

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.

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

**BRIEF FOR AMICUS CURIAE THE UNITED
STATES HOUSE OF REPRESENTATIVES
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS CURIAE AND INTRODUCTION¹

The United States House of Representatives² has a compelling interest in this case, which arises out of the Trump Administration’s violation of the bedrock constitutional principle 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. The Appropriations Clause vests Congress with “exclusive power over the federal purse,” and is “one of the most important authorities allocated to Congress in the Constitution[.]” *U.S. Dep’t of the Navy v. FLRA*, 665 F.3d 1339, 1346 (D.C. Cir. 2012) (quotation marks omitted). Moreover, the House has its own distinct interest in seeking to ensure Executive Branch compliance with Congressional

¹ The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amicus and its counsel, made a monetary contribution to this brief.

² The Bipartisan Legal Advisory Group (BLAG) of the United States House of Representatives, which “speaks for, and articulates the institutional position of, the House in all litigation matters,” authorized the filing of an amicus brief in this matter. See Rules of the U.S. House of Representatives (117th Cong.), Rule II.8(b); see also H. Res. 8, 117th Cong. (2021), <https://perma.cc/G6XY-VTPF> (adopting House Rules); 167 Cong. Rec. H13 (daily ed. Jan. 4, 2021), <https://perma.cc/YA9W-4RG5> (same). The BLAG comprises the Honorable Nancy Pelosi, Speaker of the House, the Honorable Steny H. Hoyer, Majority Leader, the Honorable James E. Clyburn, Majority Whip, the Honorable Kevin McCarthy, Republican Leader, and the Honorable Steve Scalise, Republican Whip. Representative McCarthy and Representative Scalise dissented.

funding decisions: As the Founders observed, the federal purse has “two strings, one of which [is] in the hands of the H. of Reps,” and “[b]oth houses must concur in untying” them. 2 *The Records of the Federal Convention of 1787*, at 275 (M. Farrand ed., 1911) (James Wilson). Or, as the D.C. Circuit recently put it, “the Appropriations Clause requires two keys to unlock the Treasury, and the House holds one of those keys.” *U.S. House of Representatives v. Mnuchin*, 976 F.3d 1, 13 (D.C. Cir. 2020). By spending funds that Congress refused to appropriate, the Administration has “snatched the House’s key out of its hands.” *Id.*

The Administration claims that this case raises no constitutional issue, much less one involving a central component of our system of checks and balances. In its telling, the parties’ dispute is nothing more than a disagreement over the meaning of an appropriations transfer law. But, as this Court recently observed, courts “are ‘not required to exhibit a naivete from which ordinary citizens are free.’” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

As the parties have recounted, this case involves a high-profile clash between President Trump, who has insisted on spending more than \$8 billion building a southern border wall, and Congress, which refused to appropriate anything close to that amount. President Trump’s refusal to accept Congress’s limits on border-wall spending resulted in the longest Federal Government shutdown in history. Congress refused to back down, ultimately appropriating only \$1.375 billion for a southern border wall. Then, on the day he signed the relevant appropriations act into law,

President Trump immediately overrode the terms of that legislative compromise and announced that his Administration would spend up to *\$8.1 billion* on the wall instead. The Department of Defense (DOD) improperly invoked the appropriations transfer statute at issue here to help President Trump achieve that goal. The Administration’s decision to spend these funds without a valid Congressional appropriation directly contravenes the Appropriations Clause and infringes on the House’s constitutional authority.

To be sure, this case—and this brief from the House, in particular—arrives at the Court in the waning hours of the Trump Administration. President Trump’s term will come to an end on January 20, 2021. On that day, President-Elect Biden will be inaugurated, and he has publicly pledged not to continue building the border wall.³ There is thus little doubt that the Appropriations Clause violation—and the related federal spending—at issue here will soon cease.

Nevertheless, the House submits this brief because the Trump Administration has transgressed bedrock separation-of-powers principles and flouted the constitutional command that “the expenditure of public funds is proper *only when authorized by Congress.*” *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (plurality) (emphasis added). Indeed, not only has this Administration spent far more than

³ See Rebecca Rainey & Bryan Bender, *Biden will stop the border wall and loosen immigration again*, Politico (Nov. 7, 2020, 6:00 pm), <https://perma.cc/K5KN-B39W> (“There will not be another foot of wall constructed on my administration[.]”).

Congress appropriated for construction of its much-touted border wall, but throughout this and parallel litigation brought by the House, the Administration has maintained that its constitutional transgression is insulated from judicial process.

The Administration is wrong on the merits of its argument justifying its border-wall expenditures, and its effort to evade judicial review poses a threat to our system of checks and balances. The House has, accordingly, supported Respondents at every stage of this litigation and continues to do so here to reiterate that the Administration's usurpation of the House's appropriations authority is unconstitutional, and this Court should therefore affirm the judgments below.

BACKGROUND

Contrary to the Administration's anodyne recitation of events, this dispute did not arise merely from a request for assistance that the Department of Homeland Security (DHS) made to DOD in February 2019. It grew directly out of the months-long battle waged between the President and Congress over the subject of this litigation: funding for a southern border wall. Although the President originally requested "\$1.6 billion to construct approximately 65 miles of border wall,"⁴ by the middle of 2018, he was "press[ing] Republicans to give him \$5 billion as a

⁴ Office of Mgmt. & Budget, *Fiscal Year 2019: Efficient, Effective, Accountable: An American Budget: Budget of the U.S. Government* 58 (2018), <https://perma.cc/RK9W-UFNB>.

down payment on his wall.”⁵ Near the end of the 115th Congress, he and Congress faced an impasse on the issue.

In December 2018, President Trump held a televised meeting with then-Minority Leader of the House, Nancy Pelosi, and then-Senate Minority Leader, Charles Schumer, to negotiate fiscal year 2019 appropriations for a border wall.⁶ During that meeting, the President reiterated his demand for \$5 billion for a border wall. He also warned that “[i]f we don’t get what we want one way or the other, whether it’s through you, through a military, through anything you want to call it, I will shut down the government.”⁷ Indeed, he asserted that he would be “proud to shut down the government” in order to ensure that his wall would be built.⁸

Congress did not yield to President Trump’s threat, and on December 21, 2018, the longest Federal Government shutdown in history began. More than two weeks later, President Trump addressed the Nation from the Oval Office, imploring Congress to

⁵ Rachael Bade, *Immigration storm bears down on Republicans*, Politico (July 2, 2018, 5:05 am), <https://perma.cc/GGG4-SXE2>; see also Letter from Russell T. Vought, Acting Dir., Office of Mgmt. & Budget, to Sen. Richard Shelby, Chairman, U.S. Senate Comm. on Appropriations, at 1 (Jan. 6, 2019), <https://perma.cc/LHM7-7CJT> (requesting \$5.7 billion for a border wall).

⁶ Aaron Blake, *Trump’s extraordinary Oval Office squabble with Chuck Schumer and Nancy Pelosi*, Annotated, Wash. Post (Dec. 11, 2018), <https://perma.cc/32FE-JAHG>.

⁷ *Id.*

⁸ *Id.*

“do[] its job” and “pass a bill that ends this crisis.”⁹ Congress still refused to appropriate the funds he sought.

On January 25, 2019, President Trump signed a continuing resolution ending the partial government shutdown by providing short-term appropriations through February 14, 2019, for the portion of the government that had been shut down.¹⁰ Over the next several weeks, a bipartisan conference committee negotiated a deal for full-year funding for that portion of the government. While those negotiations were underway, the Acting White House Chief of Staff announced that the southern border wall “is going to get built, with or without Congress.”¹¹

Ultimately, Congress passed the Consolidated Appropriations Act, 2019, Pub L. No. 116-6, 133 Stat. 13 (the CAA), which appropriated just \$1.375 billion for construction of fencing in the Rio Grande Valley area of the border. *Id.* § 230, 133 Stat. 28. The CAA restricted construction to certain areas in Texas, *id.*, and imposed various limitations to protect the environment and local interests, *id.* §§ 231-32, 133 Stat. 28.

⁹ *Full Transcripts: Trump’s Speech on Immigration and the Democratic Response*, N.Y. Times (Jan. 8, 2019), <https://perma.cc/LC8M-RYR3>.

¹⁰ Further Additional Continuing Appropriations Act, 2019, Pub. L. No. 116-5, 133 Stat. 10.

¹¹ Fox News, *Mick Mulvaney on chances of border deal, Democrats ramping up investigation of Trump admin*, YouTube (Feb. 10, 2019), <https://perma.cc/P9SP-7HRM>.

On February 15, 2019, President Trump signed the CAA into law.¹² That same day, however, he expressed dissatisfaction with the amount appropriated for border-wall construction, and he announced that his Administration would instead spend up to \$8.1 billion for that purpose.¹³ The White House identified three sources of funds, including, as relevant here, “up to \$2.5 billion under the Department of Defense funds transferred for Support for Counterdrug Activities (Title 10 United States Code, section 284).”¹⁴

Section 284 authorizes DOD to “provide support for the counterdrug activities . . . of any other department or agency,” if “such support is requested.” 10 U.S.C. § 284(a); *see* J.A. 74-75; J.A. 96-97. Such support can include the “[c]onstruction of roads and fences and installation of lighting to block drug smuggling corridors” at the borders. 10 U.S.C. § 284(b)(7). DOD relied on Section 8005 of the 2019 Department of Defense Appropriations Act to transfer funds and make them available under Section 284. Section 8005 authorizes DOD to transfer up to \$4 billion, but only if such transfers are for “higher priority items, based on unforeseen military requirements.” Pub. L. No. 115-245, § 8005, 132 Stat. 2981, 2999 (2018); *see also* J.A. 76-79; J.A. 98-101. Section 8005 prohibits transfers if “the item[s] for which funds are requested [have] been

¹² *See Statement by the President*, White House (Feb. 15, 2019), <https://perma.cc/ZE4M-ZUTG>.

¹³ *See Fact Sheet: President Donald J. Trump’s Border Security Victory*, White House (Feb. 15, 2019), <https://perma.cc/29T7-7G82>.

¹⁴ *Id.*

denied by the Congress.” Pub. L. No. 115-245, § 8005, 132 Stat. 2999.

Ten days after President Trump’s announcement, DHS requested DOD’s assistance with the construction of fences, roads, and lighting along the southern border. J.A. 80-95. Although DHS’s request included statistics about the amounts of illegal drugs seized in this area during fiscal year 2018, the agency did not assert or demonstrate that these amounts reflected an unforeseen increase in drug smuggling. *See* J.A. 80-95. In fact, far greater amounts of illegal drugs enter the country through ports.¹⁵ And for these reasons, among others, Congress had refused to appropriate the large sums that the Administration had requested for wall construction.¹⁶

Over the next several months, DOD approved DHS’s requests for assistance. *See* J.A. 74-75 (Memorandum from Acting Secretary of DOD to Acting Secretary of DHS, May 9, 2019); J.A. 96-97 (Letter from Acting Secretary of DOD to Secretary of DHS, Mar. 25, 2019); Pet. App. 83a. DOD relied on its

¹⁵ *See CBP Enforcement Statistics FY 2019*, U.S. Customs & Border Protection, <https://perma.cc/24C2-7FRS>. Administration documents also reveal that (in addition to altering routes) smugglers evade border walls using drones, tunnels, and other techniques. *Drug Smuggling at the Border*, Office of Intelligence, U.S. Customs & Border Protection (Oct. 18, 2017), <https://perma.cc/CL3F-K2AE>.

¹⁶ *See, e.g.*, Chairwoman Lowey Statement at House-Senate Conference Committee on Homeland Security (Jan. 30, 2019), <https://perma.cc/TP5V-LHZM> (calling for enhancements for drug detection at ports and asserting “[s]mart border security is not overly reliant on physical barriers”).

statutory authority under Section 284 and its Section 8005 transfer authority.¹⁷

Respondents, the Sierra Club and the Southern Border Communities Coalition (collectively, Sierra Club) and California and New Mexico (the States), challenged these funding transfers, arguing that, among other things, they violated the Appropriations Clause and the Administrative Procedure Act, and the Executive conduct at issue was *ultra vires*. See, e.g., C.A. E.R. 333-35, 345-47, 349-51; C.A. E.R. 444-47.

The district court found that the Administration's spending was unlawful and issued an injunction against it; the court of appeals affirmed. Pet. App. 1a-77a (Sierra Club decision); Pet. App. 78a-173a (States decision). The court of appeals held that the States could proceed with a claim under the Administrative Procedure Act, Pet. App. 100a-106a, and that the Sierra Club had both a constitutional and an "equitable *ultra vires* cause of action" to challenge the unlawful transfer, Pet App. 19a-30a.

SUMMARY OF ARGUMENT

The Administration's transfer of funds to pay for its border-wall construction was unconstitutional. As the events surrounding enactment of the CAA make clear, Congress considered and denied funding in excess of \$1.375 billion for border-wall construction.

¹⁷ DOD also invoked Section 9002 of the 2019 Department of Defense Appropriations Act, which provides authority to transfer another \$2 billion, "subject to the same terms and conditions" as Section 8005. Pub. L. No. 115-245, § 9002, 132 Stat. 3042; see also J.A. 77. For simplicity, like the parties, we refer to both as Section 8005.

The Administration ignored that appropriations limitation and instead invoked its authority to transfer funds between agencies under Section 8005—relying on that statutory authority to circumvent Congress’s denial. If left unchecked, the Administration’s evasion of Congress’s appropriations decision sets a dangerous precedent and would allow the Executive Branch to unconstitutionally usurp Congress’s essential power of the purse.

The Administration’s reliance on Section 8005 as a defense to its Appropriations Clause violation also fails on its own terms. The Administration’s arguments rest on the implausible theory that, even though Congress refused—in the face of a weeks-long government shutdown—to appropriate the funds that President Trump demanded for border-wall construction, it still did not “deny” such funding within the meaning of Section 8005. That is so, the Administration claims, because DOD’s formal budget proposal did not include an explicit line item requesting funding for fencing, roads, and lighting at the southern border for drug interdiction; thus, the Administration claims, such item was never “denied,” and the agency was free to make the transfer. This interpretation of Section 8005’s “denied by Congress” limitation is wrong, inconsistent with the statute’s purpose, and would invite the Executive Branch to play a shell game in the budgeting process.

The Administration likewise cannot show that the transfer request was based on “unforeseen military requirements.” Under the Administration’s view, the “unforeseen” limitation requires only that, when submitting an initial budget request, an agency (here, DOD) not be certain that a second agency (DHS) will

later ask it to provide assistance for a particular project. The Administration ignores entirely that a requirement is “foreseen” where it is clearly one of the President’s priorities. Moreover, the notion that the “requirement” at issue here—southern border-wall construction—was unforeseen is implausible on the facts. The Administration further errs in arguing that even if a project belongs to, and is wholly managed by, a civilian agency, it nevertheless may be deemed a “military” requirement for purposes of Section 8005, merely because DOD is the agency being asked for the funding support.

ARGUMENT

Section 8005 Did Not Allow The Trump Administration To Spend More On Border-Wall Construction Than Congress Appropriated For That Purpose.

The Administration’s faulty reading of Section 8005 cannot save it from the obvious: It unlawfully abused its transfer authority to fund a project that Congress had clearly refused to pay for. These actions transgressed Congress’s express disapprovals and thereby violated the Appropriations Clause.

The Administration argues in defense that the spending *was* lawful because Section 8005 of the DOD Appropriations Act authorized DOD to transfer funds to DHS for border-wall construction. But a fundamental principle of appropriations law provides that “[a]n amount available under law may be withdrawn from one appropriation account and credited to another . . . only when authorized by law,”

31 U.S.C. § 1532—and Section 8005 did not authorize the Administration’s transfer and expenditures.

Section 8005 authorizes DOD to transfer funding from one appropriation to another where the agency concludes that “such action is necessary in the national interest,”

Provided, That such authority to transfer may not be used unless [1] for higher priority items, [2] based on unforeseen military requirements, than those for which originally appropriated and [3] in no case where the item for which funds are requested has been denied by the Congress

Pub. L. No. 115-245, § 8005, 132 Stat. 2999.

Here, DOD’s reliance on Section 8005 founders on the second and third conditions. Given the circumstances underlying the enactment of the CAA, the Administration cannot show that “the item for which funds [were] requested” (the border-wall project) was not previously “denied by the Congress.” The Administration also fails to establish that the transfers were “based on unforeseen military requirements.”

A. Congress Denied Funds For The Item For Which DHS Requested Support.

As the court of appeals correctly recognized, the events surrounding enactment of the 2019 appropriations bills leave little doubt that Congress considered—and denied—appropriations for the border-wall construction that DOD financed largely

through its Section 8005 authority. Indeed, “Congress declined to fund the border wall numerous times in a variety of ways.” Pet. App. 116a. Congress “failed to pass seven different bills . . . that were proposed specifically to fund the wall”; “refused to appropriate the \$5.7 billion” the White House sought to have included in the CAA; and instead appropriated just “\$1.375 billion, less than a quarter of the funds requested.” Pet. App. 116a.

Section 8005 does not authorize the Administration to circumvent that denial. This restriction was added to “tighten congressional control of the reprogramming process.” H. Rep. No. 93-662, at 16 (1973).¹⁸ It thus ensures that Section 8005 is not used to “undo[] the work of the Congress.” *Id.* Consistent with that purpose, this provision, like other similar restrictions, is to be “construed strictly” to “prevent the funding for programs which have been considered by Congress and for which funding has been denied.” *See* H. Rep. No. 99-106, at 9 (1985) (discussing analogous appropriations restriction in

¹⁸ As the States explain, “reprogramming” and “transfer” are distinct terms; the former refers to the shifting of funds within an appropriation, and the latter refers to the shifting of funds between appropriations. *See* States Br. 36 (citing U.S. Gov’t Accountability Office, *Principles of Federal Appropriations Law* 2-38, 2-44 (4th ed. Rev. 2016)). But read in context, the Committee report’s discussion of the need to enhance Congressional control over DOD’s “reprogramming process” clearly applies to both reprogramming and transfers. *See* H. Rep. No. 93-662, at 16. Moreover, as the States also note, DOD itself uses the term “reprogramming” to encompass both reprogramming and transfers. States Br. 36-37 n.16 (citing Congressional Research Service, *Defense Primer: DOD Transfer and Reprogramming Activities* (Feb. 14, 2020)).

§ 502(b) of the National Security Act of 1947, as added by § 401(a) of the Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99-169, 99 Stat. 1005 (codified at 50 U.S.C. § 3094(b)).

Congress indisputably denied appropriations for the physical border wall that the Administration sought to construct. Nevertheless, the Administration contends that, in context, the phrase “item for which funds are requested” in Section 8005 refers only “to a specific project or program for which DoD sought funds” during the appropriations process—here, “the item of providing this counterdrug assistance to DHS.” SG Br. 41-42. Under the Administration’s view, an “item” cannot be “a ‘border wall’ writ large.” SG Br. 42.

Acting DOD Secretary Patrick Shanahan’s 2019 memoranda directing the funding transfers at issue suggest a contrary understanding. *See, e.g.*, J.A. 98-99 (Memorandum from Acting Secretary of DOD to Undersecretary of Defense (Comptroller)/Chief Financial Officer, Mar. 25, 2019). He states, for example, that the “items to be funded” are components of the border-wall project: “18-foot high pedestrian fencing” and supporting infrastructure in “Yuma Sector Projects 1 and 2 and El Paso Sector Project 1.” J.A. 98-99; *see also* J.A. 76-79 (Memorandum from Acting Secretary of DOD to Undersecretary of Defense (Comptroller)/Chief Financial Officer, May 9, 2019) (stating that “[t]he items to be funded” are additional border-wall projects in other locations requiring “30-foot pedestrian fencing” and supporting infrastructure). There is no debate that in denying additional appropriations for border-wall

expenditures, Congress denied funds for every component of such a wall.

The Administration also unsuccessfully invokes Section 8005's history and purpose, arguing that its limiting proviso was "designed to safeguard Congress's choices in the appropriations process" and ensure that the "item" funded through transfer was not "something that DoD requested during that process that failed to win legislative approval." SG Br. 43 (citing H. Rep. No. 93-662, at 16). But that history and legislative intent cuts *against*, not for, the Administration. Indeed, it is hard to fathom that by repeatedly refusing the Trump Administration's requests and denying it the border-wall funding it sought, Congress understood that it was doing anything other than making absolutely clear that the proposed projects had "failed to win legislative approval."

Nevertheless, the Administration insists that the border-wall projects are not excluded under Section 8005 because the statute's proviso applies only to items that were initially requested during the budgeting process, but then "*specifically deleted*" later in that process. *See* SG Br. 43 (citing H. Rep. No. 93-662, at 16, adding emphasis). That unnatural reading of the text also begs credulity. Such a reading would convert a provision designed "to tighten congressional control" over DOD's efforts to redirect appropriated funding, H. Rep. No. 93-662, at 16, into an invitation to the Executive Branch to engage in gamesmanship. An agency could prepare a budget request while intentionally omitting a particular line item—giving Congress nothing to deny—and then, even if it understood Congress to have refused funding for a

broad set of related projects elsewhere in the budgeting process, it could still redirect funds for its desired “item,” claiming that it had never been specifically denied.

Especially where, as here, Congress had made its consistent, staunch opposition to an appropriation clear, it is plainly unreasonable to say that the Executive Branch’s decision to omit such an item from a budget request (to avoid its subsequent deletion) could somehow vitiate Congress’s otherwise unequivocal “den[ial]” of that funding for purposes of Section 8005. As the court of appeals observed, “Congress’s broad and resounding denial resulting in a 35-day partial government shutdown must constitute a previous denial for purposes of Section 8005.” Pet. App. 117a; *see also id.* (Congress’s “general denial necessarily encompasses narrower forms of denial.”).

Indeed, under the Administration’s strange interpretation, the government shutdown was little more than political theater. The DOD Appropriations Act authorizing DOD to provide counter-narcotics support to DHS under Section 284 was enacted on September 28, 2018. Pub. L. No. 115-245, 132 Stat. 2981. As noted, when that legislation was passed, DOD did not expressly ask for—and was therefore not denied—funding for the “item” of barrier construction under its counter-narcotics support line. *See* SG Br. 44. Therefore, in the Administration’s view, from September 2018 onward, it would have been permitted to transfer billions from DOD to DHS for border-wall funding. *See* SG Br. 44. If that were true—and the Administration had in fact always understood that to be the case—then it would have made little sense for

President Trump to instigate the longest government shutdown in history simply because Congress refused to appropriate \$5.1 billion for wall construction. Indeed, under the Administration’s theory, President Trump already would have had at his disposal an end-run around the appropriations process: he could have just ordered DOD to make the transfer. Instead, he entered into a weeks-long stand-off with Congress, causing significant economic damage to the American people.¹⁹ The Administration’s actions at the end of 2018 speak far louder than its arguments before this Court now.

B. DHS Did Not Request Support Based On Unforeseen Military Requirements.

The Administration’s reliance on Section 8005 also fails because DHS’s request for assistance was not “based on *unforeseen* military requirements.” Congress included this limitation to confine DOD’s transfer authority to situations where unanticipated circumstances justify a departure from Congress’s previously authorized spending decisions. *See* H. Rep. No. 93-662, at 16. As the court of appeals observed, the Executive Branch’s “[p]rior use of this authority” confirms that it applies only where military needs are truly not anticipated. Pet. App. 108a. “Previously,” for example, “DOD has invoked Section 8005 authority to transfer funds to repair hurricane and typhoon damage to military bases—natural disasters that

¹⁹ Congressional Budget Office, *The Effects of the Partial Shutdown Ending January 2019* (Jan. 28, 2019), <https://perma.cc/3A54-D37N>.

inflict damage that may not be anticipated or expected ahead of time.” Pet. App. 108a.²⁰

Here, by contrast, the Administration’s supposed “need” for border-wall construction was well established. See Pet. App. 108a-11a. President Trump’s desire to build a border wall was known before he took office; once in office, he confirmed his intent to immediately execute that plan. See Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017) (announcing “policy” to “secure the southern border” through the “immediate construction of a physical wall”); see also Pet. App. 109a.

In the months (and years) that followed, the President repeatedly asked Congress to fund his border-wall project, but Congress “repeatedly declined to provide the amount of funding [the Administration] requested.” Pet. App. 81a; Pet. App. 109a; see also States Br. 7-10, 31-33 (detailing appropriations requests and Congressional denials from 2017 through 2018). The President refused to back down, even at the cost of a lengthy government shutdown.

²⁰ See, e.g., Office of the Under Sec’y of Def. (Comptroller), U.S. Dep’t of Def., DoD Serial No. FY 08-43 PA, *Reprogramming Action–Prior Approval* (Sept. 17, 2008), <https://perma.cc/M2TA-JYC6> (invoking Section 8005 to finance costs incurred by the National Guard in responding to Hurricane Gustav in several southern states, as well as operations related to Hurricane Ike in Texas and Louisiana); Office of the Under Sec’y of Def. (Comptroller), U.S. Dep’t of Def., DoD Serial No. FY 04-37 PA, *Reprogramming Action–Prior Approval* (Sept. 3, 2004), <https://perma.cc/QL4H-QRTQ> (invoking Section 8005 “to pay for storm damage incurred” by Air Force bases across Florida during Hurricane Charley).

The urgent “requirement” of a southern border wall was thus entirely foreseen.

The Administration acknowledges this background but maintains that it is “irrelevant” because (in its view) what matters is not whether the relevant *need* is foreseen but rather whether the specific funding *request* is already known. SG Br. 45-46. That reading of the statute is wrong. By its plain terms, “Section 8005 permits transfers based only on unforeseen military *requirements*—not unforeseen budgetary *requests*.” Pet. App. 110a. Once again, the Administration’s construction of the governing statute would allow the Executive Branch to easily game the system, waiting until after the relevant Congressional appropriations cycle had concluded to then seek funding through supposedly “unforeseen” transfer requests. It is unreasonable to read the statute to permit the Executive to so easily and massively evade Congress’s control over federal expenditures.

Moreover, the Administration does not even seriously contend that DHS’s request for DOD support was *unanticipated*; rather it focuses on the fact that the request *had not yet been made* at the time the 2019 DOD Appropriations Act was enacted. SG Br. 45. But asking whether an event can be “foreseen” *assumes* that it has not yet come to pass. *See* Pet. App. 111a (rejecting Administration’s attempt to equate “foreseen” with “known”). So this argument too fails.

The Administration’s argument is also incompatible with the facts. The record establishes that DHS’s requests for assistance were both anticipated and expected in early 2018—well before the 2019 DOD Appropriations Act was enacted. Pet.

App. 111a.²¹ In April 2018, President Trump specifically put DOD on notice that it might be called upon to help fund the border-wall project, issuing a memorandum directing that “[t]he Secretary of Defense shall support the Department of Homeland Security in securing the southern border and taking other necessary actions to stop the flow of deadly drugs and other contraband . . . into this country.”²²

DOD itself confirmed this understanding when, in response to a request from the House Armed Services Committee, it explained that the DOD Comptroller had withheld nearly \$1 billion of fiscal year 2018 counter-drug funding until July 2018 because it was considering using that funding for “Southwest Border construction.”²³ Thus, even under the Administration’s erroneous understanding of the statute, it was foreseen that DOD would be asked to supply funds to assist DHS with border-wall construction.²⁴

²¹ See Tr. of Proceedings at 95, *U.S. House of Representatives v. Mnuchin*, No. 1:19-cv-00969-TNM (D.D.C. May 23, 2019) (*Mnuchin* Tr.) (“It is true that it was foreseeable in general that someone at some time might ask DoD to use its [Section] 284 authority to engage in border barrier construction.”).

²² Presidential Memorandum for the Sec’y of Defense, the Att’y General, and the Sec’y of Homeland Security (Apr. 4, 2018), <https://perma.cc/A35F-3R4K>.

²³ Decl. of Paul Arcangeli ¶¶2-3, Attach. 1 to Mot. for Leave to File Suppl. Decl. Suppl. Appl. for Prelim. Inj., *Mnuchin*, No. 1:19-cv-00969-TNM (D.D.C. May 15, 2019) (included in record below at C.A. States Supp. E.R. 1206-07).

²⁴ The Administration appears to have abandoned its argument in the courts below, in which it claimed that the
(*cont’d*)

The Administration’s reliance on Section 8005 fails for yet another reason: the border-wall project was not an “unforeseen *military* requirement,” as the statute requires for transfer authority to be used. As the court of appeals observed, the projects here were undertaken by DHS, a *civilian* law enforcement “agency entirely separate from any branch of the armed forces.” Pet. App. 113a. There are no military installations in the areas surrounding the relevant border-wall projects, nor does the Administration even contend that the construction serves a military function. See Pet. App. 115a; SG Br. 46-47. That military resources were ultimately used (and even contemplated by Section 284) does not render the border-wall “requirement” a military one for purposes of Section 8005.

* * *

For all these reasons, the Administration’s funding transfer does not comply with Section 8005’s strict limitations. It therefore violates the Appropriations

“unforeseen” event was not the request for assistance from DHS, but rather Congress’s decision not to appropriate the full amount of funding the Administration had requested. See Tr. of Proceedings at 80, *California v. Trump*, No. 4:19-cv-00872-HSG (N.D. Cal. May 17, 2019) (“The plan was to get a direct appropriation from Congress to do what the President wanted to do . . . so DOD had no reason or occasion to be requesting a larger 284 appropriation.”); see also *Mnuchin* Tr. at 94 (“[N]obody foresaw . . . that [Section 8005] . . . would come into play” because “[e]veryone thought this would all happen in the DHS appropriations bill.”). Regardless, that argument is also untenable on its face. Congress’s denial of funding for a project cannot constitute the “unforeseen military requirement” that justifies a transfer under a statute designed to limit DOD’s authority to redirect appropriated funds.

Clause and intrudes on Congress's constitutional authority.

CONCLUSION

For the foregoing reasons, the House urges the Court to affirm the judgments below.

Respectfully submitted,

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