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.

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

BRIEF FOR THE PETITIONERS

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
HASHIM M. MOOPPAN
Counselor to the Solicitor General
SOPAN JOSHI
Senior Counsel to the Assistant Attorney General
MATTHEW GUARNIERI
Assistant to the Solicitor General
H. THOMAS BYRON III
ANNE MURPHY
COURTNEY L. DIXON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

In Section 8005 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999, Congress authorized the Secretary of Defense to transfer certain appropriated funds between Department of Defense (DoD) appropriations accounts "[u]pon determination by the Secretary * * * that such action is necessary in the national interest." Section 8005 contains a proviso stating "[t]hat such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." *Ibid.* In 2019, the Acting Secretary of Defense transferred approximately $2.5 billion pursuant to Section 8005 and another similar provision to make funds available for DoD to respond to a request from the Department of Homeland Security for counterdrug assistance under 10 U.S.C. 284, including in the form of construction of fences along the southern border of the United States. The questions presented are as follows:

1. Whether respondents have a cognizable cause of action to obtain review of the Acting Secretary's compliance with Section 8005's proviso in transferring funds internally between DoD appropriations accounts.

2. Whether the Acting Secretary exceeded his statutory authority under Section 8005 in making the transfers at issue.

PARTIES TO THE PROCEEDING

With respect to the Ninth Circuit's judgment in *Sierra Club* v. *Trump*, No. 19-16102, petitioners (defendants-appellants below) are Donald J. Trump, in his official capacity as President of the United States; Steven T. Mnuchin, in his official capacity as Secretary of the Treasury; Christopher C. Miller, in his official capacity as Acting Secretary of Defense; and Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security.[*] Respondents (plaintiffs-appellees below) are the Sierra Club and the Southern Border Communities Coalition.

With respect to the Ninth Circuit's judgment in *California* v. *Trump*, No. 19-16299, petitioners (defendants-appellants and cross-appellees below) are Donald J. Trump, in his official capacity as President of the United States; Steven T. Mnuchin, in his official capacity as Secretary of the Treasury; Christopher C. Miller, in his official capacity as Acting Secretary of Defense; David Bernhardt, in his official capacity as Secretary of the Interior; Chad F. Wolf, in his official capacity as Acting Secretary of Homeland Security; Ryan D. McCarthy, in his official capacity as Secretary of the Army; Kenneth J. Braithwaite, in his official capacity as Secretary of the Navy; Barbara M. Barrett, in her official capacity as Secretary of the Air Force; the United States; the Department of the Treasury; the Department of Defense; the Department of the Interior; and the Department of Homeland Security. Respondents (plaintiffs-appellees and cross-appellants below) are the States of California and New Mexico.

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[*] Acting Secretary Miller is substituted as a party for his predecessor pursuant to Rule 35.3 of the Rules of this Court.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The petition for a writ of certiorari in this matter was filed pursuant to Rule 12.4 of the Rules of this Court, seeking review of two related Ninth Circuit judgments.

The opinion of the court of appeals in *Sierra Club* v. *Trump*, No. 19-16102 (Pet. App. 1a-77a), is reported at 963 F.3d 874. An earlier order of the court of appeals (Pet. App. 206a-299a) is reported at 929 F.3d 670. The order of the district court (Pet. App. 174a-188a) is not published in the Federal Supplement but is available at 2019 WL 2715422. Earlier orders of the district court (Pet. App. 302a-304a, 305a-385a) are available or reported at, respectively, 2019 WL 2305341 and 379 F. Supp. 3d 883.

The opinion of the court of appeals in *California* v. *Trump*, No. 19-16299 (Pet. App. 78a-173a), is reported

at 963 F.3d 926. The order of the district court (Pet. App. 189a-203a) is not published in the Federal Supplement but is available at 2019 WL 2715421. An earlier order of the district court (Pet. App. 386a-437a) is reported at 379 F. Supp. 3d 928.

JURISDICTION

The judgments of the court of appeals were entered on June 26, 2020. The petition for a writ of certiorari was granted on October 19, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 8005 of the Department of Defense Appropriations Act, 2019 (DoD Appropriations Act), Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999, provides:

> Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed $4,000,000,000 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, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred: *Provided*, That such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress: *Provided further*, That the Secretary of Defense

> shall notify the Congress promptly of all transfers made pursuant to this authority or any other authority in this Act: *Provided further*, That no part of the funds in this Act shall be available to prepare or present a request to the Committees on Appropriations for reprogramming of funds, 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 reprogramming is requested has been denied by the Congress: *Provided further*, That a request for multiple reprogrammings of funds using authority provided in this section shall be made prior to June 30, 2019: *Provided further*, That transfers among military personnel appropriations shall not be taken into account for purposes of the limitation on the amount of funds that may be transferred under this section.

Ibid.

The Appropriations Clause of the U.S. Constitution provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, Cl. 7. Other pertinent provisions are reproduced in the appendix to this brief. App., *infra*, 1a-18a.

STATEMENT

In 2019, the Acting Secretary of Defense transferred certain already appropriated funds between Department of Defense (DoD) appropriations accounts in order to respond to a request from the Department of Homeland Security (DHS) for counterdrug assistance at the southern border of the United States pursuant to 10 U.S.C. 284. Upon request by another government agency, Section 284 authorizes DoD to provide counterdrug support in the form of "[c]onstruction of roads

and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. 284(b)(7). DoD has used the funds transferred by the Acting Secretary to undertake the construction of more than 100 miles of fencing, along with roads and lighting. The district court held that the Acting Secretary had exceeded the scope of his authority to transfer funds, and that respondents in these companion cases—two States and two environmental groups—are proper plaintiffs to enforce the limits on that authority. In the environmental groups' case, the court enjoined DoD and DHS from using the transferred funds to "construct a border barrier." Pet. App. 188a. This Court stayed that injunction, holding 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" the transfer statute. 140 S. Ct. 1, 1. Yet a divided panel of the Ninth Circuit concluded otherwise and affirmed in both cases. Pet. App. 1a-77a (*Sierra Club*); *id.* at 78a-173a (*California*).

A. Statutory Background

In September 2018, Congress enacted the DoD Appropriations Act, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999, to fund DoD's operations for fiscal year 2019. Like most annual appropriations laws, the DoD Appropriations Act directs funds to discrete, named accounts—each of which is called an "appropriation"—to be used for specified purposes. See James V. Saturno et al., Cong. Research Serv., R42388, *The Congressional Appropriations Process: An Introduction* 12 (updated Nov. 30, 2016) (*Appropriations Process*). Thus, for example, Congress provided approximately $42 billion for an appropriation entitled "Military Personnel,

Army" to be used "[f]or pay * * * for members of the Army." 132 Stat. 2982 (capitalization altered).

During the budgeting process, DoD requests funds for each such appropriation by describing the amounts it will need to execute the various programs, projects, and activities funded by the appropriation. See, *e.g.*, Office of Mgmt. & Budget, *An American Budget: FY 2019: Appendix* 213-214 (2018) (DoD's request for funds for "Military Personnel, Army" appropriation for fiscal year 2019). In its budget, DoD identifies items of expenditure to be paid from each appropriation—for example, "Pay and Allowances of Officers" as an item to be funded from the military personnel appropriation. *Id.* at 214. Congress may require or prohibit the use of funds for particular proposed items; legislators also commonly use non-binding committee reports to memorialize their expectations about how appropriated funds will be used for particular items in DoD's budget. See, *e.g.*, H.R. Conf. Rep. No. 952, 115th Cong., 2d Sess. 161-164 (2018) (2018 Conference Report) ("Military Personnel, Army" example); cf. *Appropriations Process* 12.

DoD's budget requests are based on estimates, and its actual needs may change during the ensuing fiscal year for a variety of reasons, from price fluctuations to new national-security threats. To address that problem, Congress regularly authorizes DoD to "transfer amounts provided in appropriation Acts." 10 U.S.C. 2214(a). In appropriations law, a "transfer" refers to "the shifting of funds between appropriations," to be used for whatever purposes Congress authorized for funds in the transferee account. Gov't Accountability Office (GAO), *Principles of Federal Appropriations Law* 2-38 (4th ed. rev. 2016) (*GAO Red Book*). "For example, if an agency receives one appropriation for

Operations and Maintenance and another for Capital Expenditures, a shifting of funds from either one to the other is a transfer." *Ibid.*

Section 8005 of the DoD Appropriations Act confers transfer authority for the funds appropriated by that Act. It authorizes the Secretary of Defense, "[u]pon determination * * * that such action is necessary in the national interest," to transfer up to $4 billion between appropriations made by the DoD Appropriations Act. 132 Stat. 2999. Section 8005 contains a proviso stating that funds may not be transferred under that provision "unless for higher priority items, based on unforeseen military requirements," and "in no case where the item for which funds are requested has been denied by the Congress." *Ibid.* Congress provided additional transfer authority in Section 9002, which permits the Secretary to "transfer up to $2,000,000,000 between the appropriations or funds made available" in Title IX of the DoD Appropriations Act. 132 Stat. 3042. That authority is "subject to the same terms and conditions as the authority provided in section 8005." *Ibid.*

The DoD Appropriations Act also contains an appropriation entitled, "Drug Interdiction and Counter-Drug Activities, Defense," 132 Stat. 2997 (capitalization altered), which funds DoD's drug interdiction and counterdrug activities, see *ibid.*—including activities that DoD undertakes pursuant to 10 U.S.C. 284. Under Section 284, the "Secretary of Defense may provide support for the counterdrug activities * * * of any other department or agency of the Federal Government," if "such support is requested * * * by the official who has responsibility for the counterdrug activities." 10 U.S.C. 284(a)(1)(A). As relevant here, DoD may provide assistance in the form of "[c]onstruction of roads and fences

and installation of lighting to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. 284(b)(7).

B. The Challenged Transfers

This case arises from actions taken by DoD and DHS in the wake of President Trump's February 15, 2019, declaration of a national emergency on the southern border under the National Emergencies Act, 50 U.S.C. 1601 *et seq.* See 84 Fed. Reg. 4949 (Feb. 20, 2019). In his proclamation declaring the emergency, the President determined that "[t]he current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests" of the United States, in part because the border is "a major entry point" for "illicit narcotics." *Id.* at 4949; see Memorandum on Securing the Southern Border of the United States, 2018 Daily Comp. Pres. Doc. 2 (Apr. 4, 2018) (directing DoD to "support [DHS] in securing the southern border and taking other necessary actions to stop the flow of deadly drugs"). Hundreds of thousands of pounds of illegal narcotics are smuggled into the United States from Mexico each year—primarily by transnational criminal organizations, such as Mexican cartels. See, *e.g.*, Office of Nat'l Drug Control Policy, *National Southwest Border Counternarcotics Strategy* 2-6 (May 2016), https://go.usa.gov/xyBZp.

On February 25, 2019, DHS submitted a request for DoD's assistance, under 10 U.S.C. 284(a), "with the construction of fences[,] roads, and lighting" to block drug-smuggling corridors on the southern border. J.A. 80, 82. The Acting Secretary of Defense ultimately approved DHS's request for assistance under Section 284 with respect to six projects in Arizona, California, and New Mexico. Pet. App. 83a; see J.A. 74-75, 96-97 (DoD

approvals); see also J.A. 72-73 (noting DHS's decision not to proceed with a seventh project). The six projects consist in part of constructing 30-foot-high steel bollard fencing to replace existing pedestrian fencing or vehicle barriers that had proven to be ineffective. J.A. 82-83, 94, 102-104.

The projects are located in sectors of the border where, in the 2018 fiscal year, DHS made hundreds of drug-related arrests and seized thousands of pounds of illegal narcotics. For example, the Acting Secretary approved several projects in the Yuma Sector of the border in Arizona. J.A. 97. Those projects were among DHS's highest priorities, based on the volume of drug smuggling that occurs between ports of entry in the Yuma Sector. See J.A. 85-87. As DHS explained in seeking DoD's assistance, DHS agents recorded more than 1400 separate drug-related events between border crossings in the Yuma Sector in fiscal year 2018, and "seized over 8,000 pounds of marijuana, over 78 pounds of cocaine, over 102 pounds of heroin, over 1,700 pounds of methamphetamine, and over 6 pounds of fentanyl." J.A. 85. DHS further explained that Yuma County had been identified as a high-intensity drug-trafficking area and that the Sinaloa Cartel, "the most powerful cartel" in Mexico, operates in the area. *Ibid.*; see 21 U.S.C. 1706. DHS provided similar information for each of the other approved projects, all of which are located in areas of the border where DHS annually intercepts hundreds of pounds of illegal narcotics between ports of entry. J.A. 84, 88, 92; see J.A. 63-65, 69-70 (figures for fiscal year 2019).

To ensure adequate funds to complete the first tranche of approved projects, the Acting Secretary invoked Section 8005 of the DoD Appropriations Act to

transfer $1 billion of funds from two personnel accounts to the "Drug Interdiction and Counter-Drug Activities, Defense" appropriations account. J.A. 98-99. The Acting Secretary determined that the transfer satisfied Section 8005 because it would be "in the national interest" and "[t]he items to be funded * * * are a higher priority than the item for which funds and authority are transferred (excess Army military personnel funds)." J.A. 99. The Acting Secretary also explained that, for purposes of Section 8005's proviso, there was an "unforeseen military requirement" because DoD's need to provide support to DHS was "not known at the time of" DoD's earlier budget requests to Congress; he further explained that Congress had not "denied" any request for DoD to provide this assistance to DHS. J.A. 99-100. To fund a second tranche of projects, the Acting Secretary later transferred an additional $1.5 billion from a variety of accounts, invoking both Sections 8005 and 9002 of the DoD Appropriations Act. J.A. 76-79.[1]

C. Prior Proceedings

Respondents brought these suits to challenge the Acting Secretary's internal transfers of funds, as well as other governmental actions to construct physical barriers along the southern border. The challenges to the Acting Secretary's transfers proceeded along similar tracks before the same district court judge and were consolidated for briefing and argument in the court of appeals. See Pet. App. 204a-205a.

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[1] Because Section 9002 is "subject to the same terms and conditions" as Section 8005, DoD Appropriations Act § 9002, 132 Stat. 3042, the remainder of this brief refers to both transfer authorities collectively as Section 8005, consistent with the approach of the courts below. Pet. App. 2a & n.2.

1. *Sierra Club* v. *Trump*

a. The district court first addressed the challenges brought by respondents the Sierra Club and the Southern Border Communities Coalition (collectively, Sierra Club). Sierra Club contended that the construction of fencing and roads in drug-smuggling corridors along the southern border would impair its members' interests in "hiking, birdwatching, photography, and other professional, scientific, recreational, and aesthetic activities." Pet. App. 12a.

The district court issued a preliminary injunction forbidding federal officials from "taking any action to construct a border barrier * * * using funds reprogrammed by DoD under Section 8005," Pet. App. 385a; see *id.* at 305a-385a, and later incorporated the same reasoning into an order granting a permanent injunction and entering partial final judgment, see *id.* at 174a-188a. The court held that it had "authority to review" challenges to the Acting Secretary's transfers pursuant to its equitable power to enjoin government officials from violating federal law, rather than under a specific grant of statutory authority, such as the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. 345a. The court concluded, on that basis, that Sierra Club need not demonstrate that its asserted interests "fall within the 'zone of interests'" protected by Section 8005's proviso, because the court viewed that requirement as applicable only "to statutorily-created causes of action." *Id.* at 347a.

The district court then determined that the Acting Secretary had exceeded his authority under Section 8005 in transferring the funds at issue. The court stated that Congress had denied funds for the projects within the meaning of Section 8005's proviso, see p. 6, *supra*,

when Congress enacted the Department of Homeland Security Appropriations Act, 2019, as part of the Consolidated Appropriations Act, 2019 (CAA), Pub. L. No. 116-6, 133 Stat. 13. In that law, Congress appropriated $1.375 billion to DHS for DHS to construct fencing in the Rio Grande Valley pursuant to DHS's own separate authority to construct border fencing, see CAA, Div. A, Tit. II, § 230(a)(1), 133 Stat. 28—a decision the court took to be a denial of the "item" of "[b]order barrier construction" for purposes of Section 8005, Pet. App. 353a. The court also reasoned that DoD's need to provide assistance to DHS was not "unforeseen" for purposes of Section 8005's proviso because, even though DHS had not requested DoD's support under Section 284 until February 2019, the "government as a whole" had made other funding requests for border-wall construction in 2018. *Id.* at 356a-357a.

b. After the district court declined to stay its permanent injunction pending appeal, Pet. App. 188a; see *id.* at 302a-304a, a divided panel of the court of appeals also declined to stay the injunction, although for different reasons. *Id.* at 206a-299a.

The panel majority stated that Sierra Club was not required to demonstrate that its members' putative recreational and aesthetic interests fall within the zone of interests protected by Section 8005's proviso because, in the majority's view, Sierra Club "allege[s] a constitutional violation." Pet. App. 234a. In particular, Sierra Club alleged that any use of funds transferred improperly under Section 8005 "would cause funds to be 'drawn from the Treasury' not 'in Consequence of Appropriations made by Law,'" in violation of the Appropriations Clause. *Id.* at 246a (quoting U.S. Const. Art. I, § 9, Cl. 7). Under that theory, the majority reasoned that

the relevant question is whether Sierra Club's asserted interests "fall within the zone of interests of the Appropriations Clause," *id.* at 264a—a test it found satisfied, see *id.* at 265a-267a.

Judge N.R. Smith dissented. Pet. App. 274a-299a. In his view, when Sierra Club's "claim is properly viewed as alleging a statutory violation" of Section 8005, Sierra Club has "no mechanism to challenge [DoD's] actions." *Id.* at 276a.

On July 26, 2019, this Court stayed the district court's injunction pending appeal and, if necessary, the disposition of a petition for a writ of certiorari. 140 S. Ct. at 1. The Court stated that "[a]mong 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." *Ibid.* Justice Breyer concurred in part and dissented in part. *Id.* at 1-2. He would have stayed the injunction to the extent it prohibited the government from finalizing the contracts at issue. *Id.* at 2. Justices Ginsburg, Sotomayor, and Kagan would have denied a stay. *Id.* at 1.

c. On the merits, a different panel of the court of appeals affirmed by a divided vote. Pet. App. 1a-77a.

The panel majority first concluded that Section 8005 did not authorize the transfers at issue, based on the panel's reasoning in a companion opinion issued in the States' case. Pet. App. 17a; see pp. 15-16, *infra*. The majority then turned to addressing "whether Sierra Club is a proper party to challenge the Section 8005 transfers." Pet. App. 18a. Notwithstanding this Court's stay order, the majority held that Sierra Club "has both a constitutional and an *ultra vires* cause of action" to claim that the Acting Secretary exceeded his authority

in transferring the funds. *Id.* at 19a. On the former, the majority elaborated that the Appropriations Clause itself confers an implied cause of action to challenge allegedly unlawful spending. *Id.* at 20a-25a. Finally, the majority concluded that Sierra Club need not demonstrate that its asserted interests are within the zone of interests protected by Section 8005's proviso for the same reasons the motions panel had given in denying a stay—*i.e.*, because the zone-of-interests requirement either does not apply at all here or applied to the Appropriations Clause rather than Section 8005. See *id.* at 31a-34a.

Judge Collins dissented. Pet. App. 40a-77a. He would have held that Sierra Club "lack[s] any cause of action to challenge the transfers." *Id.* at 41a. He explained that Sierra Club lacks a cause of action under the APA because the APA "incorporates the familiar zone-of-interests test," *id.* at 53a, and the relevant zone is set by Section 8005's proviso, see *id.* at 56a ("*All* of [Sierra Club's] theories for challenging the transfers * * * rise or fall based on whether DoD has transgressed the limitations on transfers set forth in § 8005."). He further explained that Sierra Club's "asserted recreational, aesthetic, and environmental interests clearly lie outside the zone of interests protected by § 8005," which "does not mention" such interests or "require the Secretary to consider" them before transferring funds. *Id.* at 60a. And he would have rejected Sierra Club's effort to "evade" that limitation by invoking an implied constitutional or equitable cause of action rather than the APA. *Id.* at 74a. In his view, Sierra Club lacks any distinct constitutional claim because its Appropriations Clause claim "is effectively the very same § 8005-based claim dressed up in constitutional

garb." *Id.* at 65a. And regardless, he would have held that any implied constitutional or equitable cause of action "would still be governed by the same zone of interests defined by the relevant limitations in § 8005." *Ibid.*; see *id.* at 74a-76a. In all events, he concluded that "the transfers were lawful," as explained in his parallel dissent in the States' case. *Id.* at 41a; see pp. 16-17, *infra*.

2. *California* v. *Trump*

a. In the companion case, a group of States challenged the same internal DoD transfers under the APA and other theories. Two States—California and New Mexico (the States)—sought an injunction and asserted that construction of the projects funded by the transfers within the States would harm their environmental interests and their sovereign interests in the enforcement of state environmental laws. Pet. App. 90a, 94a. DHS had invoked Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-555, as amended, to waive the application of any state environmental laws to these projects. See Pet. App. 83a (noting DHS's express authority under IIRIRA to "'waive all legal requirements' that would otherwise apply to the border wall construction projects") (citation omitted); see also 8 U.S.C. 1103 note (Improvement of Barriers at Border). The district court entered a declaratory judgment in the States' favor on their challenge to the transfers based largely on the reasoning of its prior order in *Sierra Club*, while declining to grant a duplicative injunction. Pet. App. 189a-203a.

b. The same panel of the court of appeals that had affirmed on the merits in *Sierra Club* also affirmed in the States' case, with Judge Collins again dissenting. Pet. App. 78a-173a.

The panel majority held that the States have a cause of action under the APA to challenge the Acting Secretary's compliance with Section 8005 because their asserted interests in enforcing state environmental laws are within the zone of interests protected by Section 8005. Pet. App. 100a-106a. The majority recognized that the proviso in Section 8005 limiting the Secretary's transfer authority is "primarily intended to benefit" Congress. *Id.* at 102a. But it reasoned that "[t]he field of suitable challengers must be construed broadly in this context" in light of "restrictions on congressional standing." *Id.* at 103a. And the majority found that "California and New Mexico are suitable challengers," because it viewed their interests as "congruent with those of Congress," *ibid.*, stressing the "unique" role of States in the constitutional scheme and the preemption of state environmental laws for these projects, see *id.* at 104a-105a. In light of that holding, the majority declined to address the States' alternative theory that they have "an equitable *ultra vires* cause of action." *Id.* at 100a n.12.

The panel majority also held that Section 8005 did not authorize the transfers at issue for the reasons given by the district court—namely, that DoD's need to provide support to DHS was not "unforeseen" in light of the "history of the President's efforts to build a border wall," Pet. App. 109a-110a, and that Congress had "denied" the relevant "item" when it declined to appropriate the full amount of funds the President had requested for the 2019 fiscal year for DHS to construct border barriers, *id.* at 116a-117a. The majority also concluded that providing counterdrug support to DHS did not qualify as a "military requirement" within the meaning of Section 8005's proviso, see *id.* at 112a-116a,

notwithstanding that Congress authorized the military to provide such support, see 10 U.S.C. 284(b)(7).

Judge Collins dissented. Pet. App. 119a-173a. He would have held that the States' "asserted environmental interests clearly lie outside the zone of interests protected by § 8005," which, again, "does not mention environmental interests." *Id.* at 138a; see *id.* at 139a (observing that Section 8005 did not require the Acting Secretary "to give even the slightest consideration to whether [the challenged transfers] would result in the death of more flat-tailed horned lizards"). As to the States' asserted interest in the enforcement of state environmental law, Judge Collins explained that "the ultimate preemption of state law occurred, not as a result of § 8005, but rather as a result of DHS's separate determination" to waive any application of those laws to these projects under IIRIRA, "a completely separate statute." *Id.* at 140a.

Judge Collins also would have held that the challenged transfers complied with Section 8005, when correctly interpreted in light of the backdrop of federal appropriations law. Pet. App. 156a-173a (Collins, J., dissenting). He explained that, in Section 8005's proviso forbidding a transfer to fund an "item" that has "been denied by the Congress," 132 Stat. 2999, the term "item" refers to the "itemizations * * * as set forth in the already existing budgetary documents exchanged and generated during the appropriations process for DoD." Pet. App. 161a. Under that reading, he observed that "this case is easy" because, during the budgeting process, DoD never proposed and Congress never denied any item of expenditure for DoD to provide assistance to DHS under Section 284. *Id.* at 162a-163a. He further explained that the transfers at issue were

"based on unforeseen military requirements." DoD Appropriations Act § 8005, 132 Stat. 2999; see Pet. App. 165a. He reasoned that the requirements were "military" in nature because Congress assigned the task of providing counterdrug support to the armed forces, Pet. App. 165a-169a, and that the requirements were "unforeseen" because "funding for the DoD assistance" was never "requested, proposed, or considered during DoD's appropriations process," *id.* at 171a.

c. After the court of appeals' decisions, Sierra Club moved for this Court to lift its prior stay of the injunction. The Court denied that motion. 140 S. Ct. 2620, 2620. Justices Breyer, Ginsburg, Sotomayor, and Kagan would have granted the motion. *Ibid.*[2]

SUMMARY OF ARGUMENT

I. As this Court already preliminarily concluded with respect to Sierra Club, respondents "have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." 140 S. Ct. 1, 1.

A. Under this Court's precedent, the APA's express cause of action to obtain judicial review of whether a federal official's actions are in excess of statutory authority is not available unless the plaintiff's asserted interests at least arguably "fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 129-130 (2014) (citation omitted). Here, respondents are not

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[2] In litigation involving essentially the same parties, the same panel of the court of appeals later determined—by the same 2-1 margin—that DoD exceeded limitations in 10 U.S.C. 2808 in reprioritizing certain military-construction funds to undertake other barrier construction projects at the border. 977 F.3d 853, 861-862. On November 17, 2020, the government filed a petition for a writ of certiorari to review that related judgment. See 20-685 Pet. I.

proper plaintiffs under a straightforward application of that requirement. Their asserted recreational, aesthetic, environmental, and sovereign interests in the public lands where construction is occurring are not remotely related to the interests protected by Section 8005's limitations, which primarily protect the interests of Congress in the appropriations process. The court of appeals therefore erred in concluding that the States have a viable cause of action under the APA—a conclusion it reached only after deciding that limitations on congressional standing justified broadly construing the "field of suitable challengers" here. Pet. App. 103a.

B. The court of appeals further erred in allowing respondents to "dress[] up" their statutory claims "in constitutional garb." Pet. App. 65a (Collins, J., dissenting). Under the reasoning of this Court's decision in *Dalton* v. *Specter*, 511 U.S. 462 (1994), respondents' claims are statutory, not constitutional. Moreover, even if respondents could assert a distinct claim for a violation of the Appropriations Clause, any such claim would be merely a judicially implied cause of action under Congress's grant of equity jurisdiction, not a cause of action created by the Constitution itself. See *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). Contrary to the court of appeals' suggestion, implied equitable causes of action are subject to "express and implied" limitations, *ibid.*, including the zone-of-interests requirement. If anything, this Court has suggested that a plaintiff should be required to meet a more demanding standard under the zone-of-interests requirement when the plaintiff does not rely on the APA's generous review provisions. And the relevant zone of interests here is set by Section 8005, because that statute's limits form the necessary legal basis for respondents' claims.

II. In all events, the challenged transfers were entirely lawful under Section 8005. The Acting Secretary reasonably determined that the transfers were "necessary in the national interest," DoD Appropriations Act § 8005, 132 Stat. 2999, to respond to a request from DHS under 10 U.S.C. 284 for assistance with drug interdiction efforts at the southern border. And as the nonpartisan GAO concluded during this litigation, the transfers were fully consistent with Section 8005's proviso, which states that the 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." 132 Stat. 2999. The court of appeals conflated DoD's border-barrier construction under Section 284 with DHS's separate and broader proposal for constructing a border wall, and thus misconstrued Section 8005's proviso in three ways.

A. Congress never previously "denied" the relevant "item" within the meaning of the proviso. In this context, the term "item" refers to a specific project or program for which DoD seeks funds in its budget submissions to Congress. DoD had not previously requested funds to provide this assistance to DHS, and Congress had not denied that item of expenditure.

B. DoD's need to provide this support to DHS was also "unforeseen" within the meaning of the proviso. DoD can provide counterdrug assistance to another agency only if the agency requests assistance. When DoD made its budget requests to Congress, DoD did not know that DHS would later make this particular request for assistance.

C. Finally, DoD's need to provide counterdrug support to DHS was a "military requirement" under the proviso. Although DoD was supporting a civilian law-enforcement agency, Congress determined that providing this form of counterdrug assistance at the southern border is a task for the armed forces. And it suffices that the projects were needed to accomplish that military objective, whether or not they were indispensable.

ARGUMENT

I. RESPONDENTS LACK ANY CAUSE OF ACTION TO OBTAIN JUDICIAL REVIEW OF WHETHER THE ACTING SECRETARY OF DEFENSE EXCEEDED HIS AUTHORITY UNDER SECTION 8005

Respondents are not proper plaintiffs to challenge whether the Acting Secretary of Defense violated a proviso in Section 8005 of the DoD Appropriations Act when he transferred funds to fulfill DHS's request for counterdrug assistance at the southern border. Congress has authorized DoD to provide such assistance in the form of "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States." 10 U.S.C. 284(b)(7). In this litigation, no court has ever held that the underlying construction projects are themselves inconsistent with Section 284, and they plainly are not. Respondents instead direct their attack at the Acting Secretary's antecedent decision to transfer excess appropriations under Section 8005 to ensure that adequate funds are available for the Section 284 projects.

That decision is not subject to judicial review at the behest of these particular plaintiffs, who "have no cause of action." 140 S. Ct. 1, 1. Respondents cannot invoke any express or implied cause of action to challenge the Acting Secretary's compliance with the limiting proviso

in Section 8005 because their asserted interests are not even arguably within the zone of interests protected by the proviso. Section 8005 governs DoD's internal transfers of already appropriated funds as part of Congress's regulation of DoD's budget. Respondents assert recreational, aesthetic, environmental, and sovereign interests in the public lands where projects funded by the Section 8005 transfers are occurring, pursuant to an entirely different statute, 10 U.S.C. 284. Respondents' asserted interests in public lands indirectly affected by the transfers are entirely outside the contemplation of Section 8005's proviso.

Respondents cannot circumvent that problem by instead invoking the Appropriations Clause. Under this Court's decision in *Dalton* v. *Specter*, 511 U.S. 462 (1994), respondents' claims are statutory, not constitutional. The necessary gravamen of respondents' claims is that the Acting Secretary exceeded the limits imposed by Section 8005's proviso, and such a garden-variety challenge to compliance with a statute does not implicate the Constitution. And even if, contrary to *Dalton*, respondents could assert a constitutional violation, respondents do not have any cause of action under the Appropriations Clause itself, which does not create any implied private right of action. Instead, as this Court explained in *Armstrong* v. *Exceptional Child Center, Inc.*, 575 U.S. 320 (2015), the ability to sue to enjoin federal officials from violating federal law is the creation of courts of equity.

Any such implied equitable cause of action would be subject to the zone-of-interests requirement. The zone-of-interests test is a "requirement of general application" that presumptively operates in the background for all federal causes of action. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 129 (2014)

(brackets and citation omitted). Respondents' contrary view—under which the zone-of-interests test would limit who may invoke an *express* cause of action but not an *implied* cause of action—is inconsistent with this Court's precedent and backwards as a matter of first principles. And in these circumstances, Section 8005 necessarily prescribes the relevant zone of interests for any implied equitable cause of action because it is "the statute whose violation is the gravamen of the complaint," *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 886 (1990) (*NWF*), even for any purported constitutional claim.

A. Respondents' Asserted Interests Are Not Within The Zone Of Interests Protected By Section 8005's Proviso

1. The "zone-of-interests" requirement limits the plaintiffs who "may invoke [a] cause of action" authorized by Congress for an alleged violation of law to those whose asserted interests "'fall within the zone of interests protected by the law invoked.'" *Lexmark*, 572 U.S. at 129-130 (citation omitted). For many years, this Court described the requirement as a generally applicable rule of "prudential standing." *Id.* at 125; see, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997); *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-475 (1982). In *Lexmark*, however, the Court clarified that the requirement rests not on "counsels of prudence," 572 U.S. at 127 n.3 (citation omitted), but rather on an inference of legislative intent, see *id.* at 127-128—namely, that when Congress authorizes a cause of action, it presumptively does not intend the "absurd consequences" that would follow "[i]f any person injured in the Article III sense" by an alleged violation of federal law could sue over the violation, *Thompson* v. *North Am. Stainless, LP*, 562

U.S. 170, 176-177 (2011). For example, "the failure of an agency to comply with a statutory provision requiring 'on the record' hearings" might cause Article III injury to a stenographer, but the stenographer "obviously" would not be a proper plaintiff to challenge the agency's action because the stenographer's business interest is not within the zone of interests protected by the on-the-record requirement. *NWF*, 497 U.S. at 883; see *Thompson*, 562 U.S. at 177 (shareholders cannot sue corporation for racially discriminating against employees in ways that harm the stock price).

The modern formulation of the zone-of-interests requirement originated during the 1970s in cases involving the APA's "generous review provisions." *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 156 (1970) (*ADPSO*) (citation omitted); see *Lexmark*, 572 U.S. at 129. In the particular context of the APA's express cause of action, 5 U.S.C. 702, this Court's precedent provides that a plaintiff's asserted interest need only be "arguably within the zone of interests" of the provision to be enforced; suit is foreclosed only where the asserted interest is "marginally related to or inconsistent with the purposes implicit in the [provision]." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 224, 225 (2012) (citations omitted). But this Court has made clear that the zone-of-interests requirement is "of general application," and that the breadth of the zone "varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the APA may not do so for other purposes." *Bennett*, 520 U.S. at 163 (quoting *Clarke* v. *Securities Indus. Ass'n*,

479 U.S. 388, 400 n.16 (1987), and, in turn, *ADPSO*, 397 U.S. at 156).

2. Respondents are not proper plaintiffs under a straightforward application of the zone-of-interests requirement, even using the generous APA formulation. Sierra Club asserts that construction of fencing and roads in drug-smuggling corridors along the southern border, using funds transferred pursuant to Section 8005, will impair its members' "scientific, recreational, and aesthetic activities" in the project areas, such as birdwatching. Pet. App. 12a; see C.A. E.R. 319-320. The States assert that construction of the projects funded by the challenged transfers will cause harm to the environment and will impair their sovereign interests in the enforcement of state environmental law. Pet. App. 90a-98a; see C.A. E.R. 381, 398. Both sets of respondents allege in substance "that the challenged transfers are not authorized by § 8005," so Section 8005 "is plainly the 'gravamen of the complaint[s],' and it therefore defines the applicable zone of interests." Pet. App. 55a-56a (Collins, J., dissenting) (quoting *NWF*, 497 U.S. at 886); see *id.* at 134a. Yet respondents' asserted interests are not even "marginally related to * * * the purposes implicit" in Section 8005's limitations, and may even be "inconsistent with" them. *Patchak*, 567 U.S. at 225 (citation omitted). Respondents therefore cannot invoke the APA's cause of action.

Section 8005 primarily protects the interests of DoD and Congress. The statute authorizes the Secretary of Defense to transfer up to $4 billion of certain funds between "appropriations or funds * * * to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to

which" the transfer is made, if the Secretary determines that the transfer "is necessary in the national interest." 132 Stat. 2999. The proviso at issue here states that the Secretary's transfer authority "may not be used unless for higher priority items, based on unforeseen military requirements, than those for which [the transferred funds were] originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." *Ibid.* The statute additionally requires the Secretary to "notify the Congress promptly of all transfers made pursuant to this authority or any other authority" in the DoD Appropriations Act. *Ibid.*

Nothing about Section 8005's text or context suggests any connection whatsoever to 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. Section 8005 does not require the Secretary to consider those kinds of interests before transferring funds. To the contrary, it empowers the Secretary to make transfers in order to fund any type of activities that Congress has authorized DoD to perform. And Congress conditioned the Secretary's transfer authority on judgments about national security that are uniquely within the Executive Branch's expertise and that courts and third parties are ill-suited to second guess—*e.g.*, that the transfer is "necessary" for the "national interest" and for a "higher priority" item of defense spending. DoD Appropriations Act § 8005, 132 Stat. 2999; see *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1861 (2017) (cautioning that courts should be "reluctant to intrude upon the authority of the Executive in military and national security affairs") (citation omitted).

Section 8005's congressional-notification requirement confirms that the proviso primarily protects Congress's interests in the appropriations process. The requirement ensures that, if Congress disagrees with a particular transfer after receiving notice of it, Congress may enact legislation to override the transfer or to modify DoD's transfer authority. The history of the statute's proviso further confirms that it is wholly unrelated to the interests of third parties indirectly affected by the separately authorized actions funded by Section 8005 transfers. When DoD was first given this transfer authority, a committee report explained that legislators imposed conditions on it in order to "tighten *congressional* control of the reprogramming process." H.R. Rep. No. 662, 93d Cong., 1st Sess. 16-17 (1973) (1973 House Report) (emphasis added).

Permitting any person who meets the bare minimum of Article III injury to bring suit to challenge a transfer under Section 8005 could often be antithetical to the interests of Congress. Opportunistic litigation by private parties or States may frustrate the desirable "flexibility," *GAO Red Book* 2-38, that Congress intended to confer in granting DoD transfer authority. Indeed, this case starkly illustrates the concern. The nonpartisan GAO—which is headed by the Comptroller General, "an agent of the Congress," *Bowsher* v. *Synar*, 478 U.S. 714, 731 (1986) (citation omitted)—determined that the transfers at issue here were a lawful exercise of the authority that Congress conferred on DoD in Section 8005. See *Department of Defense—Availability of Appropriations for Border Fence Construction*, B-330862, 2019 WL 4200949, at *1 (Comp. Gen. Sept. 5, 2019) (*GAO Opinion*). Decisions to exercise that flexible authority should not be subject to routine second-guessing by any

litigant who happens to meet the bare minimum of Article III injury. Such routine private enforcement of Section 8005's proviso would also create a risk of excessive court-ordered remedies even for minor or technical violations—which Congress itself may have viewed as inconsequential, or at least insufficient to warrant the wastefulness of bringing to a halt statutorily authorized projects for which funds have already been expended.

3. Sierra Club makes no pretense of being able to meet the zone-of-interests requirement with respect to Section 8005, but the States contend (Br. in Opp. 18-24) that their asserted environmental and sovereign interests can satisfy the test. The court of appeals erred in accepting that contention, and even the States largely do not defend the panel majority's reasoning. The States' alternative theory is equally flawed.

a. The panel majority began by reasoning that the "field of suitable challengers must be construed broadly in this context" in light of "restrictions on congressional standing [that] make it difficult for Congress to enforce these obligations itself." Pet. App. 103a. But the majority should not have taken it upon itself to relax the zone-of-interests requirement to achieve what it perceived to be the optimal number of "suitable challengers." *Ibid.* The federal courts "are not entitled to bend the otherwise applicable * * * standards to ensure that someone will be able to sue in this case or others like it." *Id.* at 145a (Collins, J., dissenting). As this Court has repeatedly admonished 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." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 420 (2013) (citation omitted); cf. *United States* v. *Richardson*, 418 U.S. 166, 179

(1974) ("[T]he absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.").[3]

The panel majority further reasoned that the States satisfy the zone-of-interests requirement because their "challenge actively furthers Congress's intent to 'tighten congressional control of the reprogramming process.'" Pet. App. 103a (citation omitted). The majority asserted that the States' lawsuit "furthers this intent" because two House committees "expressly disapproved of DoD's use of the [transfer] authority" in non-binding resolutions after the fact. *Id.* at 103a-104a; see *id.* at 86a. That reasoning—which has nothing to do with the environmental or sovereign interests asserted by the States—is effectively "tautological." *Id.* at 144a (Collins, J., dissenting). *Any* plaintiff with Article III injury who asserts a violation of Section 8005 could be said to have the same congruence of interests with Congress in avoiding Section 8005 violations. Moreover, the majority erred in conflating the actions of two committees with the will or interests of Congress as a whole, especially given the GAO's contrary view. The Legislative

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[3] In any event, recognizing that these particular plaintiffs lack a cause of action would not mean that Section 8005 transfers "can never be challenged in court," Sierra Club Br. in Opp. 19, nor would it amount to "prohibit[ing] all judicial review," *id.* at 23 (citation omitted). As the States acknowledge (Br. in Opp. 16 n.8), the government has not raised a zone-of-interests challenge in other litigation involving parties claiming an entitlement to transferred funds. Cf. Pet. App. 289a (N.R. Smith, J., dissenting) (stating that Section 8005 "arguably protects * * * those who would have been entitled to the funds as originally appropriated"). Respondents do not allege that they would have directly received any of the funds at issue here.

Branch has the necessary tools to protect its own interests from the Executive Branch, cf. *Trump* v. *Mazars*, 140 S. Ct. 2019, 2031 (2020), without any need for proxy litigation by States or private parties, whose interests may well diverge from the ultimate position of Congress. See pp. 26-27, *supra*.

Finally, the panel majority reasoned that the States are proper plaintiffs because of their "unique" interest in enforcing the "structural separation of powers"—an interest the majority found to apply with "particular force" here because of the preemption of state environmental laws. Pet. App. 104a-105a. But the States do not have any "unique" interest in enforcing the limits of Section 8005, which does not mention States or otherwise require the Secretary to take their interests into account before transferring funds for separately authorized activities. The majority was likewise wrong to rely on the preemption of state law as a basis for finding the zone-of-interests requirement satisfied. The Section 8005 transfers did not themselves preempt any state law, and Section 8005 does not reflect any interest in protecting States from lawful federal preemption. DHS—not DoD—invoked an entirely separate statute to waive the application of any state environmental laws to the construction of the projects funded by the challenged transfers. *Id.* at 140a (Collins, J., dissenting); see p. 14, *supra* (discussing IIRIRA).

b. In opposing certiorari, the States did not defend the panel majority's flawed reasoning. The States instead contended (Br. in Opp. 19-23) that they satisfy the zone-of-interests requirement when that requirement is applied by reference to the CAA—the 2019 omnibus spending bill in which Congress appropriated $1.375 bil-

lion for DHS to construct fencing in the Rio Grande Valley in Texas. See CAA, Div. A, Tit. II, § 230(a)(1), 133 Stat. 28. According to the States (Br. in Opp. 21), Section 8005's proviso "protect[s] Congress's substantive spending choices," including its decision to appropriate funds in the CAA for fencing in Texas, but not in California or New Mexico. The zone-of-interests requirement, however, must be applied "by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175-176. The States' theory that the challenged transfers violate Section 8005's proviso relies on Section 8005, not the CAA, and respondents may not "leapfrog" from the latter to the former to satisfy the zone-of-interests requirement. *Air Courier Conf.* v. *American Postal Workers Union*, 498 U.S. 517, 529-530 (1991); see *NWF*, 497 U.S. at 883 ("[T]he plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.").

B. Respondents Cannot Evade Their Failure To Satisfy The Zone-Of-Interests Requirement For Section 8005's Proviso By Invoking Either The Appropriations Clause Or An Equitable Cause Of Action

Respondents' failure to satisfy the zone-of-interests requirement with respect to Section 8005's proviso should be the end of this case. Respondents cannot circumvent that failure by styling their challenge as a claim under the Appropriations Clause, to which Section 8005 is merely a "defense." Sierra Club Br. in Opp. 23 n.4. Respondents' claims are necessarily statutory, not constitutional, because they hinge on a purported violation of Section 8005's proviso. In any event, the

Appropriations Clause itself does not provide a cause of action; any implied equitable cause of action that respondents might invoke would be subject to at least the same zone-of-interests requirement as an APA claim, if not a more stringent limitation. And Section 8005's proviso is the source of the relevant zone of interests, however respondents style their claims.

1. Respondents do not have any constitutional claim distinct from their claim that the Acting Secretary exceeded his authority under Section 8005's proviso

Respondents do not allege any distinct violation of the Appropriations Clause. That provision states 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. "[I]n other words, [a] payment of money from the Treasury must be authorized by a statute." *Office of Personnel Mgmt.* v. *Richmond*, 496 U.S. 414, 424 (1990). The gravamen of respondents' claim is that the challenged transfers "amounted to drawing funds from the Treasury without *authorization by statute*" in light of Section 8005's proviso. Pet. App. 18a (emphasis added; citation and internal quotation marks omitted). Because respondents do not seriously dispute that the Constitution is satisfied on their own theory if Section 8005 authorized the transfers, Judge Collins was correct to observe that respondents' putative Appropriations Clause claim is merely "the very same § 8005-based claim dressed up in constitutional garb." *Id.* at 65a, 146a (dissenting opinion).[4]

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[4] Sierra Club argued below that Section 8005 violates the Presentment Clause, U.S. Const. Art I, § 7, Cl. 2, but that argument—as Judge Collins also correctly observed—is "wholly insubstantial and frivolous." Pet. App. 66a (dissenting opinion) (quoting *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946)); see *id.* at 65a-66a.

The inherently statutory nature of the claim follows directly from this Court's decision in *Dalton* v. *Specter*, *supra*. In *Dalton*, the plaintiffs "sought to enjoin the Secretary of Defense * * * from carrying out a decision by the President" to close a military facility pursuant to a federal statute. 511 U.S. at 464. The court of appeals had permitted the suit to proceed on the assumption that the plaintiffs were effectively seeking "review [of] a presidential decision." *Id.* at 467 (citation omitted). After this Court held that the President is not an "agency" for APA purposes, see *id.* at 468-469, the court of appeals adhered to its decision on constitutional grounds—reasoning, based on *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), "that whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine." *Dalton*, 511 U.S. at 471.

This Court unanimously rejected that theory. The Court explained that not "every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution." *Dalton*, 511 U.S. at 472. Instead, this Court has carefully "distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority." *Ibid.* (collecting cases). The Constitution is implicated if an executive official relies on it as an independent source of authority to act, as in *Youngstown*, or if the official relies on a statute that itself violates the Constitution. See *id.* at 473 & n.5. But claims alleging simply that an official has "exceeded his statutory authority are not 'constitutional' claims." *Id.* at 473.

The same reasoning fully applies here. This dispute concerns whether the Acting Secretary "exceeded his

statutory authority" in authorizing the disputed transfers under Section 8005, and "no 'constitutional question whatever' is raised," "'only issues of statutory interpretation.'" *Dalton*, 511 U.S. at 473-474 & n.6 (citation omitted). The Acting Secretary did not invoke the Constitution as a basis to transfer funds, and respondents have no plausible argument that Section 8005 is unconstitutional, see p. 31 n.4, *supra*. Respondents' claims are therefore "properly classified" as "'statutory,'" not constitutional. Pet. App. 67a (Collins, J., dissenting) (quoting *Dalton*, 511 U.S. at 474).

The court of appeals erred in concluding otherwise. The panel majority in *Sierra Club* stated that "*Dalton* suggests that a constitutional violation may occur when an officer violates an express prohibition of the Constitution," citing the Court's discussion of *Bivens* claims. Pet. App. 23a (citing *Dalton*, 511 U.S. at 472). But Sierra Club's claim does not remotely resemble a *Bivens* claim. On Sierra Club's own theory of the case, no violation of the Appropriations Clause has occurred *unless* the Acting Secretary exceeded his authority under Section 8005. That claim is inherently statutory, not constitutional.

2. Any implied equitable cause of action would be subject to the zone-of-interests requirement

Even if, contrary to *Dalton*, respondents' claims could be viewed as arising under the Constitution, respondents would still face the same zone-of-interests problem. The Constitution itself does not create any cause of action to enforce the Appropriations Clause, and any implied equitable cause of action would be subject to at least the same zone-of-interests requirement as an APA claim, if not a more demanding standard.

a. The panel majority repeatedly stated that Sierra Club has a "constitutional cause of action." Pet. App. 20a, 22a n.12, 40a; see *id.* at 21a (reading circuit precedent to have "held that the Appropriations Clause contains * * * a cause of action"). To the extent the majority understood the Appropriations Clause itself to create an implied private right of action, the majority clearly erred. The Appropriations Clause "does not create a cause of action," *Armstrong*, 575 U.S. at 325, much less one that lacks a zone-of-interests requirement. Like the Supremacy Clause—the provision at issue in *Armstrong*—the Appropriations Clause "is silent regarding who may enforce [it] in court, and in what circumstances they may do so." *Ibid.* Rather than flowing from the Constitution itself, "[t]he ability to sue to enjoin unconstitutional actions by * * * federal officers is the creation of courts of equity." *Id.* at 327. Thus, respondents' "constitutional" claim would be, at most, a judicially implied cause of action under Congress's grant of jurisdiction for federal courts sitting in equity to enjoin a putative Appropriations Clause violation, see *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999)—not a cause of action created directly by the Constitution.

In asserting otherwise, the panel majority relied on four of this Court's decisions that it understood to establish that "certain structural constitutional provisions give rise to causes of action." Pet. App. 20a. But those cases do not address judicially inferred causes of action authorizing suits to enforce constitutional provisions. Three involved the assertion of a constitutional challenge as a *defense* to government enforcement proceedings pursuant to a *statutory* right of review. See *NLRB* v. *Noel Canning*, 573 U.S. 513, 520 (2014); *Bond* v.

United States, 564 U.S. 211, 215-216 (2011); *INS* v. *Chadha*, 462 U.S. 919, 927-928 (1983); see also Pet. App. 69a-71a (Collins, J., dissenting). And the fourth involved an *express* cause of action created by the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200. See *Clinton* v. *City of New York*, 524 U.S. 417, 428 (1998).

b. As the creation of courts exercising Congress's grant of equity jurisdiction, a judicially implied cause of action must respect all "express and implied statutory limitations" imposed by Congress. *Armstrong*, 575 U.S. at 327. The particular limitation at issue here is the rule that Congress presumptively does not extend a cause of action to a plaintiff whose asserted interests do not "fall within the zone of interests protected by the law invoked." *Lexmark*, 572 U.S. at 129 (citation omitted).

The panel majority erred in reasoning that the zone-of-interests requirement applies only to "statutory causes of action and causes of action under the APA," not judicially inferred equitable causes of action. Pet. App. 31a (citing *Lexmark*, 572 U.S. at 129). The zone-of-interests requirement is "'of general application,'" reflecting a limitation on appropriate plaintiffs that "Congress is presumed" to intend in authorizing suit in federal court. *Lexmark*, 572 U.S. at 129 (quoting *Bennett*, 520 U.S. at 163). *Lexmark*'s statement that the requirement applies to "all statutorily created causes of action," *ibid.*, encompassed judicially implied equitable causes of action because the equitable powers of federal district courts are themselves conferred by statute. See *Grupo Mexicano*, 527 U.S. at 318. *Lexmark* thus did not silently abrogate this Court's precedents recognizing that the zone-of-interests requirement applies to equitable actions seeking to enjoin constitutional violations. See, *e.g.*, *Valley Forge Christian Coll.*, 454 U.S.

at 469, 475 (Establishment Clause); *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 320 n.3 (1977) (Dormant Commerce Clause).

Permitting litigants to evade the zone-of-interests requirement by disclaiming any request for relief under the APA and instead invoking an equitable cause of action would be contrary to the fundamental rationale for the requirement. As this Court explained in *Thompson*, the zone-of-interests requirement reflects Congress's refusal to accept the "absurd consequences [that] would follow" "[i]f any person injured in the Article III sense by a [legal] violation could sue," even where the person's interests are entirely unrelated to the provision being enforced, *Thompson*, 562 U.S. at 176-177; see pp. 22-23, *supra*. Indeed, courts should be even less willing to impute such absurd results to Congress under the statutory grant of equity jurisdiction than under the APA. See *Hernandez* v. *Mesa*, 140 S. Ct. 735, 747 (2020) ("It would be 'anomalous to impute . . . a judicially implied cause of action beyond the bounds Congress has delineated for a comparable express cause of action.'") (brackets and citation omitted).

c. If anything, this Court has indicated that a more demanding showing should be required of a plaintiff outside the context of the APA's "generous review provisions." *Clarke*, 479 U.S. at 400 n.16 (quoting *ADPSO*, 397 U.S. at 156); see *Bennett*, 520 U.S. at 163. In *Clarke*, the Court stated that the "difference made by the APA can be readily seen" by comparing APA cases with decisions involving an implied private right of action under a federal statute, where the "would-be plaintiffs [bear a] threshold burden of showing that they were 'one of the class for whose *especial* benefit the statute was enacted.'" 479 U.S. at 400 n.16 (quoting *Cort* v. *Ash*,

422 U.S. 66, 78 (1975)); see *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283-286 (2002) (relying on the "implied right of action cases" to limit circumstances in which plaintiffs may invoke 42 U.S.C. 1983 to sue state officials for violations of federal statutes).

Imposing a more stringent zone-of-interests requirement for implied equitable causes of action would be consistent with this Court's recent emphasis on the separation-of-powers concerns with judicially implied causes of action. See *Hernandez*, 140 S. Ct. at 741-742, 749; *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1402-1403 (2018). A more stringent requirement would also accord with the "roots" of the zone-of-interests requirement "in the common-law rule that a plaintiff may not recover under the law of negligence for injuries caused by violation of a statute unless the statute 'is interpreted as designed to protect the class of persons in which the plaintiff is included.'" *Lexmark*, 572 U.S. at 130 n.5 (citation omitted). And a more stringent requirement would be consistent with pre-APA principles of judicial review, under which a putative plaintiff lacked standing to sue federal officials over a purported violation of a federal statute unless the statute conferred some particular "privilege" on the plaintiff, or the violation otherwise invaded a "legal right." *Tennessee Elec. Power Co.* v. *Tennessee Valley Auth.*, 306 U.S. 118, 137-138 (1939); see, *e.g.*, *Stark* v. *Wickard*, 321 U.S. 288, 290 (1944); *American Sch. of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 110 (1902).[5]

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[5] "As an original matter," the APA's reference to a party "'adversely affected or aggrieved *within the meaning*' of a statute" could easily be read to incorporate the pre-APA principles discussed above, regarding whether a particular statute confers a privilege or legal interest on a putative plaintiff. *NWF*, 497 U.S. at 883; see U.S.

Section 8005, of course, was not enacted for the especial benefit of States or environmental groups, nor does the statute confer any privileges on such entities or otherwise protect them as a class. Ultimately, though, this Court need not resolve here whether a plaintiff who invokes an implied equitable cause of action should be required to meet a more demanding zone-of-interests standard than the one this Court has adopted under the APA. Respondents cannot meet the latter standard and so, *a fortiori*, could not meet a more demanding one.

3. Section 8005 prescribes the relevant zone of interests regardless of how respondents style their challenge

Finally, just as the Appropriations Clause and an equitable "ultra vires" claim do not eliminate the zone-of-interests requirement, they also do not alter the conclusion that the requirement in this case focuses on Section 8005's proviso. The requirement must be applied "by reference to the particular provision of law upon which the plaintiff relies." *Bennett*, 520 U.S. at 175-176. As discussed above, the Appropriations Clause states that appropriations must be "made by Law," U.S. Const. Art. I, § 9, Cl. 7, and respondents do not seriously dispute that the obligation of funds properly transferred under Section 8005 would satisfy that requirement.

Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 95-96 (1947) ("'adversely affected or aggrieved'" language was "a restatement of existing law") (citation omitted). This Court "rejected that interpretation" in the 1970s, *NWF*, 497 U.S. at 883, proclaiming a "trend * * * toward enlargement of the class of people who may protest administrative action," *ADPSO*, 397 U.S. at 154. Whether or not the Court was correct to adopt that expansive construction of the APA, non-APA equitable suits should remain limited to their traditional scope.

Similarly, the Acting Secretary's actions would not be "ultra vires" in any respect if Section 8005 authorized the transfers. Because a violation of Section 8005's proviso is thus a necessary element of their claims, that proviso is the "provision whose violation forms the legal basis for [the] complaint." *Bennett*, 520 U.S. at 176 (quoting *NWF*, 497 U.S. at 883) (emphasis omitted).

The D.C. Circuit's decision in *Haitian Refugee Center* v. *Gracey*, 809 F.2d 794 (1987) (discussed at Pet. App. 31a-32a & n.14), is not to the contrary. The court stated there, in dicta, that the interests of a litigant "injured by *ultra vires* action * * * normally will not fall within the zone of interests of the very statutory or constitutional provision that he claims does not authorize action concerning that interest." *Id.* at 811 n.14. But the court then went on to explain that the relevant question in a suit—like this one—involving a statutory provision that "limit[s] the authority conferred" is whether "the litigant's interest may be said to fall within the zone protected by the limitation." *Ibid.*; see Pet. App. 75a n.17 (Collins, J., dissenting). Respondents' asserted aesthetic, recreational, environmental, and sovereign interests are not even arguably within the zone of interests protected by the limits in Section 8005's proviso on the Secretary's transfer authority.

In concluding otherwise, the panel majority dismissed Section 8005 as "relevant only because, to the extent it applies, it authorizes executive action that otherwise would be unconstitutional or *ultra vires*." Pet. App. 33a. But that is precisely the point. Whether the Acting Secretary's conduct was unlawful turns entirely on the applicability of Section 8005's proviso; respondents certainly could not have pleaded in their complaint

that they take no position on whether the proviso is satisfied here. To have an express or implied cause of action, respondents' asserted interests must, at a minimum, arguably fall within the zone of interests protected by Section 8005's proviso. They do not.

II. THE ACTING SECRETARY FULLY COMPLIED WITH SECTION 8005

In all events, the challenged transfers are entirely lawful under Section 8005. That provision authorizes the Secretary to transfer, "[u]pon determination * * * that such action is necessary in the national interest," up to $4 billion from certain appropriations made available in the DoD Appropriations Act. 132 Stat. 2999. The court of appeals did not dispute that the Acting Secretary made the requisite national-interest determination. The panel majority instead held that the transfers violated Section 8005's proviso, which states "[t]hat such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress." *Ibid.*; see Pet. App. 17a, 105a-118a. That conclusion is inconsistent with the statutory text, history, and purpose of the proviso.

The decision below also flatly contradicts an opinion issued by the GAO in response to an inquiry from lawmakers during this litigation. See *GAO Opinion*, 2019 WL 4200949, at *1. The GAO's decisions, while not binding, have been viewed as "expert opinion[s]" on federal appropriations law. *United States Dep't of the Navy* v. *FLRA*, 665 F.3d 1339, 1349 (D.C. Cir. 2012) (Kavanaugh, J.) (citation omitted). Here, the GAO "conclude[d] that [DoD's] transfer of amounts into its Drug

Interdiction and Counter–Drug Activities, Defense, account for border fence construction was consistent with [its] statutorily enacted transfer authority." *GAO Opinion*, 2019 WL 4200949, at *1. And the GAO rejected the same arguments that respondents have raised in litigation to challenge those transfers—including, in particular, respondents' misplaced reliance on entirely separate decisions Congress made in the CAA with respect to requests by a different agency, DHS, for appropriations to construct border barriers under DHS's own separate statutory authorities. See *id.* at *8.

A. Congress Never "Denied" Any Request By DoD For The "Item" Of Providing Counterdrug Support To DHS

Section 8005's proviso states that funds may not be transferred "where the item for which funds are requested has been denied by the Congress." 132 Stat. 2999. In this context, the term "item" refers to a specific project or program for which DoD sought funds. See Pet. App. 162a-163a (Collins, J., dissenting) ("[W]hen § 8005 requires a consideration of whether 'the item for which funds are requested has been denied by the Congress,' it is referring to whether Congress, *during DoD's appropriations process*, denied an 'item' that corresponds to the 'item for which funds are requested.'") (citation omitted); accord *GAO Opinion*, 2019 WL 4200949, at *8 ("[T]he President's Budget for Fiscal Year 2019 did not request any amounts for [DoD] with respect to construction of fences at the southern border, so there was nothing for Congress to deny with respect to [DoD]."). Thus, for purposes of Section 8005's proviso, Congress has not previously "denied" the "item" for which funds are requested: DoD never requested appropriations for the item of providing this

counterdrug assistance to DHS, and Congress never denied any request for that item of expenditure.

The panel majority erred in interpreting the term "item" to refer instead to additional funding for a "border wall" writ large, which the majority understood Congress to have "denied" when it appropriated only $1.375 billion to another agency—DHS—for construction of fencing in other sectors of the border pursuant to DHS's own distinct statutory authorities. Pet. App. 116a-117a. That interpretation is inconsistent with "the backdrop of the sort of familiar item-level analysis" that has long been part of the budgeting process. *Id.* at 162a (Collins, J., dissenting); see *Home Depot U. S. A., Inc.* v. *Jackson*, 139 S. Ct. 1743, 1748 (2019) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (citation omitted). During the budgeting process, DoD requests funding from Congress for particular items, which may be as varied as personnel expenses, weapons systems, training activities, or other programs, and Congress appropriates funds in light of those requests. See, *e.g.*, 2018 Conference Report 452 (identifying the House-, Senate-, and conference-committee views about DoD's requests for items to be funded by the appropriation for "Drug Interdiction and Counter-Drug Activities, Defense"); see also pp. 4-5, *supra*. Section 8005 reflects Congress's judgment that, after that process is complete, DoD must retain "financial flexibility" to respond to changing circumstances during the ensuing fiscal year. 1973 House Report 17; see *GAO Red Book* 2-38 ("[A]gencies have a legitimate need for a certain amount of flexibility to deviate from their budget estimates.").

The panel majority's view is also inconsistent with the proviso's history and purpose. When Congress first imposed limitations on DoD's transfer authority for "denied" "items" in 1974, the relevant committee report stated that the proviso would ensure that DoD could not transfer funds for items in its budget that "ha[d] been *specifically deleted* in the legislative process" of appropriating funds to DoD, or "for projects or items which are of a lower priority from programs of higher priority which have been funded." 1973 House Report 16 (emphasis added). The proviso was thus designed to safeguard Congress's choices in the appropriations process by mandating that the "item" for which funds are transferred cannot be something that DoD requested during that process that failed to win legislative approval. Congress included similar language in later DoD appropriations acts and codified the procedures and limitations of the recurring transfer authority in 10 U.S.C. 2214, without ever suggesting any desire to sweep more broadly than the scope of the original proviso.[6]

Interpreting the term "item" to refer to the items identified during the DoD budgeting process is also supported by the principle that "[a] term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994). The first clause of the proviso—"[t]hat such authority to transfer may not be

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[6] See National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, Div. A, Tit. XIV, § 1482(c)(1), 104 Stat. 1709 (codification); Department of Defense Appropriation Act, 1984, Pub. L. No. 98-212, Tit. VII, § 729, 97 Stat. 1444 (transfer authority); Department of Defense Appropriation Act, 1975, Pub. L. No. 93-437, Tit. VIII, § 834, 88 Stat. 1231 (same); Department of Defense Appropriation Act, 1974, Pub. L. No. 93-238, Tit. VII, § 735, 87 Stat. 1044 (same).

used unless for higher priority items," 132 Stat. 2999—uses the term "item" to refer to items of defense spending *by DoD*. Section 8005 only permits transfers between DoD appropriations accounts, so the "higher priority items" for which the transferred funds will be used are necessarily items of expenditure by DoD. The first clause also refers to the items for which Congress has *already* appropriated funds to DoD, in that the transferred funds must be used for items of "higher priority items * * * than those for which" the funds were "originally appropriated." *Ibid.*; cf. 10 U.S.C. 2214(b)(1) (restating the proviso to refer to "a higher priority item * * * than the items for which the funds were originally appropriated"). The usage of the term "item" in the first clause of the proviso to refer to spending on DoD's specific programs and activities confirms that the same term is also used in the same way in the "denied by the Congress" clause at the end of the proviso.

Here, as the Acting Secretary recognized, the relevant "item for which funds are requested" is DoD's counter-narcotics support to DHS under Section 284 pursuant to DHS's request. At no point in the budgeting process did Congress deny a DoD funding request for border-barrier construction under DoD's counter-narcotics support line. That DHS made a request to Congress for funds to construct border barriers under its own statutory authority, and that Congress ultimately appropriated less money than DHS requested, is irrelevant under Section 8005. See *GAO Opinion*, 2019 WL 4200949, at *8-*9.

B. DoD's Need To Provide This Particular Counterdrug Support To DHS Under Section 284 Was "Unforeseen"

Section 8005's proviso also states that the "authority to transfer may not be used unless * * * based on unforeseen military requirements." 132 Stat. 2999. DoD's need to provide counterdrug support to DHS was an "unforeseen" military requirement within the meaning of the proviso because, when DoD made its budget requests to Congress for the 2019 fiscal year, DoD did not know and could not have anticipated that DHS would later request its support under Section 284 for these projects. *GAO Opinion*, 2019 WL 4200949, at *6.

More specifically, Congress enacted and the President signed Section 8005 into law as part of the DoD Appropriations Act on September 28, 2018. 132 Stat. 2981. DHS did not request DoD's assistance in blocking specific drug-smuggling corridors at the southern border until February 2019. J.A. 80. DoD may undertake counter-drug support pursuant to Section 284 only after receiving a request by another agency. The Acting Secretary correctly determined that DoD's "need to provide support" to DHS for those proposed projects thus was "not known at the time of [DoD's] FY 2019 budget request" in 2018. J.A. 100.

The panel majority asserted that "[n]either the problem" of illegal narcotics crossing the southern border "nor the President's purported solution" of physical barriers "was unanticipated or unexpected." Pet. App. 108a. But the specific requirement that prompted DoD to transfer these funds was a request from DHS for assistance under Section 284 with a discrete set of identified projects—a request that came only six months *after* the enactment of the DoD Appropriations Act. Whether the "President's efforts to build a border wall," Pet.

App. 109a, were foreseeable is irrelevant. See *id.* at 170a-172a (Collins, J., dissenting).

C. Providing Counterdrug Assistance To DHS At The Southern Border Was A "Military Requirement"

Finally, the unforeseen budgetary need involved "military requirements." 132 Stat. 2999. In this context, "military requirement" is a term of art referring generally to an "established need justifying the timely allocation of resources to achieve a capability to accomplish approved military objects, missions, or tasks." *GAO Opinion*, 2019 WL 4200949, at *7 (citation omitted). When DoD "accepted DHS's request, the provision of support constituted a military requirement." *Ibid.* Section 284 authorizes DoD to use its military resources, including expertise and funding, to assist in combatting drug smuggling. See, *e.g.*, 10 U.S.C. 284(b)(3), (5)-(6), and (10) (Supp. V 2018) (authorizing DoD to assist other federal agencies with transportation, training, communications monitoring, and aerial reconnaissance). Indeed, as the title of Chapter 15 of Title 10 of the U.S. Code makes clear, Section 284 is one of a number of provisions authorizing "Military Support for Civilian Law Enforcement Agencies." See, *e.g.*, 10 U.S.C. 124(a)(1) ("[DoD] shall serve as the single lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States.").

The panel majority asserted that the projects at issue are not "military requirement[s]" because they were undertaken "to support a civilian agency" and are not, in the majority's view, "needed or essential to the armed forces, soldiers, arms, or any sort of war effort." Pet. App. 113a, 115a-116a. As noted above, in this context "requirement" is a term of art for "established need."

The majority was wrong to suggest a standard of strict essentiality; indeed, even the plain-meaning definition of "requirement" cited by the majority includes "'something wanted,'" not just something absolutely indispensable. *Id.* at 115a (citation omitted). Likewise, providing counterdrug assistance to DHS under Section 284 qualified as a "military" requirement within the meaning of the proviso because Congress has expressly assigned the task of providing such support to the military. See *id.* at 165a-169a (Collins, J., dissenting). The majority had no warrant to reevaluate for itself whether the military is required, needed, or essential to provide that assistance.

* * * * *

Even if respondents have a cause of action to obtain judicial review of whether the Acting Secretary exceeded his authority under Section 8005, the judgments below should be reversed. The Acting Secretary reasonably determined that transferring funds to respond to DHS's request for counterdrug assistance at the southern border satisfied all of the conditions in Section 8005's proviso. The Ninth Circuit erred in disregarding that national-security determination.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
HASHIM M. MOOPPAN
Counselor to the Solicitor General
SOPAN JOSHI
Senior Counsel to the Assistant Attorney General
MATTHEW GUARNIERI
Assistant to the Solicitor General
H. THOMAS BYRON III
ANNE MURPHY
COURTNEY L. DIXON
Attorneys

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APPENDIX

1. U.S. Const. Art. I, § 9, Cl. 7 provides:

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

2. 10 U.S.C. 284 provides:

Support for counterdrug activities and activities to counter transnational organized crime

(a) SUPPORT TO OTHER AGENCIES.—The Secretary of Defense may provide support for the counterdrug activities or activities to counter transnational organized crime of any other department or agency of the Federal Government or of any State, local, tribal, or foreign law enforcement agency for any of the purposes set forth in subsection (b) or (c), as applicable, if—

(1) in the case of support described in subsection (b), such support is requested—

(A) by the official who has responsibility for the counterdrug activities or activities to counter transnational organized crime of the department or agency of the Federal Government, in the case of support for other departments or agencies of the Federal Government; or

(B) by the appropriate official of a State, local, or tribal government, in the case of support

for State, local, or tribal law enforcement agencies; or

(2) in the case of support described in subsection (c), such support is requested by an appropriate official of a department or agency of the Federal Government, in coordination with the Secretary of State, that has counterdrug responsibilities or responsibilities for countering transnational organized crime.

(b) TYPES OF SUPPORT FOR AGENCIES OF UNITED STATES.—The purposes for which the Secretary may provide support under subsection (a) for other departments or agencies of the Federal Government or a State, local, or tribal law enforcement agencies, are the following:

(1) The maintenance and repair of equipment that has been made available to any department or agency of the Federal Government or to any State, local, or tribal government by the Department of Defense for the purposes of—

(A) preserving the potential future utility of such equipment for the Department of Defense; and

(B) upgrading such equipment to ensure compatibility of that equipment with other equipment used by the Department.

(2) The maintenance, repair, or upgrading of equipment (including computer software), other than equipment referred to in paragraph (1) for the purpose of—

(A) ensuring that the equipment being maintained or repaired is compatible with equipment used by the Department of Defense; and

(B) upgrading such equipment to ensure the compatibility of that equipment with equipment used by the Department.

(3) The transportation of personnel of the United States and foreign countries (including per diem expenses associated with such transportation), and the transportation of supplies and equipment, for the purpose of facilitating counterdrug activities or activities to counter transnational organized crime within or outside the United States.

(4) The establishment (including an unspecified minor military construction project) and operation of bases of operations or training facilities for the purpose of facilitating counterdrug activities or activities to counter transnational organized crime of the Department of Defense or any Federal, State, local, or tribal law enforcement agency within or outside the United States.

(5) Counterdrug or counter-transnational organized crime related training of law enforcement personnel of the Federal Government, of State, local, and tribal governments, including associated support expenses for trainees and the provision of materials necessary to carry out such training.

(6) The detection, monitoring, and communication of the movement of—

(A) air and sea traffic within 25 miles of and outside the geographic boundaries of the United States; and

(B) surface traffic outside the geographic boundary of the United States and within the United States not to exceed 25 miles of the boundary if the initial detection occurred outside of the boundary.

(7) Construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.

(8) Establishment of command, control, communications, and computer networks for improved integration of law enforcement, active military, and National Guard activities.

(9) The provision of linguist and intelligence analysis services.

(10) Aerial and ground reconnaissance.

(c) TYPES OF SUPPORT FOR FOREIGN LAW ENFORCEMENT AGENCIES.—

(1) PURPOSES.—The purposes for which the Secretary may provide support under subsection (a) for foreign law enforcement agencies are the following:

(A) The transportation of personnel of the United States and foreign countries (including per diem expenses associated with such transportation), and the transportation of supplies and equipment, for the purpose of facilitating counterdrug activities or activities to counter transnational organized crime within or outside the United States.

(B) The establishment (including small scale construction) and operation of bases of operations or training facilities for the purpose of facilitating

counterdrug activities or activities to counter transnational organized crime of a foreign law enforcement agency outside the United States.

(C) The detection, monitoring, and communication of the movement of—

(i) air and sea traffic within 25 miles of and outside the geographic boundaries of the United States; and

(ii) surface traffic outside the geographic boundaries of the United States.

(D) Establishment of command, control, communications, and computer networks for improved integration of United States Federal and foreign law enforcement entities and United States Armed Forces.

(E) The provision of linguist and intelligence analysis services.

(F) Aerial and ground reconnaissance.

(2) COORDINATION WITH SECRETARY OF STATE.—In providing support for a purpose described in this subsection, the Secretary shall coordinate with the Secretary of State.

(d) CONTRACT AUTHORITY.—In carrying out subsection (a), the Secretary may acquire services or equipment by contract for support provided under that subsection if the Department of Defense would normally acquire such services or equipment by contract for the purpose of conducting a similar activity for the Department.

(e) LIMITED WAIVER OF PROHIBITION.—Notwithstanding section 276[1] of this title, the Secretary may provide support pursuant to subsection (a) in any case in which the Secretary determines that the provision of such support would adversely affect the military preparedness of the United States in the short term if the Secretary determines that the importance of providing such support outweighs such short-term adverse effect.

(f) CONDUCT OF TRAINING OR OPERATION TO AID CIVILIAN AGENCIES.—In providing support pursuant to subsection (a), the Secretary may plan and execute otherwise valid military training or operations (including training exercises undertaken pursuant to section 1206(a) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189; 103 Stat. 1564)) for the purpose of aiding civilian law enforcement agencies.

(g) RELATIONSHIP TO OTHER SUPPORT AUTHORITIES.—

(1) ADDITIONAL AUTHORITY.—The authority provided in this section for the support of counterdrug activities or activities to counter transnational organized crime by the Department of Defense is in addition to, and except as provided in paragraph (2), not subject to the other requirements of this chapter.

(2) EXCEPTION.—Support under this section shall be subject to the provisions of section 275[1] and, except as provided in subsection (e), section 276[1] of this title.

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[1] See References in Text note below.

(h) CONGRESSIONAL NOTIFICATION.—

(1) IN GENERAL.—Not less than 15 days before providing support for an activity under subsection (a), the Secretary of Defense shall submit to the appropriate committees of Congress a written and electronic notice of the following:

(A) In the case of support for a purpose described in subsection (c)—

(i) the country the capacity of which will be built or enabled through the provision of such support;

(ii) the budget, implementation timeline with milestones, anticipated delivery schedule for support, and completion date for the purpose or project for which support is provided;

(iii) the source and planned expenditure of funds provided for the project or purpose;

(iv) a description of the arrangements, if any, for the sustainment of the project or purpose and the source of funds to support sustainment of the capabilities and performance outcomes achieved using such support, if applicable;

(v) a description of the objectives for the project or purpose and evaluation framework to be used to develop capability and performance metrics associated with operational outcomes for the recipient;

(vi) information, including the amount, type, and purpose, about the support provided

the country during the three fiscal years preceding the fiscal year for which the support covered by the notice is provided under this section under—

(I) this section;

(II) section 23 of the Arms Export Control Act (22 U.S.C. 2763);

(III) peacekeeping operations;

(IV) the International Narcotics Control and Law Enforcement program under section 481 of the Foreign Assistance Act of 1961 (22 U.S.C. 2291);

(V) Nonproliferation, Anti-Terrorism, Demining, and Related Programs;

(VI) counterdrug activities authorized by section 1033 of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105-85); or

(VII) any other significant program, account, or activity for the provision of security assistance that the Secretary of Defense and the Secretary of State consider appropriate;

(vii) an evaluation of the capacity of the recipient country to absorb the support provided; and

(viii) an evaluation of the manner in which the project or purpose for which the support is

provided fits into the theater security cooperation strategy of the applicable geographic combatant command.

(B) In the case of support for a purpose described in subsection (b) or (c), a description of any small scale construction project for which support is provided.

(2) COORDINATION WITH SECRETARY OF STATE.—In providing notice under this subsection for a purpose described in subsection (c), the Secretary of Defense shall coordinate with the Secretary of State.

(i) DEFINITIONS.—In this section:

(1) The term "appropriate committees of Congress" means—

(A) the Committee on Armed Services, the Committee on Appropriations, and the Committee on Foreign Affairs of the House of Representatives; and

(B) the Committee on Armed Services, the Committee on Appropriations, and the Committee on Foreign Relations of the Senate.

(2) The term "Indian tribe" means a Federally recognized Indian tribe.

(3) The term "small scale construction" means construction at a cost not to exceed $750,000 for any project.

(4) The term "tribal government" means the governing body of an Indian tribe, the status of whose land is "Indian country" as defined in section

1151 of title 18 or held in trust by the United States for the benefit of the Indian tribe.

(5) The term "tribal law enforcement agency" means the law enforcement agency of a tribal government.

(6) The term "transnational organized crime" means self-perpetuating associations of individuals who operate transnationally for the purpose of obtaining power, influence, monetary, or commercial gains, wholly or in part by illegal means, while protecting their activities through a pattern of corruption or violence or through a transnational organization structure and the exploitation of transnational commerce or communication mechanisms.

3. 10 U.S.C. 2214 provides:

Transfer of funds: procedure and limitations

(a) PROCEDURE FOR TRANSFER OF FUNDS.—Whenever authority is provided in an appropriation Act to transfer amounts in working capital funds or to transfer amounts provided in appropriation Acts for military functions of the Department of Defense (other than military construction) between such funds or appropriations (or any subdivision thereof), amounts transferred under such authority shall be merged with and be available for the same purposes and for the same time period as the fund or appropriations to which transferred.

(b) LIMITATIONS ON PROGRAMS FOR WHICH AUTHORITY MAY BE USED.—Such authority to transfer amounts—

(1) may not be used except to provide funds for a higher priority item, based on unforeseen military requirements, than the items for which the funds were originally appropriated; and

(2) may not be used if the item to which the funds would be transferred is an item for which Congress has denied funds.

(c) NOTICE TO CONGRESS.—The Secretary of Defense shall promptly notify the Congress of each transfer made under such authority to transfer amounts.

(d) LIMITATIONS ON REQUESTS TO CONGRESS FOR REPROGRAMMINGS.—Neither the Secretary of Defense nor the Secretary of a military department may prepare or present to the Congress, or to any committee of either House of the Congress, a request with respect to a reprogramming of funds—

(1) unless the funds to be transferred are to be used for a higher priority item, based on unforeseen military requirements, than the item for which the funds were originally appropriated; or

(2) if the request would be for authority to reprogram amounts to an item for which the Congress has denied funds.

4. Section 8005 of Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999, provides:

DIVISION A—DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2019

* * * * *

Tit. VIII
GENERAL PROVISIONS

* * * * *

SEC. 8005. Upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed $4,000,000,000 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, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred: *Provided*, That such authority to transfer may not be used unless for higher priority items, based on unforeseen military requirements, than those for which originally appropriated and in no case where the item for which funds are requested has been denied by the Congress: *Provided further*, That the Secretary of Defense shall notify the Congress promptly of all transfers made pursuant to this authority or any other authority in this *Act:* *Provided further*, That no part of the funds in this Act shall be available to prepare or present a request to the Committees on Appropriations for reprogramming of funds, 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 reprogramming is requested has been denied by the Congress: *Provided further*, That a request for multiple reprogrammings of funds using authority provided in this section shall be made prior to June 30, 2019: *Provided further*, That transfers among military personnel appropriations shall not be taken into account for purposes of the limitation on the amount of funds that may be transferred under this section.

5. Section 9002 of Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. IX, 132 Stat. 3042, provides:

DIVISION A—DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2019

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TITLE IX

OVERSEAS CONTINGENCY OPERATIONS

MILITARY PERSONNEL

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SEC. 9002. Upon the determination of the Secretary of Defense that such action is necessary in the national interest, the Secretary may, with the approval of the Office of Management and Budget, transfer up to $2,000,000,000 between the appropriations or funds made available to the Department of Defense in this title: *Provided*, That the Secretary shall notify the Congress promptly of each transfer made pursuant to the

authority in this section: *Provided further*, That the authority provided in this section is in addition to any other transfer authority available to the Department of Defense and is subject to the same terms and conditions as the authority provided in section 8005 of this Act.

6. Section 102(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-555, as amended (8 U.S.C. 1103 note) provides:

(a) IN GENERAL.—The Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.

(b) CONSTRUCTION OF FENCING AND ROAD IMPROVEMENTS ALONG THE BORDER.—

(1) ADDITIONAL FENCING ALONG SOUTHWEST BORDER.—

(A) REINFORCED FENCING.—In carrying out subsection (a), the Secretary of Homeland Security shall construct reinforced fencing along not less than 700 miles of the southwest border where fencing would be most practical and effective and provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border.

(B) PRIORITY AREAS.—In carrying out this section [amending this section], the Secretary of Homeland Security shall—

(i) identify the 370 miles, or other mileage determined by the Secretary, whose authority to determine other mileage shall expire on December 31, 2008, along the southwest border where fencing would be most practical and effective in deterring smugglers and aliens attempting to gain illegal entry into the United States; and

(ii) not later than December 31, 2008, complete construction of reinforced fencing along the miles identified under clause (i).

(C) CONSULTATION.—

(i) IN GENERAL.—In carrying out this section, the Secretary of Homeland Security shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes, and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed.

(ii) SAVINGS PROVISION.—Nothing in this subparagraph may be construed to—

(I) create or negate any right of action for a State, local government, or other person or entity affected by this subsection; or

(II) affect the eminent domain laws of the United States or of any State.

(D) LIMITATION ON REQUIREMENTS.—Notwithstanding subparagraph (A), nothing in this paragraph shall require the Secretary of Homeland Security to install fencing, physical barriers, roads, lighting, cameras, and sensors in a particular location along an international border of the United States, if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location.

(2) PROMPT ACQUISITION OF NECESSARY EASEMENTS.—The Attorney General, acting under the authority conferred in section 103(b) of the Immigration and Nationality Act [8 U.S.C. 1103(b)] (as inserted by subsection (d)), shall promptly acquire such easements as may be necessary to carry out this subsection and shall commence construction of fences immediately following such acquisition (or conclusion of portions thereof).

(3) SAFETY FEATURES.—The Attorney General, while constructing the additional fencing under this subsection, shall incorporate such safety features into the design of the fence system as are necessary to ensure the well-being of border patrol agents deployed within or in near proximity to the system.

(4) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to carry out this subsection. Amounts

appropriated under this paragraph are authorized to remain available until expended.

(c) WAIVER.—

(1) IN GENERAL.—Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section [amending this section]. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

(2) FEDERAL COURT REVIEW.—

(A) IN GENERAL.—The district courts of the United States shall have exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). A cause of action or claim may only be brought alleging a violation of the Constitution of the United States. The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

(B) TIME FOR FILING OF COMPLAINT.—Any cause or claim brought pursuant to subparagraph (A) shall be filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security. A claim shall be barred unless it is filed within the time specified.

(C) ABILITY TO SEEK APPELLATE REVIEW.—An interlocutory or final judgment, decree, or order of the district court may be reviewed only

upon petition for a writ of certiorari to the Supreme Court of the United States.