No. 20-298

In the Supreme Court of the United States

EL PASO COUNTY, TEXAS, ET AL., PETITIONERS,

v.

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

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners have Article III standing.

2. Whether petitioners have a cause of action to challenge the Acting Secretary of Defense's compliance with Section 8005 of the Department of Defense Appropriations Act, 2019, Pub. L. No. 115-245, Div. A, Tit. VIII, 132 Stat. 2999, and, if so, whether the Acting Secretary exceeded his authority under Section 8005 in transferring certain funds between Department of Defense (DoD) appropriations accounts.

3. Whether petitioners have a cause of action to enforce certain provisions of the Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13, and, if so, whether those provisions expressly or implicitly limit DoD's authority to construct barriers at the southern border.

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OPINIONS BELOW

The opinions of the district court granting summary judgment (Pet. App. 1a-41a) and granting a permanent injunction (Pet. App. 42a-66a) are reported, respectively, at 408 F. Supp. 3d 840 and 407 F. Supp. 3d 655.

JURISDICTION

The district court granted summary judgment in favor of petitioners on October 11, 2019, and entered a permanent injunction on December 10, 2019. Respondents filed a notice of appeal on December 16, 2019. The appeal remains pending in the court of appeals, and oral argument was held on September 1, 2020. The petition for a writ of certiorari before judgment was filed on September 2, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

1. Section 102(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. I, Subtit. A, 110 Stat. 3009-554, as amended, authorizes the Department of Homeland Security (DHS) to "take such actions as may be necessary to install additional physical barriers and roads * * * in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States." 8 U.S.C. 1103 note (Improvement of Barriers at Border). Section 102(b) directs DHS to "construct reinforced fencing along not less than 700 miles of the southwest border." *Ibid.* As of 2017, approximately 650 miles of barriers had been constructed. Michael J. Garcia, Cong. Research Serv., R43975, *Barriers Along the U.S Borders: Key Authorities and Requirements* 1 (2017).

In the Consolidated Appropriations Act, 2019 (CAA), Pub. L. No. 116-6, 133 Stat. 13, Congress appropriated funds to several federal agencies, including DHS, for the 2019 fiscal year. Like most annual appropriations laws, the CAA directs funds to discrete, named accounts to be used for specified purposes. See James V. Saturno et al., Cong. Research Serv., R42388, *The Congressional Appropriations Process: An Introduction* 12 (2016). As relevant here, Congress appropriated approximately $2.5 billion to an account entitled "Procurement, Construction, and Improvements" for U.S. Customs and Border Protection (CBP), a component of DHS. CAA, Div. A, Tit. II, 133 Stat. 18 (capitalization altered). The funds appropriated to that account are generally available for "construction," *ibid.*, including construction of physical barriers at the border pursuant

to Section 102 of IIRIRA. In the CAA, Congress specified that "[o]f the total amount made available" in the CBP construction account, $1.375 billion "shall be available only * * * for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector" of the southern border of the United States. § 230(a)(1), 133 Stat. 28. Congress also specified that none of the funds "made available by this Act or prior Acts are available for the construction of pedestrian fencing" in five specified areas, such as the National Butterfly Center in Texas. § 231, 133 Stat. 28.

2. On February 15, 2019, after signing the CAA into law, the President declared a national emergency at the southern border under the National Emergencies Act, 50 U.S.C. 1601 *et seq.* See 84 Fed. Reg. 4949, 4949 (Feb. 20, 2019). This case concerns steps taken by the Department of Defense (DoD), in the wake of the President's declaration, to assist DHS in securing the southern border—including through the construction of fencing. DoD acted under two statutes in particular: 10 U.S.C. 284 and 2808.

a. 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)(1). The support that DoD is authorized to provide includes the "[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). On February 25, 2019, DHS requested DoD's assistance pursuant to Section 284 in blocking "11 specific drug-smuggling corridors along certain portions of the southern border." C.A. ROA 1493. DoD approved several projects, located in Arizona, California, and New Mexico. See *id.* at 1493,

1511, 1758; cf. *California* v. *Trump*, 963 F.3d 926, 933 (9th Cir. 2020), cert. granted, No. 20-138 (Oct. 19, 2020).

To ensure adequate funds to complete the projects, the Acting Secretary of Defense invoked his authority under 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, to transfer funds between internal DoD accounts. See C.A. ROA 1511-1512, 1515, 1539. Section 8005 provides that, "[u]pon determination by the Secretary of Defense that such action is necessary in the national interest," the Secretary may transfer up to $4 billion "between such appropriations * * * 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." DoD Appropriations Act § 8005, 132 Stat. 2999. Section 8005 contains a proviso stating 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." *Ibid.* The Acting Secretary found that each of those requirements was satisfied in directing the transfers of funds. C.A. ROA 1511-1512.

b. Section 2808 authorizes the Secretary of Defense, "[i]n the event of a declaration of war or the declaration by the President of a national emergency" that requires the use of the armed forces, to "undertake military construction projects * * * not otherwise authorized by law that are necessary to support such use of the armed forces." 10 U.S.C. 2808(a). The statute further provides that "[s]uch projects may be undertaken" with unobligated funds "that have been appropriated for military

construction." *Ibid.* In his February 2019 declaration of a national emergency, the President determined that "it is necessary for the Armed Forces to provide additional support to address the crisis," and he made Section 2808 available to the Secretary of Defense to provide support through military construction, consistent with Section 2808's terms. 84 Fed. Reg. at 4949; see 50 U.S.C. 1631.

On September 3, 2019, the Secretary of Defense, relying on analysis from the Chairman of the Joint Chiefs of Staff and other officials, decided to undertake 11 additional border-barrier projects under Section 2808. C.A. ROA 1788-1789. In order to fund the Section 2808 projects, the Secretary authorized DoD to expend up to $3.6 billion in appropriated but unobligated military construction funds—*i.e.*, funds that Congress had already appropriated in previous DoD appropriations laws for military construction by DoD. *Id.* at 1789.

Approximately $20 million of the $3.6 billion came from a proposed defense access road military construction project at Fort Bliss, an Army installation partially located in El Paso County, Texas. See Pet. App. 6a. Congress had appropriated $20 million in the prior fiscal year as an "additional amount" for one of DoD's military construction appropriations accounts, "for the Defense Access Road Program." Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. J, Tit. I, § 131, 132 Stat. 805. To date, Congress has not authorized the Fort Bliss project, as required before that project may begin. See 10 U.S.C. 2802(a).

3. a. In February 2019, petitioners—the County of El Paso, Texas, and the Border Network for Human Rights (BNHR), a community organization focused on border and immigration issues, see C.A. ROA 931-932—

brought this suit in the Western District of Texas to challenge the government's transfers and expenditures of funds for border-barrier construction. Compl. ¶¶ 1, 14-16. None of the Section 2808 projects will occur in El Paso County. The closest project begins roughly 100 miles away from the city of El Paso, "approximately 20 miles west of the Columbus" point of entry in New Mexico. C.A. ROA 1790. El Paso County alleges, however, that it is harmed by the diversion of money that would otherwise have been available for construction projects at Fort Bliss. Am. Compl. ¶ 60. El Paso County also alleges that the construction will harm its reputation and diminish its tourism revenues. *Id.* ¶¶ 96-107.

b. On October 11, 2019, the district court granted petitioners' motion for summary judgment. Pet. App. 1a-41a. At the outset of its analysis, the court stated that it would "not further address either parties' arguments regarding" whether the Acting Secretary had exceeded his authority under Section 8005 of the DoD Appropriations Act in internally transferring funds between DoD appropriations accounts to respond to DHS's request for assistance under Section 284. *Id.* at 8a; see pp. 3-4, *supra*. The plaintiffs in a then-pending action in the Northern District of California had made a similar claim; the district court in that action had enjoined DoD from using funds transferred under Section 8005 to undertake the same Section 284 projects at issue here; and this Court had granted a stay of the injunction, stating that "[a]mong the reasons" for the stay was the government's showing that "the plaintiffs have no cause of action to obtain review of the Acting Secretary's compliance with Section 8005." *Trump* v. *Sierra Club*, 140 S. Ct. 1, 1 (2019), mot. to lift stay denied, 140 S. Ct. 2620 (2020); see *Sierra Club* v. *Trump*, 963 F.3d

874, 882-883 (9th Cir. 2020) (setting forth procedural history), cert. granted, No. 20-138 (Oct. 19, 2020). In light of this Court's stay in *Sierra Club*, the district court found petitioners' "argument that the DOD Secretary exceeded his statutory authority under § 284 unviable." Pet. App. 8a.

The district court then turned to Article III standing. Pet. App. 11a-28a. It reasoned that El Paso County has demonstrated Article III injury because the County has suffered a "reputational" injury from its "'unwanted association'" with "the construction of a border wall through executive action," as well as an "'economic'" injury because the government's actions pose "'a serious threat to'" El Paso's "'tourism and economic development.'" *Id.* at 16a, 19a (citations omitted). The court further reasoned that El Paso has demonstrated economic harm because "El Paso County's reputation will be tarnished in the eyes of tourists and developers," and because the Section 2808 construction "will divert $20 million away from a planned military construction project at Fort Bliss." *Id.* at 20a. The court also found that BNHR has Article III standing as an organization because it has "divert[ed] resources" away from its mission in order to "counsel[] community members who are fearful," and to "oppos[e]" the construction. *Id.* at 27a (citation omitted).

On the merits, the district court held that because Congress had "specifically appropriate[d]" funds to DHS for border-barrier construction in the CAA, and because "'a more specific statute will be given precedence over a more general one,'" other agencies such as DoD could not use their own statutory authority and appropriations, which are for more "general purposes," to construct barriers at the southern border. Pet. App.

32a-33a (citation omitted). The court thus held that DoD could not use its appropriations to undertake any border-barrier construction under either Sections 284 or 2808. *Id.* at 33a. According to the court, DoD's use of its appropriations to perform construction pursuant to its own statutory authority would, in light of the restrictions contained in the CAA's appropriation to DHS, "flout[] the cardinal principal that a specific statute controls a general one," and thus violate the CAA. *Ibid.*

The district court also held that Section 739 of the CAA "prohibits [respondents'] plan to fund the border wall." Pet. App. 37a. Section 739 provides:

> None of the funds made available in this or any other appropriations Act may be used to increase, eliminate, or reduce funding for a program, project, or activity as proposed in the President's budget request for a fiscal year until such proposed change is subsequently enacted in an appropriation Act, or unless such change is made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act.

CAA, Div. D, Tit. VII, § 739, 133 Stat. 197. Invoking what it described as the "ordinary meaning" of the term "'project,'" the court reasoned that the relevant "'project'" was a "wall along the southern border," and that DoD's use of its own appropriations and statutory authorities to construct barriers at the border was "'increas[ing] funding'" for that "'project,'" in violation of Section 739. Pet. App. 38a-39a (citations omitted).[1]

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[1] Although the district court had found petitioners' allegations regarding Section 8005 "unviable" in light of this Court's stay of the injunction in *Sierra Club*, Pet. App. 8a, the court stated in its discussion of the CAA that it agreed with the *Sierra Club* district

The district court declined to reach any of petitioners' other claims and declined to order any remedy until after receiving further briefing. See Pet. App. 31a, 41a.

c. On December 10, 2019, the district court entered a permanent injunction prohibiting the government from using "§ 2808 funds beyond the $1.375 billion in the [CAA] for border wall construction." Pet. App. 66a; see *id.* at 42a-66a. The court declined to enjoin DoD from using appropriations to undertake construction under Section 284, in deference to this Court's grant of a stay in *Sierra Club*. *Id.* at 60a.

4. The government appealed and moved to stay the district court's injunction. On January 8, 2020, the court of appeals granted the government's request and stayed the injunction pending appeal, explaining that "among [the] reasons" a stay was warranted was "the substantial likelihood that [petitioners] lack Article III standing." Pet. App. 68a. The court also noted that this Court had granted a stay in *Sierra Club*. *Ibid.* Judge Higginson would have denied the government's request. *Id.* at 68a-69a.

Petitioners filed a cross-appeal to challenge the district court's denial of an injunction with respect to the Section 284 projects. Briefing was completed in May 2020, and a different panel of the court of appeals heard oral argument on September 1, 2020. On the day after oral argument, petitioners filed a petition for a writ of certiorari before judgment. The appeal and cross-appeal remain pending before the Fifth Circuit.

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court's conclusion that the "zone-of-interests test is inapposite" when a "plaintiff seeks equitable relief against a defendant for exceeding its statutory authority," *id.* at 31a n.1.

ARGUMENT

Petitioners ask (Pet. i) this Court to take the extraordinary and rare step of granting a petition for a writ of certiorari before judgment in order to review two questions: (1) whether the Acting Secretary of Defense exceeded his authority under Section 8005 of the DoD Appropriations Act in transferring funds to respond to DHS's request for counterdrug assistance under 10 U.S.C. 284; and (2) whether DoD's expenditures of the transferred funds violate the CAA and the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7. A writ of certiorari before judgment is not warranted to address either of those questions in this case.

A petition for a writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Petitioners fail to meet that "very demanding standard." *Mt. Soledad Mem'l Ass'n* v. *Trunk*, 573 U.S. 954, 955 (2014) (Alito, J., respecting the denial of the petition for a writ of certiorari before judgment). Although petitioners' first question is undoubtedly important, this Court has already granted review of that question in a separate case. See *Trump* v. *Sierra Club*, cert. granted, No. 20-138 (Oct. 19, 2020). In *Sierra Club*, Section 8005 had been the subject of several reported decisions by the district court and the Ninth Circuit, as well as two orders of this Court, before the Court granted certiorari. See Pet. at 2, 8-13, *Sierra Club*, *supra* (No. 20-138) (*Sierra Club* Pet.). By contrast, no court in this case has addressed the Acting Secretary's compliance with Section 8005 or the antecedent question whether these plaintiffs have a cause of action to challenge the Acting

Secretary's compliance. Moreover, this case would be an unsuitable vehicle in which to do so because petitioners lack Article III standing. Thus, granting petitioners' request (Pet. 2-3) to consider this case alongside *Sierra Club* would frustrate, not aid, the Court's review of the Section 8005 question.

Petitioners' second question also does not warrant deviating from the ordinary appellate process. No court of appeals has addressed whether DoD's expenditures violate any implicit or express limits in the CAA, and petitioners identify no compelling basis for this Court to do so in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). Petitioners also lack Article III standing to press the CAA claim, and the claim lacks merit in any event. The petition for a writ of certiorari before judgment should be denied.

1. In *Sierra Club*, a district court in California issued an injunction forbidding federal officials from "taking any action to construct a border barrier * * * using funds reprogrammed by DoD under Section 8005." Pet. App. at 385a, *Sierra Club*, *supra* (No. 20-138) (*Sierra Club* Pet. App.). 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.* See *Sierra Club* Pet. App. 345a. The court concluded, on that basis, that Sierra Club need not demonstrate that its asserted injuries "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.

A divided panel of the Ninth Circuit declined to stay that injunction pending appeal, although for different reasons. The panel majority stated that the plaintiff environmental groups were not required to demonstrate that their members' putative recreational and aesthetic interests fall within the zone of interests protected by Section 8005's proviso because, in the majority's view, the plaintiffs "alleg[e] a constitutional violation" of the Appropriations Clause and their asserted interests fall within the zone of interests of that Clause, assuming the zone-of-interests test applies. *Sierra Club* Pet. App. 234a; see *id.* at 264a-267a. Judge N.R. Smith dissented and would have granted a stay. *Id.* at 274a-299a.

This Court stayed the district court's injunction pending appeal and, if necessary, the disposition of a petition for a writ of certiorari filed by the government. *Trump* v. *Sierra Club*, 140 S. Ct. 1, 1 (2019), mot. to lift stay denied, 140 S. Ct. 2620 (2020). 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.

A different (and also divided) panel of the Ninth Circuit later affirmed the *Sierra Club* district court's injunction. *Sierra Club* Pet. App. 1a-77a. The panel majority endorsed the earlier motions panel's reasoning with respect to the zone of interests. *Sierra Club* Pet. 11-12. In a companion case, the same panel determined that the States of California and New Mexico have a

cause of action under the APA to challenge the Acting Secretary's Section 8005 transfers. *Id.* at 13-14. In both cases, the panel majority also concluded that the Acting Secretary had exceeded his authority under Section 8005 in making the transfers at issue. See *ibid.* Judge Collins dissented in both cases. *Id.* at 12, 14-15.[2]

On August 7, 2020, the government filed a petition for a writ of certiorari to review the Ninth Circuit's judgments in *Sierra Club* and the companion case. *Sierra Club* Pet. 1. The government's petition sought review of two questions:

> 1. Whether respondents [*i.e.*, the Sierra Club plaintiffs and the States of California and New Mexico] 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.

Id. at I. On October 19, 2020, this Court granted the government's petition. The Court has not yet scheduled oral argument in the case.

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[2] Judge Collins relied in part on an opinion from the U.S. Government Accountability Office, prepared in response to an inquiry from lawmakers, which concluded that the Acting Secretary's Section 8005 transfers were "consistent with DOD's statutorily enacted transfer authority, and that use of these amounts for the purpose of border fence construction was permissible under various statutory provisions." *Department of Defense—Availability of Appropriations for Border Fence Construction*, B-330862, 2019 WL 4200949, at *1 (Comp. Gen. Sept. 5, 2019).

2. Petitioners, who filed their petition while the government's petition in *Sierra Club* was still pending, contend (Pet. 19-23) that review should also be granted in this case because petitioners assert different interests than the plaintiffs in *Sierra Club* and therefore the zone-of-interests analysis may be different. But that is a reason to deny review, not to grant it. No court in this case has addressed whether petitioners' alleged "economic and budgetary" interests (Pet. 19) are within the zone of interests protected by Section 8005. Petitioners identify no sound basis for this Court to do so in the first instance.

The district court viewed petitioners' Section 8005 challenge as "unviable" in light of this Court's *Sierra Club* stay and declined to "further address either parties' arguments regarding the statutory authority of [the Acting Secretary] to spend under § 8005." Pet. App. 8a; but see *id.* at 31a n.1 (agreeing with the reasoning of the *Sierra Club* district court that "the zone-of-interests test is inapposite" when a plaintiff "seeks equitable relief against a defendant for exceeding its statutory authority"). The court instead adjudicated the case on an entirely different basis, concluding that DoD's challenged expenditures "violate[] the CAA" and declining to "address the other merits arguments." *Id.* at 31a. And petitioners raised Section 8005 only briefly in the still-pending Fifth Circuit proceedings, addressing it in approximately two pages of their opening brief in the cross-appeal, in the context of arguing in favor of a broader injunction. Pet. C.A. Br. 64-66. Petitioners' principal argument below revolves around the CAA, not Section 8005 See *id.* at 64.

Petitioners argue (Pet. 20-21) that they may have a viable cause of action to challenge the Acting Secretary's compliance with Section 8005 even if the plaintiffs in *Sierra Club* do not. Petitioners are mistaken in asserting that their asserted economic and budgetary interests are within the zone of interests protected by Section 8005, which concerns the intergovernmental budgetary process between DoD and Congress. See *Sierra Club* Pet. 16, 18-22. Section 8005's limitations on the transfer of funds between DoD appropriations accounts to address changing priorities for national defense spending are completely unrelated to any indirect impact a transfer may have on the municipal budget of El Paso County (see Pet. 22) or on any of the thousands of other municipal governments in the United States. Indeed, petitioners' asserted injuries are too speculative even to satisfy the bare-minimum requirements of Article III standing. See pp. 20-22, *infra*. In any event, the Fifth Circuit is more than capable of addressing whether petitioners are proper parties to sue, and it should be allowed to do so in the ordinary course. If this Court holds that the *Sierra Club* plaintiffs lack a cause of action because their asserted interests are not even arguably within the zone of interests protected by Section 8005, see *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 224 (2012), the Court's decision is likely either to resolve the zone-of-interests question here or at least to provide significant guidance on that question. The extraordinary step of certiorari before judgment is unwarranted.

3. Petitioners also contend (Pet. 16-19) that certiorari before judgment should be granted in this case so that the Court may review petitioners' CAA question alongside the questions presented in *Sierra Club*. No

court of appeals has addressed petitioners' CAA question, and petitioners again identify no sound basis for this Court to do so in the first instance, before the Fifth Circuit has an opportunity to address the question in the still-pending appeal. A litigant's asserted desire for "efficiency and certainty" (Pet. 19) generally does not warrant skipping over the court of appeals, particularly where the litigant files a petition for a writ of certiorari before judgment the day after oral argument in the court of appeals, as petitioners did here.

Further review at this time is also unwarranted because petitioners' CAA arguments lack merit. Petitioners assert (Pet. 16-18) that the CAA expressly or impliedly prohibits DoD from using its own appropriated funds for border-barrier construction under DoD's statutory authorities, but the CAA does no such thing.

In the CAA, Congress appropriated funds to DHS (among other agencies) for the 2019 fiscal year. As relevant here, Congress appropriated a lump sum of money to a CBP appropriations account for "procurement, construction, and improvements." CAA, Div. A, Tit. II, 133 Stat. 18 (appropriating over $2 billion). Congress specified that, "[o]f the total amount made available under" *that specific account*, $1.375 billion "is for the construction of primary pedestrian fencing, including levee pedestrian fencing, in the Rio Grande Valley Sector." § 230(a)(1), 133 Stat. 28.

Petitioners assert that, in appropriating $1.375 billion to DHS for border-barrier construction in the Rio Grande Valley Sector, Congress meant to preclude other agencies from relying on other statutory authorities and appropriations for border-barrier construction. But the CAA says nothing of the sort. As set forth above, Congress appropriated a particular amount of

money to an account for DHS, and limited how those funds may be spent, as Congress often does when appropriating funds to an agency. The CAA nowhere says that the appropriation to DHS prohibits other agencies from relying on their own separate statutory authority, and their own appropriated funds, to construct border barriers. When Congress sought in the CAA to place restrictions on the construction of border barriers, it did so explicitly. See CAA, Div. A, Tit. II, § 231, 133 Stat. 28 (providing that "[n]one of the funds made available by this Act or prior Acts are available for the construction of pedestrian fencing" within five specified areas of the border, such as "the Santa Ana Wildlife Refuge," and "the National Butterfly Center").

In insisting otherwise, petitioners invoke the interpretive canon that the "specific * * * controls [the] general." Pet. 18 (citation omitted); see Pet. 16-17. According to petitioners, Congress's "specific" appropriation of $1.375 billion to DHS prohibits other agencies from relying on more "general" statutory authorities to construct border barriers. But the canon petitioners invoke is inapplicable here. Although "[i]t is true that specific statutory language should control more general language when there is a conflict between the two," that interpretive canon does not apply where "there is no conflict." *National Cable & Telecomms. Ass'n, Inc.* v. *Gulf Power Co.*, 534 U.S. 327, 335-336 (2002). Indeed, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).

No conflict exists between Congress's appropriation to DHS of certain funds for border-barrier construction by DHS pursuant to Section 102 of IIRIRA (see p. 2,

supra), and DoD's use of DoD appropriations to undertake border-barrier construction projects under the authority Congress has separately granted to DoD. Section 2808 authorizes DoD to complete certain military construction to support the use of the armed forces during a declared national emergency. 10 U.S.C. 2808(a). And Section 284 explicitly envisions that DoD will use its resources to construct "roads and fences * * * to block drug smuggling corridors across international boundaries" at the request of other agencies. 10 U.S.C. 284(b)(7). All of those provisions can operate alongside each other, without any need to resolve a manufactured "conflict" between the specific and the general.

Petitioners' reliance (Pet. 16-17) on guidance from the U.S. Government Accountability Office (GAO) is misplaced. The GAO has explained that "if *an agency* has a specific appropriation for a particular item, and [the agency] also has a general appropriation broad enough to cover the same item, * * * [i]t must use the specific appropriation." GAO, *Principles of Federal Appropriations Law* 407-408 (4th ed. rev. 2017) (emphasis added). No authority supports petitioners' effort to extend that principle here, where petitioners argue that Congress's appropriation to one agency impliedly precluded a different agency from using its own appropriations for lawful purposes.

Petitioners also err (Pet. 17) in relying on Section 739 of the Financial Services and General Government Appropriations Act, 2019, a component of the CAA. Section 739 provides:

> None of the funds made available in this or any other appropriations Act may be used to increase, eliminate, or reduce funding *for a program, project, or activity* as proposed in the President's budget request

> for a fiscal year until such proposed change is subsequently enacted in an appropriation Act, or unless such change is made pursuant to the reprogramming or transfer provisions of this or any other appropriations Act.

CAA, Div. D, Tit. VII, § 739, 133 Stat. 197 (emphasis added). Similar language has been included in appropriations statutes since 2014. See, *e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Div. E, Tit. VII, § 740, 128 Stat. 2390.

Petitioners assert (Pet. 17) that construction under Sections 284 and 2808 will improperly increase funding for a "border wall," which they describe as a "project" for purposes of Section 739. But the phrase "program, project, or activity" in an appropriations statute such as the CAA has an established and specific meaning. The GAO has defined "program, project, or activity" as an "element within a budget account." GAO, *A Glossary of Terms Used in the Federal Budget Process* 80 (2005) (capitalization and emphasis omitted); see 31 U.S.C. 1112 (requiring GAO to publish standard budget terms); cf. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("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). The CAA, like other appropriations laws, uses the terms "program, project, or activity" in this specific manner: to refer to elements within an agency's budget accounts. See, *e.g.*, CAA, Div. A, Tit. I, § 101, 133 Stat. 16 (directing DHS Chief Financial Officer to submit to the appropriations committees reports "that include[] total obligations of the Department for that month * * * at the

appropriation and program, project, and activity levels"); see also H.R. Conf. Rep. No. 9, 116th Cong., 1st Sess. 503 (2019) ("remind[ing]" DHS, in the conference report accompanying the CAA, to "follow GAO's definition of 'program, project, or activity'").

None of the construction projects that DoD is undertaking pursuant to its own statutory authorities and appropriations increases funding for an element within any budget account that belongs to DHS (or any other agency). The mere fact that appropriations to different agencies can be used for similar purposes does not transform a valid use of one source of appropriated funds into an improper expenditure.

4. In any event, this case would be an unsuitable vehicle in which to address the questions petitioners seek to present because petitioners lack Article III standing. See Pet. App. 68a (court of appeals' order granting a stay, in part because of "the substantial likelihood that [petitioners] lack Article III standing"). None of the Section 284 or 2808 projects that petitioners challenge are located in El Paso County. The closest Section 284 project that petitioners challenge is approximately 15 miles away from downtown El Paso, in Doña Ana County, New Mexico. See C.A. ROA 918, 1505. That project will replace existing vehicle barriers with new pedestrian fencing. *Id.* at 1504-1505. The closest Section 2808 construction that El Paso challenges is approximately 100 miles away from downtown El Paso, in New Mexico. See *id.* at 1790 (third segment of El Paso Project 2); Resp. C.A. Br. 6-7.

El Paso states that the use of transferred funds to build border barriers in New Mexico will affect tourism and business development in El Paso because that construction will cause "uncertainty," and "fears," among

tourists and "potential investors." C.A. ROA 924-925; see Pet. C.A. Br. 62-63. But that conclusory speculation in no way demonstrates that El Paso is suffering any certainly impending economic injury from border-barrier construction in a different State. See *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 411-414 (2013) (noting this Court's "usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors").

El Paso has attempted to bolster its standing to challenge the Section 2808 construction based on the fact that DoD has identified as an available source of funds a proposed $20 million construction project at Fort Bliss, an Army installation partially located in El Paso County. See Pet. C.A. Br. 20-21. But El Paso itself would receive no funds as part of that federal construction project, and El Paso cannot base its standing on allegations that the federal government's actions with respect to a federal construction project will indirectly injure El Paso's "economy and thereby cause[] a decline in general tax revenues." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 448 (1992).

In any event, the record fails to support even the indirect injuries asserted by El Paso. El Paso's declarants merely state summarily that Fort Bliss is the "lifeblood" of El Paso's economy and that it "create[s] nearly 62,000 jobs." C.A. ROA 925-926. Nothing in the record establishes that the use of amounts from the proposed roads project at Fort Bliss, in particular, will have any specific effect on jobs in El Paso, let alone that the use will indirectly harm the County's economy as a result. See *id.* at 926. Indeed, El Paso submitted its

declarations before the Secretary made any final decision as to which projects would be used as funding sources. Compare *id.* at 919 and 928, with *id.* at 1788.

El Paso's co-plaintiff, BNHR, also lacks Article III standing. BNHR asserts that construction of border-barriers has caused its members to experience "noise," "[t]raffic," and "blight." C.A. ROA 940-941. But BNHR is not suing on behalf of its members; rather, it is suing on its own behalf, claiming that construction has harmed its organizational mission, see p. 7, *supra.* And BNHR entirely fails to explain how its members' concerns over increased noise and traffic impair its own organizational mission of promoting immigration reform, let alone how the challenged construction has injured BNHR itself or caused it to divert resources to redress that injury. See Pet. C.A. Br. 28-29, 63; cf. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 379 (1982).

At a minimum, the threshold Article III questions in this case provide a compelling basis not to grant certiorari before judgment. The case is a far worse vehicle than *Sierra Club*, not a better one.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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