No. ____

IN THE

Supreme Court of the United States

EL PASO COUNTY, TEXAS ET AL.,

Petitioners,

v.

DONALD J. TRUMP ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

In January 2019, during a government shutdown, President Trump formally requested from Congress $5.7 billion in appropriations for a wall along the Southwest border. On February 14, 2019, Congress passed the Consolidated Appropriations Act (CAA), 2019, Pub. L. No. 116-6, 133 Stat. 13, which appropriates $1.375 billion for wall construction "in the Rio Grande Valley Sector" of the border, but declines to appropriate the remaining funds requested by the President. 133 Stat. at 28, div. A, § 230(a)(1). The CAA further states that "[n]one of the funds made available in this or any other appropriations Act may be used to increase … funding for a … project … as proposed in the President's budget request for a fiscal year until such proposed change is subsequently enacted in an appropriation Act." 133 Stat. at 197, div. D, § 739.

On the same day the President signed the CAA, his Administration determined to spend an additional $6.1 billion on border-wall construction, including $2.5 billion at issue here. The questions presented are as follows:

1. Whether the Executive Branch's expenditure of §2.5 billion on border-wall construction violates the CAA and thus the Appropriations Clause.

2. Whether the Department of Defense's transfer of $2.5 billion between agency appropriations accounts violates § 8005 of the DoD Appropriations Act, 2019, Pub. L. No. 115-245, div. A, 132 Stat. 2999, and thus the Appropriations Clause.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were as follows:

Petitioners El Paso County, Texas and Border Network for Human Rights were plaintiffs in the district court and appellees/cross-appellants before the court of appeals.

Respondents Donald J. Trump, Mark Esper, Chad F. Wolf, David Bernhardt, Steven T. Mnuchin, and Todd T. Semonite, all in their official capacity, were defendants in the district court and appellants/cross-appellees before the court of appeals.

RULE 14.1(b)(iii) STATEMENT

Petitioners are aware of the following related cases:

- *El Paso County et al. v. Trump et al.*, No. 3:19-cv-00066 (W.D. Tex.);
- *El Paso County et al. v. Trump et al.*, No. 19-51144 (5th Cir.).

Petitioners are unaware of any other directly related cases in this or any other Court, within the meaning of Rule 14.1(b)(iii). Petitioners do note, however, that similar issues as those raised in this petition are presented in *Trump v. Sierra Club* and *Trump v. California*, No. 20-138 (U.S.) (cert. pending).

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PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

Petitioners El Paso County, Texas and the Border Network for Human Rights respectfully petition for a writ of certiorari before judgment to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The order of the District Court granting petitioners' motion for summary judgment is reported at 408 F. Supp. 3d 840 and reprinted in the Petition Appendix (App.) at 1a-41a. The order of the District Court granting in part and denying in part petitioners' request for declaratory and injunctive relief is reported at 407 F. Supp. 3d 655 and reprinted at App. 42a-66a.

JURISDICTION

On October 11, 2019, the District Court granted summary judgment to petitioners. App. 40a. On December 10, 2019, the District Court granted petitioners declaratory and injunctive relief in part and denied it in part. App. 66a. On January 8, 2020, the U.S. Court of Appeals for the Fifth Circuit stayed the District Court's injunction pending appeal and denied petitioners' motion to expedite the appeal. App. 67a-69a. The Fifth Circuit's jurisdiction over petitioners' pending appeal rests on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(e).

RELEVANT STATUTORY PROVISIONS

The pertinent statutory provisions are reprinted at App. 70a-72a.

INTRODUCTION

This case presents a challenge to the Executive Branch's construction of a wall along the Southwest border with funds that Congress appropriated for other purposes. Petitioners prevailed on the merits of their claims in the District Court. The District Court then enjoined respondent Executive Branch officials from spending $3.6 billion on the wall under 10 U.S.C. § 2808's military construction provision, but declined to enjoin them from spending an additional $2.5 billion under 10 U.S.C. § 284's counterdrug support provision, even though the court had earlier held that expenditure unlawful. The Fifth Circuit stayed the District Court's injunction pending appeal, and the case has been briefed and argued in the Fifth Circuit.

Meanwhile, two related but different challenges to the Executive Branch's border-wall expenditures have proceeded in the Ninth Circuit, and a petition for a writ of certiorari in those cases is currently pending before this Court. In those cases, the Ninth Circuit affirmed an injunction barring the Department of Defense (DoD) from transferring and spending the aforementioned $2.5 billion in § 284 counterdrug support funds on the border wall. *See Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020); *California v. Trump*, 963 F.3d 926 (9th Cir. 2020). And on August 7, 2020, the Solicitor General filed a petition for certiorari in those cases. *See* Petition for a Writ of Certiorari, *Trump v. Sierra Club*, No. 20-138 (U.S. Aug. 7, 2020) ("U.S. *Sierra Club* Pet.").

If this Court grants review in *Sierra Club* and *California*, it should grant this petition for certiorari before judgment as well. The Court has regularly

granted certiorari before judgment in companion cases like this one, recognizing that doing so is often necessary to fully consider and resolve the relevant issues. Indeed, the Court granted two such petitions last Term in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020). In those two petitions, the Solicitor General stressed that granting certiorari before judgment was necessary "[t]o ensure an adequate vehicle for the timely and definitive resolution of th[e] dispute." Petition For a Writ of Certiorari Before Judgment, *Trump v. Nat'l Ass'n for Advancement of Colored People*, No. 18-588 ("*NAACP* Pet."), at 16 (Nov. 5, 2018); Petition For a Writ of Certiorari Before Judgment, *Nielsen v. Vidal*, No. 18-589 ("*Vidal* Pet."), at 16 (Nov. 5, 2018).

The same logic applies here for two reasons. First, petitioners press a merits argument that the District Court here endorsed and that independently precludes the Executive Branch's border-wall expenditures, but which was not raised or considered in *Sierra Club* or *California*. As the District Court correctly held, respondents' expenditures are barred by the Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13. Because that argument was not pressed to or passed upon by the Ninth Circuit, it is not presented by the Solicitor General's pending petition for certiorari in *Sierra Club* and *California*. Review here is thus warranted to allow for full presentation and consideration of all the arguments addressing the legality of the expenditures at issue.

Second, petitioners assert different injuries and interests than the plaintiffs in *Sierra Club* and *California*, and those injuries and interests clearly satisfy the zone-of-interests test. The Solicitor General has contended that the plaintiffs in *Sierra Club* and *California*, who assert recreational, aesthetic, environmental, and sovereign interests, fall outside the zone of interests of the relevant statutory provision. Petitioner El Paso County, by contrast, asserts economic and budgetary interests that fall comfortably within that provision's zone of interests. Even a dissenting judge in *Sierra Club* admitted that "as a budgetary statute regarding the transfer of funds among DoD accounts," the relevant provision "arguably protects economic interests" like the County's. *Sierra Club v. Trump*, 929 F.3d 670, 715 (9th Cir. 2019) (N.R. Smith, J., dissenting). Granting certiorari before judgment will thus "ensure an adequate vehicle for the timely and definitive resolution of th[e] dispute." *NAACP* Pet. at 16.

An issue of pressing importance to the Nation and the separation of powers should be resolved in a single instance, not in multiple iterations with different plaintiffs and arguments. The Court should therefore grant certiorari before judgment here.

STATEMENT OF THE CASE

1. Presidential candidate Donald Trump made building a wall across the Southwest border one of his signature campaign issues. *See* Fifth Circuit Electronic Record On Appeal ("C.A. ROA") 361, 415. Once elected, President Trump sought to fulfill the promise he made to voters. Five days after his inauguration,

President Trump issued an order directing the Executive Branch to "take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border." Exec. Order No. 13767, 82 Fed. Reg. 8793, 8794 (Jan. 25, 2017).

Initially, the President sought funding for the border wall through the ordinary appropriations process. In fiscal-year 2017, the President requested that Congress appropriate $999 million for the wall, C.A. ROA 433, and Congress responded by appropriating $341.2 million, *see* Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135, 434. In fiscal-year 2018, the President requested $2.6 billion in wall funding,[1] and Congress responded by appropriating $1.571 billion, *see* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 616.

In fiscal-year 2019, the President began by again employing the traditional appropriations process, requesting $1.6 billion for the border wall. C.A. ROA 619. But the President eventually gave up on that process. Mere weeks before fiscal-year 2018 appropriations were to expire, the President declared that he in fact was seeking at least $5 billion for the wall and would be "proud to shut down the government for border security." *Id.* at 729. On December 22, 2018, the Nation's longest-ever government shutdown began.

In the midst of the shutdown, the President formalized his latest funding request. He sent a letter

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[1] *See* Office of Mgmt. & Budget, Exec. Office of the President, *Budget of the United States Government*, *Fiscal Year 2018*, at 18 (2017), https://www.govinfo.gov/content/pkg/BUDGET-2018-BUD/pdf/BUDGET-2018-BUD.pdf.

to the Senate Appropriations Committee "request[ing] $5.7 billion for construction of a steel barrier for the Southwest border." *Id.* at 944. "The Administration's full request," the letter explained, "would fund construction of a total of approximately 234 miles of new physical barrier." *Id.*

Also during the shutdown, the President raised a new idea. If the "negotiated process" with Congress did not yield sufficient border-wall funding, he maintained, he could "call a national emergency and build [the wall] very quickly." *Id.* at 756.

2. After the 35-day shutdown had finally ended, Congress passed the Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (CAA). Instead of satisfying the President's request for $5.7 billion in wall funding, the CAA appropriates $1.375 billion to the Department of Homeland Security ("DHS") "for the construction of primary pedestrian fencing … in the Rio Grande Valley Sector." 133 Stat. at 28, div. A, § 230(a)(1). It also establishes a process through which DHS is to consult with Congress about whether more border-wall appropriations should be made in future years. *Id.* § 230(c). And, crucially here, the CAA contains a provision—§ 739 of division D, Title VII—that precludes additional Executive Branch spending on projects proposed by the President that Congress has rejected. Section 739 applies "Government-Wide" and states:

> None of the funds made available in this or any other appropriations Act may be used to increase … 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.

133 Stat. at 197, div. D, § 739. On February 15, 2019, the President signed the CAA into law.

3. On the same day the President signed the CAA, he invoked the National Emergencies Act (NEA), 50 U.S.C. § 1601 *et seq.*, to declare "the current situation at the southern border" a "national emergency." Proc. No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019).[2] Relying on this emergency declaration, DoD invoked 10 U.S.C. § 2808, which states that "[i]n the event of a … declaration by the President of a national emergency in accordance with the [NEA] that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects." *Id.* § 2808(a). "[S]uch projects," the provision continues, "may be undertaken only within the total amount of funds that have been appropriated for military construction." *Id.*

DoD has used this § 2808 military construction provision to spend $3.6 billion appropriated for "military construction projects" on the border wall. To do so, DoD cancelled 127 already-planned military construction projects. C.A. ROA 1968. One of those pro-

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[2] Congress twice passed joint resolutions terminating the President's emergency declaration, H.R.J. Res. 46, 116th Cong. (2019); S.J. Res. 54, 116th Cong. (2019), but the President vetoed both.

jects was a $20 million "Defense Access Roads" construction project at Fort Bliss, in El Paso County. *Id.* The money for that project was supposed to have been awarded to Fort Bliss in January 2020, but was instead redirected toward the border wall. *Id.*

Most relevant here, DoD invoked 10 U.S.C. § 284 to spend an additional $2.5 billion on border-wall construction. That provision allows DoD to "provide support for the counterdrug activities" of other agencies. *Id.* On February 25, 2019, ten days after the CAA's enactment, DHS sought counterdrug support from DoD, requesting that it build over 200 miles of the border wall. C.A. ROA 863-70. DoD approved this support request. *Id.* at 1493-94. The § 284 counterdrug support construction includes "El Paso Project 1," consisting of 46 miles of construction in Luna and Doña Ana Counties, New Mexico. *Id.* at 870. Doña Ana County borders El Paso County.

DoD lacked sufficient funds in its "counter-narcotics support" appropriation account, however, to proceed with DHS's requested construction. To compensate for that shortfall, DoD transferred $2.5 billion from other appropriations accounts—for example, its military personnel account—to its counter-narcotics support account. *Id.* at 900; *id.* at 1494. As its asserted authority for those transfers, DoD cited § 8005 of the DoD Appropriations Act, 2019, Pub. L. No. 115-245, 132 Stat. 2981, 2999, which allows DoD transfers in specified circumstances.[3] As pertinent here, those

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[3] DoD also cited § 9002 of the Act, but that provision contains the same substantive requirements as § 8005. *See* 132 Stat. at 3042, § 9002. For simplicity's sake, this petition refers to § 8005 alone.

transfers: (1) must be "based on unforeseen military requirements," and (2) may not be made "where the item for which funds are requested has been denied by the Congress." *Id.*

4. In March 2019, petitioners El Paso County, Texas and BNHR sued the President and certain Executive Branch officials in the U.S. District Court for the Western District of Texas, challenging the President's emergency declaration, DoD's § 2808 military construction and § 284 counterdrug support expenditures, and DoD's § 8005 transfer. On October 11, 2019, the District Court granted summary judgment to petitioners, holding that respondents' § 2808 military construction and § 284 counterdrug support expenditures were unlawful. App. 40a. Those expenditures, the court reasoned, were barred by the CAA for two reasons. First, the CAA's specific appropriation of $1.375 billion for border-wall construction in the Rio Grande Valley Sector precludes respondents from relying on more general statutory authorities to spend additional funds on border-wall construction elsewhere. App. 32a-37a. Second, § 739 of the CAA (quoted above) "expressly forbids Defendants' funding plan" because that plan seeks to "increase … funding for a … project" (the border wall) that was "proposed in the President's budget request for a fiscal year" beyond the amount Congress appropriated for that project. App. 37a.

On December 10, 2019, the District Court granted a declaratory judgment and permanent injunction against respondents' § 2808 military construction expenditures and construction. App. 66a. It declined to

declare unlawful or enjoin respondents' § 284 counterdrug support expenditures and construction, however, in light of this Court's order staying an injunction of DoD's § 8005 transfer in *Trump v. Sierra Club*, 140 S. Ct. 1 (2019).

Respondents appealed the District Court's declaratory judgment and injunction as to the § 2808 military construction expenditures and construction, while petitioners cross-appealed the District Court's denial of relief as to the § 284 counterdrug support expenditures and construction. A motions panel of the Fifth Circuit stayed the District Court's injunction and declaratory judgment pending appeal and denied petitioners' motion to expedite the appeal. App. 68a. Judge Higginson dissented from both rulings. App. 68a-69a. The parties have briefed both respondents' appeal and petitioners' cross-appeal, and the Fifth Circuit held oral argument on September 1, 2020.

5. In parallel with petitioners' case here, two separate challenges to respondents' border-wall construction have proceeded in federal court in California. In *Sierra Club v. Trump*, the district court enjoined DoD's § 8005 transfer (thereby halting DoD's § 284 counterdrug support expenditures and construction). The Ninth Circuit denied a stay, but this Court granted a stay pending appeal, with four Justices dissenting. 140 S. Ct. at 1. Meanwhile, in *California v. Trump*, the district court held unlawful the same § 8005 transfer but declined to enjoin it because it had already been enjoined by the court in *Sierra Club*. 2019 WL 2715421 (N.D. Cal. June 28, 2019).

On June 26, 2020, the Ninth Circuit affirmed in both *Sierra Club* and *California*. *See Sierra Club v.*

Trump, 963 F.3d 874 (9th Cir. 2020); *California v. Trump*, 963 F.3d 926 (9th Cir. 2020). In *Sierra Club*, the Ninth Circuit held that plaintiffs Sierra Club and Southern Border Communities Coalition had equitable causes of action to sue, 963 F.3d at 887-895, and that DoD's § 8005 transfer exceeded its statutory and constitutional authority, *id.* at 886-87. And in *California*, the Ninth Circuit held that California and New Mexico had Administrative Procedure Act (APA) causes of action to sue, 963 F.3d at 941-44, and again held on the merits that DoD's § 8005 transfer exceeded its statutory and constitutional authority, *id.* at 944-49.

On August 7, 2020, the Solicitor General filed a joint petition for a writ of certiorari in both *Sierra Club* and *California*. *See* U.S. *Sierra Club* Pet. That petition argues that the plaintiffs in *Sierra Club* and *California* lack causes of action to sue, *id.* at 18-29, and that DoD's $2.5 billion transfer complied with § 8005, *id.* at 29-32.

6. In light of the Solicitor General's August 7 petition, and the fact that the Ninth Circuit in *Sierra Club* and *California* considered the legality of DoD's § 284 counterdrug support expenditures, but *not* the arguments adopted by the District Court in this case, petitioners now file this petition for certiorari before judgment.

REASONS FOR GRANTING THE WRIT

If the Court grants the Solicitor General's petition for certiorari in *Sierra Club* and *California*, it should grant the petition for certiorari before judgment here. Doing so is necessary for the Court to fully resolve the

lawfulness of respondents' construction of a wall along the Southwest border and to avoid disjointed consideration of related issues in different cases (and possibly different Terms).

This Court has regularly granted certiorari before judgment in companion cases after the Court has decided to review a major legal question. Just last Term, for instance, the Court granted two petitions for certiorari before judgment after it had decided to review whether DHS had validly rescinded the Deferred Action for Childhood Arrivals (DACA) program. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1905.

The Court should do the same here, for two reasons. First, granting certiorari before judgment will ensure full presentation and consideration of all relevant substantive challenges to the Executive Branch's border-wall expenditures. Petitioners here have successfully pressed a merits argument that would independently preclude respondents' border-wall expenditures, but which was not addressed in *Sierra Club* or *California*. Specifically, petitioners argue that respondents' § 284 counterdrug support expenditures are unlawful because they violate the CAA. The District Court in this case agreed with petitioners' CAA argument, but this CAA argument has not been pressed or passed upon in either *Sierra Club* or *California*. Granting certiorari before judgment would allow the Court to consider and resolve both major legal arguments challenging respondents' border-wall expenditures at one time.

Second, granting certiorari before judgment will ensure that the Court has a proper vehicle before it to

resolve the § 8005 argument as well—which petitioners have made in addition to their CAA argument. The Solicitor General argues that the plaintiffs in *Sierra Club* and *California* fall outside § 8005's zone of interests. But even if those plaintiffs' recreational, aesthetic, environmental, and sovereign interests do not satisfy the zone-of-interests test, El Paso County's economic and budgetary interests do. A dissenting judge in *Sierra Club* recognized as much. So even if the Court were to agree with the Solicitor General's threshold argument in *Sierra Club* and *California*, it would not preclude petitioners' challenge here.

I. The Court Has Regularly Granted Certiorari Before Judgment In Complementary Companion Cases

This Court may grant certiorari before judgment "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." S. Ct. R. 11; *see* 28 U.S.C. § 1254(1) (writ of certiorari may be granted "upon the petition of any party … before or after rendition of judgment"); *id.* § 2101(e) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment … may be made at any time before judgment.").

On several occasions, this Court has found this standard satisfied when a case pending in a Court of Appeals is an important companion case to a case that the Court has decided to review. And in particular, the Court has deemed this approach proper in cases involving challenges to major governmental actions, where doing so would permit the Court to address the

full scope of issues surrounding the action, or would ensure that the Court had before it a proper vehicle to resolve those issues.

For example, just last Term, in *Regents of the University of California*, 140 S. Ct. 1891 (2020), the Court granted two petitions for certiorari before judgment in order to ensure full consideration and resolution of the issues involved in DHS's rescission of DACA. *See Trump v. NAACP*, 139 S. Ct. 2779 (2019). There, the Court granted certiorari in the normal course after the Ninth Circuit affirmed an injunction of DHS's rescission. *Regents of the Univ. of Cal.*, 140 S. Ct. at 1905. At that time, cases challenging the same action were pending in two other Circuits. *Id.* The Solicitor General sought certiorari before judgment in those two cases, emphasizing the need "[t]o ensure an adequate vehicle for the timely and definitive resolution of th[e] dispute." *NAACP* Pet. at 16; *Vidal* Pet. at 16. The Court granted the Solicitor General's certiorari before judgment petitions in both cases and consolidated all three cases for oral argument. *Regents*, 140 S. Ct. at 1905.

Similarly, in *United States v. Fanfan*, 542 U.S. 956 (2004), the Court granted a petition for certiorari before judgment in order to hear that case alongside *United States v. Booker*, 543 U.S. 220 (2005). *See* 543 U.S. at 229. Both cases involved similar constitutional challenges to the federal sentencing guidelines, but granting the petition in *Fanfan* allowed the Court to resolve additional remedial questions at the same time that it considered the constitutional issues. *Id.* at 267.

And in *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court granted certiorari before judgment in order to hear that case together with *Grutter v. Bollinger*, 539 U.S. 306 (2003). *See Gratz*, 539 U.S. at 260. While *Grutter* involved an equal-protection challenge to a law-school admissions policy, *Gratz* involved a similar challenge to an undergraduate admissions policy. Hearing both cases at once allowed the Court to "address the constitutionality of the consideration of race in university admissions in a wider range of circumstances." *Id.*

II. If The Court Grants Certiorari In *Sierra Club* and *California*, It Should Grant Certiorari Before Judgment Here

In the foregoing cases, the Court granted certiorari before judgment either to ensure that the full scope of substantive issues was before the Court, or to ensure that jurisdictional or other vehicle obstacles did not prevent the Court from resolving those issues. If this Court grants certiorari in *Sierra Club* and *California*, granting this petition for certiorari before judgment would accomplish both purposes.

First, granting certiorari before judgment would ensure presentation of petitioners' argument (adopted by the District Court here) that respondents' border-wall expenditures and construction violate the CAA. Second, granting certiorari before judgment would facilitate resolution of the § 8005 issue that is raised both in this case and in *Sierra Club* and *California* by increasing the odds that at least one plaintiff falls within § 8005's zone of interests.

Unless this petition is granted, the Court's ultimate decisions in *Sierra Club* and *California* are unlikely to fully resolve the legality of the Executive Branch's border-wall expenditures. Rather than considering multiple iterations of border-wall challenges, the Court should grant this petition for certiorari before judgment and consolidate this case for argument alongside *Sierra Club* and *California*.

1. As noted, petitioners here argue that respondents' border-wall expenditures violate the CAA. The District Court in this case agreed with this argument, but this argument was not pressed or passed upon in either *Sierra Club* or *California*.[4] This Court should grant certiorari before judgment to ensure consideration of petitioners' CAA argument.

a. Settled appropriations law principles govern this case. It is well-established that "[a]n appropriation for a specific purpose is exclusive of other appropriations in general terms which might be applicable in the absence of the specific appropriation." *Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005); *see United States v. MacCollom*, 426 U.S. 317, 321 (1976) ("Where Congress has addressed [a] subject" and "authorized expenditures where a condition is met, the clear implication is that where the condition is not met, the expenditure is not authorized."). As the Government Accountability Office (GAO), the agency tasked with interpreting federal appropriations law,

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[4] Another district court has also agreed with this same argument. *See State v. Trump*, 441 F. Supp. 3d 1101, 1115-17 (W.D. Wash. 2020).

has put the point when addressing construction projects in particular: "The appropriation of a specific amount for a construction project … is the exclusive source of funds for the project and may not be augmented with funds from some other appropriation." GAO, *Principles of Federal Appropriations Law*, 13-197 (3d ed. 2008) ("GAO Redbook").

These principles preclude respondents' border-wall expenditures. After the President had formally requested $5.7 billion for a 234-mile border wall, C.A. ROA 944, Congress instead appropriated only $1.375 billion for construction in "the Rio Grande Valley Sector," 133 Stat. at 28, div. A, § 230(a)(1). Respondents are barred from relying on more general, earlier-enacted authorities, such as § 284's counterdrug support provision, to circumvent Congress's specific and recent appropriations judgment in the CAA.

To remove any doubt about the Executive Branch's ability to spend beyond amounts specifically appropriated, Congress enacted § 739. As noted above, that provision applies "Government-Wide" and states that "[n]one of the funds made available in this or any other appropriations Act may be used to increase … funding for a program, project, or activity as proposed in the President's budget request for a fiscal year." 133 Stat. at 197, div. D, § 739.

Respondents' border-wall expenditures run headlong into this express prohibition. Respondents are using appropriated money to "increase … funding for a … project"—namely, the border wall. *See, e.g.*, *Project*, American Heritage Dictionary (5th ed. 2011) ("project": "an undertaking requiring concerted effort"); *Detroit Int'l Bridge Co. v. Gov't of Canada*, 883

F.3d 895, 901 (D.C. Cir. 2018) (referring to bridge construction as a "project"). And that project was "proposed in the President's budget request for a fiscal year." Not only did the President request $5.7 billion for wall construction in fiscal-year 2019, *see* C.A. ROA 944, but he also requested another $8.6 billion for wall construction in fiscal-year 2020.[5] Rather than acceding to these requests, Congress appropriated $1.375 billion for construction in "the Rio Grande Valley Sector." 133 Stat. at 28, div. A, § 230(a)(1). As a result, § 739 precludes respondents from using other funding sources to accomplish the President's proposed project anyway.

b. The District Court in this case agreed with petitioners' CAA argument. The court held that respondents' border-wall expenditures "flout[] the cardinal principle that a specific statute"—the CAA—"controls a general one"—§§ 284 and 2808. App. 33a. And the court further held that, in any event, "CAA § 739 expressly forbids Defendants' funding plan." App. 37a.

By contrast, the Ninth Circuit did not address this CAA argument in either *Sierra Club* or *California* because it has not been raised in those cases. Instead, the Ninth Circuit adopted a separate argument that DoD's transfer of funds between appropriations accounts—upon which respondents' § 284 counterdrug support expenditures rely—is not authorized by

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[5] *See White House Fact Sheet* (Mar. 11, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-promoting-fiscally-responsible-pro-american-2020-budget/.

§ 8005. *See Sierra Club*, 929 F.3d at 886-87; *California*, 963 F.3d at 944-49. And because the Ninth Circuit did not address petitioners' CAA argument, the Solicitor General's petition for certiorari in *Sierra Club* and *California* does not address it either.

This Court should grant certiorari before judgment so that it can resolve petitioners' argument that respondents' border-wall expenditures violate the CAA.[6] As explained, this argument provides an independent basis on which to invalidate respondents' expenditures that the Court will be unable to consider in *Sierra Club* and *California*. If the Court grants certiorari in *Sierra Club* and *California*, it should hear this case alongside them for the sake of efficiency and certainty.

2. There is an additional reason why certiorari before judgment is warranted. In its petition for certiorari in *Sierra Club* and *California*, the Solicitor General's threshold argument is that the plaintiffs fall outside of § 8005's zone of interests. U.S. *Sierra Club* Pet. 18-29. Because petitioner El Paso County asserts economic and budgetary interests, it falls within § 8005's zone of interests even if the plaintiffs in *Sierra Club* and *California* do not. Thus, granting certiorari before judgment will ensure that the Court has a proper vehicle before it to resolve the § 8005 issue.

a. The Solicitor General argues that the plaintiffs in *Sierra Club* and *California* lack a cause of action

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[6] Petitioners have also argued, and will continue to argue, that DoD's transfer of funds between appropriations accounts is not authorized by § 8005. But, unlike the *Sierra Club* and *California* plaintiffs, petitioners do not rest exclusively on that argument.

because they fall outside the zone of interests protected by § 8005 of the DoD Appropriations Act. U.S. *Sierra Club* Pet. 18. Section 8005, the Solicitor General contends, protects Congress's budgetary "interests in the appropriations process." *Id.* at 21. And the plaintiffs' "recreational, aesthetic, environmental, scientific, [and] sovereign interests," the Solicitor General maintains, are not within § 8005's zone of interests. *Id.* at 20.

b. Even assuming *arguendo* that the Solicitor General's argument was correct in *Sierra Club* and *California*, it would not govern here. On the contrary, El Paso County's distinct economic and budgetary interests easily fall within § 8005's zone of interests. Because El Paso County argues (in addition to its CAA argument elaborated above) that DoD's transfer of funds between appropriations accounts violates § 8005, granting this petition will ensure that the Court has a proper vehicle to resolve the merits of this § 8005 argument.

The zone-of-interests test asks whether "[t]he interest [the plaintiff] asserts [is] arguably within the zone of interests to be protected or regulated by the statute that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012) (internal quotation marks omitted). It "forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 225 (internal quotation marks omitted). As these formulations show, the test turns on the interests and harms alleged by the particular

plaintiff at issue and "is not meant to be especially demanding." *Id.* (internal quotation marks omitted); *see id.* at 227-28 (holding that plaintiff's "economic, environmental, [and] aesthetic" interests "c[a]me with [the relevant provision's] regulatory ambit"); *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222, 1269 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part) (under zone-of-interests test, "suit should be allowed unless the [relevant provision] evinces discernible congressional intent to preclude review").

In this case, petitioner El Paso County asserts economic and budgetary interests that are entirely distinct from the recreational, aesthetic, environmental, scientific, and sovereign interests asserted by the *Sierra Club* and *California* plaintiffs. As the District Court held, the County has "suffered concrete … economic injury" due to respondents' wall construction. App. 11a. A significant portion of that construction is occurring just 15 miles from downtown El Paso, C.A. ROA 918, and thereby harming the County's regional economy and tourism industry, *id.*; *id.* at 926-27 (County official stating that the construction is impeding the County's "ability to compete for business investment and tourism"). In turn, a reduction in tourism and investment depresses tax revenues and "significantly damage[s] the County's financial health." *Id.* at 922-23 (declaration of County official).

The County's economic and budgetary interests are "arguably within the zone of interests" protected by § 8005. *Patchak*, 567 U.S. at 224 (internal quotation marks omitted). Read most naturally, § 8005 pro-

tects those who will be harmed by DoD's transgression of congressionally imposed transfer limits. But even accepting the Solicitor General's characterization that § 8005 protects Congress's budgetary interests, *see* U.S. *Sierra Club* Pet. 21, the County's own budgetary interests—in a consistent stream of tax revenues and financial health—are substantially related to the interests § 8005 protects. Certainly, the County's budgetary interests cannot be considered "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Patchak*, 567 U.S. at 225 (internal quotation marks omitted).

To be sure, under the Solicitor General's characterization, Congress, not the County, is § 8005's intended beneficiary. U.S. *Sierra Club* Pet. 21 (§ 8005 "principally safeguards the interests of Congress"). But that fact is "beside the point," because the Court "do[es] not require any 'indication of congressional purpose to benefit the would-be plaintiff.'" *Patchak*, 567 U.S. at 225 & n.7 (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987)); *see Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998) ("we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff"). "The question is not whether [§ 8005] seeks to benefit [the County]," *Patchak*, 567 U.S. at 225 n.7, or whether it requires DoD "to consider [the County's interests] before transferring funds," U.S. *Sierra Club* Pet. at 20. The question is instead whether economic and budgetary interests arguably fall within § 8005's compass.

Because they do, and because the County is asserting precisely those interests, the County may sue to enforce § 8005's limits.

Thus, the County's zone-of-interests theory is critically different from that of the plaintiffs in *Sierra Club* and *California*. Rather than economic and budgetary interests, those plaintiffs assert recreational, aesthetic, environmental, scientific, and sovereign interests. Indeed, both dissenting judges in the Ninth Circuit suggested that economic interests may be protected by § 8005 even if the plaintiffs' interests in *Sierra Club* and *California* are not. *See California*, 963 F.3d at 962 (Collins, J., dissenting); *Sierra Club*, 929 F.3d at 715 (N.R. Smith, J., dissenting) ("as a budgetary statute regarding the transfer of funds among DoD accounts, it arguably protects economic interests"). This Court should grant certiorari before judgment to ensure that at least one plaintiff falls within § 8005's zone of interests, thereby permitting the Court to reach the merits of the § 8005 issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari before judgment should be granted.

Respectfully submitted,

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