the border wall. DoD had previously told Congress that these projects were necessary to support servicemembers and military missions. "[P]rojects include 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." *California v. Trump*, 407 F. Supp. 3d 869, 881 (N.D. Cal. 2019).

Days later, the President explained that "[w]e're taking money from all over because, as you know, the Democrats don't want us to build the wall." "A Message from President Trump on the Border Wall," White House (Sept. 9, 2019) https://www.youtube.com/watch?v=0fEdhud7RJI. Soon after, the President explained: "We wanted Congress to help us. It would have made life very easy. And we still want them to get rid of loopholes, but we've done it a different way. . . . We still want them to do it because it would be a little bit easier, but Congress wouldn't do it." Remarks by President Trump During Visit to the Border Wall, White House, (Sept. 18, 2019) https://www.whitehouse.gov/briefings-statements/remarks-president-trump-visit-border-wall-san-diego-ca ("Border Wall Visit Remarks").

On September 27, 2019, the House and Senate passed an additional joint resolution to terminate the emergency. *See* S.J. Res. 54, 116th Cong. (2019); 165 Cong. Rec. S5855, S5874–75 (2019). The President vetoed the resolution.

4. *Effects of Defendants' Actions on Plaintiffs.*

Plaintiffs' members own nearby property and regularly use the lands on which Defendants are building a massive wall, despite Congress's refusal to authorize its construction. The wall at issue here stretches across three states and includes protected public lands, including Organ Pipe National Monument, Coronado National Memorial, the Cabeza Prieta National Wildlife Refuge, and the San Bernardino National Wildlife Refuge. These unique border landscapes are renowned for their beauty and archaeological, historic, and biological value. "Sierra Club's thousands of members live near and frequently visit these areas along the U.S.-Mexico border for hiking, birdwatching, photography, and other professional, scientific, recreational, and aesthetic activities." Pet. App. 12a.

Many of Plaintiffs' members have chosen to purchase land and make their homes in close proximity to these protected wilderness areas. For example, Bill Broyles "own[s] land near Ajo, Arizona, near the Organ Pipe Cactus National Monument and the Cabeza Prieta National Wildlife Refuge," and has spent five decades hiking and studying these lands. J.A. 113–14. Ralph Hudson has likewise "owned property in Ajo, Arizona for almost two decades." J.A. 108. His "love of this unique desert ecosystem led [him] to build [his] house in Ajo back in 2001." J.A. 109.

Margaret Case lives approximately ten minutes from the Coronado National Memorial, and "[t]he border wall and the foliage corridor along the San Pedro River are visible from [her] house's patios." J.A. 121–22. Border wall construction and the attendant infrastructure diminish the value of her home. J.A. 123–25. Degradation of the public lands around her home causes further injury: Ms. Case "chose to live the rest of [her] life in this area" in light of Congressional protection of the surrounding "natural and cultural resources." J.A. 125. She "relied upon those legal protections to protect the lands around [her] home, never dreaming that they would be rendered impotent with the stroke of a pen." J.A. 125.

Congress took into account the ecological and other concerns of border residents, including Plaintiffs' members, in refusing to fund the border wall construction at issue here. In light of these concerns, Congress in the CAA authorized wall construction only in Texas, carved out ecologically sensitive sites from construction, and set up a public notice-and-comment requirement prior to construction within cities.

But Defendants have contravened Congress's deliberate choices and used $2.5 billion diverted from military purposes without any of the ecological restrictions or consultative requirements that Congress imposed. Defendants' construction has drastically altered the landscape in which Plaintiffs' members own property and which they use and enjoy. Defendants have dispensed with environmental protections previously used for border barrier construction, destroyed protected saguaro cacti that can take 100 years to reach maturity, blasting ancient

burial sites, and siphoned a 16,000-year-old desert aquifer sacred to the Tohono O'odham Nation. *See* Br. for Tohono O'odham Nation as Amicus Curiae Supporting Pls.-Appellees, *Sierra Club et al. v. Trump et al.*, 963 F.3d 874 (9th Cir. 2019) (Nos. 19-16102, 19-16300, 19-16299, 19-16336). Defendants have recently increased their pace, rapidly dynamiting and altering as much territory as possible for further border wall construction. *See, e.g.*, *A Rush to Expand the Border Wall That Many Fear Is Here to Stay*, N.Y. Times (Nov. 28, 2020), https://nyti.ms/3o8EUz5.

### C. Prior Proceedings

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

On May 24, 2019, the district court entered a preliminary injunction barring Defendants' initial transfer of $1 billion to construct wall sections in Arizona and New Mexico. The district court concluded that Defendants' plan was unlawful because the wall construction projects were specifically "denied by Congress" and not an "unforeseen" need, and thus failed to meet the requirements of the authority Defendants had invoked to defend their spending—Section 8005 of the DoD Appropriations Act. Pet. App. 350a–357a. The district court also noted that Defendants' position raised serious constitutional

concerns under the Appropriations Clause and the separation of powers. *Id.* at 357a–365a.

On June 28, 2019, the district court issued a permanent injunction incorporating its prior reasoning on the merits. *Id.* at 187a–188a.

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

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

On June 26, 2020, a different panel of the court of appeals affirmed the district court's permanent injunction. Writing for the court, Chief Judge Thomas found that Congress did not appropriate funds for the challenged border wall construction, and rejected Defendants' invocation of Section 8005 as a defense. Because Section 8005 was inapplicable, and "the

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

The court determined that Sierra Club, whose members are injured by Defendants' efforts to evade Congress's appropriations decisions, "has both a constitutional and an *ultra vires* cause of action." *Id.* at 19a. First, "because the Federal Defendants not only exceeded their delegated authority, but also violated an express constitutional prohibition designed to protect individual liberties"—the Appropriations Clause—"Sierra Club has a constitutional cause of action here." *Id.* at 25a. Second, Plaintiffs had a cause of action in equity. "Equitable actions to enjoin *ultra vires* official conduct do not depend upon the availability of a statutory cause of action; instead, they seek a 'judge-made remedy' for injuries stemming from unauthorized government conduct, and they rest on the historic availability of equitable review." *Id.* (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015)). Relying on decisions from this Court and the D.C. Circuit, the court found that "[s]uch causes of action have been traditionally available in American courts." *Id.* at 26a.

In the companion case, *California v. Trump*, 963 F.3d 926 (9th Cir. 2020), the court of appeals set forth its reasons for rejecting Defendants' Section 8005 defense on the merits. The court concluded that border wall construction was not "unforeseen" as required under Section 8005. Pet. App. 107a–112a. It pointed out that Defendants' position—that financial support for a multi-agency project is foreseen only at

the moment a request is received by DoD—"would swallow the rule and undermine Congress's constitutional appropriations power," and would be "inconsistent with the purpose of Section 8005: to 'tighten congressional control of the reprogramming process.'" *Id.* at 110a (quoting H.R. Rep. No. 662, 93d Cong., 1st Sess. 16 (1973)). Moreover, it found that the historical record demonstrated that DoD did, in fact, anticipate just such a request. *See id.* at 111a.

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

The court also concluded that Section 8005 could not authorize the spending because by its terms it does not permit a transfer for programs Congress has "denied." *Id.* at 116a–117a. "Congress's broad and resounding denial resulting in a 35-day partial government shutdown must constitute a previous denial for purposes of Section 8005." *Id.* at 117a.

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

On July 31, 2020, this Court denied Plaintiffs' motion to lift the stay the Court had previously imposed. *See* 140 S. Ct. 2620. Justices Breyer,

Ginsburg, Sotomayor, and Kagan would have granted the motion. *Id.*[2]

## SUMMARY OF ARGUMENT

Plaintiffs' claims are founded on the Constitution's vesting of the appropriations power in Congress, not the President. The Appropriations Clause was designed to ensure that only the people's representatives could authorize the expenditure of funds on federal projects. In this case, Congress exercised that constitutional authority to deny the President's request for $5.7 billion to build hundreds of miles of wall along the U.S.-Mexico border. After an extended confrontation, Congress appropriated $1.375 billion to build a wall only in parts of Texas. Defendants nonetheless have spent billions more to build the very wall sections Congress rejected. Defendants' violation of a core constitutional protection directly injures Plaintiffs' property interests and use and enjoyment of protected lands. The decision below correctly enjoined that unconstitutional action.

The court of appeals faithfully applied this Court's precedents in recognizing the availability of a cause of action to seek equitable relief against Defendants' unconstitutional conduct. In line with a tradition of judicial review dating back to England,

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[2] On October 9, 2020, the court of appeals in a 2–1 decision affirmed the district court's injunction of an additional $3.6 billion in wall construction funding, finding that Defendants could not circumvent Congress's refusal to fund the wall by transferring billions from military construction projects to DHS's unfunded wall projects. 977 F.3d 853. On November 17, 2020, Defendants filed a petition for a writ of certiorari with this Court. *See* 20-685 Pet. I.

Plaintiffs are entitled to seek equitable relief against *ultra vires* acts that directly harm Plaintiffs' members' properties and their use of public land. Defendants' chief response is that their invocation of Section 8005 as a defense to unconstitutional spending transforms this action into a garden-variety statutory claim, and effectively precluded judicial review—even if their actions are not authorized by Section 8005. But this Court has never restricted constitutional or *ultra vires* claims by imposing a statutory zone-of-interest requirement. Decades ago, Judge Robert Bork rejected a similar argument, reasoning that it would make no sense to require a litigant who challenges action as *ultra vires* to show he is protected by the very statute he claims is inapplicable. *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987). No court has adopted the government's novel theory, which would radically constrict the judiciary's traditional equitable powers, and threaten individual property and liberty interests with lawless intrusion.

Moreover, although the court of appeals did not have cause to reach the question, the APA also provides a cause of action to challenge agency actions so long as "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). Here the Appropriations Clause provides the relevant zone of interests, and Plaintiffs' claims are fully consistent with its purpose of protecting individual liberty and property interests by ensuring that public funds are spent only in accordance with "the difficult judgments reached by Congress as to the common good." *Richmond*, 496 U.S. at 428. To the extent a

statutory zone of interests applies at all, Plaintiffs' claims fall within the zone of those protected by the CAA, which rejected the President's request for the wall sections at issue here and explicitly took into consideration interests like those of Plaintiffs. But even if the Court were to look only to Section 8005, Plaintiffs' interests are entirely congruent with that statute's purpose of preventing executive officials from spending funds that Congress denied.

The court of appeals' determination on the merits that Defendants' actions are unlawful is also correct. Section 8005 authorizes diversion of appropriated funds only for "unforeseen military requirements," and only where Congress has not "denied" the item. But here, Defendants diverted monies to finance *civilian* law enforcement projects that the Executive *foresaw*, and which Congress had just *denied*. As the President conceded, Congress unequivocally considered and denied the funding request at issue here, the debate over which occupied central stage in the most public and protracted budgetary standoff in U.S. history. And as the record demonstrates, nothing about this wall construction was unforeseen or military in nature: the Executive requested these wall sections from Congress under an assertion of a civilian counternarcotics need, and DoD specifically anticipated providing support.

## ARGUMENT

### I. PLAINTIFFS HAVE A CAUSE OF ACTION.

#### A. Defendants Are Violating the Constitution.

Plaintiffs' claims arise from Defendants' efforts to circumvent congressional control over

appropriations. The Appropriations Clause provides that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const., Art. I, § 9, cl. 7. Its "fundamental and comprehensive purpose . . . is to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good." *Richmond*, 496 U.S. at 427–28. Defendants' expenditure of billions of dollars on a project Congress specifically refused to fund violates that provision. And because those actions directly inflict injury on Plaintiffs and their members, Plaintiffs have a cause of action for judicial redress.

Defendants seek to recast Plaintiffs' constitutional claim as a "garden-variety challenge to compliance with a statute," Pet. Br. 21, and then to argue that Plaintiffs do not fall within the zone of interests of that statute, and therefore have no cause of action. But Plaintiffs' claims arise from Defendants' violation of the Appropriations Clause. Defendants' expenditures on the challenged wall sections were not authorized by Congress—indeed, they were specifically considered and rejected. In the CAA, after the longest budgetary standoff in U.S. history, Congress rejected the proposed border wall and authorized construction only in a limited location, with limited funds and subject to further restrictions based on local community consultation and environmental considerations. Defendants' decision to nonetheless spend far in excess of what Congress appropriated, in locations Congress rejected, forms the basis for this lawsuit.

Although Defendants' brief studiously avoids any of the essential context underlying this lawsuit, it cannot obscure the constitutional nature of this

dispute. In the President's words, he "went through Congress" and "made a deal"—and the terms of that deal were that he "got almost $1.4 billion" for the border wall. J.A. 142. Wall funding was the central budgetary disagreement and Congress's decision was to reject the President's multibillion-dollar request. As the President put it, "the primary fight was on the wall," and, "on the wall, they skimped." J.A. 143. "To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring).

That Plaintiffs' claim sounds in a violation of the Constitution is confirmed by the D.C. Circuit's recent decision in *United States House of Representatives v. Mnuchin*. There, the court examined the House's claim that "Congress authorized the defendants to spend $1.375 billion, and only $1.375 billion, for construction of a barrier, but the defendants are attempting to spend $8.1 billion." 976 F.3d at 5. Writing for the court, Judge Sentelle recognized that "[t]he alleged Executive Branch action cuts the House out of the appropriations process, rendering for naught its vote withholding the Executive's desired border wall funding and carefully calibrating what type of border security investments could be made." 976 F.3d at 13. Thus, while the House could not raise a "garden-variety challenge to compliance with a statute," Pet. Br. 21, it stated a constitutional claim that "by spending funds that the House refused to allow, the Executive Branch has

defied an express constitutional prohibition," 976 F.3d at 13.

Defendants argue that *Dalton v. Specter*, 511 U.S. 462 (1994), supports their view that no constitutional violation is possible if an official claims statutory authority. Pet. Br. 32. But *Dalton* "does not hold that *every* action in excess of statutory authority is *not* a constitutional violation." Pet. App. 23a. Rather than impose such a sweeping rule, this Court in *Dalton* only rejected the equally sweeping, inverse rule: "that an action taken by the President in excess of his statutory authority *necessarily* violates the Constitution." 511 U.S. at 473 (emphasis added). "There would have been no reason for the Court to include the word 'necessarily' if the two claims were always mutually exclusive." Pet. App. 250a. Instead, "*Dalton* suggests that some actions in excess of statutory authority may be constitutional violations, while others may not. Specifically, *Dalton* suggests that a constitutional violation may occur when an officer violates an express prohibition of the Constitution." *Id.* at 23a. That is precisely what Defendants did here in spending funds that Congress refused to appropriate.

An executive official who spends taxpayer funds without congressional authorization violates the Appropriations Clause, which prohibits taking any money "from the Treasury except under an appropriation by Congress." *Reeside v. Walker*, 52 U.S. 272, 291 (1850). "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned." *Id.* The Appropriations Clause was "intended as a restriction upon the disbursing authority of the Executive department." *Cincinnati*

*Soap Co. v. United States*, 301 U.S. 308, 321 (1937). In this case, "by spending funds that the House refused to allow, the Executive Branch has defied an express constitutional prohibition." *House v. Mnuchin*, 976 F.3d at 13.

If Defendants' distorted reading of *Dalton* were correct, it would be effectively impossible to plead a violation of the Appropriations Clause, because the executive *always* points to *some* statutory authorization when it spends funds. *See Knote v. United States*, 95 U.S. 149, 154 (1877) (the Appropriations Clause commands that the Executive "cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress"). "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

Appropriations legislation thus has a constitutional significance distinct from the "Defense Base Closure and Realignment Act of 1990 at issue in *Dalton*." Pet. App. 23a n.13. While "[t]he Constitution divides authority with respect to the military between Congress and the President," it "delegates exclusively to Congress the power of the purse." *Id.* Congress "has plenary power to give meaning" to its exclusive power, and does so through legislation. *Harrington v. Bush*, 553 F.2d 190, 194 (D.C. Cir. 1977). "Federal statutes reinforce Congress's control over appropriated funds." *Dep't of Navy v. Fed. Lab. Rels. Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.). Executive refusal to abide by this congressional control violates the Appropriations Clause.

Section 8005, if it applied, might authorize expenditures Congress otherwise did not consider. But invocation of Section 8005 cannot convert a constitutional violation into a mere "garden-variety" issue of "compliance with a statute," where, as here, Section 8005 is inapplicable by its terms. Pet. Br. 21. Defendants maintain that no constitutional claim is presented because "no violation of the Appropriations Clause has occurred *unless* the Acting Secretary exceeded his authority under Section 8005." Pet. Br. 33. But that is a non sequitur. Government action can simultaneously be *both* unauthorized by statute and violate the Constitution, and that does not somehow transform the constitutional claim into a statutory one. "When the challenged action is not only unauthorized but also intrusive on power constitutionally committed to a coordinate branch, the action may violate the Constitution, specifically, its mandate for the separation of legislative from executive powers." *New York v. Dep't of Just.*, 951 F.3d 84, 101 (2d Cir. 2020). Defendants' contravention of Congress's decision to limit wall funding violated the Appropriations Clause. That their attempted transfer of military funds also violates the plain terms of Section 8005 does not erase the constitutional violation.

Defendants' expenditure on a project rejected by Congress violates "a bulwark of the Constitution's separation of powers." *Dep't of Navy*, 665 F.3d at 1347. It contravenes the Framers' view that the power of the purse be vested "specifically in the hands of the 'representatives of the people.'" *House v. Mnuchin*, 976 F.3d at 9. And it harmed Plaintiffs in direct, tangible, and concrete ways. The court of appeals correctly

rejected Defendants' efforts to avoid the constitutional implications of their actions.

### B. Plaintiffs Have an Equitable Cause of Action to Enjoin Defendants' Violation of the Appropriations Clause.

#### i. Equitable actions are traditionally available.

As the court of appeals correctly recognized, Plaintiffs are entitled to seek equitable relief against Defendants' violation of the Appropriations Clause, as that violation directly harms Plaintiffs' members' properties and their use of public land. Injunctive relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001). "The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong*, 575 U.S. at 327 (citing Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. Rev. 345 (1956)). In affirming the district court injunction, the court of appeals followed the "established practice" of "this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Bell v. Hood*, 327 U.S. 678, 684 (1946).

Unlike a statutory cause of action, "[t]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief . . . depend on traditional principles of equity jurisdiction." *Grupo Mexicano de Desarrollo, S.A. v.*

*All. Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999) (quoting 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2941, at 31 (2d ed. 1995)). The question is simply "whether the relief [Plaintiffs] requested . . . was traditionally accorded by courts of equity." *Id.* at 319. And as *Armstrong* reaffirmed, "equitable relief . . . is traditionally available to enforce federal law" through injunctions against unlawful executive action. 575 U.S. at 329.

Defendants argue that there is no right of action for violations of the Appropriations Clause. Pet. Br. 34–35. But this Court has already rejected a similar argument seeking to avoid review of an Appointments Clause violation. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, "[t]he Government assert[ed] that 'petitioners have not pointed to any case in which this Court has recognized an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles.'" 561 U.S. 477, 491 n.2 (2010) (quoting Br. for United States at 22, *Free Enter. Fund*, 561 U.S. 477 (2010) (No. 08–861)). But, as the Court observed, private plaintiffs are entitled to such "relief *as a general matter*." *Id.* (emphasis added).

This Court has never suggested that private parties lack a cause of action in equity when government officials, acting without authority, inflict specific, concrete injuries on them—here, by damaging the use and enjoyment of their homes and properties, and the protected lands they regularly visit. Instead, "[g]enerally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers." Pet. App. 26a (quoting *Harmon v. Brucker*,

355 U.S. 579, 581–82 (1958)). This Court has long reviewed such claims. *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902).[3]

The lower courts have followed this lead, and for decades recognized that a cause of action exists to enjoin *ultra vires* conduct by Executive Branch agencies that harm individuals, particularly when it is unconstitutional. *See* Pet. App. 27a–28a (citing *Chamber of Com. of the U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) and *Dart v. United States*, 848 F.2d 217 (D.C. Cir. 1988)); *see also, e.g.*, *Duncan v. Muzyn*, 833 F.3d 567, 576–79 (6th Cir. 2016); *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1231–32 (10th Cir.

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[3] While this Court has emphasized the importance of restraint in implying novel causes of actions for damages or recognizing remedies that were unknown at equity, there is nothing new or unknown about "redress designed to halt or prevent [a] constitutional violation," which is a "traditional form[] of relief." *United States v. Stanley*, 483 U.S. 669, 683 (1987) (citations omitted). Defendants' reliance on this Court's jurisprudence regarding private suits for money damages is misplaced. *See* Pet. Br. 36–37 (citing *Hernandez v. Mesa*, 140 S. Ct. 735, 747 (2020), *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402–1403 (2018), and *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–286 (2002)). As Justice Harlan recognized in his concurrence in *Bivens* itself, the only thing novel about that decision was its extension of a long-established principle of equity to damages. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring) (noting "presumed availability of federal equitable relief"). While this Court has narrowed the *damages* remedy available under *Bivens*, it has never questioned the availability of *equitable* relief for a constitutional violation.

2005); *Rhode Island Dep't of Env't. Mgmt. v. United States*, 304 F.3d 31, 41–43 (1st Cir. 2002). Courts have consistently rejected the position Defendants advance here, which "would permit the President to bypass scores of statutory limitations on governmental authority" so long as the President maintains he is acting under some other unreviewable statute. *Chamber of Com.*, 74 F.3d at 1332.

There is no merit to Defendants' suggestion that equitable review of unconstitutional or *ultra vires* acts turns on the availability of a statutory cause of action, much less under the statute the *defendants* invoke to defend allegedly unconstitutional action. In *Harmon*, for example, this Court held that the district court erred when it dismissed a claim that the Secretary of the Army exceeded his statutory and constitutional authority. As the Court explained, the district court had the "power to construe the statutes involved to determine whether the respondent did exceed his powers." 355 U.S. at 582; *see also, e.g.*, *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689 (1949) ("[W]here [an] officer's powers are limited by statute, his actions beyond those limitations . . . are ultra vires his authority and therefore may be made the object of specific relief."). "Judicial review is favored when an agency is charged with acting beyond its authority," *Dart*, 848 F.2d at 221, and "[t]he responsibility of determining the limits of statutory grants of authority . . . is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction," *Chamber of Com.*, 74 F.3d at 1327 (quoting *Stark v. Wickard*, 321 U.S. 288, 310 (1944)); *see also* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 148 (1998)

("[A] litigant having no other statutory authority for judicial review may unabashedly point to Section 1331 as the basis for injunctive relief against agency officers").

Defendants' fear that the availability of judicial review would flood the courts with "minor or technical violations," Pet. Br. 27, is baseless given this lengthy and uninterrupted tradition of equitable actions. Article III itself is a significant limit on the cases that could be brought, because in many instances no one would have standing to sue. If the President spent excess funds on military salaries, foreign aid, or health care, for example, it is unlikely that anyone would be harmed in a non-generalized way. But where, as here, executive officials violate the Appropriations Clause in a way that inflicts concrete, specific, and non-generalized Article III injury on an individual, there should be no bar to relief.

And Defendants' proposed solution to the imagined floodgates problem—barring from court anyone save those entitled to diverted funds, Pet. Br. 28. n.3—would undermine the separation of powers. This case arises from Defendants' open disregard of Congressional control over spending decisions, which violates a core constitutional protection designed to safeguard individual liberty. As Justice Kennedy observed, when "the decision to spend [is] determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened." *Clinton v. City of New York*, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring). "The individual loses liberty in a real sense" in the absence of congressional control over the purse. *Id.* And as Alexander Hamilton argued, unless "the purse is lodged in one branch, and the sword in another," the

"division of powers, on which political liberty is founded" would be destroyed, and "would furnish one body with all means of tyranny." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 349 (Jonathan Elliot ed., 2d ed. 1836) (Alexander Hamilton). "If not for the Appropriations Clause, 'the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.'" *Dep't of Navy*, 665 F.3d at 1347 (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213–14 (1833)).

It is true that "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations." *Armstrong*, 575 U.S. at 327; *see* Pet. Br. 35. But *Armstrong* requires a clear showing of congressional "'intent to foreclose'" equitable relief, 575 U.S. at 328 (citation omitted), and the only statute Defendants identify, Section 8005, evidences no such intent. Unlike the statute at issue in *Armstrong*, Section 8005 does not identify an alternate remedy nor are the textual limitations at issue here "judicially unadministrable." *Id.*

Defendants speculate that Congress might have wished to preclude "private enforcement" of executive officers' refusal to abide by enacted appropriations laws, and preferred to enact new "legislation to override the transfer or to modify DoD's transfer authority." Pet. Br. 26–27. This gets it exactly backwards: "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *MacCollom*, 426 U.S. at 321; *see also Dep't of Navy*, 665 F.3d at

1348 ("[A]ll uses of appropriated funds must be affirmatively approved by Congress; the mere absence of a prohibition is not sufficient."). Defendants profess that this case "starkly illustrates the concern" that judicial review "could often be antithetical to the interests of Congress." Pet. Br. 26. But they have shown nothing in the text or context of Section 8005 or any other statute to suggest that Congress agrees. And Defendants' solicitude for Congress's interests rings especially hollow when they have disregarded Congress's express rejection of the very expenditures at issue here.

#### ii. A statutory zone-of-interests test is inapplicable to such a claim.

Defendants argue that "the zone-of-interests requirement applies to equitable actions seeking to enjoin constitutional violations," Pet. Br. 35, and that the relevant zone of interests is determined not by the constitutional provision said to be violated, but by the statute Defendants invoke *as a defense* to Plaintiffs' claims. Indeed, Defendants go further: In their view, equitable claims arising under the Constitution are subjected to a stricter *statutory* zone-of-interests test than claims actually arising under a statute. *See* Pet. Br. 36–38. This Court has never imposed such a rule, and Defendants provide no reason to take that radical step here.

The Court has applied a zone-of-interests test to a constitutional claim exactly once, more than forty years ago, in a footnote. *See Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977). In that single case, the Court evaluated the zone of interests of a Dormant Commerce Clause claim, explaining that

the test was a prudential aspect of standing doctrine. *Id.* (evaluating "standing" under "the two-part test of *Data Processing*"). As Judge Silberman observed in 2013, it was unclear for decades whether "that decision was simply anomalous" or if there is actually a "prudential" test "in the constitutional context." *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 676 n.3 (D.C. Cir. 2013) (Silberman, J., concurring). This Court suggested the next year in *Lexmark Int'l, Inc. v. Static Control Components* that application of the test in this context is indeed anomalous. As the Court explained, "'prudential standing' is a misnomer as applied to the zone-of-interests analysis, which asks whether this particular class of persons ha[s] a right to sue under this substantive statute." 572 U.S. 118, 127 (2014) (quotation marks omitted). The Court made no mention of the test as serving any function in the context of equity, instead describing the test as one of "statutory interpretation" to determine "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id.* The Court has not applied the zone of interests to any post-*Lexmark* constitutional claim, just as it did not apply it to any for nearly four decades preceding *Lexmark*.[4]

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[4] Defendants cite *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982), as a constitutional case applying the zone-of-interests test. Pet. Br. 35–36. There, however, the Court only quoted the *Data Processing* test in listing "prudential principles that bear on the question of standing" and did not actually apply the test. *Valley Forge*, 454 U.S. at 474. In any event, the Court certainly did not suggest that the Establishment Clause claim at issue in that case should be restricted by the zone of interests of the Federal Property and Administrative Services Act of 1949, the statutory authority the government there invoked. Yet that is precisely the novel argument Defendants advance here.

If the zone-of-interests test applies to Defendants' violation of the Appropriations Clause, the relevant analysis is "the zone of interests to be protected by the constitutional guarantee in question"—not a statute Defendants invoked in defense of their actions. *Bos. Stock Exch.*, 429 U.S. at 321 n.3 (quotation and alteration marks omitted). And Plaintiffs' interests are at the heart of the Appropriations Clause, which has a "fundamental and comprehensive purpose . . . to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *Richmond*, 496 U.S. at 427–28.

Moreover, the Court has never applied the zone-of-interests test Defendants propose to an *ultra vires* claim—and for good reason. As D.C. Circuit Judge Bork explained decades ago, such a requirement would make no sense: "[A] meritorious litigant, injured by *ultra vires* action, would seldom have standing to sue since the litigant's interest normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest." *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987). Unlike a party asserting a right under a statute, there is no requirement that parties injured by *ultra vires* government action "show that their interests fall within the zones of interests" of the "statutory powers invoked" by an executive official. *Id.*

In *Youngstown*, for example, the President invoked his war powers as the source of authority permitting him to injure steel mill owners. Under Defendants' rule, the President's war powers would

therefore prescribe the relevant zone of interests for any claim brought by the steel mill owners: the challenged "actions would not be 'ultra vires' in any respect if [presidential war powers] authorized the [seizures]," so the limits on the President's war powers were "a necessary element of their claims." Pet. Br. 39. But as Judge Bork explained, "[w]ere a case like [*Youngstown*] to arise today, the steel mill owners would not be required to show that their interests fell within the zone of interests of the President's war powers in order to establish their standing to challenge the seizure of their mills as beyond the scope of those powers." *Haitian Refugee Ctr.*, 809 F.2d at 811 n.14.

Similarly, in *Dames & Moore v. Regan*, the Court addressed the merits of an action for equitable relief based on a claim that officials acted "beyond their statutory and constitutional powers." 453 U.S. at 667. There, "the President purported to act under authority of both the [International Emergency Economic Powers Act ("IEEPA")] and 22 U.S.C. § 1732, the so-called 'Hostage Act.'" *Id.* at 675. But even though the limits of IEEPA and the Hostage Act were "a necessary element of the[] claims," Pet. Br. 39, the Court examined the *ultra vires* claim without asking whether the plaintiff's claims fell within the statutory zone of interests of the authorities the President invoked.

Plaintiffs' members are experiencing concrete, cognizable injuries to their property, and to their use and enjoyment of public land. It would make no sense to bar them from court unless they additionally claim an entitlement to the funds Defendants are spending to injure them. *Cf.* Pet. Br. 28. n.3 (suggesting that only "parties claiming an entitlement to transferred

funds" could be within the zone of interests of Section 8005). "If the Government were to use a Medicare statute, for example, to justify building the border wall on someone's property, it would make little sense to require that person to show that he was a Medicare beneficiary or provider to argue that the Medicare statute did not permit border barrier construction." *Ctr. for Biological Diversity v. Trump*, 453 F. Supp. 3d 11, 48 (D.D.C. 2020). Such a rule has no basis in statute, history, or logic. The Court should reject it.

### C. Plaintiffs Have an APA Claim.

The court of appeals correctly concluded that Plaintiffs have a cause of action grounded in the judiciary's traditional equitable powers, and therefore did not reach Plaintiffs' "alternative argument that they have a valid cause of action under the Administrative Procedure Act." Pet. App. 52a. Should the Court disagree with the court of appeals and find that equitable review is foreclosed, Plaintiffs' claims should still proceed under the APA. *See Japan Whaling Ass'n. v. Am. Cetacean Soc'y*, 478 U.S. 221, 228, 230 n.4 (1986) (treating Mandamus Act petition as APA claim).

The APA provides a cause of action to challenge agency actions so long as "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee." *Data Processing*, 397 U.S. at 153. The zone-of-interests test for APA claims is "not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (quotation marks and citation omitted). It "seeks to exclude those plaintiffs whose suits are more likely to

frustrate than to further statutory objectives." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 397 n.12 (1987). A suit should be permitted unless a plaintiff's interests are "inconsistent with the purposes implicit in the statute." *Id.* at 399.

In determining the appropriate zone of interests, the Court looks to the provision "whose violation is the gravamen of the complaint." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886 (1990). Plaintiffs' complaint is that Defendants' action violates the "constitutional guarantee" of the Appropriations Clause, *Data Processing*, 397 U.S. at 153, and is therefore "contrary to constitutional . . . power," 5 U.S.C. § 706(2)(B). The zone-of-interests test therefore focuses on the Appropriations Clause. *Data Processing*, 397 U.S. at 153. And for the reasons stated above, Plaintiffs' members, as individuals whose property and other interests are directly harmed by Defendants' unconstitutional expenditures, are plainly within the zone of interests of a clause intended to protect individuals from unauthorized executive action. Certainly their effort to halt construction that Congress refused to authorize in no way "frustrates" the purpose of the Appropriations Clause.

If the Court were to look to a statute, the CAA would be the appropriate focus. There, Congress rejected the President's request for a wall across the southern border and instead authorized only $1.375 billion for limited construction in the Border Patrol's Rio Grande Valley Sector in Texas. *See* CAA § 230(a)(1). Defendants' refusal to abide by that rejection embodied in the CAA gave rise to Plaintiffs' complaint. *See* Dist. Ct. ECF No. 26 ¶¶ 139–56 (First Claim for Relief, First Amended Compl.). When

Plaintiffs initially filed suit on February 19, 2019, Defendants had not even invoked Section 8005, instead announcing the diversion of "[u]p to $2.5 billion under the Department of Defense funds transferred for Support for Counterdrug Activities"—without revealing that they would fund construction by funneling billions of dollars into the Section 284 counterdrug account. J.A. 138. In denying construction altogether on the lands at issue here and in wildlife refuges and parks, Congress sought to protect the interests of Plaintiffs and people like them, who live in those communities, who use wildlife preserves along the border, and whose representatives unanimously objected to such construction. *See* CAA §§ 231–32, 133 Stat. at 28–29 (restricting border wall construction in ecologically sensitive locations).

Defendants maintain that only Section 8005 matters in the zone-of-interests inquiry because the "theory that the challenged transfers violate Section 8005's proviso relies on Section 8005." Pet. Br. 30. But Plaintiffs' "theory" that the challenged transfers are unlawful "relies on" the Appropriations Clause and the CAA, not Section 8005. Section 8005, which *Defendants* invoked, not Plaintiffs, is inapplicable as a funding source for items that Congress denied. *See infra* II.A. Congress denied the wall sections at issue here when it "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.'" Pet. App. 116a–117a (quoting CAA at § 230(a)(1)).

But even if Plaintiffs had to show that their interests fall within the zone of interests protected by Section 8005, they would have a cause of action. Defendants argue that Plaintiffs do not fall within that statute's zone of interests because the statute does not evidence concern for "the interests of parties who, like respondents here, assert that a transfer would indirectly result in harm to their recreational, aesthetic, environmental, scientific, or sovereign interests." Pet. Br. 25. The Court has repeatedly rejected this argument. In *National Credit Union Administration*, for example, the government argued that banks had no cause of action to protect against competitive injury because there was "no evidence that Congress, when it enacted the [Federal Credit Union Act], was at all concerned with the competitive interests of commercial banks, or indeed at all concerned with competition." *Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 496 (1998). But as the Court explained, whether Congress was concerned about competition or harm to the competitive interests of commercial banks was immaterial; it was sufficient that the commercial banks sought to "limit[] the markets that federal credit unions can serve," an interest arguably protected by the statute. *Id.* at 493. Here too, that Congress may not have considered environmental interests when enacting Section 8005 is no more relevant than Congress's lack of consideration for competitive interests when it enacted the Federal Credit Union Act. Section 8005's restrictions at least arguably protect an interest in limiting Executive Branch spending on projects that Congress denied. Plaintiffs' interest in protecting the outcome of the appropriations process—which reflects their successful advocacy to deny funds—thus falls within

the ambit of interests arguably protected by Section 8005.[5]

The D.C. Circuit's decision in *Scheduled Airlines* further illustrates that Plaintiffs are within the zone of interests protected by Section 8005. In that case, the court evaluated the zone of interests of the Miscellaneous Receipts statute, 31 U.S.C. § 3302(b), a law aimed solely at protecting "congressional control of the appropriations power." *Scheduled Airlines Traffic Off., Inc. v. Dep't of Defense*, 87 F.3d 1356, 1362 (D.C. Cir. 1996). The court concluded that a private party was a "suitable challenger" to enforce Congress's interests, because its interests could not meaningfully diverge from Congress's own. *Id.* at 1359–61. As the court explained, "[e]ither the funds at issue in this case are covered by the statute or they are not. There is no possible gradation in the statute's requirement. Because a statutory demarcation thus limits what [the plaintiff] can request, we run no risk that the outcome could in fact thwart the congressional

[5] It is irrelevant that, as Defendants put it, "Section 8005 does not require the Secretary to consider" Plaintiffs' interests. Pet. Br. 25. That is not a requirement under the zone-of-interests inquiry. The same was true in *Patchak*, where the statute at issue "authorize[d] the acquisition of property 'for the purpose of providing land for Indians,'" and imposed no requirement that the Secretary of the Interior consider downstream "environmental" and "aesthetic" interests of non-Natives who objected to eventual construction on acquired land. 567 U.S. at 225, 228. The Court nonetheless sustained a challenge by a non-Native who objected to land acquisition that he alleged would lead to casino construction and cause "an irreversible change in the rural character of the area" in which he lived, bringing about "aesthetic, socioeconomic, and environmental problems." *Id.* at 213 (quotation marks omitted).

goal." *Id.* at 1361 (quotation and alteration marks omitted).

The same is true here. By Defendants' description, Section 8005's restrictions—like those in the Miscellaneous Receipts statute—"primarily protect[] Congress's interests in the appropriations process." Pet. Br. 26. And Plaintiffs' suit cannot thwart Congress's interests because "[e]ither the funds at issue in this case are covered by the statute or they are not." *Scheduled Airlines*, 87 F.3d at 1361. Thus, Plaintiffs' "interests cannot diverge" from Congress's goal of restricting executive expenditures that Congress denied. *Id.* at 1360. Plaintiffs' "interests are sufficiently congruent with those of the intended beneficiaries that the litigants are not 'more likely to frustrate than to further the statutory objectives.'" *First Nat'l Bank & Tr. Co. v. Nat'l Credit Union Admin.*, 988 F.2d 1272, 1275 (D.C. Cir. 1993) (quoting *Clarke*, 479 U.S. at 397 n.12).

On Defendants' view, the appropriations safeguards Congress enacts are largely unenforceable. The D.C. Circuit's contrary view is more faithful to "Congress's evident intent when enacting the APA to make agency action presumptively reviewable." *Patchak*, 567 U.S. at 225 (quotation omitted). It is also more faithful to this Court's "capacious view of the zone of interests requirement," under which a "suit should be allowed unless the statute evinces discernible congressional intent to preclude review." *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1269 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev'd*, *Michigan v. EPA*, 576 U.S. 743 (2015).

* * *

At bottom, Defendants argue that so long as they take care to divert billions from surplus funding, so no one is denied previously allocated funds, no one may state a claim. *See* Pet. Br. 28. n.3 (suggesting that only "parties claiming an entitlement to transferred funds" could state claim). But courts "ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command." *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 681 (1986). And because Plaintiffs raise constitutional claims, Defendants' efforts to evade review are particularly disfavored. *See Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting that if "Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear") (citing *Johnson v. Robison*, 415 U.S. 361, 373–74 (1974)). There is simply no evidence that Congress intended to allow the Executive Branch to spend billions of denied funds, directly harming Plaintiffs in concrete ways, without any judicial recourse.

## II. DEFENDANTS HAVE NO AUTHORITY TO SPEND BILLIONS OF DOLLARS ON CONSTRUCTION THAT CONGRESS REFUSED TO FUND.

The court of appeals also correctly concluded on the merits that Defendants' actions violated the Appropriations Clause. The President repeatedly asked Congress to appropriate billions to build a border wall, and Congress repeatedly declined. The President admitted as much when he signed the CAA, which gave him only $1.375 billion for wall

construction. Yet he immediately took $2.5 billion appropriated for other purposes and repurposed it for the very project Congress refused to fund.

Defendants' defense—Section 8005—is unavailing. By its terms it may be used only for "unforeseen military requirements," and "in no case [may be used] where the item for which funds are requested has been denied by the Congress." The courts below properly found that the use here was neither unforeseen nor military, and that Congress expressly denied it.

### A. Congress Denied the Multibillion-Dollar Border Wall.

First, Section 8005 does not authorize the border wall transfer because it forbids any transfer where the "item for which funds are requested has been denied by the Congress." The words "item" and "denied" have readily ascertainable plain meanings. *See FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011) ("When a statute does not define a term, we typically give the phrase its ordinary meaning." (quotation omitted)). An item is "a distinct part in an enumeration, account, or series," or "an object of attention, concern, or interest." Merriam–Webster Online Dictionary (2020). To "deny" is "to refuse to grant." *Id.*

The President made a distinct request for a budgetary item: "$5.7 billion for construction of a steel barrier for the Southwest border" to "fund construction of a total of approximately 234 miles of new physical barrier." J.A. 131–32. Congress in the CAA specifically considered and "denied" the President's request to build the wall sections at issue here. "[T]he reality is that Congress was presented

with—and declined to grant—a $5.7 billion request for border barrier construction.” Pet. App. 353a.

Defendants suggest that “item” should be limited to a “project or program for which *DoD* sought funds.” Pet. Br. 41 (emphasis added). And they urge that the relevant item is not a border wall, but the “item of providing this counterdrug assistance to DHS.” *Id.* at 41–42. Recast this way, Defendants insist, “Congress never denied any request for that item of expenditure.” *Id.* at 42.

But Defendants’ argument is incompatible with the plain text, which “refers to ‘item[s] . . . denied by the Congress,’ not to *funding requests* denied”—much less to funding requests *made by DoD only*. Pet. App. 239a (alterations in original). Because the text Congress enacted focuses on items rather than DoD requests, the “inquiry centers on what DoD wishes to spend the funds on, not on the form in which Congress considered whether to permit such spending.” *Id.* Here, the President requested a border wall specifically as a counterdrug measure “to support CBP” in “combating the scourge of drug addiction.” J.A. 128. That the President did not call the border wall “DoD counterdrug assistance to CBP” or identify a specific budget line does not change the “item” at issue, which is “construction of a steel barrier for the Southwest border” along the very miles at issue here. J.A. 132. Even though Congress indisputably denied the President’s request for this counterdrug wall funding, Defendants argue that “[a]t no point in the budgeting process did Congress deny a DoD funding request for border-barrier construction under DoD’s counternarcotics support line.” Pet Br. 44. But as the Ninth Circuit explained, “putting a gift in different

wrapping paper does not change the gift." Pet. App. 240a.

Because Section 8005 refers to "items" denied, not "funding requests by DoD," the court of appeals correctly "decline[d] to impose upon Congress an obligation to deny every possible source of funding when it refuses to fund a particular project." Pet. App. 117a. "The amount to be appropriated for a border barrier occupied center stage of the budgeting process for months, culminating in a prolonged government shutdown that both the Legislative and Executive Branches clearly understood as hinging on whether Congress would accede to the President's request for $5.7 billion to build a border barrier." *Id.* at 241a. "Congress repeatedly and deliberately declined to appropriate the full funds the President requested for a border wall along the southern border," and "[a]s Justice Field wrote more than a century ago, a court cannot shut its 'eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men.'" *Washington v. Trump*, 441 F. Supp. 3d 1101, 1120, 1121 (W.D. Wash. 2020) (quoting *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879)). This Court is "'not required to exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, C.J.)). The President has already admitted that "Congress wouldn't do it." Border Wall Visit

Remarks. This should end the matter: "'No' means no." Pet. App. 117a.[6]

### B. The Wall Project is Not an "Unforeseen Military Requirement."

Section 8005 independently fails to authorize the transfer because wall construction is not an "unforeseen military requirement," as the statute requires. The wall construction was neither "unforeseen" nor a "military requirement." This condition has been met in the past by truly "unanticipated circumstances (such as hurricane and typhoon damage to military bases) justifying a departure from the scope of spending previously authorized by Congress." Pet. App. 355a. By contrast, a multi-year, protracted, public budget dispute over a civilian border wall is not an "unforeseen military requirement."

First it is not reasonable that Congress intended *its own* refusal to fund a requested item to constitute an unforeseen circumstance justifying an agency's transfer of funds to circumvent that very refusal. Defendants maintain that "Section 8005 reflects Congress's judgment that, after that process is complete, DoD must retain 'financial flexibility' to

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[6] Defendants cite an opinion of the Governmental Accountability Office (GAO). Br. 40–41, 44–46 (citing *Department of Defense—Availability of Appropriations for Border Fence Construction*, B-330862, 2019 WL 4200949 (Comp. Gen. Sept. 5, 2019)). While courts "should prudently consider" GAO opinions, there is "no obligation to defer" to the GAO's views. *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 201–02 (D.C. Cir. 1984) (Scalia, J.) (quotation and alteration marks omitted). The opinion's conclusory reasoning—for example, that "there was no denial of fences at the southern border," 2019 WL 4200949 at *9, even though Congress refused to fund *any* wall construction outside Texas—is unpersuasive, and no court has followed it.

respond to changing circumstances during the ensuing fiscal year." Pet. Br. 42. But here, "neither the conditions at the border nor the President's position that a wall was needed to address those conditions was unanticipated or unexpected by DoD." Pet. App. 110a. As early as February 2018, the President specifically claimed in his budget proposal to Congress that "$18 billion to fund the border wall" was necessary because "a border wall is critical to combating the scourge of drug addiction." J.A. 128. The only "circumstance" that changed is that Congress denied the President's request, leading DHS to seek the same funding from DoD. To interpret Congress's efforts to "tighten *congressional* control of the reprogramming process," Pet. Br. 26, as permitting DoD to circumvent Congress's funding decisions in this way "would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947).

Second, there was nothing unforeseen about DHS's wall funding requests. The record indicates that DoD was holding back its Section 284 funding in early 2018 specifically because it was anticipating a request that its funds be used for border barrier construction. *See* Pet. App. 111a. And "[n]early six months before the enactment of the 2019 DoD Appropriations Act," the President instructed that "[t]he Secretary of Defense shall support the Department of Homeland Security in securing the southern border and taking other necessary actions to stop the flow of deadly drugs and other contraband . . . into this country." *Id.* (ellipsis in original). Both the President's asserted need for the border wall and a DHS request to DoD to pay for the wall "were

anticipated and expected" and neither was "'unforeseen' within the meaning of Section 8005." *Id.* at 112a.

Defendants argue that none of this matters, because the requirement underlying every Section 284 request is unforeseeable until the very moment DoD receives the request. Pet. App. 110a (quoting Defendants' argument that "an agency's *request*" "will be foreseen" only "when *it is received by DoD*"). But this argument is grounded neither in text nor logic. A wall funding request can be "foreseen" before it is received, and the record indicates that such a request was expected and prepared for. *See id.* at 111a. The court of appeals correctly rejected Defendants' efforts to substitute an actual knowledge standard for the statute's foreseeability standard. "Congress' choice of words is presumed to be deliberate and deserving of judicial respect." *Id.* at 112a (quoting *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018)). Defendants' tautological rule would gut Congress's restrictions because a Section 284 request could *never* be foreseen. "[T]he exception would swallow the rule and undermine Congress's constitutional appropriations power." Pet. App. 110a.

Finally, the court of appeals correctly determined that the border wall project—which Defendants concede is a *civilian* law enforcement activity—does not qualify as a "military requirement," as Section 8005 requires. Pet. App. 116a. Congress limited the use of Section 8005 to *military* requirements rather than civilian purposes. There is no indication that Congress intended to permit military budget lines (here, for in-service missiles and support for U.S. allies in Afghanistan, *id.* at 5a–6a) to be transferred for the benefit of other agencies' civilian

missions, *particularly when Congress specifically denied funds to those agencies*. When Congress wants to fund military support for civilian priorities, it does so by appropriating money into support accounts, such as the Section 284 account. But Congress made no such appropriation for border wall construction, and Section 8005 does not provide a vehicle for countermanding Congress's judgment.

Defendants' contrary view is that "military requirement" is a term of art meaning any "established need" justifying the use of military resources. Pet. Br. 46. This circular definition would render the statutory phrase "unforeseen military requirement" entirely superfluous. *But see McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016) (presumption that statutory language not superfluous). While the limitation is intelligible if it refers to a military necessity that could not be anticipated, Defendants' proposal is that Section 8005 funding requirements are simultaneously "unforeseen" and "established." And if "military requirement" includes, as Defendants suggest, any action within DoD's budget, then the statutory phrase imposes no restriction at all. On this *ipse dixit* reasoning, using the military to process tax returns in the absence of any need would be a "military requirement" merely because the military is doing it.

* * *

If Section 8005 were interpreted as Defendants urge, the Secretary of Defense would be empowered to use the military budget as a slush fund for any projects Congress denied to other agencies. Should Congress refuse to fund a new Bureau of Alcohol, Tobacco, and Firearms transnational gun-trafficking

operation after the Operation Fast and Furious debacle, the Secretary of Defense could just divert military money to the counterdrug support account and fund the same operation. *See* 10 U.S.C. § 284(b)(4) (authorizing support for "establishment . . . and operation of bases of operations" for "activities to counter transnational organized crime" by "any Federal . . . law enforcement agency within or outside the United States"). It is not reasonable to read Section 8005 as permitting the Secretary of Defense to provide other agencies billions that Congress denied them, particularly when that denial was the outcome of the central disagreement in an open political dispute between the branches. *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.") (internal quotation marks omitted)).

## CONCLUSION

The court of appeals decision should be affirmed.

Respectfully submitted,


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