No. 20-298

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

REPLY BRIEF FOR PETITIONERS

Anton Metlitsky
Counsel of Record
Bradley N. Garcia
Ephraim McDowell
O'MELVENY & MYERS LLP
Seven Times Square
New York, N.Y. 10036
(212) 326-2000
ametlisky@omm.com

Kristy Parker
Deana K. El-Mallawany
THE PROTECT DEMOCRACY PROJECT, INC.
2020 Pennsylvania Ave., NW #163
Washington, DC 20006
(202) 579-4582
kristy.parker@protectdemocracy.org

Stuart Gerson
EPSTEIN BECKER GREEN
1227 25th St., NW
Washington, DC 20037
(202) 861-4180
sgerson@egblaw.com

Richard Mancino
Shaimaa M. Hussein
WILLKIE FARR & GALLAGHER LLP
787 Seventh Ave.
New York, N.Y. 10019
(212) 728-8000
rmancino@willkie.com

Laurence H. Tribe
Carl M. Loeb University
Professor Emeritus
HARVARD LAW SCHOOL*
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-1767
tribe@law.harvard.edu

David Bookbinder
NISKANEN CENTER
820 First St. NE
Washington, DC 20002
(301) 751-0611
dbookbinder@niskanen-center.org

*University affiliation noted for identification purposes only

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Other Authorities

REPLY BRIEF FOR PETITIONERS

After the petition was filed in this case, this Court granted certiorari in *Trump v. Sierra Club* and *Trump v. California*, two separate challenges to respondents' border-wall expenditures and construction. *See* No. 20-138 (cert. granted Oct. 19, 2020). The Court should grant certiorari before judgment in this companion case to ensure full consideration of potential arguments for why respondents' actions are unlawful, and what types of interests allow plaintiffs to challenge executive expenditures under the zone-of-interests test. The Solicitor General has recently sought and obtained certiorari before judgment in similar circumstances. *See* Petition For a Writ of Certiorari Before Judgment, *Trump v. Nat'l Ass'n for Advancement of Colored People*, No. 18-588 ("U.S. *NAACP* Pet.") (Nov. 5, 2018). But here, the Solicitor General reverses course, stressing the need to await a Fifth Circuit ruling.

The Solicitor General's current approach should be rejected. Any benefit of awaiting lower-court percolation is far outweighed by the need for definitive resolution of the important issues presented, which are already before the Court. Considering the border wall's legality in piecemeal fashion rather than all at once would disserve the parties, the Court, and the public.

That conclusion is not altered by the Solicitor General's assertion that petitioners lack Article III standing. The District Court correctly rejected this argument. And the existence of a potential standing issue does not distinguish this case from *Sierra Club* and

California, since the Ninth Circuit addressed standing in those cases too.

This petition should be granted, and the case should be consolidated with *Sierra Club* and *California*. Petitioners request to brief this case on an expedited timeline to ensure consideration alongside *Sierra Club* and *California*.

A. This Case Presents An Ideal Companion Case To Consider Alongside *Sierra Club* And *California*

This Court has now granted certiorari to consider the legality of respondents' border-wall expenditures and construction. The Solicitor General admits that the issues in *Sierra Club*, *California*, and this case are "undoubtedly important." BIO 10. The Solicitor General's arguments for nevertheless denying review make little sense.

1. a. Petitioners' first question presented addresses whether respondents' border-wall expenditures and construction violate the 2019 Consolidated Appropriations Act (CAA). Pub. L. No. 116-6, 133 Stat. 13. The District Court agreed with petitioners' CAA argument. *See* App. 33a-37a. But no party in either *Sierra Club* or *California* has raised it. Thus, the only way to "ensure an adequate vehicle for the timely and definitive resolution" of the border wall's legality is to grant certiorari before judgment here. U.S. *NAACP* Pet. at 16.

It is true that the Fifth Circuit has not yet addressed petitioners' CAA argument. BIO 16. But in an extraordinary case like this one, the ordinary preference for lower-court ventilation of issues should

give way to the urgent public need for a definitive resolution. That is all the more true because petitioners' CAA argument is a purely legal one that this Court is fully capable of resolving without the benefit of a court of appeals' analysis.

b. The Solicitor General's responses to petitioners' CAA argument are unpersuasive. *See* BIO 16. "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." *United States v. MacCollom*, 426 U.S. 317, 321 (1976). Here, Congress specifically addressed the subject of border-wall spending in the CAA and authorized $1.375 billion of spending in the Rio Grande Valley Sector alone. 133 Stat. at 28, div. A, § 230(a)(1). It did not accede to the President's request for a $5.7 billion, 234-mile border wall. *See* Court of Appeals Record on Appeal (C.A. ROA) 944. Under the specific-controls-the-general canon, respondents may not circumvent Congress's specific judgment by relying on general "support for … counterdrug activities," 10 U.S.C. § 284, and "military construction," 10 U.S.C. § 2808, provisions to spend the same amount of money on the same project that Congress considered and rejected.

According to the Solicitor General, the specific-controls-the-general canon applies only when a single agency seeks to circumvent spending limitations expressly imposed on that agency. BIO 18. But that argument flouts established appropriations-law principles. The Government Accountability Office (GAO)—which the Solicitor General cites when convenient, *see* BIO 18—articulates the specific-controls-

the-general canon in categorical terms: a "specific amount for a construction project … is the *exclusive* source of funds for this project." GAO, *Principles of Federal Appropriations Law*, 13-197 (3d ed. 2008) ("GAO Redbook") (emphasis added). That is why the GAO applies the principle across agencies—for instance, it has concluded that an appropriation to the Army Corps of Engineers for a specific project precluded spending by the Navy on that same project. GAO Redbook, at 3-408-09 (4th ed. 2017). And the D.C. Circuit has agreed, explaining that "specific appropriations preclude the use of general ones even when the two appropriations come from different accounts." *See Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005). Any other regime would threaten the separation of powers: because multiple executive agencies may have similar missions and statutory authorities (here, DHS and DoD), the Solicitor General's approach would license the Executive to creatively "evade or exceed congressionally established spending limits." GAO Redbook, at 3-407-08.

In the Solicitor General's view, though, if Congress wanted "to place restrictions on the construction of border barriers," it should have "d[one] so explicitly." BIO 17. That proposed rule flips black-letter appropriations law on its head. The actual rule is that "the expenditure of public funds is proper only when *authorized* by Congress, not that public funds may be expended *unless prohibited* by Congress." *MacCollom*, 426 U.S. at 321 (emphasis added). Or as Justice Kavanaugh has put the point: "[A]ll uses of appropriated funds must be affirmatively approved by

Congress; the mere absence of a prohibition is not sufficient." *Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1348 (D.C. Cir. 2012). Even if there were no explicit prohibition here, *but see infra*, the Solicitor General's position would be irreconcilable with this precedent.

c. The Solicitor General's argument is also irrelevant because Congress *did* include the explicit prohibition the Solicitor General thinks is necessary: to dispel any doubt about the Executive's ability to spend beyond the CAA's limits, Congress enacted CAA § 739. 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. Applying that prohibition here is straightforward. A border wall costing at least $5.7 billion is a "project" that the President proposed in formal budget requests for fiscal-years 2019, *see* C.A. ROA 944, and 2020.[1] Congress rejected that proposed project. So under § 739's plain terms, respondents may not use other appropriated funds to "increase … funding" for that same project.

The Solicitor General does not dispute that the ordinary meaning of "project" encompasses the border wall. Rather, he hinges his argument on a single GAO

---

[1] *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/.

definition of "program, project, or activity"—*i.e.*, an "element within a budget account" of a specific agency. BIO 19 (quoting GAO, *A Glossary of Terms Used in the Federal Budget Process* 80 (2005)). That definition does not save respondents' expenditures.

To start, even if the GAO's definition were controlling here, respondents' border-wall expenditures would still be barred. The President's fiscal-year 2020 budget request sought $3.6 billion in funding for *DoD*'s "military construction" account to be used on building the border wall. *See supra* n.1. Congress has not appropriated funds to fulfill that request. And yet *DoD* is now using its "military construction" and "counterdrug support" accounts to increase funding for the President's proposed border-wall project. Under the Solicitor General's own theory that a "project" must be tied to a particular agency, respondents' border-wall spending is precluded.

In any event, the GAO itself recognizes that the agency-specific definition of "project" does not apply where context dictates otherwise, GAO Redbook, 8-21-22, 24, which is the case here. If that definition applied in this case, then § 739 would be superfluous. Longstanding federal law already bars an agency from "withdraw[ing] from one appropriation account and credit[ing those funds] to another" of its accounts unless "authorized by law." 31 U.S.C. § 1532. On the Solicitor General's view, § 739 simply duplicates this prohibition.

On petitioners' view, by contrast, § 739 has real effect: it precludes the Executive Branch as a whole from repurposing appropriations—whether within or

across agencies—to "increase … funding" for a "project … proposed in the President's budget request" that Congress elected not to endorse. That reading comports with the statutory context. Congress did not insert § 739 into a CAA title that appropriates funds to a single agency, like the provisions the Solicitor General cites. *See* BIO 19 (citing a DHS-specific provision). Congress instead placed § 739 in a title called "General Provisions—Government-Wide." 133 Stat. at 187. That deliberate placement confirms § 739's function as a comprehensive *inter*-agency prohibition, not merely an *intra*-agency one.

2. The Court should also grant certiorari before judgment to aid its resolution of the issue on which it has already granted certiorari in *Sierra Club* and *California*. The Solicitor General's threshold argument in those cases is that the plaintiffs' environmental interests fall outside the zone of interests of § 8005 of the DoD Appropriations Act, 2019, Pub. L. No. 115-245, div. A, 132 Stat 2999. *See* Petition for a Writ of Certiorari at 18-29, *Sierra Club*, No. 20-138 (Aug. 7, 2020) ("U.S. *Sierra Club* Pet."); BIO 13. But because El Paso asserts economic and budgetary interests, it would satisfy the zone-of-interests test even if the Court were to conclude that the plaintiffs in *Sierra Club* and *California* do not.

The Solicitor General argues that even economic and budgetary interests fall outside the zone of interests that § 8005 protects. BIO 15. On that understanding, *no party* could fall within § 8005's zone of interests, and thus no party could challenge DoD budgetary transfers under that provision. The Solicitor General offers no basis for that radical rule, which

is quite wrong: parties asserting budgetary interests can enforce the limitations imposed by budgetary provisions. The zone-of-interests test "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." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (internal quotation marks omitted). That is not the case here. The Solicitor General admits that § 8005 is "intended to protect Congress's interests in the appropriations process." U.S. *Sierra Club* Pet. 21. If so, then the County's own budgetary interests in a consistent stream of tax revenues are related to the interests § 8005 protects. A dissenting judge in *Sierra Club* thought so: "as a budgetary statute regarding the transfer of funds among DoD accounts," Judge Smith explained, "[§ 8005] arguably protects economic interests"—even if (in his view) it does not protect environmental interests. *Sierra Club v. Trump*, 929 F.3d 670, 715 (9th Cir. 2019) (N.R. Smith, J., dissenting).

Finally, the Solicitor General recommends (BIO 14) that the Court wait to consider petitioners' zone-of-interests arguments until after the Fifth Circuit does so. But again, this Court has *already* decided to consider the zone-of-interests issue in *Sierra Club* and *California*. Given that decision, the Court should not artificially limit its consideration of the issue to environmental interests alone. Rather, the Court should have the full array of potential interests and injuries before it.

B. Petitioners Have Article III Standing

The Solicitor General maintains that this case is "an unsuitable vehicle" for addressing the questions presented because, in his view, petitioners lack Article III standing. BIO 20. But the presence of a standing issue here is unremarkable. The Ninth Circuit addressed the plaintiffs' standing in both *Sierra Club v. Trump*, 963 F.3d 874, 883-86 (9th Cir. 2020), and *California v. Trump*, 963 F.3d 926, 935-41 (9th Cir. 2020), so standing questions will already be before the Court. What is more, both petitioners have standing, as the District Court correctly held after extensively considering the issue. *See* App. 11a-31a.

1. El Paso County has standing based on classic budgetary injuries. Respondents are unlawfully spending funds on constructing portions of the border wall in Doña Ana County, New Mexico, which neighbors El Paso County and is only 15 miles from downtown El Paso. C.A. ROA 918; *accord* BIO 20. As County officials have explained, the "blight" of that nearby construction disrupts the County's "regional economy" and ability to "compete for business investment and tourism." C.A. ROA 918, 924, 926-27. "Any drop-off" in the County's "$4 million in tax revenue based on tourism … would significantly damage the County's financial health." *Id.* at 922-23.[2] The inference that the blight of nearby construction would deter tourism and investment is not "speculat[ive]," BIO

[2] That the construction is "in a different State" (BIO 21) is irrelevant. A major, politically controversial construction project in Arlington, Virginia could certainly have direct effects on Washington, DC's budget. So too here.

21, but rather "the predictable effect of Government action on the decisions of third parties," *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019). Courts of appeals have found municipal standing in similar circumstances. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1198-99 (9th Cir. 2004) (redevelopment of nearby military base would produce "aesthetic damage" and "traffic," "erod[ing] [the plaintiff city's] tax revenue" and "tourism industry"); *City of Olmsted Falls v. FAA*, 292 F.3d 261, 268 (D.C. Cir. 2002) (similar).

The Solicitor General also challenges the District Court's holding (App. 20a-21a) that the cancellation of a planned $20 million construction project at Fort Bliss in El Paso likewise gives the County standing to sue. BIO 21; *see id.* at 5 (describing project). But the cancellation of that project—which DoD did to free up funds for wall construction under 10 U.S.C. § 2808—has caused El Paso budgetary harm through the "lost tax revenue" that the Fort Bliss project would have generated. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1303 (2017) (finding municipal standing based on "lost tax revenue and extra municipal expenses"); *see Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110-11 (1979).[3] Indeed, it is a "basic law of economics" that a major construction project in a

[3] Ignoring these municipal-standing precedents, the Solicitor General cites *Wyoming v. Oklahoma*, 502 U.S. 437 (1992)—a case holding that a state *had standing* to sue under the dormant commerce clause. *Id.* at 447. *Wyoming*'s dicta about a state's "decline in general tax revenues" (*id.* at 448) does not apply when, as here, a county loses a specific construction project that would have invariably generated tax revenues.

small community will generate tax revenues by attracting contractors to the area, who will in turn purchase goods and supplies. *See Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 738 (5th Cir. 2016). That is particularly true when the project will occur at an Army base that is the "lifeblood" of that community's economy. C.A. ROA 926. The Solicitor General's position (BIO 21-22) that such a project would somehow have brought no economic benefit to the County bucks "common sense." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017) (Kavanaugh, J.) (when evaluating standing, "common sense can be a useful tool").

2. While only one plaintiff needs standing for the Court to reach the merits, co-petitioner Border Network for Human Rights (BNHR) also has standing. BNHR is an immigrant-rights organization headquartered in El Paso, consisting of 5,000 members who live and work in west Texas and southern New Mexico. C.A. ROA 931.

An organization "suffer[s] injury in fact" when government action causes a "concrete and demonstrable injury to the organization's activities" and a "consequent drain on the organization's resources." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). BNHR has standing under this principle. BNHR devotes its resources to twin missions of (a) empowering the "immigrant community" in west Texas and southern New Mexico and (b) engaging in proactive immigration "policy and advocacy" work. C.A. ROA 931. Respondents' wall construction under 10 U.S.C. § 284 is occurring where BNHR members live and work, substantially disrupting their daily lives. C.A. ROA

931, 941. In response, BNHR has diverted resources away from its proactive advocacy and toward "helping [its] members deal with the harmful impacts they experience from [the construction]." *Id.* at 940-41. *Contra* BIO 22. That establishes organizational standing.

In *Sierra Club*, one of the organizational plaintiffs asserts the same basic injury as BNHR does here. *See* 963 F.3d at 885-86 (discussing Southern Border Communities Coalition). The Ninth Circuit expressly held that plaintiff had standing. *Id.* at 886. And yet there, the Solicitor General has not contested the organization's standing. *See id.* at 883 n.9. The Solicitor General does not even attempt to reconcile his conflicting positions.

***

The Solicitor General's basic argument against certiorari before judgment is that the Fifth Circuit should decide the relevant issues before this Court does. That argument would apply to every petition for certiorari before judgment, and yet in other companion cases the Solicitor General has recognized that certiorari before judgment is warranted. The same is true here: when deciding the legality of a highly consequential executive action, this Court should have all theories and arguments presented to it at once. Disjointed and piecemeal consideration of the issues will disserve the litigants and the Court. And equally important, it will disserve the public, which has a compelling interest in this Court's definitive pronouncement about the lawfulness of the Executive Branch's border wall.

CONCLUSION

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

Respectfully submitted,

Anton Metlitsky
Counsel of Record
Bradley N. Garcia
Ephraim McDowell
O'MELVENY & MYERS LLP
Seven Times Square
New York, N.Y. 10036
(212) 326-2000
ametlisky@omm.com

Stuart Gerson
EPSTEIN BECKER GREEN
1227 25th St., NW
Washington, DC 20037
(202) 861-4180
sgerson@egblaw.com

Laurence H. Tribe
Carl M. Loeb University
Professor Emeritus
HARVARD LAW SCHOOL*
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-1767
tribe@law.harvard.edu

*University affiliation for identification purposes only

Kristy Parker
Deana K. El-Mallawany
THE PROTECT DEMOCRACY PROJECT, INC.
2020 Pennsylvania Ave., NW #163
Washington, DC 20006
(202) 579-4582
kristy.parker@protectdemocracy.org

Richard Mancino
Shaimaa M. Hussein
WILLKIE FARR & GALLAGHER LLP
787 Seventh Ave.
New York, N.Y. 10019
(212) 728-8000
rmancino@willkie.com

David Bookbinder
NISKANEN CENTER
820 First St. NE
Washington, DC 20002
(301) 751-0611
dbookbinder@niskanencenter.org

November 23, 2020