No. 20-138

In the Supreme Court of the United States

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

v.

SIERRA CLUB, *et al.*, *Respondents*.

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

v.

STATES OF CALIFORNIA AND NEW MEXICO, *Respondents*.

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

BRIEF OF THE STATES OF CALIFORNIA AND NEW MEXICO

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
JANILL L. RICHARDS
Principal Deputy Solicitor General
AIMEE FEINBERG*
JOSHUA A. KLEIN
Deputy Solicitors General

JAMES F. ZAHRADKA II
LEE I. SHERMAN
Deputy Attorneys General

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
1300 I Street
Sacramento, CA 95814
(916) 210-6003
Aimee.Feinberg@doj.ca.gov
**Counsel of Record*

(*Additional counsel listed on inside cover*)

January 12, 2021

ROBERT W. BYRNE
MICHAEL L. NEWMAN
EDWARD H. OCHOA
Senior Assistant Attorneys General
MICHAEL P. CAYABAN
CHRISTINE CHUANG
Supervising Deputy Attorneys General
BRIAN J. BILFORD
NOAH M. GOLDEN-KRASNER
SPARSH S. KHANDESHI
JANELLE M. SMITH
Deputy Attorneys General

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
1300 I Street
Sacramento, CA 95814

Additional Counsel for the State of California

HECTOR BALDERAS
Attorney General of New Mexico
TANIA MAESTAS
Chief Deputy Attorney General
NICHOLAS M. SYDOW
Civil Appellate Chief
JENNIE LUSK
Civil Rights Bureau Chief

STATE OF NEW MEXICO
DEPARTMENT OF JUSTICE
P.O. Drawer 1508
Santa Fe, NM 87504

Counsel for the State of New Mexico

QUESTIONS PRESENTED

In late 2018 and early 2019, Congress and the President engaged in extended negotiations over the appropriate level of funding for the construction of a wall along the Nation's border with Mexico. The President requested $5.7 billion for such projects. After a long impasse, Congress appropriated $1.375 billion for border-wall construction at one location in Texas. The same day he signed that legislation, the President announced that the Executive Branch would spend far more, on additional border-wall projects, by diverting funds that Congress had appropriated for different purposes. As one part of that effort, the Acting Secretary of Defense transferred $2.5 billion appropriated for Army personnel and other military activities to finance wall-construction projects in California, Arizona, and New Mexico. The questions presented are:

1. Whether California and New Mexico have a cause of action to challenge the transfers of funds for border-wall construction within their territory.

2. Whether the challenged transfers are unlawful.

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INTRODUCTION

During budget negotiations for fiscal year 2019, President Trump asked Congress to appropriate $5.7 billion to fund the construction of 234 miles of physical barriers along the southern border. Congress refused. As a result, the federal government partially shut down for more than a month. The shutdown ended without Congress acceding to the President's wishes. Instead, in a compromise, Congress appropriated $1.375 billion for construction of border barriers in a single place in Texas, subject to restrictions designed to protect the environment and local interests.

On the same day that the President signed that appropriation into law, he announced that his Administration planned to finance up to $6.7 billion of additional border-wall construction projects, using funds that Congress had appropriated for other purposes. As part of that unilateral executive action, the Department of Homeland Security (DHS) requested that the Department of Defense (DoD) use its counter-narcotics account to finance DHS's priority wall-construction projects along the border in California, Arizona, and New Mexico. DoD agreed to the request and transferred $2.5 billion from Army personnel and other military programs into its counter-narcotics account to finance that construction.

That circumvention of Congress's appropriations decisions was unlawful and should be set aside. Congress denied the Administration's request for border-barrier funding beyond the $1.375 billion that was appropriated to DHS. No statute authorized the Executive Branch to disregard that funding decision. Section 8005 of the Department of Defense Appropriations Act of 2019 allows DoD to transfer funds only for unforeseen military requirements and only where

Congress has not denied funding for the item requested. Here, the Administration's asserted need for additional physical barriers on the southern border was anything but unforeseen. And Congress had already considered and rejected funding for wall construction outside of Texas.

Petitioners principally contend that California and New Mexico have no federal cause of action to challenge the legality, under federal law, of the Executive's unilateral action funding construction within their sovereign territory. That is not correct. The States are appropriate plaintiffs under the Administrative Procedure Act because their interests fall within the zone of interests protected by the federal laws they invoke. Section 8005 provides limited transfer authority to DoD while protecting the legislature's substantive funding decisions. Here, Congress pointedly refused to appropriate funds for barrier-construction projects outside of Texas. States that are harmed by federal executive actions in derogation of that decision are predictable and appropriate APA plaintiffs—and there is certainly no evidence of any congressional intent to preclude them from suing. And while the Court need not look beyond the APA to resolve this case, California and New Mexico are also appropriate plaintiffs to claim that petitioners' unilateral actions to finance projects for which Congress denied appropriations were *ultra vires* and unconstitutional.

STATEMENT

A. Legal Background

1. The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. It is a "straightforward and explicit

command." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990). "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." *Reeside v. Walker*, 52 U.S. 272, 291 (1850). "Congress's control over federal expenditures is 'absolute.'" *Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1348 (D.C. Cir. 2012) (Kavanaugh, J.).

The power over the purse was "one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several departments.'" *Dep't of Navy*, 665 F.3d at 1346 (quoting The Federalist No. 51, at 320 (Madison) (Rossiter ed., 1961)). Madison regarded it as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people." The Federalist No. 58, at 359 (Rossiter ed. 1961). By depriving the Executive of the power to "apply [the nation's] monied resources at his pleasure," the Constitution prevents the "profusion and extravagance, as well as . . . corrupt influence" typical of "arbitrary governments." 3 Story, Commentaries on the Constitution § 1342 (1st ed. 1833); *see generally Richmond*, 496 U.S. at 427-428.

Assigning the spending power to Congress was seen as particularly vital with respect to expenditures by the military. As Justice Story explained, the Constitution protects against "[t]he danger of an undue exercise" of federal military power by placing the power to raise armies in "the representatives of the people of the states." 3 Story, *supra*, § 1182; *see also* 3 Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in

1787, at 393 (2d ed. 1891) (quoting Madison's statement that "'the people . . . have the appropriation of all moneys. They have the direction and regulation of land and naval forces.'").

2. Congress has enacted numerous statutes implementing its constitutionally assigned control over federal spending. For example, it has provided that appropriations may be applied only "to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a). And it has specified that an agency may withdraw funds "from one appropriation account and credit[them] to another . . . only when authorized by law." *Id.* § 1532.

In recognition of the possibility that unanticipated circumstances may arise or that needs may change, Congress has enacted statutes authorizing certain agencies to transfer funds from one appropriation to another, subject to prescribed conditions. This case implicates one such statute, Section 8005 of the Department of Defense Appropriations Act of 2019, Pub. L. No. 115-245, Div. A (2018). That statute allows the Secretary of Defense to transfer up to $4 billion "of working capital funds of the Department of Defense or funds made available in this Act to the Department of Defense for military functions (except military construction) between such appropriations or funds or any subdivision thereof[.]" Pub. L. No. 115-245, Div. A, Tit. VIII, § 8005, 132 Stat. 2981, 2999 (§ 8005). That transfer authority "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.*; *see also* 10 U.S.C. § 2214(b) (similar).

Congress first adopted a version of Section 8005 in 1974 to "tighten" congressional control over funds appropriated to DoD and to "save money for the taxpayers." H.R. Rep. No. 93-662, 93d Cong., 1st Sess., at 16-17 (1973). Among other things, Congress sought to prevent DoD from "undoing the work of the Congress" by shifting appropriations allocated for one purpose to items Congress had declined to fund. *Id.* at 16. A separate provision of the 2019 Defense Appropriations Act allows transfers of up to an additional $2 billion "between the appropriations or funds made available to the Department of Defense in this title . . . subject to the same terms and conditions as the authority provided in Section 8005." Pub. L. No. 115-245, Div. A, Tit. IX, § 9002, 132 Stat. at 3042 (§ 9002).

B. Factual Background

1. In his first week in office, President Trump issued an executive order declaring it to be "the policy of the executive branch to . . . secure the southern border of the United States through the immediate construction of a physical wall on the southern border . . . so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism." Exec. Order No. 13,767, 82 Fed. Reg. 8,793, 8,793 (Jan. 25, 2017). To achieve that objective, the President directed DHS to "take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border" and instructed that agency to "[p]roject and develop long-term funding requirements for the wall, including preparing Congressional budget requests for the current and upcoming fiscal years." *Id.* at 8,794-8,795. In his State of the Union address the next month, the President told Congress that "we will soon begin the construction of a great, great wall along our southern border." C.A. State S.E.R. 1276.

From his first days in office, President Trump also identified the military as a source of possible funding for border-barrier construction. His January 2017 executive order instructed DHS to "[i]dentify and, to the extent permitted by law, allocate *all sources of Federal funds* for" constructing a wall on the border. 82 Fed. Reg. at 8,794. In March 2018, the President stated that the military was "rich," asserted that stopping illegal drugs from entering the country was a matter of national defense, and stated that the Nation should "[b]uild [the] WALL through [the] M[ilitary]." Donald J. Trump (@realDonaldTrump), Twitter (Mar. 25, 2018), archived at http://bit.ly/39cDeyo.

In April 2018, the President issued a memorandum to cabinet officials declaring that the "situation at the border" had "reached a point of crisis." Presidential Memorandum for the Secretary of Defense, the Attorney General, and the Secretary of Homeland Security, 2018 WL 1633761, at *1 (Apr. 4, 2018). It instructed DoD to "support the Department of Homeland Security in securing the southern border and taking other necessary actions" to stop drug trafficking and unlawful entry into the United States. *Id.* at *2. It further directed DoD and DHS "to determine what other resources and actions are necessary to protect our southern border," including law enforcement and military resources, and ordered them to submit a report within 30 days "detailing their findings and an action plan, including specific recommendations as to any other executive authorities that should be invoked to defend the border and security of the United States." *Id.*

DoD planned some of its spending around the possibility of supporting construction of border barriers. Federal law allows DoD, upon request from another federal agency, to provide support for a variety of

counterdrug activities of the requesting agency. *See* 10 U.S.C. § 284(a). Among other things, DoD may provide support for constructing roads and fences and installing lighting "to block drug smuggling corridors across international boundaries of the United States." *Id.* § 284(b)(7). For most of fiscal year 2018, DoD reserved $947 million—84 percent of the amount appropriated for its counterdrug activities—"'for possible use in supporting Southwest Border construction.'" Pet. App. 111a; *see* C.A. State S.E.R. 1206-1207.

2. President Trump also asked Congress to provide funding for border-wall construction. Congress, however, "repeatedly declined to provide the amount of funding requested" for that purpose. Pet. App. 81a. For fiscal year 2017, the President asked Congress for almost $1 billion for designing and constructing a border wall.[1] Congress instead appropriated $341.2 million to replace 40 miles of existing fencing. Consolidated Appropriations Act of 2017, Pub. L. No. 115-31, Div. F, Tit. VI, 131 Stat. 135, 434 (2017). For fiscal year 2018, the President requested $2.6 billion for border security, including "'to plan, design, and construct a physical wall along the southern border.'" Pet. App. 210a. Congress provided $1.571 billion. *Id.*

In February 2018, the President presented his proposed budget for fiscal year 2019 to Congress, identifying a wall across the southern border as one of his

[1] *See* Donald J. Trump, Letter to Speaker of House of Representatives (Mar. 16, 2017), https://bit.ly/31VpBBl, at 1; *id.*, Attachment, at 3.

Administration's priorities.[2] His budget requested approximately $1.6 billion for that purpose.[3] Congress did not enact legislation funding that request. And throughout 2018, Congress considered—but never enacted—a variety of bills to appropriate billions of dollars for border barriers. Pet. App. 210-211a; D. Ct. Dkt. 57-7, Exs. 14-19.

In September 2018, Congress enacted the Department of Defense Appropriations Act of 2019, Pub. L. No. 115-245, Div. A, 132 Stat. 2981, 2982 (2018). That Act appropriated funds for a broad range of DoD activities, including approximately $517 million for counter-narcotics activities. *See id.*, Div. A, Tit. VI, 132 Stat. at 2997; *supra* p. 7. The Act did not include funding for the President's proposed wall on the southern border. Nor did it include specific appropriations to support border infrastructure, such as for fences and vehicle barriers, as Congress had provided in prior years.[4] As discussed above, Congress also granted DoD limited authority to transfer funds for certain "unforeseen military requirements." § 8005; *see also* § 9002.

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[2] *See* Office of Management & Budget, Fiscal Year 2019: An American Budget (Feb. 12, 2018), at 57-58, reproduced in D. Ct. Dkt. 112-1, Ex. 51; *see also id.* at 2. Citations to "D. Ct. Dkt." are to the docket in *California v. Trump*, No. 19-cv-872 (N.D. Cal.).

[3] *Id.* at 57-58.

[4] *See* Department of Defense Appropriations Act, Pub. L. No. 110-116, Div. A, Tit. II, 121 Stat. 1295, 1299 ($247 million "shall be available for National Guard support to" DHS, including for "installing fences and vehicle barriers" and "building patrol roads"); Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Hurricane Recovery, 2006, Pub. L. No. 109-234, Tit. V, 120 Stat 418, 420 ($708 million in emergency National Guard support to DHS for same activities).

Later in 2018, the President and Congress attempted to negotiate an appropriations bill to fund other departments. Pet. App. 309a. DHS publicly announced that, when combined with funds from the prior two fiscal years and "if funded at $5B in FY 2019[,] DHS expects to construct more than 330 miles of border wall in the U.S. Border Patrol's highest priority locations." Dep't of Homeland Security, Press Release, Walls Work (Dec. 12, 2018), reproduced in D. Ct. Dkt. 57-7, Ex. 40. DHS explained that it was "positioned to construct" some of "Border Patrol's highest priority border wall miles," including in El Centro Sector in California, El Paso Sector in New Mexico, Rio Grande Valley Sector in Texas, and other locations in California, Arizona, and Texas. *Id.*

In December 2018, the House adopted a bill appropriating $5.7 billion to DHS to fund border-barrier projects, but the Senate did not pass it.[5] In the face of congressional opposition, the President announced that he would not sign any bill that lacked such funding.[6] As a result of that impasse, the federal government partially shut down. Pet. App. 81a.

During the shutdown, the Acting Director of the Office of Management and Budget wrote to Congress, conveying the President's request for "$5.7 billion for

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[5] *See* House Amendment to H.R. 695, 115th Cong., Div. A, § 141 (Dec. 20, 2018) (proposal to appropriate $5.7 billion for "U.S. Customs and Border Protection—Procurement, Construction, and Improvements"), reproduced in D. Ct. Dkt. 57-7, Ex. 24; *see also* McClanahan & Murray, Congressional Research Service, Congressional Action on FY 2019 Appropriations Measures: 115th and 116th Congresses 7-8 (2019), https://bit.ly/2FkFV5H.

[6] Donald J. Trump, Twitter (Dec. 21, 2018), archived at http://bit.ly/39fkJcO ("Shutdown today if Democrats do not vote for Border Security!").

construction of a steel barrier for the Southwest border." J.A. 131-132; *see* Pet. App. 310a. The request explained that "[a]ppropriations bills for fiscal year (FY) 2019 that have already been considered by the current and previous Congresses [were] inadequate to fully address" this issue. J.A. 131. The additional appropriations requested would "fund construction of a total of approximately 234 miles of new physical barrier and fully fund the top 10 priorities in [Customs and Border Protection's] Border Security Improvement Plan." *Id.* at 132.

The government shutdown lasted more than a month—the longest in the Nation's history. *See* Pet. App. 81a. On the thirty-fifth day, Congress and the President agreed on a stop-gap funding bill that, along with later stop-gap bills, reinstated existing levels of funding through February 15, 2019. *Id.* at 213a.

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

In that act, Congress addressed the issue that had led to the shutdown: funding for the construction of border barriers. It appropriated $1.375 billion "for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector" in Texas. CAA, Div. A, Tit. II, § 230(a)(1), 133 Stat. at 28. In the same provision, Congress imposed certain procedural and substantive requirements related to the environmental impact of that construction

and potential infringements on state and local government interests. *See id.* § 231, 133 Stat. at 28 (prohibiting construction within certain wildlife refuges and state and federal parks); *id.* § 232, 133 Stat. at 28-29 (requiring intergovernmental consultation and notice-and-comment procedures prior to the use of any funds for construction within certain city limits). The CAA contained no funding for any other border-barrier construction. The President signed the CAA into law. Pet. App. 313a.

3. The same day that President Trump signed the CAA, he issued an executive proclamation "declar[ing] that a national emergency exists at the southern border of the United States." Proclamation No. 9844, 84 Fed. Reg. 4,949, 4,949 (Feb. 15, 2019). The proclamation stated that "[t]he current situation at the southern border presents a border security and humanitarian crisis"; described the border as "a major entry point for criminals, gang members, and illicit narcotics"; and cited a "longstanding" problem of "large-scale unlawful migration" that had worsened "in recent years." *Id.* The proclamation also stated that, in response to the President's April 2018 memorandum and subsequent requests from DHS, DoD had provided support and resources to DHS at the southern border. *Id.*

A White House statement issued the same day "identified up to $8.1 billion that will be available to build the border wall." Fact Sheets: President Donald J. Trump's Border Security Victory, Feb. 15, 2019, http://bit.ly/3i4Pghl. Of that total, $1.375 billion was the amount Congress appropriated in the CAA. *Id.* The remaining $6.725 billion was to be drawn from funds Congress had appropriated for other purposes,

including "'[u]p to $2.5 billion [of] Department of Defense funds transferred'" to DoD's account for supporting counter-narcotics activities under 10 U.S.C. § 284. Pet. App. 315a.[7]

Ten days after the President's proclamation, DHS invoked Section 284 and asked DoD for assistance "with the construction of fences[,] roads, and lighting" for the asserted purpose of blocking drug-smuggling corridors in specified priority project areas in the El Centro, Yuma, Tucson, and El Paso Sectors of the border in California, Arizona, and New Mexico. J.A. 80, 82, 83-95; *see* Pet. App. 317a. The request stated that DHS would accept custody of the completed infrastructure and operate and maintain it. J.A. 95.

In March 2019, the Acting Secretary of Defense approved the request for assistance as to three of DHS's priority projects, including a project in the El Paso Sector in New Mexico. J.A. 96-97. In May 2019, he approved funding for four more of DHS's priority projects, including one project in the El Centro Sector in California. *Id.* at 74-75; *see also id.* at 72-73 (DoD decision not to proceed with an Arizona project). Consistent with the terms of the request, those approvals stated that DHS would accept custody of the completed infrastructure and would operate and maintain it. *Id.* at 75, 97. The Acting Secretary of Defense approved spending of up to $2.5 billion in DoD funds for these projects. *Id.* at 75, 97.

At that time, however, DoD's Section 284 counter-narcotics support account contained only about

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[7] The statement also described more than $4 billion reallocated from DoD military construction projects and from the Treasury Forfeiture Fund. Pet. App. 315a. Those transfers are not at issue in this proceeding. *See infra* n.10.

$238 million of the amount that Congress had originally appropriated to that account—less than 10 percent of the $2.5 billion required for the seven border-barrier projects approved by DoD. *See* Pet. App. 5a; *supra* p. 12. To fill that gap, the Acting Secretary of Defense transferred funds from other DoD accounts into the Section 284 counter-narcotics support account and asserted authority to do so under Sections 8005 and 9002 of the 2019 Defense Appropriations Act. J.A. 76-79, 98-101; *see supra* pp. 4-5.[8] He transferred $1 billion from Army personnel funds and "$1.5 billion from 'various excess appropriations,' which contained funds originally appropriated for purposes such as modification of in-service missiles and support for U.S. allies in Afghanistan." Pet. App. 5a-6a. The Acting Secretary explained that the transfers were in furtherance of the President's April 2018 direction to "DoD to assist DHS in stopping the flow of illegal drugs into the United States." J.A. 77, 99.

Because the funding was for border barriers, the Acting Secretary of Homeland Security asserted authority under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended (IIRIRA), Pub. L. No. 104-208, Div. C, § 102(c), 110 Stat. 3009, 3009-555, to waive a variety of legal requirements that ordinarily would have applied to the construction projects, including requirements for protection of the environment. As relevant here, with respect to the El Paso Sector project in New Mexico and the El Centro Sector project in California, the Acting Secretary waived all "federal, state, or other laws, regulations, and legal requirements of, deriving from, or

[8] Because Section 9002 "is subject to the same terms and conditions" as Section 8005, this brief refers to both statutes collectively as Section 8005. *See* Pet. App. 2a n.2; U.S. Br. 9 n.1.

related to the subject of" various statutes, including the Clean Water Act, Clean Air Act, and Endangered Species Act. *See* 84 Fed. Reg. 17,185, 17,187 (Apr. 24, 2019); 84 Fed. Reg. 21,800, 21,801 (May 15, 2019). As a result of the waivers, the construction projects financed by the Section 8005 transfers were exempt from state regulatory standards and processes that would otherwise have applied under the cooperative-federalism programs established by federal environmental laws. *See* 33 U.S.C. § 1323(a); 42 U.S.C. § 7506(c)(1).

C. Proceedings Below

1. California and New Mexico sued to challenge petitioners' diversions of funds for wall-construction projects within their borders.[9] The complaint alleged, among other things, that petitioners violated Section 8005 and the Appropriations Clause and acted *ultra vires*. C.A. E.R. 445-448. The States moved for a preliminary injunction to bar the transfer of funds for construction in New Mexico's El Paso Sector. *See* Pet. App. 87a.

The district court held that the States had established Article III standing, that they had stated a cause of action, and that their claims were likely to succeed. Pet. App. 391a-424a. The court denied the States' request for provisional relief because the court had issued a preliminary injunction in favor of the plaintiffs in a parallel suit filed by the Sierra Club and the Southern Border Communities Coalition (also respondents here). *Id.* at 431a.

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[9] The first amended complaint includes 20 state plaintiffs. C.A. E.R. 374. Only California and New Mexico sought to enjoin the transfers at issue here, J.A. 48, and they are the only state respondents before this Court.

The States then moved for partial summary judgment regarding the use of money that petitioners had transferred under the purported authority of Sections 8005 and 9002 for the El Paso Sector project in New Mexico and the El Centro Sector project in California. Pet. App. 192a. The district court granted that motion in part and issued a declaration that petitioners' transfers of funds were unlawful. *Id.* at 195a. It denied the States' request for injunctive relief in light of a permanent injunction the court issued against the same transfers in the *Sierra Club* case. *Id.* at 200a. The court entered partial final judgments in both the *California* and *Sierra Club* cases, allowing for immediate appeals while other claims continued to be litigated. *See id.* at 8a-9a, 88a; *supra* p. 12 n.7.[10]

While the appeals were pending, the court of appeals denied petitioners' request for a stay of the permanent injunction in the *Sierra Club* case. Pet. App. 206a-273a; *see also id.* at 274a-299a (dissent). This Court subsequently granted petitioners' stay application, observing that petitioners had "made a sufficient showing at [that] stage" that the *Sierra Club* plaintiffs had "no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." 140 S. Ct. 1 (2019).

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[10] Other claims in the *California* and *Sierra Club* cases concern separate transfers that petitioners seek to justify under 10 U.S.C. § 2808. The district court entered a separate judgment resolving those claims. It held that those transfers violated Section 2808 and again enjoined them only in the *Sierra Club* case. D. Ct. Dkt. 257, at 37, 46-47. That judgment resolved all remaining claims in both cases. The Ninth Circuit affirmed the district court's judgment on October 9, 2020. That decision is the subject of a separate certiorari petition now pending before this Court. *See* No. 20-685.

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

a. The court first determined that the States had Article III standing. Pet. App. 88a-99a. It concluded that the construction projects financed by the transfers would injure the States by harming specific endangered species in California and New Mexico. *Id.* at 90a-94a. In addition, the States had demonstrated injury to their sovereign and quasi-sovereign interests in enforcing their environmental laws. *Id.* at 94a-98a.

The court next considered whether the States could challenge the transfers under the Administrative Procedure Act. Pet. App. 100a-106a. It concluded that the States fell within the zone of interests because their challenge furthered Section 8005's intent to tighten congressional control over spending, among other reasons. *Id.* at 103a.

On the merits, the court held that Section 8005 did not authorize DoD's transfers to fund border-wall construction in California and New Mexico. Pet. App. 106a-118a. The court explained that DoD's $2.5 billion transfers violated Section 8005 because they were not for an unforeseen military requirement. *Id.* at 107a. The problem of cross-border drug-smuggling that the transfers were aimed at addressing was longstanding, as was the Administration's position that the problem required substantial funding for border-barrier construction, including possibly from DoD. *Id.* at 108a-110a. In addition, the wall-construction projects were not for a "military requirement," because they supported a civilian agency in its civilian mission. *Id.* at 113a.

The transfers also funded an item that had been "denied by the Congress." Pet. App. 116a-117a. Congress "refused to appropriate the $5.7 billion requested by the White House in the CAA," instead appropriating only $1.375 billion for construction in Texas. *Id.* The court rejected petitioners' contention that the transfers would be invalid only if Congress had denied a specific Section 284 budgetary line-item requested to fund the border wall. *Id.* at 117a. The court explained that Congress had denied the President's request for border-wall construction, and that that general denial "necessarily encompasses narrower forms of denial—such as the denial of a Section 284 budgetary line item request." *Id.* "[S]urely when Congress withheld additional funding for the border wall, it intended to withhold additional funding for the wall, regardless of its source." *Id.*[11]

The court of appeals affirmed the district court's judgment declaring that the transfers to fund construction of the New Mexico and California projects were unlawful. Pet. App. 118a. It further held that the district court did not abuse its discretion by denying the States a permanent injunction in light of the injunctive relief it had granted in *Sierra Club*. *Id.* at 118a-119a.

b. Judge Collins dissented. He agreed that Article III's standing requirements were satisfied. Pet. App. 127a-131a. But he concluded that the States had no cause of action under the APA, *id.* at 132a-145a, or to directly challenge unconstitutional or otherwise *ultra vires* executive action, *id.* at 145a-156a. He also

[11] Because it concluded that the States prevailed on their APA claims, the court did not address their alternative claims that the transfers were *ultra vires* and unconstitutional. Pet. App. 100a n.12, 119a.

concluded that the States' claims would fail on the merits. *Id.* at 156a-173a.

c. In a separate opinion, the court of appeals held that the *Sierra Club* respondents had established standing and ruled in their favor on their constitutional and *ultra vires* claims. Pet. App. 1a-34a. The court also affirmed the district court's grant of a permanent injunction in favor of the *Sierra Club* respondents. *Id.* at 34a-40a. Judge Collins again dissented. *Id.* at 40a-77a.

SUMMARY OF ARGUMENT

Congress considered and rejected President Trump's request for more than $5 billion to build a wall across the southern border. Petitioners decided to transfer more than $2.5 billion—which Congress had appropriated for other purposes—to construct that wall. Those transfers are unlawful and should be set aside.

California and New Mexico are proper parties to challenge petitioners' transfers under the Administrative Procedure Act. The APA forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in a statute that it cannot reasonably be assumed that Congress intended to permit the action. Section 8005 protects Congress's substantive spending decisions, including its decisions to deny funding for particular projects. In the circumstances of this case, Section 8005 operates to protect Congress's decision in the CAA to fund construction only in one State—Texas—and only subject to specific terms and conditions that mitigated environmental harm and took local concerns into account. The States' interests in enforcing Congress's choice to deny funding for harmful border-construction within

their territory fall within the zone of interests that Section 8005 was intended to protect.

The transfers violated Section 8005. That provision allows DoD to transfer funds up to prescribed amounts, but prohibits transfers "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." Petitioners' perceived need to construct a border wall was far from "unforeseen." Indeed, President Trump had made clear his intent to construct a wall on the southern border since at least 2017. In addition, the "requirement" that prompted the challenged transfers was not a "military" one; DoD transferred the funds specifically to support DHS's civilian law enforcement activities. And the item for which DoD transferred the funds was "denied by the Congress." The President asked Congress for a $5.7 billion appropriation to fund construction of 234 miles of barriers across the southern border. Congress rejected that request, triggering the longest partial government shutdown in United States history, which ended when Congress ultimately approved just $1.375 billion for a single project in Texas. Section 8005 did not allow the Executive to circumvent that decision by spending billions more for barriers elsewhere on the border.

Petitioners' actions to fund and construct border-wall projects denied by Congress were also *ultra vires* and unconstitutional. When an official acts *ultra vires*, courts are normally available to re-establish the limits on his authority. And this Court has long recognized that a court in equity may enjoin unconstitutional acts by federal officers. Here, no statute authorized petitioners to circumvent Congress's decision to allocate

funding only for border construction in Texas. And the Appropriations Clause prohibits the Executive Branch from spending public funds without affirmative authorization, which petitioners lack here.

ARGUMENT

I. PETITIONERS' TRANSFERS SHOULD BE SET ASIDE UNDER THE APA

The Administrative Procedure Act requires courts to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2). California and New Mexico are proper parties to seek enforcement of those requirements under the circumstances here. And petitioners' diversion of appropriated funds for border-wall construction violated, in multiple respects, the limitations that Congress imposed on DoD under Section 8005.

A. The States May Sue Under the APA

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Petitioners do not dispute the conclusion of the court below that the States are harmed by the challenged agency actions. *See* Pet. App. 90a-99a; *id* at 129a-131a & n.7 (dissent). Nor do they dispute that their funding transfers under Section 8005 are final agency actions subject to judicial review. They instead contend that California and New Mexico are not appropriate plaintiffs to challenge those transfers because the States' interests fall outside the relevant "zone of interests." U.S. Br. 20-21. That is incorrect.

1. The APA serves "the central purpose of providing a broad spectrum of judicial review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). Accordingly, this Court has "read the APA as embodying a 'basic presumption of judicial review.'" *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993). Although an APA suit must satisfy the zone-of-interests requirement, this Court has emphasized that the test "'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). There need not be "any 'indication of congressional purpose to benefit the would-be plaintiff.'" *Id.* The test turns on congressional intent and asks only whether the interests asserted by the plaintiff are "'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." *Id.* at 224; *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130-131 (2014). And the Court has "always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Patchak*, 567 U.S. at 225. In other words, "[t]he test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.*

Under these standards, California and New Mexico may challenge DoD's transfers. The States' complaint alleges that petitioners exceeded their limited transfer authority under Section 8005 by diverting funds appropriated for other purposes to pay for wholly foreseen, non-military border-barrier construction that Congress had specifically considered and refused to

fund. C.A. E.R. 445-447. The States' interest in enforcing that spending decision falls well within the zone protected by the statute.

Section 8005 was intended to provide DoD with limited flexibility to meet unforeseen military needs, while protecting the substantive appropriations decisions made through the regular legislative process. It was aimed at "tighten[ing]" congressional control over DoD spending, H.R. Rep. No. 93-662, at 16, including by preventing the agency from shifting appropriations to items that were "denied by the Congress," § 8005. That textual limit reflects the concern that DoD not "undo[] the work of the Congress," by redirecting money to projects that Congress had chosen not to fund. H.R. Rep. No. 93-662, at 16. Because Section 8005 safeguards spending decisions made in the regular appropriations process, the interests reflected in those decisions are relevant to determining whether a particular plaintiff may bring an APA action to enforce Section 8005's limits in the circumstances of a particular case. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987) (zone-of-interests test looks at statute's "overall context," including provisions that inform Congress's purpose); *cf. Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 288 (1992) (Scalia, J., concurring in judgment) (zone of interests for a RICO civil suit will "obvious[ly]" depend on predicate criminal offense alleged as basis for RICO offense).

Here, the interests of California and New Mexico in preventing petitioners from circumventing Congress's decision to limit border-wall funding fall within the interests protected by Section 8005. The Executive requested funding for physical barriers extending 234 miles across four States at the southern border,

and Congress extensively considered that request. Ultimately, the legislation that Congress enacted and the President signed funded construction only in one State—Texas—and allowed such construction only on specific terms and conditions to mitigate environmental harm while retaining a role for local governments in shaping the construction effort. *See supra* pp. 10-11. Section 8005 protects against DoD efforts to override that determination and shift funds for construction outside of Texas and without the same protections for environmental and local interests. The States' interests in preventing that construction, and in avoiding the environmental and sovereign harms it would cause, surely are not "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *See Patchak*, 567 U.S. at 225. Indeed, under these circumstances, California and New Mexico are "predictable" challengers to transfers designed to circumvent Congress's decision not to fund construction within their sovereign territory. *See id.* at 227.

2. Petitioners do not advance any persuasive arguments that the States' interests fall outside the relevant zone of interests. *See* U.S. Br. 22-30.

a. Petitioners first contend that Section 8005 "primarily protects the interests of DoD and Congress." U.S. Br. 24; *see also id.* at 25-26. As just explained, however, Section 8005 does not merely protect the abstract allocation of power between Congress and the Executive—it protects the substantive spending decisions that result from the appropriations process. Indeed, petitioners themselves have conceded that Section 8005's zone of interests includes beneficiaries of Congress's original appropriations. *See California*

v. Trump, No. 20-cv-1563, Dkt. 62, at 9 n.4; *see also* U.S. Br. 28 n.3; Pet. App. 289a (N.R. Smith, J., dissenting). Section 8005's limitations on permissible transfers likewise protect the interests of those who are harmed by activities carried out with improperly transferred funds: the provision aims to prevent not only improper *subtraction* of funds from an original appropriation but also improper *addition* of funding that Congress did not agree to provide.

In addition, although Section 8005 may explicitly refer to the prerogatives and responsibilities of Congress and DoD, *see* U.S. Br. 24-25, even a general legal requirement that allocates authority between different branches of government does not necessarily protect *only* the interests of those branches. As the Court has recognized in other contexts, litigants who are injured when a branch of government oversteps its constitutional authority may invoke the Constitution's structural protections in an otherwise justiciable controversy. *See Bond v. United States*, 564 U.S. 211, 222-224 (2011) (collecting cases).

It is likewise not relevant that Section 8005 does "not mention States or otherwise require the [Defense] Secretary to take their interests into account." U.S. Br. 29. The zone-of-interests test does not "require any indication of congressional purpose to benefit the would-be plaintiff." *Patchak*, 567 U.S. at 225 (internal quotation marks omitted). Instead, a plaintiff's "suit should be allowed unless there was a discernible congressional intent *to preclude suit* by the plaintiff class." *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1270 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part), *rev'd on other grounds sub nom. Michigan v. EPA*, 576 U.S. 743 (2015). No such intent can be discerned here.

There is also no reason to think that allowing California and New Mexico to bring suit would be "antithetical to the interests of Congress." U.S. Br. 26. The zone-of-interests test turns on congressional intent. *Lexmark*, 572 U.S. at 130-131. Here, Congress's intent was to restrict DoD from countermanding congressional appropriations decisions by diverting funds to projects that Congress had declined to fund. *Supra* p. 22. Judicial enforcement of Section 8005 gives effect to those decisions.

b. Petitioners also argue that Congress's decision in the CAA to deny funds for border-wall construction outside of Texas should be ignored in the zone-of-interests analysis. U.S. Br. 29-30. They contend that Section 8005 is the gravamen of respondents' complaint, *id.* at 24, and that the States cannot "'leapfrog'" over it to Congress's spending decision embodied in the CAA, *id.* at 30.

To begin with, this argument ignores the text of Section 8005, which specifies that "in no case" may DoD transfer money to fund an "item" that "has been denied by the Congress." That provision and its "zone of interests" protect any pertinent denial of funding by Congress. There is no basis for any limiting construction under which it would prevent executive circumvention only if such a decision is reflected in the DoD appropriations act itself. *See infra* pp. 35-38.

Moreover, the relevant zone of interests is determined not only by the specific statute that plaintiffs seek to enforce, but also by "the overall context" of that statute, *Clarke*, 479 U.S. at 401, and by other provisions that have an "integral relationship" with it, *Air Courier Conf. of Am. v. Am. Postal Workers Union, AFL-CIO*, 498 U.S. 517, 530 (1991). Here, the overall

context is the 2019 appropriations cycle; the relationship between an anti-circumvention measure restricting the repurposing of DoD appropriations and the hard-fought compromise over border-wall funding reflected in that cycle's CAA is clear.

This Court's decision in *Air Courier Conference* does not suggest a different conclusion. *See* U.S. Br. 30. That case involved a statutory "revenue protection measure" for the postal service, designed to prevent private carriers from selectively undercutting postal prices on profitable routes. *Air Courier*, 498 U.S. at 519; *see id.* at 527-528. This Court held that a postal-employee union was not within the zone of interests of that measure, rejecting arguments based on a different statute addressing labor-management relations. *Id.* at 530. The Court emphasized that there was nothing to suggest that Congress "saw any connection between" the two statutes. *Id.* Here, as explained, the connection between transfers under Section 8005 and spending denials made elsewhere by Congress is drawn by the statutory text itself.

c. For similar reasons, petitioners are incorrect in asserting that the environmental and sovereign injuries that the States seek to prevent are outside the relevant zone of interests. *See* U.S. Br. 25. Again, Section 8005 must be viewed in the light of other "provision[s] that help[] us to understand Congress' overall purposes." *Clarke*, 479 U.S. at 401. When Congress enacted the CAA, it directed that "[n]one of the funds made available by this Act or prior Acts are available for the construction of pedestrian fencing" in certain environmentally sensitive locations. CAA, Div. A, Tit. II, § 231, 133 Stat. at 28. And in appropriating limited funds for use elsewhere in Texas, it required DHS to "confer" with local governments "and

seek to reach mutual agreement" regarding design and alignment of barriers on lands within the purview of those governments. *Id.*, § 232, 133 Stat. at 28-29. Congress thus took account of much the same kinds of sovereign and environmental interests that the States assert here. By unilaterally transferring funds in violation of Section 8005, petitioners not only circumvented Congress's decision to deny funding for barrier construction in California and New Mexico, but also deprived those States of the opportunity to secure the kind of environmental and sovereignty protections that Texas and its localities received through the congressional appropriations process culminating in the CAA.

Furthermore, because the transfers here funded border-barrier construction for DHS, the relevant context also includes DHS's general authority to waive otherwise applicable state environmental regulations with respect to such projects. *See supra* pp. 13-14 (discussing waiver authority under IIRIRA); U.S. Br. 29. In the period leading up to the enactment of the 2019 Defense Appropriations Act and the CAA, DHS invoked that authority repeatedly, including with respect to environmental laws of California, New Mexico, and Texas.[12] When Congress ultimately appropriated specific funds to DHS for barrier construction in Texas, it imposed substitute requirements to protect environmental and comity interests, which applied notwithstanding DHS's waiver authority. *See*

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[12] *See, e.g.*, 83 Fed. Reg. 51,472 (Oct. 11, 2018) (IIRIRA waiver of federal, state, and other environmental laws for construction of barriers and roads at border in Hidalgo County, Texas); 83 Fed. Reg. 3,012 (Jan. 22, 2018) (same, near Santa Teresa Land Port, New Mexico); 82 Fed. Reg. 42,829 (Sept. 12, 2017) (same, near Calexico, California).

supra pp. 10-11. Congress had no need to impose comparable requirements or limit any existing waiver authority with respect to projects in California or New Mexico, because it refused to fund projects there at all. Section 8005's transfer restrictions thus protect the environmental and comity interests that were preserved by that refusal.

d. Petitioners' remaining arguments against judicial review lack merit. Petitioners suggest Congress could not have intended judicial enforcement of Section 8005's restrictions because DoD funding transfers may implicate issues of national security that are not amenable to judicial resolution. U.S. Br. 25. Petitioners do not, however, contend that their decision to transfer funds under Section 8005 is committed to agency discretion or otherwise not subject to judicial review. And the issues presented in this case—whether petitioners' transfers were for unforeseen military requirements and whether they funded an item that Congress had denied—involve routine questions of statutory interpretation that the courts are well-equipped to address. *See infra* pp. 30-38.

Petitioners also fault the court of appeals for considering, in its zone-of-interests analysis, limitations on congressional standing that it concluded would make it difficult for Congress to enforce Section 8005. U.S. Br. 27. Petitioners are correct that, "in the Article III standing context, the 'assumption that if [these plaintiffs] have no standing to sue, no one would have standing, is not a reason to find standing.'" *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 420 (2013)). But the zone-of-interests test does not implement the "'irreducible constitutional minimum'" of Article III standing. *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1547 (2016); *see Lexmark*, 572 U.S. at 125-

128. Instead, it poses a question of statutory interpretation. *Lexmark*, 572 U.S. at 128; *see also* U.S. Br. 22.

With respect to that question, the availability of other potential plaintiffs can be relevant. When it passed the Defense Appropriations Act, Congress would have been aware that its standing to enforce that Act's limitations would involve substantial complications not present in suits brought by other parties.[13] And Congress surely also knew of the practical impediments that would make it difficult to enforce Section 8005's substantive limitations by means other than a lawsuit. For example, "enact[ing] legislation to override the transfer or to modify DoD's transfer authority" (U.S. Br. 26) would require "a veto-proof majority of both houses of Congress"—and would not address the possibility that the Executive might again simply "ignore[]" those statutory restrictions. *Mnuchin*, 976 F.3d at 14. Accordingly, it is at least arguable—indeed, it is probable—that Congress intended parties to be able to sue to enforce Section 8005's limitations in situations where the Executive's violation of those limitations has undermined congressional funding decisions that benefit those parties or protect their interests. There is no reason to think that Congress would have ceded one of its core powers by implicitly precluding the most practical defense of it.

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[13] *See United States House of Representatives v. Mnuchin*, 976 F.3d 1, 9-15 (D.C. Cir. 2020) (discussing precedents on legislative standing and holding that House of Representatives may bring constitutional but not APA challenge to petitioners' transfers); Pet. for Reh'g or Reh'g En Banc, *United States House of Representatives v. Mnuchin*, No. 19-5176, at 13-16 (D.C. Cir.) (filed Nov. 9, 2020) (federal defendants' argument that Congress has no constitutional standing to enforce the limits of federal appropriations statutes).

In essence, petitioners argue that Congress intended Section 8005's substantive limitations to be mere admonishments—effective only to the extent that the Executive chooses to abide by them. But Congress is the "guardian of" the Nation's "treasure," with "the power to decide, how and when any money" shall be spent. 3 Story, Commentaries on the Constitution § 1342 (1st ed. 1833). And Congress enacted Section 8005 to "tighten" that control. H.R. Rep. No. 93-662, at 16-17. The APA's "'basic presumption of judicial review,'" *Lincoln*, 508 U.S. at 190, and the nature of Section 8005 and the underlying appropriations decisions that Congress sought to protect, cannot be squared with petitioners' "overly restrictive view" of the States' ability to sue, *White Stallion*, 748 F.3d at 1267 (Kavanaugh, J., concurring in part and dissenting in part).[14]

B. Section 8005 Did Not Authorize Petitioners' Transfers

On the merits, Section 8005 did not authorize petitioners to transfer funds for border-wall construction beyond the $1.375 billion that Congress appropriated for that purpose.

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[14] The transfers may also be set aside under the APA on the additional ground that they violated the Appropriations Clause. *Infra* pp. 44-47; *see* 5 U.S.C. § 706(2). This Court has clarified that the zone-of-interests test reflects a question of statutory construction to discern whether Congress intended for a particular class of plaintiffs to be able to enforce the limits of any statute underlying an APA claim. *Lexmark*, 572 U.S. at 129-131. Where an APA claim is grounded in the Constitution, however, there is no underlying statute to consult, and no further congressional action that might restrict the generous judicial review presumptively afforded by the APA. *Cf. Patchak*, 567 U.S. at 225-226.

1. To begin with, the challenged transfers were not "based on unforeseen military requirements." § 8005.

a. Section 8005 does not define "unforeseen," but the usual meaning of the word is "[n]ot foreseen" or "not expected." *E.g.*, Black's Law Dictionary 1839 (11th ed. 2019). Here, the perceived need to construct a border wall was hardly unexpected. In his first days in office in 2017, the President announced the Executive Branch's policy to build a wall on the southern border. *Supra* pp. 5-6. And petitioners sought funding for border-wall construction from Congress in appropriations cycles preceding the one at issue here. *Supra* p. 7.

Petitioners do not dispute that they foresaw a need to construct a physical barrier across the southern border throughout the relevant appropriations process. *See* U.S. Br. 45-46. Instead, they contend that, at the time DoD presented its funding requests to Congress for fiscal year 2019, it was unforeseen that DHS would ask for DoD's support for wall-construction projects under Section 284. *Id.* at 45. But Section 8005's limitations are not so narrow. The operative question under the statute is whether a perceived "requirement" for the use of appropriated funds—here, the ostensible need to create a physical barrier across the southern border—was unforeseen, not whether DoD anticipated a specific funding *request* from a specific agency under a specific statutory rubric. Congress knows how to write a statute that refers specifically to a "request for funds." *E.g.*, 20 U.S.C. § 925. If it had intended the permissibility of a transfer under Section 8005 to turn on whether a particular agency's funding request was unforeseen, it would have said so.

The purpose of Section 8005's transfer restrictions confirms that petitioners' narrow reading is incorrect.

As petitioners acknowledge, U.S. Br. 26, Congress intended Section 8005 to "tighten congressional control" over DoD's redirection of appropriated funds. H.R. Rep. No. 93-662, at 16. Under petitioners' reading of Section 8005, however, the Executive could claim that any request was "unforeseen" simply by coordinating with the requesting agency to make sure it does "not request DoD's assistance" (U.S. Br. 45) until after DoD transmits its budget requests to Congress for the relevant fiscal year. There is no indication that Congress intended to authorize such gamesmanship.

Moreover, on the facts of this case, it *was* foreseen throughout the appropriations process that DoD could be asked to supply funds to assist DHS with border-wall construction. In January 2017, more than a year before DoD submitted its relevant budget requests to Congress, President Trump issued an executive order instructing DHS to identify "all sources of Federal funds" for a wall along the southern border. 82 Fed. Reg. at 8,794. The Administration's February 2018 budget proposal reiterated the President's commitment to build a wall on the southern border. *See supra* pp. 7-8 nn.2-3. And the Executive plainly foresaw the possibility that DoD support would be needed to achieve that goal. In April 2018, the President issued a memorandum specifically instructing DoD to "support the Department of Homeland Security in securing the southern border and taking other necessary actions" to stop drug trafficking and other unlawful activity. 2018 WL 1633761, at *2. That instruction—which preceded the September 2018 enactment of the Defense Appropriations Act—was precisely what the Acting Secretary of Defense said he was carrying out when he later approved the Section 8005 transfer. *See* J.A. 77. He explained that the President's April memorandum "directed DoD to assist DHS in stopping the

flow of illegal drugs into the United States" and DoD's transfer action was "necessary to advance that goal." *Id.*

DoD's own conduct confirms that the request was foreseen. For most of fiscal year 2018, DoD held back the overwhelming majority (84%) of funds appropriated for counter-narcotics activities, explaining that it was saving them "'for possible use in supporting Southwest Border construction.'" Pet. App. 111a; *see also* C.A. State S.E.R. 1206-1207. Because expenditures under Section 284 require a "request[]" from the federal agency that is being supported, 10 U.S.C. § 284(a)(1), this history indicates that DoD anticipated—indeed, planned for—a request by DHS before the passage of the 2019 Defense Appropriations Act.[15]

b. In addition, the "requirement[]" that prompted the challenged transfers was not a "military" one. § 8005. DHS requested assistance from DoD to support civilian law enforcement activities at the southern border, including preventing unlawful border crossings and drug trafficking. *See* J.A. 80-95. In approving DHS's requests, the Acting Secretary of Defense explained that the funding would support DHS efforts and that the completed infrastructure would be maintained, operated, and in the custody of DHS—not the military. *Id.* at 74-75, 96-97.

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[15] Petitioners note (at 40-41) that the Government Accountability Office concluded that Section 8005 authorized the challenged transfers. *See* Dep't of Defense—Availability of Appropriations for Border Fence Construction, B-330862, 2019 WL 4200949 (Comp. Gen. Sept. 5, 2019). GAO's opinion did not address the evidence, discussed above, that DoD actually anticipated that it would use DoD funds to support border-wall construction. For that and the other reasons given in the text, GAO's conclusions are not persuasive. *See Dep't of Navy*, 665 F.3d at 1349.

Petitioners incorrectly assert that Section 284 establishes that the transfers were for a "military requirement." *See* U.S. Br. 46-47. Section 284 authorizes DoD to provide a range of support for non-military activities, such as counterdrug and other law enforcement efforts. 10 U.S.C. § 284; *see also, e.g., id.* §§ 271, 272. These provisions only confirm that, while assistance provided under these authorities comes from DoD's budget, it is put to use for civilian purposes.

2. Petitioners' transfers violate Section 8005 for the additional reason that "the item for which funds [were] requested" was "denied by the Congress." As described above, the President asked Congress for a $5.7 billion appropriation to "fund construction of a total of approximately 234 miles of new physical barrier," including DHS projects in California, Arizona, New Mexico, and Texas. J.A. 131-132; Walls Work, reproduced in D. Ct. Dkt. 57-7, at 263-264. But Congress rejected that request, "triggering the longest partial government shutdown in United States history." Pet. App. 81a. The shutdown ended 35 days later, only after Congress and the Administration reached a compromise that appropriated just $1.375 billion to DHS for border-barrier funding, for a single project in Texas. *See id.* It is hard to think of a more pointed denial of an item by Congress.

It is also hard to think of a more pointed effort to "undo[]" that decision. H.R. Rep. No. 93-662, at 16. The day President Trump signed the CAA, the Administration announced a plan to transfer funds to make up for what Congress had refused to appropriate. *Supra* p. 11. In his decision approving the transfers, the Acting Secretary of Defense explained that the "items to be funded" with the transferred DoD appropriations are "DHS Priority Projects" in California, Arizona,

and New Mexico. J.A. 76-77, 98-99; *see also* J.A. 83-95 (DHS list and description of its priority projects). Funding for such construction is precisely what Congress "denied" when it refused the President's request for $5.7 billion in border-wall funding.

Petitioners regard Congress's refusal to appropriate the funds sought by the President for border-wall construction as irrelevant. U.S. Br. 41-42. In their view, Section 8005's restrictions apply only to budget items that *DoD* specifically requests in the *DoD* appropriations process and that Congress declines to fund within the four corners of the Defense Appropriations Act. *Id.* Here, because "DoD never requested appropriations for the item of providing this counterdrug assistance to DHS" in DoD's budget requests, petitioners argue that "Congress never denied any request for that item of expenditure." *Id.* That cramped reading finds no support in the text of Section 8005 or its underlying purpose and would lead to results that Congress could not have intended.

To begin with, the statutory text refers to an "item . . . denied by the Congress"—not an appropriation "specifically requested by the Department of Defense and denied by the Congress," or an item "denied by the Congress during its consideration of funding for the Department of Defense." § 8005. When Congress limited its focus to DoD funding or funding allocated within the Defense Appropriations Act, it used different words. *See id.* (describing working capital funds "of the Department of Defense" and "funds made available in this Act to the Department of Defense"). Further, the use of the term "item" in other parts of Section 8005 does not support petitioners' reading. *See* U.S. Br. 43-44. When Section 8005 elsewhere employs the word "item"—such as when it prohibits

transfers unless for "higher priority items"—it likewise does not say that those "items" are only those "identified during the DoD budgeting process." *Id.* at 43.

The "'item-level analysis'" applied in the reprogramming context and discussed by the dissent below likewise does not help petitioners. *See* U.S. Br. 42. According to the dissent, Section 8005 "must be understood against the backdrop of the sort of familiar item-level analysis required in a budgetary reprogramming." Pet. App. 162a. Specifically, the "benchmark for evaluating the proposed destination item is . . . , as with any reprogramming, the original allocation among items that is reflected in the records of the DoD appropriations process." *Id.* (emphasis omitted); *see also id.* at 159a-160a (discussing standards for determining whether an agency has reprogrammed funds). But the source cited by the dissent as "authoritative" (*id.* at 158a) makes clear that a "reprogramming" is not the same as a "transfer." U.S. Gov't Accountability Office (GAO), *Principles of Federal Appropriations Law* 2-38, 2-44 (4th ed. rev. 2016) (GAO Red Book). A "reprogramming shifts funds within a single appropriation"; a "transfer shifts budget authority from one appropriation to another" and generally may be done only with express statutory authorization. *Id.* at 2-44. Thus, while determining whether an agency has "reprogrammed" funds may require looking at itemizations within a single appropriation, *see id.* at 2-46; Pet. App. 159a-160a, that has nothing to do with whether a transfer is permitted.[16]

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[16] DoD uses the term "reprogramming action" to encompass both "reprogramming" (shifting funds within an appropriation) and

Congress's purpose in enacting Section 8005 confirms that it prohibits DoD's transfers here. Congress intended to tighten control over DoD's redirection of funds; it was not narrowly focused on which appropriations bill the item was considered in or whether DoD had formally requested funds for the item. Indeed, Congress specifically called out—and sought to prevent—DoD's practice of redirecting funds toward items that were *not* specified in DoD's budget request. H.R. Rep. No. 93-662, at 16-17 (discussing "a great number of programs which are not of sufficient priority to be included in the budget"). Petitioners contend that Congress was focused on funds that "'ha[d] been *specifically deleted* in the legislative process' of appropriating funds to DoD." U.S. Br. 43 (quoting H.R. Rep. No. 93-662, at 16) (emphasis and alterations in U.S. brief). But the limiting clause in that quotation—"of appropriating funds to DoD"—was added by petitioners, not Congress. *See* H.R. Rep. No. 93-662, at 16.

To be sure, in the ordinary case, one could expect an analysis of Section 8005's "denied" proviso to focus on Congress's spending decisions made in the context of the Defense Appropriations Act. But when the Executive seeks to use Section 8005 to countermand a funding decision that Congress made in another appropriations bill, as the Executive did here, the statute's restrictions equally apply. Indeed, it is not plausible that Congress would have broadly authorized DoD to redirect appropriated funds for projects that Congress had specifically considered and rejected just because the projects were discussed in the context

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"transfers" (shifting funds between appropriations). Congressional Research Service, Defense Primer: DOD Transfer and Reprogramming Activities (Feb. 14, 2020). But there is no dispute that the diversions here were "transfers."

of a different bill. That is particularly true in the context present here, where DoD transferred money specifically to fund a project that has been proposed by—and will be owned and operated by—another agency. *Supra* p. 12. When Congress considered and rejected the Administration's request for $5.7 billion for DHS to construct a wall at the southern border, it did not intend for another agency to fund construction of the same wall for DHS's benefit.

And even if there were any doubt that Section 8005 applied to the unprecedented circumstances here, that doubt should be resolved against allowing the transfers. The "fundamental and comprehensive purpose" of the Appropriations Clause "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 and not according to the individual favor of Government agents[.]" *Richmond*, 496 U.S. at 427-428. The Court has taken "a most strict approach" to claims that would result in payment of money from the Treasury without congressional authorization. *Id.* at 426. Congress itself has directed that a "law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made." 31 U.S.C. § 1301(d). That provision reflects "how jealously [Congress] guards the appropriations prerogative," and it requires a clear statement from Congress before a court will find that an appropriation has been authorized. *Am. Fed'n of Gov't Employees, AFL-CIO, Local 1647 v. Fed. Labor Relations Auth.*, 388 F.3d 405, 410 (3d Cir. 2004). There is certainly no clear statement in Section 8005 authorizing a transfer of billions of dollars to fund border-wall projects under the thankfully unusual circumstances here, where Congress could not have more

pointedly rejected the President's request for those funds.

II. PETITIONERS' ACTIONS ARE UNCONSTITUTIONAL AND *ULTRA VIRES*

In the *California* case, the court of appeals affirmed on the basis of the States' APA challenge and did not reach the additional claims that petitioners' conduct was unconstitutional and *ultra vires*. Pet. App. 100a n.12, 119a; *cf. id.* at 399a-402a. Those claims, which the court of appeals addressed in the *Sierra Club* case and which the United States has addressed here, U.S. Br. 30-40, provide an alternative basis for affirmance.

A. The States May Bring Equitable Claims to Challenge Petitioners' Conduct

1. In addition to their APA claim, the States alleged equitable causes of action that petitioners violated the Appropriations Clause by spending funds without a congressional appropriation and acted *ultra vires*. *See* C.A. E.R. 443-446. This Court has long recognized that a court in equity may enjoin unconstitutional acts by federal officers. The ability to sue for injunctive relief "reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). The Executive Branch has generally recognized this principle as well.[17] Furthermore, "[w]hen an executive acts *ultra vires*, courts are

[17] *See Free Enterprise Fund, Inc. v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (noting that government did "not appear to dispute" the availability of an implied private right of action to challenge unconstitutional action "as a general matter").

normally available to reestablish the limits on his authority." *Dart v. United States*, 848 F.2d 217, 224 (D.C. Cir. 1988). This Court first recognized the availability of an *ultra vires* cause of action "long before" the APA, and the APA did "not repeal the review of *ultra vires* actions." *Id.*; *see, e.g.*, *Am. School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902).

Equitable causes of action are of course subject to limits. For example, an equitable action may be unavailable if Congress acts to preclude or limit review. *See Bowen*, 476 U.S. at 673. Plaintiffs may sue in equity only to prevent a particularized injury rather than a generalized grievance. *Lexmark*, 572 U.S. at 127 n.3; *see, e.g., Hein v. Freedom From Religion Found.*, 551 U.S. 587, 559-600 (2007) (plurality opinion). And the harm caused by the allegedly illegal action cannot be too speculative or too attenuated from the violation. *See, e.g., Clapper*, 568 U.S. at 410-411. Petitioners do not argue that these principles preclude the States' suit. As a result, the presumption is that the federal courts are available to enforce the basic requirement that the Executive must obey the law. *See Bowen*, 476 U.S. at 681.

2. Nothing overcomes that presumption here. Petitioners imply that the existence of non-statutory causes of action to enforce constitutional and statutory limits should be viewed with suspicion because of this Court's "recent emphasis on the separation-of-powers concerns with judicially implied causes of action." U.S. Br. 37. The cases petitioners cite, however, express concern about "implied claim[s] for *damages*." *Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020) (emphasis added); *see also Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018). This Court has expressed no simi-

lar skepticism about implied actions seeking injunctive relief. *See Free Enterprise Fund*, 561 U.S. at 491 n.2.

Nor is the "power of federal courts of equity to enjoin unlawful executive action" withdrawn here by any "express [or] implied statutory limitations." *Armstrong*, 575 U.S. at 327; *see, e.g.*, *Bowen*, 476 U.S. at 673. For instance, Section 8005 does not contain any indications of an "'intent to foreclose' equitable relief" like this Court identified in the Medicaid Act in *Armstrong*. 575 U.S. at 328 (discussing Medicaid Act's explicit remedy and exceptionally broad and unspecific standards).

And there is no reason for the Court to conclude that the States' equitable challenges are foreclosed by a zone-of-interests requirement. *See* U.S. Br. 33. As to the constitutional claim, some decisions of this Court applied a zone-of-interests test to certain constitutional challenges. *See, e.g.*, *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977) (dormant Commerce Clause); *cf. Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). More recently, however, the Court has addressed constitutional challenges without asking whether the plaintiff fell within the zone of interests of the constitutional provision being enforced. *See, e.g., Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019).

That approach is consistent with the contemporary understanding of the zone-of-interests doctrine. The doctrine was originally understood as a matter of "'prudential standing.'" *Lexmark*, 572 U.S. at 127; *see Data Processing*, 397 U.S. at 154. More recently, however, the Court has recognized that "prudential standing is a misnomer as applied to the zone-of-interests

analysis, which asks whether this particular class of persons has a right to sue under this substantive statute." *Lexmark*, 572 U.S. at 127 (internal quotation marks and alterations omitted). In other words, the analysis involves a non-jurisdictional and non-constitutional inquiry into whether, under a given statutory framework, Congress intended to preclude suit by a given type of plaintiff. *See id.* at 127-128; *Patchak*, 567 U.S. at 225. There is no reason to apply that inquiry to a constitutional claim.[18]

As to the *ultra vires* cause of action, it would not make sense to expect plaintiffs asserting such a claim to "show that their interests fall within the zones of interests of the constitutional and statutory powers invoked" by the agency as justification for the action the plaintiffs challenge. *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 811 n.14 (D.C. Cir. 1987) (Bork, J.). If the law required otherwise, then "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."

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[18] Petitioners argue that "*Lexmark*'s statement that the [zone-of-interests] requirement applies to 'all statutorily created causes of action' encompassed judicially implied equitable causes of action because the equitable powers of federal district courts are themselves conferred by statute." U.S. Br. 35 (internal citation omitted); *see also Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (Judiciary Act of 1789 conferred on federal courts jurisdiction over suits in equity). But petitioners do not explain how the statutory conferral of federal courts' equity *jurisdiction* transforms an equitable *cause of action* into a statutorily created one. *See* Pet. App. 261a-262a n.25.

Id.; *accord Chiles v. Thornburgh*, 865 F.2d 1197, 1211 (11th Cir. 1989).[19]

3. Petitioners are also incorrect that *Dalton v. Specter*, 511 U.S. 462 (1994), forecloses the States' Appropriations Clause claim. *See* U.S. Br. 31-33. In *Dalton*, the Court considered a suit to enjoin the closure of the Philadelphia Naval Shipyard that alleged violations of the Defense Base Closure and Realignment Act of 1990. *Dalton*, 511 U.S. at 464. The court of appeals held that there was no "agency action" reviewable under the APA, but that the President's alleged violation of the statute by accepting the procedurally flawed recommendations of agency officials could be scrutinized as a "'form of constitutional review.'" *Id.* at 468. To do so, it theorized that "*whenever* the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." *Id.* at 471. This Court rejected that sweeping conclusion, holding that presidential actions in excess of statutory authority do not "necessarily violate[] the Constitution." *Id.* at 473.

The Court in *Dalton* did not, however, hold that such actions could *never* be the basis of a constitutional claim. In that case, the plaintiffs' "claims simply alleg[ed] that the President ha[d] exceeded his

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[19] Petitioners assert that *Haitian Refugee Center* qualified this conclusion by stating that "the relevant question" in a suit involving a statutory provision that limits agency authority is whether the litigant's interest falls within the zone protected by that limitation. U.S. Br. 39. The passage they cite, however, does not say that. The passage notes only that *if* "a particular constitutional or statutory provision was intended to protect persons like the litigant by limiting the authority conferred," then "the litigant's interest may be said to fall within the zone protected by the limitation." *Haitian Refugee Ctr.*, 809 F.2d at 811 n.14.

statutory authority," *Dalton*, 511 U.S. at 473; and the statute conferred on the President unreviewable discretion, *id.* at 474-476. His actions did not necessarily tread into an area reserved for Congress, because the Legislative and Executive Branches share constitutional responsibility over military bases. *See* U.S. Const. art I, § 8; *id.*, art. II, § 2. In contrast, here, the Executive has *no* authority to spend money "out of the Treasury unless it has been appropriated by an act of Congress." *Richmond*, 496 U.S. at 424 (internal quotation marks omitted). While petitioners may surely seek to defend against the States' Appropriations Clause claim by arguing that the challenged spending was duly authorized under Section 8005 that does not mean the States' claim is "not constitutional." U.S. Br. 33.

Indeed, if no cause of action were available to enforce the Appropriations Clause, that Clause could become an empty promise. The Executive will invariably respond to an Appropriations Clause challenge by arguing that the challenged expenditure was authorized in some fashion. Under petitioners' reading of *Dalton*, the mere assertion of statutory authority would be enough to defeat virtually any appropriations claim. And when combined with petitioners' unduly restrictive view of who may sue under the APA to enforce statutory spending limitations such as those in Section 8005, *see supra* pp. 23-30, it would effectively immunize the type of conduct at issue here from judicial review. This Court has explained, however, that "both" the Appropriations Clause and statutory spending provisions "constrain how federal employees and officers may make or authorize payments without appropriations." *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1321 (2020). And the Court has previously rejected arguments that would effectively

"render the Appropriations Clause a nullity." *Richmond*, 496 U.S. at 428.

B. Petitioners' Actions Were *Ultra Vires* and Violated the Constitution

Applying its equitable authority, the court should enjoin petitioners' conduct on the ground that it was *ultra vires* and unconstitutional. As explained above, petitioners lacked statutory authority to transfer money that Congress had appropriated to DoD for other purposes and spend it on border-wall construction efforts that were not only foreseen but actually considered and rejected by Congress during the appropriations process. Under 31 U.S.C. § 1301, public funds may be spent only on "the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a); *see also id.* § 1341(a)(1) (prohibiting expenditures and obligations in excess of appropriations). And an agency may withdraw funds "from one appropriation account and credit[them] to another . . . only when authorized by law." *Id.* § 1532. Here, no law authorized DoD to withdraw funds from its Army personnel and other military accounts and credit them to its Section 284 account for the purpose of augmenting funds available for DHS's priority wall-construction projects. *Supra* pp. 30-38.

Petitioners' conduct also violates the Constitution. Under the Appropriations Clause, "Congress's control over federal expenditures is 'absolute.'" *Dep't of Navy*, 665 F.3d at 1348; *see also Richmond*, 496 U.S. at 424-426. "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) (plurality opinion); *see also*

Mnuchin, 976 F.3d at 13-14 ("The ironclad constitutional rule is that the Executive Branch cannot spend until both the House and the Senate say so."). And the Clause precludes the Executive Branch from "evad[ing]" Congress's restrictions, including when the President is "displeased" with those restrictions. *Richmond*, 496 U.S. at 428.

Here, the only affirmative authorization for spending on border-wall construction in fiscal year 2019 was the CAA, through which Congress authorized petitioners to spend $1.375 billion on a single project in Texas, subject to specific conditions. *Supra* pp. 10-11. But petitioners spent billions of additional dollars on different border-wall projects—without Congress ever appropriating money for that purpose. That additional spending unconstitutionally drew "Money . . . from the Treasury," not "in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7.

In spending money that Congress refused to appropriate, the Executive badly overstepped its authority under our constitutional scheme. The Framers intended to erect "enduring checks on each Branch and to protect the people from the improvident exercise of power." *INS v. Chadha*, 462 U.S. 919, 957 (1983). Within that design, "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). And the President is not permitted to unilaterally countermand Congress's policy judgments based on a different evaluation of the same conditions considered by Congress. *Cf. Clinton v. City of New York*, 524 U.S. 417, 443-444 (1998).

The question of how much money should be spent on border-barrier construction was hotly debated

within the political branches. After extensive consideration and negotiations, Congress made the judgment to appropriate only $1.375 billion for particular border barriers in a specified area—and the President signed that appropriation into law. Petitioners claim legal authority to circumvent Congress's judgment on the basis of a general provision giving executive officials limited flexibility to transfer funds to meet unforeseen military needs. But to read Section 8005 in that way would ignore the limitations spelled out in its text and allow the Executive "to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld." *Youngstown*, 343 U.S. at 609 (Frankfurter, J., concurring). Under the circumstances here, that interpretation is "quite impossible." *Id.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

HECTOR BALDERAS
Attorney General of New Mexico
TANIA MAESTAS
Chief Deputy Attorney General
NICHOLAS M. SYDOW
Civil Appellate Chief
JENNIE LUSK
Civil Rights Bureau Chief

Counsel for the State of New Mexico

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
JANILL L. RICHARDS
Principal Deputy Solicitor General
ROBERT W. BYRNE
MICHAEL L. NEWMAN
EDWARD H. OCHOA
Senior Assistant Attorneys General
AIMEE FEINBERG
JOSHUA A. KLEIN
Deputy Solicitors General
MICHAEL P. CAYABAN
CHRISTINE CHUANG
Supervising Deputy Attorneys General
BRIAN J. BILFORD
NOAH M. GOLDEN-KRASNER
SPARSH S. KHANDESHI
LEE I. SHERMAN
JANELLE M. SMITH
JAMES F. ZAHRADKA II
Deputy Attorneys General

Counsel for the State of California

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