No. 20-138

In The
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners,*
v.
SIERRA CLUB, ET AL., *Respondents.*

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., *Petitioners,*
v.
STATE OF CALIFORNIA, ET AL., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS*[*]

Amicus Curiae, the American Center for Law and Justice (the "ACLJ"), is an organization dedicated to the defense of constitutional liberties and structures secured by law. Counsel for the ACLJ have presented oral argument, represented parties, and submitted *amicus* briefs before this Court and numerous state and federal courts across the country in cases concerning the First Amendment, including *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); and, *McConnell v. FEC*, 540 U.S. 93 (2003).

Additionally, the ACLJ has been active in advocacy and litigation regarding the need for strong and secure borders, prompting it to file *amicus* briefs in these cases in the courts below: *Sierra Club v. Trump*, No. 19-16102 (9th Cir., filed June 10, 2019), and *California v. Trump*, No. 19-cv-872 (N.D. Cal., filed May 2, 2019). The ACLJ also filed *amicus* briefs in a case raising similar challenges against lawful Executive actions taken to protect our national border security, *U.S. House of*

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[*] All parties have provided written consent to the filing of this brief, and were notified on September 1, 2020, of *Amicus*' intent to file. No counsel for any party in this case authored in whole or in part this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

Representatives v. Mnuchin, No. 19-5176 (D.C. Cir., filed December 31, 2019), and *U.S. House of Representatives v. Mnuchin*, No. 19-cv-969 (D.D.C., filed May 16, 2019).

The ACLJ has long engaged in cases before this Court affecting national security, immigration, and separation of powers, participating as *amicus* in *Trump v. Hawaii*, 585 U.S. ___, 138 S. Ct. 2392 (2018); *Trump v. IRAP*, 583 U. S. ___, 138 S. Ct. 353 (2017); *Trump v. Hawaii*, 583 U.S. ___, 138 S. Ct. 377 (2017); *United States v. Texas*, 579 U.S. ___, 136 S. Ct. 2271 (2016); *Arizona v. United States*, 567 U.S. 387, 132 S. Ct. 2492 (2012); *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229 (2008); and *Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S. Ct. 2749 (2008).

The ACLJ submits this brief on behalf of over 215,000 of its members who support a secure border.

SUMMARY OF ARGUMENT

The lower courts erred in creating constitutional and equitable causes of action for plaintiffs without the prudential zone-of-interests test this Court requires. As the dissent below correctly explained, had the zone-of-interests test been applied, it would have foreclosed the causes of action the majority fashioned. To the extent the Appropriations Clause of the Constitution may support a cause of action, like that which this Court established in *Bond v. United States,* 564 U.S. 211 (2011), the statute at issue, § 8005, governs the relationship between the Executive Branch and Congress, not private

litigants. Congress could have amended the relevant requirements but declined to do so.

Petitioners' transfer of funds pursuant to § 8005 into its § 284(b)(7) drug-interdiction account to support DHS with roads, fences, and lighting, is lawful. Congress authorized it through statutes and appropriations and Petitioners determined it was necessary for unforeseen military requirements. The lower court erred, imposing grave consequences upon our national and border security, as well as the constitutional structure and function of our national government. *Amicus* urges this Court to grant the Petition.

ARGUMENT

I. THE CREATION OF CONSTITUTIONAL AND EQUITABLE *ULTRA VIRES* CAUSES OF ACTION FREE OF ZONE-OF-INTERESTS SCRUTINY EXCEEDS THE LOWER COURTS' LEGAL AUTHORITY AND HARMS THE NATION.

The lower court in *Sierra Club* created a constitutional cause of action based in the Appropriations Clause and an "*ultra vires*" cause of action in equity to challenge Executive Branch transfers of appropriated funds. *Sierra Club v. Trump*, 963 F.3d 874, 888-92 (9th Cir. 2020). In doing so, the lower court neglected critical aspects of prudential requirements.

In *Bond*, an opinion upon which the lower court ostensibly based its rulings in this regard, *see Sierra Club*, 963 F.3d at 888, this Court held that that a convicted criminal defendant had standing to appeal her conviction on grounds that the statute upon which she was convicted violated the Tenth Amendment and federalism. Beyond the Article III standing analysis, the Court took on an argument raised by an *amicus* that individuals could not present a claim for relief that relied upon a third party's interest: "In *amicus*' view, to argue that the National Government has interfered with state sovereignty in violation of the Tenth Amendment is to assert the legal rights and interests of States and States alone." *Bond*, 564 U.S. at 220. To that *amicus*, the defendant's Tenth Amendment federalism challenge violated the "prudential rule . . . that a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* (internal quotations and citations omitted).

A unanimous Court rejected that proposition, because, "[t]he individual, *in a proper case*, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State." *Id.* (emphasis added). As the Court explained:

> Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping

> the destiny of their own times without having to rely solely upon the political processes that control a remote central power. *True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy*; but the individual liberty secured by federalism is not simply derivative of the rights of the States.

Id. at 221-22 (emphasis added). Further, and importantly, this Court explained: "An individual who challenges federal action on these grounds is, of course, subject to the Article III requirements, *as well as prudential rules, applicable to all litigants and claims*." *Id.* at 225 (emphasis added).

One such prudential rule applicable to all litigants and claims reserving *Bond*-type constitutional claims for a proper case is the zone-of-interests test for standing. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Yet, the majority for the court below failed to recognize the zone-of-interests requirement and, in fact, failed to address it in its opinion. But the dissent addressed it head-on. *Sierra Club*, 963 F.3d 874, 908 (9th Cir. 2020) (Collins, Circuit Judge, dissenting) (Regarding the APA claim, "[h]ere, the problem is not that the Organizations' interests are inconsistent with the purposes of § 8005, but rather that they are too 'marginally related' to those purposes."); *id.* at 909 ("Even assuming that an equitable cause of action to enjoin unconstitutional conduct exists alongside the APA's cause of action . . . . The Organizations have failed to allege the sort of

constitutional claim that might give rise to such an equitable action, because their 'constitutional' claim is effectively the very same § 8005-based claim dressed up in constitutional garb.").

Respondents contended they did not have to satisfy any zone-of-interests test for their non-APA claims. *Id.* Judge Collins cut right to the core of the majority's error in accepting the Respondents' argument: "even if this claim counted as a 'constitutional' one, *it would still be governed by the same zone of interests defined by the relevant limitations in § 8005*." *Id.* (emphasis added). Where the Respondents contended that, "if § 8005 did not authorize the transfers, then the expenditures violated the Appropriations Clause, the Presentment Clause, and the separation of powers," Judge Collins relied on this Court's precedent in *Dalton v. Specter*, 511 U.S. 462 (1994), to point out that "this theory—despite its constitutional garb—is properly classified as 'a statutory one.' It therefore does not fall within the scope of the asserted non-APA equitable cause of action to enjoin unconstitutional conduct." *Sierra Club*, 963 F.3d at 910 (Collins, Circuit Judge, dissenting) (quoting *Dalton*, 511 U.S. at 474).

One of the illegitimate results of the lower courts' constitutional/equity creation, freed from prudential zone-of-interests impediments, is that it allows lawsuits, like these, to proceed at the funds-changing-accounts stage and before the governmental conduct actually at issue — *i.e.*, the action for which the funds are transferred to

capitalize — even occurs. This provides end-runs around established limitations on claims against governmental acts of repair and construction as well as acts in furtherance of our national and border security,[1] including but not limited to ripeness, justiciability, prudential standing, sovereign immunity, supremacy, and the Administrative Procedures Act. The lower courts' rulings are especially wayward, and troubling, given the constitutional powers and responsibilities of national border security vested in the Executive Branch, utilizing funds appropriated by Congress.

As Judge Collins aptly explains in his dissent, Congress is the party whose interests are implicated by Executive Branch appropriations activity. If Congress disapproved of the Petitioners' transfers and usage of funds, *as to which Congress was notified by Petitioners pursuant to statute*, Congress at all times possessed the power to tighten or amend its restrictions on appropriated funds. It did not. If there is a plaintiff duly interested in the lawfulness of appropriations transfers that, on their face, comply with congressional structures and restrictions, it is certainly not these Respondents.[2] And if there exists a constitutional cause of action

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[1] The causes of action created below are not actions against any governmental undertaking, like construction or repair, allegedly injuring a plaintiff, but against the transfer of funds between congressionally created appropriations accounts *preceding* any governmental act.

[2] Neither is it one chamber of a bicameral Congress.

within the Appropriations Clause, it cannot be as the courts below have framed it.

In sum, the lower court erred in accepting the Respondents' invitation to generate new causes of action unrestrained by the zone-of-interest test that, conveniently, allow litigants and courts to stymie the President's actions — and constitutional power using congressionally appropriated funds — to secure the border. Bestowing in this manner causes of action upon private litigants and States when the Executive Branch transfers appropriated funds in the congressionally approved structure and for congressionally approved purposes is contrary to the constitutional separation and balance of powers, and this Court's clear jurisprudence — especially concerning issues of security and immigration. *See Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976), and note 5, *infra*. The lower court's version of a constitutional or *ultra vires* cause of action found within the Appropriations Clause, based in equity or otherwise, fails to cure the defect. There is a reason the lower court neglected to apply the zone-of-interests test to any of Respondents' claims: If it did, those claims would fail. *See Trump v. Sierra Club*, No. 19A60 (July 26, 2019) ("The application for stay presented to JUSTICE KAGAN and by her referred to the Court is granted. Among the reasons is that the Government has made a sufficient showing at this stage that the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005.). *Amicus* urges this Court to

grant the Petition for Certiorari so it may right this dangerous wrong.

II. PETITIONER DOD'S TRANSFER OF FUNDS PURSUANT TO § 8005 OF THE FY 2019 DODAA INTO ITS § 284(b)(7) DRUG-INTERDICTION ACCOUNT TO SUPPORT DHS WITH ROADS, FENCES, AND LIGHTING, IS LAWFUL BECAUSE IT IS AUTHORIZED BY CONGRESS AND DETERMINED TO BE FOR UNFORESEEN MILITARY REQUIREMENTS.

Before addressing the obvious lawfulness of the Petitioners' challenged fund transfers, it must be noted that the Petitioners' challenged actions did not occur in a vacuum. On February 15, 2019, the President of the United States proclaimed the existence of a national emergency under the National Emergencies Act, 50 U.S.C. § 1631, *et seq.*, necessitating, among other actions, the construction of a wall across the southern border. Declaring a Nat'l Emergency Concerning the S. Border of the United States, Pres. Proc. No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) ("Emergency Declaration").

In spite of the District Court's visible disapproval of the Emergency Declaration, it is both indisputable and undisputed that both Congress and the President followed the executive and legislative procedure set forth by Congress itself in the National Emergencies Act to provide a political check on the President's power concerning national

emergencies. [3] It is equally indisputable and undisputed that, consistent with that procedure, Congress was unwilling to terminate the President's Emergency Declaration.[4]

Congress enacted the National Emergencies Act both recognizing the President's power to declare a national emergency and granting to him certain statutory resources to utilize in his discretion. It is thus neither the Respondents' nor the courts' proper role to determine whether there is an emergency on the southern border. Petitioners have made this determination based on legitimate criteria they have reviewed and in accordance with what they view as necessary to serve vital national security interests. At all times, Petitioners have proceeded under their duly authorized powers. "[T]he Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving 'sensitive and weighty interests of national security and foreign affairs.'" *Trump v.*

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[3] Both Chambers of Congress voted on a House Joint Resolution, H.J. Res. 46, to terminate the President's Emergency Declaration. On March 15, 2019, the President vetoed this Joint Resolution. Subsequently, on March 26, 2019, Congress failed to override the Presidential with a vote of 248-181, falling well short of the constitutionally required two-thirds threshold.

[4] The District Court's insinuation of disapproval of the Emergency Declaration reveals its lack of understanding of the seriousness of both the requirement and unforeseen nature of that requirement for the § 8005 funds Congress has authorized Petitioners to transfer into the DOD's § 284(b) drug interdiction account.

Hawaii, 138 S. Ct. 2392, 2421–22 (2018) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010)). From an objective legal perspective, there is an undisputed national emergency.

Dealing with the underlying facts giving rise to the President's Emergency Declaration has engendered unforeseen incidental costs, including unforeseen military requirements such as additional roads, fences, and lighting. Thankfully for the Nation, in a different statute, Congress has explicitly authorized the Executive Branch to use funds, 10 U.S.C. § 284(b)(7), and to transfer funds, § 8005 of the Department of Defense and Labor, Health and Human Services, and Education Appropriations Act ("FY 2019 DODAA"), Pub. L. No. 115–245 (to be printed at 132 Stat. 2981, 2999) (2018), for exactly this kind of unforeseen military requirement.

Pursuant to well-established jurisprudential and separation of powers principles, the courts are not properly situated to intervene and substitute policy judgments for that of the political branches — especially when issues of national security, foreign affairs, and immigration are involved; [5] and

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[5] *See Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976) ("Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."); *Trump v. Hawaii*, 138 S. Ct. 2392, 2419–20 (2018) (quoting *Mathews*, 426 U.S. at 81–82; *Lujan v.*

especially for plaintiffs, who, like Respondents, are nowhere near any sound articulation of the zone-of-interests test.[6]

To be sure, Petitioners' authority to utilize § 284 drug-interdiction account funds — and their authority under § 8005 to transfer additional funds to that account enjoined by the court below — are not specifically dependent upon the President's Emergency Declaration. *See Sierra Club*, 963 F.3d

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Defenders of Wildlife, 504 U.S. 555, 577 (1992) (rejecting plaintiffs' incorrect position that "would enable the courts, with the permission of Congress, to assume a position of authority over the governmental acts of another and co-equal department, to become virtually continuing monitors of the wisdom and soundness of Executive action." (internal quotations and citations omitted)); *see also Trump*, 138 S. Ct. at 2421 ("But we cannot substitute our own assessment for the Executive's predictive judgments on such matters," *i.e.*, whether an executive branch policy was wise, effective or does little to serve national security interests, "all of which 'are delicate, complex, and involve large elements of prophecy.'" (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948))); *Regan v. Wald*, 468 U. S. 222, 242–243 (1984) (declining invitation to conduct an "independent foreign policy analysis").

[6] Indeed, the District Court did not imagine a zone of interests within which these Respondents could stand; but instead, dispensed with the test altogether. Order, 28-30 (misapplying *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378 (2015), and incorrectly concluding zone of interests test does not apply to implied actions for equitable relief). The Ninth Circuit in *Sierra Club* repeated this error, *supra*, Section I, and in *Sierra Club* and *California v. Trump*, applied a zone-of-interests to the APA claims so watered down and contorted it lacks any meaningful prudential purpose or strength.

at 881 n.5. The unchallenged Emergency Declaration and the overwhelming facts of the national security and humanitarian crisis leading to the issuance of that Emergency Declaration, while not dispositive, are still informative and relevant to a proper understanding of the Petitioners' § 8005 actions enjoined by the District Court. Many of the same facts giving rise to the national emergency give rise to the unforeseen military requirement for Department of Defense ("DOD") support to the Department of Homeland Security ("DHS"). The District Court categorically failed to understand this reality.

The District Court wrongly concluded that Petitioners' utilization of the authority granted by § 8005 exceeds the limitations contained in that provision for two reasons: *First*, "Plaintiffs have shown a likelihood of success as to their argument that Congress previously denied 'the item for which funds are requested,' precluding the proposed transfer." Pet.'s App., 351a. *Second*, "[s]eparate and apart from the Court's analysis above regarding whether Congress previously denied funding for the relevant item, Plaintiffs also have shown a likelihood of success as to their argument that Defendants fail to meet the 'unforeseen military requirement' condition for the reprogramming of funds under Section 8005." *Id.*

The Ninth Circuit, in *Sierra Club* and *California*, agreed. *Sierra Club*, 963 F.3d at 886-87 ("In the opinion filed today in the companion case, *State of California, et al. v. Trump, et al.*, Nos. 19-16299 and

19-16336, slip op. at 37 [963 F.3d 926, 944] (9th Cir. filed June 26, 2020), we hold that Section 8005 did not authorize the transfer of funds at issue here because 'the border wall was not an unforeseen military requirement,' and 'funding for the wall had been denied by Congress.' We reaffirm this holding here and conclude that Section 8005 did not authorize the transfer of funds.").

Section 284(b) provides that "[t]he purposes for which the Secretary [of Defense] may provide support" to other agencies include "[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), (b)(7). According to the transfer authority granted in § 8005 of the FY 2019 DODAA, the Secretary of Defense may transfer the funds at issue, "*[p]rovided*, [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." FY 2019 DODAA.

A. Congress Has Not Denied, *but Instead Has Expressly Authorized*, Petitioners' § 8005 Transfer and Utilization of § 284(b)(7) Drug-Interdiction Account Funds for Roads, Fences and Lighting.

The lower courts conflated two issues when they determined that the "item" for which § 8005 funds

were being transferred by Petitioners was a general "steel barrier for the Southwest border" desired by the President, for which the President asked Congress for "$5.7 billion for construction." Pet.'s App., 351a (Order, 32). In the FY 2019 Consolidated Appropriations Act ("CAA"), Pub. L. No. 116-6 (to be printed at 133 Stat. 13) (2019), "passed by Congress and signed by the President, Congress appropriated only $1.375 billion for the construction of pedestrian fencing, of a specified type, in a specified sector, and appropriated no other funds for barrier construction." Pet.'s App, 351a (Order, 32-33). Again, the Ninth Circuit agreed. *California*, 963 F.3d at 948-49. To the lower courts, this meant Congress denied funds for item for which §8005 funds were being transferred by Petitioners. The lower courts are wrong.[7]

In this case, the correct "item" to which the § 8005 "denied by the Congress" restriction applies is roads, fences, and lighting constructed by the DOD, in support of the DHS, in countering international criminal and drug trafficking activity within specified Sectors of the Southwestern border, all pursuant to 10 U.S.C. § 284(b)(7). That is explicitly what the § 8005 funds are being transferred to accomplish. And that is what the District Court enjoined.

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[7] Neither the Ninth Circuit nor the District Court pointed to any provision of the CAA that purports to deauthorize Petitioner *DOD*'s preexistent and separate § 8005 transfer and utilization of § 284(b)(7) drug-interdiction account funds for roads, fences and lighting.

The District Court conceded there was no direct denial by Congress for the item at issue, and creatively worked around the undisputable absence of a direct or specific denial. Pet.'s App., 353a, 408a ("Defendants point to nothing in the language or legislative history of the statutes in support of their assertion that only explicit congressional denial of funding for '[Section] 284 projects,' or even DoD projects generally, would trigger Section 8005's limitation."); *id.* 413a-14a ("Defendants' decision not to refer specifically to Section 284 in their $5.7 billion funding request deprived Congress of even the *opportunity* to reject or approve this funding item."). The Ninth Circuit did as well. *California*, 963 F.3d at 949 ("We decline to impose upon Congress an obligation to deny every possible source of funding.").

The District Court incorrectly *blamed Petitioners* for Congress' failure to directly deny specific Sector improvements or change the requirements of § 8005 or 10 U.S.C. § 284(b). Pet.'s App., 353a, 408a, 413a-14a. *But the law does not require the Petitioners to request funds for a § 8005 item*. Instead, it merely provides that if funds for such an item have been denied by Congress, Petitioners cannot rely on § 8005 to circumvent that congressional denial. In short, the lower courts created and imposed upon Petitioners a duty not found in the law.[8]

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[8] The lower courts' reliance on committee letters purporting to deny Petitioners' § 8005 transfer is surprising. *Sierra Club*, 963 F.3d at 882; *Sierra Club v. Trump*, 929 F.3d 670, 681 (9th Cir.

Ultimately, Congress expressly authorized Petitioners' § 8005 transfer by way of passing § 8005 itself. Regardless of whether Petitioners gave Congress "the opportunity" (as the District Court put it), Congress could have acted if it wished to prohibit the support it had *already* authorized the DOD to provide to the DHS. It did not. There was no denial barring Petitioners' utilization of § 8005 and the lower courts' attempts to manufacture a denial are misguided.

B. There is An *Unforeseen* Military Requirement for DOD's § 8005 Transfer and Utilization of § 284(b)(7) Drug-Interdiction Account Funds for Roads, Fences and Lighting in the Yuma and El Paso Sectors.

As discussed herein, Petitioners *have* identified an unforeseen military requirement for the challenged DOD support. Again, it is the President,

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2019); Pet.'s App., 318a, 413a (citing RJN Ex. 35 ("The committee denies this request. The committee does not approve the proposed use of [DoD] funds to construct additional physical barriers and roads or install lighting in the vicinity of the United States border."); *id.* Ex. 36 ("The Committee has received and reviewed the requested reprogramming action . . . . The Committee denies the request."). The Court failed to explain, nor could it possibly, how these partisan committee letters could in any way constitute, substitute for, or express the voice of Congress *vis-à-vis* a majority vote on the floor of both chambers as is the legally and constitutionally required process.

and other Petitioners, who have statutory power to identify an unforeseen military requirement, not the Respondents and not the judiciary. *See* National Emergencies Act; 10 U.S.C. § 284(b); FY 2019 DODAA, § 8005.

First, the President illustrated his determination on this matter, in part, by declaring a national emergency consistent with the National Emergencies Act. As the President explained in his Emergency Declaration, "despite the executive branch's exercise of existing statutory authorities, the situation has worsened in certain respects in recent years"; and, "[b]ecause of the gravity of the current emergency situation, it is necessary for the Armed Forces to provide additional support to address the crisis." Emergency Declaration (Feb. 15, 2019).

Second, the DHS identified the unforeseen nature of its need by and within its request to the DOD for § 284 support. On February 25, 2019, the DHS requested the DOD "[t]o support DHS's action under Section 102 of IIRIRA," explaining that "DHS is requesting that DoD, pursuant to its authority under 10 U.S.C. § 284(b)(7), assist with the construction of fences, roads, and lighting within the Project Areas to block drug-smuggling corridors across the international boundary between the United States and Mexico." DHS Memorandum, Request for Assistance Pursuant to 10 U.S.C. § 284, 2 (Feb. 25, 2019) (Doc. # 7-3, p. 7) ("DHS Memorandum"); *see* Cert. Pet., 7 (quoting C.A. E.R. 272); Pet.'s App. 216a-17a. Within its request for

support, the DHS explained that, "[w]ithin the Project Areas, DHS is experiencing large numbers of individuals and narcotics being smuggled into the country illegally." DHS Memorandum at 1 (Doc. # 7-3, p. 6). The DHS also explained that:

> [t]he Project Areas identified are adjacent to some of the most densely populated metropolitan areas of Mexico and are also home to some of the strongest and most violent drug cartels in the world. *Deterring and preventing illegal cross-border activity will help stem the flow of illegal narcotics and entries in these areas. Similarly, the improved ability to impede, deny, and be mobile within the Project Areas creates a safer operational environment for law enforcement.*

Id. at 2 (Doc. # 7-3, p. 7) (emphasis added). Further, the DHS stated with respect to the Yuma Sector,

> [t]he replacement of *ineffective pedestrian fencing in this area is necessary because the older, wire mesh design is easily breached and has been damaged to the extent that it is ineffective*. Additionally, this area is notorious for border violence and narcotics smuggling. Furthermore, while the deployment of vehicle barrier in the Yuma Sector initially curtailed the volume of illegal cross-border vehicular traffic, *transnational criminal organizations quickly adapted their tactics* switching to foot

> traffic, cutting the barrier, or simply driving over it to smuggle their illicit cargo into the United States. Thus, in order to respond to these changes in tactics, DHS now requires pedestrian fencing.

Id. at 4 (Doc. # 7-3, p. 9) (emphasis added). The DHS's request for DOD support also identified and described similar facts concerning the El Paso Sector, *id.* at 8 (Doc. # 7-3, p. 13), as well as other sectors of the border, *id.* at 3 (Doc. # 7-3, p. 8) (addressing El Centro Sector); *id.* at 5 (Doc. # 7-3, p. 10) (addressing Tucson Sector). Congress clearly provided that the DHS may request, and the DOD may provide, support *in just such instances*. 10 U.S.C. § 284(a)(1) (authorizing DOD to support counter-drug activities of other agencies when "such support is requested").

Third, the DOD identified the unforeseen nature of the need for support both by and within its notifications to the DHS and to Congress concerning its § 284(b)(7) support for the DHS and § 8005 funds transfer in furtherance of that support. In the DOD's March 25, 2019, response to DHS's request for support, Acting Secretary of Defense Patrick Shanahan expressly cited the DOD's statutory authority under 10 U.S.C. § 284(b)(7) and acknowledged that "[t]he work requested by DHS to block these identified drug smuggling corridors involves construction of fences (including a linear ground detection system), construction of roads, and installation of lighting (supported by grid power and

including imbedded cameras)." Letter, Acting DOD Secretary Patrick Shanahan, to DHS Secretary Kirstjen Nielsen (Mar. 25, 2019) (Doc. # 7-3, p. 17); see Cert. Pet., 7, Pet.'s App. 83a, C.A. E.R. 219, 274, 278-279, 285-286, 294-298. "Accordingly, at this time, I have decided to undertake Yuma Sector Projects 1 and 2 and El Paso Sector Project 1 by constructing 57 miles of 18-foot-high pedestrian fencing, constructing and improving roads, and installing lighting as described in your February 25, 2019 request." *Id.*

According to the DOD's notification to Congress, "[t]his reprogramming action provides funding in support of higher priority items, based on unforeseen military requirements, than those for which originally appropriated; and is determined to be necessary in the national interest." Office of the Under Secretary of Defense (Comptroller), DOD Serial No. FY 19-01 RA, Reprogramming Action (Mar. 25, 2019) (Doc. # 7-3, p. 24).

The DOD's notification to Congress further stated that:

> Funds are required to provide support for counter-drug activities of the [DHS]. DHS has identified areas along the southern border of the United States that are being used by individuals, groups, and transnational criminal organizations as drug smuggling corridors, and determined that the construction of additional physical barriers and roads in the vicinity of the United States

> border is necessary in order to impede and deny drug smuggling activities. DHS requests DoD assistance in the execution of projects to replace existing vehicle barriers or dilapidated pedestrian fencing with new pedestrian fencing, construct roads, and install lighting.

Id. Clearly, the requirement for roads, fences, and lighting constructed by the DOD to support the DHS in countering international criminal activity and drug trafficking at our Nation's southern border was determined to be, and identified as, unforeseen by Petitioners. The § 8005 "unforeseen" restriction, therefore, does not bar Petitioners' fund transfers into DOD's drug-interdiction account for § 284(b)(7) support.

C. The Lower Court's Conclusion That a Border Wall is Not a Military Requirement is Wrong and Misunderstands the Constitutional and Statutory Framework in Which Petitioners Interact With Congress to Protect our National and Border Security.

The Ninth Circuit in *California* "also conclude[d] that the need was unrelated to a military requirement," even though the district court had not. *California*, 963 F.3d at 944. This holding is in error.

As previously noted, Defendants' § 8005 transfer into DOD's drug-interdiction account was so that the Secretary of Defense may support other federal agencies in the "[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States," all as expressly authorized by § 284(b)(7) — not a "border wall." This reality is amply demonstrated by Petitioners' own record below[9] and

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[9] In Respondents' own words to the District Court, "DOD approved the transfer in response to a February 25 request by DHS for DOD to 'assist with the construction of fences[,] roads, and lighting' under § 284(b)(7) to 'block drug-smuggling corridors across the international boundary between the United States and Mexico' in certain areas identified by DHS." Plaintiffs' Motion (Doc. #59, p. 8) (quoting RJN Ex. 33); *see* Pet.'s App., 317a, 329a, 426a. And, "In the March 25, 2019 response to DHS's request, Defendant Shanahan notified Defendant DHS Secretary Nielsen that he authorized the Commander of the U.S. Army Corps of Engineers to utilize the $1 billion being transferred to coordinate with DHS to assist in the construction" *not of a border wall*, but "of 18-foot-high-pedestrian fencing, the construction and improvement of roads, and the installation of lighting in the Yuma Sector Projects 1 and 2 (on the southwest border of Arizona) and El Paso Sector Project 1 (on the southwest border of New Mexico) identified in DHS's February 25 request." *Id.* (quoting RJN Ex. 34); *see* Pet.'s App., 317a.

Also "[o]n March 25, 2019, Defendant [] Acting Secretary [of Defense] Shanahan apprised Congress that pursuant to § 8005, DOD was transferring $1 billion from DOD's Military Personnel and Reserve Personnel account to DOD's drug-interdiction account to be used for barrier fencing," *Id.* (citing RJN Ex. 32); *see* Pet.'s App., 317a, roads, and lighting. Further, DOD notified Congress that (1) "[f]unds are required to provide support for counter-drug activities of the Department of

in the Ninth Circuit's opinion. [10] Accordingly, whether "*a border wall*" is a "military requirement" is not even the proper question for the courts to decide. Even if it were, within the American constitutional structure, courts are simply unable to make this type of judgment. *See supra* n. 5. If the question is framed properly, it becomes clear that Congress' own statutes and appropriations requirements recognize DHS' ability to assist the DOD in the construction of roads, fences, and lighting.

In addition, the President has already determined that:

> The current situation at the southern border presents a border security and humanitarian crisis that threatens core national security interests and constitutes a national emergency. . . . *Because of the gravity of the current emergency situation, it is necessary for*

Homeland Security (DHS)"; (2) "DHS has identified areas along the southern border of the United States that are being used by individuals, groups, and transnational criminal organizations as drug smuggling corridors"; (3) DHS "determined that the construction of additional physical barriers and roads in the vicinity of the United States border is necessary in order to impede and deny drug smuggling activities"; and (4) "DHS requests DoD assistance in the execution of projects to replace existing vehicle barriers or dilapidated pedestrian fencing with new pedestrian fencing, construct roads, and install lighting." *Id.*

[10] *California*, 963 F.3d at 947 (quoting same sources); *id.* (referring to the item as "border wall construction projects").

> *the Armed Forces to provide additional support to address the crisis. . . . I hereby declare that this emergency requires use of the Armed Forces.*

Emergency Declaration (emphasis added). Against this backdrop, the Court of Appeals' conclusion that a border wall is not a military requirement is, objectively, wrong, and Respondents' contention to the District Court that "[t]he protection of the border is the job of DHS, not DOD" Plaintiffs' Motion (Doc. # 59, p. 23), and the Ninth Circuit acceptance of that idea, *California*, 963 F.3d at 947 ("The record demonstrates that the diverted funding is primarily intended to support DHS—a civilian agency entirely separate from any branch of the armed forces."), fails to salvage it. Instead, it displays a failure to understand the constitutional and statutory framework within which Petitioners interact with Congress to protect our national and border security.

The lower courts erred, and the error presents grave national consequences.

CONCLUSION

Petitioners have taken no unconstitutional or *ultra vires* action. The United States Constitution grants to the President inherent foreign affairs and national security powers. U.S. Const. art. II; *Harisiades v. Shaughnessy*, 342 U.S. 580, 588 (1952) (recognizing that immigration control is an integral part of article II authorities "in regard to the conduct

of foreign relations [and] the war power"). "The Supreme Court has 'long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Cardenas v. United States*, 826 F.3d 1164, 1169 (9th Cir. 2016) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)). This kind of power must include the power to protect and secure the border. Petitioners have utilized those powers *within a congressionally enacted and appropriated structure*. Petitioners' § 8005 transfer accomplishes precisely that which the Constitution vested and Congress expressly authorized *and funded* Petitioners with the power to do. The lower courts' decisions impact the entire nation's security and confound the national government's constitutional structure and functions.

For these reasons, *Amicus* respectfully urges this Court to grant the Petition for Certiorari.

Respectfully submitted,

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